CORPORATE SOCIAL RESPONSIBILITY: SOME CRITICAL QUESTIONS FOR AUSTRALIA

HELEN ANDERSON*

Introduction

Corporate social responsibility (CSR) is currently one of the most discussed topics by business and scholars alike. The concept has been enthusiastically supported by three very disparate groups – by government,[1] by non government organisations (NGOs) ranging from charities to national and international industry groups, and by business itself, in particular large corporations.[2] This support comes at a time when there is greater awareness by individuals about environmental matters, sustainability, workplace rights and issues concerning labour in other countries, and occupational health and safety. Rhetoric about corporations 'giving back' to the communities that made them successful abounds.

* LLB (Hons) (Melb), GradDipBus (Acc), LLM, PhD (Monash); Barrister and Solicitor (Vic); Associate Professor, Department of Business Law and Taxation, Monash University.

1 There have been a number of inquiries into CSR – see Corporations and Markets Advisory Committee, *Corporate Social Responsibility Discussion Paper*, November, 2005, (CAMAC Discussion Paper) available at http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFDiscussion+Papers/$file/CSR_DP.pdf, accessed 11th April, 2006; Parliament of Australia, Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value*, June 2006, (the Parliamentary Joint Committee Report) available at http://www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/report/index.htm, accessed 11th April, 2006. The Prime Minister has also established the Prime Minister's Community Business Partnership, discussed further below. See http://www.partnerships.gov.au/csr/corporate_links.shtml

2 In 2000, a study by the Centre for Corporate Public Affairs and the Business Council of Australia found around half of Australia's large companies has policies related to community involvement, social responsibility or stakeholder engagement. More than half of these companies had developed policies in the last decade. Centre for Corporate Public Affairs and Business Council of Australia, 'Corporate Community Involvement: Establishing a Business Case' (2000) 38 – 9. In 2001, Cronin and Zappalà concluded from their survey of Australia's top 100 companies that just over 70 percent of companies surveyed had CCI policies. Caitlin Cronin and Gianni Zappalà, 'The Coming of Age of Corporate Community Involvement: An Examination of Trends in Australia's Top Companies' (Working Paper No 6, Research and Social Policy Team, The Smith Family, 2002), 6.

Much of the corporate citizenship literature, both in Australia and internationally, looks at the superficial 'what' of CSR and examines actions that companies can take to be good corporate citizens.[3] Other authors delve deeper by looking at the 'how',[4] and examine the variety of ways in which companies embrace CSR – ranging from cursory philanthropy to stakeholder engagement in the most fundamental decision making processes of the company.

This article takes a normative approach and looks at the 'why' of CSR; in particular, it will question whether governmental support and enthusiasm for CSR is appropriate, given the neo-classical view of corporations as entities devoted to the maximisation of shareholder wealth. Milton Friedman famously decried CSR as a 'fundamentally subversive doctrine' with the capacity to distract companies from their primary focus. It will be asked whether responsibility for the provision of some community services or the protection of various aspects of society and the environment should be devolved, albeit gradually and apparently with the consent of all concerned, to an unaccountable being, the business community, particularly where participation is on a voluntary basis.

Corporations, especially large, successful ones, are willing participants in CSR, for the protection and enhancement of their reputations. It is arguable that, with the retreat of the welfare state, governments take advantage of this to shift costs to the business sector. NGOs are also keen to encourage CSR to ensure that their own social objectives are advanced. However, the difficulty with reputation-driven CSR is that it might encourage companies to engage in activities which are 'seen' to be doing the right thing – conspicuous donations, support for high profile causes[5] - rather than the more fundamental protection of stakeholder interests, such

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3 Eg David Brereton, 'Self-regulation of Environmental and Social Performance in the Australian Mining Industry' (2003) 20 *Environmental and Planning Law Journal* 1; Jonathan Batten, Samanthala Hettihewa and Robert Mellor, 'The Ethical Management Practices of Australian Firms' (1997) 16 *Journal of Business Ethics* 1261; Robert Kagan, Neil Gunningham and Dorothy Thornton 'Explaining Corporate Environmental Performance: How Does Regulation Matter' (2003) 37 *Law and Society Review* 51.

4 Eg David Birch and George Littlewood, 'Corporate Citizenship Some Perspectives from Australian CEOs' (2004) 16 *The Journal of Corporate Citizenship* 6; Mark Glazebrook, 'The Social Construction of Corporate Citizenship' (2005) 17 *The Journal of Corporate Citizenship* 5; Gianni Zappala, 'Corporate Citizenship and Human Resource Management: A New Tool or a Missed Opportunity' (2004) 42 *Asia Pacific Journal of Human Resources* 185; Jonathan Batten and David Birch, 'Defining Corporate Citizenship: Evidence from Australia' (2005) 11 *Asia Pacific Business Review* 293.

5 A cursory look at the websites of major Australian corporations shows that environmental, health, educational and indigenous causes are most popular, along with support for the homeless and financially disadvantaged. See further n 103 below.

as good treatment of their employees, timely and full payment of creditors and manufacturing of quality, safe and inexpensive products and services. The more that government promotes the visible forms of CSR, the more likely it is that companies will adopt these superficial measures of good corporate behaviour, window dressed to the maximum extent, rather than inherently sound business practices which are of true benefit to the community. For this reason, the espousal of reputational indices, which may support a culture of CSR 'form over substance', is to be discouraged.

While there is an extensive international literature which looks at the costs and benefits of CSR to companies individually, the current debate in Australia over CSR lacks a rigorous analysis of its costs and benefits to society as a whole. It is assumed that with corporate reputational enhancement flowing from schemes to benefit the community, all parties win. But this does not take into account consideration of what corporations could do in the alternative with their resources, which might be of equal benefit to society. It also fails to examine the long term consequences for society if a pattern of government retreat from the provision of social services or the protection of vulnerable parties becomes entrenched. It does not consider whether the money invested by corporations into CSR achieves the corporations' stated objectives or whether the money is spent in an economically efficient or effective way.

This article begins with a discussion of the meaning of CSR, and how companies incorporate it into their activities. It then examines legislation that already imposes obligations on companies to behave in a socially responsible manner, and looks at some of the recent CSR initiatives in Australia. Next, the motivations for CSR are examined, highlighting the issue of protection of corporate reputation and the government's motives for its encouragement of CSR. Finally, the proper role of CSR in Australia will be analysed. It will be recommended that a redefined CSR is appropriate to ensure the true protection of stakeholder interests.

CSR defined

Definitions of corporate social responsibility proliferate, although each is generally accompanied by the disclaimer that the term is neither universally or easily defined.[6] For brevity and simplicity, it is hard to go

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6 Mr Jeremy Cooper of the Australian Securities and Investments Commission (ASIC) outlined the definitional issues that arise in the area of corporate responsibility: '[t]here are some very vexing terminology problems ... such as what a stakeholder is, what sustainability means, what triple bottom line reporting is and what we really mean by corporate social responsibility itself...' Parliamentary Joint Committee Report, above n 1 [2.3]. For an extensive coverage of the development of the term in the American

past Baron, who states that '[f]rom one perspective, it is the assumption and fulfilment of responsibilities beyond those dictated by markets'.[7] The report of the Parliamentary Joint Committee on Corporations and Financial Services, issued in June 2006 and entitled *Corporate Responsibility: Managing Risk and Creating Value*, stated that

> [c]orporate responsibility is usually described in terms of a company considering, managing and balancing the economic, social and environmental impacts of its activities. It is about companies assessing and managing risks, pursuing opportunities and creating corporate value, in areas beyond what would traditionally be regarded as a company's core business. It is also about companies taking an 'enlightened self-interest' approach to considering the legitimate interests of a company's stakeholders.[8]
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> Recognising that corporate responsibility is a multi-faceted concept the committee makes no attempt to reach a conclusive definition. Because of the sheer diversity of modern corporations – in terms of size, sectors, stakeholders, structures and strategies – the concept of corporate responsibility can have a different meaning to different people and different organisations.[9]

The implementation of all CSR activities entails costs for all companies, regardless of the form of those activities. One common point of difference in definitions is whether corporate social responsibility involves the company's core activities or is outside of those – in other words, whether the company should be recovering the costs of the programs or indeed be making money from them. At one end of the spectrum are those who consider it wrong to profit from these activities,

literature, see Archie B Carroll 'Corporate Social Responsibility Evolution of a Definitional Construct' (1999) 38(3) *Business and Society* 268.

7 David P Baron 'Private Politics, Corporate Social Responsibility, and Integrated Strategy' (2001) 10 *Journal of Economics and Management Strategy* 7, 9.

8 Parliamentary Joint Committee report, above n 1 [2.7].

9 Ibid [2.15]. The CAMAC Discussion Paper noted that [w]hile there is an increasing recognition and acknowledgement of corporate social responsibility (or comparable notions such as 'corporate citizenship' or 'corporate social accountability') as an issue, the term does not have a precise or fixed meaning. Some descriptions focus on compliance with the spirit as well as the letter of applicable laws regulating corporate conduct, while other descriptions concentrate on the societal impacts of corporate activities (sometimes encapsulated in the notion of sustainability) on groups (usually referred to as stakeholders) including, but extending beyond, shareholders. These societal effects, going beyond the physical or social goods or services provided by companies and returns to shareholders, are sometimes subdivided into environmental, social and economic impacts. CAMAC Discussion Paper, above n 1, [1.1].

and therefore treat CSR as external to the core business of the company.[10]

Indeed some definitions demand that the company's CSR activities are less profitable than 'normal' corporate actions. Manne and Wallich observed that '[t]o qualify as socially responsible corporate action, a business expenditure or activity must be one for which the marginal returns to the corporation are less than the returns available from some other expenditure …'.[11]

At the other end are those who believe that truly successful corporate social responsibility is embedded into a corporation's core profit making activities and values, and goes far beyond superficial philanthropy. This approach was mentioned with interest in the Parliamentary Joint Committee report, where it was noted that '[e]vidence received by the committee ... strongly underlined the importance of integrating the consideration of broader community interests into the core business strategy of companies, if corporate responsibility was to succeed'.[12]

This view is shared by a number of commentators,[13] but how widely this view has been adopted is debatable. The CAMAC Discussion Paper revealed research which found that

> [w]hereas 54% of executives in one global survey in 2000 said that this notion was 'central' or 'important' to their corporate decision-making, that

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[10] For example, Moon maintains that '[i]t is not suggested here that companies derive no benefit from pursuing social responsibility. They may improve their reputation among customers and among public contractors thereby. Nonetheless, the activities so described are not directly for-profit, nor do they represent direct product advertising.' Jeremy Moon, 'The Firm as Citizen? Social Responsibility of Business in Australia' (1995) 30 *Australian Journal of Political Science* 1, 1. See further JF Vos 'Corporate Social Responsibility and the Identification of Stakeholders' (2003) 10 *Corporate Social Responsibility and Environmental Management* 141, who maintains that CSR is an obligation to stakeholders 'to carry out actions that appear to further some social good, beyond the interest of the firm and that which is required by law to do'.

[11] Henry G Manne and Henry C Wallich 'The Modern Corporation and Social Responsibility' (1972) 4.

[12] Parliamentary Joint Committee Report, above n 1, [3.89].

[13] Batten and Birch concluded that '[i]t is becoming clearer that the social (and environmental) has to be incorporated, not as an add-on to a corporation's economic activities, but as an essential, integral, more social redefinition of that corporation, in order to better reflect the rapidly changing post industrial economy we now find ourselves operating in.' .Batten and Birch, above n 4, 293. Amongst scholars, it is commonly emphasised that CSR is more than simple 'chequebook philanthropy', 'cause-related marketing' or business ethics. See David Birch, 'Corporate Citizenship: Rethinking Business Beyond Corporate Social Responsibility' in Jörg Andriof and Malcolm McIntosh (eds) *Perspectives on Corporate Citizenship* (Sheffield: Greenleaf, 2001) 53, 54.

> figure had grown by 2005 to 88% of executives surveyed. Likewise, whereas 34% of professional investors in that same global survey in 2000 said that corporate social responsibility was 'central' or 'important' to their investment decisions, that figure had risen by 2005 to 81%. [14]

This was noted by the Parliamentary Joint Committee who concluded that it demonstrated 'the significant global rise of corporate responsibility as a factor in corporate decision-making and investment practices. Importantly, there also appears to be a global trend towards "doing" rather than mere rhetoric.'[15]

In contrast, Batten and Birch noted[16] research in 1999 which found that only 7 percent of CEOs of top corporations viewed corporate citizenship as central to the strategic direction of their business. Their own survey, published in 2005, found that '[m]ost respondents defined corporate citizenship in terms of the community activities of the corporation ... and felt that it did not include core products or services ... or the way in which the corporation was organised or run. ...'.[17]

Indeed, a report commissioned by the Prime Minister's Community Business Partnership[18] observed that while businesses are aware of the big picture issues of CSR and corporate citizenship, they lack expertise rather than commitment in implementing their CSR goals. [19]

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14 CAMAC Discussion Paper, above n 1, [1.1].

15 Parliamentary Joint Committee Report, [2.30].

16 Batten and Birch, above n 4, 296.

17 Ibid 300. In a case study involving BP, Glazebrook observed that 'corporate citizenship was predominantly interpreted through the language of "community affairs" which occupied a centralised and monetised function within BP undertaken on behalf of the organisation, but not in conjunction with its core operations ... . By limiting this function to a discretionary "spend" allocated outside the operational considerations of BP's business, managers, employees and stakeholders external to the company had been acculturated into viewing BP's corporate citizenship expressed through a discrete, separate pot of money unrelated to core business, but spent because of a prevailing social norm that "companies must give something back"'. Glazebrook, above n 4, 61.

18 Jehan Loza and Sarah Ogilvie, *Corporate Australia Building Trust and Stronger Communities? A Review of Current Trends and Themes,* Australian Government Department of Family and Community Services For the Prime Minister's Community Business Partnership, November, 2005 (the Community Business Partnership report). Available at http://www.partnerships.gov.au/pdf/Corporate%20Australia%20Building%20Trust%20and%20Stronger%20Communities.pdf

19 '[T]hese activities generally take the form of transactive relations (involving little or no interaction beyond the provision of money or in-kind support) rather than interactive partnerships (involving a much greater interaction of the company with the community or partnering organisation beyond a simple transaction of funds or equipment).' Ibid 16-17.

The confusion over the definition of CSR and the fact that corporations struggle to determine how to integrate CSR into their operations suggests that businesses do not really understand the meaning or the purpose of CSR. Part V will suggest a new paradigm.

CSR at Present in Australia

There is already considerable amounts of legislation in Australia which impose obligations on companies to behave in a socially responsible manner. Companies, as separate legal entities, have the usual obligations of legal persons in tort and in contract. The corporate veil is lifted by the *Corporations Act 2001* (Cth)[20] to impose liability on directors personally if their companies fail to meet some of these obligations. Examples include the protection of employee entitlements under Part 5.8A and the directors' duty to prevent insolvent trading under Part 5.7B. Creditors are also protected against the improper actions of directors in the prelude to the company's insolvency by the voidable transaction provisions of Part 5.7B.

Legislation other than the *Corporations Act* imposes additional obligations on companies and their directors in relation to employees and the environment. For example, companies must pay their employees at least minimum rates of pay[21] and they must comply with occupational health and safety,[22] anti-discrimination and equal opportunity requirements.[23] Companies must also comply with a wide range of environmental requirements.[24] Consumers and businesses are protected by laws proscribing companies engaging in anti-competitive behaviour and misleading or deceptive conduct.[25]

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20 Hereinafter referred to as the *Corporations Act.*

21 *Workplace Relations Act 1996* (Cth).

22 For example, *Occupational Health and Safety Act 2004* (Vic), *Occupational Health and Safety Act 2000* (NSW), *Workplace Health and Safety Act 1995* (Qld), *Workplace Health and Safety Act 1995* (Tas), *Occupational Health, Safety and Welfare Act 1986* (SA), *Occupational Safety and Health Act 1984* (WA), *Occupational Health and Safety Act 1989* (ACT), and the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth).

23 For example, *Equal Opportunity Act 1995* (Vic), *Equal Opportunity in Public Employment Act 1992* (Qld), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1984* (WA).

24 For example, *Environment Protection Act 1970* (Vic), *Waste Management and Pollution Control Act 1998* (NT), *Environment Protection Act 1997* (ACT), *Protection of the Environment Operations Act 1997* (NSW), *Environmental Protection Act 1986* (WA), *Environment Protection Act 1993* (SA), *Environmental Protection Act 1994* (Qld) and the *Environmental Management and Pollution Control Act 1994* (Tas).

25 For example, *Trade Practices Act 1974 (Cth)*, *Fair Trading Act 1999* (Vic), *Fair Trading Act 1987* (SA), *Fair Trading Act 1989* (Qld), *Fair Trading Act 1987* (WA),

In terms of reporting, there are two specific sections in the *Corporations Act* that are widely recognised as expanding company reporting in a way that relates to CSR. Section 1013D(1) of the Act imposes obligations on superannuation, life insurance and managed funds to disclose the extent to which they take account of environmental, social, labour and ethical standards in their investment decisions. Section 299(1)(f) requires companies to include within their annual reports details of breaches of environmental laws and licences.

However, despite the evident ability[26] of governments to legislate for the protection of corporate stakeholders in particular and society in general, there has been a push by government to increase the responsibility of corporations for these matters, not through regulation but by the enthusiastic promotion of CSR.[27] This is apparent from initiatives such as the Prime Minister's Community Business Partnership, which was established in 1999. Chaired by the Prime Minister, it is 'a group of prominent Australians from the community and business sectors, appointed by the Prime Minister to advise and assist the Government on issues concerning individual and corporate social responsibility.'[28] It does this through three streams of activities – advocacy of the business case for CSR and for partnerships between business and the community,

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Fair Trading Act 1987 (NSW), *Fair Trading Act 1990* (Tas), *Fair Trading Act 1992* (ACT), *Consumer Affairs and Fair Trading Act 1991* (NT).

26 Whether these laws are sufficient to meet their stated objectives is another matter. While the ability to legislate for socially responsible behaviour by corporations is obvious, it is arguable that some of the laws to protect vulnerable stakeholder groups are demonstrably deficient. An example is the laws for the protection of employee entitlements under Part 5.8A of the *Corporations Act*. The Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (2004) described the employee entitlement sections as a 'toothless tiger', at [10.59]. See also Celia Hammond, 'Insolvent Companies and Employees: The Government's Year 2000 Solutions' (2000) 8 *Insolvency Law Journal* 86, 92; David Noakes, 'The Recovery of Employee Entitlements in Insolvency' in Ian Ramsay (ed), *Company Directors' Liability for Insolvent Trading* (2000) 129, 129.

27 Motivations for this will be discussed in Part IV. It is interesting to note the comments of Johns here. He describes it as the 'socialisation of the corporation and the privatisation of regulation', at 369. He says '[i]n the new terminology, tax laws are social justice laws, environment and planning laws are sustainability laws, employment, OH&S, consumer and contract laws are human rights laws, and self-regulation is governance.' Gary Johns 'Deconstructing Corporate Social Responsibility' (2005) 12 *Agenda* 369, 370.

28 http://www.partnerships.gov.au/about/about_the_history_the_challenge.shtml accessed on 31st July, 2006.

facilitation through the provision of information, and recognition of successful CSR through an awards program.[29]

The Australian Stock Exchange has also taken an active step in encouraging socially responsible business practices amongst listed companies. Its Listing Rules[30] require companies to state in their annual reports the extent to which they have complied with 28 ASX Council Recommendations, which are pursuant to ten Principles of Good Corporate Governance. Compliance with the recommendations is not mandatory, although companies must explain why an alternative approach was adopted. Three of the recommendations are relevant to CSR. They are Principle 3: Promote ethical and responsible decision-making; Principle 7: Recognise and manage risk; and Principle 10: Recognise the legitimate interests of stakeholders.[31]

Business appears to have enthusiastically embraced the trend towards corporate social responsibility. The Parliamentary Joint Committee report noted a submission by Philanthropy Australia, stating that:

> [t]here is undoubted growth in corporate community activity in Australia, evidenced through Australian Bureau of Statistics data and more generally in the growth of voluntary corporate participation in initiatives such as the Australian Corporate Responsibility Index, the Prime Minister's Community Business Partnership Awards, and the Global Reporting [Initiative].[32]

> Australia also has many companies that are leading the push towards greater sustainability.[33] It is impossible to provide a comprehensive list of strong corporate performers in this area without the risk of omitting a committed company.[34]

29 Prime Minister's Awards for Excellence in Community Business Partnerships are divided into small, medium and large business categories and are presented a the state and territory level and at the national level.

30 ASX Listing Rule 4.10.3.

31 See http://www.asx.com.au/supervision/governance/principles_good_corporate_governance.htm. These principles have recently been reviewed, with revised rules taking effect from 1 January, 2008 .

32 Parliamentary Joint Committee report, above n 1, [2.54].

33 Sustainability is a term that also lacks precise definition in the CSR debate. It is generally used in the context of reporting. The Parliamentary Joint Committee report, above n 1, [2.23] notes that 'sustainability reporting refers to reporting mechanisms used by organisations to disclose information on social, environmental, and economic performance. It facilitates reporting on achievements in sustainable development, and allows a degree of transparency to shareholders and other stakeholders of organisational performance and behaviour.'

34 Ibid [2.55].

Much of this community involvement has manifested itself in philanthropic activities. [35] Recently, the Parliamentary Joint Committee on Corporations and Financial Services has released a report entitled *Corporate Responsibility: Managing Risk and Creating Value*[36] which has made a number of important recommendations, which encourage, but do not mandate, socially responsible activity by companies.[37]

Motivations for CSR

Much has been written about the multiplicity of drivers for companies to engage in CSR,[38] but it would probably be fair to say that few companies would engage in socially responsible activities, beyond compliance with the law and the generation of profit for their shareholders, if nobody knew about it.[39] For this reason, CSR in Australia is most likely to fall into the

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[35] The Parliamentary Joint Committee report notes a recent study entitled 'Giving Australia: Research on Australian Philanthropy' which 'identified that business giving in 2003–04 more than doubled since 2000–01, with more than 525,000 businesses, or 67 per cent of all businesses, giving $3.3 billion in money, goods, services and time during 2003–04. The report was coordinated by the Australian Council of Social Service and funded by the Prime Minister's Community Partnerships Program.' Ibid [2.66].

[36] Parliamentary Joint Committee report, above n 1. The Corporations and Markets Advisory Committee (CAMAC) has also sought public submissions. Reference from the Hon Chris Pearce to the Corporations and Markets Advisory Committee, 'Reference in Relation to Directors' Duties and Corporate Social Responsibility' 23 March, 2005. See http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewDirectors%27+duties+and+corporate+social+responsibility?openDocument, accessed on 30th April, 2006.

[37] A summary of these recommendations is at Parliamentary Joint Committee report, above n 1, xxi.

[38] The Parliamentary Joint Committee Report lists them as 'competitiveness and profitability, attracting investments, attracting and retaining employees, reputation, risk management, corporate failures, community expectations and license to operate, avoidance of regulation and globalisation', above n 1, [3.15] Brereton records them as 'the growing size and influence of "ethical investment funds", increasing requirements and expectations being placed on companies to report publicly on their environmental and social, as well as economic, performance, the explosive growth in the number of NGOs, industry organisations and professional networks focused on promoting corporate social responsibility and sustainable development principles [and] a parallel growth in the number of voluntary standards, codes, certification schemes being developed and promoted by industry bodies, NGOs and international institutions such as the United Nations, the OECD and the World Bank' above n 3, 3. See also, the KPMG International Survey of Corporate Responsibility Reporting 2005, conducted by the University of Amsterdam and KPMG Global Sustainability Services, 18, available at http://www.kpmg.nl/Docs/Corporate_Site/Publicaties/International_Survey_Corporate_Responsibility_2005.pdf.

[39] Moon notes research from the United States which indicates that 'social responsibility of small firms tends to be smaller and less institutionalised than larger firms'. One explanation for this which Moon offers is that 'large firms, which by definition has a

category of strategic CSR[40] and not be seen by courts as a breach of directors' duties.[41]

Building and retaining a good reputation is therefore arguably the main motivator for CSR.[42] However, there are many aspects of reputation-driven CSR, which can be broken down into three broad and sometimes overlapping and interrelated categories: company strategy, responding to community demands, and responding to external demands from government, industry, or national and international NGOs.

There are many strategic reasons why a company may choose to improve their reputation by the adoption of CSR practices. A company may undertake socially responsible initiatives to improve competitiveness and profitability,[43] to win government favour[44] or to attract investment from

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public profile, see their reputations as an important part of their marketing mix.' Moon, above n 10, 12. Porter and Kramer noted that '[w]hile these [sponsorship] campaigns do provide much needed support to worthy causes, they are intended as much to increase company visibility and improve employee morale as to create social impact. Tobacco giant Philip Morris, for example, spent $75 million on its charitable contributions in 1999 and then launched a $100 million advertising campaign to publicize them.' Michael E Porter and Mark R Kramer 'The Competitive Advantage of Corporate Philanthropy' [2002] *Harvard Business Review* 5,5

40 Profit sacrificing social activism which involves socially beneficial behaviour lacking a calculated benefit to the corporation, may be in breach of directors' duties, while strategic corporate social responsibility, designed to directly benefit key stakeholders or build the company's reputation, does not. Wilson notes that the latter is the predominant form of corporate social responsibility in Australia.

Therese Wilson, 'The Pursuit of Profit at all Costs: Corporate Law as a Barrier to Corporate Social Responsibility (2005) 30 *Alternative Law Journal* 278, 279, drawing on the research of Parkinson: John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1994) 279.

41 *Corporations Act 2001* (Cth) s 181(1). On the question of whether consideration of the interests of external stakeholders amounts to a breach of directors duties, see Hugh Grossman, 'Redefining the Role of the Corporation: The Impact of Corporate Social Responsibility on Shareholder Primacy Theory' (2005) 10 *Deakin Law Review* 572.

42 Orlitzky, Schmidt and Rynes, in a meta-analysis of 52 studies examining the link between corporate social and financial performance, made the following recommendation: 'Top managers must learn to use CSP [corporate social performance] as a reputational lever … and be attentive to the perceptions of third parties, regardless of whether they are market analysts, public interest groups, or the media. … the key to reaping benefits from CSP is a return from reputation …' Marc Orlitzky, Frank L Schmidt and Sara Rynes 'Corporate Social and Financial Performance: A Meta-analysis' (2003) 24(3) *Organizational Studies* 403, 426.

43 The Parliamentary Joint Committee Report, above n 1, [3.20] noted recent research which 'found that issues relating to competitiveness were cited frequently by large companies as the benefits of producing sustainability reports. The four most often cited benefits were reputation enhancement (82%); ability to benchmark performance (68%); operational and management improvements (64%); and improved management of risks (62%). All have some bearing on a company's competitiveness, revenue and

ethical investment funds, such as superannuation funds.[45] Improving employee morale is also often cited as a driver for CSR activities,[46] as people, given a choice, would rather work for a company saving the planet than one which is destroying it.

CSR also allows companies to combine normal risk management practices with the appearance of social responsibility. Providing a safe workplace beyond the legally required limits or a stress reduction program for staff is both beneficial for building the appearance of a caring work environment, as well as reducing the financial cost from staff injury and absenteeism.

Another strategic reason for the voluntary adoption of CSR activities is the desire to avoid CSR regulation.[47] This is openly acknowledged by companies,[48] often with the justification that legislative mandate would encourage a culture of box ticking and compliance, rather than a genuine expression of care for the communities in which companies operate.

Responding to community demands and expectations, and enhancing and retaining a good reputation for doing so, are also drivers for companies to embrace CSR. The ready availability, via the media and internet, of

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profitability.' Whether the adoption of CSR practices do in fact lead to increased profitability will be discussed in Part V below.

44 Ruth Phillips, 'Australia's NGOs Current Experiences of Corporate Citizenship' (2005) 17 *Journal of Corporate Citizenship* 21, 23.

45 The *Financial Services Reform Act 2001* (Cth) s 1013D(1)(l) imposes obligations on superannuation, life insurance and managed funds to disclose the extent to which they take account of environmental, social, labour and ethical standards in their investment decisions. See also Zappala, above n 4, 187; Brereton, above n 3, 3. The Parliamentary Joint Committee report also notes that '[a]ccording to the Ethical Investment Association (EIA), there has been a significant increase in Australian funds managed as sustainable investments, also known as Sustainable Responsible Investment (SRI). The EIA in its survey entitled Sustainable Responsible Investment in Australia 2005 reported that during the 2005 financial year, SRI managed funds grew by around 70 percent (from \$4.5 billion to \$7.7 billion). In the five years between 2000–05, SRI managed funds grew by over 2 000 percent. The main factors contributing to this significant increase were large superannuation funds adopting SRI policies for existing portfolios, and the strong investment performance of SRI managed funds.' Parliamentary Joint Committee report, above n 1, [2.70].

46 Parliamentary Joint Committee report, above n 1, xiv, where the committee stated that '[e]vidence also strongly suggested that an "enlightened self-interest approach" assists companies in their efforts to recruit and retain high quality staff, particularly in the current tight labour market'. See also Zappala, above n 4, 188; Moon, above n 10, 4.

47 Zappala, above n 4, 187.

48 The Parliamentary Joint Committee Report, above n 1, xiv and [4.35]. See also Johns, above n 27, 381, where he talks about the World Business Council for Sustainable Development, a group of 175 international companies committed to sustainable development. Johns comments that '[t]he bravest interpretation of the group is that it is attempting to hold back the tide of CSR regulation by appearing to be CSR friendly.'

information about corporate activities, good and bad, and the readiness of consumers and members of the community to complain and litigate is often noted.[49] Commentators frequently speak of CSR as the price to pay for the 'social licence to operate'.[50] Lucas cited 'evidence ... that Australians' attitudes are less complacent, compared with their past attitudes, about the behavioural conduct of major Australian companies.'[51] There is also a greater consumer sophistication and awareness of the environment and of product safety and manufacture, for example in relation to the manufacture of goods by child labour in third world countries.[52]

Another motivator for the uptake of CSR has been the need to respond to the demands placed on companies by government, international treaties and non-governmental organisations (NGOs), and by industry groups. It can be argued that while all of these bodies may have valid and laudable reasons for wanting companies to improve their behaviour as corporate citizens, they use corporations' need to protect and enhance their reputations as a means of boosting the acceptance of socially responsible activities as behavioural norms. This can be seen by the proliferation of reputational indices[53] that rate corporate behaviour and the call for mandatory triple bottom line reporting.[54]

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49 Johns, above n 27, 371.

50 Parliamentary Joint Committee Report, above n 1, [4.33]. Zappala, above n 4, 186 notes 'the need for companies to improve stakeholder relations and gain a 'social licence to operate' from the community', See also Donald P Robin and R Eric Reidenbach 'Social Responsibility, Ethics and Marketing Strategy: Closing the Gap between Concept and Application' (1987) 51 *Journal of Marketing* 44, 45.

51 Trevor Lucas, 'The Emerging Practice of Corporate Citizenship in Australia' (2004) 13 *The Journal of Corporate Citizenship* 28, 28

52 Zappala, above n 4, 186. See the NikeWatch campaign at: http://www.oxfam.org.au/ campaigns /labour/index.html

53 For example the international Global Reporting Initiative, http://www.globalreporting .org and the Australian Reputex SRI (Socially Responsible Investment) Index https://secure1.impactdata.com.au/reputex/public1/SRIIndex.asp, the St James Ethics Centre Corporate Social Responsibility Index http://www.corporate-responsibility.com.au/, the Dow Jones Sustainability index http://www.sustainability-index.com/. *The Age/ Sydney Morning Herald*'s Good Reputation Index (GRI) measures the performance of Australia's top 100 largest companies in terms of corporate governance, market performance, management and ethics, employee relations and social and environmental impact. Launched in 2005, the Australian Sustainable Asset Management Index invites the largest listed companies in Australia to participate in a 'corporate sustainability assessment'.

54 Brereton, above n 3, 3 remarks upon the increased requirements and expectations being placed on companies to report publicly on their environmental and social, as well as economic, performance. See further http://www.partnerships.gov.au/links/links _triple.shtml. Also the credible reporting standards promoted by Accountability at http://www.accountability.org.uk/. In 2003, the Department of the Environment and

It is interesting to consider here why these diverse organisations appear to be united in their desire to encourage companies to be responsible for outcomes which traditionally were the duty of government. Two reasons for governmental enthusiasm for the voluntary adoption of socially responsible behaviour by corporations are most commonly cited. The first is their wish to shift the cost and obligation for the provision of social services away from government, and the second is the desire to reduce the need to pass and enforce appropriate legislation.

Moon notes that

> Australian governments, like their OECD counterparts, seek alternative solutions to social and economic problems. Budgetary constraints along with bureaucratic models of management give incentives to find alternatives to what have traditionally been seen as governmental responsibilities.'[55]

The retreat of the welfare state has led to the increasing importance of NGOs, and, in turn, on the demands placed by NGOs on corporations.[56] It appears, therefore, that the enthusiasm of government for the protection of society is an enthusiasm for this to be done by others rather than by themselves. [57]

Heritage developed a guide for public environmental reporting, entitled 'Triple Bottom Line Reporting in Australia: A Guide to Reporting against Environmental Indicators'. The Department of Family and Community Services in 2004 released a draft guide to assist companies report on their social impacts. Both of these guides are based on the international Global Reporting Initiative guidelines.

55 Moon, above n 10, 2. This view is echoed by Lucas, who says that 'Additional leverage on corporate Australia to adopt business strategies that are more socially responsible has come from Australian governments mirroring the trend of various European national governments of revising their role and their relationships with business in the form of new social partnerships … A shift in the burden of social responsibility from the Australian federal government onto families and communities, and more recently onto business, has resulted from a transformation of Australia's post war welfare state coupled with a move towards a deregulated, global market by the progressive removal of barriers to freer trade.' Lucas, above n 51, 28, 29.

56 This situation also occurred in the United States. Wulfson notes that 'Reaganomics reduced government funding to non-profit organizations, thereby shifting the responsibility to corporations and foundations. In 1986 Congress passed the Tax Reform Act, designed to encourage greater financial investment by the private sector into social programs and issues'. Myrna Wulfson, 'The Ethics of Corporate Social Responsibility and Philanthropic Ventures' (2001) 29 *Journal of Business Ethics* 135, 143. See also Phillips, above n 44, 21. Phillips observes, at 23, that 'the proportion of people living in poverty has increased by 30% since 1973' and at 24, that Mission Australia's 'further motivation was prompted by the recognition of a pattern whereby governments are searching for opportunities to lessen the burden on the public purse if it can be provided elsewhere.'

57 Horrigan points to 'the heavy emphasis in Australian corporate and political debate on matters such as minimising governmental regulation of business, maximising shareholder value, promoting investor security, catching corporate renegades, enhancing competition, creating business sustainability and responding to market

The growth and proliferation of NGOs which promote CSR and sustainability has been remarked upon by a number of commentators. Phillips quotes Philanthropy Australia in saying that there are 700,000 NGOs in Australia.[58] Prominent NGOs playing a significant role in the call for CSR include Amnesty, the International Labour Organisation, the United Nations, the Australian Conservation Foundation, the Smith Family, Mission Australia, Oxfam, SustainAbility, AccountAbility and the St James Ethics Centre.

The appropriateness of relying on NGOs as the providers of services normally provided for by government or as the mechanism for putting pressure on corporations[59] to supply those services has been questioned by some. Johns states: 'The question must be asked, "even if the public interest could be defined, why would a process of bargaining between publicity seeking, single issue NGOs and profit seeking companies necessarily reach the right outcome?"'[60]

Johns describes the pressure on companies from NGOs as a 'tool in the transfer of power'.[61] He contends that 'CSR advocates have discovered that they can place corporations under some pressure without recourse to government, the so-called soft path to power'[62] – 'business doing the work of government in conjunction with "other societal actors"'.[63] Whether this power has been deliberately sought, or is merely a consequence of the increasing reliance by government on NGOs is debatable.

The increase in the number of international treaties has further added to obligations by corporations to behave in a socially responsible manner,

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needs.' Bryan Horrigan, 'Fault Lines in the Intersection between Corporate Governance and Social Responsibility' (2002) 25 *University of New South Wales Law Journal* 515, 519.

58 Phillips, above n 44, 22. See also Brereton, above n 3, 3.

59 Zappala notes that NGOs play a role in applying pressure on corporations for greater transparency and accountability particularly in the areas of environmental impact and human rights. Above n 4, 187.

60 Johns, above n 27, 371, quoting Martin Wolf, 'Corporate Social Responsibility' New Zealand Business Roundtable, (2004) Wellington, 12. It was noted in the Parliamentary Joint Committee report, page xvii, that '[t]here was a concern that some not-for-profit organisations, although performing worthy community services and often having limited financial and staffing resources, were not fully considering the environmental and social impact of their own activities. The committee recommends that the not-for-profit sector should endeavour to meet the same standards of those expected of the for-profit sector in considering the interests of stakeholders.'

61 Johns, above n 27, 376.

62 Ibid 370

63 Ibid 371.

despite the absence of a regulatory imperative to do so.[64] These include the United Nations Global Compact,[65] International Labour Organisation's Declaration on Fundamental Principles and Rights at Work,[66] the United Nations Environment Programme's Rio Declaration on Environment and Development[67] and the United Nations Convention Against Corruption.[68] Again, the need to protect reputations against allegations of breach of these treaties provides a powerful incentive for companies to comply with their requirements, especially when their business is conducted internationally.

Arguably in response to these reputational pressures and the desire to avoid more onerous regulation and compliance costs, there has been a growth in the number of voluntary national and international schemes being promoted by industry bodies.[69] It can be seen, therefore, that the building and protection of corporate reputations is a leading driver of the adoption of CSR principles. As this objective is consistent with the generation of business and therefore with the maximisation of shareholder wealth, there is no breach of directors' duties. However, there are a number of causes for concern when governments take advantage of this to shift, at least in part, responsibility for aspects of social protection and the provision of welfare services onto corporations. This will be explored in the next Part.

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64 Note also the draft United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, launched in 2003. These are opposed by many corporations and many governments. See further David Kinley and Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) *Human Rights Law Review* 447; David Kinley, Justine Nolan and Natalie Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 29 *Company and Securities Law Journal* 30.

65 http://www.unglobalcompact.org/

66 http://www.ilo.org/dyn/declaris/DECLARATIONWEB.ISSUESHOME?var_language=EN

67 http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163

68 http://www.unodc.org/unodc/crime_convention_corruption.html

69 Brereton, above n 3, 3. Brereton cites the example in 1999 of 'ten major mining companies, belonging to the World Business Council on Sustainable Development's Mining and Minerals Working group, [which] launched the Global Mining Initiative. It launched the Mining Minerals and Sustainable Development project in 2000, collectively funded by 28 mining companies, and [is] managed through a London Based NGO, the International Institute for Environment and Development.' Ibid 4.

A New Paradigm for CSR in Australian Society

It was observed above that CSR is an ill-defined concept, and that some companies struggle to incorporate it into their mainstream activities. The ideas of CSR are vigorously promoted by government, who appears anxious to shift some of the burdens of social welfare onto corporations whilst at the same time limiting the actual regulatory burden on them. Corporations respond because of a desire to protect and enhance their reputations, and this desire is arguably exploited by both government and NGOs who see the protection of reputation as a means of furthering their own objectives.

This Part will ask some critical questions about the role of CSR in Australian society. Is it appropriate for companies to be increasingly responsible for the welfare of society, or should their focus be on the generation of profits for shareholders and the consequent payment of tax to a government which bears this responsibility?[70] Are there dangers in governments transferring social responsibility to corporations? If not, is it sufficient for the extent of that responsibility to be purely voluntary on the part of corporations, so that they can decide the objects and degree of their CSR activities?

Subject to meeting their legal liabilities, human beings as natural legal persons can choose to do what they like with their own resources, including generous philanthropy and socially responsible activities. Companies, on the other hand, are artificial legal persons created for the purpose of combining shareholder funds in order to maximise their return. Milton Friedman famously observed that

> [i]n [a free economy] there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud. …
>
> The view has been gaining widespread acceptance that corporate officials and labour leaders have a 'social responsibility' that goes beyond serving the interests of their stockholders and their members … few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibilities other than to make as much money for their stockholders as possible. This is a fundamentally subversive doctrine … the claim that business should

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70 Wilson asks 'Are directors to be given carte blanche discretion to decide appropriate social causes in which to invest? Are directors, and the corporations under their management, the appropriate vehicles for redistribution of wealth in society?' Therese Wilson, above n 40, 282.

> contribute to the support of charitable activities ... is an inappropriate use of corporate funds in a free enterprise society. [71]

This neo-classical economic perspective has its supporters. Some maintain that it is an abuse of the trust of members of the company if the funds they contribute are used for purposes other than the profitability and continuation of the company. Von Hayek[72] argued that companies would gain 'undesirable and socially dangerous powers' if they deviate from the shareholder profit maximisation objective by taking into account 'social considerations' in their decision making.[73]

Similarly in the United States, Porter and Kramer report that '[e]xecutives increasing see themselves in a no-win situation, caught between critics demanding ever higher levels of "corporate social responsibility" and investors applying relentless pressure to maximise short-term profits'.[74]

Donations to charity are one context in which the debate on the proper role of CSR has arisen. Wilson relates the conflict which took place in the wake of the Asian tsunami. In early January, 2005, a spokesman for the Australian Shareholders association, Stephen Mathews, criticised corporate donations to aid in tsunami relief. It was reported that:

> The Australian Shareholders Association has expressed disapproval at companies pledging money to the tsunami relief effort in Asia, saying they have no approval for their philanthropy. Association spokesman Stephen Mathews says firms should not generally give without expecting something in return. Mr Mathews says that in most circumstances, donations should

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71 Milton Friedman, 'Capitalism and Freedom', University of Chicago Press, 1962, 133.

72 Frederick A von Hayek, 'The Corporation in a Democratic Society: In Whose Interests Ought It and Will It be Run?' in HI Ansoff (ed) *Business Strategy* (1969) 225.

73 David Birch and George Littlewood, 'Corporate Citizenship Some Perspectives from Australian CEOs' (2004) 16 *The Journal of Corporate Citizenship* 61. Birch and Littlewood relate the opinions of corporate CEOs who 'express concern that the bigger picture, the more process-orientated view of corporate citizenship, poses dangers for refocusing on what many consider to be the principal objective of a shareholder company: namely, the creation of shareholder value and positive economic returns to society. This is, they assert, the principal core business of business' at 65. The data referred to by Birch and Littlewood was derived from the Third National Conference on Corporate Citizenship, held in Melbourne 2003. Questions were directed to 28 invited CEOs and senior executives of some of Australia's leading businesses, at 62. As a result of the views articulated by the CEOs, Birch and Littlewood concluded that 'business, in making the move beyond rhetoric, is actually beginning to realise what it has gotten itself into. In fact, some may well now be in retreat from those commitments, as they experience increasing calls for greater access and influence from those community organisations that business has been so quick to label as its key stakeholders, without always knowing how to handle them as such.' At 66.

74 Porter and Kramer, above n 39, 5.

> only be made in situations that are likely to benefit the company through greater market exposure.[75]

This argument is consistent with Milton Friedman's view that 'corporate expenditure on social causes is a violation of management's responsibility to shareholders to the extent that the expenditures do not lead to higher shareholder wealth'.[76]

However, in the case of conspicuous donations to charitable causes, the company's behaviour may be both socially responsible as well as profitable, due to the protection or enhancement of the company's reputation.[77] Indeed, in relation to the tsunami donations, Wilson recounts that 'community attitudes at the time seemed to be in favour of such donations, and the corporate sector in fact received criticism for not giving enough.'[78]

Two factors contribute to the consideration of whether CSR is, in fact, profitable and therefore acceptable under neo-classical economic analysis. The first is the benefit to reputation that flows from being seen to be socially responsible. There is extensive literature internationally, particularly in the United States, on the issue of whether CSR is profitable. Some researchers have concluded that improvement in reputation from socially responsible behaviour has a positive correlation with increased profitability.[79]

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75 Wilson, above n 40, 278.

76 Bernadette M Ruf et al, 'An Empirical Investigation of the Relationship between Change in Corporate Social Performance and Financial Performance; A Stakeholder Theory Perspective' (2001) 32 Journal of Business Ethics 143, 143.

77 Wilson describes generous donations from leading corporations. 'Reports of corporate donations to tsunami relief included $1million each from Qantas, National Australia Bank, Telstra, the Commonwealth Bank, Foster's Group, Visy Industries, Westfield Group, Travelex and News Corp. ANZ donated $500,000 to match $500,000 donated by staff …' at 279-280. Wilson notes that '[i]n such cases even "social activism" CSR takes on strategic characteristics, making it legally acceptable. For corporations who do not need to be concerned with consumer approval, and which could not justify philanthropy on the basis of benefiting from an improved social reputation, the position is less clear.' Above n 40, 280.

78 Ibid 280.

79 Ruf et al, above n 76. The research by Ruf et al found that sales increase straight away, but the benefits from this are offset in the short term by the costs of the CSP measures. The increase in profitability flows through at a later time. They note that 'improvements in CSP [corporate social performance] have both immediate and continuing financial impacts. … This finding suggests that consumers are aware of and support a company's actions with respect to meeting its social responsibility. …. Profitability impacts of CSP improvements are not immediate but may be observed in later time periods'. At 151. A positive association between business performance and increased levels of corporate citizenship was also observed in both France and the United States. Isabelle Maignan and O C Ferrell. 'Measuring Corporate Citizenship in Two Countries: the Case of the United States and France' (2000) 23 *Journal of*

However, there are other studies with neutral or contrary results.[80] The inconsistency in the findings of these studies has been attributed to a variety of factors.[81] Definitional differences in the term 'CSR' and the lack of distinction in many studies between strategic CSR, altruistic CSR[82] and 'coerced' CSR[83] has caused problems.[84] In addition, measures of CSR have been inconsistent. Some researchers use reputational index rankings and other use proxies such as environmental performance; as

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Business Ethics 283. See also Abagail McWilliams and Donald Siegel, 'Corporate Social Responsibility: A Theory of the Firm Perspective' (2001) 26 *Academy of Management Review* 117; Michael V Russo and Paul A Fouts, 'A Resource Based Perspective on Corporate Environmental Performance and Profitability' (1997) 40 *Academy of Management Journal* 534.

80 Johns quotes research by Laffer which notes that 'CSR initiatives imposed significant program and administrative costs, and that businesses that are inclined to engage in CSR initiatives tend to be those that are already financially successful and can afford the added "CSR overhead"'. Johns, above n 27, 375. Pava and Krausz analysed 21 prior studies conducted over a 20 year period, and found that twelve reported a positive association between social and financial performance, one reported a negative association and eight reported no measurable association: Moses Pava and Joshua Krausz 'The Association between Corporate Social-Responsibility and Financial Performance: The Paradox of Social Cost' (1996) 15 *Journal of Business Ethics* 321, 324. See also Jean McGuire, Alison Sundgren and Thomas Schneeweis 'Corporate Social Responsibility and Firm Financial Performance' (1988) 31(4) *The Academy of Management Journal* 854, 869, where it was found that favourable financial performance was a variable influencing the uptake of CSR rather than CSR having an effect on financial performance.

81 McWilliams, Siegal and Wright observe in relation to an overview of twelve surveys on the profitability of CSR that '[t]here is little consistency in these findings. This may be as a result of inconsistency in defining CSR, inconsistency in defining firm performance, inconsistency in samples, imprecision and inconsistency in research design, misspecification of models, changes over time, or some more fundamental variance in the samples that are being analysed'. Abagail McWilliams, Donald Siegal and Patrick Wright 'Corporate Social Responsibility: Strategic Implications' (2006) 43(1) *Journal of Management Studies* 1, 12.

82 Hillman and Keim's 2001 study concludes that there was a positive correlation between firm performance and strategic CSR, and a negative relation between firm performance and altruistic CSR. Amy Hillman and Gerald Keim 'Shareholder Value, Stakeholder Management and Social Issues: What's the Bottom Line?' (2001) 22 *Strategic Management Journal* 125. Pava and Krausz, above n 80, 334 note that effective social responsibility 'must fit the organization's value system' and be an integral part of the enterprise rather than a distraction from it. They conclude that 'environmental pollution, employee and consumer relations, and product quality ... are inextricably linked with financial performance'. Above n 80, 348.

83 This occurs, for example, when a firm is pressured by a community activist group into making certain changes in its behaviour. As a result of the coercion, the firm does not enjoy the same sorts of reputational enhancements are firms engaging in voluntary CSR.

84 McWilliams, Siegal and Wright, above n 81, 10.

measures of financial performance, some use improvements in share price and others use end of year financial performance figures.[85]

Importantly, studies have not established causation, and the causative aspects of improvements in financial performance have been difficult to identify. This is particularly so in industries such as banking where all major competitors are active in CSR and therefore attracting additional market share is an unlikely explanation.[86] The Parliamentary Joint Committee report concludes that

> [i]t should be noted that because of the relatively recent emergence of the concept of corporate responsibility, and the fact that 'responsible corporate behaviour' is said to be a value proposition for companies in the longer-term, it is premature to conclude that there is any definitive connection between 'responsible corporate behaviour' and improved financial performance.[87]

The second factor in the consideration of whether CSR is profitable and therefore acceptable under neo-classical economic analysis is the investment of funds in 'ethical' investments. The Parliamentary Joint Committee report notes that

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85 McGuire, Sundgren and Schneeweis, above n 80, 857-859.

86 This observation is confirmed by McWilliams, Siegal and Wright. 'The question of whether firms can use CSR to achieve a sustainable competitive advantage is [an] important question. ... [A] firm engaging in a CSR-based strategy can only generate an abnormal return if it can prevent competitors from imitating its strategy. In competitive markets, this is unlikely, since CSR is highly transparent, with little causal ambiguity.', above n 81, 6. Pava and Krausz ask an excellent question: 'Simply put, if doing good is always costless, which isn't everyone good? ... even a scoundrel would eventually notice that it is in his or her best interests to choose CSR. We therefore need a view which can explain the persistence of scoundrels, as well as saints.' Pava and Krausz, above n 80, 331.

87 Parliamentary Joint Committee report, above n 1 [3.27]. The Parliamentary Joint Committee report noted evidence from a variety of studies with contrary findings. 'The committee was referred to a number of studies which attempt to demonstrate a positive or negative relationship between company financial performance and responsible corporate behaviour. A 2005 study by researchers in the UK investigated the relationship between corporate social performance and financial performance, and found that companies which rated poorly in corporate responsibility terms achieved higher financial returns than those which rated well: ...firms with higher social performance scores tend to achieve lower returns, while firms with the lowest possible [corporate social performance] scores of zero considerably outperformed the market' at [3.22]. 'Alternatively, other research indicated a positive relationship. The results from CPA Australia's Confidence in Corporate Reporting 2005 survey demonstrate that a significant majority of respondents (86%) agreed with the proposition that "better management of a company's social and environmental concerns benefits shareholders." Interestingly, there was general agreement on this proposition from the various classes of respondents which included shareholders, analysts, advisors and brokers, directors, CEOs and CFOs.' Ibid, [3.23].

> [a] comparison of average investment returns also clearly demonstrates the strong performance of Australian funds managed by 'ethical' investors compared with mainstream investors. ... Although there is insufficient empirical research to support this view emphatically as yet, based on the evidence so far, the committee is of the opinion that corporations that engage in material corporate responsibility activities may better and more completely assess medium and long term risk and business opportunities. [88]
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> ...
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> Although past returns do not guarantee future performance, the sustained positive trend, particularly over the long term, is an encouraging development and lends weight to the connection between good corporate behaviour and strong financial performance. [89]

On the other hand, a study by Ali and Gold on returns from ethical investments concludes that 'the empirical analysis demonstrates that a financial sacrifice is involved when excluding sinful industries [defined by the authors as alcohol, tobacco and gambling] from a market portfolio in the Australian context'[90]. Indeed, for the purpose of this exercise, it is difficult to define what amounts to either 'ethical' investments or to sinful ones. BHP Billiton, responsible in the past for substantial environmental damage at its Ok Tedi mine in Papua New Guinea, is one of Australia's foremost exponents of CSR.[91]

The British American Tobacco Australia website has substantial information on its CSR program, including environmental health and safety, community involvement, and youth smoking prevention.[92] Given the tax on tobacco products per annum in Australia is 70% of tobacco company revenue, or an estimated $5.2 billion in 2004-2005, it is arguable that this contribution to social wellbeing by tobacco companies extends well beyond individual CSR initiatives, despite the health related costs of smoking which must be offset against this figure. The Nike

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88 Ibid [2.71].

89 Ibid [2.72].

90 Paul Ali and Martin Gold, 'Analysing the Cost of Ethical Investments' (2002) 3 *Journal of the Australian Securities Institute* 13.

91 This was recognised in the Parliamentary Joint Committee report, above n 1, [3.12].

92 The BATA website states that 'if a business is manufacturing products that pose real risks of serious disease, we believe it is all the more important that it does so responsibly.' Bata supports charities including Mission Australia, Conservation Volunteers Australia, Guide Dogs Australia, The Benevolent Society, Lifeline, Barnardos, The Northcott Society, Life Saver Rescue Helicopter, and The Abused Child Trust (QLD). On the Corporate Social Responsibility Index, a project of the St James Ethics Centre, the international parent company, British American Tobacco, received a gold star rating in 2005, the highest ranking available.

http://www.bata.com.au/OneWeb/sites/BAT_53RF5W.nsf/vwPagesWebLive/80256AED003D81CC80256ABE00345D08?opendocument&SID=&DTC=.

company, widely criticised for using underpaid labour in third world countries, now lists all its factories on its website[93] as part of a substantial corporate responsibility report.[94]

While it may be debatable whether CSR is actually doing good for society, it is also important to question whether it may be doing harm. There are a number of arguments that can be raised to support this.

First, while there is an enormous international literature on the profitability of CSR to individual firms, the wealth of discussion of CSR conspicuously lacks a rigorous examination of the costs and benefits *to society as a whole* from its adoption. It is assumed to be beneficial to all concerned – the company benefits from improved reputational standing, government benefits from shifting the costs of the provision of certain services, and society benefits from the CSR initiatives of the corporations.

But this analysis makes two mistakes. It assumes that these benefits actually accrue, and it ignores the costs involved.[95] Because there is a lack of conclusive evidence that CSR is profitable, there is no evidence that the costs to companies of engaging in CSR do not exceed the benefits which the company receives. The benefits to society are also questionable. In 2005, the Department of Family and Community services released a lengthy report entitled 'Corporate Australia Building Trust and Stronger Communities? A Review of Current Trends and Themes'.[96] The authors noted that 'the focus on partnership processes has come at the expense of capturing partnership program outcomes – that is, the positive or negative impacts of the program.'[97] They reported that

> [i]mportantly, there has been no research worldwide that has developed social capital and capacity building indicators to empirically examine the ways in which (some) companies, via their cross-sectoral partnerships and programs, are strengthening communities and generating social capital.[98]

93 http://www.nike.com/nikebiz/nikebiz.jhtml?page=29&item=fy04.

94 It is interesting to contrast the Nike report with the information contained from the OxFam Australia website on sportswear manufacture, available at http://www.oxfam.org.au/campaigns/labour/index.html.

95 Baron remarks that '[c]orporate social responsibility is often advocated as a normative component of the social contract between business and society, yet competition and markets demand efficiency. To the extent that private politics [the actions of NGOs] and CSR impose costs on a firm, its competitive position relative to its rivals can suffer.' Baron, above n 7, 8.

96 The Community Business Partnership report, above n 18.

97 Ibid 5

98 Ibid 12

The costs also need to be quantified. If a company gives a charitable donation,[99] the money this consumes[100] could be used in a number of alternative ways which could also have a positive economic impact on society – in reducing the cost to consumers of its products, in paying higher wages or in paying larger dividends. The donation may not be the most economically efficient or effective way of achieving the specified social objective, and more worryingly, the CSR debate fails to ask the question whether the relevant behaviour is efficient or effective or even if it should be. If the donation is tax deductible, then it reduces the revenue payable to the government which could be used to provide services, for example, in health, education or protection of the environment.

Secondly, engaging in CSR may complicate the focus of corporate decision making and distract firms from the activities which may benefit society the most – creating a strong business with secure jobs as well as favourable returns to shareholders, resulting in economic growth for society.[101]

In this regard, there is a particular risk to companies from the importance of CSR to the protection and building of reputation. The more prevalent CSR becomes and the more it is endorsed by government as 'the right thing' to do, the more that all companies will feel pressured to do so, including companies which can ill-afford to spare the money. This may become a problem especially for small to medium companies as the trend set by the large corporations permeates down to them. Adoption of CSR could therefore come at a cost of financial viability for these companies, or have the effect of inhibiting the growth of their business.

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99 The Giving Australia Report of October 2005 estimates business donations at $3.2 billion from 525,900 businesses, or 67% of all businesses in the 2003-04 financial year. See the Philanthropy Australia website at: http://www.philanthropy.org.au /research/fast.htm.

100 The National Australia Bank website reports that in 2005, of the $17.7 million dollars of their 'Corporate Community Investment', one part of their CSR program, $2.7 million was charitable gifts, $1.8 was in kind volunteering, $5.4 million was foregone revenue, $2.2 was community investment, $4.3 was commercial initiatives in the community and $1.2 was management costs. At: http://www.nabgroup.com /0,,76551,00.html.

101 Johns comments that '[CSR] radically overturns the social contract for business, which includes obligations to obey the law, honour contracts and agreements and respect the rights of others. It ignores the fact that economic value is produced by owners who make their savings available to other members of society to put them to use in productive ways. The owners have an exclusive moral claim to the benefits produced by their activities, as others have a moral claim for the benefits produced by their labour or other contracted services. Such a base provides the certainty from which claims and counterclaims may be settled.' Johns, above n 27, 372.

Thirdly, the general encouragement and endorsement of CSR by governments and NGOs arguably allows companies to hide their poor practices in some areas behind elaborate window dressing. Moon quotes an interviewee:

> The community ultimately gains the greatest benefits from a highly successful and profitable enterprise which operates within these high corporate standards [of ethical, social, safety, environmental, management and legal behaviour] rather than a company which has low standards but makes significant payments to community groups.[102]

Fourthly, the more that companies do or admit responsibility for, the more that governments may relinquish their own responsibility in those areas.[103] If there were general acceptance of corporations as liable for the maintenance of social and environmental conditions, it would allow governments to shift those duties away from an entity which is accountable to the community, namely themselves, and on to others which are not accountable in the same way. Corporations are only answerable via the imprecise mechanism of 'reputation' which is capable of distortion both by window dressing and public relations 'spin'. It is arguably just as wrong to make companies responsible for the improvement of social conditions as it is for governments to be relieved of that responsibility.[104]

The dangers of this can be seen with the institutionalisation of charity to hospitals. It is well accepted in society that money needs to be raised from public appeals,[105] private benefactors, philanthropic foundations and companies to fund the purchase of major equipment for hospitals. In the same way, it is accepted that schools needs to raise money to fund buildings, computer purchases and other 'extras', and sponsorship is commonly being suggested as a way of doing this. If CSR becomes more

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[102] Moon, above n 10, 8.

[103] Many examples exist of corporations contributing to programs traditionally undertaken by governments. For example, Shell Australia is involved in a childhood reading program, and supports child health research, the conservation of the coastal environment, indigenous communities and a number of charities such as World Vision and Save the Children. BP Australia is involved in Clean Up Australia, Kids Under Cover, Education Grants, Retail Diversity and the Return to School Program, as it states that it is 'focused on sustainable human progress, growth in jobs and wealth creation in the communities in which we operate, rather than traditional philanthropic or sponsorship funding.' See: http://www.bp.com/sectiongenericarticle.do?categoryId=9008719&contentId=7016385. BHP Billiton supports a number of different indigenous and conservation programs.

[104] Johns comments that 'CSR displaces the corporation with an entity, for which the directors patently cannot be responsible, the society.' Johns, above n 27, 372.

[105] An example is the annual Good Friday Appeal by the Royal Children's Hospital in Victoria.

entrenched, will governments increasingly hand over responsibility to the private sector for the funding of hospitals, schools and universities? And if so, will this money be distributed evenly or given where it is needed most,[106] or will it go to the places where companies have their client bases?[107] It should, if it is to enhance their reputations and deliver profit maximisation benefits to their shareholders.

Fifthly, imposing responsibility on companies to care for society has the potential to allow important aspects of social protection to be overlooked. Companies will tend towards the protection of stakeholders where the damage from their non-protection is greatest. This includes consumer groups and employees, where adverse publicity is likely to have the most detrimental effect. Victims of tort, on the other hand, are less likely to be considered, unless the size of the class of claimants is large.

Finally, it can be maintained that CSR, with its rhetoric of consideration of stakeholder interests, simply raises expectations, and does not provide a formula for resolving disputes between competing interests. The fact that corporations adopt CSR voluntarily means that no one stakeholder group has standing to challenge corporate decision making on the basis that their interests were not given consideration or priority.[108] The reality is that the directors can legally defend any decision which puts shareholders first, arguably demonstrating the shortcomings of CSR as an effective means of social protection.

The negative aspects of CSR are therefore an important consideration when weighing up whether there should be such widespread encouragement of CSR by governments, NGOs and even by companies themselves. However, there are undoubtedly some benefits from CSR activities which could not easily be replicated by government.

For example, the initiative by some retail corporations and communities to protect the environment by replacing plastic bags with cloth alternatives would be difficult for governments to match. Legislation prohibiting plastic bags would be difficult and costly to enforce. The

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106 Friedman states that 'corporate officials are in no position to determine the relative urgency of social problems or the amount of organizational resources that should be committee to a given problem'. Friedman, above n 71, 133.

107 Porter and Kramer note that '[t]he majority of corporate contribution programs are diffuse and unfocused. ... Rather than being tied to well-thought-out social or business objectives, the contributions often reflect the personal beliefs and values of executives and employees.' Porter and Kramer, above n 39, 6.

108 Horrigan notes that the stakeholder view 'does not offer any self-evident or easy way of "adjudicating the competing demands of various groups" of shareholders and stakeholders in terms which can be sheeted home to directors, officers and corporate decision-makers and advisors in terms of specific guidance.' Above n 57, 539.

Social Compass report also noted cross sector partnerships which can achieve objectives that individuals are not able to achieve on their own 'because such partnerships combine resources and skills, can be an effective way to build social capital, community capacity, increase the skills required for the new economy and leverage resources.'[109]

The increasing vulnerability of corporations to the scrutiny by NGOs has had the effect of applying pressure to multinational corporations to improve their workplace practices in third world countries.[110] It would be difficult for the Australian government to apply pressure in the same way. To reconcile these points of view, and as a genuine way of taking into account the interests of corporate stakeholders, it is suggested that a new paradigm of corporate social responsibility be developed, along the following lines.

First, the primary responsibility of corporations is to run a financially sound business, for the benefit of all their stakeholders.[111] This will include paying dividends to shareholders, providing good working conditions and paying the full entitlements of employees, and ensuring that creditors and taxation authorities are paid in full and on time. Socially responsible corporations should also avoid all artificial schemes to deprive taxation authorities, employees or creditors of their entitlements. The community will benefit from the jobs created and the goods and services produced, as well as the taxation revenue paid.

Secondly, socially responsible corporations should obey the spirit, as well as the letter, of the law. This includes all laws relating to the protection of the environment, occupational health and safety, conditions for employees, and laws concerning restrictive trade practices and the protection of consumer rights.

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[109] The Community Business Partnership report, above n 18, 30. Phillips describes a number of partnerships entered into by leading charities and corporations in Australia which realised benefits that could not be achieved otherwise. '[The Smith Family] recognised the need to expand its geographical coverage and to develop core capacity-building programmes such as the educational programme 'Learning for Life'. Because it did not have the internal capacity to achieve such large scale change in a short time period, it turned to the corporate sector to borrow their expertise.' Phillips, above n 44, 23.

[110] Phillips reports that World Vision Australia (WVA) enters into partnerships agreements with corporations to assist them in achieving social responsibility benchmarks. 'For example, of a company is expanding into South East Asia and is aware of specific issues such as the trafficking of children (a core strategic interest of WVA) this may be the basis of a partnership.' Ibid 22.

[111] Porter and Kramer suggest that '[t]he acid test of good corporate philanthropy is whether the desires social change is so beneficial to the company that the organisation would pursue the change even if no one ever knew about it.' Porter and Kramer, above n 39, 15.

Thirdly, socially responsible corporations should develop good reputations from producing quality and safe products and services, the price of which does not incorporate a premium to pay for philanthropic activities. Advertising is a necessary aspect of promotion, and doing so in a manner which benefits the community, such as by the sponsorship of a community activity, is to be encouraged. However, most importantly, the costs and benefits of doing so should be evaluated in the same way that other promotional strategies are.

In addition, companies should be supported in other behaviour to benefit the community provided that it does not have an adverse impact on their ability to carry out any of the responsibilities set out above. However, companies should not take on aspects of social responsibility that are arguably the province of government. Pava and Krausz describe the ideal corporate social responsibility program existing where there is a high degree of local knowledge, the corporation is responsible for the harm and takes responsibility for correcting it, stakeholders broadly agree and it enhances financial performance, although the authors agree that the first three are likely to be traded off against the last.[112]

In its turn, socially responsible governments have a valuable role to play in ensuring that corporations are able to fulfil their proper functions. This includes matters such as the proper regulation and policing of environmental protection, employment conditions and consumer protection. Governments can encouraging a culture of partnerships between business, governments and NGOs where there is a gain to be made that could not be made otherwise, and where it is quantifiably and demonstrably beneficial to each of the parties concerned.

Government should encourage and facilitate, by removing bureaucratic impediments and by regulatory reform, the improvement of corporate behaviour. This is exemplified by some of the present industry initiatives where businesses combine to codify good behaviour – the 'competition to be good'.[113] This is particularly useful in entrenching sound and desirable

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[112] Moses Pava and Joshua Krausz, 'Criteria for Evaluating the Legitimacy of Corporate Social Responsibility' (1997) 16 *Journal of Business Ethics* 337, 346.

[113] The Parliamentary Joint Committee report, above n 1, noted, at xvi - xvii, '[a] number of initiatives by business and industry to encourage corporate responsibility were brought to the attention of the committee. The mining and finance sectors provided encouraging examples, and the committee is strongly supportive of such sector wide, industry-led projects. Of particular interest is an example from overseas: the United Kingdom industry-led organisation Business in the Community, a network which works with business to develop practical and sustainable solutions to manage and embed responsible business practice. The committee supports the establishment of such a network in Australia, and recommends that the Australian Government provide seed-funding for the network.

business practices, to help reduce the temptation to make quick and easy gains from breaking the law or from 'cutting corners'.

Governments can also build and support a strong economy, with stability for the protection of corporate enterprise and the protection of jobs. In addition, it should set the example of corporate citizenship, thereby modelling the way and encouraging business to follow suit.[114]

Conclusion

This article has asked some critical questions about the role of CSR in our society and has asked whether the widespread growth of CSR and its enthusiastic support by government is beneficial to society.

It began with an examination of the meaning of CSR, which concluded that there is no accepted definition. More importantly, there was disagreement about whether CSR ought to be integrated into the core of the corporation's business, and even where companies were willing to do so, there was a lack of understanding about how this could be done.

While there are already considerable amounts of legislation requiring companies to act in a socially responsible way, there are still a number of government initiatives, such as the Prime Minister's Community Business Partnership, which encourage further adoption of CSR strategies by companies. The recent Parliamentary Joint Committee report made a series of recommendations which will further advance CSR uptake.

Because of the desire to protect and enhance their reputations, corporations have willingly embraced CSR, and this has been actively encouraged by governments and NGOs for purposes of their own. Despite this appearance of unanimity, however, there are a number of dangers from the widespread acceptance of CSR. These include a consideration of whether the costs exceed the benefits, whether it presents a distraction to business from their true function of profit maximisation and whether it is desirable for government to increasingly cede responsibility to the private sector.

Most importantly, it was suggested that there is a very real risk from governments endorsing a visible kind of CSR which designates corporations as good citizens because of their support for discrete projects or causes, where appearance could triumph over substance.

It was therefore suggested that a new paradigm of corporate social responsibility be developed, which focuses on companies fulfilling their

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[114] The Parliamentary Joint Committee report, ibid, noted, at xvii-xviii that '[t]he committee acknowledges that government could do more to encourage and facilitate corporate responsibility. One way is by providing leadership in best practice, primarily through its own agencies and activities.'

traditional roles in a manner that is socially responsible, with proper support from governments. This new definition is a genuine way of taking care of the interests of corporate stakeholders, rather than the piecemeal approach of superficial philanthropy.

To recommend that business no longer supports charities appears heretical. Indeed, realistically, it would be impossible to prevent companies from contributing to the communities in which they operate. Nonetheless, it is important to be careful in advocating more widespread adoption of CSR without considering what that means and what the consequences could be. Like all sound business decisions, the costs and benefits must be weighed up.