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Journal

UCLA Pacific Basin Law Journal, 27(1)

Author

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Publication Date

2009

DOI

10.5070/P8271022214

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ARTICLES

AUSTRALIAN EFFORTS TO PROMOTE CORPORATE SOCIAL RESPONSIBILITY: CAN DISCLOSURE ALONE SUFFICE?

Paul von Nessen*

ABSTRACT

The importance of encouraging corporations to act in socially responsible ways is increasingly apparent in a world where the effects of economic, environmental and social misbehavior are not felt only by local communities. Australian corporations, like those elsewhere in the world, have occasionally acted irresponsibly, as three recent examples amply attest. Fortunately, these actions have met with public criticism and community pressure for the corporations to rectify their actions, with some degree of success. Recent developments in Australia attempt to assure that those Australian corporations listed on the Australian share market will in the future more fully consider the social consequences of their actions and will implement strategies to avoid the risks which such actions would present. Required disclosure of corporate practices and the resultant reaction to them should mean that Australian corporations will meet evolving community expectations that they act in socially responsible ways.

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1. INTRODUCTION

That corporations should be encouraged to operate in a socially responsible way is, in the abstract, a statement with which few would disagree. Unlike a simple financial imperative which can be measured and compared, the concept of social responsibility is both open-ended and often imprecise. As a result, much of the recent discussion about corporate social responsibility has concerned the full nature and extent of a corporation's responsibilities in the social context, the best way to ensure that corporations do act in agreed socially responsible ways, and the relationship between acting in a socially responsible way and the impact of such considerations upon corporate profitability.

In Australia, as in the remainder of the common law world, the corporate form¹ has historically been utilized and justified by

1. In Australian law, a corporation is defined in the Corporations Act, 2001 § 57A (Austl.) to include the concept of companies (which are registered under the Corporations Act itself), foreign or domestic bodies corporate, and any unincorporated body that under the law of its place of origin may sue or be sued or may hold property in the name of its secretary or some other office holder duly appointed for that purpose. Consequently, in this paper the use of the term corporation would include companies (which is the commonly used historical term referred to by most of the English cases discussed herein).

the enhancement of shareholder value, often to the exclusion of corporate social responsibility. As with other countries, Australian corporate history, though perhaps not as well publicized as those of the United States and the United Kingdom, provides a number of unfortunate examples of the pitfalls of excessive regard for profitability to the exclusion of acting in a socially responsible way (imprecise and undefined as that term might be). Consensus appears to be developing throughout the world that corporate social responsibility necessitates concern for the environment,² the labor force,³ the community,⁴ and as articulated more recently, the promotion of human rights.⁵

This article considers the Australian perspective and recent developments concerning the concepts of corporate social responsibility. Although international trends have informed and affected much that has occurred in Australia, there is much uniquely Australian material that provides insights into the importance of these concepts. This paper attempts to consider these developments both by reference to prevalent corporate culture (based upon shareholder primacy) in Australia in recent years as well as by consideration of the Australian responses to international developments in corporate social responsibility.

2. Tara J. Radin, *Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 363 (2007).

3. Jennifer L. Hagerman, *Navigating the Waters of International Employment Law: Dispute Avoidance Tactics for United States-based Multinational Corporations*, 41 VAL. U. L. REV. 859 (2006); Anthony Forsyth, *The "Transplantability" Debate Revisited: Can European Social Partnership be Exported to Australia?* 27 COMP. LAB. L. & POL'Y J. 305 (2006); Stephen Bottomley & Anthony Forsyth, *The New Corporate Law: Corporate Social Responsibility and Employees' Interests*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (D. McBarnett, A. Voiculescu & T. Campbell eds., 2007).

4. Lisa J. Laplante and Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69 (2008); Paul Kapelus, *Mining, Corporate Social Responsibility and the "Community": The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi*, 39 J. BUS. ETHICS 275 (2002).

5. Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?*, 40 WILLIAMETTE L. REV. 103 (2004); David Kinley, Justine Nolan & Natalie Zerial, *The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25 COMPANY & SEC. L.J. 30, 31 (2007); Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431 (2002); Claire Moore Dickerson, *Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers*, 53 FLA. L. REV. 611 (2001); Tarek F. Maassarani, Margo Tatgenhorst Drakos & Joanna Pajkowska, *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 CORNELL INT'L L.J. 135 (2007); David Weissbrodt, *Eighteenth Annual Corporate Law Symposium: Corporate Social Responsibility in the International Context: Business and Human Rights*, 74 U. CIN. L. REV. 55 (2005); and David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004).

The paper concludes with an assessment of whether proposals for regulatory change in Australia are likely to see its corporations meet best international practice in corporate social responsibility in the foreseeable future.

2. AUSTRALIAN CORPORATIONS AND RECENT FAILURES OF CORPORATE SOCIAL RESPONSIBILITY

In recent years, Australian corporations have been involved in a number of high profile illustrations of the potentially abusive effect of allowing corporations to act in blind pursuit of profit, without regard to their social responsibilities. The three cases considered below are by no means exclusive examples of this evil. Given the size and notoriety of these three cases, however, they are worthy of consideration. It is also noteworthy that all three examples resulted in significant public and political pressure upon the corporations to modify their actions, although with varying degrees of success. They provide an interesting background to Australian law reform proposals to strengthen the social responsibility of corporations, and indicate how the blind pursuit of advantage for shareholders to the exclusion of broader social considerations can ultimately result in even greater harm to shareholders themselves.

2.1 BHP – OK TEDI ENVIRONMENTAL DISASTER AND USE OF POLITICAL POWER

The Broken Hill Proprietary Company Ltd. (“BHP”) was, prior to its merger with Billiton PLC (originally from South Africa),⁶ Australia’s largest mining and resources company.⁷ Ok Tedi Mining Limited (OTML), 52 percent owned by BHP and 30 percent by the Papua New Guinea (PNG) government, operated a mine producing gold, silver, and copper on the Ok Tedi River near the border of Papua New Guinea and Irian Jaya (Indonesia).⁸

Originally, a dam was to capture all tailings and waste from the Ok Tedi mine; however, difficulties arising from the mine’s

6. The history and structure of the new entities which were formed in 2001 can be found at <http://www.bhpbilliton.com/bb/aboutUs/companyOverview.jsp>

7. Known locally as “the Big Australian,” the history of BHP can be found at: <http://www.bhpbilliton.com/bb/aboutUs/companyOverview/ourHistory/bhpHistory.jsp>

8. A good discussion of the background of this case can be found in Heather G. White, *Including Local Communities in the Negotiation of Mining Agreements: The Ok Tedi Example*, 8 *TRANSNATIONAL LAW* 303, 320-22 (1995). See also William Prince and David Nelson, *Developing an Environmental Model: Piecing Together the Growing Diversity of International Environmental Standards and Agendas Affecting Mining Companies*, 7 *COLO. J. INT’L ENVTL. L. & POL’Y* 247 (1996).

location (including seasonal torrential rainfall) meant that construction of such a dam would erode the mine's profitability. The Papua New Guinea government therefore acquiesced in allowing mine tailings to go directly into the Ok Tedi River.⁹ As a result, the mine severely disrupted the local populace by ending fishing in the Ok Tedi River and by poisoning vegetation.¹⁰

In 1994, 73 landowners, representing 30,000 local residents, sued BHP in the Supreme Court of Victoria, Australia for the ecological disaster, seeking A\$4 billion in compensatory and punitive damages.¹¹ Efforts to settle the litigation, which would have provided A\$110 million in compensation, failed. Before the litigation proceeded to trial, the Parliament of Papua New Guinea considered legislation to settle the matter and effectively to prohibit the landowners from pursuing their claims in a foreign court.¹² The legislation imposed significant penalties for bringing such actions and for challenging the constitutionality of the legislation itself.¹³

When the Papua New Guinea legislation was brought to the attention of the Supreme Court of Victoria, it determined, after it

9. See generally *Dagi v. BHP Ltd.* 1 V.R. 428, 430 (1997).

10. See Heather White, Including Local Communities in the Negotiation of Mining Agreements: The Ok Tedi Example, 8 *TRANSNAT'L LAW* 303, 311-16 (1995). (80,000 tons of sediment was pumped by the Ok Tedi mine into Ok Tedi river system each day). For a discussion of the implications of this discharge, see also Gregory Tzeuschler, Corporate Violator: the Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad, 30 *COLUM. HUM. RTS. L. REV.* 359, 360 (1999) and HELEN ROSENBAUM AND MICHEAL KROCKENBERGER, *REPORTS ON THE IMPACTS OF THE OK TEDI MINE IN PAPUA NEW GUINEA* (Australian Conservation Foundation, 1993).

11. See *Dagi v. BHP Ltd.*, 1 V.R. 428 (1997) (considering the basis of the actions brought against BHP, including those brought by plaintiffs by the names of Maun, Ambetu, and Shackles. The actions of Dagi differed from that of the other three plaintiffs in relying more heavily upon possessory and proprietary rights.) Whether the Victorian Supreme Court could, under private international law, consider such claims was addressed in several authorities. Compare S. Lee, *Papua New Guinea or Parish of St Mary Le Bow in the Ward of Cheap?*, 71 *AUSTL. L. J.* 602 (1997), with P. Solomon, *Papua New Guinea or Parish of St Mary Le Bow in the Ward of Cheap? A Reply*, 72 *AUSTL. L. J.* 231 (1998); see also J.L.R. Davis, *The OK Tedi River and the Local Actions Rule: A Solution*, 72 *AUSTL. L. J.* 786 (1998); and Peter Prince, *Bhopal, Bougainville and Ok Redi: Why Australia's Forum Non Conveniens Approach Is Better*, 47 *INT'L & COMP. L.Q.* 573 (1998). The essential elements of the various original actions can be found in Lee, 71 *AUSTL. L. J.* 602, 612 (1997).

12. *BHP Ltd. v. Dagi*, 2 V.R. 117, 165 (1996) (summons filed by the plaintiffs against BHP seeking relief in relation to alleged contempt of court by reason of its conduct in relation to events leading to the preparation of a Bill for consideration by the Parliament of Papua New Guinea and which, in short, would have the consequence of precluding the plaintiffs' pursuing their litigation against the defendants in return for compensation to be paid according to the provisions of the Bill).

13. Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act, (1995) (Papua N.G.). See also N. Moshinsky, *The Ok Tedi Mine Dispute*, 69 *LIJ* 1114 (1995).

ascertained that BHP had been involved in drafting the Papua New Guinea legislation, that BHP was in contempt of court.¹⁴ The Full Court of the Victorian Supreme Court subsequently reversed this decision.¹⁵

As a result of the legislation enacted in Papua New Guinea, the plaintiffs in the Victorian Supreme Court may have faced significant penalties for pursuing their claims in Australia.¹⁶ Under such political pressure, it is not surprising that the plaintiffs accepted a new, slightly improved settlement offer.¹⁷ Despite these maneuvers by BHP and the PNG government, part of the local population in the affected area refused to accept the new compensation arrangements. As a consequence, further negative public relations and financial liability may haunt BHP Billiton for years to come.¹⁸

2.2 AUSTRALIAN WHEAT BOARD – BUSTING UN SANCTIONS IN IRAQ

The Australian Wheat Board (AWB Ltd.) is the “single desk” seller of Australian wheat in the international market place. During the UN sanctioned embargo on Iraq (under Sad-

14. According to Phillips J in *BHP Ltd. v. Dagi*, 2 V.R. 117 at 165-66 (1996):

The plaintiffs sought that BHP be punished for contempt by reason of its conduct in procuring and drafting a certain agreement with the Government of Papua New Guinea (called “the Eighth Supplemental Agreement”), which was said to underlie the Bill, and for its conduct in relation to the Bill itself. . . . Cummins J. was required to deal only with the plaintiffs’ application that BHP be punished for contempt. The application was heard over three days and evidence was taken. On 19 September, his Honour announced that he found BHP guilty of contempt of court and invited submissions, in due course, as to penalty.

See also, N. Moshinsky, *The Ok Tedi mine dispute*, 69 LIJ 1114, 1116 (1995).

15. *BHP Ltd. v. Dagi*, 2 V.R. 117, (1996) (The reversal occurred because proceedings for contempt were required to be brought by the Attorney-General of Victoria under the Public Prosecutions Act, No 43, §§46 and 49 (1994)(Vic.)).

16. See Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995 (Papua N.G.) (These would have included some disqualification to participate in the benefits of the compensatory scheme devised through this Act). See also, N. Moshinsky, *The Ok Tedi Mine Dispute*, 69 LIJ 1114 (1995).

17. See Peter Prince, *Bhopal, Bougainville, and Ok Tedi: Why Australia’s Forum Non Conveniens Approach is Better*, 47 INT’L & COMP. L.Q. 573, 595 (1998) (Plaintiffs agreed to an out-of-court settlement under which BHP would pay all legal fees and provide up to AUD\$150 compensation. BHP further agreed to rectify the poor waste disposal by providing AUD\$400 million for the construction of a tailings containment system).

18. “Villagers Sue BHP Billiton for \$5 billion,” AGE (Melbourne), Jan. 20, 2007 (indicating that a number of clans in the area have decided to seek recourse through the PNG Courts rather than accept the compensation regime offered).

dam Hussein), an exception for the provision of foodstuffs allowed food to be sold to Iraq under strict guidelines.¹⁹

Following the Iraqi invasion of Kuwait in 1990, the United Nations imposed sanctions on Iraq.²⁰ Without international currency, Iraq was unable to buy food, and the United Nations consequently established the Oil for Food Program to limit the hardship on the Iraqi people.²¹ Under the Oil for Food Program, Iraq purchased significant quantities of wheat from AWB,²² in accordance with the United Nations resolutions through the beginning of 1999.²³

In June 1999, Iraq, through its wheat-purchasing instrumentality, introduced a land transport fee of US\$12.00 per metric ton to be paid to the Iraqi Land Transport Co. This fee (imposed for the first time in 1999) purportedly was imposed to cover the cost of transporting the wheat from shipside to containers throughout Iraq. In personal negotiations, AWB officials understood that the transportation fee fixed by Iraq was being paid to Iraq (through a bank located in Jordan), that there was no obligation on AWB to obtain inland transport despite provisions in the contract to the contrary, and consequently, that the fee was merely a means by which the Iraqi government could obtain U.S. dollars from UN-controlled oil revenues.²⁴

AWB obtained approval on a number of such contracts from the United Nations customs inspectors, who overlooked references to the fact that the fee was to be paid to nominated agents in Iraq. Moreover, Australian authorities also granted AWB permission to make such sales.²⁵

19. Hon. Terrence Cole, Commissioner, REPORT OF THE INQUIRY INTO CERTAIN AUSTRALIAN COMPANIES IN RELATION TO THE UN OIL-FOR-FOOD PROGRAMME (Commonwealth of Australia, 2006) (hereinafter "Cole Report") available at <http://www.offi.gov.au/>.

20. By U.N. Security Council Resolution 661 the United Nations required that all states prevent their nationals making available funds to the Government of Iraq, or to persons or bodies within Iraq and to prohibit their nationals from trading with Iraq, except for the provision of supplies for medical purposes or, in humanitarian circumstances, foodstuffs.

21. In 1995 the U.N. Security Council adopted Resolution 986, establishing the Oil-for-Food Programme. Iraq was permitted to sell oil under UN-approved contracts, with the proceeds of sale being controlled by the United Nations. The purchase by Iraq of humanitarian goods, including foodstuffs, was allowed from these funds if approved by the United Nations. The restrictions imposed by Resolution 661 otherwise remained in place.

22. By 1999, the AWB was selling to Iraq about 10 per cent of Australia's annual wheat exports. 1 Cole Report, *supra* note 19.

23. *Id.*

24. According to the findings of the Cole Report, *supra* note 19, vol. 1, at 84.

25. Customs (Prohibited Exports) Regulations 13CA (1990) (Austl.) (permission granted by the delegate of the Minister of Foreign Affairs and Trade pursuant to these regulations).

Between June and December of 1999, AWB entered into a number of contracts for the sale of grain to Iraq. None of the contracts reflected the arrangements made between AWB and the Iraqi agencies for the sale of grain under those contracts.²⁶ Two contracts made through Russian grain traders did accurately indicate that AWB was to pay a fee of US\$12.00 per metric ton directly to the Grain Board of Iraq three days prior to arrival of each shipment; however, AWB officials did not show those contracts to either the United Nations or Australian authorities.²⁷

After complaints by wheat exporting authorities in the United States and Canada, investigations confirmed that officials of the Australian Wheat Board had agreed to the transport fee paid to the Iraqi authorities.²⁸ The Australian government's official inquiry into the Oil for Food Program concluded that such payments were made to contravene the UN sanctions, and as a result, that the Australian Wheat Board and a number of its officials had probably committed numerous offenses.²⁹

2.3 JAMES HARDIE – RESTRUCTURING TO AVOID LONG TAIL TORT LIABILITY

Australia has been a high user of asbestos throughout most of the twentieth century,³⁰ and by the 1950s, it was the fourth largest consumer of asbestos cement products and the highest per capita user of asbestos in the world. One of the major Australian producers of asbestos was the James Hardie Group, which was estimated to be responsible, prior to its departure from manufacturing in 1987, for 70 percent of the asbestos consumption in the Australian market.

Asbestos fibers can cause several fatal and debilitating diseases, such as asbestosis, lung cancer, and mesothelioma.³¹ This widespread use of asbestos products has resulted in tort claims being brought against a wide range of asbestos producers and users, with James Hardie Company (the manufacturing arm of the James Hardie Group) and some of its related companies be-

26. 1 Cole Report, *supra* note 19.

27. *Id.*

28. *Id.*

29. *Id.*

30. Asbestos products have been widely used in building products such as sheeting and roofing, pipes, insulation materials and friction products such as brake linings.

31. Mesothelioma is particularly dangerous and can be caused by very slight exposure to asbestos fibre and may not become apparent until 40 or more years later. Further discussion of diseases associated with asbestos exposure can be found in D. F. Jackson, REPORT OF THE SPECIAL COMMISSION OF INQUIRY INTO THE MEDICAL RESEARCH AND COMPENSATION FOUNDATION (Sept 2004) vol. 2 Annexure J, "Asbestos and James Hardie" at 119-21.

ing pursued for compensation by those suffering illnesses thought to have been caused by asbestos dust. In claims made before the Dust Diseases Tribunal of New South Wales, James Hardie Company made a number of admissions regarding the compositions of its products and its knowledge of the damage caused by asbestos.³²

The James Hardie Group's asbestos liabilities prior to 1996 were significant, but manageable:

Pre-1991/1992	A\$7.167m
1991/1992	A\$3.815m
1992/1993	A\$4.244m
1993/1994	A\$9.744m
1994/1995	A\$12.208m ³³

In view of the increasing liabilities, John Trowbridge Consulting Pty. Ltd. (Trowbridge Deloitte Ltd. after May 2000) made an actuarial assessment in 1996 in an attempt to estimate for the company the potential liability of the James Hardie companies for personal injuries claims arising from asbestos-related diseases. It concluded that those liabilities at a net present value, discounted at 8 percent per annum, would be A\$230 million.³⁴

The James Hardie Group was restructured during the period between 1995 and 1998. The James Hardie Company (which, along with one other company, carried on the Group's manufacturing activities) ceased its manufacturing activities. The assets of the original manufacturing companies, apart from land, were sold.³⁵ Dividends and transfers from the original manufacturing companies to other Group companies as a result of this restructure totalled over A\$200 million.³⁶ Except for the possibility that dividends from the manufacturing companies may have been suspect, the two original manufacturing companies were the only ones in the Group that remained primarily liable for asbestos claims.³⁷

32. *Id.* Annexure J pp 123-26, lists admissions made by James Hardie Co. in *Berry v Aultas Pty Ltd* (1997) 14 NSWCCR 266. These admissions indicate that James Hardie was first alerted to the dangers of inhalation of asbestos fibres in the 1940s and became aware that inhalation could cause asbestiosis in the 1950s. It became aware that inhalation could cause lung cancer and mesothelioma in the mid 1960s.

33. D. F. Jackson, REPORT OF THE SPECIAL COMMISSION OF INQUIRY INTO THE MEDICAL RESEARCH AND COMPENSATION FOUNDATION (Sept 2004) vol. 1 at 20.

34. *Id.* A later 1998 report assessed these liabilities, discounted at 7% per annum, at \$254 million.

35. The company's activities were limited to defending and settling asbestos related claims and acting as landlord and lender to other companies in the group. *Id.* at 21.

36. *Id.* at 23.

37. *See* *Briggs v. James Hardies & Co. Pty. Ltd.* (1989) 7 A.C.L.C. 841 for consideration the exposure under Australian law of other companies within the group.

By 2000, the James Hardie Group's main business activities were being carried on by a subsidiary of a newly formed Dutch company. That year, another Trowbridge report estimated the net present value of the Group's asbestos liabilities at A\$294 million. The amount of potential liability in excess of the assets in original manufacturing companies was estimated at that time to be A\$80 million dollars.³⁸ The accepted accounting practice in 1999 required only a disclosure of contingent liabilities in notes to the financial accounts, but the introduction of new accounting standards in 2001 meant that the total estimated liability, discounted to present value, would have to be disclosed in the Group's accounts.³⁹

In consequence of the potential harm of retaining two companies in the James Hardie Group which had continuing liabilities for asbestos claims, the two original manufacturing companies were transferred out of the Group and into the Medical Research and Compensation Foundation, a foundation established by James Hardie Industries Limited in February 2001.⁴⁰ The Foundation's objectives were to meet the liability claims of asbestos claimants and to fund research for cures to some of the asbestos-caused diseases. The Group committed sufficient funds to the Medical Research and Compensation Foundation to enable it, with the assets of the original manufacturing companies, to meet the claims as conservatively estimated at that time.⁴¹ Through a later arrangement, James Hardie Group's ultimate holding company became a Netherlands-incorporated company.

The actions of the James Hardie Group can be seen as exhibiting either the worst or the best of corporate social responsibility. Ejecting the manufacturing companies from the Group and relocating to the Netherlands could be viewed as merely walking away from one's tort responsibilities through a legal device (that is, a combination of the limited liability doctrine and a court-sanctioned scheme of arrangement). On the other hand, the James Hardie Group did attempt to fund the liabilities of the original manufacturing companies (although the original amount was insufficient due to overly conservative estimates) where, by strict legal principle, limited liability might have prevented full

38. The net assets of James Hardie Company and the relevant subsidiary (Jsekarb) were approximately A\$214 million, representing a shortfall of A\$80 million to meet the liabilities (net of insurance recovery of approximately A\$30 million) estimated by the 2000 Trowbridge Report.

39. Australian Accounting Standards Board, Exposure Draft 88 (October, 2001).

40. D. F. Jackson, REPORT OF THE SPECIAL COMMISSION OF INQUIRY INTO THE MEDICAL RESEARCH AND COMPENSATION FOUNDATION (Sept. 2004) at 28-29.

41. *Id.* at 27.

liability from attaching to the companies not involved in asbestos manufacturing. Indeed, asbestos sufferers elsewhere had faced similar hurdles as well as the difficulty caused by their tortfeasors seeking bankruptcy protection.⁴²

Whether or not the James Hardie Group was originally considered to be socially responsible,⁴³ its actions subsequent to the discovery by Australian officials and the Australian public of the deficiencies in funding for asbestos victims eventually compelled it to assume greater responsibility, even though it may not have been legally obligated to do so. In 2004, it agreed to provide additional funding for asbestos claims in order to meet more realistic estimates of those claims.

In a further public relations nightmare, the transactions surrounding the decision to separate the manufacturing entities has subjected the members of the James Hardie Board of Directors to prosecutions both for breach of their duties of care and diligence and for their failure to assure that James Hardie itself properly disclosed the restructure to investors and the market.⁴⁴ The Hardies' directors asserted that they were protected by their reliance upon others (including corporate management)⁴⁵ and by the Australian statutory business judgement rule (a statutory enactment with similar effect to the United States common law rule).⁴⁶ Despite these claims, both executive and non-executive

42. United States asbestos producers Amatech, Carey-Canada, Celotex, Forty-Eight Insulations, Manville Corporation, National Gypsum, Standard Insulation, Unarco, and UNR Industries had all sought bankruptcy protection. See Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. CIN. L. REV. 1319, 1320 (2003). This has resulted in a number of questions about the appropriate way to regulate such claims in bankruptcy. See Yair Listokin, *Is Secured Debt Used to Redistribute Value from Tort Claimants in Bankruptcy? An Empirical Analysis*, 57 DUKE L. J. 1037 (2008); Douglas Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C.D.L.Rev. 1613 (2008) at 1622.

43. See the discussions in Edwina Dunn, *James Hardie: No Soul to be Damned and No Body to be Kicked*, 27 SYD. L. REV. 339 (2005) and Peta Spender, *Second Michael Whincop Memorial Lecture: Weapons of Mass Dispassion: James Hardie and Corporate Law*, 14 GRIFFITH L. REV. 280 (2005).

44. Australian Securities and Investments Commission v. Macdonald (No 11) [2009] N.S.W.S.C. 287 (Justice Gzell, 23 April 2009).

45. Corporations Act, 2001, § 189 (Austl.).

46. Corporations Act, 2001, § 180(2) (Austl.). This enactment, modelled upon the common law business judgment rule in the United States, indicates that a director or officer is assumed to meet his or her duty of care and diligence in relation to a business judgment if they:

- (a) make the judgment in good faith for a proper purpose; and
- (b) do not have a material personal interest in the subject matter of the judgment; and
- (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
- (d) rationally believe that the judgment is in the best interests of the corporation.

directors of James Hardie were found to have breached their duties of care and diligence in implementing the restructure.⁴⁷ It was accepted by Justice Gzell, who presided in the prosecutions, that James Hardie's statements to the market⁴⁸ provided improper disclosure of its restructuring.⁴⁹ The successful prosecutions of the members of James Hardie's Board caused significant injury to the reputation of both James Hardie and the members of its board.⁵⁰

3. IMPEDIMENTS TO SOCIAL RESPONSIBILITY: SHAREHOLDER PRIMACY IN AUSTRALIA

Each of the three cases above indicate the evils that may occur when corporate officials allow their corporations to seek corporate profitability without regard to the effect of such actions upon the environment and local communities (as in the case of BHP), upon the international system's ability to assure that countries comply with their obligations (as in the case of AWB), or upon the environment and consumers generally (as with James Hardie). To appreciate how Australian law has historically permitted profitability to outweigh social responsibility, a review of Australian law's concept of shareholder primacy is warranted.

Shareholder primacy in Australia is built on two pillars inherited from the corporate law of the United Kingdom. These are, first, that the corporation only has the capacity to pursue the objectives found in its memorandum or constitution (actions not in furtherance of such objectives are *ultra vires* and invalid). In addition and perhaps of greater importance, the company directors, in exercising their functions, must act in the best interests of the company. As discussed below, the second of these limitations refers directly to the interests of the shareholders or members (for companies limited by guarantee) as a general body or group rather than of the company as a financial entity itself.⁵¹

While the limitation on corporate capacity (the concept of *ultra vires*) has now been effectively abolished in Australia

47. Australian Securities and Investments Commission v. Macdonald (No 11) [2009] N.S.W.S.C. 287, paras. 258 - 478.

48. As required by Corporations Act, 2001, § 1001A (2) (Austl.).

49. Australian Securities and Investments Commission v. Macdonald (No 11) [2009] NSWSC 287, paras. 481 - 538

50. See, e.g., Scott Murdoch, Hellicar's Career Crashes On Misleading Conduct, THE AUSTRALIAN, Apr. 24, 2009, at F19 (Several members of the James Hardie Board of Directors had already resigned from that position. Several members of the Board of Directors resigned from other company's Board of Directors in consequence).

51. Greenhalgh v. Arderne Cinemas LD and others [1951] Ch 286 (C.A.).

through legislation,⁵² it originally hindered the performance of any function which did not further the commercial activities of the corporation. In *Hutton v. West Cork Railway Co.*,⁵³ Justice Bowen raised this concept in the following way when considering whether it is permissible to pay company officials upon sale of the company's entire undertaking, even if sanctioned by the company in a general meeting:

It is the money of the company and the majority want to spend it. What would be the natural limit of their power to do so? They can only spend money which is not theirs but the company's, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company.⁵⁴

Similarly, in *Parke v. Daily News Ltd*,⁵⁵ the directors of a newspaper company wished to pay a portion of the proceeds of the sale of the company's newspapers to employees who would lose their jobs as a consequence of the sale. Minority shareholders asserted that such payments were *ultra vires* and, consequently, could not be made even with the approval of a majority of shareholders. Concluding that the transaction was impermissible, Justice Plowman indicated:

Stripped of all its side issues, the essence of the matter is this, that the directors of the defendant company are proposing that a very large part of its fund should be given to its former employees in order to benefit those employees rather than the company, and that is an application of the company's funds which the law, as I understand it, will not allow.

If it is right, then it appears to me from the *Hutton* case that the proposal to pay compensation is one which a majority of shareholders is not entitled to ratify.⁵⁶

In both *Hutton* and *Parke*, the conclusions that the payments did not further the business objectives of the company were aided by the fact that both companies had ceased to operate. Thus, it would have been difficult to assert that gratuitous payments to former enterprise employees or managers could eventually benefit the business of the company itself. Nevertheless, both courts recognized that, hypothetically, a continuing enterprise might expend funds for charitable purposes (such as providing cake and ale to employees) to further its commercial objectives:

52. In Australia, see Corporations Act, 2001, §§ 124 and 125 (Austl.), which greatly limit the *ultra vires* doctrine.

53. (1883) 23 Ch. D. 654, per Justice Bowen.

54. (1883) 23 Ch. D. 654, 671.

55. [1962] Ch. 927, per Justice Plowman.

56. [1962] Ch. . 927, 962.

The law does not say that there are to be no cakes and ale. But there are to be no cakes and ale except such as are required for the benefit of the company. Now that, I think, is the principle to be found in the case of *Hampson v. Price's Patent Candle Co.* (1976) 45 LJ Ch 437. The Master of the Rolls there held that the company might lawfully expend a week's wages as gratuities for their servants; because that sort of liberal dealing with servants eases the friction between masters and servants and is, in the end, a benefit to the company. It is not charity sitting at the board of directors, because as it seems to me charity has no business to sit at boards of director qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board but for no other purpose. . . .⁵⁷

For continuing businesses, the above statement supports the proposition that, even prior to the abolition of the *ultra vires* doctrine, the expenditure of funds on charitable or non-commercial purposes might have been in furtherance of the objectives of a commercial company and thus not *ultra vires*. Companies may also be formed with objectives which are charitable rather than commercial,⁵⁸ and pursuit of such objectives would clearly be within the ambit of that company's capacity.⁵⁹

With the effective abolition of the *ultra vires* doctrine in Australia, the primary legal impediment to the corporation's consideration of interests other than those of shareholders is the requirement that directors, in exercising their powers, must act "bona fide in what they consider—not what the court may consider—is in the best interests of the company."⁶⁰ A similar statutory obligation now also appears in the Corporations Act § 181 (1): "A director or other officer of a corporation must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for proper purposes."

The primary factor (and until quite recently, arguably the exclusive factor) to consider in determining the best interest of the company is what is in the interests of shareholders, as demon-

57. [1962] Ch. . 927, 962, citing the opinion of Justice Bowen in *Hutton v. West Cork Ry. Co.*, (1883) 23 Ch D. 654, 671.

58. Corporations Act 2001 § 150 (Austl.) permits a company limited by guarantee to omit "Limited" in its name if its constitution requires the company to pursue charitable purposes only and to prohibit the company making distributions to its members.

59. "Clearly, for example, the constitution of a charitable company can effectively require profits to be devoted to charitable purposes rather than to be distributed among members." H.A.J Ford, R.P. Austin and I.M. Ramsay, FORD'S PRINCIPLES OF CORPORATIONS LAW (Butterworths, 2005) para. 8.070.

60. This oft-cited formulation of the requirement comes from the decision of Lord Greene M.R. in *Re Smith & Fawcett Ltd* [1942] Ch 304, 306.

strated by a number of judicial considerations.⁶¹ In *Greenhalgh v. Arderne Cinemas*,⁶² Justice Evershed, explained what was meant by the term “interests of the company as a whole” when he said:

. . . the phrase, “the company as a whole,” does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the incorporators: it means the incorporators as a general body. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person’s benefit.⁶³

In *Parke v. Daily News Ltd.*, Justice Plowman referred to the above passage from the *Greenhalgh* opinion and agreed that requiring directors to act in the interests of the company meant the interests of the shareholders generally: “. . . the benefit of the company meant the benefit of the shareholders as a general body, and in my opinion that is equally true in a case such as the present.⁶⁴”

The English courts’ general proposition that directors are obligated to regard the interests of shareholders has been adopted elsewhere in the common law world; however, more recent broadening of the interests to be considered has occurred, particularly in Australia and Canada. In *Darvall v. North Sydney Brick & Tile Co Ltd (No. 2)*,⁶⁵ Justice Hodgson indicated that, in his view, consideration of a company’s best interests involved a longer-term view than just considering the possible benefits to current shareholders:

In my view it is proper to have regard to the interests of the members of the company as well as having regard to the interests of the company as a commercial entity. Indeed, it is proper also to have regard to the interests of creditors of the company. I think it is proper to have regard to the interests of present and future members of the company, on the footing that it would be continued as a going concern.⁶⁶

Although Australian cases have indicated that directors should consider the interests of creditors when the company

61. Most cases concern companies limited by shares; however, by analogy, the concept would be applied by reference to present and future members of those companies whose membership is not represented by shares.

62. [1951] Ch. 286 (C.A.)

63. [1951] Ch. 286, 291. This passage was quoted with approval by the High Court of Australia (Justices Williams, Fullagar and Kitto) in *Ngurli v. McCann*, (1953) 90 CLR 425 at 438.

64. [1962] Ch. 927, 963.

65. (1987) 6 A.C.L.C. 154. This view was confirmed on appeal. See the observations of Justice Mahoney in *Darvall v. North Sydney Brick & Tile Co Ltd (No. 2)* (1989) 16 N.S.W.L.R. 260.

66. 16 N.S.W.L.R. 260, .

nears insolvency,⁶⁷ there has been little authority in the common law that the interests of any stakeholders other than shareholders and creditors (in the limited circumstances of insolvency) must be considered by directors. Nevertheless, it seems clear that the continued prosperity of the company may necessitate consideration of broader stakeholders. The Australian Senate Standing Committee on Legal and Constitutional Affairs, when reviewing the state of the Australian law on directors' duties in 1989, concurred in this view of the law at the time:

The courts have associated directors' duties with the "interests of the company." This does not mean that directors must not consider other interests. The "interests of the company" include the continuing well-being of the company. Directors may not act for motives foreign to the company's interests, but the law permits many interests and purposes to be advantaged by company directors, as long as there is a purpose of gaining in that way a benefit to the company.⁶⁸

Other common law jurisdictions have similarly broadened the interests that may be considered by directors. For example, Justice Berger of the Supreme Court of British Columbia indicated in *Teck Corp Ltd v. Millar* that the view of shareholder primacy should be viewed in a modern context:

A classical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees, no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to their community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.⁶⁹

In *People's Department Stores Inc. v. Wise*,⁷⁰ the Supreme Court of Canada agreed with the proposition that other interests may be considered, expressing this in following the terms:

. . .in determining whether [directors] are acting with a view to the best interests of the corporation, it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders,

67. *Kinsela v. Russell Kinsela Pty Ltd*, (1986) 4 N.S.W.L.R. 722.

68. SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS, COMPANY DIRECTORS' DUTIES: REPORT ON THE SOCIAL AND FIDUCIARY DUTIES AND OBLIGATIONS OF COMPANY DIRECTORS (Australian Government Publishing Service) (1989).

69. *Teck Corp. v. Millar*, [1973] 33 D.L.R. (3d) 288 at [106] (Can.).

70. *People's Department Stores, Inc. v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68 (Can.)

employees, suppliers, creditors, consumers, governments and the environment.⁷¹

Without further case law or legislative change, the current state of Australian corporate law appears to be similar to that of the Canadian judicial pronouncements previously mentioned. Corporations may act within their capacity for altruistic purposes, and not only for commercial purposes, unless prohibited by their constitutions from doing so. Even though the company directors and, in certain instances its shareholders in general meeting, must act in the interests of the company, this does not prevent the consideration of that benefit by reference to broader societal objectives and the long term interests of the company. These interests will be served if, for example, the company is seen by the community as being a good corporate citizen with regard for its consumers, the broader community, the ecology, its workforce, and those with whom it has business relations.⁷²

While Australian corporate law does not mandate that corporate managers consider broader stakeholder interests, developments since 1998 have improved the disclosure of socially responsible practice by Australian companies. Even though disclosure obligations do not directly require that Australian companies act responsibly, the disclosure of their actions and the possible implications thereof facilitates the use of community pressure to assure that Australian companies do act responsibly.⁷³ The importance of corporate image to increased corporate social responsibility can be demonstrated anecdotally. Improved disclosure of socially responsible practices by Australian companies (either as a result of legislative requirement or as a result of requirements of the market operators on which their shares are traded) are implicitly based upon the assumption that disclosure will ultimately allow public pressure to influence Australian companies to improve their practices.

Anecdotally, both the actions of the Australian Wheat Board and the James Hardie Group resulted in public backlashes in Australia once the practices became known. Prior to providing improved funding for asbestos sufferers, James Hardie faced union and public calls for boycotts of their products. The Australian Wheat Board, on the other hand, faced the prospect of elimination of its monopoly position for Australian wheat exports as a result of its practices. Both examples indicate that public pres-

71. *Id.* at 42.

72. The Corporations and Markets Advisory Committee expressly endorsed this view. *See infra* note 89.

73. The requirements of the Listing Rules of the Australian Stock Exchange under which the disclosure obligations for listed corporations are controlled are discussed in the text and footnotes immediately following note 116.

sure, brought about through the disclosure of suspect practices, can be effective.

4. CORPORATE SOCIAL RESPONSIBILITY INTERNATIONALLY – ALTERNATIVES FOR AUSTRALIA

With poor corporate behavior being a worldwide problem, Australia can look to international developments for potentially useful initiatives. As might be expected, the developments of the most influential of the common law countries, the United Kingdom and the United States, are perhaps the most relevant to the Australian context, since both of those countries share similar legal systems and cultural norms.

For Australia, the most instructive development may be the United Kingdom's enactment of § 172 of the Companies Act of 2006.⁷⁴ This section clarifies that shareholder primacy should be approached with a view to long-term success, which may be facilitated by consideration of other stakeholder interests. It specifically indicates that a director, in promoting the success of the company for the benefit of its members as a whole, should consider:

- the likely long term consequences of any decision;
- the interests of the company's employees;
- the need to foster the company's business relationships with suppliers, customers, and others;
- the impact of the company's operations on the community and the environment; and
- the desirability of the company in maintaining a reputation for high standards of business conduct.⁷⁵

In the United States, unlike the United Kingdom or Australia, corporate law is largely state-based, so there is no uniform treatment of corporate social responsibility throughout the country. As in Australia, much of the debate surrounding the need for corporate social responsibility has arisen in the context of corporate governance. The American Law Institute's *Principles of Corporate Governance* does not have the force of law as does the Companies Act in the UK. Nevertheless, it provides guidance to the development of corporate law in all of the states. Section 2.01(b)(2) of these principles goes somewhat further than legal developments in either the United Kingdom or Australia,

74. Companies Act, 2006, c.46, § 172 (U.K.).

75. See Dr. Iris H-Y Chiu, *The Meaning of Share Ownership and the Governance Role of Shareholder Activism in the United Kingdom*, 8 RICH. J. GLOBAL L. & BUS. 117, 134 (2008); Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance* 50 HARV. INT'L L.J. 129, 168 (2009).

when it states: “Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business, may take into account the ethical considerations that are reasonably regarded as appropriate to the responsible conduct of its business.”⁷⁶

In addition to these reforms in the United Kingdom and the United States, the European Union (EU), the Organization for Economic Cooperation and Development (OECD), and the United Nations (UN) have all proposed guidelines to which corporations should adhere. These include the *OECD Guidelines for Multinational Enterprises*;⁷⁷ the *UN Global Compact*;⁷⁸ the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*;⁷⁹ the *UN Principles for Responsible Investment*;⁸⁰ the *EU Green Paper Promoting a European Framework for Corporate Social Responsibility*;⁸¹ and the *EU Commission Communication Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*.⁸²

These international guidelines provide principles by which corporations, through voluntary compliance, can meet their social responsibilities.⁸³ These developments, though not directly

76. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b)(2) (1994). The ethical dimension is discussed in Larry O. Natt Gant II, *More than Lawyers: the Legal and Ethical Implication of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365 (2005).

77. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

78. United Nations Global Compact, available at <http://www.unglobalcompact.org/index.html>.

79. U.N. Comm'n on Human Rights, Sub-Comm'n on the Promotion & Practice of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 13, 2003).

80. United Nations, *Principles for Responsible Investment*, available at <http://unpri.org/principles> (last visited Oct. 18, 2009).

81. Comm'n of the European Communities, *Green Paper on Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 final (July 18, 2001), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0366:FIN:EN:PDF> (last visited Oct. 18, 2009).

82. Comm'n of the European Communities, *Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM (2002) 347 final (July 2, 2002), available at http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127374.pdf (last visited Oct. 18, 2009).

83. See Joe W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J. L. & PUB. POL'Y 334 (2009); Rachel Kyte, *Balancing Rights with Responsibilities: Looking for Global Drivers of Materiality In Corporate Social Responsibility and the Voluntary Initiatives That Develop and Support Them*, 23 AM. U. INT'L L. REV. 559 (2008); Tim Baines, *Integration of Corporate Social Responsibility through International Voluntary Initiatives*, 16 IND. J. GLOBAL LEGAL STUD. 223 (2009); Kenneth W. Abbott and Duncan Snidal, *Strengthening Interna-*

relevant to Australian corporations, presented a stark contrast to the actions of certain Australian corporations in the last few years. Consequently, it is not surprising that they were considered a valuable comparator when corporate social responsibility was placed on the law reform agenda.⁸⁴

As with many transnational legal developments, the solutions adopted by one country or group of countries may not be accepted easily in another. With corporate social responsibility, Australia was informed of international developments, but preferred to address its own needs in a way which would be acceptable locally. As a result, the Australian approach toward corporate social responsibility does not reflect direct legislative action to modify further the concepts of shareholder primacy as seen in the United Kingdom, the United States or the European Union. Rather, Australian government, law reform, and markets have come to a solution which, in light of recent events, has had some success in causing corporations to act in socially responsible ways.

5. AUSTRALIAN EFFORTS AT PROMOTING SOCIAL RESPONSIBILITY

Disquiet in Australia with the lack of corporate social responsibility led, in 2005 and 2006, to both a Parliamentary inquiry and a separate governmental law reform inquiry into the manner by which Australia could encourage better practices. Additionally, the Australian Stock Exchange (ASX) considered whether further and better disclosure to the market would enhance corporate social responsibility. All three inquiries concluded that disclosure alone would be sufficient to improve the social responsibility of Australian corporations.

In March 2005, the Parliamentary Secretary to the Honorable Chris Pearce, the Treasurer, formally requested the Corporations and Markets Advisory Committee (“CAMAC”),⁸⁵ to ascertain whether directors’ duties under the Corporations Act of 2001 should include corporate social responsibility or explicit obligations to take account of the interests of certain classes of

tional Regulation through Transnational New Governance: Overcoming the Orchestration Deficit, 42 VAND. J. TRANSNAT’L L. 501 (2009).

84. Corp. and Mkts. Advisory Comm., *Report on the Social Responsibility of Corporations* 53-68 (Austral., Dec. 2006); available at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf) (last visited Oct. 18, 2009).

85. See Australian Securities and Investments Commission Act, 2001. Part 9 (Austl.). The Corporations and Markets Advisory Committee is a law reform body appointed to advise the government on issues which are referred to it for consideration.

stakeholders other than shareholders. The Parliamentary Secretary also addressed specific questions to CAMAC:

1. Should the Corporations Act be revised to clarify the extent to which directors may take into account the interest of specific classes of stakeholders or the broader community when making corporate decisions?
2. Should the Corporations Act be revised to require directors to take into account the interest of specific classes of stakeholders or the broader community when making corporate decisions?
3. Should Australian companies be encouraged to adopt socially and environmentally responsible business practices and, if so, how?
4. Should the Corporations Act require certain types of companies to report on the social and environmental impact of their activities?⁸⁶

At the same time that CAMAC was considering these questions, the Parliamentary Joint Committee on Corporations and Financial Services undertook a separate inquiry into corporate social responsibility. Prior to the completion of the CAMAC inquiry, the Joint Committee itself had resolved to inquire into similar questions, such as:

The extent to which organizational decision-makers have an existing regard for the interests of stakeholders other than shareholders, and the broader community;

The extent to which organizational decision-makers should have regard for the interests of stakeholders other than shareholders, and the broader community;

The extent to which the current legal framework governing directors' duties encourages or discourages them from having regard for the interests of stakeholders other than shareholders, and the broader community;

Whether revisions to the legal framework, particularly to the Corporations Act, are required to enable or encourage incorporated entities or directors to have regard for the interests of stakeholders other than shareholders, and the broader community (but also having regard to obligations that exist in laws in addition to the Corporations Act);

Any alternative mechanisms, including voluntary measures, that may enhance consideration of stakeholder interests by incorporated entities and/or their directors;

The appropriateness of reporting requirements associated with these; and

86. The terms of reference may be found in Corp. and Mkts. Advisory Comm., *Report on the Social Responsibility of Corporations 2-4* (Austl., Dec. 2006); available at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf) (last visited Oct. 18, 2009).

Whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia.⁸⁷

5.1 PARLIAMENTARY JOINT COMMITTEE REPORT

The Parliamentary Joint Committee released its report, *Corporate Responsibility: Managing Risk and Creating Value*, in June 2006.⁸⁸ The report reviewed both the current state of Australian law and contrasted it with international developments promoting corporate social responsibility. The Joint Committee took the view that it would not be appropriate to mandate the consideration of stakeholder interests into directors' duties, or to mandate sustainability reporting, but that there was a need to seriously consider options in order to encourage greater uptake and disclosure of corporate responsibility activities. In summarizing the state of Australian law, the Joint Committee concluded:

The committee considers that an interpretation of the current legislation based on enlightened self-interest is the best way forward for Australian corporations. There is nothing in the current legislation which genuinely constrains directors who wish to contribute to the long term development of their corporations by taking account of the interests of stakeholders other than shareholders. An effective director will realise that the wellbeing of the corporation comes from strategic interaction with outside stakeholders in order to attract the advantages described earlier in this chapter.

The committee considers that more corporations, and more directors, should focus their attention on stakeholder engagement and corporate responsibility. However it is clear from this chapter that any hesitation on the part of corporate Australia does not arise from legal constraints found in the Corporations Act. As the problem is not legislative in nature, the solution is unlikely to be legislative in nature. Elsewhere in this report, the committee gives long consideration to other, non-legislative ways in which Government might encourage greater corporate responsibility. However, the conclusion of this chapter is that amendment to the Corporations Act, and in particular to the provisions setting out directors' duties, is not required.⁸⁹

Although the Joint Committee did not call for legislative changes to the directors' duties obligations, nor for the imposition of legislatively-mandated sustainability reporting, it sup-

87. The terms of the inquiry can be found in Parliamentary Joint Comm. on Corps. and Fin. Serv., *CORPORATE RESPONSIBILITY: MANAGING RISK AND CREATING VALUE* ii (June, 2006); available at http://www.aph.gov.au/Senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/report/index.htm (last visited Oct. 18, 2009).

88. *Id.*

89. *Id.*, Concl. 4.76, 4.77.

ported initiatives to improve corporate social responsibility by Australian companies through education,⁹⁰ improved voluntary disclosure,⁹¹ governmental support,⁹² disclosure requirements to the markets about risk exposure relating to sustainability,⁹³ and the development of best practice through voluntary initiatives.⁹⁴

5.2 CORPORATIONS AND MARKETS ADVISORY COMMITTEE REPORT

CAMAC released its final report in December 2006 and took into account the recommendations in the Parliamentary Joint Committee's report.⁹⁵ Due to the specific nature of the reference given to CAMAC, its findings concentrated on:

1. Duties of directors in Australian corporate law;⁹⁶
2. Corporate disclosure as a method of assuring that social responsibility is encouraged;⁹⁷ and
3. Other methods of promoting responsible corporate practices.⁹⁸

After reviewing the state of Australian law and comparing this to international law and practice, CAMAC concluded that little in the way of significant legal amendment was necessary.⁹⁹

Regarding the formulation of directors' duties, CAMAC concluded that it could be counterproductive to amend the Corporations Act to require or permit directors to regard certain matters or the interests of certain classes of stakeholders. In CAMAC's view, such a change to the formulation of directors' duties found in § 181 of the Corporations Act (namely, to act in the best interests of the company) might blur rather than clarify the purpose directors were expected to serve, thus making them less accountable to shareholders without significantly enhancing the rights of other parties.¹⁰⁰ In contrast to any proposal to modify the statutory formulation of directors' duties, CAMAC indicated that:

90. *Id.*, Recommendations 10, 11, 12 and 16.

91. *Id.*, Rec. 5, 6, 8, and 9.

92. *Id.*, Rec. 13, 20, 21, 22 and 25.

93. *Id.*, Rec. 22 and 25.

94. *Id.*, Rec. 14, 15, 17, 24, and 26.

95. Corp. and Mkts. Advisory Comm., *Report on the Social Responsibility of Corporations 5* (Austral., Dec. 2006); available at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf) (last visited Oct. 18, 2009).

96. *Id.* at Ch. 3.

97. *Id.* at Ch. 4.

98. *Id.* at Ch. 5.

99. *Id.* at 7-8.

100. *Id.* at 111.

. . . [T]he current common law and statutory requirements on directors to act in the interests of their companies . . . are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including changes in societal expectations about the role of companies and how they should conduct their affairs. The Committee is not persuaded that the elaboration of interests that, where relevant, can already be taken into account would improve corporate decision making in any practical way. A non-exhaustive catalogue of interests to be taken into account serves little useful purpose for directors and affords them no guidance on how various interests are to be weighed, prioritised or reconciled.¹⁰¹

When considering the effectiveness of disclosure requirements for improving the social responsibility of corporations, CAMAC noted that a number of countries had implemented reporting regimes of some kind. The models considered included the United States,¹⁰² the European Union,¹⁰³ the United Kingdom,¹⁰⁴ France,¹⁰⁵ Germany,¹⁰⁶ South Africa,¹⁰⁷ and Canada.¹⁰⁸ While the benefits of these reporting regimes were supported by a number of submissions,¹⁰⁹ CAMAC identified a number of factors which any type of reporting would present, including:

- Comparability of the reports presented;
- Cost associated with preparation of such reports;
- Flexibility of the required reports;
- Possible stifling of innovation; and
- Enhancement of market advantage by requiring balanced reporting (both positive and negative effects), thus assisting corporations which consistently apply socially responsible corporate best practice.¹¹⁰

While CAMAC thought that there was considerable overlap in aspects of corporate performance of interest to both investors and other groups or the public generally, it considered that the Corporations Act's current mandatory reporting regime would be a blunt instrument if used for the collection of information, from a broad range of companies, of a kind that may be material only in selective cases. Consequently, CAMAC concluded that: "[i]t would be premature and counterproductive to introduce detailed legislative social and environmental reporting require-

101. *Id.*

102. *Id.* at 125.

103. *Id.* at 128.

104. *Id.* at 130.

105. *Id.* at 132.

106. *Id.* at 133.

107. *Id.*

108. *Id.* at 134.

109. *Id.* at 136-37.

110. *Id.* at 137.

ments given that the form and content of non-financial disclosures are still evolving, internationally as well as locally.”¹¹¹

CAMAC, however, did conclude that both the reporting requirements which had been initiated by the ASX (applying only to listed companies), and the voluntary reporting schemes under various industry and international initiatives, had much to commend them, as these had the benefits of greater flexibility and responsiveness to change. It thus supported allowing such initiatives to continue rather than supplanting them with legislatively-prescribed requirements while those initiatives were still in their formative stages.¹¹² Finally, CAMAC considered other methods of encouraging better corporate social responsibility in Australia.¹¹³ After reviewing a number of industry and governmental initiatives in Australia, CAMAC also considered international experience in encouraging better corporate social responsibility by use of a “light touch” rather than compulsion. It concluded that government should encourage, but not be responsible for, assuring more socially responsible corporate behavior: “[t]he Committee does not see a need for government to provide across-the-board fiscal or other incentives for companies to operate in a socially responsible manner. Nor should government seek to compel companies to adopt a particular managerial approach.”¹¹⁴

Despite its preference for minimal governmental intervention, CAMAC did acknowledge that there was room for additional measures by the government to help corporate and other participants in ways that would not unduly constrain energy and initiative in the marketplace:

The corporate sector’s own appreciation of the relevance of responsible practices to business success is likely to be the key determinant of change. Also, care should be taken not to lose sight of the fact that the role of companies is to carry out their business or other objectives, subject to legal and other constraints. While the community may look to companies to behave responsibly and to contribute in ways relevant to their business, they should not be expected to bear a general fiduciary duty to solve societal problems.¹¹⁵

111. *Id.* at 144-45.

112. *Id.* at 147.

113. *Id.* at Ch. 5.

114. *Id.* at 168.

115. *Id.*

5.3 AUSTRALIAN STOCK EXCHANGE DISCLOSURE DEVELOPMENTS

Reliance upon disclosure of a corporation's policies and actions to assure that each corporation acts in a socially responsible way is well advanced in Australia. Legislatively, the Corporations Act has mandated environmental impact disclosure for all companies since 1998. At that time, minor parties controlled the balance of power in the Australian Senate, and the Howard conservative coalition government conceded to certain amendments requested of the Australian Democrats in order for them to pass the Company Law Review Act of 1998. One of those amendments required companies to report on its compliance with environmental regulation.¹¹⁶

In contrast to the environmental disclosure required by the Corporations Act, the primary disclosure obligation relating to corporate social responsibility is imposed by the primary share market, the ASX, for entities listed upon it. Entities admitted for listing on the ASX commit to comply with the ASX Listing Rules as a condition of their admission. While these, consequently, apply only to a minority of all companies in Australia, the ASX Listing Rules do obligate the largest and most significant companies in Australia to conform to standards of disclosure higher than those applying under the Corporations Act generally.

Subsequent to the corporate collapses in the early part of this decade, the ASX sought to encourage good corporate governance by implementing the ASX Corporate Governance Principles and Best Practice Recommendations,¹¹⁷ which included both broad principles about best corporate governance practice and recommendations for their implementation. Like similar codes of practice in the United Kingdom, neither the ASX Corporate Governance Principles and Best Practice Recommendations, introduced in 2003, nor the 2007 version, the ASX Good

116. Corporations Act, 2001, § 299(1)(f) (Austl.). The Commonwealth Government indicated that it intended to repeal the environmental disclosure requirement in the GOV'T RESPONSE TO THE REPORT OF THE PARLIAMENTARY JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES — MATTERS ARISING FROM THE COMPANY LAW REVIEW ACT 1998 (Austl., Dec. 2000). This intention was never acted upon, and it is unlikely to occur now that the Labor party controls the government (from 2007).

117. ASX CORP. GOVERNANCE. COUNCIL, CORP. GOVERNANCE. PRINCIPLES AND BEST PRACTICES RECOMMENDATIONS (1st ed 2003); ASX CORP. GOVERNANCE COUNCIL, CORP. GOVERNANCE. PRINCIPLES AND RECOMMENDATIONS (2d ed. 2007). ASX Listing Rule 4.10.3 requires listed entities to reveal the extent to which they comply with the ASX Corporate Governance Principles and Recommendations on an "if not why not basis." ASX Listing Rule 4.10.17 also requires each listed company to provide a review of its operations and activities; however, this obligation would not require specific disclosure of CSR practice.

Corporate Governance Principles, is prescriptive.¹¹⁸ The ASX Listing Rule 4.10.3 requires only that listed entities indicate whether they comply with the ASX recommendations on good corporate governance and to explain why their practice differs if it does (“if not, why not”). Consequently, the reporting requirements are not prescriptive, but merely indicative, of good practices. The ASX Listing Rules themselves provide no specific requirement to report on corporate social responsibility issues other than in the context of a listed entities’ compliance with the ASX Corporate Governance Principles and Best Practice Recommendations, which originally provided little by way of reference to corporate social responsibility.

In 2007, the ASX Corporate Governance Council reviewed its Corporate Governance Principles and Best Practices Recommendations, refining its reporting requirements. At that time, a number of submissions were made concerning the appropriate way to deal with corporate social responsibility issues.¹¹⁹ In response to the submissions, the ASX Corporate Governance Council amended Principle 3 (Promote Ethical and Responsible Decision-making) to clarify that when making ethical and responsible decisions, companies should not only comply with their legal obligations, but should also consider the “reasonable expectations” of their stakeholders.¹²⁰ More significantly, a number of submissions raised the possibility of reporting in relation to environmental and corporate responsibility (“CR”) in the context of the requirement to manage risk effectively (Principle 7). In response, the ASX Corporate Governance Council, in language similar to that of both CAMAC and the Joint Committee, concluded:

Council considers that there is little support in submission for including a requirement for disclosure of material business risks in the Revised Principles. Where a company has risks relating to sustainability/CR issues that are material to its business they should be considered in the context of the revised [generic recommendation on risk identification and management]. The Revised Principles should not, however, include a requirement to disclose specific business risks relating to sustainability/CR.¹²¹

118. ASX Listing Rule 4.10 adopts an “if not why not” reporting regime.

119. ASX CORP. GOVERNANCE COUNCIL, RESPONSE TO SUBMISSIONS ON REVIEW OF CORP. GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (Aug., 2007); available at http://www.asx.com.au/supervision/pdf/corp_governance_response_to_submissions_aug07.pdf. Forty-four submissions were received in relation to Principle 3, “Promote ethical and responsible decision making,” (para. 53) and ninety-seven were received in relation to Principle 7, “Recognise and manage risk” (para. 72).

120. *Id.* at para. 54.

121. *Id.* at para. 92.

As a result of this conclusion, Principle 7 of the revised Corporate Governance Principles and Recommendation made no recommendation specifically regarding sustainability and corporate responsibility. Rather, only the commentary on the general obligation to establish and disclose policies for identifying and managing risk¹²² includes the advice that effective risk management involves considering factors that bear upon the company's continued good standing with its stakeholders.¹²³

In August 2007, the second edition of the ASX Good Corporate Governance Principles was released, with greater emphasis on corporate social responsibility. While the reporting requirements are not prescriptive, both ASX Principle 3 (Ethical and Responsible Decision-making) and Principle 7 (Risk Management) would encourage reporting of matters which promote corporate social responsibility. Principle 3 provides, in part:

Companies should actively promote ethical and responsible decision-making.

To make ethical and responsible decisions companies should not only comply with their legal obligations, but should also consider the reasonable expectations of their stakeholders including shareholders, employees, customers, suppliers, creditors, consumers and the broader community in which they operate. It is a matter for the board to consider and assess what is appropriate in each company's circumstances. It is important for companies to demonstrate their commitment to appropriate corporate practices and decision making.¹²⁴

Principle 7 reinforces this obligation by indicating that companies should establish policies for the oversight and management of material business risks and disclose a summary of those policies. The commentary to this principle indicates clearly how this risk management relates to corporate social responsibility in the following terms:

Each company will need to determine the "material business risks" it faces. When establishing and implementing its approach to risk management, a company should consider all material business risks. These risks may include but are not limited to: operational, environmental, sustainability, compliance, strategic, ethical conduct, reputation or brand, technological, product or service quality, human capital, financial reporting and market-related risks.

122. ASX CORP. GOVERNANCE COUNCIL, CORP. GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (2d ed. 2007), Recommendation 7.1.

123. The full text of the commentary is found at the text preceding *supra* note 126.

124. ASX CORP. GOVERNANCE COUNCIL, CORP. GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (2d ed. 2007), *supra* note 122, at 33.

When developing risk management policies the company should take into account its legal obligations.¹²⁵ A company should also consider the reasonable expectations of its stakeholders. Stakeholders can include: shareholders, employees, customers, suppliers, creditors, consumers and the broader community in which the company operates.

Failure to consider the reasonable expectations of stakeholders can threaten a company's reputation and the success of its business operations. Effective risk management involves considering factors which bear upon the company's continued good standing with its stakeholders.¹²⁶

Although Australian corporations are faced with a legal system which still purports to prioritize shareholders over other stakeholders, it is also clear that acting in a socially responsible way will probably benefit shareholders over the long-term.¹²⁷ Improved transparency is one means of improving better corporate responsible behavior; international experience, however, indicates that alteration of legal norms and adoption of best practice models of conduct can also play a role. The Australian responses to these developments (as exemplified by the reports of the Parliamentary Joint Committee¹²⁸ and the CAMAC report¹²⁹) do not give encouragement to those who hope to see any major alterations in the near future.

Although the Joint Committee review, the CAMAC inquiry, and the revision of the ASX Corporate Governance Principles were all undertaken while the Australian government was under former Prime Minister John Howard, there is little to indicate that implementing compulsory requirements to assure that Australian companies would act in a more socially responsible way (either by legislation or by attempting to influence the ASX into requiring greater reporting requirements) is a great priority of

125. The commentary indicates that legal obligations include but are not limited to requirements dealing with trade practices and fair dealing laws, environmental law, privacy law, employment law, occupational health and safety, equal employment and opportunity laws.

126. *Id.*

127. See Andrew Keay, *Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'*, 29 SYDNEY L. REV. 577 (2007); Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests*, 30 COLUM. J. L. & SOC. PROBS. 587, 613-14 (1997).

128. Parliamentary Joint Comm. on Corps. and Fin. Serv., CORPORATE RESPONSIBILITY: MANAGING RISK AND CREATING VALUE (June, 2006); available at http://www.aph.gov.au/Senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/report/index.htm (last visited Oct. 18, 2009). Their report is discussed, in the text following *supra* note 86.

129. See Corp. and Mkts. Advisory Comm., *Report on the Social Responsibility of Corporations*, (Austral., Dec. 2006), *supra* note 85; available at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf) (last visited Oct. 18, 2009).

the Rudd Labour government. Consequently, any improvements in the actions of Australian companies may indicate the success of the government's "light touch" approach to promoting better corporate social responsibility, supplemented by market pressures on Australian companies to meet emerging societal expectations.

6. JUDGING THE SUCCESS OF AUSTRALIAN CORPORATE SOCIAL RESPONSIBILITY INITIATIVES

Disclosure as a means of improving the socially responsible practices of corporations has been employed by a number of different countries prior to Australia's commitment to this strategy.¹³⁰ While there is support for the proposition that full disclosure of such practices will eventually lead to improvement in some aspects of corporate behavior¹³¹ (in environmental sustainability practices, for example¹³²), there is little empirical evidence that disclosure has resulted in a broad or sustainable improvement in corporate social responsibility.¹³³ Nevertheless, anecdotal evidence (for example, public pressure upon James Hardie to resolve its asbestos liability problems¹³⁴) indicates that disclosure can be an effective tool to encourage proper corporate

130. See Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelle Régulations Économiques*, 21 ARIZ. J. INT'L. & COMP. L. 441 (2004); Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT'L L. 591 (2008); Olufemi O. Amoa, Comment, *Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States*, 52 J. AFR. L. 89 (2008); Kevin Campbell & Douglas Vick, *Disclosure Law and the Market for Corporate Social Responsibility*, in THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnet et al., eds., 2007).

131. See Douglas M. Branson, *Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility*, 29 VAND. L. REV. 539 (1976); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999); Frank René López, *Corporate Social Responsibility in a Global Economy After September 11: Profits, Freedom, and Human Rights*, 55 MERCER L. REV. 739 (2004).

132. See, e.g., European Comm'n, *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development* (2002), available at <http://www.corporatejustice.org/Communication-from-the-Commission.html>.

133. Cf. David S. Gelb & Joyce A. Strawser, *Corporate Social Responsibility and Financial Disclosures: An Alternative Explanation for Increased Disclosure*, 33 J. BUS. ETHICS 1 (2001); David J. Doorey, *Who Made That? Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 OSGOODE HALL L.J. 353 (2005). See generally Allison M. Snyder, *Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer?*, 2007 COLUM. BUS. L. REV. 565 (2007).

134. For a discussion of the union campaigns which contributed to intervention by the New South Wales government, see Rae Cooper, *Trade Unionism in 2004*, 47 J. INDUS. REL. 202, 208 (2005).

behavior, at least in Australia. The mechanisms of disclosure and public awareness are also being improved on a continual basis, pointing to some optimism that the Australian mechanisms are effective.¹³⁵

The longest standing corporate social responsibility disclosure requirement in Australia is the one regarding the environmental impact of corporations.¹³⁶ While several studies support the conclusion that disclosure of corporations' environmental practices has led to better environmental practices or global changes in market value,¹³⁷ the Australian experience has been studied only recently.¹³⁸ The Australian studies have not concentrated upon the quality or consequences of environmental disclosure, but rather have observed that companies are, by and large, committing greater efforts to environmental disclosure.¹³⁹ The most recent study, conducted by Gibson and O'Donovan in 2007, concluded that, should the trends identified in the twenty-one year study continue, the amount of environmental information provided in annual reports will increase.¹⁴⁰ If Australian experience is consistent with that observed internationally, better disclosure of environmental practices will undoubtedly convert into market responses. These market responses, in turn, may result in Australian companies improving environmental performance and disclosure in order to improve market performance.

In the disclosure of non-environmental corporate social responsibility matters, the Australian experience is quite limited. Nevertheless, it is already clear that corporations have had to accept that they should meet community expectations. Of the three examples discussed in this article, the airing of the failure

135. For example, the ASX has recently provided guidance to entities listed on its exchange that "boilerplate" language in reference to assessment of risks is inappropriate. See ASX Markets Supervision Education and Research Program, PRINCIPLE 7: RECOGNISE AND MANAGE RISK: GUIDE FOR SMALL MID-MARKET CAPITALISED COMPANIES 6 (2009), http://www.asx.com.au/supervision/pdf/principle_7_recognise_and_manage_risk_guide.pdf.

136. See Corporations Act, 2001, § 299(1)(f) (Austl.).

137. E.g., Ahmed Belkaoui, *The Impact of the Disclosure of the Environmental Effects of Organizational Behavior on the Market*, 5 FIN. MGMT 26 (1976); Barry Spicer, *Investors, Corporate Social Performance and Information Disclosure: An Empirical Study*, 53 THE ACCT. REV. 94 (1978); Joanne W. Rockness, *An Assessment of the Relationship Between US Corporate Environmental Performance and Disclosure*, 12(3) J. BUS. FIN. & ACCT. 339 (1985).

138. See generally Kathy Gibson and Gary O'Donovan, *Corporate Governance and Environmental Reporting: An Australian Study*, 15 CORP. GOVERNANCE 944 (2007).

139. See generally Craig Deegan & Ben Gordon, *A Study of the Environmental Disclosure Practices of Australian Corporations*, 26 ACCT. & BUS. RES. 187 (1996); R. Gibson and J. Guthrie, *Recent Environmental Disclosures in Annual Reports of Australian Public and Private Sector Organisations*, 19 ACCT. FORUM 111 (1995).

140. Gibson & O'Donovan, *supra* note 138 at 954.

of corporate social responsibility proved significant in two. The James Hardie board faced governmental and union pressure when its failure to provide adequately for asbestos victims became widely known.¹⁴¹ When strict legal recourse was ineffective, this resulted in a New South Wales government-brokered compensation arrangement.¹⁴² Moreover, failures of the James Hardie board to reveal the deficiencies of the original compensation arrangements have recently caused board members to be judicially disqualified from acting as company directors for periods of seven years.¹⁴³ Similarly, the disclosures of the Australian Wheat Board's actions have resulted in the Australian government bringing greater scrutiny to its operations on a continuing basis, including the consideration of eliminating its monopoly on wheat exports.¹⁴⁴

In an attempt to portray themselves more positively in recent years, corporations have voluntarily participated in the corporate social responsibility index, an initiative of the St James Ethics Centre, Sydney, Ernst & Young, *The Age*, and *The Sydney Morning Herald*.¹⁴⁵ The organizers of the index have noted continuous improvement in the performance of Australian companies since its introduction in 2003.¹⁴⁶

The value of disclosure as a means of assuring proper action of corporations has not been completely validated. It is clear,

141. See John Kluver, *Entity vs. Enterprise Liability: Issues for Australia*, 37 CONN. L. REV. 765, 772 (2005).

142. *Id.* For further background of the pressure which resulted in the current compensation scheme, see *AICF Issues Notice to James Hardie and NSW Government* (2009), <http://www.asx.com.au/asxpdf/20090423/pdf/31h5zcp2bm12qn.pdf> (discussing the James Hardie Company Announcement to the Australian Stock Exchange).

143. A table providing a summary of the findings in *Australian Securities and Investments Commission v. Macdonald* (No.11) [2009] NSWSC 287, can be found in ASIC Media Release 09-69 "James Hardie proceedings" (23 April 2009): [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/James-Hardie-table-of-findings.pdf/\\$file/James-Hardie-table-of-findings.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/James-Hardie-table-of-findings.pdf/$file/James-Hardie-table-of-findings.pdf).

144. Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413 n.223 (2007).

145. The Corporate Responsibility Index was designed by over 80 UK businesses with Business in the Community, a unique movement of 700 member companies committed to continually improving their impact on society. Business in the Community agreed to donate the Corporate Responsibility Index under licence to St James Ethics Centre to be implemented in Australia with *The Sydney Morning Herald* and *The Age*, and supported by Ernst & Young who will validate the results. See http://www.corporate-responsibility.com.au/about/cri_history.asp.

146. Dr Simon Longstaff, Executive Director of St James Ethics Centre noted in his foreword to the 2007 report, "This year's Index is evidence of a corporate sector that is beginning to lose its fear of candid and transparent reporting. This suggests a deeper commitment to learning than has been evident in the past." This year's report is available at: http://www.corporate-responsibility.com.au/results/2007_results.asp.

however, that Australia will proceed to assure its corporations act in the interest of a broad range of stakeholders by relying primarily upon full disclosure to the investing public of each company's socially responsible practices. The Australian government has promoted these disclosures and has provided financial support for the analysis of such practices.¹⁴⁷

In early 2008, the Parliamentary Joint Committee on Corporations and Financial Services once again addressed the issue of the disclosure of environmental, governance and social issues in its inquiry concerning better shareholder engagement. The Joint Committee's final report indicated that it had some concerns about liability arising from incorporating such disclosure requirements into the regulation of the market.¹⁴⁸ In response to these concerns (and to possible government intervention to assure more complete corporate disclosure of environmental, social and governance—"ESG"—issues), the Joint Committee concluded:

The committee strongly supports and encourages companies adopting ESG reporting on a voluntary basis. The committee recognises that ESG reporting is in its early stages and companies should continue to be given the opportunity to determine the best way to approach the task free of government regulations. However, investors are increasingly pressing for ESG reporting and companies should respond to this demand accordingly. If companies cannot, by the end of the current decade, show that they have done this in a manner acceptable to shareholders then it is the view of the committee that the government should consider regulating this area.

Companies should be encouraged to adopt ESG reporting and engage on ESG issues without being concerned that it may contravene their continuous disclosure obligations.¹⁴⁹

Since the means by which Australia has chosen to encourage corporations to act responsibly is primarily disclosure-based, it is important that adequate disclosure is accomplished. In the 2009 case of *The Australian Securities and Investments Commission v. Macdonald (No.11)*,¹⁵⁰ the James Hardie directors were found to have failed in their duties of care and diligence in allowing their

147. The Federal Government, through the Treasury, has commissioned St James Ethics Centre to undertake a three year project to expand responsible business practice nationally. See *Corporate Responsibility Index*, <http://www.corporate-responsibility.com.au/>.

148. Parliamentary Joint Committee on Corporations and Financial Services, *Better Shareholder – Better Company: Shareholder Engagement and Participation in Australia* para. 3.33 (2008), http://www.aph.gov.au/senate/committee/corporations_ctte/sharehold/report/index.htm.

149. *Id.* at para. 3.36-37. The Joint Committee, in recommendation 2, encouraged the ASX to clarify the scope of continuous disclosure obligations as they apply to ESG reporting. *Id.* at para. 3.38.

150. [2009] NSWSC 287 (Gzell J. 23 April 2009).

corporation to make public announcements that it had adequately funded a scheme for the compensation of asbestos victims.¹⁵¹ This indicates that disclosure obligations will be considered both significant and worthy of enforcement. While the disclosure in that case was not directly about James Hardie's practices in relation to corporate social responsibility under the ASX Listing Rules, the general welcome that the case received suggests that punishment of such failures will likely be pursued in the future.

Several continuing concerns about the use of a disclosure based system persist, however. First, the current disclosure system is based upon requirements to keep the market informed, and the market disclosure regime is not prescriptive. The ASX Listing Rules are designed and articulated by reference to the consequences for investors. Listed entities need not disclose their corporate social responsibility practices if they can reveal why this disclosure is not made.¹⁵² Furthermore, so long as corporate social responsibility systems failures have no material effect upon investors, failure to disclose may go unpunished.¹⁵³ Finally, disclosure can often be obscured by general, "boilerplate" or "motherhood" statements. To avoid this, the ASX recently issued a guidance note advising listed entities to indicate not only the policies in broad, vague terms, but also specifically how these policies were formulated to meet the risks (including risks presented by the failure to act in socially responsible ways).¹⁵⁴

151. Australian Securities and Investments Commission v. Macdonald (No.11) [2009] NSWSC 287 at para. 1269 *et seq.* A table providing a summary of the findings can be found in ASIC Media Release 09-69 "James Hardie proceedings" (23 April 2009): [http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/James-Hardie-table-of-findings.pdf/\\$file/James-Hardie-table-of-findings.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/James-Hardie-table-of-findings.pdf/$file/James-Hardie-table-of-findings.pdf)

152. ASX Listing Rule 4.10.3 requires listed entities to reveal the extent to which they comply with the ASX Corporate Governance Principles and Recommendations on an "if not why not basis." See *Chapter 4: Periodic Disclosure*, <http://www.asx.com.au/ListingRules/chapters/Chapter04.pdf>.

153. Disclosure obligations are phrased in terms related to the value placed upon the securities by investors. For example, disclosure is required where information would have an effect upon the price of the securities (ASX Listing Rule 3.1) or where failure to disclose would cause a false market. See *Chapter 3: Continuous Disclosure*, <http://www.asx.com.au/ListingRules/chapters/Chapter03.pdf>; see also Corporations Act, 2001, §§ 674(1), 1001A(2), 1040E (Austl.).

154. See *supra* note 135, at 16. The guide indicates:

Consistent with the philosophy of open disclosure and an 'if not, why not' regime, the Principles do not prescribe the content, format or style of the public disclosures required under Principle 7. It is the expectation that such disclosures are not 'boilerplate' and provide genuine insight into the risk management processes and management of material business risks within the company. *Id.*

7. CONCLUSION

The regulatory landscape for corporate social responsibility in Australia will not soon change. To achieve better performance by Australian corporations for the near future, the government will rely on corporations to voluntarily improve their social responsibility disclosures, as well as on public pressure for Australian corporations to achieve better performance. Some empirical and anecdotal evidence shows that this approach may be effective. The recent economic downturns and market corrections, however, will test the commitment of Australian corporations to consider broader stakeholder interests for the long-term benefit of its shareholders, when short-term shareholder concerns about the commercial value of their investments is paramount in their minds. One can only hope that longer term attitudes about corporate performance and ethical behavior will eliminate bad behavior by Australian corporations in the future, and that Australian shareholders and the public generally will approve of this cultural change.