

UNDERSTANDING CSR: AN EMPIRICAL STUDY OF PRIVATE REGULATION

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This article is a study of an important burgeoning form of regulation — private self-regulation — in the area of Corporate Social Responsibility ('CSR'). Rather than taking a purely theoretical approach or a social scientific study relying on publicly reported data, the article addresses the issue by way of interview-based case studies. As a study in regulation it clarifies the difference between various types of self-regulation, trade associations' codes as private self-regulation and government sponsored self-regulation. This distinction hampers efforts to understand the important aspects of motivation and compliance. This study provides an empirical examination of compliance in private self-regulation. Given the impact and reach of multinational companies ('MNCs') as well as the difficulties associated with regulating them through hard law, the necessity of effective CSR becomes paramount. CSR is a global movement of self-regulation utilised by MNCs with decidedly mixed outcomes. This study shows how private self-regulation can work by leveraging the personal motivation of employed managers educated in CSR and given discretion to pursue important social ends, particularly in conjunction with their communities.

I INTRODUCTION

This paper seeks to make a contribution to the literature on CSR and to the literature on regulatory theory. First, it attempts to contribute to the CSR literature by clarifying what CSR is: it examines how CSR is characterised and how practitioners understand it. In terms of characterisation, CSR is described as anything from a philanthropic program, to internal management systems, to code and ultimately, a form of regulation. In terms of practice, firms claim to be practising CSR when they do anything from a minor charitable donation, to expending considerable sums to mitigate environmental and other impacts well beyond that mandated by law. Accordingly, the paper begins with a theoretical analysis which identifies and distinguishes between the different characterisations of CSR. This analysis is conducted by focusing on the juridical features of CSR and leads to the conclusion that CSR is best characterised as private self-regulation. It then moves to an analysis of CSR from a pragmatic perspective, by focusing on how managers responsible for CSR understand it.

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The second contribution the paper makes is with respect to regulatory theory. It examines the core theoretical and practical issues for private self-regulation: it distinguishes clearly the various attributes of private self-regulation, and investigates related compliance and enforcement issues in the absence of public resources. Again, the paper does so first through a thorough theoretical analysis and then by examining motivation in the context of managers responsible for CSR in practice. Thus, the paper addresses the research questions of how to best understand CSR and how, as a private regulatory system, it can find motivation within a business corporation through theoretical and empirical investigation.

Characterising and understanding CSR as a regulatory phenomenon is an important if somewhat distinct step from much of the discussion surrounding CSR. That discussion often conflates a number of distinct regulatory and juridical phenomena such as codes, self-regulation, voluntary regulation, internal management systems, unenforceability and private regulation. Further, it focuses on questions such as whether CSR is an internal management system like Total Quality Management ('TQM'),¹ or better characterised as some other type of phenomenon.² What these discussions of CSR miss, however, is that CSR becomes a type of regulation — private self-regulation — where it becomes an intercompany rule system. As a type of regulation, CSR encounters all the challenges inherent in all regulatory systems. These challenges include identifying coherent regulatory objectives, designing appropriate institutional infrastructure, making coherent rules, and importantly, making the system effective by identifying appropriate motivating mechanisms to promote compliance.³

As a private self-regulatory system, CSR must work within a set of constraints distinct from those experienced by public regulatory systems. In particular, private regulation cannot rely on the public resources of public law, public adjudicative bodies, and executive investigation and enforcement to motivate compliance. It cannot rely on fear of public punishments like jail and fines and, other than a desire for publicly funded incentives such as tax credits, it must rely on resources readily available in the private sphere. Such motivations include prestige, feeling good about oneself and, where possible, re-framing the nature of the activity in which one is engaged to something with broader moral appeal. This study seeks to identify and understand these motivations and framings in large companies, and further, how they can be understood within the accepted frameworks of business and CSR.

In so doing, the current study contributes to an understanding of CSR as a regulatory system and to understanding motivations in private self-regulation. The current study is informed by the theoretical analysis and then tested and further

- 1 See, eg, Göran Svensson and Greg Wood, 'Corporate Ethics in TQM: Management Versus Employee Expectations and Perceptions' (2005) 17(2) *TQM Magazine* 137.
- 2 Andrew Crane et al, 'The Corporate Social Responsibility Agenda' in Andrew Crane et al (eds), *Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008) 3–18; Benedict Sheehy, 'Defining CSR: Problems and Solutions' (Working Paper, SSRN, 3 October 2012).
- 3 Benedict Sheehy and Donald P Feaver, 'A Normative Theory of Effective Regulation' *McGill Law Journal* (forthcoming) ('*Normative Theory*'); Donald P Feaver and Benedict Sheehy, 'A Positive Theory of Effective Regulation' *McGill Law Journal* (forthcoming) ('*Positive Theory*').

conducted as an empirical study examining the internal management practices and systems of companies that have commitments to external intercompany standards. The study identifies the motivations available in the private sphere and draws implications for the design of private regulatory systems and CSR specifically.

The paper is divided into two main parts. The first part is theoretical. It examines CSR through the lens of regulatory systems. It disentangles some of the CSR discussion by identifying and analysing the juridical aspects of CSR that make it a form of regulation. In doing so, it distinguishes and examines private regulation and self-regulation, then considers the nature and role of codes and standards, and finally considers the normative foundations. Contributing further to regulatory theory, it examines the particular issue of motivation in private regulatory systems, again using the example of CSR. The second part of the paper provides an empirical investigation into CSR practice in three firms, and provides insight into how managers define and understand CSR in practice. Such an understanding is an important antidote to the academic debate about what CSR is providing a pragmatic and substantive perspective, and insight into what needs to be done if CSR is to make a significant impact on industrial activities in society.

II THEORETICAL EXAMINATION: PRIVATE REGULATION, SELF-REGULATION, INTERNAL MANAGEMENT SYSTEMS AND CSR

Having referred to CSR as a private self-regulatory system, it is important to establish the juridical features which justify the nomenclature. These juridical features are that it is a non-state based,⁴ normative rule system developed by the private, for profit sector in the form of explicit formal rules, usually codified in some type of code of conduct, which are voluntarily adopted by a group of enterprises or on an industry wide basis. As such CSR forms a regulatory system designed with the aim of reformulating solutions to problems arising at the intersection of economic, socio-environmental and political systems. As the nature of and connection between these juridical features are commonly conflated and misunderstood, they merit some further analysis.

A Private and Self-Regulatory Systems

CSR needs to be understood as a private self-regulatory system, and such a system needs to be distinguished from other types of regulation including public regulation — regulation referred to as voluntary regulation and as regulation without enforcement. The two distinct aspects of the CSR regulatory system need explication: the private aspect and the self-regulatory aspect. Although

4 This is confusingly referred to by non-lawyers as ‘civil regulation’. See David Vogel, ‘Private Global Business Regulation’ (2008) 11(1) *Annual Review of Political Science* 261.

these two aspects are crucial distinctions in terms of understanding CSR, they receive little attention and indeed are confused in the literature.⁵ For example, King and Lennox identify ‘industry self-regulation’ which they equate with ‘trade association sponsored industry standards’⁶ and which they see as at least a partial solution to environmental problems in the chemical industry. Yet, clearly self-regulation and sponsored standards are markedly different phenomena: the former is a type of regulatory system, while the latter identifies both the source of rules as well as a substantive rule type, ie a standard. Other scholars refer to CSR as voluntary regulation,⁷ and as regulation without enforcement.⁸ Again, these are both incorrect or, at least, incomplete descriptors. Accordingly, private regulation, voluntary regulation, enforcement and self-regulatory systems are discussed next.

Private regulation is not produced by or dependent upon public resources, and is not implemented by or dependent upon a public regulatory body. Public regulation is promulgated by a public authority, depends on the exercise of public legal powers, utilises public resources such as taxes or incentives, and relies on public executive and judicial branches of government for testing compliance and, where compliance fails, enforcement.

Self-regulation is distinct from private regulation in that self-regulation may be either public or private. Public self-regulation commonly occurs, for example, when government sponsors it,⁹ ie government imposes a duty upon industry to develop a set of standards or processes and fund a compliance and enforcement program. Such a regulatory system cannot properly be called a private regulatory system. As another example, one may consider the traditional regulation of the

5 An exception is Benjamin Cashore et al, ‘Private or Self-regulation? A Comparative Study of Forest Certification Choices in Canada, the United States and Germany’ (2005) 7(1) *Forest Policy and Economics* 53, who identify the distinction in this context. However as the article focuses on substantive aspects of forest industry selection, it does not pursue the significant juridical distinctions.

6 Andrew A King and Michael J Lennox, ‘Industry Self-Regulation without Sanctions: The Chemical Industry’s Responsible Care Program’ (2000) 43(4) *Academy of Management Journal* 698.

7 Sonia Labatt and Virginia W Maclaren, ‘Voluntary Corporate Environmental Initiatives: A Typology and Preliminary Investigation’ (1998) 16(2) *Environment and Planning C: Government and Policy* 191; Organisation for Economic Co-operation and Development, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes* (OECD Publications Service, 2003); Krista Bondy, Dirk Matten and Jeremy Moon, ‘The Adoption of Voluntary Codes of Conduct in MNCs: A Three-Country Comparative Study’ (2004) 109(4) *Business and Society Review* 449; Kernaghan Webb, ‘Understanding the Voluntary Codes Phenomenon’ in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (School of Public Policy and Administration, Carleton University, 2004); Kernaghan Webb and Andrew Morrison, ‘The Law and Voluntary Codes: Examining the Tangled Web’ in Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (School of Public Policy and Administration, Carleton University, 2004); Thomas F McInerney, ‘Putting Regulation Before Responsibility: The Limits of Voluntary Corporate Social Responsibility’ (2007) 40 *Cornell International Law Journal* 171; Magali Delmas and Ivan Montiel, ‘The Diffusion of Voluntary International Management Standards: Responsible Care, ISO 9000, and ISO 14001 in the Chemical Industry’ (2008) 36(1) *Policy Studies Journal* 65; Virginia Haufler, ‘The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention’ (2009) 89(4) *Journal of Business Ethics* 403; Ralitzia Nikolaeva and Marta Bicho, ‘The Role of Institutional and Reputational Factors in the Voluntary Adoption of Corporate Social Responsibility Reporting Standards’ (2011) 39(1) *Journal of the Academy of Marketing Science* 136.

8 King and Lennox, above n 6.

9 Feaver and Sheehy, ‘Positive Theory’, above n 3.

professions which was by way of self-regulation; again, it may well be argued that they were not wholly private either. The church, which controlled admission and practice of theology among ministers of religion, did not allow that profession to set and follow its own rules. Further, with respect to lawyers, the courts as part of government oversaw and approved admission to the professions of solicitors and barristers. These self-regulatory bodies have become connected more closely to government under the regulatory state.¹⁰

A further consideration of the distinction between public and private regulation needs to be made. The hard division between public and private regulation, while helpful analytically, does not necessarily hold true in practice.¹¹ Government sponsored self-regulation, as noted above, which occurs in several areas of society, is but one example. Government and the private sector may collaborate in regulatory systems at different points, from policy making to standard setting to oversight and enforcement. For example, one of Ayers and Braithwaite's insights was the potential for public interest groups to participate in the setting of standards and adjudication of compliance,¹² a matter of particular importance in environmental regulation.¹³

Both government and CSR advocates favour private self-regulation in the realm of corporate activity and make the case that regulation of corporations is best left to the corporations themselves. Various industry codes and successes are put forth as viable examples and the suggestion is made that if left to itself, industry will continue in this benevolent direction. The oft-cited Responsible Care initiative of the chemical industry is the most widely known and lauded model. It has a large group of members, representing 60 per cent of the global chemical sales and 90 per cent of global output,¹⁴ a very active membership, and a full schedule of activities. There is little notice taken, however, of the extensive institutional infrastructure necessary to implement and maintain it, or of the long list of disasters that forced the industry to regulate itself to avoid facing a formidable array of process and output regulatory standards.¹⁵

In Australia, the government has made a commitment to CSR as private self-regulation. In 2004 it stated:

The Australian Government is strongly committed to the principle that guidelines for Corporate Social Responsibility (CSR) should be voluntary.

10 Donald P Feaver and Benedict Sheehy, 'The Legal and Political Divisions of Labour and the Regulatory State' (Working Paper, SSRN, 3 July 2011).

11 Darren Sinclair, 'Self-Regulation Versus Command and Control? Beyond False Dichotomies' (1997) 19(4) *Law & Policy* 529.

12 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 5, 56 ff.

13 Neil Gunningham, 'Environment, Self-Regulation, and the Chemical Industry: Assessing Responsible Care' (1995) 17(1) *Law & Policy* 57.

14 International Council of Chemical Associations, *ICCA Statement on Outcomes of ICCM-3* (4 October 2012) <<http://www.icca-chem.org/en/Home/News-and-press-releases/News-Archive/2011/ICCA-Statement-on-Outcomes-of-ICCM-3/>>; Aseem Prakash, 'Responsible Care: An Assessment' (2000) 39 *Business & Society* 183.

15 Webb, above n 7, 6.

The Norms represent a major shift away from voluntary adherence. The need for such a shift has not been demonstrated. ... We believe the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging greater awareness of societal values and concerns through voluntary initiatives.¹⁶

Both the Corporations and Markets Advisory Committee ('CAMAC')¹⁷ and the Parliamentary Joint Committee on Corporations and Financial Services have advised the Australian government to take this approach. CAMAC advised:

Governments are able to influence corporate behaviour in a number of ways ... providing public policy settings that shape the environment ... lead[ing] by example ... contribut[ing] through advocacy or facilitation to the shaping of the community viewpoints. In the end, however, it is for companies themselves and those who run them to take responsibility for what they do and the decisions they take.¹⁸

Further, CAMAC did 'not see a need for government to provide across-the-board fiscal or other incentives for companies to operate in a socially responsible manner' and advised that government should not 'seek to compel companies to adopt a particular managerial approach.'¹⁹ The Joint Committee on Corporations and Financial Services recommended that 'sustainability reporting in Australia should remain voluntary.'²⁰

Additionally, the distinction between voluntary and mandatory regulation needs consideration. Voluntariness is not necessarily the hallmark of private regulation. Much public government sponsored regulation is voluntary in nature. For example, government might publish guidelines which may be followed for a range of activities from parenting to such things as safe swimming or bushwalking. These non-binding guidelines are voluntary in nature. A person may choose to comply or refuse while engaging in the activity. The uptake of the guidelines is voluntary.

Another set of public regulation is voluntary in another way. Activities such as driving a car are not mandatory and one voluntarily undertakes the activity. As such, the regulation may be considered voluntary in that it is based on an opt-in rather than a blanket imposition. In this case, the voluntary characteristic is dependent on the choice of whether to engage in the activity in the first place.

16 Australian Permanent Mission to the United Nations, *Comments by Australia in Respect of the Report Requested by the Office of the High Commissioner for Human Rights in Its Decision of 2004/116 of 20 April 2004 on Existing Initiatives and Standards Relating to the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (13 September 2004) Office of the High Commissioner of Human Rights <www2.ohchr.org/english/issues/globalization/business/docs/australia.pdf> 1, quoted in Justine Nolan, 'Corporate Responsibility in Australia: Rhetoric or Reality?' (2007) 12(2) *Australian Journal of Human Rights* 63.

17 See Corporations and Markets Advisory Committee, Parliament of Australia, *The Social Responsibility of Corporations Report* (2006).

18 *Ibid* 166.

19 *Ibid* 168.

20 See Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 89, Recommendation 5 [6.46].

Further, ‘regulation without enforcement’ is not an appropriate moniker. While private regulatory systems do not generally give external parties enforcement rights, contrary to some thinking,²¹ this does not mean that such systems are without enforcement.²² Rather, enforcement needs to be conceived of differently than is commonly considered in public systems which rely on the enforcement mechanisms of police, courts and jail. Enforcement can occur through expulsion from a group, some type of public or semi-public disclosure of lack of compliance,²³ or, where a regulatory system is operating on inducements, ‘enforcement’²⁴ occurs by the bestowal and publication of promised things such as social honours. Essentially, enforcement may use any one of a number of undesirable or desired outcomes available in the private sphere in order to obtain compliance.

Given that compliance and enforcement are often conflated, some further discussion is also desirable. Compliance refers to doing the mandated thing whereas enforcement refers to the consequences of failure to do the mandated thing or the method of promoting the mandated thing.²⁵ Further, attempting to distinguish public and private regulatory systems on the basis of public resources in compliance and enforcement alone is not tenable. Contrary to the common assumption, compliance in public systems is not necessarily dependent on public monitoring. In the EPA, for instance, voluntary monitoring and self-reporting is the accepted procedure.²⁶

The attempted distinction between public and private regulatory systems based on enforcement lacks nuance. Rather than attempting to frame the issue as enforcement versus non enforcement, the distinction is between public enforcement which relies on public resources such as courts and police versus private resources such as participation in a whole range of activities; from being listed in stock exchanges, to participation in industry organisations, to consumer censure and public honours such as the UN-endorsed GRI. Accordingly, in a private regulatory system which lacks traditional public enforcement mechanisms — usually considered in terms of external threats — considerable innovative thought is required to motivate compliance. Accordingly, an examination of compliance and enforcement is not definitive in determining whether a regulatory system is private or public.

To summarise, a private self-regulatory system is made up of rules that operate at an inter-enterprise level affecting groups of companies, industries at local, national or international levels, and must provide for the necessary institutional

21 See, eg, Maria Fernanda Matach, *Governance and Responsibility of Multinational Enterprises: The Use of Codes of Conduct and Litigation to Change Multinational Enterprises' Behavior* (LLM Thesis, School of Law, University of Georgia, 2005).

22 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 328.

23 King and Lennox, above n 6, 700.

24 This use of the term ‘enforcement’ may perhaps be better framed as the psychological tool of ‘reinforcement’; that is, the reinforcement of positive behaviours by the giving of rewards.

25 Feaver and Sheehy, ‘Positive Theory’, above n 3, 23.

26 Although the EPA has the right to investigate, it relies primarily on self-reporting.

infrastructure.²⁷ To be a system, the rules must set up an institutional framework that administers the rules. These rules are usually in the form of codes, ie a set of rules organised around themes, principles or practices. However, the code itself is not a self-regulatory system. We turn next to discuss the juridical feature of codification.

B Codes and Standards

Private self-regulatory systems, as just noted, are usually established in a set of codified rules. As a result, much CSR discussion revolves around ‘codes of conduct’ and standards.²⁸ This focus on the characterisation of CSR based on its codified form distracts from the substantive content. A substantive focus queries how social costs are being identified and counted, whether they are being addressed and what is being done to avoid them in the first instance. This turn toward form, however, mistakes the form for the institution and practice of CSR and, as we have seen, for regulation.²⁹ The code is no more CSR than the black letters of the cases and statute books are either the substance or the sum total of the legal system.³⁰ The codes contain rules which may or may not have substantive rights and duties, and may or may not create an effective regulatory system. Describing CSR as codes without careful attention to the substantive provisions and the design of the underlying regulatory system is a fundamental error.³¹ The same applies when referring to CSR as standards. Again, it is unhelpful to equate standards with the whole of CSR or a regulatory system or to put them all into a single undifferentiated category. Generally speaking, there are two types of standards: first, those addressing the applicability of a standard to a group,

27 Sheehy and Feaver, ‘Normative Theory’, above n 3, 10.

28 See review in Wai Fong Chua, *Extended Performance Reporting: An Overview of Techniques* (Institute of Chartered Accountants in Australia, 2006). For an older but informative review of corporate codes of conduct, see Bureau for Workers’ Activities, International Labour Organisation, *Corporate Codes of Conduct* <<http://actrav.ilo.org/actrav-english/telearn/global/ilo/code/main.htm>>. See also Gare Smith and Dan Feldman, *Company Codes Of Conduct And International Standards: An Analytical Comparison, Normative Theory of II: Apparel, Footwear and Light Manufacturing Agrubusiness Tourism* (World Bank, 2003).

29 Esben Rahbek Pedersen and Mette Andersen, ‘Safeguarding Corporate Social Responsibility (CSR) in Global Supply Chains: How Codes of Conduct are Managed in Buyer-Supplier Relationships’ (2006) 6(3–4) *Journal of Public Affairs* 228; Julien Levis, ‘Adoption of Corporate Social Responsibility Codes by Multinational Companies’ (2006) 17(1) *Journal of Asian Economics* 50; Lance A Compa and Tashia Hinchliffe-Darricarrère, ‘Enforcing International Labor Rights through Corporate Codes of Conduct’ (1995) 33 *Columbia Journal of Transnational Law* 663; Ans Kolk, Rob van Tulder and Carljin Welters, ‘International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?’ (1999) 8(1) *Transnational Corporations* 143; Xiaomin Yu, ‘Impacts of Corporate Code of Conduct on Labor Standards: A Case Study of Reebok’s Athletic Footwear Supplier Factory in China’ (2008) 81(3) *Journal of Business Ethics* 513; Rhys Jenkins, *Corporate Codes of Conduct: Self-Regulation in a Global Economy* (United Nations Research Institute for Social Development, 2001); S Prakash Sethi, ‘Codes of Conduct for Multinational Corporations: An Idea Whose Time Has Come’ (1999) 104(3) *Business and Society Review* 225; Michael J Hiscox, Claire Schwartz and Michael Toffel, ‘Evaluating the Impact of SA8000 Certification’ in Deborah Leipziger (ed), *SA8000: The First Decade: Implementation, Influence, and Impact* (Greenleaf Publishing, 2009).

30 This is the insight of the legal realist movement.

31 Sheehy and Feaver, ‘Normative Theory’, above n 3.

process or product — ie the rules around membership and the rules establishing which contexts the standards are to apply — and secondly, standards affecting the quality of products, whether they be goods or services. In the present discussion, the standard in focus is the former. Again, the code is not a regulatory system in and of itself.

This view is not shared universally. A somewhat contrary position is advanced by institutionalists who argue that even the mere promulgation of codes by corporations, industry groups, NGOs and others, have a regulatory effect.³² They argue that the simple existence of such codes provides a benchmark and an aspiration for corporate enterprises, and further, by diffusing norms they influence organisations' behaviour. Institutionalists argue that the existence of these codes will cause some corporations to alter or modify their behaviour,³³ and rightly in such cases, they argue that the codes have had a regulatory effect.³⁴ Further, institutionalists claim that membership in an industry group or prestigious group may drive adoption of and compliance with CSR codes.³⁵ Essentially, they claim that a desire to belong to a prestigious group will cause organisations to adopt codes and comply with those codes. Thus, where a CSR code contains substantive provisions which address social costs, those codes may generate a regulatory impact. Finally, in some instances, CSR codes may have legal impact, where, for example, a court has taken internal management protocols and held a corporation liable for their breach. Where such codes deal with CSR, they likewise may be brought to bear in judicial proceedings for corporate failure to comply.³⁶ The next juridical feature examined is the normative content creating substantive obligations.

C Normative System

As a type of regulation, CSR is norm-based, imposing positive and substantive obligations. Although the particulars are hotly contested, CSR's general norms involve the minimisation of harm and the promotion of non-organisation focused benefits.³⁷ This normative shift, a shift at least in terms of economic theory,³⁸ is a shift from a model which focuses on shareholder wealth maximisation without

32 Nikolaeva and Bicho, above n 7.

33 John W Meyer and Brian Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83(2) *American Journal of Sociology* 340; King and Lennox, above n 6; Kelly Kollman, 'The Regulatory Power of Business Norms: A Call for a New Research Agenda' (2008) 10(3) *International Studies Review* 397.

34 Some would argue that sweatshop codes have had this effect.

35 Kerstin Sahlin-Andersson, 'Corporate Social Responsibility: A Trend and a Movement, but of What and for What?' (2006) 6(5) *Corporate Governance* 595.

36 Kernaghan Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Carleton Research Unit for Innovation, Science and Environment, 2004); Michael Kerr, Richard Janda and Chip Pitts, *Corporate Social Responsibility — A Legal Analysis* (LexisNexis, 2009).

37 Benedict Sheehy, 'Conflicts between CSR, Corporate Law and the Problems of Social Costs' (Working Paper, SSRN, 4 October 2012).

38 Forest L Reinhardt, Robert N Stavins and Richard H K Vietor, 'Corporate Social Responsibility through an Economic Lens' (2008) 2(2) *Review of Environmental Economics and Policy* 219.

regard for externalities, to a model which distributes a range of benefits more widely conceived to a broader population. When these norm-based rules are put into codified form, like codes in any other area of law, CSR codification becomes a step toward formalising a practice, as well as systematising an area of law or regulatory endeavour.³⁹

All such legal and quasi-legal codes have other functions, including normative functions, as can be seen through the lenses of other disciplines. Herberg brings two such understandings to CSR codes.⁴⁰ He notes from the perspective of strategic management that the adoption of a code functions as a break from the past, a type of absolution for acknowledged past wrongs. It allows the demarcation of past from the future, and acts restoratively for the corporation, underpinning its new claims for legitimacy and acceptance going forward. This view is not foreign to law: it is the idea of having paid one's social debts for past wrongs as a type of social rehabilitation.

The other understanding Herberg provides is known among law scholars as law's 'expressive function.'⁴¹ Law has a role in society of expressing community values and norms in ways that commit and demonstrate that commitment to the public at large. Regardless of whether law's sanctions against actions like rape, fraud and hate speech function to reduce their occurrence, law functions to communicate or express social disgust or reprehension toward those acts. In this sense, law is a normative communicative system that communicates the norms of a society.⁴²

Putting these ideas into the context of CSR as private law, Herberg writes:

corporate codes are an almost paradigmatic example of how private actors, by their own means, manage to establish norm systems of considerable binding effect. By presenting their codes of conduct to the public, the corporations put behind them the failures of the past; the texts claim credibility, and they do so (only seemingly paradoxically) by publicly mortgaging the corporations' integrity and credibility with the burden of compliance with the stated duties. Through publication of guidelines, normative facts are created, as with any speech act of the type of a self-obligation. Later deviations from the norms cannot just be presented as a simply shift of the firm's policy; they rather take on the quality of a violation of justified normative expectations.⁴³

39 Michael Torrance, 'Persuasive Authority Beyond the State: A Theoretical Analysis of Transnational Corporate Social Responsibility Norms as Legal Reasons Within Positive Legal Systems' (2011) 12(8) *German Law Journal* 1573.

40 Martin Herberg, 'Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making' in Olaf Dilling, Martin Herberg and Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart Publishing, 2008).

41 Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144(5) *University of Pennsylvania Law Review* 2021.

42 Stanley L Paulson, 'Continental Normativism and Its British Counterpart: How Different Are They?' (1993) 6(3) *Ratio Juris* 227.

43 Herberg, above n 40, 25.

In other words, CSR articulates a publicly oriented organisational commitment placing it within society's larger normative context. Such an understanding of CSR is wholly consistent with it as a regulatory system, and indeed, underpins CSR as every regulatory system must have a normative foundation.

D Motivating Compliance in the Private Self-Regulatory System of CSR

The basic question for any regulatory system is whether it works. In the public system, regulation can be forced upon regulated parties by the power of the state. In the context of private self-regulatory systems however, the issue is troublesome because of the lack of public resources usually associated with regulation and regulatory environments. Put in question form, the issue is: will the parties in fact voluntarily restrict themselves, or constrain their behaviour to avoid undesirable outcomes or other detriment to third parties? Regulation must have some impact on, or in some way modify or regulate, behaviour to be meaningful at all. This issue of motivating compliance in private self-regulation is an exceedingly important regulatory issue. Without the public government tools of punishment or incentive, private self-regulatory systems must rely on motivating compliance in other ways.

Different disciplines explain motivation, and hence compliance, differently. The traditional legal approach to motivating compliance is a command and control approach which generates compliance by threatening the exercise of imminent and direct control. Economists explain motivation in terms of economic incentive or disincentive.⁴⁴ Management scholars tend to emphasise self-interest — in some cases to the point where the concept becomes no more than meaningless dogma, rather than an analytic tool.⁴⁵ In management circles, CSR is referred to as 'enlightened self-interest' or 'doing good while doing well.'⁴⁶

In terms of CSR, institutionalists make a variety of claims. Motivation to comply, they claim, comes from public pressure exerted when negative information is disclosed and disseminated.⁴⁷ It also arises from the earlier mentioned creation and diffusion of norms via codes.⁴⁸ Finally, mimetic forces arise from group membership⁴⁹ and it is a desire to belong to a particular, elite group that drives acceptance and the necessary level of compliance.⁵⁰ Other scholars indicate that

44 Fabrizio Ferraro, Jeffrey Pfeffer and Robert I Sutton, 'Economics Language and Assumptions: How Theories Can Become Self-Fulfilling' (2005) 30 *The Academy of Management Review* 8, 11–12.

45 Robert Folger and Rommel Salvador, 'Is Management Theory Too "Self-ish"?' (2008) 34 *Journal of Management* 1127; Archie B Carroll, 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38 *Business & Society* 268.

46 Sally Hamilton, Hoje Jo and Meir Statman, 'Doing Well While Doing Good? The Investment Performance of Socially Responsible Mutual Funds' (1993) 49(6) *Financial Analysts Journal* 62.

47 Gunningham, above n 13.

48 King and Lennox, above n 6, 713–14.

49 Michael O'Hare, 'Information Strategies As Regulatory Surrogates' in Eugene Bardach et al (eds), *Social Regulation: Strategies for Reform* (Transaction Books, 1982) 221, 225.

50 Sahlin-Andersson, above n 35, 598.

compliance is a result of a combination of institutional pressures, organisational characteristics, path dependencies and resources.⁵¹ None of these explanations alone, however, is adequate.

A further area needs to be considered in terms of motivation and compliance, for although organisations may implement decisions, the decision-makers themselves are distinct human individuals. As distinct from this important and sophisticated work by institutionalists, the study of human motivation by psychologists makes it clear that human motivation⁵² and decision-making⁵³ is markedly complex. The interaction of individual decision-makers and organisational culture is a further area of complexity addressed by organisational psychologists, and in the context of CSR, in the domain of business ethics.⁵⁴ From a regulatory perspective, to some degree these broader sets of motivations have been implicitly included in the new regulatory methods. Rather than relying solely on traditional threats of coercive enforcements, new regulatory methods include incentive and inducement. This trio is referred to in the literature conveniently as ‘carrots, sticks and sermons’.⁵⁵

In the context of business, and business regulation in particular, the potential for and proposal of non-economic incentives or punishments may be risible among some orthodox economists. Nevertheless, as Coase himself declared, people are more than rational utility maximisers. Coase stated ‘There is no reason to suppose that most human beings are engaged in maximizing anything unless it be unhappiness and even this with incomplete success.’⁵⁶ As such, it is important to consider and understand the role of motivators other than the economist’s incentive and punishment, in private self-regulatory systems, and particularly in the context of CSR.

Again, if there is no motivation, CSR will have no regulatory impact on corporate practice and will be little more than a further avenue for corporate communications, mere ‘greenwash’,⁵⁷ wherein business organisations claim environmental and other social contributions while continuing to generate excessive social costs,

51 Megali Delmas and Michael W Toffel, ‘Stakeholders and Environmental Management Practices: An Institutional Framework’ (2004) 13 *Business Strategy and the Environment* 209; Nikolaeva and Bicho, above n 7.

52 See, eg, Bernard Weiner, *Social Motivation, Justice, and the Moral Emotions: An Attributional Approach* (Taylor & Francis, 2006); Edward L Deci, *Intrinsic Motivation* (Plenum Press, 1975) and of course, A H Maslow, ‘A Theory of Human Motivation’ (1943) 50 *Psychological Review* 370.

53 Scott Plous, *The Psychology of Judgment and Decision Making* (Mcgraw-Hill, 1993).

54 See, eg, Linda-Klebe Trevino, ‘Ethical Decision Making in Organizations: a Person-Situation Interactionist Model’ (1986) 11 *Academy of Management Review* 601; Haesun Park, ‘The Role of Idealism and Relativism as Dispositional Characteristics in the Socially Responsible Decision-Making Process’ (2005) 56 *Journal of Business Ethics* 81.

55 Marie-Louise Bemelmans-Videc, Ray C Rist and Evert Vedung (eds), *Carrots, Sticks, and Sermons: Policy Instruments and Their Evaluation* (Transaction, 1998).

56 Ronald H Coase, ‘The Relevance of Transaction Costs in the Economic Analysis of Law’ in Francesco Parisi and Charles K Rowley (eds), *The Origins of Law and Economics: Essays by the Founding Fathers* (Edward Elgar, 2007) 199, 200.

57 Jed Greer and Kenny Bruno, *Greenwash: The Reality Behind Corporate Environmentalism* (Apex Press, 1996).

ie ‘business as usual’.⁵⁸ As Graham and Woods observe, ‘companies may simply find it rational to continue life as before with a little more investment in public relations.’⁵⁹ Further, where the private regulatory model is structured to serve entrenched interests, and where industry demarcates the public/private divide sharply and seeks to avoid, if not subvert, government (as is argued in the case of the Responsible Care program)⁶⁰ institutional pressures will be insufficient to motivate compliance in a private self-regulatory system.⁶¹

A useful framework for identifying and addressing the underlying motivations for CSR while working within the economic model of the firm is available for use.⁶² This framework, referred to as the CSR motivation framework, allows a reordering of norms and transformation of business practices while remaining within the economic model. The economic model of the firm is used because of its wide acceptance within the business community and as a touchstone for discussion. The CSR motivation framework leads to suggestions as to how corporations might shift or re-frame business priorities within the accepted model to take account of values other than shareholder wealth. There are five orderings of managers’ activities and value orientations developed leading to suggestions as to how prioritising between economic and social values might work to promote CSR while remaining within the economic model of the firm.⁶³

The first ordering suggests that managers might use their power to gain the personal satisfaction they could achieve from helping others, doing good in the UN Global Compact Model, and to avoid public personal condemnation they could receive from decisions with negative social consequences. The second ordering reframes the managers’ time horizon. That is, by moving from short- and medium-term to long-term, managers can deliver information to stockholders showing how social investments can create long-term wealth. This requires an intellectual shifting of managers’ understanding of the long-term interests of stockholders. The third ordering focuses on a broader conception of stockholders’ values. Like the previous ordering, it requires a shifting of stockholders’ values to include the social with the economic values, and motivates managers to respond.

58 There is rather convincing evidence from the Organisation for Economic Co-operation and Development (‘OECD’) and the United Nations Environment Programme (‘UNEP’), both are advocates of voluntary initiatives, and believe that such initiatives are of questionable value in changing from ‘business as usual’: OECD, *Voluntary Approaches for Environmental Policy: An Assessment* (1999); UNEP, ‘Voluntary Initiatives: Current Status, Lessons Learnt and Next Steps’ (Discussion paper, UNEP Multi-Stakeholder Workshop on Voluntary Initiatives, Paris, 20 September 2000); OECD, *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes* (2003); KPMG Global Sustainability Services and UNEP, *Carrots and Sticks for Starters: Current Trends and Approaches in Voluntary and Mandatory Standards for Sustainability Reporting* (2006). See also Guido Palazzo and Ulf Richter, ‘CSR Business as Usual? The Case of the Tobacco Industry’ (2005) 61 *Journal of Business Ethics* 387.

59 David Graham and Ngaire Woods, ‘Making Corporate Self-Regulation Effective in Developing Countries’ (2006) 34 *World Development* 868, 881.

60 Gunningham, above n 13.

61 King and Lennox, above n 6.

62 Benedict Sheehy, Peter M Gerhart and Donald P Feaver, ‘Is CSR Consistent with the Economic Model of the Firm?’ (Working Paper, SSRN, 3 November 2011).

63 Ibid.

Examples of these include institutional investors' interests in ethical investment and socially responsible investment.

The fourth ordering emphasises consumer norms. That is, consumers may become more interested in characteristics of their products other than quality and price. Such interests are reflected in movements such as fair-trade, and the anti-sweatshop movement. The fifth ordering re-examines the notion of efficiency. That is, efficiency is not simply the lowest cost inputs, or the natural outcome of markets. Rather, efficiency must include a wider array of inputs and outputs, and new ways of looking at all aspects of production, distribution and consumption. For example, where greater investment in employee welfare increases production, then such investment may well be efficient. This change can be implemented if the definition of efficiency is modified by broadening it to include a wider range of social concerns. Taking these five orderings to the economic model of the firm allows a deft re-ordering of priorities while working within that model. The article now turns to the empirical part of the study.

III EMPIRICAL INVESTIGATION

A Method

To answer the practical parts of the research questions — what managers understand as CSR, and what motivates them to engage in CSR — empirical methods are most appropriate, and in particular, case studies.⁶⁴ While case studies are of limited generalisability, a case study method is a powerful method for investigating the characteristics of real-life events.⁶⁵ Given the nature of the research — ie into social phenomena in near proximity that form part of a complex social network and social meaning, and examining the potential impact of CSR on continuity and change in corporate practice — a case study method is appropriate. Semi-structured interviews were conducted in accordance with Schein's 'iterative clinical interview' technique that involves conducting a series of joint explorations between the researcher and the interviewee.⁶⁶

The companies were selected on the basis of commitment to CSR or community, size, significant social and/or environmental impacts, accessibility and proximity. Each of the companies publicly commit to some form of CSR, community or social engagement. Each is publicly traded, and has an active secondary market for its shares. Each company has significant social and/or environmental impacts as a participant in the extractive industry or its logistics supply chain. Further, all companies responded positively to the request for research, and were in relatively close proximity, facilitating researcher access.

64 Alan Bryman, *Social Research Methods* (Oxford University Press, 4th ed, 2012) 66–73.

65 Robert K Yin, *Case Study Research: Design and Methods* (Sage Publications, 3rd ed, 2003) 13.

66 Edgar H Schein, *Organizational Culture and Leadership* (Jossey-Bass, 1997) 169.

One or more senior members of the management team of each company were made available for interviews ranging from an hour to an hour and a half long. The questions which were to form the basis of the interview were supplied prior to the interview to allow the company to send appropriately knowledgeable parties to the interviews. The interviews were conducted on-site in a semi-formal manner using open-ended questions. This format allowed probing questions to be put forward in areas of interest and to explore ambiguities. It was used to draw out the perspectives and to investigate more thoroughly the nature of thinking about and the practice of CSR within the specific business activities of the corporate enterprise. In two cases, follow up interviews were conducted and in the third company, additional information was provided electronically after the interview.

The interviews were conducted after preliminary research into the companies was done, drawn from the companies' published information. This prior research focused on the corporate structure, including interlocking shareholdings with other companies, corporate governance arrangements, and ideas about social responsibility. The interviewer, with that background knowledge, approached the interviews and discussed CSR in the context of the company's published materials and explored the understandings and practices of the particular manager in the company. The topics covered in the interviews included the following: how the company defined and established its CSR program, what its motivations were for its commitment to CSR, dedication of corporate resources to the program, the relationship between voluntary CSR and mandatory legal standards — meaning whether higher standards were preferred or intended to have legal significance — and what benchmarks were used in establishing CSR standards.

In all cases, the managers put forward were knowledgeable, open and made a clear effort to collaborate with the researchers. All research was conducted on the basis of the anonymity of the companies and managers. Anonymity is critical in this research as its purpose is not exposure of non-compliant companies or companies engaging in greenwash. Rather, it is an exploration of the depth and nature of CSR practices in companies publicly committed to CSR.

B Three Case Studies

In this section, the three case studies are discussed and examined. The discussion follows the loose structure of the interview, set out above.

1 Company A

Company A was a proprietary subsidiary of three large MNCs listed on the NYSE, the ASX and other stock exchanges. The combined market capitalisation of the parent companies is in excess of \$100 billion. Company A operates a support services business provided primarily to the parent companies and despite an apparent very modest annual turnover of \$70 million, provides critical services to the parent companies. A review of the accounts suggests that the turnover is more

a matter of transfer costs within the corporate groups than an accurate account of the potential revenues generated by Company A in a competitive market.

The parent companies of Company A are participants in the UN Global Compact, Global Reporting Initiative ('GRI') and subscribe to and advocate CSR. Although their relationship with Company A is not publicised on the parent websites (Company A being too small) or prominently on subsidiary Company A's website, the relationship is clear in company reports through the published shareholdings.

The interview with Company A revealed that the company is well aware of CSR in broad terms. It was aware of both civil society activism and the notion of social responsibility. In a technical sense, however, Company A was less clear on the nature and demands of CSR. There was no knowledge of the GRI, nor of things such as the UN Global Compact. CSR was loosely defined as good community relations.

Within this case, CSR was viewed as being a matter of occupational health and safety, undefined environmental impacts, and as to the social, a sense of a 'licence to operate'. The company felt constrained not by codes or parent company commitments, but by the community in which its operations were conducted. The officers were aware of community attention not in a negative sense of being monitored for misconduct, but in the sense of knowing that the community was aware of its conduct. They described it as the 'community watching through the fence'. Although this surveillance was a driver of its CSR activities, the main concern was its social reputation with international customers. Company A's critical role in a major international supply chain motivated it to jealously guard its international reputation. This reputation may be a 'carrot' for Company A.

The point is interesting because the company operated in a monopoly type position. Not only were its customers tied by their membership in related corporate groups, but its control of a critical point in the supply chain would suggest that it had considerably more power and hence the ability to ignore the reputational affects of poor CSR performance. Notwithstanding this powerful position, it was aware of and considered CSR an important factor in its management practices. The specifics of those practices, however, were unclear. What would the company have done differently were it not in some way committed to CSR? The answer to this question was ambiguous.

The final aspect of the interview addressed the standards by which the companies measured their CSR activity. Company A indicated that it followed industry practice internationally and nationally. Further, it indicated that its practices followed from dialogue with government authorities. This latter point is interesting because it supports the view that hard law is not the only way to influence industry, and it also gives credence to reflexive legal theory's point of a legal system being responsive to the environment. Industry in this instance appears to be both attempting to avoid further regulation by anticipating that regulation, and to be working cooperatively with government to achieve government's social and environmental regulatory objectives.

What, if anything, can be drawn from Company A's CSR in terms of the research questions? Company A's CSR, while well intentioned at the level of the individual manager, appears largely unrelated to the parent company's public commitment to the standard set out in the Global Compact and related GRI. (Indeed, one parent company has subsequently been suspended from the Global Compact for a failure to file documents.) Further, the parent company's lack of investment in educating and otherwise resourcing CSR at the level of the subsidiary allows a negative inference to be drawn. The CSR initiative in the Global Compact has not proved to be a critical development in terms of this company.

Turning to understanding compliance in private self-regulatory systems, there are two implications from the study of Company A. Analysed in terms of the CSR motivation framework, the main motivation for compliance with CSR in this corporation was the personal satisfaction managers derived from 'doing the right thing'. This internal motivation of individuals rejects the narrow economic understanding of motivation as exclusively extrinsic and incentivised by financial reward. It points to the polyvalent nature of humanity even in an environment purportedly committed to a single value referred to by Jensen as the objective function.⁶⁷

In this company, the personal ethics of the upper management drove it to commence and continue in CSR even though it lacked support from the parent company. This divergence between the local operating company and the global parent illustrates the ambiguity in, and provides support for, the contradictory greenwash and serious claims to CSR. While the parent publicises its commitment to CSR via the GRI, it shirks that commitment. Simultaneously, however, the unsupported local subsidiary is aware of and concerned because of personal managerial commitment to mitigating the social impacts of the industrial activity at the local level.

Of further interest in terms of compliance in private self-regulatory systems was the interest of the company in maintaining its international profile as a socially responsible entity. This finding provides support for institutionalist hypotheses of mimetics and the desire to belong to a club. Interestingly, the existence of codes of conduct appeared not to influence the company's behaviour or values. Despite knowing about the codes, and contrary to institutionalist hypothesis about their effect, Company A took no notice of them at least in terms of substantive content. The empirical question of whether CSR changes behaviour cannot be answered from the data provided by Company A. What is clear is that in terms of definition, Company A understands CSR to be well beyond any mere philanthropy.

Finally, given the attention to societal interests, the practices of this company's management give credence to the idea of law's expressive function. What is interesting is that it does so even in the private context. That is, private self-regulation, like public law, expresses normatively important values.

67 Michael C Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function' (2001) 14(3) *Journal of Applied Corporate Finance* 8.

2 Company B

Company B is an Australian company listed on the ASX with an annual turnover of approximately \$200 million. It is a primary resources provider in the extractive industry sector. The company is publicly committed to sustainable development,⁶⁸ a term which in many definitions includes taking account of the following five factors: occupational health and safety, internal and external communities, environment, and climate change. In the interview, the company identified CSR as consisting of its occupational health and safety commitments and philanthropy.

In the motivations for developing its CSR commitment — and one would suggest, its sustainable development program — Company B identified a wide range of external and internal drivers. Interestingly, the first motivators of its CSR were debt investors; the commercial banks.⁶⁹ As part of its effort to ensure good relationships with its bankers, Company B developed and followed CSR and sustainable development programs. Company B was also motivated by ASX's rules and Corporate Governance Guidelines which it understood to require some form of CSR. In other words, the company initiated its CSR to keep its equity investors onside and to comply with external stock exchange rules.

Company B was not unconcerned with the local community. Company B saw philanthropy as a significant part of its CSR commitment. It referred to having a 'licence to operate' and believed that it was responsible for community engagement. The belief expressed in this view is an important part of several mining companies' strategies for dealing with the rural towns in Australia.⁷⁰

In terms of direction for CSR, Company B drew its cues primarily from concerns expressed in the local environment. While it had its own ideas on social responsibility, these ideas did not constrain it in receiving and dealing with local concerns — a type of stakeholder engagement.⁷¹ In this sense, Company B's policies are reflexive. In terms of benchmarking its standards, Company B expressed a strong preference for globally recognised stable standards, and specifically referred to the GRI in that context. Interestingly, Company B, the only participant in this study that was a non-signatory to the GRI, seemed most attuned to it.

68 The term 'corporate sustainability' is used as a synonym for CSR in some corporate practice contexts. See, eg, Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar, 2010) vii.

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

70 Jackie Tuck, Julian Lowe and Pam McRae-Williams, 'Managing Community Relationships, Reputation and Sustaining Competitive Advantage: The Case of Mining Towns' (2nd Future of Australia's Country Towns Conference, Bendigo, 11–13 July 2005). In the global context, see Paul Kapelus, 'Mining, Corporate Social Responsibility and the "Community": The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi' (2002) 39 *Journal of Business Ethics* 275; Heledd Jenkins and Natalia Yakovleva, 'Corporate Social Responsibility in the Mining Industry: Exploring Trends in Social and Environmental Disclosure' (2006) 14 *Journal of Cleaner Production* 271; Natalia Yakovleva, *Corporate Social Responsibility in the Mining Industries* (Ashgate Publishing, 2005).

71 Benedict Sheehy, 'Scrooge — The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate' (2005) 14(1) *University of Miami Business Law Review* 193; R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman, 1984).

Company B offers diverse and contradictory insights into CSR. Company B, although not a member of GRI, looked to it as a benchmark. This approach supports the institutionalist view mentioned earlier — the mere existence of CSR codes may influence behaviour. Company B, while clearly locally focused, drew upon the GRI as a point of reference for benchmarking its own practices and to glean ideas on how it might go about fulfilling its mandate within the norms of the community. Yet, the lack of clarity on CSR and the corollary lack of dedicated resources to CSR may be indicative of the overall lack of clarity in the theoretical and practical discussion surrounding the nature and role of CSR in corporate practice.

Further, in terms of understanding and defining CSR, this company saw it as more than philanthropy. Indeed, its view is in line with the conception of CSR as a form of private self-regulation by its reference to an external norm system, the GRI. In this company, CSR is well understood to be more than a private internal management system. CSR was specifically linked to the external norm system of the GRI.

Further, in terms of compliance in a private self-regulatory system, this company falls loosely into the CSR motivation framework's third ordering — stockholders' values. While the debt investors are not stockholders, they are financiers of the operations and so may be considered in the same category: essentially, they see their investment risk reduced by CSR initiatives within the company. Interestingly, although the company began at this point, it took up the initiative and spread it further through the organisation's operations as if the ethic were in some way contagious. This outcome is interesting in that it provides further support for the institutionalist view that outside parties provide pressure for changes in corporate practice of CSR. As well, it taps into organisational culture and motivation — an offshoot of personal motivation discussed above. It may be that the complex psychological motivations discussed above were at work: the data did not provide further insight on that phenomenon in the company. What was clear again was that economic rationality was not driving CSR. It appears that a combination of institutionalist and organisational factors were at work. To answer the empirical question of the impact of CSR is not possible. What is evident is that aspirations to be more than a revenue-generating centre both informed and motivated management decisions at least to some degree.

3 Company C

Company C is a subsidiary of a large MNC focused on mineral exploration, mining and refining. This subsidiary company has an annual turnover of approximately \$100 million is listed on the ASX. Its parent, with a market capital also in excess of \$100 billion, is listed on the NYSE and the ASX, and has a public commitment to sustainable development. Company C started as an independent local company that was taken over in the recent past by the large MNC.

Company C views CSR as a 'long-term local community focus'. That is, as part of its interaction and relationship with the community, seeking to ensure the

wellbeing of the community over the long-term. Unlike its parent company or the other companies in this study, Company C did not see CSR as a set of categories such as labour, environment or philanthropy. Rather, it viewed it as a means of sustaining itself by sustaining the community from which it drew many of its human resources.

Although the community was the focus of Company C's CSR program, the main motivation of the CSR program was a socially responsible institutional investor that held a significant, if not controlling, block of shares. While this investor appears to have focused attention on CSR, the focus was not contrary to the ethos of the company prior to that investor's involvement. A second motivator of CSR was a concept already seen in Company B — 'licence to operate'. Interestingly, Company C saw its licence to operate as being directly related to its care of the environment, both natural and social. As a heavy industry, it has significant discharges of pollutants. Proper care of these discharges was viewed as critical to maintaining that licence and hence a priority for the company in its CSR program.

CSR for this company, however, was no more than an internal management system in that it used no external codes or benchmarks. Given its focus on environmental impacts, the internal system was managed by way of internal, self-audits. It meant that it regularly inspected its works and processes to ensure it was complying with its own standards. This company explicitly set itself to go beyond compliance with the legal and regulatory frameworks to achieve its CSR goals.

What does Company C's CSR provide in terms of the research questions? In terms of defining CSR, Company C's CSR, like Company B's, is a locally focused internal management system. It is focused on maintaining the natural environment, is not limited to mere compliance with existing law, and is certainly more than mere philanthropy. Further, more than reputation management, Company C was concerned in the actual underlying actions and their impact on local natural and social environments. This internal management system dedicated to preserving the natural environment was viewed as a condition of maintaining a licence to operate. Although Company C specified its intention to exceed legal requirements as part of its licence to operate, the lack of a national or international benchmark makes the claim less robust than it might otherwise be.

A further issue to note is that the parent company's public commitment to CSR has not been driven throughout the corporate group. Indeed, that public commitment had not been communicated to Company C, a not insignificant subsidiary, which was left to its own devices to develop and implement its own CSR program. That program, as noted, is an internal management system and was inherited from the pre-acquisition company. That earlier company was evidently closely linked to the local community, which was an important source of labour.

In terms of motivating compliance in private self-regulatory systems, again, institutionalist views are helpful. The institutional investor applied pressure and hence the institutionalist attention to pressures in the external environment exerting influence on company behaviour as in CSR is validated. Interestingly, the impetus to adopt a more-than-compliance approach to the natural and social

environment came from a shareholder. This source of motivation may lead to the suggestion that economic rationality is not the main motivating force. Rather, other social values are motivating compliance. Whether or not such is the case, or what such other values may be, however, cannot be determined as the data is not clear on this issue.

Company C's CSR system allows an interesting way to understand compliance which is consistent with Jensen's view of the objective function. That view, drawn from the CSR motivation framework is that this company has management that has changed its time horizon as well as its notions of efficiency. Rather than focusing exclusively on the short-term profits and as a consequence ignoring the long-term impacts of its operations, this management team engaged in some longer-term planning. Further, it took the notion of efficiency to include employee, community and environmental support. Perhaps motivation to comply with this internal management system of CSR had been construed as consistent with the profit motive and efficiency. Again, the data is inconclusive on this issue.

Evidence from other studies suggests that where companies do attend to longer-term planning and include employee, community and environment into that decision-making, they have better employee retention and satisfaction rates. While such by-products of effective CSR programs may be attractive, it would seem that they best remain in that position — as by-products rather than goals. Again, CSR, despite being no more than an internal management system for Company C, still demonstrates law's expressive function, as expressing the norms of more-than-compliance. It expresses the idea that law's basic requirements are not the sum total of a company's obligations to the society in which it operates.

C Discussion

The interviews provide rich insight into CSR. First, in terms of definitions and norms, it is clear that none of the participants saw CSR as merely corporate philanthropy. CSR in practice, they said, is not simply giving a few hundred dollars to charity. Rather it was understood to be a serious effort to behave ethically as a corporate citizen in the community. This understanding was expressed colloquially as the desire to 'do the right thing'. This broader view of the corporation's role and obligations in society suggest that there is a more substantial normative core to CSR than some scholars and lobbyists would advocate. That core includes the community 'over the fence' — albeit still a poorly defined community and weakly defined normative core.⁷²

Secondly, the study provided insight into important aspects of how one might make CSR more effective. In particular, it is evident that while senior managers may well be aware of and concerned about CSR, they have a poor understanding of what it is. They do not have a clear understanding of social costs as a

72 Benedict Sheehy and Donald P Feaver, 'CSR as Regulation' (Working Paper, SSRN, 5 October 2012); Sheehy, 'Defining CSR', above n 2.

phenomenon.⁷³ They do not conceptualise the activities of the organisations for which they are responsible as part of a larger problem impacting the wellbeing of human society. As such, they have difficulty locating the impacts of the productive activities of their business organisations on society.⁷⁴ This difficulty is evident in the lack of clear conceptions of CSR that they had, for CSR is not about the corporation per se, but about the social impact in the first instance. The corporation pre-existed CSR by several hundred years.⁷⁵ Accordingly, the issue is not the corporation but being able to identify and understand its social costs. Without a clear understanding of social costs and hence the need for CSR, management will struggle to understand either the call for, or the appropriate response, in terms of CSR.⁷⁶

Thirdly, the interviews also provide unique insight into motivations. Interestingly, from a regulatory perspective, the motivations for uptake and compliance with CSR have much more to do with individuals' intrinsic ethical motivation than either compliance with internal organisational directives or economic incentives. This finding implies that thinking about motivating compliance in private self-regulatory systems is still mired in the public model — carrots, sticks and sermons. While the shift from public to private in terms of norms and rules generation has occurred, thinking about motivating compliance in private self-regulatory systems, has not kept pace. The thinking in private self-regulatory systems is still focused on out-dated and narrow legal and economic forms of motivation, namely, punishment and incentive.

As these interviews make clear, even in a commercial context ostensibly driven by pure profit or motivated by incentive, high-level managers are making decisions and acting upon non-economic motivators.⁷⁷ The evidence from these case studies suggests that tapping into these intrinsic motivators may be a rich source of power for the purpose of generating compliance in private self-regulatory systems with social objects, even in a commercial context. Further, it leads to the suggestion that more training in CSR and ethical decision-making would be of benefit to managers; not only helping them to identify and understand their motivations, but also providing frameworks for ethical decision-making. Being provided with such education will help managers think more critically and to articulate their thinking and rationale for decisions where CSR issues are particularly important.

Fourthly, the study suggests that socially responsible practices in business organisations will be more effective where they are connected to external standards and external scrutiny. By having external standards, managers can be clear that they are not only participating in a local management inspired exercise,

73 Benedict Sheehy, 'Corporations and Social Costs: The Wal-Mart Case Study' (2004) 24 *Journal of Law & Commerce* 1.

74 Benedict Sheehy, 'CSR and Law as Competing Regulation: A Systems Approach' (Working Paper, SSRN, 4 October 2012).

75 Sheehy, 'Conflicts between CSR, Corporate Law and the Problems of Social Costs', above n 37.

76 Sheehy, 'Corporations and Social Costs', above n 73.

77 Benedict Sheehy, 'The Frightening Inadequacy of Economics as a Worldview' (2006) 17(4) *Journal of Interdisciplinary Economics* 445.

but connecting to an important social and internationally recognised goals. Further, it is clear that those external standards that can allow some exertion of peer pressure — local external scrutiny ‘over the fence’ viewing, a view in line with Ayres and Braithwaite’s public interest group,⁷⁸ and a critical issue compromising the potential of the Responsible Care program⁷⁹ — offer a greater chance of success. As the managers indicated, they responded to a sense of being watched by the local community. Where the industrial operations are hidden away behind a high barrier or fence, well away from the view of passers-by, managers will feel less subject to scrutiny and so may not find themselves as motivated to address social concerns.⁸⁰ It provides support for stakeholder involvement in business organisations.⁸¹

Fifthly, there are significant personnel suggestions that arise from this study. Given that the managers engage in CSR in ways they saw fit in their particular corporate circumstances, a matter which coalesces with the common rationale for private self-regulation in the first instance (potential to mould CSR to particular circumstances), there is good reason to provide managers with discretion in how CSR might be implemented in particular contexts. The local level at which the managers operated allowed them to see and develop appropriate responses to the local social issues they were able to identify. Thus, being clearly informed as to the nature of CSR including why it is important, and being given adequate discretion to develop responses, leads to the suggestion that managers will develop CSR programmes suited to their local contexts. It allows managers to move beyond a compliance approach to CSR and to pursue CSR aspirationally.⁸²

This leads to the final implication that may be drawn from this study. Intelligent motivation of managers needs to take account of the personal commitment to, and satisfaction derived from, engaging in CSR practices. Accordingly, an opportunity for personal recognition — but specifically excluding economic incentives which drive out intrinsic motivation⁸³ — for those involved in social responsibility activities will promote more effective CSR including helping to spread it throughout a corporate enterprise.

Thus, although this study reveals both the potential, and to some degree the failure, of CSR, it is clear that there remains an immense potential for CSR initiatives such as the Global Compact’s GRI to change corporate practice. Leaving governments to design and enforce regulation to address the social impacts of industrial organisation is no longer viable given the size of the MNCs and the stresses on government. Yet, industry’s private self-regulatory systems have their own limitations and risks. To some extent, these limitations and risks

78 Ayres and Braithwaite, above n 12.

79 Gunningham, above n 13.

80 Dima Jamali, ‘MNCs and International Accountability Standards through an Institutional Lens: Evidence of Symbolic Conformity or Decoupling’ (2010) 95(4) *Journal of Business Ethics* 617, 630–3.

81 Sheehy, ‘Scrooge — The Reluctant Stakeholder’, above n 71; Freeman, above n 71.

82 Horrigan, above n 68, 7–8.

83 André H J Nijhof and Ronald J M Jeurissen, ‘The Glass Ceiling of Corporate Social Responsibility: Consequences of a Business Case Approach towards CSR’ (2010) 30 *International Journal of Sociology and Social Policy* 618, 626–7.

may be overcome by injecting aspects of public regulation into CSR, as do the GRI and other initiatives by such things as collaborative standard setting, community scrutiny and other representations of public interest at specific points of the systems.

IV CONCLUSION

If CSR is failing to deliver all it has promised, should it be abandoned altogether? Commenting on a successful intervention in an urban renewal project in Sydney which relied on real estate developers purporting CSR, the CEO of the Environmental Defender's Office observed: 'The retreat of legal regimes leaves CSR as the only option for positive environmental outcomes. Innovative law approaches outside of environmental law can be used to hold to account those practising or purporting to practise CSR.'⁸⁴ This statement indicates that encouraging business organisations to adopt CSR, and tapping into those normative commitments — 'law's expressive function', provides power to motivate compliance in areas otherwise outside the jurisdiction of public law.

These private self-regulatory options not only serve business interests narrowly defined in economic terms, but also provide managers with opportunities to advocate for socially responsible decisions, as well as providing an avenue for parties external to the corporation to contribute to corporate decision-making. The adoption of CSR codes allows private parties some leverage in getting their legitimate social concerns taken into account when corporate decisions are being made. This ability may have significant international law implications. As financial interests have been able to entrench some aspects of *lex mercatoria* into the fabric of public international law, it may be that CSR may equally provide a foundation for a similar public international law outcome. This is particularly important at the international level, as MNCs are seldom if ever wholly under the control of national governments.⁸⁵ Were CSR to become entrenched in public international law, it may provide an opportunity for constraining the more harmful practices of MNCs and supporting and enhancing the benefits they are able to provide using the public resource of public international law.

Clearly, new means and methods need to be developed to improve the uptake of CSR, and new ways of strengthening and increasing its effects need to be found. Accordingly, a research agenda is called for in which the implications of the current study are expanded and tested more broadly and in the international context. MNCs are too entrenched in economic, government and production-distribution, and hence global welfare, to close down, yet their social costs, as

84 Jeff Smith, 'Contemporary Environmental Law Issues & CSR' (Paper presented at 'The Doctor as GOD, the Corporation as QUEEN, What About the Country?': 64th Australasian Law Teachers Association Conference, University of Western Sydney, 5–8 July 2009).

85 Janet Dine, *The Governance of Corporate Groups* (Cambridge University Press, 2000) 151–75; Régis Bismuth, 'Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing between International and Domestic Legal Orders' (2010) 38(2) *Denver Journal of International Law and Policy* 203.

they currently operate, are too high. This situation makes it imperative that CSR be developed to the point it can be implemented, allowing these corporations the opportunity to contribute the necessary and desirable positive externalities while minimising and mitigating their negative externalities. Among other things, this research will require a better understanding of the critical infrastructure in terms of definitions, education, dissemination and resources necessary to allow CSR to realise its potential as an effective private self-regulatory initiative.