Rethinking Corporate Social Responsibility in Australia: Time for Binding Regulation?

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Abstract

Corporate social responsibility (CSR) and regulation have become prominent in discussions of controlling corporate behaviour in this era of globalisation, stemming from the growth of power and influence of multinational corporations. The scenario of voluntary CSR emerged as an alternative to mandatory legislation to encourage corporations to embrace their responsibilities on social, environmental and human rights issues. This thesis explores the concept of CSR and the theories behind it. It is followed by a perspective of the legal status of corporations which will highlight the difficulty in bringing them to account or expecting them to voluntarily commit to the CSR phenomenon. To provide the reader with a clear insight into the discussion over whether CSR should be mandatory or voluntary, this thesis evaluates the arguments regarding the necessity of CSR and the criticisms of its voluntary aspect.

Due to the limitations of the voluntary approach, there has been a movement to encompass CSR into regulation in order to ensure corporate compliance with social, environmental and human rights issues. This thesis examines this movement within Australia, where there are three main areas of discussion: directors' fiduciary duty, extraterritorial regulation and corporate disclosure. Although amendment proposals have not been approved, the discussions over regulatory reform will continue. Therefore, it is important to understand these underlying issues for the future development of appropriate mechanisms.

Utilising examples of corporate irresponsibility by Australian companies, this thesis suggests there may be a case to implement and strengthen regulations within Australia regarding social responsibility of corporations, which would promote and protect international standards both at home and abroad. While the attempt to implement this aspect has not yet been successful, it is hoped, in the future, 'political will' changes and public pressure will encourage reforms to the present regulatory system.

Key words: corporate social responsibility, voluntary, mandatory, fiduciary duty, extraterritorial corporate disclosure

Category: Qualitative Research Thesis

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Chapter 1

Introduction, Outline and Literature Review

1.1 Introduction

Modern business has been an integral part of society since the industrial revolution, assisting to improve the standard of living and providing society with new technologies and developments.[1] The operations and activities of corporations have become a progressively more significant aspect of civil society, to such as an extent that modern society cannot survive without them or their products and knowledge. According to Michael Novak, the corporation is a major source of benefit for civil society. He noted:

> 1. it creates jobs;
> 2. it provides desirable goods and services;
> 3. through its profits it creates wealth that did not exist before; and
> 4. it is a private social instrument, independent of the state, for the moral and material support of other activities of civil society".[2]

For these reasons, it may seem that corporations bring to society both an abundance of opportunities and financial resources, previously lacking. However, at the same time, they also reap benefits in return, which can be considered to be greater than they provide to society. Often, their activities have created massive negative results for the community, especially through the destruction of social, environmental and human rights standards.[3]

The fact that corporations have become so indispensable raises the issue of how society can maximise the benefits obtainable through business operations without them creating situations that ultimately

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[1] Mescon M. H., Bovée C. L. & Thill J. V., *Business Today* (Prentice Hall, 1999), p. 64.
[2] Novak M., *The Fire of Invention: Civil Society and the Future of the Corporation* (Rowman & Littlefield, 1999), p. 37.
[3] "Human rights that multinational corporations have been accused of violating include human rights to life, including the right to enjoy life; freedom from torture and cruel, inhuman, or degrading treatment; freedom from forced or slave labor; freedom from arbitrary detention or deprivation of security of person; freedom to enjoy property; freedom from deprivation of or injury to health; enjoyment of a clean and healthy environment - the latter also implicating interrelated international law recognizing private responsibility for pollution; - and freedom from discrimination. One should also consider private corporate deprivations of rights such as free choice in work; fair wages, a "decent living," and equal remuneration for work of equal value; safe and healthy working conditions; protection of children from economic exploitation; and protection of mothers". Deva S., "Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19, *Connecticut Journal of International Law*, p. 8, <http://ssrn.com/abstract=637665>.

become destructive of that society. In the past a corporation that benefited society and stayed within the law was lauded and respected. However, today's society expects corporations to do more than just obey the law; it demands that they apply ethical and moral responsibility, above and beyond the law, to their business conduct. This has become more problematic with the growth of multinational corporations (MNCs) through globalisation as it has become increasingly difficult for any particular state to control their activities. In order to attract greater investment through MNCs, states have been tempted to reduce their internal control mechanisms, thus allowing corporations to adversely affect social, environmental and human rights standards in host countries.[4] As there is difficulty in providing effective regulatory controls over cross-border activities, voluntary self-regulation as an alternative approach appears to be the favoured mechanism to deal with this aspect of corporate activity.

The concept of Corporate Social Responsibility (CSR) has been developed through the changing demands and expectations of society and is likely to continue to evolve accordingly. It relates to the understanding of social expectations with which corporations have to comply and influences how they behave in accordance with those expectations.[5] Carroll stated that ―social responsibility of business encompasses the economic, legal, ethical and discretionary expectations that society has of organisations at a given point of time".[6] Whetten, Rand and Godfrey described CSR as ―societal expectations of corporate behaviour: a behaviour that is alleged by a stakeholder to be expected by society or morally required and is therefore justifiably demanded of business".[7] While public expectations, as a core concern for corporations to meet social responsibility requirements, have continued to change with the passage of time, the onus has been placed on corporations to recognise and analyse these changes in order to establish a policy for response and methods of compliance.

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[4] Oatley T, ‗Multinational Corporations and the Race to the Bottom', in *The Global Economy: Contemporary Debates* (Pearson Longman, 2005), p. 172.
[5] Branco M.C. & Rodrigues L.L., ‗Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility' (2007) 12(1), *Electronic Journal of Business Ethics and Organisation Studies*, p.11.
[6] Carroll A.B. 1979, ‗A three-dimensional conceptual model of corporate performance' (1979) 4(4), *Academy of Management Review*, p. 500.
[7] Whetten D.A., Rands G. & Godfrey P., ‗What are the responsibilities of business in society?', in Pettigrew A. et al (eds), *Handbook of Strategy and Management* (Sage, 2001), p. 374.

As the expectations of business within society have changed, the concerns over social conditions have increased in importance for corporate management and CSR has emerged as a means to ensure that business contributes to the benefit and well-being of society. Collectively, CSR is regarded as covering the interests of all stakeholders regarding, especially, social, environmental and human rights issues. Corporations have a major role in promoting and protecting these standards through the adoption of CSR in their policies, especially in developing countries where inadequate or unenforced laws exist.

Generally speaking, CSR is used to define the responsibilities of corporations to respect the rights of others and promote the well-being of society. An analogy can be drawn between responsible corporations and behaviour of responsible individuals who constantly consider the impact their actions have on others in society. As articulated by Christopher Stone:

> "To begin with, responsible persons are ones who, at the least, think before they act, not only about the benefits to themselves, but also about the effects their actions are likely to have on others. They gather and take into account information bearing on distant consequences, on how their choices will impact neighbours and neighbourhoods. They weigh alternatives with reference to certain socially sensitive categories, that is, 'right,' 'wrong,' 'harm'… If a responsible individual is one who looks before s/he acts, who traces out consequences, the responsible corporation is one whose bureaucratic structure, information-gathering protocols, etc., are similarly oriented".[8]

The understanding that business activities affect society at large has been the key argument for approaches requiring social responsibility from business enterprises. Increasingly, the issue of CSR has become a serious subject for corporations when pursuing business excellence. Corporations are encouraged to comply with CSR standards and become 'good corporate citizens'.[9] The fear of losing their reputation and facing public repercussions has influenced corporations to take positive steps towards adopting CSR in their policies.

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[8] Stone C.D., 'Corporate Regulation: The Place of Social Responsibility', in Fisse B. & French P. (eds.), *Corrigible Corporations and Unruly Law* (Trinity University Press, 1985), p. 17.
Further explanation of 'responsibility' is given by Craig:
"To be responsible for something is to be answerable for it. We have prospective responsibilities…, or the responsibilities we have as moral agents, or as human beings. We have retrospective responsibilities, for what we have done or failed to do, for the effects of our actions or omissions. Such responsibilities are often…moral or legal responsibilities." Craig E., 'Prospective and Retrospective Responsibility', *The Concise Routledge Encyclopedia of Philosophy* (Routledge, 2000), p. 768. Quoted by Amaeshi K. M., Osuji O. K. & Nnodim P., 'Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications' (2008) 81(1), *Journal of Business Ethics*, p. 225.

[9] Moon, J., Crane, A. & Matten, D., 'Can Corporations Be Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society' (2005) 15(3), *Business Ethics Quarterly*, p. 427-451.

There has also been a growing interest by governments and civil society groups in the impact of corporations and their activities around the world, especially in the effects they have on social, environmental and human rights standards. It has become a challenge for corporations to respond to public interests, promoting sustainable development and international standards by adopting CSR policies. Nevertheless, although companies have been under pressure to accept their social responsibilities, this has not yet been universally achieved in the areas of social, environmental and human rights standards. Examples of corporate violations have been shown through various cases such as Shell in Nigeria[10], BHP in PNG[11], and more recently, BP's oil spill in the Gulf of Mexico.[12]

Thus, self-regulation that emerged as an alternative to legislation has not been universally effective. Increasingly, with the realisation that many of the world's problems arise from corporate activities, there has been a call for binding regulation on CSR issues, both in the developed and the developing world. Wood noted that "given what we know about human, organisational, and institutional behaviour, government is the most *effective* vehicle for implementing necessary social controls in support of environmental protection, human rights and justice".[13] Where free trade is seen as a political choice, it might be suggested that the problems of its failures can be resolved by returning total power to governments where they can apply direct control to corporations. In Australia, there have been various attempts to impose regulation over CSR issues to ensure that corporations operate within society's expectations in both the domestic and international arenas.[14] Even though these attempts have

[10] Essential Action and Global Exchange, "Oil For Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta (2000), A U.S. Non-Governmental Delegation Trip Report, September 6-20, 1999, <http://www.essentialaction.org/shell/Final_Report.pdf>, Human Rights Watch, The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities (1999), <http://www.hrw.org/legacy/reports/1999/nigeria/>.

[11] BHP, Australia's largest mining corporation, has caused environmental damage through its project in Papua New Guinea. *Dagi v Broken Hill Proprietary Co Ltd (No 2)* [1997]1 VR 428.

[12] Cleveland C. (Lead Author); Hogan C. M., Saundry P. (Topic Editor), "Deepwater Horizon oil spill', in C. J. Cleveland (ed), *Encyclopedia of Earth, Environmental Information Coalition* (National Council for Science and the Environment, 2010), <http://www.eoearth.org/article/Deepwater_Horizon_oil_spill?topic=50364>.

[13] Wood D. J., "Corporate Responsibility and Stakeholder Theory: Challenging the Neoclassical Paradigm', in Agle B. R., Donaldson T., Freeman R. E., Jensen M. C.,Mitchell R. K. & Wood D. J., "Dialogue: Toward Superior Stakeholder Theory' (2008) 18(2), *Business Ethics Quarterly*, p.162.

[14] Examples can be seen from the introduction of the Corporate Code of Conduct Bill 2000 and the inquiries in relation to corporate social responsibility by the Corporations and Markets Advisory Committee (CAMAC) and the Parliamentary Joint Committee on Corporations and Financial Services (PJCFS) in 2005-2006. These are discussed in a later chapter.

not met with success, it is possible that the Australian government may apply increased intervention to ensure corporations exercise social responsibility and contribute positively to the well-being of society.

1.2 Thesis Outline

This thesis will investigate, analyse and evaluate the increase in public attention to the growth of corporations and the consequent role of CSR. It explores the possibility of control over the activities of corporations, especially, regarding social, environmental and human rights issues. While these issues are often seen as being intermingled, in the main, they are different. Social rights can be considered to be those that are necessary for basic life participation. They are included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which address matters such as the right to adequate food, clothing, and housing[15], the right to basic health care[16], and the right to education.[17] Environmental issues have been of increasing concern because of the destruction of natural resources and biodiversity which can affect the general health and safety of society. Pollution and global warming threaten the well-being of the planet. Human Rights are norms recognised by treaties and under international law.[18] They can be defined as:

> —rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible".[19]

Therefore, even though social and environmental issues are intrinsic to human rights,[20] this thesis considers them to be individual subjects and uses the phrase _social, environmental and human rights' to express the importance of these matters in the context of corporate responsibilities.

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[15] United Nations, _International Covenant on Economic, Social and Cultural Rights' (Article 11), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.
[16] Ibid, Article 12.
[17] Ibid, Article 13.
[18] Such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
[19] United Nations, _What are Human Rights?', <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.
[20] The connection between social, environmental and human rights issues can be seen in the statement made by the Human Right Council as:
—Noting that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to

The aim of this thesis is to investigate what form corporate control should take in the future. It will argue that corporate profitability should be balanced with the well-being of society and, in achieving this, ethical behaviour should be an integral part of corporate practices. While the adoption of voluntary CSR policies has become widely accepted by governments and the business sector, this thesis suggests that having minimum standards required by law still has a significant role to play in the interaction of business and society. As both voluntary CSR and the law can have a significant impact on shaping corporate behaviour, this thesis proposes that developments in the law, to follow the ever-changing expectations of society, can enhance the interaction of corporations with that society.

The origins and operation of CSR are explained in this thesis, using as an example the corporate irresponsibility of Shell in Nigeria which captured public interest worldwide. The theories related to CSR are examined to clarify its development and necessity. By analysing those theories, it provides an understanding of the position of corporations in society. While each theory demonstrates the link between corporate profits and social behaviour, it suggests that under all theories corporations would find it beneficial to operate in a socially acceptable manner and that these theories can be used to encourage corporations to adopt good corporate practices. Nevertheless, where corporations fail to engage with voluntary CSR and ignore the interests of others, some form of regulation may still be required to ensure that they accept their social responsibilities. The arguments that corporations have social responsibilities are supported through analysis of the perspective of corporations as legal persons, in that, with their special status and great power, they should be expected to exercise the same responsibilities in society as individuals.

The discussion of the interaction between the law and CSR is then evaluated to discover the appropriate mechanism for controlling corporate activities. This thesis demonstrates the effectiveness of promoting

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access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence".
UNHRC, ‗Resolution 10/4: Human Rights and Climate Change' (2009), p. 1, <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf>.

CSR through codes of conduct introduced by international organisations and explores the potential for direct control of corporations under international law. As the thesis evolves, it will provide two examples of corporate irresponsibility by Australian corporations, James Hardie Industries and BHP. These case studies will be used to illustrate how corporate activities can create negative effects on society. It will be shown that there is overwhelming evidence that in each case the Board of Directors was more interested in satisfying their shareholders than in considering the impact of their operations on social, environmental and human rights issues. The thesis will highlight that these corporations displayed a total disregard for social responsibility, giving priority to the importance of profit maximisation. While these are only examples of corporate irresponsibility, they illustrate that some corporations do ignore their social responsibilities, and therefore demonstrate the need for regulation to augment voluntary CSR. The analysis of previous attempts to amend Australian domestic law, to provide increased control of Australian corporations operating both at home and abroad, shows that both the government and business sector still favour a voluntary approach. Three areas of possible enhanced regulation: directors‘ duties, exterritorial regulation and corporate disclosure are examined to search for a conclusion and recommendation which, if adopted, may improve overall corporate behaviour, both nationally and internationally to the betterment of both corporations and society.

Overall, the thesis acknowledges the benefits of voluntary CSR; however, it considers that some form of legal intervention to increase control over the activities of corporations in order to promote international standards and, therefore, improve their competitiveness in the global market may be needed. While it may be argued that existing Australian law is adequate to control corporate activities, this should not be used as a reason to prevent further legal improvements. A combination of both voluntary and mandatory approaches may be the most effective method for encouraging Australian corporations to promote and protect social, environmental and human rights standards both at home and abroad.

1.3 Thesis Chapters

This thesis is divided into eight chapters:

Chapter 1 provides the structure and aim of this thesis, explaining its scope and depth, and giving an insight into the subject matter. It also examines, via a literature review, various academic arguments for both voluntary CSR and mandatory regulation to form the basis for further discussion.

Chapter 2 presents an overview of the concept of CSR and explain its emergence in the global era. It will use the case of Shell in Nigeria as an example of the negative effect that corporate behaviour can have on society and will highlight the growing public interest in both the impact of corporate activities and the desirability of some form of control to prevent irresponsible practices.

Chapter 3 explores the theories behind CSR to reach a broader understanding of the subject matter. It will highlight the perspective of corporations towards social responsibility issues and demonstrate that each theory is, in reality, similar in that corporations behaving in accordance with society‘s expectations can both maximise profits and meet their social and moral obligations.

Chapter 4 examines previous attempts that have been made to bring corporate entities to account. It will discuss corporations as legal persons and the effect that this should have on their social obligations. Using the analogy of individuals‘ responsibility, it will show that there are rational reasons for expecting corporations to behave in a socially responsible manner.

Chapter 5 explores the promotion of CSR through global codes of conduct and analyses the voluntary aspect of those codes to evaluate the effectiveness of a soft law mechanism. Arguments both for and against the mandatory and voluntary approaches will be analysed and discussed in searching for the appropriate mechanism to promote corporate ethical practices. The chapter will also examine the possibility of increasing corporate control through international law and/or domestic regulation.

Chapter 6 discusses two examples of corporate malpractices by the Australian corporations, James Hardie and BHP, to highlight the weaknesses of voluntary CSR and the lack of legal enforcement to control corporate activities. Both cases illustrate how corporations can impact on society when they ignore their social responsibilities. Moreover, the consequential loss to their reputation and financial performance demonstrates the importance for corporations to operate in a socially responsible manner in the first place.

Chapter 7 examines three areas of current legislation for possible amendment to address the identified problems. First, whether the scope of the duties and responsibilities of directors in the *Corporations Act 2001* (Cth) should be expanded to include a duty to consider the interests of stakeholders other than shareholders. Second, the desirability of imposing extraterritorial regulation on corporations, ensuring Australian corporations operate with due regard for social, environmental and human rights standards both domestically and internationally. Third, the desirability of requiring mandatory disclosure in order to acquire genuine and transparent information with regards to CSR performance.

Chapter 8 discusses the findings of the previous chapters and presents the conclusion that while there is a need for a voluntary approach to promote the social responsibility of corporations, it may need to be augmented by a mandatory mechanism that would ensure a greater outcome for the promotion of social, environmental and human rights standards. It recommends that a combination approach may provide the best solution, where both voluntary CSR and a legislative base have a role to play and may complement each other.

1.4 Thesis Structure

Purpose

This thesis examines the arguments for and against the imposition of CSR into law. It suggests there is a need for further legislative intervention in Australia where, it can be argued that voluntary CSR is not universally working to ensure the protection of social, environmental and human rights standards in

both the national and international arenas. In particular, the thesis argues that there is a case for regulatory reform in the areas of directors' duties, extraterritorial regulations and corporate disclosures to impose and enforce corporate social responsibilities. This would assist in solving the problems of double standards and the limitations of self-regulation and would ultimately be to the advantage of those vulnerable to social, environmental and human rights violations. The thesis presents reasoned support for the combination of both voluntary and minimum mandatory mechanisms. It argues that while the present voluntary approach to CSR has produced positive effects, mandatory regulation can be used to augment effective voluntary measures and lead to greater social responsibility outcomes.

Hypothesis

Given the evidence that some Australian corporations have failed to engage with their social responsibilities and have violated social, environmental and human rights standards, current regulation in Australia can be criticised as being insufficient to ensure that those standards are upheld. Voluntary CSR has emerged as a mechanism to fill the gaps in the law, but this self-regulatory initiative has proved to be less than universally effective. Therefore, the hypothesis underlying this thesis is that, to ensure corporate compliance with CSR standards, there needs to be some amendment to the legal mechanism to impose mandatory minimum social responsibilities and liabilities.

Research Questions

The questions that will be examined in this thesis are:

- Should corporations have the same social responsibility requirements as individuals?
- Is the voluntary approach to CSR an effective method of protecting society from the abuses of corporations?
- Should CSR be promoted through a mandatory mechanism?
- Should the *Corporations Act 2001* (Cth) be amended to clarify directors' duties over stakeholders' interests?

- Should government accept and implement the imposition of extraterritorial regulation on corporations?
- Should the *Corporations Act 2001* (Cth) be amended to impose mandatory disclosure?

Methodology

This thesis adopts a qualitative research approach, using both primary and secondary resources to resolve the questions presented. In order to ascertain whether corporations should have the same responsibility as individuals, it examines the concept of legal personality and compares their status as artificial persons with that of a real person. The theories underpinning the emergence of CSR will be analysed to explain whether corporations can be expected to operate in line with social expectations. In seeking an appropriate mechanism for controlling corporate behaviour, the arguments for and against both voluntary and mandatory approaches will be examined. Two case studies, James Hardie and BHP in PNG, will be used to demonstrate the dangers of reliance on an entirely voluntary approach to CSR. The desirability of regulatory reform to prevent similar behaviour will be examined, especially in the areas of fiduciary duty, extraterritorial regulation and corporate disclosure.

Findings

Corporate scandals, such as those examined in this thesis, have raised questions over the failure of voluntary CSR and the sufficiency of existing corporate law to control corporate behaviour. While voluntary CSR may be ineffective, corporate misconduct may also be linked to weaknesses and loopholes in regulations, allowing corporations to ignore their social responsibilities. Despite this, the Australian government has been reluctant to amend current legislation. The thesis will suggest that, with their privileged legal status, corporations should be bound to meet the same social responsibilities as individuals. Moreover, because corporations are granted their charters for existence by government, it is proper and appropriate for government to require minimum standards to apply to how they conduct their business. Even though the potential to improve long-term financial benefits may motivate

corporations to engage with voluntary CSR, there are still cases where that does not happen and they fail to take other stakeholders' interests into consideration or to operate in an ethical manner. Therefore, it is argued that to ensure corporate commitment to CSR, it may be reasonable to augment voluntary CSR with a mandatory aspect, which could impose an enforceable duty to comply with those social responsibilities. It will be suggested that particular attention should be focused on the areas of:

- the scope of the duties and responsibilities of directors in the *Corporations Act 2001* (Cth);
- the imposition of extraterritorial regulation on corporations; and
- the imposition of mandatory disclosure.

Originality/Value

The thesis will demonstrate that all of the major theories related to CSR are similar in that they are linked to financial benefits, and that they all can be used to encourage corporations to engage actively with their social responsibilities through a process of voluntary self-regulation. Nevertheless, self-regulation of CSR has not been universally effective and, therefore, cannot be seen as a complete replacement for governments' responsibility to protect their citizens from misuse of corporate power. The thesis shows that there are advantages in combining voluntary CSR with enforceable and clear direction by law. It presents arguments for further development of the law, demonstrating that an expansion of directors' duties to include consideration of other stakeholders' interests, the imposition of mandatory disclosure, and the introduction of extra-territorial regulation would assist Australian corporations to act ethically and in accordance with society's expectations both at home and abroad, especially in jurisdictions where the voluntary mechanism is weak. The combination of these three aspects would provide a significant contribution towards the future development of the social responsibility of corporations. The arguments and discussions provided should be of value to corporations, government regulators, and individuals who have an interest in CSR, and will assist in the development of appropriate means of ensuring that corporations behave responsibly and are held accountable to society for their activities.

1.5 Literature Review

CSR has been a subject of attention by scholars, politicians, business entrepreneurs and the public in Australia for several decades, an attention that derives from a desire to protect society from the abuses of corporations. As government intervention in business practices varies from country to country, depending on their socio-economic status, there are differences in the legal frameworks that may be needed to control corporate activities. Voluntary CSR emerged as an attempt to reduce these differences and the worldwide growth and impact of business through the globalisation process has resulted in interest in the development of a voluntary approach. Nevertheless, while voluntary CSR may be appropriate in a globalised world, one must also ask whether a voluntary mechanism can be as effective as a regulatory framework. As a general remark, regulatory intervention may be a more effective mechanism because it ensures the responsible behaviour of corporations.[21] Consequently, the two distinct approaches have been a major area of discussion in attempts to develop more effective measures to control corporate activities and enhance society's overall well-being.

Since 2001, the European Union has encouraged CSR and has endorsed a voluntary approach.[22] Nevertheless it has also acknowledged that while CSR can generate greater benefits for society through increased sustainable development, there remains a role for public authorities in encouraging corporations to undertake socially responsible practices.[23] This role stems from the fact that there has been a prolonged lack of adequate governance at both national and international levels.[24] Accordingly, in its new strategy for CSR 2011-2014, while the European Commission recognised that the development of CSR should be carried out by corporations themselves on a voluntary basis, it also

[21] Unerman J. & O'Dwyer B., 'The Business Case for Regulation of Corporate Social Responsibility and Accountability' (2007) 31(4), *Accounting Forum*, p. 332-353..
[22] European Commission, 'Green Paper: Promoting a European framework for corporate social responsibility' (2001), COM(2001)366, 18 July 2001,< http://www.csr-in-commerce.eu/data/files/resources/717/com_2001_0366_en.pdf>.
[23] Commission of the European Communities, 'Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development' (2002), COM(2002)347 final, 2nd July 2002, p. 7, <http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127374.pdf>.
[24] Ibid, p. 8.

acknowledged the role of complementary regulation, to ~~p~~promote transparency, create market incentives for responsible business conduct and ensure corporate accountability".[25]

Therefore, the European Commission's endorsement of a voluntary approach to CSR does not detract from the desirability of an innovative legal framework to enhance more responsible behaviour by corporations, especially if it gives the public access to information that is reliable and transparent, which gives them a greater insight into corporate activities and practices. As Pascale suggested, a regulatory approach should be encouraged as a tool that would ~~e~~nhance the credibility of information, foster transparency and improve legal certainty."[26]

Many developed states, such as France and Belgium, have acknowledged the importance of complementary regulation and have adopted a comprehensive regulatory framework in relation to CSR.[27] This approach has also been adopted in developing countries, such as India, which has imposed a mandatory requirement that every company that meets a certain financial standing spend 2% of their net profit on specified CSR activities.[28] While this development in regulation has gained attention in many states, others have not yet been convinced of the necessity for such a strategy. The challenge in imposing regulatory framework is to evaluate whether it will create the best outcomes for society. In a situation where voluntary CSR cannot achieve its full potential, the development of a regulatory approach may be necessary and may develop into a core task for states. To ensure public confidence in corporate behaviour concerning social responsibilities, it has been suggested that ~~i~~it will also take

[25] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility' (2011), <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf>.
[26] Pascale A. D., 'The EU Voluntary Approach to Corporate Social Responsibility in Comparison with Regulatory Initiatives Across the World' (2007), <http://core-conferences.net/attach/CSR2007-016.pdf>.
[27] Ibid.
[28] This mandatory requirement became effective from 1 April 2014 under the Companies Act. See KPMG, 'CSR in India – A Changing Landscape' (2014), <http://www.kpmg.com/CH/Documents/Blog/pub-20140430-csr-india-changing-landscape-en.pdf>.

effective government action, in the form of reformed regulatory systems, improved auditing, and stepped up law enforcement".[29]

Concerns over the available means of controlling corporate activities in the international arena have increased with the growth of globalisation. The fact that the power of states has been shrinking has led to an expansion of the scope and responsibility of corporations for social, environmental and human rights issues, under international law. David Kinley suggested three factors for the shrinking of states: first, the role and legitimacy of states are decreasing; second, the growth in the transference of responsibilities for human rights to corporations; and third, the increase in global regulation.[30] This realignment of the responsibility and authority of states presents an opportunity for corporations to take up this challenge and demonstrate their commitment to society. However, Kinley argued that, despite all pressures and arguments, ~~t~~the State will and must be central to the protection of human rights".[31] While he agreed that states may not be the only actor to have responsibility for the protection of human rights, he insisted that they must remain as the foundation of the task.[32]

Certainly, the possibility of sharing responsibility is not beyond consideration. However, corporations taking over the responsibility of states for those matters might not create a desirable outcome. State responsibility cannot be eliminated and must remain an enduring principle to protect the well-being of citizens and society in general. The obligation of states, under international law, to protect human rights, and enforce social and environmental standards within their jurisdictions, no matter who the perpetrator is, gives them responsibility over both direct state action and non-state action.[33] Therefore, in the modern world, where corporations can have a greater effect on people's lives, it may be

[29] Coglianese C., Healey T. J., Keating E. K. & Michael M. L., ‗The Role of Government in Corporate Governance' (2004), Regulatory Policy Program Report, Centre for Business and Government, Harvard University, MA, Cambridge, p. 1, <http://www.hks.harvard.edu/m-rcbg/research/rpp/reports/RPPREPORT8.pdf>.
[30] Kinley D., ‗Human Rights and the Shrinking State: The New Footprint of State Responsibility' (2001), Castan Centre for Human Rights Law, Monash University Law School, <http://www.law.monash.edu.au/castancentre/conference2001/papers/kinley.html>.
[31] Ibid.
[32] Ibid.
[33] Ibid.

suggested that states should increase their regulatory role for the protection of society from the abuses of corporate activities.

Another possible dimension of imposing regulation on corporations is through international law. Kinley, later, developed that idea with Tadaki, proposing that reforms to regulation of corporate obligations in relation to human rights should be made at the level of international law.[34] They argued that a state-based approach is inadequate and reliance on states only may result in violation of human rights standards by corporations.[35] They examined the impact of codes of conduct and determined that these codes, by themselves, also cannot be used to guarantee the protection of human rights from acts by corporations.[36] Nevertheless, such codes can be important in the development of legislation.[37] In their conclusion, Kinley and Tadaki supported the creation of regulation under international law to impose human rights responsibilities on corporations. However, they also acknowledged that this would not be in substitution for the role of states in protecting those rights.[38]

This idea of imposing human rights obligations upon corporations under international law has been discussed by others and, similarly, none have suggested that it should be a substitute for improved domestic regulations that place limitations on corporate power.[39] Despite the noteworthy comments on the advantages of the development of international law, the attempts to move away from a state-centric approach to international law have not yet been unanimously supported. An example can be seen from the failure to gain agreement on the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, which polarised the arguments about

[34] Kinley D. & Tadaki J., ‗From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4), *Virginia Journal of International Law*, p. 931-1023.
[35] Ibid, p. 1021.
[36] Ibid, p. 953-960.
[37] Ibid, p. 936.
[38] Ibid, p. 1021.
[39] See Duruigbo E., ‗Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6(2), *Northwestern University Journal of International Human Rights*, p. 222-261; Deva S., ‗Human Rights Violations by Multinational Corporations and International Law: Where from Here?' (2003) 19, *Connecticut Journal of International Law*, p. 1-57,< http://papers.ssrn.com/sol3/papers.cfm?abstract_id=637665>; Danailov S., ‗The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations' (1998), <http://www.humanrights.ch/home/upload/pdf/000303_danailov_studie.pdf>.

governing corporations under international law.[40] Even though the idea of imposing direct international law obligations on corporations is ideal in theory, reaching that stage may not be achievable in practice – though it is likely to continue to be a subject of debate. Where it is unlikely, if not impossible, to seek an alternate enforceable mechanism for controlling corporate activities in the global arena, it would remain the states' responsibility through their individual regulatory frameworks. Therefore, the focus of imposing regulation should logically be on strengthening existing domestic mechanisms to achieve a more effective protection of social, environmental and human rights standards.

In examining the accountability of corporations for human rights violations under Australian law, Fitzgerald acknowledged that while there are many domestic laws for the protection of human rights, the lack of an enforceable corporate code of conduct presents difficulties in locating them and, therefore, they are insufficiently applied.[41] Moreover, despite the protection of human rights being promoted under Australian domestic law, there are still some areas of human rights within the economic, social and cultural group that require protection.[42] Also, the law does not usually cover the activities of corporations operating overseas, which leads to the problem that, where human rights standards in many developing countries do not exist or are not enforced, Australian companies are able to ignore these rights without fear of repercussion.[43] One particular concern over human rights enforcement on corporations is based on their legal personality and their ability to relocate jurisdictions.[44] Even though Fitzgerald argued that the law cannot be seen as the only way to provide protection for human rights, it still has the capacity to provide justice.[45] She proposed recommendations for greater enforcement of human rights through the state increasing its role and taking direct action to

[40] Bachmann S. O. V. & Miretski P. P., _Global Business and Human Rights - The UN _Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights': A Requiem' (2012) 17(1) *Deakin Law Review*, p 1-41. Also see Kinley D., Nolan J. & Zerial N, _The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25(1) *Company and Securities Law Journal*, p. 30-42.
[41] Fitzgerald S., _Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1) *Australian Journal of Human Rights*, p. 19.
[42] Ibid, p. 15.
[43] Ibid, p. 15.
[44] Ibid, p. 16.
[45] Ibid, p. 19.

protect human rights by imposing obligations on both companies and directors under corporate law and international norms.[46] This idea is explored in this thesis, which suggests that extraterritorial regulation could be introduced in Australia to deal with the regulatory disparity between countries and the enforcement problems that arise where corporations operate overseas.

In the book "The New Corporate Accountability", McBarnet discussed three aspects of CSR and the law: CSR beyond the law, through the law and for the law. The first concept sees CSR as a voluntary approach, where business adopts policies, which are above and beyond those required by the law.[47] The second concept considers the increasing role of the law in fostering and enforcing CSR policies.[48] The last concept considers that, where there is a limitation to the law or a lack of enforcement capability, CSR can contribute to the effectiveness of legislation by encouraging corporate compliance with the spirit of the law rather than the letter of the law.[49] The authors suggest that, while social and market forces have provided the impetuous for corporate engagement with CSR, law has also played an important part in assuring legal accountability by corporations. As the role of law continues to increase, it is nevertheless recognised that it is not the only method for controlling the activities of business.[50] Both law and CSR can be seen as "complementary controls in a new style of corporate accountability that involves both legal and ethical standards".[51] It would be an error to ignore the positive aspects that the law and voluntary CSR can offer. This thesis acknowledges that complementarity, in that, while it supports the development of the law, it does not attempt to negate voluntary CSR. The strengthening of regulation with the power of enforcement would ensure corporate compliance and supplement voluntary CSR where it is unable to fulfil its potential.

[46] Ibid, p. 16-17.
[47] McBarnet D., 'Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability', in D. McBarnet, A. Voiculescu & T. Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007), p. 13-31.
[48] Ibid, p. 31-44.
[49] Ibid, p .44-54.
[50] Ibid, p. 55.
[51] Ibid, p. 55.

Horrigan explored key aspects of the emergence of comparative corporate law and regulations relating to CSR within various countries, including Australia.[52] He recognised that despite the failure of three enquiries in Australia to produce changes in directors' duties that would make corporations more socially responsible, other nations such as the UK and the US have been more forthcoming in the development of their corporate law, considering all relevant stakeholders instead of only shareholders' interests.[53] He acknowledged the trend towards CSR becoming more important in the 21st century, as illustrated by the G8 leaders in their 2007 Summit Declaration, which promoted the need for CSR and addressed the desirability of efforts beyond those of emphasising only voluntary initiatives.[54] The G8 leaders strongly supported the Global Compact and urged both corporations and developing nations to participate in this initiative, and encouraged their progression towards the next level of global CSR dialogue.[55] Additionally in 2007, a global business survey found that corporate directors and other senior executives of the world's companies accepted the need for non-financial performance information and indicators for the essential maintenance of corporate profit-making.[56] The business case for corporate involvement with CSR is increasingly important for business performance and is now widely accepted by business leaders.[57] Horrigan used studies from the 1970s to the 1990s to indicate the correlation between financial performance and the social responsibility practices of corporations. This correlation remains under debate and it may be that successful companies engage with CSR because their financial abilities and resources allow them to do so.[58] The connection between corporate profits and CSR involvement is discussed in this thesis, which questions whether corporations will adopt CSR for a profit motive only. Where there is this possibility, it will be argued that the requirement for legislation is unavoidable.

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[52] Horrigan B., '21st Century Corporate Social Responsibility Trends - An Emerging Comparative Body of Law and Regulation on Corporate Responsibility, Governance, and Sustainability' (2007) 4, *Macquarie Journal of Business Law*, p. 85-122.
[53] Ibid, p. 86.
[54] Ibid, p. 90.
[55] Ibid, p.90-91.
[56] Ibid, p. 92.
[57] Ibid, p. 93.
[58] Ibid, p. 93.

Horrigan further pointed out that CSR-related corporate law and regulation stem from the connections between international law and regulation, where states are required under international law to impose obligations on individuals and other actors, including corporations, under domestic law.[59] An emerging international law of corporate responsibility has been developed from strands, such as, "state liability for failing to prevent corporate abuses of human rights, extra-territorial jurisdiction for international crimes committed by or against a state's citizens and corporate polluter responsibility under international environmental law".[60] Despite the attempts of international law to provide common frameworks for corporate responsibility, they remain elusive and it may be unrealistic to expect all states to adopt treaties that may adversely affect their national interests. Even though the development of international law is complemented by various norms and codes of conduct, established by international bodies, such as the ILO, OECD and UN, their success in controlling corporate activities has not yet been fulfilled. This is a major concern, given the need for state law to provide an enforceable framework for corporate responsibility, which will be further analysed and discussed in this thesis.

As the debates over CSR have increased, legal frameworks on corporate governance and corporate law have developed. The above discussions reflect the trends in the literature towards the regulatory opportunities related to CSR. Whilst most are focused on human rights, the same thinking could be applied to other issues including social and environmental standards. This thesis examines the issue of regulatory reform in the areas of directors' duties, extraterritorial regulation and corporate disclosure for future development. The imposition of minimum standards in these areas would be seen as a move towards an effective mechanism that can shape and control corporate conduct. Through the capacity for enforcement, regulation would create better and safer conditions for society which a voluntary mechanism cannot achieve. In the words of Utting and Marques in their book "Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development":

[59] Ibid, p. 93.
[60] Ibid, p. 94.

–increasing attention is now being focused on a more comprehensive notion of „corporate accountability‘, which implies moving beyond ad hoc voluntary initiatives, top-down „do-gooding‘ and very selective forms of stakeholder engagement. Instead, this approach emphasises the need for mechanisms that oblige corporations to answer to various stakeholders, allow victims of corporate bad practice to channel grievances and seek redress, and entail consequences for companies that do not comply with agreed standards".[61]

[61] Utting P. & Marques J. C. (eds), *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development (International Political Economy Series)* (Palgrave Macmillan, 2010), p. 5.

Chapter 2

An Overview of CSR

2.1 Introduction

Despite the increased discourse over CSR, there is still some uncertainty over what exactly the concept encompasses. This chapter will explain and clarify the various meanings of CSR, and discuss the reasons for its emergence. A case study of Shell in Nigeria is presented as an example that reflects those reasons whilst demonstrating the increasing public interest in CSR. This case also illustrates the negative impact of corporate activities on society, leading to further discussion of arguments for and against voluntary CSR.

2.2 The Concept of CSR

The concept of CSR stemmed from efforts by religious thinkers and theologians during the early part of the twentieth century to align religious and moral principles with business practices. In 1889, Andrew Carnegie, a US industrialist and philanthropist, presented the idea of CSR through two principles, that of charity and stewardship.[1] He believed that the rich should use their wealth to assist poorer members of society through redistribution, thus solving the problems brought about by the gap between them.[2] As a major philanthropist, he considered that business and the wealthy have a responsibility to benefit society through charitable actions rather than merely increasing their own wealth and eventually failing to use their wealth to create equality in society.[3] Voluntary philanthropic activities and social contributions by corporations have been seen as highlighting corporate performance and have become increasingly important over the last fifty years.

[1] Carnegie A., ‗Wealth' (1889) 149(397), *North American Review*, (Later published as Part I of *The Gospel of Wealth*), p.653-664, <http://cdl.library.cornell.edu/cgi-bin/moa/moa-cgi?notisid=ABQ7578-0148-88>.
[2] Ibid.
[3] Ibid.

The early debate on corporate responsibility can be found in the exchange of views between Professor Adolph Berle and E. Merrick Dodd in the 1930s, which greatly influenced the thinking on CSR today. Adolph Berle proposed that maximising shareholder value should be the main consideration and focus of corporate purpose and decisions.[4] He stated:

> ‗all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears'.[5]

Dodd argued against Berle's position, stating that:

> ‗public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function'.[6]

He saw corporations as not being separate from society or the community where they are allowed to take root and develop. In the 1950s, the debate ended with Berle coming around to Dodd's view that corporations have a duty to society as well as to their shareholders.[7]

During the same period, H.R. Bowen suggested the idea of social responsibilities of business, proposing that businessmen have obligations ‗to pursue those policies, to make those decisions, or to follow those lines of actions which are desirable in terms of the objectives and values of our society'.[8] This began the modern debate over CSR, which led to its scrutiny, examination and analysis over the succeeding decades. Two basic premises comprise the foundation of Bowen's idea. First, business is allowed to function at the will of society, thus its actions must satisfy the rules expected and set by society.[9] This constitutes a form of social contract which may develop and change over a period of time.[10]

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[4] Berle A.A., Jr., ‗Corporate Powers as Powers in Trusts' (1931) 44, *Harvard Law Review*, p. 1049-1074.
[5] Ibid, p.1049.
[6] Dodd E.M., ‗For Whom are Corporate Managers Trustees?' (1932) 45(7), *Harvard Law Review*, p. 1148.
[7] Berle A.A., Jr., *The 20th Century Capitalist Revolution* (Harcourt, 1954), p. 169.
[8] Bowen H.R., *Social Responsibilities of the Businessman* (Harper & Row, 1953), p. 6.
[9] Wartick S. L. & Cochran P.L., ‗The Evolution of Corporate Social Performance Model' (1985) 10(4), *The Academy of Management Review*, p. 759.
[10] Ibid.

Second, business has a moral obligation and should act as an agent in reflecting the values of society, following leaders such as churches and states in guiding and strengthening such values.[11]

In 1955, Bowen further noted that ‗[b]usinessmen are steadily becoming more conscious of the manifold consequences of their actions and more concerned about their social responsibilities".[12] He acknowledged that many business leaders had changed their attitudes on business practice and stated that:

> ‗businessmen and their corporations have disavowed their selfish impulses and turned their thoughts to the social welfare. And the progress that has occurred has been achieved primarily as a result of changes in the social climate of opinion, attitudes, and values within which business functions. Nevertheless, businessmen have made great progress in their responsiveness to their obligations to society".[13]

Public interest in CSR began to grow during the 1960s, when corporations were seen as having a self-interested attitude and a lack of concern for the negative effects that their operations were having on the rest of society. That concern has rapidly increased since the 1990s, when neo-liberal policies allowed a softer and friendlier approach towards corporate control. With the subsequent growth of the power and influence of corporations, this approach only increased criticism over their negative impact on social and environmental issues. Consequently, CSR emerged as a response to the demands that corporations develop a positive interaction with society.

CSR has been described as ‗a highly imprecise concept encompassing a bewildering array of expectations about corporate behaviour".[14] It is recognised as a synonym for corporate social performance, corporate sustainability and corporate citizenship.[15] With the increasing concern over the responsibility of business to society, there have been many attempts to define the scope and meaning of

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[11] Ibid.
[12] Bowen H.R., ‗Business Management: A Profession?' (1955), *The Annals of the American Academy of Political and Social Science*, p. 116.
[13] Ibid, p. 115.
[14] Jeyaretnam T., ‗Disentangling Sustainability: Corporate Social Responsibility- Rhetoric or Reality?' (2002), <http://ees.ieaust.org.au/pdf/Corporate_responsibility.pdf>.
[15] Branco M.C. & Rodrigues L.L., ‗Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility' (2007) 12(1), *Electronic Journal of Business Ethics and Organisation Studies*, p.12.

CSR but no uniform definition has been laid down and the exact meaning of CSR remains controversial. Consequently, CSR can become ―a confusing thing".[16] As Kitchin noted:

> ―o[]ne moment, it seems to mean the engagement of non-governmental organisations (NGOs), the next it is all about charitable donations; five minutes later it seems to mean the ethical treatment of employees. One minute the NGOs are calling the shots, the next the accountants are in on the act selling reputation assurance".[17]

The multiplicity of definitions of CSR does not help clarify the situation but have created more confusion. Clearly, CSR may be just one concept but it has come to mean different things to different people. To some, it means ―socially responsible behaviour, legal responsibility or liability, or a charitable contribution"[18] or some sort of norm of behaviour for business people rather than for ordinary people. Valor makes the point that different meanings for CSR can be used by the same author, even in the same article.[19] It can be seen as an ―eclectic field with loose boundaries",[20] depending on the perspective of people with different skills, knowledge and beliefs. Moreover, different social problems that exist in various societies create divergent expectations about the exact role business should take.[21] The World Business Council for Sustainable Development (WBCSD) found that the interpretations of CSR depend on local views and issues such as religion and governmental policies.[22] However, the overriding basis of CSR is that corporations have to behave in a moral manner and act with due responsibility toward society.

Attempts to narrow the gap between different notions of CSR have often been made. In 1978 Frederick traced the change in the concept ―from the ethical-philosophical concept of corporate social

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[16] Kitchin T. 2003, Corporate Social Responsibility: A Brand Explanation, *Journal of Brand Management*, Vol. 10, No. 4-5, p. 312.
[17] Ibid.
[18] Votaw D., ‗Genius Became Rare: A Comment on the Doctrine of Social Responsibility Pt 1' (1972) 15(2), *California Management Review*, p. 25.
[19] Valor C., ‗Corporate Social Responsibility and Corporate Citizenship: Towards Corporate Accountability' (2005) 110(2), *Business and Society Review*, p. 191.
[20] Carroll A. B., ‗Social Issues in Management Research' (1994) 33(1), *Business and Society*', p. 14.
[21] Masaka D., ‗Why Enforcing Corporate Social Responsibility (CSR) is Morally Questionable' (2008) 13(1), *Electronic Journal of Business Ethics and Organisation Studies*, p. 14.
[22] World Business Council for Sustainable Development, Business Role: Corporate Social Responsibility, <http://www.wbcsd.org/templates/TemplateWBCSD5/layout.asp?type=p&MenuId=MTE0OQ>.

responsibility to the action-oriented managerial concept of corporate social responsiveness".[23] This shift in the concept of CSR from an obligation on corporations to apply themselves to social well-being, to one of corporate ability to respond to the pressures and demands of society, is a significant change in approach. The change in concept is seen as a proactive approach where corporations can use foresight to manage problems through corporate policy implementation, while the previous one is seen as a reactive approach to solving problems individually as they arise, dependant on the CEO's directions.[24] In 1986, Frederick added ethical and moral values to the concept of CSR which corporations should employ within their policies and corporate culture.[25] This concept he called ‗corporate social rectitude'.[26] In 1998, he suggested another concept of CSR that would supplant the inadequacies of the distinctions in previous concepts, widening the dimensions of CSR through a new format of C for Cosmos, S for Science, and R for Religion.[27] Under Cosmos, corporations ―must be capable of dealing with the forces and powers that literally define human existence, human consciousness, and human purpose".[28] It is time for corporations to relinquish their central status and recognise themselves as part of the cosmological process.[29] Science is the foundation of the knowledge of the cosmos, encompassing the understanding of human and business behaviour.[30] Religion derives from an understanding that, ―a nature-based religious impulse is a fact of corporate life", whereas the religious beliefs of corporate managers can affect their decision-making to the detriment of others in society.[31] Interestingly, Frederick's concepts can be regarded as CSR discourse on the description of corporate practices and structures. Those concepts are descriptions of normative and behavioural patterns for corporations to respond to society,[32] providing them with a guideline for becoming good corporate citizens.

[23] Frederick W.C., ‗From CSR1 to CSR2: The Maturing of Business-and-Society Thought' (1994) 33(2), *Business & Society*, p. 150.
[24] Ibid, p. 155.
[25] Frederick W.C., ‗Toward CSR3: Why Ethical Analysis is Indispensible and Unavoidable in Corporate Affairs' (1986) 28(2), *California Management Review*, p.136.
[26] Ibid.
[27] Frederick W.C., ‗Moving to CSR4: What to Pack for the Trip' (1998) 37(1), *Business & Society*, p. 40-59.
[28] Ibid, p. 45.
[29] Ibid, p. 47.
[30] Ibid, p. 47.
[31] Ibid, p. 52.
[32] Eslava L., ‗Corporate Social Responsibility & Development: A Knot of Disempowerment' (2008) 2(2), *Sortuz: Oñati Journal of Emergent Socio-Legal Studies*, p. 51.

Nevertheless, it can be noted that, „[t]hey give corporations a linguistic readiness for social, environmental and cultural engagement, while remaining highly slippery in confrontational discussion".[33]

Carroll in 1979 described CSR as the relationship on the three dimensional levels of social responsibility, social responsiveness and social issues.[34] Through the integration of these dimensions, his model presents an enlightened view of a corporate approach towards obligations to society. He also proposed a well-known four-part definition of CSR, indicating that corporations should accept four aspects of responsibility to become good corporate citizens: economic, legal, ethical and philanthropic (see Figure).[35] He suggests that these four categories can be represented as a pyramid with the peak being philanthropic responsibilities and the foundation that supports all categories being economic responsibilities. Corporations are expected to apply all four categories equally and at the same time in their business practices.

Figure 1: The Pyramid of Corporate Social Responsibility Source: Carroll (1991, p. 42.)

[33] Ibid, p. 52.
[34] Carroll A.B., „A Three-Dimensional Conceptual Model of Corporate Social Performance" (1979) 4(4), *Academy of Management Review*, p. 497-505.
[35] Carroll A.B., „The Pyramid of Corporate Social Responsibility: Towards the Moral Management of Organisational Stakeholders" (1991) 34(4), *Business Horizons*, p. 42.

The changes in definitions have been studied by Ivan Montiel, who provides the following useful table for understanding the similarities and differences of the scope of CSR, given by various authors.

Corporate Social Responsibility – Related Definitions

Table 1

References	Definition
Elbing (1970)	Social Responsibilities of Businessmen. Describes the social responsibility framework (businessman has a responsibility more important than profit maximization), as opposed to the economic framework (businessman has one singular responsibility to maximize profits of its owners).
Davis (1973)	Social Responsibility. Firm‘s consideration of, and response to, issues beyond narrow economic, technical, and legal requirements (p. 312).
Hay and Gray (1974)	Social Responsibility of Business Managers. Responsibilities that extend beyond the traditional economic realm of profit maximization or merely balancing the competing demands of the sundry contributors and pressure groups (p. 137).
Purcell (1974)	Corporate Social Responsibility. A willingness on the part of the corporate manager (acting not only as an individual but as a decision maker implicating his or her firm) actively and with moral concern to confront certain social problems he or she deems urgent and to bend the influence of his or her company toward the solution of those problems insofar as the firm is able to do so. Such responsibility requires that the manager intelligently balance the needs of the many groups affected by the firm so as best to achieve both profitable production and the common

	good, especially in situations in which he or she is not required to do so by law or by external pressures that the company cannot easily resist (p. 437).
Gavin and Maynard (1975)	Corporate Social Responsibility. Refers to Luthans and Hodgetts (1972), encompassing such concerns as world poverty, consumerism, ecology, civil rights, as well as physical and psychological well-being of workers. Also refers to Davis and Blomstrom (1971) that the substance of CSR arises from the institution‘s ethical obligation to evaluate the effects of its decisions and actions on the whole social system (p. 377).
Mears and Smith (1977)	Social Responsibility. Responsibility of the firm to the public, employee, and consumer and responsibility of the employee to the firm.
Crawford and Gram (1978)	Social Responsibility. The outcome of transactions between firms and social interest organizations (p. 883).
Zenisek (1979)	Social Responsibility. A model with four phases: 1. Owner–manager type; 2. Organizational–participant type; 3. Task–environment type; 4. Societal type.
Aupperle, Carroll, and Hatfield (1985); Carroll (1979); Tuzzolino and Armandi (1981)	Social Responsibility. It must embody the economic, legal, ethical, and discretionary categories of business performance because of the need to address the entire range of obligations business has to society.
Boal and Peery (1985)	Corporate Social Responsibility. A three-dimensional construct: 1. Economic, noneconomic, human outcomes; 2. Ethical considerations; 3. Consequences for relevant interest groups. Describes four CSR outcomes for each Zenisek four-celled partition of social responsibility: 1.

	Organizational owner-manager (promotes economic interests of business, maintains high levels of productivity, promotes long-range survival of business, and promotes interests of stockholders); 2. Employees-organizational participants (safe working conditions, jobs that allow employees to use valued skills and abilities, promotes employee rights, job security for employees); 3. Task environment-consumers (produces products desired by customers, prices products fairly, maintains high quality of products and services, produces safe products); 4. Societal (company obeys the law, promotes social justice, supports social and cultural activities, does not degrade the environment).
McGee (1998)	Corporate Social Responsibility. It states the ambiguity of the CSR concept, sometimes defined in purely economic profit-making terms or as socially oriented in a proactive social responsiveness view.
McWilliams and Siegel (2001)	Corporate Social Responsibility. Actions that appear to further some social good, beyond the interests of the firm and that which is required by law (CSR is beyond obeying the law) (p. 117).
Maignan and Ralston (2002)	Corporate Social Responsibility. Conceptualized as motivating principles (driven by values, stakeholders, performance); processes (programs and activities aimed at implementing CSR principles and/or addressing specific stakeholder issues, including philanthropic, sponsorships, volunteer, code of ethics, quality, health and safety, and managing environmental impacts); and stakeholder issues (community, customer, employee, shareholders, suppliers).

Source: Montiel 2008[36]

[36] Montiel I., ‗Corporate Social Responsibility and Corporate Sustainability: Separate Pasts, Common Futures' (2008) 21(3), *Organization Environment*, p. 253-254.

A definition of CSR has also been developed by many organisations as shown in the following table.

Table 2 (Continued)

References	Definition
World Business Council for Sustainable Development (1998)	„Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large".[37]
Business for Social Responsibility (2000)	„Business decision-making linked to ethical values, compliance with legal requirements, and respect for people, communities, and the environment".[38]
CSR Europe (2002)	„It is about developing a new business strategy in which companies: - conduct business responsibly by contributing to the economic health and sustainable development of the communities in which they operate; - offer employees healthy, safe, and rewarding work conditions, ensuring fair compensation, good communication and equal opportunities for employment and development; - offer quality, safe products, and services at competitive prices, meet customers' needs promptly and accurately and work responsibly with their business partners; - are accountable to stakeholders through dialogue and transparency regarding the economic, social and environmental impact of their business activities; - provide a fair return to shareholders whilst fulfilling the above principles".[39]

[37] World Business Council for Sustainable Development, „CSR: Meeting Changing Expectations' (1998), p. 3, <http://www.wbcsd.org/DocRoot/hbdf19Txhmk3kDxBQDWW/CSRmeeting.pdf>.
[38] See Ethics & Policy Integration Centre, Ethics, Compliance & Social Responsibility, <http://www.ethicaledge.com/responsibility.html>.

World Bank (2003)	–Corporate Social Responsibility (CSR) is the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve quality of life, in ways that are both good for business and good for development".[40]
CSRwire (2003)	–CSR is the integration of business operations and values whereby the interests of all stakeholders including investors, customers, employees and the environment are reflected in the company's policies and actions".[41]
The Kennedy School of government at Harvard University (2008)	–We define corporate social responsibility strategically. Corporate social responsibility encompasses not only what companies do with their profits, but also how they make them. It goes beyond philanthropy and compliance and addresses how companies manage their economic, social, and environmental impacts, as well as their relationships in all key spheres of influence: the workplace, the marketplace, the supply chain, the community, and the public policy realm".[42]
European Commission (2011)	–the responsibility of enterprises for their impacts on society".[43]

[39] CSR Europe, „CSR Europe's Response to the European Commission Green Paper –For a European Framework on CSR": Proposal for Action' (2002), <http://www.cgil.it/archivio/ambiente-territorio/Governance/Responsabilit%C3%A0SocialeImpresa/PosizioneCsrEuropeSulLibroVerde.pdf>.

[40] World Bank Institute, „Public Policy for Corporate Social Responsibility' (2003), *WBI Series On Corporate Responsibility, Accountability, And Sustainable Competitiveness*, p. 1, <http://info.worldbank.org/etools/docs/library/57434/publicpolicy_econference.pdf>.

[41] CSRwire, Corporate Social Responsibility Categories, <http://www.csrwire.com/categories>.

[42] The Centre for Business and Government of the Kenedy School of Government , „The Initiative: Defining Corporate Social Responsibility' (2008), *Harvard University: John F. Kennedy School of Government*, <www.hks.harvard.edu/m-rcbg/CSRI/init_define.html>.

[43] The European Commission has previously defined CSR as –a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis" European Commission, „Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee Of The Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility' (2011), COM(2011) 681 final, 25 October 2011, p. 6, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>. Also see Commission of the European Communities, „Green Paper: Promoting a European Framework for Corporate Social Responsibility' (2001), p. 6, <http://www.csr-in-commerce.eu/data/files/resources/717/com_2001_0366_en.pdf>.

From the above tables it can be seen that although the definitions vary, they all share the same vision of providing a common good for society, based on ethical conduct. Their objectives are for business to operate in a manner that does not harm society but acts for its betterment and prosperity. Lantos argues that certain levels of misunderstanding over the extent of CSR often occur because of the lack of distinction of the ethical and philanthropic component; also from the wrongly premised idea that corporations should not get benefits from doing ‗good works' for society.[44] Nevertheless, it has been pointed out that ―what is good for society does not necessarily have to be bad for the firm, and what is good for the firm does not necessarily have to come at a cost to society".[45]

Even though there is still no consensus on a definition for CSR, concerns over social responsibility have continued to grow over the years, and many terms and concepts have emanated from these lengthy exchanges of ideas. Through this, the desire to identify an ethical basis for the conduct of business that reconciled profit and social responsibility has resulted in a very broad understanding of the meaning of CSR. However, while CSR does not mean the same thing to everyone, most accept it to be a voluntary commitment by business to serve their stakeholders' interest for the betterment of society. This interpretation was given by Jones over thirty years ago:

> ―Corporate social responsibility is the notion that corporations have an obligation to constituent groups in society other than stockholders and beyond that prescribed by law and union contract. Two facets of this definition are critical. First, the obligation must be voluntarily adopted; behaviour influenced by the coercive forces of law or union contract is not voluntary. Second, the obligation is a broad one, extending beyond the traditional duty to shareholders to other societal groups such as customers, employees, suppliers, and neighboring communities".[46]

Continuing into the 21st century, the ideology of CSR still remains a voluntary practice. Corporations are encouraged to operate with norms and standards that go above and beyond the letter of the law. As noted by the ILO, ―CSR is a voluntary, enterprise-driven initiative and refers to activities that are

[44] Lantos G.P., ‗The boundaries of strategic corporate social responsibility' (2001) 18(7), *Journal of Consumer Marketing*, p. 2-3.
[45] Moran P. & Ghoshal S., ‗Value Creation by Firms', in J. B. Keys & L. N. Dosier (eds), *Academy of Management Best Paper Proceedings*, (Academy of Management, 1996), p. 41-45.
[46] Jones T., ‗Corporate Social Responsibility Revisited, Redefined' (1980) 22(3), *California Management Review* (pre-1986), p.59-60.

considered to exceed compliance with the law".[47] The _voluntary' aspect is the main concern with the capacity of CSR to effectively encourage responsible and ethical behaviour by corporations. The fear that a voluntary mechanism is unworkable has led to the question of whether corporations should be forced to adopt CSR policies. That issue will be discussed in Chapter 5 of this thesis.

While corporations continue to grow and exist within society, the relationship between business and society will remain a significant theme, and CSR will increasingly become a priority for business conduct. Even in the absence of a formulated acceptable definition, which may never eventuate, corporations can no longer avoid embracing social issues in their business practices. Whether they are in favour of it or not, the community's expectations will become irresistible and the existing concepts already provide a significant contribution to the understanding of how corporations should interact with society. For the purpose of this thesis CSR is defined as to encompass all aspects of the expectation that corporations will conduct business in a way that improves social benefits as well as their own corporate performance, and that, they will balance their commitment to both business and society.

2.3 The Emergence of Corporate Social Responsibility

The reasons for the emergence of CSR can be derived from four factors:

a) the introduction of neo-liberal ideology;

b) the growth of globalisation;

c) the increasing influence of NGOs; and

d) pressure from media attention.

a) The Introduction of Neo-Liberal Ideology

Prior to the introduction of neo-liberalism in the 1980s, corporations were strictly governed by the state and operated under its instructions. The reduction of corporate regulation was achieved through the

[47] International Labour Office, _International Labour Conference, 96th Session, Report VI: The Promotion of Sustainable Enterprises' (2007), p. 115, <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_093969.pdf>.

support for a free trade system, a prescription for neo-liberalism, promoted by capital exporting-states. In the 1980s, US President Ronald Reagan and British Prime Minister Margaret Thatcher promoted neo-liberalism, a system of unrestricted market capitalism, as being the only feasible economic model.[48] With this ideology, came a shift towards privatisation and deregulation.[49] These regimes had a big impact on the national policy agendas, where public sectors that were previously the province of the government alone, such as in the area of energy, telecommunications, and transportation, became managed and owned by private business entities[50], and governments removed regulation from some areas to encourage greater investment by corporations.[51]

Neo-liberal ideology was supported through the belief that, if corporations are left free to operate without any constraints, that would bring with it market efficiency, which would generate wealth and increase economic prosperity for states.[52] It was argued that open competition based on the pursuit of self-interest would serve the world best, as markets are more efficient at providing goods and services to society.[53] It was believed that economic growth through free trade regime would distribute income and create a better quality of life for society.[54]

This explains why some governments are still reluctant to regulate business activities unduly and interfere with the efficiency of markets. Thus, through neo-liberalism, governments, which are responsible for the protection of their citizens, were, instead, playing a key role in reducing their

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[48] Harvey D., *A Brief History of Neoliberalism* (Oxford University Press, 2007).
[49] Swann D., *The Retreat of the State: Deregulation and Privatisation in the UK and US* (Harvester Wheatsheaf, 1988).
[50] ‗Governments privatise their assets for several reasons. One is to shed state enterprises that are operating at a loss and draining the government's coffers. Another is the hope that private owners will run the enterprises more efficiently, bringing better service than the state could provide by infusing the enterprise with new capital, improved management practices, and better technologies". United Nations Development Programme, United Nations Environment Programme, World Bank, World Resources Institute, *World Resources 2002-2004* (World Resources Institute, 2003), p. 94, <http://pdf.wri.org/wr2002_fullreport.pdf>.
[51] Sullivan A.& Sheffrin S. M., *Economics: Principles in Action* (Pearson Prentice Hall, 2002).
[52] Prasad M., *The Politics of Free Markets: The Rise of Neoliberal Economic Policies in Britain, France, Germany and the United States*, (University of Chicago Press, 2006).
[53] This has been described by Adam Smith as the ‗invisible hand of the market'.
Smith A., *An Inquiry into the Nature and Causes of the Wealth of Nations*, (Edwin Cannan (ed), Methuen & Co., Ltd, first published 1776, 5th ed, 1904), <http://www.econlib.org/library/Smith/smWN.html>.
[54] David Dollar and Aart Kraay found that economic growth raises incomes of the poor as well as others in society, and therefore, the free market is necessary for poverty reduction. Dollar D. & Kraay A., ‗Growth is Good for the Poor' (2001), *World Bank Policy Research Working Paper No. 2587*, p. 32, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=63265>.

regulatory standards in the promotion of free-trade efficiency. In order to attract foreign investment, this reduction in regulatory control was the main policy adopted by developing nations to increase their competitiveness. This strategy responds to corporations "seeking out favourable conditions such as low labour costs, fewer regulations and other financial or tax incentives"[55], resulting in a "race to the bottom" for states as they are continuously undercut by other states trying to attract corporate investment.[56]

The reduction in social control has also allowed corporations to violate human rights and fail to comply with social and environmental standards by abusing their power. These rights, as a common interest of all citizens, have too often been ignored by corporations in their efforts to maximise profits.[57] In such cases their economic goal has taken priority over socially responsible activities, which may ultimately result in long-term negative impacts on society. Thus, in reality, the belief that free trade would always improve the economic development of nations and benefit their citizens was unrealistic. The fact is that it can increase the gap in inequality and poverty between rich and poor around the world[58] as was shown in Oxfam's 2014 report which noted that the richest 85 people in the world controlled the same

[55] Makwana R., 'Multinational Corporations (MNCs): Beyond the Profit Motive' (2006), p. 3, <http://www.stwr.org/multinational-corporations/multinational-corporations-mncs-beyond-the-profit-motive.html>.

[56] A race to the bottom is a concept that occurs when countries reduce regulatory standards to compete with others. For example, China where the legal minimum wage is kept very low to gain competitive advantage over other developing countries vying for foreign investment. See Chan A., 'A "Race to the Bottom": Globalisation and China's Labour Standards' (2006), <http://rspas.anu.edu.au/~anita/pdf/AChancp461.pdf>.

[57] According to the Australian Human Rights Commission, human rights that are relevant to corporate activity might include:

- The right to liberty and security of the person.
- The right to an adequate standard of living (including adequate food, water, shelter and clothing), the right to education, the right to health, and other economic, social and cultural rights.
- The right to freedom of thought, conscience and religion.
- The right to freedom of expression.
- The rights of Indigenous peoples.

This indicates that not all human rights are affected by corporate activities, which raises the question of what human rights are not relevant. Understanding the scope of human rights would assist in the future development of regulations governing corporations.

Australian Human Rights Commission, 'Corporate Social Responsibility & Human Rights' (2008), <http://www.hreoc.gov.au/human_rights/corporate_social_responsibility/corporate_social_responsibility.html>.

[58] United Nations illustrates the income inequality between rich and poor countries in Human Development Report 2005: "The world's richest 500 individuals have a combined income greater than that of the poorest 416 million. Beyond these extremes, the 2.5 billion people living on less than $2 a day—40% of the world's population—account for 5% of global income. The richest 10%, almost all of whom live in high-income countries, account for 54%". Watkins K. (director &lead author), *Human Development Report*, *International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World* (United Nations Development Programme, 2005), p. 4.

wealth as the poorest half of the world population.[59] It also observed that, where financial resources are controlled by fewer people, that would also have a major influence on the political and economic system, creating possible social tensions and risking the breakdown of society.[60]

Certainly, many laws are purposely designed to assist the few accumulate greater wealth[61] and that often results in the poor getting poorer, especially during times of economic growth. As noted by David Korten:

> "It is all too common for poor people's deprivation to increase during periods of rapid economic expansion and decrease during periods of economic contraction. The reason is simple: the policies that favour economic expansion commonly shift income and assets to those who own property at the expense of those who labour for their livelihood. Although growth does not necessarily cause poverty, the policies advanced in its name often do".[62]

Clearly, while corporations are more able to operate freely throughout the world due to the reduction of barriers and regulations, this freedom of movement has not proved to have an equally positive effect on people or civil societies. This impact of global inequality occurs not only between countries but also within them.[63] Growing inequality is not confined to the economic aspect but also extends to health, education, and opportunities for social and political participation.[64] Ultimately, these inequalities result in widespread social disintegration, violence and crime, which exacerbate continuing global problems in a vicious unending cycle.[65]

The theory of free trade is impressive, as long as all the participants in the equation receive the financial benefits and, even more importantly for some, the societal benefits as promised or intended. Unfortunately, the promise of the plan often does not match the reality of the outcome. Irresponsible

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[59] Oxfam, 'Working for the Few: Political Capture and Economic Inequality' (2014), p. 2, <http://www.ipu.org/splz-e/unga14/oxfam.pdf>.
[60] Ibid, p. 3.
[61] Ibid, p. 3.
[62] Korten D. C., *When Corporations Rule the World* (Kumarian Press, 2nd edition, 2001), p.48.
[63] Wade R.H., 'Should We Worry about Income Inequality?', in Held D. & Kaya A., *Global Inequality: Patterns and Explanations* (Polity Press, 2007).
[64] United Nations, 'The UN's Report on the World Social Situation 2005: The Inequality Predicament' (2005), <http://www.sustainable-design.ie/sustain/un2005_ReportWorldSocialSystem.pdf>.
[65] Ibid.

corporations, whilst searching for cheap labour, often move their manufacturing plants to poor countries, promising them better living standards but frequently leaving a trail of devastated communities, ravaged economies, and with a degeneration in the local political scene. When corporate profit becomes the ultimate goal, liberalised trade practices begin to lose their mutually beneficial characteristics and do far more damage than good to all players in the equation, not only to the societies of the poor countries that are being exploited, but also to the societies of those developed nations that host these irresponsible corporations.

Indeed, a free-market system has created many problems for the world through the lack of control of corporate activities. Not only does it break the promise, it also has enabled corporations to gain advantage from unregulated markets and increase their ability to exercise their power to the detriment of others. Khor asserted that:

> ―Formost developing countries the globalisation process of rapid trade, financial and investment liberalisation has not fully lived up to its promise despite their adoption of profound structural reforms. Developing countries are ever more vulnerable to pressures from the most powerful players in the international order, whether these be states or transnational companies".[66]

In a regulatory vacuum, corporations may abuse their power without fear of retribution from government authorities. This situation has led to the traditional view of corporations complying only with legal standards being replaced by an expectation that they will adopt more ethically responsible actions, above and beyond the requirements of the law, through voluntary self-regulation.[67] Thus, voluntary CSR emerged to fill the gaps in the legal order for the control of corporate behaviour. With this voluntary mechanism, in alliance with NGOs and media support as discussed below, corporations may now face the consequence of loss of reputation resulting in diminished financial performance for non-compliance. CSR initiatives are widely encouraged as it is assumed that they would be an appropriate approach to solve the problems of the lack of regulatory control and

[66] Khor M., ‗Third World Network, Developing World Voices Doubts on Globalisation' (1999), <http://www.hartford-hwp.com/archives/25a/033.html>.
[67] Buhmann K., ‗Corporate Social Responsibility: What Role for Law?: Some Aspects of Law and CSR' (2006) 6(2), *Corporate Governance - The International Journal of Effective Board Performance,* p. 199.

consequential abuse of power by corporations. CSR is regarded as a tool working against the entrenched forces of neo-liberalism which fuelled the process of deregulation and resulted in the aforesaid ‗race to the bottom' of regulatory policies.[68] However, even though promoting voluntary CSR is seen as a way of resolving the consequences of the deregulation process, it still raises concerns as it is not considered a universally effective solution to ensure that corporations respect human rights and comply with environmental and other social standards. The pressure from the public that can influence companies' financial performance cannot always guarantee their compliance with voluntary approaches. Thus, while CSR would fill the gap in the legal orders, the strengthening of regulations in areas where voluntary mechanisms are weak may be necessary to provide a better balance and enhance CSR practices. The question remains whether governments will be able or willing to reinstate their power and impose legislative interventions on corporations. As Meessen stated:

> ―Oncethe means of production are privatised world-wide, once trade in goods and services is liberalised, once all State owned and State licensed monopolies are dismantled, and once macroeconomic decision-making is entrusted to market forces alone, the question arises whether the State deprived of all those functions will continue ‗to be above' all private forces that might emerge by then. For example, multinational enterprises, whose earlier challenge to State sovereignty had been overcome in the 1970s, might then escape another reinforcement of State control".[69]

b) The Growth of Globalisation

The expansion of a free-market ideology has accelerated the process of globalisation, promoting interconnectedness between corporations, communities, states, civil society groups, and international institutions.[70] Thomas Friedman defined globalisation as:

> ―Ite inexorable integration of markets, nation-states and technologies to a degree never witnessed before – in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation-states farther, faster, deeper, cheaper than ever before, and in a way that is also producing a powerful backlash from those brutalised or left behind by this new system.
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> The driving idea behind globalisation is free-market capitalism—the more you let market forces rule and the more you open your economy to free trade and competition, the more efficient and flourishing your

[68] Utting P., ‗Rethinking Business Regulation: From Self-Regulation to Social Control' (2005), *United Nations Research Institute for Social Development, Technology, Business and Society Programme Paper No. 15*, p. 23.
[69] Meessen K. M., ‗Sovereignty' in Wolfrum R. & Philipp C. (eds), United Nations: Law, Policies and Practice, (Martinus Nijhoff Publishers, 1995), p. 1200
[70] Held D., McGrew A., Goldblatt D. & Perraton J., *Global Transformations : Politics, Economics and Culture* (Stanford University Press, 1999), p. 27.

economy will be. Globalisation means the spread of free-market capitalism to virtually every country in the world. Globalisation also has its own set of economic rules—rules that revolve around opening, deregulating and privatising your economy".[71]

According to Brink Lindsey, globalisation involves:

"1. the economic phenomenon of increasing integration of markets across political boundaries;
2. the strictly political phenomenon of falling government-imposed barriers to international flows of goods, services, and capital; and
3. the much broader political phenomenon of the global spread of market-oriented policies in both the domestic and international spheres".[72]

Accompanying this process, there has been a massive increase in cross-border trade and foreign investment. With the growth in the number and size of multinational corporations[73], they have become the dominant force in economic development. It has been observed that corporations have become more powerful and influential, sometimes with incomes exceeding that of entire nation states.[74] This shift of power has resulted in a significant alteration to political authority, with corporations having an increased ability to affect government decision-making. With the flexibility to move resources between geographical locations and the ability to choose where and, to an extent, what rules they desire to operate under, they can use their power to influence government policies in their favour. Christensen wrote that:

"The economic strength of globalised businesses has shifted the balance of political power in their favour, allowing them to secure the upper hand in negotiations with governments around the world.

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[71] Friedman, T. L., *The Lexus and the Olive Tree* (Farrar, Straus and Giroux, 1999), p. 7-8.
[72] Lindsey B., *Against the Dead Hand: The Uncertain Struggle for Global Capitalism* (John Wiley and Sons, 2002), p. 275.
[73] Gabel and Bruner stated that the numbers of multinational corporations (MNCs) "were around 3,000 in 1900. By 1970 there were close to 7,000, and by 1990 the number had swelled to an incredible 30,000. A decade later there more than 63,000". In 2009, according to the World Investment Report, the numbers of MNCs around the world has increased to 889,416, which 82,053 are parent corporations and 807,363 are affiliates. Gabel M. & Bruner H. 2003, *Global Inc.: An Atlas of the Multinational Corporation* (The New Press, 2003), p. 2, and United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2009*: *Transnational Corporations, Agricultural Production and Development* (United Nations, 2009), Annex table A.1.8: Number of parent corporations and foreign affiliates, by region and economy, latest available year, p. 223, <http://unctad.org/en/docs/wir2009_en.pdf>.
[74] "In 1998 the annual turnover of BP was larger than the income of all the least developed countries combined". Chigunta F., 'Building Trade Capacity and Attracting Foreign Direct Investment' (2006), *Youth Employment Summit 2006*, <http://www.yesweb.org/thematic%20publications_Kenya%20Summit%202006/building_trade_capacity.pdf>. Also, according to Anderson and Cavanagh, of the world's 100 largest economies in 1999, 51 are corporations, whereas only 49 are countries (based on a comparison of corporate sales and country GDPs). Corporations have become more powerful than some states, e.g. General Motors is wealthier than Denmark, Ford Motors is bigger than Poland and Norway, and Sony is bigger than Pakistan. Anderson S. & Cavanagh J. 2000, The Rise of Corporate Global Power, p. 3 and 9, Available at: http://s3.amazonaws.com/corpwatch.org/downloads/top200.pdf.

> They have used this political power, enhanced by considerable political patronage, to advance their own interests, to oppose change, and to ensure that they are not held to account for their actions".[75]

Hofstadter viewed the situation as corporations becoming more powerful and influential than governments, "capable of buying up political support on a wholesale basis, just as they bought their other supplies".[76] Therefore, not only does globalisation help corporations to accelerate their economic power, it also assists them in increasing their political power at the same time. It is believed that this trend "has disempowered people and governments and transferred power into the hands of global corporations".[77] As Albareda noted:

> "within global governance is the growing participation by firms in tasks that were once the domain of public authorities. As a result, the state authority's control over society and the economy has eroded, and areas of authority once exclusive to the state are now shared with other sources of authority".[78]

Undeniably, through globalisation, business has increased its influence over governments. Many have observed that, "as the global economy becomes more integrated, the power of states is declining".[79] This is considered as a global problem, occurring in both developed and less developed nations. As Oshionebo stated:

> "The power of [corporations] is not felt at the level of the host developing countries alone. Depending on the extent of their integration with their home (and usually developed) economies, [corporations] are also able to deter both their home countries and the international community – the latter through the agency of the powerful home governments of the corporations – from developing effective national or international regulatory regimes…This explains the attitude of the developed countries in protecting the investment of their [corporations] in foreign countries through binding and enforceable international rules, while simultaneously opposing the imposition of binding international social duties on the [corporations]".[80]

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[75] Christensen J., 'Power Without Responsibility: Tax Avoidance and Corporate Integrity' (2005), <http://www.evb.ch/cm_data/Referat_JohnChristensen_e.pdf>.
[76] Hofstadter R., *The Age of Reform* (Vintage Books, 1955), p. 231.
[77] Rees S. & Wright S., *Human Rights and Business Controversies, in Human Rights, Corporate Responsibility: A Dialogue* (Pluto Press Australia, 2000), p. 10.
[78] Albareda L., 'Corporate Responsibility, Governance and Accountability: From Self-Regulation to Co-Regulation' (2008) 8(4), *Corporate Governance*, p. 432.
[79] International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (International Council on Human Rights Policy, 2002), p. 1.
[80] Oshionebo E., *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study*, (University of Toronto Press, 2009), p. 44.

This has been reflected in a genuine loss of control and represents a change in where the lever of control is held.[81] Corporations have taken over the mantle of national governments in making policy decisions, which has fuelled fear over the loss of democracy. At this level, it seems that corporations, which hold greater financial power and economic leverage, control the keys to democracy as the influence of market forces become a part of everyday life.[82] Korten commented that:

> "Corporate globalisation is neither in the human interest nor inevitable. It is axiomatic that political power aligns with economic power. The larger the economic unit, the larger its dominant players, and the more political power becomes concentrated in the largest corporations. The greater the political power of corporations and those aligned with them, the less the political power of the people, and the less meaningful democracy becomes".[83]

The role of states is an important subject for discussion, where the traditional "centralised governmental power was forced to give way toward more decentralised power".[84] State power is now no longer all-encompassing because certain aspects have been effectively surrendered to the private sector. In the process, with the decline of their power, states seem to have lost the ability to protect their social functions. They are seen as relinquishing their power to corporations, which have been given the responsible positions of managing certain economic and social tasks. As Drucker stated:

> "Every major social task, whether economic performance or health care, education or the protection of environment, the pursuit of new knowledge or defence, is today being entrusted to organisations".[85]

This loss of control is probably a major reason behind the concerns over globalisation. One might wonder how corporations can be relied on to competently take on a social role that is supposed to be the responsibility of government. The realignment of power between states and corporations has only increased the public's awareness of the need to restore state powers.

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[81] See Ohmae K., *The End of the Nation State: The Rise of Regional Economies* (Harper Collins, 1995), and Strange S., *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press, 1996).
[82] Share the World's Resources (STWR), Multinational Corporations, Available at: http://www.stwr.org/multinational-corporations/overview.html.
[83] Korten D. C., *When Corporations Rule the World* (Kumarian Press, 2nd ed, 2001), p. 142.
[84] Post J.E., Lawrence A.T. & Weber J., *Business and Society: Corporate Strategy, Public Policy, Ethics* (McGraw-Hill, 10th ed, 2002), p. 20.
[85] Quoted in Dunstan P.J., *The Social Responsibility of Corporations* (Committee for Economic Development of Australia, 1976), p. 9.

Consequently, as the world is becoming even more interwoven, it is hard to envision, on a national stage, how it would be possible to attain a suitable level of coping with the growing issues. This is a hurdle to overcome, where corporations become transnational and therefore cannot be dealt with by one government acting in isolation. Thus, it is suggested that the best way to solve these problems is through the emergence of global mechanisms. Despite the difficulties, there is a need for the participation of non-state players, such as NGOs, corporations and civil society groups in the creation of global governance, providing solutions for global problems above and beyond those of traditional political realms. This trend has been described as ―a shift in global business regulations from state-centric forms toward new multilateral, non-territorial modes of regulation, with the participation of private and non-governmental actors".[86]

Indeed, globalisation has transformed the process of legal and social regulation in order to absorb the changes and expansion of a borderless society and adapt to the new global economic order. This transformation has been referred to as ―[p]ostmodernity [where] a plurality of legal orders operating nationally, internationally and transnationally and increasingly in a privatised mode involving voluntary and soft regulation".[87] The emergence of voluntary CSR can be seen as having arisen to accommodate this transformation in authority, where corporations are encouraged to participate in voluntary codes aimed at promoting social responsibility.

Voluntary CSR has been regarded as a new form of global governance that provides a standard of corporate behaviour that can be applied on a global scale.[88] The rise of voluntary CSR mirrors the growth and impact of activities carried out by corporations in what has become a global economy. This

[86] Scherer A.G., Palazzo G. & Baumann D., ‗Global Rules and Private Actors: Towards A New Role of the Transnational Corporation in Global Governance' (2006) 16(4), *Business Ethics Quarterly*, p. 506.
[87] Cutler A.C., ‗Problematizing Coroporate Social Responsibility under Conditions of Late Capitalism and Postmodernity', in V. Rittberger & M. Nettesheim (eds), *Authority in the Global Political Economy* (Palgrave Macmillan, 2008), p. 206.
[88] Haufler viewed CSR as ―a potential new source of global governance, that is, mechanisms to reach collective decisions about transnational problems with or without government participation". Haufler V., *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, 2001), p. 1. Also see Levy D. L. & Kaplan R. 2007, ‗CSR and Theories of Global Governance: Strategic Contestation in Global Issue Arenas' (2007), <http://www.faculty.umb.edu/david_levy/CSR2007.pdf>.

raises the expectations that corporations should behave responsibly towards various civil societies, concerning social conditions and the overwhelming effects their operations have on a global scale. It is recognised that the unparalleled opportunities for business expansion offered by globalisation also brings up the issue of how to determine responsibilities for corporations in managing their impact around the world. CSR can therefore be seen as a "global social contract", requiring corporations to respect and protect the multiple societies that comprise their economic foundations. As noted by the UN:

> "The expanded scope for business efficiencies permitted by liberalized economic conditions seem to bring with them a new perception of a "global social contract", whereby MNCs that enjoy the freedom and benefits of globalization must accept some expanded responsibilities for managing its effects on various societies".[89]

c) The Increasing Influence of NGOs

The reduction in the power of nation states in their social role and the impact of corporations on social, environmental and human rights standards have triggered action by non-governmental organisations (NGOs)[90] aimed at protecting against violations on these issues. The definition of NGOs as given by Martens is that:

> "NGOs are formal (professionalized) independent societal organizations whose primary aim is to promote common goals at the national or the international level".[91]

Martens further explains that:

> "NGOs are *societal actors* because they originate from the private sphere. Their members are individuals, or local, regional, national branches of an association (which, again, are composed of individuals) – and usually do not (or only to a limited extent) include official members, such as governments, governmental representatives, or governmental institutions. NGOs *promote common goals* because they work for the promotion of public goods, from which their members profit and/or the public gains. NGOs can be *professionalised* because they may have paid staff with specifically trained skills, but they are not profit-orientated. NGOs are *independent* because they are primary sponsored by membership fees and private donations, but only to a limited extent, so that they are not under the

[89] United Nations, 'The Social Responsibility of Transnational Corporations' (1999), p. 20, <http://www.unctad.org/en/docs/poiteiitm21.en.pdf>.

[90] "A non-governmental organisation (NGO) is any non-profit, voluntary citizens' group which is organised on a local, national or international level. Task-oriented and driven by people with a common interest, NGOs perform a variety of service and humanitarian functions, bring citizen concerns to Governments, advocate and monitor policies and encourage political participation through provision of information. Some are organised around specific issues, such as human rights, environment or health. They provide analysis and expertise, serve as early warning mechanisms and help monitor and implement international agreements."
From NGO Global Network, Definition of NGOs, <http://www.ngo.org/ngoinfo/define.html>.

[91] Martens, K., 'Mission Impossible? Defining Nongovernmental Organizations', (2002) 13(3), *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, p. 282.

> control of governmental institutions. NGOs are *formal organisations* because NGOs have at least – a minimal organisational structure which allows them to provide for continuous work. This includes a headquarters, permanent staff, and constitution".[92]

NGOs have employed many tactics when dealing with corporate behaviour. Confrontational tactics include the "naming and shaming"[93], and the use of campaigns and boycotts[94] to increase public awareness of the impact of adverse corporate behaviour on society and the environment.[95] Many NGOs, such as Greenpeace, the World Wildlife Fund (WWF) and Friends of the Earth, have long experience with campaigning for the protection of the environment and on the understanding of CSR.[96]

The development in technology has also assisted NGOs in creating a global network and promoting CSR through their publications on the internet and in social media and they have become more prominent in increasing awareness of the importance of CSR. Examples of leading NGOs contributing in this way include the (ECCJ),[97] ICAR,[98] Human Rights Watch,[99] ESCR-Net,[100] FIDH,[101] Amnesty International,[102] Earth Rights International,[103] and the Business and Human Rights Resource Centre.[104]

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[92] Ibid, p. 282.
[93] Winston M., 'NGO Strategies for Promoting Corporate Social Responsibility' (2002) 16(2), *Ethics & International Affairs*, p. 71.
[94] Top ten boycotts in the U.S. are listed as: 1. Britain's East India Company, 2. FireHollywood, 3. Toyota, 4. Wal-Mart , 5. Tesco, 6. Herbal Essences, 7. Chevron –Texaco, 8. Caterpillar, 9. Kahrs Company and 10. Adidas Football Cleats and Shoes. Stretch J. 2010, Top Ten Boycotts, available at: http://www.toptenz.net/top-ten-boycotts.php.
[95] Such as in 1977, Infant Formula Action Coalition (INFACT) launched a boycott against Nestle in the US for its unethical marketing that caused health problems and deaths of babies in developing countries. The boycott spread throughout Europe, Australia, Canada and New Zealand. See History of the Campaign, <http://www.babymilkaction.org/pages/history.html>; Baby Milk Action, Protecting Breastfeeding – Protecting Babies Fed on Formula, <http://info.babymilkaction.org/>; and Fazal A. & Holla R., The Boycott Book, <http://www.theboycottbook.com/>.
[96] Greenpeace has campaigned against Nestle for the use of palm oil in their products, which destroy Indonesia's rainforests in the process. The WWF has campaigned over climate change, encouraging businesses to reduce emissions in their operations. Friends of the Earth campaigned against Shell in Nigeria for the flaring of gas in its operations. See Arkisaeo 2010, Boycott Nestle's Products! Greenpeace Campaigns to Save Indonesia's Rainforests, <http://www.greenfudge.org/2010/03/21/boycott-nestles-products-greenpeace-campaigns-to-save-indonesias-rainforests/>. WWF, Climate: Overview, <http://www.worldwildlife.org/climate/>, NBF News, 'Friends of the Earth campaigns against Shell's Gas Flaring in Nigeria' (2010), <http://www.thenigerianvoice.com/nvnews/17880/1/friends-of-the-earth-campaigns-against-shells-gas-.html>.
[97] "European Coalition for Corporate Justice (ECCJ) is the only European coalition bringing together European campaigns and national platforms of NGOs, trade unions, consumer organisations and academics to promote corporate accountability.[They] seek to tackle some of the root causes of corporate injustice by improving European laws governing business activities and by increasing access to justice for victims of human rights abuses". ECCJ, 'About ECCJ', <http://www.corporatejustice.org/-about-eccj,012-.html?lang=en>.
ECCJ promotes CSR issues through their publications such as 'Corporate social responsibility at EU level November 2006: Proposals and recommendations to the European Commission and the European Parliament' (2006), <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/eccadvocacybriefing112006_/eccadvocacybriefing112006_en.pdf>; and 'CSR Communication – Going beyond words: time to act' (2011), <http://www.corporatejustice.org/IMG/pdf/eccj_position_paper_on_csr.pdf>.

Apart from providing information to the public, NGOs have also engaged with corporations and promoted partnerships that encourage the management of their operations in accordance with society's expectations, reducing any negative effects on social, environmental and human rights issues.[105] They

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[98] "The International Corporate Accountability Roundtable (ICAR) is a coalition of human rights, environmental, labour, and development organizations that creates, promotes, and defends legal frameworks to ensure corporations respect human rights in their global operations". ICAR, <http://icar.ngo/>. Examples of publications are "Assessments of Existing National Action Plans (NAPs) on Business and Human Rights' (2014), <http://icar.ngo/wp-content/uploads/2014/10/ICAR-ECCJ-Assessments-of-Existing-NAPs.pdf>; and "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (2013), <http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>.

[99] "Human Rights Watch defends the rights of people worldwide. [They] scrupulously investigate abuses, expose the facts widely, and pressure those with power to respect rights and secure justice. Human Rights Watch is an independent, international organization that works as part of a vibrant movement to uphold human dignity and advance the cause of human rights for all'. Human rights Watch, "Mission Statement', <http://www.hrw.org/about>.
Human Rights Watch has actively published news and articles regarding CSR issues. Examples are "Corporate Social Responsibility' (28 July 2000), <http://www.hrw.org/news/2000/07/27/corporate-social-responsibility>
"Towards Binding CSR Standards' (2006), <http://www.hrw.org/legacy/wr2k6/corporations/4.htm>.

[100] "ESCR-Net is a collaborative initiative of groups and individuals from around the world, including a General Assembly of Members, an International Board and a Secretariat. ESCR-Net seeks to strengthen economic, social and cultural rights by working with organizations and activists worldwide to facilitate mutual learning and strategy sharing, develop new tools and resources, engage in advocacy, and provide information-sharing and networking".
ESCR-Net, About ESCR-Net, <http://www.escr-net.org/about>.

[101] The International Federation for Human Rights (FIDH) "is an international NGO defending all civil, political, economic, social and cultural rights, set out in the Universal Declaration of Human Rights. It acts in the legal and political field for the creation and reinforcement of international instruments for the protection of Human Rights and for their implementation". FIDH, "What is FIDH', <https://www.fidh.org/International-Federation-for-Human-Rights/what-is-fidh/#>.

[102] "Amnesty International is a global movement of more than 7 million people who take injustice personally. [They] are campaigning for a world where human rights are enjoyed by all". Amnesty International, "Who We Are', <https://www.amnesty.org/en/who-we-are/>. Examples of their campaign regarding corporate responsibility can be seen in the case of Shell in Nigeria, where Shell caused environmental impact through their oil spills. See Amnesty International, "Nigeria: Hundreds of oil spills continue to blight Niger Delta' (2015), <https://www.amnesty.org/en/articles/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/>.

[103] "EarthRights International (ERI) is a nongovernmental, nonprofit organization that combines the power of law and the power of people in defense of human rights and the environment, which we define as "earth rights." [They] specialize in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, EarthRights International seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in the communities where [they] work". ERI, "About EarthRights International', <http://www.earthrights.org/about/about-earthrights-international>. Their promotion of corporate accountability and responsible business practices can be seen through the publication of:
"2014 Congressional Report Card on Corporate Accountability' (2015), < http://www.earthrights.org/publication/2014-congressional-report-card-corporate-accountability>.
"2013 Congressional Report Card on Corporate Accountability' (2014), <http://www.earthrights.org/publication/2013-congressional-report-card-corporate-accountability>.
"Corporate Accountability Coalition: 2012 Congressional Report Card' (2013), <http://www.earthrights.org/publication/corporate-accountability-coalition-2012-congressional-report-card>.

[104] Business and Human Rights Resource Centre "work with everyone to advance human rights in business. [They] track the human rights abuse and advances of companies around the world, and help the vulnerable eradicate abuse". Business & Human Rights Resource Centre, "About us', <http://business-humanrights.org/en/about-us>.
Their publication regarding legal cases of human rights abuses by companies can be seen in "Corporate Legal Accountability Annual Briefing' (2015), <http://business-humanrights.org/sites/default/files/documents/BHRRC-Corp-Legal-Acc-Annual-Briefing-Jan-2015-FINAL%20REV.pdf>.

[105] Example such as Coca-Cola entered into a partnership with the World Wildlife Fund (WWF) to improve the water quality of China's Yangtze River. Kaye L., "WWF and Coca-Cola Partner to Save China's Longest River' (2010), <http://www.triplepundit.com/2010/08/wwf-coca-cola-partner-to-save-china-yangtze-river/>. Also See Damlamian C., "Corporate-NGO Partnerships for Sustainable Development' (2006), *CUREJ: College Undergraduate Research Electronic Journal, University of Pennsylvania*, <http://repository.upenn.edu/curej/12>.

have also engaged in dialogue with corporations to motivate them to adopt voluntary codes of conduct that embrace their social responsibilities.[106] These partnerships have become a norm in this global era, with both sides gaining benefits from their collaboration. NGOs may receive not only financial assistance but also a heightened reputation, whereas corporations access support for their engagement with CSR through the contribution of the skills and knowledge of NGOs.[107]

Through the use of both confrontation and collaboration tactics, NGOs have been actively influencing corporate compliance with codes of conduct relating to ethical behaviour and social responsibility. Their scrutiny and exposure of corporate social, environmental and human rights abuses also influence changes in society's expectations regarding CSR and add to pressure for government regulation.

d) The Pressure of Media Attention

The development of information and communications technology (ICT) has provided faster and easier public access to information on corporate performance throughout the world.[108] As a result, the scrutiny of corporate activities has become increasingly global, matching the growth of corporations. This increases public knowledge of rising worldwide problems created by corporations. The media has shown several areas of impact caused by the lack of ethical respect by some corporations, especially in the areas of social, environmental and human rights issues.[109] These corporations have been depicted as morally deficient by these media outlets, increasing public awareness of corporate irresponsibility and highlighting demand for corporations to change their practices.

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[106] Winston M., 'NGO Strategies for Promoting Corporate Social Responsibility' (2002) 16(2), *Ethics & International Affairs*, p. 77.
[107] Yaziji M. & Doh J., *NGOs and Corporations: Conflict and Collaboration* (Cambridge University Press, 2009), p. 123.
[108] Pegg S., 'An Emerging Market for the New Millennium: Transnational Corporations and Human Rights', in J. G. Frynas & S. Pegg, *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003), p. 10.
[109] Such as the oil companies, Chevron and Exxon Mobil. Chevron violated human rights and caused environmental damage in its operations around the world, eg. in Ecuador and Nigeria, and Exxon violated human rights in Indonesia. See The True Cost of Chevron: An Alternative Annual Report May 2011, <http://truecostofchevron.com/2011-alternative-annual-report.pdf>, and Reuters, 'Exxon to Face Lawsuit Over Rights Violations in Indonesia' (*New York Times*, 8 July 2011), <http://www.nytimes.com/2011/07/09/business/global/exxon-to-face-lawsuit-over-rights-violations-in-indonesia.html>.

It has become generally expected that corporations will operate responsibly and be accountable for the effects of their actions. Any untoward media attention over lapses can affect corporate reputation and profit, with consumers and investors reacting against corporate insensitivity and unethical conduct. Examples of corporations facing the repercussions of public boycotts and demonstrations can be shown in the reactions to Shell's human rights abuses in Nigeria[110], Nike's sweatshops in Asia[111], and the BP oil spill in the Gulf of Mexico.[112] Those reactions should caution corporations that they can no longer concentrate on profit-making policies alone, but should also take positive steps to meet social expectations in protecting and upholding social, environmental and human rights standards. As Rodman explained:

> "If there was a strong public, interest group or congressional constituency, corporations were often deterred by the threat of adverse publicity and the complications that might create with customers, shareholders and workers".[113]

The repercussions of bad publicity can also result in overly burdensome legislation for corporations. As Cochran stated "[i]f firms do not react appropriately, this media attention can also lead to unwanted legislation and regulation".[114] Therefore, to prevent the demand for more regulation, corporations need to operate in a manner that is in line with society's expectations.

Overall, media attention can pressure corporations to engage with ethical and moral practices as a means of preventing the risk of suffering adverse publicity and the subsequent loss of public support. Consequently, many corporations have developed and expanded the scope of their activities through CSR programs, and those of their associates, to improve their reputation and financial performance. As Spar stated:

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[110] Friends of the Earth, 'Behind the Shine: The other Shell Report 2003' (2004), < http://www.h-net.org/~esati/sdcea/shellreportFIN.pdf>.
[111] Teather D., 'Nike Lists Abuses at Asian Factories' (*The Guardian*, 14 April 2005), <http://www.guardian.co.uk/business/2005/apr/14/ethicalbusiness.money>.
[112], Krauss C., 'Oil Spill's Blow to BP's Image May Eclipse Costs' (*New York Times*, 29 April 2010), <http://www.nytimes.com/2010/04/30/business/30bp.html>.
[113] Rodman K. A., *Sanctions Beyond Borders: Multinational Corporations and U.S. Economic Statecraft* (Rowman and Littlefield, 2001), p. 127.
[114] Cochran P.L., 'The Evolution of Corporate Social Responsibility' (2007) 50(6), *Business Horizons*, p. 449.

to the community. This reinforces the argument that a voluntary system might not be able to resolve the problems stemming from the reduction of regulatory control associated with neo-liberalisation.

Second, Shell is a multinational corporation operating in many countries as a result of globalisation. With its financial status, Shell exerted a powerful influence on Nigeria, making it more difficult for the government to control its activities and to hold the company to account for any wrongdoing. This case can, therefore, be used to demonstrate that when corporations gain economic power through the effects of globalisation, they can take advantage of the situation and enhance their own interest at the expense of others in society. The fact that globalisation will continue to fuel the expansion of corporations throughout the world indicates there will be a commensurate need for a mechanism to control their activities worldwide.

Third, the impact of Shell's activities in Nigeria resulted in criticism of its operations by many NGOs. The Body Shop, Greenpeace, Friends of the Earth, Amnesty International and Human Rights Watch are among those NGOs who led the campaign against Shell's abuse of environmental and human right standards. They played a significant role in bringing Shell to account for its activities in Nigeria, which promoted the message that corporations cannot continue operating with their _business as usual' attitude. It may also be suggested that the judicial proceedings against Shell were as a result of the assistance by NGOs as most of the victims could not afford to take a powerful corporation like Shell to court. As Vidal stated:

> ~~in~~ternational groups such as Amnesty, Friends of the Earth International and Platform…have done extraordinary work to bring the human rights and environment scandal of the delta to world attention."[116]

Thus, this case illustrates that corporate activities can be challenged by NGOs not only through the tactical application of protests and boycotts but also through bringing them into the justice system. Moreover, it provides a message that corporations can no longer avoid their social responsibilities as

[116] Vidal J., _UN Report on the Ogoniland Oil Spills could be Catalyst for Change' (*The Guardian*, 10 August 2011), <http://www.theguardian.com/global-development/poverty-matters/2011/aug/10/un-nigeria-ogoniland-oil-spills>.

The image of Shell in Nigeria was of a corporation only playing its role as an economic actor, concentrating on maximising profits at the expense of others in the community. Its operations caused environmental destruction, leading to massive public demonstrations against the devastation of the Niger Delta led by Ken Saro-Wiwa in 1993.[118] His arrest because of these protests attracted attention from worldwide media and many NGOs. Shell was seen as being implicated with the Nigerian military in order to suppress the campaigns against the company.[119] Human rights organisations demanded Shell persuade the military government to commute the death penalty of Ken Saro-Wiwa and his colleagues. Paul Horsman of Greenpeace International stated that:

> ―With profitability comes responsibility and Shell should use their undoubted influence on the Nigerian authorities to stop the tragic deaths of Ken Saro-Wiwa and the Ogoni".[120]

However, Shell chose to remain centred on its purely economic interests rather than provide any opposition to social injustice, as illustrated by its statement, ―[i]t is not for commercial organisations like Shell to interfere in the legal process of a sovereign state such as Nigeria".[121] In fact, Shell was subsequently found to have been involved in bribing the military government to maintain its profit-making position.[122] While it blatantly stated that the company did not involve itself in any political activities[123], it was working alongside the Nigerian government, assisting with finance to restrain protests against the company through the use of torture and deadly force.[124] Eventually, despite a public outcry,

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[118] See Factsheet on the Ogoni Struggle, <http://www.ratical.org/corporations/OgoniFactS.html>.
[119] Vidal J., ‗Shell Oil Paid Nigerian Military to Put Down Protests, Court Documents Show' (*The Guardian*, 3 October 2011), <http://www.guardian.co.uk/world/2011/oct/03/shell-oil-paid-nigerian-military>.
[120] Greenpeace Press Releases, ‗Greenpeace Calls on Shell to Condemn Nigerian Death Sentences' (1 November 1995), <http://archive.greenpeace.org/comms/ken/confirm.html>.
[121] Lewis P., ‗Blood and Oil: A Special report; After Nigeria Represses, Shell Defends Its Record' (*New York Times*, 13 February 1996), <http://www.nytimes.com/1996/02/13/world/blood-and-oil-a-special-report-after-nigeria-represses-shell-defends-its-record.html?pagewanted=all&src=pm>.
[122] It has been found that ―When the Ogoni people pretested, Shell allegedly made a deal with the Nigerian government to invest $4 billion in a new natural gas project in return for police putting a permanent end to the protests...[and] allegedly paid off witnesses to provide false testimony used to execute Wiwa and the other 8 activists". Icky People, ‗Shell Goes on Trial for Crimes Against Humanity' (2009), <http://www.ickypeople.com/2009/05/shell-goes-on-trial-for-crimes-against.html>.
[123] New York Times, ‗Ken Saro-Wiwa' (22 May 2009), <http://topics.nytimes.com/topics/reference/timestopics/people/s/ken_sarowiwa/index.html>.
[124] The Center for Constitutional Rights, ‗The Case Against Shell' (2009), <http://wiwavshell.org/the-case-against-shell/>.

Ken Saro-Wiwa and eight other Ogoni colleagues were executed by the Nigerian military government on 10 November 1995.[125]

During his trial, Ken Saro-Wiwa said in his closing statement to the Nigerian military appointed tribunal that:

> ―I repeat that we all stand before history. I and my colleagues are not the only ones on trial. Shell is here on trial and it is as well that it is represented by counsel said to be holding a watching brief. The Company has, indeed, ducked this particular trial, but its day will surely come and the lessons learnt here may prove useful to it for there is no doubt in my mind that the ecological war that the Company has waged in the Delta will be called to question sooner than later and the crimes of that war be duly punished. The crime of the Company's dirty wars against the Ogoni people will also be punished".[126]

His vision was successfully pursued when in 2000 his family sought the right to proceed against Shell in a New York court.[127] The New York Court of Appeals overturned the District Court's decision that granted Shell's motion to dismiss on the grounds of *forum non conveniens* and ruled that the United States was a proper forum and that the case could be heard in the US jurisdiction. [128] Even though Shell appealed against that decision, the US Supreme Court allowed it to stand.[129] This decision increased the level of enforcement of international law in the US, providing further deterrence for corporations violating human rights.[130] As Fellmeth noted:

> ―U.S. courts have traditionally been reluctant to exercise jurisdiction over human rights violations committed abroad against foreign persons, often invoking forum non conveniens to dismiss cases. The Second Circuit's ruling in *Wiwa v Royal Dutch Petroleum Company* altered the balance of forum non conveniens, making it easier to bring claims based on a foreign human rights violation despite the availability of an alternative forum. The court's reasoning emphasizes the interest of the United States in vindicating human rights abroad and would hold wealthy parties to a greater standard of inconvenience

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[125] Greenpeace Press Releases, Ken Saro-Wiwa and 8 Ogoni People Executed: Blood on Shell's Hands' (10 November 1995), < http://archive.greenpeace.org/comms/ken/murder.html>.

[126] Ken Saro-Wiwa's Closing Statement to the Nigerian Military Appointed Tribunal, <http://archive.greenpeace.org/comms/ken/state.html>.

[127] *Wiwa v Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir. 2000).

[128] Earthrights International, Wiwa v Royal Dutch Shell Case History, <http://www.earthrights.org/legal/wiwa-v-royal-dutch-shell-case-history>. Also see United States Court of Appeals, Second Circuit, *Wiwa v Royal Dutch Petroleum Company*, <http://caselaw.findlaw.com/us-2nd-circuit/1401109.html>.

[129] Center for Constitutional Rights, *Wiwa et al v Royal Dutch Petroleum et al*' (2009), <http://ccrjustice.org/Wiwa>.

[130] Aaron Xavier Fellmeth concluded that ―In human rights litigation, which usually represents a means for less powerful parties to secure rights or obtain compensation for violations of their rights from more powerful parties, such as wealthy multinational corporations, this holding may prove extremely consequential. It avoids the double victimisation of human rights plaintiffs, who have been injured first by the defendant, then again by the denial of access to justice where a more powerful defendant's convenience is considered as important as that of the victim". Fellmeth A. X., *Wiwa v Royal Dutch Petroleum Co*.: A New Standard for the Enforcement of International Law in U.S. Courts?' (2002) 5, *Yale Human Rights and Development Law Journal,* p. 254.

> than poorer parties. The decision may mark a turning point away from judicial indifference and hostility to international human rights law".[131]

Ultimately, Ken Saro-Wiwa's wish that Shell would be put on trial came true 14 years after his death, with the company being charged with human rights abuses.[132] The lawsuit claimed that Shell provided assistance to the Nigerian government for the abuse and murder of protestors against the environmental damage caused by the company.[133] It was also submitted by the claimants that prosecution witnesses had been bribed to testify against Saro-Wiwa at his trial.[134]

After delays, Shell settled out of court on 8th June 2009 agreeing to pay US$15.5 million compensation to the plaintiffs for the deaths of their family members.[135] This settlement also created the 'Kiisi Trust' to support the education, health, community development and other benefits for the Ogoni people and their communities.[136] The fight for justice by the victims' families represented a further step towards holding corporations legally accountable for the consequences of their acts or omissions that result, even indirectly, in human rights violations.

Judith Chomsky, one of the attorneys in this case for the plaintiffs, stated after the settlement:

> "The fortitude shown by our clients in the 13-year struggle to hold Shell accountable has helped establish a principle that goes beyond Shell and Nigeria—that corporations, no matter how powerful, will be held to universal human rights standards".[137]

Indeed, this abuse of human rights by Shell produced an outcry from around the world, and the case illustrates that global campaigns can assist to bring justice against corporate wrongdoing. Even though

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[131] Ibid, p. 241.
[132] *Wiwa v. Royal Dutch Petroleum Co*., No. 96 Civ. 8386 (KMW), S.D.N.Y. 2002.
See Mathiason N., 'Shell in Court over Alleged Role in Nigerian Executions' (*The Observer*, 5 April 2009), <http://www.guardian.co.uk/business/2009/apr/05/shell-saro-wiwa-execution-charges>.
[133] Glovin D., 'Shell Faces Trial over Nigerian Crimes Against Humanity Claims' (2009), <http://www.bloomberg.com/apps/news?pid=20601102&sid=a91zA2YudcL4>.
[134] Mathiason, above n 132.
[135] Mouawad J., 'Shell to Pay $15.5 Million to Settle Nigerian Case' (*New York Times*, 8 June 2009), <http://www.nytimes.com/2009/06/09/business/global/09shell.html?_r=2&adxnnl=1&adxnnlx=1289920241-Jc+ypae9kZYMqEnzJ7ZWDw>.
[136] Center for Constitutional Rights, 'Trust Deed' (2009), <http://wiwavshell.org/documents/Wiwa_v_Shell_TRUST_DEED.pdf>.
[137] Center for Constitutional Rights, 'Settlement Reached in Human Rights Cases Against Royal Dutch/Shell' (2009), <http://wiwavshell.org/documents/Wiwa_v_Shell_Settlement_release.pdf>.

this was an out-of-court settlement and therefore did not establish any legal precedent, it demonstrated that anti-social activities can have adverse economic consequences either because companies think they could lose or because the negative publicity is such that it is cheaper to pay compensation to make the issue disappear. Consequently, even though Shell agreed to a settlement and denied any responsibility or liability over the allegations, there is ―no doubt that Shell has emerged guilty…[and] could not stand the damage of bad publicity around this human rights case".[138] The settlement strengthens the lesson that corporations need to take heed of their social responsibilities, respecting the rights of others, wherever they operate. As Han Shan, ShellGuilty Campaign Coordinator for Oil Change International, stated, ―[t]his case should be a wake up call to multinational corporations that they will be held accountable for violations of international law, no matter where they occur".[139] As a result, it may help discourage corporations operating overseas from engaging in activities that violate human rights, social or environmental standards, especially in host countries where there is a lack of regulation and/or enforcement.

In 2002, another attempt to prosecute Shell for being involved with the military government's execution of the environment protestors proceeded in the case of *Kiobel v Royal Dutch Petroleum Co.*[140] This case was under the continued examination of the courts over whether Shell could be sued in the US courts for its violations of human rights in Nigeria. In 2008, Shell's motion to dismiss the case on the grounds of a lack of personal jurisdiction was granted in the District Court.[141] In 2009, the motion for reconsideration of the jurisdiction issue by the plaintiff was granted.[142] A direct business relationship between Shell and the US was a major consideration for the decision, and because the

[138] Stated by Steve Kretzmann, Executive Director of Oil Change International, in Amunwa B., ‗Royal Dutch Shell Forced to Settle Human Rights Case Out of Court' (2009), <http://remembersarowiwa.com/royal-dutch-shell-forced-to-settle-human-rights-case-out-of-court/>.
[139] Amunwa B., ‗Royal Dutch Shell Forced to Settle Human Rights Case Out of Court' (2009), <http://remembersarowiwa.com/royal-dutch-shell-forced-to-settle-human-rights-case-out-of-court/>
[140] Shell was sued by Esther Kiobel, the wife of Dr. Barinem Kiobel, an Ogoni activist who was executed at the same time as Ken Saro-Wiwa. International Crimes Database, ‗*Esther Kiobel et al v Royal Dutch Petroleum Company et al*' (2013), <http://www.internationalcrimesdatabase.org/Case/1209>.
[141] Business & Human Rights Resource Centre, ‗Shell lawsuit (re Nigeria - Kiobel & Wiwa)' (2013), <http://business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa>.
[142] Ibid.

plaintiffs could not prove that relationship existed, the District Court dismissed the case in 2010.[143] The case was continued by appeal and petitions for rehearing until the US Supreme Court ordered that the case be reargued in 2012.[144] The questions presented were whether corporations could be held liable for violations under international law and whether they were immune from tort liability for international crimes.[145] In support of the plaintiff, Jennifer Green, a law professor, stated that:

> —the most significant principle is that corporations that are doing business in the United States are bound by U.S. law and U.S. law includes the prohibition of human rights violations. So when a corporation is complicit in those violations, it can be held liable under the Alien Tort Statute".[146]

It is not surprising that those who supported Shell included other multinational corporations, and the governments of the UK and the Netherlands, which are both heavily involved with the oil company.[147] It has been argued that the imposition of severe litigation on corporations operating in developing countries might result in them declining future investment.[148] This case attracted considerable public interest and it was hoped that Shell would be held liable by the US Courts in order to raise the standards of legal enforcement of human rights on corporations. Unfortunately, it was disappointing that, on 17 April 2013, the claims against Shell by a group of Nigerian nationals were dismissed by the U.S. Supreme Court on the grounds of the presumption against extraterritorial application of the Alien Tort Statute.[149] The Court held that it would be inappropriate for non-U.S. citizen plaintiffs to file lawsuits in the U.S. for alleged activities conducted outside the U.S. sovereign territory by non-U.S. companies.[150] Chief Justice Roberts delivered the opinion of the Court, saying:

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[143] *Kiobel v Royal Dutch Petroleum Co.,* 621 F.3d 111 (2d Cir. 2010)
[144] Hurley L., „Supreme Court: Justices Weigh Shell's Liability in Nigeria Case' (*Greenwire*, 28 February 2012), <http://eenews.net/public/Greenwire/2012/02/28/3>.
[145] Blake C. & Uren J., *Kiobel v Royal Dutch Petroleum (10-1491)* (Legal Information Institute, 2012), <http://www.law.cornell.edu/supct/cert/10-1491>.
[146] Colombant N., „US Supreme Court will Hear Shell Nigeria Abuse Case' (2012), <http://www.voanews.com/english/news/usa/US-Supreme-Court-Will-Hear-Shell-Nigeria-Abuse-Case-140437183.html>.
[147] Ibid.
[148] Hurley L., „Supreme Court: Justices Weigh Shell's Liability in Nigeria Case' (*Greenwire*, 28 February 2012), <http://eenews.net/public/Greenwire/2012/02/28/3>.
[149] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013)
Also see International Human Rights Clinic: Human Rights Program at Harvard Law School, *Kiobel v Royal Dutch Petroleum Co.*, <http://harvardhumanrights.wordpress.com/criminal-justice-in-latin-america/alien-tort-statute/kiobel-v-royal-dutch-petroleum-co/>.
[150] *Kiobel v Royal Dutch Petroleum Co*., 569 U.S. (2013).

> —Hd the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application…Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices".[151]

This decision was unexpected and criticised by many human rights activist groups that wished to seek justice for victims of Shell and the Nigerian government.[152] Raha Wala, Senior Counsel at Human Rights First, a Washington-based advocacy group, stated:

> —tImeans that the doors to justice will be shut for a large category of foreign individuals who really have nowhere else to turn to receive redress for international human rights issues including torture and extrajudicial killings. I think the Supreme Court really missed the mark today with its ruling."[153]

While it is reasonable to expect that victims should get justice no matter what their nationality or where the violation occurred, the US Supreme Court's decision implied that the US Courts should not be regarded as —eustos morum [moral custodians] of the whole world".[154] Other arguments justifying the decision were —to avoid conflicts with other nations, to avoid juridical interference with diplomacy [and] to protect U.S. citizens from similarly being haled into foreign courts".[155] These arguments are consistent with the presumption against extraterritorial jurisdiction and could equally be raised by other nations' courts when dealing with claims arising in other foreign countries, making it more difficult for those seeking justice to access it.

The lesson from this case is how difficult it can be for victims of human rights abuses by corporations operating overseas to seek redress through legal proceedings. As long as there is no universal jurisdiction where victims of corporate violations can pursue justice, there may be a case for home

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[151] *Kiobel v Royal Dutch Petroleum Co*.(Slip Opinion) 569 U.S. (2013), at 14.
[152] Centre for Constitutional Rights, _Kiobel v Shell: Supreme Court Limits Courts' Ability to Hear Claims of Human Rights Abuses Committed Abroad' (2013), <http://ccrjustice.org/newsroom/press-releases/kiobel-v.-shell%3A-supreme-court-limits-courts%E2%80%99-ability-hear-claims-of-human-rights-abuses-committed-a>.
[153] Hitchon J., _U.S. Kiobel Decision Bucks 30 Years of Precedent' (2013), <http://www.ipsnews.net/2013/04/u-s-kiobel-decision-bucks-30-years-of-precedent/>.
[154] *Kiobel v Royal Dutch Petroleum Co*, 569 US (2013) (US Supreme Court, Docket No. 10-1491, Decided 17 April 2013) (Slip Opinion) 12 (Roberts CJ) quoting approvingly from United States v La Jeune Eugenie, 26 F Cas 832, 847 (Story J) (Mass, 1822).
[155] Halmai G., _Domestic Courts and International Human Rights', in Mihr A. & Gibney M. (eds), *The Sage Handbook of Human Rights: Two Volume Set, Volume 1*, (Sage Publication Inc, 2014), p. 764.

states to introduce regulations with an extraterritorial application to reduce jurisdictional difficulties and increase access to justice. This will be discussed in more detail in Chapter 7.

In response to a long history of environmental and human rights abuses by Shell in Nigeria, on 4 August 2011, the United Nations Environment Programme presented a report on the impact of oil pollution in Ogoniland by Shell.[156] The report found that oil pollution had been severely widespread and damaging to the Ogoniland region for over 50 years and the restoration –could prove to be the world's most wide-ranging and long term oil clean-up exercise ever undertaken", initially US $1 billion and may take up to 30 years.[157]

Key findings of the report included:

- –Some areas, which appear unaffected at the surface, are in reality severely contaminated underground and action to protect human health and reduce the risks to affected communities should occur without delay;
- In at least 10 Ogoni communities where drinking water is contaminated with high levels of hydrocarbons, public health is seriously threatened;
- Control and maintenance of oilfield infrastructure in Ogoniland has been and remains inadequate: the Shell Petroleum Development Company's own procedures have not been applied, creating public health and safety issues;
- The impact of oil on mangrove vegetation has been disastrous. Oil pollution in many intertidal creeks has left mangroves-nurseries for fish and natural pollution filters- denuded of leaves and stems with roots coated in a layer of bitumen-type substance sometimes one centimetre or more thick;
- When an oil spill occurs on land, fires often break out, killing vegetation and creating a crust over the land, making remediation or revegetation difficult. At some sites, a crust of ash and tar has been in place for several decades".[158]

[156] United Nations Environment Programme, 'Environmental Assessment of Ogoniland' (2011), <http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf>.
[157] Eboh C. & Onuah F., 'U.N. Slams Shell As Nigeria Needs Biggest Ever Oil Clean-Up' (2011), <http://www.reuters.com/article/2011/08/04/us-nigeria-ogoniland-idUSTRE7734MQ20110804>.
[158] UNEP News Centre, 'UNEP Ogoniland Oil Assessment Reveals Extent of Environmental Contamination and Threats to Human Health' (4 August 2011), <http://www.unep.org/newscentre/default.aspx?DocumentID=2649&ArticleID=8827>.

The findings in this report can not only be used as a wake up call for the impact of corporate activities on communities but also as an expose of the truth for which Ken Saro-Wiwa was fighting:

> —Nearly 16 years after he and eight other Ogoni activists were hanged by the Sani Abacha regime, the truth has finally come out that Ken Saro-Wiwa was not merely shouting wolf about environmental degradation in his native Ogoniland. If anything, independently verified facts have shown that, perhaps, Saro-Wiwa and his fellow travelers possibly underestimated the magnitude of the disaster they fought to draw the world's attention to".[162]

Overall, the evidence of bad practices by Shell in Nigeria highlights the exploitation of a developing country by a multinational corporation operating overseas. According to Nnimmo Bassey, director of Friends of the Earth Nigeria and Chair of Friends of the Earth International:

> —Shell continues to reap obscene profits from the oil fields of Nigeria at the expense of the lives and the livelihoods of poor people. As we speak Shell is intensifying its poisoning of the environment and the peoples of the region. By our records Shell had over 200 oil spills in 2011 alone and the 2012 tally is rising already. Shell must stop the poisoning and start cleaning up its mess right now".[163]

In January 2015, in order to avoid further litigation in London, Shell agreed to pay £55 million for compensation for the massive oil spills in the Niger Delta in 2008 and 2009.[164] The compensation will be split as to £35 million for individuals and as to £20 million for the Bodo community. It appears that this is the first time that compensation has been paid directly to victims of the oil spills in Nigeria.[165] The lawyer representing the claimants, Martin Day, stated that:

> —While we are delighted for our clients, and pleased that Shell has done the decent thing I have to say that it is deeply disappointing that Shell took six years to take this case seriously and to recognise the true extent of the damage these spills caused to the environment and to the those who rely on it for their livelihood".[166]

It has been a long road since the case of Ken Saro-Wiwa for Shell to acknowledge its responsibilities. Over decades Shell has got away with the environmental problems it has caused in Nigeria, concentrating on Public Relations exercises rather than clean up operations and claiming it works to the

[162] The Guardian, 'UN Report on the Ogoniland Oil Spills could be Catalyst for Change' (10 August 2011), <http://www.guardian.co.uk/global-development/poverty-matters/2011/aug/10/un-nigeria-ogoniland-oil-spills>.
[163] Friends of the Earth International, 'Seventy Thousand People Ask Oil Giant Shell to Clean Up Its Mess in Nigeria' (2012), <http://www.foei.org/en/media/archive/2012/seventy-thousand-people-ask-oil-giant-shell-to-clean-up-its-mess-in-nigeria>.
[164] Vidal J., 'Shell announces £55m payout for Nigeria oil spills' (*The Guardian*, 7 January 2015), <http://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>.
[165] Ibid.
[166] Leigh D., 'Shell agrees £55m compensation deal for Niger Delta community' (7 January 2015), <http://business-humanrights.org/en/shell-agrees-%C2%A355m-compensation-deal-for-niger-delta-community>.

best international standards".[167] It is understood that the company [took] advantage of weak laws and lax enforcement in Nigeria to avoid responsibility for the environmental damage [its] operations cause".[168] In seeking to increase its profits through the extraction of natural resources, Shell ignored its social responsibility, resulting in the violation of social, environmental and human rights standards. Despite Shell signing up to the codes of conduct laid down in the Global Sullivan Principles,[169] it is obvious that the company was not committed to the objectives of those principles.[170] According to Shell's website, [p]rinciples are easy to sign up to – it's far harder to ensure that they are built into corporate culture and that we keep delivering real advances on the ground".[171] Clearly, notwithstanding the negative effects its operations caused to the local community, Shell promoted itself as complying with social expectations, using voluntary CSR as window dressing by publicly acknowledging its responsibility toward society. This illustrates that, while voluntary CSR has received growing interest from the public and corporations are expected to engage with its principles, some corporations, like Shell, fail to implement and commit themselves to CSR.

The case of Shell in Nigeria also illustrates the far reaching repercussions on human rights abuses and environmental damage, and the difficulties of bringing a company to account for its misconduct. For the purpose of this thesis, the case demonstrates the negative impacts corporations can have on society through focusing on profit maximisation alone. After the exposure of its activities in Nigeria by the media, it has since become the subject of wide discourse by scholars when considering CSR practices. It also raised the attention of NGOs towards CSR awareness and increasing the desirability for strengthening control of corporations to prevent irresponsible practices. This case is used in thesis

[167] Amnesty International, 'UN Confirms Massive Oil Pollution in Niger Delta' (2011), <http://www.amnesty.org/en/news-and-updates/un-confirms-massive-oil-pollution-niger-delta-2011-08-04>, and Vidal J., 'Shell Nigeria Oil Spill '60 Times Bigger Than It Claimed' (*The Guardian*, 23 April 2012), <http://www.guardian.co.uk/environment/2012/apr/23/shell-nigeria-oil-spill-bigger>.

[168] Essential Action and Global Exchange, 'Oil For Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta' (2000), A U.S. Non-Governmental Delegation Trip Report, September 6-20, 1999, p. 12, <http://www.essentialaction.org/shell/Final_Report.pdf>.

[169] See discussion in Chapter 5.

[170] Pegg S., 'An Emerging Market for the New Millennium: Transnational Corporations and Human Rights', in J. G. Frynas & S. Pegg, *Transnational Corporations and Human Rights* (Palgrave Macmillan, 2003), p. 24.

[171] Quoted in the UN High Commissioner for Human Rights, 'Business and Human Rights: A Progress Report' (2000), <http://www.ohchr.org/Documents/Publications/BusinessHRen.pdf>.

as a starting point for discussion of the arguments for and against implementing regulation relating to CSR, which will be undertaken in Chapter 5.

2.5 Conclusion

CSR is not a new concept and has developed rapidly over the past 30 years. Even though a unified definition has not yet been agreed, there is a common concept of CSR being that it is now centred on efforts to encourage corporations to consider society‘s interests and expectations. Certainly CSR has many key features that gain the support of NGOs and the media. In circumstances where corporations have no fear of repercussion through the lack of regulations, this may be replaced by fear of the consequences of loss of reputation by adverse attention from media and NGOs. Nevertheless, this is not always a sufficient deterrent. The situation of Shell in Nigeria shows that companies risk massive damage to their reputations and financial performance by disregarding their responsibilities to society. While the popularity of CSR is on the rise and corporations are expected to commit themselves to it, the case of Shell can be used as an example that some corporations may not actually engage with voluntary CSR. The failure of a voluntary approach combined with the difficulties of bringing corporations to account gives strength to the argument for additional regulation. This will be analysed later in this thesis.

Chapter 3

Theories Related to CSR

3.1 Introduction

This chapter will examine the four major theories on which concepts of corporate behaviour are based to determine whether, and, if so, to what extent, the ideas of CSR is, or can be, consistent with those theories. Shareholder and stakeholder theories are chosen as they are commonly discussed in the context of corporate responsibility. Social contract theory is chosen as this can be linked to the responsibilities of corporations in their role as members of society. Ethical theory is included because of its reliance, unlike other theories, on the existence of an inherent moral obligation to behave in defined and responsible ways. The basic premise of each of these theories is as follows: [1]

1. Shareholder theory – The business of business is to maximise its profits. Any social event is deemed relevant when it leads to greater wealth creation. Thus, CSR is a tool that corporations can use to pursue their own profit-generating ends.
2. Stakeholder theory – Due to the changing expectations of society, corporations need to acknowledge their responsibilities to stakeholders other than shareholders alone. CSR commonly addresses the improvement of relationships between business and stakeholders.
3. Social contract theory – The existence of any business, its growth and its development is dependent on society‘s approval. As members of society, corporations owe a responsibility to that society, having a moral obligation to provide benefits for the common good.
4. Ethical theory – Ethical values are the primary factor regulating the relationship between business and society. CSR imposes ethical considerations that business should take into account in its involvement with society. Corporations are therefore encouraged to apply moral and ethical behaviour in their business practices.

[1] Garriga E. and Mele D., ‗Corporate Social Responsibility Theories: Mapping the Territory‘ (2004) 53, *Journal of Business Ethics*, p. 52-53.

What determines the purpose and strategic approach of corporations depends on how they utilise these theories and how they see their position within society. Therefore, an understanding of the theories will illustrate what affects corporate behaviour and the response by business to the CSR phenomenon. This Chapter will, however, demonstrate that, in essence, each theory revolves around the reality that corporate behaviour is aimed at corporate survival and maximisation of profits. As they all share a common objective, irrespective which theory corporations adopted, their best interests can be advanced by policies that emphasise CSR.

3.2 Shareholder Theory

Under shareholder theory, corporations are enterprises whose role is essentially economic and whose major objective is to maximise shareholder value. The interests of others are not a consideration nor are any moral aspects of business decisions. This school of thought considers business as having very little or no social responsibility and is known as the orthodox paradigm.[2] The proponents of shareholder theory argue that "the business of business is business" and no other role exists for corporations other than that of creating and maintaining wealth for their shareholders. The most famous discussion of shareholder theory derived from Milton Friedman, who expressed the opinion that managers only have a responsibility to their shareholders. As he stated:

> "In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society…there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[3]

This concept has been criticised as being out of tune with modern society's view of corporations. In Friedman's view corporations do not have social or public obligations. Unlike politicians who are elected and are socially obligated and accountable to society, the business of business is general wealth

[2] Zu L., *Corporate Social Responsibility, Corporate Restructuring and Firm's Performance: Empirical Evidence from Chinese Enterprises* (Springer, 2009), p.21.
[3] Friedman M., 'The social responsibility of business is to increase its profits' (*New York Times Magazine*, 13 September 1970).

maximisation.[4] In a similar vein, this point of view was presented by Levitt, well before Friedman, who considered social responsibility as dangerous ground for business to explore.[5] He viewed social responsibility as "narrow ideas about a broad spectrum of unrelated non-economic subjects on the mass of man and society".[6] Corporations should know where they stand and focus their attention and efforts on the main objective of profit. They are not formed through a democratic process and are not able to handle social issues, as governments are.[7] It is the responsibility of states to look after their own public good, not business corporations.[8] Levitt acknowledged the pluralistic system of society consisting of many institutions whose function as groups can be best preserved when there is no external interference from others.[9] This means that business should not encroach on what is the government's responsibility for the protection and development of society. He saw social responsibility as harmful to business, and argued that for businesses to survive, profit maximisation and not social responsibility should be above all.[10]

A further criticism of social responsibility can be seen in arguments by Sternberg who sees business ethics and CSR as an oxymoron.[11] In her view it is absurd to consider that "business is ethical, or 'socially responsible', only if it pursues some 'socially responsible' objective".[12] She argues that, to be considered as ethical, it is crucial for business to serve its primary purpose of long-term maximisation of shareholder benefits.[13] Therefore, the CSR approach of corporations pursuing social responsibilities while sacrificing owner or shareholder values is, in fact, deterring corporations from being ethical businesses.[14]

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[4] Ibid.
[5] Levitt T., 'The Dangers of Social Responsibility' (1958) 36(5), *Harvard Business Review*, p. 41-50.
[6] Ibid, p. 44.
[7] Ibid, p.41-50.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Sternberg E., 'The Need for Realism in Business Ethics' (*Reason Papers*, Vol.31: May 2010, Correction), p. 34.
[12] Ibid, p. 34.
[13] According to Sternberg, "[t]he defining purpose of business is maximising owner value over the long term by selling goods or services". Sternberg E., *Just Business: Business Ethics in Action* (Oxford University Press, 2000, 2nd Edition), p. 32.
[14] "The key to Realist business ethics is very simple: business is ethical when it maximises long-term owner value while respecting Distributive Justice and Ordinary Decency. If an organisation is not directed at maximising long-term owner value, it is not a business; if it does not pursue that purpose while satisfying Distributive Justice and Ordinary Decency, it is not ethical". Sternberg, above n 11, p. 46.

The perspective of shareholder wealth maximisation, based on property/ownership rights, has been the subject of many academic papers. Those who support this view do not recognise corporations as creations of society; therefore they believe that they do not owe any responsibility to society. Corporations are simply seen as private property for use by their owners; they are totally private economic enterprises designed to increase their owners' wealth. As Younkins propounded:

> "Corporations are properly viewed as voluntary associations and as private property. Arising from individual contracts, corporations are not the creation of the state – the state simply recognizes and records their creation in a similar fashion as it does with births, marriages, sales of real estate, etc. The corporate charter is merely the articles of incorporation which are not related to state authority and do not obligate the corporation to serve the public interest".[15]

Since corporations are viewed as private property, fundamentalism maintains that individual rights are essential. Therefore, it is argued that the owners and those who act on their behalf retain property rights and, correspondingly, the right to participate in profitable activities.[16]

However, this ownership perspective has been opposed by Stout, in that:

> "the shareholders do not, in fact, own the corporation. Rather, they own a type of corporate security commonly called 'stock'. As owners of stock, shareholders' rights are quite limited. For example, stockholders do not have the right to exercise control over the corporation's assets. The corporation's board of directors holds that right. Similarly, shareholders do not have any right to help themselves to the firm's earnings; the only time they can receive any payment directly from the corporation's coffers is when they receive a dividend, which occurs only when the directors decide to declare one. As a legal matter, shareholders accordingly enjoy neither direct control over the firm's assets nor direct access to them. Any influence they may have on the firm is indirect, through their influence on the board of directors. And (as Berle himself famously argued) in a public corporation with widely dispersed share ownership, shareholder influence over the board is often so diluted as to be negligible. Thus, while it perhaps is excusable to loosely describe a closely held firm with a single controlling shareholder as 'owned' by that shareholder, it is misleading to use the language of ownership to describe the relationship between a public firm and its shareholders".[17]

Another criticism against a shareholder primary approach is that even though corporations are regarded as economic institutions, they cannot avoid their responsibility towards society. As Steiner stated:

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[15] Younkins E., 'Individual Rights, Social Responsibiities and Corporations' (2000), <http://www.quebecoislibre.org/younkins22.html>.
[16] Klonoski R. J. 1991, 'Foundational Considerations in the Corporate Social Responsibility Debate' (1991) July- August, *Business Horizons*, p. 10.
[17] Stout L., 'Bad and Not-so-Bad Arguments for Shareholder Primacy', (2002) 75, *Southern California Law Review*, p. 1191.

> —Business is and must remain fundamentally an economic institution but it does have responsibilities to help society achieve its basic goals and does, therefore, have social responsibilities".[18]

This view may be based on the fact that while profit achievement is the foundation for corporations, they cannot survive in a dysfunctional and unstable environment, thus their success depends on the condition of society. Therefore, while pursuing profits, corporations cannot refuse to engage with society.[19] Indeed they should automatically include in their management paradigm this social obligation, whilst expediting their self-interests.[20] Accordingly, the concept of profit maximisation by itself can be seen as being misconstrued. As Packard pointed out:

> —I think many people assume, wrongly, that a company exists simply to make money. While this is an important result of a company's existence, we have to go deeper and find the real reasons for our being…we inevitably come to the conclusion that a group of people get together and exist as an institution that we call a company so that they are able to accomplish something collectively that they could not accomplish separately—they make a contribution to society, a phrase which sounds trite but is fundamental".[21]

Additionally, Wilson argued in his rules of corporate conduct that for corporations to earn and maintain their social legitimacy, they need to define their mission to include serving society rather than only profit-making as their social purpose.[22] He also opposes those who view corporations as private property by declaring that "the corporation must be thought of, managed, and governed more as a community of stakeholders, less as the property of investors".[23] This view is similar to that of Charles Handy, who suggested that "[a] good business is a community with a purpose, and a community is not something to be 'owned'."[24] The idea that corporations are a piece of private property and that their owners are free to make use of their property rights entirely as they see fit is arguably out of date. Conflict between business and society often arises when shareholders use their corporate property in the way they desire, especially to increase their own profits with no consideration for other

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[18] Steiner G. 1974, 'The Social Responsibilities of Business', in G. Steiner (ed), *The Changing Business Role in Modern Society* (UCLA Mimeograph, 1974), p. 85.
[19] Drucker P. F., *Concept of the Corporation* (Transaction Publishers, 1993), p. 16-17.
[20] Ibid, p. 7.
[21] Dave Packard was a co-founder of Hewlett Packard Company in 1939. Quoted in Handy C. 2002, 'What's a Business For?' (2002) December, *Harvard Business Review*, p. 54.
[22] Wilson I., 'Institutional Change in the Corporation: The New Social Charter' (2005) 13(1), *On the Horizon*, p. 21.
[23] Ibid.
[24] Handy, above n 21, p. 49-55.

stakeholders. Today, the measure of business has changed and corporations are viewed as common property, which reverses the traditional understanding of corporate property and ownership control.[25]

In reality, the impact of corporations is not only on economic matters but also on society at large, as the lives of people and communities are affected by their activities. To this end, "to think of the business corporation simply as an economic instrument is to fail totally to understand the meaning of the social changes of the last half century".[26] Modern corporations are expected to regard themselves as "social institutions" which carry relevant responsibilities towards society. As Daugherty stated "[c]orporations are viewed as not only economic institutions but also social institutions [and] as social institutions, corporations have responsibilities to society".[27]

This position of corporations as social institutions has long been recognised. Even in the 1930s, Berle and Means wrote:

> "Corporations have ceased to be merely legal devices through which the private business transactions of individuals may be carried on. Though still much used for this purpose, the corporate form has acquired a larger significance. The corporation has, in fact, become both a method of property tenure and a means of organising economic life. Grown to tremendous proportions, there may be said to have evolved a "corporate system"—which has attracted to itself a combination of attributes and powers, and has attained a degree of prominence entitling it to be dealt with as a major social institution".[28]

This suggests that corporations should consider themselves as social, rather than exclusively economic institutions focusing on maximisation of financial profits alone. The recognition that corporations have an obligation to the community reveals a growing awareness of their status as social institutions. Kenichi Ohmae argued that:

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[25] Birch D. & Glazebrook M., 'Doing Business-Doing Culture: Corporate Citizenship and Community', in Rees S. & Wright S., *Human Rights, Corporate Responsibility: A Dialogue* (Pluto Press Australia, 2000), p. 42.
[26] Stated by a sociologist, Daniel Bell in the 1970s. Quoted in Birch D., 'Corporate Social Responsibility: Some Key Theoretical Issues and Concepts for New Ways of Doing Business' (2003) 1(1), *Journal of New Business Ideas and Trends*, p. 3-4.
[27] Daugherty E. L., 'Public Relations and Social Responsibility', in Heath R. L. & Vasquez G. M., *Handbook of Public Relations* (SAGE Publications, Inc., 2001), p. 392. Also see Bick P. A., *Business ethics and responsibility: An information sourcebook* (Oryx Press, 1988).
[28] Berle A. & Means G., *The Modern Corporation and Private Property* (The Macmillan Company, 1932), p. 1

> —A corporation is a social institution whose responsibilities extend far beyond the well-being of its equity owners to giving security and a good life to its employees, dealers, customers, vendors and subcontractors. Their whole life hinges on the well-being of the corporation".[29]

Therefore, being regarded as social institutions, corporations have a duty and responsibility to do good for society. They have to comply with social norms, which determine the limitations on the use of their power. The social nature of corporations derives from the human beings who constitute their membership.[30] This clarifies their role in the dynamic relationship with society, giving them at least the foundation of an obligation to serve society's interests. Konosuke Matsushita, respected in Japan as the God of Management, also considered corporations as social institutions and argued that, in this modern era, corporations cannot do as they wish but need to operate in line with social expectations, contributing to the betterment of society to enable them to exist and grow.[31]

It is therefore generally considered that where businesses focus on maximising profits, their actions can cause a negative effect on society. Consequently, modern corporations need to redirect their purpose from purely economic efforts to a paradigm of a socio-economic institution. The prevailing logic of business management suggests that adopting a socio-economic paradigm will assist corporations to increase their economic value by enhancing their competitive advantage.[32] This view is linked to the corporate community model where,

> —[C]orporate community is the new form of organisation governance that shifts emphasis from profit to democracy by unifying the goals of all parties...The old profit-centred model of business is too limited and limiting because it ignores the reality that business is both an economic and a social institution".[33]

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[29] Ohmae K., *The Borderless World: Power and Strategy in the Interlinked Economy* (HarperCollins, 1991), p. 214.
[30] Henry Mintzberg states that, —Treat the enterprise as a community of engaged members, not a collection of free agents…Corporations are social institutions, which function best when committed human beings (not human —resources") collaborate in relationships based on trust and respect. Destroy this and the whole institution of business collapses". Mintzberg H., 'Productivity Is Killing American Enterprise' (2007) 85(7/8), *Harvard Business Review* 25.
[31] Quoted in Kawamura M., 'The Evolution of Corporate Social Responsibility in Japan (Part 1): Parallels with the History of Corporate Reform, Social Development Research Group' (2004), p. 3, <http://www.nli-research.co.jp/english/socioeconomics/2004/li040524.pdf>.
[32] Mangos N.C. & Lewis N.R., 'A Socio-economic Paradigm for Analysing Managers' Accounting Choice Behaviour' (1995) 8(1), *Accounting, Auditing & Accountability Journal*, p.38-62.
[33] Varey R. J. & White J., 'The Corporate Communication System of Managing' (2000) 5(1), *Corporate Communications: Bradford*, p. 5-12.

Halal added, "[t]he corporate community model, therefore, views the firm as a socio-economic system in which wealth is created through stakeholder collaboration".[34] From this perspective corporations should develop their policies to include all stakeholders' interests, to become part of the corporate community and reap the benefit through creating a better relationship with their stakeholders. Accordingly, it is no longer acceptable in modern society that business should exist for the aim of shareholder "wealth" or "value" maximisation alone. Its management should be required to consider the interests of others in society. As Charles Handy noted:

> "The purpose of a business, in other words, is not to make a profit, full stop. It is to make a profit in order to enable it to do something more or better. What that something is becomes the real justification for the existence of the business".[35]

With this growing realisation, voluntary CSR emerged as a means of addressing the boundaries between corporate goals and societal expectations, delineating how businesses should operate to fit within that society. As Werther stated:

> "CSR broadly represents the relationship between a company and the principles expected by the wider society within which it operates. It assumes businesses recognise that for-profit entities do not exist in a vacuum and that a large part of their success comes as much from actions that are congruent with societal values as from factors internal to the company".[36]

In this matter, CSR can redress the conflict between private profits and public good where, to become successful, corporations cannot avoid the condition of society and their responsibilities toward its well-being. By complying with voluntary CSR, corporations can ensure their long-term profits through enhanced competitive advantage. This can be used as a driver for corporations to operate in a socially acceptable manner and consider the interests of others in society.

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[34] Halal W. E., 'Corporate Community: A Theory of the Firm Uniting Profitability and Responsibility' (2000) 28(2), *Strategy & Leadership*, p. 10-16.
[35] Handy C. B., *Myself and Other More Important Matters*, (AMACOM/American Management Association, 2008), p. 139.
[36] Werther W. B. & Chandler D., *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (Sage Publications, Inc., 2006), p. 16.

3.2.1 CSR and Financial Performance

The view of shareholder ―wealth" or ―value" maximisation has been widely accepted in the business world and has been heavily criticised for encouraging corporate selfishness. However, it has been argued that this view has not precluded business from carrying out charitable and philanthropic activities, as long as the main goal of shareholder value maximisation is not forgotten.[37] This suggests that business will engage with ethical standards when it gains benefits from doing so. As Yunus noted, ―[c]ompanies that profess a belief in CSR always do so with this proviso, spoken or unspoken. In effect, they are saying, ―[w]e will do the socially responsible thing—so long as it doesn't prevent us from making the largest possible profit".[38] Therefore, even though managers are not required, in their decision-making, to be responsible for ethical standards and need only consider legal and economic concerns, the long-term benefit for corporations from compliance with ethical standards should motivate them to conduct their management in a socially responsible manner. In other words, ―as [managers] are charged with maximising shareholder value and are given large incentives to do so through stock options or other schema, they will respond by embracing whatever manipulations are necessary to achieve that goal".[39]

For this reason, the idea of maximising profits for business can be used to persuade corporations to behave ethically by highlighting the ways in which long-term business success can be derived from adopting high ethical standards. Therefore, even though some managers have little interest in business ethics, they may all strive to satisfy their non-shareholder stakeholders' demands for ethical behaviour if that is consistent with maximising profits because corporations cannot achieve their aims without the support of their stakeholders. This proposes that the extremities of shareholder theory and stakeholder theory can coincide.[40] Schaefer points out that, ―[e]ven if we understand shareholder theory to demand

[37] McWilliams A. & Siegel D., 'Corporate Social Responsibility: A Theory of the Firm Perspective' (2001) 26(1), *Academy of Management Review*, p. 117-127.
[38] Yunus M., *Creating a World without Poverty: Social Business and the Future of Capitalism* (PublicAffairs, 2007), p. 17.
[39] Smith H. J. 2003, 'The Shareholders vs. Stakeholders Debate' (2003) 44(4), *MIT Sloan Management Review*, p. 88.
[40] It has been argued that ―Indeed, the shareholder model—when viewed from a long-term perspective—provides a better framework than stakeholder theory in which to protect the interests of both current and future stakeholders". Danielson M.

a goal of maximising corporate profits, a company‘s policies may at least sometimes satisfy both shareholder and stakeholder theories, as we see when doing good (morally) leads to doing well (financially).”[41] In this sense, corporate involvement with CSR can provide another means of maximising shareholders‘ interests. Thus, a link between social and economic objectives could lead to increased CSR standards in corporate policies. As Solomon noted:

> —Ite –social responsibility” of business, properly understood, is not an odd number of extraneous obligations of the business and corporations. It is the very point of their existence. Social responsibility does not mean sacrificing profits to —degooding” or fleecing the stockholders. Social responsibility only means that the purpose of business is to do what business has always been meant to do, enrich society as well as the pockets of those who are responsible for the enriching”.[42]

Many studies have revealed a definite relationship between CSR and financial performance. Burke and Logsdon noted that corporations can improve benefits when corporate philanthropic activities are provided to the community.[43] Porter and Kramer agreed that engaging in charitable works and investing in community activities is a way to achieve competitive advantage for the company.[44] They pointed out that –the more a social improvement relates to a company‘s business, the more it leads to economic benefits as well”.[45] Social and economic objectives are no longer seen as being separate; in fact, –in the long run…social and economic goals are not inherently conflicting but integrally connected”.[46] Drucker also supported the link between CSR and economic benefits noting that, –The proper social responsibility of business is to tame the dragon–that is, to turn a social problem into economic opportunity and economic benefit, into productive capacity, into human competence, into well-paid jobs, and into wealth.”[47]

G., Heck J. L. & Shaffer D. R., ‗Shareholder Theory : How Opponents and Proponents Both Get it Wrong‘ (2008), p. 1, <http://ssrn.com/abstract=1309066>.

[41] Schaefer B.P., ‗Shareholders and Social Responsibility‘ (2008) 81(2), *Journal of Business Ethics*, p. 298.

[42] Solomon R. C., *Ethics and Excellence: Cooperation and Integrity in Business* (Oxford University Press, 1992), p. 180-181.

[43] Burke L. & Logsdon J.M., ‗How Corporate Social Responsibility Pays Off‘ (1996) 29(4), *Long Range Planning*, p. 495-502

[44] Porter M.E.& Kramer M.R., ‗The Competitive Advantage of Corporate Philanthropy‘ (2002) 80(12), *Harvard Business Review*, p. 5-16.

[45] Ibid, p. 3.

[46] Ibid.

[47] Drucker P. F., *Frontiers of Management* (E.P. Dutton, 1986), p. 323.

Lee described the developing relationship between CSR and Corporate Financial Performance (CFP) as occurring in three stages:

1. exclusive relationship: where there is no connection between CSR and financial performance, each being mutually exclusive;
2. inclusive relationship: CSR and financial performance can have overlapping considerations, where engagement with CSR can create mutual benefits to society and corporations in the long term;
3. integrated relationship: corporations engaging with CSR can increase their financial performance through enhanced reputation and reduced legislative conflict. Obviously the benefits to society will be reflected in increased returns for shareholders.[48]

He then demonstrated the evolution of the three relationships in the following diagram:

Perceptual Trends in the relationship between CSR and CFP 1950s-1990s

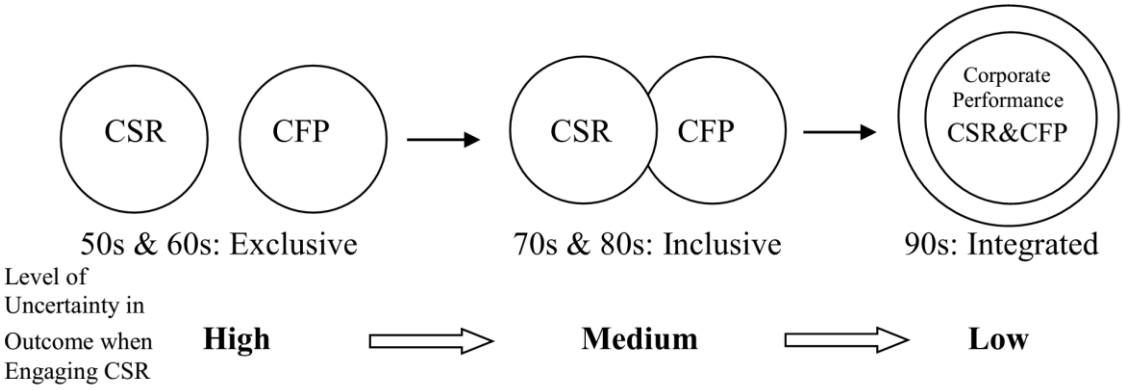

Figure 2 Source: Lee 2008

The three stages shown in the figure above can be seen as a developing theme of increased awareness of CSR. CSR is no longer considered as a restriction on the profit-making of corporations but can be seen as a means of increasing their financial bottom line by enhancing their competitive advantage. In fact, it has been found that involvement with CSR can reduce the costs of compliance with possibly

[48] Lee M. P., ‗Theory of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead' (2008), p. 5-7, <http://mindong.lee.googlepages.com/EvolutionofCSR.pdf>.

increased regulation by lessening public demand for more government control.[49] As Ruf et al. point out, either by reducing costs or increasing revenues, compliance with CSR can increase corporate financial performance.[50]

Accordingly, it has been assumed under shareholder theory that socially responsible activities are instigated and sustained by corporations whenever such undertakings can contribute to the satisfaction of shareholders' interests. The view that CSR can be taken into consideration, as long as shareholders benefit, has long been recognised. As Professor Sealey noted in 1987:

> "Underthe traditional rules of company law, directors' duties are regarded as being owed to the company and to the company alone; and for this purpose the company's interests are equated with the interests of the members collectively. Directors on this view are not entitled, still less bound, to consider the interests of other groups, such as the company's employees, creditors, customers and suppliers, or to have any concern for such matters as the community, the environment, welfare and charity, unless what they do has derivative benefits for their shareholders".[51]

To explain, managers do not have as their main priority conducting business that directly produces benefits to the community but rather maximising the wealth of their shareholders. For this reason, the potential value of CSR for corporations is a basic consideration that managers need to evaluate. Baron sees that "[t]his strategic CSR is simply a profit-maximisation strategy motivated by self-interest and not by a conception of corporate social responsibility".[52] Thus, the motivation of corporations in their response to CSR is subjected to question, whether they desire to meet society's expectations or simply focus on their economic performance and outcome.[53]

Ludescher et al. noted, "[i]f the motivation is to serve society, at the cost of profits, the action is socially responsible, but if the motivation is to serve the bottom line, then the action is privately

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[49] Ruf B.M., Muralidhar K., Brown R.M., Janney J. J. & Paul K., 'An Empirical Investigation of the Relationship Between Change in Corporate Social Performance and Financial Performance: A Stakeholder Theory Perspective' (2001) 32(2), *Journal of Business Ethics*, p. 144.
[50] Ibid.
[51] Sealy L. S., 'Directors' 'Wider' Responsibilities – Problems Conceptual, Practical and Procedural' (1987) 13(3), *Monash University Law Review*, p. 187.
[52] Baron D.P. 2001, 'Private Politics, Corporate Social Responsibility, and Integrated Strategy' (2001) 10(1), *Journal of Economics & Management Strategy*, p. 9.
[53] Ibid.

responsible."[54] In this regard, CSR is seen as a tool for business to increase shareholders' profits, where their motivation is financial rather than socially responsible.[55] This leads to scepticism about their real intentions where their agenda is to increase the bottom line. Thus, the concern is that there will be no genuine change in their behaviour and social responsibility will be a relatively minor interest unless there is a considerable financial advantage for them.

According to Schreuder, CSR refers to corporate performance without the expectation of financial profit but for the benefit and improvement of social well-being.[56] With only a profit-making motive, corporations cannot be regarded as social entrepreneurs.[57] However, Peredo and McLean point out that even though "[i]t is tempting to say that only ventures willing to accept a significant reduction in their profits as a consequence of their pursuit of social goals should be considered examples of social entrepreneurship", it is difficult to judge the real reasons for corporate involvement with social issues and possibly it is not of real value to do so, as long as good deeds are seen to be done for society.[58] There is nothing to be gained from disqualifying corporations that pursue profit through engaging with social issues, from being socially responsible, where the outcome in social values is of more importance. While corporations have been criticised for using CSR to serve their shareholders' interests, it might be argued that, "[t]his does not change the fact that some activities that are motivated by the bottom line may have social benefits".[59] In this sense, corporations can have a hybrid approach

[54] Ludescher J. C., McWilliams A. & Siegel D. S., The Economic View of Corporate Citizenship', in A. G. Scherer & G. Palazzo (eds), *Handbook of Research on Global Corporate Citizenship* (Edward Elgar, 2008), p. 328.
[55] Ibid.
[56] Schreuder H., The Social Responsibility of Business', in C. V. Dam & L. M. Stallaert (eds), *Trends in Business Ethics* (Nijhoff Social Sciences Division, 1978), p. 74.
[57] Dees explained, "[f]or a social entrepreneur, the social mission is fundamental. This is a mission of social improvement that cannot be reduced to creating private benefits (financial returns or consumption benefits) for individuals. Making a profit, creating wealth, or serving the desires of customers may be part of the model, but these are means to social ends, not the end in itself". Dees J.G., The Meaning of "Social Entrepreneurship" (1998), p. 5, <http://www.fntc.info/files/documents/The%20meaning%20of%20Social%20Entreneurship.pdf>.
[58] Peredo A.M. & Mclean M., Social Entrepreneurship: A Critical Review of the Concept' (2006) 41(1), *Journal of World Business*, p. 62-63.
[59] They provided the example as, "a firm might provide day care to increase employee morale and decrease absenteeism. The provision of this day care may provide social benefits by lowing juvenile crime and increasing school retention". McWilliams A., Siegel D.S. & Wright P.M., Corporate Social Responsibility: International Perspectives' (2006), p. 7, <http://ssrn.com/abstract=900834>.

by pursuing both economic and social objectives, without compromising either set of values. Thus, it is clear that CSR "can, and should, be used to enhance the bottom line".[60]

Nevertheless, even though corporations can "pursue two bottom lines, one of which deals with profits while the other deals with social value",[61] this does not guarantee the achievement of both objectives, especially when a conflict arises between profits and social expectations. Under shareholder theory, where the goal of business is to increase profits, the vision of voluntary CSR may not be sufficient to ensure corporations willingly serve society's interests if their bottom line is not being fulfilled. As Sternberg noted:

> "Business is a specific activity, with a definitive end, that of maximising long-term owner value… To the extent that businesses or corporations pursue something other than their definitive purposes, they fail to be organisations of the designated sort. But such deviation is just what conventional business ethics and CSR demand…When goals conflict, however, one must take precedence".[62]

In these circumstances, while CSR advocates would encourage corporations choosing a social goal, it is unfortunate that in reality they would prefer the choice of pursuing corporate benefits over that of CSR. This suggests that there may be a need for some form of mandatory minimum approach to ensure that, in such cases, corporations do not pursue financial profits preferentially and at the expense of social values.

3.3 Stakeholder Theory

Under stakeholder theory corporations are responsible, not only to their shareholders, but also to other groups in society, for example, customers, suppliers, creditors, employees and the natural environment.[63] The complexity of modern society makes the relationship between its constituents increasingly inter-reliant. As Davis stated, "[b]usiness is influenced by all other groups in the system,

[60] Cochran P.L., 'The Evolution of Corporate Social Responsibility' (2007) 50(6), *Business Horizons*, p. 453.
[61] Certo S.T. & Miller T., 'Social Entrepreneurship: Key Issues and Concepts' (2008) 51(4), *Business Horizons*, p. 269.
[62] Sternberg, above n 11, p. 34-35.
[63] Mark Starik argued that the non-human natural environment can be considered as stakeholders. Starik M., 'Should Trees have Managerial Standing? Towards Stakeholder Status for Non-Human Nature' (1995) 14(3), *Journal of Business Ethics*, p. 207-217.

and it, in turn, influences them".[64] The advance of technology, together with globalisation, has tied the groups together and has added up to a mixed and dynamic pluralistic society. Pluralism, therefore, is an important factor in linking the social responsibility of corporations to the various stakeholders in society. Through the process of globalisation, "the entire planet has become a stakeholder of all corporations. All societies are now affected by corporate operations and as a result, social responsibility has become a worldwide expectation".[65]

Under stakeholder theory, corporations are regarded "as a nexus of cooperative and competitive interests possessing intrinsic value".[66] This view runs counter to the assumption that shareholders are the only group whose interests should be pursued by management and accepts that managers have an obligation to other stakeholders as well. Freeman, Wicks and Parmar proposed that stakeholder theory is a matter for managerial concern, affecting how managers operate their companies.[67] It is used as a common point of reference to guide corporations in their policy making, as part of their operations.[68] Concerns over social, environmental and human rights standards have an increasingly important place in the corporate decision-making process and ensure that other stakeholders' interests are a priority, alongside those of the shareholders. The first person to identify and detail stakeholder theory was R. Edward Freeman in 1984. He set down guidelines for business to identify who the stakeholders are and how to address who or what is most important.[69] His definition of a stakeholder is "any group or individual who can affect or is affected by the achievement of the organisation's objectives."[70] This clearly includes those who are affected by but do not benefit from corporate activities, and acceptance of the theory necessarily requires companies to consider the effects they have on the community and environment in which they operate.

[64] Davis K., 'Understanding the Social Responsibility Puzzle' (1967) 10(4), *Business Horizons*, p. 46.
[65] Lawrence A. T. & Weber J., *Business and Society: Stakeholders, Ethics, Public Policy* (McGraw-Hill Irwin, 2008), p. 47.
[66] Shankman N. A. 1999, 'Reframing the Debate Between Agency and Stakeholder Theories of the Firm' (1999) 19(4), *Journal of Business Ethics*, p. 322.
[67] Freeman R. E., Wicks A. C. & Parmar B., Stakeholder Theory and "The Corporate Objective Revisited" (2004) 15(3), *Organization Science*, p. 364.
[68] Matten D., Crane A. & Chapple W., 'Behind the Mask: Revealing the True Face of Corporate Citizenship' (2003) 45(1/2), *Journal of Business Ethics*, p. 111.
[69] Freeman R. E., *Strategic Management: A Stakeholder Approach* (Pitman, 1984).
[70] Ibid, p. 46.

Clarkson, in 1994, redefined ‗stakeholders' by classifying them into two groups, voluntary and involuntary stakeholders, where:

> ―Voluntary stakeholders bear some form of risk as a result of having invested some form of capital, human or financial, something of value, in a firm. Involuntary stakeholders are placed at risk as a result of a firm's activities. But without the element of risk there is no stake".[71]

Later in 1995, he further defined stakeholders as primary and secondary stakeholders. The former includes those who have input and output in corporations and without whom it would be impossible for corporations to continue.[72] This group consists of ―shareholders and investors, employees, customers, and suppliers, together with what is defined as the public stakeholder group: the governments and communities that provide infrastructures and markets."[73] The secondary stakeholders are ―those who influence or affect, or are influenced or affected by the corporation, but they are not engaged in transactions with the corporation and are not essential for its survival".[74] This group may include the media and NGOs which are capable of causing considerable negative consequences for corporations through their publicity initiatives.

Post et al defined the stakeholders of a corporation as any individual or group who add, voluntarily or not, to the increased wealth of the corporation and could become beneficiaries or risk bearers.[75] Werhane and Freeman proposed describing stakeholders as:

> ―any individual or group whose role-relationships with an organisation:
> (a) helps to define the organisation, its mission, purpose, or its goals, and/or
> (b) is vital to the development, functioning, survival, and success or wellbeing of the organisation and its activities (Freeman, 1997), or
> (c) is most affected by the organisation and its activities."[76]

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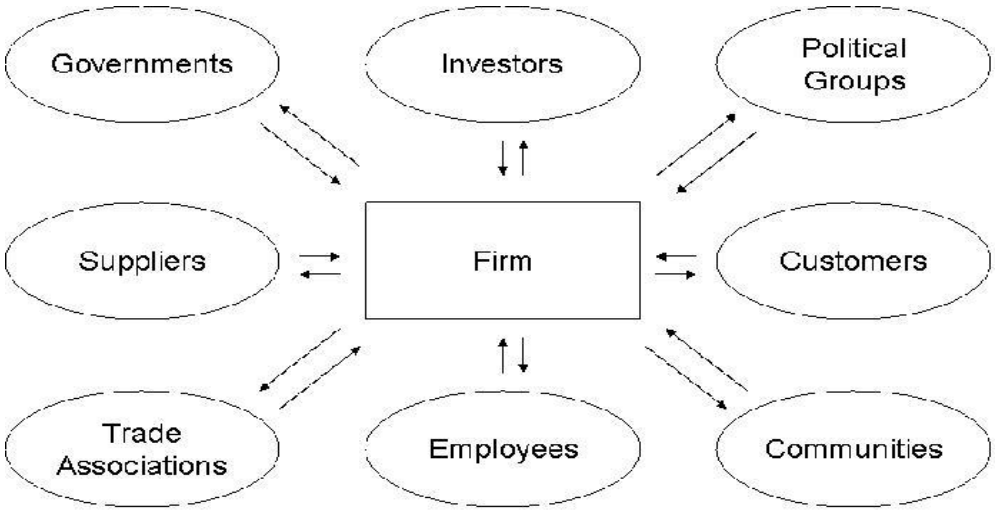
[71] Clarkson M., ‗A Risk Based Model of Stakeholder Theory' (1994), Paper presented at the Proceedings of the Second Toronto Conference on Stakeholder Theory, Centre for Corporate Social Performance and Ethics, University of Toronto: Toronto, p. 5.
[72] Clarkson M., ‗A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance' (1995) 20(1), *Academy of Management Review*, p. 106.
[73] Ibid.
[74] Ibid, p.107
[75] Post J. E., Preston L.E. & Sachs S., ‗Managing the Extended Enterprise: The New Stakeholder View' (2002) 45(1), *California Management Review*, p. 8.
[76] Werhane P. H. & Freeman R. E., ‗Business Ethics: The State of the Art' (1999) 1(1), *International Journal of Management Reviews*, p. 7.

Donaldson and Preston suggested that stakeholders are those who have an input into the organisation and are affected by the organisation's efforts. They used the diagram below to illustrate.[77]

The Stakeholder Model (Figure 3)



Source: Donaldson and Preston, 1995

Overall, the perspectives of stakeholder theory can be summed up from the view of Donaldson and Preston as:

1. the descriptive/empirical, ~~u~~sed to describe and sometimes explain, specific corporate characteristics and behaviours";
2. the instrumental, used with the descriptive/empirical, ~~to~~ identify the connections, or lack of connections, between stakeholder management and the achievement of traditional corporate objectives (e.g., profitability, growth)"; and
3. the normative, ~~u~~sed to interpret the function of the corporation, including the identification of moral or philosophical guidelines for the operation and management of corporations".[78]

[77] Donaldson T., Preston L.E., 'The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications' (1995) 20(1), *The Academy of Management Review*, p. 69.
[78] Ibid, p. 70-71.

The descriptive and instrumental aspects are used in conjunction with one another in that the former shows the condition of corporations and their stakeholders' affairs, whereas the latter connects the stakeholder interests with the corporations' aims of maximising profits.[79] The normative aspect considers stakeholders as an "end", whereas, the instrumental considers them to be a "means" to that end.[80]

Argandona used the concept of the "common good" to explain the basis of stakeholder theory.[81] He reasoned that humans are of a social nature and came together for a social life to satisfy and better themselves through their relationships with others.[82] This sociability led to society forming a bond that helped exceed the expectations of individuals. Thus, the common good can be defined as "the good of society and also the good of its members, insofar as they are part of society, since the goal of society is not independent of the goals of its members".[83] In this aspect, as a part of society, business has a responsibility to contribute benefits for the common good of society as a whole. This suggests that while business and society form a union of efforts for the common good, companies have a responsibility to the other stakeholders in the community. Argondona stated that, companies should "guarantee the conditions in which each participant receives from the company what he or she can reasonably expect".[84] In support of this, Mele provided business with five components of the common good:

> "1supply of useful goods and services efficiently and fairly
> 2. generate wealth fairly and proceed to its equitable distribution
> 3. provide jobs and organisational conditions respectful with people and their personal growth and appropriate to supply efficiently goods and/or services and to create wealth
> 4. act within the society as a good social actor
> 5. strive for the financial, environmental and social sustainability of the firm".[85]

[79] Branco M.C. & Rodrigues L.L., 'Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility' (2007) 12(1), *Electronic Journal of Business Ethics and Organisation Studies*, p. 8.
[80] Ibid.
[81] Argandona A., 'The Stakeholder Theory and the Common Good' (1998) 17(9/10), *Journal of Business Ethics*, p. 1093-1102.
[82] Ibid, p. 1094.
[83] Ibid, p. 1095.
[84] Ibid, p. 1097.
[85] Mele D., 'Shareholder and Stakeholder-Oriented Management -Toward a More Complete Approach' (2008), IESE Business School University of Navarra, 1st IESE Conference, "Humanizing the Firm & Management Profession", Barcelona, IESE Business School, 30 June - 2 July 2008, p. 14, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295301>

Through the concept of common good, as well as creating wealth in a fair manner, companies need to see stakeholders' interests as being equally important. This does not exclude corporations from attaining benefits but it excludes them from pursuing their own ends to the disadvantage of others in society.[86] As Post et al. put it, "The corporation is an organisation engaged in mobilising resources for productive uses in order to create wealth and other benefits (and not to intentionally destroy wealth, increase risk or cause harm) for its multiple constituents or stakeholders".[87] These arguments can be used to motivate the opponents of stakeholder theory into reconsidering the benefits that can be gained from applying this theory. Stakeholder theory does not attempt to undermine the rights of business owners to pursue their own objectives[88] but to conduct their business with a consideration for other stakeholders which ultimately would increase their own benefits.

The CSR approach is consistent with stakeholder theory. Husted refers to CSR as "the ability of the company to meet or exceed stakeholder expectations regarding social issues".[89] Thus, stakeholder theory is complementary and essential to the operation of CSR.[90] The emphasis of business on value creation for all stakeholders is achieved by focusing on the need for understanding, and satisfying these expectations, which have expanded from only direct transactions between business and stakeholders to involvement with solving the problems of society and adopting a proactive approach towards the effects that business has on society.[91] Under both CSR and stakeholder theory, social responsibility should be of prime importance, despite any pressures to the contrary from shareholders. It is prudent to

[86] Argondona, above n 81, p. 1096.
[87] Post J.E., Preston L.E. & Sachs S., "Managing the Extended Enterprise: The New Stakeholder View' (2002) 45(1), *California Management Review*, p. 17.
[88] According to Sternberg: "Stakeholder theory undermines private property, because it denies owners the right to determine how their property will be used. Insofar as assets are held or utilised by organisations, stakeholder theory stipulates that those assets should be used not for the benefit of any one group or purpose, but for the benefit of all the stakeholders. The owners of those assets are thereby prevented from devoting their property unequivocally to the ends of their choice, whether those ends are maximising owner values, housing the homeless or finding a cure for cancer. This may look like a small infringement, affecting as it does only organisational property".
Sternberg E., "The Stakeholder Concept: A Mistaken Doctrine' (1999) Issue Paper No. 4, *Foundation for Business Responsibilities*, p. 31.
[89] Husted B. W., "A Contingency Theory of Corporate Social Performance' (2000) 39(1), *Business and Society*, p. 27.
[90] Matten et al, above n 68, p. 111.
[91] Kok P., Wiele T.V.D., McKenna R. & Brown A., "A Corporate Social Responsibility Audit within a Quality Management Framework' (2001) 31(4), *Journal of Business Ethics*, p. 285.

treat all stakeholders as important elements in the strategies formulated by high performance management for corporations to become regarded as good corporate citizens. Thus, it should be the primary aim of every corporation to become a flourishing business for the benefit of all its stakeholders.

3.3.1 Stakeholders' Interests and Value Maximisation

As noted above, the proponents of stakeholder theory consider that managers should take into consideration all stakeholders' interests rather than just those of shareholders. Corporations need to embrace all of those interests proactively in solving social issues, including by the creation of work opportunities, improvement of environmental issues and the support of global justice.[92] This requires communication between stakeholders and corporations to improve their relationship through a harmonised understanding of their respective interests.[93] Corporate survival and growth in profitability relies on how corporations reconcile their economic and social responsibilities, creating both financial gain and value for society, which encourages them to continue their involvement with other stakeholders' interests.[94] Thus, corporations should be seeking opportunities for value creation that benefit all stakeholders rather than concentrating their efforts on shareholder interests alone.[95] Managers should be the "builders of stakeholder relations" rather than the shareholder's agents, for their companies to become increasingly successful.[96] They need to build long-term relationships with customers, suppliers and society to gain competitive advantage, ensuring corporate success in a highly competitive market. Svendsen concluded that:

> "[t]he ability to balance the interests of all stakeholders will be a defining characteristic of successful companies in the next decade. This is not to say that companies will be able to satisfy everyone's

[92] Lantos G.P., 'The Boundaries of Strategic Corporate Social Responsibility' (2001) 18(7), *Journal of Consumer Marketing*, p. 602.
[93] Zakhem defined communicative practices, based on Habermas's work, to "those social interactions that are driven toward dialogically motivating, sustaining, and renewing intersubjective consensus and mutual understanding". Zakhem A., 'Stakeholder Management Capability: A Discourse- Theoretical Approach' (2008) 79(4), *Journal of Business Ethics*, p. 396.
[94] Clarkson, above n 72, p. 107.
[95] Rodriguez M.A., Ricer J.E. & Sanchez P., 'Sustainable Development and the Sustainability of Competitive Advantage: A Dynamic and Sustainable View of the Firm' (2002) 11(3), *Creativity and Innovation Management*, p. 142.
[96] Ibid.

> interests all the time. However, companies that have a strong set of values and that can communicate their business goals clearly will maintain stakeholders' support when the results are not in their favour".[97]

Certainly, it is impossible for corporations to satisfy all stakeholders. "When everyone in the world is a stakeholder of everyone else",[98] it would be unrealistic to expect corporations to achieve a perfect balance among multiple stakeholders. This may be seen as a limitation of the stakeholder theory, in that it could be considered as a mere theory rather than a practical approach. The difficulties of identifying benefits and balancing the conflicting interests of all stakeholders can be considered as a weakness of stakeholder theory and have led to the criticism that the "stakeholder objective is unworkable".[99] As Sternberg noted:

> "stakeholder theory gives no guidance as to whose benefits are to be balanced. If stakeholders include all who can affect or are affected by the organisation, the number of groups whose benefits need to be included in the calculation will be infinite. For a balance ever to be struck, the number or type of stakeholders would, somehow, have to be limited. But stakeholder theory offers no guidance as to how the appropriate stakeholder groups should be selected or defined".[100]

However, this weakness should not be used to justify not applying the theory. The question should not be whether applying the theory can provide equal benefits for all stakeholders, but how it can lead to practices that appropriately distribute benefits without incurring detriment to anyone. Estimating the risks to individual groups of stakeholders and then actively compensating them by reducing those risks or offering other means of compromise would establish a good foundation for corporate management and could form the basis for a 'protective cushion' for corporations from complaints by disadvantaged stakeholders. On the other hand criticisms of their failure to serve stakeholder interests appropriately when they violate social, environmental, or human rights standards would be exacerbated if corporations knew the risks but ignored them.

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[97] Svendsen A., *The Stakeholder Strategy: Profiting from Collaborative Business Relationships* (Berrett-Koehler Publishers, Inc., 1998), p. 188.
[98] Phillips R., *Stakeholder Theory and Organisational Ethics* (Berrett-Koehler Publishers, Inc., 2003), p. 34.
[99] Sternberg, above n 88, p. 18.
[100] Ibid, p. 18.

The failure to consider stakeholders' interests may be caused by the lack of a solid base linking economics with morality. Stakeholder theory has sought to add ethics and morals to the economic model.[101] Global market indications have shown that corporations that develop long-term relationships with stakeholders achieve the additional competitive advantages that can be gained through rational interaction with stakeholders rather than through mere transactional involvement.[102] Jensen argued that the interests of all stakeholders should be taken into account during managers' decision-making to ensure long-term value maximisation for corporations.[103] He described this as an enlightened stakeholder theory', where focusing attention on meeting the demands of all important corporate constituencies, specifies long-term value maximisation as the firm's objective".[104] In his view, corporations cannot maximise the long-term market value of an organisation if [they] ignore or mistreat any important constituency".[105] Therefore, this suggests that it is better for corporations to increase their long-term values by operating in line with the stakeholder approach. This idea is not new and was also proposed by Carr in 1968, who, even though being a supporter of pure profit making, recognised that any corporation interested in long-term added value should ensure that it maintains good relations with its stakeholders.[106] Therefore, value creation for stakeholders is an integral part of doing business. As Post et al. stated:

> "Our central proposition is that *organizational wealth* can be created (or destroyed) through relationships with stakeholders of all kind—resource providers, customers and suppliers, social and political actors. Therefore effective *stakeholder management*—that is managing relationships with stakeholders for mutual benefit—is a critical requirement for corporate success."[107]

Nevertheless, Werhane and Freeman commented that corporations should take stakeholders' considerations into account not only because they may affect their survival and profitability, but also

[101] Key S., Toward a New Theory of the Firm: A Critique of Stakeholder Theory" (1999) 37(4), *Management Decision*, p. 324.
[102] Hillman A.J. & Keim G.D., Shareholder Values, Stakeholder Management, and Social Issues: What's the Bottom Line?' (2001) 22(2), *Strategic Management Journal*, p. 127.
[103] Jensen M.C., Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2001) 14(3), *Journal of Applied Corporate Finance*, p. 9.
[104] Ibid, P. 9.
[105] Ibid, p. 16.
[106] Carr A.Z., Is Business Bluffing Ethical?' (1968) 46(1), *Harvard Business Review*, p. 149.
[107] Post J. E., Preston L. E., & Sachs S., *Redefining the corporation: Stakeholder Management and Organizational Wealth* (Stanford Business Books, 2002), p. 1.

because they are individuals – human beings with rights and interests".[108] In this regard, the concept of moral responsibility may be used as a benchmark for corporate obligations over stakeholders' interests. This recognition of moral responsibility regards stakeholders as an end rather than a means to corporate success.[109] However, it is undeniable that most businesses will embrace stakeholders' interests as a means to increase shareholder value, which supports the aims of shareholder theory. This point of view has had many supporters over the years such as Professor Donald C. Hambrick who stated that "[t]he stakeholder perspective is best seen as a means to shareholder fulfilment".[110] Hillman and Keim have found that corporations can also achieve positive benefits for shareholders when they are associated directly with their stakeholders.[111] Freeman et al. support this, declaring that managers can maximise shareholder value by satisfying stakeholders through improving the production of goods and services, providing jobs, having good relationships with suppliers and being a good member of society.[112] Additionally, the creator of the EVA financial management system, Bennett Stewart believed that corporations which satisfy the requirements of their stakeholders, better than their competitors, can increase their shareholders' benefits.[113]

From the above discussion, it is clear that there are two views of stakeholder theory. One sees it as a method of corporate management to maximise shareholder value. The other sees the issue as one of moral responsibility to society regardless of increasing shareholder value. While the latter view seems to create genuinely responsible behaviour, the motivation of the former is more likely to encourage corporations to address stakeholder theory in their policies. Thus, adopting the moral aspect of considering stakeholder interests while, at some point, also expressly maximising shareholder value might better motivate corporations to engage with social responsibility.

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[108] Werhane & Freeman, above n 76, p. 7.
[109] Michelle Greenwood suggested that "there are (at least) two distinct attitudes the organisation can adopt towards stakeholders: that where the organisation takes into account the stakeholder for the good of the firm—the stakeholder as a means to an end; and that where the organisation takes into account the stakeholder as a matter of principle—the stakeholder as an end in themselves". Greenwood M., 'The Importance of Stakeholders According to Business Leaders' (2001) 106(1), *Business and Society Review*, p. 33.
[110] Birchard B. 1995, 'How many masters can you serve?' (1995) 11, *CFO*, p. 54.
[111] Hillman & Keim, above n 102, p. 128-135.
[112] Freeman et al, above n 67, p. 366.
[113] Birchard, above n 110, p. 54.

Where increasing shareholder value is seen as a motivation for corporations to adopt stakeholder theory, this might create scepticism that they would not take stakeholders' interests into consideration without there being substantial benefits for their shareholders. As there is no legal obligation for corporations to consider stakeholders' interests, their commitment to those stakeholders may be dependent on the results of their financial performance. Thus, the concern that corporations may fail to recognise stakeholder theory where there is no financial incentive to do so may lead to the desirability of a mandatory minimum requirement for directors to consider stakeholder interests in their business management. This discussion over directors' duties to stakeholder interests will be continued in Chapter 7.

3.4 Social Contract Theory

Social contracts are important to the function of society as they provide the cohesion and direction that holds society together.[114] The concept initially evolved in the 16th century based on the relationship between citizens and government. Now, when corporations possess great influence in the moulding of people's lives and government policies, the idea of a social contract has been expanded to include the relationship between business and society. As members of society, corporations are urged to include an ethical element in their business conduct in order to meet the terms of a social contract; being part of society means much more than just abiding by law, corporations are required to adopt a moral and ethical commitment that goes beyond legal foundations.

The theory of the social contract was derived from Plato's dialogue between Socrates and Crito, and argues that persons agree to the rules of society simply through living in that society.[115] The modern notion of a social contract can be seen as emanating from the philosopher, Thomas Hobbes, who was of

[114] Edmund Burke wrote, "[s]ociety is indeed a contract … It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born". Burke E., *Reflections on the Revolution in France, and on the Proceedings in Certain Societies in London* (Printed for J. Dodsley, 1790), p. 143-144.

[115] Plato, *The Republic*, Translated by Benjamin Jowett , <http://www.constitution.org/pla/republic.htm>. Also see The Internet Encyclopedia of Philosophy, 'Social Contract Theory', <http://www.iep.utm.edu/soc-cont/>.

the opinion that government takes the form of a contract with the people which binds all parties, creating sovereignty. People relinquish individual rights to gain the benefits and protection of that society.[116]

Following on from Hobbes, John Locke developed the social contract to include moral justifications, conforming to natural law.[117] In his view, a social contract is formed by the people to ensure that government treats all citizens equally without favour. If governments break the contract by ignoring the basic rights of people, they can be removed through public rebellion.[118] Later, Jean-Jacques Rousseau proposed the modern concept of the social contract based on the common will and collective agreement.[119] As he stated:

> "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."[120]

Therefore, everyone has a social contract with society in that we all place ourselves together under a common agreement to live under the general will. This general will is the will of the majority and is applicable to all. As Rousseau wrote, "the general will, to be really such, must be general in its object as well as its essence; that it must both come from all and apply to all".[121] The unification of wills creates a moral and collective body that provides an ordered society to which all belong and owe loyalty.[122] This idea was the inspiration of a move towards common justice and moral obligations within society. The social contract, therefore, according to this theory, is concerned with society and the right of individuals in that society, with the understanding that every member will work together and have respect for each other.

John Rawls also deliberated on the social contract and proposed the concept of the "veil of ignorance" being imposed on those in judgement, depriving them of other parties' information on characteristic

[116] Hobbes T. 1651, *Leviathan* (Penguin Books, first published 1651, 1985 ed).
[117] Locke J., 'Two Treatises of Government' (1690), <http://oregonstate.edu/instruct/phl302/texts/locke/locke2/locke2nd-a.html>.
[118] Ibid.
[119] Rousseau J. J., 'The Social Contract, Or Principles of Political Right' (1762), <http://ebooks.adelaide.edu.au/r/rousseau/jean_jacques/r864s/>.
[120] Ibid, Book I, Chapter 6: The Social Compact.
[121] Ibid, Book II, Chapter 4.
[122] Ibid, Book I, Chapter 6: The Social Compact.

and personal situations.[123] This concept is designed to bridge the gap between an individual's self-interested motivation and the requirements of impartiality which are built into the principles of justice".[124] He then provided two basic principles of justice, which form the basis of equality between members of society where liberty and social and economic goods should be distributed equally to everyone. These two principles of justice are:

> 1. Each person is to have an equal right to the most extensive total system of equal basic liberties comparable with a similar system of liberty for all.
>
> 2. Social and economic inequalities are to be arranged so that they are both:
>
> (a) to the greatest benefit of the least advantaged, consistent with a just savings principle; and
>
> (b) attached to offices and positions open to all under conditions of fair equality of opportunity".[125]

From the above, the traditional social contract between the government and its citizens derives from people being willing to give up some of their rights to a government in exchange for the necessities and the protection of that society.[126] It is based on the assumption that citizens give up their freedoms and obey the law, to become participating members of that society. Thus, the social contract can be defined as an actual or hypothetical agreement among individuals forming an organized society or between the community and the ruler that defines and limits the rights and duties of each".[127]

According to the traditional view, mere compliance within the bounds of the law is the basis of the social contract. However, it is argued that it is more than just obeying the law; it requires a commitment to ethical standards that go beyond and above the law. As Sheehy expounded:

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[123] Rawls wrote, "It is assumed, then, that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like". Rawls J., *A Theory of Justice* (Harvard University Press, 1971), p. 137. Also see Standford Encyclopedia of Philosophy, 'Orginal Position' (1996), <http://plato.stanford.edu/entries/original-position/>

[124] Kelly P., 'Justifying 'Justice': Rianism, Communitarianism and the Foundations of Contemporary Liberalism', in Boucher D. & Kelly P., *The Social Contract from Hobbes to Rawls* (Routledge, 1994), p. 229.

[125] Rawls, above n 123, p. 302.

[126] John Locke Wrote, "men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, to be so far disposed of by the legislative, as the good of the society shall require; yet it being only with an intention in every one the better to preserve himself, his liberty and property.", Locke J., 'Two Treatises of Government' (1690), section 131, <http://oregonstate.edu/instruct/phl302/texts/locke/locke2/locke2nd-a.html>.

[127] Dictionary.com, "social contract," in *Merriam-Webster's Dictionary of Law*. Source location: Merriam-Webster, Inc., <http://dictionary.reference.com/browse/social contract>.

> —Social contract theory holds that once humans have surrendered to the social contract in a civil society, citizens believe that each other citizen will respect rights and justice by acting within the bounds of the law. But this is an inadequate explanation of society. No one would want to live in a society in which the citizens acted only in accord with the law".[128]

In other words, just obeying the law is not sufficient for citizens to comply with a social contract. To create a society, it needs the recognition and application of ethics, rather than just the function of the law. In this regard, a social contract is based on a moral approach towards society and being responsible for actions that affect others. Society will function properly if all members of society interact with each other with respect and moral justice. James Rachels refers to the social contract in the following terms:

> —morality consists in the set of rules governing how people are to treat one another that rational people will agree to accept, for their mutual benefit, on the condition that others follow those rules as well".[129]

Therefore, in essence, this suggests that the social contract is possible where ethical and moral principles exist. Adam Smith used the moral stance when talking of the interrelationship of people and society and urged that at all times we should place ourselves in other people's situations to be able to understand their feelings.[130] To achieve the true state of a social contract, people should interact in a high moral condition that ensures equality for all.

3.4.1 Corporations and the Social Contract

The traditional understanding of the social contract as the relationship between the government and its citizens has been modified to encompass business and society. Corporations have been recognised as being a third-party to the social contract, along with government and citizens, since the early part of the 19th century.[131] In the late 20th century, the results of the Reagan-Thatcher ideology of capitalism that expanded free markets and privatisation created pressure for corporations to recognise their obligation

[128] Sheehy B., 'Corporations and the Lateral Obligations of the Social Contract' (2006), <http://law.bepress.com/cgi/viewcontent.cgi?article=8159&context=expresso>.
[129] Rachels J.,*The Elements of Moral Philosophy*, (McGraw-Hill Higher Education, 4th ed, 2003), p. 150.
[130] Smith A., *The Theory of Moral Sentiments*, Sixth edition, (A Millar, first published 1790, 6th ed, 1790), p. 4-5.
[131] White A. L., 'Is It Time to Rewrite the Social Contract?' (2007), *Business for Social Responsibility (BSR)*, p. 6, <http://www.bsr.org/reports/BSR_AW_Social-Contract.pdf>.

to the social contract, especially as they increased in both number and size, and affected the lives of more and more people.[132] As noted by the UN:

> —[t]he expanded scope for business efficiencies permitted by liberalized economic conditions seem to bring with them a new perception of a —global social contract", whereby MNCs that enjoy the freedom and benefits of globalization must accept some expanded responsibilities for managing its effects on various societies".[133]

Under social contract theory, corporations are allowed to operate in an open and competitive market, while improving the prosperity of society at the same time. According to John Stuart Mill:

> —[t]hough society is not founded on a contract, and though no good purpose is answered by inventing a contract in order to deduce social obligations from it, everyone who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest".[134]

This view, that there is a corporate obligation aspect to the social contract has emerged from the principle that corporations only exist through the forbearance of the society in which they operate; thus they have a social contract with that society. According to communitarianism, corporate entities are granted by the state, which in turn is created by society, therefore —corporations are actually made by society and are responsible to the public to serve whatever is deemed to be in the public interest or for the common good".[135] Consequently, in a narrow sense, corporations can be seen as being servants of society, having a duty to serve its needs and interests.

In the same vein, Richard DeGeorge describes this view as the —legal creator".[136] He says the corporation is a product of law and exists only in accordance with the law. Therefore, as the law derives from the state and the state is a creation of society, corporations which exist under the law are creatures of society.[137] Accordingly, corporations have rights and duties as members of society. This syllogism strongly indicates the dependence of corporations on society and the power of society to

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[132] Ibid, p. 8.
[133] United Nations, ‗The Social Responsibility of Transnational Corporation' (1999), p. 20, <http://www.unctad.org/en/docs/poiteiitm21.en.pdf>.
[134] Mill J. S., On Liberty, Chapter IV (Longman, Roberts & Green Co., first published 1859, 1869 ed), p.44.
[135] Younkins E.W. 2001, ‗Two Perspectives on Corporate Social Responsibility' (2001), <http://www.quebecoislibre.org/010609-13.htm>.
[136] DeGeorge R. T., *Business Ethics* (MacMillan Publishing Co., 1986).
[137] Ibid.

suspend or even cancel their license to operate, when it perceives that such business enterprises are no longer serving the public's interest.

Similarly, Solomon suggests "corporations, like individuals, are part and parcel of the communities that created them, and the responsibilities that they bear are not the products of argument or implicit contracts but intrinsic to their very existence as social entities".[138] In this regard, corporations are expected to accept these rights and obligations as prima facie duties. This inescapable responsibility is described by Anshen as "the corporation receives its permission to operate from a society and ultimately is accountable to the society for what it does and how it does it".[139] Drucker explained that this social responsibility derives from a social dimension point of view where business cannot survive without society. As he stated:

> "The social dimension is a survival dimension. The enterprise exists in society and economy. Within an institution one always tends to assume that the institution exists by itself in a vacuum. And managers inevitably look at their business from the inside. But the business enterprise is a creature of society and economy. Society or economy can put any business out of existence overnight. The enterprise exists on sufferance and exists only as long as society and economy believe that it does a job, and a necessary, useful, and productive one".[140]

The question of whether corporations are able to enter into a social contract with civil societies may be answered by the fact that, as legal persons, they have the same responsibilities as every other person in society.[141] Therefore, while individuals have an obligation to conform to a social contract with society, corporations should also have the same obligation to respect and protect the rights and well-being of others in that society. To support this, in the UK, the Confederation of British Industry has commented:

> "While the law establishes the minimum standard of conduct with which a company must comply if it is to be allowed to exist and trade, a company, like a natural person, must be recognised as having functions, duties and moral obligations that go beyond the pursuit of profit and the specific requirements of legislation".[142]

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[138] Solomon R. C., *Ethics and Excellence: Cooperation and Integrity in Business* (Oxford University Press, 1992), p. 149.
[139] Anshen M., *Corporate Strategies for Social Performance* (Macmillan, 1980), p. 6.
[140] Drucker P. F., *Management: Tasks, Responsibilities, Practices* (Transaction Publishers, 2007), p. 113.
[141] See discussion in Corporate Legal Personality in Chapter 4.
[142] Quoted in Smith N. C., *Morality and the Market: Consumer Pressure for Corporate Accountability* (Routledge, 1990), p. 93-94.

Moreover, the fundamental idea that society and business are interrelated leads to the expectation that corporations have to behave in an acceptable manner as demanded by society. Their symbiotic relationship derives from the fact that while corporations are viewed as providers of products and services, employment, and a source of state revenue, their success also depends on society's well-being. In the words of Porter and Kramer:

> "Successful corporations need a healthy society,…[where it] creates expanding demand for business, as more human needs are met and aspirations grow…At the same time, a healthy society needs successful companies. No social program can rival the business sector when it comes to creating the jobs, wealth, and innovation that improve standards of living and social conditions over time".[143]

Thus, this two-way relationship between business and society, where both gain benefits, results in a partnership sharing the rights and responsibilities under a social contract. As Lantos put it,

> "The corporate social contract holds that business and society are equal partners, each enjoying a set of *rights* and having reciprocal *responsibilities*".[144]

In addition, as corporations are legitimised through societal approval, their activities need to be kept in line with the changes in societal expectation. In 1969, Henry Ford II declared:

> "The terms of the contract between industry and society are changing…Now we are being asked to serve a wider range of human values and to accept an obligation to members of the public with whom we have no commercial transactions".[145]

Consequently, with this in mind, no longer can corporate legitimacy[146] be attained by staying only within the bounds of the law. Society expects corporations not only to comply with current law but adapt to the morally acceptable behaviour of that society.[147] Downling and Pfeffer considered that corporations can be legitimate when they are recognised as "just and worthy of support".[148] Thus, their legitimacy depends on how their behaviour is viewed by the community, and whether their activities

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[143] Porter M. E. & Kramer M. R., 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility' (2006) 84(12), *Harvard Business Review*, p. 83.
[144] Lantos G. P., 'The Boundaries of Strategic Corporate Social Responsibility' (2001), p. 7, <http://faculty.stonehill.edu/glantos/Lantos1/PDF_Folder/Pub_arts_pdf/Strategic%20CSR.pdf>.
[145] Quoted in Donaldson T., *Corporations and Morality* (Prentice-Hall, 1982), p. 36.
[146] Legitimacy is defined as "a generalised perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions". Suchman M. C., 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3), *Academy of Management Review*, p. 574.
[147] See Palazzo G. & Scherer A. G., 'Corporate Legitimacy as Deliberation: A Communicative Framework' (2006) 66(1), *Journal of Business Ethics*, p. 71-88.
[148] Taken from Eweje G., 'Environmental Costs and Responsibilities Resulting from Oil Exploitation in Developing Countries: The Case of the Niger Delta of Nigeria' (2006) 69(1), *Journal of Business Ethics*, p. 32.

are perceived as beneficial. Accordingly, to retain corporate legitimacy, it can be argued that corporations must redefine their business decisions to include CSR standards in their procedures. Campbell et al. noted, "[u]nder a social contract, [corporations] can only continue to enjoy social legitimacy if they continually modify their policies and activities to accord with societal opinion".[149] This point of view is related to the "license to operate", where corporations cannot operate without the public's support, and are automatically obligated to a social contract that contributes to the benefit of society. According to the Small Enterprise Education and Promotion (SEEP) Network:

> "the social contract for business is founded on consent—that firms exist only through the cooperation and commitment of society, and that every firm needs tacit or explicit permission from governments, communities, and numerous other stakeholders to do business. This suggests an implicit agreement between the firm and society. The simplest form of the contract is to specify what business needs from society and what, in turn, are its obligations".[150]

A critic of the social contract theory argued that the "social contract" is a "fiction", as it is not a written legal contract but a morally binding agreement amongst all members of society.[151] According to Rachels, "The social contract is an implicit agreement about the basic principles or ethics of a group".[152] Similarly, Kolm stated that, "Social Contracts are the conceptual instruments of social ethics that define what is just, right or good in society as the result of putative (hypothetical, fictive, implicit) unanimous agreements among the concerned persons".[153] Thus, it can be viewed as imaginary and hypothetical because it has no real existence. However, Donaldson argued that "[t]here may never have been a pen and ink contract, but remarkably enough, thousands of people have acted as if there were".[154] It owes nothing to force but owes everything to duty and responsibility towards each other. As Binmore commented:

> "Nobody is bound by the terms of such a social contract. It serves only to coordinate behaviour on an equilibrium in the Game of Life. The survival of the social contract does not therefore depend on its

[149] Campbell D., Stonehouse G. & Houston B., *Business Strategy: An Introduction* (Butterworth-Heinemann, 2002), p. 280.
[150] The SEEP Network Social Performance Working Group, 'Social Performance Map' (2008), p. 20-21, <http://communities.seepnetwork.org/sites/hamed/files/SPMap_2ed.pdf>.
[151] Younkins states that "The social contract is a fiction. Corporations are expressions of individual freedom, do not derive their power from society, and need only respect individuals' natural rights and adhere to government regulations". From Younkins E., 'Individual Rights, Social Responsibilities, and Corporations' (2000), <http://www.quebecoislibre.org/younkins22.html>.
[152] Rachels J.,*The Elements of Moral Philosophy* (Random House, 1986), p. 199-200.
[153] Kolm S. C., *Modern Theories of Justice* (MIT Press, 1996), p. 72.
[154]Donaldson, above n 145, p. 40.

> being backed up by some external enforcement mechanism. In a well-ordered society, each citizen honors the social contract because it is in his own self-interest to do so, provided that enough of his fellow citizens do the same".[155]

Thus, it can be suggested that corporations should view the social contract as a self-assumed obligation. According to Robert E. Goodin:

> —noone is forced to go into business, hiring employees or selling to customers. That is a matter of choice; and only if one chooses that role does one incur the special responsibilities that accompany it. Hence, the special responsibilities of businessmen are, if not exactly contractual (because unalterable and non-negotiable), at least —self-assumed" in some broader sense".[156]

Ruf et al. discussed how corporations have two types of contracts: explicit as a written legal contract, and implicit as a self-enforcing contract between parties that has no legal foundation.[157] Corporations are expected to honour their responsibilities under both types of contract. Frey and Cruz-Cruz argued that the social contract is also structured using the same three conditions as other contracts:

(1) free and informed consent; contracting parties agree to enter the contract without force, pressure, fraud or deception;

(2) a quid pro quo; where each party has a mutual benefit from being part of the contract;

(3) the rational self-interest of the contracting parties; each participant knows the value of their input as well as the value of their expectations and the best way of promoting or protecting them.[158]

Therefore, even though the social contract is not written, it is still regarded as an accepted contract with which corporations need to comply in their business practices. While the obligations of corporations cannot be defined under the implicit contract, this does not provide an excuse for them not to take into account the duties and responsibilities of the social contract. As Donaldson asserted, —[a]lthough the

[155] Binmore K., *Game Theory and the Social Contract Volume 2: Just Playing* (MIT Press, 1998), p. 5.
[156] Goodin R. E., *Protecting the Vulnerable: A Re-Analysis of Our Social Responsibilities* (University of Chicago Press, 1986), p. 61.
[157] Ruf et al, above n 49, p. 145.
[158] Frey W. & Cruz-Cruz J. A., _Three Views of CSR (Corporate Social Responsibility)' (2009), <http://cnx.org/content/m17318/latest/>.

social contract is unable to specify a corporation's obligations precisely, it holds implications for the manner in which corporate improvement should occur".[159]

Garrett claimed there are real rights and obligations in this implicit or implied contract between business and society, deriving from the expectations of both parties. As he stated:

> "Business normally expects that the local community will maintain a reasonable and orderly tax policy and encourage good labour relations. The community, on its side, assumes that business will strive to maintain stable employment patterns as well as pay its taxes and protect community resources. Although the contract between the firm and the community is not enforceable by law, it generates a real obligation on both sides, since orderly social life and community development are impossible without it".[160]

Thus, from the perspective of social contract theory, corporations have a moral responsibility to society which is regarded as an implicit social agreement based on ethical principles. CSR, as a mechanism that promotes the ethical behaviour of corporations, has been seen as a means of fulfilling the obligations imposed by the social contract.

While the specifics of social contracts differ greatly from culture to culture and between traditions, the rights of individuals within democratic societies to receive a fair reciprocal return is a norm based on a common foundation. Generally, the idea of a social contract can be accepted as leading to a "common association for the protection, peace, and prosperity joined to notions of principle, reciprocity, and law which make the association not only generally beneficial but also fair to its members".[161] This notion can be adapted to set the boundaries of the social contract between corporations and society.

Donaldson and Dunfee developed a social contract model, called the Integrative Social Contract Theory (ISCT), combining two distinct forms of social contract:

- "The hypothetical or "macro" contract, reflecting hypothetical agreement among rational members of a community.

[159] Donaldson, above n 145, p. 171.
[160] Garrett T. M., *Business Ethics* (Prentice-Hall, 1966), p. 185.
[161] Franck T.M., *Fairness in International Law and Institutions* (Oxford University Press, 1995), p. 28.

- The ―extant" or ―micro" contract, reflecting an actual agreement within a community".[162]

This combination provides the strengths of each while at the same time minimising their weaknesses.[163] The advantages would be that ―[b]y insisting that business ethics take full account of the extant agreements within companies, industries, and other economic communities, the blurring usually associated with traditional ethical theory is avoided".[164]

This could be used as a foundation for the development of a social contract that would establish a better relationship between business and civil society. The attempt to redefine the social contract can follow the suggestions by Allen White of four building blocks:

1. The purpose of corporations must be changed to serve the public interests rather than just those of their shareholders.
2. Corporations should recognise long-term wealth creation derives from serving the well-being of society rather than that of short-term benefits.
3. Corporations have to recognise their interdependence with government and civil society and develop a new partnership.
4. The role of government needs to be restored and redirected in light of the problems created by globalisation.[165]

Overall, the idea of corporations serving society's interests under the social contract can be seen as having many of the same characteristics as stakeholder theory. Corporations have to consider their effects and relationships with other stakeholder groups in the social contract, as shown below:

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[162] Donaldson T. & Dunfee T.W, *Ties that Bind: A Social Contract Approach to Business Ethics* (Harvard Business School Press, 1999), p. 19.
[163] ―The traditional weakness of macro contracts is their vagueness", while the extant contracts ―can be morally out of bounds". Ibid, p. 19.
[164] Ibid, p. 19.
[165] White A.L., _Is It Time to Rewrite the Social Contract?' (2007), *Business for Social Responsibility (BSR)*, <http://www.bsr.org/reports/BSR_AW_Social-Contract.pdf>.

Chapter 4, in which corporations are compared to natural persons. If, as is argued there, corporations are recognised as persons under the law, they should be regarded as parties to the social contract, so their rights and privileges necessarily carry with them concomitant responsibilities to others in society.

The challenge with the social contract theory is not understanding its concept and its application but how corporations approach it in practice. The level of compliance with the social contract may depend on whether the consequences of non-compliance are clearly visible. If corporations do not fear risks or repercussions, they may choose not to comply, especially when there is a conflict between their interest and those of society. Consequently, the effectiveness of voluntary CSR as a new social contract, in the larger context of society, is still to be demonstrated and if it does not produce the desired outcomes it may need to be supplemented by some form of mandatory CSR to ensure corporate compliance with the essence of the social contract.

3.5 Ethical Theory

Business ethics were adapted from philosophical and religious teachings, and have become a major consideration for corporate management. Ethical responsibility is the starting point for corporate social involvement and emphasises the main objective of CSR. As CSR extends the perspectives of management to encompass not only shareholders but the wider frame of responsibilities expected by modern society, it requires corporations to accept ethical standards in their business policies. However, a question remains over whether corporations need to comply with ethical obligations that go beyond the requirements of the law. One might expect that they would ignore their ethical responsibilities as there is lack of enforceability and some believe business management does not need to take ethics into consideration given the number of regulations in place to control corporate activities.[168] However, McCarty argues that ethics are as important as the law and should be taken by business even more

[168] McCarty R., ‗Business, Ethics and Law' (1988) 7(11), *Journal of Business Ethics*, p. 881.

seriously than the law.[169] Even though the reason corporations must behave ethically may not be apparent, they still cannot ignore the social requirement of ethics in their operations.[170] McCarty also stated that ―ethics and law are normative systems" in that they are the rules for the conduct of business.[171] Where the virtuousness of corporations can only be defined through the perspective of the community at large[172], this does not prevent them being penalised. Failing to engage with ethical standards may result in a loss of public support, adversely affecting financial performance. Therefore, it is argued that, corporations need to increase the scope of their responsibilities to include ethical considerations in their corporate practices.

The word ―ethics" comes from the Greek word *ethos,* meaning ―character" or ―custom"[173], and it often refers to moral behaviour and standards of individuals or groups. Daft defined ethics as ―the code of moral principles and values that governs the behaviour of a person or group with respect to what is right or wrong".[174] When discussing ethics, most people seem to rely on their cultural, religious and philosophical traditions for their values. This results in a difference of understanding over what is right or wrong in the application of ethical behaviour. Even though it is difficult to define ethics in business, it does not mean that corporations can ignore moral and ethical standards in their operations. It is a commonly held understanding that ethical behaviour is an essential element for conducting business. To ensure their integrity, corporations must not engage in any unethical practices that may adversely affect society or the environment.

The concept of business ethics developed from the ideas of Aristotle.[175] Robert Solomon developed Aristotle's approach to business ethics and stated that:

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[169] Ibid, p. 881-889.
[170] Ibid, p.887.
[171] Ibid, p. 881.
[172] Solomon R.C., *Ethics and Excellence: Cooperation and Integrity in Business* (Oxford University Press, 1992), p.102.
[173] Solomon R. C., 'Introduction to Ethics', in W. C. Zimmerli, K. Richter & M. Holzinger (eds), *Corporate Ethics and Corporate Governance* (Springer, 2007), p. 15.
[174] Daft, R. L., *Organization Theory and Design*, (South-Western Cengage Learning, Mason, 10th ed, 2010), p. 389.
[175] See Bragues G., 'Seek the Good Life, not Money: The Aristotelian Approach to Business Ethics' (2006) 67(4), *Journal of Business Ethics*, p. 341-357.

> ―one has to think of oneself as a member of the larger community,…to bring out what was best in ourselves and our shared enterprise. What is best in us-our virtues-are in turn defined by that larger community, and there is therefore no ultimate split of antagonism between individual self-interest and the greater public good."[176]

Through this concept, corporations should consider society's interests in addition to their own and realise that moral responsibility may be of at least equal importance in business to that of achieving personal wealth. Morality should be linked to business practices, where benefits can be gained through virtuous acts and becoming more generous to others. By being seen as ethically responsible, corporations can increase both trust and profitability. In support of business ethics, Solomon proposed that the purpose of business should be increasing wealth, creating quality and desirable goods, and improving the quality of life.[177] This aligns with directors' duties to act in the best interests of their companies as a whole, especially where ethically serving the interests of wider stakeholders would contribute to the maximisation of profits.

Business ethics supply the basic justification of what is right and wrong for managerial analysis of moral business practices. Hitt and Collins related business ethics to ―a set of standards by which the actions taken by a firm and its authorised representatives are determined, by the firm's stakeholders, to be morally appropriate".[178] Through a perspective that ―good ethics is good business"[179], corporations are called on to recognise and serve the needs of stakeholders through moral obligations. Bartlett and Preston believed that business ethics can improve economic benefits as corporations performing with high ethical standards would increase their competitive advantage.[180] Moreover, as ethics are linked to cultural norms of society, corporations that behave ethically reduce the effects of any changes in the

[176] Solomon R., ‗Corporate Roles, Personal Virtues: an Aristotelian Approach to Business Ethics', in T. Donaldson, P. Werhane & M. Cording (eds), Ethical *Issues in Business: A Philosophical Approach*, (Prentice-Hall, 7th ed, 2002), p. 73. Quoted in Schaefer B. P., ‗Shareholders and Social Responsibility' (2008) 81(2), *Journal of Business Ethics*, p. 303.
[177] Solomon R. C., *Ethics and Excellence: Cooperation and Integrity in Business* (Oxford University Press, 1992), p. 118.
[178] Hitt M. A. & Collins J. D., ‗Business Ethics, Strategic Decision Making, and Firm Performance' (2007) 50(5), *Business Horizons*, p. 354.
[179] Bartlett A. & Preston D., ‗Can Ethical Behaviour Really Exist in Business?' (2000) 23(2), *Journal of Business Ethics*, p. 205.
[180] ―A survey conducted among U.S. executives, directors and business school deans in 1988 by Touche Ross found that 65% of the respondents believed that high ethical standards improved a firm's competitiveness". Ibid, p. 205.

socio-cultural environment because they are already operating in line with acceptable norms.[181] In addition, as the –socio-cultural environment is tied to the political/legal environment", if corporations operate in an ethical manner that follows the cultural norms, it would help to minimise any increases in political or regulatory conditions that control corporations within society.[182] Clearly, the benefits of compliance with ethical rules can add to the profitability of corporations, or at least reduce the burden of additional regulation introduced by governments.

While being ethical can ensure benefits for corporations, ethicists believe they should act in an ethical manner because it is the right thing to do.[183] The famous moral philosopher, Immanuel Kant, proposed that actions were only morally right if done out of a sense of duty by stating that, –[a] human action is morally good, not because it is done from immediate inclination–still less because it is done from self-interest–but because it is done for the sake of duty."[184] He used the example of a merchant who did not overcharge customers as this would achieve a good reputation for his business.[185] It might be criticised that whilst this is a good act, it is not a moral one because it was done with a hidden motive and not for its own sake. In this regard, corporations that engage with social responsibility to achieve a good reputation and increase benefits cannot necessarily be considered as moral because their actions were done with an ulterior motive, self-interest. Therefore, to become morally regarded, corporations should consider their actions in the light of the well-being of society, as part of their duty and not just because it happens to coincide with their own interest. Otherwise, corporations acting only out of their own self-interest might risk their reputation rather than enhance it.[186] They should engage in socially responsible

[181] Gallagher S., 'A Strategic Response to Friedman's Critique of Business Ethics' (2005) 26(6), *Journal of Business Strategy*, p. 57.
[182] Ibid, p. 57.
[183] Fisher J., 'Surface and Deep Approaches to Business Ethics' (2003) 24(2), *Leadership & Organization Development Journal*, p. 96.
[184] Kant I., *Groundwork of the Metaphysic of Morals* (H. J. Paton trans, Harper & Row Publishers, 1964), p. 18-19, (first published 1948).
[185] Kant I., *Groundwork of the Metaphysics of Morals* (Gregor M. J. (ed), Cambridge University Press, 1998), p. xiii.
[186] Porter & Kramer, above n 44, p. 14.

activities because it is the right thing to do, for its own sake, to become recognised as a moral business.[187]

Corporate culture that shows more concern over economic values than the well-being of society can encourage ethical blindness in decision making, leading to the erroneous assumption that "[t]here is no such thing as business ethics".[188] Through the media outlets that present the negative impacts caused by a lack of ethical respect, corporations have been depicted as being amoral. However, Carr compared business to poker and argued that business rules and moral standards are different from those of ordinary society, whereas if not against the law, they cannot be regarded as unethical.[189] In his words:

> "Poker's own brand of ethics is different from the ethical ideals of civilized human relationships. The game calls for distrust of the other fellow. It ignores the claim of friendship. Cunning deception and concealment of one's strength and intentions, not kindness and openheartedness, are vital in poker. No one thinks any the worse of poker on that account. And no one should think any the worse of the game of business because its standards of right and wrong differ from the prevailing traditions of morality in our society".[190]

Nevertheless, this approach is seen as being against the expectation of modern society where business is encouraged to apply ethical behaviour. Profit-making alone without the application of ethical and moral standards is no longer an acceptable way to become a successful business. Due to the complexity of business in modern society, it becomes impossible to separate moral and ethical values from the purely economic performance of corporations.[191] Society's expectations of ethical and moral behaviour have extended into being an integral part of business practice; single-minded profit making is no longer acceptable. Business should consider all aspects of society, not only those directly engaged with their economic dealings. In regard to stakeholder theory, modern corporate management combines ethical behaviour and social responsibility within the process of decision-making, in order to meet stakeholders' expectations. Corporations derive their survival and success from maintaining a

[187] Masaka D., 'Why Enforcing Corporate Social Responsibility (CSR) is Morally Questionable' (2008) 13(1), *Electronic Journal of Business Ethics and Organisation Studies*, p. 18.
[188] Bartlett & Preston , above n 179, p. 201.
[189] Carr, above n 106, p. 143-153.
[190] Ibid.
[191] Werhane & Freeman, above n 76, p. 2.

satisfactory relationship with stakeholders through showing positive attitudes towards the moral and ethical values presented in their business practices.

3.5.1 Corporations as Moral Agencies

It is generally accepted that the law is based on moral standards and that what is illegal can be considered morally unacceptable. However, it is a different proposition when it comes to reality, a legally correct action is not necessarily a morally correct action. As Daft put it, ―[c]urrent laws often reflect combined moral judgements, but not all moral judgements are codified into law".[192] In other words, ―[o]beying the law does not imply that such a company is also functioning morally. Not everything that is considered morally (un)desirable is necessarily covered by legislation".[193] Therefore, just obeying the law is not enough to fulfill moral obligations. The claims that corporations restrict their responsibility to only legal requirements can be countered by the fact that their activities have effects on others in society, thus they cannot ignore their moral responsibilities.[194]

One point of the argument over corporate morality links with the basic assumption that corporations that are regarded as legal persons, possessing the rights and duties of individuals, have a moral responsibility to society. As Werhane and Freeman stated, ―[c]orporations are treated as legal persons under the law, so it is not outrageous to think of them as moral persons as well".[195] In a similar vein, Donaldson put it that, ―[s]ince certain rights and responsibilities automatically accompany corporate status, society may wish, again, to make the conditions of moral agency also be conditions of corporate status".[196] Thus, it might be argued, as Dunn noted, ―moral responsibilities attach to ―personhood" rights, and therefore granting corporations ―personhood" status necessarily implies they are noble creatures as well".[197]

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[192] Daft, above n 174, p. 391.
[193] Kaptein M., *Ethics Management: Auditing and Developing the Ethical Content of Organizations* (Kluwer Academic Publishers, 1998), p. 52.
[194] Barrett W. 2004, Responsibility, Accountability and Corporate Activity, <http://www.onlineopinion.com.au/view.asp?article=2480 >.
[195] Werhane & Freeman, above n 76, p. 4.
[196] Donaldson, above n 145, p. 32.
[197] Dunn C. P., ‗Are Corporations Inherently Wicked?' (1991) 34(4), *Business Horizons*, p. 5.

In support of the proposition that corporations have moral responsibility for their actions, Freeman and Werhane stated, "corporations are collectives made up of persons who can "act" as moral agents, and therefore are morally responsible".[198] In this view corporations are seen as a collective of individuals, where any actions carried out by these individuals belong to the collective.[199] Accordingly, corporations, as a collective, can be assumed to act as individuals and are therefore morally responsible for those actions. Therefore, it is clear that even though the decisions and actions are done by individuals, corporations are culpable. As Freeman and Werhane further stated, "although the actions of an organisation are often the result of collective, not individual decision-making, corporations, as well as individuals, are normatively evaluated".[200] Of the same point of view, French argued that "corporations can be full-fledged moral persons and have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons".[201]

Donaldson supported the idea that corporations can be considered as moral agents, noting that they have the capacity to apply moral reasons when making decisions and control of the decision-making process.[202] Therefore, they should behave in a manner that complies with moral values of society, producing an ethical component to business management. Freeman and Werhane noted:

> "Corporations also enjoy legal rights such as the right to freely exist, own property, engage in commerce, and even go out of business. The result is that corporation exhibit intentional behaviour, engage in reciprocal accountability relationships, are the subjects of rights, and are said to act. But their so-called intentions, their accountability relationships, and their "actions" are the collective result of decisions made by individual persons. Their rights are assigned to an artificial entity, not to any individual person. The corporation is an *eliminatable* subject because, without persons, corporate "actions" literally could not occur. Thus, corporations are moral agents, but not moral persons".[203]

[198] Freeman R. E. & Werhane P. H., 'Corporate Responsibility', in R. G. Frey & C. H. Wellman (eds), *A Companion to Applied Ethics* (Blackwell Publishing, 2003), p. 557.
[199] Richard DeGeorge noted, "The attribution of actions to collectives [corporations] can be correct in that collectives can produce results, and in that the actions of the collective can be the resultant of other actions, even though collectives act only through the actions of individuals". Quoted in Klonoski R. J., 'Foundational Considerations in the Corporate Social Responsibility Debate' (1991) 34(4), *Business Horizons*, p. 10.
[200] Werhane & Freeman, above n 76, p. 4.
[201] French P. A., 'The Corporation as a Moral Person' (1979) 16(3), *American Philosophical Quarterly,* p. 207.
[202] Donaldson, above n 145, p. 30.
[203] Freeman & Werhane, above n 198, p. 556.

Alternative thinkers argue that moral responsibility cannot be expected of corporations. As John Ladd argued:

> —Thus, for logical reasons it is improper to expect organisational conduct to conform to the ordinary principles of morality. We cannot and must not expect formal organisations, or their representatives acting in their official capacities, to be honest, courageous, considerate, sympathetic, or to have any kind of moral integrity".[204]

The difference between corporations and individuals is that corporations have no conscience and are therefore not able to act in a morally responsible manner on their own.[205] Without conscience, they are unable to decide what is right or wrong. Therefore only those who act on their behalf can hold that moral responsibility. As DeGeorge reasoned:

> —A corporation as such has no conscience, no feelings, no consciousness of its own. It has a conscience only to the extent that those who make it up act for it in such a way as to evince something comparable to conscience. Because a corporation only acts through those who act for it, it is the latter who must assume moral responsibility for the corporation".[206]

In the words of Edmund Wall:

> —Even if corporations and social groups are actual entities in the world (which has not been established), a corporation lacks cognitive ability to follow reasons. It cannot act, let alone be considered an agent whose actions can elicit praise or blame. In the absence of beliefs and desires, reasons and actions cannot be attributed to an entity".[207]

In support, David Ronnegard asserted that:

> —The corporation is not a principal in its own right with the relevant ability to have an autonomous intention with which to direct the corporate constituents. The morally relevant sense of an intention is one which the agent is aware of. This is the property of the intentions of natural people from which the concept of moral agency originates, which suggests that the morally relevant sense of intentions are based on actual mental states rather than a mere functional attribution of such states. The corporation itself does not possess —intrinsic intentionality". Further, it seems useless to attribute moral responsibility to a structure which cannot learn from its mistakes, nor appreciate the moral nature of its acts".[208]

The fact that corporate entities do not have the conscience or morality of real persons leads to the argument that corporations cannot be expected to have the same moral obligations and responsibilities

[204] Ladd J., _Morality and the Ideal of Rationality in Formal Organizations' (1970) 54(4), *The Monist*, p. 500.
[205] DeGeorge R. T. 1986, *Business Ethics* (MacMillan Publishing Co., 1986).
[206] Ibid.
[207] Wall E., _The Problem of Group Agency' (2000) 31(2), *The Philosophical Forum*, p. 189.
[208] Ronnegard D., *Corporate Moral Agency and the Role of the Corporation in Society*, (London School of Economics and Political Science, University of London, 2006), p. 120.

as individuals. Even though corporations may indulge in philanthropic and socially responsible activities, which could assist with their marketing advantage, through the nature of their corporate structure, they cannot ever be able to nurture moral values as individuals do. To support this, Danley regards corporations as a machine, "designed by humans, modified by humans, operated by humans".[209] In this manner, it would not be appropriate to express any moral responsibility to the machine. Such a machine cannot have morals nor be held responsible for its actions, only those people who operate it can be held responsible.[210] Whether a corporation fails or succeeds, the blame cannot be on the corporation but on the managers and directors. Thus, he strongly concludes that moral responsibility lies with the creator, not with that which is created.[211]

Velasquez also supports the stance of moral responsibility being in the hands of the human individuals and not in the corporation. He presents the concept of moral responsibility as "the kind of responsibility that is attributed to an agent only for those actions that *originate* in the agent, insofar as the action derives from the agent's intentions (the *mens rea* requirement) and from the same agent's bodily movements (the *actus reus* requirement)".[212] In his view, corporate actions cannot be originated by corporations themselves but by their members, who can direct their bodily movement to produce the act, therefore, only those members can be held morally responsible.[213]

However, even though corporations are not able to have a sense of morality as humans do, they can still be considered as being a moral agency, originating from the members of the organisation. Werhane posited that the actions of their managers and members are primary actions whereas the actions of the corporation are merely secondary, and "[b]ecause a corporation is capable of secondary action, it is a secondary moral agent, but is not morally autonomous. And corporations, like persons, are and should

[209] Danley J. R., "Corporate Moral Agency: The Case for Anthropological Bigotry' (1980), in J. C. Callahan (ed). 1988, *Ethical Issues in Professional Life* (Oxford University Press, 1988), p. 274.
[210] Ibid, p. 269-274.
[211] Ibid, p. 269-274.
[212] Velasquez M., "Why Corporations Are Not Morally Responsible for Anything they Do' (1983), in L. May & S. Hoffman, *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Rowman & Littlefield, 1991), p. 114.
[213] Ibid, p. 111-132.

be held morally responsible for actions within their control when, all things considered, they could have acted otherwise".[214]

At the heart of this argument, it is true that corporations, being comprised of human beings, have characteristics in common with individuals, which allows them to be held morally accountable. In this sense, corporations can make decisions in the same way as individuals, and like an individual their decisions can be either good or bad. It is clear that they have the capacity to determine if their decisions and activities could be harmful or beneficial.[215] This makes them into moral agents in the same way as individuals. Accordingly, if corporations can be considered as moral agencies, this characteristic quality would significantly contribute to their responsibility towards society. With this analogy, while government can introduce stringent regulation for individuals when they fail to uphold their ethical responsibilities, it is reasonable to apply the same logic to corporations. While this may prove to be difficult, it could be suggested that as corporations have to act through individuals, regulating individuals such as directors to ensure they conduct their corporations in a socially acceptable manner is one possible way for consideration.

Therefore, the question is no longer whether corporations are capable of acting in an ethical manner. Ethical theory requires that they should behave ethically and ensure that their activities are, and are seen to be, both ethically and morally acceptable in order to avoid public criticism or business repercussions. It can, of course, be argued that corporations should engage in ethical and moral activities as the right thing to do rather than as a means to improve corporate profits, but this argument carries little weight. What is important is whether the behaviour results in benefits to society; whether it occurs because the corporation is inherently ethical or because it believes that there are benefits to itself in behaving in that way is really irrelevant.

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[214] Werhane P. H., *Persons, Rights and Corporations* (Prentice Hall Inc., 1985). Quoted in Klonoski R. J. 1991, ‗Foundational Considerations in the Corporate Social Responsibility Debate' (1991) 34(4), *Business Horizons*, p. 11.
[215] Painter-Morland M., ‗Redefining Accountability as Relational Responsiveness' (2006) 66, *Journal of Business Ethics*, p. 90.

To summarise, it is not unreasonable to expect corporations to act ethically. In fact, there may be strong financial arguments for doing so. This motive can be linked to shareholder theory which leads to the goal of profit maximisation. However, as things stand, some corporations may concentrate on their short-term gain and ignore their ethical responsibilities. Therefore, where they fail to behave in an ethical manner, the existing mechanisms may need to be adjusted to ensure their compliance. A complimentary approach involving both voluntary and mandatory mechanisms could encourage corporations to operate ethically rather than concentrating on increasing their own benefits at the expense of others in society.

3.6 Conclusion

The theories discussed above can be used to illustrate the various aspects in the relationship between business and society. It may be assumed that how corporations understand their position in society depends on which theories they apply in their business models. It is not the intention of this chapter to suggest which theory is most appropriate for promoting the application of CSR to business practices. By examining each theory, this chapter has demonstrated that they have a similarity in their objectives in that by behaving in a socially acceptable manner, corporations can ensure their existence in society and enhance their financial returns. Simply put, corporations that consider stakeholders‘ interests, comply with the societal obligation defined within the social contract and behave in an ethical manner should accomplish their goal of profit maximisation. Through this, it can be considered that no matter which theory corporations base their practices on, they all lead to the same objective of increasing benefits by complying with society‘s expectations. Thus, it might be suggested that even though each theory has a different ideology, in the end they all link to serve the interests of corporations and therefore those of their shareholders. While that objective can be seen as a business case for CSR, it can also be seen as a limitation, especially if there are no clear reciprocal corporate benefits. This may lead to the question of whether corporations will conduct their business in line with the core values of these theories if there are no financial benefits to be gained from doing so. With this in mind, it is reasonable

to expect that corporations may not engage with voluntary CSR when they cannot envisage any profit for their shareholders. To quote Bakan:

> —Corporate social responsibility is like the call boxes. It holds out promises of help, reassures people, and sometimes works. We should not, however, expect very much from it. A corporation can do good only to help itself do well, a profound limit on just how much good it can do".[216]

As a result, a mere reliance on voluntary CSR may not ensure that corporations absorb the values and intentions that form the foundations of these theories. One example can be seen in the case study of Shell provided in Chapter 2; others will be presented in Chapter 6. These examples of corporate irresponsibility illustrate that the ideology in theories often does not match with reality. As Albert Einstein stated, —[i]n theory, theory and practice are the same. In practice, they are not".[217] This is especially true where there is no obligation towards the theories. Thus, it may need some form of regulation to assist when practical application of social expectation is not exercised by corporations. Reducing the gap between theories and practice should increase participation by corporations, leading to an improvement in the relationship between business and society. However, one difficulty may arise from the perspective that the creation of theories were based on the rights and responsibilities of individuals and may not be compatible with corporate entities. Therefore, to convert theories into practice, the challenge remains of how to align the responsibilities expected of individuals with those expected of corporations. This consideration will be discussed in the next chapter, which will explore whether corporations as legal entities should be held to the same responsibilities as individuals.

[216] Bakan J., *The Corporation: The Pathological Pursuit of Profit and Power* (Constable, 2004), p. 50.
[217] Quote Factory, <http://www.thequotefactory.com/quote-by/albert-einstein/in-theory-theory-and-practice/29081>.

Chapter 4

Responsibility and Accountability of Legal Persons

4.1 Introduction

The status of a corporation as a legal person has long been established and corporate entities have been commonly available since the enactment of the *Companies Act 1862* (Imp) in the UK. To the extent that the law has created this persona for corporations, the obvious question is whether the rights and duties of natural persons should also be applied to these artificial persons. This chapter will expand on the discussion in Chapter 3 and will investigate how ―legal personality"[1] has been applied to corporations. It will argue that, even though corporate persons cannot be held accountable in the same way as individuals, their legal status should impose on them the same responsibilities, at least to the extent to which that is possible. Through this it can be suggested that it would be reasonable to impose further requirements on corporations, in addition to those to which they are already subjected, in return for them being granted the same rights and privileges as individuals and to reinforce society's reasonable expectation that with power comes responsibility.

4.2 The Legal Status of Corporations

The concept of legal personality has led scholars and theorists alike to examine the nature and composition of corporations. When corporations are incorporated, an artificial ―legal person" is brought into being. Under the law, there are two forms of persons, natural and artificial.[2] As Blackstone stated:

> ―Persons also are divided by the law into either natural persons**,** or artificial**.** Natural persons are such as God of nature formed us**;** artificial are such as are created and devised by human laws for the purposes of society and government which are called corporations or bodies politic"[3]

[1] Legal person or entity is defined as ―[a] body, other than a natural person, that can function legally, sue or be sued, and make decisions through agents. A typical example is a corporation". Garner B. A.(ed), *Black's Law Dictionary* (West Group, 7th ed, 1999), p. 903.

[2] Artificial person is defined as ―[a]n entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being. – Also termed *fictitious person; juristic person; legal person; moral person*". Ibid, p. 1162. According to Bouvier's Law Dictionary 1839, the corporation is defined as ―[a]n artificial being created by law and composed of individuals who subsist as a body politic under a special denomination with the capacity of perpetual succession and of acting within the scope of its charter as a natural person". Quoted in Duhaime's Legal Dictionary, ‗Corporation Definition', <http://www.duhaime.org/LegalDictionary/C/Corporation.aspx>.

―Person" is also defined in the legal dictionary as:

> ―1. a human being. 2. An entity (such as a corporation) that is recognized by law as having the rights and duties of a human being…"[4]

Consequently, there is another type of person recognised by law other than human beings, and that is the corporation.[5] While human beings and corporations are very different creatures, as persons they can be regarded as having the same legal rights and duties. As Salmond declared:

> ―So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not ... Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition".[6]

The beginnings of the concept of corporate entity can be seen emerging from the desire of the church of the middle ages to have a means of retaining ownership of properties donated to it, without violating the vows of poverty.[7] Wanting to meet the demands of the law and its desire to hold properties, the church and the state designed a property theory. From this the legal entity of the church was formed separate to its members and was the beginning of the evolution of modern corporations. As Fraher stated:

> ―Ecclesiastical property-holding [thereby] gave birth to modern corporation theory. In trying to explain the roles of bishops, lower clergy, and laity, medieval lawyers ultimately decided that each church was an entity distinct from the persons who made up the church. The fictional person, the corporate entity, theoretically lived forever, and theoretically this fictional person had property rights and interests of its own. Vis-à-vis the corporate church, the clergy were agents subject to fiduciary duties. Hence the direct conveyance to the church ultimately produced legal rules that look to the modern reader like a combination of corporation law and trust law".[8]

Thus, this alteration in property rights for the church formed the basis of corporate legal personality where corporations are identities distinct from the members who compose them. This form of

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[3] Blackstone W., *Commentaries on the Laws of England* (Clarendon Press, 1765-1769), Book I, Online edition by *Lonang Institute*, <http://www.lonang.com/exlibris/blackstone/>.
[4] Garner, above n 1, p. 1162.
[5] As Savigny stated, ―[b]esides men or ‗natural persons', the law knows as ‗subjects' of proprietary rights certain fictitious, artificial or juristic persons, and as one species of this class it knows the corporation". Gierke O. F., *Political Theories of the Middle Age* (Maitland F. W. trans, Cambridge University Press, 1900), p. xx.
[6] Salmond J. W. & Fitzgerald P. J., *Salmond on Jurisprudence* (Sweet & Maxwell, 12th ed, 1966), p. 299.
[7] Dunn C. P., ‗Are Corporations Inherently Wicked?' (1991) 34(4), *Business Horizons*, p. 4.
[8] Fraher R. M., ‗The Historical Origins of Trusteeship and Charitable Foundations' (1989), Paper presented at Poynter Center Conference on Ethical Duties of Trustees, Indiana University, Bloomington, Indiana, as quoted in Dunn C. P., ‗Are Corporations Inherently Wicked?' (1991) 34(4), *Business Horizons*, p. 4.

corporation has been criticised on the grounds that it was created to increase the capacity of corporations to maximise profits for their shareholders.[9]

In the UK, the separation of the general incorporated corporation from its members began when the *Joint Stock Companies Act 1856* (s3)[10] was replaced by the *Companies Act 1862* (s6)[11]. The 1856 Act suggested that the members were regarded as the company and there was no separation between them, where s3 stated that, "[s]even or more persons…may…form themselves into an incorporated company".[12] The 1862 Act amended this position in s6 by deleting the words "themselves into", enabling people to form an incorporated company, thereby separating the members from the company.[13] This format is the basis of modern law where corporations are depersonalised and seen as entities separate from their members.

As illustrated in *Salomon v Salomon & Co Ltd* in 1897, under the 1862 Act corporations were regarded as legal persons, having separate identities from their members, owners and directors.[14] Often, the concept of a separate legal personality has been recognised as originating from this case. Lord Halsbury stated that "once the company is legally incorporated it must be treated like any other independent person with its own rights and liabilities appropriate to itself".[15] The legal person status therefore enabled corporations to enjoy the rights and privileges of real persons, for example, to own property, conduct business and to sue and be sued in their own right. This characteristic was recognised long before, in 1793, by Stewart Kyd, the author of the first treatise on corporate law in English, when he defined a corporation as:

> "a collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by policy of the law, with the capacity of acting, in

[9] Banerjee S. B., *Corporate Social Responsibility: The Good, the Bad and the Ugly* (Edward Elgar Publishing Limited, 2007), p. 10.
[10] *Joint Stock Companies Act 1856* s3, 19 & 20 Vict. c. 47.
[11] *Companies Act 1862* s6, 25 & 26 Vict. c. 89.
[12] Ireland P., Grigg-Spall I. & Kelly D., 'The Conceptual Foundations of Modern Company Law' (1987) 14(1), *Journal of Law and Society*, p. 150.
[13] Ibid.
[14] *Salomon v Salomon & Co Ltd* [1897] AC 22.
[15] *Salomon v Salomon & Co Ltd* [1897] AC 22. HL

> several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence".[16]

This concept of legal personhood was also adopted in the U.S., as illustrated in *Dartmouth College v Woodward* in 1819,[17] where Chief Justice John Marshall of the US Supreme Court described corporations as:

> —A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use".[18]

4.3 Piercing the Corporate Veil

Where corporations are recognised by law as persons separate from their owners, this seems to provide them with a greater opportunity to pursue profits without having to consider the effects of their actions on society. With the limited legal liability given to limited liability corporations, those who own the company are able to walk away and ignore the legal responsibilities that corporate activities create. This special characteristic can encourage corporations to concentrate on maximising shareholder value at the expense of social, environmental and human rights standards. Corporations hiding behind the corporate veil of limited liability were heavily criticised in the documentary —The Corporation" as:

> —a psychopath hiding behind and protected by the corporate veil of limited liability…the modern corporation has all the traits on the World Health Organisation's diagnostic checklist for psychopathic personalities: callous unconcern for the feelings of others, incapacity to maintain enduring relationships, reckless disregard for others' feelings, incapacity to experience guilt, deceitfulness and a failure to conform to social norms with respect to lawful behaviour".[19]

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[16] Kyd S., *A Treatise on the Law of Corporations* (J. Butterworth, 1793), Volume 1, p. 13.
[17] *Trustees of Dartmouth College v Woodward,* 17 U.S. 4 Wheat, 518 (1819).
[18] *Trustees of Dartmouth College v Woodward,* 17 U.S. 4 Wheat, 518, 636 (1819).
[19] The Age, ‗Oedipus Wrecks' (28 August 2004), <http://www.theage.com.au/articles/2004/08/27/1093518071536.html#>; and Bakan J., *The Corporation: The Pathological Pursuit of Profit and Power* (Constable, 2004).

As it stands, corporate legal personality provides shareholders with limited liability, protecting them from any financial risk from the debts and obligations of the company. This corporate veil can therefore be seen as facilitating, perhaps even encouraging, socially undesirable activities by corporations as long as returns are maximised for shareholders. Thus, it seems that corporations are "designed in law to create a class of legally irresponsible profit-maximisers, [where their owners] have no reason to care about the way in which profits are garnered by their creature".[20] In the words of Ronald Green:

> "Thanks to limited liability, shareholders can fund the activities of large corporations, receive dividends and capital gains on their investments, and yet remain immune to some of the costs of misconduct or misjudgement by their corporate agents".[21]

While limited liability can promote risk-taking by enterprises that may benefit to economic development, it can also create a problem for those outside the company who may be unable to recover adequate compensation if something adverse occurs.[22] Therefore, it can be criticised for allowing corporations and their shareholders to maximise profits through risky practices without bearing any (or all) of the associated costs. It results in negative externalities in both risks and costs.[23] As Bainbridge stated:

> "Limited liability allows equity holders to cause the firm to externalize part of the risks and costs of doing business onto other constituencies of the firm and, perhaps, even onto society at large".[24]

The effect of those externalities provides justification for piercing the corporate veil. Piercing the veil allows externalities to be internalised, which can allow recovery by tort victims, uncompensated

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[20] Glassbeek H., 'The Invisible Friend: Investors are Irresponsible. Corporations are Amoral' (2003), *New Internationalist*, <http://findarticles.com/p/articles/mi_m0JQP/is_358/ai_105767345/>.
[21] Green R. M., 'Shareholders as Stakeholders: Changing Metaphors of Corporate Governance' (1993) 50(4), *Washington and Lee Law Review*, p. 1415.
[22] As shown in the James Hardie case. Prince P., Davidson J. & Dudley S., 'In the Shadow of the Corporate Veil: James Hardie and Asbestos Compensation' (2004), Research Note no. 12, 2004-2005, <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn12.htm>.
[23] Blumberg stated that "even economists convinced of the utility of limited liability . . . concede that limited liability raises serious problems because it enables the enterprise to externalize its costs". Blumberg P. I., 'Limited Liability and Corporate Groups' (1986) 11 *Journal of Corporation Law*, p. 576.
[24] Bainbridge S. M., 'Abolishing LLC Veil Piercing' (2005), *University of Illinois Law Review*, p. 95

creditors and society in general.[25] It recognises that, where corporations misuse limited liability, it would be reasonable to hold those responsible to account. As Wormser stated:

> —When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web [i.e., veil] of entity, will regard the corporate company as an association of live, up-and-doing, men and women shareholders, and will do justice between real persons".[26]

An example of the Court permitting the piercing of the veil can be seen in *Littlewoods Mail Order Stores v IRC*, where Lord Denning noted:

> —The doctrine laid down in *Salomon v Salomon & Co* [1897] AC 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit". [27]

A further example is shown by the decision of the New York Supreme Court in *Emposimato v CIFC Acquisition Corp.*, where it was said:

> —A corporate veil may be pierced, and an entity affiliated with a corporation may be liable for the corporation's breach of contract, either —where the officers and employees of the [affiliated entity] exercise control over the daily operations of the [corporation] and act as the true prime movers behind the [corporation's] action, or on the theory that the [affiliated entity] conducts business through the [corporation], which exists solely to serve the [affiliated entity]".[28]

The courts may consider piercing the corporate veil under certain circumstances. In Australia, there are five grounds for consideration:[29]

1. Agency: shareholders have effective control over the company where the acts of the company are seen as being the acts of the shareholders.
2. Fraud: the use of corporations to avoid legal liabilities by the controller.

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[25] Orn stated that —[i]f corporate veil piercing were not option, that is if limited liability would be absolute under all circumstances, uncompensated creditors and tort victims would constitute a vast externality. Corporate veil piercing offers courts a means of internalizing these externalities. As externalities are costs which are born involuntarily by third parties, internalization would result in societal wealth gains".
Orn P., —Piercing the Corporate Veil – A Law and Economics Analysis' (2009), Master Thesis, Faculty Of Law: University of Lund, p. 4, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1563314&fileOId=1566244>.
[26] Wormser I. M, —Piercing the Veil of Corporate Entity', (1912) 12(6) *Columbia Law Review*, p. 517.
[27] *Littlewoods Mail Order Stores v IRC* [1969] 1 WLR 1214 at 1254.
[28] *Emposimato v CIFC Acquisition Corp*., No. 601728/2008, 2011 WL 833801, at 10 (N.Y. Sup. Ct., 7 March 2011).
[29] Ramsay I. M. & Noakes D. B., —Piercing the Corporate Veil in Australia' (2001) 19(4), *Company and Securities Law Journal*, p. 253-260.

3. Sham or façade: corporations were created to hide the true purpose of their controllers.
4. Group enterprises: where subsidiaries are operated in a manner that disguises their liabilities, the corporate veil should be pierced to ensure parent companies are liable for the acts of their subsidiaries.
5. Unfairness/Justice: where the court needs to pierce the corporate veil to ensure a fair and just outcome.

Even though the ability to pierce the corporate veil exists in Australia, it is not widely exercised and, it has been argued that efforts to protect the tort victims of insolvent subsidiaries of powerful parent companies still remain inadequate.[30] Roger AJA in *Briggs v James Hardie* stated:

> —different considerations should apply in deciding whether to pierce the corporate veil in actions in tort from the criteria applied in actions in contract or, for that matter, revenue or compensation cases. Control and dominance by a holding company of a subsidiary do not in themselves increase the risk of injury to tort victims…The factors of shareholder control and dominance by a parent corporation may be equally irrelevant in determining in actions in tort whether the parent should be held liable".[31]

A study of cases in Australia up to the end of 1999 found that the courts lifted the corporate veil more than they had previously.[32] Nevertheless, there were still only a small number of successful cases, with only 40 from 104 cases brought in Australian courts and tribunals piercing the corporate veil.[33] It is also interesting to note that piercing is often successful in proprietary rather than public companies and in contract cases rather than in tort.[34] Most successful cases of piercing the veil derive from where the number of shareholders is smaller and where the shareholders play an active part in monitoring management.[35] Also, it was noted that the most successful argument for piercing the corporate veil is based on unfairness/ justice.[36] If improvement is to be sought in the potential for lifting the veil of

[30] Jackson D. F., _Report of the Special Commission of Inquiry into Medical Research and Compensation Foundation' (2004), Annexure T: The Concept of Limited Liability – Existing Law and Rationale, p. 417, <http://www.dpc.nsw.gov.au/about/publications/publications_categories_list>.
[31] *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, at 578-580.
[32] Ramsay & Noakes, above n 29, p. 261.
[33] Ibid, p. 262.
[34] Ibid, p. 262, 264.
[35] Ibid, p. 262-263.
[36] Ibid, p. 265.

limited liability, it might be suggested that the courts should include social, environmental and human rights violations as yet further reasons for piercing the corporate veil.

4.4 Attempts to Impose Accountability on Artificial Beings

As the artificial entity metaphor in English corporate law has been widely adopted, such as in the Dartmouth College case,[37] it is generally understood that corporations as artificial persons possess the same rights as individuals. As Dewey stated:

> "The dialectic of the courts, under the pressure of social facts, was equal to declaring that corporations, while artificial and fictitious, nevertheless had all the natural rights of an individual person, since after all they were legal persons".[38]

This, in itself, creates problems. As Demott observed, "it is often difficult to explain how duties and rights … might be intelligibly applied to a person that is purely the invented creature of compliance with legal form".[39] From one point of view, corporate legal status is criticised as being "set up for failure as a citizen. It is a fish out of water, an artificial person in a society of human persons. Its legal limitations, including limited liability, undermine its ability to act as a responsible citizen—paying its dues in case of failure".[40]

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[37] In the *Trustees of Dartmouth College v Woodward,* 17 U.S. 4 Wheat, 518 (1819), the Court ruled that Dartmouth continued as a private college and a state could not pass laws to impair its charter that was granted by King George III of England in 1769. This decision provided security for businesses which encouraged investment and growth of corporations. However, Judge Cooley disagreed with the Court's decision, as he noted, "[i]t is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country and upon the legislation of the country than the states to which they owned their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretense—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debs and just contracts, protects and perpetuates the evil". Cooley M. C., *A Treatise on the Constitutional Limitations which Rest upon the Legislative power of the States of the American Union* (Little Brown & Co., 2nd ed, 1871), p. 335.

[38] Dewey J., 'The Historic Background of Corporate Legal Personality' (1926) 35(6), *Yale Law Journal*, p. 669.

[39] Demott D. A., 'Organizational Incentives to Care About the Law' (1997) 60(4), *Law and Contemporary Social Problems*, p. 39.

[40] Sheehy B., 'Corporations and the Lateral Obligations of the Social Contract' (2006), *Bepress Legal Series*, p. 38-39, <http://law.bepress.com/expresso/eps/1738>.

Few would argue that the privileges given to corporations are greater than those of ordinary citizens.[41] Yet, ironically, with their artificial status, corporations can compete on the same level as natural persons and seem to have gained greater rights.[42] Grossman and Adams noted that:

> —Today's business corporation is an artificial creation, shielding owners and managers while preserving corporate privilege and existence. Artificial or not, corporations have won more rights under law than people have -- rights which government has protected with armed force".[43]

The concerns over the artificial beings of corporations existing only because state law recognises them as legal persons, create criticisms of this privilege as they cannot be adequately brought to account for their wrongdoings in the same way as individuals. Hence, it has been suggested that they should not be given the same rights as natural persons. Edward, Baron Thurlow, Lord Chancellor of England in the 18th century posed the question, —Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?".[44] This situation was also highlighted by Lord Coke in the 17th century, who wrote:

> —a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law ... They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney … A Corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear, … it is not subject to imbecilities, death of the natural body, and divers other cases".[45]

John P Davis also noted:

> —Having no physical body, a corporation aggregate could not be an imbecile, commit a crime, be guilty of treason or suffer an assault or battery; nor could it be imprisoned or suffer attainder, forfeiture or corruption of blood; it could not be outlawed but had to be coerced through its lands and goods".[46]

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[41] As Krannich stated, —[o]nce conceived as a creature of the state, the modern business corporation is now the ultimate legal actor, endowed with most of the rights of individual citizens, yet with control over more resources than any individual". Krannich J.M., ‗The Corporate —Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation' (2005) 37(1), *Loyola University Chicago Law Journal*, p. 108.

[42] In US history, in 1886, a corporation was even considered as —natural person" by the US Supreme Court in *Santa Clara County v Southern Pacific Railroad*, under the US Constitution, sheltered by the 14th Amendment. Taken from Grossman R. L. & Adams F. T., *Taking Care of Business: Citizenship and the Charter of Incorporation* (Charter Inc., 1993), <http://www.ratical.org/corporations/TCoB.pdf>.

[43] Ibid.

[44] Lord Chancellor Thurlow (1731–1806), cited in Banerjee S. B., *Corporate Social Responsibility: The Good, the Bad and the Ugly* (Edward Elgar Publishing Limited, 2007), p. 15.

[45] *Case of Sutton's Hospital* (1612) 10 Co. Rep 32 b.

[46] Davis J. P. 2001, *Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State* (Batoche Books, 2001), p. 363-364.

The efforts to bring corporations to account can be seen through several courts' decisions, where corporations have been held liable for their criminal activities through the concept of 'directing mind and will'. For example, in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*, Viscount Haldane held that:

> "a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".[47]

This approach also appears in Lord Denning's judgment in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd*:

> "A company may in many ways be linked to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such". [48]

Also, in *Tesco Supermarkets Ltd v Nattrass,* Lord Reid stated:

> "A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company".[49]

The issue with the 'directing mind and will' argument is that using it to hold corporations responsible for their actions relies on their managerial structure, which will be different, depending on the corporation.[50] This makes it difficult, especially in large corporations, to identify the source of the directing mind and will of the corporation.[51]

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[47] *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, at 713.
[48] *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 QB 159 at 172.
[49] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, at 170.
[50] Tomasic R., Bottomley S. & McQueen R., *Corporations Law in Australia* (The Federation Press, 2nd ed, 2002), p. 255.
[51] Ibid.

In addition to the ‗directing mind and will' argument, since the early twentieth century the criminal law has overcome the inability of the corporation to form the requisite *mens rea* (guilty mind) for a crime by attributing the *mens rea* to those people who are the human minds and management of the corporation. It has been suggested that members who conduct the companies' business on behalf of those companies should be liable for the results of their activities. In Machen's view, while positing the idea that corporations can be imagined as having ―a body capable of being imprisoned…[a] threat of imaginary punishment would not deter any rational beings from wrongdoing".[52] Therefore, he suggested that an appropriate solution would involve actual punishment of the members who act on behalf of the corporation. As he put it:

> ―it is men and not legal entities whose rights and liabilities the court must decide. The corporate entity, or personification, which we call a corporation is regarded as having rights and liabilities for the sake of convenience; but it is men of flesh and blood, of like passion with ourselves, who must in one form or another and in varying degrees enjoy the rights and bear the burdens attributed by the law to the corporate entity".[53]

Consequently, even though the legal status of corporations may give the appearance they cannot be held accountable for their actions, their members who carry out the act can be held responsible for corporate activities, but only if the legislature makes them liable.[54] In the words of Morawetz:

> ―Although a corporation is frequently spoken of as a person or unit, it is essential to a clear understanding of many important branches of the law of corporations to bear in mind distinctly, that the existence of a corporation independently of its shareholders is a fiction; and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who composed it, not an imaginary being".[55]

Therefore, directors and managers who are given the powers and responsibility to act on behalf of the corporation could be made accountable for any wrongful acts of the corporation. This can be applied to a corporation that is not compliant with mandatory standards, where its directors could be made accountable for corporate activities that have a detrimental effect on society. Examples of areas where

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[52] Machen W., ‗Corporate Personality (Continued)' (1911) 24(5), *Harvard Law Review*, p. 349.
[53] Machen W., ‗Corporate Personality' (1911) 24(4), *Harvard Law Review*, p. 266.
[54] Oliver Wendell Holmes, Jr. stated that ―It is true that the existence of a corporation is a fiction, but the very meaning of that fiction is that the liability of its members shall be determined as if the fiction were the truth". *Remington v. Samana Bay Co.* (1886) 140 Mass. 494, 5 N.E. 292, 297.
[55] Morawetz V., *A Treatise on the Law of Private Corporations Other Than Charitable* (Little, Brown, and Company, 1882), p. 2.

this already occurs can be seen in the imposition of liability on directors for misleading statements in relation to the offering of securities under s729 of the *Corporations Act 2001* (Cth)[56], for environmental breaches under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)[57] and for workplace breaches under the various state and territory Work, Health and Safety laws.[58]

A further avenue for holding corporations accountable for their actions can be found in the ‗direct duty of care' jurisprudence. An example can be seen from *Chandler v Cape plc* [2012] EWCA Civ 525, where the Court of Appeal upheld a High Court decision that a parent company owed a direct duty of care to an employee of its subsidiary.[59] In determining whether a parent company has a duty of care, the Court applied a three-stage test:

1) the damage was foreseeable;

2) there was sufficient proximity between the company and the claimant, and

3) there was a fair, just and reasonable situation for a duty of care to exist.[60]

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[56] See *Corporation Act 2001 (*Cth), s 729: Right to recover for loss or damage resulting from contravention, <http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s729.html>.
To prevent the misleading information in the offer and issue of securities, disclosure requirements has been made under s 710 of the *Corporations Act 2001*(Cth): ―A prospectus for a body's securities must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters [such as in relation to an offer to issue (or transfer) shares, the matters to be disclosed include] the rights and liabilities attaching to the securities offered; the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue (or issued) the shares, debentures or interests".
<http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/>.

[57] *Environment Protection and Biodiversity Conservation Act 1999* (Cth),
<http://www.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/>.

[58] Such as the Queensland *Work Health and Safety Act 2011*, s 27: ―If a person conducting a business or undertaking has a duty or obligation under this Act, an officer of the person conducting the business or undertaking must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation".
<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WorkHSA11.pdf>.

[59] *Chandler v Cape plc* [2012] EWCA Civ 525
Chandler had been employed by a subsidiary of Cape PLC, which manufactured asbestos products. He had contracted asbestosis during his employment and brought a case against the parent company as the subsidiary he was working for was no longer in existence.

[60] *Chandler v Cape plc* [2012] EWCA Civ 525, at 32.
The Court of Appeal demonstrated circumstances in which a parent company may assume the duty of care for the health and safety of the employees of its subsidiary, which include:

―(1) the businesses of the parent and subsidiary are in a relevant respect the same;
(2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
(3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
(4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.

In appropriate cases therefore (where a "direct duty of care" can be established) parent companies can be held accountable for the activities of their subsidiaries. There would seem to be no reason why the same principles and tests could not be applied to other categories of claims against parent companies in multinational groups. The Court expressly rejected any suggestion that this case could be linked with piercing the corporate veil,[61] so the clear implication is that this provides an alternative, and direct, basis for recovery, especially where subsidiaries are established solely or predominantly to quarantine known or foreseeable risks to identified potential victims.

4.5 Legal Personality Imposes the Same Responsibility as Individuals

The legal rule that confers on corporations the same rights and privileges as natural persons has come under question because it does not appear to impose the same responsibilities as those persons. While enjoying those privileges, they have also been allowed to avoid liability for damage created by their activities.[62] As Noam Chomsky put it:

> "Corporations, which previously had been considered artificial entities with no rights, were accorded all the rights of persons, and far more, since they are "immortal persons", and "persons" of extraordinary wealth and power. Furthermore, they were no longer bound to the specific purposes designated by State charter, but could act as they choose, with few constraints".[63]

This has led to arguments for imposing the same responsibilities on corporations as currently apply to individuals. One argument for requiring corporations to accept these responsibilities is that, as corporate rights are based on individual rights, corporations should owe the same responsibilities to society as individuals do. As Werhane and Freeman put it, "[j]ust as individuals are expected to meet

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For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues". *Chandler v Cape plc* [2012] EWCA Civ 525, at 80.

[61] "I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company".
Chandler v Cape plc [2012] EWCA Civ 525, at 69.

[62] The James Hardie case can be seen as an example. See Chapter 6.

[63] Barsky R. F.,*The Chomsky Effect: A Radical Works Beyond the Ivory Tower* (MIT Press, 2007), p. 188.

their responsibilities and are blamed if they fail to do so, corporations and other organisations have responsibilities and are expected to meet them".[64] Dunstan supported this view with the proposition that:

> —As individuals we accept that we must operate within the rules, both formal and informal, of society. It is perhaps a more recent idea that organisations such as companies as well as individuals should be responsive to society. Once the company was considered to be merely a legal entity, today, while it may not have a face, a company does have an image, a management style, objectives, and considerable capacity for action which can affect the lives of thousands of people. Consequently companies are considered to be corporate citizens and, as such, to be bound by similar societal norms as the individual citizen".[65]

An objection to this idea could be based on the fact that corporations are artificial or fictional persons.[66] No one would dispute that fact and to expect them to adopt the same rights and duties of individuals would be unrealistic. However, it can be argued that as corporate entities derived their status from the state, their actions should conform to the rules of society, which includes an obligation to behave responsibly or, at least, not to cause harm to others in society.[67] While the theory of fictional entity is merely a legal recognition, it should be remembered that the reason for it is to be able to confer rights and obligations on corporations which normally apply only to real human beings.[68]

Further support for corporate social responsibility can be found in the aggregated theory, under which corporations are seen as the creation of collective individuals, not state power.[69] Under this theory, corporations cannot exist without the initiative of natural persons and, therefore, can be regarded as an aggregate entity.[70] Cressey noted that:

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[64] Werhane P. H. & Freeman R. E., ‗Business Ethics: The State of the Art' (1999) 1(1), *International Journal of Management Reviews*, p.4.
[65] Dunstan P. J., *The Social Responsibility of Corporations* (Committee for Economic Development of Australia, 1976), p. 45.
[66] Under the fiction theory, corporate persons are artificial and not real. See Ghadas Z. A., ‗Real or artificial? Jurisprudential Theories on Corporate Personality' (2007) 4(5), *US-China Law Review*, p. 7.
[67] The view that corporations are creature of the state can be seen in *Hale v Henkel*, when the Supreme Court stated that: —the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law… Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation". *Hale v Henkel*, 201 U.S. 43 (1906), at 74-75.
[68] Freund E., *The Legal Nature of Corporations* (B. Franklin, 1971), p. 11.
[69] Michalski R.M., ‗Rights Come with Responsibilities, Personal Jurisdiction in the Age of Corporate Personhood' (2013) 50, *San Diego Law Review*, p. 137
[70] Ibid.

> —They are —entities" that are owned, managed, and administered by people. Each of these persons talks, decides, intends, agrees, disagrees, deliberates, buys, sells, works, thinks, estimates, errs, and otherwise behaves… Its so-called actions are but manifestations of actions by real persons".[71]

To this extent, the rights and duties of corporations can be linked to those of the individuals who compose them. Therefore, it is possible to postulate that corporations have the same responsibility as individuals through the connection of their relationship. This can be used as an underlying reason for requiring corporations to exercise the same obligation for social responsibility as is expected from those individuals.

Another theory that can be used to explain the essence of corporations is that of natural entity. This theory eliminates the distinction between corporate entities and human beings, and suggests that corporations are independent from state law and individuals.[72] Machen regarded corporate entities as real as he stated that:

> —Artificial is real, and not imaginary; an artificial lake is not an imaginary lake…If a corporation is —created," it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination".[73]

Geldart adopted the same doctrine of real personality by stating:

> —To say that all legal personality—whether of so-called natural or so-called juristic persons—is equally real because in fact the law gives it an existence, and equally artificial or fictitious because it is only the law which gives it an existence, is really to confound personality with capacity".[74]

Katsuhito Iwai used the concept of property rights to describe corporations as both things and persons. She explained that, —[p]ersons are subject to property rights and can own things, things are the objects of property rights and are owned by persons".[75] Thus, in her view, corporations, which can own

[71] Cressey D. R., _The Poverty of Theory in Corporate Crime Research', in Laufer W. S. & Adler F (Eds), *Advances in Criminological Theory*, *Volume 1* (Transaction Publishers,1989), p. 36.
[72] Michalski R.M., above n 69, p. 140.
[73] Machen W., _Corporate Personality' (1911) 24(4), *Harvard Law Review*, p. 257.
[74] Geldart W. M., _Legal Personality' (1911) 27, *Law Quarterly Review*, p. 94.
[75] Iwai K., _The Nature of the Business Corporation: Its Legal Structure and Economic Functions' (2002) 53(3), *The Japanese Economic Review*, p.246.

property and be owned by their shareholders at the same time, are recognised as legally being both persons and things.[76]

By recognising of corporations as real persons, they can be seen to have an existing social reality that is not found in the other theories.[77] This implies they should be subject to the same social responsibility obligations as individual persons and may be expected to behave morally and ethically in the pursuit of their business. The same applies where individuals are subject to regulatory control. In such cases, the same obligations to conform should be expected of corporations.

Each of the theories regarding corporate entity can be regarded as an attempt to explain the concept of corporate personhood to highlight the rights and duties of corporations to society. However, for the purpose of this thesis, the reality of corporate personhood is not of critical consideration. What the thesis argues is that if the law governing corporations grants them the same rights of individuals, it should also impose on them the same duties and responsibilities. Maitland stated that ―the corporation is a right-and-duty-bearing unit".[78] Even though certain legal principles applicable to individuals cannot be applied to corporations, such as they cannot be married, in the majority of cases what stands for individuals stand for corporations.[79] In this respect, it is reasonable to expect that corporations should have the same responsibilities and duties as ordinary citizens. Moreover, possessing rights also implies the symbiotic responsibilities to justify these rights.[80] As corporations are granted rights by society, in return they should conform to the expectations of others in that society. Sweeney noted that:

> ―In our society, corporations are treated as if they were persons, with many of the rights and duties of the human person. Societies have extended these rights to corporations on the understanding that the duties are also fulfilled and that the activities of the corporation are of benefit to that society. In this sense, corporations have a social license to operate".[81]

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[76] Ibid, p. 249.
[77] Michalski R.M., above n 69, p. 140.
[78] Maitland F.W., *The Collected Papers of Frederic William Maitland, 3 Volumes* (H.A.L. Fisher (ed), Cambridge University Press, 1911), Vol. 3, p. 307.
[79] Ibid.
[80] Dunn C.P., ‗Are Corporations Inherently Wicked?' (1991) 34(4), *Business Horizons*, p. 5.
[81] Sweeney J., ‗How to measure corporate social responsibility' (2006), <http://www.eurekastreet.com.au/article.aspx?aeid=875#>.

Clearly, on this basis, corporations, whether artificial or real entities, are expected to accept social responsibility in the same manner as individuals. However, this expectation cannot be used to assume that they will always operate in a socially responsible manner. Awareness of their social responsibilities does nothing to guarantee commitment, especially when there are no means to enforce accountability. Thus, the question remains of how to ensure that these legal persons accept their responsibilities to society and do not use their privileged status to abuse the rights of the natural persons from whom they gained their existence.

4.6 With Power Comes Responsibility

It is undeniable that corporations have the power and influence to underpin economic and political policies in order to pursue their greater advantage. Thus, it can be argued that there is a need to balance corporate power with social responsibility, in order to prevent the misuse and violation of that power. As David Korten noted:

> —Business has become, in the last half century, the most powerful institution on the planet. The dominant institution in any society needs to take responsibility for the whole. . . . Every decision that is made, every action that is taken, must be viewed in light of that kind of responsibility".[82]

In 1960, Keith Davis was one of the first to recognise the power of corporations and their corresponding responsibility to society. He stated that the social responsibility of corporations is directly derived from the amount of power they possess.[83] He pointed to the fact that if such power is used responsibly, society tends to support it. Contrarily, if such power is not used responsibly, corporations will be in danger of losing it.[84]

Opponents of the power-responsibility equation are usually rooted in an economic model of increasing wealth without any responsibility to society unless or beyond that mandated by law. It can be argued

[82] Korten D.C., _Limits to the Social Responsibility of Business, The People-Centred Development Forum' (1996), Article 19, <http://www.pcdf.org/1996/19korten.htm>.
[83] Davis K., _Understanding the Social Responsibility Puzzle' (1967) 10(4), *Business Horizons*, p. 48.
[84] Davis K., _Can Business Afford to Ignore Corporate Social Responsibility?' (1960) 2(3), *California Management Review*, p. 63.

that this policy should not be applicable to modern corporations where their power and activities have the potential to affect society significantly. In such cases, it is reasonable to expect that the power of corporations will be balanced with social responsibility, to prevent abuses and violations of social, environmental and human rights conditions, in particular through unscrupulous business practices. As a part of a locally and globally inter-connected society, business should be concerned for the well-being of others, not only themselves. With the possession of economic wealth and power, it should be expected that corporations will exercise the responsibility that goes with it and utilise their abilities to improve the quality of society. As Drucker wrote:

> "And yet who else is there to take care of society, its problems and its ills? These organizations collectively are society…Power must always be balanced by responsibility; otherwise it becomes tyranny. And organizations do have power."[85]

Power and responsibility are as two sides of a coin; where one exists so does the other, in equal amounts. It would be unjustifiable for corporations to continue to receive the benefit of their power without returning an equal benefit to society. Modern corporations have learnt that the complexity of society and the consequent upsetting of the social equilibrium can have an influence on their performance.[86] In cases where corporations fail to exercise their social responsibility, their power would eventually become eroded, whereas those that operate within society's expectations will continue to enjoy the use of that power. This is known as the "Iron Law of Responsibility".[87] If corporations "do not accept social-responsibility obligations as they arise, other groups eventually will step in to assume those responsibilities".[88] Those groups could include national and international regulators either through states or the private sector as well as investors, stakeholders, consumers, NGOs and unions who may step in to assert, and sometimes impose, those responsibilities compulsorily through, for example, the law.

[85] Drucker P. F., *Post Capitalist Society* (HarperCollins Publishers, 1993), p. 101.
[86] An example can be seen through the BP oil spill in 2010, where the company faced the repercussion of the loss of reputation as well as financial damage. See Krauss C., 'Oil Spill's Blow to BP's Image May Eclipse Costs' (*New York Times*, 29 April 2010), <http://www.nytimes.com/2010/04/30/business/30bp.html>.
[87] Davis, above n 83, p. 49.
[88] Ibid, p. 50.

Thus, in terms of liberal moral philosophy, the "iron law of responsibility" makes it essential for the various players in society to maintain the balance between social power and social responsibility.[89] Corporations are reminded that, if they wish to maintain their power, they need to accept their responsibilities, otherwise, regulators, in some form or other, will dilute that power. This concept is similar to the social contract discussed in Chapter 3, which suggested that corporations can lose their existence by failing to satisfy society's expectations, or government can take steps to control the power of corporations to ensure they operate in a socially acceptable manner.

4.7 Conclusion

The doctrine of corporate legal personality is often explored in an attempt to clarify the responsibilities of business to society.[90] In practical effect, the legal status of corporations is different from that of human beings, which creates possible difficulties in enforcing responsibility and accountability, at least to the same standard as is possible with individuals. Their legal status can be criticised for giving them the freedom to exercise their power for the maximisation of shareholders' profits without paying any appropriate penalty for failing to consider society's interests more broadly. Thus, the concepts of 'legal personality' and 'limited liability' can be seen as providing an escape route for corporations, allowing them to avoid liability for any irresponsible activities. Such discrepancies are recognised as inadequacies in the special status granted by society. In the words of Dahl:

> "Business corporations are created and survive only as a special privilege of the state. It is absurd to regard the corporation simply as an enterprise established for the sole purpose of allowing profit making. One has simply to ask: Why should citizens, through *their* government, grant special rights, powers, privileges, and protections to any firm except on the understanding that its activities are to fulfill *their* purposes? Corporations exist because we allow them to do so".[91]

As can be seen, the separate legal identity accorded corporate entities limits the measures that can be effectively adopted to prevent or appropriately penalise identified forms of anti-social behaviour. The

[89] Ibid, p. 49-50.

[90] Banerjee S. B., *Corporate Social Responsibility: The Good, the Bad and the Ugly*, (Edward Elgar Publishing Limited, 2007).

[91] Dahl R. A., 'Governing the Giant Corporation', in Nader R. & Green M. J.(eds), *Corporate Power in America* (Grossman Publishers, 1973), p. 11.

only effective counter to this appears to be to impose legislative sanctions on those who were ultimately responsible for the behaviour. This requires some form of statutory lifting of the corporate veil, which has already been seen to be effective, especially in the environmental, financial and workplace contexts.

This chapter has argued that as corporations are granted the same rights as individuals, they should have the reciprocal responsibility to fulfill society‘s expectations. Where they fail to use their power responsibly, governments should be entitled to take action by introducing further regulation to control corporate activities, under the ~~“ir~~on law of responsibility”. This could occur perhaps by mandating minimum standards where there is a risk that corporations will not commit themselves to socially responsible behaviour through voluntary CSR. In such cases, there may be a need for some form of regulation to ensure corporations cannot escape their responsibilities and can be held liable for their actions. An evaluation of the likely effectiveness of mandatory and voluntary mechanisms will be undertaken in the following chapter.

Chapter 5

The Law and CSR

5.1 Introduction

The evolution of mechanisms for protecting social, environmental and human rights standards from the abuse of corporate power has witnessed the introduction of soft law as an addition to hard law. Various instruments such as codes of conduct and guidelines have been introduced to promote corporate responsibility in the international community. This chapter will explore the most widely recognised global codes related to CSR to illustrate the increased trend in promoting CSR through soft law and to examine the effectiveness of that phenomenon. It will also discuss the attempts that have been made to impose direct obligations on corporations through international law. Its aim is to create a better understanding of both the mandatory and voluntary aspects of CSR, to examine their interaction and to propose workable mechanisms to bring greater effectiveness to control corporate activities.

5.2 The Promotion of CSR through Soft Law Initiatives

There are various regulations that governments have enacted to control corporate behaviour domestically in fields such as human rights, worker‘s rights and the environment. It has always been accepted that corporations must comply with legislation, which formed an early component of the corporate citizenship model. What is new is the idea that, in an era of globalisation, corporations need another form of control in addition to domestic regulation, even where it purports to extend to international behaviour. Where social harm has emerged from states concentrating solely on economic advantage and ignoring the effects of corporate activities, various codes of conduct, consistent with international standards, have been created to respond to this problem.

Those codes of conducts can be defined as ―commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the

marketplace".[1] The introduction of such codes of conduct is an example of the development of transnational regulation, which provides for the on-going privatisation of regulation on such issues as the environment, human rights and other areas related to commercial activities. These forms of privatised regulation stem from neo-liberal economic doctrines and are considered to be the best method to approach the required standards of regulation.[2] The use of codes of conduct and soft law has established a set of universally accepted norms and standards for business. These codes and other manifestations of _soft law' are also recognised as the basis for legal regulation as they become more globally accepted.[3]

Soft law has been defined as –rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects".[4] It includes a multitude of approaches covering standards, codes, conventions and agreements. These codes and strategies have been introduced in an attempt to provide guidelines for and controls on corporate activities, developed by international organisations to promote social, environmental and human rights standards for corporations. Consequently, corporations have been encouraged to encompass these codes of conduct in their policies. While some developing states are limited in their enforcement capabilities, these codes are seen as an alternative approach to assist corporations in adopting global norms and standards in their business practices.

While corporations acting in accordance with existing law can be seen as complying with the basic standards required by law, allowing them to continue trading legally, codes of conduct as an addition to those minimum standards assists corporations to behave in a more ethical and responsible manner towards societal expectations. Thus, these instruments of soft law become important, especially in

[1] OECD, _Codes of Corporate Conduct: Expanded Review of their Contents' (2001), OECD Working Papers on International Investment, 2001/06, OECD Publishing, p. 3, <http://www.oecd.org/investment/investment-policy/WP-2001_6.pdf>.
[2] Cutler A.C., _Gramsci, Law, and the Culture of Global Capitalism' (2005) 8(4), *Critical Review of International Social and Political Philosophy*, p. 537.
[3] Ibid.
[4] Snyder F., _The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', in T. Daintith (ed), *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (John Wiley & Sons, 1995), p. 64.

less-developed countries where legal structures to control corporate activities may be lacking.[5] They also provide corporations with a wider view of expected global corporate conduct where local laws either do not exist or are contrary to recognised international practices, thus giving them the opportunity to go beyond the letter or spirit of national law rather than taking advantage of any loopholes presented.

The establishment of codes of conduct on social, environmental and human rights issues by concerned international organisations also gives the voluntary approach of CSR a more acceptable public appearance. New ideas on business management are continually being developed, producing alternate visions and perspectives on business practices. Many corporations are moving towards the creation of new management programs that include social responsibility and ethical standards that will enhance their reputations and benefits.[6] It is expected that an increased corporate involvement with codes of conduct will assist the public to accept the voluntary approach of self-regulation of corporate conduct and will eventually lead to them being considered as common practice, especially if they were seen as, in some way, enforceable.

5.2.1 Global Codes Related to CSR

CSR has developed over the last fifty years, changing from being considered an oxymoron into being accepted as an essential part of business practice. The support and encouragement of public concerns, governments, NGOs and organisations at an international level have motivated a global movement towards CSR.[7] Such has been the transformation that corporations have increasingly accepted the concept and have put in place policies that ensure their commitment to social responsibility.

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[5] "The soft law approach is said to offer many advantages, including timely action when governments are stalemated or otherwise unable to effectively respond to the challenges of economic globalisation". Vogel D., 'Private Global Business Regulation' (2008) 11, *The Annual Review of Political Science*, p. 264.

[6] The Australian Centre for Corporate Social Responsibility (ACCSR) released "The State of CSR Annual Review: 2010-2011", which named the top 20 organisations in various industry sectors in Australia with the most advanced CSR capabilities. ACCSR, 'The State of CSR in Australia Annual Review 2010/2011' (2011), <http://www.accsr.com.au/html/stateofcsr2011.html>. Also see ProBono Australia, 'Australian Companies Recognised for CSR Excellence' (2011), <http://www.probonoaustralia.com.au/news/2011/02/australian-companies-recognised-csr-excellence#>.

[7] See example, European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for

As CSR becomes increasingly important in global markets, there has been support and promotion through many major international organisations such as the United Nations (UN), the International Labour Organisation (ILO) and the Organisation for Economic Co-operation and Development (OECD). These organisations have established rules and guidelines for the assistance and promotion of CSR within globalised corporations. The more important of these are set out in the following table and are discussed below.

Table of global codes for business conduct

Code	Purpose	Sponsor	Established Year
OECD Guidelines for Multinational Enterprises	Providing voluntary principles and standards of responsible business conduct for multinational corporations operating in or from OECD countries.	OECD	1976 (last revised 2011)
ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy	Providing universal guidelines on social policies for MNEs, governments and workers' organisations that encourage MNEs to promote economic growth and social development.	ILO	1977 (last revised 2006)
Caux Round Table Principles for Responsible Business	Providing a global standard of ethical and responsible corporate behaviour for business leaders.	Business leaders from Europe, Japan and the United States	1994
ILO Declaration of Fundamental Principles and Rights at Work	Established universal standards for workers that all ILO member countries are committed to respect and promote.	ILO	1998
The Global Sullivan Principles	Providing principles for corporations to support human rights, social justice and economic opportunity for employees and the communities in which they operate.	Reverend Leon Sullivan and UN Secretary- General Kofi Annan	1999
The United Nations Global Compact	Providing principles based framework on sustainability and social responsibility for business adoption.	UN Secretary-General Kofi Annan and global business leaders	2000

Corporate Social Responsibility' (2011), <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf>.

The UN Guiding Principles on Business and Human Rights	Providing framework and guidelines for States and business to ensure that companies do not violate human rights in their operations. The Guiding Principles focus on 3 pillars: • The State duty to protect human rights • The corporate responsibility to respect human rights • The need for greater access to remedy for victims of business-related human rights abuse.	UN Human Rights Council	2011

Table 3

a) OECD Guidelines for Multinational Enterprises

In 1976, the OECD created guidelines for controlling various aspects of corporations, which were called the OECD Guidelines for Multinational Enterprises.[8] The guidelines were recognised by a group of OECD countries and recommended how business should conduct itself in a responsible manner. They attempt to achieve sustainable development through the contribution of corporations to economic, social and environmental improvements. They cover areas such as human rights, employment, the environment, consumer interests and combating bribery.[9] These are internationally agreed principles that ease the difficulties and conflicts created by globalisation between corporations and the societies in which they operate.[10] Governments of all OECD member States share these values and are committed to supporting and promoting these guidelines internationally. The Guidelines are seen as complementary to domestic regulation, encouraging corporations to operate in a responsible manner

[8] Organisation for Economic Co-operation and Development, ‗The OECD Guidelines for Multinational Enterprises', <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/oecd.htm>.
[9] Ibid.
[10] Statement by the Chair of the Ministerial, OECD Guidelines for Multinational Enterprises: Statements Made on the Adoption of the Review 2000, p. 3, <http://www.oecd.org/dataoecd/38/38/2070763.pdf>.

not only in OECD member countries but globally.[11] Revisions to the guidelines were made in 1979, 1982, 1984, 1991, 2000 and 2011.[12]

In the latest revision, the following areas were updated for responsible business conduct in a global context:[13]

- The establishment of a new human rights chapter, following the Guiding Principles on Business and Human Rights for the Implementation of the UN Protect, Respect and Remedy Framework.
- Strengthening the due diligence and responsible supply chain management approaches.
- Major changes in certain chapters, such as Employment and Industrial Relations, Combating Bribery, Environment, Consumer Interest, Disclosure and Taxation.
- Strengthening the role of the National Contact Points (NCPs) by introducing clearer and fortified procedural guidance.
- The implementation of procedures to assist corporations to meet their responsibilities.

Prior to the changes in 2011, there were many criticisms regarding the effectiveness of the Guidelines. Despite those amendments, some criticisms are still applicable today. One criticism is that the Guidelines are aimed at the commitment of governments and not corporations, which makes it difficult to bring corporations directly to account.[14] Additionally, with their voluntary nature, it appears that ~~"~~if companies are unwilling to abide by the OECD-Guidelines, there is no way of forcing them to do so".[15] There is no sanction imposed on corporations that have violated the Guidelines; they can only suffer

[11] Cernic J. L., ‗Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises' (2008) 3(1), *Hanse Law Review*, p. 77.
[12] Organisation for Economic Co-operation and Development**,** ‗2011 Update of the OECD Guidelines for Multinational Enterprises' (2011), <http://www.oecd.org/investment/mne/2011update.htm>.
[13] OECD, *OECD Guidelines for Multinational Enterprises 2011 Edition* (OECD Publishing, 2011), p. 3-4, <http://www.oecd.org/daf/inv/mne/48004323.pdf>.
[14] Hartman L. P. & Painter-Morland M., ‗Exploring the Global Reporting Initiative Guidelines as a Model for Triple Bottom-Line Reporting' (2007), p. 10, <http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=laurahartman>.
[15] Weschka M., ‗Human Rights and Multinational Enterprises: How Can Multinational Enterprises Be Held Responsible for Human Rights Violations Committed Abroad?' (2006), p. 649, <http://www.zaoerv.de/66_2006/66_2006_3_a_625_662.pdf>.

the consequences of loss of reputation through adverse publicity and as a result, a reduction in their profits.[16] These consequences are the only driving force for corporations to follow the Guidelines.

A further criticism is the weakness of the NCPs procedures in dispute resolution and handling of complaints regarding breaches of the Guidelines. As Schutter noted in 2006:

> —[t]he NCPs have no investigative powers; the procedures followed lack transparency and are seen as biased towards the interests of business; as they belong to the governmental apparatus, the NCPs are neither independent nor, in most cases, impartial in the consideration of the complaints they receive".[17]

An example can be seen from the Swiss NCP in the case of Baby Milk Action's complaint against Nestlé alleging breaches of the Guidelines.[18] The Swiss NCP failed to provide an appropriate means to deal with the complaint as is shown in the following extract from the Baby Milk Action website:

Baby Milk Action v Nestlé

On 27 November 2009, Baby Milk Action sent a specific complaint to the Swiss NCP regarding Nestlé's latest global marketing strategy for breastmilk substitutes... Nestlé is marketing breastmilk substitutes with the claim that they ‗protect', whereas babies fed on them are more likely to become sick than breastfed babies and, in conditions of poverty, more likely to die. The Swiss NCP was asked to take whatever action it could to stop these violations of the Guidelines. There followed a protracted discussion by email and letter in which the Swiss NCP reiterated it was a voluntary system aiming to promote dialogue. Baby Milk Action again pointed out that it was already in ‗dialogue' with Nestlé and asked what communicating through the Swiss NCP was intended to add. The Swiss NCP suggested it could assist with ‗mediation' and ‗negotiation', which Baby Milk Action suggested may be appropriate in a labour dispute, but the specific provision Nestlé was violating, the International Code of Marketing of Breastmilk Substitutes, had been adopted by the World Health Assembly. Baby Milk Action argued that it was for the Assembly to adopt further Resolutions if it wished to update the Code, not for a civil society organisation to ‗negotiate' its provisions with Nestlé. The Swiss NCP also rejected the suggestion that companies should abide by the Code independently of government measures, although this is explicitly stated in the Code. Baby Milk Action also pointed out that the Assembly adopted the Code as a ‗minimum requirement', that human rights are meant to be universal and that the Nestlé ‗protect' marketing strategy is global, hence the need to invoke measures at an international level. The Swiss NCP asked Baby Milk Action to provide copies of the labels. Baby Milk Action suggested it was more appropriate to put the request to Nestlé, situated close to the Swiss NCP, as the labels were being rolled out around the world and the company would be able to provide the latest versions. The Swiss NCP refused to do so and said it was closing the case and did not wish to be copied in on further correspondence between Baby Milk Action and Nestlé.

Table 4 Source: Baby Milk Action 2010[19]

[16] Schutter O. D., *Transnational Corporations and Human Rights* (Hart Publishing, 2006), p. 9.
[17] Ibid, p. 8.
[18] Baby Milk Action, ‗Nestle, the UN Global Compact and OECD Guidelines: What happened when Nestlé was reported for violating the UN Global Compact and OECD Guidelines for Multinational Enterprises?' (2010), <http://www.babymilkaction.org/archives/1094>.

The lack of appropriate action from the Swiss NCP clearly illustrates the failure of the role of this mechanism with obvious consequences for the effectiveness of the Guidelines. Similar failure was also observed in the U.S. NCP where it was suggested that the reason for its failure could include the limited number of people who know of the existence of the Guidelines and their dispute resolution mechanism, the fact that complaints are not always properly addressed and the fact that there is no transparency in the procedures. [20]

By 2013, the Guidelines had been adopted by 42 OECD and non-OECD countries.[21] Although the various amendments have strengthened the Guidelines, their non-enforceable and voluntary aspects are still seen as a weakness, resulting in them being regarded as a ―gentlemen's agreement".[22] Their effectiveness remains under scrutiny as to whether they have any impact on business activities. The perception of the Guidelines being only advisory rather than ensuring corporate commitment leads to scepticism regarding their ability to tackle corporate abuses of social, environmental and human rights standards, let alone improve their business conduct, effectively. Further developments may be needed to reinforce their effectiveness by adopting a more mandatory approach towards the Guidelines. By imposing some form of enforcement mechanism, corporations may increase their compliance through the fear of legal liability, in a way that a voluntary system cannot achieve.

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[19] Ibid.
[20] American University, ‗Comments on the U.S. OECD National Contact Point' (2010), <https://www.wcl.american.edu/environment/PICEL-CommentsonUSOECDNCP.pdf>.
[21] There are 34 OECD member countries including Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israël, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States. Non-OECD states that adopt the Guidelines include Argentina, Brazil, Egypt, Estonia, Latvia, Lithuania, Peru and Romania. See List of OECD Member countries - Ratification of the Convention on the OECD, <http://www.oecd.org/general/listofoecdmembercountries-ratificationoftheconventionontheoecd.htm>; and OECD Guidelines for Multinational Enterprises 2011 Edition, <http://www.oecd.org/daf/inv/mne/48004323.pdf>.
[22] Pak N. S. & Nussbaumer J. P., ‗Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses' (2013), Working Papers: Prepared for the European Centre for Constitutional and Human Rights, Berlin, p. 13, <http://edoc.vifapol.de/opus/volltexte/2013/4259/pdf/45.pdf>. Also see Corporate Watch, ‗The OECD'S Crocodile Tears' (2000), Issue 12, <http://www.flyingfish.org.uk/articles/oecd/tears.htm >.

b) ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

In 1977, the Governing Body of the International Labour Office adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy which, working alongside various UN resolutions, encourages multinational enterprises (MNEs) to contribute to economic and social development and to reduce the difficulties and problems their operations may create. These Principles provide guidance to governments, MNEs, workers and employers in adopting social policies in their practices that would further promote social progress. The principles in this Declaration cover the areas of:

1. employment;
2. training;
3. conditions of work and life; and
4. industrial relations.[23]

MNEs affected by this Declaration, which include all business enterprises of private, public or mixed ownership operating outside their country of origin, are expected to respect the sovereign rights of states, obey national laws and show due regard for local practices and international standards. They are also expected to operate within the policies and priorities of the host countries and harmonise with their social development and aims.[24] The governments of home countries have a duty to promote the practice, by MNEs, of social standards in host countries in accordance with this Declaration.[25]

[23] International Labour Organisation, ‗ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (2006), <http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm>.
[24] Article 10 of the ILO Tripartite Declaration states that ―[m]ultinational enterprises should take fully into account established general policy objectives of the countries in which they operate. Their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate. To this effect, consultations should be held between multinational enterprises, the government and, wherever appropriate, the national employers' and workers' organisations concerned".
[25] Article 12 of the ILO Tripartite Declaration states that ―[g]overnments of home countries should promote good social practice in accordance with this Declaration of Principles, having regard to the social and labour law, regulations and practices in host countries as well as to relevant international standards".

While the Declaration has a wide scope, applying not only to governments, employers' and workers' organisations but also to multinational corporations, its weakness is in its voluntary application.[26] There are no provisions for monitoring corporate compliance with the Declaration, only for providing guidance for the affected parties' conduct, and with little or no enforcement capability.[27] As the ILO Committee on Multinational Enterprises can only interpret the Declaration without power to sanction any breaches, there is a lack of redress against abuse of corporate power in breach of the Declaration.[28] Its limitation is similar to the OECD Guidelines in that its non-legally binding mechanism and lack of enforcement considerably weaken its effectiveness.[29] Perhaps, this weakness could be addressed if there were some form of enforcement, such as through national laws of signatory states, to ensure minimum levels of compliance by multinational corporations.

c) Caux Round Table Principles for Responsible Business

In 1994, the Caux Round Table set down Principles for Business that promote global standards for ethical and responsible corporate behaviour for business leaders.[30] These principles were developed by business leaders from Europe, Japan and the United States who believe that business is the driving force behind economic and social change. They emphasise the values of the common good and human dignity, from ethical ideology, as being essential to these principles:[31]

1. respect stakeholders beyond shareholders;
2. contribute to economic, social and environmental development;
3. built trust by going beyond the letter of the law;

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[26] Article 7 of the ILO Tripartite Declaration states that "[t]his Declaration sets out principles in the fields of employment, training, conditions of work and life and industrial relations which governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a voluntary basis; its provisions shall not limit or otherwise affect obligations arising out of ratification of any ILO Convention".
[27] Weschka, above n 15, p. 646.
[28] Burkett B. W., Craig J. D. R., Regenbogen S., Link M., Montgomery-Graham S. & Gallagher S. J., 'Corporate Social Responsibility: An Evolving Global Business Phenomenon' (2006), p. 19, <http://www.ggt.uqam.ca/IMG/pdf/CSR_Paper.pdf>.
[29] Muchlinski P., 'Corporate Social Responsibility', in P. Muchlinski, F. Ortino. & C. Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008), p. 652.
[30] The Caux Round Table (CRT) is an international network of senior business executives, launched in 1986 by business leaders from Europe, North America and Japan to address global issues and reduce trade tensions.
[31] Caux Round Table – Principles for Business, <http://www.cauxroundtable.org/index.cfm?menuid=8>.

4. respect rules and conventions;
5. support responsible globalisation;
6. respect the environment; and
7. avoidance of illicit activities.

These principles for business are widely accepted by corporations, which use them as guidelines for their day-to-day activities. However, again, there is no ―formal mechanism for corporate commitment to these principles".[32] Despite the good intentions of promoting social responsibility by global business, the voluntary approach is a limitation because the principles can be used by corporations not for their intended purpose but mainly to avoid public criticism of their activities.[33] The scepticism with which the principles have been greeted lies in the practicality of changing business behaviours, as the ―[i]deals and morality are often spoken of as virtual antimatter to the behaviours allegedly needed to maximise profits".[34] Indeed, there is a challenge for integrating virtue and self-interest in an attempt to promote social responsibility whilst pursuing corporate profits. As Jean-Loup Dherse stated:

> ―not everyone is ready to subscribe in practice to the consequences of such philosophy. The CRT is a special place where the logics of business can be enriched by a philosophy of action which converges among a number of individuals who believe that a quest for better service of each person and of humanity beyond all cultural differences is part of their business life. The challenge is permanent". [35]

Even though corporate success has become inseparably linked with socially responsible corporate behaviour, the challenge to divert some corporations from their single-minded approach of profit maximisation alone still remains. As the degree of implementation of these principles may depend on the roots of their corporate culture, it is important to encourage a change in corporate attitude and strategic goals which would considerably improve corporate social performance. While the shift in this

[32] Gordon K., ‗The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison) (2001), Box 2: Global Instruments for Corporate Responsibility, p. 9, <http://www.oecd.org/daf/inv/mne/2075173.pdf>.
[33] Kavaljit Singh lists several limitations of voluntary codes, including being ―often misused by firms to deflect public criticism of corporate misdemeanour". Fernando A. C., *Business Ethics: An Indian Perspective* (Prentice Hall, 2009), p. 103.
[34] Young S.B., ‗The Caux Round Table Principles for Business: Decision-Making Matrix for a More Moral Capitalism', in R. Mullerat & D. Brennan, *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International, 2011), p. 260.
[35] The Caux Round Table Principles for Business: Setting, <http://institute.jesdialogue.org/fileadmin/bizcourse/CAUX.pdf>.

mind-set has not yet been fully achieved, there may be a need for intervention by law to apply a common standard and impose legal accountability for non-compliance. To this extent, the public perception and practical effectiveness of the principles would be significantly enhanced by some form of enforceable compliance mechanism. The task to identify what that might be would be a challenge because the Caux Round Table is different from other codes of conduct, as its principles were privately developed and do not even have treaty status.

d) ILO Declaration on Fundamental Principles and Rights at Work

In 1998, the ILO Declaration on Fundamental Principles and Rights at Work was established to ensure that social development coincides with economic progress, universally and for all levels of development. The Declaration has been supported by a tripartite system of governments, employers' and workers' organisations. Member States that have not ratified the Conventions[36] are still committed to the Declaration and are required to promote the principles and rights which are:

1. freedom of association and the effective recognition of the right to collective bargaining;
2. the elimination of forced or compulsory labour;
3. the abolition of child labour; and
4. the elimination of discrimination in respect of employment and occupation.[37]

Those member states that have not yet fully ratified the Conventions are required to provide an annual report on progress towards achieving the rights and principles within their countries.[38] A review of these reports is then carried out by the Committee of Independent Expert Advisors. There

[36] There are eight core ILO Conventions relevant to the fundamental principles and rights at work:
- Convention No.87: Freedom of Association and Protection of the Right to Organize, 1948;
- Convention No.98: Right to Organize and Collective Bargaining, 1949;
- Convention No.29: Forced Labour, 1930;
- Convention No.105: Abolition of Forced Labour, 1957;
- Convention No.138: Minimum Age Convention, 1973;
- Convention No.182: Worst Forms of Child Labour, 1999;
- Convention No.111: Discrimination (Employment and Occupation), 1958;
- Convention No.100: Equal Remuneration, 1951.

[37] ILO Declaration on Fundamental Principles and Rights at Work, <http://www.ilo.org/declaration/lang--en/index.htm>.
[38] Ibid.

are three ways for the Declaration to assist countries, employers and workers to reach an understanding of its aims and objectives:

- First, through the Annual Review which is formulated from the annual reports by those non-ratified countries. This process provides governments with a chance to describe the steps they have taken and the progress they have made towards compliance with the Declaration and gives employees and workers the ability to state their views on that progress.[39]
- Second, the Global Report highlights current views on the global situation relating to the Declaration. It describes the global state of affairs and the progress that has been made in achieving the rights and principles of the Declaration. It also provides an opportunity to review those areas that are in need of significant attention.[40]
- Third, Technical Cooperation Projects can assist members in achieving and implementing the Declaration by identifying their needs and strengthening their capabilities.[41]

The Declaration has been widely recognised and supported by business and the community. The principles and rights in the Declaration are also emphasised in the OECD Guidelines for Multinational Enterprises and promoted by the UN Global Compact to be the universally accepted standard for global business conduct. However, there have been criticisms of the Declaration in that the follow-up mechanisms have not been actively supported by employers or workers' organisations, which leads to scepticism as to their commitment and undermines ~~a~~any suggestion that tripartism will ensure the effectiveness of the Declaration in upholding respect for labour rights".[42] A further concern is that many governments have not ratified the core Conventions relating to the principles stated in the Declaration, or have failed to adopt and enforce the recommendations in domestic legislation.[43] According to the Annual Review under the follow-up to the Declaration in 2011:

[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Alston P., _Facing Up to the Complexities of the ILO's Core Labour Standards Agenda' (2005), NYU Law School, Centre for Human Rights and Global Justice Working Paper No. 5, p.11, <http://ssrn.com/abstract=832105>.
[43] Ibid, p. 13

> —While the Office has recorded a large number of ratifications of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), many categories of workers do not yet enjoy full freedom of association and right to collective bargaining…
>
> At the global level, more than half the world's labour force work in countries that have not ratified both of these instruments. Thus, even though governments may consider that their law and practice are sufficient, millions of workers and employers do not enjoy the protection offered by international law".[44]

This problem continues as can be seen through the Annual Review under the follow-up to the Declaration in 2013:

> —Although progress has been recorded, challenges in moving ahead with ratification processes and in realizing the principle and right have essentially remained the same since the previous year. They continue to relate mainly to national legal incompatibilities with Convention No. 87 and/or No. 98 (…). The Governments of China, Jordan, Republic of Maldives, Nepal and Somalia reported that factors related to political, social or economic circumstances had interrupted or hampered ratification processes or the realization of the principle and right. Additional difficulties included: lack of public awareness and/or support (…); prevailing employment practices (…); lack of capacity and resources of responsible government institutions (…); lack of capacity of employers' or workers' organizations (…); and lack of social dialogue on this principle and right (…)."[45]

Thus, these reviews may indicate that the Declaration has not yet developed into an effective mechanism to promote international norms. Moreover, where corporations are not directly bound to comply with these international standards, it can provide ammunition for criticism of the effectiveness of the Declaration. Indeed, it has even been accused of weakening the ILO system:

> —the vagueness of the wording of the declaration, the failure to name the actual conventions being referred to, the soft monitoring system proposed, and the enthusiastic support for it by the United States (which had previously evinced hostility to the ILO and great reluctance to ratify any of its conventions) indicated that the declaration would be used to further dilute the existing system of protecting worker's rights".[46]

Therefore, the challenge for the ILO is to enhance the effectiveness of the instruments in protecting international workers' rights by developing the follow-up mechanisms and removing the uncertainty of the present system. To date, it might be considered that the ILO has had little success in upholding

[44] International Labour Office, 'Review of Annual Reports Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work' (2011), para. 14-15, p. 2-3, <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_152684.pdf>.
[45] International Labour Office, 'Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work' (2013), para. 35, p. 7, < http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_204555.pdf>.
[46] Hensman R., *Workers, Unions, and Global Capitalism: Lessons from India* (Columbia University Press, 2011). Also see Alston P. & Heenan J., 'Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work' (2004) 36, *New York University Journal of International Law and Politics*, p. 221-264.

workers' rights, such as in the area of child labour as it has been estimated by UNICEF that "nearly one in six children aged 5–14 are engaged in child labour in the world [and] according to the International Labour Organisation (ILO), 7.4 million children in the same age group are domestic workers."[47] This figure shows insufficient improvement in child labour standards and casts doubt on the effectiveness of the ILO and its Declaration. It also indicates the desirability of a shift away from a merely promotional position.[48] Again, the Declaration may be reinforced by the adoption of some form of compliance measures, perhaps via the national laws of member states, which could facilitate the implementation of the rights and principles within their borders.

e) The Global Sullivan Principles

In 1999, the Global Sullivan Principles were announced by Reverend Leon Sullivan and United Nations Secretary General Kofi Annan to urge corporations to support human rights, social justice and economic opportunity for all workers and communities where they operate.[49] These principles were proposed after the original Sullivan Principles in 1977, which contributed to the anti-apartheid protests in South Africa.[50] The development of the Global Sullivan Principles encouraged corporations to promote and expand their CSR activities in a global context and they have been widely adopted by U.S. based corporations. The principles are a voluntary corporate code of conduct, providing norms for corporations to: [51]

1. Support universal human rights, particularly those of employees, the communities within which they operate and parties with whom corporations do business.

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[47] Niles C., "World Day Against Child Labour Shines Spotlight on Plight of Domestic Workers' (2013), <http://www.unicef.org/protection/57929_69606.html>. Also see UNICEF Global Databases 2012, Based on DHS, MICS and other national surveys 2002-2011, from Childinfo, "Statistic by Area – Child Labour' (2013), <http://www.childinfo.org/labour.html>.

[48] It has been criticised that "[t]he Declaration further weakened the ILO by making even the core "standards' subject only to monitoring by means that were "strictly promotional' that could include offers by the ILO of technical assistance to improve implementation". Standing G., "The ILO: An Agency for Globalisation?' (2008) 39(3), *Development and Change*, p. 367.

[49] Global Sullivan Principles of Social Responsibility, <http://www.thesullivanfoundation.org/gsp/default.asp>.

[50] In 1977, Reverend Leon Sullivan was a Board Member of General Motors, the largest employers of coloured workers in South Africa. He proposed his principles to apply economic pressure to end apartheid in South Africa. The Sullivan Principles, <http://muweb.marshall.edu/revleonsullivan/principled/principles.htm>.

[51] Global Sullivan Principles of Social Responsibility, <http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp>.

2. Promote equal opportunity for employees at all levels of the company with respect to issues such as colour, race, gender, age, ethnicity or religious beliefs, and operate without unacceptable worker treatment such as the exploitation of children, physical punishment, female abuse, involuntary servitude, or other forms of abuse.
3. Respect employees' voluntary freedom of association.
4. Compensate employees to enable them to meet at least their basic needs and provide the opportunity to improve their skills and capabilities in order to raise their social and economic opportunities.
5. Provide a safe and healthy workplace; protect human health and the environment; and promote sustainable development.
6. Promote fair competition including respect for intellectual and other property rights, and not offer, pay or accept bribes.
7. Work with governments and communities in which they do business to improve the quality of life in those communities – their educational, cultural, economic and social well-being – and seek to provide training and opportunities for workers from disadvantaged backgrounds.
8. Promote the application of these principles by those with whom they do business.

Despite the good intentions of those launching these Principles, they have been criticised for failing to deliver on their promises and creating confusion.[52] As Sethi and Williams stated:

> "For the most part, the enhancements were aimed at making the implementation procedures and performance standards more precise, thus ensuring that all companies interpreted their performance expectations in a consistent manner. Thus, the so-called amplification process often degenerated into acrimonious debates between and among the companies…
>
> When the enhancements involved an expansion in the scope of the Principles, such enhancements invariably were reactive rather than proactive. Rather than leading and taking a forward-looking stance toward events in South Africa, the companies typically found themselves being dragged willy-nilly into accepting the new reality of changing political circumstances and expanded obligations".[53]

[52] Sethi S. P. & Williams O. F., *Economic Imperatives and Ethical Values in Global Business: The South African Experience and International Codes Today* (Kluwer Academic Publishers, 2000).
[53] Ibid, p. 397-398.

Further criticisms have been made over the Principles' lack of suitable membership screening, allowing ethically questionable corporations, such as Unocal Corporation and Pfizer to become members.[54] Moreover, the Principles have no adequate verification system which is an important aspect of its transparency and credibility.[55] While hundreds of businesses, including big corporations, such as General Motors, Royal Dutch/Shell, Chevron and Colgate-Palmolive, have endorsed these Principles, many questions over their effectiveness remain, effectively for the same reason as for other voluntary codes of conduct.[56] Corporate compliance is seen to rely on the impact it would have on their reputation and business opportunities, which may not guarantee their commitment. To resolve the weakness of there being no enforceable legal status, its effectiveness may be strengthened through mandatory measures that can ensure signatories do actually comply with the objectives of the Principles.

f) The Global Compact

In January 1999, the United Nations Secretary-General Kofi Annan, announced the Global Compact at the World Economic Forum, which was officially established in 2000. It is ―the world's largest voluntary corporate citizenship initiative",[57] which brings together all relevant social players including governments, corporations, labour, civil society and the United Nations to participate in the promotion of the Global Compact.[58] This makes it a unique venture in that it was facilitated by the UN and drafted by representatives of MNCs on the one hand and international NGOs on the other. Thus it is a compromise between critical activists and the corporations they critique. Corporate signatories to the Global Compact are encouraged to adopt social responsibility in their practices and demonstrate their

[54] Unocal Corporation violated human rights and the environment on its pipeline operation in Burma and Pfizer failed in its promise to supply free HIV drugs to South Africa. See Oil Watch, UNOCAL:Making a Killing in Burma, <http://www.thirdworldtraveler.com/Oil_watch/Unocal_MakingKillingBurma.html>; and Corporate Watch, ‗Pfizer Inc: Corporate Crimes' (2001), <http://www.corporatewatch.org/?lid=330#pricefixing>. Also see Chumir S., ‗The Ethics of Corporate Social Responsibility: Management Trend of the New Millennium?' (2001), <http://www.chumirethicsfoundation.ca/files/pdf/azeralison1.pdf>.

[55] Hartman L. P. & Painter-Morland M., ‗Exploring the Global Reporting Initiative Guidelines as a Model for Triple Bottom-Line Reporting' (2007), p. 8, <http://works.bepress.com/cgi/viewcontent.cgi?article=1017&context=laurahartman>.

[56] The list of companies endorsing the Global Sullivan Principles has been taken from Rudolph P. H., ‗The Global Sullivan Principles of Corporate Social Responsibility', in R. Mullerat & D. Brennan, *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International, 2011), p. 250.

[57] Global Compact Self Assessment Tool, About the UN Global Compact, <http://www.globalcompactselfassessment.org/aboutthistool/unglobalcompact>.

[58] United Nations Global Compact, <http://www.unglobalcompact.org/AboutTheGC/index.html>.

compliance through the elaborate Global Reporting Initiative (GRI). As of June 2014, "the initiative has grown to more than 12,000 participants, including over 8,000 businesses in 145 countries around the world".[59]

The Global Compact covers ten principles, extracted from the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention against Corruption. These principles are based on human rights, labour and environmental standards and anti-corruption measures. They are:[60]

- Principle 1: support and respect the protection of internationally proclaimed human rights.
- Principle 2: make sure that they are not complicit in human rights abuses.
- Principle 3: freedom of association and the effective recognition of the right to collective bargaining.
- Principle 4: the elimination of all forms of forced and compulsory labour.
- Principle 5: the effective abolition of child labour.
- Principle 6: the elimination of discrimination in employment and occupation.
- Principle 7: support a precautionary approach to environmental challenges.
- Principle 8: undertake initiatives to promote environmental responsibility.
- Principle 9: encourage the development and diffusion of environmentally friendly technologies.
- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

Despite genuine attempts by the UN Global Compact to encourage corporate responsibility, it too has been criticised for its lack of enforceability and accountability.[61] It is another example of a voluntary initiative that is not particularly effective in promoting socially responsible practices. The influence of

[59] United Nations Global Compact, UN Global Compact Participants, <http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>.
[60] United Nations Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.
[61] See Deva S., 'Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34, *Syracuse Journal of International Law & Commerce*, p. 107-151.

corporations in the process of the Global Compact has been criticised for leading to an out of balance approach with a bias towards corporate interests, helping them to ―rule the world".[62] NGOs are wary that the Global Compact may threaten any attempt to hold corporations publicly accountable, as offending companies are allowed to participate in the initiative.[63] Bendell argued that ―it is wrong for business with questionable practices to participate in the Compact, that there is little monitoring of their commitments, and that participation can thus diffuse criticism of specific companies".[64] Additionally, through voluntary initiatives, the Compact is seen as yet another means for corporations to ―avoid their social responsibilities and to clean up their tarnished reputations and images".[65] All of these criticisms can also be seen from the letter expressing the concerns of representatives of several NGOs to Kofi Annan:

> ―We believe the Compact as currently designed has serious flaws that threaten the integrity and mission of the United Nations. In particular, we believe that the Compact allows companies to improve their reputation through association with the UN, without committing to concrete changes in corporate behaviour. It allows these corporations and the private sector as a whole, to block substantial measures for sustainability and accountability – even to oppose agreements under the framework of the United Nations itself – while offering only token changes when convenient".[66]

Despite the growing number of participants in the Global Compact, there still remains a gap in the implementation and commitment by corporations.[67] While some are less than committed to change their business behaviour and practices, ―[they] get a chance to "bluewash" their image by wrapping themselves in the flag of the United Nations".[68] Such a mechanism has been seen as undesirable since it

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[62] Richter J., _Building on Quicksand: The Global Compact, Democratic Governance and Nestle' (2003), Published by CETIM, IBFAN/GIFA and Berne Declaration, p. 43, <http://www.corporate-accountability.org/eng/documents/2003/building_on_quicksand_the_global_compact.pdf>

[63] Known human rights violators, such as Nestle, were allowed to become partners of the Global Compact. See Richter J., _Building on Quicksand: The Global Compact, Democratic Governance and Nestle' (2003), Published by CETIM, IBFAN/GIFA and Berne Declaration, p. 5, <http://www.corporate-accountability.org/eng/documents/2003/building_on_quicksand_the_global_compact.pdf>.

[64] Bendell J., _Flags of Inconvenience? The Global Compact and the Future of the United Nations' (2004), International Centre for Corporate Social Responsibility, Research Paper Series - ISSN 1479-5124, p. 9, <http://www.nottingham.ac.uk/nubs/ICCSR/research.php?action=download&id=58>.

[65] Richter, above n 62, p. 12.

[66] Alliance for a Corporate-Free UN, _Letter to Kofi Annan Recommending Redesign of Global Compact' (2002), <http://www.corpwatch.org/article.php?id=1428>.

[67] According to the UN Global Compact Annual Review 2008, ―only 30 per cent of companies with subsidiaries required their regional branches and suppliers to implement the scheme's principles, and only nine per cent of companies with subsidiaries even considered spreading their Compact commitments beyond headquarters." United Nations News Centre, _Membership to UN Ethical Business Initiative Swells, But Much Work Still to Be Done' (2009), <http://www.un.org/apps/news/story.asp?NewsID=30429&Cr=global+compact&Cr1=>.

[68] Bruno K. & Karliner J., _Tangled Up In Blue: Corporate Partnerships at the United Nations' (2000), <http://www.corpwatch.org/article.php?id=996>.

allows businesses to promote themselves without adequate monitoring or accountability measures. According to the Compact itself:

> —[T]he Global Compact is not a regulatory instrument—it does not —police", enforce or measure the behavior or actions of companies. Rather, the Global Compact relies on public accountability, transparency and the enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based".[69]

The voluntary character of the Compact limits its practical effectiveness in advancing good corporate practices simply because it contains no means to enforce compliance nor provide for repercussions if corporations fail to implement its principles. Its achievement only relies on the transparency and enlightened self-interest of corporations together with public pressure and initiatives for the pursuit of its principles. Nolan pointed out that the lack of clarification of its principles, the limits of accountability and the weakness of a voluntary approach have resulted in a reduction of the Global Compact's credibility in improving corporate behaviour.[70] The resulting freedom of corporations from any command and control with little possibility of any kind of sanction by the UN has led to calls for the dissolution of this initiative and the realignment of the UN position towards legally binding regulatory control.[71] As Irene Khan, Secretary-General of Amnesty International commented:

> —i[t] is important to recognise that the Global Compact is one piece of a much larger puzzle…the UN, governments, business and civil society -- must also put energy into addressing the other parts of the puzzle, including in particular the responsibility of governments".[72]

Consequently, there may be a need for governments to play a role in actively ensuring corporations' commitment to the Global Compact by implementing its standards through some form of regulatory framework. Even though the Compact reflects good intentions and is aimed at promoting social responsibility, the lack of commitment by participants suggests that it may require augmentation by

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[69] See United Nations, The Global Compact: Overview, <http://www.unglobalcompact.org>.
[70] Nolan, J., _The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?' (2010), *University of New South Wales Faculty of Law Research Series*, Paper 10, p. 15-20, <http://law.bepress.com/cgi/viewcontent.cgi?article=1205&context=unswwps>.
[71] Bandi N., _United Nations Global Compact: Impact and its Critics' (2007), Covalence Analyst Papers, <http://www.covalence.ch/docs/UnitedNationsGlobalCompact.pdf>; and Richter, above n 62, p. 44.
[72] Public Statement by Irene Khan, Secretary-General of Amnesty International, to the Opening Plenary of the Global Compact Leadership Summit 2007, <http://64.22.127.124/docs/summit2007/Opening_AMNESTY_Khan.pdf>.

some form of development of legal compliance mechanisms.[73] That is, while the Global Compact has resulted in an increasing global awareness of how corporations should conduct their business with regard to CSR, its failure to reach its goals reflects a need for enforceable regulation to enhance its overall effectiveness. Put simply, to be successful, it should become an instrument of control rather than simply an instrument of awareness.

g) The UN Guiding Principles on Business and Human Rights

In 2005, the UN Secretary-General, Kofi Annan, appointed John Ruggie as a 'Special Representative of the Secretary General' (SRSG) with the following mandate:

> "(*a*) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
> (*b*) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
> (*c*) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity" and 'sphere of influence";
> (*d*) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
> (*e*) To compile a compendium of best practices of States and transnational corporations and other business enterprises".[74]

In 2008, Ruggie presented his report proposing a concept for strengthening corporate responsibilities in relation to human rights. It included the three pillars of protect, respect and remedy.[75] In his final report in 2011, and working within this framework, Ruggie produced the Guiding Principles on Business and Human Rights. His report stated:

> "The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that

[73] One of the core commitments to the Global Compact is that participants are required to submit an annual Communication on Progress (COP) report on their implementation of its principles. However, the Global Compact Office declared that in February 2014, 41 companies were expelled for failing to meet this requirement. The total number of delisted business participants has reached 4,330. Refer to the UN Global Compact News and Events, 'UN Global Compact Bulletin' (March, 2014), <http://www.unglobalcompact.org/NewsAndEvents/UNGC_bulletin/2014_03_01.html>.
[74] UN Commission on Human Rights, 'Human rights and transnational corporations and other business enterprises: Human Rights Resolution 2005/69', (2005), p. 1, <ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-69.doc>.
[75] Human Rights Council, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (2008), <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

> business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse".[76]

The Guiding Principles provided practical recommendations for the implementation of the framework and they were endorsed by the UN Human Rights Council in June 2011.[77] Under the first pillar, the Guiding Principles were premised on states having obligations under international law to respect and protect human rights from corporate abuses through appropriate policies and regulations.[78] As part of that state duty, home states are expected to take steps to control their corporations operating overseas, especially where those states have supported or are involved with those corporations.[79] Clearly, this raised issues over extraterritorial jurisdiction and the right of states to legislate measures to control the overseas activities of corporations domiciled in their territories and/or jurisdiction but, as the Commentary noted, they are not prohibited from doing so, as long as there is some 'recognised jurisdictional basis' for the provisions.[80]

To achieve their duty to protect in their operational stage, States should:

> (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
> (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
> (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
> (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts".[81]

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[76] Human Rights Council, 'Report of the Special Representative of the SecretaryGeneral on the issue of human rights and transnational corporations and other business enterprises, John Ruggie – Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011), A/HRC/17/31, para. 6, p. 4, <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf>.
[77] Ibid, para 9, p. 4.
[78] United Nations - Office of the High Commissioner for Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011), Guiding Principle No. 1, p. 3, <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.
[79] Ibid, Guiding Principle No. 2, p. 5
[80] Commentary of the Guiding Principle No. 2 stated that "[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis". Ibid, Guiding Principle No. 2: Commentary, p. 3-4.
[81] Ibid, Guiding Principle No. 3, p. 4.

On the second pillar, the Guiding Principles make it clear that the responsibility imposed on corporations is in addition to the legal requirements of state law.[82] As it noted that:

> ―It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights".

To this extent, while there is no mechanism for legally enforcing the Guiding Principles, their recognition of this separate corporate responsibility can be seen as not merely endorsing a voluntary approach but as requiring that appropriate values be embedded within business practices.[83] Specifically, the Guidelines require corporations to:

> ―(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts".[84]

While all corporations have responsibility to respect human rights, the Guidelines acknowledge that their ability to meet this responsibility can depend on their size and circumstances.[85] There are three policies and processes that corporations should implement accordingly:

> ―(a) A policy commitment to meet their responsibility to respect human rights;
> (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
> (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute".[86]

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[82] ―The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions". Ibid, Guiding Principle No. 11, p. 14.

[83] International Trade Union Confederation ―(ITUC), ‗The United Nations ―Protect, Respect and Remedy" Framework' for Business and Human Rights and the United Nations Guiding Principles on Business and Human Rights: A Guide for Trade Unionists' (2012), p. 8, <http://www.ituc-csi.org/IMG/pdf/12-04-23_ruggie_background_fd.pdf>.

[84] United Nations, above n 78, Guiding Principle No. 13, p. 14. This Principle recognises the responsibilities of corporations for the activities of their affiliated companies, as the commentary states:
―Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties…For the purpose of these Guiding Principles a business enterprise's ―activities" are understood to include both actions and omissions; and its ―business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services". Commentary on the Principle No. 13, p. 15.

[85] Principle No. 14 stated that ―t[]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts". Ibid, Guiding Principle No. 14, p. 15.

[86] Ibid, Guiding Principle No. 15, p. 16.

The exercising of due diligence by corporation is understood as an ongoing process where corporations can address and prevent negative impacts on human rights by corporate activities. It is part of a risk management system that should be instigated as an early process of corporate management.[87] It is expected that where corporations discover any negative impacts from their operations, they should take necessary actions to stop and prevent further impact.[88] Moreover, when corporations have caused or been involved with creating negative impacts, they should take steps to remediate those affected.[89]

The third pillar, the access to remedy, has only one foundation principle which is to provide access for victims of business-related human rights abuses to effective judicial and non-judicial remedial mechanisms.[90] This is a part of the state duty to protect against human rights abuses by corporations. Corporations can play a role in the operational process by ensuring that there are effective grievance mechanisms available[91] and participating ―in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted".[92]

The Guiding Principles have now been endorsed and they have wide support by both governments and business. In assessing Ruggie's work, Catá Backer concluded that:

> ―We move here from vague notions of corporate social responsibility applied in an ad hoc basis by individual corporate and state actors to the elaboration of a multi -level system of polycentric governance. The process from conception to elaboration has been complicated by the need to challenge the basis for conventional governance – one grounded in the idea of the singularity of the state. The SRSG has proposed a set of principles for the governance of economic actors operating within and beyond the state that is grounded on both public and private power. The coordination of these two sources of authority, and their development of systems of behaviour control will be the great challenge for the emerging system of economic globalization in the coming decades".[93]

Certainly, it will take time for the Guiding Principles to prove their effectiveness. While some might be disappointed that they do not create biding obligations on corporations, it can be hoped that they will

[87] Ibid, Guiding Principle No. 17: Commentary, p. 18.
[88] Ibid, Guiding Principle No. 19: Commentary, p. 21
[89] Ibid, Guiding Principle No. 22, p. 24.
[90] Ibid, Guiding Principle No. 25, p. 27.
[91] Ibid, Guiding Principle No. 30, p. 32.
[92] Ibid, Guiding Principle No. 29, p. 31.
[93] Catá Backer L., ‗On the Evolution of the United Nations' ―Protect-Respect-Remedy" Project: The State, the Corporation and Human Rights in a Global Governance Context'(2010) 9(1), *Santa Clara Journal of International Law* p. 156.

achieve increasing global acceptance in the future. They have already been credited with influencing the development of other codes of conduct such as the revision of the OECD Guidelines for Multinational Enterprises.[94] In his final report to the Human Rights Council, Ruggie noted that they ―will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments".[95] One possibility for those longer-term developments could be binding regulation, providing the enforceability and accountability mechanisms that are lacking in voluntary codes of conduct. As Ruggie himself remarked:

> ―At the end of the day, none of these efforts of aggregation and leveraging can be successful without governments, because governments are the global embodiment of representative politics. Yet, at the same time, when devising strategies for change, it is not always wise to begin with governments".[96]

5.2.2 Are Codes of Conduct Effective in Promoting CSR?

As can be seen from the previous section, the major issue with voluntary codes of conduct is their lack of enforcement or accountability. While codes of conduct introduced by international organisations such as the OECD, ILO and the UN are well promoted and accepted, they reflect the reality of the global arena that those bodies can only promulgate soft law in relation to matters such as human rights, labour standards and environmental protection. The principles from these organisations are derived from the growing interest in the social responsibility of corporations in the global economy. They attempt to promote international standards within market capitalism, which requires rules and structures to ensure it functions effectively, and ―avoid being subject to the ‗law of the jungle'."[97] However, it has been argued that the emergence of the self-regulatory framework of these codes of conduct has tended to be biased towards Anglo-American values which has somewhat negated the

[94] OECD, ‗OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (2014), p. 3, <https://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf>.
[95] Human Rights Council, above n 76, para. 13, p. 5.
[96] Ruggie J., Kolb C., O' Rourke D. & Kuper A., *The Impact of Corporations on Global Governance, A Report of the Empire and Democracy Project* (Carnegie Council on Ethics and International Affairs, 2004), p. 23.
[97] Jenkins R., ‗Corporate Codes of Conduct: Self-Regulation in a Global Economy' (2001), United Nations Research Institute for Social Development, Technology, Business and Society Programme Paper Number 2, p. 1, <http://www.unrisd.org/80256B3C005BCCF9/search/E3B3E78BAB9A886F80256B5E00344278?OpenDocument>.

global and universal concept that is supposed to be the core consideration of globalised organisations.[98] This situation has created the perception of an American hegemony, which insists on the protection of its interests while giving the appearance of promoting international standards. Indeed, this hegemony represents the rationalisation of developed countries' interests, primarily America's, in their attempt to make those interests globally acceptable as common sense.[99] In this regard, it might be criticised that corporate codes of conduct are used as a means of promoting the public facade of globalisation but in actual fact they divert attention from the true nature of global capitalism.

While these codes of conduct have been widely supported by both business and states, the lack of enforceability is undeniably seen as a weakness and a limitation on the ability of mere principles and guidelines to control corporate behaviour. Worse, the resulting scepticism over how these voluntary mechanisms could be expected to protect international standards and provide effective control indicates that they might actually hinder the real potential of Western governments. As Robinson stated:

> —[t]he guidelines are a calculated compromise by Western governments between, on the one hand, the need to sensitise firms to their social, economic, and political responsibilities and, on the other, the need to make the rest of the world aware, and in particular the [less developed countries] LDCs negotiating a UN code of conduct for transnational corporations, that the West is not prepared to see excessive constraints imposed on their major creators of wealth: MNCs".[100]

As previously discussed, even though corporations may adopt these codes of conduct, their operations may not comply with the application required by these principles.[101] In practical terms, ensuring implementation of these codes of conduct depends on some form of independent monitoring, which is lacking.[102] The reluctance of many corporations to accept independent monitoring with a preference for self-monitoring has been perceived as them merely using the codes of conduct as a publicity exercise and that, in turn, gives the perception of —[t]he fox minding the chicken coop".[103] This highlights the dangers of codes of conduct when they can be used for purposes other than those originally intended.

[98] Cutler, above n 2, p. 537.
[99] Ibid.
[100] Robinson J., *Multinationals and Political Control* (St. Martin's Press, 1983), p. 7.
[101] Jenkins, above n 97, p. 25.
[102] Ibid, p. 27.
[103] Keller H., 'Corporate Codes of Conduct and their Implementation: The Question of Legitimacy' (2006), p. 59, <http://www.yale.edu/macmillan/Heken_Keller_Paper.pdf>.

Corporations may adopt them simply to avoid further regulation and, in some cases, may use them to counter criticisms from the public.[104] Moreover, while the various codes of conduct provide corporations with an element of choice in what they do, even when they are looking to embrace the ideas, having so many choices may be too confusing or complicated for many corporations.[105] As Hopkins noted that:

> "[t]here are literally hundreds of codes of conduct and principles around the world. These codes are proliferating, but rarely if ever situate themselves within what has happened before or specify why the new code is different or an advance on previous codes…There is a serious need for rationalisation if companies are not to become even more confused than they are now about what is expected of them".[106]

Nevertheless, despite many criticisms, codes of conduct can be seen as "[forming] part of the new rules of the game and contribute to the establishment of new regulatory institutions".[107] Whilst the limitations are obvious, they provide a forum for dialogue and discussion in solving global problems associated with corporate activities. However, codes of conduct should be seen as a basis for further development in the improvement of corporate behaviour rather than as a replacement for government regulation. Certainly many have found them to be unsatisfactory and ineffective, "allowing states to preserve the *status quo* while appearing to take action on pressing global problems".[108] This may be considered as a reason to pressure government to develop regulatory control of corporate activities to ensure a better quality outcome for society.

Due to the limitations of codes of conduct, it is debatable whether soft law is a more appropriate mechanism for controlling corporate behaviour than hard law. While many leading international

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[104] Jenkins, above n 97, p. 29-30.
[105] Sethi stated that "[a] multiplicity of codes would make it hard for others to compare and evaluate performances among different companies. It would make it difficult for local manufacturers to comply with codes from different companies". Sethi S. P., *Setting Global Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations* (John Wiley & Sons, Inc., 2003), p. 86.
[106] Hopkins M., 'Corporate Social Responsibility: An Issues Paper' (2004), Working Paper No. 27, Policy Integration Department World Commission on the Social Dimension of Globalization International Labour Office, p. 12, <http://195.130.87.21:8080/dspace/bitstream/123456789/1193/1/Corporate%20social%20responsibility%20an%20issues%20paper.pdf>.
[107] Keller, above n 103, p. 59.
[108] Tollefson C., 'Indigenous Rights and Forest Certification in British Columbia', in J. J. Kirton & M. J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate Publishing Limited, 2004), p. 93.

organisations are proponents of a voluntary approach,[109] command and control regulation, on the other hand, has increasingly wide support as being a more effective way to control corporate behaviour.[110] Perhaps, the way forward is to find a balanced approach between soft law and hard law, leading to a hybridisation of both mechanisms. An analysis of the relative merits of both mandatory and voluntary approaches is provided in the following section.

5.3 Voluntary CSR v Mandatory Regulation

Most discussion over CSR has been over whether a voluntary or mandatory approach should be adopted. The flexibility of a voluntary approach has generally been seen as the preferable method to deal with the intricacies of a globalised world. Nevertheless, opponents of the voluntary approach criticise it for not being an effective restraint on corporate behaviour and consider that a mandatory approach may provide a more effective means of control. The arguments for and against both mechanisms will be highlighted in this section to illustrate their different perspectives and to better understand the purpose and important aspects of each approach.

5.3.1 Support for a Voluntary Approach

One important aspect of CSR (at least to date) is its voluntary nature. CSR has been defined as:

> "arrangements initiated and undertaken by industry and firms, sometimes formally sanctioned or endorsed by government, in which self-imposed requirements which go beyond or complement the prevailing regulatory requirements. They include voluntary initiatives, voluntary codes, voluntary agreements, and self-regulation and can vary in regard to their enforceability and degree of voluntarism".[111]

[109] "[The OECD and the UN] were where the battle over compulsory vs. voluntary regulation was fought in the 70s, and where it is being fought today. The primary difference between now and then, however, is that both the OECD and UN are on the same side –that of business and the voluntary code of conduct". Rowe J. K., 'Corporate Social Responsibility as Business Strategy' (2005), p. 20, <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1057&context=cgirs>. Another version of this paper appears as a chapter in Lipschutz R. with J. Rowe (eds), *Globalization, Governmentality and Global Politics: Regulation for the Rest of US?* (Routledge, 2005).

[110] See International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (International Council on Human Rights Policy, 2002).

[111] OECD, 'OECD Reviews of Regulatory Reform: Regulatory Policies in OECD Countries' (2002), p. 140, <http://www.oecd.org/dataoecd/10/43/35260489.pdf>.

Support for voluntary CSR comes from those globalists who recognise a decline in the role of nation states through the effects of globalization,[112]which has eroded ―the division of labour between business and government"[113] and increased the role of business in society. As Schwab stated, ―[a]s state power has shrunk, the sphere of influence of business has widened".[114] Thus, the growing importance for business to participate as a social actor derives from the lack of state regulations capable of controlling corporate activities, especially in countries where regulations have been removed (or are not enforced) to attract multinational corporations.[115]

Generally, businesses must operate within the law, which serves as a benchmark for the basic standards required by society. This is common ground, even amongst those who do not support the idea of socially responsible behaviour for business. The assumption is that the only social responsibility of corporations is to operate within the rules and regulations that are determined by governments.[116] However, with the growth of the global market, this basic assumption may no longer be as applicable because corporations have the option of relocating to countries that are not heavily regulated in order to sidestep inconvenient laws. With the complexity of multinational corporations, governments now face the difficulties of imposing regulations to control their activities.[117] As Beth Stephens pointed out, ―[m]ultinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms".[118] Clearly, the existing framework of national legislation is not adequate to

[112] ―Many argue that, as the global economy becomes more integrated, the power of states is declining". International Council on Human Rights Policy (ICHRP), above n 110, p. 1. See also Ohmae K., *The End of the Nation State: The Rise of Regional Economies* (Harper Collins, 1995), and Strange S. 1996, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press, 1996).
[113] Scherer A. G. & Palazzo G., ‗The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' (2010) , Institute of Organization and Administrative Science University of Zurich (IOU), IOU Working Paper Series No. 109, p. 8, <http://ssrn.com/abstract=1609539>.
[114] Schwab K., ‗Global Corporate Citizenship: Working with Governments and Civil Society' (2008) 87(1), *Foreign Affair*, p. 109
[115] Chudnovsky D. & Lopez A., ‗Globalization and Developing Countries: Foreign Direct Investment and Growth and Sustainable Human Development' (1999), p.3, <http://www.fund-cenit.org.ar/eng/Descargas/globalization.pdf>.
[116] Friedman M., ‗The Social Responsibility of Business is to Increase its Profits' (1970), *The New York Times Magazine*, September 13.
[117] Cassels J., ‗Outlaws: Multinational Corporations and Catastrophic Law' (2001) 31, *Cumberland Law Review*, p. 314.
[118] Stephens B., ‗The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20(1), *Berkeley Journal of International Law*, p. 54.

restrain corporate excesses nor strong enough to apply controls on their power. This is especially so in developing countries which lack the ability and willingness to regulate corporate activities.[119] Their attempts to attract business investment can result in a depressing ‗race to the bottom' where governments reduce their regulatory standards.[120]

In these matters, voluntary codes of conduct could become more efficient than state regulation, especially where weak regulations exist or are not enforced. It has been argued that a voluntary code is a better approach, especially for developing countries because even though they may have adequate laws concerning social, environmental and human rights issues, they often do not have the resources or desire to enforce them.[121] Recognition of the realities of that situation reinforces the desirability of a voluntary approach.

A voluntary approach is not only preferred by business; it also has the support of many developed states[122] and other international organisations which promote various corporate codes of conduct containing standards recognised in international law. For example, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,[123] the OECD Guidelines for Multinational Enterprises[124] and the UN Global Compact[125], all of which were discussed earlier in this Chapter. These provisions supplement what may be ineffective regulations, especially in developing

[119] Joseph S. 2004, *Corporations and Transnational Human Rights Litigation* (Hart Publishing, 2004), p. 4-5.
[120] Fauchald O. K. & Stigen J., ‗Corporate Responsibility Before International Institutions' (2009) 40, *The George Washington International Law Review*, p. 1028.
[121] United States Government Accountability Office (GAO), ‗Globalization: Numerous Federal Activities Complement U.S. Business's Global Corporate Social Responsibility Efforts' (2005), Report to Congressional Requesters, p. 6.
[122] Such as the European Union (EU), see Commission of the European Communities 2001, ‗Green Paper: Promoting a European Framework for Corporate Social Responsibility' (2001), <http://www.csr-in-commerce.eu/data/files/resources/717/com_2001_0366_en.pdf>.
[123] The Declaration was adopted in 1977, providing ―guidelines to MNEs, governments, and employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations". See International Labour Office, *Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration)* (ILO, 4th ed, 2006), <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf>.
[124] The Guidelines were adopted in 1976 and last revised in 2000. They are recommendations addressed by governments to multinational corporations for responsible business conduct, covering the areas on employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. See OECD Guidelines for Multinational Enterprises, <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.
[125] See the UN Global Compact, <http://www.unglobalcompact.org/>.

countries, and provide corporations with a summation of the common norms concerning the appropriate approach to set their own policies and standards.

With pressure from both the media and the public, corporations have increasingly begun to consider their impact on society and to move towards adoption of self-regulatory standards to demonstrate their willingness to participate in solving social problems.[126] Such self-regulation can help rectify issues resulting from regulatory failures stemming from the effects of economic globalisation. Reluctant corporations may even "jump on the band wagon" if they see another corporation gaining a competitive advantage by acting in a more socially responsible manner. Effectively, they are forced to follow because it would be disadvantageous not to be considered "good and responsible". As Haigh and Jones noted, "even where the CSR strategy has not been proven a 'winner' (in terms of net payback), other firms will imitate it because they perceive the costs of not doing so are prohibitive".[127]

One possible advantage of voluntary compliance is that it can offer another way to contribute to social benefits without the burden of enforceable regulation. The decision to comply with codes of conduct remains with corporations and can be couched in a way they find acceptable and manageable. It also allows corporations the flexibility to evaluate and implement codes of conduct they consider suitable to the conditions of their business.[128] The public is then given the opportunity to observe corporate performance and to examine whether those corporations are conforming to social expectations. This can be very useful in parts of the world where domestic law fails to protect social, environmental and human rights standards.

Further support for a voluntary approach comes from the argument that legislation does not effectively influence corporate attitudes toward socially responsible behaviour. As CED co-chair Roderick Hills

[126] Jenkins, above n 97, p. 1.
[127] Haigh M. & Jones M., 'The Drivers of Corporate Social Responsibility: A Critical Review' (2006) 5(2), *The Business Review, Cambridge*, p. 3.
[128] "To be effective and relevant to an individual company's specific circumstances, business principles should be developed and implemented by the companies themselves. The thousands of multinational enterprises throughout the world face widely differing conditions in the various countries in which they operate". International Chamber of Commerce (ICC) 2002, 'Business in Society: Making a Positive and Responsible Contribution – A Voluntary Commitment by Business to Manage its Activities Responsibly' (2002), p. 5, <http://www.iccwbo.org/uploadedFiles/ICC/static/B_in_Society_Booklet.pdf>.

stated, "[w]e acknowledge at the outset that no laws or policies will ever be sufficient to end all corporate misbehaviour – or, for that matter, misbehaviour in any segment of public life".[129] While regulations seem to be effective on the surface in controlling corporate activities, they do not provide any genuine change in corporate behaviour. Regulations only provide the minimum norms with which corporations have to comply and little incentive for doing the "right thing".[130] Where corporations concentrate on compliance with the law, they may fail to engage in an ethically responsible manner with society. Wilson argued that, a "new wave of legislation and regulation can achieve only limited results. What is needed is a more radical rethinking, by corporations themselves, of their true role and purpose in society".[131]

Therefore, to encourage corporations to behave ethically, it is necessary to provide incentives for them to change their role and purpose to include serving society's interests. As Robinson noted:

> "Regulation is crucial to mimimise abuses and to enforce compliance with minimum norms. But regulation alone won't establish the business case for making necessary changes. To do so, we must provide incentives so that doing the right thing also makes good business sense. By focusing exclusively on regulation, business is driven toward the logic of managing the costs of compliance. The result is that society loses out on the power of business to innovate and establish new forms of behaviour that are so desperately needed".[132]

From this perspective, it could be said that voluntarism provides the incentive for corporations to conduct their business ethically where regulations are lacking.[133] As Braithwaite stated:

> "business actors exploit a strategy of persuasion and self-regulation when they are motivated by economic rationality. But a strategy based mostly on punishment will undermine the good will of actors when they are motivated by a sense of responsibility".[134]

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[129] Committee for Economic Development (CED), 'CED Releases Recommendations for Improving Corporate Governance' (2006), <http://www.ced.org/images/content/events/corporate_governance/press_2006corpgov.pdf>.
[130] Robinson M., 'Beyond Good Intentions: Corporate Citizenship for a New Century', in Lechner F. J. & Boli J. (eds), *The Globalization Reader* (Blackwell Publishing, 2004), p. 191.
[131] Wilson I., 'The Agenda for Redefining Corporate Purpose: Five Key Executive Actions' (2004) 32(1), *Strategy & Leadership*, p. 26.
[132] Robinson, above n 130, p. 191.
[133] In the review of sanctions in Australia's corporate law, as the Government noted:
"It has been suggested that laws that promote a 'tick the box' approach to compliance may have the effect of weakening the ethical sinews of society by absolving participants of any responsibility for choosing to act in a manner that is right. An unintended consequence of a regulatory system designed to ensure that people cannot choose to do what is wrong is that they can no longer choose to do what is right. They no longer choose at all, they merely comply". Commonwealth of Australia, 'Review of Sanctions in Corporate Law' (2007), para. 1.14, p. 5, <http://www.treasury.gov.au/documents/1182/PDF/Review_of_Sanctions.pdf>.
[134] Ayres I. & Braithwaite J., *Responsive Regulation, Transcending the Deregulation Debate* (Oxford University Press, 1992), p. 22.

Business leaders have argued that corporations would operate more ethically under voluntary CSR, whilst compulsory regulation would instill an antagonistic mentality and affect their economic performance.[135] There are also concerns that regulation could destroy the essence of CSR and reduce participation by corporations to the minimum level required by law. As noted by Adrian Henriques:

> ―The most common reason given for why new legislation would set CSR back is the lowest common denominator argument. This suggests that if there were legislation around CSR, then companies will deliver what the law requires, but never more. At the moment, voluntary CSR is experiencing a hundred flowers in bloom. But legislation, the argument goes, would wither ethical motivation to its roots".[136]

Additionally, Ayres and Braithwait observed that a voluntary approach would effectively decrease the number of corporate violations:

> ―A voluntary program will stop many violations that cost the company money and others that are cost neutral; it will even halt some violations that benefit the company financially in the short term, for the sake of the long-term benefit of fostering employee commitment to compliance".[137]

They, too, considered that regulation is not the best way to control the problems of corporate activities, regarding it as counterproductive. Their reasons may be described as: [138]

1. The whole procedure of punishment is far more expensive than persuasion through a voluntary approach. The success of persuasion would make more resources become available for regulatory expansion.
2. Enforcement of regulation results in corporations playing cat and mouse with the law, attempting to find any possible loopholes. While governments introduce more and more regulations to cover these loopholes, this results in patch-work rule making with no coherence and having little application to the underlying problems.
3. It is impossible for regulation to keep pace with industries where the realities of changes to technology and the environment are rapidly advancing.

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[135] Christian Aid, ‗Behind the Mask: The Real Face of Corporate Social Responsibility' (2004), p. 2. <http://www.humanrights.ch/upload/pdf/050816_csr_behindthemask_2004.pdf>.
[136] Henriques A., ‗The First Law of CSR' (2002), <http://www.henriques.info/downloads/The%20First%20Law%20of%20CSR.pdf>.
[137] Ayres & Braithwaite, above n 134, p. 106.
[138] Ibid, p. 26.

Those who attempt to make CSR mandatory may ignore these problems, as well as the ability of corporations to avoid their legal liabilities. As Christopher Stone commented,

> "Those who trust to the law to bind corporations have failed to take into account a whole host of reasons why the threat of legal sanctions is apt to lack the desired effects when corporate behaviour is its target – for example, limited liability, the lack of congruence between the incentives of top executives and the incentives of "the corporation," the organisation's proclivity to buffer itself against external, especially legal threats, and so on.[139]

This might suggest that there is a place for voluntary mechanisms to control corporate behaviour where there is an indication that mandatory regulation alone cannot provide the best answer. Long-term benefits gained through self-regulation could motivate corporations to re-establish their corporate strategy and culture with a new sense of their social role and responsibility. If corporations voluntarily engage with CSR, only then will they "pursue [their] goals with sufficient enthusiasm to produce genuine and meaningful change".[140]

5.3.2 Criticisms of a Voluntary Approach

Despite the benefits of a voluntary approach, the alternate view is that it is unlikely to contribute effectively to the well-being of society. From a practical perspective, corporations cannot be relied on to genuinely commit themselves to voluntary initiatives. In other words, the assumption that corporations will energetically operate in a socially responsible manner without any underlying reason is optimistic. Various reasons for this skepticism have been advanced. They include:

a) A Tool for a Public Relations Exercise

Critics of voluntary CSR argue that it has become merely a tool for promotion, advertisement and public relations.[141] This phenomenon has thrived in response to a growing awareness of CSR among customers, investors, NGOs and the media. While corporations are quite content to operate under

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[139] Stone C.D., *Where The Law Ends* (Harper and Row, 1975), p. 93. Quoted in Simpson S. S., *Corporate Crime, Law, and Social Control* (Cambridge University Press, 2002), p. 5.
[140] Werther W. B. & Chandler D., *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (Sage Publications, Inc., 2006), p. 102.
[141] See Surma A., "Challenging Unreliable Narrators: Writing and Public Relations', In J. L'Etang & M. Pieczka (eds), *Public Relations: Critical Debates and Contemporary Practice* (Lawrence Erlbaum Associates, Inc., 2006), p. 41-59.

voluntary codes of conduct and self-regulation, they can be criticised if they present themselves as being committed to CSR only to improve their public support.[142] This is supported by evidence that many corporations have incorporated CSR into their public statements, but, in reality, have ignored their social responsibilities.[143] Many, especially poor people in less developed countries, who are supposed to benefit from business operations with a professed commitment to CSR, can suffer negative impacts on their human rights and the local environment from corporate activities.[144] All of this is under cover of a highly publicised commitment to CSR by corporations whose main interest is profit in a growing competitive market. Thus, it is argued that CSR has, in the main, assisted companies to promote themselves "without changing their practices in any substantial respects".[145] Often, their practices can be used as evidence to unmask the 'real' attitude of corporations, hiding 'behind the veil' of CSR, which only increases scepticism that CSR is often an illusion to protect corporations from public criticism rather than actually resulting in genuine change to business practices.[146]

b) A Tool for the Avoidance of Regulation

A further criticism is that voluntary CSR has been a useful tool for companies determined to prevent mandatory legislation being imposed.[147] As Goodpaster pointed out, "[a] management team…might be careful to take positive and (especially) negative stakeholder effects into account for no other reason than that offended stakeholders might resist or retaliate (e.g. through political action or opposition to necessary regulatory clearances)".[148] More and more companies are committing to comply with CSR, in order to forestall enforceable norms being applied. Anand suggested that to avoid costly mandatory

[142] Christian Aid, above n 135.
[143] Ibid.
[144] An example can be illustrated from Shell advocating CSR but still continuing to violate human rights and destroy the environment through their operation. See Friends of the Earth 2004, 'Behind the Shine: The other Shell Report 2003' (2004), <http://www.h-net.org/~esati/sdcea/shellreportFIN.pdf>.
[145] Livesey S. & Graham J. 2007, 'Greening of Corporations?: Eco-talk and the Emerging Social Imaginary of Sustainable Development', in S. May, G. Cheney & J. Roper (eds), *The Debate over Corporate Social Responsibility* (Oxford University Press, 2007), p. 336.
[146] See Rondinelli D. A., 'Globalization of Sustainable Development?: Principles and Practices in Transnational Corporations' (2006), Georgia Tech Center for International Business Education and Research, Working Paper Series 2007-2008, p. 28, <http://www.ciber.gatech.edu/workingpaper/2007/023-07-08.pdf>.
[147] Reich R. B., 'The Case Against Corporate Social Responsibility' (2008), Goldman School of Public Policy Working Paper No. GSPP08-003, <http://ssrn.com/abstract=1213129>.
[148] Goodpaster K. E., 'Business Ethics and Stakeholder Analysis' (1991) 1(1), *Business Ethics Quarterly*, p. 57.

legislation, ―they will commit to a certain level of self-regulation so that subsequent regulatory initiatives may be weakened or made unnecessary".[149] The argument, therefore, is that if corporations behave responsibly and accept the concept of CSR, they can defuse calls for increased regulation and leave themselves free to operate in a constructive and flexible manner. Rowe sees this as a symptom of CSR and notes that ―the strategic hope that voluntary mechanisms can create regulation-friendly environments is problematic when, historically, corporate codes have been self-consciously invoked by business to avoid social regulation".[150]

c) The Lack of Enforcement and Accountability

As more self-regulation is allowed, it has been observed that it creates a possible danger of over-reliance on a voluntary system through a reduction in actual government control. Freeman pointed out that allowing extended self-regulation powers for corporations may eventually lead to them becoming the actual, or de facto, regulatory authority, with the public receiving a very short straw in the procedure.[151] This erosion of state authority has led to scepticism over corporations' compliance with voluntary CSR where there are no means of enforcement or accountability. It has been said that a voluntary approach of CSR ―[o]wing to the absence of any global monitoring and enforcement mechanism [presents] a danger that CSR could become a privatised system of governance lacking public accountability".[152] This system of ―governance without government"[153] is not reinforced by formal authorities that can ensure corporations' implementation and compliance.

d) Rhetorical CSR

With the criticisms outlined above, it has to be asked whether there is any substance to corporate commitment to CSR when they claim adherence to its principles. According to one report, ―while over

[149] Anand A. I., „Voluntary vs Mandatory Corporate Governance: Towards an Optimal Regulatory Framework' (2005), p. 20-21, <http://law.bepress.com/cgi/viewcontent.cgi?article=2773&context=expresso>.
[150] Rowe, above n 109, p. 4.
[151] Freeman J., „The Private Role in Public Governance' (2000) 75(101), *New York University Law Review*, p. 644.
[152] Banerjee S. B., *Corporate Social Responsibility: The Good, the Bad and the Ugly* (Edward Elgar Publishing, 2007), p. 155.
[153] See the discussion of ―governance without government" in Rosenau J. N. & Czempiel E. O., *Governance Without Government: Order and Change in World Politics* (Cambridge University Press, 1992).

90% of Fortune 500 companies have launched a sustainability initiative in some form, fewer than 50% have developed a sustainability strategy to drive business success".[154] Even the European Commission acknowledged this situation when it stated:

> "In spite of [the progress of corporations involved with CSR], important challenges remain. Many companies in the EU have not yet fully integrated social and environmental concerns into their operations and core strategy. Accusations persist of the involvement of a small minority of European enterprises in human rights harm and failure to respect core labour standards".[155]

Indeed, various corporations may integrate their economic programs with CSR activities but in reality, there is always a gap between CSR programs that corporations endorse and the extent to which they carry them out.[156] It becomes obvious that, through voluntary CSR, there are many cases of outright irresponsibility by corporations which have 'talked the talk' but have not 'walked the walk'.[157] Often, behind the rhetoric of CSR, corporations continue to cause many problems to civil society, especially in developing countries which host their operations. This emphasises the limited effectiveness of voluntary CSR. It is not enough to develop codes of conduct; corporations must be willing to comply with the essence of CSR standards.

In summary, the argument against voluntary CSR relies on the fact that instances of social, environmental and human rights violations through corporate activities have continued. Indeed, in many host countries, especially among developing nations, people have suffered increasing abuses as a

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[154] Unger M., Csicsila A. & Smith C. (Archstone Consulting) 2008, 'Good Business Meets the Common Good: How to Structure Corporate Sustainability to Drive Long-Term Business Success' (2008), *IndustryWeek*, <http://www.industryweek.com/articles/good_business_meets_the_common_good_17656.aspx?ShowAll=1>.

[155] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility' (2011), p. 5, <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf>. According to the European Commission, indicators of progress include:

"-The number of EU enterprises that have signed up to the ten CSR principles of the United Nation Global Compact has risen from 600 in 2006 to over 1900 in 2011.

-The number of organisations with sites registered under the Environmental Management and Audit Scheme (EMAS) has risen from 3,300 in 2006 to over 4,600 in 2011.

-The number of EU companies signing transnational company agreements with global or European workers' organisations, covering issues such as labour standards, rose from 79 in 2006 to over 140 in 2011.

-The Business Social Compliance Initiative, a European, business-driven initiative for companies to improve working conditions in their supply-chains, has increased its member ship from 69 in 2007 to over 700 in 2011.

-The number of European Enterprises publishing sustainability reports according to the guidelines of the Global Reporting Initiative rose from 270 in 2006 to over 850 in 2011".

[156] Rondinelli, above n 146, p. 28.

[157] Such as British American Tobacco, Coca-Cola and Shell. See Christian Aid, above n 135.

result of exploitation by corporations.[158] Arguably, this would not be the case if voluntary CSR were a sufficient deterrent. While some corporations have openly displayed their engagement with voluntary CSR, they have not yet proved any authentic change in their behaviour and practices.[159] Instead, it seems that voluntarism has provided gaps and loopholes that enable corporations to hide behind their false claims of commitment to CSR.

5.4 The Argument for Internationally Binding Regulations

The impact of corporations on the quality of life and environment throughout the world has resulted in an increased public interest in more regulation to control their activities, ensuring justice and fairness. Dependence on economic development and a lack of ability and resources to deal with corporate power are among the factors that exacerbate the problems of regulating and controlling corporations for host countries.[160] Nevertheless, the same obstacles to binding legislation exist in developed countries, where there is also a lack of willingness to monitor and control abuses perpetrated by their corporations.[161] Home states such as the UK and US are hesitant to control their national corporations in order to maintain the international competitive advantage of their corporate industries.[162] In many cases it seems that they are more concerned to ensure that their corporations continue to gain power from their operations abroad, as this generates financial advantages for their home economies.[163] Clearly, corporate power and influence provide pressure on home states to shape policies in their favour. As Broecker noted:

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[158] Examples can be seen from the companies such as Dow Chemical, Coca Cola, Caterpillar, Lockheed, Philip Morris, and Wal-Mart. See Global Exchange 2007, Some of the "Most Wanted" Corporate Human Rights Violations, Available at: http://www.globalexchange.org/getInvolved/corporateHRviolators.html.

[159] See Christian Aid, above n 135.

[160] Deva S., 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?' (2004) 5, *Melbourne Journal of International Law*, p. 64; and Partel R. M., 'Eclipse of the State: Multinational Corporations in the Third World' (2000), *The Columbia Journal of International Affairs, Law and Public Policy*, p. 27.

[161] For example, the United States and Australia failed to pass the Bills to impose extraterritorial regulations for their corporations. See Broecker C., "Better the Devil You Know": Home State Approaches to Promoting Transnational Corporate Accountability (2008) 41(1), *New York University Journal of International Law and Politics*, p. 202-210.

[162] Zerk J. A., *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006), p. 7.

[163] "[MNCs] repatriate profits and send royalties, management fees and interest payments back to their home countries". Roberts S., Foreign Direct Investment and the Multi-lateral Agreement on Investment - The Hidden Agenda, http://www.tcd.ie/Economics/SER/sql/download.php?key=242, Spero and Hart noted that historically, the benefits created by MNCs were returned to home states and not contributed to the local economy. Spero J. E. & Hart J. A., *The Politics of International Economic Relations* (Wadsworth Cengage Learning, 2010), p. 310.

> —business actors also exert powerful influences over home states, incentivising them to structure the relations between their domestic investors and their foreign hosts in ways that heavily favour the former. The influence of business actors on state policies is similarly reflected at the international level, where states are often unwilling to support mechanisms that would constrain the actions of their own nationals abroad".[164]

The fact that international treaties are binding only on countries that are signatories to them, is a further reason why it is difficult to hold corporations accountable for any breaches of social, environmental or human rights standards in a global sphere. Corporations can only be held accountable under national law and by the power of enforcement of that nation state. States must, therefore, bring local laws to international standards before they can force corporations to operate in a manner that does not abuse or violate the well-being of society. However, whereas most states have accepted and ratified international treaties to enforce laws on social, environmental and human rights issues, these are, unfortunately, often not enforced and, even more often, corporations are not held responsible for breaches committed by their subsidiaries overseas.

As a consequence, governments can be seen to be failing to fulfill their responsibilities to protect their citizens from adverse corporate practices. Thus, it might be suggested that an alternate approach to constrain negative corporate activities would be to impose direct obligations on corporations through international law. Theoretically, there is no reason why corporations should not be legally obliged to comply with a set of internationally agreed rules governing responsible corporate practices. In the words of Andrew Heard, —[i]f human rights set moral standards for the treatment of all humans, those standards should bind anyone who is capable of infringing those rights - be they corporations, governments, or other human beings".[165] Following this thinking, the duty to protect the rights of others should be expanded to include all those who have the capability to cause harm to society, not just governments.

[164] Broecker, above n 161, p. 166-167.
[165] Heard A., _Human Rights: Chimeras in Sheep's Clothing?' (1997), < http://www.sfu.ca/~aheard/intro.html>.

This approach would resolve the situation where states are unable or unwilling to uphold their own obligations to ensure corporations promote and protect social, environmental and human rights standards. In a globalised world where state ability is no match for corporate power, it may be unrealistic to leave the responsibility for enforcing multinational corporations to respect these standards with states alone. Arguably, there needs to be another mechanism, where host states are too weak to enforce compliance or are reluctant to address the problem in some other way. If international law could create direct obligations on corporations, they could be held directly accountable for their abuses. This could effectively prevent or at least, limit violations of social, environmental and human rights standards in the global arena and, ultimately, international standards could be expected to rise significantly.

So far implementing direct obligations on corporations under international law has not been successful. An example can be seen with the creation of the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (1998-2004).[166] The Norms attempt to impose human rights responbsibilities on corporations but despite support from NGOs, many business sectors and governments are opposed to approving the Norms.[167] One reason the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE) gave for their opposition was that they would be counterproductive:

> "This approach would be counterproductive because it risks undermining the resources and attention necessary to improve the capacity of national governments to implement and enforce their existing human rights laws, with which all companies – foreign or domestic, local or global – must already comply".[168]

[166] The Norms were drafted in August 2003 by the UN Sub-Commission on the Protection and Promotion of Human Rights. See United Nations 2003, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En>.

[167] The main opposition comes from business sectors, such as the International Chamber of Commerce (ICC), the International Organization of Employers (IOE) and the US Council for International Business and Confederation of British Industry, and from states such as the US, the UK, Saudi Arabia, Egypt and India. Mantilla, G., 'Emerging Human Rights Norms for Non-State Actors: The Case of Transnational Corporations' (2009), Paper presented at the annual meeting of the ISA's 50th Annual Convention "Exploring the Past, Anticipating the Future", New York Marriott Marquis, NY, US, p. 21, <http://www.allacademic.com/meta/p314062_index.html>.

[168] International Chamber of Commerce (ICC) & International Organization of Employers (IOE), Joint Views of ICC and the IOE on the Draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (2004), submitted to the United Nations Commission on Human Rights, <http://198.170.85.29/IOE-ICC-views-UN-norms-March-2004.doc>.

They also insisted that it is the responsibility of national governments to establish a regulatory framework regarding human rights protection, and while calling the Draft Norms ―non-voluntary and using legal language where there is no legal obligation, [they] blur the line between voluntary and legal actions, and make corporate compliance virtually impossible".[169] Additionally, the Draft Norms would create negative consequences for developing host countries by discouraging the investment that is necessary to their economic and human rights standards development.[170]

Notwithstanding those objections, in 2005, the UN Secretary-General appointed John Ruggie as the Special Representative on Business and Human Rights to, inter alia, review the Norms and explore issues emerging during their proposal. He acknowledged the problems of the Norms in the context of their legal authority and the allocation of human rights responsibilities between states and corporations.[171] He did not consider that the Norms could restate international legal principles and be binding on corporations at the same time.[172] In his words:

> ―What the Norms have done, in fact, is to take existing state-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law – hard, soft, or otherwise".

Regarding the problem of the imprecision in allocating the responsibilities for human rights between states and corporations, Ruggie pointed out that:

> ―While it may be useful to think of corporations as ―organs of society," in the preambular language of the Universal Declaration, they are specialized organs, performing specialized functions. They are not a microcosm of the entire social body. By their very nature, therefore, corporations do not have a general role in relation to human rights like states, but a specialized one. The Norms do allow that some civil and political rights may not pertain to companies. But they articulate no actual principle for differentiating human rights responsibilities based on the respective social roles performed by states and corporations. Indeed, in several instances, and with no justification, the Norms end up imposing higher obligations on corporations than states, by including as standards binding on corporations instruments that not all states have ratified or have ratified conditionally, and even some for which states have adopted no international instrument at all".

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[169] Ibid.
[170] Ibid.
[171] Ruggie J., _Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2006), U.N. Doc. E/CN.4/2006/97, para. 59, <http://www1.umn.edu/humanrts/business/RuggieReport2006.html>.
[172] Ibid, para. 60.

With these problems, the Norms were not worthwhile pursuing and therefore a new framework was required. Ruggie then proposed his Guiding Principles on Business and Human Rights in 2011.[173] His work can be considered as a watershed but it did not produce any real change to the international human rights obligations of corporations. As Ruggie noted:

> —The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved".[174]

He then went on to reinforce this, saying:

> —n[]othing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights".[175]

The non-binding status of the Guiding Principles caused some criticism with some NGOs still seeking mechanisms that impose binding obligations on corporations. In the words of Ganesan from Human Rights Watch:

> —In effect, the council endorsed the status quo: a world where companies are encouraged, but not obliged, to respect human rights. Guidance isn't enough - we need a mechanism to scrutinize how companies and governments apply these principles".[176]

While Pillars 2 and 3 of the Principles acknowledge responsibilities of corporations to respect human rights and provide remedial access through _operational-level grievance mechanism' for those affected by their operations,[177]the weakness inherent in a non-binding mechanism remains an issue. Consequently, the Guiding Principles are really yet another voluntary code of conduct. Nevertheless, this movement provides new ideas towards promoting responsible business behaviour which may be used as a foundation for improving regulatory mechanisms. As Ruggie indicated, his framework

[173]See the discussion on _The UN Guiding Principles on Business and Human Rights' in Section 5.2.1.
[174] Human Rights Council 2011, above n 76, para. 14, p. 5.
[175] Ibid, p. 6.
[176] Human Rights Watch, _UN Human Rights Council: Weak Stance on Business Standards' (2011), <http://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>.
[177] United Nations, above n 78, Guiding Principles No. 11 and 29.

–offers a platform for generating cumulative and sustainable progress without foreclosing further development of international law".[178]

The key challenge will lie not only in the attempt to place obligations on corporations under international law but on the problem of the lack of an institution empowered to deal with corporate violations at an international level. Even when corporate obligations under international law exist, they will be ineffective unless there are enforcement procedures for non-compliance. It is unfortunate that the establishment of the new International Criminal Court (ICC) at the Rome Conference in 1998, did not provide jurisdiction over corporations. At present only individuals can be prosecuted for human rights violations through this court system. Extraordinarily, –the possibility that corporate entities might be liable as _individuals' on this basis has never been seriously mooted".[179] It is expected that this court's jurisdiction will eventually be extended to include all legal persons, providing liability and accountability for criminal conduct by corporations. Even though the cost of litigation through the ICC will be expensive and the victims distant from the court, the benefits that can occur are considerable and should not be ignored.[180] Relevant considerations include:

1. not all criminal activities are the responsibility of individuals as they may be the result of corporate policy or culture;
2. there is a danger of individuals being used as scapegoats or, alternatively, shielded to avoid corporate liability and that prosecuting them will produce no consequences for the corporation;
3. prosecution of individuals cannot provide justice or a remedy for violations caused by corporations, especially when they gain the benefits of participation in illegal activities; and

[178] Ruggie J. G., _Treaty Road Not Travelled, Ethical Corporation' (2008), p. 43, <http://www.hks.harvard.edu/m-rcbg/news/ruggie/Pages%20from%20ECM%20May_FINAL_JohnRuggie_may%2010.pdf>.
[179] Rees S. & Wright S., *Human Rights and Business Controversies, in Human Rights, Corporate Responsibility: A Dialogue* (Pluto Press Australia, 2000), p. 6.
[180] Pak N. S. & Nussbaumer J. P., _Beyond Impunity: Strengthening the Legal Accountability of Transnational Corporations for Human Rights Abuses' (2009), Hertie School of Government Working Papers, Prepare for the *European Centre for Constitutional and Human Rights, Berlin*, p. 43, <http://edoc.vifapol.de/opus/volltexte/2013/4259/pdf/45.pdf>.

4. the ability to bring corporations to account for their criminal activities would assist victims to access corporate assets.[181]

Despite these positive aspects, the obstacle of the ICC having no jurisdiction over corporations remains. However, this is only one hurdle to be overcome in efforts towards the development of international regulation that could offer effective control over corporations. Many NGOs consider that ―while enforceable international legal standards for corporations are desirable and in principle are preferable to voluntary ones, in practice they are not achievable in the present or near future".[182] Despite the difficulties of achieving direct control of corporations under international law, it can be predicted that the discourse over this issue will continue. In the meantime, individual states should be encouraged to integrate international standards into their national law, and to actively and effectively enforce them.

5.5 The Argument for Strengthening State Regulations

Although some major corporations have set codes of conduct that adhere to high standards of CSR, there are still many that ignore their obligations to society. Large bodies of evidence of social, environmental and human rights violations by corporations, such as the BP oil spill in the Gulf of Mexico in 2010,[183] have illustrated that self-regulation does not provide sufficient control over corporate activities. No matter what responsible operations are initiated by ―good" corporations, it is probable that the ―bad" will continue to abuse their power unless and until corporate responsibility is reinforced by legally enforced international standards, with adequate avenues for monitoring and reporting. Only then can the protection of social, environmental and human rights standards be secured.

[181] Ibid, p. 42.
[182] Winston M., ‗NGO Strategies for Promoting Corporate Social Responsibility' (2002) 16(2), *Ethics & International Affairs*, p. 76.
[183] Cleveland C. (Lead Author); Hogan C. M., Saundry P. (Topic Editor), ‗Deepwater Horizon oil spill', in C. J. Cleveland (ed), *Encyclopedia of Earth, Environmental Information Coalition* (National Council for Science and the Environment, 2010), <http://www.eoearth.org/article/Deepwater_Horizon_oil_spill?topic=50364>.

The command and control mechanism does not give any choice to corporations; it requires them to act in accordance with the law.[184] It encompasses what is seen to be a positive approach to corporate responsibilities. At least corporations can be expected or required to conform to minimum standards set out in the law in terms of their corporate conduct. To be able to operate in a society, the corporation must, as a legal entity, abide by that society's rules and legislation. Corporations that do not comply with the law would face the penalty of sanctions, fines and may eventually have their license to operate revoked. Therefore, it may be suggested that regulation is necessary to ensure corporations operate in line with social expectations.

At this point, if voluntary procedures are seen as inadequate, there may be a need to reinforce corporate responsibility through legally binding obligations. This can provide an effective barrier, ensuring the protection of social, environmental and human rights standards from abuse by corporations, whose level of compliance is based on whether they see complying with a voluntary approach as advantageous or disadvantageous to their financial performance. Corporations would then find it difficult to avoid their liabilities through the use of voluntary initiatives. Clearly defined and enforceable norms would appear to be a better way to ensure that corporations behave in line with social expectations, rather than run the risk of under-performance in line with an ill-defined voluntary code. Moreover, it is likely that the cost of compliance with regulation will ultimately be less than the cost of rectifying the problems caused by corporate malpractices. In fact, corporations which already have CSR policies in place should not fear extra regulation and ~~c~~an rightly claim to be more socially responsible".[185]

Ultimately, it would be unrealistic to suggest that voluntary initiatives could be a formula for ensuring that all corporations behave in a responsible manner, especially when it comes to a consideration of the

[184] Hard law is referred as ~~l~~egally binding obligations that are precise (or can be made precise through adjudication or the issuing of implementing regulations) and that delegate authority for interpreting and implementing the law". Curtin D. 2010, 'Public Accountability of Transnational Rule Making: A View From the European Union and Beyond', in Faure M. & Van der Walt A., *Globalization and Private Law: The Way Forward* (Edward Elgar Publishing Limited, 2010), p. 39.
[185] International Council on Human Rights Policy (ICHRP), above n 110, p.19.

wide range of cultures and norms of those countries in which they operate. Even though voluntary CSR is a useful tool to improve corporate behaviour, there will always be a need for some form of governmental regulation to enforce ethical practices on corporations that do not voluntarily comply.[186] Voluntary initiatives may never achieve their full potential and cannot, in all cases, replace the need for states to protect their citizens. States should uphold their responsibility as ―primary duty-bearers" to safeguard their citizens from abuse of corporate power. This vision has been backed by the UN which noted, ―[t]he State remains the primary duty-bearer under international law, and cannot abrogate its duty to set in place and enforce an appropriate regulatory environment for private sector activities and responsibilities".[187] Therefore, it remains a challenge for states, as the only actors that can directly control corporate activities, to protect the well-being of society. Even though regulations provide a basic benchmark for minimum standards, they remain of prime importance as the only way to ensure that corporations have a uniform and clear set of basic norms of behaviour to follow. As McBarnet argued:

> ―only legal regulation can provide ‗systematic impact'. It would apply to and be enforceable against all business, not just those companies which voluntarily choose or are pressed by brand vulnerability to adopt it. It would be fairer, making for a level playing field for business, it would have more legitimacy, based on and providing due process of law, and, most importantly, it would be more effective".[188]

5.6 Conclusion

Society's expectations may vary from time to time with increasing demands for businesses to consider the social values of the community in which they operate. To achieve these expectations, corporations should anticipate any social issues, for example, it may become their business to engage with CSR as an operational value system. When corporations are faced with issues such as the impact of their activities on society, the environment or in relation to human rights, their responses can be critical to

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[186] Friends of the Earth stated in its submission to the European Union's Green Paper 2001 that ―[w]hile CSR can be valuable in terms of promoting better corporate behaviour it can never be seen as an alternative to good public policy and legislation...Voluntary commitments are hardly the basis for ensuring responsible corporate behaviour. Friends of the Earth (England, Wales & Northern Ireland), ‗Submission on The Commission of the European Communities' Green Paper: Promoting a European Framework for Corporate Social Responsibility' (2001), p. 2, <http://www.foe.co.uk/sites/default/files/downloads/corporate_social_responsibility.pdf>.

[187] Office of the Unites Nations High Commissioner for Human Rights, ‗Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation' (2006), p. 4, <http://www.un.org/Depts/dhl/humanrights/toc/toc9.pdf>.

[188] McBarnet D., ‗Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability', in D. McBarnet, A. Voiculescu & T. Campbell, *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007), p. 29.

their image locally, as well as internationally. Various international codes of conduct can serve as a risk management tool to anticipate and avoid problems, allowing corporations the chance to address any possible issues and approach them correctly. However, these codes of conduct can only be indirectly enforced, depending on state regulation to ensure their effectiveness.

While international law recognises the social responsibilities of corporations, states that have the ability to enforce them may not include these internationally-accepted norms of corporate conduct in their national laws. This problem has led to discussions over creating direct corporate obligations under international law which, so far, have not reached a conclusion. It remains impossible to obtain a practical approach for internationally binding regulation to control corporate activities. The difficulty in enforcing international norms may be one of the main reasons why voluntary arrangements still appear attractive. In support of voluntary CSR, Weltzein noted:

> —Social responsibility starts where the laws leave off (…) To be socially responsible means not only fully complying with legal obligations, but going beyond compliance by investing more in human capital, the environment, and relations with stakeholders. If, by definition, CSR means going beyond legal obligations, how can CSR be turned into regulations? This apparent contradiction is not just an indicator of how diffuse this area is, but also reflects the perspective of those who perceive that the principles relating to CSR are the start of a genuinely fundamental shift towards future legislation on CSR".[189]

Certainly, voluntary regimes provide a positive aspect in controlling corporate activities, especially in a rapidly changing world where formal laws can become very quickly outdated. Where there is a lack of government control, corporations have an important role to play in promoting social responsibility. Thus there is space for a voluntary approach to encourage responsible business practices. As Wood said:

> —In the absence of appropriate government controls—where governments are weak, authoritarian, or corrupt—corporate social responsibility is a second-best stand-in for the broad-based interests of stakeholders and society as a whole".[190]

[189] Quoted in Martinez J.L. & Aguero A., _The Why, When, and How of Corporate Social Responsibility' (2005), Instituto de Empresa Business School Working Paper No. WP05-04, p. 10, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015859>.
[190] Wood D. J., _Corporate Responsibility and Stakeholder Theory: Challenging the Neoclassical Paradigm', in B. R. Agle, T. Donaldson, R. E. Freeman, M. C. Jensen, R. K. Mitchell & D. J. Wood, _Dialogue: Toward Superior Stakeholder Theory' (2008) 18(2), *Business Ethics Quarterly*, p.162.

If business voluntarily conforms to CSR standards, the need for introducing mandatory measures to augment soft law mechanisms would not be necessary. However, this situation has not yet been achieved. In some cases, CSR is used merely as a tool for promoting the image and public perception of corporations. Consequently, it can either be an authentic code for guiding corporate conduct or a tool for stakeholder manipulation that requires little change in corporate behaviour. Where voluntary CSR is limited in its effectiveness, it is reasonable to argue that some form of mandatory compliance regime may be desirable.

Indeed, a combination of both mandatory and voluntary mechanisms may provide the best possible solution for promoting socially responsible behaviour by corporations. Where corporations fail to comply with a voluntary approach, regulation can set minimum standards, ensuring compliance through a more rigorous mode of enforcement. As Ayres and Braithwaite noted:

> —persuasion is preferable to punishment as the strategy of first choice. To adopt punishment as a strategy of first choice is unaffordable, unworkable, and counterproductive in undermining the good will of those with a commitment to compliance. However, when firms which are not responsible corporate citizens exploit the privilege or persuasion, the regulator should switch to a tough punitive response".[191]

This combined approach seems to have the greatest potential for applying effective controls to corporations that are acceptable to supporters of both voluntary and mandatory regimes. From this standpoint, it means that even though there is an acceptance of voluntary CSR, there still remains a need for regulation, even if it only applies in cases where a voluntary approach fails. Therefore, it might be suggested that there is a role for both voluntary and mandatory approaches to ensure corporate behaviour meets society's expectations.

Even though a mandatory approach alone is not the way forward and should not be a substitute for voluntary codes, there seems to be evidence that some form of regulatory control is desirable, at least in some states. The argument is that, where the voluntary approach is ineffective and there is no direct control through international law, the appropriate authority to control corporate activities remains with

[191] Ayres & Braithwaite, above n 134, p. 26.

the state. One possible solution may be for developed states to take steps to enforce international norms against their own corporations for infringements wherever they operate. This would also overcome the difficulty of not being able to prosecute corporations through the International Criminal Court, which seems unlikely to expand its jurisdiction to include corporations, at least in the immediate future.

In the end, while it might be regarded as a good response to examine the existing law and restructure where there might be a perceived weakness to ensure social responsibility of corporations, the possibility of changing corporate behaviour through voluntary mechanisms should not be overlooked. With all the problems of corporate activities, the application of all possible methods that might contribute to a more desirable outcome for the protection of civil society should be available to effectively deal with the complexity and intricacy of modern corporations. To that end, it might also be useful to consider polycentric governance as a basis for future development –where multiple independent actors mutually order their relationships under a general system of rules".[192] This form of governance would blur the lines between states and corporations in traditional corporate governance and allow them to interact with each other in a new form of governance to promote the concept of CSR.[193] The expansion of economic growth and concerns over the impact of corporate behaviour within a multi-level society may increase the attractiveness of polycentric governance as a means of solving global issues.[194] The coordination between the public and private sectors would lead to the desirable solution where economic opportunities and social functions can be developed in collaboration.

[192] Araral E. & Hartley K., 'Polycentric Governance for a New Environmental Regime: Theoretical Frontiers in Policy Reform and Public Administration' (2013), International Conference on Public Policy, 26-28 June 2013, p. 2, <http://www.icpublicpolicy.org/IMG/pdf/panel_46_s1_araral_hartley.pdf>.

[193] Gouldson A., Sullivan R. & Afionis S., 'The Governance of Corporate Responsibility' (2013), Centre for Climate Change Economics and Policy Working Paper No. 137 Sustainability Research Institute Paper No. 47, p. 7, <http://www.cccep.ac.uk/Publications/Working-papers/Papers/130-139/WP137-governance-of-corporate-responsibility.pdf>.

[194] –Polycentricity can be utilized as a conceptual framework for drawing inspiration not only from the market but also from democracy or any other complex system incorporating the simultaneous functioning of multiple centers of governance and decision making with different interests, perspectives, and values". Aligica P. D. & Tarko V., 'Polycentricity: From Polanyi to Ostrom, and Beyond' (2012) 25(2), *Governance*, p. 260.

Chapter 6

Case Studies

6.1 Introduction

The increasing evidence of corporate activities having an adverse impact on human rights, the environment and other social issues has resulted in a need to analyse the effectiveness of voluntary CSR and to examine the possible desirability of augmenting it by mandating minimum standards through regulation. This chapter will examine two case studies, James Hardie and BHP, which will demonstrate how corporate attitudes towards voluntary CSR and their emphasis on shareholders' interests at the expense of others in society can be detrimental. These two cases have been selected because of their high profile within the general public's perception of corporate irresponsibility. They were both Australian corporations that can be linked to the subject of regulatory development within Australia as discussed in the following Chapter. Importantly, both cases will show that, while there is a place for voluntary CSR, there may still be a need for it to be augmented or supplemented by mandatory regulation to cater for those instances when a voluntary system fails in order to prevent similar occurrences in the future.

6.2 The James Hardie Case

One might say that good business practice requires companies not only to concentrate strongly on compliance with the law and market rules, but also to participate in social responsibility concerns such as CSR. Nevertheless, some large businesses, such as James Hardie Industries Ltd (hereinafter James Hardie), have failed to consider their broader moral or ethical responsibilities which has, sometimes, had drastic consequences as a result of them behaving in what they perceived to be the interests of their shareholders at the expense of the interests of others in society.

James Hardie is a well-known global player in fibre cement building products containing asbestos which proved to be dangerous to the health of those who were involved with them.[1] Throughout the 20th century, this company was ―Australia's largest manufacturer of asbestos containing products, including asbestos containing insulation products, asbestos cement sheet or _fibro', pipes and friction materials particularly brake and clutch lining".[2] Asbestos products had long been known to have potentially serious health risks for those who had contact with it.[3] The knowledge of its danger and the link to lung cancer has been known since the 1930s.[4] However, the company continued its operations, even as the link to mesothelioma[5]was announced in the 1960s, taking no precautions nor acknowledging the dangers, and continued to openly engage in practices that were detrimental to the health of its employees and others.[6] This behaviour indicated its lack of consideration for social responsibility while concentrating on profit making alone.

Hardie persevered with distributing asbestos products until the late 1980s.[7] The large-scale health consequences caused by asbestos were considered to have given Australia ―the highest rates of

[1] About what diseases are asbestos related and who is at risk see Slater & Gordon Lawyers, Asbestos Diseases, <http://www.slatergordon.com.au/files/editor_upload/File/ASB%20A4%20bro.pdf>.

[2] Australian Council of Trade Unions, _James Hardie Asbestos Victims Compensation Background Facts'(2007),p.2, <http://www.actu.org.au/Images/Dynamic/attachments/5055/James%20Hardie%20Fact%20Sheet%20080207.doc>.

[3] The first medical article on the asbestos disease was written by William Cooke in the *British Medical Journal* in 1924. He discovered fibrosis of the lungs and tuberculosis of the workers in an asbestos factory. Cited in Bartrip P. W. J., _History of Asbestos Related Disease' (2004) 80(940)*, Post Graduate Medical Journal*, p. 72. Also see Cooke W. E., _Fibrosis of the Lungs due to the Inhalation of Asbestos Dust' (1924)**,** *British Medical Journal*, 26 July, p. 147, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2304688/>.

[4] Ibid, p. 73. Also see *Jones v James Hardie and Co Pty Ltd* (1939) WCR (NSW) 129. Also see Australian Plaintiff Lawyers Association (APLA), _Special Commission of Inquiry into the Medical Research and Compensation Foundation' (2004), p. 2-3, <http://www.lawyersalliance.com.au/documents/public_affairs/James%20Hardie%20220404.pdf>.

[5] ―Mesothelioma is a type of cancer that is primarily caused by exposure to certain types of asbestos, a material once used in building construction. The disease can affect the lungs, the abdomen, or the heart. There are three types of mesothelioma:

- Pleural: Pleural mesothelioma affects the pleura - the lining of the lungs. It is the most common type of mesothelioma.
- Peritoneal: Peritoneal mesothelioma affects the peritoneum - the lining of the abdomen.
- Pericardial: Pericardial mesothelioma affects the pericardium, the membrane that surrounds the heart. It is the least common type, affecting about 5 percent of people with the disease".

Fayed L., _Mesothelioma – What is Mesothelioma' (2009), <http://cancer.about.com/od/mesothelioma/a/mesothelioma.htm>.

[6] An example where James Hardie failed to warn of the dangers of asbestos can be seen from *Misiani v Welshpool Engineering Ltd & Anor* [2003] WASC 263 at [138]-[139]. Also see Hamilton F. & Tozer L., _Moral Liabilities: James Hardie and the Social Contract' (2007), p. 4, <http://www.afaanz.org/openconf/afaanz/paper.php?p=256.doc>; and Bartrip, above n 3, p. 72-76.

[7] James Hardie stopped selling asbestos products in 1987. See Queensland Laboratory News Details, _The Corporate Timeline of James Hardie' (2009), <http://www.queenslandlab.com/news_detail.php?id=41>.

mesothelioma in the world".[8] It was found that ‗[a]round 600 mesothelioma cases are recorded every year in Australia"[9] and the rise was expected to continue into the future. The fact that the signs of associated illness often take up to 40 years to develop after exposure[10] meant that people who were exposed to asbestos could develop symptoms much later in their lives. Given that approximately 33 per cent of Australian houses built before 1985 are said to contain asbestos,[11] potential asbestos-related diseases could increase for many more years to come. According to the Asbestos Diseases Foundation of Australia, ‗the number of people diagnosed with asbestos-related diseases will not peak until 2020, by which time there will be 13,000 cases of mesothelioma and up to 40,000 cases of asbestos-related lung cancer".[12] Even though James Hardie has no involvement in the industry anymore, its responsibility for its actions remains. Unfortunately, the company tried in many ways to evade responsibility for the effects that its products have had on victims, such as by restructuring the company and claiming limited liability.[13] These issues all create concerns over the effectiveness of a system that relies either entirely or substantially on a voluntary commitment to CSR.

The James Hardie case is one illustration of corporate single-mindedness, focusing on the enhancement of shareholder profit at the expense of the rights and interests of others in society and it raises the question of the effectiveness of the current regime of corporate regulation in the area of social responsibility in Australia. It also raises issues about corporate structures and the ability of companies to hide behind the corporate veil.

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[8] MesotheliomaWise.org, ‗Mesothelioma in the United States & Australia' (2009), <http://www.mesotheliomawise.org/>.
[9] Sarat A., ‗High Incidence of Malignant Pleural Mesothelioma in Australia' (2007), <http://ezinearticles.com/?High-Incidence-Of-Malignant-Pleural-Mesothelioma-In-Australia&id=741340>.
[10] Prince P., Davidson J. & Dudley S., ‗In the Shadow of the Corporate Veil: James Hardie and Asbestos Compensation' (2004), <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn12.htm>.
[11] Master Builders Australia, ‗Master Builders National Asbestos Management Control and Removal Policy' (2009), <http://www.masterbuilders.com.au/Downloads/F651092C-11BC-4CFC-B906-C4C206340431-National%20Asbestos%20policy.pdf>.
[12] The Age, ‗The Road to a Corporate Inquisition' (31 July 2004), <http://www.theage.com.au/articles/2004/07/30/1091080439991.html>.
[13] Example cases showing the James Hardie holding company avoiding liability for acts of its subsidiary can be seen from *James Hardie & Co Pty Ltd v Hall as Administrator of Estate of Putt* (1998) 43 NSWLR 554; and *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549. Also see Jackson D. F., ‗Report of the Special Commission of Inquiry into Medical Research and Compensation Foundation' (2004), <http://www.dpc.nsw.gov.au/about/publications/publications_categories_list>.

6.2.1 Background

James Hardie was originally an Australian company, established in 1888, which later developed into a global leader in fibre cement technologies.[14] From 1937 to 1987, asbestos products were manufactured and sold by two operating subsidiaries of James Hardie Industries Limited (JHIL), James Hardie & Coy Pty Ltd (Coy) and Jsekarb Pty Ltd (Jsekarb), which were later renamed Amaca and Amaba respectively.[15] The group operates mainly in the USA, Australia, New Zealand, the Philippines and Chile and now concentrates on the development of non-asbestos fibro-cement technology.[16]

As far back as 1939, Hardie was subject to a claim for compensation for asbestos related disease in *Jones v James Hardie and Co Pty Ltd* (1939) WCR (NSW) 129.[17] By 1957, a report by Dr. Gordon Thomas to the Victorian State Health Department found 539 cases of lung damage of workers in ―dusty" industries, mainly from James Hardie's asbestos manufacturing, and recommended that it was extremely urgent that conditions in dusty trades be improved.[18] In the mid-1960s the company received medical evidence that its employees were at risk from asbestos products and its manufacturing.[19] One important fact came out in 1966, when a Hardie director (later to become company chairman for 23 years), John Boyd Reid, read an article on asbestos and mesothelioma, published in the Sunday Times newspaper, headlined ―Urgent Probe into 'New' Killer Dust Disease".[20] This article stated that:

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[14] James Hardie, 'James Hardie Investor Relations: History' (2010), <http://www.ir.jameshardie.com.au/jh/about_us/history.jsp>.
[15] ―James Hardie Industries Limited (JHIL) was the holding company of the James Hardie Group and manufactured and sold asbestos products until 1937". Czoch K. & Mulder M., 'Australia: The James Hardie Decision: *Australian Securities and Investments Commission v Macdonald (No. 11)* [2009] NSWSC 287' (2010), *Insurance and Financial Services Bulletin*, July, <http://www.mondaq.com/australia/article.asp?articleid=106690>.
[16] James Hardie Annual Report 2004, p. 46, <http://www.ir.jameshardie.com.au/jh/artable/annual_reports_2004.jsp>.
[17] Cited in Australian Plaintiff Lawyers Association (APLA), 'Special Commission of Inquiry into the Medical Research and Compensation Foundation' (2004), p. 3, <http://www.lawyersalliance.com.au/documents/public_affairs/James%20Hardie%20220404.pdf>. Samuel Jones worked at the asbestos factory at Camellia for seventeen years, daily inhaling asbestos dust. After he died from asbestos dust, his wife claimed for compensation against James Hardie. However, it was unsuccessful as the judge concluded, ―while generally speaking, exposure to asbestos dust is an industrial hazard, there is nothing known as to what degree of exposure is necessary to cause asbestosis". From Queensland Laboratory News Details, 'The Corporate Timeline of James Hardie' (2009), <http://www.queenslandlab.com/news_detail.php?id=41>.
[18] Hills B., 'A Dynasty Waits for the Dust to Settle' (*The Age*, 2 October 2004), <http://www.theage.com.au/articles/2004/10/01/1096527935549.html?from=storylhs>.
[19] Hamilton & Tozer, above n 6, p. 5.
[20] Peacock M., *Killer Company: James Hardie Exposed* (HarperCollins Publisher, 2009), p. 3. The newspaper report on the killer dust was based on an article in the *British Journal of Industrial Medicine*, which found 76 deaths at one hospital in London alone, where victims were the workers in the asbestos industry for up to 33 years earlier, including seven women

> —A disquieting —new" occupational disease capable of killing not only the exposed workman, but also perhaps his womenfolk and even people living near his place of work, is the subject of intensive behind-the-scenes activity by British scientists, experts on industrial health, and at least two government ministries. The condition is a rapidly fatal tumour that spreads over the pleural covering the lung. So rare a disorder was it until recent years that many pathologists dispute its existence, but now the growth is being met in increasing numbers at autopsy, especially in patients at one time exposed to asbestos".[21]

Afterward, Reid sent the article to Hardie's personnel manager, Ted Pysden, for comment. He wrote back to Reid:

> —The article is not new—it is merely one of many reports on world studies which have been conducted since 1935 when the association between exposure to dust and carcinoma of the lung, mesothelioma of the pleura, tumour of the bladder and uterus and other fatal complaints, was first recognised. The best advice you can give your friend is to ignore the publicity - dust is a fact - denials merely stir up more publicity".[22]

An acknowledgement by James Hardie of the risks of asbestos can also be found in *Lowes v Amaca Pty Ltd* [2011] WASC 287, where the court stated:

> —It has been found that the defendant actually knew of the relationship between exposure to asbestos and mesothelioma by no later than May 1965. The documents relied on to make that finding did not refer to any particular fibre type. I further find that:
>
> (a) by 1960, the defendant was aware that occupational exposure to asbestos was associated not only with asbestosis but also with lung cancer and that all commercial fibre types were implicated in those diseases; and
>
> (b) by the early 1960s, the defendant appreciated the need to control dust levels in its factories to reduce health risks to its employees from exposure to asbestos".[23]

James Hardie's knowledge of asbestos risks was also used in *King v Amaca Pty Ltd* [2011] VSC 422 to prove negligence against the company for exposing its employees to asbestos in 1972. The plaintiff provided evidence from James Hardie's former chief medical officer, Dr. McCullagh, in 1966, stating that:

> —(a) recent literature has reported fairly conclusive evidence that asbestos dust when inhaled can cause cancer of the chest cavity lining;
>
> (b) there is no safe upper limit for asbestos dust;
>
> (c) any exposure is dangerous and cumulative;
>
> (d) heaviest exposures cause asbestosis, lighter exposures cause cancer; and

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who cleaned and washed their husband clothes, other family members who lived with the workers and residents living in the vicinity of the factory. See Hills B., 'Sins of the Fathers' (*The Sydney Morning Herald,* 2 October 2004), <http://www.smh.com.au/articles/2004/10/01/1096527939130.html>.

[21] Sunday Times, 'Urgent Probe into 'New' Killer Dust Disease' (31 October 1965). Quoted in Peacock, Ibid, p. 3.

[22] Ibid, p. 4.

[23] *Lowes v Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd)* [2011] WASC 287, at [517].

(e) it is almost inevitable that any lung cancer that develops in employees who have had even minimal exposure to asbestos will be classified by courts as compensation cases".[24]

The court found that the company should have reasonably foreseen the risks and, therefore, had a duty of care to ensure the workplace was an environment safe from asbestos exposure.[25] The judge concluded that:

> "The defendant knew or should have reasonably foreseen that there was a risk that persons such as the plaintiff that visited the factory would be exposed to asbestos dust and fibres as a result of attending the factory over a short period to work on a machine, and that there was a risk of contracting a lung disease such as mesothelioma from such exposure".[26]

Apparently, although James Hardie knew of the dangers associated with its product for a long time, it ignored the mounting evidence and continued to manufacture these products with little or no consideration for the effects that they could have on the health of its workers. Unfortunately, not only workers in the production and distribution process were exposed to asbestos risks. Those who installed or removed asbestos products during renovations or demolition were also affected.[27] Thus, claims, which previously only emanated from workers in the production process, spread to include claims from those who installed or used asbestos who had thereby also become susceptible to health risks from it.[28] Later, family members of the workers became involved as parties to the claims when it became apparent that asbestos-related diseases were not restricted to those workers but to anyone who came into contact with asbestos dust.[29] The company did not include any warnings or directions on its

[24] *King v Amaca Pty Ltd* [2011] VSC 422, at [12].
[25] *King v Amaca Pty Ltd* [2011] VSC 422.
[26] *King v Amaca Pty Ltd* [2011] VSC 422, at [16].
[27] An article published in the *Medical Journal of Australia* in 1957 by Dr D. L. Gordon Thomas pointed out that "[t]he following occupations are involved: handling the substance in its raw state; grinding the substance prior to its use in some process; mixing with diatomaceous earth or kaolin to form lagging material; sawing, cutting and finishing any product containing asbestos - for example brake linings, asbestos sheeting and various insulating materials; tearing down old lagging – this a very dangerous process, even in the open air; spraying asbestos on walls and ceiling as an insulator". Cited in *Father Robert McNeill v Seltsam Pty Limited* [2005] NSWDDT 43, at [64].
[28] Hamilton & Tozer, above n 6, p. 5.
[29] According to the Jackson Report, "[f]amilies of asbestos workers exposed to asbestos on hair and clothing have been found to be at risk, as are employees who worked in the same vicinity as asbestos workers". Jackson, above n 13, Annexure J: Asbestos and James Hardie, p. 120. Also see, Smith M., 'Questions for James Hardie as Asbestos Takes My Mum' (*The Age*, 8 January 2010), <http://www.theage.com.au/opinion/society-and-culture/questions-for-james-hardie-as-asbestos-takes-my-mum-20100107-lwpx.html>.

asbestos products until 1978 and continued its manufacture until 1987.[30] This led to increased cases of exposure for its employees and customers.[31] As Clarke noted:

> "Though they knew of this growing evidence of the danger of its products, and by the end of the 1970s a total of 250 companies associated with asbestos were being sued in the United States, the James Hardie senior management took decades more to begin to face this reality and cease using these materials…Those in control of the James Hardie companies knew, or ought to have known, of the dangers of asbestos and should have taken measures to guard against the risk of injury of their employees and customers".[32]

Clearly, James Hardie ignored its ethical and social responsibilities by not taking due care for the health of its workers and customers. Later, former Hardie executive, Peter Russell, told the court that "the company was well aware of the dangers of asbestos and kept confidential files on research findings and workers who had been 'dusted'."[33] This action demonstrated the amoral behaviour of the company. As Hamilton and Tozer described it:

> "In what can be seen, at best, as 'amoral' actions, for many years Hardie failed to give serious attention to working conditions and paid scant regard to their employees' and customers' exposure and community health concerns".[34]

Undeniably, "[f]or decades, James Hardie's management felt it was safer to sweep the company's asbestos problems under the corporate carpet".[35] Even though, over the years, James Hardie provided many employment opportunities, its activities also created massive negative effects for its workers and the community. This emphasises "the paradox of modern business organisation, [where] corporations can generate so much wealth, create so many jobs and spur innovation, while at the same time doing so

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[30] Australian Council of Trade Unions (ACTU), 'James Hardie Asbestos Victims Compensation Background Facts' (2007), p. 3, <http://www.actu.org.au/Images/Dynamic/attachments/5055/James%20Hardie%20Fact%20Sheet%20080207.doc>.
[31] Example cases are: *Lowe v Amaca Pty Ltd (Formerly James Hardie & Co Pty Ltd)* [2011] WASC 287;
McGilvray v Amaca Pty Ltd (Formerly James Hardie & Coy Pty Ltd) [2001] WASC 345;
Hannell v Amaca Pty Ltd (Formerly James Hardie & Co Pty Ltd) [2006] WASC 310;
Brian Anthony Mooney v Amaca Pty Ltd [2009] NSWDDT 23;
Bill Bramwell Roberts v Amaca Pty Limited [2009] NSWDDT 28; and
John William Booth v Amaca Pty Limited and Amaba Pty Limited [2010] NSWDDT 8.
[32] Clarke T., *International Corporate Governance: A Comparative Approach* (Routledge, 2007), p. 422.
[33] Bastian P., 'Asbestosis: The Silent Killer' (2005), <http://www.cfmeu-construction-nsw.com.au/pdf/changing_australia/p41-p44Asbestosis.pdf>.
[34] Hamilton F. & Tozer L., 'Ethical Corporations? James Hardie and the Social Contract' (2008), p. 10, <http://www.afaanz.org/openconf-afaanz2008/modules/request.php?module=oc_proceedings&action=view.php&a=Accept+as+Paper&id=575>.
[35] Hills B., 'A dynasty waits for the dust to settle' (*The Age*, 2 October 2004), <http://www.theage.com.au/articles/2004/10/01/1096527935549.html?from=storylhs>.

much harm".[36] In this case the benefits that James Hardie brought to society, including wealth creation and employment, could not offset the negative effects its activities created when it neglected to recognise, and meet, its other responsibilities to society.

Although there was growing public interest in corporations behaving responsibly in general, James Hardie seems to be a particular example of a company ignoring its social responsibilities. It not only failed to protect others from the dangers of asbestos, but also later actively sought to avoid its liability to the victims by restructuring itself and hiving-off asbestos claims by creating a limited fund to avoid paying compensation for outstanding and future claims resulting from its asbestos-related activities.[37] In 2001, when Hardie faced a huge number of long-tail claims against the company, it attempted to reduce its financial liability by isolating its asbestos related companies and establishing a limited fund called the Medical Research and Compensation Foundation (MRCF).[38] In a media release in February 2001, James Hardie announced that:

> —The Foundation has sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL".[39]

James Hardie's CEO, Mr. Peter Macdonald, also stated that:

> —t[]he Foundation will concentrate on managing its substantial assets for the benefit of claimants. Its establishment has effectively resolved James Hardie's asbestos liability and this will allow management to focus entirely on growing the company for the benefit of all shareholders…James Hardie is satisfied that the Foundation has sufficient funds to meet anticipated future claims".[40]

However, it soon become apparent that the Foundation faced a funding shortfall for meeting asbestos liability claims and James Hardie refused to issue any further substantial funds, claiming that it had taken all appropriate steps in creating the Foundation.[41] According to the later Jackson report, —[i]t did not take long after the establishment of the Foundation for the Foundation to discover that its outgoings

[36] The Age, _Oedipus Wrecks' (28 August 2004), <http://www.theage.com.au/articles/2004/08/27/1093518071536.html#>.
[37] Hamilton & Tozer, above n 6, p. 6.
[38] Jackson, above n 13, Report - Part A, Sec. 2.34, p. 28.
[39] James Hardie's Media Release, _James Hardie Resolves its Asbestos Liability Favourably for Claimants and Shareholders' (16 February 2001), Annexed to Jackson Report, above n 13, Annexure R. Exhibit 1, Vol. 7, Tab 66, p. 333.
[40] Ibid, p. 333-334.
[41] Ibid, Report - Part A, Sec. 1.22, p. 12.

were significantly higher than expected. This gave rise to a number of unsuccessful attempts by the Foundation to obtain further funding from JHIL".[42] It can, therefore, be argued that, in reality, Hardie established the Foundation not as a bona fide vehicle to meet its responsibilities but as a separate entity in an attempt to avoid its liabilities to prevent the company from losing economic ground and to maintain shareholder value.

Not only did James Hardie tactically establish the MRCF, it also tried to avoid its liabilities by moving its headquarters to the Netherlands. The NSW Supreme Court was assured that the Foundation would have access to $1.9 billion to resolve future claims and that was the hinge point for the court's approval for the company's relocation.[43] However, James Hardie later cancelled access to this fund without informing the authorities.[44] Moreover, it was noted that the Netherlands "does not have a treaty for the enforcement of a legal decision taken in Australia",[45] which effectively severed the legal link allowing victims to sue for compensation in the Netherlands. This movement offshore was said to be, "to position the Group for further international growth and to improve the after tax returns to shareholders".[46] As Grant Samuel, an independent expert, reported on the proposed restructuring:

> "The proposed restructure is, on balance, in the best interests of James Hardie Industries' shareholders as a whole. The transaction is essentially neutral insofar as shareholders will have the same underlying economic interest in the business of James Hardie Group before and after the proposed restructure. The primary benefit of the proposed restructure is an increase in after tax returns to shareholders. This benefit is a tangible and material gain relative to the status quo. In the absence of some form of restructuring, James Hardie Industries faces an increasing corporate tax rate that could reach almost 50% in the near future. A "do nothing" approach would ultimately have negative consequences on shareholder value.

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[42] Ibid, Report - Part A, Sec. 10.15, p. 135.
[43] Parliament of Australia, James Hardie (Investigations and Proceedings) Bill 2004, p.4, Available at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r2230.
Australian Securities and Investments Commission v Macdonald (*No 11)* (2009) 230 FLR 1, at [33]. "In August 2001, JHIL commenced proceedings in this Court seeking approval of the Scheme. The proceedings were listed before the late Justice Santow who was provided with a later version of the Draft IM. Allens Arthur Robinson (Allens) drafted a letter to be sent to Santow J's Associate (Draft Court Letter). It advised that JHIL proposed to impose a condition on its ability to call the partly paid shares: a call could only be made if the directors formed the view that it was necessary to ensure that JHIL was able to pay its debts as and when they fell due and in such amount as the directors believed was necessary to ensure that JHIL remained solvent. The Draft Court Letter contained a statement to the effect that JHIL would have, through existing reserves and access to funding in the form of the partly paid shares, the means to meet liabilities that it might incur in the future whether in relation to Asbestos Claims or otherwise". Also see *Re James Hardie Industries Ltd* [2001] NSWSC 888.
[44] Ibid.
[45] International Metalworkers' Federation (IMF), "Asbestos and James Hardie: The background' (2004), <http://www.imfmetal.org/index.cfm?c=9636&l=2>.
[46] Jackson, above n 13, Report - Part A, Sec. 2.45, p. 33.

> There are other benefits such as a more attractive ―currency" for scrip acquisitions but these are not regarded as substantial. There are a number of costs, disadvantages and risks arising from the proposed restructure. Key issues for shareholders will be impacts on corporate governance and liquidity. While these factors are not inconsequential, and some may be significant for some shareholders, they do not, in Grant Samuel's opinion, outweigh the benefits for shareholders as a whole".[47]

James Hardie later moved its domicile to yet another country, relocating its headquarters from the Netherlands to Ireland in June 2010.[48] The stated reason was similar to that for the previous move, to minimise its tax obligations, with the company claiming that tax benefits would provide greater contributions to both shareholders and asbestos victims.[49] However, there were concerns that the costs of the move would affect its ability to deposit enough funds to continue compensation for the claimants, and the company was heavily criticised for ―consistently [showing] itself to be a poor corporate citizen".[50]

Significantly, though this scheme apparently seemed to be designed to create tax benefits for the company and its shareholders, in reality it was a manoeuvre to protect the company's assets and avoid liabilities to its claimants.[51] This became clear after the shortfall in funding for the MRCF was announced in 2003 and Hardie refused to accept any further liability for claims by victims, arguing that the Foundation and the company were separate legal entities.[52] In its annual report in 2003, it stated

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[47] Jackson, above n 13, Report - Part A, Sec. 2.45, p. 33.

[48] Cratchley D., ‗Shareholders approve James Hardie move' (*The Sydney Morning Herald*, 3 June 2010), <http://news.smh.com.au/breaking-news-business/shareholders-approve-james-hardie-move-20100603-x0f1.html>. Also see James Hardie, ‗Company Statement: James Hardie Industries NV Announces Proposal to Change Its Domicile' (24 June 2009), <www.ir.jameshardie.com.au/public/download.jsp?id=3859>.

[49] Rich S., ‗Hardie Shares in Orbit on US Revival' (*The Australian*, 19 August 2009), <http://www.theaustralian.news.com.au/business/story/0,28124,25949650-643,00.html>.

[50] McIntyre D., ‗Unions Angry at James Hardie Move to Ireland' (*The Canberra Times*, 25 June 2009), <http://www.canberratimes.com.au/news/national/national/general/unions-angry-at-james-hardie-move-to-ireland/1550429.aspx>.

[51] This action was described by Greg Combet, Secretary of the Australian Council of Trade Unions, as ―one of the most morally and legally repugnant acts in Australian corporate history". Australian Broadcasting Corporation (ABC), ‗TV Program Transcript: 7.30 Report, James Hardie Executives Accused of Fraud' (28 July 2004), <http://www.abc.net.au/7.30/content/2004/s1164158.htm>.

[52] According to James Hardie annual report 2003, it stated that:
―While it is difficult to predict the incidence or outcome of future litigation, the Company believes it is remote that any significant personal injury suits for damages in connection with the former manufacture or sale of asbestos containing products that are or may be filed against ABN 60 or its former subsidiaries would have a material adverse effect on its business, results of operations or financial condition. This belief is based in part on the separateness of corporate entities under Australian law, the limited circumstances where ―piercing the corporate veil" might occur under Australian law, and there being no equivalent under Australian law of the US legal doctrine of ―successor liability". The courts in Australia have

that ―[t]he foundation is managed by independent trustees and operates entirely independently of James Hardie…the Company does not believe it will have any liability should future asbestos-related liability of JH & Coy and Jsekarb [its former subsidiaries] exceed the funds available to those entities or the Foundation".[53] Additionally, James Hardie's CEO, Peter Macdonald, declared that James Hardie:

> ―is not involved in the foundation set up in any way or in any asbestos claims, circumstances for involving [James Hardie] just do not exist, they cannot be described. [James Hardie] has no legal obligation to provide further funding to the foundation. We are very confident of our position".[54]

The company also stated that:

> ―[t]here can be no legal or other legitimate basis on which shareholder funds could be used to provide additional funds to the foundation and the duties of the company's directors would preclude them from doing so".[55]

Clearly, this action was to protect shareholders' interests at the expense of other stakeholders, especially asbestos victims. Indeed, the company showed little regard for its employees, customers or the community in general. It not only ignored its social responsibilities in the first place but continued to do so by trying to avoid its liabilities after its activities were exposed. The company became well-known for fighting the hardest to resist any liabilities, forcing those who made claims against it through difficult and extended court procedures. An example can be seen in *Banton v Amaca Pty Ltd* [2007] NSWDDT 29, which was the first case seeking exemplary damages for asbestos related diseases caused by James Hardie. Mr Banton's initial claim was successful and James Hardie appealed on the grounds that exemplary damages had been included in the previous orders made in 2000.[56] The New

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confirmed the primacy of separate corporate entities and have generally refused to hold parent entities responsible for the liabilities of their subsidiaries absent any finding of fraud, agency, direct operational responsibility or the like".
James Hardie Annual Report 2003, p. 74, <http://www.ir.jameshardie.com.au/jh/artable.jsp>.
Also see Jackson, above n 13, Report - Part C, Sec. 26.8-26.9, p. 461.

[53] James Hardie Annual Report 2003, p. 80, <http://www.ir.jameshardie.com.au/jh/artable.jsp>.

[54] Australian Broadcasting Corporation (ABC), 'James Hardie Abnegates Responsibility for Asbestos Compensation, Transcript from PM' (30 October 2003), <http://www.abc.net.au/pm/content/2003/s979006.htm>.

[55] The Sydney Morning Herald, 'Directors: To Whom Do They Owe Care?' (4 July 2005), <http://www.smh.com.au/news/business/directors-to-whom-do-they-owe-care/2005/07/03/1120329328502.html>.

[56] On 26 July 2000, orders were made as follows:
1. That the Defendant pay to the Plaintiff the sum of $800,000.00 in respect of the Plaintiff's claim for Provisional Damages under s8(a) of the *Dust Diseases Tribunal Act* and as particularised in paragraph 13 of the Further Amended Statement of Claim.
2. The dust related conditions in respect of which an award of further damages may be made are:
(a) Lung cancer;
(b) Mesothelioma;
(c) Asbestos induced carcinoma.

South Wales Supreme Court dismissed the appeal and agreed that Mr Banton had the right to pursue further exemplary damages.[57] The Asbestos Diseases Society of Australia commented that:

> —And yet in spite all of this knowledge and the means to avoid such asbestos risks and such damage to families, just claims to compensation have been fought by [James Hardie] with an aggression and with an expense account rarely seen in Australia's legal history".[58]

Despite its failed attempts to escape its liabilities, Hardie continued to defend itself declaring that its activities were lawful and in accordance with its social obligations. In support, the company claimed that it had always operated under the rules and standards of the community. In its 2003 annual report, the company stated, —We think it is important that our behaviour reflects the spirit, as well as the letter, of the law and we aim to govern the company in a way that meets or exceeds appropriate community expectations."[59] It also asserted that the company promoted social responsibility through ethical practices, saying, —[t]he company seeks to maintain high standards of integrity and is committed to ensuring that James Hardie conducts its business in accordance with high standards of ethical behaviour".[60] Nevertheless, in reality, its statements contradicted what was happening and could be characterised as _spin' at its extreme, leading to criticism over the credibility of the report.[61] It is also interesting to note that despite the public outcry over the deliberate underfunding of the foundation, the company, in its report, still denied any liability for claims against its former subsidiaries or the foundation.[62]

Amaca Pty. Limited v Banton [2007] NSWCA 336, at [7].

[57] —My view is that there is no reason why —further damages" under s11A(2)(b) cannot include exemplary damages. As to the second submission, I would not wish to rule out the possibility that the subsequent occurrence of greater damage might justify greater exemplary damages. It is true that the award of exemplary damages focuses on the conduct of the defendant, and is not in order to compensate the plaintiff". *Amaca Pty Limited v Banton* [2007] NSWCA 336, at 16.

[58] Asbestos Diseases Society of Australia (ADSA), *Asbestos: What You Should Know* (Asbestos Diseases Society of Australia Inc., 4th ed, 2003), p. 14.

[59] James Hardie Annual Report 2003, p. 51, <http://www.ir.jameshardie.com.au/jh/artable.jsp>.

[60] Ibid, p. 53. Also stated in James Hardie Annual Report 2010, p. 73, <http://www.ir.jameshardie.com.au/public/download.jsp?id=4241>.

[61] In 2004, the company received a —Gold Award" for its 2003 Annual Report of the Australasian Reporting Awards James Hardie Industries N.V. 2004, James Hardie Industries Awards 2001-2004, <http://www.irasia.com/listco/au/jameshardie/awards.htm>.

[62] James Hardie Annual Report 2003, p. 74, 80, <http://www.ir.jameshardie.com.au/jh/artable.jsp>.

In February 2004, when it became apparent that future claimants would not be able to receive compensation, the government of NSW commissioned a special enquiry into the Medical Research Fund and Compensation Foundation, called the Jackson Inquiry.[63] In September 2004 Commissioner David Jackson QC handed down his report and wrote:

> "The notion that the holding company would make the cheapest provision thought ‗marketable' in respect of those liabilities so that it could go off to pursue other more lucrative interests insulated from those liabilities is singularly unattractive. Why should the victims and the public bear the cost not provided for?" [64]

Hammond later summarised the key findings of the report as:

> ―aThe report recognised that Hardie should pay the cost of future claims brought by persons injured by the use of Hardie asbestos products. It is not appropriate for victims to meet the shortfall. Mr Jackson explicitly made the comment that "James Hardie has in its pockets the profits made in dealing with asbestos and those profits are large enough to satisfy most, perhaps all, of the claims of victims of James Hardie asbestos".
>
> b. In connection with the creation of the foundation in 2001, James Hardie and its officers Peter Schaffron and Peter McDonald engaged in misleading and deceptive conduct. There is evidence to support a finding that MacDonald breached s1309 of the Corporations Law, a criminal offence, punishable by fine or imprisonment.
>
> c. The failure to disclose to the Court that the separation of JHIL and consequent cancellation of the partly paid shares was likely in the short to medium term, was a breach by Hardie and its lawyers of their duty of disclosure.
>
> d. The report indicates that the Hardie proposal for a statutory scheme is "embryonic and tentative" and "somewhat contradictory" and does not permit a concluded view being formed in relation to it".[65]

In December 2004, after the results of the Jackson Inquiry were published and in response to pressure from the Australian Council of Trade Unions, the New South Wales Government and asbestos support

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[63] The inquiry was based on the following matters:
―1. the current financial position of the Medical Research and Compensation Foundation (―the MRCF"), and whether it is likely to meet its future asbestos-related liabilities in the medium to long term;
2. the circumstances in which MRCF was separated from the James Hardie Group and whether this may have resulted in or contributed to a possible insufficiency of assets to meet its future asbestos-related liabilities;
3. the circumstances in which any corporate reconstructions or asset transfers occurred within or in relation to the James Hardie Group prior to the separation of MRCF from the James Hardie Group to the extent that this may have affected the ability of MRCF to meet its current and future asbestos-related liabilities; and
4. the adequacy of current arrangements available to MRCF under the Corporations Act to assist MRCF to manage its liabilities, and whether reform is desirable to those arrangements to assist MRCF to manage its obligations to current and future claimants". Jackson, above n 13, Report - Part A., p. 1.

[64] Ibid, Report - Part A, Sec 1.25, p. 13.

[65] Hammond T., ‗Asbestos Litigation in Australia: Past Trends and Future Directions' (2004), <http://worldasbestosreport.org/conferences/gac/gac2004/PL5-05.php>.

groups, James Hardie agreed to set up a voluntary compensation fund to pay the victims.[66] This agreement was non-binding and subject to certain conditions, including the NSW Government "passing laws to reduce associated legal costs"[67] and the final approval of lenders and shareholders of the company.[68] While this agreement was considered as "the largest ever voluntary compensation offer made in Australia's history…based on sound commercial as well as compassionate principles"[69], it cannot be seen as coming from the company's socially responsible attitude but from the pressure of public demand. Indeed, the intention behind this agreement was not only to calm the public outrage but to protect the other companies in the James Hardie Group from being made legally responsible for further compensation. According to the Jackson Report:

> "There was no *legal* obligation for JHIL to provide greater funding to the Foundation, but it was aware – indeed, very aware…that if it were perceived as not having made adequate provision for the future asbestos liabilities of its former subsidiaries there would be a wave of adverse public opinion which might well result in action being taken by the Commonwealth or State governments (on whom much of the cost of such asbestos victims would be thrown) to legislate to make other companies in the Group liable".[70]

Eventually, in December 2005 James Hardie signed the Final Funding Agreement, where the company agreed to "being satisfied with the tax treatment of the proposed funding arrangements".[71] In November 2006, the deal for compensation was finalised after the government introduced "black hole" tax legislation[72] and the subsequent ruling by the Australian Taxation Office creating tax-exempt status for the voluntary fund and allowing James Hardy's contributions to the compensation fund to become

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[66] James Hardie, 'Company Statement: James Hardie Signs Heads of Agreement' (2004), <http://www.ir.jameshardie.com.au/public/download.jsp?id=1305&page=>.
[67] O'Connell B. T. & Webb L., 'Asbestos Victims versus Corporate Power: The Case of James Hardie Industries' (2006), p. 11, <http://www.afaanz.org/research/AFAANZ%2006145.pdf>.
[68] James Hardie, above n 66, p. 3.
[69] Announced by the company chairman, Meredith Hellicar on the Australian Broadcasting Corporation (ABC), 'TV Program Transcript: The 7.30 Report, James Hardie agrees to largest personal injury settlement in Australian history' (2004), <http://www.abc.net.au/7.30/content/2004/s1270338.htm>.
[70] Jackson, above n 13, Report - Part A, Sec. 1.8, p. 8-9.
[71] James Hardie, 'James Hardie Investor Relations: Principal Deed Signed - James Hardie Board Approves Final Funding Agreement' (2005), <http://www.ir.jameshardie.com.au/jh/news/principal_deed_signed.jsp?>.
[72] *Tax Laws Amendment (2006 Measures No. 1) Act 2006*, <http://www.comlaw.gov.au/comlaw/Legislation/Act1.nsf/0/428BD4D4299C4989CA25714C0025842E/$file/032-2006.pdf>. Also see Australian Taxation Office, 'Blackhole Expenditure (Business Related Costs)' (2006), <http://www.ato.gov.au/taxprofessionals/content.asp?doc=/content/59005.htm>.

tax deductible.[73] After a long-term battle for a compensation fund, in February 2007, following its shareholder's approval, James Hardie made the first payment into the Asbestos Injuries Compensation Fund (AICF)[74]. However, due to negative cash flow in 2008 and 2009, caused by the downturn of the US housing market, the company was not in a position to make payments into the fund which led to an expectation that the fund would run out by mid-2010.[75] Concerned for the victims, in late 2009 the company was assisted by a loan from the New South Wales and Federal Governments to meet the payments[76], which would "cover three years worth of payments from 2011 onwards as needed".[77] Under the agreement, the loan available was valued at $320 million with a cap on withdrawals set at $214 million.[78] In 2014, the company sought to increase the available drawings to $320 million as it expects a shortfall in the fund in 2017.[79] If approved, it would come into effect from 1 July 2015.[80]

6.2.2 Implications for the Board of James Hardie

Despite the agreement for the compensation fund, the Australian Securities and Investments Commission (ASIC) also subsequently took action against executives and directors who were in breach of their duties. As the ASIC Chairman, Jeffrey Lucy stated, "[w]hile the new compensation arrangements were very much welcomed, they do not diminish the need for those responsible for the breaches we have identified to be held to account for their actions".[81] Accordingly, in 2007, board

[73] Australian Council of Trade Unions, 'James Hardie Asbestos Victims Compensation Background Facts' (2007), p. 6-7, <http://www.actu.org.au/Images/Dynamic/attachments/5055/James%20Hardie%20Fact%20Sheet%20080207.doc>.
[74] The Age, 'James Hardie compensation battle finally over' (8 February 2007), <http://www.theage.com.au/news/business/james-hardie-compensation-battle-finally-over/2007/02/08/1170524196283.html>. Also see ABC News, 'James Hardie Makes First Asbestos Payment' (10 February 2007), <http://abc.gov.au/news/stories/2007/02/10/1844626.htm?site=news>.
[75] Brisbane Times, 'Asbestos Fund Could Run Out by Mid -2010' (26 October 2009), <http://news.brisbanetimes.com.au/breaking-news-national/asbestos-fund-could-run-out-by-mid2010-20091026-hev2.html>.
[76] Hawley S., 'James Hardie Victims Get $320m Lifeline' (*ABC News*, 7 November 2009), <http://www.abc.net.au/news/stories/2009/11/07/2736010.htm>.
[77] Addressed by the Hon. John Hatzistergos, Parliament of New South Wales, 'James Hardie and Asbestos – Related Diseases Liability' (2010), <http://www.parliament.nsw.gov.au/Prod/parlment/hansart.nsf/V3Key/LC20100902027>.
[78] Ibid.
[79] Asbestos Injuries Compensation Fund Limited, 'Press Release: Asbestos Injuries Compensation Fund Announces Plans to Propose an Approved Payment Scheme Due to Anticipated Shortfall (15 September 2014), <http://www.aicf.org.au/docs/Press%20Release%20150914%20Final.pdf>.
[80] Ibid.
[81] Australian Securities and Investments Commission, 'ASIC commences proceedings relating to James Hardie' (2007), <http://www.asic.gov.au/asic/asic.nsf/byheadline/07-35+ASIC+commences+proceedings+relating+to+James+Hardie?openDocument>.

members were charged by ASIC, in relation to disclosures regarding the funding of the foundation.[82] The public statements made in 2001 and approved by the board, explaining that the foundation was ―fully funded" to provide compensation for claimants, was proven to be unfounded and it was later established that there was a shortfall in funding, claimed to be up to $2 billion.[83] With this misleading statement, those who were involved were found to be in breach of the *Corporations Act 2001 (Cth)* and were, therefore, held responsible for their actions.[84] ASIC made its case under the following sections:[85]

- Section 180: care and diligence – directors and other officers.
- Section 181: good faith – directors and other officers.
- Section 1041E: false or misleading statements.
- Section 1041H: misleading or deceptive conduct.

In April 2009, the NSW Supreme Court found that the former directors and executives were in breach of the Corporations Act by making misleading or deceptive statements to the public over the company's ability to pay compensation, declaring that:

> ―JHIL contravened Section 999 by making a statement or disseminating information, namely, statements made on its behalf by its Chief Executive Officer at a press conference that:
>
> (a) were false in a material particular or materially misleading in that they falsely represented that:
>
> (i) it was certain that the amount of funds made available to the Foundation would be sufficient to meet all legitimate present and future asbestos claims brought against Amaca and Amaba;
>
> (ii) the material available to JHIL provided a reasonable basis for the assertion that it was certain that the amount of funds made available to the Foundation would be sufficient to meet all legitimate present and future asbestos claims brought against Amaca and Amaba;

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[82] Ibid.

[83] Australian Manufacturing Workers' Union, ‗Concerns over Hardie's Ability to Pay Compensation' (30 April 2009), <http://www.amwu.org.au/read-article/news-detail/283/Concerns-over-Hardie%E2%80%99s-ability-to-pay-compensation/>.

[84] Justice Gzell stated that, ―I have found that Mr Macdonald breached Section 180(1) in approving for release the Final ASX Announcement, or in failing to advise that the Final ASX Announcement not be released, or that it be amended before being released to remove the matters that were false or misleading".
Australian Securities and Investments Commission v Macdonald (*No 11)* (2009) 230 FLR 1, at [1281].
Also see Gibbs K., ‗Judgement Day for James Hardie Execs, Victims' (2009), <http://www.thenewlawyer.com.au/article/Judgement-day-for-James-Hardie-execs-victims/478361.aspx>.

[85] *Australian Securities and Investments Commission v Macdonald* (*No 11)* (2009) 230 FLR 1.
Also see Cunningham R., ‗James Hardie Prosecution- Implications for Company Directors and Officers, FlowerandHart Lawyers: Corporate and Financial Services Bulletin' (2009), <http://www.firmsite.com.au/flowerandhart/docfiles/James%20Hardie%20Bulletin%2011%20May%202009.pdf>.

(iii) Mr Macdonald believed that it was certain that the amount of funds made available to the Foundation would be sufficient to meet all legitimate present and future asbestos claims brought against Amaca and Amaba;

(iv) JHIL had received expert advice from PwC and Access Economics that supported the statement that it was certain that the amount of funds made available to the Foundation would be sufficient to meet all legitimate present and future asbestos claims brought against Amaca and Amaba; and

(v) JHIL did not have any potential claims on the assets of Amaca and Amaba;

(b) JHIL knew or ought to have known were false in a material particular or materially misleading; and

(c) were likely to induce the sale or purchase of JHIL shares and have the effect of increasing or maintaining the market price of JHIL shares".[86]

Shortly afterwards, in August 2009, the former CEO and directors who authorised these false statements, faced penalties involving disqualifications from holding corporate office and fines.[87] As can be seen, the punishments were not given for the results of asbestos related diseases but for ―authorising a misleading statement".[88] The severity of the punishment in no way matches the severity of Hardie's acts against those affected by its products. Australian Manufacturing Workers state secretary, Paul Bastian, said that ―[t]here are real problems with corporate law in this country when a scheme can be devised to the extent here to dud so many people in such dire circumstances, and they simply get disbarred and simply get a fine".[89]

This case can be used to demonstrate the injustice to society where a company causing death or injuries to workers or customers did not receive an appropriate level of penalty. Clearly, the penalties of fines and bans were ―not enough considering the extent of their immoral and illegal behaviour and the harm

[86] *Australian Securities and Investments Commission v Macdonald (No 12)* (2009) 259 ALR 116, at [479].
[87] James Hardie Industries NV was fined $80,000 for breaches of continuous disclosure rules. Peter Macdonald, the former director and CEO was fined $350,000 and banned from managing a company for 15 years. Peter Shafron, company secretary and general counsel was fined $75,000 and banned for 7 years. Phillip Morley, Chief Financial Officer and other seven non-executive directors, Meredith Hellicar, Michael Brown, Michael Gillfillan, Martin Koffel, Geoffrey O'Brien, Gregory Terry and Peter Willcox were fined $30,000 and banned for 5 years.
Australian Securities and Investments Commission v Macdonald (No 12) [2009] NSWSC 714.
Also see Australian Securities and Investments Commission (ASIC), ‗09-152 James Hardie civil penalty proceedings' (2009),<http://www.asic.gov.au/asic/asic.nsf/byheadline/09152+James+Hardie+civil+penalty+proceedings?openDocument#>.
[88] Peacock M., James Hardie Fines ‗a Joke' (*ABC News, 7:30 Report*, 20 August 2009), <http://www.abc.net.au/news/stories/2009/08/20/2662140.htm>.
[89] ABC News, ‗Banton's widow 'disappointed' with Hardie fines' (20 August 2009), <http://www.abc.net.au/news/stories/2009/08/20/2661579.htm>.

the company's deadly asbestos products have caused".[90] Therefore, the issue here is that minimal financial costs and few criminal prosecutions may not be sufficient to deter businesses from engaging in unethical practices. As Gooden stated:

> "No employer is prosecuted under criminal law for assault, negligence, recklessness, manslaughter or grievous bodily harm. The simple reason for this is that the capitalist state has always attempted to quarantine capitalist businesses from criminal law and cocoon them in separate industrial and occupational health and safety laws, which the big employers are not afraid of violating".[91]

The legal battles were significantly extended with many appeals. The former directors, with the exception of the CEO, Peter Macdonald, applied to the NSW Court of Appeal, which subsequently overturned the decisions against them in 2010.[92] ASIC appealed that ruling in the High Court of Australia and in May 2012 the High Court upheld the New South Wales Supreme Court 2009 decision, confirming the former James Hardie non-executive directors breached their duty to act with care and diligence by approving a misleading statement to the stock market over the asbestos victims' compensation fund.[93]

Behind the legal battles, what can be learned from the James Hardie case is that not only did the penalties James Hardie receive not match the seriousness of its wrongdoings but they were only for misleading conduct, after the injury causing actions were proven, and not for permitting the injury causing activities to continue after the company was aware of the risks. This clearly indicates that to be able to ensure compliance by corporations, the regulations must provide a sufficient deterrent through the application of appropriate and enforceable penalties. While corporations should conduct their business in a moral and ethical manner to avoid the risks to financial performance and reputation,

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[90] Australian Council of Trade Unions, 'Penalties for Ex-Hardie Directors are Not Enough' (2009), <http://www.actu.asn.au/Media/Mediareleases/PenaltiesforexHardiedirectorsarenotenough.aspx>.
[91] Quoted in Meerding D., 'Workplace Deaths Need to Stop' (*Green Left Weekly*, 8 September 2004), <http://www.greenleft.org.au/node/31482>.
[92] *Morley and others v ASIC* [2010] NSWCA 331
[93] *Australian Securities and Investments Commission v Hellicar* (2012) 247 CLR 345; and *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465.
Also see Austin R., Standen M. & Reynolds C., 'The High Court Decides the James Hardie Case' (2012), <http://www.minterellison.com/files/uploads/Documents/Publications/Alerts/NA_20120509_JamesHardieDecision.pdf>; and The Sydney Morning Herald, James Hardie Directors Lose Final Appeal' (13 November 2012), <http://www.smh.com.au/business/james-hardie-directors-lose-final-appeal-20121112-298v1.html>.

imposing stringent penalties for non-compliance with CSR would provide stronger incentives for them to engage in socially responsible behaviour.

6.2.3 Case Analysis

James Hardie's behaviour over a long period of time was clearly derived from the shareholder primacy theory and aimed at maximising shareholders' returns. As Redmond noted:

> "Each of [its] decisions was driven by the interest of Hardie shareholders. What is missing in each is a concern for their effect upon those injured by past asbestos operations. That effect was profound and direct. The issues before directors and managers posed are seen in terms of the legal construction of the social reality of the situation, rather than in terms of their effect on individuals whose lives have been or will be painfully diminished by making or using the group's products. The human lives affected by the decisions are obscured from view, not part of the utility calculus except in so far as they may generate adverse governmental action".[94]

This traditional view distracted the company from acknowledging the reputational and other consequences of its anti-social business behaviour. By concentrating on short-term profits at the expense of others in society, the company ultimately adversely affected its financial performance.[95] If the company had shown a more responsible attitude towards society, the damage it sustained could have been reduced significantly.

Ironically, despite the public exposure of the company's unethical behaviour, the company still claimed in its 2003 annual report that its "practice over many years has been…the maintenance of high standards of integrity and ethical behaviour, through the implementation of sound policy".[96] This statement contradicts reality. If the company had really been interested in ethical practices, less aggressive responses to the victims' claims would have been made much earlier, and a compensation fund should have been offered before any public disruption was imminent. In addition, much more should have been done for the protection of its workers and customers as soon as concerns were raised.

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[94] Redmond P., *Supplementary Submission, Parliamentary Joint Committee on Corporations and Financial Services* (Commonwealth of Australia Government, 2006), p. 5.
[95] Tozer L. & Hamilton F., 'Aethical' Corporations: Is There a Case to Answer Under a 'Social Contract'? (2006), The Australasian Conference on Social and Environmental Accounting (CSEAR) Conference, Wellington, NZ, 22-24 November, p. 14, <http://www.victoria.ac.nz/sacl/CSEAR2006/documents/tozer-hamilton.pdf>.
[96] James Hardie Annual Report 2003, p. 32, <http://www.ir.jameshardie.com.au/jh/artable.jsp>.

James Hardie used statements in its reports for the purpose of public relations. Another example was shown in the following statement:

> —The core responsibility of directors is to exercise their business judgement in the best interest of the company and its shareholders. Directors must fulfill their fiduciary duties to shareholders in compliance with all applicable laws and regulations. As appropriate, directors will also take into consideration the interests of other stakeholders in the company, including employees, customers, creditors and others with a legitimate interest in the company's affairs".[97]

The fact that James Hardie was able to boast in its Annual Reports of its compliance with ethical standards and good corporate governance also raises serious doubts over the ability of voluntary corporate governance systems to impact on the ethical behaviour of corporations.[98] The gap between what was reported and what actually happened also creates concerns over the credibility of management reports, leading to a consideration of the need for more transparency and accountability in corporate reporting.[99]

Overall, this case can be used to highlight two major points in this thesis:

1. A voluntary mechanism controlling corporate activities does not always work and, in those cases, regulation is necessary; and
2. Even where regulation is available, it must be such as to ensure compliance.

James Hardie's failure to engage with voluntary CSR demonstrates the need for regulation to ensure companies meet at least minimum standards of social responsibility. Additionally, the case shows that what is lacking is a determination by legislators to provide appropriate penalties for the company and its human agencies that caused such massive consequences to workers and members of the public. It also highlights the repercussions of public opprobrium when corporations ignore their social responsibilities. As a result of these consequences, the company had to work on repairing its reputation and regaining its position in the market. Several strategies were used to shield its business from the increased public and political threats that would have impacted on its ability to continue making profits.

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[97] James Hardie Annual Report 2003, p. 51, <http://www.ir.jameshardie.com.au/jh/artable.jsp>.
[98] Tozer & Hamilton, above n 95, p. 16.
[99] Ibid.

To reduce the pressure, its public statements described the creation of the Foundation as a voluntary act and fully funded, giving certainty to claimants. Although it is true that the Foundation was set up voluntarily, it only came about after intense pressure was brought to bear on the company. This may be used to support the criticisms that the company's underlining intention in engaging with voluntary activities was to safeguard its economic performance rather than through any concern for the victims who had suffered from its corporate activities. Additionally, the use of legal tactics to minimise the financial risk and limit the company's liability against future claims raises the question of whether existing law allows corporations to avoid their responsibilities and liabilities.[100] This may encourage a growing appetite for amended regulation to ensure corporations can be held to account for their activities.

6.3 BHP in PNG Case

The case of BHP in Papua New Guinea is another example of what can happen if companies fail to adopt and apply voluntary CSR policies and concentrate instead on profit maximisation. The main differences between this case and the James Hardie case are the location in which BHP was operating and the effects of its activities on the local community. While James Hardie operated inside Australia and the negative effects of its activities were on the health of individuals affected by its products, BHP was operating overseas in PNG, where its negative effects were on the environment and the lives and livelihood of the local indigenous people. The BHP case is used in this thesis to illustrate the argument that society's well-being cannot necessarily be ensured through reliance on voluntary CSR alone. Where there is a lack of effective regulation and enforcement of social, environmental and human rights standards in host countries, particularly in under-developed nations such as PNG, there may be a need for some form of control by home countries to ensure that these standards are not violated by their national corporations.

[100] As viewed by *The Age*, ~~t~~he legal structure Hardie created appears to be solid. Under the corporate law concept of the corporate veil, companies and not their shareholders are individually responsible for liabilities, even if they are part of a larger group. That means Hardie's new, Netherlands-based, Australian-listed parent company and the old Australian parent are protected from claims against Amaca and Amaba". The Age, _The Road to a Corporate Inquisition' (31 July 2004), <http://www.theage.com.au/articles/2004/07/30/1091080439991.html>.

6.3.1 Background

Mining has been an important business in the history and economy of Australia. It is still the biggest revenue-earner for the country and, over the years, it has contributed positively to improving Australian standards of living. A group of Australian companies have operated in Papua New Guinea's western province since 1984, mining copper and gold from the OK Tedi mine. By the early 1990s, BHP Ltd had secured a controlling interest (52%) in Ok Tedi Mining Limited (OTML), being a joint venture company, working in partnership with the State of Papua New Guinea (30%), and the Canadian company, Inmet Mining Corporation (18%).[101] Together they ran the mine, and almost immediately produced a serious negative effect on the surrounding environment. The extraction method being used was aggressive, and changed the lives of tens of thousands of people who made their living along the river system, whether by growing crops, fishing, or engaging in other related activities.[102]

The OK Tedi River is hugely important ecologically, as it flows initially into the Fly River and then into the Gulf of Papua, eventually reaching the Torres Strait.[103] Its journey is around 1,000 kilometres long, and it is amongst the largest river complexes in the world.[104] Therefore, any problem produced by the OK Tedi mine could become extremely far-reaching. Daily, the OTML treatment mill discharged about 80,000 tonnes of tailings straight into the river.[105] In the early years of its operation, the company only mined for gold, which it did through the use of cyanide, allowing large amounts of this chemical to enter the river, resulting in the decimation of fish, plant and forest, which affected the livelihoods of the local population.[106]

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[101] Banks, G., „Papua New Guinea Baseline Study, Mining, Minerals and Sustainable Development' (2001), University of New South Wales, Unisearch, No. 180, p. 16-17.
[102] WWF Global, Ok Tedi, Papua New Guinea: Belching Out Copper, Gold and Waste, <http://wwf.panda.org/what_we_do/where_we_work/new_guinea_forests/problems_forests_new_guinea/mining_new_guinea/ok_tedi_forest_new_guinea/>.
[103] Townsend P. K. & Townsend W. H., „Assessing an Assessment: The Ok Tedi Mine' (2004), <http://www.maweb.org/documents/bridging/papers/townsend.patricia.pdf>.
[104] Ibid.
[105] Van Zyl D., Sassoon M., Digby C., Fleury A. M. & Kyeyune S., „Mining for the Future, Appendix H: Ok Tedi Riverine Disposal Case Study' (2002), *Mining, Mineral and Sustainable Development*, International Institute for Environment and Development, p. 6, <http://pubs.iied.org/pdfs/G00561.pdf>.
[106] Ibid.

In 1987 the company began mining for copper. The resulting copper concentrates were then sent, via a pipeline, to a river port called Kiunga, on the Fly River.[107] Unfortunately, there were many occurrences of the pipe breaking, allowing the concentrate to leak out and contaminate large areas of land around the pipes.[108] This, combined with the tailings discharged direct into the river, which after heavy rain were swept into the forest, resulted in the contamination of the land increasing to cover 30 square kilometres.[109] The increased waste discharge from the Ok Tedi Mine can be seen from its annual production figures from 1984 to 1998 shown below:

Annual production at the Ok Tedi Mine

Year	Waste rock	Tailings	Copper in waste	Copper product	Gold product
		(thousand tonnes)			(ounces)
1984	96.750	1,731	0.1	-	32,399
1985	904.419	5,945	1	-	523,847
1986	10,347	7,770	1	-	601,476
1987	13, 852	9,719	20	39.488	583,918
1988	25,946	14,935	42	52.677	580,135
1989	29,955	23,596	63	135.309	512,975
1990	32,722	27,463	67	170.210	443,766
1991	36,013	27,011	67	204.459	355,864
1992	27,348	26,742	65	193.359	337,415
1993	17,385	28,621	55	203.184	394,039
1994	32,693	29,667	73	207.236	476,643
1995	41,897	30,689	98	212.737	482,132
1996	44,019	28,504	118	185.665	425,611
1997	29,211	15,469	95	111.515	265,758
1998	42,378	22,286	80	151.556	413,265
Total	384,767.169	300,148	845.1	1,867.395	6,429,243

Table 5 Source: BHP 1999[110]

As copper is one of the most deadly metals when it is brought into contact with ecosystems, it was not surprising that, when combined with other waste materials in the tailings and discharged into the river,

[107] Keogh J. H., ‗Seeing the Unforeseeable: Risk Management Aspects of Due Diligence in Environmental Management Systems' (1998), p. 6, <http://www.prres.net/proceedings/proceedings1998/papers/keog4ai.pdf>.
[108] Ibid.
[109] Kirsch S., ‗Cleaning Up Ok Tedi: Settlement Favours Yonggom People' (1996) 4(1), *Journal of the International Institute,* <http://quod.lib.umich.edu/j/jii/4750978.0004.104?view=text;rgn=main>.
[110] Extracted from Van Zyl et al, above n 105, p. 7.

it brought devastation to the local environment.[111] In addition, the tailings increased the amount of sediment polluting the water which became unusable for human consumption and ~~k~~killed hundreds of fish, prawns, turtles and crocodiles".[112] The river therefore became incapable of supporting the ecosystem and the additional sediment also caused the river bed to rise approximately five times higher than was previously known.[113] This meant the river banks were too low to contain the water, resulting in flooding over crop producing areas, therefore also making the land unsuitable for growing vegetables and sago.[114] The evidence is shown in the pictures below.

Dieback of vegetation in the Ok Tedi River Catchment, 1996

Photo credit S. Kirsch[115]

[111] Harper A. & Israel M., ‗The Killing of the Fly: State-Corporate Victimization in Papua New Guinea, Resource Management in Asia-Pacific' (1999), Working Paper No. 22, Australian National University, Canberra, p. 4, <https://digitalcollections.anu.edu.au/bitstream/1885/40949/3/rmap_wp22.pdf>.
[112] Ibid.
[113] Turare R. & Kavanamur D., ‗Reinvigorating Sustainable Development in Papua New Guinea: A Systems Thinking Approach' (1999) 50, *Development Bulletin*, p. 26.
[114] Hettler J. & Lehmann B., ‗Environmental Impact of Large-Scale Mining in Papua New Guinea: Sedimentology and Potential Mobilization of Trace Metals from Mine-Derived Material Deposited in the Fly River Floodplain' (1995), South Pacific Regional Environment Programme, SPREP Reports and Studies Series no. 90.
[115] Extracted from Papua New Guinea Constitutional & Law Reform Commission, ‗Review of Environmental and Mining Laws Relating to Management and Disposal of Tailings' (2013), Issues Paper 6, p. 25, <http://www.paclii.org/pg/LRC/IP_06.pdf>.

Effects of Ok Tedi Mine on the Ok Mani and Ok Tedi Rivers

Source: Papua New Guinea Constitutional & Law Reform Commission 2013[116]

Indigenous people who relied on their natural resources for survival suffered from the resulting lack of food. The by-products of mining operations therefore became a threat to their basic requirements for living and, consequently, to their very existence. Not only did the mining affect their ecological system, it was also „culturally destructive, threatening the integrity of their heritage and identity".[117] Unfortunately, the damage is likely to continue, even under its new ownership, as Professor Doug Holdway from the Royal Melbourne Institute of Technology noted:

> „We're going to see a lot more damage in the future, not less. If you put 400 million tonnes of tailings down a river system, there should be no surprises that you're going to have significant and biological impacts that will last for decades, possibly even centuries".[118]

Originally, the Papua New Guinea government required the corporation to provide a tailings dam, for the purpose of preventing waste being discharged into the river. However, just before the company was

[116] Ibid, p. 23.
[117] Henry D., „Leaving the Scene of the Mine' (2005), <http://www.acfonline.org.au/articles/news.asp?news_id=93>.
[118] Quoted in Marshall W., „Australian Mining Giant Leaves Environmental Disaster in Papua New Guinea' (2002), <http://www.wsws.org/articles/2002/apr2002/png-a09.shtml>.

due to commence operations, the dam foundations were destroyed by a landslide and the Papua New Guinea government therefore allowed the company to start operating without a dam.[119] This illustrates that the problems that subsequently arose from the company's operation were not only from corporate practices but also from political decisions. The environmental damages might therefore be seen as a result of ~~–s~~state-corporate crime".[120]

In 1989, the PNG government declared that it would make a decision on building a new tailings dam later. However, that was not instigated because civil war broke out in Bougainville, resulting in a loss of export income from the Panguna mine located there.[121] BHP contended that to build the OK Tedi dam would cost the company about 1.5 billion Australian dollars and declared the consortium could not afford this and would have to cease its operations if the tailing dam was required.[122] That would have resulted in the loss of another 20 per cent of PNG's exports and a further reduction of over 10 percent of its GDP.[123] Given the circumstances, the government gave BHP permission to continue operating without the dam, as long as it limited the environmental damage to that previously predicted.[124]

This action displayed a lack of motivation and ability by the host government to protect the rights and well-being of its citizens from abuse by foreign corporations. It was subsequently noted in relation to this failure that ~~–th~~e Papua New Guinea government could not organise the proverbial piss-up in a brewery, let alone foreign investment in the mining and petroleum industries".[125] That problem also brought public attention to the desirability of direct control of corporate activities through home state regulation in the hope of reducing the problem of double standards being applied in the international arena.

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[119] Van Zyl et al, above n 105.
[120] Harper & Israel, above n 111.
[121] Keogh, above n 107, p. 7.
[122] Ibid.
[123] Ibid. Also see Marshall W., _Australian Mining Giant Leaves Environmental Disaster in Papua New Guinea' (2002), <http://www.wsws.org/articles/2002/apr2002/png-a09.shtml>.
[124] Ibid.
[125] Filer C. & Imbun B., A Short History of Mineral Development Policies in Papua New Guinea, 1972-2002, in R. J. May 2009, *Policy Making and Implementation: Studies from Papua New Guinea* (ANU E Press, 2009), p. 75.

6.3.2 Case Analysis

During the 1980s, Papua New Guinea was actively seeking investment from foreign mining companies by lowering its environmental protection standards.[126] When the OTML tailing dam could not be constructed as part of the agreement to deal with dangerous waste, the Papua New Guinea government gave BHP a dispensation to continue operations, fearing the loss of income for the country.[127] With the pressures of the civil war and the closure of the Bougainville Copper mine, the government simply chose to let the company discharge mine waste into the river.[128] The Minister for Environment and Conservation, Mr Waim, stated that:

> —Everybody [Ministers] were concerned with the effects on the Fly River and everybody was concerned with the welfare of the nation. We decided in favour of the people. It was the best decision any responsible government could take under the circumstances. In anything there has got to be give and take. We risked our environment in favour of the people."[129]

This decision concentrated on economic outcomes rather than the environmental damage caused by the disposal of mine tailings into the river system. A spokesperson for the Government said:

> —the government [did this] after giving much thought to the advantages and disadvantages of the project, [believing] at that time that the overall development advantage to the nation outweighed the environmental impact on the Fly River system, as it was not considered permanent".[130]

Thus, the Ok Tedi case demonstrated that economic development in host developing countries, such as PNG, could undermine the political will of their governments to control corporate activities. Despite PNG having regulations to protect the environment and the lives and livelihood of the indigenous inhabitants, the government allowed the perceived economic benefits to outweigh its responsibilities to protect those rights. The resulting violation of social, environment and human rights standards not only illustrated the lack of ability or willingness of the host country to enforce regulation, but also showed

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[126] —The First Supplemental Agreement between the PNG government and OTML allowed the mine to discharge tailings directly into the Ok Tedi River. Seven subsequent Supplemental Agreements to the same effect were negotiated between OTML and the PNG government up until 1995". Harper & Israel, above n 111, p. 10.
[127] The reasons given why the tailing dam could not be constructed were because of a landslide destroying the foundations and the costs of a new dam being prohibitive. Keogh, above n 107, p. 7.
[128] See Filer & Imbun, above n 125.
[129] Post Courier, 24 September 1989, p. 1.
[130] Times of PNG, 17 May 1989, p. 23.

that relying on CSR to fill the regulatory gap was not effective. As there was no enforcement, BHP ignored its social responsibility and concentrated on maximising its profits.

Fortunately, those who suffered from BHP's operation were able to bring their case to an Australian court.[131] The plaintiffs sought damages and an injunction which would have stopped any further tailings being released into the river system. When the case was brought, the Supreme Court of Victoria found that it did not have jurisdiction to hear the claims in respect of trespass, nuisance or negligence because the alleged offences took place outside Australia.[132] However, the claims involving public nuisance or negligence resulting in loss of amenity could be heard.[133] Byrne J. held that:

> —I was referred to a number of decisions of the courts in the U.S. and Canada which were concerned with jurisdiction where a negligent act in one jurisdiction caused, directly or indirectly, damage to the plaintiff's real property in another. It is not necessary for me to resolve the question whether the claim may be brought in the court of the place where the tort was committed or that of the place where the damage was suffered, for in this case both occurred in P.N.G., outside the jurisdiction of this court. It is sufficient for my purposes that these cases accept that the action was local so that the question as to the jurisdiction of the court to entertain a claim for foreign negligence was a live one...
>
> I conclude, therefore that, at common law, a claim in negligence for damage to land is local and that, where the negligent acts and damaged land are outside Victoria, this court is without jurisdiction.
>
> On the other hand, where the claim is for negligence for damage other than to land, this court will accept jurisdiction provided the two-fold requirements of *Phillips v Eyre* (1870) L.R. 6 Q.B. 1, are satisfied. These requirements as applied in Australia are: first, that the circumstances giving rise to the claim are of such a character that, if they occurred within Victoria, a cause of action would have arisen entitling the plaintiff claims to enforce; and second, by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to, and at the time of judgment continue to give rise to, a civil liability of the kind which the plaintiff claims to enforce".[134]

Because it was necessary to satisfy the second requirement, the defendants submitted that the court had no jurisdiction to determine whether the circumstances alleged gave rise to civil liability under PNG law, as ~~–~~it would be an impermissible intrusion upon the sovereignty of PNG for this court to undertake that task".[135] However, the court held that:

> —Recognising that there may be difficulties of proof in a given case, I cannot accept that this court is denied jurisdiction because this involves hearing evidence as to how a PNG court might formulate or

[131] *Dagi v Broken Hill Proprietary Co Ltd (No 2)* [1997]1 VR 428.
[132] Ibid
[133] Ibid.
[134] Ibid, p. 442-443.
[135] Ibid, p. 452.

> even create a principle of its own domestic law. Bearing in mind that the point here is not put in support of a forum non conveniens argument, I do not accept that this court lacks jurisdiction to hear and determine as a question of fact what is the relevant PNG domestic law".[136]

In 1996, there was an out-of-court settlement, which included $110 million as compensation to villagers with an additional $40 million to the most affected areas on the Lower Ok Tedi.[137] Ultimately, BHP agreed to examine options for removing the tailings and rehabilitating the polluted areas.[138] The company would also pay for the plaintiff's legal costs of $7.6 million.[139] Whether the settlement was a result of public pressure or an acceptance by BHP that it had a moral liability, it showed that the negative effects of its operations resulted in financial consequences for the company. The case also demonstrated that if BHP had voluntarily acted more responsibly in the first place, it would not have been exposed to liabilities created by its activities. The impact on corporate financial performance and its public image was not compatible with short-term gain through ignoring social responsibility. As Rae noted:

> —While simple cost-effectiveness in terms of mine operations might be realised by riverine tailings disposal, recent experience indicates that those benefits can be outweighed by the costs associated with the resulting environmental and social impacts and damage to company reputation".[140]

After the settlement was reached, the plaintiffs' solicitors announced that:

> —The landowners regard the settlement as a victory for all concerned. It should send a message to the international investment community that any dispute that arises in a major resources project in PNG can be resolved peacefully and with goodwill. Landowners believe that the result has vindicated their decision to pursue their remedy through the Courts in Australia and PNG".[141]

Notwithstanding this, the settlement did not really compensate for the environmental loss or the human rights violations. The compensation also did not compare with the financial benefits the company gained in those areas over a very long period of time. Moreover, the settlement was reached under the

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[136] Ibid.
[137] Dixon N. 1996, 'Ok Tedi Villagers Force BHP Back Down' (1996), <http://www.greenleft.org.au/node/11609>.
[138] Harper & Israel, above n 111, p. 6. Also See Banks G. & Ballard C., 'The Ok Tedi Settlement: Issues, Outcomes and Implications' (1997), National Centre for Development Studies and Resource Management in Asia-Pacific Project, Australian National University, Canberra.
[139] Ibid.
[140] Rae M. 2000, 'Rivers are No Place for Mine Waste, from Mineral Policy Centre Newsletter' (2000) Winter, p. 4, <http://www.earthworksaction.org/files/publications/MPCnews2000winter.pdf>.
[141] Quoted in Hunt M., 'Opposition to Mining Projects by Indigenous Peoples and Special Interest Groups' (1997), *Murdoch University Electronic Journal of Law*, <http://www.murdoch.edu.au/elaw/issues/v4n2/hunt42.html>.

terms of the *Mining (Ok Tedi Restated Eighth Supplemental Agreement) Act 1995* that attempted to block any further legal actions for compensation in both Victoria and PNG and prevent persons from assisting others in taking legal proceedings against the company.[142] The agreement also allowed the company to continue to operate the mine while compensating those who were affected by its operations. The drafting of this agreement was assisted by BHP lawyers, which the plaintiffs' lawyer, John Gordon criticised by saying:

> "When we saw the agreement, we were staggered that a foreign government could draft an agreement that so abrogated the fundamental democratic rights of its citizens and stood in flagrant disregard of international treaties, such as the United Nations Universal Declaration on Human Rights, let alone its own Constitution. But then we had another shock. We noticed that word processing codes at the bottom of the Agreement and the Bill were the same as those emanating from the offices of BHP's Australian lawyers. Thus, human rights and freedoms Australians hold dear were being swept away on the instructions of an Australian company to its Australian lawyers".[143]

This again demonstrated that relying on government action, especially in developing countries does not always achieve positive outcomes. Therefore, there may be a need for assistance by developed countries to restrain multinational corporations from abusing their power and exploiting host countries. Even though home state jurisdiction may allow litigation for violations by multinational corporations in host countries to proceed, this only applies in limited circumstances. This may explain the desirability of home states developing extraterritorial regulation that will extend their control over the overseas activities of their corporations and ensure that they are held accountable for the impact of those activities on host countries.

In 2000, the landowners' representatives commenced further litigation against BHP claiming a breach of contract in relation to the 1996 settlement that was supposed to compensate them for environmental violations and minimise further damage. They stated that BHP was continuing to deliberately discharge

[142] Ibid, Paragraph 108, p. 14. Also see Marychurch J. & Stoianoff N., "Blurring the Lines of Environmental Responsibility: How Corporate and Public Governance was Circumvented in the Ok Tedi Mining Limited Disaster' (2006), Australian Law Teachers Association – ALTA 2006 Refereed Conference Papers, <http://www.alta.edu.au/pdf/conference/published_papers/marychurch_j_stoianoff_n_2006_alta_conference_paper_blurring_lines_of_environmental_responsibility.pdf>.

[143] Gordon J., "Ok Tedi: The Law Sickens From a Poisoned Environment' (1995) 33(9), *Law Society Journal*, p. 58.

tailings into the river contrary to the terms of the agreement.[144] It seemed nothing had improved as 90,000 tonnes of tailings were still being dumped daily into the Fly river.[145] Those proceedings were abandoned at the end of 2003, mainly because of the *Mining (OK Tedi Mine Continuation (Ninth Supplemental) Agreement) Act 2001* which was passed by the Papua New Guinea government, allowing the mine to continue working, and preventing BHP from being sued for any further damage.[146] The Community Mine Continuation Agreement (CMCA) formulated under the *Ninth Supplemental Agreement Act* was signed, in exchange for compensation, by representatives of the communities to support the continued operation of the mine and to provide legislative protection for the company.[147] Again, as can be seen, the PNG government prioritised the economic benefits of the mine continuing over the protection of its citizens. PNG's Minister of Mining at that time stated that:

> —[t]he Ok Tedi mine has and continues to have a significant beneficial impact on affected landowner communities of the Western Province in terms of development activities and the Western Province and the national economy through taxes and dividends and royalty payments".[148]

With the assistance of the government through the rational of its economic argument, the CMCA became a legally binding agreement between the people from the affected communities and OTML. As written, the agreement provides that —neither the State nor any government agency may take, pursue or in any way support proceedings against a BHP Billiton party in respect of an environmental claim relating to the operation of the project".[149] This agreement was clearly a mechanism to control future compensation claims through legal actions.[150] It has been noted that:

> —[The CMCA] binds each and every existing and future members of the impacted community or clan, including without limitation, children and persons who are subsequently born into, or who subsequently

[144] Van Zyl et al, above n 105, p. 17.
[145] Ibid.
[146] Penovic T., 'Undermining Australia's International Standing: The Failure to Extend Human Rights Protections to Indigenous Peoples Affected by Australian Mining Companies' Ventures Abroad' (2005) 11(1), *Australian Journal of Human Rights*, p. 105.
[147] Papua New Guinea Constitutional & Law Reform Commission, above n 115, p. 45.
[148] Haivetta C., 'Mining (Ok Tedi Continuation (Ninth Supplemental) Agreement) Bill' (2001), Second Reading Speech to Parliament, Papua New Guinea, 11 December, p. 1.
[149] *Mining (Ok Tedi Mine Continuation (Ninth Supplement) Agreement Act* 2001, Section 5(1), <http://www.paclii.org/pg/legis/consol_act/mtmcsaa2001589/>.
[150] The Director of the Mineral Policy Institute, Geoff Evans, remarked that —BHP is getting a total legal indemnity against future impacts caused by its Ok Tedi mine, and in so doing has deprived Papua New Guinea of its sovereign right to protect its citizens". Mines and Communities (MAC), 'BHP Deal Faces Supreme Court Today in Australia and Papua New Guinea' (2001), <http://www.minesandcommunities.org/article.php?a=521>.

> join that community or clan. As long as this provision remains, generations of people in the affected communities will remain bound by the terms of the CMCA and its enabling legislation".[151]

From this point of view, the CMCA was inherently unfair, as it became binding on the whole community, even when it was signed by only one purported representative.[152] All members of the community were held to it even when they were opposed and it disadvantaged the whole community by depriving them of recourse for further environmental damage or subsequent loss of their lives and livelihood.[153]

With the continued operation of the mine, it is apparent that there will be further impact on the environment and human rights to the community. Therefore, the CMCA was regarded as providing advantages for shareholders rather than for those who were affected by mining activities. As Kalinoe stated:

> —[The CMCA is] undoubtedly more advantageous to OTML and its shareholders, because it is able to control and minimise its liability for environmental damage, at levels which it knows it can afford. However, this may not necessarily represent a ‗just and equitable' value, or extent of the damage and loss suffered by the affected communities, as a direct or indirect consequence of the environmental damage and resultant loss".[154]

The situation of the CMCA was comparable to that of the Medical Research and Compensation Foundation by James Hardie, which was established to limit its responsibilities and liabilities for future claims. In a similar vein, the CMCA granted BHP immunity from any further liabilities. Questions arose over whether the compensation by BHP was sufficient to cover the damage caused to the

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[151] Papua New Guinea Constitutional & Law Reform Commission, above n 115, p. 47.

[152] Under the Mining (Ok Tedi Mine Continuation (Ninth Supplement) Agreement Act 2001, the agreement is signed —by a person representing or purporting to represent a Community or clan…,[and] that there is no express authority for the person to sign or execute the Community Mine Continuation Agreement.", *Mining (Ok Tedi Mine Continuation (Ninth Supplement) Agreement Act* 2001, Available at: http://www.paclii.org/pg/legis/consol_act/mtmcsaa2001589/.

[153] Matilda Koma from the Papua New Guinea Environmental Watch Group, commented that —[t]his agreement not only deprives a whole community or clan of their rights, but it is given legal force no matter who signed it on the community's behalf". Mines and Communities (MAC), ‗BHP Deal Faces Supreme Court Today in Australia and Papua New Guinea'(2001), <http://www.minesandcommunities.org/article.php?a=521>.

[154] Kalinoe L., ‗The Ok Tedi Mine Continuation Agreements: A Case Study Dealing with Customary Landowners' Compensation Claims' (2008), The National Research Institute (NRI) Discussion Paper No. 105, p. 9, <http://www.nri.org.pg/publications/Recent%20Publications/2010%20Publications/Discussion%20Paper%20105_OkTedi%5B1%5D.pdf>.

environment and the community and how far future damage by the company would be allowed to continue.[155]

Following the passing of the Act, BHP withdrew from the Ok Tedi mine in 2002, transferring its 52 per cent share to the Papua New Guinea Sustainable Development Program.[156] This left the Papua New Guinea government and the local people with a massive clean up operation, and insufficient funding to carry it out in a proper manner, notwithstanding the ongoing decline in the area's sustainability.[157] Thus, the development fund could be described as mere window-dressing for BHP rather than a proper solution to the problems caused by its mining operations in PNG. It was seen as a way for BHP to escape further responsibilities, leading to the grievance that:

> —t[]he terms and conditions of BHP's exit from the OK Tedi mine were not discussed with us before the company left. We feel that BHP is still responsible for the environmental problems in our land and must take on its share of these problems. It is a great injustice that this company has been allowed to escape without fixing the problems that it created, and without cleaning the river that is the life of our people".[158]

Unfortunately, while the public attention and media interest was focusing on the negative effects of mining operations, it appeared that the PNG government at that time did not alter its attitude over its mineral policy process and continued to give mining companies special treatment. Although most would agree that BHP should not have been allowed to evade its responsibilities for the clean up of the Ok Tedi River, the then-PNG government took a different stance, passing the Agreement Act that allowed the company to exit and released it from any future claims over environmental damages.[159] This situation can be paralleled with the way PNG treated Malaysian timber companies, where the

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[155] Henry D., _Leaving the Scene of the Mine' (2005), <http://www.acfonline.org.au/articles/news.asp?news_id=93>.
[156] Knight D., _BHP Billiton Leave the Scene of the Crime' (*Asia Times*, 2002), <http://www.atimes.com/oceania/DA05Ah01.html>.
[157] As Nick Styant-Browne of law firm Slater & Gordon stated:
—in the same way if you were moving out of a house you would clean up and put things in order before you left. That in simple terms is what the landowners want BHP to do before BHP leaves the mine". Molloy F., _BHP Abandoning Ok Tedi - Papua New Guinea to Clean Up' (2001), <http://www.reportage.uts.edu.au/news-detail.cfm?ItemId=12356>.
[158] Mineral Policy Institute, _Western Province Mine Affected People Continue Their Struggle For Justice' (2005), Report on a summit held by the Western Province Alliance for a Sustainable Future held in Kiunga, <http://www.mpi.org.au/campaigns/waste/kiunga_summit/>.
[159] Mas R. F., _Unless Court Intervenes, BHP Exits Ok Tedi Dec. 31' (*American Metal Market*, 14 December 2001), p. 2, <http://business.highbeam.com/436402/article-1G1-81018260/unless-court-intervenes-bhp-exits-ok-tedi-dec-31>.

government was seen as having engaged in corrupt practices, allowing the companies to pursue their self-interests at the expense of local communities.[160] It can also be equated with the treatment accorded the Chinese in relation to their activities at the Ramu nickel mine, where the interests of the local population were effectively undermined by the PNG government in favour of the mining company, again as a result of corruption.[161] As the chairperson of an investigation into corruption in government departments, Sam Koim, stated:

> —The level of corruption has migrated from sporadic to systematic and now to institutionalisation, where government institutions are dominated by corrupt people who orchestrate corruption using lawful authorities. Institutions that are supposed to practice openness and provide check and balance are now becoming a secrecy haven, where they sanction illegality and secrecy".[162]

Following many criticisms of the 2001 agreement, in September 2013 the situation drastically changed when the PNG parliament, led by Prime Minister Peter O'Neill, passed a bill for the PNG government to take over complete ownership of the Ok Tedi mine.[163] At the same time, a separate bill was passed, repealing the immunity of BHP from legal prosecution for claims against the environmental damage caused by its operations at the Ok Tedi.[164] Mr O'Neill stated that:

> —This parliament has done gross injustice to our people, denying their right to have access to have their say and have their claims against the damage that was done to the environment and themselves".[165]

That legislation permits more justice for individuals within the communities in that BHP can now be held to account. While the effect of the removal of immunity is still under scrutiny, one issue that may cause concern is the risk to the economic development of the state in that foreign investors may be

[160] Greenpeace, 'Partners in Crime: Malaysian Loggers, Timber Markets and the Politics of Self-Interest in Papua New Guinea' (2002), <http://www.greenpeace.org/australia/PageFiles/320427/partners-in-crime-malaysian-l.pdf>.
[161] Pacific Media Centre, 'PNG's Ramu NiCo Mine: An Environmental Time Bomb?' (2012), <http://www.pmc.aut.ac.nz/articles/pngs-ramu-nico-mine-environmental-time-bomb>.
[162] Pemberton A., 'Papua New Guinea: New Evidence of Eco-Damage from Nickel Mine' (2012), <http://www.greenleft.org.au/node/51089>.
[163] Bice S., 'Ok Tedi Immunity Gone, With Implications Beyond BHP' (2013), <http://www.miningaustralia.com.au/news/ok-tedi-immunity-gone-with-implications-beyond-bhp>.
[164] Ibid.
[165] Fox L., 'PNG Government Takes Control of Ok Tedi Mine, Repeals Laws Protecting BHP From Legal Action over Pollution' (2013), <http://www.abc.net.au/news/2013-09-19/png-government-takes-control-of-png-ok-tedi-mine/4967004>.

discouraged from doing business in PNG.[166] There is no doubt that there will be some implications from the changes however, hopefully, they will not force the PNG government to reverse its decisions.

Overall, the decisions of the then PNG government regarding the OK Tedi mine showed its collusion with corporate interests, preferencing economic benefits over concerns about environmental damage or human rights abuse. This approach has proved economically successful as, between 1984 and 2011, OTML contributed more than US $11 billion to the economy of PNG, through taxes, royalty payments and dividends etc.[167] Unfortunately, by favouring the economic opportunity, the government's decisions ultimately caused the destruction of its natural resources and threatened the lives and livelihoods of its citizens.

The situation in PNG being linked with government's decision-making can be used as an example of the weakness of political will in host countries. While voluntary CSR may be used as a supplement to regulation, this case also showed that BHP ignored its social responsibilities which resulted in extensive environmental damage to the host country. This provides further evidence that voluntary mechanisms cannot be relied on as there are no enforcement or accountability measures in place. As Kirsch stated:

> "If corporations are granted the authority to regulate their own conduct, setting the standards for emissions, monitoring, and compliance, then surely they must also be held accountable for its outcomes. Yet just the opposite is the case for transnational mining companies like BHP Billiton, which has walked away from environmental disaster at the Ok Tedi mine rather than take responsibility for its actions".[168]

[166] Ibid.
[167] Mackenzie S., Topurua A. & Werror M., 'Using Risk Assessment to Guide Progressive Closure Planning for the Ok Tedi Mine, in A.B. Fourie & M. Tibbett (eds), Mine Closure 2012 (Australian Centre for Geomechanics, 2012), p. 834, <http://www.mineearth.com.au/wp-content/uploads/2013/10/2012_PDF.pdf>.
[168] Kirsch S., 'Litigating Ok Tedi (Again)' (2002), <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/papua-new-guinea/litigating-ok-tedi-again>.

One research study on BHP's CSR practices at the Ok Tedi mine between 1984 and 2000 demonstrated that BHP was likely to engage in CSR disclosure in response to public pressure as a means of protecting its interests and reputation.[169] The findings are shown on the chart below:

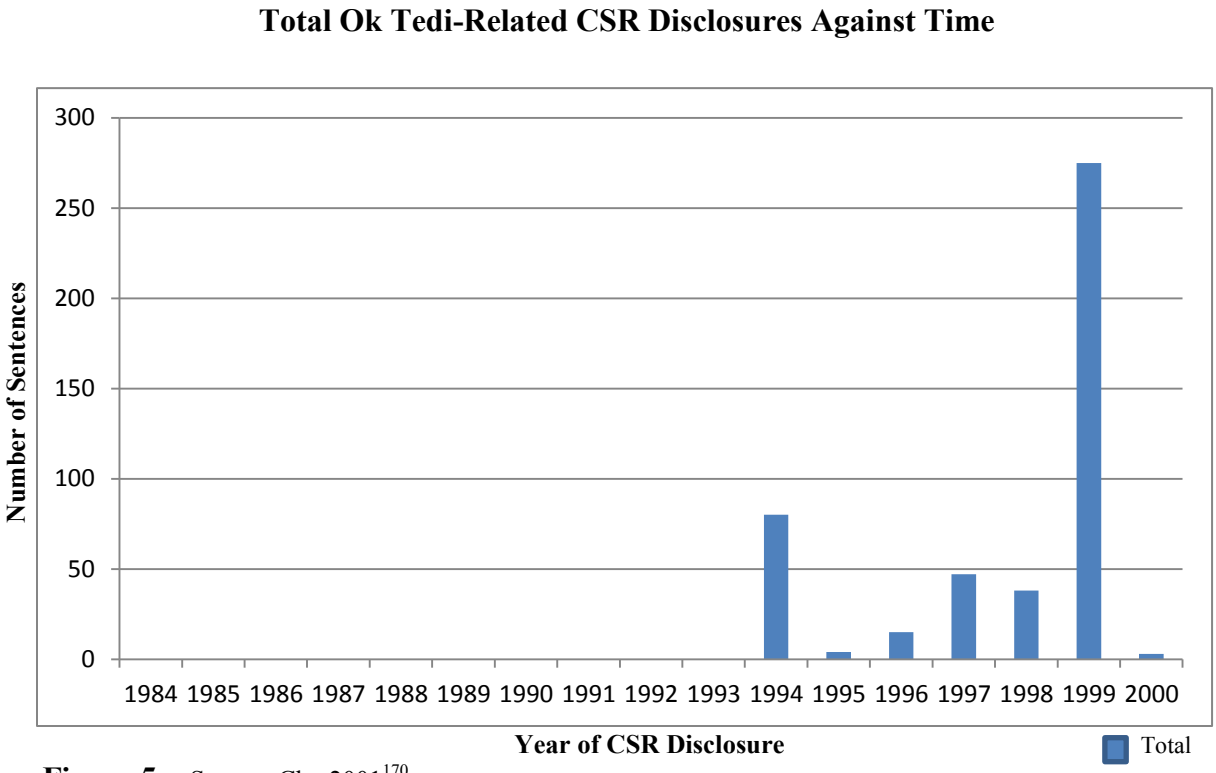

Figure 5 Source: Chu 2001[170]

This illustrates that BHP did not consider CSR as important to its practices until it was taken to court and received public exposure of its operation at the Ok Tedi mine. The company only participated in CSR disclosure after acknowledging the consequences of failing in its responsibilities to society. According to the research:

> —BHP mostly seeks to maintain organisational legitimacy by managing societal opinions (manipulation or deflecting negative events) by disclosing more good news. In some cases, BHP was actually trying to inform its relevant publics about intentions of the company to enhance its social performance when there was good news to report".[171]

[169] Chu B.S.P., _The BHP and Ok Tedi Case, 1984-2000: Issues, Outcomes and Implications for Corporate Social Reporting' (2001) 7(1), *Journal of Asia-Pacific Centre for Environmental Accountability*, p. 11, <http://www.unisa.edu.au/Global/business/centres/cags/docs/apcea/APCEA_2001_7(1)_Chu.pdf>.
[170] Ibid, p. 17.
[171] Ibid, p. 18.

As can be seen, BHP used CSR disclosure as a tool to promote its public perception and protect its interests, which exposed its lack of genuineness in its approach to CSR. This suggests that where regulation or enforcement is lacking, the opportunity for companies to exploit CSR for their own purposes can easily occur. As Chu noted:

> —The PNG government's economic dependence on the Ok Tedi project resulted in the lack of regulation in a relationship whereby BHP had more power to exploit CSR. Therefore, BHP used CSR disclosures in order to influence social norms or perceptions and to influence the distribution of wealth and power".[172]

Consequently, the inherent potential weakness of regulation in host countries where political will may be an issue and the danger of relying on voluntary CSR to fill those gaps may lead to a need to consider alternative mechanism that can ensure compliance and accountability. However, the difficulties for host countries in effectively controlling corporate activities lie in their focus on economic development by attracting investment from multinational corporations. Even where there are local regulations in place, host governments do not always enforce regulations that would interfere with corporate activities. To solve this conundrum, there may be a need to look at home state regulation to provide an alternative. One possible solution might be for home states to strengthen their control over the overseas activities of their national corporations. This approach was proposed in some developed countries, including Australia, and will be discussed further in Chapter 7.

6.3.3 A Voluntary Framework for the Improvement of Sustainability Development in the Mining Industry

There is little doubt that BHP's activities at the OK Tedi mine did severe damage to the standing of Australian companies throughout the world. The case also demonstrates that, for corporations operating overseas to maintain their legitimacy and public support, they cannot claim only to have complied with the law of their host countries.[173] Pressure from the public has contributed to the development of

[172] Ibid, p. 19.
[173] Gunningham N. & Sinclair D., _Voluntary Approaches to Environmental Protection: Lessons from the Mining and Forestry Sectors' (2002), OECD Global Forum on International Investment, Conference on Foreign Direct Investment and

voluntary codes of conduct to ensure that corporations meet acceptable standards of behaviour both in their home country and internationally. One notable available framework for Australian mining industries is the Minerals Council of Australia (MCA)'s *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development*, established in 2005.[174] This Framework is based on a set of sustainable development principles adopted by the International Council on Mining and Metals (ICMM) in May 2003.[175] Those Principles are as follow:

> "Principle 1: Implement and maintain ethical business practices and sound systems of corporate governance.
>
> Principle 2: Integrate sustainable development considerations within the corporate decision-making process.
>
> Principle 3: Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities.
>
> Principle 4: Implement risk management strategies based on valid data and sound science.
>
> Principle 5: Seek continual improvement of our health and safety performance.
>
> Principle 6: Seek continual improvement of our environmental performance.
>
> Principle 7: Contribute to conservation of biodiversity and integrated approaches to land use planning.
>
> Principle 8: Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products.
>
> Principle 9: Contribute to the social, economic and institutional development of the communities in which we operate.
>
> Principle 10: Implement effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders".[176]

The Enduring Value Framework provides critical guidance to assist the mining industry to implement higher standards in their operations, "which seeks to maximise the long-term benefits to society that can be achieved through the effective management of Australia's natural resources".[177]

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the Environment: Lesson to be Learned from the Mining Sector, 7-8 February 2002, p. 4, <http://www.oecd.org/dataoecd/46/1/1819792.pdf>.

[174] Minerals Council of Australia, "Enduring Value: The Australian Minerals Industry Framework for Sustainable Development, Guidance for Implementation' (2005), <http://www.minerals.org.au/file_upload/files/resources/enduring_value/EV_GuidanceForImplementation_July2005.pdf>

[175] Ibid p. 2.

[176] Ibid, p. 3.

[177] Sarker T. & Gotzmann N., "A Comparative Analysis of Voluntary Codes of Conduct in the Australian Mineral and Petroleum Industries" (2009), Centre for Social Responsibility in Mining, University of

Compliance with this Framework would assist corporations, both in mining and elsewhere, to achieve their commitment to sustainable development and improve their performance regarding their social responsibilities overall. The Framework also suggests bringing indigenous people into the processes of mining operations.[178] By consulting and using their knowledge regarding the environment in the corporate decision-making process, companies could reduce any conflict and their negative impact on the local community.

With the intention of providing a vehicle for mining corporations to behave in a socially acceptable manner, the Enduring Value Framework recognised that corporations have social obligations to support and maintain their legitimacy with the community. It promotes the concept of a "social licence to operate", noting:

> "The Australian mineral industry strongly supports the role of a 'social licence to operate' as a complement to a regulatory licence issued by government. To the minerals industry 'social licence to operate' is about operating in a manner that is attuned to community expectations and which acknowledges that businesses have a shared responsibility with government, and more broadly society, to help facilitate the development of strong and sustainable communities".[179]

BHP as a member of the MCA has developed their policies to encompass this Framework. For example, in regards to Principle 8 where mining companies should encourage the re-use and recycling of their products, BHP stated its commitment in its Sustainability Report 2013:

> "Through our membership of the international Council on Mining and Metals (ICMM), we commit to implementing the ICMM sustainable Development Framework, which requires that we facilitate and encourage responsible design, use, reuse, recycling and disposal of our products along the supply chain. We recognise there is strong business merit in implementing product stewardship programs with other participants involved in the life cycles of our products".[180]

A further example can be taken from its Annual Report 2014, where BHP expressed its commitment to Principle 9 on making a positive contribution to society, when it stated that:

Queensland, <https://www.csrm.uq.edu.au/publications/a-comparative-analysis-of-voluntary-codes-of-conduct-in-the-australian-mineral-and-petroleum-industries>.

[178] Minerals Council of Australia, above n 174, p. 10.

[179] Ibid, p. 2.

[180] BHP Billiton, 'Our Shared Value: Sustainability Report 2013' (2013), p. 11, <http://www.bhpbilliton.com/home/society/reports/Documents/2013/BHPBillitonSustainabilityReport2013_Interactive.pdf>.

—Creating lasting economic and social benefit for our communities is fundamental to our business. This helps create a diversified local economy and ensures our investment continues to benefit the community beyond the life of our operations. We are an active participant in industry and sustainable development forums, such as the ICMM. We seek to understand our socio-economic impact on local communities and host regions through our participation in the ICMM's Mining: Partnerships for Development initiative. This global initiative builds on the ICMM's resource endowment initiative and seeks to enhance mining's contribution to development and poverty reduction through multi-stakeholder partnerships.
Wherever we operate, we contribute taxes and royalties to governments which, in turn are used to provide important public services and amenities to their communities. At many of our locations, we also develop infrastructure to support our operations – including roads, aerodromes, emergency response facilities, housing, public amenities, community facilities – which can be accessed and utilised by local communities and businesses".[181]

In line with BHP's commitment to sustainable development under the Enduring Value Framework, the company demonstrated an example through its Arid Recovery Project in South Australia, where the company is in partnership with several organisations and the local community to restore the flora and fauna destroyed in the Roxby Downs region.[182]

Arid Recovery Project

The combined impacts of feral species and unsustainable farming have devastated Australian ecosystems since European settlement. Over 60 per cent of desert mammals have been driven to total or regional extinction, and many other animals and plants remain threatened. However, a unique partnership titled 'Arid Recovery' has started reversing these trends.

Located near BHP Billiton's Olympic Dam mine in South Australia, Arid Recovery is the largest fenced reserve in Australia from which all feral cats, foxes and rabbits have been removed. The reserve straddles the mine lease and sections of four other pastoral properties, two of which are leased by the Company. Native animals and plants are now thriving within the 86-square-kilometre enclave, which has become both a centre for ecological research and the site of a nationally significant conservation program.

Arid Recovery was initiated in 1987 by a partnership comprising the Olympic Dam mine, the South Australian Department for Environment and Heritage, the University of Adelaide and a community group, Friends of Arid Recovery. The partnership's mission is to 'facilitate restoration of arid zone ecosystems through on-ground works, applied research and industry, community and government partnerships'.

Together with other Arid Recovery partners and collaborators, BHP are committed to ensuring maintenance of the existing reserve and the sustainability of research and public education programs. A key future objective is to leverage broad-scale benefits to the environment and to the perception of resource industries by re-establishing threatened species outside the reserve, on both the Olympic Dam mine lease and surrounding pastoral properties.

Table 6 Source: Minerals Council of Australia 2008[183]

[181] BHP Billiton, _Value through Performance: Annual Report 2014' (2014), p. 55, <http://www.bhpbilliton.com/home/investors/reports/Documents/2014/BHPBillitonAnnualReport2014.pdf>.
[182] BHP Billiton, _Arid Recovery', <http://www.bhpbilliton.com/home/society/environment/Pages/Arid-Recovery.aspx>.
[183] Minerals Council of Australia, _Submission: Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999 (Supplementary Submission)' (2008), p. 7, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2008-10/epbcact/submissions/sublist >.

This example demonstrates how mining companies can contribute to the benefit of society through the implementation of the Enduring Value Framework. While this Framework is a voluntary initiative, members of the MCA[184] can be subject to sanction if they fail to comply with its Principles. The fear of sanction for non-compliance and motivation to increase their reputation could encourage mining companies which are members of the MCA to ensure their commitment to the Framework. However, sanction is the only consequence for members and its effect is questionable as no evidence has yet been found to indicate disqualification of any member.[185] Thus, the effectiveness of this Framework may be seen as relying on whether the mining companies see the opportunity to increase their reputation rather than their concern over the risk of sanctions.

Unfortunately, the history of corporate malpractice in the mining industry, such as the case of BHP in PNG, has created mistrust and scepticism towards mining corporations, especially regarding their involvement with voluntary codes of conduct. Although the industry acknowledges the benefits from pursuing social responsibilities and realises that to be successful it must maintain public support by conforming to social expectations, there are still cases where corporations apply an element of _window dressing' associated with this voluntary initiative. If there is no workable mechanism for auditing or monitoring compliance, voluntary codes may be marginalised in the search for profits. In the words of Gunningham and Sinclair:

> —While such "win-win" opportunities do exist in some industry sectors and for some companies, they are often insufficient to prompt voluntary action, and are frequently overwhelmed by circumstances where no such self-interest exists".[186]

Therefore, although these voluntary codes could mark important changes in corporate behaviour and provide the building blocks for what later could become a set of internationally agreed standards, that will not be the case if compliance relies solely on the promise of financial benefits. If companies relate their social performance to these benefits, it is unlikely that voluntary codes of conduct will effectively

[184] See a list of MCA member companies on MCA website: <http://www.minerals.org.au/corporate/about_the_mca/mca_member_companies>.
[185] Sarker T. & Gotzmann N, above n 177, p. 18-19
[186] Gunningham & Sinclair, above n 173, p. 20.

contribute to the improvement of their behaviour towards human rights and the environment in host countries. As Harrison stated, ―[g]iven that the business community is the last place many would look for altruism, that represents a significant leap of faith".[187] In this regard, voluntary codes of conduct may need to be accompanied by government regulation. In the case of corporations operating in developing countries, where the ability or willingness of governments to initiate control of corporate activities is weak, as can be seen in the case of BHP, a hybrid approach encompassing both mandatory and voluntary mechanisms may be the preferable solution, with part of the mandatory aspect being provided by the corporations' home countries.

6.3.4 The Attempts to Bring Multinational Corporations to Account under National Law

The consequences of BHP's conduct in relation to the Ok Tedi mine can be used as an example of the desirability of increasing control over business to ensure compliance with social, environmental and human rights standards. This not only brings corporate violations to the forefront but could also be used to highlight the lack of enforcement of regulation by host states and the importance of home states in assisting to provide justice for those affected by abuse of corporate power. It could be argued that, because developing countries are very keen to attract foreign investment and may be prepared to loosen their regulations to achieve that result, corporations operating in those countries should be regulated by their home countries, insisting that their home countries' standards should be applied to their offshore activities. However, there is an initial difficulty in bringing multinational corporations operating in host countries to account in their home countries: a matter of jurisdiction, which the Australian government has seemed reluctant to address.

[187] Harrison K., ‗Voluntarism and Environmental Governance', in Parson E. A. (ed), *Governing the Environment: Persistent Challenges, Uncertain Innovations* (University of Toronto Press, 2001), p. 237.

Following public concern over the Ok Tedi case, the Australian Democrats introduced the Corporate Code of Conduct Bill into the Australian parliament in September 2000. The Bill aimed to exert control over the activities of Australian companies and their subsidiaries in foreign countries. Companies employing more than 100 people overseas would be required to adopt codes of conduct concerning human rights, labour rights, health and safety, and environmental standards, and would have had to file reports on their actions with the Australian Securities and Investments Commission.[188] Failure to comply was to be made punishable by fines and/or redress for those damaged.[189] Thus, the Bill contained principles for corporations to adopt and report on those standards, with civil penalties for non-compliance.

In 2004, Senator Natasha Stott Despoja, the then leader of the Australian Democrats, drafted a revised version of the Corporate Code of Conduct Bill that expanded its provisions for extraterritorial regulation by, for example, imposing it onto companies employing more than fifty workers.[190] She argued the need for the legislation, saying, ~~"t~~he self-regulatory approach to corporate standards is not working effectively…We need to change the law to ensure that Australian companies lead the way when it comes to upholding labour standards, respecting human rights and protecting the environment".[191] The Bill was not passed.

It was not only in Australia that this initiative was attempted. There were similar moves in other countries, for example in the US and the UK, but they were also unsuccessful.[192] They did, however, illustrate the trend towards increasing awareness of the desirability of control of corporations operating overseas by their home countries. In Australia, the government regarded the Bill as not necessary and

[188] The Parliament of the Commonwealth of Australia, 'Corporate Code of Conduct Bill 2000' (2000), <http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/040FDF572892D11CCA256F720024ACCA/$file/code.rtf>.
[189] Ibid.
[190] Penovic, above n 146, p. 23.
[191] Australian Democrats, 'Laws Needed to Protects Rights of Workers Overseas' (2004), <http://www.democrats.org.au/news/?press_id=3268&display=1>.
[192] The Code of Conduct Bill in the US is called the McKinney Bill, and in the UK called the Corporate Responsibility Bill (CORE). See Zerk J. A., *Multinational and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006), p. 167-170.

did not support it.[193] One reason given for rejecting it was that, whilst there were cases of poor corporate behaviour abroad, they were considered to be few in number, indicating a lack of evidence of any systemic failure.[194] Despite that, it is possible that the Bill could still be used as a focal point for further debate over the issues it contained.

The main objection to the Bill was that it could be seen as impinging on the sovereignty of other states.[195] This argument links to the concept of international law where all states should be able to govern in their own countries free from any external intervention. Therefore, imposing obligations by extraterritorial legislation can be seen as the home state undermining the host states' own efforts to deal with their own social, environmental and human rights issues. Consequently, extraterritorial legislation can threaten the host states' sovereignty and is ultimately viewed as a threat to the principle of non-intervention.

In short, using Australian law to deal with issues in other countries can be seen as an attempt to impose Australian standards on their traditional values. This could give the impression that local standards are not as good as those in Australia, implying that they are ~~in~~ferior, inadequate or somehow inappropriate".[196] This especially applies if, as in the BHP case, the host country passed laws that had an effect that was directly opposite to that mandated by Australian legislation. According to Mr. Brent Davis, Trade and International Affairs, Australian Chamber of Commerce and Industry:

> ~~"~~The bill says to foreign nations that, 'We do not regard your standards as adequate, and we will ensure our firms do better than you require of them. We will mandate higher standards than you will for yourself'."[197]

[193] The Parliament of the Commonwealth of Australia, 'Report on the Corporate Code of Conduct Bill 2000- Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities' (2001), <http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/1999_02/corp_code/report/report_pdf.ashx>.
[194] Ibid, Paragraph 3.3, 4.44.
[195] Joint Committee on Corporations and Securities, 'Official Committee Hansard' (14 March 2001), p. 37, <http://www.aph.gov.au/hansard/joint/committee/j4633.pdf>.
[196] Ibid, p. 16.
[197] The Parliament of the Commonwealth of Australia, above n 188, Paragraph 3.55.

Clearly, sovereignty will remain as a problematic issue for home states to control actions outside their territorial boundaries. However, even though asserting Australian values may be seen as imperialistic,[198] it is possible that imposing high standards on social, environmental and human rights issues would increase the attractiveness of Australian companies operating internationally. Moreover, improving the quality of life in developing countries might not only reduce inequality amongst nations, but could also provide a higher regard and greater respect for Australian standards.

Criticisms of the failure to pass the Bill were also based on the moral ground that the Australian government failed to protect and improve the communities' conditions in which Australian companies operate. As Beaumont stated:

> "The Australian government has an obligation to prevent the recurrence of these sorts of violations, and address the inability of communities such as those at Ok Tedi to access justice. The Australian legal system has failed to provide means of preventing, or remedies for, human rights violations and environmental devastation caused by companies such as BHP Billiton…in their operations abroad".[199]

In that context, extraterritorial regulation would most likely be of assistance to indigenous people who are in a relatively weak position when faced with the power of corporations. The practices used in the Ok Tedi mine would not have been allowed inside Australia as the standards here are high with effective enforcement. Unfortunately, the Australian government was not able to impose similar standards in Papua New Guinea and the PNG government was not willing to do so. As Geoff Evans, director of Mineral Policy Institute, an Australian NGO, noted, "BHP would never have been allowed to dispose of toxic mine waste directly into rivers in Australia. Yet BHP does this in Papua New Guinea, and continues to do so".[200] Thus, the adoption of the Bill's proposals would have allowed the same standards that apply within Australia to apply to corporations operating overseas and would have assisted with the creation of a universal standard applicable to all. It was expected that the corporate

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[198] Ibid, Paragraph 3.53.
[199] Quoted in Mines and Communities (MAC), 'OK Tedi Landowners Refuse to Let BHP Billiton Escape Justice' (2004), <http://www.minesandcommunities.org/article.php?a=587>.
[200] Mineral Policy Center – MiningWatch Canada, 'Environmental Groups to BHP: Don't Abandon Environmental Responsibilities or Affected Communities' (1999), <http://www.miningwatch.ca/one-worlds-worst-mine-disasters-gets-worse-bhp-admits-massive-environmental-damage-ok-tedi-mine-papu>.

code of conduct proposed in the Bill would be of great assistance to host countries where there is a lack of regulation or enforceability in dealing with corporate power. As Ms Koma, Papua New Guinea NGO Mining Coordinator, NGO Environment Watch Group, stated:

> ―It would be very good if a corporate code of conduct was encouraged so that Australian companies working in Papua New Guinea were able to do what they practice overseas in their own country if our legislation is weaker than theirs".[201]

Despite the Democrats' proposals being unsuccessful, that does not prevent the possibility of strengthening regulatory control by home countries through extraterritorial regulation being explored. A more detailed discussion on this topic will continue in the next chapter.

6.4 Conclusion

The James Hardie and BHP case studies presented above can be used as examples of what can happen when corporations simply act with regard to profit maximisation and shareholder interests. Their failure to consider the interests of others caused enormous negative impacts, which still continue. Despite arguments by both companies that they fulfilled their legal obligations, they did not operate in line with accepted levels of moral behaviour and ignored their obligations to the social contract. They gave scant regard to the fundamental rights of others and sought to find a way to limit their financial risks through legal means. The law was used as a tactic to avoid their liabilities to those affected by their activities.

However, despite those attempts to avoid their liabilities, they eventually faced drastic consequences to their financial performance and public image. Thus, these cases demonstrated that corporations that fail to engage with their social responsibilities can suffer far greater longer-term losses than the short-term profits they gained. As James Hardie and BHP did eventually acknowledge their responsibilities as a result of public pressure, that might suggest that, while there is a weakness in the present system, there is some possibility that corporations may eventually accept their social responsibilities through public

[201] The Parliament of the Commonwealth of Australia, above n 188, Australian Democrats Minority Report on the Corporate Code of Conduct Bill 2000 by Senator Andrew Murray, Paragraph 30.

case-by-case actions rather than legal enforcement.[202] This situation has been recognised in a report by SustainAbility, which states:

> ―There is a growing concern that companies (and others) should conform to the spirit as well as to the letter of the law. In other words, technical compliance may no longer be an adequate defence against social and environmental activists in the court of public opinion and even in the courts of law. Technical innocence or escaping accountability through legal expertise and subtle arguments on points of legal interpretation and precedent are becoming increasingly unacceptable in a society that expects real world performance and behaviour standards".[203]

Not only can these cases be used as examples of the negative impact society may experience when corporations single-mindedly pursue their economic interests, they also highlighted the weaknesses of both regulation and CSR in controlling corporate activities. The weakness of regulation can be seen where there is no enforcement by the authorities or willingness by the government to impose control on corporations. While CSR was supposed to fill this gap, it failed to do so because its voluntary aspect allowed corporations to ignore it. Even where the companies claimed to have engaged with CSR through their corporate disclosure, in reality, they only used it as a platform to protect their interests and reputations. Therefore, what can be learnt from these cases are two lessons:

1. where voluntary CSR is not working, there may be a need for regulation to complement the voluntary aspect; and
2. where regulation is in place, it needs to be enforced to be effective.

Using these two cases, there are also three areas of regulation that should be further considered:

1. directors' duties;
2. extraterritorial regulation; and
3. corporate disclosure.

[202] Rose J., ‗People Power' (2005), *Ethical Corporation Magazine*, <http://www.ethicalcorp.com/content.asp?ContentID=3441>.
[203] SustainAbility, ‗The Changing Landscape of Liability: A Director's Guide to Trends in Corporate Environmental, Social and Economic Liability' (2004), p. 5, <http://www.sustainability.com/library/the-changing-landscape-of-liability>.

The first derives from the James Hardie case where the problems were linked to decisions by its directors to concentrate on profit maximisation. The second derives from the BHP in PNG case where the company exploited its host developing country, which highlighted the desirability of corporations operating overseas being brought to account in home countries through extraterritorial regulation. The third derives from both cases where the companies were not genuinely participating in CSR reporting, which raises the desirability of making corporate disclosure more credible and transparent. An analysis of these three areas will be explored in the following Chapter in an attempt to determine whether there is a need to strengthen regulatory control in these and/or other areas in support of a voluntary CSR regime.

Chapter 7

Imposing CSR through Domestic Legislation: A Case for Revision of the Law in Australia

7.1 Introduction

The cases discussed in Chapter 6 highlighted the desirability of a regulatory revision in Australia. In this Chapter, three main areas are examined for potential development to help ensure corporate compliance with social responsibility:

- First, the existing scope of the duties and responsibilities of directors in the *Corporations Act 2001* (Cth) may need to be amended to include requiring directors to consider the interests of other stakeholders in their decision-making. Even though there is a business case for considering the interests of other stakeholders to increase shareholder benefits, as discussed in Chapter 3, there is still an argument that amending the letter of the law to allow them, explicitly, to consider other stakeholder interests would provide an equitable framework that would apply to all businesses and lessen the chances of corporations avoiding their responsibilities.
- Second, the desirability of imposing regulation on corporations‘ extraterritorial activities should be considered. The acknowledgement that nations differ in their levels of development and their attitudes to regulations makes it desirable that corporations be encouraged to apply the standards of behaviour expected in their home jurisdictions wherever they operate. This would ensure Australian corporations operate with due regard to appropriate social, environmental and human rights standards both domestically and internationally.
- Third, the desirability of requiring additional mandatory disclosure should be examined. In order to acquire genuine and transparent information with regards to CSR performance, governments should require transparent and unambiguous reporting by mandating social and environmental disclosures. This would encourage corporations to comply with their social responsibilities.

Each of these possible reforms is discussed in more detail below.

7.2 The Desirability of Expanding Directors' Fiduciary Duties to Serve Stakeholder Interests

Corporate law has been referred to as "the study of how shareholders, directors, employees, creditors, and other stakeholders such as consumers, the community and the environment interact with one another under the internal rules of the firm".[1] The provisions discussed here relate to the duties imposed on company directors by law. Due to the growing public awareness of corporate social responsibility, a concern over whose interests corporate directors should pursue has been and continues to be a significant issue.[2]

Currently, in Australia, s181(1)(a) of the *Corporations Act 2001* (Cth) requires directors to exercise their powers and discharge their duties in good faith in the best interests of the corporation (emphasis added).[3] It is considered that while doing so, managers who are given the authority to conduct business might assume that the best interests of the corporation are equated to their shareholders' interests, which is the maximisation of profits.[4] Robert Hinkley commented that this interpretation is common throughout the world, noting that:

> "the corporate design contained in hundreds of corporate laws throughout the world is nearly identical. That design creates a governing body to manage the corporation usually a board of directors and dictates the duties of those directors. In short, the law creates corporate purpose. That purpose is to operate in the interests of shareholders".[5]

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[1] International Business Times, 'Business & Law: Overview', <http://www.ibtimes.com/business-law/detail/686/corporate-law/>.

[2] See Berle A.A., Jr., 'For Whom Corporate Managers are Trustees: A Note' (1932) 45(8), *Harvard Law Review*, p. 1365-1372, Veasey E. N. & Di Guglielmo C. T., 'How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors' (2008) 63(3), *Business Lawyer*, p. 761-775; Marshall S. & Ramsay I., 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1), *University of New South Wales Law Journal*, p. 291- 316; and Governance Institute of Australia, 'Shareholder Primacy: Is There a Need for Change?' (2014), <http://www.governanceinstitute.com.au/media/695936/govinst_shareholder_primacy_disc_paper_october2014_web.pdf>.

[3] Corporations Act 2001 – s181 Good faith--civil obligations

Good faith--directors and other officers

(1) A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.

<http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s181.html>.

[4] Greenberg D., 'Making Corporate Social Responsibility an Everyday Part of the Business of Business: Offering Realistic Options for Regulatory Reform' (2007) 19(2), *Bond Law Review*, p. 42.

[5] Hinkley R., 'How Corporate Law Inhibits Social Responsibility' (2002), *Business Ethics: Corporate Social Responsibility Report,* January/February, <http://www.commondreams.org/views02/0119-04.htm>.

However, that view should now be linked to the four theories of corporate behaviour discussed in Chapter 3 where it was shown that, in the end result, an application of each theory results in largely the same basic principle of increasing shareholder value. The interests of shareholders can ultimately be maximised by good corporate citizenship, creating goodwill in the market place. The concept of ―enlightened value maximisation" might therefore be used to motivate directors to include other stakeholders' interests in their decision-making.[6] However, the motivation for directors to serve other stakeholders' interests may be reduced, or even eliminated, if they do not see any potential benefit for their shareholders. Therefore, if recognition and acceptance of these interests is seen as desirable, a regulatory requirement for directors to take the interests of other stakeholders into account is an issue for consideration.

This section describes the early legal perception of directors' duties as being merely to maximise shareholders' profits, using the decision in *Dodge v Ford Motor Co*[7] as an illustration. It will then examine regulatory reforms that would oblige directors to consider the interests of a broader spectrum of stakeholders than simply shareholders. It also evaluates court decisions within the Australian context to identify which interests directors are under a duty to take into account and scrutinises whether there is a need for regulatory amendment.

7.2.1 Directors' Duties and the Ford Motor Company Case

The perception that directors and managers have an obligation to serve only the interests of their shareholders derives from the decision in the classic case of *Dodge v Ford Motor Company,* 204 Mich. 459, 170 N.W. 668 (1919). In 1916, Henry Ford planned for the expansion of his factory to create more employment, produce cheaper cars for customers and increase the profits of the corporation. With this in mind, and wanting to use corporate profits to create a larger manufacturing base, he stopped payment

[6] See Jensen M. C., ‗Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2001) 14(3), *Journal of Applied Corporate Finance*, p. 8-21.
[7] *Dodge v Ford Motor Co*. 204 Mich. 459, 170 N.W. 668 (1919). Cited at http://www.businessentitiesonline.com/Dodge%20v.%20Ford%20Motor%20Co.pdf.

of a special dividend to the company's shareholders. Ford declared it to be settled policy of the company not to pay in the future any special dividends, but to put back into the business for the future all of the earnings of the company other than regular dividend".[8]

The Dodge brothers, two minority shareholders, lodged a complaint against the Ford Motor Company and Henry Ford, seeking reinstatement of these special dividends and an injunction against further expansion of the factory.[9] One of their arguments was that the expansion was not driven by the maximisation of profits and would put at risk the shareholders' interest.[10] In response, Ford publicly stated that:

> "I do not believe that we should make such an awful profit on our cars. A reasonable profit is right, but not too much. So it has been my policy to force the price of the car down as fast as production would permit, and give benefits to users and labourers—with resulting surprisingly enormous benefits to ourselves".[11]

When asked by an attorney what the purpose of the company was, Ford replied:

> "To do as much as possible for everybody concerned, to make money and use it, give employment, and send out the car where the people can use it... and incidentally to make money... Business is a service not a bonanza."[12]

He proposed that business should look after employees and customers as well as themselves. It is worthy of note that Ford's view was considered to be innovative and modern for its time, showing a concern for social responsibility rather than simply profit-making. Nevertheless, this proposition was not recognised as acceptable business practice at that time. The company did not receive support from its shareholders nor the court. Ford lost his case and the court of first instance ordered the company to pay the special dividend and not to carry out its expansion plans.

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[8] *Dodge v Ford Motor Co*. 204 Mich. 459, 170 N.W. 668 (1919). Cited at http://www.businessentitiesonline.com/Dodge%20v.%20Ford%20Motor%20Co.pdf.

[9] Henderson M. T., 'Everything Old is New Again: Lessons from Dodge v Ford Motor Co' (2007), *University of Chicago Law & Economics, Olin Working Paper No. 373*, p. 19, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1070284>.

[10] "(27) In the face of the increased labor and material cost and the uncertain conditions that will prevail in the business world at the termination of [World War I], the policy of said Henry Ford, in continuing the expansion of the business of [the Ford Motor Company], is reckless in the extreme and seriously jeopardizes the interest of . . . stockholders in said corporation". *Dodge v Ford Motor Co*. 204 Mich. 459, 170 N.W. 668 (1919), at 473.

[11] Ford H. & Crowther S., *My Life and Work* (Kessinger Publishing, 2003), p. 162.

[12] Quoted in Lewis D. L., *The Public Image of Henry Ford: An American Folk Hero and His Company* (Wayne State University Press, 1976), p. 100.

In the company's appeal in 1919, Ford declared that:

> "My ambition is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back into the business".[13]

He saw that the long-term benefits of the company would be brought about through the well-being of its employees. In his view, shareholder value was not the primary consideration of the company. However, the Michigan Supreme Court disagreed, upholding the decision of the court below in favour of the shareholders. It allowed Ford to continue his expansion plans but upheld the decision that he had to pay out the special dividend. In the Court's view, the company's conduct should not adversely affect the interests of shareholders. The court stated:

> "There should be no confusion …A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes…it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others".[14]

This case is frequently quoted by those studying CSR as the classic case of shareholders' interests versus stakeholders' interests. Because the court declared in favour of shareholders' interests, the decision has often become translated as: corporate law requires directors to serve shareholders' interests. This is then used to support the idea that corporations have as their primary aim the maximisation of shareholders' profits. As Stout commented:

> "Among non-experts, conventional wisdom holds that corporate law requires boards of directors to maximize shareholder wealth. This common but mistaken belief is almost invariably supported by reference to the Michigan Supreme Court's 1919 opinion in *Dodge v. Ford Motor Co*."[15]

However, this view is a misinterpretation of the law and the Ford case should not be seen as a legal mandate for profit maximisation at the expense of all other considerations. As Henderson noted:

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[13] *Dodge v Ford Motor Co*. 204 Mich. 459, 170 N.W. 668 (1919). Cited at http://www.businessentitiesonline.com/Dodge%20v.%20Ford%20Motor%20Co.pdf.
[14] Ibid.
[15] Stout L. A., 'Why We Should Stop Teaching Dodge v. Ford' (2007), UCLA School of Law, Law & Econ Research Paper No. 07-11, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013744>.

> —The *Dodge* case is often misread or mistaught as setting a legal rule of shareholder wealth maximization. This was not and is not the law. Shareholder wealth maximization is a standard of conduct for officers and directors, not a legal mandate. The business judgment rule protects many decisions that deviate from this standard".[16]

Therefore, the case should not be used to support the view that a company's sole aim should be to advance only shareholders' interests. Not only is shareholder wealth maximisation not a legal mandate but it may increase the perceived conflict between what is regarded as ethical behaviour and the pursuit of profits. While in reality these two perspectives share a common goal, the question remains whether they will always work together. If corporations have to choose between ethics and profits, there is no guarantee they will choose the ethical path. This can be seen though the cases of James Hardie and BHP discussed in Chapter 6, where both companies chose profit maximisation over ethical practices. They failed to recognise other factors for corporate success such as the interests of other stakeholders and the well-being of society which resulted in loss of reputation and reduction in overall performance.

As unethical behaviour can ultimately adversely affect corporate performance, this has increased the understanding that corporations should absorb ethical norms into their practices.[17] Thus, the idea of shareholder value maximisation should not exclude companies from applying ethical considerations or recognising other stakeholder interests. As demonstrated in Chapter 3, the shareholder theory, stakeholder theory, social contract theory and ethical theory are all essentially ultimately based on the same premise of maximising business profits and shareholder value. Accordingly, the pursuit of profits and the adoption of ethical standards should work alongside one another and be an integral part of business conduct. This can then be used as a driving force for changing the perspective of business to the issues and importance of CSR. This change can be demonstrated by the fact that, nearly a century after the Dodge case, Henry Ford's grandson, William Clay Ford Jr. could express his vision of the company as:

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[16] Henderson, above n 9, p. 34.
[17] Long M. D. & Rao S., _The Wealth Effects of Unethical Business Behaviour' (1995) 19(2), *Journal of Economics and Finance*, p. 65-73.

> —t be the world's leading consumer company that provides automotive goods and services…to find ingenious new ways to delight consumers, provide superior returns to shareholders, and make the world a better place for us all."[18]

He gave the distinction between a good company and a great company as, —[a] good company delivers excellent products and services, a great company does all that and strives to make the world a better place."[19] His statement showed a sense of responsibility towards society and consumers which mirrored that of his grandfather. However, unlike his grandfather, his view of social responsibility did not meet with objections from his shareholders. That acceptance reflected the increasing realisation of the competitive advantage that is to be gained from socially responsible actions.

The Dodge case highlights the change in the perspective of corporations towards social responsibility where, a century ago, it was not seen as an integral part of corporate performance. There was a wrongly premised idea that corporations could not get benefits from doing _good works'. Today, this attitude has changed and, as it has been pointed out, —what is good for society does not necessarily have to be bad for the firm, and what is good for the firm does not necessarily have to come at a cost to society".[20]

Nevertheless, while it is now common for business to acknowledge not only the need to generate profits but also the need to meet other performance standards, there is nothing to guarantee that directors will necessarily consider the interests of other stakeholders. One might argue that the drive for reputational and long-term financial profits cannot always ensure that corporations will behave responsibly. This has led to various attempts to ensure directors take into consideration other stakeholders' interests and ethical standards in their decision-making. These attempts are discussed below.

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[18] Speech: William Clay Ford, Jr., Annual Meeting of Ford Shareholders (13 May 1999), <http://www.mustangsvo.org/fordnews/Speech_by_William_Clay_Ford_Jr_at_1999_Annual_Meeting.htm>.
[19] Ibid.
[20] Moran P. & Ghoshal S., _Value Creation by Firms', in Keys J.B. & Dosier L.N. (eds), *Academy of Management Best Paper Proceedings* (Academy of Management, 1996) p. 41-45.

7.2.2 Attempts to Amend the Corporations Act

In response to public interest over the issues of CSR, there have been various attempts to impose further fiduciary duties regarding stakeholder interests on directors. On 26 May 1988, the Australian Senate commenced an inquiry through its Standing Committee on Legal and Constitutional Affairs into the matter of "social and fiduciary duties and responsibilities of company directors".[21] The committee examined the views that "the modern company director should be required to take into account not just the shareholders…, but also groups such as consumers and employees, and the environment, when making decisions about the operation of the company".[22]

In its subsequent report, the Committee argued that the imposition of a duty to consider other stakeholder interests on directors was unwarranted as they already consider those interests in their decision-making in order to ensure their business success.[23] By requiring directors to balance the different interests of wider stakeholders, "[i]t would also limit the enforceability of shareholders' rights if directors were able to argue that, in making a certain decision, they had been exercising their option to prefer other interests".[24] The expansion of directors' fiduciary duties to include other stakeholders could also remove directors from the control of shareholders without any resulting improvement in the rights of those other stakeholders.[25] Moreover, it would be difficult to widen directors' fiduciary duties to protect all stakeholders. As the Committee noted:

> "To impose a duty to act fairly between entities as divers as creditors, employees, consumers, the environment, is to impose a broad and potentially complex range of obligations on directors. Such a duty could be vague…Without a legally-ordered set of priorities between the various groups, it would be difficult for any claim by one group to be upheld, as the directors' action could probably be characterised as being in the interest of some other group or groups. The question of who could enforce the various duties in the courts would also be difficult".[26]

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[21] Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Australian Government Publishing Service, 1989), Paragraph 1.1, p. 1, <http://www.takeovers.gov.au/content/Resources/parliamentary_reports/downloads/social_fuduciary_duties_obligations.pdf>.
[22] Ibid, Paragraph 1.2.
[23] Ibid, Paragraph 2.19, p. 12.
[24] Ibid, Paragraph 2.20.
[25] Ibid, Paragraph 6.49, p. 97.
[26] Ibid, Paragraph 6.46-6.47, p. 96-97.

The committee further noted that directors' fiduciary duties are designed to protect the shareholders' investment and imposing an obligation on directors to consider the interests of others would weaken those duties or make them meaningless.[27] Therefore, the Committee concluded that it would be best to legislate for other stakeholders' interests through specific legislation, rather than via amendments to the corporations legislation. It stated:

> "It is appropriate that matters external to the company be dealt with in separate and specific legislation…This is because companies legislation should deal only with corporate structure and organisation and matters arising as and between the constituents of the corporate body".[28]

Despite the report not supporting any change to corporate legislation governing directors' fiduciary duties, efforts to impose social responsibility obligations on corporations through corporate law did not diminish and several other enquiries followed.

In 2005-06, following the public outcry over the James Hardie case, the Australian Federal Parliament instigated two inquiries in relation to CSR: through the Corporations and Markets Advisory Committee (CAMAC)[29]and through the Parliamentary Joint Committee on Corporations and Financial Services (PJCFS).[30] Neither inquiry recommended any change to Australian corporate law in regard to directors'

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[27] Ibid, Paragraph 6.51, p. 98.
[28] Ibid, Paragraph 6.55, p. 99.
[29] The CAMAC's report considers the following matters:
1. Should the Corporations Act be revised to clarify the extent to which directors may take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?
2. Should the Corporations Act be revised to require directors to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?
3. Should Australian companies be encouraged to adopt socially and environmentally responsible business practices and if so, how?
4. Should the Corporations Act require certain types of companies to report on the social and environmental impact of their activities?

Corporations and Markets Advisory Committee (CAMAC), 'The Social Responsibility of Corporations Report' (2006), p. 3-4, <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf>.
[30] The PJCFS's report considers the following matters:
a. The extent to which organisational decision-makers have an existing regard for the interests of stakeholders other than shareholders, and the broader community.
b. The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders, and the broader community.
c. The extent to which the current legal framework governing directors' duties encourages or discourages them from having regard for the interests stakeholders other than shareholders, and the broader community.
d. Whether revisions to the legal framework, particularly to the Corporations Act, are required to enable or encourage incorporated entities or directors to have regard for the interests of stakeholders other than shareholders, and the broader community. In considering this matter, the Committee will also have regard to obligations that exist in laws other than the Corporations Act.

duties. The PJCFS recognised that directors had a duty to increase shareholder value and noted that this obligation could encourage directors to take other stakeholder's interests into account, when it stated:

> "Directors' duties as they currently stand have a focus on increasing shareholder value. This is important, because the provision is first and foremost intended to protect those investors who trust company directors with their savings and other investment funds. Directors' duties enable such investors to have some confidence that their funds will be used in order to increase the income and value of the company they part-own. In many cases, it will be clear that corporate responsibility enhances shareholder value…Progressive, innovative directors, in seeking to add value for their shareholders, will engage with and take account of the interests of stakeholders other than shareholders".[31]

The PJCFS further concluded that the current law allows directors to take into consideration the interests of other stakeholders as well as shareholders and that the long-term advantage perspective would motivate directors to engage with greater social responsibility.[32] As it noted:

> "The committee considers that an interpretation of the current legislation based on enlightened self-interest is the best way forward for Australian corporations. There is nothing in the current legislation which genuinely constrains directors who wish to contribute to the long term development of their corporations by taking account of the interests of stakeholders other than shareholders. An effective director will realise that the wellbeing of the corporation comes from strategic interaction with outside stakeholders in order to attract the advantages".[33]

CAMAC adopted essentially the same position and concluded that the existing law was already sufficient. It stated:

> "The current common law and statutory requirements on directors and others to act in the interests of their companies…are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including changes in societal expectations about the role of companies and how they should conduct their affairs. The Committee is not persuaded that the elaboration of interests that, where relevant, can already be taken into account would improve the quality of corporate decision-making in any practical way".[34]

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e. Any alternative mechanisms, including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors.
f. The appropriateness of reporting requirements associated with these issues.
g. Whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia.

Parliamentary Joint Committee on Corporations and Financial Services (PJCFS), 'Corporate Responsibility: Managing Risk and Creating Value' (2006), <http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/report/report.pdf>.

[31] Ibid, Paragraph 4.58-4.59, p. 59.

[32] Nolan J., 'Corporate Responsibility in Australia: Rhetoric or Reality?' (2007) 12(2), *Australian Journal of Human Rights*, University of New South Wales Law Research Paper No.2007-47, p. 77, Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001552.

[33] Parliamentary Joint Committee on Corporations and Financial Services (PJCFS), above n 30, Paragraph 4.76, p. 63.

[34] Corporations and Markets Advisory Committee (CAMAC), above n 29, Paragraph 3.12, p. 111.

In the same vein as the Senate Standing Committee in 1989, it also considered that directors' duties with regards to social responsibilities should be addressed through specific targeted legislation, saying:

> "The more appropriate response where the level of concern calls for legislative intervention is to address particular behaviours or activities through legislation targeted at the mischief in question. Importantly, legislation of that kind can also cover all relevant activities whether carried out by companies, other entities or individuals and not just the corporate sector".[35]

Despite the findings of both the PJCFS and CAMAC reports, the debate over increasing regulation has continued. After the James Hardie decision by the New South Wales' Supreme Court in 2009, which highlighted directors' responsibilities,[36] Chris Bowen, the Minister for Financial Services, Superannuation and Corporate Law, asked CAMAC to consider the guidance provided for directors to understand their roles and responsibilities. Bowen requested that CAMAC:

- "examine the guidance or codes of conduct that are available overseas for corporate directors;
- examine whether there is sufficient guidance provided to executive directors and non-executive directors in Australia to ensure that they have a clear understanding of their roles and responsibilities; and
- advise whether the performance of directors would be enhanced by the introduction of guidance for directors – for example through a code of conduct or best practice guidance by a relevant regulator, and if so, what form that guidance should take".[37]

The Committee presented its report in April 2010 and again rejected the need for a new code of conduct or best practice guidance by a regulator.[38] It reasoned that "there is already a good deal of guidance available in Australia to help directors…to understand their duties and responsibilities"[39] and "[CAMAC] does not consider that the performance of directors would be enhanced by the introduction by a regulator of further guidance".[40] However, the Committee recommended that in order to follow international developments, it might be time for a review by the ASX Corporate Governance Council

[35] Ibid, Paragraph 3.12, p. 113.
[36] In April 2009, the NSW Supreme Court found that former directors and executives were in breach of the Corporations Act by making misleading and deceptive statements to the public over the company's ability to pay compensation. Shortly after, in August, the former CEO and directors who gave rise to these false impressions, faced penalties of being barred from holding corporate positions and additional fines. See Adams, M. A., 'Does the Punishment Fit the Crime?: James Hardie Case Final Outcomes' (2009) 61(9), *Keeping good companies*, p. 519-521.
[37] Corporations and Markets Advisory Committee (CAMAC), 'Guidance for Directors Report' (2010), p. 1, <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2010/$file/Guidance_for_directors_Report_April2010.pdf>.
[38] Ibid, p. 73.
[39] Ibid, p. 78.
[40] Ibid, p. 79.

of its principles.[41] The Committee also considered that there was already much guidance available for directors, but it then noted that this, on its own, ―will not ensure improved governance, [thus] efforts to assist directors to understand their role and enhance their effectiveness are worthwhile and should be pursued".[42] It is also interesting to observe that the CAMAC report was not based on any empirical research regarding directors' understanding of their roles and responsibilities; nor did it follow any ―formal public consultation process".[43] This may be regarded as a weakness in the report, allowing room for continued discussions. Certainly, by rejecting calls for the development of a new code of conduct, it has not precluded further reviews regarding strengthening existing mechanisms to improve directors' performance. This is evident in a recent discussion paper, in 2014, by the Governance Institute of Australia, which invited the public to comment on the question of whether there is a need for change towards ensuring directors take into account other stakeholder interests.[44] While the topic of discussion is not new, the paper provided alternative thinking towards different approaches to any changes. One possible approach is to amend corporations law whether through a permissive or explicit clause to directors' duties (s181).[45] The paper provided examples of what these changes could be which gave a clearer picture of the discussion. Whether a legal solution can be reached in the near future or not, this and other discussions will provide a basis for development towards protecting the interests of broader stakeholder groups in society.

7.2.3 "The Best Interests of the Company" are Not Necessarily the Same as the "Best Interests of Shareholders"

Under s181(1) of the *Corporations Act 2001* (Cth), directors have a duty to act in the best interests of the company as a whole. Attempts to amend this provision specifically to include power to consider other stakeholders' interests derived from a view that directors could otherwise simply interpret this

[41] Ibid, p. 79.
[42] Ibid, p. 79.
[43] Ibid, p. 4.
[44] Governance Institute of Australia, 'Shareholder Primacy: Is There a Need for Change?' (2014), <http://www.governanceinstitute.com.au/media/695936/govinst_shareholder_primacy_disc_paper_october2014_web.pdf>.
[45] Ibid.

duty in line with the traditional shareholder primacy model. Setting a clear line of duty to stakeholders would reduce any confusion over whose interests directors should properly take into account. While there is not yet any legal requirement in this matter, a recognition that the ―best interests of the company" should not be translated the same as ―the best interests of shareholders" has been demonstrated by various Court decisions in common law jurisdictions, as illustrated below. Those decisions have recognised that, in appropriate circumstances, directors may take into account matters other than mere immediate profit for shareholders and provide guidance to directors on when they may properly consider the interests of other stakeholders in their decision-making.

- **Australia**

Australian courts have indicated that directors have a duty to consider the interests of creditors when a company is insolvent or near insolvent. In *Walker v Wimborne* (1976) 137 CLR 1, Mason J. stated:

> ―In this respect it should be emphasised that the directors of a company in discharging their duty to the company must take account of the interest of its shareholders and its creditors. Any failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them. The creditor of a company…must look to that company for payment. His interests may be prejudiced by the movement of funds between companies in the event that the companies become insolvent".[46]

In *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 the court stated:

> ―In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise… But where a company is insolvent, the interests of creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets… [C]reditors are entitled to consideration…if the company is insolvent, or near insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency…[Thus, the] duty arises when a company is insolvent in as much as it is the creditors' money which is at risk, in contrast to the shareholders proprietary interests". [47]

The decisions in both cases were known as part of a ―quiet revolution" to expand directors' duties with regard to creditors.[48] The *Kinsela* case clearly identifies that in normal circumstances shareholders are

[46] *Walker v Wimborne* (1976) 137 CLR 1, at [6]-[7].
[47] *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722, at [730].
[48] McConvill J., ‗Directors' Duties to Creditors in Australia after *Spies v The Queen*' (2002) 20(1), *Company and Securities Law Journal*, p. 7. Also see Berkahn M., ‗Directors' Duties to 'the Company' and to Creditors: *Spies v The Queen*' (2001) 6(2), *Deakin Law Review*, p. 360-372.

regarded as the company and directors have a duty to serve their interests. Only in insolvent circumstances do directors have to take the interests of creditors into account. After the *Walker* and *Kinsela* cases, it was accepted in *Grove v Flavel* (1986) 43 SASR 410 that directors could owe a duty not only to a company but also to its creditors. The Court found that the directors there had to take into consideration the interest of creditors independently from those of the company. Jacob J. considered that:

> "if that is the principle which dictates the "duty" of a director to have regard to the interest of creditors when the company is known to be insolvent there can be no reason in principle why knowledge of a real risk of insolvency should not attract the same duty".[49]

However the view that perhaps directors owe a general duty to creditors was rejected in *Spies v The Queen* (2000) 201 CLR 603 where the High Court concluded that:

> "In so far as remarks in *Grove v Flavel*…suggest that the directors owe an independent duty to, and enforceable by, the creditors by reason of their position as directors, they are contrary to principle…and do not correctly state the law".[50]

While this case did not deny the interests of creditors, at least in cases of insolvency or near insolvency, it clarified the position that directors do not owe a duty independently to creditors nor can it be forced on them. The concern for creditors' interests can, however, be regarded as part of the directors' duty to the company. As Gummow J. noted in *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425:

> "It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is similar to that found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors… The result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator".[51]

This decision simply confirms that where creditors' interests are involved, they have no legal basis for claims against directors except in cases of insolvency or near insolvency. Thus, it makes it clear that

[49] *Grove v Flavel* (1986) 43 SASR 410, at [421].
[50] *Spies v The Queen* (2000) 201CLR 603, at [636]-[637].
[51] *Re New World Alliance Pty Ltd; Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425, at [444]-[445].

there is no general duty to consider the interests of creditors; the main concern of directors' duties is the company.

The above decisions are of critical consideration. They do not support the view that directors owe a general duty to creditors – except when insolvency is a factor. Certainly, they do not support the view that directors owe a duty to stakeholders generally. In insolvency, creditors have a direct interest in the company; but the question remains: when can directors take into account the interests of other stakeholders who have no direct interest in the company? The answer may be: when those stakeholders' interests can be linked with those of the company. A more recent example is in *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) (2008) 39 WAR 1. While Justice Owen recognised that "a reflection of the interests of the company may be seen in the interest of shareholders",[52] he further stated that:

> "This does not mean that the general body of shareholders is always and for all purposes the embodiment of 'the company as a whole'. It will depend on the context, including the type of company and the nature of the impugned activity or decision. And it may also depend on whether the company is a thriving ongoing entity or whether its continued existence is problematic. In my view, the interests of shareholders and the company may be seen as correlative not because the shareholders *are* the company but, rather, because the interests of the company and the interests of the shareholders intersect.
> …
> It is, in my view, incorrect to read the phrase 'acting in the best interests of the company' and 'acting in the best interests of the shareholders' as if they meant exactly the same thing. To do so is to misconceive the true nature of the fiduciary relationship between a director and the company. And it ignores the range of other interests that might…legitimately be considered. On the other hand, it is almost axiomatic to say that the content of the duty may (and usually will) include a consideration of the interests of shareholders. But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored".[53]

This decision can be seen as adapting to present trends in society but it also acknowledges that any interests directors take into consideration should be only those that advance the best interests of the company. As demonstrated in Chapter 3, by serving other stakeholders' interests, a company may also increase its financial performance and consequently, shareholder benefits.[54] Therefore, the benefits of

[52] *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) (2008) 39 WAR 1, at [4392].
[53] *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) (2008) 39 WAR 1, at [4393] and [4395].
[54] Jensen M.C., 'Value Maximisation, Stakeholder Theory, and the Corporate Objective Function' (2001) 14(3), *Journal of Applied Corporate Finance*, p. 8-21.

long-term profit maximisation might encourage directors to consider the interests of other stakeholders even though they do not have any direct obligation to do so. Their duty to the company suggests that they may take into consideration stakeholders' interests when that results in maximising corporate profits. In a practical sense, this may put an end to the discussion of whether directors have a duty to serve interests beyond those of shareholders. However, because directors may ignore other stakeholders' interests due to a lack of direct legal obligation, it may well be desirable to develop further the existing framework of directors' fiduciary duties to allow them, when appropriate, to consider other stakeholders' interests more proactively.

- **Canada**

In Canada, a famous judicial statement of the directors' duties to consider stakeholders' interests appears in Justice Thomas Berger's decision in *Teck Corporation Ltd v Millar* (1972) 33 DLR (3d) 288 (BCSC). He stated:

> —Aclassical theory that once was unchallengeable must yield to the facts of modern life. In fact, of course, it has. If today the directors of a company were to consider the interests of its employees no one would argue that in doing so they were not acting *bona fide* in the interests of the company itself. Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered *bona fide* the interests of the shareholders.
>
> I appreciate that it would be a breach of their duty for directors to disregard entirely the interests of a company's shareholders in order to confer a benefit on its employees…But if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company".[55]

On this view, directors who take into account other stakeholders' interests whilst pursuing shareholder profit maximisation would not be in breach of their fiduciary duty to the company. If the interests of other stakeholders can be linked to those of the company, directors may be legitimately allowed to serve the interests of employees, creditors and the community as well as their shareholders. The recognition that "the best interests of the company" is not the same as the best interests of the

[55] *Teck Corporation Ltd v Millar* (1972), 33 DLR (3d) 288 (BCSC), at [314].

shareholders was also recognised in the well-known case of *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 SCR 461; 2004 SCC 68*,* where the Supreme Court held that:

> "Insofar as the statutory fiduciary duty [of directors] is concerned, it is clear that the phrase the "best interests of the corporation" should be read not simply as the "best interests of the shareholders". From an economic perspective, the "best interests of the corporation" means the maximisation of the value of the corporation…We accept as an accurate statement of law 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…At all time, directors and officers owe their fiduciary duties to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders".[56]

That decision was in the context of the duty of directors under s122(1) of the *Canada Business Corporations Act* (CBCA), which states:

> "(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".[57]

The Court made it clear that, in that context, directors' duties are owed to the company and not primarily to shareholders. While it accepted that "the best interests of the corporation" includes maximising its value, it also accepted that, in doing so, directors may look to the interests of other stakeholders. The decision, however, does not provide a certainty of obligation for directors to serve other stakeholders' interests, except in that context. As one commentator noted, "[t]he Court firmly rejected the shareholder primary model, but it does not seem to have fully endorsed the stakeholder theory".[58]

A more recent decision by the Supreme Court of Canada in *BCE Inc. v 1976 Debentureholders* [2008] 3 SCR 560; 2008 SCC 69 followed the same thinking as in *Peoples v Wise*, when it stated:

> "Where conflicting interests arise, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation. The cases on

[56] *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 S.C.R. 461, 2004 SCC 68, at [42]-[43].
[57] *Canada Business Corporations Act*, Available at: http://laws-lois.justice.gc.ca/eng/acts/c-44/fulltext.html.
[58] Kitching A., "Directors Liability under the *Canada Business Corporations Act*' (2008), p. 4, <http://www.parl.gc.ca/content/lop/researchpublications/prb0825-e.htm>.

> oppression, taken as a whole, confirm that this duty comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules and no principle that one set of interests should prevail over another. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including — but not confined to — the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen. Where it is impossible to please all stakeholders, it will be irrelevant that the directors rejected alternative transactions that were no more beneficial than the chosen one".[59]

That case involved the concerns of debenture holders who had accused the directors of acting oppressively during the sale of the company. The court accepted that sometimes it is difficult for directors to satisfy all stakeholders' interests and that, where a conflict of interests occurs, their decisions will be respected if they show reasonable judgement in the best interests of the corporation. With regard to directors' fiduciary duties, the court ruled that shareholders' interests need not prevail over those of other stakeholders and that directors should exercise sound business judgement in making their determinations.

- **New Zealand**

The major New Zealand case regarding directors' duties towards creditors is *Nicholson v Permakraft (NZ) Ltd.* [1985] 1 NZLR 242. In that case, through a restructuring of the company, the resulting profits were issued to its shareholders as a capital dividend. When the company was eventually ordered to be wound up, the liquidator attempted to recover this capital dividend for the company's creditors.[60] The court rejected the liquidator's claim, finding that the directors acted honestly and did not attempt to deliberately remove assets of the company from the reach of its creditors.[61] Justice Cooke stated that:

> —The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider *inter alia* the interests of creditors. For instance creditors are entitled to consideration, in my opinion, if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency.
>
> …as a matter of business ethics it is appropriate for directors to consider also whether what they do will prejudice their company's practical ability to discharge promptly debts owed to current and likely continuing trade creditors.

[59] *BCE Inc. v 1976 Debentureholders*, [2008] 3 S.C.R. 560, 2008 SCC 69, at [81]-[83].
[60] Senate Standing Committee on Legal and Constitutional Affairs 1989, _Company Directors' Duties' (1989), Paragraph 5.24, p. 69, <http://www.aph.gov.au/SEnate/committee/legcon_ctte/completed_inquiries/pre1996/directors/report.pdf>.
[61] Ibid.

> To translate this into a legal obligation accords with the now pervasive concepts of duty to a neighbour and the linking of power with obligation…In a situation of marginal commercial solvency such creditors may fairly be seen as beneficially interested in the company or contingently so".[62]

This statement was based on a view that directors may owe a direct duty to creditors through the premise of limited liability being a privilege. As Cooke J. noted:

> —The recognition of duties to creditors, restricted as already outlined, is justified by the concept that limited liability is a privilege. It is a privilege healthy as tending to the expansion of opportunities and commerce; but it is open to abuse. Irresponsible structural engineering – involving the creating, dissolving or transforming of incorporated companies to the prejudice of creditors – is a mischief to which the courts should be alive".[63]

This approach has been cited with approval in many cases. In *Dairy Containers Ltd v NZI Bank Ltd; Dairy Containers Ltd v Auditor- General* [1995] 2 NZLR 30 (HC), Thomas J. noted that:

> —directors must now in appropriate circumstances have regard to the interests of creditors within the context of the general duty to act in the company's best interests. The interests of the company become in reality the interests of existing creditors. In short, the residual risk has shifted from the shareholders to the creditors".[64]

As already seen these decisions are similar to those in Australia where it has been held that directors have no general duty to creditors, except in insolvency situations. In such cases the interests of creditors may be considered to be aligned with the best interests of the company. However, except in those very limited situations, the current law does not adequately protect all stakeholders. Consequently, some legislative amendment to directors' fiduciary duties may be desirable to facilitate legitimate CSR objectives by allowing (and, perhaps, requiring) directors to consider the interests of other stakeholders in their decision-making.

- **The United Kingdom**

In the UK, the courts have also recognised that as a result of the directors' fiduciary duty to act in the best interests of the corporation, they have a duty to take into account the interests of creditors, at least when the company is at or near insolvency. This approach was first mooted in *Lonrho Ltd v Shell*

[62] *Nicholson v Permakraft (NZ) Ltd*. [1985] 1 NZLR 242, at [249].
[63] *Nicholson v Permakraft (NZ) Ltd*. [1985] 1 NZLR 242, at [250].
[64] *Dairy Containers Ltd v NZI Bank Ltd; Dairy Containers Ltd v Auditor- General* [1995] 2 NZLR 30 (HC).

Petroleum Co Ltd [1980] 1 WLR 627 (HL), when Lord Diplock stated that the best interests of the company ―are not exclusively those of its shareholders but may include those of its creditors".[65] Nevertheless, this decision did not indicate any direct necessary application of creditors' interests in corporate decision-making.[66]

The argument that a company's interest could include the interest of creditors was later examined in *Re Horsley & Weight Ltd* [1982] 1 Ch 442, where Buckley LJ stated:

> ―It is a misapprehension to suppose that the directors of a company owe a duty to the company's creditors to keep the contributed capital of the company intact… It may be somewhat loosely said that the directors owe an indirect duty to the creditors not to permit any unlawful reduction of capital to occur, but I would regard it as more accurate to say that the directors owe a duty to the company in this respect… On the other hand, a company, and its directors acting on its behalf, can quite properly expend contributed capital for any purpose which is *intra vires* the company".[67]

The Court therefore found that, in the absence of misfeasance, a company and its directors could pursue any purpose that was within the legal power of the company. While there is no general duty to creditors, the indication that the English courts would support a limited directors' duty to creditors was also recognised in *Winkworth v Edward Baron Development Co. Ltd.* [1987] 1 All ER 114 (HL), wherein Lord Templeman said:

> ―A] company owes a duty to its creditors, present and future. The company is not bound to pay off every debt as soon as it is incurred and the company is not obliged to avoid all ventures which involve an element of risk, but the company owes a duty to its creditors to keep its property inviolate and available for the repayment of its debts. The conscience of the company, as well as its management, is confided to its directors. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors".[68]

These judgments reinforced the view that directors have an obligation to serve the corporation as a whole and that, only in very limited circumstances will this include taking into account the interests of third parties such as creditors. This clearly means that directors have no recognised legal duty to consider the interests of other stakeholders. However, the decisions also confirm that directors owe a

[65] *Lonrho Ltd. v Shell Petroleum Co. Ltd.* [1980] 1 WLR 627 (HL), at [634].
[66] Keay A. R., *Company Directors' Responsibilities to Creditors* (Routledge-Cavendish, 2007), p. 156.
[67] *Re Horsley & Weight Ltd* [1982] 1 Ch 442, at [453]-[54].
[68] *Winkworth v Edward Baron Development Co. Ltd.* [1987]1 All ER 114 (HL), at [118].

direct duty to the company which can support the argument that directors may take such stakeholder interests into consideration if that will advance the best interests of the corporation. As Heydon J. has noted:

> —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…the law permits many interests and purposes to be advantaged by company directors, as long as there is a purpose of gaining in that way a benefit to the company".[69]

In the same vein, Mark Standen commented:

> —The duty to act in the best interests of the corporation does not require that the directors act to maximise shareholder wealth *at the expense* of the interests of other stakeholders. Indeed it will often be in the interests of the corporation that appropriate recognition is given to the interests of such groups as employees, customers, contractors and the community. That is, the existing law already provides a significant degree of flexibility which facilitates due consideration of the interests of such stakeholders as part of the broader consideration of what is in the best interests of the corporation as a whole".[70]

The critical words from these quotes indicate that the law does not say that directors must consider the interests of outsiders. To the contrary, it states that they may consider those interests but only if doing so will be beneficial to the company. This firmly demonstrates that directors are not legally bound to consider only their shareholders' direct interests and the law does not restrain them from considering other stakeholder interests, especially if it can be seen to be of benefit on economic grounds. As Andrea Corfield observed:

> —Whilst there is an absence of legislative recognition, there is no prohibition on directors choosing to take into account these other interests…Directors are not estopped from considering other interests provided that there is a prospect of commercial advantage to the company".[71]

Clearly, the passages demonstrate that the law does not impose on directors, shareholders' profit maximisation but in fact allows them leeway in their decision-making to serve the best interests of the

[69] Heydon D. 1987, _Directors' Duties and the Company's Interest', in P. D. Finn (ed), *Equity and Commercial Relationships* (Law Book Co., Ltd., 1987), p. 134-135.
[70] Standen M., _The Corporation in Society: Time to Revise Its Role?' (2005/06) 87, *Reform (Australian Law Reform Commission)*, p. 13.
[71] Corfield A., _The Stakeholder Theory and its Future in Australian Corporate Governance: A Preliminary Analysis' (1998) 10(2), *Bond Law Review*, p. 221.

corporation.[72] However, while the scope of directors' duties is considered wide enough to embrace the interests of others and long-term profit maximisation for the corporation might motivate directors to serve other stakeholders' interests, history has shown that this has not deterred directors from pursuing the interests of shareholders through the short-term goals of profit maximisation. Therefore, the reality that permission to consider third party interests does not equate to an obligation to do so may lead to the suggestion that, in appropriate cases an effective CSR regime may require some form of regulatory support.

7.2.4 In Support of Regulatory Development to Directors' Duties

Notwithstanding that directors are allowed to take the interests of other stakeholders into account, many still pursue narrow shareholder interests at the expense of others in society. It has been pointed out that this situation continues "because the law contains neither an explicit statement of what the societal purpose of companies is, nor of what the interests of the corporation are".[73] This lack of clarity in regulation is seen as a key problem allowing directors to pursue shareholder primacy. As it stands, even though the current law allows directors to consider other stakeholders' interests, it also allows them <u>not</u> to do so. Ben Neville argued in his submission to the Parliamentary Inquiry into CSR:

> "Currently, directors are "permitted" to consider the interests of other stakeholders apart from shareholders. Although this allows for an ethics approach, it also 'permits' directors to *not* consider the interests of other stakeholders. As such, it condones a James Hardie-like scenario where stakeholders are harmed and not properly compensated…[Therefore] this 'permission' must be revoked and substituted with a mandate that directors *must* consider the effects of their action upon stakeholders".[74]

Similarly, Robert Hinkley wrote:

> "Nothing in the system encourages (let alone requires) corporations to be socially responsible or to contribute, cooperate or sacrifice for the benefit of the community or the common good (that is, be a good citizen). To the extent that there is any restraint on the duty of directors to make money, it comes in

[72] Mitchell R., O' Donnell A. & Ramsay I., 'Shareholder Value and Employee Interests: Intersections of Corporate Governance, Corporate Law and Labour Law' (2005) 23(3), *Wisconsin International Law Journal*, p. 438.
[73] Sjåfjell B, Johnson A., Anker-Sørensen L.& Millon D., 'Shareholder Primacy: The Main Barrier to Sustainable Companies' (2014), p.2, <http://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/news/sustainablecompanies2pagesummarycompanylaw.pdf>.
[74] Neville B., 'Re: Inquiry into Corporate Social Responsibility' (2006), <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFSubmissions_2/$file/BNeville_CSR.pdf>.

> the form of government regulations…It is time to amend corporate law to encourage corporations to be good citizens as well as make money".[75]

Despite directors being protected under the business judgment rule in s180(2) if they rationally believe that taking the interests of other stakeholders into account is in the best interests of the corporation,[76] this is only permission and not an obligation. Accordingly, there may be a need for some form of mandatory provision to ensure that directors do not limit their considerations to those of maximising profits. An unambiguous rule allowing them to take other stakeholders' interests into account would deflect corporate decision-making from over-reliance on the shareholder primacy model. As Berle argued as far back as 1932:

> —you cannot abandon emphasis on the view that business corporations exist for the sole purpose of making profits for their stockholders, until such a time as you are prepared to offer a clear and reasonable enforceable scheme of responsibilities to someone else".[77]

This desire for legislation was also recognised in the same year by Dodds, who concluded that:

> —The legal recognition that there are other interests than those of the stockholders to be protected does not, as we have seen, necessarily give corporate managers the right to consider those interests, as it is possible to regard the managers as representatives of the stockholding interest only. Such a view means in practice that there are no human beings who are in a position where they can lawfully accept for incorporated business those social responsibilities which public opinion is coming to expect, and that these responsibilities must be imposed on corporations by legal compulsion. This makes the situation of incorporated business so anomalous that we are justified in demanding clear proof that it is a correct statement of the legal situation".[78]

In this regard, it can be argued that even though, under current law, directors are not prohibited from taking into account other stakeholders' interests, it is still desirable for the *Corporations Act* to provide proper guidance in relation to those interests they may consider in their decision-making. As the

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[75] Hinkley R., 'The Profit Motive Can Work With a Moral Motive' (7 April 2000), *Australian Financial Review* (Sydney), p. 33.

[76] *Corporations Act 2001* (Cth), s180 (2) states that "A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and
(b) do not have a material personal interest in the subject matter of the judgment; and
(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
(d) rationally believe that the judgment is in the best interests of the corporation".

Available at: http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s180.html.

[77] Berle A.A., 'For Whom Corporate Managers are Trustees: A Note' (1932) 45(8), *Harvard Law Review*, p. 1372.

[78] Dodds E. M. Jr, 'For Whom Are Corporate Managers Trustees?'(1932) 45(7), *Harvard Law Review*, p. 1162.

provisions governing directors' duties do not currently include an obligation to consider stakeholder interests, it does not guarantee that directors will take social responsibility into account and, in extreme cases, might even result in them ignoring social responsibility altogether. As Hinkley noted:

> "the law, in its current form, actually inhibits executives and corporations from being socially responsible…No mention is made of responsibility to the public interest…Corporate law thus casts ethical and social concerns as irrelevant, or as stumbling blocks to the corporations fundamental mandate…It is the law that leads corporations to actively disregard harm to all interests other than those of shareholders".[79]

Supporters of regulatory reform to achieve this outcome insist that because of the predominant corporate imperative of maximising shareholders' wealth, the only effective way to achieve equity between all stakeholders is through legislation. As the Chamber of Commerce and Industry of Western Australia noted:

> "Underthis shareholder-oriented model, [the] constraints are external. No more is expected of businesses than that they obey the rules as they go about their core function of generating profits. This limited expectation can be expressed either negatively or positively. Positive advocates of the shareholder-oriented firm assert that maximising profit within a framework of laws is both the most ethically appropriate behaviour of business managers and the most socially desirable, because it leads to the best economic and social outcomes…The negative view of shareholder orientation presumes that corporate ethics is an oxymoron. In this view nothing better than greed can be expected of business operators and pursuit of owners' interests will be at the expense of the wider community, so a system of laws and regulations is necessary to force corporations to behave according to the community interest".[80]

Another reason to support legislative clarification of directors' duties is that the conflict between the interests of shareholders and those of other stakeholders may be reduced through the intervention of such regulations. According to a survey of Australian company directors, despite finding that "[a] majority of directors (55 percent) believed that acting in the best interests of the company meant they were required to balance the interests of all stakeholders",[81] 44 percent still believed that shareholders are their priority and 81.2 percent believed that shareholders maintained a major influence over

[79] Hinkley R. 2002, "How Corporate Law Inhibits Social Responsibility' (2002) January/February, *Business Ethics: Corporate Social Responsibility Report,* <http://www.commondreams.org/views02/0119-04.htm>.
[80] Chamber of Commerce and Industry of Western Australia, "A Submission to the Australian Government Corporations and Markets Advisory Committee' (2006), p. 9, <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFSubmissions_2/$file/CCI_CSR.pdf>.
[81] Jones M., Marshall S., Mitchell R. & Ramsay I. M., "Company Directors' Views Regarding Stakeholders' (2007), *University of Melbourne Legal Studies Research Paper No. 270*, p. 5, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023259>.

management.[82] This suggests that directors consider shareholders to be their most important constituents, as well as being the most influential, with the result that it is unlikely they will take other stakeholders' interests into consideration when there are no direct benefits for the shareholders. Thus, while they acknowledge other stakeholders' interests, that does not mean in practice that they will act in that balanced way, especially if it clashes with commercial imperatives for the company. By more explicitly mandating directors' obligations to other stakeholders, there may be greater incentive for them to take non-shareholder stakeholder interests into consideration. Directors who conduct business in breach of the law or have knowledge of that conduct will also be more accountable for their actions. The net result may be better outcomes both for society and corporate reputation and eventually, through it, for the shareholders.

The objection that directors cannot serve the interests of all stakeholders, because different stakeholders have different interests, fails to recognise that directors already balance different interests among stakeholders. As the survey referred to above demonstrates, the understanding that stakeholders' interests are linked to the long-term interests of corporations has already influenced directors to take those interests into account in their decision-making in order to best serve the "interests of the company as a whole". [83] Therefore, imposing a duty to that effect should not be seen as increasing their responsibilities but as protection from the fear of adverse reaction by shareholders. Directors would then be more able to make such decisions as they would feel more secure within the protection of the law.[84] As Professor Bob Baxt noted:

> "Many people believe directors of large corporations, including banks, insurance companies, telecommunications companies etc, should have regard to a broader set of community obligations. However, if that is the way society wants to regulate such companies (…), then legislation governing the

[82] Ibid, p. 5, 9.
[83] Marshall S. & Ramsay I., 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1), *University of New South Wales Law Journal*, p. 313.
[84] James Hardie Chairwoman, Meredith Hellicar stated:
"I think protection [for Directors seeking to act in the interests of stakeholders other than shareholders] would be beneficial because there is no doubt that the threat of a shareholder suit – even if we get majority shareholder support – a minority shareholder can still say, we don't agree, so some protection would help…it certainly might make us feel more comfortable".
Buffini F., 'Calls to Protect Corporate Conscience' (*Australian Financial Review*, 23 November 2005), p. 4. Quoted in Parliamentary Joint Committee on Corporations and Financial Services (PJCFS), above n 30, p. 47.

> duties of the directors of such companies should be clarified…If directors are expected to run the activities of their companies with the interests of the community at the forefront of their obligations, then they must have adequate protection in the law (and from the courts), that should shareholders feel they are not receiving the same level of dividends they had been accustomed to, the directors will not be in breach of those duties".[85]

In this respect, regulatory reform may not be overburdening or too radical but merely clarifying of directors' authority. As many directors already consider other stakeholders' interests as part of ensuring their corporations are good corporate citizens,[86] the additional protection could only increase their numbers.

7.2.5 Regulatory Developments in the UK and US

The development of directors' duties has been incorporated into the law of other countries such as the UK and US. These jurisdictions have been chosen for discussion because they have similar legal systems to Australia and, like Australia, are first world countries. The examination of regulatory there is intended to provide useful guidance for Australia's future development. In the UK, under the *Companies Act 2006*, s172, directors are explicitly required to consider the interests of wider stakeholders.[87]

> **" s172 Duty to promote the success of the company**
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company

[85] Baxt B., _Avoiding the Rising Floods of Criticism: Do Directors of Certain Companies Owe a Duty to the Community?' (2000) 16(11), *Company Director*, p. 42.
[86] It has been noted that, ~~a~~lthough 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. The management of a company may be justifiably concerned to ensure that the company is a good corporate citizen. A sole trader managing an enterprise for himself or herself may decide whether to perform what he or she sees as a moral obligation. But a fiduciary managing for the benefit of another person may not enjoy that freedom". Austin R. P., Ford H. A. J. & Ramsay I. M., *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths Australia, 2005), p. 281.
[87] *Companies Act 2006*, Section 172—Duty to Promote the Success of the Company, <http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf>.

> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."[88]

On its face, s172 would seem to entrench the directors' right to take the interests of other stakeholders into account. However, in reality the benefits have mainly been to the interests of shareholders. As Chohan noted, "[a]n inherent hierarchy, problematic language and complicated enforcement of s172 seems to arguably uphold shareholder primacy only".[89] Nothing has really changed and shareholders are still at the apex of directors' considerations. In the view of CAMAC:

> "The section makes clear that directors owe their fiduciary duty only to the shareholders generally, rather than a range of interest groups, but seeks to provide a broader context for fulfilling that duty".[90]

While the motivation of Enlightened Shareholder Value can encourage directors to take other stakeholders' interests into account, in reality they are still primarily concerned with the interests of their shareholders. Thus, s172 appears to have been more window dressing than effective legislation. As Gopal noted:

> "the intention of the provision is not to engender a surreptitious adoption of 'stakeholder management', as the assertion suggests, since the interests of other stakeholders are only instrumental to ensuring that the company is profitable which is causatively linked to the members' interests".[91]

One weakness of s172 is in the issue of enforcement because the power to bring proceedings against the directors lies with the shareholders.[92] It has been suggested that while there may be few situations where the shareholders might wish to challenge non-compliance, it would be unlikely that shareholders would take action because of the length, complexity and cost of legal proceedings.[93] Another weakness

[88] Ibid.
[89] Chohan A., 'Is Section 172 of the Companies Act 2006 Capable of Delivering For All Stakeholders?' (2012), p. 11, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2139528>.
[90] Corporations and Markets Advisory Committee (CAMAC), above n 29, p. 103.
[91] Gopal P., 'A Critical Examination of the Impact of Section 172 of the Companies Act 2006' (2012) 4, *The Student Journal of Law*, p. 1.
[92] Tate R. C., 'Section 172 CA 2006: The Ticket to Stakeholder Value or Simply Tokenism?' (2012), <https://www.abdn.ac.uk/law/documents/Section172CA2006-theticketostakeholdervalueorsimplytokenism.pdf>.
[93] Ibid. Tate noted that these situations may include where shareholders are concerned that directors fail to promote long-term business success through not taking into consideration other stakeholder interests.

is the difficulty of proving non-compliance as directors have discretionary powers when carrying out their duties.[94] Under the business judgment rule, the Court will consider the directors' opinions rather than the Court's interpretation.[95] Consequently, directors can deny any breach of their obligation and claim to have acted in a way that promotes the success of the company, even when they fail to consider other stakeholder interests.

Therefore, while s172 may appear to advance positive changes in directors' duties, in reality it simply reinforces fundamental shareholder interests. While its aim is to promote company success, the consideration of other stakeholder's interests is wholly dependent on the perceived benefits to the company. This demonstrates that, if expanded regulation is to be effective it must not only underpin shareholder interests but also those of other stakeholders. Moreover, the interests of those other stakeholders should not be overly reliant on the exercise of discretion by directors and the enforceability of the law should be strengthened by allowing stakeholders to take action against directors for non-compliance.

A further development in the *Companies Act 2006* that can be linked to s172 is s417 which requires directors to produce a "business review' to "inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company)".[96] The business review must include information on:

> "(i) environmental matters (including the impact of the company's business on the environment),
> (ii) the company's employees, and
> (iii) social and community issues,
> including information about any policies of the company in relation to those matters and the effectiveness of those policies".[97]

[94] Ibid. Also see Fisher D., "The Enlightened Stakeholder – Leaving Shareholders in the Dark: Will Section 172(1) of the *Companies Act 2006* Make Directors Consider the Impact of their Decisions on Third Parties?' (2009) 20(1), *International Company and Commercial Law Review*, p. 15.
[95] Wen S. & Zhao J., "Exploring the Rationale of Enlightened Shareholder Value in the Realm of UK Company Law – The Path Dependence Perspective' (2011) 14, *International Trade and Business Law Review*, p. 153-173.
[96] *Companies Act 2006*, s417(2), <http://www.legislation.gov.uk/ukpga/2006/46/section/417>.
[97] *Companies Act 2006*, s417(5)(b).

Even though this obligation can be seen as an attempt to compensate for the lack of enforceability under s172, the requirements under s417 retain the problem of not having a "comprehensive guidance framework and reporting standards".[98] This could result in directors providing little information to clarify whether they have performed their duties under s172. Thus, the business review has been criticised as being "productive of self-serving and vacuous narrative rather than analytical material which is of genuine use".[99] Consequently, s172 together with s417 do not ensure that directors manage their businesses in a more socially responsible manner because their compliance with the s172 requirements cannot be reliably verified as they may not disclose information that will damage their reputation or reduce their business advantage.[100]

The development in the US is similar to that of the UK. In the US, many states adopted constituency statutes that permit or require directors to take into consideration the interests of stakeholders other than the shareholders in their decision making.[101] Most states have permissive constituency statutes, for example in New York, s717b of the New York Business Corporation Law states that:

> "a director shall be entitled to consider without limitation, (1) both the long-term and the short-term interests of the corporation and its shareholders and (2) the effects that the corporation's actions may have in the short-term or in the long-term upon any of the following:
> (i) the prospects for potential growth, development, productivity and profitability of the corporation;
> (ii) the corporation's current employees;
> (iii) the corporation's retired employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from or pursuant to any plan sponsored, or agreement entered into, by the corporation;
> (iv) the corporation's customers and creditors; and
> (v) the ability of the corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business".[102]

[98] Tate R. C., above n 92, p. 7.
[99] Davies P. L., *Gower and Davies' Principles of Company Law*, (Sweet and Maxwell, 2008, 8th ed), p. 740.
[100] Keay A. R. "The Duty to Promote the Success of the Company: Is It Fit for Purpose?' (2010), University of Leeds School of Law, Centre for Business Law and Practice Working Paper, p. 21-22, <http://www.law.leeds.ac.uk/assets/files/research/events/directors-duties/keay-the-duty-to-promote-the-success.pdf>.
[101] In approximately 30 states, the first statute was passed by Pennsylvania in 1983. See Keay A., "Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and All That: Much Ado About Little?' (2010), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1530990>.
[102] N.Y. BSC. LAW § 717: NY Code – Section 717: Duty of Directors, <http://codes.lp.findlaw.com/nycode/BSC/7/717>.

This permissive approach has been criticised in that while directors may take into consideration the interests of various stakeholders, it is still difficult for them in their decision-making to consider when and how to serve those interests as they fear being in breach of their fiduciary duties. As noted in the Benefit Corporation White Paper:

> —Without clear authority explicitly permitting directors to pursue both profit and a company's mission, even directors of mission-driven companies in constituency statute jurisdictions may be hesitant to —consider" their social missions for fear of breaching their fiduciary duty. This uncertainty and resulting hesitation makes it difficult for the directors of mission-driven companies to feel they are legally protected in considering the interests of constituencies other than the shareholders who have elected them (and can therefore replace them)".[103]

There are only three states, Connecticut, Arizona and Idaho, that have enacted mandatory statutes.[104] The example provided here is in Connecticut's statute, the closest provision to that of the UK. It reads;

> —A] director of a corporation…shall consider, in determining what he reasonably believes to be in the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation's employees, customers, creditors and suppliers, and (4) community and societal considerations including those of any community in which any office or other facility of the corporation is located. A director may also in his discretion consider any other factors he reasonably considers appropriate in determining what he reasonably believes to be in the best interests of the corporation".[105]

Being similar to the UK legislation, the US constituency statutes have also been subject to scepticism over their ability to provide any real benefit for stakeholders, as they allow directors a wide discretion to take the interests of stakeholders into consideration but do not require them to do so.[106] That discretion appears to protect directors in their decision-making when claiming they have considered the interests of any particular group of stakeholders.[107] In particular, it has been noted that:

> —The US constituency statutes and UK's s172 do little more than provide directors with —a get out of gaol free card," for they permit them to defend a case for breach by asserting that they did what they did because they were considering the interests of non-shareholding stakeholders".[108]

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[103] Clark W. H. & Vranka L. (Principle Authors), _White Paper - The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public' (2011), p. 10, <http://www.benefitcorp.net/storage/Benefit_Corp_vs_Traditional_Corporations.pdf>.
[104] Ibid.
[105] General Statutes of Connecticut 2005, Title 33, Chapter 601, Sec. 33-756 (d) – General standards for directors, <http://www.cga.ct.gov/2005/pub/Chap601.htm#Sec33-756.htm>.
[106] Keay, above n 101, p. 48.
[107] Keay A. R., _Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's _Enlightened Shareholder Value Approach' (2007) 29, *Sydney Law Review*, p, 596.
[108] Keay, above n 101, p. 48.

The US constituency statutes are also regarded as being a "red herring", having had little impact on improving stakeholder interests.[109] Like the UK's s172, they provide no obligation on directors to perform responsibly regarding social or environmental aspects, and the resulting lack of enforceability may lead to other stakeholders' interests being overshadowed.[110] As things stand, it seems that the provisions in both the UK and US provide little innovation in protecting stakeholder interests. It appears that directors are able to rely on their own discretion and can use this to avoid any consequences of non-compliance. Perhaps future development in this field should rely less on directors' discretion and more on positive obligation.

However, despite the criticisms, these regulatory provisions in the UK and US have highlighted some development in the Anglo-American corporate governance system. Their direction has shone a light on the way forward, ensuring corporations may promote sustainable development of social responsibility issues through serving a wider stakeholder interest. It is also possible that other countries will follow the UK and US provisions, and use them as a basis for the development of their own regulatory systems. Even though the movement in Australia has not yet succeeded in having similar provisions included in our law, developments overseas have seen increased attention being paid to our approach to protect stakeholder interests. The fact that those provisions now exist elsewhere also provides support for the contention that, in the absence of general common law provisions, some statutory provision may be needed to achieve that aim.

7.3 The Desirability of Imposing Extraterritorial Regulation: Should Home States' Law Apply to Their Corporations Operating Overseas?

Home states legislating to control their corporations in foreign countries is a relatively new concept worldwide but because international law has yet to develop procedures designed to apply direct control

[109] Kerr M. & Segger M-C. C., 'Legal Strategies to Promote Corporate Social Responsibility and Accountability: A Pre-Requisite for Sustainable Development' (2004), *A CISDL Legal Brief*, p. 9, <http://www.cisdl.org/pdf/Legal_Strategies_Resp.pdf>.
[110] Ibid.

over corporations, this responsibility has been effectively left entirely to national states. The concern over extraterritorial regulation is linked to serious social, environmental and human rights violations by, in particular, multinational corporations. The differences between the ability of developed and developing nations to deal with this problem are significant. Rich, developed nations, which are home to most of the larger and more powerful multinational corporations, have highly refined laws and adequate mechanisms for enforcement of the rules covering corporate activity. In contrast, developing countries, where those corporations operate often have limited resources to introduce and enforce legislation which is needed to protect their citizens. This enables unscrupulous corporations to adopt a ―frontier" mentality and overwhelm local communities and their environment. Moreover, where developing nations are often forced to concentrate on economic prosperity and social responsibility issues are seen as a ―luxury" more than a ―necessity", it is inevitable that issues relating to social, environmental and human rights degradation in these host countries do not receive adequate consideration.[111]

To generalise, there are three significant factors deterring host developing countries from applying and enforcing regulation of corporate activities:

- first, motivation, where host nations fear huge losses of revenue if corporations choose to relocate their operations elsewhere;
- second, lack of resources and expert personnel with adequate training and experience in legal and regulatory affairs, especially in comparison with the massive resources available to large and powerful corporations; and
- third, corruption, where the corrupt nature of many developing nations renders effective enforcement unlikely.[112]

[111] Morimoto T., ‗Growing Industrialization and Our Damaged Planet: The Extraterritorial Application of Developed Countries' Domestic Environmental Laws to Transnational Corporations Abroad' (2005) 1(2), *Utrecht Law Review*, p. 143.
[112] Ibid, p. 145.

The net effect of these factors is that while host states have a duty to regulate corporate activities to restrain companies from violating social, environmental and human rights standards, many fail to fulfill their responsibilities adequately, giving economic concerns a priority over the rights of their citizens and the impact on the environment. It is no surprise therefore, that they often show little enthusiasm for restraining corporate activity, as any kind of restriction may potentially hamper their economic advantage.

While obeying local laws is a normal requirement for business management, under CSR precepts corporations are also expected to operate in a manner that protects and respects rights and standards in host states, as they would do so in their home states.[113] Despite the expectation that these standards should be met whether a company is operating in its home state or abroad, history has shown that many corporations have not applied stringent standards to their operations in developing host countries even though they have the ability to do so.[114] As the profit imperative and shareholders' interests have taken precedence, corporations which respect social, environmental and human rights standards while operating in their home countries have often demonstrated different behaviour when operating extraterritorially.[115]

Where these double standards occur, instances of devastating abuse have resulted from the fact that corporations which do not breach host nations' regulations cannot normally be held responsible for the consequences of their actions, even if such actions violate international standards. Even where those corporations employ codes of conduct on a voluntary basis to promote and protect international standards wherever they operate, the problems continue. Given this, the continuation of these abuses

[113] See Deva S., Human Rights Standards and Multinational Corporations**:** Dilemma between _Home' and _Rome' (2003) 7, *Mediterranean Journal of Human Rights*, Vol. 7, p. 69-97.
[114] An example can be seen from the Bhopal case in 1984, where the Union Carbide company caused thousands of deaths through a gas leak from their plant. There are concerns that safety standards and maintenance procedures of the plant in Bhopal are lower than those in the sister plant in West Virginia. See Murphy-Medley D., _Exportation of Risk: The Case of Bhopal' (2001), Online Ethics Center for Engineering, National Academy of Engineering, <http://www.onlineethics.org/Resources/Cases/Bhopal.aspx>.
[115] See Greenpeace, _Corporate Crimes: The Need for an International Instrument on Corporate Accountability and Liability' (2002), <http://www.greenpeace.org/raw/content/international/press/reports/corporate-crimes.pdf>.

could be prevented if extraterritorial regulation was adopted by home states, enforcing control over the activities of their national corporations both domestically and abroad. This would also eliminate the problem of double standards that can arise in developing host states.

Concern over extraterritorial regulation has been recognised in the Guiding Principles, which encourage home states to introduce mechanisms to prevent corporations violating human rights in their overseas operations.[116] The commentary of Principle No. 2 states that:

> „There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation. States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on „parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement".[117]

While extraterritorial regulation could control national corporations operating overseas, the question is how to extend this concept to corporations which operate through a local subsidiary. One possibility would be to make the parent corporations responsible for the activities of their subsidiaries which abuse social, environmental and human rights standards. This may be a challenge as it is unclear under the Principles whether states should consider parent-subsidiary relationships in their attempts to introduce extraterritorial regulation but creating a form of legislative vicarious liability should be possible, at least the parent can exercise real „control' over the activities of the subsidiary.

[116] United Nations - Office of the High Commissioner for Human Rights, „Guiding Principles on Business and Human Rights: Implementing the United Nations „Protect, Respect and Remedy" Framework' (2011), Guiding Principle No. 2, p. 3, <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.
[117] United Nations - Office of the High Commissioner for Human Rights, „Guiding Principles on Business and Human Rights: Implementing the United Nations „Protect, Respect and Remedy" Framework' (2011), Guiding Principle No. 2: Commentary, p. 4, <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

Where most multinational corporations have origins in developed states,[118] it might be expected that the most appropriate way to control corporate activities is for their home countries to establish effective checks and balances to ensure social responsibility practices by their national corporations. If those large and powerful corporations are subject to their home state's domestic legislation, the problems of exploitation in host countries because of lower standards or lack of legal enforcement would become less significant. However, these developed states are more likely to be in the vanguard of opposition to state intervention in any business affairs.[119] A culture of non-interference in business activity and reliance on market forces has long been supported by those states to encourage a free trade environment for the benefit of their corporations and, thus, to promote their countries' financial interests. Morimoto noted that ―a developed home country would be reluctant to adopt extraterritorial regulations unilaterally, because such unilateral action would inevitably place its [corporations] at a competitive disadvantage in the global market".[120] Consequently, home states may fear that, under globalisation, corporations can simply relocate their operations under ―a flag of convenience"[121], especially to states where little weight is placed on social, environmental and human rights issues. This underlines one of the key difficulties in proposing effective control of corporations because the political will in home countries will inevitably influence their willingness to strengthen or expand the application of their regulations.[122]

Confronted with this scenario, where the very states which could achieve positive results in regulating business activity are the ones which offer the most resistance to any advances in control, the difficulty of effectively imposing responsibility and accountability on corporations is only exacerbated. An

[118] In 2008, the number of multinational corporations worldwide was 82,000, with 810,000 foreign affiliates. United Nations Conference on Trade and Development (UNCTAD), *World Investment Report: Transnational Corporations, Agricultural Production and Development* (United Nations, 2009), p. xxi,<http://unctad.org/en/docs/wir2009_en.pdf>.
[119] Such as the US, Australia and the UK failed to pass the Bill concerning extraterritorial regulation. Morimoto, above n 111, p. 153-154.
[120] Ibid, p. 151.
[121] The term ―flag of convenience" refers to ships that are registered in foreign countries where there are minimal regulations and poor standards, which is used to describe corporations choosing their location based on regulatory advantage. See Murphy D. D., ‗The Business Dynamics of Global Regulatory Competition' (2002), GAIA Books: Global, Area, and International Archive, UC Berkeley, <http://escholarship.org/uc/item/2vw6101r>.
[122] Skogly S., ‗Economic and Social Human Rights, Private Actors and International Obligations', in M. K. Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International, 1999), p. 253.

example in Australia can be seen in the unsuccessful attempt to pass the Corporate Code of Conduct Bill 2000 (Cth), which would have introduced a form of extraterritorial regulation. There were many objections put forward that led to the failure of the Bill and these are further discussed below.

7.3.1 Australian Corporate Code of Conduct Bill

As discussed in Chapter 6, legislation to control the activities of Australian corporations operating overseas was attempted in the Corporate Code of Conduct Bill 2000, introduced by the Australian Democrats, which failed to be passed into law.[123] The purpose of the Bill was to ensure basic compliance by Australian companies with international standards of human rights and environmental protection. Regrettably, it was seen to have many weaknesses, resulting in a lack of political support and its ultimate rejection.

The Parliamentary Joint Statutory Committee on Corporations and Securities found that while the Bill's underlying intention was not to supersede local legislation, host nations would inevitably regard the Bill as an imposition, inferring that their legislation was inferior.[124] There were also negative comments over the potential competitive disadvantage for Australian corporations through the extra costs of compliance and reporting.[125] The majority of companies felt there was no need for extra legislation, because they were already voluntarily complying with the same standards as were proposed

[123] The Parliament of the Commonwealth of Australia, _Report on the Corporate Code of Conduct Bill 2000- Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities' (2001), <http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/1999_02/corp_code/report/report_pdf.ashx>.

[124] Committee report noted that —it[] is unable to see any way that the Bill's extraterritorial imposition of Australian standards on corporations operating within the territory of sovereign, foreign nations will be interpreted as anything other than implying that local standards are inferior". Ibid, Paragraph 4.47, p. 45.

[125] Corporations Law Committee of the Business Law Section of the Law Council of Australia, _Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities: Corporate Code of Conduct Bill 2000' (2001), Paragraph 3.11, <http://www.aph.gov.au/SENATE/COMMITTEE/corporations_ctte/completed_inquiries/1999-02/corp_code/submissions/sub40.pdf>. Also see CPA Australia and The Institute of Chartered Accountants in Australia, _Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities: Corporate Code of Conduct Bill 2000' (2000), <http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/1999_02/corp_code/submissions/sub31_pdf.ashx>.

in the Bill through other codes of conduct.[126] Mr. Divecha stated that ―[m]ost of the Australian companies would say—and indeed there is evidence—that they are already seeking to get to what is in the Bill as a minimal set of standards".[127] One example can be seen from BHP, where it declared in its submission that the voluntary codes it had adopted were of the same standard as the proposal and negated the need for further legislation, rendering the Bill neither desirable, nor workable.[128]

The Corporations Law Committee submitted that having legislation rather than voluntary codes might deter companies from trading in developing countries, and would therefore be detrimental to the development of those nations.[129] Companies could instead adopt a code of conduct consistent with international standards that would assist them to operate in a socially responsible manner and provide benefits to host countries.[130] It would not only prove difficult, but also impracticable ―for an Australian legislature to effectively institute specific and prescriptive laws for companies to obey as a means of achieving this end".[131] Where the Bill might have increased justice for individuals or communities who had been negatively affected by Australian corporate activities, through court proceedings in Australia, the Committee concluded that, as some access to the Australian legal system already existed, the Bill was superfluous.[132]

In brief, the main arguments against the Bill were:[133]

- An attempt to apply Australian law to other territories might be seen as encroaching on the sovereignty of those states.[134]

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[126] This observation was made by Dr. Ranald in the Joint Committee on Corporations and Securities, ‗Official Committee Hansard: Corporate Code of Conduct Bill 2000' (15 March 2001), p. 95, <http://www.aph.gov.au/hansard/joint/committee/j4634.pdf>.
[127] Ibid, p. 130.
[128] BHP, ‗Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities -Corporate Code of Conduct Bill 2000' (2001), <http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/1999_02/corp_code/submissions/sub39_pdf.ashx>.
[129] Corporations Law Committee of the Business Law Section of the Law Council of Australia, above n 125, Paragraph 5.8.
[130] Ibid, Comments By Labour Members On The Corporate Code Of Conduct Bill 2000, p. 4.
[131] Ibid.
[132] The Parliament of the Commonwealth of Australia, above n 123, Paragraph 3.112, p. 26.
[133] See Deva S., ‗Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?' (2004) 5, *Melbourne Journal of International Law*, p. 57-62.

- It was deemed unnecessary and unwarranted because of the infrequency of misconduct by Australian companies and the fact that there is already an existing legal system available to overseas litigants wanting to sue in Australia.[135]
- It was impracticable as it could place Australian companies at a disadvantage when compared to competitors overseas.[136] Moreover, it could lead to corporations relocating from their home state to avoid legislation they deemed to be disadvantageous for compliance, cost and other reasons.[137]
- It was viewed as ―arrogant, patronising, paternalistic and racist"[138] towards foreign countries if domestic regulations were to be applied to their corporations operating in other states. The imposition of extraterritorial regulation would cause other states to react negatively and consider that Australia was of the opinion that its law and standards were more appropriate than others.[139]
- It was unworkable because the scope was too wide and vague, adding to the difficulty of enforceability.[140] Arguably, the extraterritorial provision could result in conflict over the jurisdiction and sovereignty of other nations.[141]

Although the Bill was rejected by Parliament, the Labour party report commented that ―[t]he objectives of this Bill are noble ones and need realisation with due dispatch".[142] Senator Andrew Murray stated that:

> ―I conclude that the Bill cannot proceed without amendment; however, I disagree with rejecting the Bill outright. I intend recommending to the author of the Bill that amendments that recognise valid

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[134] Ranald P., 'Global Corporations and Human Rights: The Legislative Debate in Australia' (2002), Paper presented at the Royal Institute of International affairs Conference on the Legal Dimensions of Corporate Responsibility, <http://www.piac.asn.au/publications/pubs/Global%20corps%20&%20%20HRs.pdf>.
[135] The Parliament of the Commonwealth of Australia, above n 123, Paragraph 4.12, 4.44, p. 40, 44.
[136] Ibid, Paragraph 3.155, p. 33
[137] Ratner noted that ―[c]orporations can also shift their activities to states with fewer regulatory burdens". Ratner S. R., 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111, *Yale Law Journal*, p. 463.
[138] The Parliament of the Commonwealth of Australia, above n 123, Paragraph 4.49, p. 45.
[139] Ibid, Paragraph, 4.47, p. 45.
[140] Ibid, Paragraph 3.16, 4.20, p. 9, 41.
[141] Ibid, Paragraph 3.18, 3.58, p. 10, 17.
[142] Ibid, Comments by Labour Members on the Corporate Code of Conduct Bill 2000 [minority report].

suggestions and criticisms should be made. I believe there are difficulties with the Bill, as it stands, but not that the Bill itself is unwarranted".[143]

Undeniably, the proposals in the Bill underlined efforts to bring corporations to account, in their home states, for violations of social, environmental and human rights standards in host countries. Using the experience of BHP in PNG as an example, there may be a need to develop a regulatory framework to ensure corporations act in a socially responsible manner whilst operating overseas. Taking such steps would at least provide assistance to host states which are unwilling or unable to enforce regulations against multinational corporations and at the same time uphold international standards. The challenge will continue to be to seek a solution that will ensure that corporations comply with international obligations with an enforcement mechanism that can effectively control their activities globally.

7.3.2 Overcoming the Opposition to Extraterritorial Regulation

Certainly, the arguments against extraterritorial regulation are understandable. However, they may be overcome through reconsidering the objections and finding a more balanced approach that would outweigh the negative aspects of imposing extraterritorial regulation. The reasons for reconsidering might be as follows:

1. The scope of a state's jurisdiction to control their national entities can be extended to their national corporations, and subsidiaries of those corporations while operating outside their territory. This is discussed in 7.3.3.
2. Extraterritorial regulation should not be resisted by claiming there is no demonstrated ~~-s~~ystemic failure in the *status quo*".[144] The development of protection for social, environmental and human rights standards should not be dependent on existing violations of these rights. Regulation should provide a deterrent to future transgressions rather being a reaction to

[143] Ibid, Senator Andrew Murray: Australian Democrats, Minority Report on the Corporate Code of Conduct Bill 2000.
[144] The Parliament of the Commonwealth of Australia, above n 123, Paragraph 4.45, p. 45.

systemic failures.[145] The enactment of extraterritorial regulation should be a proactive rather than a reactive approach to the protection of international standards.

3. The argument that those corporations would suffer competitive disadvantage as a result of such regulation can be countered using discussions based on the theories in Chapter 3. It can be argued that corporations would ultimately gain benefits from operating in a socially responsible manner, both financially and non-financially.
4. The arguments that the imposition of extraterritorial regulation would patronise host countries and cajole them into accepting first world standards may be overcome by the potential benefits that can be gained by those nations. Such regulation would enhance international norms, promoting and protecting social, environmental and human rights standards in the global arena. It would only obligate home state corporations to comply with international standards through domestic regulation, simply extending that obligation to other states in which they operate. It could, incidentally, influence an increase in standards within host states even though that may not be the primary aim.
5. While the proposal for extraterritorial regulation contained in the Corporate Code of Conduct Bill was too vague and broad in its application, at that time ~~–it~~ was only feasible for it to lay down broad parameters or aspirational standards".[146] This problem may be remedied through implementing specific laws to control corporations operating overseas rather than the broad coverage originally suggested.

These arguments may be used to encourage developments in regulating corporate nationals operating overseas. Additionally, an understanding that home state regulation could contribute benefits to host states' local communities may provide support for such developments. These potential benefits include: [147]

[145] Deva S., _Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?' (2004) 5, *Melbourne Journal of International Law*, p. 57.
[146] Ibid, p. 61.
[147] Brotherhood of St Laurence, _Corporate Social Responsibility: Supplementary Material to the Australian Government Corporations and Markets Advisory Committee' (2006), p. 2, <http://www.bsl.org.au/pdfs/BSL_subm_corp_soc_respons_CAMAC.pdf>.

- ensuring multinational corporations provide positive benefits in the global market, especially in host states which may have lower standards than home states;
- facilitating broader spheres of development instead of mere economic development, where corporations are required to consider the well-being of local communities, human rights and other social problems, which may deter them from actions that would have a negative impact on the societies in which they operate;
- promoting compliance with international standards, procedures and treaties appertaining to worldwide guidelines on corporate governance, such as the OECD Guidelines on Multinational Enterprises, the ILO Declaration on Fundamental Rights at Work and the UN Global Compact;
- taking positive steps to encourage host countries to develop their own regulations and procedures, promoting and protecting the well-being of their own citizens;
- enhancing higher standards in business practices to create competitive advantages for corporations through greater public image and reputation.

A further benefit would be that host states could be in a position to introduce realistically rigorous legislation since they would no longer fear that such actions may deter investors as corporations would have to uphold these high standards imposed by their home countries. Home states‘ decisions to enact extraterritorial regulations would serve as a role model and perhaps instigate a domino effect that would be a step forward in promoting higher standards in the global arena. With these benefits, perhaps any objection to extraterritorial regulation on the grounds that it is unnecessary should be carefully reconsidered. It should be seen as a desirable step towards home states‘ responsibility to prevent social, environmental and human rights violations by their national corporations. Through this, not only would extraterritorial regulation establish a higher degree of regulation for home countries, showing their leadership in upholding international standards, double standards would also be reduced and a higher level of living conditions in host countries would be achieved.

7.3.3 Do Home States Have the Right to Control Their National Corporations Operating Extraterritorially?

The commonly accepted concept of jurisdiction is one of the main arguments against extraterritorial regulation of multinational corporations.[148] Where ―jurisdiction involves both the right to exercise it within the limits of a state's sovereignty and the duty to recognise the same right of other states",[149] it is accepted that a state should not exercise its jurisdiction on other states' sovereignty.[150] Consequently, it has been argued that home states should not apply extraterritorial regulation to their national corporations operating overseas as they would be impinging upon the host states' sovereignty.[151]

However, this can be countered by the argument that states' jurisdiction is not necessary limited to their own territory. While states will normally be in breach of international law if they exercise their jurisdiction outside their own territory, that is not the case where there is a permissive rule allowing them to do so. This position was noted by the Permanent Court of International Justice (PCIJ) (a forerunner to the International Court of Justice (ICJ)) in the Lotus case, where it said:

> ―Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention".[152]

However, the PCIJ then also suggested that states are not prohibited from exercising their jurisdiction to cover matters occurring overseas, even when there is no permissive rule, as long as they do not overstep other states' sovereignty. As it stated:

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[148] According to Skogly, ―[e]xtraterritorial will be used to mean any action that has effect outside the defined territory of a state, whether in a neighbouring country or a country thousands of miles away". Skogly S., Beyond National Boders: State's Human Rights Obligations in International Cooperation (Antwerp: Intersentia, 2006), p. 5.
[149] Hillier T., *Sourcebook on Public International Law* (Cavendish Publishing Limited, 1998), p. 250.
[150] ―[S]overeignty' is referred to as the general legal competence of States (or as the legal personality of statehood), [whereas], ‗jurisdiction' refers to particular exercises of sovereignty (or particular exercises by States of their legal personality". Heijer M. & Lawson R., ‗Extraterritorial Human Rights and the Concept of ‗Jurisdiction', in Langford M. et al. (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013), p. 155.
[151] See Brownlie I., *Principles of Public International Law* (Clarendon Press, 5th ed, 1998), p. 289.
[152] S.S. Lotus (France v Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at [45].

> —tIdoes not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States …In these circumstances all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[153]

Consequently, it is possible that, in certain circumstances, states are able to apply their national regulations extraterritorially to police the activities of their nationals outside their own jurisdiction. This concept of extraterritorial jurisdiction —refers to the ability of a state, via various legal, regulatory and judicial institutions, to exercise its authority over actors and activities outside its own territory".[154] In Australia, an example can be taken from the law against child sexual exploitation under the *Criminal Code Act 1995* (Cth), which makes it a crime for Australians to engage in sexual activities with children whilst travelling outside Australia.[155] This law comprehensively protects children everywhere from abuse by Australians. This approach, where the government can introduce regulations to control its citizens from committing criminal activities overseas, can also be adapted to regulate national corporations operating outside Australian territory. It is acknowledged that criminal prosecution is different from controlling corporate activities, but there is no reason, in principle, why such laws should not be used to provide a philosophical basis for a wider application of extraterritorial regulation.

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[153] S.S. Lotus (France v Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at [46]-[47].

[154] Zerk J. A., _Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010), A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights, Working Paper No. 59, p. 13, <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf>.

[155] *Criminal Code Act 1995* (Cth), Division 272 – Child sex offences outside Australia, <http://www.comlaw.gov.au/ComLaw/Management.nsf/current/bytitle>.

The attempt to regulate actors other than individuals using the concept of extraterritorial jurisdiction requires an understanding of the ―nationality principle", in that it also applies to corporations.[156] Under this principle, home states have a responsibility to control their national corporations under international law. This responsibility derives from a general obligation that states should not cause harm in terms of social, environmental and human rights standards within other states, including harm done through the activities of their corporations, at least where states have had control of their conduct.[157]

Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts states that:

> ―The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".[158]

In this regard, states that have control of their national corporations have a responsibility to monitor and control their corporations operating extraterritorially as failing to do so may result in them being in breach of international law. It seems, then, that home states may have some basis for preventing and alleviating abuses by their corporations by adopting appropriate legislation to comply with international obligations.[159] However, while this obligation may be used to motivate home states to introduce a more-comprehensive extraterritorial regulation to control corporate activities, that is still far from being realistic as most multinational corporations are private entities and not under the control of states. Thus, this approach may not be seen as practicable at this moment in time.

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[156] This principle ―is justified on the grounds that a national owes allegiance to his country irrespective of wherever he may be". In Boczek B. A., *International Law: A Dictionary* (Scarecrow Press, Inc, 2005), p. 78. Also see discussion in Hillier T., *Sourcebook on Public International Law* (Cavendish Publishing Limited, 1998).

[157] McCorquodale R. & Simons P., ‗Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights law' (2007) 70(4), *Modern Law Review*, p. 617, 619.

[158] International Law Commission, ‗Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001), <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf>.

[159] Jagers N., *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia, 2002), p. 171-172.

Alternatively, states are encouraged to control the activities of their nationals outside their jurisdiction through various treaties, such as the International Covenant on Civil and Political Rights (ICCPR), where the UN Human Rights Committee's statement on the obligations of states noted that:

> "States Parties are required…to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party…This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained."[160]

This responsibility is also imposed under the International Covenant on Economic, Social and Cultural Rights (ICESCR), which places an obligation on states to ensure private actors respect rights in other states, such as the rights to food and health.[161] A similar approach can also be seen under the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights:

> "The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-State actors".[162]

Logically, the state obligations under these treaties can be used to support extending state control of corporate activities outside their normal jurisdiction. A further logical step that may be used to resolve the conflict of sovereignty issues would be the adoption of "universal jurisdiction" where states are allowed to prosecute perpetrators for serious crimes against international law committed outside their

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[160] UN Human Rights Committee (HRC), 'General Comment No. 31(80) on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004), UN Doc CCPR/C/21/Rev.1/Add.13, at 10, <http://www.refworld.org/docid/478b26ae2.html>.

[161] The Committee on Economic, Social and Cultural Rights (CESCR) stated that "[a]s part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food", and "[w]hile only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society…as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities".
Committee on Economic, Social and Cultural Rights (CESCR), 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12: The right to adequate food (Art. 11 of the ICESCR)' (1999), UN Doc E/C12/1999/5 para 27, <http://www.escr-net.org/docs/i/425234>; 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the ICESCR)' (2000), UN Doc E/C12/2000/4 para 42, <http://www.refworld.org/docid/4538838d0.html>.

[162] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted in Maastricht, (January 1997), para 18, <http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html>.

territory.[163] Universal jurisdiction ―holds the promise of a system of global accountability – justice without borders – administered by the competent courts of all nations on behalf of humankind".[164] The exercise of universal jurisdiction is not considered to be a breach of other states' sovereignty as proceedings are brought inside the prosecuting countries and outside the territory where the violations were committed.[165] However, this principle might not be applicable to bring corporations to account by home states as most breaches of CSR standards are not considered to be serious crimes. Thus, the term ―serious crimes" is a limitation on the scope of state power to impose control on corporations under this principle.[166] The negative impact of corporate activities might not be regarded as a serious crime and, therefore, states could not apply the concept of universal jurisdiction to prosecute their national corporations. In these circumstances, there may be a case for extending the coverage of the term ―serious crimes" to cover violations by corporations that cause enormous destruction to social, environmental and human rights standards in the communities where they operate. However, it may be too difficult to draw the line on what would be regarded as serious crimes for corporations and eventually, we may have to accept that the concept of universal jurisdiction might not be a basis for a solution.

As demonstrated above, a state's responsibility to control the activities of its corporations is not limited to its own territory in reasonable circumstances. Even though states are not mandated to impose extraterritorial regulation on their corporations, they can do so. As the Special Representative of the Secretary-General (SRSG) noted:

> ―The extraterritorial dimension of the duty to protect remains unsettled in international law. Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognised jurisdictional basis, and that an overall test of

[163] Macedo S., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2004).
[164] Ibid, p. 4.
[165] Inazumi M., *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, 2005), p. 135.
[166] Serious crimes are referred to, ―such as crimes against humanity, war crimes, genocide, and torture – based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect." International Justice Resource Centre, 'Universal Jurisdiction', <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>.

> reasonableness is met. Within those parameters, some treaty bodies encourage home States to take steps to prevent abuse abroad by corporations within their jurisdiction".[167]

In theory, while there is no positive duty on home states to impose extraterritorial regulation on corporations, such an approach may be considered to fill the regulatory gaps and reduce double standards between states. However, it is important to bear in mind that the imposition of extraterritorial regulation will not always be supported and can be criticised for possible impingement on the sovereignty of host states. Jurisdictional conflicts will continue to be contested, especially where states' sovereignty can be a sensitive issue. To overcome this, it would perhaps be more useful to encourage a better understanding of the reasons for extraterritorial legislation through working in conjunction with host states. Attitudes should be changed to one of providing benefits to host states, rather than as an intrusive command-and-control tactic. At the end of the day the matter of impingement on state's sovereignty should not be made an obstacle to the promotion of the socially responsible practices of corporations, globally.

7.4 The Desirability of Imposing Mandatory Disclosure of Social Responsibility

With the growing concern regarding the impact corporations can have on society, the role of corporate disclosure has moved from the traditional financial performance to also including social and environmental impacts.[168] This CSR reporting is defined as:

> "The provision of financial and non-financial information relating to an organization's interaction with its physical and social environment, as stated in corporate annual reports or separate social reports, [which] includes details of the physical environment, energy, human resources, products and community involvement matters".[169]

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[167] Human Rights Council, 'Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy Framework' (2009), Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 22 April 2009, A/HRC/11/13, Paragraph 15, p. 7, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>.

[168] John Elkington described this as "Triple Bottom Line" (TBL) reporting. See Elkington J. 1980, *The Ecology of Tomorrow's World: Industry's Environment* (Associated Business Press, 1980). Section 299(1)(f) of the *Corporations Act 2001* (Cth) also expressly requires corporations that are subject to "any particular and significant environmental regulation" to include in their annual report details of their performance in relation to environmental regulation.

[169] Hackston D. & Milne M. J. 'Some Determinants of Social and Environmental Disclosures in New Zealand Companies' (1996) 9(1), *Accounting, Auditing & Accountability Journal*, p. 78.

It might be expected that the requirement for corporations to provide information regarding social and environmental practices would have an effect on changing business's approach to socially responsible practices. However, this expectation has not yet been achieved through voluntary reporting, which corporations may use to underscore their own benefits without providing the facts of their performance. Examples can be seen in the James Hardie and BHP cases discussed in Chapter 6 which demonstrated how corporations can use CSR reporting as a means to divert public attention from their misconduct and restore their reputations.

In the same way that corporations can engage with CSR without genuine commitment, CSR reporting may not reflect their actual performance. Thus, the conflict between CSR disclosure and corporate performance can highlight the lack of reliability and transparency in voluntary reporting. By having the flexibility of engaging with CSR disclosure, corporations can generally choose whether and how to report on their activities relating to social, environmental and human rights issues. The degree of participation may depend on how corporations perceive the motivations for doing so. These motivations are listed in the table below:

Companies' Motivations for Reporting or Non-Reporting

Reasons for reporting
• enhanced ability to track progress against specific targets • facilitating the implementation of the environmental strategy • greater awareness of broad environmental issues throughout the organisation • ability to clearly convey the corporate message internally and externally • improved all-round credibility from greater transparency • ability to communicate efforts and standards • licence to operate and campaign • reputational benefits, cost savings identification, increased efficiency, enhanced business development opportunities and enhanced staff morale

Reasons for not reporting
• doubts about the advantages it would bring to the organisation • competitors are neither publishing reports • customers (and the general public) are not interested in it, it will not increase sales • the company already has a good reputation for its environmental performance • there are many other ways of communicating about environmental issues • it is too expensive • it is difficult to gather consistent data from all operations and to select correct indicators • it could damage the reputation of the company, have legal implications or wake up _slæping dogs‘ (such as environmental organisations)

Table 7 Source: Kolk 2004[170]

As can be seen, the underlying reasons for CSR reporting include social and financial issues similar to those motivations for engaging with CSR to increase corporate value maximisation, as was discussed in Chapter 3. This may lead to the same criticisms that applied to voluntary CSR, in that corporations may not conduct their CSR reporting if they do not perceive any economic advantage in doing so. It is probable that the considerations that corporations may fail to engage with voluntary CSR reporting and the result that their disclosures may not be reflect their actual performance have led to discussions over enhanced CSR reporting through a mandatory mechanism. As Loftus noted:

> –the reliance on CSR reporting to empower social, political and market forces may need to be supplemented by regulatory intervention to promote CSR outcomes commensurate with broader social expectations”.[171]

7.4.1 The Current Situation of Social Responsibility Reporting in Australia

In Australia, directors‘ legal obligations on social and environmental issues include:

- *Corporations Act 2001* (Cth) s299(1)(f) which requires companies to provide directors‘ reports on their performance regarding environmental regulation.[172] It has been criticised as being

[170] Kolk A., _A Decade of Sustainability Reporting: Developments and Significance‘ (2004) 3(1), *International Journal of Environment and Sustainable Development*, p. 54. The author compiled from Sustainability/UNEP, The Non-Reporting Report (1998), < http://www.sustainability.com/>.
[171] Loftus J., _CSR Reporting and CSR Performance – Which Drives Which?‘ (2011), p. 13, <http://www.utas.edu.au/__data/assets/pdf_file/0010/188407/Loftus.pdf>.

subject to qualifications, allowing companies to avoid disclosing worthwhile information.[173] However, despite its vagueness and need for clarification, it is important to realise that the Act has increased reporting on environmental compliance generally.[174] The evidence of its effectiveness can be seen through the data below. This data was taken from the periods immediately before and after the introduction of s299(1)(f), using 71 Australian companies as the database for the research.[175]

Corporate Reporting Practices Relating to Section 299(1)(f) (n = 71)

	Pre-operative Period	Post-operative Period
Identified Significant Environmental Regulations	17	67
Specified Level of Compliance with Environmental Regulations	13	62
Reported Non-compliance of Environmental regulations	9	27

Table 8 Source: Frost & English 2002

This data indicates a trend towards corporations recognising the importance of reporting. The numbers suggest a contradiction to the arguments, opposing the provision that voluntary disclosure was already effective and that companies would find difficulties in complying with mandatory reporting.[176] However, it has also been argued that this section does not provide any substantive information in reporting. As Overland noted, despite the increase in the numbers of companies reporting, ~~t~~the actual substance of such disclosure is, for the most part, non-substantive in content".[177]

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[172] Corporations Act 2001 - Section 299(1)(f) provides that ~~t~~the directors' report for a financial year must, if the entity's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory, give details of the entity's performance in relation to environmental regulation".
[173] Australian Conservation Foundation submission to PJCFS, Submission 21, p. 31. Quoted in PJCFS, above n 30, p. 137.
[174] Nolan J., 'Corporate Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure' (2007), University of New South Wales Faculty of Law Research Series 15, p. 5, <http://www.austlii.edu.au/au/journals/UNSWLRS/2007/15.html>.
[175] Frost G.R. & English L., 'Mandatory Corporate Environmental Reporting in Australia: Contested Introduction Belies Effectiveness of its Application' (2002), p. 4,<http://www.australianreview.net/digest/2002/11/frost.html>.
[176] Ibid, p. 5.
[177] Overland J., 'Corporate Social Responsibility in Context: The Case for Compulsory Sustainability Disclosure for Listed Public Companies in Australia?' (2007) 4(2), *Macquarie Journal of International and Comparative Environmental Law*, p. 9.

- *Corporations Act 2001* (Cth) s1013D(1)(l) which requires the disclosure, in relation to financial products with an investment component, of ―the extent to which labour standards or environmental, social or ethical issues are taken into account in the selection, retention or realisation of the investment".[178] Even though this provision applies only to financial products, Nolan has suggested that in time it may influence all corporations to increase their concerns over corporate responsibility standards.[179] The *Financial Services Reform Act 2001* (Cth) brought amendments to this provision, and may be seen as a development in corporate disclosure in the area of human rights.[180] The intention behind this change was to give potential investors more information over social standards and other issues concerning their investment.[181] It is very much in line with the rise of ethical considerations in business practices whereby corporations are required to provide information that can be exposed to public scrutiny and which leads to possible consequences if they are found to be involved in questionable acts.
- Corporate Law Economic Reform Program (Audit Reform & Corporate Disclosure) Bill 2003 (Cth) (CLERP 9) introduced s299A into the *Corporations Act 2001* (Cth) in July 2004 to require additional general disclosure for listed entities.[182] It requires directors to report on information that shareholders could reasonably expect to enable them to make informed decisions on:
    - the company's operations;
    - the company's financial position; and
    - the company's business strategies and future financial prospects.[183]

  This means that directors need to report on environmental and other issues that could affect their companies' future financial performance, which may include, for example, climate change

[178] *Corporations Act 2001* – Section 1013D: Product Disclosure Statement
[179] Nolan, above n 174, p. 5.
[180] Fitzgerald S., ‗Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1), *Australian Journal of Human Rights*.
[181] Ibid.
[182] Taberner J., ‗How will CLERP 9 Impact Companies and Corporate Environmental Reporting?' (2004), <http://www.mondaq.com/australia/article.asp?articleid=24783>.
[183] Ibid. Also see *Corporations Act 2001* (Cth) s299A(1)(a)-(c), <http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s299a.html>.

and water pollution.[184] If directors fail to comply with the reporting procedure, they are liable to a civil penalty up to $200,000 for an individual.[185]

The above mandatory reporting requirements highlight the development of sustainability reporting in Australia. However, the crucial issue of their effectiveness is not yet obvious, perhaps because of the very general nature of the requirements and the emphasis on financial performance and financial outcomes. At present where the requirements only apply to issues of financial products, it could be used as a basis for a more extensive regulation of general application to company reporting.

On the other hand, the development of voluntary mechanisms to assist with sustainability reporting by companies has been shown through various principles and guidelines. These include:

- ASIC's Guidelines developed under s1013DA which provide guidance for product issuers concerning disclosure on labour standards or environmental, social and ethical considerations regarding Product Disclosure Statements (PDS) under *Corporations Act* s1013D(1)(l), at least where the product has an investment component.[186] These guidelines only apply to investment products and product issuers must declare which of these standards and considerations are taken

[184] Ibid. Also see Richards F. & Freiman D., 'Are Your Environmental Reporting Practices Ready for Clerp 9?' (2004) 10(2), *Journal of the Asia Pacific Centre for Environmental Accountability*, p. 8.
According to Regulatory Guide 247: Effective Disclosure in an Operating and Financial Review (RG 247), "[t]he scope and depth of information that needs to be provided under s 299A is considerably less than the information required in a prospectus or Product Disclosure Statement (PDS), giving that an operating and financial review:
(a) is provided to shareholders (who may already have some level of familiarity with the entity);
(b) is designed to be read in conjunction with the financial report; and
(c) provides information about an entity that is subject to an observable market price and continuous and periodic disclosure obligations (although the fact that these disclosures have been made cannot be regarded as a substitute for complying with s299A)".
RG 247.14 – Regulatory Guide 247: Effective Disclosure in an Operating and Financial Review (2013), <https://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg247-published-27-March-2013.pdf/$file/rg247-published-27-March-2013.pdf>.

[185] See s344(1)(2) and the civil penalty provisions in s1317E(1)(d) under which ASIC can seek a pecuniary penalty order under s1317G or a disqualification order under s206C. The penalty for breach of s344 is $200,000 because it is not a financial services civil penalty provision (for which companies can pay $1 million). If the non-disclosure was intentional and dishonest s344(2) makes it an offence for which s1311 makes criminal penalties apply (see the s1311(3) reference to Schedule 3). Schedule 3 says the penalty is 2000 penalty units or 5 years jail.

[186] Australian Securities and Investments Commission (ASIC), 'Section 1013DA Disclosure Guidelines: ASIC Guidelines to Product Issuers for Disclosure about Labour Standards or Environmental, Social and Ethical Considerations in Product Disclosure Statements (PDS)' (2003), <http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/s1013DA_finalguidelines.pdf/$file/s1013DA_finalguidelines.pdf>.

into account and how they are taken into account.[187] However, they neither set out what is included in the consideration of labour, environmental, social or ethical standards, nor the methodology that product issuers should use, only how and what should be reported.[188] It has been suggested that further guidance should be introduced to assist corporations to understand and comply with these vague guidelines.[189]

- ASX Corporate Governance Council's Corporate Governance Principles and Recommendations (revised 2007 and reviewed 2012-2013) which provide guidelines for public listed companies regarding their governance activities.[190] Companies are required to explain to the ASX why they have not complied with particular recommendations, known as "if not, why not" disclosure.[191] There are two principles in the ASX rules that are related to social responsibility disclosure:

  -Principle 3: Act ethically and responsibly. Corporations are encouraged to act in accordance with the expectations of investors and society, and become good corporate citizens by:

  - respecting the human rights of its employees;
  - creating a safe and non-discriminatory workplace;
  - dealing honesty and fairly with suppliers and customers;
  - acting responsibly towards the environment; and
  - only dealing with business partners who demonstrate similar ethical and responsible business practices.[192]

  -Principle 7: Recognise and manage risk. Corporations need to consider business risks involving not only impact on its entity and shareholders, but also other stakeholders, including

[187] Ibid. Investment products include superannuation products, managed investment products and investment life insurance products.
[188] Ibid.
[189] Nolan, above n 174, p. 6.
[190] Australian Stock Exchange Corporate Governance Council (ASX CGC), 'Corporate Governance Principles and Recommendations' (3rd ed, 2014), <http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>.
[191] Ibid, p. 3.
[192] Ibid, p. 19.

> employees, customers, suppliers, creditors, consumers, taxpayers and the broader community. Corporations are encouraged to disclose whether their operations have been exposed to economic, social and environmental risks and how they control those risks.[193]

The ASX Principles and Recommendations are seen as forming a flexible framework available for reporting requirements. Under ASX Listing Rule 4.10.3, listed companies are required to disclose in their annual report their compliance with the framework and, in the case of non-compliance, they "must identify those recommendations that have not been followed and give reasons for not following them".[194] Thus, while the framework is voluntary, it also has a mandatory aspect in that corporations may face sanctions if they are in breach of ASX Listing Rule 4.10.3.[195] Consequently, the ASX Principles and Recommendations could be seen as a hybrid approach in which both voluntary and mandatory rules apply.[196]

However, the "if not, why not" approach may also be considered as a weakness in that it allows corporations to decide not to comply with certain aspects of the Recommendations. Those companies may use whatever reason they choose to explain their non-compliance and may still meet the requirements of the "comply or explain" mechanism.[197] This could result in reports not providing any real disclosure, and being unreliable and/or distorted. Thus, the effectiveness of this mechanism may not be easy to evaluate and it may suggest that the numbers of those that are compliant may not be a good indicator of the true effectiveness of the Recommendations,[198] as corporations are allowed too much flexibility in responding.

Overall, the above disclosure requirements can be seen as developments in Australia to encourage corporations to report on their social and environmental impact. However, it has been argued that they

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[193] Ibid, p. 28.
[194] ASX Listing Rule 4.10.3, <http://www.asx.com.au/documents/rules/Chapter04.pdf>.
[195] Zadkovich J., 'Mandatory Requirements, Voluntary Rules and 'Please Explain': A Corporate Governance Quagmire' (2007) 12(2), *Deakin Law Review*, p. 30.
[196] Ibid, p. 29.
[197] An example is a company may use prohibitive costs as grounds for non-compliance. Overland 2007, above n 177, p. 20.
[198] In 2010, overall compliance with the ASX Principles and Recommendations was 92%. Grant Thornton, 'Corporate Governance Reporting Review 2012' (2012), p. 5, <http://www.grantthornton.com.au/files/gt-corporategovernance-2012.pdf>.

are still insufficient to ensure greater corporate commitment to socially responsible activities.[199] One weakness of these procedures may be derived from corporate reporting directed at shareholders rather than all stakeholders, in that where directors have a wide discretion in their reporting, they may concentrate on financial risks rather than social risks.[200] Another weakness might be that obligations to include social and environmental impact disclosures in financial reports are limited to situations where this impact is an easily measurable liability. They also, as yet, do not include disclosure of human rights issues. Additionally, in relation to corporate disclosure under a "comply or explain" mechanism, corporations can avoid compliance by providing reasons for failing to do so.

Notwithstanding those weaknesses, the Federal Government seems to place great emphasis on voluntary sustainability reporting as against mandatory reporting.[201] In its 2006 report, CAMAC considered that:

> "[voluntary initiatives] have benefits of flexibility and responsiveness to change that cannot be achieved as readily through legislative prescription…[and] may provide a useful model and possible commercial benefits for companies that choose to follow them. There is something to be said for allowing the current activity in this area to continue rather than cutting across it by legislative prescription, particularly where recommended practice is still at a formative stage".[202]

Similarly, the PJCFS noted that:

> "mandating sustainability reporting in the current Australian context would promote form over substance. As a result of these issues the committee believes that it is vitally important for companies to be encouraged strongly to engage voluntarily in sustainability reporting rather than being forced to do so".[203]

Their clear view was that the best way to achieve more sustainable business practices is by encouraging social and environmental responsibility through voluntary mechanisms.[204] Further rules and regulations were seen as being counter-productive.[205] One of their main oppositions to mandatory reporting is the

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[199] Overland J., 'Corporate Social Responsibility in Context: The Case for Compulsory Sustainability Disclosure for Listed Public Companies in Australia?' (2007) 4(2), *Macquarie Journal of International and Comparative Environmental Law*, p. 16-20.
[200] For example, "s299A of the *Corporations Act* requires the directors' report to include information which "members" would require to make an informed assessment of the relevant matters". Ibid, p. 12.
[201] CAMAC, above n 29 and PJCFS, above n 30.
[202] CAMAC, above n 29, p. 147.
[203] PJCFS, above n 30, p. 88-89.
[204] Ibid
[205] CAMAC, above n 29, p. 139.

financial costs of compliance. Both noted that it would be an outlandishly expensive proposition.[206] In addition, the Parliamentary Joint Committee predicted the rise of a superficial "box ticking" mentality, should mandatory reporting be imposed, leading to "an undesirable outcome and one that defeats the purpose behind the concept of corporate responsibility".[207] The Committee's concerns were echoed by business leaders. For example, Tim Sheehy, Chartered Secretaries Australia chief executive stated:

> "Not only does mandatory reporting create a box-ticking, mechanical culture, but the compliance costs, particularly for small companies, would be overly burdensome. Providing guidance and models for good reporting is a preferable approach, as it allows companies to tailor the reports to the size and nature of their business."[208]

Similarly, the CEO of the Australian Institute of Company Directors (AICD), Ralph Evans, stated that:

> "Given the breadth and depth of activities associated with corporate social responsibility, it is impossible to create a workable 'one-size-fits-all' reporting framework. Tick-a-box compliance creates a mindset where no-one wins".[209]

Tom Honan, national president of the G100, which represents the chief financial officers of Australia's leading enterprises, also noted that:

> "Flexibility is important as approaches to CSR will vary, depending on the nature of a company, its culture and the relationships it has with the communities in which it operates. In a competitive environment, the practices of leading companies and how they report will encourage improved reporting by others as they respond to changes in community expectations — which is unlikely to occur under a mandatory 'one-size-fits-all' regime".[210]

There is therefore clearly an arguable case for voluntary reporting, but a major problem with this approach, apart from its non-enforceable nature, is its lack of structure and uniformity. Without a structured, uniform framework it is difficult to make any informed judgement on corporate involvement with ethical practices. Corporations are unlikely to highlight their failures in promoting social standards, and are likely to present their reports emphasising their positive results, to the extent

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[206] PJCFS, above n 30, p. 135; CAMAC, above n 29, p. 139.
[207] PJCFS, above n 30, p. xv.
[208] Quoted in Shkolnikov A., 'Corporate Social Responsibility: Voluntary or Mandatory?' (2006), Center for International Private Enterprise, <http://www.cipe.org/blog/?p=248>.
[209] The Australian Institute of Company Directors, 'CSR and the Law' (2006) 4(5), *The Boardroom Report*, <http://www.companydirectors.com.au/Media/The+Boardroom+Report/Vol+4.+2006/060314/Item+1/>.
[210] Quoted in Gettler L., 'Inquiry Report One Small Step for CSR' (2006), <http://www.theage.com.au/news/business/inquiry-report-one-small-step-for-csr/2006/06/28/1151174270757.html>.

that some reports may become de facto the public relations or advertising exercises. Clear guidelines would lessen this risk as reports would be more measurable and transparent.

7.4.2 CSR Reporting

One commonly used voluntary framework for corporations to report on sustainable activities is the Global Reporting Initiative (GRI).[211] According to KPMG research, in 2008 79% of the Global Fortune 250 companies actively reported on environmental, social and governance (ESG) data and 77% of those utilised GRI as the mechanism for reporting. Those figures represented an increase in reporting of 27%, from 52% in 2005.[212] In 2011, these figures increased even more dramatically to 95% of the G250 companies reporting on corporate responsibility activities with 80% using GRI as their reporting standard.[213]

These impressive figures may be used to indicate that voluntary reporting has becoming acceptable worldwide and can increase corporate disclosure regarding the social and environmental impacts of corporate activities. However, despite this trend, Australian companies have not shown much enthusiasm for voluntary sustainability reporting. This is borne out by the findings of the KPMG International Survey of Corporate Responsibility Report 2005-2011. In 2005, only 23 out of the top 100 Australian companies participated in CSR reporting, while Japan had 80% and the UK had 71%.[214] In 2008, the number reporting had increased by 14% in Australia to 37%, but it was still regarded as being a low rate when compared with international levels, where Japan and the UK had increased their sustainability reporting to 88% and 84%, respectively.[215] In the 2011 survey, the percentage of top 100 Australian companies reporting on corporate responsibility had risen to 57% while the UK had reached

[211] See Global Reporting Initiative G3 Guidelines, <http://www.globalreporting.org/ReportingFramework/G3Guidelines/>.
[212] KPMG, ‗International Survey of Corporate Social Responsibility Reporting' (2008), <http://www.kpmg.com/LU/en/IssuesAndInsights/Articlespublications/Documents/KPMG-International-Survey-on-Corporate-Responsibility-Reporting.pdf>.
[213] KPMG, ‗KPMG International Survey of Corporate Responsibility Reporting 2011' (2011), <http://www.kpmg.com/ES/es/ActualidadyNovedades/ArticulosyPublicaciones/Documents/CR_Report_2011.pdf>.
[214] KPMG Global Sustainability Services, ‗KPMG International Survey of Corporate Responsibility Reporting' (2005), p. 10, <http://www.kpmg.com.au/Portals/0/KPMG%20Survey%202005_3.pdf>.
[215] KPMG, above n 212, p. 16.

100% and Japan 99%.[216] The key driver for companies engaging with sustainability reporting was noted as seeking bottom-line benefits with nearly half of the companies demonstrating that they gained financial advantage from their CSR reporting.[217] This is in line with the discussion in Chapter 3 above where it was demonstrated that profits of the companies can be linked to their CSR involvement. Thus, attainment of financial benefits can be used to motivate companies to participate in voluntary reporting.

While the figures in the KPMG reports demonstrated that companies from other nations have a stronger voluntary commitment to sustainability disclosure than Australian companies, one study suggested that the lack of organisational support may be a major contributor to this low level of reporting in Australia.[218] Along with no clear direction from the organisation, additional barriers can be derived from the lack of a business case for sustainability reporting and of human resources who have sufficient reporting expertise.[219] A summary of the key drivers, barriers and benefits of sustainability reporting from the study is shown in the table below.

Figure 6 Source: Net Balance Foundation & National Centre for Sustainability (NCS)[220]

[216] KPMG, above n 213, p. 10-11.
[217] Ibid, p. 18.
[218] Net Balance Foundation & National Centre for Sustainability (NCS), ‗Impact of GRI Training on Sustainability Reporting in Australia' (2012), p. 18, <http://www.swinburne.edu.au/ncs/documents/GRI%20report_Final.pdf>
[219] Ibid, p. 23.
[220] Ibid, p. 22.

The problem of lack of corporate involvement with sustainability reporting lies not only within Australia but has occurred worldwide. The Global Reporting Initiative noted that from 82,000 MNCs worldwide, only 3,000 issue sustainability reports, leaving a staggering 79,000 companies lacking in transparency over their social and environmental performance.[221] This report also illustrates that it is unlikely that voluntary initiatives provide adequate measures for corporate disclosure, especially among smaller companies, which may be linked to the extra cost of voluntary involvement.[222] The overwhelming lack of corporate involvement with sustainability reporting may indicate the necessity for a more rigorous approach that would ensure transparency and accountability for their sustainability performance among a much broader range of corporations.

7.4.3 Is Mandatory Disclosure Necessary?

While voluntary reporting is criticised for its lack of standardisation[223]and commitment to participation, mandatory reporting is seen as an alternative which would enhance corporate disclosure through a clear directive and enforceable measures. As Lydenberg et al. stated:

> —mandated sustainability disclosure permits stakeholders to send clear market signals to corporations on their sustainability performance. It will encourage companies to compete on how they mitigate their sustainability risks and how they capitalize on their sustainability opportunities. In short, mandatory reporting regimes create better disclosure, which, when incorporating key sustainability performance indicators, can lead to better performance in those areas most crucial to stockowners, other stakeholders, and society".[224]

It would be beneficial if corporate performance can be assessed using uniform reporting standards. By assessing their activities against their social and environmental impacts, not only can corporate

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[221] Global Reporting Initiative, _Beyond Voluntary Laissez-Faire Reporting: Towards a European ESG Disclosure Framework' (2010), <http://www.globalreporting.org/NR/rdonlyres/BA446A5C-613C-4717-B79E-FB5067D87EC9/3924/2010GRIEUNote.pdf>.

[222] –Companies can spend anywhere from $100,000 to $1 million (USD) on a report. A bulk of these costs are often through production, rather than auditing costs". Doane D., _Market Failure: The Case for Mandatory Social and Environmental Reporting' (2002), Paper presented to IPPR Seminar-The Transparent Company, 20th March 2002, p. 7, <http://www.hapinternational.org/pool/files/doanepaper1.pdf>.

[223] –It is often argued that the voluntary nature, progressive character and number of standards envisioned in initiatives such as the GRI and other national and international initiatives, are unlikely to result in the standardization of sustainability reporting practices".
UNEP & KPMG, _Carrots and Sticks for Starters: Current Trends and Approaches in Voluntary and Mandatory Standards for Sustainability Reporting' (2006), p. 13, <http://www.kpmg.com/gr/en/issuesandinsights/articlespublications/sustainability/pages/ss_carrotsandsticksforstarters.aspx>.

[224] Lydenberg S., Rogers J. & Wood D., _From Transparency to Performance: Industry-Based Sustainability Reporting on Key Issues' (2010), p. 6, <http://hausercenter.org/iri/wpcontent/uploads/2010/05/IRI_Transparency-to-Performance.pdf>.

financial value be enhanced but improvements in the welfare of society can also be realised, as illustrated in the table below.

Supportive Infrastructure for Transparent and Accountable CSR Reporting

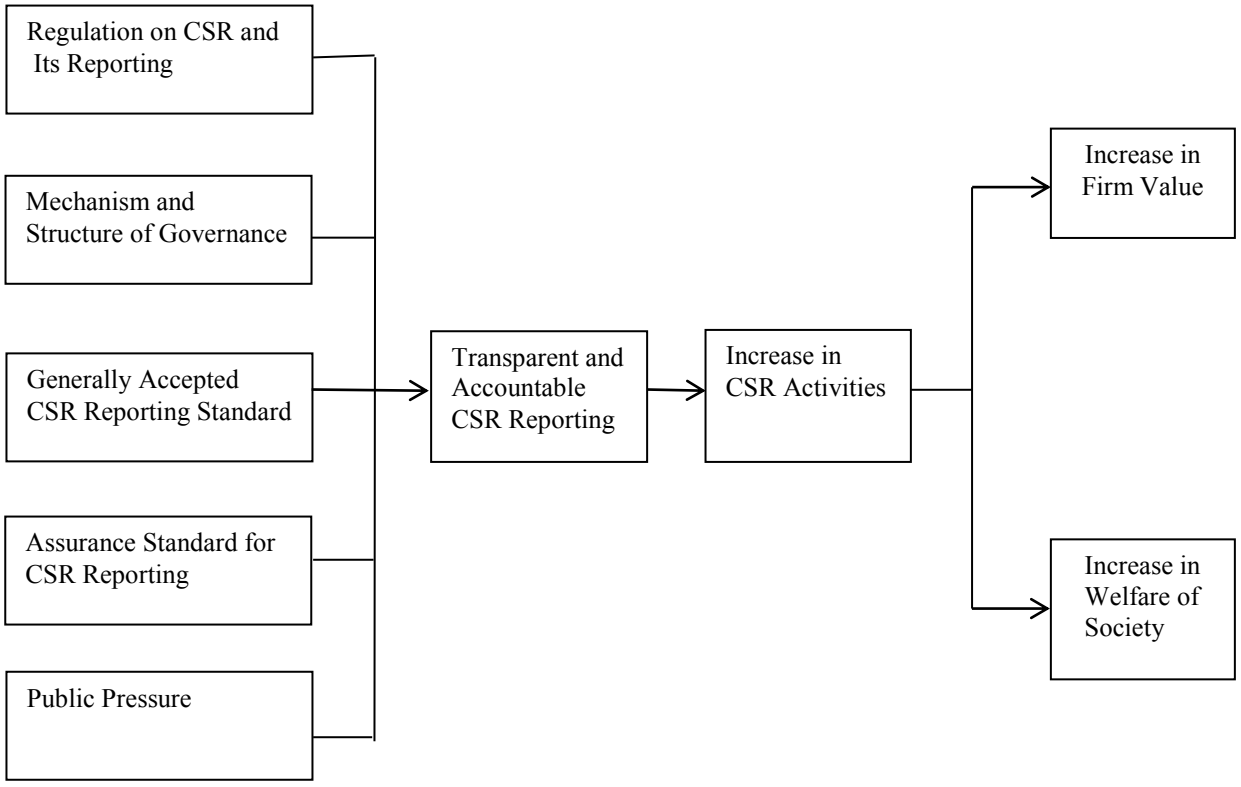

Figure 7

Source: Utama 2007[225]

In addition, having mandatory minimum standards would decrease the complexity and confusion in so many choices of voluntary reporting programs. Managers would be able to direct resources to comply with uniform mandatory disclosure instead of using additional resources to select suitable reporting frameworks. Ultimately, transparency, comparability and reliability of business reports would be strengthened, ensuring credibility of information available to the public and all stakeholders. As Lord Razzall commented:

> ―we support the NGOs in believing that the Government…ought to give some indication of what the standard reporting practice should be, which they have the power to do by regulation. The whole purpose of this is not only to obtain the disclosure of information itself, but also to provide a measure by

[225] Utama S., ‗Regulation to Enhance Accountable Corporate Social Responsibility Reporting' (2007), p. 26, <http://sydney.edu.au/business/__data/assets/pdf_file/0003/56613/Regulation_to_enhance_accountable.pdf>.

> which a number of ethical investors, or those who wish to invest within an ethical framework, can obtain comparisons between different companies. It would be difficult for those ethical comparisons to be made without some element of standard reporting practice which I feel can come only from the Government".[226]

Overall, the benefits of mandatory disclosure could be summarised as follow:[227]

1. a clearly defined reporting framework would prevent companies from selecting how their information is presented and from using corporate disclosure as an advertising tool;
2. a uniform framework, once established, would enable the measurement of companies' performances and provide accurate comparisons against each other;
3. all parties involved would have access to the procedures of corporations in regard to their impact on society and the environment;
4. a climate would be engendered where companies would have to pay more attention to the impact their activities may have on society; and
5. stakeholders who have social responsibility concerns would be able to access relevant information regarding company practices.

At present, there are many countries in Europe that have introduced mandatory disclosure on social and environmental impacts such as France[228], Denmark[229], and the Netherlands.[230] These mandatory requirements have led to a considerable increase in sustainability reporting.[231] An example can be seen from the European Government as shown below:

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[226] Quoted in Clark G. L. & Knight E. R., 'Institutional Investors, the Political Economy of Corporate Disclosure, and the Market for Corporate Social Responsibility: Implications from the UK Companies Act (2006)' (2008), Alfred P. Sloan Foundation: Annual Conference, 1-2 May 2008, Boston, p. 18, <http://web.mit.edu/is08/pdf/Companies%20Act%20version%2013.pdf>.

[227] Overland J., 'Corporate Social Responsibility in Context: The Case for Compulsory Sustainability Disclosure for Listed Public Companies in Australia?' (2007) 4(2), *Macquarie Journal of International and Comparative Environmental Law*, p. 19-20.

[228] See Egan M. L., Mauléon F., Wolff D. & Bendick M., 'France's Mandatory "Triple Bottom Line" Reporting: Promoting Sustainable Development through Informational Regulation' (2009) 5(5)*, The International Journal of Environmental, Cultural, Economic and Social Sustainability,* p. 27-48.

[229] From 2009, large businesses in Denmark are required to report on CSR in their annual report. See Statutory Requirements on Reporting CSR, <http://www.csrgov.dk/sw51190.asp>.

[230] See Hoffman E., 'Environmental Reporting and Sustainability Reporting in Europe: An Overview of Mandatory Reporting Schemes in the Netherland and France' (2003), <http://enviroscope.iges.or.jp/modules/envirolib/upload/118/attach/BE2_3025.pdf>.

[231] Ibid.

Disclosure Efforts by European Government

2014 On April 15, 2014, the European Parliament passed a vote to require mandatory disclosure of non-financial and diversity information by certain large companies and groups on a "report or explain" basis. This vote amended Directive 2013/34/EU and affects all European-based "Public Interest Entities" (PIEs) of 500 employees or more as well as parent companies.
2013 The European Parliament passed a law requiring oil, gas, mining and logging companies to disclose the payments they make for access to natural resources in all countries where they operate.
2010 Large emitters of greenhouse gases are to collect and report data with respect to their greenhouse gas emissions.

Table 9 Source: The Initiative for Responsible Investment (IRI) 2014[232]

The introduction of mandatory disclosure by the European Parliament in 2014 is similar to the requirements of the ASX Principles and Recommendations in Australia. This and other developments in Europe can be used as examples for further possible amendment to reporting in the Australian system to ensure that companies which have so far avoided engaging in socially responsible practices may be encouraged to do so in the future. While it can argued that there are already existing mechanisms for reporting, further development in this area would provide an opportunity for businesses to improve their reporting standards. As Horrigan noted:

> —While Australia's system of continuous disclosure and reporting is good, there are credible arguments that we do not yet have the balance right on the range, specificity, and usefulness of reporting for its intended audiences. In this way, CSR reporting reform could also provide the occasion for improvements to the wider corporate reporting regime".[233]

However, debate continues despite the benefits that mandatory reporting can offer. An example of arguments for and against mandatory and voluntary reporting can be seen in the studies by UNEP, KPMG, Global Reporting Initiative and Unit for Corporate Governance in Africa in 2010, entitled *Carrots and Sticks – Promoting Transparency and Sustainability.* The arguments are summarised in the following table:

[232] The Initiative for Responsible Investment (IRI), „Global CSR Disclosure Requirements" (2014), <http://hausercenter.org/iri/about/global-csr-disclosure-requirements>.
[233] Horrigan B., „Law and Justice Policy Impact Project" (2006), Submission to the Australian Government Corporations and Markets Advisory Committee (CAMAC) on Corporate Social Responsibility, p. 64, <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFSubmissions_2/$file/BHorrigan_CSR.pdf>.

Reasons for and against mandatory and voluntary approaches

	Reasons for	Reasons against
Mandatory approaches to reporting	• Changing the corporate culture – leaders will continue to innovate above minimum requirements • Incompleteness of voluntary reports • Comparability • Non-disclosure of negative performance • Legal certainty • Market failures – theory of regulation • Reduction of non-diversifiable market risk free rider problem • Cost savings • Standardisation • Equal treatment of investors	• Knowledge gap between regulators and industry • One size does not fit all • Inflexibility in the face of change and complexity • Lack of incentive for innovation • Constraints on efficiency and competitiveness
Voluntary approaches to reporting	• Flexibility • Proximity • Compliance • Collective interest of industry	• Conflicts of interest • Inadequate sanctions • Under-enforcement • Global competition • Insufficient resources

Table 10 Source: UNEP, KPMG, Global Reporting Initiative and Unit for Corporate Governance in Africa 2010[234]

As can be seen in the table, there are various reasons to warrant both approaches to corporate reporting. By comparing the positive and negative aspects of both mandatory and voluntary systems, it can be concluded that each can complement the other. While mandatory reporting can provide legal certainty and reduce costs for compliance, a voluntary approach can introduce greater flexibility. Thus, a combination of both approaches should be encouraged as a trend for future development. The starting point may be to develop regulations based on the hybrid approach of the ~~"~~if not, why not" principle, where sustainability reporting will be enhanced by an obligation to comply with minimum standards required by law, augmented by practical encouragement to also meet higher voluntary standards.

[234] UNEP, KPMG, Global Reporting Initiative & Unit for Corporate Governance in Africa, _Carrots and Sticks – Promoting Transparency and Sustainability: An Update on Trends in Voluntary and Mandatory Approaches to Sustainability Reporting' (2010), p. 8, < https://www.globalreporting.org/resourcelibrary/Carrots-And-Sticks-Promoting-Transparency-And-Sustainbability.pdf >.

7.5 Conclusion

Previous attempts to amend Australian legislation in the areas of directors‘ duties, extraterritorial regulation and corporate disclosure have considered the extent to which development in the legal system may assist in controlling corporate activities. Despite arguments to maintain the status quo on the basis that existing regulation is adequate, the question remains whether it can ensure social responsibility by corporations, particularly in the areas of social, environmental and human rights issues. Perhaps the answer may lie in the lessons learned through James Hardie and BHP which ignored their social responsibilities and created negative effects for the communities at large as was discussed in Chapter 6. While these instances can be considered as isolated examples that do not indicate any systemic failure of existing regulation, they can still be used to highlight the fact that corporate irresponsibility can and does occur on a massive scale. It can be suggested that further development of the regulatory system may prevent similar situations from occurring in the future.

Notwithstanding all the debates, it might be too early to determine which mechanism is best between a voluntary or mandatory approach. However, it could be suggested that development in regulation may be necessary where the voluntary approach is weak and existing legal provisions are ineffective. The increasing trends in many states to implement regulations to control corporate behaviour can be used as examples that Australia can use to encourage its own regulatory development. Although these changes have been opposed, the arguments over regulatory reform of directors‘ duties, extraterritorial regulation and corporate disclosure would at least be a starting point for future discussions. Should the debate continue on the same grounds, further research would be required on the effectiveness of voluntary versus mandatory aspects of CSR. So far the argument of their effectiveness has not yet been proven conclusively and more time may be needed to produce substantive evidence to reinforce the debate. Whatever future indication there may be, at present, regulatory reform might be a desirable option which would promote international standards and increase corporate commitment to CSR values.

Chapter 8

Findings and Conclusion

8.1 Introduction

CSR has become an important issue in the global economic arena, in relation to the norms and mechanisms for controlling corporate activities. The growth of globalisation and the influence of the media and NGOs have stimulated the trend towards CSR. An understanding that business operations can have an effect on society at large has been the key argument for approaches requiring social responsibility from corporations and CSR has been promoted as the means for achieving an improvement in the relationship between business and society. This increasing attention on CSR has led to consideration of which form of mechanism, soft law or hard law, would be the best vehicle for delivering CSR values that would enhance the social behaviour of corporations.

Up to this point, this thesis has explored those important aspects involving the CSR movement and its interaction with regulation. This chapter will provide an overall consideration of the critical aspects of CSR and answer those research questions that were posed in Chapter 1. It will then present the recommendations and conclusion of this thesis, which may stimulate a greater development in the interaction of law and voluntary CSR to enhance social, environmental and human rights standards at home and abroad. This chapter ends by suggesting that a combination of both voluntary and mandatory approaches would form the most positive outcome for controlling corporate activities.

8.2 The Trend towards CSR and its Motivation of Increasing Shareholder Value

Over the past 160 years corporations have become a national as well as international economic and political force never anticipated by the initiators of the limited liability company. Corporations are constantly acquiring more power on a global basis with the ability to hold a huge amount of economic control. The movement to neo-liberalism has given them significant leverage over the economies of individual states, especially in the underdeveloped world. With this enormous economic power,

corporations have the ability to manoeuvre state laws and policies in their favour, which is evident throughout the world.[1] As Koksal stated:

> "Whether the nation states accept it or not the influence of multinationals and their "behind the scenes" presence is quite undeniable even in the most powerful nation state in the world, the United States".[2]

Clearly, the introduction of a free-trade market has created a considerable restructuring of the relationship between states and civil society. This regime has resulted in governments reducing regulatory standards to attract foreign investments.[3] By deregulating social control in order to promote the expansion of markets, state authority may be seen as having become a tool of market development. In this regard, a well-functioning society becomes more reliant on corporations assuming a role in engaging with social responsibility practices. Accordingly, voluntary CSR has emerged as a framework for corporations to adopt in their policies that could satisfy public expectations above and beyond the law. It is seen as a significant mechanism, influenced by market forces, that encourages good business practices by corporations.

Despite there being no uniform definition of CSR, corporations are now expected to take into account ethical considerations of social values and norms that require a transformation of business thinking from a concentration on companies as economic players to that of their role as corporate citizens. It has been recognised that in order to ensure their acceptance by society, companies need to comply with social expectations and, in doing so, cannot ignore their CSR obligations. As Kok et al stated:

> "Corporate social responsibility is the obligation of the firm to use its resources in ways to benefit society, through committed participation as a member of society, taking into account the society at large, and improving welfare of society at large independently of direct gains of the company".[4]

[1] An example of corporate influence over the government can be seen in the US where American multinationals tried to lobby US Congress through political contributions to protect their interests. See the lobbying database at OpenSecrets.org, <http://www.opensecrets.org/lobby/index.php>.
[2] Koksal E., 'The Impact of Multinational Corporations on International Relations: A Study of American Multinationals' (2006), p. 142, <http://etd.lib.metu.edu.tr/upload/12608016/index.pdf>.
[3] Such as in China. See Navarro P., The Economics of the "China Price" (2006) 68(6), *China Perspectives*, p. 13-27.
[4] Kok P., Wiele T. V. D., McKenna R. & Brown A., 'A Corporate Social Responsibility Audit within a Quality Management Framework' (2001) 31(4), *Journal of Business Ethics*, p. 287.

The calls for corporations to engage in CSR are supported by media exposure of corporate abuses and the realisation that governments are unable or unwilling to attend to the social problems created by corporate activities. In a less than perfect world, especially in terms of the state's ability to police the system, gaps will always occur and they will be exploited by corporations. Where the state cannot practically provide a full framework of legislation, there is a need for businesses to go over and above the rule of law. In this regard, companies engaging with CSR are considered as not only going beyond the minimum requirements of law but also filling in the gaps created by the limitations of a state imposed regime.

Public attention has resulted in corporations gradually changing their emphasis from profit-making alone to also using their resources to assist in solving society's problems. It can be said that corporations are sometimes in a better position to deal with some of these problems, as they have the resources, both human and monetary, to achieve a significant effect. Nevertheless, while corporations have the ability and skills that could be utilised for solving social issues, this does not mean that they are always willing to do so.[5] This could be considered the major limitation of voluntary CSR where it depends on the discretion of corporations to engage with CSR practices.

There are many factors that indicate the degree of corporate involvement with CSR. The size of the business, reputation, changing communication over CSR and the growth in public value all contribute as incentives for corporations to engage with responsible practices.[6] On the other hand, the risk of competitive disadvantage, the drive for short-term profit maximisation, individual behaviour and the lack of binding public policy can lead to corporations being constrained from becoming involved with CSR practices.[7]

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[5] Ayres I. & Braithwaite J., *Responsive Regulation, Transcending the Deregulation Debate* (Oxford University Press, 1992), p. 105-106.
[6] Zadek S., Raynard P. & Oliveira C. 2005, „Responsible Competitiveness: Reshaping Global Markets Through Responsible Business Practices' (2005), p. 33-34, <http://www.accountability.org/images/content/1/1/110/Full%20Report%20(Compressed).pdf>
[7] Ibid, p. 34-35.

productivity, technological advancement and employment opportunities.[11] They may satisfy their stakeholders but that is always a means to their own end – to serve their shareholders' interests.[12] The view that CSR is intrinsically not just instrumentally the right thing to do is not a consideration for those businesses whose sole focus remains on economic outcomes. Their activities provide no significant improvement in corporate behaviour and they may fail to fulfil the commitment to voluntary CSR if there is no link to corporate benefits. Thus, their so-called voluntary CSR programs, no matter how many positive results they provide for society, are but utilities for corporations to further obtain greater economic benefits.

In this context, corporations that involve themselves in voluntary CSR initiatives with the sole motive of increasing their financial performance may ultimately risk losing the support of the public and their reputation. Companies wanting to build a reputation through voluntary CSR need to convince the public of the sincerity of their actions, otherwise ~~–if~~ they feel it is all just for show they will be more negative, more cynical than if the company had done nothing at all".[13] While engaging with CSR for competitive reasons can increase corporate advantage, it may also receive negative attention from activists and interest groups if they do not appear to be genuine. According to activists, corporations should engage with voluntary CSR as it is the right thing to do and not just a speculative manoeuvre to increase the economic benefits.[14] As Zsolnai pointed out:

[11] Jones M., ‗The Transnational Corporation and New Corporate Citizenship Theory: A Critical Analysis' (2006), European Group for Organisation Studies Conference, Bergen, July, <http://www.ashridge.org.uk/Website/IC.nsf/wFARATT/The%20Transnational%20Corporation%20and%20New%20Corporate%20Citizenship%20Theory%20-%202006/$file/TheTransnationalCorporationAndNewCorporateCitizenshipTheory.pdf>.

[12] Smith made the point, ~~–~~[t]he stakeholder theory demands that stakeholder interests be considered *as an end in themselves*. If stakeholder interests are being considered only *as a means to the end of profitability*, then managers are using stakeholders to affect the results dictated by the shareholder theory". Smith H. J., ‗The Shareholders vs. Stakeholders Debate' (2003) 44(4), *MIT Sloan Management Review*, p. 87.

[13] Baker M. 2008, Can You Have Social Responsibility without Ethics?, An article from Business Respect, No. 132, 20 July 2008, http://www.mallenbaker.net/csr/CSRfiles/page.php?Story_ID=2157

[14] CSR should be ~~–a~~bout how the company decides to do the right thing by society." Baker M. 2008, Arguments against Corporate Social Responsibility – Redoubled, An article from Business Respect, No. 139, 26 October 2008, Available at: http://www.mallenbaker.net/csr/CSRfiles/page.php?Story_ID=2281.

> —To promote corporate social responsibility on the basis of the pure economic logic of the market and to use it solely as an instrument for improving economic competitiveness is not a sufficient strategy to address the unsustainable and irresponsible growth strategy of today's business".[15]

Logically, corporate financial imperatives may take precedence over any and all other issues, and directors, concentrating their obligation on maximising profits, may inevitably create negative effects on others in society. Despite positive contributions to civil society, such as development and prosperity, the corporations' pursuit of profit has unarguably become the root cause of many of the social and environmental problems in the world. As Campbell noted, —in the single minded pursuit of immediate economic profit corporations are capable of gross rights violations, against which their victims rarely have any recourse".[16] This potentially disastrous situation is compounded by allowing corporations, which have no sense of morality, to control their own business conduct through the use of voluntary CSR. In the face of all this, these self-seeking-at-all-costs corporations have been left to self-regulate without any means of enforcement or accountability.

Consequently, to diminish the risk that voluntary CSR will not provide effective outcomes in the global economic era and will, instead, become a tool of neo-liberalism, it may be suggested there is a need for like-minded political and social forces to encourage reforms of the present regulatory system. This in turn led to the discussion in this thesis of the reasons and options for improving mechanisms of corporate control. While there are no explicit arguments supporting regulatory reform, this thesis suggests further development in Australia to areas such as directors' fiduciary duties, extraterritorial regulation and corporate disclosure as a means of ensuring corporations operate in a socially responsible manner.

The suggested proposals may attract criticism but the potential benefits for the broader community should be seen as a positive development. Moreover, developing the regulatory framework would

[15] Zsolnai L., ‗Competitiveness and Corporate Social Responsibility' (2006), Corporate Social Responsibility Papers: The potential to contribute to the implementation and integration of EU strategies (CORE), p. 4, <http://www.feem.it/NR/Feem/resources/CSRPapers/CSR2006-002.pdf>.
[16] Campbell T., *Rights: A Critical Introduction* (Routledge, 2006), p. 126.

ensure Australia does not lag behind other countries, which are currently advancing faster in these aspects.[17] Whatever the reason, further development in regulation would at least assist where the voluntary approach is not working and would enhance the promotion of responsible business activities for Australian corporations. The motivation for doing so can be found through the following answers to the research questions posed in Chapter 1.

8.3 Answers to the Research Questions

8.3.1 Should Corporations Have the Same Social Responsibility Requirements as Individuals?

As discussed in Chapter 4, the reason for requiring corporations to exercise social responsibility can be found in the legal status they have been granted by society which imposes reciprocal responsibilities, obliging them, under the social contract, to operate in a positive manner toward society. Additionally, as the balance of power has shifted towards corporations, there has been an assumed equal shift in their roles and responsibilities toward society in accordance with the equilibrium of the power-and-responsibility relationship.[18] This idea of counter-balancing corporate power can be used to caution corporations to exercise their immense power in a responsible manner as they could risk losing their power and existence in society.

The challenge is that it may be unusual to impose social responsibility on non-individuals. Indeed, it could be said that social responsibility is derived from the mindset of individuals[19]and to expect corporations, which do not have a mind to accept this responsibility seems impossible. However, by comparing corporate persons with individuals, this thesis argues that corporations, as legal entities with the same rights and privileges as individuals, should have the same social responsibilities that are

[17] Such as the development in the US and UK with regard to directors' duties, and France, Denmark and the Netherland for corporate disclosure.
[18] Davis K., ‗Understanding the Social Responsibility Puzzle' (1967) 10(4), *Business Horizons*, p. 45-50.
[19] Foster N. H. D., ‗The Theoretical Background: The Nature of the Actors in Corporate Social Responsibility', in Tully S. (ed), *Research Handbook on Corporate Legal Responsibility* (Edward Elgar, 2005), p. 16.

expected of individuals. Their legal status should be challenged if they fail to meet society's expectations and exercise their power in a way that is against the interests of others. As Cohen explained:

> "Under this understanding, limited liability entities have a responsibility to operate in the public interest. Under the concession/communitarian view, the 'corporateness' of the artificial entity should be disregarded when the entity is being operated in a manner which runs counter to the spirit of the grant of privilege, i.e., when the public wealth is damaged, rather than enhanced, by the operation of the corporation".[20]

This means that corporations should not be able to hide behind the veil of incorporation to ignore their social responsibilities and there have been a number of cases where courts have held corporations and their members accountable by lifting the corporate veil.[21] Even there however, there are arguments for strengthening regulatory control by comparing the continuing development of the law preventing individuals from behaving in an unethical manner with the rules governing corporations. This analogy can also support the argument for mandatory CSR, especially where corporate activities can negatively impact on society. In such cases the law should be able to ensure corporations operate in a socially responsible manner. It might also be recognised that where individuals are not expected to regulate themselves, it would be unreasonable to expect corporations to do so. As Bakan put it:

> "no one would seriously suggest that individuals should regulate themselves, that laws against murder, assault and theft are unnecessary because people are socially responsible. Yet oddly we are asked to believe that corporate persons – institutional psychopaths who lack any sense of moral conviction and who have the power and motivation to cause harm and devastation in the world – should be left free to govern themselves".[22]

The question might be how all behaviour can be regulated. The answer is that it is not possible, as can be drawn from the fact that not all human behaviour is regulated and only the more extreme forms require regulation. However, individuals should not display bad manners, even though they are not illegal, in order to be accepted as members of society. This can also be applied to corporations, which

[20] Cohen D. L., 'Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company?' (1998) 51, *Oklahoma Law Review*, p. 444.
[21] See Ramsay I. M. & Noakes D. B., 'Piercing the Corporate Veil in Australia' (2001) 19(4), *Company and Securities Law Journal*, p. 253-260.
[22] Bakan J., *The Corporation: The Pathological Pursuit of Profit and Power* (Constable, 2004), p. 110.

should voluntarily engage with socially acceptable behaviour because failing to do so can affect their existence in society. In parallel with individuals, certain behaviour needs to be regulated. Even though corporations may undertake CSR, there will always be some rules and regulations necessary to ensure at least minimum standards of behaviour are complied with.

Another question is how corporations can be held to account for their misbehaviour. Whatever the arguments may be for bringing artificial persons to account, the difficulties in dealing with corporations holding such immense power cannot be easily overcome as that requires significant time and financial resources. While the difficulties remain, one thing is certain: as long as corporations are recognised as having the rights and privileges of individuals, the question is no longer whether they should exercise social responsibility but how they respond to this obligation. Put another way, it is not beyond reasonable expectation that corporations should behave responsibly. Separate legal personality should not permit corporate entities to take advantage of those who granted them their status. The real challenge is how to ensure they fulfill their social responsibilities and, where they fail to do so, whether it is proper and appropriate for government to take steps to introduce regulatory regimes enforcing corporate compliance.

8.3.2 Is the Voluntary Approach to CSR an Effective Method of Protecting Society from the Abuses of Corporations?

Many corporations have promoted themselves as having voluntarily engaged with CSR, which has created controversy over their true motives. While some corporations are indeed truly motivated by genuine sentiments, many are still using the concept of CSR either simply to promote themselves, or to avoid the imposition of further regulation. The James Hardie and BHP cases are examples of Australian corporations preferencing profit maximisation and avoiding any acknowledgement of their wider responsibilities to society. Both cases demonstrate that a voluntary mechanism is not always adequate.

This, in itself, is a major argument for changing CSR from voluntary to mandatory to make its principles fully effective. Interestingly, with corporations being the focus of attention in respect of revisions and implementation of both national and international law to impose accountability and responsibility for social, environmental and human rights issues on them, they somehow appear to have kept themselves largely aloof from these developments. They have managed to divert the attention of regulatory systems away from themselves, having convinced governments that it was best that they be left in an environment of self-regulation. They argued that to do otherwise would confuse their main priorities and create a conflict of responsibility with the state and that it was more mutually palatable for them to be coerced by marketing incentives, rather than being threatened by legal actions.[23] This, they argued, would have a greater effect on improving their social behaviour.[24] As Maitland noted that "we would be better off if we could rely on the promptings of a corporate 'conscience' to regulate corporate behaviour instead of the heavy hand of government regulation".[25]

The counter-argument is, however, that:

> "If self-regulation and market forces were the best way to ensure respect for human rights, one might expect, since this has been the dominant paradigm, the number of abuses attributable to companies to have diminished. In fact, in many parts of the world, the experience of workers and communities is precisely the opposite".[26]

Therefore, one may well wonder if self-regulation will actually control or improve corporate behaviour, or whether corporations have in fact persuaded the authorities to "put the fox in charge of the hen house". Their arguments in favour of a voluntary approach has only increased criticism from the public and driven the desire for more regulatory reform. In general, the voluntary approach raises the question

[23] International Chamber of Commerce (ICC) & International Organization of Employers (IOE), 'Joint Views of the IOE and ICC on the Draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights", The Sub-Commission's Draft Norms, If Put into Effect, Will Undermine Human Rights, the Business Sector of Society, and the Right to Development: The Commission on Human Rights Needs to End the Confusions Caused by the Draft Norms by Setting the Record Straight' (2004), <http://www.business-humanrights.org/Links/Repository/179848/link_page_view>.
[24] International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (International Council on Human Rights Policy 2002), p. 7.
[25] Maitland I., 'The Limits of Business Self-Regulation' (1985) 27(3), *California Management Review*, p. 132.
[26] Ibid, p. 7.

of whether corporations engaging in deregulated markets are willingly and genuinely compliant with obligations that go beyond the requirements of the law.

Overall, attempts to improve corporate behaviour through voluntary CSR often come into conflict with the ideology of maximising profits. While corporate long-term advantages can be used as a motivation for corporations to engage with voluntary CSR, it may be that corporations will ignore their social responsibilities if there are no profits or other short-term benefits to be gained. Thus, corporations are at a crossroad between making profits and becoming good corporate citizens. While the successful satisfaction of both commitments indicates the epitome of good business, this is rarely achieved. Many corporations have failed to find the necessary balance of profits versus practices that enhance rather than violate human rights and other social issues. Consequently, effective voluntary control by those whose fundamental objective is to maximise financial interests may be unrealistic. The cases discussed earlier in this thesis demonstrate conclusively that some corporations will continue to operate irresponsibly. Therefore, as demonstrated, ensuring that corporations will always operate in a socially responsible manner is not a likely result of continued self-regulation by itself. There may be a need for the development of some level of mandatory regulation to complement a voluntary system in order to control corporations which choose not to be involved with social responsibility.

8.3.3 Should CSR be Promoted through a Mandatory Mechanism?

While the objectives of CSR are slowly becoming a norm of business practice, a perfect outcome is far from being achieved. In this thesis, even though voluntary CSR is recognised as necessary for restraining corporate conduct in the modern globalised market, it is argued that the achievements of CSR are largely illusory, requiring the restoration of the states‘ power to deal with corporate activities in the quest for the well-being of society. Attention to the imposition of regulations regarding CSR practices needs to be brought forward in an attempt to establish an effective framework to deter the potential negative effects of corporate operations. As Luftig and Ouellette noted:

> —The time to avoid the results of unethical behaviour is before it occurs, not after…we learned a long time ago that prevention is superior to inspection. In no area might this be more important than business ethics." [27]

Although it might be considered that voluntary self-regulation requires more time to grow to reach its potential, and that market forces will inevitably create an ethical worldwide norm, at present, complementary regulations would assist in countering the weaknesses of a voluntary system, and help prevent violations of social, environmental and human rights standards. In the words of Aaronson and Reeves:

> —Although market forces are increasingly pressing companies to act responsibly, markets have not succeeded in prodding corporations to _do the right thing' everywhere they operate".[28]

The reality is that in some circumstances regulations may be considered as an appropriate method to ensure the adoption of social responsibility practices by corporations. If a voluntary mechanism is not effective, regulations that provide an enforceable power to ensure corporations are accountable for their wrongdoings may be necessary. As previously emphasised, this need not replace or negate the existing voluntary codes of conduct endorsed by corporations and international organisations but would augment them and become an essential part of ensuring corporate compliance with these self-governing measures. Encompassing both initiatives can provide a win-win situation, allowing corporations to concentrate on their business goals while also considering the well-being of society.

The idea of promoting CSR standards through regulation is not only limited to national law but has also been expanded to international law.[29] The proposal to impose direct obligations on corporations under international law would at least set the foundation for universal standards and remove the gap in

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[27] Luftig J. T. & Ouellette S., _The Decline of Ethical Behaviour in Business' (2009), <http://www.qualitydigest.com/magazine/2009/may/article/decline-ethical-behavior-business.html>.
[28] Aaronson S. A. & Reeves J. T., *Corporate Responsibility in the Global Village: The Role of Public Policy* (National Policy Association, 2002), p. 3.
[29] See examples Vazquez C. M., _Direct vs. Indirect Obligations of Corporations Under International Law' (2005) 43, *Columbia Journal of Transnational Law*, p. 927-959; and Van den Herik L. & Černič J. L., _Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again' (2010) 8(3), *Journal of International Criminal Justice*, p. 725-743.

regulations between nations. Unfortunately, this idea is unlikely to become a reality. Not only is the transition from a traditional concept of state centric to non-state actors complicated, the difference in the structure between states and corporations presents many variations to the scope of the obligations. The difficulties and complexities the proposal may face would present insurmountable barriers to it becoming successful.

Consequently, with the lack of international law controlling corporations, states remain the only actors who are able to exercise their authority to constrain corporate activities. This becomes an issue when certain countries, especially in the developing world, are unable or unwilling to enforce control over corporate operations. As a consequence, corporations have been allowed to violate social, environmental and human rights standards through their malpractices without fear of prosecution. Therefore, this thesis suggests that adequate regulation and effective enforcement are the key solutions to ensure ethical and moral behaviour by corporations.

While regulation may not be considered a perfect solution and, in many ways, needs to be complemented by a voluntary system, mandating minimum standards would at least clarify the limits and scope for corporate obligations on human rights and other social issues, which would enable corporations to meet society‘s expectations. The challenge that remains is how to do that and what should determine the minimum standards that need to be mandated to meet those expectations.

8.3.4 Should the *Corporations Act 2001 (Cth)* be Amended to Clarify Directors' Duties over Stakeholders' Interests?

The problem of directors‘ fiduciary duties is not of the law itself but of the interpretation of the law. Many have interpreted directors‘ duties as being to serve shareholder interests whereas in reality the law allows directors to take into account other stakeholders‘ interests. The best interests of the company are not the same as the interests of shareholders and directors can consider stakeholders‘

interests if that would contribute to the long-term interests of the company. This understanding supports the conclusion of the CAMAC and PJCFS reports, discussed in Chapter 7, that there is no requirement for a formal change to the law.

However, despite the ability of directors to balance the interests of all stakeholders in their decision-making, two example cases discussed in Chapter 6, James Hardie and BHP, have suggested that some corporations may concentrate on serving shareholder interests at the expense of others in society.[30] This has led to continuing propositions that the requirements of directors' duties should be expanded to also formally include other stakeholders' interests. Even though this may not be the only option to ensure socially responsible behaviour by corporations, broader interests can be protected if directors have an obligation to do so. That would also reduce their fear of being in breach of their fiduciary duties to shareholders.

While the scope of this extended duty may be too broad and may produce a challenge to satisfy all stakeholders' interests,[31] the road to regulatory reform would ultimately enhance the responsible practices of corporations. One thing is certain, conflicts will always arise between stakeholders but there is always room for further debate and manoeuvring within the law. The challenges remain to overcome the many barriers and difficulties of attempting such reforms. In the meantime, the trends in the UK and the US may be considered as examples for other countries to develop their own appropriate mechanisms.

8.3.5 Should Government Accept and Implement the Imposition of Extraterritorial Regulation on Corporations?

Examples of Shell in Nigeria and BHP in PNG, illustrate the imbalance of power between corporations and host countries' governments. The motive of economic development undermines appropriate

[30] Both cases illustrate the corporate culture of profit maximisation where directors can be regarded as being ~~"n~~nothing more than the agent of profit-maximising decision making". Hovenkamp H., "Neoclassicism and the Separation of Ownership and Control' (2009) 4(2), *Virginia Law & Business Review*, p. 381.

[31] CAMAC noted that ~~"a~~ non-exhaustive catalogue of interests to be taken into account serves little useful purpose for directors and affords them no guidance on how various interests are to be weighed, prioritised or reconciled". Corporations and Markets Advisory Committee (CAMAC), "The Social Responsibility of Corporations Report' (2006), p. 111, <http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf>.

responses to the irresponsible behaviour of corporations. Their lack of regulatory control coupled with the ineffectiveness of voluntary CSR has exacerbated the seriousness of violations by corporations in host developing countries. This emphasises the desirability for home states to provide assistance through extraterritorial regulation as a means of controlling corporations operating overseas. However, there is strong opposition to this proposal and it seems unlikely that extraterritorial legislation will be achieved in the foreseeable future, especially where home states have economic reasons to protect the interests of their corporations. As Muchlinski noted

> "The closer the relationship between [corporations] and the major economic policy-makers of their home states…the greater the likelihood that [corporations] will be able to influence, if not to set, the economic policy agenda of the home state. This power becomes increasingly important as national economies become more internationalised as a result of the activities of [corporations]. The policy-maker's priority may then become one of ensuring that regulatory conditions in the internationalising economy are favourable to its home-based firms". [32]

To overcome this, home state governments need to look at the broader perspective of the impact corporate activities can have on the global arena, rather than concentrating on their own economic advantage. While there is no obligation for home states to regulate activities of their national corporations in host countries, they may do so in an attempt to raise the standards of social, environmental and human rights issues in the international community, especially where developing host nations fail to fulfill their responsibilities to protect the rights of their citizens.

One way for home states to alleviate the possible problems of overstepping the inherent sovereignty of other foreign nations is through consultation and collaboration with host states to reach an understanding of the benefits that can be achieved. The initiative of an extraterritorial approach by home states could at least assist in closing the gaps in standards between nations through enforcing the message that corporations should operate in the same manner overseas as they are expected to in their home states.[33] Above all, as we share the same planet, the realisation that what happens in one country

[32] Muchlinski P. T., "Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community', in Teubner G. (ed), *Global Law Without a State*, (Dartmouth, 1997), p. 91.
[33] Deva S., "Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?' (2004) 5, *Melbourne Journal of International Law*, p. 48.

could ultimately affect others could provide the drive for safeguarding the next generation from the results of corporate malpractice by expanding corporate control beyond their own state territorial boundaries.

8.3.6 Should the *Corporations Act 2001 (Cth)* be Amended to Impose Mandatory Disclosure?

The lack in uniformity of voluntary mechanisms and weaknesses in the existing regulations contribute to the inadequacies of CSR reporting. To a large extent, corporations can be flexible in their reporting where they can choose what they want to report and what mechanism to use. While the statistics from the KPMG report discussed in Chapter 7 clearly demonstrate that companies worldwide have increased their participation in sustainability reporting through the use of GRI standards[34], this, in itself, does not indicate that the reports provided were a genuine reflection of their actual activities. It can therefore be argued that strengthening the reporting framework to enhance socially sustainable practices of corporations is desirable.

As corporations already recognise that business success can be enhanced by undertaking voluntary reporting, to increase its effectiveness by additional regulation would not present any significant degree of difficulty. Minimum requirements for corporate disclosure in the areas of social, environmental and human rights issues in the annual report would enhance CSR practices and provide credibility to the report by reducing the possibility of mere tick-in-the-box compliance.[35] Simply put, strengthening the

[34] See KPMG, ‗KPMG International Survey of Corporate Responsibility Reporting 2005', <http://www.kpmg.com.au/Portals/0/KPMG%20Survey%202005_3.pdf>; ‗International Survey of Corporate Social Responsibility Reporting 2008', <http://www.kpmg.com/LU/en/IssuesAndInsights/Articlespublications/Documents/KPMG-International-Survey-on-Corporate-Responsibility-Reporting.pdf>; and ‗KPMG International Survey of Corporate Responsibility Reporting 2011', <http://www.kpmg.com/ES/es/ActualidadyNovedades/ArticulosyPublicaciones/Documents/CR_Report_2011.pdf>.

[35] Turner R. J., ‗Corporate Social Responsibility: Should Disclosure of Social Considerations Be Mandatory?' (2006), Submission to the Parliament Joint Committee on Corporations and Financial Services Inquiry, p. 47, <http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/submissions/sub05.pdf>.

reporting framework would eliminate the perception of CSR as merely being a tool for public relations and increase the participation, transparency and credibility of reporting.

There are many countries that have taken steps towards improving CSR reporting, which can be used as examples by others for further possible development in this field. In Australia, the requirement of an _if not, why not' approach provides a basis for continued research towards the improvement of reporting mechanisms. Flexibility and encouraged compliance would be key elements in finding a future transparent and effective reporting system.

8.4 Recommendation: A Combination Approach

The advantages and disadvantages of both mandatory and voluntary approaches that were discussed in Chapters 5 and 7 can be used to contribute to the future development of the social responsibility of corporations. Certainly, there will be a continuing debate over whether command-and-control or self-regulation is a better solution to shape and control corporate conduct. Nevertheless, the emphasis between the two main arguments could be seen as providing a pathway for building better corporate behaviour regarding the protection of social, environmental and human rights standards. While this thesis supports the argument for greater state regulation to control corporate activities, it does not attempt to dismiss the significant positive aspects of voluntary mechanisms. It is worth noting that ―[s]ome mandatory standards are adopted from, or based on, existing voluntary standards".[36] From this perspective, it is important to recognise the benefits from a combination of both legal intervention and voluntary approaches where each complements the other by directing appropriate behaviour for corporations. As the OECD commented, ―[a]lthough the two approaches both offer distinctive strengths and weaknesses, the tendency now is to look at them as largely complementary efforts".[37] Broadly

[36] Shelton J. R., *The OECD Report on Regulatory Reform: Volumes 1-2* (OECD, 1997), p.278.
[37] OECD, *Corporate Responsibility: Private Initiatives and Public Goals* (OECD, 2001a), p. 22, <http://www.oecd.org/dataoecd/58/54/35315900.pdf>.

speaking, this suggests that a combination of both mandatory and voluntary approaches will provide the best possible solution for promoting the social responsible behaviour of corporations.[38]

Undoubtedly, the law has an important role in fostering active participation in CSR policies, whereas a voluntary approach would encourage company dedication and commitment to responsible corporate behaviour where the level of legal enforcement seems weak. In the words of Martin:

> —In situations like this, the Voluntary Approach to CSR enables governments to work with businesses to gain an understanding of the issues facing the implementation of CSR practice in different situations and it engages businesses – gradually in a culture of greater transparency. Legislation can be introduced in specific instances where the issues at stake are well understood and cannot be compromised, or as a way to punish recalcitrant companies and to establish a level playing field that benefits those companies that have embraced a culture of transparency".[39]

This combination approach is also supported by the International Council on Human Rights Policy (ICHRP) which stated that:

> –neither legal nor voluntary approaches should be a substitute for the other. Both are needed, and they can be complementary. Voluntary codes will make binding regulation more likely to succeed because they have started to build consensus – or at least understanding – around some core rights. Willing consent to such norms will be helpful when binding regulations are introduced in the future. As companies introduce new management practices to implement codes, they develop business expertise that will also be essential to successful implementation of binding regulations. Overall, however, we believe it is time to move beyond voluntarism – not in order to stop voluntary approaches but because a new international legal regime will become increasingly necessary. The future should hold a blend of voluntary and binding rules that together will ensure that companies respect human rights and demonstrate that they do so".[40]

The benefits of a combination approach might also demonstrate that a move from soft law to hard law does not offer an absolute solution. An example of the integration between mandatory and voluntary mechanisms can be seen from the Code of Banking Practice which provides standards of good

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[38] Ayres and Braithwaite argued that, –Good policy analysis is not about choosing between the free market and government regulation. Nor is it simply deciding what the law should proscribe. If we accept that sound policy analysis is about understanding private regulation - by industry associations, by firms, by peers, and by individual consciences- and how it is interdependent with state regulation, then interesting possibilities open up to steer the mix of private and public regulation. It is this mix, this interplay, that works to assist or impede solution of the policy problem…We argue that by working creatively with the interplay between private and public regulation, government and citizens can design better policy solutions". Ayres I. & Braithwaite J., *Responsive Regulation, Transcending the Deregulation Debate* (Oxford University Press, 1992), p. 3-4.

[39] Martin F., _Corporate Social Responsibility and Public Policy', in R. Mullerat & D. Brennan, *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International, 2011), p. 110.

[40] International Council on Human Rights Policy (ICHRP), above n 24, p. 9.

practices towards customers.[41] The banks that have adopted the Code are obligated to the commitments of the Code and disputes can be referred to the Financial Ombudsman Service if they are in breach of the Code.[42] The Ombudsman will try to resolve the disputes through mutual agreement between the parties or suggest a Recommendation, which will be binding if both parties accept it.[43] Therefore, even though the code is voluntary, a bank which does not comply with the Code obligations will be investigated and may face consequences. This inclusion of a mandatory aspect into a voluntary system provides a positive improvement to banking business practices and standards. Hence, the Code of Banking Practice can be used as a possible model for the development of a combination mechanism where both mandatory and voluntary aspects can work together, utilising each other's strengths to achieve the best possible outcome.

8.5 Conclusion

The aim of this thesis has been to suggest options to strengthen control over the activities of corporations regarding social, environmental and human rights issues. Its key points may be summarised as follows:

- Despite corporations applying different theories to justify their engagement with CSR practices, their motivation is often driven by the bottom line of enhancing shareholder value. Consequently, some corporations may fail to operate in a socially responsible manner because, either there is no enforcement in a voluntary system or they are only interested in pursuing short-term profits.
- Corporations as legal persons, possessing rights and privileges similar to those of individuals, should have the same responsibilities as individuals and it is not unreasonable to expect a degree of accountability from them. The key to shaping the behaviour of corporations which

[41] Australian Bankers'Association (ABA), _Code of Banking Practice' (2014), <http://www.bankers.asn.au/Industry-Standards/ABAs-Code-of-Banking-Practice/Code-of-Banking-Practice>.
[42] Graw S., Parker D., Whitford K., Sangkuhl E. & Do E., *Understanding Business Law* (LexisNexis Australia,7th ed, 2014), p. 855.
[43] Ibid.

have no sense of morality and to encourage their corporate citizenship is through imposing at least minimum standards of CSR through mandatory regulation. This may be particularly desirable where corporations engage with CSR merely as a public relations tool to ensure at least a threshold level of enforcement and accountability.

Given that corporations have increased their impact on society as a whole, it would not be unreasonable to expect regulatory mechanisms to continue developing and adapting to the situation. It might be argued that existing mechanisms are adequate but it is important to learn from the past and try to prevent the same mistakes happening in the future. Negative attitudes should not deter society from enhancing existing frameworks to promote social responsible practices. Above all, we should ensure the mechanisms we have are compatible with society‘s changing expectations.

Ultimately, this thesis presents the view that both voluntary and mandatory approaches have their own positive and negative aspects for controlling corporate activities and, with this in mind, perhaps the benefits of CSR can be maximised through the utilisation of a combination of both approaches. Certainly, there is no easy path to achieve perfect control of corporations but what we can do is to limit the possibility and/or impact of corporate violations. It is the contention of this thesis that a better understanding of voluntary CSR and of the need for the law to intervene when necessary can provide a solid foundation for further development of appropriate mechanisms. Hopefully, this could lead to the greatest of achievements, ensuring corporations operate in a socially acceptable manner both domestically and internationally.

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