# University of New South Wales

University of New South Wales Faculty of Law Research Series

*Year* 2007 *Paper* 47

# Corporate Responsibility in Australia: Rhetoric or Reality?

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#### **Abstract**

Corporate responsibility involves a notion that companies have some level of responsibility (but not necessarily liability) for social issues that include human rights. But the parameters of such responsibility are unclear. What human rights are relevant to companies? What are the limits on a corporation's 'responsibility' for human rights? To whom is such responsibility owed? Does corporate responsibility involve anything more than a voluntary assumption by companies to act 'ethically'? This article examines the concept of corporate responsibility and its relationship with international human rights law. It then focuses on the particular Australian derivation of corporate responsibility in light of the two recent federal government inquiries in 2005–06. The article concludes by arguing that if corporate responsibility is to be given meaning, it urgently requires greater articulation of both the concept and its limits. A common framework that identifies the rights relevant to business and the limits of a company's responsibility to implement them is required and greater regulatory guidance is needed in setting parameters for corporate reporting on nonfinancial issues. While companies must ultimately take responsibility for what they do and the decisions they take, governments have a key role in providing a framework that articulates the limits of corporate responsibility and clarifies the reporting requirements for non-financial issues that may materially affect corporate performance.

# Corporate responsibility in Australia: rhetoric or reality?

#### Justine Nolan\*

Corporate responsibility involves a notion that companies have some level of responsibility (but not necessarily liability) for social issues that include human rights. But the parameters of such responsibility are unclear. What human rights are relevant to companies? What are the limits on a corporation's 'responsibility' for human rights? To whom is such responsibility owed? Does corporate responsibility involve anything more than a voluntary assumption by companies to act 'ethically'? This article examines the concept of corporate responsibility and its relationship with international human rights law. It then focuses on the particular Australian derivation of corporate responsibility in light of the two recent federal government inquiries in 2005-06. The article concludes by arguing that if corporate responsibility is to be given meaning, it urgently requires greater articulation of both the concept and its limits. A common framework that identifies the rights relevant to business and the limits of a company's responsibility to implement them is required and greater regulatory guidance is needed in setting parameters for corporate reporting on nonfinancial issues. While companies must ultimately take responsibility for what they do and the decisions they take, governments have a key role in providing a framework that articulates the limits of corporate responsibility and clarifies the reporting requirements for non-financial issues that may materially affect corporate performance.

#### Introduction

The last three decades have witnessed an evolution in societal notions of corporate responsibility at both the national and international levels. Most recently, international developments — including the appointment in 2005 of a United Nations Special Representative for business and human rights — have outstripped the willingness of some national governments to confront and more clearly articulate their own understanding of what corporate responsibility entails. It is clear that few companies today do not confront human rights problems of some sort, but the level

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of interest from Australian companies in addressing them has waxed and waned over the past three decades. The Australian approach to corporate responsibility has largely been characterised by short-term initiatives of a philanthropic nature rather than measures designed to integrate the principles of corporate responsibility into corporate culture (Anderson and Landau 2006, 28). In the 1980s, a lawsuit against BHP concerning its OK Tedi mine in Papua New Guinea made front-page news and briefly gave the concept some resonance in the Australian marketplace. However, while interest in corporate responsibility in the following decades continued to gather steam internationally, Australia remained largely immune to any real examination of the concept. Corporate responsibility was, it seemed, a one-hit wonder in the Australian market. Recent media interest in companies such as James Hardie Industries and its equivocating payments to asbestos victims<sup>2</sup> and the corruption allegations against the Australian Wheat Board<sup>3</sup> has brought the issue well and truly back in the public eye. Government interest has also been ignited and the last 12 months in Australia have seen two separate federal government inquiries examining the relevance of corporate responsibility for incorporated entities in Australia.<sup>4</sup> However, while reference is made or lip service is paid to corporate responsibility, for many it remains a nebulous concept. Corporate responsibility, particularly the place of human rights in corporate responsibility, is a contentious issue. Is it an innovative mechanism for providing tangible human rights protection, or a triumph of corporate marketing rhetoric that rewards form over substance?

Corporate responsibility involves a notion that companies have some level of responsibility (but not necessarily liability) for social issues that include human rights.

On 23 March 2005, the Parliamentary Secretary to the Treasurer requested the Corporations and Market Advisory Committee (CAMAC) to consider and report on several issues relating to corporate responsibility. On 23 June 2005, the Parliamentary Joint Committee on Corporations and Financial Services of the Australian Parliament announced that it would conduct an inquiry into corporate responsibility.



See Dagi v BHP, 1995.

See the Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (2004). Also, for an example of the media focus on James Hardie, see <www.abc.net.au/7.30/content /2004/s1204160.htm>.

In November 2005, the Hon T R H Cole was appointed Commissioner to conduct an inquiry into and report on whether decisions, actions, conduct or payments by Australian companies mentioned in the Final Report (Manipulation of the Oil-for-Food Programme by the Iraqi Regime) of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme breached any federal, state or territory law. The Australian Wheat Board is one of the companies being investigated. See <www.ag.gov.au /agd/www/UNOilForFoodInquiry.nsf>.

In many jurisdictions, including Australia, there is an established set of domestic legal regulation governing corporate behaviour, such as that regulating discriminatory behaviour, health and safety in the workplace, environmental protection and labour regulation (Fitzgerald 2005; Bottomley and Kinley 2002). The concept of corporate responsibility looks beyond these specific issues where a company has direct and clear legal obligations to its employees, and examines if other responsibilities might ensue either beyond the domestic jurisdiction and/or to a broader range of stakeholders. But the parameters of such responsibility are unclear. What human rights are relevant to companies? What are the limits on a corporation's 'responsibility' for human rights? To whom is such responsibility owed? Does corporate responsibility involve anything more than a voluntary assumption by companies to act 'ethically'? What role should government play in promoting, encouraging or even regulating corporate responsibility? For some, corporate involvement in the promotion and protection of human rights is a necessary, if innovative, supplement to duties traditionally assumed by governments. Under international human rights law, the primary responsibility for human rights rests with states, but there is an emerging realisation in many parts of the world that business also has an important role to play in the promotion and protection of human rights (Ratner 2001). In Australia, the report issued in June 2006 by the Parliamentary Joint Committee on Corporations and Financial Services noted that 'corporate responsibility is emerging as an issue of critical importance in Australia's mainstream business community' (PJCFS 2006, xiii). However, others suggest that for many Australian companies there is little to indicate that they have gone beyond the rhetoric stage by incorporating the precepts of corporate responsibility into practice (Sweeney 2001, 91; Anderson and Landau 2006, 28).

Globally, the issue is steadily gaining prominence and has been recently debated by the United Nations Commission on Human Rights (now Human Rights Council), culminating in the appointment in 2005 of the first ever United Nations Special Representative for business and human rights (UN Resolution).<sup>5</sup> The growing acceptance (in some circles) of a broad concept of corporate responsibility signifies acknowledgment of the influence of corporations on the economic and political life of most countries. The debate about corporate responsibility has largely centred on the conduct of transnational corporations (TNCs).<sup>6</sup> The largest corporations,

<sup>6</sup> The term 'transnational corporation' refers to an economic entity operating in more than one country, or a cluster of economic entities operating in two or more countries — whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively (Norms 2003, Art I).



<sup>5</sup> The most recent report of the Special Representative to the UN Human Rights Council was issued on 9 February 2007 (Ruggie 2007).

generally TNCs, are more powerful, influential and wealthy than the poorest countries. There are conceptual and practical difficulties in requiring a less powerful entity to be responsible for the actions of a more powerful entity (UNRISD 2004, 1; Joseph 2004, 1). The notion that this power should be accompanied by some level of responsibility lies at the heart of the corporate responsibility movement. However, there is a distinct lack of consensus about the nature and extent of such responsibility and the most appropriate forum for 'enforcing' it. Some view corporate responsibility as simply encompassing voluntary activities that might boost a corporation's ethical profile. Others are looking for the movement to produce some sort of (legal) accountability for human rights protection. Some attempt to employ international human rights law as a mechanism for more clearly defining the parameters of corporate responsibility; others argue that corporate law provides the more appropriate forum. This article begins by examining the concept of corporate responsibility and its emergence in international human rights law. It then focuses on the particular Australian derivation of corporate responsibility and the corporate law framework within which it is largely viewed in Australia. Finally, the article concludes by examining the future of corporate responsibility and the issues that must be addressed if it is to have a future in protecting human rights in the Australian marketplace or indeed in any marketplace.

#### Corporate responsibility: a concept in search of definition

While corporate responsibility seems to have become a 'hot' topic for politicians, companies and the media in many countries over the last three decades, it is still without a firm definition. This lack of precision around the concept has led some to question whether there is substance behind the words or whether corporate responsibility is just all talk or even a 'con job' (Albrechtsen 2006). But despite, or perhaps because of, these queries, discussion of corporate responsibility seems to have only accelerated in the years since economist Milton Friedman first argued that discussion of the 'social responsibilities' of companies has no place in the boardroom.<sup>7</sup>

Corporate responsibility is an exceptionally broad-reaching and varied melange of soft and hard law, encompassing subjects as diverse as the environmental and fiscal responsibilities of corporations; occupational health and safety; labour rights; and, most importantly for this discussion, human rights obligations. Corporate responsibility can be generally described in terms of a company managing the

See Milton Friedman's classic enunciation of this view when, more than 30 years ago, he argued that 'there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game ...' (Friedman 1970, 32).



economic, social and environmental impacts of its activities. The relevance of human rights is captured in the 'social' aspect of that tripartite definition. It was this broad impact-oriented definition that was adopted by the recent Australian Parliamentary Inquiry (PJCFS 2006, xiii). However, at the same time, the Inquiry acknowledged that the concept can mean different things to different people and made no further attempt to conclusively define the term (PJCFS 2006, xiii). The Corporations and Markets Advisory Committee noted in its December 2006 report that 'the focus of the issue of corporate social responsibility is on the way in which the affairs of companies are conducted and the end to which their activities are directed, with particular reference to the environmental and social impact of their conduct' (CAMAC 2006, 15). In the United Kingdom, the government has been studying the concept of 'corporate social responsibility' (CSR) for some years8 in the context of corporate law reform and defines the concept generally as 'how business takes account of its economic, social and environmental impacts in the way it operates — maximising the benefits and minimising the downsides'. Specifically, it notes that CSR is all about 'voluntary actions that business can take, over and above compliance with minimum legal requirements, to address both its own competitive interests and the interests of wider society' (<www.csr.gov.uk/whatiscsr.shtml>). The emphasis on voluntariness is a crucial aspect of both the Australian and the British governmental approaches. Corporate responsibility is viewed as something that companies should be encouraged to do, but not necessarily legally obligated to do.9

Other groups have chosen different definitions, no one more accepted than any other. For example, the World Business Council for Sustainable Development defines corporate responsibility rather abstractly as 'the commitment of business to contribute to sustainable economic development, working with their employees, their families, the local community and society at large to improve their quality of life' (KPMG 2005, 10). Business for Social Responsibility, a leading US-based corporate responsibility organisation, interprets it as a means of addressing the legal, ethical, commercial and other expectations society has for business, and making decisions that fairly balance the claims of all key stakeholders (<www.bsr.org>). The key features of many definitions tend to be a focus on the long-term impact of not only the economic aspects of corporate practices, but also their social and environmental impacts and the principle that organisations owe an obligation to a broader set of stakeholders beyond simply shareholders.

<sup>9</sup> However, s 172 of the UK Companies Act 2006, which imposes a new potentially broad duty on company directors to have regard to the impact of a company on the community and the environment, may now challenge this traditional view. See discussion at note 26 below.



<sup>8</sup> The UK has had a Minister for Corporate Social Responsibility since 2000.

The growing acknowledgment of corporate responsibility and the accompanying relevance of human rights to business is not a purely legal issue. A recent global survey conducted among 21,000 respondents in 20 industrial countries and emerging markets noted that eight out of 10 people assigned at least part of the duty to reduce the number of human rights abuses around the world to large companies (GlobeScan 2005). Such social surveys do not result in legal consequences for business, but are indicative of the increased pressure faced by companies to assume duties that have been traditionally held by states. The corporate world has demonstrable global reach and capacity and can often make and act on decisions far faster than governments (Ruggie 2002). The corporate responsibility movement aims to put this efficiency to greater use by employing the corporate machinery in the protection of human rights. However, the blending of human rights with business has not been a seamless merger.

The traditional application of international human rights law is to bind states because states have long been regarded as the most prominent potential violators of human rights. The drafters of the Universal Declaration of Human Rights (UDHR) could not have foreseen in 1948 that select states' powers might one day be dwarfed by corporate power. 10 As such, the emphasis in the UDHR, and in international human rights law generally, is on states as the primary bearers of human rights responsibility. This does not mean, however, that other actors have no obligations. The preamble to the UDHR states that 'every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance'. Increasingly, human rights activists draw on this statement as a basis for arguing that corporate responsibility should be transformed into 'corporate accountability' that holds companies legally liable for protecting human rights. Although this statement in the UDHR's preamble has been interpreted as excluding 'no company, no market, no cyberspace' (Henkin 1999, 25), the UDHR is a declaration and thus is non-binding. The text of the Declaration provides further substance for divining a responsibility for business to engage with human rights. For example, Art 29 acknowledges that '[e]veryone [including non-state actors] has [non-specific] duties to the community' and Art 30 prohibits 'any State, group or person' from engaging in any activity or performing any act aimed at the destruction of any of the rights and freedoms in the Declaration. Ultimately, it is difficult to avoid the conclusion that the provisions in the UDHR express no more than a desire that business might 'strive' to promote respect for human rights, rather than impose any binding legal obligation (Kinley and Tadaki 2003-04, 948).

For example, the American retailer Walmart is one of the world's largest companies, with revenues of over US\$287 billion in 2005. See <a href="https://www.money.cnn.com/magazines/fortune/global500/2005/index.">www.money.cnn.com/magazines/fortune/global500/2005/index.</a> html>. By contrast, the IMF estimates Cambodia's GDP in 2005 to be approximately US\$4.5 billion.



In the nearly 60 years since the drafting of the UDHR, international human rights law has continued to emphasise the primary responsibility of states to protect human rights, while remaining at least partially blind to the opportunity to speak more directly to powerful non-state actors such as corporations.<sup>11</sup> As the influence of business has increased, international human rights law has barely responded to this growing imbalance of power between large corporations and some states. However, other mechanisms, in particular soft law standards and voluntary codes of conduct, have stepped into the breach in an attempt to close the gap between law and practice. Since the 1970s, a number of attempts have been made to draft voluntary guidelines, declarations and codes of conduct to regulate the activities of business with respect to human rights. The most notable of these (at an inter-governmental level) are the Organisation for Economic Cooperation and Development Guidelines for Multinational Enterprises, the International Labour Organisation's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy<sup>12</sup> and the International Labour Organisation's Tripartite Declaration on Fundamental Principles and Rights at Work. All are non-binding and state-focused and, while they aim to delineate more clearly the relevance of human rights to business and encourage companies to promote and protect internationally recognised human rights, there are no effective, independent enforcement mechanisms to ensure that they do so. Decisions cannot be enforced directly against a company and their power to compel behavioural changes remains subject to the political will and ability of national governments (ICHRP 2002, 99-102). More recently, in 2000, the United Nations established the Global Compact, whereby the UN Secretary-General, Kofi Annan, called on world business leaders to voluntarily 'embrace and enact' in their individual corporate practices a set of 10 principles relating to human rights, labour rights, the protection of the environment

The Declarations can be seen as providing guidance for how corporations should implement the fundamental International Labour Organisation conventions. The overarching obligations with respect to labour rights are set out in the eight fundamental conventions of the ILO: Forced Labour Convention; Freedom of Association and Protection of the Right to Organise Convention; Right to Organise and Collective Bargaining Convention; Equal Remuneration Convention; Abolition of Forced Labor Convention; Discrimination (Employment and Occupation) Convention; Minimum Age Convention; and Worst Forms of Child Labour Convention. These Conventions are legally binding on those states that have ratified them. Obligations then exist at a national level to ensure enforcement of these rights by corporations; they do not directly bind companies.



It is possible to move beyond the state-centred focus of human rights treaties by drafting a treaty that, while still signed by states, enunciates more clearly obligations for how states should deal with private parties and the responsibilities that ensue. Models already exist; for example, see the International Convention on Civil Liability for Oil Pollution Damage and the United Nations Convention on Contract for the International Sale of Goods. See further Kinley and Tadaki 2003–04, 994.

and corruption. The United Nations Global Compact seeks to promote what it vaguely refers to as 'responsible corporate citizenship so that business can be part of the solution to the challenges of globalisation' (<www.unglobalcompact.org>).

These soft law standards are notable for their emphasis on the voluntary aspect of corporate responsibility. The division between voluntary and mandatory actions that corporations might undertake with respect to the protection of human rights is becoming increasingly apparent in the emerging terminology divide within the corporate responsibility movement. Corporate responsibility, corporate social responsibility and corporate citizenship are becoming synonymous with a voluntary uptake of ethical conduct by corporations that is not legally enforceable. Recently, as the limits of such soft law standards and the vagrancy of the voluntary approach have started to become more apparent, alternative methods emphasising corporate accountability are emerging (Nolan 2005b). The interest of a large number of civil society groups, including some high-profile human rights groups, in promoting corporate accountability over corporate responsibility is evidenced by their unified stance towards the development of the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms) (Amnesty International 2004). The Norms constitute the most recent attempt to definitively outline the human rights and environmental responsibilities attributable to business. The Norms, drafted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights and debated for the first time by the United Nations Commission of Human Rights in 2004 and again in 2005, provoked diverse reactions from business, governments, human rights organisations and international and corporate lawyers.<sup>13</sup>

The rights encompassed by the Norms cover a wide spectrum of human rights, including the most fundamental and basic rights that have been agreed as accepted standards for nation states and individuals for decades. For example, the Norms

For a negative reaction, see IOE and ICC 2003. In contrast, the Business Leaders Initiative on Human Rights (BLIHR), chaired by Mary Robinson, the former United Nations High Commissioner of Human Rights, is 'road-testing' the Norms. Participating companies are Alcan, AREVA, Novartis, National Grid, Body Shop, Barclay's Bank, MTV Europe, Novo Nordisk, ABB, Hewlett Packard, Statoil and Gap Inc. The response of both the United States and the Australian governments to the Norms is indicative of the wary negative approach adopted by several states with regard to the possibility of developing binding corporate accountability measures. See, for example, the stakeholder submissions of the US and Australia to the Office of the High Commissioner for Human Rights. The US and Australia were two of only three countries that voted against the 2005 resolution of the Commission on Human Rights calling for an appointment of a Special Representative on business and human rights issues.



state that businesses should not engage in, nor benefit from, war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking and other international crimes against the human person (Art C). Equally, security arrangements for businesses should observe international human rights, as well as the laws and professional standards of the countries in which they operate. Businesses should ensure equality of opportunity and treatment (Art B). Businesses should provide a safe and healthy working environment; should provide workers with remuneration that ensures an adequate standard of living for them and their families; and should not use child labour. Freedom of association and effective recognition of the right to collective bargaining should be guaranteed (Art D). The Norms also prohibit business involvement in corrupt practices and bribery and incorporate restrictions relating to fair business practices, marketing and advertising (Arts E-F).<sup>14</sup> The Norms acknowledge the proximity of business and environmental issues, and state (rather broadly) that business practices should be conducted in a manner consistent with preserving the environment and in a manner so as to contribute to the wider goal of sustainable development (Art E). Finally, a 'catch all' obligation is imposed on business to:

... respect economic, social and cultural rights as well as civil and political rights and contribute to their realisation, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realisation of those rights. [Art G.]

The comprehensive nature of the rights included in the Norms and its initial attempt to introduce some type of regulatory mechanism for enforcing such rights (Norms 2003, Art H) led to a polarisation of opinions about the appropriateness and mode of business's 'responsibility' for human rights. In 2005, in an attempt to overcome the deadlock that ensued from the incompatible positions embraced by different stakeholders towards the Norms, the UN Commission on Human Rights adopted a resolution on Human Rights and Transnational Corporations and Other Businesses, which requested the Secretary-General to appoint a Special Representative on the Issue of Human Rights and Transnational Corporations and Other Businesses (UN Resolution). On 28 July 2005, Professor John Ruggie was

Issues relating to irresponsible marketing may not be considered by some as a primary human rights concern, but the experience of Nestlé and its inappropriate marketing of baby-milk products in Africa provide a useful example of how these restrictions are relevant to human rights. Subsequent to, and in part contingent on, Nestlé's experience, the World Health Organization adopted an International Code of Marketing of Breast-Milk Substitutes.



appointed as the Special Representative to the Secretary-General (SRSG) and was given the task of moving the debate beyond the current political impasse, as well as the mandate to focus on (in part) defining the human rights relevant to business and to elaborate on the role of states in regulating and adjudicating business on such issues.<sup>15</sup>

Demand for stronger notions of corporate accountability and impatience with the slow response of international human rights law to corporate abuses of human rights is also evidenced by a new wave of litigation against companies alleged to have violated human rights. Corporations are increasingly facing scrutiny for the effect of their operations on human rights, and the Alien Torts Claims Act (the ATCA) in the United States (legislation not traditionally applied to business activities) is one tool that is being used to emphasise this link in the public arena. The ATCA was passed by the US Congress in 1789 and provides District Courts with jurisdiction over violations of the 'law of nations'.  $^{16}$  In the modern era, courts have allowed foreign victims to use the ATCA to address egregious human rights violations. More recently, the ATCA has been used against corporations that allegedly have been knowingly complicit in human rights violations. Cases have also proceeded under ordinary tort law in the US (Joseph 2004, 65) and other common law countries such as the United Kingdom (Lubbe v Cape plc) and Australia (Dagi v BHP). In Kasky v Nike, an action was brought against Nike in California under consumer protection legislation, whereby Nike was accused of misleading and deceptive practices in denying human rights abuses within its supply chains.<sup>17</sup> So far, these cases have proceeded slowly as numerous procedural arguments, such as forum non conveniens (FNC), 18 have been raised by

<sup>18</sup> FNC is a common law doctrine which allows judges to dismiss cases on the basis that the case should be heard in another forum.



<sup>15</sup> The Interim Report of the Secretary-General's Special Representative was released on 22 February 2006. The SRSG has already noted the 'existing time and resource constraints' (Ruggie 2006, para 6), which will inevitably limit the scope of his final report due in 2007; however, there is a strong probability that his mandate will be extended in line with UN practice.

The Alien Tort Claims Act was passed as part of s 9 of the Judiciary Act (1789). The Act in its entirety reads:

'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' For an overview of cases brought under the ATCA with respect to corporate liability, see generally Joseph 2004.

<sup>17</sup> Regarding the possibilities of such an action being replicated in Australia under s 52 of the *Trade Practices Act* 1974 (Cth), see Spencer 2003, 297.

defendants to have the cases dismissed. However, an increasing number of cases are making it through these procedural hurdles and will, barring settlement, proceed to the merits.<sup>19</sup>

The resort to litigation, or perhaps at least the threat of litigation, and the attempted emergence of 'harder' forms of corporate accountability in the mode of the UN Norms are indicative of the frustration of trying to fit corporate responsibility within the framework of international human rights law. International human rights law provides valuable guidance in terms of the human rights relevant to business, but the mechanisms for practical enforcement are lacking. Part of the perceived problem with imposing international legal obligations directly on corporations has been that it 'privatises human rights' (IOE and ICC 2003). Under the extreme version of this argument, the Norms are accused of absolving states of their international human rights law responsibilities by placing obligations on institutions that are neither democratically elected nor qualified to make the sorts of difficult decisions regarding human rights that are required by international law. The old adage of trying unsuccessfully to fit a square peg into a round hole seems fitting. But it should be emphasised that it does not follow that assigning a portion of responsibility to corporations with respect to human rights results in a corresponding reduction of the state's obligations to protect such rights. The obligations of companies should and can supplement and not replace state obligations, but the question still remains as to the most effective method for securing corporate compliance with human rights norms. Despite the cogent arguments for an international document that speaks directly to corporations, the way forward will inevitably be through the international legal orthodoxy of state responsibility (Kinley and Chambers 2006). International human rights law does not seem yet ready to communicate more directly (even through states) to business. As such, the increasingly common soft law standards that attempt to more aggressively merge human rights responsibilities with business offer an important path forward for divining an emerging consensus on the human rights most relevant to business and provide guidance, but are unlikely to transform in the short term into legal obligations for corporate best practice.

<sup>19</sup> The International Criminal Court (ICC) also offers another opportunity for using the law to hold individuals within companies accountable for egregious human rights abuses. The ICC is a permanent tribunal that investigates and tries individuals for the most serious international crimes: genocide, crimes against humanity and war crimes. The current prosecutor of the ICC, Luis Moreno-Ocampo, has indicated that officials of corporations could be held accountable before the ICC for directly or indirectly facilitating conduct that leads to violations of international law. The ICC can only investigate events that occurred after the treaty was entered into force, on 1 July 2002. For a discussion of the ongoing investigation into Australian company Anvil Mining and its liability for egregious human rights abuses, see Nolan 2005a, 451.



#### Is corporate law reform the answer?

Given what some might regard as the incompatibility of international human rights law to fully embrace and 'enforce' corporate responsibility on the global stage, other legal arenas are facing scrutiny as to whether they could adequately house some notion of corporate responsibility and what that would entail. In Australia, the debate around corporate responsibility has taken place over some decades and has primarily considered the issue from the perspective of corporate law, not always a comfortable fit with human rights.<sup>20</sup> Relevant issues in the general corporate responsibility debate were discussed by the Senate Standing Committee on Legal and Constitutional Affairs in its report Company Directors' Duties (1989), but went largely unnoticed by most. However, corporate responsibility burst onto the public arena in the last few years fuelled by media interest in the James Hardie company and its obligation (or not) to compensate victims injured by the asbestos content in its products. The 2004 Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation found that James Hardie was not legally obliged to pay compensation, but it clearly implied a moral obligation to do so. Union, media, governmental and public interest in the issue was a major factor in bringing James Hardie to the negotiation table. The report of Commissioner Cole into the bribery and corruption allegations concerning the Australian Wheat Board (AWB) raised further questions about both corporate and governmental roles in promoting compliance with international human rights standards and the limits, legal or otherwise, of corporate responsibility (Cole 2006). In the case of the AWB, the Cole report indicated that the legal line of corporate misconduct was crossed and inquiries are ongoing as to whether criminal and corporate offences will be laid against the AWB's principal corporate officers. The long-running inquiry substantiated allegations of payment by the AWB of hundreds of millions of dollars worth of kickbacks to Saddam Hussein's regime, but also heard evidence that government ministers and officials missed, largely ignored or failed to fully investigate dozens of warnings about the AWB's illicit payments. Although beyond the limited ambit of the Cole inquiry, the investigation raises questions about whether the government and relevant corporate regulatory agencies should be required to take a clearer role in at least encouraging corporations such as the AWB and James Hardie to take a stronger ethical position and provide clearer guidance on what such a 'corporate responsible position' might entail?

Around the same time that the AWB was being investigated for allegedly proffering up to \$290 million in illegal payments to Saddam Hussein's regime in Iraq, it was also participating in the Australian Corporate Responsibility Index, seeking

<sup>20</sup> For a fuller discussion on corporate responsibility and Australian domestic law beyond corporate law, see Fitzgerald 2005.



validation of its corporate responsibility initiatives. Participation in the Australian Corporate Responsibility Index by the AWB at this time is symptomatic of the pitfalls of relying on such voluntary self-assessment tools to publicly review a company's corporate responsibility credentials. In his report, Commissioner Cole highlighted the company's internal corporate culture as a factor in supporting and condoning its unethical and, in this case, clearly illegal actions, none of which was evident in the results of how the AWB performed in respect of the Corporate Responsibility Index. Cole concluded that the AWB was focused on doing whatever was necessary to maintain its trading contracts with Iraq and that the AWB board of management failed to 'create, instil or maintain a culture of ethical dealing' (Cole 2006, xii). The AWB was crippled by a closed corporate culture of 'superiority and impregnability, of dominance and self-importance' (Cole 2006, xii). As long as corporate responsibility is dependant on corporate self-assessment mechanisms for divining and publicly reporting on the nature, limits and level of 'corporate responsibility' within a company's confines, it will continue to be a random process (and concept) that offers little to a company's own investors or the public in terms of transparency, consistency and comparability of reporting. While legislation may not alone be able to destroy or create a 'responsible' corporate culture, a starting point is for business to at least be provided with greater clarity and guidance about society's expectations of what corporate responsibility demands, and this is where government has an obvious role to play.

The role government might play with respect to more clearly defining the limits of corporate responsibility and the relevance of international human rights standards to corporations is accepted more readily in some jurisdictions than in others. Australian regulators have not been proactive in this area and corporate responsibility, including respect for human rights, has been an issue that has largely been left to the market to determine. This is perhaps in part influenced by Australia's generally chequered history in dealing with its state responsibilities for international human rights standards — emerging as a champion of ratifying treaties, but less than effective in implementing them (Charlesworth et al 2006, 65). Given this background, it is unsurprising (and necessary, given the limited legislative protection for international human rights generally in Australia) (Williams 2004) that corporate law has surfaced as a possible arena for addressing the human rights responsibilities of corporations. Companies are not obliged to go beyond compliance with the law, but

<sup>21</sup> For example, as noted above, the United Kingdom appointed a Minister for Corporate Responsibility in 2000. Also consider US calls for national corporate responsibility regulation in light of the February 2006 US congressional inquiry (Committee on International Relations, US House of Representatives) into the activities of technology companies (such as Microsoft, Cisco and Google) in China and their role in internet censorship.



the James Hardie debate raised questions anew about a company's responsibility to also comply with the 'spirit' of its legal obligations. Indeed, the report issued in late 2006 by the Australian Government's Corporations and Market Advisory Committee (CAMAC) acknowledged that companies that promote full compliance with both 'the "spirit" as well as the "letter" of legal obligations may signify a well-managed and responsible company' (CAMAC 2006, 36). But such musings should be given clarity and this is, in part, what the two federal government inquiries into corporate responsibility were focused on in 2005–06.

Housing corporate responsibility in corporate law provides an opportunity to mainstream human rights issues into the corporate arena. For example, the international human rights standards espoused in the Norms could be linked to corporate public reporting requirements, whether in annual reports or in respect of specific legislation. Recent legislative initiatives in the United Kingdom, France and South Africa indicate a willingness by corporate regulatory agencies within these jurisdictions to adopt a more expansive view of what issues are considered material to a corporation's short- and long-term performance, thus requiring disclosure and increasing corporate transparency in a company's public reports.<sup>22</sup> Discussion has also focused on the duty of a director to act in the best interests of a company, and whether this includes accounting for interests of other stakeholders (such as employees, customers, suppliers) beyond simply the company's shareholders. Ultimately, the Australian inquiries were assessing the role government can or should play in promoting and regulating 'socially responsible behaviour by companies' (CAMAC 2006, vii), and whether the existing legal framework should be amended to clarify any such corporate responsibility for human rights. Like the Parliamentary Inquiry's report released in June 2006, CAMAC's report (released in December 2006) recommended maintenance of the status quo and did not recommend any substantial changes to corporations law that might clarify the nature and limits of corporate

<sup>22</sup> For example, superannuation legislation in the United Kingdom and Australia has incorporated reporting requirements with respect to certain human rights. Also, France has introduced mandatory annual disclosure and reporting requirements for the largest corporations under French law (the New Economics Regulations were adopted in May 2001 by the Parliament and came into force on January 2002). In South Africa, the Johannesburg Securities Exchange adopted a Code of Corporate Practices and Conduct that requires all publicly listed corporations to disclose non-financial information in accordance with the Global Reporting Initiative Sustainability Reporting Guidelines. Attempts to expand corporate reporting requirements have also featured in Corporate Code of Conduct Bills introduced in the United States, the United Kingdom and Australia. No such Bills have yet been enacted. For a discussion of each of these Bills, see McBeth 2004.



responsibility. Both the Parliamentary Inquiry and CAMAC supported the existing legal framework that relies on business adopting an 'enlightened self-interest' approach to companies integrating human rights and corporate responsibility notions into their operations.

The PJCFS acknowledged that, despite evidence that Australian companies have shown greater engagement with the corporate responsibility agenda over the past decade, by international standards Australia still lags in implementing and reporting on corporate responsibility (PJCFS 2006, xiii). However, despite this, both CAMAC and the Parliamentary Committee concluded that the existing legal framework is adequate and that the desire of most companies to avoid regulation would voluntarily spur business to 'improve responsible corporate performance' (PJCFS 2006, xiv). Both inquiries concluded that the *Corporations Act 2001* (Cth) currently permits directors to have regard for the interests of stakeholders other than shareholders, and as such amendment was not required. The PJCFS also noted that sustainability reporting (reporting on economic, social and environmental performance) should remain voluntary. Arguments that mandatory reporting of the social aspects of corporate performance might lead to a 'tick the box' culture of compliance were accepted and it was agreed that encouraging companies to engage voluntarily in sustainability reporting is the best approach.

CAMAC assigned its aspirations for improved corporate reporting on non-financial issues, such as human rights compliance, to a new provision in the *Corporations Act* which requires listed companies to provide an operating and financial review (OFR). Section 299A requires that an OFR be included in the annual reports of listed companies from 2005. The provision requires disclosure of information that shareholders would reasonably require to make an informed assessment of the operations of the company; its financial position; and its business strategies and prospects for future financial years.<sup>23</sup> Section 299A is intentionally expressed in broad terms and does not specifically refer to social or environmental issues, but the Explanatory Memorandum to s 299A directs companies to the G100's *Guide to Review of Operations and Financial Conditions*, which specifically references the relevance of non-financial issues in assessing corporate performance (Group of 100 2003, 21). The G100 *Guide* suggests that the OFR should include discussion of key non-financial indicators, including social and environmental performance measures. The *Guide* argues that 'disclosure of information about unrecognised intangible assets such as

<sup>23</sup> The Corporations Act allows for limited consideration of social and environmental issues in two other specific instances. Sections 299(1)(f) and 1013D are currently the clearest examples of attempting to make 'non-financial' issues material to Australian companies, though both are restricted in their scope.



... human resources, customer and supplier relationships and innovations is helpful to users in making decisions'. Section 299A is potentially a significant development in broadening the reporting requirements of Australian listed companies to include reference to material non-financial issues, which might include human rights compliance, but much will depend on the breadth with which companies interpret the provision as to whether there will be any major change in the quantity or quality of information reported. The lack of specific guidance within the provision itself may mean that disclosure will continue to be dominated by a short-term focus that prioritises issues that have an immediate effect on the share price of a corporation, rather than including longer-term environmental or social trends that may also affect the corporation.<sup>24</sup>

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These conclusions of the PJCFS and CAMAC that emphasise the voluntariness of corporate responsibility are perhaps not surprising, given the overarching views of the federal government. The Australian Government made its stance on corporate responsibility clear in its official response in late 2004 to the proposed UN Norms in the context of their debate by the UN Human Rights Commission. Writing in the context of international legal responsibility for human rights standards, the government's formal response made these revealing comments:

The Australian Government is strongly committed to the principle that guidelines for Corporate Social Responsibility (CSR) should be voluntary. The Norms represent a major shift away from voluntary adherence. The need for such a shift has not been demonstrated ... We believe the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging greater awareness of societal values and concerns through voluntary initiatives. [Australian Permanent Mission 2004, 1.]

Consistent with this approach, the PJCFS recommended the establishment of an Australian Corporate Responsibility Network that would be an industry vehicle to raise the collective level of corporate responsibility performance in Australia (PJCFS 2006, 145). However, voluntarism has its limits — particularly if initiatives remain exclusively the domain of business. Network learning may act as an impetus for improving corporate behaviour, but only if business takes the next step and

<sup>24</sup> The ASX Corporate Governance Council's *Principles of Good Corporate Governance and Best Practice Recommendations* also provides guidance for reporting by companies listed on the ASX. ASX Listing Rule 4.10.3 requires listed entities to provide a statement in their annual report disclosing the extent to which they have followed the recommendations of the ASX Corporate Governance Council; identifying any recommendations that they have not followed; and giving reasons for not following them (known as the 'if not why not' reporting requirement).



incorporates it into its practices.<sup>25</sup> For corporate responsibility to survive and indeed succeed in Australia, companies must be open to and seek input from a broad array of stakeholders (such as its employees, its customers and the community in which it operates) as to the relevance of human rights in its business operations and the most effective means of ensuring that such rights are respected, promoted and protected. The prominent role of corporations in society and the perceived reach of corporate activities and influence rightly give rise to concern about the impact of corporate conduct on the broader community. However, limits should be placed on the assumed extent of a company's influence. It is not the role of a company to act as a substitute for government and much depends on the closeness of the connection between a company and its stakeholders. There is a sliding, and at this point in time still largely undefined, scale of responsibility between a company and the victim or violator of the human rights abuses. The more direct the connection, the greater the responsibility placed on the company to prevent or protect from such abuse. The opportunity to more clearly define such responsibility and set its parameters has once again been passed up by regulators and, as such in Australia, corporate responsibility remains a rather nebulous concept that relies on the 'enlightened selfinterest' of companies to voluntarily improve corporate practices. The principles, in particular the human rights standards, which a company must adhere to in the pursuit of responsible corporate behaviour should be clearly specified and parameters should be set for reporting on significant non-financial issues that may affect corporate performance. Without this, it will not be possible for external stakeholders to evaluate and verify the outcomes. As is apparent in the paradox of the AWB participating in the 2005 Corporate Responsibility Index while paying bribes to a regime that flagrantly violated human rights, the lack of clarity in the nature and scope of corporate responsibility in Australia at present leaves far too much room for speculation as to whether or not a business is adhering to 'responsible corporate performance' (PJCFS 2006, xiv).

#### Corporate responsibility: where to from here?

It is increasingly apparent that there is a need for greater clarity at the international level, as well as domestically, on the nature and extent of business responsibility for respecting, promoting and protecting human rights. If corporate responsibility is to be given meaning, then a common framework that identifies the rights relevant to business and the limits of a company's responsibility to implement them is required. Some of this work has been done, but most is still ongoing.

Network learning is also the backbone of the United Nations Global Compact, an initiative of which the author is somewhat critical. See Nolan 2005a.



The core substantive provisions of the UN Norms provide the most obvious starting point for compiling the list of rights relevant to business. This list needs to be refined and translated into a language that companies can interpret. This is most likely to be effective if done at a domestic level through, among others means, corporate law reform.<sup>26</sup> Greater clarity and standardisation of corporate reporting on non-financial matters, such as human rights, that are material to corporate performance is one mechanism that has been adopted in both France and South Africa in recent years.<sup>27</sup> In the United Kingdom, the Companies Act 2006 takes a more proactive regulatory approach to corporate responsibility by clarifying that directors of companies in fulfilling their duty to act in good faith to promote the success of the company 'must have regard to' (among other things) 'the impact of the company's operations on the community and the environment' and 'the desirability of the company maintaining a reputation for high standards of business conduct' (Companies Act 2006 (UK), s 172). While still containing some uncertainty as to what form the 'regard' of such non-shareholder interests should take and whether it is a subjective or objective test, it is a step in the direction of clarifying that corporations should look beyond shareholders when assessing the impact of their operations.

Beyond explicating the nature of the relevant human rights, companies need clearer guidance on the limits of corporate responsibility for human rights. As has been acknowledged above, corporate responsibility for human rights is intended not to replace governmental responsibility, but instead to supplement it. As stated by the Secretary-General's Special Representative on business and human rights, 'we live in a world of proliferating "problems without passports" and there is no government at the global level that can respond to them' (Ruggie 2002). The corporate sector has the opportunity — and, some might argue, the moral, and occasionally legal, obligation — to assist. However, a company is not a government and there must be limits on how far corporate responsibility extends. Companies involved in the Business Leaders Initiative on Human Rights (BLIHR) (which does not include any Australian companies as yet) are proactively working to define such limits. BLIHR is attempting to translate human rights into a business context and, in doing so, help to define the boundaries of responsibility. It is examining



Other mechanisms could be legislative code of conduct Bills, such as those discussed above at note 22 by McBeth 2004. However, such regulation is unlikely in Australia, given that neither of the two major political parties was supportive of the initial bill introduced by the Democrats in 2000.

<sup>27</sup> See discussion above at note 23.

which human rights standards are 'essential' business behaviour, and which can be categorised as 'expected' or 'desirable'. The companies involved in BLIHR clearly recognise that corporate responsibility is being refined by a variety of social, legal and political forces and, as societal expectations of business change, 'expected' behaviour today could become 'essential' behaviour tomorrow. Governments could assist in this endeavour by clarifying what non-financial issues companies should publicly report.

While the UN Secretary-General's Special Representative struggles to find a way through the political impasse in the international arena to blend human rights and business, so too must the attention of national governments focus on this new opportunity to divine a mechanism for protecting human rights. The intermarriage of human rights and business presents both a conceptual and a practical challenge. From the perspective of international human rights law, there must be acceptance that the traditional state-centric legal framework does not adequately cater for powerful nonstate actors, such as corporations. Corporate lawyers must accept the conceptual challenge to at least consider that the purpose of corporations has evolved beyond the limits of Milton Friedman's dogmatic definition and now includes the responsibility to consider and manage the 'social' impact of its activities on a broader set of stakeholders, beyond shareholders. The practical challenge to both camps is to find mechanisms for 'enforcing' corporate responsibility for human rights that incorporates a multiplicity of approaches. Greater transparency of reporting and clarification of corporate duties is key, along with measures advocating credible monitoring mechanisms for measuring corporate performance. Corporate liability for compensating victims of human rights abuses has also been raised as a mechanism for strengthening corporate accountability, and the practicalities of where and by whom such judgment should be made should be debated. Companies are increasingly being assigned moral responsibility for some rights. Corporations and their broad set of stakeholders deserve to have such expectations dealt with in a positive and constructive manner. The responsibility should not simply be placed on those 'enlightened' companies that are willing to act voluntarily in the pursuit of a more responsible paradigm for operating. Responsibility for human rights is a shared responsibility — states, corporations, civil society and individuals all have roles to play in promoting and protecting rights and a new framework that rethinks traditional roles and apportions, supplements and complements responsibility between the various players is needed. For corporate responsibility to have substance and provide a real means of protecting human rights, it first requires greater articulation of the nature and limits of corporate responsibility and leadership from national governments in clarifying what exactly 'responsible corporate performance' entails and how it should be measured.



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