

GOVERNING THE CORPORATION: THE ROLE OF 'SOFT REGULATION'

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I INTRODUCTION

In the last two decades, a new type of regulation has been added to the control of corporate conduct. It is corporate governance standards, a type of soft regulation. Whether part of stock exchange listing rules, codes or 'best practice' guidelines issued by investor bodies, much reliance has been placed on the effectiveness of such soft regulation. This is so in the politics of corporate governance, in the growing literature on the best ways for corporations to govern themselves,¹ and more recently in judicial decisions.

Soft regulation in the form of corporate governance guidelines or standards is beginning to have an important influence on the judicial development of director's duties.² This can be seen in Australian cases, most emphatically in *ASIC v Healey*, where Middleton J referred to a publication by the Australian Institute of Company Directors ('AICD') in 2006 entitled 'How to Review a Company's Financial Reports – A Guide for Boards'. He did so in deciding that the AICD guidelines 'reflect[ed] [his] own view of what is required of the directors in this proceeding, and what is required by the Act and the case law'.³ From here on, I will use the term 'soft regulation' or 'SR' to mean standards, codes, guidelines etc, including stock exchange listing rules, issuing from a variety of non-state sources. SR is part of the legal and normative pluralism of corporate regulation and governance, which ranges from statute at one end of the regulatory spectrum to corporate ethics at the other. This approach sees legality on a spectrum ranging from the full force and effect of state authority at one end, through oblique and indirect legal effect, and finally to governance power and

1 Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002); Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); John Farrar, *Corporate Governance: Theories, Principles and Practice* (Oxford University Press, 3rd ed, 2008).

2 *ASIC v Rich* (2003) 174 FLR 128, 147 ('*Rich*'). See also *ASIC v Rich* [2004] NSWSC 836, [35]–[36] (White J); *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1, 528–9 [4362]–[4367], 665 [6073]; most recently *ASIC v Healey* (2011) 196 FCR 291, 336–7 [192]–[194] ('*Centro*'); *ASIC v Healey (No 2)* (2011) FCA 1003, [169]–[175].

3 *Centro* (2011) 196 FCR 291, 337–9 [194]–[207].

influence that depends on non-legal institutions such as the market, organisational culture, and ethics.

While there are some good accounts of the style and content of SR,⁴ few analyse its nature and effect. The aims of this article are to consider the nature and effect of SR within the mechanisms of corporate governance. The purpose of the article then, is not to make an argument preferring legislation or formal regulations over SR, or vice versa. The idea is to map and analyse some of the many ways in which non-state corporate governance norms operate and have effect. The more interesting questions are 'how does SR operate?', 'what effects does SR have?', and most particularly 'how does SR inter-relate with state regulation and other non-legal orders, to have the effects it does?'.⁵ In considering the nature and effect of SR, there are three main questions.

First, what is SR in corporate regulation and governance? Where does SR fit within traditional corporate law, and what can it add to directors' duties and other (mainly non-legal) techniques of corporate governance? Here the revised 'Corporate Governance Principles and Recommendations'⁶ of the Australian Securities Exchange ('ASX Principles') are examined. They are not the listing rules and do not have the contractual effect usually attributed to those rules, but are principles annexed to the listing rules. They are compared with similar SR in the United Kingdom Corporate Governance Code ('UK Code'), which is incorporated into the Listing Rules of the United Kingdom Listing Authority in Britain ('UK Code').

Continuing on, we already see a subtle difference in grades of SR, for corporate governance standards for United States ('US') companies are included *within* the listing rules of the New York Stock Exchange⁷ ('NYSE Listing Rules') themselves. By contrast, with this more direct legal effect of the listing contract on corporate governance for US companies, the ASX Principles and UK Code are *annexed* to the listing rules. Their governance effect is much more reliant on disclosure and the serendipity of the circumstances in which effectiveness is claimed for them. These circumstances are various: for example in directors' duties cases, in shareholder advisory resolutions on directors' remuneration, in supply chain contracts, in institutional shareholder action, in corporate control transactions, in supplier and recruitment markets, in charters of corporate ethics, in consumer markets where reputation can be made and lost on the quality of governance, and in supplying bench-marks in governance or sustainability indexes and so on. In all these instances and others, rather than being merely aspirational, SR may be influential. So the second question is: what

4 Farrar, above n 1; Jean Jacques du Plessis, Anil Hargovan and Mirko Bagaric, *Principles of Contemporary Corporate Governance* (Cambridge University Press, 2nd ed, 2011); Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (Sweet and Maxwell, 7th ed, 2003) 291.

5 This operation and effect is referred to as 'interlegality'; see Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Globalization and Emancipation* (LexisNexis Butterworths, 2nd ed, 2002).

6 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations, 2nd Edition' (Working Paper, Australian Securities Exchange, 2 August 2007) ('ASX Principles').

7 New York Stock Exchange, *Listed Company Manual* (2012) NYSE <<http://nysemanual.nyse.com/LCM/Sections/>>.

is the nature and effect of SR, particularly in hybrid formation with state law and non-legal orders?

The third concern is with the strengths and weaknesses of SR in corporate governance. SR may set more specific and even higher standards of conduct than statute or general law directors' duties. It may be easier to secure compliance with SR: it has an educative role and if seen as voluntary may appear less risky to a board to adopt. SR may be internalised in organisational practice and culture, becoming part of the everyday practices of a corporation. SR standards may be transported across borders by the subsidiaries of corporations, even where there are no such legal requirements.

SR has drawbacks too. There is often no clear duty to comply and no clear beneficiary of the duty. This leaves questions such as 'in whose interests?', 'by whom?' and 'against whom?' the SR applies and can be 'enforced', if that word captures the multiple ways in which SR has influence or effect. SR may have no obvious supervisory body and only indirect sanctions, which depend on the vagaries of markets, on whether reputational effects will take hold in a community and the uncertainty of whether ethical failings will be felt on the bottom line. Some of these drawbacks can be mitigated by the degree to which SR operates in the shadow of the state or in tandem with state law. Accordingly, the conclusion of this article is that in deploying SR, it is important to reflect on SR's connection with or influence from the state. An important reason for choosing to concentrate on SR from stock exchanges is the greater connection with the state by comparison with other codes and guidelines, particularly those in the area of corporate social responsibility. If there are irredeemable weaknesses with stock exchange SR, then we must be pessimistic about the effectiveness of SR further from the state.

II WHAT IS 'SOFT REGULATION' AND WHERE DOES IT FIT WITHIN CORPORATE GOVERNANCE?

The term 'corporate governance' has become so common that we take for granted its scope and content. Some definitions or descriptions of corporate governance from leading corporate law works and corporate governance codes are helpful. The terms 'regulation' and 'governance' are also commonplace, but they are used in quite precise ways by scholars, and it is helpful to consider these as well. It helps us see where corporate governance fits within the wider realms of regulation and governance, and where SR fits in too.

A The Idea of Corporate Governance

At their core, the techniques of corporate governance consist of legislative and administrative rules and judicial principles. Directors' duties are essentially discretions, and while they provide minimum standards for conduct, they leave

ambiguities about exactly what is required to discharge them.⁸ This gap has come to be filled in part by the requirements of corporate governance SR. Some SR requires particular board structures, such as audit or remuneration committees. Some concentrate on status, such as independence of directors, or separation of chief executive officer and chairperson. Much SR requires company disclosure about governance arrangements, and relies on responses of actors in markets for capital, labour, and products. Some SR mandates that companies adopt ethical charters and hopes that business ethics will constrain the conduct of management. Other governance techniques do not depend on SR. For example, some rely on aligning the interests of management and shareholders by linking directors' remuneration to share price. Others depend on voting or litigation action by shareholders and rarely, other stakeholders. Corporate governance has come to mean a cluster of mechanisms that may all influence management behaviour.

As Tomasic, Bottomley and McQueen put it:

There is no single agreed definition of this term (and most of the time it is not defined at all). At its broadest, it can be used to refer to the formal and informal control and regulation of companies by outsiders. More commonly it refers to intra-corporate processes and structures but even here there are different usages. These range from a narrow focus on the formal system of accountability of directors to shareholders, to a wider concern with responsible management and improved corporate performance. ... We use the term ... to refer to the structures, processes and systems, both formal and informal, by which power is exercised, constrained, monitored and accounted for in the management of a corporation.⁹

The authors of *Ford's Principles of Corporations Law* describe corporate governance as:

about the management of business enterprises organised in the corporate form, and the mechanisms by which managers are supervised. Thus, the topic includes a study of corporate governance rules, a 'static' study of the organisational structure of the company, and the duties of those involved in its management, and a 'dynamic' account of the process of corporate activity. Corporate managers have a measure of power to deal with other people's money ... With that power comes responsibility ... Corporate governance is a very broad topic, extending to all aspects of the relationships to one another of the stakeholders, managers and auditors of a company.¹⁰

These authors suggest that corporate governance is a very wide topic, extending to relationships both internal to the company to those external to it. Both descriptions have a legal focus, but it is clear that there is acceptance that corporate governance extends to non-legal mechanisms. Management theory and the growing use of voluntary 'checks and balances' are mentioned,¹¹ as are both formal and informal systems of control.

8 Davies, above n 4, 291.

9 Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 262.

10 H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 10th ed, 2001) 176. Surprisingly no such description or definition appears in the 11th edition.

11 These are described as being non-legal in nature (eg, non-executive director membership of the board and the creation of audit and remuneration committees).

In Australia, Ramsay and Stapledon¹² identify three dimensions in which we can classify corporate governance mechanisms: those triggered by stakeholders, those internal and those external to the corporation. The stakeholder pressure for good governance relies on shareholder action, especially those of institutional shareholders. These may include voting, litigation, and pressures such as threatened sale of large shareholder stakes or board spills. Internal mechanisms are board structures,¹³ processes,¹⁴ and remuneration arrangements designed to introduce checks and balances on board decision-making. Finally, external incentives to good governance include statutory and equitable directors' duties, scrutiny by auditors and other gate-keepers, information disclosure, and regulatory action. Importance is also placed on the market for corporate control, and the competitive advantage in markets more generally from having a good governance reputation. SR is usually external, eg, stock exchange requirements, but as well as being an external influence, ideally the governance effect of SR is also the incorporation into the company's internal rules, norms, and culture.

So there is a wide range of actors (shareholders through auditors to regulators), structures (board committees through to corporate websites for disclosure) and processes (establishing director independence through to competition in various markets) in the techniques of corporate governance and the SR where many of them are found. More than one technique may operate at once. John Farrar makes this point very clearly in the following diagram (see next page),¹⁵ placing SR of the sort we are interested in between rules of state origin and business ethics.

He further describes corporate governance in the following way:

In its narrower, and most usual, sense it refers to control of corporations and to systems of accountability by those in control. It refers to the companies legislation but it also transcends the law because we are looking not only at legal control but also de facto control of corporations. We are also looking at accountability, not only in terms of legal restraints but also in terms of systems of self-regulation and the norms of so called 'best practice'.¹⁶

12 Ian Ramsay and Geof Stapledon, 'Institutional Investors, Corporate Governance and the New Financial Architecture' in Ian Ramsay (ed), *Key Developments in Corporate Law and Trust Law* (LexisNexis Butterworths, 2002) 73, 80–1.

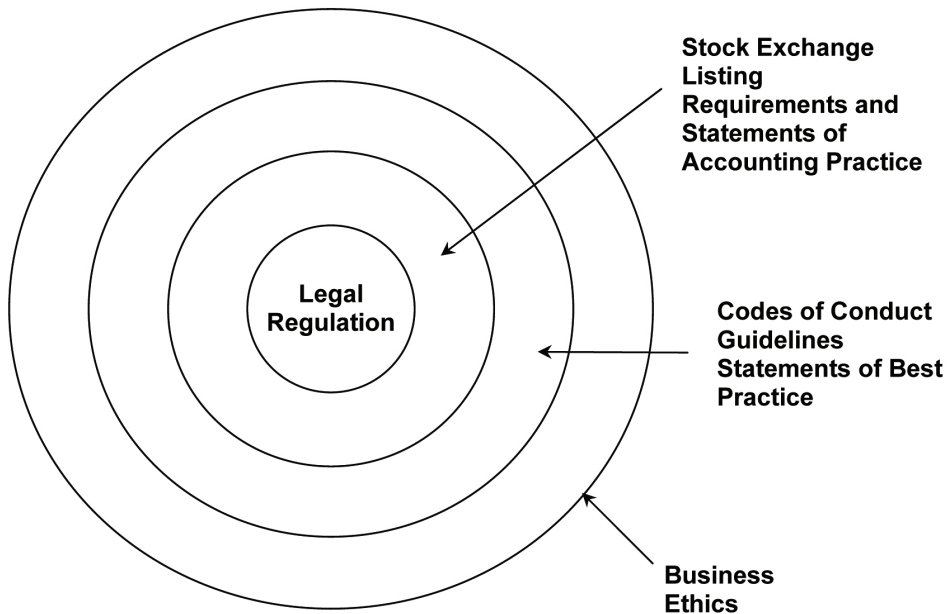
13 See, eg, audit and remuneration committees.

14 See, eg, ensuring independence of a certain percentage of directors.

15 Farrar, above n 1, 4.

16 Ibid 3.

Where does SR fit in Corporate Governance?



Finally, corporate governance and what it means varies along national lines. In all of Australia, the UK, and the US there is a well-developed core of legislative and judicial law. Beyond this there is growing harmonisation of content of corporate governance requirements, though some differences in their nature and effect. With world-wide influence (including for Australia), corporate governance in Britain has been associated with the Cadbury Committee and its 'Code of Best Practice'.¹⁷ That committee described corporate governance as follows:

Corporate governance is the system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting.¹⁸

¹⁷ Committee on the Financial Aspects of Corporate Governance, Parliament of the United Kingdom, *Report of the Committee on the Financial Aspects of Corporate Governance* (1992) ('Code of Best Practice').

¹⁸ *Ibid* [2.5].

Also in the UK, Paul Davies argues that corporate governance arises from the separation of owners and managers in large companies, where managers do not simply do what the shareholders say. He continues: 'thus is identified the central issue of the corporate governance debate, which is the accountability of the senior management of the company for the extensive powers vested in them'.¹⁹ Parkinson, writing in 1993, does not define corporate governance. Yet in writing a book 'to describe some of the ways in which companies exercise power and to examine the relevance of the possession of power to the concerns, or what should be the concerns, of company law',²⁰ he is considering corporate governance. His analysis includes broad ideas including those from economics, board structure and recruitment, employee participation on boards, and opening the board to information from and influences of society at large.

Another approach, more familiar in North America, is taken by Cheffins. He describes the company as a nexus of contracts between its different classes of participants: shareholders, workers, and creditors. He argues that 'company participants often rely on *bargaining* to resolve issues which affect relations between them ... a company's members can use the corporate constitution and a shareholders' agreement to structure their relationship among themselves'.²¹ Speaking of those who control a company, he continues:

Hence, control seems to rest with managerial personnel. The discretion of corporate officials, however, is often distinctly circumscribed. Market forces, together with action taken by shareholders, creditors and directors, can all influence the development of company policy. This means that the topic of control is more complex than it might appear to be at first glance.²²

In the US, the contractual character of corporate law is emphasised. Corporations legislation is seen as 'enabling statutes', providing a standard form contract which can be tailored to meet the corporation's needs.²³ Reliance is placed on the efficiency of capital markets to maintain this enabling structure. Management is primarily regulated by the market for corporate control. Managers compete for positions and corporations need to attract customers and investors to survive.²⁴ If ineffectively managed, a company becomes vulnerable to a takeover bid. A takeover results in the displacement of management, thus the market for corporate control provides a strong managerial incentive for efficiency.²⁵ This approach leads Shleifer and Vishny to describe corporate

19 Davies, above n 4, 291.

20 J E Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press, 1993) 3.

21 Brian R Cheffins, *Company Law: Theory, Structure and Operation* (Clarendon Press, 1997) 45.

22 Ibid.

23 Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991).

24 Ibid 4.

25 By management not shirking the job or self-dealing (taking company assets): see Daniel R Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers* in Richard A Posner and Kenneth E Scott (eds), *Economics of Corporation Law and Securities Regulation* (Little, Brown, 1980) 211.

governance as 'the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment'.²⁶

Despite the domination of the market-based approach in the US, there has been a persistent and provoking stream of critique from the progressive or 'communitarian' school of corporate governance.²⁷ These approaches see corporate governance more widely, leading Bradley et al to describe corporate governance as implicating

how the various constituencies that define the business enterprise serve, and are served by, the corporation. Implicit and explicit relationships between the corporation and its employees, creditors, suppliers, customers, host communities – and relationships among these constituencies themselves – fall within the ambit of a relevant definition of corporate governance.²⁸

In the presence of limited US federal legislative authority for corporate governance, much regulatory weight was placed on stock exchange listing rules²⁹ to make corporate governance effective.³⁰ However, since the *Sarbanes-Oxley Act of 2002*, and the *Dodd-Frank Wall Street Reform and Consumer Protection Act*,³¹ it is now necessary to recognise a greater degree of state authority in federal corporate governance in the US, and less reliance on non-state law alone. As the Securities Exchange Commission ('SEC') now has direct rule-making power over important corporate governance subject matters, including in relation to the listing rules of major US stock exchanges, we must conclude that US corporate governance is now more state-centric than was previously the case. While this provides a contrast with the greater use of non-state techniques in Australia and the UK, there remain in the US influential sources of non-state

26 Andrei Shleifer and Robert W Vishny, 'A Survey of Corporate Governance' (1997) 52(2) *Journal of Finance* 737, 737.

27 See Lawrence E Mitchell, *Progressive Corporate Law* (Westview Press, 1995); Lynne L Dallas, 'The Relational Board: Three Theories of Corporate Boards of Directors' (1996) 22(1) *Journal of Corporation Law* 2. For responses to this communitarian view, see Michael H Bradley et al, 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Cross Roads' (1999) 62(3) *Law and Contemporary Problems* 9.

28 Bradley et al, above n 27, 11.

29 Roberta S Karmel, 'The Future of Corporate Governance Listing Requirements' (2001) 54 *Southern Methodist University Law Review* 325, 326–48 reviews the history of corporate governance listing rules and the authority of the Securities and Exchange Commission.

30 Ibid. See also John C Coffee Jr, 'Racing towards the Top? The Impact of Cross-Listings and Stock Competition on International Corporate Governance' (2002) 102 *Columbia Law Review* 1757; Kerry Shannon Burke, 'Regulating Corporate Governance Through the Market: Comparing the Approaches of the United States, Canada and the United Kingdom' (2002) 27 *Journal of Corporation Law* 341; William B Chandler and Leo E Strine Jr, 'The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State' (2003) 152 *University of Pennsylvania Law Review* 953; Robert B Thompson, 'Collaborative Corporate Governance: Listing Standards, State Law and Federal Regulation' (2003) 38 *Wake Forest Law Review* 961.

31 *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* ('Dodd-Frank Act of 2010').

standards in relation to corporate governance.³² As in Australia and the UK, the juridical nature of these codes remains to be determined.

B The Idea of Soft Regulation

Many of these observations line up with what Christine Parker and others working in the domain of regulatory studies sum up as ‘changes in control of corporate conduct reflect[ing] a broader change in governance styles in which it is recognised that the state is not the only source of regulation’.³³ In this they are a form of self-regulation,³⁴ or enforced self-regulation, and may be contrasted with the ‘command and control’ (‘C&C’) approach to regulation by the state. C&C involves the setting of corporate governance standards backed by sanctions in the form of criminal or civil penalties for breach of director’s duties.

C&C is the main technique of corporate regulation in all of the US, UK, and Australia, and it has a number of well acknowledged weaknesses.³⁵ C&C can be difficult or costly for business to comply with. It may lead to over-regulation, legalism, inflexibility in design, and unreasonableness in implementation – breaking down the willingness of companies to comply with good objectives.³⁶ C&C can inspire ‘creative compliance’³⁷ with companies complying with regulatory form not substance. There is the ever-present difficulty of agency access to enforcement resources and expertise.³⁸ Most particularly, C&C rules can be so open-textured that they provide ambiguous guidance to the conduct actually required of management. It is here that SR may help with ‘filling in the gaps’ of what is required.

By contrast, SR, or decentred regulation as it is also called, is a mixture of state and non-state types.³⁹ Most SR adopts a decentred approach for several reasons. The first is a perception of greater legitimacy because the regulation is closer to the regulated population, though it must not just reflect the power of

32 See the discussion in Special Study Group of the Committee on Federal Regulation of Securities, American Bar Association, Section of Business Law, ‘Special Study on Market Structure, Listing Standards and Corporate Governance’ (2002) 57 *The Business Lawyer* 1487, 1489–1510; American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (West Publishing, 1994).

33 Parker, above n 1, 16; Peter N Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995) 8 *Governance* 527; Colin Scott, ‘Accountability in the Regulatory State’ (2000) 27 *Journal of Law and Society* 38.

34 Julia Black, ‘Constitutionalising Self-Regulation’ (1996) 59 *Modern Law Review* 24.

35 Robert Baldwin, ‘Regulation: After Command and Control’ in Keith Hawkins (ed), *The Human Face of the Law*, 65 (Oxford University Press, 1997).

36 Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 1999) 35; Eugene Bardach and Robert A Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982).

37 Doreen McBurnet and Christopher Whelan, ‘The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control’ (1991) 54 *Modern Law Review* 848, 848.

38 Parker, above n 1, 8.

39 Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998); Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory World”’ (2001) 54 *Current Legal Problems* 103; Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1.

vested interests. Another is that SR is more flexible and responsive to particular contexts. Private creation is thought to mean cheaper regulation, from the state's perspective, if not that of the stock exchange or other sponsor of SR. Finally, non-state alternatives can traverse borders, since they operate trans-nationally through networked regulation⁴⁰ such as cross-listings on international exchanges.⁴¹ This transit may also occur through the replication of compliance systems through entities in corporate groups.

While this piece concentrates on SR at the national level, there is much SR promoted by international and transnational organisations. Some of these, such as the 'Guiding Principles for the Implementation of the United Nations 'Respect, Protect and Remedy' Framework',⁴² or principles of the International Organisation of Securities Commissions ('IOSCO') and the Organisation for Economic Co-operation and Development ('OECD'), have considerable legitimacy.⁴³ In recent years these have been joined by non-government organisations in a myriad of codes and guidelines, which have their own effects and are often appealed to in justifying the content and normative force of national law.

As we have seen, the term corporate governance is a pretty loose and inclusive one in common parlance. Similarly 'regulation', particularly when it includes SR or decentred regulation, is a large field and potentially includes all other social norms.⁴⁴ What features might help to identify corporate governance guidelines, codes, and principles etc?

Julia Black has suggested three elements that might help us to identify 'regulation' including sources not originating with the state. She suggests that:

regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.⁴⁵

Much writing on corporate governance principles only considers the standards issued, and not the other elements of regulation – information gathering and behaviour-modification, or in regulator's language, supervision and enforcement. In its aim of analysing the nature and effects of SR, this article concentrates on information gathering and behaviour-modification. An important element in Black's cluster, which identifies regulation including SR, is intention. This would seem to exclude from regulation, mechanisms which are often

40 D A Kingsford Smith, 'Networks, Norms and the Nation State: Thoughts on Pluralism and Globalized Securities Regulation' in Catherine Dauvergne (ed), *Jurisprudence for an Interconnected Globe* (Ashgate Publishing, 2003) 93.

41 Coffee, above n 30.

42 John Ruggie, 'Guiding Principles for the Implementation of the United Nations "Respect, Protect and Remedy" Framework' (Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 21 March 2011).

43 Kingsford Smith, above n 40.

44 Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443, passim.

45 Black, 'Critical Reflections', above n 39, 26.

considered important in corporate governance, such as the market and organisational culture. Whether markets and culture are regulation, or 'governance' as some academics argue, may wait for another day. The point here is that SR is intentional action, which involves standard-making, supervision, and enforcement, often indirectly,⁴⁶ and through both state and non-state mechanisms.

III WHAT IS THE NATURE AND EFFECT OF SOFT REGULATION IN CORPORATE GOVERNANCE?

A The Nature of Soft Regulation in Corporate Governance

1 *What is the Content of Soft Regulation?*

In August 2007, the Australian Securities Exchange ('ASX') released the second edition of the ASX Principles for listed companies.⁴⁷ The ASX Principles define corporate governance as the system by which companies are directed and managed. It influences 'how the objectives of the company are set and achieved, how risk is monitored and assessed, and how performance is optimised'.⁴⁸ There are eight principles that a company should adopt and then report on in its annual report.⁴⁹ Each principle is accompanied by best practice recommendations on the type of reporting required.

Under ASX Listing Rule 4.10, companies must disclose in their annual report the extent to which they have followed each of the recommendations.⁵⁰ They must also identify any recommendations that have not been followed and state reasons for this.⁵¹ The ASX describes this as the 'if not, why not' approach. The Listing Rules provide a disclosure obligation, but the governance principle is only a recommendation. The ASX states that 'the best practice recommendations are not prescriptions. They are guidelines ... aspirations of best practice for optimising corporate performance and accountability'.⁵² The only exceptions relate to audit and remuneration committees of the company board. Companies

46 Scott, above n 33.

47 ASX Corporate Governance Council, above n 6. When originally developed in 2003, The Council brought together 21 disparate business groups to develop this framework for use as a practical guide for listed companies, their investors and the community in general.

48 Ibid 3.

49 Ibid. The principles are as follows:

1. Lay solid foundation for management and oversight;
2. Structure the board to add value;
3. Promote ethical and responsible decision-making;
4. Safeguard integrity in financial reporting;
5. Make timely and balanced disclosure;
6. Respect the rights of shareholders;
7. Recognise and manage risk;
8. Remunerate fairly and responsibly.

50 ASX Limited, *Listing Rules* (at 1 January 2012) r 4.10.

51 Ibid.

52 Ibid.

which are included in the S&P/ASX 300 Index of the ASX must observe ASX Listing Rules 12.7 and 12.8, requiring the entity to have respectively an audit and remuneration committee. The composition, operation and responsibility of the audit and remuneration committees must comply with the ASX Principles.⁵³ Here there is both a disclosure requirement, and a direct listing requirement as to board structure.

As in Australia, in the UK the most influential SR is found annexed to listing rules. In the UK this annexed document is the UK Code, revised in 2010.⁵⁴ As at the ASX, the rules for listing on the London Stock Exchange ('LSE')⁵⁵ require a statement of compliance in the annual report to shareholders. The UK Code contains corporate governance principles and more specific supporting principles, with detailed code provisions on how to implement the principles. The UK Code covers governance topics similar to the ASX Principles, including board structure, independence of directors, directors' remuneration, accountability and audit, and relations with shareholders. As at the ASX, there is a disclosure requirement but this may be departed from if good reasons are given: companies must 'comply or explain'.

Even with the passing of the *Sarbanes-Oxley Act of 2002* and the *Dodd-Frank Act of 2010*, the Listing Rules of US stock exchanges remain the source of the most prominent corporate governance standards. The *Sarbanes-Oxley Act of 2002* and the *Dodd-Frank Act of 2010* have made it mandatory for exchanges to have listing rules on particular subject matters, approved by the SEC.⁵⁶ The *Dodd-Frank Act of 2010* has gone further and mandated direct SEC rules on advisory votes and disclosure about management compensation and the retaining of compensation advisors.⁵⁷ The aspects of corporate governance addressed in the NYSE Listing Rules include board structure, independence of directors, remuneration of directors, disclosure to shareholders and shareholder relations. The content of stock exchange corporate governance listing rules are broadly similar to Australia and the UK, though not identical.

2 How is Soft Regulation Created and by Whom?

The ASX Principles are made by the ASX Corporate Governance Council, a body in which 'ASX played a central role as instigator, facilitator, Chair and

53 Ibid.

54 *Revisions to the UK Corporate Governance Code (Formerly the Combined Code)* (May 2010) Financial Reporting Council <<http://www.frc.org.uk/corporate/reviewCombined.cfm>>.

55 Listing Rule 9.8.6(a), see *LR 9.8 Annual Financial Report*, Financial Services Authority <<http://fsahandbook.info/FSA/html/handbook/LR/9/8>>; *DTR 7.2 Corporate Governance Statements*, Financial Services Authority <<http://fsahandbook.info/FSA/html/handbook/DTR/7/2>>.

56 Regarding the more rigorous outside scrutiny on audit committees under the *Sarbanes-Oxley Act of 2002*, see, eg, *SEC Requires Exchange Listing Standards for Audit Committees* (4 April 2003) US Securities and Exchange Commission <<http://www.sec.gov/news/press/2003-43.htm>>; regarding enhanced director independence requirements under the *Dodd-Frank Act of 2010*, see, eg, *Corporate Governance Issues, including Executive Compensation Disclosure and Related SRO Rules* (18 August 2011) US Securities and Exchange Commission <<http://www.sec.gov/spotlight/dodd-frank/corporategovernance.shtml>>.

57 *Corporate Governance Issues*, above n 56.

leader'.⁵⁸ Section 761A of the *Corporations Act 2001* (Cth) ('*Corporations Act*') includes 'any rules (however described) that are made by the operator of the market ... and that deal with ... (b) the activities or conduct of entities' as listing rules. Any change in ASX Listing Rules requires ASIC notification,⁵⁹ and is subject to Ministerial disallowance.⁶⁰

This is the twentieth year of the UK Code, and although it has been created by a number of specially convened groups,⁶¹ it is now maintained by the Financial Reporting Council.⁶² In 2000, the UK Financial Services Authority took over from the LSE as the UK Listing Authority, with compliance with the UK Code remaining the subject of the listing rules.

The NSYE formulates and administers its own Listing Rules,⁶³ and as in Australia there is a process for rule approval. The SEC⁶⁴ is given broad authority to approve, disapprove, abrogate, add to or delete from rules adopted by the stock exchanges.⁶⁵ In practical terms, since most large public companies are listed on a national stock exchange, listing standards for corporate governance have become national.⁶⁶

3 *How is Soft Regulation Supervised?*

All three of the ASX, the LSE, and the NYSE have been demutualised. Regardless, both the ASX and the NYSE, as self-regulatory bodies listed on their own exchange, still supervise compliance with their own Principles and listing regulations respectively. Questions have been raised as to whether conflicts of interest will undermine the regulatory side of ASX and NYSE's dual roles as market operator and governance supervisor.⁶⁷ ASX and NYSE have both attempted to separate the market and regulatory roles, but neither has escaped criticism about the vigour of their governance supervision. In both cases responsibility for supervision and enforcement of market abuse (insider trading etc) has been moved away, but in relation to corporate governance, the ASX and NYSE remain the supervisors. Since LSE demutualisation, the UK Listing Authority does some company monitoring, including of transparency and disclosure.⁶⁸

58 *Australian Stock Exchange Report to Shareholders 2002/03*, Australian Securities Exchange Group <http://www.asxgroup.com.au/media/PDFs/annual_report_2002-03.pdf>.

59 *Corporations Act* s 793D.

60 *Ibid* s 793E(2).

61 A good genealogy of the Combined Code can be found in Phillip Goldenberg, 'Reforming Corporate Governance – A Very British Solution' (2003) 24(4) *Business Law Review* 82; see also Ben Pettet, 'The Combined Code: A Firm Place for Self-Regulation in Corporate Governance' (1998) 13(12) *Journal of International Banking Law* 394.

62 Financial Reporting Council (2012) <frc.org.uk>.

63 Karmel, above n 29.

64 *Securities Exchange Act of 1933*, 15 USC §§ 77Sa–77Sb (1933).

65 Karmel, above n 29, 349.

66 Thompson, above n 30.

67 Coffee, above n 30, 1800–1.

68 *Company Monitoring* (13 March 2012) Financial Services Authority <<http://www.fsa.gov.uk/doing/>>

What steps does ASX take to supervise the ASX Principles?⁶⁹ ASX has company advisors, who review the annual governance disclosure of each company. If there are omissions (in the sense of not keeping the market informed) then ASX will ask the company to remedy the breach, usually requiring supplementary disclosure. ASX had, until 2010, published statistics about rates of disclosure compliance (including exception reporting) and failure to report at all.⁷⁰ The rates of no reporting at all (and hence failure to comply with Listing Rule 4.10) for all entities range from 2 per cent (establish an audit committee) to 19 per cent (evaluation of senior executives). Rates of compliance for the top 200 entities are generally closer to 100 per cent.⁷¹ It is interesting to note that the ASX is content to report these rates of non-compliance with its own Listing Rules amongst companies which remain listed, when it has other means of enforcement at its disposal.

If the company does not respond to requests for supplementary disclosure, ASX may issue a rectification notice⁷² which is usually published on the ASX Market Announcements Platform, or more rarely, suspend trading.⁷³ Very occasionally, if the ASX considers that governance disclosure is essentially fabricated or contains significant misleading or deceptive statements, it may refer the matter to ASIC for further investigation or prosecution.⁷⁴ That the ASX prefers to supervise and not enforce is evident from the fact that as far as can be found, it has never used the provisions under section 793C of the *Corporations Act* to enforce its Listing Rules through court proceedings.

Unlike the ASX, the NYSE mandates compliance with its corporate governance rules rather than merely requiring disclosure. If after review a company is non-compliant, the NYSE adds it to a 'BC Indicator' list, which it publishes, and removes the company only after it returns to compliance.⁷⁵ The company may continue to trade while non-compliant, unless the failure is of a qualitative or quantitative continuing requirement⁷⁶ designated as grounds for suspension or delisting. Failure to maintain a compliant audit committee is a failure of a continuing requirement⁷⁷ that could lead to suspension or delisting⁷⁸ – with other governance deficiencies the company may continue trading while on the 'BC Indicator' list.

ukla/company>; Paul Geradine, 'The FSA as UK Listing Authority' (2000) 2(5) *Journal of International Financial Markets* 162, 164.

69 ASX Limited, *ASX Listing Rules: Guidance Note 9* (at 10 February 2012) 11.

70 *Analysis of Corporate Governance Disclosures in Annual Reports for Year Ended 30 June 2010*, ASX Limited <http://www.asx.com.au/documents/about/corporate_governance_disclosures_30_june_2010_analysis.pdf>.

71 Ibid 12–14.

72 ASX Limited, *Chapter 18: Application of Listing Rules* (at 31 March 2008) r 18.8.

73 ASX Limited, *Chapter 19: Interpretation and Definition* (at 1 August 2008) r 19.

74 *Corporations Act* ss 792, 1309.

75 *Noncompliant Issuers*, US Equities: Regulation <<http://usequities.nyx.com/regulation/listed-companies-compliance/listings-standards/noncompliant-issuers>>.

76 New York Stock Exchange, *Listed Company Manual, Section 8 Suspension and Delisting* [802.01].

77 Ibid [802.01D].

78 Ibid [802.02]–[805.00].

Unlike the ASX and the NYSE, which are self-regulators in relation to listing requirements, the UK Listing Authority now monitors the UK Listing Rules. The Company Monitoring team is responsible for monitoring companies' compliance with their continuing obligations of disclosure under the Listing Rules and the Disclosure and Transparency Rules.⁷⁹ Armour reports that the UK Listing Authority investigates, on average, six instances of non-compliance with the listing rules per annum, and takes two civil penalty actions per annum.⁸⁰ At the time of the research, there were approximately 2 500 companies listed on all the boards of the LSE.⁸¹ The implication is that enforcement of the Combined Code is the responsibility of shareholders. This view is buttressed by the introduction in 2010 of the UK Stewardship Code,⁸² designed to improve the quality of engagement between institutional investors and companies.

In terms of creation of stock exchange listing rules, the state is quite involved. On the supervision and enforcement side, the picture is rather different. The formal enforcement action of authorities' supervising listing rules, including the UK Listing Authority which is a statutory authority, is actually or virtually nil. Though queries and warnings are more frequent, they too are in trivial numbers. All listing authorities seem content that companies may remain listed though non-compliant with either or both of listing and disclosure obligations. Despite suspension and de-listing powers and direct support of listing rules by state law, regulatory action is more of the monitoring type than enforcement, and certainly formal action is vanishingly rare.⁸³ However, before concluding that corporate governance SR is ineffective, or not even regulation on Black's definition for want of enforcement, we must consider the extended effect of SR in combination with other formal legal and non-legal orders. The argument is that SR is often effective through more indirect or oblique action, with a variety of mechanisms, some legal and some non-legal. It is argued that this provides extended effect or 'extended accountability'⁸⁴ which can be seen as a form of behaviour modification or enforcement.

79 *Company Monitoring*, above n 68.

80 J Armour, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment' (Law Working Paper No 106/2008, European Corporate Governance Institute, April 2008) 22.

81 *Ibid* 9.

82 See Stewardship Code: Financial Reporting Council, *The UK Stewardship Code* (2012) <<http://www.frc.org.uk/corporate/investorgovernance.cfm>>. This code is also sponsored by the Financial Reporting Council.

83 The court noted:
it appears that the appellants complained to the ASX about the alleged breach of the Listing Rules, but the ASX decided to take no action in the matter. Counsel for the appellants pointed out that at a directions hearing in the action the ASX had indicated that they had no wish to be joined as a party in the appellants' action: *Quancorp Pty Ltd v MacDonald* [1999] WASCA 33, [23].

84 Scott, above n 33.

B Behaviour Modification: The Extended Effect of Soft Regulation in Corporate Governance

1 *Extended Effect of Soft Regulation through Directors' Duties*

An important aspect of corporate governance is the legal duties imposed on directors by both general law and legislation.⁸⁵ These duties require the bearer to understand the detail of corporate practice, to know what conduct will discharge them.⁸⁶ That SR may provide greater specificity to legal duties, is well understood in other areas of regulation.⁸⁷ That it might apply to directors' duties is a view gaining currency in several jurisdictions.⁸⁸

Recent development of directors' duties has been influenced by statutory standards reflecting community expectations of better corporate governance.⁸⁹ In an early extra-curial opinion, Chernov J suggested that there is a 'symbiotic relationship between corporate governance practices and the principles applied by courts in determining whether a director has breached the standard expected by the law'.⁹⁰ If corporate governance principles were set out in guidelines (such as the ASX Principles) and had support of the corporate sector, then they may become the 'yardstick' by which courts determine if directors have complied with what is expected of them.⁹¹

In the recent case of *ASIC v Rich*, corporate governance guidelines were relevant in determining the responsibilities of a non-executive chairman. Austin J stated:

Much of the literature of corporate governance is in the form of exhortations and voluntary codes of conduct, not suitable to constitute legal duties. It is sometimes vague and less than compelling, and must always be used with caution. Nevertheless, in my opinion this literature is relevant to the ascertainment of the responsibilities to which Mr Greaves was subject during the period from January to March 2001.⁹²

85 In Australia the relevant duties are those of skill, care and diligence and the statutory analogue *Corporations Act* ss 180(1)–(2); the duty to avoid a conflict with statutory analogues: at ss 181–182; the duty to act honestly and for proper purposes with statutory analogues: at s 183.

86 Even proponents of these duties acknowledge these features; see Chandler and Strine, above n 30, 977–80. See also *Rich* (2003) 174 FLR 128, where governance principles and evidence of corporate practice was relied on to ascertain the responsibilities of the Chairman's role.

87 Christine Parker and Olivia Conolly, 'Is There a Duty to Implement a Corporate Compliance System in Australian Law?' (2002) 30 *Australian Business Law Review* 273, 273; Christine Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *Modern Law Review* 209.

88 Alex Chernov, 'The Role of Corporate Governance Practices in the Development of Legal Principles Relating to Directors' in Ramsay (ed), *Key Developments in Corporate Law and Trust Law*, (LexisNexis Butterworths, 2002) 133, 138; Eddy Wymeersch, 'Corporate Codes and Their Implementation' (Financial Law Institute Working Paper No 2006-10, Ghent University, September 2006); Thompson, above n 30, 976; regarding the UK and the Auditing Standards, see *Berg Sons and Co Ltd v Adams* [1992] BCC 661, 695.

89 *Daniels v Anderson* (1995) 37 NSWLR 438; *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; *Morely v Statewide Tobacco Services* [1993] 1 VR 423.

90 Chernov, above n 88, 147.

91 *Ibid* 148.

92 *Rich* (2003) 174 FLR 128, 146–7 [70].

Later in his reasons he expressly mentioned the Higgs Report, a contributor to the UK Code, and said that such sources and expert evidence of current board practice was to be preferred in establishing the standards of conduct that would satisfy director's duties, to 'unassisted armchair reflection'.⁹³ This view was adopted by White J in reasons, also in *ASIC v Rich*,⁹⁴ in adopting the view of a board chairman's responsibilities set out in the UK Hampel Committee Report (another contributor to the UK Code). Justice White also expressly adopted the approach of Austin J, who had 'carefully reviewed the authorities, the literature and expert evidence which was also adduced before me as to the responsibilities ordinarily undertaken by chairmen of public listed companies in Australia'.⁹⁵ In *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* Owen J remarked:

there are no hard and fast rules that constitute 'corporate governance'. But there are some basic underlying principles that help to explain the guidelines and legal principles that have developed over time and now dictate how a director is expected to carry out her or his responsibilities.⁹⁶

Since 'guidelines' are not a traditional source of legal material, it is fair to assume that he was referring to governance guidelines such as the ASX Principles or the UK Code. Later referring back to this passage he held: 'the Australian directors failed to put into practice the notion of stewardship that is at the heart of corporate governance and which underpins the fiduciary concept to which directors are subject'.⁹⁷ Stewardship is the central idea of the UK Financial Reporting Council's 'Stewardship Code'.⁹⁸

This approach was followed even more directly in *ASIC v Healey* where Middleton J said 'I consider that the published materials on matters of corporate governance, in particular those referring to the role of directors in the review of financial statements, are of some assistance in determining the obligations to be imposed on directors'.⁹⁹ He went on to expressly adopt the approach of Austin J in *ASIC v Rich*, and to rely in part on the governance standards set out in an Australian Institute of Company Directors publication on how to review financial statements in establishing the directors' negligence.¹⁰⁰ In the judgment considering sanctions, in taking the measure of the board's conduct as honest and competent directors, Middleton J said 'the Board's corporate governance structures were in accordance with the recommendations contained in the ASX's Corporate Governance Principles and Recommendations' and those recommendations were followed.¹⁰¹

This review of recent directors' duties decisions provides evidence that SR has indirect effect in the production of legal liability for corporate boards. These

93 Ibid 147 [72].

94 *ASIC v Rich* [2004] NSWSC 836, [35]–[36].

95 Ibid [36].

96 (2008) 39 WAR 1, 528 [4362].

97 Ibid 665 [6073].

98 Financial Reporting Council, above n 83.

99 *ASIC v Healey (No 2)* [2011] FCA 1003, [193].

100 *Centro* [2011] FCA 717, [192]–[194].

101 *ASIC v Healey (No 2)* [2011] FCA 1003, [170]–[173].

cases suggest that compliance with SR is relevant in judicial reasoning in both liability and sanctioning decisions. While listing authorities may shy away from enforcement of governance standards, to fail to comply may be negligent. There has been no rush to judgment: corporate governance SR has been around for 20 years, and its content and operation is well understood.¹⁰² Contrariwise, evidence of substantial compliance with SR, may be effective in mitigation of liability¹⁰³ as it seemed to be in part in *ASIC v Healey*.

2 *Extended Effect of Soft Regulation through Actions for Misleading and Deceptive Conduct*

Disclosure is central to the operation of SR; but with disclosure comes the risk of statements which misrepresent the true conduct of the company. The most infamous example is *Nike Inc v Kasky*¹⁰⁴ in which Nike was sued for alleged false and misleading statements about labour practices in its supply chain factories in developing economies that manufactured its sports products. Although the case was eventually settled, it put Nike's ethical and commercial practices under intense scrutiny, which continues today.¹⁰⁵ The company continues to be a by-word in ethical discussions about the 'off-shoring' of manufacturing, despite two decades of commercial and civil society action¹⁰⁶ to address the reputational damage caused by its assertions of ethical labour practices.

Nike's statements in public relations literature and its code of conduct were attacked under Californian legislation¹⁰⁷ prohibiting negligent misrepresentation, unfair business practices and false advertising. Here the governance standards were in the company's own code of conduct but it seems even more likely that misleading statements of compliance with generally adopted SR would lead to liability. As with directors' duties, the combination of SR standards with formal legal actions provides an indirect, though real, threat of liability with potential to influence corporate conduct.

SR, in this case Listing Rules, provides another example of productive combination of state and private law, where disclosure and misleading conduct are central. ASX Listing Rule 11.2 requires a company wishing to 'dispose of its main undertaking'¹⁰⁸ to obtain a resolution from its shareholders to approve the disposal. The Listing Rule demands a higher standard of transparency and accountability because the statute permits the directors only to make this decision.¹⁰⁹ To pass an effective resolution however, the pre-meeting disclosure must comply with statutory and case law disclosure standards, in particular

102 Ian M Ramsay and Richard Hoad, 'Disclosure of Corporate Governance Practices by Australian Companies' (1997) 15 *Company and Securities Law Journal* 454, 456.

103 Parker and Conolly, above n 87; Parker, above n 1, 259–6.

104 539 US 654 (2003).

105 Associated Press, 'Nike Still Dogged by Worker Abuses', *The Japan Times* (Japan), 15 July 2011, 4.

106 'When the Jobs Inspector Calls', *The Economist* (New York), 31 March 2012, 67.

107 *California Business and Professions Code* §§ 17200, 17500.

108 ASX Limited, *ASX Listing Rules: Guidance Note 12* (at 1 January 2012) 17–8.

109 *Corporations Act* s 198A(2).

director's duties regarding meetings.¹¹⁰ Here too, SR hooks onto formal law to increase the degree of legality in disclosure while at the same time SR is itself, mandating greater accountability through requiring a shareholders' resolution.

3 *Extended Effect of Soft Regulation through Investor Action, Auditors and Gatekeepers, Consumers, Suppliers and Governance Indexes*

As companies are required to detail their adoption of the ASX Principles in annual reports,¹¹¹ individual and institutional shareholders may evaluate companies' governance programs and make investments accordingly. This assumes that shareholders will consider non-compliance, or unsatisfactorily explained non-compliance, negatively.¹¹² It also assumes that the market responds not just to disclosure or not, but also its content.¹¹³

Institutional and individual investors may respond more positively to those companies that adopt the content of the ASX Principles. In Australia institutional share ownership has been increasing and can play a role in corporate governance.¹¹⁴ Investors can sell holdings or 'exit' if they are unsatisfied by company performance. However, this can be a difficult strategy for institutions, because holdings size can depress sale especially in a small market such as Australia. The alternative to 'exit' is 'voice',¹¹⁵ taking action with management to get a governance change. The original UK Cadbury Report encouraged investors to use general meetings and shareholder organisations to represent their interests collectively. It argued the requirement of annual governance disclosure provides shareholders with a 'ready-made agenda' for their representations to company boards.¹¹⁶ Indeed, the UK Code and the Stewardship Code particularly encourage boards to cultivate relations with shareholders, particularly institutions, and encourage institutions especially to vote their shares.

In annual general meetings in Australia, shareholders have a statutory right to ask questions of the directors, including reasons for not adopting any of the ASX Principles.¹¹⁷ They could also question the auditor.¹¹⁸ Shareholders in a public company may, by resolution, remove a director from office and appoint another.¹¹⁹ Shareholders could remove a board that has failed to explain not adopting the ASX Principles. Members with at least 5 per cent of the vote or a

110 *Corporations Act* s 249L; *ENT v Sunraysia* [2007] NSWSC 270, [24]–[26].

111 ASX Limited, *Listing Rules* (at 1 January 2012) r 4.10; *Corporations Act* s 314.

112 Alice Belcher, 'Regulation by the Market: The Case of the Cadbury Code and Compliance Statement' (1995) 2 *Journal of Business Law* 321.

113 *Ibid.*

114 Ramsay and Stapledon, above n 12, 101.

115 Albert O Hirschman, *Exit, Voice and Loyalty: Responses to Declines in Firms, Organisations and States* (Harvard University Press, 1970).

116 Vanessa Finch, 'Corporate Governance and Cadbury: Self-Regulation and Alternatives' (1994) 3 *Journal of Business Law* 51.

117 *Corporations Act* s 250S(1).

118 *Ibid* ss 250T(1), 250PA.

119 *Ibid* s 203C.

group of at least 100 members could require directors to call a meeting¹²⁰ or give a company notice of a resolution to be moved at a general meeting to remove a director and appoint a new director.¹²¹ In reality, the company board controls meeting agendas, notices of meetings, and the proxy voting process.¹²² The chairman of the board usually chairs company meetings, and has considerable discretion in their conduct. Despite encouragement of voting by governance bodies, shareholder activism is rare. Although the ASX Principles could be a powerful corporate governance mechanism, the hurdle is investor cost of identifying company underperformance and mounting any action.¹²³

In his article on gatekeepers as private third party enforcers, Kraakman highlighted the valuable role of private parties in regulation, who are able to disrupt misconduct by withholding their cooperation from wrongdoers.¹²⁴ The refusal of an audit certificate, for example, means a company quickly becomes non-compliant with important financial disclosure in a very public fashion. As well as deterring illegal behaviour by refusing to provide sign-offs or certification auditors, lawyers, and other professionals can establish the standards they will sign off on, by referring to independent benchmarks such as SR. The contribution of gate-keeper failure to the governance aspects of corporate collapse has been well documented.¹²⁵

Governance disclosure could also be influential in supplier and consumer markets. Supply chain contracts might incorporate governance standards making a company a better risk to deal with.¹²⁶ Bankers may offer cheaper credit where good governance reduces repayment risk. Insurers may reduce premiums for risk insurances if observing risk management SR leads to fewer claims. In consumer markets, publicised failures to observe good corporate governance may affect consumer loyalty.

An important contribution to the influence which might be exerted by stakeholders is the development of ratings systems based on non-financial data.¹²⁷ Conventional rating agencies undertake reviews of corporations whose securities they are asked to rate, against traditional financial criteria. Their power in influencing a corporation to improve its financial performance is that the higher the rating of its securities, the cheaper the cost of capital to the

120 Ibid s 249D(1).

121 Ibid s 249N(1).

122 *Whitlam v ASIC* (2003) 57 NSWLR 559.

123 Ramsay and Stapledon, above n 12, 81.

124 Reinier H Kraakman, 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy' (1986) 2(1) *Journal of Law, Economics and Organization* 53.

125 John C Coffee Jr, 'Understanding Enron: "It's about the Gatekeepers, Stupid"' (2002) 57 *Business Lawyer* 1403.

126 Doreen McBarnet, 'Corporate Social Responsibility: Beyond Law, Through Law or For Law' in Doreen McBarnet et al (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, (Cambridge University Press, 2007) 9.

127 See Dow Jones, *Dow Jones Sustainability Index*, Dow Jones and SAM Indexes <www.sustainability-index.com>. In Australia, see Reputex, *Reputex Social Responsibility Ratings* <www.reputex.com.au>. In the UK, see Business in the Community, *Corporate Responsibility Index* <www.bitc.org.uk/index.html>.

corporation.¹²⁸ The newer rating systems are based on the techniques (and the reputation) of financial systems, but rate corporations on criteria like governance, environmental and social impact. Stakeholders may then deal with companies on non-financial criteria, not just financial ones. Governance disclosure of the wider qualitative type allows these ratings to be compiled.

A related governance pressure comes from non-governmental organisations and other self-appointed watch-dogs of a variety of stakeholder and public interests.¹²⁹ Such organisations sometimes publish their own governance and corporate social responsibility standards, generally as guides to both conduct and disclosure. Some conduct a certain degree of monitoring of compliance with their standards, using public campaigns to advocate their reform programs. These may be random and spasmodic, but they contribute to the pressure on corporations towards better governance and socially responsible conduct.

4 Extended Effect of Soft Regulation through International Adoption

Another factor that may also influence corporate governance is cross-listing by foreign issuers onto stock exchanges. It has been characterised as ‘bonding’, whereby issuers voluntarily submit to the higher disclosure standards and greater threat of enforcement to compensate for the less stringent standards under their own jurisdictional laws, in an effort to achieve higher market valuation.¹³⁰ Listing on a stock exchange such as the US, UK, or Australia commits the company to higher standards, particularly in the areas of disclosure and corporate governance. The company is subject to the enforcement mechanisms just described. It is suggested that world securities markets are in flux, exchanges are privatising and issuers cross-listing,¹³¹ thus creating competition between markets. Instead of creating a ‘race to the bottom’, Coffee argues that if exchanges in developed economies apply listing rules to both foreign and domestic issuers even-handedly, there could instead be a ‘race to the top’.¹³² He argues that governance reform is a strategy to increase the competitiveness of the market as studies indicate that firms with higher quality governance have higher market values. Through these types of mechanisms, SR is made to extend not just nationally but trans-nationally.

128 Steven L Schwarcz, ‘The Role of Rating Agencies in Global Market Regulation’ in Eilis Ferran and Charles A E Goodhart (eds), *Regulating Financial Services and Markets in the 21st Century* (Hart Publishing, 2001) 297.

129 See Global Reporting Initiative, *A Common Framework for Sustainability Reporting*, Global Reporting Initiative <www.globalreporting.org>. In Australia the Australian Consumer’s Association has also reported publicly on the corporate governance performance of Australia’s top 50 listed companies: see <www.aca.org.au>.

130 Coffee, above n 30, 1757.

131 Ibid 1811.

132 Ibid 1812.

IV ANALYSIS AND CONCLUSION

A The Strengths of Soft Regulation

Why does the extended effect of corporate governance guidelines matter? The first and perhaps the most compelling reason is that the plurality of influences which I have shown can be brought to bear on management might help good governance practices to be internalised in the corporation's everyday operations. Rather than being just an external legal obligation, multiple influences allow SR to be a pressure on the corporate organisation at a number of points: to seep into the cracks and crannies of the organisation and into the expectations of its officers. Prominent statements of practice such as those issued by stock exchanges give legitimacy to arguments of those within a company who wish to enhance the reputation of a company for responsible action. The consensus of expert and influential opinion gathered in the creation of SR provides authority which is important in their diffusion, in multiplying their points of influence and in their extended effect.

Second, SR often mandates higher standards than the formal law. Many see it as a weakness that sanctions for disregard of SR are indirect or oblique. In fact, it may be a strength, in that their more informal nature makes it less risky to try to implement them, and lowers political and organisational resistance to the raising of governance standards. By contrast, C&C techniques of regulation can remain external to corporate practice, and viewed in an adversarial rather than a constructive fashion.

Another strength is that SR tends to give detailed specification of the operational requirements that are likely to result in good governance. SR is often very specific about matters such as board structures and processes, and about the quality of director independence, and what parts of the management task should be done by independent directors. SR specifies steps to be taken to encourage the participation of shareholders in the company, especially through voting at meetings. By contrast, traditional legal duties of directors are open-textured and ambiguous. They are full of terms like 'reasonable', 'good faith', and 'proper purposes', the very listing of which can beg an explanation of what is meant by them. Of course experienced lawyers and business people can express opinion on what might be required to discharge such duties. But it has not always been the case that management has identified the governance tasks necessary to fulfil these duties. By contrast, SR sets out details for good practice that are both educative and may be used to show that a corporation has (or has not) observed accepted standards.

Fourth, traditional C&C legal duties owed by management are difficult for shareholders to enforce. As a result, most traditional legal actions against management are taken by successful takeover bidders, by liquidators or by regulators. Even where shareholders' remedies and class suits are relatively liberally available as in Australia, the dangers of huge adverse costs orders and collective action problems will usually stem the enthusiasm for litigation of even the most aggrieved of shareholders. In contrast, the 'enforcement' of SR, though fragmented and variable, is spread around widely especially when in response to

disclosure. An active shareholder or shareholder's association may publicise SR non-compliance or a listing authority may raise a query providing some pressure towards compliance. These will likely be more effective (in the sense that the action is actually taken) and speedier than directors' duties proceedings, for which all enforcers public and private, have limited resources and appetite.

Another strength of SR is the widening of those whose interests might be considered in the making of corporate decisions. While there are exceptions,¹³³ traditional corporate law (both statutory and common law) assumes that management owes its duties only to the corporation, generally conceived as its shareholders. In the US and the UK, statutes now expressly permit directors to take into account the interests of those other than the corporation and its shareholders.¹³⁴ In other countries, the extension of the stakeholders whose interests boards might consider has become a feature in the variety of SR. Encouraging boards to consider these wider interests might be given real impetus through the pressure of supplier and consumer contracts and pressure groups.

Although there are some developments in traditional corporate law that recognise the enterprise or group nature of the modern corporation,¹³⁵ much corporate law still operates on the idea of the single corporate entity. Directors' duties, one part of the corporate governance matrix, are generally interpreted as only reaching to the edges of the company to which a director or officer is appointed. There is virtually no incentive for directors and officers to consider or take responsibility for the interests of other entities in a group despite the wider realities of corporate ownership and control that may exist between them. In fact, there are a number of disincentives.¹³⁶

By contrast, SR being soft law in nature may be more fluid. So a fifth strength may be that SR can flow over from the practices instituted in a listed company, to subsidiary companies. To the degree that modern corporate business has extended from group formations to joint ventures and networks,¹³⁷ this point follows with even more emphasis. Where corporations operate through networks of contracts and arrangements rather than incorporated formations, the flow on of SR might be achieved through contractual terms or financing arrangements in the fashion that has already been discussed above.

Finally, in the same way that networks and enterprise forms have outstripped the entity vision of most corporate law, the transnational activities of most large corporations have outstripped the national boundaries of state law and its

133 Though some statutory provisions provide wider standing to 'a person whose interests have been ... affected by the conduct': see *Corporations Act* s 1324; some decisions allow other stakeholders in the company to be considered in management's decisions: see, eg, *Parke v The Daily News Ltd* [1962] 2 All ER 929; though there are recent doubts raised in relation to creditors: see, eg, *Spies v The Queen* (2000) 201 CLR 603.

134 Bradley et al, above n 27, at fn 134; *Companies Act* (UK) s 172.

135 See, eg, *Corporations Act* ss 189, 588V; see also *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50.

136 For example, liability as a shadow director, see *Standard Chartered Bank of Australia v Antico* (1995) 38 NSWLR 290.

137 Bradley et al, above n 27, 22–24.

enforcement. In this too SR can reach beyond the limits of jurisdiction, extending good management practices into the practices of subsidiary and related corporations in jurisdictions where such SR is not routinely observed, or is not part of the law.

B The Weaknesses of Soft Regulation

The most obvious weakness of SR is the lack of vigour of their enforcement by the bodies that promulgate them. There is a disparity between the terms of SR, and the institutional arrangements and willingness to take action when they are disregarded. There is no doubt that this is a weakness, but its significance depends on knowing more about informal 'enforcement' activities of investors, suppliers, consumers and gatekeepers, rather than listing authorities or regulators. It is true that empirical studies such as reported by Ramsay and Stapledon¹³⁸ suggest that shareholders for example, are not very active. On the other hand there is significant evidence that supply chain contracts are supervised better, and sometimes not renewed because of non-compliance with SR Standards. Generally, the picture of enforcement weakness is obscured, because the informal nature of such activity is difficult to identify and monitor. One response may be to give these actors greater incentives to decide in favour of good governance through the redesign of some legal obligations.

While the pluralism of governance has clear strengths, the fragmentation and redundancy of oversight can make it difficult to trace the linkages of extended effect and work out who is accountable to whom, for what and how.¹³⁹ The mechanisms may overlap and they may be in tension with each other.¹⁴⁰ Leaving the accountability process to private bodies may result in capture of the policy process and policy incoherence, conflicts of interest which sap vigour in oversight and erosion of public commitment to the regulatory process and its public interest goals. It is therefore necessary to balance the mechanisms of extended accountability with state regulation to ensure that these problems and the power effects they imply are reduced.

Further, the values that are recognised as providing accountability, as well as those who provide it and to whom it is provided, are different to those associated with regulatory action and curial review. As we have seen, investors, suppliers and consumers want one or more of value for money, financial accountability, and risk management.¹⁴¹ These are forms of accountability which are clearly additional to those inherent in traditional directors' duties and more generally in the rule of law. They are mostly of an economic variety, captured in the decision of the investor, supplier or consumer to deal with the corporation in one of these capacities. It is very difficult to program accountability through these

138 Ramsay and Stapledon, above n 12.

139 Scott, above n 33, 46.

140 Ibid; Jody Freeman, 'Extending Public Law Norms through Privatization' (2003) 116 *Harvard Law Review* 1285, 1305.

141 This is also a purpose of some financial regulators.

transactions to rule of law values, even to a more contemporary version of the concept.¹⁴² This is accountability for a diffuse group of economic factors rather than the more politico-legal ones envisaged in traditional legal liability or regulatory supervision. Accountability through the market is also more hidden, informal and fragmented, by comparison with the more formal, open and institutionalised versions seen in curial review or formal regulatory action.

C Conclusion

SR is variable in nature¹⁴³ and real though fragmented in effect. Where procedures for SR creation are more formal, as in listing rules, SR's nature appears as a contract with a substantial regulatory (not exchange) purpose. Further from the state, the variability and relative informality attending the creation of much other SR makes it difficult to establish legal nature from the process of creation, and unwise to assume universal effect. Likewise, non-state mechanisms of 'enforcement', for example private accreditation bodies or supply contract factory inspectors, are variable and fragmented. A supply chain contractor working for several companies might be audited for its labour practices several times, under differing codes. Or, it may not be audited at all, for there is no central standard or co-ordinating body. These characteristics of variability and fragmentation appear to increase the greater the distance of any type of SR from the state.

Despite the protean qualities of much SR, its regulatory character including the behavioural modification element has been recognised in academic definitions and descriptions of regulation.¹⁴⁴ It is also recognised in the still underdeveloped principles for the judicial review of decision-making under non-state rules that are acknowledged to have a governmental or regulatory role in lieu of state legislative action. This may occur by traditional administrative law and specially provided financial regulation avenues.¹⁴⁵ Here the regulatory character of the SR comes to the fore, with public interest considerations displacing the private law baselines which might apply if the SR has contractual aspects. Even in instances where there are no direct connections with the state, such as state approval of form and content of rules, a power to judicially review has sometimes been found.¹⁴⁶

Another characteristic of SR which our discussion reveals is its evidential quality. In the discussion of director's duties, the failure to comply with ASX

142 This is Selznick's affirmative rule of law: see Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnota (eds), *The Rule of Law after Communism: Problems and Prospects in East-Central Europe* (Ashgate Dartmouth, 1999) 35.

143 Robert Baldwin, *Rules and Government* (Clarendon Press, 1995) Ch 4.

144 Black, 'Critical Reflections', above n 39.

145 See *R v Panel on Takeovers and Mergers; Ex parte Datafin plc* [1987] QB 815, and discussion surrounding notes 61–6.

146 See Michael Gillooly, 'Public Law Review of ASX Delisting Decisions' (1995) 13(3) *Australian Bar Review* 220; Jody Freeman, 'Private Parties, Public Functions and the New Administrative Law' in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (Hart Publishing, 1999) 331.

Principles may (along with expert testimony) provide evidence of breach. As we have seen, the evidential weight of standards promoted by an exchange or other governance sponsor has been adopted by judges. An implication of identifying SR as evidential is that it is not productive of legal rights by itself, but has effect through combination with rights enforced by the state.

Herbert Hart acknowledged the 'internal' aspect of law – the sense of obligation that law must impart in order to be effective, and within the concept of law.¹⁴⁷ SR, especially that further from the state, lacks the same intensity of obligation attached to say, legislative or judicial rules prohibiting crimes. Still, SR has normative force. This can be seen from the fact that many companies follow SR, believing it to have no legal effect but acknowledging in their public documents that they accept its obligations. Another example of how measures with no legal force can still have behaviour modifying effects is the response to the advisory resolutions of shareholders of listed companies on director remuneration.¹⁴⁸ Although the resolutions are non-binding, there are many instances of companies changing their remuneration proposals after shareholder rejection.¹⁴⁹ This demonstrates the normative effect of standards which like SR, are of uncertain legality, but nonetheless, effective in modifying behaviour.

The aims of this article have been to consider the nature and effect of SR within the mechanisms of corporate governance. The point has been to inquire 'how does SR operate?', 'what effects does SR have?', and most particularly 'how does SR inter-relate with state regulation and other non-legal orders, to have the effects it does?'. Our conclusion is not that we should prefer legislation or formal regulations over SR, or vice versa. Rather we have seen that SR works in many different ways and that despite some considerable weaknesses, its extended effect especially where it combines with state law is not all or nothing, but along a spectrum.¹⁵⁰

147 H L A Hart, *The Concept Of Law* (Clarendon Press, 1961) 84.

148 *Corporations Act* s 250R.

149 See, eg, *Say-on-Pay.com: A Blog Dedicated to the Latest Developments on Say on Pay* <<http://say-on-pay.com/>>.

150 As MacCormick puts it: 'but, even in law, rules need not be conceived as the *only* grounds of wrongdoing, of obligation, or of duty': Neil MacCormick, *H.L.A Hart* (Stanford University Press, 1981) 69.