

21ST CENTURY CORPORATE SOCIAL RESPONSIBILITY TRENDS – AN EMERGING COMPARATIVE BODY OF LAW AND REGULATION ON CORPORATE RESPONSIBILITY, GOVERNANCE, AND SUSTAINABILITY

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I OVERVIEW

This article examines key aspects of the emergence across a number of jurisdictions of a distinctive body of comparative corporate law and regulation relating to corporate social responsibility (CSR).¹ The story of CSR in the 21st century is a story of progressive business sensitization to systems and dynamics of governance beyond government, regulation beyond law, and responsiveness beyond responsibility. It is a story of a rapidly growing alignment across many individual businesses, industry sectors, and geopolitical regions between those systems and dynamics of governance, regulation, and responsibility, on one hand, and a company's business model, strategy, and impact, on the other. It marks the progressive development of corporations as organs of both societal and corporate governance, sites for the interaction of both public and private interests,² participants in various forms of organisationally and societally orientated regulation, and holders of shared, relational, and other forms of connected outward-looking and inward-looking responsibilities. It is also a story of the emergence of a

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¹ This article revises and amplifies material from the author's forthcoming book for Edward Elgar Publishing (UK) *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices across Government, Law and Business*. It forms part of a wider research project on societal, public, and corporate responsibility and governance from comparative and international perspectives, drawing upon work on this wider project developed through the author's involvement in two ARC-funded research projects on public and corporate governance (ie ARC Linkage Grant LP0348470 for 2003-2007 and ARC Discovery Grant DPO666665 for 2006-2010). It also constitutes work arising from the author's research grants and other University funding received from Macquarie University, including for a period as a Visiting Professor at the Wharton Business School, attached to the Department of Legal Studies and Business Ethics and the Zicklin Centre for Business Ethics Research.

² See, for example, the theory of corporate constitutionalism developed in S Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (2007).

distinctive CSR movement.³ Both the developed and developing worlds are rapidly reaching the point where they must decide if today's global CSR movement is a passing social fad, a threat to economically efficient corporate capitalism, an intrinsic element of corporate responsibility, or even a key to humanity's long-term survival. CSR literacy is quickly becoming a primary imperative for a variety of actors in a multiplicity of roles across governmental, business, and community sectors nationally and internationally.

Australian corporate law and regulation has reached a new plateau in its engagement with CSR.⁴ Despite emphatic rejection by three different national inquiries in the last twenty years of any need to make the law of directors' duties more socially responsible,⁵ other countries in the Anglo-American and Anglo-Commonwealth tradition have been more explicit in sensitising their corporate laws to consideration of stakeholders beyond shareholders, even within corporate regulatory systems that are widely regarded as shareholder-based in nature. Nor does the law regulating socially responsible boardroom conduct and decision-making exhaust the gamut of CSR-related law and regulation, either within corporate law itself or beyond it to other areas of law affecting corporations. Australian corporate reporting requirements sit within a wider background of corporate responsibility and sustainability reporting developments worldwide. Commentators are highlighting the emergence of a distinctive body of law and other regulation relating to corporate governance that transcends and, to some degree, reorientates the doctrines of corporate law, in ways that resonate for CSR too.⁶ The insights of new regulatory scholarship on the emerging body of meta-regulation is increasingly turning to its CSR-related implications.⁷ Similarly, new theoretical insights into corporations, corporate law, and corporate governance are emerging that not only challenge conventional theories on such matters, but also illuminate matters of concern in assessing and implementing CSR. So, in a range of jurisdictions, the next cycle of law and policy reform surrounding corporate responsibility and governance is likely to need a level of engagement with these and other CSR-related developments in the 21st century.

³ On the evolution of the CSR movement, see J Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (2006) 15-29.

⁴ For other recent Australian analyses of CSR in the context of corporate law and regulation, see S Bottomley and A Forsyth, 'The New Corporate Law' in D McBarnett, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (forthcoming); H Anderson and I Landau, 'Corporate Social Responsibility in Australia: a Review' (Working Paper No 4, Monash University Corporate Law and Accountability Research Group, 2006).

⁵ Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989); Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS), *Corporate Responsibility: Managing Risk and Creating Value* (2006); Corporations and Markets Advisory Committee (CAMAC), *The Social Responsibility of Corporations* (2006).

⁶ Bottomley and Forsyth, above n 4.

⁷ Eg C Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility' in McBarnett *et al* (forthcoming).

Mapping the landscape of this comparative body of CSR-related law and regulation is timely and important for a number of reasons. Policy-makers, legislators, official inquiries, and law reformers charged with reviewing corporate responsibility and governance are increasingly looking to international and comparative models and other sources of guidance, as evidenced by the two major Australian CSR inquiries that reported in 2006 as well as the revised Australian Stock Exchange (ASX) Corporate Governance Council (CGC) *Corporate Governance Principles and Recommendations* (ASX CGC Principles).⁸ As we move towards a view of law and other regulation that straddles mandatory state-based standard-setting and other forms of standard-setting (eg voluntary corporate self-regulation), on one hand, and the domains of public and private interests concerning corporations, on the other, our notions of corporate law and regulation must fit within, and keep up to date with, correlative changes in the thinking and practice of law and regulation more generally.⁹ This includes changes in our understanding of the point of law and regulation, the sources and range of legal and regulatory standards, the force of different standards, and the enforcement mechanisms and other ordering mechanisms relating to different standards. All of this sits within a wider framework of corporate responsiveness to systems and dynamics of governance, regulation, and responsibility across the public, private, and civil society sectors, both nationally and internationally.

At the international level, the set of primary rules for state responsibility under international law and secondary rules arising from domestic implementation of that state responsibility also interacts with primary and secondary rules concerning the obligations and rights of individuals, groups, and corporations, as part of an emerging body of international law of corporate responsibility.¹⁰ Of course, what happens at national and sub-national levels in terms of CSR-related corporate law and regulation contributes not only to a wider body of CSR-related law and regulation within individual countries, but also to emerging bodies of international and comparative law and regulation concerning CSR. Accordingly, this article focuses upon recent developments in CSR-related corporate law and regulation, within this more expansive body of comparative CSR-related law and regulation generally. In particular, it focuses on some of the key areas of CSR-related corporate law and regulation that have been subject to major review or change in recent times across comparable jurisdictions, especially from an Australian perspective. This gives special attention to the CSR-related aspects of corporate governance regulatory requirements, directors' duties and business judgments, regulatory promotion of socially responsible investing (SRI), and corporate

⁸ For example, the terms of reference for the PJCCFS inquiry into CSR included reference to '(w)hether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia'.

⁹ Eg Parker *et al*, *Regulating Law* (2004).

¹⁰ S Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, 489-496. For recent mapping of some international and national sources of CSR-related law and regulation, see I Bantekas, 'Corporate Social Responsibility in International Law' (2004) 22 *Boston University International Law Journal* 309.

responsibility and sustainability reporting requirements. In short, this mapping exercise helps to position Australian developments within a wider landscape of comparative and international developments, as a platform for enhanced ongoing review and implementation of CSR-related standards by a variety of CSR actors across government, business, and civil society.

II NOTIONS OF CORPORATE RESPONSIBILITY, SUSTAINABILITY AND CITIZENSHIP

Collectively, CSR and related terms serve as a counterpoint to the classical notion, associated most often in the last few decades with the views of economist Milton Friedman, that corporate responsibility is exhausted by profit-making for shareholders within the boundaries of the law and accepted business ethics.¹¹ No consensus yet exists worldwide about an appropriate taxonomy for CSR. Some commentators challenge the suitability of each element of the compound phrase, ‘corporate social responsibility’.¹² Why should this form of responsibility be limited to *corporate* entities and not other public and private entities, why should it be limited to *social* responsibilities and not other responsibilities too, and why should it be confined to legal and even ethical *responsibility* instead of wider notions of corporate citizenship and responsiveness to societal conditions?, they ask.

In some contexts, ‘corporate social responsibility’ is sometimes used interchangeably with terms like ‘corporate citizenship’, ‘responsible business’, ‘corporate sustainability’, and ‘triple bottom line’ responsibility. In other contexts, subtle differences between them emerge. In an attempt to reorient traditional thinking about the financial bottom line of business, sustainability expert John Elkington famously described a ‘triple bottom line’ for business in which considerations of ‘economic prosperity’, ‘environmental quality’, and ‘social justice’ combined and filtered their way into the overall calculus for business.¹³ Increasingly, CSR scholars and business leaders differentiate in substantive and not just semantic terms between the concept of ‘corporate responsibility’ (CR) and the concept of CSR. In a Working Paper on CSR infrastructure for Harvard University’s John F Kennedy School of Government, Sandra Waddock distinguishes ‘the impacts that a company’s strategies and operating practices have on its stakeholders and the natural environment’ (ie CR) from ‘those activities that companies undertake to directly benefit society’ (ie CSR).¹⁴

The term ‘sustainability’ has multiple possible meanings, being associated initially with environmental and ecological sustainability before being adapted or hijacked (depending on your perspective) by business and others in explaining what makes

¹¹ G Cheney, J Roper and S May, ‘Overview’ in S May, G Cheney and J Roper (eds), *The Debate Over Corporate Social Responsibility* (2007) 7.

¹² On this point and the following arguments, see *ibid* 8-9.

¹³ J Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (reprinted ed, 2002) 1999, 2.

¹⁴ S Waddock, ‘Building the Institutional Infrastructure for Corporate Social Responsibility’ (Working Paper No 32, John F Kennedy School of Government, 2006) 5.

business enterprises sustainable over time, and even wider notions of the preconditions for sustainable societies.¹⁵ ‘The two main features of sustainability reporting are that, first, they attempt to deal with the three strands of social, environmental and economic dimensions in one report and, secondly, they express a commitment to involving stakeholders directly in the reporting process’, notes one contemporary scholar of company law and reporting, Bristol University’s Professor Charlotte Villiers.¹⁶ In their work on transforming companies into ‘triple bottom line businesses’, Andrew Sabitz and Karl Weber favour ‘sustainability’ as a core concept over what they see as more confined concepts like ‘business ethics’ and even ‘corporate social responsibility’, because of sustainability’s capacity to embrace ‘a wide array of business concerns about the natural environment, workers’ rights, consumer protection, and corporate governance, as well as the impact of business behaviour on broader social issues, such as hunger, poverty, education, healthcare, and human rights – and the relationship of all these to profit’.¹⁷ On their definition of sustainability as applied to business, ‘a sustainable corporation is one that creates profit for its shareholders while protecting the environment and improving the lives of those with whom it interacts [and] operates so that its business interests and the interests of the environment and society intersect.’¹⁸

Others contrast two or more of these terms, thinking of ‘corporate citizenship’ as something different from basic CSR, for example, in its holistic approach to integrating societal and stakeholder engagement within standard business operations.¹⁹ In this wider sense, corporate citizenship amounts to ‘business taking greater account of its social, environmental and financial footprints’, in the words of one author.²⁰ ‘Corporate citizenship, as a progression from CSR, is therefore seen as a fuller understanding of the role of business in society’, in the words of others.²¹ Australian-based US law firm partner and originator of a well-known code for corporate citizenship, Robert Hinkley, carefully contrasts corporate citizenship and CSR, for example, in terms that are anchored in cost-externalising corporate actions that harm the public interest:²²

Citizenship is different from corporate social responsibility. CSR occurs when, in an effort to protect the public interest, a company does more than the law requires. As a company becomes more socially responsible, its behaviour approaches corporate

¹⁵ Waddock, above n 14, 9.

¹⁶ C Villiers, *Corporate Reporting and Company Law* (2006) 232.

¹⁷ A Sabitz and K Weber, *The Triple Bottom Line: How Today’s Best Run Companies are Achieving Economic, Social and Environmental Success – and How You Can Too* (2006) xii.

¹⁸ Ibid x.

¹⁹ G Zappala, ‘Corporate Citizenship and the Role of Government: the Public Policy Case’ (Research Paper No 4 2003-2004, Australian Parliamentary Library Research Paper Series, December 2003).

²⁰ S Zadek, *The Civil Corporation: The New Economy of Corporate Citizenship* (2001) 7.

²¹ M McIntosh *et al*, *Living Corporate Citizenship: Strategic Routes to Socially Responsible Business* (2003) 16.

²² R Hinkley, ‘Do No Harm: A Corporate Hippocratic Oath’, *The Australian Financial Review*, 31 July 2007, 63.

citizenship ... The extent to which a company externalizes costs that damage the public interest can be described as a company's citizenship gap. When operating in the citizenship gap, companies act legally (and maybe even socially responsibly), but they are not being good citizens. The consequences of the citizenship gap can be seen wherever legal behaviour results in significant damage to the public interest, including global warming, Third World sweatshops and millions of people succumbing prematurely every year from tobacco.

III CORPORATE SOCIAL RESPONSIBILITY'S 21ST CENTURY ENVIRONMENT

The 21st century is already bearing witness to transformational changes in CSR thinking, regulation, and practice. Even in these early stages of the 21st century, CSR has achieved a new focus and prominence at the highest political levels worldwide. At the G8 Summit of world leaders in 2007, CSR clearly emerged from the shadows as a secondary global concern to enter the spotlight as a primary international policy issue of the same order as climate change, international security, sustainable development, and free trade and investment. Outlining the G8 Agenda for cross-border investment and global economic development in their 2007 Summit Declaration, the world's G8 leaders committed their countries to 'promoting and strengthening corporate and other forms of social responsibility' as one of four priority areas for action, through 'internationally agreed corporate social responsibility and labour standards'.²³ The G8 leaders also committed their countries to an invited High Level Dialogue with major emerging economies such as China, India, and South Africa on these key global issues, under the auspices of an OECD platform for global dialogue, culminating in a final report on outcomes of the dialogue at the G8 Summit in 2009.²⁴

The G8 leaders also directly addressed the need for CSR and suitable standards for it in a new way that went beyond simply emphasising the desirability of voluntary CSR initiatives.²⁵ Speaking directly to companies and those responsible for them, the G8 leaders targeted corporate CSR disclosure and corporate engagement with particular CSR standards, saying that '(w)e call on private corporations and business organisations to adhere to the principles in the OECD Guidelines for Multinational Enterprises', '(w)e invite corporations from the G8 countries, emerging nations and developing countries to participate actively in the Global Compact and to support the worldwide dissemination of this initiative', and '(w)e invite the companies listed on our Stock Markets to assess, in their annual reports, the way they comply with CSR standards and principles'.²⁶ Taken at face value, these commitments extend beyond generic rhetorical support for CSR, and position it anew within contemporary international policy priorities. In short, the 2007 G8 Summit Declaration not only places CSR in the top tier of international policy

²³ G8 Summit, *Growth and Responsibility in the World Economy*, G8 Summit Declaration (2007) 4, 7.

²⁴ Ibid 36-37.

²⁵ P Hohnen, 'By Invitation: The G8 and Responsible Business: Wading into CSR Waters', *Ethical Corporation* (12 June 2007).

²⁶ G8 Summit Declaration, above n 23, 7-8.

concerns and initiatives, and signals clear roles and responsibilities of the private sector in addressing such shared geopolitical problems as climate change, underdeveloped economies, and unsustainable development, but also urges progression to the next stage of global CSR dialogue, framework-building, and standard-setting.

By the end of the 20th century, almost 60,000 parent corporations existed worldwide, with more than half a million foreign corporate subsidiaries and affiliates.²⁷ Approximately US \$1.5 trillion worth of assets were held in ethical investment funds worldwide at the turn of this century, under investment portfolios of socially and environmentally responsible investments.²⁸ In the first twelve months of their promulgation, almost 200 institutions worldwide with oversight of US \$8 billion committed to the UN Principles for Responsible Investment and their enhanced disclosure of environmental, social, and governance (ESG) issues affecting investment portfolio performance.²⁹ In early 2007, a group of almost 300 global institutional investors managing funds worth US \$41 trillion asked 2,400 of the world's largest companies by market capitalization to disclose how they managed business risks and opportunities stemming from climate change, as an investment-relevant consideration of growing importance.³⁰

Transnational corporations and not governments are responsible for 80 per cent of the investment by developed nations in developing nations.³¹ Just as the world is seeing more major companies making the transition in corporate reporting from environmental reporting to more expansive sustainability reporting, under a combination of mandatory, voluntary, and co-regulatory initiatives,³² so too the investment domain is witnessing a trend towards the incorporation of SRI and ESG considerations in investment decision-making, although this trend is yet to become embedded in mainstream investment practice.³³

According to a recent Deloitte global business survey on non-financial business information, almost 90 percent of CEOs and senior executives globally believed that their capacity to track the financial performance of their company was good or excellent, although slightly less than 30 percent of them could say the same about

²⁷ H Ward, 'Governing Multinationals: The Role of Foreign Direct Liability' (Briefing Paper New Series No 18, 2001) 1.

²⁸ M Hopkins, 'Corporate Social Responsibility: An Issues Paper' (Working Paper No 27, Policy Integration Department, World Commission on the Social Dimension of Globalization, International Labor Office, Geneva, 2004) 4.

²⁹ N Ridehalgh and A Petersen, 'Climate for Change Has Arrived', *The Australian Financial Review*, 24 May, 2007, 63.

³⁰ Ibid.

³¹ These statistics are cited in Canadian Democracy and Corporate Accountability Commission, *The New Balance Sheet: Corporate Profits and Responsibility in the 21st Century* (2002).

³² KPMG Global Sustainability Services, *KPMG International Survey of Corporate Responsibility Reporting 2005* (KPMG).

³³ United Nations Environment Programme Finance Initiative (UNEP FI) Asset Management Working Group (AMWG), *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* (2005) 23-27.

their tracking of their company's non-financial performance, notwithstanding that more than half of them admitted that companies are under more pressure than ever before to measure their non-financial performance, with more than 80 percent of these senior corporate executives admitting that this kind of performance information is increasingly emphasized by financial markets, investment fund managers, and others.³⁴ This 2007 global business survey highlights in stark terms the transitional phase in which the corporate directors and other senior executives of the world's companies find themselves in the path towards the establishment of satisfactory non-financial information and performance indicators for sustainable and responsible corporate profit-making, let alone in facilitating the corporation's wider roles as an organ of governance, participant in regulation, site of intermingled public and private interests, and bearer of responsibilities.

While a majority of these corporate leaders see the need for better information about the non-financial drivers of corporate success, satisfactory corporate frameworks for corporate assessment, measurement, and management of such things remain elusive. In turn, this inhibits the capacity of corporate boards and senior managers to assess corporate performance fully, given their acceptance of the limits of focusing exclusively upon financial drivers of corporate risks, performance, and success. Obstacles to be overcome include inadequate non-financial performance measurement tools, organizational scepticism about the value and utility of such tools, lack of clarity about the relation between corporate success and non-financial drivers, internal accountability gaps in responsibility and rewards for non-financial performance, time and cost constraints associated with proper development and use of non-financial metrics, and concerns about counter-productive disclosure of information to market competitors.³⁵ Other global business surveys reflect similar results.³⁶

The business case for the importance of socially responsible business activity is also now commonly accepted, even amongst business leaders. 'In the past decade, "corporate social responsibility" (CSR) has become the norm in the boardrooms of companies in rich countries, and increasingly in developing economies too', conceded *The Economist* in late 2007.³⁷ This alignment of business and social value is emphasised in the McKinsey Award-winning article on CSR from the 2006 *Harvard Business Review*,³⁸ although recent public³⁹ and scholarly⁴⁰ debate has

³⁴ As reported in 'Many Firm Boards are in the Dark: Survey', *The Age*, 23 May 2007; 'Soft Measure Predict Corporate Health', *The Australian Financial Review*, 25 May 2007; Deloitte Touche Tohmatsu, *In the Dark II: What Many Boards and Executives Still Don't Know About the Health of Their Businesses* (2007).

³⁵ Ibid.

³⁶ Eg KPMG, above n 32.

³⁷ 'In Search of the Good Company', *The Economist*, 8-14 September 2007, 67.

³⁸ M Porter and M Kramer, 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility' (2006) 84 *Harvard Business Review* 78.

³⁹ 'In Search of the Good Company', *The Economist*, 8-14 September 2007, 67-68.

⁴⁰ R Reich, *Supercapitalism: The Transformation of Business, Democracy and Everyday Life* (2007).

reignited over the extent to which such an alignment by companies of public and corporate interests is worthy of being called CSR at all. A meta-study examining 25 years of other studies of corporate performance from the 1970s to the 1990s sees a positive correlation between a company's financial performance and how it practices corporate social responsibility.⁴¹ While comprehensive and reliable confirmation of the correlation between good corporate governance, profitable corporate performance, and socially responsible business remains elusive, glimpses of this correlation emerge from reports across countries and industry sectors about companies with better governance, social, environmental, and human rights performance records outperforming their competitors economically too.⁴² Of course, like the causal connection between good corporate governance and good corporate performance, the causal connection between CSR and corporate performance also remains the subject of much debate and conflicting evidence. Good companies that do everything well might simply do corporate governance and responsibility well too, or at least have more resources available to deploy in these endeavours because of their financial success.⁴³

IV EMERGING BODY OF INTERNATIONAL AND COMPARATIVE LAW AND REGULATION OF CORPORATE SOCIAL RESPONSIBILITY

A International CSR-Related Law and Regulation

The emerging body of comparative CSR-related corporate law and regulation does not develop in a systemic vacuum. It has points of connection with international law and regulation generally and international CSR-related law and regulation in particular. The orthodox framework of international law envisages direct imposition of obligations upon nation states under international law, for their own actions as well as the actions of others, and flow-on imposition of obligations upon individuals, corporations, and other actors under domestic law, in fulfilment of those state obligations. At the same time, this system of primary and secondary rules for state responsibility under international law interacts with primary and secondary rules of international law for the obligations and rights of individuals, corporations, and other actors, albeit in ways that must still overcome barriers to simple transposition of rules for states and individuals to rules for corporations, in developing various strands of an emerging international law of corporate responsibility.⁴⁴ Those strands include:⁴⁵

⁴¹ M Orlitzky, E L Schmit and S L Ryndes, 'Corporate Social and Financial Performance: A Meta-analysis' (2003) 24 *Organisational Studies* 403-41. See also Anderson and Landau, above n 4.

⁴² As cited in Canadian Democracy and Corporate Accountability Commission, above n 31, 11.

⁴³ A Chatterji and S Listokin, 'Corporate Social Irresponsibility' (Winter 2007) 3 *Democracy: A Journal of Ideas*.

⁴⁴ Ratner, above n 10, 489-496.

⁴⁵ On these relationships and examples involving international law and corporations, see generally Ratner, above n 10; and A/HRC/4/35.

- 1 state liability for failing to prevent corporate abuses of human rights;
- 2 investment-attracting state obligations and arrangements favouring business entities under bilateral investment treaties;
- 3 corporation-affecting domestic laws of nation states in meeting their international legal obligations generally (eg labour conditions and workplace non-discrimination);
- 4 corporate complicity in human rights atrocities and other international crimes committed by state actors (eg crimes against humanity);
- 5 extension of corporate liability domestically for involvement in international crimes;
- 6 extra-territorial jurisdiction for international crimes committed by or against a state's citizens;
- 7 corporate civil liability in home countries for corporate wrongs committed in host countries (eg foreign direct liability laws such as the US Alien Torts Claims Act);
- 8 authoritative codes and other standards of corporate responsibility developed by intergovernmental bodies, including 'soft' law norms that draw heavily upon human rights enshrined in international human rights instruments (eg UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights);
- 9 corporate polluter responsibility under international environmental law;
- 10 international standard-setting for corporate avoidance of corruption and bribery of foreign officials; and
- 11 the impact upon business of economic sanctions imposed by the UN.

In addition to these aspects of international law, policy frameworks supporting CSR exist nationally (eg in the UK) and regionally (eg in the EU). Soft law norms and codes emanating from bodies like the ILO, OECD, UN, World Bank, and EU clearly play an important role in establishing common frameworks for whole or partial aspects of corporate responsibility that transcend national borders. Such intergovernmental and governmental initiatives are not only important in their own right, but also provide official credibility and impetus for the development of complementary multi-stakeholder CSR initiatives at industry, regional, or wider levels of focus, and with membership across public, private, and community sectors.

B *A Snapshot of Comparative CSR-Related Regulatory Developments*

If, at least since the last decade of the 20th century and the beginning of the 21st century, global debates about CSR have reached a new level of transition from *why* corporations must be socially responsible to *how* they can become socially responsible,⁴⁶ we might at least expect to see that movement reflected in the legal frameworks underpinning corporate governance, decision-making, and reporting, as well as in corporate law reform and other regulatory initiatives orientated around

⁴⁶ Zerk, above n 3, 25.

CSR concerns. This macro-level comparative trend is evident across the major European, Anglo-American, and Anglo-Commonwealth domains highlighted in this article. In this way, corporate law and regulation in the 21st century is on a trajectory of improving corporate accountability in ways that at least coincide with aspects of CSR's wider vision of corporate responsibility and governance and, in turn, that trajectory itself bears the hallmarks of the wider CSR movement's impact upon the shape and direction of corporate law and regulation as a whole.⁴⁷ More widely, the emerging body of comparative law and regulation surrounding the socio-ethical, environmental, and governance responsibilities of corporations serves not only as a touchstone for corporate regulatory models and reforms in comparable national systems, but also both shapes and reflects evolving notions of multinational responsibility under 'hard' and 'soft' rules of international law.⁴⁸

The requirements for director's duties, business risk and operational assessments, and corporate reporting also remain a 21st century work in progress across these systems. Directors' duties and business judgments in the USA are responsive to Delaware-led corporate jurisprudence as well as to the wave of anti-takeover and corporate constituency laws progressively passed in many US states in the late 1980s and early 1990s, all of which frame boardroom consideration of the relation between shareholder and other corporate stakeholder interests in discrete ways. Viewed through the prism of CSR, the UK Company Law Review process begun in the death throes of the last century and brought to fruition mid-way through the first decade of this century, culminating in the passage of the most comprehensive legislative reform of UK corporate law in more than a century, has produced reforms of directors' duties, business reviews, and corporate reporting that explicitly factor non-shareholder interests into the new regulatory mix. In one year alone in the first decade of the 21st century, two major federal governmental entities reported on possible CSR reform in Australia,⁴⁹ while the country's premier standard-setting body for corporate governance overhauled its approach to that topic in ways that put corporate responsibility risks and sustainability reporting squarely in the spotlight.⁵⁰

Such a result is unsurprising. The law regulating the obligations, liabilities, and reporting requirements confronting company directors is a strong driver and moderator of socially responsible corporate behaviour. The acknowledgement and assessment of both financial and non-financial drivers of business success inevitably weaves its way into business risk management and reporting, without necessarily scaling the fullest heights of what society wants and needs from

⁴⁷ Zerk, above n 3, 26.

⁴⁸ Zerk, above n 3, 134-140; and Bantekas, above n 10, 317-327.

⁴⁹ PJCCFS, above n 5; and Corporations and Markets Advisory Committee (CAMAC), *The Social Responsibility of Corporations*, Final Report, 2006.

⁵⁰ Australian Stock Exchange Corporate Governance Council (ASX CGC), *Corporate Governance Principles and Recommendations* (2007); Australian Stock Exchange Corporate Governance Council (ASX CGC), *Supplementary Guidance on Principle 7: Recognise and Manage Risk* (2007); Australian Stock Exchange Corporate Governance Council (ASX CGC), *Media Release: Revised Corporate Governance Principles Released* (2007).

business corporations. Whatever differences properly remain between CSR and conventional corporate responsibility and governance, the cross-over in their areas of focus and their mutual responsiveness to the interaction between shareholder and non-shareholder interests increasingly intersects in the regulation and practice of corporate responsibility and governance. At the same time, even these areas of reform show no sign as yet of leading to a paradigm shift in corporate law and regulation, in which non-shareholding stakeholders gain greater rights of corporate participation, regulatory enforcement, business disclosure, and other means of empowerment on a wider plane of corporate democracy, not as an erosion of corporate efficiency and success but as a condition of what flows from the place of corporate governance within wider societal governance.⁵¹

The relevance of this nascent comparative body of CSR-related corporate law and other official regulation is not confined to corporate executives, those who advise them, and those affected in some way by their decisions. Each country's approach and particular manifestation of these elements in its corporate regulatory system serves as a model point of comparison and differentiation for policy-making, public inquiries, and law reform initiatives in other countries too. Accordingly, the story of CSR in the 21st century still has a long way yet to go.

C Corporate Responsibility and Governance Laws

Together with related international developments, a genuine comparative body of CSR-related corporate law and regulation is also starting to materialise across North American, European, Anglo-Commonwealth, and related corporate regulatory systems. Major highlights of this body of law's development, at least in Anglo-American and Anglo-Commonwealth corporate regulatory systems since the turn of the century, include:

- 1 stakeholder-sensitive formulations of directors' duties under US corporate constituency statutes and UK corporate law (and permissible consideration of stakeholder interests under Australian and Canadian corporate law);
- 2 business judgment rules and defences under North American and Australian corporate jurisprudence, with the capacity for advantaging or at least considering stakeholders in a company's wider interests;
- 3 reporting of the relevance and impact of environmental and other societal factors for corporate operations in US, UK, and Australian regulatory requirements;

⁵¹ For reform initiatives in such directions, see for example J Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1993); K Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (2006); Villiers, above n 16, 2006. For a fresh conceptual treatment of the multiplicity of corporate and societal interests in play in corporate governance and decision-making, in a theory of corporate constitutionalism to join other theories of the corporation and corporate law, see Bottomley, above n 2.

- 4 stakeholder participation or interest-representation of various kinds in corporate governance arrangements across Anglo-American and Anglo-Commonwealth regulation (eg socio-ethically and environmentally minded shareholder proposals for corporate meetings, stakeholder board representation, and stakeholder-orientated principles of corporate governance for publicly listed companies);
- 5 inclusion of environmental, socio-ethical, and governance considerations in regulated investment decision-making in the UK and Australia; and
- 6 advancement and protection, usually for the benefit of the overall business enterprise, of the interests of particular groups of non-shareholding stakeholders – most notably, employees and creditors – in particular ways in particular corporate circumstances under Anglo-American and Anglo-Australian law.⁵²

Within corporate law, the major topic areas with some CSR relevance conventionally include:

- 1 preconditions for incorporation and continued corporate existence (eg revocable corporate charters);
- 2 corporate objectives and powers (eg corporate philanthropy and corporate community investment);
- 3 directors' and officers' duties and defences (eg stakeholder-sensitive business judgments);
- 4 business risk management requirements (eg CSR-related business risk drivers);
- 5 corporate disclosure and reporting obligations (eg non-financial and sustainability reporting requirements);
- 6 shareholder (and stakeholder) participation in corporate decision-making and governance;
- 7 consideration and treatment of employee, creditor, and other stakeholder interests in corporate governance and decision-making;
- 8 creation of incentives and removal of disincentives for socially responsible corporate behaviour (eg matching regulatory treatment and business opportunities to business regulatory compliance and corporate citizenship track records);
- 9 standards for corporate behaviour (eg corporate conduct meeting SRI requirements); and
- 10 conferral of standard-setting authority on others (eg legal backing for CSR-related accounting, auditing, and other standards set by official and professional regulators).

Beyond corporate law, CSR also has close connections with other laws affecting corporate responsibility and governance but not directly regulating the system of

⁵² This article primarily discusses key aspects of the first, second, third, fourth, and fifth items in this list.

corporate responsibility and governance in its own right. These laws variously cover corporate-related topics such as employment, workplace health and safety, the environment, equal opportunity, non-discrimination, human rights, and a range of other legal topics too.

D *Corporate Governance Mechanisms*

1 *The Significance of Corporate Governance Standpoints*

Just as corporate responsibility is increasingly intertwined with at least some aspects of CSR, so too corporate governance is evolving to embrace both of these notions of responsibility. Corporate governance has evolved beyond a 'top down' vision of how corporations are managed and controlled. It also extends beyond how corporations are structured and the relations between corporate directors, managers, and shareholders as corporate actors engaged in private ordering of private interests, eg.⁵³

Corporate governance is more than simply the relationship between the firm and its capital providers. Corporate governance also indicates how the very constituencies that define the business enterprise serve, and are served by, the corporation. Implicit and explicit relationships between the corporation and its employees, creditors, suppliers, customers, host communities – and relationships among these constituencies themselves – fall within the ambit of a relevant definition of corporate governance. As such, the phrase calls into scrutiny not only the definition of the corporate form, but also its purposes and its accountability to each of the relevant constituencies.

The variety of standpoints from which we might conceive the *point* of corporate governance from the outset inevitably affects the approach we take to define what corporate governance means, which, in turn, affects how we characterise the relation (if any) between corporate governance and CSR. The importance of this methodological insight for how we frame corporate governance is illustrated in how Bessler, Kaen, and Sherman conceive of perspectives on corporate governance:⁵⁴

One perspective approaches the corporate governance debate as part of the larger question of how to organise economic activity to achieve more fundamental societal objectives related to equity, fairness, freedom and citizen responsibilities. The other perspective is more narrowly concerned with economic efficiency objectives and, at the risk of exaggeration, considers economic efficiency to be an end in itself rather than a means to non-economic societal objectives.

Considered from the perspective of corporations in the private sector, these grand differences in starting positions for framing an understanding of corporate

⁵³ Bradley *et al*, 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads' (1999) 62 *Law and Contemporary Problems* 9, 11.

⁵⁴ Quota in R Austin, H Ford and I Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 7.

governance lead naturally in different directions, summarised by leading Australian corporate law and governance scholars Austin, Ford, and Ramsay as follows:⁵⁵

According to one of these perspectives, good corporate governance should have as its objective the maximisation of shareholders' wealth. The broader perspective (which might be called the stakeholder perspective of corporate governance) focuses upon companies being 'socially responsible' and often subordinating profit maximisation to other goals. It can, therefore, be seen that the corporate governance debate is intrinsically linked to the important question: For whom do directors govern? Do they govern for shareholders or for a broader range of stakeholders?

Two of the USA's foremost commentators on corporate governance, Monks and Minow, link corporations and their responsibility in defining a corporation as 'a mechanism established to allow different parties to contribute capital, expertise, and labor, for the maximum benefit of all of them'.⁵⁶ Such a definition immediately raises questions about the extent to which corporate responsibility and governance extends beyond shareholders as providers of financial capital to embrace other parties who contribute something to a corporation's success. Some theories of corporations and corporate law (eg team production theories,⁵⁷ and contrarian proposals for reforming corporate law⁵⁸) also emphasize the importance of factoring into the corporate equation the various different contributions that all relevant stakeholders (including shareholders) make to a company's success, within the communities in which it operates and draws politico-regulatory attention and support. Even from an economic standpoint alone, modern corporate governance appreciates that maximising shareholder value requires multi-dimensional attention and responses to corporate opportunities and risks from a variety of politico-regulatory, socio-economic, and environmental sources in the surrounding business landscape.

2 Stakeholder Engagement and Enforcement

The enhancement of corporate responsibility and sustainability across jurisdictions already occurs through multiple corporate governance regulatory mechanisms. These include mechanisms requiring compliance with authorised principles of corporate governance, creating industry and corporate codes of conduct, setting standards for corporate governance and responsibility, developing corporate and boardroom decision-making frameworks and guidelines, putting forward shareholder proposals, calling corporate meetings, engaging investors (especially institutional investors) in corporate dialogue and voting, and even initiating actions on behalf of the company.

⁵⁵ Ibid 7-8.

⁵⁶ R Monks and N Minow, *Corporate Governance* (3rd ed, 2004) 9.

⁵⁷ Eg M Blair and L Stout, 'A Team Production Theory of Corporate Law' (1999) 85 *Virginia Law Review* 247.

⁵⁸ Eg, Greenfield, above n 51.

Various legal and regulatory measures already go directly to CSR concerns, especially opportunities for shareholders and other stakeholders to engage in company dialogue with management and other shareholders, or otherwise intervene in company affairs through formal means of exercising discipline over management. The UK Combined Code contains principles for dialogue between companies and their institutional investors that cross-refer to investment industry guidelines, which recognise the legitimacy of intervention by institutional investors in corporate affairs because of their concerns about ‘the company’s approach to corporate social responsibility’.⁵⁹ Australian corporate law contains a provision with unrealised CSR potential that empowers courts, on the application of Australia’s official corporate regulator (ASIC) or affected parties either inside or outside the company, to prevent corporate conduct in breach of corporate law that harms those interests.⁶⁰

3 *Authoritative Principles and Codes of Corporate Governance*

The relevance of legal and other interests of non-shareholding corporate stakeholders is now well-recognised in authoritative codes and principles of corporate governance, both nationally and internationally. Authoritative supranational corporate governance standards like the *OECD Principles of Corporate Governance* reveal a number of important points about the relationship between the importance of company-specific investments and what stakeholders invest in a corporation. A company’s success depends upon encouraging stakeholders to make firm-specific investments of capital in the company. Those investments consist of various forms of capital, including (but not limited to) financial capital contributed by a company’s equity holders. A company’s interests need to be assessed over the long term. It is in a company’s long-term interests to stimulate ‘wealth-creating cooperation among stakeholders’. The interests of stakeholders that deserve respect by companies are those interests ‘established by law or through mutual agreements’. All of these things also relate to a company’s governance arrangements. The institutional and regulatory framework supporting corporate governance must accommodate this link. In the words of the OECD:⁶¹

Corporate governance is also concerned with finding ways to encourage the various stakeholders in the firm to undertake economically optimal levels of investment in

⁵⁹ UK Combined Code on Corporate Governance, Section 2, E.1; and Institutional Shareholders’ Committee, *The Responsibilities of Institutional Shareholders and Agents – Statement of Principles* (2002) 4.

⁶⁰ *Corporations Act* 2001 (Cth) s 1324. For academic discussion of section 1324’s potential use, see R Baxt, ‘Directors’ Duty of Care and the New Business Judgment Rule in the Twenty-First Century Environment’ in Ian Ramsey (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford*, (2002); A Lumsden and S Fridman, ‘Corporate Social Responsibility: The Case for a Soft Regulatory Model’ (2007) 25 *Company and Securities Law Journal* 147.

⁶¹ Organisation for Economic Co-operation and Development (OECD), *OECD Principles of Corporate Governance* (2004) 46. See also *OECD Guidelines for Multinational Enterprises* (2001).

firm-specific human and physical capital. ... The governance framework should recognize that the interests of the corporation are served by recognizing the interests of stakeholders and their contribution to the long-term success of the corporation.

Within Anglo-Commonwealth countries, stakeholder interests and concerns are weaved into a number of different corporate governance principles. Corporate governance principles endorsed by the New Zealand Securities Commission expressly or implicitly embody stakeholder-regarding elements going to business ethics (ie 'Directors should observe and foster high ethical standards'), risk systems (ie 'The board should regularly verify that the entity has appropriate processes that identify and manage potential and relevant risks'), and stakeholder consideration (ie 'The board should respect the interests of stakeholders within the context of the entity's ownership type and its fundamental purpose').⁶² Similarly, the ten original principles of good corporate governance formulated by the ASX CGC in 2003 contain a number of principles with actual or potential stakeholder-regarding elements, including Principle 3 (ie 'Promote ethical and responsible decision-making'), Principle 7 (ie 'Recognise and manage risk'), Principle 8 (ie 'Encourage enhanced performance'), and Principle 10 (ie 'Recognise the legitimate interests of stakeholders').⁶³

4 Shareholder Proposals

Shareholder proposal and advisory resolution mechanisms have a long history and still much potential in ventilating CSR concerns at company meetings. Many major commercial jurisdictions provide for shareholder-initiated proposals for company consideration that have at least some capacity to raise matters of social, environmental, and other stakeholder concern, although there are differences across jurisdictions in their scope, exceptions, triggering requirements, and interpretation by courts.⁶⁴ Such mechanisms can be viewed formally as instruments of corporate governance and dialogue between corporate management and shareholders, or more substantively as instruments of active corporate membership, decision-making, and democracy, within a wider system of meta-regulation. 'Set against the backdrop of the internationalisation of corporate activities, the ability of shareholders to utilise basic corporate law building blocks to reshape the orientation of their corporations toward evolving political and cultural circumstances is essential (particularly in an era of increasing institutional ownership)', notes one North American proponent of shareholder proposal reform to enhance corporate social and human rights accountability.⁶⁵

⁶² New Zealand Securities Commission (NZSC), *Corporate Governance in New Zealand: Principles and Guidelines – A Handbook for Directors, Executives and Advisers* (2004).

⁶³ Australian Stock Exchange Corporate Governance Council (ASX CGC), *Principles of Good Corporate Governance and Best Practice Recommendations* (2003).

⁶⁴ A Dhir, 'Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability' (2006) 43 *American Business Law Journal* 365. For other academic discussion of the position of shareholder proposals in different countries, see Bottomley and Forsyth, above n 4.

⁶⁵ Dhir, above n 64, 407-408.

In recent decades, especially in North America, shareholder proposals have gone beyond a primary preoccupation with conventional corporate governance issues of corporate rules, executive remuneration, voting issues, and meeting requirements, sometimes moving wholly and directly towards socio-ethical activism, as in shareholder proposals to disinvest from apartheid South Africa, and sometimes becoming 'something of a hybrid, combining elements of social policy and corporate governance', as in matters of environmental compliance and protection.⁶⁶ The modern trend towards these hybrid concerns is reinforced in the concerns of individual shareholders, institutional investors, share analysts, and ratings bodies about a company's ESG performance.

North American and Australian experience also suggests that shareholder activism pursued through shareholder-initiated proposals is more likely to produce results in either successful shareholder proposals or corresponding management responses when employee, environmental, and community concerns reflected in those proposals are not left at large, but are aligned to corporate governance, reporting, and performance concerns affecting corporate success.⁶⁷ American experience of employee-shareholder activism and alliances between trade unions and union-sponsored pension funds is part of a wider pattern of coalition-building with pension funds and other institutional investors in supporting shareholder proposals, with different dynamics (eg historical institutional investor voting passivity) affecting how different kinds of institutional investors (eg non-union-affiliated institutional investors) respond to different kinds of proposals (eg socio-environmental proposals) in different countries.⁶⁸ In the USA, hundreds of CSR-related shareholder proposals were filed in 2005 on topics ranging from workplace conditions to climate change,⁶⁹ with a noticeably increasing trend of shareholder proposals calling for companies to disclose, reduce, and manage business risks and opportunities arising from greenhouse gas emissions.⁷⁰ The number of socially orientated shareholder proposals submitted to Canadian companies has increased since recent removal of a key regulatory blocking device.⁷¹

⁶⁶ Monks and Minow, above n 56, 162.

⁶⁷ A Black, 'Mechanisms for Shareholder Activism under the Corporations Act' (13th AMPLA Annual Conference, Melbourne 2006); Dhir, above n 64.

⁶⁸ S Schwab and R Thomas, 'Realigning Corporate Governance: Shareholder Activism by Labour Unions' (1998) 6 *Michigan Law Review* 1019; K Anderson and I Ramsay, 'From the Picket Line to the Board Room: Union Shareholder Activism in Australia' (2006) 24 *Companies and Securities Law Journal* 279.

⁶⁹ Porter and Kramer, above n 38, 80.

⁷⁰ C Ross, E Mills and S Hecht, 'Limiting Liability in the Greenhouse: Insurance Risk-Management Strategies in the Context of Global Climate Change' (2007) 26A *Stanford Environmental Law Journal* 251, 264-265.

⁷¹ Dhir, above n 64, 404.

*E Directors' Duties and Business Judgments**1 US Corporate Constituency and Anti-Takeover Laws*

The corporate law of many comparable jurisdictions now permits and sometimes even requires corporate directors to consider not only shareholder interests, but also non-shareholder interests and the third party effects of corporate decisions and actions too, as reflected in laws governing directors' duties and business judgment defenses. Authoritative US-based guidelines on corporate governance stipulate that while 'a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain', a corporation must 'act within the boundaries set by law', can justifiably allocate 'a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes', and is entitled to 'take into account ethical considerations that are reasonable regarded as appropriate to the responsible conduct of business' – and it can do all of these things '(e)ven if corporate profit and shareholder gain are not thereby enhanced'.⁷²

By the end of the 20th century, corporate constituency statutes ostensibly promoting interests beyond shareholder interests had been enacted in many US states. Characteristically, they empower corporate executives to consider a wide range of interests in corporate decision-making, including the interests of employees, customers, creditors, and local communities. Their impetus lay in equivalent amendments to corporate charters by members, the long-standing debate about CSR, the rise of stakeholder theory in influential American business and management schools, and the need for legislated anti-takeover protection in the USA in the latter part of the 20th century.⁷³ Commentators accept that many of the constituency statutes in American states were introduced from the 1980s onwards not simply to guard against undesirable takeovers as such, but to ensure that state employment and services provided by companies for local communities would not be adversely affected by the resultant asset-stripping, sell-offs, and lay-offs inevitably resulting from some takeovers. Still, one common criticism is that these laws use the rhetoric of consideration for non-shareholders and other third party effects of importance to state politicians, such as the impact on local economies and employment, simply to secure greater discretion for directors in resisting takeovers and hence securing their own ongoing control of their companies. Another common criticism is that these laws simply serve to confirm in clear terms for takeover situations the wide managerial discretion generally afforded to directors by a variety of legal means (eg the business judgment rule, especially in Delaware corporate jurisprudence). Yet another common criticism is that the superficially CSR-sensitive appeal of these stakeholder-regarding laws has never been realised, in

⁷² American Law Institute (ALI), *Principles of Corporate Governance: Analysis and Recommendations* (2001) s 2.01.

⁷³ On these points, see E Orts, 'Beyond Shareholders: Interpreting Corporate Constituency Statutes' (1992) 61 *George Washington Law Review* 4, 16-25.

light of how the regulatory, business, and legal cultures in each state have received, interpreted, and applied these laws.

At the same time, many of these standard corporate constituency laws seem at face value to go beyond existing leeways of managerial discretion, and to permit outcomes beyond simply self-interested maintenance of corporate control by existing directors, even if they happen to produce that effect too. So, properly viewed, either they cannot be seen simply as an anti-takeover device, or else their anti-takeover role must be assessed by reference to the background interests thereby served. On either view, the context of their original introduction and their relative lack of success so far in CSR terms does not completely preclude their applicability to CSR contexts in the future.⁷⁴

2 UK Developments Under the Companies Act 2006

In the new statutory duty of loyalty for company directors imposed under the UK's 2006 Companies Act, directors who are looking to 'promote the success of the company for the benefit of its members as a whole' must at least take account in their boardroom decision-making of a range of legislatively laid down shareholder-related and other stakeholder-related considerations. These considerations include 'the likely consequences of any decision in the long term', 'the interests of the company's employees', 'the need to foster the company's business relationships with suppliers, customers, and others', 'the impact of the company's operations on the community and the environment', 'the desirability of the company maintaining a reputation for high standards of business conduct' and 'the need to act fairly as between members of the company'.⁷⁵

The UK's landmark Companies Act in 2006 is pregnant with potential CSR implications for a variety of CSR actors. Although grounded in a minimum baseline of existing law, the new Companies Act embodies the UK Government's acceptance of the policy of 'enlightened shareholder value', which also conditions and orientates that body of law in discrete ways from a CSR perspective. In particular, it makes the crucial triumvirate of directors' duties, business risk management, and corporate reporting more explicitly long-term, relational, and stakeholder-sensitive in their structure, content, and implementation. It offers a 21st century approach to legislative and policy development in these three areas of corporate law and practice that not only has relevance for students and practitioners of CSR, but also serves as one model for comparative reform of corporate law and practices elsewhere, notwithstanding Australia's initial failure to embrace this new UK approach to directors' duties in the outcomes of the two major national CSR inquiries in 2006. It marks another milestone in the development of UK corporate law in directions that are sensitive to wider EU standards for boardroom

⁷⁴ On these and related points about US corporate constituency and anti-takeover statutes, see S Deakin, 'The Coming Transformation of Shareholder Value', *Corporate Governance: An International Review* (January 2005) 13(1), 11-18; Orts, above n 73.

⁷⁵ *Companies Act 2006* (UK) s 172.

accountability and corporate reporting, while also providing important points of contrast with some corporate orthodoxies in countries such as Australia, all within the wider context of being a constituent part of an emerging body of comparative CSR-related corporate law and regulation. It legislatively enshrines for the first time in UK corporate law a formulation of directors' duties and other obligations that also offers an overarching structure and matrix of factors to guide boardroom decision-making. That decision-making framework is one that also lends itself to additional forms of regulatory support and guidance.

Inevitably, the most comprehensive legislative overhaul in more than a century of company law generally and directors' duties and corporate reporting obligations in particular is bound to generate important questions of interpretation, application, and practice for some time to come for a variety of CSR actors in the UK, as well as for those interested in such comparative developments and experiments from afar. Its many untested issues and implications will progressively unfold in judicial test cases, professional corporate advice, official regulatory guidance, and the practice of corporate decision-making, risk management, and reporting in the UK.⁷⁶

3 Australian and Canadian Developments

Although Australian corporate law does not expressly deal with shareholder and non-shareholder interests in the same terms as UK law in its formulation of the duties of directors, the federal governmental advisory committee (CAMAC) and the joint federal parliamentary committee (PJCCFS) engaged in parallel CSR inquiries throughout 2005 and 2006 both concluded that the current law implicitly permits and affords sufficient leeway for company directors to consider both shareholder and non-shareholder interests in acting in socially responsible ways. The 2006 federal parliamentary committee's *Corporate Responsibility* report concluded that 'the Corporations Act 2001 permits directors to have regard for the interests of stakeholders other than shareholders', thus alleviating any need for legislative amendments to this effect.⁷⁷ Similarly, in its landmark interpretation of the cognate statutory duty of loyalty imposed upon directors under Canadian corporate law, Canada's highest court recently accepted 'as an accurate statement of law' the legal proposition 'that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment'.⁷⁸

The conclusion that Australian corporate law implicitly recognizes this position was also accepted some time ago by Dyson Heydon (now Justice Heydon of the High

⁷⁶ For further discussion and analysis of various issues of interpretation, application and practice arising from this new regime of directors' duties in the UK, see B Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (2007/8, forthcoming).

⁷⁷ PJCCFS, above n 5, [4.78].

⁷⁸ *Peoples Department Stores Inc (Trustee of) v Wise* 2004 SCC 68, [42].

Court), in comments that highlight the differences between duties owed by directors to companies, duties (if any) concerning shareholders, and due consideration of non-shareholder interests within the confines of those duties.⁷⁹

The duty which is owed to the company is not to be limited to, or to be regarded as operating alongside, a duty to advance the interests of shareholders. There is no superadded duty to shareholders (in the absence of something specific in the facts creating a fiduciary relationship or requiring a constructive trust to be imposed). And the directors' duty to the company is not to be limited to the duty to consider shareholders, because, for example, businessmen in their daily talk reveal that they are constantly considering, without impropriety, interests other than those of the shareholders.

'Although there may be no direct legal obligation in company law on directors to take other interests into account, it does not follow that directors cannot choose to do so', conclude three of Australia's leading corporate law and governance scholars, joining the chorus of elite thinking on this point.⁸⁰ All of this is predicated upon non-shareholder interests being considered and advanced only to the extent relevant to the interests of the company and its members, in the context of boardroom decision-making. Other laws also provide specific protection for employee, environmental, and other societal interests in other contexts.

This position has both costs and benefits for business. On the 'benefit' side, it leads to the additional business argument that no significant CSR-related reform of directors' duties is needed, because the law of directors' duties already provides adequate capacity for consideration of non-shareholder interests where necessary. On the 'cost' side, if directors are implicitly allowed to take account of non-shareholder interests as part of what they do in fulfilling their statutory directors' duties, directors are exposed if decision-making that involves consideration of those interests is not already implicitly covered by an applicable 'business judgment' defence.⁸¹ This also raises questions about who (if anyone) might properly complain about inadequate consideration of stakeholder interests, and what level and range of consideration of stakeholder interests is due consideration for the purpose of both statutory duties and relevant defences. In addition, even if existing law on the legal duties of directors already permits reference to stakeholder interests, though not at the expense of shareholder interests, that still leaves questions about how and when that is accommodated within corporate decision-making and reporting frameworks and processes. More widely, obligations to advance or even consider non-

⁷⁹ D Heydon, 'Directors' Duties and the Company's Interest' in Paul Finn (ed), *Equity and Commercial Relationships* (1987) 134-135.

⁸⁰ Austin *et al*, above n 54, 281.

⁸¹ One additional problem here is that provisions like the statutory 'business judgment' defence to a breach of the duty of care and diligence have been drafted mainly with shareholder-focused concerns in mind. How, for example, does someone demonstrate in evidential terms that they have met all of the preconditions for reliance upon this defence when the issue is the extent to which they have informed themselves about and then properly assessed relevant non-shareholder interests and their interplay with shareholder interests, in the overall balance of deciding what is best for the company?

shareholder interests can have a ripple effect and even create problems elsewhere within corporate law, including limitations on shareholder approval and verification.⁸²

4 *Comparative Position on Directors' Duties*

In short: in a number of comparable jurisdictions, the applicable corporate law clearly requires or permits reference by corporate directors to relevant non-shareholder interests as well as shareholder interests in their decision-making. Where business judgment rules or defences apply, or other legal elements are in play that give some leeway or discretion to company directors, the corporate law in applicable jurisdictions contains an extra layer of protection for directors who take account of non-shareholder interests in some way, even if that appears to be at the expense of immediate financial gain for at least some current shareholders.

Still, there seems little legislative or judicial appetite across North American or Anglo-Australian jurisdictions for reforming directors' duties' beyond permitting or even requiring boards to consider employee, customer, creditor, and other community interests to the extent needed to meet the financial interests of shareholders over the long run. Canada's recent recognition of this point at the highest judicial level⁸³ is far from an endorsement of shaping the law towards stakeholder pluralism or multi-fiduciary duties to stakeholders. After more than half a decade progressing towards legislative enactment of the most extensive reform of corporate law for more than a century, and the first legislative encapsulation of directors' duties in UK corporate law, that country settled in late 2006 for an enshrinement of 'enlightened shareholder value' in directors' duties that probably does little more than recognise the business sense of enlightened self-interest for shareholders if directors are forced to take account of non-shareholder interests in support of sustainable business profitability. The two separate but related official inquiries into possible CSR law reform in Australia this century both ultimately decided that no change to directors' duties is needed for the foreseeable future, even to the limited extent now enshrined in UK corporate law. The potential of standard US corporate constituency statutes to empower directors, both within and beyond takeover contexts and other battles for corporate control, to sacrifice shareholder gain on the altar of advantaging non-shareholder constituencies lies mainly dormant and relatively unexplored.

F *Socially Responsible Investing*

Enhanced attention to the balance of interests between shareholders and non-shareholders, and to their connection to a company and its prospects for success (whether or not that success is characterisable purely in terms of private financial gain for shareholders), is emerging in other areas of CSR-related corporate law and

⁸² Eg Baxt, above n 60.

⁸³ *Peoples Department Stores Inc (Trustee of) v Wise* 2004 SCC 68.

other official regulation across these jurisdictions too. Under UK law governing pension trusts for employees and others, the trustees must develop and act according to a statement of investment principles that not only records their policy on how they will exercise voting and other rights concerning their investment portfolio, but must also identify ‘the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments’.⁸⁴ Both are a route to enhanced CSR through institutional involvement in corporate governance.

Similarly, under Australian corporate law, product disclosure statements for share schemes, superannuation funds, and other investment products with an investment component must disclose ‘the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realization of the investment’, with the national corporate regulator (ASIC) being statutorily authorized to develop compliance guidelines for such claims.⁸⁵ The more detailed information that must be included in product disclosure statements about the extent to which labour, environmental, social or ethical considerations are taken into account in investment decision-making includes a statement about whether the issuer of the product disclosure statement does or does not take those considerations into account and, where they are taken into account, an indication of the particular standards that the issuer of the statement identifies as relevant standards for this purpose, the particular considerations that the issuer of the statement believes are relevant for this purpose, and the extent to which those considerations are taken into account.⁸⁶

A 2005 report by international law firm Freshfields Bruckhaus Deringer for the United Nations Environment Programme Finance Initiative aimed to address the following major question: ‘Is the integration of environmental, social and governance issues into investment policy (including asset allocation, portfolio construction and stock-picking or bond-picking) voluntarily permitted, legally required or hampered by law and regulation; primarily as regards public and private pension funds, secondarily as regards insurance company reserves and mutual funds?’⁸⁷ In an expansive review of the positions in France, Germany, Italy, Japan, Spain, the UK, the US, Canada, and Australia, the report noted that none of these jurisdictions completely prescribes how investment decision-makers should incorporate environmental, social, and governance (ESG) considerations in their investment decisions, before concluding that ‘decision-makers are required to have regard (at some level) to ESG considerations in every decision they make ... because there is a body of creditable evidence demonstrating that such

⁸⁴ *Pensions Act* 1995 (UK) s 35; Occupational Pension Schemes (Investment) regulations 1996 (UK) reg 11A, inserted by the Occupational Pension Schemes (Investment, and Assignment, Forfeiture, Bankruptcy etc.) Amendment Regulations 1999 (UK).

⁸⁵ *Corporations Act* 2001 (Cth) ss 1013D(1)(l) and 1013DA.

⁸⁶ *Corporations Act* 2001 (Cth) s 1013D (4) and Corporations Regulations 2001 (Cth), regulation 7.9.14C.

⁸⁷ UNEP FI, above n 33, 6.

considerations often have a role to play in the proper analysis of investment value'.⁸⁸

Given the emerging evidence and increasing acceptance of the relationship between a company's financial performance and ESG considerations, 'integrating ESG considerations into an investment analysis so as to more reliably predict financial performance is clearly permissible and is arguably required in all jurisdictions', the report adds.⁸⁹

At a broader level, this evidences growing appreciation of the important contributions that ESG factors can make to sound investment decision-making within the law across jurisdictions, whatever the particular legal pigeon-holes within which the duties and obligations of institutional investors to the beneficiaries of investment funds might be placed in each jurisdiction. In going beyond static preconceptions of financial self-interest of beneficiaries to embrace a more dynamic view of the interests they value in investment decision-making for their benefit, it also evidences a growing awareness of the importance of responsibility-enhancing values being included and integrated within corporate decision-making frameworks – a development with wider significance for corporate law and life beyond simply the institutional investment industry. This dovetails with new perspectives on the range of financial and non-financial values of shareholders, with implications for reconceptualisation of such basic concepts as 'shareholder value', 'enlightened shareholder value', and their ilk.⁹⁰

G Corporate Responsibility and Sustainability Reporting

1 International and Comparative Perspectives

Corporate self-reporting and independent rating in the area of corporate responsibility and sustainability is becoming mainstream, although reliable socio-ethical standard-setting still lags behind relatively recent environmental standards and long-standing financial, auditing, and accounting measures of corporate performance. Authoritative comparative and international sources of corporate reporting requirements demonstrate the recognised importance today of the interaction between business and societal sustainability, financial and non-financial business drivers, and even corporate governance and CSR reporting. For the moment, the emphasis of officially regulated sustainability reporting remains firmly confined to sustainability reporting from the inwards-looking perspective of how companies relate discrete societal drivers to their material business strategies, risks, and operations, as exemplified explicitly and most notably in sources as diverse as the OECD Guidelines for Multinational Enterprises (OECD Guidelines), OECD

⁸⁸ UNEP FI, above n 33 10-11.

⁸⁹ UNEP FI, above n 33, 13.

⁹⁰ Eg C Sampford and V Berry, 'Shareholder Values, Not Shareholder Value: The Role of "Ethical Funds" and "Ethical Entrepreneurs" in Connecting Shareholders' Values with Their Investments' (2004) 13:1 *Griffith Law Review*.

Principles of Corporate Governance (OECD Principles), EU Accounts Modernisation Directive and other directives, UK business review requirements, and Australian corporate reporting requirements.

The central requirement under the OECD Guidelines is for multinational business enterprises to provide disclosure ‘regarding their activities, structure, financial situation and performance’.⁹¹ This requirement extends beyond adequate financial disclosure, as they are ‘also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist’. Essential disclosures include ‘(m)aterial foreseeable risk factors’ and ‘(m)aterial issues regarding employees and other stakeholders’, either of which might straddle both shareholder and other stakeholder matters, on one hand, and financial and non-financial business information and drivers, on the other. In addition, businesses are ‘encouraged’ to disclose ‘information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes’, as well as ‘(i)nfornation on relationships with employees and other stakeholders’. Disclosure is mainly investor-centric and market-centric, as it is aimed squarely at what is needed ‘to fully inform the investment decision and to avoid misleading the investor’, and is further limited by considerations of business cost, administrative burden, and secrecy of competitive success. In other words, the primary emphasis is upon what companies *must* disclose because it goes materially to the enterprise’s financial performance in the eyes of the market, with social, environmental, and non-financial dynamics and information being viewed tightly through that prism.⁹²

The OECD Principles similarly reinforce these principles of disclosure and transparency, particularly their primary focus upon investor-focused analysis of company finances and operations, even in relation to material risks, employee and stakeholder matters, and the focus of non-financial information about corporate performance.⁹³ Like the OECD Guidelines, the OECD Principles ‘do not envision the disclosure of information in greater detail than is necessary to fully inform investors of the material and foreseeable risks of the enterprise’.⁹⁴ The emphasis in disclosing employee and stakeholder issues remains squarely upon anything that ‘may materially affect the performance of the company’.⁹⁵ The OECD Principles also recommend disclosure of any stakeholder-orientated company policies and public positions covering ‘business ethics, the environment, and other public policy commitments’, because of the value of this information ‘for investors and other users of information to better evaluate the relationship between companies and the

⁹¹ On these and following requirements, see OECD Guidelines, above n 61, 20.

⁹² OECD Guidelines, above n 61, 45. On the distinction between investor-centric and market-centric reporting, on one hand, and more societally-sensitive reporting, on the other, see generally Villiers, n 16.

⁹³ OECD Principles, above n 61, 22 and 53-54.

⁹⁴ OECD Principles, above n 61, 53.

⁹⁵ OECD Principles, above n 61, 53.

communities in which they operate and the steps that companies have taken to implement their objectives'.⁹⁶

2 European Corporate Responsibility and Sustainability Reporting Requirements

For some time, policy and regulatory debate in the European Union has progressively sharpened its focus upon enhancing overall corporate responsibility, governance, and reporting, on one hand, and boardroom accountability, on the other. Improvements to date in the modernization and harmonization of requirements for financial accounting, business reporting, and corporate governance set the scene for a further wave of policy and regulatory attention to other aspects of boardroom accountability (eg the scope and content of directors' duties) and corporate reporting (eg wider corporate sustainability reporting requirements).

European initiatives match a wider trend worldwide towards inclusion of social, environmental, ethical, and governance aspects in voluntary and officially regulated corporate reporting. In enhancing boardroom reporting accountability for a company's business, for example, EU directives accept that relevant disclosure 'should not be restricted to the financial aspects of the company's business', so that 'where appropriate, this should lead to an analysis of environmental and social aspects necessary for an understanding of the company's development, performance or position'.⁹⁷ Accordingly, 'the analysis shall include both financial and, where appropriate, non-financial key performance indicators ... including information relating to environmental and employee matters', at least '[to] the extent necessary for an understanding of the company's development, performance, and position'.

Other directives further enhance collective boardroom responsibility for corporate governance and reporting, emphasise the importance of disclosing relevant corporate governance information and, in that context, note the relevance of social and environmental information for investors' understanding of the company's success and prospects.⁹⁸ Going further, the European Parliament's 2007 resolution on corporate social responsibility signals the future possibility of more expansive corporate responsibility and sustainability reporting requirements, 'so that social and environmental reporting is included alongside financial reporting requirements', especially in light of the inadequacies of voluntary trends in social and environmental reporting, in which 'only a minority of the reports use internationally accepted standards and principles, cover the company's full supply chain or involve independent monitoring and verification'.⁹⁹

⁹⁶ OECD Principles, above n 61, 50-51.

⁹⁷ Directive 2003/51/EC.

⁹⁸ Directive 2006/46/EC.

⁹⁹ European Parliament Resolution of 13 March 2007 on Corporate Social Responsibility: A New Partnership.

3 UK Business Review and Reporting Requirements

The strong connection in regulated reporting requirements between non-financial information, social and environmental matters, and material business risks and drivers is also reflected in recent national reform of corporate reporting in Commonwealth countries such as the UK and Australia. The UK's provision for a business review under the 2006 Companies Act supersedes earlier regulatory requirements for an Operating and Financial Review (OFR). This business review includes key non-financial information and commentary, orientated towards a forward-looking assessment of matters affecting a company's strategy and operations. It also needs to be examined against the background of ongoing European debate over the best means of regulating non-financial reporting. Under the impetus of applicable EU directives, UK law is moving further in the direction of narrative reporting, along a European path that also leads to enhanced reporting of non-financial information, greater collective boardroom accountability, and increased corporate governance disclosure.

Going beyond corporate reporting on environmental matters, UK corporate law now requires annual directors' reports for particular businesses to include a business review which, in the case of listed public companies, must contain relevant information and appropriate business-related performance indicators about 'the company's employees', 'social and community issues', and 'environmental matters (including the impact of the company's business on the environment)'.¹⁰⁰ These requirements for a business review in the directors' report have a number of important features.¹⁰¹ Given the different scale and cost of complying with these requirements for small, medium, and large business enterprises, important exceptions to some or all of these requirements apply to different kinds of companies. The primary audience for the business review envisaged by the legislation is the company's shareholders, although the information and analysis in the business review will also be of interest and relevance to the company's other stakeholders. The business review is legislatively intended to inform the assessment by a company's shareholders of how well the directors are performing their duty to promote the company's success.¹⁰²

The business review has both backward-looking and forward-looking elements. The requirement imposed upon particular kinds of companies to include reference in the business review to information going to employment, environmental, and social concerns, as well as other non-financial information, is not an absolute requirement of a company's business review. Rather, the inclusion of such material in a company's business review is contingent upon its precise relationship to 'an understanding of the development, performance or position of the company's business'. This condition keeps these aspects of the business review tightly focused

¹⁰⁰ *Companies Act 2006* (UK) sub-s 417(5) and 417(6).

¹⁰¹ For further discussion and analysis of the new business review reporting requirements under the UK's *Companies Act 2006*; see Horrigan, above n 76.

¹⁰² *Companies Act 2006* (UK) s 417 (2).

upon how they relate to the company's business, as distinct from how well the company meets public policy goals concerning the advancement of social, environmental, and other interests in their own right. The financial and non-financial indicators of a company's business activity provide the evidence-based platform for the business review's analysis. Relevant information about a company's supply and distribution chain corresponds to 'information about persons with whom the company has contractual or other arrangements which are essential to the business of the company', subject to considerations of privacy, confidentiality, competitiveness, and other countervailing interests precluding the disclosure of such information.

The explicit connection drawn in the UK legislation between the business review's reporting requirements and informing investor perceptions of the performance by directors of their legislated duty to promote the company's success has both legal and practical implications. The kinds of matters legislatively required to be canvassed in the business review also go to the long-term and relationship-focused elements of a successful business upon which the proper performance of directors' duties turns.¹⁰³ In other words, both the legislated duty of promoting the company's success (and other directors' duties too) and the business review requirements are positioned within a wider boardroom decision-making framework that is orientated around the dynamics of the 21st century business environment, with everything that means in terms of abandoning short-term wealth-maximisation for particular shareholders at a particular time. Operationally, boards face the more immediate tasks of relating the business review requirements to internal corporate governance and reporting, as well as to meeting the expectations of investors and the market in assessing and comparing what boards report publicly in meeting these requirements.¹⁰⁴

The fact that narrative reporting and business reviews can present information gathering, assessing, and reporting challenges that are quite different for directors from what they might be accustomed to in annual reporting is reflected in the UK Accounting Standards Board's first review of narrative reporting in early 2007. It found that companies were much better at describing their markets, strategies, and performance than disclosing forward-looking information, identifying sources of business risk, and explaining their approach to managing those risks.¹⁰⁵ Considered from both a strategic and an operational perspective, the ASB's analysis leads to questions about: (a) the range, type, currency, completeness, accuracy, and relevance of financial and non-financial information available to boards; (b) the degree of mismatch between what boards conventionally have before them, and what they need to have before them, in meeting the new business review requirements; (c) necessary internal and external consultations with stakeholders

¹⁰³ Villiers, above n 16, 216.

¹⁰⁴ Company Law Reform White Paper, UK Department of Trade and Industry (2002) [4.33]; Villiers, above n 16, 219-221.

¹⁰⁵ *Review of Narrative Reporting by UK Listed Companies in 2006*, Financial Reporting Council, 2007.

about reportable matters; (d) validation and verification of board information for both internal and external reporting purposes; (e) discovery and handling of information and communication gaps; (f) development of communication and reporting procedures and lines of responsibility; (g) decision-making about how much of what is gathered and reported internally needs to be included and customised in public reporting requirements associated with the business review; and (h) alignment of reporting for business review purposes with other corporate strategising and operational needs.

4 US Corporate Reporting Requirements

Despite differences in form and content, US regulation of corporate reporting takes a similar line in recognising the contemporary need for some kind of narrative from directors to investors and the market about the company's business performance, position, and prospects. The use and communication of non-financial information and social, environmental, and sustainability perspectives in corporate reporting falls for determination accordingly. As in the EU, the UK, Australia, and elsewhere, environmental compliance and protection is singled out for special attention. Under US securities law, for example, Regulation S-K's Item 101 (Description of Business) requires a business narrative that is heavily financial in focus, but with particular details that go explicitly to aspects of environmental compliance and sustainable business development under the law. For example, appropriate disclosure is required of present and anticipated 'material estimated capital expenditures for environmental control facilities' as well as any material impact of environmental compliance upon a company's or group's 'capital expenditures, earnings and competitive position'.¹⁰⁶ Disclosure of this and other information is required '(t)o the extent material to an understanding of the [company's] business taken as a whole'.¹⁰⁷ Similarly, disclosure of environmental proceedings against companies is also singled out for attention amongst the kinds of legal proceedings that can materially affect a company and its prospective liabilities, and hence warrants disclosure.¹⁰⁸

More widely, in terms of the potential for using and disclosing non-financial information and wider dimensions of social, environmental, and sustainability performance, Regulation S-K's Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations) (MD&A) requires disclosure of specific matters and other information that the company believes is 'necessary to an understanding of its financial condition, changes in financial condition and results of operations'.¹⁰⁹ Again, the focus remains tightly upon how these matters affect a company's business, considered primarily in terms of their impact upon its financial position and prospects. It is aimed at providing investors 'and other users' with meaningful information for assessing a company's 'financial condition and results

¹⁰⁶ Ibid Item 101(c)(1)(xii).

¹⁰⁷ Ibid Item 101(c)(1).

¹⁰⁸ Ibid Item 103 (Legal Proceedings).

¹⁰⁹ Ibid Item 303(a).

of operations'.¹¹⁰ In addition, forward-looking projections have the benefit of a 'safe harbor' for such information under US securities laws.¹¹¹

Commenting from a comparative perspective on Anglo-American developments in the field of non-financial reporting requirements, one commentator crystallises what the UK business review and the US MD&A have in common in concluding that

'(t)he UK business review is similar to the US MD&A [as] disclosures are to be made to shareholders as part of the directors' annual reporting obligation to shareholders, enhancing traditional financial disclosure, in order to facilitate assessment of investment value and facilitate shareholder discipline with respect to corporate profitability'.¹¹²

Each of these components is important. They orientate and condition corporate responsibility and sustainability reporting in some directions (eg reporting what investors and markets need to know about a company's business dynamics) and not others (eg facilitating social accountability to all stakeholders for all corporate harm-causing or benefit-precluding actions as a stakeholder-based form of corporate discipline over management).

5 *Australian Corporate Reporting Requirements and the Revised ASX CGC Principles*

The broad movement from environmental reporting to at least some aspects of sustainability reporting is reflected in comparative Anglo-Australian corporate law. In Australia, annual directors' reports must include 'details of the [company's] performance in relation to environmental regulation', with wider non-financial and sustainability factors that affect corporate operations and performance falling implicitly within the coverage of additional legislative reporting requirements for listed public companies, reinforced by authoritative guidance on non-financial and sustainability reporting in the revised ASX CGC Principles.¹¹³ Australia's corporate regulatory requirements ultimately remain firmly fixed upon relating any use of non-financial information and sustainability reporting to business risks and drivers for corporate strategies, finances, and operations.¹¹⁴ At this stage, the integration of financial and non-financial information, and any reference to social, environmental, and sustainability perspectives, are all viewed through that prism.

Although Australia's legislative requirements for an operating and financial review in annual corporate reporting are not as detailed as UK corporate law in their coverage of business review and reporting requirements for non-financial and

¹¹⁰ Ibid Item 303(a), Instructions (paragraph 2).

¹¹¹ See section 27A of the *Securities Act* of 1933; section 21E of the *Securities Exchange Act* of 1934; Item 303(b), Instructions.

¹¹² I Chiu, H-Y, 'The Paradigms of Mandatory Non-Financial Disclosure: A Conceptual Analysis: Part 2' (2006) 27:10 *Company Lawyer* 291.

¹¹³ *Corporations Act* 2001 (Cth) ss 299(1)(f) and 299A respectively.

¹¹⁴ ASX CGC, above n 50.

sustainability reporting, other authoritative regulatory and business guidelines clearly signal the arrival of this kind of reporting as part of mainstream corporate reporting. Both ASX listing rule requirements and the explanatory parliamentary material accompanying the introduction of Australia's version of the superseded UK OFR, for example, incorporate reference to authoritative guidance from the Group of 100 (G100) *Guide to the Review of Operations and Financial Condition* that heads in this general direction. According to reporting guidelines developed by this association of senior finance and accounting executives associated with Australia's major corporations and government-owned business enterprises, the reported review of a company's operations and financial condition should contain 'a discussion and analysis of key financial and non-financial performance indicators (KPIs) used by management in their assessment of the company and its performance', with these KPIs covering 'multiple perspectives such as sustainability measures including social and environmental performance measures'.¹¹⁵

The primary legislative requirement for Australia's equivalent of the UK's superseded OFR and current business review arrangements is as follows:¹¹⁶

The directors' report for a financial year for ... a listed public company must also contain information that members of the company would reasonably require to make an informed assessment of:

the operations of the entity reported on; and
the financial position of the entity; and
the entity's business strategies and its prospects for future financial years.

This broad framework for reporting on a company's operations, financial position, and prospects is one within which companies might take a narrow or wide approach to reporting matters of socially orientated corporate responsibility (CR) and sustainability. 'This requirement has the potential to increase sustainability/CR reporting and other disclosure by companies', according to the ASX CGC.¹¹⁷ Additional official regulatory requirements affecting corporate reporting by companies listed on the Australian Stock Exchange (ASX) appear in ASX listing rules¹¹⁸ and revised ASX CGC Principles.

¹¹⁵ G100, 2003: [8].

¹¹⁶ *Corporations Act* 2001 (Cth), s 299A(1). Disclosure exemptions apply to material that 'is likely to result in unreasonable prejudice' to the companies involved: see s 299A(3).

¹¹⁷ ASX Corporate Governance Council, *Review of the Principles of Good Corporate Governance and Best Practice Recommendations* (Explanatory Paper and Consultation Paper, November 2006, 31).

¹¹⁸ Especially, in this context: Listing Rule 4.10 (Disclosure of Corporate Governance Practices) and Listing Rule 4.10.17 (Review of Operations and Activities).

As part of its first major review of the principles and recommendations originally promulgated in 2003,¹¹⁹ and bolstered by an official request in 2005 from the federal Minister for Environment and Heritage for it to consider voluntary non-financial reporting guidelines for companies going to matters of environmental and sustainability reporting, in 2006 the ASX CGC released for public discussion and feedback a range of proposals for enhanced reporting of corporate responsibility and sustainability. Focusing upon the original principles and recommendations, the ASX CGC set itself terms of reference for public consultation going to its jurisdiction over corporate responsibility and sustainability reporting, the suitability of additional regulatory requirements and guidance within the prevailing 'comply or explain' disclosure framework, the enhancement and boundaries of guidance on disclosing material business risks beyond conventionally reportable financial risks, and the desirability of Australia establishing a mechanism for collecting and communicating sustainability information akin to the London Stock Exchange's Corporate Responsibility Exchange.¹²⁰ Having formulated and then received feedback on two main options for enhancing corporate responsibility and sustainability reporting – ie either releasing voluntary additional guidance on reporting material business risks but with no extra reporting requirements for companies (what it called 'Option A'), or alternatively introducing an additional reporting requirement on an 'if not, why not?' basis (what it called 'Option B') – the ASX CGC encountered considerable business opposition to these particular proposals and ultimately backed away from both options in its final review.

The revised ASX CGC Principles commence operation in 2008. They now contain eight principles instead of ten principles, with former Principle 8 ('Encourage enhanced performance') amalgamated into Principles 1 and 2 (ie 'Lay solid foundations for management and oversight' and 'Structure the board to add value' respectively), and former Principle 10 ('Recognise the legitimate interests of stakeholders') amalgamated into Principles 3 and 7 (ie 'Promote ethical and responsible decision-making' and 'Recognise and manage risk' respectively). In backing away from its previously mooted Option A and Option B for public discussion, the ASX CGC has settled on a less radical but still significant improvement in corporate reporting requirements that is of considerable relevance to CSR.

First, whatever the difficulties surrounding the concepts of non-financial, narrative, and other forms of reporting in contrast with conventional financial reporting, Principle 7 now clearly articulates that what matters from a corporate reporting perspective is material business risk identification, assessment, and management, with a correlative recognition that business risks have both financial and non-financial drivers. Secondly, companies following these reporting requirements are invited to consider using a structured framework in developing overall risk

¹¹⁹ The ASX CGC also reviewed the main principle relating to risk (ie Principle 7 ('Recognise and manage risk')) in 2005, with that review focusing upon material business risks relating to non-financial information and factors.

¹²⁰ ASX CGC, above n 117, 29.

management and control systems that addresses questions such as ‘What is a system of risk oversight, risk management and internal control?’, ‘What is a risk profile?’, ‘What are risk oversight and management and internal control policies?’, and ‘What is a material business risk?’.

Thirdly, the notion of a ‘material business risk’ embraces a number of CSR-related elements. Supplementary guidance from the ASX CGC about Principle 7 suggests that corporate risk management policies include statements about the purpose of those policies (eg ‘to formalise and communicate the company’s approach to risk management’) and mission statements on risk (eg defining risk as ‘anything that hinders the sustainable achievement of objectives and results, including the failure to exploit opportunities’).¹²¹ The ASX CGC now defines ‘material business risks’ in these terms:¹²²

Material business risks have the potential to create value and protect established value. The following examples of material business risk categories are identified in Principle 7:

- operational
- environmental
- sustainability
- compliance
- strategic
- ethical conduct
- reputation or brand
- technological
- product or service quality
- human capital
- financial reporting
- market-related risks.

Fourthly, companies need to establish policies concerning material business risk management and to disclose at least a summary of the applicable corporate policies.¹²³ As part of this, companies are not required to disclose particular material business risks. Nor are companies under any obligation to identify and disclose corporate responsibility and sustainability risks as a specific category of identified generic risks. However, where such CSR-related risks constitute a material business risk for a particular company, that needs to be handled within the overall approach to material business risks for that company. In other words: ‘Where a company has risks relating to sustainability or corporate social responsibility (CR) that are material to its business they should be considered in the context of the revised Recommendation 7.2’, according to the ASX CGC.¹²⁴

¹²¹ ASX CGC, above n 117, 3.

¹²² ASX CGC, above n 117, 4.

¹²³ Australian Stock Exchange Corporate Governance Council (ASX CGC), *Corporate Governance Principles and Recommendations* (2003) Recommendation 7.1.

¹²⁴ ASX CGC, above n 50, *Media Release 2*.

Finally, all of this sits within the overall requirements of Principle 7 on recognising and managing risk, including specifications on the balance of responsibilities between the board and management for the design, implementation, and oversight of overall risk management systems and controls relating to material business risks for the company. Once again, the wider point of the intended audience for such corporate reporting must be kept strongly in focus. In short, how CSR-related dynamics might feature in corporate assessment and disclosure of relevant material business risks for current and potential investors in a company as well as corporate regulators and other market players is very different from how CSR-related dynamics might feature in a corporate reporting regime that is designed to meet a wider range of public interests in society too.

5 *Wider Dimensions of Corporate Responsibility and Sustainability Reporting*

Accordingly, all of this contrasts with sustainability from the outward-looking perspective of how companies impact upon society, affect external stakeholders, and serve wider public interests than simply the public interest of efficient capital deployment for shareholder wealth-generation and flow-on societal benefits, as reflected for now in largely voluntary standards such as the Global Reporting Initiative (GRI) Reporting Framework and Sustainability Reporting Guidelines. This tension between inward-looking and outward-looking perspectives on sustainability is exemplified in the UK's business review requirements for annual directors' reports. Under these requirements, publicly listed companies must report information about environmental matters that includes 'the impact of the company's business on the environment', but they need only do so 'to the extent necessary for an understanding of the development, performance or position of the company's business'.¹²⁵ Citing sustainable development's dual implications for business and society as one of the 21st century's greatest challenges, the GRI's G3 Sustainability and Reporting Guidelines proceed to marry these business and societal dimensions of sustainability in recognising that '(t)he urgency and magnitude of the risks and threats to our collective sustainability, alongside increasing choice and opportunities, will make transparency about economic, environmental, and social impacts a fundamental component in effective stakeholder relations, investment decisions, and other market relations'.

Nevertheless, the optimal conditions for social, environmental, and sustainability reporting are yet to emerge across corporate regulatory and reporting regimes. No single definition of this form of reporting, its orientation, and its content attracts sufficient support to hold sway.¹²⁶ Reporting accuracy, reviewability, and comparability are compromised by the relative lack of reliable, uniform, and accepted standards and indicators.¹²⁷ The gap between corporate PR and corporate reality in CSR-related reporting remains, with considerable obstacles to meaningful

¹²⁵ *Companies Act 2006 (UK) s 417(5).*

¹²⁶ Villiers, above n 16, 228.

¹²⁷ Villiers, above n 16, 228-229.

use of such reporting by investors exercising discipline over corporate boards.¹²⁸ Corporate stakeholders other than shareholders characteristically are not the primary audience for such reporting, and hence face barriers in meaningfully engaging with corporations about the orientation, nature, and scope of reportable corporate activity, as well as in seeking redress for reported corporate impacts upon them.¹²⁹ The use of CSR-related reporting by key investment industry participants in their investment rating criteria and decision-making is still undergoing significant development, as are reliable tools for social, environmental, and sustainability accounting, auditing, and verification.¹³⁰

In Australia, as much as in the UK, there has been strong business and politico-regulatory resistance to corporate disclosure and reporting reform that goes beyond the capture of corporate responsibility and sustainability concerns by investor-based and market-driven corporate governance. As a result, these concerns are stripped of their wider societal dimensions and transformed into more narrowly focused concerns going to corporate prospects and risks in business reports. Transparent identification, assessment, and disclosure of all societal costs and benefits of corporate activity, and its impact upon all corporate stakeholders, is still not seen as part of the core of reportable corporate governance and responsibility despite the rise of transparency as a major corporate regulatory value worldwide, at least in some business regulatory contexts.¹³¹ Accordingly, the intertwined socio-economic, environmental, and governance dimensions of sustainable business development and accounting for a company's wider impact upon society both remain on the fringes of mainstream corporate reporting, except to the extent that a company's self-chosen competitive strategy and positioning seeks to align its business and societal dynamics. At the systemic level, the resistance of some supporters of a shareholder-based model to making the connection between these dimensions of corporate activity and its overall societal impact sits uneasily with the recognition by other supporters of that model that its legitimacy stems from its overall contribution to societal efficiency and effectiveness.

Still, there is some evidence of change. Recent changes to regulated reporting requirements in the UK and Australia at least recognise the commercial significance of both financial and non-financial business drivers and risks. The growing acceptance globally of detailed and credible frameworks for corporate investing (eg UN Principles for Responsible Investment) and other areas of activity is leading towards a critical mass of reliable, accepted, and widely used standards, with some leaders emerging from the pack of multiple, fragmented standards. Most importantly, corporate sustainability reporting frameworks and measures are gathering acceptance worldwide, most notably through the GRI, its infusion of sustainability perspectives,¹³² its alignment with other frameworks (eg the Global

¹²⁸ Villiers, above n 16, 229.

¹²⁹ Villiers, above n 16, 229.

¹³⁰ Villiers, above n 16, 229.

¹³¹ J Braithwaite and P Drahos, *Global Business Regulation* (2000).

¹³² Global Reporting Initiative (GRI), *Sustainability Reporting Guidelines* (2002).

Compact), and its high-level political endorsement in different countries and even internationally.¹³³ As more businesses embrace a form of strategic CSR that seeks competitive advantage from better aligning corporate responsibility and sustainability with wider societal trends, needs, and impacts, the gap narrows between what is essential for a company as a business and what is necessary for society, even if that still leaves many social problems and areas of public policy untouched and unreachable by any particular company's self-chosen strategic CSR.

V CONCLUSION

In this early stage of the 21st century, much of the public, regulatory, and business debate in Anglo-American and Anglo-Commonwealth domains, at least as reflected in their corporate regulatory regimes, remains heavily anchored in notions of shareholder value, state-mandated legal responsibility, and the voluntariness of CSR. Yet the 21st century business environment places pressure upon this comfortable orthodoxy at a number of points all at once, leading to an increasing need for corporate responsiveness to a wide range of governance, regulatory, and responsibility drivers. This article focuses upon only one part of that picture, in terms of the emergence of a distinctive body of CSR-related corporate law and regulation as part of a wider body of comparative CSR-related law and regulation across a range of comparable countries – a development that, at least on some levels, both reflects and shapes national and international CSR-related developments too.

A number of trends are likely to become more rather than less significant as the 21st century story of CSR further unfolds. First, as evidenced by recent corporate law reforms in both the UK and Australia, any CSR-related corporate law reform in the future must engage with comparative models and regulatory measures available in other jurisdictions, as a necessary part of the policy analysis, public consultation, and justification of final recommendations. Secondly, despite the topic of socially responsible directors' duties and business judgements occupying much attention each time one of these jurisdictions reviews the state of its corporate law with CSR in mind, it is also apparent from the most recent round of Anglo-Australian corporate law reviews that other CSR-related legal and regulatory measures are increasingly making their presence felt as well. The rise of corporate legal and regulatory measures covering SRI and ESG considerations in corporate and investment decision-making, business and operational review requirements, corporate responsibility and sustainability reporting, and integration of these developments within conceptions and practices of corporate governance are all major highlights of how much business concerns are increasingly intersecting with at least some CSR-related concerns. Increasing reference to SRI and ESG considerations and standards in the investment community worldwide is a third major trend in its own right. The wider injection of other societal interests into the domain of corporate responsibility and governance regulation is less evident to this

¹³³ Eg PJCCFS, above n 5; G8 Summit, above n 23.

point. A final trend of present relevance is the explosion of CSR-related networks and standard-setting initiatives nationally and internationally, even since the turn of the century.

Nevertheless, just as the story of CSR still has a long way to go in the 21st century, so too the development of national, comparative, and international bodies of CSR-related law and regulation still has some way yet to travel. At the same time, new corporate theories and insights are revealing that, even within orthodox shareholder-based corporate regulatory systems, ‘the shareholder primacy model does not, as a matter of law, restrict the concerns of corporate managers to the financial interests of shareholders (short-term or otherwise)’, but rather ‘permits attention to be given to shareholders’ non-financial concerns (such as concerns for the social or environmental impact of their corporation’s activities) and, through the medium of the shareholders, ... the interests of non-shareholders’.¹³⁴

CSR might not yet have become fully mainstream across all areas of corporate regulation and practice, but it is clearly moving away from being simply an optional or marginalised part of corporate strategising, decision-making, and reporting for many companies. As one of the modern architects of Anglo-Australian corporate governance standards declared in 2003:¹³⁵

Every company, like it or not, has a CSR policy. The first issue is whether they recognise the fact, and the second is how far they are alert to changes in what society expects of them in this field.

¹³⁴ Bottomley, above n 2, 175.

¹³⁵ A Cadbury, ‘The Challenge of Corporate Social Responsibility’ (2003) (CIPDA Conference, Business in the Community (BITC) UK).