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# Official Committee Hansard

JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL  
SERVICES

**Reference: Corporate responsibility**

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SYDNEY

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**JOINT STATUTORY COMMITTEE ON  
CORPORATIONS AND FINANCIAL SERVICES**

**Thursday, 9 March 2006**

**Members:** Senator Chapman (*Chairman*), Ms Burke (*Deputy Chair*), Senators Brandis, Murray, Sherry and Wong and Mr Baker, Mr Bartlett, Mr Bowen and Mr McArthur

**Members in attendance:** Senators Brandis, Chapman and Wong and Mr Baker, Mr Bowen and Ms Burke

**Terms of reference for the inquiry:**

To inquire into and report on:

Corporate Responsibility and Triple-Bottom-Line reporting, for incorporated entities in Australia, with particular reference to:

- a. The extent to which organisational decision-makers have an existing regard for the interests of stakeholders other than shareholders, and the broader community.
- b. The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders, and the broader community.
- c. The extent to which the current legal framework governing directors' duties encourages or discourages them from having regard for the interests of stakeholders other than shareholders, and the broader community.
- d. Whether revisions to the legal framework, particularly to the Corporations Act, are required to enable or encourage incorporated entities or directors to have regard for the interests of stakeholders other than shareholders, and the broader community. In considering this matter, the Committee will also have regard to obligations that exist in laws other than the Corporations Act.
- e. Any alternative mechanisms, including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors.
- f. The appropriateness of reporting requirements associated with these issues.
- g. Whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia.

In inquiring into these matters, the Committee will consider both for profit and not-for-profit incorporated entities under the Corporations Act.

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**Committee met at 9.03 am**

**CHAIRMAN (Senator Chapman)**—I call the committee to order. Today the Joint Committee on Corporations and Financial Securities will continue to hear evidence regarding its inquiry into corporate responsibility and related matters. This is the fifth public hearing of the committee and hearings will continue here in Sydney tomorrow. The committee expresses its gratitude to contributors to the inquiry, including those who will be appearing before us as witnesses today. Before we start taking evidence, I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence provided. Parliamentary privilege refers to special rights and immunities attached to the parliament or its members and others necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person that operates to the disadvantage of a witness on account of evidence given by him or her before the parliament or any of its committees is treated as a breach of privilege. I also wish to state that, unless the committee should decide otherwise, this is a public hearing and as such all members of the public are welcome to attend. If any witness wishes to give evidence in private, they may request that of the committee and the committee will consider such a request to go in camera.

[9.04 am]

**GREGG, Ms Pauline, Senior Manager, Corporate Social Responsibility, Insurance Australia Group**

**MOSTYN, Ms Sam, Group Executive, Culture and Reputation, Insurance Australia Group**

**CLARRY, Ms Sarah Jane, Corporate Social Responsibility and Communications Manager, Unilever Australasia**

**GODDARD, Mr Nicholas Clive, Corporate Relations and Communications Director, Unilever Australasia**

**CHAIRMAN**—The committee has before it your respective submissions, which it has numbered 29 and 68. As there are no alterations or additions you wish to make to those submissions, I invite you to make brief opening statements, at the conclusion of which I am sure we will have some questions.

**Mr Goddard**—Firstly, we thank you for the opportunity to present evidence to this inquiry. I will start with the reason I got out of bed this morning, and that is basically the corporate mission of our business, which is to help people look good, feel good and get more out of life. This dates back to a philosophy bred in the 1890s by one of the founders of the business. We essentially deliver on that mission through the products that we sell. We help people look good through products like Sunsilk, Dove and Omo. We help people feel good through some of our food products—for instance, our ice cream products, soups and pastas. We help people get more out of life with products like Lipton, Rexona and Flora Pro-activ.

But we also deliver on this mission by the things we do, the way we do them and the way we interact with our stakeholders—consumers, employees, customers and the community. From this social agenda that has been running in this company for about 130 years, we have come to the realisation that there are natural forces in the marketplace that both reward good behaviour and punish bad behaviour. It is these natural forces that we believe determine the long-term viability and ultimate sustainability of businesses. I will briefly elaborate on those. Some of the penalties for and disincentives to poor behaviour are things like reputation. We have seen the decline of reputation and, in fact, the decline of businesses through poor corporate behaviour. We are seeing much richer accountability of businesses through much greater visibility of what they are doing.

The information age has enabled a mum who buys one of our packets of soup to get on the web within 15 minutes of getting home and, through various sites, determine what our work practices are in developing countries, what our policy is to genetically modified food and if we might have had any environmental incidents in her own backyard or around the world. We also see a much greater role for interest groups—stakeholders, including employees and consumers—in being able to shape the agendas of companies.



We also have the legal frameworks that we operate within: the Trade Practices Act, the environmental protection legislation and the financial services acts. Within our business we have a code of business principles. It is very clear that any breach of those principles results in instant dismissal. So we have these natural forces that exist as penalties. We also have some things that are incentives to good behaviour. One is the opportunity to differentiate your business in the marketplace through acting properly and doing the right thing. It stimulates creativity and innovation. There are also straight cost savings in doing the right thing. That is fairly evident in energy initiatives but also through other initiatives, which I am happy to elaborate on if so required.

There is clearly an opportunity for improved reputation by doing the right thing in the marketplace as well as by improving both the attraction and the retention of good staff and improving overall employee engagement. We believe that these natural forces that exist in the marketplace preclude the need for changes to the legal framework, which in themselves would create an increased administrative burden for businesses. They would lead to a compliance driven culture within the business world and we feel minimum standards would become the norm rather than companies striving to exceed those standards. In summary, we believe that revisions to the legal framework to force consideration for stakeholders other than shareholders would add no real value.

**Ms Mostyn**—Insurance Australia Group welcome the opportunity to present evidence to the committee and we will be delighted to take your questions after this introductory statement. Our approach to corporate responsibility lies in the fundamental recognition that our business has impacts on the community, the environment and the wider economy and that it is simply good business to operate in a way that recognises these impacts and responds to them effectively. It is worth noting that our company was born of a history of mutuality. We were a mutual in the form of the NRMA in New South Wales before the demutualisation of the insurance arm some five or six years ago that led to the incorporation of Insurance Australia Group. At that time the chief executive decided that, in order to preserve the principles of mutuality culturally, we needed to be very up-front about the fact that our culture would be our reputation—that we could not manufacture reputation. As such, my role was created, which brought together the functions of human resources, the corporate affairs departments and all external affairs to make that point very simply.

The core of IAG's sustainability work is that we seek to deliver shareholder value by excellent management of our group of companies for the long term. We actively make sustainability central to our core business by embracing opportunities and managing risks deriving from the full range of economic, environmental and social factors that interact with and impact on our operations every day. In those operations every day we pay \$11 million in claims to people across Australasia in order to restore them to their lives. IAG maintains that the essence of success in achieving full integration of stakeholder considerations into business decision-making lies in the understanding that there is no one-size-fits-all approach. Success in owning and driving our corporate responsibility agenda lies in the effort that the company makes in exploring, debating and deciding how best it can integrate these considerations into its purpose and operation.

In pursuing such an approach, corporations have a very real opportunity to develop and implement agendas that are not only new and innovative, but which are relevant to their

operations and which resonate with their employees. More importantly, it provides the opportunity for companies to understand the approach that will take account of stakeholder interests in a way that adds value to their business and their shareholders.

IAG believes that attempting to regulate corporations in this regard has the following potential problems: the practical difficulty in prescribing directors' duties that can apply across a range of sectors and markets—one size does not fit all—how to define the actual desired outcomes of a regulatory framework and the means for achieving them, and the risk of creating compliance driven cultures within organisations which inevitably leads to a failure of integrating responsible behaviour into the business. I note that at the time that Enron collapsed it was winning awards for best corporate practices against a tick-a-box process.

IAG believes that investor activity and market demands combined with complementary government policies and frameworks provides enormous potential to encourage companies to adopt our corporate responsibility approach. There is therefore a pivotal role for government in corporate responsibility and it need not involve mechanisms regulating corporate activity. In particular, we believe that government has two major roles: to demonstrate leadership in its own activity and to encourage corporate responsibility and sustainability across all sectors, providing an environment where companies are encouraged to create innovative corporate responsibility and sustainability approaches by providing for flexibility, competitive and market led developments.

IAG believes that meaningful dialogue on the desired outcomes of all sectors in pursuing a mutually acceptable corporate responsibility agenda will achieve strong outcomes. Most importantly, it presents an opportunity to create a flexible operating framework that encourages companies to explore, debate and decide how best to integrate these considerations into their operations. In our view, each company is best placed to identify which interests should be taken into account and how best to do so. Companies that fail to take relevant stakeholder interests into account potentially risk negative reaction from stakeholders, community groups, the media and government. They also have the potential to destroy significant shareholder value. These are powerful factors and it is arguable that directors would already risk breaching their duties if they failed to give due regard to such interests or to give regard to the interests of shareholders to the exclusion of those other interests. IAG believes there are strong opportunities for government and business to develop a policy framework that will encourage companies to build long-term shareholder value and grow social capital for Australia.

**CHAIRMAN**—From which of your stakeholders—in either case, Unilever or IAG—does the principal push for sustainability and corporate responsibility come from? Is any particular group of your stakeholders pushing for that more than others, or has pushed in the past—the investment community, or institutional investors or employees?

**Mr Goddard**—It would be our employees first and foremost and our consumers second. With regard to the wider community, many of whom are indeed consumers anyway, they would be the two interest groups for us.

**Ms Mostyn**—We would have a slightly different take on that. Investigating the purpose of our company, we came to the view that we could not run a company without keeping in balance all stakeholders that were relevant to our business. So, however we impact a person—whether it is

an employee, a customer, a shareholder, or a broader stakeholder—if we get those things out of balance in any regard we risk doing significant shareholder damage. Ultimately, it is a test of whether the company actually understands how to run the business.

**CHAIRMAN**—In the case of Unilever, how much of the corporate responsibility strategy is driven by your parent company and how much of it has been derived from within Australia?

**Ms Clarry**—I think corporate responsibility is something that is very much embedded in the business globally. In Australasia, we formalised our strategy around corporate responsibility four years ago when we formed the Unilever Foundation, and we were very mindful at that point of being quite strategic about how we were going to go forward and take a leadership role in corporate responsibility. We do have a lot of support, however, globally and, as Nick referred to before, there is a push at the moment to bring the community and environmental thrust to the fore around the world, which supports what we are doing in Australasia.

**CHAIRMAN**—As I understand it, both of your organisations are represented at board level on the issue of corporate responsibility. That is not the case with a number of organisations. How has that sort of high-level representation changed the way in which you approach sustainability issues, if it has?

**Ms Mostyn**—I guess from our perspective it means there is the highest level of accountability both to shareholders and to the company sitting in the board of directors. The types of issues that our directors are looking at are all about accountability. So, for any behaviour that is occurring within the company, anyone knows that that behaviour—if it is outside the disciplines of how we think about running the company sustainably—will make its way up to a reporting level at the very highest point of the company. It means that we have had to find reporting mechanisms. We have had to get very clear about what we mean by sustainability and corporate responsibility, take it out of the more ephemeral world and put it very much into key business operations that can be reported. Because of that it is taken very seriously throughout the company.

**Ms Clarry**—To add to that, we have business targets around some of our community programs, so it is actually embedded in what we report on at the end of the year—people's KPIs, key performance indicators, in their roles. The board is leading by example, making it part of whether we succeed or otherwise at the end of the year. Have we achieved our corporate responsibility targets as well as our other targets? The message that sends is clearly one that this is something that we take very seriously.

**CHAIRMAN**—The committee has received a range of views on the current state of the Corporations Law as it applies to directors' duties in relation to this issue. Some argue that directors' duties as currently defined are sufficiently permissive to allow the interests of stakeholders, other than shareholders, to be taken into account and given due weight. Others argue that it is not. In fact, we have even had evidence to the effect that a whole lot of prescriptive United Nations provisions should be written into the Corporations Law. There is a wide range of views on that. I note that in IAG's submission you refer to:

- The practical difficulty in prescribing directors duties for corporate responsibility that can apply across a range of sectors and markets (one size does not fit all);

I am just wondering, in both cases, what your views are on the current state of the Corporations Law—whether it needs amending, or whether it is sufficiently permissive to allow and indeed encourage stakeholders’ interests, other than shareholders, to be taken into account.

**Ms Mostyn**—As we said in our submission, we believe that the Corporations Law does not require amendment in relation to directors’ duties. What I would say about what is in the document is this: when we see the way in which our directors are questioned by shareholders directly at annual general meetings, the fact that we have chosen to go down a path of reporting against global criteria like the GRI has led to increased information to our shareholders who then make that an issue for directors at those public forums. The types of questions our directors are now receiving as a direct consequence of reporting on these issues are becoming the issues that shareholders want more information on.

In terms of having not prescribed it as an actual duty, the fact that within those duties the director must look after the interests of the shareholder—and it is a fiduciary duty and is taken very seriously—we have broadened the notion of what factors a shareholder can take into account in testing whether that director is actually fulfilling those duties. We are seeing a change in the way our shareholders ask those questions of our directors as a result of taking that action. As we said in the submission, it has bred a level of innovation and of taking the duties very seriously at a broad level rather than the ‘tick a box’ approach, which we feel very strongly would inhibit a corporation’s ability to innovate and do the things that our companies are able to do by understanding that this is just core business.

**Mr Goddard**—We have explicitly not expressed an opinion on this in our submission, and for that reason I am not prepared to express one today. It is a global issue for us, and the opinion of local business needs to be ratified globally. I am not prepared to give a response to that point.

**CHAIRMAN**—Have either of you incurred circumstances where you have found there is a conflict between one or other of the stakeholder groups, between the interests of shareholders and employees or shareholders and the community? If so, what is your process of resolving such a conflict in line with your corporate responsibility approach?

**Mr Goddard**—I will give a very practical and real example that we face in that area. We identified some time ago that a particular protein that is found in deep water fish, which stops their blood from freezing at low depths, is very beneficial in ice cream. It gives a much better mouth feel for our Magnums and Cornettos. So there is a great opportunity for us there. However, the particular fish stock that we needed for this protein was scarce, and harvesting it would have resulted in depletion of fish stocks. We then sought technological solutions to the problem. We manufactured that protein through a fermentation process, so it mimicked that protein through fermenting yeast to enable us to be able to do that. The challenge there is that yeast is genetically modified.

**CHAIRMAN**—There is nothing wrong with that.

**Mr Goddard**—So on one side we placate one interest group and on the other side we have another interest group that we need to engage with, which we have been doing—for example, in Australia it has been the Australian Consumers Association—and make them aware of the situation. In this particular case, the genetic material does not exist in the final product; it is

consumed in the fermentation process. This is an example of where we have differing views implicating one group of stakeholders and where we need to engage with another to meet our goals.

**Ms Mostyn**—On our behalf, I would say that managing a business, if you are serious about the long term, is always about managing conflicts. Every day our managers deal with a broad range of stakeholder issues, and the principles of how the company intends to operate against a set of values must come into operation. Every day—as Unilever has described it, and as we would describe it—we are forced to think through the issues that our various groups of stakeholders will bring to a matter and resolve them with the long-term interests of the company in mind.

The one we are grappling with at the moment would be climate change. We see the effects of climate change in our actuarial and underwriting tables. We had chosen for many years not to say very much about it because it was seen as a privileged piece of information that the company had in order to price risk. And, in thinking about the purpose of our company over the long term, we realised that we could not be passing on that risk to customers without understanding how to reduce it, so we have taken an advocacy position on climate change and the costs of climate change in an environment where many corporations have been nervous to do so. We believe it is in the long-term interests of the country and our customers and the viability of the insurance industry and our presence in it in order to do that, but along the way there will be some stakeholders who will challenge the validity of our being in that debate. In order to be in that debate, we have had to ensure that we understand that it is actually about long-term value for the organisation and not some short-term win for a reputation gain that drives that kind of discussion.

**CHAIRMAN**—The Unilever submission states:

The imposition of regulations on this area of business will serve only to stifle this natural innovation and energy, and shift the focus of CSR from its essential role of ensuring the future of the community and environment, to one of obligation and bureaucracy.

I take it from that that you do not support the mandatory imposition of reporting requirements or a standard reporting process or system.

**Mr Goddard**—We support a standard reporting process in principle, but not the imposition of a mandate to do that.

**CHAIRMAN**—The IAG submission, at page 23, identifies institutional investors as a key driver in influencing corporate behaviour, and yet some of the evidence we have heard—particularly given the absence of a standard reporting framework—is that the capital markets do not take this aspect, reporting on sustainability, seriously. I am wondering what your responses are to this balance between the extent to which the capital markets do take notice of it and your claim that institutional investors are the main drivers for the corporate responsibility approach.

**Ms Mostyn**—I think it goes to the heart of the dilemma that all corporations face, because I think the capital markets tend to play on the short term, and CSR or sustainability is at its heart about long-term value and sustainable development. I think the capital markets will change over

time, and I think enlightened companies such as the ones before you today are increasingly changing the way we talk to the markets about how we value these principles. We have started to talk about the lead indicators of our ability to derive profit over the long term rather than the lag indicators of financials over a quarterly backward-looking program. We are finding that some investors view that as terribly interesting, particularly those who represent pension and superannuation funds and are looking to guarantee the long-term viability of their deposits with us.

This will be a long and hard road, and I think the capital markets will come to this slowly. In part it is to do with the lack of financial literacy around these issues of the people who drive those markets. There are new things on the horizon, like the Carbon Disclosure Project, which we see as essential for a greater understanding of what is really driving value within those markets. So I think there are growing levels of innovation that enlightened companies are standing by and showing value to. I think the markets will come to this, and there will be enlightened investors who will take risk and risk selection very differently in the future. I think it is up to companies like us to make that point to markets and demonstrate the value in the long term to shareholders.

**Mr Goddard**—I can only support what Sam has just said. It is a long journey, but it needs to be led.

**Ms BURKE**—At the outset the IAG made a reference to Enron and the tick-a-box. My take on that is more about auditing. You can make a lot of claims in your annual reports, but how do we know that they are valid? Are they green-washed as the state has been coming? What auditing process do you currently use to demonstrate the claims that you are making are valid?

**Ms Mostyn**—This is where I think there probably is a role for government in thinking about regulations as opposed to fiduciary duties. We would not put out a sustainability report unless we could have it verified and assured by the same auditors who assure all of our financial reporting. I think those documents are only worthwhile if you can get that assurance and that assurance comes with a degree of independence and is not simply a part of the component of the financial reporting. Pauline will add to that.

**Ms Gregg**—In the reporting process a company goes through a period of maturing as it gets its systems and processes around measuring the important data, and, indeed, the independent verification gives us confidence in the information we are releasing to market. So from our perspective it is about having comfort as well. However, there are also a variety of other standards internationally around social accountability and the extent to which you engage with your stakeholders that companies make use of as they go down that reporting track and become more mature. There are quite a number of rungs in the process through the reporting that you can actually go through, and they have some very significant levels of assurance, right through to the level of stakeholder consultation.

**Mr Goddard**—In our case, our sustainability report is a global report produced out of our UK office which is independently audited by companies that specialise in this. They are not the KPMGs et cetera. In the UK environment there are companies whose sole task it is to independently audit such reports, so we can only take it as read that that is done with all the due diligence that would be expected.

**Ms BURKE**—So I can take it that there would be in IAG some sort of facilitative role that government might be able to play—if you do not go down a prescriptive regulatory route, there might be some sort of facilitative role that government could play—in assisting stakeholders to take on board corporate responsibility reporting?

**Ms Mostyn**—I think that that would only help the whole debate. In the same way as when government in the past found there to be a need, there has been a way to do that—such as the Equal Opportunity for Women in the Workplace Agency, which reports on how you report the gender break-up of your organisations. There have been instances in the past where it has been terribly helpful to companies to know what they are to report against and how you verify that to the market.

**Ms BURKE**—In Unilever’s opening remarks, overseas standards of employment were mentioned. I thought that was an interesting comment. Don’t you think people in Australia are interested in how you treat your staff here too? You are not the only ones who have said it. I just find that somehow people assume that everybody in Australia at an employee level is treated well.

**Mr Goddard**—That is a fair point, but there tends to be more community concern and sentiment about the way workers are treated in developing countries.

**Ms BURKE**—Unilever produces quite a lot of food and other products in Australia as well. Your submission talks about some of the social activities being done by the staff. You have stakeholder interests with your unions and your employee groups. Are they reported on as well?

**Ms Clarry**—Can you elaborate? Do you mean unions?

**Ms BURKE**—Yes, the unions. Your reporting talks about staff doing things for communities and donating money—philanthropic activities—but you do not talk about your engagement either with unions or with employees as stakeholders. I am wondering whether Unilever talks about engagement with unions and employee groups as stakeholders in its global report.

**Ms Clarry**—No, I do not believe that that is reported on.

**Mr Goddard**—If it comes across that we take a somewhat philanthropic approach, then we have not expressed it clearly enough in the document. Our programs are basically driven by the staff, having been developed by the staff through consultation with them. Through discussion groups, they have identified the issues in the community that they felt they wanted to address with our support. The engagement with unions is part of doing business; it is part of what we do. That is not reported on formally, but it can be.

**Ms Clarry**—I divided the report up into workplace, marketplace et cetera. Our employees have an EBA on each of the sites on which they work, and we have a standard to which we are constantly striving to improve upon as far as workers’ safety, conditions and so forth are concerned. The EBA is agreed on by the unions and by the workforce, so I guess it is implicit then that it is satisfactory.

**Ms Mostyn**—Could I add something from IAG’s point of view, and I would like us to provide a supplementary submission through our most recent sustainability report. We believe fundamentally that our people drive all of the policies as to how we manage our employment strategy. As an example of that, the FSU is a union that we engage with very productively, and we currently have them sitting on a task force with our staff in order to explore the issues of workforce diversity and flexibility. We have done a survey across the organisation with the union in order to understand those flexibility and diversity issues that we need to address. The union has been driving that with our people very successfully. We see a very productive relationship with the union. The recent industrial law changes have not changed that in any respect because it is a fundamental part of how our people regard their ability to talk to us as employers in a productive manner.

**Ms BURKE**—Your other stakeholders are people who do work for you on behalf of claimants—smash repairers come to mind.

**Ms Mostyn**—Yes.

**Ms BURKE**—There has been a long dispute in which smash repairers have been very unhappy with notions of various companies saying, ‘You must go and use X, Y and Z individuals’ as opposed to choosing which smash repairer you go to. I am wondering whether you include that broader stakeholder group—the people who are beneficiaries at the end of the day of doing the work on behalf of the business—as part of your reporting.

**Ms Mostyn**—Absolutely. In fact, in this year’s sustainability report we used our relationship with the smash repair industry as an example publicly of something we did not handle well. For us to say anything otherwise would be seen to be pure hubris. When it comes to why we felt we needed to restructure the smash repair industry based on inflationary costs, it is because we believe fundamentally in the model. The way we pursued that agenda was not in line with the way we think of stakeholders and our engagement with stakeholders. It has taught us a lot as a company about the impact of a decision to impose a new way of working on an industry that relies on us. It has taught our managers a lot about why we actually have purpose and values that sit around engagement and why by not observing that you can find yourself in all sorts of trouble.

We are learning the lesson of that today as a company. We are suffering brand damage and reputational damage as a result. There is no way for a corporate affairs department to fix that. That is about fundamental issues of management in the company. Whilst we believe in the actual process itself, I think that is a classic example of where you lose sight of what you stand for and how you do things, and how you just do things because it helps with your cost base without thinking through those complications on a longer term basis.

So it has been a very productive learning experience for us. We are still in the middle of it. We are hoping to build a much better relationship with those smash repairers who are outside the system at the moment and we are sure that it will lead to a better relationship over time. It will certainly lead to other things in New South Wales that have upset the parliament and certain backbenchers about the need for reform. For me it is the classic example of where things go wrong and how the long-term welfare of the company is put at risk. I do not want it to be read



that we are walking away from a system that we fundamentally believe in. I think it is about how we did this rather than what we did.

**Mr BOWEN**—I have a quick follow-on from Ms Burke's question. I was interested to read in your submission, if I have interpreted it correctly, that you regard keeping your operating cost to a minimum as part of your social responsibility and therefore you keep premiums down.

**Ms Mostyn**—Correct.

**Mr BOWEN**—I thought that was a very interesting view. It is not a view that many people have put to us in that context. A cynic would suggest that that it is a very convenient view—that reducing the costs as a measure of social responsibility is something convenient—but I can see where you are coming from. The question arises in the balance between keeping your costs down and the obvious impacts on other stakeholders. Ms Burke referred to the smash repairers actually having a whole situation of taking photographs and doing quotes from those, which is controversial and, with respect, justifiably controversial, I think. How do you go about striking a balance? For example, in your particular role of looking after corporate responsibility and reputation, would you be in the loop on that? Is that more a cost-driven decision which you then have got to sell rather than you having an impact on it and saying: 'Hang on a second. This is going to have a huge impact on our stakeholders and it is really going to be bad for our reputation and you really cannot do this even though it reduces costs'?

**Ms Mostyn**—It is a great question. The purpose statement, of which managing our costs is a quadrant, came from our people. This was not a top-down driven purpose statement. We spent a year working with our people on what was the purpose of the company. The simple things, I think, were pay claims and helping to reduce risk. They were things that our people understood implicitly and wanted to have as part of our purpose. What came back from our people who understand how insurance works, was that, if we do not manage our own costs—both the friction costs between premiums paid and claims paid out—and help keep costs low across the community so that insurance is affordable, people will not be able to afford insurance. So it was not just about managing our own costs; it was about the essence of insurance being driven by all of the inputs of cost. So when we say 'managed costs' we are not talking about finding the lowest cost for everything. We think about it in a very sophisticated manner. The best example I can give you is around our people. We want to have the lowest cost model of employing people but drive it through the lowest turnover rates of people so that we can pay people the best salaries and run the best conditions but have the lowest turnover rates because it is that kind of cost that blows out the people costs of an organisation.

It is the same with safety. If you are injuring workers it is a cost to your business and, quite apart from the moral duties of protecting your workers, it is actually a very expensive way to manage a business to have them constantly injured and on leave. So by looking at that we realised that we had to focus on things that were cost drivers, of which the good management of people is one—protecting their safety and good management in providing flexible arrangements for them.

With suppliers it came down to how we are going to provide huge amounts of volume to suppliers in an equitable fashion and ensure that we sustain the viability of the industries that support us. The smash repair industry is a good case in point. We were seeing the cost of smash

repairs rising astronomically because of an oversupply of providers in the market needing work with fewer and fewer car accidents as cars and roads get safer. At a time when the actual cost of repairs across the insurance industry should be dropping, they were rising as a cost of running the business.

**Mr BOWEN**—If there was more competition, wouldn't that reduce costs?

**Ms Mostyn**—No, it means that you get small operators in an oversupplied supplier market that can call their price because customers say that they want their car fixed at a particular location and they want a particular provider. Within the smash repair industry there are all sorts of cost drivers that we could probably take offline and have a further discussion about—and I would be happy to do that—but the essence of that reform was about saying that there was a structural problem in that industry, as there were in previous times with the dairy industry and with the waterfront. There are a number of industries that have been problematic in Australia because of our smaller population and oversupply, and smash repair for us was one of them. I could talk about the building industry or a whole lot of other industries. We thought that by finding ways of working with preferred suppliers who will guarantee quality and safety at work at a price that was affordable and good for their business, was the appropriate decision to take on behalf of consumers.

What we also saw on the other side of the ledger was people beginning to underinsure or not take out insurance as insurance got too expensive. In the bushfires in Canberra, a third of houses affected were uninsured or underinsured. That is a cost to the community because otherwise we pay for those issues through taxes, by filling out for those that have not taken out insurance. Many would say insurance is too expensive. For us that cost driver is about the viability of the product that underpins the economy. We take it very seriously, not as a driver of lowest common denominator or 'cheaper is best' but as a fundamental principle of how the sector works and how we want to be a leader in that sector, always with a view to balancing all stakeholders' needs.

**Senator WONG**—Thank you for your submission. It was pleasant to read about companies that think of this as a core business activity and that do not come before us and talk about reputation issues only. I wonder if we can unpack a little bit of what you have already said. Can I turn first to stakeholders. Mr Goddard, you talked about an interest group you had to deal with in relation to the GM issue. Ms Mostyn, you talked about stakeholders. You talked a bit about how you identified them. I am interested in knowing how each of the companies have gone about the process of identifying the stakeholders to whom you want to have regard to and what your process was for doing that—both for identifying and then for working out what changes, if any, to your business activities and your organisational activities were required in order to bring their interests into the framework.

**Ms Clarry**—There are a number of ways in, I suppose, for our stakeholders to our business. We actively engage stakeholders—

**Senator WONG**—No, sorry, I want to start at the beginning. How did you identify who you describe as stakeholders?

**Ms Clarry**—By looking at the market in which we operate. We have major stakeholders in our customers, Coles and Woolworths; in our consumers, obviously the people who buy our products and keep us in business; and in our competitors.

**Senator WONG**—Unilever has the code of practice for suppliers.

**Ms Clarry**—That is correct.

**Senator WONG**—So you have identified them as, I suppose, a stakeholder.

**Ms Clarry**—Sure.

**Senator WONG**—So you look at the market and you look at your suppliers, but what sort of process did you go through to identify who it was you had to have regard to? The reason I am asking—perhaps I should clarify—is that one of the arguments of those who come before us saying, ‘This is an ephemeral issue,’ is ‘who is a stakeholder?’ It is a definitional question.

**Mr Goddard**—We split them into two areas. The core stakeholders are the obvious ones: employees, consumers, suppliers, customers. There is a secondary lot of stakeholders that we identify either reactively or proactively—ideally proactively, in advance—according to our own practices. So if we are looking to bring a new product onto the market that might have an ingredient that might upset particular groups, it is a case of scoping the landscape and identifying who those particular groups are.

**Senator WONG**—That is almost a risk analysis, saying, ‘If we do this, this might happen, so we’d better talk to these people.’

**Mr Goddard**—That is right.

**Senator WONG**—Ms Clarry, what about the competitors? How have you had regard to them?

**Ms Clarry**—I might let Mr Goddard answer that question.

**Mr Goddard**—We are stakeholders in the sense of common stakeholders. If we look at the food industry, we are common stakeholders in, for example, the obesity debate that is going on at the moment. If we look at the debate in the community, as an industry we have got a role to play and as an individual company we have got a role to play. On issues like that, one of our stakeholders in that wide group is in fact our competitors. So through an industry group, the Australian Food and Grocery Council, we operate as one entity to put forward a food industry perspective, and then we execute that through our own individual ways at a company level.

**Ms Mostyn**—We started a few years ago with this investigation about core purpose. Once we had spent the time on core purpose we then started to map very dramatically with a number of people in the organisation those people who they believed were affected by us in any particular way. We try to avoid the word ‘stakeholder’. I think ‘stakeholder’ takes you into that more ephemeral land of them being just a number to be counted in the process or, back to Mr Bowen’s point, an area for the corporate affairs department to go and manage. I hate the word ‘manage’ as

well. We think about it as an engagement model. So we mapped who we felt were the people we had an impact on and had the potential to impact on us against our core purpose of paying claims, looking after our people and reducing risk in the community generally.

**Senator WONG**—You say ‘we’: who is ‘we’?

**Ms Mostyn**—We sat down as an executive team as a starting point to look at it, and we talked to our board about the fact that we needed to create the subcommittee of the board. We looked at the executive. We needed to create an executive committee around reputation risk that went to how well we were engaging with stakeholders. We then looked into our employee base—who did our employees think were important: unions, work site management?—and at safety issues. We created a safety committee. Every time we went down a certain path it led to a form of management and governance that we had to fix or get rid of if it was seen to be stopping things.

We then brought together a group of people who we identified as thought leaders in the various groups we impacted on and took them away for a few days to discuss with them at a very senior level who they thought were the stakeholders of the insurance sector and of our company in particular. Those two days then led to us reporting back to them and creating a survey for the people we thought we impacted to say, ‘What do you think we should be doing on certain things and how do you think we’re going at the moment?’ We report back to them on a regular basis. It has driven how we do our advocacy and how we think about those core people.

**Senator WONG**—What do you call them instead of stakeholders?

**Ms Mostyn**—I think we just talk with the people we impact and who impact us. We try not to put them into that category that just gets so euphemistically used—they are ‘managed’. In fact, we realised that because of the issues to do with cost and the issues to do with long-termism and short-termism we needed a higher level committee. So we have now invited a group of independent experts to join the company at an independent level, unpaid other than the per diem, to advise us on how they think we are going at this macro level. It is an independent group of senior academics, people in policy positions, who will come to us every quarter and discuss with us from their perspective, looking at us in total, whether we are doing a good enough job running the company against a set of values and principles that say we want to be sustainable.

**Senator WONG**—Is the benefit to the company of that approach primarily in risk reduction, or is it more than that?

**Ms Mostyn**—If all you looked at was risk, I would be happy, because every company looks at its risks.

**Senator WONG**—It is better than nothing.

**Ms Mostyn**—It forces you to think about things that you could otherwise ignore. I think many companies ignore the safety risk of their people on the basis that, if they are a white-collar company, a financial services company, that is an issue for the mining industry or the heavy resources sector, where people get hurt. Unless you force yourself to think of it as a risk, you probably do not do much about it. So I am quite comfortable that risk frameworks provide you with a very good insight into things you need to fix, but we have taken it further and said it is

actually about core purpose and it engages our people and sees us running a better business. So it is an opportunity driven model rather than a risk driven model. I am quite comfortable if people say there is risk—we just take it to that next level of opportunity.

**Senator WONG**—Maybe it is just the first step.

**Ms Mostyn**—Yes.

**Senator WONG**—On the staff issue, your approach to try and reduce what I suppose is the most obvious way of reducing costs—or perhaps not the most obvious but perhaps the most beneficial—and that is turnover. Has that been successful?

**Ms Mostyn**—We are in the middle of this at the moment. It will be the hardest management challenge we face. With the changing demographics of people in the country, we have to get better at flexibility and diversity. We are seeing the benefits. Where parts of our organisation embrace this, the cost of turnover drops rapidly, levels of staff engagement rise rapidly, innovation rises and you get better outcomes for customers. So we know the principle was right. It is the focus on this as a long-term management obligation for us.

**Senator WONG**—Can you talk about the investment community now? You mentioned the short termism of the capital markets, and that has been a fairly consistent theme in the evidence before us. People say, ‘We’re doing all this, but we don’t necessarily get much benefit from it from that end.’ How can that be impacted on? You talked about the fact that you were engaging with various investors and that people were interested in the approach you were taking, but I think you would probably agree the culture is still very lag indicator focused, as opposed to lead indicator focused—I think that was the terminology.

**Ms Mostyn**—Absolutely.

**Senator WONG**—How can that be impacted on—from your perspective but also from government’s perspective? Can we try and stay out of regulations, please? I do not want to have that argument. I understand your position on that.

**Ms Mostyn**—Sure. From our perspective, it involves us talking to investors very differently. We encourage them to take a long-term view of us rather than the punishing quarter-by-quarter financial review. We find that we are now attracting investors into our company who understand that very issue. VicSuper invested in us on the basis that they have a screen they apply for their superannuants around the sustainability model that a company uses before they will invest, and they have chosen to invest in us as an example of an Australian company that they are prepared to put their superannuants’ money into on the basis of what we do.

The creation of a company in London called Generation Investment Management, which is chaired by Al Gore and run by an ex-Goldman Sachs senior banker, I think is a sign of what is changing in the market. Generation will only invest in companies from which they are prepared to take a stake for at least 10 years, and they then work actively with the management of the companies they invest in to say whether or not they think you are behaving well enough for the long term. So we look for investors who will come to us because of the way we are running the company and we are constantly finding ways to talk about those lead indicators of success in

order to change over time what the market looks at as an indicator of the financial sustainability of the entity.

I think one of the things that government can do is think about those funds that you have under management on behalf of Commonwealth employees, where those funds go in Australian companies in particular as to the screens you may use, in the same way that VicSuper has chosen to. The lead behaviour of government about those massive amounts of money that wash through the system is that, 'There are some companies we want to keep investing in and, as we invest, we will see that benefit over the long term and we will not pull in and out quarter by quarter or half by half as those markets are changing.' Many of us are in industries where there are cyclical things going on, but we want to promise our investors a return over the longer period and the medium term that they can rely on when they need drawn down things like superannuation. I think this is at the heart of what will drive good companies—

**Senator WONG**—I think so too.

**Ms Mostyn**—in the publicly listed sense. I think it is why there is also a move to private equity and many people in the listed environment are moving to private equity, to try to reignite a direct relationship between an investor, the provider of capital, and the management of a company. Warren Buffet talks about the need to get away from this rampant short termism that is driven by markets where trillions of dollars are washed in and out through day traders where it does not matter that we have a long term view; they are looking at a share price differential on a daily, or even hourly, basis. Corporate responsibility and sustainability only work if those markets begin to take notice of these issues and move their investments accordingly and show the value over time to their investors.

**Senator WONG**—So impacting on it, you think, is government as leader—

**Ms Mostyn**—Absolutely.

**Senator WONG**—companies like yourselves and others engaging, movements within the investment community for different investment structures and different approaches to these things.

**Ms Mostyn**—Yes.

**Senator WONG**—Is there anything more? It seems to me that you are describing a range of different types of investors.

**Ms Mostyn**—Yes.

**Senator WONG**—The question from a policy perspective is: how do you encourage that?

**Ms Mostyn**—I think the government as leader is key in all of this. Language is important. The language around the term shareholder—the supremacy of the shareholder—to me encourages short termism. As I said earlier in my evidence, we do not think of the shareholder as the supreme interest in that group of stakeholders. It is ultimately where the fiduciary duty lies and where benefit must be derived. But shareholders will not get benefit if we do everything to the

exclusion of our employees, suppliers and customers. There will not be a return to the shareholder. So language about what is good, long-term value coming from government is important. Also important are where government funds go, the suppliers government uses, screens for how you use your procurement models for companies that are embracing a different way of operating who will be around for longer and be more sustainable in their relationships, the focus on cross sectoral relationships that stop this being about a corporate sector and a government sector. The creation of programs we see in our own world are where we invest in a community in a local government area and work with the police, the local council and the community around crime reduction. We get a much better result on the crime reduction initiative leading to less payment of claims than we would ever get if we just went directly to a consumer. So government's role at the federal level is working on some of those social programs with companies that have a sustainability agenda looking always with an eye to social capital and an outcome for shareholders. That would be a great leadership role for the government to play. It would encourage companies to voluntarily do this because it would be good for their business.

**Senator WONG**—On social partnerships, the government has its business partnerships. A less philanthropic approach taken by Britain is how I would probably describe the difference between how the UK might look at this and how the Howard government has looked at it. Do not worry; I am not playing politics here. I am just saying that as a way of trying to get companies to engage in issues, do you have any views about what can be done? How could you structure a facilitation framework for socially responsible companies, government and communities to work together?

**Ms Mostyn**—In relation to the Prime Minister's business and community partnerships, I think there has been a shift over time that makes it a much more interesting model of sustainable business than philanthropy. The winners of those awards are now much more obvious in their programs around core business driving how they connect with the community. I think that model is getting better in rewarding and recognising the companies that do very well. Those are lead companies and they are being recognised. Being able to say they have the Prime Minister's award has been very useful to take it out of the philanthropic world into core business. I think building on that would be terrific. Things like the Banksia awards on environmental excellence and the government's involvement in that through certain prizes also help make issues like climate change a business issue.

More generally on those partnerships, I think there probably needs to be some sort of conversation opened up with business about how we are going to do this, because there are a lot of companies around the world at the moment and many in Australia that are uniting to sort out some social issues. We have the chairmanship of an organisation called Business and the Community in Australia—that is 16 companies who are taking on literacy in schools in the south-west of New South Wales using core business principles to help solve a problem that they see as affecting their own businesses.

That is one example of a number of things happening around the country that would be worth having a discussion with government about: how do we get clear about what we are doing? How do we measure the results? And what is the real role for companies in this—is this a transfer of responsibility or is it simply that, when companies act well, they pick up some of these social issues? And they can be very good advocates of government policy at the same time.

**Senator WONG**—What about tax policy? You do refer to that in your submission, I think.

**Ms Mostyn**—Taxes for us are very much an insurance driven issue, because we would see as inequitable anything that punishes a citizen for taking out a risk product to protect themselves. We see things like the fire services levy in Victoria and New South Wales—it is not a federal issue; it is a state issue—as punishing people who take out insurance and who then effectively fund all of the emergency services that help those who are not insured. We certainly see a problem with any form of tax or regulation that holds back an industry, and we support all the submissions to the various red-tape groups around the reduction of those issues.

**Senator WONG**—So there is nothing specific you want to put to us?

**Ms Mostyn**—Not today.

**Senator WONG**—You mentioned the provision of incentives. Apart from awards, did you have any other policy that you would like to put before us?

**Ms Mostyn**—It comes back to the procurement and HR practices of the government.

**Senator WONG**—Yes, that makes sense.

**Ms Mostyn**—It is probably covered by all those things. One thing I would say is that superannuation arrangements do bother us.

**Senator WONG**—They bother you!

**Ms Mostyn**—They bother us! They cause us a problem when we start to deal with the issue of the ageing population and the ageing workforce. We find that a lot of people who are fast approaching typical retirement age tell us that they do not want to extend their life of work with us because it will upset their superannuation arrangements and the tax treatment of their super payments. I think it would be very interesting to conduct an investigation to look at what the impediments are for companies truly offering flexibility, in workforces where we need to get older people working for longer and a lot of people across the system working differently, many of whom cannot move from full time to part time or hold onto their super and start drawing down on it earlier without some sense that they are upsetting their tax position. I think that sits so perfectly alongside the issue of intergenerational reports, but it remains one of the things that have not yet been dealt with.

**Senator WONG**—Yes, I think there have been a number of Senate committees that have looked at that. It has certainly been raised with me before in different contexts. Essentially, what I am interested in, Ms Mostyn, if you have anything more on this, is looking at non-regulatory mechanisms that government can engage in to try and facilitate better partnerships. I think page 3 of your exec summary talks about, broadly, what you say government can do. I would be interested in any particular detail on that. If you do not have time, fair enough; but, if you are interested in providing any further information on that, I would certainly be very interested in it.

**Ms Mostyn**—If you would not mind, Senator, I would love to take that on notice and provide some supplementary material.

**Senator WONG**—Yes, that is what I am suggesting.



**Ms Mostyn**—We would very much like to take you up on that.

**Senator WONG**—Thank you. Can I just ask one question of Unilever, Ms Clarry or Mr Goddard, and that is about the business partner code. It is a supply chain issue essentially, isn't it? What was the impetus behind that?

**Ms Clarry**—That is correct. We became aware that we could play a leadership role by ensuring that our suppliers were also aiming to be socially responsible businesses. That came about because we are a large customer, so we see that we have some influence with our suppliers. We also did not want to do business with suppliers that were compromising our reputation, I suppose, and simply not doing the right thing. That is how the supplier business code has come about. It is globally driven as well.

**Senator WONG**—It is interesting: it refers not only to the ILO standards but also to minimum employment conditions. It is quite clear in terms of labour standards, which is somewhere that a lot of companies do not choose to go. Is that primarily because there has been for some time criticism of various companies about their use of overseas labour? Was that primarily driven by a reputational risk perspective?

**Ms Clarry**—That, and also the fact that we are operating in fast-developing markets. In Indonesia, Unilever partnered with Oxfam, which is quite—

**Senator WONG**—We have heard from Oxfam.

**Ms Clarry**—an unusual sort of an arrangement for a corporation. We recognise that we have a role to play in addressing poverty, child labour and those sorts of issues in developing countries.

**Senator WONG**—Why is that? Why do you think you have a role? I am genuinely interested; I am not trying to interrogate you.

**Ms Clarry**—I understand that, it just seems—

**Senator WONG**—Intuitive?

**Ms Clarry**—Yes, self-evident, that—

**Senator WONG**—From a commercial perspective?

**Mr Goddard**—It also comes back to our mission of helping people get more out of life. It is driven by our mission. It is a social agenda that has been running through the company for 100-plus years now. We have a responsibility in the markets in which we operate to move that population base from one place to a better place in both developed countries and developing countries.

**Ms Clarry**—Our original mission was to lessen work for women, to make hygiene commonplace and so forth. It is so culturally embedded that we could not operate any other way.

**Senator WONG**—There has to be some sort of cost-benefit analysis, I assume. You make a determination of how much you are going to spend on the Oxfam project. Do you think about what you then get out of it?

**Mr Goddard**—Iodine deficiency is a real problem in many developing countries, causing birth defects and ultimately lowering the IQ of a population of a developing country, which is basically a backwards step. So, in conjunction with the WHO, we started to put iodised salt into our food or provide iodised salt. That is a cost to us and it is a cost the consumer ultimately pays for in those countries. But we are also changing the marketing. So instead of selling salt in large packs, as has been the case in village markets, we put it in affordable packs for them. That is a case in point where there is a business opportunity for us. We want to build savoury foods businesses in these countries, and salt is a basic starting point for building a savoury foods business. We can do that as well as meeting our social agenda and changing the health profile of the nation.

**Ms Clarry**—A similar example to that is in India, where they were looking at how to grow the business in rural areas. So there was a growth agenda there. They have taken on a project whereby they train up local rural women to go door to door and sell their products. So that has a really great social benefit as well, in that they are reaching areas that infrastructure dictates would otherwise be difficult to get to. And, in the process, they are providing work for people who would otherwise be below the poverty line. So it has a dual benefit, I suppose, in operating that way.

**Ms Mostyn**—I will just add one aspect to why companies think about moral, social and environmental issues. Even if we do it for no other reason, the generation Y employee will actively choose a company to work for that thinks like this and thinks about the long term. If we do not do these things, we will lose a whole lot of people who think that companies are just about profit making and do things at the expense of the long term. We know that, at the end of the day, taking these broader issues into consideration is a long-term issue for the health of a business and has many impacts, one of which is how your employees feel about you and how engaged they are with how you conduct your business. This leads to better outcomes wherever you may be operating if you stand for something and can demonstrate that it comes back to your core business and is not pure philanthropy or purely morally driven. It is actually about the sustainability of those markets, those people—and you stand for something as an employer. We can look at how little companies are valued on tangibles; it is the intangible things that drive the value of a company. Brand value and human capital value, which are these kinds of issues, become seminal within an organisation. You see companies fall by the way side when they lose sight of those high order principles out of which you drive your business.

**Senator WONG**—The GRI or a standardised reporting framework: does anyone have any comments about that in terms of consistency of information to shareholders and investors?

**Ms Clarry**—I have a comment—or perhaps it is a question. We need to look at what the purpose of reporting is: whether we are comparing apples with apples across all the various industry sectors, so we would have a reporting tool. We are asking people to report. Sam referred to the investor market, but we are not a publicly listed company in Australasia. I do think that there are ways that we can bring forward the cause of corporate responsibility in this country,

other than by the introduction of a standardised reporting tool. That goes back to that whole issue of leadership by the government.

**Senator WONG**—Just to clarify: I do not think I was necessarily indicating mandated reporting.

**Ms Clarry**—Sure.

**Ms Mostyn**—Our difference is that, as a public listed company, we see the GRI, particularly through the G3 reforms that have just been announced, as the best model of a standard reporting tool. It is much more driven around lead indicators than lag, and the current reforms to the GRI pick up business concern around the focus on economic over social and environmental—so turn those things into economic issues, which transform it into a very robust set of things that we can rely on.

The one problem we have in Australia on which the government could take a leadership role is that the preponderance of small- and medium-sized businesses burdened with the need to report against the GRI would not be fair. But education by government of the small business community around how thinking about some of those aspects of the GRI will make them better businesses, and provision of tools and education would lift the behaviour of smaller companies that struggle with these things and see them purely as punitive regulatory or reporting requirements as opposed to an opportunity to grow better businesses. Education and an understanding of why the GRI can transform a business and play a key role in long-term value would be useful.

**Senator WONG**—Would you make it mandatory for any sector of the market?

**Ms Mostyn**—I do not think it is useful to make it mandatory at the moment. Pauline, do you have a view about that?

**Ms Gregg**—The appeal of GRI is also the fact that it is developed through a stakeholder consultative process. For example, our company was involved in developing the sector supplement for the finance sector on environmental indicators, and that was a global group of NGOs, business and government representatives. It was certainly a very difficult process to go through and get agreed indicators across all parties, but that is the value of GRI. There really is stakeholder input all the way through.

**CHAIRMAN**—I have a couple more questions before we conclude. In your submission you refer to tax reform, and in some of your discussion with Senator Wong you referred to that briefly. In the light of the comments you made in response to Senator Wong's earlier questions about long termism and short termism, do you think a change to the capital gains tax requirements would assist with encouraging a longer term view? In other words, rather than having the current one-off discount after 12 months ownership, you had a sliding scale of discounted capital gains tax over an extended period of time, down to zero over a long period of time. Would that encourage a longer term view on the part of investors?

**Ms Mostyn**—I think the principle of encouraging long-term investment thinking is to be encouraged however that makes its way into regulation or tax reform. I would not mind taking

on notice the specific question because we could look at that and come back with some evidence to that. Anything that does things that are counter to a long-term view or counter to efforts to reduce things is undesirable. The example I think of is FBT on cars and fleets. We often have people racing around at 30 June using up lots of miles to meet their FBT requirements so they get the benefits of having a company provided vehicle because the system requires a proof of mileage. That encourages people to drive around and emit lots of CO<sub>2</sub>. Those kinds of things that have a consequence that is not intended are worth looking at. Anything that sends a signal about short termism or behaviour that does not fit with a broader perspective on long-term social, environmental and economic impacts is to be encouraged.

**Mr Goddard**—I can reiterate that: anything that encourages long-term thinking is beneficial.

**CHAIRMAN**—Do either of your companies in any way link executive or management remuneration to the achievement of corporate responsibility goals? If so, what component of remuneration is linked to that and how far down the management chain, if you like, does such a system go?

**Ms Mostyn**—We are beginning to apply a different way of assessing whether our managers who are at a senior enough level to be entitled to bonuses are entitled to that bonus simply on the performance of the financial outcome of their business. We now ask a series of questions about what impacts they had on various groups in the community, whether it be our employees, our suppliers, our brands, the government or whatever it might be, in determining whether that profit was short-term and should be rewarded with short-term bonuses. We are moving down a path of incorporating the way we think into remuneration structure. At the very top, the chief executive examines his executives on a half-yearly basis on the basis of our core purpose and principles and our remuneration at the discretionary level is reflected as a part of that.

**CHAIRMAN**—Related to that, it has been suggested by some that the short-term nature of executive tenure these days also militates against taking a longer-term view and a view that takes account of stakeholder interests other than the short-term interests of shareholders. It has also been suggested that executive pay could focus more on long-term growth such as economic value added. What is your response to that issue?

**Ms Mostyn**—We take a very strong view about it being the long-term economic value that is the test of how we are performing. The phenomenon of short-term chief executives is driven by how the markets assess the behaviour of a chief executive over six-month periods. We have often said to the markets that we do not think in those terms and want to be judged over the long period, but we have a market that is punishing on those who have a longer-term view. I think it is an entrenched issue around the notion of capitalism that we discussed earlier. It is changing now with younger chief executives making the point that this is how they are going to run their companies—with value for their shareholders that is there over time.

It is a significant issue for the retention of good chief executives, and we have to find ways to ensure that there are measurements that those chief executives can use to show the market that they are adding value. At the chief executive and senior management group level we rely more heavily on long-term incentives in stock than we do on the cash side and the short-term side. Most of the executives are looking to benefit over the five to 10 year period with increase in stock value.

**Mr Goddard**—On your first point, KPIs are definitely built into executive remuneration in the broader CSR context of safety, health, environment and quality. When it comes down to mortals such as ourselves those specific community projects are also built into our individual KPIs. On the second point, short-term tenure is not an issue for us. The average tenure of our executive is 15 to 20 years—not necessarily in the Australian context but in the Unilever context. There are various views there but they have been with Unilever for some time and will be so for some time yet.

**CHAIRMAN**—I thank each of you for your appearance before the committee and for your assistance with our inquiries. It has been very valuable.

[10.12 am]

**McLELLAN, Mr Allan Anthony, Chairman, Habitat for Humanity Australia**

**CHAIRMAN**—Welcome. I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

**Mr McLellan**—It seems to me that one could divide corporate social responsibility into three broad categories, about which I am sure your committee has received many comments. In the first category there are those NGOs and others that often without any rationale feel that corporations should take a proportion of their profits to support their local communities. Many mining companies feel this way. I happen to be a director of a number of public mining companies, and I see that you have received submissions from some which I believe consider that that is the right thing to do.

In the second category I place those who believe NGOs have the right to bully or blackmail corporations. I am thinking of organisations such as Greenpeace and certain environmental groups seeking to force their targets to adopt policies against their wishes. But it is not for NGOs to impose their agendas on corporations. The law provides penalties for unacceptable behaviour by corporations and in a democracy like ours governments establish the laws, not NGOs. Recently my former chairman of Barrick Gold, of which I was president and CEO, spoke out at the world leaders conference at Davos when he raised the rhetorical question: who regulates the NGOs?

In the third category I would place the approach adopted by Habitat for Humanity Australia. In our case, rather than using the word ‘responsibility’, we have chosen to use ‘investment’, for we believe that some of the difficulty in increasing corporate involvement in social work has been the way in which it has been framed—as an obligation through the use of the term ‘responsibility’ rather than as a benefit through the use of such words as ‘investment’.

We consider corporate social investment as not about guilt or self-congratulation; it is about building bridges while building brands and powering communities while creating a corporate ethic of which staff and shareholders can be proud. It is not about writing cheques but about benefiting communities whilst providing powerful marketing opportunities for sponsors.

Habitat for Humanity implements corporate social investment programs in partnership with a wide range of corporate partners. Whatever their size, whatever their objectives and whoever they are trying to reach, we work with them to develop partnerships that are measurably beneficial for both. These partnerships provide a wide range of paybacks for the corporation, its brands, its employees and even its customers and result in a tangible social good in the form of homes for low-income families. Having recently won the Prime Minister’s award for excellence in community-business partnerships, I believe we can speak with some experience and authority in this area.

Habitat for Humanity is a not-for-profit Christian housing organisation which builds affordable homes in partnership with low-income families. We have now built over 220,000

homes in 100 countries. A house is now completed somewhere in the world every 24 minutes. We have raised funds in Australia for the construction in this past year of over 500 homes in our part of the world. There are over 1,000 already committed in the current financial year.

Following the catastrophic tsunami a little over a year ago, we were the first organisation to fund houses in Aceh. We propose, in collaboration with our international partners, to complete 35,000 homes in that area to replace those lost. In doing so I think we have provided an effective and timely response, lasting social and community benefits and a permanent, sustainable operation.

Over the past decade the business sector has increasingly acknowledged that not only can it make a significant contribution to building a strong community but that there are also measurable benefits to be gained by the business when community investment objectives are aligned with their long-term plans. For several years we have teamed up with PMI Mortgage Insurance. Last October the Prime Minister presented Habitat and PMI jointly with this award. Our partnership with PMI is a great example of hands-on philanthropy. Not only does PMI provide seed capital but it also assists with the construction of houses, with thousands of man hours having been contributed over the period. ANZ Banking Group is another one of our cornerstone sponsors. I would like to read to you a quote from their chief executive:

Our association with Habitat for Humanity Australia has enabled our staff, through their generosity of spirit, to help with the projects and to touch the lives of those families in need ... It has also helped us to build upon the sustainability of our business.

... ..

We have found that working with Habitat for Humanity Australia has been a sincere two-way relationship. And the organisation's tenacious pursuit of its goals is totally aligned with our company motto, "tenacity of spirit"...it's about putting people into homes and being relevant and committed to the communities in which we operate.

Benefits like increased morale, higher education and retention rates for staff, improved reputation and a greater customer loyalty are all tangible returns from strategic philanthropy and employee engagement. Habitat for Humanity offers its corporate partners a unique experience—the ability to send out employees to build the houses it has funded. We do this not only in Australia but also overseas. This not only benefits the family being housed but it connects the corporation and its employees with the community and builds teams within the corporation. Volunteers love the experience of actually assisting to build a home for a deserving family. Not only do they often learn a new skill and see the tangible results of their efforts but the shared hardship of day's work on a building site creates a bond between team members that is hard to replicate in an office environment.

When a company matches its mission with the values of its workers, the morale of the company is transformed. Becoming passionate about the organisation they work for, employees create a work culture that brings out the best in people. Working with values they have internalised, employees feel the immense power of these values in their own lives and know how to use them to create meaningful work. Performance and productivity are automatically improved. We have, ourselves, established a set of critical values, which explain our high levels of motivation and morale and which generate enormous psychological energy.

At his famous day of affirmation address at the University of Capetown, Senator Robert Kennedy said: 'It is from numerous diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope.' Our aim, and I believe the aim of the companies that partner with us, is to send out a tiny ripple of hope to those less fortunate than ourselves.

**CHAIRMAN**—Thank you very much, Mr McLellan. In your submission you refer to the stakeholder theory.

**Mr McLellan**—Yes.

**CHAIRMAN**—If I can correctly summarise what you are saying, it is that the stakeholder theory is based on the view that society has granted the corporation the right to exist and therefore that gives the community some rights over the corporation. Could you enlarge on what you said was the fallacy of that theory and how it relates to corporate responsibility?

**Mr McLellan**—Speaking from my personal perspective, I get irritated when some people who want to do good believe that it is the corporations that should pay for that good. I personally believe that the corporation's obligation is to make profits to enable good to be done. It is not for the corporation to do it. The theory, as I understand it, says that there are many stakeholders in the corporation who all have an interest perhaps as great as the shareholders, the owners of the company, and that they have an obligation to do these things. I do not believe so.

**CHAIRMAN**—What do you see as the *raison d'être* for corporate responsibility? If it is not the stakeholder theory, what is the basis on which corporate responsibility should—

**Mr McLellan**—From my perspective, the company should be able to decide what it wants to do, if anything. It may be nothing. Our job at Habitat is to convince corporations that they get a deal here, that it is an investment, that it is profitable for them to do and that they are achieving corporate social benefits and at the same time benefiting themselves.

**Senator BRANDIS**—So you do not draw a sharp distinction, as some do, between corporate social responsibility and corporate philanthropy. If I understand you correctly, you are saying that the way in which a company may choose to fulfil obligations beyond its obligations to its shareholders is by voluntary acts of corporate philanthropy. Is that your point?

**Mr McLellan**—That is one part of it. I think the thing that Habitat does is convince corporations that they are making an investment to their benefit.

**Senator BRANDIS**—So this is prudential behaviour by them?

**Mr McLellan**—Yes, of course, and it is our job to design a package that they think is valuable. We do not go to them and say, 'Please give us a quarter of a million dollars because we want to build a house.' We go to them and say, 'Let me show you how we could benefit you by your building a house.'



**CHAIRMAN**—In your submission you refer to the fact that you have adopted the principles set out in the Australian Stock Exchange’s corporate governance principles of good corporate governance and best practice guidelines. As a non-profit organisation, was that an onerous or difficult undertaking?

**Mr McLellan**—It is a big paint. If you have ever done it—and I personally have done it twice for two public companies—it is a tedious job, but I set out to do it for Habitat for two reasons: (1) I thought it would really lift our standards, and I believe it has, and we have now had to document things that we assumed were okay but were never really seriously considered and (2) I think it gives us great brownie points when we call on a corporation and say, ‘We have the same standards of corporate governance set by the Stock Exchange that you have to adopt.’ It is a very tedious job. I have spoken quite a lot about it amongst other NGOs and, as far as I know, none have adopted it. I think they all thought it was a bit too daunting.

**Senator BRANDIS**—We have heard from other witnesses that one of the benefits to corporations of engaging in various philanthropic endeavours is the development of esprit de corps among staff. I think you touched on that as well in your submission. I am interested to hear you elaborate a little further on that, because I myself think that is quite an important issue.

**Mr McLellan**—I think it is enormous. In our case, we have a rather unique opportunity for people to get their hands dirty and do some hard yakka—things that they are not used to doing. Anybody who has ever had anything to do with team building knows that one of the clues is to put the team through a difficult and challenging situation. That is why they go and fall out of canoes or rappel down cliffs. At the end of the day, they have left something; they have left a house. They have met a family. It is a tremendous feel-good experience. I gave an example in my submission—and I think it is such an attractive idea. In America, where I lived for 20 years, all the leading firms compete for top graduates. They are all beating the doors of the universities saying, ‘Come and work for me at Goldman Sachs,’ ‘Come and work for me at the law firm at MacKenzie.’ I know of some firms—I do not know how many—who say to their potential hires, ‘If you come and work for me, we’ll send you away for two weeks to any destination in the world you choose to build a Habitat house.’ These students are all broke. They get a free trip anywhere they choose—to Guatemala, London or wherever—paid for by the company, which costs a few thousand dollars. What does it do? It gives them a fantastic start in their new career and says profound things about what values the company holds.

**Senator BRANDIS**—I find your vision very inspiring. I wonder if, conversely, it would concern you that the kind of philanthropic spirit which you have sought to garner could be damaged by heavy handed government regulation or interference. In other words, to what extent is the benefit which you see a product of spontaneity rather than conformity with regulation?

**Mr McLellan**—I think regulation would be terrible. I think our partners get something of great value and they think they are showing some leadership here. They are in the market and they suddenly see a new opportunity to benefit themselves and the community. To think that they would be forced to do that would take so much of the advantage away. I have read some discussion in the reporting on this, I can tell you that our partners, without exception, cannot stop talking about what they are doing. In the ANZ annual report, there are two pages in the centre of the report with pictures of the people building houses. What has that got to do with the billions of dollars of financial results?

**Senator BRANDIS**—One thing that has certainly struck me, and I do not know if it has struck other members of the committee, is that all the evidence we have heard from different corporations—which have extensive programs, not the same as yours, of course, for various charitable or philanthropic purposes—is that they have developed those programs not as a result of legal obligations to do so but spontaneously; not only because it is an intrinsically good thing to be doing but also because it is good for the business.

**Mr McLellan**—Of course, yes. I think that is the new way of thinking about things and it can be good business.

**CHAIRMAN**—Given your responses to Senator Brandis and your earlier reference to the ASX corporate governance principles and recommendations, which you say are in favour of a soft approach to reporting, can I ask what your reaction is to the proposal by the current federal environment minister to the ASX to develop a standardised voluntary reporting framework, perhaps the Global Reporting Initiative, as a means of reporting corporate responsibility?

**Mr McLellan**—I happen to think that the ASX guidelines are terrific. I think they have struck a very nice balance between an overhanded approach—and I have not lived in America through the Sarbanes-Oxley fiasco—and a carefully thought out, light touch, ‘You tell me if you are not doing this and I will want to know why.’ What I do not know is what the ASX might do if companies persistently do not do it—whether the ASX will then say: ‘Hey, that’s telling me you don’t care about it or you haven’t done it or you’re going to do it next year. That’s not good enough.’ We have not seen how heavily it might enforce it. As for this, I think it will be terrible.

**CHAIRMAN**—So you do not see a need to bring in the Global Reporting Initiative as part of those guidelines?

**Mr McLellan**—Absolutely not. First of all, I do not think it is our business to tell companies what they should be doing and therefore we do not need to report what they might do. If we have sensible programs and companies benefit from them, they will tell the world, their shareholders included.

**Senator BRANDIS**—I suppose we should not lose sight of the fact that companies have no obligation to be generous, just as individual citizens have no obligation to be generous. If, for whatever reason, they choose not to engage in philanthropic endeavours, it does not mean they are bad companies any more than it means they are bad citizens.

**Mr McLellan**—Of course not.

**Senator WONG**—I am sorry I missed the first part of your evidence. I want to come back to the issue of competitive success to which you refer in your submission where you quote Robert Haas as saying that, essentially, a company’s values are crucial to their competitive success. I suppose instead of looking at profit versus generosity or philanthropy what I would put to you is this: do you agree that the long-term benefit to shareholders can be maximised if a company has regard to long-term value which includes reputational risk, the risk that might arise from conflict with different stakeholders and so forth? Therefore, if you take a view that those issues have to be managed in terms of your core business, that is entirely consistent with both a notion of responsibility, or sustainability, and the maximisation of shareholder return.

**Mr McLellan**—Absolutely. I added just this morning that there is no question in my mind that it is really important for morale and productivity for employees to feel they work for a company of which they are proud. That comes from having values aligned with what we all feel. We all have many common values and it is really important that the company articulate and promote those and show them in some opportunities that may present themselves such as our program and others.

**Senator WONG**—Therefore, just putting aside any mandatory requirements, what is being put to us by some groups is that GRI or any other reporting mechanism should be not a requirement but a useful tool for companies to manage their own engagement with stakeholders and long-term value risks and also to enable that information—that is, how they manage that—to be communicated to investors and shareholders.

**Mr McLennan**—Some of the surveys that I have seen have been absolute nonsense, in my opinion.

**Senator WONG**—I think that is the point. We do not have a clear reporting framework. It does not have to be standardised because obviously the services sector is different from the mining sector and housing is different to construction and so forth. But, if we had some sort of consistent framework with the flexibility within it to recognise that different risks to manage and the different stakeholders, that might introduce a bit more consistency of analysis by people external to the company and also by investors and perhaps provide a tool for companies to assist them in manage these risks.

**Mr McLennan**—There is a basic presumption in that, isn't there, that it is good for companies to do these things?

**Senator WONG**—To manage their risks?

**Mr McLennan**—No, to get involved in corporate social responsibility.

**Senator WONG**—That is what I am asking. I am not talking so much about philanthropy. I am talking more about where you and I started in our discussion—where a company says: 'We want to build long-term value and part of that is managing our risk. Part of that therefore is managing our engagement with stakeholders and working out how we make sure our employees are clear about what values we have.' Do you not think that having some reporting tool might be of assistance in that?

**Mr McLennan**—For example, in the ASX requirements, one of the questions is, 'What risk management do you have?'

**Senator WONG**—Correct.

**Mr McLennan**—I think that is a proper question. I think that is a proper thing for companies to report upon. It is proper to address to their shareholders and stakeholders what they are doing in these various areas. I think I may be listening to you incorrectly, but if what you are implying is that that should then be extended into reporting on what they might be doing in social work in their communities—

**Senator WONG**—I suppose it depends on how you define risk, doesn't it? I think you were here for some of the Unilever evidence. The example they gave was of, I think, a fish protein that would help in the taste of their ice-cream. They made the point that there is a benefit there to them because they then can produce ice-cream that tastes better or does not melt as quickly or whatever the particular benefit was. But they said that, for them, there was a significant risk associated with that—and I am paraphrasing—because the fish stock from which the protein is derived is dwindling. Therefore, if they had gone down that path, they would have been on a collision course, obviously, with environmental groups or governments and therefore the community. They then looked at how they might manufacture that in another way and realised that it involved genetically modified organisms. So they thought, 'We would have to manage that process also with the groups who are against that.' So they made decisions about a production process which sought to look at and anticipate risks to them in the long term. That is what I am talking about.

**Mr McLennan**—I absolutely agree with that. I happen to be in the mining business and there are enormous risks and potential problems environmentally that one has to assess as part of the process of digging holes in the ground.

**Senator WONG**—I suppose what I am putting to you is that, if we had some better framework for reporting, whether that was mandated or not, it would be a way in which companies could disclose to the market how they do that in a consistent fashion and perhaps arguably it might provide a tool to assist them in that process.

**Mr McLennan**—I have not thought about that. I wish I was smart enough to have an instant viewpoint.

**Senator WONG**—That is fine. Thank you.

**Ms BURKE**—We have talked a lot about corporations and you have come with your NGO hat on today. If there were some sort of requirement for people to report, do you think it would become incumbent upon NGOs to also report?

**Mr McLellan**—I think the standard of reporting by NGOs is deplorable. It is a big issue and a subject close to my heart. We really ought to be addressing it. I would love to be sitting before a committee that were getting some views about what ought to happen there. Just as an aside but somewhat related to it, I am a director of the company in the US which is owned a friend of mine. So far as I know, it is the only company that advises donors how to give away their money. It advises on the investment of millions and millions of dollars a year. The money that is available in the hands of the wealthy in America is just enormous, and often these people have no contact with NGOs. They do not come from, perhaps, a Christian background, where they might have been connected through their church. And they say, 'What am I going to do with these millions?' It is a painful process, trying to figure out what the NGOs do.

**Senator BRANDIS**—This is going to be a growing problem, too.

**Mr McLellan**—It is enormous. It is a great opportunity for this business.

**Senator BRANDIS**—With the accumulation now—particularly in the United States, of course, but in this country too—of large private fortunes being much more democratically spread, the demands of not just corporate but individual philanthropy and the demands of making wise judgments about the disposal of those assets is a vast problem.

**Mr McLellan**—That is exactly right. It is a huge problem. We at the NGO level are always on our knees, begging people for money, and we do not give enough thought perhaps to how we might wisely invest that money and account to the people for it. I also happen to be a director of Opportunity International, which has a similar issue. We are always asking, ‘Give us 10,000 bucks and we will start a little bank in Indonesia.’ We say, ‘We’ll give you a report every year and let you know how we’re going,’ but we’re not nearly—

**CHAIRMAN**—This is the microcredit organisation?

**Mr McLellan**—Yes, that is exactly right. It is a very similar organisation to Habitat in culture, thought, foundation, repayment of the money and so on. It is a big issue and a great opportunity for those organisations who really want to be accountable and more thoughtful about what they do. It is not only giving the money away; it is structuring the deal so that there is accountability. If you are going to give a guy \$1 million, do not write him out a cheque for one million. Give him 100 and see that what he does with that, and then go to the next one. You can say, ‘I’ll promise you a million, but you have to meet these milestones.’ There is hardly anybody doing that.

**Senator BRANDIS**—Are you familiar with Professor McGregor-Lowndes’s work at QUT? He holds the chair of philanthropic studies, which I think is the only such chair at any Australian university.

**Mr McLellan**—I have heard of it, yes.

**Ms BURKE**—We have been looking at the notion of ethical investments for corporations, and I suppose what you are hinting at here is ethical investment for NGOs. If you are going to give someone \$1 million, you want to know that they have produced the outcome—

**Mr McLellan**—Exactly.

**Ms BURKE**—It is exactly the same sort of reporting. If as a charity you are competing against all the other charities and the other NGOs—

**Mr McLellan**—Yes, that is right. It is a competitive market and I am afraid, when I decided in 2000 that I was going to give my life to non-profit work, that my best friend—this friend in America who has this organisation—said, ‘They will eat you up.’ And I said, ‘No, no; I’m really smart, I’m tough and I know how to do this.’ And they have eaten me up. It is a terrible business, working with people who have got such a passion and who work for nothing—for half or a third the salary of anybody else—and they are so committed. It is so hard to get them to see the big business picture and the level of responsibility. As donations are coming in in increasingly higher amounts, there is more and more responsibility for us to be accountable.

**Ms BURKE**—I am just curious: with the program—which until I read your report I did not know a lot about and I feel a bit guilty for that—the individual who gets the home has to repay the loan. I am wondering about the financial arrangement for that. Is that done through you, or do you do it through a bank? Who has got the loan, and who are you repaying it to? How do you organise that?

**Mr McLellan**—That is a very good question. We hold all the loans. They are all interest free as it is a central precept of Habitat for Humanity throughout the world that there is no interest. We believe that is a biblical principle, and no interest is ever charged. We raise the money for the house. We go to ANZ Bank and say, ‘Give me the money.’ I need about \$70,000 cash to build a house in Mooroolbark and I need about \$1,100 cash to build a house in East Timor—interesting contrast. I beg for the land. I ask the local councils to give me land or a developer. We are always on our knees, trying to get some land. We are just about to launch a \$10 million land fund, which we think will produce a \$100 million worth of houses, but it is about \$70,000 in this country. So we get that money and we get a tremendous lot of donated material—a lot of building supply places will do it. We go to electricians, tilers, roofers and plumbers and say, ‘Can you do this job for me for free?’

All the hard labour is provided. The painting, the digging and the planning is all provided by labour, typically from the person who is the sponsor of the house but not exclusively. We then sell that house and finance the buyer into the house 100 per cent less \$500. He has to undertake to repay the loan, give us \$500 down payment and spend 500 hours working on the house—that is, a year of Saturdays with 10 hours. It is a significant commitment, and he does not get the keys till he does. Lots of people say, ‘No, I’m not going to do that. You just give me the house.’ They never get the house and, as a result, our default rates in Australia are zero. They are not zero elsewhere but in Australia they are zero, and I think that is a big key to it. They have to work on the house or someone else’s house. The husband and wife will come along and both will work typically on Saturdays.

We take the repayments and invest them in a pool. I have all those repayments coming into one central pool, and somebody in Ballarat says, ‘I’m ready to start; here’s the money.’ The repayments go immediately to the one who is ready to start the project. I have got some repayments coming in from Perth, from Rockhampton or wherever it is and they immediately go out and go into another house. We are constantly expanding, so we are always trying to find new sponsors and new individual donors.

There is another interesting thing when we are talking about the size of the donation. As you move up the donor pyramid, donors become much more specific and start to designate their donations. You, Senator, a wealthy man, would say, ‘I’ll give you \$10,000 but I want it to go into this place here,’ ‘These are my friends’ or ‘I know this place,’ so that is where it has to go. Fewer and fewer people are giving us money to pay our overheads. Our overheads are about 16 per cent, which is very low in not-for-profit terms, which are typically in the 30 per cent to 40 per cent range. It is 16 per cent because there is a lot of donated labour and a lot of donated materials, so it is relatively low but it is hard to raise that money. You can only get that from undesignated money. People give you \$10 a week or \$30 a month or send you a cheque for \$1,000 occasionally. It becomes increasingly hard because you are always wanting to move those people up. You get them to give you \$10,000, and they start to designate it and you lose the \$1,000 of undesignated.

**CHAIRMAN**—I think you indicated at the outset of your remarks that Habitat had built 220,000 houses world wide. How many in Australia so far?

**Mr McLellan**—We have only built a handful of houses in Australia.

**CHAIRMAN**—How long have you been operating in Australia?

**Mr McLellan**—We have been operating since the late eighties. Let me just give you the numbers: our organisation was moribund and only building four or five houses a year when I became chairman 2½ years ago. Last year we did over 500 houses—it went from four to 500 in two years—and we are going to do more than a thousand this year. That is what I say about eating you up—you do not get from five to 500 easily with people who have been satisfied with five. We are moving ahead. We have got a long way to go yet, but I am very grateful for it.

**CHAIRMAN**—Would you like to tell us a little about winning the Prime Minister’s award?

**Mr McLellan**—How I got involved?

**CHAIRMAN**—What were the characteristics and the issues around your winning that partnership award?

**Mr McLellan**—There are two problems. One is that the people who work in the Habitat affiliates, the local groups on the ground, are people who like to build. They are very much connected with their community and are locally identified as ‘somebody from Ballarat’. They want to build a house in Ballarat, and when they have built that house they want to build another house. Unfortunately, these people were together in a board that had no overall vision. They were just thinking about Ballarat, Rockhampton or Maribyrnong instead of thinking about what they could do for Australia and what they could do for the world. Changing that perception has been a big job. We have had significant turnover in the board and had to recruit some more people who had a bigger vision and who could go out and raise the money. These are wonderful people, and I am very grateful for them, but they are raising money from the butcher, the baker and the candlestick maker in Ballarat and not calling on the ANZ Bank and asking to be given millions.

**CHAIRMAN**—Was the award won by Habitat for Humanity or was it in partnership with a specific corporation?

**Mr McLellan**—The way it is structured is that Habitat for Humanity Australia has a franchise, in effect, a licence to use the Habitat model and the name and the branding, and it in turn sublicenses it to individual affiliates—somebody in Ballarat, Maribyrnong or wherever. We had lots of these affiliates all doing their own thing. What I did was to collapse them all into one affiliate per state and have one legal entity per state. That was a big fight in itself. I had to take away power from some of them because I was concerned about our brand. Our brand has just been valued in the US at \$US1.83 billion. It is right up there with Federal Express, Starbucks and so on.

**Senator BRANDIS**—When you say that your ‘brand’ has been valued, what do you mean?

**Mr McLellan**—There are firms that put a relative value on the brand of major corporations.

**Senator BRANDIS**—Do you mean the commercial goodwill?

**Mr McLellan**—Yes, exactly. Habitat's balance sheet is nothing. Habitat is just like any other NGO—it has a few desks and chairs—but it has a reputation that has been valued in the stratosphere. When we go to the ANZ Bank, which I keep mentioning, we are very proud of our brand—it is hardly known in Australia, of course—and we want to protect it. We think it adds value to the ANZ Bank. We are expanding in Australia, and we are very active in East Timor, Cambodia and Aceh. We are doing a huge amount of work in Aceh, and we are about to start a 550-house project in the Philippines, all financed out of Australia. We have a lot going on.

**CHAIRMAN**—Again, was the award to Habitat for Humanity on its own or was it to Habitat for Humanity in partnership with a major corporate sponsor?

**Mr McLellan**—No, on its own. The arrangement is something like: 'You will give me a quarter of a million this year and I will build three houses in places that we agree on.' The ANZ Bank then say, 'We want to start a branch in, say, Tullamore and we would like to get connected to the community there. Can we build a house in Tullamore? We have to form a group in Tullamore to get that under way, and you will sponsor the house—that is, you will put up the money for the house—and we will do all the organisation and programming, we will bring in all the materials, organise the labour and allow you to work on the house, but it is our property.' They have made that donation, but they get all the trade-offs from it in the local community, in the press and from their staff visiting and working on the site. It is our property, but they have made a donation to us.

**CHAIRMAN**—Thank you very much for your submission. It will be very helpful to our inquiry.

**Mr McLellan**—Thank you very much for giving me the honour.

**Proceedings suspended from 10.54 am to 11.08 am**



**REDMOND, Professor Paul Murray, Private capacity**

**CHAIRMAN**—Welcome. Do you have any comments to make on the capacity in which you appear?

**Prof. Redmond**—I am appearing in my personal capacity as a professor in the Faculty of Law of the University of New South Wales.

**CHAIRMAN**—The committee has before it your submission, which we have numbered 84. Are there any alterations or additions you wish to make to the written submission?

**Prof. Redmond**—No, though re-reading it for purposes of this appearance today, I was embarrassed by the number of errors that should have been picked up in a closer reading. If it is of any assistance to the committee, I would be delighted to correct those errors. The other thing is that I put in a supplementary submission when I was invited to appear today—

**CHAIRMAN**—Submission 84(a).

**Prof. Redmond**—yes, and that submission only went in on Monday.

**CHAIRMAN**—I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

**Prof. Redmond**—I start by saying that the present and rather exiguous—scant—body of legal doctrine with respect to the duty to act bona fide in the interests of the company, and its statutory counterpart in section 181(1), does not in my view encourage a broad view as to the extent to which directors may have regard to stakeholder interests. That is my proposition, and I will develop it briefly.

As my submission seeks to say, there are very few cases in this very important area outside of the area of creditor protection, which has really only developed in the last 2½ decades. Those cases require that measures to assist stakeholders must be ‘reasonably incidental to the carrying on of the company’s business for the company’s benefit,’ in the language of *Hutton v West Cork Railway Co.* This restriction does not require disregard for stakeholder interests but permits their recognition only where there is a commercial advantage to the business and therefore indirectly to shareholders.

Probably, although this is not explicit in the case law, that commercial advantage needs to be proportionate to the cost of the stakeholder accommodation. In most cases commercial benefit will permit stakeholder accommodation. However, problems arise where this proportional benefit cannot be confidently assured. These problems are aggravated by the forces of short-termism and directors’ fears of legal action because the accommodation provided might depress stock price in the short term or even in the longer term. That was the advice given to the James Hardie directors by a top tier law firm. In my experience it is the advice routinely given in like circumstances and it is the common understanding of many company directors. It is advice that I think is supported by the present, albeit exiguous, state of legal doctrine in this area.

**Senator BRANDIS**—There is an old saying that all good legal advice is conservative.

**CHAIRMAN**—Senator Brandis, I think the professor is still doing his opening statement.

**Senator BRANDIS**—I was just making an observation arising from his observation.

**CHAIRMAN**—Let us do that at the end.

**Prof. Redmond**—I would be happy to explore that with you, Senator. In the James Hardie case, that advice operated to stifle augmentation of the foundation's funding when that inadequacy was clear and perhaps operated to stifle close consideration of the initial adequacy of that funding in the board meeting of 16 February 2001. The problem was not self-correcting. In fact, the problem in the James Hardie case was corrected only by an extraordinary social and political coalition that extended across the party boundaries.

Directors' duties support one aspect only of the present culture of shareholder value, which my submission suggests is a phenomenon of the moment that was not so evident in the 1970s and has been driven by a number of factors in the 1980s and beyond. In the James Hardie case, I think the important effect of directors' duties, in combination with other forces—including the forces that sustain a broad culture of shareholder value—was to suppress concern for the tragic human dimensions of the issue before the board. Those human dimensions seem to me to be absent from directors' consideration, as revealed most particularly in the report of the Jackson committee of inquiry.

Secondly, I want to emphasise that the logic and force of directors' duties, limited liability and separate corporate personality doctrines are to encourage the externalisation of enterprise cost and enterprise risk and to punish in the long term those firms that voluntarily internalise the cost of their operations where they are not under a legal obligation to do so or where they may escape that obligation through deficiencies in enforcement. We rely upon legislation to protect in those areas. My submission makes the point, which I hope to elaborate, that that protection of legislation is often too limited, too late, too slow and overall inadequate.

Thirdly, I put in a supplementary submission to clarify what seem to me to be five or six options that are valuably available to this committee if it wishes to change the terms of directors' duties. I call the first model mandatory pluralism—the notion that directors and managers must have regard to the aggregate constituency utility, to balance the interests of all and accord primacy to none, including withdrawing primacy from shareholders. That notion, based on a quick look at the transcripts of this committee, is not one that is commanding much attention. I am not here to advocate that it is the model that should be followed by this committee. To do that, I think you would need to have a greater body of research than that which I am presently aware of.

I do think that this notion brings to mind a saying of GK Chesterton—that is, that this idea has not been tried and found wanting; rather, in this country, the notion of mandatory pluralism has been thought difficult and there has been a failure to address it. In fact, it rests upon a very important notion. The rationale for it is that, nowadays, to get maximum enterprise value, you need the commitment not just of shareholders but a whole host of people whose full-scale engagement and commitment in the making of a firm-specific investment, whether it be human

capital or tailoring of the factors of production, is best achieved by a recognition of their interests and is inhibited by a focus upon shareholder interest exclusively. In some ways, this is a team production inquiry that one will get better enterprise value by recognising the claims of the providers of crucial inputs. In some ways, the model of director's duties reflects an industrial revolution mode of thought that the factors of production are fungible and are easily replaceable. Essentially, they are mere commodities. The problem is essentially one of getting a full commitment from sophisticated people where that full commitment is essential for the optimal success of the enterprise.

The second model is one of discretionary pluralism, that you may allow directors to have regard to stakeholder interests and accord priority and sacrifice shareholders' interest to them. The third model, which the committee would be aware of, is the model of enlightened shareholder value, which the English inquiry produced. It was a lengthy inquiry. I must say that it acknowledges the concerns of pluralism by its inclusive approach that requires advertence to certain stakeholder interest but accords priority to the collective shareholder interests and couples that to the operating and financial review.

The fourth and the fifth models are immanent in my primary submission and developed more fully in the other. I think there is case to be made that a model might be that you allow directors and managers to internalise the costs of enterprise operations where they are not required to do so—to clean up, if you like, after the corporation and to allow an explicit licence and permission to do so. A variation on that, which my second submission treats as being simply another way of doing that, is the model adopted by the American Law Institute in rule 2.01(b) that directors and managers may have regard to ethical considerations that are reasonably regarded as appropriate for the responsible conduct of business. It is an ethical licence or safe harbour, if you like. That is not synonymous with the licence to internalise.

The fifth model is simply a much older and presently declining European notion of the enterprise as being more than simply shareholders but a commercial reality with a complex of relationships, lives and commitments embedded in that.

For some of those models, you would want to examine and protect against self-dealing conduct through a statutory business judgment rule akin to that applying to the duty of care. I suppose I would strongly recommend to the committee's attention as between those models some consideration of a combination of the enlightened shareholder value concept with a licence either to internalise or have regard to ethical considerations in terms of the American Law Institute's model coupled in either case with a safe harbour protection in the form of a statutory business judgment rule.

**Senator BRANDIS**—In the five models that you have suggested, unless I missed something, you have not given the status quo as an option.

**Prof. Redmond**—I am sorry. I am looking at alternatives to the status quo. I am assuming the status quo is clearly before the committee. I am simply trying to offer some alternative notions. The arguments against the status quo and the inhibition it has posed are set out in my submission.

**Senator BRANDIS**—But you are not necessarily saying, or are you saying, that the status quo is inadequate?

**Prof. Redmond**—I think the status quo is inadequate on a number of grounds. One is that it is exiguous. We do not know clearly what the status quo is. If you go through the decisions, they rest upon *Ngurli Ltd v McCann*, as with any High Court decision on what the interests of the company are.

**Senator BRANDIS**—If we were to change the law to one of the alternative models you have suggested, that is going to attract the same criticism, isn't it? Any legal status quo, particularly in a complex area of the law, is going to invite the critique, 'We're not quite sure what the meets and bounds of the law are.'

**Prof. Redmond**—I see the force of what you are saying. I will try to bring this to you: at the core of company law is the notion of the interests of the company—what does that mean? It is a category which Julius Stone would have called a category of concealed circular reference; it takes us back to something else entirely. Of course, the statutory expression in 181(1) simply adopts that general law formulation. Richard Brady Franks said it was 'a cant phrase but not yet a shibboleth'. The content of it is so unclear. All the textbooks assume that it means the collective interest of shareholders on the basis of *Ngurli Ltd v McCann*, but with the issue your committee is concerned with—the accommodation of non-shareholder interests—we are forced back to *Hutton v West Cork Railway*, which gives accommodation to those interests only insofar as it is supported by a commercial advantage to the company.

**Senator BRANDIS**—Remind me of the name of the decision of the High Court which said that directors may be required to consider the interests of creditors.

**Prof. Redmond**—*Walker v Wimborne*. Justice Mason referred to that.

**Senator BRANDIS**—*Walker v Wimborne* is the one I am thinking of, which was in 1975, wasn't it?

**Prof. Redmond**—It was reported in about 1976, so about 1975, yes.

**Senator BRANDIS**—Is that the most recent occasion on which the High Court, whether directly or by way of dicta, passed on that issue of creditors?

**Prof. Redmond**—No, the Spies case in the High Court. It was a joint judgment and a criminal prosecution in which a more cautious view was taken in relation to the interests of creditors and, in the context of that criminal prosecution—

**Senator BRANDIS**—Is there a reference to that in your paper?

**Prof. Redmond**—No, there is not. My paper assumes that in relation to creditors there has been a rich elaboration and the position is clear. There is an explicit accommodation of creditors, and the position has been clear for 20 years in relation to directors' duties in the situation in which the company is failing. It is creditors' money which is then at risk. In that area, there has

been clear elaboration. It is in situations in relation to other stakeholders and outside the area of pending insolvency that I think the position is unclear.

**Senator BRANDIS**—I was somewhat attracted to your option 4—the American Law Institute model, which as I understand it is permissive. I invite you to elaborate further on it. I see you refer to it in paragraph 53 of your submission. Do you set out the ALI rule there?

**Prof. Redmond**—No, I do not, but it is very simply stated. I think I can recall it. You may have regard to ethical considerations which may reasonably be considered appropriate for the responsible conduct of business.

**Senator BRANDIS**—Is that in the American Law Institute’s restatement of Corporations Law?

**Prof. Redmond**—It is not a restatement. That particular corporate governance document was not to be a restatement of the law. I think it took the subtitle, ‘Analysis and Recommendations’. I picked this up in footnote 49 on page 23 of my primary submission. The text is in the body of the text of footnote 48.

**Senator BRANDIS**—I am familiar with these American Law Institute statements, but when I was a legal practitioner I referred to the restatements in certain bodies of doctrine which had a certain authoritative status. But I am not actually familiar with *Principles of Corporate Governance: Analysis and Recommendations*. Does that purport to be a statement of the American law or a critique of it? What is the status of the document?

**Prof. Redmond**—I cannot find the footnote reference quickly but, as I recall, the chief reporter, who I think was Professor Melvin Eisenberg of Berkeley, who was the author of that section, stated in the reporter’s commentary that there is doctrinal support in American law for the propositions contained in relation to the statements about the ethical considerations and philanthropy. I can find that and give you that reference. It is not meant to be like the agency restatements and the restatements on trusts. It is not meant to be a restatement of American law, which in this area is state law. There is a quality of a Tower of Babel about American state based corporate law. In fact I think the institute was unable to find common agreement. So, in this area, various portions of it are expressed to be normative in the sense that they are grounded in authority. Others are meant to be recommended.

**Senator BRANDIS**—And what is this?

**Prof. Redmond**—My understanding is that it is grounded in authority. There is authority that supports that.

**Senator BRANDIS**—So should we take this ALI statement, to which you have referred and described as option 4, as being at least arguably a statement of what American law is?

**Prof. Redmond**—The answer is yes. I refer you to footnote 50. I see it now. It reads:

The commentary to the *Principles* states that “there is direct or indirect authoritative support [in legal doctrine] for all of the principles embodied in § 2.01”

And that includes that particular principle.

**Senator WONG**—On that issue, if you wanted to consider whether or not a similar approach would be taken in Australia, how would you then implement it? I understand your evidence is that, essentially, this is an interpretation of the law as opposed to effective amendment. Is that right?

**Prof. Redmond**—The American Law Institute is a body unlike the parliament of Australia—

**Senator WONG**—I am familiar with it.

**Prof. Redmond**—It puts out this document, which does not have the authority of force of law. I suppose one option open to this committee is to include a provision in section 181 which would qualify the operation of section 181(1) by saying that in exercising their powers—

**Senator WONG**—So the business judgments rule applied. Is that what you are talking about?

**Prof. Redmond**—No. Leaving aside the business judgment—

**Senator WONG**—But restating a business judgment rule in the context of ethical or—

**Prof. Redmond**—No. I would say qualifying the duty of good faith in section 181(1). You would say, ‘In exercising their powers and discharging their functions’—the language of 181(1)—‘the directors may have regard to ethical considerations that may reasonably be regarded as appropriate for the responsible conduct of business.’ You can put it in those terms—that would be one option—or you could qualify it more particularly.

**Senator BRANDIS**—Correct me if I am wrong, but that does not seem to me to be very far away from one of the options put before this committee by Chartered Secretaries Australia, I think, to give companies the option to adopt in their constitution what they call a replaceable rule which would enable them to have regard to such matters. Without necessarily adopting that view, do you have a view as to whether or not a permissive principle like that could just as well be in the constitution of the company?

**Senator WONG**—Can I put something to you to think about before you answer that?

**Prof. Redmond**—Yes.

**Senator WONG**—One of the arguments against that, it seems to me, would be that if a company chose to replace the rule, the argument might in fact be that there was no power to have regard and no ability to have regard.

**Prof. Redmond**—Yes, I think that is a consideration. I must say that not every company has a constitution. In fact, since 1998 the thrust of legislation has been to allow companies to be formed without a constitution and to encourage that through replaceable rules. I think, secondly, that the justification for putting in this provision is not so much to protect shareholder interests but to widen the perspective on shareholder interests into a longer term perspective that will be encouraged by allowing explicit regard for ethical considerations. This is not a matter which

should be entirely within shareholders' control. There is a public interest in encouraging directors to give effect to those considerations. So, in a sense, it protects against that kind of pressure also.

**Senator BRANDIS**—I must freely concede, Professor, that I still have an open mind on this question, although my mind was tending to close a bit when I heard the submission of the Business Council, who urged against that course. I can give you my paraphrase of it and hear your response.

**Senator WONG**—Not just because it was the Business Council, Senator!

**Senator BRANDIS**—The argument as it seemed to me was that, if you put even a permissive provision in the Corporations Act, that might very well lead by a train of judicial interpretation to the conversion of the permissive status of that rule to a quasi-mandatory status.

**Prof. Redmond**—Do you mean the Australian Institute of Company Directors?

**Senator WONG**—No, the BCA. The evidence—

**Senator BRANDIS**—No, I mean the Business Council of Australia.

**Prof. Redmond**—A similar point was made to you, I think, by the Institute of Company Directors.

**Senator BRANDIS**—What do you say about that?

**Prof. Redmond**—My instincts are very strongly against that. It seems to me that of course, if it is poorly drafted, it has that concern. It has the risk by implication.

**Senator BRANDIS**—Let us assume it is beautifully drafted.

**Prof. Redmond**—And then that by implication you would say therefore it denies a licence in relation to areas that are not—I must say, in relation to ethical considerations, that I have no problem with denial of an ethical consideration that could not reasonably be regarded as being appropriate for the responsible conduct of business. I think that is a wide enough umbrella, and, if there is an exclusion in relation to conduct that cannot be reasonably regarded as responsible, I am not worried about that. I think that, in a sense, that can be a convenient alibi for not giving a licence whose need has been powerfully demonstrated in the James Hardie matter. I think the Hardie matter is really important for this committee.

**Senator BRANDIS**—Sure.

**Prof. Redmond**—There are powerful messages from that about problems it discloses in relation to the failure to heed human suffering, the human dimensions of matters before the board, and I think directors' duties were part of the great fog, the great mist, that prevented due regard for the human dimensions of the issue.

**Senator BRANDIS**—It seemed to me that the legal advice to which you referred in your opening, when I interjected, which was conservative legal advice, caused the directors to operate under a perhaps appropriate sense of constraint.

**Prof. Redmond**—You say it was conservative. I think it was sound legal advice. It is what the doctrine says. It is exactly—

**Senator BRANDIS**—Sure. But, as I said to you, most practising lawyers do live by the rule that good legal advice is conservative.

**Prof. Redmond**—In a sense, if ‘conservative’ means ‘faithful to the body of doctrine’—

**Senator BRANDIS**—Yes, cautious.

**Prof. Redmond**—then I think yes, and that is the problem before your committee. We have a body of doctrine which (a) is exiguous and (b) supports only a narrow view of recognition of non-shareholder interests.

**Senator WONG**—Can I take you through this step by step so that we are clear. As I understand your evidence, your suggestion is that the current state of the law, of decided authority, is that there is a significant question mark over the ability or entitlement of directors to have regard to ethical or stakeholder issues when discharging their duties. Is that correct?

**Prof. Redmond**—Unless that regard is supported by commercial advantage to the company, which arguably needs to be proportional to the cost of that regard.

**Senator WONG**—Which is TEC, is it?

**Prof. Redmond**—No, I think that is the effect of *Hutton v West Cork Railway Co.* 1883.

**Senator WONG**—All right. Can we go back that far?

**Prof. Redmond**—That is still the leading case.

**Senator WONG**—I am about to put to you what has been put to us so that we can be at least *ad idem* on the arguments. You raised the issue of James Hardie. That has been a subject of discussion for the committee, although, to be honest with you, we have also attempted to discuss it not only in that context. But I think that, in the context of directors’ duties, there are issues there which need to be determined. I invite you to consider the *Hansard* and submission from the BCA. Mr Munchenberg clearly indicated that he was not a lawyer; he was paraphrasing the legal advice. The first issue I want to raise about Hardie is that his assertion was that the reports as to Hardie’s view of the limitations on the choices that directors had arising out of directors’ duties were incorrect.

**Prof. Redmond**—The Jackson report?



**Senator WONG**—No, the media reporting and public discussion. I hope I am getting this right. He said that it was not so much an issue of directors feeling they were unable to have regard to those broader or ethical considerations as a result of their legal duties.

**Prof. Redmond**—I quoted in both submissions the words of the directors, in the case of the chairman of directors, that were used in the Jackson report, which were in terms of the advice they received. I also quoted Hardie's media release of October 2003.

**Senator WONG**—I am not putting this view to you as mine.

**Prof. Redmond**—I think there is a great deal of evidence on the record as to the role of directors' duties in that decision and in the body of the report itself and much more fully in—

**Senator WONG**—The Jackson report?

**Prof. Redmond**—Yes, in terms of the decisions that prompted the various directors at the board meeting of February 2001.

**Senator WONG**—The second argument that has been put to us—and I think Senator Brandis referred to this—is the concern that a permissive provision would essentially lead to a mandatory requirement. So it is less the issue that you raised about what is excluded from the umbrella or rubric—I cannot recall the phrase you used—but more that, if you failed to have regard to the issues that you are permitted to have regard to, the case law could then proceed to a situation where the legal requirement was in fact akin to a mandatory requirement. The reason that I am having difficulty putting the argument to you is that I do not agree with it and I am trying to be faithful to it. Essentially, the concern is that, even if you drafted it in the permissive—that is, 'may have regard to' or 'is permitted to have regard to' et cetera—many of the peak business groups coming before us say that that would end up being essentially mandatory. So I wonder if you could comment on that from a legal perspective.

**Senator BRANDIS**—Before you answer that—if I may, Senator Wong—to do justice to Mr Munchenberg, I think his argument was a tiny bit more sophisticated than that. He said, as I recall, that one of the reasons that that fear was held was that, by the inclusion of a permissive provision, that of itself identified that which was permitted to be necessarily a relevant matter. So, although it would not necessarily follow that the board must have regard to those matters, it could. It would not be much of a leap to imagine a court deciding that, because the legislator has said that the board may have regard to these matters, in any event they are relevant matters and, having elevated them to statutory relevance, the threshold of the extent of judicial review of directors' performance of their duties might be increased. I think that puts Mr Munchenberg's argument fairly.

**Senator WONG**—Professor Redmond, I apologise that Senator Brandis and I are arguing across the table, rather than asking you the questions, but Mr Munchenberg said:

The second concern is, and there are probably better lawyers here than me and I am happy to discuss this, that having put in a provision that says, for example, the board may have regard to, there may come a time when a court says, 'What did you do as directors to determine whether you should have had regard to these other things?' so you do actually create a legal obligation, notwithstanding that you are attempting to—

And then he was interrupted. Do you understand the argument?

**Prof. Redmond**—I think so. Let me try to briefly respond to it in three ways. Firstly, the courts are not clogged with litigation against directors for breach of their duty to act bona fide for the benefit of the company. That is part of the problem: we have so little case law in this area because we have so little judicial decision in this area. One could easily exaggerate the fears of litigation, and I think they are exaggerated. Secondly, the United Kingdom parliament are in the process of passing a law that will require directors to have regard to a much wider range of matters than the ALI's brief formulation in relation to ethical considerations, and that is not seen as an obstacle. I must say that I think it is a conservative document they are bringing forward. It requires that, and I do not think it is an unreasonable requirement in the context.

To come more specifically to this point, one quick response is to say that if it became a de facto requirement that you must have regard to ethical considerations that are reasonably regarded as appropriate for the responsible conduct of business and if directors must have regard to ethical considerations of that kind, is that the most egregious, wrong thing imposed by legislation. I would hope that every board would have regard to the ethical considerations reasonably regarded as appropriate.

**Senator BRANDIS**—That begs the question, with respect, doesn't it?

**Prof. Redmond**—In terms of what they are?

**Senator BRANDIS**—Yes.

**Senator WONG**—The same argument: that they are in the best interests of the company.

**Prof. Redmond**—Is this decision we have made within the realm that might be regarded as responsible conduct of business? I do not regard that as an impossible exaction. If expressed as a mandatory rule, of course the fear is, as you put it, that a licence might be perceived as a mandatory rule. I think that fear, in its own terms, is a scarecrow of apprehension. But even—

**Senator BRANDIS**—But you favour mandatory pluralism, don't you?

**Prof. Redmond**—Me personally?

**Senator BRANDIS**—Yes.

**Prof. Redmond**—No, I don't. I think mandatory pluralism has not been given proper consideration. I think it was a great weakness of the Cooney committee, that they thought they could address that question just by saying it is shareholders' money. It is more than that. Enterprise is much more than shareholders' money; it is a kind of a jejune notion of enterprise, which I think should not be repeated in the early 21st century. Enterprise is much more complex and it requires very sophisticated inputs, particularly with the kind of high-end enterprise that we are looking for in this country. It requires a real buy in—real firm-specific investment by smart individuals, as well as simply people who give their working lives—and, in the case of James Hardie, their lives—to an enterprise.

In the UK, the Company Law Review, in its consideration of pluralism, in one of its papers, said, 'We think much more research needs to be done about that, and we are going to commission that research.' In the next report that research was not referred to. They simply said, in rejecting the pluralism model, that which I paraphrase, namely, 'It gives the courts or managers too much discretion.' I think that is an argument that is defensible, but the research on the elements of team production has not been done. I expect it is not within the time frame of this committee to do that research. I think it is a question which the successful prosecution of enterprise requires much more consideration be given to.

**Senator WONG**—Chairman, I wonder whether I could proceed a bit and then if you need the call again, I am sure the Chairman will look at you, Senator Brandis. Professor Redmond, your view about the current state of the law is that it raises a question mark over the ability of directors to take into account ethical considerations. Is that an accurate—

**Prof. Redmond**—At the moment, yes, if there is no commercial benefit.

**Senator WONG**—Your view is that the legal framework or the advice regarding the legal framework as to directors' duties contributed to the decisions of the Hardie board?

**Prof. Redmond**—I think there was evidence of that in the Jackson report.

**Senator WONG**—Mr Bowen has very kindly found the section where Mr Munchenberg on the last occasion—and I am not trying to have a go at him; this is a view that has been put to us by others—suggested that the Hardie board's claim was somewhat narrower than perhaps what you might have indicated here today. He said:

My understanding is that they claimed that, having identified a shortfall in the funding to the foundation that was established to deal with claims, they perceived that they were being asked to sign what might be construed as a blank cheque in agreeing to fund any future amount of liability. They said that they were unable to do that without shareholder approval and they were concerned about the potential for litigation being brought against them in the US, which has a somewhat different attitude to shareholder rights than we have in Australia.

**Prof. Redmond**—What I suggest in my submissions is that directors' duties obscured careful consideration of the financial needs of the foundation when the foundation was established. Secondly, the inadequacy of the foundation's funding and the assumptions upon which the foundation was formed were brought to the attention of James Hardie management in May 2001, and it was not until July 2004 and the last day of the public hearings of the Jackson committee that Hardie's made some commitment to augment the funding for compensation. That was over three years. In its media statement of October 2003, the company indicated that directors' duties preclude directors from augmenting the funding of its former asbestos subsidiaries. A third, very powerful element in relation to directors' duties is the cancellation of the 'partly paid' with no consideration at all. I have to say that I find that breathtaking.

**Senator WONG**—I agree with that. When we looked through the Jackson report, that was the thing I noticed. It did not get as much press because it is a complex issue, but essentially removing that—

**Prof. Redmond**—It was the lifeline.

**Senator WONG**—I was about to say ‘removing the lifeline’.

**Prof. Redmond**—If there had been no settlement, it was the only way in which those deficiencies in the funding could have been met.

**Senator WONG**—Yes, I agree with that. Therefore, if we were to consider different options around changing the law in this area, do I understand that at the top of your list would be a permissive provision in 181?

**Prof. Redmond**—Where you put it is not important, but its context is in relation to the duty that is contained in section 181(1), so proximity to that would be logical.

**Senator WONG**—What I am trying to clarify is: would you try to seek to amend the act in relation to putting in a permissive provision regarding directors’ duties? Would you look to some other mechanism, perhaps a definition around what constitutes the best interests of the company? I am asking for your views—and I appreciate that you are not at a drafting stage. What are your views about the benefits of it?

**Prof. Redmond**—What I have put to you in my opening remarks is that it seems to me that, while the enlightened shareholder value model, adopted as a result of the United Kingdom review, is seen by many as a very conservative model—that committee started with the notion of looking at pluralist models—and what it came down to was an enlightened shareholder value. In my submission I said that that really is an enhanced shareholder value model. It says that in the interests of shareholders you must consider these other interests. I think there is great deal of value in that model, partly because it gives the directors protection against the very strong market forces that the English committee recognised and had evidence of in favour of short-term thinking—not taking any action that affects the stock price in the short term.

**Senator WONG**—Do you not have concerns about the mandatory language?

**Prof. Redmond**—I have to say that, no, I do not and I think there is very reasoned elaboration in favour of that inclusive approach which requires consideration in the shareholders’ interests where practicable and where relevant to those interests, those matters. It is paying an appropriate obeisance to the commitments that you want in enterprise from various people whose inputs are essential to its success, and they are much more than shareholders. It opens up the horizons of thought. I think that one of the contributions of pluralism is to draw attention to the team production nature of much enterprise and the necessity of encouraging firm-specific investment from all those people, those stakeholders. I would couple with that what I have called the American Law Institute’s ethical consideration. My preference, I suppose, would be an explicit licence to internalise the enterprise costs.

**Senator WONG**—Why would you need that in addition to the enlightened shareholder provision?

**Prof. Redmond**—Because the enlightened shareholder value is really saying that in the interests of shareholders you must—

**Senator WONG**—I see.

**Prof. Redmond**—This goes further and says that in some cases company law permits you to ignore the waste of enterprise and that you ought to be given explicit licence to clean up after enterprise.

**Senator WONG**—What do you say about those who would argue that there are inconsistencies therefore in what directors must have regard to? One of the arguments about not changing the duties is that people say you cannot achieve social outcomes by creating a multiplicity of social objectives against which directors must measure their actions. Let us leave that to one side, but that is the context. In the amendments that you talk about, you are looking at what could be potentially inconsistent requirements to have regard to not only enlightened shareholder value but also licence to internalise costs, which potentially could reduce your shareholder value.

**Prof. Redmond**—What I am saying in my submission is that this model would permit a licence to internalise the costs of group enterprise. So it would address the problem of James Hardie—namely, that the costs of group enterprise in the case of the former asbestos subsidiaries were all these compensation claims for the future. The directors of Hardie would have had the option clearly in front of them that they could bear those costs. Subject to the protection against self-serving, rationalising conduct, there must be the four elements for the statutory business judgment rule that is presently confined to the duty of care—namely, good faith and proper purpose, the absence of material personal interest, appropriate information and that the judgment made must be within the realm of the rational, the reasonable.

**Senator WONG**—I am still not entirely clear, other than on the cost perspective, why you are arguing for both.

**Prof. Redmond**—I think that, from the perspective of shareholders and enterprise success, the enlightened shareholder value model has considerable encouragement value against taking a short-term view of shareholder interests. To bring in a range of other stakeholder interests in the interests of—

**Senator WONG**—I understand that.

**Prof. Redmond**—I think that, in a sense, that still leaves the problem of what if there is a cost of group operations that the company is not legally bound to pick up? The problem in the Hardie situation is the combination of directors' duties plus separate personalities within corporate groups. The pincer effect of those two doctrines is to enable a holding company, a group company, to slough off the tort liabilities of a subsidiary. In fact, the directors' duties make it difficult to voluntarily assume those obligations. I think they should have the licence to do so if they wish to do so, despite the fact that it may not be, in the short- or medium-term, to the commercial advantage of the company to do so. That is why I think that licence is valuable.

**Senator WONG**—Can I just clarify your view about the replaceable rule option?

**Prof. Redmond**—I think it is the Chartered Secretaries' notion.

**Senator WONG**—Yes.

**Prof. Redmond**—I had a look at that submission and at the transcript of discussion involving it. I do not see a lot of value in it. This is not a matter of shareholder autonomy; this is a matter in which I think you are legitimately protecting directors against shareholders to a certain extent. You are enabling them to give effect to either ethical considerations or their own sense of where the company's long-term benefit lies, against all the market pressures of short-term impacts. I think there is a public interest in granting that licence and doing it in a way that does not allow shareholders the autonomy of withdrawing it.

**Senator WONG**—What about the argument I raised before? If we were to go down the path that is, I suppose, an easier option in some ways, you might have a situation where a company chose to remove that rule. Perhaps you add weight to the argument that the existing duties do not allow you to have regard to those wider considerations.

**Prof. Redmond**—Its withdrawal may well have that negative implication.

**Senator WONG**—Is there anything beyond the amendments in the terms you have described—in the two areas of the enlightened shareholder and the licence to internalise? Is there any other option you would want to put before us? You seem to have done a fair bit of preparation for this, and both your submissions are of a very high quality. I do thank you for them because it has been an area we have talked around a fair amount. But you would have seen from your research and from the *Hansard* that there is considerable opposition to amendment. I understand where you are coming from in terms of the argument: is it so egregious that we actually require this? People would argue from a practical perspective whether this is the way to go. I am more interested in whether there is any other way in which you can see that parliament could indicate or encourage directors to have regard to broader stakeholder concerns?

**Prof. Redmond**—There is the question of incentives to encourage disclosure in all those provisions which I see that you are interested in. That is a different question. If you are looking in the area of director's duties, alternatives to the status quo, I suppose I have sought to rummage out and produce six here that seem to me to be different. I saw the contribution that I could perhaps make to your work in terms of identifying alternatives. To be honest, I cannot think offhand of another, but I am very happy to give you a further submission.

**Senator WONG**—No, you have done well with six. Most people just say no. One of the options Senator Murray canvassed was a statutory note.

**Prof. Redmond**—The provision has been adopted in the last 10 years for statutory notes in footnotes to the section. Whether it is in the body of the section or in a statutory note to the section, I do not see it as being a difference of substance. What I think is important is to meet head on the view that no change is necessary; that the current law permits directors and managers to have regard to stakeholder interests as they wish to do. I think that proposition is not supported by the state of current law. It is not supported by current practice. It is not supported by directors' perceptions of the licence they enjoy. And it is not supported by the experience of the James Hardie imbroglio. Addressing that matter head on is the most useful contribution I can make.

**Senator WONG**—Thank you. That has been very useful.

**CHAIRMAN**—How do you account for the evidence from the Institute of Company Directors that they believe that the current law is sufficient for business?

**Prof. Redmond**—I was surprised that the foundations for their view were not pursued in discussion with them, that the statement that there was simply a right under the present law to do that was not one that was examined. I do not see in the body of their submission an examination of the basis for that view. Of course, it stands in stark contrast to the view that Allens Arthur Robinson gave to the board. I think the views of the general feelings amongst company directors are more accurately reflected in that advice.

**Senator BRANDIS**—Forgive me, Professor, I have not read the Jackson report. Does Mr Jackson make any recommendations in relation to this matter of amending the law?

**Prof. Redmond**—No, he does not. He is very cautious. He had quite specific terms of reference, and they did not involve an examination of law reform.

**Senator BRANDIS**—So we would not get any guidance from the Jackson report on this matter, other than, as you would say, what it reveals of one particular instance of corporate behaviour?

**Prof. Redmond**—Yes. I am looking at it through the lens of a particular inquiry that you have established. What it does look at is whether there should be some reform of the law in relation to the circumstances in which a holding company should be required to bear the responsibility for the torts of its subsidiaries, and there is some useful—

**Senator WONG**—Particularly when they have already been discussed.

**Prof. Redmond**—They have been discussed before.

**Senator WONG**—That is right. The liability essentially has already been accrued at the time the relationship is created.

**Prof. Redmond**—Yes. Mr Jackson drew attention to the fact that there was a limited body of submitters before the Corporations and Markets Advisory Committee when it conducted that review in 2000 and that a variety of perspectives were not brought to the committee. I think it is a strength of this committee that you have a very broad range of submissions and a broad body of evidence from a number of perspectives.

**Senator BRANDIS**—So Mr Jackson did not even comment on whether he thought the Allens Arthur Robinson advice to the board as to the considerations to which they could have regard was correct?

**Prof. Redmond**—I don't recall him passing judgment on that. I must say that my assumption is that he did not query its accuracy, but that is a matter about which I would not want to be making a positive statement.

**Senator WONG**—My suggestion, I assume, would not be a problem with you, Professor. Given that we have been discussing the AICD evidence, might we invite them to reply to some of the arguments you have put here today and in your submission?

**Prof. Redmond**—Certainly.

**Senator WONG**—I presume you would not have a difficulty with that.

**Prof. Redmond**—No problem at all.

**Senator WONG**—The reason we probably did not canvass it with them, Professor Redmond, is we were very clearly aware that they were not going to shift in their position.

**Prof. Redmond**—If you were to do that, I would be grateful if you would draw to their attention the written submissions I have made—

**Senator WONG**—Absolutely.

**Prof. Redmond**—I think the question is a central one for your committee.

**CHAIRMAN**—Thank you very much, Professor Redmond, for your appearance before the committee and for your expansive views. They have been very helpful.

**Prof. Redmond**—Thank you very much.



[12.01 pm]

**BELL, Mr David Peter, Chief Executive Officer, Australian Bankers Association**

**TATE, Ms Diane Elizabeth, Director, Corporate and Consumer Policy, Australian Bankers Association**

**CHAIRMAN**—I welcome the representatives of the Australian Bankers Association. The committee has before it your submission, which we have numbered 106. Are there any alterations or additions you wish to make to the written submission?

**Mr Bell**—No.

**CHAIRMAN**—If not, I invite you to make an opening submission, at the conclusion of which we shall have some questions, I am sure.

**Mr Bell**—Thank you, Chairman, and thank you, Committee, for the opportunity to appear today. My colleague Diane Tate has prepared the submission, so I will call on her for answers to technical matters. I would like to make a few key points by way of summary rather than read our submission onto the record, which I am sure you will be grateful for. It would be fair to say that these days banks are recognised for their leadership in the area of corporate responsibility. Our banks acknowledge, quite explicitly, corporate responsibility and have many programs that demonstrate this. In fact, many of our members would see corporate responsibility as an integral part of the service offered to customers and the potential point of differentiation when they are making their offerings to customers. In other words, they actively embrace corporate responsibility. There are any number of examples of that: the financial literacy programs which we have been running, the community banking model, which a couple of our banks run, flexible work arrangements for staff and the substantial corporate sponsorships we make. Some banks also publish comprehensive statements of their commitment to corporate responsibility.

Corporate responsibility is also a very familiar concept to me at the ABA. My board of bank CEOs, some 12 of them, constantly deal with the reputation and regulatory issues that we have to deal with through the prism of wanting to be good corporate citizens and do what is best for the community and for Australia. Some examples of the things that we have undertaken with the support of our CEOs in the corporate responsibility area include a world-class bank code, our own financial literacy programs and standards for electronic banking for older Australians and people with disabilities.

I make those comments to provide context for some specific remarks in relation to mandating corporate responsibility. You will see from where I am coming from that our view is that there is no need to mandate some of the aspects of corporate responsibility which have been proposed. We believe that corporate decision makers already have the ability within the current legislative framework to have regard for the interests of shareholders and other stakeholders. Whilst directors must have regard for the short-term and long-term interests of the company, to ensure sustainable economic growth and increased profitability they should also, and do, take into account different operational issues impacting stakeholders. In fact you can argue that it is not

possible to run a sophisticated corporate entity today and not take account of corporate responsibility without jeopardising your financial and operational performance. That is certainly our view at the ABA and our observation of the performance of our banks.

Therefore, we feel that revising the Corporations Act to oblige or explicitly allow directors to take into account the interests of other stakeholders we feel is unnecessary. We believe that banks already demonstrate that they have regard for stakeholders in addition to shareholders. Further, we think that a statutory obligation could have adverse consequences for innovation in corporate responsibility practices and therefore could be potentially counterproductive. As a general observation, we would say that sometimes, when you introduce a standard for performance, performance necessarily gravitates towards that standard. Additionally, codification or legislation for sustainability-reporting requirements could limit the value of such disclosure as well as the company's ability to determine what best suits its reporting needs and the needs of its shareholders and stakeholders.

So by way of conclusion I would say that we believe it is important for a board to retain discretion in assessing interests of stakeholders to determine when and to what extent certain stakeholders in particular circumstances may be impacted by the decisions of the company. We believe that banks have already demonstrated that they do this through our increasing voluntary commitment to corporate responsibility and responding to the expectations of shareholders, customers and the community. We understand that there is no evidence that the corporate responsibility approach based on compliance will ensure responsible business practices, an ethical corporate culture or a long-term sustainable corporate performance. In fact it could lead to a tick-a-box approach to compliance, which is not desirable and which defeats the spirit and intent behind the concept of corporate responsibility.

**CHAIRMAN**—Thank you, Mr Bell. Do you have anything to add?

**Ms Tate**—No. We are happy to go to questions.

**CHAIRMAN**—You have reinforced what you said in your submission, namely:

A prescribed reporting framework could limit the value of such disclosure as well as limit the company's ability to determine what best suits its reporting needs and the needs of its shareholders and stakeholders.

Given the absence of a standard reporting framework in Australia for non-financial information, how seriously do you believe the financial markets take information that is published by those companies that do report in this context?

**Ms Tate**—In a sense, our submission highlights that we believe that sustainability reporting is still evolving. Parking that as our assumption, we know that market analysts are increasingly getting interested in this sort of information. By way of example, we know that our banks that make available stand-alone reports as well as parts of their annual reports that give information on staff turnover or, conversely, staff retention rates are being looked at a lot more closely by analysts as a way of measuring current and future performance. Staff turnover obviously has real costs to a company and also costs in terms of reputation and corporate culture. I guess that sustainability reporting at the moment generally lies in the thinking that it is perhaps not something that is already done by companies. We disagree with that presumption. We think that

it is done by companies already. There are a number of frameworks available—the Global Reporting Initiative is one of them—that some of our banks use as part of their annual reporting. Also in the law we have requirements, such as in the Corporations Act in terms of the management discussion and analysis obligation recently introduced by the CLERP 9 amendments. We have also got continuous disclosure obligations and, as things become increasingly important for the community and for companies, such as climate change and those sorts of things, it is possible that these sorts of things would meet the materiality test of continuous disclosure. Also, of course, the ASX corporate governance principles have a number of explicit and implicit requirements for listed companies to report against financial and non-financial matters.

**Mr Bell**—I would round off that answer by saying that market analysts would presumably have two interests, one being a per se interest. The second one is how it affects the business prospects of the entity. I guess there are two bits to that. Firstly, by banks and other entities doing these things, does it stave off regulation which might follow, which would be more costly than banks doing things? If it does achieve that, that is a good thing—a tick in the box. The other thing that they would have to consider—and I do not have any evidence to hand on this but we can certainly look at it—is whether by banks doing these things and having regard to corporate social responsibility it attracts customers to their particular business model. There is a clear indication from what I have seen and read that people are attracted, for example, to what Bendigo Bank does with its community banking model.

**CHAIRMAN**—What is your view on the request by the federal environment minister to ask the ASX to consider the Global Reporting Initiative as a standardised voluntary reporting framework for inclusion in the Australian Stock Exchange Corporate Governance Council's principles and recommendations?

**Ms Tate**—The ABA is not a member of the ASX Corporate Governance Council but we are aware of that reference being made. We liaise closely with some other groups in terms of that sort of issue, like the Business Council of Australia. I guess that our views on GRI are that a number of our banks have made a decision that this is a framework that they think is useful. It is certainly evolving, as I said. It provides some financial sector-specific reporting indicators. Having said that, though, it is a very substantial framework. The important point we would make in relation to reporting frameworks is ensuring that they are appropriate for the company in terms of its own reporting needs and the needs of its shareholders and stakeholders. There are a lot of companies and a lot of sectors, so it is difficult to envisage how a reporting framework could be codified that is relevant to the interests of those wide interests. At this stage companies are using the reporting framework, but that is an evolving process. I think that a number of problems have been identified, such as lack of guidance regarding some intangibles, some indicators that are not necessarily consistent and lack of comparability of company performance. These are things that are being worked through. I think that as GRI continues its process—and I know that round 3 is still being consulted at the moment—these things will start to develop further. A number of our banks are actually involved in the process of giving information on the usability of these indicators. So I guess there are two points: we need to remain flexible and we need to make sure that, if it is a reporting framework, it is useful for the informational needs of all shareholders and all stakeholders.

**CHAIRMAN**—What is your view on KPMG’s proposal—and again it relates to the ASX Corporate Governance Council—that there be encouraged the inclusion of sustainability reporting on those principles but that those listed companies that do not issue such reports should be required to explain why they have not done so?

**Ms Tate**—Again, I make only an observation as we are not involved intimately in the process. I think that principle 7 regarding managing risk and disclosure of risks that are financial and non-financial already has you a long way to that point. Whether there would be any added value for renaming that as sustainability, I am not sure. We believe there already is sustainability reporting.

**CHAIRMAN**—You recommend the development in Australia of a web based tool similar to the London Stock Exchange Corporate Responsibility Exchange noting that this would complement existing voluntary reporting practices and would not impose additional regulatory burdens. Can you give us any information on your members’ experience of the LSE Corporate Responsibility Exchange and why you support this initiative in the Australian context?

**Ms Tate**—We put that forward because we obviously are supporting the legislative status quo and we pre-empted that the committee would be interested in what possible alternatives we see as improving what is currently done within Australian corporate reporting and behaviour. I guess what we were looking at here are the push and the pull. Our banks are already pushing information out there but how do we get that pull from institutional and individual investors to be interested in this information? One of the areas that we see as being a little problematic is that there are a number of market surveys conducted as part of these indices or matrixes that are out there currently. Our banks do very well in them, which is a good thing, but it does take up some time responding to them. So, in a sense, it is an idea of being able to put into a single model something you can disseminate to the market in a systematic way. We would not see this being an added burden to what is currently done; it is just a mechanism for getting it out there in one way. So from a company perspective it would be more efficient and from an information dissemination perspective for the investors they know where to go. As far as experience in it goes, we know that a number of our banks that operate within the UK environment are involved in this and they find the process has been useful.

**Mr Bell**—It would be useful if we explain beyond the status quo. We certainly support the status quo for any further legislative or mandating requirements. We certainly do not support the status quo when it comes to banks and other institutions constantly developing their corporate responsibility programs.

**Ms BURKE**—On that notion of indices and that the banks are all getting big ticks for doing all these wonderful things—and literally every submission has quoted one or other of the majors as doing these things—how do you actually verify that that is going on? What audit process and scrutiny is demonstrating that the banks are the great corporate citizens that you, they and everybody else are claiming they are? You can write it in a report, but where is the audit, the actual analysis, that that is taking place, especially if it is being used as the basis for a decision for people to invest or be employed or for customers to make that decision to go to?

**Ms Tate**—In answer to your question there are two points that I would like to make. The first point is that these indices and matrixes that exist already have checks and balances that they go

through. The best to answer those are Dow Jones, RepuTex, St James Ethics Centre and so forth. The second point goes to auditing of reports. Our members had some interesting views on that. Some members do have assurance reports completed for them. They are the larger member banks. Some of the smaller banks indicated that some impediments for costs and resources to implementing a really large structure like the GRI is going through that verification process. Those who do this sort of reporting have them verified, whether it is internal or external. As long as disclosure is made as to the verification process, then it is up to the individual or the market as to how they see that information.

**Ms BURKE**—If you have a narrow base and you say, ‘We are good corporate citizens because we are philanthropic and we donate this or we get our staff to donate their money or their time’—I find that is one of the interesting claims that many of these institutions make, that they are great because they make their staff give up their time and money, but leaving that aside—how do you do it on a range of things? I am sorry, I am being a bit flippant. Mr Bell probably knows that I am not agreeing with much of what he said in respect of his members, but there is a range of things—you are environmental and you are philanthropic and there is your treatment of staff and customers. Banks in particular seem to be getting big ticks for their philanthropic endeavours. I am not going to diminish that—they do it and do it well—but how do you do it on a range when we are talking about corporate social responsibility? You are claiming there is no need to mandate because they are already doing it. Is it across the range? Is it on one thing? How do you do it? How do you rank and verify that that is being done over the range as opposed to one issue?

**Mr Bell**—That is a fair question. There is no weighting applied to what you would call components of demonstrating corporate social responsibility. I am not sure whether there is a need to do that. Our answer to that would be that the proof is in the pudding. There are a number of things which we are being very transparent about, which we can demonstrate and which we shall provide to the committee that shows that our banks in each of those segments are doing things which are contributing to the notion of corporate responsibility. On your first remark about staff giving up their time, yes, they do give up their own time, but it is voluntary. They are not required to do it. Banks also allow them to use bank time to do similar things. I know that your remark was made in jest, but I thought I had better clarify that.

**Ms BURKE**—I understand. I just find it entertaining that a corporation gets credit for something which, in some cases, they are requiring staff to do. There are some examples that I am not going to go into because you are here as the overarching body. I am not going to ask you to drill down into individual banks. What would you say about the notion of offshoring, as in corporate responsibility? All the majors have done it; some of the minors have done it. Some of them have come back and some are contemplating it again. If you look at it from an Australian perspective, I would say it is bad corporate responsibility because we are losing jobs and skills. If you look at it from a global sense, they may say that they are creating jobs in other places where they have business. How do you weigh that up? How do you say what is good corporate responsibility for something that I would say is short termism in the notion of offshoring? How do you justify and look at that from a corporate responsibility point of view?

**Mr Bell**—I would not mind being clear about what your definition of ‘offshoring’ is. Are you talking about offshoring or outsourcing? Are we talking about the same thing?

**Ms BURKE**—I am specifically talking about offshoring.

**Mr Bell**—Are you talking about, for example, the National Australia Bank buying banks overseas?

**Ms BURKE**—No, the National Australia Bank or one of the majors taking a current role, such as a call centre, from Tasmania to India, as an example.

**Mr Bell**—I am not aware of any of our Australian banks who have outsourced any of their front-of-house operations.

**Ms BURKE**—They have done back-of-house.

**Mr Bell**—I can clarify that. I am aware that some of our banks may have outsourced some of their back-of-house operations, but it has been very much at the margin. I can certainly get you a detailed list of what they have done, but I understand that has been really at the margin. Certainly no front-of-house operations have been outsourced at all. You would appreciate that it is very difficult for me to comment.

**Ms BURKE**—That is exactly right. I am asking from, I suppose, a philosophical viewpoint, which is a difficult thing to do. You claim your members are all great corporate citizens. I am looking at the totality of how they give themselves the tick for that, given the notion of both outsourcing, which they have done, and offshoring, which they have done in the back-of-house sense.

**Mr Bell**—Yes, but it has been very much at the margins, as I understand. I can get you the precise amounts of outsourcing and offshoring that have occurred. I would be reluctant to speculate about what they might and might not do and what that means from a philosophical point of view. I do not think it would be appropriate for me to do so.

**Ms BURKE**—Another issue in looking at all the stakeholders—and obviously, from my background, employees are one of the major ones—is the notion that the current majors, bar one, are attempting to enterprise bargain at the moment. They are in court, they are haggling or they have completely given up and they are waiting for a further date in March. I have not even drilled down to some of the minors who get kudos for doing other things and have all their staff on AWAs. Looking at all your stakeholder groups and at the spectrum of how you get a tick for being a good corporate citizen, how do you say your members are looking after their employees as stakeholders—listening to them as stakeholders, talking to them and dealing with them—when they have frozen out one of the voices, the union? They have also frozen out, in other situations, even local employee groups who are not unionised. They are not even talking direct to staff in some instances. Again, I am not going to go to specifics, because that is unfair, but I just mention that notion. You are saying they are doing the right thing, but I could give you examples where I would say they are doing the wrong thing by their staff.

**Mr Bell**—I do not think you will be surprised that I will not be able to give you a complete answer on that, on the basis that the ABA literally does not get involved in industrial relations matters. That is entirely in the province of our banks. So we do not have a policy area there at all. I can make a general observation—and it is presumably self-evident, to us anyway—that it is

in the interests of banks to make sure they have the happiest relations with their staff. Clearly you do not think they do and have given me examples where you do not think they are taking the right approach, but generally speaking banks would prefer to have the happiest and most appropriate relations with their staff. It is very difficult for me to comment on those things. I am sorry I cannot.

**Ms BURKE**—That is all right. Thank you.

**Mr BAKER**—You state in your submission that the current legal framework enables and encourages directors to have regard for shareholders and other stakeholders. Other submissions have argued that, while the existing regulations enable consideration of broader stakeholder interests, to turn it the other way, they neither encourage nor discourage such consideration. Can you explain to the committee why you believe the current legal framework encourages directors to have regard for non-shareholder stakeholders? All we have heard about is the resistance. Turn it right around the other way. Why? We have heard why not.

**Ms Tate**—What are the drivers of CSR? Is that another way of asking your question or are you being a little bit more particular?

**Senator WONG**—No, I think Mr Baker was asking a question about directors' duties. You were here for Professor Redmond's evidence, so we would be grateful for your views.

**Mr BAKER**—Correct.

**Ms Tate**—The first thing to say is that we are bankers and not lawyers; so, in the interests of how Steven Munchenberg presented his evidence, we say the same thing. Having said that, in our submission we did make some comments about directors' duties and also what we think acting in the best interests of a company is. I make two high-level points. We support the status quo. The other point is to do with a mandatory or permissive provision. We think that a mandatory provision would largely result in a tick-a-box approach, which would not necessarily work for the spirit or the intent of CSR as a concept. Alternatively, there is a permissive provision. We note the comments that have been made by the BCA and the AICD on that. Another way of looking at that is—

**Senator WONG**—What does that mean—'we note the comments'?

**Ms Tate**—Effectively, that it would be a mandatory provision in their eyes. They would have to go through a process of determining whether they had taken account of the interests.

**Senator WONG**—Are you putting legal advice before us that suggests that?

**Ms Tate**—It is an observation to suggest that it might be perceivable that it could translate from 'you could' to 'you should' to 'you ought' to 'you must' fairly quickly.

**Senator WONG**—I am sorry to interrupt Mr Baker. I understand the position of the ABA, the BCA and the AICD. I still have an open mind on this issue, and I do see the weight of the argument that says mandating something that is still somewhat nascent and that has longer term commercial benefits for companies is perhaps not the way to engage in reform. But I have to say

I have difficulty with an argument that is being put by some of the peak business bodies that you cannot do this because it will end up being mandatory without clear legal advice to that effect. It seems to me the more cogent argument from your perspective is the policy argument, and I think there is a lot of merit in some of what you say there. But, as a matter of what would happen to the law, it is an extremely defensive approach that is more about, 'If you do that, this might happen, then this might happen,' without a lot of evidence as to whether it will. As you said, you are not lawyers, and I appreciate you may not want to answer that.

**Mr Bell**—I think it is the case that we cannot answer it. We heard the toing-and-froing between what the AICD suggested and how the professor responded. Could I make the offer that we ourselves go away and get some legal interpretation of that and give our legal view.

**Senator WONG**—Sure, you can do that, or I suppose you can encourage the AICD or the BCA to do that as well.

**Mr Bell**—We will encourage them as well.

**Ms Tate**—And perhaps the Law Council.

**Mr BAKER**—The concern is that in the peak bodies there is no consideration; there is just resistance, resistance, resistance without opening up the minds and asking, 'How can this work, for the right reasons?'

**Ms Tate**—We make some comments in that regard in our submission. In practice, we question whether a permissive duty would actually have an impact on how decisions are made now. If this is about changing corporate behaviour, would it actually have that result? Another consideration we think about when we look at this is a drafting issue: how would it look? If it is too broad, then it is possible that it would have an impact on effective decision making. If it is too narrow, then it calls into question that if something is not included then are companies able to have relevant interest to those interests that are not included. There are some practical issues in that sense, and we have made some comments on them. We would defer to the Law Council on anything more technical.

**Senator BRANDIS**—Coming back to Mr Baker's earlier question, that your submission, as he points out, says that the existing law enables and encourages boards to have regard to non-shareholder interests, it is probably right to say that it enables boards to, but it is just not right to say, is it, that it encourages them to? I know you are not lawyers, but that is as close to purple prose as bankers get, isn't it?

**Mr Bell**—That may be an enthusiastic way of describing it.

**Senator BRANDIS**—An unsentimental way of describing it would be to say it is inaccurate.

**Mr Bell**—Fair enough. The point we would make is that the existing regime has resulted in banks—and we can only comment on banks—doing a number of things which have meant that we are recognised as being leaders in the area of corporate responsibility. There is some debate about that, but we believe we do and we think the evidence is there.



**Senator BRANDIS**—I accept that, and I think that anything has been achieved that is beneficial in this area has been achieved under the existing legal status quo. But I do cavil at your going a bit too far by suggesting that the current framework encourages that.

**Mr Bell**—I accept that. What I would say is that an overall view of our position is that we believe that the current situation has allowed us to do the things that we do, and we have received appropriate recognition for that. You would appreciate that we and our sector have a healthy suspicion of additional rules and regulation. We are particularly mindful of what the government is doing in regulatory review and we have given any number of examples to that review of the real costs that have flowed to customers which have not necessarily benefited customers as a result of increased regulation. That would be our overall view. I accept your point about the quality of the pros.

**CHAIRMAN**—What have been the main drivers of the banks' commitment to corporate responsibility? It could be postulated that 10 years ago, particularly in the context of rural branch closures and the like, banks were not being corporately responsible. Where does the drive come from to commit to corporate responsibility? Has it come from a particular stakeholder or as a result of the public reaction to some of those decisions that banks took in the past?

**Mr Bell**—That is a question from someone who has seen the banks at their lowest point, of course. The simple answer is that it is a reaction to the very poor reputation that developed in the nineties for a number of things that we have done—for example, the rapid change to electronic banking and the fact that we did not properly explain it. So there is no doubt that the steps we have taken have been as a direct result of the fact that we did things in the nineties which gained us very poor publicity and resulted in politicians and governments taking steps against us and which resulted in poor customer outcomes. Yes, the root of it has been that in the past we have not done the right thing.

Having said that, we have taken a very positive view from here on in. I have been in my job for the last five years and I have seen a clear shift in the thinking of the banks right at the very top. My board comprises bank CEOs and they are genuinely determined and committed to restoring the banks' reputation and the community perception of the banks. The best way that we can do that is not to do things by spin but to actually do things in practice. I think we have done those things. There have been increases in branch numbers. We have bank codes in place. We have revised our protocols when it comes to closing branches in country areas. We have done a whole range of things, and our strategy, quite simply, is that we hope that those practical things will turn around our reputation in the long run.

**CHAIRMAN**—Some of which this committee helped you with, I might add!

**Mr Bell**—Yes, through direct encouragement, you did.

**Mr BAKER**—We do not seem to be getting a real answer to the question of the resistance to transparency in non-financial reporting, without being too prescriptive. What is the problem in having something that is very simple that will actually encourage without, as your concerns suggest, the 'ought to be, will be, has to be'? You are already doing it on a voluntary basis.

**Mr Bell**—I do not think there is a resistance per se; I think we are simply observing that a number of our banks are already doing it.

**Mr BAKER**—I meant resistance by the other peak bodies.

**Senator WONG**—Do you resist it? Your position is that you would oppose mandatory reporting.

**Mr Bell**—Yes, we do.

**Senator WONG**—Then Mr Baker's point is accurate: all the major banks do report against non-financial outcomes.

**Mr Bell**—Again, it goes to that philosophical argument: do we want to have additional regulation in place when we are doing these things already? Given that we are doing these things already, we would not support regulation. That other corporate entities and other sectors do not do that is their business. We believe it is our business to do the right thing.

**Senator WONG**—I think the chairman asked you a bit about government research into the benefits of CR. Is that right?

**Ms Tate**—No.

**Senator WONG**—I want to get away from the legal and mandatory contexts and have a look at some of the other ways in which government can impact on the drivers of CR. One of the ways I think you raised in your submission and others have is research, policy, advocacy around the benefits of taking a responsible approach to your business and to long-term value. Could you comment on some of the things that government could do outside of the regulation and legal amendment space? Government research is one area, but I would be interested in your views.

**Ms Tate**—We make some comments in our submission about how we think there is a role for business and government in partnership to help promote CSR or CR. In terms of government, there are three areas where we believe that there is a potential role. The first area would be about endorsing and adopting international covenants. A number of our banks, for example, have adopted the UN declaration of human rights, OECD guidelines on multinational enterprises and ILO standards.

**Senator WONG**—You would endorse that?

**Ms Tate**—About encouraging those that have been adopted by Australia and are in the interests of Australian companies, certainly. Another area that we put in our submission is about encouraging corporate responsibility amongst our companies in Australia and also foreign companies that operate in Australia. This could be done through raising awareness and getting industry sectors to be made aware of the potential and possible value add that CSR can give. We have heard from Westpac—they have given you a submission and obviously given some evidence also—about the real value that they have seen as they have gone through a CSR approach within the company. The third area is about facilitating good business and getting

messages out there. That is where we see that some research in this area can assist with raising the profile of CR.

**Senator WONG**—What sort of areas of research?

**Ms Tate**—For example, in identifying some of the incentives. In our submission we give a list of incentives. In developing those, we went to our member banks and asked them straight, ‘What is it that means this is important for you?’ They came back with many answers and these were bundled into what we saw as seven key areas, which are on pages 4 to 5. Some of the issues that we see as key themes, as being incentives, are: enhanced corporate governance so that you can respond to business risk better and identify business opportunity; improved ability to understand your business performance; and improved ability to attract and retain quality employees—this can get back to your comment before, Ms Burke, about the time that they give and their involvement in activities. We have feedback from banks which says that staff are actually attracted to banks which will arrange opportunities for them to be more engaged in the community.

**Senator WONG**—This is reasonably high level. Can we unpack it a bit? What would government do? You could research, case study, get some quantitative and qualitative analysis of Australian companies which are doing the right thing, to use the Westpac term, and how that has benefited the long-term value of the company.

**Mr Bell**—I can think of one specific example of a government program. That is the Financial Literacy Foundation. That has been a very positive initiative by the government. Not only is it taking the lead in publishing information by the sheer fact of its leadership position in financial literacy but also it is encouraging others to come along. We do not believe we need the encouragement but maybe other sectors do. I think that is an example of where the government has done a good thing in the area of corporate responsibility.

**Senator WONG**—I interrupted you, Ms Tate. Please keep going.

**Ms Tate**—I think I got up to point 4, which is improved ability to conduct a dialogue with stakeholders; better financial monitoring and resource allocation—

**Senator WONG**—Okay, can we are unpack those then—improved ability to conduct a dialogue with stakeholders. How can government impact on that? Would you do something such as develop different models of engagement?

**Ms Tate**—Certainly. I also think, as part of raising awareness, we can look at an initiative already under way which is the Prime Minister’s Community Business Partnership Awards. A number of our banks have been recognised at state and federal level for the programs that they have. A lot of other industries have been acknowledged as well. I think there is an exercise in promotion and raising awareness of how there is value in enlightened self-interest—that is, real enlightened self-interest. It is about acknowledging that there is value that can be obtained for both the company and the community environment side.

**Mr Bell**—I think there are some other good examples. For example, ASIC has a community consultative forum where it speaks directly to community groups about their views, because

ASIC is a part of government. I know ASIC is also developing things in that area. Any mechanisms that are put in place to make sure that there is community input, as we do at the ABA, is a good thing for government to do.

**Senator WONG**—What about in the investment community or sector? One of the things in your list, I think it is the sixth point, says:

Greater profile for raising capital: disclosing to shareholders—

et cetera. There is an argument that one of the militating factors against taking a long-term value perspective to running a corporation is the state of the capital markets and the way in which investors assess the value of a company. Do you have any views about that as an issue and whether government can impact on that?

**Ms Tate**—Again, we get back to some comments we made before about the push and the pull. You encourage companies to push information out by making available mechanisms that are easy to do so, and you pull that information by having tools that are available to make it easy to compare information. We have made some comments about how market analysts are receiving more information regarding quantitative information, like staff turnover rates and those sorts of things, which they are then able to extrapolate. There are a number of initiatives we are aware of. For example, even GRI are looking at digitising their reporting. This makes it easier for the analysts to crunch the numbers, because we know they are number crunchers.

**Senator WONG**—That is an area. On the point you make, that you have got to have tools to compare information—leaving aside whether or not it should be mandatory—isn't that a view that would support having some agreed standardised reporting framework, such as the GRI or whatever Australia might determine? I would have thought, given the internationalisation of your sector, you probably want to pick up something that was already in place.

**Ms Tate**—Certainly.

**Senator WONG**—But what do you say about actually attempting to spread the use of that tool within the Australian market?

**Ms Tate**—Essentially, our point on that is we think it is premature to introduce a reporting framework in Australia.

**Senator WONG**—I said let us leave aside the issue of whether it should be mandatory.

**Ms Tate**—It is not a question about being mandatory at this stage. If we introduce a framework, whether it is mandatory or voluntary, we need to make sure that it is appropriate for companies across sectors to be able to report what is relevant to their shareholders and stakeholder interests. Our banks are involved in the GRI. Some of them are reporting against the criteria, some are involved in developing the finance sector-specific indicators of that framework. But we think there is some time that needs to be given for that to evolve. We are also aware that the AASB and CPA Australia are looking into a non-financial reporting and accounting framework in Australia.

**Mr Bell**—What we are saying is that at some point in the future, when things are settled, we can see that there could be these guidelines in place.

**Senator WONG**—But would you agree that the principle of having some sort of consistent framework is a useful tool for investors, shareholders and arguably companies to assess their performance against? It would have to have regard to different sectors, as I understand the GRI does. Obviously, the things against which your members will wish to report will be very different from what Rio Tinto would wish to report against.

**Ms Tate**—Part of the government role is in promoting and raising awareness, whether it is an information push exercise or whether it is a research exercise. Senator, you are aware of the RMIT's community of practice on ethics and corporate governance. That type of partnership approach between a wide number of groups, including the ABA, means you can have this discussion. It eventually influences behaviours within the corporate environment.

**Senator WONG**—Why are you resisting this? I understand your views that you need to develop it more, but as a matter of principle, if you really believe that there is benefit in companies having regard to broader community interests in the conduct of their business, surely it is difficult to argue against having some sort of consistent framework against which companies across a range of sectors can assess and report their performance and provide that information to the market?

**Mr Bell**—I have not been in discussion with my banks about this—

**Senator WONG**—Okay.

**Mr Bell**—but I would say, personally, that that sounds to me like a sound thing to do, so long as you have the right reporting guidelines in place. The proposition seems to me to be reasonable and, from a personal point of view, I would support it. So we need to go away and take up your point with our banks and get a clarification on that, because it does seem like a reasonable thing.

**Ms BURKE**—At a board level, though, has there been discussion—given that the majors are all global—about the actual impact of ethical investment in other markets at the moment? Other people have responded that that has been a consideration and a pressure—that people are using those standards for comparison in deciding where to invest.

**Ms Tate**—We are aware that there are indices that compare companies based on how they perform in the market and so forth.

**Ms BURKE**—I am asking: have your members actually said that that has been a consideration for them as to why they have voluntarily gone down this route—that they are noticing it in other markets?

**Mr Bell**—I have never heard it discussed as any of our council or board meetings, no. That does not necessarily mean that it is not discussed at the board meetings, but I have never heard it discussed.

**Ms BURKE**—I am wondering whether most of them have already chosen to do it and are getting kudos for doing it, at one level. On another level, the problem has been about customer base and customer erosion because of some of the bad practices—and fees and charges and branch closures and all the rest of it. Has that been another reason or a motivation for some of them to voluntarily do it—the notion of, ‘We are good corporate citizens’? As I say, I see it as a range of things, not just one thing, but I am wondering if there has been any discussion about that—again, at the level that there has been a desire to do it because of customer erosion and a need to maintain customer base.

**Mr Bell**—Again, my answer stands—though I do not recall who asked the question. Quite clearly, we were stung by what happened to us a decade ago. We have woken up to the negative impacts upon our reputation, the potential regulation that can follow and the impacts it has upon our customers’ view of us; that has been a very clear motivation for us to do the right thing.

**Senator WONG**—Did Senator Chapman ask you about the corporate responsibility exchange web based tool? All right, I will go back. Was there anything further you wanted to say about that in terms of the Australian context?

**Ms Tate**—No. But actually, a point I would make in terms of your question as well, about standardisation, is that, as per the comments we made previously, systematic collection of information will assist consumers as well as companies.

**Senator WONG**—My next question is particularly relevant for the ABA. As you said, Mr Bell—and the impression we have gleaned from the evidence has been that—there was a reasonably concerted effort by the banking sector to improve its reputation and all that goes with it. Is that the role of peak and industry organisations?

**Mr Bell**—Yes.

**Senator WONG**—It seems to me that you are one example—and notwithstanding that people might be critical of some of the failings in what has happened, but you would be an example—of an industry that has said, ‘We have got to do something here.’ So I am wondering if you have any comments to make about what the role of a peak or industry body is in road-mapping change for your sector, and whether there is anything that government can do to encourage that or support that, other than prod you and say, ‘If you don’t, we’re going to regulate you,’ which I think—

**Mr Bell**—That is not the sort of encouragement that we like! In fact—

**Senator WONG**—But it did get you to do things!

**Mr Bell**—Well, that was a decade ago; before my time! The answer to that lies in the relationship an association like ours has with its members. If we are simply there to do our members’ bidding, then that is the wrong sort of relationship to have because we simply become a mouthpiece for them and that is not what we are here to do. On the other hand, if we get too far ahead of our members we get cut down—quite naturally, because we are doing things without their permission. So it is a combination of listening to what they want us to do and encouraging them to take steps which they might not have taken otherwise by themselves.

The best example I can give of that is our bank code. There was not universal agreement amongst our members to adopt the bank code, for a whole range of reasons. Notwithstanding that, they decided that, collectively, it was in the interests of the industry to do so and they did so. That was an example of some leadership from the Australian Bankers Association.

In terms of the second part of your question, our preference is not to be prodded by the government—or by anybody. Having said that, forums like this are very useful. You raised a very good question, which I have conceded on the face of it sounds like it makes sense. I am going to go back and speak to my banks about it and come back to you, because it does seem like a reasonable proposition. We prefer not to be prodded by people; we prefer to be in the lead. That cannot happen all the time. Inevitably things happen which means that you are placed in a situation where you are prodded.

We would also like to encourage opinion leaders, like you, if they see we are doing good things, to encourage us by saying things publicly like, 'Isn't it terrific that the banks have taken these steps.' There is nothing like a bit of praise to get people going forward. That would be my frank answer to that question.

**Senator WONG**—I will acknowledge, Mr Bell—notwithstanding obviously for Labor people there is an industrial relations issue, but, separating that to one side—that I think a number of your members have made quite demonstrable and substantial efforts to change how they view their core business, with I think some consequent benefits to the community.

Coming back to the road mapping or peak group role, apart from prodding and encouraging, do you think there is anything government can provide in terms of research, information or is it more an issue of engagement and encouragement and sitting down saying, 'Look, David, we think this is an issue in the community. Why don't you think through how it is your industry might deal with that?'

**Mr Bell**—That is our preferred model. There is nothing worse for an industry, if it is trying to do the right thing, which we think we are, to be faced with surprises; to be told by a government—it does not have to be a federal government—a state government, for example, 'By the way, we are going to regulate you because we think these things,' without any form of engagement. We would much prefer for a government or groups like yourselves to tell us there is an issue and for us to then properly engage with you and to make a fair assessment of whether there is an issue that can be fixed. That is the model we prefer.

The other observation I would make going back to your question about the role of associations is that there is definitely a tension within an association if one of the members is not doing the right thing. It may surprise you the amount of pressure being put on.

**Senator WONG**—Peer pressure—that does not surprise me.

**Mr Bell**—Literally peer pressure from fellow chief executives who will observe that they are doing the right thing, that the other organisations in the association are doing the right thing—why don't you blokes get on with it?

**Mr BAKER**—Guilty by association?

**Mr Bell**—I would not say ‘guilty by association’.

**Senator WONG**—That does not surprise me.

**Mr Bell**—That is our preferred model of engagement. We do sometimes slip behind the curb. It is not deliberate. If it does happen perhaps a prod is essential, but we prefer to be engaged rather than be told what to do.

**Senator WONG**—Finally on the peer pressure issue—and this is probably a question I should have addressed to AICD or the BCA—the James Hardie issue has been a live discussion before us. If it really were the view of the business community and the peak bodies that the legal position articulated by the James Hardie board as a justification for not doing the right thing for a significant period of time—that is, that their director’s duties prevented them is from doing so—was incorrect, why did no-one come out and say so?

**Mr Bell**—That is a good question. Do you have the answer to that?

**Senator WONG**—I do not recall seeing any AICD, BCA, ABA or any other peak group saying, ‘We don’t believe that is what our directors duties mean.’

**Ms Tate**—In terms of the banks, which is what we can speak of, we deferred on making a comment on the particular James Hardie case. The Jackson report has highlighted some issues and I know that CAMAC is looking into one of those at the moment. That is probably all we can say on the Hardie case.

**Mr Bell**—Again to answer your question generally, perhaps if we had been asked the question by journalists, we may have made a response.

**Senator BRANDIS**—I was thinking that, Mr Bell. Was there an opportunity for you to say it, other than gratuitously?

**Senator WONG**—It is not gratuitous. Mr Bell, I do not want you to be pinged with too much just because you have come later in the inquiry. We had the discussion and Mr Baker asked you some questions about some of the comments in your submission and the resistance. But if the business community is seriously saying to this committee, ‘We don’t want you to change our directors duties because we think they already enable us to do that’, I do not recall anyone saying, ‘We think James Hardie was wrong in their legal advice or their articulation of the law.’ I could be wrong on that, but I do not recall that.

**Mr Bell**—I cannot speak for the banks, because I cannot recall them ever saying anything about it. I certainly was never asked the question at any point by any journalists on the issue. If we had been asked a question, no doubt we would have dug around and come up with a response.

In terms of how we respond to these things to this inquiry, you would appreciate that we are taking a bank-specific point of view, so we do not necessarily want to shoulder the burdens of James Hardie or anyone else. But, again, I think your point is fair—that is, that banks are significant corporate players and corporate entities. We take our leadership role seriously, and if



there are issues like that, for example, which reflect upon all directors, then perhaps we should be taking a view on that.

**Senator WONG**—I am not necessarily saying that, although that may be welcome. It is more that if you rely on a different legal view subsequently in an inquiry, it calls it into question. We are confronted with one company that says this and you say something else—are you saying they are wrong?

**Mr Bell**—I do not think we are saying they are wrong. We are saying that we have made a submission which states the banks' point of view. We appreciate that you have to take a broader view than simply our point of view.

**Senator BRANDIS**—I must say, Mr Bell, I think those last couple of questions directed to you by Senator Wong were pretty unfair to you.

**Senator WONG**—Is that a question or a statement?

**Senator BRANDIS**—No, it is a question, Senator Wong. My own point of view, if I can put it to you and invite you to respond, is that it is no business of banks to be freelance commentators on the corporate morality or, indeed, the legality of the behaviour of other corporations which are not even members of the banking sector. What do you say about that?

**Senator WONG**—But he is relying on an alternative viewpoint.

**Senator BRANDIS**—Senator Wong, you asked the same question about 15 times in a most repetitive fashion.

**Senator WONG**—I am terribly sorry!

**Senator BRANDIS**—Let me ask my questions in my way without interrupting me.

**Senator WONG**—That was a bit gratuitous, George. Are you a bit stressed today?

**Mr Bell**—There are two parts to the answer to the question. The first is that quite clearly banks do not want to comment on other sectors where they have no capacity or technical expertise to do so. That would be unfair on us and particularly unfair on them. That is the first point. The second general point is that I think the view is evolving amongst banks now that we are not just responsible for our own sector. We are major players in the business community and at some times it is appropriate for us to speak out when these things need fixing in the general business community. But, in terms of detailed speculation or responses to questions on particular companies or sectors, I think we would shy away from that for obvious reasons.

**Senator BRANDIS**—Yes.

**Ms Tate**—If I could just add to that, as a general observation, I think that a number of banks' CEOs have made statements in the last six to 12 months regarding their corporate behaviour, how they feel about CR and how they are implementing it in their own company. That

demonstrates how they feel about their company's behaviour within the corporate and social community and environment context.

**Senator BRANDIS**—I would have thought that the way James Hardie behaved, whether it was good or bad, was none of your business—to put it crudely.

**Senator WONG**—I did not actually ask a question on that.

**Senator BRANDIS**—In any event, one other issue is that I have been somewhat struck by the number of witnesses before this inquiry, including you, who have explained to us the quite extensive corporate social responsibility programs that are undertaken freely and spontaneously under the existing law. I wonder whether or not, were there to be some form of mandatory requirement in this area, it might run the risk of having, for some, a chilling effect. So if the attitude of corporations moved from being one of spontaneous acceptance of obligations which were in superaddition to their legal obligations to one where they were merely complying with a legal requirement the extent to which companies strove to achieve a level of corporate social responsibility might in fact be diminished. Perhaps that is what you meant when you were talking about a tick-a-box mentality. Could you respond to that?

**Mr Bell**—Generally speaking, that could be the case.

**Senator BRANDIS**—I am not saying it always would be, but I am concerned that it might be.

**Mr Bell**—It could be the case. I think I mentioned before that individual banks see corporate responsibility and their contribution to it as a competitive advantage. So, if you start mandating these things, perhaps you discourage them from taking steps that they might have taken themselves. That might be one of the perverse effects of doing what you suggested. Having said that, if there was to be that mandating, I do not think that banks would be cutting back on their programs in the short term. It is hard for me to predict.

**Senator BRANDIS**—Of course.

**Mr Bell**—But I think the general proposition applies, typically, that if you introduce standards and they are of the wrong standard or too low then, generally speaking, people's standards migrate to that standard, which could be lower than the ones we are already setting.

**Ms Tate**—In David's opening comments, he made the point that mandating corporate responsibility could stifle innovation and this could be counterproductive. That goes to exactly the point that you are making, Senator. We have seen our banks look at their business processes and practices, and evolve and change based on this engagement with stakeholders including customers, employees and those sorts of people. Financial literacy is a key example of that. If we look at how financial literacy programs have evolved in the banking sector, there are real outcomes for banks and real outcomes for the community and for consumers. The ABA also now has its own financial literacy program, which complements what our banks are doing, and we are now working with the Financial Literacy Foundation. So that it is a really good example of how industry and government can work together. But I do admit that industry was already doing a lot of this work before the government saw a need to step in and also fill a space. Perhaps it is in this example that we acknowledge that industry is doing a certain amount of work and, therefore,

the role of government is to promote what is already taking place and to encourage wider adoption.

**Senator WONG**—Mr Bell, I just want to clarify something, and I am not criticising you or your sector for not coming out and criticising Hardie's actions; the point I am making it is a far narrower one. That is, as I understand your submission, that you are suggesting a view of directors' duties which your members hold to—and which, I have to say, a number of your members take on in terms of their actions and how they run their businesses—but it is a view that is directly contrary to the view that has been put by some of the directors of James Hardie. That is the narrower position I put to you. So, as I understand your evidence, you are saying the view that has been put by the Hardie board about the nature of their directors' duties is not your understanding of your members' views about their duties?

**Mr Bell**—Correct me if I am wrong, Diane, but my understanding is that the view that we put did not take into account the views put forward by James Hardie. Is that correct?

**Ms Tate**—Correct. It only put forward the views that our banks have.

**Mr Bell**—So it literally did not take account of those other views.

**Ms Tate**—The comments that we make in our submission about acting in the best interests of the company, and what that means, put forward a position that our banks see as their role. Inherently, making corporate decisions is about balancing interests, and sometimes those interests can be competing. Would our banks make different business judgments in different situations? Of course they would; that is part of making a corporate decision. It is about taking into account the relevant interests and balancing those decisions.

**Mr Bell**—But, to be very clear, when you wrote the submission in cooperation with our banks, we literally did not take into account the James Hardie view of the world?

**Ms Tate**—Correct.

**CHAIRMAN**—Mr Bell and Ms Tate, thank you very much for your appearance before the committee and for your assistance with our inquiry. It was very valuable.

**Mr Bell**—Thank you.

**Ms Tate**—Thank you.

**Proceedings suspended from 1.03 pm to 1.41 pm**

**HOGARTH, Mr Murray Lloyd, Senior Associate, Ecos Corporation****WHITNALL, Ms Jennifer, Senior Consultant, Ecos Corporation**

**CHAIRMAN**—I welcome representatives from the Ecos Corporation. The committee has before it your submission, which we have numbered 51. Are there any alterations or additions that you wish to make to the written submission?

**Ms Whitnall**—No, not at this stage.

**CHAIRMAN**—I invite you to make an opening submission, at the conclusion of which I am sure we will have some questions.

**Ms Whitnall**—We thought we would start by giving you a bit of a context for Ecos. We will give you some background as to the kind of work we have done and our expertise in this area. Ecos is a small organisation. It was started about 10 years ago by Paul Gilding, who, previous to that, was the international managing director of Greenpeace. He left Greenpeace after suggesting to Greenpeace that, instead of always targeting organisations, they should be working with them to achieve more social change, particularly in the environmental area. Having left Greenpeace, he began an organisation based on that philosophy. So our philosophy is very much around achieving social and environmental change with large corporates. With that in mind, we have worked with corporations such as Ford and Dupont in the States, IAG, ANZ, Diageo Australia and Diageo Korea. We also have experience in areas with Tomra, which is a recycling company based in Norway. We are a small organisation of only about eight people in Australia and three people in the US, but we work worldwide.

Our approach to sustainability and corporate social responsibility really comes from the interaction between the business environment and the organisations. Our philosophy is very much not based on the triple bottom line. I am sure that other speakers will have talked to you about that. Basically, there is only one bottom line, which is the financial bottom line. But, for companies to be successful moving into the future, they need to incorporate issues around the social and environmental elements of their work. The business environment in which corporations in Australia and worldwide operate has changed to the point that social and environmental issues now impact upon their financial bottom line. Therefore, they should be viewed and treated as business risks and opportunities. Our philosophy on that could be summarised—and this is included in the submission—in the sense that organisations need to look at not only the shareholder value that they add to their corporations but also the social value they add in order to maintain a licence to operate in the environment moving forward.

Moving from that philosophy, I guess we see corporate social responsibility as only the first step in a continuum that leads up to more market focused solutions. Pretty much every major organisation these days is doing something in CSR. We would class that kind of work as things like philanthropy, volunteering and staff focused involvement. Our work is focused on how companies really look at the environment they are operating in and take advantage of social and environmental issues. In looking at consumer products, our focus is on what products they are putting on the market, how they market those products and what demographics they are aiming

for, as well as taking responsibility from a producer perspective for the products and the ways they are used in the environment. So our philosophy is very much around organisations taking responsibility for the social impact of their products as well as being very focused on delivering the shareholder value.

**Mr Hogarth**—While we typically work with large corporations and very rarely with government, a lot of the companies that we work with are very significantly impacted on by decisions of government and policy of government. With regard to the bit of thinking that we do about the role of government in this area, regulation is an obvious opportunity, and that is a fact. Almost any company is going to be operating with a level of regulation. But there are a lot of things that government can do to frame the marketplace and to create a level playing field where companies of a mind to do more than comply with regulation can then drive more change. That can be in things like tax treatment and national policies on litter, waste—things like container deposit legislation—and climate change. Wherever you may fall on that issue, clearly an emissions trading scheme—if that were the approach to be taken—needs a significant role for government in setting the basis for a marketplace, which would then allow companies to do the minimum or more, depending on what their commitment was to creating social value.

**CHAIRMAN**—Thank you. In your submission you say:

Corporate Social Responsibility immediately implies obligation to do things that are against what business wants to do.

We have heard a lot of evidence from people who would question the existence of such friction—in fact who see corporate responsibility as being in the long-term sustainable interests of the corporation. On occasions, even when it might be detrimental to their short-term interests, they will still maintain their positive approach to corporate responsibility because of the long-term benefit that is to be derived. I am wondering what your response is to that.

**Ms Whitnall**—I think that is true and I think that is also fundamental to the philosophy of most of the people working in the field of CSR. But in our experience there is still a lot of tussling within organisations about how people view these issues. In most of the organisations we have worked in there has been significant work around just getting the people who are making business decisions to think about these as business issues, to overcome the short-term demands on their business from the market, the analysts and so forth, to actually be prepared and to have the head space and the resources to invest in the long-term sustainability of their organisation, because often the short-term demands are just so much more prominent. So we totally agree with that philosophy. In our experience, though, most companies are still seeing it to some degree as being something that they should be doing. But there is always a battle between short-term and long-term decision making.

**CHAIRMAN**—What is your view of the current state of the Corporations Law in relation to the degree of permissiveness that is there for directors to take regard of interests other than those of shareholders?

**Mr Hogarth**—It is not really an area that I can claim expertise on. But in most of these things I think what we find is that the law is not really the impediment; it is the business rationale for doing things that is much more important.

**Ms Whitnall**—I think it is probably a measure of the kind of work that we are doing that I can honestly say I have never looked at the Corporations Law in this because it is not a driver for change.

**CHAIRMAN**—So it is not a hindrance or an encourager; it is neutral.

**Ms Whitnall**—It is just there.

**Mr Hogarth**—When we talk about the moral imperative being in conflict with what business wants to do, this is based on 10 years for the organisation working inside the belly of the beast and seeing the change process close-up and seeing whether it gains traction. You might have a CEO who gets a spear-through-the-heart conversion on sustainability or corporate responsibility and tells the organisation, ‘We’re going to have this change,’ but below the CEO you have the layers of lead—the two and three and four layers of management down—who are looking at their performance agreements which say, ‘Make your numbers,’ and nothing about the change that the CEO’s vision is talking about. It is about how you actually get through that hard business change process.

**Ms Whitnall**—It also depends a bit on what else is going on. We had an experience with Ford in the US where Jack Nasser totally got these issues and saw them as being fundamental to the long-term sustainability of their business. Events have obviously proven that they are, particularly in the automobile industry. But right at the point when they were starting to do some work on it they had the Firestone tyre issue, which then overtook everything else they were doing. It was a major crisis at that point. Timing is all-important in this. They have to have not just the leadership but also the opportunity, the focus and the head space to be able to take action when they need to take action.

**CHAIRMAN**—Is it necessary to encourage more market pressure toward sustainability, given your strong focus on the importance of companies creating value from sustainability? If so, how should that market pressure occur?

**Ms Whitnall**—The market pressure can work for and against it. The automotive industry is a really good example of that. Toyota has changed the whole market based on sustainability issues, and those decisions were made over many years before now. That has changed the market. That pressure is now forcing other organisations to change and that, in turn, will change consumers’ habits in how they use their cars and what cars they are using. But in a lot of industries that pressure has not happened. As to some of the ways we think pressure can change—obviously a market leader can change it. The government acting as a participant within that market can change the behaviour of the other players.

Westpac are an interesting example of the leadership issue. They have taken a very structured approach to their supplier agreements. For example, last year they put out a new legal tender and required, for the first time, their legal suppliers to fulfil these questionnaires, and that caused considerable movement, shall we say, in the legal industry. Whether or not that will be maintained is a different question, but it certainly caused a number of legal firms to look differently at what they needed to do to be competitive on those sorts of tenders.

**Mr Hogarth**—A massive change can be driven once a customer starts telling their supplier what to do. Ford Motor Co., just by introducing environmental management system ISO 14,000 across its 200 plants around the world, then requiring its 5,000 suppliers to match that management system, drove an incredible lot of change, which is now reaching out to the tens of thousands of suppliers et cetera.

The two big areas that are really starting to develop now, but where the drive for change has not really come from, are capital and consumer spaces. It is truly a work in progress. Most of the change thus far has been driven by companies deciding that, even against the evidence of consumer demand in front of them, action needs to be taken. Over the years ahead I believe we will increasingly see that the capital markets access to capital and consumer demand will become more powerful forces.

**CHAIRMAN**—You argue that improved non-financial reporting is insufficient on its own, as it is not a business strategy, to create social and environmental value and will not drive change quickly enough. What improvements would you suggest to non-financial reporting to make it more effective in that regard?

**Ms Whitnall**—Our issue with non-financial reporting is that the danger in this work is that it becomes a PR spin effort. So with the reporting as it is at the moment, while there are some structures in place around how companies report on this sort of material, there are a number of companies who are putting in sustainability reports or corporate social responsibility reports in which there is still a large element of rhetoric getting ahead of the reality. Sometimes you can make it work to your advantage. As a company, you can get them to put a stake in the ground publicly and then they have to work to get up to that position, but there are certainly instances where organisations are basically just doing it because they have to do it and to look good without getting the social change. Our philosophy has not been, ‘Don’t do the non-financial reporting,’ but unless you make real changes to your core business then the reporting will not effect change by itself.

**Mr Hogarth**—Just to add to that, a perfectly reasonable response—given that most companies now do some sort of non-financial reporting—is that government might up its level of regulation in some way. That would be a new compliance signal and everybody would adjust to that. But if the markets increasingly assess non-financial reporting and apply it to the value of the company, like asking, ‘Is the company exposed to climate change, and is it acting to take account of it?’ so that the non-financial elements of what they are reporting and the disclosure is increasingly being processed as a potential risk or opportunity consideration, that will really drive action around it. There is evidence that the infrastructure for that to happen has started to form in the marketplace. There is socially responsible investment. Analysts are now in place and they probably were not five years ago. There has been a certain mainstreaming of what people have called ethically or socially responsible investing. Again, I think more often now traditional analysts will at least have some of these elements on their radar in looking at the value of companies.

**Senator BRANDIS**—I must say I am very interested in the observations you have both made. But it seems to me that almost everything you have said contradicts the basic thesis of your submission. After the sentence Senator Chapman read to you, it goes on to say:

... to do things that are against the flow or natural state. Business wants to create value, not incidentally or by surprise, but actively pursue it as the central focus of business strategy. That is the nature of the beast.

That is by way of elaboration on the proposition that corporate social responsibility:

... implies obligation to do things that are against what business wants to do.

Yet you have come here and given us example after example of why that is not so—which is a very optimistic picture—and that businesses are doing all these things that you say in your written submission go against the grain and that there is no compulsion upon them to do so.

**Ms Whitnall**—I think part of it is how you define corporate social responsibility.

**Senator BRANDIS**—How do you define it? I assume that when you make your oral presentation you are using the same meanings and vocabulary as in the written submission. You have told us, as I understand you, that it is a good picture—businesses are becoming more and more socially responsible and increasingly are agents for desirable social change, and nobody is forcing them to do that apart from a change in the culture. They are not under any legal compulsion.

**Ms Whitnall**—I think we did say early on that we see in organisations a constant battle between short-term business drivers and longer term business drivers.

**Senator BRANDIS**—Yes, you did say that, but the conclusion you seem to be offering to us—which I am delighted to hear—is that the good guys are winning, as you would have it.

**Ms Whitnall**—Can I direct you to one of our diagrams on page 12 of the 13 pages that we submitted to give some context for that conversation. We work in sustainability, which we see as being a bit different to corporate social responsibility. Where we think a lot of organisations have CSR is down the left-hand side of this diagram. It is sort of like a have-to-do at this point and most organisations do some level of philanthropy, staff volunteering and getting involved in some format with the community.

**Senator BRANDIS**—Sorry to jump in, but on that point would you agree that when firms do philanthropy and they get their staff, including their executives, involved in volunteering, they do that for at least two different reasons? One is because it is an intrinsically good thing to do, but also for prudential reasons, because it is actually good for business. It is good, for example, to energise the staff, build esprit de corps and those sorts of considerations that are perhaps a little bit more selfish. Would you agree with that?

**Ms Whitnall**—We would agree with that. Our view is that sustainability is up the right-hand end of this diagram around market growth. You are doing philanthropy and volunteering; you may be doing CSR but you will not actually promote the sustainability of your business if your products are wrong. To give you an example, we have done some work in the alcohol industry. There is enormous social and community concern around the ready-mix drinks. If the alcohol industry does not address those community concerns, there is a risk to those products going forward. There is potential for increased regulation, restrictions on advertising and restrictions on how those products can be marketed. So—



**Senator BRANDIS**—I accept what you say because it is a matter of notorious fact that there are some businesses that make noxious products, and alcohol and tobacco might be thought to be in that category. But it is really a matter for health regulation rather than the regulation generally of the way corporations go about their business, isn't it?

**Ms Whitnall**—It is a matter of what pressures the community puts on various industries. You could just as well use the automobile industry as an example as well. The community still sees some role for these products, and therefore the organisation has to address two lots of concerns: consumer demand for their products and also community concerns about the long-term sustainability of their products. Perhaps you can look at the automobile industry, because they have gone through this process already. They are in a situation at the moment where there is very strong community demand for their products. People do not want to do without their cars, but there is also recognition that the way we have used cars and the way cars have been made in the past is not sustainable moving into the future.

**Senator BRANDIS**—Well, some people think that and some people do not. But let us take two of the examples you have mentioned: the tobacco industry and the automotive industry. At the end of the day, a tobacco company is going to make tobacco products. That is what it does. Whether it should be allowed to do that is a question of whether or not the parliament chooses to pass a law prohibiting the sale or consumption of tobacco. Assuming the parliament does not pass such a law, the government might nevertheless regulate its availability to minors, the way in which it can be advertised, health warnings and issues like that. But at the end of the day the company is going to make its core product and, to change the example to the automotive industry, a motor car company is going to make motor cars. The community, through its law-makers, might impose safety standards and other technical specifications onto products, but in both of the examples I have given you—whether it be the health, advertising and availability issues for tobacco or the safety specifications for motor vehicles—those are industry-specific standards directed to the conditions on which a particular good may be put on the market. In neither case is it a function of the way in which corporations generically operate.

**Ms Whitnall**—I guess we are coming at it from slightly different angles. Looking at the automotive industry, Toyota's biggest growth area is in the Prius. They cannot make enough of those cars to keep up with consumer demand. So where our work goes is not ignoring the government legislation and regulation—far from it—but really looking at the consumer demand. How do you marry consumer demand for particular products with the community concerns around the use or value of those products at the same time?

**Senator BRANDIS**—Aren't those two different ways of describing the same phenomenon, which might broadly be called 'what the public wants'?

**Ms Whitnall**—Not necessarily. We work with our companies by saying that when they are developing products and looking at marketing strategies they should be getting information from a range of different sources. Pretty much every consumer goods company of whatever form will consumer test its products: will the consumers buy it? But a lot of companies are now starting to look at talking to key stakeholders within the community; some of which would be government at different levels, but also key social commentators on those products.

**Senator BRANDIS**—To have a more nuanced view about what community standards are and hence to anticipate where they might maximise their sales?

**Ms Whitnall**—And to respond to those concerns, to have a greater understanding about what those concerns are. The consumers are usually asked whether they will actually use this product individually. That does not necessarily reflect the broader community concerns around certain products.

**Mr Hogarth**—Increasingly operating alongside government regulation, official regulation, is a form of community regulation. The standards there are being ratcheted up, and that affects the operating environment for business. How they respond to that will decide in the case of some companies whether they succeed or fail.

**Senator BRANDIS**—It may not be your intention, but I do not think I have ever heard a more eloquently expressed argument for laissez-faire and the free market!

**Mr Hogarth**—As we say, we are certainly not arguing against a degree of regulation, because it is absolutely crucial to underpin the marketplace, but we are very firm believers that there is the potential for a lot more change to be driven by the market forces themselves operating on top of that—that virtually, if you operate at a compliance level, you cap how much change you will drive. If you harness the things that drive business profit and growth and connect them to better social and environmental outcomes, you are potentially going to deliver a lot more of that change.

**Senator BRANDIS**—Before you go on, on that point: I am not an economist, but it is my understanding that the rapidity of changing consumer sentiment is in part a function of education and sophistication, so that, the more sophisticated choices consumers make, the more mobile their preferences are. If that is right—which I think is somewhat similar to what you said, put in a slightly different way, a moment ago—that means to me that we should have a high level of assurance that businesses seeking to maximise profit will make increasingly rapid responses to increasingly sophisticated consumer preferences. Would you agree?

**Mr Hogarth**—I agree, and they need the ability to read the market right, to understand, because sometimes the signals—

**Senator BRANDIS**—But they do, don't they, because that is what they want to do? Whatever else a business does, the business is going to want to maximise its sales, so businesses have a built-in, intrinsic primacy of interest in reading the market right for that core commercial purpose.

**Mr Hogarth**—But often plant is a very long-term proposition to change, and the signals are often quite weak but then can become strong very quickly, depending on events that occur. You can imagine that, if we suddenly started experiencing a series of major ecocollapses around the world very clearly associated with climate change, in a matter of a couple of years the level of consumer and voter demand for action could shift dramatically, and businesses might be caught completely flat-footed on something like that, even though the signals have been there. Did the signals ever get powerful enough—did they ever focus on them enough in terms of what the risks and opportunities for their businesses were?

**Senator BRANDIS**—Sure. But I particularly like the example you gave of the Prius. That has to be as good an example as you can immediately think of of a total fit between the economic self-interest of a company seeking to meet the market and the market leading by more sophisticated consumer preferences.

**Mr Hogarth**—But, in that example, Ford and General Motors looked at the market signals and they said, ‘Consumers will not buy green cars,’ and they kept making big SUVs that—

**Senator BRANDIS**—They got it wrong.

**Mr Hogarth**—And they got it wrong. So Toyota—

**Senator BRANDIS**—But Toyota got it right, and Toyota did not need the government to tell them; that is my point.

**Mr Hogarth**—Absolutely. And it will drive a lot more change by the way it got it right than if it had been responding to regulation.

**Senator BRANDIS**—Thank you; that is very interesting.

**Ms Whitnall**—From our point of view, in the work we are doing with companies at the moment, Toyota did not get that information necessarily from the consumers, because 10 years ago, when they were making those decisions, things like rising oil prices to the degree we have now were not a consumer issue in the way they are now. But they were talking to other members of the community who were flagging issues around potential climate change, pressures on the oil market and so forth.

**Senator BRANDIS**—But those would be the same factors that would have fed into the consumer sentiment. The people who have given profile to these issues—in this case, the environmental issues—are the very opinion leaders who would have been influencing the changing consumer sentiment too.

**Ms Whitnall**—The thing about that, though, is the timing. Often when companies go out and test a product with consumers they are really saying, ‘Here’s a prototype of a product; would you use this style of product,’ rather than, ‘Think about what your issues might be in 10 years time.’ So it is the marrying of community concerns with consumer sentiment.

**Senator BRANDIS**—But the consumers are the community; that is my point. When we say ‘community concerns’ I suspect what we really mean, if we analyse that, is the concerns of opinion leaders. But, at the end of the day, when you are talking about consumer sentiment and you are talking about community concerns, you are talking about the state of mind of the same class of people—that is, what others might call ‘the marketplace’.

**Ms Whitnall**—Most businesses say that the two things are synonymous. However, it is not always just the opinion leaders; often it is people from within the community who might have a different perspective that may not be reflected in that of mainstream consumers.

**Mr Hogarth**—Also, when companies conduct consumer research, they tend not to approach it that way. They ask consumer type questions like ‘Would you buy this product?’ rather than ones that are going to capture the broader issues of, say, concern around alcohol harm, public violence, young people consuming particular kinds of drinks or binge drinking, and those sorts of things. In the way that companies typically do their consumer research, they do not get that community focus. We see it as being very important for them to have all the information in front of them so that they know what the impact of a particular decision or product that they put in the marketplace might be.

**Senator BRANDIS**—That might be so, but in the examples you have just given us, as I said earlier, the way in which society seeks to regulate that antisocial behaviour or those socially inimical products has nothing to do with corporate governance. It is to do with the specific regulation of a specific noxious thing.

**Mr Hogarth**—It is part regulation and part change in the community environment—

**Senator BRANDIS**—Whatever, but the real point is that it is not about corporate governance.

**Mr Hogarth**—Yes. And, for the sake of correcting the record if we have inadvertently given an overly rosy view of the state of business action in this area—because we have talked to some examples where we have seen positive change—we can say, from working at the coalface, that there is a lot of disappointment, there is a lot of failure, there are lots of things going wrong. The corporate world is dynamic by its nature and affected by personnel changes, focus changes et cetera; this year’s fashion can be out next year. So it is not an overly rosy picture; there has been change.

**Senator BRANDIS**—I do not think you need to persuade any of us of that.

**Senator WONG**—Can we go back to the statement in your submission about market forces—and you have been discussing this with Senator Brandis. You say:

... market forces can be leveraged to speed the transition to sustainability.

Can I unwind that a bit? What market forces will do that and what drives them?

**Ms Whitnall**—If we look at the automotive industry again, we can use Toyota and the Prius as an excellent example of that. The market forces for that were around the factors that influence consumers when they choose to buy a car—the rising price of oil, the increasing cost of fuel—

**Senator WONG**—But they were not in place, as you correctly pointed out, at the time the decision was made some years ago that Toyota would prioritise this in its research.

**Ms Whitnall**—Yes, and this goes back to the point we were discussing with Senator Brandis: the value of getting corporations to talk to more people than their consumers and to talk to experts from within the community who have interest and expertise in particular issues allows them to project forward to what their business environment is going to be like within whatever their time frame is.

**Senator WONG**—So are you saying that one of the things that will drive this is corporations believing that engaging in such a process will enable them to better predict what the market will demand in a number of years time?

**Ms Whitnall**—It is giving them different information. I think one of the issues the corporations are facing now in the transition that we see happening, albeit quite slowly, is that previously, if community opinion leaders were challenging a particular product, corporations would see a need to basically deal with that, usually in some sort of public relations way. The move we see happening is that, by taking on information, they are trying to then project forward as to what products will be needed in the future and create a market for a different type of product, because for every corporation it is all about getting out there faster than your consumers.

**Senator WONG**—So what do you say drives the corporation in that situation? What drives them to engage with these I think you called them opinion leaders—what drives them to try to assess the future shape of the market? One of the things that we have been arguing, as I was saying, is that what we want is for companies to say, ‘This is part of our core business and this is why,’ which is essentially a market argument. But I think we sometimes say ‘market forces’ without being clear about what we mean and, therefore, about what actually has to happen.

**Ms Whitnall**—It is a good point.

**Mr Hogarth**—One thing that drives companies is that they have what you could euphemistically call a significant emotional experience, where their survival is threatened or immense damage is done to their business. For example, 10 years or so ago, what BHP had with the Ok Tedi mine incident, which came on top of a whole lot of other business problems, was a huge-impact event. A number of industry sectors and corporations have woken up and found that they are hated and that it really threatens their business—because their people do not enjoy working in an industry or for a company that is hated—and it stops them from being able to grow their business. If concern about old-growth forests manifests itself as a market force then a business can look at that and, even though that business might have a government licence to keep logging an old-growth forest, it might say: ‘We can clearly see where this is headed; we are better off investing in plantation forests and recycling for pulp and paper than continuing to fight against the clear trend, where this is headed. This is operating as a market force; it will get at us one way or another.’

**Senator WONG**—Let us talk about signals then. The forest and the automotive industry are two examples of this. You would agree that there are a great many situations, and I am sure you would come across them—although presumably the businesses with whom you work are not in this category—where either the signal is too weak or, even if the signal is loud, it is not seen as legitimate, and it does not actually manifest in any behavioural change by the company. In a perfect neo-classical world, if you had a rational company, from your perspective, then they would make a rational business decision. But that does not happen. We know that companies do not do that. For every BHP that learns from Ok Tedi, there is another, equivalent Ok Tedi created in a different sector, where, as I said, either the signal is too weak or the company does not hear it.

**Ms Whitnall**—Ford is a really good example of that. As was pointed out earlier, Ford and Toyota and General Motors were all in the same spot. Ford and General Motors were leading the market 10 years ago when Toyota made these decisions. I think it is not just that sometimes they do not hear the signals; sometimes it is that the degree of change required is too scary.

**Senator WONG**—Sure.

**Ms Whitnall**—So, for a company that has invested in very oil-dependent products, making that total change is a very big change. I gave the example of the business crisis they had in the middle of that thinking, which then distracted them. They got very focused on how to get over that crisis, how to keep the share price up at that point. That in itself does not then give them the head space to look at these other longer term signals.

**Senator WONG**—All agreed—and you probably see where I am heading—therefore, the market forces impinging on that decision were insufficient to create the behavioural, cultural and business changes that you might say would have been appropriate if they had a rational response to those things. So what drives that? What can you do then? What do you do as a consultant to try to change that?

**Mr Hogarth**—The loudest noise that most publicly listed companies are hearing is their quarterly reports and the analysts riding them on that. I am sure you have heard lots about short-termism in the context of this inquiry, and it truly is the enemy of a lot of what we are talking about, because sustainability and corporate responsibility are things that are much more connected to long-term value creation for a business. So it is not only about building the capacity in the business to recognise social and environmental issues as being relevant to their core business and their financial performance but also giving them the context and capacity to consider things in the longer term and to act in that way.

Again, it is no accident that Toyota is the company that has the Prius, because there is a particular culture inside Toyota as a Japanese company and in the way they direct their engineers which encourages the kind of innovation that has led to the Prius. The company has a longer term view about its objective to be No. 1, and it has been prepared to back something even though the market signals at the time were very weak and unclear to them. There is an element of business in the end. People often talk about having the business case for doing something, and they apply that to sustainability or corporate responsibility as well, but by the time you have a 100 per cent business case the opportunity is almost always gone in business. So a lot of business is about leadership, gut instinct and taking a punt on things. That approach should be applied in this area just as much as it is in a whole range of other more commercial decisions.

**Senator WONG**—I am asking: is that something that we just leave to the market, or are there ways that that can be contributed to? Let us get out of the directors' duties and the mandated reporting space. I am speaking more generally. I think earlier in the submission you said, 'Government can create a marketplace for sustainability.'

**Mr Hogarth**—I think it can create and underpin some quite surgical tweaking of regulation and reviewing of taxation. There is a lot of discussion about the fact that taxation is directed at taxing goods—things that are good, like employment and so on in society—and not so much the

bad, such as environmental pollution. If government increasingly looked at how to ensure that the laggards in the areas of responsibility and environmental performance—

**Senator WONG**—You tax the evils as opposed to the goods.

**Mr Hogarth**—Yes, and one of the big problems in this whole area in getting companies to act has been that the leaders have not been rewarded very well by the marketplace, government regulators or a number of other ways in which they could actually benefit from their leadership, and the laggards have essentially been protected and not been punished enough for failing to act.

**Senator WONG**—So you have identified taxation as a general proposition. How else would you reward and punish?

**Mr Hogarth**—In part, that is the willingness of government to enforce its decisions to drive change. In areas like extended producer responsibility the marketplace always says: ‘No, it’ll cost business too much. We won’t be competitive. At least hasten slowly, and we really shouldn’t go there at all.’ If a strong government resolves to actually push ahead, you will often be surprised by how quickly some of the companies adapt and do very well out of it, and some will not. Over the last several years in Australia, government intention has clearly been to move towards cleaner fuels. A couple of the major oil companies invested early, and very substantially, and then watched while those companies that had not invested in the new technology were given extensions year after year—because it is obviously a significant challenge to the political process if a major refinery is closed down and jobs are lost. So part of it is, having identified policy changes that will achieve better outcomes for society and the environment, that the resolve is there to see them through.

**Senator WONG**—What about the capital and consumer spaces? I certainly think it has emerged in the evidence that we should not just be focusing on companies, but also on those who invest and those who consume. Obviously, those who consume arguably have a little less power in an organisational sense. What can be done to try to facilitate change being driven in those spaces? This is where people use reporting as an example, and I understand your view about compliance being a cap. I have some sympathy for that, but some might argue that if you had more consistent information and perhaps better knowledge of the benefit of more sustainable business practices to the long-term value of a company, for example in capital markets and within the investment sector, that actually would also drive change. What you are seeing now is, as you say, that the better companies may not be rewarded in an economic or political sense, and maybe they are not rewarded in terms of their access to capital either because the markets do not necessarily value what they are doing.

**Mr Hogarth**—With regard to the capital markets, one of the market forces, for example, that will drive change in that direction is litigation. And increasingly, if you take the idea of climate litigation then at some point, and we may be past that now, where the body of evidence was such that climate change really needs to be taken into account and companies demonstrably do not and banks and lending institutions which lend money to them or invest in them do not take it into account, directors would be liable. So without there necessarily being any actual legislative change in the obligations of directors in that sense, a market force in the form of litigation is driving change in what really will be prudent and acceptable behaviour now or going forward.

**Senator WONG**—What about the issue of reporting and information to markets? Can I clarify where I am coming from so we do not have a discussion about where we both are?

**Mr Hogarth**—Sure.

**Senator WONG**—I am not suggesting we have to have mandated reporting. I am not putting that to you. What I am saying is if you have the situation, and companies have said this to us, where they say, ‘In terms of those who invest in us or who are thinking about investing in us, they don’t necessarily see the value of what we do,’ it seems to me, if that is the case then surely there is some benefit to having a reporting framework that is consistent. Then you could at least have some capacity for looking at company A versus company B as an investment decision. You could say, ‘They’re doing a fair bit better against these sorts of parameters, and that is something that is relevant to their long-term value, so I’ll invest there instead.’

**Mr Hogarth**—I would agree that yes, the ability of companies working in this area to be able to extract value from what they are doing, from investing and reporting and that, means that some form of uniform standards and an ability to compare across sectors and between different sectors et cetera could be desirable. How does that come about? One avenue, and it may be necessary, is that it is to be a regulated approach. Another may be that it is market set. The Australian Stock Exchange could move to establish what that benchmark is going to be. There would be a number of ways to skin that cat, but I see the value in having that.

**Senator WONG**—So you do?

**Mr Hogarth**—Yes.

**Ms Whitnall**—Would you mind if I picked up on that point; you asked also about consumers.

**Senator WONG**—Yes.

**Ms Whitnall**—We have a particular interest in the consumers at the moment. Ecos’s work has been around working with major corporates, but we are in a joint venture with another small company, called Easy Being Green, which at the moment has tapped into a business that has been created by a New South Wales government scheme—the NGAC scheme, which is the New South Wales government abatement scheme around trading in energy. That piece of legislation has created a whole process of getting energy efficient products to consumers in a way that is introducing consumers to those benefits without cost to them.

**Senator WONG**—That is a great example of what I was trying to explore with you. I think it was Senator Brandis who talked about laissez-faire. That is an example where you utilise market mechanisms but government makes a clear policy decision that says: ‘We are essentially going to create a market. We are going to make a policy decision that will enable it.’ I do not know whether they thought of it like that. From that you create a new market which has as its end point or benefit something that is obviously socially good as opposed to environmentally destructive. So it is not just saying, ‘Government withdraw.’ Government has a clear role in saying, ‘Okay, let’s develop this.’ Essentially, market forces will then drive behaviour change in consumers and therefore companies. But we still create the market.



**Ms Whitnall**—And that is what we are saying. We are not advocating that government should withdraw; but the nature of the government intervention is quite crucial. I am not sure whether they went out intending to create that market either, but there are a number of new companies playing in that space. One of our philosophies that we are debating internally at the moment is about how hard it is for some of these very big multinational corporations in particular to change versus getting some new entries, new companies, created into the space who can take advantage of a market opportunity and really push that through and therefore change the nature of a market.

**Senator WONG**—If either of you have anything further to add, particularly on the point you raised, Mr Hogarth, that governments have a role to underpin—I think that was the word you used, along with something else—I would be interested in seeing, without prejudice, some of the options you would say could be looked at. It is up to you. You can take that on notice, have a think about it and, if you want to, bring something back to us.

**Mr Hogarth**—I would say just that it is the cleverness with the things government can influence and how they are used that will really get the results. Red letter regulation may bludgeon about a particular outcome, but if you can give the right regulatory signals to companies and let them innovate to find ways to achieve the goals, you are likely to actually get more action faster.

**Senator WONG**—Better results. I agree with that.

**Ms BURKE**—I am interested by the chart you showed us. On page 12 or 13 you put CRS as philanthropy and volunteering. Is that your view of what it is? It seems that we have been having this very limited view about people getting ticks on the boards because they donate some money or time, whereas I would have thought corporate responsibility, from what you have been discussing in a range of issues, is much broader than that and involves more stakeholders. But you, like a lot of the people before us, have said, ‘This is how we define it,’ in a really narrow one-off way. Certain players are getting big ticks because they donate money whereas with your example of the Prius there is a whole change of philosophy, they invest a lot of money, and it could have been a really bad mistake. I was wondering what your view is and what you tell your client base.

**Ms Whitnall**—We frame this on a continuum, I think, to have that conversation with clients. It is not necessarily our view of CSR, but a lot of companies are seeing CSR as being about saying, ‘If we just do philanthropy and the staff volunteering, that will be enough.’ That is not about creating genuine social value; it is about getting some more ticks on the board. It is a bit of a PR strategy to be honest.

So we use this kind of diagram to get them to think through, first of all, what they are doing at the moment but also what the opportunities are and the threats posed to the business by these sorts of issues. Quite often, when we do it for a particular client, we end up with five or six threats which are poised over the product market, market development and market growth areas that are directly related to environmental and social concerns, and all their work is down in a bit of lobbying and a bit of philanthropy, which are not going to address these issues. We use it to get them to think about the fact that if they do not look at their products and their extended producer responsibility for those sorts of issues, the philanthropy is not necessarily going to help

them make their business sustainable. That is this distinction we make between CSR and sustainability.

**Mr Hogarth**—In the context of the obesity debate, we are talking to a major fast food company. We are going to be saying that no amount of giving to children's sports, opera and that sort of thing over here is actually going to address the impacts of your business over here. It is that interpretation of corporate social responsibility—people use many different definitions—and that sort of thinking about what it is and that idea that you can balance the bad there with a smaller good over here. We reject that completely.

**Ms BURKE**—You keep saying that people are still getting the PR kudos about doing a one-off good versus the whole spread. That is one of the problems—we do not have a framework or an auditing process of that framework. You can say you are doing it but who actually knows? It is the notion of what we refer to now as 'greenwash'. Certain companies are actually leveraging off and getting market advantage by saying they are doing something—

**Senator BRANDIS**—The Body Shop.

**Ms BURKE**—I was not thinking about them. I was thinking about some of the banks who were talking to us before.

**Senator BRANDIS**—They are your iconic class enemies.

**Mr Hogarth**—Greenwash in the consumer context is an issue here where government certainly could do something. The consumer is very jaded about green claims.

**Ms Whitnall**—The whole issue of extended producer responsibility is one of the most challenging ones we face when we work with companies. There is always the argument that the consumers make a choice, we give them options on products but they make a choice and we are responding to consumer demand. For us that is a cop out. They are not responding to the broader community issues around that consumer demand.

**CHAIRMAN**—Thank you to both of you for appearing before the committee and for your assistance with our inquiries.

**Mr Hogarth**—Thank you for the opportunity.

[2.38 pm]

**RIDEHALGH, Mr David Nicholas, Partner and Head, Corporate Communications Team, PricewaterhouseCoopers**

**CHAIRMAN**—Welcome. We have before us your submission, which we have numbered 110. Are there any alterations or additions that you wish to make to that written submission?

**Mr Ridehalgh**—I have an additional exhibit, and I also have a copy of my opening presentation.

**CHAIRMAN**—The committee accepts that as a supplementary submission. I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

**Mr Ridehalgh**—I would firstly like to thank you, on behalf of PricewaterhouseCoopers, for the opportunity to give evidence here today at this PJC hearing on the way forward with respect to corporate responsibility and triple bottom line reporting in Australia. You will have noted that in our submission we have focused on one area of the committee's terms of reference, being point (f), on the appropriateness of reporting requirements associated with the issues of corporate responsibility and triple bottom line reporting.

In our submission, we shared with the committee our findings from nearly a decade of research into the corporate information needs of the capital markets and senior executives to effectively assess and manage an organisation. These are the key messages in our submission. The current Australian corporate reporting framework is delivering complex compliance based reports which do not meet the information needs of corporate stakeholders. Further legislation on environmental and social matters would further burden corporate Australia. We believe the corporate reporting framework should be simplified, not expanded. Our research indicates that 'less is more', and that corporate stakeholders want to understand the company's key business strategies, management's performance in achieving those strategies over time and using available resources, as well as an indication of the company's future prospects.

Our research also found that although certain financial measures such as earnings, cash flows and capital expenditure are critical, the majority of information used to assess or manage a company is non-financial in nature. In addition, the relative importance of non-financial measures differs between industries. For example, innovation in the product pipeline is critical to a pharmaceutical company, whereas environmental performance would be a critical success factor in the mining sector.

In our submission, therefore, we put forward a three-tiered model for reporting, built on the principles of consistency and transparency. Tier 1 is already being addressed by the introduction of international accounting standards—we are starting to achieve consistency in financial measurement. Tier 2 requires industries to develop standard definitions for key industry specific metrics, again enabling stakeholders to understand the relative performance of various industry players. Finally, tier 3 requires companies themselves to be more transparent in reporting performance against their unique strategies and plans.

Underpinning this model we presented a holistic framework for reporting, which can be used by any company in developing a corporate communications blueprint. This is on page 5 of our submission. This framework is broader based than traditional CSR reports or triple bottom line reports, and it gives the company the freedom to determine what its own important strategic areas are and what its key measures of success should be, and therefore what it will report on a consistent basis to its stakeholders.

Our research has identified a number of benefits for companies that are transparent in their corporate communications, and many companies are already providing voluntary additional information to assist stakeholders in understanding the business's overarching performance. However, this additional information is on top of the regulatory required disclosures and adds to the volume of data produced. It also increases the cost of compliance and reporting for corporate Australia.

Finally, it can be hard to picture what I mean by 'less is more'. Therefore, I have brought an additional exhibit for consideration by the committee. The *Shareholder friendly report* developed by PwC with the Australian Institute of Company Directors is an illustrative guide on what a simplified annual report could look like in the future. We launched the *Shareholder friendly report* late last year, and there has been significant interest in it from major corporates, the Australian Shareholders Association and the various regulatory bodies. The *Shareholder friendly report* was developed as a performance report to be sent to the majority of stakeholders. It is built using the model and framework for reporting outlined in our submission.

What may be of interest to this committee is that in explaining the company's performance against the key strategy of operational efficiency on pages 7 to 9, the CEO in this illustrative guide has reported on a number of strategically important areas, including the company's environmental and social performance. Under this framework, the company itself sets out its own strategy within its chosen markets, and identifies the key measures of success against which the management team should be assessed. By reporting on performance against these strategies, stakeholders are kept informed on progress and any required changes through a brief report. They are receiving less, but more focused information which they are finding more relevant and useful.

**Senator BRANDIS**—This is a fictional thing?

**Mr Ridehalgh**—It is a dummy company, but I hope it adds some clarity to the framework articulated in our submission. I would be happy to answer the committee's questions.

**Senator BRANDIS**—Are they real people or other models or actors?

**Mr Ridehalgh**—They are real people who are part of the PwC suite of pictures. Most of them are employees or partners.

**CHAIRMAN**—Am I correct in assuming from your submission and presentation that you do not go as far, for instance, as KPMG?

**Mr Ridehalgh**—In what respect?

**CHAIRMAN**—In what they are recommending for reporting requirements.

**Mr Ridehalgh**—We actually go further. I think they have something called the ‘quadruple bottom line’. Is that correct?

**CHAIRMAN**—They have advocated that a reporting index should be used. I got the impression that you were not necessarily advocating a standardised approach.

**Mr Ridehalgh**—No, we are not advocating a standardised approach.

**CHAIRMAN**—Or a mandated approach.

**Mr Ridehalgh**—No, we are not advocating a mandated approach to triple bottom line reporting. What I am advocating is along the lines of what Ecos presented before. The market forces discussion we had a minute ago was of interest because what we are identifying is that the companies, in order to succeed and be sustainable in the long term, have to articulate clearly the markets they operate in, their strategies within those markets, the resources they have at their disposal and how they are going to utilise those resources to maximise returns. In producing a framework of internal management and then external reporting around those kinds of concepts, they will be considering and addressing their social obligations and the importance of the social environment to their business. They will be considering and addressing the environmental impact of their business and what they need to do around that particular area of their business. But it is one facet of the framework that they need to consider and assess in setting up their strategy.

The framework we put forward on page 5 of the submission, the round circle, is really a codification of our research. It is a very holistic framework, and it actually covers a very broad spectrum of matters for consideration in setting your strategy within your markets by identifying your key measures of success against those strategies and then developing communication plans around that framework. So, no, I am not advocating additional regulation or an index. What I am advocating is more along the lines of guidance for the kind of information that organisations should consider at the time they start developing their strategy and, then, once they have developed their strategy, the kind of information they should report to their various stakeholders on how they are going in addressing and delivering on that strategy.

**CHAIRMAN**—Again, KPMG have recommended that those companies that do not issue sustainability reports should be required to explain why they have not done so.

**Mr Ridehalgh**—I would not advocate the need for sustainability reports as another obligation on corporate Australia. I do believe, though, that it is in the company’s best interest to move away from focusing on short-term earnings, as the people from Ecos were saying a minute ago. If you focus on short-term earnings, then that is what the market focuses on. If you focus on how you are going to deliver value over time as part of your internal strategy and work towards that strategy and then communicate that to the market, then you move the capital markets away from a single focus of earnings in the short-term to a long-term sustainable business which will deliver capital growth as well as a level of earnings over time. That is a framework we are putting forward.

**CHAIRMAN**—You advocate that capital markets take reporting information more seriously when it is clearly linked to a corporate strategy. I suppose that is part of the basis for you saying that the report should be tailored to the dynamics of each industry. CPA Australia published some research on sustainability reporting that indicated that the absence of a common basis for reporting undermined its utility to the financial markets. What is your reaction to that claim?

**Mr Ridehalgh**—I have not seen that particular bit of research but, from the research we have done in the UK around the CSR reports and its impact on analysts and investors in making their various decisions, it had no impact at all. It was very low down the list of considerations. I had some Australian analysts in PwC two years ago. It was a small group of 12 analysts. I asked them whether they were aware that companies, particularly the companies we were talking about, produced CSR reports, and they were not. So they obviously were not factoring anything into their assessment of the organisation based on these additional reports that had been produced.

However, if the CSR report is aligned to the strategy for assessing the organisation as a whole and the long-term success of that organisation it becomes part of the whole picture. And you can build in the social implications, the environmental implications, the people implications, the supply chain, the customers et cetera into that overarching strategy for the organisation. You can say: ‘This is what we are trying to do here. This is what we have actually done in this period, and this is what we intend to do going forward.’ You are putting a stake in the ground against which you can be measured, which is broader than the earnings game. If you separate it, then it can be lost and the capital markets cannot see what the linkage is with that overarching strategy for the long-term success of the business for the shareholders and its other stakeholders. Suddenly there is a separate debate going on for a separate audience that is not brought into the fold. So alignment and focus on one key strategy is my position.

**CHAIRMAN**—I also take it that you do not support the proposal by the current federal environment minister to have the ASX consider the global reporting initiative as a standardised voluntary reporting framework for inclusion in the ASX corporate governance council’s principles and recommendations?

**Mr Ridehalgh**—No. I have no problem with anything that is put in place on a voluntary basis as best practice and guidance for people to consider. I think the GRI is a very good initiative. In fact, it is probably quite aligned to the research that we have done. To the extent that that was being put into a recommended principle of best practice or a G100 guide of how to do something, I can see that as being a framework for consideration.

The only concern I would have is if the ASX puts in place the principles then, when you have to actually report against those principles, it suddenly becomes a tick-a-box exercise. You have the same sort of situation with the governance framework. People actually go through it and say, ‘We’re doing 10 out of 14, but we are working on the other four.’ It suddenly becomes not a real-life thing but, rather, a mandatory obligation on the company. It may not actually be in their best interest to do it that way. It suddenly becomes a negative point and they have to argue why they are not doing it. I would prefer to go down the full voluntary route with some guidance and guidelines like the *G100 Guide to the Review of Operations and Financial Condition*, which gives you a framework to work with perhaps more than another obligated reporting matter.

**CHAIRMAN**—Can you give us some more details of the January 2005 obligation that you refer to?

**Mr Ridehalgh**—Sure. Every year on a global basis PricewaterhouseCoopers firms within countries go through the annual reports of many companies. We try to find the best examples of corporate reporting around the specific headings of this reporting framework. We try to find those companies who are best at analysing their markets and providing the best linkage between their markets and the strategies they are setting. We try to find companies with the best reporting of how they actually manage their people resources—their human capital—or how they manage their supply chain or whatever. Then we pull the best of the best together.

We go through the whole process and create a Trends book, that probably has between 40 and 50 good practice examples in it. It shows globally what the best corporate reporting organisations are doing in this space. This is about the seventh year. The new one is coming out later this month, actually. This year we actually decided to build a website of those examples for people to access.

We are focusing now not just on the individual components of disclosure but who is actually aligning better their overview of the markets they operate in, the reasons they have set their strategy within those markets, how they are utilising their resources to achieve specific performance and, to the extent possible, how that is then tying into executive remuneration. So it is that alignment that we are actually trying to identify. We are trying to identify those companies that actually understand the alignment between the macro picture and how they set their strategy and utilise their resources and non-financial assets to achieve their financial and other social and economic results.

**Ms BURKE**—So you are just relying on their reporting? Is there any actual auditing of that reporting or are you just relying on what they have actually put in the reports?

**Mr Ridehalgh**—That is the other interesting factor with CSR reports or triple bottom line reports now. I am a financial auditor. The amount of effort that goes into a financial audit—that is, the amount of effort that goes into the controls over the systems of handling the cash, producing ledgers, delivering the accounts and then having them audited—is considerable compared to perhaps some of the other disclosures that are going in some of these other reports. I think Ecos referred before to some of these other reports really being more of a marketing document and with cherry-picked disclosures. Not everybody but certainly some are very focused on giving a certain picture and a certain spin whereas, if reported performance is tied into the strategy and aligned to the strategy and you have articulated early on what your measure of success is, how you define it and what your targets are, it is very easy to measure. But you cannot change it—you set up what you are trying to achieve and you try to achieve it.

I am advocating a voluntary methodology rather than a forced methodology. But one where each industry is putting standard definitions out there of how industry measures should be calculated and disclosed. These measures can be put in the company's report, and if the company wants to have an internal audit or an external audit done on those particular disclosures then so be it. If it is in the range of expectation and it is believable and the management have strong credibility with their market then there may be no need for an external audit. It is more information to demonstrate that this particular company is achieving its strategy. If it is not

achieving its strategy, why not and what has it done about it? It comes down to transparency and conciseness in reporting. It is a performance report. A lot of the information that is produced at the moment in annual reports is standing data. It does not change terribly much year on year. It could be something on a website. It is taking up pages and pages and it is hiding some of that performance information, and so we are advocating in our sub: 'More is less.'

**Ms BURKE**—There are individuals out there nowadays who are basing investment advice on some of this stuff because they want to undertake an ethical investment, or these people say, 'I want to work for this company; I want to be a customer of this type of thing.' So if we are just relying upon these reports and they have met their targets, can people be relying on them to make those decisions if there is not a framework whereby you can compare or have some understanding that there was some rigour in place for what they have put down and actually achieved? If you put down a set of numbers and they have been audited, you know that that set of numbers, on the whole, is correct. Occasionally, one or two slip through but, on the whole, that is what we assume. They can put a nice gloss on things and people will therefore say, 'This is a good company; I'll invest in that,' or, 'That's a good place to work.' People nowadays are actually making decisions on these reports. I suppose it is a two-part question: how do you compare and can you compare that audit process, as a consumer looking at it?

**Mr Ridehalgh**—Just going back to the *Shareholder friendly report*, we have put a directors' declaration and auditors' report at the back, as there is in a normal set of financial statements. Just as in a normal set of financial statements, the audit is actually covering the financial numbers; it is not covering all the stuff that goes in the annual report before the financial statements. We are saying that the financial numbers in that particular document have been audited or have been extracted from audited accounts. Nowadays, in the full annual report, we say, 'By the way, as an independent party we have reviewed the rest of the document and it aligns with our understanding of how this organisation is going.' So it is not an audit statement per se; it is a 'smell test' type statement. The annual report looks in line with what we understand about this organisation. It is a balanced view. That is as far as we went with that document.

Some organisations might say, 'No, that "employee innovation" statistic is so core to my organisation, it is actually more important to my investors and stakeholders than my "other assets" number, so I want to have that audited.' There is no reason why, if they have defined how they have calculated it, someone cannot go in and audit it against their definition and against their underlying data and give it a tick and say, 'As an independent party, I have audited that number and it is fair and reasonable.' That can happen. I was not advocating it should be required. It is not required now. With respect to any organisation putting information out in an annual report, a shareholder friendly report or any publication, the directors themselves have a duty of care not to mislead. That basic law is still there, so they cannot put anything out there, otherwise they start to be misleading and deceptive. They will be caught under the current law.

**Ms BURKE**—Do you think there should be a range of issues included, so the argument is not just a case of saying, 'Because we have been a philanthropic organisation we have therefore met corporate social responsible goals'? Do you think there is a range of issues, such as environmental issues, your employees, your customers—you are being given a big tick because you are corporately responsible and because you donated pretax profits versus 'we have done a range of things'? Some people are saying, 'We're this really great corporate entity, but it is on a one indicator as opposed to'—



**Mr Ridehalgh**—I totally agree that that is not the right way of doing it at all. The framework is very broad based and our research certainly says that certain industries have more focus on customers, customer satisfaction, customer sentiment et cetera because they are very much face to face with customers. Extractive industries are perhaps far more concerned about environmental matters and OH&S matters for their people, because they have different pressures. All these categories in this framework are relevant and important to every organisation, but the relativity is different. So to try and mandate it from the centre, saying, ‘You must do this, this and this’ will set a tick-a-box approach again, rather than the company identifying what is important to them.

Going back to the actual model I mentioned, where we had consistency and definitions for financial reporting under international accounting standards, it would be good for industry to get some level of consistency in the key measures. In the telecommunications industry, things like churn are very important. If they all use the same definition for churn, then you can assess the churn of one telco versus another telco, because they are all using the industry based definition of churn. There will be other measures that are very critical to your company’s strategy that are different to other organisations. You have a different angle on some things, and therefore you should articulate that by defining how you are calculating it. But you should calculate on a basis that is consistent year-on-year, so people can see that your trend line is going the right way and you are going towards that medium- to long-term strategic goal.

**Ms BURKE**—You mentioned directors’ fees and salaries in the 2005 report. What do you look at? They have met the criteria that they are set they are getting their bonuses based on that, but what is it you are actually looking at?

**Mr Ridehalgh**—The board has approved a strategy that management has then implemented. Each of those key executives has got areas of responsibility that will have key measures. Some of those measures are identified in the report, and you can see how those measures are linking into their performance based pay. Some organisations are starting to do that much more clearly than in the past.

**Senator WONG**—It is interesting getting different accounting firms appearing before us and different views about reporting. Can I firstly clarify this three-tiered model: you said you favour an entirely voluntary approach. Are you suggesting that for all tiers?

**Mr Ridehalgh**—No, the top tier has already been taken out of my hands.

**Senator WONG**—That is right.

**Mr Ridehalgh**—The only way to get the global consistency would be to drive that through the legislation that we have seen. In fact, to a large extent it started off voluntarily between the various accounting bodies around the world so it was really the professions that drove the financial accounting consistency. On the industry perspective, I would not see a central government doing it; I would see it as the industry bodies starting to ask: ‘What are the key measures of our industry? What is it that we should be tracking on a regular basis?’ In some industries, those things are already starting to happen. We were talking about the automotive industry; they are starting to define their key measures in the United States, because they want to transition to a new technology called XBRL for reporting purposes. You need to have a very

clear structure for reporting in order to provide the right information electronically so that the analysts and other users can do their various calculations. So we are seeing some industries pulling those definitions together. It is a matter of trying to get that together, like the international accounting standards, on an industry basis. The last level is really the company putting at the back of the accounts, or on its website, 'this is how I have calculated that particular measure' so people actually understand how they built it up. Again, they are tracking against what they have set themselves as a target to achieve, aligning it with their strategy and then showing the glide path—the trend—towards achieving that strategy.

**Senator WONG**—One of the points that was made, I think by Senator Murray in our Melbourne hearings, was that you could have a requirement that people report both on financial and on non-financial measures and indicators without necessarily mandating how they do that. Wouldn't that deal with some of the concerns that you rightly raised, that one size does not fit all? I think we have had enough evidence to be clear that how a services company might report against these issues will be different, and they will identify as important different issues to those identified by a mining and extractive industry company, and so forth. Is your concern about mandating a general proposition, or is it more that you do not want an inflexible, rigid approach to reporting that may stifle what people are doing?

**Mr Ridehalgh**—I want to say three things. The first one would be, adding some more now without taking something away, with the burden of reporting, would need to be—

**Senator WONG**—Yes, I understand that.

**Mr Ridehalgh**—So that is No. 1. Corporate reports at the moment are not actually meeting stakeholder needs. Most people get the annual report of the large corporations in Australia and throw them in the bin because they are too big. They might read the chairman's report, and that is about it. If we can take some of the volume away—

**Senator WONG**—People always say that, and I think: 'What you do? Do you check that?' That is a throwaway line—

**Mr Ridehalgh**—No, there are two pieces of research done recently—

**Senator WONG**—Do you check who puts them in the bin?

**Mr Ridehalgh**—Yes, that is right. I do not know whether it gets thrown into the bin or what they do with it, but there was a CBA study done to find out what happened to their annual reports. They did a survey of their shareholders, and there was very little reading of the report. The second project was done I think by the Australian Chartered Secretaries Association a few weeks ago, which again basically demonstrated that the annual report was not a used document by a majority of corporate shareholders. Certainly, when we asked the capital markets what they use in our global research, the annual report itself was about No. 5 on the list.

**Senator WONG**—Sure, and I do want to come to the capital markets, there are some issues there, but can we go back to the reporting issues?

**Mr Ridehalgh**—Yes. So if we can take some away then we already have in place the framework for a review of operations and financial conditions, which is now required under CLERP 9. We also have the G100 guide as to how the review of operations should actually be developed. These are the best practice disclosures that should go in the report. You will find that actually covers a lot of the areas of reporting focus. If you are setting your strategy in non-financial areas, what are those key areas? How important are they to your strategy? How are you managing and monitoring and measuring those performance metrics on a regular basis, and what are the results? It is now a matter of trying to get organisations incentivised to give a broader picture in that review of operations of financial condition. That would pull together the information that is needed to understand how this organisation is managing its responsibilities to the environment and its responsibilities to its community in a way that is beneficial to the community and the environment but also to the other stakeholders, including the shareholders. In other words, it is linked to the overarching strategy. It is good business sense to do this, and we are doing it because not only is it good business sense today, but longer term it is good business sense to understand, read the market, go with the trends et cetera.

**Senator WONG**—Sure.

**Mr Ridehalgh**—That is my answer: do not mandate it as the framework is already in place, but encourage organisations to use that framework. That might mean cutting down some of the other stuff that is required to enable people to focus on the review of operations and financial condition.

**Senator WONG**—And your position on non-mandating is that, even if it were flexible et cetera, you think people will not do it correctly.

**Mr Ridehalgh**—Many organisations will, and many of them have already started to do it.

**Senator WONG**—But that is my point.

**Mr Ridehalgh**—Yes, so the good ones will, and the ones who do not have the resources will try to skim over it because they have other things to do. It is not primary to their core strategy.

**Senator WONG**—Do you think reporting can be a driver of change?

**Mr Ridehalgh**—Absolutely. The previous team also mentioned Westpac. Several years ago, Westpac started their squashed tomato campaign. They used public reporting to drive internal change in the organisation, and it was brilliant: four or five years of a program of external reporting to drive cultural change within the organisation linked other programs.

**Senator WONG**—You have talked a bit about why non-financial indicators are important. I do not know if there is anything more you want to say about that. I was interested in your reference to your publication. Did you say that it is coming out again?

**Mr Ridehalgh**—Yes, we are launching it again at the end of the month, the global publication.

**Senator WONG**—Seventy-five per cent of the measures that management investors ranked as important were contextual and non-financial. That is a very high proportion.

**Mr Ridehalgh**—Yes, it is. And when you get past earnings, cash flow and capital expenditure, the other numbers in the accounts are of less importance in assessing an organisation.

**Senator WONG**—Than these other factors?

**Mr Ridehalgh**—The market share, the product pipeline, the speed to market, the return on investment for new innovation, the employee satisfaction, the customer satisfaction, the impact on the environment, the work within the community from a value added perspective can actually be far more valuable to them than other creditors being a couple of million.

**Senator WONG**—Wouldn't companies be wanting to report on that?

**Mr Ridehalgh**—Going back to the volume, I think a lot of companies are starting to report on that in separate documents to what they are being obliged to report on, so they are doing compliance based documents which are 150 pages long. Some of them were starting to look like marketing documents in the first half of the annual report. Some of them are starting to be separate documents for specific user groups like a customer charter, a CSR or whatever it might be. It is pulling all that back into a central and simplified reporting structure so you are articulating performance against strategy over time.

**Senator WONG**—Can we go back to analysts or the capacity markets more generally.

**Mr Ridehalgh**—Yes.

**Senator WONG**—It has been quite clearly put before us by a number of people that very few analysts see what you call non-financial information as a priority and that companies that are doing the right thing, to use the Westpac term, are not necessarily extracting value from that in terms of those who invest in them.

**Mr Ridehalgh**—I will share with you an experiment we did the year before last in the UK on a company that is very good at contextual disclosure. They are called Coloplast, and they have been in our book every year for very good disclosure. We gave one set of analysts a copy of their full disclosures and one set of analysts just the regulatory accounts. We asked them to give us an earnings estimate and we asked them to give us a buy or sell recommendation and an assessment of the risk. The results came back that the spread of earnings for the guys with the regulatory accounts was huge. The volatility in that account to one piece of bad news would have been considerable, whereas the range of earnings estimates for the fuller accounts—they had a lot more information about the company's products; they were medical equipment companies and they got information about how they got their medical equipment through all the various powers that be—came up very tight, so less volatility. The majority of these guys with the regulatory accounts said: 'Sell the stock. It is too risky. The medical equipment might break down and may cause a problem.' The guys who got the more detailed information understood the risks. They could actually assess the risks and then also buy.

**Senator WONG**—Sure, and how the company was managing it.

**Mr Ridehalgh**—That was our way of trying to quantify the impact of this non-financial information, so we are out there very clearly articulating to our clients and to the world at large the importance of the broader based reporting. The message is getting through, and people are starting to do it. The regulatory burden of compliance in many organisations, the middle-tier listed organisations who have not got the resources or the time to do all the compliance stuff and the broader based reports, I think is probably where I would focus.

**Senator WONG**—Where would you focus? Which sector?

**Mr Ridehalgh**—The top end have got the resources to produce both reports whereas the middle order are struggling to get the compliance done.

**Senator WONG**—So they are not going to worry about the other bits.

**Mr Ridehalgh**—They can see the value. They have not got the resources to go after additional value potentially. Going back to the analysts, we asked the same group that came in what they thought of non-financial information and whether they utilised it. It is true they do not build it into their models. They have not got sophisticated enough models yet—although some of those green funds we talked about are obviously getting there from an environmental perspective. Their models are very much focused on cash flows and future earnings forecasts and the like, but they have something called a management premium. They increase it for a premium or reduce it for a discount, with an end result of their model being based on a number of the factors around non-financial reporting, the credibility of the management team and the like. It makes a difference. If the management team is believable, they are out there with a broad based strategy and they are achieving against that broad based strategy. Not only does that take the focus away from short-term earnings blips to a broader suite of strategies and the achievement of those broader suite of strategies; there is also a management premium and the management team is believable. They are quite comfortable in saying ‘We’ve achieved most of our strategies this year. We’ve failed here, and this is what we’ve done about it and this is what we are going to do going forward.’ That honest approach is likely to achieve some form of premium but it is not scientific.

**Senator WONG**—No, but going back to your experiment, which I think is quite an interesting piece of evidence, what that suggests, doesn’t it, is that these, you call them, contextual or non-financial information or the management of external risks—however you want to describe them—are, clearly, important aspects of the information an analyst ought to consider when she or he is making recommendations about particular stock. Do you think that is a view within that sector that that information is important?

**Mr Ridehalgh**—I think they see it as important. I am not an analyst, so you might need to ask one for more detail on how they do their modelling, but it is taken into account. How far forward they are going with their forecasts will have an impact. Their forecasts might be for five years and then they might bring it back from five years. If so, it is the short to medium term they are focusing on rather than the longer term. A sustainability type approach is maybe focusing beyond five years as well. That might have an impact on it, but I think they are certainly cognisant of it. They are clearly focused on the quality of the management team in delivering against their suite of strategies, and they will penalise or put a premium on a stock according to whether they believe the management team is or is not doing a good job.

**Senator WONG**—I think I am probably correct in saying that that is the most optimistic piece of evidence we have had about this area.

**Mr Ridehalgh**—That was straight from the horse's mouth—12 analysts around a room. They called this thing a 'management premium'.

**Senator WONG**—Sure, but most of the evidence before us has been more the other way—that even if you are doing the right thing that is not necessarily something for which you can extract value, in terms of how potential investors view your company. I guess I asked the question because what is of interest to us is not just what directors are doing but, if you are trying to encourage more sustainable corporate behaviour—or whatever phrase you want to use—what could drive that behaviour. One of the drivers, I would have thought, would be investment—the decision to invest or not—and those making that decision having regard to these issues.

**Mr Ridehalgh**—You are right. It is really a matter of moving the analysts away from the short-term earnings game and moving your stock from an earnings play to a capital growth play, such that you can then talk about how the long-term value of the organisation is going to be built. In investing today, you might actually be expending cash that could be a dividend today while your competitor might not be. But if the analysts believe that you have got something that, in two years time, will give you a competitive advantage over an organisation that is not investing today, then you are driving them towards a more long-term view to go with your strategy. But you have to have the credibility as a management team to allow you to make that decision; otherwise, you will be driving a short-term decision to put that cash into dividends and pay out today.

**Senator WONG**—Isn't that an argument for a more consistent framework of reporting? I am not saying that it should be identical or template style but, to enable an analyst to make the decision or the judgment that you have just described, surely you are going to want some reasonably consistent information to be provided from the two companies you are considering?

**Mr Ridehalgh**—It is interesting to consider how far down you go in the level of disclosure. That investment could have just been a piece of capital equipment that cost you \$1 million; if it has got an important strategic impact on the organisation, then the company that is doing it will actually be putting it out there and saying: 'In this current market we can see a trend happening; we're going to invest in this trend; our strategy is to invest in the trend, to realise the benefit in two years time.' So they are out there, putting to the market that, 'We are doing this and reporting on performance in achieving those benefits over those couple of years.'

The other organisation then has two choices: it can ignore that, and probably get a question from the analysts at their analysts' briefing, 'We've just read the other company's reports. What are you doing about this?', or it can put out a separate strategy of its own which says, 'We're not investing in this because we do not believe this is the right technology. We're actually going to do something else.' Suddenly you have got two competing strategies, but the information is out there, if it is material enough to be at the strategic level.

If it is at the management level—as in: it is just a piece of equipment—then it probably will not get into the external reporting. You would not really mind that too much, as an investor in

that company, because that is why you put the management team in place—to make those smaller management decisions. If it is a change in the risk profile of the organisation, or a change in strategic direction of the organisation, then you really have got a right to understand, but it has to be at that really high level of strategic change or risk change.

**Senator WONG**—I am not sure if that answered my question, but I will leave it at that.

**Mr Ridehalgh**—Sorry.

**Senator WONG**—I turn now to the Global Reporting Initiative. I am not sure what your views are on that—if you want to express a view—and where it would fit in your three-tiered framework. Are there three tiers?

**Mr Ridehalgh**—Yes, there are three tiers. We are part of the GRI in Europe, so we are working with the initiative in Europe. I would not claim to be an expert in what they are doing, so I might pass on saying what our firm's views are on that, but we are participating in that discussion and in that initiative.

**CHAIRMAN**—Mr Ridehalgh, thank you very much for appearing before the committee and for your evidence. It has been most useful for our inquiry.

**Mr Ridehalgh**—Thank you very much. Chairman, would a couple of pages on that experiment that we did be useful as an exhibit?

**CHAIRMAN**—It would be.

**Mr Ridehalgh**—Shall I forward that to the secretary?

**Senator WONG**—Yes.

**CHAIRMAN**—Thank you. We look forward to receiving that.

[3.20 pm]

**COLLINS, Mr Jason Allan, Corporate Campaigner, Greenpeace**

**MOHR, Mr Tony David, Associate Director, Total Environment Centre**

**CHAIRMAN**—Welcome. We have before us your submissions, which we have numbered 56 and 43 respectively. Are there any alterations or additions you wish to make to the written submissions?

**Mr Mohr**—No.

**Mr Collins**—No.

**CHAIRMAN**—I invite you to make a brief opening statement, at the conclusion of which we will have some questions.

**Mr Collins**—Corporate social responsibility, whether through voluntary measures or permissive legislation allowing broader stakeholder interests to be considered, is not in itself going to result in the cessation of the negative impacts of externalities of corporations. Some businesses have impacts that are fundamentally unsustainable, and it is clearly not in their shareholders' interests to change that unsustainable behaviour. However—and this will be borne out in my later points—while CSR base measures will not deliver the environmental solutions we will require, they will deliver better outcomes than would occur in their absence.

What will address environmental and other problems in totality is legislation directed at the specific problem. The legislation needs to be focused not on corporations per se but instead on the undesirable conduct. With legislation focused specifically on certain conduct, businesses can operate within the framework of legislation targeted at specific impacts, with the sole purpose of maximising their returns to shareholders without externalising their costs to the environment and the community. This is of course based on there being a framework of legislation that targets the elimination of those externalities. What I have just described is a lowest common denominator approach. There are companies that recognise that balancing shareholder interests with stakeholder interests is not always a zero sum gain. Where consideration of non-stakeholder interests is required in order to preserve shareholder value, this activity should be allowed, if not encouraged.

This brings us to the question of whether the current corporate law is sufficient in allowing directors to act in the interests of other stakeholders where it is also believed to be in the interests of the corporation. I note that many of the submissions thus far have argued that the current law is sufficient. However, the fact that the business judgment rule in its current form is considered by some directors not to be sufficient in this respect means that, regardless of its legal interpretation, it continues to act as a barrier. In this case, a clarification of the business judgment rule would be beneficial and would allow those more risk averse directors who do not have the same confidence in that legal interpretation of the law to act in the stakeholders', and ultimately the shareholders', interests.



Those who suggest that the current business judgment rule is already adequate and covers this win-win scenario should have no problems with this clarification. I am not presently proposing that protection be extended to cases whereby shareholders are clearly disadvantaged due to actions in favour of stakeholders. If there is conduct that is considered environmentally or socially destructive enough that it warrants shareholder interests to be overridden then that same conduct should be generally controlled or prohibited by appropriate legislation targeted at that conduct. I will briefly note that my submission is not that nothing should be done to increase corporate accountability. As I have stated in the written submission, corporate accountability must be obtained through strong environmental legislation that controls the activities of corporations and ensures liability for their actions. The current legislative framework does not achieve this.

I will now make a brief comment in relation to mandatory reporting, which I noted in my submission. I would like to note that the driving element behind performance above the lowest common denominator approach is information. Information can result in competition and drive corporate sustainability. It is in effect creating a market for reputation. Information also allows for better regulation, as decision makers can better assess impacts and risks. Furthermore, despite the primary concept that corporations exist to deliver value to shareholders, shareholders as individuals often do look for more than pure financial return. The presence of information on environmental risks and the like, as well as allowing better financial judgment, will allow for those who look for more than just value to find it. A market for these factors will be created.

An example of the benefit of information in practice is the National Pollutant Inventory, or NPI. Through the reporting of levels of emissions of around 90 hazardous substances a market for reputation has been created. Companies are regularly competing to ensure that they are low down the list of big polluters. In relation to dioxin, which is generally considered to be the most toxic of chemicals, most dioxin-emitting facilities make a great deal of effort to reduce their dioxin output each year, and that has been reflected in the results. They know that a lack of performance will bring focus from local communities, environmental groups and, eventually, legislators. Furthermore, after ratification of the Stockholm Convention on Persistent Organic Pollutants in May 2004 by the federal government, the information provided by the NPI was yet another guide as to what areas need attention in the implementation plan that resulted from that convention. With the current draft implementation plan lacking any real measures to reduce dioxin emissions, dioxin emissions still continue to drop as a result of that spotlight from the NPI. However, that result is not the best-case scenario. Firm implementation of the Stockholm convention through legislation would bring us somewhat closer to the goal of elimination of dioxin emissions. However, the market for reputation and pressure associated with the NPI has delivered results far better than what would have occurred otherwise. That is the strength of requiring reporting of environmental risk and performance.

I would also like to add to our statement about the need to remove perverse subsidies. Perverse subsidies include the granting of our natural resources and environment to corporations for their use and destruction at less than full cost or at unsustainable rates. While prohibition will often be a required element of the control of these activities, at a minimum the cost of all activities should be made to be internalised by the corporation. Otherwise, we are effectively subsidising the activities of those companies.

Finally, I would like to make comment on the nature of legislation aimed at protecting the environment or with other social aims. Some of the legislation required to solve environmental problems result in large losses by, and possibly the demise of, some companies. However, other companies will thrive and new companies will emerge and take advantage of the new environment. That, after all, is the nature of capitalism. We should not be afraid of that result.

**Mr Mohr**—Thanks for very much for the committee’s time and the invitation to give evidence before it. First of all, Green Capital is a corporate sustainability program run by the Total Environment Centre. TEC has been around for a long time; Green Capital has not. So that is where we come from.

To give you a shortened version of our snapshot, because I am aware of the time, in our experience there is currently not sufficiently enough regard for stakeholder concerns by businesses in their decision making. We would suggest that a safe harbour is necessary—some sort of permissive clarification that would make it clear that directors and decision makers are able to consider stakeholder concerns. However, we think that it is probably not quite enough. There are a number of states in the US that have that requirement and it has not really led to the amount of change that we might like to think it would. I would like to suggest that business should have a minimum obligation, if you like, to at least do no harm to stakeholders the environment and society. This is, I suppose, fashioned from other areas of society, such as the medical profession, who have in their Hippocratic oath the principle to first do no harm. On environmental issues the precautionary principle also reflects this.

A lot of environmental and social legislative legislation that already exists or is created now is for that same purpose: to protect the environment or society from any negative impacts. To reflect that sentiment in Corporations Law, or perhaps somewhere outside of Corporations Law, could be a useful addition. Of course, that just sets a minimum standard, and programs, initiatives, rebates or structures to help incentivise business to do more than just that and to provide something positive towards the public would also be useful. In practical terms, that means that a business’s primary obligation would remain to act in the interests of the corporation but on the condition that is not at the expense of stakeholders society or the environment. I am not pretending that is an easy thing to do. It is a long-run kind of issue, and in the meantime there are lots of other things that we need to get on with, particularly issue specific legislation.

**CHAIRMAN**—Earlier in the day we heard from the Ecos Corporation, who indicated that their initiator had been a person who had broken away from Greenpeace because he favoured a more cooperative approach in this area of corporate responsibility than he believed was evident from Greenpeace. They probably prefer more carrot and less stick. I guess they are characterising you as wanting—and these are not their words; I am summarising what they were saying—more stick and less carrot. Would you comment on that?

**Mr Collins**—I think they are filling one half of the bargain. As I said, in many cases where there are stakeholder interests and shareholder interests we are not playing a zero sum game. It is clear, in many cases, that by working to benefit stakeholders shareholders also benefit, whether that be through reputation or, say, in the case of treating employees better, with efficiency and that kind of thing. That is certainly a role that Ecos fills. Whereas, as I said, sometimes for corporations to stop the unsustainable part of their behaviour would have severe shareholder detriment. It is not Ecos’s role at the moment to come along to them and say, ‘Hang on, you

can't continue that behaviour anymore.' As it is, it is government's role to step in. That is why I make the comment that, although in the end legislation is a target specifically, unfortunately in the end some business activities simply do not come up to the mark, no matter what you do to them and how you dress them up.

**CHAIRMAN**—Where there is a conflict between stakeholder interests and shareholder interests, in your view which should prevail?

**Mr Mohr**—If there is a cost or if there is a negative impact on the stakeholder interests then the stakeholder interests should prevail. If there is a neutral or a positive outcome for the stakeholders then it becomes a bit immaterial. I do think that part of the problem with suggesting directors should be enabled to simply consider stakeholder interests is that it makes it very confusing as to which one should have priority. Indeed, when you are considering a suite of different issues, in some circumstances you favour which one has more currency, if you like, which one is more legitimate, which one has higher value. I think in practice that tends to mean that the directors tend to revert back to whatever cultural practice was there before. I would say that the legislation in some of the US states, where there is this permissive approach to considering stakeholder interests, would suggest that, yes, when they are faced with a wide array of things to consider, directors do tend to revert back to what the cultural norm is, which is to consider shareholder interests first.

**CHAIRMAN**—If they do not do that, what are the implications? Are there not negative implications for both the availability and the cost of capital?

**Mr Mohr**—Not always, no. It depends, rather, on whether the cost to stakeholders is adequately translated into a financial cost. Sometimes that is quite good. Sometimes, for example, if there is a cost on emitting pollutants or if there is a cost on emitting carbon, if a business makes a decision which has a negative impact on society then it will cost them some money as well. But if they are a company that, for example, does not have a reputation to defend, if they are a business-to-business company with not a very big public profile, then it is more difficult, sometimes, to create a business case for sustainability. Sometimes there is a business case and sometimes there is not. Where there is not, that is probably where there needs to be some other intervention by government, by Greenpeace or by somebody.

**Senator BRANDIS**—Mr Mohr, I do not think you are right in the observation you made before about the confusion about the respect of priorities of shareholder and stakeholder interests where there is a permissive rule, because, where there is a permissive rule, the way it works is that the directors must consider shareholder interests but may also consider stakeholder interests. So ordinarily any conflict would be resolved in favour of shareholder interests because there is a mandatory requirement rather than merely a permissive requirement.

**Mr Mohr**—I suppose it depends on which way you see that permissive requirement. You could do it either way.

**Senator BRANDIS**—Sure.

**Mr Mohr**—In the States it probably is set up such that in the end their shareholder interests would prevail.

**Senator BRANDIS**—Mr Collins, I was broadly attracted to what I took to be the theme of your submission, that from the point of view of your—what do you call yourself—advocacy organisation the real issue is having the right set of environmental laws, and broader or more generic issues of corporate governance are a secondary issue. I took that to be the emphasis of your submission.

**Mr Collins**—That is correct.

**Senator BRANDIS**—I agree with you. But let me put a hypothetical to you: let's say we had a Greenpeace government and let's say you were the minister for the environment or the Prime Minister or the most powerful environmental regulator in the government, and you wrote what was from your point of view the perfect set of environmental laws. There was nothing in the laws that you would have liked to have seen that was not there; there was everything you could possibly have wished for. Why would we need to address the issue of corporate governance?

**Mr Collins**—I think, if we did nail that, there would not be much left to address.

**Senator BRANDIS**—That is my point. But, drawing back from that *reductio ad absurdum*, it seems to me that, if you want to make businesses—and not just businesses but other entities in the community as well—environmentally responsible, the way to do it is to write the right environmental laws rather than come at it through the clumsy, oblique, derivative approach of corporate governance.

**Mr Collins**—I think that in terms of the ideal situation that is perfectly correct. We would have a set of environmental laws and a lot of this debate about corporate governance would fall by the wayside, and that would be the ideal solution. In the absence of a perfect environmental backdrop, we would suggest there are still some things which can be done to help get us across the line to get to performance above the bottom line of legislation that we currently have.

**Senator BRANDIS**—Okay. I think we broadly see eye to eye on that. Changing the experiment for a moment, let's say you are not Greenpeace; let's say you are the advocate of the mining industry—on the other side of the argument—and you are writing the perfect set of mining laws that the mining industry would like. The same thing follows, doesn't it, that, whatever your particular beef is, whatever the particular public policy concern is that animates you, getting the specific laws right is the trick? And corporate governance seems to me, if I may say so, to be such a distant fall-back or default position as to be almost irrelevant.

**Mr Collins**—I do not feel that—

**Senator BRANDIS**—Sorry, let me make that point a little more precisely: almost irrelevant from the point of view of getting the public policy outcome you want.

**Mr Mohr**—I guess it depends on whether you want to write loads and loads of issue-specific environmental and social legislation or whether you would like to change the culture of business so that you did not have to do quite so much of the issue-specific regulation.

**Senator BRANDIS**—Mr Mohr, I am or used to be a lawyer. I have a fairly simple-minded view that all citizens including corporate citizens have an obligation to obey the law and, if they

do not, they should be penalised for their disobedience of the law. So from my point of view it is not really a matter of corporate culture. You get the laws right and then you enforce them, and there you go.

**Mr Mohr**—Sure, but we could have one law or we could have hundreds of laws, and there is, you would have to say, a large amount of pressure for not having a large number of laws.

**Senator BRANDIS**—Except we do have lots of laws. That is why I am somewhat attracted to Mr Collins's broad philosophy about this. Corporate governance which is totally generic is never going to get you sector-specific policy outcomes, is it?

**Mr Mohr**—I think it would go a long part of the way.

**Senator BRANDIS**—Would it, though? Think about that again. Would it really?

**Mr Mohr**—You do not think I can—

**Senator BRANDIS**—You are an environmental advocate, so from your point of view you would have to say, wouldn't you, that the stakeholders are every person who has an interest in a clean, green environment, which is everyone.

**Mr Mohr**—Indeed.

**Senator BRANDIS**—So the word 'stakeholder' loses meaning because you are talking about every human being on the planet. 'Stakeholders' ceases to be an identifiable class and becomes everything; you define the expression virtually out of existence.

**Mr Mohr**—I do not think so. I think it is possible for businesses to take a broad concept. There are plenty of broad concepts that already exist in Corporations Law that govern how businesses make decisions. I think that it is worthwhile addressing societal concerns in that broad framework. It will not fix everything, certainly. Let us take, for example, the notion that we will deal with every single environmental issue on an issue to issue basis. There is something of a problem when there are environmental issues that are emerging where legislation has not caught up yet. If there was something in Corporations Law which sought to in some way incorporate the precautionary principle into the decision making of business it would avoid the lag time between an environmental issue being identified and the environmental issue being legislated, which can be, for example in the case of climate change, decades.

**Senator BRANDIS**—I understand the argument, Mr Mohr, but it seems to me there is a logical flaw with it, because as merely an emerging issue it is bound to be a controversial one. It would be even more difficult to pin that corporation as being in breach of any obligation to even an indeterminate class of persons when there is a controversy about whether the conduct is harmful or not anyway.

**Mr Mohr**—I think you have more of a chance if you have it in the macro Corporations Law than if you wait for issue-specific legislation to come around. In the case of asbestos or in the case of climate change, if this change was put in place, I think there would be better decisions

made earlier than if we wait for issue-specific legislation to come around. It is going to be a mix of the two.

**Mr Collins**—On that emerging point, that is where I guess permissive legislation does certainly have some benefits in that a company can act early and take advantage of it for reputational purposes et cetera. But, of course, hopefully, the government is not too far behind and will bring those laggards who choose not to act up to the mark.

**Senator BRANDIS**—Maybe the government is way behind.

**Mr Collins**—Yes, it is a distinct possibility.

**Senator BRANDIS**—I do not particularly share your passion for your issue, but there are issues that I am passionate about and the last thing I would do to advance those agendas would be to bundle them up in generic corporate regulation to an unlimited class of persons rather than tackle them head-on with specific legislation. As an advocate—and I think you are saying this; I am seriously agreeing with you—that is probably the worst way to go about it.

**Mr Collins**—I think you see it coming through in our campaign work for Greenpeace. We have very specific issues targeted, be it climate change, forests or oceans. That is where do we believe we will get results in the end that will best deliver much more sustainable environmental outcomes.

**Senator BRANDIS**—I guess to summarise it in a sentence: corporate governance is a clumsy—and I would go so far as to say useless—mechanism to dictate specific public policy outcomes.

**Mr Collins**—I definitely agree with the word ‘clumsy’—not ‘useless’, but definitely ‘clumsy’, yes.

**Senator BRANDIS**—One last unrelated point, Mr Collins, I see you want to ban all corporate donations to political parties. Would that extend to other organisations, such as, for example, churches?

**Mr Collins**—As in donations from—

**Senator BRANDIS**—Donations to political parties, yes. I know it is a little off the topic, but you have raised it, so I thought I would test you about it.

**Mr Collins**—I have not put the finer detail of that, you will notice, in the submission. The rough line on that is that, where we have continued corporate donations, legislation is going to be influenced through that. There are a number of models that have been proposed recently, such as limiting donations to people on the electoral roll or having a central fund where companies can donate for democracy. I am not quite sure if they will, based on their interest in their shareholders. It is that kind of thing. It is about setting up a process whereby we do not have clear corporate influence, because most companies, I believe, are donating with the clear intention of benefiting their shareholders.

**Senator BRANDIS**—I was rather wondering about a different question—that is, why you limit that to corporations or do you not limit it to corporations?

**Mr Collins**—I am not limiting it to corporations. I simply put it in that form for the sake of that argument. I guess I am not prepared to go into the finer detail at this moment.

**Senator BRANDIS**—Thank you.

**Senator WONG**—We had evidence from I think ACF in Melbourne where I have to say a different point of view was put than the one that appears to be expressed by the centre and by Greenpeace as to the space, rationale and philosophy behind corporate responsibility—not corporate governance, because it seems to me that is a more structural area than the notion of what the role of the corporation is in society and to whom it has responsibility. That seems to me to be the central question when you are looking at corporate responsibility.

I guess I am in the unusual position of putting to you an alternative view—that is, clearly, there are things such as industrial relations and environmental protection that should be the subject of specific laws, but there is a movement within the business community and others that looks to integrate the consideration of stakeholder concerns as a risk management mechanism and also because it is seen as being relevant to the long-term value of the business. So I suppose I am drawing a distinction between specific legislation and what we might be trying to achieve through considering this policy area in this inquiry.

**Mr Mohr**—As to whether corporations have responsibilities outside specific issues in legislation, we believe that they do. A lot of companies are finding ways to translate those responsibilities into the way that they have made decisions in the past. So risks, reputation and other forms of creating a business case have been used quite effectively by some businesses to justify action to address stakeholder concerns. I guess our concern is that that does not always work. There are limitations to that approach. Where there are limitations to that approach, there does need to be something else to enable businesses to address stakeholder concerns and address those responsibilities.

**Senator WONG**—The list of things that you say are priority actions include capping costs for greenhouse emissions, perverse subsidies and pricing various externalities into the price of petrol, road use and vehicles. What are the perverse subsidies that you are talking about?

**Mr Mohr**—Perverse subsidies at both federal and state government level are usually in the form of providing infrastructure that is used by polluting or high impact industries. That may be things like ports for coal export. It may be things like public roads for road freight. It may be things like historical tax incentives for particular types of fuels. Some of these are difficult to track down. A lot of them are caught up in other projects. But ‘perverse subsidy’ is generally a term given to subsidies which distort the market away from an environmentally or socially sustainable approach.

**Senator WONG**—Ecos Corporation this morning gave some evidence about the importance of leveraging market forces to drive change in this area. But they made the very good point that that does not mean governments withdrawing; it means that governments have a role in actually underpinning the market mechanisms or creating them. Do you have any suggestions or views

about specific subsidies or specific mechanisms that you would be saying that governments should engage in or implement to try and drive more sustainable corporate behaviour within your area of expertise, which is clearly environmental?

**Mr Mohr**—I think the most urgent one of those would be putting a cost on the price of meeting carbon dioxide emissions and greenhouse gas emissions. The first step would be to apply that cost probably to the stationary energy sector and then, subsequently, to other sectors that have high greenhouse gas emissions. It is probably the single biggest area where there is an externalised cost to the environment and society.

**Mr Collins**—I was actually going to say exactly the same thing as the No. 1 priority.

**Senator WONG**—So you are in furious agreement. Thank you.

**Ms BURKE**—Just going back to the notion of corporate responsibility, I know that you are coming from an environmental perspective. But, if we are looking at corporate responsibilities and corporate organisations saying that they are good corporate citizens, my contention is that it cannot just be on their environmental outcomes. If legislation is the way to go and it is on environment, that will not cover the full gamut of things. It obviously will not cover them being decent to their staff or their customers and it will not cover them being philanthropic and all of the rest of it. Would you still see some need for the notion of corporations saying and reporting that they have been, as I would term it, good corporate citizens?

**Mr Collins**—I guess I should apologise for my environmental focus.

**Ms BURKE**—No, I accept that.

**Mr Collins**—I would suggest that many of those same principles I have stated as the underpinning of bottom line legislation would exist in relation to labour laws and those kinds of things. Of course, it is not simply limited to environment. We should still end up at a point where a corporation, if it were to choose to focus solely on shareholder value, is not going to significantly impact on those other parties. That is the bottom line we need to get to.

**Ms BURKE**—Do you think though with legislation that we race to the bottom? That is one of the arguments about why we do not want to have corporate responsibility because we will have this tick-a-box thing. I would like to know which article that was in because everybody seems to now use it back at us. With legislation—I will show my political bias too—under the current government in certain areas we are going to the lowest common denominator and that is why sometimes we actually look to other institutions, other corporations and other groups to set a higher benchmark.

**Mr Mohr**—I do not think setting a minimum standard prevents that higher benchmark. Legislation usually creates a minimum standard, not a maximum standard. In the case of, say, sustainability reporting you could introduce a minimum standard of reporting and that will not prevent people from reporting to a higher level or to a better degree of environmental or social reporting. I think that there are plenty of instances where we can already see that. There is already environmental reporting required and there are companies which report to a higher degree. I do not think we should be worried about creating a tick-a-box or compliance focused



mentality—there are lots of words that have been bandied around—by introducing legislation. Certainly, it will create a minimum standard but companies that are innovative will go beyond that minimum standard, as they do now.

**Mr Collins**—I tend to think that you never see more innovation from corporations than when they are subject to legislation. It is one of the primary drivers of it. In the case of, say, individuals, when we are subject to more criminal laws in the end, despite the fact our conduct is further regulated in that sense, it does not change our day-to-day actions at any point. Most of us try to live up to a certain standard. I think we see that with most corporations. They do not go for the bottom, they try to live up to a certain standard. Adding an extra requirement at the bottom should not impact on that. But also, a lot of this environmental legislation does not have to be a hugely rigorous process where we end up with endless reports and great big, thick documents demonstrating exactly what the impact is. If we went to a more basic environmental approach where we could identify unsustainable activities and stop some of them, introduce simple pricing mechanisms and that kind of thing, we would start to see the tick-a-box approach. There is not as much box ticking because we have simply got some straight easy lines.

**Ms BURKE**—One of the other things that we have come across a lot is this notion of green wash, that people report something but there is no actual auditing of it. They say: ‘We’ve been great environmentalists because we looked after the environment after we left. The mine has finished and we have left.’ But if you go and ask the local community they say, ‘The arsenic level in the water has gone through the roof and they did not replant the trees.’ There is a notion of actual auditing to make sure the claims they are making and getting kudos for have actually been lived up to. Do you think there is a necessity for that especially, I would say, in the environmental area?

**Mr Mohr**—Yes, there is a necessity for it, although sometimes all the auditing in the world will still not fix an environmental report. We did some work on green wash last year. I think probably the misleading claims clause in the Trade Practices Act under section 54 gives you a bit of an idea of what you should be aiming for in being transparent about environmental and social impacts. That is, that it should not be misleading or even able to be misleading. It is really not a test of whether all the information is true and correct, which is, a lot of the time, what auditing and assurance is about, but simply whether it is misleading in its presentation. So there are reports, even the ones that are heavily audited and assured, which still have the potential to mislead. It is really up to the report writers to make sure that their reports are not misleading.

**Mr Collins**—Most of the time, if there is any misleading, it is normally by omission rather than by misstating the facts. I get sustainability reports from all sorts of companies in my mailbox on a regular basis and your average coal company in their greenhouse section will not mention at all the fact that coal emits greenhouse gases. It is the omission that is occurring. If someone were to look at it and go through and ask the question, ‘How much greenhouse gas is this company emitting?’ the answer is just not there.

**Mr BAKER**—Mr Mohr, we have seen this in previous submissions but, with regard to the UK experience, you have stated twice on page 3 of your submission that similar reporting should be implemented in Australia. Can you expand on the positive and negatives in your experience?

**Mr Mohr**—Of that kind of legislation?

**Mr BAKER**—Yes.

**Mr Mohr**—I guess the positives of that legislation are that it requires a much higher degree of disclosure on environmental and social issues. Another positive would be that it is not quite so much of a lag indicator. There are a lot of requirements in the OFR to disclose future activities or future prospects. That includes social and environmental prospects, if you like. That is important from where we stand, because it gives a bit of an insight in terms of in which direction the company wants and intends to go and whether there are future liabilities or future problems or positives that may result from that. I guess the negatives of it are that it is fairly unlikely to get implemented, to be honest. There is a lot of kickback from business that do not particularly like having to report in that way.

**Mr BAKER**—That is generic. What you are saying is fine, but I am interested in how it is actually operating in the UK, how that is relevant to industries here and whether you can give some examples.

**Mr Mohr**—I am not sure that it is operating in the UK any more. I think it got undone a month or two ago. Are you asking for specifics in terms of how it is operating in the UK and the positives and negatives of that?

**Mr BAKER**—Yes.

**Mr Mohr**—From the point of view of ethical investment, it certainly gave the ethical investment sector a lot more information about what activities different companies were undertaking, so it was much easier for ethical investment to do what it had to do and much easier to assess companies. From the point of view of NGOs, there was more information; there was a high level of transparency. That makes it easier to assess, talk to and decide who is doing well and who is not. That is an important tool for the civil sector and for community groups.

**Mr BAKER**—We live in a global world. If it did not work and you are saying it should be implemented here—

**Mr Mohr**—It did work there, it was just undone by the government of the day.

**Senator BRANDIS**—They obviously did not think it worked.

**Mr Mohr**—It depends on in whose opinion it was working or not. In the government's opinion, perhaps it did not appear to be working. In the views of community groups and the ethical investment industry, perhaps it was. There are different opinions about whether it was working or not.

**CHAIRMAN**—It is a fairly major step to undo a piece of legislation that has been put in place.

**Mr Mohr**—It is.

**CHAIRMAN**—There must have been a lot of concern about it.

**Senator BRANDIS**—When was it passed?

**Mr Mohr**—Late last year, or in the third quarter of last year.

**Senator WONG**—We did have some evidence from the last witness in Melbourne. With all due respect, Mr Mohr, I am not sure your analysis of what has occurred is entirely accurate.

**Mr BAKER**—Because they were very positive in Melbourne.

**Senator WONG**—Yes, so you might want to clarify that more closely. I meant the extent to which it has been undone, not your opinion as to whether it was working. You are entitled to that.

**Mr Mohr**—Sure.

**CHAIRMAN**—I thank both of you for your appearance before the committee, for your evidence and for your assistance with our inquiry.

**Mr Mohr**—Thank you.

[3.59 pm]

**BAILEY, Ms Jemma Renee, Trade Justice Policy Officer, Public Interest Advocacy Centre**

**RANALD, Dr Patricia Marie, Principal Policy Officer, Public Interest Advocacy Centre**

**SMITH, Mr Jeffrey Owen, Chief Executive Officer, Environmental Defender's Office**

**LAIRD, Mr Nathan Paul, Member, New South Wales Young Lawyers Pro Bono and Community Services Taskforce**

**MATHEWS, Ms Lily, Member, New South Wales Young Lawyers Pro Bono and Community Services Taskforce**

**CHAIRMAN**—I welcome representatives from the Public Interest Advocacy Centre, the Australian network of the Environmental Defender's Offices and New South Wales Young Lawyers. We have before us your respective submissions, which we have numbered 76, 48 and 65. Are there any alterations or additions you wish to make to the written submission.

**Ms Bailey**—No.

**CHAIRMAN**—I invite you to make a brief opening statement or statements. I am not sure how you are going to handle that. Will you do each group separately or do a combined opening statement?

**Ms Bailey**—Separately.

**CHAIRMAN**—At the conclusion of that we will have some questions.

**Senator BRANDIS**—Before anybody says anything, it would be helpful for me at least, and I dare say for other members of the committee too, that if you are going to give separate opening statements you indicate where, if it be the case, you disagree with one another.

**Dr Ranald**—We will try to do that.

**Senator BRANDIS**—You do not have to, but it would be helpful if we knew to what extent this is a joint submission and to what extent the submissions are different from each other.

**Senator WONG**—Can I just clarify something. These submitters are here together as a result of our agenda and our timetabling of witness evidence—

**Senator BRANDIS**—That is right.

**Senator WONG**—not because—although I am sure they talk to each other—they purport to have made a joint submission. Is that right?

**Senator BRANDIS**—Yes. I am not saying—

**CHAIRMAN**—That is why you ask them questions.

**Senator BRANDIS**—That is exactly right. I know there are separate submissions, but you are making a joint oral presentation—

**Senator WONG**—No, that is because we asked them to.

**Senator BRANDIS**—so it would be helpful for us to know where you agree. I assume there is a level of commonality of view among you, but it would be helpful to know where there is not a commonality of view.

**Mr Smith**—I was wondering if I could proceed first because I may have to leave early. I am speaking today on behalf of the Australian network of the Environment Defender's Offices. I am the CEO of the New South Wales EDO. The network has nine offices around Australia. We are community legal centres that specialise in public interest in environmental law. We do policy and law reform—that is the hat we are wearing today—advice and casework, community legal education and we also provide scientific advice—the New South Wales office does, at least.

I want to make two brief observations in our opening statement. Our submission was fairly schematic. We feel that if corporate social responsibility is to go anywhere, it needs to take the next step and be reflected in proper laws and regulations. The position at the moment, which I will simplify for the purposes of a brief submission, is essentially based on voluntary codes and mechanisms of that ilk. Such codes, as we have seen, are not binding. They are practised by a few large corporations, and they are not regularly independently monitored. Such codes are problematic. I think most people, and perhaps even corporations privately, would concede that fact. We need to move beyond this to clear and enforceable rules that would allow for a level playing field and produce better outcomes. The Environmental Defender's Office has a mandate whereby it is a service provider or organisation in the environmental field, but our focus is on environmental issues and, more particularly, the integration of sustainable development in any legal systems and policies.

To give a simplified outline, sustainable development involves the integration of economic and environmental considerations in decision making. What we see at the moment is that that principle, in New South Wales and equally so under Commonwealth legislation, has been pretty much fully reflected in environmental legislation. You will find it emersed throughout environmental laws in those jurisdictions, so there is an obligation on decision makers to take into account social and economic factors in environmental legislation, and that is fine, that is what sustainable development is about. If you take the flip side of that, and again I am using simplified definitions, and look at business or economic legislation, the notion of ESD is very underdeveloped. You will rarely find it at all.

**Senator BRANDIS**—What is ESD?

**Mr Smith**—Sustainable development—the integration of economic and environmental considerations in any decision that is made.

**Mr BAKER**—Are you saying that, at state government level, with all the levels of approvals that have to be achieved as far as the environment is concerned, it is not working and currently letting you down at the moment?

**Mr Smith**—I recognise that this is a simplified explanation of the situation, but in New South Wales the notion of sustainable development is integrated into environmental legislation reasonably fulsomely; whereas, it is not in legislation outside of that sphere—outside of our area of expertise—in the same way. The very notion of sustainable development is that it is integrated throughout society and ideally in all sorts of legislation, whether it be the Corporations Act, tax law and all those kinds of things. That is the first point.

In terms of taking the next step and making that integration happen, we would say that great advances can be made by recognising the drivers of corporate conduct—notions of reputation, prestige and competitive advantage—and designing a system that firstly encourages compliance and secondly discourages noncompliance. Those are separate things. As our submission says, that would involve at the very least a mandated positive duty to take into account broader considerations than mere shareholders' interests coupled with some kind of fulsome and detailed set of reporting requirements that are independent.

**CHAIRMAN**—Thank you, Mr Smith.

**Ms Bailey**—PIAC welcomes this inquiry into corporate responsibility and thanks the committee for the invitation to give evidence today. By way of background, PIAC undertakes strategic legal and policy work in the public interest in order to foster a fair, just and democratic society. We have long played a role in the public debate on corporate regulation and have made submissions on the Corporate Code of Conduct, the Multilateral Agreement on Investment and the OECD guidelines. Through these, we have consistently advocated that corporations should be legally bound to abide by internationally recognised standards on human rights, labour rights and environmental sustainability. In this opening statement, I want to touch briefly on the human rights framework used by PIAC and pull out a few threads from our recommendations, trying not to repeat things that the committee has already heard, on directors' duties, the need for mandatory codes in reporting and also the issue of extraterritoriality.

PIAC explicitly use a human rights framework in our submission, and we use the UN norms as the recommended benchmark to define the extent of corporate accountability obligations, and these are attached to the back of our submission, as you will see. The UN declaration on human rights calls on every organ of society to respect, protect and promote human rights. Corporations are an organ of society, and therefore all companies have a direct responsibility to respect human rights in their decision making and operation. Furthermore, this human rights framework places a primary responsibility on governments to put in place legislation and policy to ensure that corporations are accountable for their social and environmental impacts.

Going to our recommendations—and I will do this quickly—the first is the issue of directors' duties. We are concerned that the current legal interpretation of the best interest of the corporation under section 181 of the Corporations Act discourages directors to act in the interests of broader stakeholders and pursue decisions that favour social and environmental interests where those decisions may adversely affect the financial interests of shareholders. We acknowledge that the financial interests of shareholders and the broader interests of stakeholders

are often aligned but, in cases where they are not, PIAC recommends that the Corporations Act be amended to clarify that directors can consider broader stakeholder interests and the social and environmental impacts of their decisions—

**Senator BRANDIS**—Did you say ‘can’?

**Ms Bailey**—In fact, we recommend that this is a positive duty, rather than a permissive—

**Senator BRANDIS**—So, you are saying ‘must’, not ‘can’?

**Ms Bailey**—Yes. We are saying ‘can’ and, in fact, we are saying ‘must’. That is the way it goes.

**Senator BRANDIS**—There is a big difference.

**Ms Bailey**—To this end we draw the committee’s attention to the proposed UK Company Law Reform Bill as a potential model. I think this has been brought up a couple of times in the submissions.

Secondly, I want to briefly touch on codes of conduct and reporting. We acknowledge and welcome the positive steps being made in corporate accountability, the willingness of many corporations to adopt corporate social responsibility and particularly the proliferation of codes of conduct such as the OECD guidelines and reporting mechanisms such as the GRI: the Global Reporting Initiative. These codes and reporting are important vehicles to encourage corporations to consider broader stakeholder interests. However, we note that many have existing structural limitations. Jeff has already touched on these. I will just bring you to one point. In 2004, the UN Human Rights Committee commissioned a report on the scope of existing CSR initiatives. The report criticises existing initiatives as being voluntary, failing to meet minimum standards and therefore lacking consistency, being reliant on self-assessment, and lacking independent reporting, evaluation and monitoring mechanisms. To address these deficiencies and to build on the existing momentum towards CSR that we see, PIAC recommends that corporate codes of conduct and reporting mechanisms be mandatory, uniform, publicly available, independently audited and legally enforceable.

Finally, I want to touch on the issue of extraterritoriality. PIAC submits that multinational corporations in particular are a distinct challenge to corporate accountability as their operations generally extend beyond the regulatory capacity of national legal frameworks. The increasing global movement of capital means that corporations are able to move their operations to countries with less rigorous legal systems and often lower standards of labour rights and human rights. PIAC is concerned that Australian companies may engage in conduct in their overseas operations and through overseas subsidiaries that would be unlawful in Australia. Examples in our submission include Esmerelda’s gold mine in Romania and the BHP Ok Tedi incident. Accordingly, we recommend that any corporate accountability mechanisms that this committee recommends be extended to the extraterritorial operations of Australian companies. We thank the committee for its time and invite any questions.

**Mr Laird**—On behalf of the New South Wales Young Lawyers Pro Bono and Community Services Taskforce, I would like to thank the committee for the opportunity to make a

submission to this important inquiry and to give evidence at this public hearing. I trust that the committee has had the opportunity to read our submission. I would also like to tender for the public record a copy of the submission that we made to the Corporations and Markets Advisory Committee inquiry into corporate social responsibility.

**CHAIR**—Will the committee accept that as a supplementary submission?

**Ms BURKE**—I so move.

**Mr Laird**—New South Wales Young Lawyers is a division of the Law Society of New South Wales and is a professional association in the state of New South Wales for lawyers under 36 years of age or in their first five years of practice. Consistent with the overall objects of New South Wales Young Lawyers to assist disadvantaged groups in our community, a task force of volunteer lawyers and law students from diverse backgrounds has been set up to coordinate this function of our organisation. It is the mission of the Young Lawyers Pro Bono and Community Services Taskforce to encourage, support and facilitate young lawyers to do pro bono and community services work; increase community awareness of pro bono and communities services in their role as part of our profession; facilitate and participate in the broader debate about pro bono assistance in our community; reinforce the need for proper legal aid funding, as pro bono assistance is not a substitute; and explore, collaborate on and create innovative opportunities for young lawyers in the delivery of voluntary legal services to individuals and communities in need.

I will just say at the outset that we broadly agree with the EDO and PIAC submissions and I will make a few brief points in opening. We believe that the level of regard by corporations for other stakeholders is as best variable and, at the end of the day, corporations will act in the best interests of their shareholders. There is definitely a need for greater regard of the interests of stakeholders other than shareholders. As a minimum, we submit that all companies should, as a matter of basic responsibility, identify their stakeholders and the interests of each stakeholder group and update these assessments regularly and, as part of each significant business decision, assess the ways and extent to which these decisions—and, more generally, the company's activities, products, services and other impacts—are likely to affect those interests.

The current legal framework for director duties hampers, if not actively discourages, consideration of stakeholders other than shareholders. A good recent example of this is the James Hardie and Jackson public inquiry. That highlighted that there clearly was a failure in terms of the considerations. I think Meredith Hellicar said that, if they had been required to consider other stakeholders as part of their obligations, then they may not have done the things that they ultimately did in terms of making provision for asbestos claims.

We believe that there is a need for legislative change to the Corporations Law. As we set out in our submission, the traditional view of directors' duties as captured in the act require a director to act in the best interests of shareholders by maximising profits and not to consider social and environmental concerns outside of that context. In limited situations, directors are required to consider the interests of creditors when in insolvency or near insolvency. The act is clearly the most appropriate framework in which to incorporate corporate responsibility obligations on directors.



Australian companies are highly aware of compliance requirements under the act. The regulator, ASIC, administers a highly effective regime. Furthermore, the penalties under the act are more appropriate than those that may be available under various environmental statutes, for example. In this regard we refer the committee to Robert Hinkley's proposed amendment to the Corporations Act, which has been detailed in his submission to this inquiry. His proposal is to amend section 181 of the Corporations Act through the addition of what he termed 'a code for corporate citizenship.' The effect of that amendment would be to require directors to continue to act in the best interests of the corporation but only if it is not at the expense of the environment, human rights, public health and safety, the dignity of employees or the welfare of the communities in which the corporation operates.

The committee has a firm view that voluntary codes do not work. Australian companies report less than the international average. As a minimum, if there is not to be legislative change to director duties, we need mandatory reporting for the reasons that are set out at paragraph 4 on page 21 of our submission. The committee believes that the best current reporting regime is the global reporting initiative, as has already been referred to.

**Senator BRANDIS**—I might start with you, Mr Laird, but others might wish to respond as well. I have a conceptual difficulty with the potential breadth of who stakeholders might be. I do not know if you were in the room when we had the gentleman from Greenpeace and his colleague at the table, but they agreed that when it came to environmental issues, for example, stakeholders basically meant everybody because everybody was potentially affected by harm to the environment. Don't you run the risk, when making a recommendation imposing a positive obligation to have regard to the interests of stakeholders—and one of you, I forget who, said that the interests of stakeholders actually should be prioritised above the interests of shareholders—that what you are doing is basically making a corporation responsible for everybody?

**Mr Laird**—As we suggested in our submission to CAMAC inquiry, one way of potentially overcoming that—

**Senator BRANDIS**—You see the problem, don't you?

**Mr Laird**—I can see the potential problem, yes. But one way of overcoming that would be for a company to undertake an exercise through which they identify the stakeholders who were most likely to be affected by their activities. That could be submitted to ASIC and signed off on perhaps on a yearly reporting type basis. Obviously, for a particular company, other than perhaps environment concerns, you can define the impact. Even with environmental issues it is a question of what the company's activities are and how they interact with the environment, labour rights and human rights. There is a way of defining the scope of their impacts, who the stakeholders are for a particular activity.

**Senator BRANDIS**—I suppose you could say, for example, with a mining company that, for the purposes of environmental impact, the stakeholders could be defined as people who live in some degree of vicinity to the mine.

**Mr Laird**—That is one possibility, yes.

**Senator BRANDIS**—If this is not to be reduced to a nonsense, would you agree that there must be some reasonably precise and tight definition of the various classes of persons to whom the expression ‘stakeholder’ applies?

**Mr Laird**—One way of overcoming that issue is the Robert Hinkley approach, where you say that directors have the duty to make money for shareholders but not at the expense of the environment. In the example of a mining company, obviously a mining company will undertake its operations, but it would have to clean those up. At the end of the life of the mine it would have to restore the area to the state it existed in before it was mined. There are examples of rehabilitation.

**Senator BRANDIS**—That brings me to my next point, which is also something that was discussed with the previous witnesses. Why need this be an issue of corporate governance? To use the very example you just gave, if we want a situation in which companies have a legally enforceable obligation not to harm the environment, then surely the way to legislate for and enforce that is to pass laws giving them specific obligations and exposing them to specific liabilities in relation to particular species of conduct. Conversely, to the extent to which corporations may engage in behaviour which is not proscribed by the law, how can it be said that they have done harm that is cognisable by the law?

**Mr Laird**—I think corporations today have the potential for a huge impact on society. The influence that companies exercise in society and the harm that their activities can cause—

**Senator BRANDIS**—Not just corporations; anybody’s activities can cause harm. Trade unions’ activities can cause harm; motorists’ activities can cause harm. In the seamless web of social relationships anybody’s activities can cause harm.

**Mr Laird**—Corporations by their very size, particularly the multinationals, have the capacity to cause huge damage. I think director duties are at the heart of the point at which you can exercise greatest influence over them.

**Senator BRANDIS**—Sure, but what you are all saying in one way or another is that directors should be subject to a legally enforceable duty. At least one of your submissions says that the offence provisions of the Corporations Act should be specifically applied to any breach of those duties. So you are talking about potentially a criminal as well as a civil liability. And yet, when asked to define what constitutes the breach of that duty and hence the exposure to that civil or potentially criminal liability, you cannot tell me other than to use the most general expressions like, ‘Can’t harm the environment.’ If I can use a parallel case that might at first seem a little remote from this discussion, we have had a lot of debate in this country in the last two or three years about Mr David Hicks in Guantanamo Bay. What is the allegation being made against the American and, by extension, the Australian governments? That this poor man is being held in custody and he does not know the extent of his exposure. He does not know how long he is going to be in custody or what the charges against him are. He does not have a clear idea of what his liabilities are.

In any society governed by the rule of law, the same principle applies to the company director who might be part of the establishment as it applies to Mr David Hicks and to everybody else. They are entitled to know the ambit of their legal liabilities and exposure. So how on earth can

we have a workable system of directors' duties if we see say, 'A director can be civilly and potentially criminally liable for breach of duty for causing harm to the environment where—it seems to me it follows from what you are saying, Mr Laird—the activity in which the corporation might be engaged is not in fact activity sanctioned by the law that specifically regulates behaviour by the company from the point of view of environmental regulation?

**Ms Bailey**—I think one way to tackle this, Senator Brandis, may be to still have—I think it is very important to have—principles and references to things like the UN norms. But to get around the specific ambit we could have, and we have referred to this in PIAC's submission, regulations which are customised according to the sector in which the corporation operates, because clearly not every regulation is relevant to every corporation and every sector. So you could clump corporations into particular sectors—we say according to their ABNs—and create customised regulations that would direct the board and the directors as to exactly what their obligations are.

**Senator BRANDIS**—Let me give you what seems to me to be the hardest case. Let it be assumed that a corporation engages in a particular activity which, from your point of view, is environmentally harmful. But let it also be assumed that it is not breaking any environmental law at any level of government in doing so. Do you say that, nevertheless, the directors of that company could be in breach of a duty—the duty that you contend they should be subjected to in not sufficiently considering the interests of stakeholders in this case of the environment rubric—because in your view they make a decision as a result of which the corporation's activities harm the environment? Could they be?

**Mr Smith**—Could they be in breach of their directors duties?

**Senator BRANDIS**—Could they be in breach of the duty you want them exposed to, for making a decision which you think harms the environment, even though in fact the corporation, in operationalising the decision, does not breach any specific environmental law?

**Mr Smith**—We would like to see consideration of a test which is nothing more than the same type of test that applies to decision makers every day. In deciding whether or not to approve a particular proposal, they have to consider the economic, social and environmental ramifications, for example.

**Senator BRANDIS**—All right. Let me just stop you there. The board have a meeting, they consider the environmental ramifications and they turn their minds specifically to the topic. They are fully informed about the matter; their environmental scientists have prepared an impact statement. The advice to the board is: 'This will have a very bad effect on the environment. It is likely to produce effects A, B, C and D. However, within the current scheme of environmental regulation in the state'—for example, New South Wales—'you will not be breaching any law by creating these deleterious effects on the environment.' So the directors say, 'Right-o, we'll go ahead because we're not in breach of the environmental law, even though we know that it will have these consequences which might be thought, objectively, to be harmful.' Under your proposal, is that a breach of the directors' duties that you contend for or not?

**Mr Smith**—No, I would not have thought so—

**Senator BRANDIS**—Thank you.

**Mr Smith**—if they have—

**Senator BRANDIS**—No, that was the correct answer.

**Mr Smith**—fully considered it in those circumstances and they have complied with the other laws. What that approach of mandating consideration of those issues would do, however, is to, first of all, allow for directors to be protected from shareholder lawsuits should they decide to take into account those matters.

**Senator BRANDIS**—We know that.

**Mr Smith**—It would also empower the corporations to go down that path and be responsive to the community and to their shareholders should they see fit.

**Senator BRANDIS**—I suppose, Mr Smith, you would also say that at least it makes sure that they think about it, that they turn their mind to this topic.

**Mr Smith**—Yes.

**Senator BRANDIS**—What about the other two groups? What is the answer to my question on the hypothetical I posed? Would they or would they not be in breach of the law in doing something which they advertently and consciously knew was environmentally harmful but which they also knew was not otherwise specifically unlawful?

**Mr Laird**—We do not believe it would be a breach in those circumstances, because of the legal framework, though perhaps morally it would be a different consideration.

**Senator BRANDIS**—What about the PIAC people? What do you think?

**Dr Ranald**—I think the issue we are getting at is that at the moment the directors are not even able to consider these issues. That is certainly the interpretation that was raised in the Hardie case, and there have been other cases as well.

**Senator BRANDIS**—That is right. We are conscious of that issue. But that does not answer the question as to whether there should be a permissible or mandatory requirement. You all seem to be contending for a mandatory requirement.

**Dr Ranald**—We think there should be a mandatory requirement that they consider these issues.

**Senator BRANDIS**—Right, but what is the answer to my question?

**Dr Ranald**—I would say that if they have considered them then they have probably met the test that we are talking about. However, there are also moral obligations, and that is precisely—

**Senator BRANDIS**—Parliament cannot enforce moral obligations.

**Dr Ranald**—No, it cannot enforce them.

**Senator BRANDIS**—Parliament can pass laws.

**Dr Ranald**—In terms of corporate responsibility one would hope that, if they are considering these issues, there would be more chance that that consideration would have some effect on their actions.

**Senator BRANDIS**—I think you are on stronger ground there. This is the consciously applying an informed mind point. I go, then, to that next stage of the argument: if this conclusion we all seem to have arrived at is right, what is the point of approaching this through the window of corporate governance? Staying with the environment for the moment, what you need is strong environmental laws. If you do not have strong environmental laws, having a higher standard of corporate governance is going to get you precisely nowhere.

**Ms Mathews**—I think the two go together.

**Senator BRANDIS**—Do they, though?

**Ms Mathews**—You do need to have strong specific laws to protect the environment, employees and so on.

**Senator BRANDIS**—And if you do have those laws—

**Senator WONG**—Let them finish—

**Senator BRANDIS**—No, let me go on.

**Senator WONG**—Before you ask them another question—

**Senator BRANDIS**—No, this is a dialogue.

**Senator WONG**—Point of order, Chairman. It is not a dialogue.

**Senator BRANDIS**—Let me stop you there.

**Senator WONG**—These witnesses have not been able to finish an answer while I have been in the room.

**Senator BRANDIS**—Senator Wong, let me ask my own questions in my own way. If I am out of order the chairman will interrupt.

**Senator WONG**—If you did not interrupt them every time, Senator Brandis, we might actually get some evidence.

**Senator BRANDIS**—Ms Mathews, let me stop you at that point. Let it be assumed you have the strong environmental laws that will satisfy the most tender and green environmental advocate. If the company breaches those laws there is a direct breach of a primary legal obligation. What do you need a corporate governance principle to back it up for? You have already got them.

**Ms Mathews**—We have not got the perfect laws, necessarily, for all areas. That is a point that Bob Hinkley might have made: changing the directors' duties is the point of greatest leverage to actually affect companies' behaviour. It is a simple change and it can have a broad effect. It does need to be drafted very clearly, and we do think that companies should be able to specify the stakeholders they should consider. But it is just the most direct and straightforward way to make sure that they at least consider the effects they are having.

**Senator BRANDIS**—I think we have established from the earlier discussion that if the behaviour is not independently unlawful there is nothing, from a legal point of view, to stop the directors disregarding the consequences anyway. If that is the case, I challenge your conclusion, Ms Mathews. May I remind you that the most fundamental obligation of a director, which has been an obligation of company directors for as long as there have been companies, is to ensure that the corporation or company obeys the law. If all company directors are, as we know they are, subject to that fundamental obligation and the company itself is subject to that fundamental obligation, it seems to me to be approaching this from completely the wrong end of the analysis to suggest that changing the corporate governance rules is going to achieve anything at all.

**Dr Ranald**—I just make the point that at the moment directors are not permitted to consider these things at all.

**Senator BRANDIS**—I understand that.

**Dr Ranald**—What we are proposing is a change to that, because we think that is wrong. It is demonstrably wrong in the case of the Hardie example and other examples.

**Senator BRANDIS**—I accept that point, Dr Ranald. You do not need to persuade me, at least, in relation to it.

**Ms BURKE**—We also need to tell our witnesses that they are not under oath; they are actually here to provide their opinion on this.

**CHAIRMAN**—Their evidence.

**Ms BURKE**—We are not having a legal argument.

**Senator BRANDIS**—I do not know about that. I think we are entitled to test the cogency of the argument.

**Dr Ranald**—Can I just make another point? I do not think it is a choice. I think you are setting up a false dichotomy between strong regulation on particular environmental or other issues and some regulation about corporate social responsibility. The reason we are addressing this issue is that there is a public debate about corporate social responsibility, not only because

corporations themselves have to some extent initiated it but because there is a public belief that corporations ought to behave well in the community. There are very strong public opinion polls that show this. That is why we are addressing this issue, and it is not to say that we are therefore not addressing the need for specific environmental or other regulation. All of our organisations also support and advocate for specific regulatory change in all sorts of areas.

**Senator BRANDIS**—I am sure you do.

**Dr Ranald**—So both of those things have to be considered. It is not one or the other. I think it is a false dichotomy.

**Senator BRANDIS**—I hear what you say, Dr Ranald, but the reason I do not think it is a false dichotomy is that, if you follow the analysis, having a mandatory standard for directors which does not compel them to make decisions any different from the decisions they would have made in the absence of the mandatory standard, but for the existence of appropriately strong—in this case—environmental laws, shows the lack of utility of having a mandatory standard. That is not a false dichotomy. I take your point completely about having a permissive provision, but the discussion we have been having does not address that point; it addresses the point of the utility of a mandatory provision. My point is that if it is not independently unlawful, having a mandatory provision gets you precisely nowhere.

**Mr Smith**—There does not seem to me to be a great deal of difference, I must say, between what would be a mandatory provision and a permissive provision, because both would allow the corporation to move forward and to consider a broader range of factors. I think there is a great deal of value in having directors of corporations—in your words, as you summarised my point before—to at least have said that they have considered it. I do not think you should underestimate the educative value of that type of mechanism. I also agree with the point that has been made by others—and this flows from my original point—that we have two worlds operating here. We would like to see at a legal level those worlds come together. We have environmental laws which are chock-full of economic and social considerations, being imbued within them, and we have corporations and tax laws which only touch on the environment and other broader social issues.

**Senator BRANDIS**—I understand that. I think that the informed consciousness point, if I can call it that, is probably your best point. But it does seem to me from what each of you have said in your own different ways that the only change to the law that you are urging on us which would in a practical sense make a real difference is to include a permissive provision and that the mandatory provision, for the reasons we have discussed, would not make any more difference than the permissive provision would make.

**Mr Smith**—Except it would force all corporations to have to say they considered it as opposed to those who wanted to lead the pack, to lead by example.

**Senator BRANDIS**—Is that its only additional utility then on reflection?

**Mr Smith**—I would have thought so. We were certainly never suggesting a sanction.

**Mr Laird**—If it were mandatory, our point would be that like any breach of director duties there would be criminal and civil penalties that would flow. Obviously, in the context of making it mandatory the issue of defining stakeholders is something, as you have raised, that would need to be addressed. We touch on that point in the submission that we did to the CAMAC inquiry on page 16, paragraphs 19 to 21. That goes back, again, to that idea which I briefly mentioned before where a method of possibly addressing this is:

... to require each company to prepare a list of stakeholders it reasonably considers may be adversely affected by its activities, and submit this list to ASIC for authorisation. If a company fails to prepare a list or ASIC considers the list unreasonable, ASIC may mandate which stakeholders the company should consider, by considering the information listed in the corporation's annual report or calling for further reports from the directors, or from stakeholders.

It could be potentially audited by professional auditors rather than ASIC. That could be done on an annual basis and could be published in the company's annual report and/or web site.

We recognise legally, as you say, that there are some issues in terms of stakeholders in ensuring that there is appropriate definition and defining who your stakeholders are so that someone cannot be unfairly found to be in breach of directors' duties where they never would have had regard for that type of stakeholder but are caught by an amorphous term. That is why we are in favour of Robert Hinkley's proposal, which is a slightly different approach to that which is the zero tolerance approach to companies—for example in terms of environmental harm, committing any environmental harm at all.

**Senator BRANDIS**—I do not want to go back over old ground, but it sounds very much to me, Mr Laird, as if you are in substance agreeing with Mr Smith's point that the only additional utility of the mandatory above the permissive standard is to ensure that the directors at least address the issue in decision making—is that right?

**Mr Laird**—I think we probably agree with that. I still think there is benefit of sanctions in terms of ensuring that they consider the interests of stakeholders. Obviously, as you say, if a particular action is not going to be in breach of existing regulations, then they could not be found to be in breach of those duties.

**Senator BRANDIS**—That is my point.

**Mr Laird**—Obviously, sometimes the law unfortunately is not always as up-to-date as it might be. One example that sprang to mind was the issue of smoking and tobacco companies knowing for years of the health effects. As you say, legally, perhaps they were not in breach of the regulations in doing what they did, or lead and petrol when they knew from the beginning that it had deleterious impacts on health but because the existing environmental regulations were not up to scratch, they could say, 'This may have potential harm, but we're not going to be in breach of the law, so let's just do it because profit comes first.'

**Senator BRANDIS**—Except in the case you gave, they would probably be in breach of the ordinary law of tort, which is a different issue. But we have been confining this discussion, I guess, to environmental regulation.



**Mr Laird**—I think there is a great deal of positivity to be taken from that sort of cultural shift where companies are required to take into account other stakeholders other than shareholders, that which would encourage wholesale change.

**Senator WONG**—I do not want to traverse the whole area again but I want to make a comment and you tell me if you agree with me. It seems to me there is a little bit of a cross-purpose argument occurring here. I did not understand any of you to be saying that protective or beneficial legislation in environmental areas, human rights areas et cetera was to be replaced by a different approach being taken by corporations. It seems to me what your organisations are struggling with or advocating—and this inquiry is looking into—is: what is the role of the corporation in society; what is appropriate for governments to require of them or to encourage; and, what does the community require or encourage? Clearly, there is a very strong financial element to that but, as Dr Ranald pointed out, there is a growing community view about what their role might be.

I do not think anybody has the right answer as to what that is and whether or not there need to be changes to our legal framework or whatever. It seems to me there is a distinction between that more philosophical view about how we encourage a different type of engagement by our corporations and the legitimate view of the community that there are certain protective pieces of legislation which we would want retained. I do not know whether you have a view and you want to comment on that.

**Mr Laird**—With the Robert Hinkley approach, as I understand it, his idea would be that you would change directors' duties in the way that he set out in his submission to the committee. You would have I think a 10- or 15-year lead time whilst companies are required to meet that standard of zero tolerance in terms of any impact on the environments or on labour rights. Correspondingly, you could do away with all of the regulation in relation to those areas.

**Senator WONG**—I do not agree with that—I will be clear about that. I think there are some areas where you would want quite prescriptive and protective legislation and the community would want that. It seems to me that this is actually about a different space. It is also recognising that a great many companies in Australia and internationally believe that having regard to stakeholder interests—and they do define it themselves in terms of what they believe is relevant to their core business—is important in terms of their long-term value as a business. So there is a space there that is actually not about what protective laws we might have in place.

**Dr Ranald**—I have already said that, certainly from PIAC's point of view, we do believe there is a need for prescriptive and protective legislation in a whole number of different areas. We advocate for those. But here we are talking more specifically about what are the social responsibilities of corporations. That is what we are addressing. In doing that, we are not saying that you do not need prescriptive legislation in other areas.

**Senator WONG**—I do not really want to go into it now because of time and frankly because I think we had a reasonable discussion on extraterritoriality and the operations of Australian companies overseas with Oxfam a couple of others. Just so that you are aware, that has been put to the committee, including some of the issues that PIAC in particular raised. But that does seem to me to be an area where the argument about the juxtaposition between legislation and corporate

responsibility is perhaps not so great. Corporations in that context are operating in a very different legal environment to the one in which they operate domestically.

**Dr Ranald**—Yes, that is true, but our argument would be that they should abide by standards that they would be obliged to abide by in their home country and not take advantage, for whatever reason, of the lack of standards or lack of implementation of those standards in other countries.

**Senator WONG**—My point is that the argument that you do not have to worry about corporate responsibility because the external law will regulate it is not as strong in terms of extraterritorial activity.

**Dr Ranald**—That is true.

**Senator BRANDIS**—Yes, I accept that.

**CHAIRMAN**—I think you referred to the issue of Ok Tedi as demonstrating the need for the Corporations Law to extend directors' duties into the areas that we have been discussing. We heard earlier, I think it was from Ecos Corporation, that, in fact, the public opprobrium that descended on BHP as a consequence of Ok Tedi was one of the main factors that caused them to develop a positive approach to corporate responsibility. Given that, why would you need to apply legislation in that field? If public opinion is sufficient—if the reaction of public opinion if companies act in the way they did in the past is sufficient to bring them forward along the path—then why legislate?

**Mr Smith**—It is consistent with what I said in my submission at the start. You need to design a system which actually builds on public opinion and prestige as the drivers of corporate conduct. I agree totally that those kinds of things really are in many respects the drivers of corporate conduct. But, of course, no-one wants an Ok Tedi happening as a basis for sound corporate social responsibility policy. We want to get on the front foot and get corporations putting those practices into place before any of those kinds of horrific and abhorrent incidents occur.

**Ms Bailey**—While we do recognise that BHP has improved their CSR responsibilities, there are more recent examples of Australian corporations operating, particularly mining corporations in the Asia-Pacific, which have more recent examples of their environmental devastation and human rights abuses, which I can provide the committee with.

**Mr BAKER**—How do we continue to enforce that? How do we continue to ensure that corporations act from an overseas perspective, as they do in Australia?

**Ms Bailey**—The answer to that is through mandatory rules that have extraterritorial application.

**Mr Laird**—Mandatory reporting would definitely be a first step. They should be required to report on their environmental activities around the world: what they are doing and why they are doing it. That would, as a minimum, encourage them to meet the requirements of the legislation here. Obviously, extraterritoriality is a big issue because if companies can get away with lesser

standards they will. As you say, they sometimes get caught out and public opinion will force a change. An example of that might be the college campus campaigns in relation to Nike sweatshops and Nike, on paper at least and in talks, saying that they are raising labour standards, wage conditions and pay conditions in their factories around the world. I think companies are always going to be pushing the boundaries of what is legal and what they can get away with. The issue with voluntary reporting is that they will tend to gloss over these things. They will say, 'Yes, we're doing that, aren't we wonderful.' I think if you have mandatory reporting, it at least requires them to meet certain defined standards and say how they are addressing those.

**Ms BURKE**—How would you establish those standards? Would it be GRI, or what ASIC is doing, or some of you have mentioned other countries such as France. What is the model GRI?

**Ms Bailey**—We have recommended that we use the UN norms pretty much as the benchmark, so adapting those so companies have to—

**Ms BURKE**—What would you say would be the benefit of the UN norms over the GRI?

**Ms Bailey**—They are the accepted standard of UN human rights and environmental standards. They have been conformed from the UN declaration and various other conventions into the UN norms.

**Ms BURKE**—You would say they would take the full breach of what is known as corporate responsibility? It is one of my beefs that you can say you are being corporately responsible because you have donated a wad of money to someone as opposed to looking at your environmental issues, your labour rights issues, your human rights issues and your externality issues.

**Ms Bailey**—The UN norms do cover things like rights to equal opportunity and non-discriminatory treatment, rights to the security of the person, rights of workers, respect for national sovereignty and human rights. They also cover environmental protection but I would probably refer to an environmental organisation to see whether they are sufficient. They are quite specific.

**Mr Smith**—Putting aside the issue of what set of indicators are in use at the moment, if you take the UN norms as an example, the advantage, in terms of corporations and the things that motivate them, is you have an independent and objective set of criteria by which you can judge one corporation against another and then you let the market play out. If they want to get a competitive advantage about being able to say that they were the best, then they will do so. That will drive it. You set independent benchmarks and make everyone play by the same set of rules rather than being able to cherry pick what they do or do not want to do. That is what happens now and it becomes a public relations exercise. Whereas if you actually have an independent set of indicators then it can be a legitimate public relations exercise where they can say, 'We won by a predetermined and agreed set of rules.'

**Ms BURKE**—Would you have to audit those rules? In the case of Nike where they have gone out and said X, Y and Z—I do not want to draw attention to them, it is just the example that has been used—there is a notion of green wash. They have indicated that they have achieved it

because they have written it into a nice glossy brochure versus someone actually externally auditing, assessing or verifying that they have actually lived up to what they have put out.

**Ms Bailey**—The two other important components would be that they are independently audited and also that they are publicly available which would add a transparency element to it.

**Ms BURKE**—Would you see your organisations needing to do such a thing? Not the NGOs—I do not want to draw that example—but philanthropic organisations are also now looking for people to invest in them and also setting standards. Would it be across the board, for large companies and for medium companies? The argument we then drill down to is usually: where do we draw the line?

**Ms Mathews**—With reporting, one suggestion we made in our paper is that you could have a kind of size criterion where companies or other organisations are required to report by turnover or employees or some other measure. In addition to that, you could also have a criterion which is impact on stakeholders, such as a small mining company might not have the high turnover or number of employees but it may have a big impact on the environment. We could have those two criterion working together to specify which companies need to report.

**Dr Ranald**—We would certainly agree that non-profit organisations should also report on their activities, which indeed they do, and that if these criterion were going to be applied across the board to incorporated organisations then, depending on size and so on, they should do so.

**CHAIRMAN**—Your refer to the UN norms. Are you suggesting they be one of several optional reporting mechanisms or are you suggesting, as I think one of our witnesses in Melbourne a couple of weeks ago suggested, that they should actually be written into the Corporations Law?

**Mr BAKER**—Legislated.

**Ms Bailey**—Probably the requirement to report should be written into the Corporations Law. There should be a consistent set of criteria that people have to report against and we are suggesting that those criteria should be based on the principles in the UN norms.

**CHAIRMAN**—So you want the reporting criteria written into the Corporations Law rather than through parliament just a requirement to report?

**Ms Bailey**—Yes.

**Mr Laird**—Yes. We would support that as well. Otherwise, what you are reporting against would be the issue. At the moment, people pick and choose how they report and whether they use GRI or some other set of indicators.

**CHAIRMAN**—How do we judge? You are advocating that the UN norms and there are other people advocating the GRI. There is no consistent agreement as yet on what the reporting requirements or measures should be.

**Dr Ranald**—We cannot take responsibility for what other people are advocating. We are saying that this is what we are advocating.

**CHAIRMAN**—There are no further questions. I thank all of you for your appearance before the committee and for your assistance with our inquiry.

[4.57 pm]

**JOHNS, The Hon. Dr Gary, Private capacity**

**CHAIRMAN**—I now welcome Dr Gary Johns. We have before us your submission, which we have numbered 126. Are there any alterations or additions you wish to make to your written submission?

**Dr Johns**—No.

**CHAIRMAN**—I invite you to make an opening statement, at the conclusion of which I am sure we will have some questions.

**Dr Johns**—You will note that my submission is essentially a letter, which I took to be a start to the process. I have referred members of the committee to a paper that was published in *Agenda* late last year. Those are my thoughts on the question of CSR. I thought I would summarise some of those to an extent, just by way of an introduction.

**CHAIRMAN**—That would be helpful.

**Dr Johns**—I do not think there is any convincing evidence that CSR is profitable. I think it is costly regulation. I do not think there is any evidence that it is a useful guide to future corporate failure or misdeeds or indeed that it would minimise misdeeds. In that sense it is not a useful risk management tool. I note that corporations that have indulged the CSR dialogue in the last number of years have added to the possibility that governments will legislate for CSR. Having realised the error of that dialogue in some ways, those same companies I see coming before this committee to ask you to not change the duties of directors and broaden them. Nevertheless, they got themselves into the game.

I worry that corporations are responding to people who I call ‘private regulators’—NGOs—which they must do. People are of course quite welcome to have their own views heard in a democracy, but I do not want the parliament to buy into what is essentially new regulation—for the sorts of reasons that I put in the paper and have stated here: I do not think CSR gives us any guide as to what is or is not good behaviour, because essentially parliaments have been divining what is improper behaviour—the negative side of goodness—for a long time. It is what governments do almost every day, but they start with the particular. For instance, there are laws in occupational health and safety which have been worked up over generations through negotiation by the actual players, and having someone come along at the end and say, ‘Wouldn’t it be nice to call this human rights?’ does not add value. It does not change the decisions that went before, and I do not think it provides any new insights.

So I am worried that CSR provides no new tools or insights, but it does invite a whole new set of players to regulate and interfere with corporations. It also invites corporations to become public entities. They are not. Their responsibilities are particular and well known, and, to the extent that CSR wants corporations to save the world, I think they are a very poor instrument to do that. Corporations may or may not be good at what they do, which is, for instance, creating

wealth. Governments regulate them to make sure that in the creation of that wealth they do not do damage, but the definition of ‘damage’ is something that has been worked up over many years in thousands of different ways. I think drawing a broad concept across the front of all that does not assist.

So my plea to this committee and, subsequent to any of its recommendations, to the government is to not buy into the CSR debate particularly and to be confident about all of the legislation that governments have been passing for a very long time which directs corporations how to go about their business without breaking the law. I would also encourage business to be a little bolder about their role in society. I think business has forgotten how to make its own case about what good they do. I would even encourage them to draw up an alternative CSR that says, ‘This is what we do, and we should do no more.’ But that is perhaps a job for further down the track.

**CHAIRMAN**—What is your response to the argument that the community or society gives the corporation a licence to operate and therefore the directors of the corporation owe society a duty beyond that which they owe to the shareholders?

**Dr Johns**—I think it is a nice argument, but it is an argument by those who do not have an investment in the company or anything at risk. It is used to get their leg in the door to have a say about what that company should do. So it is a nonsense argument. It is presumptuous. Nevertheless, governments do license corporations and have licensed what they do in a thousand different areas. You literally have to get a licence to pollute, to run a factory, to deal with workers through contracts or whatever. So I am arguing that governments do license corporations to do what they do, but it is not a licence at large to exist. That argument is an extraordinarily presumptive thing.

**CHAIRMAN**—Can I ask your view of corporate philanthropy? Do you see corporate philanthropy as a subdivision of corporate responsibility, or is it something that is quite separate from the concept of corporate responsibility that has been developing over recent years?

**Dr Johns**—I think corporate philanthropy was easy to put in a box when the owner of the company was known—as in a family company, for instance. Any profits were theirs to do with what they wanted. There are not too many of those private companies left. Basically, CSR is a debate about public companies, and I worry that moneys are put aside in the name of the public corporation to do things. My response there is to say, ‘If you want to philanthropic things you should ask the permission of the owners.’ That may be as simple as just putting in your annual report what you do by way of philanthropy during the year. But as long as there is a dialogue that says: ‘We want to do something with these profits; we’re not going to give them back to the shareholder and we’re not going to give them to the workers by way of wages. We’re not going to give them to suppliers by dint of better prices for the services and goods they supply; we’re going to hold them and put them to one side.’ It is either public relations or it is nothing, to tell you the truth. So I would incorporate philanthropy—which has a very decent history—into the running of the company. I do not think a company is bad because it is or is not philanthropic. CSR is really an overlay on top of one aspect of that.

**CHAIRMAN**—Your article argues that CSR is not profitable. Given that, why is there an increasing trend for profit-driven businesses to incorporate what is defined or described as CSR

into their activities? Is it because they fear that if they do not governments might legislate in this area as a result of the activities of other pressure groups, or is it enlightened self-interest in the sense that it has the effect of building their brand or reputation so it might have a marketing benefit? What is your view of why they are going down this path?

**Dr Johns**—I think there are a number of strands. It is a response to political pressure. To be seen to do good, corporations naturally will turn that to their advantage by competing among themselves by putting aside some money, which is really money that should be distributed to other people, and then competing on that level of goodness. If you get representatives from six Australian banks in the one room and have them talk about their CSR performance, they argue that they are undercutting each other in one element. They are looking for competitive advantage, so I see it in those terms. CSR is a tool that is used by some corporations against others. At the same time, it is meant to fend off the political will of some others to regulate corporations.

**CHAIRMAN**—Would you concede that there are instances when it could be profitable?

**Dr Johns**—It may be, in that sense. But there are some really good studies. I refer to one in particular, which says: ‘The causation is wrong: we do not think that CSR begets profitability. Profitable companies can afford to dabble in CSR.’ That is a very important insight.

**CHAIRMAN**—A limited number of research projects have been undertaken into the costs and benefits of CSR. There was a recent one in the UK by Professor Brooks of the University of Glamorgan Business School, which showed that the returns of those companies alleged to be the least socially responsible were 24 per cent higher than the most socially responsible companies, so defined. I understand there are other studies and research projects that show the opposite. What do you make of those?

**Dr Johns**—I have seen only a press release of the paper—is it the Brooks paper; is that his name?—so I cannot comment, not having read the whole paper. But the logic is pretty tight: if you deny investments in certain profitable activities then over time your returns are likely to be less. The thing that is required for good markets is that there be good information. So if an individual investing in a company chooses not to do so for their own good reasons—because it is manufacturing things that they think are destructive or whatever—that is their business. I do not think it is the business of government to tell people how to invest, for instance, and I do not think it is the business of government to tell corporations what to do, in the sense of telling them what is ‘good’. I think governments can tell people what is wrong. If you define what is good, you are essentially taking away from everyone else their definition of what is good. That is what worries me about this debate.

**CHAIRMAN**—Can I ask you for your reaction to the approach by the current federal environment minister, Senator Ian Campbell, to the Australian Stock Exchange to consider incorporating the Global Reporting Initiative as a standardised, voluntary reporting framework for CSR within the ASX corporate governance provisions?

**Dr Johns**—Well, that is this year’s trick; what is next year’s? That is my worry. There will be another sort of sponsored measure of ‘goodness’ next year and we will have to go around and do it again. It worries me that governments want to make sure they are looking good, so they will



take on board a half-baked debate and say, ‘Look, we advise corporations to move in this direction.’ They should either get fair dinkum and do it in legislation or get out of it. I guess that is my view. And I would rather governments stayed out of it for the reasons I gave at the beginning. Governments have been in the business of regulating corporations against harm for a very long time.

For instance, take the human rights dialogue that the United Nations tells us about. Western liberal democracies, Australia in particular, have been leaders in defining human rights for 100 years. All of the work that has been done between governments and businesses and the trade union movement in, say, occupational health and safety, has been a dialogue about human rights. It is defined responsibilities. It is defined safety. It is allocated risks. It set in motion insurance. It set in motion means of assisting people. It is written handbooks about how to proceed safely. All of that is a dialogue of human rights, and I really resent someone coming along at the end and saying, ‘We’ve got a new tool for you,’ and I open up the box and there is nothing in it, unless it is just the stuff we have already done—which is not to say that we do not improve or continue to modify any of these particular dialogues. But there is no new game out there.

I think we are all working away at trying to do reasonable things, but do not give me a once and for all definition of ‘goodness’. That would be like the end of history as we know it, the end of politics. It is nonsense. What this game is really about, of course, is allowing new people into the game as regulators. That is the worry with passing laws that have general terms attached to them rather than specific ones.

**Senator WONG**—Dr Johns, when you rail against corporate social responsibility in your letter, what do you understand it to mean?

**Dr Johns**—I am sorry; I missed that.

**Senator WONG**—Could I ask you, by way of beginning, when you rail against CSR in your letter to us, what precisely you understand it to mean.

**Dr Johns**—Essentially, it is a dialogue. It has so many adherents we could give it many definitions, and I do not want to be lumbered with defining it. Corporate social responsibility is a dialogue, mainly by those who have no real interest in the corporation, to modify a corporation’s behaviour. I do not think you can say much more than that, because it has a thousand meanings.

**Senator WONG**—Do you have a view that the community, stakeholders, consumers or shareholders—separately—have or have not the right to attempt to modify corporation’s behaviour?

**Dr Johns**—Of course they do and they have been doing it through their elected representatives and directly and indirectly forever.

**Senator WONG**—You accept that they have done so, as you said, both directly and indirectly. So it has not always been and nor is it currently the case that the behaviour of corporations is modified only by way of legislation?

**Dr Johns**—Correct.

**Senator WONG**—Do you think that it is reasonable for corporations to take into account the impact of their activities on ‘stakeholders’? I use that term very generally as meaning all groups on whom a corporation’s activities impact.

**Dr Johns**—Yes. But the trick is that they have now some freedom to make judgments about balancing various forces. I suspect the more we continue to widen their responsibilities, the greater will be their restriction on making judgments.

**Senator WONG**—We have had quite a bit of evidence before this committee from corporations who say, ‘We just think that having regard to the impact our activities have on stakeholders’—they have worked out who they are; I am not suggesting the whole of the community but their stakeholders—‘is part of our core business.’

**Dr Johns**—Yes. That is right; it is. That is why I say that there is nothing new in the game because corporations have to make judgments about how much you pay workers, how much you pay suppliers, whether you conform with the existing laws, how much you return to shareholders and how long you will exist as a corporation.

**Senator WONG**—We have heard a lot about the stakeholders from mining companies who say, ‘We do try.’ There is a very good business argument for it, which I will paraphrase so I may not get it right. Essentially the message has been: our sector had some problems in terms of particular stakeholders—for example, communities in the areas in which we operate. So we take the view that, before we determine to mine or expand a mine, it is good business for us to go in and look at the impacts on the environment and the local community—for example, are we stripping the community too much of available workers, and how do we manage that—and discuss those potential impacts with the community ahead of their arising and a community backlash. Some would argue that that is actually what they mean by corporate social responsibility. You would not have difficulty with that, would you?

**Dr Johns**—No, but they are getting on with business. There are a number of dialogues here which really do not meet. So business tries to get on with doing what it does best and wraps itself in the cloak of CSR, and other people who want to regulate business also wrap themselves in the cloak of CSR, the dialogue—and that is the worry, by the way.

**Senator WONG**—What if the argument is not about regulation but about encouraging companies to do what many companies or some companies are already doing—that is, as part of their core business to look at the impact of their activities on the environment and their stakeholders. Do you have an in-principle opposition to that?

**Dr Johns**—Yes. There is a worry. You talk about a simple matter of: ‘What is the impact of?’ What is the responsibility of a particular company, even a mining company, to a particular community?

**Senator WONG**—Can I just stop you there. That can be worked out. There may not be agreement, but there can be a dialogue around that. But, as a matter of principle, do you have an in-principle objection to companies being encouraged to consider these issues?

**Dr Johns**—Of course not, because that is just a discussion. You can ask them to consider those things. What I am saying is it gets difficult when you say, ‘These are the lack of limits to your responsibilities—that is, whatever goes on in this town becomes your responsibility and will for a very long time.’

**Senator WONG**—But who is saying that?

**Dr Johns**—Bit by bit, the responsibilities, which sometimes are called externalities, are incorporated into what businesses do and the costs to them. If those responsibilities are well-defined, then that is okay. It does not mean to say that they are defined for all time. But we are getting into the business, and have been for a long time, of continually widening the public responsibilities of companies.

**CHAIRMAN**—By regulation.

**Dr Johns**—By regulation. Regulation is when you have some rules that change what people do and shift their responsibilities—in effect, taxing them.

**Senator WONG**—What do you think about this statement:

Companies able to tackle issues such as poverty, climate change and population shifts are those most likely to succeed in the future.

Is that something you would agree with or disagree with?

**Dr Johns**—I think probably the reverse is more accurate. Is there a company that is in the business of alleviating poverty or climate change at large? I do not think so.

**Senator WONG**—So you would also disagree with the proposition that ‘We see shareholder value as a measure of how successfully we deliver value to society, rather than as an end in itself’?

**Dr Johns**—It is a nice idea. The corporation does not have responsibility to society. It can say it has, but it has a literal responsibility to particular parts of society.

**Senator WONG**—These are extracts from a statement by a group called Tomorrow’s Leaders Group. They are eight corporate leaders from the companies Adidas, BP, CLP, Grupo Nueva, Procter and Gamble, Storebrand, Swiss Re and TNT. You would not regard those as being—how did you describe it—‘non-owner political interests wishing to use corporate wealth for their own ends,’ would you?

**Dr Johns**—This is their response to political pressure.

**Senator WONG**—So you think they are not telling the truth.

**Dr Johns**—That is their business. I do not see what they are saying as being a particularly valuable contribution to debate.

**Senator WONG**—And you disagree with companies that have come before us—Westpac, IAG, Unilever, Wesfarmers and Rio Tinto, to name some of them—who have argued that integrating stakeholder impacts, community impacts, environmental impacts as they define them, and I recognise that is something for them, is a part of their core business?

**Dr Johns**—It is and, to some extent, it always has been.

**Senator WONG**—With respect, Dr Johns, I do not think that is the evidence.

**Dr Johns**—I think it is.

**Senator WONG**—I think the banks would say—and the ABA appeared before us today—that they probably did not do so well in the nineties on this stuff, as you called it, and they made a concerted effort as a sector, and some people would think less successfully than others, to address community concern about the impact of their business activities. So they have obviously decided, ‘We’ve actually go to do something here,’ from a business perspective. What I am putting to you is that they have done that for business reasons and not because some non-owner political interests are wishing to use corporate wealth for their own ends, to use your words.

**Dr Johns**—Did they stop introducing electronic banking? Did they stop taking their branches out of towns? No, they did not. What I am saying is—

**Senator WONG**—They did, actually. They actually put a moratorium on branch closures.

**Dr Johns**—For a while, in response to political pressure. But what I am saying is that there business plan probably did not change. It was determined by other things. Westpac will tell you a little story—that as it went to towns where people were upset about closures, they would always ask the audience, ‘How many people bank with Westpac?’ and not many did. So there was a broader problem there, that people in small towns were worried that there were 10 buildings left and then there would be nine. I fully sympathise with that problem but to what extent was Westpac responsible as opposed to lots of other players for the demise of that town?

**Senator WONG**—Who is arguing that they are? I have to say, Dr Johns, it seems like your evidence is fighting against something that no-one is putting to you.

**Dr Johns**—No.

**Senator WONG**—I am not suggesting, and I do not think anyone in this room is suggesting, that it is Westpac’s responsibility if a town dies.

**Dr Johns**—But what you are failing to do is give a sufficiently tight definition. You want them to do good, and if someone says, ‘I don’t want them to leave this town; that is my definition of good,’ then how have you advanced the argument? You still have someone who is going to get angry—

**Senator WONG**—I do not believe I have said, ‘I want them to do good.’ When did I say that?

**Dr Johns**—With great respect, that is what CSR does.

**Senator WONG**—When did I say that? That is my point.

**Dr Johns**—I am not responding to you.

**Senator WONG**—I am saying that you are arguing against the definition of CSR which, frankly—

**Dr Johns**—Exists everywhere.

**Senator WONG**—I disagree.

**Dr Johns**—It does.

**Senator WONG**—I disagree.

**Dr Johns**—That is your business.

**Senator WONG**—We have had some groups before us, and I do not necessarily agree with their views; they obviously have a particular barrow to push in terms of some issues and they see this as an opportunity. But I have to say the great weight of evidence before us goes well beyond, ‘We want to make corporations do good.’

**Dr Johns**—It goes beyond that? Is there anything beyond that?

**Senator WONG**—It is far more complex than that. I think the argument is—and I concede there is a lot of definitional discussion which needs to occur—whether or not corporations ought to have regard to the impacts of their activities, how that might occur and how that might be encouraged or discouraged. That is really where the debate is at.

**Dr Johns**—In that sense, it is a very old debate. It has always been the debate. But if you are looking at new instruments of regulation—and that is what CSR and reporting requirements are—then you end up with the broadest definitions of ‘goodness’. It becomes very difficult for a corporation to ever stop, to ever close off and to say, ‘I have fulfilled my obligations,’ because the next person says, ‘It was not good enough for me.’ Do you see how the generalised terms become endless?

**Senator WONG**—But you are assuming that the definition of what a corporation should be doing is external to the corporation. That is how you have constructed the argument: that CSR means the corporation having to do good as per an external definition. What I am putting to you is that the evidence we, and people before us, have had is that companies are saying, ‘We actually want to engage in sustainable business practice and corporate social responsibility’—or whatever phrase they choose to use—‘because we see it as being good for business.’ They determine, with some dialogue depending on the company, how they define those objectives.

**Dr Johns**—Yes, and if you push them, they will say—as will anyone—‘There is a limit to the extent that we can do what is corporately socially responsible.’ This is an argument about limits. For instance, the greatest single act of philanthropy was Sidney Myer feeding, I think, 32,000 people on Christmas Day in 1930 in Melbourne. It was a magnanimous gesture and he

personally and all of his staff served food. Should he have done that every year? Should he have packed 64,000 people into the room? Do you see what I mean?

**Senator WONG**—Yes, but is that we mean by CSR?

**Dr Johns**—Yes.

**Senator WONG**—I do not mean that. I think it is about philanthropy.

**Dr Johns**—It is all about defining the limits of goodness or, indeed, of misdeeds. That is what parliaments do. They give you a sense. Corporations want to get ahead of the game. They want to be seen to be good. They want to be seen in the best light, of course, but none of them give their money away. They run the business. So this is really a game about ratcheting up how much we—other stakeholders—can get out of the business. At some point you increase the risk to the business.

**Senator WONG**—If you define it in terms of ‘Let’s ratchet up the amount of corporate philanthropy’ then your argument holds. If that is how you understand CSR and that is what you think is the policy issue that is before us, that is fine. I do not think it is. I could be wrong but I think I have heard all the evidence so far, and I do not recall anyone putting to us that that is how CSR should be defined.

**CHAIRMAN**—Dr Johns, this ratcheting up could well apply beyond the narrow aspect of philanthropy. It can apply to other community impacts, can’t it?

**Dr Johns**—It can apply to all aspects of impact.

**Senator WONG**—So do we listen to you, Dr Johns, or do we listen to the number of companies that have come before us who have said that they believe this is something that is good for their business? Are you saying they are all—

**Dr Johns**—You are best to answer that, of course. But you will look at real motives.

**Senator WONG**—Are you saying that you think that their motives are not real?

**Dr Johns**—No, their motives are real. You have to determine what they are. At the end of the day, they have legal responsibility to certain classes of people. If we ask them to do more than that then they have to apportion the cost of doing that amongst those responsibilities.

**CHAIRMAN**—But also, Dr Johns, you are not saying these companies should be prevented from doing this. The companies that have come before us and given evidence I think are consistent with your view in saying, ‘We do not want more legislation and more regulation in this area.’

**Senator WONG**—But I am putting the point to Dr Johns that he is saying it is not profitable and it is not a good thing. I am saying that we have had a fair bit of evidence from people from the business sector who actually think quite differently than that.

**CHAIRMAN**—Dr Johns, your bottom line says: ‘Do not regulate this area. If corporations choose to undertake this activity, that is for them to decide.’

**Dr Johns**—We might say, ‘Were they doing any of this 20 years ago?’ They were not. Why? Are they now more enlightened? Perhaps so. But it is because the community expectations of them are high. That is not a bad thing but we have to watch where we use instruments that are very broad brush and that expect people to do things without clear definitions. It is an unending game then. Of course, corporations will say to you that they are doing their very best and they want to do well. What else would they say? It does not mean to say that they are not doing well but a number of the corporations that came before you were, on the one hand, saying, ‘We embrace CSR’ and, on the other hand, saying, ‘Don’t change the duties of directors; don’t impose rules on us.’ You will make judgments about what the real game is.

**Senator WONG**—Should we listen to the public position of James Hardie? You said the current formulation of directors’ duties prevented them from making reasonable settlement.

**Dr Johns**—Yes, I have heard their argument. I will leave that to you to judge. But if you begin to widen the duties of directors, I think you are more likely to have directors making judgments. It does not matter how you effect them, directors will have to shift, if you like, moneys—to put it in crude terms—between different sets of stakeholders. If you want to determine how they should shift it, that is a very major new form of regulation.

**Senator WONG**—I do not think anybody is suggesting that. No-one has raised that except you, Dr Johns.

**Dr Johns**—You may deny them the ability to make judgments.

**Senator WONG**—No-one has suggested that except you, Dr Johns. I am making the point—

**Dr Johns**—I think if you read it all, it is pretty much what it is about.

**Senator WONG**—What I have said to you is that you are saying, ‘Do not change them.’ I have to say that I still have an open mind on that. I do not have a particular view yet. You are saying, ‘Do not change the directors’ duties.’ I am putting to you that we have a fairly high profile company essentially saying, ‘The current formulation of the duties prevented us from doing the right thing.’ Are you therefore saying James Hardie is wrong and we should ignore that?

**Dr Johns**—I make no comment on James Hardie’s decision.

**Senator WONG**—So you do not want to say whether or not they are right or wrong but you want us to change the law?

**Dr Johns**—Did James Hardie come here and ask for changes?

**Senator WONG**—They have publicly indicated that.

**Dr Johns**—So they have given submissions to you.

**Senator WONG**—They have not made any submission to the committee. They have publicly said this is—

**Dr Johns**—That would be some sort of proof to me that they would rather have them left alone.

**Senator WONG**—But they have indicated quite publicly to the community that this was the reason why they did not, for a number of months, sign off on the deal. I am just making the point. Those who come before us and say we should not do anything but do not want to comment on whether or not James Hardie use the argument that the duties were too narrow to justify their behaviour seem to me to be putting a fairly inconsistent position. You either have to say, ‘Hardie’s are wrong and the duties don’t prevent it,’ or you have to say, ‘The duties need to be amended.’

**Dr Johns**—The duties are sufficiently broad so that directors can take account of all of their responsibilities, if you like. James Hardie, it appears, felt that they would have liked more freedom. If you give them less freedom, I would have thought it would make it even more difficult for them. The proof of the pudding for me is those corporations that came before you talking the talk of CSR but not wanting you to change the duties of directors. That seems to me to be the real debate.

**Mr BAKER**—If I have been hearing you correctly, would I be right to assume that, from a corporation’s or company’s perspective, directors have a sole responsibility to make money and not take into account CSR and the associated issues, whether it is in a community or whether it is the environment?

**Dr Johns**—No, it is not that crude, and it never was, because the directors already have responsibilities to obey the law. Those laws are so thoroughgoing, they give them thousands of directives about what is good and what is not. In other words, they are all part of a dialogue that says, ‘Here’s what governments and the electorates through governments have determined over a very long period is socially responsible for a corporation to do.’ They are already in the business of doing that. If you then have an overlay, if you like, of broader concepts, of CSR, I do not think it adds value. It does not give them any insight. It does not give them any new tools as to how to go about their business.

**Mr BAKER**—A simple point, which we have heard a number of times, relates to the extraterritorial position of companies based in Australia and operating overseas and some of the destruction that they have caused. Surely those companies who face fewer regulations than we do in Australia have a corporate and social responsibility to act in a similar behaviour that they are required to within Australia as in other countries.

**Dr Johns**—No. I think it is somewhat of a colonial mentality to say, ‘We in Australia will direct you’—someone else—‘how to operate in another country.’

**Mr BAKER**—I am talking about an Australian company.

**Dr Johns**—But you are still directing them how to operate in another country. They may have negotiations with a sovereign government and you are saying, ‘I’m not happy with those



negations.' It is quite a presumption. In the old days, it would be called imperialist. The East India Company or something would have done that. Now we are doing it.

**Senator WONG**—If the other country allows child slavery, would that be fine?

**Dr Johns**—No, but it is a presumption. I would rather assert it on a case-by-case basis. If you dive into any particular, you have to say: 'Yes, it is good to have a law against child labour. It is a shame that those children may not work anywhere else in that country, because that is what happens in a Third World country.' There are consequences for every rule you want to pass.

**Mr BAKER**—Surely some of the devastation that has occurred by some of the mining operations who have not had to abide by regulations because of Third World countries—

**Dr Johns**—You would have to particularise. The Ok Tedi case is always the one that is used. Ok Tedi was a negotiation between the company and a sovereign government. Both sides knew that there was considerable risk trying to have a tailing dam halfway up a river in a geologically unstable area. We have to be careful here that we are not saying we want to banish all risk, because probably nothing will happen. We are all terrific in hindsight. There are many instances where Australian governments or other governments want to intervene in the affairs of other countries and companies but, if you state a bold and bald proposition that we should determine what Australian companies do elsewhere in the world, you may have problems. One problem is that defining the nationality of companies is becoming a less and less easy matter, because they may be registered in one place but most of them are not simply owned by a nation state or even by a large number of one group of citizens.

**Mr BAKER**—I will not go into them, but there are a number of cases here, such as the cyanide leak into Hungary's second largest river, and Esmerelda, the gold mine in Romania. Surely there is a role of corporate responsibility for these mining companies that are based here in Australia when they operate overseas.

**Dr Johns**—There is also a role for those sovereign governments to learn how to regulate and improve standards, because it will affect their investment into that country if there are problems.

**Mr BAKER**—I concede you point from a legal perspective, but does that make it right?

**Dr Johns**—I am careful using the term 'right'. It is part of this aid debate where we say, 'We will come and do good for you.' If you keep doing good for someone else, they do not do anything themselves. A lot of Third World countries' ability to regulate and have insights into industry has in fact declined as they receive more aid, because they do not have to do it. They do not have to take the bumps. They do not have to learn from the mistakes. There is quite a bit of literature now which is suggesting that the enormous amount of aid which flows from the West to Third World countries has in fact lessened the ability of those nations to govern themselves.

**Mr BAKER**—We are not talking about aid; we are just talking about—

**Dr Johns**—But the analogy is that if we think we can use Australian legislation to solve all offshore problems, through companies legislation or whatever, then that is a real problem. All I

am saying in all of these debates is that there is usually a knock-on effect. The knock-on effect may be denying or lessening the capacity of those governments to regulate for their own good.

**Mr BAKER**—It is not a matter of solving their problems; it is a matter of their practices being consistent with what occurs in this country.

**Dr Johns**—Consistency is a goal that they might not agree with. They are entitled to have another standard. This is something we can debate and, of course, it is a healthy debate, but they are entitled to say, ‘This is how we believe our people should live.’ That is democracy. We have to be a bit wary of being the world’s best at everything and telling other people how to live. It does not stop us from discussing it, of course.

**Mr BAKER**—We could have a long debate on this, but just as a diversion to it, with the social impact that companies have when they change business direction, do you believe that they should or should not have a responsibility to that particular region or area that they profit from? I will use the case, as I mentioned before, of McDonald’s, who have, for the sake of a few cents per packet of french fries, taken a big contract out of Tasmania and given it to New Zealand. Basically, it was done purely for the dollar and minimal profit.

**Dr Johns**—It is an argument which pretty quickly slips into one that says that is a non-tariff barrier.

**Mr BAKER**—I am talking about social responsibility. I am not talking about whether it is right or wrong. Legally, yes, it is—absolutely.

**Dr Johns**—Take your spuds from here and do not take the best price from somewhere else is a very old argument.

**Mr BAKER**—Yes, but the social impact that—

**Dr Johns**—Of course there is a social impact. But there is a social impact somewhere else if you do not buy them from there. As long as we have the balance of scales and we hang it over New Zealand and Tasmania, that is okay.

**Mr BAKER**—But then we continue down that line of profits above everything else.

**Dr Johns**—But profits are actually redistributed to people. So you have to make judgments. We are sitting here in judgment, saying—

**Mr BAKER**—No, we are not in judgment.

**Dr Johns**—‘Use Tasmanian spuds and do not take so much in profits.’ I suppose if you were in touch with all your shareholders and asked if that were acceptable you would really be asking people to talk about transfers of incomes. If you want to legislate for all that it gets a bit sticky, doesn’t it? But there are no free french fries. There is just no way out of this. Of course it will have an impact, but if you say that a company has a responsibility to its local community you are really saying that it may, by implication, lessen its responsibility to another community where it

could have bought the spuds or to its shareholders or to its workers to whom wages are paid. All you are doing is shifting blame. You are not actually adding to the welfare of the broader group.

**Mr BAKER**—I agree. All that I would put back to you is that it is a matter of getting a balance.

**Dr Johns**—‘Balance’ is a very dangerous word. Who is to make a judgment about what is ‘balanced’? That is the worry if we talk about satisfying all the stakeholders. This is the classic debate. Is anyone from the National Party here? If your electors are highly physically located in your electorate, they may be a very small problem overall, but they will turn a vote for you so you really look after them. Your sense of balance is: these people need to be looked after. All you are doing is balancing interests; you are not really solving the problem.

**Mr BAKER**—The next step would be the vision—or the short termism against sustainability and long termism—where we could take that next step in using the word ‘balance’.

**Dr Johns**—I know what you mean. Because you might ask them to balance the short term and the long term and all that sort of stuff. But one who uses this argument would not be giving us the tools to answer, ‘How the hell do I have that insight? How do I have an insight that says, “This company will remain strong for 50 years.”’ ‘Blowed if I know. You see what I mean? It is not helping.

**Mr BAKER**—I am talking from the community point of view.

**Dr Johns**—The definition of populism in political terms is doing something you know to be wrong that is popular. But we all—those of us who have experience around politics—know that you have to do a bit of both. If someone passes a law that tilts the balance in a particular way, they either put you out of a job or they force you to do wrong things. They do not help; they just produce a particular outcome.

**Mr BAKER**—I would love to continue, but I have been told that we are running out of time. Thank you very much.

**CHAIRMAN**—Dr Johns, thank you very much for appearing before the committee. We have appreciated your contribution to our inquiry.

**Dr Johns**—I wish you well, thank you.

**Committee adjourned at 5.47 pm**