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Committee Secretary,
Parliamentary Joint Committee on Corporations
and Financial Services
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Sir,

Inquiry into Corporate Responsibility

Thank you for providing the opportunity to make a submission in relation to the Committee's present inquiry into corporate responsibility.

Summary

This submission is confined to dealing with parts (c) and (d) of the terms of reference of the inquiry, that is:

(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 2001* (Cth), 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 short, I do not believe that reforming the law of directors' duties in the manner envisaged is necessary. The existing framework of directors' duties under the *Corporations Act* accommodates directors taking into account, and indeed embracing, the interests of non-shareholder stakeholders- so long as a commercial justification for this benevolence can be articulated. The common law confirms this position. Clarification, recognition and promotion of the relevance of stakeholder interests to corporations should be something that develops within the corporation as part of the natural workings of corporate governance, rather than being the outcome of legislative will. Australia's law relating to directors' duties is sufficiently flexible, dynamic and forward-looking to cope with a shift in contemporary corporate governance away from a narrowly-focused shareholder primacy norm towards a pluralistic, long-term stakeholder approach to governance.

The discussion and analysis which follows is derived from a paper I wrote earlier this year, and which is now published as a scholarly article. See: 'Directors' Duties to Stakeholders: A Reform Proposal Based on Three False Assumptions' (2005) 15 *Australian Journal of Corporate Law* 88. A summary of this *Australian Journal of Corporate Law* article has also been published as an opinion piece. See: "Law Already Looks Kindly on Directors Who Care", *The Australian Financial Review*, 5 July 2005.

Discussion

The momentum towards broadening the duties of directors under company law is, I believe, based on three false assumptions:

1. Company directors do not already take into account stakeholder interests;
2. Taking into account stakeholder interests is contrary to the best interests of the company; and
3. Emphasising a stakeholder-oriented approach to corporate governance necessitates legislative intervention.

False Assumption 1: Directors Do Not Take Into Account Stakeholder Interests

Underlying recent calls for a broadening of the duties of directors to include recognition of stakeholder interests is a belief that at present company directors can get away with simply ignoring the interests of stakeholders, and instead simply focus on achieving short-term gains in the form of profits for shareholders. It is further believed that even if directors could not get away with ignoring stakeholder interests, most directors do not respect the interests of stakeholders, and elevate shareholder interests to a privileged position on the basis that shareholders have borne some risk by investing in the company.

Yet it is simply not the case that stakeholder interests can be undermined or ignored without repercussions- the James Hardie controversy is an excellent case study highlighting this point. The company encountered significant financial and reputational costs and was labelled a bad corporate citizen for upholding and protecting the interests of its shareholders, by relocating to The Netherlands, whilst at the same time undermining the interests of asbestos victims by under-funding the Medical Research and Compensation Fund (MRCF)- a separate company set up by James Hardie to compensate victims.

James Hardie's subsequent decision, under pressure, to enter into a long-term agreement with the NSW Government and the ACTU, returned the company to the status of good corporate citizen, with the end result being an increase in the company's share price, stronger profits, and a more positive and secure outlook for the future. By recognising the interests of its stakeholders, principally asbestos victims, shareholders directly benefited and the interests of the company were well and truly being pursued.

James Hardie is not the only company to realise that the interests of stakeholders and of the company are not separate and distinct, and that ignoring the interests of stakeholders in fact ignores what is best for the company. As Stephen Bartholomeusz wrote in *The Age* newspaper:

> A basic question is whether companies are in practice constrained from considering a broader range of stakeholders. [James] Hardie's own eventual acceptance of its responsibility for the victims suggests not. CSR has been making voluntary payments to asbestos victims for decades. Australian resource companies have become world leaders in adding a social responsibility dimension to their interaction with the communities within which they operate. … Most Australian companies take the welfare and aspirations of their employees very seriously. Few could disregard the interests of their customers for any length of time.
>
> …
>
> The fact that companies do more than the legal minimum for non-shareholder stakeholders says boards don't define their obligations narrowly.
> *That isn't surprising. There is an increasing understanding that it is good business- and good for the long-term interests of the company and shareholders- for companies to be good employers and good citizens. The damage done to [James] Hardie, or that Ok Tedi did to BHP in a different era, provides graphic evidence of the reputational and financial consequences of defining shareholder interests too narrowly.*[1]

Company directors are now further dissuaded from defining the interests of the company too narrowly such as to exclude or undermine stakeholders, by recent reforms in corporate governance which emphasis that fostering positive relationships with stakeholders is an integral component of company performance.

Since 1 July 2004, listed companies in Australia have been required, in order to comply with the ASX *Principles of Good Corporate Governance and Best Practice Recommendations* ("ASX Best Practice Recommendations"), to have in place and post on their website, a Code of Conduct and Ethics indicating how they intend to deal with stakeholder concerns and interests.

As I have explained elsewhere,[2] the ASX Best Practice Recommendations operate according to a 'comply or explain' regime: pursuant to Listing Rule 4.10.3, listed companies must either comply with each Recommendation, or *clearly* explain why not in the annual report of the company. The 28 Recommendations build on 10 key 'good corporate governance principles'. For the present discussion, Principle 10 is the most relevant. Principle 10 states that to achieve good corporate governance practices, listed companies need to 'recognise legal and other obligations to all legitimate stakeholders'.

Recommendation 10.1 then goes on to provide that to achieve this, listed companies should 'establish and disclose a Code of Conduct to guide compliance with legal and other obligations to legitimate stakeholders'. Box 10.1 goes further in setting out some comprehensive guidelines as to the type of content that should be included in a Code of Conduct. Box 10.1 contains the following guidance as to possible content:

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[1] Stephen Bartholomeusz, 'New Director Plans Could Backfire', *The Age*, 6 April 2005 (emphasis added). Available on-line at: <http://www.theage.com.au/news/Stephen-Bartholomeusz/New-director-plans-could-backfire/2005/04/05/1112489485068.html> (last accessed: 12 April 2005).
[2] James McConvill and John Bingham, 'Comply or Comply: The Illusion of Voluntary Corporate Governance in Australia' (2004) 22 *Company and Securities Law Journal* 208.

1. Clear Commitment by Board and Management to the Code of Conduct

- This is often linked to statements about the aspirations or objectives of the company; its core values; and its views about the expectations of customers, shareholders, staff and the broader community.

2. Responsibilities to Shareholders and the Financial Community Generally

- This might include reference to the company's commitment to delivering shareholder value and how they will do this, the company's approach to accounting policies and practices, and disclosure.

3. Responsibilities to Clients, Customers and Consumers

- This might include reference to standards of product quality or service, commitments to fair value, and safety of goods produced.

4. Employment Practices

- This might include reference to occupational health and safety; employment opportunity practices; special entitlements about the statutory minimum; employee security trading policies; training and further education support; policies on giving and acceptance of business courtesies; prohibitions on the offering and acceptance of bribes, inducements and commissions and on the misuse of company assets and resources; handling of conflicts of interest; and policy and practice on drug and alcohol usage and on outside employment.

5. Obligations Relative to Fair Trading and Dealing

6. Responsibilities to the Community

- This might include environmental protection policies, support for community activities, donation or sponsorship policies.

7. Responsibilities to the Individual

- This might include the company's privacy policy, the use of privileged or confidential information, how conflicts of interest are addressed.

8. How the Company Complies with Legislation Affecting Its Operations

- For company operations outside of Australia, particularly in developing countries, the Code of Conduct should state whether those operations comply with Australian or local legal requirements regarding employment practices, responsibilities to the community and responsibilities to the individual, particularly if the host country adopts lower standards than those prescribed by Australian law or international protocols.

9. How the Company Monitors and Ensures Compliance with its Code

- It is stated on page 59 of the ASX Best Practice Recommendations that Box 10.1 'contains some *suggestions* for the content of' (emphasis added) the corporate Code of Conduct, and therefore of course companies have flexibility to include or exclude some of the above matters, or include others (that may be more specifically relevant to their business).

- It is explained that codes of conduct are intended to state the values and policies of the company, to ensure adequate public or social accountability by corporations.

For non-listed companies in Australia, there are comparable guidelines on how companies can organise and structure their governance arrangements to account for shareholder interests. In June 2003, Standards Australia released a five-part 'suite' of standards on corporate governance to encourage a culture of compliance in non-listed private companies, government departments and not-for-profit organisations. Two of the guidelines, 8003-2003 ('Corporate and Social Responsibility') and 8002-2003 ('Organisational Codes of Conduct') deal with the recognition and protection of stakeholder interests.

8003-2003 sets out the essential elements for establishing, implementing and maintaining an effective corporate social responsibility program within an entity, and then goes into more detail by providing guidance as to how these elements should be used. AS 8002-2003 sets out the essential elements for establishing, implementing and managing an effective organisational code of conduct within an entity.

Both of these recent corporate governance standards complement the general standard, AS-3806-1998 'Compliance Programs', released in 1998. According to Standards Australia, this general standard provides an outline of, and recommendation for, a program to ensure legal compliance within an organisation. Furthermore, as raised by Standards Australia on its website, legal compliance is considered to be part of an organisation's overall risk management, and AS/NZS 4360 also offers guidance on risk management.

As has been noted by commentators such as Professor Robert Baxt and Professor Ian Ramsay, outside of company law and corporate governance, there are other regulatory requirements imposed on companies which necessitate company directors giving due regard to stakeholder interests as part of fulfilling their overriding duty of acting in the best interests of the company. Following the release of the Special Commission of Inquiry's report into the affairs of James Hardie, Professor Baxt wrote in *The Australian Financial Review* that:

> …from time to time we have flirted with allowing wider interests to be taken into account by directors in running the company (for example, in takeovers). But, in fact, those obligations are already imposed on them and their companies in a different form. Directors of companies must

> obey the laws relating to environmental protection, taxation, occupational health and safety, trade practices and consumer protection as well as many others. Failure to comply with these laws not only exposes companies to potential fines but, in appropriate cases, directors and officers to potential fines or even jail.
>
> Directors who act negligently in such cases run the added risk that they will be liable for a breach of duty to act with appropriate care and diligence and may be sued by the company.[3]

Thus, there does not seem the need to engage in reform of the Corporations Act to clarify the extent to which directors may take into account of stakeholder interests, because it is quite clear that contemporary corporate governance, as well as the law generally, demands that directors recognise and protect stakeholder interests, and that directors are responding to these demands.

False Assumption 2: Taking Into Account Stakeholder Interests is Contrary to the Best Interests of the Corporation

The commonly held view, and the view taught to students in many law schools in Australia, is that when we talk of the "best interests of the company", "the company" means the company's shareholders as a collective whole. The "interests" of the company is therefore generally interpreted to mean the interests of existing shareholders.[4] This privileging of shareholder interests is considered justifiable given that shareholders "are proprietors of the company who have risked their capital in the hope of gain."[5] Indeed, the traditional position in the case law both in Australia and England is that the concept of "the company" in the context of whom the ultimate duty of company directors is bestowed upon <u>does not</u> mean "the company as a commercial entity, distinct from the corporators [ie, shareholders]".[6]

However, if we look a little deeper into the treasure trove of precedent on directors' duties in Australia and England, we see that the directors duty to act "in the best interests of the company" does not restrict the ability of directors to broaden the focus beyond simply maximising profits in the short-term for shareholders when making decisions on behalf of the company. Courts typically appreciate that directors have discretion to recognise and promote stakeholder interests, and give precedence to short or long-term considerations when making company decisions, so long as this can be explained and justified in terms of what is in the best interests of the company.[7] It is appreciated that a focus on the short-term pursuit of profit for the benefit of current shareholders places obvious restrictions on directors which may turn out to be costly for the company.

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[3] 'Corporations law a fragile structure', *The Australian Financial Review*, 19 November 2004, 55. See also Angus Corbett and Stephen Bottomley, 'Regulating Corporate Governance' in Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (2004) 60, 65: 'There are many different regulatory schemes which affect the conduct of directors and the system of corporate governance adopted by companies.'

[4] See Ian Ramsay, 'Pushing the Limit for Directors', *The Australian Financial Review*, 5 April 2005, 63.

[5] See H A J Ford, R P Austin and I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 275.

[6] See *Greenhalgh v Ardene Cinemas Ltd* [1951] Ch 286 at 291 (England), and *Ngurli v McCann* (1953) 90 CLR 425 at 438 (Australia). For a discussion of these cases, see Ford, Austin and Ramsay, above n 5, 276.

[7] Ford, Austin and Ramsay, above n 5, 281-2.

In considering the relevant cases regarding what acting in the "best interests of the company" actually entails, Ford, Austin and Ramsay note in *Company Directors: Principles of Law and Corporate Governance* that:

> Although there may be no direct legal obligations in company law on directors to take [extraneous] interests into account, it does not follow that directors cannot choose to do so. … Management … may be justifiably concerned to ensure that the company is a good corporate citizen. …
>
> *The decided cases in this area indicate that management may implement a policy of enlightened self-interest on the part of the company but may not be generous with company resources when there is no prospect of commercial advantage to the company*.[8]

Similarly, in the 1989 report of the Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (the so-called "Cooney Report"), in discussing the relevant case law on the meaning of the "best interests of the company" it was noted that the concept is not necessarily confined to pursuing shareholder interests:

> The courts have associated directors' duties with the 'interests of the company'. This does not necessarily mean that directors must not consider other interests. The 'interests of the company' include the continuing well-being of the company. Directors must not act for motives foreign to the company's interests, but the law permits many interests and purposes to be advantaged by company directors, as long as there is a purpose of gaining in that way a benefit to the company.[9]

This supports my point regarding the importance of approaching stakeholder interests not through a narrow lens of stakeholder responsibility being an end in itself, but from the broader view that recognising stakeholder interests is an inevitable part of doing what is in the best interests of the company. It is incumbent upon directors to not only recognise, but also articulate to employees and shareholders, how respecting the interests of stakeholders will actually benefit the company in terms of long-term sustainable growth. As current Australian Competition and Consumer Commission chairman, Graeme Samuel presciently remarked in 1986 when he was Executive Director of Macquarie Bank Ltd:

> I am beginning to question whether changing social attitudes are not now demanding that, consistent with their obligations to take account of shareholder interests, directors should take a long term view and act to also protect the interests of other stakeholders who are vital to the future generation of shareholders' wealth- employees, customers, suppliers and the like.[10]

Professor Deakin of the University of Cambridge has recently made some important comments on why the "best interests of the company" should not be narrowly confined to maximising profits for shareholders in the short-term, and why directors should be confident that taking into consideration the interests of stakeholders does not automatically involve departing from their overriding duty to the company.

> In the English-law based common law system, with only a few exceptions, directors' fiduciary interests are owed to the company, not directly to the shareholders. …

[8] Ibid (emphasis added) [my interpolation]. The authors refer to the cases of *Hutton v West Cork Railway Co* (1883) 2 Ch D 654; *Re George Newman & Co* [1895] 1 Ch 674, in support of their proposition.
[9] Cooney Report, at [6.3]. The Report is available on-line at:
<http://www.takeovers.gov.au/content/542/Download/companyd.rtf> (last accessed: 12 April 2005).
[10] 'Regulation and the Vesting of Discretions in the NCSC', Speech to Macquarie Bank, 1986.

> [C]ompany law [says nothing of] the level of returns to which shareholders are entitled, nor of the time scale over which their expectations are to be met.
>
> … Because it is essentially a cultural rather than legal point of reference [influenced by norms and practices surrounding the risk of the hostile takeover movement in the 1970s], shareholder primacy is less strongly institutionalised than what might be supposed.[11]

In the United States, Professor Michael Jensen of Harvard Business School, a traditional advocate of shareholder primacy, has also recently emphasised that there is a strong link between respecting stakeholder interests and acting in the best interests of the company. In a July 2004 research paper co-authored with Kevin J Murphy and Eric G Wrick,[12] it is suggested that a long-term approach to company management which takes into consideration the interests of a variety of stakeholders, should be the key "governing objective" of the company.

In the research paper, Recommendation 1 of a list of over 30 recommendations and guiding principles on executive remuneration and corporate governance is that companies should embrace "enlightened value maximisation" in which "existing firm value" is the firm's sole or governing objective. The authors insist on long-term value-creation as the primary basis for decision-making or evaluating the success or failure of the firm or management. But the authors are quick to emphasis the difference between the enlightened value maximization that they are advocating, and traditional stakeholder theory. Rather, they see value maximization as embracing an *enlightened* approach to stakeholder theory.

> Because advocates of stakeholder theory refuse to specify how to make the necessary tradeoffs among … competing interests, they leave managers with a theory that makes it impossible to make purposeful decisions.
>
> …
>
> Without a single-dimensional governing objective managers are either left unmotivated or are subject to the vagaries of an evaluation process in which the evaluator can change the weight on a set of agreed upon critical dimensions to arrive at any score he or she pleases.[13]
>
> ….
>
> Enlightened value maximization utilizes much of the structure of stakeholder theory but accepts maximization of the long run value of the firm as the criterion for making the requisite tradeoffs among its stakeholders. Managers, directors, strategists, and management scientists can benefit from enlightened stakeholder theory. Enlightened stakeholder theory specifies long-term value maximization or value seeking as the firm's governing objective and therefore solves the problems that arise from the multiple objectives that accompany traditional stakeholder theory.[14]

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[11] Simon Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 *Corporate Governance: An International Review* 11, 12-16 [my interpolation].

[12] See Michael C Jensen, Kevin J Murphy and Eric G Wrick, 'Remuneration: Where We've Been, How We Got Here, What Are the Problems and How to Fix Them', Harvard Business School Research Paper, July 2004. Available on-line at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=561305> (last accessed: 12 April 2005).

[13] Ibid. at 16.

[14] Ibid. at 17.

In justifying enlightened value maximisation as the governing objective of the modern corporation, Jensen et al articulately outline how the interests of stakeholders and the interests of the company are interdependent rather than independent considerations for directors.

> [T]wo-hundred years of research in economics and finance have produced the result that if our objective is to maximize the efficiency with which society utilizes its resources (that is to avoid waste and to maximize the size of the pie), then the proper and unique objective for each company in the society is to mazimize the long-run total value of the firm. …
>
> Firm value will not be maximized, of course, with unhappy customers and employees or with poor products. Therefore, consistent with "stakeholder theory" value-maximizing firms will be concerned about relations with all their constituencies. A firm cannot maximize value if it ignores the interests of its stakeholders.[15]

Importantly, to influence companies to embrace an enlightened approach to corporate governance, the authors do not propose reform of the law to broaden the duties of directors, but rather suggest that companies adopt a statement of corporate vision and strategy that guides and motivates directors and the organisation as a whole to fulfil its governing objective of creating value.[16] Given that many Australian companies already have in place, or are in the process of developing, codes of conduct to articulate their approach to dealing with stakeholder interests, we are half way there.

The focus now must be on making these codes of conduct meaningful within the corporation, both in terms of the contents of these codes, but also in terms of the attitude of directors, senior managers and other employees towards the principles and requirements articulated in the codes. Corporate governance fails if it is perceived as merely a matter of compliance, rather than as setting the foundation for strong and lasting company performance. Further compliance measures arrived at by broadening the statutory duties of directors are clearly not the best means to deal with this potential failure.

I wish to conclude this section of the article by noting that the dichotomy that has been allowed to develop in the cases and commentary between the interests of stakeholders and the best interests of the company, leading to the most recent call for law reform to broaden the duties of directors, can be closed and closed for good if we open our minds and appreciate what a "stakeholder" truly means. A rather narrow, one-sided view has shaped the general understanding of what is a "stakeholder". According to this traditional definition, a stakeholder is an "any individual or group on which the activities of the company have an impact".[17] In other words, individuals or groups fit within the definition of stakeholder if the corporation's activities impact upon their rights or interests in some way. In defining "stakeholder" in this way, we miss the second, and important part of the story, being that the activities of many of these individuals and groups, and other individuals and groups, in terms of what they buy, what they produce, where and how they live and what their values are, also impact on the corporation- shaping its activities and dictating its performance. In their excellent work, *Redefining the Corporation: Stakeholder Management*

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[15] Ibid. at 15.

[16] See also Allan Kennedy, *The End of Shareholder Value* (2000), in which it is argued that the modern corporation's objective must be directed to building wealth long-term- which requires establishing a sustainable, long-term relationship with stakeholders.

[17] See Christine Mallin, *Corporate Governance* (2004) 43.

and Organizational Wealth,[18] James E Post, Lee E Preston and Sybille Sachs emphasise this point:

> The stakeholders in a corporation are the individuals and constituencies that contribute, either voluntarily or involuntarily, to its wealth-creating capacity and activities, and that are therefore its potential beneficiaries and/or risk-bearers.[19]

Taking the time to appreciate the two-dimensional character of "stakeholder" as a concept, provides for a fresh perspective regarding the issue of broadening the duties of directors. Rather than imposing an explicit statutory obligation on directors to take into account the interests of stakeholders in order to improve corporate social responsibility, directors simply need to understand this two-dimensional character of "stakeholder", and appreciate that adopting a stakeholder-oriented approach is a necessary step in serving the company and fulfilling their overriding duty of acting in the best interests of the company.

False Assumption 3: Generating a Stakeholder-Oriented Approach to Corporate Governance Requires Legislative Change

A starting point in the debate regarding the accommodation of stakeholder interests in corporate decision-making is that legislative intervention is the best mechanism to achieve a certain regulatory outcome(s). An emphasis on formal legislative intervention in any forthcoming proposal to accommodate the interests of stakeholders would, I believe, represent a very limited view of the scope of "regulation", and also place little faith in the directors themselves (and the internal governance arrangements of the company more generally) to achieve certain outcomes.

In a report released by the Centre for Corporate Law and Securities Regulation at the University of Melbourne in 2003 entitled "ASIC Enforcement Patterns", Helen Bird, Davin Chow, Jarrod Lenne and Ian Ramsay highlight the very wide scope of "regulation" as a mechanism to achieve outcomes:

> Three broad 'textbook' definitions or approaches to regulation are commonly identified, ranging from the narrowest to widest sense of the term. First, regulation as (government-determined) legal rules backed by mechanisms for monitoring and enforcement. Secondly, in a more encompassing variation of the first, regulation includes any form of deliberate state intervention in the economy or other fields of social activity. Thirdly, regulation, in its widest reading, includes all mechanisms of social control or influence, from whatever source and whether intentional or not.[20]

It is the third, and widest reading, of regulation noted in the quote above that I wish to focus upon in this final part of the article. As was noted earlier, very prominent scholars such as Professor Simon Deakin and Professor Michael Jensen have recently stressed the importance of directors elevating stakeholder interests to a central consideration when making decisions on behalf of the company. Neither Deakin nor Jensen, however, advocated changing the statutory duties of directors to expressly require directors to consider stakeholder interests. Rather, both intend that a developing corporate culture, which appreciates that protecting and fostering strong relationships with stakeholders is vital to the future success of the company, will steer the company and its

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[18] Published in 2002 by Stanford University Press.
[19] Ibid., at 19.
[20] The report is available on-line via the Centre for Corporate Law and Securities Regulation website at: <http://cclsr.law.unimelb.edu.au/research-papers/ASIC%20Enforcement.pdf> (last accessed: 12 April 2005).

directors naturally in the direction of stakeholder engagement. Jensen suggested that a statement of corporate vision and strategy developed by the company, along the lines of the codes of conduct now required of Australian listed companies and increasingly expected of other non-listed companies, will guide and motivate directors in making decisions which respect stakeholders and create value for the company long-term.

We should heed the calls of Deakin and Jensen, along with others, to confine developments in corporate governance to being, so far as possible, internal matters for the company. We should respect the abilities and intelligence of directors, senior managers and others within the company to develop and foster a positive corporate culture which recognises the interests of stakeholders, and incorporates stakeholder interests as part of the considerations of the company in general, and when directors are making high-level decisions on behalf of the company. There is every indication that directors and senior managers are moving towards a more enlightened, long-term approach to framing objectives for the company and making decisions on behalf of the company. James Hardie is a case in point, rather than an embarrassing exception.

As stated by the Cooney Committee back in 1989, when dealing with the same issue of whether broadening the duties of directors was a favourable option, "Self-regulation, if it works, in many respects is better than regulation imposed by law".[21] Allowing time for a corporate culture to develop within companies, in which consideration of stakeholder interests is respected as a legitimate and central component of the decision-making process, more so than now, is preferable to trying to achieve the same outcome through the imposition of black letter law.[22] There is already an over-emphasis on conformance rather than performance in contemporary corporate governance as a result of CLERP 9 and other regulatory initiatives responding to corporate collapse.[23] Further, directors are hardly going to truly appreciate the virtues of stakeholder engagement if this is forced upon them with threat of sanction, rather than by a stakeholder-oriented norm cultivating within the company over time based upon recognition of the positive impact such an approach has in terms of company performance.

Conclusion

Fostering a stakeholder-oriented approach to corporate governance, by which stakeholder interests are given consideration by directors when making corporate decisions, should be left to the company and its own internal governance arrangements, rather than being a matter for external regulation in the form of rules imposed by the legislature. For this to be achieved effectively, we must be pragmatic. Rather than continuing to stress the virtues of stakeholder responsibility as an end itself, what needs to be made clear is that recognising and taking into account various stakeholder interests is actually a means to an end- that end being long-term sustainable growth for the company.

By changing our perspective slightly to focus on what stakeholders can do for the corporation, rather than adopting a narrow approach of considering how corporations are or can be made responsible to stakeholders, what we arrive at is a meeting of the minds between those who

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[21] Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors*, at [2.25].

[22] See Michael Wenzel, 'The Social Side of Sanctions: Personal and Social Norms as Moderators of Deterrence' (2004) 28 *Law and Human Behavior* 547, 549.

[23] See James McConvill, *An Introduction to CLERP 9* (2004) Ch 1 ("Reflections on Contemporary Corporate Governance").

emphasise the virtues of stakeholder dialogue and those who emphasise the rights of shareholders and the importance of concentrating on the company's bottom line. The company's interests are intertwined with, and dependent upon, stakeholders and their interests, rather than stakeholder interests and company interests being completely separate issues that can only be bridged by legislative intervention in the form of broadening the statutory duties of directors.

The most effective way to influence companies and their directors to consider stakeholder interests, is to concentrate on company performance rather than company conformance.

Thank you once again for the opportunity to comment on the above issues. I would be happy to discuss these further at any public inquiry convened by the Committee. Please contact me on (03) 9244-6431 or by e-mail at jamccon@deakin.edu.au if you have any questions in relation to this submission.

Yours sincerely,

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