

## Joint Committee on Corporations and Financial Services

### Inquiry into Corporate Responsibility

#### 1. INTRODUCTION

We welcome the Committee's examination of the identified issues with respect to Corporate Responsibility (referred to here as CSR: corporate social responsibility) and Triple-Bottom-Line reporting.

No doubt the Committee's own research and the submissions made to it will highlight in some detail the state-of-play with respect to CSR and the experience of various reporting regimes and options. Given this, we have chosen to concentrate in this brief submission on the underlying issues relating to:

- the nature and responsibilities of a corporation operating in Australia
- the likely impact of emerging issues on corporate behaviour and Australia's expectations of companies in those situations.

These matters relate most directly to parts b), d), e) and f) of the Committee's Terms of Reference.

We see this submission as canvassing certain ideas and approaches rather than it being a comprehensive analysis. That said, we hope that it might prove useful to the Committee's deliberations in opening the door to different avenues of exploration.

#### 2. THE NATURE OF THE CORPORATION

The Committee's terms of reference include consideration of:

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

We would suggest that consideration of this issue needs to be understood in terms of the historical roots of the modern corporation, most specifically with respect to and the continuing implications of the corporation operating at the discretion of the State on terms established by the Government in accordance with the will of the people in a sovereign, democratic nation.

## **2.1. Current situation**

Corporations only exist by virtue of statute. They are granted particular privileges to achieve social goals. As creatures of our laws corporations may be moulded to any shape or for any purpose our society may deem most conducive for the common good.

In Australia the nature of the corporation is currently shaped by the Corporations Act and a multitude of other legislation and regulations (e.g. environmental). There is no apparent clear articulation of a shared Australian understanding regarding the nature of the corporation which underpins granting corporate privileges.

The nature of the corporation and its relationship to society was a major issue when the USA developed its general incorporation legislation. It granted a privilege to groups of individuals in order to accomplish specific public functions. There was a clear understanding that corporations were the creation of the state and should remain deferential to the interests of the State. While differing in approach and substance both Japan and Germany are clear that companies are creatures of statute granted particular privileges to achieve social goals. Similarly UK common law developed from an approach which granted franchise to achieve social goals or perform public functions.

## **2.2. A possible response**

The Committee has expressed an interest in:

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

We would urge the Committee to consider this issue in the light of a corporation's operating in Australia only at the discretion of the Government and for the benefit of the Australian people. As such, it is a fundamental misunderstanding and an inappropriate limitation on the corporation's responsibilities to express these only, or even primarily, with respect to an obligation to shareholders. The interests of shareholders after all may or may not be consistent with the interests of and benefits to Australians generally.

It is our view that many issues associated with companies operating in Australia would be assisted through a Company Charter enunciating the nature of the corporation.

- a) It is submitted that the Committee recommend that the Australian Parliament adopt a Corporate Charter clarifying the definition of the nature of the corporation.

That Charter should include the following elements:

- ⇒ Corporations are creations of statute
- ⇒ Creations of statute are answerable to society (their statutory creators)
- ⇒ Corporations are granted particular privileges to achieve social goals
- ⇒ Corporations are expected to contribute positively to:
  - the economy
  - the environment
  - society

- ⇒ The activities of a corporation should not unduly harm:
- the economy
  - the environment
  - society
- b) It is further proposed that the Corporate Charter must be incorporated into the constitution/replaceable rules of each company upon acceptance of limited liability acknowledging that the privilege of limited liability and corporate personality are granted so that the wider society will benefit and not be unduly harmed by the company's activities.
- c) The Corporate Charter and requirement for inclusion in the constitution/replaceable rules of each company should be achieved through amendment to the Corporations Act.

### 3. EMERGING ISSUES

We would like to take this opportunity to also raise a critical issue with respect to the Committee's interest in:

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

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

We would suggest that there is a danger in the Committee adopting a static view of these matters rather than adopting an approach which takes due account of the fact that the public-private division of activities and other aspects of the corporate activity are subject to constant change.

By way of support for this view we would draw the Committee's attention to a number of emerging issues. These include:

- Demographic changes will place substantial stresses on funds available for Australia's public services. For example, 30 years ago, there were 22 people who were taxpayers for everybody who was seeking welfare. There are now five. In about 15-20 years it will be about 2 or 2.3 taxpayers for each person on welfare. There will also need to be funding for health care and a range of other services.
- The cost of basic infrastructure (such as transport, communication and clean drinking water) is significant for all nations. Australia's size and the spread of its relatively small population magnifies the cost of providing universal access to transport and

communication. The current public discussion of the full sale of Telstra reflects concerns about the long-term provision of universal access to communications in Australia where this is entirely dependent on corporations.

- Increased outsourcing of government services to corporations has resulted in complex issues relating to accountability and the provision of basic levels of service. It will result in corporations which provide public services being accountable to interests other than those of shareholders. (*Recent examples highlighting this are the Commonwealth’s contract with GSL for the operation of immigration detention facilities and the issues relating to the full privatisation of Telstra*).
- Superannuation funds managers and their members will demand quality investment returns over 15-20 years. This will necessitate corporations taking account of environmental issues, their impact on society and factors which affect corporate reputation. (*This is reflected in recent research by BT GAS, the Mays Report, the [Enhanced Analytics Initiative](#) and the Department of Environment’s report “The Materiality of Environmental Risk to Australia’s Finance Sector”* )
- Exploring further the example of privatising prisons highlights the emerging issues. A contracted company might maximise its shareholder return by cutting costs to the bare minimum. Does that company have any responsibility if there is a high recidivism rate? How does society avoid such companies actively encouraging “repeat business” (a strong driver in many businesses) as growing prison populations are presumably very good for business? The notion of “product stewardship<sup>1</sup>” is gaining increasing currency. It may also be applied to companies who provide services such as running prisons, community services or job searches. For example it could be that society will ask companies running prisons to bear some of the cost of the crimes carried out by those who have passed through their private prison facilities or expect the companies to take recidivists back at no further cost to the state.
- Cases such as James Hardie, Steve Vizard and OK Tedi result in greater public and Government scrutiny and strengthened regulatory responses.
- There has been increasing pressure on individuals regarding their “mutual obligation” to their society/community. Key government ministers are increasingly speaking of the collective good over-riding the rights of individuals.

It must be anticipated that there will be similar pressure on corporations – as legal persons - to fulfil broader obligations to the society of which they are part. There is also likely to be future pressure on corporations to quantify their contribution to society and the impact of their activities.

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<sup>1</sup> “product stewardship” is approach where businesses accept some on-going responsibility for the products they produce. The logic is that those who put something into the community need to accept some responsibility for the consequences, even if the product's use is not directly under their control. Examples are McDonald's acting on obesity, Ford and Toyota acting on climate change, BP on air pollution and Volvo on recycling car parts.

Examples which can be realistically anticipated include:

- Are the investment decisions of companies creating a risk that self-funded retirees or superannuants will become more reliant on welfare in future?
  - Are corporate behaviours undermining confidence in the market forces of the economy, thereby damaging the nation's economy?
  - Are corporate behaviours contributing to society's increasing health costs? (*e.g. diseases resulting from tobacco smoking, obesity resulting from fast foods, diabetes resulting from soft-drinks*)
  - Is a corporation contributing to social cohesion and long-term viability of a community? (*e.g. what is the impact of bank closures or building large shopping malls?*)
- Increasing concerns are being expressed that unless there is a broader and longer-term view of the future, Australia runs the risk of becoming a dysfunctional society in a beautiful economy. Bodies such as the UN are turning their attention to indicators of a society's well-being. These matters raise questions such as what will be the indicators of the health of Australian society in 2025 and what will this mean for citizens and corporations?

## **IN CONCLUSION**

As indicated above, this submission simply represents a preliminary consideration of these matters. We would be willing to elaborate on these matters should the Committee be interested.