

Australian directors face increased legal risk where corporate reputation suffers as a result of human rights violations in offshore subsidiaries and supply chains

Riana Cermak*

Executive Summary

- 1 This paper describes the legal risks faced by company directors in Australia where corporate reputation suffers as a result of human rights violations in offshore subsidiaries and supply chains.
- 2 It is aimed at company directors, particularly those of ASX Listed companies, but the principles are broadly applicable, including to smaller companies.
- 3 This paper discusses the relationships between community expectations of corporate behaviour, corporate reporting, corporate reputation, and directors' duties. It is argued that where corporate reputation suffers as a result of failing to meet community expectations to respect human rights, potential liability may arise under existing Australian law even if the actions occur offshore or in supply chains.
- 4 A company's reputation is one of its most important assets. With the increasing focus on corporate social responsibility, and rising community expectations, Australian companies must adapt their procedures to counter reputational risks.
- 5 Australian companies are increasingly voluntarily reporting on non-financial aspects of their performance and operations, further raising the bar for directors. In cases on directors' duties, a court will look to broader practice among Australian companies to determine the standard of behaviour which is required by directors.
- 6 Company directors who fail to address these risks may face personal liability for a breach of their directors' duties.
- 7 This paper is intended to highlight the increasingly high standards required of directors by Australian courts and raise awareness for directors and corporate counsel. Directors and officers can undertake measures to mitigate the risks of reputational loss and potential breach of duties by incorporating CSR into business strategies.

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Introduction

In 1970, economist Milton Friedman stated that “[t]here is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits”.¹ Fifty years later this statement is no longer guaranteed under Australian corporate law. The collapse of the Rana Plaza clothing factory in Bangladesh in 2013 killed over 1,100 workers and focused global attention on poor business practices leading to human rights abuses in supply chains around the world.² In the past, human rights have been categorised as the legal responsibility of governments,³ however incidents such as the Rana Plaza factory collapse have created an international regulatory push toward corporate accountability for human rights violations.⁴ Legislation has been enacted in many countries providing for various forms of corporate accountability for human rights,⁵ with Australia recently joining this trend and proposing the enactment of a Modern Slavery Act modelled on the UK legislation of the same name.⁶ As it is proposed, this regime will require companies with an annual consolidated revenue of more than \$100 million to report annually on the risk of modern slavery in their operations and supply chains, and the actions taken to address those risks.⁷

However, this article contends that there is also a wider social responsibility already imposed on Australian directors through their directors’ duties. There is an increasing community expectation that Australian directors will respect human rights in offshore operations and supply chains, and a failure to do so can negatively impact the company’s reputation and bring the conduct within the scope of directors’ duties. This paper will cover the changing community expectations with respect to human rights, the recent case of *Australian Securities and Investments Commission v Cassimatis (No 8)*⁸ (**Cassimatis**), the interpretation of the duty of care, skill and diligence, the importance of reputation, and the rise in voluntary self-reporting on non-

* BCL Candidate (Oxford University); BlnSt; LLP/LP (Hons I) (Flinders University). This article is based on research which was awarded the Law Council of Australia Baxt Prize and accepted for publication in the *Company and Securities Law Journal*.

¹ Milton Friedman, ‘The Social Responsibility of Business is to Increase its Profits’ *New York Times Magazine* (New York, 13 September 1970) <<http://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>>.

² See Australian Human Rights Commission and Australian Centre for Corporate Social Responsibility and Global Compact Network, *Human Rights in Supply Chains: Promoting Positive Practice* (2015) 2; Jim Yardley, ‘Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame’ *New York Times* (online), 22 May 2013 <<http://www.nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html>>.

³ See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948).

⁴ See, eg, John Southalan, ‘Human Rights and Business Lawyers: The 2011 Watershed’ (2016) 90 *Australian Law Journal* 889, 889.

⁵ *Modern Slavery Act 2015* (UK); *California Transparency in Supply Chains Act of 2010*, Cal Civil Code § 1714.43 (2010) (California); *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (1)* (France) JO, 28 March 2017 (France); Directive 2014/95/EU (European Union); Danish Financial Statements Act (Accounting for CSR in large businesses) (Denmark).

⁶ Modern Slavery Bill 2018 (Cth).

⁷ *Ibid.* See also the NSW equivalent *Modern Slavery Act 2018* (NSW) which applies to commercial organisations with a consolidated revenue of more than \$50 million and also includes penalties for non-compliance with the reporting requirements.

⁸ *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 [515]-[519].

financial performance. The evolving expectation that modern companies include a corporate social responsibility (CSR) focus in their corporate strategies is likely to become even more relevant for directors of Australian companies in the coming years.

Changing Community Expectations with Respect to Human Rights

Community expectations and considerations of what constitutes appropriate corporate behaviour naturally evolve over time. Companies are increasingly held to a higher human rights and CSR standard. These changing expectations play a role in the judicial interpretation of directors' duties, and provide a "solid policy basis for judges to interpret the law to reflect corporate social responsibilities".⁹ Further, the standard of care imposed on directors responds to shifting expectations, with "the development of directors' duties in Australia [being] one of increasing obligation".¹⁰ Community expectations regarding CSR were heightened in the 1930s, when it was first recognised that companies have 'social responsibilities'.¹¹ Over the past few decades, community expectations have developed even further in terms of what is considered 'acceptable corporate behaviour'.¹² Business practices and the law necessarily reflect underlying social norms as societal values and expectations change. In order to conform to changing community expectations, directors must adapt and change their strategies.

Alongside changing community expectations with respect to human rights is the increased ability for information to be spread via the internet and social media. In particular, civil society organisations and the media are increasingly holding companies responsible for poor human rights practices,¹³ with the internet and social media spreading their reach. These mediums have also made corporate actions more transparent, and have increased the publicity of companies' human rights profiles.

In the past few decades there has also been a significant increase in shareholder activism by institutional investors.¹⁴ Financiers are beginning to consider a company's CSR profile before making decisions in relation to their commitment of capital,¹⁵ with investors increasingly considering a socially responsible profile in their

⁹ Jean Jacques du Plessis, 'Corporate Social Responsibility and "Contemporary Community Expectations"' (2017) 35 *Company and Securities Law Journal* 30, 45.

¹⁰ Vivienne Brand, 'Connections Between Ethics and Directors' Duties in Australia' in Adolfo Paolini (ed) *Research Handbook on Directors' Duties* (Edward Elgar, 2014) 239, 239.

¹¹ Du Plessis, above n 9, 39.

¹² Raisa Blanco, 'Reconsidering the Self-Regulatory Approach to Corporate Social Responsibility' (2017) 35 *Company and Securities Law Journal* 7, 10.

¹³ Stéphane Brabant, *Crisis Contenders: Human Rights Violations as a Source of Risk* (12 April 2016) Herbert Smith Freehills <<https://www.herbertsmithfreehills.com/latest-thinking/crisis-contenders-human-rights-violations-as-a-source-of-risk>>.

¹⁴ James Spigelman, 'Institutional Shareholders and Corporate Governance' (2010) 28 *Company and Securities Law Journal* 235, 236.

¹⁵ Rosemary Langford, 'The Corporate Culture Chameleon: Reflections and Reporting' (2016) 34 *Company and Securities Law Journal* 558, 562.

investment choice.¹⁶ In his 2018 letter to CEOs outlining the ‘most pressing issues facing investors today’, Larry Fink, Chair and CEO of BlackRock Inc, the world’s largest asset manager, stated that “[s]ociety is demanding that companies, both public and private, serve a social purpose.”¹⁷ He went on to say:

“To prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. *Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate. Without a sense of purpose, no company ... can achieve its full potential. It will ultimately lose the license to operate from key stakeholders.*”¹⁸

Australian shareholders are increasingly concerned about human rights issues. A study in 2006 found that high percentages of shareholders would sell their shares if companies neglected social responsibilities, including human rights and child labour.¹⁹ The financial sector is dominated by institutional investors such as superannuation funds, with these funds primarily operating through equity investments. In this way, they function as intermediaries by pooling the collective capital of individual members and investing on their behalf. The fastest growth of share ownership in Australia has been amongst persons between the age of 18 and 34, with data showing that these shareholders are sensitive to human rights issues.²⁰ An increasing number of large and influential funds, including Westpac, AMP, ING, Hesta and UniSuper have all recognised this demand trend and responded by introducing socially responsible investment options for their members.²¹ Newer funds dedicated to ethical investing are also growing in influence.²² Investment in socially responsible mutual funds in Australia is increasingly outgrowing the broader market of managed portfolios.²³ Institutional investors and shareholder activists play an important role in corporate governance due to their “ability to leverage on their size and voting power to encourage good corporate governance practices within companies”.²⁴ The moral commitment to human rights by these investors shapes the response to these issues by the companies they invest in, as companies are required to respond to the demands of their shareholders or risk activist campaigns. Furthermore, directors’ duties may require directors to take into

¹⁶ See Francesco Gangi, Ida Camminatiello and Nicola Varrone, ‘Analysis of Private Socially Responsible Investment: The Impact of Personal Concern with Corporate Social Responsibility’ (2016) 6 *Review of Economics and Finance* 47, 59–60.

¹⁷ Larry Fink, *Larry Fink’s Annual Letter to CEOs: A Sense of Purpose*, BlackRock, Inc, (January 2018) <<https://www.blackrock.com/corporate/en-us/investor-relations/larry-fink-ceo-letter>>.

¹⁸ *Ibid* (emphasis added).

¹⁹ Dallas Hanson and Bruce Tranter, ‘Who Are the Shareholders in Australia and What Are Their Ethical Opinions? An Empirical Analysis’ (2006) 14(1) *Corporate Governance: An International Review* 23, 31.

²⁰ Tony Ciro and Ewa Banasik, ‘Socially Responsible Investments: Markets, Regulations and Compliance Risks’ (2009) 20 *Journal of Banking and Finance Law and Practice* 332, 336.

²¹ *Ibid*.

²² See eg Australian Ethical Super, *Homepage* (2018) <<https://www.australianethical.com.au>>.

²³ Jeremy Galbreath, ‘ESG in Focus: The Australian Focus’ (2013) 118 *Journal of Business Ethics* 529, 532.

²⁴ Shueh Hann Lim, ‘Do Litigation Funders Add Value to Corporate Governance in Australia’ (2011) 29 *Company and Securities Law Journal* 135, 144.

account the possibility that institutional investors and other capital providers may refrain from providing capital to companies which do not meet their human rights standards.

Risk and the Importance of Reputation

Often the most serious consequences of a poor decision or failure to supervise management are not the legal consequences but the commercial consequences – arguably, a company’s most valuable asset is its reputation. Furthermore, a negative human rights record can lead to a negative market reputation, which could be a breach of directors’ duties following the decision in *Cassimatis* which will be explored below. Due to these factors, directors must consider reputational damage and take measures to mitigate this risk. In recent years ASIC has increasingly focused on the importance of corporate culture. In a 2016 speech, former ASIC Chairman, Greg Medcraft, emphasised the linkages between corporate culture, reputation and financial performance, stating that “[a] good culture enhances brand loyalty and bolsters reputation, which has a very real financial impact.”²⁵ Given ASIC’s increased focus on corporate culture and reputation, this paper now turns to the way in which human rights violations can feed into reputation and lead to legal risk for directors.

Human rights risk is directly linked to corporate reputation, with human rights principles being recognised as a significant risk for global businesses as early as 2010.²⁶ The Ernst & Young Business Risk Report states that “[c]ompanies need to take account of public viewpoints and rather than dismiss them, work to better inform the public through transparent activities”.²⁷ This risk has not gone away, with the KPMG Top 10 Business Risks in 2018/19 Report including ‘brand and reputation risk’ at number 5. The KPMG Report provides that “[t]o manage this risk, there is a need for organisations to implement a sustainability framework comprising governance, social, ethical and environmental standards and performance indicators that evaluate metrics that can be proven to directly impact the brand and reputation of an organisation.”²⁸ Specifically, KPMG considers that supply chain reputational risk is a high priority. In another report, Adrian King, Global Head of KPMG’s Sustainability practice provides that “[i]nherent with supply chain risk is the threat of reputational damage. If one supplier is engaging in poor ethical or environmental activities, the impact on every linked organisation could be devastating.”²⁹

²⁵ Greg Medcraft, “Culture Shock” (Speech delivered at the Australian Securities and Investments Commission Annual Forum, Sydney, 21 March 2016). This was also repeated by ASIC Commissioner John Price in “Outline of ASIC’s approach to corporate culture” (Speech delivered at the AICD Directors’ Forum: Regulators’ Insights on Risk Culture, Sydney, 19 July 2017).

²⁶ Ernst & Young, *The Ernst & Young Business Risk Report 2010: The Top 10 Risks for Business: A sector-wide view of the risks facing businesses around the globe* (December 2010) 26.

²⁷ *Ibid.*

²⁸ KPMG, *Top 10 Business Risks in 2018/19* (April 2018).

²⁹ See, KPMG, *Supply chain risk – a global perspective* (March 2017)

<<https://home.kpmg.com/au/en/home/insights/2017/03/supply-chain-risk-global-perspective.html>>.

Also recently, the social licence to operate for businesses has been included in the Ernst & Young top 10 business risks facing mining and metals companies in 2017 and 2018.³⁰ The primary risks facing companies failing to respect human rights are reputational, legal, operational, and human capital.³¹ A further example of the importance of human rights reputational risk management is a 2015 survey of 90 Australian businesses which found that two primary drivers for taking action on human rights are: (1) improvement of brand and reputation; and (2) to better manage risks related to operations and supply chains.³² Thus, managing risks related to human rights is important for companies, as a failure effectively to do so can lead to reputational damage and, potentially, a fall in share price.³³ This focus on reputational risk is particularly relevant following the decision in *Cassimatis*, which suggests that a director's failure to prevent reputational damage to the company could result in a breach of directors' duties.³⁴

Reputation and Directors' Duties Following *Cassimatis*

The decision in *Cassimatis* has brought corporate reputation, as distinct from financial considerations, into the ambit of directors' duties. In 2010, ASIC began civil penalty proceedings against the executive directors of Storm Financial Limited (**Storm Financial**), Mr and Mrs Cassimatis, for breaches of the duty of care, skill and diligence under section 180 of the *Corporations Act 2001* (Cth) (**Corporations Act**). The decision by Justice Edelman, now of the High Court of Australia, centres on one of the most highly publicised Australian corporate collapses in recent times.³⁵

ASIC alleged that Mr and Mrs Cassimatis, as directors of Storm Financial, were responsible for the company providing advice to vulnerable investors in accordance with the 'Storm Model' of investment. This essentially provided a 'one size fits all' investment strategy to investors, regardless of their circumstances. The investors who were affected by the conduct were elderly investors, approaching or planning for retirement with limited income, few assets and little or no prospect of rebuilding their financial position in the event of suffering significant loss.³⁶ Justice Edelman found that Mr and Mrs Cassimatis had each breached their duty of care, skill and diligence by allowing Storm Financial to provide inappropriate advice to investors. Relevantly, they were the only shareholders of Storm Financial, and the breach of their duty was found to

³⁰ Ernst & Young, *Business risks facing mining and metals 2017-2018* <<http://www.ey.com/gl/en/industries/mining---metals/business-risks-in-mining-and-metals#segment2>>.

³¹ Alexis Cellier and Pierre Chollet, 'Corporate Social Responsibility Rating Information: Relevance and Impacts on Financial Markets' in Sabri Boubaker and Duc Khuong Nguyen (eds) *Board Directors and Corporate Social Responsibility* (Palgrave Macmillan, 2012) 179, 195.

³² Australian Human Rights Commission, above n 1, 11.

³³ For discussion on human rights risk see KPMG, *Addressing Human Rights in Business - Executive Perspectives*, <<https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/11/addressing-human-rights-in-business.pdf>>.

³⁴ *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 [480]–[483].

³⁵ See <https://www.smh.com.au/business/collapse-of-financial-planner-was-inevitable-20100527-whtv.html>; https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2008-10/fps/report/c03.

³⁶ See *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 [18].

have occurred while the company was solvent. They had argued that they could not breach their duty as they had acted in good faith in the best interests of the shareholders (themselves).

This decision is particularly relevant for directors, as it recognised that harm is not confined to financial harm to the shareholders, '[i]t includes harm to *all* the interests of the corporation ... including its reputation'.³⁷ Justice Edelman specifically refers to the interest of a company's reputation, stating that companies "have reputations, independently of any financial concerns".³⁸ His Honour considered that "harm should not be confined" narrowly when a court determines whether the acts or omissions of directors caused the company harm.³⁹ His Honour concluded that if it is foreseeable that the acts or omissions of directors would cause harm to the company's reputation, then the directors will be in breach of their duty of care, skill and diligence, even if no financial harm is sustained.⁴⁰

Importantly, Justice Edelman emphasised the importance of pursuing lawful and legitimate conduct regardless of risk of being caught or whether loss would be sustained. To this end, his Honour said:⁴¹

A corporation has a real and substantial interest in the lawful or legitimate conduct of its activity independently of whether the illegitimacy of that conduct will be detected or would cause loss. One reason for that interest is the corporation's reputation. Corporations have reputations, independently of any financial concerns, just as individuals do. Another is that the corporation itself exists as a vehicle for lawful activity. For instance, it would be hard to imagine examples where it could be in a corporation's interests for the corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable and was reasonably considered by the director to be virtually undetectable during a limitation period for liability.

Further, it was emphasised that in 'balancing' the assessment of due care and skill, the factors considered are not to be balanced and weighed as though by a common metric.⁴² His Honour used the example of a director making a decision to intentionally discharge large volumes of toxic waste which would breach environmental regulations:⁴³

Suppose the decision is made on the basis that the financial cost of avoiding the breach would be far greater than the cost of a pecuniary penalty under the relevant environmental regulation. This conduct might nevertheless involve a breach of the director's duty of care and diligence, irrespective of any other breaches. In other words, the director might not avoid liability merely because he or she

³⁷ Ibid [483].

³⁸ Ibid [482].

³⁹ Ibid [480]–[483].

⁴⁰ Ibid.

⁴¹ Ibid [482].

⁴² Ibid [485].

⁴³ Ibid.

proved that a balancing exercise showed that the likely financial cost of a penalty was exceeded by the likely profit from a serious contravention of the law.

This is analogous to the risk of breaching international human rights norms: a cost comparison of the likely profit from the contravention versus the penalty which might be imposed is not sufficient to avoid a breach.

‘Stepping Stones’ Approach to Directors’ Duties

Cassimatis built upon the ‘stepping stones’ approach to directors’ duties.⁴⁴ The first ‘stepping stone’ is an action against the company for breach of the *Corporations Act* or another law, and the second ‘stepping stone’ is the director being found liable for exposing the company to risk of liability.⁴⁵ The decision in *Cassimatis* extends this ‘stepping stones’ approach to directors who expose the company to risk of reputational damage even if the law is not breached. Whilst in *Cassimatis* the negative impact on the company’s reputation arose in the context of exposing the company to litigation, the reasoning of Justice Edelman supports the proposition that exposing the company to reputational damage due to poor human rights practices could be a breach of this duty.⁴⁶

Further, Justice Edelman considered the submission by ASIC that the statutory duty of care, skill and diligence in the *Corporations Act* is not merely a private duty owed to the company, but also a broader public duty. While his Honour found that he did not need to reach a conclusion on this point, the case outlined the evolution of the duty, noting that “Australian company legislation since 1958 has clearly recognised a public character to the duty” and that the current formulation of the *Corporations Act* “continues to treat a contravention of [the statutory duty of care, skill and diligence] as both a public and a private wrong.”⁴⁷ This judicial consideration highlights a trend that is likely to evolve further: that directors may be required to consider the broader public interest in their company decision-making.

Self-regulation Further Raising the Bar for Directors

Until recently, the main focus of corporate reporting has been the ‘single bottom-line’, namely, the financial performance of the company. This has been enforced by extensive statutory provisions requiring financial reports to be prepared and published, either annually or bi-annually depending on the company’s size.⁴⁸ However, there is increasing pressure on companies to implement a ‘triple bottom-line’ reporting structure

⁴⁴ See *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364 [10]; Abe Herzberg and Helen Anderson, ‘Stepping Stones – From Corporate Fault to Directors’ Personal Civil Liability’ (2012) 40 *Federal Law Review* 181, 181.

⁴⁵ Herzberg and Anderson, above n 44, 181; Rosemary Langford, ‘Corporate Culpability, Stepping Stones and Mariner: Contention Surrounding Directors’ Duties Where the Company Breaches the Law’ (2016) 34 *Company and Securities Law Journal* 75, 76.

⁴⁶ This type of social licence reputation is increasingly relevant following the reputational damage suffered by financial institutions in Australia following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

⁴⁷ *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 [455].

⁴⁸ See *Corporations Act 2001* (Cth) Pt 2M.1 ‘Financial reports and audit’.

whereby they report on the social and environmental impact of their operations,⁴⁹ as well as the financial aspects.⁵⁰ Many companies now report on these aspects through voluntary codes of conduct and voluntary reporting.

Voluntary Codes of Conduct

Over time, expectations have mounted that companies adopt and adhere to environmental, social and governance policies⁵¹ and companies are increasingly broadcasting voluntary codes of responsible behaviour.⁵² Voluntary acts of CSR and human rights codes of conduct “are very much in vogue”,⁵³ with companies expressing voluntary commitments in relation to respect for human rights.⁵⁴ An example is Coca Cola’s ‘Human and Workplace Rights’⁵⁵ initiative where the company published a ‘human rights statement’, ‘workplace rights policy’ and ‘supplier guiding principles’ based on the Universal Declaration of Human Rights⁵⁶ and the United Nations Guiding Principles.⁵⁷ By broadcasting these codes of conduct, companies are setting a standard and publicly committing to it.⁵⁸ This self-regulation goes beyond the company’s specific legal obligations, and assists in the development of directors’ duties as it creates a standard of compliance. By committing to standards beyond those legally required, directors are raising the minimum standard of corporate conduct and increasing the standard of their directors’ duties.⁵⁹ While the legal directors’ duties provide a minimum standard of compliance, standards created by directors through codes of conduct are increasingly being used by the Australian judiciary to aid in the interpretation and development of directors’ duties more broadly. The voluntary CSR practices of companies assist with defining and “shift[ing] the legal baselines applicable to other companies”,⁶⁰ with companies creating their own norms and standards. Coca Cola states on its website that, from 2009, it began “a more robust dialogue ... with suppliers about human rights” with the aim to move “beyond compliance and align to the latest advances in business-related human

⁴⁹ However, I note there is already an express obligation in s 299(1)(f) of the *Corporations Act* for directors to provide details of the company’s performance in relation to environmental regulation and legislative requirements in their annual directors’ report.

⁵⁰ Nadia Bernaz, ‘Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?’ (2013) 117 *Journal of Business Ethics* 493, 502.

⁵¹ Jean Jacques du Plessis, ‘Disclosure of Non-Financial Information’: A Powerful Corporate Governance Tool’ (2016) 34(1) *Company and Securities Law Journal* 69, 70.

⁵² Paul Redmond, ‘Directors’ Duties and Corporate Social Responsiveness’ (2012) 35(1) *UNSW Law Journal* 317, 321; Elisa Giuliani, ‘Human Rights and Corporate Social Responsibility in Developing Countries’ Industrial Clusters’ (2016) 133 *Journal of Business Ethics* 39, 40.

⁵³ Andrew Johnston, ‘Facing Up To Social Cost: The Real Meaning of Corporate Social Responsibility’ (2011) 20(1) *Griffith Law Review* 221, 234.

⁵⁴ Paul Redmond, ‘Directors’ Duties and Corporate Social Responsiveness’ (2012) 35(1) *UNSW Law Journal* 317, 321.

⁵⁵ Coca Cola, *Human and Workplace Rights* (7 November 2012) <<http://www.coca-colacompany.com/sustainability/report/we/human-and-workplace-rights.html#section-a-key-compliance-goal-achieved-early>>.

⁵⁶ *Universal Declaration of Human Rights*, above n 3.

⁵⁷ Coca Cola, above n 55.

⁵⁸ Justine Nolan, ‘With Great Power Comes Great Responsibility: Human Rights and Corporate Accountability’ (2005) 28 *University of New South Wales Law Journal* 581, 589.

⁵⁹ See, eg, Blanco, above n 12, 27.

⁶⁰ Radu Mares, ‘Global Corporate Social Responsibility, Human Rights and Law: An Interactive Regulatory Perspective on the Voluntary-Mandatory Dichotomy’ (2010) 1 *Transnational Legal Theory* 221, 269

rights concerns”.⁶¹ Adoption of these codes indicate a company’s “willingness to accept accountability for its activities ... thereby limiting its ability to abrogate responsibility for any social ... costs”.⁶² In turn, this type of conduct by individual companies can influence community expectations in relation to corporate respect for human rights in general.

Voluntary Reporting

Voluntary reporting of corporate human rights impact is promoted on a global level by various initiatives and reporting standard guidelines, including the Global Reporting Initiative⁶³ and the Organisation for Economic Cooperation and Development’s Principles of Corporate Governance.⁶⁴ These voluntary standards provide guidance to companies and are designed to set benchmarks for appropriate CSR reporting.⁶⁵ In Australia there is an increasing emphasis on the importance of CSR reporting,⁶⁶ which will be heightened with the introduction of the Modern Slavery Act.

Some Australian companies have disclosed aspects of their social impact and human rights performance for decades, with the early reporters often larger companies in prominent industries motivated by stakeholder pressure.⁶⁷ The practice of stand-alone CSR reporting is a more recent development.⁶⁸ Many companies now consider the importance of human rights factors with respect to their business strategy, and the importance of sufficient reporting of these factors to provide a complete view of the competitive risks facing the company.⁶⁹ For example, in June 2016, the Australian Council of Superannuation Investors released a report on the progress in disclosure of sustainability risks (which could include human rights aspects as previously indicated) among S&P/ASX200 companies titled ‘Corporate Reporting in Australia’ (‘Report’).⁷⁰ The Report found that 189 companies in the ASX200 reported to the public on environmental, social and governance risks as of 31 March 2016.⁷¹ Larger companies report more thoroughly, with 99% of the ASX100 companies reporting on these risks to some extent.⁷² Furthermore, the Report found that year on year there was a significant drop in ‘no reporting’, with 40 companies not reporting in 2010 and only 9 not reporting in 2016.⁷³

⁶¹ Coca Cola, above n 55.

⁶² Blanco, above n 12, 20.

⁶³ Global Reporting Initiative, *GRI Standards* <<https://www.globalreporting.org/standards>>.

⁶⁴ Organisation for Economic Cooperation and Development, *G20/OECD Principles of Corporate Governance* (September 2015) <<https://www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf>>.

⁶⁵ Corporations and Markets Advisory Committee Report, 25.

⁶⁶ See, eg, Du Plessis, above n 51, 74.

⁶⁷ Colin Higgins, Markus Milne and Bernadine van Gramberg, ‘The Uptake of Sustainability Reporting in Australia’ (2015) 129 *Journal of Business Ethics* 445, 447.

⁶⁸ *Ibid* 448.

⁶⁹ Anne Durie and Laura Horn, ‘Sustainability Reporting: The Role of Financial Institutions’ (2009) 37 *Australian Business Law Review* 342, 358.

⁷⁰ Australian Council of Superannuation Investors, *Corporate Reporting in Australia: Progress in Disclosure of Sustainability Risks Among S&P/ASX200 Companies* (June 2016) 8.

⁷¹ *Ibid* 13.

⁷² *Ibid*.

⁷³ *Ibid*.

The expectation to disclose is primarily driven by investor and community expectations as outlined above. Companies can achieve ‘moral legitimacy’ in society through participation in social dialogue.⁷⁴ The literature on business legitimacy highlights a link between companies adopting CSR reporting practices and a company’s credibility.⁷⁵ From a reputational perspective, CSR reporting “has been adopted to not only repel critics against the lack of non-financial reporting, but also to improve corporate image and identity”.⁷⁶ Many companies see CSR reporting as a way to signal their commitment to human rights, with the idea that they will face reputational harm if they stop reporting.⁷⁷ This reputational damage is particularly relevant for companies following the decision in *Cassimatis*.

This voluntary social impact reporting has the potential to “contribute to the creation of a culture of corporate responsibility”,⁷⁸ which can then be used by the judiciary to interpret directors’ duties. Although companies have been criticised for only undertaking ‘selective positive reporting’,⁷⁹ even selective positive reporting highlights the increased focus on human rights by companies. It also forces companies to implement positive human rights practices so as not to be sanctioned for misleading and deceptive statements.⁸⁰ Providing false or misleading information could attract criminal liability alongside reputational damage.⁸¹

Conclusion

This article proposes that directors who allow their companies to disregard human rights in offshore operations and supply chains risk reputational damage, which could result in a breach of their directors’ duties. The discussion indicates that there is an increasing risk of a successful action against company directors for a failure to prevent their company from breaching international human rights norms. This risk is heightened by the rise in community expectations regarding human rights, and the increase in self-regulation by companies. Even a single successful case applying the ‘stepping stones’ approach to directors’ duties as applied in *Cassimatis* in the context of offshore human rights violations could dramatically change the corporate risk calculus for Australian companies. As such, these considerations should be at the forefront of modern companies’ business strategies.

⁷⁴ Mia Mahmuder Rahim, ‘Raising Corporate Social Responsibility – The “Legitimacy” Approach’ (2012) 9 *Macquarie Journal of Business Law* 102, 105.

⁷⁵ Kaushik Sridhar, ‘The Relationship between the Adoption of Triple Bottom Line and Enhanced Corporate Reputation and Legitimacy’ (2012) 15(2) *Corporate Reputation Review* 69, 73.

⁷⁶ *Ibid.*

⁷⁷ Higgins, Milne and Van Gramberg, above n 67, 463.

⁷⁸ Brand, above n 10, 260.

⁷⁹ See, eg, Alice Klettner, Thomas Clarke and Martijn Boersma, ‘The Governance of Corporate Sustainability: Empirical Insights into the Development, Leadership and Implementation of Responsible Business Strategy’ (2014) 122 *Journal of Business Ethics* 145, 162.

⁸⁰ Langford, above n 15, 562.

⁸¹ *Corporations Act 2001* (Cth) ss 1308–1309.