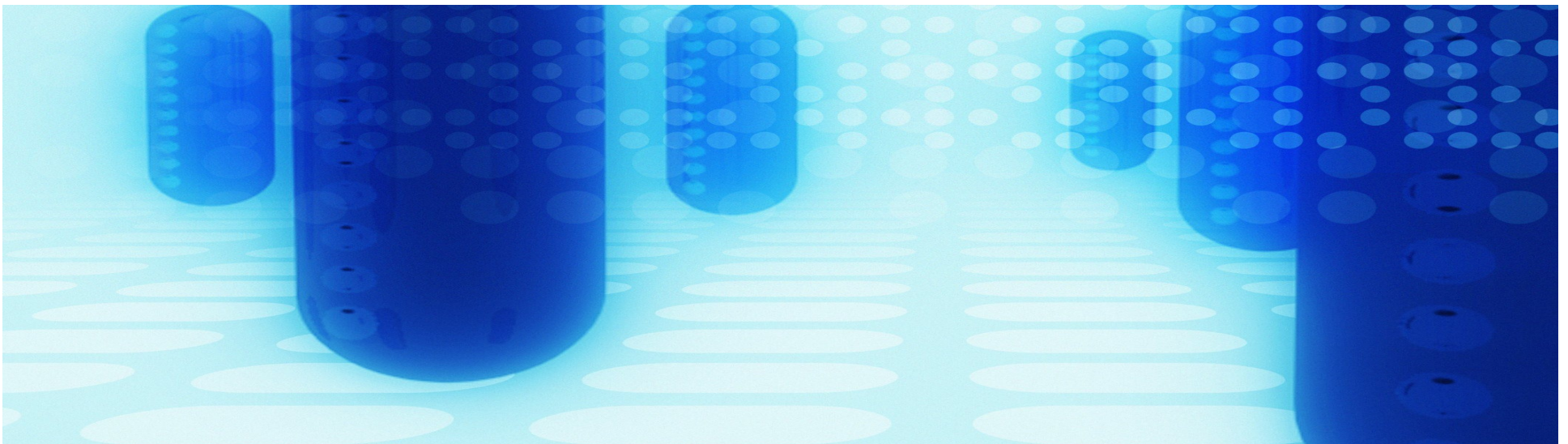


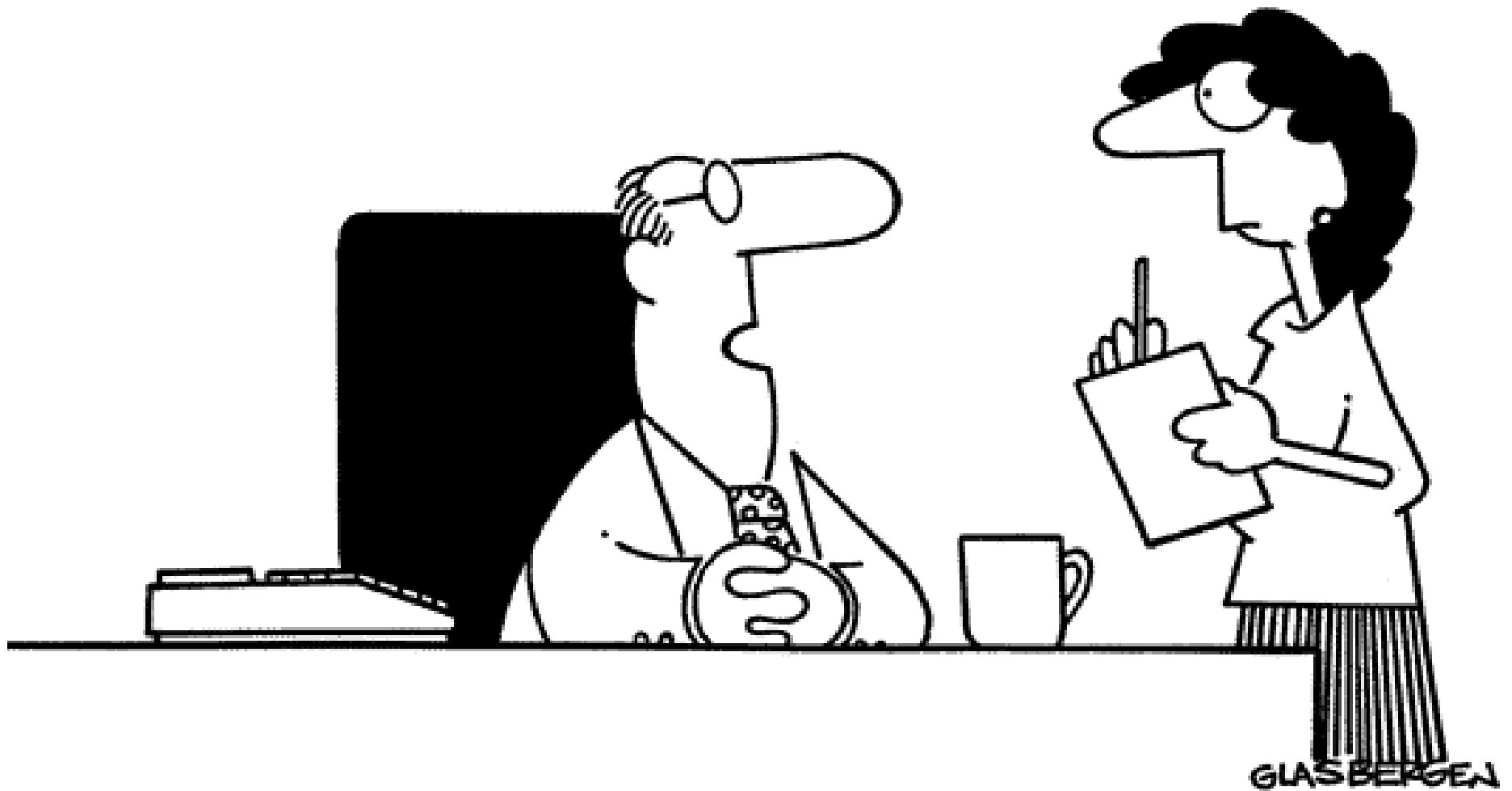
# The Legal Implications of CSR: Changing Landscape of Liability

Christopher Tung  
25 September 2006

MALLESONS STEPHEN JAQUES

G O I N G B E Y O N D





**“I laid off 12,000 workers to pay for my bonus. Make sure the public knows that no dolphins or rain forests were harmed in the process.”**

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# What is corporate social responsibility?

- Corporate social responsibility (“CSR”) is a concept with no single definition (cf sustainable development)
- In essence, CSR requires a company to:
  - consider the social, environmental and economic impacts of its business operations
  - be responsive to the needs and expectations of its customers, employees, investors, shareholders and the community or communities (otherwise known as stakeholders) in which it operates in the context of those impacts

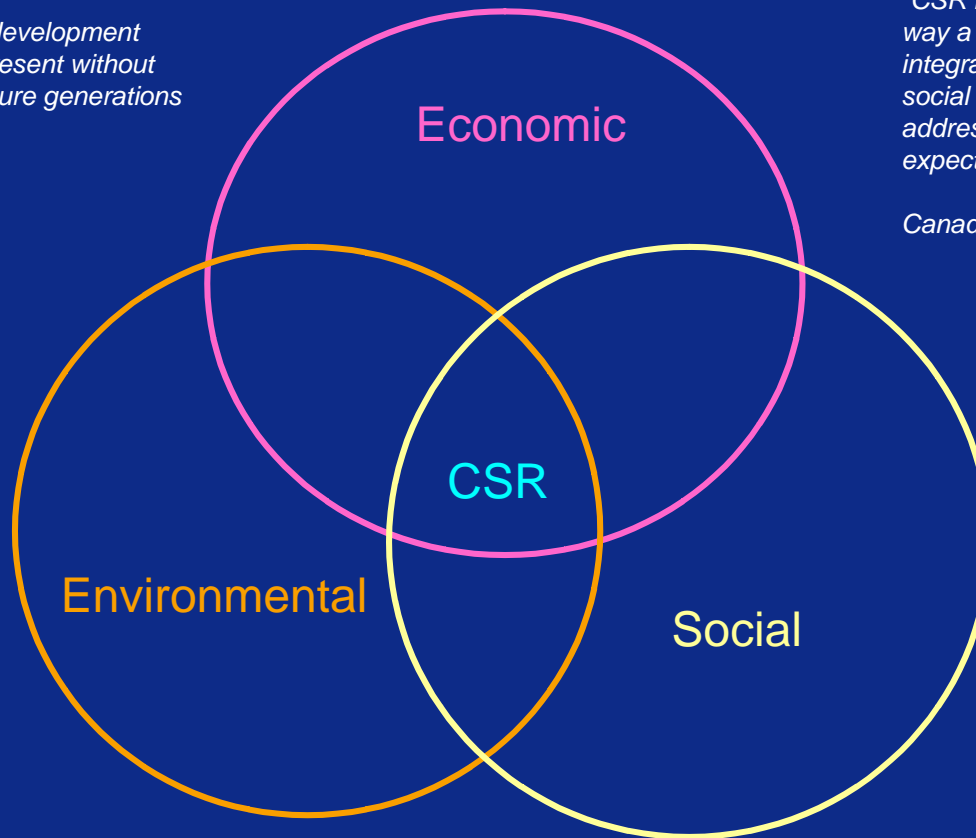
# What is corporate social responsibility?

*“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs”*

*Brundtland Report 1987*

*“CSR is generally understood to be the way a company achieves a balance or integration of economic, environmental and social imperatives while at the same time addressing shareholder and stakeholder expectations”*

*Canadian Government*



*“We define CSR as business’ commitment to contribute to sustainable economic development, working with employees, their families, the local community, and society at large to improve their quality of life”*

*World Business Council for Sustainable Development*

*“The Government sees CSR as the business contribution to our sustainable development goals. Essentially it is about how business takes account of its economic, social and environmental impacts in the way it operates...”*

*UK Government*

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# What is corporate social responsibility?

- The benefits to the corporation of following CSR practices are realised over the medium to long term when notable improvements may be discerned in the competitiveness, operational efficiency, product and service innovation, investor confidence, employee and community engagement of the company
- The introduction of CSR practices is not an all or nothing proposition and should be adapted to suit the circumstances and requirements of a particular company

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# What are CSR practices?

- Key CSR practices include the following:
  - good corporate governance
  - business management, development, planning and training in accordance with sustainability principles and standards
  - business and legal risk assessment in accordance with sustainability principles and standards
  - corporate or socially responsible investment (CRI or SRI)
  - promotion of transparency

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# What are CSR practices?

- anti-discrimination
- employee health and safety
- stakeholder engagement
- development and adoption of environmental, ethical, social and/or CSR codes of conduct or policies

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# What are CSR practices?

- non-financial reporting - environmental, social and/or CSR or sustainability (triple bottom line) reporting (against for example, the SME Key, Sigma, the GRI and the Global Compact) on a mandatory or voluntary basis
- legal compliance with minimum internationally recognised standards for the protection of the environment, human rights, labour, investments and the prevention of corruption

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# What are the legal implications of CSR?

- In one sense, a company which is fully appraised of its legal responsibilities and ensures that it acts in accordance with those legal responsibilities is likely to be responsible under CSR principles
- This is not an absolute because it is possible that laws may not be sensitive or supportive to CSR. Indeed, cutting edge CSR practices are often not motivated by strict legal requirements but by strong corporate governance and active management

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# What are the legal implications of CSR?

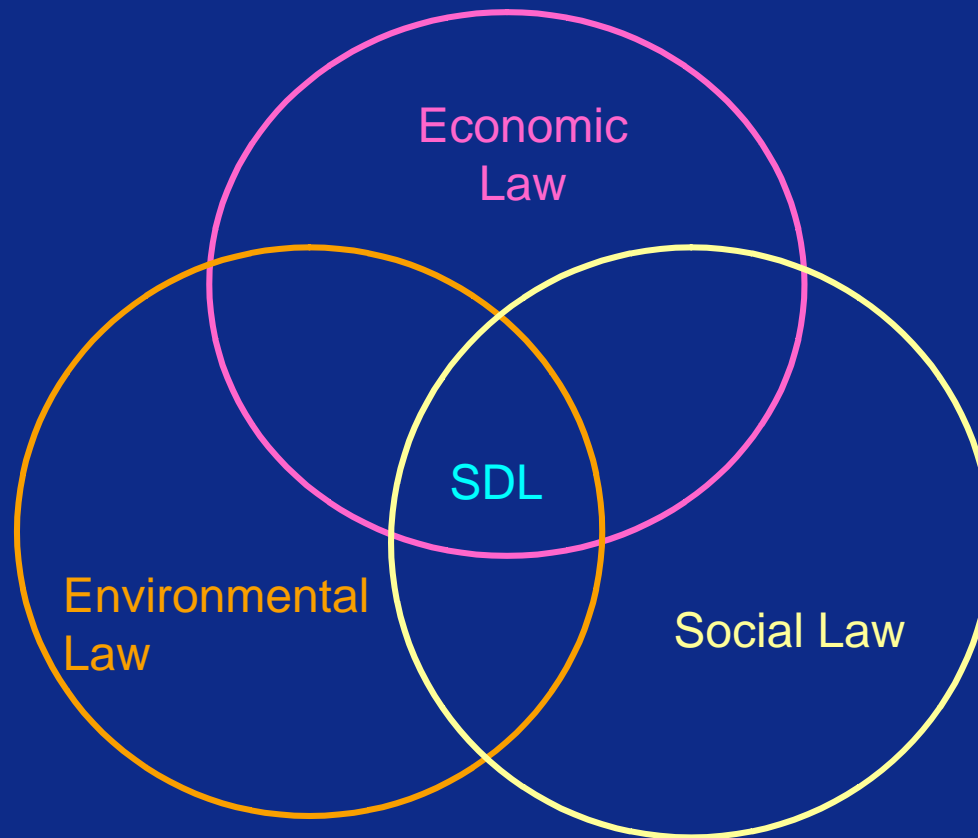
- CSR cannot and does not exist in a legal vacuum
- Companies looking to engage in CSR practices need to consider:
  - whether its current and proposed business activities are consistent with CSR practices
  - the extent to which those practices are consistent with existing laws
  - the legal effect of statements made under a CSR code of practice or policy

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# What are the legal implications of CSR?

- any legal risks that may arise or increase once the level of transparency of the activities of the company are fully reported under a recognised sustainability reporting system
- It is inevitable that laws will be needed to encourage and support the wider adoption of CSR and sustainability practices in general
- There is an increasing appreciation of the emerging field of sustainable development law and the crucial role that it will play in CSR and wider sustainable development issues

# What are the legal implications of CSR?



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# What laws are appearing?

## *Statutory*

- Non-financial reporting (*France*)
- Directors duties (*UK proposed*)
- Investment in financial, managed funds and insurance products (*Australia, UK*)

## *Case law*

- Company law cases, directors duties (*Canada*)
- Environmental and planning law cases (*Australia, Hong Kong*)

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# What is the position in Hong Kong?

## *General*

- There are currently no laws in Hong Kong which address social, environmental and economic considerations in an integrated manner.
- Note Hong Kong sustainable development policy and strategy (but no reference to CSR)
- *Society for Protection of the Harbour v Town Planning Board [2004] HKCFA*

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# What is the position in Hong Kong?

## *Directors duties*

- Non-Statutory Guidelines on Directors' Duties (Guidelines) intended to:
  - provide a model set of principles for all company directors; and
  - restate the common law and equitable duties already existing under Hong Kong law

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# What is the position in Hong Kong?

- The Guidelines confirm that a company director has:
  - a duty to act in good faith for the benefit of the company as a whole; and
  - a duty to exercise care, skill and diligence
- No reference to CSR principles

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# What is the position in Australia?

## *Financial services - disclosure*

- Section 1013D of the Financial Services Reform (FSR) Act (Commonwealth) 2001 requires disclosure for all financial products, managed funds and insurance products regarding:

*“the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of investment”*

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# What is the position in France?

## *Non-financial reporting*

- In 2001 the French Parliament arguably took one of the boldest steps to make environmental and social reporting mandatory for publicly listed companies by passing the *Nouvelles Regulations Economique (NRE)*
- The 144 articles of the NRE essentially address the improvement of corporate governance, transparency and the strengthening of antitrust regulation

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# What is the position in France?

- Article 116 of the NRE specifically requires the disclosure of social and environmental issues in the annual reports of companies listed on the French Stock Exchange
- No sanctions for failure to report
- Failure to disclose information in good faith is a criminal offence
- Manner of reporting for company to decide

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# What is the position in the UK?

## *Pensions*

- In 1999, the UK Parliament approved the Pension Disclosure Regulation. The Regulation amended the Pensions Act 1995 and requires the trustees of occupational pension fund schemes to disclose:

*“the extent, (if at all), to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments.”*

# What is the position in the UK?

*Directors' duties: New Companies Bill*

*“Section 173 Duty to promote the success of the company*

*(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of a company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:*

*(a) the likely consequences of any decision in the long term;*

*(b) the interests of the company's employees;*

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# What is the position in the UK?

*(c) the need to foster the company's relationships with suppliers, customers and others;*

*(d) the impact of the company's operations on the community and the environment;*

*(e) the desirability of the company maintaining a reputation for high standards of business conduct; and*

*(f) the need to act fairly as between members of the company.*

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# Closing observations

## *Trends*

- CSR and sustainability can no longer be ignored by businesses (both in the public and private sector) aspiring to the highest governance and standards
- New laws are emerging to incorporate CSR and sustainable development principles
- Existing laws and legal principles can and will be extended to cover CSR and sustainable development.

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# Closing observations

- The emergence of mandatory non-financial reporting and recent rating reports of companies based on non-financial performance by the rating agencies such as Standard & Poors, underscores the growing importance of CSR
- Carbon Disclosure Project Reports
- Multinational companies
- Global supply chain pressures

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