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Committee Secretary
Parliamentary Joint Committee on
Corporations and Financial Services
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Inquiry into Corporate Responsibility

We refer to the Committee's inquiry into corporate responsibility and in particular to sub-paragraph (c) of the terms of reference which provides:

"The extent to which the current legal framework governing directors' duties encourages or discourages them from having regard for the interests stakeholders other than shareholders, and the broader community."

To assist the Committee's inquiry we attach a copy of Freehills' article "*Pursuing profit, productivity and philanthropy: the legal obligations facing corporate Australia*" by Quentin Digby and Leah Watterson.

Earlier versions of this article were published in 2002 and in the June 2004 edition of the Journal of Chartered Secretaries Australia, *Keeping Good Companies*.


It is the view of the authors that the current legal framework provides company directors and officers with the flexibility to support a range of stakeholders without impeding the duties owed by them to the company.

Education as to the scope and application of the duties under the Corporations Act rather than amendment may go some way toward alleviating misguided concerns that the current legislation does not allow directors to consider the community.

Yours faithfully
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Pursuing profit, productivity and philanthropy: the legal obligations facing corporate Australia

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Summary

This article addresses the company law principles applying to corporate giving in Australia. In summary:

- the Corporations Act provides Australian companies with the power to make charitable donations
- the exercise of the corporation's power to make donations must be in compliance with applicable laws, including the laws dealing with directors' and officers' duties and may be further limited by specific restrictions in the constitution of the company, or any contractual obligations entered into (for example security documents)
- directors of companies are subject to both statutory and fiduciary duties when making charitable donations out of corporate funds
- the proper exercise of the power to make charitable donations will depend on the size of the gift, the motivation for the donation, the decision-making process followed and the financial health of the corporation at the time the donation is made, and
- particular care needs to be exercised by directors and officers where they have a personal interest in the charity which will benefit from a corporate gift.

For the purposes of this article the term philanthropy is not confined to donations and includes any support given by a company to the not-for-profit sector.

Introduction

In 1883, Lord Justice Bowen in the case *Hutton v West Cork Railway* stated:

It is not charity sitting at the board of directors, because as it seems to me charity has no business to sit at boards of directors *quâ* charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose.¹

The relationship between corporations and the community in which they operate is still a topic of debate in Australia 120 years after the Hutton decision. This may be due in part to the increase in size and influence of today's corporations.² While it may be a traditional role of government

to redistribute wealth, it has been argued in some jurisdictions that government resources are no longer sufficient for this task and that corporations with their wealth and influence should help make up the shortfall.³ Some commentators, concerned that corporations should not be charitable for purely philanthropic motives, have argued that the company has only one responsibility and that responsibility is to make profits for its shareholders.⁴ Whichever view is preferred, 'that companies do intervene in social affairs is indisputable'⁵.

This article considers the circumstances in which corporations are entitled to give to charity.

As artificial legal persons, companies must conduct business through their officeholders. Officeholders must consider two issues before a company can proceed with any conduct. First, the corporation must have the power to engage in the activity and second, any exercise of that power must be proper in light of any internal or external limitations. These same considerations apply in the context of corporate giving.

With an understanding of these issues and the development of a practical approach within corporations and charities alike, there is significant scope for corporate giving in Australia, generating mutual benefits for both sectors.

The source of the power to donate

Section 124(1) of the *Corporations Act 2001* (Cth)(Act) provides:

A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate ...

This section of the Act confers upon companies the ability to act as individuals. Just as individuals have power to donate to charity, so too can companies.

There are a number of limitations to the extent that companies can act like an individual, for example, a company cannot donate all of its capital and profit to charity. This however is a limitation on the exercise of the power conferred by section 124 rather than a limitation on the capacity of a company.⁶ The limitations on the exercise of the power to make charitable donations are discussed later in this article.

Exercising the power to donate

The fact that a company has the power of a natural person to make donations does not mean that the power can be exercised without restriction. Numerous limitations exist in the way that companies can exercise their powers. In summary, the exercise by directors⁷ of the power of a company to make charitable donations can be limited by:

- the constitution of the company
- the duties of directors under statute, common law and equity
- contractual obligations, and
- any other applicable legislation for example, taxation laws prohibiting a company reducing its assets in a way which may adversely affect its capacity to pay tax and employee entitlements.

This paper is confined to a discussion of the limitations noted in the first two points.

Limitations imposed by the company constitution

The ability of a company to exercise the powers of a natural person and body corporate as described in section 124 of the Act may be constrained by the company's constitution. The constitution is the governing document of the company and operates as a contract between the members of the company and the company itself.⁸

Section 125 of the Act states:

- if a company has a constitution, it may contain an express restriction on, or a prohibition of, the company's exercise of any of its powers. The exercise of a power by the company is not invalid merely because it is contrary to an express prohibition in the company's constitution
- if a company has a constitution it may set out the company's objects. An act of the company is not invalid merely because it is contrary to or beyond any objects in the company's constitution.

Activities undertaken by a company that are contrary to the constitution will not be invalid or a prima facie breach of the Act.⁹ However, acts carried out in disregard of the company's governing document may give rise to an action by shareholders against the relevant officeholders of the company for a breach of the statutory contract and breach of duty.

Usually the constitution will vest the powers of the management and affairs of the business in the directors. These powers are generally broad and authorise directors to do all things necessary to carry out the conduct of the business unless the Act or constitution requires a particular power to be exercised by the members at a general meeting. If the constitution of a company has no express constitutional restriction it is the decision of the directors (properly discharging their duties as directors) who will decide whether the company's assets will be made available to charity.

This position is not always viewed favourably by shareholders. Supporters of the shareholder-maximisation or shareholder primacy¹⁰ view of the corporation often argue that it is not the role of the corporation to support charity with corporate funds. As Milton Friedman expounded in the 1970's 'the social responsibility of business is to increase its profits'¹¹. Friedman also commented on the role of the corporate executive and stated, 'in his capacity as a corporate executive, the manager is the agent of the individuals who own the corporation'¹². The legal force behind this statement is questionable and it has been pointed out that 'these directors are not, in any legal sense, anyone's agent'¹³.

In Australia, shareholders have very little direct control over the decisions of management that are made in the 'best interests of the company'¹⁴. Shareholders cannot directly instruct management as to how they should exercise the powers vested in them by the company's constitution or by legislation. Shareholders can indirectly influence management by seeking the removal of directors or by changing the constitution to limit the exercise of certain powers in defined ways. The limited province of shareholders was made clear by Justice McLelland in *NRMA v Parker* where he stated:

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It is no part of the function of the members of a company in general meeting by resolution, ie as a formal act of the company, to express an opinion as to how a power vested by the constitution of the company in some other body or person ought to be exercised by that other body or person ... The members of the [company] no doubt have a legitimate interest in how these powers are exercised, but in their organic capacity in general meeting they have no part to play in the actual exercise of the powers.¹⁵

The view that charity should not be in the domain of a company because shareholders own the corporation has also been rejected by commentators in other jurisdictions. For example in the United States, Margaret Blair and Lynn Stout make the following comments:

Corporate law itself does not obligate directors to do what shareholders tell them to do ... To the contrary, it grants—and should grant—the directors of public companies enormous freedom to decide where and how the firm ought to allocate its scarce resources.¹⁶

Conceivably, in an attempt to curtail the ability of directors in Australia to make corporate gifts to charity, companies (through the resolution of shareholders) could insert an express prohibition into their constitution banning charitable donations. However, there are a number of reasons why shareholders would ordinarily refrain from attempting to insert such a provision.

Shareholders seem to be increasingly aware that corporate social responsibility including the donation of corporate funds to charity is good for business.¹⁷ Restricting unselfish activity on the part of companies could operate to the detriment of a company in terms of damage to goodwill, reputation, and the loss of other indirect benefits. This is partly due to the increasing pressure on corporations to become good corporate citizens¹⁸ in the eyes of shareholders, customers, and the investing public.

In August 2001 the Shareholders Project, a group that examines shareholder corporate relations in Australia, commissioned Irving Saulwick and Associates to conduct surveys of individual and institutional investors.¹⁹ The surveys targeted the issues of corporate citizenship, share ownership and sustainability. The results show the emergence of a shareholder view in Australia, that business should:

Share the benefits of company benefits with key stakeholders as well as the shareholders and demonstrate that the company can make more money by doing the right thing, in some cases by re-inventing its business strategy.²⁰

Second, any move to ban the giving of corporate assets to charity may unnecessarily limit the exercise of the directors' power. Directors, after viewing the position of the company, are not obliged to make charitable contributions and should in any event refuse to accede to a request where it is not viewed to be in the best interests of the company. To facilitate the objective review and consideration of requests received from charities, corporations often identify a particular officer to administer a philanthropy budget. Companies may also choose to work with a limited number of partner charities (charities chosen by the organisation to be long term partners) in order to define the boundaries of the company's charitable pursuits.

Inserting a prohibition on the company making gifts of any sort may prevent the company from engaging in legitimate business development activities or from implementing programs that assist or encourage employees. Such a limitation of power was a concern of the court in the early case of Hutton. Typically, it would be unduly restrictive for a company to voluntarily draft in such a prohibition. As Lord Justice Bowen stated:

It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to the law, otherwise the wheels of business would stop.²¹

Limitations imposed by directors' duties

Part 2D.1 of the Corporations Act sets out the duties and powers of company officers. These statutory duties sit alongside the common law and equitable duties which require directors to 'act bona fide for the benefit of the company as a whole'²². The duties of directors are owed to the company. These duties must be considered and complied with when directors decide to make a charitable donation.

Care and diligence

Directors owe a duty to exercise reasonable care and diligence in discharging their role as directors.²³ The Act provides that the standard of a director's duty of care and diligence will be that of a reasonable director, with the same set of skills and responsibilities when placed in the same circumstances.²⁴

The duty of care and diligence in the context of corporate giving will include requiring that the directors ensure the company has the financial capacity to make the donation without prejudicing the company's interests. This will depend on the size of the company, the size of the donation and the financial position of the corporation. Directors are required to inform themselves of the company's activities and financial affairs.²⁵ As with any expenditure, directors should not give corporate funds to charity if there is a danger that the company is in a precarious financial position or approaching insolvency.²⁶

The Act makes an exception to the statutory duty of care and diligence and the equivalent equitable and common law duties where a legitimate business judgment has been made.²⁷ To satisfy the business judgment rule, the judgment must be made in good faith, must be for a proper purpose and the director must rationally believe that the decision is in the best interests of the company. The director must be informed and must not have a material personal interest in the decision.

Courts are generally reluctant to interfere in matters that involve the exercise of a commercial judgment, especially where a range of decisions could have been made by a director in a particular circumstance. This is likely to be the approach taken by a court if a reasonable corporate donation was ever challenged in Australia. Charitable donations by their nature often accrue intangible benefits to a company, making the reward for the company difficult to measure. For example, the result of philanthropy may be increased goodwill to the business, improved reputation or a long-term shift in the well-being of the community where the business operates. If a decision has been made to donate to a charity for these reasons, courts will be cautious in second guessing the business decision of the directors.

Conflict of interest

Directors must avoid making charitable donations out of corporate funds where they have a material personal interest in the decision to donate.²⁸ Even where the director's interest falls short of a 'material personal' interest, they must take particular care where they face conflict issues because corporate funds are directed towards charities that are linked to the director. For example, a director's spouse may be diagnosed with a life threatening disease and the company of which he or she is a director considers making a sizeable donation to the hospital unit treating the spouse. Or, for example, where the company is considering a donation to a local church of which a director is a member.

Directors need to be transparent with the other directors on the board when disclosing their personal involvement with non-for-profit organisations. Directors are required under section 191 of the Act to disclose their interests where there is a 'real and sensible possibility' of conflict. Usually directors will give a standing notice of interest when they are appointed. This should be the case where a director is on the board of a non-profit organisation. In the event another type of conflict arises, the director should formally write to all other directors on the board informing them of the interest.

There are a range of mechanisms for dealing with conflicts, for example a director may remove him or herself from any decision to donate to a particular charity or the company may choose to direct corporate funds to other non-profit organisations to remove any danger of impropriety. A company may also choose to let employees decide who will be the recipient of any company donations.

After the Enron collapse in the United States there were allegations that at least one independent Enron director served on the board of a non-profit organisation which received sizeable donations from the company.²⁹ In response, the *Corporate Charitable Disclosure Act of 2005*³⁰ was proposed to Congress. The Bill requires directors to disclose their interests and for the company to make clear the amount given each year to director involved charities which exceed a certain value. The Bill has been referred to the House Committee on Financial Services and then the subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises for review. In Australia, there is no equivalent legislation to that proposed by the *Corporate Charitable Disclosure Act of 2005*. Any disclosure of charitable activities carried out by Australian companies is done on a voluntary basis. For example after the tsunami disaster which affected large parts of Asia at the end of 2004, many Australian companies disclosed the amount of support pledged to relief efforts in annual reports or media releases.³¹

Good faith

Directors are required to act in good faith and in the best interests of the company.³² For this purpose, the 'interests of the company' are often equated to the interests of the body of shareholders as a whole. The duty extends to existing members and the future interests of existing members.³³ If the directors' decision in making the gift is motivated by a judgment that supporting the community confers appropriate benefits to the corporation in the short-or long-term, the directors are likely to be acting in compliance with their 'good faith' duties.

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Some supporters of the shareholder primacy view of the corporation argue that providing corporate funds to charity necessarily reduces the resources available to the corporation to increase value for shareholders. As mentioned above, this does not follow. There are a range of business reasons why companies will hold profits in reserve or will sacrifice a short-term gain in share price. The shareholder primacy view may be served best by implementing a range of strategies including philanthropy and not just heeding to the short-term financial goals of shareholders. As long as these strategic decisions are made in good faith and for a proper purpose, the directors are adequately discharging their duties.

The benefits of corporate giving were addressed by the Delaware Court of Chancery in *Theodora Holding Corporation vs Henderson*.³⁴ In this case the company made a grant of \$528,000 to a foundation it had set up to rehabilitate and educate deprived young people. The cost of the gift to shareholders was approximately \$80,000 after taxation considerations were applied. The court stated:

The relatively small loss of immediate income otherwise payable to the plaintiff and the corporate defendant's other stockholders, had it not been for the gift in question, is far out-weighted by the overall benefits flowing from the placing of such gift in channels where it serves to benefit those in need of philanthropic or educational support, thus providing justification for large private holdings, thereby benefiting the plaintiff in the long run.³⁵

In Australia, the position of creditors also needs to be considered where the company is approaching insolvency or is insolvent. In both of these situations a director would not be acting in the best interests of the company by providing a charitable donation. Apart from breaching the duties of directors, the prohibition against trading while insolvent³⁶ and the provisions in the Act relating to voidable transactions³⁷ would need to be considered.

Use of position

Directors must be careful not to use their position as director to 'improperly gain advantage for themselves or someone else or cause detriment to the corporation'.³⁸ For example, if a well-known environmentalist was to be elected to the board of a public company it would be an abuse of his or her position to direct as many funds as possible away from the organisation and into the hands of environmental groups. In this scenario the director would be improperly using their position to create an advantage that is not for the company's benefit.

Use of information

In line with the duty not to improperly use the position of director, directors must not use the information they receive by virtue of their role as director to gain an advantage for themselves or someone else or to cause detriment to the corporation.³⁹

For example, a director with ties to a not-for-profit environmental organisation should not hand over information of a company's environmental impact report to the not-for-profit agency. This would be a misuse of the information that has been provided to the director in his or role as director and would cause the director to breach the Act.

Intentional, reckless or dishonest breaches of duties may cause directors to face criminal sanctions, not just civil penalties.⁴⁰

Conclusion

It was once stated that the law relating to company directors as applied in Australia will 'often prevent directors making decisions on the basis of social responsibility'.⁴¹ While it is true that Australian law does not set specific guidelines as to how much and in what circumstances Australian companies should give or not give to charity, the law provides flexibility and protection for companies.

The power to donate is clear and yet the limitations imposed on the exercise of the power to donate ensure that philanthropic support is appropriate for the particular position of the company and its shareholders. Companies that have reliable systems in place to relay information to directors have greater scope to donate to charity. This is because directors will be able to make prudent decisions about the level of support offered based on accessible, timely and accurate information. Business judgments are less likely to face legal challenges when a company fosters reasonable care, diligence and transparency in day-to-day operations.

Approaches to Australian corporate philanthropy under the current law can also be tailored to the needs of the company. It may be beneficial for companies to introduce employee payroll matching schemes, staff volunteer programs or sponsorship support. Although charities may be wary of sponsorship from corporations, charities need to be aware that sponsorship is an attractive option for the company directors as it is easier to show a tangible benefit accruing from the assistance. This type of support fits more readily into the test that the financial donation is in the best interests of the company.

On the other hand, unpublicised donations may also have an impact by word of mouth. For example, if stakeholders are aware by informal channels that a certain company donates to charity without using the exercise as a marketing tool, this may create greater benefits through consumer and employee loyalty than if the donations were publicised in a high profile marketing campaign. As highlighted in a recent Australian study:

There was ... a general consensus that companies these days had to be, and had to be seen to be, corporate citizens. If this involved sponsorships or other community-based investment, so be it. However, sponsorship needed to be done with a sense of propriety and in a spirit of genuinely adding to the well-being of the community. Done crassly, it could be damaging.⁴²

As no two companies or charities are alike, the law allows companies to direct their resources in a way that is unique to their organisation and to the not-for-profit organisations they support. However, companies cannot sacrifice their own viability to serve the community and the worthiness of the cause should not be allowed to prejudice the interests of shareholders and creditors. As one United States judge commented; 'only among the inhabitants of Sherwood forest has need been accepted as justifying the end'⁴³.

In Australia the law provides directors with the flexibility to contribute to charity but requires directors to take an informed and sensible approach to all of their company's activities including philanthropy.

Endnotes

¹ [1883] 23 Ch D 654 at 673

² A study conducted in the United States in the year 2000 found that of the '100 largest economies in the world, 51 are corporations and only 49 are countries (based on a comparison of corporate sales and country GDP's)'. See Sarah Anderson and John Cavanagh, *Top 200 The Rise of Corporate Global Power*, Institute for Policy Studies, Washington DC at <http://www.nacdonline.org/members/dmx/NACD-Mar02-DMX.pdf> at 26 August 2005 and 'Corporate vs Country Economic Clout The Top 100' http://www.ips-dc.org/global_econ/top_100.pdf at 26 August 2005 which identifies 52 corporations in the top 100 economies. See also Canadian Democracy and Corporate Accountability Commission '*The New Balance Sheet, Corporate Profits and responsibility in the 21st Century*', January 2002 p2.

³ In *Theodora Holding Corporation vs Henderson* 257 A.2d 398 (Court of Chancery Delaware 1969) Justice Worthen stated 'Contemporary courts recognise that unless corporations carry an increasing share of the burden of supporting charitable and educational causes the business advantages now reposed in corporations by law may well prove to be unacceptable to the representatives of an aroused public'.

⁴ See Milton Friedman, 'The Social Responsibility of Business is to Increase Its Profits' *New York Times Magazine*, September 13, 1970, 32. See also the comments made by Mike Nahan; 'Corporate Australia has contributed to the environmental and social well-being of the country in the most effective and appropriate way, which is by creating wealth, jobs and opportunities.' Address Institute of Public Affairs to CPA's Congress 2000, 3 May 2000 as cited by C Brown, & C Thomas, 'Shareholders Project: Background Briefing Paper' July 2001.

⁵ Lord Wedderburn, 'Southey Memorial Lecture 1984: The Social Responsibility of Companies' (1985) 15 *Melbourne University Law Review* 4, 13.

⁶ The power conferred by section 124 ensures that the company will have the capacity to contract with outsiders even when it has acted contrary to its objects or to an express prohibition in the company's constitution.

⁷ The authors note that while this article refers to the duties of directors, officers (including senior management) also owe duties to the company and will be subject to the statutory duties set out in sections 180–184 of the *Corporations Act 2001* (Cth). The authors recognise that it is commonly the responsibility of senior management to make corporate funds available for philanthropic purposes.

⁸ *Corporations Act 2001* (Cth) section 140 provides:

A company's constitution (if any) and any replaceable rules that apply to the company have effect as a contract:

- (a) between the company and each member, and
- (b) between the company and each director and company secretary, and
- (c) between a member and each other member,

under which each person agrees to observe and perform the constitution and rules so far as they apply to that person.

⁹ *Corporations Act 2001* (Cth) section 125.

¹⁰ Shareholder maximisation is the view that the sole responsibility of the corporation is to make profits for shareholders which in itself has benefits to the community. See for example Jacques Bughin & Thomas E. Copeland, '*The virtuous cycle of shareholder value creation*' *The McKinsey Quarterly* No 2, 157, 1997 and Margaret M. Blair & Lynn A. Stout '*Director Accountability and the Mediating Role of the Corporate Board* (2001) 79(2), *Washington University Law Quarterly* 403, 405.

¹¹ Friedman, above n4

¹² Friedman, above n4 at 33.

¹³ Margaret M. Blair & Lynn A. Stout '*Director Accountability and the Mediating Role of the Corporate Board* (2001) 79(2), *Washington University Law Quarterly* 403, 423, and Margaret M Blair, '*Corporate Philanthropy Symposium: A contractarian defence of corporate philanthropy*' (1998) 28 *Stetson L. Rev.* 27 at 34.

- ¹⁴ See the decision of the NSW Court of Appeal in *Massey & Anor v Wales & Ors; Massey & Anor v Cunney & Anor* [2003] NSWCA 212 where Justice Hodgson stated: 'Where, as is usual, the Articles of Association of a company provide that the business of the company is to be managed by the directors, there is generally no power in the general meeting to make management decisions or to control or direct the board of directors in the management of the company.'
- ¹⁵ *NRMA v Parker* (1986) 6 NSWLR 517 at 522.
- ¹⁶ Blair & Stout above n 15, 406.
- ¹⁷ In Canada it was found 'on a sector by sector basis, shares of companies with a superior environmental or human rights record appear to outperform dirty ones, clean oil companies will outperform dirty oil companies'. Geoffrey Heal, 'Mastering Investment: The bottom line to a social conscience', *Financial Times* (July 2, 2001) as cited in: Canadian Democracy and Corporate Accountability Commission 'The New Balance Sheet; Corporate Profits and responsibility in the 21st Century' January 2002 p11. See also Environics International Ltd & The Prince of Wales Business Leaders Forum; *The Millennium Poll on Corporate Social Responsibility* May 1999, and Walker Information Indianapolis *Measuring the Business Value of Corporate Philanthropy*, May 2002.
- ¹⁸ See for example the release of the ASX *Corporate Governance Guidelines*, 31 March 2003 at para 10.1 and Standards Australia, AS 8003-2003 *Corporate Governance – Corporate Responsibility* 2003, which aim to foster a better corporate approach to social issues.
- ¹⁹ Birch David, 'The Shareholders' Project, Shareholder-Corporate Relations in Australia: Some New Economics, Corporate Citizenship and Sustainable Capitalism Perspective.' October 2001.
- ²⁰ *Ibid* p7.
- ²¹ *Hutton v West Cork Railway Company* 1883 23 Ch D 654 at 672.
- ²² *Mills v Mills* (1938) 60 CLR 150 at 188. For a discussion of equitable duties see P.D Finn (ed), *Equity and Commercial Relationships* (1987) Chapter 5.
- ²³ *Corporations Act 2001* (Cth) section 180.
- ²⁴ For a summary of a director's duty to exercise care and diligence see *ASIC v Adler* [2002] NSWSC 171 at [372] per Santow J. For a discussion of non-executive directors duties refer to *Australian Securities Investments Commission v Rich* (2003) 44 ACSR 324.
- ²⁵ *Daniel (t/as Deloitte Haskens & Sells) v AWA Ltd* (1995) 16 ACSR 607. For a further discussion of the duties of directors see *ASIC v Rich* (2003) 44 ACSR 341 and *ASIC v Vines* (2004) 22 ACLC 37.
- ²⁶ Insolvent trading is an offence under *Corporations Act 2001* (C'th) section 588G. See also *ANZ Executors & Trustee Company Ltd v Qintex Australia Ltd (Receivers & Managers Appointed)* [1991] 2 Qd R 360 at 368.
- ²⁷ *Corporations Act 2001* (Cth) section 180(2) (the business judgment rule).
- ²⁸ *Corporations Act 2001* (Cth) section 180(2)(b).
- ²⁹ National Association of Corporate Directors, 'Reform Season More than Sound and Fury' (2001) <http://www.nacdonline.org/members/dmx/NACD-Mar02-DMX.pdf> at 2 September 2005.
- ³⁰ Bill HR 543 was introduced in the House of Representatives by Rep. Gillmor on 2 February 2005. In earlier attempts to introduce the legislation, Bill HR 275 (8 January 2003) and Bill HR 3745 (13 February 2002) were introduced in the House of Representatives. On both occasions the bills were referred to the House subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises.
- ³¹ See for example AXA Asia Pacific Holdings Concise Annual Report 2004-2005 at page 6, Rio Tinto 2004 Annual Report at page 5, NAB Media Release 'National update on tsunami appeal' (6 Jan 2005), Foster's Group Media Release 'Fosters Support for Southern Asia Appeal' (4 Jan 2005), and Qantas Media Release 'Qantas Statement on Tsunami Relief' (29 Dec 2004).
- ³² *Corporations Act 2001* (Cth) section 181.

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- ³³ For a discussion on the future interests of existing members see Renard in Finn (ed) *Equity and Commercial Relationships* (1987) at 138. See Gower (1955) 68 Harv L Rev 1176 at 1184. Note that in the United States company legislation in nearly every state contains an express provision allowing the company and its officers to make charitable donations and to consider the well-being of the community when determining what is in the 'best interests of the company.' [See for example; Delaware: Title 8 Del.C §122. Idaho, Idaho Code §30 -1702, Massachusetts: Mass. Ann. Laws ch 156B, §65 (2000), Georgia: Georgia; O.C.G.A §14-2-202 (2000)]. Proposed changes to British Company Law would also expressly allow company directors to recognise the impact of their decision on the community and the environment (Company Law Reform White Paper, March 2005, draft clause B3(3)(b)).
- ³⁴ 257 A2d 398.
- ³⁵ *Theodora Holding Corporation v Henderson* 257 A2d 398 at 405.
- ³⁶ *Corporations Act 2001* (Cth) section 588G.
- ³⁷ *Corporations Act 2001* (Cth) Part 5.7B Division 2.
- ³⁸ *Corporations Act 2001* (Cth) section 182.
- ³⁹ *Corporations Act 2001* (Cth) section 183.
- ⁴⁰ *Corporations Act 2001* (Cth) section 184.
- ⁴¹ Senate Standing Committee on Legal & Constitutional Affairs, Federal Parliament, *Company Directors Duties* (1989) p86.
- ⁴² Birch, David 'The Shareholders' Project: Shareholder-Corporate Relations in Australia: Some New Economics, Corporate Citizenship and Sustainable Capitalism Perspectives', Deakin University, October 2001, 12.
- ⁴³ See the comments of Justice Worthen, *Union Pacific Railroad Company v Trustees Inc* (1958) 8 Utah 2d 101.