return to AMPLA 2005 Table of Contents

Social Responsibility of Resource Corporations

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SUMMARY

The opening statement in Leigh Clifford's paper that corporate responsibility in the resources sector is not, and cannot be, simply about CSR opens up the various layers of meaning that can be found in discussion of corporate social responsibility. This paper examines various approaches to corporate responsibility including compliance, philanthropy, adoption of socially desirable goals and management of relevant issues in the context of a company's business goals. It refers to the broader governance model within which these matters arise for consideration.

There is interest around the world in the social responsibility of corporations – resources companies in particular – heightened by the pervasiveness of corporate businesses in so many facets of life and perceptions of tension between the goals of corporations and the broader public interest.

The paper also draws out the distinction between the internal perspective, that is, the efforts of companies themselves to address relevant issues – as exemplified by Leigh Clifford's paper – and the external perspective where the focus is more on the public policy case for regulatory or other intervention in market behaviour.

Against the background of two inquiries currently under way – one by the Parliamentary Joint Committee on Corporations and Financial Services and the other by the Corporations and Markets Advisory Committee – the paper canvasses questions such as whether the current law regarding duties of directors should be modified to permit or require directors to take into account the interests of groups other than shareholders and whether there is a positive role for government to play in encouraging companies to adopt socially and environmentally responsible business practices including through additional disclosure requirements.

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INTRODUCTION

I was struck by Leigh Clifford's opening statement in which he emphasised that corporate responsibility in the resources centre is not, and cannot be, simply about corporate social responsibility. It raised for me the threshold question of just what is it we mean when we talk about corporate social responsibility. What is it, is it part of – or something apart from – the more general concept of corporate responsibility with which Clifford seems to contrast it?

Clifford's opening statement also leads into the whole question of the governance structure within which corporate business is conducted.

This paper provides some background to the current interest in the responsibilities of companies, draws out various approaches taken by companies, notes issues arising for consideration in current inquiries and refers to developments in corporate disclosure to meet demands for more information.

Heightened Interest

While the issue is not new, we are experiencing a wave of interest in the social responsibility of corporate businesses. This interest is reflected in the efforts of companies themselves to explain better their own practices, in calls by community groups and non-government organisations for improved practices, more information or more regulation, in the growth of self-styled ethical investment funds, in academic and popular writing and in sessions such as this one.

The wave of interest follows hard on the heels of the corporate governance debate – a not unrelated subject – which has attracted so much attention in the past few years.

The level of interest is reflected in the fact that there are at present two inquiries under way. The Corporations and Markets Advisory Committee has been asked to provide advice to the government on certain aspects of corporate social responsibility, and more recently the Parliamentary Joint Committee on Corporations and Financial Services has instituted its own inquiry.

The interest is not confined to Australia. The subject is attracting considerable attention in Europe, in particular, including initiatives promoted by the European Commission and several member states of the European Union.

The Economist published a report earlier this year[1] including the results of a global survey of senior executives of large companies and institutional investors. One of its findings was that while 44% of executives and investors in an earlier survey (in 1999) considered corporate responsibility to be an essential and important consideration in their business activities, that figure had virtually doubled to 85% of respondents in 2004.

[1] 22 January 2005.

As with corporate governance, the heightened interest in the social responsibility of corporate businesses – sometimes couched in terms of corporate citizenship – reflects the pervasiveness of those businesses in so many facets of our life together with concerns about the transparency and accountability of the ways in which they conduct their affairs. The resources industry has featured prominently in the debate – partly because of the visibility of many of its operations and their effects, and also because of the location of many projects in developing countries or other sensitive or challenging locations. Names such as OK Tedi, Bougainville, Brent Spar and Wittenoom still resonate with a wide public and disputes and claims continue to arise around issues of the environment, public health, human rights and so on.

Of course issues of social responsibility are not confined to resource and energy companies; the debate extends to other sectors including manufacturing, chemicals and financial and other services.

It should be noted also that, while most debate is in terms of corporate social responsibility, the underlying concerns can extend to all business enterprises, whether incorporated or not, as well as state owned entities or non-profit or other organisations in whose name business is conducted or other activities are undertaken. It is not difficult to think of public bodies in areas as diverse as hospital administration, public transport and police administration whose management performance has raised questions of social responsibility.

Lack of Definition

While a phrase like corporate social responsibility – or CSR – may be a convenient tag, confusion can arise from its generality and lack of definition. We might describe corporate social responsibility as having a high level of brand recognition as an issue, but what the issue involves and what is driving it are more complex questions. The broad-brush notion of corporate social responsibility is one that invites support, just as corporate governance does. Of course, what is judged to be socially responsible in a particular instance may sometimes lie in the eye of the beholder. Care is needed in drawing out the issues, in considering their implications and in keeping clear the perspective from which those issues are being addressed.

Commentary is sometimes presented from an internal corporate perspective with a focus on the business case for pursuing socially responsible objectives and on the organisational challenges in imbedding a desired approach. Leigh Clifford has provided us with such a perspective in his paper. Others come at the topic from an external perspective with a focus more on the public policy case for regulatory or other intervention in corporate behaviour.

My own starting point is that we are talking about the way in which corporate bodies behave or, more precisely, the way in which those people who conduct the affairs of companies, or act in their name, cause things to be done. To what ends

are or should their activities be directed? What is it that drives the decision-making of corporate leaders and, from an external perspective, what can the community reasonably expect from them or should governments require?

A more particular focus looks at the extent to which corporate decision-making takes into account matters relating to the social, environmental and broader economic circumstances in which the company operates.

The Nature of Corporations

The very success of the corporate entity as an engine of economic activity – as a vehicle for harnessing capital and human, physical and intellectual resources to productive ends – is sometimes taken for granted. I recall Justice Michael Kirby being reported some years ago as referring in a speech to "the brilliant idea of the corporation which remains one of the few truly creative contributions of the law to the economic wellbeing of the world and the economic liberty of the people".

Yet underlying the debate about social responsibility is a lingering perception of an inherent tension between the overriding duty of directors – to the wellbeing of the company constituted by the shareholders – and the general good of the community. This is often expressed in terms of the pursuit of short term gains in the form of profits for shareholders at the expense of others with an interest in the welfare of a company or whose interests may be affected by its activities. Similarly it is sometimes suggested that the taking account by directors of the interests of other stakeholders is in some way contrary to the best interest of the company.

There are concerns too I think about differences between the social responsibility of individuals acting on their own account and the collective responsibility of individuals acting in a corporate or other organisational environment. Some of the more interesting analyses of the corporate enterprise – going beyond the classical legal and economic models – brings sociological, psychological, political and even psychiatric analysis to bear on how corporations actually operate. Professor Eric W Orts of the Wharton School referred to developments in this field and the search for a social theory of business at a recent corporate law seminar.[2]

Again, Leon Gettler, in his recently published work,[3] undertook a psychological and psychiatric study of corporate failures.

Justice Neville Owen, in his Royal Commission report on the failure of HIH Insurance, referred to behavioural aspects including the influence of dominant individuals and the apparent failure of certain individuals, advisers as well as corporate personnel, to stand back and ask themselves the question "is this right?" in relation to particular transactions or decisions.[4]

[2] Corporate Law Seminar Series, University of Sydney, Faculty of Law, 19 July 2005.

[3] *Organisations Behaving Badly, a Greek Tragedy of Corporate Pathology* (Wiley, 2005).

[4] Some of these themes have been depicted in popular culture over the years including, for those with long memories, in Sloan Wilson's successful novel of the 1950s, *The Man in*

The question that is sometimes thrown up is whether in effect the corporate employee leaves his or her conscience behind on entering the workplace.

Debate around the various approaches to corporate responsibility seems to turn in part around the basic assumptions people make about the nature of corporations and their behaviour.

At the benign end of the spectrum, socially responsible corporate behaviour may be seen as reflecting good corporate citizenship and enlightened self interest. Thomas L Friedman in his recent book *The world is flat* says:[5]

> "The balance of power between global companies and individual communities in which they operate is tilting more and more in favour of the companies, many of them American based. As such, these companies are going to command more power, not only to create value but to transmit values, than any transnational institutions on the planet."

He offers the view that:

> "The bottom line is that a growing number of companies have come to believe that moral values, broadly and liberally defined, can help drive shareholder values and that if you want to be a great company today, you have to be a good company."[6]

On the other hand is a more malign view of the corporation reflected for example in the book *The Corporation: the pathological pursuit of profit and power.*[7] A premise of this work is that corporations, as institutions, have a mandate to pursue their own self-interest regardless of harmful consequences to others. This view was perhaps exemplified by the corporate adviser who observed: "if you find an executive who wants the corporation to take on social responsibilities, fire him, fast".

A benign view of the corporation may give rise to the question, from a public policy viewpoint, whether there are any impediments preventing directors from acting in ways designed to promote socially responsible goals as they see them. A malign view is more likely to see social responsibility as calling for some form of corrective to be imposed on directors whether they like it or not.

VARIOUS APPROACHES TO CORPORATE RESPONSIBILITY

At least four differing – although not mutually exclusive – approaches seem to emerge.

the Gray Flannel Suit (and the subsequent movie starring Gregory Peck) with its indictment of corporate culture and message about the importance of taking responsibility for one's own life.

5 Allen Lane, 2005, at 297.

6 Ibid, at 302.

7 Joel Bakan (Free Press, 2004) and the film based on it.

Compliance

The first approach views social responsibility as essentially an issue of compliance. On this approach businesses are required to comply with applicable laws or guidelines whatever they may be. This approach was reflected in some of the answers provided in *The Economist* report which noted that "there is a wide variation in approaches to CSR. At one extreme is a legalistic approach in which a company goes by the book on CSR, following a set of specific guidelines or measurements".

Other businesses may approach compliance in a more positive fashion and seek to comply with the spirit as well as the letter of applicable laws or guidelines. They may take active steps to build and maintain a corporate culture of compliance and not accept breaches as simply part of the cost of doing business.

Companies are not of course operating in a legal vacuum. Public policy is commonly implemented through laws that prohibit particular conduct by corporations (or other persons) that is regarded as contrary to the public interest. Laws for the protection of the environment, promotion of competition, occupational health and safety and many other subjects fall into this category. While such laws may prescribe certain things to be done, such as the keeping of records or notification of specified events, they generally fall short of positively prescribing how companies or others should act. As has been oft-observed, you can punish bad behaviour but you cannot legislate for good behaviour. It is one thing to penalise dangerous driving, and quite another to legislate for people to drive defensively.

Philanthropy

A second approach is that social responsibility involves corporate philanthropy in its various forms, that is, companies being able and encouraged to give something to the community in financial or other ways in return for the opportunity they have to carry on business. Philanthropy in this context can go beyond giving donations to worthwhile causes. It can extend to corporate sponsorship, involvement with particular community programs, staff volunteering and work place giving.

Issues have been raised about the place of corporate charity viewed from a governance point of view. Sir Gerard Brennan referred in an article to a tension between corporate charity and the directors' duty to apply a company's resources for the benefit of shareholders. He said:

> "There are sound reasons of policy for imposing a limitation on directors' powers to donate corporate assets. Investors, whose charitable inclinations are diverse, do not authorise directors to dispose of corporate assets to charitable objects of the directors' choice. The choice should remain with the individual investor when he or she obtains his or her share of the distributed profits. From the moral viewpoint, there is no virtue in a

directors' [sic] resolution to dispose of corporate assets to a charitable object. Virtue consists of the giving of what is one's own, not in the giving of assets that belong to another."[8]

Similarly, Warren Buffet, chairperson of Berkshire Hathaway said:

> "Just as I wouldn't want you to implement your personal judgments by writing checks on my bank account for charities of your choice, I feel it inappropriate to write checks on your corporate 'bank account' for the charities of my choice."[9]

The report of the Royal Commission into the Failure of HIH Insurance touched on issues relating to corporate donations. The Royal Commissioner, Justice Owen, concluded that HIH's procedures in respect to donations constituted a significant departure from appropriate corporate governance practice. He made the general observation that:

> "The board and management of a company have a good deal of discretion as to how they use the company's funds so long as they act reasonably in the interests of the company…, companies not uncommonly make donations to charitable or philanthropic causes or other discretionary contributions including to political parties.
>
> While there is nothing inherently wrong with any of this, it is an area where a board's stewardship responsibilities call for deliberation on how a payment will serve the company's interests and appropriate accountability to shareholders on whose behalf that discretion has been exercised."[10]

Justice Owen also said that "however laudable the object of a donation, discretionary payments of this kind from the funds of shareholders should be undertaken in a transparent and justifiable way with full regard to the interests of shareholders."[11]

On this approach, boards do have discretion to support philanthropic causes so long as that support can be justified in terms of the company's business interests. Particular donations may be seen as promoting a company's interests, improving staff morale or motivation, enhancing support in relevant communities or so on. Some companies communicate the approach that they take, including commitments such as the contribution of a specified percentage of pre-tax profits to relevant causes.

In this connection, while an anonymous donation by an individual may be seen as particularly commendable, directors would probably find it more difficult to justify an anonymous corporate donation.

[8] Hon Sir Gerard Brennan, "Law values and charity" (2002) 76 *Australian Law Journal* 492 at 497.

[9] Buffet, Berkshire Hathaway Inc, Shareholder – Designated Contributions 1981.

[10] Report of the HIH Royal Commission Vol 1, p 119.

[11] Report of the HIH Royal Commission Vol 1, p 120.

Corporate Adoption of Environmental, Social and Economic Goals

This third approach is based on the view that corporations should operate in a manner that is consistent with, or advances, a society's environmental, economic and other goals, such as sustainability and community development.

The primary focus of this approach is the impact of a company's external behaviour on the broader community. However, matters related to internal corporate governance, for instance, the behaviour of decision-makers in regard to possible conflicts of interest, have also been characterised as social responsibility issues in light of their possible effect on community standards of fairness and perceptions of commercial morality.

On one view, companies may or should pursue these goals provided there is some perceived benefit to the company (which may include avoiding a detriment) in so doing. This approach to corporate decision-making is not new. For instance, a survey conducted in the early 1990s reported that a sample of directors of Australia's top 500 companies "felt that the quest for the good corporate citizen label should not be incompatible with the achievements of the commercial or business objectives of the company. In other words, the goal of good corporate citizenship should not get in the way of the profit goal or of the interests of shareholders".[12] An example from that period was the decision by certain corporations to stop using environmentally damaging propellants in aerosol containers, given the perceived threat to profitability by community reaction to those propellants.[13]

On another view, social responsibility permits or requires corporations to adopt these goals as ends in themselves, regardless of whether this advances the interests of the corporation itself. Corporations should be obliged to act in accordance with these goals, even if it reduces their profitability.

Good or Enlightened Management

A fourth approach starts from the premise that many of the economic, social and environmental considerations referred to discussion can be characterised, in the context of a particular company, as factors that need to be managed in pursuit of the company's business goals. Viewed in another way those factors can be seen as actual or potential corporate risks, the proper management of which may be integral to the company's overall financial performance and its long-term shareholder value. This approach may have the same end result as the third approach, but the focus is different. Whereas the third approach may see

[12] Tomasic and Bottomley, "Corporate governance and the impact of legal obligations on decision-making in corporate Australia" (1991) 1 *Australian Journal of Corporate Law* 56.

[13] B McCabe, "Are corporations socially responsible? Is corporate social responsibility desirable?" (1992) 4 *Bond Law Review* 1.

environmental, social and economic factors as ends in themselves, the fourth approach sees them as relevant so far as they may affect the overall achievement of the company's business goals including the management of its risks.

CURRENT INQUIRIES

Reference was made earlier to the inquiry being conducted by the Corporations and Markets Advisory Committee (CAMAC), and to the Parliamentary Joint Committee on Corporations and Financial Services which will cover similar ground in its own inquiry.

CAMAC has been asked to consider a series of questions which, in effect, test various possible bases for regulatory or other intervention in corporate behaviour. In essence, CAMAC has been asked to consider:

- the ambit of the current law regarding the duties of directors;
- in light of this, whether some provision should be introduced to permit, or require, directors to take into account the interests of specific groups of persons in addition to shareholders, or the broader community, in corporate decision making;
- whether there may be a positive role for government to play in encouraging companies to adopt socially and environmentally responsible business practices and, if so, what measures government might take;
- whether the *Corporations Act* should require certain types of companies to report on the social and environmental impact of their activities.

The inquiry by the Parliamentary Joint Committee on Corporations and Financial Services was announced on 23 June, with a reporting date of 29 November this year. The Committee has sought submissions and is expected to hold hearings.

CAMAC for its part is developing a discussion paper, with a view to publication later this year. The Advisory Committee will consider submissions on that paper before settling its report.

A starting point, in any consideration of changes in directors' duties in order to promote socially responsible behaviour, is an understanding of the present position. It is also important to consider how any new proposals would fit into the overall governance structure for companies including the enforcement mechanisms.

DIRECTORS' DUTIES

Common Law

At common law, directors are obliged to act in the interests of "the company as a whole". The relevant case law equates this concept with the financial wellbeing of shareholders and, when the company is insolvent or near insolvent, the financial interests of creditors.

These principles have developed through a number of leading cases. For instance, in *Hutton v West Cork Railway Co,*[14] the court considered the circumstances in which directors could spend corporate funds for the benefit of their employees or others, over and above any legal obligations to them. The court said:

> "They [the directors] can only spend money which is not theirs but the company's, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company. … The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale expect [sic] such as are required for the benefit of the company … charity has no business to sit at a board of directors qua charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it [the company], and to that extent and in that garb … charity may sit at the board, but for no other purpose."

In *Dodge v Ford Motor Co,*[15] a US court upheld a shareholder's claim that the Ford Motor Co be compelled to pay a dividend rather than plough back all profits to expand the business and thereby "to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes". The court held that "a business corporation" is organised and carried on primarily for the profit of shareholders' and directors could not act in a way primarily to benefit persons other than shareholders.

In *Parke v Daily News,*[16] the court held that a corporation cannot take into account the interests of past, as opposed to current, employees, as that would not further the financial interests of current shareholders.

The subsequent trend has been to give company directors a greater discretion in the factors they may take into account in determining what is in the best interests of the corporation and the financial wellbeing of its shareholders. For instance, in *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance Oil NL),*[17] the High Court observed that:

> "Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in

[14] (1883) 23 Ch D 654.
[15] 170 NW 668 (1919).
[16] [1962] Ch 927.
[17] (1967) 121 CLR 483.

> good faith and not for irrelevant purposes, is not open to review in the courts."

In *Teck Corporation Ltd v Millar,*[18] a Canadian court recognised a broader context in which to judge the advancement of the interests of the company and the financial wellbeing of its shareholders.

> "The classical theory that once was unchallengable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.
>
> I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of the company's shareholders in order to confer a benefit on its employees: *Parke v Daily News* [1962] Ch 927. But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company."

Directors of a company approaching insolvency are obliged to consider the interests of creditors as part of the discharge of their duties to the company. However, directors have no direct fiduciary duties to creditors.[19] In consequence, the duty the directors owe to the company is not enforceable by creditors.

Corporations Act Duties

The common law duties of directors, as restated or supplemented in the *Corporations Act*, include the requirements for directors to act with reasonable care and diligence (s 180) and in good faith in the best interests of the corporation and for a proper purpose (s 181).

Section 180

Section 180 of the *Corporations Act* requires directors or other officers of a corporation to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise in the same position.

For the purpose of exercising these duties, directors have the benefit of the business judgment rule in s 180(2), which applies where the directors can show that they rationally believed a judgment was in the best interests of the corporation. Under this provision, "[that] belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold."

[18] (1973) 33 DLR (3d) 288.

[19] *Spies v The Queen* (2000) 201 CLR 603.

The courts have held that the statutory formulation adopts an objective standard of care and diligence.[20] Failure to exercise reasonable care and diligence is not established unless it was reasonably foreseeable at the time the directors acted (not through the benefit of hindsight) that their conduct might harm the interests of the company.[21] In applying that test, the foreseeable risk of harm must be balanced against the potential benefits which could reasonably accrue to the company from the conduct.[22] However, it would be a breach of the duty of care and diligence for directors to allow a corporation to enter into a transaction that had no prospect of producing a benefit to it.[23]

Section 181

Section 181 of the *Corporations Act* obliges directors to exercise their powers and discharge their duties "in good faith and in the best interests of the corporation and for a proper purpose".

According to a leading text:

"• directors are required to act in the interests of the corporation, but their decisions do not have to satisfy the additional standard of being the best possible decisions for the corporation;[24]
- directors must comply with a company's constitution. Shareholders may choose to approve a constitution that requires the board to take into account various environmental, social or economic factors, or the interests of specified groups in addition to shareholders;[25]
- directors are not obliged to focus only on maximising shareholder profits in the short term. The interests of the corporation can include its continuing well-being in a longer-term context. Also, although there is no case that explicitly requires directors to take into account the interests of employees, customers, contractors and the community, 'management may implement a policy of enlightened self-interest on the part of the company but may not be generous with company resources when there is no prospect of commercial advantage to the company'."[26]

It is also arguable that under s 181, company directors, as part of their duty to act in the best interests of the company, must see that the company complies with

[20] *ASIC v Vines* [2005] NSWSC 738 at [1058]-[1060].

[21] In *ASIC v Vines* [2005] NSWSC 738 at [1077], Austin J stated, in relation to the forerunner of s 180 that "The statutory standard [of care and diligence], like the general law, permits the court to take into account the circumstances of the particular case, and requires the standard to be applied to those circumstances as they existed at the relevant time, without the benefit of hindsight".

[22] *Vrisakis v ASC* (1993) 11 ACSR 162 at 211-213; *ASIC v Doyle* (2001) 38 ACSR 606 at 641, para [222].

[23] *Gamble v Hoffman* (1997) 24 ACSR 369; *ASIC v Adler* (2002) 41 ACSR 72.

[24] Austin, Ford & Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, Butterworths, 2005) at 7.2.

[25] Ibid, at 7.4, 7.6.

[26] Ibid, at 7.12-7.13.

environmental, workplace health and safety, consumer protection and other laws that are relevant to corporate social responsibility.

Enforcement of Fiduciary Duties

Civil penalty and criminal liability

Possible civil penalties for breach of the statutory fiduciary duties, including ss 180 and 181, include a pecuniary penalty order of up to $200,000, compensation orders and disqualification from managing a corporation. The criminal penalties for breach of s 181, where the fault elements in s 184(1) are established, can include up to five years imprisonment. A convicted person is also automatically disqualified from managing a corporation for at least five years.

Injunction and/or damages

Where a person "has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute" a contravention of the *Corporations Act*, including ss 180 and 181, the court may, on the application of the Australian Securities and Investments Commission (ASIC), or of a person whose interests have been, are or would be affected by the conduct, grant a final or interim injunction to stop the conduct (s 1324(1),(4)) or order the person in breach to pay damages (s 1324(10)).

The courts have indicated that for a person to show that his or her interests "have been, are or would be affected by the conduct", that person must have an interest more than merely an ordinary member of the public.[27] A later case suggests that where ASIC, rather than a private litigant, is an applicant, the court is more likely to give greater weight to the broad question whether the injunction would serve a purpose within the contemplation of the *Corporations Act*.[28] Also, where ASIC is acting to protect the public interest, the absence of any undertaking as to damages on its part will usually be of little consequence.[29] By contrast:

> "where the proceedings are brought to advance a plaintiff's private interests, then if such an undertaking [as to damages] is not proffered even though it is likewise exempted under [s 1324(8)], the court may take that circumstance into account as a matter of practicality, common sense and fairness in determining where the interests of justice lie and whether 'it is desirable' to grant the injunction."

[27] *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* (1984) 8 ACLR 609; *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 23 ACSR 715.

[28] *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd* (2002) 42 ACLR 605 at 613.

[29] Ibid at 614.

Statutory derivative actions

A shareholder may seek to bring a statutory derivative action under which that person can act in the name of the company to enforce civil remedies against any director, including for breach of the fiduciary duties under ss 180 and 181.[30]

Oppression

Shareholders may bring an oppression action against directors in appropriate circumstances, including where directors have breached their statutory fiduciary duties under ss 180 and 181.[31]

Question arising

A key question to be explored is whether, or in what circumstances, companies which are seeking to pursue socially responsible goals feel constrained in so doing by their understanding of the current law of fiduciary duties. It is noteworthy that Leigh Clifford in his paper does not refer to any such legal constraint in pursuing the corporate approach that he outlines.

POSSIBLE CHANGES TO DIRECTORS' DUTIES

A Permissive Provision

In considering the question of whether to introduce a permissive provision – that is a provision that would expressly permit directors to have regard to the interests of groups other than shareholders – one possible starting point is the statutes found in some 30 of the US states (but not including Delaware) which provide for directors to take into account in their decision-making the interests of various stipulated groups, such as employees or the communities in which a company operates, in addition to shareholders. These statutes were developed in response to concerns raised by corporate management about hostile takeovers.

There has been little case law to illuminate the possible implications of these provisions in a broader context beyond takeover defence.

An initial question is whether and how far a permissive provision of this nature would assist corporate decision-makers in pursuing what they see as socially responsible goals. Consideration would also have to be given to the question whether such a provision could result in directors becoming less accountable by enabling them to choose between a range of interests in justifying their actions. The thrust of efforts in recent years, through legislative changes and the promotion of more effective governance processes, has been to make the accountability of directors to shareholders more effective. Is there a difference between taking account of the interests of particular groups and being legally accountable to

[30] Part 2F.1A of the *Corporations Act.*
[31] Part 2F.1 of the *Corporations Act.*

them? Would shareholders be left with a less effective remedy? Would a permissive provision create enforcement problems for the regulator?

A Mandatory Provision

A mandatory provision would go further and require directors to take into account the interests of particular groups other than shareholders. A key question is whether such a provision would wrap up such an obligation within the overall duty of directors to the company or would seek to balance that obligation against that duty in some way.

An example of a provision containing a mandatory element can be found in a recently released draft bill in the United Kingdom that, if enacted, would oblige directors, where appropriate, to take long term and various societal factors into account in advancing the success of the company, albeit for the benefit of the shareholders as a whole.

Clause B3 of the draft Company Law Reform Bill is as follows.

"*Duty to promote the success of the company for the benefit of its members*

(1) As a director of a company you must act in the way you consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.

(2) Where or to the extent that the company is established for purposes other than the benefit of its members, your duty is to act in the way you consider, in good faith, would be most likely to achieve those purposes.

(3) In fulfilling the duty imposed by this section you must take account (where relevant and so far as reasonably practicable) of –

   (a) the likely consequences of any decision in both the long and the short term,

   (b) any need of the company –

      (i) to have regard to the interests of its employees,

      (ii) to foster its business relationships with suppliers, customers and others,

      (iii) to consider the impact of its operations on the community and the environment, and

      (iv) to maintain a reputation for high standards of business conduct, and

   …

   (g) the need to act fairly as between members of the company who have different interests.

(4) 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."

The aim according to the UK white paper accompanying the bill is to achieve "enlightened shareholder value". While couched in a mandatory form, there appears to be an element of circularity in the draft provision. It says, in part, that

directors *must* take account of *any* need of the company to consider the impact of its operations on the community and the environment, or the interests of employees and so on, leaving open the question whether there is in fact any such need.

GOVERNMENT ENCOURAGEMENT

Government encouragement of socially responsible corporate behaviour (beyond the basic setting of rules and limits by legislation) can take a number of forms including tax incentives, programs such as the Prime Minister's Community Business Partnership and advocacy ("jawboning"). The United Kingdom and France both have a designated Minister for Corporate Social Responsibility.

DISCLOSURE

The encouragement or prescription of disclosure of matters relevant to social, environmental and other concerns is another avenue for possible government action. There is considerable activity in this area, both initiated from the corporate side and stimulated by regulatory initiatives. Leigh Clifford, in his paper, has emphasised the importance for mining and energy companies of explaining better what they are doing. An interesting question is whether disclosure of more detail about a company's safety or environmental record, for example, may in itself generate competition (within a company and between companies) to improve performance.

Triple Bottom Line Reporting

There is a move internationally towards corporate reporting of environmental and social, as well as financial, matters. The question is what form such reporting should take, given the challenge in devising yardsticks for the measurement of societal outcomes which by their nature can be more difficult to capture than profit performance. The Global Reporting Initiative, which appears to have been adopted by many of the world's biggest companies, is but one example.

An emerging proliferation of CSR disclosure principles and standards has led to calls for a single, universally accepted method of measuring corporate responsibility, so that enterprises can be compared across borders and across industries. Some recent research findings in Australia suggest that there is considerable diversity in the scope and format of current sustainability reports, as well as a lack of comparability between these reports.[32] Some commentators have raised the idea of a central international body to achieve this end, with a role

[32] CPA Australia, *Sustainability Reporting: Practices, Performance and Potential* (July 2005).

similar to the International Accounting Standards Board. Whether the challenge of developing a more effective framework for reporting non-financial matters should be left to accounting bodies is another question.

Disclosure Provisions in Australia

Another question relevant to the current inquiries is whether the current corporate disclosure provisions in the *Corporations Act* that go beyond financial reporting, in particular s 299(1)(f) and s 299A, supported by the ASX Listing Rules and the ASX Corporate Governance Council Principles 7 and 10, already require the disclosure of sufficient non-financial information to meet the needs of the market.

Annual reports

All corporations, other than some small proprietary companies, must prepare and file with ASIC an annual report comprising a financial report and a directors' report (s 292). In some cases, small proprietary companies must also comply with this requirement (ss 293, 294). Annual reports are available to the public.

Financial report

The Act prescribes the content of the annual financial report, including various declarations by directors and others concerning solvency and compliance with accounting standards (ss 295-297).

Directors' report

The Act also prescribes the content of the annual directors' report. This covers a broad range of general information concerning the operation of the corporation, including its principal activities and outcomes during the year (ss 298-300A). Within these requirements are some provisions that are directly relevant to the broader environmental and social context of a corporation's activities, namely:

- s 299(1)(f)
- s 299A.

Section 299(1)(f)

Section 299(1)(f), which came into effect in July 1998, provides that:

> "if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory — [the annual directors' report must] give details of the entity's performance in relation to environmental regulation."

Section 299A

This provision requires listed public companies to include in their annual directors' report information that shareholders would reasonably require to make an informed assessment of:

- the operations of the company;
- the financial position of the company, and
- the company's business strategies and its prospects for future years.

The Explanatory Memorandum to s 299A indicated that the primary purpose of the new provision was to respond to the HIH Royal Commission recommendation 13 concerning the need to include an operating and financial review in annual reports. One of the consequences of the provision may be that we will see more reporting of environmental or social matters in the context of their effect on operations, financial position, business strategies or future prospects.

The provision has only been operative since July 2004. How companies interpret the provision, and the amount of environmental or social information they provide, will become apparent when the annual reports for 2004-2005 are published.

Fund managers

It is relevant also to mention s 1013D(1)(l), introduced in 2002, which requires superannuation and other fund managers, in offering products with an investment component, to disclose the extent to which they have taken various environmental, social and ethical considerations into account in their selection of those investments.

Continuous disclosure

Each listed disclosing entity is required by virtue of ss 674-678 of the *Corporations Act* and ASX Listing Rule 3.1 to disclose to the Exchange "any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities". Some exceptions apply.

The continuous disclosure requirement would cover environmental, social or economic information relevant to the entity's activities where that information is materially price-sensitive.

United States Disclosure Requirements

It is interesting to compare the Australian position with the relevant requirements for disclosure in the USA.

SEC regulations

The Securities and Exchange Commission (SEC) reporting obligations under Items 101, 103 and 303 of Regulation S-K include environmental disclosure requirements. These requirements apply to all companies subject to SEC rules (registrants).

Each item employs the concept of "materiality" as a disclosure trigger. SEC reg 240.12b-2 defines "material" as follows:

> "the term 'material', when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered."

Goals of environmental disclosure

The US Environment Protection Authority (EPA) in 2001 summarised the goals of these disclosure requirements, as they apply to environmental factors, as follows:

> "The federal securities regulatory system relies on US Securities and Exchange Commission registrants to fully disclose material information to actual and potential shareholders to ensure they can make informed investments, and for proper market functioning. Moreover, full and fair disclosure of material information related to a firm's environmental performance, compliance and liabilities is essential if stock markets are to accurately reflect the financial condition of publicly traded companies."

Item 101

This item requires each registrant to file a general description of its business.

This description must include information about the material impact that environmental regulations will have on the registrant's capital expenditures, corporate earnings, and general competitive position. Under (c) *Narrative description of business*, para (xii):

> "Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material."

Item 103

This item requires each registrant to disclose information relating to legal proceedings.

Paragraph 5 requires disclosure, on at least a quarterly basis, of any actual or pending administrative or judicial proceedings involving the registrant that arise under federal, state or local provisions that have the primary purpose of protecting the environment.

This disclosure requirement is triggered if:

- the proceedings are material to the business or financial condition of the registrant
- the relief sought amounts to more than 10% of the registrant’s current assets, or
- government sanctions would amount to more than US$100,000.

Item 303

This item requires disclosures in the form of a management discussion and analysis (MD&A).

Paragraph (3)(ii) of this Item requires the MD&A to:

> “Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favourable or unfavourable impact on net sales or revenues or income from continuing operations.”

An EPA Enforcement Alert (October 2001) applies this requirement to environmental contingencies.

CONCLUSION

Debate around the responsibilities of corporations will not go away. As participants in so much activity around the world, and powerful engines of enterprise, companies and those who run them can expect to be judged on their performance, activities and decisions. They have to anticipate or respond to the sentiments of investors – including ethical funds – to the needs and preferences of suppliers as well as customers, to the opinion and regard of employees and local communities as well as the policies of governments.

The views and advocacy of non-government organisations or special interest groups, and public opinion more generally, all affect the corporate business environment. Leigh Clifford has emphasised in his paper the need for companies – mining and energy companies in particular – to explain better what they are doing and their overall contribution to society.

We are seeing initiatives by some companies to improve the scope, standard and detail of their reporting on environmental and other issues. Sometimes this reporting takes the form of a special social responsibility report separate from a company's annual report. Perhaps the full development of this process will see the integration of this "special" reporting into the company's general reporting process. Likewise, the maturing of corporate efforts may see greater integration of the handling of health, safety, environment, community and like issues into general management – and more alignment of those issues with business strategy – just as the achievement of effective governance is embedded in principles and culture rather than the adoption of particular forms and processes.

At the same time, the question whether more is called for from a government or regulatory perspective is live. The current inquiries in Australia provide an opportunity for those who are interested to address the issues and make their views known. In considering any new proposals, regard will need to be had to how they fit into or would change the overall framework for the governance of companies.

return to AMPLA 2005 Table of Contents