COMPANY LAW MODERNISATION AND CORPORATE GOVERNANCE IN THE UK— SOME RECENT ISSUES AND DEBATES

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Many elements of British company law are deeply embedded in nineteenth-century assumptions. Change has come very slowly when efforts have been made to modernise company law in the United Kingdom. The passage of the Companies Act 2006 *was a significant advance after a lengthy period of debate and consultation, but the outcome is far from perfect. This legislation has, however, introduced some important new concepts into this body of British law. The Act sought to simplify company law and to start with a small firm focus as these comprise the vast majority of companies. For the first time, the Act also codified the duties of directors and introduced the concept of 'enlightened shareholder value', to give greater attention to stakeholders other than shareholders and to encourage companies to adopt more long-term perspectives. This paper explores some of these important changes.*

I INTRODUCTION

The modernisation of company law and corporate governance principles has been a concern of reformers around the world for some years.[1] In recent times, there has been increased activity in this regard in the UK and Europe and there is much to be learnt from a study of comparative company law and corporate governance in jurisdictions where major reforms have been under way. In addition to its internally generated reform efforts, the UK has been increasingly affected by European law reforms as a result of its membership of the EU—mainly in the form of compliance with EU Company Law Directives[2] that have been implemented into UK law, as well as by other EU policies relating to companies, such as the EU Insolvency Regulation which deals with cross-border insolvencies in Europe[3] and

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1 For a general discussion of the topic of modernisation of corporate law, see: R Tomasic, 'The Modernization of Corporations Law: Corporate Law Reform in Australia and Beyond' (2006) 19(1) *Australian Journal of Corporate Law*, 2–34, Social Science Research Network <http://ssrn.com/abstract=1433326>.

2 For a list of these Directives see: European Commission, 'The EU Single Market—Directives and other official acts' <http://ec.europa.eu/internal_market/company/official/index_en.htm >.

3 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:EN:NOT>.

EU corporate governance debates.[4] This paper will look at some reform efforts reflected in recent UK companies legislation and discuss developments in UK corporate governance principles.

This paper is organised into six parts; section 2 discusses some of the principles that guided the making of the new *Companies Act*; section 3 examines the forces instrumental in shaping company laws and corporate governance rules in the UK, with a particular focus on judicial restraint and the power of industry groups; section 4 examines the degree to which the global financial crisis forced a rethink of largely self-regulatory strategies relating to corporate governance and market regulation; section 5 looks briefly at the movement to bring about greater disclosure of executive remuneration in UK companies, while section 6 examines the emergence of stakeholder ideas and their expression within the *Companies Act 2006*. Section 7 concludes the paper.

II The Journey to the Enactment of the *Companies Act 2006*

A new Company Law was enacted in the UK in 2006. When introducing the UK Government's March 1998 Consultation Paper, *Modern Company Law for a Competitive Economy,* at the start of the company law review, Minister Margaret Beckett observed that she wanted 'the review to play an important part in modernising the nation and ensuring that our economy is well placed for the challenges which lie ahead.' This 1998 Consultation Paper went on to emphasise that the Review was concerned with 'the modernisation of core company law'. It was also noted that:

> Many of the key features of our current arrangements were put in place in the middle of the last century; and although there have been numerous changes and additions through the years, it is nearly 40 years since the last broad review of company law. The current framework has as a result become seriously out-dated in key respects, not least as the economy has become more globalised.[5]

In the Company Law Review's 1999 *Strategic Framework* paper it was emphasised that UK company law needed to have greater regard for the problems of small business. It was noted in this 1999 paper that this problem should be addressed as:

> Company law… makes little attempt to respond to the peculiar needs of small firms, either in accessibility and simplicity of operation or in substantive provision. The start up and development of such businesses is a particularly important process for which the law should provide an optimal climate.[6]

4 Two Green Papers on aspects of EU corporate governance have been published recently: European Commission*, Green Paper—Corporate governance in financial institutions and remuneration policies***, (**Brussels, 2010) 284. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0284:FIN:EN:PDF>; and European Commission, *Green Paper—The EU corporate governance framework,* (Brussels, 5 April 2011) <http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf>.

5 Department for Business Innovation & Skills UK, *Modern Company Law for a Competitive Economy* (March 1998) [1.1] [6.1] <http://www.bis.gov.uk/files/file23283.pdf>.

6 Company Law Review Steering Group, Department of Trade and Industry, *Modern Company Law for a Competitive Economy: The Strategic Framework* (1999) [2.19]<http://www.berr.gov.uk/files/file23279.pdf>.

A basic principle that was therefore to be reflected by the UK company law reforms was the 'think small first' principle. This was intended to rebalance company law having regard to the large number of small- to medium-sized companies affected by this law.

The eventual enactment of the UK *Companies Act 2006* has been a major development in Britain's company law history. Not only was it said to be the largest single piece of legislation enacted in the UK but the UK Companies House noted that: '[t]he Act received Royal Assent on 8th November 2006 and consists of 1300 sections and is the single largest piece of legislation ever made.'[7]

The 2006 Act also adopted some other important new principles seeking to simplify company law and to reduce the burden of regulation, especially on smaller companies, which will continue to echo within UK company law as well as in the Commonwealth jurisdictions which tend to look to the UK for reform ideas.[8] Whether the law will have a significant effect on the related area of corporate governance (that has been largely regulated through private codes of conduct) is yet to be seen as there has been a resistance to legislation and governmental regulation in regard to matters of corporate governance in the UK.

Although some of the reforms introduced by the *Companies Act 2006* have long been a part of Australian legislation, they have, for a variety of reasons, been slow to gain a statutory foothold in the UK. One of these new ideas has been a statutory statement of directors' duties introduced into the UK by the *Companies Act 2006*, although similar legislation had existed in Australia for almost half a century.[9]

This was a legislative restatement of well-established common law ideas, but it also sought to break new ground; interestingly these innovations were expressed in terms of promoting enlightened shareholder value in the decision-making of directors.[10] A 2005

7 See <http://www.registermybusiness.co.uk/business/companies-act.html>.

8 Malaysia has, for example, recently moved to revise its companies legislation along lines similar to those in the new UK legislation. See Joshi A, 'An Insight to Corporate Law Reform in Malaysia' <http://www.ssm.com.my/clrc/article_1.html>. Hong Kong has also been moving slowly in a similar direction: Hong Kong Standing Committee on Company Law Reform, 'Twenty-Sixth Annual Report' (2009/2010) <http://www.cr.gov.hk/en/standing/docs/26anrep-e.pdf>. See Companies Registry, The Government of the Hong Kong Special Administrative Region, 'Companies Bill' <http://www.cr.gov.hk/en/companiesbill/companiesbill.htm>.

9 *Victorian Companies Act 1958*, s 107 contains a list of directors' duties: provision is made for directors 'to act honestly and use reasonable diligence' in the discharge of their duties. The section also prohibits directors from misusing information to gain improper advantage or to cause detriment to the company; at the same time, other common law and statutory duties were also preserved. *Tasmanian Companies Act 1959* contained a similar provision to that in Victoria and similar provisions then made their way into the *Australian Uniform Companies Act 1961*. The *Corporations Act 2001* (Cth) draws upon these prior legislative provision and reflects these earlier statutory provisions in s 180 and ss 183–185.

10 Company Law Review Steering Group, Department of Trade and Industry, 'Modern Company Law for a Competitive Economy: The Strategic Framework' (1999) 37 <http://www.berr.gov.uk/files/file23279.pdf>; A R Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach"', (2007) 29 *Sydney Law Review* 577; A R Keay, 'The Duty to Promote the Success of the Company: Is it Fit for Purpose?' (August 20, 2010) University of Leeds School of Law, *Centre for Business Law and Practice Working Paper* <http://ssrn.com/abstract=1662411>; Arden LJ, '*Companies Act 2006*: A new approach to directors' duties' (2007) 81 *Australian Law Journal* 162; Arden LJ, 'Regulating the Conduct of Directors' (2010) 10 (1) *Journal of Corporate Law Studies* 1–15.

White Paper summarised the UK Government's reform objectives in this area when it noted that the Government wanted company: '… decisions to be made based on the longer-term view and not just immediate return.' This was to be done by:

> [Embedding] in statute the concept of Enlightened Shareholder Value by making clear that directors must promote the success of the company for the benefit of its shareholders, and this can only be achieved by taking due account of both the long-term and short-term, and wider factors such as employees, effects on the environment, suppliers and customers.[11]

The UK Government explained the need for a statutory statement of directors' duties when introducing its legislative reforms in a 2005 White Paper as follows:

> The general duties which directors owe to the company are at the moment found in case law—i.e., decisions in individual court cases over the years—rather than in the *Companies Act*. As a result, those who become company directors may do so without understanding their obligations under the law. Those obligations may also not be understood by the members of the companies, in whose interests the directors should be acting. Both the CLR and the Law Commission believed that there was a need to make the law in this area more consistent, certain, accessible and comprehensible, and recommended that there should be a statutory statement of directors' general duties. The Government agrees that directors' duties are fundamental to company law, and that it is very important that the duties are widely known and understood. The Bill will therefore introduce a statutory statement of directors' general duties.[12]

While these arguments may not seem novel in the Australian context, they were clearly significant in the UK. The 2006 UK legislation was clearly the product of a major reform effort spanning the previous decade and reflecting a growing disenchantment with non-legislative approaches to company regulation.[13] The UK Government saw UK company law as being increasingly archaic and in need of modernisation. This was in part due to the fact that UK courts had failed to develop basic company law principles, such as the updating of the duties of directors in line with changes in business practices.[14] Also, the *laissez faire* approach that had dominated UK markets since the mid-1850s had led to a minimal involvement of government in developing systematic new corporate law rules of the kind that had emerged in other modern legal systems.

This had created a fertile ground for calls for major reform in this area, especially where there had been calls for a movement beyond mere self regulation and traditional command and control models to more nuanced systems of corporate regulation. The old dichotomy between self-regulation and government regulation had not been helpful in developing more effective systems of corporate regulation as legal scholars have been

11 UK Department of Trade and Industry, *Company Law Reform*, White Paper (London, March 2005) 5.

12 Ibid [3.3].

13 Arden, LJ, 'Modernising Directors' Duties and Shareholders' Rights—the recent UK experience'(15 December 2009) Kuala Lumpur luncheon talk <http://agc-blog.agc.gov.my/?p=107>. Lady Justice Arden was a member of the Steering Group of the Company Law Review established by the UK Department of Trade and Industry from 1998 to 2001.

14 R A Tomasic 'Raising Corporate Governance Standards in Response to Corporate Rescue and Insolvency', (2009) 2(1) *Corporate Rescue & Insolvency* 5–9; also available at: <http://ssrn.com/abstract=1418996>.

advocating for some time.[15] For example, it was clear that there was room for a more integrated system of company regulation that combined industry self regulation, internal corporate compliance programs and external regulatory monitoring and control.

III WHO MAKES UK COMPANY LAWS?

It is clear that in similar countries different forces may have a powerful influence over the shape of their respective bodies of business law.[16] UK company law is a mixture of formal and informal rules which have evolved over many years. Many basic company law principles were developed in famous nineteenth century (and earlier) court cases. UK judges had generally favoured judicial self-restraint and have been reluctant to fashion broader company law principles—such as those regarding the duties of directors—or to take judicial notice of broader trends in business, preferring to wait for Parliament to legislate about wider corporate law problems.

For example, in *Re City Equitable Fire Insurance Co*,[17] Romer J adopted this somewhat timid judicial approach in articulating some basic company law principles; his Honour followed Lord McNaughten in *Dovey v Cory*[18] where it had been stated that it was for Parliament and not for the courts to lay down detailed rules for the conduct of directors in their business affairs.[19] As a result of this approach, the 1925 decision in *Re City Equitab*le simply restated nineteenth-century legal principles regarding the duties of directors and these largely remained in place until the 2006 legislation. As Professor Andrew Keay has noted, '[f]or the best part of 65 years the law did not move on in any major way. The exposition of Romer J in *Re City Equitable* was regarded as explaining and laying down the law.'[20] This largely subjective approach was modified by the legislature by the enactment of the wrongful trading provisions in s 214 of the *Insolvency Act 1986*; this provision introduced an objective standard of care in relation to directors of companies that had gone into insolvent liquidation. Thus s 214(4) stated that in regard to this section that:

15 D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2009); I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1995); J Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008).

16 J Armour and D A Skeel, 'Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation' (2007) 95 *Georgetown Law Journal* 1727; also available at: <http://ssrn.com/abstract=928928>.

17 [1925] Ch 407.

18 [1901] AC 477.

19 For a further discussion of this theme, R Tomasic, 'Beyond "Light Touch" Regulation of British Banks after the Financial Crisis' 111–130 in I G MacNeil and J O'Brien (eds), *The Future of Financial Regulation* (Richard Hart, 2010); also available at: <http://ssrn.com/abstract=1561617>.

20 A R Keay, *Directors' Duties* (Jordans, 2009) 182. A R Keay also notes (183) that a leading legal text of the early 1990s had noted that the common law was lamentably out of date by the late 1980s. See J Farrar *et al*, *Farrar's Company Law*, (Butterworths, 3rd edition, 1991) 396.

> …the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken , by a reasonably diligent person having both—
> (a) The general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by the director in relation to the company; and
> (b) The general knowledge, skill and experience that that director has.

In the context of s 214, UK courts began to recognise that they should not be as aloof as Lord Justice Romer had suggested.[21] Having said this, they have not gone on to adopt an 'overly harsh' approach to directors and some commentators have suggested that they have actually 'been quite lenient'.[22] Somewhat boldly, in a number of insolvency cases under s 214, Hoffman J took the view that s 214 now reflected the common law duty-of-care for directors, although no authority was cited in support of this assertion.[23] In a series of cases under the *UK Companies Directors Disqualification Act 1986*, the courts had also begun to expect a higher standard of directors and rejected arguments that they could escape liability as they had delegated responsibilities to subordinates.[24]

Keay has concluded that at the very least the 'UK case law of the late 1980s and early 1990s saw a change in the approach of the courts rather than an essential change in the law. The courts merely applied the law in cases, such as *Re City Equitable Fire Insurance*, in a modern context.'[25] The 2006 Company Law reforms have now clarified any uncertainty that remained by enacting s 174 which clearly imposed a more objective duty-of-care for directors generally; the language of s 174 of the *Companies Act* was heavily influenced by the wording of the wrongful trading provision in s 214(4) of the *Insolvency Act*, but applied it beyond the insolvency context. This finally over-turned the narrower approach found in the older authorities dealing with the directors duties-of-care, skill and diligence. Directors' actions will now be assessed against the standard of a 'reasonably diligent person'.

The restrained judicial approach to directors duties has been widely followed in the UK and contrasts markedly with the more activist approach found in many leading Australian corporate law cases where the courts have been influenced by foreign case law and by developments in business administration, such as the rise of stakeholder theory. This was well-illustrated in the New South Wales decision in *Daniels v Anderson*[26] where the court adopted more robust American ideas in regard to the duties of directors. Prior to the enactment of the *Companies Act 2006*, some British commentators have pointed to the

21 Foster J in *Dorchester Finance Co Ltd v Stebbing* [1989] BCLC 498.

22 A R Keay, above n 20, 188.

23 *Norman v Theodore Goddard* ([1992] BCC 14 and Re D'Jan of London [1983] BCC 646.

24 Re Barings plc (No 5) [1999] 1 BCLC 1; and *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263; *Lexi Holdings plc (in admin) v Luqman* [2008] WLR (D) 1.

25 A R Keay, above n 20, 185.

26 (1995) 37 NSWLR 438; (1995) 13 ACLC 614; (1995) 16 ACSR 607. See generally: G Flint, 'Non-Executive Directors' General Law Duty of Care and Delegation of Duty: But do we need a Common Law Duty of Care?' (1997) 9(2) *Bond Law Review* 198.

wider legal duties of directors of UK companies, but this was not generally reflected in UK law.[27] There was however a recognition that there was a duty to creditors in situations in which companies were in financial difficulties or nearing insolvency—the 1986 New South Wales Supreme Court decision in *Kinsela v Russell Kinsela Pty Ltd*[28] has been influential here and was approved in 1988 by the Court of Appeal in *West Mercia Safetywear Ltd v Dodd*.[29] This body of law which seeks to protect the interests of creditors is now alluded to in s 172(3) of the *Companies Act* and is seen as a consideration that may have priority over other interests in some circumstances.

The pattern of judicial self restraint in UK company law cases has been sustained by the lack of a robust tradition of corporate litigation (of the kind that exists in the United States and in Australia) which might have seen this pattern of judicial restraint challenged. UK Chancery judges have often tended to see directors as somewhat akin to trustees and therefore as persons who could be relied upon to manage companies without too much judicial scrutiny. This contrasts to the more challenging culture of other UK superior courts which broadened the boundaries of various areas of law, such as the laws of negligence and human rights principles in public law. This was well-illustrated when a recent shareholder action by disgruntled former Northern Rock plc shareholders had to rely principally upon human rights principles to challenge actions taken by a government-appointed valuer after the collapse of the company.[30] One might have expected that shareholders could have found a cause of action by drawing upon company law or commercial law principles, but the relevant principles did not prove adequate to support their claims. Matters were made more difficult by public policy concerns that bank failures might destabilise wider markets.

Not surprisingly, private-sector initiated inquiries had dominated thinking about key features of corporate governance in the lead up to the passage of the *Companies Act 2006*. These inquiries were generally narrowly focussed on one or two areas and failed to adopt a broad approach to the regulation of companies. Such inquiries were often undertaken after a financial or corporate crisis, usually to undercut calls for governmental intervention. Most noteworthy was the report of the Cadbury Committee (1992) focussing on the financial aspects of corporate governance which informed UK and international approaches to corporate governance for the next two decades. The Cadbury report was followed by the 1995 Greenbury Report into directors' remuneration (an initiative of the Confederation of British Industry) and subsequently, the 1998 Hampel Report reviewed the implementation of Cadbury and Greenbury committee reports (having been sponsored by the London Stock Exchange). In 1999, the Institute of Chartered Accountants completed the Turnbull Report

27 L Sealy, 'Directors' 'Wider' Responsibilities—Problems Conceptual, Practical and Procedural' (1987) 13 *Monash University Law Review* 164, at 165–166.

28 [1986] 4 NSWLR 722.

29 [1988] BCLC 250 (CA).

30 See further R A Tomasic, 'Shareholder Litigation and the Financial Crisis—The Northern Rock Shareholder Appeal' (October 2009) *Company Law Newsletter* 262, 1–5; also available at: <http://ssrn.com/abstract=1636430>.

into internal controls in companies; this report was also sponsored by the London Stock Exchange.

Private-sector organisations therefore played key roles in steering the renewal of UK corporate law and regulation, albeit with a strong bias against government involvement. This seems to have reflected prevailing Thatcherite and Friedmanite ideas of the period which fostered the limited role of government in markets, except in situations of fraud.[31] Private-sector-initiated inquiries and self-regulatory codes often emerged in response to government threats that it might legislate if industry did not set its house in order through more effective private regulation. This was an effective way of limiting government involvement in markets, but it did not produce broadly based solutions.

As the need for comprehensive reforms became apparent, governments inevitably become more active in commissioning inquiries and reports into company law matters, especially from around the early 2000s. Interestingly, these inquiries continued to be led by senior industry figures who were appointed by government agencies to convene them. For example, in 2001 Lord Myners (the former chairman of Marks & Spencer), submitted a report on institutional investors to HM Treasury. In 2003 the Higgs Report into the role of non-executive directors and audit committees report was commissioned by the UK Government,[32] and in 2003 the Smith Report was also submitted to the UK Government after the failures of Arthur Anderson and of Enron.[33]

After the global financial crisis and the collapse of Lehman Brothers in 2008, this process accelerated, even if some of those commissioned to undertake enquiries by government departments were keen to avoid the use of legislation in response to company failures. For example, Sir David Walker (the former chairman of Morgan Stanley International), in his November 2009 review of the duties of directors of banks and financial institutions, strongly urged the adoption of non-legislative responses to the failure of directors and institutional shareholders to maintain robust corporate governance standards; these solutions included resorting to the 'comply or explain' approach that had been used by companies in reporting on their corporate governance practices.[34] Walker observed that:

> The implicit preference embedded in the current UK corporate governance model is to focus principal attention on key matters such as the qualities of directors, the functioning of boards and appropriate incentive structures, with primary legislation and black-letter regulation reserved for a limited array of prescriptive rules related to explicit obligations relating to disclosure and fiduciary duties.[35]

31 M Friedman, *Capitalism and Freedom* (University of Chicago Press, 2002).

32 Sir Derek Higgs had been the former chairman of the UK banking group, Alliance & Leicester.

33 Sir R Smith (chair), Financial Reporting Council Audit Committees, 'Combined Code Guidance' (London, January 2003) <http://www.ecgi.org/codes/documents/ac_report.pdf>.

34 Sir David Walker, *A review of corporate governance in UK banks and other financial industry entities—final recommendations* (London, 26 November 2009) <http://www.hm-treasury.gov.uk/walker_review_information.htm>.

35 Ibid [1.17].

Walker added that much could be done to reform the UK's corporate governance framework:

> …without need for new primary legislation; and that new statutory provision through amendment of CA 2006 would be unlikely to contribute positively to such improvements and could impede them through promoting compliance with specific rules rather than strengthening an overall culture of good governance.[36]

Indeed, Walker concluded that 'there would be no advantage and considerable potentially serious negative consequences from any broadening in the statutory specification of the responsibilities of directors.'[37] Instead, such matters were seen to be better dealt with through what is now known as the *UK Corporate Governance Code*.[38] Moreover, Walker suggested that more of the same kind of approach was required in the form of the new *Stewardship Code*[39] which was published in July 2010. This Code was intended to deal with the failure of institutional investors to take a more active approach to engaging with the management and boards of companies that they were involved with.[40]

It is interesting to contrast the above conclusions with those reached by the European Commission in 2010 regarding corporate governance in European financial institutions during the recent financial crisis. A 2010 European Commission Green Paper stated:

> The general consensus is that the existing principles of corporate governance, namely the OECD principles, the recommendations of the Basel Committee, and Community legislation already cover to a certain extent the problems highlighted by the financial crisis. In spite of this, the financial crisis revealed the lack of genuine effectiveness of corporate governance principles in the financial services sector, particularly with regard to banks.

The European Commission went on to note that various theories had been advanced to explain this apparent failure of corporate governance. Thus, it noted that it had been argued that:

> [T]he existing principles are too broad in scope and are not sufficiently precise. As a result, they gave financial institutions too much scope for interpretation….[and that there was a…] lack of a clear allocation of roles and responsibilities with regard to implementing the principles, within both the financial institution and the supervisory authority.

The Commission also pointed to the problem of the 'non-binding nature of corporate enterprise principles' and added that:

36 Ibid [2.23].

37 Ibid [138].

38 Financial Reporting Council, 'UK Corporate Governance Code' (London, June 2010) <http://www.frc.org.uk/documents/pagemanager/Corporate_Governance/UK%20Corp%20Gov%20Code%20June%202010.pdf >.

39 See <http://www.frc.org.uk/corporate/investorgovernance.cfm>.

40 This Stewardship Code has now been proclaimed, despite some academic commentary on its limitations; see B R Cheffins, 'The Stewardship Code's Achilles Heel', (2010) 73(6) *Modern Law Review* 985, and A Reisberg, 'The Notion of Stewardship from a Company Law Perspective: Re-defined and Re-assessed in Light of the Recent Financial Crisis?' (2011) *18 Journal of Financial Crime*, 126–146.

> [T]he fact that there was no legal obligation to comply with recommendations by international organisations or the provisions of a corporate governance code, the problem of the neglect of corporate governance by supervisory authorities, the weakness of relevant checks, and the absence of deterrent penalties all contributed to the lack of effective implementation by financial institutions of corporate governance principles.[41]

The opposition by many leading UK business leaders to direct government involvement in regulating markets through legislation is very much a continuation of an older approach that had not been successful in preventing or even moderating the market excesses and failures identified after the recent financial crisis.[42] This approach may have been appropriate in the old City of London before the deregulation of financial markets in the mid-1980s, but it became less relevant in the highly globalized and financialised world in which banks and other large corporations based in the UK now found themselves.[43]

In more recent times, as a result of the UK's membership of the EU, outside forces, such as the European Commission in Brussels have also begun to have greater influence over the shape of UK business laws.[44] As a result of this EU influence, the UK Takeovers Panel has, for example, been given a more formal legislative status (by its recognition in Part 28 of the *Companies Act 2006*), although its rules are still largely private in nature. However, the EU Takeover Directive is modelled upon the UK approach and as such has not led to significant changes to the approach to takeovers in the UK. More significant change may have been internally driven, such as from the public concern about the weak takeover defence mounted by the target company during the 2010 acquisition by the US company, Kraft Foods, of the UK confectionary company, Cadbury plc, which has led to a limited review of UK takeover practices by the Takeover Panel.[45]

Similarly, the *UK Corporate Governance Code* is also closely linked to industry as a product of the independent Financial Reporting Council and the Code is itself enforced by stock exchange listing requirements. Corporate regulation has tended to be 'light touch' and principles-based; this approach has been celebrated in the UK even after the collapse of Enron in the United States (which saw only a small modification of corporate regulatory strategies) although the light-touch approach was to fall out of favour after the collapse of Northern Rock plc in 2007.

41 European Commission*, Green Paper: Corporate governance in financial institutions and remuneration policies*, **(**Brussels, 2 June 2010); COM (2010) 284 final [3.2] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0284:FIN:EN:PDF>.

42 R McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate, 2009).

43 P Augur, *The Death of Gentlemanly Capitalism* (Penguin, 2001); P Augur, *The Greed Merchants: How the Investment Banks Played the Free Market Game* (Penguin, 2006); P Augur, *Reckless: The Rise and Fall of the City* (Vintage, 2010). In regard to the effects of globalization: T Porter, *Globalization and Finance* (Polity Press, 2004); G A Epstein, *Financialization and the World Economy* (Edward Elgar, 2006).

44 M Andenas and F Woolridge, *European Comparative Company Law* (Cambridge University Press, 2009).

45 R Wachman, 'UK watchdog tries to ward off foreign takeovers' (21 October 2010) *The Guardian* <http://www.guardian.co.uk/business/2010/oct/21/takeover-rules-reform-proposals>.

The dominance of private sector business groups in the UK has meant that successive governments were reluctant to legislate in regard to the control of companies and accepted that self-regulatory and market-based solutions were more likely to be effective ways of restraining corporate abuses. But successive market failures and corporate collapses have led to calls for a modernisation of largely nineteenth-century laws and for more effective government business regulation. These failures included the Guinness share trading scandal of the 1980s, the collapse of Polly Peck in 1990, the death of Robert Maxwell in 1991 in the wake of the massive indebtedness of Maxwell companies, and the failure of Barings in 1995. The liquidation of the Bank of Credit and Commerce International (BCCI) in 1991 was followed by Lord Justice Bingham's inquiry in 1992 into this collapse. The failure of Enron and the more recent market failures in the UK and the US, such as the rescue of Northern Rock plc and the collapse of Lehman Brothers, have accelerated the pace of legislative intervention in markets.

Although the 2006 UK companies legislation has not gone so far as to introduce a statutory business-judgment rule, it has introduced some other notable changes—a primary focus was placed upon the needs of smaller companies and also saw a concern for greater shareholder engagement and the avoidance of short-termism in companies. In some respects, the *Companies Act 2006* went further than similar reforms in Australia, such as s 172 which has moved the UK towards the inclusion of some modest stakeholder principles within its body of company law.[46] This reform will be briefly discussed below, but it is worth noting here that it was directed towards the adoption of more long-term perspectives in the governance of UK companies.

A concern about the effects of short-termism on the part of UK companies came to a head during the recent global financial crisis.[47] This was manifested in a number of ways, ranging from the adoption of new business models by banks and financial institutions (which emphasised the use of securitisation of mortgage products and the use of derivatives) to the short-termism evident in the remuneration policies adopted by these institutions, particularly in regard to the payment of bonuses. Short-termism has also been evident in UK companies through a focus on such things as quarterly company returns to investors rather than the enhancement of the longer-term profitability of companies. More generally, the emergence of phenomena such as high-speed securities trading (which now dominates about 75% of stock market trading in the UK) has created even narrower planning horizons for companies that have been concerned with the maintenance of an attractive share price.[48]

46 We are yet to see how effective these principles really are in changing the decision-making practices of company directors; see A R Keay, 'Moving Towards Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and More: Much Ado About Little?'(2011) 22 *European Business Law Review*, 1–49; A R Keay, 'Section 172(1) of the *Companies Act 2006*: an interpretation and assessment' (2007) 28 *Company Lawyer*, 106–110.

47 J Treanor, 'Vince Cable puts pay and takeovers at centre of City review' (25 October 2010) *The Guardian*.

48 M Price, 'High-speed traders dominate UK stock markets' (24 January 2011) *Dow Jones Financial News* <http://www.efinancialnews.com/story/2011-01-24/high-speed-traders-dominate-uk>.

The UK Government's Department of Business Innovation and Skills (BIS) recently summarised the goals of its company law reform efforts as follows:

> The phased implementation of *Companies Act 2006*, completed in October 2009, represents a comprehensive review and modernisation of the UK company law framework. The Act introduced a number of significant changes to simplify and improve company law—making it easier to understand and more flexible—and delivering estimated benefits to business of up to £400m per annum. The objectives of the Act were to enhance shareholder engagement and long-term investment; make it easier to set up and run a company, and reduce the burden of regulation, especially for small business.[49]

A number of further 'minor and technical corrections' are planned to the 2006 Act by the UK Government relating to the registration of charges, limited liability partnerships, simplified accounting and auditing requirements, and a single corporate form for one-person businesses. A number of recent consultations and an evaluation of the *Companies Act 2006* have provided the basis for these corrections. Interestingly, BIS has observed that: 'The Government does not believe there is a need for further significant reform of the company law framework underpinned by the Act.' This seems to be a bold statement, as the history of company law has shown that it needs ongoing modernization and reform, as has been confirmed by the recent global financial crisis.

IV SOME EFFECTS OF THE GLOBAL FINANCIAL CRISIS ON LAW REFORM

Economic crises have often prompted law makers to engage in company law reform. In reality, crises are often the only times that legislators look at company law issues as these issues are usually seen as being of relatively limited interest to the public.[50] Public outrage about corporate failures is often the stimulus for lawmakers to begin to address issues that they previously avoided due to the reassurances that all was well, received from industry lobby groups. The collapse of Enron was one such crisis which saw the passage of the *Sarbanes-Oxley Act* in the USA in response to mass public concerns about poor company accounting practices.[51]

Although much can be said about the origins and effects of the global financial crisis, it had some clear legal effects—for example, it changed patterns of financial regulation and prompted a stream of lawmaking activity in the UK, such as the passage of the *Banking Act 2009* which put in place new bank rescue procedures.[52] Insofar as core company law matters are concerned, there has been little new legislation, although the nature of company regulation has changed to place much more pressure on licensed persons such as brokers

49 See <http://www.bis.gov.uk/policies/business-law/company-and-partnership-law>.

50 P L Davies, 'Enron and Corporate Governance Reform in the UK and the European Community' in *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (J Armour and J A McCahery eds) (Hart Publishing, 2006) 415-444.

51 R Romano, 'The *Sarbanes-Oxley Act* and the Making of Quack Corporate Governance' (2005) *114 Yale Law Journal* 1523–1611; also available at: <http://ssrn.com/abstract=749524>.

52 R Tomasic, 'Creating a Template for Banking Insolvency Law Reform after the Collapse of Northern Rock', (2009) 22 *Insolvency Intelligence* 65–70, 81–88; also available at: <http://ssrn.com/abstract=1416823>.

and mortgage intermediaries. However, there has been increasing pressure to deal more effectively with matters relating to the executive remuneration policies of major companies.

The Financial Services Authority (FSA) has also agreed to keep an up-to-date public register of regulated persons, individuals and firms doing business in the UK. Similarly, the UK Serious Fraud Office has to some degree been energised by the recent passage of the *Bribery Act 2010* aimed at dealing with corrupt practices by UK companies.[53] However, recent efforts by the UK Government to reform the SFO and merge it into a broader economic crime agency have undermined its strength as a result of the departure of key personnel concerned about their future careers.[54] Similar restructuring has occurred in relation to the FSA due to its perceived failures as a regulator during the global financial crisis; as a result, the UK Government has planned to abolish the FSA and parts of it are to be absorbed into the Bank of England.[55] While there is a case for more effective prudent regulation in the UK, this reform may further weaken market surveillance of large financial institutions in the UK and open the door for pressure for greater use of narrow private-sector-based regulation.

At the same time, we have seen other government-initiated inquiries, such as the Walker Review recommend the use of 'soft-law' techniques including improved corporate governance codes to deal with failures on the part of company directors, especially those of banks and financial institutions.[56] These recommendations have now been applied to all listed companies in the UK.[57] Further, as a consequence of the docile approach of institutional shareholders in allowing their invested companies to assume increasing risk by the rise in their debt levels prior to the global financial crisis,[58] the *Stewardship Code* has been introduced to encourage institutional shareholders to be more active in their communications and relationships with company boards and senior management of

53 Serious Fraud Office, 'Bribery & Corruption' <http://www.sfo.gov.uk/bribery--corruption/bribery--corruption.aspx>.

54 J Palazzolo, 'SFO Receives Late Support From Solicitor-General' (26 April 2011) *The Wall Street Journal* <http://blogs.wsj.com/corruption-currents/2011/04/26/sfo-receives-late-support-from-solicitor-general/?mod=google_news_blog>; L Fortado and K Donaldson, 'Survival of U.K. Fraud Office Said to Create Rift Among Government Leader' (April 26 2011) *Bloomberg* <http://www.bloomberg.com/news/2011-04-26/u-k-fraud-office-s-future-said-to-create-cabinet-level-split.html>.

55 G Parker and B Masters, 'Osborne abolishes FSA and boosts Bank'(16 June 2010) *The Financial Times* <http://www.ft.com/cms/s/0/0203b99e-797f-11df-b063-00144feabdc0.html#axzz1Ktz4UVul>.

56 Sir David Walker, *A review of corporate governance in UK banks and other financial industry entities – Final recommendations* (26 November 2009, UK Treasury) <http://www.hm-treasury.gov.uk/walker_review_information.htm>.

57 Financial Reporting Council, *UK Corporate Governance Code* (June 2010) <http://www.frc.org.uk/documents/pagemanager/Corporate_Governance/UK%20Corp%20Gov%20Code%20June%202010.pdf>.

58 In his review of directors' duties in UK financial institutions, Sir David Walker noted that: 'there appears to have been a widespread acquiescence by institutional investors and the market in the gearing up of the balance sheet of banks as a means of boosting returns on equity'; see Sir David Walker, *A Review of Corporate Governance in UK Banks and other Financial Industry Entities—Final Recommendations* (26 November 2009, UK Treasury) [5.10] <http://www.hm-treasury.gov.uk/walker_review_information.htm>.

companies.[59] This new private-sector Code will however, also operate on a 'comply or explain' basis, similar to the UK *Corporate Governance Code*, with firms being expected to disclose on their web sites whether they are compliant with the Code and how they had become so.[60]

A number of earlier inquiries into the failure of British banks and financial institutions found that directors had not been able to effectively monitor and control risk-taking by their companies. These inquiries also found that dominant institutional shareholders were also somewhat docile in challenging risky business strategies and acquisitions by major British banks.[61]

V DEBATES ON DISCLOSURE AND THE REFORM OF EXECUTIVE REMUNERATION POLICIES

The global financial crisis has also led to a closer scrutiny of remuneration practices of major companies, although banks have continued to find arguments for the payment of substantial bonuses to their leading investment bankers.[62] A major challenge remains facing companies is to link the remuneration of their directors and other senior corporate officers to their actual performance. There has been an international movement to introduce greater 'say on pay' rules to allow shareholders to more effectively comment on proposed remuneration for directors. The UK has been handling this issue somewhat cautiously.

In 2002, the UK enacted the *Directors' Remuneration Report Regulations* which required that executive remuneration policies of quoted companies be disclosed to and approved by shareholders, and that companies demonstrate how such remuneration was related to performance.[63] Section 420(1) and (2) of the *Companies Act 2006* now requires that directors of quoted companies must prepare a directors' remuneration report setting out prescribed information which includes a statement of the company's policies in regard to the remuneration for directors. Failure to comply with these Regulations will mean that

59 Financial Reporting Council, *The UK Stewardship Code* (July 2010) <http://www.frc.org.uk/images/uploaded/documents/UK%20Stewardship%20Code%20July%2020103.pdf>.

60 Financial Reporting Council, *Implementation of the Stewardship Code* (July 2011) [20] <http://www.frc.org.uk/images/uploaded/documents/Implementation%20of%20Stewardship%20Code%20July%2020103.pdf >. The effectiveness of this new Code is yet to be adequately evaluated. However, it is likely that institutional shareholders will continue to face many significant obstacles to engaging in greater activism in regard to the corporate governance practices of the companies in which they hold shares.

61 House of Commons, Treasury Committee, *The Run on the Rock; Fifth Report of Session 2007–08, Volume I, Report, together with formal minutes*, (24 January 2008) <http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmselect/cmtreasy/56/56i.pdf>. Also *Independent Commission on Banking (Vickers Commission) Interim Report* (April 2011) <http://s3-eu-west-1.amazonaws.com/htcdn/Interim-Report-110411.pdf>.

62 G Plimmer, 'Investment banks put bonuses before recruitment' (21 October 2010) *The Financial Times* <http://www.ft.com/cms/s/0/40eaaf7e-dcf7-11df-884a-00144feabdc0,s01=1.html#axzz1KUYQHhWN>; J Treanor, 'British bank bonus bonanza for bosses' (9 February 2011) *The Guardian* <http://www.guardian.co.uk/business/2011/feb/09/bank-bonus-chief-executive>.

63 See further the UK *Directors' Remuneration Report Regulations* <http://www.legislation.gov.uk /uksi/2002/1986/contents/made>. Similar regulations have been promulgated after 6 April 2009.

each director will have committed an offence and be liable to a fine. A remuneration report must be prepared and this must be approved by the board and signed by or on behalf of the board by a director or company secretary, pursuant to s 421(3).

Also, the UK's *Companies (Summary Financial Statement) Regulatio*ns *2008* require that a Summary Financial Statement (SFS) must be prepared setting out the aggregate amount of directors' emoluments. Shareholders who receive an SFS will be able to vote on this Report.[64] These rules provide a modest degree of company disclosure in regard to remuneration, but there is still room for further improvement. In the meantime, the UK Government has, for example, entered into agreements with leading UK banks as to their remuneration disclosure policies for their highest paid officers and by 2012 it proposes to introduce mandatory remuneration disclosure rules for major banks.[65] UK public companies are now required to prepare remuneration reports and to allow their shareholders to vote on these at Annual General Meetings, but only in an advisory capacity, falling short of giving shareholders a formal veto over remuneration paid to senior executives.

The European Commission has also considered providing a greater degree of shareholder power over remuneration. In its April 2011 Consultation, the Commission has asked whether '…disclosure of remuneration policy, the annual remuneration report (a report on how the remuneration policy was implemented in the past year) and individual remuneration of executive and non-executive directors be mandatory? It has also asked whether it should 'be mandatory to put the remuneration policy and the remuneration report to a vote by shareholders?'[66] This is a key area in which further reform is called for as remuneration policies are at the heart of good corporate governance.[67] Official remuneration rules have been developed in a fairly *ad hoc* fashion, in response to media outcries rather than as part of a holistic response to this area. As a result, much has been left to the flexible discipline of the 'comply or explain' procedures of the UK *Corporate Governance Code* to lay down comprehensive company policies. A revised *Corporate Governance Code* was issued in June 2010 following the work of the Walker Review and this now states that:

> Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose. A significant proportion of executive directors'

64 For an excellent summary of these rules and regulations, see Freshfields Bruckhaus Deringer, 'Directors' Remuneration Report Regulations, checklist, commentary and related best practice' (1 November 2010) <http://www.freshfields.com/publications/pdfs/2010/nov10/29355.pdf>.

65 HM Treasury (Press Release 17/11, 9 February 2011) <http://www.hm-treasury.gov.uk/press_17_11.htm>.

66 European Commission, *Green Paper—The EU corporate governance framework* (Brussels, 5 April 2011) [1.4] <http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf>.

67 L Bebchuk and J Fried, *Pay Without Performance—the Unfulfilled Promise of Executive Compensation* (Cambridge, Harvard University Press) 2006.

> remuneration should be structured so as to link rewards to corporate and individual performance.[68]

The Code adds that '[t]here should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his or her own remuneration.' Schedule A of the UK *Corporate Governance Code* also sets out a template for the design of performance-related remuneration programs for executive directors and emphasises the importance of longer-term considerations in setting such policies. This long-term focus in corporate governance is a direct result of the combined influence of the *Companies Act 2006* and the reviews that followed the recent global financial crisis.

Schedule A to the revised 2010 UK *Corporate Governance Code* provides (in para 1) that in considering whether directors should be eligible for annual bonuses, the remuneration committee of the board should have regard to performance conditions which are 'stretching and designed to promote the long-term success of the company.' Other benefits received by directors should be considered 'under other kinds of incentives scheme' (para 2). Schedule B adds (para 3) that any new long-term incentives scheme 'should be approved by shareholders and should preferably replace any existing schemes.' The Schedule strongly urges the use of robust performance criteria by companies in regard to remuneration when it states that:

> Payouts or grants under all incentive schemes, including new grants under existing share option schemes, should be subject to challenging performance criteria reflecting the company's objectives, including non-financial performance metrics where appropriate. Remuneration incentives should be compatible with risk policies and systems.[69]

These soft-law provisions may be avoided as they operate within a 'comply or explain' framework. On the other hand, the Financial Reporting Council has argued that:

> The 'comply or explain' approach is the trademark of corporate governance in the UK. It has been in operation since the Code's beginnings and is the foundation of the Code's flexibility. It is strongly supported by both companies and shareholders and has been widely admired and imitated internationally….Companies and shareholders both have responsibility for ensuring that 'comply or explain' remains an effective alternative to a rules-based system...[70]

Time will tell whether this flexible—if somewhat weak—set of rules will be adequate to ensure that companies are successful in closely linking pay and performance.[71] It is inevitable that shareholders will need to be given a greater role in the approval of remuneration if the policy of encouraging greater shareholder engagement with companies

68 Financial Reporting Council, *The UK Corporate Governance Code* (June 2010) 7 <http://www.frc.org.uk/documents/pagemanager/Corporate_Governance/UK%20Corp%20Gov%20Code%20June%202010.pdf>.

69 Ibid 27.

70 Ibid 4–5.

71 Similar debates are currently occurring in Australia: Productivity Commission, *Enquiry Report No 49—Executive Remuneration in Australia* (Commonwealth of Australia, 19 December 2009): P Durkin, 'Experts question exec pay reform' (29 April 2011) *The Australian Financial Review* 13.

(as espoused by the 2005 *White Paper* and by the Walker Review) is to be meaningful. However, one of the clear lessons of the recent global financial crisis has been that soft-law codes such as these have not been very effective constraints on what Keynes called the 'animal instincts' of the market.[72]

VI THE MOVEMENT TOWARDS A STAKEHOLDER APPROACH

One of the most interesting developments to have emerged from the recent company law review process in the UK has been the enactment of promising new provisions in the UK *Companies Act 2006* to foster the longer-term success of the company when making decisions and to do so to by having regard to various stakeholder considerations. This is a long overdue legislative enactment given the extensive business school and management literature which has fostered the adoption of stakeholder perspectives.[73] It may be somewhat symbolic, given the broad terms in which it is expressed, but it is nevertheless an important development in modern company law. The challenge will be to see how the legislation is applied by directors.

Thus, s 172(1) of the *Companies Act 2006* creates a new duty for directors to promote the success of the company having regard to stakeholder interests. It provides that: '…A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole…' In the exercise of this duty, directors are required to have 'regard to' to a broad range of considerations, including those listed in the section. A consideration of 'the likely consequences of any decision in the long term' is one of these matters. In addition, a series of stakeholders are set out in the section; these stakeholder interests are:

> (b) the interests of the company's employees,
> (c) the need to foster the company's business 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.

Section 172(2) provides that where interests other than those of the members arise, any reference to the promotion of the success of the company is to assume that the benefit of the members will also be achieved in this way. The new duty in s 172(1) is however, made subject (by s 172(3)) to any enactment or rule of law which requires directors to act in the interests of creditors of the company. The legislation is strengthened by the inclusion of a

72 G A Akerlof and R J Shiller, *Animal Spirits: How Human Psychology Drives the Economy and Why It Matters for Global Capitalism* (Princeton University Press, 2010).

73 The literature in this regard is quite voluminous following the early work of R Edward Freeman, especially, *Strategic Management: A Stakeholder Approach* (Pitman, 1984) and R E Freeman and J McVea, 'A Stakeholder Approach to Strategic Management' (2001) *Darden Business School Working Paper* 01–02 <http://ssrn.com/abstract=263511>.

further requirement of a 'business review' by directors of larger companies so as to illustrate how these longer-term stakeholder considerations were applied. This business review is to be tabled as part of the annual reporting duties of directors of larger companies. Thus, s 417(2) provides that

> The purpose of the business review is to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company).

To some extent, this requirement of a business review is connected with developments in EU law. Thus, the Explanatory Notes to the *Companies Act 2006* provide that:

> 670. Section 417 provides for what must be contained in the business review element of the directors' report. All companies, other than small companies, will need to produce a business review, as required by the EU Accounts Modernisation Directive (2003/51/EEC)….

However, these reporting requirements are much less ambitious than had originally been planned with the foreshadowed 'Operating and Financial Review' (OFR) which would have required major companies to report on how they dealt with social and environmental issues. This requirement has long existed in the USA and had been much discussed in the UK prior to the enactment of the 2006 legislation, but was suddenly withdrawn by Chancellor of the Exchequer Gordon Brown in November 2005.[74] It has been suggested that the last-minute decision to delete this requirement was made to please the Confederation of British Industry and to protect Gordon Brown's reputation for being pro-business.[75] However, the new coalition government in the UK has now indicated that it may yet reinstate a version of the old OFR reporting requirements.[76]

If this is done, it will also have implications for the directors' remuneration report. In the interests of greater transparency, we will hopefully see some form of these OFR rules reintroduced into UK Company Law in the not-too-distant future. This is something that a fuller evaluation of the UK *Companies Act 2006* might have considered, although the most recent evaluation has not done so.[77] Given the often-stated official concern for promoting longer-term thinking in relation to UK companies, it is not unreasonable to expect this to

74 C A Williams and J M Conley, 'Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the UK' (2007) 31 *William & Mary Environmental Law and Policy Review,* 317.

75 G Searjeant, 'Caught in its own red tape' (3 December 2005) *The Sunday Times* <http://www.timesonline.co.uk/tol/money/investment/article598695.ece>; Friends of the Earth, 'Brown Faces Legal Challenge After Scrapping OFR' (8 December 2005) <http://www.naturalmatters.net/news-view.asp?print=1&news=808>.

76 Department for Business Innovation & Skills, 'The Future of Narrative Reporting: a Consultation' (2 August 2010) <http://www.bis.gov.uk/Consultations/the-future-of-narrative-reporting-a-consultation>.

77 Infogroup/ORC International, 'Evaluation of the *Companies Act 2006*, Executive Summary, Department for Business, Innovation and Skills' (London, 2 August 2010) <http://www.bis.gov.uk/assets/biscore/business-law/docs/e/10-1362-evaluation-companies-act-2006-executive-summary.pdf>. The evaluation noted (at p 13) in regard to the issue of a business review and the proposed OFR that: '…added clarity on the process is still required to improve the quality of information provided, to ensure the review is not seen as 'boiler plate'. Should the Operating and Financial Review (OFR) be reintroduced, clarity of requirements must be stressed to optimise value provided to shareholders.'

occur. The fact that this has also become a matter of concern in the EU may strengthen the resolve of governments in the UK to move further in this direction.

VII Some Conclusions

There is much to be learnt from the study of comparative company law and corporate governance, although ultimately laws and codes in these areas have been heavily influenced by local customs and traditions.[78] This paper has sought to sketch some of the issues underlying reforms that have been introduced in the area of company law and corporate governance in the UK in recent years. The UK has been slow to move to revise its company law legislation and to some extent it has been able to learn from the experiences of other countries. This is a good position to be in if one is open-minded about drawing from foreign experiences. However, a deeply ingrained reliance on market-based regulatory solutions to company problems has not helped the modernisation project in the UK.

Recent economic and financial crises have highlighted the need for change, but the magnitude of the changes that may be required has dampened the enthusiasm for change. Although Australia has much to teach the rest of the world about the process of company law reform, it may have something to learn from the UK company law experience, out of which Australian law has emerged. Despite the slowness of reform, some UK changes have reflected broader business ideas (such as the importance of stakeholderism and the need for greater transparency). The UK is fortunate in that it is part of the EU as this has often energised the company law reform process in the UK. The State has also come to be more actively engaged in the reform process and this reflects a broader realignment that may be occurring between the state and neo-liberalism in the UK.

It is however, still relatively too early to provide a definitive review of recent UK company law reforms, although UK corporate governance practices are deserving of more attention as they have been in place for some time, despite the introduction of new reforms such as the recent *Stewardship Code*. The failure to draw to any significant degree on the sizeable body of academic learning on corporate governance and corporate regulation is regrettable as this has stood in the way of the adoption of a more multi-faceted approach in this area. To some degree, wider academic concerns drove the early stages of the UK's company law review process[79] that produced the *Companies Act 2006*, but this influence could be further enhanced.

[78] P Ireland, 'Law and the Neoliberal Vision: Financial Property, Pension Privatization and the Ownership-Society', (2011) 62 *Northern Ireland Legal Quarterly* 1-32.

[79] The work on stakeholderism by Professor John Parkinson was noteworthy here: J Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press, 1993); J Parkinson, A Gamble and G Kelly (eds), *The Political Economy of the Company* (Hart Publishing, 2001).