# Corporate Social Responsibility and the Legal Framework for Sustainable Decision Making in the Business Sector [– A Work In Progress]

By Wayne Gumley[1]

## 1. Introduction

In recent years the debate about sustainable development has generally interfaced with the business community in the form of a debate about 'corporate social responsibility' (CSR). There is widespread recognition that corporations should take more responsibility for social and environmental consequences of their operations than they have in the past. However there is wide disagreement about the best means of imposing such social responsibilities upon corporations. There are two central questions that are often raised in this context from a legal policy perspective. The first is whether new obligations in this area should be imposed directly upon corporations, or, as an alternative, whether these matters are best dealt with by specific legislative schemes (such as environmental regulation, planning laws and labor laws)? The second question is whether any new requirements should be mandatory obligations at all, as it can be argued that voluntary or market based responses are adequate to address sustainability. These questions have been considered recently by two parallel inquiries in Australia which both commenced in 2005 and concluded in 2006. One was a Parliamentary Joint Committee inquiry on whether reforms to the current legal framework governing directors' duties are necessary to enable or encourage corporations to have regard for the interests of 'stakeholders other than shareholders'.[2] The other inquiry was conducted by the Corporations and Markets Advisory Committee (CAMAC) on whether the *Corporations Act* should be revised to clarify the role of directors and the obligations of companies with respect to social and environmental impacts.[3] These inquiries were prompted by recent controversies involving the interaction between corporations law and tort law, such as the James Hardie asbestosis controversy,[4] as well as broader concerns about the extent to which company directors should consider the interest of third party stakeholders in corporate decision-making processes. The purpose of this paper is to review the approach taken to these two questions in these inquiries, bearing in mind some recent global perspectives in relation to ecological sustainability and recent trends in specific legislative schemes.

## 2. Recent Global Perspectives

The combination of global population increase and rapid growth of the consumer lifestyle has led to human domination of the Earth's ecosystems.[5] This has created a crisis in resource consumption, water shortages, deforestation and unprecedented species extinction rates, along with the prospect of irreversible climate change. With major developing countries like China and India rapidly expanding their resource consumption, it is now apparent that humanity's 'ecological footprint' has already exceeded the productive

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2 Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Corporate Responsibility & Triple Bottom Line Reporting*, Terms of Reference 23 June 2005

3 Australian Government Corporations and Markets Advisory Committee, *Reference in relation to directors' duties and corporate social responsibility* (2005), see letter of Referral from Hon Chris Pearce MP, Parliamentary Secretary to the Treasurer, dated 23 March 2005

4 The NSW Government's James Hardie Inquiry highlighted problems in the law whereby the principle of limited liability could be raised by a foreign parent company to protect itself from the torts of a subsidiary, see David Jackson QC, *The Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation*, September 2004.

5 See P M Vitousek, H A Mooney, J Lubchenco and J M Melillo, 'Human Domination of Earth's Ecosystems' (1997) *Science* 494 The number of people in the world doubled between 1960 and 2000 Estimates of the fraction of land transformed or degraded by humanity fall in the range of 39-50% Species extinction is now of the order of 100 to 1000 times the rate before humanity's dominance of the Earth, eg one quarter of the Earth's bird species have been driven to extinction in the last two millenia

capacity of the Earth's ecosystems.[6] A dilemma arises because economic development is widely regarded to be one of the highest achievements of the twentieth century. However, more balanced views of the overall environmental and social record have challenged the traditional development model. In 1987 the Brundlandt Report popularized the concept of 'sustainable development', to reflect the urgent need for a balance to be struck between economic prosperity for present generations and the protection of ecological resources for future generations.[7] One of its key recommendations was that environmental and economic goals must be considered on the same agendas and in the same national and international institutions.[8] The international community reaffirmed this message at the Earth Summit held in Rio de Janiero in 1992. The Rio Declaration stated 27 'soft law' principles for promoting sustainable development, including the principle that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'[9] The Australian Government also adopted similar principles in 1996 through its National Strategy for Ecologically Sustainable Development.[10]

The Earth Summit was also the occasion for the establishment of two of the most far-reaching international conventions to date; being the Framework Convention on Climate Change and the Convention on Biological Diversity. These two conventions are notable for their ambitious agendas, which challenge many of our established economic development patterns. The main objectives of the Biodiversity Convention are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.11 This clearly requires a balancing of conservation and economic policy objectives. Of course, governments are not able to 'wind back the clock' to return the world's ecosystems to pre-industrial conditions. Accordingly the Convention contemplates continued exploitation of natural resources but requires 'sustainable use' of biological diversity and 'integration' of biodiversity protection into other (economic and social) policies. The Climate Change convention requires 'stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with climate system'12 which inevitably entails extensive limitation of greenhouse gas emissions and curtailment of many energy intensive aspects of our modern lifestyle. The importance of both conventions has been underlined by an increasing body of scientific evidence. The advances in climate science have received much publicity and need no further comment here. Reports on biodiversity loss are less well known, and thus the findings of the 2005 United Nations Millennium Ecosystem Assessment will be outlined below.13

The Millennium Assessment starts with the obvious but economically 'inconvenient truth' that natural ecosystems provide a wide range of essential 'ecological services' to our society, including basic raw materials (such as food, water, fibres and fuels), as well as a wide range of less obvious services which support human life and wellbeing (such as moderation of climate, floods, disease, water quality as well as cultural, recreational and spiritual benefits). Amongst its findings was the alarming statement that:

'Nearly two thirds of the services provided by nature to humankind are found to be in decline worldwide. In effect, the benefits reaped from our engineering of the planet have been achieved by running down natural capital assets. In many cases, it is literally a matter of living on borrowed time.'[14]

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6 According to the World Wildlife Fund, *Living Planet Report* (2004), the Living Planet Index, which measures freshwater, marine and terrestrial species diversity, has declined by 37% since 1970. The enormity of the problem is well illustrated by calculations of humanity's 'ecological footprint', which has been estimated by WWF to be 2.3 hectares per person in 2002 (this represents the area of land required to provide the average amount of food and fibre consumed by one person). By contrast, the Earth's productive capacity is estimated to be only 1.9 hectares per person. Any business with a similar 20% shortfall of costs over revenue would soon be wound up.

7 World Commission for Environment and Development, *Our Common Future* (1987) Oxford University Press.

8 Ibid, at pp 49, 62, 217 and 220.

9 United Nations, *Rio Declaration on Environment and Development* (1992) 31 I.L.M. 874, Principle 4. The Rio Declaration is a non-binding statement of principles emerging from the United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

10 Commonwealth of Australia, *National Strategy for Ecologically Sustainable Development* (1996)

11 United Nations, *Convention on Biological Diversity*, Article 1.

12 United Nations, *Framework Convention on Climate Change*, Article 2

13 The Millennium Assessment was called for by United Nations Secretary-General Kofi Annan in 2000 to assess the consequences of ecosystem change for human well-being and the scientific basis for actions needed to enhance the conservation and sustainable use of those systems. See Millennium Ecosystem Assessment Board, *Living Beyond Our Means: Natural Assets and Human Well-being* ('The Millennium Ecosystem Assessment') – comprising a series of reports available at http://www.millenniumassessment.org/en/index.aspx

14 Ibid, at Statement from the Board, 2.

Under 'Key Trends in Ecosystems and Their Services', it states:

> 'Over the past 50 years, humans have changed ecosystems more rapidly and extensively than in any comparable period in human history, largely to meet fast-growing demands for food, fresh water, timber, fiber, and fuel. The changes we have made to ecosystems have contributed to substantial net gains in human well-being and economic development. However, these gains have come at growing costs in the form of degradation of many ecosystem services ..., increased risks of abrupt and harmful changes in ecosystems, and harm to some groups of people.'

The Millennium Assessment provided three key recommendations:

> '(i) The protection of ecosystem services is unlikely to be achieved as long as they are perceived to be free and limitless. Thus effective policies will require natural costs to be taken into account in all economic decisions.
>
> (ii) Local communities are far more likely to act in ways that conserve natural resources if they have real influence in the decisions on how they are used, and if they end up with a fairer share of the benefits.
>
> (iii) Natural assets will receive far better protection if their importance is recognized in the central decision making of governments and businesses, rather than relatively weak environment departments.' [15]

These recommendations are consistent with several basic principles of international environmental law. For instance, Principle 4 of the *Rio Declaration* provides:

> '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.'

This was supplemented by one of the key objectives of the charter for action formulated by the parties to the Rio Earth Summit, known as *Agenda 21*:

> '8.3... to improve or restructure the decision-making process so that consideration of socio-economic and environmental issues is fully integrated and a broader range of public participation assured.' 16

A common thread through all of these principles is that ecological considerations must be integrated into *all* relevant decision-making processes, for both public agencies and private organisations. In Australia, there has been some progress in the public sector by inclusion of internationally recognized principles of ecologically sustainable development within decisionmaking processes of certain government environmental and planning agencies.[17] Several recent cases have illustrated the importance of these principles in achieving more sustainable outcomes.[18] However, a glaring weakness in the overall legal framework is that these principles are not mandated for all government agencies, nor are they mandated in decision-making by private organisations. This leads us to the first central question in the CSR debate; on whether social and environmental problems ought to be addressed under corporations law or by more specific legislation.

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15 Ibid, Statement from the Board, at pp 18-19

16 Agenda 21 is a. See United Nations *Agenda 21* A/Conf 151/26 (1991). A similar objective has been stated in Australia's *National Strategy for Ecologically Sustainable Development* (1996).

17 eg. the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) requires the Commonwealth Government to make decisions under that Act in accordance with the 'principles of ecologically sustainable development' set out in s 3A of that Act, whilst in Victoria, the *Environment Protection Act* 1970 requires that this Act be administered having regard to the 'principles of environmental protection' set out in ss 1A- 1L .

18 Eg see *Booth v Boswell* [2001] FCA 1453 concerning the impact of electrocution of flying foxes on World Heritage values of the Queensland rainforests and *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 concerning the impacts of a major irrigation project in central Queensland upon the Great Barrier Reef (the Nathan Dam case).

# 3. Corporations law versus specific legislative schemes

## 3.1 Traditional views

Modern corporations law can be traced back to the early stages of the industrial revolution as a mechanism for capital to be raised for business ventures whilst protecting investors and company directors from personal liability. Justice Kirby has described the corporation as 'a brilliant legal idea' and 'an indispensable device for modern economic growth'.[19] However, His Honour also pointed out that major challenges like globalism, the internet, genetic engineering and global warming, have created problems that 'are so pervasive international and powerful that nation states appear to have lost the power to control or regulate them effectively'.

The traditional view of corporations law is that it should be confined to regulation of the internal relationships between a corporation and its directors and shareholders. This approach is commonly supported by economists like Milton Friedman, who strongly maintain that the only social obligation of a corporation is to make profits for its shareholders.[20] In Australia, a 1989 Senate Standing Committee Report took a similar approach when it recommended that matters such as consumer or environmental protection should be dealt with in legislation aimed specifically at those matters.[21] However this narrow perspective of corporations law is not founded upon legal principle, and it is increasingly difficult to support in view of the dominant role played by corporations in modern society. It should not be overlooked that the central concepts of corporations law were developed in an era when society was just entering the industrial age, and much less concerned with social and environmental responsibility. Those were times when slavery and child labor were permitted by law and European traders enjoyed access to seemingly unlimited natural resources from the continents of the 'New World'. In this context, the corporation emerged as a convenient legal device for pooling capital and spreading risk, and it became one of the most critical catalysts for the industrial revolution.[22] By contrast, many modern corporations now carry on a wide range of business activities, often across a number of different countries. The sheer scale of their financial operations can provide great influence over the very structure and location of many industries, including the sources of labour and raw materials, as well as product design and waste disposal practices.[23] Modern corporations have also taken a far greater role in the provision of public infrastructure (such as water, transport and energy supply), which has a profound influence upon environmental outcomes such as land degradation, biodiversity loss and greenhouse gas emissions.[24] Fundamental changes have also occurred in the nature of corporate shareholding. Whereas the shareholders of early corporations typically comprised a small group of like-minded individuals, now a very wide range of entities, including many diverse individuals and other corporations, as well as highly influential institutional shareholders, such as financial institutions and pension funds, commonly owns a public corporation. These diverse shareholder groups often have very different objectives, and it is increasingly common for shareholders (and many other stakeholders) to have a personal interest in the environmental and social impacts outcomes of a corporations activities. The commercial objectives of many corporations are also greatly influenced by the extensive growth of modern share markets, with daily monitoring of prices and the rapid turnover of shares prompting corporate managers to focus strongly upon share value and short-term profit objectives.

The foregoing discussion suggests that there are many new socio-economic factors that challenge the effectiveness of the traditional legal framework for the regulation of corporations. One of the traditional principles that may be questioned is the doctrine of limited liability, whereby directors and shareholders

19 The Hon Justice Michael Kirby (1998) 'The Company Director: Past Present and Future' Speech to the Australian Institute of Company Directors, Hobart, Tasmania, 31 March 1998.

20 Milton Friedman, 'The social responsibility of business is to increase its profits' (1970) *New York Times Magazine*, 13 September 1970.

21 Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on Social and Fiduciary Duties and Obligations of Company Directors* (November 1999), at para 6.44.

22 The Hon Justice Michael Kirby, 'The Company Director: Past, Present and Future' (1998) Speech to the Australian Institute of Company Directors, Hobart, Tasmania, 31 March 1998.

23 For example it is a well established trend for companies to relocate manufacturing activity in developed countries, where environmental standards and labour laws are much weaker.

24 In Melbourne, the privatisation of the rail network and the establishment of the CityLink tollway has imposed legal and economic constraints upon future public transport options. The privatisation of coal fired electricity generators formerly operated by the State Electricity Corporation of Victoria resulted in the termination of government programs to promote energy efficiency and renewable energy options.

are generally shielded from personal liability by treating the corporation as a separate legal person.[25] There are now many statutes which impose personal liability upon directors and other corporate officers, particularly in important public policy areas such as environmental law, consumer protection, and occupational health and safety.[26] The James Hardie Inquiry has highlighted the inappropriateness of this principle where it protects a foreign parent from liability for the torts of a local subsidiary. Another traditional principle that may be increasingly inappropriate is the fiduciary model for directors duties. The fiduciary concept is derived from medieval concepts of agency law, which broadly require that company directors (who are analogous to agents) must avoid conflicts of interest and not take secret profits at the expense of the company and its shareholders.[27] It cannot be disputed that directors ought to observe such duties to shareholders, but the practical weakness in this doctrine is that it provides little or no guidance in dealings with third parties and the broader community. This lack of accountability for corporate officers should be viewed as an anomaly in modern society, where corporations are the primary architects of a wide range social and environmental outcomes.

Corporate officers have recently come under greater scrutiny world wide, but this has been primarily due to high profile cases of financial mismanagement rather than environmental harm. The main response in Australia has been the issue of corporate governance principles as part of the Australian Stock Exchange Listing Rules. The listing rules do not prescribe particular practices but merely promote disclosure of the company's corporate governance practices, as compared to guidelines on 'best practice' published by the ASX Corporate Governance Council.[28] This essentially implements a 'soft law' approach to corporate governance in Australia. The guidelines promote ethical and responsible decision making (Principle 3), a sound system of risk management (Principle 7) and recognition of the legitimate interests of stakeholders (Principle 10). Listing Rule 4.10.17 also requires a listed entity to undertake a review of its operations for the reporting period 'to meet the needs of its shareholders, capital market participants and an increasing array of other stakeholders'.[29] The ASX guidelines stop short of requiring an integration of environmental considerations in all decision making processes.

By contrast, the current model of environmental law has developed largely as a response the post-WW2 economic boom, which generated unprecedented levels of industrial pollution and natural resource consumption. Its general objective is to protect the 'public' interest in the conservation of natural resources, which are generally threatened by the very same industrial activities that have been facilitated by corporations law. This recent emergence of environmental law has given it a 'subordinate' character as a separate body of 'public' law, which is often in conflict with well entrenched 'private' property rights. This problem has been magnified in recent decades by globalization of trade and market based policies promoting deregulation and privatization which have tended to reduce the influence of national governments, whilst increasing the influence of large corporations. However, the many recent ecological crises in our atmosphere, forests, waterways and oceans have given cause to reconsider the relative importance of environmental protection.

The *Millennium Ecosystem Assessment* has called for better integration between ecology and the economy in business decision-making processes. This suggests that enhancements to the decision-making processes of corporations could provide a more effective legal framework for achieving ecologically sustainable development. The two inquiries on corporate social responsibility were both asked to consider whether the corporations law should be revised to permit, or require, that directors take into account the interests of stakeholders other than shareholders when making corporate decisions. Both committees recommended against any reform to directors duties of this type. The CAMAC Report contended that changes of this kind '... do not provide meaningful clarification for directors, yet risk obscuring their accountability.'[30]

25 *Salomon v Salomon & Co Ltd* [1897] AC 22

26 For example, see *Environment Protection and Biodiversity Conservation Act* 1999 (Cth), ss 494 and 495 and the *Environment Protection Act* 1970 (Vic) s 66B

27 HAJ Ford, RP Ramsay and IM Ramsay, *Ford's Principles of Corporations Law* (2001, 10th ed) 302

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

29 ASX Listing Rules, Guidance Note 10

30 Corporations and Markets Advisory Committee (2006) Report on the Social Responsibility of Corporations, (Dec 2006), at p 7

Whilst the task of considering a multitude of stakeholder interests may be a difficult one for company directors, it is not clear why corporations should be free to make short-term profit-maximising decisions that are clearly in conflict with the longer term societal goal of ecological sustainability. Under the traditional view, directors can find it difficult to justify making a choice in favour of social and environmental objectives (at the expense of shareholders). These objectives are problematic due to the terms of s181 of the *Corporations Act* 2001 (Cth), which provides that directors must:

'... exercise their powers and discharge their duties:

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

There is a traditional 'shareholder primacy' view of this provision which argues that 'the interests of the corporation' simply means the interests of its shareholders. This view is largely based upon the early concept of directors as agents of the shareholders, which imposes upon them a range of fiduciary duties. However the changing role of corporations in society has caused this view to be questioned with increasing force in recent times.[31] Bryan Horrigan has pointed out that shareholder primacy thinking is predicated upon a 'zero-sum game' between the interests of shareholders and the interests of other 'non-shareholder stakeholders'. This is far from the reality of modern corporations, in which shareholders often have an extensive commonality of interest with many stakeholder groups.[32] Many academic writers have interpreted the concept of 'the interests of the corporation' widely to support progressive theories of the corporation. These theories contend that directors should give consideration to a broad range of stakeholders, including employees, suppliers, creditors and relevant community groups, in order to advance the interests of the corporation.[33] However, there is little support in case law for such a view, apart from a recognition of the interests of creditors where a corporation is insolvent or nearing insolvency and some recognition of the 'future interests' of existing shareholders.[34] This lack of recognition for legitimate stakeholder interests was highlighted by the recent NSW Government Inquiry into the James Hardie group, where the Special Commissioner Jackson found that:

> 'the circumstances that have been considered by this Inquiry suggest there are significant deficiencies in Australian corporate law. In particular, it has been made clear that current laws do not make adequate provisions for commercial insolvency where there are substantial long-tail liabilities ... In addition, the circumstances have raised in a pointed way the question whether existing laws concerning the operation of limited liability or the "corporate veil" within corporate groups adequately reflect contemporary public expectations and standards.'[35]

It is relevant to note in this context that that the 'long tail liabilities' and 'public expectations' applicable to asbestos are very similar to the types of latent liabilities and stakeholder expectations that arise in relation to environmental matters. Advocates of the shareholder primacy view argue that the law already requires directors to have regard to these types of interests under various specific statutory schemes in areas like workers compensation, occupational health and safety, and environmental protection. This paper will now review the effectiveness of some specific legislative schemes that apply to environmental problems in Australia.

### 3.2 Review of regulatory strategies

Our environmental laws generally consist of specific legislative schemes directed at 'traditional' environmental problems like industrial pollution and nature conservation. In Australia, as in most other industrialized countries, the earliest environmental laws were mandatory command and control measures whereby specific standards of behaviour are prescribed by legislation, and breaches are generally penalised

31 See Bryan Horrigan 'Fault lines in the intersection between corporate governance and social responsibility' (2002) 25:2 *UNSW Law Journal* 515, Andrea Corfield, ' The Stakeholder Theory and Its Future in Australian Corporate Governance: A Preliminary Analysis' (1998) 10 Bond LR 213.

32 Ibid, Horrigan, at 531.

33 For instance , see Margaret Blair and Lynn Stout, ' A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247, David Millon ' Communitarians, Contractarians and the Crisis in Corporate Law' (1993) 50 *Washington and Lee Law Review* 1373.

34 HAJ Ford, RP Ramsay and IM Ramsay, *Ford's Principles of Corporations Law, Tenth Edition* (2001) at 318-323.

35 D.F. Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation*, (2004) at 571.

as criminal offences under industrial pollution legislation. These early measures were usually not aimed at protecting 'the environment' as such, but were primarily directed at threats to human health from industrial activities which caused pollution of air and water. These strong prescriptive measures were largely a reaction to a series of tragic experiences overseas, such incidents at Love Canal USA, Minimata Japan and Bhopal India.[36] The public policy rationale is that the potential for serious harm from some activities is so high that very strict measures are justified. In more recent times, specific legislative schemes have increasingly adopted alternative 'softer' approaches to influence environmental outcomes. These include self-regulation, incentive based regimes, market harnessing controls, direct action, rights and liabilities public compensation or social insurance schemes.[37] This paper will now review a range of specific legislative schemes adopted in response to some key environmental issues in Australia, to assess the range and effectiveness of these strategies.

### (i) Industrial pollution

The State of Victoria (like other Australian States) regulates industrial pollution quite strictly under a mandatory licensing scheme, which generally requires that all discharges to air, land and water be compliant with standards set by a range of relevant State Environmental Protection Policies (SEPPs). Any breaches of the SEPPs or other licence conditions will expose the licensee to a range of penalties and offences, including penalty infringement notices, pollution abatement notices, pollution clean up orders, as well as prosecution for a range of summary and indictable offences. Where the offending licensee is a corporation, any directors and other corporate officers concerned in management of the premises, will be automatically liable for the same offence as the corporation, but they may have a statutory defence if they have acted with 'due diligence'.[38] It is generally accepted that this strict regulatory approach has been highly successful in restricting serious industrial pollution problems over the last few decades.[39] The most recent *State of the Environment Report* reported that urban air quality in Australia had significantly improved under these strategies.[40] Strong prescriptive measures have also been important to restrict air pollution from motor vehicles. For instance, motor vehicle emissions have been managed very effectively by prescription of mandatory emission controls for new vehicles under the *Australian Design Rules*.[41] One consequence of a strong prescriptive approach is that 'self-regulation' by voluntary codes of conduct has emerged in many heavy industries. This generally occurs where industry groups have recognized that stronger government regulation would be inevitable unless the industry improves its environmental outcomes. In such cases, an industry can forestall tougher regulation by developing its own code of practice. A good example is the chemical industry's Responsible Care program developed in the USA, which has been adopted by the Plastics and Chemicals Industry Association in Australia.[42]

### (ii) Greenhouse gases

In negotiations towards the Kyoto Protocol to the Framework Convention on Climate Change, the Australian Government agreed to restrict national greenhouse gas emissions to 108% of the baseline emissions 1990, for the period 2008-2012. However, Australia has failed to ratify the protocol and its regulatory response to climate change has largely avoided prescriptive approaches. Instead, the Australian Government has relied upon a 'no regrets' policy, which merely encourages industries to develop their own cost effective emission reduction responses. For example, the *Greenhouse Challenge* program, seeks to promote energy efficiency and reduce greenhouse emissions by a range of voluntary agreements with

36 At Love Canal, near Niagara Falls USA, the Hooker Chemical Company dumped toxic waste into a disused canal for several decades until 1953, when it sold the site to the local government The site was then developed for residential housing and a school, resulting in serious birth defects and other illnesses for many residents At Minimata, Japan, a local company dumped an estimated 27 tons of mercury compounds into Minamata Bay from 1932 to 1968 Thousands of people whose normal diet included fish from the bay, developed symptoms of methyl mercury poisoning

37 For example, see Robert Baldwin and Martin Cave, 'Regulatory Strategies' Chapter 4 in *Understanding regulation theory, strategy and practice* (1999 Oxford University Press)

38 *Environment Protection Act* 1970 (Vic) s 66B

39 However, there are incidents from time to time which suggest the system is not completely successful, see Ewin Hannan and Stathi Paximos 'Tackling Corio's Big Stink' *The Age* (Melbourne) November 8, 2003, concerning regular breaches of licence by the Shell Oil Refinery at Corio Bay.

40 Commonwealth of Australia, *Australia State of the Environment* (2001) at 22, Thematic Findings, Atmosphere

41 The Australian Government's Department of Transport and Regional Services (DOTARS) administers these rules under the *Motor Vehicles Standards Act* 1989 (Cth)

42 See the Responsible Care website at http //www.responsiblecare org/

industry partners. Whilst it is claimed that Australia is on track to meet its Kyoto target[43] this is largely the result of greenhouse accounting rules which allowed credit for cessation of land clearing. With respect to actual emissions, the *National Greenhouse Gas Inventory* for 2004 (released in August 2006), reveals that Australia's energy sector, which produces about 67% of total emissions, had increased emissions by 34.7% since 1990. This includes increases of 25% from road transport, 65% from domestic air transport and 66% from electricity generation.[44] These figures clearly indicate that Australia's voluntary approach to greenhouse gas emissions has not been effective. One of the few mandatory measures is the *Mandatory Renewable Energy Target*, which requires electricity retailers to source about 1% of their electricity supplies from renewable sources.[45] This scheme has been fully utilized and highly successful in promoting investment in renewable energy sources, such as windfarms. Market based approaches such as carbon taxes and emissions trading schemes have also been considered but not yet implemented, due to government perceptions that they would harm the Australian economy. However, industry leaders have recently questioned whether the cost of inaction would be far more onerous in economic terms.[46]

### (iii) Water use in agriculture

There have been numerous reports on the ecological damage caused by current patterns of water use in Australia, including the following statement by the Wentworth Group of Concerned Scientists, which indicates the difficult political context of this problem, due to its nexus with agricultural productivity, as about 70% of total water use in Australia is applied to agriculture:

> 'The National Land and Water Resources Audit tells us that in 1996–7, the gross value of agricultural production was $28 billion. Half of the profits came from irrigated agriculture, which takes up half of one percent of the land area. Today, however, much of our agriculture is economically marginal and depends on acceptance of high levels of natural resource degradation: to our rivers, wildlife, wetlands, estuaries and coastal waters, including the Great Barrier Reef.' [47]

The regulatory approach to water has been through prescriptive legislation by State Governments, which traditionally vests ownership of water in the Crown. Water users can obtain extraction rights under licences issued by a range of regulatory bodies such as State and local water authorities and irrigation trusts. Unfortunately the numerous water agencies concerned have been primarily concerned about maximizing the supply of water for commercial and private purposes in their local region, without regard to broader environmental needs. Another fundamental problem is that many river catchments extend across State and municipal borders which has made catchment level coordination very difficult. As a result, by 2001, about 26% of Australia's surface water management areas were considered to be close to, or in excess of sustainable extraction limits, particularly in our largest agricultural region, the Murray Darling basin.[48] However, it should also be noted that these problems are not purely historical, as many poor practices have been expanded quite recently, with the volume of water extracted for irrigation since 1985 increased by over 76%. For example, a single irrigation property on the lower Ballone river system in Queensland (Cubbie Station) has built a private dam capable of retaining 1.2 million megalitres (about twice the capacity of Sydney Harbour). This inevitably deprives properties downstream of access to periodic floodwaters which they formerly relied upon to revive their pastures, and also greatly reduces environmental flows to support the associated ecosystems.[49] Another adverse impact, which has only become well understood relatively recently, is the spread of salinity due to the rising of saline ground water, which is generally associated due to land clearing upper catchments.

43 Prime Minister John Howard, Media Release, 'Securing Australia's Energy Future' 15 June 2004.

44 Department of Environment and Heritage (2006), *National Greenhouse Gas Inventory* 2004, at pp 6-10.

45 The *Renewable Energy (Electricity) Act* 2000 requires the generation of 9,500 gigawatt hours of extra renewable electricity per year by 2010.

46 Australian Business Roundtable on Climate Change (2006) 'The Business Case for Early Action' (April 2006).

47 Wentworth Group, *Blueprint for a Living Continent* (2002) at 5.

48 Commonwealth, *Australia State of the Environment 2001*, at p 6 (Key Findings, Inland Waters). See also Australian Conservation Foundation, 'Murray-Darling Basin: the Facts', from the ACF website at http://www.acfonline.org.au/news.asp?news_id=122

49 Peter Mac, 'Agribusiness in Huge Water Scam' *The Guardian* No 1171, 18 February 2004.

Thus it might be concluded that a prescriptive approach has failed to manage water resources successfully. However, the better view is that the prescriptive approach to water supply in Australia has been very poorly structured due to a lack of effective catchment level management to provide water for environmental purposes and the tendency of water supply agencies to under-price the water they supply. In effect, any actions to promote the use of inland waters for environmental purposes in agricultural regions have been largely voluntary. With the current water crisis throughout most of Australia there have been major reforms of water management implemented. These are largely based upon the CoAG Water Reform framework, which promotes measures to strengthen property rights and provide a better basis for water trading. This reflects a broader policy preference to use 'market based' approaches rather than prescriptive measures. It is of some concern that the main objective of these reforms is to provide greater security to water users, and the new water market has tended to facilitate the expansion of water intensive industries like rice, cotton and grape growing. There are some new legislative schemes to ensure environmental flows. For instance the Victorian Government has recently legislated to create of an 'environmental water reserve' to set water aside for environmental purposes through legally enforceable environmental entitlements.[50] However, it is still far from certain that the environment is adequately protected in the context of broader reforms to entrench 'property rights' in water.[51] One consequence of moves to strengthen property rights is that governments will now be obliged to buy back water licences that in most cases provided no more than an annual entitlement, that could be cancelled in the discretion of the issuing authority.

### (iv) Conservation of biodiversity

The Federal Government and various State governments have a long history of providing a high level of protection for sites with high natural biodiversity, as well as aesthetic or cultural values, through direct ownership under a system of conservation reserves or national parks, sometimes in conjunction with World Heritage listing.[52] However, this approach has generally applied only to relatively small areas of Crown land which have limited commercial uses (eg. Uluru, Kakadu, Daintree). Another important prescriptive strategy is to establish lists of endangered species of flora and fauna, which may be protected by legislative penalties and offences wherever they are located.[53] Once a species or an ecosystem is listed there is generally an obligation for the government to prepare and implement a management plan. Any development proposals which may have a significant impact upon a listed species or ecosystem may require an environmental impact assessment under State legislation or the Federal *EPBC Act*. The effectiveness of these biodiversity protection strategies can be seriously questioned given that extinction rates in Australia are the worst in the world, resembling those of small islands, rather than a major continent.[54] One problem is a lack of research funding for identification and listing of threatened species. For instance, the 2002 *National Land and Water Resources Audit*, identified some 2,836 threatened ecosystems across Australia, yet a mere 32 ecosystems have been listed under the *EPBC Act*.[55] Similarly some 1,682 species of endangered plants and animals are listed under the Act but this is generally considered to be far below the full extent of species eligible for listing.

Another major difficulty in biodiversity protection is that more than 60% of Australia's land area and thus a high proportion of our natural ecosystems, is owned and managed by the private sector (including large outback pastoral leases).[56] Substantial further areas of public land are also managed by the private sector under forestry and mining arrangements. The Australian Government policy for the protection of biodiversity managed by the private sector relies upon 'cost effective and flexible economic instruments,

50 *Water Act* 1989 (Vic); ss.4A& 4B, enacted through the *Water (Resource Management) Bill* 2005 (Vic).

51 *Whitten. S, Bennett. J Moss. W, Handley. M and Phillips. W* 'Incentive Measures for Conserving Freshwater Ecosystems Review and recommendations for Australian policy makers' (2000, *Environment Australia).*

52 For instance, in Victoria see the *National Parks Act* 1975 (Vic) and the Federal *EPBC Act* at Part 15, Protected Areas.

53 Eg. the *Flora and Fauna Guarantee Act* 1988 (Vic) and the former *Endangered Species Protection Act* 1992 (Cwth), now superceded by the *EPBC Act* Part 13.

54 Australian Bureau of Statistics (1990) 'Endangered Species in Australia' Year Book Australia Special Article (Australia Now, ref 1301.0 – 1990)

55 The National Land And Water Resources Audit (2002), *Australian Natural Resources Atlas*, under the section Biodiversity Assessment, Threatened Ecosystems and species.

56 Geoscience Australia, *Land Tenure Database* 1993 (at http://www.ga.gov.au/education/facts/tenure.htm).

such as improved valuation, pricing and incentive mechanisms, rather than regulatory strategies'.[57] However, there are few examples of effective financial incentives for biodiversity conservation by the private sector, and little evidence that voluntary approaches will be sufficient to reverse the current decline in ecological systems. To the contrary there are a many public subsidies and taxation concessions that encourage the over–exploitation of natural resources by the private sector.

One of the biggest threats to biodiversity on public lands is habitat destruction through forestry activities. International comparisons indicate that Australia has a very high rate of native vegetation clearance (exceeded only by a handful of third world countries).[58] As a response to a series of bitter legal disputes over forestry in the 1980s, the Federal Government entered into a series of Regional Forest Agreements with the State Governments, which have allowed the States to manage forests largely free of Federal intervention. In particular the Federal Government gave up its right to export control over wood products and environmental impact assessment of forestry activities under the *EPBC Act*. The RFA process included a Comprehensive Regional Assessment to identify forests worthy of protection in reserves, with the remainder generally earmarked for logging. The RFA process has been widely criticised for its lack of appropriate mechanisms to ensure ecological sustainability, appropriate levels of accountability and community participation.[59] Under-pricing of timber by government agencies is also prevalent, which enables timber resources to be applied to very low value products, such as woodchips.

Another contentious aspect of forestry regulation is the Federal Government's 1997 policy to treble the area of forestry plantations in Australia by the year 2020. This policy was alleged to provide for the rehabilitation of degraded farmlands and to also increase 'carbon sinks' for greenhouse purposes.[60] However, a Senate Inquiry reported in 2004 that this target was effectively unattainable due to a lack of suitable land (in high rainfall areas).[61] The Inquiry also revealed that the 2020 target was being used to justify clear-felling of large areas of native forest to establish plantations. One witness to the inquiry argued that Forestry Tasmania was heavily subsidizing the woodchip industry through inadequate pricing of native forest resources (though direct information was difficult to obtain, due to exemption of this agency from Freedom of Information legislation).[62] Witnesses also reported widescale breaches of the forestry standards on protection of watercourses and biodiversity. There were also reports of excessive use of chemicals to establish the plantations, including aerial spraying of herbicides to suppress indigenous plant species and poison baits to kill off native animals.[63] Local communities also expressed concerns about the expansion of plantations on private land due to loss of agricultural productivity and rural community disruption.[64] It seems that the current regulatory scheme for forestry takes a very narrow economic perspective which focuses upon the export earnings from woodchips, whilst failing to recognize the multitude of costs incurred by the broader community, including damage to water catchments, loss of biodiversity as well as direct costs such as provision of roads and other infrastructure to support the industry.

57 Department of the Environment, Sport and Territories, National Strategy for the Conservation of Australia's Biological Diversity, (1996)

58 Andreas Glanznig 'Native Vegetation Clearance, Habitat Loss and Biodiversity Decline' Biodiversity Series Paper No. 6 (1995, DEH) and Dr Jann Williams, 'Biodiversity Theme Report' in *Australia State of the Environment Report 2001.*

59 Andrew Walker (2004) 'Forest Reform In Victoria: Towards ecologically sustainable forest management or mere greenwash?' 29:2 AltLJ 58 (Apr 2004).

60 Centre for International Economics, *Plantations for Australia: The 2020 Vision* (1997).

61 The Senate Rural and Regional Affairs and Transport References Committee, *Australian forest plantations, A Review of Plantations for Australia: The 2020 Vision* (2004), at Chapter 2.

62 Ticky Fullerton, ABC TV Four Corners program 'Lords of the Forest' 16 February 2004, Interview with actuary Naomi Edwards, who revealed that over the previous five years the volume of pulp exported from Tasmania had doubled, and the rate of native forest clearance in Tasmania had also doubled, whilst the dividends paid to the Tasmanian public had halved.

63 Rural town water supplies have been contaminated by chemical use in the Tasmanian forestry industry; see Nine Network, 'Tasmania: name your poison' *Sunday* September 26, 2004.

64 The Senate Rural and Regional Affairs and Transport References Committee, above, at 143.

## 4. Mandatory versus voluntary strategies

Progressive corporations have voluntarily adopted a range of very effective strategies to improve the quality of environmental outcomes in their business operations. Some companies take voluntary action as a matter of good corporate citizenship whilst others act in recognition of the 'business case' for sustainability.[65] Some of the most successful 'sustainability' strategies are facilitated by specific legislative schemes, including:

- environmental management systems;
- sustainability reporting;
- stakeholder engagement; and
- resource efficiency policies.

### (a) Environmental management systems ('EMS')

An EMS is a management process for developing and implementing the environmental policy of an organisation.[66] The leading guideline on EMS is the International Standards Organisation ISO14001. To meet this standard and thereby gain ISO accreditation, an organisation must establish an appropriate environmental policy and implement a management system tailored to the specific nature of its activities and environmental impacts. The EMS must also support compliance with all relevant laws, and provide for active participation by top management and a commitment to continual environmental improvement by the organisation.

Whilst EMS are not generally mandated by legislation, the Victorian *Environment Protection Act* 1970 provides encouragement for EPA licensed industrial premises to adopt them to qualify for certain compliance concessions under its 'accredited licensee' system.[67] They may also be prescribed by the EPA in cases where a licensee persistently fails to meet environmental standards. EMS are also used as a key performance indicator to satisfy the sustainability reporting guidelines of the *Global Reporting Initiative.*[68] There is also judicial authority to support the view that an EMS can assist in establishing a defence of due diligence for company directors facing prosecution for corporate environmental offences.[69] In effect, the use of an EMS provides a sound mechanism for integration of environmental considerations into the decision making processes of an enterprise, and is widely regarded as a sign of good management.

### (b) Sustainability reporting

Sustainability reporting refers to the practice of public reporting on the non-financial, social and environmental performance of an organization (which together with traditional financial reporting is often referred to as 'triple bottom line' reporting). Reporting on environmental aspects is prescribed to a limited extent for listed entities in Australia by s 299(1)(f) of the *Corporations Act* which requires a director's report to include 'details of the entity's performance' in relation to any 'particular and significant' environmental regulation under a law of the Commonwealth or of a State or Territory.[70] Another provisions which arguably encourages reporting of sustainability performance is s 295 of the *Corporations Act*, which requires that financial statements must give a 'true and fair view' of 'the financial position and performance of the

65 The business case recognises that shareholder value may be threatened by the risk of adverse environmental impacts. Opportunities for improved shareholder value may also arise from efficiency gains and reputation enhancements due to good environmental strategies. See Australian Government, *Corporate Sustainability –An Investor Perspective; The Mays Report* (2003) at 10.

66 See Standards *Australia Environmental management systems- specifications with guidance for use* AS/NZS 14001:1996 at paragraph 3.5.

67 *Environment Protection Act* 1970 (Vic), s 26B

68 The Global Reporting Initiative (GRI) is a multi-stakeholder process and independent institution whose mission is to develop and disseminate globally applicable Sustainability Reporting Guidelines. GRI 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. See the GRI website at: http://www.globalreporting.org/index.asp

69 See s 66B(1A)(c) of the *Environment Protection Act* 1970 (Vic) and the comments on due diligence by Ormston J in *R v Bata Industries Ltd et al* (1992) 70 CCC (3d) 394 (Canada).

70 S 299(1)(f) was criticised for being too vague and uncertain by the Parliamentary Joint Standing Committee on Corporations and Securities in its report: *Matters Arising from Company Law Review Act 1988* (AGPS, Canberra, October 1999).

company'. Sean Lucy and Megan Utter have argued that s 295 may require careful consideration of the environmental sustainability of a company's operations.[71] They point out that there is a growing trend for the intangible aspects of a company's business to make up the bulk of the value of the company, and that this value is highly vulnerable to environmental risks. This is highly pertinent in industries associated with climate change, where sectors like motor vehicle manufacturing and coal fired power generation are vulnerable to declining profitability. It is argued that directors who do not report on such matters may subsequently be sued by disgruntled investors.

A recent study has shown that 23% of the top 100 Australian companies go beyond the basic requirements of s 299(1)(f), to voluntarily publish comprehensive sustainability reports.[72] However this report also indicates that Australia is well behind the average rate of sustainability reporting in comparable countries, which is 43%. There are also some indications that many corporations provide sustainability reports for public relations purposes, rather than out of a genuine environmental commitment.[73]

### (c) Stakeholder engagement

Stakeholder engagement strategies generally involve participation of the community in the management of environmental problems. This is consistent with the principle of 'subsidiarity', which is based on the view that decisions made at the lowest possible level in a hierarchy are more likely to take into account the full range of relevant considerations (from all relevant stakeholders). In Victoria the Environment Protection Act encourages licensed industrial premises to establish an 'environmental improvement plan' (EIP) in order to qualify for exemption from certain compliance obligations.[74] One of the main outcomes of an EIP is the establishment of a stakeholder consultation process with representatives from the community and local government as well as the company and the EPA. For instance, Australian Paper's Maryvale Mill in the Latrobe Valley, has a long history of issues with the local community relating to odour and waste discharges. The company decided to establish an EIP, which included formation a Community Environmental Consultative Committee to hold regular community meetings. This process has helped identify and prioritise environmental aspects of the Mill and facilitated a range of remedial actions which have resulted in a reduction in community complaints. This process has also provided the company with many cost savings in water conservation and waste treatment processes, and assisted the Mill to gain accredited licensee status. [75]

### (d) Resource efficiency

The concept of 'resource efficiency' is recognized in Victorian legislation through the statutory corporation Sustainability Victoria, which was established to promote environmental sustainability in the use of resources.[76] This agency uses a wide range of collaborative and promotional strategies to achieve its objectives, including grants and funding support for innovative projects that increase resources efficiency. The Victorian EPA also promotes resource efficiency through 'sustainability covenants'.[77] These voluntary arrangements encourage a business entity or other organization to undertake reduction of its ecological impact through strategies developed with the assistance of the EPA. These strategies may include on-site energy, waste, and water saving efficiencies as well as off-site 'extended product responsibility' strategies to manage the wider long term impacts throughout the supply chain, ranging from raw materials supplier management to 'downstream' product distribution and waste recovery. The first sustainability covenant in Victoria was signed by VicSuper Pty Ltd in May 2003. VicSuper is one of Victoria's largest public

71 Sean Lucy and Megan Utter, 'Directors' duties and sustainability: Are you being true and fair?' *Keeping Good Companies* , February 2004 at 40.

72 Centre for Australian Ethical Research (2006) *The State of Sustainability Reporting in Australia 2005* (March 2006).

73 See Australian Conservation Foundation, *CorpRate An Assessment of Australia's Top 50 Listed Companies in 2003*, (April 2004) which found: '...Improvements in corporate policy and sustainability reporting are frequently not reflected in on the ground performance.' At p 6.

74 *Environment Protection Act* 1970 (Vic) s 31C(2) and 31C(6).

75 Australian Paper (2003) Environment Report.

76 Sustainability Victoria was established under the *Sustainability Victoria Act* 2005 (Act No. 65/2005) as successor in law of the Sustainable Energy Authority Victoria and EcoRecycle Victoria (which had earlier replaced the former Waste Management Council).

77 *Environment Protection Act* 1970 (Vic) s 49AA.

offer superannuation funds with over 170,000 members, 4,000 participating employers and over $1.6B in assets under management. Whilst the financial services sector has not been traditionally seen as having major environmental impacts, VicSuper has recognised that the financial services sector can have a very strong influence on the environmental outcomes of the wide range of businesses and industries that utilise financial and investment services. For instance, VicSuper accepts recent research which indicates that investment strategies based on sustainability principles will provide better long term shareholder value. Accordingly VicSuper introduced policies to invest 10% of its of listed equity portfolio in companies rated as sustainability leaders, and also to provide its own members with an option to invest 100% of their funds in such stock. The overall strength of sustainability covenants is that they provide a convenient mechanism for the integration of environmental considerations into the central decision-making processes of corporations. Details of other sustainability covenants entered to date can be found at the EPA website.[78]

This brief review of voluntary sustainability strategies shows that they have been successfully adopted by a growing number of progressive corporations in Victoria. Each strategy can contribute strongly to corporate decision making processes on environmental and sustainability matters. In particular, an EMS provides the framework for setting objectives and measuring performance, high quality sustainability reporting and stakeholder engagement provide comprehensive and transparent processes for gathering and exchange of relevant information, and resource efficiency policies provide sound goals for central decision making and the long term ecological sustainability of the enterprise.

## 5. Conclusions And Recommendations

The first issue raised in this paper was whether CSR objectives should be addressed through specific legislative schemes or whether reforms to business decision-making processes under corporations law would be a more effective approach. A review of the current range of specific legislative schemes dealing with environmental problems in Australia suggests that the specific approach has had highly variable success. In the case of industrial pollution a prescriptive approach based upon licensing and harsh criminal penalties has proved highly effective. Prescriptive measures have also been successfully applied to restrict motor vehicle emissions under the Australian Design Rules. By contrast, the approach to greenhouse emissions has relied largely upon voluntary strategies, such as the Greenhouse Challenge. Whilst these voluntary schemes may have produced emission reductions for participating businesses, national greenhouse emissions continue to rise steeply. One successful example of a prescriptive strategy in greenhouse regulation is the Mandatory Renewable Energy Target, which has proved highly successful in encouraging investment in renewable energy within its very restricted scope. Market based responses such as carbon taxes and emissions trading have been discussed but not yet implemented. The strategy for management of water resources is primarily a prescriptive approach but it is complicated by involvement of a large number and variety of government agencies. This fragmented system has clearly failed in the face of increasing demand for water and fluctuating availability and recent moves to market based approaches have not produced any significant improvements. In the area of biodiversity protection, there is a prescriptive approach that is narrowly focused on conservation reserves and listing of endangered species. Unfortunately, these strategies are inadequate to deal with the most significant recent threat to biodiversity, which is the loss of habitat outside conservation reserves. One major anomaly is that Regional Forestry Agreements have effectively exempted forestry operations from normal biodiversity controls and environmental impact assessment processes, which severely compromises biodiversity conservation in many state forests. It has also been concluded above that the traditional view of corporations law, that it should be confined to the 'internal relationships' between directors and shareholders is out of step with the increasing influence of modern corporations, particularly with regard to the impacts of corporate activities upon natural resources. The catastrophic threats posed by climate change and biodiversity loss clearly demonstrate the urgent need for better integration of social and environmental considerations in public and private decision making processes, and strongly supports a conclusion that reform of corporations law is needed.

Once it is accepted that corporations law has a role to play in this area, the second issue for consideration is what type of regulatory strategies should be applied for this purpose? It was clearly recognized by the James Hardie Inquiry that the current wording of s 181 of the *Corporations Act* can have an inhibitory effect on the consideration of stakeholder interests by directors. On this basis, the first specific recommendation of this paper is that the Act should be amended to provide directors with a clear power to consider the impacts of the company's operations upon the community and the natural environment (so far as reasonably practicable) and to balance these against the interests of the company and its shareholders.

78 See http://www.epa.vic.gov.au/bus/sustainability_covenants/default.asp

Whilst this first recommendation might remove one of the traditional barriers to protection of non-shareholder interests, it does not provide a positive obligation upon a corporation to act in a more sustainable manner. This presents a difficult challenge as 'sustainability' is a very broad concept that is not easily encapsulated in a statutory obligation. It is contended here that a more specific approach should be adopted, which requires corporations to adopt current best practice models for environmental management which have been proven successful in industry. In particular, it is recommended that every corporation must establish and maintain the following 'best practice' procedures which have been detailed above:

(a) an 'environmental management system' that is appropriate to the nature and scale of its business operations, in accordance with best practice guidelines, such as ISO 14000;

(b) a 'sustainability reporting process' in accordance with best practice guidelines, such as the *Global Reporting Initiative*;

(c) a process for 'stakeholder engagement' that is appropriate to the nature and scale of its business operations; and

(d) appropriate policies to promote 'resource efficiency' or 'ecological sustainability' of the business operations, with appropriate regard to principles such as 'extended product responsibility', 'responsible waste management' and 'reduction in ecological footprint'.

It is recognized that these reforms to the *Corporations Act* would not apply to other business entities such as sole traders, partnerships and other unincorporated business structures. The extension of these reforms to all business operators would be desirable, and this would be achievable through parallel State legislation, similar to the structure of consumer protection laws. It is also recognized that these reforms would involve a considerable enlargement of administrative effort by the Federal Government, with an appropriate Federal agency required to administer these new measures. However, given the Federal Government's recent interest in nationalizing water management, it would be entirely appropriate for similar arrangements to be entered into with respect to the corporate social responsibility.

# The Parliamentary Joint Committee on Corporations and Financial Services Report on Corporate Responsibility

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A parliamentary inquiry into corporate responsibility in Australia, concluded in June 2006, attracted little media and public attention. This is despite the widespread interest in the topic arising from recent high-profile corporate collapses and scandals, as well as the global focus on climate change and the environment. The low-key response can be attributed to the fact that the inquiry found that no major changes to the law were necessary. Does this mean that the corporate responsibility ship has sunk? This article contends that the parliamentary inquiry is actually supportive of corporate social responsibility, but recommends that the Government keep its hand off the wheel... for now.

## Background

The Parliamentary Joint Committee on Corporations and Financial Services (the ***Committee***) handed down a report entitled "Corporate responsibility: Managing risk and creating value" (the ***Report***) on 21 June 2006 based on 146 submissions from corporations, individuals and non-government organisations. The Committee found no major changes to the law were necessary and advised against mandatory triple-bottom-line reporting (ie sustainability reporting) and amending directors' duties to expressly require consideration of CSR issues in making corporate decisions.

However, the Report contains 29 recommendations regarding the way corporate social responsibility (***CSR***) should progress in Australia. The message is clear that continuing to improve CSR practices is of critical importance.