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## **CORPORATE SOCIAL RESPONSIBILITY: LEGISLATIVE OPTIONS FOR PROTECTING EMPLOYEES AND THE ENVIRONMENT**

### ABSTRACT

This article examines the recent reports of the Parliamentary Joint Committee on Corporations and Financial Services and of the Corporations and Markets Advisory Committee into corporate social responsibility, with regard to the position of employees and the environment. It notes that both of these cohorts of stakeholders are particularly vulnerable to abuses of power by the corporation and its directors, especially at the time of impending insolvency, and therefore need appropriate measures put in place to safeguard their interests. While some companies voluntarily adopt socially responsible practices, the lack of compulsory measures to protect these non-shareholder constituencies means that there have been many instances where they have not been adequately protected. The current legislative regime governing employees and the environment has made some progress in recognising companies' social responsibilities, but is shown to fall short in key aspects. Revisions are recommended to mandate directors' consideration of employee interests at times of insolvency, and also a range of new measure to encourage the integration of environmental considerations into corporate decision making processes.

### I INTRODUCTION

Corporate social responsibility ('CSR') and the consideration by directors of the interests of non-member corporate stakeholders is a matter of considerable debate in Australia at present. The Parliamentary Joint Committee on Corporations and Financial Services ('the PJC') handed down an extensive report entitled 'Corporate Responsibility: Managing Risk and Creating Value' in June, 2006,<sup>1</sup> which makes significant recommendations for the treatment of CSR in Australia for the future. This was followed in December 2006,

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<sup>1</sup> The Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006).

by the Corporations and Markets Advisory Committee ('CAMAC') report entitled 'The Social Responsibility of Corporations'.<sup>2</sup>

To a limited extent, corporations and directors in Australia do have regard to the interests of stakeholders other than shareholders. Specific legal obligations are imposed upon companies by various legislative schemes which protect the interests of a range of stakeholders. These include employment laws, occupational health and safety laws, insolvency laws, trade practices and environmental laws. In addition, a fiduciary duty is imposed upon company directors requiring them to take into account the interests of creditors when the company approaches insolvency.<sup>3</sup> Some companies adopt voluntary strategies which seek to protect the interests of stakeholders as a matter of good corporate citizenship, whilst others recognise that such practices can enhance the corporation's trading performance (often referred to as 'the business case').

Neither the Parliamentary Joint Committee nor CAMAC found that there were any compelling arguments to reform corporations law to promote CSR. This article will maintain that both Committees missed an important opportunity to promote the case for increased legislative protection of corporate stakeholders. The tenor of their reports and their recommendations were entirely in favour of the adoption of CSR practices by companies and the protection of external stakeholders, yet they shied away from recommending a single change to the law to bring about this result.

The particular focus of this article will be the position of two groups of highly vulnerable corporate stakeholders, namely employees and the environment. The analysis will consider the position of these two groups both during the life of the company and at times of approaching insolvency. They have been chosen for this analysis because of their particular vulnerability and also because they typify the extremes of the external stakeholder spectrum. Employees are closely bound up with the corporation's business and can wield considerable power when represented by trade unions.

The environment, on the other hand, lacks representation before corporate decision makers and can be overlooked in the absence of express legislative mandate in the *Corporations Act 2001* (Cth).<sup>4</sup> They also exemplify the extremes of the CAMAC and Parliamentary Joint Committee reports, in that sustainability and the environment received substantial attention from the Committees while the position

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<sup>2</sup> The Corporations and Markets Advisory Committee, Parliament of Australia, *The Social Responsibility of Corporations* (2006), hereinafter the CAMAC Report. <[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)>.

<sup>3</sup> *Walker v Wimborne* (1976) 137 CLR 1, 7: where Mason J stated that 'it should be emphasised that the directors of a company in discharging their duty to the company must take account of the interests of its shareholders and its creditors'.

<sup>4</sup> Hereinafter referred to as the *Corporations Act*.

of employees was not mentioned at all. They have also been chosen because both are governed by considerable legislation outside the *Corporations Act* as well as some provisions within that Act, yet it is submitted that they are not always adequately safeguarded against the inappropriate actions of companies and their directors. It will also be maintained that appropriate protection of both employees and the environment is vital to society and the economy.

This article will examine certain of the recommendations of both the Parliamentary Joint Committee and CAMAC, and ask whether they have gone far enough in the protection of employees and the environment. It will be seen that little has been suggested that will be of practical benefit in ensuring corporate accountability to either of these stakeholder groups. This is particularly unsatisfactory for employees given the call of a previous Parliamentary Joint Committee on Corporations and Financial Services for

preventative measures to minimise the risk of loss of employee entitlements and *modifying current behaviour* to ensure directors and managers of companies take greater responsibility in meeting the cost of employee entitlements in the event of business failure.<sup>5</sup>

The committee concluded that

the protection of employee entitlements in the circumstances of employer insolvency is an important public policy and it is appropriate for governments to explore options for better protecting employee entitlements.<sup>6</sup>

In relation to safeguarding the environment, the response of both Committees is also disappointing, given widespread concerns of the international community typified by the 2005 United Nations Millennium Ecosystem Assessment, which found that:

[n]early two thirds of the services provided by nature to humankind are found to be in decline worldwide. In effect, the benefits reaped from our engineering of the planet have been achieved by running down natural capital assets. In many cases, it is literally a matter of living on borrowed time.

The changes we have made to ecosystems have contributed to substantial net gains in human well-being and economic development. However, these gains have come at growing costs in the form of degradation of many ecosystem

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<sup>5</sup> Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake 2004* (Stocktake Report) [10.55] [emphasis added].

<sup>6</sup> *Ibid* [10.53].

services ..., increased risks of abrupt and harmful changes in ecosystems, and harm to some groups of people.<sup>7</sup>

More recently, the landmark UK Treasury's Stern Review on the Economics of Climate Change has described climate change as 'the greatest and widest-ranging market failure ever seen'.<sup>8</sup> The case for making corporations more accountable for their environmental impacts has never been more urgent.

This article will use the case of employees and the environment to support recommendations for 'moderate' legislative reforms that will promote improvement to decision making processes within corporations without casting onerous new obligations upon directors. These recommendations are highly consistent with the Federal government's own policy on Ecologically Sustainable Development, which includes the principle that 'decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations'.<sup>9</sup>

Part II of this article will look at the theoretical basis for corporate decision making. A number of progressive economic theories of the corporation acknowledge the importance of non-shareholder constituencies, but fail to address the issue of how their interests are to be protected. Part III will ask the practical question of whether and in what circumstances liability for a failure to consider those interests should fall on the company itself or its directors. Part IV examines the particular vulnerability of employees and the environment, and the adequacy of their current regulation and protection against the background of the recommendations of CAMAC and the Parliamentary Joint Committee. Part V provides suggestions as to how the interests of these parties could be better recognised in Australia's corporate framework.

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<sup>7</sup> See Millennium Ecosystem Assessment Board, *Living Beyond Our Means: Natural Assets and Human Well-being* (2005) ('The Millennium Ecosystem Assessment') — comprising a series of reports available at <<http://www.millenniumassessment.org/en/index.aspx>>. The Millennium Assessment was called for by United Nations Secretary-General Kofi Annan in 2000 to assess the consequences of ecosystem change for human well-being and the scientific basis for actions needed to enhance the conservation and sustainable use of those systems.

<sup>8</sup> This report arose out of a request from the British Chancellor of the Exchequer to Sir Nicholas Stern to 'lead a major review on the economics of climate change to understand more comprehensively the nature of the economic challenges and how they can be met, in the UK and globally'. HM Treasury (2006) *Stern Review on the Economics of Climate Change*, ('the Stern Review') <[http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/sternreview\\_summary.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_summary.cfm)> at 13 July 2007.

<sup>9</sup> Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development* (1996) Part 1, Guiding Principles, available at <<http://www.environment.gov.au/esd/national/nsesd/strategy/intro.html#WhatsInIt>> at 19 July 2007.

## II THE THEORETICAL BASIS OF CORPORATE DECISION MAKING

Traditionally, directors have been confined in their actions by the shareholder wealth maximisation imperative. Companies have been seen by neo-classical economic theorists as a nexus of contracts, rather than entities in their own right.<sup>10</sup> The contracts in question are with suppliers of inputs, employees, and customers of outputs, and to maintain these contracts, the company needs to be concerned with the interests of these constituencies. To that extent, companies and directors choose to have regard to their interests.

As early as 1932, however, commentators were looking beyond the interests of shareholders to the corporation's wider impact on society. Berle and Means argued that '[n]either the claims of ownership nor those of control can stand against the paramount interests of the community ... It remains only for the claims of the community to be put forward with clarity and force.'<sup>11</sup>

More recently developed theories of the corporation have looked more explicitly at the contributions to the company made by non-shareholder constituencies. Team production theory<sup>12</sup> recognises the power of the board, but it is based on the notion that two or more individuals must combine their valuable resources to produce a single output. Directors, rather than acting solely in the shareholders' interests, act for all members of the corporate team which contribute to this output.<sup>13</sup> The purpose of the theory is to identify a unity of interest between team members in order to overcome the agency costs which arise when their interests diverge.

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<sup>10</sup> William Bratton, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407, 420. The word 'contracts' is not meant literally in this context. Instead it refers to the various relationships between the parties. Companies have relationships with the eventual consumers of their products despite a lack of privity of contract between them. Companies have relationships with the community at large, for example in their environmental responsibilities. Christopher Riley, 'Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55 *Modern Law Review* 782, 785-6.

<sup>11</sup> Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (revised ed, 1968) 312.

<sup>12</sup> Margaret Blair and Lynn Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247.

<sup>13</sup> 'The interests of the corporation ... can be understood as a joint welfare function of all the individuals who make firm-specific investments and agree to participate in the extra-contractual, internal mediation process within the firm. For most public corporations, these are primarily executives, rank-and-file employees, and equity investors, but in particular cases the corporate team may also include other stakeholders such as creditors, or even the local community if the firm has strong geographic ties.' *Ibid* 288.

Agency costs are one of the transaction costs a company incurs in making a bargain.<sup>14</sup>

Under team production theory, while the participants know that incorporation involves giving up control over their contributions to the firm, exposing them to the risk of opportunism or shirking by others, the board of directors as a ‘mediating hierarchy’ resolves these clashes.<sup>15</sup> Directors are given the task of balancing the competing interests of the team ‘in a fashion that keeps everyone happy enough that the productive coalition stays together.’<sup>16</sup>

Another recent approach which looks at the position of non-shareholder constituencies is the communitarian, or progressive corporate law, view.<sup>17</sup> This looks at the place of the company in the community and argues that various corporate stakeholders are vulnerable to abuse at the hands of those who control corporate power. However, it is by no means a unified school of thought: Bainbridge noted that ‘[t]hese scholars are far more united by what they oppose ... than by what they support.’<sup>18</sup>

As with the team production model, the communitarian view considers the wider constituency of a company. Its rhetoric is of directors’ behavioural change,<sup>19</sup> from

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<sup>14</sup> In the corporate setting, the term ‘agent’ is used broadly to capture the position wherever there is an arrangement where the principal’s welfare depends on what the agent does. According to Jensen and Meckling, ‘there is good reason to believe that the agent will not always act in the best interests of the principal’. Michael Jensen and William Meckling, ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure’ (1976) 3 *Journal of Financial Economics* 305, 308. This behaviour, where a party’s actions are for their own benefit, is known as ‘shirking’. This area of study is also known as transaction cost economics. See further Ronald Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386; Armen Alchian and Harold Demsetz, ‘Production, Information Costs and Economic Organisation’ (1972) 62 *American Economic Review* 777; Oliver Hart, ‘An Economist’s Perspective on the Theory of the Firm’ (1989) 89 *Columbia Law Review* 1757, 1760-3.

<sup>15</sup> ‘... shareholders, employees, and perhaps other stakeholders such as creditors or the local community ... enter into this mutual agreement in an effort to reduce wasteful shirking and rent seeking by relegating to the internal hierarchy the right to determine the division of duties and resources in the joint enterprise’. Blair and Stout, above n 12, 278.

<sup>16</sup> Ibid 281.

<sup>17</sup> Bainbridge took issue with the use by these theorists of the word ‘progressive’ which he believed is ‘simply a code word used by the political left to take advantage of the positive connotations most Americans associate with the idea of progress.’ Stephen Bainbridge, ‘Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship’ (1997) 82 *Cornell Law Review* 856, 857.

<sup>18</sup> Ibid.

<sup>19</sup> Peter Konstant, ‘Team Production and the Progressive Corporate Law Agenda’ (2002) 35 *UC Davis Law Review* 667, 676. ‘Serious application of TPM [the team production model of Blair and Stout] offers at least the possibility that public

focusing on the traditional wealth maximisation objective to furthering the long term viability of the enterprise which relies on the co-operation of all corporate stakeholders.<sup>20</sup> This requires a consideration of ethics and fairness which, communitarians maintain, is in the overall best interests of the company because it fosters trust and reduces risk and the costs associated with it.<sup>21</sup> While directors are allowed to favour one cohort of corporate stakeholders over another, this is only permissible where this is in the long term interests of the company. Konstant remarked that this view ‘provides a new and more inclusive paradigm of corporate governance in which stakeholder voice and loyalty are crucial.’<sup>22</sup>

The mechanisms by which progressives believe this paradigm will be achieved, however, are less clear. Williams asserted that disclosure and transparency are key determinants of directors’ actions, and that scrutiny by corporate stakeholders will foster beneficial norms of behaviour.<sup>23</sup> Greenfield contended that if corporate actions are perceived to be procedurally fair, the behaviour of others improves, to the benefit of all stakeholders.<sup>24</sup> Konstant recommended the appointment of an independent board, which ‘can check opportunistic abuses by powerful inside senior managers and which can give voice and procedural fairness to all constituents.’<sup>25</sup> An independent board is also desirable because it lacks any personal financial incentive to benefit its members from its actions, and risks reputational damage from breaches of the law.

It may be argued that because communitarianism is ultimately in the best interests of the corporation, the implementation of these mechanisms requires no change to the existing law,<sup>26</sup> and thus some communitarians regard the theory as both positively descriptive and normatively useful. Nonetheless, there are serious practical obstacles to implementing communitarianism. The outlook it espouses is of more relevance to the large public company than the far more typical, closely

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corporations can achieve some meaningful increase in fairness for all corporate constituents. Such fairness can be accomplished without changing legal rules, but by encouraging directors and all corporate constituents to act in accordance with TPM under the existing law.

<sup>20</sup> Ibid 669.

<sup>21</sup> Ibid 671.

<sup>22</sup> Ibid 674. Konstant rejected suggestions that the communitarian view is Utopian. He maintained that ‘the currently dominant academic model of corporate law is such a caricature of selfishness that the ameliorative mechanisms that corporate communitarians propose can seem real, grounded, and morally refreshing’ at 676.

<sup>23</sup> Cynthia Williams, ‘Corporate Social Responsibility in an Era of Economic Globalization’ (2002) 35 *UC Davis Law Review* 705, 711-17.

<sup>24</sup> Kent Greenfield, ‘Using Behavioural Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool’ (2002) 35 *UC Davis Law Review* 581, 642.

<sup>25</sup> Konstant, above n 19, 683.

<sup>26</sup> Section 181(1) of the *Corporations Act* states that ‘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 a proper purpose.’.

held proprietary company. As Millon noted, any action by the board which deviates from the traditional wealth maximisation objective exposes the board to dismissal or the company to a hostile takeover, as disenchanted shareholders sell their shares and look for better investments.<sup>27</sup> Shareholders are legally entitled to vote in such a way that enhances their own financial position, even if that causes harm to non-shareholders.<sup>28</sup>

It may also be argued that the communitarian theory provides no guidance to decide between competing claims; rather it seems to hope that everyone who is fairly treated and ‘heard’ by the board will accept ‘give and take’ without making the board, as referee, decide who should win and who should lose. Moreover, it does not assist in determining the winner where two communitarian claims are competing. Communitarianism may support the imposition of liability on directors to consider the claims of creditors, employees or others, but if satisfying those claims makes a director risk averse, that could have economically detrimental effects on the community because of overly cautious directors’ behaviour. In other words, is it better to ensure that non-shareholder constituencies have an entitlement to be compensated where the director fails to pay due regard to their interests, or that the director is more willing to take risks and expand the business, creating jobs and wealth for the community as a whole?

The focus in all of these models of the corporation is on achieving the best for the company and its shareholders, whether that is done by concentrating on shareholders exclusively or by looking at wider stakeholder groups. Another perspective is to look at the company’s place in society, regardless of its role in maximising shareholder wealth.

Indeed this is the way that some ‘progressive’ corporate law scholars understand communitarianism. It is sometimes also known as the ‘concession theory of the firm’. It sees incorporation as a privilege bestowed by the government, thereby justifying government interference. Cohen explained:

Under this understanding, limited liability entities have a responsibility to operate in the public interest. Under the concession/communitarian view, the ‘corporateness’ of the artificial entity should be disregarded when the entity is being operated in a manner which runs counter to the spirit of the grant of

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<sup>27</sup> David Millon, ‘New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law’ (2000) 86 *Virginia Law Review* 1001, 1024-30.

<sup>28</sup> David Millon, ‘Communitarians, Contractarians, and the Crisis in Corporate Law’ (1993) 50 *Washington and Lee Law Review* 1373, 1384 commented that ‘[t]he claim that shareholders should continue to enjoy a property right to harm non-shareholders incidentally to their pursuit of profit maximisation seems at times to rest on nothing more than a reflexive commitment to the status quo.’.



privilege, ie, when the public weal is damaged, rather than enhanced, by the operation of the corporation.<sup>29</sup>

Unlike the other models outlined above, this permissive philosophy allows for the consideration of the interests of non-shareholder constituencies where they actually conflict with the wealth maximisation objective. It is then a matter for legislative and political process to decide exactly how far the corporation will be responsible for matters beyond the generation of profits for its members.

It also goes some way to answering the question ‘why should the company have regard for the interests of non-shareholder stakeholders and the broader community’.<sup>30</sup> Two factors are important here — first, the power of the corporation, especially large corporations and secondly, the privilege that the ‘veil of incorporation’ brings.

It has been observed that the economic activity of some multinational corporations is larger than the GDP of small countries.<sup>31</sup> There is a perception that this size brings responsibilities, similar to those owed by governments. These companies can have significant impacts on the economy, for example if they move production offshore with resulting job losses, or on the environment. It is arguable that the power of such companies and the vulnerability of the community to their actions gives rise to a sense of duty, akin to a duty of care or a fiduciary duty such as is owed by trustees to beneficiaries or directors to their companies. It can also be maintained that there is an element of market failure here, due to an absence of effective competition, which might justify government intervention. From the perspective of employees, the market failure is largely manifest as inequality of

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<sup>29</sup> David Cohen, ‘Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate rules for Piercing the Veil. Fiduciary Responsibility and Securities Regulation for the Limited Liability Company’ (1998) 51 *Oklahoma Law Review* 427, 444. See also Stephen Bottomley, ‘Taking Corporations Seriously: Some Considerations for Corporate Regulation’ (1990) 19 *Federal Law Review* 203, 206.

<sup>30</sup> This question is paraphrased from the Terms of Reference to the Parliamentary Joint Committee, available at <[http://www.aph.gov.au/Senate/committee/corporations\\_ctte/corporate\\_responsibility/tor.htm](http://www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/tor.htm)> at 13 July 2007.

<sup>31</sup> See for example, Sarah Anderson and John Cavanagh, ‘Corporate Empire’ (1996) 17(12) *Multinational Monitor*, available at <<http://multinationalmonitor.org/hyper/mm1296.08.html>> at 13 July 2007. They report that ‘two hundred giant corporations, most of them larger than many national economies, have sales that exceed a quarter of the world’s economic activity. Philip Morris is larger than New Zealand, and it operates in 170 countries. ... Of the 100 largest economies in the world, 51 are corporations; only 49 are countries. Wal-Mart — the number 12 corporation — is bigger than 161 countries, including Israel, Poland and Greece. Mitsubishi is larger than the fourth most populous nation on earth: Indonesia. General Motors is bigger than Denmark. Ford is bigger than South Africa. Toyota is bigger than Norway.’.

bargaining power, rather than inequality of legal rights. However the market failure affecting the natural environment is far more profound as natural resources have no intrinsic right to be protected or conserved. Throughout history, particularly since the advent of industrialisation, an ever increasing proportion of the natural environment has been alienated from public or communal ownership to private use. Thus the political and legal avenues to protect natural resources for current and future generations have been progressively diminished.

The vulnerability of non-shareholders and the community is compounded by the limited liability of shareholders and the separate legal entity of the company. This produces a ‘veil of incorporation’ which protects the managers and owners of small and large companies alike from the consequences of their actions. This point will be explored further in Part III below, in the discussion of whose responsibility it is to look after non-shareholder constituents.

Therefore, it can be concluded that while recently developed models of the corporation acknowledge the importance of the roles played by non-shareholder constituencies, they do not provide practical advice on how the most vulnerable of those parties will be protected by the law. Theorists argue that transparency and reputational risk will be an adequate incentive to ensure that directors are socially responsible. But this ignores the fact that actions which prejudice outside stakeholders may be to the benefit of shareholders, and that in both small and large companies, therefore, they may be insufficient mechanisms to guarantee that companies and directors take these responsibilities seriously.

### III WHOSE RESPONSIBILITY IS IT TO CONSIDER NON-SHAREHOLDER STAKEHOLDERS?

It should be remembered that ‘keeping the parties happy’, to use team production theory terminology, during the solvency of the company is relatively easy. If the relevant parties are not being treated appropriately, they have means of redress against the solvent company - employees can sue for their entitlements and environmental agencies can, at least to some extent, enforce the law against errant companies and directors.<sup>32</sup> Customers are being looked after because otherwise they may take their business elsewhere. Shareholders consent to the company taking into account the interests of these parties, because the co-operation of the company with external parties has contributed to the prosperity of the company and, therefore, of themselves.

The point here is that in the corporate social responsibility debate, it is important not to overlook the time when a company nears insolvency: just when vulnerable

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<sup>32</sup> Under the *Environment Protection Act 1970* (Vic), s 66B provides that directors and other persons concerned in management shall be personally liable for any offences committed by the corporation, subject to certain statutory defences.

parties such as employees need the company and its directors to take measures to protect them, their interests deviate from those of shareholders. The natural environment can also be at risk at this time as an insolvent enterprise may choose to relax its standards on pollution and waste management. The mining industry provides many instances as mining ventures are often highly speculative as well as being totally destructive to the immediate site. Whilst there are usually statutory requirements for site rehabilitation, and financial assurances, many mining ventures fail leaving inadequate financial resources to rehabilitate the site.<sup>33</sup>

Since the directors' established fiduciary duty is to the company, they may not be permitted, let alone mandated, to consider others' interests at that time. The board of directors, in whom the employees are expected to repose their trust as a mediating hierarchy, is, after all, voted for exclusively by the shareholders and not by other stakeholders in the corporation.

Therefore, in any examination of whether organisational decision makers should have regard to the interests of non-member stakeholders, and be exposed to liability for failure to do so, the time when this ought to take place needs to be considered. Should it be their responsibility only when the company is a going concern, or ought it to continue when the company is in financial distress? The issue is simple — if it is difficult for managers to take into account the concerns of multiple parties when the company is viable and successful, how much harder is it to consider those parties when the company faces insolvency? Yet it is often precisely at this time that non-shareholder interests are most vulnerable to the decisions of the company's board.

Scott commented:

As long as the debtor's business prospects remain good, a strong reputational incentive deters misbehaviour. But once the business environment deteriorates, the [director] is increasingly influenced by a 'high-roller' strategy. The poorer the prospects for a profitable conclusion to the venture,

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<sup>33</sup> A classic example is the Mt Todd venture in the Northern Territory which was described in a submission to the PJC by the Australian Conservation Foundation. In 1994, the US-headquartered company Pegasus Mining opened a gold mine operation at Mt Todd which was abandoned after only a few years leaving on-site nearly 800,000 tonnes of cyanide and other toxic chemicals, and a massive pile of rock waste leaching heavy metals and acidic water. Under NT mining laws, Pegasus had been required to post a remediation bond of only \$900,000, whilst the estimated total remediation costs of the site are at least \$20 million. See pages 6-7 of the submission dated 14 September 2005, at <[http://www.acfonline.org.au/uploads/res\\_CSR.pdf](http://www.acfonline.org.au/uploads/res_CSR.pdf)> at 11 July 2007.

the less the entrepreneur has to risk and the more he stands to gain from imprudent or wrongful conduct.<sup>34</sup>

The problem is particularly acute for directors of small companies, who do not always have reputational incentives. Keay noted that ‘it has become axiomatic that this risk-taking will take place, particularly where the directors are also the owners in the context of closed corporations.’<sup>35</sup> However, he remarked on the importance of wanting ‘to avoid, particularly where there is a conflict of interests between corporate stakeholders, ending up with a vague obligation imposed on directors that has little content and provides insubstantial guidance.’<sup>36</sup> This leads to the issue of whose responsibility it is to consider the interests of non-shareholder constituencies — is it the company’s or its directors’ and managers’?

Clearly it is appropriate that companies, on whom the law imposes duties with respect to employees and the environment, should be liable for breach of those duties. Whether it is appropriate or necessary for additional duties to be imposed on directors, enforceable during the lifetime of the company or upon its insolvency, is the issue that will be considered here.

Imposing liability or punishment on the company alone may be insufficient, especially where an undercapitalised company owned by a sole shareholder will be readily abandoned to liquidation.<sup>37</sup> Finch noted, with reference to ensuring compensation for tort creditors:

Personal liability may leave risk evaluation and spreading to those individuals who are the best acquirers of information concerning corporate risks, levels of capitalisation, internal control systems and insurance. It thus offers firms a flexibility of response that may be preferable to externally-imposed rules on minimum insurance or adequate capitalisation. Making the director liable thus protects against legislative over-or-under provision for tort risks, and it permits managers to select the optimal strategy for covering risk from among insurance, self-insurance or risk-reduction though the control of the firm activities.<sup>38</sup>

Imposing personal responsibility on directors for behaviour that may damage the interests of stakeholders other than shareholders has the potential to deal with the

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<sup>34</sup> Robert Scott, ‘A Relational Theory of Default Rules for Commercial Contracts’ (1990) 19 *Journal of Legal Studies* 597, 624.

<sup>35</sup> Andrew Keay, ‘Directors’ Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors’ (2003) 66 *Modern Law Review* 665, 669 (footnotes omitted).

<sup>36</sup> Ibid 671.

<sup>37</sup> Vanessa Finch, ‘Personal Accountability and Corporate Control: The Role of Directors and Officers’ Liability Insurance’ (1994) 57 *Modern Law Review* 880, 881-2.

<sup>38</sup> Ibid 883 (footnotes omitted).

moral hazard<sup>39</sup> occasioned by the separate legal entity principle. It encourages directors to either obey the law or to protect themselves against liability by some other means. This may include taking more care to maintain adequate capitalisation of the company, so that claimants sue the solvent company rather than the directors themselves. Alternatively, they may seek insurance on behalf of the company or themselves.

However, a number of difficulties arise from the imposition of personal liability on directors. Experienced, well qualified business people may be reluctant to take up directorships, thus depriving companies of a valuable resource.<sup>40</sup> Moreover, imposing liability on non-executive directors may be detrimental to a large company's ability to attract such directors. Finch commented:

The outsider faces severe obstacles in monitoring board activity and the prospect of being held liable for failing in such monitoring functions may prove an excessive deterrent to non-executive direction, notably when the economic benefits of non-executive direction are seen to be dwarfed by potential liabilities for damages.

Alternatively, companies when selecting outside directors may seek to avoid such problems by choosing directors who are either non-risk averse or uncritical of risk taking. An incentive to select on such a basis would run counter to notions of the outside director as a check on corporate folly.<sup>41</sup>

Finch also observed that the imposition of liability may lead to inappropriate delegation to subordinates or outside consultants to avoid directors bearing personal responsibility.<sup>42</sup> Another difficulty is its cost, as the directors may demand compensation for being exposed to actions for breach of duties to stakeholders. Like other employees, directors generally are unable to minimise their risk by diversification. As Easterbrook and Fischel pointed out:

The problem with managerial liability is that risk shifting may not work perfectly ... a legal rule of managerial liability creates risks for a group with a comparative disadvantage in bearing that risk. This inefficiency leads to both an increase in the competitive wage for managers and a shift away from risky

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<sup>39</sup> This is the term used by corporate law scholars such as Halpern, Trebilcock and Turnbull when describing the behaviour of directors of limited liability companies, where there is no liability in their roles as directors except as prescribed by law, and their only liability as shareholders is for the unpaid amounts on their shares. Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 *University of Toronto Law Journal* 117, 148.

<sup>40</sup> Nonetheless the fact is that most directors of closely held companies are also their major shareholders, and thus will remain committed to the survival of the company even if this involves exposure to potential personal liability.

<sup>41</sup> Finch, above n 37, 885.

<sup>42</sup> *Ibid* 884-5.

activities. And there is no guarantee that the social costs of this shift away from risky activities will not exceed the social costs of the excessively risky activities in the absence of managerial liability.<sup>43</sup>

As Easterbrook and Fischel noted here, the fear of liability may make directors overly cautious.<sup>44</sup> This risk averse behaviour<sup>45</sup> on behalf of directors could be detrimental to the achievement of the company's profit and wealth maximization objectives, although Keay reasoned that the additional care taken by directors under conditions of potential liability is in fact beneficial to the shareholders.<sup>46</sup> He contended:

The argument that monitoring activity is costly and reduces efficiency masks the fact that monitoring is a necessary element of responsible corporate governance and a natural part of directors' functions, whether or not a duty to creditors exists ... Rather than inhibiting efficiency, it might well lead to improvements that could be made in the company's procedures and profit-making processes ...<sup>47</sup>

Nonetheless, it is maintained that imposing liability on directors for breaches of any potential corporate social responsibility legislation is the most effective means of ensuring its compliance. Not only does it provide a measure of compensation for aggrieved parties but also plays an important role in deterring improper behaviour. The challenge is to legislate appropriately. Here, the comments of the Cooney Committee are pertinent. It noted that

[t]he more productive the corporate sector, the more secure the economic well-being of Australia. Directors are crucial to its success. To restrict unnecessarily the operation of their skills, their industry, their enterprise, is to threaten unnecessarily a factor vital to economic growth. Any regulation of directors' activities must be warranted and a sensible balance must be found between measures necessary to promote corporate activity in a way which will

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<sup>43</sup> Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (1991) 50, 62.

<sup>44</sup> Coase also argued that it is wrong to simply impose restraints upon director behaviour without weighing up the total cost of that intervention. Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1, 2. See also Jonathan Lipson, 'Directors Duties to Creditors: Power Imbalance and the Financially Distressed Corporation' (2003) 50 *UCLA Law Review* 1189, 1244.

<sup>45</sup> Eugene Fama and Michael Jensen, 'Agency Problems and Residual Claims' (1983) 26 *Journal of Law and Economics* 327, 327.

<sup>46</sup> For example, Modigliani and Miller contended that while the recognition of a duty to creditors causes costs to the company, directors and shareholders, the costs are offset by a correlative reduction in the cost of the credit, so that the position of the parties remains unchanged, in a state of economic equilibrium. Franco Modigliani and Merton Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment' (1958) 48 *American Economic Review* 261, 267-70.

<sup>47</sup> Keay, above n 35, 686.

be of benefit to all, and measures necessary to protect the bona fide shareholder, worker, consumer, financier, and the public at large. Profitability is but one basis for good corporate citizenship.<sup>48</sup>

Accordingly, the recommendations of this paper will be designed to produce better outcomes for stakeholders without unduly increasing the difficulty of the corporate management tasks required of directors.

#### IV EMPLOYEES AND THE ENVIRONMENT

There is a growing acknowledgment — by corporations themselves and the broader community - of the impact of corporate activity on non-shareholder constituencies, such as employees, creditors, victims of their torts, as well as the environment.<sup>49</sup> This is reflected in the increased focus on corporate governance in Australian law in relation to large publicly listed companies, and in the increasing use of the terms ‘corporate social responsibility’ and ‘corporate citizenship’. However, these are poorly defined concepts. They are generally understood to convey a sense that companies are powerful and have the capacity to hurt the interests of these non-shareholder constituencies. It is contended here that this relationship of power on the one hand and vulnerability on the other gives rise to a responsibility to pay special attention to those parties’ interests.

As noted above, the focus of this examination is employees and the environment. They are both examples of ‘external’ stakeholders whose interests may be severely affected by corporate decision making. Other vulnerable external stakeholders include unsecured trade creditors and non-employee tort creditors. These categories are also exposed to the consequences of irresponsible decision making, but differ in the mechanisms by which they can protect themselves, either before the transaction or injury in question or after it.<sup>50</sup> Because of these differences, and because space

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<sup>48</sup> Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors’ Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989) [2.39].

<sup>49</sup> In 2000, a study by the Centre for Corporate Public Affairs and the Business Council of Australia found around half of Australia’s large companies has policies related to community involvement, social responsibility or stakeholder engagement. More than half of these companies had developed policies in the last decade. Centre for Corporate Public Affairs and Business Council of Australia, ‘Corporate Community Involvement: Establishing a Business Case’ (2000) 38–9. In 2001, Cronin and Zappalà concluded from their survey of Australia’s top 100 companies that just over 70 percent of companies surveyed had corporate community involvement policies. Caitlin Cronin and Gianni Zappalà, ‘The Coming of Age of Corporate Community Involvement: An Examination of Trends in Australia’s Top Companies’ (Working Paper No 6, Research and Social Policy Team, The Smith Family, 2002) 6.

<sup>50</sup> Unsecured trade creditors have a limited capacity to protect themselves ex ante from default on payment of their debts. They can build a premium into all of their contracts to compensate for the non-payment of some, and they can diversify their

constraints prevent a thorough examination, they will not be dealt with in this article.

Australia has traditionally adhered very closely to a shareholder-centred model of corporate law.<sup>51</sup> Accordingly, the current legal framework provides companies and those who run them with very limited obligation to have regard for employee, environmental, and other non-shareholder interests, and in several important ways, actually discourages them from doing so. This Part will consider how the traditional shareholder-centred paradigm of Australian corporate law has impacted upon employees and the environment, and examines the adequacy of current regulation and protection in light of the recommendations of CAMAC and the Parliamentary Joint Committee.

### *A Employees*

In recent years, a number of high-profile corporate collapses and restructures have highlighted the vulnerability of employees in Australia's current corporate law framework. In these situations, employees' interests have been overlooked or consciously bypassed. The political reaction to these events led to the passing of Part 5.8A of the *Corporations Act* and the adoption of the General Employee Entitlements and Redundancy Scheme,<sup>52</sup> amongst other measures. However, it is submitted that these do not go far enough. Despite their enormous investment of human capital in the firms for which they work, employees are still largely regarded as 'outsiders' by company law — with none of the information rights and measures

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client base to minimise the risk of loss from defaults on payment. However, these protection devices are not available to employees. Non-employee tort creditors lack the capacity to protect themselves ex ante through contract or through union activism and are forced to rely on common law remedies against the company or the particular tortfeasor. However, unlike employee tort creditors, they are less likely to be the victim of deliberate corporate restructuring and undercapitalisation to avoid the payment of tort claims. See further David Wishart, 'Models and Theories of Directors' Duties to Creditors' (1991) 14 *New Zealand Universities Law Review* 323, 336; Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (1991) 50; Ross Grantham, 'Directors' Duties and Insolvent Companies' (1991) 54 *Modern Law Review* 576, 579. Posner commented that 'the interest rate on a loan is payment not only for renting capital but also for the risk that the borrower will fail to return it': Richard Posner, 'The Rights of Creditors of Affiliated Corporations' (1976) 43 *University of Chicago Law Review* 499, 501; Andrew Keay, 'Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors' (2003) 66 *Modern Law Review* 665, 689.

<sup>51</sup> See, eg, Jennifer Hill, 'Public Beginnings, Private Ends — Should Corporate Law Privilege the Interests of Shareholders?' (1998) 9 *Australian Journal of Corporate Law* 21.

<sup>52</sup> Discussed further below.



to protect their interests enjoyed by ‘insiders’, such as shareholders and secured creditors.<sup>53</sup>

Employees suing as tort creditors are particularly susceptible to the absence of any legal obligations of corporate social responsibility, because they lack the ability to self-protect *ex ante*, or any rights of recovery *ex post*, under the *Corporations Act*.<sup>54</sup> This is a particular problem when a holding company has deliberately incorporated an undercapitalised subsidiary to minimise the loss of shareholder funds. As the James Hardie case illustrated,<sup>55</sup> the ‘separate legal entity’ principle stands in the way of tort victims seeking to recover compensation within corporate groups, in that case necessitated by the underfunding of the Medical Research and Compensation Fund that had been established for this purpose. The Report of the Special Commission of Inquiry into James Hardie identified ‘significant deficiencies in Australian corporate law’, and raised ‘the question of whether existing laws concerning the operation of limited liability or the “corporate veil” within corporate groups adequately reflect contemporary public expectations and standards.’<sup>56</sup>

Employees are vulnerable to the decisions of the boards of companies, both during the life of the company as well as when it is at or near its demise. A viable company may restructure its operations for legitimate business reasons, or deliberately to reduce its potential liabilities to employees if the company later becomes insolvent. This discussion will look at the exposure of employees in both situations, focusing primarily on the more common insolvency situation, as a basis for the argument that companies should have a social responsibility, enforceable by law, to protect the interests of employees.

The basic legal position in respect of corporate obligations to employees is quite straightforward. The duty of directors to act in good faith and in the best interests of the company, at common law and under s 181 of the *Corporations Act*, requires directors to treat the company’s interests as paramount. Heydon commented:

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<sup>53</sup> The ‘insider/outsider’ terminology is borrowed from Brian Bercusson, ‘Workers, Corporate Enterprise and the Law’ in Ray Lewis (ed), *Labour Law in Britain* (1986) 139.

<sup>54</sup> Injury compensation enjoys a degree of priority for payment in a liquidation under s 556(1)(f) of the *Corporations Act* but it ranks behind the wages and superannuation entitlements of employees. Since these and other higher ranking categories of priority must be paid in full before lower categories are considered, there is a significant risk that injury compensation claimants will not be fully compensated as a result of this priority.

<sup>55</sup> David Jackson, *The Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004), <<http://www.lawlink.nsw.gov.au/mrcf>> at 13 July 2007.

<sup>56</sup> *Ibid.*

Directors owe duties to the company, even though in fulfilling them it may be proper to take into account the interests of shareholders, beneficiaries in trusts of shares, employees and persons who have contracted or may contract with the company.<sup>57</sup>

... 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.<sup>58</sup>

He pointed out that the interests of the company are often indistinct from those of its owners, the shareholders.<sup>59</sup> The interests of employees or other stakeholders, on the other hand, *can* be considered in performing these duties, but only where this would also be in the company's and the shareholders' interests. Employee concerns cannot be placed ahead of those of shareholders. For example, a company could not make redundancy payments to employees in the context of a business closure, where this would reduce the funds available for distribution to shareholders.<sup>60</sup>

Frequently, employees are the last to find out about business restructures that adversely affect their interests. Business restructuring has become an increasingly prominent feature of the Australian economic landscape over the last twenty years or so,<sup>61</sup> leading to the retrenchment of several million workers.<sup>62</sup> Recent examples have included relocations, closures and large-scale job cuts at major companies like Arnott's, South Pacific Tyres, Coles Myer, Optus, Vodafone, AMP, Telstra, Commonwealth Bank, Mitsubishi and Holden.<sup>63</sup> These examples have highlighted an important deficiency in Australian law — the fact that, although their interests are directly and vitally affected when companies restructure, employees have few rights to information or any opportunity for input into decision making in these situations.<sup>64</sup> Labour law provides unions with minimal rights to seek orders compelling employers to consult over large-scale redundancies, although the

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<sup>57</sup> John Dyson Heydon, 'Directors' Duties and the Company's Interests' in P D Finn (ed), *Equity and Commercial Relationships* (1987) 120, 134.

<sup>58</sup> Ibid 135.

<sup>59</sup> Ibid 125. See also Francis Dawson, 'Acting in the Best Interests of the Company — For Whom are Directors "Trustees"?' (1984) 11 *New Zealand Universities Law Review* 68, 77.

<sup>60</sup> *Parke v Daily News Ltd* [1962] Ch 927; see also *Hutton v West Cork Railway Company* (1883) 23 Ch D 654.

<sup>61</sup> See eg Peter Dawkins, Craig Littler, Maria Rebecca Valenzuela and Ben Jensen, *The Contours of Restructuring and Downsizing in Australia* (1999).

<sup>62</sup> Australian Bureau of Statistics (ABS), *Retrenchment and Redundancy, Australia* (Catalogue No 6266.0) (September 1998 and August 2002).

<sup>63</sup> See Anthony Forsyth, 'The "Transplantability" Debate Revisited: Can European Social Partnerships Be Exported to Australia?' (2006) 27 *Comparative Labour Law and Policy Journal* 305, 313-14.

<sup>64</sup> Ibid 306-15.

effectiveness of even these provisions has been questioned.<sup>65</sup> This leaves employees poorly positioned to deal with the implications of events that have such serious consequences for them and their families.

The situation facing employees in times of corporate insolvency is similarly inadequate. A fiduciary duty requires directors to take into account creditors' interests when a company is insolvent or facing insolvency.<sup>66</sup> However, the cases stop short of establishing a fiduciary duty that is enforceable at the instance of creditors,<sup>67</sup> and even the duty that is enforceable by the company is ill-defined.

The 'uncommercial transactions' provisions of the *Corporations Act*,<sup>68</sup> which operate as a form of statutory duty to protect creditors' interests, are only enforceable by the company's liquidator or the Australian Securities and Investments Commission (ASIC). ASIC can bring an action for compensation or the recovery of company funds to return to creditors. As Symes has indicated, these developments do not provide much comfort to employees in insolvency situations. He noted that '[f]rom these cases, it is not possible to state that a duty to creditors upon insolvency means that they should take "care" of employees ...' albeit that employees 'are creditors (statutory priority creditors, in fact) for their unpaid salary and other entitlements.'<sup>69</sup>

When companies become insolvent, employees not only lose their jobs. They also have to compete with other creditors for recovery of their unpaid wages and other employment entitlements. Workers take their place behind secured creditors, such as financiers, although they have the right to priority treatment over other unsecured creditors.<sup>70</sup> Frequently, however, there are no assets remaining to meet employee claims once the debts of secured creditors have been fully or partly satisfied.<sup>71</sup> The particular vulnerability of employees, who lose both their means of support in the future as well as their past entitlements, suggests that employees should be treated as more than mere creditors, and that regulation should be put into place that

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<sup>65</sup> *Workplace Relations Act 1996* (Cth) ss 668-671; see Anthony Forsyth, 'Giving Teeth to the Statutory Obligation to Consult over Redundancies' (2002) 15 *Australian Journal of Labour Law* 177.

<sup>66</sup> *Walker v Wimborne* (1976) 137 CLR 1; *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722.

<sup>67</sup> *Spies v R* (2000) 18 ACLC 727.

<sup>68</sup> *Corporations Act 2001* (Cth) ss 588FB, 588FC.

<sup>69</sup> Christopher Symes, 'A New Statutory Directors' Duty for Australia — A "Duty" to be Concerned about Employee Entitlements in the Insolvent Corporation' (2003) 12 *International Insolvency Review* 133, 137.

<sup>70</sup> *Corporations Act* s 556(1)(e).

<sup>71</sup> See, eg, Robbie Campo, 'The Protection of Employee Entitlements in the Event of Employer Insolvency: Australian Initiatives in the Light of International Models' (2000) 13 *Australian Journal of Labour Law* 236.

reduces the ‘increased opportunities for business strategies that shift risk and insecurity onto workers’.<sup>72</sup>

Employees are also comparatively disadvantaged in their capacity to avoid the adverse consequences of insolvency. Directors, shareholders, banks and other secured creditors are all privy, to varying degrees, to information that enables them to see the warning signs of corporate failure and act to protect their interests.<sup>73</sup> For example, corporate financiers have a range of devices at their disposal to secure their debts, such as mortgages, fixed and floating charges, pledges and liens.<sup>74</sup> Usually, these legal instruments also provide secured lenders with a vital source of information about the company’s financial performance, through contractual provisions imposing reporting obligations on the borrower and allowing the lender to appoint accountants to look into the company’s affairs when concerns arise.<sup>75</sup> The use of ‘quasi-securities’ of this nature not only bolsters the information rights of secured lenders, it can also obscure the company’s true position for other creditors, including employees, by creating an ‘illusion of financial prosperity’.<sup>76</sup>

In some of the corporate collapses — primarily National Textiles in early 2000 and One.Tel and Ansett in 2001 — large numbers of employees lost unpaid entitlements to annual leave and long service leave, and missed out on redundancy payments prescribed in industrial awards and agreements. The waterfront dispute of 1998 saw a corporate restructure to facilitate the sacking of waterside workers and their replacement with non-union employees.<sup>77</sup> These led to the federal government implementing a range of legislative and policy initiatives in recent years to improve the legal protection offered to employees in the event of corporate failures.

The first is the *Corporations Law Amendment (Employee Entitlements) Act* (2000) (Cth), which introduced Part 5.8A into the *Corporations Act*. It builds on the existing duty of directors to prevent companies from trading whilst insolvent,<sup>78</sup> by

<sup>72</sup> Richard Mitchell, Anthony O’Donnell and Ian Ramsay, *Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labour Law* (2005) Centre for Corporate Law and Securities Regulation/ Centre for Employment Labour Relations Law Research Report University of Melbourne, 25; Paula Darvas, ‘Employee’s Rights and Entitlements and Insolvency: Regulatory Rationale, Legal Issues and Proposed Solutions’ (1999) 17 *Company and Securities Law Journal* 106, 108.

<sup>73</sup> See John Adams and Norman Jones, ‘Distressed businesses — preventing failure’ in CCH Australia Ltd, *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (2001) 185.

<sup>74</sup> Ibid 189; see also Joellen Riley, ‘Locating Labour’s Voice in Corporate Enterprise: Lessons from Ansett’ (Paper to the Corporate Law Teachers’ Association Conference, Melbourne, February 2002) 4.

<sup>75</sup> Adams and Jones, above n 73, 189-190.

<sup>76</sup> CCH, *Australian Labour Law Reporter* [1-515].

<sup>77</sup> *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 27 ACSR 497.

<sup>78</sup> *Corporations Act* pt 5.7B and in particular ss 588G and following.

imposing personal liability on directors where they enter into ‘uncommercial transactions’ — that is agreements, transactions, or corporate restructures which are *intended* to prevent workers from accessing their accrued employment entitlements. Heavy penalties, including fines and imprisonment, are available to deal with breaches of these provisions, and employee creditors can themselves initiate legal proceedings with the liquidator’s permission. However, the significant problems for employees in proving that directors are acting with the requisite intention under these provisions ‘inevitably limit [their] scope and effectiveness as a protective mechanism for employees’.<sup>79</sup> There have been no reported cases to date involving a successful action by employees, or by liquidators on their behalf, under these provisions.

The second is the *Corporations Amendment (Repayment of Directors’ Bonuses) Act* (2003). Prompted mainly by the One.Tel collapse in 2001, the legislation inserted s 588FDA into the *Corporations Act* to enable the recovery by a liquidator of excessive bonuses that have been paid to directors in circumstances where a company is in no financial position to make such payments.

The third is the General Employee Entitlements and Redundancy Scheme (‘GEERS’) which replaces the former Employee Entitlements and Support Scheme.<sup>80</sup> GEERS enables employees of insolvent companies to claim recovery of their unpaid entitlements from a government fund. The establishment of such a ‘safety net’ mechanism represents a significant improvement in the level of protection offered to employees.

However, it operates subject to a number of important limitations, including an overall ‘cap’ of \$98,200 on the level at which entitlements paid out under the scheme are to be calculated.<sup>81</sup> It should also be noted that the existence of a

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<sup>79</sup> Jennifer Hill, ‘Corporate Governance and the Role of the Employee’ in Paul Gollan and Glenn Patmore (eds), *Partnership at Work*, 110, 119; see further Symes, above n 69, 144-5.

<sup>80</sup> The Employee Entitlements Support Scheme (EESS) was introduced by the Federal Government on 8 February, 2000. It adopted the recommendations of the Commonwealth of Australia Ministerial Discussion Paper, ‘The Protection of Employee Entitlements in the Event of Employer Insolvency’ (1999). Its purpose was to provide a safety net for employees who lose their jobs due to the insolvency of their employers. The EESS scheme involved a 50% contribution from the states collectively, but support from the states was not forthcoming. The alternative proposal for an insurance scheme for the recovery of employee entitlements contained in that Discussion Paper was rejected. A special scheme to pay the employment entitlements for former Ansett employees was also introduced, funded by a levy on airline tickets: *Air Passenger Ticket Levy (Collection) Act 2001* (Cth) and the *Air Passenger Ticket Levy (Imposition) Act 2001* (Cth).

<sup>81</sup> For further details, see the current version of the GEERS Operational Arrangements <[http://www.workplace.gov.au/workplace/Programmes/EmployeeEntitlements/GEE\\_RSV2/](http://www.workplace.gov.au/workplace/Programmes/EmployeeEntitlements/GEE_RSV2/)> at 13 July 2007.

government-funded scheme arguably discourages directors from taking greater responsibility for ensuring that companies have sufficient assets to meet their employees' entitlements. While the outcome of GEERS in terms of employee protection is commendable, the public policy benefit of effectively transferring directors' potential liability to taxpayers is questionable.

Fourthly, the Federal Government promised to place employees ahead of secured creditors in the statutory priority list for distribution of company assets upon insolvency. In 2001, the Federal Government proposed that employee entitlements have 'maximum priority' status and that they rank ahead of secured creditors.<sup>82</sup> The fact that this proposal was made appears to provide evidence that employee entitlements are not fully paid out under the current level of winding up priority, and that the GEERS scheme is not sufficient. Despite strong support from the trade union movement and others,<sup>83</sup> criticisms of the proposal were expressed to the Parliamentary Joint Committee.<sup>84</sup> Reasons for opposition to the proposal put forward by business interests included the uncertainty the proposal would have on the cost and administration of secured lending, the complexity it would cause during administrations and the incentives for avoidance by secured creditors.

Ultimately, the Parliamentary Joint Committee on Corporations and Financial Services report entitled *Corporate Insolvency Laws: A Stocktake 2004* concluded that the maximum priority proposal not be adopted.<sup>85</sup> The federal government indicated, in late 2005, that it would accept this recommendation. Therefore, the maximum priority proposal is off the corporate law reform agenda for the foreseeable future.<sup>86</sup>

In November 2006, the Hon Chris Pearce, Parliamentary Secretary to the Treasurer, announced a package of insolvency reforms flowing on from the Stocktake report.<sup>87</sup> In relation to the protection of employee entitlements, a number of relatively minor changes were recommended. These include mandating the priority debt ranking of employee entitlements in deeds of company arrangement, changes relating to the

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<sup>82</sup> It was announced by the Prime Minister at a press conference on 14 September, 2001, and reiterated in the Government's November 2001 election policy statement entitled 'Choice and Reward in a Changing Workplace': Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake 2004* (Stocktake Report), above n 5 [10.29].

<sup>83</sup> As at March 2004, the federal Treasury Department was reportedly still consulting on these proposals: M Priest, 'States want "workers first" legislation', *Australian Financial Review*, 19 March 2004.

<sup>84</sup> Stocktake Report, above n 5, [10.33] — [10.51].

<sup>85</sup> Ibid [10.55].

<sup>86</sup> Australian Government, The Treasury, 'Corporate Insolvency Reform' 12 October, 2005, 5-6, available at <[http://www.treasury.gov.au/documents/1022/PDF/Corporate\\_Insolvency\\_Reform\\_attachment.pdf](http://www.treasury.gov.au/documents/1022/PDF/Corporate_Insolvency_Reform_attachment.pdf)> at 13 July 2007.

<sup>87</sup> <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1186>> at 13 July 2007.

superannuation guarantee charge and clarification of the rights of subrogated creditors.

It is significant to note that employees have received very little attention in the extensive debate over corporate governance reform in Australia. Rather, the debate has been overwhelmingly shareholder-centred, with legislative responses aimed at improving board relationships with shareholders, and auditor independence.<sup>88</sup> These reform measures make little or no mention of employees, partly because political actors representing workers' interests, such as the Australian Council of Trade Unions ('ACTU') and the federal Labor opposition, have not sought to take the corporate governance debate in this direction. Rather, they have supported moves to strengthen the requirements for independent company auditors, and increased shareholder scrutiny of executive remuneration.<sup>89</sup>

Several academics have lamented the narrow focus of the corporate governance debate in Australia, arguing that it should be broadened to consider options such as employee representation on company boards.<sup>90</sup> The ACTU has now embarked on a strategy of 'shareholder activism', seeking to utilise the combined voting power of employee and superannuation fund shareholdings to influence decision-making and question management about retrenchments, wage disparities and other issues at company annual general meetings.<sup>91</sup> Similarly, it has endorsed the idea of 'boardroom activism', encouraging union representatives on superannuation fund boards to use their positions to ensure 'socially responsible' investment decisions.<sup>92</sup> Several unions have also tried (unsuccessfully) to obtain seats on the boards of major companies. At this stage, the ACTU has not embraced the idea of legally-mandated employee representation at board level.

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<sup>88</sup> Andrew Clarke, 'The Relative Position of Employees in the Corporate Governance Context: An International Comparison' (2004) 32 *Australian Business Law Review* 111; Paul von Nessen, 'Corporate Governance in Australia: Converging with International Developments' (2003) 15 *Australian Journal of Corporate Law* 1.

<sup>89</sup> See eg Senator Stephen Conroy, *Directions Statement: Improving Corporate Governance* (2002); ACTU, *Corporate Governance Policy* (ACTU Congress 2003).

<sup>90</sup> See, eg, Ray Markey, 'A Stakeholder Approach to Corporate Governance: Employee Representatives on Boards of Management' in Paul Gollan and Glenn Patmore (eds), *Partnership at Work* 122, 132-3; Clarke, above n 88, 114, 119, 130-1.

<sup>91</sup> See eg ACTU, *Corporate Governance Background Paper* (ACTU Congress 2003); Greg Combet, *Superannuation, Unions and Good Labour Relations* (Speech delivered at the Conference of Major Superannuation Funds, Ashmore, 14 March 2002).

<sup>92</sup> See Sharan Burrow, 'Whispers Outside the Boardroom Door: Making Working Australia's Money Talk' (Speech delivered at the Sydney Institute, Sydney, 29 August 2000); Greg Combet, *Untitled* (Speech delivered at the Australian Council of Superannuation Investors Corporate Governance Conference, 9 July 2005).

In contrast, employees have figured far more prominently in the debate over corporate governance reform in the UK. This has included consideration of a ‘major redesign of [company] decision-making structures to permit participation by the relevant stakeholder groups’, such as employees.<sup>93</sup> Ways in which Australian corporations law<sup>94</sup> may be re-shaped to enhance the ability of employees to safeguard their entitlements will be discussed further below in Part V.

### B *The Environment*

The natural environment is not strictly a ‘stakeholder’ but rather a set of essential ecological services that are preconditions for a healthy society and the continued success of our economic activities. Thus the real stakeholder is the community, which depends upon the natural environment to supply essential ecological services which sustain its economic and social activities, as well as a multitude of unique aesthetic and recreational opportunities which add to our quality of life. Both the Parliamentary Joint Committee and CAMAC clearly accepted the view that environmental problems were already well regulated, and in any event, if environmental problems required better regulation, this was not the role of corporations law. This was well illustrated by the following comments made by the PJC Chairman during the course of hearings at Melbourne, in response to oral submissions by the authors:

... the broad assumptions that underlie the evidence you gave in your introduction, that we are heading towards economic disaster and running out of resources in general terms, and the more specific examples you gave of forestry and biodiversity and water resources seem to me to be highly contestable in themselves, before we get to the more specific issues of corporate responsibility. In terms of biodiversity, this country has more national parks declared and established now than ever before. In terms of water resources, the controls on water use are more stringent than they have ever been. Controls on forestry are probably more stringent than they have

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<sup>93</sup> John Parkinson, ‘Models of the Company and the Employment Relationship’ (2003) 41 *British Journal of Industrial Relations* 481, 499-504; see also Paul Davies, ‘Employee Representation and Corporate Law Reform: A Comment from the United Kingdom’ (2000) 22 *Comparative Labor Law and Policy Journal* 135; Janet Williamson, ‘A Trade Union Congress Perspective on The Company Law Review and Corporate Governance Reform since 1997’ (2003) 41 *British Journal of Industrial Relations* 511.

<sup>94</sup> Other options traditionally falling more within the realm of labour law than corporate law, including ‘partnership’ strategies and information and consultation rights modelled on European Union directives, should also be explored; for detailed discussion, see Anthony Forsyth, ‘Corporate Collapses and Employees’ Right to Know: An Issue for Corporate Law or Labour Law?’ (2003) 31 *Australian Business Law Review* 81.



ever been. I just question your underlying assumptions. ... Surely these are broad policy issues, not issues within the aegis of the Corporations Law.<sup>95</sup>

Both inquiries concluded that the environmental and social impacts of corporations should be regulated 'through legislation targeted at the mischief in question', in support of their recommendations that there was no need for any amendment to the *Corporations Act*.<sup>96</sup> The following discussion will challenge these conclusions.

### 1 *The assumption that existing environmental regulation is effective.*

Whilst it may be true that Australia has 'more national parks' and 'more stringent' controls on water use and forestry than ever before, merely pointing to an increase in the number of parks and new regulations does not guarantee that a satisfactory level of environmental protection has been achieved. The reality is that specific legislative approaches are failing. Space constraints prevent the reasons for the failure of specific environmental laws being fully expounded here, but they include a lack of co-ordination between the States and the Federal government, under-resourcing of environment protection agencies and the enormous political influence wielded by industry lobby groups.

For instance, there is no doubt that both urban and rural water supplies for human consumption in Australia are in crisis. A recent discussion paper has noted that all capital cities with the exception of Darwin and Hobart now have inadequate water supplies and most are relying on increasingly severe restrictions to balance demand and available supply, whilst some regional cities are facing sharply diminished supply and extreme restrictions.<sup>97</sup> Closer analysis of recent proposals like the Living Murray initiative reveal that plans to provide environmental river flows to save endangered ecosystems are inadequate and largely unimplemented, with industry needs taking precedence over the environment.<sup>98</sup> The Victorian National Parks Association reports that a high percentage of Victoria's 1.1 million hectares of native vegetation is in decline because of habitat fragmentation, changed fire regimes, uncontrolled weed invasion and other processes. On private land at least

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<sup>95</sup> See Senator Chapman, in Commonwealth of Australia, *Official Committee Hansard*, Joint Committee on Corporations and Financial Services, Reference: Corporate Responsibility, Transcript of hearings at Melbourne, Friday, 24 February 2006 at p 62.

<sup>96</sup> See Parliamentary Joint Committee, above n 1, at paras [4.60]-[4.62] and CAMAC, above n 2, para 3.12 (at p 113).

<sup>97</sup> Marsden Jacob Associates 'Securing Australia's Urban Water Supplies: Opportunities and Impediments' A discussion paper prepared for the Department of the Prime Minister and Cabinet (November 2006) available at <[http://www.pmc.gov.au/water\\_reform/index.cfm](http://www.pmc.gov.au/water_reform/index.cfm)> at 19 July 2007.

<sup>98</sup> Rebecca Keating (2006) 'Living Murray plan drains faith in governments' ABC Water 22 February 2006 available at <<http://www.abc.net.au/water/stories/s1576062.htm>> at 11 July 2007.

92% of habitat and wildlife has been lost, whilst 44% of our native plants and 30% of Victoria's native animals are now threatened or extinct.<sup>99</sup>

On a global level, the latest Living Planet Report by the World Wildlife Fund indicates that humanity's 'ecological footprint' (which estimates the area of biologically productive land and water needed to maintain our current lifestyle) is 25% greater than the Earth's available productive areas ('bio-capacity').<sup>100</sup> The latest report of the Intergovernmental Panel on Climate Change provides increasing scientific certainty on the likelihood of irreversible climate change with catastrophic outcomes.<sup>101</sup>

The main Federal government statute dealing with environmental protection is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The current deputy director of the Australia Institute, Andrew Macintosh, has concluded that the EPBC Act is not meeting its environmental protection objectives due to a combination of structural flaws and administrative failings. The structural flaws include the absence of measures to deal with existing broad acre activities such as agriculture and forestry, as well as critical national problems such as water scarcity, land degradation and climate change.<sup>102</sup> The adverse impact of the forestry exclusion was recently highlighted in the case of *Brown v Forestry Tasmania*, where the Federal Court ruled that forestry operations carried out under the terms of the Tasmanian Regional Forestry Agreement, were not compatible with Australia's international commitments under the 1992 Convention on Biological Diversity.<sup>103</sup>

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<sup>99</sup> Victorian National Parks Association (2006) 'The State We're In' (ParkWatch Sept 2006) <<http://www.vnpa.org.au/admin/pdf-pages/>> at 11 July 2007.

<sup>100</sup> See World Wildlife Fund, *Living Planet Report 2006*. (WWF–World Wide Fund For Nature (formerly World Wildlife Fund), Gland, Switzerland, <[http://assets.panda.org/downloads/living\\_planet\\_report.pdf](http://assets.panda.org/downloads/living_planet_report.pdf)> at 11 July 2007.) See also Peter M Vitousek, Harold A Mooney, Jane Lubchenco and Jerry M Melillo, 'Human Domination of Earth's Ecosystems' (1997) *Science* 494. Vitousek et al note that estimates of the fraction of land transformed or degraded by humanity fall in the range of 39-50%. The rates of species extinction are now of the order of 100 to 1000 times those before humanity's dominance of the Earth, eg one quarter of the Earth's bird species have been driven to extinction in the last two millennia.

<sup>101</sup> IPCC, 2007: Summary for Policymakers. In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M.Tignor and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA <[http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1\\_Pub\\_SPM-v2.pdf](http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Pub_SPM-v2.pdf)> at 11 July 2007.

<sup>102</sup> Andrew Macintosh, 'Why the EPBC Act's Referral Assessment and Approval Process is Failing to Achieve its Environmental Objectives' (2004) 21 *Environmental and Planning Law Journal* 288.

<sup>103</sup> *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729 (19 December 2006).

There are also serious shortcomings in the wide range of specific State and Territory laws covering industrial pollution.<sup>104</sup> These laws establish licensing systems for discharge of pollutants, which are generally enforced by a range of criminal offences and administrative measures.<sup>105</sup> These pollution offences are typically 'strict liability' or 'absolute liability' offences, which do not require proof of intention. Monetary penalties for basic pollution offences range up to \$250,000. In the case of intentional or 'aggravated' pollution the penalty may include imprisonment for up to 7 years, whilst for corporations, a higher penalty of up to \$1 million may apply.<sup>106</sup> These State pollution schemes also impose personal liability upon corporation officers. For example, under the Victorian legislation, if a corporation commits an offence, any director or other person concerned in the management of the corporation is also deemed to have committed the same offence.<sup>107</sup> However a statutory defence is available if the officer was not in a position to influence the conduct of the corporation, or had used all 'due diligence' to prevent the offence.<sup>108</sup> Other states and territories have provisions which also impose personal liability on directors, subject to similar defences.<sup>109</sup>

Whilst these substantial penalties should provide an effective deterrent against pollution offences by corporations, these regulatory schemes seem to be failing in many instances due to a lack of administrative resources and the difficulties of dealing with a series of minor breaches. This is exemplified by cases like the Shell Oil Refinery at Corio Bay near Geelong in Victoria, which has breached its pollution licence several hundred times in recent years.<sup>110</sup> State governments can be reluctant to take strong punitive against large industrial facilities which provide regional employment and substantial taxation revenue. On the other hand it is economically rational for a foreign-owned corporation like Shell to pay a series of modest fines rather than make the capital investment needed to prevent these

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<sup>104</sup> In Victoria, see the *Environment Protection Act 1970* (Vic) s 20.

<sup>105</sup> Relevant pollution offences are established by s 39 (water), s 41 (air) and s 45 (land). The EPA can also order abatement and clean up of pollution under ss 31A and 62A. *Ibid.*

<sup>106</sup> *Environment Protection Act 1970* (Vic) s 59E.

<sup>107</sup> *Environment Protection Act 1970* (Vic) s 66B(1).

<sup>108</sup> *Environment Protection Act 1970* (Vic) s 66B(1A).

<sup>109</sup> See *Protection of the Environment Operations Act 1997* (NSW) s 169; *Environmental Protection Act 1994* (Qld) s 493; *Environment Protection Act 1993* (SA) s 129; *Environmental Protection Act 1986* (WA) s 118 *Pollution Control Act 1994* (Tas) s 60; *Environment Protection Act 1997* (ACT) s 147(1); *Waste Management and Pollution Control Act 1998* (NT) s 91(1).

<sup>110</sup> An investigation in 2003 revealed Shell had committed more than 300 environmental breaches in the prior two years, including 145 between June and September 2003. It had been fined just 31 times for those breaches. See 'The Shell refinery: an issue on the nose' *The Age*, 11 November 2003, 12. For a more recent incident, see Ewin Hannan 'Shell under fire over secrecy on discharges', *The Age*, Melbourne, 18 August 2005, 1.

environmental impacts. Peter Christoff has recently evaluated the role of State environmental protection authorities as follows:

Australian EPAs lack the capacity — and often the will — to fulfil their mandate ... Yet it is also obvious that there are fundamental limits to what such localised agencies can achieve. The widely held expectation that EPAs can, given their present resources and regulatory scope and culture, guide complex economies towards ecological sustainability is manifestly unrealistic.<sup>111</sup>

A key issue identified by Christoff is that the current State and territory based regulatory schemes were designed to deal with a far simpler set of environmental problems which arose in the manufacturing based economy of the 1950s and 1960s. This ‘old’ economy created localised toxic chemical and pollution problems which have been quite successfully contained by specific legislative schemes. However the rapid and continuing transition to a ‘new’ globalised information and service based economy has radically changed both the sources and nature of environmental problems. With a diminished manufacturing base and far greater international dimensions, the new Australian economy is now dominated by retailing and services with unprecedented resource consumption, which has produced far more diffuse and intractable environmental problems such as waste management, resource scarcity, biodiversity loss and climate change. Australian companies increasingly source their raw materials overseas and sell their goods in foreign markets, and hence transport and packaging have gained in importance. Many Australian companies also have an increasing proportion of offshore operations, and an increasing proportion of foreign ownership. The traditional State based legislative schemes have both jurisdictional limitations and outdated statutory mechanisms for dealing with the powerful multi-national players in such a global economy. The two inquiries gave little or no consideration to these matters.

One positive development is that some progressive State agencies are recognising these fundamental changes and responding with innovative strategies which focus upon corporate responsibility.<sup>112</sup> These new strategies provide useful guidance for appropriate reforms to corporations law which will be considered later, in Part V of this article.

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<sup>111</sup> Peter Christoff, ‘EPAs -the Orphan Agencies of Environmental Protection’ in Steve Dovers & Su Wild River, *Managing Australia’s Environment* (2003) 316.

<sup>112</sup> For example the Victorian EPA has used its statutory licensing function to encourage the adoption of environmental audits, environmental management systems and stakeholder engagement processes. It has also used this approach to encourage the take up of cost-effective opportunities for greenhouse gas mitigation; see EPA ‘Protocol for Environmental Management Greenhouse Gas, Emissions and Energy Efficiency in Industry’ (2002) Publication 824.

## 2 *The Role of Corporations Law*

Given the weaknesses in specific environmental legislation described above, the view that corporations law is not an appropriate mechanism for environmental regulation is difficult to maintain. Both inquiries were largely preoccupied with the question of whether directors' duties could or should include consideration of the interests of environmental stakeholders. Whilst it can be conceded that this kind of reform to directors duties would create practical difficulties, that does not exclude the use of other aspects of corporations law to achieve environmental objectives. Indeed, there have been several recent reforms to corporations law which have specifically brought environmental and social considerations within the ambit of the *Corporations Act*, which will be detailed below. It is also plain that many other Federal legislative schemes quite commonly pursue broad social objectives where Parliament considers this to be appropriate,<sup>113</sup> and there is no constitutional barrier to using the corporations power for such a purpose.<sup>114</sup> The ultimate question is what legislative measures will be *most effective* to address the acute environmental problems at hand. In considering this question, it is important to recognise that the recommendations of the Parliamentary Joint Committee and CAMAC cannot be treated as definitive, as they were both constrained by quite narrow terms of reference. It is not surprising that parliamentary inquiries of this type produce a conservative response in favour of the status quo, despite the overwhelming evidence that the status quo is patently unsustainable. More balanced guidance on appropriate responses to the current range of environmental problems can be found in a multitude of reports and declarations from international agencies like the United Nations Environment Program. A well known starting point is the Rio Declaration on Environment and Development which states quite emphatically at Principle 4:

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.<sup>115</sup>

This point is elaborated by Agenda 21, which is charter for action formulated by the parties to the Rio Earth Summit.<sup>116</sup> One of its key recommendations for the business sector was:

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<sup>113</sup> For example, under the *Income Tax Assessment Act* 1936 and 1997 (Cth) and related legislation, there are tax concessions to encourage saving for retirement, venture capital raising, plantation forestry and many more ulterior purposes (beyond raising revenue).

<sup>114</sup> See *Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dams Case).

<sup>115</sup> United Nations (1992) *Rio Declaration on Environment and Development*; United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

The overall objective is to improve or restructure the decision-making process so that consideration of socio-economic and environmental issues is fully integrated and a broader range of public participation assured.<sup>117</sup>

The Millennium Assessment concluded that:

Natural assets will receive far better protection if their importance is recognized in the central decision making of governments and businesses, rather than relatively weak environment departments.<sup>118</sup>

The Stern Review primarily advocated strong market based approaches (‘sticks and carrots’) to address the prospect of severe climate change.<sup>119</sup> However it also cautioned against a single minded approach:

Refusing to move the argument beyond carrots and sticks would lose much that is important to policy formation on climate change. Alongside the influence of preferences in the community, leadership by governments, businesses and individuals is important in demonstrating how change is possible.<sup>120</sup>

Stern was indicating that change was urgently required to address climate change and business, along with government and individuals, had an important role to play. The common thread amongst these highly reputable statements is that reform to decision-making processes of governments and businesses is the most appropriate strategy to deal with modern environmental problems. The Australian Federal government itself has clearly accepted this point in its own environmental policy statements.<sup>121</sup> The Parliamentary Joint Committee and CAMAC reports themselves strongly advocate ‘enlightened self interest’, improvements to sustainability reporting and stakeholder engagement which are highly consistent with this theme.

To emphasise the importance of this approach, it is appropriate to mention one further recent shift in the dynamics of environmental management which we believe strongly supports reforms to corporations law. The natural environment has increasingly been appropriated for private use throughout Australia’s history, particularly for mining, agriculture and forestry. This process has been extended over the last decade by the widespread adoption of competition policy in

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<sup>116</sup> United Nations (1992) *Agenda 21*; United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992. Available at <<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>> at 11 July 2007.

<sup>117</sup> Ibid, at Chapter 8, Objectives, at paragraph 8.3.

<sup>118</sup> Millennium Ecosystem Assessment, above n 7, Statement from the Board, 18-19.

<sup>119</sup> Above n 8.

<sup>120</sup> Ibid [17.7].

<sup>121</sup> Above n 9.

Australia,<sup>122</sup> during which over \$100 billion of public infrastructure assets have been sold to the private sector, most notably in ecologically problematic sectors like transport, water and electricity generation.<sup>123</sup> This fundamental change in ownership and control of public infrastructure and natural resources contributed to a new environmental management paradigm where it is corporate, rather than governmental decision making that is more often the critical determinant of environmental outcomes. In this way corporations have increasingly been placed in the role of de facto guardians of the natural environment.

A good example is the privatisation of the electricity generation industry. Before privatisation, the State governments had almost absolute control over greenhouse management in that industry. After privatisation the greenhouse responses of both Federal and State governments are now restricted by long term licences granted to a small group of Australian and international corporations. The rights of community stakeholders are greatly diminished by this process. Whilst infrastructure assets like power stations were in government hands, local community could exert influence through the ballot box and also resort to well recognised rights under administrative law, which include the right to freedom of information, reasons for decisions and judicial review.<sup>124</sup> Thus the political and legal avenues to protect natural resources for current and future generations have been progressively diminished by the privatisation process. This widescale transfer of community resources into corporate hands, and the consequential dilution of stakeholder influence, provides a compelling basis for new protective measures which focus upon corporate decision making processes. Some recent reforms to the *Corporations Act* which have already taken this approach are detailed in the next section of this paper.

### 3 *Current treatment of environmental impacts under the Corporations Act*

Despite suggestions by the Parliamentary Joint Committee and CAMAC that the *Corporations Act* should not be concerned with environmental and social considerations, there are already a range of provisions in that Act which are directly or indirectly concerned with those matters. In particular, the following provisions have pioneered mechanisms for corporate disclosure and stakeholder engagement.

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<sup>122</sup> National Competition Policy was adopted by all levels of Australian government in 1997; see Compendium of National Competition Policy Agreements (Second Edition 1998) available at <<http://www.ncc.gov.au/>> at 19 July 2007.

<sup>123</sup> United Nations Online Network in Public Administration and Finance, 'Privatisation in Australia' <<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN005244.pdf>> at 19 July 2007.

<sup>124</sup> See *Administrative Law Act 1978* (Vic); *Administrative Decisions (Judicial Review) Act 1977* (Cth); *Freedom of Information Act 1989* (Cth), as well as various State and Territory counterparts.

*(a) Mandatory reporting of environmental performance - s 299(1)(f)*

Section 299(1)(f) of the *Corporations Act* provides an obligation for a director's report to include 'details of the entity's performance' in relation to any 'particular and significant' environmental regulation under a law of the Commonwealth or of a State or Territory. This provision has been criticised *inter alia*, for being vague and uncertain and duplicating other reporting obligations.<sup>125</sup> However these criticisms only support improvement to the rule rather than its removal.

Some commentators have suggested that environmental impacts should inevitably be disclosed as part of the financial reporting process. Section 295 of the *Corporations Act*, requires that company financial statements must give a 'true and fair view' of 'the financial position and performance of the company'. Lucy and Utter have suggested that this obligation necessitates careful consideration and reporting of the environmental sustainability of the company's operations.<sup>126</sup> They point out that there is a growing trend for the intangible aspects of a company's business to make up the bulk of the value of the company, and that this value is highly vulnerable to environmental risks.

This is highly pertinent in industries associated with climate change, where sectors like motor vehicle manufacturing and coal fired power generation are vulnerable to declining profitability. It is a possibility that directors who do not report on such matters may subsequently be sued by disgruntled investors. This problem is now addressed by a requirement under s 299A for directors reports to include an operating and financial review of the company's performance, plans, opportunities, corporate governance and operating risks. The provision is quite broadly framed and the level of detail required is not explicitly stated. Nevertheless it clearly requires directors to turn their mind to a range of social and environmental issues which could impact upon the company.

*(b) Requisition of general meetings by minority shareholder – s 249D*

Section 249D, enables either a minimum of 100 members, or members holding at least 5% of the votes, to call for an extraordinary general meeting and put a resolution to that meeting. This rule provides an opportunity for a small group of stakeholders to acquire the minimum number of shares and requisition a meeting to consider a resolution about the corporations operations. Several prominent companies such as North Ltd and Gunns Ltd have been subjected to such meetings by environmental activists.<sup>127</sup> In December 2002, the Government released an

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<sup>125</sup> Parliamentary Joint Standing Committee on Corporations and Securities, *Matters Arising from Company Law Review Act 1988* October 1999.

<sup>126</sup> Sean Lucy and Megan Utter, 'Directors' Duties and Sustainability: Are You Being True and Fair?' (2004) *Keeping Good Companies* 40.

<sup>127</sup> See Paula Darvas, 'Section 249D and the 'Activist' Shareholder: Court Jester or the Conscience of the Corporation?' (2002) 20 *Company and Securities Law Journal*



exposure draft of amendments to remove the 100 shareholder rule because of 'increasing public concern about the impact of the rule on the conduct of company business.'<sup>128</sup> In response to further submissions and alleged 'vexatious use' of the 100 member rule the amendments were revised and a new version released in December 2005.<sup>129</sup> The proposed amendments were to remove the 100 shareholder rule, whilst retaining the alternative mechanism for members with 5% of the votes. However, the Ministerial Council for Corporations has rejected the proposed amendment.<sup>130</sup>

Whilst the 100 shareholder rule may cause some undue cost and inconvenience in its present form, it does at least provide a limited but important avenue for stakeholders to influence corporate decisions having environmental and social impacts.

(c) *Product Disclosure Statements – s 1013DA*

In 2001, a new disclosure requirement was introduced in relation to the marketing of financial products under s 1013DA of the Act.<sup>131</sup> This provision requires 'product disclosure statements' to indicate whether labour standards, environmental considerations, social considerations or ethical considerations have been taken into account by the product issuer in selecting, retaining or realizing an investment. Whilst this measure provides only a limited level of information to investors it clearly demonstrates that Parliament considers the Act plays an important role in promoting a 'triple bottom line' approach in investment markets.<sup>132</sup>

In summary it can be seen that these recent reforms have clearly attempted to elevate the consideration of environmental and social within the terms of the *Corporations Act*. In particular they have provided some rudimentary mechanisms for stakeholder engagement and disclosure of social and environmental impacts. Whilst they collectively demonstrate a trend towards more formal consideration of

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390, and Shelley Bielefeld, Sue Higginson, Jim Jackson and Aidan Rickets, 'Director's Duties to the Company and Minority Shareholder Activism' (2004) 23 *Company and Securities Law Journal* 28.

<sup>128</sup> See *Corporations Amendment Bill 2002* (Cth), released for public comment on 24 December 2002.

<sup>129</sup> See *Exposure Draft Bill for Consultation – Corporations Amendment Bill (No. 2) 2006* <<http://www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1101>>. The draft bill also removes s 249D(1A) which allows the regulations to prescribe a different number of members or percentage of members.

<sup>130</sup> 27 July 2006.

<sup>131</sup> See the *Financial Services Reform Act 2001* (Cth).

<sup>132</sup> Note that the Parliamentary Joint Committee recommended, at [7.102], that ASIC 'revise the Section 1013DA guidelines to be relevant to mainstream fund managers rather than simply to the more limited pool of ethical investment funds.'

such ‘non-financial’ matters, they are each quite limited in scope and effectiveness, which underlines the need for a more comprehensive statutory approach.

*C Treatment of Employees and the Environment by the Committee Reports*

Given the importance of employees as corporate stakeholders, it was remarkable that there was almost no reference to their concerns or means of protecting them in the Parliamentary Joint Committee report. Almost ironically, employees are mentioned<sup>133</sup> in the context of attracting and retaining staff as a CSR driver — employees want to work for firms that have a record as being good corporate citizens — rather than as the beneficiaries of socially responsible behaviour themselves.<sup>134</sup> Two of the proposed definitions<sup>135</sup> of ‘stakeholder’ referred to employees expressly, yet their position was not addressed in the Committee’s discussions or in its recommendations. The CAMAC Report was similarly silent in dealing with the plight of employees in relation to their unpaid entitlements.<sup>136</sup>

This is of concern for a number of reasons. The reports of these Committees are likely to play a significant role in setting the agenda for the CSR debate for a number of years.<sup>137</sup> The absence of references to employees will make it difficult to highlight their plight in public policy debate or in the corporate sphere, in a way that might lead to substantive legal reform. Secondly, the emphasis in the report on encouraging CSR and on CSR reporting may have the adverse effect of drawing corporate attention away from looking after key stakeholders such as employees, and focusing it instead on rather narrow forms of CSR, such as corporate philanthropy.

In contrast, the position of the environment received considerable attention in the Committees’ reports. The natural environment appears to attract notice because of the way in which CSR links to looming ecological crises and the need to achieve sustainable development in order to protect natural resources for future generations.<sup>138</sup> However, disappointingly, the recommendations of the Parliamentary Joint Com-

<sup>133</sup> Parliamentary Joint Committee Report, above n 1, [3.36] — [3.43].

<sup>134</sup> The only exceptions to this were three brief paragraphs, which mentioned paid maternity leave and flexible workplace arrangements as factors in retaining skilled and knowledgeable staff. Parliamentary Joint Committee Report, *ibid* [3.41]– [3.43].

<sup>135</sup> The submission of the Key Centre for Ethics, Law Justice and Governance at Griffith University, *ibid* [2.16] and the submission of the Business Council of Australia, *ibid* [2.17].

<sup>136</sup> CAMAC Report, above n 2, [2.4.1].

<sup>137</sup> It should be noted that in the Supplementary Report by Labor Members, attached to the Parliamentary Joint Committee Report, it was noted that ‘more needs to be done to encourage, support and set direction for companies on sustainability and corporate responsibility issues’, above n 1 [1.13] and that ‘government must play a more engaged and strategic role now’ *ibid* [1.13].

<sup>138</sup> For example, PJC Report, above n 1, [2.7] and [2.22].

mittee's report were largely confined to proposed reforms to directors duties and sustainability reporting rather than looking at measures to improve environmental performance. The Parliamentary Joint Committee rejected calls for 'directive' directors duties to compel consideration of environmental stakeholders on the basis this would lead to a 'a "tick the box" culture of compliance'.<sup>139</sup> CAMAC came to a similar conclusion on the basis that such an approach could be counterproductive, and would possibly blur rather than clarify the purpose that directors are expected to serve.<sup>140</sup> With regard to sustainability reporting, the Parliamentary Joint Committee recommended that it should remain voluntary,<sup>141</sup> and that it was premature to adopt the *Global Reporting Initiative* framework as a voluntary sustainability reporting framework.<sup>142</sup> CAMAC concluded that it would be premature and counterproductive to introduce detailed legislative social and environmental reporting requirements, given that the form and content of non-financial disclosures are still evolving. It further stated that reporting initiatives under the ASX Corporate Governance Council Principles as well as voluntary reporting under various industry and international initiatives have the benefits of flexibility and responsiveness to change that cannot be achieved through legislative prescription.<sup>143</sup>

The reasoning of the two inquires with regard to possible extensions of directors duties is largely sound, with one notable exception concerning the rights of employees, which will be explained further in the next Part of this paper. However the reasoning with regard to voluntary reporting frameworks is flawed. Both inquiries clearly acknowledged increasing community expectations and the various 'drivers' which demonstrate the commercial value of CSR.<sup>144</sup> If the need for CSR is so clearly established, why is there a double standard between the disclosure of financial data compared to social and environmental data? Reporting of corporate financial performance is mandatory,<sup>145</sup> and it is not suggested that corporations take their financial responsibilities, either substantively or in reporting, less than seriously. There are mechanisms such as audit to check for errors in financial reporting, and substantial penalties can be imposed on directors for failure to show a true and fair view of the company's financial position and performance.<sup>146</sup> References, therefore, to a 'tick the box' culture of compliance indicate a lack of willingness to commit to any forms of enforcement or verification, rather than an

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<sup>139</sup> Ibid [4.48].

<sup>140</sup> CAMAC Report, above n 2, [3.12].

<sup>141</sup> PJC Report, above n 1, [6.46].

<sup>142</sup> Ibid [7.55].

<sup>143</sup> CAMAC Report, above n 2, [4.10], pp 145-147.

<sup>144</sup> Ibid [4.1], and PJC, above n 1, [3.3 to 3.5].

<sup>145</sup> Part 2M.2 of the *Corporations Act* requires the keeping of financial records, and Part 2M.3 deals with financial reporting.

<sup>146</sup> It is a contravention of s 344 if a director fails take all reasonable steps to comply with, or to secure compliance with, Part 2M.2 or 2M.3. This is a civil penalty breach pursuant to s 1317E(1)(d).

inherent weakness in the concept of mandatory reporting. A large number of the recommendations of both Committees were devoted to encouraging the *voluntary* uptake of CSR, yet the term ‘CSR’ is not defined in the reports. Does CSR connote the way in which the company is run, or does it relate to activities external to the company’s operations? Batten and Birch<sup>147</sup> conducted a survey, published in 2005, which found that ‘[m]ost respondents defined corporate citizenship in terms of the community activities of the corporation ... and felt that it did not include core products or services ... or the way in which the corporation was organised or run.’<sup>148</sup>

The lack of definition of CSR is of concern for a number of reasons. First, engaging in CSR which is simply superficial philanthropy may complicate the focus of corporate decision making and distract firms from the activities which may benefit society the most — including, but not exclusively, safeguarding the position of employees and the environment. In this regard, there is a particular risk to companies from the types of visible CSR which are intended for the protection and building of reputation.<sup>149</sup>

Secondly, the general encouragement and endorsement of CSR by government reports such as those of CAMAC and the Parliamentary Joint Committee arguably may allow companies to hide their poor practices in some areas behind elaborate window dressing. Moon quotes an interviewee:

The community ultimately gains the greatest benefits from a highly successful and profitable enterprise which operates within these high corporate standards [of ethical, social, safety, environmental, management and legal behaviour]

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<sup>147</sup> Jonathan Batten and David Birch, ‘Defining Corporate Citizenship: Evidence from Australia’ (2005) 11 *Asia Pacific Business Review* 293.

<sup>148</sup> Ibid 300. In a case study involving BP, Glazebrook observed that ‘corporate citizenship was predominantly interpreted through the language of “community affairs” which occupied a centralised and monetised function within BP undertaken on behalf of the organisation, but not in conjunction with its core operations ... . By limiting this function to a discretionary “spend” allocated outside the operational considerations of BP’s business, managers, employees and stakeholders external to the company had been acculturated into viewing BP’s corporate citizenship expressed through a discrete, separate pot of money unrelated to core business, but spent because of a prevailing social norm that “companies must give something back”’. Mark Glazebrook, ‘The Social Construction of Corporate Citizenship’ (2005) 17 *The Journal of Corporate Citizenship* 5, 61.

<sup>149</sup> Porter and Kramer note that ‘[w]hile these [sponsorship] campaigns do provide much needed support to worthy causes, they are intended as much to increase company visibility and improve employee morale as to create social impact. Tobacco giant Philip Morris, for example, spent \$75 million on its charitable contributions in 1999 and then launched a \$100 million advertising campaign to publicize them’ Michael E Porter and Mark R Kramer ‘The Competitive Advantage of Corporate Philanthropy’ [2002] *Harvard Business Review* 5, 5.

rather than a company which has low standards but makes significant payments to community groups.<sup>150</sup>

Therefore, whilst the benefits of CSR and sustainability reporting<sup>151</sup> were enthusiastically embraced by the reports, the two Committees have suggested very little to address the vulnerability of employees and the environment. Ways in which their interests could be better protected are examined in the next Part of this article.

## V POSSIBLE REVISIONS TO THE LEGAL FRAMEWORK

The Parliamentary Joint Committee endorsed an approach of ‘enlightened self-interest’<sup>152</sup> — companies voluntarily undertaking CSR because it is in their own best interests — rather than legislating to protect the interests of corporate stakeholders. As noted above, this was seen as preferable to mandating behaviour which could be difficult and costly to monitor and enforce.

These may be legitimate considerations, when CSR is defined very widely to include all those affected by corporate behaviour. However, as the preceding Part of this article illustrates, there is already a significant amount of legislation, however unsuccessful or inadequate, which aim to protect the stakeholders which are the subject of this analysis. This Part will now examine what can be done to improve the protection of employees and the environment.

### *A Protecting Employees*

Much of the discussion of legislative reform before CAMAC and the Parliamentary Joint Committee dealt with whether there should be an extension of the directors’ duties section<sup>153</sup> to allow or require external stakeholder interests to be considered by directors when making decisions.<sup>154</sup> In relation to employees, such amendment could take one of several forms.

It could be a statutory direction that employees’ interests be considered in specified circumstances. Such a provision would offer a defence to directors against possible

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<sup>150</sup> Jeremy Moon, ‘The Firm as Citizen? Social Responsibility of Business in Australia’ (1995) 30 *Australian Journal of Political Science* 1, 8.

<sup>151</sup> Recommendation 23 ‘recommends that the Australian Government, in consultation with relevant sections of the business community, undertake research into quantifying the benefits of corporate responsibility and sustainability *reporting*’ [emphasis added] but does not recommend that the costs and benefits of the activities themselves be quantified. Parliamentary Joint Committee Report, above n 1, [8.116]. CAMAC came to a similar conclusion, above n 2, [5.9].

<sup>152</sup> Above n 1, xiv, and [4.39].

<sup>153</sup> *Corporations Act* s 181.

<sup>154</sup> Parliamentary Joint Committee Report, above n 1, Chapter 4; CAMAC Report, above n 2, Chapter 3.

actions by shareholders for breaches of duties under ss 181 and 182 of the *Corporations Act 2001* (Cth), and their common law equivalents. However, the requirement merely to consider a party's interests is arguably meaningless. In relation to the fiduciary duty to consider creditor interests, Riley<sup>155</sup> remarked:

[A]rguing that a duty expressed in terms of merely considering interests is, in effect, worthless, for the supposed beneficiary of the duty would never be able to show that their interests were not at least considered.<sup>156</sup>

The duty must demand something more than a mere statement after the event that the directors gave a thought to the creditors, but then decided to act in a way contrary to their interests ... even for those directors wishing to comply with the duty, there are considerable difficulties in practice.<sup>157</sup>

The weakness of this sort of reform is evidenced by the legislative position in the United Kingdom. Corporations legislation there formerly required directors, in carrying out their functions, to have regard to the interests of employees as well as those of the company's shareholders.<sup>158</sup> The real value of this provision for employees has been questioned<sup>159</sup> on the grounds that it only requires employee interests to be considered, not that they be given any priority. It is also problematic that because the duty is owed to the company, it is not enforceable by the affected employees.<sup>160</sup>

Sealy remarked:

In the case of employees, what could a court be asked to *do* for them, supposing that it is established that insufficient regard has been had to their interests? At best, it might be possible to think of some woolly form of declaratory or injunctive relief which obliged the directors to reconsider their decision. (We are almost into the realms of administrative law! Even so, there

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<sup>155</sup> Christopher Riley, 'Directors' Duties and the Interests of Creditors' (1989) 10 *Company Lawyer* 87.

<sup>156</sup> Ibid 89.

<sup>157</sup> Ibid 90.

<sup>158</sup> *Companies Act 1985* (UK), section 309 which provides (1) The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members. (2) Accordingly, the duty imposed by this section on the directors is owed by them to the company (and the company alone) and is enforceable in the same way as any other fiduciary duty owed to a company by its directors. See Charlotte Villiers, 'Section 309 of the Companies Act 1985: Is it Time for a Reappraisal?', in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (London, Kluwer Law International, 2000) 593.

<sup>159</sup> Villiers, above n 158, 595-597.

<sup>160</sup> See also Lord Wedderburn, 'Employees, Partnership and Company Law' (2002) 31 *Industrial Law Journal* 99, 106-108.

could be no question of requiring the directors to give the employees' case a hearing since shareholders have no similar right.) The emptiness of the U.K.'s section 309 is thus exposed. It is either one of the most incompetent or one of the most cynical pieces of drafting on record.<sup>161</sup>

Legislation recently passed in the UK has seen this provision replaced with a more general duty imposed on directors.<sup>162</sup> The United Kingdom Law Commission and the Scottish Law Commission in their 1999 joint report *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties*<sup>163</sup> recommended that there should be a statutory statement of directors' main fiduciary duties and their duties of care and skill, and the UK government has accepted this recommendation.

The Companies Bill (UK) received Royal Assent in November 2006 and s 172 now provides for the general duty to promote the success of the company, having regards to, inter alia, the interests of the company's employees.<sup>164</sup>

However, this provision, while appearing to recognise the claims of external corporate stakeholders, suffers from a number of the shortcomings of its predecessor. The section is phrased as a mandatory requirement — 'a director must, so far as is reasonably practicable, have regard to ...' — but, like its predecessor, it arguably lacks content. The duty is not enforceable by the parties affected by its breach, even if it were possible to prove that the directors had failed to 'have regard to' a party's interests.

In relation to the legislative reform proposed in the United Kingdom, the Parliamentary Joint Committee stated:

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<sup>161</sup> Len Sealy, 'Directors' "Wider" Responsibilities — Problems Conceptual, Practical and Procedural' (1987) 13 *Monash University Law Review* 164, 177.

<sup>162</sup> See A Keay, 'Shareholder Primacy and the Advent of Enlightened Shareholder Value in the Reform of Directors' Duties in the United Kingdom', paper delivered to the Corporate Law Teachers Association, Brisbane Australia February 2006. See also Department of Trade and Industry, *Company Law Reform White Paper* (March 2005), 20-21.

<sup>163</sup> <[http://www.lawcom.gov.uk/docs/lc261\(1\).pdf](http://www.lawcom.gov.uk/docs/lc261(1).pdf)> at 6 April 2006.

<sup>164</sup> *Companies Act (2006)* (UK) s 172 provides that (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.

The committee does not support the British approach, which appears to introduce great uncertainty into the legal expression of directors' duties. For instance, there is no way to forecast those circumstances under which a court might decide that a company's purposes 'consisted of or included purposes other than the benefit of its members.' And what might a court determine those purposes to be? Until such a determination was made with respect to a particular company, directors may not even be sufficiently equipped with basic knowledge about those to whom they owed a duty. Subclause (3) [now clause 158(1)] requires directors to have regard to a menu of non-shareholder interests, but gives no guidance as to what form this 'regard' should take, and therefore gives no guidance to directors on what they must do in order to comply.<sup>165</sup>

As a matter of general principle, the committee considers that a law which imposes duties should give those upon whom the duty is imposed clear guidance as to whom the duty is owed, and how it is to be discharged. A law which does not is bad law, and at the very least magnifies the uncertainties faced by directors.<sup>166</sup>

In terms of the need to amend the directors' duties provision to avoid any suggestion that directors might construe the section as preventing the consideration of external stakeholders, the Parliamentary Joint Committee said:

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.<sup>167</sup>

However, the Committees have failed to take into account the fact that external parties are especially vulnerable to opportunistic abuses of power by directors when a company nears insolvency, after the desire to contribute to the 'long term development of their corporation' has become irrelevant.

Another alternative which might allow for increased protection of external stakeholders is the 'soft law' approach of corporate governance rules such as those of the Australian Stock Exchange.<sup>168</sup> Its Listing Rules<sup>169</sup> require companies to state in their annual reports the extent to which they have complied with 28 ASX Council Recommendations, which are pursuant to ten Principles of Good Corporate Governance. These Principles are presently under review, and the ASX Corporate Governance Council's revised Corporate Governance Principles and

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<sup>165</sup> Above n 1, [4.46].

<sup>166</sup> Ibid [4.47].

<sup>167</sup> Ibid [4.76].

<sup>168</sup> <<http://www.asx.com.au/supervision/governance/index.htm>> at 13 July, 2007.

<sup>169</sup> ASX Listing Rule 4.10.3.



Recommendations will be released on Thursday, 2 August 2007. The revised rules will take effect from 1 January, 2008.

The Principles were first released in March, 2003. Principles relevant to the present discussion include Principle 3: Promote ethical and responsible decision-making; Principle 7: Recognise and manage risk; and Principle 10: Recognise the legitimate interests of stakeholders.

However, the document makes clear that

[t]he best practice recommendations are not prescriptions. They are guidelines, designed to produce an efficiency, quality or integrity outcome. This document does not require a “one size fits all” approach to corporate governance. Instead, it states aspirations of best practice for optimising corporate performance and accountability in the interests of shareholders and the broader economy. If a company considers that a recommendation is inappropriate to its particular circumstances, it has the flexibility not to adopt it — a flexibility tempered by the requirement to explain why.<sup>170</sup>

This voluntary aspect of the Principles and a lack of uniformity due to the fact that corporations are ‘at large’ to choose how they respond is the most significant objection to this method of promoting CSR. In addition, the recommendations only relate to the issue of disclosure and reporting. No remedial action is required by companies which reveal deficiencies in some aspect of their corporate behaviour. Moreover, unlisted companies are not governed by the principles. Even small listed companies may not achieve the required standard, with the ASX Council conceding that

the range in size and diversity of companies is significant and ... smaller companies may face particular issues in attaining all recommendations from the outset. Performance and effectiveness can be compromised by material change that is not managed sensibly. Where a company is considering widespread structural changes in order to meet best practice, the company is encouraged to prioritise its needs and to set and disclose best practice goals against an indicative timeframe for meeting them.

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<sup>170</sup> ASX Corporate Governance Council Principles of Good Corporate Governance and Best Practice Recommendations, March 2003, 5. ‘Under ASX Listing Rule 4.10, companies are required to provide a statement in their annual report disclosing the extent to which they have followed these best practice recommendations in the reporting period. Where companies have not followed all the recommendations, they must identify the recommendations that have not been followed and give reasons for not following them.’ Ibid 6.

In November 2006, the Council released a public Explanatory Paper and Consultation Paper on proposed changes to the Principles and Recommendations.<sup>171</sup> The ‘if not, why not’ approach to corporate governance has been retained, with some revisions made to the Principles, including those relevant to CSR. Principle 3 now includes material previously in Principle 10 highlighting the need for companies to consider their legal obligations and a broad range of stakeholders when making decisions. Recommendation 7.1 of Principle 7 clarifies that a company’s risk management system should take into account its ‘legal obligations and the expectations of its stakeholders’<sup>172</sup> and asks companies to consider carefully who their stakeholders are. Legal obligations extend beyond those concerned with financial reporting and include a range of matters such as trade practices and fair dealing laws, environmental protection laws, privacy laws and other relevant legislation. Companies are reminded that effective risk management involves considering ‘factors which bear upon the company’s continued good standing with its stakeholders and the community’.<sup>173</sup>

In September 2005, the Council was requested by Senator Ian Campbell, Minister for Environment and Heritage to develop a set of agreed reporting guidelines of non-financial, material business risk. In light of this request and the PJC and CAMAC inquiries, the Council has sought feedback from the public on whether there is role for it in relation to sustainability and corporate responsibility reporting, in terms of specifying disclosure requirements or providing guidelines on relevant risks.

However, all of the above recommendations for revision of the ASX Principles suffer from the deficiencies of their predecessors. They are voluntary disclosures for listed companies, which do not mandate any action to protect specified stakeholder groups. In any event, the obligations are expressed so broadly as to be meaningless in terms of stakeholder protection. For example, under Principle 3, Recommendation 3.1 specifies that ‘[c]ompanies should establish and disclose a code of conduct as to ... the practices necessary to take into account their legal obligations and the expectations of their stakeholders’.

As with the British legislation discussed above, even a company which deliberately expropriated employee entitlements or knowingly damaged the environment could truthfully say that they had ‘taken into account’ the expectations of their stakeholders. The provision does not specify that those expectations must be met, or that stakeholder interests should be prioritised in specified circumstances. Again, an approach based on reporting fails to allow for the fact that external parties are especially vulnerable to opportunistic abuses of power by directors when a

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<sup>171</sup> <[http://www.asx.com.au/supervision/pdf/asxgc\\_explanatory\\_paper\\_consultation\\_paper\\_021106.pdf](http://www.asx.com.au/supervision/pdf/asxgc_explanatory_paper_consultation_paper_021106.pdf)> at 13 July 2007.

<sup>172</sup> Ibid.

<sup>173</sup> Ibid.

company nears insolvency, after the company's reputation in the marketplace has become irrelevant.

Therefore, as an alternative which ensures a measure of protection to these vulnerable corporate stakeholders, the directors' duties section provisions of the *Corporations Act* be altered to follow the model of the protection of employee entitlement provisions of the Act.<sup>174</sup> It could, for example, provide that where there are reasonable grounds to believe that a transaction prevents the recovery of employee entitlements or significantly reduces the amount available for their recovery, and at that time, there are reasonable grounds for suspecting that the company is insolvent or would become insolvent due to the transaction,<sup>175</sup> a director is in breach of the duty to exercise their powers and discharge their duties for a proper purpose. The requirement of s 596AB to show a subjective intention on the part of the director would not be included.

There are three major advantages of placing such a duty in the directors' duty provision, rather than simply strengthening s 596AB itself. First, by giving specific circumstances in which directors are mandated to prioritise employees, it would address the objection that a change to the directors' duties may allow directors who act improperly to defend their actions and avoid liability by claiming that they were acting to further other stakeholders' interests. Similarly, by displacing the priority of shareholders in the limited circumstances outlined above, it would overcome any perception by directors themselves that they are not permitted to consider the interests of other parties if those interests conflict with the interests of the company. While this appears to be a radical notion, it would simply extend and reinforce the effect of the present insolvent trading and protection of employee entitlements provisions<sup>176</sup> by forcing directors to act in a manner which safeguards the interests of a constituency other than shareholders. This behaviour is in fact contrary to the interests of the shareholders, who might wish the directors to engage in the sort of last minute, desperate behaviour described in Part III above by Scott.<sup>177</sup>

Secondly, it would overcome the deficiencies of the present statutory forms of employee protection outlined above, and in particular, it would give enforcement rights to the employees themselves. In relation to the fiduciary duty, Sealy remarked that '[a] supposed legal duty which is not matched by a remedy is a

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<sup>174</sup> Part 5.8A of the *Corporations Act*. In particular, s 596AB provides that (1) A person must not enter into a relevant agreement or a transaction with the intention of, or with intentions that include the intention of: (a) preventing the recovery of the entitlements of employees of a company; or (b) significantly reducing the amount of the entitlements of employees of a company that can be recovered.

<sup>175</sup> This borrows from the language of s 588G of the *Corporations Act*.

<sup>176</sup> Sections 588G and 596AB of the *Corporations Act* respectively.

<sup>177</sup> The "high-roller" strategy' of directors when the company approaches insolvency, described by Scott, above n 34.

nonsense.<sup>178</sup> As a breach of the *Corporations Act*, failure to consider employee interests where mandated would entitle affected parties to seek an injunction under s 1324(1) of the *Corporations Act* or to seek damages under s 1324(10). While there has been considerable uncertainty in the availability of this section to external parties,<sup>179</sup> its wording that ‘the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct’ is clear. If s 181 were amended to recognise expressly the duty of directors to avoid transactions which rob the company of funds for payment of employees, it seems unambiguous that these parties could use s 1324 to obtain appropriate redress.

Thirdly, breach of the duty would attract the operation of the civil penalty provisions of Part 9.4B of the *Corporations Act* which allows for action to be taken by ASIC and the company liquidator, including an application for disqualification of the director under s 206C of the *Corporations Act*. This would provide consistency, as the current directors’ duties are enforced by this regime, and it has proven to be highly effective in the enforcement of those duties.<sup>180</sup>

Other means of trying to ensure adequate protection for employees include reconsideration of the maximum priority proposal, noted in Part IV above,<sup>181</sup> or, as an alternative to the significant amendment of s 181 as recommended above, a redrafting of Part 5.8A of the *Corporations Act*. Making the latter an effective remedy for employees would require the removal of the requirement to prove a subjective intention on the part of directors to deprive employees of their

<sup>178</sup> Sealy, above n 161, 177. See also *Hooker Investments Pty Ltd v Email Ltd* (1986) 10 ACLR 443 (Young J). The duty’s enforcement comes from the fact that shareholders are not permitted to deny creditors’ rights by ratifying its breach which can be remedied at the suit of the liquidator. For example, Gummow J in *Re New World Alliance; Sycotex v Baseler* (1994) 122 ALR 531, 550; Street CJ in *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722, 730. See also Justin Dabner, ‘Directors’ Duties — The Schizoid Company’ (1988) 6 *Company and Securities Law Journal* 105; Richard Fisher, ‘Preferences and Other Antecedent Transactions: Do Directors Owe a Duty to Creditors?’ (1995) 8 *Corporate and Business Law Journal* 203, 212-3.

<sup>179</sup> In *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1996) 39 NSWLR 128 Einfeld J held that a creditor had standing under s 1324(1) to bring claims for breach of directors’ duties under ss 232(4) and (6) of the *Corporations Law*, as then in force. He rejected the opinion of Young J in *Mesenberg v Cord Industrial Recruiters Pty Limited* (1996) 39 NSWLR 128 which held that since breaches of statutory duties were civil penalty breaches under Part 9.4B, they were only enforceable as such, and only by those with standing to enforce civil penalty breaches. Einfeld J concluded that this was not correct.

<sup>180</sup> From March 1993 to May 2004 nineteen applications for civil penalty orders issued by ASIC were finalised. ASIC was successful in all but one of these nineteen cases. Michelle Welsh, ‘Eleven Years On — An Examination of ASIC’s Use of an Expanding Civil Penalty Regime’ (1994) 17 *Australian Journal of Corporate Law* 175.

<sup>181</sup> See above n 82.

entitlements<sup>182</sup> and also the insertion of a right for employees to take action, rather than having them rely on the decision of the liquidator to do so.<sup>183</sup>

### B *Protecting the Environment*

In relation to the protection of the environment, it will be recalled that both CAMAC and the Parliamentary Joint Committee found that the *Corporations Act* permits directors to have regard for the interests of stakeholders other than shareholders, and thus no amendment to directors duties was required.<sup>184</sup> They also specifically recommended that sustainability reporting should remain voluntary, despite the trend towards mandatory consideration of CSR matters under that Act.

This article has argued above that specific environmental legislation is failing to deal with the modern environmental crisis, and that the prevailing view of international authorities like the United Nations Environment Program is that the reform to decision-making processes of both governments and business is the most appropriate strategy to be adopted. One of the biggest weaknesses in the logic of both committee reports was the notion that corporations (and associated investors and shareholders) could improve their decision-making relating to social and environmental matters based upon voluntary approaches. It is trite to say that an essential pre-requisite for high quality decision making is the consideration of all relevant information. Whilst corporations law currently provides investors with a very high level of confidence about the accuracy of financial data, through accounting standards and auditing processes, it provides little or no assurances on social and environmental data.

Whilst the two committees clearly recognised the importance of the ‘non-financial’ attributes of a company’s performance, they offered no reliable mechanisms for the capture and verification of such data. A voluntary approach does not provide an appropriate alternative to direct regulation, if there are no universally recognised industry standards to support a ‘self regulation’ model.<sup>185</sup> Accordingly, this article will now recommend some specific legislative measures that fill this gap, to effectively compel corporations to collect and disclose the relevant information that is needed to support decision making processes which genuinely take CSR into account. The international community has provided a range of blueprints to guide

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<sup>182</sup> Section 596AB(1).

<sup>183</sup> Under s 596AC(2), the liquidator has the right of recovery for breaches of s 596AB(1). Employees have the right to recover, under s 596AC(3) if liquidator consent is obtained under s 596AF, or without consent if the procedures of s 596AG are followed. Various events, outlined in s 596AI, will prevent the employee from taking action.

<sup>184</sup> Parliamentary Joint Committee Report, above n 1, [4.78]; CAMAC, above n 2, [3.12].

<sup>185</sup> Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (1999) 39-41.

the structure of such reforms, including the UN Global Compact, the OECD Guidelines on Multinational Enterprises, and the Global Reporting Initiative, which were referred to with approval by the two committees.<sup>186</sup> These recommendations are also drawn from successful implementation of similar strategies by some State governments.

The first recommendation is that all corporations must ensure that each distinct business division establishes and maintains an appropriate environmental management system ('EMS').<sup>187</sup> This will provide the organisational framework for measuring and monitoring environmental impacts and continual improvement in environmental performance. It is already recognised by courts that establishment of an EMS is part of a 'minimum profile' expected of company directors under modern environmental legislation.<sup>188</sup> Most pollution control legislation already encourages and rewards the use of EMS, but this reform will extend this approach beyond the heavy industry sector into all sectors of business. It is important to emphasise that modern environmental problems are the responsibility of the whole of society, not just the 'smokestack' industries that would be expected to have used EMS in the past.

Secondly, it is recommended that all corporations must establish an 'eco-efficiency' plan for each distinct business division to improve the ecological sustainability of all company activities. This approach has been recently mandated for many of the largest resource users in Victoria through amendments to the *Environment Protection Act 1970* (Vic), which require relevant businesses to prepare and implement an Environment and Resource Efficiency Plan. This Plan must set out proposed actions to achieve environmental resource efficiency gains and waste disposal reductions.

A key feature of this requirement is that any actions which are shown to have a financial pay-back period of three years or less are mandatory. This is intended to demonstrate to industry that many sustainability strategies are highly cost effective. The Victorian EPA has also pioneered voluntary partnerships which promote eco-efficiency and holistic approaches to sustainability. These 'sustainability covenants' have been successfully adopted by many organisations including leading financial institutions such as VicSuper.<sup>189</sup>

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<sup>186</sup> Parliamentary Joint Committee Report, above n 1, [6.56] to [6.103]; CAMAC, above n 2, [5.2].

<sup>187</sup> EMS are specifically recommended by the *OECD Guidelines for Multinational Enterprises* (2000).

<sup>188</sup> See Ormston J in *R v Bata Industries Ltd (No 2)* (1992) 70 CCC (3rd) 394, 429.

<sup>189</sup> For details of the VicSuper Sustainability Covenant and others see EPA Victoria's website <[http://www.epa.vic.gov.au/bus/sustainability\\_covenants/default.asp](http://www.epa.vic.gov.au/bus/sustainability_covenants/default.asp)>.

Thirdly, corporations should be mandated to introduce mechanisms for consulting regularly with relevant stakeholders, including the local community in relation to all activities that may have a significant impact upon the social and environmental attributes of the local neighbourhood. Once again there are successful models for this approach found in environmental legislation in some States.<sup>190</sup> For example, a company could establish a ‘community consultative committee’ including at least one board member and the senior environmental manager together with an appropriate range of community representatives. Processes like these have proven very successful in assisting optimal outcomes in situation like major refurbishment or expansion of business facilities.

Finally, improved collection of non-financial data and disclosure of environmental (and social) impacts should be mandated. For example, corporations could be obliged to prepare and publish an annual environmental impact and ecological sustainability report. It is also important to introduce a far greater level of uniformity and hence, comparability, in the structure of sustainability reporting. Accordingly it is recommended that a certain standard be mandated in accordance with international best practice, such as the widely accepted *Global Reporting Initiative*, which the Parliamentary Joint Committee in particular, singled out to be promoted for greater acceptance in Australia.<sup>191</sup> The sustainability report should also be integrated with the financial reporting obligations of the company and thus subject to audit along with the financial report. This would be the best way to avoid the ‘tick the box’ approach mentioned by the Parliamentary Joint Committee. A ‘tick-box’ or ‘greenwash’ approach currently prevails in Australian sustainability reporting practices precisely because there is no enforceable standard to report against. This was borne out by evidence from CPA Australia that 54 per cent of survey respondents considered voluntary reporting to be a public relations exercise, whilst 83 per cent were of the view that it was only worthwhile if subject to independent audit.<sup>192</sup>

A key element of these recommended legislative changes is the inclusion of these requirements into the *Corporations Act*. There are a number of reasons for this. First, it would assist in obtaining nation-wide uniformity, which has been a problem with state based environmental legislation. Whilst some of these practices are already required or encouraged under various State and Federal legislation, there is a great deal of inconsistency and duplication between jurisdictions, and the *Corporations Act* would be a very suitable vehicle for achieving uniformity. This would also provide a ‘trickle-down’ effect to smaller unincorporated businesses, as most small businesses act as suppliers or distributors for larger corporations, which

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<sup>190</sup> *Environment Protection Act 1970* (Vic) ss 19AD and 31C.

<sup>191</sup> Above n 1, [7.56].

<sup>192</sup> Above n 1, [6.128].

can take steps to ensure sound environmental practices are adopted throughout their supply chain and distribution networks.<sup>193</sup>

Secondly, it would highlight for directors the importance of acting to protect the environment while they are discharging their broader responsibilities as directors. The statutory duty of due care and diligence clearly requires directors to keep themselves informed of relevant issues. Whilst corporations continue to have no clear mandate to collect and disclose CSR information, directors will often lack meaningful data and can rely upon a ‘know-not, care-not’ approach. Another problem with the current management of environmental issues by corporations is that they are generally viewed as compliance matters that are handled by the lower divisions of the organisation. By making them obligations under the *Corporations Act* with the potential for ASIC enforcement, directors will be far more strongly motivated to ensure these issues are being well handled. The reforms could include provisions allowing ASIC to take action against directors for their breach, for example by designating these requirements as civil penalty provisions. The precedent for elevating the protection of external stakeholder interests to civil penalty status is the insolvent trading legislation in Part 5.7B of the Act.

Finally, it should be recognised that the fundamental changes in the global market place which have followed the spread of micro-economic reforms and free trade policies, have strongly swung the responsibility for environmental outcomes away from government to the corporate sector. With the increasing power and freedom from market restrictions that corporations have come to enjoy, comes a responsibility to shoulder some of the important burdens of protecting the public interest in protection of the natural environmental.

These recommendations will impose certain up-front costs upon corporations, particularly smaller proprietary companies. However, there is now considerable recognition that the ‘business case’ for sustainability is real. For instance, the Victorian EPA has found through its new strategies that in the longer term, the resource use efficiencies which result from these measures, including reductions in business inputs like energy and water, will provide cost savings that will outweigh the original outlays. The experience from the socially responsible investment markets is that sustainability and social responsibility initiatives are recognised as key performance indicators for good management. Any concerns about additional complexity in corporations law are misplaced as these recommendations could be effectively adopted through some relatively minor adjustments to existing requirements such as s 299(1)(f) and the financial reporting obligations.

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For example, many large manufacturers like Toyota mandate that all of its suppliers have an ISO 14001 accredited EMS in place.



## VI CONCLUSION

This article has examined the recent reports of the Parliamentary Joint Committee and of CAMAC into corporate social responsibility, with particular regard to the position of employees and the environment. It was noted that both of these stakeholders are particularly vulnerable to abuses of power by the corporation and its directors, especially at the time of impending insolvency, and therefore need appropriate measures put in place to safeguard their interests. While some companies voluntarily adopt socially responsible practices, the lack of compulsory measures to protect these non-shareholder constituencies means that there have been many instances where they have not been adequately protected.

Clearly similar arguments could be made for other cohorts of external stakeholders adversely affected by corporate behaviour. It is not suggested that the two selected for analysis here are the only parties worthy of legislative protection or reform. It is also conceded that if employees and the environment were to be cared for as recommended, this might place other vulnerable groups, such as tort creditors, at further disadvantage.

Nonetheless, the history of legislative reform of the *Corporations Act* with respect to the protection of external parties is through a piecemeal and incremental approach. For example, the provisions to benefit creditors affected by insolvent trading preceded those dealing with the recovery of employee entitlements.<sup>194</sup>

The current legislative regime governing employees and the environment has made some progress in recognising companies' social responsibilities, but was shown to fall short in key aspects. In this article some specific revisions to the *Corporations Act* have been recommended to mandate directors' consideration of employee interests at times of insolvency, and a range of new measure to encourage the integration of environmental considerations into corporate decision making processes.

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<sup>194</sup> The predecessors of the current provisions dealing with insolvent trading date back decades. See Niall Coburn, 'Insolvent Trading In Australia: The Legal Principles' in Ian Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (2000) 73, 74. Also Australian Law Reform Commission, *General Insolvency Inquiry*, Report No 45 (1988) [277-280] and *Southern Cross Interiors Pty Ltd v Deputy Commissioner of Taxation* [2001] NSWSC 621, [98]. In contrast, the employee entitlement provisions were introduced in 2000.