

Human Rights and Corporate Social Responsibility

**Submission to the Parliamentary Joint
Committee on Corporations and
Financial Services Inquiry into Corporate
Social Responsibility**

July 2005

Public Interest Law Clearing House (vic) Inc.

Level One, 550 Lonsdale Street, Melbourne Vic 3000 DX 38227/Flagstaff

Telephone: (03) 9225 6684 Fax: (03) 9225 6686 Email: projects.pilch@vicbar.com.au

Human Rights and Corporate Social Responsibility

**Submission to the Parliamentary Joint Committee on
Corporations and Financial Services
Inquiry into Corporate Social Responsibility**

Philip Lynch

PILCH Homeless Persons' Legal Clinic
Public Interest Law Clearing House
Level One, 550 Lonsdale Street
Melbourne VIC 3000

Tel: (03) 9225 6684

Fax: (03) 9225 6686

Email: projects.pilch@vicbar.com.au

Table of Contents

1. EXECUTIVE SUMMARY	5
1.1 Overview.....	5
1.2 Findings.....	5
1.3 Recommendations	6
2. INTRODUCTION	8
2.1 Overview.....	8
2.2 What is ‘Corporate Social Responsibility’?	9
2.3 The ‘Public Value’ and ‘Public Interest’ in Promoting Corporate Social Responsibility	10
3. WHAT SHOULD CORPORATIONS DO ABOUT CORPORATE SOCIAL RESPONSIBILITY?	12
3.1 Overview.....	12
3.2 The Value of a Human Rights Approach to Corporate Social Responsibility.....	12
3.3 The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights	13
3.4 Other Norms and Frameworks.....	15
4. WHAT ARE AUSTRALIAN CORPORATIONS DOING ABOUT CORPORATE SOCIAL RESPONSIBILITY?	17
4.1 Overview.....	17
4.2 Corporate Social and Environmental Activity and the Corporate Responsibility Index.....	17
5. WHAT CAN AUSTRALIAN CORPORATIONS DO ABOUT CORPORATE SOCIAL RESPONSIBILITY?	19
5.1 Introduction.....	19
5.2 The <i>Corporations Act</i> and the Obligation to Act in the Best Financial Interests of Shareholders.....	19
5.3 Corporate Social Responsibility and the Best Financial Interests of Shareholders.....	20
6. EXPLAINING THE GAP BETWEEN WHAT AUSTRALIAN CORPORATIONS CAN AND SHOULD DO ABOUT CORPORATE SOCIAL RESPONSIBILITY	22
6.1 Overview.....	22
6.2 Restrictions Imposed by the <i>Corporations Act</i>	22

6.3	Lack of Incentives and Absence of Disincentives	22
7.	BRIDGING THE GAP BETWEEN WHAT CORPORATIONS CAN AND SHOULD DO ABOUT CORPORATE SOCIAL RESPONSIBILITY	23
7.1	Overview	23
7.2	Permissive Regulation	23
7.3	Proscriptive Regulation	23
7.4	Reporting and Disclosure Requirements.....	25
7.5	Market Indices and Certification Programs	26
7.6	Governmental Incentives to Corporate Social Responsibility.....	26
7.7	Consumer Advocacy and Mobilisation	27
8.	CONCLUSION.....	29
9.	BIBLIOGRAPHY	30
9.1	Books, Journal Articles and Reports	30
9.2	Newspaper Articles and Press Releases	31
9.3	Cases and Jurisprudence.....	31
9.4	Legislation, Declarations and Treaties.....	32

1. Executive Summary

1.1 Overview

This Paper examines the nature, extent, scope and incidence of corporate social responsibility in Australia. It also considers the legislative and policy frameworks that variously encourage or discourage corporations with respect to conducting their business and affairs in a socially and environmentally responsible and sustainable way.

The Paper concludes that current frameworks do not promote, and in some instances, constitute obstacles to, corporate social responsibility. Given the capacity of corporations and corporate conduct to either promote or derogate human rights and social, environmental and community interests, the Paper proposes a range of legislative and policy initiatives – including in relation to directors' duties, reporting and disclosure requirements, and government procurement – to ensure that corporations consider the interests, values and rights of stakeholders and the broader community.

1.2 Findings

- In this Paper, the term 'corporate social responsibility' is used to refer to corporate decision-making, management, practice, performance and reporting which is:
 - ethical;
 - sustainable; and
 - has regard to local, social, community and environmental interests as well as financial considerations.
- The impact and influence of corporate activity is significant, widespread and increasing. Corporations have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to impact harmfully on the human rights and lives of individuals and communities. Recognising these impacts and spheres of activity and influence, particularly as they pertain to the realisation of fundamental human rights, there is a 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.
- While the extent of corporate social responsibility in Australia has increased significantly over the last decade, it still remains low. Less than 10 per cent of corporations demonstrate a developed understanding of the relationship between corporate social responsibility and business.
- There is a manifest need for policy and incentives to promote corporate social responsibility and encourage companies to contribute to the realisation of human rights within their spheres of activity and influence.
- Section 181 of the *Corporations Act*, which requires directors to act in good faith in the best interests of the company and for a proper purpose, only permits corporations to have regard to, and act in the interests of, social, environmental and broader community interests in so far as those interests are related to, or likely to bear on, the financial interests of shareholders.

Further, while there is an emerging body of evidence demonstrating a positive correlation between corporate social responsibility and shareholder value, the *Corporations Act* requires that social and environmental interests be subverted to shareholders' financial interests where those interests are not consonant.

- Recognising the links between public values and interests, corporate activity and the realisation of universal human rights, corporate social responsibility should be promoted, regulated and evaluated within a human rights framework.
- The *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* developed and approved by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003 are the most comprehensive, clear and complete standards developed in relation to socially responsible corporate behaviour.

1.3 Recommendations

Recommendation 1

Section 181 of the *Corporations Act* should be amended to positively require directors to consider stakeholder interests and social, environmental and human rights concerns in the exercise of directors' duties.

Recommendation 2

The *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* should be legislatively enacted in Australia.

Consistently with the *Draft Norms*, this legislation should:

- enshrine, and impose obligations of realisation on corporations in relation to, relevant human rights, including: the right to equal opportunity and non-discriminatory treatment; the right to security of persons; the rights of workers and their families; consumer rights and protections; and environmental rights and standards;
- require corporations to recognise and respect the 'public interest', 'development objectives' and principles of 'transparency' and accountability';
- require corporations, within their respective spheres of activity and influence, to promote, secure the fulfilment of, respect, ensure respect for and protect human rights;
- require corporations to develop and implement operating procedures that are compliant with the *Draft Norms*;
- encourage corporations to consult with stakeholders and communities about their activities, influence and impact;
- encourage corporations to engage in business only with other corporations, entities and natural persons that comply with the *Draft Norms*;
- encourage corporations to apply and incorporate the *Draft Norms* into contracts and other arrangements with other corporations, entities and natural persons; and

- require corporations to report at least annually on their activities, operation and performance in relation to implementation of the *Draft Norms* and social and environmental impacts.

Recommendation 3

The ASX Listing Rules and the ASX Principles of Good Corporate Governance and Best Practice Recommendations should be amended to promote corporate operation and performance in accordance with the *Draft Norms*.

Recommendation 4

The Australian Securities and Investment Commission should be empowered to monitor and enforce reporting and disclosure in relation to implementation and application of the *Draft Norms*.

Recommendation 5

The Australian Stock Exchange should consider developing a market index that measures the performance of companies against the *Draft Norms*.

Recommendation 6

The Australian Government should consider providing resources for the establishment and operation of a standards and verification scheme based on the *Draft Norms* which provides certification to corporations compliant with those Norms.

Recommendation 7

The Australian Government should only procure from, and contract with, corporations, other business entities and natural persons that comply with the *Draft Norms*.

2. Introduction

2.1 Overview

In recent months, the issue of corporate social responsibility has become a 'hot topic'.

The trend towards companies engaging in, or at least being seen to engage in, socially responsible conduct was evident in the response of Australian businesses to the Indian Ocean tsunami on 26 December 2004. Many corporations made substantial contributions to support aid efforts and relief work in tsunami-affected areas. The trend has also been reflected in business performances in the Australian Corporate Responsibility Index, a voluntary measurement tool which assesses the performance of participating companies against a range of social and environmental criteria. Between 2003 and 2004, the overall average score of companies ranked by the Index increased from 77 per cent to 81.88 per cent.¹

The trend has not, however, been universal or without controversy. Following the significant corporate response to the tsunami, the Australian Shareholders Association publicly questioned whether, in the context of the duty of directors to 'act in the best interests of the company's shareholders', such donations were appropriate or legal.² Similarly, while the overall performances of companies in the Corporate Responsibility Index have improved, participation rates remain very low; only about 1.5 per cent of ASX-listed companies participate in the annual survey.

In addition to being a topic of public debate and media commentary, the issue of corporate social responsibility has also recently become a subject of policy analysis and consideration. On 23 March 2005, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, referred the issue of directors' duties and corporate social responsibility to the Corporations and Markets Advisory Committee ('CAMAC').³ CAMAC has been asked to consider the extent to which the duties of directors under the *Corporations Act 2001* (Cth) should include corporate social responsibilities or explicit obligations to take account of the interests of certain classes of stakeholders other than shareholders. Finally, on 23 June 2005, the Parliamentary Joint Committee on Corporations and Financial Services was asked to inquire into 'corporate responsibility and triple-bottom line reporting for incorporated entities in Australia'.⁴ The inquiry will consider the nature and extent of corporate social responsibility and examine mechanisms, including legislative, regulatory and policy mechanisms, to promote and enhance corporate consideration of the interests of stakeholders (other than shareholders) and the broader community.

This Paper begins at Part 2 by defining and discussing the term 'corporate social responsibility', with particular reference to the Australian context. Part 2 also discusses the public interest and

¹ 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005.

² Malcolm Maiden, 'Tsunami: The Backlash', *The Age* (Melbourne), 12 February 2005.

³ Parliamentary Secretary to the Treasurer, Commonwealth of Australia, 'Pearce Announces Integrated Approach to Insolvency Law Reform' (Press Release No 9, 22 March 2005), <<http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2005/009.asp>> at 30 June 2005.

⁴ Parliament of Australia, 'Inquiry into Corporate Responsibility', <http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/index.htm> at 28 June 2005.

public value associated with socially responsible corporate behaviour and, by extension, the desirability of public policy frameworks and initiatives to promote corporate social responsibility.

Part 3 of the Paper looks at what corporations should do and should be able to do in terms of behaving in a socially responsible way. It argues that there is a strong link between corporate conduct and social and environmental wellbeing. Recognising this association, and the need for a normative value framework within which to regulate and evaluate such conduct, Part 3 proposes a human rights framework based on the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* for the engagement of corporate social responsibility and the promotion and evaluation of socially responsible corporate conduct.

While Part 3 of the Paper focuses on what corporations should do and should be able to do in the area of corporate social responsibility, Parts 4 and 5 of the Paper looks at what corporations are doing and can do in terms of behaving in a socially responsible way. Informed by the recently released Corporate Responsibility Index 2004, Part 4 of the Paper considers what corporations are doing about corporate social responsibility, including by examining the nature and extent of socially responsible corporate behaviour in Australia. Part 5 of the Paper then discusses the legislative and policy frameworks, including the *Corporations Act*, governing the conduct and behaviour of corporations in Australia and examines the ways in which these frameworks promote or fetter socially responsible corporate behaviour.

Recognising the importance of identifying obstacles and impediments to the attainment of desirable policy outcomes, Part 6 of the Paper discusses the reasons for the gap between, on the one hand, what corporations are doing and can do in the area of corporate social responsibility and, on the other hand, what corporations should do and should be able to do.

Part 7 of the Paper then discusses a range of public policy initiatives, including international initiatives, designed to bridge these gaps. Each initiative is analysed in the context of its potential to authorise, and create incentives in relation to, companies engaging in socially responsible conduct that seeks to promote and protect human rights.

Part 8 of the Paper concludes that a range of local, national and international initiatives, including of a legislative, regulatory and financial nature, are needed to ensure realisation of the public interest in corporations conducting their business and affairs in a way that promotes and protects human rights.

2.2 What is 'Corporate Social Responsibility'?

There is no universally accepted definition of corporate social responsibility.

In its broadest and most common sense, the term 'corporate social responsibility' is used to describe corporate conduct which is ethical and has regard to social and environmental interests as well as financial considerations. Thus, for example, the World Business Council for Sustainable Development defines corporate social responsibility as the 'commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life'.⁵ In this context, socially

⁵ Richard Holme and Phil Watts (World Business Council for Sustainable Development), *Corporate Social Responsibility: Making Good Business Sense* (2000) 10. See also Phil Watts and Richard Holme (World Business Council for Sustainable Development), *Meeting Changing Expectations: Corporate Social Responsibility* (1999) 3.

responsible corporate conduct is conduct which recognises that corporations have relationships with, and impacts on, not only shareholders but also other stakeholders (including employees, their families, business partners, suppliers, creditors, consumers and local communities), the broader community and the environment. According to the Australian Corporate Responsibility Index, this requires that principles of corporate social responsibility inform the development of corporate strategy and values, be integrated into corporate decision-making and behaviour, form an integral component of management practice and stakeholder engagement, be reflected in corporate performance and impact, and be identified in corporate measurement, reporting and disclosure.⁶

Having regard to the above, for the purpose of this Paper, the term 'corporate social responsibility' will be used to refer to corporate decision-making, management, practice, performance and reporting which is:

- ethical;
- sustainable; and
- has regard to local, social, community and environmental interests as well as financial considerations.

2.3 The 'Public Value' and 'Public Interest' in Promoting Corporate Social Responsibility

In his reference to CAMAC in relation to directors' duties and corporate social responsibility, the Hon Chris Pearce MP wrote:

In modern society, a great deal of business and other activities are conducted by corporate entities. Given the broad economic, social and environmental impact of these activities, there is an understandable interest in the legal framework in which corporations make decisions.⁷

The impact and influence of corporate activity is significant, widespread and increasing. Developments in the areas of globalisation, privatisation, corporatisation and information technology mean that businesses have the potential and power to impact substantially on local, regional, national and even international communities and environments.⁸ Increasingly, corporations are involved directly in production and service delivery which impacts very directly on individual and community welfare, including in the areas of employment, occupational health and safety, transport, essential services such as energy and water, housing, food, education, communications, recreation, and environmental wellbeing and sustainability.⁹ As the UN Sub-Commission on the Promotion and Protection of Human Rights recognises:

Corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to cause harmful

⁶ 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 2.

⁷ Corporations and Markets Advisory Committee, 'Reference in Relation to Directors' Duties and Corporate Social Responsibility' (March 2005) <<http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewDirectors%27+duties+and+corporate+social+responsibility?openDocument>> at 29 June 2005.

⁸ See generally, Amnesty International, *Submission by Amnesty International under Decision 2004/116 on the 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights'* (2004) 1 <<http://www.ohchr.org/english/issues/globalization/business/docs/amnesty.doc>> at 29 June 2005.

⁹ See, eg, Adolfe Berle and Gardiner Means, *The Modern Corporation and Private Property* (2nd ed, 1967) 309-13.

impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities.¹⁰

Recognising these impacts and spheres of activity and influence, particularly as they pertain to the realisation of fundamental human rights, there is a strong public interest in, and value associated with, the conduct of business and corporate affairs to impact positively not only on relevant financial interests, but also on relevant social and environmental interests.

¹⁰ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003). See also UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, [24], UN Doc E/CN.4/2005/91 (2005).

3. What Should Corporations Do About Corporate Social Responsibility?

3.1 Overview

This Part of the Paper examines what corporations should do and should be able to do in terms of behaving in a socially and environmentally responsible and sustainable way. It argues that corporate conduct impacts significantly on social and environmental wellbeing and that there is a need for a normative value framework within which to regulate and evaluate this conduct. Recognising the links between public values and interests, corporate activity and the realisation of human rights, it proposes a human rights framework for the engagement of corporate social responsibility and the promotion and evaluation of socially and environmentally responsible corporate conduct.

3.2 The Value of a Human Rights Approach to Corporate Social Responsibility

Sound public policy is founded on strong evidence and is responsive to public and stakeholder preferences, interests and values.¹¹

This Paper adopts a 'human rights approach' to identifying and articulating what corporations should do about corporate social responsibility and how corporations should conduct their business and affairs in a socially responsible manner.¹²

This approach has been chosen for four key reasons.

First, the human rights framework is universal and founded on a set of agreed core minimum standards with respect to the conduct of governments, enterprises and individuals. As the United Nations Office of the High Commissioner for Human Rights has asserted:

The human rights approach offers an explicit normative framework — that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies.¹³

Second, the human rights framework focuses attention on basic enabling conditions, the realisation of which are necessary for people to live with human dignity and to participate in and contribute to civil, political, economic, social and cultural life.¹⁴ The framework also focuses

¹¹ See generally, Geoff Mulgan and Andrea Lee, *Better Policy Delivery and Design: A Discussion Paper* (2001); Mark Moore, *Creating Public Value: Strategic Management in Governance* (1995); Gerry Stoker, *Public Value Management (PVM): A New Resolution of the Democracy/Efficiency Tradeoff* (2003) <<http://www.ipeg.org.uk/Paper%20Series/PVM.pdf>> at 1 July 2005.

¹² See generally, Eugene Bardach, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving* (2000) for a discussion as to the importance of selecting and defining evaluative criteria to analyse and assess policy alternatives and outcomes.

¹³ UN Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004) 33. See also Ingrid Barnsley, (Centre for International and Public Law, Australian National University) cited in Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on the Corporate Code of Conduct Bill 2000* (2001) 18-19.

¹⁴ See generally, Amnesty International, *Submission by Amnesty International under Decision 2004/116 on the 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* (2004) 2 <<http://www.ohchr.org/english/issues/globalization/business/docs/amnesty.doc>> at 29 June 2005.

attention on the various civil, political, economic, social and cultural impacts and spheres of influence of corporations.¹⁵

Third, as well as enshrining rights, the international human rights framework also imposes responsibilities and obligations of realisation in relation to those rights. Implementation obligations imposed by the human rights framework on both ratifying governments and, arguably, corporations operating within their jurisdictions, include obligations to respect human rights (that is, refrain from interfering, directly or indirectly, with enjoyment of human rights), protect human rights (that is, prevent third parties, such as business partners or suppliers, from interfering in any way with the enjoyment of human rights) and fulfil human rights (in this context, take positive steps to promote and support the realisation of human rights within the relevant corporate spheres of activity and influence).¹⁶

Fourth, in addition to providing an important and useful framework to identify corporate impacts and impose obligations relating to the realisation of the civil, political, economic, social and cultural determinants of individual and community wellbeing, the human rights framework also enshrines important principles of human rights-based corporate management, stakeholder engagement and conduct, requiring that corporate programs and services be:

- fair and non-discriminatory — this requires that corporations and business enterprises ensure equality of opportunity and treatment;
- consultative, participatory and empowering — this requires that corporations consult with, and enable the participation of, stakeholders and individuals and communities affected by their business affairs and conduct; and
- transparent and accountable — this requires that corporations measure, report on and account for their social and environmental activities and impacts.¹⁷

3.3 The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*¹⁸ ('Draft Norms'), developed and approved by the UN

¹⁵ See generally, Eugene Bardach, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving* (2000) for a discussion as to the importance of projecting outcomes and anticipating indirect consequences of a particular policy or program. A human rights approach to policy analysis, design and delivery requires that explicit attention be given to the impacts and outcomes of that policy on the various civil, political, economic, social and cultural determinants of wellbeing. See also Gerry Stoker, *Public Value Management (PVM): A New Resolution of the Democracy/Efficiency Tradeoff* (2003) 9 <<http://www.ipeg.org.uk/Paper%20Series/PVM.pdf>> at 1 July 2005.

¹⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, [17]–[29], UN Doc E/C.12/2002/11 (2002). See also UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food*, 66, [15], UN Doc HRI/GEN/1/Rev.5 (2001) and UN Committee on Economic, Social and Cultural Rights, *General Comment 13: The Right to Education*, 74, [47], UN Doc HRI/GEN/1/Rev.5 (2001).

¹⁷ UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 2, 4–5. See also Geoff Mulgan and Andrea Lee, *Better Policy Delivery and Design: A Discussion Paper* (2001) and Mark Moore, *Creating Public Value: Strategic Management in Governance* (1995) 10.

¹⁸ Commission on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003). For the most authoritative

Sub-Commission on the Promotion and Protection of Human Rights in 2003, are perhaps the most 'comprehensive, clear and complete' standards developed in relation to socially responsible corporate behaviour.¹⁹

The *Draft Norms* enshrine, and impose obligations of realisation on corporations in relation to, relevant human rights, including: the right to equal opportunity and non-discriminatory treatment;²⁰ the right to security of persons;²¹ the rights of workers and their families;²² consumer rights and protections;²³ and environmental rights and standards.²⁴ The *Draft Norms* also require corporations to recognise and respect the 'public interest', 'development objectives' and principles of 'transparency' and accountability'.²⁵

In relation to implementation, art 1 of the *Draft Norms* 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, respect, ensure respect of and protect human rights.

A corporation's spheres of activity and influence will vary depending upon its size. However the spheres are clearly envisaged to have contractual, economic and geographic dimensions,²⁶ and to include shareholders, workers, unions, consumers, business partners, suppliers, creditors and individuals or groups directly or indirectly affected by a corporation's activities, including host communities and neighbouring communities.²⁷

While at this stage the *Draft Norms* are not legally binding, they envisage a range of operationalisation and enforcement mechanisms. These include:

- Corporations developing and implementing operating procedures that are compliant with the *Draft Norms*,²⁸

exposition of the *Draft Norms*, see *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003).

¹⁹ UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, [21], UN Doc E/CN.4/2005/91 (2005).

²⁰ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 2, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²¹ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, arts 3, 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²² *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, arts 5–9, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²³ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 13, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²⁴ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 14, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²⁵ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 10, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²⁶ UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, [37]–[38], UN Doc E/CN.4/2005/91 (2005).

²⁷ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 22, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

²⁸ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 15, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

- Corporations consulting with stakeholders and communities about their activities, influence and impact;²⁹
- Corporations engaging in business only with other corporations, entities and natural persons that comply with the *Draft Norms*;³⁰
- Corporations applying and incorporating the *Draft Norms* into contracts and other arrangements with other corporations, entities and natural persons;³¹
- Corporations periodically (at least annually) reporting on their activities, operation and performance in relation to implementation of the *Draft Norms* and social and environmental impacts;³² and
- Monitoring by the United Nations and relevant international and national mechanisms in relation to implementation and application.³³

Very importantly, the *Draft Norms* are not intended in any way to displace or detract from the primary responsibility of states to promote, protect and fulfil human rights. In this respect, art 17 of the *Draft Norms* imposes on states the obligation to 'establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises'.

3.4 Other Norms and Frameworks

In addition to the *Draft Norms*, there are a number of other international codes and principles that seek to promote corporate social responsibility and human rights-respecting corporate conduct. Relevant instruments include:

- The *United Nations Global Compact* — the *Global Compact* is a voluntary corporate citizenship initiative which encourages corporations to, among other things, support and respect the protection of human rights and ensure that they are not complicit in human rights violations;³⁴
- The *OECD Guidelines for Multinational Enterprises* — the *Guidelines* contain recommendations to business concerning corporate conduct and affairs. Relevantly, the *Guidelines* recommend that corporations 'respect the human rights of those affected by their activities';³⁵

²⁹ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 16, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³⁰ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 15, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³¹ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 15, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³² *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 15, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³³ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 16, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³⁴ *UN Global Compact* (2000) <<http://www.globalcompact.org>> at 29 June 2005.

³⁵ Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2000) 19 <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>> at 29 June 2005.

- The ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* — the ILO *Declaration* provides guidance to corporations on labour-related aspects of workers' rights, but does not direct itself to other areas of human rights.³⁶

While each of these instruments is important and has contributed to the development of corporate policy and practice in the area of corporate social responsibility and human rights, the *Draft Norms* are the focus of this Paper and recommendations for three key reasons. First, they cover not only transnational corporations and multinational enterprises, but all business enterprises (whether international or domestic only) across all industries and sectors.³⁷ Second, the *Draft Norms* contain the most comprehensive and authoritative exposition of human rights law and its application to corporations.³⁸ Finally, the *Draft Norms* are expressed and intended to be mandatory in nature and to establish enforcement and complaint mechanisms and monitoring and measurement procedures.³⁹

³⁶ International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977) <<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>> at 29 June 2005.

³⁷ Rachel Chambers, David Kinley and Sarah Joseph (Castan Centre for Human Rights), *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Submission from the Castan Centre for Human Rights Law, Monash University* (2004) 1.

³⁸ Rachel Chambers, David Kinley and Sarah Joseph (Castan Centre for Human Rights), *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Submission from the Castan Centre for Human Rights Law, Monash University* (2004) 2.

³⁹ Rachel Chambers, David Kinley and Sarah Joseph (Castan Centre for Human Rights), *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Submission from the Castan Centre for Human Rights Law, Monash University* (2004) 3.

4. What Are Australian Corporations Doing About Corporate Social Responsibility?

4.1 Overview

This Part of the Paper discusses the nature and extent of corporate social responsibility in Australia, informed in particular by the recently released Australian Corporate Responsibility Index 2004.

4.2 Corporate Social and Environmental Activity and the Corporate Responsibility Index

It is clear that the incidence, scope and extent of socially and environmentally responsible corporate conduct and programs have increased significantly in the last decade.⁴⁰ In 2003, for example, 71 per cent of Australian corporations reported that they had developed a corporate social responsibility strategy.⁴¹ It is less clear, however, whether and how well these programs are integrated and implemented, with only 9 per cent of corporations demonstrating a good understanding of the relationship between corporate social responsibility and business.⁴²

The gap between the rhetoric and reality of corporate social responsibility is also evident in corporate engagement with, and performance on, the Australian Corporate Social Responsibility Index. The Index is a voluntary self-assessment and strategic management tool to enhance the capacity of businesses to develop, measure and communicate socially and environmentally responsible corporate conduct. It does this through benchmarking corporate social responsibility strategy and implementation processes in the areas of community, workplace, marketplace and environment.⁴³ The Index results in 2004 demonstrate that while some corporate social responsibility strategies and programs are becoming more developed and sophisticated (the average performance increasing from about 77 per cent to about 82 per cent between 2003 and 2004), the level of voluntary participation and engagement across corporations remains very low. Participation in the Index was limited to about 1.5 per cent of ASX-listed corporations and about 10 per cent of companies are actively invited to take part.⁴⁴ This compares with about a 30 per cent participation rate among British companies on the British Corporate Responsibility Index.⁴⁵

Commenting on the Australian Corporate Responsibility Index, Leon Gettler has written:

⁴⁰ See, eg, UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, [7], UN Doc E/CN.4/2005/91 (2005).

⁴¹ David Grayson, 'Value Added' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 3.

⁴² David Grayson, 'Value Added' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 3.

⁴³ See Corporate Responsibility Index <<http://www.corporate-responsibility.com.au/default.asp>> at 30 June 2005.

⁴⁴ See Corporate Responsibility Index <<http://www.corporate-responsibility.com.au/default.asp>> at 30 June 2005.

⁴⁵ Business in the Community, *Executive Summary: Measuring, Managing and Reporting Responsible Business Practice* (2004) 5

<http://www.bitc.org.uk/programmes/programme_directory/business_in_the_environment/bie_index/index.html> at 30 June 2005.

There's no doubt that CSR has become an industry in its own right. But, while it provides work for public affairs divisions and consultants, questions are raised whether companies are investing more energy in giving the impression that they care than actually changing the world. Rivers are still being polluted, old growth forests are being destroyed and children are still working in plantations.⁴⁶

Particularly in the context of the capacity of corporate activity to positively or negatively impact on the welfare and living standards of local, host and neighbouring communities, there is a manifest need for policy and incentives to, in the words of Amnesty International, 'encourage companies to contribute to the realisation of human rights within their spheres of activity and influence'.⁴⁷

⁴⁶ Leon Gettler, 'Corporate Good Guys' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 2.

⁴⁷ Amnesty International, *Submission by Amnesty International under Decision 2004/116 on the 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights'* (2004) 1 <<http://www.ohchr.org/english/issues/globalization/business/docs/amnesty.doc>> at 29 June 2005.

5. What Can Australian Corporations Do About Corporate Social Responsibility?

5.1 Introduction

This Part discusses the legislative and policy frameworks, particularly the *Corporations Act*, that govern the conduct and behaviour of corporations in Australia. It also examines the ways in which these frameworks promote or fetter socially and environmentally responsible corporate behaviour.

5.2 The *Corporations Act* and the Obligation to Act in the Best Financial Interests of Shareholders

The powers and duties of directors and, by extension, of corporations derive from both the common law and the *Corporations Act*.

Section 181(1) of the *Corporations Act* codifies the duty of directors to act:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose.

It is well established that the term ‘the best interests of the corporation’ primarily means the financial interests of the company’s shareholders as a general body.⁴⁸ There is some authority for the proposition that the interests of the company may include interests that are reasonably incidental to, and within the reasonable scope of carrying on, the business of the corporation (such as employees⁴⁹ and creditors⁵⁰); however, shareholder interests remain paramount.⁵¹

The question as to what constitutes the exercise of a power ‘for a proper purpose’ requires consideration of the nature and purpose of the power conferred and whether the actual exercise of that power was, at least, substantially for that purpose.⁵² A duty will not be considered to have been exercised for a proper purpose where it was exercised for a purpose collateral to that for which the power was primarily conferred and would not have been exercised ‘but for’ that improper or collateral purpose.⁵³

Having regard to the above, it is likely that the *Corporations Act* as currently interpreted and applied only permits corporations to have regard to, and act in the interests of, social, environmental and broader community interests in so far as those interests are related to, or likely

⁴⁸ Harold Ford, R P Austin and Ian Ramsay, *Ford’s Principles of Corporations Law* (12th ed, 2005) 341.

⁴⁹ See, eg, *Parke v Daily News* [1962] Ch 927 in the context of United Kingdom corporations law; and *Teck Corporation v Millar* (1973) 33 DLR (3d) 288 in the context of Canadian corporations law.

⁵⁰ *Walker v Wimborne* (1976) 137 CLR 1; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50; *Sycotex Pty Ltd v Baseler* (1993) 13 ACSR 766; *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465, 473–4.

⁵¹ *Parke v Daily News* [1962] Ch 927.

⁵² *Kokotovich Constructions Pty Ltd v Wallington* (1995) 17 ACSR 478; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; *Hogg v Cramphorn Ltd* [1976] Ch 254.

⁵³ *Kokotovich Constructions Pty Ltd v Wallington* (1995) 17 ACSR 478, 490; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285.

to bear on, the financial interests of shareholders. There is certainly no obligation on directors to take into account the interests of a broader class of stakeholders or the broader community.⁵⁴

5.3 Corporate Social Responsibility and the Best Financial Interests of Shareholders

There is an emerging body of evidence demonstrating a positive correlation between corporate social responsibility and shareholder value.

A recent Australian-based study undertaken by AMP Capital Investors found that companies with a higher corporate social responsibility rating on the Corporate Responsibility Index outperformed the market by, on average, three per cent per annum over both four and ten year periods.⁵⁵ This is consistent with analysis undertaken in the European context by WestLB Panmure – which concluded that corporate social responsibility is an ‘independent return-driving factor that can exert a positive influence on the shareholder value’⁵⁶ – and a major US study which found that there is a strong positive correlation between the social and financial performance of companies.⁵⁷

This positive correlation seems to be attributable to two primary factors.

First, socially and environmentally responsible corporate conduct is likely to enhance corporate reputation and goodwill, both of which are ‘key business assets’.⁵⁸ This is particularly the case as societal expectations of corporations trend towards ethical and responsible behaviours and outputs. As Peter Henley concludes, ‘such programs use a standard business model of investment and return, and can be justified by directors as being both in the interests of the company and for a proper purpose’.⁵⁹

Second, socially and environmentally responsible corporate conduct necessarily involves building relationships and maintaining a dialogue with a range of stakeholders — including, among others, employees, consumers, suppliers, business partners, and host and neighbouring communities — that can influence and impact upon the performance of the company. These stakeholders have a range of social and environmental interests and concerns that need to be taken into account if their engagement with, and influence and impact on, the company is to be positive.⁶⁰ On this view, corporate social responsibility is authorised by, and likely to enhance value for, shareholders in so far as it promotes a sustainable business model.

Other justifications posited for corporate social responsibility and its positive impact on shareholder value include:

⁵⁴ See generally, D F Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004).

⁵⁵ Michael Anderson and Matthew Rey (AMP Capital Investors), ‘Many Good Returns’ in ‘Special Report: Corporate Responsibility Index’, *The Age* (Melbourne), 4 April 2005, 3.

⁵⁶ Hendrik Garz, Claudia Volk and Martin Gilles, *More Gain than Pain: Sustainability Pays Off* (2002) 16.

⁵⁷ J D Margolis and J P Walsh, *People and Profits: The Search between a Company’s Social and Financial Performance* (2001).

⁵⁸ Phil Watts and Richard Holme (World Business Council for Sustainable Development), *Meeting Changing Expectations: Corporate Social Responsibility* (1999) 9.

⁵⁹ Peter Henley, ‘Were Corporate Tsunami Donations Made Legally? Some Thoughts on What Directors Can and Should be Able to Do About Corporate Social Responsibilities’ (2005) 30(4) *Alternative Law Journal* (forthcoming).

- the identification of new commercial opportunities through stakeholder consultation and relationships;
- the contribution of corporate social responsibility to the building of social capital and stronger, more prosperous communities and hence consumers;⁶¹
- improved employee satisfaction and output;
- the avoidance of negative publicity and brand damage;⁶² and
- the development of more sustainable, and hence efficient and profitable, social and environmental practices.⁶³

However, despite these justifications and links, the *Corporations Act* as currently drafted, interpreted and applied would appear to require that social and environmental interests be subverted to shareholders' financial interests to the extent of any incompatibility or inconsistency.

⁶⁰ Phil Watts and Richard Holme (World Business Council for Sustainable Development), *Meeting Changing Expectations: Corporate Social Responsibility* (1999) 9.

⁶¹ UN High Commissioner for Human Rights, *Business and Human Rights: A Progress Report* (2000) <<http://www.unhchr.ch/business.htm>> at 1 July 2005.

⁶² David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 953.

⁶³ See generally Richard Holme and Phil Watts (World Business Council for Sustainable Development), *Corporate Social Responsibility: Making Good Business Sense* (2000) and Phil Watts and Richard Holme (World Business Council for Sustainable Development), *Meeting Changing Expectations: Corporate Social Responsibility* (1999).

6. Explaining The Gap Between What Australian Corporations Can And Should Do About Corporate Social Responsibility

6.1 Overview

Recognising the importance of identifying obstacles and impediments to the attainment of desirable policy outcomes, this Part of the Paper discusses the reasons for the gap between, on the one hand, what corporations are doing and can do in the area of corporate social responsibility and, on the other hand, what corporations should do and should be able to do. Part 7 of the Paper then looks at a range of initiatives and strategies designed to bridge these gaps.

6.2 Restrictions Imposed by the *Corporations Act*

As discussed above at Part 5.2, s 181 of the *Corporations Act* imposes a duty on companies and directors to act in the best financial interests of shareholders. There is no requirement to act in the interests of, or even have regard to, other stakeholders or social or environmental issues other than to the extent to which those interests and issues may impact on shareholder value. In fact, where the interests of shareholders and other interests, including social and environmental interests, are divergent, it is clear that directors are required to act contrary to those latter interests.

There is a clear need to amend s 181 of the *Corporations Act* to either require or permit directors to consider interests other than shareholders' financial interests in exercising and discharging corporate power.

6.3 Lack of Incentives and Absence of Disincentives

The restrictions imposed by the *Corporations Act* are compounded by the lack of incentives to socially and environmentally responsible corporate conduct and the absence of disincentives to short-term profit maximising conduct that may have deleterious social and environmental impacts and outcomes. Commenting on this, the Chief Executive Officer of ANZ Bank, John McFarlane, has said:

When I meet with some investors, it's surprisingly unfashionable to take a platform advocating sustainability, social responsibility and community engagement. In fact, there is an argument that the pressure for short-term performance created by fund managers, competition and shrinking product lifecycles has never been greater.⁶⁴

As there is a clear need for amendment of the *Corporations Act* to enable socially and environmentally responsible corporate conduct, there is also a clear need to create incentives to such action and disincentives to inconsistent behaviours.

⁶⁴ John McFarlane, cited in 'Follow the Leaders' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 2.

7. Bridging The Gap Between What Corporations Can And Should Do About Corporate Social Responsibility

7.1 Overview

This Part of the Paper discusses a range of public policy initiatives, including international initiatives, designed to bridge the gaps between, on the one hand, desirable corporate conduct and, on the other hand permissible and prevailing corporate conduct. Each initiative is analysed in the context of its potential to authorise, and create incentives in relation to, companies engaging in socially and environmentally responsible conduct that seeks to promote and protect human rights.

7.2 Permissive Regulation

A minimalist approach to policy and law reform to better enable corporate social responsibility would involve amending s 181 of the *Corporations Act* to permit directors to consider the interests of stakeholders other than mere shareholders in the management and operation of the company. For example, s 181 could be amended to permit consideration of the interests of employees, consumers and local communities in any exercise of corporate power or, alternatively, consideration of social and environmental interests and human rights norms. Alternatively, Peter Henley has suggested that s 181 could be amended to enable directors to have regard to the interests of stakeholders, defined as 'a person or organisation (other than a shareholder) with whom the company has or is likely to have a business or employment relationship, or who is or may become directly affected by the business of the company'.⁶⁵

Such an approach is, however, likely to be deficient for two key reasons.

First, experience suggests that compliance with voluntary or permissive legislation or codes of conduct is likely to be limited, particularly where compliance may occasion some form of financial detriment (regardless of social or environmental outcomes) and among reticent corporations.⁶⁶ Permissive legislation tends to work best for already well-intentioned actors.

Second, where a director may be permitted, but is not required, to consider the interests of a stakeholder other than a shareholder, it is unclear whether, how and by whom such consideration could be assured or enforced.⁶⁷

7.3 Proscriptive Regulation

An alternative approach to policy and law reform would involve amending s 181 of the *Corporations Act* to positively require directors to consider stakeholder interests or social, environmental and human rights concerns in the exercise of directors' duties. Such enactment would be likely to have normative, educative and promotional effects in relation to human rights-

⁶⁵ Peter Henley, 'Were Corporate Tsunami Donations Made Legally? Some Thoughts on What Directors Can and Should be Able to Do About Corporate Social Responsibilities' (2005) 30(4) *Alternative Law Journal* (forthcoming).

⁶⁶ Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability* (2004) 12.

⁶⁷ See, eg, Harold Ford, R P Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (12th ed, 2005) 346.

consistent corporate conduct. Importantly, it would also be likely to act as a deterrent to inconsistent conduct, particularly if s 184 of the *Corporations Act* was concurrently amended to impose criminal liability in respect of recklessly or intentionally dishonest inconsistent conduct (as is currently the case in respect of obligations to act in the best financial interests of shareholders). Such an approach to director's duties is currently being considered in the United Kingdom, where the Government's proposed Company Law Reform Bill 2005 (UK) will include a statement of directors' duties 'which reflects modern business needs and wider expectations of responsible business behaviour'.⁶⁸ It will do this by providing that:

the basic goal for directors should be the success of the company for the benefits of its members as a whole, but that in achieving this goal, directors must take a 'properly balanced view of the implications of decisions over time and foster effective relationships with employees, customers and suppliers, and the community more widely'.⁶⁹

If enacted, the Bill will require that, in order to fulfil the duty to promote the success of the company for the benefit of its members, directors must consider:

- the consequences of any decision in both the long and the short term;
- the interests of the company's employees;
- the importance of business relationships with suppliers, customers and others; and
- the impact of its operations on the community and the environment.

This approach is consistent with the concept of 'enlightened shareholder value', which recognises that 'long-term company performance and overall competitiveness and wealth and welfare' are most likely to be maximised by socially and environmentally responsible and sustainable corporate conduct.⁷⁰

A further alternative, which is arguably a preferable one, is a proscriptive approach which would involve legislative enactment of the *Draft Norms* to require, or at least encourage or create incentives for, all corporate activity to be consonant with the core minimum standards contained therein. As the Castan Centre for Human Rights Law has argued:

The domestic arena is the most appropriate and likely place for the Norms to obtain substantial legal effect (either before or after the Norms acquire international legal status) through the enactment of domestic law that incorporates the Norms, thereby bringing TNCs and other business enterprises within a national human rights framework.⁷¹

Such an approach would be consistent with federal and state legislative approaches to similar areas of interest and potential impact and concern, including occupational health and safety;⁷²

⁶⁸ Department of Trade and Industry (UK), *Company Law Reform* (2005) 20 <<http://www.dti.gov.uk/cld/WhitePaper.htm>> at 5 July 2005.

⁶⁹ Department of Trade and Industry (UK), *Company Law Reform* (2005) 20 <<http://www.dti.gov.uk/cld/WhitePaper.htm>> at 5 July 2005.

⁷⁰ Department of Trade and Industry (UK), *Company Law Reform* (2005) 20–1 <<http://www.dti.gov.uk/cld/WhitePaper.htm>> at 5 July 2005.

⁷¹ Rachel Chambers, David Kinley and Sarah Joseph (Castan Centre for Human Rights), *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Submission from the Castan Centre for Human Rights Law, Monash University* (2004) 8, [35].

⁷² See, for example, *Occupational Health and Safety Act 2004* (Vic).

discrimination and equal opportunity in employment and the provision of goods and services;⁷³ and environmental impact.⁷⁴ Each of these laws articulate minimum standards of conduct and enshrine certain rights in clear and accessible terms, with civil, and sometimes criminal, penalties associated with failure to adhere to the requisite standards.

7.4 Reporting and Disclosure Requirements

It is well established that mandatory measurement and disclosure requirements enhance corporate governance and conduct by ensuring a level of transparency and accountability. It is also well recognised that full disclosure and informed consumer participation is essential to the informed and fair functioning of the market. Recognising this, the ASX Listing Rules require continuous and detailed disclosure of material financial information.⁷⁵ All incorporated associations are required to report at least annually on their financial affairs.

As discussed at Part 3.3 above, art 15 of the *Draft Norms* requires corporations to report at least annually on their activities, operation and performance in relation to implementation of the *Draft Norms* and social and environmental impacts. Under Australian law there are, however, no requirements for companies to report on or disclose their social, environmental or human rights-affecting activities or impacts.⁷⁶ This can be contrasted with the position in South Africa where, for example, the JSE Securities Exchange 'Code of Corporate Practices and Conduct' requires all publicly listed companies to report in accordance with the Global Reporting Initiative Sustainability Reporting Guidelines.⁷⁷ The Guidelines require performance assessment and disclosure of economic, environmental and social policies, activities and impacts.⁷⁸

Having regard to the above, the *Corporations Act* and, at the very least, the ASX Listing Rules should be amended to require corporate operation and performance in accordance with art 15 of the *Draft Norms*. Furthermore, in accordance with art 16, which requires monitoring by relevant national mechanisms in relation to implementation and application of the *Draft Norms*, the Australian Securities and Investment Commission should be empowered to monitor and enforce such reporting and disclosure.

⁷³ See, for example, *Equal Opportunity Act 1995* (Vic) Part 3, Divisions 1, 2 and 4; *Age Discrimination Act 2004* (Cth) Part 4; *Disability Discrimination Act 1992* (Cth) Part 2, Division 1 and s 24; *Racial Discrimination Act 1975* (Cth) ss 13 and 15; *Sex Discrimination Act 1984* (Cth) Part 2, Division 1 and s 22.

⁷⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Vic).

⁷⁵ *ASX Listing Rules* (2004) at <<http://www.asx.com.au/supervision/rules/listing/index.htm>> at 30 June 2005.

⁷⁶ See David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 942 for a discussion of various failed corporate social responsibility bills introduced to legislatures in the US, the UK and Australia. Each of the draft bills, if enacted, would have imposed mandatory corporate social and environmental responsibility disclosure and reporting requirements.

⁷⁷ David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 957. See also Halina Ward, *Legal Issues in Corporate Citizenship* (2003) 3-5. In contrast, the non-mandatory ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (2003) do not contain any principles or recommendations in relation to management or disclosure having regard to social, environmental or human rights issues or impacts.

⁷⁸ See Global Reporting Initiative, 'GRI Reporting Framework' <<http://www.globalreporting.org/guidelines/framework.asp>> at 30 June 2005.

7.5 Market Indices and Certification Programs

The efficacy and utility of reporting and disclosure requirements, together with the social and environmental pressures that can be exerted by stakeholders, especially consumers, can be enhanced by market indices and certification programs which can transmit information about social and environmental corporate conduct in a fast, easily accessible, market-friendly way.

Recognising this, together with increased consumer interest in responsible and sustainable investment, share market sustainability indices have been developed in both the UK and the US. In the UK, the FTSE4Good Index measures the performance of companies that meet globally recognised corporate responsibility standards and thereby encourages investment in those companies.⁷⁹ Similarly, in the US, the Dow Jones Sustainability Indexes identify, measure, set benchmarks and report on corporations with respect to economic, environmental and social factors.⁸⁰

While sustainability indices are principally directed towards, and of utility to, investors, a number of certification schemes have been developed by industries, organisations and the non-government sector to provide 'shorthand' information to consumers about the social and environmental responsibility practices of businesses. For example, the SA8000, a standards and verification scheme based on international human rights standards, provides certification to retailers and suppliers that maintain 'just and decent working conditions throughout the supply chain'.⁸¹ Similarly, the 'Worldwide Responsible Apparel Production' program ('WRAP') is a certification program for the clothing and textile industries requiring manufacturers to comply with a range of labour rights and workplace standards.⁸²

Government has an important role to play in resourcing and promoting market indices and certification programs based on social and environmental measures, including the *Draft Norms*.⁸³

7.6 Governmental Incentives to Corporate Social Responsibility

Article 15 of the *Draft Norms* requires that businesses only engage with other corporations, entities and natural persons that comply with the *Draft Norms*. It further requires that corporations apply and incorporate the *Draft Norms* into contracts and other arrangements with other corporations, entities and natural persons.

While it is desirable to develop law and policy to fully enact this requirement under Australian corporate law, it is recognised that this is a longer-term project. In the shorter-term, however, there is considerable scope for local, state and national governments to use their significant 'purchasing power' to promote and even require ethical and socially and environmentally

⁷⁹ See FTSE, 'FTSE4Good Index Series' <<http://www.ftse.com/ftse4good/index.jsp>> at 30 June 2005.

⁸⁰ See Dow Jones, 'Dow Jones Sustainability Indexes' <<http://www.sustainability-indexes.com>> at 30 June 2005.

⁸¹ See Social Accountability International, 'Overview of SA8000' <<http://www.cepaa.org/SA8000/SA8000.htm>> at 30 June 2005.

⁸² See Worldwide Responsible Apparel Production, Website <<http://www.wrapapparel.org>> at 30 June 2005.

⁸³ Rachel Chambers, David Kinley and Sarah Joseph (Castan Centre for Human Rights), *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Submission from the Castan Centre for Human Rights Law, Monash University* (2004) 9, [38].

responsible and sustainable conduct. This potential has been recognised and harnessed to some degree in Victoria where panel members on the Government's Legal Services Panel are contractually required to:

- 'commit to the furtherance of equal opportunity in their work practices (including work allocation) and in briefing barristers';
- 'comply with model litigant principles when acting on behalf of Government Clients'; and
- 'commit to provide pro bono services of at least 5 per cent of the value of the legal fees they derive under the panel arrangements'.⁸⁴

Governmental procurement should have regard to, value and promote human rights-respecting corporate practices such as those envisaged in the *Draft Norms*.

7.7 Consumer Advocacy and Mobilisation

With the exception of proscriptive regulation and mandatory disclosure and reporting requirements, the efficacy of the various initiatives referred to above, such as market indices and certification schemes, relies on discerning investors and consumers who value corporate social responsibility. While such initiatives can have normative, educative and deterrent values and effects, most developments and progress in the area of corporate social responsibility have been driven by consumer movements and mobilisation. Thus, for example, it was the activism of Henry Spira and other members of the 'animal liberation' movement who, through a series of targeted consumer educational and advertising campaigns, pressured many cosmetics companies, such as Revlon and Proctor & Gamble, to stop animal testing.⁸⁵ Consumer movements have similarly focused attention on the corporate conduct of companies such as BHP Billiton, Shell, Nike and Reebok, with the result that some of these companies now run arguably among the most developed and sophisticated corporate social responsibility programs.⁸⁶

However, while consumer mobilisation, movements and markets have an important role to play in the promotion of corporate social responsibility,⁸⁷ they do not obviate the need for normative regulation and intervention.⁸⁸ This is particularly the case in light of recent research indicating that in terms of consumption and investment there is often 'a difference between what consumers say and what consumers do', with economic consumption and investment often being valued over ethical consumption and investment. As the Australian Graduate School of Management has concluded, there is therefore a need for regulatory intervention to respond to the situation whereby:

⁸⁴ Department of Justice Victoria, 'Government Legal Services' <<http://www.justice.vic.gov.au/CA2569020010922A/page/Business+Units-Government+Legal+Services?OpenDocument&1=0-Business+Units-&2=0-Government+Legal+Services-&3=->> at 30 June 2005.

⁸⁵ See generally, Peter Singer, *Ethics into Action: Henry Spira and the Animal Rights Movement* (1999).

⁸⁶ See, eg, Leon Gettler, 'Corporate Good Guys' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 2.

⁸⁷ See also 'Uranium May Force Ethical Funds to Sell Out of BHP', *Infochoice.com.au* (Australia), 16 March 2005 <<http://www.infochoice.com.au>> at 1 July 2005.

⁸⁸ Robert McCorquodale, 'Human Rights and Global Business' in Stephen Bottomley and David Kinley (eds), *Commercial Law and Human Rights* (2002) 112.

Organisations guilty of ethical breaches, wrecking the environment and trampling on human rights might damage their reputations but they might not necessarily find any consumer mandate for them to do the right thing.⁸⁹

⁸⁹ Leon Gettler, 'Consumers Can Be Less Than Caring' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 4.

8. Conclusion

Corporations have the potential and capacity to, on the one hand, contribute significantly to, and on the other hand, derogate significantly from, human rights in local, regional, national and even international communities and environments. At its best, corporate social responsibility is corporate governance and conduct that contributes to the realisation of human rights.

Current legislative and policy frameworks do not promote, and in some instances, constitute obstacles to, corporate social responsibility. A range of initiatives based on the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, including in relation to directors' duties, reporting and disclosure requirements, and government procurement are needed to ensure that corporations consider and act in accordance with the interests, values and rights not only of shareholders but also stakeholders and the broader community.

9. Bibliography

9.1 Books, Journal Articles and Reports

Amnesty International, *Submission by Amnesty International under Decision 2004/116 on the 'Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights' (2004)* at <<http://www.ohchr.org/english/issues/globalization/business/docs/amnesty.doc>>.

Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability (2004)*.

ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations (2003)*.

Australian Stock Exchange, *ASX Listing Rules (2004)* at <<http://www.asx.com.au/supervision/rules/listing/index.htm>>.

Bardach, E, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving (2000)*.

Berle, A and Means, G, *The Modern Corporation and Private Property (2nd ed, 1967)*.

Business in the Community, *Executive Summary: Measuring, Managing and Reporting Responsible Business Practice (2004)* 5 at <http://www.bitc.org.uk/programmes/programme_directory/business_in_the_environment/bie_index/index.html>.

Chambers, R, Kinley, D and Joseph, S (Castan Centre for Human Rights), *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Submission from the Castan Centre for Human Rights Law, Monash University (2004)*.

Corporations and Markets Advisory Committee, 'Reference in Relation to Directors' Duties and Corporate Social Responsibility' (March 2005) at <<http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewDirectors%27+duties+and+corporate+social+responsibility?openDocument>>.

Department of Trade and Industry (UK), *Company Law Reform (2005)* at <<http://www.dti.gov.uk/cld/WhitePaper.htm>>.

Ford, H, Austin, R P and Ramsay, I, *Ford's Principles of Corporations Law (12th ed, 2005)*.

Garz, H, Volk, C and Gilles, M, *More Gain than Pain: Sustainability Pays Off (2002)*.

Henley, P, 'Were Corporate Tsunami Donations Made Legally? Some Thoughts on What Directors Can and Should be Able to Do About Corporate Social Responsibilities' (2005) 30(4) *Alternative Law Journal* (forthcoming).

Holme, R and Watts, P (World Business Council for Sustainable Development), *Corporate Social Responsibility: Making Good Business Sense (2000)*.

Jackson QC, D F, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (2004)*.

Kinley, D and Tadaki, J, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931.

Margolis, J D and Walsh, J P, *People and Profits: The Search between a Company's Social and Financial Performance* (2001).

McCorquodale, R, 'Human Rights and Global Business' in Bottomley, S and Kinley, D (eds), *Commercial Law and Human Rights* (2002).

Moore, M, *Creating Public Value: Strategic Management in Governance* (1995).

Mulgan, G and Lee, A, *Better Policy Delivery and Design: A Discussion Paper* (2001).

Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on the Corporate Code of Conduct Bill 2000* (2001).

Singer, P, *Ethics into Action: Henry Spira and the Animal Rights Movement* (1999).

Stoker, G, *Public Value Management (PVM): A New Resolution of the Democracy/Efficiency Tradeoff* (2003) at <<http://www.ipeg.org.uk/Paper%20Series/PVM.pdf>>.

Ward, H, *Legal Issues in Corporate Citizenship* (2003).

Watts, P and Holme, R (World Business Council for Sustainable Development), *Meeting Changing Expectations: Corporate Social Responsibility* (1999).

9.2 Newspaper Articles and Press Releases

Anderson, M and Rey, M (AMP Capital Investors), 'Many Good Returns' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 3.

Department of Justice Victoria, 'Government Legal Services' at <<http://www.justice.vic.gov.au/CA2569020010922A/page/Business+Units-Government+Legal+Services?OpenDocument&1=0-Business+Units-&2=0-Government+Legal+Services-&3=->>>.

Gettler, L, 'Consumers Can Be Less Than Caring' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 4.

Gettler, L, 'Corporate Good Guys' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 2.

Grayson, D, 'Value Added' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 3.

Maiden, M, 'Tsunami: The Backlash', *The Age* (Melbourne), 12 February 2005.

Parliamentary Secretary to the Treasurer, Commonwealth of Australia, 'Pearce Announces Integrated Approach to Insolvency Law Reform' (Press Release No 9, 22 March 2005), <<http://parlsec.treasurer.gov.au/cjp/content/presreleases/2005/009.asp>>.

'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005.

'Uranium May Force Ethical Funds to Sell Out of BHP', *Infochoice.com.au* (Australia), 16 March 2005 at <<http://www.infochoice.com.au>>.

9.3 Cases and Jurisprudence

Equiticorp Finance Ltd (in liq) v Bank of New Zealand (1993) 32 NSWLR 50.

Hogg v Cramphorn Ltd [1976] Ch 254.

Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821.

Kokotovich Constructions Pty Ltd v Wallington (1995) 17 ACSR 478.

Linton v Telnet Pty Ltd (1999) 30 ACSR 465.

Parke v Daily News [1962] Ch 927.

Sycotex Pty Ltd v Baseler (1993) 13 ACSR 766.

Teck Corporation v Millar (1973) 33 DLR (3d) 288

UN Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food*, UN Doc HRI/GEN/1/Rev.5, 66 (2001).

UN Committee on Economic, Social and Cultural Rights, *General Comment 13: The Right to Education*, UN Doc HRI/GEN/1/Rev.5, 74 (2001).

UN Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, UN Doc E/C.12/2002/11 (2002).

UN Office of the High Commissioner for Human Rights, *Business and Human Rights: A Progress Report* (2000) at <<http://www.unhchr.ch/business.htm>>

UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002).

UN Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004).

UN Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003).

UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/2005/91 (2005).

Walker v Wimborne (1976) 137 CLR 1.

Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285.

9.4 Legislation, Declarations and Treaties

Age Discrimination Act 2004 (Cth).

Disability Discrimination Act 1992 (Cth).

Environment Protection and Biodiversity Conservation Act 1999 (Vic).

Equal Opportunity Act 1995 (Vic).

International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977) at <<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>>.

Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

Occupational Health and Safety Act 2004 (Vic).

Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2000) at <<http://www.oecd.org/dataoecd/56/36/1922428.pdf>>.

Racial Discrimination Act 1975 (Cth).

Sex Discrimination Act 1984 (Cth).

UN Global Compact (2000) at <<http://www.globalcompact.org>>.