CORPORATE SOCIAL RESPONSIBILITY, THE BUSINESS JUDGMENT RULE AND HUMAN RIGHTS IN AUSTRALIA — WARM INNER GLOW OR WARMING THE GLOBE?

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Corporate social responsibility ('CSR') has had a renaissance in corporate governance. CSR has been regarded more often as a commercial law concept which has been readily applied in the commercial boardroom but has received little judicial consideration in the courtroom. Recent corporate reform in Australia in relation to directors' duties, specifically the business judgment rule, has provided a 'safe harbour' corporate governance framework for the exercise of directors' duties generally, including, and perhaps unexpectedly, in relation to CSR-related activities. More broadly, the concepts which underpin CSR are also consistent with contemporary human rights developments. Importantly, CSR also has a potential role to play in relation to corporate attitudes towards climate change, provided it is supported by active decision-making by directors of both transnational corporations and small to medium enterprises.

I INTRODUCTION

Corporate social responsibility ('CSR') has had a renaissance.[1] Whilst the concept of CSR has existed for some time,[2] over the last two decades CSR has been one of the catchphrases of corporate governance, both internationally and in Australia. The suggested benefits of the adoption of CSR principles have included positive outcomes in diverse areas of human and corporate activity. The breadth of CSR's possible application has included beneficial impacts in relation to employment, human resources and the work environment, reputation and risk management, brand recognition and differentiation, environmental protection, community

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1 The adoption and consideration of CSR principles has not been a new phenomenon. See David L Engel, 'An Approach to Corporate Social Responsibility' (1979) 32 *Stanford Law Review* 1; Robyn Lansdowne and Julian Segal, 'The Social Responsibility of Modern Corporations' (1978) 2 *University of New South Wales Law Journal* 336.

2 Ramsay observes that the debate has been in existence for at least 70 years: Ian Ramsay (ed), *Corporate Governance and the Duties of Company Directors* (Centre for Corporate Law and Securities Regulation, 1997) 8; this is reflected in the well-known debate between A Berle and E Dodd: A Berle, 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1145; E Dodd, 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145; A Berle, 'For Whom Corporate Managers are Trustees: A Note' (1932) 45 *Harvard Law Review* 1365; see also Marina Nehme and Claudia Koon Ghee Wee, 'Tracing the Historical Development of Corporate Social Responsibility and Corporate Social Reporting' (2008) 15 *James Cook University Law Review* 129.

involvement, voluntary ethical conduct in place of formal legislative regulation, the positive promotion of otherwise negative industries, investment attraction for 'socially responsible investment' and access to global markets and government or publicly-funded projects.[3]

In this article the current framework of the CSR debate in Australia is identified in Part II, including the battle both for meaning and acceptance of the concept, and the charge that it is a 'toothless tiger'. Part III of this article considers the extent to which CSR principles have been regarded more as commercial boardroom concepts rather than as engendering judicial consideration in the courtroom. Part IV of this article considers the critical aspects of the business judgment rule which was introduced into Australian corporate law in 2000 together with its intersections with CSR considerations. Part V considers the extent to which CSR principles are consistent with modern human rights developments. Part VI identifies that CSR's next challenge is in the role which it may play in relation to global warming. Part VII identifies the extent to which CSR needs to be considered by all corporate operators, large and small, due to the central roles played both by transnational corporations and small to medium enterprises in most national economies, including the Australian economy.

II CSR — WHAT DOES IT MEAN AND DOES IT HAVE ANY TEETH?

The observation has been made frequently that CSR is difficult to define. Despite the difficulty in defining CSR with precision, the debate and discussion about it and its implications continues to rage,[4] and it has been said to have become a 'mini-industry' in both business and academic circles.[5] One European definition of CSR which helpfully summarises its core elements and provides a useful working definition is that CSR is:

> a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.[6]

3 Ray Broomhill, 'Corporate Social Responsibility: Key Issues and Debates' (Dunstan Paper No 1, 2007); Council of the Bars and Law Societies of the European Union ('CCBE') lists 14 opportunities by the adoption of CSR policies: CCBE, 'Corporate Social Responsibility and the Role of the Legal Profession — A Guide for European Lawyers Advising on Corporate Social Responsibility Issues' (September 2003) 7. See also Helen Anderson and Wayne Gumley, 'Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment' (2008) 29 *Adelaide Law Review* 29.

4 Broomhill notes more than 800 journal articles on CSR and the establishment of numerous University think tanks committed to research into CSR: Broomhill, above n 3, 37. Lumsden and Fridman observe that much of the recent literature does little to define an actual problem: Andrew Lumsden and Saul Fridman, 'Corporate Social Responsibility: The Case for a Self-Regulatory Model' (2007) 25 *Company and Securities Law Journal* 147, 153.

5 Subhabrata Bobby Banerjee, *Corporate Social Responsibility: The Good, the Bad and the Ugly* (Edward Elgar, 2007) 1.

6 European Commission, *Promoting a European Framework for CSR*, Green Paper (2001) 6.

Not surprisingly, the very premise upon which CSR is based is said to clash with the 'invisible hand' of the market economy about which Adam Smith famously remarked that '[i]t is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own self-interest.'[7]

CSR's critics and its promoters are said to fall into at least three discernible schools of thought and practice.[8] The first school is the 'neo-liberal' school which is dominated by the call for the voluntary adoption of CSR principles by corporations and is premised on the benefits of CSR predominantly as a risk management and promotional strategy. The second school is the 'neo-Keynesian' school whose adherents tend to emphasise the importance of stakeholders but, again, on a voluntary basis. The final school is the 'radical political economy' school which presses for a different set of assumptions about the role of corporations in society and emphasises that the rationale of CSR is to overcome abuses of corporate power. To date, there has been no dominant school of thought or practice and, given the breadth of the political and policy considerations which CSR is said to embrace, there is unlikely to be unanimity in the future.

Regrettably, it been said that '[s]eeking ethical guidelines for business decisions is [to be] compared to "nailing jello to a Wall."'[9] This is particularly telling when it is observed that CSR was championed by many institutions which have been the subject of the recent global financial crisis and other notorious corporate collapses.[10] As with other notable failures, the over-ready adoption of such catch-phrases runs the risk that they will be regarded as without substance when they do not reflect realistic goals and do not give rise to achievable outcomes. Lumsden and Fridman have observed that:

> The recent history of Australian corporate collapses and the Jackson Inquiry into James Hardie[11] demonstrate the pressure from the community on governments to be involved in the regulation of corporations and, if necessary, to further erode principles of limited liability. The incorporator's 'licence' will be under threat when it is used in a way that offends what the people think is fair.[12]

7 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (W Strahan and T Cadell, 1776) ch II.

8 Broomhill, above n 3, 6–8.

9 Wolfgang Harder, 'What's All the Talk about Directors' Ethics?' (2006) *Bond University Corporate Governance eJournal* <http://epublications.bond.edu.au/cgej/6>, quoting Andrew Stark, 'What's the Matter with Business Ethics?' (1993) *Harvard Business Review* 1.

10 See David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, 2005); Ronald Sims and Johannes Brinkmann, 'Enron Ethics (Or: Culture Matters More Than Codes)' (2003) 45 *Journal of Business Ethics* 243.

11 D F Jackson, *The Report of the Special Commission of Inquiry into the Medical Research and Compensation Fund* (2004) whose terms of reference included the financial position of the Medical Research and Compensation Foundation ('MRCF') and whether it was likely to meet its future asbestos-related liabilities in the medium to long term, the circumstances in which MRCF was separated from the James Hardie Group and whether this may have resulted in or contributed to a possible insufficiency of assets to meet its future asbestos-related liabilities.

12 Lumsden and Fridman, above n 4, 161.

In Australia, the Australian Law Reform Commission has noted that there have been two inquiries into CSR by the Parliamentary Joint Committee on Corporations and Financial Services ('Joint Committee') and by the Corporations and Markets Advisory Committee ('CAMAC').[13] There was also an unsuccessful legislative attempt to introduce a Corporate Code of Conduct in 2000 to penalise unacceptable and harmful conduct occurring outside Australia.

Currently, CSR compliance and reporting in Australia is limited to investment firms and listed companies.[14] Section 1013D(1) of the *Corporations Act 2001* (Cth) requires superannuation, life insurance and managed funds to disclose how environmental, social, labour and ethical standards are taken into account in the investment decisions of those organisations. These initiatives have been reported to have improved reporting by Australian companies on their environmental performance,[15] but it is now well-recognised that disclosure requirements are a 'soft' form of regulation and, whilst giving rise to a reporting obligation, they do not provide a prescription for any change in corporate behaviour.[16] In 2009 the Minister for Superannuation and Corporate Law announced that the Commonwealth Government would provide financial assistance to the Responsible Investment Association of Australasia ('RIAA') to establish the Responsible Investment Academy to deliver a range of education and training programs to assist the investment community to better manage environmental, social and governance ('ESG') issues on investment practices.

Similar initiatives have occurred in the United Kingdom, the United States of America, France and South Africa.[17] In the United Kingdom, the *Companies Act 2006* (UK) has been amended to incorporate into s 172 a duty that when promoting the success of the company there is a requirement to have regard to a wide variety of matters, including the 'impact of the company's operations on the community and the environment.' The United Kingdom development draws on *Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003* (which was derived from the 2000 Lisbon Strategy) to build more competitive European financial markets. Principal amongst these policies was the Directive which required the reporting 'where appropriate, [of] non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters.'[18]

No such equivalent duty has been introduced into Australian corporate law and the Joint Committee did not recommend that any change be made, despite

13 Australian Law Reform Commission, *Corporate Social Responsibility*, Reform Issue 87 (2005/06).

14 See *Corporations Act 2001* (Cth) ss 299(1)(f), 1013D(1).

15 See Geoffrey Frost and Linda English, *Mandatory Corporate Environmental Reporting in Australia: Contested Introduction Belies Effectiveness of its Application* (1 November 2002) Australian Review of Public Affairs <http://www.australianreview.net/digest/2002/11/frost.html>.

16 John Parkinson, 'Disclosure and Corporate Social and Environmental Performance: Competitiveness and Enterprise in a Broader Social Frame' (2003) 3 *Journal of Corporate Law Studies* 3, 4.

17 See Justine Nolan, 'Corporate Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure' (Law Research Paper No 2007-15, University of New South Wales, 20 March 2007).

18 *Council Directive 2003/51/EC of 18 June* 2003 [2003] OJ L 178/16 art 1, cl 14(a).

recognising that Australia lags behind in implementing and reporting on corporate responsibility.[19] The Joint Committee did not support a 'one-size-fits-all' approach and perceived that mandatory reporting on CSR compliance would simply result in a 'tick-a-box' compliance culture.[20]

III CSR — A LEGAL QUESTION?

The analysis of CSR concepts in economics, finance, marketing, accounting and other social sciences has been extensive. Within the discipline of the law, the concept of CSR has also been widely considered and debated.[21] However, at present, defined legislative parameters for the broad application of CSR principles beyond limited disclosure requirements in certain industries have not been introduced into Australian corporate governance. This is despite the fact that it has been contended that:

> Regulatory processes can be better conceived if they embrace the paradigm shift that is occurring worldwide in relation to the development of the notions of corporate reputation and corporate social responsibility.[22]

Accordingly, in the practice of the law to date in Australia, CSR has been seen predominantly as a commercial legal adviser's role — not necessarily or regularly the domain of trial attorneys, barristers or advocates. Internationally where mandatory CSR reporting has been introduced, the Council of the Bars and Law Societies of the European Union ('CCBE') have issued guidelines which have been updated for European lawyers advising on CSR issues.[23] In many countries in Europe, CSR reporting requirements apply to companies involved with pension funds and in France there is a mandatory disclosure by companies on the *premier marche* (with the largest capitalisations) regarding their compliance with a range of social and environmental indicators and standards. Section 406 of the United States' *Sarbanes-Oxley Act of 2002* imposed codes of conduct on companies to report on CSR requirements and written codes of ethics. The critical importance of CSR in European corporate legal practice was identified by the CCBE when it stated:

> There is no other professional who both has such ready access to EU boardrooms, and enjoys legal privilege. As a result, advising on CSR issues should become an everyday matter for corporate lawyers.[24]

19 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006) xiii.

20 Ibid xiii–xv.

21 See the review of the legal analysis of CSR in J Tolmie, 'Corporate Social Responsibility' (1992) 15 *University of New South Wales Law Journal* 268 and, over a decade later, in Helen Anderson, 'Corporate Social Responsibility: Some Critical Questions for Australia' (2005) 24 *University of Tasmania Law Review* 143.

22 Rick Sarre, 'Responding to Corporate Collapses: Is There a Role for Corporate Social Responsibility?' (2002) 7 *Deakin Law Review* 1, 6.

23 CCBE, above n 3.

24 Ibid 8.

To date in Australia, very small steps have been taken to introduce CSR concepts into corporate governance obligations but only in relation to specific industries and only as a matter of report. However, as Nolan has pointed out:

> Triple bottom line reporting runs the risk of tokenism unless and until regulatory agencies are willing to mandate its requirement for a significant number of companies and provide specific guidance as to what and to whom particular social matters should be disclosed. The implementation and enforcement of these reporting requirements in the coming years will be a key indicator of the mainstreaming of the corporate responsibility agenda.[25]

In the absence of mandated CSR compliance, the consideration of CSR concepts by the courts, particularly in Australia, has been extremely limited. Indeed, the single occasion in which CSR has even been referred to by the High Court of Australia is in a footnote in a minority judgment in a case which related to the breadth of the corporations power under the *Australian Constitution*. The footnote was to the observation that '[c]orporations law is still, in any event, developing' in which further observation was made that corporate law 'is a subject that occupies the time of the courts throughout this country daily.'[26] It is therefore curious that CSR, which has been the subject of so much time, energy, resources and activity in the corporate sector, has not featured in a similar manner in corporate cases or litigation in Australia.

Only very rarely has CSR been referred to in other courts and tribunals in Australia. One instance involved a case in which a corporation's CSR and community engagement initiatives were taken into account as mitigating factors in sentencing in a situation where a corporation pleaded guilty to environmental pollution. The pollution involved the release of over 116 million litres of toxic leachate which killed crayfish, insects and tadpoles and resulted in the waters of a contaminated creek remaining at levels which were toxic to aquatic life for five weeks until a successful clean-up occurred.[27] Another instance involved the reliance upon CSR by QANTAS Ltd as a ground whereby it satisfied 'national interest' criteria in trade practices regulations for the purpose of assessing public benefits relating to a share acquisition.[28]

Internationally, one oft-cited example of 'CSR-type' litigation in the United States of America is the decision of the California Supreme Court in 2002 which held that the sporting goods company Nike could be sued in relation to statements in press releases and other communications in which it sought to defend itself

25 Nolan, above n 17, 13.

26 *NSW v Commonwealth* (2006) 229 CLR 1, 250–1 [843] n 1094 (Callinan J).

27 *Environment Protection Authority v Waste Recycling and Processing Corporation* (2006) 148 LGERA 299.

28 *Re Qantas Airways Limited* [2004] A Comp T 9.

against allegations that it exploited workers in factories outside America.[29] The case was ultimately settled out of court.[30]

One explanation for the limited number of occasions in which CSR has featured in reported litigation in Australia may be the conceptual difficulty of defining CSR. The expression 'CSR' has not been the subject of the same kind of litigation which has occurred in relation to the adoption by corporations of the expressions 'green', 'environmentally-friendly' or '100% Australian' which have often been the subject of litigation in Australia involving allegations of misleading or deceptive conduct in breach of the *Trade Practices Act 1974* (Cth) (now the *Competition and Consumer Act 2010* (Cth)).

Another more obvious explanation is that CSR principles have not traditionally been adopted into express contractual arrangements or reflected themselves in duties of care in tort, fiduciary duties or statutory obligations of corporations or management. In that sense, the expression CSR has not had 'teeth' and given rise to effective remedies.

Additionally, CSR has predominantly been based on the voluntary principle. For example, CSR has been implemented by the adoption of codes of conduct such as a company, trade association, multi-stakeholder, intergovernmental or world level codes. Whilst the adoption of a code often brings responsibilities and expectations,[31] they rarely give rise to obligations and duties. At present at its highest in Australia, voluntary CSR adoption is simply one component of the armoury of corporate governance. As Parkinson has pragmatically observed, '[i]t is now widely recognised in the regulatory literature that State regulation makes up only a small part of the total set of mechanisms that society relies on to steer business behaviour towards socially desirable ends.'[32]

IV DIRECTORS' DUTIES AND THE AUSTRALIAN BUSINESS JUDGMENT RULE — CSR FRIEND OR FOE?

One potential approach whereby CSR compliance could be mandated would be to enact a requirement to consider CSR requirements in the exercise of directors'

29 See Tamieka Spencer, 'Talking about Social Responsibility: Liability for Misleading & Deceptive Statements in Corporate Codes of Conduct' (2003) 29(2) *Monash University Law Review* 297.

30 *Kasky v Nike Inc*, 27 Cal 4th 939 (2002).

31 Brian Burkett, John Craig and Matthias Link, 'Corporate Social Responsibility and Codes of Conduct: The Privatization of International Labour Law' (Paper presented at Canadian Council of International Law Conference, Toronto, 15 October 2004); the view has been expressed by some that many corporate codes are 'little more than window-dressing': Parkinson, above n 16, 4.

32 Parkinson, above n 16, 28. See also Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 3.

duties.[33] Another approach would be to introduce a replaceable rule to take account of CSR but its proponents have acknowledged that it was an option which was considered but ultimately rejected by the Joint Committee in 2006.[34] The reason for considering the issue in the context of directors' duties is straightforward. The principal agents of corporate behaviour are directors and management, each of whom plays a critical, or potentially critical, role in CSR-related activities and decision-making. As Ramsay observed more than a decade ago:

> the important issue is the fact that directors are central to this debate because although it is typically referred to as the corporate social responsibility debate, it is the directors who are called upon to balance the interests of various stakeholders and, of necessity, give priority to certain interests when the interests of stakeholders conflict.[35]

However, acting as something of a cross-current or even swimming against the tide to the CSR movement, corporate governance developments in the late 1990s and early 2000s in Australia have been motivated by granting directors greater business autonomy to drive entrepreneurship and profitable risk-taking. Indeed, at the time of the introduction of the business judgment rule in Australia in 2000 it was remarked that '[b]y comparison with the past, the [CLERP] reforms will also make life a paradise for company directors.'[36] The Australian business judgment rule was closely modelled on the American Law Institute's business judgment rule[37] and whilst it had a long gestation,[38] its ultimate effect has been observed as being perhaps more 'psychological' than real.[39]

33 See James McConvill and Martin Joy, 'The Interaction of Directors' Duties and Sustainable Development in Australia: Setting Off on the Uncharted Road' (2003) 27 *Melbourne University Law Review* 116. They propose a new duty which would be subject to the usual civil penalty and other remedial provisions of the *Corporations Act* to be inserted as s 180A of the *Corporations Act* to companies employing over 100 people as follows: 'A director or other officer of a corporation must exercise their powers and discharge their duties to ensure that the corporation interacts with the environment in a sustainable manner': at 130.

34 Lumsden and Fridman, above n 4.

35 Ramsay, above n 2, 8.

36 See Ivor Ries, 'Bank on Minimalist Model', *The Australian Financial Review*, 18 March 1998, 56.

37 See American Law Institute, *Principles of Corporate Governance Analysis and Recommendations* (1994) § 4.01(c) which provides:

> A director or officer who makes a business judgment in good faith fulfils the duty [of care] under this Section if the director or officer:
> (1) is not interested in the subject of the business judgment;
> (2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
> (3) rationally believes that the business judgment is in the best interests of the corporation.

38 See Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties*, (November 1989); Companies and Securities Law Review Committee ('CSLRC'), Parliament of Australia, *Company Directors and Officers: Indemnification Relief and Insurance*, Discussion Paper No 9 (April 1989); House Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Corporate Practices and the Rights of Shareholders* (November 1991); Companies and Securities Advisory Committee ('CASAC'), Parliament of Australia, *Report on Directors' Duty of Care and Consequences of Breaches of Directors' Duties*, (September 1991); See also John Farrar, 'Towards a Statutory Business Judgment Rule in Australia' (1998) 8 *Australian Journal of Corporate Law* 237, 238–9.

39 Joanna Bird, 'The Duty of Care and the CLERP Reforms' (1999) 17 *Company and Securities Law Journal* 141,152.

The central tenet of the Australian business judgment rule is that it is said to offer 'a *safe harbour* from personal liability [for breaches of the duty of care and diligence] in relation to honest, informed and rational business judgments'.[40] Some of the suggested policy bases for the American business judgment rule are: (i) the judicial concern that persons of reason, intellect and integrity will not serve as directors if the law expects from them a degree of prescience not possessed by people of ordinary knowledge; (ii) to encourage the type of informed risk-taking with which corporate enterprise is undertaken especially in an increasingly global economy; (iii) that courts are ill-equipped to exhume and examine business decisions; (iv) that the rule represents a well established judicial policy of leaving management to managers and a reluctance to undertake or second guess business decisions and (v) that the rule is a means whereby courts are aided in the management and allocation of their own resources.[41]

Of the five suggested policy bases for the American business judgment rule, it is clear that its introduction into the Act in Australia reflected the legislative (rather than judicial) concern to encourage participation in corporate governance and to encourage informed risk-taking. To that end, this presents a challenge for corporate governance as CSR-related factors often require more reflective and detailed consideration of potential external factors arising from corporate decision-making which can be subordinated when risk-taking and profit-driven business strategies are adopted or are the primary motivation. Interestingly, Bird has made the pragmatic observation that:

> The business judgment rule may create sufficient illusion of certainty to free directors from the paralysis that is allegedly caused by the current law. It provides a 'check list' against which directors can measure their decisions, rather than an open-ended test. It should be easier for directors to satisfy themselves that they have complied with the checklist, than it is for them to assure themselves that their actual decision is one that a reasonable director in a similar position and in a similar corporation would make. The brevity of the list is also an advantage. Under the current law it would be almost impossible to provide directors with a 100-word description of what they must do to satisfy their duty.[42]

It is interesting that this 'check-list' approach to the exercise of business judgments was regarded as a beneficial reason to support a 'safe-harbour' protection from liability in the introduction of the business judgment rule but, by contrast, was regarded by the Joint Committee as justifying no action in relation to the introduction of CSR-principles. The Australian business judgment rule check-list does have much to recommend it as the number and variety of 'business judgments' being made on a daily basis are immense and, often, significant. In addition to satisfying themselves of the sound business sense of a proposed course of action, for directors to satisfy themselves also that the requirements of

40 Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) [6.1].

41 Farrar, above n 38, 240, referring to Douglas M Branson, *Corporate Governance* (The Michie & Co, 1993) 338–41.

42 Bird, above n 39, 152.

the business judgment rule are met is not too onerous. Such a check-list provides a useful framework for all business decisions.

The business judgment rule of itself also contains some criteria which could be seen to influence CSR-motivated decision-making. First, a 'business judgment' is defined in s 180(3) as 'any decision to take or not to take action in respect of a matter relevant to the business operations of the corporation'. Therefore, a 'decision', whether to take or not to take action, is required. In the context of CSR, simply being a good 'corporate citizen' (or professing to be one) will not be sufficient. Second, the power must be exercised 'for the purpose for which it was conferred'.[43] However, it has been noted that it is unfortunate that this concept provides little help for managers because the business judgment rule has 'at its heart the question of what is the best interests of the corporation, ie the very question about which much of the uncertainty surrounding corporate social responsibility revolves.'[44] Third, there must be no 'material personal interest'[45] in the decision being made[46] — a central tenet of ethical decision-making. Fourth, the director must inform himself or herself by consultation, questioning, discussion or review.[47] Depending on the circumstances, the existence of many of these factors will simply reflect good business practice but will also go some way towards satisfying this aspect of the business judgment rule and the incorporation of external factors (environmental, social, community) on the decision at hand. Fifth, a key element of the business judgment rule is contained in s 180(2) which provides that the 'director's or officer's 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.' This is often an area where business judgments and CSR-principles will part ways. CSR-motivated behaviour will often involve 'non-commercial' considerations where strictly (economically) rational behaviour would not justify or support the decision. However, in fact many CSR-related decisions do have 'intangible' benefits which do provide a commercial basis for the decision — in the same way, for example, as sponsorship and corporate philanthropy have long been regarded. In *Hutton v West Cork Railway Co*, Bowen LJ held that the 'law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.'[48] In Australia, that position remains the case and it has been observed that the cases 'in this area indicate that management may implement a policy of enlightened self-interest on the part of the company

43 *The Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199, 217.

44 Lumsden and Fridman, above n 4, 171.

45 *McGellin v Mount King Mining NL* (1998) 144 FLR 288.

46 The American test is an interest 'that in the circumstances creates a reasonable probability that the independence of the judgment of a reasonable person in such circumstances could be affected to the detriment of shareholders generally': *Cinerama Inc v Technicolor Inc*, (Del Ch, No 8358, 21 June 1991).

47 John Kluver, 'The Business Judgment Rule (Including Reliance and Delegation)' (Paper presented at the Australian Institute of Company Directors /Business Law Section Seminar, 29 March 2000).

48 (1883) 23 Ch D 654, 673.

but may not be generous with company resources when there is no prospect of commercial advantage to the company.'[49]

In making effective business judgments often directors are placed in a situation where they must place reliance on others or delegate functions. Due to the fact that CSR issues may be 'non-core' aspects of the corporation's business, the role of delegation or reliance, often upon external consultants or advisers may be necessary to effectively research, implement and promote the CSR-driven business agenda. To satisfy the 'independent' assessment requirement, a director must at least consider relevant views and material and bring his or her own judgment to bear in relation to the matter.[50]

V CSR — IS THERE A HUMAN RIGHTS DIMENSION?

Interestingly, and developing in parallel with the CSR debate, the post World War II period has witnessed the increased consideration and implementation of international and national human rights. Human rights principles have increasingly been under consideration in relation to their possible application to corporations, in particular transnational corporations.

2008 marked the 60th anniversary of the *Universal Declaration of Human Rights.* The *Universal Declaration* was agreed to after World War II and in the wake of devastating international conflict. The process of healing and of rebuilding numerous nation States was paramount. The recent global financial crisis has resulted in massive financial and trading losses and European nations are currently seeking to resolve sovereignty-threatening financial crises. The economic spending packages which have been implemented to stimulate national and international economies have been extraordinary in size and dimension in comparison to the post-war programmes. Accordingly, it is timely to consider the inter-relationship between modern principles of corporate regulation, including CSR, and fundamental human rights which were agreed to in the *Universal Declaration.*

Human rights have traditionally been regarded as applicable predominantly to citizens (and their relationship with States) and not to corporations. The view has been expressed that there is a certain naivety, although noble in its intent, in seeking to regard corporations as subject to human rights obligations.[51] By contrast, Mary Robinson, then United Nations' High Commissioner for Human Rights, said:

> The issue of human rights is central to good corporate citizenship and to a healthy bottom line. Many companies find strength in their human

49 Robert Austin, Harold Ford and Ian Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005) 281–2.

50 See *Southern Resources Ltd v Residues Treatment and Trading Co Ltd* (1990) 56 SASR 455; *Blackwell v Moray* (1991) 9 ACLC 924, 936; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 824.

51 Banerjee, above n 5, 47.

> rights records, others suffer the consequences of ignoring this vital part of corporate life. Today, human rights is a key performance indicator for corporations all over the world.[52]

More recently, the OECD has developed Guidelines for Multinational Enterprises and the United Nations has launched the UN Global Compact.[53] The UN Global Compact sets out 10 key principles in relation to human rights, labour standards, the environment and anti-corruption. However, the UN Global Compact does not monitor or enforce and relies upon 'public accountability, transparency and the enlightened self-interest of companies, labour and civil society.'[54]

In Australia, the Human Rights Law Resource Centre made a submission to the CAMAC Inquiry into Corporate Social Responsibility that the United Nation's Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ('the Norms') provided the most appropriate framework.[55] It has also been said that the expansion of corporate power should be accompanied by responsibility and the Norms are said to 'constitute the most recent attempt to definitively outline the human rights and environmental responsibilities attributable to business.'[56] However, some recent attempts to introduce human rights in the corporate sector have been regarded as ultimately likely to undermine human rights and to result in the privatisation of human rights.[57] Kinley, Nolan and Zerial have observed that:

> CSR itself, particularly the place of human rights in CSR, is already contentious ground. One of the reasons the Norms have engendered such controversy, therefore, is that they have stepped into the middle of this debate, not only by crystallising the connection between human rights and CSR, but by positing a system whereby international law responds directly and forcefully to corporate action that violates such rights. It is

52 Office of the High Commissioner for Human Rights, *Business and Human Rights: A Progress Report* (January 2000) <http://www.ohchr.org/Documents/Publications/BusinessHRen.pdf>. Banerjee, above n 5, concluded at 145–6 that the 'evidence linking CSR with better financial performance is dubious to say the least. All that can be concluded from the empirical evidence is that companies that say they are socially responsible tend to perform better financially.' See also Abigail McWilliams and Donald Siegel, 'Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?' (2000) 21 *Strategic Management Journal* 603; Roger L Martin, 'The Virtue Matrix: Calculating the Return on Corporate Responsibility' (2002) 80 *Harvard Business Review* 69; P Muchlinski, 'The Development of Human Rights Responsibilities for Multinational Enterprises' in Rory Sullivan (ed), *Business and Human Rights: Dilemmas and Solutions* (Greenleaf Publishing, 2003) 33.

53 United Nations, *United Nations Global Compact* <http://www.unglobalcompact.org>.

54 Ibid.

55 Philip Lynch, 'Harmonising International Human Rights Law and Domestic Law on Policy: The Establishment and Role of the Human Rights Law Resource Centre' (2006) 7 *Melbourne Journal of International Law* 225, 240.

56 Justine Nolan, 'With Power Comes Responsibility: Human Rights and Accountability' (2005) *University of New South Wales Law Journal* 581, 581.

57 International Organisation of Employers (IOE) and International Chamber of Commerce (ICC), *Joint Views of the IOE and ICC on the Draft 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights': The Sub-Commission's Draft Norms, if Put into Effect, Will Undermine Human Rights, the Business Sector of Society, and the Right to Development: The Commission on Human Rights Needs to End the Confusion Caused by the Draft Norms by Setting the Record Straight* (2004) 1–2.

> thus not surprising that much of the critical commentary of the Norms corresponds with many of the concerns frequently voiced in respect of other CSR matters, such as the perceived problems that might flow from soft laws made hard, and from the alleged inappropriateness of placing human rights obligations on corporations.[58]

Again, no enforcement or monitoring systems have yet been introduced in relation to these rights or guidelines in Australia.

VI GLOBAL WARMING — CSR'S NEXT CHALLENGE?

Global warming has received much attention and significant resources[59] and a carbon tax has been introduced in July 2012 in Australia.[60] Environmental considerations are a major driver behind reforms to reduce carbon emissions and also are regarded as supporting CSR-based perspectives, principally in relation to the externalities of corporate activity.

Interestingly, the intersection between climate change and human rights was the subject of a case launched in 2004 by the Canadian Inuit in the Inter-American Commission on Human Rights in which damages were sought as a result of global warming affecting Inuit villagers due to the alleged violation of Inuit human rights for which the United States of America was said to be responsible. Whilst the petition was rejected by the Commission, the Commission did agree to convene a climate change and human rights hearing.[61]

58 David Kinley, Justine Nolan and Natalie Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Company and Securities Law Journal* 30, 33. See also David Kinley and Rachel Chambers, 'The United Nations Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 *Human Rights Law Review* 447.

59 See Intergovernmental Panel on Climate Change, *Fourth Assessment Report (AR4): Climate Change 2007* (2007), authored by 600 climate scientists from more than 40 countries and reviewed by a further 620 scientists. See also Rosemary Lyster, Louis Chiam and Dominic Bortoluzzi, 'Sustainability and Climate Change: Liability of Corporations' (2007) 25(7) *Company and Securities Law Journal* 427.

60 Upon the introduction of the carbon tax in 2012 in the *Clean Energy Act 2011* (Cth), the business sector will be required to substantiate any claims made in relation to the impact of the carbon price by providing information to the Australian Competition and Consumer Commission ('ACCC') that supports those claims and businesses which falsely claim increases in their prices are due to the carbon price face court penalties of up to $1.1 million per contravention and of up to $66 000 if served with an ACCC infringement notice (*Competition and Consumer Act 2010* (Cth) sch 2, ss 18, 29, 134A, 134C).

61 See Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005).

In the United States, climate change litigation has been ongoing.[62] In 2004 proceedings were commenced on behalf of 77 million people, eight states in the United States and New York City. The case involved a suit against five electricity companies under federal and state law seeking to abate global warming on the grounds of public nuisance. In 2005 certiorari was granted by Preska J on the basis that the case required:

> identification and balancing of economic, environmental, foreign policy, and national security interests, 'an initial policy determination of a kind clearly for non-judicial discretion' is required. ... Thus, these actions present non-justiciable political questions that are consigned to the political branches, not the Judiciary.[63]

On appeal, the Second Circuit Court of Appeals vacated the dismissal of the suit and remanded it back for further consideration and held that the case involved well-settled principles of tort and public nuisance law which would provide appropriate guidance for the district court and which it was competent to decide.[64]

The defendants then filed a certiorari petition in the United States Supreme Court and the Court held that the *Clean Air Act* and the environmental protection actions which it authorised 'displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants'.[65] The Court held that the Act provided a means to seek limits on carbon dioxide emissions from domestic power plants which was the same relief which the plaintiffs sought by invoking federal common law and held that there was 'no room for a parallel track'.[66] The Court held further that if the plaintiffs were dissatisfied with the decision-making of the Environmental Protection Authority then they were entitled to seek review under federal law and to petition for certiorari.[67]

The climate change litigation experience in the United States to date demonstrates a highly complex web of legal issues at the intersection between environmental and regulatory considerations, corporate governance and the traditional common law torts. Whilst the initial approach of regarding such issues as 'non-justiciable' has been shown to be flawed, the courts can provide little or no relief where statutes (often introduced well prior to the emergence of CSR and climate change considerations) are regarded as covering the field and excluding common law compensation and remedies.

62 See Hari M Osofsky, 'The Continuing Importance of Climate Change Litigation' (2010) 1 *Climate Law* 3; Hari M Osofsky, 'The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance' (2005) 83 *Washington University Law Quarterly* 1789; Eric A Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925; Hari M Osofsky, 'The Geography of Climate Change Litigation Part II: Narratives of *Massachusetts v EPA*' (2008) 8 *Chicago Journal of International Law* 573; Hari M Osofsky, 'Is Climate Change "International"? Litigation's Diagonal Regulatory Role' (2009) 49 *Virginia Journal of International Law* 585.

63 *Connecticut v American Elec Power Co*, 406 F Supp 2d 265, 274 (SD NY, 2005).

64 *Connecticut v American Elec Power Co*, 582 F 3d 309, 329 (2nd Cir, 2005).

65 *American Elec Power Co v Connecticut*, 564 US 2527, 2537 (2011).

66 Ibid.

67 Ibid 2539.

In Australia, the experience of climate change-related litigation has resulted in the recognition that litigation itself is unlikely to have a great overall effect on climate change, the results have been piecemeal and the judiciary is highly constrained by jurisdictional limitations even if a more interventionist approach would be justified due to the seriousness of the impacts of climate change.[68]

By contrast and from a more positive perspective, global warming concerns also have the capacity to be used in a positive promotional manner by interests wishing to capitalise on CSR perspectives in the 'carbon footprint' debate. Of course, such representations must be accurate and not mislead. One interesting example is demonstrated by the marketing and consumption of wine. *The Times* newspaper recommended that its United Kingdom readers purchase French wine instead of New Zealand wine due to the reduced impact on global warming as a result of reduced transport and carbon emissions in importing wine from France as compared to New Zealand. [69] The recommendation was met by the observation by Waye that:

> There is little clarity about the actual impact of climate change on consumer perceptions and purchasing behaviour. In relation to the wine production and marketing, many wine makers and wine retailers regard responding to climate change as a form of good corporate social responsibility. It remains unclear, however, whether and how consumers will respond to the redesign of supply chains, environmental assurance labeling, carbon foot printing or food miles or how they will prioritise these against other hedonic factors such as region and brand.[70]

In a practical sense, many of the steps which are required to meet the targets which have been set for the reduction of greenhouse gas emissions and arrest climate change will require both individual and collective action. As Flannery concluded:

> We are the generation fated to live in the most interesting of times, for we are now the weather makers, and the future of bio-diversity and civilization hangs on our actions. I have done my best to fashion a manual on the use of earth's thermostat. Now it's over to you.[71]

Insofar as CSR principles may assist that process, then that is to be welcomed. However, unless those CSR principles are defined and prescribed then their effectiveness will continue to be limited. CSR and human rights principles, together with regulation which enforces compliance and holds citizens, corporations and governments accountable for non-compliance, are measures whereby the security and well-being of the planet could be maintained. However, any such principles must reflect and accord with practical goals, achievable targets and sustainable

68 Justice Bruce Preston, 'Climate Change in the Courts' (2010) 36(1) *Monash University Law Review* 15, 15, 53.

69 Anna Shepard, 'Low Carbon Diet Masterplan', *Body and Soul, The Times* (London), 21 April 2007, 12.

70 Vicki Waye, 'Carbon Footprints, Food Miles and the Australian Wine Industry' (2008) 9 *Melbourne Journal of International Law* 271, 287.

71 Tim Flannery, *The Weather Makers* (Text Publishing, 2nd ed, 2008) 306.

criteria for growth and development. As Baxt has observed, legislation governing the duties of the directors of such companies should be clarified:

> If directors are expected to run the activities of their companies with the interests of the community at the forefront of their obligations, then they must have adequate protection in the law (and from the courts), that should shareholders feel they are not receiving the same level of dividends they had been accustomed to, the directors will not be in breach of those duties.[72]

VII TNCs AND SMEs — THE BACKBONES OF NATIONAL ECONOMIES

Transnational corporations ('TNCs')[73] control and exert influence over considerable proportions of the global economy. Whilst the inter-relationship between CSR principles and human rights principles is fundamental, their application to TNCs is limited and is premised on voluntary adoption. The regulation of human rights abuses by TNCs face further complexities when such abuses are conducted by nation states. Significant problems exist in the detection of such abuses, the jurisdictions in which they should be prosecuted, the applicability of human rights principles to corporate rather than State actors and the international reach of TNCs and their capacity to utilise media and marketing responses to counter the otherwise damaging effects of such allegations. Joseph concluded that 'in the absence of internationally binding comprehensive human rights duties for TNCs, one must look to national laws to uncover the extent of the current legal accountability of TNCs for human rights abuses.'[74]

The issue is not just one for the courts, nor is it a matter solely for law or lawyers. It has been observed that:

> The growing acknowledgment of corporate responsibility and the accompanying relevance of human rights to business is not a purely legal issue. A recent global survey conducted among 21,000 respondents in 20 industrial countries and emerging markets noted that 8 out of 10 people assigned at least part of the duty to reduce the number of human rights abuses around the world to large companies. Such social surveys do not result in legal consequences for business, but are indicative of the increased pressure faced by companies to assume duties that have been

72 Robert Baxt, 'Avoiding the Rising Floods of Criticism: Do Directors of Certain Companies Owe a Duty to the Community?' (2000) 16 *Company Director* 42. See also Margaret Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Brookings, 1995) 203.

73 Patricia Ranald, *Global Corporations and Human Rights: The Legislative Debate in Australia* (Paper presented at the Royal Institute of International Affairs Conference on Legal Dimensions of Corporate Responsibility, London, 23 November 2001); United Nations Research Institute for Social Development ('UNRISD'), *Corporate Social Responsibility and Business Regulation*, Research And Policy Brief 1 (2004); Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004) 1.

74 Joseph, above n 73, 11.

> traditionally held by states. The corporate world has demonstrable global reach and capacity and can often make and act on decisions far faster than governments. The corporate responsibility movement aims to put this efficiency to greater use by employing the corporate machinery in the protection of human rights. However, the blending of human rights with business has not been a seamless merger.[75]

Importantly, the economic backbone of many countries is small to medium enterprises and not just multi-national corporations. As noted by the CCBE:

> CSR is not just the business of TNCs. According to a recent survey 50% of Europe's SMEs are already involved in CSR ranging from 32% in France to 83% in Finland. According to another survey 41% have an environmental policy, 28% make charitable donations, 15% consider ethical issues when outsourcing and 13% have a diversity policy.[76]

As with much corporate regulation, the adoption of a 'one size fits all' regulatory framework in relation to the CSR and human rights responsibilities of SMEs will impose administrative and cost burdens on SMEs which may be punitive and ultimately unsustainable. Brudney expressed a concern that such a burden may result in 'uncompensatable costs for socially desirable but not legally mandated action.'[77] These challenges, and non-uniform approaches across jurisdictions in Australia and internationally, have stalled developments in certain other areas which have sought to address CSR-based concerns such as in the context of environmental protection legislation. For example, innovative recycling legislation was introduced in the 1970s in South Australia and provided for a container deposit levy ('CDL') on beverage containers. The original levy was five cents per container which was increased a generation later to ten cents per container. Similar legislation exists in some, but not all, jurisdictions around the world: 11 states in the United States of America, all Canadian provinces, eight countries in Europe (including Germany, the Netherlands, Norway, Sweden and Switzerland), in Singapore a buy-back scheme has been operating since 2004 and in China reverse vending machines operate in Beijing and Shanghai.[78] However, in Australia, South Australia remains the only state or territory which has introduced the levy.

The challenge for international and national policy-makers after the recent global financial crisis has been to protect vulnerable individuals and communities and to stimulate the economy whilst meeting targets for the reduction of global warming. Broomhill has noted:

75 Justine Nolan 'Corporate Responsibility in Australia: Rhetoric or Reality?' [2007] *University of New South Wales Legal Research Series* 47, 68.

76 CCBE, above n 3, 16

77 Victor Brudney, 'The Independent Director — Heavenly City or Potemkin Village?' (1982) 95 *Harvard Law Review* 597, 405.

78 See Environment Protection Amendment (Beverage Container Deposit and Recovery Scheme) Bill 2009 — Research Brief Number 3 [2009] Vic Bills RR (1 May 2009).

> While civil or market based forms of regulation have had some effect in moderating anti-social corporate behaviour, this paper argues that the effect is necessarily limited. What is proving to be more effective is instead the threat of litigation.[79]

The 'threat of litigation' must, however, be a real and effective threat. Litigation is an 'end-game' form of regulation which is premised on identifiable rights, obligations and remedies. As a front-end alternative, the very adoption of a corporate structure as the framework whereby an entity can exist and operate may be regarded as coming at the price of the requirement to comply with CSR goals. That is, the legal privileges which are provided to a corporation (such as limited liability, perpetual succession etc) should 'introduce a public interest dimension to the operations of and internal organization of companies' such that they ought to be run in 'the best interests of the broader society'.[80] Lord Wedderburn concluded in 1985 that the crucial question for our company law is still '[w]hat are the modern … conditions on which private capital in a mixed economy can be allowed the privilege of incorporation with limited liability?'[81] That crucial question still remains open in Australia.

VIII CONCLUSION

In 1991 Easterbrook and Fischel commented somewhat soberly that managers 'have better incentives to make correct business decisions than do judges'.[82] One of the perceived reasons for the introduction of a business judgment rule was said to be the lack of clarity arising from the decision in *Daniels v Anderson* (the *'AWA Appeal'*) in relation to the impact of the distinction between executive and non-executive directors.[83] However, it is worth remembering that in the *AWA Appeal* Clarke and Sheller JJA held that the courts 'have recognised that at law more is required of a director than supine indifference. The legislature requires both diligence and action.'[84]

The business judgment rule deals only with decisions. The protection afforded by the business judgment rule will only be provided to directors who make decisions and only those who, in doing so, comply with the check-list of the elements which are contained in the rule. In that regard, the enactment of the business judgment rule serves to reinforce the primacy of active decision-making in Australian corporate governance generally and, perhaps unexpectedly, has significant potential to support CSR-related activities.

79 Broomhill, above n 3, 17.

80 Ibid 22.

81 Kenneth N Wedderburn, *Company Law Reform* (Fabian Society, 1965) 19.

82 Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) 243.

83 See *Daniels v Anderson* (1995) 37 NSWLR 438, 500.

84 Ibid 493.

Many corporations are actively pursuing CSR-based policies in highly diverse areas ranging from environmental-awareness to workplace considerations. To date, legislative attempts and treaties requiring CSR principles to be adopted by national governments have been limited.[85] The risk of increased civil and criminal litigation against companies and management has already been recognised[86] and is starting to occur. Litigation has an educative effect and adverse results can give rise to adverse publicity but can have a limited long term impact unless remedial outcomes are available and enforceable.[87] Litigation also has limitations because of its selective and *ex post facto* nature.

Commercial pressures, such as the very capacity to invest in socially responsible investments, are causing CSR to be taken seriously. So also are other commercial restraints such as the requirement by insurers that corporations achieve minimum benchmarks for best practice disclosure of CSR compliance levels before insurers are prepared to insure or underwrite risk.[88]

The adoption of CSR by corporations is not just for the purpose of achieving a sentimental 'inner glow' about the company or its role and position in society. In some sectors, to attract 'socially responsible investment' will not be possible without CSR being embraced and implemented fully and effectively. Importantly, CSR can have a realistic and achievable impact in meeting the challenge of climate change. If so, then the 'triple bottom line'[89] goals — people (social responsibility), planet (environmental responsibility) and profit (economic responsibility) — may be achievable.

The process is slow and arduous in that corporate governance 'is moving gradually but haphazardly in a direction which is more, rather than less, favourable to notions of corporate social responsibility and "triple bottom line" performance.'[90] In the meantime, CSR will continue to be a manifestation of the 'longstanding debate over the relationship between business and society.'[91] Chief Justice Warren of the Supreme Court of Victoria ventured to define CSR extra-curially as:

> the process whereby we imbue a corporation with a conscience. In the ongoing debate on an appropriate definition for corporate social responsibility, this idea will raise more questions than it answers. But that is not the point. The point is that corporate social responsibility is not about amendments to the *Corporations Act* or the secretaries at a major

85 Chatham House, 'Human Rights and Transnational Corporations: Legislation and Government Regulation' (Workshop Summary, Royal Institute of International Affairs, 15 June 2006).

86 See Office of the High Commissioner for Human Rights, above n 52, 3, 4.

87 Chatham House, above n 85.

88 Institutional Voting Information Service, *United Kingdom Corporate Governance Guidelines: Section Seven: Responsible Investment* <http://www.ivis.co.uk/Guidelines.aspx#sectionseven>.

89 CCBE, above n 3, 11.

90 Bryan Horrigan, 'Fault Lines in the Intersection between Corporate Governance and Social Responsibility' (2002) 25 *University of New South Wales Law Journal* 515, 516.

91 Rhys Jenkins, 'Globalization, Corporate Social Responsibility and Poverty' (2005) 81 *International Affairs* 525, 526.

> corporation photocopying on both sides of the paper, but rather about asking what role corporations are to play in our society.[92]

A co-operative, outward-looking approach is fundamental to a better appreciation of the benefits of CSR and the integration of human rights principles into Australian corporate governance. There are many more steps to be taken and the debate remains in its infancy. The business judgment rule provides a strong platform for more autonomous decision-making by directors, provided it is done in an informed manner in good faith and without self-interest. These aims are inherently compatible with the objectives of CSR. The need for both corporate and governmental strategies and their implementation is vital, both nationally and internationally. As Sachs has so accurately observed:

> The challenges of sustainable development — protecting the environment, stabilizing the world's population, narrowing the gaps between rich and poor, and ending extreme poverty — will take center stage [in the twenty-first century]. Global co-operation will have to come to the fore.[93]

92 Chief Justice Marilyn Warren, 'Corporate Social Responsibility and the Best Interests of the Corporation: Can They Coincide?' [2006] *Victorian Judicial Scholarship* 1, 7.

93 Jeffrey Sachs, *Commonwealth — Economics for a Crowded Planet* (Allen Lane, 2008) 1.