

# THE PRIVATE SECTOR, BUSINESS LAW AND ENVIRONMENTAL PERFORMANCE

TECHNICAL PAPER 7

# APEEL



The Australian Panel of Experts  
on Environmental Law

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## About APEEL

The Australian Panel of Experts on Environmental Law (APEEL) is comprised of experts with extensive knowledge of, and experience in, environmental law. Its membership includes environmental law practitioners, academics with international standing and a retired judge of the Federal Court. APEEL has developed a blueprint for the next generation of Australian environmental laws with the aim of ensuring a healthy, functioning and resilient environment for generations to come. APEEL's proposals are for environmental laws that are as transparent, efficient, effective and participatory as possible. A series of technical discussion papers focus on the following themes:

1. The foundations of environmental law
2. Environmental governance
3. Terrestrial biodiversity conservation and natural resources management
4. Marine and coastal issues
5. Climate law
6. Energy regulation
7. The private sector, business law and environmental performance
8. Democracy and the environment

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## Summary and Recommendations

### Executive Summary

This *Technical Paper* considers the role of the private sector (namely business and industry) in environmental protection and management, and the effect of business law on the private sector's environmental performance. Because the philosophy of ecologically sustainable development is not well integrated into Australia's economic governance, the business sector encounters ambiguous messages about how environmental considerations should inform its decisions such as financial investing or tax planning. The long-held assumption that environmental standards and rules are best 'quarantined' to within specific environmental legislation is problematic. This paper identifies key challenges and assesses how environmental principles and standards can be integrated into Commonwealth laws relating to corporations, financial investment, tax, consumer protection and trade. The paper also considers the contribution of voluntary environmental initiatives, known as corporate social responsibility of socially responsible investment. Recommendations for law reform to facilitate private sector collaboration, innovation and leadership in environmental responsibilities are canvassed.

### Specific recommendations include:

- 7.1. *A general duty on all companies to improve their environmental performance.*
- 7.2. *Require companies to develop environmental management systems, sustainability plans, improved environmental reporting and processes for consultation with stakeholders. Company law should be reformed to establish an environmental judgement rule, collect and disclose environmental performance data, and reward shareholders with weighted voting rights.*
- 7.3. *Redefine the fiduciary and trust law responsibilities of financial institutions to require environmentally responsible investment.*
- 7.4. *Oblige the Commonwealth's Future Fund to promote environmentally responsible investment.*
- 7.5. *Develop positive environmental disclosure obligations on business.*
- 7.6. *Allow for the establishment of corporate 'hybrid' enterprises that blend profit maximisation and community benefit goals.*
- 7.7. *Reform the tax system to improve the financial advantages of environmentally responsible practices.*
- 7.8. *Explore new sources of finance such as goods and services tax (GST) revenue to support and incentivise environmental innovation and stewardship.*
- 7.9. *Give effect to the United Nations Guiding Principles on Business and Human Rights.*

## HOW TO CONTRIBUTE TO THE APEEL PROJECT

APEEL invites you to provide your responses to the ideas and recommendations presented in this paper. This will assist the development of our final proposals for the next generation of Australian environmental laws.

We look forward to your engagement on specific reform options as the APEEL journey progresses.

Please send your responses to: [admin@apeel.org.au](mailto:admin@apeel.org.au) or go to [www.apeel.org.au](http://www.apeel.org.au) where you can do so online.

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## 1. The challenges

APEEL recognises that environmental law is not the only part of a legal system that influences environmental behaviour.<sup>1</sup> A wide variety of other laws, many of which ostensibly have nothing to do with the natural environment, are highly relevant. Business law, in particular, has significant environmental ramifications because it directly influences many economic activities.<sup>2</sup> Business law also has consequences for human rights and democracy because of the often privileged position of the business community in national policy-making in areas such as tax, trade and the environment itself. To ensure their interactions are productive rather than antagonistic, an understanding is required as to how business laws interact with environmental law.<sup>3</sup> The business sector is potentially a significant source of financial support for meeting the costs of environmental protection and improvement. However, because the philosophy of ecologically sustainable development (ESD) is not deeply embedded in Australia's economic governance, the business sector sometimes faces unclear or inconsistent messages about the role that environmental considerations should play in its decisions such as financial investing or tax planning.

The areas of business law of most significance to these issues are: corporate law (which influences the goals of business enterprises and to whom they are accountable); financial investing regulation, including laws governing superannuation funds and other financial entities (affecting the scope for socially responsible financing); consumer law (controlling advertising about the environmental qualities of services and products); trade law (trade agreements influence economic activity and environmental standards); and taxation law (providing incentives or disincentives for environmentally responsible behaviour).

Legal reforms yet untried in Australia offer the potential to create a more environmentally responsible commercial climate. These reforms include new corporate models, currently operating in North America and the United Kingdom, known as benefit corporations or community interest companies. For financial investors, there are options to redefine fiduciary and trust law responsibilities to encourage long-term, sustainable investing. Corporate environmental reporting is another area of prospective legal reform that might help. Recent reviews of the Australian tax system highlight the scope to greatly improve tax concessions for private nature conservation and other environmental contributions.<sup>4</sup> Introduction of positive environmental disclosure obligations on retailers might also promote more environmentally conscious consumer choices. There are probably many other opportunities that can be identified for pursuit through law reform.

Some members of the business sector already recognise the value of improving their environmental performance for reasons of their own financial self-interest, social reputation or relationships with community stakeholders, as evident in some companies taking actions beyond legal requirements.<sup>5</sup> These efforts commonly involve internal management improvements such as purchasing standards, engineered or operations improvements, and voluntary codes and standards for industry sectors and investors.<sup>6</sup> Some retail chains and brands are also voluntarily being more transparent to consumers about the environmental attributes of their products. The quality and impact of voluntary environmental initiatives in the business sector however is a matter of some debate, with concerns that voluntary approaches cannot be relied upon to foster meaningful or significant behavioural changes.<sup>7</sup> Better support for some of these voluntary initiatives, and ensuring the integrity and transparency of their performance, are potentially important and efficient ways to improve environmental governance.

1 Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

2 Beate Sjafell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015); Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Policy* (Greenleaf Publishing, 2002).

3 Andrew J Jordan and Andrea Lenschow (eds), *Innovation in Environmental Policy? Integrating the Environment for Sustainability* (Edward Elgar Publishing, 2008).

4 *Australia's Future Tax System Review* (Commonwealth of Australia, 2010) <[https://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs\\_reports.htm](https://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm)>.

5 Kathy Babiakand and Sylvia Trendafilova, 'CSR and Environmental Responsibility: Motives and Pressures to Adopt Green Management Practices' (2011) 18 *Corporate Social Responsibility and Environmental Management* 1, 11.

6 Wayne Visser et al, *The A to Z of Corporate Social Responsibility: A Complete Reference Guide to Concepts, Codes and Organisations* (Wiley, 2007); Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29 *Law and Social Inquiry* 2, 307.

7 Jem Bendell, 'In Whose Name? The Accountability of Corporate Social Responsibility' (2005) 15 *Development in Practice* 3-4 362; Dexter Dunphy and Suzanne Benn (eds), *Corporate Governance and Sustainability: Challenges for Theory and Practice* (Routledge, 2007); Renard Siew, 'Style Over Substance: Sustainability Reporting Falling Short' *The Conversation* (23 September 2014).

This paper identifies and explains the relevance of business laws and practices of environmental significance. It identifies some key challenges and issues to address, and canvasses some principles to guide law reform, building on those identified in other APEEL *Technical Papers*. These challenges and issues include how might the law embed environmental performance standards into broader areas of economic life such as corporate governance; how can the law encourage environmental innovation and leadership in the private sector; and given the business sector's economic resources, how can corporations and investors help fund the next generation of Australian environmental laws? This paper examines some specific business laws of the Commonwealth, including financial, consumer and tax laws, in terms of their environmental implications. As well, some voluntary environmental initiatives of the private sector are considered. Finally, this paper recommends reforms to improve environmental decision-making in the private sector.

## 2. Integrating environmental principles and standards into business affairs

As discussed in Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017), the starting point for law reform is to identify and rationalise the guiding principles to underpin specific legislation and policy. Environmental law already recognises, at least notionally, the importance of addressing environmental problems systemically across all sectors of society, including the business community. Many prominent statements of environmental governance emphasise this goal. The principles of ESD as codified in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the *EPBC Act*), declare that: ‘decision-making processes should *effectively integrate* both long-term and short-term economic, environmental, social and equitable considerations’.<sup>8</sup> More strongly worded, the *Rio Declaration on Environment and Development* of 1992 affirms that: ‘to achieve sustainable development, environmental protection shall constitute an *integral part of the development process* and cannot be considered in isolation from it’.<sup>9</sup> Likewise, the *Treaty of the European Community* states: ‘Environmental protection requirements must be *integrated into the definition and implementation of (all) Community policies* and activities ... in particular with a view to promoting sustainable development’.<sup>10</sup>

The challenge, as identified in Australian Panel of Experts on Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017), is to strengthen such aspirations through more rigorous expectations articulated in law, as well as to greatly improve implementation. Though many esteemed business commentators such as John Elkington, Michael Porter and Paul Hawken,<sup>11</sup> see ample opportunities for ‘win-win’ gains for the environment and the economy, achieving this aspiration has been difficult. The attractiveness of ‘win-win’ gains can be diminished by their often misaligned timing: the costs of environmental improvements are usually very tangible and upfront, while the promised benefits are less certain and long-term. This is problematic for business corporations sensitive to near-term performance pressures. Businesses face substantial disincentives to improve their environmental performance because of market failures to reflect the economic value of such efforts.<sup>12</sup> Eco-tourism ventures, for instance, depend on paying for themselves through the market. The business collapse of Earth Sanctuaries, Australia’s first public company dedicated to wildlife conservation and recovery, is evidence of the risk of such market failures.<sup>13</sup> Environmental economists and others have evaluated how markets might be reoriented to play a more positive role,<sup>14</sup> and legal institutions can be crucial for this reorientation.

In Australia, the legislative setting is often not coherent or integrated in the manner advocated by the foregoing statements and principles. Laws governing economic activity may work at cross-purposes to dedicated environmental laws, resulting in a confusing and ineffectual approach to managing the environmental activities of the private sector. While it is unrealistic to expect that any single law or regulatory agency alone can govern all facets of any specific environmental problem or issue, these various elements are needed at the very least to work in broad unison.

Business law can conflict with environmental goals in a variety of ways. The legal framework governing for-profit corporations can discourage companies from complying with the spirit of environmental legislation because of a countervailing imperative to promote shareholder returns. Consumer law can control misleading advertising about the environmental status of products and services, but it generally does not oblige businesses to make full disclosures about their environmental performance that could be useful to promote green consumerism. Tax law subsidises the cost of fossil fuels, thereby discouraging investment in alternative green energy to help mitigate climate change, while landowners conserving biodiversity may receive no tax concessions if they do not earn any taxable income from their property.

<sup>8</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A(a) (emphasis added).

<sup>9</sup> *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992), Principle 4 (emphasis added).

<sup>10</sup> *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (vol. I), article 6 (emphasis added).

<sup>11</sup> John Elkington, ‘Towards the Sustainable Corporation: Win-win-win Business Strategies for Sustainable Development’ (1994) 36(2) *California Management Review* 90; Michael E Porter and Claas van der Linde, ‘Green and Competitive: Ending the Stalemate’ (1995) 73(5) *Harvard Business Review* 120; Paul Hawken, Amory Lovins and Hunter Lovins, *Natural Capitalism* (Little Brown, 1999).

<sup>12</sup> Jason Scorse, *What Environmentalists Need to Know About Economics* (Palgrave-Macmillan, 2010); Clement A Tisdell, *The Economics of Environmental Conservation* (Edward Elgar Publishing, 2005).

<sup>13</sup> Barbara Aretino, et al, *Creating Markets for Biodiversity: A Case Study of Earth Sanctuaries Ltd* (Australian Productivity Commission, 2001).

<sup>14</sup> Boyd Cohen and Monika I Winn, ‘Market Imperfections, Opportunity and Sustainable Entrepreneurship’ (2007) 22 *Journal of Business Venturing* 29.

Conceptually, a rethink is required about the presumption that there should be a discrete system of **environmental law** and instead aspire to a **law of the environment**. This transformation would mean, essentially, that environmental responsibility becomes a shared responsibility throughout social and economic life in Australia, with the standards and rules of environmental regulation extending to a variety of contexts so that society, government and business work cohesively and collaboratively towards common environmental aspirations. This shift would not imply abandoning core features of the environmental law system (for example, environmental impact assessment procedures and national parks), but would rather behave a supplement of new tools and processes to the existing arrangements and align the mandates and functions of government agencies, business corporations and other constituencies in a common framework for environmental stewardship.

Extending and inculcating environmental responsibility across society is an onerous challenge because some actors view environmental governance as only a responsibility of government, without any additional responsibilities of their own. For example, many financial investors have traditionally not bothered to scrutinise the environmental performance of companies so long as they adhere to minimum legal requirements – an attitude that overlooks how environmental performance beyond legal requirements may still affect financial returns. Similar truncated attitudes can be found in government agencies that have not traditionally had environmental responsibilities, such as in the finance and economic ministerial portfolios. Such attitudes might once have been understandable given limitations in the expertise or mandates of such organisations, but are hardly acceptable best practices today.

The business sector is, however, starting to recognise the need for a new approach, as evident in its growing support for action on climate change.<sup>15</sup> Environmentally relevant decisions, from development of new green technologies to everyday operations of a business interacting with its customers and suppliers, are shaped by business law, and by the practices and policies of the business sector. Better management of the interplay between business law and environmental law, could generate a comprehensive system for governing environmental activities where environmental standards are embedded in economic affairs rather than confined to specialist environmental rules and agencies.

To align business law with the goals of environmentally responsible behaviour, it is important to identify the key principles that should shape that process of harmonisation. The guiding principles that should underpin this realignment include:

- **Sharing environmental responsibilities:** The influential *Millennium Ecosystem Assessment* concluded that: ‘natural assets will receive far better protection if their importance is recognized in the central decision making of governments and businesses, rather than relatively weak environment departments’.<sup>16</sup> Environmental stewardship should be a shared undertaking, in which all groups and actors work towards common environmental goals. The law should continually seek to identify and facilitate opportunities for public authorities to share environmental governance with the private sector, while removing regulations and processes that result in the private sector receiving conflicting signals and incentives that undermine its commitment to environmental responsibility. Sharing responsibility also includes the private sector contributing to the cost of meeting environmental goals.
- **Fostering synergistic outcomes:** Building a coherent and responsive system of environmental governance is also furthered by finding ways to marry environmental goals with social and economic imperatives to foster ‘win-win’ solutions. For example, aligning the promotion of wind energy with regional economic development priorities can help align economic strategies with environmental goals. Similarly, price-based policy mechanisms that financially penalise pollution and other damaging activities or subsidise environmentally beneficial activities such as restoration of native vegetation, are means to foster productive synergies between the aspirations of the economy, society and the state. The law should exploit opportunities to advance environmental goals that provide collateral social and economic benefits that can motivate actors such as businesses to improve their environmental performance.

<sup>15</sup> Angela Macdonald-Smith, ‘Groundswell of Business Support for Action on Climate Change’, *Sydney Morning Herald* (Sydney), 28 November 2015.

<sup>16</sup> Millennium Ecosystem Assessment Board, *Living Beyond Our Means: Natural Assets and Human Well-being* (2005) 18-19.

- **Encouraging environmental innovation:** Decision-making on many environmental matters, such as climate change and biodiversity conservation, can benefit from collaborative approaches that harness the resources and expertise of all stakeholders, including business corporations.<sup>17</sup> The private sector can complement and enhance the work of governments by bringing additional financial resources and technical expertise. Many solutions to environmental problems will likely need to come from the business community, such as new energy efficient technologies and more advanced pollution control methods and the laws should harness the entrepreneurial skills and expertise of the business world to generate the necessary innovations needed to promote sustainability. For instance, tax law can be modernised to provide greater financial incentives for investment in environmental innovations, and consumer law can be used to ensure disclosures to purchasers of products and services are more informative about their relative environmental merits.

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<sup>17</sup> Peter Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8 *Governance* 527.

### 3. Business law and the environment

Some of the most important laws in Australia of environmental significance are business laws, such as legislation on corporate governance, securities regulation, tax law and financial markets rules. In indirect ways, these areas of law can have significant environmental repercussions and indeed may function antagonistically towards environmental legislation. These business laws may also adversely affect citizens and community groups by limiting their participation in economic and development decisions unless they have the wealth to participate as shareholders or other roles in the economy. This section of the paper examines different areas of business law from an environmental performance perspective. It draws attention to several important issues for future law reform, including improving the contribution of business law systematically to environmental governance, assessing the potential value of specific environmental performance standards in business law, and identifying environmental management functions that are suitable to delegate or share with the business sector.

#### 3.1 Corporate law

##### 3.1.1 Opportunities for environmental responsibility

The corporation is the principal organisation in Australia for undertaking commercial activities in mining, agriculture, manufacturing and numerous other economic sectors. Corporate law, which is embodied in the *Corporations Act 2001* (Cth) (the *Corporations Act*), controls the establishment and internal operations of companies, primarily by delineating the powers and roles of its members (shareholders) and their agents (managers) and creating checks-and-balances such as through a board of directors.<sup>18</sup> The configuration of legal controls varies, with some differences between public and private companies, and between public companies limited by guarantee and limited by shares (that is, 'listed' on the stock market).

Although corporations are sometimes perceived as governed by an unadulterated imperative to maximise profits, this is a myth in terms of the expectations of corporate law. While the *Corporations Act* is largely silent on environmental considerations, apart from the duty on corporate directors to prepare an annual report that discloses their company's compliance with environmental regulation,<sup>19</sup> the legislation is not overtly antagonistic to environmental responsibility, and indeed is not prescriptive about how a company should be managed.<sup>20</sup> Corporate law does not per se preclude a company from being managed in an environmentally focused manner, and thus a business may freely choose to prioritise environmental considerations such as making solar power or managing a wildlife sanctuary. To make such a commitment enduring, the law allows a company's shareholders to adopt by vote a constitution that can enshrine a specific mission, such as an environmental goal. This would then legally bind the company's executive officers.

With or without such a mission, the fiduciary responsibility of those who govern a company is to promote the success of the company, as a distinct legal entity, rather than to promote the interests of its shareholders, even though the interests of both overlap in practice. This distinction between the interests of the company and its members has helped to leverage growing legal acknowledgment that a company may be managed in a socially responsible way. Courts in Canada<sup>21</sup> and legislatures in the United Kingdom<sup>22</sup> have acknowledged this point in acquiescing to corporate managers who take decisions that aim to enhance the social standing of their company, a legal trend that some commentators call 'enlightened shareholder value'.<sup>23</sup> While Australian law does not yet explicitly reflect this trend, in 2006 the Parliamentary Joint Committee on Corporations and Financial Services issued a detailed report on the subject that concluded that the *Corporations Act* already permits directors to have regard to social and environmental

18 Janet Dine and Marios Koutsias, *The Nature of Corporate Governance* (Edward Elgar, 2013).

19 *Corporations Act 2001* (Cth) s 299(1)(f).

20 Sjafell and Richardson, above n 2; Dunphy and Benn, above n 7.

21 *Peoples Department Stores Inc. (Trustee of) v. Wise* [2004] 3 SCR 461.

22 *Companies Act 2006* (UK) s 172.

23 Cynthia A Williams and John M Conley, 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' (2005) 38 *Cornell International Law Journal* 493.

issues and that no amendment of the law is required.<sup>24</sup> Also relevant is the influential Australian Stock Exchange (ASX) Corporate Governance Council Principles, of which Principle 3 states a 'listed company should act ethically and responsibly'. The accompanying commentary recommends:

Acting ethically and responsibly goes well beyond mere compliance with legal obligations and involves acting with honesty, integrity and in a manner that is consistent with the reasonable expectations of investors and the broader community. It includes being, and being seen to be, a "good corporate citizen", for example, by: ... acting responsibly towards the environment.<sup>25</sup>

The ASX principles are not mandatory, though if a listed company chooses not to comply with a specific principle it must explain its reasons in its annual report filed with the ASX.

Another relevant feature of company law is the business judgement rule, which essentially means that courts will not hold corporate executives liable for poor judgements if done in good faith, with the care that a reasonable person would in such circumstances, and for the best interests of the company.<sup>26</sup> This judicial deference to business acumen means that courts will not readily scrutinise any disputed business decision unless corporate executives have acted in bad faith, with fraud or other serious failures. Thus, for instance, corporate bosses have ample legal scope to donate funds to a philanthropic cause if they judge reasonably that so doing will enhance their company's social standing and ultimate business success.

### 3.1.2 Barriers to environmental responsibility

Despite such latitudes, company law also potentially impedes environmental responsibility because the discretion given to corporate managers to act altruistically is also the discretion to act otherwise.<sup>27</sup> Company law, in other words, is a two-edged sword. The pressure to act self-interestedly tends to be stronger because of the competitive pressures of the market. Such pressure is strongest for companies that raise money from shareholders and bondholders. A company constituted as a private, family-run company, is better insulated from such market pressures, though ordinarily it must still be commercially successful to survive. Because the market often focuses on near-term performance in its valuation of companies, the market behoves businesses to act for the short-term. Reorienting the economic incentives and pressures of the marketplace in a more environmentally positive direction is crucial, and will require an equally powerful transition in reform of company law and other legal arrangements for private enterprise.

Beyond these core features of corporate governance and its market context, there are two further special situations where corporate law may affect environmental performance.

One situation owes to the doctrine of limited corporate liability, a privilege that protects shareholders against losses beyond their investment in the company. Limited liability flows from the cardinal principle that companies are legal entities separate and distinct from their individual members; thus, liability to a company's creditors is limited to the *company's* assets and does not extend to the *personal* assets of its shareholders or employees. This privilege is only removed in exceptional and extraordinary circumstances, referred to as 'veil piercing', such as perhaps where a single shareholder dominates a company.<sup>28</sup> The rationales for limited liability include that it encourages investment in business enterprise and spares shareholders the burden of closely monitoring a company for fear of liability.<sup>29</sup>

Corporate groups may exploit the shield provided by limited liability to evade responsibility for environmental hazardous activities. A 'mother' company in the group can create separate (under-capitalised) subsidiaries, of which

24 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 63.

25 ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (3<sup>rd</sup> ed, 2014) 19.

26 Lyman Johnson, 'Corporate Officers and the Business Judgment Rule' (2005) 60 *Business Lawyer* 439; *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1.

27 Kent Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago Press, 2006).

28 Karen Vandekerckhove, *Piercing of the Corporate Veil* (Kluwer, 2008).

29 Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52 *University of Chicago Law Review* 89.

it is a shareholder, to which are assigned responsibilities for undertaking hazardous activities. The actions of James Hardie Industries, a former manufacturer of asbestos who restructured its business allegedly to reduce its liability to numerous asbestos victims, is the most notorious example in Australia of the barriers limited liability and the corporate veil pose to recovery of the costs of environmental-related damage.<sup>30</sup>

Manifestation of such risks has, in turn, sometimes necessitated special legislative interventions. In the United States, the existence of thousands of orphaned brownfield sites blighted by chemical contamination moved the Congress in 1980 to enact the 'Superfund' legislation<sup>31</sup> to raise industry levies or impose liability to pay for clean-ups. The American reform however left the underlying corporate law unchanged, as is the case in other jurisdictions including Australia. Limited liability may also shield corporate managers from personal responsibility, unless this is overridden by specific legislation, such as Victoria's *Environment Protection Act 1970*, which provides that corporate managers and directors will be personally liable for any offences committed by the corporation, subject to specific statutory defences.<sup>32</sup> Recently, the Queensland government introduced the *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld), which can allow environmental protection orders to be issued against 'a party' that had some relevant association with a company that was in financial distress (for example, a parent company or senior manager), and thereby to enable cost recovery for the cleanup of environmental damage created by that company.

The second potential barrier that corporate law may pose to improving environmental performance is its impact on social investors who wish to influence a firm's environmental policies and practices. While social investors may choose to divest from an unyielding firm, that tactic is unlikely to be effective in changing corporate behaviour unless many investors act likewise.<sup>33</sup> Alternatively, investors may retain a stake to exercise pressure collaboratively from within using their shareholding rights, however such shareholder alliances and pressures are not easy to secure in a large public company with thousands of shareholders having different economic or environmental values. Corporate law in Australia, as throughout the Anglophile world, contains mechanisms that limit the voice of shareholders, such as obliging shareholders who wish to call a special meeting to pay for the cost of convening the meeting; requiring high voting majorities for special resolutions to pass (at least 75% of eligible members to amend a company's constitution/articles of association); and limiting the capacity of shareholders to coordinate action (for example, collaborating to replace directors may trigger the takeover and substantial holding requirements of the *Corporations Act*).<sup>34</sup>

The assumption among many in the business community that environmental standards are preferably quarantined in separate, external regulation as opposed to being incorporated into corporate governance, should be questioned. Although 'external' environmental regulation remains essential (for example, pollution control licensing), embedding environmental standards inside corporate governance could help minimise the tensions that business managers face when reconciling conflicting public and private expectations. Market pressures to prioritise profits create powerful incentives to avoid paying for environmental externalities. Conversely, environmental regulation seeks to communicate responsibility for such externalities and thereby constrain profit-making. How this might be achieved through legal reform is a challenging question.<sup>35</sup>

In searching for models to redesign corporate governance towards a more environmentally responsible regime, it is important to be aware that the business sector already has institutional alternatives. One is the cooperative, one of the oldest economic institutions in the world: the cooperative structure allows its members to collaboratively pursue charitable and commercial goals.<sup>36</sup> Because of their democratic governance and emphasis on meeting the needs of members, cooperatives are sometimes regarded as 'associations of persons' in contrast to business corporations as 'associations of capital'. Their global importance for sustainable development and social innovation is reflected in the United Nations General Assembly declaring 2012 the 'International Year of Co-operatives'. Co-operatives have been

30 Peter Prince, Jarome Davidson and Susan Dudley, 'In the Shadow of the Corporate Veil: James Hardie and Asbestos Compensation' (Research Note 12, Parliamentary Library, 2004).

31 *Comprehensive Environmental Response, Compensation, and Liability Act* 42 USC § 9601 (1980).

32 *Environment Protection Act 1970* (Vic) s 66B(1).

33 Benjamin J Richardson, 'Are Social Investors Influential?' (2012) 9(2) *European Company Law* 133.

34 Michael J Whincop, 'The Role of the Shareholder in Corporate Governance: A Theoretical Approach' (2001) 25(2) *Melbourne University Law Review* 418.

35 Karen Bubna-Litic, 'Climate Change and Corporate Social Responsibility: The Intersection of Corporate and Environmental Law' (2007) 24 *Environmental and Planning Law Journal* 253.

36 International Co-operative Alliance, *Co-operative Identity, Values and Principles* <<http://ica.coop/en/whats-co-op/co-operative-identity-values-principles>>.

widely used in Australia and many other countries, particularly in the agriculture and housing sectors. However, the co-operative model has never been especially popular in the business community. Entrepreneurs can be reluctant to put resources into a co-operative because of lack of control and the complicated decision-making processes.<sup>37</sup> Further, co-operatives have less access to most traditional sources of capital: they cannot raise money from the share market, and bank finance is often quite restricted because of conservative lending criteria.<sup>38</sup>

### 3.1.3 Combining business and community goals

The limitations of both the for-profit corporation and the co-operative have contributed recently to legislative reforms to create a new corporate 'hybrid' that combine both commercial and community objectives in its legal governance.<sup>39</sup> Introduced in some Anglophile nations and commonly known as the 'benefit corporation' (United States) or 'community interest company' (United Kingdom), this novel corporate form has legal characteristics, including (depending on the jurisdiction): a legal duty to promote a community benefit, in addition to a financial return for the company; an asset lock and dividend cap (which restricts company assets and profits from being transferred to ensure the company continues to be properly capitalised and able to meet its community purpose); and an annual community contribution report that documents the company's community impact. The British model also uniquely establishes a regulatory agency with responsibility to supervise compliance and maintain the integrity of the system.<sup>40</sup> As a public company with investor shareholders, the corporate hybrid has the advantage over charitable trusts of having wider access to the capital markets to raise funds and, as a profit-making enterprise, it also enjoys a broad plenary power to pursue a range of profitable ventures. As well, because the company is legally obliged to achieve a community benefit, it is legally protected to engage in environmental activities or other socially valuable projects even if such activities lack a defensible business case. Also, because of the restrictions (in some models) on selling shares or paying out dividends, the corporate hybrid is governed by less short-term considerations contrary to sustainable development.

Hybrids are growing rapidly in popularity. Since 2010 in the United States, 31 states have enacted legislation to provide for the incorporation of benefit corporations, and there are about 1,300 such corporations in operation, while Britain has about 13,000 community interest companies as of July 2015.<sup>41</sup> The Canadian provinces of British Columbia and Nova Scotia introduced their model in 2013 and 2015 respectively, with both seeing an uptake of the model by the social enterprise community.<sup>42</sup> A number of companies now utilise this model in order to undertake environmental activities: one is EuCAN, a British company established in 2011 to promote community involvement in wildlife habitat management and restoration.<sup>43</sup>

While the corporate hybrid model has not been introduced in Australia, even its adoption here would not solve all the foregoing problems of corporate governance. Because a corporate hybrid is, under existing legislative examples, a *choice* for companies, this model does nothing for existing companies that choose to remain within the conventional corporate law paradigm.

37 Peter Davis, 'The Governance of Co-operatives under Competitive Conditions: Issues, Processes and Culture' (2001) 1(4) *Corporate Governance* 28.

38 Carol Liao, 'Limits to Corporate Reform and Alternative Legal Structures' in B. Sjaafjell and B.J. Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, 2015) 274, 290-91.

39 Julie Battilana, et al, 'In Search of the Hybrid Ideal' (2012) *Stanford Social Innovation Review* 51.

40 *Companies (Audit, Investigations and Community Enterprise) Act 2004* (UK).

41 Data from Benefit Corporation <<http://benefitcorp.net>>; Regulator of Community Interest Companies, *Annual Report 2014/2015* (Her Majesty's Stationery Office, 2015).

42 Enacted pursuant to the *Business Corporations Act*, SBC 2002, c 57; *An Act Respecting Community Interest Companies*, SNS 2012, c 38.

43 See EuCan Community Interest Company <<http://www.eucan.org.uk>>.

## 3.2 Financial sector regulation

### 3.2.1 Environmental innovation

The financial sector has grown in economic significance to rival many parts of the productive sector such as mining and manufacturing. The finance industry now represents about 10% of the total added value of the Australian economy, doubling its contribution to the economy since the mid-1980s, mainly due to deregulation of the banking sector and growth in superannuation funds spurred by compulsory savings requirements.<sup>44</sup> Such growth makes financiers and investors not only influential in shaping economic development, but also relevant to the environmental performance of the economy. Financial institutions such as banks and superannuation funds might be able to help discipline corporations to improve their environmental performance.

At present, the laws governing financial institutions and transactions – such as the *Superannuation (Industry) Supervision Act 1993* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) - are largely silent on environmental performance. This is a lost opportunity in environmental governance, as investors can play a constructive role by funding environmental innovations, brokering trade in environmental goods and services, and making environmental stewardship a criterion for evaluating investments. The burgeoning voluntary movement for socially responsible investment (SRI) is catalysing such positive changes, as discussed later in this paper. Australian Panel of Experts on Environmental Law, *Energy Regulation* (Technical Paper 6, 2017) further explores the impact of financial sector regulation on the energy sector.

Until recently, few in the financial sector or among policy-makers saw investors or lenders as having much environmental relevance even though the financial economy has long been identified as extremely economically salient and potentially a vector of economic instability as borne out by the 2008 Global Financial Crisis.<sup>45</sup>

On the positive side, the financial economy can potentially play a constructive role by mobilising investors to fund environmentally beneficial innovations and brokering trade in environmental goods and services. One example is the emerging carbon market, fuelled by carbon taxes and emissions trading schemes, which in recent years has grown exponentially with increasing participation from Chinese traders.<sup>46</sup> Investors can also help channel money to companies developing clean and renewable energy technologies and designing other products that have a low eco-footprint. The emerging ‘impact investing’ market denotes an explicit role for financial investors to directly fund and support projects that bring tangible economic, environmental and social benefits to communities and regions.<sup>47</sup> The inclusion of environmental criteria in financial due diligence, such as when issuing loans, is another means by which financial decisions can reinforce good environmental practices. However, there is evidence of practices to the contrary. Although some academic commentators believe ‘there is nothing inherent in the structure of the financial system which necessarily leads to environmental destruction’<sup>48</sup>, many see the financial sector as complicit in the environmental impacts of the economy.<sup>49</sup> One example is Oxfam Australia, whose 2014 report ‘Banking on Shaky Grounds’ unveils how some major Australian banks have allegedly financed dubious land acquisitions in developing countries that are contributing to environmentally destructive land use practices.<sup>50</sup> Another example is the recent spotlight on Australian banks for funding coal mining and other fossil fuel industries. The legal separation between those who provide capital and control a business, the hallmark of corporate capitalism, may diminish investors’ knowledge of and concern about the environmental performance of companies they fund. Investors may be physically remote from the activities that directly impact the environment, such as a mining operation, thus weakening any sense of responsibility they might have for taking corrective action. Further intensifying this outlook, investors’ portfolios tend to comprise thousands of companies and other assets, with only tiny fractional stakes in any individual business,

44 Rodney Maddock, ‘Is The Australian Financial Sector Too Big?’ (Australian Centre for Financial Studies, July 2013).

45 See Robert J Shiller, *Irrational Exuberance* (Princeton University Press, 2000); John Bogle, *The Battle for the Soul of Capitalism* (Yale University Press, 2005).

46 ‘Global Carbon Market to Reach Record Volumes by 2016’, *Australian Business Review* (28 February 2014); see also World Bank Group, *State and Trends of Carbon Pricing* (World Bank, 2015) 13.

47 Antony Bugg-Levine and Jed Emerson, *Impact Investing: Transforming How We Make Money While Making a Difference* (Jossey-Bass, 2011).

48 Mark White, ‘Environmental Finance: Value and Risk in an Age of Ecology’ (1996) 5 *Business Strategy and the Environment* 198, 200.

49 William Sun, Celine Louche and Roland Pérez (eds), *Finance and Sustainability: Towards a New Paradigm? A Post-Crisis Agenda* (Emerald Books, 2011).

50 Oxfam Australia, *Banking on Shaky Grounds: Australia’s Big Four Banks and Land Grabs* (Oxfam Australia, 2014).

thus making it difficult for investors to monitor the environmental performance of companies, let alone to care about such performance. The growth of institutional investing, through intermediaries such as superannuation funds, may help diminish such obstacles if fund managers are committed to high environmental performance. The ease of selling securities (corporate shares and bonds) can further diminish the perceived importance of investors' relationship with the company, as their stake in an underperforming company can easily be sold. The net result of these factors is a potential diminution of investors' sense of moral agency for the economic activities they fund.

### 3.2.2 Legal gaps and opportunities

The law also helps to explain the foregoing behaviour. Superannuation funds, governed primarily by the *Superannuation Industry (Supervision) Act 1993* (Cth), incorporate fiduciary investment standards<sup>51</sup> that the former Insurance and Superannuation Commission viewed as excluding non-financial investment criteria unless they were material to financial risk and performance.<sup>52</sup> Otherwise, there are no legal obligations that any super fund must meet environmental or social performance outcomes. Likewise, Australian banking and insurance sector regulation is bereft of any environmental performance standards, which means environmental issues are likely only to be addressed in the context of legal due diligence standards to consider financially material risks and opportunities.

So far, few governments in the world have sought to regulate the financial economy to address such lacunae, but some tentative reforms have emerged that may lay the groundwork for a more comprehensive approach. Legal measures (in the form of incentive and informational policy instruments) to promote socially and environmentally sensitive investing have emerged in some countries over the past decade or more, but they leave largely untouched the freedom of investors to choose how to generate returns.<sup>53</sup> One example is the requirement for funds to disclose their policies for considering social and environmental issues, and policies for exercising their shareholder votes on such issues. This reform, which has been introduced since 2000 in several European Community member countries, as well as in Australia and New Zealand, generally targets pension/superannuation funds.<sup>54</sup> Interestingly, Australian legislation also gives fund members the right to choose where their monies are invested, thereby enabling socially-minded investors to switch to one of the burgeoning ethical or green funds.<sup>55</sup> But there is no obligation on super funds to invest ethically and responsibly. Economic incentives to alter the cost-benefit calculations of financiers in favour of sustainable development choices have also been introduced. A notable example is the Netherlands' Green Project Directive,<sup>56</sup> which some research credits as having significantly boosted funding for environmental-friendly projects.<sup>57</sup> No equivalent scheme exists in Australia, although taxation law (discussed later in this paper) can provide some concessions and incentives for investment in environmental industries and products.

One critically important area of financial markets governance that remains unaltered in Australia, and other jurisdictions, is the fiduciary and trust law responsibilities of investment funds. This is a significant lacuna as the prevailing fiduciary responsibility of financial trustees in superannuation funds, endowment funds and other financial entities managed under a trust structure has a major influence on their investment goals and strategies.<sup>58</sup> Case law from the United States and the United Kingdom suggests that financial trustees may be inhibited from including environmental and social criteria in their investment decisions if such criteria might jeopardise financial returns.<sup>59</sup> If the financial sector is to become more aligned to the evolving environmental performance expectations of society, it will likely be necessary to redefine the fiduciary responsibility rules and equivalent standards that govern investors and

51 *Superannuation Industry (Supervision) Act 1993* (Cth) ss 7, 52(2), 62.

52 Insurance and Superannuation Commission (ISC), *Superannuation Circular III.A.4. The Sole Purpose Test and Ancillary Purposes* (ISC, 1995).

53 Benjamin J Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (Oxford University Press, 2008).

54 For example, *Occupational Pension Schemes (Investment) Regulations 2005* (UK) cl 2(3)(b)(vi)-(3)(c); Australia's *Corporations Act 2001* (Cth) s 1013D(1)(l); France's *Projet de loi sur l'épargne salariale No. 2001-152* (France), 7 February 2001, arts 21, 23; and New Zealand's *KiwiSaver Act 2006* (NZ) s 205A.

55 *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2005* (Cth).

56 Regeling groenprojecten buitenland, *Staatscourant* 1 (2 January 2002) 31; Regeling groenprojecten, *Staatscourant* 131 (11 July 2005) 13.

57 Vereniging van Beleggers voor Duurzame Ontwikkeling (VBDO), *Socially Responsible Savings and Investments in the Netherlands: Developments in Volume and Growth of Socially-responsible Savings and Investments in Retail Funds* (VBDO, 2005) 11.

58 For further analysis, see Benjamin J Richardson, 'Governing Fiduciary Finance' in Tessa Hebb et al (eds), *Routledge Handbook on Responsible Investing* (Routledge, 2015) 650.

59 See *Cowan v Scargill* [1985] Ch 270; *Board of Trustees of Employee Retirement System of the City of Baltimore v City of Baltimore*, 562 A.2d 720 (Md Ct App, 1989).

lenders, as recommended by many including the World Economic Forum in its advice that governments should ‘modify pension fiduciary rules which discourage or prohibit explicit trustee consideration of social and environmental aspects of corporate performance’.<sup>60</sup>

Finally, it should be recognised that governments themselves participate in the market as financial investors and thus it is essential that governments follow the same environmentally sensitive practices that might be expected of the private sector. Sovereign wealth funds are one of the largest pools of financial capital held by states, and several jurisdictions including France, New Zealand and Norway have adopted legislation to require their national funds to invest with regard to ethical, social and environmental factors.<sup>61</sup> The Commonwealth’s Future Fund is not explicitly governed by such standards, although ministerial investment directives may to some extent be used to facilitate consideration of such factors.

### 3.3 Tax law

#### 3.3.1 Current tax concessions

Tax law is a powerful instrument to shape environmental behaviour. But which tax instruments offer the best means of leveraging improvements in individual and corporate environmental behaviour? Taxation itself is one of several economic policy instruments, including tradeable environmental allowances, financial subsidies, and environmental offsets, which can enhance incentives for corporations and individuals to behave more environmentally responsibly. Historically, Australian tax law contained many perverse incentives that encouraged poor environmental practices, such as the tax deductions offered before 1983 to farmers for land clearance. In recent years, tax law has been harnessed more as a means to foster positive incentives, such as the carbon tax that operated between 2011 and 2014. This short-lived tax also showed the political stigma that some attach to environmental taxes or other pricing mechanisms. While some taxation instruments have been used by state and local governments to encourage positive environmental behaviour, such as concessions on land tax and municipal rates for landowners who enter into a conservation covenant, to date some opportunities for the use of taxation law to achieve environmental outcomes have been overlooked in Australia.

The *Income Tax Assessment Act 1997* (Cth) (*ITAA*) allows taxpayers to claim as a deduction against their income a variety of expenses incurred in earning that income, and these expenses may include environmental costs. Like other tax systems worldwide, the *ITAA* distinguishes between capital and revenue expenses: expenditure of a capital nature generally can only be claimed as a deduction on a depreciated cost formula that may extend over many years, while revenue expenses can be fully claimed against income in the same tax year. Thus, revenue expense deductions are usually much more attractive to taxpayers.

The *ITAA* provides for an immediate tax deduction for some environmental protection activities related to income earning activities.<sup>62</sup> However these activities are narrowly defined, being limited to the prevention, fighting or remedying pollution or treating, cleaning up, removing or storing waste, resulting from income producing activities.<sup>63</sup> Determinations by the Australian Taxation Office (ATO) have considered requests for other expenses to be immediate tax deductions, such as septic tanks and plantings, and the ATO has declared the determinative question to be whether the dominant purpose of the capital expenditure is an environmental protection activity. Another section of the *ITAA* allows for immediate deduction of capital expenditures incurred on a landcare operation if the taxpayer is a primary producer or carrying on a business using rural land.<sup>64</sup> Otherwise, environmental improvements such as installation of solar panels may be deductible business expenses under a depreciation formula over a number of years.

60 World Economic Forum (WEF), *Mainstreaming Responsible Investment* (WEF, 2005) 10.

61 Benjamin J Richardson, ‘Sovereign Wealth Funds and Socially Responsible Investing: An Emerging Public Fiduciary’ (2013) 2 *Global Journal of Comparative Law* 125.

62 *Income Tax Assessment Act 1997* (Cth) (*ITAA*) s 44.755.

63 *Ibid* s 44.755(2).

64 *Ibid* s 40.630.

This distinction between capital and revenue expenditure is important because expenses that cannot be claimed as capital in nature may disincentivise investment in some environmental innovations. If a company wants to move into renewable energy infrastructure, for instance, it has either to borrow to invest, or raise capital or take money from an existing income stream. Whichever option it takes, it will conscript large amounts of money and it must wait for a longer period (maybe up to 20 years) to claim the full depreciation.

Two other main areas relating to the environment in the *ITAA* are deductions of gifts to environmental organisations,<sup>65</sup> and deductions for conservation covenants.<sup>66</sup> The former concession has been instrumental to supporting the work of many environmental organisations, especially in an era of declining government grants. The availability of such concessions has been questioned because of the perception that the activities of some beneficiaries are ‘political’ rather than charitable in nature.<sup>67</sup> The *ITAA* deduction for conservation covenants can benefit landowners who enter into a covenant approved by a government agency. The amount of the deduction claimable is the difference between the market value of the land just before and after the covenant. However, one must first pay a fee to the ATO and pay for a property valuation in order to apply for this deduction - a problematic expense that arguably should be borne by the government given that it is the beneficiary of the covenant. Furthermore, any reduced value of a property burdened by a covenant may become a future tax liability for the landowner if the property is subject to capital gains tax.

Additional tax relief for covenants is provided by some state and local governments, such as exemptions from land taxes and local council rates. The advantage of a land tax exemption is negated by the fact that primary producers are ordinarily exempt from such taxes. Local council rates concessions are highly uneven: in NSW, all covenanted property receives a complete exemption while in Tasmania some local governments do not offer any financial concessions. Conversely, because undeveloped land may still incur state and local property taxes, there remains an incentive for landowners to develop their property to meet tax liabilities.<sup>68</sup>

### 3.3.2 Options for reform

The taxation system has enormous potential to provide innovative incentives for environmental outcomes. One opportunity is to remove the distinction between capital and revenue expenditures by offering one-off capital deductions for a wider range of environmental improvement activities. For example, in 2014 the Australian government announced an immediate \$20,000 capital deduction to stimulate investment by small business.<sup>69</sup> A similar capital deduction could be targeted to businesses that are prepared to move their operations to a low or non-carbon basis. If this policy were coupled with an industry policy designed to support sustainable industries (or sustainable innovation) in Australia, it would create the additional benefit of stimulating the low carbon economy, establishing a new industry in Australia to provide the capital equipment and services to support the transition and maintenance of a low carbon economy, and it would provide collateral employment and training opportunities in Australia.

Another opportunity for tax reform is in regard to land management and conservation. A limitation of the current system is that nature conservation expenses are not tax deductible unless they are directly related to the commercial use of that property (for example, agriculture or an eco-tourism resort).<sup>70</sup> The incentive effect encourages landholders to put or keep land in production rather than conserve it.<sup>71</sup> Another lost opportunity is that people who donate land to governments for the addition to the public conservation estate do not receive a tax credit, which is a problem given that sometimes this is more desirable than donating such land to a private charity.<sup>72</sup>

65 Ibid Subdivision 30E (Register of environmental organisations).

66 Ibid Division 31 (Conservation covenants).

67 In 2015, a parliamentary inquiry was established to examine this issue: Australian Broadcasting Corporation, ‘Environmental Groups Face Tax Deductibility Loss in Government Push’ *ABC 7.30 Report* 10 April 2015 (Conor Duffy).

68 Carl Binning and Mike Young, *Conservation Hindered: The Impact of Local Government Rates and State Land Taxes on the Conservation of Native Vegetation* (CSIRO, 1999).

69 Australian Government, *Budget 2015* <<http://www.budget.gov.au/2015-16/content/highlights/jobsandsmallbusiness.html>>.

70 *ITTA*, s 40.635 (meaning of ‘landcare operation’).

71 Margaret McKerchar and Cynthia Coleman, ‘The Australian Income Tax System: Has It Helped or Hindered Primary Producers Address the Issues of Environmental Sustainability?’ (2003) 6(2) *Journal of Australian Taxation* 201.

72 See further Nature Conservancy Australia, *Submission to the Review Process for Australia’s Future Tax System* (October 2008).

The lack of tax reform has left the economy with a variety of perverse incentives that hinder a shift towards environmental sustainability. In 2015, fossil fuel subsidies in Australia, such as to diesel fuels, equated to around \$1,712 per person,<sup>73</sup> much of which goes to support the mining sector. Pricing of utilities is another area affected by counterproductive incentives in terms of environmental outcomes. Water and sewerage rates in Australia are mostly a fixed charge, based on property values with water usage being a very small part of the total bill. Having water usage as the larger part of the billing system would not necessarily result in less revenue for the water utilities if the cost of variable consumption increases, and it would likely lead to positive environmental outcomes of particular value during droughts. Similar pricing applies to electricity, with much of the fixed costs being the costs of poles and wire infrastructure.<sup>74</sup>

In reforming the Australian taxation system to achieve better environmental performance, it will be necessary not only to realign tax breaks and concessions away from environmentally damaging to sustainable activities, but also to link tax reform to a wider use of economic policy instruments to ensure that environmental costs and benefits are reflected in market prices. Eco-taxes, tradeable environmental allowances and liability standards are among the tools needed to incentivise companies and investors to improve their performance. This broader agenda, sometimes known as ecological tax reform,<sup>75</sup> is in its infancy in Australia, especially since the repeal of the carbon tax. Other jurisdictions illustrate how effective the tax system can be. Environmental taxes have been used extensively around the world,<sup>76</sup> but have had only modest uptake in Australia.<sup>77</sup> Environmental taxes provide an opportunity to reduce the environmental impacts of industry and to support those businesses that develop more sustainable practices and products, thereby placing them at a competitive advantage over less environmentally efficient businesses, resulting in more appropriate development, increased employment and improved environment outcomes.<sup>78</sup> The role of carbon pricing in regulatory reform is explored further in Australian Panel of Experts on Environmental Law, *Energy Regulation* (Technical Paper 6, 2017).

### 3.4 Other areas of business law

Corporate law, financial investing law and tax law are the main areas of business governance that need attention from environmental policy-makers, but they are not the only part of the agenda. One can identify a variety of other laws governing commercial activity that have environmental ramifications, such as consumer law and trade law. This *Technical Paper* does not provide the space to explore in detail these other areas of business law, but a few observations will be made.

Australian consumer law is largely a federal responsibility undertaken primarily through the *Australian Consumer Law Act 2010* (Cth), as administered by the Australian Competition and Consumer Commission (ACCC). The federal regime does not provide positive obligations on businesses to disclose to the public the environmental qualities or impacts of their products and services. A business does not, for instance, need to advise prospective consumers of its carbon footprint or how it manages pollution waste or its use of natural resources. The ACCC regime, instead, focuses on disciplining misleading or deceptive conduct.<sup>79</sup> Such conduct, for instance, might occur if a food producer advertised its goods as 'organic' when in fact they were made with chemical additives.<sup>80</sup> The ACCC regime is certainly a major improvement on common law rules of contract for addressing misleading claims, in that it offers additional remedies and enforcement machinery, but it fails to embody environmental disclosure standards that would help develop green consumerism.

73 Quoted in Damian Carrington, 'G20 Countries Pay Over \$1,000 Per Citizen in Fossil Fuel Subsidies, Says IMF', *The Guardian* (online), 4 August 2015; see also Australian Panel of Experts on Environmental Law, *Energy Regulation* (Technical Paper 6, 2017) recommending a removal of the fossil fuel subsidies.

74 Paddy Manning and Brian Robins, 'High Power Rates: It's a Poles and Wires Story' *Sydney Morning Herald* (online), 12 June 2012.

75 Evon Weiszäcker and J Jesinghaus, *Ecological Tax Reform* (Zed Books, 1992).

76 See Organisation for Economic Co-operation and Development, *Taxation, Innovation and the Environment* (OECD, 2010).

77 Benjamin J Richardson, 'Economic Instruments in Australian Pollution Control Law' in Gerry Bates and Zada Lipman (eds), *Pollution Law in Australia* (Butterworths, 2002) 51.

78 Karen Bubna-Litic and Lou de Leeuw, 'Can Our Taxation System Support 'New' Sustainable Industries? The Argument for Eco-Taxes' (1999) 16(2) *Environmental and Planning Law Journal* 140.

79 *Competition and Consumer Act 2010* (Cth) sch 2 s 18. For leading cases on interpretation of this pivotal section (in its predecessor, the *Trade Practices Act 1974* (Cth)); see *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191; *Yorke v Lucas* (1985) 158 CLR 661.

80 Australia Competition and Consumer Commission, 'Fake Food Claims Leave Bitter Aftertaste' *ACCC Update* 12 (Autumn, 2012).

Positive environmental disclosure standards have been developed outside of the ACCC regime, but they apply narrowly to specifically regulated environmental products and services or entities. For instance, the *National Greenhouse and Energy Reporting Act 2007* (Cth) requires industry to report its greenhouse gas emissions, abatement actions, energy consumption and production. Relatedly, the *Greenhouse and Energy Minimum Standards Act 2012* (Cth) creates a national framework for product energy efficiency in Australia, including a standardised, energy rating labelling system. On the other hand, a proposal in 2015 to extend seafood origin labelling laws, which would have helped seafood consumers make more environmentally responsible purchasing decisions, was rejected.<sup>81</sup> It remains open to some debate of course as to what kind of environmental information retailers should be obliged to disclose to consumers, and how to enable consumers to effectively compare the environmental performance of different products and services.

Also relevant to reforming Australia's environmental laws is trade law; the mixture of national law and public international law that applies to transactions of goods or services across national boundaries. Trade within Australia among the states is constitutionally protected from economically motivated protectionist restrictions. Section 92 of the *Australian Constitution* has been interpreted by the High Court as barring economic protectionist or discriminatory measures that confer an advantage on intrastate trade or commerce.<sup>82</sup> Trade law is influential in shaping economic growth and creating opportunities for markets to expand, which has important long-term environmental consequences, and in addition trade law may introduce specific environmental standards on imports and exports, such as for public health and biosecurity reasons. Although the proposed *Trans-Pacific Partnership* is doubtful because of its rejection by the US Trump Administration, Australia continues to participate in a variety of bilateral and multilateral trade agreements. Through global trade, additional environmental threats can arise, such as spread of invasive species such as the destructive 'fire ants' from Latin America that have in recent decades appeared in southeast Queensland. Conversely, trade can give Australian businesses and consumers greater access to new environmental technologies and products developed more efficiently abroad (for example, most solar panels on Australian homes come from Chinese or German factories).

In recent years, the growth in free trade agreements has become controversial from the standpoint of maintaining strong environmental regulations because of the perception that trade agreements give foreign governments or foreign companies additional leverage to challenge domestic environmental legislation. In particular, treaties that provide for investor-state dispute settlement (ISDS) have become contentious in Australia and elsewhere.<sup>83</sup> ISDS clauses give investors (often multinational corporations) direct access to international arbitration where they can lodge claims against a government over regulatory measures that they argue damage their bottom line. ISDS raises the standard of treatment of foreign investors above that of domestic investors by giving them an alternative to the traditional venue for complaints against a government - domestic courts. It also raises fears of a phenomenon known as 'regulatory chill', whereby governments may fail to enact or enforce legitimate regulatory measures due to concerns about ISDS. ISDS disputes have proliferated in recent years, with many involving costly challenges to environmental regulations amongst other matters. Any regulatory measure - whether promulgated at the local, state or federal level - on any issue (from banning a pesticide to introducing a carbon tax) can become the subject of an ISDS case if it has an adverse economic impact on a foreign investor.

There is a small but growing body of work that verifies the existence of regulatory chill. The Canadian government settled a dispute with Ethyl Corporation, compensating the company and retracting its ban on the gasoline additive MMT. There are differing views on whether the government capitulated because it was concerned that it would lose an ISDS case or if other factors were of primary significance (for example, a successful internal legal case brought by several provinces on the issue).<sup>84</sup> Another example is when Indonesia exempted some foreign investors from a ban

81 *Food Standards Amendment (Fish Labelling) Bill 2015* (Cth).

82 *Cole v Whitfield* (1988) 165 CLR 360; [1988] HCA 18. Section 92 thus does not necessarily bar state legislation that restricts trade in a non-discriminatory manner for non-economic reasons, such as to achieve conservation objectives, as in the *Cole v Whitfield* case.

83 Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011) 606.

84 Simon E Gaines, 'The Masked Ball of NAFTA Chapter 11: Foreign Investors, Local Environmentalists, Government officials, and Disguised Motives' in John Kirton and Virginia W MacLaren (eds), *Linking Trade, Environment, and Social Cohesion: NAFTA Experiences, Global Challenges* (Ashgate, 2002) 103.

on open-pit mining in protected forests after receiving threats of arbitration claims in the range of US\$20-30 billion. The timing of the government's actions, statements to the media and other factors suggest that the government was strongly motivated to remove the threat of arbitration.<sup>85</sup>

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85 Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press, 2009).

## 4. Voluntary initiatives in the private sector

Government legislation and trade agreements are not the only determinants of the environmental behaviour of the private sector. Many industry groups, networks of financial investors and individual companies are taking the initiative to raise their environmental performance beyond the letter of the law. They may do so for one of many reasons, including financial advantage, pressure from stakeholders, innate altruism or to stave off unwelcome government regulation.<sup>86</sup> The expression 'triple bottom line', which captures the idea that economic, social and environmental factors are interconnected and essential to commercial success, has now become a familiar idiom in business parlance.<sup>87</sup> Since 2008, the United Nations 'Protect, Respect and Remedy' framework developed by United Nations Special Representative John Ruggie has emerged as an influential standard (now known as the United Nations *Guiding Principles on Business and Human Rights*) for articulating best practice for corporate social and related environmental behaviour around the world.<sup>88</sup>

These voluntary initiatives are commonly labelled 'corporate social responsibility' (CSR), for regular business enterprises, or 'socially responsible investing' (SRI), for financial investors. Their efforts may be expressed in diverse ways, for example, companies are invited to commit through voluntary codes and standards, environmental certification schemes or individual initiatives within a single business such as adoption of a new environmental policy or management unit. Thus, CSR and SRI provide pathways by which the business community can innovate and find synergistic outcomes for themselves and the natural environment.

At present, there is little coordination between these private sector activities and government legal arrangements. These activities can either be mutually supportive, or result in confusion and suboptimal performance. This is a significant challenge and a significant opportunity for environmental governance in the future. A fundamental issue to resolve is how the law should acknowledge and facilitate voluntary efforts to protect and manage the environment, such as corporate codes of conduct.

The CSR movement in Australia and many other countries is helping to modify business cultures by making corporate decision-makers more considerate of ethical factors, the needs of other stakeholders such as local communities, as well as more cognisant of the financial materiality of environmental activities and impacts.<sup>89</sup> Numerous industry codes of conduct and standards, developed by the business community alone or in collaboration with other stakeholders, provide an increasingly important part of the fabric of environmental governance for Australian business even though such codes and standards ostensibly involve only voluntary obligations. Examples include the Australian Minerals Council Code of Environmental Management, Responsible Care, ISO 26000, the United Nations *Global Compact*, the Ruggie framework (as noted above) and many more.<sup>90</sup> Codes of conduct, though 'voluntary', can have legal consequences. A bank may require a borrower to comply with a CSR code when the borrower is planning to engage in an environmentally risky project (such as the *Equator Principles* that apply to project financing).<sup>91</sup> Similarly, a retailer who subscribes to a voluntary eco-labelling scheme will incur legal consequences if its advertised products do not accurately reflect the asserted environmental performance criteria. Apart from these legal ramifications, CSR codes and standards can be behaviourally influential - and thus resemble legal effects - because of industry peer-pressure, scrutiny from environmental watchdogs or consumer pressure.

While the CSR movement can catalyse environmental innovations and leadership in the business community, it also has many critics who see CSR as camouflage for unscrupulous or perfunctory behaviour, and it may even dangerously lead to complacency that further reform of environmental law or business law is unnecessary.<sup>92</sup> The capacity of CSR to

86 Elizabeth Garriga and Domenec Mele, 'Corporate Social Responsibility Theories: Mapping the Territory' (2004) 53 *Journal of Business Ethics* 51.

87 Andrew Savitz, *The Triple Bottom Line: How Today's Best Run Companies Are Achieving Economic, Social, and Environmental Success – and How You Can Too* (Jossey-Bass, 2006).

88 John Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Rights to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (UN Human Rights Council, 2008).

89 Andrew Crane et al, (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008).

90 Stepan Wood, 'Voluntary Environmental Codes and Sustainability' in Benjamin J Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2006) 229.

91 Benjamin J Richardson, 'The Equator Principles: The Voluntary Approach to Environmentally Sustainable Finance' (2005) 14 *European Environmental Law Review* 280.

92 Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004); S Beder, *Global Spin: The Corporate Assault of Environmentalism* (Green Books, 2002).

induce positive behaviour may be undermined by a multitude of factors, including the free-rider effect, countervailing market pressures, imperfect environmental information, and the absence of credible sanctions for non-compliance.<sup>93</sup> Thus, as leading critic David Vogel concludes, the 'most effective strategy for reconciling private business goals and public social purposes remains what it has always been, namely effective government regulation'.<sup>94</sup>

In the financial economy, a parallel movement for social and environmental responsibility is underway. Known as SRI, 'ethical investing' or 'responsible investing', it generally means use of environmental, social and governance (ESG) criteria in financial decisions such as issuing loans or acquiring corporate shares. The movement has attracted a number of mainstream financial institutions, as well as churches, trade unions, universities and others interested in promoting respect for human rights or environmental improvements through the power of financial investing.<sup>95</sup> As with CSR, diverse motivations shape SRI practices: some investors prioritise ethical criteria, others treat SRI as additional due diligence to improve financial returns, while some believe both goals can be pursued in a 'win-win' strategy. The diverse methods of SRI include screening investments, engaging with corporate managers through shareholder action, and assisting communities through targeted impact investing.

## CASE STUDY

One example of how environment-conscious financiers can discipline companies is when investors effectively blocked a controversial pulp mill in Tasmania. In May 2008, the Australian and New Zealand (ANZ) Bank declined to fund a pulp mill proposed by Gunns, a then major forestry operator. Although the ANZ publicly declined to elaborate its reasons for shunning the project, worth about \$2 billion, the bank was likely to have been concerned about the pulp mill's potential environmental impacts, or at least negative publicity about such impacts. As a signatory to the *Equator Principles*, a global voluntary SRI code, the ANZ was conscious of the environmental standards it had pledged to follow. The lender's stance is particularly notable given that the pulp mill had already won conditional approval from state and federal environmental regulators.

Although SRI has a long lineage, the sector has surged globally in recent decades as mainstream financiers, such as superannuation funds, have embraced it. The SRI market is particularly pronounced in Australia, as reflected in survey data from the Responsible Investment Association Australasia that suggests 50% of total financial assets managed in Australia in 2014 were tied to some SRI criteria,<sup>96</sup> a number anticipated to grow as pressure on all Australian financial institutions to invest more responsibly increases. Among recent examples, in 2014 the investment fund of the Australian National University withdrew from seven resource sector companies that it judged had violated ESG criteria. Another is the 2015 refusal of the National Australia Bank to fund the proposed Adani coal mine in Queensland.<sup>97</sup> Since most businesses at some point rely on bank loans or sale of shares/bonds to sustain their activities, in theory social investors can influence corporations by tying finance to environmental and social considerations.<sup>98</sup> In other words, SRI can become a means to promote CSR, although there is yet little rigorous empirical research to verify this potential.<sup>99</sup>

93 Peter Dauvergne and Jane Lister, *Eco-Business: A Big-Brand Takeover of Sustainability* (MIT Press, 2013); Jo Confino and John Drummond, 'Why CSR is Not Enough to Create a Sustainable World', *The Guardian* (online) 26 April 2010; Harry Glasbeek, 'The Social Responsibility Movement: The Latest in Maginot Lines to Save Capitalism' (1988) 11 *Dalhousie Law Journal* 363.

94 David Vogel, 'The Limits of the Market for Virtue', *Ethical Corporation* (25 August 2005) <<http://www.ethicalcorp.com/content/limits-market-virtue>>.

95 Peter Kinder, Steven Lydenberg and Ami Domini, *The Social Investment Almanac: A Comprehensive Guide to Socially Responsible Investing* (Henry Holt, 1992); Russell Sparkes, *Socially Responsible Investment: A Global Revolution* (Wiley, 2002); Marcel Jeucken, *Sustainable Finance and Banking: The Financial Sector and the Future of the Planet* (Earthscan, 2001).

96 Responsible Investment Association Australasia (RIAA), *Responsible Investment Benchmark Report* (RIAA, 2015) 4.

97 Australian Broadcasting Corporation, 'NAB the Latest to Rule Out Funding Adani's \$16 Billion Carmichael Coal Mine' (World Today, 3 September 2015).

98 Pietra Rivoli, 'Making a Difference or Making a Statement? Finance Research and Socially Responsible Investment' (2003) 13(3) *Business Ethics Quarterly* 271.

99 See Megan Bowman *Banking on Climate Change* (Wolters Kluwer, 2015); Celine Louche and Tessa Hebb (eds), *Socially Responsible Investment in the 21st Century: Does It Make a Difference for Society?* (Emerald Group Publishing, 2015).

Although it is not feasible to rely on corporate or investor volunteerism as the primary means of improving the environmental performance of Australian businesses, neither is it feasible to rely on governments alone to govern environmental behaviour. The critical question is how to best encourage private sector initiative and innovation without relinquishing the crucial role of government in ensuring environmental integrity in the marketplace. With the right policies and legal instruments, CSR and SRI could acquire a much bigger role in moving the economy towards sustainability.

Already, commentators and researchers have identified some legal reforms that could improve the contribution of CSR or SRI. The seminal Freshfields report of 2005, recognised that the judicial interpretation of the fiduciary and trust law duties of investment funds is an important influence on the scope for SRI,<sup>100</sup> while others see this law as a potential barrier if SRI prioritises ethical criteria over financial returns.<sup>101</sup> A legal hindrance to both CSR and SRI is the lack of comprehensive corporate environmental reporting standards, which makes it difficult and more costly for investors and other interested stakeholders to discriminate between environmental laggards and leaders. Corporate governance itself is a barrier to the extent that it hinders shareholders from collaborating, filing resolutions and engaging with corporate managers to exert positive change. One useful reform already adopted in Australia is the *Financial Services Reform Act 2001* (Cth), which obliges the trustees of superannuation funds and some other providers of investment products to disclose whether they have an SRI policy; although the law does not oblige any institution to practice SRI, the effect of the law appears to have greatly increased uptake (at least notionally) of SRI policies.<sup>102</sup> Leadership from public sector funds might also be helpful to facilitate change. In 2010, the Australian Greens party proposed an amendment to the legislation governing the Commonwealth's Future Fund that would have obliged the Fund's trustees to practice SRI, however the proposal was not adopted.<sup>103</sup> These are just a few examples; commentators have identified a variety of other legal reforms that could facilitate voluntary CSR and SRI practices.<sup>104</sup>

The final section of this paper concludes with some specific recommendations for improving the environmental performance of the private sector.

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100 Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment (UNEP-FI, 2005)*.

101 Benjamin J Richardson, *Fiduciary Law and Responsible Investing: In Nature's Trust* (Routledge, 2013).

102 Now embodied in the *Corporations Act 2001* (Cth), s 1013D(1)(l); and see Matthew Haigh and James Guthrie, 'Management Practices in Australasian Ethical Investment Products: A Role for Regulation' (2010) 19(3) *Business Strategy and the Environment* 147, 158-60.

103 *Government Investment Funds Amendment (Ethical Investments) Bill 2011* (Cth).

104 Mia Rahim, *Legal Regulation of Corporate Social Responsibility: A Meta-Regulation* (Springer, 2013); Daniel C Esty and Andrew Winston, *Green to Gold: How Smart Companies Use Environmental Strategy to Innovate, Create Value, and Build Competitive Advantage* (Wiley, 2009).

## 5. Options for law reform

This *Technical Paper* has identified many aspects of the interface between environmental governance and business law; similarly the range of legal reforms that might be considered to improve the current situation is numerous, however only a handful of the most important ideas for reform are canvassed here. Given the wide variety of reforms needed, some prioritisation will be needed, and business law should encourage corporations to improve their performance beyond the minimal requirements of environmental legislation.

Given that the corporation is the dominant economic actor in Australia, arguably the priority should be reform of the *Corporations Act 2001*. As the legislative framework for corporate governance in Australia, it would assist in obtaining nation-wide uniformity, and thereby help overcome limitations in the mainly state-based environmental legislation. This national approach might also provide flow-on direction to smaller unincorporated enterprises, such as through business supply-chains. Further, including specific environmental standards in the Australian corporations law, would signal to senior managers and directors that these are important responsibilities to address as diligently as other core statutory duties.

It would be worthwhile to introduce a **general duty on all companies to improve their environmental performance**, with such a duty helping to fill gaps in legislative coverage; to address new hazards as they arise; to educate business managers about the importance of environmental sustainability; and to provide businesses with considerable flexibility in determining for themselves how to achieve the best environmental outcomes. A duty of care however, would not be a complete solution. For instance, it would likely be ineffective in addressing small and diffuse cumulative impacts. The duty would also need to be supplemented with regulatory guidance to explain how fulfilment of the duty would go beyond meeting ordinary obligations under environmental legislation, for example, in regard to land use and pollution discharges.

In addition to a duty of care, legal scholars have debated and recommended other mechanisms that may indirectly improve corporate environmental performance.<sup>105</sup> Some options that APEEL recommends are:

- Require all companies to establish an appropriate **environmental management system**, such as one certified by the ISO (International Organisation for Standardisation). This would provide the organisational framework for companies to manage and continually improve their environmental performance, and it could be used to facilitate compliance with environmental legislation.
- Oblige corporations to establish an **environmental sustainability plan** that sets targets and means to achieve ongoing environmental improvements in the business, such as resource use, efficiency gains and waste emission reductions. The plan should set a framework for seeking best environmental practices, beyond minimum legal requirements. Progress in meeting the plan would be disclosed and evaluated in a company's annual report.
- Company law could include an '**environmental judgement rule**',<sup>106</sup> analogous to the business judgment rule. It would shield corporate managers from liability for any perceived failure to promote the best (financial) interests of the company if they make rational investment decisions to improve the company's environmental performance.
- To improve companies' awareness of how their operations may affect the environment, corporations could be obliged **to consult routinely with specified stakeholders**, such as a local community and major environmental organisations, and to explain in their annual reports how consultation occurred and how stakeholders' advice has been taken into account. The mechanisms to achieve such consultation might include a stakeholder consultative forum and a community liaison officer.
- Oblige companies to improve their **collection of environmental performance data, and to disclose it** in their annual reporting processes. Such requirements could complement or enhance voluntary reporting by many

<sup>105</sup> Helen Anderson and Wayne Gumley, 'Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment' (2008) 29 *Adelaide Law Review* 29; James McConvill and Martin Joy, 'The Interaction of Directors' Duties and Sustainable Development in Australia: Setting Off on the Uncharted Road' (2003) 27(1) *Melbourne University Law Review* 116.

<sup>106</sup> As proposed by McConvill and Joy, above n 105.

businesses that are keen to improve their reputation. While voluntary reporting can help gauge some aspects of corporate environmental performance, it suffers from lack of comparability, lack of consistency and reliability of data.<sup>107</sup> Environmental reporting obligations would not only help regulators to supervise compliance, they would assist social investors to understand companies' environmental performance, and would enable a more informed dialogue on environmental issues within companies and between companies and their stakeholders.

- Environmentally unsustainable practices are often attributable to the short-termism culture in business organisations, and therefore mechanisms could be introduced to encourage more patient, long-term business practices. Such mechanisms could include restructuring the exercise of voting rights of shareholders. Company law could **reward patient shareholders with weighted voting rights**, while excluding from voting those who hold shares acquired through opportunistic borrowing or equity swaps. Such reform would need to be designed cautiously to avoid the entrenchment of reactionary shareholders and barriers to progressive new investors with environmental business reform agendas. Additional incentives, perhaps provided by tax law, should be introduced to align corporate managers' incentives to act for the long term.

All the foregoing obligations would entail additional costs on companies, and therefore some differentiation of responsibilities between large and small companies should be considered in order to reduce the regulatory burden on smaller businesses. The reforms should also include penalties for noncompliance and mandate the Australian Securities and Investments Commission to take enforcement action rather than to burden private persons with such responsibilities.

- Australia should follow the example of Britain, Canada and the United States to give businesses the option of incorporating as a '**corporate hybrid**'.<sup>108</sup> As explained previously, the hybrid blends traditional for-profit and non-profit legal characteristics in their design to support environmentally sustainable and community-oriented practices. Although the obvious limitation of this model is that it leaves untouched mainstream company law, by offering an alternate legal model the corporate hybrid may at least give greater legal confidence to businesses that wish to focus on the environment, as well as to enhance public debate about the limitations of the traditional corporate model. They would serve as a reminder that it is possible to pursue both economic viability and social/environmental responsibility. A business having the status of a 'benefit corporation' or 'community contribution company', as hybrids are known in some jurisdictions, might also confer a marketing advantage with its consumers and traders.

Many of the foregoing reforms would benefit environmental-conscious investors. In addition:

- Mechanisms could be introduced to directly target the financial sector including: **redefine the fiduciary and trust law responsibilities of financial institutions** to allow consideration of the environmental aspects of corporate performance; oblige financiers to publicly report on the environmental impacts and performance of their investment portfolios; and require institutions to commit to approved voluntary SRI codes, such as the United Nations *Principles for Responsible Investing* or the *Equator Principles*; and reform corporate governance to remove impediments to shareholder activism that promotes SRI.
- The Commonwealth should also set an example of best practices in financial investment by **mandating the Future Fund to promote SRI**. Legislation governing sovereign wealth funds in some other jurisdictions, notably in New Zealand and Norway, already provides relevant precedents for Australian reformers to consider. The *Future Fund Act 2006* (Cth) would need to be amended to direct the trustees of the Fund to consider financially material environmental issues, such as climate change, that may affect investment returns.
- Like investors, consumers having the right information and incentives may be able to influence the business community's environmental performance. The most worthwhile reform would be to expand the ACCC regime to include **positive environmental disclosure obligations on businesses**. The ACCC could develop guidelines on the necessary information to disclose (for example, carbon emissions, resources consumption, waste emissions)

<sup>107</sup> Renard Slew, 'Style over Substance: Sustainability Reporting Falling Short' *The Conversation* (23 September 2014).

<sup>108</sup> Carol Liao, 'Disruptive Innovation and the Global Emergence of Hybrid Legal Structures' (2014) 11(2) *European Company Law* 66.

and, crucially, introduce a ranking system that would give consumers the ability to compare the environmental performance of companies' products and services.

- The tax system is a crucial tool for incentivising market actors to improve their environmental performance, as enhanced information disclosures will be insufficient to persuade all investors and consumers to choose the most environmentally responsible options. Instead, an **improvement of the financial advantages of environmentally responsible practices** is required. Useful reforms that should be considered include: reintroduce a national carbon pricing mechanism; remove or reduce tax concessions and subsidies on fossil fuel industries; expand property tax concessions for landowners who engage in nature conservation work; and restructure pricing of utilities to encourage conservation of water and other critical environmental resources.
- Alongside a range of other revenue-raising options that are canvassed in Australian Panel of Experts on Environmental Law, *Environmental Governance* (Technical Paper 2, 2017), it is recommended that **the tax system, including the GST, be reviewed to find opportunities to support greater investment in environmental management**. The money could reward businesses, including farmers, who demonstrate best environmental practices and engage in high quality environmental innovations.

Through the foregoing reforms to incentivise and encourage environmentally responsible practices by corporations and investors, **the business community can help fund and resource the shift to a better system of environmental governance**. Through business-led investments in renewable energy, land care, nature conservation and other environmental initiatives, the business community can help meet the costs of what otherwise are often seen as responsibilities that must be resourced by government agencies or community groups.

Finally, it should be recognised that not all legal reforms to engage the business sector on environmental issues can be restricted to the foregoing business laws. Apart from the traditional corpus of environmental legislation, as analysed in other APEEL *Technical Papers*, the human rights implications of business conduct require additional legal responses that may best be articulated in laws and policies outside conventional business regulations.<sup>109</sup>

- Because of the significant human rights dimensions of some business activities that impact the environment, such as displacement of communities, damage to economic livelihoods, and public health impacts, law reform should **give effect to the United Nations Guiding Principles on Business and Human Rights** (UNGPs). Australia declared its support for these *Principles* when it co-sponsored the 2011 Human Rights Council resolution endorsing the UNGPs. One option is a national Human Rights Act, as proposed by various organisations recently, as the means by which Australia could articulate a national action plan on business and human rights.

Such action plans have been adopted or are underway in over 40 countries worldwide. In June 2014, the Australian Government supported a resolution in the Human Rights Council encouraging all states to develop a national action plan or other such framework. One purpose of such a plan and accompanying legislation would be to ensure that all persons whose rights have been violated due to business-related activities, such as pollution or land degradation, have access to a meaningful remedy.<sup>110</sup>

<sup>109</sup> See Australian Panel of Experts in Environmental Law, *Democracy and the Environment* (Technical Paper 8, 2017).

<sup>110</sup> See for example, the recently released Human Rights Law Centre's *Safeguarding Democracy* report <[http://hrlc.org.au/wp-content/uploads/2016/02/HRLC\\_Report\\_SafeguardingDemocracy\\_online.pdf](http://hrlc.org.au/wp-content/uploads/2016/02/HRLC_Report_SafeguardingDemocracy_online.pdf)>.

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The Australian Panel of Experts  
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