

Animal Law Committee & Environment and Planning Law Committee

Submission on “Shareholder primacy: Is there a need for change?”

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The NSW Young Lawyers Animal Law and Environment and Planning Law Committees (**the Committees**) are grateful for the opportunity to make a submission to the Governance Institute of Australia in relation to its discussion paper “Shareholder primacy: Is there a need for change?”

NSW Young Lawyers

NSW Young Lawyers (**NSWYL**) is the largest group of newly practising lawyers and law students in NSW with over 15,000 members. It supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students.

The NSWYL Animal Law Committee comprises of a group of over 250 lawyers and law students interested in animal welfare and laws regulating the treatment of animals. The Committee aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst Committee members is a passion and desire to use our legal skills and the law to help improve the lives of animals.

The NSWYL Environment and Planning Law Committee brings together a network of the State's young practitioners to discuss a shared interest in our environment. It focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law, and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

It should be noted that this submission does not represent the position of the Law Society of NSW or its committees, which may take a different view on these issues.

1. Is there a view that there is no need for a change to the corporations law, as it currently allows directors to take account of the interests of stakeholders other than shareholders?

The Committees submit that there is a need to change the *Corporations Act 2001* (Cth) (**Corporations Act**) to expressly require directors to consider the interests of non-shareholders, as provided for in section 172 of the *Companies Act 2006* (UK) (**UK Companies Act**). The current provisions relating to directors' duties in section 181(1) of the Corporations Act fail to require directors to afford any specific consideration to other stakeholders who may be affected by a company's activities despite the fact that directors' decisions may significantly affect the public interest.

The lack of a legislated requirement for Australian companies to take non-shareholder interests such as the community and the environment into account has arguably previously contributed to the implication of Australian companies in allegations of environmental and human rights abuses. For example, BHP Billiton was implicated in allegations of grave environmental harm occurring as a result of the discharge of around two billion tons of untreated mining waste into the Ok Tedi River in Papua New Guinea in 1997.¹ In 2002, Rio Tinto was accused of involvement in the St Valentine's Day massacre in Bougainville.² The placement of an express obligation on directors to consider the environment and communities in carrying out their duties has the potential to result in the prevention of these kind of catastrophes in the future, and to provide communities with legal recourse should directors fail to comply with their legislated obligations.

Whilst companies have in recent years adopted corporate social responsibility (CSR) policies, there is no consistency across industries or between companies. Enshrining additional key considerations that directors must consider will go some way to addressing this inconsistency and also remove the ability of companies to differentiate themselves for simply doing the right thing.

2. Is there a need for a change to the corporations law, and should the equivalent of section 172 in the UK (permissive clause) be introduced to expand directors' duties so that they should have regard to the interests of stakeholders other than shareholders in promoting the best interests of the company?

The Committees recommend a mandatory requirement for directors to consider certain non-shareholder interests and be held to account where they fail to do so. For example, if directors are unable to provide evidence that non-shareholder interests have been taken into account, they could be faced with civil penalties such as fines (which could be tiered based on the severity of the prejudice suffered by the non-shareholder) or the risk of disqualification in the most extreme cases. These consequences are consistent with the existing repercussions if a director fails to act in the best interests of shareholders.

Directors should have an express obligation to observe the proportionality principle and, where a non-shareholder interest has been adversely affected, bear the burden of proof that alternative courses of action were considered and be required to demonstrate that the harm done to that non-shareholder was not disproportionate to the benefit achieved for the company. As part of their audits, auditors could review Board minutes for evidence that relevant non-shareholder interests have been adequately considered in the decision making process.

¹ *Dagi and Ors v BHP Minerals Pty Ltd and Ok Tedi Mining Ltd* [1997] 1 VR 428.

² *Sarei v Rio Tinto*, 2002 221 FSupp 2d 1116 (CD Cal 2002).

The Committees support the adoption of the factors contained in section 172 of the UK Companies Act but also submit that animal welfare should be expressly included as it is fundamental to CSR.³ The impacts of large-scale animal production and poor animal welfare on human health, the environment, the economy and society⁴ support the inclusion of animal welfare as a mandatory consideration.

There is also increasing community interest in food sources and the food supply chain (e.g. the UK horse meat scandal in 2013), and whilst many companies have implemented policies on animal welfare (e.g. Wesfarmers), this is not mandatory or consistent across all companies, resulting in limited transparency and slow improvement in animal welfare practices given that what gets measured gets managed.⁵

Recent public campaigns against large multinational companies such as McDonald's⁶ and Subway⁷ have been successful in forcing these companies to improve their animal welfare practices to be more consistent with community expectations. However, it should not be up to animal welfare organisations and social media campaigns to police corporate conduct. Legislating a mandatory requirement for directors to consider animal welfare in carrying out their duties has the potential to result in a uniform and enforceable standard for animal welfare.

Companies are recognising the positive impact that good animal welfare practices can have on reputation⁸ and that shareholders share common concerns with stakeholders about animal welfare.⁹ Imposing a specific duty on directors to consider their company's impact on animals is aligned with this and will make explicit an obligation that some (but not all) companies already observe.

3. Is there a need for a change to the corporations law, and should an explicit clause be introduced to expand directors' duties so that they must take account of the interests of stakeholders other than shareholders?

Yes. We refer to our response at Question 2 above. The Committees support the adoption of an explicit clause along the lines of section 172 of the UK Companies Act with the addition of the requirement to consider animal welfare.

³ <http://www.sustainabilityconsortium.org/tsc-news/animal-welfare-fundamental-to-corporate-social-responsibility/> .

⁴ Eurogroup For Animals, *Corporate Social Responsibility and Animal Welfare* (2010): http://eurogroupforanimals.org/files/publications/downloads/CSR_leaflet.pdf .

⁵ <http://www.theguardian.com/sustainable-business/farm-animal-welfare-corporate-responsibility> .

⁶ <http://www.smh.com.au/environment/mcdonalds-to-phase-out-caged-eggs-20140915-10h6ze.html>

⁷ http://www.subway.com/subwayroot/about_us/Social_Responsibility/SustainableSourcing.aspx .

⁸ <http://www.triplepundit.com/2012/06/three-reasons-farm-animal-welfare-important-csr-tenet-food-industry/> .

⁹ http://www.hsi.org/news/press_releases/2014/04/cemefi-conference-farm-animals-english-040914.html .

Citing another example, the Code of Corporate Governance¹⁰ in South Africa advocates the stakeholder approach to directors' duties. Principle 1.2 states that the *"board should ensure that the company is and is seen to be a responsible corporate citizen"*. Underpinning that principle is recommendation 1.2.1 which states that *"[t]he board should consider not only financial performance but also the impact of the company's operations on society and the environment"* and recommendation 1.2.2 which states that *"[t]he board should protect, enhance and invest in the well-being of the economy, society and the environment"*.

4. Is there a role for the government to play in protecting the interests of stakeholders — not through amendment to the corporations law, but through other forms of social policy?

The Committees are of the view that amendments to the Corporations Act would be the most appropriate and effective way to ensure that directors consider non-shareholder interests in their decision-making. Incorporating the amendments in one piece of legislation not only makes it administratively simpler, but including these additional stakeholder interests with existing director duties makes them more visible and therefore more likely that the desired objective of directors looking beyond the financial interests of their shareholders, will be achieved. It would also provide legal certainty to both companies and the community about the duties of directors to consider non-shareholders in carrying out their duties.

The Committees thank the Governance Institute of Australia for the opportunity to comment. If any further information can be provided, please contact the undersigned.



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¹⁰ <http://www.ecgi.org/codes/documents/king3.pdf> .

A handwritten signature in black ink, appearing to be 'ER' or similar initials, with a large loop at the top.

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