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JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES

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JOINT STATUTORY COMMITTEE ON

CORPORATIONS AND FINANCIAL SERVICES

Friday, 24 February 2006

Members: Senator Chapman *(Chair)*, Ms Burke *(Deputy Chair)*, Senators Brandis, Murray, Sherry and Wong and Mr Baker, Mr Bartlett, Mr Bowen and Mr McArthur

Members in attendance: Senators Chapman, Murray, Sherry and Wong and Mr Baker, Mr Bowen and Ms Burke

Terms of reference for the inquiry:

To inquire into and report on:

Corporate Responsibility and Triple-Bottom-Line reporting, for incorporated entities in Australia, with particular reference to:

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

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

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

d. Whether revisions to the legal framework, particularly to the Corporations Act, are required to enable or encourage incorporated entities or directors to have regard for the interests of stakeholders other than shareholders, and the broader community. In considering this matter, the Committee will also have regard to obligations that exist in laws other than the Corporations Act.

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

f. The appropriateness of reporting requirements associated with these issues.

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

In inquiring into these matters, the Committee will consider both for profit and not-for-profit incorporated entities under the Corporations Act.

WITNESSES

Committee met at 9.16 am

HARRIS, Mr Geoffrey John, National Executive Coordinator, Group of 100

HONAN, Mr Thomas Francis, National President, Group of 100

CHAIRMAN (Senator Chapman)—Welcome. This is the fourth public hearing of the committee. Further hearings will be held in Sydney next month and there will probably be several other hearings beyond that, if necessary. The committee expresses its gratitude to the contributors to this inquiry, including those who will be appearing before us as witnesses today. Before we start taking evidence, I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence provided. Parliamentary privilege refers to special rights and immunities attached to the parliament or to its members and others necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person that operates to the disadvantage of a witness on account of evidence given before the parliament or any of its committees by a person is treated as a breach of privilege. Unless the committee should decide otherwise, this is a public hearing and as such all members of the public are welcome to attend. If any witness wishes to give evidence in camera, they may request that of the committee and such a request will be considered. I invite you to make a brief opening statement, at the conclusion of which I am sure we will have some questions.

Mr Honan—Thank you for the opportunity to be here today. The Group of 100 is the association representing the chief financial officers and senior finance executives of Australia's major enterprises. With respect to directors' duties and corporate social responsibility, the G100 considers that mandating changes are not necessary in view of the current Corporations Law and other requirements. Our view is that these activities are already encompassed in the responsibilities of directors under the Corporations Act. This prescribes that the best interests of a company lie in its long-term survival through enhancing shareholder value. This is achieved by incorporating sustainability and socially responsible issues in its decision making.

While there may be instances where directors have abrogated their responsibility, the G100 believes that in the vast majority of cases directors take account of a broad range of stakeholders, including shareholders, employees, regulators and the community. This is also emphasised in the ASX's Corporate Governance Council principles, especially principle 10, 'Recognise the legitimate interests of stakeholders'.

The Group 100 feels the imperative is to remove regulatory duplication and contradictions rather than to impose another layer of requirements which may inhibit progressive behaviour on the part of companies and directors. The best encouragement for entities is to create an environment in which experimentation with reporting in this evolving area is able to flourish. In a competitive environment, the priorities and reporting of leading companies will induce improved reporting by other companies in response to changes in community expectations—something unlikely to occur under a mandatory regime.

We were therefore encouraged by the recent address delivered to the Group of 100 by the Hon. Chris Pearce, Parliamentary Secretary to the Treasurer, the thrust of which was the way forward on achieving a simpler regulatory system and in which he highlighted the need to strike the right

balance between the government needing to get on with the job of governing the country and the concerns of the business community that there is too much regulatory interference. Legislation, we were told, is growing at 10 per cent per year, and in 2003 there were no fewer than 1,800 Commonwealth acts of parliament.

The parliamentary secretary went on to say that business can reduce the red tape to which it is subjected by supporting appropriate commercial conduct. This approach is consistent with the view of Samuel A DiPiazza, the co-chair of the World Business Council for Sustainable Development's Beyond Reporting project, who said:

Leading companies build sustainable businesses by embedding strong governance and corporate responsibility into their strategies and culture. By earning the trust of their employees, communities, trading partners and the capital markets companies with a culture of corporate responsibility are able to generate value where others cannot.

The Group of 100 has also been asked to consider whether the Corporations Act should be revised to require directors to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions. Our view is that directors are already required to consider broader interests in addition to those of shareholders. Directors have a first duty to the interests of the company. They would be derelict in their duty if they did not seek to ensure the long-term financial performance and health of the company. In order to do so, directors must also ensure that the company continues to give appropriate recognition to the concerns and expectations of the community.

With respect to requiring certain companies to report on the social and environmental impacts of their activities, the G100 considers that the current practice of dealing with such matters in the directors' report is appropriate. Specifying requirements on certain companies and imposing a one-size-fits-all approach can be expected to impede promising and innovative developments. Today's company must underpin its core profit maximisation objective through a proactive approach to CSR in order to manage and mitigate a broad array of risk factors. Minimising risk in areas such as environmental impact, community impact and workplace management ultimately places a company in a stronger, more sustainable market position. As recently reported in the business media, the positive link between effective risk management and a company's core objective of profit maximisation suggests that CSR activities may well already be provided for under Australia's current Corporations Law and directors' duties.

In conclusion, I should like to draw committee members' attention to the G100's guidance publication, called *Sustainability: a guide to triple bottom line reporting*. It does not set out to be prescriptive but rather provides guidance on the reporting of economic, environmental and social information as well as the CSR relationship with financial reporting. We trust that it provides a further useful reference when considering the subject of corporate social responsibility. Thank you.

CHAIRMAN—Thanks, Mr Honan.

Senator MURRAY—That looks like a very useful document. Could we ask you to table that for us?

Mr Honan—Yes. It does not tell you what to do; it tells you what you could do.

CHAIRMAN—We need a motion to accept the document.

Senator MURRAY—So moved.

Senator WONG—Seconded.

CHAIRMAN—That motion is carried. Thank you very much, Mr Honan. How effective has the guide to triple bottom line reporting been in encouraging members to undertake triple bottom line reporting?

Mr Honan—I think there has been a movement since the guide was published. It is certainly not a tidal wave of movement, but we have seen more and more companies report on CSR activities in their annual reports and other reports that have come out from them, so we believe it has been an effective guide in supporting companies in how they report.

CHAIRMAN—Has the Group of 100 actively tried to promote the benefits of triple bottom line reporting among its members?

Mr Honan—We have actively supported the guide. It has been on our website since it was published. We provided some PR support for it when it was published. It provides part of the annual report to our members, to guide our membership towards that report. I should say that the membership is not that widespread; it is quite definitely a restricted group. It represents the hundred largest corporations in the country, so it is not a wide membership. But certainly, within those hundred companies, it is a very well-known organisation.

CHAIRMAN—The CPA has indicated to us that they believe that the absence of a common basis for sustainability reporting undermines the value of such reporting to capital markets and that they do not necessarily take those reports seriously. What is your view of that?

Mr Honan—I think accountants—and I speak as an accountant—too often look for a consistent and objective view of anything, and very little in our life is able to be reported in such objective means. I have just lived through the transitions from the old accounting standards to the new international financial reporting standards, and I can assure you that they are not objective. They are subject to just as many subjective issues as the old standards were, and in some cases more so. I do not believe you could ever move to something that is as objective as the CPAs have stated.

Senator MURRAY—Did you enjoy the experience?

Mr Honan—No.

CHAIRMAN—What is your view of the move by the environment minister, Senator Campbell, to have the GRI included as a standardised voluntary reporting framework under the ASX Corporate Governance Council's principles and recommendations?

Mr Honan—I think the important thing there is the word 'voluntary'. The expectation is that people will vary that to suit their needs. Providing a best practice is different to providing mandatory requirements. I support anyone who provides best practice materials. I think the 'if

not, why not?' approach that the ASX Corporate Governance Council principles espouse works for most organisations.

CHAIRMAN—KPMG, in their submission, put the view that reporting entities should be required to disclose their framework for dealing with non-shareholder stakeholders. They recommend that the appropriate disclosure requirement could be similar to those applying to product issuers' product disclosure statements under section 1013DA of the Corporations Act. That would require disclosure of:

... how labour standards or environmental, social or ethical considerations are taken into account in selecting, retaining or realising an investment.

KPMG have proposed that such a requirement could be:

Reporting Entities are required to disclose the framework adopted for their consideration of the interests of stakeholders other than shareholders.

What is your view of that proposal?

Mr Honan—That could work for some companies and not for others. The message that I have tried to put across is that 'one size fits all' does not fit all corporations in Australia. There is a wide range of companies, and that may apply to some and not others.

CHAIRMAN—Chartered Secretaries proposed the inclusion of a replaceable rule in a company's constitution to the effect that a clause could be inserted which is more permissive as far as directors are concerned in taking account of the interests of stakeholders other than shareholders—for example, having in that rule 'for any purpose the board sees fit'. Do you have a view on whether that is necessary?

Mr Honan—I do not believe that is necessary, because the directors need to act in the best interests of the company and, if they ignore the interests of the community or other stakeholders, they are not acting in the best interests of the company. I think we have all seen examples of that in the past year or so.

CHAIRMAN—Do you have any experience of the effect of corporate responsibility practices on a Group of 100 member's competitiveness, particularly international competitiveness?

Mr Honan—No, but I have personal experience. The company that I work for, Computershare—I am the CFO of Computershare—believes that it enhances our competitiveness for employees to act in a socially responsible manner. Therefore, the company will do it, as I said, in the best interests of the company to attract employees no matter where we are in the world. We have not done any research across other companies; I can only report on my personal situation.

CHAIRMAN—Are you aware of whether any Group of 100 members typically link—and, if so, to what extent—executive and management remuneration to measures of corporate responsibility or achieving measures of corporate responsibility?

Mr Honan—I am not aware of any. That does not mean that there are or there are not; I am just not aware of them, and we certainly have not done research along those lines.

Senator WONG—What proportion of your membership's companies would voluntarily either report against the GRI, TBL or some other form of reporting on their environmental and social impact?

Mr Honan—We have not done research along those lines.

Senator WONG—Are you able to take that on notice?

Mr Honan—Yes.

Senator WONG—And anecdotally?

Mr Honan—Anecdotally, I think more than half have a section in their annual report that issues their CSR and their activities along those lines.

Senator WONG—So anecdotally, and you will take this on notice, probably more than half would engage in some form of reporting.

Mr Honan—I think the growth level is important. Two years ago I do not think there would have been 10 per cent.

Senator WONG—Correct.

Mr Honan—Again, speaking personally, we certainly did not have anything in our annual report until a year and a half ago.

Senator WONG—That is the impression we have had through the inquiry.

Mr Harris—When we were putting together the sustainability guide, one of the factors we identified was that there is a whole range of different forms of reporting on what might be broadly described as corporate social responsibility issues but that it is not necessarily coordinated within the organisation.

Senator WONG—That was my next question.

Mr Harris—In some entities it is by way of newsletters in local communities. In other entities it is in the annual report. In still others it is a stand-alone sustainability type of report. In some of them, for example, Westpac, it is in the form of a corporate social responsibility report. So there is a whole range of different activities which are not necessarily described as being corporate social responsibility reporting.

Senator WONG—Yesterday I asked the CPA, I think, to give some sort of analysis of the relative cost between the current financial reporting framework and social and environmental reporting. Their view is that the cost burden of the financial reporting was still substantially high. Is that something you agree with?

Mr Honan—Yes.

Senator WONG—Obviously we have just come through the year for its implementation so it might be a bit of an unfair time to be asking that question. We also had evidence yesterday from, I think, GSK, BHP and Shell, all of whom I think—at least the two resource companies—report against the GRI voluntarily. The chairman put a question to you about standardising or having some framework that perhaps was more meaningful. Whilst I absolutely agree with your point that nothing is completely certain, I made the point yesterday that there are qualitative judgments made in the context of financial reporting and accounting treatment all the time. So I think it is a little bit of a straw man argument to say that financial reporting is written here and social and environmental reporting is not. There are judgments made in both areas. But the point the chairman made, which has been put to us a number of times, is that, because information is not at least comparable, its utility to the capital markets is significantly less. So what do you say about the need or the benefit of having a framework—not one size fits all; I hear the message on that—that means the information around environmental and social impact activities, however you want to describe it, is more easily assessable and comparable by investors essentially?

Mr Honan—My personal opinion is 98 per cent of investors look for the financial returns in a business. There are certainly some ethical funds out there that will look beyond the—

Senator WONG—But you made the point that there is a risk management issue here too. I think the IAG and others have said, 'We're actually going to start looking at how you handle your emissions.'

Mr Honan—We have a position in the G100 which is about the short-termism of the financial community. They are looking for results for the next three or six months. They are not looking for the five- or 10-year performance or outcome of a business. We believe that the senior managers and directors of companies are looking at that sort of thing. That is where I think the impact of socially responsible activities will play out—in the five- to 10-year framework, not in the three- to six-month framework. I certainly know that when I deal with my investors they are worried about what the earnings per share are in the next six months. They are not looking at the five- to 10-year outlook.

Senator WONG—The BCA said: 'We're a bit sick of companies being in the lens. How about people at both ends of the scale—shareholders, investors et cetera?' How do you impact on that? Isn't information one of the ways you impact upon that?

Mr Honan—I think it is education. We continue to espouse that and talk about that the fact that—

Senator WONG—Isn't it also information so you can make some sort of assessment about what long-term value might be?

Mr Honan—There was a push at one stage to move to three-monthly reporting, quarterly reporting, on financials and on other factors. We have continued to push back on that and say that the investment community should be looking at a longer term outlook rather than a shorter term outlook. I do not think the issues that we are pushing on short termism are necessarily counter to some of the arguments put forward for socially responsible reporting

Senator WONG—I am actually suggesting they are quite consonant. All I am asking is: do you think one of the ways we can try and impact upon this short termism, which seems, from your evidence, to plague at least a section of the investors, is to get a better set of information that is more easily comparable around issues which might impact on long-term value?

Mr Honan—This is where I definitely believe that a best practice guide is more appropriate than mandating certain times.

Senator WONG—I get your message on that. I said to the BCA yesterday that I understand that is their position and I would prefer it if it would be possible to have a dialogue with us, accepting that we have heard that loud and clear rather than with all the evidence being given around that topic. I understand that. What I am interested in is what we then do around information. I understand you do not want it mandated, but do you not think there is some value in having consistency of information to shareholders and investors around what issues might impact on a company's long-term value?

Mr Honan—As long as the goal of consistency can be achieved. I think in a lot of cases in the areas that we are talking about there cannot be a lot of consistency between a service company such as ours and a resources company such as BHP Billiton. I think we are talking about two completely different ends of the spectrum.

Senator WONG—Yes, and in most of the reports I have seen from companies that do report against the GRI, they target that there is the capacity for that flexibility. As you say, the issues that your company might have to deal with in terms of long-term risks are vastly different to what BHP Billiton would have.

Mr Honan—That is correct.

Senator WONG—I presume the market can understand that, just as it understands financial reporting.

Mr Honan—As long as the market focuses on that. As I said, I do not believe that many in the market will be focused on that.

Senator WONG—I am asking for your view about how that might be impacted on.

Mr Honan—I do not think there is a silver bullet answer to that.

Senator WONG—No, I am sure it is multifaceted.

Mr Honan—It is a matter of time and education, and that is similar to the issue of short termism. We know it is not going to change overnight, but that does not stop us from singing from that hymn book every chance that we get.

Senator WONG—I am not asking for a silver bullet. I am asking for which facets of a multifaceted policy you might look at. There are some you would want to maintain or push back against, such as quarterly reporting. You would want to try and get people focused on at least

biannual reporting. You would suggest a best practice guide around long-term issues. What else would you suggest?

Mr Honan—I think the best practice guide should encompass the sorts of issues that should be identified and reported on and how they should be reported, whether it be through the annual report or, as Geoff has said, through separate reporting.

Senator WONG—What about engaging institutional investors?

Mr Honan—I am probably cynical about institutional investors. I think we all have this vision that they are looking for something that we are not giving them. As I said, my dealings with them are generally about what the next six months are going to bring. I know that there are groups that speak on behalf of a wide range of institutional investors that look at governance issues and wide-ranging changes to things. Then you talk to an individual institutional investor and all they want to know is, 'How much money am I going to make?' So, as I said, being a CFO I tend to be cynical, and dealing with institutional investors does not make me any less cynical.

Senator WONG—How does one shift them?

Mr Honan—Again, what I do is: simple messages, repeated often. When they ask me about—

Senator WONG—Like a politician, really!

Mr Honan—the six-month term, I keep saying: 'It's the long term that I am really interested in. I am making these investments for a long-term return.' And I continue to say the same thing over and over again.

Senator WONG—Thanks.

Mr BAKER—Mr Honan, you say in your submission that 'mandating change is unnecessary'. The last few years, I am sure you will agree, have seen unprecedented growth and record profits for companies. Can you give some examples, from your Group of 100 companies, of the leading companies in this area—those that are taking social and environmental issues seriously and actually feel a need to incorporate that behaviour in their charter, instead of looking at it from a purely financial aspect?

Mr Honan—Speaking personally, as a customer of Macquarie Bank I receive a quarterly update from them that lists their community activities and what they are doing. I think it comes from the Macquarie Foundation. While there may not be environmental factors at play, there are certainly socially responsible activities listed, what they do in the communities in which they work all over the world. From my perspective, that is probably what I consider to be at the leading edge. It is a separate report; it is four or five large pages that come to me each quarter, as I say, as a client of theirs.

Mr BAKER—That is one. There are 100 companies. You said it was over fifty per cent of them.

Mr Honan—I have not personally conducted research across all of those 100 companies. I can only report according to my own experience. Geoff, do you have any?

Mr Harris—I can add a couple to that if you want a list. ANZ has recently issued a corporate responsibility report as a separate document. Westpac does similarly. BP Australia does a sustainability report. I would imagine you learned yesterday from BHP Billiton that they do similar types of reporting, but it might not be in the form of a formal report. I understand that Telstra undertake some form of reporting of that nature as well. They are the ones that readily come to mind.

Mr BAKER—That is fine that they report but, if the top G100 companies are serious about this and you as president are really serious about promoting this, that is not enough. For example, on the one hand, McDonald's do some charity work; on the other hand, what they have been doing to some of our growers in the country is less than socially responsible. You say that mandating change is unnecessary but, from the government's perspective, how can we encourage that behaviour other than by mandating change? Words are wonderful, but we want some real—

Mr Honan—I think you can take the view, as I said before, of the ASX corporate governance principles, where the vast majority of those are an 'if not, why not' type regime: 'These are the best practices we believe you should be following and if you are not following them then you need to explain to the market why you are not following them.' That is what we as the Group of 100 believe is a more appropriate method for introducing change in the business world.

Senator MURRAY—But that means you have to have a standard. With the ASX approach, they developed—

Mr Honan—A set of best practices—that is similar to what I was saying to Senator Wong.

Senator MURRAY—I think the question, if I may intercede, is: who should do that and how should that be done?

Mr BAKER—Exactly. That is what it is coming to.

Mr Honan—Who should do that? I think there is probably a framework within principle 10.

Mr BAKER—The last thing we want to do is create more red tape et cetera, but there is a huge role for companies to be up there in lights and showing the way.

Mr Honan—In principle 10 within the ASX corporate governance principles, entitled *Recognise the legitimate interests of stakeholders*, there is some commentary and guidance on how to achieve best practice. Potentially, it is more adherence to that principle.

Mr BAKER—I suppose we would like to move on from encouraging. We are looking for results and how to manage that so you can achieve results, instead of saying, 'Here's a book on how to do it. Now go away and read it.'

Mr Honan—And then if you do not follow these principles, you report on why you do not follow them. The market can make their own assessment on whether that is appropriate conduct and the company will change because those that are making the changes are being rewarded through employees wanting to work for them, through investors wanting to invest in them.

Mr BAKER—That is good if, as Senator Wong was saying, you have such influence from the institutional investors. I am interested in why you are very cynical about taking that to the next step, talking generically. Where you have an opportunity to specifically market to that group, institutional investors, there is all this nice floating around but no zeroing in on that opportunity.

Mr Honan—I am not sure I follow your question, Mr Baker.

Mr BAKER—You were talking about stakeholders et cetera but institutionally is where you could have real influence from a social, environmental responsibility. You said before to Senator Wong that you are quite cynical about how they operate.

Mr Honan—The institutional shareholders, yes.

Mr BAKER—Could you explain that?

Mr Honan—As I said, I believe that they are interested in a financial return and a short-term financial return. It is the nexus between companies and their vision to grow profits over a sustainable long period of time, which is five years. In general, an institutional shareholder is rated on a six-monthly performance by their investors, so people will provide money in a superannuation fund to these institutional funds. They are rated by Morningstar each six months as to their performance for the last six months.

Mr BAKER—But there are a lot of superannuation funds out there where there has been a growth in this particular area. I am interested from your perspective—the G100 companies—when there has been growth why you cannot or you do not believe that is part of your charter.

Mr Honan—As I said, my perspective from the company where I am the CFO is that we report on our socially responsible activities. It is not to increase our share price but to promote those activities throughout our workforce around the world and to make our organisation a better place to work. We know we are in the human capital market, so we are trying to recruit good people from all over the world and one of the ways we can do that is to show that we are a socially responsible organisation. That is the primary reason why we report on it for our staff rather than for the institutional shareholder base, the ethical investors or whoever. It is mainly done for our staff. If you were to hear my CEO talk, he would say it is all for the staff. The reason we invest shareholders' money in projects in different parts of the world to assist the development of underdeveloped countries is not to make our clients or our investors feel better; it is to make our staff feel better.

Mr BOWEN—So they are more motivated and feel better about working, and you are more an employer of choice.

Mr Honan—And also, we have 10,000 people around the world working in our business. If we can get a one per cent improvement in their effectiveness or efficiency, that is a good return

to us. If we take $1 million and invest it in a farm in Kenya, which we have done, then to us that is a good return.

Mr BAKER—What role can the government play in assisting this process?

Mr Honan—Probably an encouraging role, a supporting role, rather than a mandating role. I could say, without wanting to offend you: stay out of the way and encourage the ASX and other bodies to improve or implement some of the practices that they see as best practices around the world. I think that is part of the thing: the comments about the principles that are used by some companies may not be the best ones for all. It is an evolving market, so I think it is probably too early to say what is the best to be used. I think those things will change and in 10 years time we will be talking about different principles to be reporting on than the ones we are now.

Mr BAKER—So you believe that the government has no role whatsoever.

Mr Honan—No, I did not say that; I said it has an encouraging role, and I think it has an encouraging role to the ASX Corporate Governance Council. When I said 'stay out of the way', I meant: do not introduce legislation to impose reporting standards on companies. That is our firm belief, and we put that in our submission. We do not believe that anything will be achieved apart from an increase in work activity to report on them.

Senator MURRAY—Thank you, gentlemen, for your input. It is always good to hear from the people who have their hands on the money.

Mr Honan—It is also important to note—I did not make this comment—that if we are to introduce a lot of the reporting that has been spoken about, it generally would be the chief reporter, and that is generally the chief financial officer, who would report on these things. As the person who owns the annual report, it would generally be my team that would be responsible for reporting. That is part of the reason why we have an opinion.

Senator MURRAY—Your publication is very useful for the ready reference you provide to all sorts of sites and standards. But it seems to me, and I do not mean this in a rude sense, that there is some doubletalk going on from the business community. At the same time they are saying, 'We don't want to get into a formalised, mandated situation,' by the very fact they are in the business of reporting on CSR—or large numbers of companies of real substance worldwide are—they are in fact participating in various mechanisms to try to find a standard that they can report against which is intelligible and comparable. That is the work of the GRI, it is the work of the CPA project, it is a kind of internal working they are doing within industries. The resources companies have told us they are sitting down together and trying to work out a standard form of reporting.

Given that you support a facilitation process by government, as opposed to the interventionist process by government, don't you think a big contribution government could make is perhaps to assist with resource and bringing together people to assist this process of developing standards which satisfy those who are already neck deep in CSR reporting?

Mr Honan—I take your point. I think that the resources could assist in that process, as long as they were directed in the right manner and with the right involvement of groups such as the ASX

Corporate Governance Council and participation in the groups to which the practices will be directed.

Senator MURRAY—Mr Harris, you are listed as a member of the Group of 100 working party along with eight others. I assume you would have talked about how you can arrive at intelligible comparable reporting as part of that process.

Mr Harris—Maybe I will explain the genesis of this document, to start off with. When the working party started, the intention was to provide some reference point for those members and others who were interested in doing something in the topic area. It had originated because our national president at the time had been asked by his CEO, 'What's this triple bottom line stuff?' He had his staff try to identify some reference material about triple bottom line, and there were 30,000 hits on the internet. The thought then was that we could perhaps put together some form of guide that would sift through that type of material and act as a first-stop reference point for members interested in this activity. There was no intention to be proselytising about what you must do. Basically, it was a case of, 'If this is something you are interested in and you are inquiring about, here are some sources you can go to, and here are some of the ways in which a whole range of companies embark on this sort of journey, if you want to refer to it as a journey.' It was in the context that we were not saying there must be a standard. We were saying that, maybe, in some circumstances, you might look at GRI. Our preference was something like GRI in terms of the balance of the group, but we were not satisfied that at the time you would put all your bets onto the one horse. I think we would probably be in a similar position now in terms of whether you adopt something as a specific standard.

The whole area is in its infancy even though GRI and these other schemes or methodologies were about. It is hard to remember that in financial reporting it is only relatively recently that we have had accounting standards. Basically, we have had accounting standards only since the Great Depression. There was a whole history of financial reporting before we got to the stage of saying that some standards for financial reporting would be appropriate.

Senator MURRAY—You are right, Mr Harris. That has been exercising our minds in this inquiry, because we are alert to the fact that governments followed standards that had preceded standards. In other words, as the market indicated it needed accounting standards, governments acted to assist in the formalisation and in the supporting of those so that you have a common basis of reporting. The evidence we have had from those who are more intense about CSR is that in their sector they are already discussing competitive and comparative development of standards in particular areas.

For instance, in Perth, Wesfarmers told us that when reporting on coal emissions—from the use of power and production of coal and those sorts of things—they were looking for measures comparable to other companies reporting on that to see how they could arrive at a comparable basis, which would show that they either have competitive advantage or are falling behind. That requires a systematisation, and I understand that. The question for me is: are we still at the market development stage where companies are feeling their way or are we at the stage where governments should try and get people together to formalise the most important areas? That is behind the question, too.

Mr Honan—My opinion is the development phase, for certain.

Mr Harris—We are probably still in the development phase. If you look at the GRI, it has a whole range of sections. If you are in the oil and chemical industry, then there are suggestions or guidelines in respect of that industry, likewise for other industries. I think at this stage, when you are referring to comparability, you are looking at it in terms of industry comparability or comparability with direct competitors; whereas, earlier, when Senator Wong was referring to comparability, she was perhaps referring to comparability broadly across all entities.

Senator MURRAY—Both are issues. There are obviously risk areas you would like to compare the entire listed market companies to. There must be some few risk areas where you would do such a thing, but for most things it is within the sector. For instance, workplace safety is a comparative risk factor in which all companies should try to meet certain standards. That is my view, but obviously the nature of the way you use water is not going to be the same in some listed companies as others.

I need to move on because of a time constraint. I want to talk to you about audits. You have a chapter in your booklet called 'Verification' where you talk about assurance. I have always thought that, if reporting is to be relevant to those who are interested in the reports, particularly in capital markets, independent verification is critical. Once again, those who have produced substantial reports in this area are giving them credibility by having independent verification almost invariably, but when I asked whether the verification process was integrated into their own corporate systems, within the internal audit for instance, the answer was: 'No, not yet'—although boards and senior executives did pay attention to these areas. I note also from this that the belief is that the major accounting firms are probably best equipped methodologically and in terms of experience and background to cover this field. That is as I understand it, if I have glanced at this correctly. My question to you is: how do you think the audit process, both internal and external, relative to CSR reporting, should be developed? What should be happening in that area?

Mr Honan—Again, the more subjective reporting gets, the less value an audit of that reporting is. I think the most value comes from audit, both internal and external, when there is an objective set of standards that can be applied to a certain outcome. I do not believe, even within sectors within the Australian economy, that we are yet at the stage for CSR type reporting, where we can be objective and say, 'These are the standards that you must fulfil from a reporting perspective.' Therefore, apart from a board of review to ensure that the numbers are correct and that there have not been any untruths told, I do not think that it is a significant role.

Senator MURRAY—So you could go in one of three directions: the laissez-faire and woolly kind, which it seems to be at present; the Standard and Poor's type of rating, with your triple AAA and CSR or your negative; or the KPMG type of audit, which says, 'We have had a look at the quantifiable matter that has been reported and this is accurate and scientifically and objectively based.'

Mr Honan—Just a point about the first method, which is, as you say, laissez-fare and woolly, there is a requirement for the directors to not make false statements to the market. So, even though we might say that it is not audited, it does not mean that the directors are allowed to say anything they like. There is a requirement that they do not mislead the market in any of their statements to the market. We believe that all-encompassing requirement would not allow those statements to be fabricated or untrue.

Senator MURRAY—I am not suggesting they would be fabricated or untrue. I live in the world of politics, where a lot of people do not lie but are very woolly, and I think the same thing applies to directors in some matters. I am not saying that people are lying about what they are doing; I am just saying the reporting lacks the same sort of precision you get in finance reporting. As far as I can see from the evidence we have received, so far the more professional development is in the rating side of things rather than through the auditing side.

Mr Harris—But even if a rating system is to be relied on then the rater needs to have some assurance as to the reliability of the information that they are using for the basis of their rating.

Senator MURRAY—Exactly. Where does that come from?

Mr Harris—In this sort of area, using the term 'audit' is perhaps a bit harsh because we tend to think of audit in the context of what is involved in doing the audit on the financial reports. In this sort of area, a softer type of approach is to look at having standards or processes which provide a level of assurance in relation to the representations that are made in those forms of reports.

Senator MURRAY—People like me—and I sit on the Joint Parliamentary Committee of Public Accounts and Audit, so I have a particular interest in these matters—and in the public service generally see audit in a far broader sense than has traditionally been seen in the private sector. Most commonly, the Auditor-General reports which attract our interest are performance and assurance audits, not financial audits, because that area of risk is what interests us most. I recognise, having spent many years in business, that the emphasis in the private sector has been on financial statements. When I use the word 'audit', I use it in the public sector sense of risk performance, which obviously covers CSR better.

Mr Harris—But it is being used in respect of private sector entities.

Senator MURRAY—Yes. I will leave it there.

Senator SHERRY—Coming back to one of your responses, in response to Mr Baker's question about what the government should do, you said, 'Stay out of the way, assist us and facilitate.' What does that mean in detail but without taking too long about it?

Mr Honan—I think I said in answer to one of the questions from Senator Murray that it was to provide resources to the corporate governance council in this area.

Senator SHERRY—Can you think of any other specifics?

Mr Honan—No.

Senator SHERRY—What is wrong with minimum reporting? When I say 'minimum', I mean the requirement to report, the requirement to verify and nothing beyond that. What is wrong with that?

Mr Honan—I do not think anything is achieved by that that is not already being done.

Senator SHERRY—If you had that—and that is a very basic model—then presumably those who do nothing would just have a blank page under the heading. Don't you think that would focus their minds a little bit, when they report a blank page?

Mr Honan—I think that the market would lose the vast majority of reporting in a short time frame anyway with the overburden of regulations that insist on it.

Senator SHERRY—But how is it a regulatory burden to report nothing? If you are a company that is not interested, don't care and you are required to report nothing and it shows up in the annual report, how is that a burden?

Mr Honan—As the CFO of a company who every day comes to work and there appears to be another regulatory requirement, I believe that any additional requirement is not good for my business or for anybody's business.

Senator SHERRY—If we accept that that is valid—I don't—how is a market to be informed if there is no reporting? You talk about market. Are not markets, in part, based on information? If there is no requirement to provide even the most basic of reporting—and I am talking about very basic—surely a requirement to report a very basic requirement is informing the market.

Mr Honan—As I said, I believe that is happening anyway without the regulatory requirement that it must be done.

Senator SHERRY—In all cases? There would have to be companies and firms out there who have never heard of this. Isn't it a good starting point to at least make them report that they have never heard of it, because they have a blank page, so at least they will think about it?

Mr Honan—As I said, my belief is that we should only have regulation where it is absolutely necessary, and we believe, as a group, that the market is moving towards reporting anyway. So the introduction of a set of requirements does not actually add anything and could detract from the development of the reporting that is happening.

Senator SHERRY—How does it detract from reporting that is happening? Those who do something with a minimalist reporting requirement would, presumably, continue to report in whatever way they see fit. There is no prescription. They will report as they see fit. How does it level things out?

Mr Honan—I believe things won't move beyond what they have to report.

Senator SHERRY—But why wouldn't they? If the prescription is to report with an independent verification—that is all there is; no more detail than that, 'report'—surely they are doing that at the moment, or some of them are doing it at the moment.

Mr Harris—Some of them are doing it at the moment. As I said, I believe that the introduction of compulsory reporting would not improve their reporting that is happening now, and in fact could reduce the quality of the reporting that is happening now.

Senator SHERRY—But why would a requirement to report reduce the quality?

Mr Honan—Because it would reduce it to a minimum.

Senator SHERRY—But if there is no prescription, simply a requirement to report, how does it reduce? Why does a firm and the officer involved reduce the reporting they are carrying out at the moment if the requirement is just to report?

Mr Honan—I am saying you could, because there may be a backlash against another set of regulations that the company needs to submit to.

Senator SHERRY—So are you saying no regulation at all—full stop?

Mr Honan—In this area, not regulation, but as I said earlier to Senator Wong's questions, a series of best practices that companies are encouraged to report on.

Senator SHERRY—Can you give us an opinion? I was not here when you gave evidence earlier, but you say a majority of the group of 100 are doing something in reporting. What about those who are not? Why don't they?

Mr Honan—They have not reached that level in their understanding of the area. Other factors may be taking their focus. Every organisation has a limited set of resources, a finite set of resources that they can apply to any set of requirements. It could be as simple as they have been distracted by the implementation of new accounting standards—people who would be focusing on this issue have been distracted. I could not assess that because, as I said, I have not done a study of all of the companies.

Senator SHERRY—I am interested in your considered opinion. You are a witness. We value your opinion and you are representing the group. So it is asked on that basis.

Senator WONG—Just following up on Senator Sherry's questions, what if you set it down the track? What if you said it is voluntary but in five years time the intention is to require reporting in the sense that Senator Sherry outlined? Obviously, the framework et cetera are all issues for companies to determine. I accept your view that different companies will want to report in relation to different things.

Mr Honan—My personal opinion is that it would be better if it was voluntary with an expectation that if people did not do it then it could become mandatory rather than setting a timeline that says that in five years time it will be mandatory.

Senator WONG—How would you do that? If it is voluntary and you do not do it, will it become mandatory?

Mr Honan—Again, I think it is through the ASX Corporate Governance Council.

CHAIRMAN—Thanks, Mr Honan and Mr Harris, for appearing before the committee and for your contribution to our inquiry.

[10.16 am]

LILLYWHITE, Ms Serena, Manager, Ethical Business, Brotherhood of St Laurence

McHUTCHISON, Mr Ian, General Manager, Social Enterprises, Brotherhood of St Laurence

ENSOR, Mr James, Director, Public Policy and Outreach, Oxfam Australia

MARTIN, Ms Shanta, Advocacy Coordinator, Extractive Industries, Oxfam Australia

CHAIRMAN—Welcome. We have before us your submissions, which we have numbered 9 and 45 respectively. Are there any alterations or additions you wish to make to the written submissions?

Ms Lillywhite—No.

CHAIRMAN—I invite you to make a brief opening statement.

Ms Martin—Before we do that, I have some additional material that supports our submission. It is not an alteration to the submission.

CHAIRMAN—We can accept that as an additional submission.

Ms Lillywhite—Good morning, and thank you for the opportunity to be here. As many of you know, the Brotherhood of St Laurence is a social justice organisation, and we bring to this inquiry our own experiences in promoting and implementing corporate social responsibility and, in particular, responsible supply chain management. One of the key themes of our submission is to promote the development of a legal framework for enterprises that encourages proactive, innovative and sustainable business practices. Enterprises have a responsibility to contribute to wealth creation benefits of a society that is both inclusive and environmentally sustainable. Through this inquiry, the Brotherhood of St Laurence is seeking the broadest interpretation of CSR, including greater synergy between CSR and corporate governance frameworks.

It is our view that the existing Corporations Act has a narrow focus. However, in reality some enterprises and boards are already operating beyond this existing interpretation of the act. They do this to keep pace with global CSR trends as part of a risk management strategy and because it makes good business sense. In this context, we believe the Corporations Act is somewhat dated.

The BSL calls for organisational decision makers to have regard for the interests of all stakeholders and the broader community. This is particularly important in a transnational context, where companies are operating in countries with a poor or nonexistent regulatory environment or in conflict zones. In this context, it has been our observation and experience that voluntary mechanisms have proved inadequate.

The Brotherhood of St Laurence contends that directors are required to understand, accept and apply their responsibilities to uphold human rights and meet international standards. To achieve this, we recommend two key areas for consideration and revision: greater emphasis on local laws and international standards in countries of operation, and the development of the corporate culture and processes that value and support ethical business practices. To operate this revision, we call for particular attention to be given by enterprises and their organisational decision makers to the issues of responsible supply chain management and ethical purchasing and procurement strategies. This needs to be an integral part of the governance framework, not an additional or secondary responsibility. It goes hand in hand with independent monitoring and transparent reporting.

Further, we would like to see greater emphasis placed on international standards and mechanisms that form part of the global corporate governance framework, such as the OECD Guidelines for Multinational Enterprises. Finally, we suggest this inquiry take the opportunity to be bold, innovative and forward thinking and make revisions that really place Australian companies at the forefront of CSR practices. Thank you.

CHAIRMAN—Thank you. Do you also wish to make an opening statement, Mr Ensor?

Mr Ensor—Yes, just briefly. Firstly, Oxfam Australia welcomes the opportunity to appear before this committee and this inquiry. Oxfam is an international development agency working to eradicate poverty and injustice, and is part of a global confederation of 12 Oxfams working across 120 countries in the developing world. Our approach to and engagement with the private sector is multifaceted from financial support through to joint initiatives, policy dialogue and, where private sector and corporate activities are inconsistent with our poverty reduction and social justice aims, rigorous debate and public criticism.

The question arises as to why Oxfam, as an international development agency, is focusing more and more resources on the role of the private sector in development. During the 1990s, we saw a very significant transformation in the developing world. At the start of that decade, less than 20 per cent of investment flow and financial flow into the least developed countries of the world was in the form of private sector investment and 80 per cent was in the form of foreign aid. By the end of the decade those statistics had been reversed. The vast majority of investment in developing countries was in the form of private sector investment. Much of this investment has had a positive impact on poverty reduction, but also a significant proportion of the investment has had a very negative effect on particular communities and groups in society.

A great many of the countries in which Australian private sector firms operate in the developing world are countries where poverty is rife, where environmental and social regulations are lax or, where there are appropriate environmental and social regulatory frameworks, the resources and the capacity to enforce them are weak and where corruption can be prevalent. Over the last decade, we have been working with communities in a number of sectors negatively affected by the poor practice of private sector firms—most notably, extractive industries as they relate to forestry, fisheries and the mining sectors and a range of other sectors. From this experience, our view is that, whilst voluntary initiatives are of some value in providing information to a range of stakeholders around company performance, they are not sufficient in ensuring companies act in the interests of non-shareholders.

In our view, mandatory mechanisms are required to ensure that Australian companies are socially and environmentally responsible, transparent and accountable to their stakeholders—those stakeholders not being restricted to groups within Australia, but in their operations abroad. There is also a need to ensure that companies transparently report on their environmental, social and financial activities and, in doing so, that this reporting be transparent. In order to ensure that companies abide by these obligations, an independent monitoring mechanism is essential. In our view, it is most appropriate that such regulation and these mechanisms be instituted by legislative and parliamentary processes as a means of ensuring that Australian organisations have regard for non-shareholder interests. As a development organisation, Oxfam Australia has witnessed first-hand the impact that Australian companies have had both within Australia and abroad, both in positive and in negative terms, and our experience in these development issues perhaps distinguishes us from many of the other entities that have made submissions to this inquiry.

CHAIRMAN—Thank you. Firstly, in relation to the Corporations Law, it is probably fair to say that the overwhelming majority of submissions we have received, both from business and from non-government organisations, have expressed the view that the current Corporations Law is sufficiently permissive to allow directors to take account of stakeholders other than shareholders. Why do you take a different view?

Ms Lillywhite—Perhaps I could respond to that question. My response is really based on my experiences in managing the corporate social responsibility of some of the Brotherhood of St Laurence's own enterprises and working closely with large multinationals that are operating in particular in China. It seems to me that, particularly in an international context, we see best practice companies—big name companies like Levi and so on—as having moved beyond what we see as a quite narrow interpretation of the existing law to operating at a far more encompassing level in implementing their policies, procedures and operating guidelines and, on the ground, trying to operationalise some of the content of the Corporations Act. However, more importantly, they seem to be far more driven by international standards.

CHAIRMAN—But that does not indicate that the current Corporations Law is inadequate. If they are doing that, obviously the Corporations Law permits them to do it. So why, as I have asked, do you take a different view to the Corporations Law to that of most of the submissions?

Ms Lillywhite—We have seen that what is necessarily stated and what happens in practice can be two very different things. It is important to acknowledge that the current Corporations Law has a fairly narrow focus or interpretation of corporate social responsibility. I do not think it necessarily keeps pace with global trends and global thinking about what a corporate social responsibility framework looks like and what a corporate governance framework looks like. I think what we have in Australia is really a narrow interpretation, and there is scope for it to be broadened to really keep pace with global trends.

CHAIRMAN—So you are really arguing that the Corporations Law should mandate, rather than permit, elements of corporate responsibility.

Ms Lillywhite—I think both our submission and Oxfam's submission point out that, to date, many of the initiatives taken by enterprises to demonstrate that they are good corporate citizens or to demonstrate their commitment to CSR have been through the introduction and application

of voluntary mechanisms. While voluntary mechanisms are a useful starting point and a useful tool to help harness an enterprise's thinking about CSR, we have seen that in reality they are not adequate to guarantee that an enterprise's risk management strategies will be met, their brand will be protected and—more importantly, from our point of view—for example, in supply chain management, labour standards will be upheld.

Ms Martin—Perhaps I can add to this point. Really, in terms of the Oxfam Australia submission, the issue for us is not whether the Corporations Law prevents companies from taking into account non-shareholder interests; I think the most significant issue is really that it does not encourage the taking into account of non-shareholder interests. Certainly there is a view—and it is one that is supported by case law and so on—that the current legislative framework does not prevent taking into account stakeholders outside of shareholders. Alternatively, there is the view that, even if you assume that shareholders are the prime and/or only interest that you take into account, a long-term view of shareholders' interests means that you have to take into account issues such as the environment and social matters.

The other point I wanted to make was that when you have a look at the practice of many companies, the practice does suggest that shareholder interests are given prime concern. Unfortunately, a lot of the time that is shareholder interests in the short term as opposed to the long term. One of the materials we handed out related to the Marinduque case, which we have referred to also in our written submission. It is a case where Placer Dome corporation acted in the establishment of a mine that continued operations for about 30 years on Marinduque Island in the Philippines. Placer Dome is an Australian listed company. It has its headquarters in Canada but has significant operations in Australia. For that reason and that connection, the Oxfam Australia mining ombudsman took some interest in this case.

It is a case in which after divesting its involvement in the Marinduque mine, Placer Dome said: 'We no longer have any interest in that mine. Our shareholders clearly don't have any interest in that mine therefore we are not going to take any action in relation to any of the environmental or social devastation.' This resulted from the operation of the mine for the 30 years in which Placer Dome was involved. The continuing devastation that is a result of the activities of that mine is largely due to irresponsible tailings disposal that has caused widespread devastation in the immediate surrounds of the mine. The experience of the villagers surrounding that mine continues to be that, in their view, the mine operator has failed to take account of social environmental responsibilities. That case is a clear example of the primacy given to shareholder interests as opposed to the interests of the society surrounding the mine or the environment surrounding the mine.

Mr McHutchison—I think it is a very good example of when corporates move to CSR once they have been involved in a controversy. That is certainly the case with Levi, Nike and no doubt Placer Dome. I think it reinforces what Serena was saying, which is that voluntary moves are okay. They usually follow some detrimental reporting against the company so that, I think, is the reason why we think that some sort of mandating of corporate social responsibility reporting is required.

CHAIRMAN—Isn't this the nub of the problem? I think, Ms Lillywhite, in your presentation you said that a lot of companies are moving towards reporting and adopting corporate responsible approaches. I think I am quoting accurately—you said it makes good business sense

to do so. In other words, to take account of stakeholders other than shareholders is in the interests of shareholders in terms of the company's long-term sustainability and so on.

Ms Martin, you just said that and you highlighted the mining area. You said that for a lot of companies the interests of shareholders are their prime concern. Isn't this where we are getting to the problem area? What you are saying is that this is an area of contestability. On the one hand, you are saying that it is in the interests of shareholders for these approaches to be taken, but you are also saying, 'Hang on! We have issues here where shareholders are the prime concern so other stakeholders are of lesser concern.'

Ms Martin—I can clarify that.

CHAIRMAN—Is this an area of contestability? Surely, the prime concern should be with shareholders. If it makes good business sense for the shareholders to adopt these other practices then well and good, but should it be mandated that those practices be adopted if it is not in the shareholder's long-term interests?

Ms Martin—Certainly one of the issues in the Marinduque case is that what is being given primacy is not necessarily just the shareholders interests but their short-term interest. There is in this case a decision not to expend any funds on compensation or cleaning up the environment because obviously that immediate expenditure would not be in the short-term interest of shareholders. The more enlightened view would be that it would be in the interest of the company to expend those funds because it would be in the long-term interest of shareholders.

We are not saying that companies all of a sudden are not going to consider shareholder interests. That is not what we are saying at all. We are saying that there is a failure to encourage companies to take into account social and environmental issues when they are considering what their responsibilities are. Even where those responsibilities might be for the benefit of the shareholders in the long term, unfortunately, short-term interests are often given greater emphasis.

Senator MURRAY—Chairman, isn't this a bad example? My view is if existing Australian law and practice were applied in a foreign country, such as the Placer Dome example, they would be capable of being punished for that behaviour. That is under existing law—you do not need new law in relation to polluting an area and causing bad health consequences to the villages and so on. If that happened in Australia they would be punished. I think we mix up concepts here. My view has long been that Australian standards should apply to Australian companies overseas in key areas such as this. They should simply be capable of being punished at home for it. But that is existing law; the whole CSR debate is about new law.

CHAIRMAN—Yes, I think you are alluding to what I was about to lead into, and that is the sorts of issues that you have raised as to whether the Corporations Law is the appropriate vehicle for those issues to be dealt with, or, as Senator Murray says, existing laws that we have to deal with those particular issues.

Mr Ensor—Going back to that point, I think there are two things that are pertinent. The first is that, as you say, there is no doubt that some companies are reporting voluntarily around CSR, but the word 'some' is the critical word. In our experience across a number of sectors—and

Oxfam works across the mining and extractive industry sector, with the pharmaceutical sector, and with the apparel industry, particularly in East and South Asia—there are top-tier companies in those sectors who have a range of interests that, as you say, would be consistent with their business model to improve performance. What drives that? It is perhaps brand reputation risk and other factors. But our experience has been that there are second- and third-tier companies that, for range of reasons, are not engaged in voluntary reporting initiatives and are not disclosing CSR related performance. We find across those sectors that many of the most fundamental problems are in the performance of that second- and third-tier strata of companies.

If you look at the apparel and sportswear sector, for example, we have had conversations with a number of top-tier companies who have said to us, 'Look, your advocacy on labour rights or workplace issues has led us to reform our practices. The problem we have as companies now is to create a level playing field in these areas by encouraging the second- and third-tier companies who are not adopting these practices to reach a minimum benchmark of performance.' The top-tier companies have argued that there is a business disincentive for them, because their cost structures are higher than some of those second- and third-tier competitors.

Senator SHERRY—So the pressure is down rather than up?

Mr Ensor—Yes. The dynamic in some sectors is actually coming from those top-tier companies saying that there needs to be a minimum bar mandated for them to continue to move the agenda forward.

CHAIRMAN—Isn't there another problem with mandatory reporting? Firstly, given the absence of a standard system of reporting or measuring of these issues—you have the GRI and other indexes, but there is no agreed standard of reporting—if you introduce mandatory reporting, is there not a danger that you will perform in that regard at the lowest common denominator level? It will almost become—this is evidence we have received from other submitters—a lowest common denominator tick-the-box process rather than encourage superior performance. In fact, it will reinforce the issue you have just raised.

Mr Ensor—I do not think it is an either/or situation. Clearly, agreed standards through reporting are required; that is our view as an organisation. I do not view that as being inconsistent with ongoing initiatives that provide even greater standards and levels of performance around CSR issues. I do not see those two concepts as being mutually exclusive. Clearly, there needs to be a benchmark standard that should not be a lowest common denominator, and that should not be a disincentive for further improvements in industry for reporting performance.

Ms Lillywhite—Perhaps I could just add that I think it is important to recognise that there is a plethora of standards out there; there is no shortage of standards. From our perspective, it is very important to ensure that adequate recognition is given to international best practice standards—for example, as put forward by the ILO. Equally, it is important to recognise that the GRI is not a standard but a reporting tool. I think that often gets confused in this discussion. Really, the challenge for all of us then is to look at ways in which we can encourage companies—not just large multinational companies but also small- and medium-size enterprises that are operating offshore—to operationalise those standards in a very practical way that, for example, has some impact on their operations abroad. That is where we believe significant work can be done

through encouraging enterprises to be very transparent—for example, about where their goods and services are being sourced and the conditions under which they are being made—and making transparency of their entire production network an important first part of a reporting component.

CHAIRMAN—Are either or both of you involved in any business community partnership arrangements?

Ms Lillywhite—Perhaps Ian might like to comment from the brotherhood's perspective.

CHAIRMAN—If so, why have details of those not been included in your submissions? Many of the NGOs that have submitted to us have included in their submissions details of their involvement with those programs.

Ms Lillywhite—I think you will find that, on the first page of our submission, I make reference to some of the stakeholder engagement processes that the brotherhood has—for example, with Westpac and with NAB. That is only a couple. We also have an ongoing relationship with ANZ and with AXXA. Currently, the Brotherhood of St Laurence is an official adviser to the OECD regarding the implementation and promotion of the OECD guidelines within Australia. So I think you will find that there is reference to that. But, in the context of this inquiry, we did not list all our stakeholder partnerships.

Mr Ensor—Similarly, in the context of the terms of reference, we did not list our involvement in these initiatives. However, Oxfam is involved in Australia and globally in a number of initiatives, including GRI-related initiatives and company specific bilateral initiatives, the Forum on Corporate Responsibility with BHP Billiton in the extractive sector and the Mine Certification Evaluation Project with the Minerals Council et cetera.

CHAIRMAN—I ask both of you again: how does your experience of being involved in those programs measure up with your view of corporate responsibility, in terms of the attitude of the companies?

Ms Lillywhite—My own experience from personally being involved is that they are absolutely essential. One thing we have learned from our work in this area is that there is no one easy quick-fix answer to promoting CSR in a global context. What is required is a range of global collaborations between the business community, trade unions, the NGO sector and academics with expertise. Also, there is need for greater government encouragement and promotion of CSR practices. So our own experience has been that a stakeholder engagement process is a critical aspect of moving this forward. There are some extremely well documented examples of multi-stakeholder initiatives that have occurred internationally that we can draw on for guidance.

CHAIRMAN—Does your experience indicate that the corporations take their responsibilities seriously in this area?

Ms Lillywhite—My personal experience has been varied. I have been involved in some stakeholder engagement processes that have been long term, have had good terms of reference, have been inclusive and have had a genuine commitment to try to seek some sort of mutual

benefit for all stakeholders. I have also been in some stakeholder engagement processes which, to be perfectly blunt, have really resulted in little more than an enterprise wanting to sign off that a respected community organisation was involved in it. So it really depends on the individual process, how well it is managed and the level of commitment to that process from the most senior executives of that particular organisation.

Mr Ensor—Our experience has been similar. The multi-stakeholder processes that we have been involved with, whether that is around the GRI, the World Bank extractive industries review or some of the bilateral processes, are of great value in exploring how this is going to move forward. In general terms, however, the processes that we have been involved with have principally been with the top tier of companies across different sectors. That, in our experience, has been where the momentum has been. To give an example, we did some intensive work with BHP Billiton in the late 1990s and earlier this decade around options dealing with the Ok Tedi issue that led to the establishment of the Sustainable Development Company and a range of initiatives to attempt to mitigate the social and environmental problems associated with that mine. That evolved into a broader forum on corporate responsibility, with a range of stakeholders engaged in improving that company's performance.

At the same time, Oxfam, over the last two or three years, has been dealing with an ASX listed company that has gone into a river system in a province adjacent to the western provinces where the Ok Tedi operation is, and that company is now directly disposing of its tailings into a river system. We have commissioned independent water testing that has revealed alarming levels of contaminants—arsenic and suchlike—in the water table and in people's drinking water. It is likely we are going to see another Ok Tedi in the not too distant future in terms of some of the social and environmental impacts. There is a second- or third-tier company but it is not, for example, a member of the Minerals Council of Australia, it is not involved in the GRI and it is not required to report in a substantive sense around those impacts. So it is an example of what I was saying about where the momentum seems to be, where it is not and why we view reporting as important.

Mr BOWEN—I return to the matter of the Corporations Act. I am not quite clear on this point: in your submission you call for the Corporations Act to identify internationally recognised treaties, and you go on to name a number. What is not clear is whether you are calling for the act to require directors to have due regard to those treaties, so that they can consider them and, if they decide to do whatever they want to do, providing they have ticked the box and considered them, that is fine, or whether you are calling for some sort of legal obligation to not breach any of those treaties under the Corporations Law. Could you clarify that for me?

Ms Lillywhite—Certainly, as a minimum, we would be calling for the Corporations Act to make reference to those international standards and, as you first suggested, for company directors to then be able to demonstrate that they understand those responsibilities and that they will then apply those responsibilities within the operations of their enterprises. That really is a fundamental starting point. Many of these mechanisms that we have already referred to, such as the OECD guidelines, for example, are another voluntary mechanism. That is where there is great scope for improved partnerships between government, in terms of its responsibility to promote and implement the OECD guidelines, and enterprises and organisational decision makers. If you can even get to first base by ensuring that there are references to these

internationally recognised standards, treaties and conventions, it at least gets it onto the agenda and provides some scope for the more detailed aspects about how that is operationalised.

Mr BOWEN—So you want reference to these treaties in the act; therefore, if a board did not give due regard to one of those treaties in its decision making on its overseas operations, you would then be able to commence an action, or somebody could commence an action, to say, 'Hang on a second, you have to consider these international treaties in your decision-making process'?

Ms Lillywhite—That is exactly right. If we again take the OECD guidelines as an example, these particular guidelines have been structured in such a way that they have support from government, from the business community, from the NGO community and from trade unions. What really differentiates the OECD guidelines is that they are a mechanism that actually allows any member of society to raise a case or concern if they believe that an Australian company operating offshore is not meeting its obligations under those guidelines—and, additionally, if an overseas company is operating within Australia, they are not meeting their obligations.

Mr BOWEN—Are you aware of any overseas examples where the equivalent of a corporations act would include reference to international treaties?

Ms Lillywhite—Certainly there is a growing trend, within a global CSR framework, to ensure greater synergy between like instruments. For example, the recently developed OECD corporate governance principles make a very clear reference to the OECD guidelines. Equally, the global reporting initiative, the GRI, has recently engaged in a significant piece of work with the OECD to make a clear link between the OECD guidelines for multinational enterprises and a reporting mechanism. So that goes some way towards trying to coordinate, which is really the hard part of all this, the various mechanisms and standards that do exist.

Mr BOWEN—But you are not aware of an equivalent of a corporations act?

Ms Lillywhite—No. I am not a corporate lawyer. I can't comment on that.

Mr BOWEN—I am not trying to put you on the spot; I am just trying to flesh out your argument.

Ms Martin—Could I comment on that point. Unfortunately, there are not enough examples of that. Having just returned from Central and South America, it was almost embarrassing to see that in fact some of the countries that I was visiting had better references to international standards, and particularly to human rights law and to labour law as well, and better incorporated those standards into their national laws, than we do here. Unfortunately, there is the problem of implementation, which is a huge problem. I don't suggest that we are necessarily going to follow Central and South American countries down that route. But at the very least some sort of reference to conventions and standards that Australia has ratified and does support in national law is a positive and necessary step.

Mr BOWEN—Do you think the Corporations Act is the right law? Do both organisations believe that the Corporations Act is the right way to enshrine this in law?

Ms Martin—I think there are a number of ways that could be done. I do not think it is inappropriate that the Corporations Act makes reference to those standards, given that corporations obviously have an incredible impact on the extent to which Australia as a country complies with its international obligations.

CHAIRMAN—The Eurocentric nature of a lot of those treaties does not concern you?

Ms Martin—I do not agree that they are Eurocentric. If we have a look at the UN conventions, it is clear that there is a lot of support there from the global south.

Mr BOWEN—What do you say to the international sovereignty argument: nations in the world are entitled to apply their own environmental laws? We have environmental laws in Australia, and we probably would not appreciate America introducing a law that its multinationals have to comply with American environmental law in Australia, in addition to Australian environmental law. To play the devil's advocate: if a nation decides that they want to have more lax environmental laws to encourage more investment and employment in their country, isn't that their right as a sovereign nation to do so? What is our role in interfering with the right of that sovereign nation? That is a general question to anybody who would like to answer.

Mr Ensor—I think this is where the benchmarking against agreed international laws and standards becomes important. For example, if you look at the social and labour dimensions of the example that you raised, where sovereign governments have signed up to ILO conventions and sovereign governments have signed up to United Nations covenants, charters and obligations, that becomes an important benchmark for testing the arguments around and on sovereignty. If there are agreed international norms and standards that have been signed up to and committed to by sovereign governments, then, in those instances—

Mr BOWEN—So if an Australian company is operating in a nation that has not signed up to one of these treaties, you would say that the Corporations Act would not oblige the directors to have cognisance of that treaty if that sovereign nation has not signed on to the relevant treaty?

Mr Ensor—That would not be the argument. Oxfam would argue that that should be required. But that might be one way of looking at the issue of sovereignty.

Mr BOWEN—I want to flesh out whether the aims that we all want to achieve are best achieved by your submission. I note that the Brotherhood's submission calls for 'mechanisms to require boards to exceed their legal requirements in daily operations'. It seems to me that, once you require somebody to exceed their legal requirement, that becomes the new legal requirement. You are really instituting a whole lot of new law, and whether that is achievable in the real world is what I am trying to get to.

Ms Lillywhite—There is an element in this CSR discussion which is not always easily quantifiable or easily constrained by indicators, for example. It relates to the moral responsibility, if you like, that enterprises have. If we are thinking about this as a forward-looking inquiry that is thinking about where we can take this in the future, perhaps some consideration can be given to the aspirational responsibility of enterprises as well, and drawing attention to those international treaties is really the starting point.

The other aspect, which links this to the sovereignty issue, is that while ILO standards are an important thing to make reference to they are, of course, directed at nation states, not at corporations. The trick then is for the enterprise to operationalise the intent behind those ILO standards. That is where you have this coming together, if you like, of trying to operationalise what the standards are about and developing a corporate culture that aspires to do the right thing and to treat local communities and workers with dignity and respect within the countries in which they are operating. Corporate social responsibility does not stop at the border. You cannot have Australian enterprises producing flashy CSR reports and claiming to be great corporate citizens but then not ensuring that those commitments and responsibilities go all the way down through their supply chain and production networks and get to those second and third tier subcontracting and licensing arrangements that James was making reference to.

CHAIRMAN—Given what you have said about it being aspirational and the like, does that not reinforce that the Corporations Law should be permissive rather than prescriptive in this area? If you make it prescriptive you are maybe narrowing the aspiration.

Ms Lillywhite—I support what was said earlier. At the moment there is no clear encouragement towards really implementing CSR, and that is what really needs to be addressed.

Ms Martin—I will go back to the example you gave to clarify at least Oxfam Australia's approach to this issue of extra territoriality. We are not advocating that Australian law must operate and that is the maximum limit that any company must abide by wherever they are. We are saying that it is a minimum.

Mr BOWEN—I understand that.

Ms Martin—For example, if an American company was here and was required somehow to operate to more lax standards then, even under our own example, we would say that if the local laws are more strict you would have to—

Mr BOWEN—I understand that. My question was that a sovereign nation may choose to have more lax standards and is their right as a sovereign nation to do that? Is it our right as perhaps a more developed nation to impose our standards of them? I am being the devil's advocate. I am asking you to rebut that argument.

Senator MURRAY—Can I just clarify that? You are not suggesting that if DDT is allowable in a country and our law says that the company may not use DDT then that country should not be able to require our company in their country to use DDT.

Ms Martin—There were too many 'nots' in there for me to follow the question to the end. Australian law, for example, says that no Australian can pollute or alter the drinking water in an area in which it operates to X-standard. For example, the Australian drinking water standards say that we cannot have more than seven micrograms of arsenic per litre in our drinking water supplies. If an Australian company contributes to pollution that leads to an increase in that level then it has breached Australian standards. In Papua New Guinea the drinking water standards have not been revised for the last 25 years and are set at a level of 50 micrograms per litre for arsenic in water. If an Australian company goes over there and its operation causes significant contribution of arsenic to that water supply—that is, in addition to and over and above the

standard we set in Australia—we would be saying that that Australian company ought to be operating, at a minimum, to Australian standards. If it can do so here it ought to be able to do so there.

Senator MURRAY—I was making a deliberate point about DDT. The argument is often that sovereignty of one nation should not apply in another. But I would argue that where that one nation's are higher the sovereign nation should not be able to impose lower standards.

Ms Martin—We would agree with that.

Senator MURRAY—Although a country may allow the use of DDT, that company should not be required to use DDT if its own country says it may not.

Ms Martin—We would agree. If an Australian company is operating abroad, the stricter of the two standards should apply. Whether the Australian standard or the local standard is stricter, the stricter standard will be the greater protection to the society and to the environment.

Senator MURRAY—Ms Lillywhite, you said that if a treaty has been ratified and is internationally applied it should be entrenched where it is relevant in Corporations Law. Let us take something like gender equity. The convention has been applied for gender equity. Are you suggesting that Corporations Law would require that gender equity be implemented and observed in Australian corporations?

Ms Lillywhite—I do not think I am adequately qualified to answer that question. I am not a corporate lawyer and I am not familiar with that gender equity principle. I think it is more useful if I confine my responses to our own areas of expertise.

Senator MURRAY—But that is what you have suggested in your submission. You have said that if there is an international convention, Corporations Law should require you to take up that convention. I used a specific example because, worldwide, gender equity is a major issue. A major part of CSR on the social side is the advancement of women and the ending of unjust discrimination. Australia has signed up to numerous ILO and other conventions which recognise the issues of equality, dignity, fair value for fair work et cetera, which are encapsulated in that gender equity issue. You cannot say in your submission that you think those laws should apply in Corporations Law and then say to us that you are not an expert.

Ms Lillywhite—What we have put forward in the submission is that making reference to these international standards in Corporations Law is a very important starting point in developing a broader CSR and corporate governance framework. Having that there as a starting point may then encourage enterprises to look at ways they can operationalise that in their day-to-day activities. That is the critical aspect in all of this. It is how we move beyond standards and look at ways in which they can be operationalised both within Australia—for example, within the textile industry to ensure that home based outworkers are paid in accordance with our own laws—and internationally to ensure compliance with local laws. I see the importance of trying to raise the bar and the level of awareness amongst company directors about what their broad responsibilities are but more importantly hoping that that will then encourage them to think about how they can actually apply it.

Senator MURRAY—Some of the corporations complained to this inquiry by asking: 'Why only us? Why not the whole community?' In other words, the suggestion you put that international conventions should be enshrined in Australian law is a common theme, and promoted by people such as me in certain circumstances. But if the gender equity issue, for instance, applied to the whole society it would mean that churches would need to stop discriminating against women being priests and that sort of thing. Corporations are saying: 'Don't tell us that we must have gender equity. What about the other parts of society which do not practise it?' In the line of questioning Mr Bowen has put to you, you need to consider whether the application of conventions should be across the whole community or just the corporations.

Ms Lillywhite—I do not think that is highly relevant to this inquiry at this time. We see growing pressure on enterprises to demonstrate that they are good corporate citizens, that they have a considered and active approach to promoting corporate social responsibility and good governance, and that that be monitored independently and reported against. Those very same tools of a CSR framework are increasingly being applied to the NGO sector. Perhaps that picks up on the point you are making. The terms of reference of this inquiry are with regard to enterprises but, from my observations working for the non-government sector, I can assure you that the rigours and demands on us to be more accountable, open and transparent about how we conduct our own affairs and our business are very strong.

Mr BOWEN—I have two issues to explore. Dealing with the first one very quickly: some would suggest that if you move to mandatory reporting, the next step would be mandatory auditing. Do your organisations have a view on the best place to audit CSR reports—whether it is a KPMG or an Oxfam? Who should be auditing these things?

Mr Ensor—It is a good question. I do not think there is a clear answer at this point. Oxfam Australia is involved in a mine certification evaluation project with five or six global mining houses, which is exploring that issue around certification of mine sites and what an audit protocol for that certification would look like. KPMG are involved in that process. There are a body of emerging auditors around CSR initiatives as well. Clearly there are some principles that are widely agreed on in the context of that particular project, the cornerstone of which is a requirement for independent, objective, consistent, verifiable audit processes and procedures. On the issue of who is most appropriate, that is still in debate in relation to that initiative.

Mr BOWEN—You would see that perhaps as more of a secondary issue; the key issue is that it is audited properly? It is secondary as to who does it?

Mr Ensor—Yes, the key is the principles that would underpin an audit process.

Ms BURKE—One of the issues that have come up is the notion of 'green washing'. You have cited examples in your submissions of corporations that I would say are not great across the board on all CSR principles. A couple of them are big financial institutions. I will note my complete bias, having come from the Finance Sector Union previously. We have a situation where organisations are getting kudos for one thing, but there is a range of issues: there is the environment, employee issues and corporate governance. They can cite one project, they get the tick and people think they are ethical and people invest in them. There is a whole range of people who will go and work there and your organisations will get involved with them. They get kudos

for that, because somehow they stamp 'Brotherhood of St Laurence' or 'Oxfam' on it. It gives these companies a marketing tool or kudos.

We need to be looking at auditing a range of issues and knowing that everybody is reporting on a range of issues as opposed to saying: 'Look, we've donated a million bucks. Therefore, we are great corporate citizen.' Is that one of the things you are talking about when you say that it needs to be mandatory—that all issues need to be mandatory—and with good auditing, so that you do not say, 'I have written a nice report and my gender equity policy is fantastic,' but when you actually go to the corporation and ask the staff you find out there is still a glass ceiling in this organisation. Have you overcome that? That is one of my big problems with this whole debate.

Ms Lillywhite—To begin with, the keys to this are certainly ensuring that there is independent monitoring. Again, turning to China, where of course there are large numbers of Australian companies operating, monitoring and auditing is now big business in itself. What has become apparent is that there is a significant lack of skill and capacity amongst many of the auditors to meet the demand. The demand by multinational enterprises to have their activities audited is in fact outstripping the skill base of people who are able to do that and do that well.

I agree with James: there is no one easy answer as to who is the right person. But it does raise the issue: if we are talking about environmental audits, we need environmental experts doing that. If accounting firms are taking on the role, they need to very much have environmental experts in their midst. Obviously, as a representative of the social sector, these are complex issues to monitor and audit; it is not as easy as documenting the amount of waste one year and whether you have increased it or reduced it the following year. Monitoring the social implications of a business's impact are complex and do require skilled people with a knowledge of social justice and good networks on the ground. Certainly I would concur with you that there is a strong element of cherry picking that is done within all aspects of monitoring and auditing, and we need to be mindful of that.

Ms Martin—I completely agree with what Serena has said. The multi stakeholder approach to the MCEP is one of the most important aspects of it—that in fact it is not just an accounting firm, not just Oxfam and not just an environmental organisation.

Mr BOWEN—My final couple of questions are for Oxfam, probably Ms Martin, about the Mining Ombudsman. Can I say I think it is a very good initiative and clearly does very good work. The implication I get from your submission, although you do not actually say it, is that that would be a useful model on a more general basis. I wanted to explore whether an ombudsman investigating Australian corporations overseas more generally would be best placed in the non-government sector or as a government office resourced by public servants. Do you have a view on that?

Ms Martin—Firstly, thank you for your kind comments. The Mining Ombudsman position was created within Oxfam to show, first of all, that it was possible and, secondly, that it was necessary. It is not just showing it to the world at large; it is specifically showing that it is something the Australian government ought to actually be doing. While it is important that, as a non-government organisation, we have taken on this role, quite frankly we do not have the

resources to respond to all of the complaints that we get. It would be most appropriate for it to be a governmental position.

Mr BOWEN—Are there any international examples of a government ombudsman investigating their national corporations overseas?

Ms Martin—In terms of the replication of the same sort of model that I have been using?

Mr BOWEN—Yes.

Ms Martin—I am not aware of one specifically. A lot of the other Oxfam affiliates are considering replicating the role that we have created here in Australia with their own—

Mr BOWEN—This is an Australian initiative—Oxfam does not do this across the world, generally?

Mr Ensor—Not yet.

Ms Martin—We are moving towards it perhaps.

Mr BOWEN—Thank you

Senator SHERRY—Is the role of the Mining Ombudsman done with the cooperation of the mining sector in Australia?

Ms Martin—Yes and no is the response to that.

Mr Ensor—It resulted from dialogue with the minerals industry with which we had been suggesting the need for this sort of complaints mechanism. Most significant industry groups have a similar mechanism, albeit not necessarily all of them having extra territorial functions—

Senator SHERRY—It is very rare.

Mr Ensor—but there is the Telecommunications Industry Ombudsman, the Banking Industry Ombudsman et cetera. Because we were experiencing significant demand from affected communities offshore, particularly in East Asia, the Pacific and South Asia, we entered a process of dialogue with the minerals industry to see what could be done. The response of the industry was quite dismissive, and that led us to create this mechanism. As Shanta has said, it is not something that we think is necessarily appropriate for an NGO to be doing, but in the absence of any effective complaints mechanism for offshore affected communities, we have established the mechanism.

How has industry responded over time? It has been established for about five years now. To characterise it, the industry has moved from a position of hostility to the initiative to one of some degree of interest in some companies to look at this sort of approach. It was reflected also in the World Bank Extractive Industries Review as a key recommendation—that there be some form of complaints mechanism for communities affected by extractive industries.

Senator SHERRY—I raise a practical dilemma. I was sharing a long air flight with a former mine site manager, not one working for an Australian company. He had just quit his job in west Africa and was explaining to me why he had quit his job under pretty horrifying circumstances. The country was in civil war—there were militias—and most services had collapsed. The mine was very profitable, so the company wanted to keep it open. The mine had had to take over the running and paying of the staff at the hospital and the school. They had taken over the grading of the road for some length in and out of the mine, because no-one maintained the road. They had to pay tolls every five or six kilometres to various militia groups, make payments to so-called local government officials and, he suspected, although he was not involved, at a company level, payments to government officials as well—ghost workers. The mine was the only way of bringing in supplies securely, not just for the mine but for the entire community. There was unemployment in the area. The last straw for him—when he quit—was when one of the militia groups held a gun at his head and said, 'Hand over one of the workers or you're going to get shot.' That was it for him. How does a mining company resolve those sorts of dilemmas? Does it just pull out when the mining is profitable, knowing that there are a whole series of adverse consequences that will result even though it keeps its hands clean—it is no longer paying bribes; it is no longer, in one sense, financially supporting militias, even if it is indirect, but there are some adverse consequences?

Mr Ensor—These are very difficult issues. What you are describing is not atypical of the environment in which many companies are working.

Senator SHERRY—No, I do not suggest that it is.

Mr Ensor—Our advice to most companies we engage with on these sorts of issues is to have very clear policy frameworks at the outset in terms of their negotiations with host governments at whatever level and for those to be very clearly articulated through operations and ways of work on a day-to-day basis. If you go back to the World Bank Extractive Industries Review, good governance is, to some extent, the key missing link in these sorts of situations and, where governance is weak, a vacuum is created. Whether that vacuum is in terms of service delivery and companies having to pick up government functions around service delivery or whether the vacuum is to do with corruption and payments, companies end up dealing in grey areas if they do not have very clearly articulated frameworks when they begin.

Senator SHERRY—Do you accept that it is not easy?

Mr Ensor—Absolutely.

Senator SHERRY—In the circumstances I have outlined, it is a very gradual series of events. For example, taking over the school or the hospital and running it because no-one else can and no-one else can pay to run the thing is a good thing, presumably. But when you have the advent of militias that start to impose their particular view of the world, with a central government that is incapable of controlling civil war, it is not an easy set of issues to have to deal with.

Mr Ensor—No, and we have been running training workshops in Africa and South America—with BHP Billiton, for example—exploring exactly these issues. There are blind examples from particular sites and particular operations that they work through as a group in terms of thinking through what the implications are and how they respond in these sorts of

situations. But the most important thing, in our view, is to have some very clear benchmarks and trigger points for a company that then inform decision makers. Some of those benchmarks are obvious—say, in the situation you are describing, when going into greenfields sites in particular, making it very clear to host governments that the company will be disclosing revenue payments in its annual reports and that the company would be wanting the host government to sign up to the Extractive Industries Transparency Initiative et cetera. There are some steps that can be taken that enable this grey area to be reduced, at least to some extent.

Ms Martin—I think it is worth articulating as well that Oxfam Australia is not anti mining. What we do say, though, is that companies and governments ought to take a rights based approach to the way in which that mining goes forward.

Senator WONG—We are well out of time, so I will not ask all the questions that I would like. Essentially it seems to me that the core of both of your submissions is an attempt to grapple with how you translate the notion of CSR to multinational or transnational corporations. Is that reasonable?

Ms Lillywhite—Yes.

Senator WONG—So that is essentially what you are saying. I was interested to read about some of the mechanisms that other countries, such as the UK, engage in to grapple with this. How do you deal with the national interest, which I think undeniably is attached to companies based in your country acting in other markets? But what I am interested in is: what do we currently do? I do not mean what Oxfam does or what the Brotherhood does, but what does the Australian government currently do to encourage responsible and law-abiding behaviour by Australian companies in other jurisdictions?

Ms Martin—My initial response would be, 'Not enough.'

Senator WONG—What does it do?

Ms Martin—As Serena has mentioned, the OECD guidelines and the contact point are probably a good starting point. That does create some possibility in terms of keeping some sort of account of what transnational companies do abroad.

Senator WONG—What does the Australian government currently do?

Ms Lillywhite—With respect to the OECD guidelines, for example—this is something they definitely do—they have a nominated representative within Treasury whose responsibility it is to implement and promote those guidelines. They have, for example, held forums with representatives of the top 100 to promote the OECD guidelines. I know they are working with the Department of Foreign Affairs and Trade to try to develop an all-of-government approach and ensure that trade officials are aware of the guidelines. That is something they are doing.

Ms BURKE—Looking at the case in this report, what did the Australian government do about that one? Did they do anything?

Ms Martin—No.

Senator WONG—I think you, Ms Martin, acknowledged that there are a range of ways you might look to improve the behaviour of transnational corporations, particularly Australian corporations operating in overseas markets. One option that Ms Lillywhite's organisation proposes is having references in the Corporations Law. Obviously we have some concerns about that, for a range of reasons that are probably not necessarily connected with the objectives that you are seeking. I am trying to work out what else governments can do. It would seem to me you might look at statutorily having some sort of ombudsman function. Even if they did not have power other than to report to the parliament, there would be that name and shame process. You would obviously progress the guidelines. I am interested in what else you say governments might do. You pointed out the utility, limited or otherwise, of codes. I think that was in your submission—or was it the Brotherhood's?

Ms Lillywhite—I think both of ours.

Senator WONG—What else can governments do?

Ms Martin—I think one of the issues that we ought to raise which does definitely approach your question, and which James mentioned, is the Extractive Industries Transparency Initiative. That was started up by the Blair government in response to a lot of the problems to do with the way—

Senator WONG—This is the 'disclose what you pay' thing.

Ms Martin—Yes, Publish What You Pay. Publish What You Pay is a coalition of NGOs that support the initiative. It urges greater revenue transparency than the EITI currently proposes, only in the sense that the transparency initiative is quite focused on getting developing country governments to effectively sign on to the process and require companies that operate within that country to publish what they pay. The developing country will also publish what revenues they generate from those projects. The Publish What You Pay coalition calls for developed country governments, for example, Australia and the UK, to require their companies to transparently publish the revenues that they pay to developing countries.

Senator WONG—Kickbacks, donations or whatever.

Ms Martin—Whatever they might be.

Senator WONG—Would facilitation fees be—

Ms Martin—The Cole inquiry is a prime example of why that is needed.

Senator WONG—I would think that there is a vast range of activities governments could require—

Ms Martin—Certainly.

Senator WONG—such as reporting, or structures they could facilitate that might impact on corporate behaviour overseas without necessarily going straight to saying, 'You must comply with these particular conventions.' It seems to me that is a space we could probably explore.

Senator MURRAY—I will assist you here. Mr Ensor would be aware of this. About seven years back, maybe a little more, this committee examined the Democrats' private senators bill called the Corporate Code of Conduct Bill, which was designed to require conformity with and reporting on key sectors of Australian law overseas. I would refer both committee members and the secretariat to that report for reference. Essentially the committee rejected the idea that Australian law should apply in terms of standards overseas and reporting. But that was an attempt from within the parliament to address this issue.

Mr Ensor—That is what I was going to mention to Senator Wong—that there is that precedent, which was certainly supported by a broad cross-section of organisations at the time. It is an example of one very concrete mechanism that was within the remit and responsibility of government to address these issues.

Ms Lillywhite—One other suggestion is perhaps to give consideration to looking at financial incentives—for example, the use of export credit and finance schemes—to ensure that they are linked to good social and environmental outcomes as well.

Senator WONG—Where you are regulatorily doing the right thing.

Ms Lillywhite—That is right. There are examples in the EU where this is being developed and trialled.

Senator WONG—If there is anything more on notice that you would like to suggest in that space, please do so.

Senator MURRAY—I have a question for Mr Ensor. I get the impression that Australian companies have lagged on CSR, that, in fact, it is a foreign initiative which, as a result of global pressure, has come to Australia. It is a form of globalisation such that leading governments and leading companies worldwide are saying that we have to have a responsible reporting and auditing mechanism for social and environmental footprints as well as our economic footprints and we are going to apply that. The consequence has been that the most affected sectors have had to catch up—mining is an obvious example. Is that right—is this another side to the whole globalisation process?

Mr Ensor—I think there are a number of elements. One of the fundamental drivers of this agenda is probably even one step back from that and that is that element of globalisation that enables there to be such a rapidly instantaneous flow of information analysis around the world. I can receive an email from a remote village in the middle of West Papua containing detailed information about an event that may have happened two or three hours ago. I have the capacity to get that information on to page 1 of the *New York Times* within a 10- or 12-hour period in theory. That aspect of globalisation has fundamentally driven the CSR agenda. In particular, the private sector has recognised that there are material issues that affect their bottom line as they relate to CSR where social and environmental or other aspects of performance are highlighted and they have, in the worst instances, a very material effect on share price, shareholders and, more broadly, stakeholders. What has emerged from that has been this CSR agenda.

My impression is that a lot of the initiative around the CSR agenda has been in response to that dynamic. It has occurred principally in Europe. A lot of it has been driven from Europe for

similar reasons and again because of the globalised nature of business, the joint listing of companies on various stock exchange indices across Europe, the US, the UK, and Australia, that has been part of the driver. It is probably reflected in what I said earlier—there are exceptions—but our experience is that, relatively speaking, the better performance tends to be with globalised companies with very high brand risk profiles in terms of reputation that can translate into the bottom line very quickly. The challenge that we see moving forward is not only for those companies to improve performance and match practice with CSR rhetoric and language but for it to drill down into second and third tiers of industries.

CHAIRMAN—I thank each of you for your appearance before the committee and for your contribution to our inquiry.

[11.39 am]

BRAY, Mr Michael George, Partner, KPMG

MULCARE, Mrs Catherine, Director, Audit and Risk Advisory Services, KPMG

CHAIRMAN—Welcome. We have before us your submission, which we have numbered 53. Are there any alterations or additions you wish to make to that written submission?

Mrs Mulcare—Not at this time, thank you.

CHAIRMAN—I invite you to make a brief opening statement, at the conclusion of which we will have some questions.

Mr Bray—I should start with an apology from Rob Hogarth, who is the primary author of our submission. He has a daughter's wedding today—and you have to get your priorities right! My interest and experience in the area the committee is looking at is as a long-term advocate of what we term 'broad business based reporting', so it is not just the area of corporate social responsibility reporting. It is that interest that brings me here today, and by that I mean broad based business reporting which is a supplement to traditional financial reporting but also something that compensates for its limitations. I will introduce our submission today and Cath Mulcare will provide any detail that is required and probably answer most of the questions that members may have as we go through. I have 25 years of audit and advisory experience, principally in energy and natural resources industries, and Cath is a director in our risk and assurance services practice and has a primary interest in stakeholder reform, regulation, legislation, non-shareholder stakeholder reporting and so on. So that is where we fit into it.

I will make some broad comments on our submission. KPMG believe that, apart from legislation setting minimum compliance requirements in areas such as fair trading, environment, health and so on, there are some things about reporting. No. 1 is that the extent to which non-shareholder stakeholder interests drive organisational decisions should not be mandated by legislation. Secondly, in the reporting area, reporting entities rather than corporations should be the bodies that attract any requirements in relation to disclosure and reporting. The requirement there should be about disclosing frameworks in relation to having regard for the interests of non-shareholder stakeholders. But I make that much broader: that reporting entities should have an interest in their reporting and communications strategies catering to their absolutely broad range of stakeholders of key interest, including the capital markets. And their reporting and communications strategies should be aligned to make sure that the rewards they receive in terms of capital, reputation and licences to operate are appropriate to the organisations' business models and performance.

Thirdly, we believe that encouragement should be given to reporting entities to publicly report their performance in dealing with the interests of all stakeholders including non-shareholder stakeholders, but against their frameworks in a clear and transparent and credible manner. This should be through three main areas: firstly, encouraging the ASX Corporate Governance Council to include sustainability reporting in ASX Corporate Governance Council's principles of good

corporate governance and best practice recommendations so that listed companies who do not issue such reports would explain why they have not done so; secondly, establishing an Australian framework for sustainability reporting that is consistent with international requirements such as the GRI for use by those reporting entities who elect to issue sustainability reports; thirdly, establishing an Australian framework for assurance over sustainability reporting that is consistent with international equivalents to ensure that assurance opinions provided over sustainability reports do in fact meet minimum acceptable standards; and, fourthly, sustainability reports should require the same process for approval and issue internally, within reporting entities, as is required for financial statements—the area that I am certainly most used to.

In terms of assurance over sustainability reports, we currently have a large range of assurance providers, a variety of assurance frameworks, no quality control over assurance statements and no ethical rules for assurance providers. We suggest a few main areas: that acceptable assurance frameworks should be defined, that assurance providers should be registered and that assurance providers should meet minimum requirements for qualifications, quality control and ethics. That is all I propose to say.

CHAIRMAN—Thank you for that. I think you were here for most of the presentation by our previous witnesses. From what you have said in your introductory remarks you obviously disagree with the very prescriptive approach that they were advocating. Can you briefly outline why you have a different point of view, what you see as the flaws in their prescriptive approach?

Mr Bray—I am not sure that I can answer whether I do or do not agree with someone else, but my experience in the capital markets is that the capital markets do in fact respond to precise and accurate reporting. An organisation that really focuses on making sure that their capital position, their reputation and their licence to operate really fit their strategy and business model—that is the best way for decision making to be made.

Mrs Mulcare—Perhaps at this stage it is also worth noting that the prescriptive approach, if we were to do it now through the legislation that is being proposed, whether or not it is on a minimum basis, in the absence of a recognised framework is fraught with danger. We currently do not have one framework. Therefore, straightaway, the importance of comparability and consistency and a framework against which to get assurance basically will bring undone any initiatives we have in this space. So prescription is premature. Moreover, we would agree with the earlier comments today that these things should be done through the ASX Corporate Governance Council. The 'if not, why not' approach effectively does provide the blank piece of paper in the financial report which says that, if you are not taking account of nonshareholder stakeholders, there will be a 'why not'. You will see that blank piece of paper in the financial report, as it currently stands. So it is not that we are against prescription; we just think there is a better way to do it than through additional regulation at this time.

CHAIRMAN—What is your view of the Chartered Secretaries' advocacy of a replaceable rule in company constitutions?

Mrs Mulcare—Interestingly enough, this morning was the first time I had heard about it. Certainly, when it comes to the actual legal approach that is taken, I defer to those experts whom you have probably already heard from. Certainly our submission also states that we would prefer to leave that to the lawyers.

CHAIRMAN—In relation to your advocacy of the reporting framework and reporting requirements, it could be argued that KPMG would say that. It is in their interests to enlarge on reporting requirements. That is the sort of work you do.

Mrs Mulcare—Interestingly enough, and for many years, as Senator Murray would be aware—and I have certainly appeared before this committee before in a number of different capacities—the self-interest approach has been used either for us or against us. Certainly, from the perspective of whether we would like a nice framework and an absolute assurance, then, yes, as we are professional service providers. But that is not what this is about. It is about meeting the needs of the capital market. It is about better reporting. It is not necessarily in our interests not to have a framework against which we can charge a fee. It is about getting this particular aspect right and not confusing the users any further and not insisting on another couple of hundred pages in the annual report, which, as evidence is showing, shareholders and people are using less and less. Taking up Senator Wong's point from this morning, it is really about starting to encourage people at all ends of what we call the financial reporting supply chain to take responsibility for their decisions and not cause 'short termism'. It is about looking at the whole reporting approach, governance and financial results, not just the bottom line, the return. We would take on a number of initiatives to encourage responsible actions or positions on the financial reporting supply chain, including by users.

Mr Bray—I will just add to that. I am a partner of KPMG. We are accountants. We are about reporting and we are about assurance. We are about making sure that that reporting and assurance are the best that can possibly be achieved. In my own case, the advocacy that I have been talking about, I have been at it for at least 10 years, if not 25 years. I think it started at university, but it has certainly been for the last 10 years. In seeing the limitations of financial reporting, as important as it is, I think it is backward looking. And focusing on energy and natural resources industries, I have been trying to help in that for the last 10 years. It is not just me. Across accounting firms we are interested in making things work well.

CHAIRMAN—I take it from what you have said, Mrs Mulcare, that your focus is on the interests of the capital market, rather than on ensuring that the broader community interests are met through this.

Mrs Mulcare—There are two aspects to looking at the capital market. It is impossible to look at the capital market without considering the interest of the broader stakeholders. We stand by that view. It is a view shared by both sides of the argument—I think it was presented by the previous witnesses. Of most interest right now—and probably the short termism is of concern—is that Australia, certainly from our research, appears to be well ahead internationally on things like retirement savings and superannuation. This is work that we are looking at at the moment. The concern is that, if you take a short-term view, when we have economic policy that clearly is about a long-term position for Australia and for all stakeholders in Australia and particularly for the investing public—and I should mention that includes me and everyone in the room—there is no other way to do this but through better reporting and considering all of the stakeholders. But it is not necessarily through legislating additional reporting that no-one is going to use.

Senator SHERRY—The example you just referred to is not relevant here. Superannuation is underwritten by compulsion.

Mrs Mulcare—So you have—

Senator SHERRY—By government law.

Mrs Mulcare—So you have a compulsory base of money that is growing.

Senator SHERRY—That is right.

Mrs Mulcare—That is a very good economic policy for the future of Australia.

Senator SHERRY—That is my point.

Senator WONG—I think you are referring to the allocation of that or the investment decisions associated with that capital.

Mrs Mulcare—Yes, the investment decisions and all the rest of it are not just about the sustainability of the capital market but about the sustainability of the economy.

Senator SHERRY—Sure, I accept all of that, but the point about superannuation is that it is compulsory. It is not unique in the world, but it is certainly one of the first. The government underwrites it. The government made it compulsory. It is not voluntary here.

Mr Bray—Do you mean the reporting of superannuation?

Senator SHERRY—I am talking about the principle of compulsion.

Mr Bray—Compulsory reporting?

Senator SHERRY—No, it is compulsory to pay.

Mrs Mulcare—I agree, and in the Australian environment if it is compulsory to pay—and I am not sure what you mean by the underwriting aspect in terms of the Australian government—then surely at some point in time it is going to be important that people consider the long-term aspects of that compulsion. It is important to consider the way in which those investment decisions are made and ensure that better financial reporting happens in order to make those long-term decisions, and not have fund managers acting on a three-to-six-month time frame when that is clearly not in the interests of the users or their own stakeholders—for example, I have a long time to go before I have to claim on my superannuation—

Mr BAKER—Some of us are getting very close!

Mrs Mulcare—I would just make the point that, in the climate within which Australia operates, it becomes fundamental that we actually consider it. I do not think there is a capital market participant who is not considering things other than shareholders.

Senator WONG—I am interested that you say that because the view has been put to us by others that the capital markets actually are not interested in this sort of information. I wonder if

you could perhaps comment on that and expand on your assertion in response to the suggestion that you are doing this in order to try to develop another market for KPMG or for accountants generally, an idea which has also been aired in this committee. Why do you say that we propose this in the better interests of the capital markets? Is it something in terms of your interaction with, say, institutional investors or others that this is a set of information that people are interested in and would like to have et cetera?

Mr Bray—When I made the point before about organisations' reporting and communication strategies, I very purposefully lumped together capital, reputation and licences to operate. When I say 'capital'—I will expand on that a bit—I mean sufficient capital to execute your strategy at a reasonable cost. That is the equation that I am trying to help them to balance. I am not sure of the extent to which capital market participants have really built in longer term performance indicators to their decision-making models—

Senator WONG—Or risk management strategies.

Mr Bray—and by that I mean if an organisation does very well on managing the implementation of its strategy versus another organisation, you would expect in a financial model used by an analyst that that company would be rated better than the other, because it is demonstrably managing its business risks better. If I were to particularise on those business risks, I might head into the environmental and social areas and say that if a company manages those business risks that threaten its ability to execute its strategy and keep its capital position intact in a better way than another company then, in terms of long-term reputation and long-term licence to operate—long-term sustainability in a business sense—it is probably enhanced vis-a-vis the other business.

Senator WONG—I agree with that. What I am asking, though, is: do investors think that is relevant? I agree with all the things you are saying, but what people are saying to us is: 'People are more interested in our three-month returns, our three-monthly financial information.' They are not necessarily interested in issues around long-term value, which would include, I would have thought, your risk management strategies around stakeholders, essentially.

Mr Bray—I do not profess to be able to give an answer on what investors do want or whether investors do or do not. The advocacy on the reporting model here is that the information be in reports about the company's ability to execute its long-term strategy so that they can take those things into account in making precise decisions if they so wish. Part of what organisations should be doing is actually working with key stakeholder groups, be they investors or others, to make sure their models are equipped to take that information into account.

Mrs Mulcare—And we certainly think that the ASX Corporate Governance Council principles incorporate that approach, in two of the principles actually—not just in principle 10, which has often been referred to, I am sure, to the committee, but also in principle 5, which is exactly about the risk management and is really about saying how you are incorporating those risks. This is not something that is new. Certainly there are models that management accountants have been using for years, whether it is Porter's five forces or the capacity to take a look at all of the things that affect a business, because it is recognised that the only way to grow the business is to take all those factors into account for their own sustainability and profitability.

Senator WONG—With your suggestions around the framework, essentially what you are saying is that it should be voluntary in terms of the ASX principles of good corporate governance et cetera—and you would include sustainability reporting—but that there should be a framework established for sustainability reporting. I assume what you are advocating there is at least having some comparable and consistent information that people could utilise to compare company performance.

Mr Bray—At least we have accounting standards in financial reporting. In broader business reporting, there are a lot of models, thoughts, initiatives and views out there and, as Cath said, they need to be brought together in a framework if we are to achieve the element of consistency. When I talk about how decisions are made on the capital markets side, I always think about simple net present value models and say to people, 'If I'm going to report that, how would I, as an investor with a little simple model, plug that in and use it?'

Senator WONG—Sure. The third dot point on page 2, under (c), is essentially about audit process, is it? Is that what you are suggesting?

Mrs Mulcare—An assurance framework. Certainly our observations from the surveys, both domestically and internationally, suggest that there are varying degrees of the framework within which the reporting happens. Sometimes there is a lot of disclosure but you are not really sure which framework they are using. I think that is a must. If you say you are doing reporting, you should at least say what framework you are reporting within. After that, if you say that you are getting assurance—and I agree with the comments from previously—whoever it is that provides that assurance should absolutely live by two standards: one is a quality assurance standard that says that they have to have the necessary skills and competence to do that work and the second—and this is fundamental with any assurance service—is independence. At the moment, what these surveys are demonstrating is that those things do not happen in Australia.

Senator WONG—Sure. We had evidence from the CPA say about an initiative with the University of Sydney to try and look at a framework for reporting. Are you aware of that?

Mr Bray—I have some broad awareness of that.

Senator WONG—Who should develop that? Senator Chapman mentioned that Senator Campbell, the Minister for the Environment and Heritage, has referred one of these issues—the issue of the GRI—to the corporate governance council. You have various other people saying, 'We should do this,' or 'We should do that,' and you have the CPA working with the University of Sydney. If government were trying to facilitate some sort of standardised framework, how would you suggest that would be done?

Mrs Mulcare—It is interesting that the biggest challenge we had when we were putting this submission together was where to put this. I think that is partly why the ASX Corporate Governance Council seemed to be a place. But why the ASX Corporate Governance Council? Now that the Accounting Standards Board is concentrating purely on accounting standards, I am not sure that that is the home for it. Internationally, they have not really found a home for it. There are a lot of people espousing various principles and things like that. The danger in Australia of putting something up and saying, 'This is what Australia is going to use' is that the rest of the world will get their act together, and inevitably what will happen next is that we will

look at what we have and say, 'We have to conform with the rest of the world' and we will change it.

Senator WONG—We have had to do that in the financial reporting area. You cannot prevent that, can you.

Mr Bray—It is an ongoing process.

Senator WONG—I am not trying to belittle it. I am just saying that no framework against which you report is going to be static.

Mrs Mulcare—That is why I would learn from the experience we have just gone through with those accounting standards and that we are currently going through with auditing standards. I would learn from it and make sure that, where possible, Australia actually moves with a framework internationally. At the moment GRI seems to be the most well-established. We should monitor things internationally as well as domestically.

Mr Bray—It is a very complex thing to get the roles and responsibilities right. I addressed the World Petroleum Congress in South Africa last year and the World Energy Congress in Sydney the year before on this sort of topic. It was about the energy industry taking the initiative on this broader based business reporting initiative. It was along the lines of the international energy agencies forecasting the need for $US16 trillion to be invested in energy infrastructure by 2030 if there are only to be two billion people without access to electricity in 2030.

Senator WONG—Only two billion?

Mr Bray—That average is $US550 billion every year for the next 25, and the world's capital markets invested about $US250 billion in 2003. The existing financial reporting framework really suffers with the sorts of investments that energy companies are making for the future—where we have to be on an average annual basis. So the proposition to both of those groups was: 'You need to do something about reporting frameworks now. You cannot rely on the accounting profession to do it up front, although it has a key role. You cannot expect the companies in the industry to do it alone, but they certainly have a role.' Governments and regulators all have a role, but the primary stimulant in those sorts of things needs to be a body, a voice, for the industry. But that is at a global level.

Senator WONG—I do not know if Senator Chapman discussed reporting rates in Australia, but there has been a bit of different evidence about this today. The Group of 100 suggested that probably over half of their members would report on a voluntary basis against either the GRI or some other form of environmental and social reporting or triple bottom line reporting. The rates that you quote for the top 500 do not compare particularly well against two other countries. In fact, they are significantly lower. I have to say that was anecdotally; they had not done a survey. First, where did you get those figures; and, second, is there a reason why Australia appears to lag at least the UK and Japan in this sort of reporting?

Mrs Mulcare—In terms of the survey material, as Mr Honan or Mr Harris pointed out this morning the type of reporting and where they report varies. Whilst they believe there is more than 50 per cent, sometimes that is reporting that is done to employees and sometimes that is

reporting that is done through other types of reports; whereas the survey looked to the reports on a comparable basis internationally and then domestically in terms of annual reports. Certainly, we would be happy to provide the survey results and who was surveyed.

Senator WONG—Is it annual or a stand-alone annual? A couple of companies do their own annual report on their CSR activities essentially.

Mrs Mulcare—I would have to go back to the survey to see exactly where—

Senator WONG—Perhaps you could take that on notice.

Mrs Mulcare—I am more than happy to provide the survey. We will do that.

Senator WONG—The UK has obviously got a fair number of policy measures in place to try and encourage this.

Mrs Mulcare—It is interesting, because obviously why we are involved in the survey is to work out where we are compared to the rest of the world and why things might be different. Some of the statistics presented the fact that in Europe some 65 per cent of that reporting is assured against within the professional assurance framework as opposed to a non-traditional assurance framework. In Australia it is much lower. We are looking at why those things might be the case. I would have thought the comparison between, say, Europe and Australia would have been more comparable. We looked at things like: 'Is it because the companies here have been concentrating on things other than the IFRS?' Europe is in the same position, so I could only speculate as to why that is the case in Australia. If you go to the legislative structure and ask, 'Is it mandated overseas and that is why it is different here?' you find that is not the case.

Senator WONG—If you were to speculate—if you do not want to, that is fine—

Mr Bray—I am not going to.

Senator WONG—I am happy to leave it, if you do not want to. Did you say before that a majority of the reporting in Europe utilises the existing professional assurance framework?

Mrs Mulcare—The provider of assurance is through a professional firm.

Senator WONG—In other words, they must have dealt to some extent with the issue that we were discussing before?

Mrs Mulcare—Indeed, they have. They use predominantly GRI. The IAASB, the International Audit and Assurance Standards Board, is also working on an assurance standard for this type of reporting.

Senator WONG—For GRI-type reporting?

Mrs Mulcare—For the type of audit evidence that you would have to gather and the expertise that you would need in order to assure against that framework. We have competing pressures within Australia, because there is also another assurance standard. So in Australia we are—

Senator WONG—What is that?

Mrs Mulcare—It is called AA1000. We can probably provide that.

Senator WONG—That is okay.

Mrs Mulcare—Again, as soon as there is divergence in not just the way in which the reporting or the framework happens but the way in which assurance is provided, it creates a confusion in the users that I personally think is dangerous.

Senator WONG—I do not want to ask for the time frame, but do you have any knowledge of the process and time frame around the IAASB work on this?

Mr Bray—I do not.

Mrs Mulcare—Two years apparently.

Senator WONG—From?

Mrs Mulcare—It is guidance with respect to the way in which assurance is provided. The project has just started.

Mr Bray—Would you like an answer on that, if we can find out?

Senator WONG—I am sure that the committee can look at it. It is interesting, because we have been discussing this issue. Senator Murray, in particular, has been raising it with a few witnesses. I was not aware—which shows my ignorance—that the IAASB was working on them. Thank you very much. It has been very useful.

Senator MURRAY—I want to go back to the area of compulsion from the user's point of view, not from the provider's point of view. The corporates talking to us are very resistant to having compulsion apply to them in terms of reporting. If we go to the user and particularly to the largest users in the capital market—that is, the investment institutions—we find that their strength derives from compulsion, as Senator Sherry outlined. My thinking for long has been that, because money is taken from people and companies compulsorily and given to institutions—which benefit from that compulsion—that those institutions therefore hold that money in escrow, in trust, on behalf of those people and that, because of that, they should be obliged to a higher standard of due diligence, analysis and performance than you would otherwise expect.

That is why I have been a supporter of, for instance, institutions being required to vote at company meetings. They are holding things in escrow and I believe that they should be voting on the election of directors, on remuneration and on constitutional issues. That is why I have been a supporter of finding a mechanism to force them to have proper analytical capabilities to appropriately assess market risk. It is why I have been a supporter of the Financial Services Reform Act, because that provides a disclosure mechanism and so on. It all flows back in my mind to the idea that you have taken money from people compulsorily and therefore you have a higher obligation in terms of minimising the risk which applies to the money.

If you take that extension into the CSR area and where that line of logic follows through to, what is most important is the risk area. In my broad conception of CSR I see that there are three major components: risk, added value and philanthropy, all of which have different meanings to the companies and different effects. It is the risk area where you have to ensure that social and economic footprints are well reported because of the explicit effects on the bottom line if they are not realised. HIH and AWB are easy examples around. Have you given any thought to whether there is any compulsion mechanism to drive a higher standard of CSR reporting by making the investment institutions take account of those matters?

Mrs Mulcare—I know that you and I have had similar discussions in other forums along these lines and perhaps—

Senator MURRAY—The trouble with being so long in this business is that you end up being old friends.

Mrs Mulcare—I do not necessarily share the same view about compulsion either at the corporate level or at the investor level. I tend to take more of an incentivised approach. If people see the worth in something then they are more likely to take it up without compulsion and that is a much better way for markets to operate. There are times when I think that compulsion actually leads to the reverse effect. If I use the example from FSR, the compulsion to have PDS statements, given their nature, means that I get whatever it is in the mail and I do not pay close attention to it. Do I read it—perhaps not. Do I think that someone is reading it—absolutely. Who do I think is reading it—the regulator. Therefore I am going to rely on them, thus making me less accountable for the decision that I made. That is my view on why that particular aspect of compulsion is not necessarily the best thing.

Senator MURRAY—You missed out the middle term which I put. If I as a superannuant have my money vested with an institution, whilst I might not read that product disclosure statement I expect them to, not the regulator. They have my money in escrow and that is the point of my question to you. My assumption—and I might be doing them an injustice—is that most institutions have very weak analytical departments. If they had strong departments they would be discovering many more of the scandals that go on before they ever become scandals.

Mrs Mulcare—I still return to the incentive for the managed funds and the analyst to operate in a particular way. Perhaps it is just a difference in approach. I am not sure that—to use the very old expression of leading the horse to water—dragging them along because it is a legislative requirement will necessarily lead to a better approach. I do not necessarily think that they will drink the water.

Senator MURRAY—Senator Sherry asked an interesting question of a witness earlier: what is wrong with a generalised requirement to report on CSR? The witness said that those who do not want to will not—they will be blank paged—and those who do at present will. But the fact is, they will at least have to say, 'We are not going to say anything.' By doing that, they will have to think about it. What is wrong with taking that same approach to institutions which hold superannuation or investment funds—that they must at least assess the CSR capabilities of companies?

Mrs Mulcare—My concern is that once we have made it compulsory to consider it, does that necessarily mean that they will embrace the spirit of it and consider it in such a way that will lead to the outcome that you want?

Senator MURRAY—But Senator Sherry's question explicitly stated that the result is that they at least get onto the station platform and say, 'What are we supposed to be doing here?' The problem is that the top 100 companies said that only a little over half are paying any attention to CSR. Quite frankly, that is shocking. It is not a good thing; it is a bad thing that so many are not involved.

Mrs Mulcare—We have already addressed that within one of the recommendations in our submission. Which is to say that with the approach of sustainability reporting within the ASX Corporate Governance Council, how do you consider the wider stakeholders, how do you do your risk management through principle 5? We do believe that that is the way to do it, because you will see that blank piece of paper, you will see those who are not considering it and are not reporting. My concern about requiring CSR type reporting is that we do not have the framework, and reporting without a framework is possibly of less value and more damaging than no reporting.

Mr BAKER—Why do you say that? If they are given the total freedom, as Senator Sherry said before—

Mrs Mulcare—The total freedom without a framework means that you put in a corporate—

Mr BAKER—But is that not a starting point? You were here when Mr Honan did his presentation. He was saying that they need to encourage, but there is a resistance to have anything formalised. With the small number that are doing it—even though he said the number was encouraging and growing—how do we as the government move forward to encourage that without formalising a process as simple as the companies that are not proceeding down the line. Mr Honan was saying that they are.

Mrs Mulcare—If I remember correctly, Mr Honan's response was that the concern was about the minimalist approach. I am trying to think of a polite way to say that without making disparaging remarks about the legal profession.

Mr BAKER—He did say to us, as a government, to stay out of the road.

CHAIRMAN—Don't worry about disparaging the legal profession!

Mrs Mulcare—Even with parliamentary privilege, I know that some of my friends and colleagues read *Hansard*. From my perspective, with what I have seen through FSR, CLERP 9 and other legislative approaches, once something is in legislation we feel compelled to ask the lawyers how we should interpret it and therefore what our requirements are to meet that legislation.

Senator SHERRY—Isn't it horses for courses? Circumstances vary, and the way you apply regulation and the degree to which you do so will depend on the circumstances.

Mrs Mulcare—I could not agree more. That is why I would absolutely support the ASX Corporate Governance Council approach, because it is horses for courses—

Mr Bray—To add to that—and I am probably going to go over a little bit of old ground here—the sort of reporting model that I and others advocate does not rely on legislation or regulation. It is really about organisations having real clarity at board level and at executive level that they have got a reporting strategy in place that will in fact get the capital that they need, the reputation that they want and the licences to operate that they need to actually implement their business strategy. That inevitably leads you down a track of reporting the business strategy, performance and implementing it, and insights about what is likely to happen in the future. Because you have that sort of reporting strategy, you are thinking very carefully about who the key stakeholder groups are that operate on each of those things: the capital, reputation and licences to operate. You will have individual reporting strategies for how to deal with each key stakeholder group—and with the key people and the key organisations within those stakeholder groups—so that you will make sure that the reporting that is put out is understood and that they can build precise decision making models, be they net present value models or anything else, on it. I do not need any legislation or regulation to do that. It is organisations driving themselves to the futures that they want.

Mr BAKER—I understand what you are saying. One thing that seems to be coming through to me is that we are talking about non-financial reporting—

Mr Bray—I am talking about all reporting.

Mr BAKER—I am just saying that is in this particular situation. However, as for the actual financial reporting structure that is being applied, as in how strongly and how highly it is regulated, I am going back to what Senator Sherry was saying. I understand what you are saying. But as a minimal approach there seems to be people applying in their minds a financial regulatory approach to non-financial reporting, which are two totally different matters.

Mr Bray—For the sort of reporting that I am talking about it is generational change. We have had a self-regulated and legislatively regulated accounting model for a long time, for 60 years or whatever else.

Mr BAKER—Yes, because everything adds up.

Mr Bray—That has not achieved the sort of reporting that I am talking about. So accounting standards, be they enacted in law or self regulated, have not achieved over 60 years the sort of reporting model that we are talking about.

Mrs Mulcare—Moreover, what tends to happen then, particularly once those standards are in law, is that people are reluctant to actually do additional reporting or a variation on that reporting because then they are at risk of failing the law and the legal requirement. There is a real issue with that particularly in this space with going a similar way. You need a broad framework. You need people to report which framework they are using and why they have chosen that framework. You need them to explain how that fits into their business strategy and their long-term view of the company. As has been pointed out, you do need investors to actually read that and take that into account—

Mr Bray—and understand how to use it in making precise decisions.

Ms BURKE—Have you done any analysis of what the costs would be for corporations to go down a mandatory path or a voluntary path? Have you looked at the cost implications of doing it at an appropriate level, taking in your opening remarks about a framework?

Mr Bray—I will talk broadly and Catherine can talk about the corporate social responsibility type of reporting and the sustainability type of reporting. I come back to that performance equation about capital, reputation and licences to operate. If you want those things, it is demonstrably self funding. But it is a very strategic thing to decide: there is the future, that is where I am heading to, I can easily put the investment proposition to it—and I do not need legislation for that.

Mrs Mulcare—We have not done any surveys on the actual. The advantage of voluntary reporting is it is more likely to reflect the way in which they make decisions internally, which means it is more likely to reflect the information that they already generate for their internal reporting. Therefore it is an easier and more cost effective way to translate the sorts of reporting that they do internally, regardless of which particular management accounting model they use, to an external report than it would be if you said, 'You must do this and you must do that' in a particular way. Then you are going to have a cost burden.

Mr Bray—I should add two things on the costs side. Let us say that in many organisations today there are 20 reports—financial statements—produced. There is often a reporting channel for every one of them—people doing things. There is often a different database for each of them. So common process to achieve all reports and common process must be a cost saving proposition. The other one is a technology piece. I am not advocating this. I am just aware of it. There is a technology called XBRL that some members of the committee might be aware of. It is actually just a tagging thing. It is an electronic way of producing reports. Today it is being used all around the world for financial reports—tax returns in some countries. But it can apply to any sort of report, as long as you have a framework.

This goes to the heart of the point that Cath was making before. The sort of reporting that I am talking about is absolutely suited to something like an XBRL technology. It is the same with sustainability type reporting. I heard the people who were before us here talking about collecting statistics from a very remote location .What better way to do it than through the internet. There is a technology in the cost equation that, again, adds to the self-funding proposition.

Senator SHERRY—I thought your outline of statistics and your country-by-country analysis were really useful. I had forgotten that we have to a limited degree mandatory reporting of some areas of SRI in the Financial Services Reform Act. I had forgotten that amendment. I don't think it was a government initiative. I think it was forced on the government.

Senator MURRAY—It was Labor/Democrats.

Senator SHERRY—I suspect that is right. I did not handle the bill, but I know you did, Senator Murray.

Senator MURRAY—The one that is in the Corporations Law requiring environmental reporting was also by Labor/Democrats.

Senator SHERRY—The reason I raise that is because a lot of the submissions and debate have been around the fact that we do not have anything that is mandatory—but we do, in a limited way, applying to one particular piece of legislation; in this case fund managers and financial providers. I don't want to go down the route of PDS statements and the disaster they are in terms of whether consumers read them or not; I happen to agree with you. But in terms of the implementation of that amendment, are there any definitive research surveys about how that provision has been implemented in PDS and financial reports? I haven't seen anything, but it would be useful to have that information to see how it is being implemented.

Mr Bray—I am not aware.

Mrs Mulcare—I might need to take that one on notice to see if there is any. None comes to mind but I find it difficult to believe that, in amidst all of the work that has been done lately looking at PDS statements, particularly around the comparability and to what extent they are in accordance with the law, there would not be something. Certainly not from our perspective we have not.

Senator SHERRY—I have read a lot of PDS statements, unfortunately. But, tending to focus on the fees and a few other issues, I have not looked at the environmental labour standard disclosures. ASIC has issued a guideline, and I would not expect ASIC to have done a lot of work in this area; they have other things to worry about. But there must be some sort of indication of how this has been implemented and what standards reporting has emerged as a consequence, which I think would be a useful baseline in terms of the broader debate. Frankly, I have not had anyone in the financial services industry whinge to me about that aspect of PDSs—a lot of other issues, but no-one has ever mentioned this one to me.

Mrs Mulcare—It was interesting when you made the comment about the fact that there are no mandatory requirements in this phase, but there are so many mandatory requirements to take other stakeholders into account in so many different laws that often I think that is part of the issue that we have—how do we bring these together? I guess there are a lot of people looking at exactly that issue now. But certainly we did not want to put something in our submission that did not acknowledge that there are environmental laws, there are workplace laws, there are a lot of laws in this phase which are aimed fairly and squarely at good corporate behaviour and at making sure that corporates take care of the stakeholders that they engage with such as employees, customers.

Senator MURRAY—Occupational health and safety is the biggest one of all.

CHAIRMAN—There being no further questions, thank you to both of you for your appearance before the committee and your contribution to our inquiry.

[12.29 pm]

BOVILL, Mr Richard Yvan, Organiser, Fair Dinkum Food Campaign

CHAIRMAN—Welcome. We have before us your submission which we have numbered 123. Are there any additions or alterations you wish to make to the written submission?

Mr Bovill—No.

CHAIRMAN—I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

Mr Bovill—Our campaign grew out of a concern for the way corporations disregarded communities and a recognition that economics, free enterprise and capitalism are about the wellbeing of people and communities. In listening to the previous speakers, it appears that the tables have turned now so that we are generally interested in the wellbeing of corporations as if, in many cases, people and communities did not exist. There is a need to identify their responsibility back to individuals and communities.

We have harnessed human endeavour. Individuals have a huge capacity and willingness to prosper by their own endeavour. As on the sporting field, we know that if we allow people to achieve their maximum they will go out and strive by every means they can to do that. We have also recognised that there is a need to regulate, because unregulated human endeavour means that they will try every trick in the book.

That applies in exactly the same way to corporate behaviour. If we do not regulate corporate behaviour, they will exercise every opportunity they can to maximise profit. Offering bonuses and shareholder options to directors and senior employees in companies causes them to want to go out and maximise profit as much as they possibly can. If that is unregulated, a lot of people in the chain will suffer and we have seen clear evidence of that. In regional Australia in particular we are seeing many examples of that taking place.

CHAIRMAN—Thanks very much for your introductory remarks. You say that, unregulated, corporations will maximise profit. But, even within the context of the regulatory structure we have, is that not a legitimate purpose of a corporation? Is it not the same purpose you have in operating your farm?

Mr Bovill—Absolutely. That is the point. It is a case of finding a balance so that the purpose of that profit is to deliver good outcomes for the Australian people and Australian communities, not just as an end in itself for the corporation. We wish them to do that, because that delivers efficiency. But aggregations of businesses and the way that cause marketing is applied mean that smaller things that are taken for granted in regional communities—such as the way small sporting groups are sponsored—and the impact on the capacity of other companies to operate get forgotten. Australia is not a large marketplace. We need to be globally competitive. We are losing critical mass in many areas. One company's decision to improve their own profit can have a huge impact on another company's capacity to operate in this market.

CHAIRMAN—What particular initiatives do you want to see taken in regard to the Corporations Law to deal with the issues that are of particular concern to you? I know one of the major issues that you have been campaigning on is the issue of proper labelling. Obviously, that is not within the aegis of the Corporations Law, but are there particular initiatives you want to see taken in the Corporations Law that address some or all of these issues?

Mr Bovill—Previous witnesses were talking about the overall corporate governance, but we are concerned about the management tools within an organisation. Where they take an action, they need to take account of the effect of their actions on smaller organisations. This goes back to the case of what happened with McDonald's—and I really do not want to dwell on that company name; it is more the action. A large organisation can tender out a piece of work with the idea of reducing cost. Some people have a very large share of that business. If they were to lose that business, the impact on a particular town and a large group of people could be quite critical. We believe that organisations need to understand and research the impact that that decision will have on that body of people and on that community and take it into account in the final decision, because it is very easy to transfer business from one area to another very rapidly. It is a great way to drive price down, particularly if a business is totally dependent on it. They will not actually operate under genuinely commercial terms in accepting a real contract, because they know that their business dies if they do not get the contract. That tool was used in the way the milk tender went out under dairy deregulation. If a large organisation that has a huge market share says they are going to give all of the contract to one player in a market where six or seven players have existed in the past, the disruption that is going to happen to some of the businesses is quite extraordinary. What they are doing is almost immoral. In turn, they know that they are going to get a price which will be well below the cost of production because those people are tendering for their survival—the very fact that they wish to continue to exist—not on any genuine commercial basis.

CHAIR—Are you looking almost for a community impact statement to be undertaken by a company contemplating that sort of action?

Mr Bovill—Yes, but particularly at a management level. A lot of large companies have beautiful corporate policies where they enunciate how they deal with the public, but then they have a manager down the line who gets a bonus for achieving his gross profit in his department and there is no mechanism in place whereby he has to apply the corporate policy in his area, so he goes out and sets mechanisms like that, which are going to really put the bite on everybody who is a supplier. That is good practice, but he should also have to take into account when he makes that decision what the impact of transferring the business away from one organisation to another is and what that organisation's place in a particular community is. It could well be the major employer in a small town. If they lose that contract, there are dire social consequences in that area. They need to be able to justify the value of the decision that they make. It is one thing for them to come along and say, 'We did it because we got a deal that was substantially better in another area,' but if they do it for a very small margin and the social consequence in this area far exceeds the margin that they were going to achieve then I think there needs to be questions asked.

Senator MURRAY—Mr Bovill, I congratulate you and your colleagues on mounting a very effective and high-profile national campaign. Politicians are always impressed by those who can do that sort of thing from that basis. The issue brought to our attention is a very serious one—

and Ms Burke has been pursuing this with other witnesses—and that is the question of the proper accounting for decisions. If you think of financial statements, if you think of accounting, double-entry bookkeeping, you will know that liabilities—the negative side of a company; how much debt it has, what its risk is and so on—are accorded a great deal of attention. The liabilities and negative sides are expressed as clearly as the positive sides—the profits that are being made and the returns that are being achieved. The point Ms Burke has been pursuing with some of the witnesses, and the point that you have just made, is that companies are busily talking about their positive sides but their negative sides are not being properly reported and the consequences are not being properly assessed, understood and determined.

If we draw the analogy between financial reporting and non-financial reporting, the greatest weakness of non-financial reporting is the lack of balance and the lack of full transparency and disclosure. In financial reporting, when that is reported, companies are judged by the marketplace. In other words, if your negatives—your liabilities, your risk—are greater than the norm, people will not buy your shares, your share price will fall et cetera, so the market is applying pressure.

My question to you arising from that introduction is: how can the market apply pressure if, on the CSR side of things, proper reporting was to occur? Take the example of your situation. The company says, 'We will make so much money for our shareholders or save so much cost by this action, and we report that the effect on the community will be very large, but this is in the interests of our shareholders.' How can the government react? Is it purely a social reaction which will apply the pressure so the company then does not do that or what? What is the result of all that?

Mr Bovill—The result is that it exposes how that profit was derived. To have derived that profit, is there a cost that somebody else is picking up which is greater than the worth of the profit? I come back to the case of our friends with the golden arches. They picked up around $3 million in a deal which cost the north-west coast of Tasmania around $50 million in economic activity. They put about $30 million on the Australian balance of payments deficit. They reduced the factory hours of a whole range of employees, who would have gone back and taken social security to top their wages up. They gave no benefit back to the Australian community; not a single price dropped so that they could make a profit.

On balance, the Australian public have been asked to subsidise that profit. We subsidised that as a community because we have had to go and reinvest to pick up the pieces. Somewhere along the line, we have to account for it, because it is not just a clear arrangement with them making a profit. What is the underpinning cost of achieving some of these profits? Is there some environmental degradation that some future generation has to pick up the pieces for and pay for? It is terribly complex. I recognise the complexity of it, but I also recognise that, if we do not try and expose it and look at it now, these things will accumulate. We are accumulating a debt. We are trying to disguise the fact that these people are making clear profits when, in some cases, some of this cost is being borne out by governments and by individual communities.

It gets back to community organisations. When a company closes down some branch offices or the head office of a small regional business goes somewhere else and puts the sponsorship into a wonderful cause somewhere—which is cause marketing, which people love; it is only branding—then all the little sporting groups that used to be sponsored by this little organisation

start to cave in. Some of them go to government and ask if they can pick it up, but at the end of the day good organisations in a regional community disappear. When they disappear there is less for youth to do, so you get social problems in that area. Who pays the cost of social problems? The government does. There are many complex issues that flow down. We have organisations that say, 'Just leave it to the market to decide.' The fact is that the responsibility at the end of the day is back to people and communities, and we must try and find a way to reflect costs back against those. It is complex.

Senator MURRAY—Your answer leads me to the conclusion that the evidence we have been given so far has been very one-sided. The corporates are telling us the cost of compliance is too great. But, of course, they have never told us the other side of the equation, which is that the cost to society can be much greater where there is not truth and full disclosure going on. Essentially, your strategy seems to come down to proper reporting in labelling, labels having to disclose the truth and properly reporting the truth, and proper reporting from the corporation—in the language of the chairman, a community impact statement of social effects. Your strategy seems to be that, once you do that, the market reaction will be such that it will not pay the company to do what it originally would have done.

The other question I want to ask is whether one of the problems is that existing law is not enforced. I want to give you the example of Woolworths, which is a very capable, professional company. They advertise themselves as the 'fresh food people', yet they sell as fresh food fruit which has been stored in refrigerators and special bases for anything up to a year. They sell meat as fresh meat that has been stored and sprayed. So it is has not come, in other words, straight from the abattoir to the store; there is a period of storage in between. Yet the ACCC, to my knowledge, has never gone along to them and said, 'This is misleading and deceptive in some areas.' Is your experience, from a direct relationship as a supplier of food, that the regulators are not on the case in terms of enforcing existing law anyway?

Mr Bovill—I think that is true to some respect. We deal in complex issues. In the case of Woolworths, there has been a huge misrepresentation against Woolworths. They have taken products that, by their very nature, are always going to be 12 months old when they are put on the shelf because we have a harvest period in Australia which is probably, for example with onions, two to three months and they are always stored for the rest of the year.

Senator MURRAY—But that is not fresh, is it?

Mr Bovill—But it is fresh related to that particular product.

Senator MURRAY—But it is not fresh in the minds of the consumer. That is a problem. You cannot have it both ways. As a consumer, if I go in and buy an onion and they say to me it is fresh, in my mind somebody has dug it out off the ground, popped it on a truck, washed it, brought it to the shop and I have bought it. That is the common understanding of consumers. I recognise the veracity of what you are saying—of course it does not work like that—but it is Woolworths that has chosen to put the word 'fresh' in front of food.

Mr Bovill—I think the real issue for regulation is where we have products that are 'A product of Australia' and in many cases there is a high likelihood that they are not at all a product of Australia. They are foreign products packed in packs as 'A product of Australia', building on the

identity of what Australian people really feel like they want to buy. The regulation is not strong and there is no policing in that area. That is a matter of grave concern because, as I mentioned earlier, we are a very small marketplace. The whole purpose of country of origin labelling is to try and maintain some critical mass in this marketplace so that we can have viable factories.

If we lose critical mass, we are going to lose our food manufacturing industry. These products are coming in fully packaged, in some cases, which means that our packaging industry cannot keep pace. The judgment on the part of one organisation to do that is fine, but it impacts on every other business. There are one or two packaging manufacturers in Australia that are dependent on the critical mass of the whole marketplace. As soon as it drops off, they cannot reinvest in new world-leading technology that other countries have, so we continue to fall further and further behind. There are many complex issues which, in the longer term, will cause grave damage to our whole marketplace which never get reflected in individual annual reporting. Everything is in a 12-month reporting cycle but, with many of these things, the impact will occur over five to 10 years. Where we do have regulation, I think it is terribly important that there be a strong capacity for it to be policed.

Senator SHERRY—I agree with your analysis and outline of the problems and the issues and I agree that it is complex. What I am not clear on, though, is that on behalf of the TFGA you are advocating that we have before us the Corporations Act as the solution. We cannot deal with the issue of labelling; that is another set of regulations and laws in another area, which I hope is resolved. Are you advocating in the context of the Corporations Act that it be mandatory for a company to produce a social and environmental impact statement on major decisions that it makes? Is that what you are advocating in the context of corporations?

Mr Bovill—Yes, and that their corporate governance policies should drive that down and reflect how that will operate at management level. When they make a major decision to change their purchasing patterns—and I believe this could be done voluntarily by posting it on a website—they should do an impact statement on that decision.

Senator SHERRY—I think I am clear now. It appears to me that you are arguing not just for an impact statement on the consequences but also for an implementation report on how it is actually done.

Mr Bovill—Yes, that they can identify that they have a process within their organisation whereby their management account for these issues in the processes that take place.

Senator SHERRY—What strikes me as unusual about your position—and representing the TFGA—is that you are the first industry association to suggest this. Almost every industry association that has come forward to this committee has said: 'Don't do anything. Just make it voluntary. We don't want any mandated provisions, full stop.' You are the first to have suggested anything of any significance. Frankly, the suggestion you make is a lot deeper and goes a lot further than some of the non-industry organisations are advocating.

Mr Bovill—We represent a region, in our area, over and above the industry itself. We are interested in the outcome of what happens to regional communities with the decision-making process that is in place and how we can have a better decision-making process. A large organisation with a head office in Sydney or in some other country does not have any process

whereby an individual manager in their organisation can get any understanding of the impact that their decisions are having—there is no mechanism in place. We felt that if that mechanism had been in place at McDonald's they would have thought very carefully about the decision they made because they would have realised it had the potential to damage their brand. They can justify to the public and those who use their products why they took an action that did this damage to the community. They can use the counterargument, 'We did it, but we delivered $50 million worth of price cuts.' They can say they are delivering efficiency to consumers, but it is a double-edged sword and they have to justify why they took that action.

Senator SHERRY—So in the case of McDonald's—and I appreciate that we should not be unfair to McDonald's—you would want us to recommend a change to the Corporations Law that, given the circumstances at McDonald's, requires them to produce a social economic impact statement in terms of the region we are talking about—the north-west coast of Tasmania—and, secondly, to produce some sort of ongoing report-back mechanism against that impact statement. That should be in the law.

Mr Bovill—I do not know that it necessarily has to be in the law. But it can be for specific items and it can be for business transactions of a certain size. We state in our submission what happens with distribution in the case of Woolworths in Tasmania. It is a very clear case of how something needs to be applied in that process as well. They will do it on a set of numbers that will justify what they do, but the impact on the whole rural community in Tasmania will be quite dramatic and it will cost individuals a huge amount of money. They need to have done the sums to understand the impact of it. There needs to be some mechanism by which they look at the social cost of the decision-making process they have in place.

CHAIRMAN—Accepting the validity of the issues you are raising, is it nevertheless appropriate to attempt to deal with this under the aegis of the Corporations Law and corporate responsibility or is this more a matter, do you think, for an improvement in the Trade Practices Act in terms of the issues you are trying to resolve?

Mr Bovill—It is about accounting and reporting. It falls as a function directed out of head office in the way they do business. Unfortunately, like everything, there is probably an element of both in there, but it is an accounting function, and we are asking for an accounting function to take place within that organisation. It does not have to be too onerous. It has to be a set of questions that a manager asks before he comes to the conclusion that he has just saved the company $100,000 or whatever was involved in the process—that he has actually ticked a number of boxes that say, 'Yes, I've saved the company $100,000 by transferring business from one organisation to another, but I shut that business down in the process; they employed 15 people in a small community.' That then gets posted to a public website and gets that degree of scrutiny. Then the company has to ask, 'Do I accept that risk against my brand; is that the way we want to be seen to be operating as a responsible company in Australia?' At the moment, it happens and there is no accountability for it.

Ms BURKE—Can you see it going beyond food? Can you see the issue? I think of branch closures—a bank closing down in a small country town, telephone boxes going or call centres going out of Tasmania and moving offshore. They take the whole thing. Have you looked at it beyond just your area? Have you looked at the impact on small country towns?

CHAIRMAN—Can I interpose that, as a result of our inquiry into rural banking, the ABA agreed that as part of their code they would introduce a community impact statement on further bank closures.

Mr Bovill—This is the point: decisions cannot be seen to be taken in isolation; it does not matter what the organisation is. The other thing is when people set out to set up organisations of a short-term nature. There are many times when we set up businesses, cause people to invest a vast amount of money in an area and employ 50 or 60 people for the duration of two years knowing full well that, when we let that tender out, we can beat those guys down because we have got them. There is a very high degree of corporate responsibility in the way some of these deals are set up in the first place.

Mr BAKER—How is corporate sponsorship damaging regional Australia?

Mr Bovill—As I mentioned earlier, the idea of cause marketing is really about building brand. It is a department within major organisations now, and it is jargon for 'Our sponsorship' and 'How can we define our sponsorship dollar to give us the maximum return for our brand image?' They tend to aggregate all of their money into wonderful fluffy things that nobody can criticise—it is a hospital somewhere, generally a children's hospital. It makes them look good and nobody can have any basis to criticise them about it. But what happens is that they no longer sponsor anything in regional areas; they no longer give that depth of coverage that underpins so many different organisations in so many different areas that becomes the fabric of communities. In so many regional areas they are totally starved of funds, and regional events are disappearing because there are no sponsorship dollars left because they have all gone into wonderful causes that nobody can criticise. When that company is criticised, the first thing they do is come out say, 'Yes, but we give $50 million a year to this,' and then it is, 'Wow, look what they do.' Again, there is that double accounting. Where did all that money come from? What does it represent as a percentage of their total spend? We spend an absolute fortune on marketing and image building to actually offset some of this other stuff that goes on behind the scenes. All we are saying is let us expose the stuff that goes on behind the scenes and have genuine accountability for the way that business is done.

Mr BAKER—As you mentioned before, there is a crossover between trade practices and corporations in this area. From the corporate and social responsibility standpoint, you and others have mentioned the need for social impact studies. I think what needs to be taken into account in the McDonald's situation is a huge shift of the market from within Australia to outside Australia. A simplified version to accommodate small transactions where purchasing is shifted from one company to another could be easily satisfied. However, as you said, what they did was a major change in demographics. To be able to operate within Australia, they need to be accountable from a corporate and social responsibility standpoint. Could you expand your views on that aspect?

Mr Bovill—It goes across the board. It can be anywhere that a decision-making process has an effect in an area and damages the critical mass and the community in that area. Any organisation can move its volume across—and everybody is entitled to. They just need to justify the consequences. I think a very simple transaction model can be created for that. They can be asked to apply it as part of their corporate responsibility reporting. Just as we have quality assurance codes, we could have an accounting code that says: 'We incorporate this practice into

our accounting. This is the method by which we account for these transactions within our company. We do our transactions in a socially accountable manner and we apply this system to our decision-making process.' I think that is the sort of thing that I would be looking for.

CHAIRMAN—There being no further questions, thank you very much for your appearance before the committee. It has brought a different perspective to the issue that we are examining. I think it has been very useful and helpful.

Mr Bovill—The difficulty is that large organisations have the capacity to do representations, and they do. They are big lobbyists and they have budgets for this. It is very difficult for smaller groups, particularly individuals who have suffered, to fit into this framework of being able to make submissions. Large organisations steal the show, because that is what lobbying is all about. Caution needs to be taken about not getting the true picture of representation. These organisations are set up for it. I would never have done this had we not been involved in the program that we were in. We tend to look at these things and say, 'I just haven't got the time to do this.' This feeling is very prevalent in a lot of areas.

CHAIRMAN—I appreciate that. That is why with parliamentary committees we try to get out and around, depending on the nature of the inquiry. As well as doing the big cities, we try and get out to regional areas with a number of our hearings.

Mr Bovill—Thank you for the opportunity.

Proceedings suspended from 1.06 pm to 1.36 pm

ANDERSON, Dr Helen Lesley, Acting Head of Department, Department of Business Law and Taxation, Monash University

GUMLEY, Mr Wayne Stephen, Senior Lecturer, Department of Business Law and Taxation, Monash University

GEORGE, Professor Geoffrey Richard, Victoria Graduate School of Business and the School of Accounting and Finance, Victoria University

CHAIRMAN—Welcome. The committee has before it each of your submissions, which we have numbered 39 and 11 respectively. Are there any alterations or additions that you wish to make to the written submissions?

Dr Anderson—No.

Prof. George—No.

CHAIRMAN—I invite you to make a brief opening statement at the conclusion of which I am sure we will have some questions.

Dr Anderson—I will begin on behalf of the Department of Business Law and Taxation. Thank you for allowing us to address you today. Wayne and I represent five academic lawyers from the Department of Business Law and Taxation at Monash University and we are interested in the question of corporate social responsibility. With other people we formed the Corporate Law and Accountability Research Group, which is active in researching corporate law reform.

One of our research interests is the corporate stakeholders who are arguably the most vulnerable to the abuse of power by corporate boards. We have identified these as employees, victims of tort and the environment. They are particularly vulnerable because they lack the capacity to protect themselves from the actions of directors in the way that a secured creditor, for example, is able to do so. We have been told to keep it short so I will cut to the chase. The sorts of things we are talking about here include the waterfront dispute, where Patrick Stevedores restructured their business as a way of defeating claims of its unionised workforce. That is an example of an employment situation. The James Hardie case, as I know you have heard a great deal about before, was an example of tort creditors not receiving their full entitlements. The environment is also particularly vulnerable because it is protected by government agencies which are obviously subject to budgetary constraints and their own priorities, so it is not completely protected.

There are two things I would like to stress. The first is that I know you have been hearing from other people that there is no need to change the law because the current directors' duties provision is wide enough to allow company directors to look out for the interests of non-shareholder stakeholders. I know that you have heard that over and again. I think that is the wrong focus to take. While ever companies are going brilliantly well, directors will look after their shareholders, creditors, employees, community and the whole works because it is in their best interests to do so. You need to look at what happens when the company has its back to the

wall and is not going so well. In those cases you will find that directors shield behind the words of their directors' duties provisions and are able to say, 'We can't look after employees and creditors because the law will only allow us to look after the company and our shareholders.' I think that is an important point to make.

The second point I would like to make is that you have also heard about companies which have embraced the CSR and the idea is that everyone will get on the same bandwagon once they see how beautifully profitable it is. The reality is that some companies are window-dressing—they are doing lots of good things for the community but you will find that those same companies also have their share of environmental and other breaches. So I do not think it is a case of corporate goodies and baddies. I think that some of the people who are doing good things are also doing bad things. I am happy to answer questions about the directors' duties part. Wayne is more able to answer things about the mandatory reporting. I will hand over to him for a few words.

Mr Gumley—I would like to emphasise a few points about environmental problems and the environment as a stakeholder. It is fairly obvious that we do have an ecological crisis in this country and around the world. The problem is that our current patterns of economic development are not sustainable in the long term. That is one of the issues that corporate directors need to address. I would like to give that a bit of context. We have environmental laws that are based on an outmoded model. They are primarily directed at heavy industry discharging pollution and so on. Our current ecological problems are more concerned with consumption of resources and globalised business activities where pollution can be shipped to other jurisdictions with less rigorous standards.

One of the reasons the current model is breaking down is that we have a new model of government intervention at present. Over the last 10 or so years we have seen the introduction of competition policy at all levels of government and this has radically changed the balance of regulatory authority. Governments have privatised a lot of natural resources and infrastructure assets. We have had a handover of responsibility from a paternalistic model where the government looked after environmental issues to a private sector model where more and more corporations own relevant assets like water industry assets, forestry assets and even biodiversity reserves. I believe this handover has not gone hand-in-hand with an appropriate reform of the regulatory framework. In particular, Corporations Law has stood still. Corporations Law is still governed by some very old principles like the fiduciary concept and the limited liability concept which involved almost in the Middle Ages in a very simpler society.

That is part of the difficulty we have with Corporations Law at the moment. My contention is that corporations must take greater responsibility and the focus on directors' duties gives a very good avenue for increasing the responsibility of corporations. The government prefers voluntary and market based approaches to encourage appropriate behaviour. My view is that these have failed and we do not see any strong examples of voluntary or market based strategies working. For example, plastic bags were in the news this week. That is a failed voluntary strategy. Market based strategies include carbon taxes and plastic bag charges and they are similarly very unpalatable to the community.

My view is that mandatory strategies are the only effective alternative. The question is: how do you introduce strategies that will have an effect? My view is that we need to look at the way

that corporate decisions are made and mandate management strategies which will give boards of directors, as well as stakeholders who are influenced by those decisions, the appropriate information they need. That is why you can see reference in the submission to mandating of environmental management systems, community stakeholder engagement, resource efficiency policies and a much more comprehensive form of sustainability reporting.

Prof. George—I too am pleased to have the opportunity to present some thoughts for the consideration of the committee. My submission is very short. I commend my colleagues for their longer one. I will make some comments in respect of each of the terms of reference and elaborate slightly upon the points that they have made. My general position is that corporate reporting presently is too narrowly constructed and that the requirements for corporations and others to report upon their affairs is far too narrow to permit any evaluation of social or environmental performance of organisations. There are some exceptions that I will mention in a moment.

My interest as an accounting and finance person came recently through the argument about triple bottom line reporting. I have provided a paper to you. My observations there are that there is no existing model—certainly there is no consensus about a model—which would permit a TBL measurement. My paper of 2003 was an attempt to define what I called a 300-point enterprise and to try and put in place a metric that might provide for measurement. There are conceptual and practical problems, which I am happy to discuss if you wish. Indeed, as I have tried to apply this to some organisations in Australia, there are practical difficulties in observing from the outside whether TBL is being reported upon and indeed more serious limitations perhaps as to how one can actually get to it.

In general I am unimpressed by the existing paradigm of reporting that is explicit and implicit within corporate law and other factors which impact upon organisational reporting, ASX requirements and the like, and think that a new paradigm of measurement and reporting is required. I emphasise the significance of what I call the sustainability reporting initiative of Europe, the GRI. I think to date the GRI reporting framework is as comprehensive as any yet imagined and has prospects, in my view, for an expanded interpretation of corporate reporting.

I give Westpac a tick in my brief submission. Westpac were a member of the GRI steering group. To that extent, their reports do demonstrate a close familiarity with the requirements of GRI, and they are to be commended. Some work I am currently doing, however, might not be so pleasing to Westpac. I am looking underneath their organisation to see to whom they lend. It might be easy for banks to report upon themselves as socially responsible, but their clients might be a different story. That work is underway. The sort of reporting that Westpac have engaged in is to be commended at this time and is something of an exception among the rather small number of corporations in Australia that voluntarily participated in the RepuTex rating services of recent times.

I want to add an item to the literature that might be useful. A piece of work by Jean Tirole in *Econometrica* of January 2001, looking at the topic of corporate governance, is a serious attempt to try and examine some theoretical framework within which CSR could be imagined. Whilst I do not agree with Tirole awfully much, it is a serious attempt from a famous scholar to try and elucidate some of the points that should be considered.

I have a couple of final comments. I think another paradigm of reporting is necessary. In respect of your third term of reference, the current legal framework, I think it discourages rather than encourages reporting. It does not take a stakeholder perspective and it hardly mentions employees or the environment, and I think they are clear deficiencies in current legislation. I would support a general provision within Corporations Law that would make a requirement for social, economic and environmental performance reporting. I refer you to a piece in yesterday's *Age* at page 10, the opinion page, by Michael Linehan. He refers to some UK initiatives by way of company law reform which will establish a requirement for organisations to use a much broader reporting framework. As I said in my submission, I do not favour voluntary codes of anything. I think they are a recipe for disaster. Voluntary compliance with the sorts of things that my colleagues and I are mentioning is not self-evident by behaviour here or, indeed, elsewhere. Finally, there are developments in other legislatures, including the UK, the EC and other European countries, where the boundaries for recording and reporting are being extended usefully. Clearly, this is at a cost to corporations, but I believe the costs incurred are in the national or international interest.

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

Mr Gumley—It is simply a matter of mathematics. If we think we can continue to consume our resources at an increasing rate, we will not have the water resources and we will not have the forests. We might have the coal, I will grant you that, but there is a wealth of literature around reporting these problems on a global basis as well as in Australia. I would have thought the federal government has also published a lot of material warning of these problems. The fact that we have a water initiative is evidence—

CHAIRMAN—I understood you to say that we were not taking any action on these things. Surely these are broad policy issues, not issues within the aegis of the Corporations Law.

Mr Gumley—My point is that the action we are taking is inadequate. The way we are addressing these issues is by specific legislation to try to issue water licences, to set up water authorities, to set up regional forest agreements to contain forestry activities and so on, but there is no coherent system to manage the increasing consumption of resources. That is one of the biggest problems. The problem is that the assumption of our economic model is this exponential growth in resource consumption, and that is what is untenable, to my mind.

CHAIRMAN—Surely that is an issue of consumption that is not limited to corporations. It would include the community at large, unincorporated businesses as well as corporations. Why are you specifically targeting the corporations in order to deal with this sort of issue?

Mr Gumley—It certainly applies to every member of society. However, corporations are actually making profits out of consumption of those resources and that is what brings some additional responsibility. I would also say that it applies if corporations are consuming the lion's share of those resources—in the water industry, for instance, it is only a relatively small number of major producers of cotton and crops like that that are taking the lion's share of that resource. I am looking for a point of leverage and corporations are the logical starting point. My recommendations would extend to all business activities, not just to corporations.

Senator WONG—To start from where the chairman is, one of the key policy issues is what is the line between those issues which ought to be governed by the general law and what ought be dealt with within the Corporations Law. There are obviously vastly different views in the submissions to this committee about the extent to which social goods such as environmental sustainability et cetera ought be brought into the Corporations Law. I think it is not an either/or but it seems to me that we need to be clear about what is the line. Where is it that we say this will be imposed as a duty on directors or on companies specifically and dealt with within that context? What is it that we say is essentially behaviour regulation that applies across the community to various legal entities, whether they are corporations or individuals?

Dr Anderson—I think there is nothing stopping separate legislation dealing with the environment or any other matter, OHS&E or whatever. That is fine and it applies to everyone, companies, directors and individuals. I am certainly not saying that those pieces of legislation should go. However, I think directors have treated the directors' duties provision as a safe haven against their responsibilities in some ways.

Senator WONG—The argument that has been put to us is the other way round. The argument that has been put to us is that there is no need to change, for example, directors' duties because the best interests of the company should encompass stakeholders because the long-term value of the company is obviously going to be affected by how stakeholders regard it, amongst other things. Therefore, if we alter the duties you get into a situation where directors have a plethora of responsibilities. It has not been put to us that the evidence is that they are using it in the way that you outline.

Dr Anderson—I think there is a lack of case law to decide it exactly. It seems to me that it is absolutely obvious that while ever things are going well it pays the company to look after all of its stakeholders. I get the feeling that people are using that situation to say that there is no need to change the law, that we will always look after the stakeholders, but there is quite clear evidence—and I know you have heard James Hardie mentioned over and over again—that when things go bad it is the shareholders that are looked after and not the other stakeholders. I feel that, even though there may not be loads of cases looking at this point, nonetheless directors have the ability to say, 'My duty under section 180 is to look after the company and its shareholders and therefore you, the creditors, environment, employees, whoever, have no standing to sue.' So there are not going to be cases because there is no standing to sue. I do not know whether you have heard about the fiduciary duty on directors to consider the interests of creditors when the company faces insolvency. This duty supposedly arose in a very famous case in 1976. Ever since then it has been argued over by lawyers, commentators et cetera exactly whether it exists, what it covers and all the rest of it.

Thirty years later we still do not have definite acknowledgment that the law allows directors to consider the interests of creditors when the company is on the brink of insolvency. Think about that example. If they are still bickering about the one time when creditors almost self-evidently ought to be the most important people on the directors' minds, if that is still contentious 30 years later, how can directors honestly say, 'Of course the current provisions allow us to look at everyone inclusively'? I do not believe that is true.

Senator WONG—What do you say to the directors' contention and, frankly, the contention of most of the business community that have come before us, which is, essentially: you cannot require a whole range of essentially social objectives of this group of nameless directors and if you have a disparate range of duties you are putting them into a very difficult position in terms of for whom they are actually making the decision?

Dr Anderson—That is fair enough. We have two recommendations. No. 1 is that there be a permissive provision that allows them to consider outside interests in a number of circumstances, one of which is if the company's reputation or long-term financial viability is at stake. The point of the permissive provision is that it takes away any possible ability for the directors to say, 'I would have liked to have looked after your interests but the law wouldn't let me do it.'

Senator WONG—The facilitative provision as opposed to mandatory—

Dr Anderson—Yes.

Senator WONG—That has been raised and we have put that to the BCA and to others. Their advice is—and we flagged that we would be questioning various experts around this—that they believe there is a risk that the way a court would interpret a permissive provision would be such as to effectively make it quasi-mandatory in the sense of 'You should have turned your mind to whether or not you should in fact have considered stakeholder interests in this circumstance.' This is not my argument—I am trying to paraphrase someone else's to put it to you. I think that was their primary view, essentially—that it created a further duty.

Dr Anderson—We suggest that there be some guidelines. It is not just open slather. You may consider the interests of all sorts of different people. You have some fairly firm guidelines and it could in addition be indicated how you are required to consider these interests. For example, the board is required to have a meeting or there could be some documentation required to be lodged with ASIC where there has been some cost-benefit analysis. Say you are considering restructuring a business or something like that and you are going to have a substantial impact on the community, perhaps there could be some provisions—I think this is actually under our mandatory part—whereby you are required to document the way that you have considered these interests. It is not saying that you have to prioritise interests of external people over the company by any means. It is just saying that in certain circumstances you are permitted to look at these interests and in other circumstances—very extreme circumstances, by the way—you should be mandated to at least consider them; not prioritise them but consider them.

CHAIRMAN—Earlier you were talking about guidelines. Now you appear to be talking about mandatory—

Dr Anderson—Sorry; I have rolled the two into one. With the permissive part, I think there should be guidelines. For the mandatory part we are talking about facing insolvency, employee provisions and certain environmental situations. I think, with those things, there needs to be a mandatory consideration of those interests.

CHAIRMAN—Why aren't the laws that deal with each of those areas—employment law, environment law, bankruptcy provisions—adequate to deal with that?

Dr Anderson—I would need to deal with each of them individually.

CHAIRMAN—Briefly.

Dr Anderson—Very briefly. With the insolvency provisions, as you would know, there is the duty to avoid insolvent trading. It is only enforceable by the liquidator. There are so many problems with that. It is very difficult to prove against directors, and directors who have traded insolvently quite often enter voluntary administration to head it off.

CHAIRMAN—That aspect of the Corporations Law is currently under review.

Dr Anderson—Yes. There are problems with it. With the employee provisions, you would know that there is a new part 5.8A, which stops directors deliberately taking employee entitlements away. It has got a subjective element to it. You have to prove that the directors themselves—

Senator WONG—You need a note saying, 'We want to do this for these reasons.'

Dr Anderson—You can really imagine finding in the minutes the statement 'We are going to rip off the employees today'! It is absolutely useless.

Senator WONG—It is stupid.

Dr Anderson—I feel that that has a hole in it. The environment is being protected by the EPA, which has budgetary problems. It has to enforce so many breaches. I think that if you centralise it and make it the responsibility of directors then that would solve a lot of these problems.

CHAIRMAN—So you are saying that specific legislation that deals in some detail with those issues is inadequate. To move that to the Corporations Law you will have to be even more specific in an area of law that really is not designed to cover those things.

Dr Anderson—The way you do it is that, instead of having the EPA doing the prosecuting, you have affected groups taking the action against the directors for breach of directors' duties. That could either be done by the statutory injunction under section 1324 or, as we have recommended, an upgraded civil penalties provision with graded levels of penalties ranging from education through civil penalties to criminal sanctions. I think that the advantage of bringing it in there is that it widens the range of people who can take action. The directors are the ones who are primarily responsible. It puts the onus back on them to make sure that they are running their companies the way we want them to.

CHAIRMAN—Have you considered that that might narrow the range of people who are willing to become directors? You are making their responsibilities a lot more onerous. There is already a shortage of the pool of directors.

Dr Anderson—Is there?

CHAIRMAN—Yes, there is.

Dr Anderson—I have read that but I think it is amazing. I have also looked at the incorporations statistics and it is just amazing—when there is all this discussion about how unwilling people are to be directors—how many new companies are incorporated. Admittedly, these are small companies.

CHAIRMAN—They would mostly be family companies.

Dr Anderson—They are, but nonetheless are we honestly saying there is a shortage of people who are willing to be directors of huge companies? I do not know that there is. In the dotcom boom, when you would have thought that people were facing the ultimate risks of personal liability, people kept—

CHAIRMAN—That is right. We are talking about people who are both willing and have the requisite skills. I think there is general recognition that the pool is fairly small.

Dr Anderson—But the point of our suggestion is not that directors be nailed for making legitimate business decisions that go wrong. We are saying that all you have to do is take proper consideration of the interests of certain parties—do the right thing by these people; don't take all the assets out of your company as it is failing and put them into a phoenix company. We are not asking them to be liable for every loss that the creditors sustain. We are just asking them to not behave improperly.

Mr Gumley—I think there is a bit of a myth about what skills directors need in this respect. A director is personally liable in this country for taxation liabilities if taxes are not paid and so on. I do not expect every company director to be an expert on our taxation laws. That is one of the most arduous tasks you could ever impose. Of course, they employ experts in that area to satisfy the compliance needs. They would also be able to employ experts to satisfy compliance on environmental and human rights needs or employment problems. I think that is a furphy. Directors need to be good decision makers who are capable of bringing all the relevant material to the table and then making a balanced decision. Diversity on the board is an important aspect of that.

Can I just add one other thing about environmental law. There is no coherent body of environmental law in Australia. We have a federal government which has no jurisdiction over the operations of companies overseas. For historical reasons, it also has tried to divest its role in land use issues to the states. It now only concerns itself with certain matters of national environmental significance which are triggered by particular treaties. What you have is essentially a land use system that is controlled by the states, and we all know that certain states are rogue in the sense of allowing excessive land clearing and excessive use of water. There are cross-jurisdictional problems. The Murray-Darling system is a chronic problem because there are all kinds of

withholding of water in Queensland, depriving New South Wales graziers of the chance to get floodwaters and so on. The environmental laws system in this country is not a coherent system—

CHAIRMAN—I do not think that is a result of divesting their jurisdiction; they never had the jurisdiction.

Mr Gumley—It has always been a problem. Corporations are very good at shifting costs. Big corporations see opportunities to maximise profits via holes in our regulatory system. That is what brings me to my point: corporations need to be more accountable in their decision making.

CHAIRMAN—Thank you. We will go back to Senator Wong.

Senator WONG—Did we really finalise the line that might be drawn between what should be dealt with under general law and what ought not be? I appreciate your point, Mr Gumley. I am a South Australian. We live with the Murray River, so we understand some of the issues there and the inaction that, frankly—

Mr Gumley—I do not think—

Senator WONG—Let me finish. I guess what I am saying is this. Regardless of where one might fall on the policy objectives, there might be those who want to try to improve the environmental performance of our corporations but who might think, 'I'm not sure I want to do this by placing mandatory requirements on directors, for a whole range of other policy reasons; I'd rather try to fix up the rather haphazard environmental regulation we have in this country.' I go back to the central question: how do you say parliament should determine what goes into the Corporations Law and what ought be in other areas of law?

Mr Gumley—I think corporate decision making is clearly within Corporations Law and no other area of law. When corporate decision making impacts—

Senator WONG—But you impact on that. You impact on corporate decision making not only—

Mr Gumley—That does not take it into a new body of law.

Senator WONG—No, but you impact as a legislator on corporate decision making either by looking at what duties you impose by statute on directors, essentially, or by regulating other areas: 'You will not pollute,' or 'You will not do this,' or 'You will reduce your emissions,' or whatever other general proposition you might put in place.

Mr Gumley—I tend to not try to compartmentalise it. I would be looking for the best solution to the particular problem. The problem we seem to have here is stakeholder interests. In order to solve that problem, I believe corporate boards should gather the best information possible to address the decisions they make. When those decisions involve the use of natural resources, it is only logical that corporations should have in place strategies to bring forward the best information and stakeholder engagement and also to publicise their impact as far as possible through appropriate reporting.

Senator WONG—Sure. I agree with that.

Dr Anderson—I think the subject you are talking about is the two types of laws: do we leave it with the general law or do we bring it into the Corps Law?

Senator WONG—Yes. How do we determine where the line is?

Dr Anderson—The directors are already liable under the individual laws. The trouble is that they are not necessarily prosecuted as well as they should be or the laws are not coherent, as Wayne said; they are all over the place. In a way, if the directors' duty is clarified to say, 'You must look after shareholder interest and you may consider all these other factors'—with appropriate guidelines, as our submission says—'one of which is that you take into account other relevant laws,' if it is written there, then there is no question that the directors can overlook these duties in their bid to say, 'I'm doing what's in the best interest of the company, which is being a serial polluter, because it is easier to cop the fine and save the expense of cleaning up my act.'

Senator WONG—I suppose the companies' advocates might say, 'If that is the case then you should have better systems for prosecuting breaches of whatever regulation is associated with pollution.' The view that would be put by them is that the downside of utilising directors' duties as the locus of trying to change behaviour is inconsistency in terms of directors understanding to whom their duties are owed and, from their perspective, a multitude of people to whom duties are owed.

Dr Anderson—I do understand that argument but, at the moment, directors or their representatives are maintaining that we already can consider everyone's interests because the term is wide enough. But that argument means that they are immediately conceding that the minute there is a conflict they do not know what to do and it is too much to handle.

Senator WONG—That is true.

Dr Anderson—Doesn't that therefore contradict their argument when they say, 'We already look after everyone so you do not need to change the law'? That just shows that it is a snow job, because obviously when everything is in line they can look after everyone. What the law needs to do is make sure that the environment is protected and employees and tort creditors are protected, when it is not in the best interests necessarily of shareholders and their dividends. So there needs to be a way to make directors face these responsibilities and, if they are admitting that there will be a conflict if it is put in the section, then that highlights the fact the mechanism is needed to make sure that these parties are adequately protected. We are not talking minor situations here. If you look at what happened in the Patrick Stevedores situation where they reorganised the companies and transferred the assets to one place and the employees to the other, that brought about part 5.8A of the act—

Senator WONG—Which has never been utilised.

Dr Anderson—And is totally toothless anyway. That showed how extreme the government believed this situation was. We are saying that you need to put some real teeth into this. These are extreme situations where real people are having dreadful things done to them by company

directors, who can shield behind their duty to act in the best interests of the company, meaning the shareholders.

Senator WONG—I think I understand what your submission says about the circumstances where you would enable those things you would require. I come back to something that was raised earlier today or yesterday by Senator Murray about what the lightest touch would be that we could recommend, or parliament could impose, in order to confirm that the best interests of the company permit directors to have regard to stakeholder interests. One option raised was a legislative note. There is that. You could define 'company' in a different way and you could put a facilitative or permissive provision in. Then there is mandatory—

Senator MURRAY—Mandatory is a completely different issue from directors' duties.

Senator WONG—Yes.

Dr Anderson—Concerning mandatory provisions: in a sense, directors ought to be relieved to have mandatory provisions because it takes away the conflict. Directors naturally want to look after their shareholders, quite apart from section 180, because the shareholders are the ones that elect them onto the board and can remove them from the board. So there is a natural desire anyway to look after shareholders. With a mandatory provision they can throw up their hands and say, 'Don't blame me, guys. We had to do it.' The difficulty with a permissive provision is that those same directors are permitted to look at these interests but what happens if they get the feeling from their major shareholders that they had better consider those interests but make sure that they decide in favour of shareholders? What is the lightest touch? It really depends how serious we are about making sure that these people are protected at the most vulnerable times. If it is a legislative note, if it is some very weak, wishy-washy permission, I feel that we might be wasting our time.

Senator WONG—Do you have any knowledge of experience in other countries?

Mr Gumley—I would have thought that the UK model is probably the lightest touch. That is giving directors permission to take into account—

Senator WONG—That has been controversial too.

Mr Gumley—Industry will not like it.

Senator WONG—I am not advocating that view; I am just making the point.

CHAIRMAN—That is right. It has been withdrawn.

Mr Gumley—The reporting requirements were withdrawn but as far as I am aware the permissive provision to take into account was not. But whether it has been withdrawn or not I still believe that that would be the lightest touch.

Senator WONG—Do you have any information from other jurisdictions you could assist us with?

Mr Gumley—In Europe they have a much better developed system of stakeholder engagement on corporate boards. Employees in particular are much better represented and, through that mechanism, I think that environmental issues are probably much better managed as well, just because there is the diversity of interests there and the community is getting some input into the decision-making process.

Senator WONG—Are they mandated requirements?

Mr Gumley—Yes.

Senator WONG—I know that some of them are. I think Germany and Austria do.

Mr Gumley—I am not an expert on European law, but it certainly developed historically. Whether it is mandated or not, employee committees on the boards are the standard in European jurisdictions.

Senator MURRAY—One of the problems we have is that the Corporations Law is not yet working effectively for the company itself. Directors are required to act in the interests of the company, yet nearly all of the law changes of recent years have been because directors have been acting for vested interests and not for the shareholders at all. If you consider the laws tightening up the voting on remuneration, the tightening-up on the way in which proxy occurs and meetings are run and the way in which auditors report, all of that has been because shareholders have in fact been dudded by the directors. It was the shareholder who suffered from HIH as much as the community did. It is the shareholders who suffer from insider trading. It is the shareholders who have often been sacrificed at the altar of vested interest.

It is possible that, if you improve integrity and behaviour towards the company, you are going to get improved integrity and behaviour towards the community. The fact that we still have not got it right towards the company is one perspective I have. I have long run a campaign for the greater democratisation of companies because they are working ineffectively, with ineffective elections. In fact, there are barriers to entry for directors. I think we would all agree that there is a shortage of directors in this country. I think there is a kind of qualified franchise which excludes those who the existing lords do not want given access. There is no proper separation of powers because independence is not properly qualified in the Corporations Law and so on.

I will add one other comment. This committee produced a terrific report on insolvency law. If we improved insolvency laws, many of the problems you are talking about with respect to creditors might be addressed. One of the things I am suggesting is that, if the existing Corporations Law was improved to do what it in principle is set up to do, the wider demands you are putting before us would be not as necessary because behaviour and performance would be better institutionalised than they are at present. Have you thought in that direction at all?

Dr Anderson—I understand what you are talking about. It is a great worry for shareholders that they need to have these constant reforms to make sure that the directors are doing the right thing by them, let alone any outside person. But I am not really quite sure how you can in any way legislate to improve their integrity, even if they are more democratically elected once they are there. They are still accountable to those same shareholders and I fear that they will respond to those shareholders out of self-interest or they will please the shareholders because those

shareholders will vote them in. When you say that companies are not democratic because they are controlled by the large institutional investors, is that the point you are making?

Senator MURRAY—It is one of the points I make. The real point that I am putting across to you is that the government has recognised, as has the parliament and the community in general, that those whom it is claimed that directors look after—namely, the shareholders—are not looked after.

They have improved integrity. Even though I disagreed with it, I do not believe it should be mandated, the non-binding vote on remuneration has already improved behaviour concerning the way in which remuneration is put forward. So there is direct behavioural response to a legislation change which is in the interests of the shareholders, because those people were absolutely rorting the company remuneration situation. I think you can change behaviour through a more transparent and closely regulated environment, and I do not think that job is finished. So my question is: if you continue to improve the way in which directors perform with respect to their main responsibility, to the company, won't you automatically get an improvement in these other areas?

Dr Anderson—Is what you are saying that sunlight is the best disinfectant?

Senator MURRAY—Yes.

Dr Anderson—Isn't that exactly the argument that supports the mandatory reporting that makes them disclose exactly what they are doing and therefore they will fear how the community judges them and they will clean up their act? Maybe you do not need to change the directors' duty section if you totally expose what they really do. That would support the mandatory introduction of the reporting.

Senator MURRAY—I have been on this committee for too many years—both the chair and I—but over the years, regardless of the party, we have concentrated on trying to improve directors' responsiveness to shareholders' legitimate needs—that their views can be better expressed and their needs understood. The reason I am putting this proposition to you is that I often think it is easier to enhance an accepted principle than to introduce a new principle; and I have wondered, with the campaign for new principles, whether enough attention has been paid to a different direction.

Mr Gumley—I strongly support that, because I believe that that is ultimately achieving better decision making within the corporation. The parallel I would draw is that we go to extraordinary lengths to make sure that financial decision making is equitable and appropriate and we have draconian laws that we will apply to people who rip off the tax system, for example. Why, then, do we not have a parallel system to protect the ecological assets of this country and the human rights and employee rights that are also an integral part of that corporate operation? So there is a disconnect between the financial, the ecological and the social.

Senator WONG—I think there are some different philosophical underpinnings, don't you? That is the reason for it.

Mr Gumley—But business accepts the triple bottom line. What major corporation says, 'We don't have to look after the triple bottom line'?

Senator MURRAY—But don't you think governments and parliaments and political parties are moving towards that? As controversial as it is, the Work Choices legislation at its heart has one system versus six. The new water initiatives, the new single regulator for energy initiative—these are all designed to say: 'If we're going to have systems of regulation let's at least have one.' You can quarrel about the content, of course. My instinct is that I am with Senator Wong, that your general law needs to apply across the community with respect to environment, and corporations have to relate to it in a specific way, and then it is a question of punishments and enforcement and so on. But I struggle to go beyond a general mandated reporting of CSR to a specific reporting on specific issues. Do you understand? What I mean by that is that I could accept a reporting regime which says, 'You must report on your broad social and economic footprint and environmental footprint,' but I would struggle with something which says, "You must report with this specific itemised list in mind.'

Ms BURKE—I suppose if I could open that to the panel—

CHAIRMAN—First, could Professor George respond.

Prof. George—There is precedent in accounting, for example, for distinctions between large firm reporting and small firm reporting. The rationale for that was that the significance and impact of large firms compared to private companies means that the reporting requirements for private companies have got to be different to those for public companies and can be less.

CHAIRMAN—But we have not got that right either, according to this committee's report of a couple of years ago that still has not been acted on.

Prof. George—Well, the British spent a lot of time trying to sort it as well—and we, of course, started with their law anyway. So they are still thinking about it. But I would suggest, Senator Murray, that one of the reasons corporations attract our interest is the impact question. The impact of Shell on the environment is a lot greater than, for example, that of King and George Motors in the past in Ballarat, or some such private company.

Senator MURRAY—But perhaps not to the people of Ballarat.

Prof. George—I doubt it. There is a size and an impact question. If we take an extreme expression of this, then it is the American that makes films that criticise corporations—the culpable corporation, the corporation that inflicts harm or indulges in malicious behaviour. This is an extreme argument.

CHAIRMAN—I think it caricatures them.

Prof. George—Of course. However, this is part of the rhetoric that exists. It is part of the reason why the impact now on large corporations attracts lots of people's attention.

Ms BURKE—If you go the mandatory route and you say, 'Let's mandate it'—

Senator WONG—Mandate what? Reporting?

Ms BURKE—Yes, reporting—going away from directors' duties, because that has been done. If we go into the notion of mandating reporting that you are all looking at and talking about, do we go a model? Do we go a benchmark? Do we go a system that all people follow so that individuals—and bearing in mind the size argument—can match like with like? 'I am the capital market; I want to know where to invest.' 'I'm an individual investor; I want to know where to invest.' 'I am an employee who wants to know I am going to work for an ethical organisation.' 'I am a philanthropic trust and I want to brand somebody.' We have talked about all these things. You have cited samples. Someone gets a tick for doing one thing, but are they getting ticks across the board? Is it tick the box? Do we come up with a benchmark, in your case? Other people have talked about education. So from both groups I would like to know where we go to educate.

Senator MURRAY—Before you answer, it was going to my next line of questioning, but it fits in beautifully here. Those who are open-minded about mandating say, 'We would support mandating, but not until you've got a standard. You need to have a standard to which you are reporting, which is understood, accepted, credible, measurable, comparative, efficient, effective'—all those sorts of words—'and then mandate that.' But first we need this developmental time. Do you accept that observation?

Prof. George—I referred in my submission to the GRI initiatives of Europe. After meeting some of the people who have been involved with their preparation, and seeing now some of the impact of the existence of those guidelines, as they are called, contrary to my voluntary code, I think that has legs and could run. But it does highlight the difficulty of identifying what should be reported upon and in what form. The intercorporate differences, the differences between banks and manufacturers and universities and the rest, are important matters that are specific industry concerns. The GRI does not really attempt to solve, other than in a general way, the reporting framework for organisations.

Senator MURRAY—And it is not a standard.

Prof. George—And it is not a standard. I am an accountant who has had a long history with standards. Finally they have become law, which probably affects all you people—long overdue. But even then the boundaries within which people can operate are still very wide and open to interpretation.

My work, my research, does present a fairly negative answer to the search for undeniable standards of reporting that would be generally acceptable. I spent some time with a few philosophers last year to try and understand from quite different directions how people might imagine this sort of stuff to be done. People such as Tirole, whom I have referred to, have had a crack at it. The definitions of stakeholders and what weighting you should give to them et cetera are not clear. There are serious measurement problems, so I am somewhat pessimistic.

Senator WONG—What is your answer to Ms Burke's question?

Prof. George—In the short term, an attempt like that of the British in their corporate reform to indicate that the reporting framework of corporations should be beyond shareholders and

should address employees and other stakeholders, including the environment, is the general direction towards which reporting should be directed and required.

Senator WONG—As an accountant, you are saying that we are a fair way off from a framework that could have general application.

Prof. George—We are.

Senator WONG—How does your 300 Point company—is that what it is called?

Prof. George—Yes.

Senator WONG—I thought that was quite interesting. How does it interact with the GRI?

Prof. George—The GRI does not add anything. The GRI—

Senator WONG—But it is consistent with it, isn't it?

Prof. George—It is consistent with it. The claim to originality there is that it is the only system that I have seen that tries to make a metric and come up with a number—we like numbers. If we take the TBL argument seriously, it raises in my mind the idea that someone expects one to measure a triple bottom line rather than a single bottom line—we know what we mean by that. That was an attempt. The best comments I can make about that are that, of all the pieces I have written in my life, the citations that come to this are running at about 95 to one in favour of the paper. For whatever reason—we count citations—this is the only piece I have ever written that anyone has ever taken any notice of. I am pleased about that, obviously, but it does remind me that something there must have been original. It has a fair way to go. When I have spoken to some of my colleagues and friends of the corporate community, they have been much less enthusiastic about it.

Ms BURKE—Mr Gumley, what is your view on frameworks, systems, measurements and the other things that we have looked at?

Mr Gumley—My view is that an international standard like the Global Reporting Initiative is the model that you have to start with. The problems of definitions and comparability will be worked out in due course. Like every other legal system, it evolves. The important thing, though, is not to say that it is too difficult to work out who is a stakeholder or other such questions but to realise that it is a problem that we need to fix and to get on with it.

Ms BURKE—Professor George, the other issue that we have grappled with is that of auditing these reports and the notion of 'green wash'—that is, writing something down and saying that you have done it, but no-one ascertains whether it has been undertaken. For example: have employees been asked about whether they work for a great boss; has a small, devastated community been asked about the value of a service that has been provided? It is about auditing practices and how they are done. Interestingly, KPMG, who came before us earlier today, said that they believed an IT package—the name of it has gone straight out of my head—was available, that companies were already utilising it and that it could put in a lot of this data. This is about the notion of auditing.

Prof. George—We accountants have a long history of control of audit for good and evil in that respect. The idea of an audit has currency across a whole range of dimensions now, including all of the universities. Historically, accountants are supposed to have some skills in that respect. Aside from thinking about the notable audit failures of the recent past—

Ms BURKE—One of them at your university.

Prof. George—No comment.

Ms BURKE—Sorry; I used to work there, so just ignore the interjection!

CHAIRMAN—Ignore the interjection. We are fast running out of time.

Prof. George—It is a fair comment. The auditability of information systems that inform reporting systems will remain a critical matter. To follow Wayne's comments: the order of events would seem to me to be to modify the reporting requirements and then KPMG and others who are already pretty well informed about TBL type stuff will pick up, for obvious commercial reasons, some good work.

Mr Gumley—There are remedies for false or misleading statements made by companies.

CHAIRMAN—Professor George, in your submission you said:

I do not favour voluntary codes of anything! Such are a recipe for the repeat of Enron/Arthur Andersen behaviour!

What evidence is there that mandatory codes of conduct are foolproof in preventing such things? I note there is an article in the *Financial Review* of 17 February—

Senator WONG—On a point of order: I do not think that is saying it is foolproof.

CHAIRMAN—I will let the witness respond as he sees fit.

Senator WONG—I am just making the point.

CHAIRMAN—In the *Financial Review* of 17 February there was an extract of a memo from Ken Lay, the former chairman of Enron, to all employees about the company's code of ethics, the first line of which reads:

As officers and employees of Enron Corp ... we are responsible for conducting the business affairs of the Company in accordance with all applicable laws and in a moral and honest manner.

Prof. George—So they thought! They probably did not think enough or often enough. I do recall that young Adler recognised the existence of an ethics document within the corporation but said that he had never read it. I think he gave that in evidence.

Senator MURRAY—But Mr Lay said such a thing was there—this is Lay from Enron, not the Australian Lay.

Prof. George—I pick up your contention—and it is a very hard question to answer. It is a proper question. I cannot demonstrate that mandatory requirement is going to force people to behave properly or responsibly or make corporations socially conscious. That is perhaps a good philosophical argument that would take a long while to argue. On the other hand, I think that corporations, for most of their lives in the world, have had a free ride in terms of what they are able to do. We have erred and are continuing to err on the side of leniency and voluntariness. My response really is encouraged by the bad events, which I think are more than just a few bad apples.

Senator MURRAY—Does you university teach ethics as a basis course? Is it a required course in law?

Dr Anderson—I think there is one in the MBA.

Senator MURRAY—Is it a required course?

Dr Anderson—I think it is compulsory in the MBA.

Senator MURRAY—And in law?

Dr Anderson—We are from the Business and Economics Faculty. I could not tell you about the law faculty; I am sorry.

Senator MURRAY—It always struck me as odd that you can have lawyers who do not study ethics.

Mr Gumley—There is a professional practice unit on ethics.

CHAIRMAN—There being no further questions, I thank each of you for your appearance before the committee. It has been very useful as a contribution to our inquiry. Thank you very much.

[2.44 pm]

BERGER, Mr Charles, Legal Adviser, Australian Conservation Foundation

CHAIRMAN—We have before us your submission, which we have numbered 21. Are there any alterations or additions that you wish to make to that written submission?

Mr Berger—No.

CHAIRMAN—I invite you to make a brief opening statement, at the conclusion of which I am sure we will have some questions.

Mr Berger—I would like to offer two additional pieces of information and one additional proposal to what I have already set out in our submission. The committee has before it a large number of submissions from corporations and industry groups. Many of these submissions highlight positive initiatives that they have undertaken, and the ACF has been a strong proponent of responsible voluntary initiatives in the area of environmental sustainability by these companies. It is very good to see that becoming part of business as usual in Australia. However, it is no insult to these companies to note that these submissions are a highly self-selected group and that there is another side to business as usual in corporate Australia. That involves environmental degradation, unsustainable activities and damage to communities in Australia and overseas. Those are the submissions that are not before the committee.

I think an insightful picture of the overall attitude of corporate Australia is reflected in a recent survey that was conducted by CPA Australia. In the study called *Confidence in corporate reporting survey: 2005*, they surveyed, among other groups, 200 of Australia's CEOs, CFOs and directors of large companies. Some of the interesting findings that came out of that report were as follows. Only 54 per cent of those corporate managers agreed that 'Australian company directors have adequate regard for the interests of all stakeholders'. Fifty-three per cent agreed with the proposition that financial performance is more important than social and environmental concerns. A full 88 per cent agreed that companies would be more sensitive to their social and environmental impacts if they were required to report on them. It troubles me that just barely over half of the managers of our large corporate entities believe that corporate Australia is doing an adequate job addressing the interests of all stakeholders. I think that suggests there are some deep difficulties as to how we have arranged the incentives for corporations in Australia. Current directors' duties are one aspect of that. I do not believe that they are the main aspect or the main driver of unsustainable corporate behaviour. What we have tried to do in our submission is set out some solutions that go well beyond the issues around reporting and directors' duties, important though they are.

Business understands these deeper drivers. The Business Council of Australia put out a report in 2004 entitled *Beyond the horizon: short-termism in Australia: a call to think into the future*. I would like to quote a short passage from that:

... the clear messages from many market participants is that increasingly frequent performance monitoring, particularly by institutional investors, and incentives to maximise short-term performance (related to fund inflows, tenure and

remuneration) can exacerbate underlying biases and preferences toward short-term results among most participants in the value-creation chain. In such an environment, company executives believe the market is more disposed to favouring investment projects which deliver more certain, highly observable and shorter-term outcomes at the expense of riskier, longer-term projects.

The short-termism identified in this study so clearly and understood by the business community is a deep problem. It is one that would not be solved by changes to directors' duties, at least not substantially. I would like to suggest one solution that that problem of short-termism implies in addition to the solutions set out in our submission. I would encourage the committee to examine the possibility of utilising the capital gains tax system to refocus Australian corporate behaviour on the long term. If you can envision a capital gains tax system where the amount of tax payable is calibrated to the holding period of an investment such that the longer you hold an investment the lower your capital gains tax rate is, you would really instil a deep change in the attitude of funds managers, analysts, corporate executives, trustees and the entire investment value chain. In turn, that would drive a longer term time horizon, a better assessment of long-term investment risk and opportunities and a far deeper and more meaningful consideration of environmental and social concerns. I conclude my opening remarks there.

CHAIRMAN—Thank you, Mr Berger. I commend that last advocacy. To change the capital gains structure was the Liberal Party policy of the early 1990s. That got subsumed into an alternative policy later in the 1990s.

Senator MURRAY—Yet you voted against my amendment to do that in 1999.

CHAIRMAN—I have been working internally.

Senator MURRAY—I am pleased.

Mr BAKER—On page 5 of your submission, I am interested where you say:

In practice, there are numerous cases of Australian companies that have acted with gross disregard of the environment and the communities in which they operate. The following cases are a small sample of recent irresponsible corporate behaviour:

Point 3 reads:

The lawsuit by Gunns Limited against community activists for, among other things, voicing their concerns about Gunns' unsustainable logging practices to Gunns' investors and customers;

What quantitative information have you got that they are unsustainable logging practices to start with?

Mr Berger—There is a range of information that has been published over the years about the utilisation of old growth forests in Tasmania, and in particular the consequences that the clearing of those areas has on the biodiversity of the area. That is the focus of the case and that has been the focus of environmental activism over many decades.

Mr BAKER—At the moment, 42 per cent of Tasmania's landmass—a million hectares, with 100 trees per hectare, which is 100 million trees—is protected. Gunns say that they have a sustainable forest practice, which is put out as world's best practice. You would dispute that and say that there is still not enough forest protected?

Mr Berger—It is my view that there is still biodiversity at risk in Tasmania as a result of the clearing of old growth forests, and I would be happy to provide supporting documentation for that.

Mr BAKER—So you do not believe that it is possible to have a balance between the forestry industry and conservation at the same time?

Mr Berger—No, that is not my perspective at all. I believe that it is possible to have a sustainable forestry industry in Australia and in Tasmania consistent with environmental values.

Mr BAKER—When you say that they are unsustainable logging practices, what information do you have to substantiate those claims?

Mr Berger—The gravamen of that comment and of much of the activism that has gone on over the past decades relates to old growth, high conservation value forests in Tasmania.

Mr BAKER—So what you are saying is that the activists are right and the company—along with the state government and both sides of politics—is wrong, and that the regional forestry agreement does not protect the environment?

Mr Berger—The point of that comment was that it is legitimate for community activists to express their views to the customers of a company. You may disagree with those views. We will stand firmly by the right of people to put those views without threat of legal action.

Mr BAKER—So you would promote the things that have happened in the last few years, as you would know, such as people chaining themselves to bulldozers and preventing innocent contractors doing their work? What about some of the photos that have been put out there—photos which are 15- to 20-years old—of coupes that have been clear-felled and the claims that they show what Tasmania looks like? These photos are being displayed at places like Sydney Airport.

Ms BURKE—Mr Chairman, what has this got to do with corporations? I do not believe ACF is on trial here. What is the relevance of this to the inquiry we are having at this point in time?

Mr BAKER—The point is this: why shouldn't a company have a right to take legal action against those types of actions?

Mr Berger—Because this falls into the area of fundamental freedom of speech—the right of people to put their views to other people. That is the substance of my comment there. I am not going to comment on all of those specific activities that you have mentioned. I have not been personally involved with them.

Mr BAKER—So what you are saying is that a company does not have a right to protect its own interests?

Mr Berger—Of course a company has a right to protect its own interests, just as people have a right to put their views to other people.

Mr BAKER—So you are promoting that type of behaviour, and yet a company does not have the right to take action as a comeback?

Mr Berger—Whether it has the right to is a matter that is currently before the courts. That is currently being litigated.

Senator WONG—Mr Berger, you raise I think 11 issues or proposals. I do not want to spend too much time on directors' duties because we have had a lot of evidence about that. I understand that essentially you are saying that we ought to consider a recommendation to amend the act so that directors are obliged to consider the interests of stakeholders, essentially?

Mr Berger—That is correct.

Senator WONG—You were here, were you not, for the discussion with the academics previously?

Mr Berger—I caught most of it.

Senator WONG—Is there anything arising out of that that you particularly want to put to us? I think you might have got the thrust of where we might be coming from, certainly at this end of the table, in terms of what the most effective legal context to place such obligations is in order to minimise negative or unforeseen consequences. I do not know if there is anything you want to add as a result of our discussion with the Monash University academics.

Mr Berger—I will comment just briefly on what is properly regulated in the Corporations Act and what properly a matter for regulation under the general law. Obviously, the main place for protection of the environment should be in environmental legislation, but what I think we should not do is set up a system of conflicting incentives so that, on the one hand, you have in environmental laws incentives to act sustainably and responsibly vis-a-vis the environment and, on the other hand, you have set up a structure of economic activity which is at odds with those goals, because that will tend to undermine the enforcement of the environmental laws. It put directors and companies in the very invidious position of having to struggle between environmental compliance and short-term shareholder value maximisation, for example. So I think it is not only what is best in Corporations Law and what is best in general law but also what is the interaction between the two.

Senator WONG—And how to align the incentives.

Mr Berger—Yes.

Senator WONG—I guess the issue might be or people might say that duties is not the way that you align incentives. You talked about—and I agree with you—the disincentive to

appropriate behaviour that might arise from short termism. It might arise from a very narrow construct of value. The argument that is being put to us by I think people from both sides of this debate is that actually, if you are serious about long-term value, you will take these issues into account.

Mr Berger—Yes, and I would agree with that if you are serious about long-term value. Then the question is: what incentives do people have to think of as long term?

Senator WONG—I agree with that, so I would like to focus on that. I guess my question is: to what extent are directors' duties really an incentive in that regard?

Mr Berger—They are currently an incentive, and I would say a fairly weak one, towards shareholder value maximisation in the short term. In other words, the threat of a possible lawsuit by shareholders is a concern. I would say that it is a relatively minor concern in the grand scheme of all of the things that corporate executives have to be concerned about—for example, their own personal compensation structures, shareholder control over appointments and removals and over their remuneration, how the market is going to perceive various actions and the pressures they are getting from analysts. In that context, in exceptional cases directors' duties may come to the fore. In the ordinary course of business I would say that it is much more of a background concern.

I would add that, whether you take an enlightened shareholder view of directors' duties or whether you move to a broader stakeholder conception of directors' duties, the real rule of directors' duties is that courts are not going to inquire. The business judgment rule is broad enough that it shields directors from pretty much any suit that does not have some element of fraud, self-dealing or sheer negligence. I think that, if you look at the cases or elements or instances where a breach of directors' duties is found, it is very rare to find a case where preference of some stakeholder other than shareholders has been the primary focus of the case. So it is mostly a theoretical risk. The directors' duties are I think largely symbolic. Symbols can be important, but it is largely symbolic.

Senator WONG—I think I understand that, one, you are saying companies ought to be able to get money back from executives in certain circumstances.

Mr Berger—I would say it is a sheer matter of fairness. If directors have earned a certain level of incentive based compensation and it subsequently turns out that in fact they should not have been awarded that, because what they were doing at the time was destroying the company rather than allowing the company to prosper, then why should the company not be able to recoup some of those incentives?

Senator WONG—I am not sure whether, under the existing rule, there would be avenues for that kind of recovery, in any event.

Mr Berger—I am not aware of any particular legal avenue through which that might be pursued. Obviously, if there is some element of fraud you can imagine claims being made against the directors. In fact, the US has gone quite a bit further down this track and established a specific claim. In instances where there is a restatement of financial accounts, there is then a

specific legal right that the company has to recoup incentive based compensation from the executives. It is made much more explicit and direct.

Senator WONG—By the way, thank you for giving us some overseas examples of different constructions of directors' duties. That is quite useful. I turn now to trustees and the SI(S) Act regulated entities. It seems to me that one of the things we have not had much evidence on is to what extent investors and, more generally, the capital markets might be encouraged to take into account these long-term interests. How would you look at amending section 52, in particular with respect to other duties that are incumbent upon trustees, so as to encourage that in terms of their investment decisions?

Mr Berger—As I understand those duties and how they are currently interpreted, they are in fact far narrower and clearly more orientated towards financial maximisation of a specific investment portfolio than the more general directors' duties directed in the best interests of a corporation. This creates a situation where trustees are prohibited from considering not only other interests that the beneficiaries of superannuation funds may have but even other financial interests that the beneficiaries of the superannuation funds may have. So the actions that superannuation funds trustees may feel under an obligation to take in maximising the value of that pool of assets could in fact undermine other financial interests that their beneficiaries may have.

One instance where one suspects that that may have occurred is in the James Hardie case, where superannuation funds may have been lobbying the company to refuse to top up the fund, even though some of their beneficiaries may have been depending on a top up of the fund for compensation. It is really a perverse set of incentives that trustees are operating under. We have suggested here, in the broadest terms, that that should be widened—that trustees should have greater scope for considering the interests, broadly conceived, of their beneficiaries. There are a couple of ways that you could do that. One is simply to make it explicit that they can consider all the interests of their beneficiaries. Another way is to allow them to act if they have sought the views of their beneficiaries, and a majority of the beneficiaries have approved the taking of certain action, so instilling some element of democracy into superannuation funds and how managed funds are in fact managed.

Senator WONG—Or at least permitting them to have regard to stakeholder concerns when assessing the long-term value of a company in which they invest. Essentially, that is what we are looking at.

Mr Berger—Yes.

Senator WONG—With respect to mandatory reporting, yesterday the CPA gave us a copy of the study to which you referred. You might want to comment on two issues. Firstly, the evidence so far has suggested, one, that there is an argument that mandating reporting will—I am really getting tired of this phrase, but it has been put a number of times—'lead to a lowest common denominator approach'. Do you want to comment on that? Secondly, to what extent would you need to hold off either encouraging or mandating reporting until there is some agreement around a standard framework?

Mr Berger—There is very little to support the view that this will encourage a lowest common denominator, or box ticking, approach to compliance. In fact, we take the contrary view: if you put in place a minimum set of standards, that is going to inspire companies to go beyond that. I will give you an example of how that might work. Suppose there were a very simple requirement for every company to disclose its absolute level of greenhouse emissions every year. It is likely that most companies, rather than simply printing that number, would engage in some sort of explanation of that number—an explanation of trends from year to year. They would seek to put that in context and explain it in terms of intensities as well as absolute emission levels. That sort of contextualisation would almost definitely happen. We see that in financial reporting as well. So I do not think it would tend to reduce companies to a lowest common denominator approach. Indeed, all the incentives that are currently driving responsible companies to report their performance would continue to be in place and would continue to encourage them to strive towards better than a compliance approach towards reporting.

Senator WONG—My other point was about whether or not we have to wait for agreement around a framework. We could be waiting a long time.

Mr Berger—A way of viewing this is: is a specific reporting requirement that we could envision a net positive, rather than a perfect reporting system, or is it something that everyone can accept? Would it be acceptable to report on a discrete number of indicators that are widely if not universally recognised as important? In the environmental context, you could even boil it down to energy use, greenhouse emissions and water use. Those are three clearly major environmental issues in Australia. There is widespread agreement, I would say, that those are significant indicators of performance. If you like, you could even have minimum thresholds so that companies such as investment vehicles that have trivial or negligible impacts are exempt from those reporting requirements.

Senator WONG—In your opening statement you raised the issue of capital gains tax. In your submission you referred to fringe benefits tax as a perverse incentive from an environmental perspective. Are there any other areas of taxation or government incentives you might point to either positively or negatively? I think somebody raised depreciation in a submission. Do you have anything to say about that?

Mr Berger—There is an issue with depreciation. Consider a manufacturing facility that has to decide whether to invest in maintenance of existing equipment, which might be inefficient and generate waste or pollution, or investing in new equipment which is cleaner and more efficient. There is an incentive built into the tax system towards the maintenance of dirty old equipment rather than the purchase of new equipment. That incentive arises out of the question: what is a capital investment and what is a business cost? The investment in new technology is a capital investment and it has to be depreciated. The investment in maintenance is an immediate business expense, a deduction for which can be claimed in full in the year in which it occurred. That is obviously not an intended effect of the tax system; it is just a consequence of how it is has worked out over time. There are probably dozens of such examples where the unintended consequences of the tax system are to shift incentives towards environmentally unsound behaviour—'less sustainable behaviour' may be a better way of putting it.

Senator WONG—Has anyone done much detailed work on this? You go through some examples, but can you point the committee towards literature on some of these issues?

Mr Berger—A fellow by the name of Chris Riedy did a PhD dissertation on incentives for the use of fossil fuel in Australia. This was three or four years ago now. He identified several dozen incentives throughout the tax and subsidy systems—research and development initiatives by government—that encourage the use of fossil fuel over alternatives across a whole range of transport and manufacturing. There has been work done on that sector, but, in terms of a more overarching approach to environmental taxation and the possibilities for it, there have been some theoretical pieces done which I would be happy to take on notice and provide to the committee.

Senator WONG—That would be useful.

Mr Berger—There is still great scope for the development of information about this. I think it would be a very positive initiative for the committee to recommend not so much a separate inquiry but an ongoing program with dedicated resources towards investigating these issues on a rolling basis, identifying the environmental and social consequences of different tax and spending policies and recommending ways in which those could be reformed. You can envision a sort of secretariat coordinating input from Treasury, the ATO and external groups on that issue.

Senator WONG—If you can provide us with the information you have, I would appreciate it.

Senator MURRAY—It reminds us all that no government bill is produced with a triple bottom line categorisation to it.

Senator WONG—Or even a family impact statement.

Senator MURRAY—I am sometimes concerned that the demand for more regulation in the corporate area rises out of frustration because the law is ineffective in other areas—for instance, it is either not enforced or monitored or the penalties, if it is enforced, are very minor. It occurs to me that that is probably true with some of the things you have listed on page 5 of your submission. For instance, you refer to 'Shell's lengthy record of criminal pollution offences and breaches'. If they are criminal, they fall under the Criminal Code. I would suggest that all those oil spills are capable of being dealt with under current law, but, as I have understood, the reaction was concern that the regulator was not on the case, that matters were not properly prosecuted and that penalties were insufficient. That could be said with respect to the Hazelwood power plant—that it is because the Victorian government has acted ineffectively and inefficiently. Whilst it is important to condemn companies that do things which are contrary to the interests of a community, it is important to recognise that other laws exist to tackle that.

I am more concerned with reporting, which, if there were not a mechanism for reporting, would not be knowable. To me, that is where CSR needs to make an impact. If you look at existing financial reporting, there is no way any shareholder would ever know the intricacies of a company's accounts, unless they were obliged to report on it. You would not know the asset value, the profit and loss statement or anything, because it is all internal. Similarly, there is much that a company does which is impossible to know about—its water usage, its energy usage or any of those things—unless it is properly reported. To me, that is fairly easy to understand. What I find difficult, and what I want your reaction to, is when something seems to be self-evidently in the interests of a company but is obviously not in the interests of the country.

I want to use as an example the Cubby Station issue. I do not know who owns Cubby Station; all I know is that the trapping of a whole lot of water, which seems to be self-evidently in their interest to make money and all that sort of thing, does not seem to be in the interests of anybody who is downstream or the general health of river systems and those sorts of things. How do you get companies to report on things which would seem to be in the interests of their shareholders but are not likely to be in the interests of the community? Should we worry? Aren't those things normally reported on by the market itself? Newspapers and activists report on them. It is known, so pressure and reaction builds up. Do we need to report on those things?

The reason I raise this with you is that we had earlier as a witness Mr Richard Bovill, coordinator from the Tasmanian Farmers and Graziers Association, who dealt with the issue of a supermarket chain that made the decision to outsource its potato purchases to its own benefit but to the detriment of the region. That is the same sort of thing. He wants that kind of thing reported. I have the feeling that it generates market activity, it generates newspaper coverage, it generates social and community reaction anyway—does it need to be mandated as a reporting mechanism? Do you follow where I am going?

Mr Berger—I do. I have two responses. The first relates to your initial comments. I think that a lot of the drive for looking at corporate laws as a possibility for reform arises, just as you have said, out of a dissatisfaction with the mechanisms of other controls of corporations. I think that the challenge and the possibility of this inquiry into corporate law is not so much to impose new heavily prescriptive regulatory requirements but, rather, to set up structures to harness the power of markets, to inform markets and to enliven the possibilities for shareholders, community activists and other groups in society to act as watchdogs of companies, to exert their influence in a positive way over corporate action. I think that is the better way of looking at the aim of regulation in this area.

On the question of reporting, I think that the single bottom line is a misnomer, to begin with. The single bottom line is really at least three bottom lines—it is a cash flow picture, it is a profit and loss picture and it is a balance sheet picture. It is three different ways of looking at the finances of a company.

Senator MURRAY—You could add another one. All of those are present value. You could add future value as well. Some people do.

Mr Berger—So you have three, four or five bottom lines already. Adding a bottom line which relates to, say, the resource flows of a company is not such a stretch from those traditional financial bottom lines. They give another picture of a company. In fact, in the mining context they are crucial.

Senator MURRAY—They do it continually.

Mr Berger—Why not extend that practice from the mining industry to manufacturing, to retail? You would get a better picture of resource flows into and out of a particular company. The CSIRO has done some very interesting work on resource flows into and out of industry sectors. The conceptual framework for this is already in place. It would not be difficult for companies to adopt it. Looking at input/output—physical input/output, labour input/output—to a company as another bottom line is an avenue worth exploring.

Senator MURRAY—Won't companies do that anyway? You give me a very good example of mining companies. I have never read a mining report which does not talk about its reserves and lifetime. All you ever have to worry about is whether they are telling the truth. You do not want to be buying a stock which says it has got 15 years of reserves when it has only got five.

Mr Berger—But it is a partial resource input/output flow. In other words, it is the mining reserves that are watched and not necessarily the outputs in terms of waste generation or emissions. These issues are being picked up as relevant in a financial sense as well as to the community more broadly. This is another bottom line, another way of looking at corporate performance. Will it ever capture all of the things that are currently unknown about corporations? Probably not. But it will open up a much greater transparency and scrutiny of these companies, both by analysts and by the community.

Senator MURRAY—One of the problems we always have with this is the concern with principles based law or law which is specific and detailed. One of the ideas that has been tossed around by witnesses and committee members during this inquiry is the idea of a general report requirement—namely, that the companies shall report on all social, economic and environmental matters that are relevant and material. Then of course the company itself would choose what to report on, and the market pressure would develop as to what those might be for a corporate university body as opposed to a corporate resource body. That is one of the reactions. Are you in general, as an organisation or as a person, inclined to principles based law expressed generally like that, or are you inclined to be very specific and prescriptive?

Mr Berger—We do not see it as an either/or situation. I think a mix of the two is the best solution. It also depends on what goals are being achieved. For example, the National Pollutant Inventory is very specific. It is a 'tick the box' approach. If you emit mercury into the atmosphere, you have to disclose that on the NPI, and that is because the goals that the NPI serves are not only investment transparency for the markets but also as a legitimate means for the community to determine what the environmental and health impacts of facilities in their area are.

Mr MURPHY—So you would suggest that you would report matters which are really serious—such as putting a permanent damaging material like mercury or a radioactive mechanism into the environment or if there were deaths in your process—on a very specific basis?

Mr Berger—Yes, and I think that is necessary under the current regulatory structure as an adjunct to principles based reporting to markets. In other words, reporting serves investment goals—market based goals—and shareholders and analysts may well be interested only in things which are material, however they may understand and define that term. Communities may have quite different interests. You can imagine principles based reporting to communities as well. I think our view is a pragmatic one—that you need a good mix of the two. Where there is wide consensus about the relevance of particular practices, both to markets and to communities, it is appropriate to have fairly prescriptive reporting requirements—and, again, there can be thresholds to make that target appropriate. Aside from that, it is appropriate to have general principles based requirements. Indeed, there is already that mix in the Corporations Act between prescriptive financial reporting and 299A, principles based reporting on business prospects.

Senator WONG—Is there anything we have not covered that you would like to expand on?

Mr Berger—No.

CHAIR—Thank you very much for your appearance before the committee and your assistance with our inquiry.

[3.24 pm]

LYNCH, Mr Philip, Director, Human Rights Law Resource Centre

HILTON, Miss Kristen, Coordinator and Principal Solicitor, Homeless Persons' Legal Clinic, Public Interest Law Clearing House

LOVETT, Ms Tabitha, Manager, Public Interest Law Clearing House

URE, Mr Sam, Solicitor, Public Interest Law Clearing House

CHAIRMAN—Welcome. Do you have any comments to make on the capacity in which you appear?

Ms Lovett—I am the manager of the public interest scheme at the Public Interest Law Clearing House.

CHAIRMAN—I invite you to make an opening statement, at the conclusion of which we will ask questions.

Mr Lynch—I will make a brief opening statement about the PILCH Homeless Persons' Legal Clinic submission and then hand over to Sam, who will speak briefly to the Public Interest Law Clearing House submission. All four of us will then take questions in relation to both submissions. I will start by providing a brief overview of the case for change which we contend, in both submissions, is strong. I will then talk about the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights as the appropriate framework for the development and implementation of policy and practice in relation to corporate governance and corporate social responsibility. Sam will then talk about some domestic legislative and other initiatives, including on directors' duties, government procurement practices, reporting and disclosure requirements, market indices and the like, to seek to implement what the norms provide as an overarching framework at international level.

Looking first at the case for change, we contend that it is founded on three essential propositions. The first is that the impact and influence of corporate and business activity is very significant, widespread and increasing. Corporations have the capacity to foster economic wellbeing, development, technological improvement and wealth as well as the capacity to harm and impact harmfully on human rights and the lives of individuals, communities and the environment. Increasingly, corporations are involved in the provision of very fundamental services: education, housing, gas, electricity, water, occupational health and safety, transport and so on. Recognising these very significant impacts, there is a very strong public interest in the conduct of business and corporate affairs to impact positively not only on relevant financial interests but also on relevant social and environmental interests.

The second element of the case for change is that while the extent of CSR in Australia is clearly on the rise, it remains low. Fewer than two per cent of ASX listed companies participate in the Corporate Responsibility Index, which is probably the largest corporate reporting tool

currently used in Australia in relation to CSR, while recent research demonstrates that fewer than 10 per cent of corporations have a developed understanding of the relationship between corporate governance and corporate social responsibility, as against having merely developed a policy in relation to that. The very recent conduct and alleged conduct of the Australian Wheat Board, Anvil Mining and James Hardie Industries demonstrate manifestly that there is a need for policy and incentives to promote CSR.

This is particularly the case in the context of the third element of the case for change—namely, that directors' duties and, in particular, section 181 of the act only permit corporations to have regard to and act in the social and environmental interests of stakeholders insofar as there is some relationship between those interests and shareholder financial interest and value. Further, while there is an emerging body of evidence, which has been referred to by this committee and in other submissions, about the correlation between corporate sustainability—the enlightened shareholder approach—and shareholder value, the evidence is still not strong. And it remains clear that those interests must be subverted to shareholder financial interests where they are not consonant, where there is no relationship between those interests, which would be characterised as corollary interests, and shareholder financial interests.

Even if one takes the view—and obviously many of the corporations appearing before this committee do—that the enlightened shareholder approach permits and in fact encourages CSR, the point remains that that is based on a certain interpretation of the act which is not shared by all corporations. In fact, the act has been used in one recent high-profile case by a corporation as an excuse to engage in anything other than socially responsible conduct—and I assume that is one of the catalysts for this inquiry. There is also the point that permissive approaches work well for well-intentioned actors. It is not the well-intentioned actors, as my colleague from the ACF referred to earlier today, that we are really concerned about. It is the recalcitrant companies that have not made submissions to this inquiry and that are not subject to the same degree of public and media scrutiny and accountability about which we should be concerned.

Indeed, as we refer to in our submission, the CEO of ANZ is on the record recently as saying that it really staggers him that 'among many investors and corporations it remains unfashionable to take a platform advocating sustainability, social responsibility and community engagement because of the focus on short-term profit maximisation'.

I will turn now to talk about the UN norms and why we argue that they are an appropriate framework for the development of domestic policy and practice in relation to CSR. There are three reasons. The first is that it is a framework which is universal and founded on a core set of agreed minimum norms and standards with respect to the conduct of governments, individuals and enterprises. Secondly, it focuses attention on a range of determinants of social and community well-being—whether they be civil, political, economic, social or cultural, and encourages corporations to have regard to their various spheres of activity and influence. Finally, it enshrines a number of elements of important human rights based corporate conduct, requiring that corporate governance be fair and non-discriminatory, that it be consultative, that it be participatory, that it be transparent and accountable in its approach, and that it promote community empowerment.

Recognising the association between corporate governance and the realisation of human rights, the UN adopted the norms in 2003 and they to this day remain the most clear,

comprehensive and concise standards in relation to the relationship between corporate social responsibility, corporate governance and human rights. As this committee would be aware, the norms impose obligations on corporations in relation to a range of human rights, including the right to equal opportunity and non-discrimination, the right to security of persons, certain workers' rights, consumer rights, environmental rights and so on. They also require corporations to recognise and respect the public interest, development objectives and principles of transparency and accountability.

The most important substantive provision of the norms is article 1, which provides that, within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, ensure respect of and protect human rights. The norms envisage a range of implementation strategies, which include the development of operating procedures that are compliant with the norms, consultation with stakeholders and communities about corporate activities, influence and impact, engaging in business only with other parties that comply with the norms, applying and incorporating the norms into contracts and other arrangements, periodic reporting on corporate activities, operation and performance in relation to the norms, and monitoring by relevant international, national and domestic bodies in relation to the implementation and application of the norms. I will hand over to Sam now, who is going to provide some very practical insight and recommendations in relation to the domestic application of the norms, having regard to our current regulatory frameworks.

Mr Ure—I am going to discuss areas in which PILCH proposes the government could change the framework of corporate governance in this country to actively encourage socially responsible behaviour by corporations. The four chief areas I will concentrate on are directors' duties, corporate codes of conduct, reporting and disclosure and means of giving effect to shareholders' expectations in the area of corporate social responsibility. The key principles informing the PILCH submissions are the need to place social considerations before boards and the need for transparency and disclosure of companies, practices and conduct relevant to their social responsibilities.

The case has been put in other submissions to this inquiry that section 181 of the Corporations Act permits socially responsible conduct on the part of companies and PILCH acknowledges that this interpretation has its adherents, but its submission is that directors' duties should go further and impose a positive obligation to consider interests other than the interests of the company's shareholders.

The proposed model on pages 12 and 13 of our submission loosely adopts the formulation of directors' duties that is used in the UK Company Law Reform Bill currently before a committee of the House of Lords. There are two features to note briefly about that model. The first is that the obligation to take account of non-shareholder interests only arises where those interests are relevant and where it is reasonably practicable to do so. Secondly, the list of non-shareholder interests is inclusive, so it contemplates interests not listed as well as the possibility that there may be no need to take account of non-shareholder interests in the context of a particular decision. The idea behind this sort of list is to actively encourage directors to think laterally about impacts on other interests and to take those into account and thereby avoid a compliance style box-ticking exercise.

The committee will already be familiar with the corporate governance recommendation of the Australian Stock Exchange that requires or recommends that a company adopt a code of conduct and back it up by compliance mechanisms and appropriate whistleblower policies. PILCH's proposal is that this requirement be extended so that it applies not just to ASX listed companies but also to public companies and large proprietary companies as those are defined in the Corporations Act. Like the Australian Stock Exchange recommendation, the code of conduct would be disclosed on a comply or explain basis. A code of conduct would be defined in the act as a document stating the guiding principles for a company's decision making. One of the matters which might be addressed in the code of conduct is the statement of the differences between the standards used in the code of conduct and those set out in the UN draft norms.

A key principle in PILCH's submission is that companies' practices and decisions which have social, environmental or other impacts should be available to the market. To facilitate this sort of disclosure the PILCH submission recommends the introduction of a requirement that companies disclose internal policies, manuals and statements that are relevant to the discharge of their responsibilities. Again, this is a comply or explain requirement and would apply to both public companies and large proprietary companies. To enable the market to properly assess companies' social responsibility performance, the PILCH submission proposes to enable government to prescribe uniform reporting guidelines for companies' annual reports. The PILCH submission recommends that the prescribed reporting guidelines be the GRI guidelines.

Finally, in line with the principles of transparency and accountability which inform the PILCH submission, PILCH suggests that the five per cent or 100 shareholder rule be retained to enable shareholders to place resolutions before general meetings. Noting that a massive proportion of funds invested in Australian shares are invested by fund managers on behalf of individuals, PILCH also recommends strengthening disclosure of information about CSR principles applied by those fund managers in making investment decisions and standardising this disclosure to enable ready comparison of ethical investment policies.

CHAIRMAN—You indicate in your submission that we should encourage companies to adopt codes of conduct containing statements of principle intended to govern the conduct of company affairs at all levels of decision making. I think you may have been here when I quoted the Enron code of conduct earlier.

Mr Ure—No.

Senator WONG—Basically, it is clearly inconsistent with the activities undertaken by a significant number of people within the company.

Mr Ure—Was that with Professor George earlier this afternoon?

CHAIRMAN—Yes, it was to do with a question I put to Professor George. In effect, it obviously was not honoured. In that context, how confident are you that such codes will prevent errant actions of one or a group of directors or executives given the Enron example and also, it has been alleged, the James Hardie case?

Mr Ure—I think that a statement of a code of conduct is really only a first step. It needs to be adopted and embraced by all levels of decision-making in a company. Clearly, in the Enron case

it was merely a matter of lip service. It seems to me unacceptable that a company could not adopt such a code of conduct. Adopting such a code would send a message from board level through all the levels of decision-making of a company that 'These are the values', so that an employee who has to make a decision in a plant somewhere in the world, about what to do with waste materials for instance, will have a point of reference—if they care to look.

Mr Lynch—The failure of Enron and the code of conduct in that case also points to the importance of certain mandatory requirements. Had the Enron board been legislatively required to give consideration to interests other than mere shareholder financial interests and had there been, as is the case with other directors' duties, penalties attached to a breach of those directors' duties, their corporate governance and conduct may well have been different through all levels of the corporation, particularly if those considerations had been brought into the boardroom—the head of the corporation—and there had been penalties associated with non-compliance.

Senator WONG—I do not know all the details of Enron, but it is quite likely, I would have thought, that the interests of the shareholders were not maximised. Clearly, we had a company fall apart, essentially. Its financial statements were clearly incorrect, with over inflated profits et cetera. The argument is that if the duties had been different they might have acted differently, but they breached the duties they had in any event, so—

Mr Lynch—Perhaps that is why Enron is not a particularly good example. If a company is prepared to flagrantly violate the law, there is not a whole lot that governments and policy makers can do.

CHAIRMAN—On the subject of the Enron case, if the interests of shareholders had been considered appropriately, the interests of others would have been successfully accounted for in any case, wouldn't they? If the directors had taken account of the interests of shareholders and kept the company solvent and operating effectively, then the employees, the creditors and everyone else would not have got into strife. If the company had been maintained as a profitable going concern, in the interests of shareholders—

Mr Lynch—I am, similarly, not sufficiently familiar with the Enron case to comment knowledgeably on it, other than to say that, as I said to Senator Wong, it is probably not a good example, for the simple reason that, whatever their duties were, the directors violated them. It points to a gap between legislation and actual practice and it is very difficult to close that gap—other than through harsher penalties, I guess.

CHAIRMAN—Your submission cautions the committee to be wary of considering corporate responsibility to be limited to acts of corporate philanthropy. I assume you would be aware of the Prime Minister's Community Business Partnership. Do you have any specific comments or recommendations on that program or on other government initiatives, other than the legislative initiative that you have proposed, to perhaps broaden the scope of responsibility, beyond what you would regard as just philanthropy, through those programs?

Mr Lynch—I will not comment on the Prime Minister's business partnership program. Tabitha or Kristen may well comment, having some degree of familiarity with that program. What I will comment on—and this is referred to in our submission—is the potential associated with government procurement practices. In the Homeless Persons' Legal Clinic submission you

would have seen reference to the requirements placed in the Victorian government's legal services panel contracts that firms tendering for work disclose their briefing practices, which is intended to encourage briefing of women barristers, and also that they make disclosures in relation to their pro bono practices and commit a certain value, between five and 15 per cent of the contract price, to the provision of pro bono legal services. I will hand over to Tabitha because I think she has some awareness of the normative impact that that has had, and the significant impact it has had on pro bono activity in Victoria, as an example of potentials associated with government procurement practices.

Ms Lovett—I am not sure how familiar you are with the Public Interest Law Clearing House but we act as a legal referral service, which is funded by the private legal profession. We do not receive any government funding. In order to operate, we rely heavily on the membership fees, which are paid by the law firms and, relevant in this case, four corporate in-house legal teams, which pay membership fees and then take referrals from us to perform pro bono work for not-for-profits who have public interest aims and objectives, individuals who have raised cases that are in the public interest—whether those are raising issues of discrimination or cases where they are having difficulty getting fair representation—and also individuals who require pro bono representation because they are not eligible for legal aid, they are unable to afford legal representation and their case does have some merit.

It was interesting that, when the Attorney-General made it a key performance indicator that law firms who were on the services panel had to perform a certain percentage of pro bono work, we had quite a few law firms contact PILCH and then join PILCH not only to pay membership fees but also to receive referrals from us to perform pro bono work. The inducement for them was that the Attorney-General had recognised that membership of PILCH satisfied that criteria.

One of the things that we are quite conscious of is the impact that it can have when the government looks at making that a condition—whether it is a construction tender or a tender for a large infrastructure project. In this case of legal services, it obviously had the positive benefit of a lot of firms then taking on pro bono work. I was actually speaking to someone the other day who is the community partnership manager for a large company which provides infrastructure services to the government. They were saying that more and more there is a leaning to demonstrating in their tenders the community programs that they have in place and the impact of their practice on the community and the environment. I think if that could be formalised in the tender process it would really make that something that they were very aware of and it would not be just, as Sam said before, lip service to the community programs but an effective implementation of them.

Miss Hilton—If I could just extend from what both Phil and Tabitha have said, while the legal panel service requirements have perhaps been an inducement or an incentive for firms to join PILCH or to be engaged in other sorts of community partnerships, the normative and the cultural impact that that has had within the firms has been really significant. Four years on after its establishment, the Homeless Persons' Legal Clinic, which is now partnered with several firms throughout Melbourne, has other large firms ringing them up and requesting that they join a partnership with a particular homelessness agency to conduct their own clinic.

That has gone even further where now we have clinic lawyers who are pro bono lawyers working for large firms who take on clients who are people who have been homeless or are

experiencing homelessness. They act for them with regard to a range of issues—sometimes against government and sometimes against the big banks, which are the clients of these firms. Usually they would say to the client—it might be ANZ; it be NAB: 'We'll lie down in the rain for you but in this particular instance we have a client who has a debt with your bank and we're going to act against you. Is it all right?' The relationship partner will ring the legal counsel of a particular bank. More often than not, our experience has been that not only has the bank or the government department approved that particular instance for the firm to act but they have been impressed by it. It has led to comments like: 'That's really interesting. I'd like to hear more about that type of work' or, 'My daughter volunteers at a soup kitchen on Thursdays.' It gives a very practical and positive example of the business case for corporate social responsibility.

Senator MURRAY—You have just described a virtuous circle.

Mr BAKER—How do you extend the instruction to all the other industries?

Ms Lovett—At the moment with the law firms, it is fairly straightforward. You get this amount of work and this percentage has to be pro bono work but I do not see why that could not be extended to all the contracts that the government tenders out—whether it is for catering, construction, infrastructure, building bridges. It is really something on which the government could take the initiative—to actually make that a requirement of getting business from the government.

CHAIRMAN—It is going back to the original health system we used to have where specialists used to do pro bono work in exchange for the right to practise in public hospitals.

Mr BAKER—Why should it be confined to the legal system?

Miss Hilton—It should not; that is exactly our point.

Mr Lynch—The Victorian government has mooted the notion of inclusionary zoning, which requires developers to contribute a certain amount of construction price to the development of low-cost and social housing. So there are lots of practical examples of ways in which government procurement practices can be used to encourage their contractors to engage in socially responsible corporate conduct.

Senator WONG—I would like to go back to the UN norms. Could you remind me what the current status of those is?

Mr Lynch—They are draft norms that have been approved by the UN Subcommission on the Promotion and Protection of Human Rights.

Senator WONG—What is the process now for a forum for progressing them from draft to final?

Mr Lynch—As I understand it, they are still being commented on by a range of organisations, both within and external to the UN, such as the Business Leaders Initiative on Human Rights, the Global Compact and the Office of the High Commissioner for Human Rights. I imagine that,

pending consensus among those bodies, the norms will be put before the General Assembly for adoption.

Senator WONG—But they are still at that stage.

Mr Lynch—They are still at the draft stage and there is still a process of consultation with relevant stakeholders. National governments, corporate interests and other community stakeholders are commenting.

Senator WONG—Miss Hilton, you suggested that the procurement policies in terms of government legal work were leading to normative change as well. What is the evidence of that? That is an anecdotal comment, I presume.

Miss Hilton—It is the evidence that we have working at the Public Interest Law Clearing House. We can see a clear increase in not only the work that firms do but I suppose their preparedness to take on more and more complex matters—matters that are perhaps less politically popular, matters that are more sensitive—and not simply act directly for a client. There has been a desire to become involved in broader law reform advocacy work within the firm. I think that raises social justice awareness. There are obviously things that are quite closely related to young lawyers who have perhaps just finished their law degree or come out of law school for whom those concerns are still very prevalent. Perhaps it taps into that sense more easily than it does into other areas. But I think that the experience that we have had is not necessarily applicable only to the legal area.

Mr Lynch—Just adding to that, as I understand it, the Victorian Department of Justice is currently evaluating the impact of that policy on both briefing practices in relation to female barristers and the provision of pro bono legal services. Five years ago, when this was not the case—when the government did not include this contractual requirement in tender arrangements—we certainly did not have firms queuing up, as we do now, to provide legal services to people experiencing homelessness.

CHAIRMAN—I am wondering, particularly if you want to extend it beyond legal services provided to government—to engineering or building and construction or whatever—whether you need to be as prescriptive as this is. In a sense, in the way it seems to be operating—and correct me if I am wrong—it really is another tax on the law firm, isn't it? If you have to provide a fixed 15 per cent pro bono work in exchange for government contracts, the effect of that is simply another tax, provided in kind rather than in cash.

Mr Lynch—Or to reduce the value of the contracts. It depends how you characterise it. I think one of the advantages has been that the government has been fairly non-prescriptive in terms of the kinds of work that must be undertaken. There are certain approved causes, but those approved causes are fairly broad in their ambit. One of the advantages of that is that firms can partner with community organisations to identify particular needs and to create innovative partnerships to address those community needs.

Similarly, you could envisage that occurring in the construction industry. If a construction firm were required to contribute five per cent of the construction price for low-cost social housing, you could imagine an innovative partnership between the Council to Homeless Persons and

Leighton Constructions to identify a particular need in an area and to develop and innovative program to meet that need. I think non-prescription in that area, within certain parameters, obviously, so that it is not jobs for the boys, would be desirable in the interest of innovation.

Senator WONG—I do not know how much of this afternoon's evidence you were present for, but I think the nub of some of the conflict in the evidence before us is the line that people perceive there ought to be between what ought to be in the Corporations Law and what ought to be more generally regulated in other areas of law. I would think with things like human rights that people may well say, 'That's not necessarily something we want to put in the Corporations Law, because we do not want to have a multiplicity of requirements against which directors have to assess their actions.' Do you have a response to that?

Mr Ure—The model we are proposing really places the onus on the directors to decide the extent to which—

Senator WONG—I thought PILCH was suggesting that it was mandatory to take account of this, in fact.

Mr Lynch—No, it was in the Homeless Persons' Legal Clinic submission. The PILCH submission gives some more technical details on the new section 181. Partly rhetorically, recognising the very significant impact that corporations have on human rights, why shouldn't that be considered in the boardroom; why shouldn't that be front and centre of corporate governance?

Senator WONG—Because it may not be in the most effective context for it to be. I do not think there is anybody here who would argue that corporations should not be involved with human rights. From my perspective, I think the issue of human rights is a sound objective for all areas of government and private sector activity; that it should be taken into account in our minimum requirements for a whole range of activities, including offshore activities. The argument is not whether that is desirable; the argument is whether it is appropriate for it to be in the Corporations Law.

CHAIRMAN—Or in some other area of the law.

Mr Lynch—I do not know that they are incompatible. I am certainly a proponent of a charter of rights, or a bill of rights, that is legislative or constitutional, but I do not think—

Senator WONG—And presumably some requirements on transnational corporations to observe minimum standards?

Mr Lynch—Absolutely. But I do not know that that derogates from the desirability of ensuring that, when directors sit down and consider what are relevant interests to the conduct of the corporation in the management of their business, human rights and interests of relevant stakeholders are front and centre among those.

Senator WONG—Would you trust them to do that, though, and would a legislative change require that?

Mr Lynch—It would certainly ensure that they went much further than they do currently. Again, it is the Enron example. You cannot compel them to, but certainly a legislative requirement attached to which are penalties and remedies is more likely to place that front and centre of boards that act in good faith.

Senator WONG—Do you want to comment, Ms Lovett or Mr Ure?

Mr Ure—I do not have anything else to add to that.

Senator WONG—I think the Homeless Persons' Legal Clinic talked about the requirements in South Africa and the GRI. Do you have any information on how effective that has been?

Mr Lynch—It is not referred to in the submission, as you would have seen. I can certainly take that on notice and see if I can—

Senator WONG—I thought it was referred to in the submission.

Mr Lynch—Yes, that is referred to in the submission. But there is no evidence in there in relation to the substantive outcomes with regard to the impact and evaluation of the extent to which the JSC listed corporations report in accordance with the GRI.

Senator WONG—One of the issues that has been raised a few times in the evidence is how to deal with the green wash or lip service issue. You may have codes of conduct which are great and you may have reporting requirements which are great, but how do we ensure that their reliability is maximised? They cannot be foolproof, clearly. Do you have any views about that?

Mr Lynch—In evidence earlier today I heard a number of concerns about box-ticking exercises and the lowest common denominator. In my view, the lowest common denominator is better than no common denominator or no minimum standard whatsoever. There is literally no minimum standard in relation to the reporting level above which companies must report currently, so setting a baseline is a positive first step.

Senator WONG—In terms of social and environmental impact.

Mr Lynch—Absolutely. The other thing is that I do not accept that mandatory reporting will result in a lowest common denominator approach. Evidence of that is that there is a clear association between reporting, transparency and accountability, on the one hand, and the development and implementation of CSR policies on the other. The companies we have seen having the most developed and well implemented policies—Reebok, Nike, Shell, BHP, Rio and so on—are those companies that have been subject to the greatest level of community activism, media and public scrutiny and accountability and have been required, accordingly, to amend their practices. My view is that mandatory reporting requirements would only enhance that.

Ms Hilton—Those companies also realise that there is no value in a box-ticking exercise and, in fact, have broad and expensive campaigns that promote their community concerns and promote whatever package they choose to sail into as their corporate social responsibility. We see it with our member firms, who are perhaps introducing or launching a new pro bono policy.

It is a big deal. They have luminary speakers come in and launch the policy. It is something on which they almost try to outperform each other.

Mr BAKER—A marketing tool.

Ms Hilton—Yes, it is a marketing tool.

Senator MURRAY—I notice that you said that it would enhance existing practice. One problem with the examples you have raised is that it is an example of the market working well—namely, bad behaviour is identified; the media and activists draw attention to it and people are forced to correct their behaviour, and then others who are not subject to that behaviour recognise the dangers and they themselves do it. So the market is working quite well. I am more concerned with areas where the market does not work well at all, where there is no discoverability, if you like, about what may result in long-term harm—social, economic or environmental—to the community and how you make people report on the potential negatives resulting from what they would otherwise regard as valuable activity. I use the Cubby Station example. It is self-evidently wonderful for the shareholders and owners of that land, but downstream it is not real flash. Take the media companies. I do not know whether media companies involve themselves in CSR at all—maybe they do. They are terrific at philanthropy. You get the telethon and lovely things like that—they are wonderful—but the other side of the coin is where it affects the manner, nature and climate of free speech and the ethics of what they say and do. I do not see them reporting on stuff like that. I sometimes find the examples of Nike and so on not persuasive, because they were found out, sorted out and the world has benefited as a result. It is the hidden stuff that bothers me more.

Mr Ure—They are more examples of mischief that need to be targeted by the law of the land as opposed to corporate governance regulation.

Senator MURRAY—That is right. It is why the word 'responsibility' is in the CSR. It is not compliance with law. It is not what is or is not lawful; it is behaving in a manner which is to the long-term benefit of your economy, your society and of your land.

Mr Ure—It is compliance not just with the letter of the law but with the spirit of the law.

Senator MURRAY—No. What we are discussing here is what you put into the law to make people declare and expose what might be unlawful and might never be unlawful but what is not desirable from the community's point of view. That is the point.

Mr Lynch—There are a number of important points raised by your questions. The first is that we certainly do not want to overstate the value of the market.

Senator MURRAY—Under or overstate?

Mr Lynch—We do not want to overstate the value of the market. As you have identified, the market has worked reasonably well in terms of exposing practices of certain large corporations and ensuring that those corporations develop and implement CSR policies. The market fails where companies are not subject to such a high degree of scrutiny and accountability and that is precisely why our submissions propose a number of prescriptive approaches rather than

permissive approaches. It is not those well-intentioned corporations nor is it those that are subject to a great degree of scrutiny that we are concerned about. It is the recalcitrants that are slipping under the radar we are concerned about. For those corporations it is important to ensure that there are legislative requirements for them to engage in socially responsible corporate conduct and that social environmental interests form an integral part necessarily because there are penalties associated with failure of corporate governance and board decision making and, by extension, the conduct of the whole corporation.

Senator MURRAY—It is also complicated by the range of activities which CSR envisage. I have said several times during this inquiry that my summation of the broad field results in three main silos—and we could add others. The first silo encompasses risk both to the shareholders and to the future of the company, such as the James Hardie situation. There is risk which attaches to the community such as an AWB situation where you have a reputational effect on all Australian business, and I can clearly see that. You have a second category which I would call 'added value' or as some of the Perth witnesses said 'enduring value', which adds value to the business and the enterprise because as a result of data collection, proper quantification and comparability, they discover that there are better ways to use their energy and their water and to control their emissions and so on which resulted in cost reductions or community benefits. That is what I would call the added value side of it. Then the third silo is the feelgood reputational side which is largely philanthropic in character.

Item 1 I can clearly see has a prescriptive necessity attached to it. It really should ensure that risk is identified. There is a real weakness in our accounting and reporting systems because they are financed according to more of an insurance orientation rather than performance orientation. But the second two are unlikely to be responsive to prescription. You cannot make somebody be philanthropic. You cannot make somebody record and add value. They have got to see that it is in their interest to do so.

Mr Lynch—I think that assumes a consonance that does not always exist between shareholder value and social and environmental interests. The difficulty with the law as it currently stands is that where there is an inconsistency the shareholder interests are clearly required to be paramount. An example might be a mining company that finds a big deposit right near an Aboriginal community. It goes in and employs a whole lot of young people from that Aboriginal community, thereby stripping the school. The school in the community closes down for lack of students. The mining company pulls out a year and a half later and where is the infrastructure of the community? That is something that is clearly consistent and arguably is required by the current state of law because regard is to be had paramountly to shareholder value.

CHAIRMAN—That is a hypothetical situation.

Mr Lynch—It is.

Senator MURRAY—And highly unlikely.

Mr Lynch—Not necessarily.

Senator MURRAY—Mining companies hardly ever dip in and out in a year-and-a-half.

CHAIRMAN—Or employ schoolkids.

Mr Lynch—In those communities there are many people over the age of 18 at school.

Senator MURRAY—The point you are making is that a company can enter the market, cause disruption and damage and then remove itself.

Mr Lynch—Exactly. And may, in fact, be required to do so.

Senator MURRAY—If you return to the nub of my question and accept the broad framework—you do not have to—that I have outlined with three silos, I can see prescription as being relevant to silo 1, which is risk either to the shareholders . Very frequently the failure is to the shareholders, not to the community. HIH was a failure to the shareholders most of all and then the community. I can see that risk needs a prescriptive element attached to it, but I am concerned that, in the laying of a legislative determinant, you then automatically prescribe in the other two areas.

Ms Lovett—But if you direct the directors to consider interests other than just those of the shareholders, that is quite a separate question to corporations deciding to voluntarily engage in philanthropy or grassroots community interaction.

Senator MURRAY—Perhaps I am confusing it in your mind or perhaps I am not expressing it well enough. Of course, there are two concepts. One is directors' duties—what the directors must have regard to, or may have regard to depending on how you write the law—and the other is mandatory reporting. My concern is prescriptive mandatory reporting and then to the standards against which you report, which cover your set of recommendations on norms—norms are not about directors' duties; norms are about reporting. I am less persuaded about directors' duties than I am about the need for improved reporting.

CHAIRMAN—Thank you to each of you for your appearance before the committee and for your assistance with our inquiries.

[4.13 pm]

BLACK, Dr Leeora Deborah, Managing Director, Australian Centre for Corporate Social Responsibility

HOHNEN, Mr Paul Edward, Founder and Chief Executive, Sustainability Strategies

CHAIRMAN—Welcome. I understand evidence from Mr Hohnen will be taken by teleconference. We have before us your submission, which we have numbered 63. Are there any alterations or additions that you wish to make to the written submission?

Dr Black—Yes. There is a typographical error on the first page. The opening sentence of the last paragraph on the first page should read, 'Government plays an important role in creating an enabling environment for CSR.' There is a couple of extra words there that are not helpful.

CHAIRMAN—I invite you to make an opening statement.

Dr Black—Thank you for the opportunity to appear before the committee. The Australian Centre for Corporate Social Responsibility is a consulting, research and training firm and our singular mission is to help business become more socially responsible. Our particular research focus is on managing and measuring corporate social responsibility. We work with a number of leading Australian firms to help them integrate corporate social responsibility and have provided executive development and training programs to managers from over 45 organisations. This work gives us deep insight into the challenges and benefits of improving the corporate social responsiveness of Australian business. Before making some very brief opening remarks, I note that we are joined in this submission by our colleague Paul Hohnen, the principal of the consulting firm Sustainability Strategies. Would you like to introduce yourself Paul?

Evidence was taken via teleconference—

Mr Hohnen—I work on CSR and sustainable development issues at an international level. I have worked with United Nations Environment Program, for example, in reviewing all of the industry association reports on their progress on sustainability since 2002. I have just finished a couple of reports for the Swedish and Canadian governments on corporate social responsibility and how that might impact on their efforts to prosecute sustainability policy and other related policies within their jurisdictions and in the European Union. I am also a former director and founding director of the Global Reporting Initiative and am currently involved in the ISO 26000 series, having been a member of the ISO expert advisory committee on social responsibility. The reason I am here is that I have worked very closely with ACCSR in developing our own framework for thinking on corporate social responsibility. It is an honour to be addressing you this afternoon.

Dr Black—I know this has been a busy week for the committee and you have heard many points of view so I intend to be very concise in this opening statement. Our submission addresses items (e), (f) and (g) of the terms of reference of the inquiry into corporate responsibility. I have

listened carefully to the discussion that has gone on earlier this afternoon and I would like to be able to contribute to that as well.

In our submission we have suggested that the government has a very important role to play in creating an environment in which business can be socially responsible. The key point that we make is to recommend mandatory reporting by companies of their social and environmental impacts and to suggest the adoption of some initiatives here that have worked well in other parts of the world. I do believe that increased disclosure of social and environmental impacts may be a more effective key to improving the corporate social responsiveness of Australian business than the legislative route, which seems quite complicated.

Mandatory reporting benefits many stakeholders but most particularly the corporations themselves and their investors. The corporations benefit because it requires them to establish systems and structures for understanding and addressing their broad ranging impacts and it can help them to better manage new types of risk that they may not previously have addressed. Investors benefit because they have better quality information on corporate value drivers with which to make investment decisions and that benefits a huge number of Australians because we have so much invested in compulsory superannuation.

I would also like to briefly refer to what I think is a misapprehension in the discussion that went on earlier this afternoon, and that is what is happening with the UK mandatory reporting requirements. I do not believe they have been abandoned; I believe they are being revised. I would like to quote from the newsletter of the All Party Parliamentary Group on Corporate Responsibility that came out to report their January 2006 meeting, which was just last month. It referred to a statement by Lord Sainsbury, who I believe is the Minister for Trade and Industry, where the corporate responsibility portfolio sits. He said that the OFR requirement had been removed because of disproportionate cost but emphasised that companies will still need to produce a business review as part of the director's report in compliance with the EU accounts modernisation directive requirement.

The minister also emphasised that the government is committed to strategic forward looking narrative reporting by companies and to enhanced dialogue with shareholders based on such reporting. Paul will be able to tell you a lot more about the All Party Parliamentary Group on Corporate Responsibility in the UK, but I just wanted to clear up that misapprehension: the reporting requirements in the UK have not been dumped; they are being changed.

Our other recommendations relate to a range of public policy and certification initiatives, and both Paul and I will be pleased to answer your questions or elaborate on any of the recommendations we have made.

CHAIRMAN—Mr Hohnen, do you wish to add anything to the opening statement?

Mr Hohnen—Yes, I have just a couple of remarks. Perhaps to frame this in a slightly wider context briefly: I tend to see the reporting development in a global framework where there are a number of drivers. Several of them relate to the silos that were referred to earlier—the corporate performance issues—but I would highlight three or four. The first is that in ecological terms what we need to find is the way that governments, public agencies, for-profit organisations and not-for-profit organisations are all contributing to a rather dramatically declining ecological

situation. We had, for example, at the beginning of this year a report from the joint Yale-Columbia University environmental performance index that underlined again that 'there is no country on this planet that is yet sustainable'. So clearly business as usual in this context and government as usual is not contributing to a sustainable planet. The second proposition is that, because the public goods cannot be delivered entirely by public authorities, we need to find tools and mechanisms that enable all of the different bodies in society to contribute.

The second point I would make is that business increasingly sees that there is a profound lack of trust. I was at a World Business Council for Sustainable Development CEO meeting in Geneva this Monday where that was the theme of the meeting—how do we move forward in an environment where we have declining trust; to what extent can we help with reporting; and what other actions do we need to take jointly with governments and other stakeholders to be able to operate effectively at a global and local level? So lack of trust is part of one of the drivers.

The third driver that I would mark is about public finance. I think it is interesting that this week the International Finance Corporation announced its agreement on new environmental and social standards. These will apply to the use of public moneys internationally in development, including through the use of corporate investment, raising the bar on standards. It is a recognition that internationally coherent standards are necessary on environmental and social issues, the counterpart of that being that for those standards to be applied there is, for international competitiveness reasons, now a higher level of expectation of information materiality in relation to project performance in competing for international funds. On the private finance side, we know increasingly that SRI funds and arrangements such as FTSE4Good and the Dow Jones sustainability index are also creating market expectations in relation to transparency of information that go to both the adding value silo and the reducing risk silo in particular.

The last thing that I would mention is that from where I sit we are seeing in the proliferation of standards, norms, principles and codes and so forth in relation to CSR a fundamental public policy question—and that is, increasingly corporations and other organisations in society do not really understand and need to have an operational definition of what sustainable development is and what good social responsibility is. They are creating these codes in the absence of guidance and encouragement from public authorities and governments in particular. In that context, what I am seeing a need for and what I am working with a number of governments on is a way in which we can help identify how those different codes and principles that are out there, including on reporting, can be made more complementary, how they can fill gaps, which are working and which are not working. Certainly in relation to the global compact we are seeing uptake there—the GRI uptake and the active participation in the ISO 26000 process. At the international level we are seeing a lot of oxygen going into consideration of just how to accelerate CSR, because, as I say, there is a recognition that, for these different public policy drivers and the healthy operation of financial markets, reporting and a number of other public authority guidance tools are becoming increasingly necessary for operation at the national and international level.

CHAIRMAN—Your submission says:

The simple act of disclosing social and environmental impacts helps to build confidence within consumer and investment markets ...

CPA Australia's view, on the basis of recent published research on sustainability, is that the absence of a common basis for sustainability reporting undermines its value to the capital markets. Given the absence of a standard reporting framework, what value do you really think capital markets place on sustainability reporting?

Dr Black—I think financial markets are looking for increasing information on environmental, social and governance criteria. Whereas in the past we have seen activist groups driving increased responsibility of corporations, in the future we are much more likely to see that push coming from the finance sector and the investment market. I would suggest that we do not have to wait for agreement on a framework. We have a very good framework, the Global Reporting Initiative, but we also have around 300 different codes, principles, norms, standards, frameworks and so on in the world today related to corporate social responsibility. So I do not think that we need to wait for agreement on a framework.

I would suggest that we look locally at the model that was used to introduce greater disclosure of corporate governance requirements, which has been very effective here. It simply required corporations to disclose in their annual report the nature of their corporate governance practices and, if they did not disclose something, to explain why not. That has had very large take-up and has been very effective in driving increased disclosure of corporate governance standards, which has been extremely helpful for investors. I think we could look to that example and think about making a best-practice recommendation for disclosure by corporations of their material social and environmental issues and impacts or, if they do not disclose that information, an explanation of why not.

Mr Hohnen—I will add a point here that relates to our earlier conversation. Leeora mentioned that you had been discussing the situation in the United Kingdom. I work with a number of financial institutions there. When Gordon Brown announced the unilateral decision to scrap the OFR there were howls of protest from the financial markets and institutions in London city precisely because they had largely been driving this. In this case it was not an NGO tail wagging the dog, although the NGOs very largely supported the OFR. Financial markets themselves, for the reasons that Leeora just mentioned, were very keen to see greater transparency on the part of companies and were strong supporters. That is precisely why the government is reviewing this decision and why we expect to see some considerable remnants, if you like, coming through not only in the EU modernisation directives but in other company law.

You may be aware that in October last year the law firm of Freshfields Bruckhaus Deringer released a major report in New York in relation to the fiduciary responsibilities of pension fund trustees. In reviewing the legal situation of a number of countries, including Australia, this law firm drew the conclusion that it is actually the current responsibility of pension fund trustees and other fund managers to examine in the risk context, in particular, the governance, environment and social performance of companies. In that context, the pull factor is not only the law and the financial markets requiring this but also the desire to have more, and more consistent, information. I certainly underline what Leeora said in relation to the GRI—that that is increasingly regarded by the market as the standard. In fact, the report on the GRI from the world business council meeting I was at on Monday recognises, using the term 'standard' several times, the importance of the GRI as a standard, responding to, among other things, financial markets.

Senator WONG—I would like to raise a couple of things. Firstly, Dr Black and Mr Hohnen, can I congratulate you on your submission. From my perspective it goes exactly to some of the issues that I wanted to elicit with this inquiry, particularly the role of government. I wanted to pick up the issue you suggested, Dr Black, which went to the corporate governance disclosure requirements that have been put into the Corporations Law. Is what you are suggesting a general requirement that companies disclose against those parameters you outlined without necessarily prescribing precisely how they do that or are we saying we should, say, utilise the GRI as the tool? Down the track I assume at some point we will come to a position where there might be a more detailed standard against which people might disclose.

Dr Black—Firstly, Senator Wong, thank you very much for your remarks about our submission. It was our intention to be helpful, so I am glad if we have been. There are two points that you raise: (1) should there be disclosure; and (2) should we prescribe the manner of this disclosure? Should there be disclosure? Yes. The model that we have for the corporate governance best-practice disclosure works very well.

Senator WONG—That would be mandatory?

Dr Black—Yes.

Senator WONG—You disclose and if not you explain why?

Dr Black—Yes. It would be a matter of, 'Tell us what you're doing and, if you don't want to tell us what you're doing, why aren't you telling us?' Basically, that would be what you would ask companies to do. Should we prescribe the use of particular standards or key performance indicators? No, not at the moment. The experience of the GRI has shown that companies have such different issues, requirements, stakeholders, products and markets that there is no single company that can report on each and every one of those indicators in any case. They do pick and choose the ones that are most relevant for their business. My other concern is this. I am a very pragmatic person. You have to do what is realistic, and if you make it too hard it is not going to happen.

CHAIRMAN—In the work that you do with Australian corporations and organisations, which areas of corporate responsibility are the ones that you receive the largest call for advice with regard to? In other words, which areas of corporate responsibility do Australian organisations find the most challenging for improving their performance or activities?

Dr Black—Over the last 18 months or so, the greatest demand has been for help in training so that they can provide their management and their staff with increased understanding and they can develop the capabilities that they need in order to incorporate responsible decision making into their day-to-day decisions. That is related to the other issue, which is the embedding of responsible business decision making. How do we develop the structures, internal systems and policies to be able to behave consistently in a responsible way? It is in that area of policy and strategy development that I get a lot of calls for help. That kind of work is rarely visible to the outside world, but it is going on inside a lot of companies. They are starting to think about the inherent tensions inside the corporation because of certain requirements that they have to balance competing demands of stakeholders. They are trying to understand what kinds of

management systems they need to put in place to balance competing stakeholder needs and requirements and to deliver over the long term fair outcomes for all of these stakeholders.

CHAIRMAN—Given that currently we have no mandatory requirement for them to do that, what is driving that interest?

Dr Black—What is in it for them? They do business better. There are, as Senator Murray has suggested, a couple of very important drivers—that is, one relating to risk management and one relating to the opportunity for new innovation and creating added value. A lot of companies come from the risk management perspective, but as they get more and more into it they start to realise that there are opportunities for innovating, creating competitive advantage, opening up new products and markets and creating whole new sustainable areas of business. It is when they get to that level that they can become very great advocates of corporate responsibility. There are three main reasons why most companies would start down the path of looking at corporate responsibility. One might be that they have had a crisis and they just realise that they cannot go on like this anymore. Another might be that it is part of the founding values and vision of the company. There are some examples of that. They are just born that way. But most companies are simply looking at the writing on the wall and seeing that societal and stakeholder expectations are changing and that the bar is being raised, and they are responding to the expectations of a wide set of stakeholders.

CHAIRMAN—If that is the case, why is there a need to make the reporting aspect mandatory?

Dr Black—To give it a good boost.

Senator WONG—Good answer.

CHAIRMAN—Is that a good enough reason?

Mr Hohnen—I am sure you have heard in earlier submissions that there is also an aspect for trade competitiveness internationally. Clearly a higher level of standards, however we create them in the Australian commercial sphere, has potentially positive impacts internationally. Conversely, a lower, henhouse approach to standards and their being all over the place could result in a lower level of performance internationally and could affect access to capital and the profile of Australian companies and so forth.

Let me just add as a footnote that, from the experience in the Global Reporting Initiative, the principal driver for the hundred or so companies that first started doing it, between 2000-2002, was risk management and reputation management. Companies were doing it largely to show that they were good citizens; they were concerned that their reputation might suffer. It was a communication tool. In the years since then, a very dramatic development has happened, to my mind—that is, the companies that have used it have discovered that it is resulting in a competitive advantage for them. There are myriad reports from companies saying that they are now beginning to understand how to unlock the creative juices of their employees by making it a competition for the best ideas to seek improvements for performance across the environmental, social and labour fields. They are using it to identify market opportunities. They are using it to

identify and develop partnerships with stakeholders. They are using it to identify ways of getting cheaper, more secure capital and so forth.

We are seeing a quite interesting development where the leaders are recognising that this does have value. It is helping business respond. Overall, it comes back to the concern that I mentioned at the outset about how we respond to declining public trust in the private sector. Leeora and I certainly believe that it is a disturbing trend and one that is not healthy for society. We also recognise that, in the coming years, particularly as sustainability issues bite in all of our societies, there will be a more profound debate about public goods and the respective roles and responsibilities of the different sectors. I do not think there is any escaping the fact that the private sector is going to be a profoundly important player in our efforts to mitigate, respond to and repair the range of social and environmental damage that we know is out there.

Dr Black—I can add something to that. Senator Chapman, you asked me whether it is enough that mandatory reporting gives it a boost. There are a whole range of good reasons for requiring mandatory social reporting. One of the reasons why companies have voluntarily embarked on this course is that they are trying to avoid additional regulation. That was particularly the case in the banking industry here. One of the reasons Westpac was one of the earliest adopters of corporate responsibility was that they simply believed that, if they did not do something to satisfy the demands of customers and employees for greater accountability, they would face re-regulation. They were motivated to avoid regulation. In fact, an approach such as the one that we have suggested can help you avoid more onerous regulation and legislative requirement because it sends a very clear signal to business about what is required and it forces them to think more deeply about the nature of their social and environmental impacts and about what they should do about it. So it is a fairly minimalist response that can help you avoid much messier situations.

CHAIRMAN—Thank you, Dr Black. I have completed my questions. I have to leave, so I will appoint Mr Baker as chair.

Senator MURRAY—Mr Hohnen, when we get submissions to committees like this from the corporate world and the various associations, generally speaking the ones who volunteer to come to talk to us are the ones with better practice rather than the bad eggs. Putting aside the corporates who have spoken to us, who, by and large, are engaged in the process and adopting better practice in Australian terms, the business associations we have spoken to have been defensive, resistant, opposed or negative to varying degrees. That is the general impression I have got. Although they say they support the greater interest in corporate social responsibility, they are not particularly keen on this committee being interested in the matter and they certainly do not want government to get involved with legislation on it. I noticed that, in your submission, you said that Australia lags behind other countries in the world. Is there a reason for that? Do we have a cultural problem here or is it just the size of our economy? Why do we lag behind other countries?

Mr Hohnen—Thank you for asking that question. My own impression of Australia, and one sees it also in continental-scale countries, is that it is very easy to slip into complacency when you are naturally endowed with raw materials—the big farms and big mines that I grew up with and was so proud of. We have seen it with the evolution of the Australian economy, I guess, with the continuing highlighting of those skills, whereas we have not yet quite forced ourselves into some other areas that we might have. Neither, should I say, have we capitalised on the great

farms and the big mines. In a presentation I made to ACCSR in May in Melbourne last year I highlighted the fact that, in 1990, India, Spain and Australia had no wind power. By 2000, India and Spain were among the leading wind power states in the world and were exporting, including to Australia, and Australia was still way behind in the field. We are being complacent about our rich resources of coal and, to a lesser extent, gas and oil when we could have the lot.

I think your analysis is absolutely right. It is a disturbing trend with business associations. As I mentioned at the outset, I have just reviewed over 30 different industry sector reports in relation to global practices on sustainable development. I have to say that it makes disturbing reading. Clearly, industry associations have traditionally been lowest common denominator defenders of the status quo. Indeed, it is because they have played that role that other more innovative leadership groups such as the World Business Council for Sustainable Development have been formed.

It is also why individual businesses so often break away from the industry associations to make public statements about the need for more progress. You would probably recall that, in July last year, just before the G8 global summit on energy and climate change, the British hosted a group of CEOs from very leading companies around the world. They actually broke away from their respective industry associations to call for clear, public and binding standards in relation to greenhouse gas emissions so that they could get the trading regime in place, identify the market opportunities and deal with the risks appropriately.

So I think we have always heard that from business associations. I think it is an important message. These issues are difficult and sometimes extremely complex. But, at the same time, that does not put to one side the reality that we know from public opinion polls around the world, and I am sure in Australia as well, about declining trust in businesses and the recognition that some very profound changes are happening, including public expectations of greater contributions and, indeed, governmental expectations of their contributions.

Dr Black—I have something to add to that. The reason it appears that Australia is a laggard on corporate social responsibility is historical and has to do with the fact that we have been so isolated, that so many industries have been protected and that government has for so many years done so much for so many people. It is only over the last 20 years or so, as the financial markets have been deregulated, as our economy has become increasingly internationalised, as more Australian businesses have gone overseas and as more foreign owned companies have started to conduct business in Australia, that we have become exposed to the more complex social environment and more complex demands of more complex stakeholders. It is that increasing complexity of the market and the associated non-market environment that is driving our need to increase our grasp and management of socially responsible business.

Senator MURRAY—Do you think it is a generational thing? Do we need to get rid of the people in their sixties and late fifties, the baby boomers, and get into business the sorts of people who have been to and engaged with Europe and who are travelling and interacting more with the world? Is it simply a matter of time that you need a generation to pass?

Dr Black—Will the baby boomers go away with their hippie mentality? No, I do not think so. There is a very interesting survey that is done every 10 years or so, called the world values survey, which is done by a number of universities all around the world. It covers many countries

in the world. They have chartered changes in global societal values over the last 50 years or so. What we are seeing is an evolution of broad based societal values all over the world. When the baby boomers retire, there is going to be another generation of people who are just as interested in these issues and may even drive further change in that area.

Senator MURRAY—I had better explain to Mr Hohnen, because he cannot see me. I am a baby boomer.

Mr Hohnen—So am I. In so many respects, one cannot wait a generation for this. Within a generation, we are talking about an atmospheric doubling of CO_2 concentrations with all that is coming with that. There is every reason why the non-baby-boomer generation—Leeora, for example—will become increasingly concerned about the reduced options that they have in terms of global physical systems but also competitive systems. As we look at the trade landscape, we know that China is considering domestic social responsibility standards itself. It understands that, internationally, there is no percentage in trying to trade simply on the model of good technology and product regardless of environmental and social standards. I do not know when that will come through, but I expect it to come through fairly soon.

For the moment, we are going head to head with countries like China on technology and price. We are losing to a large extent on that, except in terms of raw materials that they do not have. What will happen down the road? We are already importing technologies from China. I think that the Chinese are sufficiently wise in terms of the impacts of their rapid development both on their own domestic environmental and social scene as well as on the global one to see that there will be developments there quite sharply so that, with improvements in their domestic environmental and social standards, we will have a further raising of the international bar in competitive terms. I do think that there is a strong case, as Leeora has said, for doing whatever we can to encourage Australian industry to use CSR as a tool for improving competitive performance, because I think it is one of the ways that we will not only feel better about our economic activities but also diversify and improve them.

ACTING CHAIR (Mr Baker)—Thank you, Mr Hohnen. We are running short on time—we have to catch some planes—so if you could make the answers fairly brief we would appreciate it.

Senator WONG—I apologise, Dr Black and Mr Hohnen, for the fact that you are at the end of the day and that those of us who are left are from interstate and must leave soon. There are three things I wanted to raise. The first was the UK ministry and whether you think that has been effective in terms of government engagement with the private sector on these issues.

Dr Black—I think it has been very effective in terms of developing a robust dialogue between government and business and supporting business in its efforts to implement better social responsibility practices. You only have to look at the overall state of social responsibility in the UK to realise that they are probably leading the world in this area.

Senator WONG—Yes, I think that is true. I would certainly be interested, if you are able—I do not want to impose too much—to provide some practical examples of what that ministry has been able to achieve.

Dr Black—Yes.

Senator WONG—My second question is on the standard. As I understand what Mr Hohnen was saying before, there is a need to find a method of operationalising CSR for most corporations. Would your position be: 'Let's have some mandatory reporting; let's try and utilise the GRI framework but let's work towards developing this standard'? Is that the sort of stepped or phased approach you are proposing?

Dr Black—That is essentially it, but I would suggest that we already have a standard in Australia for corporate responsibility.

Senator WONG—That is the one I was referring to?

Dr Black—Yes. Its profile is subterranean; it needs to be more widely understood. It is a very good basic starting point for companies that are at the beginning of the journey and are starting to wonder what they should do about this.

Senator WONG—Who developed it?

Dr Black—I do not know. Standards Australia had a committee. I was not involved in the development of it. There is information about how the standard was developed on the Standards Australia website.

Senator WONG—It certainly does not have particularly wide take-up.

Dr Black—No. A certification program would help with that, though.

Senator WONG—Finally, on the audit of the US government has done—I think it was the US and not the UK government—

Dr Black—Yes, it was the US government.

Senator WONG—I would be interested knowing what the results from that are.

Dr Black—There is a report. I would be happy to forward it to you.

Senator WONG—I would really be interested in that. Did that extend to incentives and disincentives, tax regimes and other mechanisms by which government may, without realising it, either put in place incentives or disincentives to look at environmental and social issues?

Dr Black—It is a fairly massive report about the current state of government activity there. I cannot recall the detail of it, but I would be happy to send you a copy of that. I will send it to Dr Marinac.

Senator WONG—Thank you very much.

ACTING CHAIR—Thank you, Dr Black and Mr Hohnen. I would like to conclude by also congratulating you on your submission. When you forward that information regarding the UK experience, could you also show how that could apply to the Australian parliamentary process? That would be very advantageous. We do apologise for you being at the end of the day.

Dr Black—Thank you for hearing from us. I would be very happy to provide all that information for you.

ACTING CHAIR—Thank you.

Mr Hohnen—I will also provide you with a slight qualification to what I believe was said in relation to the UN norms. I will supply you with an update on where that stands through Leeora.

Committee adjourned at 4.53 pm