

**Hawke Institute Working Paper Series
No 9**

**USING THE PRINCIPLES OF CORPORATE SOCIAL
RESPONSIBILITY IN THE PROCESS OF RISK
MANAGEMENT AND ACCOUNTABILITY**

Rick Sarre, Meredith Doig
and Brenton Fiedler

Hawke Institute,
University of South Australia
Magill, South Australia
2000

© Rick Sarre, Meredith Doig and Brenton Fiedler
and the Hawke Institute, University of South Australia 2000

The Hawke Institute
University of South Australia
St Bernards Road
Magill
South Australia 5072
Australia
www.unisa.edu.au/hawke/institute/institute

ISSN 1443-9298
ISBN 0 86803 808 3

USING THE PRINCIPLES OF CORPORATE SOCIAL RESPONSIBILITY IN THE PROCESS OF RISK MANAGEMENT AND ACCOUNTABILITY

Rick Sarre, Meredith Doig and Brenton Fiedler*

INTRODUCTION

Stories of corporate entities, public and private, that have been shown to be irresponsible, reckless or unethical are legion. Media outlets regularly report on national and international firms and government instrumentalities that have failed in their obligations to keep employees, shareholders and the public at large safe from physical harm, immune from financial jeopardy and protected from environmental disaster. News services carry, on an almost weekly basis, stories of bank collapses, air crashes, train wrecks, oil spills and nuclear fuel leaks. More specifically, the Longford gas explosion,¹ the demolition of the Royal Canberra Hospital,² the collapse of a makeshift bridge at the 1997 Maccabiah Games³ and the Swiss canyoning tragedy⁴ all involved Australian loss of life. The National Safety Council (Victorian Branch) fiasco,⁵ the civil litigation against high profile

* Rick Sarre is an Associate Professor in the School of International Business and Convener of the Legal and Business Regulation Research Group, University of South Australia. Meredith Doig is a PhD candidate at RMIT. Brenton Fiedler is a Lecturer in the School of Accounting and Information Systems, University of South Australia.

1 Editorial, 'Esso tactics reveal shameful arrogance', *The Australian*, 1 May 1999.

2 A young spectator, Katie Bender, was killed by flying debris in July 1997. See R Sarre and M Doig, 'Preventing disaster by building a risk-prevention ethic into corporate governance', *Australian Journal of Emergency Management*, vol 15, no 2, 2000, pp 54–57.

3 Ibid. *The Australian*, 19 April 2000, p 5, reported that five men have been convicted and imprisoned as a result of the Israeli criminal trial in Tel Aviv that ended on 17 April 2000. The civil action designed to recover damages for the families of the four killed in July 1997, and the dozen seriously injured, is still before a Haifa court.

4 Near Interlaken on 27 July 1999, 14 Australians and 7 others were killed when a flash flood filled a canyon they were exploring under the care of a local tour company. In October 2000 criminal charges were laid against the firm's proprietors.

5 In this case, auditors accepted blindly the word of management who were drawing false invoices and borrowing money on the security of empty shipping containers. Creditors lost A\$255 million. See *Commonwealth Bank v Friedrichs* (1991) ACLC 946.

auditors following the crash of the State Bank of South Australia,⁶ the Robert Maxwell/BCCI collapse⁷ and the Barings Bank disaster in Singapore⁸ all involved vast financial losses. Each of these disasters shares a common thread: the tragedies and losses could have been prevented if better systems of accountability had been in place.

Corporate directors are constantly reminded of the numerous ways in which they are accountable to the law. They are ostensibly bound by a range of formal controls, designed to create a 'transparency' of operation, to encourage an active dialogue with those affected by their entity's operations, and to put in place systems to observe and correct errant activity.⁹ One would have thought that a public demonstration of a willingness to adhere to these controls would be an essential component of modern corporate practice as part of a general desire of business entities to prevent irresponsible practices. Sadly, as history reveals, this trait is often lacking in practice. Although lip-service is paid by corporate managers to such adherence to the law, transparency, dialogue, observation and correction, very often the reality fails to match the rhetoric, even when these features are mandated by law and enforced by penalties.

It is our view that accountability is more likely to be effective where there is an ethic of 'social responsibility' built into a corporation's 'culture', rather than simply a reliance upon minimum legal standards and a sanctioning system should the corporation fail to meet certain standards.¹⁰ Accountability mechanisms that

6 The original claim against the auditors of the State Bank Group was \$1.1 billion (Price Waterhouse) and \$3.108 billion (KPMG Peat Marwick), for a total of \$4.208 billion, for their lax auditing of the bank group between 1984 and 1991. The cases were settled out of court in September 1997 for \$120 million.

7 G Vinten, 'Internal audit after Maxwell and BCCI: public responsibility versus loyalty to the organization', *Managerial Audit Journal*, vol 7, no 4, 1992, pp 3–5.

8 Editorial, 'Barings: the Singaporean view', *Journal of Financial Crime*, vol 3, no 4, 1996, pp 366–368.

9 These are features often associated with the word 'accountability'. Contrast the term 'regulation' which implies the presence of more formal and direct mechanisms of control—especially procedures and rules—which have been put in place with the stated intention of thwarting injustice, corruption, negligence and incompetence. See R Sarre, 'Keeping an eye on fraud: proactive and reactive options for statutory watchdogs', *Adelaide Law Review*, vol 17, no 2, 1995, pp 283–300; R Sarre, 'Issues of governance for 21st century policing and security: a theoretical overview', *Police Practice and Research: An International Journal*, vol 1, no 2, 2000, pp 169–181.

10 B Fisse and J Braithwaite, *Corporations, crime and accountability*, Cambridge University Press, Melbourne, 1993, p 226; R Tomasic, 'Rethinking criminal responsibility in a corporate society: an accountability model' in P Grabosky and J Braithwaite (eds), *Business regulation and Australia's future*, Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, Canberra, 1992,

incorporate what have become known as the principles of ‘corporate social responsibility’ or ‘CSR’ provide a valuable tool not only for minimising risks but also as a means of improving business performance.

THE LEGAL PROCESS AS A REGULATORY AGENT

The story of the roll-on/roll-off passenger car ferry *Herald of Free Enterprise* provides a sobering reminder of the weakness of the legal process as a regulatory tool. On the evening of 6 March 1987, the ferry *Herald of Free Enterprise* sank soon after leaving the Belgian port of Zeebrugge, en route to Dover. Five hundred and thirty-nine people were on board, and at least one hundred and eighty seven people lost their lives. The *Herald of Free Enterprise* rolled over because her bow doors remained open as she left port. The ferry ended up half submerged in shallow water. Only a fortuitous turn to starboard in the last moments prevented the boat from moving to deeper water, which would have meant her sinking completely.¹¹ The *Herald of Free Enterprise* was, at the time, a member of the Townsend Thoresen Car Ferries group.¹²

Justice Sheen conducted a formal investigation into the disaster between April and June 1987. In his conclusion, the judge found that the accident was partly caused by the ‘serious negligence in the discharge of their duties’ by the captain, chief officer and assistant bosun. He ordered that their Certificates of Competency be suspended. He also found the company itself had been at fault, remarking that

a full investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company. The Board of Directors did not appreciate their responsibility for the safe management of their ships. They did not apply their minds to the question: What orders should be given for the safety of our ships? ... The Directors did not have any proper comprehension of what their duties were. There appears to have been a lack of thought about the way in which the *Herald* ought to have been

pp 255–268; R Tomasic, ‘Corporate crime and its regulation: issues and prospects’ in D Chappell and P Wilson (eds), *Crime and the criminal justice system in Australia: 2000 and beyond*, Butterworths, Chatswood, 2000, p 261.

11 The death toll was the worst for a British vessel in peacetime since the sinking of the *Titanic* in 1912. See C Boyd, ‘Case study: the Zeebrugge car ferry disaster’ in W Frederick and J Post (eds), *Business and society: case studies in corporate social policy*, McGraw Hill, Singapore, 1990, p 498. See also D Bergman, *Disasters: where the law fails: a new agenda for dealing with corporate violence*, Herald Families Association, London, 1993; D Bergman, *The case for corporate responsibility: corporate violence and the criminal justice system*, Disaster Action, London, 2000, p 27.

12 Townsend Thoresen had become part of the P&O group in January 1987.

organised for the Dover-Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness ... [revealing] a staggering complacency. ... Individually and collectively they lacked a sense of responsibility.¹³

In October 1987, the coroner's inquest into the tragedy delivered a verdict of 'unlawful killing', and in June 1989, after a fifteen-month police investigation, seven individuals (including the above-mentioned crew members) were charged with manslaughter, and the company P&O European Ferries¹⁴ was charged with corporate manslaughter.¹⁵ But on 19 October 1990, after only twenty-seven days of a trial expected to last six months, the judge instructed the jury to find the defendants not guilty, and dismissed the case against the individual and corporate accused. The judge had become satisfied that the prosecution had failed to establish that the defendants should have perceived the possibility of the ferry sailing with its bow doors open to be an obvious risk.

This outcome was perhaps not surprising. In the United Kingdom, a corporate manslaughter prosecution must show that someone who represents the 'controlling mind' of the company is also guilty of the offence. Given that 'controlling mind' is such an amorphous term in common parlance, the chances of a corporate conviction in this case were always going to be slight.¹⁶

The story of this tragedy provides a good illustration of the weaknesses of the criminal legal sanction, coming as it does *after* the event, as a mechanism of corporate accountability. It is becoming more and more evident that, in order to prevent corporate irresponsibility, the threat of legal sanction to punish selected management personnel if things do go wrong is cumbersome and ineffective.¹⁷ Not

13 Quoted in Boyd, *op cit*, n 11, pp 504-505. Also see S Crainer, *Zeebrugge: learning from disaster*, Herald, London, 1993.

14 The name Townsend Thoresen was changed in October 1987.

15 This was a first for British law, although the possibility has been there since 1965: see Northern Strip Mining Co Ltd, *The Times*, 2, 4 and 5 February 1965. The French have had corporate criminal liability since 1 March 1994 and the rules apply to other organisations like trade unions and local authorities. See S Cahill and P Cahill 'A killer abroad', *Chartered Secretary*, November 1998, p 23.

16 See D Bergman, 'Bosses get away with murder', *New Statesman*, 6 November 1998, pp 29-30.

17 This is because criminal law is essentially individualistic, corporate mistakes are not seen as 'real' crime, a criminal trial is expensive to pursue, a corporation may have endless supplies of funding for legal assistance, very often there is no plain evidence of illegality, and the victims' families would rather have their loved ones back than simply a guilty verdict for, and restitution from, the perpetrators of the

only is the damage already done, but it costs a great deal of public money to bring the perpetrators to justice, money that could well be spent reimbursing losses or insisting upon prophylactic measures. Further, it is questionable whether raising penalties or bringing prosecutions against companies (or threatening them) has a deterrent effect at all.¹⁸ The answer, it is argued, lies in focusing on prevention, rather than upon some ex post facto ‘cure’.

Before moving on, it should be mentioned that, in some jurisdictions, action is being taken to change the law in an attempt to ensure corporate entities can be brought to account. For example, following sustained public pressure and a Law Commission review, the UK government proposed introducing a new crime of ‘corporate killing’, a corporate offence that would correspond to the (proposed) individual offence of killing by gross carelessness.¹⁹ ‘Death by corporate killing’ would be alleged to have occurred when there is ‘management failure’. In this context, management failure means that the organisation’s activities are so managed or organised as to fail to ensure the health and safety of employees or those affected by its activities, and, in causing death, the organisation’s conduct falls far below what could reasonably have been expected. Such a failure, said the Law Commission, should be regarded as *causative* of death even if the more immediate cause is the act or omission of an individual. In that case, both individual and corporate liability could flow from the same incident. In its May 2000 response,²⁰ the UK government, in accepting the thrust of the Law Commission’s recommendations, further proposed that any individual who could be shown to have had responsibility for the circumstances in which management conduct fell far below what could reasonably be expected should be disqualified from carrying on business henceforth.

In Australia, the *Criminal Code Act 1995* (Cth) Part 5 attempted to give some tangibility to the notion of corporate criminal liability by, firstly, explicitly stating that harm caused by employees acting within the scope of their employment is considered to be harm caused by the body corporate; and, secondly, by introducing the crucial concept of ‘corporate culture’, defined in section 12.3(6) as the ‘attitude, policy, rule, course of conduct or practice existing within the body

tragedy. Hence there is never any feeling that ‘justice’ has been served, especially following a not guilty verdict.

18 P Grabosky and J Braithwaite, *Of manners gentle: enforcement strategies of Australian business regulatory agencies*, Oxford University Press, Melbourne, 1986. In this context, the Greek passenger ferry disaster off the coast of the isle of Paros which claimed 59 lives on 27 September 2000 has an all-too-familiar ring.

19 UK, Home Office, *Reforming the law on involuntary manslaughter: the government’s proposals*, May 2000, Part 3: ‘Scope of the proposals—a new offence of corporate killing’.

<<http://www.homeoffice.gov.uk/consult/invmans.htm>>

20 Ibid at para 3.4.9, p 19.

corporate generally or in the part of the body corporate in which the relevant activities takes place'. A company with a poor corporate culture may be considered as culpable under this legislation as individual directors or senior managers.²¹ Drawing especially on the work of criminal law academic Brent Fisse,²² this brave innovation was designed to catch situations where, despite the existence of documentation appearing to require compliance, the reality was that non-compliance was expected. For example, a company would be guilty of reckless endangerment where its corporate culture tacitly authorised breaches of the safety codes (for example, by removing equipment guards, or allowing drivers to ingest drugs in order to drive longer).²³

The problem with this code, however, is that it is, for all practical purposes, irrelevant, given that it only applies to Commonwealth laws and given that there are currently no Commonwealth manslaughter offences, corporate or otherwise.²⁴ Be that as it may, what these innovations highlight is that prevention of corporate disaster and corporate crime needs to focus on the design and implementation of organisational systems and strategies that shape corporate culture, not just on legal regulation. Such systems must address not only formal policies and approved procedures, but also informal attitudes and unauthorised behaviours. They should encourage a sense of personal and collective responsibility. As Tomasic explains,

the strategy which is directed at changing the culture within the corporation, and the wider ethical context of the business community is more likely to bear fruit in achieving optimal corporate crime control

21 *Criminal Code Act 1995* (Cth) Part 5, para 501.2.1. Also see R Goffee and G Jones, *The character of a corporation: how your company's culture can make or break your business*, Harper Collins, London, 1998. Note that some judges are not shirking their role as critics of corporate culture where the opportunity arises. For example, Simsmetal Ltd had an 'appalling' culture, said Justice Heerey of the Federal Court in June 2000 (*The Risk Report*, no 90, 29 June 2000, p 3), in relation to a *Trades Practices Act* violation.

22 B Fisse, 'Corporate criminal responsibility', *Criminal Law Journal*, vol 15, 1991, p 173; B Fisse, 'Criminal law: the attribution of criminal liability to corporations: a statutory model' (1991) 13 *Sydney Law Review*, vol 13, 1991, p 281ff, and p 286.

23 *Criminal Code Act 1995*, s 12.2. See *Criminal Code Act Commentary* para 501.2: 'If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate'.

24 One might conclude that Part 5 is designed simply as a showpiece for jurisdictions looking for a statutory blueprint should they wish to go down this legislative path.

than traditional prosecutions, which are often seen as being too costly and difficult to undertake.²⁵

MANAGERIAL STRATEGIC RESPONSIBILITY: THE ORIGINS OF CORPORATE SOCIAL RESPONSIBILITY

The managerial responsibility to fulfil society's demand for accountability and to minimise corporate risk may be seen at three levels.²⁶ The first is at the level of *legal* responsibility, that is, obeying the law and meeting mandatory standards and codes of conduct. The second can be termed *discretionary* responsibility, that is, building community goodwill through acting as a 'good corporate citizen'. A third level may be described as *strategic* responsibility, that is, building corporate 'value' and attempting to ensure the long-term sustainability of a company by increasing its economic and ecological efficiency (ie, 'eco-efficiency'), and contributing to a 'sustainable capitalism'.²⁷ It is to this third level that we turn our attention in order to lay a foundation for the future survival of business enterprise. Each of these levels is described in more detail below. While it could be said that the first two are commonplace in business practice today, there are, however, inherent weaknesses in both which may militate against a firm's willingness to move to the more sustainable third level.

Legal responsibility

In a society that respects the rule of law, most companies will accept the need to obey whatever laws exist, and to meet standards relevant to their industry and/or profession. However, while accepting that legal standards usually form only a minimum requirement for corporate responsibility, even these are hard to enforce, as the preceding discussion concerning the *Herald of Free Enterprise* was designed to show. The complex decision-making processes of large modern organisations make individual liability difficult to prove,²⁸ and, if individuals are prosecuted, there is a likelihood that they may be used simply as scapegoats. Furthermore, the criminal justice process often takes a long time, given the safeguards that the law insists upon, for example, to ensure a fair trial of accused persons. These safeguards include the presumption of innocence (placing the burden of proving its case upon the prosecution) and the requirement of proof 'beyond reasonable

25 R Tomic, 'Corporate crime and its regulation: issues and prospects', in D Chappell and P Wilson (eds), *Crime and the criminal justice system in Australia: 2000 and beyond*, Butterworths, Chatswood, 2000, p 267.

26 R Sarre and M Doig, op cit, n 2.

27 J Elkington, *Cannibals with forks: the triple bottom line of the twenty-first century*, Capstone, Oxford, 1997.

28 A Ridley and L Dunford, 'Corporate killing: legislating for unlawful death', *Industrial Law Journal*, vol 26, no 2, 1997, pp 99–113.

doubt'.²⁹ Whatever deterrent effect is offered by swift prosecution and penalty, it will invariably be diluted by delay.

Discretionary responsibility

Calls for discretionary responsibility are designed to prick the conscience of directors of companies. Such responsibility usually takes the form of philanthropic actions such as what has become known as 'corporate citizenship'.³⁰ However, discretionary responsibility relies heavily upon the ethical orientations of individual managers, and their ability to reciprocate trustworthiness generally.³¹ Not all corporations acknowledge the strategic advantage of fostering public goodwill. The pressure of meeting the demands of shareholders for the best possible return from invested funds can work against the influences of discretionary responsibility. The fiduciary responsibility of company directors is usually interpreted as an imperative to maximise shareholder returns.³² Hence, any actions that divert some funds away from current dividends in favour of investing in goodwill and philanthropy may frustrate those seeking short-term financial rewards.

Strategic responsibility

Strategic responsibility is a term that describes the way companies strive to ensure their long-term sustainability through responsible management not only of their core business but of the natural environment as well as intangibles such as their corporate reputation. This reputation may be built upon ethical and responsible behaviours, safe practices and a well-publicised commitment to risk

29 The Royal Commission into the Longford gas explosion that killed two Esso workers in September 1998 identified up to 18 breaches by that company of the Victorian *Occupational Health and Safety Act*. But the charges were still 'pending' two years after the explosion.

30 Corporate citizenship (eg M M Jennings and J Entine, 'Business with a soul: a re-examination of what counts in business ethics', *Hamline Journal of Public Law and Policy*, vol 20, 1999, pp 1–88) is the notion that a company can build on its reputation for philanthropy and corporate altruism for brand-name recognition and enhanced reputation, leading ultimately to better sales. See also D King, *Stakeholders and spin doctors: the politicisation of corporate reputations*, Hawke Institute Working Paper No 5, Hawke Institute, University of South Australia, Magill, 2000.

31 A Cherney, 'Trust as a regulatory strategy', *Current Issues in Criminal Justice*, vol 9, no 1, 1997, p 79.

32 M Goyder, *Living tomorrow's company*, Gower, London, 1998. Goyder points out, however, that a director's fiduciary responsibility is to the general body of shareholders from time to time, which includes future shareholders as well as current ones.

minimisation.³³ The concept of strategic responsibility is based on the relatively recent recognition that the looming ‘crisis of unsustainability’³⁴ threatens the viability of the earth’s ecosystems upon which all economic operations ultimately depend. Following publication of the United Nations Brundtland Report³⁵ on sustainable development in 1987, the role of business has been recognised as increasingly important in averting this crisis. While it has always been notoriously difficult to get companies to focus on long-term goals and to persevere with them in the face of market demand for short-term results, it is in the notion of strategic responsibility that one finds the roots of corporate social responsibility.

THE ROLE OF CORPORATE GOVERNANCE

What contribution has the development of the notion of ‘corporate governance’ made to this debate? Corporate governance principles encompass the broad range of control mechanisms that provide a means to protect the interests of stakeholders of business entities.³⁶ A step toward formalisation of corporate governance practices is reflected in the ‘accounts disclosure’ requirements of Australian Stock Exchange listing rule 4.10.3. This rule requires publicly listed companies to include a corporate governance statement explaining the practices, control mechanisms and governance processes employed by the company. While most corporations have adopted a voluntary code of corporate governance, there continues to be dismay and concern over the failure of Australian companies to meet international best practice standards.³⁷ Furthermore, not only is there evidence of a lack of

33 M Doig, ‘The business of sustainability’, *Cranlana Chronicle* (forthcoming 2001); Business Visions 2010, *Building better business: achieving sustainable progress through continuous improvement*, Business Visions 2010, Adelaide, 1999. A good example of the way in which companies move very quickly and expend much money when facing the loss of public or political capital is the withdrawal of Herron pharmaceuticals from Queensland retail shelves in 2000 following a confirmed tampering with the product. Reputation was seen to be of paramount importance, regardless of the costs of the recall. That is, the short-term costs were small when compared with the long-term building of public trust.

34 H Tibbs, ‘Sustainability’, *Deeper News*, vol 3, no 1, 1999.

35 World Commission on Environment and Development, *Our Common Future* (The Brundtland Report), Oxford University Press, Oxford, 1987.

36 E F Fama and M C Jensen, ‘Separation of ownership and control’, *Journal of Law and Economics*, vol 26, 1983, pp 301–325. Also see I Wilson, *The new rules of corporate conduct: re-writing the social charter*, Quorum Books, Westport, CT, 2000, p 51.

37 K Dunstan and M R Logan, ‘Determinants of the composition of the board of directors in Australia: the impact of the voluntary code of practice’, *Strategic Management Journal*, vol 19, 1999, pp 269–290; T Arkley-Smith, ‘Audit committee disclosures: time to regulate?’, *Australian CPA*, August 1999, pp 36–39.

conformity and uniformity in the practices employed by Australian corporations,³⁸ it is also clear that the focus of such governance has been on financial accountability, not long-term sustainability. There are, for example, few regulations requiring environmental disclosures. Empirical evidence is building that suggests corporations are merely using existing regulatory tools such as the Australian Stock Exchange requirements as part of an overall corporate strategy to maintain their legitimacy and control, and not to allay stakeholders' concerns.³⁹ It is clear that many view the rules as a means of avoiding the threat of litigation, rather than satisfying the need for public disclosure of results in order to promote stakeholder confidence.⁴⁰

THE DEVELOPMENT OF THE NOTION OF CORPORATE SOCIAL RESPONSIBILITY

The concept of corporate social responsibility, in contrast, requires corporations to do more than just abide by the law, be good corporate citizens and abide by government and ASX requirements. It requires cultivation of an organisational 'culture of mindfulness',⁴¹ a vigilant and constant awareness of the possibility of wrong-doing, a personal ethic of care, and an assumption of individual responsibility for the consequences of one's actions. It includes, for example, an organisational commitment to the constant evaluation of corporate health, safety and environment practices to ensure that they not only *conform* with the law, but, at the same time, *perform* to a standard that is safe, responsible and environmentally benign. The principles of 'corporate social responsibility',⁴² internally focused and

38 Ibid.

39 C Deegan and B Gordon, 'A study of the environmental disclosure practices of Australian corporations', *Accounting and Business*, vol 26, no 3, 1996, pp 187–199; J Nasi, S Nasi, N Phillips and S Zyglidopoulos, 'The evolution of corporate social responsiveness: an exploratory study of Finnish and Canadian forestry companies', *Business and Society*, September 1997, pp 296–321; D Neu, H Warsame and K Pedwell, 'Managing public impressions: environmental disclosures in the annual report', *Accounting Organizations and Society*, vol 23, 1998, pp 265–283.

40 R Hiliary, 'Environmental auditing: concepts, methods and developments', *International Journal of Auditing*, vol 2, 1998, pp 71–85.

41 K Weick, 'Why efficiency is the enemy of safety', *The Manager*, <www.themanager.com.au>, June 1998.

42 Here one needs to distinguish 'corporate *social* responsibility' from 'corporate responsibility'. Corporate responsibility implies the need to strive to meet universal generalisations, such as 'do no harm' and 'act ethically'. In practice, these standards are likely to translate into relativities such as 'minimise risk' and 'act in conformity with prevailing social norms'. Corporate *social* responsibility, in contrast, can be considered a broader notion, going beyond these tenets to place upon corporations an obligation to contribute actively to the common good of society as a whole. See <<http://business.unisa.edu.au/cobar/corpresp/>>.

encouraged by senior executives,⁴³ are more likely to deter corporate irresponsibility than exhortations to ‘lead rather than manage’, platitudes such as ‘corporate governance’, or further legal regulation.

How did the development of the idea of broader reporting mechanisms come about? The 1970s saw the introduction of much social legislation designed to ensure corporations and other business entities acted responsibly. Examples included consumer protection legislation, environmental legislation and equal opportunity legislation. However, the increasingly competitive decades of the 1980s and 1990s, further globalisation of world trade, and the threat of mergers and acquisitions forced a stronger focus in directors’ minds on shareholder value and financial responsibility.⁴⁴

In Australia, a working group, formed in 1990 under the auspices of the National Companies and Securities Commission (now the Australian Securities and Investments Commission or ASIC), published a discussion paper entitled *Corporate practices and conduct*, dealing with a corporate code of conduct, in an effort to improve the accountability of corporate directors and auditors.⁴⁵

The discussion paper concluded that, to a large degree, financial responsibility to shareholders is dependent, in the long term at least, on factors such as responsible environmental management, safety, and responsiveness to societal needs and demands. This was not an entirely new approach. The idea that corporations are responsible to more than just shareholders has been gaining ground for some time.⁴⁶ One variation on this theme is the mechanism known as ‘triple bottom line’ reporting, that is, reporting to shareholders and governments that acknowledges financial, environmental and social responsibilities to the wider society.⁴⁷ Influential management consultant and author of the term ‘triple bottom line’, John Elkington, wrote in 1997:

43 C Stone, *Where the law ends: the social control of corporate behavior*, Harper and Row, New York, 1975. The impetus must come from senior management. If these matters are not made a priority, it is unreasonable to expect others to take them seriously. See Wilson, op cit, n 36, p 68.

44 Globalisation makes accountability difficult. Not only does legislation differ between sovereign states, but cultural and political differences often provide enormous barriers to consistent and effective performance.

45 H Bosch, *Corporate practices and conduct*, Information Australia, Melbourne, 1991.

46 For example, in the United Kingdom the concept of ‘stakeholder capitalism’ has developed, accepting capitalism as an economic framework but arguing that there are multiple legitimate constituencies that should be involved and benefit from it. Also see Wilson, op cit, n 36, p 3.

47 R Sarre, ‘The triple bottom line in corporate management and governance’, *Business/Higher Education Round Table News*, November 2000.

At the heart of the emerging value creation concept is a recognition that for a company to prosper over the long term, it must continuously meet society's needs for goods and services without destroying natural or social capital.⁴⁸

Research has shown that the recommendations of the *Corporate practices and conduct* paper have been adopted by many Australian organisations.⁴⁹ It is now common to hear terms such as 'triple bottom line', 'corporate social responsibility', 'stakeholder capitalism', 'corporate obligation',⁵⁰ and so forth, in business circles.

OPTIONS FOR POLICY MAKERS

How can the principles of CSR become part of the reality of corporate and business life in the twenty-first century? The literature in this field contains many ideas that may enhance an organisation's (or government's) ability to foster a culture in which corporate social responsibility is the norm. In some United States jurisdictions, for example, corporations can be penalised if they are *not* actively engaged in the development of an ethos or corporate policy in which law breaking is discouraged.⁵¹ Similarly, as an illustration of creative law making, the United States government, in the 1991 *Sentencing guidelines*, makes the existence of an internal compliance program that seeks to minimise corporate crime a mitigating factor when a judge is setting penalties upon conviction for such a crime.⁵² Moreover, one might suspect that there could be enormous value in a government granting tax concessions or preferences in contract tendering to businesses and corporations who are able to show, through the use of agreed performance indicators, that they have reduced the possibility of risk and irresponsibility. A good example is the March 2000 decision of a number of American police forces to purchase Smith and Wesson firearms exclusively, for the reason that this company was prepared to take steps to ensure that their firearms were safer, and thus children, especially, were at less risk of harm.⁵³

48 Elkington, *op cit*, n 27, p 109.

49 Dunstan and Logan, *op cit*, n 37.

50 There is also a new concept called 'corporate obligation'. This obligation is justified as fair return for society granting corporations the legal protection of limited liability and according them the social permission to operate freely in the marketplace. In other words, corporations have a broad range of obligations in order to maintain their 'licence to operate'.

51 R Tomasic, 'Corporate crime' in D Chappell and P Wilson (eds), *The Australian criminal justice system: the mid-1990s*, Butterworths, North Ryde, 1994, p 264; R Tomasic, 'Corporate crime and its regulation: issues and prospects' in D Chappell and P Wilson (eds), *Crime and the criminal justice system in Australia: 2000 and beyond*, Butterworths, Chatswood, 2000, pp 259–270.

52 Cahill and Cahill, *op cit*, n 15, p 23.

53 *Wall Street Journal*, 27 March 2000, p A38. In their agreement with the Clinton administration, Smith and Wesson has pledged to include safety locks with all

Furthermore, there could be great value in regulating by use of rewards. Positive reinforcement can be an excellent regulatory strategy, especially where verification of compliance is only possible under circumstances of great risk, cost or sacrifice.⁵⁴ Grabosky notes, however, a number of unwanted side effects of such regulation, especially where financial inducements are involved, including the potential for reducing altruistic motivation, and the vulnerability to subversion or abuse.⁵⁵ For that reason he praises non-monetary incentives. For example, a chamber of commerce or other like organisation might sponsor a 'peer approbation' campaign, championing those firms which have reduced their risk of legal problems, encouraging customers to patronise businesses that are not having to build financial compensation, high insurance rates and expensive legal retainers into their pricing structures.

The report of the Treadway Commission⁵⁶ into fraud control recommended public companies should develop and enforce written codes of corporate conduct in order to foster a strong ethical climate, to open channels of communication and to help protect against criminal activity,⁵⁷ in addition to simple structural change.⁵⁸ Codes

handguns and pistols manufactured in the next two years in exchange for immunity against threatened governmental lawsuits over gun violence. It was also reported that RSR Wholesalers Ltd would cease trading with Smith and Wesson because their agreement with the government would be 'too difficult and costly for RSR to enforce', although it is more likely that RSR are simply hoping to punish the manufacturers for appearing to 'go soft' in the gun control debate. (Also see *USA Today*, 31 March 2000, p 3A and *Time*, 10 April 2000, p 36.)

54 P Grabosky, 'Regulation by reward: on the use of incentives as regulatory instruments', *Law and Policy*, vol 17, no 3, 1995, p 273.

55 *Ibid*, p 275.

56 United States, *Fraudulent financial reporting: report of the National Treadway Commission*, 1987.

57 The Treadway Commission recommended the following steps:

- establish and communicate specific goals articulating corporate ethical standards;
- develop and implement procedures to use in achieving corporate ethical standards;
- create and install reward systems that encourage acts of moral courage;
- define and provide resources employees need to perform their ethical duties;
- create a work environment where supervision at all levels is characterised by consideration and human-ness, thereby serving as a role model.

58 J Braithwaite, *To punish or persuade*, State University of New York Press, Albany, 1985; M Clarke, 'Prosecutorial and administrative strategies to control business crimes: private and public roles' in C Shearing and P Stenning (eds), *Private policing*, Sage, Newbury Park, California, 1987, chap 11; R Sarre and B Fiedler, 'Investigating and preventing fraud against Australian businesses: counting the costs and exploring the strategies', *Accounting Forum*, vol 23, no 3, 1999, pp 275–292.

of good practice are becoming commonplace in both the public and private corporate sectors. Forensic and environmental auditing, too, could be encouraged as a standard feature of annual accounting, in order to expose a company's financial and environmental internal control strengths and weaknesses specifically related to risks.

Corporations might be required to disclose corporate preventative measures or disaster recovery plans where there are potential major environmental risks from their continued operations in order to continue to operate in a particular market, to gain government subsidies, to gain freedom from the burden of regular audits, to attract self-insurer status, and so forth. Voluntary disclosure of such measures are a key part of the relatively new Dow Jones Sustainability Index, which assesses corporations on their implementation of systems to pursue sustainability-related opportunities, and to manage sustainability-related risks.⁵⁹

With a series of market-based, non-governmental incentives in place, there is, it is argued, a greater likelihood of an entire business region becoming more competitive, nationally if not internationally, purely through its being able to prevent more potential losses than its competitors.

In many respects, these ideas mirror the theme of governance by the 'regulatory tripartism' which Ayres and Braithwaite introduced in 1992⁶⁰ and which Grabosky has since critiqued and further explored.⁶¹ These theorists note the constructive role of a range of groups and forces *outside* of the usual regulatory systems, including business interest groups, adverse publicity and consumer boycotts, in the accountability process. In other words, a judicious combination of the 'carrots' of market and social pressures with the 'sticks' of the legal regulatory system is what

59 Dow Jones, 1999, <<http://indexes.dowjones.com>>. The top 200 corporations on the Dow Jones Sustainability Index have outperformed the Dow Jones Global Index by approximately 10% since its inception in October 1999. See <<http://www.sam-group.com>>; <<http://www.sustainability.co.uk>>.

60 I Ayres and J Braithwaite, *Responsive regulation: transcending the deregulation debate*, Oxford University Press, New York, 1992; J Braithwaite, 'Responsive regulation for Australia' in P Grabosky and J Braithwaite (eds), *Business regulation and Australia's future*, Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, Canberra, 1992, pp 81–96.

61 P Grabosky, 'Discussion paper: inside the pyramid: towards a conceptual framework for the analysis of regulatory systems', *International Journal of the Sociology of Law*, vol 25, no 3, 1997, pp 195–201, especially p 197. Grabosky is also concerned that some regulatory programs actually make matters worse or result in significant harm which offsets many or most of the benefits which the original initiatives were designed to produce. See P Grabosky, 'Counterproductive regulation', *International Journal of the Sociology of Law*, vol 23, 1995, pp 347–369.

is required in order to build a socially responsible framework for corporate governance and accountability.⁶² As Grabosky notes,

[t]he challenge is to design a regulatory ordering where the need for coercion is minimal, where conflict between private interest and the public good will be reduced, but where the choice to do good is significantly driven by the opportunity to do well.⁶³

What is the role of government in an era of less regulation? Governments are certainly not irrelevant, and should retain a role in engineering

a regulatory system in which they themselves play a less dominant role, facilitating the constructive regulatory participation of private interests ... monitoring the overall regulatory system, broadly defined, and one of 'fine tuning'—manipulating incentives in order to facilitate the constructive contributions of non-government interests. Government regulatory agencies will no longer occupy center stage, but rather will be unobtrusively influential from a position offstage. ... Governments can vary their degree of investment, both symbolic and material, in forums for consultation and decision, and in the interest of intermediaries themselves. As such they can give new voice to the previously disenfranchised, and can tone down those interests which would unreasonably dominate.⁶⁴

Of course, all of the above discussion and conclusions may require continuous re-evaluation, as businesses shift from national to global institutions.⁶⁵ Be that as it may, it is recognised that legal coercion has its limits as an instrument of social and business control.⁶⁶ The task is to convince stakeholders that encouraging the notion

62 A Freiberg, 'Reward, law and power: towards a jurisprudence of the carrot', *Australian and New Zealand Journal of Criminology*, vol 19, 1986, pp 91–11; P Grabosky, 'Using non-governmental resources to foster regulatory compliance', *Governance: An International Journal of Policy and Administration*, vol 8, no 4, 1995, p 534; R Sarre, 'Alternatives to the criminal courts: Some considerations of civil and administrative options in the process of legal regulation', *Caribbean Law Review* (forthcoming 2001).

63 Grabosky, op cit, n 54, p 275.

64 Grabosky, op cit, n 62, pp 543–544.

65 J Braithwaite and P Drahos, *Global business regulation*, Cambridge University Press, Melbourne, 2000.

66 L Snider, 'The regulatory dance: understanding reform processes in corporate crime', *International Journal of the Sociology of Law*, vol 19, 1991, p 209; T Prosser and J Miller, *Law and the regulators*, Oxford University Press, Oxford, 1997; S Berns and P Baron, *Company law and governance: an Australian perspective*, Oxford University Press, Melbourne, 1997; F Haines, *Corporate regulation: beyond punish or persuade*, Oxford University Press, Oxford, 1997; I

and the practices of corporate social responsibility should be embraced *in addition* to adopting and enforcing appropriate regulatory strategies. Whatever encouragements are agreed upon, they must, of course, act in harmony with the regulatory strategies.

CONCLUSION

The setting of laws and administrative rules to control irresponsible behaviour, either by legislation or by administrative policy, may be a necessary but is not a sufficient regulatory mechanism. Companies, with the blessing of governments, must develop ways to cultivate an organisational ‘culture of compliance’, including an awareness of the possibility of illegality, a personal ethic of care, and an assumption of responsibility in the event that improper practices occur. Corporate social responsibility involves governments and industries alike encouraging and rewarding moves towards harmonisation of standards and the building of a culture of risk management. Through incentives, it can encourage risk-prevention propriety in business affairs. It correctly assumes that these initiatives are preferable to using the formal, burgeoning, expensive and time-consuming apparatus of the criminal law when something goes awry.

Active corporate social responsibility strategies that are sensitive to commercial priorities and designed to encourage rather than constrain business performance,⁶⁷ should be pursued as a matter of priority by governments, corporate conglomerations and regulatory bodies alike. The evidence is becoming clearer that such an environment reduces risks, improves business performance and better assures corporate accountability, allowing a sustainable future for both business and society.

Ramsay, *Institutional investors’ views on corporate governance*, University of Melbourne Research Report, Melbourne, 1999; C Wells, *Corporations and criminal responsibility*, Oxford University Press, Oxford, 1993.

67 I Dunlop, ‘Governance and related issues: an international perspective’, unpublished address to the Arthur D Little/Conference Board Conference, New York, 28–29 April 1998, p 14.

HAWKE INSTITUTE WORKING PAPER SERIES

- No 1 Marjorie Griffin Cohen, *The World Trade Organisation and post-secondary education: implications for the public system in Australia*, 2000.
ISBN 0 86803 800 8
- No 2 Claire Woods, *Communication and writing: footprints on a territory*, 2000.
ISBN 0 86803 801 6
- No 3 Rhonda Sharp, *The economics and politics of auditing government budgets for their gender impacts*, 2000.
ISBN 0 86803 802 4
- No 4 Anne Hawke, *Measuring the impact of gambling: an economist's view*, 2000.
ISBN 0 86803 803 2
- No 5 Debra King, *Stakeholders and spin doctors: the politicisation of corporate reputations*, 2000.
ISBN 0 86803 804 0
- No 6 Lois Bryson and Alison Mackinnon, *Population, gender and reproductive choice: the motherhood questions: directions for policy*, 2000.
ISBN 0 86803 805 9
- No 7 Margaret Brown, Justin Beilby and Eric Gargett, *Participating in end-of-life decisions: the role of general practitioners*, 2000.
ISBN 0 86803 806 7
- No 8 Nicholas Procter, *The local-global nexus and mental health of transnational communities*, 2000.
ISBN 0 86803 807 5
- No 9 Rick Sarre, Meredith Doig and Brenton Fiedler, *Using the principles of corporate social responsibility in the process of risk management and accountability*, 2000.
ISBN 0 86803 808 3

- No 10 Wendy Seymour, *The technological promise: enhancing social participation and citizenship for people with disabilities*, 2000.
ISBN 0 86803 809 1
- No 11 Gerald McBride, *Adelaide's recipe for life: wisdom of the Kaurna*, 2000.
ISBN 0 86803 810 5

Available from: Kate Leeson, Editorial Assistant,
The Hawke Institute
University of South Australia
St Bernards Road
Magill
South Australia 5072
Australia

Telephone +61 8 8302 4371
Facsimile +61 8 8302 4776

Email: katherine.leeson@unisa.edu.au

www.unisa.edu.au/hawke/institute/institute

THE HAWKE INSTITUTE

The Hawke Institute undertakes research and fosters debate on democratic participation in political, economic and social life.

The central themes of the Institute's work are

- the social, cultural and economic aspects of globalisation and its sustainability;
- issues of participation, equity and citizenship in working life, in education and in society; and
- questions of identity, of cultural production and representation, and of our place in the international community and specifically in Asia.

The Hawke Institute hosts seminar series, conferences and public lectures. It offers Hawke Research Fellowships, visiting fellowships and scholarships, and supports the work of fourteen affiliated research centres and groups. For details of the affiliated research centres and groups see the Hawke Institute website: www.unisa.edu.au/hawke/institute/institute. As well as promoting research on a local and national level, the Institute has strong international links. It is the research arm of the Bob Hawke Prime Ministerial Centre.

Hawke Institute Director: Professor Alison Mackinnon

Telephone +61 8 8302 4370

Facsimile +61 8 8302 4776

Email alison.mackinnon@unisa.edu.au

Hawke Centre Director: Ms Elizabeth Ho

Telephone +61 8 8302 0371

Facsimile +61 8 8302 0420

Email hawke.centre@unisa.edu.au