

INFORMATION ON LEGAL OBLIGATIONS CONCERNING CORPORATIONS WITH REGARD TO THEIR STAKEHOLDER RELATIONSHIPS AND ASSOCIATED REPORTING DUTIES

Australian Legal Perspective

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Outline for a Legal Perspective on an Annual Board
“Statement of Significant Audiences and Materiality” –
Australian Legal Perspective

The responses in this survey are developed at the request of Robert G. Eccles, Professor of Management Practice, Harvard Business School and have been prepared by John A. Purcell PhD (Law)(Melb.) in collaboration with his colleagues in External Positioning, CPA Australia. CPA Australia Ltd (CPA Australia) is one of the world’s largest accounting bodies representing more than 150,000 members of the financial, accounting and business profession in 121 countries.

Setting the legal landscape:

1. Briefly explain the broader legal landscape regarding the obligations that a company has to its stakeholders or with regard to its impact on stakeholders, and in particular whether its primary duty is or is not to shareholders over all other stakeholders.

The following responses to survey questions show a fairly doctrinal, though sophisticated, approach to corporate law development in Australia. The corporate law, both in statute and general law, remains relatively discrete in nature, free from the overlaying of extraneous non-economic purposes. This, of course, raises the question of the purposes of incorporation and for whose benefit it occurs. Set against this, it is by no means apparent that the corporate law in Australia is either overly or overtly oriented towards notions of shareholder primacy. Yet challenges exist in meeting the needs and expectations of stakeholders as widely defined. These challenges centre on such matter as:

- choice of appropriate disclosure regimes,
- managing the interaction between the largely private law character of corporate law and wider public law which address the environmental and social contexts,
- achieving the right balance in liability regimes, and
- handling the ‘hard cases’.

Regulatory Framework:

2. To what legal tradition does the jurisdiction belong, i.e. civil/common law, mixed?

Australia, following the English legal tradition, is a common law jurisdiction. Viewed in this way is potentially simplistic if recognition is not given to equity’s influence on company law. Equity refers to the system of justice developed in, and administered by, the English Court of Chancery. As a system operating alongside the Common Law Courts, equity developed a system of judicial intervention and principles for prevention of the hardship and injustice given rise to by common law precedent and the nature of Common Law Court pleading and actions (the common law system of writs). The processes of fusion between the administration of common law and equity occurring in the UK and Australia through a sequence of Judicature Acts, was not fully complete here until 1972. Even now, the New South Wales Corporations List (probably the busiest corporation law forum in Australia) is conducted by the Equity Division of the Supreme Court. The equitable doctrines, remedies and institutions still have significant influence on the general law¹ and corporate law², perhaps even more so in Australia than in England.

¹ For example, the creation of trusts in a variety of forms and equitable intervention in contracts through principles such as those operating against unconscionable conduct and the awarding of equitable compensation (the remedy of an account of profits).

² For example, directors’ fiduciary duties, Responsibility Entity as a trustee where operating a managed investment scheme (broadly, pooled contribution arrangements for acquiring common interests in the outputs of an enterprise, eg. forestry and other agricultural ventures) and consumer protection against unconscionable conduct in relation to financial services.

3. Are corporate/securities laws regulated federally, nationally, provincially or both?

The regulation and administration of Australian company law has been dogged by controversy and complexity centering on the constitutional division of powers between the Commonwealth and the six states (former British colonies) which in 1901 federated to form the Commonwealth of Australia. The nature of this survey does not warrant any detailed analysis of the individual State's constitutional power to legislate with respect to corporations and the numerous attempts starting in 1961 to achieve a uniform and national scheme. Essentially, the scheme as it stands today is a federal one achieved through each of the six States referring or vesting with the Commonwealth (Commonwealth of Australia Constitution Act s 51(xxxvii)) their power over corporations and financial markets. Though unlikely, the referral by the States is revocable.

4. Who are the government corporate/securities regulators and what are their respective powers (in summary only)?

- The Commonwealth Parliament by legislation prescribes the standards to be applied to companies and persons connected with them and delegates to the executive branch of government power to prescribe by subordinate legislation. The principal legislation is the Corporations Act 2001.³
- The executive arm of the government acts through a Commonwealth Minister and regulatory authorities, the main one being the Australian Securities and Investments Commission (ASIC) whose functions and powers are set out in the ASIC Act 2001. A significant thrust of the ASIC Act concerns consumer protection in relation to financial services. The ASIC Act is also the instrument creating bodies such as the Takeovers Panel, Companies Auditors and Liquidators Disciplinary Board, the Audit and Assurance Standards Board, and the Corporations and Markets Advisory Committee (CAMAC). The latter of these bodies was effectively disbanded in 2014 as part of the current Commonwealth government's *Reducing Red Tape in the Public Sector* initiative.
- Since 1996 responsibility for legislation on corporations and securities has sat with the Commonwealth Treasurer or Parliamentary Secretary to the Treasurer, prior to this it was with the Commonwealth Attorney-General. This transfer of responsibility reflects a view that company law is essentially economic in character.
- The judiciary interprets legislative prescriptions and applies these to the facts of particular cases brought before the courts. The Commonwealth Acts Interpretations Act 1901 is relevant in these regards. The Corporations Act 2001 in Part 9.6A confers jurisdiction with respect to civil matters arising under Corporations legislation to both the Federal Court and the state Supreme Courts, and recognizes also the criminal jurisdiction of the Supreme Courts in relation to criminal matters arising under Corporations' legislation. The highest appellate court hearing appeals by special leave⁴ from both the Federal and Supreme Courts is the High Court of Australia, capacity for appeal to the Privy Council in London having progressively been removed by 1975 (Commonwealth) and 1986 (last State). As such, judicial development of company law in the UK is, at most, persuasive.

³ This Act is organised into Chapters, Chapters are in turn organised into Parts, the Parts in turn organised into Divisions, and in some cases Sub-divisions, and then the operative Sections themselves which contain the statutory rules.

⁴ Special leave refers to the application process undertaken by parties wishing to appeal a judgment from a relevant lower court. Capacity to appeal is not automatic, the High Court needing to be persuaded in preliminary hearing that there is reasonable cause to hear and decide the case, typically in relation to questions of law rather than questions of fact.

5. Does the jurisdiction have a stock exchange(s)?

Three stock exchanges operate in Australia. The ASX (ASX Ltd) operates the Australian Stock Exchange and the Sydney Futures Exchange and makes markets in securities and derivatives including shares, futures options, and warrants. ASX also fulfils a market supervisory role through its listing rules. The domestic equity capital market capitalization of ASX is around AUD\$1.5 trillion, representing approximately 2,200 listed companies and 6.8 million shareholders. The National Stock Exchange of Australia (NSX) is a stock exchange established to cater specifically for the listing of small- to medium-sized enterprises. The exchange is owned by NSX Ltd, a company listed on the ASX. NSX also provides a trading platform for water entitlements and taxi licenses. NSX lists about 70 securities and has a market capitalization of around AUD\$2 billion. The third exchange operation in Australia is Chi-X Australia, part of Chi-X Global and has part ownership from a number of financial institutions and brokers. Chi-X seeks to offer lower costs for participants in competition with the largely monopoly position of the ASX.

Incorporation and listing:

6. Do the concepts of “limited liability” and “separate legal personality” exist?

Following its roots in English company law, Australian corporate law applies concepts of limited liability. In a contemporary sense, this is achieved through the recognition in s 112 of the Corporations Act 2001 of Types of Companies, of which there are six types. The first level of distinction is between proprietary and public companies. The requirements of a proprietary company are defined in s 113 as having no more than 50 non-employee shareholders. All other companies which can be registered⁵ under the Corporations Act 2001 are public companies. Within the public company category there is a four-fold classification based on the members⁶ liability to contribute to the company's debts; limited by shares, limited by guarantee, unlimited by shares, and no liability. Proprietary companies can only be one of two types; limited by shares and unlimited by shares.

The vast majority of Australia's 2.1 million or so companies are private companies limited by shares. The degree of liability of members to contribute towards payment of the company's debts upon being wound up⁷ for not being able to pay its debts in full, is set out in Pt 5.6 – Winding Up Generally – Division 2 – Contributories. There, for example, s 516 provides “if the company is a company limited by shares, a member need not contribute more than the amount (if any) unpaid on the shares in respect of which the member is liable as a present or past member.” Consistent with the concept of limited liability, s 556 (Pt 5.6 Division 6 – Proof and ranking of claims) lays out an order of distributions ahead of unsecured debts and claim. Related to this, and emphasizing the residual position of shareholders, s 563A postpones subordinate claims. These are defined as “a claim for a debt owed by the company to a person in the person's capacity as a member of the company (whether by way of dividends, profits or otherwise).” This wording enacted in 2010 emphasises the primacy of general creditors over shareholders in an insolvency, particularly where an aggrieved shareholder is seeking standing as a creditor based on misleading or defective market disclosure which induced the share acquisition. This position had been called into question in the High Court decision *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1.

⁵ Part 2A.2 of the Corporation Act 2001 is titled How a company is registered, and contains amongst other section s 117 (Applying for registration) and importantly, for present purposes, s 119 (Company comes into existence on registration), this being the commencement of corporate personhood.

⁶ *Member* is defined in s 9 (Dictionary) of the Corporations Act and includes “in relation to a company – a person who is a member under section 231.” Section 231 is within Chapter 2F - Members' rights and remedies – and specifies membership of a company as “A person - - - if they are a member of the company on its registration, or agree to become a member of the company after its registration and their name is entered on the register of members.”

⁷ Wound up/ winding up are terms used within the corporate insolvency (rather than personal bankruptcy) lexicon referring to the statutory supported commercial process of settling accounts and liquidation of assets in anticipation of a corporations dissolution. See for example Corporations Act Part 5.4 – Winding up in insolvency.

A few remarks about the less common forms. An unlimited company has its antecedence in the oldest type of company initially provided for under the English Joint Stock Companies Registration and Regulation Act of 1844 – limited liability not allowed for under that Act until 1855. Whilst members are made liable without limit in a winding up, they are not, however, directly liable to creditors. Concerning no liability companies, provision for contribution under Pt 5.6 – Div 2 is specifically excluded, so that members are not required to pay calls on capital either while the company is a going concern or is being wound up. Registration of a no liability company requires the company’s constitution to restrict its objects to mining purposes, and as a matter of alerting those who deal with it, must include in its name “No Liability” (s 148), or the abbreviation NL (s 149).

Turning now to separate legal personality. Australia is a strong adherent to this concept which is seen as a vital element in facilitating the limitation of member liability. Consistent with the doctrine affirmed in 1897 by the House of Lords in *Salomon v Salomon & Co Ltd*, Australian corporate law gives positive and consistent recognition to the principle that rights, privileges, duties, and liabilities are ascribed to the company, though a legal fiction, separate from its directors and members. Similarly, the directors are an organ of the company, rather than merely being its agent. In this latter regard, s 127 sets out the basis for execution of documents by the company itself, with ss 129(3) and (4), in turn, providing protection to those dealing with the company in terms of the assumptions they are entitled to make (the old common law indoor management rule).

Whilst the Corporations Act 2001 does not, as previous legislation did, specifically articulate that:

- the company could sue and be sued,
- could enjoy perpetual existence, and
- could acquire, hold, and dispose of property,

these characteristics are inferred by s 119 (Company comes into existence on registration) and through s 124 (Legal capacity and powers of a company). This latter section commences at subsection 1 by stating “A company has the legal capacity and powers of an individual inside and outside of this jurisdiction.” Ancillary to this, s 124(2) provides that “A company’s legal capacity to do something is not affected by the fact that the company’s interests are not, or would not be, served by doing it.” This is consistent with the abolishing of the *ultra vires* doctrine in Australia and provides a clear delineation between corporate power and directors’ powers.

Similarly, sub-section 2 of s 125, whilst acknowledging that a company’s constitution may set out its objects⁸ and limit powers, an act which is contrary to such objects or limitations of powers, is not invalid. The company will still be bound protecting those who may have contracted with the company. Under this distinction aggrieved insiders (shareholders) have resort to seek redress under Pt 2F.1 (Oppressive conduct of affairs) and the interests of outsiders are protected in a manner similar to the operation of Pt 2B.2 (Assumptions people dealing with the company are entitled to make). Parties external to, and dealing with the company, should unless put on notice, be able to assume that the various internal appointments and authorities to exercise powers are in order.

Further statutory reflections of the separate entity doctrine can be found in vesting of power to manage the business of the company by or under the direction of directors (s 198A), the reserving of specific powers to the members in general meeting (for example altering the corporate constitution (s 136)), and the effect given in s 140 to the company’s constitution having effect as a contract between the company and each member, between the company and each director, and between a member and each other member. The ideas of contract privity contained in s 140 may be pertinent to this survey’s examination of the accommodating of non-shareholder stakeholder interests.

⁸ Prior to amendments operative from 1 January 1984, every company had to state its objects in its basic constitutional documentation, the memorandum of association. Corporate acts beyond the company’s powers were void (*ultra vires*).

Notwithstanding what is outlined above, Australian corporate law does provide some limited basis for departure from the separate entity doctrine both through statute and general law. In relation to statute, one of the characteristics of corporate law distinguishable from, say, US law, is protections afforded to creditors once insolvency is present. For example, Australia has consistently rejected adoption of US-Style Chapter 11 'debtor-in-possession' restructuring.⁹ Foremost amongst unsecured creditor protection is the insolvent trading regime (Pt 5.7B – Div 3), which sets out contravention for failing to prevent the company from incurring debts if the person is aware, or has ground to suspect, the company was, or would become, insolvent by incurring a debt. Insolvency is determined on a cash flow rather than balance sheet test (s 95A). Division 4 of Pt 5.7B, in turn, provides for court orders upon declaration of a Div 3 contravention for directors to compensate the company; this being the clearest example of statutory-based departure from the separate entity doctrine. One noteworthy matter pertinent to the theme of this survey is that whilst the insolvency context (actual or real risk) requires directors to take into account the interests of creditors as part of 'acting in the best interests of the company', this does not amount to an independent, and actionable, duty owed to creditors (refer for example to *Spies v R* (2000) 201 CLR 603). This is indicative of a highly structured, rights-oriented approach to admitting into formal consideration non-shareholder stakeholder interests.

Turning now to the general law and the 'lifting of the corporate veil'. The expression figuratively describes what happens when, for reasons of public or statutory policy, the courts are able to identify classes of cases where corporate form (the separate entity) is not decisive to the application of a statute or a common law doctrine (so described by Lord Cooke of Thorndon). Adopting again UK approaches, identified classes include those where a company structure is used to perpetuate a fraud or where a company structure is used with the sole or dominant purpose of enabling the avoidance of an existing legal obligation. Nevertheless, as the authors of *Ford's Principles of Corporate Law*¹⁰ note, "no all-embracing principle has emerged." The issues of corporate veil piercing is further alluded to in response to Question 11, there in the context of controversy around group structures and the perverse incentives to shield the group assets from claims in negligence.

7. Did incorporation or listing historically, or does it today, require any recognition by the company or its directors of a duty to society, an obligation to take account of the company's social or environmental impacts, or to respect its stakeholders?

[For these purposes, the term "stakeholders" is distinct from "non-shareholder" and from "shareholder" in that it encompasses both "material audiences" (the providers of financial capital, both debt and equity), as well as "significant audiences" (non-financial stakeholders, such as employees, customers, suppliers, contractors and subcontractors, regulators etc. some of whom may be material to a firm at an entity specific level)].

These types of issue are comprehensively dealt with in Corporations and Markets Advisory Committee's 2006 Report *The social responsibility of corporations*. It is appropriate to repeat here the Committee's concluding view in Chapter 3 (Duties of directors):

The Committee acknowledges concern in many submissions about the need for companies to consider the environmental and social impacts of their conduct. The question is how best to respond to those concerns.

As noted in various submissions, the environmental and social matters referred to in the debate on corporate social responsibility are really factors that directors should already be taking into account in determining what is in the best interests of their corporation in its particular circumstances.

⁹ See Corporations and Markets Advisory Committee's 2004 Report *Rehabilitating large and complex enterprises in financial difficulty*, it noted though there is now apparent in 2014 some 'political appetite' to explore a basis for a clearer corporate rescue culture.

¹⁰ R. P. Austin and I. M. Ramsay, *Ford's Principles of Corporations Law* (15th ed. LexisNexis, 2013, p 140)

The Committee considers that the current common law and statutory requirements on directors and others to act in the interests of their companies - - - are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including change in societal expectations about the role of companies and how they should conduct their affairs. The Committee is not persuaded that the elaboration of interests that, where relevant, can already be taken into account would improve the quality of corporate decision-making in any practical way. A non-exhaustive catalogue of interests to be taken into account serves little useful purpose for directors and affords them no guidance on how various interests are weighed, prioritised or reconciled.

Also, the courts, through their interpretation of the law, including the requirement in s 181 of the Corporations Act for directors and others to act in the 'best interests of the company', can assist in aligning corporate behavior with changing community expectations. Given this, it is unnecessary to amend that section along the lines of s 172 of the UK *Corporations Act 2006* and nothing worthwhile is to be gained.

The Committee considers that an amendment to the Corporations Act, either specifically to require or to permit directors to have regard to certain matters or the interests of certain classes of stakeholder, could in fact be counterproductive. There is a real danger that such a provision would blur rather than clarify the purpose that directors are expected to serve. In so doing, it could make directors less accountable without significantly enhancing the rights of other parties." (pp. 111 – 112)

8. Do any stock exchanges have a responsible investment index, and is participation voluntary? (See e.g. FTSE4Good, Dow Jones Sustainability Index, the Johannesburg Stock Exchange's Socially Responsible Investment Index.)

None of the Australian stock exchanges identified above in Question 5 offer a responsible investment index. A number of ASX companies however, make reference to the Dow Jones Sustainability index (DJSI). DJSI Australia is constructed from the S&P /ASX 200 and the 40 RobecoSAM Industries selecting the top 30% in terms of Sustainability in each industry. RobecoSam's 2014 review shows the DJSI Australia at 48 Components, there having been 12 deletions and 4 additions. Significant amongst the deletions are BHP Billiton Ltd (along with BHP Billiton PLC), whilst the largest addition by market capitalization to the global DJSI was Commonwealth Bank of Australia. Australian companies represent DJSI Industry Group Leaders in three of the 24 categories: Westpac Banking Corp in Banks, Woolworths Ltd in Food & Staples Retailing, and GPT Group in Real Estate.

Directors' Duties

9. To whom are directors' duties generally owed?

Generally, directors' duties are owed to the company and not to individual classes of shareholders. In particular circumstances of, for example, reliance or dependency, a fiduciary relationship between a director and an individual shareholder can be held to exist (see for example *Glavanics v Brunninghausen* (1996) 19 ACSR 204 and the New Zealand Court of Appeal decision in *Coleman v Myers* [1977] 2 NZLR 224, which modify application of the old rule in *Percival v Wright* [1902] 2 Ch 421). The general duties identified below in Question 10 do not amount to a general universal obligation to conduct the affairs of a company in accordance with general law and the Corporations Act; rather, they are concerned with duties owed to the company (see *ASIC v Maxwell* (2006) 24 ACLC 1,308). Again, as will be elaborated on in response to Question 11, in the discharge of their duties directors should have regard to the interests of creditors, employees, and others with whom the company deals.

10. What are the duties owed by directors – please state briefly.

Significantly, Australian corporate law operates with a duality or overlapping of statutory and general law of directors' duties. Section 185 of the Corporations Act provides that the 'shorthand' statutory statements

of general duties have effect in addition to, and do not lessen or set aside, any rule of law applied to a person's office or in relation to a company.¹¹ This, for example, preserves the right to bring civil proceedings for monetary compensation without reference to statutory duties and allows the common law and fiduciary rules that have evolved in relation to conflict, profit, and misappropriation to be applied to the same set of facts that would attract the statutory provisions. The judicial function in these contexts is far greater than seeking out and applying through statutory interpretation parliament's intentions.

The duties can be divided between care and diligence, and loyalty and good faith. The general law duty to act with reasonable care and diligence has two statutory manifestations: the duty to act with reasonable care and diligence (s 180) and the duty to prevent insolvent trading (s 588G). The general law duty of loyalty and good faith comprises four major components. First, the duty to avoid conflicts of interest. The related statutory duties are those of the requirement to disclose certain interests (ss 191 – 196), related party transactions (Ch 2E), and the duty not to misuse information or position (ss 182, 183). Secondly, the duty to act in good faith in the interests of the company. Thirdly, the duty to use powers for a proper purpose. In relation to these latter two general law duties, the statutory manifestation is found in the s 181 duty to act in good faith in the best interests of the company and for a proper purpose. The fourth loyalty and good faith based general law duty is the avoidance of fettering the future exercise of a director's discretion. Finally, it is important to recognize that ss 181 – 183 (though not s 180) have, through the operation of s 184, a criminal element when the director or other officer's conduct is either reckless or intentionally dishonest.

Please indicate if there are express or implied duties to avoid damage to the company's reputation?

This could possibly be found in the judicially supported idea of the company as 'a real think' (corporate personhood) warranting a company's protection from director conduct which abuses the privileges of limited liability. The strong tort of negligence underpinning of the duty of care and diligence (s 180) might further suggest some sympathy for this idea, particularly from the perspective of vulnerability and consequent pure economic loss. On the other hand, however, Australian corporate law operates with a business judgment rule (s 180(2)) reflecting a longstanding judicial attitude (see *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821) that courts will not place themselves in a position of second guessing the merit of management decisions honestly arrived at.

11. More generally, are directors required or permitted to consider the company's impacts on non-shareholders, including impacts on the individuals and communities affected by the company's operations?

In response to Question 7 above reference is made to CAMAC's 2006 Report: *The social responsibilities of corporations*. Notwithstanding what might be regarded as a fairly doctrinaire position, it is relevant to consider actual practice from the stance of director perceptions. A highly valuable insight on directors' understanding of the scope and parameters of their obligations is provided in Ford's Principles of Corporations Law (15th ed., LexisNexis, 2013), which refers to research conducted by the University of Melbourne in 2007. This research surveyed the views of 400 company directors on such matters as their understanding of what 'best interests of the company' entailed and whether the law required them to act only in the interests of shareholders, and, expressed in permissive terms¹², whether the law permitted them to consider a broader range of stakeholders. These questions are at the centre of the alleged pervasiveness of shareholder primacy and the related undermining of wider stakeholder interests. Tellingly, only 5.7 % of respondents were of the view that they could have concern only for shareholders, such that 94.3% understood the law as allowing them to take account of interests other than those of the shareholders, thus confirming the CAMAC's understanding of current law not inhibiting the pursuit of stakeholder interests. The authors of Ford's further comment that with 55% of respondents understanding

¹¹ This is a possible point of divergence from New Zealand corporate law.

¹² 'Permissive' in this context addresses that idea that absence precise definition of what is prescribed or proscribed in law, a degree of latitude and discretion can be applied and that such actions should be free from challenge.

their primary obligation to be the balancing the interests of all stakeholders, in contrast to 38.2% understanding their obligation to be one of balancing stakeholder interests for the long-term benefit of shareholders, practice tended more towards an idea of “enlightened self-interest”¹³ (p. 33).

Is the answer the same where the impacts occur outside the jurisdiction?

This question is addressed in general terms around the territorial application given to the statutory duty to act in the best interests of the company and to act for a proper purpose (s 181), along with the other general duties of care and diligence (s 180) and the duties not to make improper use of position and information (ss 182 and 183). Where the corporate law is seen as permissive, this should extend in principle to actions and impacts within other jurisdictions. Corporations Act s 5(4) (Operation outside this jurisdiction) provides that each provision of the Act applies, according to its tenor, in relation to acts and omissions outside of Australia. Moreover, policy considerations are seen to provide further underpinning to this section from the stance that breaches of a duty overseas by officers of Australian companies may have an adverse effect within Australia (refer *PCH Offshore Pty Ltd v Dunn* (2009) 72 ACSR 99). In summary, then, whilst consistent with the broad scheme of the statute, no direct statutory expression is given to impact on offshore stakeholders. Nevertheless, a lower standard of corporate conduct is not permitted.

Can or must directors consider such impacts by subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction? (See e.g. s. 172 UK Companies Act 2006)?

In addition to the specific remarks above, and the general thrust of responses to this survey, brief reference is given to comments made by the authors of *Ford's Principles of Corporations Law* (15th ed. LexisNexis, 2013, pp 430 - 431) concerning the UK Companies Act 2006 s 172 and the accompanying Explanatory Note to the Companies Bill which introduced this reform. It is noted by these authors that the Companies Bill sought to codify the previous law and enshrine the principle of enlightened shareholder value.¹⁴ As a general observation, this points to complexity, particularly within common law jurisdictions, of attempts to transplant between jurisdictions statutory wording and principle without due regard being given to the underlying general law specific to each jurisdiction. The continuing development of equitable principles, both generally and specifically in the corporate context identified in Question 3 above, is a likely point of distinction in Australia.

Addressing the impact of, or by, subsidiaries. The separation between the legal identities of parent and subsidiary is strongly adhered to and applied by Australian courts (refer *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567 and *Walker v Wimborne* (1976) 137 CLR 1). Some ‘exceptions’ are made by statute, for example, provisions concerning the liability of a holding company for insolvent trading by a subsidiary (s 588V). The circumstance and treatment of corporate groups in ethical and stakeholder interest contexts is not free from significant controversy, most notably where ‘strategic’ corporate structuring might be seen as motivated by risk of industrial product long-tail negligence liability.

12. If directors are required or permitted to consider impacts on non-shareholders to what extent do they have discretion in determining how to balance different factors including such impacts?

Refer responses to Questions 7 and 11.

¹³ Simplistically explained, a philosophy in ethics which argues that acting to further the interests of others, ultimately serves one’s own self-interest.

¹⁴ Although similar, enlightened shareholder value (ESV) should be distinguished from the broader enlightened self-interest. In the development of s 172 two polar positions seemed to be in debate – retention of the common law shareholder focus and pluralist ‘stakeholderism’. ESV is perhaps a compromise position which rejects mandatory pluralism, yet at the same time recognises the welfare enhancing of different groups in society. (see R. Williams “Enlightened shareholder value in UK Company Law” (2012) 360 *UNSW Law Journal* Volume 35(1).)

13. What are the legal consequences for failing to fulfill any duties described above; and who may take action to initiate them?

The key operating provision from the Corporations Act 2001 is s 1317G(1) which provides that: “A Court may order a person to pay to the Commonwealth a pecuniary penalty of up to \$200,000 if - - - a declaration of contravention by the person has been made under section 1317E - - - and the contravention materially prejudices the interests of the scheme; or materially prejudices the corporation’s ability to pay its creditors; or is serious.” This prominence given to creditors as a distinct group of non-shareholder stakeholders is consistent with the treatment applied elsewhere in the Act, for example in relation to the company’s power to buy back its own shares which must not materially prejudice the company’s ability to pay its creditors (s 257A). Section 1317E lists 46 civil penalty provisions and includes as Item 1 each of the general statutory duties discussed in Question 10 above. The contravention declaration regime is supplemented by other sections such as s 1317H (Compensation orders – Corporate/ scheme civil penalty provisions), enabling courts to order compensation to the corporation for damages suffered. Moreover, drawing possibly on equitable principles, s 1317H(2) recognizes damages also to include profits made by the person resulting from the contravention or the offence.

A significant complementary element to the penalties regime is the extensive disqualification provisions contained in Corporations Act Part 2D.6 which can apply automatically (s 206B) or arise through the granting of disqualification powers to both the Court on application by ASIC (s 206C) and by ASIC itself (s 206F).

What defenses are available?

Aside from the business judgment defence mentioned in Question 10 above, a further noteworthy attribute of Australian corporate law is the power of courts to grant relief, wholly or partly, from liability in any civil proceedings for negligence, default, breach of trust, or breach of duty, on such terms as the court thinks fit (s 1318).

Can these issues given rise to other causes of action or regulatory routes whereby a stakeholder can exert pressure on a company with regard to its actions?

It should be apparent from the responses to this survey thus far that there is little, if indeed any, right amongst non-shareholder stakeholders to bring an action or be heard in a forum in relation to a matter under the Corporations Act. There are, however, some aspects of corporate litigation which might in the future form the basis of non-shareholder stakeholder engagement/ activism – though, of course, the path to such outcome is highly speculative.

Section 1324 of the Corporations Act allows ASIC and a “person whose interests have been, are or would be affected by” conduct in contravention of the Corporations Act to apply to the court for an injunction. There is a line of judicial development recognizing the standing of a creditor under s 1324 (see *Allen v Atalay* (1993) 11 ACSR 753 and *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 23 ACSR 715). Judicial statements also note that the interest must “go beyond the mere interest of a member of the public,” though the right affected need not be “of a proprietary nature - - - nor need it be shown that any special injury arising from the breach of the Act has occurred.” (per Hampel J in *Broken Hill Proprietary Co Ltd v Bell Resources Ltd* (1984) 8 ACLR 609 at 613 in relation to the forerunner provision in the 1981 corporate law)

In response to survey Question 6, mention is made of the Pt 2F.1 Oppressive conduct of affairs statutory rules which form a major component of the Corporations Act’s regime of member remedies. Section 234 deals specifically with who can apply for court orders to regulate, or otherwise affect, the affairs of the company. Section 234(e) identifies as having standing “a person who ASIC thinks appropriate having regard to investigations it is conducting or has conducted.” ASIC’s powers are further amplified in s 1330 (ASIC’s powers to intervene in proceedings) and again in s 50 (ASIC may cause civil proceedings to be begun) of the ASIC Act 2001. ASIC’s guidance (Information Sheet 180 issued June 2013) on its approach to involvement in private court proceedings identifies as one relevant form of private litigation class action

for breach of duty under an Act or under private contract¹⁵, though noting that it would “not lightly intervene in matters where a case primarily concerns personal legal rights” and that there should be a “broader regulatory benefit.” Information Sheet 180 also addressed ASIC’s capacity to appear in private proceeding with court leave as *amicus curiae* (“friend of the court”). Again, it is emphasized that future development around these litigation mechanisms to address non-shareholder stakeholder needs is speculative.

14. Are there any other directors’ duties which are relevant to the interests of stakeholders?

The Corporations Act in Part 7.9 operates a comprehensive scheme for financial product disclosures and other provisions relating to the issue, sale, and purchase of financial products. Subdivision C addresses the preparation and content of Product Disclosure Statements. Section 1013D sets out an extensive list of content requirements with s 1013D(1)(l) stating that “if the product has an investment component — [the disclosure statement must include information on] the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.” For the purposes of this requirement, products which have an investment component include superannuation products, managed investment products, and investment life insurance products: s 1013D(2A). Section 1013DA provides expressly that ASIC may develop guidelines for disclosure of information relating to labour standards or environmental, social, or ethical considerations. As a consequence, in November 2011 ASIC released Regulatory Guide 65.¹⁶

15. For all of the above, if these exist in your jurisdiction, does the law provide guidance about the role of supervisory boards in cases of two tier board structures.

As will be apparent, Australia does not adopt a two tier board structure for companies. It is noted, though, that CAMAC in April 2010 released a report *Guidance for directors*. The factors driving this initiative centre on the acknowledged corporate governance value of non-executive director (NEDs) involvement on boards against the backdrop of a series of post-Global Financial Crisis reviews (OECD June 2009, Basel Committee March 2010 and UK Walker Report November 2009) which challenged board behaviours and oversight. Additionally, case law in Australia generated concern and continues to do so, about the contrasting role and liability exposure of NEDs and executive directors.

¹⁵ Responses in this survey do not address in detail the current Australian circumstances of litigation funded class actions focusing on alleged misleading and deceptive disclosures in product and other fundraising documents. The Corporations Act has in these matters a very strong consumer protection orientation and these ideas are also highly evident in the private litigation setting. When in the context of disclosures which have a forward-looking or prospective element, this provides the basis of both alleged suffering of reliance-based harm and the seeking to expand the net of liability beyond the issuer to include also their advisers. Complexity in the regulatory context is further compounded by overlapping between the Corporation Act (s 1041H) and the ASIC Act (s 12DA).

¹⁶ On its face, RG 65 presents a clear and unambiguous statement of the Regulator’s assessment of the Government’s intention in s 1013D(1)(l) of a high standard of disclosure. It repeats emphatically that “A product issuer must disclose if it takes into account labour standard or environmental, social or ethical considerations in selecting, retaining and realising an investment” (RG 65.36) and continues by stating that “If the product issuer has no predetermined view about how far labour standards or environmental, social and ethical considerations will be taken into account (i.e. there is no specific methodology), this must be clearly stated.” (R65.43) RG 65 amplifies ASIC’s interpretation of the legislative meaning of “extent to which” by emphasising that this involves providing the retail client with sufficient understanding of activities on behalf of the product issuer including information on methodology and weight given to standards (RG 65.40). In terms of communications, RG 65 emphasises that ‘reasonably require’ is understood from the client perspective and technical terms/ industry jargon are to be explained. This provides a flavour of what is a fairly extensive guidance from the Regulator.

What obligations are owed by senior management who are not board directors? Is this determined by law if no specific contractual provision applies?

Statutory duties such as those in ss 180, 181, 182, 183 and 184, identified in Question 10 above, apply to directors and other officers. ‘Officer’ is given an extensive meaning in s 9 (Dictionary) and includes, amongst other factors, circumstances or relationships, “a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation.” It would seem, particularly in relation to duties which are fiduciary in character, that the statutory duties have a wider scope than their general law counterparts with the case law dealing almost exclusively with directors. Noteworthy also is s 198D which allows, unless the company’s constitution provides otherwise, for the directors to delegate any of their powers to, amongst others, an employee of the company. Correspondingly, s 198D deems the director responsible for the exercise of the power by the delegate, though subject to some relief around such matters as belief of reasonable grounds that the delegate would exercise powers in conformity with the Act and the company’s constitution, and proper inquiry as to the delegate’s reliability and competence.

Reporting

16. Are companies required or permitted to disclose the impacts of their operations (including stakeholder impacts) on non-shareholders, as well as any action taken or intended to address those impacts? Is this required as part of financial reporting obligations or pursuant to a separate reporting regime? Please specify for each reporting route whether it is mandatory or voluntary.

In response to this Question, it is relevant to distinguish between stakeholder engagement *per se* and reporting of environmental and related environmental, social, and governance (ESG) risks, impacts, and performance. The first functions largely in the voluntary domain. The second has tended towards mandatory coverage, particularly within the scope of this survey, through either formal legislation or associated guidance under Part 2M.3 (Financial Reporting) of the Corporations Act 2001.

The most likely and direct platform for stakeholder engagement reporting in Australia will be through voluntary adoption of Global Reporting Initiative (GRI) sustainability reporting. GRI penetration and growth is relatively strong in Australia. In 2013 there were 38 GRI-G3 reports, 55 GRI-3.1 reports, and eight early adopters of GRI-G4. Comparable figures for 2011 were a total of 90 and 77 for 2012. A proper appraisal of the scale and comprehensiveness of voluntary stakeholder engagement disclosure would require actual review of recent reports in terms of their reporting against GRI-G4 Standard Disclosures G4-24 to G4-27 and the possible utilization made by reporters of AccountAbility’s AA1000SES Stakeholder Engagement Standard.

Relating to ESG-type disclosures mandated by the Corporations Act, Division 1 of Part 2M.3 addresses annual financial reports and directors’ reports. Section 295 sets out the content of an annual financial report and importantly sets out the declarations to be made by directors. The specific nature of these declarations is relevant to the liability and audit implications which pertain directly to financial reports¹⁷ rather than the directors’ reports, the latter of which are the vehicle for more discursive ESG disclosures. The relevant disclosures requirements are:

- Section 299(1)(f) requires that in the directors’ report directors must give details of the entity’s performance in relation to environmental regulations if the entity’s operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State.

¹⁷ Persistence of an isolation of financial reporting from ESG factors should not of course be assumed. A number of financial accounting standards can and will be applied to capture emerging environmental and related sustainability issues. These include IAS 16 *Property, Plant and Equipment* and IAS 37 *Provisions, Contingent Liabilities and Contingent Assets*. The type of issue which financial accounting standards can be expected to contend with include carbon related ‘stranded assets’ and monetization of natural capital.

- Section 299A requires listed companies to include in the directors' report any information that shareholders would reasonably require to make informed assessments of the company's: operations, financial position, business strategies, and prospects for future financial years (operating and financial review (OFR)).¹⁸ In March 2013, ASIC released a regulatory guide on enhancing conformity with OFR reporting under s 299A(1) (Regulatory Guide 247). Significantly, it is stated in RG 247 that the OFR should include a discussion about environmental and other sustainability risks where those risks could affect the entity's financial performance or the outcomes disclosed, taking into account the nature of the business of the entity and its business strategy.

Please describe any mandatory reporting requirement, major voluntary initiative or trend towards voluntary reporting with regard to transparency (for example, payments to government or state-owned entities, reports on government orders to undertake surveillance or interception, reports on tax payments etc.).

In March 2014, the ASX Corporate Governance Council published the third edition of its *Corporate Governance Principles and Recommendations*. The third edition includes a new recommendation (7.4) which states that a "listed entity should disclose whether it has any material exposure to economic, environmental and social sustainability risks, and, if it does, how it manages or intends to manage those risks." Disclosure against the ASX CGC's *Principles and Recommendations* is on a comply or explain basis ('if not, why not') and is included as part of a Governance Statement in the directors' report section of the annual report. On the specific matter of transparency, it may be that this is embraced in the Glossary definition of *Social sustainability*: "the ability of a listed entity to continue operating in a manner that meets accepted social norms and needs over the long term." It remains to be seen, of course, the type and detail of information which listed entities disclose with reference to this aspect of new Recommendation 7.4.

At a voluntary level, entities that apply the GRI-G4, particularly at a Comprehensive 'In accordance' level¹⁹ would provide a range of disclosures and associated 'Discussions on Management Approach'²⁰ in the realms of transparent financial and other dealings with governments.

An examination of BHP Billiton's 2014 Sustainability Report reveals one further significant voluntary initiative. BHP Billiton is a participant in the Extractive Industries Transparency Initiative (EITI) and as such reports payments of taxes and royalties derived from resource developments on a country-by-country basis.

¹⁸ Refer for comparison the UK Accounting Standards Board / Financial Reporting Council (FRC) 2006 *Reporting Statement: Operating and Financial Review* which was replaced by the FRC in June 2014 with their *Guidance on the Strategic Report*. The *Guidance* states that "The **Strategic Report** should provide shareholders of the company with information that will enable them to assess how the directors have performed their duty to promote the success of the company. The key UK statutory reference is to s 414C of the Companies Act 2006. It is interesting to observe the specific cross-referencing to s 172 which, as has been pointed out, contains the notion of enlightened shareholder value (ESV); the most direct aspect of which is in s 172(d) "the impact of the company's operations on the community and environment". Other examples of these narrative type reports are management's discussion and analysis of financial condition and results of operations (MD&A) – see requirements set out under United States SEC item 303 of Regulation S-K.

¹⁹ Refer GRI G4 Sustainability Reporting Guidelines *Reporting Principles and Standard Disclosures* pp 11 – 14.

²⁰ Refer GRI G4 Sustainability Reporting Guidelines *Reporting Principles and Standard Disclosures* pp 45 – 46.

17. Do legal reporting obligations extend to such impacts outside the jurisdiction; to the impacts of subsidiaries, suppliers and other business partners, whether occurring inside or outside the jurisdiction?

Viewed from the perspective of legal reporting obligations, it is stressed that Australian law gives legislative weight to financial accounting standards (Corporations Act 2001 s 296). The scope and content of statutory financial reporting, and the accompanying directors' report, will be determined by the Australian equivalent of the International Accounting Standards Board (IASB) standards dealing with Business Combinations, Consolidated Financial Statements, Joint Arrangements, Operating Segments, and Materiality. It may well be that the boundaries of reporting established through these means may differ from GRI-based sustainability reporting with its greater emphasis on economic, environmental, and social impacts.

18. Who must verify these reports?

The directors of a public company that is required to hold an AGM must present at the AGM: the financial report, the directors' report, and the auditor's report (Corporations Act 2001s 317). Audit is defined in s 307 and has, amongst other matters, a strong alignment to compliance with accounting standards (ss 296 or 304) and 'true and fair view' (ss 297 or 305). The audit standards governing both the conduct and reporting (see also s 308) on the engagement are given statutory effect through s 307A (Audit to be conducted in accordance with audit standards) and critical matters around appointment, removal, fees, and independence dealt with in Pt 2M.4 of the Corporations Act. Relevant to the scope of this survey, the audit is an audit of, and audit opinion on, the financial statements and accompanying notes, with the focus on the directors' report being to determine that it is not inconsistent with the financial reports. Relevant to the scope of this survey, the audit is an audit of, and audit opinion on, the financial statements, with auditors' focus on the directors' report (and other documents presented in the annual report) being to read and identify material inconsistencies (ASA 720 The Auditor's Responsibilities Relating to Other Information in Documents Containing an Audited Financial Report). For example, auditors would consider whether there are any material inconsistencies between profit and other figures discussed in the directors' report and those disclosed in the financial statements. Recognising a growing user emphasis on documents other than the financial statements, the International Auditing and Assurance Standards Board commenced a project in 2012 to clarify and enhance these responsibilities. Importantly, a revised standard is expected to expand auditors' considerations to also include material inconsistencies with the knowledge they have gained during the audit, and require a positive statement by the auditor as to their responsibilities for other documents presented in the annual report such as the directors' report.

who can access reports?

The annual financial report is a report to members and the audit report is likewise a report to members (s 308(1)). Additionally, s 319 requires lodgment of annual reports with ASIC. Members have an additional right in that they can apply to the Court for an order to inspect the financial records (s 247A). Voluntary sustainability reports are typically freely available on company websites.

and, what are the legal or regulatory consequences of failing to report or misrepresentation?

The statutory requirements in relation to accounting standards (s 296) and true and fair view (s 297), have been outlined above. These sections are part of Corporations Act 2001 Part 2M.3 (Financial Reporting). In turn, Pt 2M.7 s 344 (1) deems failing to take all reasonable steps to comply with Pt 2M.3 as a contravention of Chapter 2M (Financial reports and audit). Turning to s 1317E (refer above response to survey question 13), s 344(1) is identified as a civil penalty to which a pecuniary penalty will apply. Matters do not end there. Failure in relation to these specific duties can give rise to breach of general duties (in particular the s 180 duty of care and diligence) and possible recognition of engagement in misleading and deceptive conduct (s 1041H and ASIC Act s 12DA). (Refer *ASIC v Healey* [2011] FCA 171).

Is there a regulator tasked with investigating complaints of misreporting?

As outlined in response to survey question 4, ASIC is tasked with the investigation of complaints. The regulator undertakes a review and surveillance program sampling the financial statements and audits of listed companies and, on a six-monthly basis, releases through the media a report on top areas of concern.

What is the external assurance regime for reporting on a company's impacts on stakeholders? Please specify any mandatory requirements and also where reporting is voluntary what the current market practice is as regards third party assurance.

The voluntary character and technical nature of sustainability reporting influences the form and source of external assurance. A survey conducted by CPA Australia in 2013 indicated that of the top 40 ASX listed companies, 27 produced either a standalone sustainability report, or a report of this nature embedded into the annual report. Of these, 15 declared assurance using the GRI Application Levels. Compared some five years ago, the provider market has become more concentrated with the Big Four audit firms now dominating. Concerning the use of standards, there is consistent use of ISAE/ ASAE 3000 (Assurance engagements of other than audits or reviews of historical financial information) but also strong evidence of its use in combination with AccountAbility's AA1000AS.

Please summarise any regulatory guidance on reporting that relates to impacts on non-shareholder stakeholders.

Australia provides a number of examples of sector-specific sustainability guidelines produced by industry bodies, within which there will be some degree of guidance around stakeholder issues and impacts. Significant ones include:

- Australian Minerals Council *Enduring Value: The Australian Minerals Industry Framework for Sustainable Development* (MCA 2005)
- Energy Supply Association of Australia *Sustainable Practice Framework* (ASAA 2009)
- Property Council of Australia *A Guide to Corporate Responsibility Reporting in the Property Sector* (PCA 2009).

Stakeholder engagement**19. Are there any restrictions on circulating shareholder proposals which deal with impacts on non-shareholders, including stakeholder impacts?**

This matter is addressed in Question 21 below.

20. Are institutional investors, including pension funds, required or permitted to consider such impacts in their investment decisions? What is legal duty that pension funds owe with regard to investment decisions in this regard?

There is no legal requirement or prohibition for institutional investors, particularly superannuation funds, to consider ESG factors in their investment decisions. Where a superannuation fund does include ESG considerations in an investment strategy, the regulator, the Australian Prudential Regulation Authority (APRA)²¹, expects the trustees to ensure that the ESG considerations are in the best interest of fund beneficiaries. Many large superannuation funds voluntarily adopt ESG principles and follow the governance guidelines of the Australian Council of Superannuation Investors (ACSI) and/or follow the United Nations-backed Principles for Responsible Investing. Member funds of the Financial Services

²¹ Established in 1998, APRA is the prudential regulator of the Australian financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most of the superannuation industry. The currently supervised institutions hold around AUD 4.9 trillion in assets for depositors, policyholders and superannuation fund members.

Council²² are required to formulate an ESG risk management policy in line with the ACSI governance principles.

How does the legal duty of the fund align with term and contractual performance criteria of fund managers – does this facilitate or deter consideration of such impacts?

Some of these risks of conflict and friction are addressed through industry guidance. The Governance Institute of Australia in July 2014 released *Improving engagement between ASX-listed companies and their institutional investors: Principles and Guidelines*. Of the six principles the following two are highlighted in the context of achieving better alignment of behaviours in the investment supply chain:

- Principle 1: It is good practice for institutional investors to explain how they vote and engage with companies; for companies to explain how they engage with institutional investors; and for each of them to keep abreast of this information
- Principle 5: it is good practice for institutional investors to incorporate ESG issues in engagement

21. Can non-shareholders address companies' annual general meetings? What is the minimum shareholding required for a shareholder to raise a question at a company's AGM?

Consistent with the private and contractual character of the limited liability company, the corporate constitution governs the business of an annual general meeting (AGM). Symptomatic also is the absence of any rights extending to non-shareholders in annual general meetings. Section 250R(1) provides that the business of an annual general meeting may include any of the following, even if not referred to in the notice of meeting:

- consideration of the annual financial report, directors' report, and auditor's report annual reports);
- election of directors;
- appointment of the auditor; and
- setting the auditor's remuneration.

In a public company, , the item of business concerning consideration of the annual reports is the time when the chairperson will make a statement about the company's affairs and answer members' question. Questions and comments by members on company management at the AGM is dealt specifically with under s 250S(1) requiring the chair of an AGM to allow a reasonable opportunity for the members as a whole at the meeting to ask questions about or make comment on the management of the company. The terminology "as a whole" is applied to confirm that each individual member does not have a right, rather the discretion lies with the chair to assess that reasonable opportunity has been given. Moreover, the right to ask questions and make comment under s 250S, falls short of a power by resolution to formally express opinion as to how the constitutionally vested power of the corporation ought to have been exercised (*NRMA v Parker* (1986) 6 NSWLR 517). However, one avenue of power recently being extended to shareholders concerns remuneration reporting. This arises out of the requirement that at the AGM of listed companies a resolution be put to the vote that the remuneration report (s 300A) be adopted (s 250R(2)). Notwithstanding the advisory character of the shareholder vote (s 250R(3)), a "no" vote of 25%, or more, which is not adequately dealt with in the subsequent remuneration report, being again subject to a "no" vote of 25%, or more, will cause a further resolution to be put to members. This resolution if receiving more than 50% of the votes cast, will compel the holding of a special meeting at which members vote to elect new directors (s 249L(2)), in effect, a spill of board positions.

The capacity for members to compel directors to call a general meeting is provided for in s 249D(1) which contains two potential thresholds: members with at least 5% of the votes that may be cast at the general meeting or at least 100 members who are entitled to vote at the general meeting. The 100 member-

²² The FSC is a membership body whose members include companies in funds management, superannuation, life insurance, financial advice businesses and trustee services, as well as a range of service suppliers supporting the industry, such as legal and accounting firms, research houses, asset consultants and information technology providers.

requirement has been subject to judicial concern about its possibly disruptive character, and after formal consultations dating back to 2008 is, as of the end of 2014, being removed through amendment to the statute.

Other issues of corporate governance

22. Are there any other laws, policies, codes or guidelines or standards applied in the context of particular contractual relationships (for example project finance) or through adherence to particular sustainability principles (for example the Global Compact, the OECD Guidelines for Multinational Enterprises etc.), related to corporate governance that might encourage companies to consider in a structured way their impacts upon and the interests of their wider stakeholders including through a stakeholder engagement process?

- The Commonwealth Treasury provides the contact point and complaint handling mechanism for OECD Guidelines on MNEs.
- The UN Global Compact has operated an Australian network since 2009. Involvement is wider than the cohort of firms engaged in GRI reporting and adoption of the Global Compact's communication of progress (COP) is at a satisfactory level. Similarly, expulsions from the Global Compact have historically been very low.
- The Australia finance sector is well represented as signatories and adopters of the Principles for Responsible Investment.
- The ASX Corporate Governance Council's *Principles and Recommendations* discussed above in response to question 16, contain Principle 3: Act ethically and responsibly. The Commentary which accompanies Principle 3 is built around notions of a 'good corporate citizen' and includes, amongst other matters, significant reference to: "dealing honestly and fairly with suppliers and customers," creating a safe and non-discriminatory workplace," and "acting responsibly towards the environment,"

23. Are there any laws requiring representation of particular stakeholder constituencies (i.e. employees, representatives of affected communities) on company boards?

No

24. Are there any laws requiring gender, racial/ethnic, religious or other stakeholder representation; or non-discrimination generally, on company boards?

As with public law based-regulation in the areas of the environment and occupational health and safety, anti-discrimination laws are well developed. Refer, for example, to the Commonwealth Disability Discrimination Act 1992, the Age Discrimination Act 2004, the Sex Discrimination Act 1984, and the Workplace Gender Equality Act. Many of these give effect to International Conventions. At the company board level, prescriptive approaches have been avoided. This should not be taken to suggest that there has not been concern about entrenched attitudes and practices. In this regard, CAMAC in 2009 released a significant report on *Diversity on boards of directors*. Subsequent to this, the 2014 edition of the ASX CGC's *Principles and Recommendations* contains under Principle 1 (Lay solid foundation for management and oversight) Recommendation 1.5, which addresses the need for, and reporting against, a board diversity policy and information about gender split at the board level, amongst senior executive positions, and across the organization as a whole.

25. In your jurisdiction is there any legal route whereby a parent company can incur liability with regard to the impacts that one of its subsidiaries has had on stakeholder groups? Are there any serious proposals to impose such responsibility?

In our responses to survey questions 5 and 11 the treatment of corporate groups is addressed. It is appropriate to conclude here with a few, though highly significant, observations made by David Jackson

QC in the 2004 Special Commission of Inquiry into James Hardie Industries²³ restructuring and funding of the Medical Research and Compensation Foundation:

...circumstances have raised in a pointed way the question of whether existing laws concerning the operation of limited liability or the “corporate veil” within corporate groups adequately reflect contemporary public expectations and standards.

In the 10 years since this inquiry, there has been little, if any, progress towards establishing either a unified or targeted approach to corporate veil piercing or the recognition of joint tortfeasors^{24,25}. One of the key Terms of Reference of the Inquiry was to examine:

“The circumstances in which MRCF [Medical Research and Compensation Foundation] was separated from the James Hardie Group and whether this may have resulted in or contributed to a possible insufficiency of assets to meet its future asbestos-related liabilities.”

This potential for a deficiency of assets to meet the claims of potential plaintiffs raises ethical concerns as to the validity of strategic corporate restructuring, as well as highlighting uncertainty as to the manner in which corporate insolvency rules will be applied to deal fairly with such an eventuality. The MRCF had been established to control two former companies of the James Hardies Group, Amaca Pty Ltd and Amaba Pty Ltd, which had previously been manufacturers of asbestos-based products. These companies have acquired, and will continue to acquire, legal liabilities to identified, and as yet unidentified, victims of Hardie’s asbestos products. In his conclusions Jackson identifies the motive for the reorganisation, an essential part of which was also the relocation of the Group’s control to the Netherlands:²⁶

“The principal purpose of separation was to enable the Group thereafter to obtain capital or loan funding or to use its own share capital for future acquisitions without the stigma of possible future asbestos liabilities.”

The Jackson Inquiry, along with a number of other reviews²⁷, generated some targeted reform around treatment of groups²⁸, nevertheless the situation noted in 1998 by the now retired Justice of the Equity Division of the Supreme Court of New South Wales, Professor Robert Austin, still prevails that “shareholders have all the upside of the externalities of business risk which arises through limited liability - - - and are able to make an uncompensated transfer of business risk to the tort claimant.”²⁹ In Australia, as may well be the case in other common law jurisdictions, there remains unresolved conflict between the principles of company law and those of tort law.

²³ James Hardie Industries Ltd is an industrial building materials company now headquartered in Ireland and listed on the ASX. It is the world leader in manufactured fibre cement siding and backerboard. The company was formed in Sydney, Australia in the 1930s and much of its wealth was built on mining, manufacturing and marketing of asbestos.

²⁴ Someone who commits a tort (civil wrong). The subject of allocating liability within corporate groups has from time to time attracted possible policy reform attention, The May 2000 CAMAC report on *Corporate Groups* noted with reference to the introduction of a general tort liability for parent companies in a corporate group that this “should be dealt with by specific legislation where the extension of liability beyond the tortfeasor company is desirable in the public interest.”

²⁵ Again on this specific matter, further background and analysis can be provided.

²⁶ JHI NV

²⁷ Parliamentary Joint Committee Joint Committee on Corporations and Financial Services Report *Corporate Insolvency Laws: A Stocktake* (2006-07) and CAMAC *Corporate Groups Final Report* (May 2000).

²⁸ See for example the treatment of insolvencies (Corporations Act 2001 – Part 5.6 – Winding Up Generally – Div 8 – Pooling)

²⁹ “Corporate Groups” in C E F Rickett and R B Grantham (eds) *Corporate Personality in the 20th Century* (Oxford, Hart publishing, 1998) p 88.

26. Are you aware of any incoming law or proposals that are relevant to the issues raised in this questionnaire? If so please describe, providing an indication of the anticipated date the legislation will come into force or be adopted.

- The Australian Government's Productivity Commission is conducting a public inquiry into "Business Set-up, Transfer and Closure" and will, amongst other matters, review personal/corporate insolvency regimes to identify appropriate options for reducing entry and exit barriers. One of the underlying themes is to assess the balance in business recovery objectives. The Productivity Commission is due to report in August 2015. This development is of interest in the context of major reviews of insolvency law being conducted in both the United States and Singapore.
- An ongoing controversy centres on the adequacy of the current business judgment rule protection (refer response to Survey Question 10). Arguments are that it should extend beyond the current duty of care to operate as a more general protection for directors. Possible reform is still at the level of interest group lobbying and it is currently not possible predict the nature and timing of any outcome.

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