

The adoption by companies of Corporate Social Responsibility (CSR) policies is routinely characterised as voluntary. But if CSR is self-governance by business, it is self-governance that has received a firm push from external social and market forces, from forces of social accountability.

Law is also playing a more significant role than the image of CSR suggests, and this legal accountability – the focus of the book – is set to increase. Legal intervention should not, however, be seen as making social accountability redundant. Wider ethical standards and social and market forces are also necessary to make legal regulation effective. Law is being brought into play in innovative and indirect ways. The initiative lies as much with private organisations as with the state. At the same time governments are using social and market forces to foster CSR. In the context of Corporate Social Responsibility, a new, multi-faceted, corporate accountability is emerging.

Doreen McBarnet is Professor of Socio-Legal Studies at the Centre for Socio-Legal Studies, University of Oxford.

Aurora Voiculescu is Lecturer in Law at the Centre for Law, Open University.

Tom Campbell is Professorial Fellow at the Centre for Applied Philosophy and Public Ethics (CAPPE), Charles Sturt University.

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McBarnet
Voiculescu and
Campbell

The New Corporate Accountability

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Corporate Social Responsibility
and the Law

Edited by **Doreen McBarnet,**
Aurora Voiculescu and
Tom Campbell

CAMBRIDGE

THE NEW CORPORATE ACCOUNTABILITY

This book is about Corporate Social Responsibility (CSR) and the law, a pairing which at first sight might seem a contradiction in terms. The adoption by companies of CSR policies is, after all, routinely characterised as voluntary – a matter of business going the extra mile beyond what the law requires. If CSR is self-governance by business, however, it is self-governance that has received a firm push from external social and market forces, from forces of social accountability.

At the same time law is playing a much more significant role than the image of CSR suggests, and this legal accountability – the focus of the book – is set to increase. Legal intervention should not, however, be seen as making social accountability redundant. Wider ethical standards and social and market forces are also necessary even to make legal regulation effective.

How law is being used, and by whom is also significant. Little of the new law is conventional state regulation. Law is being brought into play in subtle and indirect ways, private law is being used in innovative ways, and the initiative lies as much with private organisations as with the state. At the same time governments are using social and market forces to foster CSR. What is demonstrated in the context of corporate social responsibility is the emergence of a new, multi-faceted, corporate accountability.

DOREEN MCBARNET is Professor of Socio-Legal Studies at the Centre for Socio-Legal Studies, University of Oxford.

AURORA VOICULESCU is Lecturer in Law at the Centre for Law, Open University.

TOM CAMPBELL is Professorial Fellow at the Centre for Applied Philosophy and Public Ethics (CAPPE), Charles Sturt University.

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Corporate Social Responsibility and the Law

Edited by

DOREEN McBARNET, AURORA VOICULESCU,

TOM CAMPBELL



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a matter of individual accountability. In order for us to hold corporate managers truly accountable, we need more.

One way of providing this, and perhaps of realising the original Brandeisian goal of disclosure, is to demand that each of the directors of a corporation be given the opportunity to include a thousand-word statement in the corporation's annual report, discussing his or her view of the important events of the year and the important challenges for the future. In this manner, each director would be required to stand exposed, before the corporation's stockholders and all other interested persons, as an individual human being with his or her own ideas, thoughts, positions and values. Those interested in the corporation, including the general public, would start to be in a position to evaluate each director as an individual human being, and to hold each accountable for the fit between his or her decisions, the well-being of the corporation, his or her own attitudes and accepted *social norms of business conduct*. Such a requirement would force directors to think deeply not only about the immediate effects of his or her decisions on the corporation, but on its broader effects on society and, perhaps most significantly, on his or her *personal reputation*. While it would be difficult to subject these statements to antifraud provisions, the credibility of their reasoning and the frankness of their statements would likely be enough to compel directors' honesty, and their interests in their own reputations should ensure that their decisions are defensible. As with all decisions, people will disagree. But, like all decisions, board decisions would finally be subjected to a meaningful public test of rationality and defensibility.

There are many more ways of tinkering with both shareholder and managerial incentives within the existing structure of corporate governance. And that, precisely, is the point. History shows us that governance structure is a very difficult thing to change, and change that seems beneficial can be manipulated to produce bad results. History also teaches us that changes in incentives, which are much more easily accomplished as a practical matter (even if they might run into some political haggling), typically have the effect intended, and powerfully so. The problem has not been with the use of incentives but the use of incentives to achieve the wrong ends. Long-term management is socially responsible management. Socially responsible management can occur only when managers are given the space to do the jobs they know how to do.

The new corporate law: corporate social responsibility and employees' interests

STEPHEN BOTTOMLEY AND ANTHONY FORSYTH

I. Introduction

Corporate social responsibility (CSR) is back on the corporate law reform agenda. From an Australian perspective, the evidence for this is found in the simultaneous but separate inquiries that have recently been conducted into this topic by the Australian Parliament's Joint Committee on Corporations and Financial Services,¹ and by the Australian Government's Corporations and Markets Advisory Committee (CAMAC).² These developments are supported by the many standards, guidelines, principles and codes promulgated by non-government bodies, industry groups and other international organisations.³

Cynics might dismiss these developments as part of a regular cycle of corporate law reform. After all, as we will see, this is not the first time that CSR has appeared on the reform agenda. Others might suggest that, finally, this is an idea whose time has come. The purpose of this chapter is to examine the extent to which this renewed, and widespread, attention to CSR is being reflected in the substance of our systems of corporate law.⁴ Is it possible, and meaningful, to talk of a 'new corporate law' in which the concerns of people other than shareholders (or, indeed, the non-financial

¹ The Parliamentary Committee, established under Part 14 of the *Australian Securities and Investments Commission Act 2001*, commenced its inquiry in June 2005 and reported one year later: *Corporate Responsibility: Managing Risk and Creating Value* (2006).

² The Advisory Committee is established under Part 9 of the *Australian Securities and Investments Commission Act 2001*, and operates as a specialised corporate law reform body. It commenced its inquiry with the release of a discussion paper in November 2005: see Corporations and Markets Advisory Committee, *Corporate Social Responsibility: Discussion Paper* (November 2005).

³ Many of these are referred to elsewhere in this chapter.

⁴ When we say 'our systems of corporate law', our reference points will be primarily Australian, with supplementary references to the United Kingdom and the United States of America.

concerns of shareholders) are to be given serious attention? In particular, how far is the new focus on CSR affecting the rights of employees in corporate law?

The plan of the chapter is as follows. We begin with a brief survey of recent developments in different common law jurisdictions, with an emphasis on Australia, that have implications for the idea of CSR. The focus here is not just on statutory developments, but also on the wider array of codes, guidelines and so on that were adverted to earlier. From this base, we then draw and elaborate upon two conclusions. The first is that the shareholder primacy model continues to exert a powerful, although sometimes misunderstood, effect on the capacity of legislators to respond to CSR concerns. In particular, it constrains (though, again, this is not a necessary constraint) the actions of directors in responding to those concerns, it constrains the power of shareholders to put these concerns in front of the board, and it constrains the capacity of non-shareholders to bring these concerns to the attention of company managers. The second conclusion is that much of the action regarding CSR therefore occurs outside the parameters of the statutes, and it is in this sense that we can talk about a 'new corporate law': a system of corporate regulation that depends as much (if not more) on non-statutory mechanisms and methods, which in many cases can have a more immediate impact on corporate operations. The final part of the chapter examines some of these themes in more detail, by way of a 'case study' of the position of corporate employees, particularly in the critical situation of a corporate insolvency. Whatever definition one takes of CSR it is undeniable that the financial and physical well-being of a company's employees must be a central concern. Recent corporate collapses and policy responses to them in Australia provide a stark illustration of the limited extent to which corporate law has been able to respond to the challenges of CSR.

II. Corporate law developments in Australia

There is no express reference to CSR obligations or desiderata in the Corporations Act 2001 (Cth). There are provisions in the Act which deal, in different ways, with matters that fall under the umbrella of CSR, but these have not been inserted as part of any systematic response to the issue. For example, section 299(1)(f) requires the directors' annual report for a company to include details of the company's performance in relation to any 'particular and significant' Commonwealth or state environmental regulation to which the company is subject. Another example is found

in Part 5.8A of the Act, which seeks to protect employee entitlements, such as wages, superannuation contributions and leave entitlements, from arrangements intended to defeat the employees' recovery of those entitlements where, for example, there is a restructuring of a corporate group.⁵

As we noted earlier, there are, at the time of writing, two major inquiries being conducted into the extent to which the Australian corporations' legislation should include reference to corporate social responsibility obligations. We will come to these inquiries shortly. First, by way of context, it is useful to look at two earlier events in the history of Australian responses to the problem of legislating for corporate social responsibility.⁶

In May 1988 the Australian Senate asked its Standing Committee on Legal and Constitutional Affairs to inquire into 'the social and fiduciary duties and responsibilities of company directors'.⁷ The inquiry was prompted by a request from the Committee itself, arising from perceptions that 'companies are now so dominated by directors that their owners, the shareholders, are denied any effective say in their control' and that 'the corporate sector is now central not only to the economic well-being of society but to most dimensions of community life'.⁸ Much of the inquiry was occupied by the duties owed by directors to shareholders and creditors – in other words, the inquiry stayed within the accepted boundaries of corporate law. However the final Report also dealt with the prospect that directors could be given duties to 'outside' interests, with employees, environmental issues and consumers receiving particular attention. Responding to this suggestion, the Committee began with the premise that:

It is the shareholders' investment that creates the company. Directors' fiduciary duties are premised on this fact and are designed to protect that investment. If company law were to impose new and, at times, contradictory duties (such as looking after interests which may be directly opposed to those of the corporators), directors' fiduciary duties could be weakened, perhaps to the point where they would be essentially meaningless.⁹

The Committee reached the conclusion that '[t]o impose a duty to act fairly between entities as diverse as creditors, employees, consumers, [and]

⁵ This is discussed further below.

⁶ This is not presented as a comprehensive history of developments on the topic.

⁷ Australian 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).

⁸ *ibid.*, pp. 8–9. ⁹ *ibid.*, p. 98.

the environment, is to impose a broad and potentially complex range of obligations on directors. Such a duty would be vague.¹⁰ The Committee recommended, therefore, that these 'outside' interests should be dealt with 'not in companies legislation but in legislation aimed specifically at those matters'.¹¹ The Committee's report had the effect of quieting subsequent debate in Australia about the link between corporate law and corporate social responsibility for a number of years.

The second event occurred in 2000 when an Australian Democrats Senator (the Democrats being a minority party that then held the balance of power in the Senate) introduced the Corporate Code of Conduct Bill into the Senate.¹² The Bill aimed to regulate the overseas activities of Australian companies on matters of human rights, environmental practice, labour relations, and occupational health and safety. The Democrats urged support for the Bill on the grounds that it would promote good corporate citizenship and a broadening of corporate social responsibilities to a wide range of stakeholders. The Democrats argued that the Bill was a necessary response to the failure of voluntary codes, international guidelines and regional initiatives¹³ to adequately regulate the activities of multinational corporations. Specifically, the Bill sought to tackle the problem of regulating the conduct of corporate structures which locate the head office functions in one country, separated from the corporate operations in another jurisdiction. The Bill was introduced in the wake of a decision by the House of Lords to permit a group of plaintiffs employed by a South African subsidiary to bring a claim for damages against the UK-based parent company, Cape plc, for injuries suffered in connection with the mining of asbestos.¹⁴ The drafters of the Bill drew on a number of sources for inspiration, including the 1999 EU Resolution on EU Standards for European Enterprises Operating in Developing Countries,¹⁵ a bill introduced in the United States by Congresswoman McKinney,¹⁶ the Universal Declaration of Human Rights, and standards contained in International Labour Organisation conventions.

¹⁰ *ibid.*, p. 96. ¹¹ *ibid.*, p. 99.

¹² The full title of the Bill was 'A Bill for an Act to impose standards on the conduct of Australian corporations which undertake business activities in other countries, and for related purposes'.

¹³ Such as the North American Free Trade Agreement: www.dfait-maeci.gc.ca/nafta-alena/menu-en.asp.

¹⁴ *Lubbe and Others and Cape plc and Related Appeals* [2000] 4 All ER 268, [2000] 1 WLR 1545.

¹⁵ eur-lex.europa.eu/LexUriServ/site/en/oj/1999/c_104/c_10419990414en01800184.pdf.

¹⁶ Bill for a Corporate Code of Conduct Act (H.R. 4596).

The Bill proposed the imposition of obligations on Australian corporations employing more than one hundred persons in another country to take all reasonable measures to prevent any material adverse effect on the environment, and to promote the health and safety of its workers. The Bill required such corporations not to use, or obtain benefit from, forced or compulsory labour or child labour, and to comply with human rights standards concerning equality of opportunity in matters concerning race, colour, sex, sexuality, religion, political opinion, national extraction or social origin. Corporations were required to comply with applicable tax laws, and to ensure that goods and services provided by the corporation complied with relevant consumer health and safety standards and consumer protection and trade practice standards. Corporations would be required to submit detailed annual compliance reports to the Australian corporate regulator, the Australian Securities and Investments Commission (ASIC). A contravention of any of these requirements would make the corporation liable to proceedings for the recovery of a civil penalty.¹⁷ Corporate officers could also incur criminal liability if their involvement in the contravention was done knowingly, recklessly or negligently (and they were in a position to influence the corporation's conduct in relation to the contravention).

The Bill was referred to a Joint Committee of the Australian Parliament for consideration. The Committee received submissions from forty-three individuals and organisations. Some submissions opposed the Bill outright. Others supported the intention of the Bill, but made 'positive criticisms'¹⁸ about its drafting. In its Report,¹⁹ the Committee noted that there was no consensus on whether the Bill should be passed, and came to the conclusion that because there was 'no evidence of systemic failure regarding Australian corporate behaviour',²⁰ and because the Bill was 'impracticable and unwarranted',²¹ it should not be passed. The Bill did not pass the Senate.

As we noted earlier, two inquiries into CSR were established in 2005. The spur for this activity was the Special Commission of Inquiry into matters arising from the restructuring of the James Hardie group of companies in an effort to isolate liability to claimants who had suffered

¹⁷ This could include an order to pay a monetary penalty of up to \$1 million and/or compensation to a person who suffered loss or damage from the contravention.

¹⁸ A term used in the final report – see para. 4.3.

¹⁹ Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on the Corporate Code of Conduct Bill 2000* (June 2001).

²⁰ *ibid.*, para. 4.44. ²¹ *ibid.*, para. 4.5.

asbestos-related illness associated with James Hardie building products.²² We can surmise that a further factor was the lingering impact of the collapse of the HIH Insurance group of companies in 2001 (at the time, the largest corporate collapse in Australian history) and the subsequent report of the Royal Commission of Inquiry into the collapse. One matter of concern to the Commission was the potential for abuse by directors of the power to make corporate donations:

The board of HIH appeared to exert no meaningful control over the amount or direction of the not inconsiderable donations made by the company over the years. There may have been a corporate interest underlying the donations but if so it was not articulated. Credit for the company was not usually sought for having made the donations and there was little if any disclosure of details of the company's magnanimity to the board let alone to shareholders.²³

Among other detailed recommendations for reforms to Australian corporate regulation, the Report urged companies to develop guidelines for the disclosure of their arrangements for making corporate donations.

In June 2005 the Australian Parliament directed its Joint Committee on Corporations and Financial Services to inquire into corporate responsibility and triple-bottom-line reporting with particular reference, amongst other things, to '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'.²⁴ The Committee received over 145 submissions and conducted hearings, publishing its report in June 2006. Prior to this inquiry, in March 2005 CAMAC was asked by its Minister to inquire into whether the duties of company directors should be revised to include corporate social responsibilities, and whether the Corporations Act 2001 should require certain types of companies to report on the social and environmental impact of their activities. The Committee published a detailed Discussion Paper in November 2005,

²² Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (September 2004). See also G. Haigh, *Asbestos House: The Secret History of James Hardie Industries* (Melbourne: Scribe, 2006).

²³ The HIH Royal Commission, *The Failure of HIH Insurance – Volume 1: A Corporate Collapse and its Lessons* (2003), p. 119.

²⁴ Parliamentary Joint Committee on Corporations and Financial Services, Terms of Reference, 23 June 2005. See the final report, *Corporate Responsibility: Managing Risk and Creating Value* (2006).

seeking submissions.²⁵ At the time of writing, the CAMAC inquiry has not been completed.

As the Discussion Paper from the CAMAC inquiry observes, alongside the Corporations Act 2001 there are a wide range of codes, guidelines and so on which address corporate social responsibility matters. In Australia these codes fall outside the law in that they are not formally incorporated into, recognised by, or mandated by legislation or other forms of regulation. Some of these have international application and voluntary effect, such as the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance, Principle IV of which states that '[t]he corporate governance framework [of a company] should recognise the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises'.²⁶

Others have local application. For example, the Australian Stock Exchange (ASX) Corporate Governance Council's Principles of Good Corporate Governance and Best Practice Recommendations encourage companies listed on the ASX to 'recognise legal and other obligations to all legitimate stakeholders'. In support of this the Principles state that '[t]here is growing acceptance of the view that organisations can create value by better managing natural, human, social and other forms of capital. Increasingly, the performance of companies is being scrutinised from a perspective that recognises these other forms of capital'.²⁷

The Principles recommend that listed companies should 'establish and disclose a code of conduct to guide compliance with legal and other obligations to legitimate stakeholders'.²⁸ The suggested contents of such a code include details of a company's responsibilities to the general financial community, to clients, customers and consumers, to employees, to the community and the environment. The ASX Principles are not binding on listed companies. Instead, such companies are required to disclose in their annual reports the extent to which they have followed these best

²⁵ Corporations and Markets Advisory Committee, *Corporate Social Responsibility: Discussion Paper* (November 2005).

²⁶ Organisation for Economic Co-operation and Development, *Principles of Corporate Governance* (2004), p. 21. See also the OECD *Guidelines for Multinational Enterprises – Revision 2000*, which set out non-binding principles and standards covering human rights, anti-corruption, labour relations, environment and consumer protection.

²⁷ ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (March 2003), Principle 10.

²⁸ *Ibid.*, Recommendation 10.1.

practice principles and, where specific principles have not been followed, these must be identified and reasons given.²⁹

Another example of local, non-legislative initiatives is provided by Standards Australia³⁰ which has published a set of voluntary standards for non-listed private-sector companies as well as not-for-profit organisations and government departments. The standard for corporate social responsibility specifies processes for establishing, implementing and maintaining a programme that deals with employee issues, environmental issues, and matters of health and safety.³¹

In general the Australian situation is replicated in the United Kingdom³² and the United States.³³ In the United Kingdom, section 309 of the Companies Act 1985, introduced in 1980, states that directors, as part of their duty to the company, are to have regard to the interest of the company's employees in general, in addition to the interests of its members. A generous interpretation of this provision is that it elevates the interests of employees to the same level as those of shareholders. It also leaves it to directors to decide how to balance those interests when they are in competition with each other. A more pessimistic interpretation is that the section 'does not compel the directors to do anything they would not otherwise have been inclined to do'.³⁴ Instead, it simply requires (and there is debate about its mandatory effect) directors to 'have regard to' employees' interests; that is, 'the duty is merely a procedural one, having no substantive content'. Perhaps this is what lies behind Len Sealy's observation that this section 'is either one of the most incompetent or one of the most cynical pieces of drafting on record'.³⁵ We make further comment on this statutory provision later in this chapter.

Section 172 of the Companies Act 2006 introduces a 'duty to promote the success of the company'. The section has its origins in the recommendations of the Company Law Review Steering Group which reported

²⁹ ASX Listing Rule 4.10.3.

³⁰ As described on its website (www.standards.org.au/). Standards Australia, via a Memorandum of Understanding with the Australian Government, operates as the peak non-government standards development body in Australia. It is a company limited by guarantee, with seventy-two members representing groups interested in the development and application of standards and related products and services.

³¹ AS 8003-20043.

³² For a more detailed analysis, see Chapter 9.

³³ See also, Chapters 10 and 17.

³⁴ J. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Clarendon Press, 1993), p. 84.

³⁵ L. Sealy, 'Directors' "Wider" Responsibilities - Problems Conceptual, Practical and Procedural', *Monash Law Review* 13 (1987), 164, at 177.

in 2001.³⁶ The section begins by stating that a director must act in the way that would be most likely to promote the success of the company for the benefit of its members as a whole. The section then goes on to state that in fulfilling this duty, a director must have regard to a range of factors including the interests of the company's employees (thus replacing the present section 309), its suppliers and customers, 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.³⁷

The legislative change in the United Kingdom thus links 'the success of the company' to 'the benefit of the members as a whole'. It attempts to put non-shareholder interests on the directors' managerial agenda, while remaining true to the basic shareholder primacy model that underpins UK (and Australian) corporate law. The difficulty that this presents is emphasised by the indeterminacy of the qualifier used in the proposed section: directors must have regard to these other matters 'so far as reasonably practicable'.

For purposes of comparison we note that, notwithstanding the strong application of the shareholder primacy model in the United States, many states have passed 'corporate constituency' statutes that permit directors to take into account a wider range of constituencies when making corporate decisions in response to a hostile takeover. While the details vary from one state to another, the general pattern of these statutes is to allow directors, when considering the best interests of the corporation, to consider the effects of their proposed action on groups such as employees, customers and suppliers, and communities in which the corporation is located.³⁸ Unlike the UK proposal, the statutes are permissive, not mandatory, but like the UK proposal they usually do not give any indication about how directors should take the various interests into account.

III. Shareholder primacy

The lesson from the above discussion is that efforts to incorporate the idea of CSR into the general body of corporate law rules and principles

³⁶ Company Law Review Steering Group, *Modern Company Law For a Competitive Economy - Final Report* (2001, Volume 1), Appendix C; see also Department of Trade and Industry, *Company Law Reform White Paper* (March 2005), pp. 20-1.

³⁷ Again, see further below.

³⁸ See L. Mitchell, 'A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes', *Texas Law Review* 70 (1992), 579; B. McDonnell, 'Corporate Constituency Statutes and Employee Governance', *William Mitchell Law Review* 30 (2004), 1227.

inevitably confront two deeply entrenched – and legally enshrined – presumptions. One is the idea that, once elected, directors (and the managers they appoint) should be left to get on with the job. The other is the idea that ‘the job’ is to maximise shareholder value. Increasingly, this seems to be measured by the daily price of the company’s shares. As Paul Redmond explains, ‘[a] consequence of the shareholder value focus is that the company is seen as a set of income claims and property rights’.³⁹

Against the background of this limited shareholder primacy model, efforts by legislators, judges and corporate personnel to tackle the issues of CSR will therefore prove to be difficult. Deciding who counts as a ‘stakeholder’, how to ensure that their interests count, and how to reconcile competing claims on corporate resources are just three of the many problems to be resolved. On one view, the shareholder primacy model presents a simple solution to these problems: it is the collective interests of the shareholders that matter. We suggest, though, that this argument is often used more as a convenient shield to avoid the problems than as a reasoned attempt to engage with them. Importantly, it also begs some important questions: What *are* the interests of shareholders? Are they always exclusively financial and, even if that is the case, can they only be satisfied by short-term strategies and responses? If shareholders have non-financial interests, such as ethical concerns or a respect for the welfare of the company’s workers, how are these to be dealt with? Can shareholders – indeed, *should* shareholders – be a means whereby the interests of non-shareholders may be brought to bear on the decisions of corporate managers?

In posing these questions we accept that, for better or worse, the shareholder primacy model has proven to be resilient, notwithstanding repeated efforts to introduce stakeholder-centred concerns. Despite its limitations, the model continues to exert a powerful grip on the mind-set of legislators, judges, law reformers and corporate managers. As we see it, the first challenge is to see what can be done within the shareholder primacy model.⁴⁰ Legally speaking, it is a flexible model; it has the potential to be used in ways that do not necessarily shut out other interests and concerns. The questions posed above suggest there are two key limitations in which the shareholder primacy model has been conceived. One is that

³⁹ P. Redmond, ‘Corporate Social Responsibility: An Overview’, *Reform* 87 (2005–06), 7, at 9.

⁴⁰ Thus, we do not agree with the claim that there is no more work to be done: H. Hansmann and R. Kraakman, ‘The End of History for Corporate Law’, *Georgetown Law Journal* 89 (2001), 439.

short-term price maximisation has come to be equated with shareholder primacy.⁴¹ The other is that, notwithstanding their ‘primacy’, shareholders themselves are frequently marginalised in corporate decision-making processes. We suggest, however, that, read carefully, the model does permit attention to be given to shareholders’ non-financial concerns (such as concerns for the social or environmental impact of their corporation’s activities) and, through the medium of the shareholders, the model can also take account of the interests of non-shareholders.

One way in which this might be achieved is by permitting shareholders to pass advisory resolutions; that is, resolutions on matters of corporate management that fall outside the formal jurisdiction of the general meeting. The long-established common law position is that shareholders may pass resolutions only on those matters that fall within the power of the general meeting, as determined by statute, the company’s constitution and (if applicable) the listing rules of the relevant stock exchange. Where, as is most commonly the case, the company’s constitution or the legislation⁴² gives exclusive managerial power and discretion to the directors, the shareholders have no formal power to dictate or interfere in the directors’ exercise of that power.⁴³

Nevertheless, advisory resolutions or proposals are permitted in some countries. Legislation in Canada permits a shareholder (with the support of the requisite number of other shareholders) to submit a proposal to the corporation, which the shareholder proposes to raise at a general meeting, of any matter that relates in a significant way to the business and affairs of the corporation.⁴⁴ This does not bind the directors to act upon the proposal; it is, in the words of one writer, designed to promote ‘shareholder consciousness raising’.⁴⁵ In New Zealand, the Companies Act 1993 permits shareholders in a general meeting to pass a resolution that relates to the management of the company; the resolution is not binding on the board

⁴¹ D. Millon, ‘Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It?’, *George Washington Law Review* 70 (2002), 890, at 900–2.

⁴² In some jurisdictions (e.g. Canada: Canada Business Corporations Act, RSC 1985, s 102; United States: the Revised Model Business Corporations Act § 8.01 (2002); Delaware General Corporation Law, § 141) this division of power is prescribed by statute. In Australia it is the default position that may be varied by a corporation (see the ‘replaceable rule’ in s. 198A of the Corporations Act 2001).

⁴³ *Automatic Self-Cleansing Filter Syndicate Co. Ltd v. Cunningham* [1906] 2 Ch 34; *Gramophone & Typewriter Ltd v. Stanley* [1908] 2 KB 89; *Shaw & Sons (Salford) Ltd v. Shaw* [1935] 2 KB 113.

⁴⁴ Canada Business Corporations Act, s. 137

⁴⁵ B. Welling, *Corporate Law in Canada: The Governing Principles* (2nd edn, Toronto: Butterworths, 1991), p. 472.

unless the company's constitution provides otherwise.⁴⁶ A suggestion that advisory resolutions should be permitted in Australian corporate law was considered in 2000. It was quickly dismissed on the grounds that 'the boundaries . . . between the role of directors and that of the shareholders in general meeting should not become confused'.⁴⁷ The concern was that such resolutions might, in practice, be regarded by the board (mindful of the shareholders' power to appoint and dismiss directors) as directive rather than advisory.⁴⁸ Notwithstanding this concern, the Corporations Act 2001 was later amended to require that the adoption of the directors' remuneration report at a listed company's annual general meeting be decided by an advisory resolution.⁴⁹ This amendment was introduced in the wake of public concern about extravagant rates of pay for directors and senior executives.⁵⁰

We draw attention to the idea of advisory resolutions to emphasise that the shareholder primacy model does not necessarily eliminate the capacity of corporate law to recognise corporate social responsibility concerns. Directors are not necessarily restricted to short-term decisions about shareholder value.⁵¹ Shareholders should not be encouraged to discard wider concerns about the company's operations. However, to achieve this more flexible application of the shareholder model, it is necessary to think of modern corporate regulation in ways that go beyond the usually accepted parameters of corporate law. In the conclusion to this chapter we argue that understanding the new corporate law means understanding the place and role of the many codes, guidelines and other mechanisms that now have a vital role in regulating corporate behaviour.

Having said that, we acknowledge that even an expanded conception of the shareholder primacy model can only push the corporate social responsibility debate so far. More radical proposals, such as the reformulation of directors' formal legal duties to enable and (in some situations) require them to take into account the interests of non-shareholder stakeholders, should be among the options for continued consideration.

⁴⁶ Companies Act 1993 (NZ), s. 109.

⁴⁷ Companies and Securities Advisory Committee, *Shareholder Participation in the Modern Listed Public Company*, Final Report (2000), para. 3.55.

⁴⁸ This is notwithstanding the requirement in the Act that the chair of the meeting must allow a reasonable opportunity for shareholders to ask questions about or make comments on the management of the company: s. 250S (see further below).

⁴⁹ Corporations Act 2001 (Cth), s. 250R(2) and (3), inserted in 2004.

⁵⁰ Parliament of the Commonwealth of Australia, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 Explanatory Memorandum* (2003), pp. 165–9.

⁵¹ See Millon, 'Why Is Corporate Management Obsessed with Quarterly Earnings?'

IV. The position of employees: a case study of the legal limitations on corporate social responsibility

In order to illustrate the limited extent to which recent reforms to the legal framework of corporate governance have involved any real recognition of CSR concerns, we now turn to focus on the position of employees. Along with other non-shareholder stakeholders, employees have traditionally been treated as the 'outsiders' of corporate enterprises under the Anglo-American shareholder primacy model of corporate regulation – with none of the information rights or legal protections of their interests enjoyed by 'insiders', such as shareholders and secured creditors.⁵² In Australia, the high-profile collapses of companies like Ansett and One.Tel, and the James Hardie episode, have highlighted the vulnerability of employees within this model. These and many other recent cases of corporate failures and restructures, in which employees' interests have either been overlooked or consciously bypassed, have triggered several regulatory responses. After a brief discussion of the traditional legal position, we examine and evaluate these legislative and policy initiatives. Another significant recent development in Australia – the increasing recourse by unions, lawyers and other representatives of employees to the mechanisms of corporate law to defend and advance workers' interests – will also be explored. Some brief comparisons will then be made of the extent to which employees have received attention in the recent corporate governance debates in Australia, the United Kingdom and the United States.

V. Employees under Australian corporate law

The limited recognition of employees within Australia's traditional arrangements for corporate regulation is best illustrated by the narrow focus of directors' legal duties to act in good faith and in the best interests of the company. At common law and under section 181 of the Corporations Act, company directors must treat shareholders' interests as paramount. The concerns of employees, or other stakeholders, *can* be considered in performing these duties – but only where this would also be in the best interests of the company (that is, the shareholders as a whole). Employee interests cannot generally be placed ahead of those of shareholders, unless this is necessary to ensure that the company meets its obligations to employees under employment, industrial or occupational

⁵² The 'insider/outsider' terminology is borrowed from B. Bercusson, 'Workers, Corporate Enterprise and the Law', in R. Lewis (ed.), *Labour Law in Britain* (Oxford: Blackwell, 1986), p. 139.

health and safety laws.⁵³ For example, a company could not make ex gratia redundancy payments to employees in the context of a business closure, where this would run down the funds available for distribution to shareholders. Not even the company's interest in maintaining harmonious industrial relations would warrant directors pursuing such a course of action.⁵⁴

Of course, the greatest threats to the welfare of employees are posed when companies run into financial difficulty and face potential insolvency. At this point, workers' jobs, wages and accrued leave, redundancy and other employment entitlements are placed at considerable risk. Australian case law requires directors to consider creditors' interests when a company is insolvent or near insolvency.⁵⁵ However, the cases stop short of establishing a *duty* that is enforceable at the instance of creditors;⁵⁶ only the company's liquidator or ASIC can bring an action for compensation or the recovery of company funds to return to creditors. As Symes has indicated, this provides little comfort to employees in insolvency situations: '[f]rom these cases, it is not possible to state that a duty to creditors upon insolvency means that they should take "care" of employees . . .', albeit that employees 'are creditors (statutory priority creditors, in fact) for their unpaid salary and other entitlements'.⁵⁷

This 'priority creditor status'⁵⁸ has been one way in which Australian corporate law has attempted to preserve employee rights in situations of company failure and restructuring.⁵⁹ Under section 556 of the Corporations Act, employee claims to recover unpaid wages, superannuation,

⁵³ Ensuring compliance with such laws forms part of directors' common law and statutory duties to act with due care and diligence; see, e.g., Justice S. Whelan and L. Zwier, *Employee Entitlements and Corporate Insolvency and Reconstruction*, Research Paper, Centre for Corporate Law and Securities Regulation, University of Melbourne (2005), p. 10.

⁵⁴ *Parke v. Daily News Ltd* [1962] Ch 927; see also *Hutton v. West Cork Railway Company* (1883) 23 Ch D 654.

⁵⁵ *Walker v. Wimborne* (1976) 137 CLR 1; *Kinsela v. Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722. The 'uncommercial transactions' provisions of the Corporations Act (s. 588FB and related provisions in Part 5.7B, Division 2) operate as a form of statutory duty to protect creditors' interests.

⁵⁶ See for example *Spies v. R* (2000) 18 ACLC 727.

⁵⁷ C. Symes, 'A New Statutory Directors' Duty for Australia – a "Duty" to be Concerned about Employee Entitlements in the Insolvent Corporation', *International Insolvency Review* 12 (2003), 133, 137.

⁵⁸ Whelan and Zwier, *Employee Entitlements*, p. 4.

⁵⁹ For a detailed account of the evolution of the relevant statutory provisions in Australian and English law, see R. W. Harmer, 'Employee Creditors and Corporations', in R. McCallum, G. McCarry and P. Ronfeldt (eds.), *Employment Security* (Sydney: The Federation Press, 1994), p. 227.

injury compensation, leave entitlements and retrenchment payments rank ahead of the claims of other unsecured creditors. However, the claims of secured creditors such as banks and other financiers, and costs incurred in the insolvency process (for example, liquidators' or administrators' fees), take precedence over those of employees. The limitations of the priority treatment for employees become immediately apparent: frequently, there are no assets remaining to meet employee claims once the debts of secured creditors have been fully or partly satisfied.⁶⁰

In a series of high-profile company collapses from the late 1990s – primarily, National Textiles in early 2000, and One.Tel and Ansett in 2001 – thousands of Australian workers lost not only their jobs, but also their accrued leave and redundancy entitlements.⁶¹ In some of these cases, these harsh outcomes were visited upon workers as a result of deliberate corporate strategies to avoid meeting their obligations to employees, or in circumstances where directors had diverted company funds to ensure that payments were made to themselves (for example, in the form of bonuses). The political fallout from these events led the Australian Government to adopt several initiatives aimed at enhancing the level of protection offered to employees under Australian corporate law. However, as the following discussion will reveal, it must be questioned whether that objective has been realised to any appreciable extent.

VI. Moves to enhance the recognition of employee interests – but how far?

The first of these measures was the Corporations Law Amendment (Employee Entitlements) Act 2000 (Cth), which inserted Part 5.8A into the Corporations Act. The new provisions built on the existing duty of directors to prevent companies from trading whilst insolvent,⁶² by imposing personal liability on directors where they enter into 'uncommercial transactions' – that is, agreements, transactions or corporate restructures that are *intended* to prevent workers from accessing their accrued

⁶⁰ R. Campo, 'The Protection of Employee Entitlements in the Event of Employer Insolvency: Australian Initiatives in the Light of International Models', *Australian Journal of Labour Law* 13 (2000), 236.

⁶¹ For an account of some of these corporate collapses and their impact on employees, see Campo, 'The Protection of Employee Entitlements', 243–4, noting that the estimated value of employees' lost entitlements as a result of company insolvencies in Australia is between \$140 and \$181 million annually; more generally, see CCH, *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (Sydney: CCH Australia Ltd, 2001).

⁶² Corporations Act, ss. 588G–588X.

employment entitlements. Heavy penalties, including fines and imprisonment, are available to deal with breaches of the uncommercial transactions provisions, and employee creditors can themselves initiate legal proceedings with the liquidator's permission.⁶³ However, the difficulty of proving that directors were acting with the requisite intention under these provisions 'inevitably limit [their] scope and effectiveness as a protective mechanism for employees'.⁶⁴ This assessment is borne out by the fact that there have been no reported cases to date involving a successful action by employees under Part 5.8A of the Corporations Act; in fact, only one case has been initiated under these provisions.⁶⁵ In 2004, an influential Parliamentary Committee recommended that the provisions be reviewed to determine their effectiveness in deterring companies from adopting corporate structures (such as 'phoenix' company arrangements) to avoid meeting employee entitlements, and to consider other possible law reform options.⁶⁶

Further statutory changes came in the form of the Corporations Amendment (Repayment of Directors' Bonuses) Act 2003, inserting section 588FDA in the Corporations Act. This provision enables the recovery by a liquidator of excessive payments made to directors in circumstances where a company is in no financial position to make such payments – such as in the One.Tel case, where the once high-flying telecommunications company's joint managing directors paid themselves \$7.5 million each in

⁶³ For detailed discussion of Part 5.8A, see D. Noakes, 'Corporate Groups and the Duties of Directors: Protecting the Employee or the Insolvent Employer?', *Australian Business Law Review* 29 (2001), 124.

⁶⁴ J. Hill, 'Corporate Governance and the Role of the Employee', in P. Gollan and G. Patmore (eds.), *Partnership at Work: the Challenge of Employee Democracy* (Sydney: Pluto Press, 2003), p. 119; see further Symes, 'A New Statutory Directors' Duty for Australia', 144–5.

⁶⁵ Whelan and Zvier, *Employee Entitlements*, p. 14, referring to *The Creditors of Antal-Air Pty Ltd (Administrator Appointed) v. Australian Securities and Investments Commission* [2004] FCA 1090, and the appeal decision *Creditors of Antal-Air Pty Ltd v. Antal-Air Pty Ltd* [2004] FCAFC 303; see also C. Symes, 'Will there ever be a Prosecution under Part 5.8A?', *Insolvency Law Bulletin* 3 (2002), 17.

⁶⁶ See Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Insolvency Laws: A Stocktake* (Canberra: Commonwealth of Australia, June 2004), pp. 182–5; the Parliamentary Joint Committee recommended that this review be conducted by CAMAC. While this issue was not referred to CAMAC, in late 2005 the government announced a package of insolvency law reform measures, including proposals 'targeting misconduct by the officers of assetless companies' and 'disqualifying directors . . . who are involved in repeat phoenix activity': see Australian Government, The Treasury, 'Corporate insolvency reform', 12 October 2005, pp. 5–6, available at www.treasury.gov.au/contentitem.asp?NavID=013&ContentID=1022.

bonuses, in a year when One.Tel had lost \$291.1 million.⁶⁷ When the company was placed into voluntary administration in May 2001, the union with coverage of its 1,600 employees brought industrial tribunal proceedings to ensure that the workers would be entitled to redundancy payments. These payments were ultimately met in the course of the winding-up process.⁶⁸ The new statutory provision aims to prevent companies from providing directors or their associates with payments or other benefits (such as shares), in a situation where no 'reasonable person in the company's circumstances' would enter into such transactions. Again, concerns have been raised about the potential effectiveness of this provision, as it is left to the courts to determine whether payments to directors were 'unreasonable'.⁶⁹

In the wake of the collapse of Ansett Airlines, just prior to the November 2001 Federal election, the government announced several measures to assist the 16,000 unemployed Ansett workers whose employment entitlements were threatened, and to improve the level of protection offered to other employees that might face a similar plight as a result of future corporate insolvencies. First, the government established the Special Employee Entitlements Scheme for Ansett Group Employees (SEESA), to ensure the recovery by former Ansett workers of their employment entitlements.⁷⁰ Second, the government replaced the Employee Entitlements and Support Scheme (established in 2000) with the General Employee Entitlements and Redundancy Scheme (GEERS),⁷¹ a more comprehensive scheme enabling employees of insolvent companies to claim recovery of their unpaid entitlements from a government fund. Under GEERS, employees can recover unpaid wages; unpaid annual leave; unpaid long-service leave; payments

⁶⁷ C. Jay, 'The Day of Reckoning', in CCH, *Collapse Incorporated*, p. 9 at p. 35.

⁶⁸ For a detailed account, see L. Floyd, 'Enron and One.Tel: Employee Entitlements after Employer Insolvency in the United States and Australia (Australian Renegades Championing the American Dream?)', *Southern Methodist University Law Review* 56 (2003), 975, 991–5.

⁶⁹ See D. Noakes, 'Measuring the Impact of Strategic Insolvency on Employees', *Insolvency Law Journal* 11 (2003), 91, 112; there have been no decided cases as yet on s. 588FDA.

⁷⁰ See S. Kinsey, 'A Triumph for Labour over Capital: Employee Entitlements in Insolvency in the Wake of the Ansett Collapse', *Insolvency Law Journal* 10 (2002), 132; see also Whelan and Zvier, *Employee Entitlements*, pp. 32–41, explaining the difficulties encountered by former Ansett workers in recovering their full employment entitlements under SEESA; see further below.

⁷¹ The following description of the operation of GEERS is based primarily on information contained in the most recent version of the GEERS Operational Arrangements (dated 1 November 2005), available at: www.workplace.gov.au/workplace/Category/SchemesInitiatives/EmployeeEntitlements/GEERSV2.

in lieu of notice; and up to sixteen weeks' redundancy pay. Employees must have a legal entitlement to receive such payments under their employment contract, or an applicable industrial award or statutory agreement, or relevant legislation. An overall 'cap' of \$98,200 (indexed annually) applies to the level at which entitlements paid out under GEERS are to be calculated.⁷² Having advanced payments to employees under GEERS, the Federal Government is able to 'stand in the employees' shoes' as a creditor with the same priority rights in the distribution of the company's assets in liquidation as the employees would have enjoyed.⁷³

The establishment of a 'safety net' mechanism such as GEERS represents a welcome improvement in the level of protection offered to Australian employees in the event of employer insolvency – for example, \$66.7 million was paid to 8,126 employees in respect of 572 failed businesses in 2004–05. However, the scheme operates subject to a number of important limitations that limit its effectiveness as a protective measure. Most significantly, the establishment of GEERS as a policy instrument, rather than under legislation, means that it is a precarious form of protection compared to the wage protection funds operating in many countries.⁷⁴ In *Commonwealth of Australia v. Rocklea Spinning Mills Pty Ltd (Receivers and Managers Appointed)*,⁷⁵ Justice Finkelstein of the Federal Court of Australia observed that '[GEERS] is not constituted by statute but by an act of the executive government alone'; and, further, that '[t]he scheme is a voluntary scheme. No employee has a right enforceable by action in a court of law to obtain any payment from the money granted by Parliament'.⁷⁶ In that case, Justice Finkelstein found that the Federal Government's priority right to recover funds paid to employees under GEERS did not extend to situations where a 'deed of company arrangement' was entered into by creditors.⁷⁷ The government's rights of recovery only applied where the insolvency process proceeded to the stage of liquidation of the relevant company.

The decision in *Commonwealth v. Rocklea Spinning Mills* was widely considered to threaten the future viability of GEERS. As Justice Finkelstein indicated, the government's priority creditor rights constitute a key feature underpinning the entire scheme: 'if GEERS breaks down because

⁷² That is, employees who earn more than \$98,200 per annum receive payments under GEERS as if that were their level of annual income.

⁷³ By virtue of s. 560 of the Corporations Act 2001.

⁷⁴ See Kinsey, 'A Triumph for Labour over Capital', 141–2.

⁷⁵ [2005] FCA 902 ('*Commonwealth v. Rocklea Spinning Mills*').

⁷⁶ *Commonwealth v. Rocklea Spinning Mills* [2005] FCA 902, paras. 3 and 16.

⁷⁷ Under Part 5.3 A, Divisions 10 and 11 of the Corporations Act 2001.

parties have found a way to get around the Commonwealth's priority in a winding up there is a real risk that the scheme will be scaled back or itself terminated to the detriment of many employees of insolvent companies'.⁷⁸ In response, the government changed the GEERS Operational Arrangements from 1 November 2005, to prevent employees from accessing GEERS payments while the employing entity is under administration or receivership, or is subject to a deed of company arrangement. Claims under GEERS can now only be made once a liquidator has been appointed to 'wind up' the company.⁷⁹ The government also extended GEERS to enable employees to recover any wages unpaid in the three months prior to the employer's insolvency; and to make employees who resigned or were dismissed within six months prior to insolvency eligible to recover any unpaid entitlements under GEERS.

A further observation, by way of assessment of GEERS, is that the existence of a government-funded scheme arguably discourages directors from taking greater responsibility for ensuring that companies have sufficient assets to meet their employees' entitlements. While the outcome of GEERS in terms of increased employee protection is commendable, the public policy benefit of effectively transferring directors' potential liability to taxpayers is questionable.⁸⁰ Overall, however, the Parliamentary Joint Committee's recent review of GEERS found widespread support for the scheme, arguing that it 'is an important aspect of the overall arrangements for the protection of employee entitlements in Australia and should continue to be a feature of those arrangements'.⁸¹ At the same time, it was recommended that alternative mechanisms for safeguarding employee entitlements should be explored, such as industry trust funds, insurance schemes and employer levies.⁸²

⁷⁸ *Commonwealth v. Rocklea Spinning Mills* [2005] FCA 902, paras. 3 and 33.

⁷⁹ A complementary measure announced by the government to further improve the security of employee entitlements was a proposed amendment to the Corporations Act, 'to make it mandatory for a deed of company arrangement to preserve the priority available to creditors (as set out in [s.] 556 of the Corporations Act) unless employees agree to waive their priority, or the court upholds the deed on the grounds it offers dissenting creditors a better return than they would receive in liquidation': see Australian Government, 'Corporate Insolvency Reform', p. 2.

⁸⁰ Parliamentary Joint Committee, *Corporate Insolvency Laws*, p. 186; for a detailed exploration of the competing arguments and potential alternative arrangements, see Kinsey, 'A Triumph for Labour over Capital', 142–7.

⁸¹ Parliamentary Joint Committee, *Corporate Insolvency Laws*, p. 187.

⁸² Parliamentary Joint Committee, *Corporate Insolvency Laws*, pp. 188–90; see further J. Riley, 'Protection for Employee Entitlements: a Legal Perspective', *Australian Bulletin of Labour* 29 (2003), 31, 40–1, 43.

The third measure announced by the Federal Government in response to the Ansett collapse was a promise to place employees' claims to recover unpaid wages and notice and leave entitlements ahead of those of secured creditors in the statutory priority list for distribution of assets upon the insolvency of large companies (the 'maximum priority proposal').⁸³ After four years of consideration, this proposal was finally abandoned in late 2005, when the government accepted the Parliamentary Joint Committee's recommendations that the maximum priority proposal not be adopted.⁸⁴ The Committee had been influenced by many submissions by business interests opposing the proposal. Concerns that were raised included its potential negative impact on lending practices by banks and other finance providers (for example, they would make loans only to companies holding assets without employees, or seek security over the personal assets of proprietors and directors), and the resultant 'stifl[ing of] entrepreneurship' and reduction in investment levels across the economy.⁸⁵ Rather than pursuing the maximum priority proposal, the Committee recommended that 'preventative measures' be adopted to modify the behaviour of directors and managers with a view to ensuring that they accept increased responsibility for meeting employee entitlements in future.⁸⁶

It can be seen, then, that the various statutory and policy measures adopted in recent years – especially GEERS – have improved the position of Australian employees in the event of employer insolvency. However, these reforms have done little to bring employees in from 'outside' the corporation. The prevailing corporate governance framework still prioritises the interests of 'insiders', such as directors and shareholders, as well as banks and other secured creditors, at the expense of employees. Employees, unlike these other players, have no access to information about company financial performance (for example, under secured lending instruments) that would enable them to see the warning signs of corporate failure and act to protect their interests.⁸⁷ Employees are therefore usually the last to find out about insolvencies or business restructures (such as relocations, closures and mass redundancies) that threaten their

⁸³ D. Macfarlane, 'Put Workers First in Debt Queue, Says PM', *The Weekend Australian*, 15–16 September 2001, p. 7; Parliamentary Joint Committee, *Corporate Insolvency Laws*, pp. 172–3.

⁸⁴ Australian Government, 'Corporate Insolvency Reform', p. 3.

⁸⁵ See Parliamentary Joint Committee, *Corporate Insolvency Laws*, pp. 175–80.

⁸⁶ Parliamentary Joint Committee, *Corporate Insolvency Laws*, p. 181.

⁸⁷ See J. Adams and N. Jones, 'Distressed Businesses – Preventing Failure', in CCH, *Collapse Incorporated*, p. 185.

jobs and accrued entitlements.⁸⁸ The defeat of the maximum priority proposal illustrates the extent to which business interests continue to hold sway under Australia's shareholder-centred corporate law model,⁸⁹ and can be motivated to obstruct the translation of theoretical constructions of CSR into effective legal measures.

VII. Increasing recourse to corporate law mechanisms to advance employee interests

Another significant recent development in Australia has been the increasing resort by unions, lawyers and other representatives of employees to the mechanisms of corporate law to defend and advance workers' interests, through the following types of strategies. First, labour representatives have sought to make more creative use of the limited legal rights of employees in corporate insolvency situations. This approach was pursued with some success to combat the notorious corporate restructuring and forced redundancies of unionised maritime workers by Patrick Stevedores in the 1998 waterfront dispute. In that case, the High Court of Australia ultimately found that the courts could not interfere with the discretion of the Patrick companies' administrators to make decisions in the course of the administration, even if these might be prejudicial to employees' interests.⁹⁰ However, the union's pursuit of industrial law claims, in tandem with the assertion of the former employees' rights as creditors, put it in a much stronger position to influence the outcome of settlement negotiations between the disputing parties.⁹¹ Similarly, following the Ansett collapse, unions representing the airline's former employees played a pivotal

⁸⁸ See further A. Forsyth, 'Corporate Collapses and Employees' Right to Know: an Issue for Corporate Law or Labour Law?', *Australian Business Law Review* 31 (2003), 81.

⁸⁹ For example, note the Parliamentary Joint Committee's observation that the proposal 'attacks the rights of legal owners of the property in question': *Corporate Insolvency Laws*, p. 176.

⁹⁰ In particular, the administrators could not be required to keep the defunct Patrick companies operating and observe Federal Court orders to reinstate the sacked workers to their positions (these orders had been made on the basis that the Patrick restructure breached applicable industrial laws): *Patrick Stevedores Operations No. 2 Pty Ltd v. Maritime Union of Australia* (1998) 195 CLR 1; see M. Gronow, 'Insolvent Corporate Groups and their Employees: the Case for Further Reform', *Company and Securities Law Journal* 21 (2003), 188, 200–1; and P. Spender, 'Scenes from a Wharf: Containing the Morality of Corporate Law', in F. Macmillan (ed.), *International Corporate Law*, vol. 1 (Oxford: Hart Publishing, 2000), p. 37.

⁹¹ See, e.g., Spender, 'Scenes from a Wharf', p. 43; C. Hughes, 'Towards Pinstriped Unionism: Protecting Employee Entitlements through Securitisation', *Bond Law Review* 12 (2000), 7, 9–10.

role in the voluntary administration process, (unsuccessful) efforts to enable the business to continue operating through another corporate entity, and the subsequent protracted litigation to recover their superannuation benefits and full entitlements under the SEESA scheme.⁹² Indeed, in the Ansett case, the Federal Court granted the unions' applications to remove the original administrators (on conflict of interest grounds), and to be recognised as the representatives of the former employees at creditors' meetings without meeting the formal statutory requirements for the appointment of proxies.⁹³

In Whelan and Zwier's view, these and other aspects of the Ansett case suggest that 'where the employee claimants are united and organised they have the capacity to have a very significant influence on the course of an insolvency administration.'⁹⁴ They point to several other cases indicating both the success of this approach, and the 'growing willingness' of the Australian Council of Trade Unions (ACTU) to engage insolvency practitioners and utilise corporate law devices for the benefit of union members adversely affected by company failures.⁹⁵ There are also several recent examples of unions successfully arguing for the 'piercing of the corporate veil' in proceedings under industrial law – for example, to overcome a company's attempts to transfer staff to a subsidiary entity so as to avoid the application of a collective agreement;⁹⁶ and to enable the Ansett unions to draw Air New Zealand (the airline's parent company) into negotiations over the employees' redundancy and employment entitlements.⁹⁷ Interestingly, these and other cases exhibit an increasing recognition by the judiciary of the need for greater protection of employee interests in corporate restructures and insolvencies. This is perhaps best exemplified by Justice Merkel of the Federal Court's condemnation of the Coogi clothing company's treatment of its 'long serving and loyal employees . . . as if they were serfs, rather than free citizens', by transferring their employment

⁹² See again Whelan and Zwier, *Employee Entitlements*, pp. 32–41.

⁹³ See Whelan and Zwier, *Employee Entitlements*, pp. 32–3; and Forsyth, 'Corporate Collapses', 94, discussing *In the matter of Ansett Australia Ltd; Rappas v. Ansett Australia Ltd* [2001] FCA 1348, 39 ACSR 296.

⁹⁴ See Whelan and Zwier, *Employee Entitlements*, pp. 42–3.

⁹⁵ See Whelan and Zwier, *Employee Entitlements*, pp. 44–6, discussing the Pasmenco, Newmont Yandal and James Hardie cases; see also the examination of the Coogi clothing case in Forsyth, 'Corporate Collapses', 81–2.

⁹⁶ *Burswood Catering and Entertainment Pty Ltd v. ALHMHU (WA Branch)* [2002] WASCA 354 (Western Australian Industrial Appeal Court); see J. Harris, 'Lifting the corporate veil on the basis of an implied agency: a re-evaluation of Smith, Stone and Knight', *Company and Securities Law Journal* 23 (2005), 7, 21–4.

⁹⁷ *ASU and TWU v. Ansett Australia Ltd* (Australian Industrial Relations Commission, Boulton J, PR909513, 24 September 2001).

(without notice) to shell companies with insufficient assets to pay out the workers' entitlements.⁹⁸

The second and third of the corporate law strategies adopted by Australian unions in recent years – 'boardroom activism' and 'shareholder activism' – really amount to attempts to bring employees 'inside' the institutional structures of the corporation, and so take advantage of the shareholder primacy model. Through the concept of *boardroom* activism, the ACTU encourages union representatives on superannuation fund boards to use their positions to ensure 'socially responsible' investment decisions.⁹⁹ Boardroom activism has also involved attempts by unions to obtain seats on the boards of major companies, such as the Finance Sector Union's campaign to have a representative elected to the ANZ Bank board. Although (to date) unsuccessful, these efforts have provided a platform for unions to articulate concerns about staff reductions, collective bargaining rights and other employment issues.¹⁰⁰

The ACTU's *shareholder* activism strategy seeks to utilise the combined voting power of employee and superannuation fund shareholdings to influence decision-making about retrenchments, wage disparities and industrial negotiations at company annual general meetings (AGMs).¹⁰¹ This approach involves the use of various provisions of the Corporations Act,¹⁰² including those enabling a minimum of a hundred shareholders to submit proposed resolutions at AGMs¹⁰³ and to request the holding of extraordinary general meetings;¹⁰⁴ the right of shareholders to ask

⁹⁸ *McClusky v. Karagiozis* [2002] FCA 1137, para. 16. In this decision, Merkel J overturned the company's actions and found that the employees should be regarded as having continued in employment with the original employing entity, making them creditors of that entity and thereby increasing their prospects of recovering their entitlements; see further Forsyth, 'Corporate Collapses', 81–2.

⁹⁹ See S. Burrow, 'Whispers Outside the Boardroom Door: Making Working Australia's Money Talk' (Address to the Sydney Institute, Sydney, 29 August 2000); G. Combet, Speech to ACSI Corporate Governance Conference, 9 July 2005.

¹⁰⁰ See K. Anderson and I. Ramsay, *From the Picket Line to the Boardroom: Union Shareholder Activism in Australia* (Research Report, Centre for Corporate Law and Securities Regulation and Centre for Employment and Labour Relations Law, University of Melbourne, December 2005), pp. 22–6.

¹⁰¹ See Australian Council of Trade Unions, *Corporate Governance Background Paper* (ACTU Congress, 2003); G. Combet, 'Superannuation, Unions and Good Labour Relations' (Address to the Conference of Major Superannuation Funds, Ashmore, 14 March 2002).

¹⁰² See Anderson and Ramsay, *From the Picket Line to the Boardroom*, pp. 1, 50–7.

¹⁰³ Corporations Act 2001, s. 249N.

¹⁰⁴ Corporations Act 2001, s. 249D; the Australian Government has proposed to amend this provision so that only holders of 5 per cent of voting shares may requisition a general meeting; see Parliament of Australia, *Inquiry into the Exposure Draft of the Corporations Amendment Bill (No. 2) 2005* (2005), p. 6.

questions of directors at the AGM;¹⁰⁵ and the 'proxy voting' provision.¹⁰⁶ Although unions have not yet obtained shareholder support for their resolutions at any Australian company AGM, shareholder activism has proved successful in enabling unions to focus board and public attention on industrial issues at major companies like Rio Tinto, Boral, Commonwealth Bank, Blue Scope Steel and NRMA.¹⁰⁷ The strategy has been a particularly effective mechanism for unions in obtaining satisfactory outcomes to protracted enterprise bargaining negotiations – that is, after raising concerns about industrial disputes at company general meetings, resolution of the outstanding issues has often quickly followed.¹⁰⁸ As part of their shareholder activism campaigns, unions have also focused on 'mainstream' corporate governance issues, such as the need for independent non-executive directors and limits on executive pay, in order to attract support on industrial issues from other shareholders (especially large institutional investors like superannuation funds).¹⁰⁹

The increasing recourse by labour representatives to the mechanisms and processes of corporate law represents a considerable shift in the perception of employees and unions as corporate 'outsiders' under the traditional shareholder primacy model.¹¹⁰ In part, this phenomenon is a response to the removal of many of the long-standing rights and protections for workers and unions under the Australian labour law system since the election of the (conservative) Coalition Government in 1996. This process began with the passage of the Workplace Relations Act 1996 (Cth), and has been taken considerably further by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth), which virtually abolishes the right to strike and significantly constrains employees' rights to access collective bargaining and union representation.¹¹¹ Unions have therefore

¹⁰⁵ Corporations Act 2001, s. 250S. ¹⁰⁶ Corporations Act 2001, s. 249X.

¹⁰⁷ See the detailed case studies reported in Anderson and Ramsay, *From the Picket Line to the Boardroom*, pp. 10–42.

¹⁰⁸ See Anderson and Ramsay, *From the Picket Line to the Boardroom*, pp. 10–42, 71–6, 83–5.

¹⁰⁹ Anderson and Ramsay, *From the Picket Line to the Boardroom*, pp. 76–8, 85.

¹¹⁰ See further R. Mitchell, A. O'Donnell and I. Ramsay, *Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labour Law*, Research Paper, Centre for Corporate Law and Securities Regulation, Centre for Employment and Labour Relations Law, University of Melbourne (2005).

¹¹¹ See A. Forsyth and C. Sutherland, 'Collective Labour Relations under Siege: the Work Choices legislation and collective bargaining', *Australian Journal of Labour Law* 19, 2 (2006) 183. The 2005 legislation also reduces the (already limited) labour law protections for employees in situations of corporate restructure and insolvency, by removing the scope for employees to obtain severance payments through an award variation (as occurred in the case of One.Tel, discussed above) or under statute; and limiting the statutory rights of unions to obtain information and consult with management about mass redundancies.

looked to corporate law as an alternative avenue for influencing management decision-making, and it is expected that this trend will continue in light of the further diminution of labour law protections under the 2005 legislation.¹¹² This also challenges the concept of shareholder primacy, as workers' interests increasingly fall into alignment with those of the broader shareholder base.¹¹³ Not unexpectedly, therefore, a 'backlash' against union reliance on corporate law has already commenced,¹¹⁴ once again illustrating the power of company 'insiders' to fend off incursions by non-shareholder interests into the corporate realm.

VIII. Employees 'missing' in the debate over corporate governance reform? Australia, the United Kingdom and the United States compared

Employees have received very little attention in the extensive debate over corporate governance reform in Australia. That debate has been overwhelmingly shareholder-centred, with legislative responses aimed at improving board relationships with shareholders and auditor independence.¹¹⁵ These reform measures make little or no mention of employees, partly because political actors representing workers' interests (such as the ACTU and the Australian Labor Party) have not sought to take the corporate governance debate in this direction. Rather, they have supported moves to strengthen the requirements for independent company auditors, and increased shareholder scrutiny of executive remuneration.¹¹⁶ The ACTU has also pressed for legislative reform to enable 'piercing of the corporate veil' in cases of tortious liability (in response to the James Hardie episode), and for 'appropriate' regulatory support for voluntary initiatives

¹¹² Anderson and Ramsay, *From the Picket Line to the Boardroom*, pp. 74–6, 86.

¹¹³ See further Anderson and Ramsay, *From the Picket Line to the Boardroom*, pp. 88–92; Mitchell, O'Donnell and Ramsay, *Shareholder Value and Employee Interests*.

¹¹⁴ For example, proposed legislative amendments will require unions to obtain the support of at least 5 per cent of a company's shareholders to call an extraordinary general meeting (rather than only 100 shareholders, as at present); and the Commonwealth Bank brought (unsuccessful) legal proceedings alleging that the Finance Sector Union's shareholder activism campaign breached industrial law prohibitions on 'coercion' in enterprise bargaining: see *Commonwealth Bank of Australia v. Finance Sector Union of Australia* [2006] FCA 1048.

¹¹⁵ See A. Clarke, 'The Relative Position of Employees in the Corporate Governance Context: an International Comparison', *Australian Business Law Review* 32 (2004), 111; P. von Nessen, 'Corporate Governance in Australia: Converging with International Developments', *Australian Journal of Corporate Law* 15 (2003), 1.

¹¹⁶ See, for example, Senator S. Conroy, *Directions Statement: Improving Corporate Governance* (2002); ACTU, *Corporate Governance Policy* (ACTU Congress, 2003).

to promote corporate responsibility.¹¹⁷ Several academics have lamented the narrow focus of the corporate governance debate in Australia, arguing that it should be broadened to consider options such as European-style systems for employee representation on company boards.¹¹⁸ That the ACTU has not embraced the idea of legally-mandated employee representation at board-level demonstrates that, despite the recent developments examined in this chapter, the concept of shareholder primacy remains strongly entrenched in Australia.

In the United Kingdom, recent corporate law developments suggest mixed fortunes for employees. On the one hand, employees have figured far more prominently in the debate over corporate governance reform in the United Kingdom. This has included consideration of a 'major redesign of [company] decision-making structures to permit participation by the relevant stakeholder groups', such as employees.¹¹⁹ The United Kingdom has also implemented EU laws requiring at least partial adaptation of the shareholder primacy model, to reflect aspects of the European 'stakeholder' approach to corporate regulation – specifically, employee board representation.¹²⁰

On the other hand, as indicated earlier in this chapter, amendments to UK company legislation have seen the provision requiring directors to have regard to the interests of employees as well as shareholders¹²¹ replaced by a more general directors' duty provision.¹²² In addition to the criticisms of the former statutory provision discussed above, its effectiveness in protecting employee interests has been questioned on the basis that it does not require those interests to be given priority, and

¹¹⁷ See Australian Council of Trade Unions, *Submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Corporate Responsibility* (September 2005).

¹¹⁸ See, for example, R. Markey, 'A Stakeholder Approach to Corporate Governance: Employee Representatives on Boards of Management', in Gollan and Patmore (eds.), *Partnerships at work*, pp. 122, 132–3; Clarke, 'The Relative Position of Employees', 114, 119, 130–1.

¹¹⁹ J. Parkinson, 'Models of the Company and the Employment Relationship', *British Journal of Industrial Relations* 41 (2003), 481, 499–504; see also P. Davies, 'Employee Representation and Corporate Law Reform: a Comment from the United Kingdom', *Comparative Labor Law and Policy Journal* 22 (2000), 135; J. Williamson, 'A Trade Union Congress perspective on the Company Law Review and Corporate Governance Reform since 1997', *British Journal of Industrial Relations* 41 (2003), 511.

¹²⁰ See P. Davies, 'Workers on the Board of the European Company?', *Industrial Law Journal* 32 (2003), 75; C. Barnard and S. Deakin, 'Reinventing the European Corporation: Corporate Governance, Social Policy and the Single Market', *Industrial Relations Journal* 33 (2002), 484.

¹²¹ Companies Act 1985 (UK), s. 309(1). ¹²² Companies Act 2006 (UK), s. 172.

because the duty is owed to the company and therefore is enforceable only at the instance of shareholders.¹²³ However, the enshrinement of the concept of 'enlightened shareholder value' through the new statutory provision¹²⁴ means that employees will have to *compete* with a range of other stakeholders for legal recognition.¹²⁵

Finally, in the United States, although employees were significantly adversely affected by massive corporate collapses like Enron and World-Com, the major corporate governance response to these events – the Sarbanes-Oxley Act – did not contain any reforms to improve the protection of employee interests.¹²⁶

IX. Conclusion: the new corporate law

The discussion in this chapter has highlighted the restricted, though still important, role of formal corporate law rules and processes in responding to demands for improved CSR. We have emphasised that the shareholder primacy model, which underpins the Australian and Anglo-American corporate law systems, imposes limits on what can be achieved by corporate legal doctrine and legislative rules. For that reason, rather than focusing solely on attempts to adapt or formalise exceptions to established concepts such as directors' fiduciary duties, we suggest that it may be more fruitful to acknowledge the constraints of formal statutory and judicial rules, and to recognise the growing significance of codes, guidelines and standards, and so on, and their impact on corporate managerial behaviour. Indeed, we argue that the 'new' corporate law in these jurisdictions should be understood not as an attempt to expand or adapt the content of corporate law, but instead as an expanded conception of what counts as corporate law.

Most often the analysis of CSR and how to encourage it begins by assuming a separation between 'the law' and other 'non-legal' phenomena,

¹²³ C. Villiers, 'Section 309 of the Companies Act 1985: is it Time for a Reappraisal?', in H. Collins, P. Davies and R. Rideout (eds.), *Legal Regulation of the Employment Relation* (Dordrecht: Kluwer, 2000), pp. 595–7; Lord Wedderburn, 'Employees, Partnership and Company Law', *Industrial Law Journal* 31 (2002), 99, 106–8.

¹²⁴ See P. Davies, 'Enlightened Shareholder Value and the New Responsibilities of Directors: What Does the Best Director Do for the Creditor?' (Inaugural W. E. Hearn Lecture, Law School, The University of Melbourne, 4 October 2005).

¹²⁵ B. Wedderburn, *The Future of Company Law: Fat Cats, Corporate Governance and Workers* (London: The Institute of Employment Rights, 2004), p. 43.

¹²⁶ Whelan and Zwier, *Employee Entitlements*, p. 16; Clarke, 'The Relative Position of Employees', 121–5.

such as codes and guidelines (for ease of reference, we will use the term 'codes' to refer to this diverse array of material). But, as we have seen in this chapter, corporate law increasingly depends on codes; the law leaves it to codes to fill in the gaps that the law cannot or will not deal with. Where corporate law prescribes general standards, such as 'best interests', 'good faith' or 'care and diligence', codes can supply the further detail. Furthermore, corporate law relies on 'other areas of law which support and create corporations, and the transactions which those corporations enter into'.¹²⁷ Rather than viewing corporate law as a discrete, self-referential category of law, we should be concerned with the way in which corporate law interacts with other categories of law, and with other mechanisms for influencing behaviour (such as codes), or non-legislative instruments, to achieve specific outcomes (such as the GEERS policy described above).

Understanding how CSR can be encouraged and enforced means recognising the interdependent nature of corporate law. This does not mean elevating codes to the status of law. Amongst other things, that would carry risks of unaccountable rule-making. And it does not mean assuming that codes are always effective or that they cannot be used in a tokenistic way – as part of CSR 'window-dressing.' Nor does it mean that the law is unimportant, irrelevant or marginal in how we respond to concerns about CSR. The previous discussion about the shareholder activism strategies of Australian unions demonstrates this. It does mean, however, that focusing only on accepted legal categories (and legal limitations) is to miss a big part of the picture. The recent Australian experience of efforts to change formal rules of corporate regulation to accommodate employee interests demonstrates the difficulties that can be encountered in efforts to transpose CSR concepts into meaningful legal rules. For employees, more significant inroads into the shareholder primacy model might be made through reforms to labour law. This could include the adoption of mandatory works councils and other mechanisms for employee 'voice' that can challenge the power of company institutions (such as the board) from which workers are largely excluded.¹²⁸

¹²⁷ A. Corbett and S. Bottomley, 'Regulating Corporate Governance', in C. Parker, C. Scott, N. Lacey, and J. Braithwaite (eds.), *Regulating Law* (Oxford: Oxford University Press, 2004), p. 63.

¹²⁸ For an account of how this has occurred in the United Kingdom under the influence of EU labour law directives, see J. Armour, S. Deakin and S. Konzelmann, 'Shareholder Primacy and the Trajectory of UK Corporate Governance', *British Journal of Industrial Relations* 41 (2003).

In summary, the new corporate law owes more to expanded ideas of regulation than to formal conceptions of what counts as law.¹²⁹ The new literature on regulation supplies a means for bringing these parts together. It recognises that, in everyday corporate practice, the boundaries between the law and codes are not always felt so clearly. This idea builds on an argument, developed elsewhere, that the category of law known as 'corporate law' is being transformed into a broader category of rules, which can be called 'corporate governance':

Corporate law may in the past have been described as a one-dimensional body of law concerned with the regulating the interests of investors, managers and directors. The impact of regulation has been to transform this body of law into an emerging law of corporate governance, which seeks to integrate the policies and concerns of broad areas of regulation into corporate law.¹³⁰

The terrain of CSR, ill-defined though it is, is a prime example of this transformation.

¹²⁹ The essays in Parker *et al.*, *Regulating Law* explore the impact of 'regulation' on different aspects of the law.

¹³⁰ Corbett and Bottomley, 'Regulating Corporate Governance', p. 81.