26 August 2005

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

Dear Committee Secretary,

Inquiry into Corporate Responsibility

I refer to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into corporate responsibility. I attach as my submission my Master's thesis, *Greening our Corporate Law: A Prerequisite for Achieving Sustainable Development* (December 2004).

With respect to my professional credentials, I am a corporate social responsibility consultant and a Lead Counsel with the Montreal based Centre for International Sustainable Development Law. Prior to my current positions, I practiced as a lawyer in Victoria for eight years specialising in corporate and environmental law. Four of those years were spent as legal advisor to the Australian Conservation Foundation (ACF). During that time, I had a leading role in the NGO campaign that resulted in the introduction of section 1013 D (1)(l) of the *Corporations Act 2001* (Cth) which requires the issuers of financial products with an investment component to disclose *the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.*

The thesis is relevant to the inquiry as follows:

1. In chapter 6, the thesis proposes a corporate law reform agenda designed to integrate the principle of environmental protection into Australian corporate law. As the Committee would no doubt be aware, promoting environmental responsibility within Australian corporations is an important community and corporate stakeholder concern. The law reform agenda consists of three legislative amendments to the *Corporations Act*:

    (1) A new directors' duty to ensure that a corporation, and any subsidiary, acts in accordance with the principles of sustainable development;
    (2) New mandatory, public reporting requirements for public corporations and large proprietary corporations with respect to their environmental and social performance; and
    (3) New winding up provisions that will allow the court to wind up a company if the court is of the opinion that the affairs of the company are being conducted in a manner that is repetitively in breach of Australian laws.

Note: Although the law reform agenda concentrates primarily on environmental concerns, the proposed public reporting provisions would also address a number of social/human rights issues.

2. The thesis (see chapter 7) provides examples of similar corporate laws in overseas jurisdictions, including the United States, Canada, the United Kingdom, Europe and South Africa. Please note that since the finalisation of my thesis, both the UK and Canada have

implemented corporate environmental reporting provisions. For details on these two additional reporting laws, see http://www.cisdl.org/pdf/CISDL_Reporting_Brief.pdf

3. The thesis justifies why it is important to amend the *Corporations Act* as proposed. Several arguments and themes are followed in my research that I wish to draw to the Committee's attention:

    - Corporations are responsible for a significant proportion of Australia's environmental problems. Chapter 1 describes what those environmental problems are. Chapter 2 describes how corporate activity is inextricably linked to environmental degradation.
    - Australian corporate law is very much at the heart of the environmental problems experienced in modern day Australia and represents a formidable hurdle in national efforts to achieve sustainable development. Chapter 3 describes how Australian corporate law ensures the interests of a corporation and its shareholders, namely profit maximisation, are placed before the interests of the environment. Furthermore, Australian *corporate law* now actively undermines the capacity of Australian *environmental law* to achieve its objectives (see part 5.3.2 for commentary). In other words, we cannot rely on environmental law to bring about corporate environmental responsibility without first amending Australian corporate law.
    - Too much reliance has been placed on voluntary initiatives to improve corporate environmental performance. Several weaknesses of the voluntary approach are identified in chapter 4 which highlight why this approach has so far failed to improve the environmental performance of corporate Australia and cannot be relied upon to improve its performance in the future.

4. Australia cannot afford the economic consequences of failing to implement strong regulatory measures to improve corporate environmental performance. Chapter 8 describes why it is in the economic interests of corporations that we introduce new corporate laws in this area. This chapter also describes how the proposed laws could assist in reducing the enormous economic costs arising from environmental 'externalities,' such as climate change, which are ultimately borne by society as a whole.

I trust that the research material provided in the attached thesis will be of assistance to the Committee as it undertakes this important inquiry. If I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely,

Michael Kerr

Greening Our Corporate Law: A Prerequisite for Achieving Sustainable Development

By

Michael Kerr

December 2004

A Thesis Submitted in Fulfilment of the Requirements for the Degree of Master of Laws (Research)

Faculty of Law
University of Sydney

Printed on Recycled Paper

Abstract

This thesis presents a critical analysis of Australian corporate law from an environmental perspective. With reference to extensive case studies and examples, it is argued that corporations contribute significantly to the environmental problems we are currently encountering in Australia and at the global level. After establishing the link between corporate activity and environmental degradation, the thesis examines the legal regime we have established to create and govern *our* corporations in an effort to understand why they act the way they do. This examination reveals that Australian corporate law is very much at the heart of the environmental problems experienced in modern day Australia and represents a formidable hurdle in national efforts to achieve sustainable development. To remedy this problem, the thesis proposes and justifies a corporate law reform agenda designed to ensure that profitable corporate ventures can still be conducted but in an environmentally sustainable manner.

Acknowledgments

I am indebted to a large number of people who assisted me in the task of completing this research. First and foremost, I would like to thank my supervisors, Rosemary Lyster and Jennifer Hill, who have carried out their roles with dedication, providing many suggestions which have greatly strengthened my thesis. I also wish to extend my gratitude to Melbourne based lawyer, John Rutherford, who provided me with valuable insights and feedback as I developed the ideas and proposed law reforms outlined in this work. I am indebted also to my father, Peter Kerr, who undertook the tedious task of editing. His fine command of the English language has assisted me in expressing my thoughts and ideas in a way that, I have no doubt, will make far better sense to the reader. Apart from his editorial assistance, he has been of great support and encouragement throughout.

Special thanks must also go to Richard Graham and Charles Berger who assisted me in tracking down some hard to find references.

My wife, Genevieve Brunet, provided me with the time and space that was needed to complete this work. From the very first day I met her, she has been the source of my inspiration to pursue what I now know to be my life's work: joining the countless number of other people in the task of ensuring a sustainable future. As for my son Samuel, a big 'thankyou' for being so patient with me during the long hours I spent locked away in my study from you and your fun and games.

To all my friends and former colleagues at the Australian Conservation Foundation (ACF), I wish to extend my gratitude for teaching me the true meaning of the word "commitment." The ideas behind this thesis were developed in my early days at ACF and I hope this work provides a valuable law reform tool that will assist the foundation in its conservation work.

Finally, I wish to acknowledge my late mother, Moya Kerr. Her dedication to family and the courage she showed through out her life are qualities that I will never forget. It is to Moya I dedicate this thesis.

Contents

Introduction

When I was 12 years old my father took me on one of the horse and carriage rides that operate for tourists through the streets of downtown Melbourne. I remember the ride well. The carriage was pulled by two aging Clydesdale horses that seemed remarkably placid given all the distractions caused by the busy city traffic thundering past. I was impressed by the horses and asked the driver why they were so focused on the road ahead. He pointed out that the horses were wearing a set of 'blinkers' around their eyes. This, he told me, enabled them to look only in one direction; straight ahead. That way, they could concentrate on the job at hand and not be distracted by anything that would otherwise be viewed on their outside, such as passing traffic. The blinkers did a great job. The horses took us to our destination without batting an eyelid.

Australian corporate law reminds me in some ways of this horse and carriage ride. Like the two old Clydesdales, it is an aging body of law that has a custom-built set of blinkers so that it may operate within a narrow set of parameters to exclude certain major 'outside' distractions. Tomasic, Bottomley and McQueen in their insightful text book, *Corporations Law in Australia*, described the narrow parameters of corporate law in this way:

> "Corporate law, as it is taught and practiced in Australia, is concerned with the legal relations between a narrow category of corporate actors. Along with the corporation itself, corporate law is concerned with the rights, interests, duties and liabilities of corporate "insiders": the members of the corporation and its directors. The other primary concern is the relations between the corporation with certain "outsiders," primarily creditors and others who enter into contracts with corporations. Corporate regulators can also be thought of as significant outsiders. It is apparent then that modern corporate law is not concerned directly with the role of the corporation as an employer, taxpayer or tax avoider, or as an economic or environmental actor."[1]

In many respects, this thesis represents a critical analysis of Australian corporate law undertaken from an environmental perspective. Such an exercise has rarely been undertaken in the Australian context but is occurring with increasing frequency in overseas jurisdictions, particularly those of North America.[2] It begins by examining the enormous environmental consequences that have arisen from the blinkered nature of Australian corporate law and its failure to be concerned with the role of the

[1] Tomasic R et al, *Corporations Law in Australia* (Sydney: Federation Press, 2nd ed., 2002) at 67. For a similar perspective on the narrow focus of corporate law and the way it is taught in Australian universities, see generally Darvas P, "How to See the Forest for the Trees: What's the Point of so Much Corporate Law" (2002) 9 (3) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/indices/title/darvas93_abstract.html> (21 April 2004).

[2] For examples of North American critical analyses, see Bakan J, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004); Yaron G, *The Corporation Inside and Out*. Vancouver: Aurora Institute, 2003 <http://www.aurora.ca/docs/CorporationInside&Out.pdf.> (16 May 2004); Kelly M, *The Divine Right of Capital: Dethroning the Corporate Aristocracy* (San Francisco: Berrett Koheler, 2001); Glasbeek H, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (Toronto: Between the Lines, 2002).

corporation as an "environmental actor." Much attention has been given to these environmental consequences. In fact, the first two chapters deal exclusively with the troubling relationship between corporations and environmental degradation. These two chapters are designed to place the legal discussion that follows in its wider context. They demonstrate through the findings of numerous reports and case studies that we are on the verge of an environmental crisis, for which corporations are significantly responsible, and that measures to reverse this trend must be identified and implemented with the highest priority.

To assist in identifying such measures, a key question must then be asked: *why is corporate activity degrading the environment?* Chapters three, four and five set about answering this question. In chapter three, it is argued that Australian corporate law ensures the interests of a corporation and its shareholders, namely profit maximisation, are placed before the interests of the environment. Chapter four examines the 'flip side' of the regulatory coin, demonstrating how too much reliance has been placed on voluntary initiatives, particularly at the federal level, to bring about improved corporate environmental performance. In chapter five, I contend that where environmental law does attempt to minimise the environmental impacts of corporate activity, it is undermined by competing legal obligations contained in Australian corporate law. What these three chapters confirm is that corporate law is very much at the heart of the environmental problems experienced in modern day Australia and represents a formidable hurdle in national efforts to achieve sustainable development.

This critical analysis is followed by chapter six which outlines a law reform agenda designed to integrate the principle of environmental protection into Australian corporate law. My suggested reforms consist of three strategic amendments to the *Corporations Act* 2001 (Cth) which are proposed as one vital set of measures to remedy the environmental and legal problems identified in the preceding chapters.

It is acknowledged that laws of the kind proposed are likely to spark a great deal of opposition, particularly from the corporate sector, which often views new forms of regulation as imposing yet another set of costs that will eat into company profits. Furthermore, conservative members of the legal fraternity and law makers might view the law reform agenda with a degree of scepticism. After all, it proposes to use corporate law as the vehicle to achieve an environmental objective, an idea that, until recently, was inconceivable. To counter such concerns, chapters seven through to ten identify a solid foundation for an Australian government to justifiably acknowledge that the law reform proposals represent a 'legitimate' legislative action worthy of implementation. Sources of this legitimacy include foreign legislative precedents, the fact the laws make economic sense, corporate law theory, Australia's commitment to the concept of sustainable development and, most importantly, the public interest.

Unfortunately, due to research constraints, this thesis can only tell half the story. As highlighted by the unfolding scandal involving **James Hardie Industries**, Australian corporate law is at the heart of a wider problem that has resulted in a corporate culture that tolerates human rights violations and disregards the legitimate rights of

employees and communities in which corporations operate.[3] The task of identifying amendments to Australian corporate law that may address this wider spectrum of so called 'outside' issues is a much needed exercise but falls outside the scope of the discussion that follows. [4]

But before commencing and in an effort to counteract the predictable attacks that will be made against this work, I would like to stipulate one thing 'loud and clear:' my thesis is not intended to be an "anti-corporate" tirade. At no point have I argued that corporations are intrinsically evil. Instead, I remind the reader that corporations are, in fact, *our* creations and that they have no lives, powers or capacities beyond what we give them through our laws, our institutions and our own hard work.[5] Accordingly, if corporations are environmentally irresponsible (which it is argued the majority are) we only have ourselves to blame. With this in mind, my thesis sets about examining the legal regime which we have established to create and govern *our* corporations in an effort to understand why they 'act' in the manner they do. Once this examination is complete, it then proposes and justifies a law reform agenda designed to ensure that profitable corporate ventures can still be conducted but in an environmentally sustainable manner.

[3] See, for example, the case studies outlining human right violations by Australian mining companies in McDonald I and Ross B, *Oxfam Community Aid Abroad Mining Ombudsman Annual Report 2001-2002.* Melbourne: Oxfam Community Aid Aborad, 2002. A further and well publicised example, is the 'disregard' Australian corporation, **James Hardie Industries** (a former asbestos manufacturer), has shown for the rights of the victims of asbestos related diseases to access compensation: See Jackson DF (Commissioner), *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (September 2004). The report found that James Hardie misled the public and knowingly under-funded a foundation it established to compensate future victims of asbestos-related diseases.

[4] Two of the proposed corporate laws, the mandatory sustainability reporting requirements and the proposed winding up provision, have been designed to accommodate these wider social issues. The proposed directors' duty could be adapted to include a positive obligation on corporate directors to consider human rights, employees and community interests in corporate decision making.

[5] Professor Joel Bakan, author of *The Corporation*, also reminds us of the fact that corporations are our creations: Bakan J, Note 2 at 164.

Chapter 1

A Looming Environmental Crisis

Australia, and indeed the world, is on the edge of a looming environmental crisis. We are depleting our natural resources at an unprecedented rate, the health of our biodiversity is in serious decline and the world's climate is changing. If not soon rectified, these problems stand to threaten the viability of a significant proportion of the human population.

In making such a statement, accusations will be immediately cast that this is nothing but a repeat of the standard alarmist message of 'doom and gloom' portrayed by the environmental movement. Significantly, this is not just the message of Greenpeace or the Australian Conservation Foundation. It is the underlying theme contained in numerous reports prepared by, or for, governments in Australia and around the world.

It is a problem that cannot be ignored and swept under the carpet simply because it is too large and disturbing to confront. Unless we can begin by acknowledging it and then seek to understand its causes, we stand little chance of formulating the solutions that will be required as part of the rectification process.

This first chapter is about the first step in this process: acknowledgement. It identifies some of the major environmental problems currently being experienced in Australia, placing them in their global context. Given that it would be possible to devote an entire thesis to this topic alone, this chapter serves as an introduction only. The environmental problems are divided into three groupings, although there is some cross referencing due to the fact that many of the problems are interrelated. The groupings have been chosen to provide the most appropriate summary and cross section of the difficult environmental issues Australia now faces. They include:

1. Unsustainable Human Settlements;
2. Declining Health of Biodiversity; and
3. Climate Change.

The final part of this chapter is the most important. It reminds us that there is some good news amidst the gloom and doom; it is not too late to implement the necessary measures that will one day mean that we can lead a healthy and productive life in harmony with nature.

1.1 Unsustainable Human Settlements

Human settlements (e.g. cities and towns) are where the majority of Australians live, work and enjoy their recreation. It is a common misconception to localise the environmental problems associated with cities and towns. For example, few people would think twice about the wider environmental impacts arising from a simple visit to the local supermarket. Yet the reality is, Australia's expanding human settlements with their high rates of consumption, waste and heavy transport use are having a detrimental environmental impact far beyond the boundaries of the urban environment.

1.1.1 Expanding Human Settlements

Australia's urban settlements are expanding to accommodate a growing population. In December 2003, Australia's population reached 20 million. This is around 2.5 million greater than in 1992 and over 16.2 million more than the 1901 population of 3.8 million.[1] For a country as large as Australia, this might not appear to be unsustainable population growth. But the problem is that Australia's population growth is primarily concentrated in the fragile coastal environment, a pattern of human settlement which accentuates the environmental impacts of its growing population. According to the Commonwealth Scientific and Industrial Research Organisation (CSIRO), more than 80% of Australia's population now resides within 50 km of the coast and between 1991 and 1996, 25% of Australian population growth occurred within 3km of the coast.[2]

Significant growth of human settlements in the coastal areas, particularly in New South Wales, southern Queensland and south-west Western Australia, is attributed to the declining health of the terrestrial and marine biodiversity in those areas.[3] This has been caused by a host of problems associated with human settlements including, loss of habitat through land clearing, creation of acid run-off through the disturbance of acid sulfate soils, degraded water quality resulting from stormwater run-off and litter, and the environmental impacts of marine transport.[4]

1.1.2 Unsustainable Consumption

It is now widely acknowledged that unsustainable consumption is one of the primary drivers of environmental degradation in Australia and around the world.[5] For those living a 'modern' lifestyle there is no escaping consumption. Even simple daily tasks, such as buying food from the supermarket, driving a car or turning on a light at home, involve the consumption of energy, water, soil, forests and other natural resources.

Environmental degradation occurs when consumption rates are such that the natural systems supplying the resources to produce goods and services are over utilised to the extent that they cannot regenerate, in the case of renewable resources, or are fully exploited, in the case of non-renewable resources. Such rates of consumption are often described as 'unsustainable' as they are inconsistent with the concept of 'sustainable development' or the related concept of 'ecologically sustainable development.'

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[1] Based on figures released by the Australian Bureau of Statistics (ABS): See ABS, *Year Book Australia 2004: Population* (2004) <http://www.abs.gov.au> (28 August 2004) and ABS, "20 Million Australians on 4 December 2003" (Media Release, 28 November 2003).

[2] CSIRO, *Climate Change and Australia's Coastal Community.* Aspendale, Victoria: CSIRO, 2002 at 1.

[3] Australian State of the Environment Committee, *Australia State of the Environment 2001*. Canberra: CSIRO Publishing on Behalf of the Department of the Environment and Heritage, 2001 at 96.

[4] Note 3 at 38.

[5] For a perspective of unsustainable consumption in Australia, see Australian Bureau of Statistics, *Year Book Australia 2002: Environment, The Influence of Lifestyle on Environmental Pressure* (2002) <http://www.abs.gov.au> (9 September 2003). For a global perspective, see Matthews E and Hammond A, *Critical Consumption Trends and Implications: Degrading Earth's Ecosystems.* World Resources Institute, 1999.

The most commonly cited definition of sustainable development is derived from the 1987 *Brundtland Report.* The report states that "sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[6] Australia's *National Strategy for Ecologically Sustainable Development,* released in 1992, defines the related concept of ecologically sustainable development as "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased."[7]

The Federal Government's *Australia State of the Environment Report 2001* (the "*SoE Report 2001"*), found that Australia's current rate of material consumption is unsustainable and among the highest in the world.[8] Australia generates material flows of almost 180 tonnes a person per year.[9] Material flows are the natural resources, goods, pollutants and wastes that flow through an industrial economy such as Australia's. The most environmentally damaging are often the hidden material flows (such as overburden, wastes from mineral processing operations, and soil loss from agricultural cultivation) which provide no economic benefit. Peter Newton of the CSIRO[10] concludes that hidden material flows, representing 70% of total material flows in Australia, provide no economic benefit while incurring enormous environmental cost.[11] The high rates of energy and water consumption in Australia (highlighted below) are typical of Australia's high consumption rates, which ultimately lead to environmental degradation.

1.1.2(A) Unsustainable Energy Consumption

According to the *SoE Report 2001,* Australia's energy use, which is currently one of the highest in the world, is increasing at unsustainable levels. Total energy use has doubled over the last 25 years and, unlike most other developed countries, is growing at a faster rate than the Gross Domestic Product (GDP).[12] High energy use is closely associated with the production of greenhouse gases responsible for global climate change. The projected environmental, social and economic impacts of climate change are enormous and are discussed at length later in this chapter.

1.1.2(B) Unsustainable Water Consumption

Despite being the driest inhabited continent on earth, Australia has the highest per capita consumption of water of any country.[13] The consumption of Australia's freshwater resources has increased dramatically in the last two decades. Between 1983-84 and 1996-97 national water consumption increased from 14,600 gigalitres

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[6] World Commission on Environment and Development (WCED), *Our Common Future* (The "Brundtland Report") (Oxford: Oxford University Press, 1987) at 43.

[7] Australian Government, *National Strategy for Ecologically Sustainable Development* (1992) <http://www.deh.gov.au/esd/national/nsesd/index.html#read> (20 August 2003).

[8] Note 3 at 99.

[9] Note 3 at 99.

[10] Peter Newton, Science Director, CSIRO Infrastructure Engineering.

[11] Newton P, "State of the Environment Report Card," *Built Environment Innovation & Construction Technology* (April 2002) 24 <http://www.cmit.csiro.au/innovation/2002-04/soe.htm> (8 September 2003).

[12] Note 3 at 100.

[13] Note 11.

(GL) to 23,300 GL. Of the water diverted in 1996-97, approximately 75% was used for irrigated agriculture (17,356 GL), 5% (1,238 GL) for other rural purposes such as stock and domestic uses, with the remaining 20% (4,673 GL) for urban and industrial purposes.[14] Australia's high level of water consumption has had a detrimental impact on the health of the nation's river systems and wetlands and contributed to the growing problem of salinity.

1.1.3 Waste

Unsustainable consumption has also created a problem with excessive urban waste. According to the *SoE Report 2001*, waste generation in Australia is at a high level with the per capita disposal rate for domestic waste at 620 kg/year, placing Australia second only to the USA among OECD countries. Of the solid waste produced, over 95% is disposed to landfill rather than recycled.[15]

Excessive waste involves the non-utilsation of valuable materials placing further pressure on the world's dwindling natural resources. When disposed to landfill, waste also brings with it a number of environmental impacts. These include the inefficient use of land that could otherwise be used for productive purposes, release of methane from the breakdown of organic waste, and greenhouse gas emissions through the transportation of waste to landfills, which are often located far from where the waste was generated.[16]

Not all waste is disposed of in landfill. The disposal of human waste in some areas still continues out to sea, evidenced by the fact that the waters of Sydney Harbour remain affected by sewer overflows.[17] Littering also has major environmental impacts. For example, many of the estimated 6 billion plastic shopping bags used by Australians each year are intentionally or unintentionally discarded into the surrounding marine and terrestrial environment. Plastic bags contribute to the death of marine animals, such as turtles and whales, which eat them mistaking the plastic for food.[18]

1.1.4 Increased Transport Use

Australia's increasing reliance on transport is contributing to the growing environmental impacts of human settlements. For example, a 63% increase in private transport use and road freight since 1981 has contributed to Australia's high levels of greenhouse gas emissions.[19] According to the Australian Greenhouse Office (AGO) *National Greenhouse Gas Inventory 2001*, the transport sector accounted for 14.2% of the nation's greenhouse emissions in 2001.[20]

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[14] Australian Bureau of Statistics, *Year Book Australia 2003: Special Article- Australia's Rivers* (2003) <http://www.abs.gov.au > (27 August 2003). One gigalitre equals one billion litres of water.
[15] Note 3 at 104.
[16] Australian Bureau of Statistics, *Year Book Australia 2003: Special Article- Construction and the Environment* (2003) <http://www.abs.gov.au> (27 August 2004).
[17] Note 3 at 106.
[18] Pearce K , "No Bags, Thanks," *ABC Online* (27 March 2003) <http://www.abc.net.au/science/features/bags/default.htm> (9 September 2003).
[19] Note 3 at 103.
[20] Australian Greenhouse Office (AGO), *National Greenhouse Gas Inventory 2001*. Canberra: AGO, 2003 at A-12.

Increased transport use, particularly private and road freight, has also increased the demand for road construction. Roads have a heavy impact upon biodiversity acting as a barrier to movements by many native species and facilitating the dispersal and movement of weeds and feral predators. Road construction can also lead to adverse changes in water flows and increased sedimentation in local waterways.[21]

1.2 The Declining Health of Australia's Biodiversity

The terms 'biological diversity' or 'biodiversity' refer to the variety of life on earth; the plants, animals, microorganisms, as well as the variety of genetic material they contain and the ecological systems in which they occur.[22] Australians are custodians to some of the most diverse ecosystems on earth. Our continent is one of the world's 12 biologically 'megadiverse' regions, with a high proportion of species that are found nowhere else.[23]

Australia's biodiversity, apart from its intrinsic value, is bound to our cultural, spiritual, economic and physical well-being. It provides us with our food, air, water and other natural resources. It has a central role in our cultural identity and is a place of deep spiritual significance, particularly for indigenous Australians. Put quite simply, without it we would not exist.

The health of Australia's terrestrial and marine biodiversity is in serious decline. This next section examines a number of key indicators that point to this declining health, whilst also highlighting the major threats to the health of biodiversity.

1.2.1. Terrestrial Biodiversity: Indicators of Declining Health

1.2.1(A) Threatened Ecosystems and Ecological Communities

According to the *Australian Terrestrial Biodiversity Assessment 2002* (the "*Biodiversity Assessment 2002*"), there are 2891 threatened assemblages in Australia. Of those, 2859 are threatened ecosystems and a further 32 other ecological communities.[24] Ten bioregions[25] have greater than 50% of ecosystems threatened. For example, the Cumberland Plains remain one of the most threatened regions in NSW, with only 13% of the native vegetation cover remaining.[26]

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[21] Australian Bureau of Statistics, *Year Book Australia 2003: Special Article- Environmental Impacts of Australia's Transport System* (2003) <http://www.abs.gov.au> (September 2003).

[22] National Land and Water Resources Audit (NLWRA), *Australian Terrestrial Biodiversity Assessment 2002 –Introduction* (2002) <http://audit.deh.gov.au/ANRA/vegetation/docs/biodiversity/bio_assess_contents.cfm> (28 August 2003).

[23] Department of Sustainability and Environment (Victoria), *Fact Sheet: Australia's Biodiversity*. Melbourne: Department of Sustainability and Environment, February 2003 at 4-21.

[24] Note 22 at chapter 4.

[25] The bioregions include: Central Mackay Coast, South Eastern Queensland, New South Wales North Coast, Nandewar, New England Tableland, Sydney Basin, South East Highlands, Darling Riverine Plains, Victorian Volcanic Plain and Murray Darling Depression

[26] Note 22 at Case Study- Cumberland Plains.

Woodlands, which are the most cleared vegetation group in Australia, are the most extensively threatened vegetation class that make up these threatened assemblages. Eucalyptus forests also account for a high number of the threatened ecosystems.[27] In all, approximately 982,000 square kilometres, or 13% of Australia's native vegetation, has been cleared or substantially modified since European settlement.[28] Most of this has occurred in the fertile well vegetated areas once rich in biodiversity.

A majority of Australia's river and wetland ecosystems are also experiencing problems, with significant degradation and continuing decline in ecological condition. Since European settlement it is estimated that about 50% of Australia's wetlands have been destroyed, with many others subject to major modification.[29]

With respect to Australia's rivers, over 85% of river length has been classified as having undergone some environmental modification, including catchment disturbance, reduced riparian vegetation, hydrological disturbance and increases in the load of suspended sediments and nutrients.[30] For example, large-scale storage and diversion of water for agriculture has reduced average natural flows from the Murray River system, one of Australia's most significant river systems, by around 75 per cent.[31]

1.2.1(B) Threatened and Extinct Terrestrial Species

Australia is experiencing an increase in the number of threatened and extinct terrestrial species. One of Australia's largest environmental Non-Government Organisations, the Australian Conservation Foundation ("ACF"), has gone as far as labelling it an "extinction crisis."[32] There are a number of indicators that support such a conclusion:

Mammals: According to the *Biodiversity Assessment 2002*, one third of the world's extinct mammals since 1600 AD are Australian, an unenviable record that "is unparalleled in any other component of Australia's biodiversity, or anywhere else in the world."[33] Of the mammals that remain, 85 Australian mammal species (representing about one third of Australian mammal species) are listed under federal environment legislation as threatened with extinction.[34]

Reptiles: Of Australia's 770 known reptile species, 50 species are listed under federal environment legislation as threatened with extinction.[35]

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[27] Note 22 at chapter 4.
[28] Australian Bureau of Statistics, *Year Book Australia 2003: Environment: Extent and Clearing of Native Vegetation* (2003) <http://www.abs.gov.au > (28 August 2003).
[29] Note 22 at chapter 3.
[30] Note 22 at chapter 3.
[31] Australian Conservation Foundation, *Help Save the Murray* <http://www.acfonline.org.au/asp/pages/document.asp?IdDoc=1012> (27 August 2003).
[32] Australian Conservation Foundation (ACF), *Australia Facing an Extinction Crisis.* Melbourne: ACF, 2003.
[33] Note 22 at chapter 6.
[34] Listed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) as threatened species as of 30 September 2003.
[35] Listed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) as threatened species as of 30 September 2003.

Plants: Of Australia's known plant species, 1347 species are listed as threatened with extinction. Sixty one plant species are already extinct.[36]

Frogs: Almost one in every seven frog species is now threatened with extinction.[37]

Birds: 50% of Australia's land-based bird species are predicted to become extinct by 2100, if current rates of land clearing and habitat decay continue.[38]

Freshwater Fish: About one-third of Australia's freshwater fish species are threatened with extinction.[39]

1.2.2 Threats to Terrestrial Biodiversity

There are many threats to Australia's terrestrial biodiversity. The Federal Department of Environment and Heritage recognises seven major threats, which include: invasive species, land clearing, salinity, hydrological changes to aquatic systems (such as through irrigation), over grazing of livestock, altered fire regimes and climate change.[40] There are, of course, other threats such as the pressures from expanding and unsustainable human settlements, which have already been outlined in part 1 of this chapter. Due to their sheer magnitude, the threats posed to biodiversity by land clearing and salinity warrant further discussion.

1.2.2 (A) Land Clearing

According to the *SoE Report 2001*, clearance of native vegetation remains the single most significant threat to biodiversity in Australia. Land clearing figures cited in the report show that during 2000, 564,800 hectares of native vegetation was cleared.[41] In 2001, ACF estimates that over 680,000 hectares of land was cleared. If broken down, this amounts to just over 77 hectares being cleared every hour, of every day of the year. Only four other nations in the world exceed this rate of clearing. These include Brazil, Indonesia, Sudan and Zambia.[42]

1.2.2 (B) Salinity

Salinity is caused by land clearing or through excessive irrigation both of which can bring water tables to the surface. This in turn mobilises salt in the soil and surface water, killing vegetation on land and causing significant damage to the health of rivers

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[36] Listed under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) as threatened species as of 30 September 2003.
[37] Note 23 at 4-22.
[38] Note 23 at 4-22.
[39] Note 23 at 4-22.
[40] Department of the Environment and Heritage, *The Biodiversity Toolbox* <http://www.ea.gov.au/biodiversity/toolbox/about-biodiversity.html> (27 September 2003).
[41] Note 3 at 73.
[42] Australian Conservation Foundation (ACF), *New Data Reveal Land Clearing 22% Worse*. Melbourne: ACF, 2002 at 3.

and wetlands.[43] The *Australian Dryland Salinity Assessment 2000* estimates that 5.7 million hectares are within regions mapped to be at risk or affected by dryland salinity and that within 50 years' time the area affected may increase to 17 million hectares. The Assessment also estimates that as much as 20,000 kms of Australia's river systems could be significantly salt affected within 50 years.[44]

1.2.3 Marine Biodiversity: Indicators of Declining Health

1.2.3 (A) Threatened Marine Ecosystems

Australia's marine area is one of the largest in the world, extending over about 16 million square kilometres.[45] As is the case with our terrestrial ecosystems, Australian marine ecosystems are also showing signs of declining health. There are a number of indicators that point to this conclusion:

Coral Reefs: Australian coral reefs show continuing signs of degradation. This degradation has primarily been caused by increased amounts of sediment and nutrient run-off (due to agriculture and expanding human settlements), recreational and commercial fishing,[46] and significant coral bleaching episodes linked to climate change.[47]

Estuaries: The *SoE Report 2001* reported on the health of 972 Australian estuaries. Almost half of these showed signs of degradation. This has been attributed to land use practices leading to increased sediment and nutrient runoff, and human settlement pressure. For the other estuaries, degradation was assumed to be light owing to low levels of human use.[48]

Coastal Habitat: Australia's coastal habitat, such as dunes, beaches and mangrove forests are poorly studied. The *SoE Report 2001* reported that localised destruction of mangrove forests is occurring due to changes to drainage systems and urban expansion.[49] Dunes and beaches are also exhibiting signs of pressure from urban development, particularly around population centres.[50]

1.2.3 (B) Threatened and Extinct Marine Species

Australian marine species are the 'poor cousin' of Australia's biodiversity. Compared to the data available on the status of terrestrial species, the status of marine species is

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[43] National Land and Water Resources Audit, *Australian Dryland Salinity Assessment 2000- Summary* (2001) < http://audit.ea.gov.au/ANRA/land/docs/national/Salinity_Summary.html> (27 August 2003).
[44] Note 43.
[45] Australian Bureau of Statistics, *Year Book Australia 2003: Environment, Coastal and Marine Environment* (2003) <http://www.abs.gov.au> (22 August 2003).
[46] Note 3, at 34.
[47] CSIRO, Australian Institute of Marine Science and CRC Reef Research Centre, *Final Report to the State of Queensland Taskforce on Climate Change Through the Department of Natural Resources and Mines: Global Climate Change and Coral Bleaching on the Great Barrier Reef*. Queensland: July 2003 at 1. Available online at <http://www.nrm.qld.gov.au/science/pdf/barrier_reef_report_1.pdf> (1 November 2004).
[48] Note 3 at 33.
[49] Note 3 at 32.
[50] Note 3 at 33.

relatively unknown. From the data that is available, a picture of declining health is still evident:

Coastal and Marine Bird Species: According to the *SoE Report 2001*, the populations of seabirds and shorebirds have declined since 1996 when last reported on. This decline has been attributed to a wide variety of sources, including urban development, airports, mining and minerals exploration, off-road vehicles, tourism at nesting sites, longline fishing, discarded fishing gear, and rats and feral cats on offshore islands.[51]

Cetaceans (whales, porpoises and dolphins): Of the forty-three species of cetaceans that have been recorded in Australian waters, only 12 species are 'possibly' secure in status and only one, the killer whale, is 'probably' secure. Threats to Cetaceans include: direct killing, entanglement and incidental take in fishing nets, boat and ship strike, competition for food with commercial fisheries, oil spills, plastic debris, habitat disturbance and acoustic pollution (such as that produced by seismic testing for oil and gas reserves).[52]

Marine Turtles: Of the seven species of marine turtles found worldwide, six species are found in Australian waters. Each of these six species is now listed as threatened under federal environment legislation. This 'threatened' status has been caused by a number of factors which include, bycatch in trawl nets, traditional hunting, deteriorating water quality, coastal development, marine debris (such as plastic), boat strike and loss of habitat. [53]

Commercial Fisheries*:* Almost all the major known fish, crustacean and mollusc resources in Australian waters are fully utilised. Some major species such as gemfish, southern bluefin tuna and shark have suffered serious biological depletion. This has been attributed to the increased level of commercial fishing activity, particularly over the last decade.[54]

1.3 Climate Change

1.3.1 Causes

Climate change is occurring as a result of human activity having caused higher concentrations of greenhouse gases in the earth's atmosphere leading to increased trapping of infrared radiation. As a result, the lower atmosphere has warmed and continues to warm, changing weather and climate.

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[51] Note 3 at 36.

[52] Bannister J et al, *The Action plan for Australian Cetaceans-Executive Summary* (1996) Department of the Environment and Heritage <http://www.ea.gov.au/coasts/species/cetaceans/actionplan/summary.html > (27 September 2003).

[53] Department of the Environment and Heritage, *Recovery Plan for Marine Turtles in Australia-Summary* (2003) <http://www.ea.gov.au/coasts/species/turtles/recovery/index.html> (29 September 2003).

[54] Australian Bureau of Statistics, *Year Book Australia 2003: Forestry and Fishing Resources-Fisheries Resources* (2003) <http://www.abs.gov.au> (22 August 2003).

The main greenhouse gases increasing in concentration due to human activities are carbon dioxide, methane, nitrous oxide, chlorofluorocarbons (CFCs), and ozone. Of these gases, carbon dioxide is said to be the biggest contributing factor to climate change. Most of the increase in carbon dioxide comes from the burning of fossil fuels such as oil, coal and natural gas, and from deforestation.[55]

There still remains some scepticism surrounding the reality and extent of climate change. For example, the Australian based 'Lavoisier Group' and the U.S. based 'Global Climate Coalition' claim that there are too many scientific uncertainties underpinning the climate change debate.[56] However, the consensus among a significant proportion of the international scientific community is that human induced climate change is a scientific reality. Arguably the most authoritative report on human induced climate change was released in 2001 by the Intergovernmental Panel on Climate Change ("IPCC"). In this report, its Third Assessment Report- *Climate Change 2001,* the IPCC concluded that observed changes in the world's climate can be attributed to human activity.[57] The report was compiled by over 600 climate experts from around the globe and was subject to a 'peer review' by 420 other experts in the field.

Australia's contribution to global climate change is significant. A study undertaken by the Australia Institute in 2002, based on official greenhouse gas data supplied by Australia to the United Nations, found that Australia's greenhouse gases were the highest per capita of any country. The study also found that Australia's emissions are the seventh highest among industrial countries, exceeded only by the USA, Japan, Russia, Germany, the United Kingdom and Canada.[58]

Using inventory accounting techniques for the Kyoto target, the Australian Greenhouse Office (AGO) *National Greenhouse Gas Inventory 2002* found that Australia's net greenhouse gas emissions in 2002 totalled 550.1 million tonnes (Mt) of CO_2-e. Of this total, carbon dioxide was the main greenhouse gas emitted, constituting some 69.9% of the aggregate greenhouse gas emissions. The two other major gases were methane (22.3%) and nitrous oxide (6.3%).[59]

1.3.2 Observed Climate Change and Sea-Level Rise in Australia

Climate change has already been observed in Australia. For example, Australia's continental average temperature has risen by about 0.7 °C from 1910-1999, with most of this increase occurring after 1950. The earth on average has warmed by about 0.6°C since 1900.[60] This warming trend has also been evident in records after 1999. In 2002, Australia recorded its highest ever average annual daytime maximum temperatures with temperatures 1.22ºC above the average. Globally, 2002 was the

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[55] CSIRO, *Greenhouse: Questions and Answers* < http://www.dar.csiro.au/publications/gh_faq.htm#8> (30 September 2003).

[56] For information on the Lavoisier Group, go to <http://www.lavoisier.com.au/>. For information on the Global Climate Coalition, go to <http://www.globalclimate.org/>.

[57] Intergovernmental Panel on Climate Change (IPCC), *Third Assessment Report: Climate Change 2001* (Synthesis Report). IPCC, 2001 at 4.

[58] Australia Institute, (Press Release, 7 August 2002).

[59] Australian Greenhouse Office (AGO), *National Greenhouse Gas Inventory 2002*. Canberra: AGO, 2004 at A11-12.

[60] CSIRO, *Climate Change Projections for Australia*. Aspendale (Victoria): CSIRO, 2001 at 1.

second warmest year on record.[61] While in 2003, Australia experienced its sixth warmest year on record, in a year that saw global mean temperatures climb to their third warmest since recent records commenced.[62]

Sea-level has also risen. In Sydney the sea-level has risen by an average of 1.38mm per year between 1897 and 1998. Globally, there has been an average rise in sea-level between 1 and 2mm per year over the past 50 years.[63]

1.3.3 Projected Climate Change and Sea-Level Rise in Australia

Extensive information on projected climate change and sea-level rise for Australia has been prepared by the CSIRO and other government agencies. The following is a summary of some of the major projections:

Temperature Rise: Annual average temperatures are projected to increase by 1ºC to 6ºC by 2070 through out most of Australia.[64] Changes in daily temperature extremes are also projected. For example, the number of summer days over 35ºC in Melbourne are projected to increase from 8 (present) to between 10 and 20 by 2070 and in Sydney, from 2 (present) to between 3 and 11 by 2070.[65]

Rainfall: Rainfall projections vary between regions and between seasons. For many areas of Australia (such as the south-west, south east and Queensland), rainfall is projected to decrease by 2070, particularly spring and winter rainfall. In other areas of Australia (such as the north and east), rainfall is projected to increase in the summer months by 2070.[66]

Sea-Level: Sea-level is projected to rise by between .09 metres and .88 metres by 2100 relative to 1990 levels. It is expected that the coast line will retreat horizontally 50 to 100 times the vertical sea-level rise. Accordingly, the projected sea-level rise will cause coastal recession of sandy beaches of between 4.5 metres and 88 metres by 2100.[67]

Extreme Weather: Climate change projections point to an increase in the severity and frequency of extreme weather events such as tropical cyclones,[68] floods,[69] droughts,[70] fires[71] and severe storms.[72]

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[61] Commonwealth Bureau of Meteorology, *Annual Australian Climate Summary 2002* (6 January 2003).
[62] Commonwealth Bureau of Meteorology, *Annual Australian Climate Summary 2003* (5 January 2004).
[63] CSIRO, *Climate Change and Australia's Coastal Communities.* Aspendale (Victoria): CSIRO, 2001 at 2.
[64] Note 60 at 2.
[65] Note 60 at 4.
[66] Note 60 at 4.
[67] Note 60 at 2.
[68] Note 63 at 2-3.
[69] Pittock B (ed), *Climate Change: An Australian Guide to the Science and Potential Impacts.* Canberra: Australian Greenhouse Office, 2003 at 146-147.
[70] Note 69 at 122-123.
[71] Note 69 at 65.
[72] Note 63 at 3-4.

1.3.4 The Impacts of Climate Change: Environmental, Social and Economic

Based on the above climate changes projections, there will be significant environmental, social and economic impacts in Australia:

***Environmental Impacts*:** The CSIRO has projected a number of environmental impacts arising from climate change. These include increased fire frequency, shrinking rainforest habitat, reduced biodiversity in shrinking alpine areas, less fresh water for our rivers and wetlands, and salt intrusion into our coastal wetlands (such as Kakadu) due to rising sea level.[73]

The Great Barrier Reef is also expected to be significantly impacted by climate change. A 2003 study undertaken by CSIRO, the Australian Institute of Marine Science and CRC Reef Research Centre predicted that climate change will lead to increased levels of coral bleaching, coral mortality and biodiversity depletion on the Great Barrier Reef that could have serious consequences for the reef's ecology, recreational use and economic activity.[74]

Social Impacts: Human society will not be immune from the impacts of climate change. Due to Australia's 'love affair' with living in the coastal region, there could be thousands if not hundreds of thousands of Australians displaced by coastal recession that is projected to be as much as 88 metres by 2100.[75]

Increasing temperatures are also likely to have a dramatic impact on the health of Australians, particularly the elderly. The number of deaths in France attributed to the 2003 European heatwave was estimated at 11,400 people.[76] Based on the high death rate arising from this event, there is likely to be a significant increase in the number of deaths during hotter and more extreme Australian summers.

Economic Impacts: The economic impacts of rising sea-level and extreme weather events associated with climate change, such as storms, bushfires and droughts, will be enormous. In Australia and internationally, the economic impacts of extreme weather events is already being felt. For example, worldwide economic losses due to natural disasters appear to be doubling every ten years, and have reached almost US$1 trillion

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[73] CSIRO, *Future Climate Change in Australia* (Poster Publication). Canberra: CSIRO, 2002.

[74] Note 47. Other reports provide an even grimmer outlook for the reef. For example, a 2004 report commissioned by WWF Australia and the Queensland Tourism Council concludes that coral cover on the Great Barrier Reef will decrease to less than 5% on most reefs by 2050 under even the most favourable assumptions. Reefs will not disappear but they will be devoid of coral and dominated by other less appealing species such as sea weed and blue green algae: See, Hoegh-Guldberg H and Hoegh-Guldberg O, *The Implications of Climate Change for Australia's Great Barrier Reef* . WWF Australia and the Queensland Tourism Industry Council, 2004 at 4. The report is available at <http://www.wwf.org.au/News_and_information/Publications/PDF/Report/reef_report_summary.pdf > (20 August 2004). According to the report (page 11), the task at hand is to minimise the temperature increase projected under climate change scenarios so that coral cover can become rehabilitated beyond 2050.

[75] Note 63 at 2.

[76] News Interactive, *Heatwave Death Toll Tops 11400* (7 September 2003) <news.com.au> (8 September 2003).

over the past 15 years. If current trends persist, the annual loss amounts will come close to US$150 billion within the next decade.[77]

The cost of rising sea-level is a little more difficult to calculate given the fact it is an event that is unprecedented in recent human history.[78] Despite this uncertainty, the projected sea-level rise that will inundate buildings and infrastructure in low lying areas of Australia's coastal cities, such as Adelaide, Brisbane, Darwin, Hobart, Melbourne, Perth, and Sydney will undoubtedly result in significant economic costs.[79] See chapter 8 for an extensive discussion on the economic costs arising from climate change.

1.4 A Global Trend

Australia's environmental problems represent a typical case study in a world that is experiencing significant environmental degradation and related social problems. The extent of the global environmental crisis was well summarised in the United Nations Environment Programme's (UNEP) *Global Environment Outlook 3,*[80] which reached the following conclusions:

i. Recent human impacts on the atmosphere have been enormous, with anthropogenic emissions a prime cause of environmental problems.
ii. Ground-level ozone, smog and fine particulates have emerged as significant health risks, triggering or exacerbating respiratory and cardiac problems, especially in vulnerable people such as children, the elderly and asthmatics.
iii. Over-exploitation of many of the surface water resources and great aquifers upon which irrigated agriculture and domestic supplies depend has resulted in more and more countries facing water stress or scarcity.
iv. The Earth's biological diversity is under increasing threat. The extinction rate of species is believed to be accelerating.
v. Land degradation continues to worsen, particularly in developing countries where the poor are forced onto marginal lands with fragile ecosystems and in areas where land is increasingly exploited to meet food and agricultural needs.
vi. Urban areas and megacities, infrastructure and municipal services are inadequate to accommodate millions of the urban poor. Urban air pollution and deteriorating water quality are having major health, economic and social impacts.
vii. An increase in the frequency and intensity of natural disasters over the past 30 years has put more people at greater risk, with the greatest burden falling on the poorest communities.

1.5 Some Good News: It's Not Too Late

The previous discussion paints a bleak picture. However, there is some good news: it is not too late to avert the looming environmental crisis and change our unsustainable ways. We are reminded of this fact by the IPCC, which stipulated in its Third

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[77] Innovest, *Climate Change and the Financial Services Industry: Module 1-Threats and Opportunities.* UNEP Finance Initiative, 2002 at 4. Available at <http://www.unepfi.net/cc/mod1_ccwg_unepfi.pdf> (30 September 2003).

[78] The last dramatic sea level rise occurred following the last glacial maximum 18,000 years ago. Following this event, sea levels rose 130 metres and stabalised 6,000 years ago.

[79] Coastal recession of between 4.5 and 88 metres (as described at Note 67) will result in the inundation of significant areas of Australia's low lying cities. See also chapter 8 for a more in depth discussion of the economic costs arising from projected sea level rise and other climate change events.

[80] UNEP, *Global Environment Outlook 3- Chapter 2* (2002) <http://www.unepfi.net/cc/mod1_ccwg_unepfi.pdf> (30 September 2003).

Assessment Report that "the greater the reductions in emissions and the earlier they are introduced, the smaller and slower the projected warming and the rise in sea levels."[81] In other words, the projected impacts of climate change will not be as severe as forecast if we take immediate and concrete measures to reduce our greenhouse gas emissions. The same assessment applies to other environmental problems, whether they relate to our unsustainable lifestyles and human settlements or the interlinked declining health of our biodiversity. For the most part, these environmental problems have not gone so far as to be irreversible.[82]

There have also been some areas of environmental improvement. In Australia, for example, air[83] and drinking water quality[84] have generally improved over the past decade, while the vast majority of Australians now also engage in some form of domestic recycling.[85] Several programmes are also under way which are helping to bring some of our threatened plants and animals back from the brink of extinction.[86] These environmental success stories, as isolated as they are, show it is not too late to implement the necessary measures that will one day mean we can lead a healthy and productive life in harmony with nature.[87]

1.6 Conclusion

Australia is on the edge of a looming environmental crisis. Our human settlements are unsustainable, the health of our biodiversity is in decline and our climate is changing. These environmental problems are not unique to Australia. They are reflective of a wider pattern of global environmental degradation. Fortunately, it is not too late to implement the necessary raft of measures that will avert this crisis.

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[81] Note 57 at 19.

[82] In some instances, irreversible damage has already been done. The extinction of species is an obvious example.

[83] Australian Bureau of Statistics, *Measures of Australia's Progress: Summary Indicators* (2005) <http://www.abs.gov.au> (25 April 2005).

[84] Australian Bureau of Statistics, *Year Book Australia 2003: Environmental Views and Behaviour* (2003) <http://www.abs.gov.au> (25 April 2005).

[85] As wasteful as Australians are, 97% of Australians still engage in some form of domestic recycling. See note 84.

[86] See, for example, the work of the CSIRO in Western Australia to reintroduce Burrowing Bettongs, Western Barred Bandicoots and the Greater Stick Nest Rat to mainland Australia: CSIRO, *Bringing Them Back From the Brink* (2000) <http://www.csiro.au/> (25 April 2005).

[87] Principle 1 of the *Rio Declaration on Environment and Development* states, "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

Chapter 2

Corporate Responsibility?

Having just identified the significant environmental problems we currently face as a nation and at the global level, the next logical question to ask is *who is responsible for causing them*? This is a confronting question. No one likes to play the 'blame game,' particularly when the responsibility for a degrading environment ultimately rests on the shoulders of each and every one of us.[1] However, it is an important question and one that must be answered if corrective solutions are going to be found.

This chapter demonstrates that corporations[2] play a significant role in contributing to the environmental problems already identified. The first part of the chapter examines the dominant role corporations play in our economy and how corporate activity is inextricably linked to environmental degradation. To highlight this link, the environmental impacts of corporations within five key industry sectors are examined: Electricity; Construction; Manufacturing; Agriculture; and Mining.

Before commencing, two important caveats must be stipulated. Firstly, it is acknowledged that corporations are not the sole cause of our environmental problems. There are many other contributing factors. Unsustainable population growth, government economic policy, weak and ineffective environmental protection laws, the consumption habits of individual consumers- to name just a few- also play a role in degrading the environment. Instead, it is argued that corporations play a significant role, not the sole role, in causing environmental degradation.

Secondly, there are some corporations (albeit a minority) working hard and making concerted efforts to minimise the environmental impacts of their activities. This positive development has been recognised in studies conducted into the environmental performance of the Australian corporate sector. One such study is the survey undertaken by 'Reputex,' which measures the reputation of Australia's 100 largest business enterprises with respect to environmental performance, governance practices, social impact and work place practices. The 2003 survey revealed that 12 companies were rated as having 'good' or 'satisfactory' performance on environmental issues. The top three corporations in this ranking included: **Visy Industries, Westpac** and **IBM Australia.** However, what this survey also revealed is that such companies are

[1] Ultimately, what we might recognise to be the root causes of our environmental problems, such as population growth, government policy and consumer habits, can be traced back to us- people. Even the environmental problems associated with corporate conduct are of our own design. After all, corporations are a human creation. Recognising where, why and how human expression impacts upon the environment is a necessary step in identifying the corrective solutions to remedy the problem.

[2] The term "corporation" is used to describe three broad types of corporate entity: public companies, proprietary (private) companies and state run corporations. As this chapter shows, corporations of all types and sizes are having a detrimental impact on the environment. Accordingly, unlike much of the literature dealing with the role and impacts of corporations within society, this thesis does not use the term "corporation" or "company" in the narrow sense to deal only with the large, publicly traded corporation.

in the minority. The remaining 88 enterprises were rated as having 'low' 'very low' or 'inadequate' environmental performance.[3]

2.1 The Corporate Economy: The Link to Environmental Degradation

2.1.1 The Dominance of the Corporation in Economic Activity

The economic dominance of the modern corporation has been a common theme in recent literature.[4] A study undertaken by the Washington based Institute for Policy Studies, *Top 200- The Rise of Corporate Global Power*,[5] provides one of the clearest insights into this dominance at the global level. After comparing the corporate sales of the largest 200 corporations as listed by *Fortune* in 1999 with the Gross Domestic Product (GDP) of the world's nations for the same year, the study found that of the 100 largest economies in the world, 51 were corporations while only 49 were countries. To put this in perspective, **General Motors'** sales, the largest corporation in the top 200 list, were bigger than the GDP of Denmark, **Daimler Chrysler** was found to be bigger than Poland and **IBM** was bigger than Singapore. The study also found that together the sales of the top 200 were the equivalent of 27.5 percent of world economic activity.[6]

Australian economic activity is also dominated by corporations. According to figures released in 2003 by the Australian Securities and Investment Commission (ASIC), there were 1.25 million corporations registered on its data base, an increase of 90,175 from figures released the year before.[7] Australian corporations are not only becoming more numerous, they also account for a significant proportion of Australian economic activity. This is reflected in the annual study undertaken by the *Business Review Weekly* (BRW) which lists the largest 1000 business enterprises operating in Australia and New Zealand. Of the 1000 enterprises in the 2003 BRW list, approximately 82% were either public or proprietary (private) companies. The remaining 18% were government organisations, a large proportion of which were state run corporations.[8] According to BRW, together the top 1000 enterprises obtained revenue during a 12

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[3] Reputex, *Social Responsibility Ratings 2003* (2003) <http://www.reputex.com.au/pdfs/RepuTex_DPS_9.pdf> (2 March 2004). The website publication includes the final ranking, information on the research groups and the methodology employed to undertake the survey.

[4] See, for example, Korten D, *When Corporations Rule The World* (London: Earthscan Publications,1995); and Bakan J, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004).

[5] Anderson S and Cavanagh J, *Top 200: The Rise of Corporate Global Power*. Washington: Institute for Policy Studies, 2000.

[6] Note 5 at 3.

[7] Australian Securities and Investment Commission (Press Release, 8 April 2003).

[8] Kavanagh J, *Running the Numbers: Revenue Snapshot* (20 November 2003) Business Review Weekly <http://www.brw.com.au/fearticle.aspx?docId=25202> (2 September 2004). Of the *BRW1000* enterprises for the year 2003, 273 were publicly listed companies, 223 were private companies, 328 were foreign-owned companies and 176 were government organisations (including state owned corporations). The figure of 223 private companies is subject to a small margin of error of up to 10 due to the fact it is difficult to determine what form of business structure has been adopted by a small number of enterprises within this grouping.

month period in 2002/03 which was equal to approximately 50% of Australia's total revenue. Furthermore, just 30 Australian publicly listed companies accounted for 14.7% of the nation's total revenue during this same 12 month period. [9]

2.1.2 The Link to Environmental Degradation

The dominance of corporations in the Australian and wider global economy has come at an enormous cost to the natural environment. This is because corporate activity, as currently undertaken, is inextricably linked to environmental degradation based on the following equation: *With an increase in corporate outputs (such as goods, services, construction and resource extraction) is a corresponding increase in environmental degradation.*

This equation is supported by numerous studies confirming that due to our current unsustainable production practices, economic growth is 'coupled' with increased environmental degradation, such as greenhouse gas emissions, loss of biodiversity and the depletion of natural resources.[10] In Australia, for example, it is estimated that each dollar increase in GDP requires the consumption of 37 litres of water, three square metres of land disturbance and 10 megajoules of fossil energy.[11] This has prompted a description of Australia's economy as "hot, heavy and wet," one that requires large amounts of energy, material and water to produce a unit of GDP.[12]

Renowned author and architect, Michael McDonough describes the environmental consequences of our current system of production by asking us to imagine that we had

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[9] Ruthven P, *Perspective: Strange Days Indeed* (20 November 2003) Business Review Weekly <http://www.brw.com.au/fearticle.aspx?docId=25201> (2 September 2004).

[10] For an example of an international study, see OECD General Secretariat, *Indicators to Measure Decoupling of Environmental Pressure from Economic Growth* (SG/SD(2002) 1/final). Paris: OECD, 2002. This study found that while some progress has been made in 'decoupling' environmental degradation from GDP across a number of indicators, much of this progress has been limited to a relative (partial) decoupling rather than absolute decoupling. For an example of figures relating to the coupling of economic growth and environmental degradation in Australia, see Note 11.
Some economists, particularly proponents of the environmental Kuznets curve (EKC), have argued that developed nations have already managed to or will soon decouple economic growth from environmental degradation. EKC is a hypothesised relationship between environmental degradation and income per capita. In the early stages of economic growth, environmental degradation increases. As income per capita rises, the trend reverses to a point where at high-income levels, economic growth actually leads to environmental improvement. However, the EKC model has been severely criticised in recent years. Critics of the model point to the continuing environmental degradation in developed nations (Australia being a case in point) and the fact the EKC has never been shown to apply to all pollutants or environmental impacts: See Stern D, "The Environmental Kuznets Curve" (June 2003) *Internet Encyclopaedia of Ecological Economics* <http://www.ecologicaleconomics.org/publica/encyc_entries/Stern.doc> (16 May 2004).

[11] Foran B, *Future Dilemmas: A Reply to the Critics* (2003) <http://www.actuaries.asn.au/PublicSite/pdf/horizonpaper030827reply.pdf> (11 November 2003). The data was obtained through modelling undertaken for the CSIRO and published in Foran B and Poldy F, *Future Dilemmas: Options to 2050 for Australia's Population, Technology, Resources and the Environment* (Canberra: CSIRO, 2002). See also Green J, "Australia's Fifty Year Horizon," (2003) 84 *Actuary Australia* at 11.

[12] Krockenberger M et al, *Natural Advantage: A Blueprint for a Sustainable Australia-Introduction* (2000) <http://www.acfonline.org.au/na/asp/pages/document.asp?IdDoc=27> (11 November 2003).

been given the task of designing the industrial revolution- retrospectively. If based on its negative consequences, he believes the assignment would have to read something like this:

> Design a system of production that
>
> - Puts billions of pounds of toxic material into the air, water and soil every year
> - Produces some material so dangerous they will require constant vigilance by future generations
> - Results in gigantic amounts of waste
> - Puts valuable materials in holes all over the planet, where they can never be retrieved
> - Requires thousands of complex regulations-not to keep people and natural systems safe, but to keep us from being poisoned to quickly
> - Measures productivity by how few people are working
> - Creates prosperity by digging up or cutting down natural resources and then burning them or burying them
> - Erodes the diversity of species and cultural practices.[13]

McDonough' s observations are particularly troubling when one considers that the system of production he describes is the basis of a global economy which has more than quintupled in size since 1950.[14]

Returning to the equation outlined above. Considering then that economic growth is presently 'coupled' with environmental degradation, it follows that corporations (which account for a significant proportion of Australian and global economic activity) play a major role in contributing to the massive environmental impacts that go 'hand in hand' with a growing economy. Put simply, the present methods employed by corporations to produce their products and services are inextricably linked to environmental degradation.

To illustrate this link within an Australian context, five Australian industry sectors are profiled, namely: electricity, construction, manufacturing, agricultural and mining. These sectors have been chosen to explore the environmental impacts of corporations across a diverse range of industries.

In profiling these sectors a number of themes emerge. First, it is evident that the environmental impacts of corporations make a significant contribution to the environmental problems outlined in chapter 1. Second, the environmental impacts of corporate activity do not necessarily involve a breach of the law. They, in most instances, arise from the lawful pursuit of a business venture. Third, many of the environmental impacts of corporate activity are inherent in the design of goods and services and emerge only when the goods or services are utilised by consumers. Fourth, in many instances, corporations could take alternative action that would eliminate or minimise the environmental impacts of their actions. Finally, it is not just high profile corporate 'incidents,' such as oil spills and industrial accidents, that are environmentally damaging. Activities that many of us accept as normal corporate undertakings are systematically degrading the natural environment.

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[13] McDonough W and Braungart M, *Cradle to Cradle* (New York: North Point Press, 2002) at 18.

[14] United Nations Environment Program, *Global Environment Outlook 2000: Social and Economic Background* (1999) <http://www1.unep.org/geo-text/0026.htm> (12 November 2003).

2.2 Electricity Sector

The electricity sector refers to enterprises involved in the generation, transmission and retail of electricity. Of the largest 15 Australian electricity enterprises operating in 2003, five were either private or public companies, with state run corporations constituting the other ten enterprises. (See Appendix 1 for a list of the largest 15 electricity enterprises)

Environmental impacts commonly associated with the activities of electricity companies in Australia include:

(i) Clearing of extensive areas of native vegetation for transmission lines, which, in some instances, results in the loss of habitat for threatened terrestrial species;[15]

(ii) The detrimental impact of hydro electricity on Australian river systems, particularly within Tasmania, the Australian State with the highest proportion of hydro electricity production;

(iii) The environmental impacts, such as bird strike, noise, vegetation clearance and ascetic impacts, arising from wind farms in coastal areas and on rural landscapes;[16]

(iv) The threats posed to marine biodiversity from electricity transmission cables that pass through the marine environment;[17] and

(v) The greenhouse gas emissions emitted by coal fired electricity production in Australia and the significant contribution such emissions make to global climate change.

Of the abovementioned impacts, it is the greenhouse gas emissions from coal fired electricity production that arguably represents the most significant environmental impact associated with the Australian electricity industry.

2.2.1 Coal Fired Electricity Generation and Climate Change

Despite the availability of renewable energy alternatives, such as wind and solar, approximately 84% of Australia's electricity needs are met through coal fired electricity production, making Australia one of the largest coal burning nations on earth.[18] An unfortunate consequence of coal combustion is that it is the direct source of approximately 20% of global greenhouse gas emissions. [19]

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[15] For example, the proposed clearing associated with the installation of transmission lines for the Musselroe wind farm in Tasmania: See Tasmanian Conservation Trust, "Musselroe Wind Farm" (June 2003) 288 *The Tasmanian Conservationist.*

[16] See environmental impacts of Musselroe wind farm, Note 15.

[17] See, for example, marine impacts arising from the proposed Basslink project outlined in Environment Australia, *Environment Assessment Report: Basslink Electricity Interconnector Between Victoria and Tasmania.* Canberra: Environment Australia, 2002. The report can be viewed online at <http://www.deh.gov.au/assessments/epip/notifications/basslink/assessmentreport.html > (25 November 2003).

[18] Dissendorf M, *Australia's Polluting Power: Coal Fired Electricity and its Impact on Global Warming.* Sydney: WWF Australia, 2003 at 1.

[19] Knapp R, (Chief Executive to World Coal Institute), "A Positive Contribution From Coal" (Speech to World Bank, 7 April 1999).

A report released by the World Wildlife Fund ("WWF") in 2003, *Australia's Polluting Power: Coal Fired Electricity and its Impact on Global Warming*[20] ("the WWF Report"), highlights the contribution Australia's coal fire power stations make to global climate change. The WWF Report calculates that about 97% of the Australian electricity sector's greenhouse gas emissions (which in 2002 amounted to 33% of Australia's total net emissions)[21] come from Australia's 24 coal-fired power stations.[22]

The ownership of these power stations can be traced to 23 companies, which are identified in Appendix 2. Based on the calculations contained in the WWF Report, these 23 companies are therefore directly responsible for approximately one-third of Australia's greenhouse gas emissions. To place this in perspective, the emissions arising from the activities of this small group of companies are equivalent to the annual emissions from about 40 million cars and are more than the total emissions from nations such as Argentina, Belgium, Greece, Ireland, Israel, Malaysia and Pakistan.[23]

Apart from corporations that specialise in electricity generation, the corporate ownership list of Australia's coal fired power stations includes a prominent financial corporation, the **Commonwealth Bank of Australia** (see Appendix 2). This provides an example of how corporations in the seemingly low impact financial sector can have serious environmental impacts when their investments are targeted at high impact industries.

2. 3 The Construction Sector

The Construction sector includes an extensive array of enterprises engaged in the construction of residential and commercial buildings. The sector incorporates the infrastructure associated with air, sea and road transportation, telecommunications, mining and energy, whilst also encompassing a multitude of associated preparation, fabrication, installation, beautification, and fixing and finishing trades and services. Of the largest 20 Australian construction enterprises in the 2002/2003 financial year, all but two were either public or private companies. (See Appendix 3 for a listing of the top 20 construction enterprises)

The environmental impacts of the Australian construction sector have dramatically increased over the past decade. This can be attributed in part to a residential development boom that has seen an increase in the number and size of buildings being constructed by construction companies. During the five years ending June 2001, there were approximately 717,000 residential dwelling approvals in Australia, representing a 10% increase from the level of approvals in 1996.[24] This growth continued in 2002 to the point where approvals for the construction of residential dwellings outstripped

[20] Note 18.
[21] Australian Greenhouse Office (AGO), *Fact Sheet 1, National Greenhouse Gas Inventory 2002 - Energy: Stationary Sources and Fugitive Emissions.* Canberra: AGO, 2004 at 1.
[22] Note 18.
[23] Note 18.
[24] Australian Bureau of Statistics, *Year Book Australia 2003: Special Article- Construction and the Environment* (2003) <http://www.abs.gov.au> (25 October 2003).

actual demand.[25] Furthermore, although the average number of people in an Australian household declined from 3.3 persons in 1976 to 2.6 persons in 1996, the average floor area of new houses increased by 28 % over the last 15 years.[26]

The rise in the number and size of the buildings being constructed in Australia has resulted in increased material and energy consumption by the sector, higher greenhouse gas emissions, increased waste and the expansion of human settlements into fragile ecosystems.

2.3.1 The Construction Sector: A Driver of Unsustainable Consumption and Waste Production

2.3.1 (A) Material Consumption and Waste

The construction sector is one of the major drivers of Australia's unsustainable consumption, which, as already outlined in chapter 1, is among the highest in the world and results in significant environmental degradation. In one year alone (1997), the Australian construction sector consumed approximately 98 million tonnes of construction materials. If broken down, this amounted to an average of just over 5,200 kg per person. In any given year, the sector consumes 55% of all Australian timber products, 27% of all plastic products and 12% of iron and steel.[27]

The harvesting and production of many materials used by the construction sector has a detrimental impact on biodiversity, including the extinction of species and the destruction of natural ecosystems.[28] For example, a large proportion of the forest products used by the construction sector are produced by **Gunns Limited**, Australia's largest producer of hardwood timber products. This company has been criticised by Australian environmental groups for its continuing practice of logging old growth forests in Tasmania, inappropriate logging on steep hill sides, the laying of 1080 poison to kill native wildlife that eat re-growth trees and for breaches of the Tasmanian Forestry Code of Practice.[29]

Due to its high material usage, the construction sector also produces a high proportion of the nation's waste. It is estimated that construction and demolition of buildings contributes 30-40% of the Australia's waste equating to about eight million tonnes nationwide, or 430 kg/year per capita.[30]

2.3.1(B) Energy Consumption and Greenhouse Gas Emissions

Direct energy consumption by the construction sector remains relatively low, accounting for a very small proportion of the nation's total energy use.[31] However,

[25] Crawford T, Heffernan J and Ryan S, *Economic Outlook 2002*. St George Economics, October 2002 at 2
[26] Note 24.
[27] Note 24.
[28] Note 24.
[29] See The Wilderness Society, *Gunns Limited: Australia's Biggest Destroyer of Native Forests* <http://www.wilderness.org.au/campaigns/corporate/gunns/whatisgunn/> (17 November 2003).
[30] Note 24.
[31] Note 24. In 1997/98 it amounted to .5% of national energy use.

because of the design and construction methods employed by the sector, Australian buildings become high consumers of *embodied* and *operating* energy.

Embodied energy is the energy consumed by all the processes associated with the production of a building such as the acquisition of natural resources, the manufacturing and transportation of construction materials, and all other activities leading to the completion of building. The energy embodied in the current Australian building stock is equal to approximately 10 years of the total energy consumption for the entire nation.[32]

Operating energy is the energy consumed in maintaining and using a building throughout its life span. Examples include the consumption of energy for heating and air conditioning. The operating energy for Australian buildings, particularly residential buildings, is very high. Electricity consumption in Australian households accounts for about 11% of the national end user energy consumption.[33] Much of this energy is used for household heating and cooling made inefficient by residential buildings constructed with poor insulation. The Australian Bureau of Statistics estimates that 38% of Australian residential buildings have been constructed without wall or ceiling insulation.[34]

High embodied and operational energy use attributed to the construction sector, has also significantly contributed to Australia's greenhouse gas emissions. For example, greenhouse gas emissions from the extraction, harvesting, processing and transportation of materials used in the construction industry as well as those produced by the industry itself, produced 7.1% of total indirect greenhouse gas emissions in 1994-95.[35]

2.3.2 The Construction Sector: Expanding our Human Settlements

The most visible environmental impact of construction companies has arisen from their role in the expansion of human settlements, particularly into fragile coastal environments. As already highlighted in chapter 1, the environmental impacts of expanding human settlements on the terrestrial and marine biodiversity of the coastal region have been considerable.

The Port Hinchenbrook tourist and residential development at Oyster Point, Queensland (the Hinchenbrook Development) undertaken by **Cardwell Properties Pty Ltd**, provides a high profile example of the environmental impacts often associated with corporate development projects in coastal regions. Commenced in 1998 and located on the edge of the Great Barrier Reef World Heritage Area, the Hinchenbrook Development presently includes a boat marina, convention centre, a

[32] Note 24.
[33] Australian Bureau of Statistics (ABS), *Year Book Australia 2003: Energy, Australian Energy Use Allocated to Final Use* (2003) <http://www.abs.gov.au> (5 November 2003). According to ABS calculations (based on 1994/95 data), 53% of energy use in Australia (if allocated to the end user) was consumed by Australian households. Twenty one per cent of this was for electricity in households, meaning that household electricity consumption amounts to approximately 11% of all energy use.
[34] Note 24.
[35] Note 24.

major tourist/hotel complex with associated shops bars and restaurants, and residential allotments.

Prior to its commencement, the Hinchenbrook Development sparked enormous local and international opposition. A reflection of the high level of concern was a letter published in *The Australian* calling for governments to halt the project, which was signed by internationally acclaimed scientists and environmentalists including David Suzuki, Sir David Attenburough, David Bellamy and Tim Flannery.[36] The development's environmental impacts and the inadequacy of the approval processes also sparked an unsuccessful Federal Court challenge by conservationists to block the development[37] and a subsequent Federal Parliamentary inquiry conducted by the Senate Environment, Communications Information Technology and the Arts Committee.[38] Possible environmental impacts of the development investigated in the course of the Parliamentary inquiry included, inter alia:[39]

i. possible impacts on the marine biota from acid runoff (including possible mobilisation of heavy metals);
ii. impact on seagrass beds from dredging, removal of mangroves, and changes to the foreshore;
iii. impact on dugongs from possible decline in seagrass (a source of food) and from likely increase in boat strike resulting from more boating in the area;
iv. impact of a large waterfront development on the aesthetic and wilderness values of the Hinchinbrook Channel and abutting Great Barrier Reef world heritage area; and
v. impact of increased tourism on the wilderness values of the neighbouring island national parks.

The Senate Committee concluded that the environmental impacts of the Hinchenbrook Development were not adequately assessed prior to approval for the development having been granted. [40] In the words of the Committee's chairperson, the management of development proposals at Oyster Point was "a tragedy of errors, the results of which have been unsatisfactory to all concerned."[41]

Despite the controversy and environmental impacts of the first stage of development, in October 2003 Cardwell Properties referred an application to the Federal Environment Minister, under the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the *EPBC Act*"), seeking approval for a second stage of the Hinchenbrook Development. The second stage includes, inter

[36] Nowakowski S, *Hinchenbrook Island: A Sacred Wilderness* (Cairns: Little Ramsay Press, 2003) at 97.
[37] *Friends of Hinchinbrook Society Inc. v. Minister for Environment and others* [1997] 55FCA (14 February 1997), 69 FCR 28; and on appeal, *Friends of Hinchinbrook Society Inc. v. Minister for Environment and others* [1997] 789 FCA (6 August 1997), 77 FCR 153.
[38] Senate Environment, Communications Information Technology and the Arts Committee, Parliament of Australia, *Majority Report: The Hinchenbrook Channel Inquiry* (1999). Available online at < http://www.aph.gov.au/Senate/committee/ecita_ctte/hinchinbrook/report/c04.htm> (19 October 2003).
[39] Note 38 at chapter 4.
[40] Note 38 at chapter 6.
[41] Note 38, Chair's Foreword.

alia: a 16 hectare artificial lake, 291 residential housing lots, with associated housing and access roads, a 100 room motel, and an 18-hole golf course.[42]

This new application is far from unique. Within the 90 day period between 1 August 2003 and 31 October 2003, which includes the date of Cardwell Property's application, there were no less than 11 separate *EPBC Act* applications (referrals) by corporate developers seeking approval to undertake major new tourist or urban developments in coastal areas. Together these referrals consisted of: 1905 residential housing lots, 2751 self contained units/villas, four multi-unit tourist hotel complexes, two marinas, four commercial shopping precincts, six artificial lakes, two 18 hole golf courses, associated roads, car parks and other infrastructure needs.[43]

Due to the limited regulatory reach of the *EPBC Act*, these referrals account for only a small proportion of proposed coastal developments arising from this 90 day period.[44] They do, however, provide a conservative indication of the speed and extent of development undertaken along the length of the Australian coast line by corporate developers, which cumulatively is having a significant impact on the terrestrial and marine biodiversity of the coastal region.

2.4 The Manufacturing Sector

The manufacturing sector is comprised of enterprises involved in the manufacturing of a diverse range of products such as building materials, petroleum and chemical products, machinery and equipment, wood and paper, food, beverages and tobacco. The ten largest Australian enterprises (for the 2002/2003 financial year) in each of the four manufacturing sub-sectors that manufacture: (1) building materials, (2) wood and paper, (3) food, beverages and tobacco, and (4) machinery and equipment were either private or public companies. (See Appendices 4-7 for a listing of the ten largest corporations in each of these sub-sectors)

2.4.1 The Manufacturing Sector: A Driver of Unsustainable Consumption

Like the construction sector, the manufacturing sector is a major driver in Australia's unsustainable consumption habits. In the production of goods for Australian and foreign consumers, the manufacturing sector consumes vast amounts of materials,

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[42] Title of Referral: Mr K Williams & Cardwell Properties Pty Ltd/Tourism, recreation and conservation management/Cardwell/QLD/Port Hinchinbrook Resort Stage II
Date Received: 09 Oct 2003 Reference Number: 2003/1246.

[43] The referrals were for the 90 day period between 1 August 2003 and 31 October 2003. They included referrals: 2003/1262, 2003/1256, 2003/1249, 2003/1246, 2003/1216, 2003/1183, 2003/1179, 2003/1160, 2003/1149, 2003/1146, 2003/1144. The number of residential dwellings was not supplied in two of the referrals (including a major development in Darwin Harbour), so it represents a conservative account of the cumulative size of the developments.

[44] This is because the *EPBC Act* only requires developments that may have a "significant impact" on a matter of national environmental significance to be referred for approval. The matters of national environmental significance include: world heritage properties (s 13), declared Ramsar wetlands (s 16), listed threatened species and communities (s 18), listed migratory species (s 20), nuclear actions (s 21), marine environment (s 22) and Commonwealth land (s 26). Section 11 of *the EPBC Act* provides a summary of how the approval provisions operate. See chapter five for a discussion on this federal act.

energy and water and is a heavy user of road transport. Such production practices have significant environmental impacts from the resulting waste, greenhouse gas pollution and land disturbance.[45]

Due to the diversity of companies in the manufacturing sector, it is difficult to provide an overall picture of the sector's consumption rates and greenhouse gas pollution. Despite this, some relevant data are available. For example, the Australian Bureau of Statistics estimates that the sector directly accounts for over a third of the nation's energy use and is the sixth highest water user in Australia.[46] Furthermore, in 2001 the sector as a whole directly contributed 6.5% of the nation's greenhouse gas emissions.[47]

Instead, in order to highlight the environmental impacts of manufacturing companies, a case study is presented below setting out the manufacturing process involved in producing a packet potato of chips. By highlighting the high level of material consumption and energy and transport use involved in the production of a simple packet of chips, an appreciation for the environmental impacts arising from the production of larger and more complex goods, such as motor vehicles, electrical items and building materials, can also be gained.

Case Study: Kettle Chips

Outline of manufacturing process for *Kettle Chips* as described by the Power House Museum, Sydney. *Kettle Chips* are manufactured in Shepparton Victoria by **Arnotts Snack Foods**, a wholly owned subsidiary of the U.S based **Campbell Soup Company**.

i. Kettle Chips are manufactured using only Atlantic potatoes that are less than seven days out of the ground. The company buys potatoes from different growers along the east coast of Australia, depending on the season. This ensures that chips look and taste the same all year round. Trucks transport the potatoes to Shepparton, Victoria.
ii. Cheetham Salt in Price, South Australia, supplies the salt. It is extracted from sea water in shallow ponds using the sun's heat. It's then washed with brine, spin-dried and dried again with natural gas heating. It's crushed, sieved and trucked to Shepparton.
iii. Sunflower seed provides the oil for frying. High in mono-unsaturated fats, the oil makes the chips last longer. It is extracted in Newcastle, NSW, refined in Sydney, and transported to Shepparton.
iv. The production of the packaging for the chips involves a process in which two layers of polypropylene film sandwich a layer of aluminium and another of ink in between.

[45] Australian Bureau of Statistics (ABS), *Year Book Australia 2003:Feature Article- Manufacturing and the Environment* (2003) <http://www.abs.gov.au > (25 November 2003).
[46] Note 45.
[47] Based on calculations contained in Australian Greenhouse Office (AGO), *National Greenhouse Gas Inventory 2001*. Canberra: AGO, 2003 at B87. In 2001, the manufacturing sector (less construction and non energy mining) accounted for 35 MT Co2-e or 6.5% of the national net green house gas emissions.

v. The polypropylene film is made from a gas, which in turn comes from oil. Shorko Australia in Wodonga, Victoria, supplies the film, which is economical, lightweight and doesn't react with food or chemicals. One layer of film is printed in Melbourne, the other is metallised in Sydney. The two films are then fused by the printer Finewrap Australia in Melbourne.

vi. The inks for printing are made in Melbourne. The nitro-cellulose base comes from India or China. The pigments come from Europe and the U.S. The alcohol is made from sugar by CSR.

vii. Making the aluminium contained in the packaging requires large amounts of energy from coal, oil and gas. The aluminium comes from bauxite, which is mined, crushed and dissolved in caustic soda. The aluminium oxide or alumina that forms is filtered, washed and processed to make aluminium. Kettle imports Italian aluminium that's probably made with some Australian bauxite.

viii. Electricity for all the processes is generated by burning coal mined in Australia [Australia's primary source of greenhouse gas pollution]. The fuel for all the trucks used in the transportation is diesel, which is refined from oil in Sydney, NSW; Melbourne and Geelong, Victoria; Port Augusta, South Australia; and Brisbane, Queensland.

ix. The cardboard cartons that protect the chips during transportation are made by Amcor Fibre Packaging, Melbourne, from 100% recycled paper and cardboard.

Source: Power House Museum (Sydney), *Ecologic Online* < http://203.10.106.20/ecologic/cycles.htm> (10 November 2004).

This case study is provided to focus attention on the environmental impacts of the manufacturing process itself. However, in many instances the environmental impacts of goods produced by manufacturing companies are not evident until the goods are later consumed or utilised. One notable example is the greenhouse gas emissions emanating from motor vehicles produced by car companies. In 2002, Australian passenger cars contributed 8% of national greenhouse gas emissions.[48]

Car manufacturers have been criticised in Australia and abroad for their failure to adopt technology that would reduce or eliminate the greenhouse emissions that are produced by motor vehicles. The United States based environmental NGO, the Sierra Club, typifies such criticism. It argues that the technology exists to create better fuel economy but is not implemented by the large car manufacturers. It singles out the **Ford Motor Company,** which is among the largest car manufacturers operating in Australia,[49] for special criticism. It does this by comparing the fuel economy of the Ford *Model T* (released 1908), which could travel an average 25 miles per gallon of petrol, with the average Ford car and truck manufactured in 2003 that now travels an

[48] Australian Greenhouse Office (AGO), *FACT Sheet 2: Energy: Transport –National Greenhouse Gas Inventory 2002.* Canberra: AGO, 2004 at 1.

[49] The Ford Motor Company operates in Australia through its subsidiary, Ford Motor Company of Australia Ltd. It is listed as the third largest enterprises in the sub sector, "Manufacturing: Machinery and Equipment" by BRW in the 2003 BRW 1000 list. Refer to Appendix 7.

average 22.6 miles per gallon of petrol.[50] In other words, a Ford *Model T* could go further on a tank of petrol than the average Ford vehicle of today. Despite this lack of innovation in fuel economy, the Ford Motor Company still celebrated its global centennial anniversary in 2003 with the headline "100 Years of Automobile Achievement."[51]

2.5 The Agricultural Sector

The term 'agricultural sector' is used to refer to the group of enterprises engaged in the breeding, keeping or cultivation of animal or plant life, except forest trees and marine life. The Australian agricultural sector is no longer the sole domain of the family farm. Corporations now generate an increasing proportion of agricultural income. This is reflected in figures published in the *Australian Farm Journal*[52] which showed that in 2002:

i. Of the largest ten private Australian landholders, nine were companies. These companies controlled 7.3% of Australia's land mass;
ii. Of the largest ten Australian wool growers, nine were companies;
iii. Of the largest six Australian cotton growers, all were companies. These growers accounted for 18% of Australia's cotton crop;
iv. Of the largest seven Australian beef producers, all were companies
v. Of the largest ten Australian crop producers, eight were companies;
vi. Medium, large and very large farms (where corporate farming operations are predominant) generated 76% of national farm income;

Please refer to Appendix 8 for the list of company names and statistics.

2.5.1 The Agricultural Sector and Its Impacts on Terrestrial Biodiversity

Approximately 456 million hectares, or 59% of land in Australia, are used for agriculture making it the dominant form of land use.[53] The extensive reach of the agricultural sector across the Australian landscape has had a significant impact on the health of Australia's biodiversity.

As already stated in chapter 1, the Department of Environment and Heritage recognises seven major threats to Australian terrestrial biodiversity.[54] Four of these threats, the threats posed by land clearing, salinity, over grazing and hydrological

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[50] Sierra Club, *Driving Up the Heat: Putting the Pressure on Ford Motor Company to Build Clean Cars* (2003) < http://www.sierraclub.org/globalwarming/fordaction/ford_fact_sheet.pdf> (25 November 2003). These figures are based on the average fuel consumption of U.S made Ford vehicles.

[51] Ford, <www.ford.com> (25 November 2003).

[52] Department of Agriculture, Fisheries and Forestry Australia, *A Summary of the Top Producers and Landholders in Australian Primary Production Major Industry Sectors* (2002) <http://www.agrifood.info/members/stats/top2002.htm> (6 November 2003).

[53] Australian Bureau of Statistics (ABS), *Year Book Australia 2003: Feature Article- Environmental Impacts of Agriculture* (2003) <http://www.abs.gov> (10 November 2003).

[54] Department of the Environment and Heritage, *The Biodiversity Toolbox* <http://www.ea.gov.au/biodiversity/toolbox/about-biodiversity.html> (27 September 2003). The seven threats include: invasive species, land clearing, salinity, hydrological changes to aquatic systems (e.g. due to irrigation), over grazing of livestock, altered fire regimes and climate change.

changes to aquatic systems (such as through irrigation), are predominately associated with the activities of the agricultural sector.[55]

Agricultural companies, particularly within the Australian beef industry, have been singled out by the environment movement for their contribution to Australia's unsustainable land clearing practices. The land clearing activities of **Stanbroke Pastoral Company,** Australia's largest land holder and beef producer, were the focal point for much of this attention when it was revealed in 2001 that this company alone held permits to clear in excess of 100,000 hectares of native vegetation.[56]

In response to pressure from environmental groups aimed at Stanbroke and its then owner, **AMP**, the company has since publicly stated that it will no longer clear remnant vegetation (old growth) on its properties. This commitment does not extend to the clearing of re-growth vegetation.[57]

Companies engaged in cotton growing have also been cited for their high water consumption and land clearing practices. In 2000/01, the Australian cotton industry produced just over 3.4 million bales of cotton with a gross value of over $1.7 billion.[58] Most cotton production is taking place within the Murray/Darling basin in Queensland and New South Wales but there are now plans to expand the industry into the Northern Territory, Western Australia and Northern Queensland.[59]

It is estimated that to produce a single bale of cotton requires enough water to fill an Olympic size swimming pool, making it an extremely thirsty crop to be grown in Australia; the driest inhabited continent on the planet. This thirst for water has resulted in cotton companies building large irrigation dams to capture water that would otherwise flow into Australia's already stressed rivers and lakes.[60] For example, **Cubbie Station** (Australia's third largest cotton producer), has constructed a dam within the Queensland section of the Murray/Darling catchment that is more than 27kms long, spans 12,000ha and holds more water than Sydney Harbour.[61]

The building of large irrigation dams is not confined to Cubbie Station. **RMI Pty Ltd**, a subsidiary of **Carrington Cotton** (Australia's sixth largest cotton producer), applied to the Federal Environment Minister in April 2003 for approval under the *EPBC Act* to undertake works that would help expand cotton production on its property near the

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[55] See generally, Note 53.

[56] Kerr M, *The Environmental Performance of Australia's Top 100 Companies 2001*. Melbourne: Australian Conservation Foundation, 2001 at 7.

[57] Stanbroke Pastoral Company, *Stanbroke Environmental Summary -Autumn 2003.* Stanbroke Pastoral Company, 2003 at 1. Available online at < http://www.stanbroke.com.au/_upload/20033269158.pdf> (11 November 2003).

[58] Cotton Australia, *Facts and Figures* (2003) <http://www.cottonaustralia.com.au/aboutindex.html> (27 November 2003).

[59] See Australian Cotton Cooperative Research Centre, *Research Project: Northern Australia-Opportunities for Strategic Development* <http://cotton.crc.org.au/AboutUs/Org/CRCPrograms.htm#northernaus> (27 November 2003).

[60] Hodge A, *The Dams that Drank a River* (31 March 2001) The Weekend Australian <http://www.theaustralian.news.com.au/common/story_page/0,5744,1956284%255E12810,00.html> (2 September 2004).

[61] Note 60.

northern NSW town of Bogabilla.[62] The application relates to the construction of a levee bank 85kms in length, with the capacity to capture billions of litres of water each year, and the clearing of 3,500 hectares of native vegetation within the boundaries of the levee bank.[63]

It is corporate agricultural practices such as these that contribute to Australia's high rates of land clearing, unsustainable irrigation practices and the associated problems of salinity, which together play a significant role in the declining health of Australia's terrestrial biodiversity.

2.6 The Mining Sector

The term 'mining sector' is used to refer to the group of enterprises engaged in mining for coal, oil, gas, uranium and metallic minerals. Of the largest 20 mining enterprises in Australia, all are either private or public companies. (See Appendix 9 for a list of the largest 20 mining companies).

2.6.1 Impacts of Mining Companies on Terrestrial Biodiversity

The impacts of Australian mining companies on terrestrial biodiversity are significant. In some instances, the greatest impacts are felt in foreign countries where Australian mining companies are able to operate under a domestic legal system that permits practices that would not be permitted in Australia. One well documented example involves the Ok Tedi copper mine located on the Ok Tedi/Fly river system in Papua New Guinea, which commenced operations in 1984. The Australian mining company, **BHP Billiton,** was the majority owner of the mine until 2002.[64]

The environmental impacts of the Ok Tedi mine stem from the annual disposal of approximately 85 million tones of waste rock and tailings directly into the river system rather than using the more conventional alternative of disposing mine waste into a tailings dam. As a consequence of this riverine disposal system, the following environmental impacts have resulted:[65]

i. Extensive over-bank flooding into the surrounding rain forest causing the loss of forest (or die back) in an area of more than 400 square kilometers. The area affected by die back is based on 1999 estimates and is projected to increase to an area of 1,350 square kilometers (or 135,000 hectares);

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[62] Title of Referral: RMI Pty Ltd/Agriculture and forestry/Macintyre River valley/NSW/Irrigated intensive crop production Date Received: 10 Apr 2003 Reference Number: 2003/1014.

[63] Woodford J, *Cotton Irrigator's Great Wall of Shame Dangerous: Farmers* (2 December 2002) Sydney Morning Herald <www.smh.com.au> (22 November 2003).

[64] In February 2002, BHP Billiton announced its withdrawal from the mine and the transfer of its 52% equity stake to a "development fund" named PNG Sustainable Development Ltd (Program Company).

[65] These environmental impacts were identified in BHP, *BHP and Ok Tedi: Discussion Paper October 1999.* Melbourne: BHP, 1999 at 8, 15.

ii. A reduction in fish numbers in the Ok Tedi and Fly rivers of 90% and 70% respectively;
iii. Copper levels in the river system have risen to 30 times above natural levels. High levels of copper can be toxic to sensitive organisms in the food chain; and
iv. An increased risk of acid rock drainage with the potential for significant environmental damage to downstream ecosystems.

The environmental impacts of the mine and the resulting affects on the indigenous people prompted the commencement of a legal action against BHP (as it was then known) for damages in the Supreme Court of Victoria by representatives of more than 40,000 residents living along the Ok Tedi and Fly rivers. The action was settled out of court in 1996 for a reported $A110 million.[66]

2.6.2 Impacts of Mining Companies on Marine Biodiversity

The environmental impacts of mining companies are also significant within the marine environment, particularly from companies involved in offshore petroleum exploration and production. The Australian offshore petroleum industry remains fairly small by global standards with most production coming from resources located in the Bass Strait, the North West Shelf and the Timor Sea.[67] However, the likelihood of petroleum extraction moving into other marine areas is increasing. This is reflected in the Federal Government's release in 2003 of 35 new marine areas for petroleum exploration across Northern Australia, North Western Australia, South Western Australia, Southern Australia and South Eastern Australia.[68] While in 2004, the Federal Government also announced as part of its 2004/05 budget a $1.50 subsidy to petroleum companies for each dollar spent on oil exploration, which is also likely to stimulate further growth in the industry[69]

The most recognised and significant threat to the marine environment posed by petroleum extraction is from a major oil spill. Despite the fact the Australian offshore petroleum industry has yet to experience a major spill, the risk of an oil spill from offshore petroleum sources in Australia remains quite high at over 25% in any 5 year period.[70] Petroleum companies, therefore, carry an enormous responsibility for ensuring that no major spills occur within Australian waters in the future.

Other recognised impacts include those caused by the sound waves arising from seismic testing in the search for offshore petroleum reserves, which have the potential to cause mortality or sublethal injury to marine organisms, or modification of the

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[66] Note 65 at 13.
[67] Department of Industry, Tourism and Resources- *2003 Release of Offshore Petroleum Exploration- An Overview for Investors* (2003) <http://www1.industry.gov.au/acreagereleases/Overview/red_contents.html> (10 November 2003).
[68] Note 67.
[69] Australian Broadcasting Corporation (ABC), *Govt Pledges Funds for Deep Water Oil Fields* (13 May 2004) ABC News Online <http://www.abc.net.au/news/newsitems/s1107567.htm> (16 May 2004).
[70] Zann L, *Our Sea, Our Future: Major Findings of the State of the Marine Environment Report for Australia*. Canberra: DEST, 1997 at chapter 3. Available online at <http://ea.gov.au/coasts/publications/somer/chapter3.html#HDR50> (24 August 2003).

feeding or mating activity of marine mammals, fish and other organisms.[71] In addition, the environmental impacts arising from the construction and use of infrastructure assocaited with offshore petroleum will also increase incrementally with the exapnsion of the industry. One example, is the infrastructure needs of the large natural gas devlopment planned for the Gorgon gas field off the Western Australian coast, which some claim will be the "largest industrial project in the nation's history."[72]

The joint venture partners involved in the devlopment of the Gorgon Gas fileds, **Chevron Texaco**, **Shell** and **Exxon Mobil**, intend to construct a gas processing plant on Barrow Island half way between the Western Australian coast and the gas fileds. Barrow Island is listed as a class A nature reserve under Western Australian legislation on account of it being the last remaining refuge for a number of animals now extinct on the mainland. The waters around Barrow Island have also been proposed for reservation as part of a Barrow-Montebello Islands Marine Conservation Reserve.[73] The construction of the plant will require: the clearing of 300 hectares of the island's native vegetation, the construction of a domestic gas plant and gas to liquid plant, the dredging of a shipping channel, a new 4km jetty and the construction of CO_2 waste treatment plant with associated wells for injection of CO_2 beneath the island.

The environmental impacts to the island reserve and surrounding marine environment arising from the construction of the processing plant were considered to be unacceptable by the Western Australia Environment Protection Authority ("EPA"). The EPA recommended that the plant should instead be located at another location.[74] Despite this recommendation, the joint venture partners still propose to locate the processing plant on Barrow Island on the basis that the island is the most commercially viable location. The Western Australian Government has since given the project its final approval.[75]

2.6.3 Australian Mining Companies: Contribution to Climate Change

It is difficult to account for the Australian mining industry's actual contribution to greenhouse emissions. This is because accounting techniques employed by the National Greenhouse Inventory do not attribute the mining sector with the emissions that arise when the coal, gas and oil extracted by the sector is combusted as a fuel for electricity and transport. Instead, these emissions are attributed to electricity

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[71] Australian State of the Environment Committee, *Australia State of the Environment 2001: Coasts and Oceans Theme Report* (2001) < http://ea.gov.au/soe/2001/coasts/coasts06-2.html> (29 September 2003).

[72] Claims made by Western Australia's premier, Dr Gallop: AAP, *Gorgon Gas Project Approved* (9 September 2003) Sydney Morning Herald <http://www.smh.com.au/articles/2003/09/08/1062901999613.html?from=storyrhs> (10 November 2003).

[73] Environment Protection Authority (EPA), *Environmental Advice on the Principle of Locating a Gas Processing Complex on Barrow Island Nature Reserve -Gorgon Venture* (Bulletin 1101). Perth: EPA, July, 2003 at 1-2.

[74] Note 73 at 9-10.

[75] AAP, *Gorgon Gas Project Approved* (9 September 2003) Sydney Morning Herald <http://www.smh.com.au/articles/2003/09/08/1062901999613.html?from=storyrhs> (10 November 2003).

producers, the manufacturing sector and transport users, such as the owners of passenger vehicles.

The mining industry's direct contribution to emissions comes primarily in the form of fugitive emissions, which in 2002 accounted for 5% of Australia's total net emissions. Fugitive emissions mainly arise from methane released as a by product of coal mining and in the emissions released in the process of oil and natural gas production.[76]

However, it is the industry's indirect contribution to greenhouse gas emissions, those which are not attributed to the mining sector by the National Greenhouse Gas Inventory, where the most significant contribution lies. This indirect contribution primarily arises from fuel combustion activities using coal, natural gas and oil, most of which is originally extracted by Australian mining companies. Fuel combustion activities account for 62% of Australia's net emissions with the combustion of coal being the greatest contributor, followed by natural gas and oil.[77]

The Australian mining sector, particularly the coal sub-sector, also makes a significant indirect contribution to greenhouse gas emissions when calculated on a global scale. As already stated, conservative estimates have attributed approximately 20% of global greenhouse gas emissions to the combustion of coal. Given that Australia is recognised as the world's largest exporter of coal,[78] the activities of Australian mining companies engaged in the export of coal (see Table 1 below) contribute significantly to the first stage of a carbon cycle that is responsible for approximately a fifth of all global greenhouse emissions.

Table 1. Top 5 Australian Coal Exporters 2001 According to Percentage of Market Share.

Company Name	Market Share
1. BHP Billiton	**25.5%**
2. Rio Tinto	**21.6%**
3. Ennex Resources (Xstrata)	**11.6%**
4. MIM Holdings	**10.2%**
5. Anglo Coal Australia	**8.1%**

Source: Mimuroto Y, *Latest Coal Situation in Australia*, International Cooperation Department, Japan (January 2003) <http://eneken.ieej.or.jp/en/data/pdf/177.pdf> (17 October 2003).

2.7 Conclusion

This chapter highlights the inextricable link between corporate activity and environmental degradation. This degradation continues to occur in conjunction with the production of corporate outputs, evident in the fact that environmental degradation

[76] Australian Greenhouse Office (AGO), *Fact Sheet 1, National Green House Gas Inventory 2002 - Energy: Stationary Sources and Fugitive Emissions.* Canberra: AGO, 2004 at 4.
[77] Australian Greenhouse Office (AGO), *National Greenhouse Gas Inventory 2002.* Canberra: AGO, 2004 at A17.
[78] Australian Department of Industry, Tourism and Resources (DITR), *Fact Sheet-Australian Black Coal Industry.* Canberra: DITR, 2002.

remains coupled with economic growth. Accordingly, corporate activity, when viewed as a whole, is presently unsustainable.

Before concluding this chapter it is important to note that the Australian experience is not unique. Australia represents a typical case study of the adverse environmental impacts arising from corporate activity around the globe. An examination of the activities of corporations within the United States, Canada, Japan, Europe or any other economy dominated by corporations, will reveal a similar link between corporate activity and environmental degradation.[79]

The dominance of the corporation within Australia and at the global level has come at an extraordinarily high price for the natural environment.

[79] See, for example, the environmental damage in overseas jurisdictions arising from the corporate crimes cited by New Internationalist, *Corporate Crime Wave* (July 2003) <http://www.newint.org/issue358/contents.htm> (10 September 2004). See also Bakan, Note 4, who documents the environmentally harmful activities of some of the world's largest and most respected corporations.

Chapter 3

Why Are Our Corporations Degrading the Environment? The Role of Australian Corporate Law

It is clear that measures need to be taken to improve the environmental performance of Australian corporations. The extent of the environmental problems identified in chapter one and the significant role corporations play in causing them, discussed in chapter two, justify action to ensure corporate activity is sustainable for the sake of today's generation and generations to come. However, in order to determine what measures are required, we must first stop to remember one important fact: corporations are *our* creations. Yes it is true that through our legal system we recognise the corporation as a distinct 'legal person' with many of the rights, privileges and responsibilities of a natural person. Perhaps as a consequence of this legal principle, we sometimes have a tendency to view corporations, particularly the largest of them, through the perspective of an "us and them" mentality as if they somehow had a mind and will of their own.[1] Yet the reality is corporations have no lives, powers or capacities beyond what we give them through our laws, our institutions and our own hard work.[2] Therefore, to understand why corporations 'act' the way they do, one important point of investigation will be the laws that we have established to create and govern the corporate entity.

With this in mind, we can now ask the next important question: *Why are our corporations degrading the environment?* Answering this question will assist in the task of crafting the most suitable measures to achieve the desired environmental objective of directing corporations on a pathway towards improved environmental performance and, eventually, sustainability.

This chapter and the following two chapters (chapters four and five) demonstrate that the legal regime we have developed to govern corporate activity is significantly at fault.[3] Beginning with this chapter, there is an examination of the role Australian corporate law has had in ensuring that when a perceived conflict of interests arises,

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[1] For commentary on the concept of "corporate personhood" and its significance in shaping the way we sometimes view corporations, see Millon D, "The Ambiguous Significance of Corporate Personhood," (2001) 2 (1) *Stanford Agora* <http://agora.stanford.edu/agora/cgi-bin/article2_corp.cgi?library=millon> (10 September 2004). This article also discusses 'natural entity theory,' which views the corporation not as an artificial entity but as a natural expression of the desires of the corporators.

[2] See Bakan J, *The Corporation: The Pathological Pursuit of Profit and Power* (Toronto: Viking Canada, 2004) at 164.

[3] It is not argued that the current regulatory environment is the sole contributing factor in bringing about unsustainable corporate conduct. There are many other factors at play. For example, Australian economic policy has directed subsidies to many environmentally damaging corporate activities such as wood chipping, land clearing, fossil fuel use and overuse of water. For a discussion of environmentally harmful subsidies, see Krockenberger M et al, *Natural Advantage: A Blueprint for A Sustainable Australia* (Melbourne: Australian Conservation Foundation, 2000) at 20-21. This discussion identifies a 1996 study undertaken for the Federal Government, *Subsidies to the Use of Natural Resources*, which found government subsidies (Commonwealth, State and Local) to the energy production, water and waste-water, solid waste disposal, native forestry, agriculture, chemicals and fisheries sectors amounted to at least $5.7 billion in 1993-94, equal to 4.4% of total revenues for Australian governments.

the interests of the corporation and its shareholders are, in most circumstances, placed before the interests of the environment. Chapter 4 examines the 'flip side' of the regulatory coin and the over reliance on voluntary initiatives as a means for bringing about improved corporate environmental performance. It explains how voluntary initiatives have failed to shift Australian corporate behaviour beyond 'business as usual' and to the extent that is necessary to abate the significant environmental impacts of corporate activity.

Chapter 5 then proceeds to briefly examine the effectiveness of Australia's environmental laws in regulating corporate activity. It illustrates how our environmental laws, like many well intentioned voluntary initiatives, have failed to bring about the deep seated environmental improvement that is required to shift corporations on a pathway towards sustainability.

3.1 Australian Corporate Law: Reinforcing Corporate Self Interest

Australian corporate law reinforces the classical notion that corporations need only serve one interest: their own. Consequently, environmental concerns are a secondary consideration of corporate decision makers when there is a 'perceived conflict'[4] between what is in the best interests of the company and what is in the interests of the natural environment.

The central expression of corporate self interest is contained in the principal fiduciary duty of directors and other corporate officers (hereinafter referred to collectively as "directors")[5] *to act in good faith in the best interests of the company*, which is recognised in Australia both under general law[6] and in section 181 of the *Corporations Act 2001* (Cth) ("the *Corporations Act*").[7] Outside of Australia, this directors' duty has a central role in the corporate law regimes of many jurisdictions. It is recognised, with some statutory variations, in other common law jurisdictions, including the United States, and has now been adopted by an increasing number of civil law jurisdictions around the world.[8]

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[4] As is argued later in chapter 8, corporate directors that choose to implement measures designed to improve the environmental performance of their company may in fact be making a financially sound decision that has the potential to increase the long term profitability of the company. It is for this reason the words "perceived conflict" have been used. Corporate directors may perceive that there is a conflict between the company's interests and taking an environmentally sound decision when in fact there is no conflict at all.

[5] Australian courts have recognised that senior executives and senior managers are subject to similar fiduciary duties to company directors, whether or not they have the official title of director. See *Green v Bestobell Industries Pty Ltd* (1982) 1 ACLC 1. See also the *Corporations Act* ss 180 - 184 which imposes statutory duties on directors and other officers of the corporation. Section 9 of the *Corporations Act* defines the term officer to include, inter alia, a director, or any person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation.

[6] See generally, *Chan v Zacharia* (1984) 53 ALR 417 and *Hospital Products Ltd v United States Surgical Corporation* (1984) 55 ALR 417.

[7] For a discussion of the nature of the general law duty, see Ford HAJ et al, *Ford's Principles of Corporations Law* (Australia: Butterworths, 11th ed., 2003) at 321-335.

[8] For a discussion of this directors' duty within its wider common law setting and in the United States, see Canadian Democracy & Corporate Accountability Commission (CDCAC), *Canadian Democracy & Corporate Accountability: An Overview of Issues*. Toronto: CDCAC, 2001 at 30 -

The crucial role of directors in determining corporate culture is highlighted by the observations of the Senate Standing Committee on Legal and Constitutional Affairs ("the Cooney Committee") in its 1989 report into *The Social and Fiduciary Duties and Responsibilities of Company Directors*:

> "Directors are the mind and soul of the corporate sector. They are crucial to how it operates and to how its great power is exercised. They determine the character of the corporate culture. Their actions can have a profound effect on the lives of a great number of people, be they shareholders, employees, or the public generally. They can weaken and even suppress market forces. They can disturb and destroy an environment."[9]

If, as the Cooney Committee observed, directors "are the mind and soul" of the corporate sector and are "crucial to how its great power is exercised," the interpretation of the directors' duty to act in the best interests of the company is a key determining factor in how corporations will operate.

3.1.1 The Best Interests of the Company: The Shareholder Focus

How then does a director act in the best interests of the company? As is often the case with the law, there in no single answer to this question. A narrow legal view is that the powers of a director should only be exercised for the pursuit of profit for the benefit of company shareholders. This narrow view is reflected in the United States decision of *Dodge v Ford Motor Company* in which it was held:

> "[A] business corporation is organised and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of a means to attain that end and does not extend to a change in the end itself, to the reduction of profits or the non distribution of profits amongst stockholders in order to devote them to other purposes."[10]

It should be noted the courts in common law jurisdictions outside the United States, Australia included, have been careful to stress that directors' fiduciary duties are not

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33. For a statutory version of this duty in the United States, see *Pennsylvania's Consolidated Statutes: Corporations and Unincorporated Associations* (title 15) ss 512 and 1712. Most statutory variations to this duty are 'permissive' in nature and are not intended to impose a separate fiduciary obligation on the directors to consider interests outside those of the company's interests. For example, in New Zealand s 132 of the *Companies Act 1993* (NZ) clarifies that the duty of a director to act in the best interests of a company does not inhibit a director to make provision for the benefit of employees of the company in connection with the company ceasing to carry on the whole or part of its business. Like wise, in the United States 32 states have introduced non-shareholder constituency statutes that explicitly permit directors to consider a variety of non-shareholder interests. Like the New Zealand variation, most of these laws are only permissive: the directors may take the interests of non-shareholders into account but are not obliged to do so. For an example of this directors' duty in a civil law jurisdiction, see *Russian Law of Joint Stock Companies* 1996 (Russia), Article 71. For a wider discussion of its adoption in civil law jurisdictions, see OECD, *Experiences From the Regional Corporate Governance Roundtables.* Paris: OECD 2004 at 44-45.

[9] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: The Social and Fiduciary Duties and Responsibilities of Company Directors* (1989) at 7.

[10] *Dodge v Ford Motor Company* (1919) 204. Mich.459, 170 N.W. 668, 3 A.L.R. 413.

owed to the shareholders as such, but to the company.[11] This does not mean the directors are not obliged to have regard to the interests of the shareholders. Australian courts have recognised the inextricable link between the shareholders (or 'corporators' as they are sometimes described) and the company as is evident in the High Court decision of *Ngurli Ltd v McCann*:

> "[P]owers conferred on directors by the articles of association of companies must be used bona fide for the benefit of the company as a whole…[T]he phrase the 'company as a whole,' does not mean…the company as a commercial entity, distinct from the corporators: it means the corporators as a general body."[12]

In light of this and other decisions,[13] it is clear that the pre-eminent consideration for a director in fulfilling the duty to act in the best interests of the company under Australian law is the interests of the shareholders as a general body. This is a legal principle which supports the views of a large number of corporate law theorists[14] and which was certainly not lost on members of the Cooney Committee:

> "The laws regulating the director's role have arisen from the intrinsic nature of companies, their purpose, their structure and their history. For the most part directors are enjoined to act in the best interests of the company. In this way, the board is required first and foremost to give regard to the shareholders' interests."[15]

3.1.2 Directors' Duties and External Environmental Interests

What about interests other than those of the shareholders, such as the 'external' interests of corporate employees, society and the natural environment? A case that is commonly cited to support the argument that directors have a duty to consider external interests is the 1973 Canadian decision of *Teck Corp. Ltd v Millar* in which it was observed:

> "The classical theory is that a director's duty is to the company. The company's shareholders are the company and therefore no interests outside of those of the shareholders can be considered by the directors. ... [But] A classical theory that was once unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue

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[11] *Percival v Wright* [1902] 2CH 421. However, more recent case law suggests that directors may owe a fiduciary duty to individual shareholders in small private companies. See, for example, *Glavanics v Brunninghausen* (1996) 19 ACSR 204.

[12] *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 438.

[13] See also *Greenhalgh v Ardene Cinemas Ltd* [1951] Ch 286 at 291.

[14] Without wanting at this point to engage in a lengthy discussion on corporate law theory, it is worth noting that the pre-eminence of shareholder interests has also been assumed in the majority of corporate law theories developed since the mid 19th century. For a discussion of this pre-eminence, see Hill J, "Public Beginnings Private Ends: Should Corporate Law Privilege the Interests of Shareholders?" (1998) 9 *Australian Journal of Corporate Law* 21. See also the discussion of contract based theories of corporate law, which have a distinct shareholder focus, later in chapter 9. It should be noted, however, that various legal theorists are now challenging the shareholder centred model of the corporation. For example, the contemporary "team theory" of corporate law sees the role of the board of directors as existing not just to protect shareholders per se, but to protect the enterprise-specific investments of all the members of the corporate "team," including shareholders, managers, rank and file employees, and possibly other groups, such as creditors: See, Blair M and Stout L, "A Team Production Theory of Corporate Law" (1999) *85 Virginia Law Review 247*. Communitarian scholarship, discussed later in chapter 9, also challenges the shareholder centred model.

[15] Note 9 at 8.

> that in doing so they were not acting bona fide in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitments to that policy as a result, it could not be said they had not considered bona fide the interests of the shareholders."[16]

This decision may have provided clarity on whether or not a director is permitted to consider external interests in discharging their fiduciary duties. However, it does not provide legal authority for an extension of the directors' fiduciary duties to these interests. While directors may consider external interests, such as the environment, the courts have remained clear on the fact they do not have a duty to do so if they do not consider it to be in the best interests of the company.[17]

3.1.3 The Corporate Profit Motivation

Within the confines of the narrow duty of directors to act in the best interests of the company without any obligation to consider external interests, a profit motive is generally pursued for the benefit of the shareholders. Tolmie in her 1992 article, "Corporate Social Responsibility," sums this connection up concisely:

> "The corporation is a unique fiction which is ostensibly locked into a profit motivation. Unlike businesses run by private individuals, none of the participants involved in a corporation may take responsibility for deviating from that motivation. By way of broad generalisation, shareholders may not interfere with business operations except on the grounds of a detrimental impact upon their economic interests. Managers may not use their powers for purposes other than the profit interest of the company qua the shareholders."[18]

Tolmie's observations are not just confined to the academic community. After 23 years of legal practice, U.S Corporate lawyer, Robert Hinkley, made a similar observation:

> "[T]he corporate design contained in hundreds of corporate laws throughout the world is nearly identical… the people who run the corporations have a legal duty to shareholders, and that duty is to make money. Failing this duty can leave the directors and officers open to being sued by the shareholders. [The law] dedicates the corporation to the pursuit of its own self interest (and equates corporate self interest with shareholder self interest)."[19]

The corporate sector has also come to interpret its primary responsibility as the pursuit of profit for the benefit of company shareholders. This interpretation is a common theme in many of the headline statements contained on company websites and in annual reports. A typical sample of such statements is provided below:

(i) **BHP Billiton-** "Around the globe, every day, the commodities we supply are used to make products that enhance people's daily lives,

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[16] *Teck Corp. Ltd v Millar* (1973) 33 DLR (3d) at 313-14.

[17] In *Woolworths Ltd v Kelly* (1990) 4 ACSR 431 at 446 Mahoney J observed: "A company may decide to be generous with those whom it deals. But- I put the matter in general terms- it may be generous to do more than it need do only if, essentially, it be for the benefit or for the purposes of the company that it do such." The recent High Court decision of *Spies v R* (2000) 18 ACLR 727 also put to rest the notion that directors had a separate fiduciary duty to consider the interests of company creditors (an external consideration).

[18] Tolmie J, "Corporate Social Responsibility" (1992) 15(1) *UNSW Law Journal* 268 at 275.

[19] As cited in Baken J, Note 2 at 37.

from power sources to computer parts to precision-made surgical instruments. In carrying out our key role in the production process, we aspire to be not only the premier supplier of natural resources and related products, but one of the world's best companies - creating value and delivering superior, sustainable returns for our shareholders." (BHP Billiton, *Annual Report 2003*)[20]

(ii) **Wesfarmers**- "The primary objective of Wesfarmers is to provide a satisfactory return to shareholders." (Wesfarmers, *Annual Report 2003*).[21]

(iii) **WMC**- "Our mission: Our aim is to maximise shareholder value by finding, acquiring, developing and operating or participating in mineral resource projects around the world. (WMC website)[22]

(iv) **Woodside**- **"**Woodside's mission is to create outstanding growth and shareholder wealth." (Woodside website)[23]

(v) **CSR**- "CSR is a diversified Australian manufacturing company with a strong portfolio of businesses in building products, aluminium and sugar… CSR's core strategy is to optimise the performance of its three businesses to increase shareholder returns." (CSR *Annual Report 2003*)[24]

(vi) **AMCOR**- Amcor's mission is to generate sustainable shareholder value by: becoming the premier packaging solutions provider, creating superior customer service relationships and value and encouraging and rewarding employees to achieve the highest standard of performance. (Amcor website)[25]

(vii) **Rio Tinto**- Rio Tinto's fundamental objective is to maximise the overall return to shareholders by operating responsibly and sustainably in finding, mining and processing minerals - areas of expertise in which the Group has a clear competitive advantage." (Rio Tinto website)[26]

(viii) **Xstrata**[27]- "We will grow and manage a diversified portfolio of metals and mining businesses with the single aim of delivering industry-leading returns for our shareholders." (Xstrata website)[28]

(ix) **Chevron Texaco Corp**-[29] Our No.1 goal: to provide stockholders with a superior return on their investment (Chevron Texaco, *Annual Report 2002*).[30]

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[20] BHP Billiton, *Annual Report 2003* <http://www.bhpbilliton.com/annualReport/2003/plc/home/home.html> (8 December 2003).

[21] Wesfarmers, *Annual Report 2003* at 1.

[22] WMC, *Vision and Values* < http://www.wmc.com/about/vision.htm> (10 September 2004).

[23] Woodside, *About Woodside* < http://www.woodside.com.au/About+Woodside/> (10 December 2003).

[24] CSR, *Annual Report 2003* < http://www.csr.com.au> (9 December 2003).

[25] Amcor, *Mission Vision and Values* < http://www.amcor.com.au/Default.aspx?id=1086> (10 September 2004).

[26] Rio Tinto, *About the Company* < http://www.riotinto.com/aboutus/strategy.aspx> (9 September 2004).

[27] Xstrata Plc is the owner of several subsidiary companies operating in Australia such as Xstrata Coal Pty Ltd, Xstrata Copper Pty Ltd and MIM holdings Pty Ltd.

[28] Xstrata <http://www.xstrata.com/> (9 December 2003).

[29] Chevron Texaco Corp is operating in Australia through it subsidiary Chevron Texaco Australia Pty Ltd.

[30] Chevron Texaco, *Annual Report 2002* at 1.

The statements above are from either publicly listed Australian companies or foreign publicly listed companies, operating in Australia through wholly and partly owned subsidiary companies. Unlike public companies, proprietary ('private') companies are not likely to make public statements about their profit motive because they generally do not need to attract funding from outside sources. However, it follows that private companies, which actively engage in a business venture[31] and do not satisfy the requirements of a not-for profit company for taxation purposes, [32] are in most cases established for the primary purposes of realising a profit for the shareholder(s).

3.1.4 Corporate Social Responsibility and Corporate Profit

Of course, many companies claim to consider other matters than just corporate profits. Indeed, including environmental and social considerations within a corporate business strategy is now widely viewed as an important means of ensuring a company's long term success and profitability.[33] A reflection of this 'enlightened self interest' has been the recent trend sweeping the corporate world to state a commitment to the concepts of 'corporate social responsibility' (CSR),[34] the 'triple bottom line'[35] or 'sustainable development.'[36] These commitments are expressed in varying ways but are generally underpinned by the notion that corporate decision makers will seek to integrate financial considerations with environmental and social considerations when managing corporate business activities. The public commitment of **Shell**, published on its corporate website,[37] typifies such commitments:

> Shell companies recognise five areas of responsibility:

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[31] Many companies are established for purposes other than operating a business venture, such as tax minimisation. Such companies may not necessarily be established for the purpose of realising a profit.

[32] A not-for profit company is recognisable when its constitution includes provisions to the effect that any profit realised by the company goes back into the operation of the organisation to carry out its purposes and is not distributed to any of its members even at the stage of dissolution: See Australian Taxation Office Fact Sheet, *Are You a Non-Profit Organisation? - Tax Basics for Non-Profit Organisations* <http://www.ato.gov.au/nonprofit/content.asp?doc=/content/33732.htm> (4 December 2003).

[33] This is consistent with case law which views such a strategy as a type of enlightened self interest. See, for example, *Teck Corp. Ltd v Millar*, Note 15. See also chapter 8 for a discussion regarding the economic justification for such a strategy.

[34] For a discussion of the concept of CSR, see Tolmie, Note 17. See also Canadian Democracy & Corporate Accountability Commission (CDCAC), *Canadian Democracy & Corporate Accountability: An Overview of Issues*. Toronto: CDCAC, 2001 and Wells H, "The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century" (2002) *51 Kansas Law Review 77*. See also the discussion of CSR in chapter 9.

[35] The business concept of the triple bottom line (economic, environmental and social) arose from the widely cited book, Elkington J, *Cannibals With Forks: The Triple bottom Line of 21st Century Business* (Gabriola Island, Canada: New Society Publishers, 1998).

[36] See Chapter 1 (Note 7).

[37] Shell Australia, *Shell's Business Principles* <http://www.shell.com/home/Framework?siteId=au-en&FC2=/au-en/html/iwgen/leftnavs/zzz_lhn2_0_0.html&FC3=/au-en/tailored/about_shell/sope_about_shell/about_shell/how_we_work/shell_business_principles_ga_1011.html > (10 December 2003).

a. To shareholders - To protect shareholders' investment, and provide an acceptable return.

b. To customers - To win and maintain customers by developing and providing products and services which offer value in terms of price, quality, safety and environmental impact, and which are supported by the requisite technological, environmental and commercial expertise.

c. To employees - To respect the human rights of their employees, to provide their employees with good and safe conditions of work, and good and competitive terms and conditions of service, to promote the development and best use of human talent and equal opportunity employment, and to encourage the involvement of employees in the planning and direction of their work, and in the application of these principles within their company. It is recognised that commercial success depends on the full commitment of all employees.

d. To those with whom they do business - To seek mutually beneficial relationships with contractors, suppliers and in joint ventures and to promote the application of these principles in so doing. The ability to promote these principles effectively will be an important factor in the decision to enter into or remain in such relationships.

e. To society - To conduct business as responsible, corporate members of society, to observe the laws of the countries in which they operate, to express support for fundamental human rights in line with the legitimate role of business and to give proper regard to health, safety and the environment consistent with their commitment to contribute to sustainable development.

These five areas of responsibility are seen as inseparable. Therefore, it is the duty of management continuously to assess the priorities and discharge its responsibilities as best it can on the basis of that assessment.

Shell's commitment to consider 'external' matters, such as the environment, in addition to the interests of company shareholders provides a 'marker' to where the problem lies with most, if not all, corporate commitments of this nature. This marker is located in the final sentence of the commitment, which states that: "*it is the duty of management continuously to* ***assess the priorities*** *and discharge its responsibilities on the basis of that assessment.*"

Undoubtedly, the directors responsible for the management of Shell made an assessment of the "priorities" between Shell's responsibility to protect "shareholder investments to provide an acceptable return" and its responsibility to give "proper regard to the environment" when deciding with the other joint venture partners[38] to locate the Gorgon gas processing plant on the environmentally sensitive Barrow Island Nature Reserve.[39] In that case, Shell's directors chose what they considered to be the most commercially viable option of locating the plant on Barrow Island, over alternative locations cited by the Western Australian EPA that are less environmentally sensitive.[40]

The directors of Shell most probably made a similar assessment of the priorities between their conflicting responsibilities when deciding to continue Shell's

[38] ChevronTexaco and ExxonMobil.
[39] See discussion of Gorgon Gas Project in chapter 2, section 2.6.2.
[40] The alternatives were referred to in Environment Protection Authority (WA), *Environmental Advice of the Principle of Locating a Gas Processing Complex on Barrow Island Nature Reserve* (Bulletin 1101). Perth; EPA, July 2003 at 2.

profitable investments in petroleum extraction and production despite the recognised link of such activities to climate change and the resulting environmental and social impacts. Likewise, they have made a similar assessment to continue Shell's profitable petroleum activities in Nigeria despite the enormous environmental and social costs such activities have caused in that country.[41] And so the assessment of priorities between conflicting responsibilities goes on and on.

The directors of Shell are not alone in making such an assessment. Australian corporate directors are continuously called upon to assess priorities when a perceived conflict between responsibilities arises. Such an assessment might be required by directors of an Australian coal company weighing up the financial benefits to company shareholders of opening a new coal mine against the environmental impacts of the associated greenhouse gas emissions. A similar assessment might be required by the directors of an Australian cotton company weighing up the financial benefits to shareholders of building a large storage dam to feed thirsty but profitable crops against the health of a near by river system, which may dry up if the dam is built.

This is not to say that the typical corporate director is not concerned about the environment. It is highly likely that many of them are. Despite their personal convictions and the best intended public commitments of a company to concepts such as CSR, where a perceived conflict arises between what is in the financial interests of the company shareholders and the prospect of environmental degradation, corporate directors are bound by their legal duty to act in the best interests of the company shareholders over and above what is in the best interests of the natural environment.[42] Consequently, corporate activity continues to play a significant role in causing the environmental problems outlined previously in chapters one and two. As the Cooney Committee observed, corporate directors through their decisions "can disturb or destroy an environment."[43] Due to the narrowness of their legislative and general law duties, this they quite often do.

3.2 Socially Responsible Investors: A Challenge to Corporate Self Interest?

In addition to the decision making power of company directors, Australian corporate law recognises a second area of decision making power: the general meeting of members.[44] Therefore, can shareholders who do not wish to obtain profit at the

[41] The environmental and social impacts of Shell's activities in Nigeria gained international recognition in 1995 following the execution of Ken Saro-Wiwa, an outspoken Nigerian critic of Shell, along with a number of fellow activists. The execution is now the subject of a U.S legal action initiated by the son of Ken Saro-Wiwa against Shell under the *Alien Tort Claims Act* (U.S). To view a copy of the complaint, go to <http://www.earthrights.org/shell/complaint.shtml>.

[42] The exception being when the corporate activity in question is contrary to existing environmental regulations. As chapter 2 points out, there are many corporate activities with significant environmental impacts which are legally permissive.

[43] Note 9 at 7.

[44] Tomasic R et al, *Corporations Law in Australia* (Sydney: Federation Press, 2nd ed., 2002) at 263.

expense of the environment, commonly known as "socially responsible investors,"[45] require directors to extend the scope of their considerations to external environmental matters? After all, the interests of the shareholders are the paramount consideration of the directors in carrying out their duty to act in the best interests of the company.[46] As outlined below, there are a number of obstacles that make this task extremely difficult, while proposed legislative amendments, if adopted, will make the task near impossible.

3.2.1 The Formal Legal Model and the Principle of Non-interference

The formal legal model which divides power between the directors and the general meeting of shareholders is not a model which favours socially responsible investors. The most common method of allocating managerial power is defined in the replaceable rule contained in section 198A of the *Corporations Act*:

> (1) The business of a company is to be managed by or under the direction of the directors;
> (2) The directors may exercise all the powers of the company except any powers that this Act or the company's constitution (if any) requires the company to exercise in general meeting.

The extent of power conferred on the directors by this replaceable rule is broad [47] and underpinned by a principle of non-interference by the shareholders as the early English decision of *John Shaw and Sons (Salford) Ltd v Shaw* so clearly pointed out: "If powers of management are vested in the directors [by the constitution], they and they alone can exercise those powers"[48]

Although the traditional legal model restricts the course of action open to socially responsible investors, it does not leave such shareholders completely without mechanisms to leverage change in corporate governance practices. For example, it is still open to shareholders, by way of a resolution at a general meeting, to seek an alteration of the company constitution that might require the directors to implement certain environmental policies or measures.[49] Furthermore, it would also be open to shareholders to remove company directors perceived to be unsympathetic towards

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[45] "Socially responsible investor" is the term commonly used to describe shareholders who have a wider set of investment interests other than profit maximisation. Such interests might include: the environment, human rights, labour standards and ethical issues, such as anti-alcohol and anti-cigarette investments. "Shareholder activists" is a second term often used to describe such shareholders. However, this term has a negative connotation and is applied to shareholders that are perceived to hold shares merely to alter the behaviour of corporations for a purpose that is outside the interests of the wider body of shareholders. It is therefore, a term that is not wide enough to include legitimate investors, individual and institutional, that invest in corporations for the purposes of seeking a positive return on an investment but do so according to wider environmental and social considerations. For a discussion of the concept of shareholder activism, see Darvas P, "Section 249D and the Activist shareholder: Court Jester or Conscience of the Corporation?" (2000) 20 *Company and Securities Law Journal* 390-408. For a wider discussion of socially responsible investment, see chapter 8.

[46] Hill has observed that while corporate theories (and the law itself) treat shareholder interests as paramount, most corporate law theories also assume that shareholder participation in corporate governance is either impossible, unnecessary or positively undesirable: Hill, Note 14 at 23.

[47] Tomasic, Note 44 at 263.

[48] *John Shaw and Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134. This principle has been accepted in Australia: *NRMA v Parker* (1986) 11 ACLR 1.

[49] Pursuant to s 136(2) of the *Corporations Act*, a special resolution (passed by a majority of 75%) is required for such an amendment.

the environment[50] or refuse to re-elect such directors.[51] Shareholders could also propose an environmental resolution to be moved at a general meeting that is technically invalid, on the basis it interferes with the exclusive powers of the directors, in the hope that it is nevertheless accepted by a board wishing to avoid the publicity that disputing the validity of the resolution could bring.[52]

3.2.2 The Corporations Act: Sections 249D and 249N

Within the boundaries of the limited scope corporate law has provided socially responsible investors for participation in corporate decision making, there have been several instances where environmental matters have been formally introduced by shareholders for consideration at general meetings. These matters have been introduced in accordance with the *Corporations Act* either pursuant to section 249D or section 249N.[53]

Section 249D(1) of the *Corporations Act* entitles members (hereinafter referred to as shareholders) with at least 5% of the votes that can be cast at a general meeting ("the 5% threshold") or at least 100 shareholders entitled to vote at a general meeting ("the 100 shareholder threshold") to request the directors to requisition a general meeting of the company.[54] These general meetings are commonly referred to as an extraordinary general meeting ("EGM"). Section 249E provides that should the directors fail to call the meeting within 21 days of the request, the requisitioning shareholders may call, arrange and hold the general meeting. The entitlement to requisition an EGM has been used on at least three occasions by shareholders for the purpose of proposing resolutions relating to environmental issues:

(i) It was utilised by 166 shareholders in **Wesfarmers Ltd** to requisition a company EGM held in July 1999. Eight resolutions were proposed at this meeting. The primary resolution sought to restrict the company, through its subsidiary **Bunnings Forest Products Pty Ltd** "from undertaking logging or roading activities" or receiving logs from certain Western Australian forest blocks. Although this resolution appeared to be technically invalid, it was not disputed by the board. The resolution was not passed, gaining 2% support. [55]

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[50] See *Corporations Act*, s 203C (private companies) and s 203D (public companies). Section 203C requires only an ordinary resolution of a simple majority. Section 203D requires a special resolution with a 75% majority.

[51] This, unlike the other courses of action, does not require a resolution.

[52] It is arguable that three of the environmental resolutions, discussed below, dealt with matters within the exclusive power of the directors under the company constitution. The environmental resolutions tabled at the Wesfarmers EGM (see Note 55), at the Commonwealth Bank 2003 AGM (see Note 61) and the Boral 2003 AGM (see Note 63) sought to direct the board of directors to put in place certain policies or undertake certain tasks without constitutional amendments, which most likely made them technically invalid.

[53] This does not include informal questions at general meetings, which may also be used to include questions about environmental issues.

[54] For a recent decision that considers section 249D, see *Gratton v Carlton Football Club & Ors* [2004] VSC 379 (Unreported, Mandie J, 6 October 2004).

[55] Wesfarmers Ltd, *Notice of EGM* (29 July 1999) <http://wfcm.vivid.global.net.au/uploads/pdfs/EGMNOM.pdf> (15 December 2003). This resolution appears to be technically invalid: See note 52. Rather than test the validity of the

(ii) It was utilised by 121 shareholders in **North Ltd** to requisition a company EGM held in October 1999. The principle resolution proposed at the meeting was an amendment to the company's constitution that would incorporate a set of principles of responsible development. These principles would have restricted the company from investing in activities such as uranium mining. In 1999, North Ltd was the majority shareholder of **Energy Resources Australia Ltd**, the company developing the Jabiluka uranium mine within the boundaries of the Kakadu World Heritage Area. The resolution was not passed, gaining 6% support.[56]

(iii) It was utilised by over 100 shareholders in **Gunns Ltd** to requisition a company EGM held in August 2003. The principle resolution involved an amendment to the company's constitution that would restrict the company from logging old growth forests and other forests of high conservation value. The resolution was not passed, gaining approximately 0.4% support.[57]

The second of the two mechanisms, section 249N, entitles shareholders with at least 5% of the votes that can be cast at a general meeting or at least 100 shareholders entitled to vote at a general meeting to give a company notice of a resolution they intend on moving at a general meeting. The focus of this mechanism has been on resolutions intended for a company's annual general meeting ("AGM"). Some examples of environment related resolutions include:

(i) A special resolution was proposed by 150 shareholders of the **Commonwealth Bank** at the company's AGM held in October 2002. It called for an amendment to the company's constitution that would remove the directors' power to invest company assets in logging high conservation or old growth forests.[58] The resolution was not passed but gained the support of 23% of the company's shareholders.[59]

(ii) A special resolution was proposed by over 100 shareholders of the **National Australia Bank** at the company's AGM held in November 2002. It called for an amendment to the company's constitution that would remove the directors' power to invest company assets in logging high conservation or old growth forests. The resolution was not passed but gained the support of approximately 22% of the company's shareholders.[60]

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meeting in court, the directors stated that they chose to hold the meeting to allow shareholders to discuss the issues in an open forum.

[56] The Wilderness Society, *North Ltd and the EGM* <http://www.wilderness.org.au/campaigns/northernaustralia/kakadu/northegm/> (15 December 2003).

[57] National Association of Forestry Industries (NAFI), *e news* (2 Sept 2003) <http://www.nafi.com.au/files/newsletter/NAFI%20eNews%20No.33.pdf> (15 December 2003).

[58] The Commonwealth Bank, "Notice of General Meeting 2002" (13 September 2002) at 12. It is arguable that this resolution was technically invalid: See Note 52

[59] The Wilderness Society, *Historic Support for Commonwealth Bank Shareholder Resolution on Old Growth Forests* (2002) <http://www.wilderness.org.au/campaigns/corporate/gunns/20021101_CBA_agm/ > (16 December 2003).

[60] Note 59.

(iii) An ordinary resolution was proposed by 104 shareholders of the **Commonwealth Bank** at the company's AGM held in October 2003. It called for the bank's directors to prepare an environmental risk statement associated with the banks logging investments. Although the resolution appeared to be technically invalid, it was not disputed by the board.[61] The resolution was not passed, gaining approximately 25% of total valid proxies.[62]

(iv) An ordinary resolution was proposed by a "group of more than 100 shareholders" of **Boral Ltd** at the company's AGM held in October 2003. It called for the company to annually report on its performance in relation to a "sustainability self diagnostic tool" previously adopted by the company. Although this resolution appeared to be technically invalid, it was not disputed by the board. [63] The resolution was not passed, gaining 6.02% support.[64]

3.2.3 Institutional Investors

Each of the abovementioned examples (relating to sections 249D and 249N) has involved resolutions that were ultimately defeated. As was observed by Stephen Mayne of Crikey.com with respect to the Gunns Ltd EGM, this failure is largely due to the inability of socially responsible investors to capture the support of institutional investors for their resolutions:

> "Gunns executive chairman and 5 per cent shareholder John Gay was able to round up support from most of his major institutional shareholders such as The Commonwealth Bank, Perpetual Trustees, Deutsche Bank and AMP to deliver what must be close to the highest against vote to a resolution in Australian corporate history."[65]

Institutional investors[66] represent an almost insurmountable hurdle for socially responsible investors in changing corporate governance practices through resolutions at general meetings. Most resolutions proposed by socially responsible investors will relate to public corporations[67] where large institutional investors are

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[61] The Commonwealth Bank, "Notice of General Meeting 2003" (12 September 2003) at 12. It is arguable that this resolution was technically invalid: See Note 52.

[62] The Commonwealth Bank, *Annual General Meeting -31 October 2003* <http://shareholders.commbank.com.au/GAC_File_Metafile/0,1687,3331%255Fagm%252520%252D%252520proxy%252520count%252520final,00.pdf> (16 December 2003).

[63] Boral Ltd, "Notice of Annual General Meeting" (10 September 2003) at 3. Available at <http://www.boral.com.au/Images/common/pdfs/2003_nom.pdf?AUD=corporate&Nodes=IC,IR,IN&site=Boral> at 16 December 2003. It is arguable that this resolution was technically invalid: See Note 52.

[64] Boral Ltd, "Annual General Meeting: Outline of Business and Declaration of Polls" (21 October 2003) at 3.

[65] Mayne S, *Greens Gunned Down at EGM* (1 September 2003) Crikey.com <http://www.crikey.com.au/business/2003/08/29-0003.html> (16 December 2003).

[66] The term 'Institutional investors' is used to describe a range of institutions ranging from bank nominee companies, insurance companies, superannuation funds and managed investment schemes.

[67] This has certainly been the case so far. Broadly speaking, the interests of shareholders in private companies are more likely to be aligned with the decisions of directors. This is because the primary shareholders are often the directors themselves (as is the case with 'closely held companies') or the directors are appointed by a parent company who is the sole or majority shareholder, as is common among corporate groups.

prevalent.[68] Like the corporations in which they invest, institutional investors are often themselves profit driven corporate entities.[69] In most instances, these entities, their officers or trustees have fiduciary obligations to act prudently and in the best interests of the members.[70] Similar to the fiduciary duty of company directors, this duty will require the interests of the members to be considered over and above external environmental interests should a perceived conflict arise.[71] Accordingly, an environmentally focused resolution that is perceived to impact on the returns to company shareholders will generally not be supported by institutional investors who have a duty to safeguard the investments of their own members.[72]

This conflicting fiduciary duty is not the only obstacle for socially responsible investors in gaining institutional support. Many institutional investors must keep their investments liquid, leading to a short term approach to investment that is not conducive to the consideration of so called 'non-financial matters,' such as the environment.[73] Furthermore, it has been observed that institutional investors may form strategic alliances with corporate managers, leaving smaller socially responsible shareholders powerless to challenge the decisions of management through general meetings.[74]

Despite the obstacles posed by institutional investors, environmentally focused corporate resolutions have succeeded in gaining sufficient support and publicity to act as a valuable tool in focusing the attention of management, other shareholders and the public at large on environmental issues relating to corporate conduct. For example, despite the defeated resolutions at the North Ltd EGM, the company subsequently incorporated environmental considerations into its governance strategy. Additionally, Rio Tinto, the new majority owner of Energy Resources Australia Ltd, has since announced a moratorium on uranium mining at the Jabiluka mine site and the commencement of back filling operations as part of a plan for long term maintenance and care.[75] It is arguable that these decisions would not have been made had it not been for the publicity surrounding the EGM and the relentless

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[68] For a discussion of the prevalence of institutional investors in Australia, see Hill J, "Visions and Revisions of the Shareholder" (2000) 48 *American Journal of Comparative Law* 39; Bird J and Hill J, "Regulatory Rooms in Australian Corporate Law" (1999) 25 *Brooklyn Journal of International Law* 55; and Berns S and Baron P, *Company Law and Governance: An Australian Perspective* (Melbourne: Oxford University Press, 1998) at 127. For commentary on the prevalence and power of institutional investors in the United States, see Brancato C and Price M, "The Institutional Investors Goal for Corporate Law in the Twenty First Century" (2000) 25 *Delaware Journal of Corporate Law* 35.

[69] For example, the top five shareholders in Gunns Ltd are corporate institutional investors: Perpetual Trustees Australia Ltd (11.1%), the Commonwealth Bank of Australia (8.8%), Permanent Trustees Company Ltd (7.8%), Concord Capital Ltd (7.4%) and AMP Ltd (5.9%). Figures are accurate as of August 2003: Gunns Ltd, *Annual Report 2003* at 74.

[70] See, for example, the duties of the responsible corporate entity and the officers of managed investment schemes contained in sections 601FC and 601FD of the *Corporations Act.*

[71] Like the fiduciary duty of company directors, the fiduciary duty pertaining to institutional investors will not preclude the consideration of environmental matters should it be in the best interests of the members to do so.

[72] The exception being institutional investors that have in place an environmental screen that require it to take into account environmental considerations in the investment process. See chapter 8 for more information on ethical and socially responsible investment funds.

[73] Tomasic, Note 44 at 282.

[74] Hill, Note 68 at 63-64.

[75] Rio Tinto, (Press Release, 1 August 2003).

protests from traditional land owners and environmental NGOs that continued well after the EGM. [76]

3.2.4 The 100 Shareholder Threshold

Such success, limited as it has been, has caused the Federal Government and some corporations to take action in an attempt to restrict the use of the *Corporations Act* by socially responsible investors. The Federal Government's efforts have focused on attempts to amend section 249D to make it more difficult for socially responsible shareholders to raise "outside interests,"[77] such as the environment, through company EGMs.

The frustration within the Federal Government arising from the use of section 249D by socially responsible investors is evident in a remarkably blunt article penned in 2000 by Joe Hockey in his capacity as the Federal Minister for Financial Services and Regulation. The first four paragraphs of this article, "Wealth not Politics,"[78] are set out below:

> "People who invest in shares do so because they want to increase their wealth. They put their investment in the hands of a company's manager and directors with the hope of making a decent return. And to keep the company accountable, they attend the annual general meeting.
>
> But over the last five years, there has been a heated debate over who can call a meeting and what should be on the agenda at the meeting. Increasingly, bands of vigilante groups – environmentalists, unionists and other political activists – have banded together and taken advantage of our corporate laws to force extraordinary general meetings.
>
> This has come about because under existing laws only 100 members are needed to call a general meeting. That meant any 100 people with just a handful of shares can hold a company to ransom and impose on it any agenda it wanted – environmental issues, union politics, globalisation, to name a few.
>
> These spurious general meetings have come at considerable cost to corporate Australia and its real shareholders – often up to $1 million for some large corporates – and forced boards to deal with issues way outside their normal ken and that have nothing to do with creating shareholder wealth."

The misguided notion that environmental issues have nothing to do with creating shareholder wealth is discussed at length in chapter eight. However, for the more immediate purposes of this discussion, Hockey's article clearly shows that the government's concern with section 249D relates primarily to the '100 shareholder threshold.' The government's first attempt to remove this numerical threshold from section 249D came in the form of a regulation, introduced in April 2000, which sought to increase the numerical threshold from 100 to 5 percent of shareholders.[79]

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[76] For an analysis of the successful outcomes flowing from the North Ltd EGM, see Darvas, Note 45 at 391.

[77] Federal Government Minister, Joe Hockey described environmental issues as outside issues that have nothing to do with creating shareholder wealth. See Note 78.

[78] Hockey J, *Wealth Not Politics* (2000) <http://www.minfsr.treasury.gov.au/content/pressreleases/2000/083.asp> (12 December 2003).

[79] The regulation was introduced pursuant to section 249D(1A) of the *Corporations Act*, which enables the numerical threshold of 100 to be amended with respect to a particular company or a particular class of company.

In effect, this would have meant that the sole test for requisitioning a general meeting under section 249D would be shareholders with 5% of the vote. The regulation was proposed following the recommendations of the Parliamentary Joint Statutory Committee on Corporations and Securities which concluded in its report, *Matters Arising from the Company Law Review Act 1998* (1999), that the 100 shareholder test contained in section 249D was "inappropriate and open to abuse."[80] Despite the government's best efforts to amend the law, the Senate later disallowed the proposed regulation. The disallowance motion was passed with the support of ALP, Democrat and Green Senators (who together at that time held a majority in the Senate) on the basis that the proposed threshold was too high and would prevent shareholders with small holdings from raising legitimate issues through general meetings.[81]

More recently, the Federal Government appears to have focused its efforts on removing the 100 shareholder threshold through a legislative amendment, as opposed to a regulation. In December 2002, the Federal Treasury released an exposure draft of the *Corporations Amendment Bill 2002* which, inter alia, seeks to remove the 100 shareholder threshold from 249D so that the sole test for requisitioning a general meeting will be shareholders with 5% of the vote that may be cast at a general meeting.[82] Although this draft Bill has yet to be tabled in Parliament, the provision which seeks to remove the 100 shareholder requirement has already been opposed by a number of prominent environmental NGOs.[83] However, such opposition is unlikely to count for much. Following the 2004 federal election the Howard government gained control of the Senate, finally opening the door for its planned amendments to section 249D.

Perhaps frustrated by the government's earlier failed attempts to deal with the so called "vigilante groups," one corporation has decided to take matters into its own hands. At the company's 2003 AGM, the Board of **Boral Ltd** proposed a special resolution to adopt a new constitution. The new constitution, which was eventually accepted by the AGM, now includes a provision requiring that any special resolution to modify or repeal the constitution, or a provision of it, must either have been approved by a special resolution of the Board, or included in a notice of general meeting given to shareholders as a resolution proposed by shareholders with at least 5% of the votes that may be cast on the resolution.[84]

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[80] Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Matters Arising from the Company Law Review Act 1998* (1999) at chapter 15. See also the subsequent final report of the Company & Securities Advisory Committee, *Shareholder Participation in the Modern Listed Company* (June 2000) at 14, which also recommended to remove the 100 shareholder threshold from section 249D.

[81] Tapley M, *How Many Shareholders Should it Take to Call a Meeting?* (Research Note 18 2001-02). Canberra: Parliament of Australia, Department of the Parliamentary Library Laws and Bills Digest Group, 12 February 2002. Available online at <http://www.aph.gov.au/library/pubs/rn/2001-02/02rn18.htm> (12 December 2003).

[82] The *Draft Corporations Amendment Bill 2002*, schedule 1, item 2.

[83] See, Australian Conservation Foundation (ACF), *A Submission to Treasury on the Exposure Draft of the Corporations Amendment Bill 2002*. Melbourne: ACF, April 2003. The submission was endorsed by Greenpeace Australia, Friends of the Earth (Australia), The Wilderness Society Climate Action Network Australia, and Australian Centre for Environmental Law-ANU. Available online at <http://www.acfonline.org.au/docs/general/00460.pdf> (20 January 2004).

[84] Boral Ltd, *Notice of Meeting 2003* (10 September 2003). See in particular resolution 3, explanatory notes at 5.

This new constitutional provision was introduced in reliance on section 136(3) of the *Corporations Act,* which states that a company's constitution may provide that a special resolution to modify or repeal the constitution does not have any effect unless a further requirement specified in the constitution relating to the modification or repeal has been complied with. It is worth considering for a moment whether the new requirement for constitutional changes which now forms part of Boral's constitution is consistent with section 136(3). This section appears to permit a company to put in place the following two step procedure for modifying or repealing its constitution: *Step one*- In compliance with the provisions of the *Corporations Act,* a special resolution seeking to amend or repeal the company constitution can be proposed for consideration by the general meeting. *Step two*- a further requirement specified in the constitution must then be complied with. The Boral amendment does not appear to introduce this two step process. It introduces the additional requirement, of gaining the support of the Board or shareholders with 5% of the vote, at step one of the process before the resolution can even be voted on by the general meeting. It is arguable therefore, that this new procedure is not consistent with section 136(3).

Notwithstanding its questionable validity, Boral's new constitution has managed to achieve what the Federal Government has so far failed to do. With respect to section 249D and the requisitioning of EGMs, it has managed to render the 100 shareholder threshold obsolete when the EGM is requisitioned for the purpose of proposing a special resolution that will modify or repeal Boral's constitution. In such circumstances, Boral shareholders must now satisfy a requirement that is in effect identical to the first arm of section 249D[85] and muster the support of shareholders with at least 5% of the votes that maybe cast on the resolution, or alternatively, gain the approval of a special resolution of the Board. If the shareholders fail to do this, the directors can ignore the shareholder requisition on the grounds that the accompanying resolution is inconsistent with the company's constitution and therefore invalid.[86]

Unlike the government's efforts, which have focused on removing the 100 shareholder test within section 249D, Boral's new constitution goes one step further. It also purports to render the 100 shareholder threshold in section 249N obsolete when a special resolution designed to amend or repeal Boral's constitution is proposed to be moved at a company AGM.

Efforts to eliminate the 100 shareholder threshold are particularly troublesome for socially responsible investors. Each of the above mentioned examples pertaining to the use of sections 249D and 249N have involved the use of this numerical threshold. This is due to the difficulties that would have been encountered by the shareholders in gaining the upfront support of a larger institutional investor that would normally be required to reach the 5% threshold. In the case of Boral, for example, the 5% threshold would be met with the support of shareholders with

[85] Pursuant to the first arm of section 249D (Section 249D(1)(a)) company directors must call a general meeting on the request of shareholders with at least 5% of the votes able to be cast at the general meeting.

[86] Company directors can ignore a requisition under 249D if it is determined that the general meeting will not be held for a proper purpose: See section 249Q of the *Corporations Act*.

approximately 28 million shares; a difficult task when the top 20 company shareholders control approximately 60% of ordinary shares between them.[87]

Should the 100 shareholder threshold become unavailable to shareholders, fewer environmental resolutions will make it to the floor of future company general meetings. In the process, it would come close to eliminating one of the few formal avenues available to socially responsible investors to ensure external environmental matters are considered as part of the corporate governance practices of Australian companies.[88]

3.3 Conclusion

Australian corporate law ensures that the interests of the corporation and its shareholders, namely profit maximization, are placed before the interests of the environment. Efforts by socially responsible investors to utilise the *Corporations Act* to require the consideration of external environmental matters in corporate decision making have so far failed due to a lack of support from institutional investors. Despite these failed efforts, the Federal Government and some corporations are attempting to make it even more difficult for socially responsible investors to bring their environmental concerns before company general meetings. If these misconceived attempts are successful, environmental considerations will remain a distant, secondary consideration for many Australian corporations.

[87] Calculations made using share information (as at August 2003) reported in Boral Ltd, *Annual Report 2003* at 48.

[88] In 2004, the Australian Parliament passed the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth). Schedule 8 of the Act introduces a number of new provisions into the *Corporations Act* relating to shareholder information and participation at general meetings. These new provisions do not amend or affect the operation of sections 249D and 249N.

Chapter 4

Why Are Our Corporations Degrading the Environment? The Failure of the Voluntary Approach

While Australian corporate law has evolved to ensure that the interests of the corporation and its shareholders are placed before the interests of the environment, on the 'flip side' of this regulatory coin, voluntary initiatives have dominated targeted efforts to bring about improved corporate environmental performance. In many cases, particularly at the federal level, these initiatives have been adopted as substitutes for regulation or used as justification for dismantling regulatory capacity.

Although voluntary initiatives have brought with them some environmental benefits, they have been ineffective in altering corporate environmental performance beyond "business as usual" and to the extent that is necessary to abate the significant environmental damage caused by corporate activity.

4.1 Targeted Measures to Improve Corporate Environmental Performance: Some Context

Traditionally, environmental protection measures have not singled out a specific actor for special attention. In this traditional approach, what is important is the ultimate environmental protection objective, not whether the harm is perpetrated by a corporation, a government or an individual.[1] Over the course of the past decade, this approach has been somewhat altered by the appearance of targeted measures to improve corporate environmental performance.[2] Many of these measures have been spawned by the corporate social responsibility movement[3] and the increasing recognition that the promotion of 'corporate responsibility and accountability' is a vital component of global efforts to achieve sustainable development. [4]

Objectives that commonly underpin these targeted measures include: the abatement of the environmental impacts of corporate activity, the ecologically efficient use of resources in the production of corporate goods and services, and the incorporation of

[1] See Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: The Social and Fiduciary Duties and Responsibilities of Company Directors* (1989) at 93.

[2] Some of the targeted regulatory measures adopted internationally will be discussed in greater detail in chapter 7.

[3] See generally Ward H, *Legal Issues in Corporate Citizenship*, London: International Institute for Environment and Development, 2003. See also chapter 9 for a discussion of corporate social responsibility.

[4] An expression of this recognition is contained in The World Summit of Sustainable Development (WSSD) *Plan of Implementation* 2002, which at paragraph 49 encourages action at all levels to "actively promote corporate responsibility and accountability, based on the *Rio Principles*, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations, and support continuous improvement in corporate practices in all countries."

environmental considerations as part of corporate governance practices.[5] Although the range of measures designed to achieve such objectives is broad, they can accurately be placed within the following three categories of policy instruments: [6]

(i) **Regulatory instruments** (e.g. industry emission and eco-efficiency standards, company environmental reporting requirements, extending company directors' duties to external environment matters) through which public authorities mandate industry targets and standards or certain corporate governance practices to bring about improved corporate environmental performance;

(ii) **Economic instruments** (e.g. taxes, tradable permits and refund systems) through which corporations are either taxed for polluting or given financial incentives to reduce environmental damage and implement eco-efficient technologies in the provision of goods and services; and

(iii) **Voluntary instruments** (e.g. voluntary codes of conduct and voluntary reporting initiatives) through which corporations make voluntary commitments to improve their environmental performance.

4.2 Voluntary Initiatives: The Preferred Instrument to Improve Corporate Environmental Performance

Before the United Nations ("UN") officially encouraged their use in 1992 through *Agenda 21*, only a handful of formal voluntary environmental initiatives existed. Over the past decade, they have increased in popularity to the point where they now number in their thousands[7] and are viewed in some countries, such as Australia, as the preferred instrument to improve corporate environmental performance.[8]

The United Nations Environment Program ("UNEP") has sought to divide voluntary initiatives into five major categories, which include:[9]

(i) **Industry initiatives** in which industry has exclusive management responsibility including defining the targets, if any, to be reached and whether or how to report progress publicly. These initiatives may be industry-specific,

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[5] These objectives are reflected in many of the voluntary measures discussed below in part 4.2 of this chapter.

[6] This is based on the categorisation used by the OECD to describe the range of instruments available with respect to the broader environmental policy agenda: See OECD, *Voluntary Approaches for Environmental Policy: An Assessment*. Paris: OECD, 1999 at 15.

[7] United Nations Environment Program (UNEP), *Voluntary Initiatives: Current Status, Lessons Learnt and Next Steps.* UNEP, 2000 at 3. Available at <http://www.uneptie.org/outreach/vi/reports/voluntary_initiatives.pdf> (20 January 2004).

[8] This is evident in the Federal Government's selection of a voluntary initiative (the greenhouse challenge), as opposed to a regulatory instrument, as the primary federal environmental instrument to decrease greenhouse gas emissions from Australian industry. See also section 4.4.5 of this chapter. For a discussion of the extent to which the voluntary approach now dominates the wider CSR agenda, particularly in Europe, see Ward H, *Legal Issues in Corporate Citizenship*, London: International Institute for Environment and Development, 2003 at 1.

[9] Note 7 at 5. Some Australian examples are provided in substitute for the examples originally provided by UNEP.

cross sectoral, or otherwise exclusive to the company, as well as national or international in their reach. Some examples include:

(a) Voluntary environmental management standards adopted by individual corporations, such as the Health Safety, Environment and Community Management Standards adopted by BHP Billiton.[10]

(b) Industry codes of conduct, such as the Australian Minerals Industry Code for Environmental Management. This initiative of the Minerals Council of Australia is designed to assist Australian mining companies improve their environmental performance beyond regulatory compliance.[11]

(c) International cross-sectoral codes of conduct, such as the Business Charter for Sustainable Development. This initiative of the International Chamber of Commerce contains 16 principles to assist corporations improve their environmental performance.[12]

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(ii) **Government initiatives** in which governments set the goals to be met (usually in consultation with industry and other stakeholders) and monitor the performance of the companies that volunteer to take part. A relevant example is the Federal Government's voluntary Greenhouse Challenge which is designed to abate the greenhouse gas emissions of Australian industry. Participating organisations sign agreements with the government that provide a framework for undertaking and reporting on actions to abate emissions.[13]

(iii) **Joint government / industry initiatives,** such as negotiated agreements or covenants, in which government and industry negotiate the goals to be met and how progress is to be monitored and reported. They may be company or industry specific, or cover cross-sector issues. Other stakeholders usually have only a consultative role. Falling into this category are the Federal Government's Eco-efficiency Agreements through which an industry association and the Federal Government agree to work together to promote eco-efficiency to the association's members.[14] A further example is the

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[10] To view the standards, see BHP Billiton, *Health, Safety, Environment and Community Management Standards* (2002) <http://www.bhpbilliton.com/bbContentRepository/Policies/HSECManagementStandardsIssue2.pdf > (10 January 2004).

[11] To view the code, see Minerals Council of Australia, *Australian Minerals Industry Code of Environmental Management* (2000) < http://www.minerals.org.au/environment/code http> (29 October 2004).

[12] To view the charter, see International Chamber of Commerce, *Business Charter for Sustainable Development* <http://www.iccwbo.org/home/environment_and_energy/sdcharter/charter/about_charter/about_charter.asp > (12 January 2004).

[13] See Australian Greenhouse Office, *About the Greenhouse Challenge* <http://www.greenhouse.gov.au/challenge/about/index.html> (29 August 2004). It should be noted that there is considerable cross over between categories 2 and 3. For example, the UNEP discussion paper places the Australian Greenhouse challenge within category 2 when it could just easily fall within category 3.

[14] Department of the Environment and Heritage, *Eco-Efficiency Agreements* <http://www.deh.gov.au/industry/corporate/eecp/agreements/index.html> (12 January 2004).

National Packaging Covenant, a self-regulatory agreement between participating businesses and governments (state and federal) to reduce waste from packaging, wasted materials, wasted energy and money and waste going to landfill.[15]

(iv) **Third-party initiatives** in which third parties (non-government, non-business) develop and run the initiative, although companies or industry associations are usually involved in an advisory capacity or as members of the organisation. For example, environmental management standards contained in the ISO 14000 series developed with input from 'Australian Standards,' the Australian standards development organisation. Australian Standards has also produced a corporate governance-corporate social responsibility standard (AS 8003-2003).[16]

(v) **UN and other international voluntary initiatives** in which the UN or other intergovernmental organisation act as a catalyst for the development and implementation of the initiatives. A prominent example is the UN Global Compact which is designed to bring companies together with UN agencies, labour and civil society to support ten principles in the areas of human rights, labour, the environment and anti corruption.[17] A further example is the Global Reporting Initiative ("GRI") whose mission is to develop and disseminate globally applicable Sustainability Reporting Guidelines for use by organisations for voluntary reporting on the economic, environmental, and social dimensions of their activities, products, and services.[18]

4.3 The Benefits of Voluntary Initiatives

There are numerous benefits associated with the use of voluntary initiatives, as opposed to economic or regulatory instruments, to bring about improved corporate environmental performance. Firstly, voluntary initiatives can be implemented faster than economic or regulatory instruments which ordinarily must pass through a lengthy legislative process before implementation. Accordingly, voluntary initiatives can be implemented as a speedy response to a pressing environmental issue. [19]

Secondly, many voluntary initiatives are designed, implemented and administered by an individual corporation or an industry association. In these circumstances, governments are not burdened with the administration and enforcement costs that are associated with regulatory or economic instruments.[20] Voluntary initiatives also offer a degree of flexibility to participants and governments. [21] Unlike regulatory and

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[15] Department of the Environment and Heritage, *National Packaging Covenant* <http://www.deh.gov.au/industry/waste/covenant/index.html > (12 January 2004).

[16] See Australian Standards < http://www.standards.com.au> (12 January 2004).

[17] See United Nations Global Compact <http://www.unglobalcompact.org/Portal/Default.asp> (12 January 2004).

[18] See Global Reporting Initiative <http://www.globalreporting.org/about/brief.asp viewed 12/01/03> (12 January 2004). Started in 1997 by the Coalition for Environmentally Responsible Economies (CERES), the GRI became independent in 2002, and is an official collaborating centre of UNEP.

[19] Note 7 at 3.

[20] Note 7 at 3.

[21] Note 7 at 3.

economic instruments, the targets or processes associated with voluntarily initiatives can therefore be quickly altered to suit the changing needs of industry or governments or to meet an evolving environmental problem that may increase or decrease in intensity.

Finally, proponents of voluntary initiatives argue that the voluntary approach provides for longer lasting cultural change within a corporation to address an environmental issue, than can be achieved through regulation.[22] This is because the environmental initiatives are adopted voluntarily by the corporation concerned and not in response to prescriptive regulatory standards. This creates a sense of ownership and acceptance of the initiative among corporate directors, management and employees. In light of this and the other abovementioned benefits, it is not surprising that voluntary initiatives have become a popular instrument to improve corporate environmental performance.

4.4 The Limitations of Voluntary Initiatives

Although voluntary initiatives have some clearly recognisable benefits, they carry with them several limitations. These limitations have rendered voluntary initiatives ineffective in altering corporate environmental performance beyond "business as usual" and to the extent that is necessary to abate the significant environmental damage caused by corporate activity outlined in earlier chapters.

Australian human rights and environmental NGOs have been particularly vocal in voicing their concerns about the 'effectiveness' of the voluntary approach. This was evident in several submissions from NGOs to the Federal Parliamentary Inquiry into the provisions of the *Corporate Code of Conduct Bill* 2000 (Cth),[23] a Bill designed to regulate the overseas activities of Australian companies with respect to the environment, labour standards, human rights and occupational health and safety. A typical example was the submission of the Sydney based NGO, the Minerals Policy Institute:

> "The reality is that self regulation often fails to fulfill its promise and efforts at self-regulation are regarded with scepticism by conservationists, consumer organisations and other parties interested in the externalities associated with the performance of industry. Self-regulatory standards are seen as weak, enforcement is generally ineffective and punishment is secret and mild. Furthermore, self-regulation is seen as lacking many of the strengths of conventional regulation in term of visibility, credibility, accountability and compulsory application."[24]

Recognition of the limitations of voluntary initiatives has not been confined to the NGO community. Both UNEP[25] and the OECD[26] have published discussion papers and reports critical of environmental voluntary initiatives. The OECD's most recent

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[22] Note 7 at 3.

[23] See Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Code of Conduct Bill 2000* (2001).

[24] Minerals Policy Institute (MPI), *Submission to the Inquiry into the Provisions of the Corporate Code of Conduct Bill 2000* (Submission 24). Sydney: MPI, 2000 at 8.

[25] Note 7.

[26] OECD, *Voluntary Approaches for Environmental Policy: An Assessment*. Paris: OECD, 1999. For a more recent OECD report on voluntary initiatives, see OECD, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes.* Paris: OECD, 2003.

report, *Voluntary Approaches for Environmental policy: Effectiveness, Efficiency and Usage in Policy Mixes* (2003),[27] contains perhaps the most critical analysis to date. It conveyed the findings of a study into the effectiveness of a significant number of national and international voluntary initiatives. The study found that the initiatives had failed to bring about a change in corporate behaviour beyond that of "business as usual":

> "While the environmental targets of most but not all voluntary approaches seem to have been met, there are only a few cases where such approaches have been found to contribute to environmental improvements significantly different from what would have happened any way. Hence, the environmental effectiveness of voluntary approaches is still questionable."[28]

The remainder of this chapter examines five commonly recognised limitations of voluntary environmental initiatives that have led to their ineffectiveness in bringing about the desired shift in corporate behaviour.

4.4.1 Limitation 1: Non-Binding

By their very nature, voluntary initiatives are non-binding. Accordingly, in most circumstances they are unable to encourage all companies to improve their environmental performance and cannot on their own deal with negligent or consistently poor performers.[29]

One pertinent example is the failure of the Minerals Council of Australia ("MCA") to encourage **Esmeralda Exploration Ltd**, an Australian mining company with operations in Romania, to become a signatory to the Australian Minerals Industry Code for Environmental Management.[30] On 30 January 2000, a tailings pond burst at a mining facility operated by the company near the Romanian city of Baia Mare. This led to approximately 100,000 m_3 of waste water containing up to 120 tonnes of cyanide and heavy metals being released into the Lapus River, then travelling downstream into the Somes and Tisa rivers into Hungary before entering the Danube.[31] The discharge contaminated the water supply of 2.5 million Hungarians and devastated the ecology of the local river system, an outcome described by a Hungarian government official as the "first environmental catastrophe of the 21st century."[32] Although it is debatable whether this environmental pollution would have been averted had the company been a signatory to the industry code, it still highlights the inability of the MCA to convince all Australian mining companies to become signatories to the code.

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[27] OECD, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes.* Paris: OECD, 2003.

[28] Note 27 at 14.

[29] Note 7 at 3.

[30] Note 24.

[31] International Task Force for Assessing Baia Mare Accident (BMTF), *The Report of the International Task Force for Assessing the Baia Mare Accident.* BMTF, 2000 at 11. The report can be viewed at <http://www.reliefweb.int/library/documents/eubaiamare.pdf> (20 January 2004).

[32] Australian Conservation Foundation (ACF), *Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities Inquiry into the Corporate Code of Conduct Bill 2000* (submission 33). Melbourne: ACF, 2000 at 3.

A further example, but with wider application, has been the failure of the Australian Greenhouse Challenge to bring about sufficient greenhouse gas abatement action from all industrial sectors. This failure is evident in the findings of the most recent evaluation of the initiative.

> "The Greenhouse Challenge has excellent coverage of emissions in some key areas including 100 per cent coverage of aluminium and cement production, 98 per cent of oil and gas extraction and electricity generation and distribution and 91 per cent of coal mining. In other areas, however, coverage is less comprehensive, often significantly so, and opportunities remain for greater coverage, by targeting large emitters not yet on the program and a number of sectors with relatively low participation."[33]

Such poor cross-sectoral coverage is a significant shortcoming given that the Greenhouse Challenge is the Federal Government's 'flag ship,' cross-sectoral instrument designed to abate the greenhouse gas emissions of Australian industry.[34]

4.4.2 Limitation 2: Targets

According to the OECD, voluntary initiatives need to contain transparent and clearly defined quantitative targets in order to be effective. [35] Many voluntary initiatives fail to meet this objective. A case in point is the UN Global Compact which contains targets that are qualitative rather than quantitative. Among its ten principles designed to guide corporate behaviour, are the following three environmental principles:

- **Principle 7:** Businesses should support a precautionary approach to environmental challenges;
- **Principle 8**: undertake initiatives to promote greater environmental responsibility; and
- **Principle 9**: encourage the development and diffusion of environmentally friendly technologies.

The problem with targets of this nature is that a company's success in implementing them cannot be measured nor properly monitored. Furthermore, it is open to the company to interpret what is meant by such targets in any way it chooses. The website for the Global Compact openly acknowledges this: "The Global Compact is not a regulatory instrument – it does not "police", enforce or measure the behaviour or actions of companies."[36]

Other voluntary initiatives may contain quantitative targets, but they are set at such a level that they do not bring about change in behaviour that is anything beyond "business as usual." When this occurs the voluntary initiative is said to have been "captured" by industry. The OECD states that a voluntary approach is captured by industry when the environmental target set is no more than the abatement associated

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[33] Australian Greenhouse Office, *Greenhouse Challenge Evaluation Report*. Canberra: Commonwealth of Australia, 1999 at 4.

[34] There are other federal greenhouse initiatives, such as the 2 % mandatory renewable energy target (MRET), which target specific sectors. In the case of MRET, the energy sector is the specific target. This initiative is discussed at length in chapter 5.

[35] Note 6 at 12.

[36] Note 17.

with a "business as usual pattern." There is also a degree of capture when the target is close to the business as usual pattern. In other words, the closer the target to this pattern, the higher the degree of capture of a voluntary approach by industry interests.[37]

The Greenhouse Challenge is a voluntary initiative which arguably comes within the OECD's definition of industry capture. The initiative has been established to permit corporations to set their own greenhouse gas abatement targets. This allows an individual company to choose an abatement target as close to its "business as usual" pattern as it might like. Of course, it is open to a company to strive for an ambitious abatement target, but in many cases targets are set close to a "business as usual pattern" to allow for the continuation of greenhouse gas intensive operations.

The greenhouse abatement target of **BHP Billiton**, a greenhouse challenge member, provides one such example. The company has set a target of improving its greenhouse gas emissions 'intensity' in its operations of not less than 5% over the years 2002 to 2007.[38] In its *Climate Change Position Statement*, **BHP Billiton** describes what such a target entails:

> "In contrast to an absolute reduction target, an intensity target is a commitment to reduce emissions on a per unit of output basis. This permits companies that have significant growth objectives to improve their greenhouse gas emission performance. (For example, BHP Billiton has significant expansion plans for aluminium assets in Mozambique and South Africa that will increase the level of greenhouse gases produced but these facilities will be among the most energy efficient in the world.)"[39]

While this intensity target, if it is met, will result in less greenhouse house gas emissions being produced by the company than might have otherwise been the case, BHP Billiton will still meet its target even with a dramatic increase in its 'absolute' greenhouse gas emissions. The company will therefore be able to continue on, "business as usual," expanding its greenhouse intensive operations without breaching its greenhouse gas commitments. The target therefore offers no incentive to BHP Billiton to begin phasing out or reducing its greenhouse intensive operations which make such a significant contribution to global climate change.

In some cases, voluntary initiatives may contain no targets at all. Such initiatives are described as being 'implementation' based as opposed to 'target' based.[40] An example of an implementation approach is the Federal Government's "Australian Framework for Public Environmental Reporting," which was launched in 2000.[41] The introduction to the framework document states that it was developed "to further facilitate and encourage voluntary public environmental reporting in Australia, by providing simple and effective guidance at a national level." The framework is purely process driven

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[37] Note 6 at 31.

[38] BHP Billiton, "Climate Change Position Statement" (October 2003) at 1. The statement can be viewed at <http://www.bhpbilliton.com/bbContentRepository/Policies/ClimateChangeOct2003.pdf> (21 January 2004).

[39] Note 38 at 2.

[40] Note 6 at 20.

[41] Environment Australia, *A Framework for Public Environmental Reporting: An Australian Approach*. Canberra: Commonwealth of Australia, 2000. The framework may be viewed at <http://www.deh.gov.au/industry/finance/publications/framework/foreword.html> (20 January 2004).

and does not contain any targets relating to the number of participants that it is hoped might be attracted to the initiative.

So far, it would appear this process driven initiative has failed to encourage wide spread voluntary environmental reporting in the corporate sector, a conclusion that is reflected in a 2004 study commissioned by the Department of Environment and Heritage. The findings of this study, outlined in the report, *The State of Sustainability Reporting in Australia*,[42] reveal "a very low" rate of sustainability reporting among Australian companies. Of the 509 Australian public and private corporations researched in the study, only 116 companies were found to have produced a sustainability report or included sections relating to sustainability issues in an annual report or website. Only 27% of these reports were found to be independently verified and only 8% made reference to the internationally recognised GRI sustainability reporting guidelines.[43]

4.4.3 Limitation 3: Monitoring

According to the OECD, provisions for monitoring and reporting in voluntary initiatives are essential for keeping track of performance improvements and constitute the key to avoiding failure to reach targets.[44] In some cases, voluntary initiatives contain no provision for monitoring. For example, the UN Global Compact does not incorporate provisions for the monitoring of the performance of companies that participate in the Compact. Therefore, there is no official means to gauge the effectiveness of the initiative.

In other cases, voluntary initiatives may be monitored but in an adhoc or inadequate fashion. The Greenhouse Challenge is such an example. Between 1995 and 2004, it was subject to only one official evaluation, which took place in 1999. Such infrequent evaluation provides little guidance in determining the success of the initiative in achieving a reduction in Australia's greenhouse gas emissions.

Other monitoring mechanisms of the Greenhouse Challenge have been plagued by difficulties. Members of the Challenge voluntarily agree that they will report annually to the Australian Greenhouse Office on progress in meeting their specified abatement targets. However, these reporting requirements appear to be regularly breached. A random verification process into the accuracy of Greenhouse Challenge member reports, commissioned by the Australian Greenhouse Office in 2002, was unable to verify the accuracy of reports from participants in the Agricultural sector. This was due to the fact that at the time of the verification process, not a single member among the 63 agricultural participants had submitted an annual progress report.[45]

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[42] The Centre for Australian Ethical Research in collaboration with KPMG and Deni Greene Consulting Services, *The State of Sustainability Reporting in Australia*. Canberra: Commonwealth of Australia, 2004. The report may be viewed at <http://www.deh.gov.au/industry/corporate/reporting/pubs/final-report.pdf> (25 November 2004). A broad range of corporate non-financial reports were considered under the heading of 'sustainability reports', including triple bottom line reports, environment reports and community reports.

[43] Note 42 at ii-iii.

[44] Note 6 at 12.

[45] Australian Greenhouse Office (AGO), *Report on the Independent Verification of the Greenhouse Challenge Program 2002*. Canberra: AGO, 2003 at 9.

Weaknesses in the reporting provisions of the National Packaging Covenant ("NPC") have also been identified. Signatories to the NPC are required to develop and submit an action plan detailing how they propose to implement their voluntary covenant commitments. In 2002, an independent review of NPC action plans was undertaken, which included a comprehensive review of 104 representative action plans. The review found that:

> "The majority of action plans expressed a general intent of addressing most of the issues identified in the National Packaging Covenant, and provided detailed actions on how these were to be addressed. However, few of the action plans included details on data collection, measurable targets or what resources had been assigned for the implementation of the action plan."[46]

In 2004, a further review of the NPC reported little if any change. It reported that among covenant signatories "there is almost a universal lack of measurable targets in action plans." With respect to the annual reporting requirements, the review found that many of the annual reports did not report against the original actions and measures that the signatories had committed to. Findings such as these, led to the more general conclusion that "there are few [signatory] companies setting measurable (numerical) targets, providing a sound system for collecting relevant data, and identify[ing] the necessary resources to most meet product stewardship commitments."[47]

4.4.4 Limitation 4: Sanctions

Voluntary initiatives generally do not incorporate sanctions for non-compliance. Without adequate sanctions it is difficult to ensure compliance, leaving the strategic and commercial interests of a company as the sole incentive for bringing about any environmental improvements.[48] Often, the only sanction available to a government or industry association overseeing a voluntary initiative is to terminate a non-complying party's membership. For example, it is open to the Federal Government to terminate an agreement under the Greenhouse Challenge with a member who consistently fails to meet the reporting obligations.[49] It has not been revealed publicly whether the government has ever acted on this right of termination.

The failure of industry associations to terminate the membership of corporate participants in industry sponsored voluntary initiatives has been a constant source of criticism from Australian environmental NGOs. Much of this attention has been focused on the mining sector and the failure of the mining association, MCA, to sanction signatories to the Australian Minerals Industry Code for Environmental Management ("the Mining Code") for action that is inconsistent with the code's environmental principles.

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[46] Gutteridge Haskins & Davey Pty Ltd, *Independent Review of Action Plans and Annual Reports* 2002. Canberra: National Packaging Council 2002 at i.

[47] Nolan-ITU Pty Ltd, *National Packaging Covenant Council: Evaluation of the Covenant.* Melbourne: Nolan-ITU, 2004 at 50.

[48] Note 27 at 86.

[49] Australian Greenhouse Office, *Greenhouse Challenge Implementation Plan 2003*. Canberra: AGO 2003 at 9.

In its submission to the Parliamentary Inquiry into the *Corporate Code of Conduct Bill 2000*, the Minerals Policy Institute outlined six cases, including BHP's actions at the Ok Tedi mine, where corporate signatories to the Mining Code have acted in a way that might reasonably be considered inconsistent with the code's principles. [50] In each of the cases cited, the offending corporation was permitted to remain as a signatory to the code. This is not surprising, given that the Mining Code does not contain provisions for sanctioning non-compliant members, nor a specified right to terminate membership. The only provision that resembles a sanction of any kind, is a mechanism that enables the code's secretariat to ask signatories to "reaffirm their commitment" to the principles of the Code.[51]

4.4.5 Limitation 5: Regulatory Capture.

Perhaps the most significant limitation of voluntary initiatives is that they will be ineffective in bringing about a change in corporate environmental performance if they are used in isolation and as a substitute for other regulatory or economic instruments. This was one of the key messages of the UNEP discussion paper, *Voluntary Initiatives: Current Status Lessons Learnt and Next Steps (2000)*:

> "Typically, the successes and failures of an initiative result not so much from its own design as from the strengths and weaknesses of outside pressures (e.g. fear of regulatory action or liability claims, anticipation of new tax burdens or new market opportunities). Voluntary initiatives should not be proposed and adopted as substitutes for regulation or used as justification for dismantling regulatory capacity."[52]

When voluntary initiatives are adopted as substitutes for regulation or used as justification for dismantling regulatory capacity, "regulatory capture" is said to have been achieved by industry. [53]

There is ample evidence to support an assertion that there has been a significant degree of regulatory capture within Australia, particularly at the federal level of government, with respect to targeted efforts to improve the environmental performance of Australian corporations. Such evidence includes:

(i) In 1989 the Senate Standing Committee on Legal and Constitutional Affairs recommended against extending the fiduciary duty of directors under Australian corporate law to consider inter alia, external environmental matters. In recommending against the extension of this duty to such matters, the committee promoted as one alternative the introduction of a voluntary code of ethics for company directors:

> Doctors, lawyers, pharmacists and others belong to honourable professions. All are expected to act according to codes of ethics. Ethics are morality tempered with experience. Peers best know what is reasonable to expect from practitioners and strong peer pressure is a powerful force for proper conduct. It is to be hoped that a code of ethics and strong peer pressure will come to guide the conduct of

[50] Note 24 at 12.
[51] See Note 11 at 5 (Code Implementation).
[52] Note 7 at 13. Quote from Robert Gibson, University of Waterloo, Canada- UNEP workshop participant
[53] Note 27 at 43.

company directors. A corporate culture that promotes one is vital. Self regulation, if it works, in many respects is better than regulation imposed by law.[54]

A voluntary code of ethics for Australian company directors was introduced in 2001 by the Australian Institute for Company Directors. The code's guidelines are designed to encourage company directors to carry out their functions in a professional and ethical way.[55]

(ii) In 2001, the Parliamentary Joint Statutory Committee on Corporations and Securities recommended against the adoption of the *Corporate Code of Conduct Bill 2000*. A key consideration of the Committee was the joint submission of the MCA, Australian Industry Group and Business Council of Australia. The submission argued that voluntary initiatives are more effective mechanisms than legislation in leading to improved environmental performance:

> "Unilateral legislative action by Australia will not be successful in raising standards in other countries. Market forces and industry led initiatives, such as voluntary codes are more effective vehicles than legislation in leading to improved performance. The proposed legislation could actually reduce the flexibility of companies to determine their own measures to improve performance."[56]

(iii) It would appear that this industry view (outlined directly above) is also shared by the Howard, Federal Government. In 2002, it proposed the *Draft Corporations Amendment Bill 2002*, designed to, inter alia, delete section 299(1)(f) of the *Corporations Act 2001*. Section 299(1)(f) requires company directors to report on the corporation's performance in relation to any particular significant environmental regulation to which the corporation's operations are subject. Until recently, it was the only provision in the *Corporations Act* with a specific environmental focus.[57] In the explanatory memorandum to the Bill, the following statement is provided as an explanation for the deletion of the reporting provision:

> "It is desirable for public corporations to adopt appropriate governance structures and processes (for example environmental disclosure), on an ongoing basis and in a non-

[54] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: The Social and Fiduciary Duties and Responsibilities of Company Directors* (1989) at 13. The Committee also found that if specific legislation to require directors to consider environmental issues in decision making were deemed necessary, it should be contained in environmental regulation rather than corporate law. See p 99.

[55] The code can be downloaded from the website of the Australian Institute for Company Directors <http://www.companydirectors.com.au> (21 January 2004).

[56] Mineral Council of Australia, Australian Industry Group and Business Council of Australia, *Joint Submission Into the Provisions of the Corporate Code of Conduct Bill 2000* (submission 21). 2000 at 3.

[57] The second environmental provision, section 1013 D (1)(L), came into effect in 2002. This provision requires companies issuing or selling a financial product with an investment component to include details in the product disclosure statement on the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.

> prescriptive manner. It is considered preferable for Australian corporate governance practice to develop in response to competitive economic, commercial and international pressures, rather than in response to prescriptive rules mandated by Government."

The only national substitute for this legislative corporate environmental reporting provision is the Federal Government's voluntary initiative, the Australian Framework for Public Environmental Reporting.

(v) The above statement, provided in explanation for the proposed deletion of 299(1)(f), is indicative of the Federal Government's voluntary approach to improving corporate environmental performance. The extent to which the voluntary approach now dominates federal efforts in this area is particularly evident when visiting the "Sustainable Industry" section of the Federal Department of the Environment and Heritage (the Department) website.[58] The website contains information on numerous government sponsored environmental initiatives concerned with improving the environmental performance and sustainability of industry. The initiatives, the majority of which are voluntary, [59] are underpinned by a spirit of "partnership" between government and industry, terminology that reflects a relationship between equals rather than one of a government that has the power and indeed the responsibility to regulate the activity of industry.[60]

All of the voluntary initiatives featured on the website have positive qualities and are likely to result in some environmental outcomes. However, they are not part of a broader integrated regulatory framework designed to improve corporate sustainability. Instead, they appear to be used as a substitute for regulation. For example, Australia's only cross-sectoral federal instrument to abate the greenhouse gas emissions of Australian industry, the Greenhouse Challenge, is a voluntary initiative.[61] Likewise, Australia's only cross-sectoral federal mechanism to reduce waste from packaging, the National Packaging Covenant, is also voluntary.[62] Furthermore, the Federal Government's eco-efficiency agreements also appear to be implemented in the absence of any

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[58] Department of the Environment and Heritage, *Sustainable Industry* <http://www.deh.gov.au/industry/index.html> (15 August 2004).

[59] The website includes information on some federal regulatory initiatives, such as the National Pollution Inventory (NPI) which requires Australian industrial facilities using more than a specified amount of the substances listed on the NPI reporting list to estimate and report emissions of these substances annually.

[60] See generally Department of the Environment and Heritage, *Partnering Industry* <http://www.deh.gov.au/industry/partnering-industry/index.html> (15 August 2004).

[61] Note 34.

[62] In 1996, all nine Australian Parliaments passed legislation which established the National Environment Protection Council (NEPC). The NEPC makes National Environment Protection Measures (NEPMs) to be implemented in each jurisdiction through regulatory measures. In 1999 the NEPC made the NEPM on used packaging. This was intended to operate in tandem with the National Packaging Covenant. The role of the NEPM was to ensure that industries who became signatories to the Covenant would not be disadvantaged in the market place compared to competitors who chose not to become signatories. The federal jurisdiction was the only jurisdiction not to implement regulations that would bring the NEPM on used packaging into effect. The NEPM expired in June of 2004.

other federal regulatory mechanisms to improve the eco-efficiency of Australian industry. [63] As highlighted earlier in this chapter, each of these voluntary initiatives will be ineffective in the absence of complementary regulatory instruments.

Despite the degree of regulatory capture at the federal level, state governments have not necessarily been precluded from introducing regulatory measures specifically designed to improve corporate environmental performance. For example, in 2002 the Victorian Government introduced an innovative piece of environmental legislation through the *Environment Protection (Resource Efficiency) Act 2002* (Vic) ("the *Resource Efficiency Act"*) designed in part to push Victorian producers of products and services towards measures which decrease ecological impact and increase resource efficiency.[64] The *Resource Efficiency Act*, which amends the provisions of the *Environment Protection Act 1970* (Vic),[65] provides for a regulatory framework through which individual producers and industries have a choice to either, enter into a voluntary covenant to decrease their ecological impact and increase resource efficiency, or risk that the Victoria's Environment Protection Authority will impose these changes through regulatory action. [66] Because this legislation has only been recently enacted, it is too early to comment on the effectiveness of the *Resource Efficiency Act* in achieving the desired shift in corporate behaviour. But if properly implemented, the new legislation will undoubtedly improve the environmental performance of corporations operating within the State of Victoria.

However, state governments remain hampered by the limited reach of their regulatory efforts, which will have no application beyond their state borders. This is a significant limitation when action to improve corporate environmental performance (e.g. reducing industry greenhouse gas emissions) often requires a national approach. In such circumstances, state governments will view the primary responsibility for implementing regulatory measures as resting with the Federal Government.[67]

Furthermore, proposals for regulatory instruments with the objective of improving corporate environmental performance often focus on corporate governance practices, such as corporate environmental reporting or the extension of the fiduciary duty of company directors to environmental considerations. Regulatory measures of this kind are best implemented through the framework of the *Corporations Act*, which now falls within the federal jurisdiction. While it is acknowledged that the states have an

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[63] Note 14.

[64] The Act applies to persons or bodies other than corporations. However, because corporations account for the vast majority of goods and services produced in Victoria, the Act appears to be targeted primarily at the corporate sector.

[65] See *Environment Protection Act 1970* (Vic), part IX.

[66] For commentary on the *Resource Efficiency Act*, see McConvill J and Joy M, "Interaction of Directors' Duties and Sustainable Development in Australia: Setting Off on the Uncharted Road" (2003) 27 *Melbourne University Law Review* at 122-125. The *Resource Efficiency Act* adopts a hybrid approach, combining a regulatory and voluntary instrument to achieve an environmental outcome.

[67] For an example of how a state government (Victoria) views the need for federal legislation to curb greenhouse gas emissions, see Victorian Government, *The Victorian Greenhouse Strategy and Victoria's Responsibilities Under The National Greenhouse Strategy* [p 1.] <http://www.greenhouse.vic.gov.au/files/NGS-VGS.pdf> (21 January 2004).

important regulatory role in this area, the lack of regulatory action at the federal level has been, and will continue to be, a major impediment in improving the environmental performance of Australian corporations.

4.5 Conclusion

The 'capture' of Australian regulatory efforts to improve corporate environmental performance has had significant environmental implications. As a substitute for regulatory instruments or as justification for dismantling regulatory capacity, voluntary initiatives remain the preferred and, in many cases, the only environmental instrument specifically implemented to shift corporations towards sustainability. This has exposed the limitations of voluntary initiatives, which generally are non-binding, lack strong quantitative targets, are poorly monitored, contain few, if any, sanctions and when used in isolation have proven ineffective. Because of these limitations, voluntary initiatives have failed to shift Australian corporate performance beyond "business as usual" and, to the extent that is necessary, to abate the significant environmental impacts of corporate activity outlined in earlier chapters.

Chapter 5

Why are Our Corporations Degrading the Environment? Limitations of 'Traditional' Environmental Law

Despite Australia's over reliance on voluntary initiatives to improve corporate environmental performance, it would be incorrect to suggest that Australian corporations are unregulated on environmental matters. Within the last three decades, hundreds of environmental laws have been introduced within Australian federal, territory and state jurisdictions, a great number of which regulate corporate activity.[1]

Most of this legislation has concentrated on what could aptly be described as the more traditional objectives of environmental law: controlling the disposition and use of natural resources, biodiversity and cultural conservation, land use planning and pollution control.[2] Such laws regulate an activity as it relates to the environment rather than focusing on the actor undertaking the activity. For example, pollution control laws will focus on minimising the release of harmful pollutants into the environment, and are applicable to corporations, governments and natural persons alike.[3]

Notwithstanding the fact it typically does not target corporations per se, one would expect that existing environmental legislation, based on its shear quantity alone, would provide public authorities with the instruments they need to improve corporate environmental performance. Why then, with such regulatory controls in place, is corporate activity still unsustainable and continuing to degrade the environment to the extent outlined in earlier chapters? Outlined below, are three factors which it is argued have contributed to this outcome.

5.1 Factor 1: Regulatory Capture of Environmental Impact Assessment Laws

Environmental impact assessment legislation (EIA legislation) is, in many respects, the 'keystone' environmental legislation operating in Australia. Each of the federal, territory and state jurisdictions has EIA legislation or procedures that form a central component of their environmental law regimes.[4] Legislation of this kind requires an assessment of the environmental impacts of a proposed activity that is considered

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[1] Bates G, *Environmental Law in Australia* (Sydney: Butterworths, 5th ed, 2002) at 89.

[2] For a discussion of the traditional categorisation of environmental law, see Bates G, *Environmental Law in Australia* (Sydney: Butterworths, 4th ed, 1995) at 6-7.

[3] There are exceptions. For example, amendments to the *Corporations Act 2001* (Cth) (discussed later in this chapter) have been introduced that now require companies to make disclosure on certain environmental issues. Because of the regulatory reach of the *Corporations Act*, these provisions only apply to corporate entities. Further, the *Environment Protection (Resource Efficiency) Act 2002* (Vic) appears to be targeted primarily at corporations. The Act is designed in part to push Victorian producers of products and services towards measures which decrease ecological impact and increase resource efficiency resource. Because corporations account for the vast majority of goods and services in Victoria, the Act's primary target is the corporate sector.

[4] For a general discussion that includes references to the EIA legislation enacted in Australian federal, state and territory jurisdictions, see Bates, Note 1 at 275-333.

likely to have a significant environmental impact. Following this assessment, if the proposed activity is determined to have unacceptable environmental consequences, the controlling authority may impose conditions on the activity or refuse approval for the activity to proceed.[5]

Falling within the category of EIA legislation is the principal environmental legislative instrument operating at the federal level, the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("the *EPBC Act*"). Its environmental objectives include, inter alia, the protection of the environment, the conservation and ecologically sustainable use of natural resources and biodiversity conservation.[6] Under the provisions of the *EPBC Act*, persons (which includes corporations) undertaking "actions" that are likely to have a significant impact on "matters of national environmental significance" require approval from the Federal Environment Minister (the Minister) before they can proceed.[7] The Minister, after considering the environmental impacts of the proposed activity through an environmental impact assessment process, has the discretion to grant approval for the proposed action, with or without conditions, or to deny approval altogether.[8]

While representing a typical example of the EIA legislation now in place in the various Australian jurisdictions, the operation of the *EPBC Act* also highlights why this form of regulation has failed to minimise the environmental impacts of corporate activity. This failure has largely arisen due to the discretionary nature of the powers vested in the controlling authority or relevant minister to grant or deny approval for the subject activity.[9] In many cases, this discretion is 'captured' by industry to the extent approval is almost always granted to a proposed activity, rendering the whole process nothing more than a rubber stamp requirement prior to environmentally harmful activity.

With respect to the *EPBC Act*, by March 2004 there had been a total of 1154 "actions" referred to the Minister for approval under the provisions of the Act since its enactment in 1999. Of these actions there had been only two instances where the Minister had not provided the requisite approval for the proposed action to proceed.[10]

Such figures would not come as a surprise to Australian environmental law experts. As Gerry Bates observes in the fifth edition of *Environmental Law in Australia*, "EIA

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[5] See Bates, Note 1 at 275.

[6] The *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 3.

[7] Matters of national environmental significance include: World Heritage properties (s 13), declared Ramsar wetlands (s 16), listed threatened species and communities (s 18), listed migratory species (s 20), nuclear actions (s 21), marine environment (s 22) and Commonwealth land (s 26). Section 11 of the *EPBC Act* provides a summary of a how the approval provisions operate.

[8] See *EPBC Act*, s 133.

[9] Apart from the problems associated with broad ministerial discretion, other weaknesses of the EPBC Act have emerged. These include an emerging pattern of non-compliance, particularly within the agricultural sector, (see the discussion in 5.2 below) and the failure of the Act to specifically deal with greenhouse gas emissions and land clearing activities by listing such matters as "matters of national environmental significance" that would trigger the operation of the Act: See Macintosh A, *Environment Protection and Biodiversity Conservation Act 1999: An Overview of the First Two Years.* Sydney: WWF Australia, 2002 at 21.

[10] Department of the Environment and Heritage, *Monthly Statistics-Referrals, Assessments and Approvals* (March 2004) <http://www.deh.gov.au/epbc/statistics/statistics.html> (24 August 2004).

does not introduce an environmental veto power into decision making."[11] Instead, it is a means for environmental impacts to be identified and given 'due consideration' in the decision making process. Bates points out that in the past, Australian governments have been very clear on this. In 1974, when the Federal Government enacted the preceding EIA legislation to the *EPBC Act*, the *Environment Protection (Impact of Proposals) Act* 1974 (Cth), the then Minister for Environment and Conservation had this to say about the legislation:

> "It will not grant me the exclusive power of veto over porposals or policies. It will not force developers to abandon environmentally unsound objectives. It will not ensure that the government makes environmentally sensible decsions. It will not give individual citizens the power to stop bad projects or to set conditions for moderate ones. The legislation will, intead, enable me to gather extensive information on specific proposals. It will force developers to include envionmental impact in their planning. It will present the government with comprehenisive information about environmental impact as an aid to decision making."[12]

This rather blunt admission about the limitations of EIA legislation can be contrasted with the way the current *EPBC Act* is publicly portrayed by the Department of the Environment and Heritage. In its 2002/03 annual report, the Department stated:

> "The Environment Protection and Biodiversity Conservation Act continues to deliver significant benefits for all Australians, the international community and future generations. It does this by protecting matters of national environmental significance - namely, internationally important wetlands, migratory species, nationally threatened species and ecological communities, World Heritage, and the Commonwealth marine environment - and by protecting the environment from nuclear actions. In addition, the Act provides protection for the environment in relation to proposals involving Commonwealth land and regulates the activities of Commonwealth agencies that might significantly affect the environment."[13]

The emphasis on the environmental protection objectives of the *EPBC Act* masks the reality of the way the new legislation has so far been utilised. Rather than protecting the environment from development activities that are likely to have a significant envronmental impact, which one might assume would require the denial of development approval on some occassions, it has merely served its tradtional role of informing the government authroities of the environmental impacts of the proposed activities. While there were 70 instances (as of March 2004) where the Minister had placed environmental conditions on an activity before granting the approval, the fact the approval rate stood at over 99.8% almost three years after the enactment of the Act,[14] suggests the *EPBC Act* has been ineffective in achieving its environmental protection objectives. Furthermore, it illustrates that environmentally harmful activities undertaken by corporations and private individuals have continued largely unrestrained by the operation of the Act.

Regulatory capture is not the only problem plaguing Australian EIA legislation. Other general problems persist that weaken its effectiveness in achieving environmental protection objectives:

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[11] Bates, Note 1 at 278.
[12] Cited in Bates, Note 1 at 278.
[13] Department of the Environment and Heritage, *Annual Report 2002-03: Operation of the Environment Protection and Biodiversity Conservation Act 1999, Overview* <http://www.deh.gov.au/about/annual-report/02-03/reports-epbc-overview.html> (20 April 2004).
[14] Figures based on the *EPBC Act* monthly statistics-referrals, assessments and approvals, as at March 2004. See Note 10.

i. The EIA documentation used to assess the environmental impacts of a project is usually prepared by the proponent or by persons employed by the proponent. This practice is biased in favour of the proponent and inevitably leads to aspects of a project which are environmentally harmful being glossed over with superficial studies or omitted altogether.[15] In the words of U.S Judge, Justice Douglas, who was commenting on this practice which is also common in the United States, "the final say on these environmental matters should not be under the direct or indirect control of those who plan to make millions out of their destruction."[16]

ii. EIA legislation is triggered far too late in the decision making process. In many cases, by the time it is triggered important decisions on the site, design, processes and equipment for a project have already been made making it difficult and costly to introduce significant last minute changes to the proposal for environmental reasons.[17]

iii. EIA procedures are often criticised for their lack of transparency. For example, a 2002 "issues paper" prepared by the Victorian Government as part of a wider review into the adequacy of its EIA procedures under the *Environmental Effects Act* 1978 (Vic) stated that:

> "There is significant concern about the need for greater transparency in the referral, screening and scoping aspects of the [EIA] process and the Minister's final Assessment. In particular, the reasoning behind decisions to require an [EIA] for some proposals, and not for others of an apparently similar nature or significance, is unclear to external stakeholders. This is coupled with concern about the potential conflicts of interest of some public-sector agencies involved in the process, and a perception of an inherent bias towards proponents in the overall process."[18]

As if to confirm stakeholder fears about the lack of transparency in the Victorian EIA procedures, the Victorian Government refused to publicly release the final report and recommendations arising from the review. This is hardly surprising given its critical findings. After obtaining a leaked copy of the confidential final report, *The Age* newspaper revealed that:

> The report points out that Victoria's Environment Effects Act has fallen behind those of other governments. It says the act does not state its objectives, makes no mention of "sustainability" and fails to define "environment"…In particular it notes that: "The protection of the environment appears to be of less importance than the promotion of economic wellbeing . . . the biophysical environment is less important than other considerations, particularly economic."[19]

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[15] Bates, Note 1 at 326.

[16] *Life of the Land* v *Brinegar* (1973) 414 US 1052. Cited in Bates, Note 1 at 326.

[17] For commentary on this criticism levelled against the *Environmental Effects Act 1978* (Vic), see Department of Infrastructure (Vic), *Environment Assessment Review: Issues and Options- Summary* (2002) at 9.

[18] Department of Infrastructure (Vic), *Environment Assessment Review: Issues and Options- Summary* (2002) at 10.

[19] Millar R and Fyfe M, *State Suppresses Vital Environment Report* (7 March 2005) The Age < http://theage.com.au/news/National/State-suppresses-vital-environment-report/2005/03/06/1110044255514.html> (26 April 2005).

iv. The claim that "Victoria's EIA legislation has fallen behind that of other governments" highlights an additional fault with Australian EIA legislation: its lack of jurisdictional consistency. As stated earlier in this chapter, each Australian jurisdiction (federal, state and territory) has its own specific EIA legislation and procedures; each with its own strengths and weaknesses. For example, a certain development activity in New South Wales might automatically trigger the requirement for an EIA under the *Environmental Planning and Assessment Act* 1979 (NSW), while across the state border in Victoria, that same activity might escape the requirement for an EIA altogether.[20] Jurisdictional inconsistencies weaken the effectiveness of EIA legislation in addressing environmental problems, particularly those that show no respect for jurisdictional borders.[21]

5.2 Factor 2: Poor Enforcement and Non-Compliance

The effectiveness of Australian environmental laws in improving corporate environmental performance has also been hampered by poor enforcement and non-compliance. A case in point is the *EPBC Act*, which is exhibiting signs of systematic non-compliance within certain industry sectors, particularly the agricultural sector. Despite operating across 59% of the Australian landscape and being responsible for a high proportion of Australia's land clearing and water extraction,[22] the agricultural sector (as of March 2004) was responsible for no more than 2.6% of the "actions" referred to the Minister for approval under the Act.[23] According to Queensland lawyer, Chris McGrath, there is a trend developing in the enforcement of the *EPBC Act* whereby the regulatory authority is "unwilling or unable to take legal action should the Act be infringed."[24] In McGrath's view:

> "There would appear to be two principal reasons for the lack of enforcement of the *EPBC Act*: lack of resources for [the Department of the Environment and Heritage] and lack of political will to enforce environmental legislation, particularly against the agricultural sector. To the extent that the latter factor is operating, and it is unclear to what extent it is, this reflects a

[20] In NSW, a proponent must prepare an environmental impact statement if the proposed development activity falls within the category of a "designated development" under Part 4 of the *Environmental Planning and Assessment Act* 1979 (NSW). Schedule 3 of the *Environmental Planning and Assessment Regulations* 2000 (NSW) declares a wide range of activities to be designated development, such as marinas, extractive industries, intensive animal industries. By contrast Victoria's EIA legislation does not have a mandatory referral requirement for development activities. Guidelines under the *Environment Effects Act* 1978 (Vic) only provide a general list of the types of proposals that might attract the need for an EIA. Since there is no formal obligation to refer proposals under the Act, notification of proposals is essentially at the initiative of either the proponent or relevant decision-makers: See Department of Infrastructure (Vic), *Environment Assessment Review: Issues and Options- Technical Paper* (2002) at 21.

[21] For example, pollution, climate change, over fishing, poor water quality and species extinction are problems experienced nationally and are not confined to a particular state or territory jurisdiction.

[22] For a discussion of the environmental impacts of this sector, see chapter 2 (2.5).

[23] As at 30 March 2004, the agriculture and forestry sectors combined were responsible for no greater than 30 (or 2.6%) of the 1154 referrals under the *EPBC* Act: See Note 10.

[24] McGrath C, *Enforcement, Politics and the EPBC Act* (2001) [p 4]. <http://www.nccnsw.org.au/member/cbn/projects/upload/Enforcement_politics_and_the_EPBC%20Act_McGrath.pdf> (30 January 2004).

> form of 'regulatory capture,' whereby government agencies refrain from enforcing the law over industries that they are responsible for regulating."[25]

The inability or lack of will to enforce environmental legislation at the federal level has placed severe limitations on the capacity of existing federal environmental laws to improve corporate environmental performance. However, enforcement difficulties are not just confined to the federal jurisdiction. State environmental regulatory regimes are also plagued by enforcement difficulties in addressing repetitive non-compliance of state environmental laws. This is highlighted by the problems experienced by the Victorian Environment Protection Authority (the EPA) in enforcing the state licence obligations of **Shell Australia** at the corporation's Geelong refinery. A special investigation undertaken by Melbourne based newspaper, *The Age*, revealed that between the beginning of 2002 and November 2003, Shell had committed more than 300 licence breaches and had been fined for 11 oil spills at the refinery. The investigation also revealed that EPA had fined Shell 31 times since 2000.[26]

Unlike the Federal Department of the Environment and Heritage, the Victorian EPA's enforcement problems do not arise from a lack of resources or political will. Instead, the institutional design of Victoria's environmental regulatory system has resulted in a situation whereby the vast majority of penalties imposed for breaches of licence amount to no more than a $5000 penalty infringement notice. Rather than issuing an infringement notice, the EPA does have the option of taking matters to court to obtain a larger penalty for a breach of licence that amounts to a contravention of Victoria's environmental laws. For example, pursuant to section 59E of the *Environment Protection Act* 1970 (Vic), a body corporate can be fined as much as one million dollars if convicted of the offence of aggravated pollution. Seeking larger penalties approaching this amount would involve issuing proceedings in the Supreme Court of Victoria. The complexity and costs associated with such proceedings are prohibitively high and, as a consequence, the EPA has shown a tendency to instead issue an infringement notice or instigate legal proceedings in the Magistrates Court for a contravention of the Act. Such proceeding, if successfully prosecuted, generally result in fines at the lower end of the scale.[27] Victoria's institutional weaknesses can be contrasted with jurisdictions, such as New South Wales, which have specialist environmental courts and tribunals. Specialist environmental courts have shown they are more willing to hand down higher criminal penalties than non- specialist courts, strengthening the deterrence value of environmental laws.[28]

It would appear that the Victorian EPA's reliance on the $5000 penalty infringement notice does not exert the degree of deterrence pressure on Shell, a multi-national petroleum corporation, necessary to ensure compliance with the corporation's environmental licence requirements. According to the EPA's south-west region manager, Tony Robinson, when reflecting on Shell's numerous licence breaches:

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[25] Note 24.

[26] Hannan E and Paxinos S, *Tackling Corio's Big Stink* (8 November 2003) The Age <http://www.theage.com.au/articles/2003/11/07/1068013395952.html> (30 January 2004).

[27] The Environment Protection Authority of Victoria (EPA) in the 2002-03 reporting period reported 34 major prosecutions during the period between July 2002 and June 2003. Of these prosecutions, Mobil Oil Australia Pty Ltd received the highest penalty of $50,000 for breaches of the *Environment Protection Act* 1970 (Vic): EPA Victoria, *Annual Report 2002-03*: Compliance at 29.

[28] See Bates, Note 1 at 103.

> "The government has chosen for the EPA to have an enforcement policy that says every company gets a $5000 fine for misbehaving, regardless of whether they're a multinational or a fish and chip shop. That's just the way it is. There is a level playing field in one sense. (But) it's not level to your ability to pay."[29]

Shell's poor compliance record highlights a wider pattern of non-compliance within the corporate sector. [30] For many corporations, compliance with the law is a matter of weighing up the costs and benefits. A large corporation that has annual profits of hundreds of millions of dollars is unlikely to be deterred by the smaller fines and penalties normally associated with a breach of environmental laws. Canadian law professor, Bruce Welling, describes the cost benefit analysis in this way:

> "The practical business view is that a fine is an additional cost of doing business. A prohibited activity is not inhibited by the threat of a fine so long as the anticipated profits from the activity far outweigh the amount of the fine multiplied by the probability of being apprehended and convicted. Considering the amount of the average fine, deterrence is improbable in most cases."[31]

The problems arising from poor law enforcement and lack of regulatory compliance severely undermine the effectiveness of Australian environmental laws in improving corporate environmental performance. It is one thing to have hundreds of environmental laws within federal, territory and state jurisdictions but if such laws are not complied with, or not enforced by the relevant authority, they are rendered incapable of meeting their environmental objectives.

5.3 Factor 3: Poor Integration of Environmental law and Corporate Law

The most influential factor in limiting the effectiveness of existing Australian environmental laws in improving corporate environmental performance has been the absence of any meaningful integration of environmental law and corporate law within Australian jurisdictions.

From its earliest conception, the underlying theme of sustainable development has been the objective of integrating environmental considerations as part of the economic

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[29] Cited in Note 26.

[30] A further Australian example is the compliance record of **Energy Resources Australia Ltd** at its Ranger Uranium Mine in the Northern Territory. Following a five month investigation into a leak of contaminated water at the mine site in March 2004, Dr Johnson, the Commonwealth's Supervising Scientist, concluded that the company had breached several conditions of its operating licence and "that a degree of complacency had set in at the mine." Since its opening in 1981 there has been more than 120 reported leaks, spills and other incidents at the ranger mine: Murdoch L, *Ranger Mine Under Threat* (1 September 2004) The Age <http://www.theage.com.au/articles/2004/08/31/1093938920221.html> (1 September 2004). For a wider discussion of the pattern of corporate non-compliance with the law, see Bakan J, *The Corporation: The Pathological Pursuit of Power* (Toronto: Viking Canada, 2002) at 79-84.

[31] Cited in Bakan, Note 30 at 80.

development process.[32] The pursuit of this objective reflected the recognition that the policies, laws and institutions governing the environment had been historically separated from the policies, laws and institutions governing economic development. As was noted by the 1987 *Brundtland Report*, this was at odds with the integrated effort that would be required to abate the environmental impacts associated with economic development:

> "The integrated and interdependent nature of the new challenges and issues contrasts with the nature of the institutions that exist today. These institutions tend to be independent, fragmented and working to relatively narrow mandates with closed decision making processes. Those responsible for managing natural resources and protecting the environment are institutionally separated from those responsible for managing the economy. The real world of interlocked economic and ecological systems will not change; the policies and institutions concerned must."[33]

This lack of integration and the clear need for reform, prompted the United Nations through *Agenda 21*, as adopted by the Plenary at the 1992 Rio Earth Summit, to call for the development and implementation of integrated laws and regulations:

> "To effectively integrate environment and development in the policies and practices of each country, it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles."[34]

The importance of integration in the pursuit of sustainable development has also been acknowledged by Australian governments. The *National Strategy for Ecologically Sustainable Development* ("the NSESD"), endorsed by the Council of Australian Governments in December 1992,[35] has a guiding principle which states that "decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations."

5.3.1 Liability of Directors for Environmental Crime: The Integration of Criminal and Corporate Law Principles of Liability into Environmental Law

It would be inaccurate, however, to assert that since 1987 when the notion of integration was first emphasised within the context of the sustainable development agenda, Australian governments have made no effort to integrate principles of environmental law into corporate law, or visa versa for that matter. Perhaps the strongest area of integration between these two bodies of law has come in the form of directors' liability for corporate environmental offences. Australian federal, territory and state jurisdictions have all now introduced provisions within their varying

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[32] For example, Principle 4 of the 1992 *Rio Declaration on Environment and Development* states that: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." See *The Rio Declaration on Environment and Development* (adopted at the United Nations Conference on Environment and Development, June 1992) in Appendix 10.

[33] World Commission on Environment and Development (WCED), *Our Common Future* (Oxford: Oxford University Press, 1987) at 310.

[34] *Agenda 21* [8.14] (adopted at the United Nations Conference on Environment and Development, June 1992). *Agenda 21* can be viewed at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (21 January 2004).

[35] The NSESD can be viewed at <http://www.deh.gov.au/esd/national/nsesd/strategy/intro.html#Principles> (2 February 2004).

environment protection legislative schemes providing that where a corporation commits an offence under the legislation a director or manager of the corporation is taken to be guilty of the same offence.[36] This incorporates a liability concept into environmental law that is drawn from both corporate and criminal law.[37]

The introduction and subsequent enforcement of these provisions has been proclaimed in some circles as "a warning to company directors to treat their environmental responsibilities with the same diligence as they do there financial duties."[38] Yet while it is accepted that directors' liability provisions are a 'step in the right direction' and have strengthened Australian environmental laws, their effectiveness has been hampered by three fundamental weaknesses. First, there is no uniformity between the director liability provisions enacted in the different Australian jurisdictions.[39] This is problematic because many Australian corporations operate in more than one state or territory. Accordingly, what might constitute a directors' offence under Queensland law may not necessarily be an offence in New South Wales (NSW) and Victoria.[40] This has prompted environmental lawyer, Tom Howard, to describe the liability of directors for environmental crime in Australia as "anything but a level playing field."[41] Howard asserts that this is unfair for directors who cannot be expected to be familiar with the many different offence models of the states and territories and unfair for communities in the different Australian jurisdictions who rely on the environment protection laws for their health, amenity and livelihoods.[42]

The second weakness relates to the defence of "no knowledge," which is a complete defence available to directors charged under the directors' liability provisions in the NSW and Victorian jurisdictions; two state jurisdictions which also account for the

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[36] See, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 494, 495; *Environment Protection Act 1970* (Vic), s 66B; *Environment Protection Act 1986* (WA), s 118(1); *Waste Management and Pollution Control Act 1998* (NT), s 91(1): *Environment Protection Act 1993* (SA), s 129*: Environment Management and Pollution Control Act* 1994 (Tas), s 60; *Protection of the Environment Operations Act 1997* (NSW), s 169(1); *Environment Protection Act 1994*(QLD), s183; and *Environment Protection Act 1997* (ACT), s 147. For commentary on these provisions, see Howard T, "Liability of Directors for Environmental Crime: The Anything-but- Level Playing Field in Australia" (2000) 17(4) *Environmental and Planning Law Journal* 250; Baird RJ, "Liability of Directors and Managers for Corporate Environmental Offences- Recent Prosecutions" (1999) 15(3) *Environmental and Planning Law Journal* 192; and Streets S, "Prosecuting Directors and Managers in Australia: A Brave New Response to An Age Old Problem?" (1998) 22 *Melbourne University Law Review* 693.

[37] Bates, Note 2 at 7.

[38] Dr Brian Robinson, when chairman of the Victorian EPA, commenting on a 1998 prosecution of a corporate director under Victoria's director liability provisions: EPA, (Media Release, 12 August 1998).

[39] See generally, Howard, Note 36. Howard points out that there is little uniformity in the wording of the offence provisions or the statutory defences that maybe raised by a director when defending a charge. Nor are the enforcement practices or court procedures consistent from one state to another.

[40] Under Queensland's *Environment Protection Act 1994* (Qld), a director cannot rely on the defence of no-knowledge to defend a prosecution made under the act's director liability provision (see s 147). In NSW, pursuant to s 169(1) of the *Protection of the Environment Operations Act 1997* (NSW), and in Victoria, pursuant to s 66B(1A) of the *Environment Protection Act 1970* (Vic), the defence of no knowledge is available to a director.

[41] Howard, Note 36 at 250.

[42] Howard, Note 36 at 271.

greatest share of the nation's economic activity.[43] In Victoria and NSW, if directors can show that they had no knowledge that the contravention of the environmental offence by the corporation had occurred, even in circumstances where they reasonably ought to have known, they will have successfully defended their charge. Accordingly, unless the prosecutor has direct evidence of the director's knowledge of the commission of the offence, there is little, if any, chance the director will ever face a charge in NSW or Victoria. Such evidence may only be obtained if the director had been directly involved in the commission of the offence. [44] This makes it extremely difficult to bring a successful prosecution against directors of large corporations who are not involved in the day to day operations of their corporation, thereby minimising the offence's deterrence value against such directors. Furthermore, the availability of the defence may actually discourage directors from familiarising themselves with the environmental management procedures of the corporation. Familiarisation could mean the director is unable to rely on the 'no knowledge' defence.

The 'no knowledge' defence is also at odds with the expectations of directors under corporate law. For example, modern authorities dealing with the duty of care, skill and diligence owed to the company by corporate directors require, as a general rule, that a director should acquire at least a rudimentary understanding of the business of a corporation.[45] As explained in a U.S ruling, relied on in the 1995 decision of the NSW Court of Appeal, *Daniels v Anderson*, "directors may not shut their eyes to corporate misconduct and then claim that because that they did not see the misconduct, they did not have a duty to look."[46] This sentiment is a far cry from the defence of 'no knowledge' which enables directors to avoid conviction under Victorian and NSW environmental law when they "shut their eyes" to corporate misconduct, even in circumstances when they reasonably ought to have known of such misconduct.

The third, and arguably the most fundamental weakness of the directors' liability provisions, stems from the strength of the competing duty a director has under corporate law to act in the best interests of the company. It is not asserted that this competing duty would ever force directors to breach environmental laws and subject themselves to personal liability. Rather, as argued later in this chapter, the directors' duty to the company undermines the effectiveness of environmental law by encouraging directors to exploit weakness and vulnerabilities in the law when it is in the best interests of the company to do so. Exploitable weaknesses of the directors' liability provisions include the no knowledge defence, the consequences of which are discussed above. Another exploitable weakness is that many Australian jurisdictions have a very poor enforcement record when it comes to charging company directors for environmental offences.[47] What is more, in cases where successful convictions

[43] In NSW, the defence is available pursuant to s 169(1)(a) of the *Protection of the Environment Operations Act 1997* (NSW). In Victoria, it is available by operation of s 66B(1A)(a) of the *Environment Protection Act 1970* (Vic).

[44] Howard, Note 36 at 259. Howard's observations were directed at the consequences of the NSW defence but apply as equally to Victoria.

[45] NSW court of Appeal, *Daniels v Anderson* (1995) 16 ACSR 607 at 667 citing statements made by Pollock J in a decision of the Supreme Court of New Jersey, *Francis v United Jersey Bank* 432 A 2d 814 (1981).

[46] Note 45.

[47] The poor enforcement practices have been well documented by both Howard and Streets, Note 36. The jurisdiction which has showed the strongest tendency to prosecute and enforce its directors' liability provisions is Victoria.

have been made, there has been a general tendency by the courts to impose very light fines that are well below the prescribed maximum penalties.[48] This may tempt directors, particularly of large corporations, to consider the prospect of a conviction and any serious sanction as too remote to worry about.

5.3.2 The Environment: Outside the Scope of Corporate Law

Just as some tentative steps have been made in Australian jurisdictions towards integrating principles of corporate law into environmental regulatory regimes, there have been some recent environmental inroads into Australian corporate law. The *Corporations Act* now includes two disclosure provisions dealing specifically with environmental matters. The first, introduced in 1999, is section 299(1)(f) which requires company directors, in the annual directors' report, to give details on the corporation's performance in relation to any particular and significant environmental regulation to which the corporation's operations are subject.[49]

The second provision, section 1013D(1)(L), was introduced in 2002 through the *Financial Services Reform Act* 2001 (Cth). This provision is targeted specifically at the financial services sector and requires companies issuing or selling a financial product with an investment component[50] to include details in the product disclosure statement on the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment. The disclosure requirements are supported by regulations[51] and mandatory guidelines issued by the Australian Securities and Investment Commission ("ASIC"),[52] which provide greater detail and guidance on the requirements of section 1013D(1)(L).

Some legal practitioners argue that a 2004 amendment to the *Corporations Act*, introduced through the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act* 2004 (Cth), will require additional corporate disclosure on environmental issues. Section 299 (A)(1)(c) now requires that the directors' report for a financial year for a company or disclosing entity that is a listed public company must also contain information that members of the company would reasonably require to make an informed assessment of the entity's business strategies and its prospects for future financial years. Sean Lucy of law firm, Phillips Fox, argues that "this will require businesses to provide information about the implications that climate change [and other big ticket environmental issues] have for them."[53] But while it is accepted that this provision provides scope for reporting on environmental and other social

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[48] The tendency to impose light penalties has been well documented by both Howard and Streets, Note 36. This is despite the fact that in some jurisdictions, maximum fines are as high as $500,000 (as is the case in Western Australia) and can also include possible prison terms for up to seven years (as is the case in NSW).

[49] The effectiveness of this reporting provision is discussed in chapter 6.

[50] Financial products which have an investment component include: superannuation products, managed investment products and investment life insurance products. See *Corporations Act*, 1013D (2A)

[51] *Corporations Regulations 2001* (Cth), reg 7.9.14C.

[52] ASIC, *Section 1013DA Disclosure Guidelines (ASIC)* (2003) <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/s1013DA_finalguidelines.pdf/$file/s1013DA_finalguidelines.pdf> (24 August 2004).

[53] See Gibbs K, *Environment Blows In Work For Lawyers* (24 February 2004) Lawyers Weekly <http://www.lawyersweekly.com.au/articles/50/0c01da50.asp> (24 August 2004).

issues relevant to a company's future prospects, it does not specifically oblige companies to report on such issues.[54]

The recent inclusion of sections 299(1)(f) and 1013D (1)(L) represent a much needed first step in the integration of environmental measures into corporate law. Care should be taken, however, not to claim that the *Corporations Act* has now obtained the status of a legal instrument "based upon sound social, ecological or economic principles;" the kind envisaged by the drafters of *Agenda 21*. After all, these two measures are isolated disclosure provisions in an Act that is thousands of pages in length, contains over 1450 sections[55] underpinned by extensive regulations and which otherwise remains silent on environmental issues. The narrow focus of Australian corporate law and its tendency to treat the environment as 'an outsider' remains unchanged, a point which has been concisely captured, by Tomasic, Bottomley and McQueen in the second edition of *Corporations Law in Australia:*

> "Corporate law, as it is taught and practiced in Australia, is concerned with the legal relations between a narrow category of corporate actors. Along with the corporation itself, corporate law is concerned with the rights, interests, duties and liabilities of corporate "insiders": the members of the corporation and its directors. The other primary concern is the relations between the corporation with certain "outsiders," primarily creditors and others who enter into contracts with corporations. Corporate regulators can also be thought of as significant outsiders. It is apparent then that modern corporate law is not concerned directly with the role of the corporation as an employer, taxpayer or tax avoider, or as an economic or environmental actor."[56]

In previous chapters the dominance of the corporation within the Australian and larger global economy was highlighted.[57] Given that corporations are responsible for such a high proportion of economic activity, improving corporate environmental performance has become an essential pre-requisite for efforts to put Australian economic development on to a sustainable footing. The fact that the *Corporations Act*, the principal regulatory instrument governing Australian corporations, is not concerned with the corporation as an environmental actor is therefore a significant hurdle in Australia's efforts to achieve sustainable development.

However, the problem runs deeper than a *Corporations Act* that is largely silent on environmental issues. The failure to adequately integrate environmental and corporate laws has resulted in a situation where Australian corporate law now actively undermines the capacity of Australian environmental law to achieve its objectives.

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[54] This interpretation is shared by Labor members on the Parliamentary Joint Committee on Corporations and Financial Services: See Parliamentary Joint Committee on Corporations and Financial Services, Commonwealth Parliament, *CLERP (Audit Reform and Corporate Disclosure Bill) 2003: Part 2, Financial Reporting and Audit Reform* (June 2004) at 209.

[55] As of 2 February 2004, the *Corporations Act* included 1452 sections.

[56] Tomasic R et al, *Corporations Law in Australia* (Sydney: Federation Press, 2nd ed, 2002) at 67. For a similar perspective on the narrow focus of corporate law and the way it is taught in Australian universities, see Darvas P, "How to See the Forest for the Trees: What's the Point of so much Corporate Law" (2002) 9 (3) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/indices/title/darvas93_abstract.html> (21 April 2004).

[57] See primarily chapter 2.

Earlier, in chapter 3, it was shown that the narrowness of the principal directors' duty of Australian corporate law, *to act in good faith in the best interests of the company*, ensures that in most instances the interests of the corporation's shareholders, namely profit maximization, are placed before the interests of the environment. This corporate law duty comes into conflict with environmental laws which attempt to elevate environmental interests above those of the corporation. Tolmie put the nature of the conflict in this light:

> "[T]ypical [environmental] regulation employs bright line standards. This results in an emphasis on form not substance and tempts actors to test the limit of what is legally permissible. The profit making incentive of the corporation and the adversarial stance taken toward market intervention encourage this attitude."[58]

The conflict first becomes apparent when environmental legislation employs targets that are below the base line of what is required to meet the environmental objectives of the legislation, as is the case with Australia's Mandatory Renewable Energy Target ("MRET"). MRET is a federal legislative scheme that places a legal liability on wholesale purchasers of electricity to proportionately contribute towards the generation of an additional 9500 gigawatt hours (GWh) of renewable energy (equivalent to an additional 2% of electricity generated) annually by 2010.[59] MRET's objectives, which are set out in the accompanying legislation, are to encourage additional renewable energy generation, reduce greenhouse gas emissions and ensure that renewable energy sources are ecologically sustainable.[60]

The MRET target continues to be criticized by environmental NGOs that claim a higher target of 10% would be a more a meaningful target to meet the scheme's objectives.[61] Such criticisms are arguably justified when one considers that the electricity sector contributes over a third of Australia's greenhouse gas emissions.[62] The 2% target is, therefore, only capable of bringing about a modest reduction in Australia's overall greenhouse gas emissions.

In September 2003, an official review into MRET concluded that by 2007, sufficient capacity is expected to have been installed to meet the MRET target of 9500 GWh for 2010.[63] However, despite having reached the target early, the review found that it was unlikely that there would be any further increase in renewable energy investment and generation thereafter. [64] This conclusion is based in part on the unstated assumption

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[58] Tolmie J, "Corporate Social Responsibility" (1992) 15(1) *UNSW Law Journal* 268 at 278.

[59] MRET Review Panel, *Renewable Opportunities: A Review of the Operation of the Renewable Energy (Electricity) Act 2000*. Canberra: Australian Greenhouse Office, 2003 at 3.

[60] *Renewable Energy (Electricity) Act 2000* (Cth), s 3.

[61] For example, Greenpeace have called for a higher target of 10%. It points out that other countries have introduced higher targets (e.g. Germany 12% by 2010; and the UK 10% by 2010 and 20% by 2020): Greenpeace Australia Pacific, *The Mandatory Renewable Energy Target* <http://www.greenpeace.org.au/climate/government/mret.html#background> (20 April 2004).

[62] See chapter 2 (2.2.1) for the precise figures.

[63] Note 59 at xvii. Despite this finding, the MRET review panel did not recommend an increase in the target prior to 2010. It did, however, recommend continuing steady increases in the MRET targets towards a target of 20,000 GWh by 2020: Note 59 at xx-xxi. In response, the Federal Government has officially stated that it will not extend or increase the MRET targets to implement the review panel's recommendations: Australian Greenhouse Office (AGO), *Government Response to the Tambling Mandatory Renewable Energy Target (MRET) Review Recommendations*. Canberra, September 2004 at 2.

[64] Note 59 at 22.

that once the 2% target has been met, wholesale electricity purchasers would unlikely go beyond regulatory compliance, creating little incentive for further investment in renewable electricity generation.[65]

The findings of the MRET review are consistent with Tolmie's observations. Wholesale purchasers, once the target is met, will have met their statutory obligations. Despite growing consumer demand for "green electricity products," electricity production using low cost and readily available non renewable energy sources, such as coal, will still be viewed as the more cost effective option in the absence of environmental regulation and market based incentives that make it otherwise.[66] Corporate decision makers within the enterprises that carry out the bulk of wholesale purchasing, in compliance with their duty to act in the best interests of the company, will direct the corporation on a route that they believe ensures greater profitability namely, the continued use of greenhouse intensive energy as the primary source of supply for its customers.

Anticipating this response, the directors of corporate electricity generators will, as the MRET review predicts, steer their corporations on a course that channels investment to meet the demands of the wholesalers by focusing their new investments in the lower cost, greenhouse intensive means of electricity production. While not environmentally sound, this decision will be perceived as being in the best interests of the company. The combined effect of these decisions will be that generation of renewable energy is not likely to move beyond the 2% target, inhibiting the legislation's capacity to make any further inroads in reducing the high proportion of the nation's greenhouse emissions arising from the electricity sector.

As is evident from the MRET example, there are two competing forces at play between environmental and corporate law in Australia. On the one hand, there is corporate law which, as a consequence of the legal duty of directors to act in the best interests of the company, reinforces the profit motivation of a corporate enterprise thereby relegating environmental issues to a position of secondary importance. On the other hand, environmental law ideally attempts to elevate environmental objectives to a position of primary importance, which, in some instances, may not necessarily accord with corporate short term interests. Where the regulatory force of environmental law ends, the profit motivation of a corporation takes over. This becomes problematic in circumstance when the environmental targets contained in environmental legislation are insufficient to meet the legislation's wider

[65] This is an assumption that can be drawn from the findings of the MRET review. Investment in new renewable energy projects is projected to fall away after the target is met. If investors projected that wholesale purchasers would move beyond the 2% target to a higher percentage threshold, it is logical to assume that investment would be projected to fall away only when that higher threshold is met.

[66] The bulk of Australia's electricity generation is presently sourced from black and brown coal. This is due to the fact Australia has abundant reserves of both black and brown coal which are readily exploitable and therefore a low cost energy resource for electricity generation. In contrast, renewable energy systems have high up-front installation costs, which immediately detract from their development, as wholesale customers mostly opt for cheaper so called 'traditional' fossil fuel generated energy. For a discussion of this trend, see Roarty M, *Renewable Energy Used for Electricity Generation in Australia* (Research Paper No 8 2000-01). Canberra: Department of the Parliamentary Library, Parliament of Australia, 2000.

environmental objectives. In such circumstances, corporate law effectively encourages corporations to go no further than compliance with the legislative environmental target, undermining the capacity of environmental law to reach its more aspirational objectives.

Some legal commentators contend that corporate law and the profit motivation it encourages not only dissuades conduct that is beyond regulatory compliance, it actively encourages corporations to breach the law. Joel Bakan, a Vancouver-based law professor, in his book, *The Corporation: The Pathological Pursuit of Power*, supports this contention:

> "[T]he corporation's mandate to pursue its own self interest, itself a product of the law, actually propels corporations to break the law. No corporation is exempt from this built-in logic, not even those that claim they are socially responsible."[67]

Consistent with the cost/benefit exercise described earlier in this chapter, Bakan is of the view that "for a corporation, compliance with the law, like everything else, is a matter of costs and benefits."[68] In other words, when deciding whether to comply with or break the law a corporation will weigh up the chances of being caught and the penalty for breach with the costs of regulatory compliance and then simply make the most cost effective decision.[69] To support his view, he cites numerous examples involving corporate "unlawfulness" and "misconduct" in North America from such companies as **BP**, **General Motors** and **General Electric**.[70] These North American examples have their Australian equivalents, as the abovementioned example involving **Shell Australia's** continual breach of Victorian environmental laws demonstrates.

However, Bakan's observations help us to look further than the enforcement and compliance problems that plague environmental law. Insignificant fines and lack of enforcement are not the only reasons why corporate enterprises continually breach environmental laws. The basic problem can be traced back to corporate law itself. The duty of corporate directors to act in the best interests of the company and the profit motivation that ensues encourages corporations to exploit the vulnerabilities and weaknesses of environmental law, often giving rise to conduct which is in breach of the law. In the absence of meaningful integration between corporate and environmental law within Australian jurisdictions, the capacity of state, territory and federal environmental laws to meet their desired objectives will continue to be undermined by Australian corporate law.

5.5 Conclusion

Despite the fact Australian environmental laws now number in their hundreds, they have been ineffective in improving corporate environmental performance to the extent necessary to abate the significant environmental impacts of corporate activity identified in earlier chapters. This has been caused by a number of contributing

[67] Bakan, Note 30 at 80.
[68] Bakan, Note 30 at 79.
[69] Bakan ,Note 30 at 80. Bakan quotes US businessman Robert Monks to support this point.
[70] Bakan, Note 30 at 60-84.

factors, which include: the regulatory capture of environmental impact assessment laws, poor enforcement and non-compliance, and the inadequate integration of Australian environmental and corporate laws.

Chapter 6

A Solution: Integrating the Principle of Environmental Protection into Australian Corporate Law

This thesis has so far been about identifying environmental problems and their causes. Chapter 1 began with an examination of the serious environmental problems currently faced in Australia, placing them in their international context. In chapter 2, it was demonstrated that corporate activity is unsustainable and has played a significant role in bringing about these problems.

Remembering that corporations are in fact our creations, a question was then asked: *why are our corporations degrading the environment?* Chapters three, four and five then set about answering this question. In doing so, the current regulatory environment was identified as being significantly at fault. First, it was argued that Australian corporate law ensures that the interests of company shareholders are placed before the interests of the environment. Second, evidence was presented to show that too much reliance has been placed on voluntary initiatives, particularly at the federal level, to bring about improved corporate environmental performance. Third, it was submitted that environmental laws currently in place in Australia have been ineffective in improving corporate environmental performance to the extent necessary to abate the significant environmental impacts of corporate activity. This ineffectiveness is partly due to the fact that Australian corporate law actively undermines the environmental protection objectives of Australian environmental law.

These chapters covered a significant amount of ground. But it was necessary. As stated in the introduction to chapter 1, only after having acknowledged the true extent of a problem, and in turn its causes, can a remedial solution be identified. What is clear from the discussion so far is that Australian corporate law is very much at the heart of the environmental problems experienced in modern day Australia and represents a formidable hurdle in national efforts to achieve sustainable development. Whilst this is the case, Australian corporate law, if strategically reformed, could also play an important role in turning these problems around. Outlined below is a proposal for corporate law reform designed to improve the environmental performance of Australian corporations, guiding them on a pathway toward sustainability.

6.1 The Overall Objective

The overall aim of the law reform agenda is to integrate the principle of environmental protection, one of the "pillars" of sustainable development, into Australian corporate law.[1] It consists of three strategic legislative amendments to the *Corporations Act*:

[1] Paragraph 2 of the *Plan of Implementation* arsing from the 2002 Johannesburg World Summit on Sustainable Development refers to three pillars of sustainable development: economic development, social development and environmental protection. The plan of implementation can be viewed at <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter1.htm> (20 April 2004).

1. A new directors' duty to ensure that a corporation, and any subsidiary, acts in accordance with the principles of sustainable development;
2. New mandatory, public reporting requirements for public corporations and large proprietary corporations with respect to their environmental and social performance; and
3. New winding up provisions that will allow the court to wind up a company if the court is of the opinion that the affairs of the company are being conducted in a manner that is repetitively in breach of Australian laws.

The amendments have been proposed in order to achieve the following objectives:

(i) To minimise the negative environmental impacts arising from the activities of Australian corporations when operating both in Australia and abroad;
(ii) To improve the ecological efficiency of Australian corporations;
(iii) To ensure environmental considerations are now a central, as opposed to a secondary, consideration in the governance of Australian corporations;
(iv) To ensure that within Australia corporate law no longer undermines the objectives of environmental law nor acts as a barrier to national efforts to achieve sustainable development ; and
(v) To better enable people, particularly foreign nationals, whose interests are affected by the environmentally harmful activities of Australian corporations to seek redress through the courts.

Each of the amendments will be discussed in greater detail below.

6.2 Legislative Amendment 1: Environmental Directors' Duty

6.2.1 Proposed Amendment

Insert into the *Corporations Act* the following section:[2]

Section 180 A

Sustainable Development – directors and other officers

[2] This proposed directors' duty (the "author's proposal") is based in part on an amendment to the *Corporations Act* first proposed in McConvill J and Joy M, "Interaction of Directors' Duties and Sustainable Development in Australia: Setting Off on the Uncharted Road" (2003) 27 *Melbourne University Law Review* 116 (the "McConvill proposal"). The two proposals are similar in three ways: (i) both propose to introduce the directors' duty through a new s 180A; (ii) both are designed to reduce the adverse impacts of corporate activity on the environment; and (iii) both are designed to increase the ecological efficiency of corporations with respect to resource use. Two major differences include: (i) the McConvill proposal, unlike the author's proposal, does not include specific wording that would extend its affect to subsidiary companies; and (ii) the author's proposal does not include an environmental judgment rule (as outlined in McConvill's proposal) designed to protect directors who in the process of complying with s 180A are viewed as not acting in the best interests of the company. The environmental judgment rule is seen as unnecessary by the author. A director who took action to comply with s 180A could always argue that such action was in the best interests of the company as it would be beneficial for the company's long term profitability and success. See chapter 8 which highlights the well established link between improved corporate environmental performance and long term profitability.

(1) A director or other officer of a corporation must exercise their powers and discharge their duties to ensure that the corporation, and any subsidiary of the corporation registered in this jurisdiction or a foreign jurisdiction, acts in accordance with the principles of sustainable development.

(2) For the purposes of subsection 1, a corporation will be taken to have acted in accordance with the principles of sustainable development if:

(a) it takes all reasonable measures to reduce the adverse impact of its activities on the environment; and
(b) it takes all reasonable measures to increase ecological efficiency in the production of goods and services.

(3) For the purposes of subsection 1, where there are reasonable grounds for belief that serious or irreversible environmental damage may arise from any act of a corporation, lack of full scientific certainty shall not be used as a reason for postponing reasonable measures to prevent adverse environmental impacts or increase ecological efficiency.

(4) A person who is involved in a contravention of subsection (1) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E).*

*Section 1317E will require a small amendment that inserts s 180A(1) to the list of provisions that will trigger a declaration of contravention.

6.2.2 Commentary on Amendment

6.2.2(A) The Objectives

This amendment incorporates a new directors' duty into the provisions of the *Corporations Act.* Of the three proposed amendments, it is undoubtedly the most important, for it is through this amendment the principle of environmental protection can most effectively be integrated within Australian corporate law.[3]

As highlighted earlier in chapter 3, the existing corporate directors' duties ensure the interests of the company and its shareholders are placed before the interests of the environment. The ultimate consequence of this is that decisions are often taken that cause corporate activity to impact adversely on the natural environment. The existing directors' duties, as argued in chapter 5, also undermine the environmental protection objectives of Australian environmental laws. The new directors' duty is primarily designed to address these two problems. First, it would elevate environmental issues to a central, as opposed to a secondary, consideration in corporate decision making. Second, it would help ensure that in Australia, corporate law no longer undermines environmental law. Instead, the new duty would further the capacity of other environmental policy instruments, such as voluntary initiatives, environmental laws and environmental taxation measures, to bring about improved corporate environmental performance.

[3] It is acknowledged that the *Corporations Act* does not regulate the activities of all corporate forms. For example, it will not apply to the activities of state owned corporations unless their Act of incorporation states otherwise. However, given that the *Corporations Act* is applicable to all Australian registered public and private corporations, the regulatory reach of this Act is sufficient to bring about the desired shift in corporate environmental performance.

6.2.2(B) Design: Sustainable Development

It is proposed that this new duty be inserted as s 180A of the *Corporations Act*, so that it can operate in conjunction with the existing statutory directors' duties found in Part 2D.1, Division 1. The proposed duty is tied to the concept of sustainable development. This, as will be argued later, provides the duty with legitimacy given the endorsement of the principles of sustainable development by the Australian, Federal Government and other governments around the world.[4] It would also ensure that, if deemed necessary, the proposed directors' duty has a degree of flexibility to incorporate other important aspects of sustainable development in such areas as human rights and labour standards, which can also be adversely affected by corporate activity.[5]

The proposed duty would require directors and officers to ensure that a corporation:

(a) takes all reasonable measures to reduce the adverse impact of its activities on the environment (s 180A2(a)); and
(b) takes all reasonable measures to increase ecological efficiency in the production of goods and services (s 180A2(b)).

These two requirements are designed to incorporate two important principles contained in the 1992 *Rio Declaration on Environment and Development* ("the *Rio Declaration*"), the declaration which forms the 'back bone' of the concept of sustainable development (see Appendix 10).[6] Specifically, s 180A(2)(a) incorporates the spirit of principle 4 of the *Rio Declaration* which states: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." While s 180A(2)(b), incorporates the spirit of principle 8 which states: "To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."

[4] The *Rio Declaration on Environment and Development*, the declaration which forms the backbone of the concept of sustainable development, was endorsed by more than 178 Governments (including Australia) at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3 to 14 June 1992 (see Appendix 10).

[5] As explained in the introduction, this research focuses on measures designed to improve the environmental performance of Australian corporations. It is acknowledged that legislative amendments to the *Corporations Act* are also needed to improve corporate performance with respect to human rights and labour issues. For information on the adverse impacts Australian companies can have on these wider social issues, particularly in overseas jurisdictions, see Oxfam/Community Aid Abroad, *Mining Ombudsman Annual Report 2001-2002.* Melbourne: Oxfam/Community Aid Abroad, 2002. A further and well publicised example, is the 'disregard' Australian corporation, **James Hardie Industries** (a former asbestos manufacturer), has shown for the rights of the victims of asbestos related diseases to access compensation: See Jackson DF (Commissioner), *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (September 2004). The report found that James Hardie misled the public and knowingly under-funded a foundation it established to compensate future victims of asbestos-related diseases.

[6] Note 4.

Section 180A (3) of the proposed duty is designed to incorporate another important principle of the *Rio Declaration*, principle 15, commonly referred to as the 'precautionary principle.' This principle holds that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[7] The importance of corporate directors adhering to the precautionary principle is best understood in the context of the uncertainties surrounding the current climate change debate.[8] Some directors might otherwise argue that the lack of full scientific certainty regarding the eventual impacts of climate change justifies a policy of no action to reduce a company's greenhouse gas emissions.

It will be necessary to define a number of new key words and terms, such as "environment" and "ecological efficiency," in the *Corporations Act.* A definition for "environment" could be drafted to incorporate the definition already contained in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[9] The term "ecological efficiency" could be defined with reference to the definition proposed by the World Business Council for Sustainable Development (WBCSD) for the concept of "eco-efficiency." The WBCSD defines eco-efficiency as being achieved by "the delivery of competitively priced goods and services that satisfy human needs and bring quality of life, while progressively reducing ecological impacts and resource intensity throughout the life cycle, to a level at least in line with the Earth's estimated carrying capacity."[10]

Additional guidance on how a director might comply with this new duty could also be provided through a practice note or guidelines issued by the Australian Securities and Investment Commission ("ASIC"). For example, guidance should be provided on what constitutes "reasonable measures" for the purposes of s 180A(2)(a) and s 180A(2)(b). This should include clear direction for directors to ensure that where practicable alternatives exist, the company is directed on a course of action that would result in the least environmental impacts or the most efficient use of resources.[11]

6.2.1 (C) Design: Penalties and Injunctions

Consistent with the operation of the existing statutory directors' duties, a contravention of the proposed duty would (by operation of s 180A(4)) trigger the civil penalty provisions contained in section 1317E of the *Corporations Act*. Once s 1317E has been amended as recommended, the court would have the power to issue a

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[7] For a discussion of the origins and interpretation of the precautionary principle, see O'Riordon T and Cameron J (eds) *Interpreting the Precautionary Principle* (London: Earthscan, 1994).

[8] See chapter 1.

[9] See section 528 *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

[10] See, World Business Council for Sustainable Development, *Eco- Efficiency* < http://www.wbcsd.ch/> (25 April 2005).

[11] The identification of reasonably practicable alternatives is a common component of environmental impact assessment legislation in Australia. See for example, the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), Schedule 4: "Matters to be addressed by draft public environment report and environmental impact statement." The proposed directors' duty will build on the identification processes of impact assessment legislation and impose a mandatory requirement for the directors to ensure the company is directed on a course of action that would result in the least environmental impacts and the most efficient use of resources.

declaration that a director has contravened the directors' duty with respect to sustainable development. When such a declaration is made, ASIC has the power under section 1317G to seek a pecuniary penalty order of up to $200,000 against the offending director or, pursuant to s 206(c) of the *Corporations Act*, seek the disqualification of the director from managing a corporation for a period that the court deems appropriate. These penalties provide significant deterrence value that would ensure a high degree of compliance among directors with the new duty.

If the proposed s 180A were to be inserted into the *Corporations Act*, a contravention of this section would also be likely to trigger the operation of s 1324.[12] Section 1324(1) allows the court to hear an application for an injunction in situations where it is alleged that a person has, is or is proposing to be engaged in conduct that is in contravention of the *Corporations Act*. An application for an injunction may be made by ASIC or "by a person whose interests have been, are or would be affected by the conduct." Furthermore, section 1324(10) permits the court to order that damages be paid by the person who is contravening the Act to the applicant or any other person in addition to, or in substitution for the injunction.

The test for standing under s 1324 has been given a broad interpretation by the courts.[13] Applicants are required to show that their interests are or maybe affected by the conduct. This does not mean that applicants have to prove that personal rights of a proprietary or similar nature have been affected nor that they have suffered any special injury arising from the contravention of the *Corporations Act*. However, they do have to show that their affected interests go beyond the mere interests of the general public.[14]

As noted by McConvill and Joy, who in 2003 proposed a similar directors' duty to that now proposed, the introduction of a duty of this nature "has the potential to change the landscape of corporate regulation in Australia dramatically."[15] This, as they point out, is because the new duty, when used in conjunction with s 1324 of the *Corporations Act*, would potentially empower environmental groups to apply to the courts for injunctive relief to force companies to comply with principles of sustainable development.[16] It would also enable socially responsible shareholders whose interests

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[12] The most recent view is that s 1324 is applicable to breaches by a company director of the statutory duties contained in ss 180-184: See Tomasic R et al, *Corporations Law in Australia* (Sydney: Federation Press, 2nd ed., 2002) at 430. See also the decision of Einfeld J in *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 15 ACLC 715.

[13] See *Broken Hill Proprietary Co Ltd v Bell Resources* (1984) 2 ACLC 157. This case was decided with reference to s 574 of the *Companies Code*, the predecessor to s 1324. See also *QIW Retailers Ltd v Davids Holding Pty Ltd* (No 2) (1992) 10 ACLC 1162.

[14] See the judgment of Hampel J, in *Broken Hill Proprietary Co Ltd v Bell Resources*, Note 13.

[15] McConville and Joy, Note 2 at 134.

[16] It is likely that certain environmental groups would be granted standing under s 1324 to seek relief for a contravention of s 180 A. At common law, the environment has been recognised as a 'special interest' for the purposes of challenging the decisions of public authorities under planning and environment laws. Environmental groups, such as the Australian Conservation Foundation, who can demonstrate a legitimate commitment to environmental objectives and who are recognised as having a special interest in the subject matter of the action, have been granted standing when those special (environmental) interests have been affected by the decisions of public authorities. See, for example, the *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200. Drawing on this analogy, it would be possible for an environmental organisation with legitimate

might be affected by a contravention of s 180A, to seek injunctive relief or even damages in substitution of the injunction.[17]

McConvill and Joy saw the prospect of this occurring in a negative light, opening up the possibility of lobby groups and 'busybodies' using s 1324 to disrupt the reasonable profit-making activities of companies and/or to generate publicity for their political causes. Instead, they proposed to restrict standing under s 1324 in relation to a contravention of their proposed directors' duty to ASIC and Environment Australia, with the latter regulatory authority charged with the responsibility of representing the interests of the environment.

As outlined in chapter 5, Environment Australia (now the Department of the Environment and Heritage) does not have a particularly sound record when it comes to enforcing the environmental laws directly under its control. It is therefore not the most suitable candidate to enforce compliance with the proposed s 180A. Consistent with the observations of the Australian Law Reform Commission in its 1995 report, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, private plaintiffs are more likely to ensure compliance with the new directors' duty and adequately represent the interests of the environment than government plaintiffs, such as the Department of the Environment and Heritage or ASIC.

> "Political, bureaucratic and financial constraints mean the Attorney-General and other government plaintiffs cannot adequately represent the public interest in all matters. There is an important role to be played by private plaintiffs in the maintenance of the rule of law through the review of government decisions and the enforcement of statutory rights and obligations. For example, a growing number of regulatory schemes, such as those concerning consumer protection and the environment, rely on private enforcement to promote compliance."[18]

The fear that s 1324 could be used by environmental lobbyists with a political agenda is somewhat offset by the discretion the courts have always had to decline to hear a case that is concerned with a decision or conduct that is essentially political.[19] Furthermore, environmental lobbyists are unlikely to risk a politically motivated action that is purely speculative when they face the prospect of having to pay sizable legal fees incurred by both themselves and the other party in the event their action is unsuccessful.[20] Finally, McConville and Joy's proposal to limit standing would also unfairly remove the ability of shareholders, whose interests are affected by a contravention of s 180A, to seek relief under s 1324. For these reasons, it is not proposed to amend s 1324, leaving the existing test for standing as a more appropriate means of filtering out so called 'busybodies' and lobby groups pushing a political cause.

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environmental objectives to satisfy a court that it is a person whose "interests" have been affected by a contravention of s 180A.

[17] Section 1234(10). For commentary on socially responsible investors, see chapter 3.

[18] Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (ALRC 78) (1995) [chapter 4] <http://www.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78.html> (16 February 2004).

[19] *South Australia v Commonwealth* (1962) 108 CLR 130.

[20] With respect to proceedings issued under s 1324, legal costs generally follow the event. The Australian Law Reform Commission note that the prospect of having to pay the other side's costs acts as a disincentive in bringing speculative legal proceedings keeping the litigation "flood gates" closed: Note 18.

6.2.1 (D) Design: Extra Territorial Application

As noted in chapter 2, Australian companies operating in overseas jurisdictions can have a detrimental impact on the natural environment of foreign countries, with considerable consequences for the lives of the local people. In many instances, these impacts arise in countries where the legal system does not provide the local inhabitants with a feasible avenue through which to pursue a company or its directors for damages arising from a corporate wrong.[21]

In recognition of this, the Australian Democrats in 2000 proposed the *Corporate Conduct of Conduct Bill* 2000 (Cth) designed to impose environmental standards on the operations of Australian corporations and their related entities when operating in a foreign country.[22] In addition, the Bill would also allow persons, both natural or corporate, who have suffered loss and damage as a consequence of the activities of an Australian company to bring actions in the Federal Court seeking injunctions and or compensation.[23]

Proposals for this form of legislation are not confined to Australia. In the United States a similar bill was unsuccessfully proposed by Congresswoman, Cynthia McKinney, aimed at the operations of U.S companies when operating abroad.[24] Likewise, the *Corporate Responsibility Bill* (UK), a private members bill tabled in the UK Parliament in 2002, had an extra territorial element that would have enable affected communities abroad to seek damages in the UK for human rights and environmental abuses committed by UK companies or their overseas subsidiaries.[25]

Although the Australian Democrats' Corporate Code of Conduct Bill is still officially listed as a Bill before the Australian Parliament,[26] it is unlikely to become legislation while the Howard Government (which was re-elected in October 2004) remains in power at the federal level. A Federal Parliamentary inquiry in 2001, led by members of the Howard Government, rejected the Bill describing it as "unnecessary and unworkable."[27]

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[21] In Papua New Guinea the government has gone as far as denying its citizens the right to seek justice through foreign courts as well. *The Compensation (Prohibition of Foreign Proceedings) Act 1995* (PNG) prohibits the taking or pursuit in a foreign court of legal proceedings in relation to compensation claims arising from mining or petroleum projects in Papua New Guinea.

[22] Corporate Code of Conduct Bill 2000 (Cth), clause 3(1).

[23] Corporate Code of Conduct Bill 2000 (Cth), clause 17.

[24] *Corporate Code of Conduct Act* H.R 2782, 107th Cong (2001), available online at <http://www.theorator.com/bills107/hr2782.html>(16 February 2004).

[25] The *Corporate Responsibility Bill* (UK) (Bill 129) available on line at <http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf> (10 February 2004).

[26] As of 10 November 2004, the *Corporate Code of Conduct Bill* 2000 was listed on the website of the Australian Parliament as "a current bill." See the list of current bills available at <http://parlinfoweb.aph.gov.au/piweb/browse.aspx?path=legislation%3Ecurrent+bills+by+title> (10 November 2004).

[27] Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Code of Conduct Bill* (2001) at 46.

Given the scale[28] and frequency[29] of environmental damage caused by Australian companies operating overseas, the claim that the Corporate Code of Conduct Bill is "unnecessary" shows signs of the regulatory capture highlighted earlier in chapter 4. Labor (opposition) members sitting on the inquiry, on the other hand, were more receptive to the objectives of the Bill. While not supporting the Bill in its existing form, labor members reported that "the objectives of this Bill are noble ones and need realisation with due dispatch. The issue in contention is the means by which they can be achieved."[30]

The proposed directors' duty incorporates an extra-territorial component that would provide an alternative means through which the objectives of the Corporate Code of Conduct Bill could be achieved. As is the case with existing directors' duties, the proposed duty would have extra-territorial application by operation of section 5(4) of the *Corporations Act*, which ensures that each provision of the *Corporations Act* applies to acts or omissions outside the Australian jurisdiction. Accordingly, directors would be required to ensure that Australian companies and their subsidiaries when operating overseas, must also act in accordance with the principles of sustainable development outlined in the proposed s 180A.

Persons domiciled in foreign countries whose interests are affected by a contravention of this duty would also be able to seek injunctive relief and/or compensation in Australian courts through the provisions of s 1324.[31] This would be an important means for foreign nationals, whose lives are adversely affected by the environmental damage caused by Australian companies, to seek redress within the Australian legal system.

However, it is often the case that Australian multi-national corporations operate away from Australia through subsidiary companies registered in foreign jurisdictions. This is a reflection of the wider trend towards the formation of 'corporate groups' through which a group of companies operate through unified control and are associated by common or interlocking shareholdings.[32] The technical structures behind many corporate groups could pose a considerable hurdle for foreign nationals seeking redress in circumstances where their interests are affected as a consequence of a

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[28] For example, the environmental damage flowing from BHP's mining activities at Ok Tedi is expected to result in the die back of 1,350 square kilometres (or 135,000 hectares) of rain forest (see chapter 2). This is environmental damage of the highest magnitude.

[29] For example, Minerals Policy Institute (MPI), *Submission to the Inquiry into the Provisions of the Corporate Code of Conduct Bill 2000* (Submission 24). Sydney: MPI, 2000 at 12 identifies eight Australian companies which have caused environmental damage abroad. See also Oxfam/Community Aid Abroad, *Mining Ombudsman Annual Report 2001-2002*. Melbourne: Oxfam/Community Aid Abroad, 2002. This report identifies an additional six cases of environmental harm caused by Australian companies operating abroad. These reports suggest that Australian companies abroad are frequently involved in activities that cause environmental damage.

[30] Note 27. See "Comments by Labor Members" following majority report, at page 2.

[31] There appears to be no restriction on natural persons (or incorporated bodies) resident in foreign jurisdictions from gaining standing under s 1324. Section 5(7) confirms that the *Corporations Act* applies according to its tenor to natural persons whether in Australia or not, or incorporated bodies whether formed or carrying on business in Australia or not.

[32] For a detailed discussion of corporate groups and their predominance, see Companies & Securities Advisory Committee, *Final Report on Corporate Groups* (2000). See also Noakes D, "Dogs on the Wharves: Corporate Groups and the Waterfront Dispute." (1999) 11 *Australian Journal of Corporate Law* 27.

contravention of the proposed directors' duty. The loss and damage suffered might arise as a consequence of the environmental impacts of a subsidiary of an Australian company registered in the foreign jurisdiction, therefore placing it beyond the regulatory reach of the *Corporations Act* and the relief offered by s 1324. To overcome this hurdle, it is proposed that s 180A forces directors to ensure that, not only the corporation acts in accordance with the principles of sustainable development, but also that any subsidiary[33] of the company, *whether registered in Australia or a foreign jurisdiction*, adheres to such principles as well. Therefore, should a non-Australian subsidiary of an Australian company act inconsistently with the principles of sustainable development outlined in s 180A and in a manner that affects the interests of a foreign national, that person would still have standing in an Australian court to issue proceedings against the directors of the Australian parent company on the basis of a contravention of their duty under the proposed s 180A.

6.2.3 Behavioral Change and Limitations

What kind of behavioral change could we expect to see if the proposed directors' duty were introduced? It is unlikely that an improvement in corporate environmental performance would be immediately noticeable. It would take time for directors to adjust to the new duty and for its effects to translate into changes in a company's 'on ground' activities.

It is also important to note that the duty would not impose any absolute prohibitions on specific types of corporate activity that some might consider have unacceptable environmental impacts. Nor would it impose any specified targets on the levels of eco efficiency a corporation is expected to reach with regard to resource use. Accordingly, the proposed duty would not, for example, necessarily 'require' directors of a mining company with coal interests to close down the company coal mines to minimise greenhouse gas emissions. Directors would, however, be acting in accordance with the duty if they chose to take such a course of action. Strict environmental prohibitions and targets are better implemented through environmental legislation, so long as such legislation is adequately enforced.

Instead, the new directors' duty would guide corporate conduct in the numerous circumstances where Australian environmental and planning laws are silent on a particular matter. In this way, company directors would no longer be afforded the luxury of setting their company's environmental performance at the lowest level of regulatory compliance. Furthermore, the new duty would deter directors from

[33] Section 46 of the *Corporations Act* defines a subsidiary as follows:
What is a subsidiary
A body corporate (in this section called the *first body*) is a subsidiary of another body corporate if, and only if:
(a) the other body:
(i) controls the composition of the first body's board; or
(ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first body; or
(iii) holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or
(b) the first body is a subsidiary of a subsidiary of the other body.

steering their company on a course which is in breach of environmental laws, a problem outlined earlier in chapter 5.

Section 180A is underpinned by the notion of 'reasonableness.' Directors would be required to ensure that a corporation takes all reasonable measures to reduce its environmental impacts and increase resource use efficiency. What comes within the definition of "reasonable" would need to be interpreted by the directors in balancing their duty to act in the best interests of the company with their duty to implement the principles of sustainable development. The interpretation of the courts may also be required should s 1324 be triggered by a person whose interests have been affected by a director's contravention of the new duty.

What falls within the definition of "reasonable" would also depend on the size of the particular company and the type of activity it is undertaking. For example, it would be reasonable to expect a large publicly listed petroleum company to implement a certified environmental management system across all its operation to reduce the risk of environmental accidents and spills. It would also be reasonable to expect directors of an Australian mining company to discontinue the practice of dumping mine tailings into river systems, in light of the documented environmental damage this practice can cause. Similarly, it would be reasonable to expect the directors of a banking corporation to implement an environmental screen across the company's investment portfolio in compliance with the new duty.[34] This would have a dramatic 'flow on' effect in improving the environmental performance of companies who wish to remain an attractive investment.

As stated earlier, what constitutes "reasonable measures" would require some additional guidance through ASIC guidelines or a practice note. Such guidance should include the expectation that, when complying with s 180A, company directors must ensure that where reasonable and practicable alternatives exist, the company is directed on a course of action that results in the least environmental impacts or the most efficient use of resources. This would ensure that decisions such as those made by Shell and its joint venture partners to locate the Gorgon gas processing plant on the environmentally sensitive Barrow Island, as opposed to other viable sites identified by the Western Australia EPA, could no longer occur.[35]

The obligation that would be imposed by s 180A to seek out reasonable and practicable 'environmentally friendly' alternatives, is where the proposed duty holds its greatest potential to bring about meaningful environmental outcomes. This potential is evident in the following hypothetical examples.

6.2.3(A) Hypothetical Example: Greenhouse Gas Emissions

Company A is an Australian manufacturing company. In compliance with their new environmental duty under the *Corporations Act*, the directors of Company A make a decision to seek out an electricity retailer who can offer an accredited green power

[34] See chapter 7 for a discussion relating to socially responsible investment products that have in place environmental screens directing the investment manger or trustee to invest in a manner that is consistent with an established set of environmental criteria.
[35] See chapter 2.

product[36] produced using a 'green' renewable energy alternative, such as wind, solar or low impact hydro. Given that many Australian electricity retailers offer these alternative products at a competitive price,[37] this decision was a reasonable measure that could be taken by the company to reduce its greenhouse gas emissions, most of which arise from its current energy needs being met by electricity produced from coal fired power stations. The resulting reduction in Company A's greenhouse gas emissions, is a direct environmental benefit flowing from the new directors' duty.

Company A is not alone in doing this. Many other Australian companies make similar decisions. As a consequence, the demand for green renewable energy increases, while the demand for greenhouse intensive electricity from coal fired power stations decreases. To cater for this changing consumer demand, electricity retailers begin to source increasing amounts of green, renewable energy from electricity generators. In the process, they move beyond the legislated 2% renewable energy target imposed by the federal government's Mandatory Renewable Energy Target[38] making larger inroads into reducing the greenhouse emissions from the electricity sector than would have otherwise been possible. Observing this trend, electricity generators focus their new investments on greener forms of energy production phasing out their greenhouse gas intensive coal fired operations. This positive flow-on effect to electricity retailers and generators is an indirect environmental benefit of the decision of the directors of Company A, and the decision of other companies, to switch to "green," renewable power.

The environmental gains do not end there. As energy companies phase out their coal fired power stations, the demand in Australia for coal drops. Some Australian resource companies, seeing little future in coal, begin to phase out their coal mining operations, focusing their operations on less greenhouse intensive resources. This decision is also an indirect consequence of the decision of the directors of Company A to source the company's needs from a green and renewable source.

6.2.3 (B) Hypothetical Example: Material Use

Company B is a large bank. In compliance with their new environmental duty, the bank's directors order an office-wide environmental audit to determine a plan of action. Among numerous things, the audit reveals that the bank uses tens of thousands of sheets of office paper a week, much of it made from virgin forest resources. It prints its documents using only one side of the page; even for internal drafts and duplicates. In fact, it is using almost twice the amount of paper that it needs at considerable cost to the bank, not to mention the nation's forests. The decision, in compliance with the new duty, is made to cut paper usage by simply printing on two sides of the page and to instigate a company wide purchasing policy which stipulates that future office paper requirements are to be met by using one or more of the numerous types of recycled office paper alternatives. To 'close the loop,' the bank

[36] Green Power is a national accreditation program that sets stringent environmental and reporting standards for renewable energy products offered by electricity suppliers to households and businesses across Australia. See <http://www.greenpower.com.au/> (25 March 2004).

[37] A list of electricity retailers who offer green power products is available at <http://www.greenpower.com.au/> (25 March 2004). Currently, green power products are accessible to 96% of the population.

[38] See commentary on MRET in chapter 5.

also initiates a comprehensive paper recycling program, which captures close to a hundred percent of its wasted office paper. The paper is then sent to a paper recycler to make more office paper and other paper products.

The bank is not alone. The directors of hundreds of other Australian corporations who are heavy uses of office paper make similar decisions. These simple, cost-effective decisions, when taken collectively, have enormous environmental benefits, as is evident when one considers the following surprising figures: In 2001/2002 Australians used 1.23 million tones of writing and printing paper, equating to over 30 million trees being cut down. But by using a single tonne of recycled paper in place of conventional paper it is estimated we can save: 31,780 litres of water; 4100 kilowatt/hours of electricity; 75 per cent of chlorinated bleach; 27 kilograms of air pollutants; 13 trees; 4 cubic metres of landfill; and 2.5 barrels of oil. [39]

These are just two hypothetical examples of the environmental benefits the new duty could produce. Another hypothetical example could be crafted around the decision of directors of a large supermarket chain to implement a new environmental purchasing policy in the selection of its product suppliers, and the significant 'flow-on' environmental improvement this would bring within the agricultural industry and manufacturing sector. In fact, the potential for the proposed directors' duty to bring about deep seated improvements in corporate environmental performance is endless. The duty, when combined with market forces, would promote environmental improvements in the way corporate goods and services are produced. This would, in turn, push the compliance bar for directors higher and higher. Each decision taken by a director in compliance with the new duty would cumulatively build on the other improving the overall environmental performance of the corporation. Accordingly, not only does the directors' duty offer a means through which to negate some of the environmental impacts of Australian companies, it also has the potential to place corporate Australia on a pathway towards sustainable development.

6.3 Legislative Amendment 2: Mandatory Sustainability Reporting

6.3.1. Proposed Amendment

Section 299(1)(f) of the *Corporations Act* currently states:

299(1) The directors' report for a financial year must:

(f) if the entity's operations are subject to any significant environmental regulation of the Commonwealth or of a state or territory-give details of the entity's performance in relation to environmental regulation.

Amend this provision so that it now states as follows:

299(1) The directors' report for a financial year must:

(f) if the entity is a listed public company or large proprietary company for the purposes of section 292, give details of the entity's environmental and social performance in meeting the

[39] Australian Conservation Foundation (ACF), *The Little Paper Book on How to Make a Big Difference Environmentally With Paper.* Melbourne: ACF, 2003 at 2-3. Available at <http://www.acfonline.org.au/docs/general/00503.pdf> (25 March 2004).

principles of sustainable development with reference to the applicable Sustainability Reporting Guidelines issued by the Global Reporting Initiative.

6.3.2 Commentary on Proposed Amendment

6.3.2 (A) Objectives and Benefits

The proposed amendment introduces a public sustainability reporting requirement into the *Corporations Act.* The new reporting requirement has two major objectives:

(1) **Evaluation-** In satisfying the new reporting requirements, corporate directors would gain valuable information which would enable them to evaluate the company's existing environmental performance and to implement strategies to improve on that performance to ensure compliance with their new duties under s 180 A.

(2) **Accountability-** It would provide shareholders and other important stakeholders[40] with valuable information on the company's environmental performance against which to judge the performance of the directors in meeting their new duties under section s 180A.

In addition, the new reporting requirement could also have ancillary benefits for the reporting companies:[41]

- **Improved community support:** Letting the local community know about the efforts the company is making to maintain or improve the environment could foster community support for the business.
- **Improved customer confidence:** Letting customers know about efforts to improve the company's environmental management could lead to increased consumer confidence in corporate products and services.
- **Improved relationships with regulators:** Demonstrating a commitment to reporting on current impacts and identifying ways to improve performance, could build improved relationships with regulators.
- **Improved attractiveness to investment:** Investors, financial analysts and brokers increasingly ask about environmental aspects of operations. A sustainability report shows what measures the company is taking to reduce environmental risks, fast-tracking the assessment work of finance and insurance suppliers, hence increasing investment attractiveness.
- **Improved competitive advantage:** Showcasing the company's environmental performance could provide a competitive edge in a market, which is increasing its environmental scrutiny of corporate activities.

[40] For example, environmental NGOs, people living in the communities where the company operates, consumers and employees.

[41] Based on the benefits of public environmental reporting outlined in The Department of the Environment and Heritage, *The Benefits of Public Environmental Reporting* <http://www.deh.gov.au/industry/corporate/per/benefits.html> (12 February 2004). For another perspective on the benefits of expanding mandatory financial reporting laws to mandate environmental and social reporting, see Williams C, "The Securities and Exchange Commission and Corporate Transparency" (1999) 112 *Harvard Law Review* 1197.

6.3.2 (B) Design: Sustainability Indicators

The proposed reporting requirement is designed to build on the existing environmental reporting requirement for company directors contained in s 299(1)(f). As it is currently worded, this section requires the directors' report to give details on the corporation's performance in relation to any particular and significant environmental regulation to which the corporation's operations are subject.[42] This links the company's environmental performance solely to its regulatory compliance. While being an important indicator of environmental performance, it requires no details to be given on the company's performance relating to other valuable environmental indicators such as water, energy and material consumption, waste, greenhouse gas emissions and land disturbance. Furthermore, it requires no reporting on the company's efforts to minimise its environmental impacts and improve on the efficiency of its resource use.

The narrow scope of the existing environmental reporting requirement enables some company directors to comply with 299(1)(f) through a simple one paragraph compliance statement. An example of such a statement can be found in the directors' report of **Macquarie Bank Ltd** for 2003, which briefly states:

> "To the best of their knowledge and belief, after making appropriate enquires, the Directors have determined that where there are environmental regulations that apply to the Bank and its controlled entities, that these have been complied with at all times during the financial year."[43]

A one paragraph compliance statement such as this provides a very limited insight into a company's environmental performance. Even for a bank, such as Macquarie, environmental reporting is important. Investors, clients, management and staff at the bank, and the wider public should be made aware of the bank's energy, material and water use, and the kind of environmental policies and management procedures it has in place. Other significant information would include details on whether the bank carries out an environmental risk assessment prior to investing or loaning money, or if it is a signatory to the numerous international banking initiatives designed to improve the environmental performance of the banking industry.[44]

To facilitate more informative sustainability reporting by Australian corporations, it is proposed to link the reporting requirements of 299(1)(f) to the sustainability reporting guidelines issued by the internationally recognised Global Reporting Initiative ("the GRI guidelines").[45] The GRI guidelines are designed to assist organisations to report on the economic, environmental and social dimensions of their activities, products

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[42] For precise wording, see 6.3.1 above.

[43] Macquarie Bank Ltd, *Directors Report* (2003) <http://www.macquarie.com.au/au/about_macquarie/investor_information/ar2003/concise_report/directors_report.htm> (12 February 2004).

[44] See commentary on the *UNEP Statement by Financial Institutions on the Environment & Sustainable Development* and the banking industry's *Equator Principles*, in chapter 8.

[45] Started in 1997 by the Coalition for Environmentally Responsible Economies (CERES), the GRI became independent in 2002. It is an official collaborating centre of the United Nations Environment Programme (UNEP) and works in cooperation with UN Secretary-General Kofi Annan's Global Compact referred to in chapter 4. It has now also been recognised through a mandatory sustainability reporting regime in South Africa. For details on the South African corporate reporting requirements, see chapter 7.

and services in reference to clearly identified economic, social and environmental performance indicators.[46]

It is not proposed that Australian companies report on their economic performance with reference to the economic performance indicators of the GRI guidelines. Clarification on this point would be required through ASIC guidelines or an ASIC practice note. Instead, the proposed reporting requirements of s 299(1)(f) would only require reporting with reference to the environmental and social performance indicators of the GRI guidelines.

The *environmental* performance indicators of the GRI guidelines are included in Appendix 11. In summary, the indicators would require company directors to report on the following issues:

- Total material use;
- Indirect and direct energy use;
- Initiatives to use renewable energy sources and to increase energy efficiency;
- Total water use, water sources and the related ecosystems/ habitats significantly affected by water use;
- The major impacts on biodiversity associated with activities and/or products and services in terrestrial, freshwater, and marine environments;
- Changes to natural habitats resulting from activities and operations, and percentage of habitat protected or restored;
- Objectives, programmes, and targets for protecting and restoring native ecosystems and species in degraded areas;
- Total emissions of greenhouse gas emissions, ozone depleting substances and other significant air emissions;
- Significant discharges to water;
- Total amount of waste by type and destination;
- The significant environmental impacts of principle products and services; and
- Incidents of, and fines for, non-compliance with all applicable international, national and local environmental laws, regulations and declarations.

The GRI *social* performance indicators relate to such matters as human rights, labour standards, community issues, bribery and corruption and product responsibility.[47] It is proposed that the reporting requirements in 299(1)(f) also be extended to such matters, in recognition of the social impacts that can arise from corporate activity which are of increasing concern to corporate stakeholders.[48]

6.3.2 (C) Design: Operation

[46] The GRI sustainability reporting guidelines are available at <http://www.globalreporting.org/guidelines/2002/contents.asp > (12 February 2004).
[47] The GRI social performance indicators are available at <http://www.globalreporting.org/guidelines/2002/c51.asp> (12 February 2004).
[48] See Note 5.

Only directors of publicly listed companies and large proprietary companies would be required to comply with the proposed reporting requirement.[49] This takes account of the fact that these larger companies, unlike small proprietary companies,[50] possess the resources, or at least the financial means to obtain the resources, necessary to prepare a sustainability report.

To effectively achieve the amendment's accountability objective, the sustainability reports must be made available to the widest audience possible.[51] Pursuant to s 314 of the *Corporations Act*, details of a company's sustainability performance [reported in compliance with proposed 299(1(f)] along with other material contained in the annual director's report, would be provided to the company shareholders on an annual basis. In addition, pursuant to s 319 these details would also need to be lodged with ASIC. To ensure that this information is publicly available at no expense, it is proposed that ASIC establish an open internet data base which includes all details reported by company directors in compliance with the proposed s 299(1)(f).[52]

6.4 Legislative Amendment 3: Winding up Provisions for Repetitive Contravention of the Law.

6.4.1 Proposed Amendments

Amend sections 461 and 462 of the *Corporations Act* to include the following subsections:

Section 461- general grounds on which company may be wound up by Court

(1) The Court may order the winding up of a company if:

(L) The Court is of the opinion that the affairs of the company are being conducted in manner that is repetitively in contravention of any law(s) of the Commonwealth or of a State or Territory.

Section 462- standing to apply for winding up

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[49] Pursuant to s 45A(3) of the *Corporations Act*, a proprietary company is a large proprietary company if it satisfies at least 2 of the following:
(a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is $10 million or more; (b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is $5 million or more; (c) the company and the entities it controls (if any) have 50 or more employees at the end of the financial year.

[50] Pursuant to s 45A(2) of *the Corporations Act*, a proprietary company is a small proprietary company if it satisfies at least 2 of the following: (a) the consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than $10 million;
(b) the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than $5 million; (c) the company and the entities it controls (if any) have fewer than 50 employees at the end of the financial year.

[51] For example, environmental NGOs, people living in the communities where the company operates, consumers and employees

[52] Generally, company information lodged with ASIC is available only upon the payment of a small fee.

Subject to this section, any one or more of the following may apply for an order to wind up a company:

(I) If the winding up is based on the grounds set out in s 461(1)(L),

(a) any person or public authority with the statutory responsibility to enforce a law of the Commonwealth or of a State or Territory; or

(b) any person whose interests have been, are or would be affected by a company that is in contravention of any law of the Commonwealth or of a State or Territory;

6.4.2 Commentary on Proposed Amendment

6.4.2(A) Design: Objectives

The proposed amendments insert clear grounds for winding up a corporation in circumstances where the affairs of a company are being conducted in a manner that is repetitively in contravention of Australian laws. It is not designed to allow a company to be wound up in circumstances where there has been an isolated unlawful act. Instead, it is aimed to capture corporations which show continual disregard for the law. As noted in chapter 5, existing penalties do not deter some companies from repeatedly breaching environmental laws. This severely undermines the effectiveness of such laws in achieving their environmental protection objectives. The proposed winding up provision is, therefore, designed to provide additional deterrence whilst ensuring improved corporate compliance with Australia's environmental laws. It would also have an additional benefit of ensuring compliance with other Australian laws governing such areas as taxation, financial services, consumer health and safety, and occupational health and safety.

In the event the proposed winding up provision does not deter repeat offenders, the provision would provide a person or public authority charged with the responsibility to enforce Australian laws with a mechanism to inflict the most severe form of corporate punishment, "corporate capital punishment," in circumstances where a company shows continual disregard for the law.[53] Once the company is wound up and deregistered, it would not be in a position to offend again nor, as Fisse and Braithwaite point out in their celebrated work, *Corporations, Crime and Accountability*, would it be able to cause the continuing social costs arising from its unlawful activity:

> "Corporations, unlike human beings do not have inviolate rights to existence. In the rare cases where corporations are found to be incorrigible criminals after they are given chances to prove themselves otherwise, there is no compelling reason to put up with the social costs they impose on us; we are best to insist on the sale of their assets to other enterprises with better management."[54]

Finally, the proposed laws would provide standing to commence winding up proceeding to any person whose interests have been affected by a company that

[53] For a discussion of the use of corporate capital punishment "as the most severe form of sanction available against a corporation," see Fiss B and Brathwaite J, *Corporations Crime and Accountability* (Melbourne: Cambridge University Press, 1993).

[54] Note 53 at 201.

contravenes an Australian law. This would ensure that standing is available to private plaintiffs where government authorities refuse to act to protect their interests from continual unlawful corporate activity.

6.4.2(B) Design: Contravention of Australian Laws

The proposed winding up provision is designed to 'sit along side' the existing winding up grounds contained in s 461 of the *Corporations Act*. When the court makes a winding up order, a liquidator is appointed to wind the affairs of the company up. Once this is complete, ASIC will then deregister the company at which time it will cease to exist as a legal entity.[55]

To recommend the imposition of this form of 'corporate capital punishment' might seem like a radical proposal. However, when viewed in the overall context of s 461, it is not a radical proposal at all. Pursuant to s 461(1)(h)(ii), the court already has the power to order the winding up of a company where ASIC has stated in a report prepared under part 3, division 1 of the *Australian Securities and Investment Commission Act* 2001 (Cth)[56] that, in its opinion, it would be in the interests of the public to wind the company up. Such a report can include details of the findings of ASIC investigations into a contravention of a law of the Commonwealth, or of a State or Territory that concerns the management or affairs of a body corporate. [57] Furthermore, s 461(k) specifies that the court has the power to wind up a company if it is of the opinion that it is just and equitable to do so. In the NSW decision of *ASIC v W. G. Herle Pty Ltd*,[58] the Supreme Court was satisfied that it was just and equitable to wind a company for repetitive contraventions of the *Corporations Law*. Accordingly, it is evident that the grounds already exist for winding up of a company that repetitively contravenes the law. When viewed in this light, the proposed s 461(1)(L), merely clarifies and builds upon the existing winding up grounds of s 461.

6.4.2 (C) Design: Standing

It is proposed that standing to bring the winding up proceedings under the new s 461 (1) (L) be available to:

(i) any person or public authority with the statutory responsibility to enforce a law of the Commonwealth or of a State or Territory or;
(ii) any person whose interests have been, are or would be affected by a company that is acting in a manner that is contravention of any law of the Commonwealth or of a State or Territory;

The appropriateness of providing standing to the person or authority responsible for enforcing Australian laws is not contentious. Such persons or authorities have a pre-existing statutory authority to ensure compliance with the laws, enough to satisfy even the narrowest notions of standing. The second arm of the proposed grounds for standing is admittedly a little more contentious. It would provide 'private plaintiffs' with grounds to bring winding up proceedings. Again this is not a novel proposal.

[55] The *Corporations Act*, s 509(5).
[56] *Australian Securities and Investment Commission Act* 2001 (Cth).
[57] *Australian Securities and Investment Commission Act* 2001 (Cth), s 13(1).
[58] [1999] NSWSC 272.

Section 462 already provides standing to creditors to bring winding up proceedings. Standing is provided to these private plaintiffs on the grounds that their financial interests have been affected by a company that cannot pay its debts and therefore should be wound up.[59]

Similar to the wide standing provisions of s 1324, discussed in 6.2 above, this second arm could possibly provide standing to environmental groups or private individuals to commence winding up proceedings against a company that is acting in a manner that is repetitively in breach of Australian environmental laws. For reasons already noted above, it is important that private plaintiffs be afforded standing to defend their interests when public authorities refuse to act. Furthermore, any fear that this standing provision could be misused by lobby groups pushing a political agenda are unfounded given the court's existing discretion to decline to hear a case that is essentially political[60] and because lobby groups are unlikely to bring a speculative action when faced with the prospect of a sizeable 'order for costs' if they are unsuccessful.[61]

6.5 Conclusion

This corporate law reform agenda is not proposed in the misguided belief it is the 'magic solution' and that on its own it will bring about the desired improvement in the environmental performance of Australian corporations. Other important measures must also be implemented. For example, specific prohibitions or controls on activities that are causing unacceptable environmental impacts, such as greenhouse gas emissions, explosive coastal development and land clearing need to be enacted through Australian environmental and planning laws.[62] Furthermore, environmentally harmful subsidies granted to Australian corporations which continue to promote unsustainable corporate behaviour should also be removed.[63] But having acknowledged they are not the sole solution, the importance of the proposed corporate laws should not be under stated. Without them, corporate law will continue to undermine national efforts to achieve sustainable development. In this regard, the corporate law amendments are proposed as a vital set of measures that are required to shift the environmental performance of corporate Australia and guide it on a pathway toward sustainable development.

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[59] Section 462(2)(b).

[60] *South Australia v Commonwealth* (1962) 108 CLR 130.

[61] See note 20.

[62] There are some positive developments in this area. The Queensland (QLD) and New South Wales (NSW) governments have both indicated their intention to introduce new land clearing laws designed to phase out the broad scale clearing of remnant vegetation within their jurisdictions. For details on the QLD government's land clearing commitments, see Australian Conservation Foundation, *Labor's Land Clearing Policy: The most Significant Environmental Decision in QLD's History* (2004) <http://www.acfonline.org.au/asp/pages/document.asp?IdDoc=1749> (25 February 2004). With respect to the NSW government's commitments, see Nature Conservation Council of NSW, *Historic Decision Should Bring Curtain Down on Land Clearing* (2003) <http://nccnsw.org.au/envote/news/media/20030315_alplcannou.html> (25 February 2004).

[63] See chapter 3, Note 1, for details on the extent of these subsidies.

Chapter 7

Legitimacy: Precedent in Foreign Jurisdictions

The simple notion that we have an obligation to protect the environment from unsustainable corporate practices would, for many of us, be sufficient justification for the amendment of the *Corporations Act* as outlined in the previous chapter. However, in the political landscape of modern Australia, which is subject to numerous competing interests, a stronger case than this would need to be put forward in support of the introduction of a law reform agenda of the kind proposed. In the first instance, it is likely to come up against a great deal of opposition, particularly from corporations that will claim that new regulations of this nature would adversely affect company profits. In the second instance, it proposes to use corporate law as the vehicle to achieve an environmental objective, an idea that until recently was inconceivable. This may prompt some of the more conservative members of the legal fraternity and some law makers to oppose amending the *Corporations Act* in the recommended fashion as it does not fit neatly into their way of thinking about a legal problem.

The remainder of this thesis will identify a solid foundation for an Australian government to justifiably acknowledge that the law reform proposals represent a 'legitimate' legislative action worthy of implementation. This chapter begins this task by identifying laws and law reform proposals in foreign jurisdictions that show there is sufficient international precedent for the introduction of each of the corporate law amendments: the mandatory sustainability reporting requirements, the winding up provisions and the new company directors' duty. The following three chapters then look at other sources of legitimacy: economic, corporate law theory, international commitments made by Australia to the concept of sustainable development and most importantly, the public interest.

7.1 Corporate Sustainability Reporting

The concept of mandatory sustainability reporting for corporations has now established a firm foot hold in the domestic legal regimes of many overseas jurisdictions. Some examples include:

South Africa: As a consequence of recommendations flowing from the King Committee on Corporate Governance in 2002, all companies with securities listed on the JSE Securities Exchange South Africa, financial entities defined in legislation regulating the South African financial services sector, and public sector enterprises and agencies must now comply with a "Code of Corporate Practices and Conduct," which requires each entity to issue an annual sustainability report. According to paragraph 5.1.3 of the Code:

> "Disclosure of non financial material [in the report] should be governed by the principles of reliability, relevance, clarity, timeliness and verifiability with reference to the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines."[1]

An outline of the environmental indicators of the GRI is provided in chapter 6.

France: *Law no 2001-420 on New Economic Regulations* 2001 (France), art. 116 now requires all companies listed on the 'premier marché' to report against a comprehensive list of sustainability indicators relating to human resources, community issues, labour standards and key health, safety and environment issues (see Appendix 12).[2] The report is to be issued annually as part of the company directors' report. The list of environmental indicators against which French public companies must report includes, inter alia:

(a) Details on the consumption of water resources, of raw materials and energy;
(b) A description of the measures taken to increase energy efficiency and use of renewable resources;
(c) Details of air, water and soil pollution that could dramatically effect the environment;
(d) Assessment or certification actions taken in terms of environmental protection;
(e) Measures taken to limit the damage on the biological balance, to the natural environment and to protected species;
(f) Actions taken to ensure compliance with environmental laws;
(g) Details of the company's internal environmental management systems and procedures;
(h) Expenditures made to prevent corporate environmental impacts; and
(i) Amount of compensation for environmental damages paid during the fiscal year.[3]

This French scheme does not require reporting with reference to the GRI Sustainability Reporting Guidelines. However, the GRI guidelines will provide a valuable reference point for companies subject to the new reporting requirements.

Norway: Since 1999, *The Accounting Act* (Regnskapsloven) (Norway) has required company directors, in the annual directors' report lodged by all companies, to report on the following:

(a) An account must be given of the working environment and an overview must be given of implemented measures that are of importance to the working environment. In addition, separate information is required about injuries, accidents and absence due to illness.
(b) An account must be given of the matters relating to the enterprise, including resources used in production and products, which contributes to an impact on the external environment and of the measures which have been implemented or are being planned to prevent or reduce negative impacts on the environment.

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[1] King Committee on Corporate Governance, *King Report 2002: Executive Summary* (2002) <http://www.ecseonline.com/PDF/King%20Committee%20on%20Corporate%20Governance%20-%20Executive%20Summary%20of%20the%20King%20Report%202002.pdf> (2 September 2004). The JSE Securities Exchange (South Africa) listing rules require annual disclosure of the extent of a listed company's compliance with the Code of Corporate Practices and Conduct and the reasons, where relevant, for non compliance.

[2] *Law on New Economic Regulation*, article 116, paragraph 4. An English translation of the reporting indicators can be found in Mansley M, *Open Disclosure: Sustainability and the Listing Regime.* London: Claros Consulting 2003 at 57-58. Available at <http://www.foe.co.uk/resource/reports/open_disclosure.pdf> (25 March 2004).

[3] This list is a summarised version of the indicators contained in the French reporting regulations and should not be taken as a definitive list of the indicators. See Appendix 12 for a more expansive list of the social and environmental indicators.

When complying with the reporting requirements, the Act also specifies that the following matters may be relevant:

(i) Type and amount of energy and raw material consumed;
(ii) Type and amount of pollution emitted, noise levels, dust and vibrations;
(iii) Type and amount of waste generated or belonging to the enterprise, i.e. deposited residues, open or closed deposits, sediments in rivers, lakes or the sea etc.;
(iv) Risk of accidents;
(v) Environmental load stemming from transport;
(vi) For enterprises manufacturing material/products, the following aspects are also of importance:
    a) Type and amount of toxic chemicals in the products;
    b) Type and amount of waste expected at end of life; and
    c) Environmental load from the use of the products.[4]

Denmark: The *Green Accounts Act (no.403/95)* (Denmark), introduced in 1995 and amended in 2001, requires companies identified under Denmark's environmental protection laws as exerting significant environmental impacts to issue public annual environmental report. The report is to include a qualitative description of the most important resources and environmental parameters directly linked with the primary activity and significant secondary activities. The report must also include specific data on, inter alia:

(a) The consumption of energy, water and raw materials;
(b) Significant types and volume of pollutants and where they are discharged by the company e.g. Air, water and soil; and
(c) Waste production and waste handling.

In addition, the report must include a statement by management outlining, inter alia:

(a) How, and to what extent, staff take part in the environmental work in the company;
(b) Working environment aspects, such as the use of polluting substances where they present a risk to the safety and health of the staff;
(c) Information about possible environmental policy and if relevant goals and results thereof (includes energy, waste and transportation issues);
(d) Information about possible environmental demands put on suppliers;
(e) In cases where the conditions in a permit have not been complied with, there must be a description of action carried out to avoid repetition; and
(f) Major complaints (complaints that have led to changes in the company's routines or processes);

The 'green accounts' are issued on the same annual reporting cycle as the company financial reports. Present estimates are that approximately 1,200 companies are subject to this reporting requirement.[5]

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[4] Emtairah T, *Corporate Environmental Reporting: Review of Policy Action in Europe.* Lund: International Institute for Environmental Economics (Lund University), 2002 at 31-32. The report is available online at <http://www.enviroreporting.com/others/cer_europe.pdf> (28 February 2004). See also, Enviroreporting.com, *Norway's Accounting Act* <http://www.enviroreporting.com/others/norway_act.pdf > (28 February 2004).

[5] See Environmental Protection Agency (Denmark), *The Danish Green Accounts: Experience and External Effect* (2003) < http://www.mst.dk/homepage/> (28 February 2004).

Sweden: An amendment to the *Law of Accounts* 1995 (Sweden) in 1999 now requires Swedish companies, which are subject to environmental permits issued under the *Environmental Code* 1998 (approximately 10,000 companies), to report on the following information in the company's annual report:

(a) The enterprise's impacts on the surrounding environment including the effects from the production processes. The enterprise needs to state where these impacts mainly arise (e.g. water, emissions to air, noise, waste);
(b) Whether the impacts have direct or indirect influence on the financial performance or future performance of the enterprise;
(c) Why the enterprise is subject to the environmental code and how dependent it is on the activity that makes it listed; and
(d) Under which orders within the environmental code it falls under and if there are significant permits that need to be renewed or revised within the coming year.[6]

Netherlands: In 1997, the *Environmental Management Act* (Netherlands) was extended to incorporate a new section (s 12.1) entitled "Environmental Reporting." This new section implements a regime through which 'establishments' licensed by the province and which have a substantial environmental impact can be required annually to produce an environmental report for the authorities (government report) and an environmental report for the general public (public report). Reporting companies are required to make the public report available to any person for inspection. Equally, any person will be able to request a copy of the government report. Approximately 300 companies are required to report under the new laws. These companies are required to report on the following:

(a) The nature of the establishment and the activities and processes in the establishment.
(b) The adverse effects on the environment caused by the establishment, including a summary of relevant quantitative data.
(c) The technical, organizational and administrative measures taken by the facilities installed in respect of the establishment in order to protect the environment.
(d) Information on the main changes that have taken place in the reporting year in relation to the previous reporting year; and
(e) Developments that may reasonably be expected in the next reporting year.[7]

The above mentioned reporting regimes incorporate different elements of the mandatory sustainability reporting requirements proposed for inclusion in Australia's *Corporations Act*. The South African reporting requirements, for example, require reporting with reference to the GRI sustainability reporting guidelines, as would the proposed Australian reporting requirements. South Africa's use of the GRI reflects a growing acceptance of the GRI as the most widely applicable and comprehensive sustainability reporting guidelines currently available. However, unlike those proposed for Australia, the South African reporting requirements do not apply to non-listed private companies. Likewise, the French reporting requirements, only apply to listed companies. In addition, the French scheme's sustainability reporting indicators, although comprehensive and far-reaching, are not specifically linked to the GRI.[8]

[6] Emtairah T, Note 4 at 33.
[7] Emtairah T, Note 4 at 29-30.
[8] However, the GRI guidelines will provide a valuable reference point for companies subject to the new reporting requirements given that the French government consulted GRI when drafting the indicators for its reporting regime: See Lippman S, "PR Flack Beware: GRI Guidelines Call for the Full Story in Corporate Reports." Trillam Asset Management, 2002. Available online at

Like the proposed Australian reporting model, the sustainability report now mandated under French law forms part of the company directors' report.

Norway's reporting requirements, on the other hand, apply to all public and private companies. It too requires reporting against specified social and environmental indicators. It is also similar in so far as it requires reporting through the company directors' report. However, Norway's scheme differs from the proposed Australian reporting requirements because it does not require reporting with reference to the wider reporting indicators of the GRI. One reason for this could be that the GRI had only been operating for two years prior to the introduction of Norway's reporting requirements and therefore were not as widely accepted as when South Africa introduced its new reporting regime.[9] The company reporting requirements of Denmark, Sweden and the Netherlands differ due to the fact they are limited to a specified number of companies (albeit quite a large number) and because they primarily mandate reporting against environmental criteria, as opposed to the wider sustainability indicators of the GRI which also include social indicators.

Notwithstanding such differences, these reporting requirements reflect a world wide trend towards the implementation of mandatory corporate sustainability reporting regimes.[10] Together they provide sufficient precedent from jurisdictions abroad to support the inclusion of mandatory sustainability reporting requirements within Australia's *Corporations Act*. They also expose the Federal Government's proposal to delete Australia's existing corporate environmental reporting requirements contained in section 299(1)(f) of the *Corporations Act*[11] as being completely at odds with legislative developments in overseas jurisdictions.

7.2 The Winding Up Provisions

There is also sufficient precedent in jurisdictions abroad to support the inclusion of the proposed winding up provisions. In Ontario, Canada, section 240 of the *Business Corporations Act* 1990 (Ontario) grants the Director (the person responsible for the operation of the Act) the authority to cancel a corporation's certificate of incorporation where "sufficient cause" can be shown. "Sufficient cause" is defined under the Act to include, inter alia, "a conviction of the corporation for an offence under the *Criminal Code* (Canada) or any other federal statute or an offence as defined in the *Provincial Offences Act*, in circumstances where cancellation of the

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<http://www.trilliuminvest.com/pages/news/news_detail.asp?ArticleID=192&Status=Archive> (28 February 2004).

[9] The GRI commenced in 1997.

[10] For a comprehensive list of the existing mandatory reporting regimes, see Mansley, Note 2. Since Mansley compiled his list, the United Kingdom has proposed the introduction of a new corporate reporting regime which requires the director's of large companies in their annual directors report to include a "Business Review" which, where appropriate, should include analysis using key performance indicators on environmental and employee matters: See proposed section 235ZZA *Companies Act 1985* (UK) as outlined in the Draft Companies Act 1985 (Operating and Financial Review and Directors' Report) Regulations 2004, reg 3. The regulations are expected to become law in January 2005.

[11] See chapter 4.

certificate is in the public interest".[12] Once the certificate of incoporation is cancelled, the company is dissolved.[13]

The grounds for dissolution of a corporation under this Canadian provision, grants the corporation less latitude for unlawful conduct than the proposed Australian winding up provision. Unlike the proposed Australian provision, the Director would not have to show that a Canadian company has repetitively contravened the law. Instead, the Director could conceivably withdraw a certificate of corporation where there has been a single contravention of the law, a 'one strike and you're out' provision, if it were in the public interest to do so. Furthermore, the Director need not even apply to the court to have the company dissolved. The *Business Corporations Act* appears to grant the Director the authority to withdraw a certificate of incorporation without an order of the court. However, section 250 of the Act grants any aggrieved person, which would include the company and or its directors, the right to appeal a decision of the Director.

Where this Canadian provision differs from the proposed Australian winding up provision is in the area of standing. Under Ontario's *Business Corporations Act*, only the Director has the authority to cancel a certificate of incorporation in circumstances where a corporation has contravened the law. Under the proposed Australian provision, the standing provisions would enable a person or public authority responsible for the enforcement of Australian laws, or a person whose interests are affected by the unlawful corporate conduct, to apply to the court to have the company wound up.

However, it is south of the Canadian border where the most significant precedent lies. In the United States (U.S.), all 50 states and the District of Colombia have in place statutes that facilitate the revocation of corporate charters (hereinafter referred to as charter revocation statutes).[14] These statutes differ slightly in each jurisdiction, but in most cases outline corporate acts and omissions that warrant the revocation of a corporate charter. The charter revocation statute in place in Alabama, *Code of Alabama* § 6-6-590, provides one such example:

> (a) An action may be commenced under this article, in the name of the state, against the offending corporation, on the information of any person for the purpose of vacating the charter or annulling the existence of any corporation, other than municipal, whenever such corporation:
>
> (1) Offends against any of the acts creating, altering or renewing such corporation;
> (2) Violates the provisions of any law, by which such corporation forfeits its charter, by abuse of its powers;
> (3) Has forfeited its privileges or franchises by failure to exercise its powers;
> (4) Has done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or
> (5) Exercises a franchise or privilege not conferred on it by law.

[12] See the *Business Corporations Act* 1990 (Ontario), s 240(2)(d).
[13] See the *Business Corporations Act* 1990 (Ontario), s 240(1)(a).
[14] Reference to each of these statutes can be found in Anderson J, "Respecting Human Rights: Multinational Corporations Strike Out" (2000) 2 *University of Pennsylvania Journal of Labour and employment Law* at 463.

(b) The judge of the circuit court, whenever he believes that any of the acts or omissions specified in subsection (a) of this section can be proved and it is necessary for the public good, must direct the district attorney to commence an action, or an action may be commenced without the direction of the judge on the information of any person giving security for the costs of the action, to be approved by the clerk of the court in which the action is commenced.

(c) Actions under this section must be commenced in the circuit court of the county in which the corporation has its principal office or, if it has no principal office, of any county in which it does business; or if it has no principal office and is doing no business in the state, such action may be commenced in any county.

Upon revocation of the corporate charter, the subject corporation is dissolved. Charter revocation actions are, therefore, similar in effect to winding up proceedings under Australia's *Corporations Act*, which also ultimately results in the dissolution of the company.[15]

As is evident in the Alabama statute, proceedings to revoke a corporate charter may be commenced when a company "violates the provisions of any law." Clearly, this would include violations of U.S environmental laws.[16] However, it is unlikely an application will succeed on the basis of an insignificant, single unlawful corporate act. The question of whether a charter will be revoked will depend on the magnitude and public importance of the unlawful or improper practices complained of.[17]

The Alabama statute is unique within the U.S as it grants standing to 'any person' to bring a charter revocation action.[18] Therefore, of all U.S charter revocation statutes, it most closely resembles the proposed Australian winding up provision. All other U.S jurisdictions limit standing to the State Attorney General.[19] This has proven problematic within many jurisdictions where the State Attorney General, particularly over the course of the last century, has been reluctant to revoke corporate charters when presented with evidence of unlawful corporate activity.[20] Some commentators have argued that the economic and political control exerted by corporations has forced a virtual withdrawal of charter revocation actions.[21]

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[15] See chapter 6, part 6.4.2(B).

[16] See generally Linzey T, "Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations" (1995) 13 *Pace University Environmental Law Review* 219. See also Linzey T, "Killing Goliath: Defending Our Sovereignty and Environmental Sustainability Through Corporate Charter Revocation In Pennsylvania And Delaware" (1997) 6 *Dickinson Journal of Environmental Law & Policy* 31.

[17] See *People v. Abbott Maintenance Corp*. 11 A.D.2d 136. This decision relates to New York's charter revocation statute, NY CLS Bus Corp § 1101, which includes similar revocation grounds to the Alabama statute in circumstances where the corporation has violated the provision of any law.

[18] See *Baxter v State ex rel. Metcalf* (1942) 243.120,9 So.2d 119. The right is granted to bring charter revocation proceedings to an individual so long as the individual makes himself a party to the proceedings and provides security for costs.

[19] Linzey (1995), Note 16 at 224.

[20] For example, the decision of Californian General Attorney not to act on the petition of Californian citizens to revoke the charter of the Union Oil Company of California (UNOCAL) for alleged violation of environmental laws and human rights standards. See also Note 23 below.

[21] Linzey (1995), Note 16 at 239.

However, the charter revocation statute, described as the "sleeping giant" of U.S corporate law, is showing signs that it rising from its decades' long slumber.[22] Spurred on by public concern with unchecked corporate crime, two recent but unsuccessful attempts by private citizens to revoke the charters of Union Oil of California (UNOCAL) [23] and five major cigarette companies[24] have raised the public profile of charter revocation under U.S law. The use of charter revocation as a law enforcement tool has also appeared to gain the support of at least one U.S state Attorney General. The Attorney General of New York, Eliot Spitzer, when campaigning for election in 1999, vowed to get tough on corporate criminals:

> "When a corporation is convicted of repeated felonies that harm or endanger the lives of human beings or destroy our environment, the corporation should be put to death, its corporate existence ended, and its assets taken and sold at public auction."[25]

Proving that he is a man of his word, Spitzer, in November of 2003, acted in cooperation with the Federal U.S Office of the Comptroller of the Currency and U.S Department of Labor to bring about the dissolution of a U.S financial institution, the **Security Trust Company**, for unlawful activities within the U.S financial market.[26] Commenting on the dissolution, Spitzer noted that a "criminal conviction could be a death penalty for a brokerage company." He added that "no company should be considered too big to fail." [27]

The dissolution laws in place in Ontario, Canada and charter revocation statues in place in the U.S, particularly the Alabama statute, provide sufficient precedent in jurisdictions abroad to support the inclusion of the proposed winding up provision within Australia's *Corporations Act.*

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[22] Note 16.

[23] The Unocal charter revocation action revolved around a petition filed in September 1998 with the Attorney General of California by a group of U.S citizens calling on the revocation of Unocal's corporate charter. Among the reasons cited in the petition were alleged breaches of environmental laws and human rights standards by the company. The Attorney General, who under California law is the only person with standing to bring a charter revocation action, did not act on the petition. For a discussion of the Unocal charter revocation action, see generally Benson R, *Challenging Corporate Rule: The Petition to Revoke Unocal's Charter As a Guide to Citizen Action* (Apex Press, 2000).

[24] In May 1998, Alabama Circuit Judge William Wynn filed a complaint in state court in Birmingham, Alabama, demanding that the corporate charters of Philip Morris, Brown & Williamson, R.J. Reynolds, The Liggett Group, and Lorillard Corporation be revoked. The complaint was unsuccessful. The Plaintiff (Wynn) alleged that the defendants had violated a litany of Alabama statutes and had committed a host of Alabama common law torts in the course of their sale of tobacco products within the State of Alabama. See William J Wynn, *ex relator, State of Alabama, Plaintiff, vs. Phillip Morris Inc., et al.,* (1999) 51 F. Supp. 2d 1232.

[25] Parrish G, "Killing Corporations," *Seattle Weekly* (15 July 1999).

[26] The dissolution proceedings were issued by the Federal US Office of the Comptroller of the Currency (the "OCC"). Spitzer, in cooperation with the OCC, initiated criminal proceeding against senior executives of the company. See U.S Department of Labor, "Federal and State Agencies Announce Actions Against Security Trust Company; Phoenix Bank will Undergo Orderly Dissolution and Close by March 31, 2004" (Media Release, 25 November 2003) <http://www.dol.gov/ebsa/newsroom/pr1125a03.html> (2 March 2004).

[27] See Ritholtz B, *Corporate Death Penalty* (26 February 2004) The Big Picture <http://bigpicture.typepad.com/comments/2003/11/corporate_death.html> (2 March 2004).

7.3 Directors' Duty to the Environment

Statutory amendments now implemented in the U.S and proposed amendments in the United Kingdom (U.K) show that there is a willingness in some overseas jurisdictions to broaden the scope of considerations of company directors when fulfilling their fiduciary duty to act in the best interests of the company.

In the U.S, 32 states have now enacted some form of 'constituency statute' which explicitly permits directors to consider the interests of non-shareholders in corporate decision making.[28] These constituency statutes were, in most cases, implemented in the desire to give the board of directors of a target company fighting a hostile takeover, a broader base of interests to consider than just the corporation and its shareholders.[29] However, many of these statutes may be interpreted to apply to corporate decision making with respect to other matters than just a hostile takeover.[30] For example, some of these statutes are so broadly worded that directors can consider the effects of their decisions on society in general.[31] Arguably, this could extend to a consideration of environmental impacts given the social consequences of environmental degradation. The constituency statute in place in the State of Minnesota provides one such example:

> In discharging the duties of the position of director, a director may, in considering the best interests of the corporation, consider the interests of
>
> (1) the corporation's employees, customers, suppliers, and creditors,
> (2) the economy of the state and nation,
> (3) community and societal considerations, and
> (4) the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation.[32]

Some commentators feel that U.S constituency statutes are "red herrings" and have done little to advance the interests of non-shareholders under U.S corporate law.[33] While these statutes represent a statutory variation of the directors' duty to act in the best interests of the company, the laws do not oblige directors to act in a socially responsible fashion. Of the 32 constituency statutes in place, all but one are permissive in nature.[34] In other words, the directors may take the interests of non-

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[28] For reference to each of these statutes, see Adams E and Matheson J, "A Statutory Model For Corporate Constituency Concerns" (2000) Vol. 49, No. 4 *University of Minnesota Law School Emory Law Journal* at 1087.

[29] Note 28 at 1093.

[30] Note 28 at 1094.

[31] For example, see Minnesota Statute, Note 32.

[32] Minn. Stat. Ann. 302A.251.

[33] See Springer J, "Corporate Constituency Statutes: Hollow Hopes and False Fears" (1999) *New York University School of Law Annual Survey of American Law* at 123.

[34] The Connecticut statute is the one exception. *Connecticut Statute: Business Corporations* 33-756(d) requires a director of a corporation, which has a class of voting stock registered pursuant to Section 12 of the *Securities Exchange Act* of 1934, in determining what he reasonably believes to be in the best interests of the company to consider, inter alia, the interests of company employees, the community and societal considerations. However, these matters need only be considered in a small number of business decisions relating to plans of merger (s 33-817), sale of assets (ss 33-830, 33-831) and approval of business combination (ss 33-841, 33-844).

shareholders into account, but are not obliged to do so. As a consequence, constituency groups do not have enforceable rights should their interests be ignored.[35] In the case of the only mandatory constituency statute in place in Connecticut, the additional non-shareholder interests need only be taken into account in a small number of business decisions relating to plans of merger, sale of assets and an approval of business combination.[36] These statutes, therefore, do not represent a marked departure from the statutory and general law duties of directors currently in place in Australia and other common law jurisdictions.[37]

In the U.K, amendments proposed to the company directors' duties under U.K corporate law arguably represent the greatest expansion of directors' duties so far seen in any jurisdiction. The proposed statutory amendments, outlined in the U.K Government's 'white paper:' *Modernising Company Law* (2002), [38] will codify the duties of company directors by requiring them to act in a way that will most likely promote the success of the company. When deciding on what will most likely promote that success, the director *must* take account of all "material factors" that it is practicable to identify. This includes, inter alia, the company's need to have regard to the impact of its operations on the communities affected and on the environment in circumstances where a "person of care and skill" would consider such a matter relevant.[39]

The proposed UK variation on the company directors' duty, unlike most statutory variations in the U.S, imposes a mandatory obligation to consider non-shareholder interests. It will also apply to all decisions of a company director. The real implications of this new duty are not yet known. Will it be effective in incorporating environmental and social considerations into corporate decision making or will it enable directors to overlook environmental and community interests in most circumstances because they are not deemed relevant or practicable to identify? Will it give socially responsible shareholders enforceable rights in the event company directors overlook environmental and community interests in deciding what will promote the success of the company? Could the duty establish grounds for persons in communities negatively affected by corporate activity to seek compensation or injunctive relief when company directors have failed to consider their interests? These questions will remain unanswered until the new duty is implemented into law and its meaning is examined by the courts.

Some U.K based environmental and human rights NGOs have been openly critical of the proposed directors' duty because it does not impose a positive duty on directors to minimise corporate environmental and social impacts.[40] It merely requires that such

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[35] Note 33 at 108.
[36] Note 33 at 108.
[37] The Canadian decision of *Teck Corp. Ltd v Millar* (1973) 33 DLR (3d) at 313-14 has clarified that company directors may consider the interests of the community when acting in the best interests of the company. For commentary on this case see chapter 3. For an Australian authority for this proposition, see *Woolworths Ltd v Kelly* (1990) 4 ACSR 431 at 446.
[38] Department of Trade and Industry (UK), *The White Paper: Modernising Company Law (Cm 5553)*, (16 July 2002) <http://www.dti.gov.uk/cld/review.htm> (2 March 2004).
[39] See schedule 2, paragraph 2 of the White Paper, Note 38.
[40] For example, the Corporate Responsibility Coalition (CORE) unhappy with a number of aspects of the proposed corporate law reforms, has drafted a *Corporate Responsibility Bill* outlining a stricter, and arguably more effective, version of the proposed directors' duty. The duty would include a

impacts be considered. This omission distinguishes the U.K's proposed directors' duty from the Australian variation proposed in the preceding chapter, which would impose a positive duty of environmental protection on company directors. Notwithstanding the potential weaknesses of the proposed U.K corporate law reforms, it is important to acknowledge their significance. If implemented into U.K company law, it most probably represents the first occasion in any jurisdiction in which environmental and community interests will be a mandatory consideration of company directors in fulfilling their duties and responsibilities to the company.[41] This is quite symbolic as it is from the early English rules of equity that the fiduciary duty of directors to the company can be originally traced.[42] Accordingly, if U.K law makers move to amend their corporate laws as proposed, it is highly likely that other jurisdictions will follow.

7.4 Conclusion

While the proposed U.K law reforms do not go as far as the proposed Australian directors' duty and impose a positive duty of environmental protection, it does lend considerable support to the notion that Australian corporate laws governing company directors are not cast in stone and can legitimately accommodate the integration of so called "outside" environmental issues along with other matters of concern to modern Australian society. Aside from the U.K, existing laws in Canada and the U.S provide legitimacy for the introduction of the proposed winding up provisions, while laws in Europe and South Africa show that Australia would not be out of step with jurisdictions abroad if it were to introduce mandatory sustainability requirements within the provisions of the *Corporations Act*.

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positive duty on directors to minimise the negative environmental and social impacts of the company's operations. To visit the CORE website and view a copy of Bill, which has been twice tabled as a private members bill in UK Parliament go to <http://www.corporate-responsibility.org/> (2 March 2004).

[41] There is presently no evidence confirming the inclusion of mandatory environmental considerations within the scope of company directors' duties in the domestic legislation or judicial precedents of other jurisdictions: Ong D, "The Impact of Environmental Law on corporate governance: International and comparative Perspectives" (2001) Vol. 12 No. 4 *European Journal of International Law* 685 -726 at 716. See also the investigations of McConvill J and Joy M, "Interaction of Directors' Duties and Sustainable Development in Australia: Setting Off on the Uncharted Road" (2003) 27 *Melbourne University Law Review* 116.

[42] The rules which impose fiduciary obligations on company directors are rules of equity, developed by the Court of Chancery in England in the 19th century and later by Australian courts exercising equitable jurisdiction. For a discussion of the directors' duty to the company in its context as a fiduciary duty and its adoption within Australian corporate law, see Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia *Company Directors' Duties: The Social and Fiduciary Duties and Responsibilities of Company Directors* (1989) at 37-60.

Chapter 8

Legitimacy: Do the Proposed Corporate Laws Make Economic Sense?

Does it make economic sense to reform Australian corporate law to bring about improved environmental performance of Australian corporations? According to some business commentators, the idea of a company integrating environmental and other social considerations into a business framework will interfere with the company's ability to achieve its financial objectives undermining the very reason for its existence; tantamount to killing the goose that lays the golden egg.[1] This view is shared by David Henderson, the former chief economist of the OECD, who has been an outspoken critic of the concept of corporate social responsibility (CSR):

> "Within businesses, the adoption of CSR carries with it a high probability of cost increases and impaired performance. Managers have to take account of a wider range of goals and concerns, and to involve themselves in new and time-consuming processes of consultation with outside stakeholders. New systems of accounting, monitoring and auditing are called for. On top of all this, the adoption of more exacting self-chosen environmental and 'social' standards is liable to add to costs, all the more so if firms insist on observance of these same standards by their partners, suppliers and contractors."[2]

It is conceded that the proposed corporate laws will require Australian corporations to implement environmental measures that will have short term compliance costs. However, as the first part of this chapter demonstrates, rather than impairing corporate performance, these environmental measures have the potential to increase long term corporate profitability and stimulate the Australian economy. The second part of this chapter illustrates that that the corporate laws could also assist in reducing the enormous economic costs arising from environmental 'externalities,' which are ultimately borne by society as a whole.

8.1 Improved Corporate Profitability

It is now commonly recognised that good environmental performance can add value to a commercial endeavour and makes good business sense.[3] In fact, there is mounting evidence to suggest that corporations that are environmentally responsible are more profitable, providing greater returns and lower risk to their shareholders, than those that are not.[4] Accordingly, directors who consider environmental issues in

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[1] For example, see Mclean T, "Reject Zealotry as Triple Bottom Line," *The Australian* (18 September 2001) at 32; Albrechston J, "Corporate Accountability Takes a Dive In Ratings: Directors are Paid to Save the Company, Not the Planet," *The Australian* (16 April 2003) at 13; and Wilson S, "TBL Derails Gravy Train on the True Bottom Line," *The Australian* (30 April 2002) at 24.

[2] Henderson D, "The Case Against Corporate Social Responsibility" (2001) 17 (2) *Policy* (Centre for Independent Studies) at 30. For an online version go to<http://www.cis.org.au/policy/winter01/polwin01-6.pdf> (15 March 2004).

[3] See generally Mays S, *Corporate Sustainability- An Investor Perspective (The Mays Report).* Canberra: The Department of the Environment and Heritage, 2003; and Deni Green Consulting Services (DGCS), *A Capital Idea: Realising Value from Environmental and Social Performance*. Melbourne: DGCS, 2001.

[4] Note 3.

corporate decision making would be acting in the best interests of the company. Set out below are some of the economic advantages to Australian corporations that could arise from the introduction of mandatory measures through the *Corporations Act* designed to minimise corporate environmental impacts and promote the ecological efficiency of resource use.

8.1.1 Cost Savings

Measures that are designed to promote the ecological efficiency of resource use can result in considerable cost savings for a company. This has been demonstrated by the multinational carpet manufacturer, **Interface Inc**. Interface is the world's largest manufacturer of commercial carpets operating in 110 countries around the world, including Australia. The company aims to be "the first company that, by its deeds, shows the entire industrial world what sustainability is in all its dimensions: people, process, product, place and profits - by 2020 - and in doing so become restorative through the power of influence."[5] In order to achieve this goal, the company has set itself seven ambitious objectives, one of which includes the total elimination of waste.[6] The company defines waste as anything that does not provide value to the customer. This includes traditional forms of waste such as off-quality and scrap, as well as nontraditional forms of waste such as overuse of materials and inventory losses. Since 1995, the company has made cumulative savings of over $209 million in waste reduction initiatives.[7]

Australian based corporations are also proving that there are financial rewards for efficient resource use. In 2001, **Amcor Ltd** invested $600,000 on an energy management program in its NSW operations. Projects with the potential to deliver in excess of $1.8 million in annual energy savings were identified. A number of these have already been implemented, saving $716,000 in the first year alone.[8] Likewise, **Coles Myer Ltd** in its Victorian supermarkets has cut energy costs by $1 million and saved 17,000 tonnes of greenhouse gas emissions with a new lighting efficiency program. More than 50 supermarkets across Victoria now reduce their lighting bills by upwards of $20,000 each year achieving combined savings exceeding $1,000,000 pa. Investment payback for the measures is expected to be less than 2 years.[9]

8.1.2 Reducing Risk

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[5] See Interface Inc, *Our Goals, Our Vision* <http://www.interfaceinc.com/goals/vision.html> (17 March 2004).

[6] Note 5. The seven objectives: (1) Eliminating waste (anything that does not add value to our customers); (2) Eliminating harmful emissions into the biosphere; (3) Using renewable energy sources; (4) Creating self-sustaining, closed-loop products and processes; (5) Developing alternatives to the physical movement of people and material, using resource-efficient means of transportation; (6) Creating a culture that integrates the principles of sustainability into what we do everyday; and (7) Creating a new model for business (redesigning it) by pioneering sustainable commerce.

[7] See Interface Inc, *Waste Elimination Activities* <http://www.interfacesustainability.com/metrics.html> (17 March 2004).

[8] BT Financial Group, *Position Paper: Energy-Use*. Sydney: BT Financial Group, 2003 at 3. Available online at <http://www.pss.gov.au/pss/governance/energy%20position%20paper%20and%20background%20FINAL.pdf > (17 March 2004).

[9] Note 8 at 4.

Corporations that implement measures to minimise their actual or potential environmental impacts expose their shareholders and other investors to less risk from legal proceedings and clean up costs arising from poor environmental practices. The shareholders of **Exxon Mobil** became fully aware of this fact, when in January 2004 a U.S Federal Judge ordered the company to pay plaintiffs to a class action arising out of the 1989 Exxon Valdez oil tanker spill a massive $US4.5 billion in punitive damages plus interest of $US2.25 billion.[10]

The shareholders of Australian based **BHP Billiton Ltd** are also aware of how poor environmental performance can impact on their company's financial bottom line. The environmental impacts arising from the company's Ok Tedi copper mine in Papua New Guinea[11] prompted the commencement of a legal action against BHP (as it was then known) for damages in the Supreme Court of Victoria by representatives of more than 40,000 residents living along the Ok Tedi and Fly rivers. The action was settled out of court in 1996 for a reported figure of $A110 million.[12] In addition, the company wrote off its entire investment in the mine on two occasions, once in 1985[13] and, again in 2001, when it announced it was withdrawing from the project, costing the company hundreds of millions of dollars.[14]

Despite withdrawing from Ok Tedi, BHP Billiton's exposure to environmental risks is likely to continue. The company was among 145 major Australian greenhouse gas emitters served with a legal notice by law firm, Maurice Blackburn Cashman, placing them on notice with respect to their potential exposure to climate risk and climate change litigation.[15] In a press release on the day notice was issued, Dr. Peter Cashman, General Counsel with Maurice Blackburn Cashman stated:

> "What we're seeing is an emerging area of climate change litigation. As the impacts of climate change worsen, the number of potential plaintiffs, and the range of legal actions available to those plaintiffs, will undoubtedly increase."[16]

8.1.3 Customer Demand

Corporations that implement measures to improve their environmental performance will attract the growing number of customers of corporate goods and services who are now factoring in environmental considerations as part of their purchasing decisions. A

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[10] Reuters, *Exxon Told to Pay More Than $US4b for Valdez Spill* (29 January 2004) ABC News Online <http://www.abc.net.au/news/newsitems/s1033792.htm> (23 March 2004). The company has appealed the ruling in light of a U.S Supreme Court ruling which has placed a ceiling on punitive damages.

[11] See chapter 2.6.1 for details of the environmental impacts arising from the mine.

[12] BHP, *BHP and Ok Tedi: Discussion Paper October 1999.* Melbourne: BHP, 1999 at 13.

[13] Note 12 at 10.

[14] BHP Billiton in its preliminary results for the year ended 30 June 2001, reported a $US 148 million charge to profit for the write off of its share in the net assets in the Ok Tedi copper project in Papua New Guinea. See, BHP Billiton, (News Release, 20 August 2001).

[15] The notice was sent on behalf of the law firm's client, the Climate Action Network of Australia (CANA). A copy of the notice and full list of the 145 companies is available at CANA's website, <http://www.cana.net.au/index.php?site_var=333> (17 March 2004).

[16] Climate Action Network, (Media Briefing, 30 July 2003). For an analysis of the legal basis for climate change litigation, see Grossman D, "Warming Up to a Not-So-Radical Idea: Tort Based Climate Change Litigation (2003) 28 *Columbia Journal of Environmental Law* 1-61.

2001 report funded by the Federal Government, *A Capital Idea: Realising Value From Environmental and Social Performance*, cited a number of Australian surveys which support this conclusion.[17] These surveys found that 60% of all consumer decisions are made with an awareness of environmental impacts,[18] while 75-82% of respondents had brought products on the basis of environmental or social issues over the course of the previous years.[19]

It is not just individual consumers that are considering environmental matters in their purchasing decisions. Many Australian governments now factor in environmental criteria as part of government procurement. For example, in 2003 the NSW government announced as part of its *Cleaner Vehicle Action Plan*, a key initiative to improve the environmental performance of the NSW government's vehicle fleet. This requires agencies to develop fleet improvement plans demonstrating reductions in fuel use, greenhouse gas emissions and better average fuel consumption.[20] Reporting on this announcement, the Australian Financial Review stated that "domestic car makers risk loosing lucrative government fleet contracts because their models can't match the environmental credentials of leading foreign models."[21]

Some Australian institutional customers are also developing environmental purchasing policies. The **Insurance Australia Group Ltd**, Australia's largest individual purchaser of white goods and brown goods (electrical household entertainment appliances),[22] is developing a set of environmental principles to be contained in its proposed Supplier Selection Guidelines.[23]

8.1.4 Investment

Corporations that can demonstrate sound environmental performance are likely to be more attractive to investors. This is particularly the case among the growing number of 'socially responsible investors' who consider social and environmental factors, in addition to the traditional financial matters, when they invest.[24] A benchmarking

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[17] Deni Green Consulting Services, Note 3 at 7.

[18] This study was first cited in State Chamber of Commerce (NSW), *Taking The First Steps: An Overview of Corporate Social Responsibility in Australia*. Sydney: State Chamber of Commerce, 2001.

[19] This survey was first cited in Resnik Communications/KPMG Consulting, *Putting Your Money Where Your Mouth Is.* Sydney: Resnik Communications/KPMG Consulting, 2000.

[20] *Motor Vehicle Policy for NSW Government Agencies*, clause 8.3. Available online at <http://www.premiers.nsw.gov.au/our_library/travel/Motor_Vehicle_Policy/MVP_index.htm#_Toc524762755> (18 March 2004).

[21] Lekakis G, "Car Makers Face the Green Test," *The Australian Financial Review* (16 May 2003) at 4.

[22] Insurance Australia Group, *Annual Report 2003* at 17.

[23] Insurance Australia Group, *Environmental Commitment* (December 2003) <http://www.iaglimited.com.au/pub/iag/sustainability/media/environmentDec03.pdf> (18 March 2004).

[24] Three different types of activities come under the umbrella of socially responsible investment. One is placement of money in managed funds, shares, bonds or other securities that are screened to reflect environmental, social or other non-financial values. A second type of socially responsible investment is shareholder action which involves efforts to improve a company's environmental or social behaviour through exercise of rights gained as an owner of shares in the company. A third type of activity also commonly included in socially responsible investment is community-based investing. This typically consists of direct investments in projects or financial institutions that benefit specific communities or constituencies, especially in economically disadvantaged areas: See, Deni Greene Consulting Services, *Socially Responsible Investment in Australia – 2003*, Sydney: Ethical

survey conducted for the Australian Ethical Investment Association, *Socially Responsible Investment in Australia – 2003,* found that socially responsible investment (SRI) in Australia continued to grow dramatically, rising to at least $A21.3 billion by 30 June 2003.[25] This is an increase of 54% since the benchmarking study of 2002. The survey also found that over the past three years SRI managed fund assets in Australia have achieved a staggering increase of 625%.[26]

The popularity of SRI is also evident outside of Australia. In the U.S it is estimated that $US2.18 trillion, more than one out of every nine dollars under professional management, was involved in SRI in 2003. In Canada it is estimated that SRI accounted for $US38.2 billion in 2002, while in Europe it accounted for an estimated $US260 billion. [27]

Investors that choose to follow an 'SRI approach' are by no means disadvantaged. In a December 2003 report, **AMP Capital Investors** released the findings of a study into the financial performance of 14 SRI mutual funds in Australia which arrived at the median performance of SRI managers in Australia. The study found that the median SRI manager outperformed the most relevant benchmark, the S&P/ASX 200, over the one, two, three, and five year periods, through to September 30, 2003. The report acknowledged SRI underperformance in the year 2002.[28]

The environmental performance of a company is not just a concern to socially responsible investors. It has now become a concern of mainstream investors as well. This is reflected in the establishment of the Carbon Disclosure Project. In November 2003, the 87 institutional investors who are part of the project (with combined assets of over $9 trillion under management) wrote to the 500 largest quoted companies in the world by market capitalisation, asking for the disclosure of investment-relevant information concerning their greenhouse gas emissions.[29] Commenting on the information request, Paul Dickinson, the project coordinator, said:

> "There are potential business risks and opportunities related to actions stemming from climate change that have implications for the value of shareholdings in corporations worldwide. Examples of such actions are political and regulatory momentum moving against significant carbon emitters; emissions-sensitive technologies, products and services superseding those existing today; and shifts in consumer sentiment due to a corporation's stance on climate change."[30]

Investment Association, 2003 at 4. Available online at <http://www.deh.gov.au/industry/finance/publications/pubs/benchmark-2003.pdf > (17 March 2004).

[25] Deni Greene Consulting Services, Note 24 at 1.

[26] Note 25.

[27] Social Investment Forum, *2003 Report on Socially Responsible Investing Trend in the United States*. Washington: Social Investment Forum, 2003 at 33.

[28] AMP Capital Investors, *SRI Research Update* (December 2003) at 1. Available at <http://www.ampcapital.com.au/_PDF/adviser/sri/papers/SRI%20Median%20151203.pdf> (20 March 2004).

[29] Carbon Disclosure Project, "Institutional Investors Collaborate on a Second Greenhouse Gas Emissions Questionnaire" (Press Release, 1 November 2003). To visit the website of the Carbon Disclosure Project go to< http://www.cdproject.net/> (25 March 2004).

[30] Note 29.

8.1.5 Lenders

For banking institutions, environmental performance has now become an important criterion in the loan process. Corporations that cannot demonstrate sound environmental management risk being denied loan facilities.[31] This notion has obtained tangible expression in the *UNEP Statement by Financial Institutions on the Environment & Sustainable Development* signed by 160 financial institutions around the world. Australian signatories include **Westpac**, the **National Australia Bank** and **ANZ**.[32] Paragraph 2.3 states:

> "We recognize that identifying and quantifying environmental risks should be part of the normal process of risk assessment and management, both in domestic and international operations. With regard to our customers, we regard compliance with applicable environmental regulations and the use of sound environmental practices as important factors in demonstrating effective corporate management."

In a similar industry sponsored initiative, twenty seven of the world's leading financial institutions (including Australia's **Westpac**) have adopted a set of principles known as the 'Equator Principles.' First adopted in 2003, these principles require signatories to ensure that that the projects they finance are developed in a manner that is socially responsible and reflect sound environmental management practices. The preamble to the principles states that signatories will not provide loans directly to projects where the borrower will not or is unable to comply with the equator principle's environmental and social policies and processes. The significance of this initiative is reflected in the fact that the 27 signatories account for 80% of global project financing.[33]

8.1.6 Insurance

The insurance industry has also begun to take notice of environmental issues in their core activities. This is reflected in the *UNEP Statement of Environmental Commitment by the Insurance Industry* which has 72 signatories world wide, including two Australian companies, the **Insurance Australia Group Ltd (IAG)** and **QBE Insurance Group Ltd**.[34] Paragraph 2.1 of the statement reads:

> "We will reinforce the attention given to environmental risks in our core activities. These activities include risk management, loss prevention, product design, claims handling and asset management."

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[31] Mays, Note 3 at 14.

[32] There were 160 signatories to the statement as of February 2004. The full statement and list of signatories is available at the UNEP Finance Initiative website < http://unepfi.net/> (17 March 2004).

[33] For details on the Equator Principles and the list of Signatories, see Equator Principles <http://www.equator-principles.com/index.html> (17 November 2004). For details on the signatories' percentage share of global project financing, see Environmental Finance, "Putting Principles into Practice" (June 2004) <http://equator-principles.com/ef2.shtml> (17 November 2004).

[34] There were 72 signatories to the statement as of February 2004. The full statement and list of signatories is available at the UNEP Finance Initiative website <http://unepfi.net/> (17 March 2004).

In accordance with this commitment, IAG is now looking at developing insurance products and services that promote sound environmental practice through measures such as loss prevention and contract terms and conditions.[35] Corporations that do not have sound environmental practices may be denied access to these new products and, if current trends in the industry persist, could one day find themselves an unattractive insurance risk to Australian insurers all together.[36]

8.1.7 New Business Opportunities and Challenges

Many economic and business commentators have observed that we are on the cusp of the next industrial revolution. They point out that consumer demand for environmentally friendly products and services, the demands of the financial sector and the worldwide acknowledgement that our industrial processes are unsustainable, all point to the next industrial revolution (which will take place this century) being a sustainability revolution.[37]

The question remains: is the Australian economy positioned to be at the forefront of this revolution? Some, such as Michael Krockenberger a lead author of *Natural Advantage: A Blueprint for a Sustainable Australia,* argue that currently it is not:

> "We [Australia] have a particularly 'hot, heavy and wet' economy; one that requires large amounts of energy, materials and water to produce a unit of gross domestic product (GDP). Unless we can 'cool, lighten and dry' our economy we will be stuck in the 21st century peddling the products of the 20th century. Coal, uranium, woodchips, iron-ore and even aluminium will decline in demand and value in the coming decades."[38]

Australian corporations stand to loose out if they cannot meet the challenges and demands of the 21st century economy. For example, sun drenched Australia was once a leader in the development of solar power technologies and was well positioned to benefit from the growing demand for solar power. Now it seems that Japan and Germany are out in front, which are certainly not the world's sunniest places.[39] But as Krockenberger points out, "there is a happy solution to what is both an environmental and economic problem. We can use the environment to drive the economy and gain an international competitive advantage in the same way that we have previously used natural resource exploitation to drive our economy."[40] The proposed corporate laws, outlined in chapter six, could play an important role in creating the regulatory framework that would place Australian corporations in a position to take full advantage of the business opportunities, and to meet the many challenges, that will arise in the coming sustainability revolution.

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[35] Note 23.

[36] See Gettler S, *The Insurance Sector Sharpens the Cutting Edge of Corporate Virtue* (19 March 2004) The Age <http://www.theage.com.au/articles/2004/03/18/1079199362355.html> (23 March 2004).

[37] See generally, Elkington J, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Canada : New Society Publishers, 1998); Hawken P, Lovins A and Lovins L, *Natural Capitalism: The Next Industrial Revolution* (London: Earthscan Publications, 1999); Krockenberger M et al, *Natural Advantage: A Blueprint for A Sustainable Australia* (Melbourne: Australian Conservation Foundation, 2000); and McDonough W and Braungart M, *Cradle to Cradle* (New York: North Point Press, 2002).

[38] Krockenberger M et al, Note 37 at 3.

[39] Robertson H, *The Race to Harness Sustainable Energy* (18 May 2001) ABC Online <http://www.abc.net.au/worldtoday/s299216.htm> (24 March 2004).

[40] Krockenberger M et al, Note 37 at 3.

8.2 Reducing Externalities

The first part of this chapter outlined some of the economic benefits to Australian corporations that could arise from the proposed corporate laws. The remainder of this chapter demonstrates that the economic benefits of such laws would be enjoyed not just by the corporate sector but by all in Australian society.

When corporations produce goods and services, the costs arising from any associated environmental degradation are, more often than not, borne not by the companies but by society as a whole. Because those costs are borne externally to the company, economists refer to them as "externalities." [41]

New corporate laws that ensure corporations implement measures to minimise their environmental impacts and increase resource use efficiency, would not only benefit the environment by minimising environmental degradation but stand to benefit society as a whole due to the resulting reduction in costly externalities. Accordingly, any economic hardship that Australian corporations may initially suffer (which as argued above will be offset by other savings and benefits) in meeting the compliance costs of the new laws, would be far outweighed by the reduction in the costs of environmental externalities that society would otherwise be called upon to bear.

To illustrate this point, the financial costs of the externalities arising from greenhouse gas emissions and resulting climate change are examined through the following case study.[42] Once the cost of externalities arising from climate change and other environmental problems[43] is factored into the equation, the economic justification for taking regulatory action designed to minimise the environmental degradation resulting from corporate activity becomes clearly evident.

8.2.1 Case Study: The Financial Costs of Climate Change

Little work has been done in Australia to estimate the financial costs of climate change. In 2003, the Australian Greenhouse Office (AGO), reported in *Climate Change: An Australian Guide to the Science and Potential Impacts* (the "AGO climate change report") that "comprehensive cross-sectoral estimates of net climate change impact costs for various greenhouse gas emission scenarios, as well as for

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[41] In a 2000 discussion paper, Environment Australia defined the term 'externality' very broadly "as the impact of changed environmental conditions on people who do not fully participate in the process that caused these conditions to change:" See Environment Australia, *Freshwater Related Environmental Management Principles*. Canberra: Environment Australia, 2000 at 6. See also the definition of externalities in Young M, *Managing Externalities: Opportunities to improve Urban Water Use*. Canberra, CSIRO Policy and Economic Research Unit, 2000) at 4-6.

[42] See chapter 2 for details of the contribution corporate activity makes to Australia's greenhouse gas emissions.

[43] It is not just the externalities associated with climate change that are costly. For example, it is estimated that the cost of dryland salinity to agriculture, infrastructure and the environment amounts to $AUD 270 million per year: Wilson S.M, *Dryland Salinity:What are the Impacts and How do You Value Them?(part 1).* Canberra: Murray-Darling Basin Commission & National Dryland Salinity Project, 2000 at iii.

different societal scenarios, are not yet available."[44] Given the potential for climate change to have catastrophic economic consequences for Australia, one can only wonder whether the lack of research in this area is an act of willful blindness on the part of Australian governments fearful of what such research might uncover.

However, the scale of the potential financial costs of climate change can still be deciphered from the AGO climate change report which, in a remarkably measured tone, states that:

> "About 80% of Australia's population live within 50 km of the coast. Marked trends to greater population and investment in exposed coastal regions are increasing vulnerability to tropical cyclones and storm surges. Thus, projected increases in tropical cyclone intensity and possible changes in their location-specific frequency, along with sea level rise, would have major impacts—notably, increased storm-surge heights for a given return period. Increased frequency of high-intensity rainfall and fire would increase damages to settlements and infrastructure.…
>
> Tourism would be adversely affected by the death of coral reefs and loss of some freshwater ecosystems, such as Kakadu. The ski industry and dependent communities will need to adapt to reduced natural snow cover."[45]

Let us now examine the potential economic implications of the impacts outlined in this statement.

8.2.1 (A) The Economic Cost of Sea-Level Rise and Storm Surge

As highlighted by the AGO, Australia's primary urban and commercial centres are located in close proximity to the Australian coastline making them particularly vulnerable to climate change. A projected sea-level rise in Australia of between 9 cm and 88 cm by 2100 (translating to coastal recession of between 4.5 meters and 88 meters) combined with the impact of storm surges, will result in major damage to buildings and infrastructure located in low lying coastal areas.[46] While there are no Australian studies that can provide an insight into the magnitude of the financial costs that might be incurred due to such damage, a U.S study suggests the costs will be massive. In 2003, a study funded by the U.S Environment Protection Agency into the impact of rising sea level on the Boston metropolitan area concluded that the potential costs for Boston could run as high as $US 94 billion if nothing is done to prevent the worst projections of climate change coming to fruition within the next 100 years.[47]

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[44] Pittock B (Ed), *Climate Change: An Australian Guide to the Science and Potential Impacts*. Canberra: Australian Greenhouse Office, 2003 at 8.

[45] Note 44 at 6.

[46] According to the CSIRO, sea level will rise by between .09 metres and .88 metres by 2100 relative to 1990 levels. It is expected that the coast line will retreat horizontally 50 to 100 times the vertical sea level rise. Accordingly, the projected sea-level rise will cause coastal recession of between 4.5 metres and 88 metres by 2100: See CSIRO, *Climate Change and Australia's Coastal Communities.* Aspendale (Victoria): CSIRO, 2001 at 2.

[47] See *Tufts Civil Engineer Predicts Boston's Rising Sea Levels Could Cause Billions of Dollars in Damage* (Media Briefing, March 2003) < http://www.tufts.edu/tie/tci/pdf/Kirshen.pdf> (24 March 2004). The research project was led by Tufts University civil and environmental engineering research professor, Paul Kirshen. Based on the projections that sea level rise will reach .62 meters (2 feet) over the next 100 years due to climate change and that the area will be damaged by a maximum of one storm per year, Kirshen predicts Boston will suffer $20 billion in damages. If the sea level

The study did have some brighter news. The city could construct sea walls that would reduce the total costs to $US 9.4 billion. Alternatively, the city could flood proof existing buildings and implement planning restrictions on the construction of new buildings in flood prone areas, resulting in a projected cost of $US 6.5 billion.[48]

The extent of the financial cost associated with a sea level rise and resulting damage to buildings and infrastructure in Australia's coastal cities and communities, such as Adelaide, Brisbane, Darwin, Hobart, Melbourne, Perth, and Sydney, is presently unclear. However, if the Boston study is any guide, the costs could potentially run into the billions and possibly hundreds of billions of dollars.

8.2.1 (B) Impact on Tourism

The AGO's conclusion that "Australian tourism will be adversely affected by the death of coral reefs and loss of some freshwater ecosystems, such as Kakadu" is an understatement of significant proportions. The projected "death" of coral reefs, such as the Great Barrier Reef (GBR),[49] the "loss" of Kakadu and other predicted consequence of climate change will have an impact on Australia's $26.5 billion tourism industry[50] of the highest magnitude. Recent analysis by the Great Barrier Reef Marine Park Authority indicates that GBR tourism annually contributes $1.4 billion to the Australian economy,[51] while tourism in the larger GBR catchment is estimated to be worth in excess of $4.2 billion annually.[52] The most obvious conclusion is that very few tourists would visit a dead GBR, resulting in a direct cost to the Australian economy of $1.4 billion per annum and a likely reduction in the number of tourists visiting other areas of the GBR catchment, seriously jeopardising the entire $4.2 billion industry. Additionally, in 1998-99 GBR industries employed 47,600 persons.[53] A large number of these jobs would be lost if the reef were to die, creating an additional economic strain on the public purse.

The "loss" of the World Heritage listed wetlands in Kakadu (Northern Territory) will have similar economic consequences. Approximately two hundred thousand people

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rises to one meter and Boston properties are damaged by more than one storm per year, the total property and emergency costs could easily reach $94 billion.

[48] Note 47. These costs include the cost associated with carrying out the preventative works and the unpreventable damage that will result if climate projections are correct.

[49] A 2004 report commissioned by WWF Australia and the Queensland Tourism Council, concludes that coral cover on the Great Barrier Reef will decrease to less than 5% on most reefs by 2050 under even the most favourable assumptions. Reefs will not disappear but they will be devoid of coral and dominated by other less appealing species such as sea weed and blue green algae: See, Hoegh-Guldberg H, and Hoegh-Guldberg O, *The Implications of Climate Change for Australia's Great Barrier Reef* (2004) at 4. The report is available at <http://www.wwf.org.au/News_and_information/Publications/PDF/Report/reef_report_summary.pdf > (25 March 2004). According to the report (page 11), the task at hand is to minimise the temperature increase projected under climate change so that coral cover can become rehabilitated beyond 2050.

[50] Australian Bureau of Statistics (ABS), *Year Book Australia 2004- Tourism: The Economic Contribution of Tourism* (2003) <www.abs.gov.au> (25 March 2004).

[51] See the Department of the Environment and Heritage (DEH), *The Benefit of Marine Protected Areas* <http://www.deh.gov.au/coasts/mpa/wpc/benefits/benefit-tourism.html> (24 March 2004).

[52] Note 51.

[53] Note 51.

visit Kakadu every year. [54] Considering that the average tourist to the region spends over $100 per day[55] and stays approximately 2.5 nights,[56] if Kakadu is lost due to climate change there will be enormous implications for local businesses and jobs.

It is not just the tourist icons of Kakadu and the GBR that will be negatively affected. Climate change is projected to significantly reduce snow cover in the Australian ski fields,[57] significantly decrease the area of rainforest in the Wet Tropics World Heritage Area of Northern Queensland[58] and erode Australia's world renowned sandy beaches.[59] When this damage is viewed collectively, climate change threatens the attractiveness of Australia as a tourist destination with significant economic implications for the entire Australian tourism industry.

8.2.1 (C) Economic Costs of Extreme Weather Events

Climate change projections point to an increase in the severity and frequency of extreme weather events, such as tropical cyclones,[60] floods,[61] droughts,[62] fires[63] and severe storms,[64] which will have significant economic implications. In fact, we may already be experiencing the economic impacts of extreme weather events linked to climate change. The Zurich based insurer, **Swiss Re** in a report, *Natural Catastrophes and Man Made Disasters 2003*, had this to say about the unusual increase of weather related catastrophes in 2002 and 2003.

> "During April 2003, a storm system swept across the US from the North East to the Mid-West, bringing snow and ice, while in May, a record series of more than 400 tornadoes hit the US Mid-West with hailstorms. These two events cost insurers USD 3.2 billion and USD 1.6 billion respectively. In September, Hurricane Isabel stormed across the US states along the Eastern Seaboard and Ontario, generating an insured property loss of USD 1.7 billion. Between the end of October and beginning of November, two forest fires raged in California, resulting in building insurance losses of USD 1.1 billion and USD 1 billion respectively…."[65]

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[54] See, the Department of the Environment and Heritage, *Kakadu National Park Visitor Survey Results 2000 – 2001* <http://www.deh.gov.au/parks/kakadu/parkjointmang/visitorsurvey/index.html-> (20 March 2004).

[55] The Northern Territory government estimates that the average expenditure by interstate tourists to the Northern Territory was $104 per day in 2001/02 and $148 per day for international visitors. Figures cited in an online discussion paper, Northern Territory Treasury, *Northern Territory Economy 2003/04* [p.94] <http://www.nt.gov.au/ntt/financial/budget03-04/#NTEcon> (24 March 2004).

[56] Note 54.

[57] Hennessy K et al, *The Impact of Climate Change on Snow Conditions in Mainland Australia*. Canberra: CSIRO, 2003 at 37.

[58] See the Department of the Environment and Heritage, *Climate Change Impacts on Biodiversity in Australia* (August 2003) <http://www.deh.gov.au/biodiversity/science/bdac/greenhouse/summary.html> (24 March 2004).

[59] CSIRO, *Climate Change and Australia's Coastal Communities*. Aspendale (Victoria): CSIRO, 2001 at 2.

[60] Note 59 at 2-3.

[61] Note 44 at 146-147.

[62] Note 44 at 122-123.

[63] Note 44 at 65.

[64] Note 59 at 3-4.

[65] Swiss Re, *Sigma: Natural Catastrophes and Man Made Disasters 2003* (Vol 1/2004). Zurich: Swiss Re, 2004 at 8.

> In 2003 countries in Europe and the world over experienced their hottest summer on record. Crop failure in southern, central and eastern Europe caused economic damage estimated at USD 12.3 billion. Forest fires in Portugal alone resulted in total damage of USD1.6 billion. Only a tiny part of this damage was insured. In France, the summer heatwave was followed by severe flash floods in December, causing total losses of around USD 1.5 billion (including insured loss of USD 0.9 billion).
>
> In comparison, major floods across Europe in July and August 2002 has caused total damage of USD 15.6 billion (including insured loss of USD 3.3 billon). France was hit by further flash floods in September resulting in total damage of USD 1.3 billion (including insured losses of USD 0.8 billion). In other words 2002 was a record year for flood losses around the world.
>
> Why the increase in extreme weather events? Is it attributable to the steady rise in global temperatures seen in recent decades? Whilst individual events cannot be used to furnish proof or counter proof of climate change…an increase in extreme weather events is consistent with the developments climatologists expect in a warmer climate.[66]

In 2002 and 2003, Australia also experienced its fair share of natural disasters. The 2002/03 Australian drought was estimated to have reduced economic growth in Australia by around 0.9 percentage points, or equivalent to $6.6 billion[67] while the Canberra and Victorian bushfires in January 2003 were estimated to have resulted in economic loss of $200 million[68] and $121 million respectively.[69] The Victorian bushfires were also estimated to have cost the Victorian government an additional $60 million just to fight.[70] The Melbourne rainstorm of December 2003, is estimated to have resulted in $75 million in damage, the biggest weather related insurance payout in the city's history.[71]

Swiss Re cannot be accused of hiding its concern about the future economic impacts of climate change. The global insurer believes "there is a danger that human intervention will accelerate and intensify natural climate changes to such a point that it will become impossible to adapt our socio-economic systems in time. The human race can lead itself into this climatic catastrophe or it can avert it, since human beings are capable of learning and adapting."[72]

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[66] Note 65 at 10.

[67] See Australian Bureau of Agricultural and Resource Economics (ABARE), "Commodity Export Earnings forecast to Fall 2003/04" (Media Release, 23 June 2003).

[68] The Canberra bushfires of January 2003 burnt in excess of 500 homes and were estimated to have caused around $200 million worth of damage to private and public buildings and infrastructure: Nolan T, *Canberra Counts the Cost of Fire Destruction* (22 January 2003) ABC News Online <http://www.abc.net.au/pm/s767858.htm> (24 March 2004). This estimate does not include the costs of fighting the fire.

[69] A report released by Timber Towns Victoria, estimates that the loss of income and production in the Shires of Alpine, East Gippsland, Indigo and Towong from the time of the Victorian fires of January 2003 to May 2003 to be around $121.1 million. This report does not include estimates of the financial cost arising from damaged buildings and infrastructure: Gangemi M et al, *Socio-Economic Impact of Bushfires on Rural Communities and Local Government in Gippsland and North East Victoria*. Melbourne: Timber Towns Victoria, 2003 at 5.

[70] Simpson K, *Fires: State's $60m Bill* (23 February 2003) The Age Online <http://www.theage.com.au/articles/2003/02/22/1045638541768.html> (24 March 2004).

[71] Wood L, *Insurers Expect Record Payout for Melbourne After Storm* (8 December 2003) The Age Online <http://www.theage.com.au/articles/2003/12/07/1070732071449.html?from=storyrhs> (24 March 2004).

[72] Swiss Re, *Opportunities and Risks of Climate Change*. Zurich, Swiss Re, 2002 at 10.

The insurer is correct in saying a climate catastrophe can be averted. The Intergovernmental Panel on Climate Change stipulated in its third assessment report that "the greater the reductions in emissions and the earlier they are introduced, the smaller and slower the projected warming and the rise in sea levels."[73] Accordingly, if the proposed corporate laws could assist in reducing Australia's greenhouse gas emissions and the associated financial costs of climate change (which it is argued they would) then surely they make economic sense. On the other hand, if we choose not to regulate, allowing Australian corporations to continue 'business as usual' and the projections of climate change come to fruition, we might one day look back and view our regulatory inaction as nothing short of economic madness.

8.3 Conclusion

The proposed corporate laws have the potential to increase long term corporate profitability and act as a driver for the Australian economy. In addition, the new laws could also assist in reducing the enormous economic costs arising from environmental 'externalities,' such as climate change, which are ultimately borne by society as a whole. Amending the *Corporations Act* to bring about improved corporate environmental performance is therefore justified from an economic perspective.

[73] Intergovernmental Panel on Climate Change (IPCC), *Third Assessment Report: Climate Change 2001* (Synthesis Report). IPCC, 2001 at 19.

Chapter 9

Legitimacy: Corporate Law Theory

Identifying a strong theoretical grounding for a corporate law reform proposal is an increasingly important means of establishing its legitimacy.[1] This chapter explores whether the law reform proposals can be justified within the context of corporate law theories from either side of the public/private distinction, the great theoretical divide which continues to shape much of the theoretical discussion in this area.[2]

Considering this thesis can only devote this one chapter to a specific discussion of corporate law theory, a representative selection of the vast array of theories has been chosen. On the public side of the divide, concession theory is examined. On the private side, the contract-based theories of aggregate theory and the modern economic theories are discussed. To balance things, corporate constitutionalism, corporate social responsibility and communitarian theory, theories and perspectives which avoid trying to place corporations within the private or public field, are studied.

This chapter does not set out to provide a critical analysis of these theories and argue that one is right or another is wrong. While it is acknowledged some theories provide stronger support for the proposed corporate laws than others, it will be shown that legitimacy for the proposed winding up provision, the new directors' duty and the mandatory sustainability reporting requirement can be found within the framework of each of the theories examined.

9. 1 Concession Theory

The underlying premise of concession theory is that the corporation is an artificial entity created by the state.[3] This status as a separate legal entity and other legal

[1] In 1996 Australian academic, Katherine Hall, noted that there had been a striking lack of emphasis on corporate law theory in the debate surrounding Australian corporate law: Hall K, "The Interior Design of Corporate Law: Why Theory is Vital to the Development of Corporate Law in Australia" (1996) 6 *Australian Journal of Corporate Law* 1 at 2. Since that time, there has been an increasing amount of interest in corporate law theory evident in the recent writings of many Australian authors such as Jennifer Hill, Michael Whincop and Stephen Bottomley. Reasons for this increase in discourse could possibly be traced to the international focus on issues of corporate governance emerging from the late 1990's and the recent worldwide corporate trend of stating a commitment to the concept of corporate social responsibility. Today, students of Australian corporate law can now open their corporate law text books and read about corporate law theories such as concession theory, aggregate theory, economic theories, communitarian theory and corporate social responsibility; a stark change from the void of theoretical discussion observed by Hall almost a decade before: See, for example, the Australian law text book Tomasic R et al, *Corporations Law in Australia* (Sydney: The Federation Press, 2nd ed, 2002) chapter 2.

[2] A common theme running through much of the academic literature on corporate law theory is the public/private distinction. See, for example, Bottomley S, "The Birds, the Beasts, and the Bat: Developing a Constitutionalist Theory of Corporate Regulation" (1999) 27(2) *Federal Law Review* 243; Tomasic, Note 1; and Hall, Note 1.

[3] Bratton W, "The New Economic Theory of the Firm: Critical Perspectives From History" (1989) 41 *Stanford Law Review* at 1475. According to Bratton, concession theory comes in degrees. A strong version attributes the corporation's very existence to state sponsorship. A weaker version sets up state permission as a regulatory prerequisite to doing business. For further commentary on concession theory, see Bottmomley, Note 2.

incidents usually associated with incorporation, such as perpetual succession and limited liability of members, are viewed as a concession or privilege granted by the state which underlines the state's control over the process of incorporation and legitimises the use of regulation to control a corporation's post incorporation activities.[4]

Despite being considered a relic of the 19th century by many of today's corporate law scholars,[5] concession theory is by no means dead and buried. The theory has been influential in decisions of the High Court of Australia as recently as the 1990's. For example, a proponent of concession theory would find a great deal of 'common ground' in the 1990 judgment of Brennan J in *Northside Developments Pty Ltd v Registrar-General* in which he observed that a company's "existence, capacities and activities are only such as the law attributes to it."[6] Concession theory has also experienced a revival of sorts through the modern U.S corporate charter revocation movement, discussed earlier in chapter seven. Proponents of charter revocation rely on concession theory to establish legitimacy for their calls to revoke corporate charters as a means of punishing and deterring corporate polluters.[7] Similarly, in Australia, the theory was viewed by Stephen Bottomley "as a useful place to start" in constructing his alternative corporate law theory, 'corporate constitutionalism,' discussed later in this chapter.[8]

Concession theory falls firmly on the public side of the public/private divide. As Bottomley points out, this is because "concession theory purports to offer a rationale of state regulation of company activity. Indeed, concession theory out of all the theories of corporate regulation makes the strongest claims about state involvement in the corporate arena."[9]

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[4] This is a summary of what Bottomley describes as the two related claims of concession theory: the "status claim" and the "regulatory claim:" See Bottomley, Note 2 at 247- 248.

[5] The origins of concession theory can be traced to early Roman law. It was prominent in corporate law theory in the early 19th century in both England and the United States. It has lost favour among many legal scholars who believe that the administrative nature of the modern incorporation process and the fact that incorporation is now freely available undermines the explanatory force of concession theory: Bottomley, Note 2 at 250.

[6] *Northside Developments Pty Ltd v Registrar-General* (1990) 8 ACLC 611 at 626. See also the joint judgment of Mason CJ and Toohey J in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1994) 12 ACSR 452 at 458-459.

[7] See Linzey T, "Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations" (1995) 13 *Pace University Environmental Law Review* at 221- 222. Linzey argues that "Individuals who wish to carry on a business as a "corporation" have been subject to procedures which have evolved from colonial American "special chartering" to the present day process of incorporating according to applicable state general incorporation statutes. Through the process of "incorporation," corporate owners gain access to limited liability and the corporation is granted the judicial legal fiction of "personhood," which guarantees a corporation many of the same constitutional rights individuals are entitled to under United States law. While the corporate entity does receive many benefits from its "personhood" status, it very often gains benefits above those of normal citizens. Although a corporation is held liable for all of its actions, corporations often violate federal and state environmental laws and continue to operate unscathed. Corporate liability for environmental violations, although extensive, does not harm many corporations as they are able to pass the totality of their overall costs on to the consumer. The power of the Attorney General of a state to revoke corporate charters, and thereby end the corporate life, may be the only effective deterrent for corporate polluters."

[8] Bottomley, Note 2 at 249.

[9] Note 8.

With its strong claims for state regulation of corporate activity, concession theory provides justification for the introduction of each of the law reform proposals. Just as the state grants the privilege of incorporation ,[10] it would be entirely justified in taking this privilege away through a corporate law provision that facilitates the winding up and dissolution of a corporation which abuses its privileges by engaging in conduct that is repetitively in breach of the law.[11] Likewise, within the framework of concession theory it would be a legitimate exercise of state control over a corporation's post incorporation activities to introduce a new directors' duty pertaining to the environment and accompanying sustainability reporting requirements.[12] Particularly, if the state were of the view the new laws could play a part in minimising the significant environmental degradation arising from corporate activity.[13]

9.2 Contract-Based Theories: Aggregate and Economic Theories

In contrast to concession theory, contract-based theories view the corporation as a private proposition. These theories focus on what is viewed as the underlying contractual foundation of the corporate form and have moved away from trying to define or justify its status as a separate legal entity.[14]

One of the earliest contract based theories, traceable to the mid 19th century, can be found in what is commonly referred to as 'aggregate theory.'[15] It asserts the primary status of the individual, by emphasising the individual's right to association, and the private nature of the corporation. Aggregate theory is based on the view that the status of the corporation and its external and internal relationships are most appropriately explained by reference to the principles of contract.[16] The corporation is to be regarded as an association or aggregation of individuals who contract with each other and management through the company constitution.[17] This theory offers only limited scope for state regulation of corporate activity, instead viewing the role of the law to facilitate the formation of these contractual relationships.[18]

'Economic theories' of the corporation share the contractual foundation of aggregate theory along with the notion that the corporation falls firmly within the private sphere where state regulation should play a limited and facilitative role.[19] Economists

[10] In Australia's case, incorporation most commonly takes place pursuant to part 2A.2 of the *Corporations Act* 2001 (Cth).
[11] The proposed winding up provision is outlined in chapter 6.
[12] The proposed directors' duty and sustainability reporting requirements are outlined in chapter 6.
[13] See chapter 2 for evidence of the environmental degradation arising from corporate activity.
[14] For a general discussion of the contractual theory of the corporation, see Butler H, "The Contractual Theory of the Corporation" (1989) 11 *George Mason University Law Review* 99.
[15] For a discussion of aggregate theory within its historical context, see Millon D, "The Ambiguous Significance of Corporate Personhood," (2001) 2 (1) *Stanford Agora* <http://agora.stanford.edu/agora/cgi-bin/article2_corp.cgi?library=millon> (10 September 2004).
[16] Hall, Note 1 at 22.
[17] Note 16.
[18] Hall, Note 1 at 23
[19] According to Tomasic, Note 2 at 56, economic theories can be divided into two different classes: "agency theory" and "transaction cost economics." In other academic literature, the two variants are

devised these theories in the 1970's but it was not until the 1980's that they gained wide currency and acceptance amongst corporate legal scholars.[20]

Instead of viewing the corporation as a separate legal entity, economic theories describe the corporation as a 'firm.' The firm is treated as nothing more than a series of private, consensual contract based relationships (a nexus of contracts) between rational economic actors- shareholders, managers, employees and customers- each seeking to maximise their own benefit.[21] The most effective means of ensuring the success of the firm is to view the firm as having one overarching purpose: the maximisation of profit for the benefit of the shareholders.[22] The shareholders (the principals) as investors in the firm, contract with the firm's managers (their agents) to undertake the managerial tasks that will maximise their investments. Such contracts are concerned with minimising the agency costs associated with this task. Agency costs include the costs to the shareholder associated with limiting managerial opportunism, or put simply, the risk that managers will use their discretionary powers to further their own interests rather than maximising profits for the shareholders. Managers also incur agency costs through "bonding" with the shareholders to convince them that their investments will be secure.[23]

Agency costs, for the shareholder at least, can be reduced by careful monitoring of managerial activity. However, for a number of reasons, the cost of monitoring

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described as "neo-classical" and "institutional," as in Bratton W, "The New Economic Theory of the Firm: Critical Perspectives From History" (1989) 41 *Stanford Law Review* 1471. In other instances, the more recent strands of the economic analysis of corporate law are referred to as "contractarianism" as in Whincop M, "Fault and Default: Contractarianism as a Theory of Anglo-Australian Corporate Law" (1997) 21 *Melbourne University Law Review* 187. The different variants or strands of economic theory share enough commonalities to be discussed as an amalgamation for the purposes of this chapter.

[20] Bratton, Note 19 at 1476. The watershed year was 1976, when Jensen and Meckling's well-known analysis of the firm appeared in Jensen M and Meckling W, "Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305. However, earlier writings of Ronald Coase in the 1930's have also been influential in shaping modern economic theories: See, Ronald H. Coase, "The Nature of the Firm" 4 *Economica* at 390-394 (1937).

[21] Viewing the firm as a nexus of contracts arose from Jenson and Meckling's commonly cited theory of the firm: Jensen M and Meckling W, Note 20 at 311. Jenson and Meckling also argued that the firm is a legal fiction and it was wrong to view it as a person or individual with motivations and intentions.

[22] The primacy of the shareholder under economic theories of the corporation is commonly justified on the basis of what is referred to as the "residual claimant argument." As the residual claimants, shareholders have the greatest interest in ensuring the firm's profitability. They have the most to gain or lose financially from the firm as it undertakes new projects or increases its output. On the other hand, the fixed claimants (e.g. management and employees) will stand to gain or lose only a small fixed amount from the firm. Accordingly, because shareholders-out of all the stakeholders- value the firm most highly and have the greatest incentive to maximise the value of the firm, they in turn earn the ultimate right to guide the firm, or more precisely, to have it guided on their behalf: See Macey J and Miller G, "Corporate Stakeholders: A Contractual Perspective" (1993) 43 *University of Toronto Law Journal* 401. But Macey and Miller argue that this presents only half the picture. Running side by side with the residual claimant justification is the view that fiduciary duties are valuable assets and like other assets are rendered less valuable the more diffuse they become. Accordingly, any group of stakeholders will find that fiduciary duties are more valuable to them if they are exclusive (e.g. exercised for the exclusive benefit of the shareholders) than if they were shared.

[23] See generally Jensen M and Meckling W, Note 20.

managers is high while the prospect of effective monitoring is low.[24] According to economic theories, two mechanisms can act as an efficient substitute for investor monitoring of management's behaviour. The first mechanism is provided by the operation of market forces which supply information about companies and constrain corporate power. The second mechanism is provided through corporate law. [25] The fundamental components of corporate law, such as separate legal status, limited liability and directors' duties, are viewed as an "off-the-rack" set of contractual terms which participants in a corporate venture would have otherwise bargained for.[26]

In keeping with the 'freedom of contract,' some proponents of economic theories regard corporate law as a set of default rules and that persons seeking to establish a corporate venture should have the freedom to opt out of corporate law if they wish to strike a different bargain more suited to their specific circumstances.[27] Others see some role for mandatory rules in circumstances where the body establishing those terms (e.g. the parliament or a court) is more competent in identifying the parties' interests than the parties are.[28] Indeed, since the recent spate of corporate collapses in the United States, the most notable being **Enron Corporation**, a number of prominent North American law and economic scholars have openly expressed their support for the introduction of mandatory rules through the *Sarbenes- Oxley Act* 2002 (U.S) to address the abject failures of U.S corporate governance.[29] This suggests there has been a small shift in law and economic scholarship towards a greater acceptance of mandatory rules within corporate law where circumstances 'clearly' justify it.

With its natural leaning away from mandatory corporate regulation, it might appear contract-based theories offer little justification for the implementation of the proposed corporate law reforms. It is arguable, however, that within the theoretical framework of these theories there is still some room for regulatory intervention of the kind proposed.

With respect to the proposed winding up provision for repetitive breaches of Australian law, one could justify the dissolution of a corporation in such circumstances with reference to the principles of contract law. Just as Australian

[24] Investors are generally limited in the amount of time they can devote to monitoring the firm's performance. Furthermore, in large public companies the share ownership is dispersed meaning the prospect of collective action to share the monitoring burden is low: Tomasic, Note 2 at 57.

[25] Tomasic, Note 2 at 58.

[26] Easterbrook F and Fischel D, "The Economic Structure of Corporate Law" (Harvard University Press, 1991) at 34.

[27] Coffee J, "The Mandatory/ Enabling Debate in Corporate Law: An Essay on the Judicial Role" (1989) 89 *Columbia Law Review* at 1620. Coffee himself attempts to take a 'middle ground' approach. He argues that contractual innovation can be reconciled with a stable mandatory core of corporate law if we recognize that what is most mandatory in corporate law is not the specific substantive content of any rule, but rather the institution of judicial oversight.

[28] Whincop, Note 19 at 193.

[29] For example, Jonathan Macey, an influential law and economic scholar, views the *Sarbenes-Oxley Act* as "a measured and appropriate response to the abject failures in U.S. corporate governance typified by Enron:" Macey J, "A Pox on Both Your Houses: Enron, Sarbenes-Oxley and the Debate Concerning the Relative Efficiency of Mandatory versus Enabling Rules" (2003) 81 *Washington University Law Quarterly* 329. For other perspectives on the lessons drawn from the collapse of Enron by other corporate law scholars, see Mitchell G, "Case Studies-Counterfactuals and Casual Explanations" (2004) 152 *University of Pennsylvania Law Review* 1157.

courts are willing to declare a contract void on account of illegality,[30] Australian courts on the application, of an affected party, should be able to wind up a contractual corporate relationship that involves frequent illegal activity.

As for the proposed environmental directors' duty and accompanying sustainability reporting requirements, it has become increasingly likely modern shareholders and corporate managers would choose such rules as desirable contractual provisions in a corporate venture. The proposed directors' duty, which among other things, is aimed at improving the environmental performance of the corporation, has the potential (as argued in chapter eight) to increase the long term profitability of a corporation to the benefit of its shareholders. From the perspective of corporate management, the new duty would provide directors and officers with greater freedom to implement measures that will decrease the likelihood of them being held personally liable under Australian environmental law for environmental damage arising from corporate activity.[31]

Finally, the proposed sustainability reporting requirements would serve the function of providing the existing shareholders with a useful tool for monitoring management's performance in ensuring the corporation is environmentally sound, thereby maximising their potential for a profitable return. The reporting requirements would also inform future investors about the environmental performance of a particular corporation, which has become an important part of the selection criteria for many of 'today's' investors.[32]

However, a proponent of contract-based theories might rightfully point out that the proposed corporate law reforms consist of mandatory rules. Is this not inconsistent with the freedom of contract? In addressing this question, it is important to place contract-based theories within the wider context of liberal philosophy. Liberal concepts such as the sanctity of private property, the limited role of the state, the public/private distinction, the autonomous individual and the related concept of liberty have been an extremely powerful influence in shaping contract based theories of corporate law. [33]

Yet even within the boundaries of liberalism, there are circumstances when the state can and must intervene through law to exercise power over the individual. One such circumstance is to prevent harm to another individual or the public. The influential

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[30] It is a long standing principle of contract law that the courts can declare a contract void or unenforceable on account of illegality: See generally Carter JW and Harland DJ, *Contract Law in Australia* (Sydney: Butterworths, 4 ed., 2002), Chs 16-17.

[31] The Commonwealth and every State and Territory (with the exception of the Northern Territory) now have provisions within their varying environment protection legislative schemes that expose directors and mangers of a corporation to personal liability for corporate offences arising from environmental harm. For commentary on the directors liability provisions, see chapter 5.3.1. It should be noted, however, that directors would already have some degree of flexibility to protect themselves from liability by arguing that the introduction of compliance based environmental management procedures are also in the best interests of the company.

[32] See generally chapter 8.

[33] For a discussion of the link between liberalism and contract-based theories, see generally Hall, Note 1. This link was also identified in Hazen T, "The Corporate Persona, Contract (And Market), and Moral Values Failure" (1991) 69 *North Carolina Law Review* at 294; and Bratton W, "The Nexus of Contract Corporation: A Critical Appraisal" (1989) 74 *Cornell Law Review* at 457-458.

British liberal philosopher, John Stuart Mill, in his famous essay, *On Liberty*, put it in this fashion:

> "Whenever… there is definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law."[34]

We have now reached the threshold envisaged by Mill when the state has a responsibility to intervene. Corporate activity, and the significant environmental degradation that results from it, is causing definite harm to other individuals and the public at large. Such harm is evident in the enormous financial burden society is called upon to bear in paying for the negative environmental externalities that arise from corporate production practices.[35] It is evident in the significant social consequences that arise from the environmental damage caused by a corporate venture that goes horribly wrong.[36] It is evident in the ever increasing damage that is being inflicted on treasured natural assets from unsustainable corporate activity.[37]

It is also important to recognise the scale of the environmental degradation. The environmental consequences of corporate activity are not just harming a few isolated individuals. Environmental problems such as climate change, the unsustainable consumption of our natural resources and the mass extinction of species, all of which are inextricably linked to corporate activity, threaten our very way of life.[38]

Some proponents of contract-based theories might then argue that this is all true but the state need not intervene because the market place will correct the problem.[39] The inherent weakness with this argument, of course, is that in the twenty or so years since the free market ideology has come to dominate the economic policies of Australia and a large number of other nations through out the world,[40] the market place has failed to

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[34] Cited in Crisp R, *Mill on Utilitarianism* (London: Routledge, 1997) at 179.

[35] See chapter 8.

[36] For example, the social impacts of BHP Billiton's OkTedi mine, discussed in chapter two, prompted a class action on behalf of 40,000 local inhabitants living along the fly and Ok Tedi river system. The local people experienced a significant decline in fish stocks in the river system (a source of their food) because of increased river sediment levels caused by the mine. The rising waters of the river, caused by the riverine disposal of mine waste, also flooded their food gardens and much of the surrounding forest on which they also relied for food.

[37] For example, the projected loss of treasured natural assets such as the World Heritage listed wetlands of Kakadu, the Great Barrier Reef and the erosion of Australia's sandy beaches due to climate change, outlined in chapter eight. Chapter two identifies the link between corporate activity and greenhouse gas emissions.

[38] See generally chapters 1, 2 and 10.

[39] However, since the recent spate of corporate collapses (e.g. Enron Corporation), corporate law theorists are finding it increasingly difficult to justify unregulated market reign: See Note 29. For commentary on the rational for allowing the market unregulated reign, see generally Browne M and Kubasek N, "A Communitarian Green Space Between Market and Political Rhetoric about Environmental Law" (1999) 37 *American Business Law Journal* 127.

[40] The free market ideology goes by different names, some of which include: neo classical, neo liberal, or libertarian economics; neo liberalism; market capitalism; and market liberalism. In Australia it is known as economic rationalism. The common binding philosophy of this economic ideology is that free markets unrestrained by government intervention generally result in the most efficient allocation of resources and that sustained economic growth is the path to human progress: See Korten D, *When Corporations Rule the World* (London: Earthscan, 1995) at 70-72. Since the early 1980's and the free market economic policies of the Thatcher government in the UK and the Reagan government in

correct environmental externalities. It is for this reason they are referred to as a 'market failure.'[41]

When viewed in this light, even within the theoretical framework of contract-based theories there is justification for the implementation of the proposed corporate laws if they can address this market failure and, in any way, assist in reducing the environmental degradation arising from corporate activity. The freedom of the individual to undertake an uninhibited corporate venture is a right liberal philosophy and contract-based theories value dearly. But this right, even according to liberal ideology, cannot be enjoyed at the expense of the fundamental right of others to have a clean, healthy and stable environment in which they can live, prosper and enjoy.

9.3 Corporate Constitutionalism, Corporate Social Responsibility and Communitarian Theory

This part examines three corporate law theories that, according to their proponents, occupy a more central position in the public and private debate. It begins by looking at Bottomley's theory of corporate constitutionalism to determine whether this "alternative theory" can accommodate the proposed corporate law reforms. A similar exercise is then undertaken with respect to the concept of corporate social responsibility and the closely related communitarian theory.

9.3.1 Corporate Constitutionalism

Any discussion about corporate law theory written from an Australian perspective would be incomplete without reference to Bottomley's theory of corporate constitutionalism, first outlined in his 1999 article, "The Birds, the Beasts, and the Bat: Developing a Constitutionalist Theory of Corporate Regulation."[42] According to Bottomley, concession and contract-based theories of the corporation are too restrictive and viewed from the narrow perspective of a two sided debate.[43] On the one hand, he argues, concession theory places the corporation firmly within the public domain. It traces the source of all powers of the company, its managers and its shareholders to the state. This often leads to "inappropriate command and control style of corporate regulation" giving insufficient weight to private interests in the creation and operation of companies.[44]

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the U.S, the free market ideology has swept across the world and come to dominate the economic policies of Australia, countries in North and South America, much of Europe, parts of Asia and an increasing number of developing nations.

[41] According to Browne and Kubasek, "Externalities are market failures because there is no mechanism by which the interests of the third party can be integrated into prices and output decisions. According to market theory, price represents the value of the resources that went into the production of a good. If the calculation of a price excludes third party effects, it does not reflect social value of resources. Consequently, resources are not properly allocated. In summary, when externalities occur, the market does not allocate resources correctly because the prices do not reflect the cost or value of the good to the consumers": Browne and Kubasek, Note 39, at 41 (footnote 66).

[42] Bottomley, Note 2.

[43] Bottomley, Note 2 at 263.

[44] Bottomley, Note 2 at 254.

On the other hand, firmly embedded in the private sphere, are contract based theories. Bottomley argues that these theories place too much reliance on market forces and the private individual. He points out that despite claims to the contrary, the market has been unsuccessful in controlling the conduct of corporate managers (as the Enron, Worldcom and One Tel scandals demonstrate) and, in reality, state influence over the corporation cannot be dismissed as something from a 'bygone era.'[45]

Bottomley views these two positions as too extreme, eventually requiring us to make an unnecessary choice: "we are either in favour of state intervention or individual freedom, and therefore we either support mandatory rules or we support some form of contractual freedom. In the debate between two theories there is little chance of a position which argues for some form of value in state regulation and at the same time stresses the value of private ordering."[46]

Instead, Bottomley proposes an alternative theory, 'corporate constitutionalism,' which tries to accommodate something of both the concession and contractual perspectives.[47] This alternative theory recognises there is a role for both state regulation of corporations and private corporate inputs:

> "[T]he label corporate constitutionalism carries a double meaning. First, it reminds us that corporations operate within a constitutional setting in which the state has responsibilities and powers. Secondly, at the same time it proposes that corporations are themselves constitutional arrangements. To put it another way, a corporation is an institution which, via its constitution, mediates public and private interests and values." [48]

Within the framework of corporate constitutionalism, there are justifiable constraints and costs which the state can impose on corporate activity.[49] This proposition is based on contemporary republican theory which holds that the state has a unique role in protecting and furthering public values.[50] Bottomley joins this republican theory of state regulation with corporate law theory and argues that corporate law should also be concerned with protecting public values. One value he cites is "the importance of accountability in the exercise of power within and by corporations."[51]

The proposed corporate laws can be justified within the framework of corporate constitutionalism. The proposed winding up provision is one means by which the state can protect the public from unlawful corporate activity and hold corporations 'accountable' for repetitive breaches of Australian law. Likewise, the proposed sustainability reporting requirement will ensure corporations provide an 'account' of their environmental and social performance to shareholders, potential investors, employees and the communities in which they operate.

The proposed directors' duty protects other important public values, not specifically identified by Bottomley but important nonetheless. For example, the proposed duty is

[45] Note 44.
[46] Bottomley, Note 2 at 253.
[47] Bottomley, Note 2 at 254.
[48] Bottomley, Note 2 at 257.
[49] Bottomley, Note 2 at 255.
[50] Note 49.
[51] Bottomley, Note 2 at 256.

aimed at ensuring corporations minimise their environmental impacts, which reflects the now deeply entrenched public value of environmental protection.[52]

9.3.2 Corporate Social Responsibility and Communitarian Theory

Sharing Bottomley's view that there is a role for state regulation of corporate activity, are the proponents of regulatory measures to mandate the notion of corporate social responsibility (CSR). Given the explosion of literature and corporate statements referring to the concept of CSR during the past two decades, the casual observer might be excused for thinking CSR is a relatively modern concept. However, the concept dates back to at least the early 1930's when E. Merrick Dodd wrote his landmark article "For Whom are Corporate Managers Trustees."[53] Dodd, like many of the modern day proponents of CSR, was acutely aware of the power large corporations had over the lives of external actors such as employees and the consumers of corporate goods and services.[54] This power over the lives of others, he argued, created on the part of those most worthy to exercise it, namely the corporate managers, a sense of responsibility.[55]

Dodd was critical of the entrenched legal view that corporate managers should only act in the best interests of company shareholders. He observed that, in practice, this meant there are no human beings who are in a position to lawfully accept for a corporation its wider social responsibilities and that these responsibilities must be imposed by legal compulsion:[56]

> "Business which is the economic organization of society- is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the property rights of its owners are thereby curtailed."[57]

Seven decades on from Dodd's famous article, we continue to debate the concept of CSR and still, the law narrowly defines directors' duties, as pointed out earlier in chapter three, to ensure the primacy of the shareholders' interests to the exclusion of all others. What has changed, however, is that CSR in its 'progressive formulation'

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[52] The public value of environmental protection is inherent in the hundreds of environment protection laws that are now in place in federal and state jurisdictions within Australia. It is also reflected in the fact that environmental issues have consistently rated in the top five issues of importance for the Australian electorate between 2001 and 2003. During this period economic concerns such as employment, taxation and inflation have rated lower than the environment in importance for the Australian electorate: See Baker G and Miskin S, *Opinion Polls: Important Issues and Preferred Party (Research Note - no. 24 2003-04).* Canberra: Parliament of Australia- Parliamentary Library, 2003.

[53] Dodd EM, "For Whom are Corporate Managers Trustees" (1932) 45 *Harvard Law Review* 1145. Dodd was responding to an earlier article in the Harvard Law Review by Professor Berle of Harvard Law School in which Berle had stated a view that "all powers granted to a corporation or to the management of a corporation ... are necessarily and at all times exercisable only for the rateable benefit of all the shareholders as their interest appears:" Berle A, "Corporate Powers as Powers in Trust" (1931) 44 *Harvard Law Review* at 1049.

[54] Dodd, Note 53 at 1157

[55] Note 54.

[56] Dodd, Note 53 at 1162.

[57] Note 56.

has now taken on a wider meaning than when Dodd first considered it. In addition to the responsibilities a company has to its employees and consumers, CSR now encompasses the notion that a company also has a responsibility to protect the environment, to respect human rights and to consider the interests of the local communities in which they operate.[58] What has also changed is that many of the modern definitions of CSR specifically make reference to it being a voluntary concept. For example, the European Union defines CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."[59] This European definition also reflects the legal reality of CSR within Australia where, in the absence of a legal duty on the part of company directors to consider social and environmental issues, CSR remains in essence a voluntary concept.[60]

However, true to the spirit of CSR as Dodd conceived it, there are many who still see a legitimate role for regulation as a mandatory means of ensuring socially responsible corporate behaviour. Perhaps the strongest claims for a law reform approach to bring about CSR have been put forward by proponents of 'communitarian theory.' The common theme underpinning this theory has been the effort to replace corporate law's traditional commitment to shareholder wealth maximization, with a new corporate law regime that is more responsive to the social costs of corporate activity.[61] This wider conception of the scope for corporate law reflects a view of the corporation as a community of interests embracing more than just shareholders.[62] Communitarians view the corporation as having wider social responsibilities towards employees,

[58] For a discussion of the wide array of issues that come within the more 'progressive' formulations of CSR, see Deni Green Consulting Services (DGCS), *A Capital Idea: Realising Value from Environmental and Social Performance*. Melbourne: DGCS, 2001 at 5. Much of the academic literature on the issue highlights the varying ways of conceptualising CSR. For example, Cynthia Williams outlines three ways of conceptualising it. First, adherents of what she terms the 'irresponsible position' suggest that because the corporation is a legal fiction, useful only as a designator to refer to the nexus of any particular company's contracts, it is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations. Second, the 'predominant view' suggests that corporations have no specific social responsibilities beyond profit-maximizing for the benefit of shareholders, but that such profit-maximizing must occur within the confines of the law, without deception or collusion. Third, the 'progressive alternative,' which is derived from the stakeholder theory of the corporation, suggests that corporate managers' underlying social obligations are more extensive than just maximizing shareholders' wealth within the confines of the law. Specifically, progressive scholars contend that directors ought to consider the impact of their decisions on a wider range of constituents than just shareholders, and thus ought to consider the implications of their actions on employees, consumers, suppliers (in some cases), the community, and the environment: Williams C, "Symposium: Corporations Theory and Corporate Governance Law. Corporate Social Responsibility in an Era of Economic Globalization" (2002), 35 *University of California Davis Law Review* 705. For an Australian perspective on the different variants of CSR, see Tolmie J, "Corporate Social Responsibility" (1992) 15(1) *UNSW Law Journal* 268.

[59] See the Commission of the European Communities' final communication from the Commission Concerning Corporate Social Responsibility, "A Business Contribution to Sustainable Development," July 2002 at 5. Available at <http://europa.eu.int/comm/employment_social/soc-dial/csr/csr2002_en.pdf> (15 April 2004).

[60] See chapter 3.

[61] Millon D, "Default Rules, Wealth Distribution, And Corporate Law Reform: Employment at Will Versus Job Security" (1998) 146 *The University of Pennsylvania Law Review* 975 at 976.

[62] Note 61 at 977.

creditors, suppliers, consumers, the environment and the community in which they operate.[63]

Like corporate constitutionalism, communitarian theory avoids classifying corporations as purely private or public. It views the corporation as being both private and public simultaneously, respecting the right of private investors to pursue a profit through corporate ventures but highlighting the fact the activities of corporations affect nearly every aspect of our lives, even in circumstances when we have no formal relationship with them.[64]

The law reform strategy representing the central tenet of communitarian scholarship is the expansion of the traditional, legal duties of corporate directors so they are required by law to consider both shareholder and non-shareholder interests.[65] The proposed directors' duty, outlined earlier in chapter six, is consistent with this aspect of communitarian scholarship. It would ensure a director gives due consideration to environmental issues in corporate decision making, which is a commonly cited non-shareholder issue of communitarians.[66] Similarly, the proposed sustainability reporting requirements would most likely be viewed favourably within communitarian theory as it would ensure a corporation publicly reports on a number of environmental and social indicators that are relevant to both shareholders and non-shareholder constituents. As for the proposed winding up provision, a communitarian scholar might view this law reform proposal as an appropriate means of holding corporations accountable when they breach their responsibility to the wider community to respect and comply with the law.

9.4 Conclusion

Legitimacy for the proposed corporate laws can be found within the framework of corporate law theories that span the public and private continuum. While it is acknowledged that concession theory, corporate constitutionalism and communitarian theory provide stronger justification for the implementation of the proposed laws than contract-based theories, even within the framework of aggregate and economic theories there is a time and a place for the state to intervene in private corporate ventures; and that time has arisen.

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[63] Kuras R, "Corporate Social Responsibility: A Canada--U.S. Comparative Analysis" (2002) 28 *Manitoba Law Journal* 303 at 306. Kuras does not specifically list creditors in her list of communitarian concerns. However, consideration of a creditor's interests are among the list of issues often cited by communitarian scholars: See Tomasic, Note 1 at 60.

[64] Wolf A, "The Modern Corporation: Private Agent or Public Actor?" (1993) 50 *Washington & Lee Law Review* 1673 at 1692. For a list of the non-shareholder interests commonly associated with communitarian scholarship, see Note 63.

[65] Millon, Note 63 at 980.

[66] Note 65.

Chapter 10

Legitimacy: Sustainable Development and the Public Interest

This final chapter sets out to demonstrate that the proposed corporate law reforms are consistent with Australia's international commitments to the concept of sustainable development. In fact, without taking such measures, or measures like them, it is unlikely Australian economic development can be shifted on to a sustainable footing. The consequences of inaction on this issue will not only be felt by other species and the natural world, it will have enormous adverse implications for our society as a whole. Accordingly, measures designed with the intention of 'greening our corporate law' are justified on the grounds that they will further the interests of all Australians, of this generation and those to come.

10.1 Sustainable Development

The concept of 'sustainable development' or 'ecologically sustainable development,' as it is sometimes referred to in Australia, represents a framework within which the international community can address many of the pressing environmental and social issues that have arisen in the context of human progress and development. While there is no single, accepted definition of sustainable development, it is commonly defined as "development that meets the needs of present generations while not compromising the ability of future generations to also meet their needs."[1]

Despite recent action suggesting otherwise,[2] Australia has been a global leader in its support and endorsement of the concept. In 1992, at the United Nations Conference on Environment and Development held in Rio de Janeiro, Australia was one of 178 governments from around the world that endorsed the *Rio Declaration on Environment and Development* ("the *Rio Declaration"*),[3] which contains the guiding principles of sustainable development, and *Agenda 21*,[4] an action plan designed to implement the core principles contained in the *Rio Declaration*. Australia was one of the first nations to implement a national strategy for sustainable development, when in December 1992 the Council of Australian Governments endorsed the National

[1] World Commission on Environment and Development (WCED), *Our Common Future* (The "Brundtland Report") (Oxford: Oxford University Press, 1987) at 43. See also Australia's *National Strategy for Ecologically Sustainable Development* (1992), which defines the related concept of ecologically sustainable development as "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased:" Australian Government, *National Strategy for Ecologically Sustainable Development* (1992) <http://www.deh.gov.au/esd/national/nsesd/index.html#read> (20 August 2003).

[2] For example, the refusal by the Howard, Federal Government to ratify the *Kyoto Protocol* is not reflective of a government that has previously embraced the concept of sustainable development.

[3] See Appendix 10. *The Rio Declaration on Environment and Development*, adopted at the United Nations Conference on Environment and Development, June 1992, can be viewed at <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> (24 August 2004).

[4] *Agenda 21* adopted at the United Nations Conference on Environment and Development, June 1992 <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> (21 January 2004).

Strategy for Ecologically Sustainable Development (NESD).[5] In 1993, Australia was also a founding member of the United Nations Commission on Sustainable Development (CSD) established to oversee the implementation of Agenda 21.[6] More recently, in September 2002, Australia was one of 190 nations at the World Summit on Sustainable Development (WSSD) in Johannesburg, South Africa, that reaffirmed their commitment to sustainable development, the *Rio Declaration* and *Agenda 21*.[7]

The importance of implementing concrete measures to improve corporate environmental performance, within the context of the wider sustainable development agenda, cannot be overstated. In many respects, such action is a pre-requisite to achieving sustainable development. As highlighted in chapter 2, corporate activity is inextricably linked to environmental degradation. Therefore, unless measures are taken to improve corporate environmental performance, there is little prospect of halting such degradation. Until this can be achieved, Australia and the wider global community will be unable to fulfill its commitment to pass on to future generations a clean and healthy environment that can supply the basic necessities required for a safe, healthy and prosperous life.

However, the interplay between corporations and sustainable development is not just about halting the environmental impacts of corporate activity. Corporations also have a more positive role to play in securing a sustainable future. With their enormous financial wealth and human resource base, corporations hold the key for developing the new technologies that will enable humankind to reverse some of the environmental damage already done, and guarantee the ecologically efficient use of resources in the production of goods and services for future generations.[8]

When viewed in this light, Australia's domestic and international commitments to the concept of sustainable development support the introduction of the proposed corporate laws. The discussion below draws on some of Australia's specific international commitments to sustainable development, identifying the linkages between such commitments and the proposed law reform agenda.

10.1.1 The Rio Declaration

The *Rio Declaration* contains a set of 27 core principles (see Appendix 10) that guides Australia and the international community in their efforts to achieve sustainable development. While not having the force of a legally binding convention, the Declaration's endorsement by Australia and the vast majority of other nations has paved the way for the eventual incorporation of its principles into customary

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[5] Australian Government, *National Strategy for Ecologically Sustainable Development* (1992) <http://www.deh.gov.au/esd/national/nsesd/index.html#read> (20 August 2004).

[6] Information on the United Nations Commission on Sustainable Development is available at the commission's website, <http://www.un.org/esa/sustdev/> (29 April 2004).

[7] These commitments were reaffirmed through the *Johannesburg Declaration* (2002) and the *WSSD Plan of Implementation* (2002) endorsed at the World Summit on Sustainable Development, Johannesburg, September 2002. The declaration and plan of implementation are available at < http://www.un.org/esa/sustdev/index.html> (26 April 2004).

[8] The pivotal role corporations have to play in achieving sustainable development is reflected in chapter 30 of *Agenda 21.* See Note 4.

international law.[9] The proposed corporate laws have been designed to incorporate a number of these principles:

Principle 3: *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.*

Application: Principle 3, commonly referred to as the principle of 'inter- and intra-generational equity,'[10] underpins the need for regulatory measures of the kind proposed. In a liberal, democratic society like Australia's, we value the right of individuals to pursue economic activity through a corporate enterprise. Such activity provides Australians with many of the goods and services that satisfy their 'non-essential' and 'essential' needs. In accordance with principle 3, corporations, when providing for those needs, should take care not to engage in environmentally and socially harmful production practices that might compromise the ability of *present* generations of Australians and people living abroad to meet their environmental needs.[11] Furthermore, corporations should also take care not to compromise the ability of *future* generations to satisfy their important needs.[12] The proposed corporate laws, when viewed collectively, will assist in ensuring that intra and inter-generational equity, with respect to developmental end environmental needs, is maintained.

Principle 4: *In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.*

Application: A fundamental objective of the law reform agenda is to integrate the principle of environmental protection into Australian corporate law. It does this through a number of means, one of which is the proposed directors' duty that would require company directors to take all reasonable measures to reduce the adverse impacts of corporate activity on the environment.[13] A second means, is through the proposed winding up provisions designed with the intent of bringing about greater compliance with Australian environmental protection laws.[14]

Principle 8: *To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.*

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[9] Bates G, *Environmental Law in Australia* (Sydney: Butterworths, 5th ed., 2002) at 123.

[10] For a discussion of the concepts of intra and inter generational equity, see Centre for International Sustainable Development Law (CISDL), *Legal Brief- International Sustainable Development Law: Principles, Practices and Prospects*. Montreal: CISDL, 2002 at 2.

[11] For example, it is arguable that the environmental impacts arising from BHP's Ok Tedi mining activities in Papua New Guinea compromised the ability of local people to meet their environmental needs: See chapter 2 for a discussion relating to the Ok Tedi mine. Another more general example is the environmental, social and economic costs associated with the negative environmental externalities arising from current corporate production practices: See chapter 8.

[12] Climate change is a case in point. The greenhouse pollution emitted by Australian corporations today, is contributing to global climate change which is projected to compromise the ability of future generations to meet their environmental needs.

[13] See chapter 6, for the full outline of this proposed duty.

[14] See chapter 6, for a full outline of the proposed winding up provisions.

Application: The reduction and elimination of unsustainable patterns of production and consumption, a central component of principle 8, is reflected in the proposed directors' duty that would require corporate directors to take all reasonable measures to increase the ecological efficiency of the corporation's resource use.[15]

Principle 10: *Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

Application: Consistent with the notions of public awareness and access to information inherent in principle 10, the proposed sustainability reporting requirements are designed with the intent of ensuring the public has access to information on the environmental, social and economic performance of Australian corporations.[16] The wide standing provisions associated with the proposed directors' duty and the new winding up provisions, also incorporate the spirit of principle 10 by ensuring a wider group of persons affected by environmentally damaging corporate conduct have the ability to seek an appropriate remedy than is currently the case.[17]

Principle 15: *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

Application: Principle 15, commonly referred to as the precautionary principle, has been incorporated into the proposed directors' duty. The new duty includes a provision designed to ensure that where there are reasonable grounds for belief that serious or irreversible environmental damage may arise from any act of a corporation, lack of full scientific certainty shall not be used as a reason for postponing reasonable measures to prevent adverse environmental impacts or increase the ecological efficiency of resource use.

Principle 16: *National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.*

Application: Principle 16, commonly known as the 'polluter pays' principle, is an underlying objective of the law reform agenda. In particular, the proposed directors' duty will require corporations to implement internal measures to control pollution and

[15] Note 13.
[16] The proposed reporting provisions are outlined in chapter 6.
[17] See chapter 6.

minimise other environmental impacts. This will transfer the short term cost[18] of pollution control measures to the corporation, which will in turn assist in reducing some of the significant financial costs society is called upon to bear in paying for the negative environmental externalities arising from corporate production practices.[19]

10.1.2 Agenda 21

Whilst the *Rio Declaration* set out the core principles of sustainable development, *Agenda 21* could aptly be described as the agreed action plan and means of implementation to bring those principles into effect.[20] It is a comprehensive document comprising some 40 chapters and is over 500 pages in length. Australia endorsed *Agenda 21* at the plenary in Rio de Janeiro in June of 1992.

As is the case with the *Rio Declaration*, Australia's endorsement of *Agenda 21* also legitimises the introduction of the proposed corporate law reforms. Three themes emerge from *Agenda 21* which support this assertion.

First, *Agenda 21* recognises the crucial role business enterprises (the most common of which are corporations) have to play in bringing about sustainable development. This is evident in the fact that an entire chapter (chapter 30) of *Agenda 21* is devoted to defining the role of business and industry in achieving this goal. Paragraph 30.3, makes this link particularly clear:

> "Business and industry, including transnational corporations, should recognize environmental management as among the highest corporate priorities and as a key determinant to sustainable development."

Chapter 30 has a particular focus on the need to promote ecologically efficient production processes within business and industry and to decouple environmental degradation. At paragraph 30.3 it states:

> "Governments, business and industry, including transnational corporations, should aim to increase the efficiency of resource utilization, including increasing the reuse and recycling of residues, and to reduce the quantity of waste discharge per unit of economic output."

The chapter also recognises the need for businesses to internalise environmental costs into accounting and pricing mechanisms[21] and the need for business and industry to report annually on its environmental record.[22]

Second, while encouraging the use of voluntary initiatives and economic instruments, *Agenda 21* recognises that legislation also has a central role to play in promoting sustainable business practices. For example, at paragraph 30.8 it states that:

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[18] As argued in chapter 8, the costs of implementing measures to bring about improved corporate environmental performance, are primarily short term. In the long term, it is possible that such measures may increase corporate profitability.
[19] See chapter 8 for a discussion relating to externalities.
[20] Note 4.
[21] *Agenda 21*, Para 30.9.
[22] *Agenda 21*, Para 30.10(a).

> "Governments should identify and implement an appropriate mix of economic instruments and normative measures such as laws, legislations and standards, in consultation with business and industry, including transnational corporations, that will promote the use of cleaner production, with special consideration for small and medium-sized enterprises. Voluntary private initiatives should also be encouraged."

Third, *Agenda 21* also highlights the importance of an integrated approach to regulatory action. Paragraph 8.14 stipulates that "to effectively integrate environment and development in the policies and practices of each country, it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles."

These three themes reinforce the need for regulatory measures of the kind proposed through the corporate law reform agenda. First, the law reform proposals recognise, as does *Agenda 21*, the crucial role corporate business enterprises have in achieving the goal of sustainable development. Consistent with the second theme, the regulatory measures are proposed in recognition that the law has a central role in bringing about sustainable business practices. Finally, they are proposed through the vehicle of the *Corporations Act*, rather than conventional environmental law, to implement the integrated regulatory approach encouraged by *Agenda 21*. This integration will ensure that, in the first instance, Australian corporate law no longer undermines the objectives of Australian environmental law and, furthermore, that Australian corporate law is underpinned by sound social, environmental and economic principles.

10.1.3 WSSD Plan of Implementation

In 2002, ten years after the Rio Earth Summit, governments from all parts of the globe met in Johannesburg at the World Summit for Sustainable Development (WSSD) to reaffirm their commitment to the concept of sustainable development. During the preparatory process for the conference, there was strong pressure exerted on governments, particularly from NGOs, to introduce a binding international convention on corporate accountability and liability.[23] This convention, if adopted at WSSD, would have required signatory states to implement laws within their own domestic jurisdictions designed to, inter alia:

1. Establish mandatory reporting requirements for corporations to report fully on their environmental and social impacts, on material risks and on breaches of environmental or social standards;
2. Require corporate directors to consider environmental and social impacts of corporate activities in decision making; and
3. Guarantee legal rights of redress for citizens and communities adversely affected by corporate activities.

[23] For an outline of the proposed convention, see Friends of the Earth International, *Towards a Corporate Accountability Convention 2002* <http://www.rio-plus-10.org/en/positions/26.php> (28 April 2004).

While the 190 governments attending WSSD did not go as far as agreeing to the implementation of the proposed convention, they did endorse the *WSSD Plan of Implementation*, which at paragraph 49 calls for action at all levels to:

> "Actively promote corporate responsibility and accountability, based on the *Rio principles*, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships and appropriate national regulations, and support continuous improvement in corporate practices in all countries."

Of all the documentation outlining the commitments of the international community with respect to sustainable development, this paragraph represents the clearest official statement yet of the need for regulatory action to promote sustainable corporate activity.[24] In recognition of the fact Australia also endorsed paragraph 49, the proposed corporate laws would be a legitimate means for Australia to develop and implement "appropriate national regulations" that "actively promote corporate responsibility and accountability, based on the *Rio principles*."[25]

10.2 The Public Interest

As principle 1 of the *Rio Declaration* states, "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[26] This reminds us that the development and implementation of concrete measures to address our pressing environmental problems is not only required for the sake of protecting other species and the 'natural world,' it is also inextricably linked to our own well being and survival.

In 1992, seventeen hundred of the world's leading scientists, including 104 Nobel Laurietes, warned humanity of the consequences if we failed to take action to address unsustainable practices:

> "Human beings and the natural world are on a collision course. Human activities inflict harsh and often irreversible damage on the environment and on critical resources. If not checked, many of our current practices put at serious risk the future that we wish for human society and the plant and animal kingdoms, and may so alter the living world that it will be unable to sustain life in the manner that we know. Fundamental changes are urgent if we are to avoid the collision our present course will bring about….
>
> We the undersigned, senior members of the world's scientific community, hereby warn all humanity of what lies ahead. A great change in our stewardship of the earth and the life on it

[24] Despite such clarity, some governments still questioned the meaning of paragraph 49. For example, at the closing plenary, the U.S Government stated that paragraph 49 referred to existing agreements only and did not mean that states were to develop or implement new agreements. An interpretive statement to this effect was eventually disallowed by the Chair after several delegations questioned the consistency of the statement in light of the provisions in the paragraph calling for the "full development" as well as "effective implementation" of agreements, measures, initiatives, etc: UN Non Governmental Liaison Service, *World Summit on Sustainable Development: Roundup 96* (2002) <http://www.un-ngls.org/documents/text/roundup/ru96wssd.htm> (29 April 2004).

[25] For the purposes of clarification, the Rio principles are the principles contained in the *Rio Declaration.*

[26] See Appendix 10.

> is required, if vast human misery is to be avoided and our global home on this planet is not to be irretrievably mutilated."[27]

It is now over a decade since this warning. Some might argue that the world has changed and humanity now has a more pressing threat to deal with in the form of global terrorism. Without wanting to devalue the significance of the horrible loss of life arising from the events of 11 September 2001 and other acts of global terrorism, the current focus on terrorism should not cause us to lose sight of the urgency and magnitude of the environmental problems that continue unabated. This was emphasised by a "leaked" report prepared by the U.S Pentagon warning that global climate change could cost millions of lives and was a far greater security risk than terrorism.[28] The report's authors, Peter Schwartz, a consultant to the US Central Intelligence Agency (CIA) and a former head of planning at Royal Dutch/Shell Group, and Doug Randall of Global Business Network based in California, advised that climate change should be considered "immediately" as a top military and political issue.[29] The Chief Scientist in the United Kingdom, Sir David King, has issued a similar warning: "In my view, climate change is the most severe problem we are facing today, more serious even than the threat of terrorism". [30] The seriousness of projected climate changes and what impact these will have on humanity, was highlighted by a World Health Organization study which found that in the year 2000 alone, 150,000 lives were lost due to climate change.[31] This is a death toll fifty times higher than the number of lives lost on September 11[32] and occurred at a time when the impacts of climate change have not approached any where near their projected intensity.[33]

As highlighted in earlier chapters, it is not just the problem of climate change that must be addressed.[34] The unprecedented loss of biodiversity, unsustainable consumption of natural resources and the degradation of our land, rivers and oceans are as equally pressing and of grave social concern. In the lead up to the 2002 WSSD in Johannesburg, United Nations Secretary, Kofi Annan, captured the urgency and scale of the environmental and social problems at hand, when he wrote in the *Washington Post*:

> "For more than two centuries, ever since the Industrial Revolution generated remarkable advances in living standards that the world had never seen or even imagined possible,

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[27] Union of Concerned Scientists, *World Scientist's Warning To Humanity* (1992) <http://www.ucsusa.org/ucs/about/page.cfm?pageID=1009> (20 April 2004).

[28] See AFP, *Leaked US Report Warns Climate Change May Bring Famine, War* (23 February 2004) ABC New Online <http://www.abc.net.au/news/newsitems/s1050857.htm> (4 May 2004).

[29] Note 28.

[30] BBC, *Scientist Renews Climate Attack* (31 March 2004) BBC News World Addition <http://news.bbc.co.uk/2/hi/uk_news/politics/3584679.stm> (30 April 2004).

[31] World Health Organisation (WHO), "New Book Demonstrates How Climate Change Impacts on Health" (Press Release, 11 December 2003). The study, "Climate Change and Human Health – Risks and Responses" was launched at the 9th Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change held in Milan, Italy in December 2003. WHO authored the study together with the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO), with the support of the United States Environmental Protection Agency (EPA).

[32] Almost 3,000 lives were lost on 11September 2001 as a consequence of the terrorist attacks in the United States.

[33] See chapter 1 for projected consequences of climate change.

[34] See particularly, chapter 1.

> economic development has rested in no small part on some very irresponsible activities and assumptions. We have filled the atmosphere with emissions that now threaten havoc in our lifetime in the form of global climate change. We have felled forests, depleted fisheries and poisoned soil and water alike. And all the while, as consumption and production continued at fever pitch, too many people -- in fact, the majority of humankind -- have been left behind in poverty, squalor and despair.
>
> The Summit is an attempt to change course before it is too late. It aims to bring an end to wanton acts of destruction and the blithe self-delusion that keeps too many from seeing the perilous state of the earth and its people. It hopes to bring home the uncomfortable truth that the model of development that has prevailed for so long has been fruitful for the few, but flawed for the many. And it seeks to impress upon political leaders in particular that the cost of inaction is greater than the cost of conservation, and that they need to stop being so economically defensive, and start being more politically courageous."[35]

Considering Australia has the unenviable distinction of having among the highest rates of energy and water consumption, waste production, land clearing, mammal extinctions and greenhouse gas emissions of any country on the planet, [36] Australia's political leaders should take particular heed of this call to action. If Australia, one of the world's most politically stable and wealthy nations, cannot successfully address these issues, what hope is there for other nations, many of which are plagued by political instability and poverty, to address their unsustainable ways?

The implementation of concrete legislative measures to abate the significant environmental degradation resulting from Australia's economic development, as Annan points out, would indeed be an act of political courage. Many corporations would likely voice strong opposition to the introduction of such measures. However, in responding to this opposition, our government need only point to the massive social costs of regulatory inaction, whether they are economic,[37] relate to human health[38] or involve the loss of our treasured natural places and species.[39] When viewed in this light, the proposed corporate laws represent a legitimate act to serve the wider public interest. As Justice Paul Finn of the Federal Court states, "the institutions of government, the officers and agencies of government, exist for the people, to serve the interests of the people, and as such, are accountable to the people."[40]

Australian Corporate law has evolved to serve the interests of the Australian people, particularly their desire to carry out economic or business activities through a corporate venture. It, therefore, could aptly be described as '*our* corporate law.' In so far as this body of law promotes corporate conduct that is environmentally harmful, with resulting social consequences, our government has a constitutional obligation to

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[35] Annan, K, "A Season for Stewardship," *Washington Post* (2 September 2002). Available at <http://www.un.org/News/ossg/sg/stories/sg-2sept-2002.htm> (30 April 2004).

[36] See chapter 1 for details relating to Australia's unenviable record in these areas.

[37] For a discussion of the economic costs arising from negative environmental externalities, see chapter 8.

[38] For example, the human health implications arising from climate change: See, Note 31. See also chapter 1.

[39] See chapter 1 for a discussion relating to the declining health of Australia's biodiversity. See also chapter 8 for details on the projected loss of Kakadu, the Great Barrier Reef and our great sandy beaches due to climate change.

[40] Finn, P (Ed.), *Essays on Law and Government: Principles and Values* (Sydney: Law Book, 1995) at 14.

act in the interests of the Australian public and reform it.[41] The greening of *our* corporate law is a legitimate act that will help ensure Australian economic development continues in a sustainable fashion through out the 21st century and beyond, furthering the interests of all Australians, of this generation and those to come.

[41] In *Attorney General (UK) v Heinemann Publishers Australia (Operations) Pty Ltd* (1987) 10 NSWLR 86 at 191, McHugh JA observed, " governments…are constitutionally required to act in the public interest."

Conclusion

As this thesis has shown, the task of greening our corporate law is a prerequisite for achieving sustainable development within Australia. The same conclusion applies to other jurisdictions that share a similar system of corporate law, particularly jurisdictions that have adopted within their respective corporate law regimes the directors' duty to act in the best interests of the company to the exclusion of outside interests such as the environment.

The question that then arises is how can we ensure consistency in approach across all national jurisdictions to avoid a situation whereby some countries choose to 'green' their corporate law while others choose not to, or choose to do so in an inadequate fashion. This lack of consistency may encourage multinational companies to undertake a form of "jurisdiction shopping" whereby they seek out countries with weaker environmental standards in which to incorporate subsidiaries and undertake their corporate projects.

One way of avoiding this would be for nation states to agree to the implementation of a multilateral convention, similar in scope to the proposed multinational convention on corporate accountability and liability discussed earlier in chapter 10. Although there may not be the political support among many states for such a convention at this present stage, it is arguably one of the more effective means of ensuring improved corporate environmental performance internationally. The convention could also be a vehicle for the implementation of uniform financial reporting, corporate governance and accounting standards that are so clearly lacking at the international level. Accordingly, it will be a fully integrated economic, environmental and social instrument. The convention could be implemented under the auspicious of the United Nations or even through negotiation of a special agreement pertaining to corporate governance through the framework of the World Trade Organisation.

With respect to the political leaders of the world's nations, Australia's included, who are reluctant to introduce such a convention, it is appropriate to refer once again to the words of Kofi Annan cited in the preceding chapter. Aiming his sights squarely on the world's political leaders, he warned them that "the cost of inaction is greater than the cost of conservation, and that they need to stop being so economically defensive, and start being more politically courageous."[42] With this warning in mind, the parting message of my thesis is this: we have the solutions to avert the looming environmental crisis and achieve sustainable development. Whether we have the political courage to implement them, unfortunately, still remains to be seen.

[42] Note 35.

Appendix 1

Largest 15 Australian Electricity Enterprises in 2002/2003 Based on Revenue

1. **AGL**
2. **Origin Energy**
3. **Energy Australia (NSW state owned)**
4. **Energex (Qld state owned)**
5. **TXU Australia**
6. **Western Power (WA state owned)**
7. **Ergon Energy (Qld state owned)**
8. **Integral Energy (NSW state owned)**
9. **Macquarie Generation (NSW state owned)**
10. **Delta Electricity (NSW state owned)**
11. **Aurora Energy**
12. **Tarong Energy (Qld state owned)**
13. **Powercor**
14. **CS Energy (Qld state owned)**
15. **Transgrid (NSW state owned)**

Source: Business Review Weekly, *BRW 1000* (20 November 2003). The BRW 1000 is a list of the largest 1000 Australasian (Australia and New Zealand) business enterprises.

This list was compiled by identifying the largest 15 Australian electricity enterprises, according to revenue, in the "*BRW 1000* (2003) Electricity, Gas and Water sector list." Several New Zealand based electricity enterprises that appeared in the BRW sector list were excluded from this final top 15 list given that they do not have a significant presence in Australia.

Note-State owned enterprises are marked "state owned." The remaining enterprises are private or publicly listed corporations.

Appendix 2

Corporate Owners of Australian Coal Fired Power Stations (May 2004)

Power Stations	*Corporate Owners*
New South Wales	
1. *Bayswater*	Macquarie Generation*
2. *Liddell*	Macquarie Generation*
3. *Eraring*	Eraring Energy*
4. *Vales Point*	Delta Electricity*
5. *Munmorah*	Delta Electricity*
6. *Mt Piper*	Delta Electricity*
7. *Wallerawang*	Delta Electricity*
8. *Redbank-*	Prime Energy Partnership Pty Ltd (50%) Babcock and Brown Pty Ltd (33%) National Power Australia (17%)
Queensland	
9. *Stanwell-*	Stanwell Corporation Ltd*
10. *Swanbank A & B*	CS Energy Ltd*
12. *Callide A &B*	CS Energy Ltd*
13. *Callide C*	CS Energy Ltd* (50%) and InterGen (a Shell/Bechtel venture) (50%)
14. *Gladstone*	Comalco Ltd (41%), NRG Energy Inc (37%), Mitsubishi Corporation (7.13%), SLMA GPS Pty Ltd (8.50%) and YKK GPS (Queensland) Pty Ltd (4.75%).
15. *Collinsville*	Transfield Services Ltd
16. *Tarong*	Tarong Energy Corporation Ltd*

17. *Tarong North*	Tarong Energy Corporation Ltd* (50%), Tokyo Electric Power Company and Mitsui and Co together hold 50%.
South Australia	
18. *Northern/Playford*	NRG Energy Inc
Victoria	
19. *Loy Yang A*	Great Energy Alliance Corporation – Ownership structure: Australian Gas Light Corporation (32.5%), Tokyo Electric Company (32.5%) and a group of investors led by the Commonwealth Bank of Australia (35%)
20. *Loy Yang B*	Edison Mission Energy
21. *Hazelwood*	International Power Hazelwood Corporation- Ownership structure: International Power plc (91.8%) Commonwealth Financial Services Australia and the Commonwealth Bank of Australia collectively own 8.2%
22. *Yallourn W*	Yallourn Energy Pty Ltd- (92% interest held by China Light and Power International)
Western Australia	
23. *Muja*	Western Power Corporation*
24. *Kwinana*	Western Power Corporation*
25. *Collie.*	Western Power Corporation*

Source: Based on WWF Australia, *Audit of Australia's Largest Power Generation Companies 2003.* Sydney: WWF, 2003. The audit material was updated by the author using company websites to be accurate as of May 2004.

* Denotes a state owned corporation

Appendix 3

Largest 20 Australian Construction Enterprises in 2002/2003 Based on Revenue

1. **Leighton Holdings**
2. **Fletcher Buildings***
3. **Downer EDI**
4. **Roads and Traffic Authority NSW (NSW state owned)**
5. **Multiplex Constructions**
6. **Tyco International**
7. **VicRoads (Vic state owned)**
8. **Chubb Security**
9. **Meriton Apartments**
10. **Transfield Services**
11. **BGC**
12. **Clough**
13. **Transfield Holdings**
14. **Baulderstone Hornibrook**
15. **Abigroup**
16. **Walter Construction**
17. **Grocon**
18. **McConnell Dowell**
19. **Clarendon Group**
20. **AVJennings**

Source: Business Review Weekly, *BRW 1000* (20 November 2003)**.** The BRW 1000 is a list of the largest 1000 Australasian (Australia and New Zealand) business enterprises.

This list of the top 20 Australian construction companies was compiled by identifying the largest 20 construction enterprises, according to revenue, in the "*BRW 1000* (2003) Construction Sector List."

Fletcher Challenge, classified by BRW as a "New Zealand based enterprise," has been included in this top 20 'Australian' list because of its substantial Australian presence. The company is listed on both the Australian and New Zealand stock exchanges.

Note-State owned enterprises are marked state owned. The remaining enterprises are private or publicly listed corporations.

Appendix 4

Largest 10 Australian Manufacturing Enterprises (Building Materials) in 2002/2003 Based on Revenue

1. **CSR**
2. **Rinker Group**
3. **Boral**
4. **Amatek Industries**
5. **James Hardie Industries**
6. **Owens-Illinois**
7. **Hanson Australia (Holdings)**
8. **GWA**
9. **Adelaide Brighton**
10. **Australian Cement**

Source: Business Review Weekly, *BRW 1000* (20 November 2003). The BRW 1000 is a list of the largest 1000 Australasian (Australia and New Zealand) business enterprises.

This list was compiled by identifying the largest 10 Australian manufacturing enterprises, according to revenue, in the "*BRW 1000* (2003) Building Materials Sector List."

Appendix 5

Largest 10 Australian Manufacturing Enterprises (Wood and Paper) in 2002/2003 Based on Revenue

1. **Amcor**
2. **Visy Industries**
3. **Paperlinx**
4. **Carter Holt Harvey***
5. **Kimberley Clark**
6. **Norske Skog**
7. **Gunns**
8. **Fletcher Challenge Forests***
9. **Auspine**
10. **Stegbar**

Source: Business Review Weekly, *BRW 1000* (20 November 2003). The BRW 1000 is a list of the largest 1000 Australasian (Australia and New Zealand) business enterprises.

This list was compiled by identifying the largest 10 manufacturing enterprises, according to revenue, in the "*BRW 1000* (2003) Wood and Paper Sector List."

*Carter Holt Harvey and Fletcher Challenge Forests, classified by BRW as 'New Zealand based enterprises,' were included in this top 10 'Australian' list because of their substantial Australian presence. Both companies have a dual listing on the Australian and New Zealand stock exchanges.

Appendix 6

Largest 10 Australian Manufacturing Enterprises (Food, Beverages and Tobacco) in 2002/2003 Based on Revenue

1. **Foster's Group**
2. **Coca-Cola Amatil**
3. **Australia Meat Holdings**
4. **Burns Philp**
5. **Murray Goulburn Coop**
6. **Nestle**
7. **George Western Foods**
8. **Lion Nathan**
9. **Cadbury Schweppes**
10. **Mars**

Source: Business Review Weekly, *BRW 1000* (20 November 2003). The BRW 1000 is a list of the largest 1000 Australasian (Australia and New Zealand) business enterprises.

This list was compiled by identifying the largest 10 Australian manufacturing enterprises, according to revenue, in the "*BRW 1000* (2003) Food, Beverages and Tobacco Sector List." Fonterra Co-op Group was excluded from this final top10 list on the basis that it is an enterprise that BRW classify as a 'New Zealand based enterprise.'

Appendix 7

Largest 10 Australian Manufacturing Enterprises (Machinery and Equipment) in 2002/2003 Based on Revenue

1. **Holden**
2. **Toyota Motor Corporation**
3. **Mitsubishi Motors**
4. **Ford Australia**
5. **Pacifica Group**
6. **Kodak**
7. **Aristocrat Leisure**
8. **Robert Bosch**
9. **United Group**
10. **Alstom Australia**

Source: Business Review Weekly, *BRW 1000* (20 November 2003). The BRW 1000 is a list of the largest 1000 Australasian (Australia and New Zealand) business enterprises.

This list was compiled by identifying the largest 10 Australian manufacturing enterprises, according to revenue, in the "*BRW 1000* (2003) Machinery and Equipment Sector List."

Appendix 8

8.1 Top Ten Australian Private Landholders.

1. Stanbroke Pastoral- More than 12.7 million hectares
2. Kidman Holdings- Approximately 11 million hectares
3. AA Company- 6.52 million hectares
4. North Australia Pastoral Co. - 5.71 million hectares
5. Consolidated Pastoral Co. - 5.23 million hectares
6. Jumbuck Pastoral Adelaide - 5.03 million hectares
7. McDonald Holdings - 3.37 million hectares
8. Heytesbury Beef - 3.34 million hectares
9. Brook Family- 2.69 million hectares
10. Colonial Agricultural Co. 2.02 million hectares

Source: Australian Farm Journal – October 2002

8.2 Top Ten Australian Wool Growers

1. Jumbuck Pastoral -8600 bales
2. Clyde Agriculture – 6500 bales
3. AJ & PA McBride P/L- 4500 bales
4. Twynam Pastoral Co. -4000 bales
5. Bell Securities Sydney -3700 bales
6. Twynam Pastoral Co. 3500 – 3700 bales
7. T A Field Estates 3500- bales
8. Tom Brinkworth 3300- bales
9 Russell Pastoral Co. 3300-bales
10. Clark and Tait 3000- bales

Source: Australian Farm Journal – October 2002

8.3 Top Six Australian Cotton Growers

1. Twynam Agricultural Group -200 000 bales
2. Auscott Ltd. - 120 000 bales
3. Cubbie Station - 105 000 bales
4. Clyde Agriculture - 60 000 bales
5. Tandou Ltd. - 53 000 bales
6. Carrington Cotton Corp. -Over 40 000 bales

Source: Australian Farm Journal – October 2002

8.4 Top Seven Australian Beef Producers

1. **Stanbroke Pastoral -36 207 551 351 tonnes**
2. **AA Company Brisbane- 33 865 408 092 tonnes**
3. **Consolidated Pastoral Co. – 15 634 242 000 tonnes**
4. **Kidman Holdings Ltd. - 14 750 165 000 tonnes**
5. **North Australia Pastoral Co. - 12 955 188 000 tonnes**
6. **Heytesbury Beef - 9 406 201 049 tonnes**
7. **Colonial Agricultural Co. - 8 659 128 277 tonnes**

Source: Australian Farm Journal – October 2002

8.5 Top Ten Australian Crop Producers- Crops Combined

1. **Agreserve**
2. **Auscott**
3. **Australian Food and Fibre**
4. **Clyde Agriculture**
5. **Ron Greentree**
6. **Harris Family**
7. **Stanbroke Pastoral**
8. **Sundown Pastoral Co.**
9. **Tandou Ltd.**
10. **Twyanm Agricultural Group**

Source: Australian Farm Journal – October 2002

Appendix 9

Largest 20 Australian Mining Enterprises in 2002/2003 Based on Revenue

1. **BHP Billiton**
2. **Rio Tinto**
3. **Newmont Australia**
4. **Alumina**
5. **Woodside Petroleum**
6. **WMC Resources**
7. **Mitsubishi Development**
8. **Pasminco**
9. **Coal & Allied**
10. **Santos**
11. **Xstrata Coal Invest Australia**
12. **Anglo Coal**
13. **Iluka Resources**
14. **Apache Energy**
15. **Newcrest Mining**
16. **Sons of Gwalia**
17. **Barrick Australia**
18. **Griffin Holdings**
19. **Placer Dome Asia Pacific**
20. **Alusuisse of Australia**

Source: Business Review Weekly, *BRW 1000* (20 November 2003). The BRW 1000 is a list of the largest 1000 Australasian (Australia and New Zealand) business enterprises.

This list was compiled by identifying the largest 20 Australian enterprises, according to revenue, in the "*BRW 1000* (2003) Mining Sector List."

Appendix 10

Rio Declaration on Environment and Development

The United Nations Conference on Environment and Development,

Having met at Rio de Janeiro from 3 to 14 June 1992,

Reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it,

With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,

Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,

Recognizing the integral and interdependent nature of the Earth, our home,

Proclaims that:

Principle 1

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Principle 5

All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

Principle 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

Principle 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Principle 8

To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

Principle 9

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

Principle 10

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 11

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Principle 12

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Principle 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Principle 14

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

Principle 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Principle 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Principle 17

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Principle 18

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

Principle 19

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

Principle 20

Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.

Principle 21

The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.

Principle 22

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Principle 23

The environment and natural resources of people under oppression, domination and occupation shall be protected.

Principle 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

Principle 25

Peace, development and environmental protection are interdependent and indivisible.

Principle 26

States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

Principle 27

States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

Source: United Nations Environment Program Website <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> (10 November 2004)

Appendix 11

The Global Reporting Initiative Sustainability Reporting Guidelines 2002: Environmental Performance Indicators

The environmental dimension of sustainability concerns an organisation's impacts on living and non-living natural systems, including ecosystems, land, air and water. The environmental dimension of sustainability has achieved the highest level of consensus among the three dimensions of sustainability reporting.

It is particularly important to provide environmental performance information in terms of both absolute figures and normalised measures (e.g., resource use per unit of output). Both measures reflect important, but distinct, aspects of sustainability. Absolute figures provide a sense of scale or magnitude of the use or impact, which allows the user to consider performance in the context of larger systems. Normalised figures illustrate the organisation's efficiency and support comparison between organisations of different sizes. In general, stakeholders should be able to calculate normalised figures using data from the report profile (e.g., net sales) and absolute figures reported in the environmental performance section. However, GRI asks the reporting organisation to provide both normalised and absolute figures.

In reporting on environmental indicators, reporting organisations are also encouraged to keep in mind the principle of sustainability context. With respect to the environmental measures in the report, organisations are encouraged to relate their individual performance to the broader ecological systems within which they operate. For example, organisations could seek to report their pollution output in terms of the ability of the environment (local, regional, or global) to absorb the pollutants.

Core Indicators	**Additional Indicators**
Materials	
1. Total materials use other than water, by type. Provide definitions used for types of materials. Report in tonnes, kilograms, or volume.	
2. Percentage of materials used that are wastes (processed or unprocessed) from sources external to the reporting organisation. Refers to both post-consumer recycled material and waste from industrial sources. Report in tonnes, kilograms, or volume.	
Energy	
3. Direct energy use segmented by primary source.	**17.** Initiatives to use renewable energy sources and to increase energy efficiency.

Report on all energy sources used by the reporting organisation for its own operations as well as for the production and delivery of energy products (e.g., electricity or heat) to other organisations. Report in joules.	**18.** Energy consumption footprint (i.e., annualised lifetime energy requirements) of major products. Report in joules.
4. Indirect energy use. Report on all energy used to produce and deliver energy products purchased by the reporting organisation (e.g., electricity or heat). Report in joules.	**19.** Other indirect (upstream/downstream) energy use and implications, such as organisational travel, product lifecycle management, and use of energy-intensive materials.
Water	
5. Total water use.	**20.** Water sources and related ecosystems/habitats significantly affected by use of water. Include Ramsar-listed wetlands and the overall contribution to resulting environmental trends.
	21. Annual withdrawals of ground and surface water as a percent of annual renewable quantity of water available from the sources. Breakdown by region.
	22. Total recycling and reuse of water. Include wastewater and other used water (e.g., cooling water).
Biodiversity	
6. Location and size of land owned, leased, or managed in biodiversity-rich habitats. Further guidance on biodiversity-rich habitats may be found at www.globalreporting.org (forthcoming)	**23.** Total amount of land owned, leased, or managed for production activities or extractive use.
	24. Amount of impermeable surface as a percentage of land purchased or leased.
7. Description of the major impacts on biodiversity associated with activities and/or products and services in terrestrial, freshwater, and marine environments.	**25.** Impacts of activities and operations on protected and sensitive areas. (e.g., IUCN protected area categories 1-4, world heritage sites, and biosphere reserves).
	26. Changes to natural habitats resulting from activities and operations and percentage of habitat protected or restored. Identify type of habitat affected and its status.
	27. Objectives, programmes, and targets for protecting and restoring native ecosystems and species in degraded areas.
	28. Number of IUCN Red List species

with habitats in areas affected by operations.

29. Business units currently operating or planning operations in or around protected or sensitive areas.

Emissions, Effluents, and Waste

8. Greenhouse gas emissions.
(CO2, CH4, N2O, HFCs, PFCs, SF6).
Report separate subtotals for each gas in tonnes and in tonnes of CO2 equivalent for the following:
- direct emissions from sources owned or controlled by the reporting entity
- indirect emissions from imported electricity heat or steam

30. Other relevant indirect greenhouse gas emissions.
(CO2, CH4, N2O, HFCs, PFCs, SF6).
Refers to emissions that are a consequence of the activities of the reporting entity, but occur from sources owned or controlled by another entity Report in tonnes of gas and tonnes of CO2 equivalent. See WRI-WBCSD Greenhouse Gas Protocol.

9. Use and emissions of ozone-depleting substances.
Report each figure separately in accordance with Montreal Protocol Annexes A, B, C, and E in tonnes of CFC-11 equivalents (ozone-depleting potential).

31. All production, transport, import, or export of any waste deemed "hazardous" under the terms of the Basel Convention Annex I, II, III, and VIII.

10. NOx, SOx, and other significant air emissions by type.
Include emissions of substances regulated under:
- local laws and regulations
- Stockholm POPs Convention (Annex A, B, and C) – persistent organic pollutants
- Rotterdam Convention on Prior Informed Consent (PIC)
- Helsinki, Sofia, and Geneva Protocols to the Convention on Long-Range Trans-boundary Air Pollution

32. Water sources and related ecosystems/habitats significantly affected by discharges of water and runoff.
Include Ramsar-listed wetlands and the overall contribution to resulting environmental trends. See GRI Water Protocol.

11. Total amount of waste by type and destination.
"Destination" refers to the method by which waste is treated, including composting, reuse, recycling, recovery, incineration, or landfilling. Explain type of classification method and estimation method.

12. Significant discharges to water by type.
See GRI Water Protocol.

13. Significant spills of chemicals, oils, and fuels in terms of total number and total volume.

Significance is defined in terms of both the size of the spill and impact on the surrounding environment.

Suppliers

33. Performance of suppliers relative to environmental components of programmes and procedures described in response to Governance Structure and Management Systems section (Section 3.16).

Products and Services

14. Significant environmental impacts of principal products and services.
Describe and quantify where relevant.

15. Percentage of the weight of products sold that is reclaimable at the end of the products' useful life and percentage that is actually reclaimed.
"Reclaimable" refers to either the recycling or reuse of the product materials or components.

Compliance

16. Incidents of and fines for non-compliance with all applicable international declarations/conventions/treaties, and national, sub-national, regional, and local regulations associated with environmental issues.
Explain in terms of countries of operation

Transport

34. Significant environmental impacts of transportation used for logistical purposes.

Overall

35. Total environmental expenditures by type.
Explain definitions used for types of expenditures.

Source: Global Reporting Initiative, Sustainability Reporting *Guidelines* 2002- environmental performance indicators <http://www.globalreporting.org/guidelines/2002/c48.asp> (10 November 2004).

Appendix 12

The French Corporate Sustainability Reporting Indicators

[To apply to all listed French companies from 2002]

Social

1. a) Total workforce, recruitment's with a distinction between fixed term contracts
   and permanent contracts and with an analysis of the possible difficulties in recruiting, of the redundancies and their motives, of overtime, of sub-contracted labour.
   b) If need be, information relating to staff reduction and employment safeguard
   plans, to the efforts made for staff redeployment, reemployment and subsequent accompanying measures;
2. Organisation of working hours, their duration for full time and part time wage earning employees, absenteeism and its motives;
3. Wages and their evolution, welfare costs, the application of the Title IV, Book IV
   of the code of Labour, professional equality between women and men;
4. Industrial relations and the assessment of collective bargaining agreements;
5. Health and safety conditions;
6. Training;
7. Employment and integration of disabled workers;
8. Company benefits and social schemes;
9. Importance of sub-contracting.

The report should detail how the company takes into account the territorial impact of its activities as far as employment and regional development are concerned.

It should describe, if need be, the relations the company develops with associations for social integration, educational institutions, associations for the protection of the environment, consumers' associations and neighbourhood populations.

It should indicate the importance of sub-contracting, how the company promotes to its subcontractors the provisions stipulated by the fundamental conventions of the International Labour Organisation and how the company makes sure its subsidiaries abide by them.

It should indicate furthermore the way the foreign subsidiaries of the company take into account the impact of their activities on the regional development and neighbourhood populations.

Environment

1. Consumption of water resources, of raw materials and energy and description, if need be, of the measures taken to increase energy efficiency and the use of renewable energies, conditions of soil use, air - water - soil pollution

emissions that could affect dramatically the environment, the list of which will be determined by an order of the ministers of the environment and of the industry, noise and olfactory pollution and waste;

2. Measures taken to limit the damage to biological balance, to the natural environment, to the protected animal and vegetal species;
3. Assessment or certification actions taken in terms of environmental protection;
4. Actions taken, if need be, to ensure the conformity of the company's activity with the legal provisions in that field;
5. Expenditures made to prevent the consequences of the company's activity on the environment;
6. Existence within the company of internal departments in charge of environmental management issues, training and information of employees on these issues, means dedicated to the reduction of environmental risks as well as the organisation put in place to deal with pollution accidents with consequences beyond the company's sites;
7. Amount of provisions and guaranties allocated for environmental risks unless this information is likely to cause a serious prejudice to the company in an ongoing lawsuit;
8. Amount of compensation for environmental damages paid during the fiscal year in execution of a court order and measures taken to repair these environmental damages; and
9. All elements on the objectives the company assigns to its foreign subsidiaries on above paragraphs 1° to 6°.

Source: An English translation of the sustainability reporting indicators contained in *Law on New Economic Regulation*, article 116 (France) as cited in Mansley M, *Open Disclosure: Sustainability and the Listing Regime.* London: Claros Consulting, 2003 at 57-58. This is a summarised version and should not be taken as a definitive list of the indicators contained in the French reporting regulations.

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