
Submission by the
New South Wales Young Lawyers Pro Bono and Community Services Taskforce
to the
Corporations and Markets Advisory Committee

Corporate Social Responsibility Discussion Paper

February 2006

Introduction

According to a communication dated 16 November 2005 released by the Corporations and Markets Advisory Committee (**CAMAC**), the Australian Government has asked CAMAC to consider a series of questions related to responsible corporate conduct, including aspects of corporate decision-making, corporate reporting and whether further measures are needed to encourage socially and environmentally responsible business practices. CAMAC has released a public discussion paper calling for public submissions on the questions that have been raised.

The New South Wales Young Lawyers Pro Bono and Community Services Taskforce (**Taskforce**) wishes to make submissions to CAMAC in response to a number of the requests for submissions in the discussion paper.

The Taskforce's submission

We have briefly addressed the requests for submissions set out in sections 1.5, 2.7, 3.4, 4.8 and 5.7 of the discussion paper. We also generally refer CAMAC to the Taskforce's September 2005 submission (**PJC Submission**) to the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into Corporate Social Responsibility (**PJC Inquiry**). A copy of the PJC Submission forms annexure A to this submission.

Throughout our submission, the terms listed below have the following definitions:

stakeholder, in respect of a particular corporation, means non-shareholder individuals and groups, including the wider community, which are or are likely to be affected (whether directly or indirectly) by the acts or omissions of that corporation. The definition extends from company employees to groups in other countries (for example, populations affected by pollution or climate change caused by the activities of corporations in other countries), to groups which may arise in the future (for example, a generation which may not be able to experience seeing certain environments or species due to destruction or extinction); and

corporate responsibility means the commitment of companies to contribute to sustainable economic development by considering and working with their stakeholders (based on the definition used by the World Business Council for Sustainable Development, 2004).

Request for submissions section 1.5:

1. *How might corporate social responsibility usefully be described for working purposes?*
2. *Which approach or combination of approaches to responsible corporate behaviour is most appropriate?*
3. *What are the incentives or disincentives for a company to conduct its business in a socially responsible manner?*
4. *Do different or additional implications arise depending on the nature or size of the enterprise, for instance:*
 - (a) *the sector or industry in which an organization operates; or*
 - (b) *whether a company has international operations?*
5. *In practice:*
 - (a) *to what extent is corporate decision-making driven by stakeholder concerns?*
 - (b) *how do companies differentiate between various categories of stakeholders?*
 - (c) *in what ways do companies balance or prioritise competing stakeholder interests?*
 - (d) *how do companies engage with stakeholders?*
6. *In practice, to what extent do stakeholders consider a company's social responsibility performance when making assessments or decisions about a company?*
7. *Are there any changes that could enhance triple bottom line, sustainability or like reporting, including:*
 - (a) *increasing the level of clarity and comparability of these reports;*
 - (b) *any suggested changes to external verification of those reports;*
 - (c) *whether any aspect of this reporting should be mandated and, if so, for what companies and in what respect(s); and*
 - (d) *are there particular issues for small to medium enterprises?*

Taskforce's response:

<i>How might corporate social responsibility usefully be described for working purposes?</i>
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1. See the definition of “corporate responsibility” at the beginning of this paper.

Which approach or combination of approaches to responsible corporate behaviour is most appropriate?

2. Our PJC Submission adopts what the discussion paper (p 25) defines as an “ethics based” approach to corporate responsibility. That is, the Taskforce sees corporations as having a responsibility to carry out their activities taking into account the interests of other stakeholders or more broadly to undertake their activities but not at the expense of the environment, labour rights, human rights, etc.

What are the incentives or disincentives for a company to conduct its business in a socially responsible manner?

3. See (in relation to the legal background) our response to the Request for Submissions section 2.7 and to Term of Reference (c) in the PJC Submission. In more general terms, at present companies operate in a climate where increasing public scrutiny and debate have caused a number of companies to re-evaluate the way they do business. However, until directors are entrusted with a duty other than to make money for shareholders, most companies will continue to operate within the limits of the law with minimal regard for other stakeholders. In this regard companies that are more forward-thinking are potentially placed at a competitive disadvantage, which has contributed to the majority of companies operating with little regard for stakeholders.

Do different or additional implications arise depending on the nature or size of the enterprise, for instance:

- (a) *the sector or industry in which an organization operates; or*
- (b) *whether a company has international operations?*

4. While it may be more important for companies with a greater impact on the community and environment (such as those of the type outlined in paragraph 3 of our response to Request for Submission section 4.8) to report on their corporate responsibility activities, the approach set out in paragraph 2 above can and should apply to all companies.

In practice:

- (a) *to what extent is corporate decision-making driven by stakeholder concerns?*
- (b) *how do companies differentiate between various categories of stakeholders?*
- (c) *in what ways do companies balance or prioritise competing stakeholder interests?*

(d) *how do companies engage with stakeholders?*

5. See our response to Term of Reference (a) in the PJC Submission.

In practice, to what extent do stakeholders consider a company's social responsibility performance when making assessments or decisions about a company?

6. Stakeholders are increasingly taking a more sophisticated view of companies and will (time and access to information permitting) look at a company's record of corporate responsibility when deciding how they should interact with it.
7. In one example of successful stakeholder action, American universities have run boycott campaigns against Nike's uses of sweatshops to manufacture its goods, which have had a direct effect on Nike's business practices.
8. However, this type of effective action is rare. Companies may argue that they are driven by their customers' wants and choices, and would act more sustainably or produce more sustainable goods if their customers or shareholders demanded it. However, the ubiquity and demonstrated effectiveness of advertising and other forms of corporate persuasion indicate in fact that companies have far greater power to influence consumer decisions than consumer decisions have to influence companies. JK Galbraith goes so far as to call the concept of consumer sovereignty a "fraud" (*The Economics of Innocent Fraud* p13, Penguin Books 2005).

Are there any changes that could enhance triple bottom line, sustainability or like reporting, including:

- (a) *increasing the level of clarity and comparability of these reports;*
(b) *any suggested changes to external verification of those reports;*
(c) *whether any aspect of this reporting should be mandated and, if so, for what companies and in what respect(s); and*
(d) *are there particular issues for small to medium enterprises?*

9. See our response to the Request for Submissions section 4.8 and to Term of Reference (f) in the PJC Submission. The Taskforce re-affirms its view that triple bottom line reporting must be made mandatory for all incorporated entities in Australia. This is the only guaranteed way to enhance its effectiveness.
10. However, by itself triple bottom line reporting is insufficient to protect the wider community from the harm that companies can cause (James Hardie being the most prominent recent example). To ensure adequate protection, directors' duties need to be

amended to ensure that they take into account the need to protect other stakeholders – see further our response to Request for Submissions section 3.4.

Request for submissions section 2.7:

1. *Whether, or in what circumstances, companies feel constrained by their understanding of the current law of directors' duties in taking into account the interests of particular groups who may be affected, or broader community considerations, when making corporate decisions.*
2. *If so, is there any useful scope for clarifying the current law in this respect?*
3. *Does the current law give directors sufficient flexibility to balance long-term and short-term considerations in their decision-making?*
4. *If you have any proposal for change, how might it be implemented and work in practice and how might directors be held to account?*

Taskforce's response:

Whether, or in what circumstances, companies feel constrained by their understanding of the current law of directors' duties in taking into account the interests of particular groups who may be affected, or broader community considerations, when making corporate decisions.

1. See our response to Term of Reference (c) in the PJC Submission, in relation to the current legal framework.
2. Overall, the current legal framework does not directly discourage directors from having some regard for the interests of employees, suppliers and customers, and the consequences of corporate activities on the environment, the broader community and stakeholders generally. However, circumstances may arise where directors feel constrained or uncertain in exercising their discretion to take into account stakeholder interests, given the legal emphasis on prioritizing the interests of the company (primarily conceived of as shareholder and creditor interests).

Current uncertainty as to duties

3. In determining whether companies feel constrained by the current formulation of the law regarding directors' duties, a key issue to note is that uncertainty as to the scope of the power to consider stakeholders and broader community interests in itself constrains a director's exercise of this discretion. Directors need to know to whom duties are owed and the extent of the obligation to consider stakeholder interests. More specifically, if a director must act in the best interests of the company, what is meant by "the company"?

Does it strictly refer to the shareholders or is there some degree to which a director may consider the interests of other stakeholders? If stakeholders' interests were considered, should such considerations still be made with the objective of maximising shareholder wealth?

4. Diverging views and the general uncertainty over the application of the principle of the "best interests of the company" will dissuade directors from investigating stakeholder considerations and engaging in activities which are not strictly in the short-term interests of the shareholders of the company.
5. This is exemplified by the James Hardie scandal, where directors stated that they were concerned that they would breach directors' duties if they used shareholder funds to provide additional compensation to asbestos victims (see E Sexton, "Directors: to whom do they own care?", Sydney Morning Herald 4 July 2005).

Directors' fiduciary obligations

6. Directors have fiduciary obligations to the corporation's investors that mean that the corporation is constrained in its activities, and does not have the same discretion to allocate its assets as does an individual.
7. However, more directors are becoming aware that it will generally be for the benefit of the company as a whole for directors to act ethically and consistently with the interests of the wider community (see the discussion of "enlightened shareholder value" below). There is an ever increasing risk for Australian companies that their goodwill, reputation and business will be damaged if directors fail to consider the interests of these stakeholders and the broader community, and there is no law which prevents them from acting to minimise that risk.

Directors' statutory duties

8. The *Corporations Act* 2001 (Cth) (**Corporations Act**) and relevant common law principles do not directly prevent corporate officers from taking into account the interests of stakeholders. While there is no direct legal obligation in company law on directors to take the interests of stakeholders into account, this does not preclude directors from choosing to do so (Senate Standing Committee on Legal and Constitutional Affairs *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* November 1989).
9. Statutory duties contained in Part 2D.1 of the Corporations Act complement common law and equitable duties requiring directors to "act bona fide for the benefit of the company

as a whole” (*Mills v Mills* (1938) 60 CLR 150 at 188) and the courts have associated directors’ duties with the “interests of the company”. This does not necessarily preclude directors from considering other interests, as long as the directors also consider the company’s interests in making a decision.

10. The case law in this area indicates that directors may implement a policy encouraging consideration of broader community interests, but may not be generous with company resources when there is no likelihood of commercial advantage to the company. (See RP Austin, HAJ Ford and IM Ramsay, *Company Directors: Principles of Law and Corporate Governance* (2005) 281-282).

11. In *Teck Corporation Ltd v Millar* (1973) 33 DLR (3d) 288, a Canadian Court said:

Similarly, if the directors were to consider the consequences to the community of any policy that the company intended to pursue, and were deflected in their commitment to that policy as a result, it could not be said that they had not considered bona fide the interests of the shareholders.

12. The “interests of the company” include the continuing well-being of the company. Directors must not act for motives foreign to the company’s interests, but the law permits them to consider many interests and purposes, as long as there is also a purpose of benefiting the company. (See JD Heydon, ‘Directors’ Duties and the Company’s Interests’ in P Finn (ed), *Equity and Commercial Relationships* (Law Book Company, 1987) at 135.)

Business Judgment rule

13. The business judgement rule established in s180(2) of the Corporations Act gives directors some leeway in making commercial decisions, provided the conditions as set out in that section are satisfied. Business judgments must be made in good faith and not for irrelevant purposes (see *Harlowe’s Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483).

14. As Q Digby and L Watterson state, “Courts are generally reluctant to interfere in matters that involve the exercise of a commercial judgment, especially where a range of decisions could have been made by a director in a particular circumstance. ... Business judgments are less likely to face legal challenges when a company fosters reasonable care, diligence and transparency in day-today operations” (“Pursuing profit, productivity and philanthropy: the legal obligations facing corporate Australia”, *Keeping Good Companies* June 2004 p266-271).

15. If a company makes a philanthropic or stakeholder-oriented decision which might also generate intangible benefits for the company (such as increased goodwill towards the business and good publicity), courts will be cautious in second-guessing the business decision of the directors, so directors need not feel constrained in making such decisions. The extent to which directors are aware that they can make use of this freedom to consider stakeholder interests is, however, debatable.

If so, is there any useful scope for clarifying the current law in this respect?

16. See our response to Term of Reference (d) in the PJC Submission.
17. As discussed above, there is some uncertainty as to the extent to which and the manner in which directors may consider stakeholder interests, and uncertainty as to how the law will be applied, which discourages decision-makers from straying too far from established short-term shareholder-interest principles. It would be useful to clarify the scope of current laws in relation to the above issues.
18. A clarification might help prevent another James Hardie-type scandal. The Australian Financial Review stated that “James Hardie chairwoman Meredith Hellicar has said protections might have helped the board in funding asbestos victims it was not legally obliged to pay” (F Buffini, “Leave responsibility to us, says business”, 24 November 2005).
19. The current government sentiment that businesses should voluntarily develop and implement technologies to reduce greenhouse gas emissions provides an additional incentive for clarification that costs in doing so are legitimate business expenses and could not provide the basis for shareholder suits against the company. (See statements by politicians and analysis of this issue reported in J Breusch “Minister places faith in shareholder conscience”, Australian Financial Review 10 January 2006; W Frew, J Freed & S Peatling “Trust firms on climate, say leaders”, Sydney Morning Herald 12 January 2006; J Breusch “Greenhouse summit rejects fossil fuel cuts”, Sydney Morning Herald 13 January 2006; and “Australia dodges the issue on climate change”, Sydney Morning Herald editorial 14 January 2006.)

Does the current law give directors sufficient flexibility to balance long-term and short-term considerations in their decision-making?

20. Directors must act in good faith and in the best interests of the company (Corporations Act s181), as reflected in the present and future interests of the shareholders as a whole (as noted by Q Digby and L Watterson in the article cited in section 14 above).

21. In support for this proposition, Helsham J stated in *Provident International Corporation v International Leasing Corp Ltd* [1969] 1 NSW 424 at 440 that directors should consider the interests of future as well as existing shareholders. The leading commentator LCB Gower noted that the phrase “the best interests of the company” does not refer to the:

sectional interest of some or even a majority of the present members or even all of the present members, but of present and future members; that the directors should balance a long term view against the short term interests of present members.

(‘Corporate Control: The Battle for the Berkeley’ (1955) 68 *Harvard Law Review* 1176, 1184-1185).

22. Alternatively, the principle can be expressed so that the duty of directors is not to take into account the interests of future members so much as the future interests of present members (IA Renard, “Commentary” in P Finn (ed), *Equity and Commercial Relationships* (1987), 137, 138).

23. There is growing acknowledgment that a narrow focus on short-term profits actually undermines the shareholder wealth maximisation objective. (See Melving Aron Eisenberg, “Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, the Prisoner’s Dilemma, Sheep’s Clothing, Social Conduct, and Disclosure” (1998) XXVIII(1) *Stetson Law Review* 1.)

24. As a result, directors should not feel confined by law to short-term considerations in their decision-making, such as maximising immediate profit or share price return. The interests of a company can legitimately include its continued long-term well-being. The extent to which directors are guided by this principle in practice is, however, debateable.

If you have any proposal for change, how might it be implemented and work in practice and how might directors be held to account?

25. See our response to Request for Submissions section 3.4.

Request for submissions section 3.4:

1. *Should the Corporations Act be revised to clarify the extent to which directors may take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?*
2. *Should the Corporations Act be revised to require directors to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?*
3. *Does the Corporations Act need to be amended to adopt a pluralist, an elaborated shareholder benefit, or some other, approach to directors' duties?*
4. *Would any suggested change be intended to go beyond the current law or would it be intended as a clarification only?*
5. *If a pluralist approach were to be adopted:*
 - (a) *should directors be permitted to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions? or alternatively,*
 - (b) *should directors be required to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?*
 - (c) *in either case, what broader interests should be identified?*
 - (d) *how might any proposed amendment be implemented and enforced?*
6. *If an elaborated shareholder benefit approach were to be adopted:*
 - (a) *what form should it take?*
 - (b) *would the UK Company Law Reform Bill clause be an appropriate precedent, either as drafted or with amendments?*
 - (c) *how might any proposed amendment be implemented and enforced?*

Taskforce's response:

<p><i>Should the Corporations Act be revised to clarify the extent to which directors may take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?</i></p>

1. The Taskforce refers to its response below and generally to Term of Reference (d) in the PJC Submission.

Does the Corporations Act need to be amended to adopt a pluralist, an elaborated shareholder benefit, or some other, approach to directors' duties?

2. In summary: The Taskforce recommends change in the present position governing directors' duties. (Improving standards of corporate governance would also help prevent egregious corporate behaviour of the kind which has recently received media attention.) However, there are potential disadvantages with both the pluralist and the elaborated shareholder benefit approaches, largely relating to practicability and enforceability, and potentially conflicting duties. Of the two, the elaborated shareholder benefit approach appears more workable.
3. In relation to this latter approach, the recent UK Company Law Reform Bill, with certain refinements, provides a possible method for making directors more accountable to stakeholders.
4. We also consider that Robert Hinkley's proposed amendment to the Corporations Act (as detailed in his submission to the PJC Inquiry), while taking a slightly different angle, remains persuasive. Mr Hinkley's proposal is to amend section 181 of the Corporations Act through the addition of what he terms a "Code for Corporate Citizenship". The effect of this amendment would be to require directors to continue to act in the best interest 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".
5. Another possible approach may be to enact separate legislation regarding duties to stakeholders. These approaches are discussed further below.

Would any suggested change be intended to go beyond the current law or would it be intended as a clarification only?

6. The Taskforce considers that corporate law should, as a minimum, be clarified so as to explicitly allow directors to consider stakeholder interests where the company's proposal could have an adverse effect on those stakeholders. This would remove the current confusion as to directors' duties (see on this our response to Request for Submissions section 2.7) and provide a greater sense of protection and encouragement for directors

already taking stakeholder interests into account. Given the legal position discussed above, this clarification would not necessarily go beyond the current law.

7. As a preferred alternative, the Corporations Act should be amended to require (rather than merely allow) directors to take into account stakeholder interests when considering a course of action which may adversely affect them. Although such a requirement would go beyond the current law, it goes no further than popular opinion (including those of most shareholders) currently demands, and is similar to legislation currently in force in several overseas jurisdictions. Claims of increased costs may be answered by the relative success of SRI funds (see “Investing in ethical firms pays off: study”, AAP, published in the Sydney Morning Herald 30 March 2005).
8. However, the most appropriate vehicle for such an amendment is debated – see further below.

If a pluralist approach were to be adopted:

- (a) *should directors be permitted to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions? or alternatively,*
- (b) *should directors be required to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions?*
- (c) *in either case, what broader interests should be identified?*
- (d) *how might any proposed amendment be implemented and enforced?*

9. The pluralist approach advocates directors serving a wider range of interests in corporate decision-making. The Taskforce submits that environmental and consumer protection are both key areas which should be incorporated into directors’ duties if a pluralist approach were adopted.
10. Successful directors already need to be able to make decisions in situations of complexity, to weigh up competing priorities and to consider intangible elements of value such as reputation and good will. Allowing or requiring directors to consider the relative importance of stakeholder and shareholder interests in a particular situation is not qualitatively different.

Disadvantages of pluralist approach

11. However, in serving other stakeholders with the same consideration as shareholders, directors could potentially be subjected to conflicting or competing fiduciary duties. The Taskforce agrees with the comment in the discussion paper that this could ultimately

make enforcement (either criminal or civil) difficult, as it would become increasingly difficult to determine which duties were owed and to whom. Furthermore, if directors were obliged to take into account the interests of shareholders in the pluralist manner, it could in practice severely compromise the role that the shareholders of the corporation have in controlling the directors.

12. The Taskforce submits that while the pluralist approach identifies the key areas for changes and seeks to implement them, it is too onerous for directors to be expected to take on board all responsibilities to balance stakeholders with shareholders.
13. The US has adopted a pluralist approach, but only in relation to taking into account non-shareholder groups or the broader community in the context of corporate takeovers. This context renders it difficult to compare to the suggested changes to directors' duties in the Australian Corporations Act (an Act which is very widely applicable).

If an elaborated shareholder benefit approach were to be adopted:

- (a) what form should it take?*
- (b) would the UK Company Law Reform Bill clause be an appropriate precedent, either as drafted or with amendments?*
- (c) how might any proposed amendment be implemented and enforced?*

14. The elaborated shareholder benefit (or enlightened shareholder value) approach requires directors to act for the benefit of shareholders of their company as a whole, as under the current law, but taking into account longer term considerations as well as the interests of various non-shareholder groups in advancing shareholder value. That is, the goal of shareholder wealth maximisation is best achieved by taking a long-term approach, and may regularly involve rewarding and compensating various stakeholders.
15. There is some evidence that a moderate form of this approach is already accepted. The business judgment rule allows directors some discretion in making decisions so long as they are ultimately made with a view to maximising shareholder value. Austin, Ford and Ramsay comment:

An extreme view, namely that a company should make only those expenditures that are directly related to the pursuit of profit for the benefit of members, would restrict management. The decided cases in this area indicate that management may implement a policy of enlightened self-interest on the part of the company but may not be generous with company resources when there is no prospect of commercial advantage to the company.

(As cited in section 10 above.)

16. However, the Taskforce considers that the law needs to be explicit on this point, and preferably mandatory, in that it should require directors to consider, in making corporate decisions, certain groups which could be reasonably considered to be adversely affected by those decisions. This approach would be best implemented by amending the director's duties in the Corporations Act.
17. In this regard the Taskforce re-iterates that careful consideration should be given to Robert Hinkley's proposal to amend directors' duties as set out in his submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry. (See paragraph 5 of Term of Reference (d) in the PJC Submission.)

UK Company Law Reform Bill 2005

18. Clause 156 of the UK Company Law Reform Bill 2005 provides an appropriate starting point when considering the elaborated shareholder benefit approach. Clause 156 is comprehensive, retaining the traditional duty of directors towards shareholders generally but giving a broader context for fulfilling that duty. Clause 156(3)(a)-(f) sets out a list of relevant considerations, which we consider are appropriate, but (d) in particular is still very broad.
19. This breadth and lack of specificity is of some concern, given the wide variety of types of corporations. A method to address this may be 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. Alternatively, the list could be audited by professional auditors rather than by ASIC.
20. The list should be reviewed annually, and should be published in the company's annual report and/or on its website. Once the list is determined, the company must consider the listed stakeholders as part of its commercial decisions, taking a long-term view of the best interests of the company and ensuring (as per the Robert Hinkley suggestion) that the activities of the company are not at the expense of those stakeholders.
21. The argument that decisions would be impossible as stakeholder interests would conflict may be addressed by suggesting some appropriate considerations, such as:
 - which stakeholders are most likely to be affected;

- the extent of the likely damage to the interests of those stakeholders; and
- whether compensatory or “off-set” mechanisms can be put in place to counteract the damage to certain stakeholders.

Conclusion

22. While the current law does not specifically prevent companies from taking into account the interests of stakeholders, there exists considerable room for legislative improvement to ensure that companies do take non-shareholders’ interests into account. Given that corporations have legal privileges and power greater than that of most individuals, they must be both responsible and accountable for their actions.
23. The Taskforce submits that the Corporations Act should be revised to require directors to take into account stakeholder interests in the manner discussed above, as part of a long-term view of the company’s interests. The private sector should be free to pursue profit-making opportunities and private interests within the law, but not at the expense of the environment or broader social concerns.

Request for submissions section 4.8:

1. *Should the Corporations Act require certain types of companies to report on the social and environmental impact of their activities?*
2. *Are any changes to current statutory requirements needed to ensure better disclosure of the environmental and social impact of corporate activities?*
3. *Are any changes desirable to any other reporting requirements, such as the ASX Listing Rule requirements, the ASX Corporate Governance Principles or relevant accounting standards, to provide more relevant non-financial information to the market?*
4. *In relation to any proposed further reporting requirements, should desired information be in a narrative or quantitative form?*
5. *Is it possible to specify criteria to assist in comparing narrative disclosures, including by valuing or quantifying intangibles?*
6. *Would an additional environmental or social 'impact' reporting obligation be appropriate and feasible and, if so, how might it be stated?*

Taskforce's response:

1. See generally on the issue of reporting our response to Term of Reference (f) in the PJC Submission.
2. While certain reporting on potential environmental liabilities is mandated under the Corporations Act and associated regulations, and some companies voluntarily provide information on their corporate responsibility programs, this information is insufficient and does not enable a full evaluation of the effect of a company's activities or a comparison between companies.
3. In support of these views, a Sydney University report commissioned by CPA Australia in 2005 found that sustainability reporting by Australian companies "runs the risk of falling behind the rest of the world" (P Weeks "Good intentions", Sydney Morning Herald 16 August 2005). Mark Coughlin, president of CPA Australia, said "...investors are deprived of reliable information that allows them to compare companies and sectors, making informed investment decisions difficult" (P Weeks article, as above). The Australian National Audit Office has published a report advocating triple bottom line reporting (*Cross Portfolio Audit of Green Office Procurement*, released 12 December 2005). The Ethical Investment Association has put forward the business case for corporate

responsibility disclosure, in that it allows better evaluation of the risks a company faces (statement at Sustainable Business Forum debate, 30 November 2005, Sydney).

4. The Taskforce considers therefore that the Corporations Act should require all companies:
 - (a) which are of a certain size, for example specified by market capitalization, annual turnover or number of employees (including employees or contractors overseas); and
 - (b) regardless of size, which are in areas of business which are more likely to affect stakeholders, eg mining or other resource-intensive or labour-intensive industries,
 - (c) to report annually on the social and environmental impact of their business and the manner in which they have investigated and considered stakeholder interests in making business decisions.
5. For maximum accessibility, reliability and comparability, these reports should be:
 - (a) in a consistent format;
 - (b) audited by professional, independent auditors; and
 - (c) included as part of the company's annual reports if the company is required to submit annual reports. If it is not, the reports should be posted on the company's website at the end of each financial year.
6. The Global Reporting Initiative (**GRI**) sustainability reporting guidelines, currently being updated, would provide a convenient and widely accepted framework for these reports. If a domestic (though less comprehensive) alternative is sought, compliance with Principle 10 and Recommendation 10.1 from the ASX Principles could be made mandatory for the types of companies listed in section 3 above.
7. Many countries have already adopted mandatory corporate responsibility reporting, as discussed in section 4.5 of the CAMAC discussion paper, and therefore the move towards mandatory reporting would not impose a distorting burden on Australian companies.
8. As envisaged in section 4.7 of the discussion paper, there is an argument for requiring all entities "whose activities have a significant environmental or social impact" to provide reports on that impact – whether or not they are companies. However, it is likely to be the case that the great majority of large or otherwise significant entities (in whose sustainability activities the public would have an interest) would be corporations.

Request for submissions section 5.7:

1. *Should Australian companies be encouraged to adopt socially and environmentally responsible business practices and if so, how?*
2. *To what extent are voluntary initiatives leading to improvements in corporate social and environmental performance?*
3. *What lessons might be derived from any experience with voluntary initiatives?*
4. *What would be the nature of any proposed initiative, what would be its intended purpose and consequences, how might it be implemented and what would be its costs and other implications?*

Taskforce's response:

1. See generally on the issue of voluntary measures our response to Term of Reference (e) in the PJC Submission.
2. The Taskforce considers that, while Australian companies should adopt socially and environmentally responsible business practices, voluntary measures are not the most effective means to achieve this important (and socially demanded) objective.
3. Previous experience has shown that voluntary measures have insufficient take-up and regulation is required to achieve any meaningful and widespread changes in corporate behaviour. Consider for example Australia's comparatively poor record in sustainability reporting, and the failure of the initial, non-mandatory version of the National Packaging Covenant to attract sufficient adherents.
4. As discussed in our response to Request for Submissions section 2.7, the current state of the law on directors' duties may dissuade many companies from making voluntary efforts to improve their performance.
5. A further difficulty with voluntary measures is that companies may consider that they would be financially disadvantaged if they adopted the measures, as against their competitors which do not do so.

**ANNEXURE A: PJC Submission – the Taskforce’s submission to the PJC
Inquiry**

Submission by the
New South Wales Young Lawyers Pro Bono and Community Services Taskforce
to the
Parliamentary Joint Committee on Corporations and Financial Services

Inquiry into Corporate Social Responsibility

September 2005

Terms of Reference

The Parliamentary Joint Committee on Corporations and Financial Services has been asked to enquire into corporate responsibility and Triple-Bottom-Line reporting for incorporated entities in Australia, with particular reference to:

The extent to which organisational decision-makers have an existing regard for the interests of stakeholders other than shareholders, and the broader community.

The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders, and the broader community.

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.

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.

Any alternative mechanisms, including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors.

The appropriateness of reporting requirements associated with these issues.

Whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia.

The TaskForce's Submission

The TaskForce has addressed each Term of Reference in order below. Throughout the submission, the terms listed below have the following definitions:

“**stakeholder**”, in respect of a particular corporation, means non-shareholder individuals and groups, including the wider community, which are or are likely to be affected (whether directly or indirectly) by the acts or omissions of that corporation. The definition extends from company employees to groups in other countries (for example, populations affected by pollution or climate change caused by the activities of corporations in other countries), to groups which may arise in the future (for example, a generation which may not be able to experience seeing certain environments or species due to destruction or extinction); and

“corporate responsibility” means the commitment of companies to contribute to sustainable economic development by considering and working with their stakeholders (based on the definition used by the World Business Council for Sustainable Development, 2004).

Term of Reference (a)

The extent to which organisational decision-makers have an existing regard for the interests of stakeholders other than shareholders, and the broader community

9. It is difficult to accurately assess the level of existing regard organisational decision-makers have for the interests of stakeholders, due to the lack of requirements for triple-bottom-line or corporate responsibility reporting in Australia, and the lack of consistent definitions of the terms above (the *Corporations Act 2001 (the Act)*, for instance, contains no definition of “stakeholder”, and related definitions in other legislation are unhelpful).
6. This submission therefore focuses on information voluntarily provided by individual companies and information provided by independent assessment and survey-style reports, with the unavoidable bias that the companies which choose to provide such information and respond to such surveys would tend to be the companies undertaking significant corporate responsibility activities, rather than the companies which do not undertake any such activities.
7. A further qualification of this submission, in relation to the reliance on self-reporting by companies, is that such reports tend to focus on successful stakeholder outcomes, rather than indicating the extent to which organisational decision-makers have regard to stakeholder interests when making decisions which affect the company. This submission does not attempt to comment on the completeness or transparency of self-reporting, but takes such reports at face value.

Reports and surveys

8. Several surveys support the fact that companies which publish reports on their corporate responsibility programs tend to be either larger domestic companies or companies with an international presence. Less evidence is available in relation to smaller corporations, as these do not tend to publish such reports. However, this may be due to lack of resources or information rather than lack of a sense of corporate responsibility.
9. From the available reports, it appears that many of the larger corporations in Australia do make some attempt to consider stakeholder interests, and some have well developed programs to address corporate responsibility (including Visy, Westpac, BP, BHP Billiton). As a whole, the performance by Australian companies is very mixed. The KPMG International Survey of Corporate Social Responsibility Reporting (2005) (**KPMG Survey** – report available at www.kpmg.com/Rut2000_prod/Documents/9/Survey2005.pdf) found that 23% of the top 100 companies in Australia publish information on their corporate responsibility activities (compared to 64% of the top 250 companies worldwide). The report by the Centre

for Australian Ethical Research entitled “The State of Sustainability Reporting in Australia 2004” (**CAER Report**) found a similar figure.

10. Internationally, the Ernst & Young survey entitled “Corporate Social Responsibility: A survey of global companies” (2002) (**E&Y Survey**) found that corporate responsibility is emerging as a significant business issue, with 73% of the companies surveyed (147 companies from the Global 1000) indicating it is high on the boardroom agenda, and 72% stating that they had or were developing corporate responsibility strategies. 73% of international companies surveyed by the Economist Intelligence Unit stated that their company undertook corporate responsibility activities, but only 15% said that corporate responsibility was a central consideration in most business decisions (reported in “The Way of the Merchant – Corporate Social Responsibility in Japan”, May 2005).
11. The Australian Corporate Responsibility Index run by the St James Ethics Centre (**CRI**) provides useful information on the level of corporate responsibility shown by companies in Australia – or would do, if more companies participated in the (voluntary) survey. Only 27 companies participated in the second CRI survey (reported in April 2005), from the more than 250 top Australian companies invited to do so – a response rate in the order of 10%. The less gruelling survey for the CAER Report had a response rate of approximately 20%. It is hard to avoid the conclusion that many of the non-responding companies (which are not small struggling companies) had either:

a lack of interest in the subject matter of the survey, reflected in a lack of internal resources allocated to answer the survey, or

a desire not to provide information which may not reflect well on the company.

12. As may be expected, the companies which did respond to the CRI survey showed a relatively high level of corporate responsibility activities. There are considerable differences in performance even among this self-selected high-performing group. Of the 27 companies in the second CRI survey, six achieved the highest score and six the lowest.
13. Professor Michael Adams, UTS, reports that “A survey of 98 of Australia’s leading corporates found that being a good corporate citizen was not generally seen as being central to core business or the way a company was organized or run” (presentation 2 August 2005, Sydney). Although companies may undertake some corporate responsibility activities, these may be seen as peripheral to the “real” business of the company. A company may dedicate some resources to undertake corporate responsibility activities, but the extent to which the company’s decision-makers consider the interests of stakeholders when making business decisions is another, and more difficult, question.

Other considerations

14. The motivations to undertake and report on corporate responsibility activities are reported to be a combination of ethical/philanthropic and business-oriented motives including reputation enhancement, risk minimisation, employee attraction and retention, and maintaining a strong market position (see the KPMG Survey and the CAER Report). Corporate responsibility programs tend to direct a company's philanthropy or ethical policies in a wide variety of ways most useful for the company.

15. The types of stakeholders which corporations consider include (but are not limited to):

employees;

disadvantaged individuals;

community groups and non-profit organisations;

public institutions;

other commercial groups or organisations, and

policy makers.

16. Companies may focus on one or two stakeholder groups or corporate responsibility areas such as the environment, health or education, often chosen in light of the company's core activities and markets, rather than undertaking a complete spectrum of corporate responsibility programs. Companies are increasingly considering their supply chain, in addition to actions taken directly by the company itself.

17. Differences in approach to corporate responsibility appear not only as a factor of the size of companies, but also in relation to their sphere of business. It appears that companies providing or relying heavily on physical resources or otherwise with significant environmental impact (for example, companies in the mining, energy or paper fields) tend to put more emphasis on corporate responsibility programs than service-based companies (see the KPMG Survey). Nonetheless, there has been an increase in corporate responsibility activity and reporting in the financial sector (KPMG Survey), also reflected in the success of Westpac in achieving the highest score in the 2004 CRI survey.

Impediments

18. The Taskforce submits that there are a number of factors impeding the ability of decision-makers to consider the interests of stakeholders in developing and implementing company policy. These include:

the duty of directors to ensure companies make money for shareholders;

competing stakeholder interests;

lack of generally-accepted definitions of relevant terms, including “stakeholder” and “corporate responsibility”;

lack of generally-accepted guidelines as to reporting corporate responsibility activities;

a low rate of awareness in organisations as to their internal corporate responsibility agenda, which undermines effective incorporation of the interests of stakeholders by decision-makers. The international E&Y Survey found that “Only 19% of companies believe that their corporate responsibility agenda had been effectively promoted and understood throughout the organisation”;

difficulties in ensuring that company decision-makers have complied with company policy in relation to corporate responsibility, in any one decision;

economic constraints placed on a company by its shareholders, or by the perceived dictum that a company must act solely in the interests of its shareholders rather than stakeholders; and

a lack of external reporting requirements, undermining the ability to track a company’s corporate responsibility performance against its stated policies.

Term of Reference (b)

The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders, and the broader community

10. As the Taskforce's submission in Term of Reference (a) indicates, the level of regard organisations have for the interests of stakeholders varies along a continuum, from those organisations which have no apparent regard for such interests, to those which evidence considerable stakeholder dialogue and engagement. In this submission, the Taskforce considers which point in the continuum is the most desirable, with regard to incorporated entities in Australia at this point in time.
19. It may be argued that the ideal point in the continuum varies depending on the type of organisation (its size, products or services and their by-products or environmental/social impact). It also depends on the group of stakeholders in question, particularly if stakeholders have conflicting interests. As a minimum, the Taskforce submits 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 in which and extent to which those decisions, and more generally the company's activities, products, services and other impacts, are likely to affect those interests.

Beyond this minimum, the Taskforce considers below the arguments for greater and lesser consideration of stakeholder interests.

Pros and cons: arguments for and against corporate responsibility

20. It is commonly argued that companies should only consider the interests of their shareholders, as these people have invested in the company or given up something of value which they risk losing. If a company focuses its resources on stakeholder interests, it is "cheating" its shareholders (see Gary Johns' 2002 Hal Clough Lecture, "Corporate social responsibility or civil society regulation?" available from the Institute of Public Affairs, and the article by John Blundell entitled "Companies exist only to trade – nothing else", available on www.iea.org.uk).
21. Under the definition of stakeholder introduced in the Taskforce's response to Term of Reference (a), all stakeholders risk losing something of value to them within the activities of the corporation. Shareholders may lose money whereas future generations may lose an

irreplaceable environment. Also, this future generation has “given” something of value to the company, assuming that the ability to use the finite environmental resources in question was useful to the company (see also the discussion of the commercial merits of social responsibility below – few shareholders today, if they were asked, would fail to recognise the valuable risk management and reputation enhancement functions of corporate responsibility, helping to maintain a company’s value over the long term).

22. Secondly, the Taskforce submits that companies are not the appropriate forum in which to resolve social problems as they do not have the appropriate expertise or resources. This is the province of governments, which are democratically elected. Allied to this is the view that corporate responsibility weakens democratic government (see Gary Johns’ paper above and his article “Insurance company whips up a storm” in the *Australian Financial Review*, 16 August 2005). These arguments lose force if the government legislates for corporate responsibility, as the Taskforce submits that it should do in response to Term of Reference (d). Furthermore, corporate responsibility does not require a company to become expert in new fields of environmental science or social policy – merely to understand and consider the effects that its own activities may have. The Taskforce submits that it is irresponsible for companies to undertake activities without such understanding.
23. Thirdly, there is the argument that companies are already obliged to consider the interests of certain stakeholders by extensive legislation dealing with employee rights, safety, anti-discrimination, privacy and environmental protection as well as other areas (see Gary John’s paper “Deconstructing corporate social responsibility”, 2005, Institute of Public Affairs). However, the very specificity of most such legislation (while it is still of benefit) encourages a compliance mentality, where companies aim to comply with the letter of the law rather than incorporating corporate responsibility principles more centrally into the company (see also the Taskforce’s response to Term of Reference (a) in relation to the extent to which companies have an existing regard for stakeholder interests).
24. A further argument that companies should have regard for the interest of stakeholders is the fact that in certain spheres, large companies today are richer and more influential than many governments, and can have an enormous effect on local communities, the environment and other stakeholder interests. Considering the number of people a multinational company employs, the resources it uses, its supply chain, the effects its products or services have on communities, the waste products it produces, companies can no longer be seen as merely an artificial form of private person.

Commercial reasons in favour of corporate responsibility

25. The following factors lend weight to the argument that organisational decision-makers, in the direct interests of their company should take into account stakeholders' interests in business decisions:

an effective form of risk management: dialogue between organisational decision-makers and stakeholders allows for the development of problem solving mechanisms and improves the overall quality and effectiveness of organisational decisions, as stakeholder input at an early stage may indicate community expectations and help resolve problems before they pose significant difficulties for the company or the community;

a commercial advantage for the company: such dialogue also provides a degree of transparency and allows some stakeholder monitoring of business transactions, which is likely to enhance the company's reputation and give rise to better relations with community members / customers / target audiences; and

as employees and potential employees are increasingly demanding that their employers are socially responsible, a company which demonstrates its high level of corporate responsibility and sensitivity to stakeholders may become an employer of choice.

26. Institutional investors are increasingly recognising the above factors and are starting to take a company's level of corporate responsibility into account for investment purposes. This is a further reason for companies to improve their performance in this area (see generally on these issues: Brad Howarth article "Character building", *Sydney Morning Herald* 23 July 2005; Andrew Cornell and Bill Pheasant article "Sick of red tape, keen for social action", *Australian Financial Review* 11 April 2005; Juno Consulting paper "Making sense of corporate social responsibility", 2004, available on www.junoconsulting.com.au; Chris Barry article "CIS green fury at Exxon boss", *Manchester Evening News* 26 May 2005).

27. As a minimum, the Taskforce submits that companies should identify stakeholder interests and how they may be affected by the company's activities. We suggest that a greater level of consideration of stakeholder interests (for example, by undertaking stakeholder dialogue) is justified by the great influence of companies in society today and by the commercial reasons in favour of such consideration.

5 Since 1 July 2004, publicly listed companies in Australia have been required to have in place and post on their website, a Code of Conduct and Ethics indicating how they intend to deal with stakeholder concerns and interests. However, this is not stated anywhere in the Act with respect to directors' duties.

Directors' fiduciary duties

6 Through the current legal framework, directors have a fiduciary relationship with their corporation (ASX Principles of Good Corporate Governance and Best Practice Recommendations). Fiduciary obligations often arise where one person is under an obligation to act in the interests of another, but this does not necessarily mean that the obligation to act in the interest of another is a fiduciary obligation (*Aequitas v AEFC* (2001) 19 ACLC 1,006). The provisions of the Act supplement the fiduciary duties, however the fiduciary duties, being the general law and not statutory, do not apply to other officers as defined in s.9 of the Act such as a secretary, a de facto officer, or person administering a compromise or arrangement involving the corporation.

7 Generally, directors owe fiduciary duties to the company and its shareholders and not, for example, to stakeholders such as creditors or minority shareholders (*Percival v Wright* [1902] 2 Ch 421; *Southern Cross Mine Mgt v Ensham Resources* (2004) 22 ACLC 724). Therefore a company may enforce fiduciary duties owed by a director. A reason for this is that otherwise, directors would be liable and exposed to a multitude of actions (*Brunninghausen v Glavanics* (1999) 17 ACLC 1,247 at 1,254 per Handley JA).

8 Directors must "have regard to the interests of the members of the company, as well as having regard to the interests of the company as a commercial entity": *Darvall v North Sydney Brick & Tile Co Ltd. & Ors* (1988) 6 ACLC 154 per Hodgson J. So in some circumstances directors' fiduciary duties may be extended, for example where directors issue new shares to advance their own interests and disregard the interests of their shareholders (*Ngurli Ltd v McCann* (1953) 90 CLR 425).

9 The exceptions to the general rule that fiduciary duties are only owed to the company are limited and can be categorised as follows:

- (a) where there is a voluntary assumption of trust and confidence by the directors, e.g. where directors encourage shareholders to have trust and confidence in them such as when they hold themselves out to shareholders as acting as their agents;
- (b) special facts, i.e. a director has sole control of information about the matter that gives that director a "special opportunity" to exercise that advantage to another's detriment (*Brunninghausen v Glavanics* (1999) 17 ACLC 1,247).

Directors' duty to creditors

10 Section 588G of the Act is designed to protect creditors by dealing with the criminal liability of directors for insolvent trading by their company. A director contravenes s588G if the director had reasonable grounds for “suspecting insolvency”. This requirement of “suspecting insolvency” requires a director to predict the company’s future financial capacity.

Directors’ wider duties

11 Critics of corporate responsibility say that it takes too much focus off the bottom line (Chapman F “Corporate Governance and CSR – one vision for all” (2005) 8(5) IHC). Ultimately, a director of a company must obey the law in running that company in the best interests of its shareholders. However, the shareholders do not include the community, environment or greater public. The current legal framework does not take into account the interests of stakeholders other than shareholders and creditors.

12 Interestingly, companies believe that their duty to the community consists of complying with the law. If directors choose to put their the interests of the community (whatever those interests might be) ahead of the interests of the shareholders they would run the serious risk of being in breach of their present duties under the Act. The James Hardie example has further brought this issue into focus, regarding its dealings with those who contracted asbestos-related diseases as a result of contact with James Hardie products.

13 As environmental issues and directors’ duties are not covered by the Act, recent cases suggest that the Courts are on occasion willing to look beyond the parameters of the corporation to consider the impact that company directors have on the community as a whole. The recent decision of *National Roads and Motorists’ Association Ltd v Geeson* (2001) 39 ACSR 401 established that in particular circumstances, directors may have a “public duty” to act or refrain from acting in order to adhere to what is in the best interests of the community as a whole, rather than according to what is in the best interests of the company. The comments of Bryson J in this decision showed that it is possible for a common law duty to exist for directors to comply with principles of sustainable development.

14 If directors are expected to run their companies taking into account the interests of stakeholders, then they must have adequate protection via a legal framework, so that they will not be liable to suits brought by shareholders on the grounds that the directors are breaching their duties to shareholders.

15 The Taskforce submits that unless directors’ duties within the Act are widened to encompass duties to stakeholders other than shareholders,

directors must continue to comply with the current framework and act in the best interests of their shareholders.

Term of Reference (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.

11. As our response to Term of Reference (c) noted, companies are not required to give consideration to any stakeholders, other than shareholders and, at times other persons in certain exceptional circumstances. Under the current legal framework directors will be prohibited from considering stakeholders if their interests conflict with those of the shareholders.
28. There are times where the interests of shareholders will conflict with those of stakeholders. Particularly with consideration to the cultural change that has emerged from the Jackson Inquiry and the current CAMAC Inquiry, it is important for directors and entities to, at a minimum, have the opportunity to act in the interests of stakeholders in these circumstances of conflict. There must be revisions of the current legal framework so that where there is a conflict, directors and entities have a clear power to act in the interests of stakeholders that are not covered by the current legal framework.
29. There is a lot of uncertainty about when a conflict does arise, often as shareholders' interests are measured with consideration to short-term results, whereas the interests of stakeholders tend to be long-term. This uncertainty discourages directors from acting in the interests of stakeholders, even where there may be the desire to do so.
30. The Taskforce considers that, to ensure that entities and their directors are either enabled or required to consider stakeholder interests, the legal framework must be revised. The revisions must alter the current effect of the provisions of the Act and the most appropriate mechanism for doing this is to make an amendment to the Act itself. This legislation must determine the rights and obligations of entities and its directors, and changes to enable or require stakeholders to be considered should be incorporated into the Act.

Duty upon directors not to adversely affect the interests of stakeholders

31. One alternative is to amend the duties of the directors to incorporate a duty that the conduct of the entity does not adversely affect the interests of stakeholders. This would require the interests of stakeholders to be considered in all aspects (see Bob Hinkley's 28-word amendment).

32. Such an amendment, while effective in ensuring that the interests of stakeholders will be considered, is a long-term objective. We support such a revision of the legislative framework in Australia but suggest a less burdensome amendment to the legislation in the short term.

Right to consider stakeholders

33. Another alternative is to amend the duties of the directors to consider the interests of stakeholders when determining what is in the best interests of the company, rather than create a whole new duty. Such an amendment would empower the directors to consider the interests of stakeholders, i.e. to make it a defence to a complaint that they had acted improperly and not necessarily contrary to shareholder interests (Bill Beerworth, "A modest proposal: recognise the existence of stakeholders", *Company Director*, December/January 2004-2005 at p.13).
34. There is an argument voiced by Tom Bostock that such an amendment would "require a director to consider corporate social responsibilities [that] will subjugate a board to the politics of trying to balance different interests and stakeholder concerns" (Tom Bostock, "Is Beerworth's proposal really so modest?", *Company Director*, December/January 2004-2005 at p.16). Here, Bostock queries how to judge stakeholder interests and meet subjective community expectations.
35. However, the Taskforce considers that while the balancing of various interests may be difficult initially, it is necessary in order to address the needs of the greater community.

Regulating corporate responsibility

36. The Taskforce submits that the Act must be amended to include the Australian Securities Investments Commission (**ASIC**) as the main regulator for ensuring directors and entities meet their obligations to the stakeholders and the broader community.
37. ASIC is already the main regulating body that enforces and gives effect to the Act to protect consumers, investors and creditors (see *ASIC Act 2001* s 1(2)(g) and "ASIC at a glance – Our role" link at www.asic.gov.au). They already have the appropriate mechanisms in place, which include extensive powers and functions under corporations legislation, and they are able to commence and conduct criminal and civil proceedings (there are various provisions in place, and most involve preservation of assets). This will ensure that any company which violates a rule of corporate responsibility will face some form of disciplinary measure. ASIC also uses the medium of the media and public publications to keep the public informed ("ASIC at a glance – Our role" link at www.asic.gov.au). This is instrumental in using public pressure to ensure principles of corporate responsibility are being taken seriously and being adhered to by companies.

38. ASIC's investigation and enforcement powers are not limited to the exercise of functions under the *ASIC Act 2001* (Cth). According to its statutory responsibilities and powers under the *ASIC Act 2001* (Cth) Pt. 3, the ASIC is the principal complaints handling body. They receive complaints from numerous informal sources. This means that the public should feel able to make a complaint, especially as a consumer. The fact that ASIC is an independent Commonwealth government body would ensure that responses would be reasonably fair and uniform. They often initiate investigations at their own motion, especially as a response to media reports or the public interest. The ASIC holds the public interest as a top priority, and this is reflected in how they proceed in their investigations (however, such investigations may not involve the formal powers of Pt. 3).

Directors' duties

39. With reference to Term of Reference (c), legal change to accompany and continue to drive the cultural change taken from the momentum of the Jackson Inquiry and now the CAMAC Inquiry is being seriously contemplated. As discussed, the traditional view of directors' duties, as is captured in the Act, requires a director to act in the best interests of shareholders by maximising profits and not to consider social/environmental concerns outside of that context. In limited situations directors are required to consider interests of creditors (when in insolvency or near insolvency).
40. 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 and the regulator, the 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.
41. The Taskforce submits (as also discussed in Term of Reference (g)) that a middle measure may be to follow the recent UK Company Law Reform Bill (introduced March 2005). Draft clause B3 of this Bill requires a director to act so as to "promote the success of [their] company for the benefit of its members as a whole", taking into account so far as is reasonably practicable any need of the company "to consider the impact of its operations on the community and the environment" (among other things).

Term of Reference (e)

Any alternative mechanisms, including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors

Code of conduct

12. The Taskforce's preferred approach, as set out in our response to Term of Reference (d), is for the Act to be amended to set out a general principle that directors must consider stakeholders' interests.
13. However, an alternative mechanism which may enhance consideration of stakeholders' interests is a code of conduct. The Taskforce proposes a new code of conduct based on existing codes as advocated by the Australian Stock Exchange (**ASX**) and Standards Australia, but with application to all entities regulated by the Act. The Taskforce's focus however, remains on listed companies and trusts (whether listed on Australian markets or overseas) as the key players in the debate on corporate responsibility.
14. Measures need to be taken with multinationals to ensure that they are bound to the law if they are dealing with Australian retail investors. There are provisions in the Act that cover this, but a specific provision about this and abiding by corporate responsibility principles needs to be included.
15. The Taskforce considers that a largely aspirational code of conduct would provide little guidance to entities without particular industry guidance. Therefore, we suggest a principles-based corporate responsibility code of conduct should be supported by guidelines to be issued from time to time by ASIC (ASIC's power to do this derives from s 1(2) of the *ASIC Act*). These guidelines will be developed in consultation with industry groups and would have no legal status.

Using an existing mechanism - ASX CGC Principle 10

42. In March 2003 the ASX Corporate Governance Council (**ASX CGC**) released the "Principles of Good Corporate Governance and Best Practice Recommendations". ASX listing rule 4.10.3 requires companies to disclose in the corporate governance section of the annual report the extent to which they have adopted the 28 recommendations.
43. 2004 was the first year that listed trusts and companies were required to provide disclosure against the ASX CGC Principles and Recommendations. A May 2005 report by the ASX on corporate governance practices reported in 2004 indicates that the average adoption rate for all ASX CGC recommendations for the whole market was 68% and almost 85% for the top-500 companies (ASX, "Analysis of Corporate Governance Practices reported in 2004 Annual

Reports”, 16 May 2005). This indicates a clear acceptance of the principles at the board-room level. However, we note that most attention has centred on the form of disclosures against the recommendation, as opposed to the utility of such disclosures as an indicator of actual company performance (in relation to those recommendations).

44. Principle 10 provides that companies should “recognise the legitimate interest of stakeholders”. Legitimate stakeholders are defined to include non-shareholder stakeholders such as employees, clients/customers and the community as a whole. Recommendation 10.1 requires a company to establish and disclose a code of conduct to guide compliance with legal and other obligations to legitimate stakeholders.

45. It includes guidelines for the content of a code of conduct as follows:

clear commitment by board and management to code of conduct;

responsibilities to shareholders and the financial community generally;

responsibilities to clients, customers and consumers;

employment practices;

obligations relative to fair trading and dealing;

responsibilities to the community;

responsibilities to the individual;

how the company complies with legislation affecting its operation; and

how the company monitors and ensures compliance with its code.

46. Such a code of conduct, based on notions of legitimacy, fairness and ethics, is intended to be used to “set the tone and standards of the company” and to “oversee adherence” to such notions.

47. The ASX notes that the virtues of a code of conduct are that they can assist the board in recognising legitimate interests and enable employees to alert management to potential misconduct (ASX CGC Principle 10, p 59).

48. Although the ASX reports that levels of adherence to the ASX CGC Principles are high, the May 2005 report contained little discussion of disclosures made against recommendation 10.1 and no discussion of specific adherence to that recommendation. The ASX directs companies and trusts to Standards Australia's Draft DR03028 *Organisational Codes of*

Conduct, Draft DR03028 *Corporate Social Responsibility* and Draft DR 03029 *Whistleblowing Systems for Organisations* for further guidance on the content of a code of conduct.

Standards Australia

49. The TaskForce notes that Standards Australia's Standard on Governance (AS 8000-2003) also sets out the role of stakeholders in corporate governance. The Standard was drafted for all types of entities (listed and non-listed) and is quite similar to the ASX CGC principles. The TaskForce believes this standard could also provide the basis of a potential code of conduct.

Term of Reference (f)

The appropriateness of reporting requirements associated with these issues

16. Presently, the reporting framework in Australia on corporate responsibility matters is voluntary. Voluntary reporting has resulted in inconsistent, incomplete and biased information. Furthermore, the number of companies reporting on social and environmental matters remains few and far between. Social reporting is particularly worrisome (Doane, D. “Market failure: the case for mandatory social and environmental reporting”, New Economics Foundation, available at www.corporate-responsibility.org).

50. The current statutory reporting requirements under the Act and the Australian Accounting Standards (**AAS**) issued by the Australian Accounting Standards Board (**AASB**) require an entity to report almost exclusively on the historical economic or financial performance of the entity during the financial year. (However, refer to sections 299(1)(d) and 299A of the Act.) While there has been a strengthening and extension of disclosure requirements since the introduction of the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (**CLERP 9**), there exists opportunity to strengthen the reporting requirements through the mandatory adoption of triple-bottom-line reporting in Australia.

51. Triple-bottom-line reporting is a reporting framework that has been voluntarily adopted by some Australian entities, and generally refers to the publication of an entity’s economic, environmental and social performance, in addition to current statutory reporting requirements to disclose the financial or economic information. While there has been some uptake in voluntary triple-bottom-line reporting, there exist strong advantages in providing a mandatory triple-bottom-line reporting framework in Australia.

52. Advantages of mandatory triple-bottom-line reporting include:

providing for a transparent and balanced reporting approach, including requiring information that is both favourable and unfavourable to a corporation’s image to be reported;

improving comparability of reporting information between different entities;

allowing information to flow to a broader stakeholder audience;

improving corporate reputation;

allowing the benchmarking of performance and facilitating international competitiveness;

attracting and retaining high-quality employees by demonstration that an organisation is focused on its long-term existence;

increasing access to investors and ethical funds;

providing for sustainability and long-term economic survival;

favourable economic performance (see “Sustainability Reporting: Practices, Performance and Potential” CPA Australia, July 2005);

enforceability;

more simplified processes – by limiting reporting to investors and other stakeholders, mandatory reporting would establish a definable standard for business and minimise transaction costs in responding to various queries relating to social and environmental performance; and

reduction in costs by limiting spin through the production of high-cost PR reports, focusing business on the management issues at hand and including this information in the annual report to shareholders.

53. Disadvantages of triple-bottom-line reporting include:

increase in annual reporting costs with disproportionate costs to smaller business;

potential exposure to risk and liability in relation to the reliability of the triple-bottom-line report's content (which could be overcome by mandatory auditing of the triple-bottom-line reports);

while there has been some successful voluntary adoption of triple-bottom-line reporting in Australia, studies have indicated that there exists potential bias in the current voluntary presentation of triple-bottom-line reporting in Australia, which has observed the inclusion of information that in some cases is limited to only favourable environmental and social reporting information; and

similarly, the usefulness and comparability of triple-bottom-line reports between different entities has been limited, after studies of disclosures made by a number of publicly listed companies show that disclosures range significantly in content and quality.

54. It is the Taskforce's view that triple-bottom-line reporting should be mandatory for incorporated entities in Australia, since the current reporting requirements and voluntary triple-bottom-line reporting is not adequately achieving meaningful and consistent reporting information for a broader range of stakeholders.

Current reporting requirements

55. Current reporting requirements under the Act and the AAS have the force of law under section 295(2)(a) of the Act. The financial statements and notes are those required by the AAS. In addition, the notes must include any other information that is necessary to give a

“true and fair” view of the financial position and performance of the company (pursuant to section 297 of the Act). The directors’ declaration must involve the director declaring whether the financial statements are in accordance with the AAS, and if the “true and fair” view requirement in section 297 primarily focuses on the entity’s requirements to report predominantly historical economic performance in the annual financial report and director’s report.

56. The requirement in section 297 of the Act is mirrored in the AAS (AASB 101 “Presentation of Financial Statements” (15 July 2004)). Paragraph 13 states:

[a] financial report shall present fairly the financial position, financial performance and cash flows of an entity. Fair presentation requires the faithful representation of the effects of transactions, other events and conditions in accordance with the definitions and recognition criteria for assets, liabilities, income and expenses set out in the Framework. The application of Australian Accounting Standards, with additional disclosure when necessary, is presumed to result in a financial report that achieves a fair presentation.

57. However, the requirement to provide a “true and fair” view is applicable only to the economic aspect of a company’s performance rather than including the broader environmental and social performance envisaged by triple-bottom-line reporting.

58. While there does exist a mandatory requirement to provide some environmental reporting in the entity’s annual director’s report under section 299(1)(f) of the Act, there has been ambiguity in practice as to the nature and extent of this legislative requirement. The application of section 299(1)(f) is uncertain due to the meaning of particular and significant environmental regulation. It could potentially mean either an environmental regulation, which has particular application only to the reporting entity. Alternatively, it could involve the reporting entity being subject to an environmental regulation, which has general application within the jurisdiction but has “particular” significance to the reporting entity by reason of the nature or extent of its operations:

The directors’ report for a financial year must - if the entity’s operations are subject to any particular and significant environmental regulation under a law of the Commonwealth or of a State or Territory – give details of the entity’s performance in relation to the environmental regulation.

59. While this requirement appears to require companies to account for their environmental performance, research indicates that disclosure is more common for companies in the materials, capital goods and energy sectors and those that are subject to regulatory regimes, for example, the *Fuel Quality Standards Act 2000*, the *Environmental Protection (Diesel and Petrol) Regulations 1999*, and state environmental legislation such as the *Protection of the Environment Operations Act 1997 (NSW)* (“Sustainability Reporting: Practices, Performance and Potential” CPA Australia, July 2005). Furthermore, the research has indicated that the

disclosure practices range in format, quality and scope with some companies providing very little information due to the ambiguity of the extent of environmental reporting that is required.

60. Although some entities are faced with this mandatory environmental performance reporting obligation, there exists little or no mandatory requirement for entities to report information pertaining to social performance.

61. Similarly, there is no requirement in the AAS that the environmental and social information relating to the entity's transactions and events must be reported on in the financial report. AASB 101 "Presentation of Financial Statements" states at paragraph 10:

Many entities also present, outside the financial report, reports and statements such as environmental reports and value added statements, particularly in industries in which environmental factors are significant and when employees are regarded as an important user group. Reports and statements presented outside the financial report are outside the scope of Australian Accounting Standards.

62. Section D of the KPMG Survey identifies codes, standards and guidelines used in many jurisdictions worldwide. Any mandatory reporting scheme introduced in Australia should have regard to reporting standards in these jurisdictions, with a view to making multinational companies accountable and reporting by these companies consistent. Section 2.4 of the KPMG Survey discusses trends in corporate responsibility reporting by sector. The results clearly show that reporting on corporate responsibility matters varies in each industry sector. Further, the report identifies that disclosure is then often selective and restricted to certain issues.

63. Section 299A of the CLERP 9 has strengthened to some extent the pre-existing reporting requirements (see sections 297 ("true and fair view"), 299(1)(d) and 299(1)(3)), by requiring the annual directors' report for a listed public company to include:

information that members of the company would reasonably require to make an informed assessment of:

- (a) the operations of the entity reported on; and
- (b) the financial position of the entity; and
- (c) the entity's business strategies and its prospects for future financial years.

64. While this has strengthened the pre-existing reporting requirements, this reporting requirement is not adequate for two reasons:

it has limited application, namely to listed public companies; and

section 299A(3) of the CLERP 9 qualifies the requirement in allowing the omission or non-disclosure in the directors' report of the information on "the entity's business strategies and its prospects for future financial years" as required by section 299A(1)(c):

If it is likely to result in unreasonable prejudice to:

(a) the company or disclosing entity; or

(b) if consolidated financial statements are required—the consolidated entity or any entity (including the company or disclosing entity) that is part of the consolidated entity.

65. Therefore, unfavourable economic, environmental and social information can be omitted from the statutory accounts, subject to the mandatory environmental reporting requirement under section 299(1)(f) of the Act.

Product disclosure statements

66. Since 11 March 2004, s1013D(1)(l) and the regulations to the Act [7.9.14C] contain obligations for all investment product issuers to disclose information about labour standards and environmental, social and ethical factors in product disclosure statements (PDSs) of investment products.
67. Section 1013DA of the Act states that ASIC may develop guidelines where a PDS claims that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.
68. The Taskforce notes that the ASIC has also developed guidelines for the inclusion of information relating to labour standards and environmental, social and ethical factors in PDSs of investment products (ASIC Media and Information Releases "ASIC releases final socially responsible investing guidelines" 17 December 2003). These guidelines stem out of reforms to the Act requiring investment products to disclose this information in PDS.
69. These guidelines are aimed at product issuers in allowing them to determine for themselves particular factors and the methodology involved with labour, social or environmental standards. The Taskforce further notes that ASIC intends to review these guidelines in 2006 (ASIC Media and Information Releases "ASIC releases final socially responsible investing guidelines" 17 December 2003).

Global Reporting Initiative

70. The Global Reporting Initiative Guidelines (2002) are for voluntary use by organisations for reporting on the economic, environmental, and social dimensions of their activities, products or services (a copy of the Global Reporting Initiative Guidelines is available at: www.globareporting.org/guidelines).

71. The presentation of voluntary triple-bottom-line reporting in Australia using the Global Reporting Initiative Guidelines has encompassed one of three forms (“Sustainability Reporting: Practices, Performance and Potential” CPA Australia, July 2005):

an integrated approach whereby the environmental and social information is integrated into the entity’s economic performance as disclosed in the entity’s statutory annual report, or

a segregated approach whereby the environmental and social information is provided by way of a stand-alone discrete report, or

a combination of the entity including some environmental and social information both in the statutory annual report, and also, on a stand-alone basis.

72. The Global Reporting Initiative Guidelines comprise a total of 40 indicators (16 core environmental indicators and 24 core social indicators). The problem with the Global Reporting Initiative Guidelines is that, like the Australian Public Environmental Reporting (**PER**) Framework, it remains a voluntary scheme. (In March 2000, “A Framework for Public Environmental Reporting - An Australian Approach” was published by Environment Australia in conjunction with the National Heritage Trust. Copies of the PER Framework can be obtained at www.environment.gov.au/epg/envirnet/eecp/publications.html.) Consequently, companies cannot be compelled to report against its standards. Consistency in reporting is, however, crucial to transparency. It is therefore vital that Australia has regard to the Global Reporting Initiative and to foreign mandatory reporting standards. Foreign standards of particular note include those in the United Kingdom (under the recent amendments to company law, introducing the “Operating Financial Review” (see www.icfconsulting.com/Publications/Perspectives-2004/uk-ofr.asp)) and those in the United States of America (under the *Sarbanes Oxley Act*), which appear to be among the more developed mandatory reporting requirements, even if these standards are not specifically focussed on corporate responsibility.

Barriers to the implementation of mandatory triple-bottom-line reporting

73. It is argued that mandatory reporting may impose a significantly higher compliance burden than would be justified by the principle that mandatory regulation should be the minimum necessary to achieve the set objectives.

74. It is also argued that regulatory provisions might impose additional costs on top of the established regulation, for little or no tangible benefit, with substantial risk of uncertainty and litigation. The risk of litigation arising from misleading disclosures and enforcement action will mean that moves to introduce any mandatory reporting requirements are likely to meet with strong business opposition.

75. Notwithstanding the above arguments, the Taskforce considers that these potential barriers should not be heralded as grounds for not implementing mandatory reporting. Increased costs are a perception only and are likely to be more than offset by risk reduction, increased stakeholder confidence in the reporting entity and costs savings arising from understanding what does and doesn't need to be reported. Costs arising from litigation are likely to be few and far between and enforcement costs are costs that should be properly borne by an entity failing to comply.

Term of Reference (g)

Whether regulatory, legislative or other policy approaches in other countries could be adopted or adapted for Australia

17. Countries in Europe and to a lesser extent, North America, have designed and implemented numerous initiatives in an effort to promote corporate responsibility both domestically and internationally. Of these initiatives, the Taskforce considers the following could be adopted or adapted for Australia.

European initiatives

France

76. France has been very active in the corporate responsibility arena, particularly through regulatory initiatives which make corporate responsibility an integral part of the workplace and financial market.
77. France mandates triple bottom line reporting for publicly listed companies, by law. The law requires a listed company to state in its annual report how it takes into account the social and environmental consequences of its activities. The law also obliges companies to report on a set of qualitative and quantitative social indicators which have been drawn by decree. However, the law does not prescribe the guidelines for reporting.
78. Similarly, the laws governing public pensions and employee savings plans require the disclosure of social, ethical or environmental criteria used for investment.
79. France also requires companies to report on community issues, including the impact of their activities on local development and local populations, how they engage with local stakeholders such as environmental NGOs, consumer groups and educational institutions. The companies must also report on their overseas subsidiaries and sub-contractors complying with ILO core labour conventions.

Germany

80. Germany has a number of approaches in place in order to encourage the use of corporate responsibility practices by companies.
81. The German federal government offers benefits and incentives to apply a European community scheme called the European eco-management and audit scheme (**EWAS**). EWAS includes agreeing to environmental supervision, reporting requirements, notification

duties regarding corporate organisation and emission measurements. The voluntary scheme was popular with 2600 German EWAS-certified companies in 2004.

82. The German federal government has also set up a website to inform consumers about fair trade, which features the companies, organisations and products in this field. This website demonstrates a practical approach by the government to encourage companies to adopt corporate responsibility initiatives.
83. The German federal government has also signed an agreement with German industry to promote gender equal opportunities in the private sector, such as best practices, advice for companies, and integration of equal opportunities and family friendly policies in training materials and corporate consulting.
84. The German export ministry promotes corporate responsibility-friendly guidelines, namely the OECD guidelines, through its export credit programme. The programme is voluntary and not mandatory.
85. In addition to the above initiatives, Germany has also legislated a requirement for all certified private and occupational pension schemes to report on whether or not they take into account ethical, ecological and social aspects in their investment policies.

United Kingdom

86. The United Kingdom government has set up a website on corporate responsibility. Although it is propaganda driven to some extent, the website actively promotes corporate responsibility and does contain some useful general information.
87. The United Kingdom government has proposed amendments to directors' duties requiring them to take into consideration the interests of a broader range of stakeholders (i.e. not just shareholders). One of the objectives for the current law reform proposal is to provide a legislative obligation upon directors to promote their companies by taking into account factors such as employees, effects upon the environment, suppliers and customers. Page 20 of the Company Law Reform White Paper (March 2005) states that:

the basic goal for directors should be the success of the company for the benefit of its members as a whole; but that, to reach this goal, directors would need to take a properly balanced view of the implications of decisions over time and foster effective relationships with employees, customers and suppliers, and in the community more widely.

88. The *Pensions Act Amendment*, which came into effect in July 2001, requires trustees of occupational pension schemes to disclose the extent to which social, environmental or ethical considerations are taken into account in the selection of investments. This

requirement is similar to the obligations imposed on product issuers under s1013D(1)(l), s1013D(2A) of the Act and 7.9.14C of the regulations to the Act.

89. The *Environmental Information Regulations 2004* came into force at the beginning of this year and requires public authorities to make a broad range of environmental information held by them available to the public. The expansion of this into the private sector in respect of Australian publicly listed companies may be of interest.

Belgium

90. Belgium, like a number of other European Union countries, has introduced a voluntary social label, by law. Under the law, a company can acquire a label as long as it meets a number of criteria and is examined by one of the bodies accredited by the Belgian Minister for Economic Affairs. A company applying for the label for one of its products has to submit information on all suppliers and subcontractors directly involved with the making of the product.

The Netherlands

91. The Dutch government has implemented a number of initiatives to promote the use of corporate responsibility in the marketplace. Among these are:

a “green investment directive” that promotes access to finance for environmentally sound projects, and provides that the returns are exempted from income taxes; and

a requirement that companies applying for taxpayer-funded subsidiaries must declare in writing that they are familiar with the OECD guidelines on corporate responsibility, and that they will make an effort to apply them to their operations. The guidelines are voluntary and compliance with them is not monitored.

Austria

92. Among its many initiatives, Austria has developed a code for its travel and tourism industry which is a code of conduct for the protection of children from sexual exploitation in travel and tourism. The overall project which developed the code includes a training component, a clause in contracts with suppliers, information to travellers and reporting guidelines.

North American initiatives

Canada

93. Canada embraces the use of education and training initiatives to advance corporate responsibility. For example, the Canadian government has designed a broad-based website called Strategis, which provides corporate responsibility-related information to corporations

and consumers. It has also designed tools such as the Environmental Management Toolkit and Sustainability Reporting Toolkit, which educate and train businesses (particularly small and medium-sized) to improve on their corporate responsibility practices.

94. Canada also employs regulatory, economic and voluntary initiatives to advance corporate responsibility. Significantly, all federally regulated financial institutions with capital assets in excess of \$1 billion are required to issue an annual Public Accountability Statement which describes their contribution to the economy and society, and all corporations listed on the Toronto Stock Exchange are required to adopt a code of ethics. Corporations also have a choice to register their greenhouse gas emission performance on the Voluntary Challenge Registry, and receive public recognition for it.
95. Canada recognises that its corporate responsibility initiatives will need to evolve over time. It has created a post for the Commission of the Environment and Sustainable Development, to monitor corporate responsibility in Canada. Furthermore, federal departments are required to produce sustainable development strategies every three years and table these in parliament. These actions are designed to ensure that corporate responsibility initiatives are effectively coordinated at the government level.

United States

96. The United States uses regulatory initiatives to increase the amount of information a company is required (or expected) to disclose, in relation to its environmental and social performance.
97. For example, the United States Securities and Exchange Commission requires corporations to disclose actual or contingent environmental costs, such as those relating to site clean-up or remediation and potential claims or penalties. Also, the *Sarbanes-Oxley Act* requires United States listed corporations to disclose whether they have adopted a code of ethics for Chief Executive Officers and senior financial officers to follow, and also requires senior executives to assure the legitimacy of performance reports (by signing off on them).

CONTRIBUTORS

This submission has been prepared on behalf of the TaskForce by:

- Louise Camenzuli
- Joanne Chaina
- Stuart Cork
- Rebecca Dimaridis
- Amelia Dixon
- Jeremy Green
- Carla Koffel
- Janette Kovacic
- Lily Mathews
- Alexandra Milcz
- Revell Norquay
- Kelleigh Rabbitt
- Mariko Ralph
- Hillary Ray
- Anita Roberts
- Davyd Wong