ENVIRONMENTAL LAW AND LAWYERS' ETHICS

By Robyn Glindemann*

Introduction

Both the drivers of the modern corporation, and the ethical components of environmental law, are derived from sources which extend far beyond the requirements of Commonwealth, state and territory environmental legislation. In the 21st century, the regulatory environment that companies inhabit continues to change and adapt, not only as a result of corporate leadership, but as a result of changes in focus and thinking at a political level, both nationally and internationally. Increasingly, corporations, governments and investors are alive to the environmental consequences of development and recognise that a healthy, sustainable economy requires a similarly healthy and sustainable environment.

Global concern in relation to issues such as climate change, international security and sustainable development mean that the ethical parameters of legislation, including environmental law, are relevant to how decisions under that legislation are made and the way in which corporations are required to comply with that legislation. Major companies are transitioning in corporate reporting from environmental reporting to more expansive sustainability reporting, which combine mandatory, voluntary and co-regulatory initiatives.[1] Although not currently mainstream investment practice, issues of environmental and social governance and responsibility are forming part of investment decision making.[2] The growing number of inputs which affect corporate behaviour in turn affects the role of corporate advisers, including lawyers. But the rules governing the legal profession are not yet, in this country, broad enough to oblige lawyers to advise on the ethical aspects underpinning legislation, or on non-traditional regulation beyond the law.

This article discusses standards and obligations contained in reporting requirements, corporate governance rules and business systems and practices. These influence how a corporation behaves and the outputs it produces within the broader framework of environmental law. It also discusses evolving lawyers' ethics, which are beginning to take broad sustainability norms and sustainability principles into account.

Ethical considerations when advising clients

In general terms, members of the legal profession have obligations to the community in relation to the law and the administration of justice. In *Re B*,[3] Moffitt P, repeating the words of Dixon J in *Re Davis*[4] framed the duty of the lawyer in the following terms:

> *The duty is owed to the public, in that in exchange for the legal privileges which the law confers on the barrister or on his relationship with his client, his duty in the public interest is to conduct himself in relation to those privileges and otherwise in the manner which will uphold the law and further its pure administration.*[5]

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1 See Bryan Horrigan, '21st Century Corporate Social Responsibility Trends – An Emerging Comparative Body of Law and Regulation on Corporate Responsibility, Governance, and Sustainability' (2007) 4 *MqJBL* (2007) at footnote 32 where the author cites KPMG Global Sustainability Services, *KPMG International Survey of Corporate Responsibility Reporting* (2005).

2 Ibid, citing United Nations Environment Programme Finance Initiative (UNEP FI) Asset Management Working Group (AMWG), *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* (2005) 23–27.

3 [1981] 2 NSWLR 372

4 (1947) 75 CLR 409

5 *Re B* [1981] 2 NSWLR 372 at 381–382

A lawyer *must* act in the best interest of their client.[6] This requirement includes an obligation to 'conduct each case in the manner counsel considers will be the most advantageous to the client,'[7] and legal services must be delivered competently and diligently.[8] However, the duty to the Court and to the administration of justice is paramount and overrides any duty to the client.[9]

In the context of advising on compliance with environmental laws and regulations, a difficult dichotomy exists between the role of the lawyer in serving the interests of their client, and the lawyer as a 'public-minded professional', whose commitment in 'promoting, in his own sphere, the cause of justice'[10] may take precedence over the interests of the client. On the one hand, when considering options under environmental legislation, the lawyer assists in maximising the client's welfare. On the other, where the lawyer encourages their clients to act in accordance with the public purposes underlying the legislation, even where other options may have greater expected value to the client; the lawyer is, at least in part, an agent for the public good.[11]

'Legal services' is defined in both the Western Australian and Commonwealth draft professional conduct rules as work done in the 'ordinary course of legal practice'.[12] The question that arises concerns the scope of the advice a lawyer must provide their client 'in the ordinary course' of their legal practice in providing competent, diligent advice that is in the client's best interests.

As Dal Pont has noted, 'as a matter of good practice lawyers should supply 'rounded' legal advice, which may involve taking into account non-legal factors', which leads to the conclusion that 'legal advice does not operate in a vacuum, and that client interests may not infrequently justify proffering other than legal advice'.[13]

The current Law Society of WA Professional Conduct Rules (July 2008) (*PCR*) include a requirement that 'a practitioner must draw the client's attention to the possible effect of any proposed cause of action which may adversely affect the client's reputation'.[14] There is evidence to suggest that companies regard environmental breaches as a potential threat to reputation.[15] This being the case, there may be scope to advise on 'non-legal' or 'ethical' components of environment legislation under this rule, although the extent to which any such advice is required is limited not only by the fact that the PCR (and the Western Australian Bar Association Rules) do not have statutory force, but the lack of more specific language.

The American Bar Association (*ABA*) includes a rule in their Model Rules of Professional Conduct that provides:

> *In representing a client, a lawyer shall exercise independent professional judgement and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.*[16]

The rule directs that non-legal factors may, and probably should, be taken into account in giving legal advice.[17] Kim Connolly notes:

> *This rule recognises that purely technical legal advice can sometimes be inadequate,*

6 Commonwealth Government, *Legal Profession National Law, Legal Profession National Rules – Solicitor's Rules 2010*, Consultation Draft 14 May 2010, rule 4.1.1; Legal Practice Board of Western Australia, *Draft Practitioner's Conduct Rules, Review and Discussion Draft*, 15 February 2010, rule 3.1.1

7 The Law Society of Western Australia, *Professional Conduct Rules (July 2008 Revision)*, rule 14.1

8 Commonwealth Government, above n 6, rule 4.1.3; Legal Practice Board of Western Australia above n 6, rule 3.1.3

9 *Kyle v Legal Practitioner's Complaints Committee* (1991) 21 WAR 56; Commonwealth Government, above n 6; Legal Practice Board of Western Australia, above n 6, rule 2.1

10 See *Myers v Elman* [1939] 4 All ER 484 at 509

11 See David Dana, 'Environmental Lawyers and the Public Service Model of Lawyering' (1995) 74 *Or. L Rev.* 57, 58-59

12 Commonwealth Government, above n 6, Glossary of Terms; Legal Practice Board of Western Australia, above n 6, Glossary of Terms

13 Gino Dal Pont, *Lawyers' Professional Responsibilities* (4th Edition, 2010) 115

14 The Law Society of Western Australia, above n 7, rule 13.2

15 The Economist Intelligence Unit, *Reputation: Risk of risks* (2005)

16 Kim Connolly, 'Considering 'nonlegal' environmental issues while counselling clients' (2010) 41(3) *Trends: ABA Section of Environment, Energy and Resources Newsletter*, 6–7

17 Ibid 6

> *because many legal problems arise in contexts that are so charged with nonlegal considerations that no 'pure' legal choice exists. In such cases these nonlegal factors directly affect how the law itself will be applied. In these cases giving inadequate advice could violate the duties [of]... competence and... communication indirectly because the lawyer has failed to provide the client with sufficient information to allow for intelligent decision making.*[18]

The draft rules released recently in relation to the National Legal Profession Reform are not as prescriptive as the American approach. However, as the current PCR require a practitioner to refer to any adverse reputational effects,[19] as well as the requirements to act in the client's best interests when competently and diligently providing legal services, there may be scope for at least a consideration of whether it is our professional responsibility to advise our clients on ethical issues arising out of environmental law queries.

Given the growing importance of environmental law and policy, and its increasing complexity, close attention to the rules of professional conduct may become vital to successful client representation. If Australia's professional conduct rules do not go so far, it may simply be time for lawyers to consider how and whether their role should be evolving.[20]

Ethics influencing best practice environmental management

The way in which Australian companies interact with the environment is shaped by various obligations and expectations. These obligations and expectations have changed greatly over the last century. Previously, companies, regulators and the community might have paid little attention to major environmental damage which a company's activities caused. This is no longer the case. Broadly, in Australia today, major environmental damage is seen as avoidable and unacceptable, whether or not it is permitted under environmental legislation. Companies, regulators and the community pay close attention to how companies interact with the environment, and expect companies to use their best efforts to minimise the environmental damage which their activities cause.

This moral shift in society has altered the way in which companies interact with the environment. The moral epicentre of a company, which dictates the environmental practices of that company, is now shaped by various legislative and non-legislative factors. These factors also drive best practice environmental management.

Bubna-Litic argues:

> *Environmental law can only go so far. It cannot, and should not, prescribe every decision taken by every business. Rather, consideration of environmental issues: the direct and indirect environmental impacts of the business; the environmental issues of concern to the wider community; and the risks and opportunities associated with them, should be part of good business practice.*[21]

'Best practice' environmental management is not driven primarily by legislation and regulatory frameworks more generally. Whilst legislation can influence corporate behaviour, there are limits to the extent to which it can prescribe responsible and desirable environmental practice.[22] The Corporations and Markets Advisory Committee (*CAMAC*) reported in 2006:

> *Beyond [compliance with laws], companies are influenced in their decision-making by the marketplace of opinions and expectations in which their businesses are carried out. They are subject to various pressures that need to be taken into account if a company is to be successful. These include environmental or other social issues that affect*

18 Ibid 7
19 The Law Society of Western Australia, above n 7, rule 13.2
20 Connolly, above n 16, 7
21 Karen Bubna-Litic, 'Climate change and corporate social responsibility: The intersection of corporate and environmental law' (2007) 24 *EPLJ* 253, 266
22 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (2006) iii

> *a company's business and that, if not adequately addressed, will put the value and viability of the business at risk.*[23]

Beyond compliance with environmental legislation, a company's environmental practice can be influenced by:

- obligations under non-environmental legislation (such as disclosure obligations and directors' duties under the *Corporations Act 2001* (Cth) (*Corporations Act*))
- obligations created by 'soft law' (eg the Australian Securities Exchange's (*ASX*) listing rules and the ASX Corporate Governance Council's *Principles of Good Corporate Governance*), and international standards and voluntary codes of practice which a company adopts
- corporate social responsibility considerations (which are based on the idea that the role of a company is not limited to complying with legal obligations and returning profits to shareholders, but that it is to consider the economic, social and environmental impacts of its activities).

Corporate social responsibility

Corporate social responsibility (*CSR*) refers to the idea that the contribution which a company is responsible for making to society is not limited to returning profits to shareholders. The activities of a socially responsible company are determined not only by consideration of strict legal obligations, but by broader considerations of the economic, social and environmental impacts of those activities. A socially responsible company considers not only financial interests of its shareholders, but the financial and non-financial interests of society more broadly.

The CSR movement received support from the CAMAC, when it concluded in its 2006 report *The Social Responsibility of Corporations* (*CAMAC Report*) that the Corporations Act allows company directors to take relevant interests and broader community considerations into account in performing their duties.[24]

A cynic might dismiss CSR as something only 'do-gooder' companies that are not serious about financial returns would worry about. But the Parliamentary Joint Committee on Corporations and Financial Services (*PJC*), in its 2006 report *Corporate Responsibility: Managing Risk and Creating Value (PJC Report)*, noted various actual benefits that CSR can have for a company. These included the maintenance and improvement of company reputation, the recruitment, motivation and retention of staff, the attraction of investment from sustainable investment funds, good status on sustainability market indices, risk management and minimisation and the avoidance of regulation (by taking voluntary action to improve corporate conduct, companies might forestall the imposition of mandatory obligations).[25]

There are also potential negative consequences for companies which choose not to adopt socially responsible practices:

Companies that do not take positive steps and proactive measures to mitigate climate change impacts may create a competitive disadvantage for themselves. This is because climate change issues have the potential to influence consumers in their decisions when buying goods and services and consumers may prefer particular goods or services because of a company's position on climate change or the greenhouse gas friendliness of the product or service. These disadvantages generally take the form of diminished reputation and customer loyalty.[26]

Directors' duties

Whose interests should a company director consider in performing his or her function? The idea of a director considering interests beyond those of shareholders is discussed above. The ways in which Australian corporations law provides directors with scope to consider corporate responsibility issues will now be considered.

23 Ibid 7
24 Corporations and Markets Advisory Committee, above n 22, 7
25 Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 20–32
26 Riccardo Troiano, 'Climate change: Corporate liability, disclosure requirements and shareholders' remedies' (2008) 26 *C&SLJ* 418, 424

***Corporations Act* – s 180(1)**

Section 180(1) requires a company director to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise in their position. This duty must be defined by reference to the nature and extent of the foreseeable risk of harm to the company that might arise if the director does not act with care and diligence. Failure to exercise care and diligence will not be established under s 180 unless at the time the director acted (i.e., not with the benefit of hindsight) it was reasonably foreseeable that their actions might harm the company's interests.[27]

Poor environmental performance has the potential to harm a company's interests, and therefore may be something that a director ought to consider in performing his or her duties. As will be discussed below, shareholders and investors may decline to hold interests in a company because of environmental concerns. It is useful however to briefly consider the example of Rio Tinto and the Grasberg mine in Indonesia. In 2008 the Norwegian Government Pension Fund divested its $1.05 billion interest in Rio Tinto because of the company's involvement in the 'severe environmental degradation caused by [the Grasberg mine]'.[28] Two years earlier, the Fund had divested its interest in Rio Tinto's joint venture partner in the mine, Freeport McMoRan, because of the same environmental concerns.

To use this as an example, one day a reasonable director might be expected to behave differently in managing the company's involvement in a development like Grasberg. A reasonable director might be expected to consider not only the short term profits of involvement in a development, but also the potential negative impacts for the company, such as damaged reputation, and the possibility of shareholders divesting their interests in the company because of environmental concerns.

The weight that a reasonable person can be expected to give to non-financial considerations may increase over time, as the community becomes more concerned with environmental protection. The interrelatedness of a company's financial and non-financial performance may also encourage the consideration of issues that might not appear to have any immediate impact on a company's financial performance.

Corporations Act – s 181

Section 181 requires a company director to exercise their powers and discharge their duties in good faith in the best interests of the corporation, and for a proper purpose. What are the best interests of the corporation? In the English case of *Greenhalgh v Ardene Cinemas*,[29] Lord Evershed MR said that the phrase 'company as a whole' did not mean the company as a commercial entity, distinct from the shareholders, but that it meant the shareholders as a general body.[30] This interpretation has been cited in various Australian decisions.[31]

Bielefeld *et al* argue that if directors are to act in the best interests of shareholders, that this might include the interests of both current and future shareholders or at least the long term interests of current shareholders.[32] It follows, that to protect these long term interests of shareholders, a director ought to make decisions that ensure the long term viability of the corporation:

> *The long term viability of a corporation may be threatened where a corporation engages in repetitive breaches of environmental legislation, but it may also, in some situations, be threatened by actions, which although not technically unlawful, involve serious environmental impacts which will continue to be associated with the company in the future.*[33]

27 *Vrisakis v Australian Securities Commission* (1993) 11 ACSR 162 at 212

28 Norwegian Ministry of Finance, *The Government Pension Fund divests its holdings in mining company,* Press Release (9 September 2008) <http://www.regjeringen.no/en/dep/fin/press-center/Press-releases/2008/the-government-pension-fund-divests-its-.html?id=526030>

29 [1951] Ch 286

30 *Greenhalgh v Ardene Cinemas* [1951] Ch 286 at 291

31 See *Ngurli Ltd v McCann* [1953] HCA 39 at 24; *Reefton Mining NL v Kimbriki Nominees Pty Ltd* [2007] FCA 17 at [38]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at [4392]

32 Shelley Bielefeld et al, 'Directors' duties to the company and minority shareholder environmental activism' (2004) 23 *C&SLJ* 28, 38

33 Ibid

Bielefeld *et al* continue:

> *Directors may often feel compelled to maximise short term profits, which could lead to environmental degradation, at the expense of ensuring the long term viability of the company. However, directors would be advised not to engage in activities which, although promising higher short term profits, could have serious implications regarding a corporation's long term viability. It may be that in pursuing short term profits at the expense of long term sustainability, directors will be in breach of their duty to act in the best interests of the corporation under s 181.*[34]

Therefore, whilst a company might maximise short term profits by remaining involved in a profitable project with significant environmental impact, this might be overshadowed by the potential long term consequences of the divestment of shareholdings from the company and a damaged reputation. These long term consequences may alter what a director needs to do to satisfy the duty to act in good faith in the company's best interest.

This view was echoed in the PJC Report. The PJC determined that the most appropriate interpretation of the interests a director should consider in performing directors' duties was the 'enlightened self-interest' interpretation.[35] This interpretation recognises that investments in corporate responsibility and corporate philanthropy, while not generating immediate profit, can contribute to the long term viability of a company. [36] This enables directors to consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation.[37] Stakeholders are groups and individuals that are impacted on by corporate activity, including shareholders, employees, the community and the environment.[38] The PJC preferred the enlightened self-interest interpretation of directors' duties to interpretations which made profit-making and legal compliance the only concerns for companies.[39] The PJC recommended companies and directors act in a 'socially and environmentally responsible manner at least in part because such conduct is likely to lead to the long term growth of their enterprise.'[40]

The directors' duties set out in the United Kingdom's *Companies Act 2006* (UK) (the *UK Act*) are said to codify and mandate the 'enlightened self-interest' approach[41] or the comparable 'enlightened shareholder value' approach.[42] Section 172 of the UK Act, entitled 'Duty to promote the success of the company', provides:

> *(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.*
>
> *(2) Where or to the extent that the purposes of the company consist of or include*

34 Ibid 39
35 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 53
36 Ibid 52
37 Ibid
38 Ibid 5-6
39 Ibid 53
40 Ibid 53
41 Ibid 55
42 Horrigan, above n 1, 104

> *purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.*
>
> *(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.*

Horrigan described the UK Act as 'pregnant with potential CSR implications for a variety of CSR actors.'[43] Its drafters were obviously convinced by the argument that a company which embraces CSR is likely to benefit in various ways, and ultimately be successful. The UK Act explicitly links the success of a company with its directors having regard to the environmental impacts of the company's operations, the company's good reputation and likely long term consequences of decisions. In a recent article, Dr Richard Alexander argued that the directors of BP might have breached their obligations under s 172 in connection with the events of the oil spill in the Gulf of Mexico.[44]

Returning to directors' duties generally, it seems unlikely for the moment that directors' duties under Australian legislation will be amended so as to reflect the UK Act and the enlightened self-interest approach. The PJC decided that the British approach 'appears to introduce great uncertainty into the legal expression of directors' duties.'[45] The PJC suggested that the British approach did not provide clear guidance as to whom the directors' duties were owed, nor how the duties were to be discharged.[46] The PJC also suggested that mandating CSR practices would lead to a 'culture of compliance', and would stifle voluntary efforts of companies to be socially responsible.[47]

CAMAC was also cautious of the British approach, suggesting that it could 'result in a radical change from traditional company law' and 'entrench in legislation particular stakeholder and other criteria that, while possibly reflecting current concerns, may not necessarily be appropriate for corporate decision-making in the future.'[48]

ASX Corporate Governance Council's Principles of Good Corporate Governance

The second edition of the ASX's Corporate Governance Council's *Corporate Governance Principles and Recommendations* (*ASX Recommendations*), which came into effect in 2008, offers guidance and suggestions as to good corporate governance practices. Although these guidelines are voluntary, if a company decides not to follow a recommendation it must explain why.[49] Various aspects of the ASX Recommendations encourage companies to adopt socially responsible practices and to consider interests beyond those of shareholders.[50] The ASX Recommendations continue:

> *To make ethical and responsible decisions, companies should not only comply with their legal obligations, but should also consider the reasonable expectations of their stakeholders including: shareholders, employees, customers, suppliers, creditors, consumers and the broader community in which they operate.*[51]

The ASX Recommendations suggest that a company should produce a code of conduct setting out policies on the appropriate behaviour of directors and employees.[52] This code of conduct 'identify measures the company follows to encourage the reporting of unlawful or unethical behaviour and to actively promote ethical behaviour.'[53]

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43 Ibid
44 Richard Alexander, 'BP: protection of the environment is now to be taken seriously in company law' (2010) *The Company Lawyer*, Issue 9, 271
45 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 55
46 Ibid 56
47 Ibid
48 Corporations and Markets Advisory Committee, above n 22, 106–107
49 ASX Corporate Governance Council, *Principles of Good Corporate Governance* (2nd ed, August 2007) 3
50 Including Principle 3, Ibid 21
51 Ibid
52 Ibid
53 Ibid 22

Principle 7 of the ASX Recommendations states that companies should establish a sound system of risk oversight and management and internal control.[54] The ASX Recommendations provide that the company's board should implement a risk management system to manage and control the company's material business risks,[55] which might include environmental risks.[56] The ASX Recommendations go on to provide:

> *When considering risk management policies the company should take into account its legal obligations. A company should also consider the reasonable expectations of its stakeholders [which can include the broader community]... Failure to consider the reasonable expectations of stakeholders can threaten a company's reputation and the success of its business operations.*[57]

Sustainability reporting

Sustainability reporting is an important feature of CSR. It refers to 'the practice of corporations and other organisations measuring and publicly reporting on their economic, social and environmental performance.'[58] This reporting allows companies to demonstrate their commitment to CSR, and allows others to judge that commitment. Sustainability reporting may occur in a company's annual financial report (for example, the Westpac group did this in 2009[59]), or in a separate sustainability report (for example, BHP Billiton creates an annual sustainability report[60]). Like CSR more generally, it is not only a sense of satisfaction at having 'done-the-right-thing' that drives a company to prepare sustainability reports. The PJC Report noted several reasons which might lead a company to prepare sustainability reports:

- informing non-shareholder stakeholders (such as employees and customers) about societal and environmental impacts of a company's performance and the strategies in place or being developed to improve such impacts
- assisting shareholders, investors and the market to determine how well companies are dealing with material non-financial and financial risks.

This will enable companies to:

- identify areas of operational or management improvement
- identify and better manage their non-financial risks
- identify new markets or business opportunities
- benchmark their performance against competitors
- improve their reputation
- recruit and retain good staff.[61]

Notwithstanding these potential benefits, a company may not choose to prepare sustainability reports voluntarily. Statutory reporting requirements can also encourage a company to disclose the sustainability of its practices and the company's approach to sustainability. There are various mandatory reporting obligations on corporations which are beyond the scope of this paper to discuss in detail.[62]

Social responsibility issues (the shareholders are watching)

Shareholders have various powers under Australian corporations law to influence the activities of companies, from

54 Ibid 32
55 Ibid 33
56 Ibid 32
57 Ibid 33
58 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 79
59 The Westpac Group, *Customer Brandwidth - Annual Review and Sustainability Report 2009*, <http://www.westpac.com.au/docs/pdf/aw/ic/annualreview-2009.pdf>
60 BHP Billiton's sustainability reports from 2001 to 2009 available at: <http://www.bhpbilliton.com/bb/sustainableDevelopment/reports.jsp?page=1>
61 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 79-80
62 Including *Corporations Act 2001* (Cth) ss 674, 299(1)(f), 299A, 1013D, ASX Listing Rule 4

raising questions at general meetings to commencing shareholder litigation.[63] A group of 100 shareholders can communicate their concerns about the environmental impacts of a company's activities, or their suggestions for the adoption of socially responsible practices, to a much larger group of shareholders. Even if a resolution which is put forward is not passed, its proposal will highlight the particular shareholders' concerns. An early example of the use of these provisions was the Wilderness Society's campaign against the Jabiluka uranium mine in Kakadu National Park. Although the group's resolutions were defeated they stimulated reform.[64] In the years since, various ethical shareholder groups have formed amongst the shareholders of some well-known Australian companies, including:

- BHP Shareholders for Social Responsibility[65]
- Boral Green Shareholders
- Gunns Ethical Shareholders[66]
- North Ethical Shareholders Group,[67] and
- Wesfarmers Investors and Shareholders for the Environment.

Ethical investment funds (discussed below) are also beginning to use shareholder resolutions to encourage companies to be more environmentally-friendly. In the past, ethical investment funds in Australia typically invested in companies that engage in 'green' activities like producing solar and wind power. Some of these funds are now investing in some of Australia's largest polluters, to allow the funds to draw attention to environmental concerns by raising shareholder resolutions.

In 2010 the Climate Institute and the Australian Ethical Investment fund created a new investment fund, called the Climate Advocacy Fund, which will put forward these environment-focussed shareholder resolutions.[68] In September 2010 the Climate Institute and the Australian Ethical Investment fund announced plans to put forward shareholder resolutions before the general meetings of various companies to force them to fully disclose their carbon emissions, how they intend to cut those emissions, and the assumptions they have made regarding potential carbon pricing in the future.[69]

Woodside Petroleum, Paladin Energy, Oil Search and Aquila Resources will be the first companies targeted by the Climate Advocacy Fund for 'failing to have adequate carbon disclosure policies and not informing shareholders of the risks associated with their carbon footprint.'[70] The first resolutions will be put forward at the general meeting of Aquila Resources and Paladin Energy's general meeting late in 2010.[71] James Their, the executive director of Australian Ethical Investment, said that the aim of environment-focussed resolutions was to protect long-term investor returns from the risk of climate change: 'The reality is that emissions-intensive companies and major polluters that aren't prepared for the rapidly emerging low pollution economy risk becoming uncompetitive.'[72]

Institutional investors

The PJC Report identified the potential influence that institutional investors like superannuation funds and managed funds could have on CSR. The PJC found that whilst small investors were essentially passive, and had little capacity to influence the management of companies, institutional investors had the capacity to influence a company's approach

63 *Corporations Act 2001* (Cth) s 250S, 249N and 249O

64 Australian Broadcasting Company, 'Transcript: Taking care of business' *Australian Story* (9 August 2001) <http://www.abc.net.au/austory/transcripts/s339970.htm>

65 See <http://www.bhpethical.shares.green.net.au/>

66 See <http://www.green.net.au/gunnsethicalshareholders/>

67 See <http://www.northethical.shares.green.net.au/nesg.html>

68 Mark Colvin and Jennifer Macey, 'Green investors target big polluters', *PM with Mark Colvin* on ABC Radio, 21 September 2010. Transcript available from: <http://www.abc.net.au/pm/content/2010/s3018098.htm>

69 Ibid

70 Matthew Murphy, 'Fund to confront firms over carbon' *Sydney Morning Herald* (Sydney) 22 September 2010 <http://www.smh.com.au/business/fund-to-confront-firms-over-carbon-20100921-15lcs.html>

71 Colvin and Macey, above n 68

72 Nicola Berkovic, 'Shareholders to grill firms on climate risk plans' *The Australian* (Sydney) 22 September 2010 <http://www.theaustralian.com.au/national-affairs/shareholders-to-grill-firms-on-climate-risk-plans/story-fn59niix-1225927540330>

to CSR. Unlike small investors, institutional investors 'control vast sums of money, and have both the capacity and the occasion to exert direct and substantial influence over the operation of listed companies.'[73]

Institutional investors are able to invest in the long term and can afford to support corporate strategies which provide the basis for longer term sustainable profitability rather than short term profits.[74] The PJC has suggested that long term institutional investors might be able to influence company directors to operate the company in a socially and environmentally responsible manner, even if this meant sacrificing short term profits.[75]

The significance of institutional investors on corporate governance can be observed when one examines their influence on a global scale. It is estimated that approximately US $1.5 trillion worth of assets were held in ethical investment funds worldwide at the turn of the century, under investment portfolios of socially and environmentally responsible investments.[76] In early 2007, a group of almost 300 global institutional investors managing funds worth US$41 trillion asked 2 400 of the world's largest companies to disclose how they managed business risks and opportunities stemming from climate change, which is becoming an investment-relevant consideration of growing importance.[77] Mounting evidence also suggests that investors are increasingly investing in ethical investment funds.[78] These funds make investments according to particular ethical and social criteria, and typically avoid investing in companies which engage in practices considered unethical or socially undesirable.[79] Investors are choosing these funds not only because the funds suit their ethical concerns, but also because they believe that these funds' investments carry less exposure to risk.[80]

The consequences of failure

In its 2005 white paper, the Economist Intelligence Unit entitled 'Reputation: Risk of risks'[81] engaged 269 senior risk managers to participate in a survey on risk and reputation. Of a choice of 13 categories of risk, reputational risk emerged as the most significant threat to business out of a choice of 13 categories.[82] Good corporate governance requires observation not only of the law, but of numerous and varied voluntary regulatory mechanisms, both internal and external. In this environment, arguably, a company's reputation has become its most valuable asset.[83]

Enforceable undertakings

Enforceable undertakings under Australian legislation are mechanisms which recognise the value of corporate reputational capital. Enforceable undertakings are sanctions which attempt to translate non-compliance with environmental standards set out in the relevant legislation into reputational loss. Where a breach or alleged breach of environmental legislation occurs, the offending party may be able to avoid prosecution by entering into an enforceable undertaking, by which it promises to act in a certain way (for example, to rehabilitate a polluted area). By using an enforceable undertaking, a company can not only satisfy the desire of public authorities to see that environmental legislation is enforced, but also improve the company's environmental practices and lessen any negative effect on its reputation.

Environmental legislation of the Commonwealth, New South Wales and Victoria provides for the use of these enforceable undertakings.[84] These are voluntary, binding agreements between a person or company with the government authority which oversees the environmental legislation. If the person or company breaches a term of an enforceable undertaking, the government authority can apply to a court for orders directing the person or

73 Parliamentary Joint Committee on Corporations and Financial Services, above n 25, 65
74 Ibid 67
75 Ibid
76 Horrigan, above n 1 at footnote 28 where the author cites Michael Hopkins 'Corporate Social Responsibility: An Issues Paper' (Working Paper No 27, Policy, Integration Department, World Commission on the Social Dimension of Globalisation, International Labour Office, Geneva, 2004) 4.
77 Ibid at footnote 30 where the author cites Nick Ridehalgh and Andrew Petersen, 'Climate for Change Has Arrived', *The Australian Financial Review* (Sydney), 24 May 2007, 63
78 Anne Durie and Laura Horn, 'Sustainability reporting: The role of financial institutions' (2009) 37 *ABLR* 342, 346
79 Julian Donnan, 'Regulating Ethical Investment: Disclosure under the Financial Services Reform Act' (2002) 13 *JBFLP* 155, 156
80 Durie and Horn, above n 78, 346
81 The Economist Intelligence Unit, above n 15
82 Ibid 3
83 Kevin Jackson, 'Global Corporate Governance: Soft law and reputational accountability' (2010) 35 *Brook. J Int'l L.* 41, 47
84 *EPBC Act* (Cth) s486DA; *Protection of the Environment Operations Act 1997* (NSW) s253A; and *Environment Protection Act 1970* (Vic) s67D

company to comply with its obligations.[85]

In May 2009 the Victorian Environmental Protection Authority (*Victorian EPA*) released guidelines for the use of enforceable undertakings under the *Environment Protection Act 1970* (Vic). The key objective of an enforceable undertaking is 'to implement systemic change in an organisation to prevent future breaches' of environmental legislation.[86]

Public awareness is an important feature of the use of enforceable undertakings. The Guidelines state that the Victorian EPA 'considers that enforceable undertakings are matters for the public record in the same way as outcomes of court proceedings. For this reason the [Victorian EPA] will maintain a register of enforceable undertakings open for public inspection.'[87] Public inspection of enforceable undertakings is also possible in the Commonwealth and New South Wales jurisdictions, on websites.[88]

Examples of enforceable undertakings published in recent years include:

- remediation actions after an overflow of diesel into the Thredbo river, NSW[89]
- remediation and preventative actions following damage to an area on the Burrup Peninsula which contained significant examples of Indigenous heritage, including rock art and which was protected as a National Heritage place[90]
- conservation offset action following damage to critically endangered native grasslands in Melbourne.[91]

Though these media releases castigated the offending companies to some extent, they also published the positive steps that the companies were taking to remedy the damage that had been caused. In this way, these publications are not entirely negative for the companies concerned. Other methods of enforcement, such as fines or prosecution, generally do not allow the company to demonstrate a commitment to improved environmental practices. Another reason for which enforceable undertakings might be preferred is that publicity caused by prosecution generally causes stigma to attach to an offending company.[92]

Bad press

Causing harm, or potentially causing harm to the environment is a potential threat to a company's reputation. Linked to the threat is the possibility of reluctance on the part of investors, shareholders and other companies to be seen as supporting a company that has a poor environmental record. Technological advancements in communication via the internet, as well as decentralised and globally available media, such as YouTube or Facebook now mean that information concerning business conduct can be disseminated virtually instantly around the globe.[93] As noted in the Economist Intelligence Unit's paper of 2005[94]:

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85 *EPBC Act* (Cth) s486DB; *Protection of the Environment Operations Act 1997* (NSW) s253A(3) and (4); *Environment Protection Act 1970* (Vic) s67E

86 Victorian Government, *Victoria Government Gazette*, No. G 20; 'Environment Protection Act 1970: Enforceable Undertakings: Guidelines' (14 May 2009) 1202

87 Ibid 1204. See also: New South Wales Environment Protect Authority, *Enforceable undertakings guidelines* (August 2009) 4 <http://www.environment.nsw.gov.au/resources/prpoeo/enforceableundertakingsguidelines.pdf>

88 See: Australian Government Department of the Environment, Water Heritage and the Arts; *Case judgments* <http://www.environment.gov.au/epbc/compliance/judgements.html>; and New South Wales Department of Environment, Climate Change and Water; *Enforceable undertakings* <http://www.environment.nsw.gov.au/prpoeo/enforceableundertakings.htm>

89 Kosciuszko Thredbo Pty Ltd, *Undertaking to the Environment Protection Authority given for the purposes of section 253A by Kosciuszko Thredbo Pty Ltd ACN 000 139 015* (14 August 2009) 5 <http://www.environment.nsw.gov.au/resources/prpoeo/undertakingEPA0005.pdf>

90 Australian Government Department of the Environment, Water Heritage and the Arts; *Company pays out over rock art damage*, Media Release (9 February 2010) http://www.environment.gov.au/about/media/dept-mr/mr20100209.html; Holcim (Australia) Pty Ltd, *Enforceable Undertaking – Undertaking to the Minister for the Environment, Heritage and the Arts given for the purposes of s486DA by Holcim Pty Ltd* (8 February 2010) <http://www.environment.gov.au/epbc/compliance/pubs/holcim-australia.pdf>.

91 Australian Government Department of the Environment, Water Heritage and the Arts; *Company pays out for grass clearing*, Media Release (17 March 2010) http://www.environment.gov.au/about/media/dept-mr/dept-mr20100317.html; Cromwell Property Securities Ltd, *Enforceable Undertaking – Undertaking to the Minister for the Environment, Heritage and the Arts given for the purposes of s486DA by Cromwell Property Securities Limited* (11 March 2010) <http://www.environment.gov.au/epbc/compliance/pubs/enforcable-undertaking-grassland-clearing.pdf>

92 Zada Lipman, 'An evaluation of compliance and enforcement mechanisms in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) and their application by the Commonwealth' (2010) 27 EPLJ 98, 111

93 Jackson, above n 83.

94 Economist Intelligence Unit, above n 15

> *Perception is the biggest threat to reputation today … you can be doing everything right, but if people don't think you are you still have a problem.*[95]

Conclusions

In situations where the stakes are high in relation to environmental risk, failing to prioritise systems to manage that risk can lead to damage to both a company's reputation and its brand, the effects of which can be long lasting. The damage may manifest in negative press, a decline in share value, or a reluctance on the part of investors, shareholders and other companies to deal with a corporation who has failed to live up to society's demand for corporate social responsibility in their approach to environmental management.

The factors which influence corporate behaviour in relation to the environment are numerous and varied. Aside from striving for environmental outcomes, minimising environmental harm, minimising pollution or reducing carbon emissions, corporations are driven by the desire to minimise the risk of measurable damage to their brand or reputation in implementing systems which regulate behaviour and influence corporate culture in relation to the environment.

In combination with legislative requirements, mandatory and voluntary reporting obligations and the growing influence of institutional investors, the landscape in which the modern corporation exists demands demonstrated consideration of environmental risk and impact. In turn, social awareness, public demand and the evolution of government policy shapes the way in which environmental obligations are construed, both under legislation and otherwise. Statutory obligations are directed at protecting environmental health, framed by core sustainability principles which import ideals rooted in international policy and theory developed over decades. The obligations in relation to the environment therefore take on an ethical character, through the recognition of the intrinsic value of the environment and the imperative of preservation of that value into the future. In light of the reputational consequences of breaches of environmental obligations and causing environmental harm as a result, it may be prudent for professional advisers to consider the ethical components of the obligations in advising clients. An obligation to do so however, does not exist at this time in Australia.

95 Ibid 13