

## **CORPORATE SOCIAL RESPONSIBILITY IN CONTEXT: THE CASE FOR COMPULSORY SUSTAINABILITY DISCLOSURE FOR LISTED PUBLIC COMPANIES IN AUSTRALIA?**

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*The impact of globalisation - and a greater understanding of the effects of business activities on the environment, local communities, developing nations, employees, customers, suppliers and creditors - has given additional impetus to the corporate social responsibility movement. Key concepts associated with corporate social responsibility are principles of accountability and responsibility to all legitimate stakeholders, and a willingness to engage in appropriate disclosure to such stakeholders. Thus there has been greater attention focused on the extent of disclosure which listed public companies make about the environmental impacts of their business activities. This paper will discuss and analyse sustainability disclosure requirements for listed public companies in Australia in relation to environmental impacts, taking into account the findings of recent reviews into corporate social responsibility issues. Deficiencies associated with the existing regime of voluntary sustainability disclosure will be identified and discussed. The potential impact of mandatory sustainability reporting will then be addressed. This paper will conclude with a discussion of likely future developments.*

### I INTRODUCTION

In recent years, the terms “corporate social responsibility”<sup>1</sup> and “sustainability” have become commonplace. There has been growing awareness of the impact of corporate behaviour, not just on shareholders, but on other stakeholders. Additionally, there has also been an increased willingness to consider a greater variety of persons and groups as “legitimate stakeholders”, with interests that deserve consideration – such as employees, customers, suppliers and creditors, as well as local communities, developing nations and the environment.<sup>2</sup>

In part, the concept of corporate social responsibility has gained currency in response or as a reaction to “shareholder primacy”. This doctrine typically places the profit-seeking interests of shareholders ahead of all others in the corporate

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<sup>1</sup> Also referred to as “corporate citizenship” or “corporate accountability”.

<sup>2</sup> See, for example, Bryan Horrigan, ‘Fault Lines in the Intersection between Corporate Governance and Social Responsibility’ (2002) 25 *University of New South Wales Law Journal* 515, 520.

decision-making process.<sup>3</sup> However many factors, including the impact of globalisation, and concern about the effects of socially “irresponsible” behaviour of corporations, have lead to dissatisfaction with a view that shareholders’ interests are always paramount, and given an increased impetus to the corporate social responsibility movement.

It is almost trite to say that corporations and corporate activity have an enormous impact on the natural environment. This is particularly true when considering the use made of primary resources for the manufacture of products, the utilization of energy and water, and the production of waste and emissions,<sup>4</sup> and a growing awareness of climate change have resulted in greater attention being paid to these impacts. For this reason, the activities and behaviours of corporations cannot be ignored or overlooked when considering appropriate measures to be taken in relation to environmental protection and sustainable development.

Thus, a desire to encourage companies to act in a socially responsible manner, to ensure development is sustainable, and to allow all stakeholders to make informed assessments of corporate activities and practices, necessarily leads to a consideration of sustainability reporting. To what extent should listed public corporations be expected to engage in “non-financial” reporting and disclosure of “material business risks”, particularly those with an environmental impact? This paper will firstly seek to define the key concepts of corporate social responsibility, sustainability disclosure and triple-bottom-line reporting. The current sustainability disclosure obligations placed on listed public companies in Australia will then be described and analysed, particularly in the context of environmental impacts. The outcomes of recent Australian inquiries which considered the issue of sustainability disclosure will also be reviewed. This paper will then consider whether compulsory sustainability disclosure maybe an appropriate option for the Australian position, and conclude with a comment on likely future developments.

## II THE LINK BETWEEN CORPORATE SOCIAL RESPONSIBILITY AND SUSTAINABILITY DISCLOSURE

### A *What Is Corporate Social Responsibility?*

There is no generally accepted or universal definition of corporate social responsibility, even though many versions have been proffered.

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<sup>3</sup> As advocated by Adolph A Berle & Gardiner C Means, “The Modern Corporate and Private Property” (Harvest Books) 1932; Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’, N Y Times Magazine (New York, USA), 13 September 1970 at 32; D Gordon Smith, ‘The Shareholder Primacy Norm’ (1998) 23 *Journal of Corporate Law* 277.

<sup>4</sup> Karen Bubna-Litic, ‘Climate Change and Corporate Social Responsibility: The Intersection of Corporate and Environmental Law’ (2007) 24 *Environmental and Planning Law Journal* 253.

The Corporations and Markets Advisory Committee<sup>5</sup> considers that a company acts in a manner which is socially responsible if it:

...operates in an open and accountable manner, uses its resources for productive ends, complies with relevant regulatory requirements and acknowledges and takes responsibility for the consequences of its actions.<sup>6</sup>

The Commission of the European Union has described corporate social responsibility as a:

...concept whereby companies integrate social and environmental concerns in their business operations and in the interaction with their stakeholders on a voluntary basis.<sup>7</sup>

The World Business Council for Sustainable Development refers to corporate social responsibility as:

... the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life.<sup>8</sup>

Whilst there is no universally agreed definition of corporate social responsibility, there is a common underlying theme in each of the selected examples quoted above – the key principles of accountability and responsibility to external stakeholders, including the environment, and a commitment to sustainable business practices. In the author's view, these two concepts lie at the heart of corporate social responsibility.<sup>9</sup>

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<sup>5</sup> To be referred to from now on as the "CAMAC".

<sup>6</sup> Corporations and Markets Advisory Committee, "*The Social Responsibility of Corporations*", December 2006, iv, available online at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR\\_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf) at 29 January 2008.

<sup>7</sup> European Union Green Paper, "*Promoting a European Framework for Corporate Social Responsibility*" 2001, available online at [http://ec.europa.eu/employment\\_social/soc-dial/csr/greenpaper.htm](http://ec.europa.eu/employment_social/soc-dial/csr/greenpaper.htm) at 29 January 2008.

<sup>8</sup> World Business Council for Sustainable Development, "*Corporate Social Responsibility: The WBCSD's Journey*", available online at <http://www.wbcsd.ch/templates/TemplateWBCSD5/layout.asp?type=p&MenuId=MTE00Q&doOpen=1&ClickMenu=LeftMenu> at 29 January 2008.

<sup>9</sup> A comprehensive discussion of the topic of corporate social responsibility also requires a consideration of directors' duties and whether directors are obliged or permitted to consider or take into account the interests of stakeholders other than shareholders. A consideration of these issues is beyond the scope of this paper.

## B What Is the Link between Corporate Social Responsibility and Sustainability Reporting?

Sustainability is easier to define than corporate social responsibility, particularly due to the widely adopted definition of “sustainable development” coined in 1987 by the World Commission on the Environment and Development:<sup>10</sup>

...development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>11</sup>

Sustainability also has a “corporate dimension”<sup>12</sup> and that corporate sustainability involves:

...aiming to meet the needs of stakeholders today while seeking to protect, support and enhance the human and natural resources that will be needed in the future.<sup>13</sup>

Indeed, whilst corporate sustainability still recognizes the importance of corporate growth and profitability, it also requires the corporation to pursue goals relating to sustainable development - environmental protection, social justice and equity, and economic development.<sup>14</sup>

The concept of “triple-bottom-line” reporting is an example of an initiative arising from the “corporate dimension” of sustainability. Triple-bottom-line reporting can be described as a voluntary form of reporting on the environmental, social and economic impact of corporate activities.<sup>15</sup> This form of reporting stems from a recognition that the financial success of a company is not reliant only on economic sustainability, but also social and environmental sustainability.<sup>16</sup>

“Sustainability reporting” or “sustainability disclosure” can be considered as an extension of, or an example of, triple-bottom-line reporting. Sustainability disclosure focuses on the appropriate management of all material business risks faced by an organisation and “non-financial” reporting. Material business risks are

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<sup>10</sup> Chaired by Dr Gro Harlem Brundtland, and also known as the Brundtland Commission.

<sup>11</sup> World Commission on the Environment and Development, “Our Common Future”, available online at <http://www.un-documents.net/wced-ocf.htm> at 29 January 2008.

<sup>12</sup> CAMAC, above n6, at 66.

<sup>13</sup> Australian Government Department of Environment and Water Resources, Corporate Sustainability, available online at: <http://www.environment.gov.au/settlements/industry/corporate> at 29 January 2008.

<sup>14</sup> Mel Wilson, “Corporate Sustainability: What Is It and Where Does It Come From?” Ivy Publishing, 2003, available online at: [http://72.14.253.104/search?q=cache:HjIdw68xGkcJ:www.iveybusinessjournal.com/view\\_article.asp%3FintArticle\\_ID%3D405+what+is+corporate+sustainability&hl=en&ct=clnk&cd=3&gl=au](http://72.14.253.104/search?q=cache:HjIdw68xGkcJ:www.iveybusinessjournal.com/view_article.asp%3FintArticle_ID%3D405+what+is+corporate+sustainability&hl=en&ct=clnk&cd=3&gl=au) at 29 January 2008.

<sup>15</sup> John Elkington, “Cannibal with Forks: The Triple Bottom Line of 21<sup>st</sup> Century Business (Capstone Publishing Limited, Oxford, 1997), 76.

<sup>16</sup> Rick Sarre, ‘Responding to Corporate Collapses: Is there a Role for Corporate Social Responsibility?’ (2002) *Deakin Law Review* 1, 9.

those which have the potential to affect the long term sustainability of a company and must necessarily include environmental impacts because:

- (a) liability (contingent or otherwise) may arise due to damage done to the environment by the corporation as a result of its business activities;
- (b) the future success and viability of the company may be affected by legislative or regulatory change, or community reaction, to the nature or impact of the company's business activities; or
- (c) there is a risk these factors may require significant changes to a company's business practices.

Appropriate and effective sustainability reporting, whether mandatory or voluntary, enables a fully informed assessment to be made of a corporation's sustainability and business practices by all legitimate stakeholders.

The current debate focuses primarily on disclosure obligations of listed public companies because:

- (a) the largest corporations are more likely to be those which engage in activities with the most impact on external stakeholders; and
- (b) they have readily tradable securities, and thus have investors who are able to react quickly to the disclosure of any information.

### III CURRENT SUSTAINABILITY DISCLOSURE OBLIGATIONS OF LISTED COMPANIES IN AUSTRALIA

In order to consider the degree of sustainability disclosure which may be appropriate for listed public corporations in Australia, the current reporting obligations which have a sustainability component must be examined.

Four types of disclosures must be reviewed in this context:

- (a) prescribed environmental disclosures;
- (b) continuous disclosure obligations;
- (c) general reporting obligations; and
- (d) periodic reporting obligations.

### A Prescribed Environmental Disclosures

Many companies are, of course, subject to various obligations of disclosure under applicable environmental protection laws, whether or not they are listed public entities. As an example, the “National Pollutant Inventory”<sup>17</sup> requires companies operating industrial facilities to submit annual reports detailing pollutant emissions. The information which is then collected is made available to the public by the relevant department in each State or Territory.

A company which is subject to such a prescribed environmental disclosure obligation is not obliged to include this information in its annual report or to make it available in any other form. Thus, any interested person who wishes to access the information can generally only do so by contacting the relevant government department. Other prescribed environmental disclosure requirements operate in a similar way.<sup>18</sup>

### B Continuous Disclosure Obligations

Listed public companies have an obligation under the Australian Securities Exchange<sup>19</sup> Listing Rules to engage in “continuous disclosure”. ASX Listing Rule 3.1<sup>20</sup> provides that a listed public company must disclose to the ASX:

...any information... that a reasonable person would expect to have a material effect on the price or value of the entity’s securities.

Information is considered to have a “material effect” if it:

...would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ...securities.<sup>21</sup>

Such information, if disclosed, is then made publicly available to the market.

Environmental impacts clearly have the potential to affect the share price of a company. However, as some commentators have noted,<sup>22</sup> there has only been one identified disclosure made under this Listing Rule concerning an environmental

<sup>17</sup> The National Pollutant Inventory comprises the following legislative and policy instruments: *Environment Protection Act 1997* (ACT); *Protection of the Environment Operations (General) Amendment (National Pollutant Inventory) Regulation 2002* (NSW); *Waste Management and Pollution Control Act (NT)*; *Environmental Protection Regulation 1998* (Qld); *National Environment Protection Council (South Australia) Act 1995* (SA); *State Policies and Project Act 1993* (Tas); *Industrial Waste Management Policy* (Vic); *Environmental Protection Regulations 1998* (WA). Please see also the National Pollutant Inventory online at [http://www.npi.gov.au/about/how\\_npi\\_implemented.html](http://www.npi.gov.au/about/how_npi_implemented.html) at 29 January 2008.

<sup>18</sup> See, for example, the *Energy Efficiency Opportunities Act 2006* (Cth).

<sup>19</sup> To be referred to from now on as the “ASX”.

<sup>20</sup> Available online at <http://www.asx.com.au> at 29 January 2008.

<sup>21</sup> Section 677 of the *Corporations Act 2001* (Cth).

<sup>22</sup> See, for example, Bubna-Litic, above n4, 273.

impact – on 19 October 2006 Santos Limited disclosed an environmental incident which occurred at the Banjar Panji exploration well in East Java. The announcement made by Santos Limited to the ASX, by its nature, highlights the potential financial impact of the event on the company rather than focusing on the general environmental impacts of the incident.<sup>23</sup>

### C General Reporting Obligations

All Australian companies, other than small proprietary companies,<sup>24</sup> are obliged to lodge annual reports<sup>25</sup> with the Australian Securities and Investments Commission,<sup>26</sup> which then become publicly available – the annual report must include a financial report and a directors' report. All shareholders must be provided with a copy of a company's annual report.<sup>27</sup> It has also become common practice for most listed public companies to make their annual reports available online for all interested parties to access.

#### 1 Financial Reports

Section 295 of the *Corporations Act 2001 (Cth)*<sup>28</sup> sets out the required contents for annual financial reports, but there is no obligation to make disclosure about environmental impacts, unless there are direct financial implications for the company.

Section 295(2) of the *Corporations Act* requires the financial report to include financial statements and accompanying notes, as required by the relevant accounting standards. One such accounting standard, AASB 137 "Provisions, Contingent Liabilities and Contingent Assets",<sup>29</sup> requires provision to be made in financial accounts for certain contingent liabilities, which may include "penalties or clean-up costs for unlawful environmental damage."<sup>30</sup>

The International Accounting Standard, IAS37,<sup>31</sup> on which AASB 137 is based, also sets out requirements for "constructive obligations" to be provided for in financial accounts. Constructive obligations are those which may arise because of undertakings that have been given, policies published, past practices or any such behaviour which creates an expectation that a company will comply with certain

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<sup>23</sup> A copy of the Santos Limited announcement is available on the ASX website at <http://www.asx.com.au> at 29 January 2008.

<sup>24</sup> Section 292 of the *Corporations Act 2001 (Cth)*.

<sup>25</sup> Pursuant to s319 of the *Corporations Act 2001 (Cth)*.

<sup>26</sup> To be referred to from now on as the "ASIC".

<sup>27</sup> Section 314 of the *Corporations Act 2001 (Cth)*.

<sup>28</sup> To be referred to from now on as the "*Corporations Act*".

<sup>29</sup> Available online at <http://www.aasb.com.au> at 29 January 2008.

<sup>30</sup> See Treasury Analysis, International Accounting Standards, 2, available online at [http://www.treasury.nsw.gov.au/\\_data/assets/pdf\\_file/0014/1157/aasb\\_137.pdf](http://www.treasury.nsw.gov.au/_data/assets/pdf_file/0014/1157/aasb_137.pdf) at 29 January 2008.

<sup>31</sup> Available online at <http://www.iasb.org> at 29 January 2008.

obligations they have taken on. However, such a provision is only made where a payment is likely to be made because of such an obligation and the amount of the likely payment can be reliably estimated.<sup>32</sup> It is certainly conceivable that such an obligation could arise from, for example, statements given by a company about its environmental commitments,<sup>33</sup> but if provision in financial accounts is only required where payments are likely and can be estimated, there may be few occasions when such a standard is actually utilized in relation to environmental impacts. Unfortunately, there is no available analysis of disclosure of environmental impacts in connection with this standard.

Interestingly, an Australian Accounting Standard which provides for the "Presentation of Financial Statements", AASB101,<sup>34</sup> notes that whilst many companies voluntarily choose to present "environmental reports and value added statements" in addition to their required financial reports, these are considered to be outside the scope of the Australian Accounting Standards.<sup>35</sup>

## 2 Directors' Reports

Section 299(1)(f) of the *Corporations Act* provides that:

if a company's operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory, the directors' report must give details of the company's performance in relation to environmental regulation.

Unfortunately, the section itself and the Explanatory Memorandum to the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (Cth)*,<sup>36</sup> which introduced this section into the *Corporations Act*, offer no assistance in determining the meaning of the phrase "particular and significant" in connection with an environmental regulation. Does it refer to environmental regulation that relates to a significant environmental issue? Or is this threshold only crossed if the environmental regulation is likely to have a significant effect on the company?

Although some commentators consider that this section, ideally, requires companies to include details of breaches of environmental laws and licences such as those relating to greenhouse gas management in their annual reports,<sup>37</sup> this does not actually appear to be occurring. There appears to be a practice for listed companies to provide only brief statements in their annual reports, either to the effect that:

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<sup>32</sup> See Deloitte, Standard IAS 37, available online at <http://www.iasplus.com/standard/ias37.htm> at 29 January 2008.

<sup>33</sup> CAMAC, above n6, 120.

<sup>34</sup> Available online at <http://www.aasb.com.au> at 29 January 2008.

<sup>35</sup> Ibid, [10].

<sup>36</sup> To be referred to from now on as the "CLERP Audit Reform Bill".

<sup>37</sup> Rosemary Lyster, 'Chasing Down the Climate Change Footprint of the Private and Public Sectors: Forces Converge' (2007) 24 *Environmental and Planning Law Journal* 281, 310.

the company's operations are not subject to any particular and significant environmental regulation under any law of the Commonwealth, State or Territory,<sup>38</sup>

or:

the company's operations are subject to some significant environmental regulations, but the directors are not aware of any significant breaches during the financial year,<sup>39</sup>

without making any substantive disclosure. Thus, although there has been a significant increase in reporting on environmental compliance since the introduction of this section,<sup>40</sup> the actual substance of such disclosure is, for the most part, non-substantive in content.

Since 2005, Australian listed public companies have also been obliged, pursuant to section 299A of the *Corporations Act*, to include in the directors' report any information:

that members of the company would reasonably require to make an informed assessment of:

- (a) the operations of the entity...;
- (b) the financial position of the entity...; and
- (c) the entity's business strategies and its prospects for future financial years.

Whilst this could conceivably encompass environmental risks, they are not specifically provided for or referenced – disclosure of an environmental risk would only be required under this provision if it would be likely to have a significant impact on the company's operations, financial position, strategies or prospects. The Explanatory Memorandum to the *CLERP Audit Reform Bill*, which provided for s299A to be inserted into the *Corporations Act*, specifically states that the section is deliberately broadly based to:

<sup>38</sup> See for example, Tattersall's Limited annual report 2007 at 7, available online at <https://www.tattsbizpartners.com.au/businesspartners/interactivepdf/ipdf.aspx?pdfID=58> at 29 January 2008; Austar United Communications Limited annual report 2007 at 31, available online at <http://www.austarunited.com.au/pdf/07-04-27%20AUSTAR%20AR%20&%20NOM%20final.pdf> at 29 January 2008.

<sup>39</sup> See for example, Qantas Airways Limited annual report 2007 at 70, available online at <http://www.qantas.com.au/infodetail/about/investors/2007AnnualReport.pdf> at 29 January 2008; Telstra Corporation Limited annual report 2006 at 78, available online at [http://www.annualreportsunlimited.com.au/report%5Ct%5CTL5C2006/tls467\\_annualreport2006.pdf](http://www.annualreportsunlimited.com.au/report%5Ct%5CTL5C2006/tls467_annualreport2006.pdf) at 29 January 2008.

<sup>40</sup> See Geoffrey Frost and Linda English, "Mandatory Corporate Environmental Reporting in Australia: Contested Introduction Belies Effectiveness of its Application" (Nov. 2002), available online at: <http://www.australianreview.net/digest/2002/11/frost.html> at 29 January 2008; Justine Nolan, "Corporate Accountability and Triple Bottom Line Reporting: Determining the Material Issues for Disclosure" [2007] *University of New South Wales Law Research Series* 15.

- (a) give boards the discretion to make their own assessment of the information which shareholders need; and
- (b) give flexibility for changing needs over time.<sup>41</sup>

Although the legislative intention was to create flexibility, the general nature of the language used in s299A of the *Corporations Act* means that directors' reports may be open to variable interpretation. It may be that in the future more companies will choose to refer to environmental risks and impacts in disclosures under this section, but that does not yet appear to be the case.<sup>42</sup>

Unlike financial reports, directors' reports do not need to be audited. However, auditors of the financial reports are required to review directors' reports to identify any material inconsistencies, pursuant to Auditing Standard 212.<sup>43</sup> If any environmental disclosure was to be made in a directors' report pursuant to s299A or s299(1)(f) of the *Corporations Act*, it would therefore require review by an auditor of the financial reports. However, since the Auditing Standard does not focus on environmental issues, it may be unlikely that it will be significantly utilized in this context.<sup>44</sup>

#### D Periodic Disclosure

##### 1 Listing Rules

Each listed company is required to provide a review of its operations and activities for each reporting period in its annual report, under ASX Listing Rule 4.10.17.<sup>45</sup> This is a compulsory obligation but it is very general in nature and therefore open to very broad interpretation.

The ASX Listing Rules specially note that there is no required format or contents for this review, although the "Guide to the Review of Operations and Financial Conditions" produced by the Group of 100<sup>46</sup> is supported. This publication is reproduced in the ASX Guidance Note 10,<sup>47</sup> which supplements Listing Rule 4.10.17. This document recommends that non-financial information relevant to the company's performance and prospects be included in the review. This could conceivably include environmental impacts, but only to the extent that they may affect the performance and prospects of the company. Additionally, compliance with these guidelines is not compulsory.

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<sup>41</sup> CLERP Audit Reform Bill, [5.306].

<sup>42</sup> Jeff Angel, "CSR – Saving The Environment", *Reform* (2005) 32 at 35.

<sup>43</sup> Available online at [http://www.auasb.gov.au/docs/AUS212\\_10-95.pdf](http://www.auasb.gov.au/docs/AUS212_10-95.pdf) at 29 January 2008.

<sup>44</sup> Bubna-Litic, above n4, at 272.

<sup>45</sup> Available online at <http://www.asx.com.au> at 29 January 2008.

<sup>46</sup> An "Association of Senior Finance Executives from the Nation's Business Enterprises": see <http://www.group100.com.au/> at 29 January 2008.

<sup>47</sup> Available at <http://www.asx.com.au> at 29 January 2008.

## 2 ASX Corporate Governance Principles and Recommendations

Under ASX Listing Rule 4.10.3, a listed public company must disclose in its annual report the extent to which it has complied with the ASX Corporate Governance Principles and Recommendations.<sup>48</sup> The Corporate Governance Principles and Recommendations provide a suggested approach to corporate governance for listed corporations, which operates on the basis of “if not, why not?” compliance. A company may choose not to comply with a particular principle or recommendation, but if so it must explain in its annual report the extent of the failure to comply, and the reasons for this failure. This is commonly referred to as “comply, or explain” reporting, although it has been characterized by some commentators as “comply, or comply” reporting, arguing that there is little option but to comply.<sup>49</sup> However, a review of recent annual reports reveals that many listed companies prefer to explain their non-compliance rather than comply. Indeed, it appears that only 45% of the top 300 listed companies in Australia provide adequate disclosure so as to be considered to be compliant with the Principles and Recommendations.<sup>50</sup>

Of the various Principles and Recommendations, Principle 7 “Recognizing and Managing Risk”<sup>51</sup> is relevant to sustainability reporting. The supporting recommendation 7.1 provides that, ideally, listed companies should establish policies for the oversight and management of material business risks and disclose a summary of those policies.

The new supplementary guidance to Principle 7 makes particular reference to both the environment and sustainability as potential material business risks which may materially or significantly impact a company’s performance. The supplementary guidance recommends that companies summarise their policies on the management of such material business risks, but specially states that it does not require details of the company’s risk profile or material business risks to be reported.

As will be discussed later in this paper, there has been a recent review of the Corporate Governance Principles and Recommendations which has considered the issue of sustainability reporting.

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<sup>48</sup> Formerly known as the “Principles of Good Corporate Governance and Best Practice Recommendations”, first issued in March 2003. To be referred to from now on as the “Corporate Governance Principles and Recommendations”. Available online at [http://www.asx.com.au/supervision/governance/Revised\\_Corporate\\_Governance\\_Principles\\_and\\_Recommendations.htm](http://www.asx.com.au/supervision/governance/Revised_Corporate_Governance_Principles_and_Recommendations.htm) at 29 January 2008.

<sup>49</sup> James McConvill and John Bingham, ‘Comply or Comply: The Illusion of Voluntary Corporate Governance in Australia’ (2004) 22 *Company and Securities Law Journal* 208.

<sup>50</sup> Grant Thornton, “Corporate Governance Reporting Review” June 2007, available online at <http://www.grantthornton.com.au/UserFiles/File/Publications/tools%20and%20resources/Corporate%20governance%20review/Corporate%20Governance%20Review%20June07.pdf> at 29 January 2008.

<sup>51</sup> Available online at: [http://www.asx.com.au/supervision/pdf/asxcgc\\_supplementary\\_guidance\\_2aug07.pdf](http://www.asx.com.au/supervision/pdf/asxcgc_supplementary_guidance_2aug07.pdf)

### E Conclusions on Existing Sustainability Reporting Obligations

It can be seen that unless a company faces a material financial impact as a result of an environmental sustainability impact, or is subject to a “particular and specific” environmental law, no disclosure of any such issues is necessary. Additionally, there is a very wide discretion given to the board of directors as to the matters on which they report, even where reporting is compulsory. Many directors may not naturally focus on environmental impacts as potential business risks, and thus overlook them when engaging in reporting. There is also a focus on information relevant for “members” or “shareholders”, rather than all interested and legitimate stakeholders. For example, ASX Listing Rule 3.1 provides that information is considered to be “material” if it would influence those who commonly invest in such securities (that is, shareholders or people who buy shares), and 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. There are options available for companies which wish to engage in reporting on environmental issues, but most are not compulsory or are otherwise extremely flexible in nature so that such reporting can be avoided or minimised.

### IV RECENT REVIEWS INTO SUSTAINABILITY DISCLOSURE

In Australia, there have been three major separate legislative and policy reviews over the last two years which have addressed and considered issues of corporate social responsibility and sustainability disclosure:

- (a) the Parliamentary Joint Committee on Corporations and Financial Services<sup>52</sup> inquiry into corporate responsibility;
- (b) the Corporations and Markets Advisory Committee inquiry into the social responsibility of corporations; and
- (c) the ASX Corporate Governance Council review of the Corporate Governance Principles and Recommendations.

As will be discussed below, there has been significant overlap between the topics and focus of these reviews.

#### A *Parliamentary Joint Committee on Corporations and Financial Services Inquiry*

In July 2005, the Parliamentary Joint Committee began an inquiry into “corporate responsibility and triple-bottom-line reporting”. One issue on which particular emphasis was placed was whether current reporting requirements are appropriate.

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<sup>52</sup> To be referred to from now on as the “Parliamentary Joint Committee”.

Approximately 144 submissions were received, and public hearings were held over nine days with input from various witnesses. The ultimate findings and recommendations of the Parliamentary Joint Committee, set out in a report entitled “Corporate Responsibility, Managing Risk and Creating Value”,<sup>53</sup> in relation to reporting requirements, were that reporting on sustainability and social responsibility issues should remain voluntary.

Even though the Parliamentary Joint Committee noted that “...by international standards, Australia lags in implementing and reporting on corporate responsibility”,<sup>54</sup> it did not recommend any active steps be taken to remedy this position. It explained its stance on the basis that “...the diverse range of companies and organisations of different sizes and from different sectors mean[s] that it [is] inappropriate to apply a ‘one-size-fits-all’ approach to corporate responsibility”<sup>55</sup> and that mandatory reporting on issues concerning corporate social responsibility “...would lead to a ‘tick-a-box’ culture of compliance.”<sup>56</sup>

The Parliamentary Joint Committee did not believe that there were compelling reasons to move to a mandatory reporting framework, and recommended that sustainability reporting remain voluntary in Australia.<sup>57</sup> The Parliamentary Joint Committee accepted that the desire of most companies to avoid regulation would voluntarily spur business to improve their performance and noted that the legislature may need to intervene in the future if companies fail to act appropriately.<sup>58</sup>

#### B *Corporations and Markets Advisory Committee Inquiry*

The CAMAC inquiry into corporate social responsibility arose from a request by the Parliamentary Secretary to the Commonwealth Treasurer to CAMAC that it consider and report on various matters concerning social responsibility of corporations. One question in particular on which CAMAC’s recommendations were sought was whether the *Corporations Act* should require certain types of companies to report on the social and environmental impact of their activities.

In November 2005, CAMAC released a discussion paper seeking public input and received approximately 61 submissions. The report entitled “The Social Responsibility of Corporations”<sup>59</sup> released by CAMAC in December 2006 set out the following findings:

<sup>53</sup> Parliamentary Joint Committee, “*Corporate Responsibility: Managing Risk and Creating Value*”, June 2006, available online at [http://www.aph.gov.au/senate/committee/corporations\\_ctte/corporate\\_responsibility/report/](http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/report/) at 29 January 2008.

<sup>54</sup> Ibid, xiii.

<sup>55</sup> Ibid, xiii.

<sup>56</sup> Ibid, xv.

<sup>57</sup> Ibid, Recommendation 5, at 88.

<sup>58</sup> Ibid, 88.

<sup>59</sup> See CAMAC, above n 6.

- (i) CAMAC did not consider that there is a need for any additional disclosure or reporting requirements; and
- (ii) CAMAC considered that there are existing means of encouraging companies to adopt socially and environmentally responsible business practices.

CAMAC considered that concerns over social and environmental issues are most appropriately dealt with by specific legislation relevant to the issue in question – for example, legislation aimed specifically at environmental compliance issues.<sup>60</sup> CAMAC also considered that there are mechanisms which allow for general disclosure of non-financial information by companies (like s299A of the *Corporations Act*) and that initiatives by the ASX may be more appropriate for any future reporting requirements.<sup>61</sup> CAMAC also took the view that companies can be sufficiently “encouraged” to engage in and adopt socially and environmentally responsible practices by “light-touch” governmental initiatives and interventions, such as leadership by example, the enunciation of policy objectives, and encouragement through corporate sector consultation.<sup>62</sup>

### *C ASX Corporate Governance Council Review of Corporate Governance Principles and Recommendations*

The ASX Corporate Governance Council recently conducted a review of the “Corporate Governance Principles and Recommendations”.<sup>63</sup> One of several issues which were addressed in this review was whether reporting obligations should be introduced in relation to sustainability and corporate responsibility and, in particular, whether companies should be obliged to make disclosure of material non-financial risks.

Three issues on which the ASX Corporate Governance Council sought corporate and community input<sup>64</sup> were:

- (i) whether there is a role for the ASX Corporate Governance Council in relation to reporting on corporate social responsibility issues;
- (ii) whether there should be disclosure requirements for material non-financial business risks; and

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<sup>60</sup> Ibid, at 147.

<sup>61</sup> Ibid, at 147.

<sup>62</sup> Ibid, at 9.

<sup>63</sup> Available online at:

<http://www.shareholder.com/visitors/dynamicdoc/document.cfm?documentid=364&companyid=ASX> at 29 January 2008.

<sup>64</sup> The author of this article made a submission to the ASX Corporate Governance Council.

- (iii) whether the ASX Corporate Governance Council should provide guidance on reporting on material non-financial business risks.

Approximately 105 submissions were received by the ASX Corporate Governance Council on all aspects of its consultation paper, the majority of which were from listed companies. In the Response to Submissions on Review of Corporate Governance Principles and Recommendations,<sup>65</sup> the ASX Corporate Governance Council noted that:

- (a) there had been significant divergence on the meaning of sustainability and corporate social responsibility in the submissions received, and that difficulty in precisely defining these terms can create challenges in terms of policy development on reporting and disclosure;<sup>66</sup>
- (b) an increasing number of companies recognise sustainability and corporate social responsibility as important in the context of risk management and broader performance issues;<sup>67</sup>
- (c) there is no clear ‘one-size-fits-all’ approach or solution;<sup>68</sup>
- (d) it considers that it has a role in relation to sustainability and corporate responsibility, but only where they pose a material risk to the value of a company;<sup>69</sup> and
- (e) it does not consider it appropriate at this time, to adopt any reporting requirement relating to sustainability or corporate responsibility, even in the context of material non-financial risks.<sup>70</sup>

The ASX Corporate Governance Council noted that there was little support in the submissions it received for a requirements of disclosure of material business risks.<sup>71</sup> This is not surprising when the list of submissions is reviewed – most submissions were from listed companies, which would bear the onus of complying with any requirements that might be introduced. Other sectors of the community were under-represented in the submissions.

To some degree the divergence on the meaning of sustainability can be expected, but it is disappointing that the ASX Corporate Governance Council did not take this

<sup>65</sup> ASX Corporate Governance Council “*Response to Submissions on Review of Corporate Governance Principles and Recommendations*”, August 2007, available online at [http://www.asx.com.au/supervision/pdf/corp\\_governance\\_response\\_to\\_submissions\\_aug07.pdf](http://www.asx.com.au/supervision/pdf/corp_governance_response_to_submissions_aug07.pdf) at 29 January 2008.

<sup>66</sup> Ibid, 7.

<sup>67</sup> Ibid, 7.

<sup>68</sup> Ibid, 29

<sup>69</sup> Ibid, 7.

<sup>70</sup> Ibid, 7.

<sup>71</sup> Ibid, 20.

opportunity to extrapolate the key principles underlying these concepts, in order to better address this issue. It is unsurprising that the ASX Corporate Governance Council noted that an increasing number of companies are paying attention to sustainability issues, even if such recognition arises purely out of self-interest and a desire to avoid reputational damage. It is also disappointing that a regulator which had set out specifically to examine the issues of sustainability and corporate social responsibility sought to avoid implementing change for the future because of the absence of a singular solution, as it is not helpful for policy makers to abdicate responsibility due to the scale or difficulty of a task.

#### V WHY EXISTING REPORTING OBLIGATIONS AND VOLUNTARY SUSTAINABILITY REPORTING ARE NOT ENOUGH - THE CASE FOR COMPULSORY SUSTAINABILITY REPORTING?

In order to consider whether sustainability reporting should be compulsory for listed public companies, the weaknesses with the existing reporting framework will be first be analysed.

##### *A Prescribed Environmental Reporting Obligations*

Certain environmental issues have resulted in specific legislation requiring particular disclosures, as discussed in section III A above. However, despite the fact that the information disclosed does become publicly available, two major issues weakness exist in this framework from the perspective of sustainability disclosure to legitimate stakeholders:

- (a) the effectiveness of the legislative obligations is dependent on enforcement or action being taken by the relevant government body in the case of a breach; and
- (b) even though the information is made publicly available, it is not always easy to find information which relates to the activities of a particular company, because it must be sought from the relevant department and is not generally available from the company itself. A company which is subject to a prescribed environmental disclosure is not obliged to include this information in its annual report or to make it available in any other form.

##### *B Continuous, Periodic and General Reporting*

Despite the various compulsory reporting frameworks which exist for listed public companies, there are weaknesses in relation to sustainability disclosure to legitimate stakeholders because:

- (a) in relation to financial reports, there is little direct reference to environmental issues even though they may be relevant, and disclosure of environmental

impacts is only required in limited circumstances where there is direct easily quantifiable liability;

- (b) in relation to directors' report, there is a wide discretion for directors in reporting on environmental regulation and current business practices seems to favour and encourage an approach which provides little in the form of substantive disclosure;
- (c) in relation to periodic disclosure under the ASX Listing Rules, a review of the company's performance must be included, but it is not compulsory to refer to environmental impacts; and
- (d) in relation to disclosure under the Corporate Governance Principles and Recommendations, even though disclosure of managing material business risks (such as environmental impacts) is recommended, it is not compulsory under the "comply or explain" reporting regime.

Additionally, there is a strong focus on the provision of information relevant to "members" or "shareholders" rather than all legitimate interested stakeholders.

### *C Voluntary Sustainability Reporting*

Much is made of a desire to encourage voluntary sustainability disclosure, and various initiatives exist as examples of the ways in which companies can choose to report on these issues if they wish to do so – such as the Global Reporting Initiative reporting framework,<sup>72</sup> the UN Global Compact,<sup>73</sup> the Carbon Disclosure Project<sup>74</sup> and the Global Framework for Climate Risk Disclosure.<sup>75</sup> Whilst the number and percentage of companies which choose to report in accordance with these voluntary guidelines is increasing,<sup>76</sup> there is no obligation for them to continue to do so.

It should also be noted that a number of companies do voluntarily choose, independently of any legal obligation, to make disclosure about sustainability issues, including risks to the environment. This may occur in a number of ways:<sup>77</sup>

- (i) in annual reports;
- (ii) in independent sustainability reports;
- (iii) through voluntary reporting initiatives;
- (iv) through market indices participation;

<sup>72</sup> Available online at <http://www.globalreporting.org> at 29 January 2008.

<sup>73</sup> Available online at <http://www.unglobalcompact.org> at 29 January 2008.

<sup>74</sup> Available online at <http://www.cdproject.net> at 29 January 2008.

<sup>75</sup> Available online at <http://www.ceres.org/pub/docs/Framework.pdf> at 29 January 2008.

<sup>76</sup> KPMG International Survey of Corporations Responsibility Reporting 2005 (June 2005) 10, available online at:

[http://www.kpmg.com.au/Portals/0/KPMG%20Survey%202005\\_3.pdf](http://www.kpmg.com.au/Portals/0/KPMG%20Survey%202005_3.pdf) at 29 January 2008.

<sup>77</sup> As identified by CAMAC, above n6, 118.

- (v) communication of a company's social goals and performance.

One of the key difficulties associated with voluntary sustainability disclosure initiatives is not merely the non-compulsory nature of such disclosure, but its ad-hoc and arbitrary character. It is difficult, if not impossible, to make a truly informed assessment as to the nature of a company's practices from the information available through these initiatives.

It is interesting to note, as has been demonstrated by some commentators,<sup>78</sup> that the previous Australian Federal Government appeared to be strongly committed to the principle that sustainability reporting should be voluntary rather than compulsory. This was demonstrated by the response sent to the United Nations in connection with the proposed United Nations Norms for Corporations in late 2004,<sup>79</sup> in which it was stated that:

The Australian Government is strongly committed to the principle that guidelines for corporate social responsibility should be voluntary... We believe the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging greater awareness of societal values and concerns through voluntary initiatives.

However, the author does not share enthusiasm for this approach. To date, although various initiatives exist, such as those described in the paragraph above, which provide a framework for voluntary sustainability reporting, Australian companies have shown themselves to be "laggards" in voluntary reporting.<sup>80</sup> This was indicated by the results of the recent KPMG International Survey of Corporate Responsibility Report<sup>81</sup> which showed that only 29% of the top 100 companies published any form of corporate responsibility or sustainability report.<sup>82</sup> Some companies do perform very well in relation to voluntary environmental disclosure but generally Australian companies are considered to perform poorly.<sup>83</sup> Despite this, the ASX Corporate Governance Council considers that there is no "systemic failure" in terms of corporate Australia failing to address or respond to issues of sustainability or corporate responsibility,<sup>84</sup> even though the Parliamentary Joint Committee noted that Australia lags in sustainability implementing and reporting, by international standards.<sup>85</sup>

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<sup>78</sup> David Kinley, Justine Nolan and Natalie Zerial, "The Politics of Corporate Social Responsibility: Reflections on the United National Hums Rights Norms for Corporations" (2007) 25 Companies and Securities Law Journal 30, 40.

<sup>79</sup> United Nations Doc E CN 4/Sub 2/2003/12/Rev 2(2003) available at <http://www1.umn.edu/humanrts/links/norms-Aug2003.html> at 29 January 2008.

<sup>80</sup> Bubna-Litic, above n4, 261.

<sup>81</sup> KPMG, above n75.

<sup>82</sup> Ibid, 10.

<sup>83</sup> Bubna-Litic, above n4, 276.

<sup>84</sup> ASX Corporate Governance Council, above n64, 28.

<sup>85</sup> Parliamentary Joint Committee, above n53, xiii.

Voluntary sustainability reporting also risks becoming more of a “public relations” exercise than a true example of information sharing and disclosure. Voluntary sustainability reporting offers the choice not only of whether to report, but the manner in which it will occur, the nature of the information to be provided, and the way in which it will be presented. This offers too great an opportunity, even for those companies who choose to engage in such reporting, to manipulate information to suit the message they wish to project and to provide only “good news” stories.

Voluntary reporting also results in a great difficulty when seeking to compare information disclosed by different companies – without uniform reporting frameworks and requirements, it is difficult (if not impossible) to determine whether one company values sustainability more highly or behaves in a more “socially responsible” manner than another.

#### *D Compulsory Sustainability Reporting*

With both the Parliamentary Joint Committee and CAMAC reviews determining that mandatory sustainability disclosure is neither necessary nor appropriate, and the ASX Corporate Governance Council resolving not to introduce any mandatory reporting requirements relating to sustainability or corporate responsibility, is there a case to be made for compulsory sustainability reporting, particularly in relation to environmental risks and impacts?

The main arguments offered against mandatory sustainability reporting are:

- (a) the costs of compliance by affected corporations, which are not insignificant, particularly when staff and management time are taken into account;<sup>86</sup> and
- (b) the potential of it creating a “tick-a-box” culture of compliance.<sup>87</sup>

However, compulsory sustainability reporting would bring the following benefits:

- (a) defined reporting frameworks could be established which would help to eliminate the potential for manipulation which otherwise allows almost all such reporting to appear as a “good news” story;
- (b) there would be a greater degree of comparability between companies if all reported pursuant to a uniform set of disclosure frameworks;

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<sup>86</sup> The State of Sustainability Reporting in Australia 2005 (Department of the Environment and Heritage) 5, available online at <http://www.environment.gov.au/settlements/industry/corporate/reporting/pubs/survey2005.pdf> at 29 January 2008.

<sup>87</sup> Parliamentary Joint Committee, above n54, xv.

- (c) all stakeholders would be able to make an assessment of the manner in which various companies deal with and manage non-financial risks, such as environmental impacts;
- (d) corporate and management attention would be refocused on environmental and sustainability issues – leading to a greater awareness and consideration of environmental impacts as a consequence of corporate activity; and
- (e) investors with ethical concerns would be better placed to make informed decisions.

Whilst the costs of compliance should not be underestimated, if a uniform mandatory reporting framework were adopted, companies would need to focus resources only on responding to that particular framework, rather than attempting to determine whether to report and the manner in which this might be done.

The author considers that the ASX Corporate Governance Principles are currently the most appropriate framework with which to meet these objectives, despite the findings of the recent review by the ASX Corporate Governance Council. This framework has the following advantageous characteristics:

- (a) it utilises the “comply or explain” mechanism, which has been in place for more than four years – listed public companies are familiar with this manner of reporting and have other existing reporting obligations of which they are already aware;
- (b) the “comply or explain” mechanism allows companies which consider, for whatever reason, that it is not necessary or appropriate for them to report, to elect not to do so – so long as this decision is itself properly explained. Conceivably, companies which consider cost to be an impediment to sustainability reporting could elect not to do so for that reason, with resulting public awareness that such a decision had been made; and
- (c) information contained in a company’s annual report is accessible by all interested parties, not just shareholders, and is easily obtained - unlike information held by a regulator. In this context voluntary disclosure on environmental issues has, to date, occurred predominantly in mediums other than annual reports.<sup>88</sup>

Most notably, CAMAC also considered in its review that if mandatory sustainability reporting was necessary, use of the ASX Principles and Recommendations may be the most appropriate method by which it could occur.<sup>89</sup>

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<sup>88</sup> Frost and English, above n 40.

<sup>89</sup> CAMAC, above n 6, 147.

## VI LIKELY FUTURE DEVELOPMENTS AND CONCLUDING REMARKS

Despite growing awareness of corporate social responsibility issues, and increased community concerns about climate change and environmental impacts, it is somewhat disheartening that the recent reviews in Australia have not resulted in any recommendation that active steps be taken to make it more likely that companies will report on sustainability issues to their stakeholders. Indeed, the recommendations of CAMAC and the Parliamentary Joint Committee have been described merely as suggestions that business continue “as usual”.<sup>90</sup> Both bodies, plus the ASX Corporate Governance Council, can be considered to have failed to capitalize on potential opportunities which a forward-looking social and environmental strategy could have achieved.<sup>91</sup>

Mandatory sustainability reporting could lead to many positive outcomes, as described above.<sup>92</sup> However, regardless of the failure of the reviews to recommend the introduction of mandatory sustainability reporting, the author still considers it likely that companies will increasingly act in more “socially responsible” ways, and engage in greater levels of sustainability reporting, even if it is only because the “pursuit of profit” will compel them to do so. Companies, their directors, and senior management are becoming aware (if they are not already) that they must act (or at least appear to act) in a socially responsible manner in order to avoid resulting negative consequences. Thus it may be in the “best interests of a corporation” to act socially responsibly. Even companies which are inclined to narrowly focus on achieving short-term benefits and profits for existing shareholders cannot therefore afford to ignore the interests of other stakeholders.

The “enlightened self-interest” approach was recognised by CAMAC, which noted that many of “...those companies already undertaking responsible corporate behaviour are being driven by factors that are clearly in the interests of the company.”<sup>93</sup>

As Australia appears to lag behind other countries in its approach to corporate social responsibility and sustainability disclosure, it is likely to become necessary in the future to legislate for compulsory sustainability reporting so that Australia remains internationally competitive and to protect local financial markets. Indeed, the Parliamentary Joint Committee, as noted above,<sup>94</sup> stated that if companies fail to engage in socially responsible behaviour and sustainability reporting voluntarily, they may be compelled to do so in the future. Although the previous Commonwealth Government has indicated a desire to keep sustainability reporting voluntary, a change of government at the Federal level may now lead to a different position and outcome.

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<sup>90</sup> Bubna-Litic, above n 4, 254.

<sup>91</sup> Ibid 261.

<sup>92</sup> See section V D above.

<sup>93</sup> CAMAC, above n 6, xiv.

<sup>94</sup> Parliamentary Joint Committee, above n 53, 88.

Thus the debate on corporate social responsibility and sustainability disclosure is unlikely to be short-lived – its outcome has the potential to affect not only the law but also the way in which all business conduct themselves. This means that the stakeholders in this debate are not only all current Australians, but all future generations as well.