

# THE INTERACTION OF DIRECTORS' DUTIES AND SUSTAINABLE DEVELOPMENT IN AUSTRALIA: SETTING OFF ON THE UNCHARTED ROAD

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*[There is growing acceptance in corporate Australia that the long-term economic viability of business depends on the willingness and ability of companies to implement systems and policies to ensure that resources are utilised in a sustainable manner into the future. However, Australia's legislators still lack the resolve to enact legislation imposing an absolute obligation on companies and their directors to make certain that the activities of the company comply with established principles of sustainable development. In this article, the authors outline their proposal for the creation of a duty upon directors under the Corporations Act 2001 (Cth) to ensure that the company interacts with the environment in a sustainable manner. The authors argue that this proposal, rather than being overly radical and imposing an unreasonable restriction on the profit-making activities of companies, actually builds upon existing environmental regulatory and common law developments, and will effectively promote a balancing of economic and social development with environmental protection — which is, after all, the overall objective of sustainable development.]*

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## I INTRODUCTION

The political economy of corporations is in a state of flux. Increasingly, corporations are being told that they have obligations beyond returning profits to their shareholders and must start to incorporate social and environmental values into their operations. Corporate Social Responsibility ('CSR') is the newest business model and is set to have a substantial impact on how corporations behave and how they are perceived by the broader community. It truly represents a paradigm shift in the moral framework on which the *Corporations Act 2001* (Cth) ('*Corporations Act*') is based. As Rick Sarre has recently written:

the concept of CSR requires corporations not only to abide by the law, to be good corporate citizens and to abide by government and professional compliance codes and requirements, but to do more — to display an elevated level of

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quality in all that they do. It requires cultivation of an organisational 'culture of mindfulness', a vigilant and constant awareness of the possibility of wrongdoing, a personal ethic of care, and an assumption of individual responsibility for the consequences of one's actions. This includes an organisational commitment to ensure that companies not only conform with the law and regulatory obligations, but perform to a higher standard than that which is required by the law. In other words, it is a rejection of the notion that prescribing minimum standards, and enforcing them by law, is an adequate form of regulation.<sup>1</sup>

Whilst the principal driver of this dynamic has been social pressure emanating from civil society, the emerging trend is that social and environmental concerns will be incorporated into the legal framework which governs corporations.<sup>2</sup> This has been evidenced in various successful and attempted legislative initiatives over recent years.<sup>3</sup>

The reorientation of the moral framework which instructs the political and economic context of corporations is a dynamic which raises the serious issue of how the profit motive will be reconciled with any novel moral duties. If we wish to continue with current levels of wealth creation, arguably we must not unduly interfere with the profit motive which has been the historical *raison d'être* of corporations. However, interference with the profit motive would be the precise purpose of any moral reorientation and corporations should reflect the moral values of contemporary society. It — the corporation — is a legal construct, a creature of statute, and the reasons for the existence of such a creature are determined by the legislator's pen. Whether a corporation has a narrow view or a broad focus really depends on legislative initiative. Unlike the church, the corporation is not a sacred institution. As Robert Hinkley has written:

Corporations ... exist only because laws have been enacted that provide for their creation and give them a licence to operate. ... The corporate law establishes rules for the structure and operation of corporations. The keystone of this structure is the duty of directors to preserve and enhance shareholder value — to make money. ... 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).<sup>4</sup>

The common good is increasingly defined as not just the betterment of our economic wealth, but also the protection and advancement of our environmental health. As the recent World Summit on Sustainable Development ('WSSD') demonstrated, the concept of sustainable development is currently the environmental ethic which enjoys the broadest support as the organising principle most conducive to addressing our environmental concerns. The concept of sustainable

<sup>1</sup> Rick Sarre, 'Responding to Corporate Collapses: Is There a Role for Corporate Social Responsibility?' (2002) 7 *Deakin Law Review* 1, 7–8 (citations omitted).

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

<sup>3</sup> See, eg, *Corporations Act* s 299(1)(f), which requires corporations to include in their annual directors' reports 'details of the entity's performance in relation to environmental regulations'. For further discussion of s 299(1)(f), see Tamara Walsh, 'Accounting for the Environment' (2002) 19 *Environmental and Planning Law Journal* 387.

<sup>4</sup> Robert Hinkley, 'The Profit Motive Can Work with a Moral Motive', *The Australian Financial Review* (Sydney), 7 April 2000, 32.

development was introduced with the release of *Our Common Future* in 1987.<sup>5</sup> The report, commissioned in response to the world's growing horror at the extent and implications of the ecological crisis, defined sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'<sup>6</sup>

Recent trends have demonstrated that environmental and general regulation in Australia is moving towards the adoption of more stringent environmental requirements and a demand that corporations concern themselves not just with regulatory compliance, but with demonstrating a holistic corporate commitment to the moral values of our society.<sup>7</sup> These simultaneous trends are tracking towards the inevitable incorporation of sustainable development as a mandatory organising principle for corporate behaviour.<sup>8</sup> The purpose of this article is to propose an optimal solution to the need to balance the moral requirement that corporations respect the environment with the overwhelming historical, and contemporary, reason for their existence: to enhance shareholder wealth and thus drive economic development.

## II BACKGROUND

The issue of sustainability and its introduction as a corporate directors' duty must be seen in the light of two contexts. First, there is the increasing concern about humanity's impact on the environment and the desire to redress environmental degradation and realign our actions so that they do not derogate from the intrinsic qualities of the environment and humanity's ability to source its essential requirements from natural systems. Second, there is the trend towards corporations having increased moral responsibility for their actions and their place in society — whether this be expressed as CSR or adherence to 'triple bottom line' thinking.<sup>9</sup> The two are clearly related: part of the increased moral responsibility of corporations requires them to take account of environmental results when assessing their annual outcomes.

What separates the two at the moment, however, is that the former has been historically addressed through specific regulatory requirements whilst the latter is still a dynamic emanating from social and shareholder pressure, with little regulatory support. Thus, compliance with the former trend has involved directing the corporation with a specific target in mind. In contrast, the more

<sup>5</sup> World Commission on Environment and Development, *Our Common Future* (1987) ('Brundtland Report').

<sup>6</sup> *Ibid.* 43.

<sup>7</sup> See D E Fisher, 'Sustainability — The Principle, Its Implementation and Its Enforcement' (2001) 18 *Environmental and Planning Law Journal* 361, 363–5.

<sup>8</sup> *Ibid.*

<sup>9</sup> See Horrigan, above n 2, 531:

According to 'triple bottom line' thinking, corporations should focus holistically on the economic, social and environmental dimensions and implications of their business and not simply on the 'single bottom line' of financial considerations, profits, business costs, and share values and dividends. Yet that alternative conception also assumes much about how we should view and regulate corporations.

See also Tom Young, 'Putting Sustainability into Practice — The Queensland Fisheries Management Debate' (2001) 18 *Environmental and Planning Law Journal* 381.

fluid CSR pressure has been addressed by corporations independently, with CSR operations being undertaken at the corporation's discretion.<sup>10</sup> Further, CSR obligations can be seen as infiltrating the entire corporate operation so that in the case of some corporations, there is little which is undertaken without falling under a CSR framework of some description. In contrast, specific environmental regulation is dealt with on an ad hoc basis, meeting the requirements when and where they arise without fundamentally altering the corporate culture. Arguably, however, there is a trend towards the merging of these requirements, with environmental obligations taking on a more pervasive nature and CSR pressures being drawn up into legislative provisions. The Australian Democrats' Corporate Code of Conduct Bill 2000 (Cth) is an example.<sup>11</sup> First introduced in 2000, and described as 'impracticable and unwarranted' by the Parliamentary Joint Statutory Committee on Corporations and Securities in its June 2001 *Report on the Corporate Code of Conduct Bill 2000*,<sup>12</sup> the Bill was reintroduced into the Senate in 2002.<sup>13</sup> Introduced by Democrats Senator Vicki Bourne, the Bill has the following objectives (as stated in s 3 of the Bill):

- (a) to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations which employ more than 100 persons in a foreign country; and
- (b) to require such corporations to report on their compliance with the standards imposed [by the Bill]; and
- (c) to provide for the enforcement of those standards.

On the environmental front, the concept of sustainable development captures the idea of reorientating commerce to be more sensitive to environmental constraints. The Brundtland Report recommended that the world's nations adopt an ethic of environmental interaction in order to perpetuate humanity's ability to command sufficient resources to live at constant levels of utility.<sup>14</sup> Within the broad scope of environmental thought, sustainable development sits at the moderate end of ethics which seek to direct humanity's dealings with the environment. As an ethic, sustainable development permits capitalist production methods and does not require a wholesale rescaling of society. Compared with non-anthropocentric ethics, which demand a more radical reorientation of the political economy, it essentially offers a business-as-usual model. There are, however, certain changes that are demanded. Resource usage and prevention of the degradation of ecological capital become central considerations in the organisation of productive capacity, so that whilst consumer-based economics may be compatible, there cannot be consumption patterns which move in

<sup>10</sup> See Douglas Branson, 'Corporate Governance "Reform" and the New Corporate Social Responsibility' (2001) 62 *University of Pittsburgh Law Review* 605.

<sup>11</sup> A succinct explanation of this Bill is provided in Walsh, above n 3, 394–5.

<sup>12</sup> Parliamentary Joint Statutory Committee on Corporations and Securities, Commonwealth Parliament, *Report on the Corporate Code of Conduct Bill 2000* (2001) 39. See especially the main conclusions and recommendations of the Committee at 39–40.

<sup>13</sup> Daren Armstrong, 'The Corporate Code of Conduct Bill' (2002) 16(2) *Commercial Law Quarterly* 30.

<sup>14</sup> See Brundtland Report, above n 5, 349 (annex 1, principle 3).

ignorance of their effect on the environment. Likewise, sustainable development does not demand that the earth's resources be protected by vast exclusion zones, with human exploitation absolutely prohibited. Rather, it permits resource usage so long as such usage does not deplete the resource, at least not over the medium- or short-term.

Expanding the lifetimes of resources is perhaps the most basic requirement of sustainable development. More intrinsic to the concept of sustainable development, however, is the pursuit of renewable and reusable technologies. Renewable energy perhaps represents the epitome of sustainable development, capturing the concept of resource reuse for the purpose of decreasing commerce's impact upon the environment. Another practical manifestation is the concept of product stewardship whereby a producer takes responsibility not just for the production of a good but also for its ecologically responsible use and disposal, often in the form of recycling or reuse. A cardboard manufacturer which undertakes involvement in the collection and recycling of its cardboard is perhaps the most common example.

The concept of sustainable development has been at the forefront of international objectives to deal with the environment in a holistic manner. Whilst there have been ad hoc agreements for issues such as climate change or species protection, it has been sustainable development which has informed the highest level of international debate on solutions to our current environmental problems. The aforementioned Brundtland Report has been notable in these discussions. The definition of sustainable development forwarded by this report, that is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs', has been taken as the defining ethic for subsequent negotiations. Following this report, the United Nations Conference on Environment and Development, also known as the 'Earth Summit', was held in Rio de Janeiro, Brazil from 3–14 June 1992. This represented an important coming together for the international community, both governmental and non-governmental, and resulted in *Agenda 21: United Nations Program of Action for Sustainable Development*,<sup>15</sup> an international plan of action for the implementation of sustainable development.<sup>16</sup> Ten years on from the Earth Summit, the WSSD was held in September 2002 and reaffirmed the world's commitment to sustainable development, in both the *Plan of Implementation*<sup>17</sup> and the *Johannesburg Declaration on Sustainable Development*,<sup>18</sup> as

<sup>15</sup> Report of the United Nations Conference on Environment and Development, UN Doc A/CONF.151/26 (Vols I–III) (1992) ('*Agenda 21*').

<sup>16</sup> For an overview of the main chapters of *Agenda 21* and the process of reviewing implementation of *Agenda 21*, see Joseph Tornberg, 'The United Nations Commission on Sustainable Development' (2001) 17 *New York Law School Journal of Human Rights* 957.

<sup>17</sup> WSSD, *Plan of Implementation* (1992) <[http://www.johannesburgsummit.org/html/documents/summit\\_docs/2309\\_planfinal.htm](http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm)>.

<sup>18</sup> WSSD, *The Johannesburg Declaration on Sustainable Development* (1992) <[http://www.johannesburgsummit.org/html/documents/summit\\_docs/1009wssd\\_pol\\_declaration.htm](http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.htm)> ('*Johannesburg Declaration*').

well as the multitude of lower level, though potentially more influential, 'Type 2' agreements.<sup>19</sup>

Whilst the *Johannesburg Declaration* imposes no obligations and hence is essentially a political document, it does affirm the three 'pillars of sustainable development' — economic development, social development and environmental protection'.<sup>20</sup> It also confirms the objectives of sustainable development which are 'poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development'.<sup>21</sup> More tangible obligations appear in the *Plan of Implementation*. The main topics reflect the objectives of sustainable development, as well as sustainable development in a globalising world, health and sustainable development, region-specific measures and means of implementation. Type 2 agreements are agreements which were concluded between any type of Summit participant, from non-governmental organisation to corporation to government, and which did not require the concurrence of all Summit states. These covered a raft of topics and perhaps offer greater hope for the practical implementation of sustainable development.

### III TRENDS IN ENVIRONMENTAL REGULATION IN AUSTRALIA

Trends in environmental regulation have historically followed three broad paths: impact assessment, conservation and pollution regulation. Impact assessment essentially considers the potential impact upon the environment of a proposed project for the purposes of determining whether that project will receive governmental approval. At the federal level, this has occurred historically under the framework of the *Environment Protection (Impact of Proposals) Act 1974* (Cth) and now under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The later Act also has the role of protecting World Heritage Areas and attempting to preserve species biodiversity.<sup>22</sup> In this regard, it has replaced the *World Heritage Properties Conservation Act 1983* (Cth) and the *Endangered Species Protection Act 1992* (Cth). Pollution control has occurred much more at the state level and has essentially involved point source emission regulation — imposing fines or fees for the discharge of pollution from production sites.

These forms of regulation have involved the imposition of specific regulatory requirements upon corporations with clear compliance criteria. They involve the attainment of government-specified goals which have been determined a priori. Non-compliance carries a variety of sanctions from licence revocation to substantial fines. Corporations can manage their environmental obligations through a compliance system dedicated to achieving the specific goals. In so far

<sup>19</sup> For a list of existing Type 2 agreements, see United Nations Division for Sustainable Development, *Sustainable Development Partnership (Type 2) Summary* (2003) <[http://www.un.org/esa/sustdev/partnerships/summary\\_partnerships.pdf](http://www.un.org/esa/sustdev/partnerships/summary_partnerships.pdf)>.

<sup>20</sup> WSSD, *Johannesburg Declaration*, above n 18, [5].

<sup>21</sup> *Ibid* [11].

<sup>22</sup> See, eg, Sophie Chapple, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): One Year Later' (2001) 18 *Environmental and Planning Law Journal* 523.

as the goals represent specific outcomes, there does not need to be any deep-seated commitment to environmental goals through the corporation, merely the avoidance of sanctions.

Perhaps representing an intermediate step in regulatory models, several new obligations have focused on achieving disclosure of environmental performance. This goes further than mere regulatory compliance as it opens up the corporation to assessment by the community and, importantly, current and prospective shareholders. Thus, s 1013DA of the *Corporations Act* provides:

[The Australian Securities and Investments Commission ('ASIC')] may develop guidelines that must be complied with where a Product Disclosure Statement makes any claim that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.

Such provisions force corporations to take account of the ecological impact of their activities by attempting to 'embarrass' corporations into action. Further, the growth in 'socially responsible investment' has provided market incentive for corporations to behave themselves with regard to the environment.<sup>23</sup> Mandatory disclosure obligations aid this interface between the market and morality.

Beyond reporting requirements, there are moves towards influencing the entire operations of corporations. Achieving cultural change is perhaps the hardest task of any regulatory initiative as it involves changing attitudes, not just attaining a specific outcome which can be achieved without any underlying commitment to the goals the outcome represents. These moves are not specific to environmental regulation. For example, corporate culture is now a consideration under Part 2.5 of the *Criminal Code Act 1995* (Cth) when determining criminal liability of corporations. 'Corporate culture' is defined in s 12.3(6) of the Act as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes [sic] place.'<sup>24</sup> Further, corporate culture is starting to be taken into account when determining the availability of a due diligence defence against occupational health and safety breaches.<sup>25</sup>

It is perhaps the recent amendments to the *Environment Protection Act 1970* (Vic), however, which represent the farthest reaching attempt to re-engineer the corporation with respect to sustainable development. The *Environment Protection (Resource Efficiency) Act 2002* (Vic) introduced new provisions which are designed to push Victorian corporations towards measures which increase resource efficiency and decrease ecological impact. The new provisions provide for a cooperative/coercive regime under which corporations and/or

<sup>23</sup> See Walsh, above n 3, 388–9.

<sup>24</sup> See Christine Parker and Olivia Conolly, 'Is There a Duty to Implement a Corporate Compliance System in Australian Law?' (2002) 30 *Australian Business Law Review* 273, 282–3.

<sup>25</sup> See the decision of *Pacific Dunlop v Ian Kamburn* (Unreported, County Court of Victoria, Nixon J, 21 January 1994) which refers to the attitude of the company and the fact that it had taken an enlightened and progressive attitude to comply with the stringent requirements of the legislation and had not put profits ahead of safety. Nixon J reduced the fine from \$40 000 to \$17 500. See also Philip Bohle and Michael Quinlan, *Managing Occupational Health and Safety: A Multidisciplinary Approach* (2<sup>nd</sup> ed, 2000).

industries may either enter into a voluntary covenant to increase resource efficiency and decrease their ecological impact, or face the risk that the considerable powers of Victoria's Environment Protection Authority ('EPA') to force these changes will be invoked.

The voluntary covenants are provided under the new s 49AA which provides that a sustainability covenant is an agreement by which a person undertakes:

- (a) to increase the efficiency with which the person or body uses resources to produce products or services; and
- (b) to reduce the ecological impact of those products or services and of the processes by which they are produced.

The parties to these covenants are essentially industry members and the EPA. The covenants may either be firm-specific or industry-wide. It is indicated in s 49AC(2) that the EPA may provide a benefit to any party to a covenant although the Act does not specify the nature of these benefits.

On the other side of the coin, s 49AD provides that the EPA can request the Governor-in-Council to make a declaration that 'an industry has the potential to have a significant impact on the environment.' The effect of a declaration is that it permits the EPA to request firstly a 'Statement of Ecological Impact' from an industry member which assesses four things:

- (a) what resources the enterprise or process is using and in what quantities those resources are being used; and
- (b) how the resource use efficiency of the enterprise or process can be improved; and
- (c) the actual or potential ecological impacts of the enterprise or process and of the products or services produced by the enterprise or process; and
- (d) how those impacts can be reduced.<sup>26</sup>

If the statement discloses:

- (a) that an enterprise or process is a significant user of resources and that the resource use efficiency of the enterprise or process can be improved; or
- (b) that an enterprise or process has, or the products or services produced by an enterprise or process, have major actual or potential ecological impacts and that those impacts can be reduced ...<sup>27</sup>

then the powers given to the EPA under s 49AH apply.

These powers are quite extensive. Section 49AH(2) allows the EPA to require the person who produced the statement:

- (a) to produce a plan of proposed actions to implement the resource use efficiency improvements or ecological impact reductions identified in the statement; and
- (b) to specify in the plan the key actions that are to be undertaken and the time-frames within which those actions are to be taken; and

<sup>26</sup> *Environment Protection Act 1970* (Vic) s 49AF(2).

<sup>27</sup> Section 49AH(1).

- (c) to specify in the plan resource efficiency or ecological impact reduction targets; and
- (d) to specify in the plan a method for monitoring compliance with the plan ...; and
- (e) to implement the plan; and
- (f) to take any specified action under the plan that has not been taken.

Further, s 49AH(3) provides other powers, namely allowing the EPA to require the person:

- (a) to assess alternative practices and product stewardship approaches to improve the use efficiency of specified resources or to reduce any ecological impacts identified by the Authority; and
- (b) to take specified actions to meet specified resource efficiency, or ecological impact reduction targets; and
- (c) to publicly report in a specified type of publication or forum specified information in relation to resource efficiency or ecological impact reduction.

Section 49AH(4) also provides that the EPA may require the person to comply with a covenant which is in place for the industry. These requirements are backed up by considerable sanctions as failure to comply is an indictable offence carrying a \$250 000 fine.<sup>28</sup>

Clearly this is a significant step in environmental regulation, representing a move beyond pollution control and environmental conservation to a situation where an environment protection authority may step in to re-engineer the operations of a business. The concepts of resource efficiency and ecological impact are not defined, although s 49AN provides that the EPA may make guidelines to clarify their meaning. Notwithstanding this, they represent targets indicative of sustainable development, and in this sense the new provisions can be seen as the first substantial movement in Australia towards legislating for sustainable development in industry.

There are, however, significant questions which can be raised about the new scheme. First, there is vague reference to the 'benefits' which may be bestowed upon a signatory to a voluntary covenant. In the absence of any clear articulation of this element, it is difficult to see what incentive there is for a corporation to alter its practices voluntarily to increase resource efficiency and to reduce its ecological impact. The clearest answer is that voluntarily entering into a covenant would pre-empt any forced changes to business practices in the event of an industry declaration under s 49AD. However, voluntarily entering into a covenant does not actually prevent a later declaration or even a request for a statement of ecological impact. Such a statement, the trigger for the s 49AH powers, can be required when the business does not comply with one or more of the undertakings in a covenant<sup>29</sup> or if the EPA considers that an insufficient number of industry participants are prepared to enter into one of the covenants.<sup>30</sup> Whilst

<sup>28</sup> Section 49AM.

<sup>29</sup> Section 49AF(1)(d)(ii).

<sup>30</sup> Section 49AG(1)(b).

strict compliance with a covenant would clearly exempt a participant from any statement requirements, this incentive is not sufficiently clear from the provisions.

Second, there is serious concern about the powers granted to the EPA. These are incredibly broad, and although there is provision for appeal to the Victorian Civil and Administrative Tribunal over the exercise of the s 49AH powers,<sup>31</sup> there is a lack of clarity as to whether cost or practicality will be taken into account if the EPA requires a business to undertake specific measures. Further, the type of changes which would be needed to achieve resource efficiency and reductions in ecological impact would involve a significant change in the business plan. Clearly the requirements made by the EPA will feed off the statement of ecological impact, but notwithstanding this, there is the concern that such requirements could be maladroitly suited to the overall operations of the business. An example of this is the potential for product stewardship requirements to be imposed which would involve a substantial extension of the business' involvement in the use and life cycle of its products and services, potentially raising costs dramatically.

Whilst the idea of sustainable business in and of itself is obviously not a negative thing, and indeed forms the premise of this article, there is the concern that the new Victorian provisions are arguably not the best way to go about achieving the paradigm shifts required. They potentially involve a substantial derogation from corporate autonomy in that the EPA can direct businesses how to operate and, in doing so, detrimentally affect the financial performance of the business. This of course represents a worst case scenario and it is obvious that the EPA would prefer to enter into voluntary covenants rather than involve itself in the operations of Victoria's businesses. Notwithstanding this, perhaps a more fluid approach under which a general obligation is imposed, allowing the corporation to achieve this in the optimal manner, is a better alternative.

A statutory directors' duty to ensure that the company interacts with the environment in a sustainable manner, as will be outlined below, has the potential to provide a broad framework in which directors may conduct the operations of the business to achieve sustainable outcomes in a manner which best suits the individual circumstances of the corporation. A more fluid approach would arguably better promote an improved management culture as it brings the requirement into the operations of the business, rather than imposing external obligations in an ad hoc fashion.

As will be seen, however, we do not propose the directors' duty as a substitute for the Victorian provisions. Rather, we see them as cooperative parts of an interlocking framework encouraging the development of sustainable commerce in Australia.

<sup>31</sup> Section 36BA.

#### IV DIRECTORS' DUTIES TO THE ENVIRONMENT — IS THIS WHERE WE ARE HEADING?

Whilst the traditional rule that directors only owe their fiduciary duties to the company is still embraced and applied by the Australian judiciary, in some circumstances the courts (usually state Supreme Courts, rather than the High or Federal Courts) have been prepared to recognise that particular factual situations justify extending the obligations of directors to apply to other stakeholders. In recent times, for example, there has been judicial commentary suggesting that in certain (albeit limited) circumstances some form of duty may also be owed to shareholders,<sup>32</sup> and perhaps even creditors.<sup>33</sup> It is important to note, however, that the courts have stressed that extending the duties of directors to apply to these stakeholders does not in any way alter the overriding principle that the fiduciary duty of directors to act in the best interests of the company remains their primary obligation.

This development in the law leads to the question of whether in time the courts will extend the obligations of directors further by establishing some form of duty to the environment and its resources. It has been recognised that stakeholders in a company, such as shareholders and creditors, are in particular circumstances directly affected by the acts or omissions of directors. Could the same reasoning influence the establishment of a duty to implement sustainable development practices within a company out of recognition that the environment is directly affected by the way in which companies (through the directing mind and will of their directors) interact with the environment's natural resources and ecosystems?

It is in this context that Professor Robert Baxt recently suggested that the law of directors' duties may again be about to head down an 'uncharted road', where traditional principles such as acting in the best interests of the company and maximising profits for shareholders will be forced to interact with, and accommodate, contemporary considerations including CSR, triple bottom line reporting and, of course, sustainable development.<sup>34</sup>

<sup>32</sup> See *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, in which the New South Wales Court of Appeal held that, notwithstanding the general principle established in *Percival v Wright* [1902] 2 Ch 421 that a director's fiduciary duties are owed only to the company and that no fiduciary duty is owed to shareholders, where a transaction does not concern the company but only another shareholder, a director may owe a fiduciary duty to that shareholder. This duty to shareholders must not, however, compete with the fiduciary duty to the company. In *Peskin v Anderson* [2001] 1 BCLC 372, it was confirmed that directors will only owe a fiduciary duty to shareholders if there is some 'special factual relationship' (usually a quasi-partnership relationship like in *Brunninghausen v Glavanics*) between the directors and shareholders giving rise to fiduciary obligations. See also Robert Valentine, 'The Director-Shareholder Fiduciary Relationship: Issues and Implications' (2001) 19 *Company and Securities Law Journal* 92.

<sup>33</sup> *Jeffrey v National Companies and Securities Commission* [1990] WAR 183; *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114. But see *Spies v The Queen* (2000) 201 CLR 603; *Geneva Finance Ltd v Resource & Industry Ltd* (2002) 169 FLR 152. These cases are discussed in James McConvill, 'Geneva Finance and the "Duty" of Directors to Creditors: Imperfect Obligation and Other Imperfections' (2003) 11 *Insolvency Law Journal* 7.

<sup>34</sup> Robert Baxt, 'Just to whom Do Directors Owe Their Duties? Will This Conundrum Ever Be Satisfactorily Resolved?' (2002) 30 *Australian Business Law Review* 445, 447.

### A The Potential of 'Public Duty' Considerations

In our view, there is no conceptual barrier to extending the duties of directors to include a positive duty to ensure that the company complies with principles of sustainable development.<sup>35</sup> As has been discussed in brief terms above, any extension of the duty of directors should not be considered as a radical upheaval of the traditional foundations of company law, but rather as simply the addition of an extra element in the political economy of corporations.

While we are not yet at the point where we can say with certainty that the courts would uphold an argument that environmental considerations warrant the imposition of an enforceable duty on directors to ensure that the company operates in conformity with principles of sustainable development, recent cases have indicated that the courts are on occasion willing to look beyond the parameters of the company to consider the impact that company directors have on the community as a whole. In other words, the momentum is moving towards considering the interests of the community, in addition to the best interests of the company, when describing the nature and scope of the duties of company directors.

The recent decision of *National Roads and Motorists' Association Ltd v Geeson*<sup>36</sup> highlights that, in particular circumstances, directors may have a 'public duty' to act or refrain from acting in order to adhere to what is in the best interests of the community as a whole, rather than according to what is in the best interests of the company. In *Geeson*, the National Roads and Motorists' Association ('NRMA') sought an injunction restraining the four defendants (Stewart Geeson, Anne Keating and Jane Singleton, who were directors, along with John Fairfax Publications) from publishing information concerning an NRMA board meeting held on 17 September 2001. During the board meeting, NRMA President Nick Whitlam had sought an undertaking from the board members not to disclose information regarded by NRMA as confidential. Due to the three board members' refusal to provide the undertaking, NRMA applied to the New South Wales Supreme Court for an injunction preventing the disclosure of all board papers or other papers read during the board meeting by the three directors.

At first instance, Bryson J refused NRMA's application. In the course of discussing NRMA's application for an injunction, Bryson J suggested that in an organisation such as NRMA there may be a 'public duty' on the part of directors to disclose information concerning the activities of the board to the public via the press. In discussing the nature of NRMA as a company limited by guarantee with

<sup>35</sup> Achieved by common law developments, and the introduction of pt 2F.1A of the *Corporations Act* which abolished the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 that 'the proper plaintiff in an action alleging a wrong done to the company by the directors, by a majority of shareholders or by outsiders, is the *company* itself' (emphasis in original). Cf Robert Baxt, Keith Fletcher and Saul Fridman, *Corporations and Associations: Cases and Materials* (9<sup>th</sup> ed, 2003) 517. For further discussion, see James McConvill, 'Directors' Duties to Creditors in Australia after *Spies v The Queen*' (2002) 20 *Company and Securities Law Journal* 4, 16–17.

<sup>36</sup> (2001) 39 ACSR 401 ('*Geeson*'). See also Robert Baxt, 'Editorial: Disclosure, Auditing, Accounting — And All Matters Financial!' (2002) 20 *Company and Securities Law Journal* 248, 250.

a large membership, along with the need for its directors to accordingly take into account public interest issues in carrying out their obligations, Bryson J said:

[NRMA's] activities are *so pervasive* that it does not seem too much to say that the NRMA is *part of the general organisation of society in New South Wales*. In my view interests of the NRMA as a whole would be positively served by making public, for the information of members and others, events and circumstances at a board meeting ... The readiness of media to report such things is a *reflection of real, well-based and widespread interest and concern in the community*.<sup>37</sup>

Although it is reasonable to suggest that the comments of Bryson J were made on the basis that NRMA is a prominent company with a large number of members, it is possible that in time the comments in *Geeson* could be extrapolated into a common law duty on directors to comply with principles of sustainable development. If Bryson J recognised in *Geeson* that the public had a right to be informed of the events and circumstances at a board meeting of a company such as NRMA, then there is no reason why in a future case it could not be held that the public have a right to demand that directors of a company similar to NRMA have a duty to ensure that the company actively takes steps to comply with sustainable development principles. From this point, it becomes conceivable that a court would consider that the duty of directors had developed so far that, as a matter of logic and justice, the sustainable development duty should apply to all company directors.

Accordingly, the statutory duty to interact with the environment in a sustainable manner proposed below is not at all radical or out of step with trends in environmental and company law. It is about building on these trends and developments (actual and potential) in environmental regulation generally, while focusing attention on principles of sustainable development. As Baxt said in a prescient remark:

concepts [such as] ... triple bottom line and social responsibilities become easily mixed up in the context of directors' duties in a more technical sense, and before long we could find that we are travelling down another uncharted road involving the issue of directors' duties and just to whom they are owed.<sup>38</sup>

## V EXPLANATION OF PROPOSAL

Society cannot legislate one way or the other on the content of directors' duties without first settling the extent to which corporations must not only comply

<sup>37</sup> *Geeson* (2001) 39 ACSR 401, 412 (emphasis added). A similar statement about NRMA was made more recently by Master Macready in *NRMA v John Fairfax Publications Pty Ltd* [2002] NSWSC 563 (Unreported, Master Macready, 26 June 2002). In that case, in which the plaintiff (NRMA) brought an application for the production of certain documents and the examination of journalists who were involved in disclosing information that arose during two NRMA board meetings, Master Macready stated (at [169]):

The plaintiff is a very large organisation fulfilling an important role in this State. We are not here concerned some [sic] local organisation whose members are at loggerheads. Many of the subjects discussed by the board are extremely confidential and serious harm could result from disclosure of such discussions.

<sup>38</sup> Baxt, 'Just to whom Do Directors Owe Their Duties?', above n 34, 447.

with legal regulation in a minimalist sense but should also meet social obligations because of society's creation of market and economic conditions for their flourishing (ie, the 'quid pro quo' argument). As Hinkley indicates, directors' and officers' legal obligations are probably the highest point of leverage for implementing change of this kind.<sup>39</sup>

### A Overview

In this part of the article, we outline and explore our proposed change to insert a new duty in the *Corporations Act* which would essentially require that directors ensure that the company actively complies with principles of sustainable development. The duty would be imposed on directors, rather than the company, to send a clear message to directors that they are responsible for ensuring that the culture within Australia's companies develops towards setting in practice systems and policies that are sustainable and respect Australia's natural resources.

Based on our research of sustainable development policies and corporate law regimes in other countries (namely the United States,<sup>40</sup> Germany,<sup>41</sup> China,<sup>42</sup> New Zealand,<sup>43</sup> Sri Lanka,<sup>44</sup> the Netherlands<sup>45</sup> and members of the European Union<sup>46</sup>), we believe that our proposal (if adopted) would be a world first, making Australia the most progressive jurisdiction in terms of implementing law reform initiatives to promote sustainable development. The majority of these jurisdictions have by now expressly recognised and endorsed the principle of sustainable development and the rules contained in *Agenda 21*, and have in place general environmental protection legislation to impose liability (civil, criminal or both) on companies and their directors who commit certain environmental

<sup>39</sup> Horrigan, above n 2, 531.

<sup>40</sup> See, eg, Gary Bryner, 'The United States: "Sorry — Not Our Problem"' in William Lafferty and James Meadowcroft (eds), *Implementing Sustainable Development: Strategies and Initiatives in High Consumption Societies* (2000) 273; Jian-Ming Zhou, *Sustainable Development in Asia, America and Europe with Global Applications: A New Approach to Land Ownership* (2001) 313–95. See also Kristina Tridico, 'Sustainable America in the Twenty-First Century: A Critique of President Clinton's Council on Sustainable Development' (1999) 14 *Journal of Natural Resources and Environment Law* 205.

<sup>41</sup> See, eg, Christiane Beuermann, 'Germany: Regulation and the Precautionary Principle' in William Lafferty and James Meadowcroft (eds), *Implementing Sustainable Development: Strategies and Initiatives in High Consumption Societies* (2000) 85.

<sup>42</sup> See, eg, Wang Xi, 'The Implementation of Rio Declaration and Agenda 21 in China since 1992' (1998) 3 & 4 *Australian Environmental Law News* 38; Michael Pickles, 'Implementing Ecologically Sustainable Development in China: The Example of Heilongjiang Province' (2002) 14 *Georgetown International Environmental Law Review* 577.

<sup>43</sup> See, eg, Rhoanna Stanhope, 'A Vision for the Future? The Concept of Sustainable Development in the Netherlands and New Zealand' (2000) 4 *New Zealand Journal of Environmental Law* 147.

<sup>44</sup> See, eg, Sumudu Atapattu, 'Sustainable Development, Myth or Reality?: A Survey of Sustainable Development under International Law and Sri Lankan Law' (2001) 14 *Georgetown International Environmental Law Review* 265.

<sup>45</sup> See Stanhope, above n 43.

<sup>46</sup> See, eg, Don Smith, 'The European Union's Commitment to Sustainable Development: Is the Commitment Symbolic or Substantive in the Context of Transport Policy?' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 241.

offences (relating to water and air pollution, and litter).<sup>47</sup> However, none of these jurisdictions has specifically given implementation of sustainable development practices the status of a primary duty of directors forming part of the jurisdiction's corporations law.

The new statutory duty that we are proposing for Australia's *Corporations Act* would be framed in a positive manner so that directors must take active steps to ensure that the corporation interacts with the environment in a sustainable manner. We believe that framing the duty in this way is sufficiently specific to overcome any concern that the duty would be too wide and unwieldy and would impose an unfathomable obligation on directors — particularly in companies whose environmental practices are constantly criticised, albeit usually without justification. Large mining companies are an obvious example. If we keep in mind that sustainability is about balance (by maintaining production of resources for present needs, but also setting in place systems to provide for future needs), then so long as these companies can demonstrate that they have in place systems and procedures to achieve this balance, they will not fall foul of the proposed new statutory duty.

### B *Outlining the Proposed New Statutory Duty*

The new duty would be inserted as s 180A of the *Corporations Act*, and would be contained in Part 2D.1 of the Act along with the main general directors' duties (such as due care and diligence, good faith, use of position) that presently exist. As alluded to above, s 180A would be framed as a positive duty, with sub-s (1) providing:

A director or other officer of a corporation must exercise their powers and discharge their duties to ensure that the corporation interacts with the environment in a sustainable manner.

In establishing this positive duty, sub-s (2) would then go on to provide that:

For the purposes of subsection (1), a corporation will be taken to be interacting with the environment in a sustainable manner if it takes all steps reasonably practicable to reduce its ecological impact and increase its resource efficiency.

Definitions of 'ecosystems', 'environment' and so on, would need to be added to the list of definitions in s 9 of the *Corporations Act* and could be based on the definitions contained in the Corporate Code of Conduct Bill 2000 (Cth).<sup>48</sup>

<sup>47</sup> Similar to the offences contained in the *Environment Protection Act 1970* (Vic) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

<sup>48</sup> Section 6. 'Ecosystem' is defined as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.' 'Environment' is defined to include:

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) natural and physical resources; and
- (c) the qualities and characteristics of locations, places and areas; and
- (d) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b) or (c).

There would also be a guidance note to s 180A stating that the precautionary principle will govern the interpretation of this provision.<sup>49</sup> The *Convention on Biological Diversity* states the precautionary principle to be 'where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat'.<sup>50</sup> This guidance note would ensure that a lack of scientific certainty about a particular method of reducing environmental degradation and/or improving resource efficiency could not be used by company directors as an excuse when faced with the prospect of being found to have contravened s 180A. In our high-tech environment, with science progressively changing the way in which we live and work, it is crucial that the precautionary principle governs the interpretation of the proposed new statutory duty.

The scope of the new duty would be limited in the same way as was intended by the Corporate Code of Conduct Bill 2000 (Cth) by only applying to companies that employ over 100 people.<sup>51</sup> Organisations of this size should have the capacity to reorganise their policies and procedures so that they are capable of operating consistently with principles of sustainable development. Indeed, many of these companies already have in place policies and systems to promote sustainable development.<sup>52</sup>

As the proposed new s 180A would act in addition to the existing duties of directors under ss 180–3 of the *Corporations Act*, which reflect the traditional rule that directors owe their duties solely to the company and must act only to maximise profits for the shareholders, there is the potential for the new duty and the existing duties to come into conflict in particular circumstances. For example, an aggrieved group of shareholders may argue that by investing the company's money to develop new policies and systems so that the company can improve resource efficiency in the long-term (and hence promote sustainable development), the directors may comply with s 180A, but breach s 181(1)(a)<sup>53</sup> by failing to focus attention on maximising the company's profits for distribution among the shareholders in the short-term.

It therefore becomes necessary when imposing a duty on directors in the nature of the proposed s 180A to establish either that the existing duties (relevantly ss 180 and 181(1)–(2)) take priority over s 180A, or to set in place a framework

<sup>49</sup> The Corporate Code of Conduct Bill 2000 (Cth) s 6 defines the precautionary principle to mean 'that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage'.

<sup>50</sup> Opened for signature 5 June 1992, 1760 UNTS 79, preamble (entered into force 29 December 1993). See also *Leach v National Parks and Wildlife Service* (1993) 81 LGERA 270, 281.

<sup>51</sup> Section 3(1)(a).

<sup>52</sup> See generally Paula Darvas, 'Section 249D and the "Activist" Shareholder: Court Jester or Conscience of the Corporation?' (2002) 20 *Company and Securities Law Journal* 390, which provides some discussion of the practices of Rio Tinto (and North Ltd, which has been acquired by Rio Tinto).

<sup>53</sup> *Corporations Act* s 181(1) provides:

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.

whereby directors can go about establishing systems to comply with s 180A without fear of being penalised for contravening other statutory duties in the process. We believe that the second course of action is the most desirable if we are to be serious about embedding sustainable development principles into our national corporations law. Whilst in the medium- to long-term, implementation of sustainable development practices enhances the profitability of companies due to improvements in resource efficiency, initially (when significant cost is involved in changing a company's procedures and systems to be capable of achieving substantial development) there is a conflict between the goal of sustainable development and the goal of maximising profits for shareholders. We believe that, during this initial period, the law should not deter directors from implementing sustainable development practices when this has such positive medium- to long-term benefits. Similar comments were recently expressed by Baxt in the context of a director's wider obligations to the community:

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.<sup>54</sup>

In our view, the most effective way of raising s 180A to the forefront of directors' statutory duties, whilst at the same time not unduly limiting the ability of directors to maximise shareholder profits and expand the company, is to introduce an 'environmental judgment rule' for each of ss 180 and 181(1)–(2) in similar terms to the business judgment rule which presently resides in s 180(2)–(3) of the *Corporations Act*.<sup>55</sup>

The existing business judgment rule in s 180(2), which applies only to the duty of due care and diligence under s 180(1) of the Act and equivalent duties at common law and in equity, operates as a defence by providing that if a director satisfies each of the preconditions specified under sub-s (2),<sup>56</sup> then they are taken

<sup>54</sup> Robert Baxt, 'Avoiding the Rising Floods of Criticism: Do Directors of Certain Companies Owe a Duty to the Community?' (2000) 16(11) *Company Director* 42, 42.

<sup>55</sup> *Corporations Act* s 180(2)–(3) reads:

(2) 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.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold ...

(3) In this section:

*business judgment* means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

<sup>56</sup> The operation of s 180(2) was explained as follows by Santow J in *Re HIH Insurance Ltd (in prov liq)*; *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 349:

in order for the safe-harbour 'statutory business judgment rule' to be relied upon, the director must first have made a business judgment. Then that business judgment must satisfy the fol-

not to have contravened the due care and diligence duty under sub-s (1). The Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 (Cth) clearly explains the rationale behind introducing the business judgment rule:

The fundamental purpose of the business judgment rule is to protect the authority of directors in the exercise of their duties, not to insulate directors from liability. While it is accepted that directors should be subject to a high level of accountability, a failure to expressly acknowledge that directors should not be liable for decisions made in good faith and with due care, may lead to failure by the company and its directors to take advantage of opportunities that involve responsible risk taking.<sup>57</sup>

If s 180A was implemented without an environmental judgment rule acting as a safe harbour device for directors, we do not believe that the principle of sustainable development would be *appropriately* incorporated into the *Corporations Act*. It could be said that a more hardline reform initiative, whereby directors would be forced to comply with the new duty under s 180A but at the same time be potentially exposed to liability under the more general duty provisions, would require a true balancing of the interests of the environment and the economic and social interests of the company and its members. We believe, however, that this dual liability regime would encourage directors to adopt an extremely minimalist approach towards sustainable development and the environment generally. In other words, directors would do just enough (in terms of implementing sustainable practices and procedures) to escape liability under s 180A, whilst at the same time not going beyond this point of environmental consciousness so as to avoid any claim for breach of the directors' duties provisions of the *Corporations Act*. Our proposed environmental judgment rule would make sure that directors are able to take seriously their duty to achieve sustainability, without the threat of penalties for doing so.

The proposed environmental judgment rule would be essentially the same as the business judgment rule, and would operate towards achieving harmony between s 180A and the existing duties under Part 2D.1, with s 180A at the forefront. We believe that the environmental judgment rule, which would be outlined in s 180A(3)–(4) of the *Corporations Act*, could be expressed as follows:

lowing requirements, namely made in good faith for a proper purpose; after the director has informed himself as to the subject matter of the judgment to the extent he reasonably believes to be appropriate; in circumstances where the director does not have a material personal interest in the subject matter of the judgment and rationally believes that the judgment is in the best interests of the corporation (s 180(2)). The director's belief that his or her judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in that position would hold (s 180(2)).

<sup>57</sup> Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth) [6.3]. For an excellent discussion of the reasons for, and operation of, the statutory business judgment rule in Australia, see Robert Baxt, 'Directors' Duty of Care and the New Business Judgment Rule in the Twenty-First Century Environment' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trusts Law: Essays in Honour of Professor Harold Ford* (2002) 151.

(3) A director or other officer of a corporation who makes an environmental judgment is relieved from liability under subsection (1), s 180(1) and s 181(1) and their equivalent duties at common law and in equity.

(4) In this section:

*environmental judgment* means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation which is rationally made to comply with subsection (1).

Note: The director's or officer's judgment is a rational one unless the belief is one that no reasonable person in their position would hold.

In relation to the existing business judgment rule under s 180(2), the definition should be amended to add a new sub-s (aa): '*act or refrain from acting to ensure that the company interacts with the environment in a sustainable manner to satisfy s 180A of the Act*'. This would make s 180(2) consistent with the proposed new s 180A(2) in ensuring that a decision rationally taken to satisfy s 180A would not contravene s 180(1). Obviously, all the existing requirements of s 180(2) would still need to be satisfied.

In terms of enforcement of the new statutory duty, like all the other general directors' duties under Part 2D.1, s 180A would be a civil penalty provision within the meaning of s 1317E(1) of the *Corporations Act*, which therefore opens up the possibility of the following remedies: disqualification from managing corporations (s 206C), compensation orders (s 1317H), pecuniary penalty orders (s 1317H) and declaration orders (s 1317F).<sup>58</sup>

It is intended that the design of s 180A will be such that not only will the new duty work in conjunction with the existing general duties of directors under the *Corporations Act*, but also (to the extent possible) complement other initiatives in environmental legislative and regulatory regimes. For example, we believe that by imposing a duty on directors to ensure that the company interacts with the environment in a sustainable manner, s 180A will act as a direct incentive for directors of companies based in Victoria to implement voluntary sustainable covenants, which is the desired outcome of the new *Environment Protection (Resource Efficiency) Act 2002* (Vic). Section 180A, combined with the threat of becoming subject to a compulsory sustainable covenant imposed by Victoria's EPA, would work to encourage a cooperative relationship between companies and the EPA in developing sustainable development practices into the future.

### C Section 1324, Proportionality and Corporate Constitutionalism

We acknowledge that the introduction of s 180A into the *Corporations Act* has the potential to change the landscape of corporate regulation in Australia dramatically as the new duty, used in conjunction with s 1324 of the *Corporations Act*, would potentially empower environmental lobbyists and interest groups to apply to the courts for injunctions to force companies to comply

<sup>58</sup> See Grant Moodie and Ian Ramsay, 'The Expansion of Civil Penalties under the *Corporations Act*' (2002) 30 *Australian Business Law Review* 61. See also *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253.

actively with principles of sustainable development. Particularly in high profile companies that attract the attention of environmentalists, this could stall development and cause serious economic deterioration, rather than setting in place an effective legal framework which promotes sustainability.

Section 1324 extends standing to seek an injunction (either restrictive or mandatory) and/or damages to ASIC and any 'person whose interests have been, are or would be affected' by a contravention, or potential contravention of the *Corporations Act*.<sup>59</sup> An aggrieved person or ASIC can seek a permanent injunction under s 1324(1) or an interim injunction under s 1324(4). In recent times, much has been written about the very wide scope and availability of s 1324 as a remedial device.<sup>60</sup> Furthermore, the universal view now held by academics and judges is that s 1324 should be accorded an expansive interpretation.<sup>61</sup> This attitude is neatly reflected in the recent decision of *Australian Securities and Investments Commission v Mauer-Swisse Securities Ltd*.<sup>62</sup> In that case, Palmer J held that when exercising its statutory injunction power under s 1324, a court is not confined by the considerations which would be applicable if it were exercising its equitable jurisdiction to grant injunctions (that is, whether there is a serious question to be tried, where the balance of convenience lay, and whether damages would be an adequate remedy).<sup>63</sup> Rather, according to Palmer J, the 'broad' question which the court must consider in an application for an injunction under s 1324 is 'whether the injunction would have some utility or would serve some purpose within the contemplation of the *Corporations Act*'.<sup>64</sup>

To avoid the possibility of s 1324 being abused by so-called 'busybodies' who do not have a direct interest in a company's environmental practices but are trying to make a company comply with its obligations under s 180A, we propose that a carve out to s 1324 be inserted at the time s 180A is enacted. The carve out provision would qualify s 1324(1) by stating that only ASIC and Environment Australia have standing under s 1324 in relation to a contravention (actual or potential) of s 180A.

We believe that this carve out provision would complement, rather than undermine, s 180A. The proposed new s 180A is about achieving sustainable development, which requires an effective balance of economic development and environmental protection. Sustainable development is not strictly about envi-

<sup>59</sup> See s 1324(1), (10). In *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 73 FCR 161, 167, Einfeld J held that damages under s 1324(10) were available even if an injunction is not sought: at 167. This was confirmed in *Vanmarc Holdings v P W Jess & Associates Pty Ltd* (2000) 34 ACSR 222, 227 (Mandie J).

<sup>60</sup> See, eg, Keith Fletcher, 'CLERP and Minority Shareholder Rights' (2001) 13 *Australian Journal of Corporate Law* 290, 300–1; McConville, 'Directors' Duties to Creditors in Australia after *Spies v The Queen*', above n 35, 22–4; Baxt, 'Directors' Duty of Care and the New Business Judgment Rule', above n 57, 163–7.

<sup>61</sup> See *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 73 FCR 161, 167 (Einfeld J). See also Julie Cassidy, *Concise Corporations Law* (2<sup>nd</sup> ed, 1999) 316–17; Harold Ford, Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (11<sup>th</sup> ed, 2003) [11.310].

<sup>62</sup> (2002) 42 ACSR 605.

<sup>63</sup> *Ibid* 609.

<sup>64</sup> *Ibid* 613.

ronmental protection. The carve out that we have structured would provide for this balancing of considerations, as ASIC and Environment Australia are both resourceful regulators that would actively pursue actual or potential contraventions of s 180A by way of the injunctions mechanism under s 1324. At the same time, the carve out significantly promotes economic development by removing the possibility of lobby groups and ‘busybodies’ using s 1324 to disrupt the reasonable profit-making activities of companies and/or to generate publicity for their political causes.

Indeed, the carve out provision is more restrictive than the position at common law as to whether environmental groups have standing to take action to protect the public interest. Although the main common law rule is that a mere intellectual or emotional interest in the subject matter of a dispute is not sufficient to confer standing,<sup>65</sup> when the matter raises environmental issues the courts are willing to take into account community perceptions and values when determining standing. For example, in *Australian Conservation Foundation v Minister for Resources*,<sup>66</sup> the Federal Court held that the Australian Conservation Foundation (‘ACF’) had standing to dispute the validity of a licence to log the South East forests for the purpose of exporting woodchips, as the community expected that a large organisation like the ACF would take such action to protect and conserve the natural environment. Important to this reasoning was that the ACF had a clearly defined role and received government financial support to perform this role. The carve out provision in s 1324 would mean that even well-established, government-funded organisations like the ACF would not have standing under s 1324. Either they would have to approach Environment Australia or ASIC to make a s 1324 application on their behalf, or decide whether it would be worthwhile instituting formal court proceedings against the relevant company alleged to have contravened s 180A.

In framing this carve out provision in a manner which facilitates the use of s 1324 injunctions to direct compliance with s 180A by companies, but without unduly interfering with the production and development activities of companies, the overall legislative framework proposed provides the best manner for the achievement of sustainable development, while endorsing the theory of corporate

<sup>65</sup> See *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 113 (Buckley J); *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 (‘ACF case (No 1)’). According to Robyn Glindemann in ‘Standing to Sue for Environment Protection: A Look at Recent Changes’ (1996) 24 *Australian Business Law Review* 246, 247 (emphasis in original):

The ACF case (No 1) was significant because it clearly limited the right of third parties to challenge decisions that would affect the environment. It was made clear by Gibbs J that a person could demonstrate a special interest in a *particular* environment; however, environmental groups such as the ACF, whose aims and objectives were solely to protect and conserve the environment generally, could not have such an interest. Gibbs J obviously believed that the ACF’s concern was an intellectual one only.

<sup>66</sup> (1989) 19 ALD 70. For a good discussion of the application of the principles established in the ACF case (No 1), see Jan McDonald and Steven Münchenberg, ‘Public Interest Environmental Litigation — Chipping Away at Procedural Obstacles’ (1995) 13 *Environmental and Planning Law Journal* 140, especially 141–2.

constitutionalism developed by Professor Stephen Bottomley.<sup>67</sup> According to the theory of corporate constitutionalism, 'a corporation is an institution which, via its constitution, mediates public and private interests and values'<sup>68</sup> and therefore corporate regulation 'should be constituted by state *and* corporate inputs'.<sup>69</sup>

## VI CONCLUSION

Although there are already a number of obligations imposed on company directors in Australia today, we believe that the statutory duty to ensure that the company interacts with the environment in a sustainable manner is far from an unnecessary extra. As Hinkley has argued, companies should be seen as more than just profit-making institutions.<sup>70</sup> A company is a statutory creation, and therefore the legislature is entitled to determine how a company is to function and operate. In our view, there is no justifiable conceptual or pragmatic reason why the achievement of sustainable development cannot be positioned alongside profit maximisation as the primary objective of the company — with the obligations of companies and duties of directors and other officers designed to reflect this repositioning.

Such an ambitious reform initiative will inevitably be criticised by corporate interest groups for being too intrusive, too wide to be enforceable and for pushing the regulatory envelope too far in favour of environmental protection at the expense of economic and social development. However, as has been argued throughout this article, such criticism would demonstrate a misunderstanding of the concept of sustainable development.

As highlighted by the *Johannesburg Declaration*, sustainable development is about more than just environmental protection. It is about achieving a balance between economic and social development and environmental protection so that we can provide for both present and future needs. In other words, sustainable development inherently accommodates companies continuing to go about making money for their shareholders through production and development, so long as systems and policies are implemented which provide for improvements in resource efficiency and ecological impact over time.

Our proposed statutory duty does not interfere with this balancing of considerations in any way. Although ensuring that the company interacts with the environment in a sustainable manner will be at the forefront of the directors' duties under our proposal, the key themes underpinning our proposed legislative framework are proportionality and balance. A company's production and development activities will only amount to a contravention of the *Corporations*

<sup>67</sup> See Stephen Bottomley, 'The Birds, the Beasts and the Bat: Developing a Constitutionalist Theory of Corporate Regulation' (1999) 27 *Federal Law Review* 243, 255 (emphasis omitted):

The theory of corporate constitutionalism begins with the proposition that corporations are more than just artificially created legal institutions (contrary to the suggestions of concession theory) and they are more than just economic institutions (contrary to the argument of contract-based theorists). Corporations have both of these dimensions, but they are also social enterprises and they are polities in their own right.

<sup>68</sup> *Ibid* 257.

<sup>69</sup> *Ibid* 255 (emphasis in original).

<sup>70</sup> Hinkley, above n 4, 33.

*Act* when it offends the standards of environmental protection that a reasonable person in the community (which includes the perspective of shareholders and businesspeople as well as environmentalists) would expect a company to meet.

Without ecologically sustainable development and an adequate environmental regulatory framework, companies will simply not be able to survive into the distant future. As Eva Cox has written, social and human capital are not only as important as financial capital, but social wellbeing is a precondition for financial capital and economic prosperity to flourish.<sup>71</sup> Increasingly, those in managerial positions are recognising that the integration of economic, social and environmental considerations must become a central part of the way in which business is conducted not just in the long-term, but in the short-to-medium term. This trend must continue. With increasing pressure from our trading partners (particularly in Europe) to ensure that Australian companies wishing to export their products or services have in place environmental management systems which adhere to the International Organisation of Standardisation's ISO 14 000 standards (requiring companies to control the impact of their activities, products or services on the environment),<sup>72</sup> implementation of sustainable management practices is a necessity if Australian businesses wish to maximise their exporting potential.

Developments on the international landscape have meant that the road to sustainable development has been clearly laid out before us. Given this context, it is crucial that the proposal made in this article to implement a duty under the *Corporations Act* forcing directors to implement sustainable development practices is adopted to ensure that Australia remains on the right track.

<sup>71</sup> Eva Cox, *A Truly Civil Society* (1995) 11.

<sup>72</sup> Refer to the International Organisation of Standardisation <<http://www.iso.ch/iso/en/iso9000-14000/tour/magical.html>>. See also Jim Parker, 'Environment Management Systems and Due Diligence' (1996) 11(8) *Australian Environment Review* 10.