

Corporate social responsibility: have recent reforms safeguarded the future?

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1. Introduction:

The social responsibility of corporations is increasingly a topic of debate. Whilst recent law reforms have targeted the accountability of directors to shareholders, questions remain whether corporations have a responsibility to the environment, society and other stakeholders and how such responsibilities should be imposed. In response, recent government reports have attempted to answer these questions and determine the future direction of corporate social responsibility (CSR). The role of CSR can be examined in the context of director's duties, reporting requirements and responsible business practices. This paper will critically discuss the current legal framework of CSR and the findings of these reports to determine the future prospects of corporate responsibility.

2. Director Duties:

A concern raised in the reports was whether the current framework of corporate law allows directors to consider other stakeholders without breaching their duty to the company and shareholders.

2.1 What does the current law allow?

At present, the law allows strategic CSR only. *Woolworths Ltd v Kelly*¹ and s181 of the *Corporations Act 2001* (Cth)² provides that directors, acting in good faith, in the best interests of the company and for a proper purpose, may choose to take into account a range of factors external to shareholders, only if this benefits the shareholders collectively.³ In certain circumstances a corporation may be obliged to consider CSR,⁴ as acting socially responsible is likely to result in positive publicity; public approval, endorsement and goodwill; investor confidence and demand; and promote a positive impact on the company share price.⁵ Therefore, directors have flexibility to balance short and long term considerations when exercising their decision making powers.⁶ An example of this is directors reducing short term corporate wealth by granting bonuses to current employees on the basis of benefiting the company long term through loyal and satisfied employees.⁷

However, the law does not extend to non-strategic social responsibility; the company and shareholders *must* receive some benefit. The Australian Shareholders Association, for example,

¹ (1991) 4 ACSR 431

² From here on will be referred to as 'CA'

³ Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Report*, Report No 4, Sydney, 2006 at 1 <[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSRReport.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSRReport.pdf)> at 5 March 2008

⁴ Ibid

⁵ Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations Summary of Submissions*, Report No 3, Sydney, 2006 at 5 <[http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSRReport.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSRReport.pdf)> at 5 March 2008

⁶ Ibid

⁷ *Hampson v Price's Patent Candle Co* (1876) 45 LT Eq 437

stated in response to corporate donations made to the tsunami relief, that directors have no approval for philanthropy. Donations should only be made in situations that are likely to benefit the company through greater market exposure.⁸

2.2 What are the shortfalls of the current law?

The CA does not provide for non-strategic CSR and not all companies incorporate CSR practices or consider environmental and other social factors as immediate risks to the company and its shareholders.⁹ The courts have also shown a reluctance to interfere with the business judgements of directors as CSR is a matter of director discretion. This is supported in case law such as *Parke v The Daily News Ltd & Others* and further strengthened by the enactment of s180(2) of the CA.¹⁰

In consideration of this, and the enormous power and wealth harnessed by corporations, it has been argued that CSR should be a *legal requirement*, rather than being hampered by legal duties to pursue an agenda of pure self interest.¹¹

2.3 Should amendments be made and are they likely?

There is a compelling policy argument that the pursuit of profits at all costs cannot be entertained, and government should legislate to require CSR practice by corporations, with views to achieving clear regulatory outcomes.¹² Whilst the Jackson report¹³ supported this notion, the CAMAC¹⁴ report did not. The report reasoned that the courts were better equipped to align corporate behaviour with changing community expectations,¹⁵ and that elaborating on interests directors may already consider would not improve decision making as it would provide no guidance on their application. Consistent with these findings, it is possible that such a provision would blur rather than clarify director's duties.¹⁶

Furthermore, stakeholders frequently have conflicting interests, whether regarding strategic or non strategic CSR; expecting directors to serve all stakeholders interests is problematic.¹⁷ For instance, where a duty is owed to a number of stakeholders with varying interests, it may be difficult for ASIC to determine whether an action is a breach of duty, or an exercise of judgement based on competing stakeholder merits.¹⁸

The Cooney Committee supported self regulation of CSR as allowing time for a corporate culture to develop within companies is preferable to trying to achieve the same through the imposition of black letter law.¹⁹ Taking this and the findings of CAMAC into consideration, it is unlikely that

⁸ Cited in Therese Wilson, 'The Pursuit of Profit at All Cost Corporate Law as a Barrier to Corporate Social Responsibility,' (2005) 30(6) *AltLJ* 278 at 278

⁹ W Gumley, 'Corporate social responsibility and the legal framework for sustainable decision making in the business sector a work in progress' (2006) *National Environmental Law Review* 34

¹⁰ Business judgement rule

¹¹ Note 8 at 282

¹² *Ibid*

¹³ D F Jackson QC, 'Report of the Special Commission of Inquiry Into the Medical Research and Compensation Foundation', September 2004

¹⁴ Corporations and Markets Advisory Committee

¹⁵ Note 3 at 111

¹⁶ *Ibid*

¹⁷ Note 8

¹⁸ *Ibid*, Note 3

¹⁹ James McConvill, 'Notes and Current developments Directors Duties to stakeholders a reform proposal based on here false assumptions' (2005) 18 *AJLC* 88

any further legislative change to director's duties will occur in the near future; rather the focus will be on voluntary mechanisms.

3. Reporting:

Companies disclosure of CSR performance is also an important factor in the CSR debate.²⁰ Whilst the CA contains legislative requirements in this area, the effectiveness of these provisions and the future direction of CSR in this regard has been a source of concern.

3.1 Triple Bottom Line Reporting:

Currently, companies are subject to numerous reporting requirements, but there is no provision in the CA or ASX listing rules that specifically requires all corporations to report on the social and environmental impact of corporate activities.

Arguments have been made for introducing triple bottom line reporting (TBLR) which involves the concept that a company's consideration of the financial "bottom line" only is inadequate and that there are additional aspects of business consideration – social²¹ and environmental – which impact on the companies activities.²²

3.2 The current requirements of social and environmental disclosure under the Corporations Act

There have been two amendments to the CA regarding environmental and social reporting. These provisions must be examined to determine whether further amendments are necessary and likely to occur in the future.

Section 299A:

According to the CAMAC report, the introduction of s299A indicated improvement in corporate reporting on social and environmental compliance.²³ Section 299A requires listed companies to provide an operating and financial review (OFR) in all annual reports. The OFR must disclose non-financial information that shareholders require to make an informed assessment of the operations of the company, its financial position, and its business strategies and prospects for future financial years. Whilst the section is expressed in broad terms and does not specifically refer to social or environmental issues, the Explanatory Memorandum directs companies to the *G100's Guide to Review of Operations and Financial Conditions*, which refers specifically to the disclosure of non financial information, including social and environmental performance.²⁴ However, s299A applies only to listed public companies and arguments have been made that it extend to other companies. CAMAC supported this argument but did not extend its recommendation to include private entities as s299A rests on an investor protection rationale.

Section 299A is potentially significant in broadening the reporting requirements in the future, but much will depend on the breadth that companies interpret the provisions. The lack of specific guidance within the provision itself may mean that corporate disclosure will continue to predominately include short term issues that have an immediate effect on share prices, rather

²⁰ Note 3 at 115

²¹ Such as human rights, health, welfare and safety

²² J Nolan, 'Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure' [2007] UNSWLRS 15 Austlii <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UNSWLRS/2007/47.html?query=corporate%20responsibility>> at 9 August 2007.

²³ Justine Nolan, 'Corporate responsibility in Australia: rhetoric or reality?' [2007] UNSWLRS 47 at 9, Auslii <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UNSWLRS/2007/47.html?query=corporate%20responsibility>> at March 2008.

²⁴ Ibid.

than long term environmental or social trends also affecting the corporation.²⁵ This conclusion is supported by arguments that the provision allows the omission of unfavourable information if it is likely to result in unreasonable prejudice to the company.

Section 299(1)(f):

Section 299(1)(f)²⁶ requires companies to include in director's reports details regarding their performance of relevant environmental regulations where the company's operations are subject to significant environmental law.²⁷ This section came under consideration in the CAMAC report.²⁸ The Committee found that whilst current legislation provides an adequate framework for environmental disclosure, it did not favour a further piecemeal approach of more specific provisions along the lines of s299(1)(f). Rather, voluntary reporting is the preferred method and any additional legislative measures should be included within specific legislation.²⁹ The provision also came under examination by the PJSC³⁰ which recommended that, due to ambiguity of both interpretation and application, the section should be repealed and replaced with a voluntary reporting system.³¹ Accordingly, it appears that in the short term at least, no additional legislative measures will be included within the CA.

3.2.1 Voluntary Reporting

The PJSC concluded that voluntary reporting would encourage companies to achieve better practice areas and be more willing to disclose information.³² Accordingly, it must be considered how effective voluntary reporting is and how this would operate in the future, particularly if the PJSC's recommended repeal were to occur.

Reports prior to s299(1)(f):

There were a number of reports conducted prior to the introduction of 299(1)(f)³³ in relation to 'poor' CSR performers; specifically companies whose negative activities had lead to prosecution by the EPA.³⁴

One study found that only 7% of companies reported negative information, calling into question the accuracy of voluntary reports, despite incentives encouraging accurate reporting.³⁵ A second study found that prosecuted firms disclosed more information of a positive nature compared to non prosecuted firms.

²⁵ Ibid at 10

²⁶ *Corporations Act 2001* (Cth) s299(1)(f)

²⁷ J Mitchell, M Percy & B McKinlay 'Voluntary Reporting Practices: A further study of 'poor' environmental performers' (2006) 19 *AJCL* 182 at 1.

²⁸ Note 3.

²⁹ Ibid at 147

³⁰ Parliamentary Joint Committee, *Corporate responsibility: Managing risk and creating value*, Canberra 2006 > http://www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/report/index.htm> at March 2008.

³¹ Note 27

³² Note 30 at 22.

³³ *Corporations Act 2001* (Cth)

³⁴ *Environmental Protection Agency*.

³⁵ Note 27 at 14

This green washing³⁶ supports the notion that companies will disclose more information where a positive societal response is required; and that voluntary reporting alone is simply a means of providing managers the opportunity to portray companies in a positive social light through selective information whilst obfuscating and misrepresenting the environmental and social performances of the firm.³⁷ Based on this it may be argued that the PJSC's recommendation to repeal s299(1)(f) would have a negative effect on CSR.³⁸

3.2.3 What does the future hold in respect of environmental disclosure?

Whilst the requirements of s299(1)(f) may reduce the amount of misleading environmental information reported, it may be argued that in many respects disclosure by companies still mirrors the voluntary scheme pre 1998, as s299(1)(f) only deals with the disclosure of environmental information.

In the submissions made to the CAMAC report there was wide support for additional mandatory social and environmental reporting requirements³⁹ to remedy concerns regarding the accuracy of information, comparability of data and general accountability.⁴⁰

Whilst the committee itself noted the current reporting regime is an imperfect mechanism for meeting the needs of interest groups extending beyond investors,⁴¹ it did not support additional measures for disclosure within the Act itself, rather that stricter requirements should be imposed through other legislation specific to the area of concern.⁴²

In the short term, given the conclusions reached in the CAMAC report, it is likely that the CA will remain untouched. This is reinforced by the federal government's commitment to the notion that greater corporate awareness of CSR should arise through voluntary initiatives.⁴³

4. Promotion of Responsible Practices

Another area of consideration is the promotion of responsible practices. Particular emphasis is placed on governments in this regard. Other initiatives requiring consideration are those that are industry based and educational in nature.

4.1 Types of Initiatives in place

4.1.1 Government Initiatives

Governments have the most substantial influence on whether corporations operate in a socially responsible manner. Not only is there the obvious advantage of imposing legislative requirements⁴⁴ but governments have the ability to encourage corporations to operate socially responsibly through a range of promotional incentives⁴⁵ such as rewards, the creation of projects

³⁶ The term 'green washing' is associated with the notion of corporate disclosure of environmental factors and is defined as, 'disinformation disseminated by an organization so as to present an environmentally responsible public image' M Naggy and R Gilsonan, 'See You in Court Beyond the Greenwash on Climate Change' (2006) 70 *Precedent* 16 at 17

³⁷ Note 27 at 14

³⁸ Ibid at 17

³⁹ Note 3 at 138

⁴⁰ Ibid

⁴¹ Ibid at 145

⁴² Ibid at 147

⁴³ Note 22 at 10

⁴⁴ For example the introduction of the *Energy Efficiency Opportunities Act 2006* (Cth) was designed to improve the efficiency of companies which use large amounts of energy

⁴⁵ R Sarre, 'Responding to Corporate Collapses Is there a role for Corporate Social Responsibility?' [2002] *DeakinLRev* 1 at 10 Austlii < <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/DeakinLRev/2002/1.html?query=co> > at 8 March 2008

and the implementation of guidelines.⁴⁶ Governments also have the ability to shame companies which operate 'poorly'.⁴⁷

4.1.2 Other Initiatives

Further promotion of responsible practice exists through industry and environmental initiatives. An example of an industry initiative is the Mining Certificate Evaluation Project, comprising of non government organizations which provide a certificate scheme to mine sites engaging in socially responsible practices.⁴⁸ Educational initiatives are evident in the number of business schools around Australia providing educational facilities in regards to 'business ethics and corporate responsibility'.⁴⁹

4.2 Is there a need for increase initiatives to encourage corporations to operate socially responsibly?

The findings of the CAMAC report suggest there is no direct requirement for increased initiatives regarding CSR.⁵⁰ Whilst CAMAC commented on the benefits such initiatives contribute to this area, the committee concluded that ultimately such enhancement of CSR practices were matters for the individual corporation⁵¹ and found that it was unnecessary for governments to provide incentives for companies to operate in a certain way and furthermore, they should not compel a company to undertake a particular approach in terms of management.⁵²

Taking consideration of these findings, it appears initiatives for promoting responsible practices is unlikely to increase in the near future, particularly within the government sphere. However, given CAMAC's comments regarding corporations enhancing their own social interests, the report may serve to encourage more industry based approaches in this area. By introducing practices through a relevant industry base, it is more likely that the particular practice will become mainstream in that area through growing awareness and industry pressure.

5. Conclusion:

As can be seen from the above discussion, CSR is an issue of increasing debate and the future direction of CSR is uncertain. Given that the PJSC and CAMAC reports advised against amendments to directors duties, it is unlikely that any will occur. This is supported by the fact that amendments making CSR mandatory would prove difficult to enforce due to conflicting interests of shareholders, stakeholders, the environment and society generally. However, whether the reporting sections in the CA will prove to be the saving grace which CAMAC claim or even remain is also unclear. Although, it can be said with certainty, given the federal government's clear support of voluntary reporting, further mandatory reporting is unlikely. With regard to the promotion of responsible initiatives, it appears that ultimately it is for corporations to enhance there own social responsibility rather than the government. All this indicates that the future of corporate responsibility is largely unregulated; rather it is a matter of director discretion.

[Note a bibliography for this article is available upon request].

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Note 3 at 150.

⁴⁹ Ibid at 157

⁵⁰ Ibid at 169

⁵¹ Ibid.

⁵² Ibid.