



VICTORIA UNIVERSITY
MELBOURNE AUSTRALIA

Developing a KPI for Measuring Staff Wellbeing: The Implications for Australian Law

This is the Published version of the following publication

Clarke, Andrew (2018) Developing a KPI for Measuring Staff Wellbeing: The Implications for Australian Law. *Victoria University Law and Justice Journal*, 7 (1). pp. 22-31. ISSN 2203-2908

The publisher's official version can be found at
<https://vulj.vu.edu.au/index.php/vulj/article/view/1064>
Note that access to this version may require subscription.

Downloaded from VU Research Repository <https://vuir.vu.edu.au/39395/>

DEVELOPING A KPI FOR MEASURING STAFF WELLBEING: IMPLICATIONS FOR AUSTRALIAN LAW

ANDREW CLARKE*

In late 2016, two well-known Australian organizations joined together to produce a new employee wellness index. The national and international firms, Medibank and Deloitte, respectively, promoted the index as enabling firms to measure the collective wellness and wellbeing of their staff. The two firms were of the view that these concepts should become a mainstream issue for boards and management, and form part of CEO accountability to the board. The case was put that responsibility for wellness should become a Key Performance Indicator (KPI) against which leadership and management performance could be judged.

This paper examines the basis for such a proposal in terms of Australia's system of corporate and tort law. It reviews the implications of a potential employee right to wellbeing. Would this impact, for example, on the established rights and expectations of employees, both individually and collectively?

In addition to examining the consequences for relevant law and regulation, this paper reviews the implications in an international context for Australia's long-established system of shareholder-primacy corporate governance. In particular, does the proposed wellness index invert the shareholder model, and give too much power to employees?

I THE EMERGING WORKPLACE 'WELLNESS' PROJECT

In the international literature, across several years, there have been several articles and studies dealing with wellness in the workplace. It is a relatively new and developing area of research and enquiry, borne out by the fact that there is to-date no 'formal and universally accepted definition of a workplace program'.¹ So far, the analysis has been taken up largely by European and US scholars. Some international benchmarks have also emerged and it has been looked at by a range of academic disciplines, including health, health management and psychology. It has also been examined by some legal scholars through the prism of corporate governance² and, in particular, corporate social responsibility and the Environmental Social Governance (ESG) movement.³ It is therefore a field of endeavour emanating from several sources, and has broad practical significance for the economy and how workers engage in their workplaces.

In Australia it is developing by reference to a corporate initiative, rather than a top-down legislative model adopted by government. This is part of the fact and recent continuum that much corporate governance

*Professor Andrew Clarke, College of Law and Justice, Victoria University, Melbourne. The author acknowledges the invaluable research assistance of Ms Bronwyn Betts.

¹ B G Mujtabaand and F J Cavico, 'Corporate Wellness Programs: Implementation Challenges in the Modern American Workplace' (2013) 1(3) *International Journal of Health and Policy Management* 193, 193–4.

² See generally the work of Professor Jennifer Hill (Sydney University), Professor Anthony Forsyth (RMIT), Professor Andrew Clarke (Victoria University, Melbourne). This includes, for example, Jennifer Hill, 'Corporate Governance and the Role of the Employee,' in Paul Gollan and Glenn Patmore (eds), *Partnership at Work: The Challenge of Employee Democracy* (Pluto Press, 2003); Andrew Clarke, 'The Relative Position of Employees in the Corporate Governance Context: An International Comparison' (2004) 32 *Australian Business Law Review* 111.

³ See, eg, the publications of Professor Helen Anderson (Melbourne University) and Professor Andrew Keay (University of Leeds). These include Helen Anderson and Wayne Gormley, 'Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment', (2008) 29 *Adelaide Law Review* 29; Andrew Keay, 'Wider Representation on Company Boards and Directors' Duties' (2016) 31(6) *Journal of International Banking and Finance Law* 530.

is in the form of self-regulation, best practice and exhortation, rather than comprising mandatory rules or black-letter law. This can be seen as a gap or as an opportunity – as a legal lacuna, or as providing a developmental window for a more holistic and integrated approach to the challenges facing contemporary firms and how they deal with their key capital asset – their people.

The challenge though, is that it is a new field of enquiry which carries with it potentially major changes for the way that Australian boardrooms operate. Change will always be viewed as challenging and as holding within it unintended consequences. As the recent Australian survey of ASX listed firms confirms, there is usually a rapid movement from a nascent, embryonic approach in relation to a corporate initiative, to the point where it becomes institutionalised.⁴ This occurs because as key issues arise, ‘relevant professions and programs become institutionalised in laws, union ideologies and public opinion, [and then] organizations incorporate these programs and professions’.⁵ It is timely therefore that a legal analysis from an Australian perspective begins to mark out some of the key issues relevant to wellness in the workplace.

The business and legal maxim ‘what gets measured, gets done’ has been in vogue for several decades. For firms, this has generally affected, and has been applied, to dollar-based, numbers-driven measures such as gross revenue, the return on capital, net margin, operating profit and the like. These are clearly agreed ‘monetisable’ targets; they are objective and adopted on a broad basis both domestically and internationally.

In Australia, however, a recent development is the proposal to measure formally so-called ‘soft’ or subjective targets that have long been regarded as intangible and essentially subjective. These ‘soft’ targets have included, in terms of firms and organisations, their culture, their diversity, and their inclusivity measures. The emerging fourth soft target is mental health and wellness.⁶ There is growing and widespread support for wellness as a developing key performance indicator (KPI) for the board to consider, and against which to hold the Chief Executive Officer (CEO) and senior management team accountable.

In Australia the formalisation of wellness as a KPI is being advocated by several key stakeholder groups, including national peak bodies dealing with community health and with business issues, major employer groups, and international professional firms. In terms of peak community health bodies, the former Premier of Victoria, and current Chair of the national mental health body beyondblue, Jeff Kennett has been a vocal proponent of the measures. Mr Kennett said that:

What I would like to see in every head of department of a bureaucracy, in every CEO’s performance, and every direct report’s KPIs, is a KPI about the mental health, the wellbeing, of their workforce, of those that report to them. When you talk about pay performance, when you talk about bonuses, particularly, I want to see a KPI in place that addresses this, because that will focus their minds more than anything else.⁷

Mr Kennett’s stance has received widespread, high-level business support. The Chair of the Business Council of Australia, Jennifer Westacott, has said:

We need to take these things very seriously because these things at a kind of bottom line result in unplanned absenteeism, they cost businesses money. They’re not just feel-good things. These are real economic things. That’s why the Business Council is interested and passionate about this.⁸

Similarly, the Chief Executive of the Australian Chamber of Commerce and Industry, James Pearson has reportedly said that:

⁴ Suzanne Young and Magalie Marais, ‘Gaining Legitimacy in Large Australian Listed Companies: Exploring the Role of Corporate Reporting Regarding Employees’ (2013) 23 (1) *Labour and Industry*, 13, 16–17.

⁵ J W Meyer and B Rowan, ‘Institutionalized Organisations: Formal Structures as Myth and Ceremony’ (1977) 83 *American Journal of Sociology* 340, 345.

⁶ See, eg. Ewin Hannan, ‘Wellbeing Survey tied to CEO Pay’, *The Australian* (Melbourne), 23 November, 2016 2; Ewin Hannan, ‘Tie CEO pay to Staff Health: Kennett’, *The Australian* (Melbourne), 24 October 2016, 6; David Marin-Guzman and Misa Han, *Deloitte, Medibank to Measure Employee Self-Esteem, Wellbeing* (22 November 2016) Financial Review < <http://www.afr.com/leadership/deloitte-and-medibank-to-measure-employee-self-esteem-20161121-gsui6n> >.

⁷ Hannan, above n 6, 6.

⁸ *Ibid.*

Many employers had KPIs based on work health and safety outcomes and recognised that mental health was important. He said it was up to individual boards to determine the KPIs of executives, but he believed mental health should be part of a broad strategy to address health and safety.⁹

The CEO of the Australian arm of international accounting firm, Deloitte, Cindy Hook, which is one of the proponents of the new measure and central to its development, has said:

Increasingly you are hearing CEOs talk about this – whether it’s just mental health or wellness more broadly, I really think the trend is increasing. For me, this does have a very strong business purpose. This is about driving performance, and I believe strongly that if the 6,000 individuals within Deloitte are well and are strong in the broader sense, they are going to perform at their best, personally and professionally, and that’s going to drive organisational performance.¹⁰

The chief executive of Lendlease, Steve McCann, has said that ‘[c]reating a culture of where mental health is as important as physical health is a fundamental part of our commitment to a mentally healthy workplace’.¹¹

As part of building this culture, Lendlease now has 750 accredited mental health first aid officers.

In summary, there is a potentially broad appetite at senior levels of the corporate, not-for-profit, and community sectors for mental health measures to be developed within firms, and for wellness more broadly, to be developed and quantified.

II IDENTIFYING THE MENTAL HEALTH AND WELLNESS INDICIA OF STAFF WITHIN FIRMS

The indicia referred to within the rubric of health and wellbeing include a wide range of factors. These are being formalised into a new national wellness index being developed by Deloitte and Medibank Private.

The proposed index measures the concept of ‘wellness’ across four ‘pillars’: mind, body, purpose, and place, respectively.¹²

These pillars are broken down as follows:

- Mind: mental health and resilience, including self-esteem
- Body: physical health, including sleep, nutrition and exercise
- Purpose: how effectively an individual can bring their whole self to work, and find meaning in what they do
- Place: how workplaces ‘walk the talk’ on policies; for example flexibility, diversity, inclusion, bullying and harassment.¹³

The basic concepts of wellness have therefore already become complex and tabulated in accordance with the new index discussed below.

III THE DELOITTE–MEDIBANK REPORT AND A NEW NATIONAL WELLNESS INDEX

The new index, formally known as the Wellbeing@Work Index, is intended to give boards ‘a more tangible way to address employee wellbeing’. The CEO of Deloitte, Cindy Hook, says that:

The first question that gets asked when you are talking about wellbeing is how you measure it. I think that’s become increasingly clear as we watched a number of AGMs, and this concept of soft measures, so what we are building is a way to turn a soft measure into a harder measure and is actually more tangible.¹⁴

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Medibank and Deloitte, *Wellbeing@Work Index: How Well is Your Workplace?* <<http://landing.Deloitte.com.au/medibank-deloitte-wellbeing-index>>.

¹³ Ibid.

¹⁴ Hannan, above n 6, 2.

IV A DEFINITION OF 'WELLBEING'

The literature points to the fact that there is no 'consensus definition' of wellbeing.¹⁵ It is noted that 'a key common element is that wellbeing is more than merely the absence of negative circumstances, such as illness; rather it also includes positive features such as the quality of a job or happiness with one's life.'¹⁶

An alternative definition put forward by Waddell and Burton in 2006 is that wellbeing is 'the subjective state of being healthy, happy, contented, comfortable and satisfied with one's life.'¹⁷ The issue is complex for several reasons.

First, terms such as 'wellness', 'wellbeing', and 'workplace health' are used often interchangeably, and they may overlap, intersect and be used in different ways.

Second, the terms are themselves complex and omnibus in nature; they each freight several sub-meanings.

Third, the terms will mean different things to different fields of academic endeavour and practical purpose; these include law, management, health, sociology and psychology. The context and purpose of their use is therefore always instructive.

Fourth, the terms may differ given the different cultural, cultural, legal, and economic contexts in which they are used. These concepts change when they move 'across national boundaries'.¹⁸

V A NEW FORM OF WORKPLACE AND MEASUREMENT ETHOS

The wellness or wellbeing concept, as it emerges as a measurable management tool, will further blur the former bright line between 'hard', tangible, and easily 'monetisable' measures, as opposed to 'soft' targets. The emerging debate will focus on how these things matter, and how they all, individually and collectively, impact on the financial success of the firm, and on its sustainability and longevity. There will be a significant change in the conversation.

As Craig Drummond, CEO of Medibank Private puts it:

When you look at short-term incentives and long-term incentive components, there's been criticism in the marketplace about too-soft measures that aren't quantified to the extent they could be. Of course, when you speak to shareholders, the majority of shareholders will still want hitting corporate plan, hitting a certain return on capital, those types of measures to be the predominant measures, but there should absolutely be softer components which reflect culture, which reflect workplace health and safety, diversity and inclusion.¹⁹

VI THE ISSUE OF STAFF WELLNESS IN THE INTERNATIONAL LITERATURE

The issue of staff wellness has received attention in the international literature. International studies and papers have been produced by the World Health Organization,²⁰ the Organization for Economic Cooperation and Development (OECD)²¹ and the European Union.²² The matter has also been addressed by multinational companies with a global employee network.²³ Countries with extensive coverage of the issue include the

¹⁵ P Schulte, and H Vainio, 'Well-being at Work: Overview and Perspective' (2010) 36(5) *Scandinavian Journal of Work Environment and Health*, 422,423.

¹⁶ Ibid.

¹⁷ G Waddell and A K Burton, *Is Work Good for Your Health and Well-Being?* (Stationary Office, 2006).

¹⁸ Young and Marais, above n 4, 30.

¹⁹ Hannan, above n 6, 2.

²⁰ Joan Burton, *Who Healthy Workplace Framework and Model: Background and Supporting Literature Practices* (World Health Organization, 2010) <www.who.int/occupational_health/healthy_workplace_framework.pdf>.

²¹ Organisation for Economic Cooperation and Development, *OECD Better Life Index* <<http://www.oecdbetterlifeindex.org/#/1>>.

²² European Agency for Safety and Health at Work, *Campaign: Healthy Workplaces 2014-15* <<https://hw2014.osha.europa.eu/en/campaign-partners/official-campaign-partners/european-network-for-workplace-health-promotion-enwhp>>.

²³ See, eg, Xerox, *Working well: A Global Survey of Workforce Wellbeing Strategies* (2016) <https://www.google.com.au/search?q=Xerox+working+well&sourceid=ie7&rls=com.microsoft:en-AU:IE-Address&ie=&oe=&gf_e_rd=cr&ei=G3hMWd6qPPDc8weJzKoAw&gws_rd=ssl>.

United States,²⁴ France²⁵ and Canada.²⁶ The topic has given rise to analysis concerning the unintended consequences of wellness programs, the issues of privacy for staff, and the fact the employees may lose power rather than gain it, and that it reinforces the power and control of management. For example, a wellness program may have in-house doctors and medical professionals as employees, or it may use a third-party provider. The provision of medical advice and treatment, however, appears to be a correlative of both having the program in place, and of eliciting private and sensitive information.

Another key point is whether the program is obligatory and applies to all staff, or whether it is optional and depends on volunteers submitting their information via questionnaire or other format. Either way, the issue of the privacy of, and use to which, information is put is a sensitive issue for employees. Is the purpose of the information proscribed or open?

The issue, in turn, with obligatory models is whether individual staff with particular medical or wellness conditions are actually targeted or are perceived as being targeted. These conditions include staff who, for example, may smoke,²⁷ may be obese,²⁸ or may have disclosed a sensitive issue such as a mental illness or a medical history of a delicate nature.²⁹

The international literature points clearly to the fact that the implementation is not a panacea for a happy workplace, and as a necessary linkage to higher profits or sustainability.

Unless constructed with the needs of the target organisation or firm in mind, and put in place with perspicacity, a wellness program may lead instead to deep distrust, to increased industrial unrest, and a widening gulf between the employees and management.

In seeking to hold the CEO to account for an additional KPI, the board may have in fact unleashed a complex and unpredictable series of consequences.

VII NATIONAL SYSTEMS OF CORPORATE LAW AND GOVERNANCE

Corporate reporting within a country is an outcome of and ‘influenced by national governance systems’,³⁰ and arrangements. These are, in turn, preceded by and embedded within ‘larger, society-wide systems of institutions’.

As Aguilera *et al.* note, ‘a major antecedent of governance structures and priorities is a country’s national characteristics, as displayed by each country’s legal, cultural and values framework’.³¹

This thesis of the macro forces at play beneath the surface, and as being productive of corporate governance arrangements at the surface, is well-established in the corporate governance literature. For example, in the Australian and German contexts, Jean Du Plessis argues that corporate governance ‘should be viewed very specifically in the context of a country’s own tradition, history, culture and corporate law system’.³² This means that the success of proposed initiatives have more chance of success if they are aligned with the wider pre-existing forces at play. This is part of the thesis linking national business practices with wider cultural and social norms.³³

In the UK corporate governance context, Jonathon Charkham has noted that:

²⁴ See, eg, Elizabeth A Brown, ‘Workplace Wellness: Social Injustice’ (2017) 20 *Legislation and Public Policy* 191.

²⁵ Julie C Suk, ‘Preventative Health at Work: A Comparative Approach’ (2011) 59 *American Journal of Comparative Law* 1089.

²⁶ Excellence Canada, *Introduction to the Healthy Workplace Criteria: Online Learning* (2016) <<http://excellence.ca/en/training-and-consulting/introduction-to-the-healthy-workplace>>.

²⁷ M Todd Henderson, ‘The Nanny Corporation’ (2009) 76 *University of Chicago Law Review* 1517.

²⁸ Elizabeth A Brown, ‘Workplace Wellness: Social Injustice’ (2017) 20 *Legislation and Public Policy* 191.

²⁹ Anne Hendrix and Josh Buck, ‘Employee-Sponsored Wellness Programs: Should Your Employer be the Boss of More than Your Work?’ (2009) 38 *Southwestern Law Review* 465.

³⁰ Young and Marais, above n 4, 16.

³¹ Ibid citing R V Aguilera et al, ‘Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US’ (2006) 14 *Corporate Governance: An International Review* 147.

³² Jean Du Plessis, ‘Reflections on Some Recent Corporate Governance Reforms in Germany: A Transformation of the German Aktienrecht?’ (2003) 8(2) *Deakin Law Review* 381.

³³ See, eg, the output of Geert Hofstede who has written widely on these and related topics.

No system [of corporate governance]... can be understood without first looking at the salient features of the particular society in which it developed. Everyone is to some extent imprisoned by their history, social, political, and economic.³⁴

We can therefore link national values to corporate governance and corporate law and in turn the sort of corporate reporting which may be appropriate, relevant and seen as adding value because it aligns with, and forms part of, the wider narrative linking these elements in a coherent manner with a given country.

VIII THE AUSTRALIAN CORPORATE MODEL RELEVANT TO MEASURING STAFF WELLBEING

The Australian model of corporate law, both in theory and in practice, promotes shareholder primacy. Under this Anglo–US system, the directors owe their primary duty to the company as a separate legal entity. The directors do not have a formal duty to the employees as a cohort. They oversee contractual and tortious duties on behalf of the corporation in terms of employment law, workplace health and safety, etc.

The proposal that the collective, measurable wellbeing of the staff as a cohort will potentially form part of the board’s deliberations contains several important consequences for the current system of board and related law. Any and all these could have fundamental practical effects on Australia’s system of corporate governance.

These are looked at in turn below.

IX CHANGES TO THE LEGAL CONTENT OF ESTABLISHED WORKPLACE ARRANGEMENTS

A *Employment Law and Contract*

Employees would generally agree that they spend enough time at work, and that the relationship with their employer is bounded by long-established legal principles and protections. There would, of course, be exceptions to this, most notably the 14% or so of the workforce who are members of a union. The employer group would share the view that established principles work reasonably well.

The response to the wellness KPI might therefore be, why add another layer to the established principles? Work is just that, a means to an end. It should be enjoyable where it can be, but it will also be challenging, and stretching, and the matters set out in the employment contract need to be taken seriously by both sides.

B *Tort Law and Occupational Health and Safety*

The staff wellness proposal has the ability to change the content of the duty of care owed by an employer to an individual employee because it provides renewed impetus to the concept of the ‘safe workplace’. As Martin Davies and Ian Malkin note:

The relationship of employer and employee is another of the ‘special relationships’ that give rise to a duty of affirmative action. The employer owes a duty to take reasonable steps to protect the employee from harm caused by others.³⁵

The High Court has confirmed that the duty owed comprises the employer providing a safe system of work,³⁶ a safe place of work³⁷ and competent fellow workers.³⁸

As the High Court noted in *Kondis v State Transport Authority*:

³⁴ J Charkham, *Keeping Good Governance: A Study of Corporate Governance in Five Countries* (Oxford University Press, 1994) 1.

³⁵ Martin Davies and Ian Malkin, *Torts* (LexisNexis, 7th ed, 2014) 300.

³⁶ *McLean v Tedman* (1984) 155 CLR 306, involving the system of garbage collection and the carrying by often several garbage collectors of large heavy bins known as ‘humpers’ in the days before a single driver operating the collection from a mechanised trucks. In this case, the garbage collector was hit by a car. The High Court found the system of work involving several moving collectors, darkness, working on roads, a moving truck etc. to be collectively part of an unsafe system of work. See also A Clarke et al, *Torts: A Practical Learning Approach* (LexisNexis, 3rd ed, 2014) 270.

³⁷ *Kondis v State Transport Authority* (1986) 154 CLR 672.

³⁸ This is part of the vicarious liability principle where the employer is liable for the negligence of its workers in a context where injury is sustained by a fellow worker.

The employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters. The consequence is that in these relevant respects the employee's safety is in the hands of the employer; it is his responsibility. The employee can reasonably expect that reasonable care and skill will be taken. In the case of the employer there is no unfairness in imposing on him a non-delegable duty.³⁹

As the Court noted, the special or affirmative duty arises in the case of the employer and employee, and in other nominated circumstances, such as hospital and patient. It does so because the:

[P]erson on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised.⁴⁰

In essence, therefore an employer already owes a series of well-established and thoroughly litigated elements making up the duty of care, given that the relationship is predicated on the bases of care, supervision and control by the employer. This raises an interesting potential development as noted briefly below.

A possible ramification of the development and growing use of the wellness KPI would be to seek to include it as a marker of the safety of the workplace. Making collective wellness/unwellness part of the content of the duty of care owed by an employer would, however, potentially at least, be a major change to the existing legal framework provided by the tortious liability regime because it would shift the underlying context and approach from that of a singularity (the employee as an individual) to that of the workforce collectively and synchronously.

Additionally, to defend such a claim, a company and its CEO would need to have access to medical and other records tendered as part of the claim and forming part of the wellness program. It could also involve complex questions of causation. For example, could the employee prove that she is unwell as a result of the workplace, and of the actions or inaction of the CEO, or is the cause of the unwellness something pre-determined, or removed from the workplace?

This raises several related issues. Is wellness a matter of physical symptoms, mental illness symptoms, or a combination of the two? Is wellness linked to the firm's performance, or is it simply a case of workplace stress and anxiety? And if it is anonymous and collective, how does the CEO deal with it and put in place a corrective strategy?

C *Class Actions by Employees of Their own Firms – A New Paradigm?*

The proposal gives rise to a potential new class action brought by employees acting collectively against the company for breach of a generalizable duty of care by the firm through its board, and by senior management via the CEO. The sort of evidence to support this claim would be gathered by the union or other third party. It would mean, theoretically at least, that each firm adopting the KPI model could potentially be subject to a class action style claim by its cohort of workers.

D *The Board's Duty to the Company as a Whole*

As Professor Bob Baxt notes:

The *Corporations Act 2001* and the general law have an important general proposition: directors owe a fiduciary duty to the company. A fiduciary duty has been defined by the High Court of Australia as the 'duty to act with fidelity and trust to another', that is, the directors must act honestly, in good faith, and to the best of their ability in the interests of the company. The directors must not allow conflicting interests or personal advantage to override the interests of the company. The interests of the company must always come first.⁴¹

The company is a separate legal entity, but what does owing this entity a duty actually entail? As Professor Baxt notes:

³⁹ (1986) 154 CLR 672, 687-8 (Mason J, Dawson and Deane JJ in agreement).

⁴⁰ *Kondis v State Transport Authority* (1986) 154 CLR 672.

⁴¹ Robert Baxt, *Duties and Responsibilities of Directors and Officers* (Australian Institute of Company Directors, 20th ed, 2012) 50.

Traditionally, the courts have treated the company as being the shareholders (or the members), and in some circumstances also extended this to include future shareholders. *Employees are generally not regarded as part of the company for this purpose.*⁴² (italics added)

In summary, boards owe a duty to the company as a whole. This is, in turn, as seen through the lens of litigated principles, primarily the current shareholders. The critical issue for present purposes is whether the board can uphold this duty, as well as comply with the wellness KPI aimed specifically at employees. According to the basic principles enunciated by Professor Baxt, the two principles may appear to be mutually exclusive or at least in tension with one another. This is because a basic assessment provides that shareholders seek return on capital, and this may mean a smaller workforce. There is a necessary tension between the deployment of the owner's capital, on the one hand, and employee entitlements as a cost line item on the business balance. If this is the case, any notion of employee 'wellness' can only be supported to the extent that it is consistent with, and aligned to, the shareholder primacy principles incorporated in the *Corporations Act 2001* (Cth), and with the plethora of corporate regulations and principles making up the totality of Australian corporate law and practice. To conclude otherwise would be to challenge and potentially dismantle a fundamental principle of Australian corporate law in favour of a new, wide-ranging, but as yet unmapped, employment or labour law type of principle.

E A New Form of Corporate Governance and Corporate Social Responsibility (CSR)?

It is also likely to raise the wider debate in corporate governance: that of the shareholder model of the firm versus the stakeholder model. Even a stakeholder model, however, primarily needs to keep the shareholders engaged and satisfied. Does this new index therefore inevitably set up the shareholders in opposition to the employees?

The corporate social responsibility (CSR) movement seeks to promote the rights of stakeholders beyond shareholders. Employees are a key group of stakeholders. The wellness KPI is a means of formalising the collective rights of employees. This would involve re-examining one of the aspects of the agency problem associated with firms and the potential re-balancing of the competing interests of shareholders and employees. Professor Jim Corkery *et al.* identify a particular agency problem confronted by corporate law as 'the opportunism of shareholders as a class who may act at the expense of other corporate constituencies such as creditors and employees'.⁴³

How this facet plays out will depend on whether firms see this as an effective and engaged CSR activity, which has a 'direct impact on company operations and [is] pictured as... sustainable and effective'⁴⁴ or whether it is 'weakly linked (or not linked at all) to the operations of a firm'.⁴⁵

F A New Form of 'If Not, Why Not' Compliance?

The proposed change is similar to recent corporate reforms, by allowing the market to adopt the mechanism, at least initially, for reasons of enlightened self-interest. This form of self-regulation was used with the ASX Principles of Best Practice. The regulatory mechanism developed into the 'if not, why not principle', where the reforms, while not mandated, simultaneously achieved two important outcomes: it allowed the early adopters to signal their voluntary compliance and enlightened innovative thinking, while at the same time putting the onus on non-adopters to explain their reluctance, and to avoid the developing label of being a market outlier or recalcitrant non-participant in complying with a contemporary and efficacious governance standard. It is a clever and effective form of organic, market-based governance development.

⁴² Ibid 52. This view is also supported in broad terms by other leading texts; see, eg, J F Corkery, *Directors' Powers and Duties* (Longman, 1987) chs 4, 5.

⁴³ Jim Corkery, Maiken Mikalsen and Katie Allan, *Corporate Social Responsibility: The Good Corporation* (Centre for Commercial Law, Bond University, 2015) 52.

⁴⁴ Michelle Sara Monachino and Paulo Moreira, 'Corporate Social Responsibility and the Health Promotion Debate: An International Review on the Potential Role of Corporations' (2014) 7(1) *International Journal of Healthcare Management* 53, 55.

⁴⁵ Ibid.

It is noted, however, that the ASX Guidelines already require publicly listed firms ‘to consider their risk management systems in regard to material effects of ethics, human capital and reputation’.⁴⁶ At this point, ‘disclosure of social performance is not required by law’.⁴⁷ A recent international study⁴⁸ has confirmed that sustainability reporting on environmental, social and governance matters ‘not only increases transparency but can also change corporate behaviour’.⁴⁹ Suzanne Benn reports that there can be widespread benefits from increased reporting of this kind. As she notes:

Researchers applied an econometric model to data from 58 countries regarding laws and regulations that mandate a minimum level of disclosure on environmental, social and governance matters. They found that: mandatory disclosure of sustainability leads to a) an increase in the social responsibility of business leaders, b) a prioritisation of sustainable development, c) a prioritization of employee training, d) more efficient supervision of managers by boards of directors, e) an increase in the implementation of ethical practices by firms, f) a decrease in bribery and corruption, and g) an improvement of managerial credibility within society.⁵⁰

X INTERNATIONAL GOVERNANCE AND COMPARATIVE MODELS

The final potential effect, referred to above, involves comparative international governance models. In particular, would the formalising of collective staff wellbeing begin to dilute the primacy of the shareholder model of governance favoured by Australia (and the USA and UK) and shift the model towards stakeholder models as practiced in countries such as Germany and Japan? These systems give official recognition to the importance and legal significance of employees as a collective group. For example, in terms of supervisory board in the German system, employees have a mandated place on the board.

XI INTENDED AND UNINTENDED CONSEQUENCES

It may be that the proposed wellness index has some positive, but unintended, consequences. The scale of Australian employee absenteeism through unwellness was put at more than AU\$7 billion a year in 2010.⁵¹ Any measures that improve this figure need to be carefully examined. For example, a wellness program may lead to more formal health checks for board members. The rationale for this is compelling: boards of directors need to be fit to serve and to do their job, before assisting others. The leadership team needs to lead by healthy example, and other employees may then follow. A three-tiered approach to health and wellbeing may be a useful paradigm to adopt within organisations. In this way, the board can be ‘tested’ first, then senior managers, and then the staff. This type of organic, top-down approach within firms is potentially far more useful than a mandatory, bottom-up, staff-driven approach that puts the board and the CEO in a potentially reactive and litigious position regarding the staff.

Serious consideration of the concept may also lead firms to adopt other measures, such as employing medical staff in-house, but as the literature shows, this can be problematic, and is liable to target vulnerable cohorts of employees.

XII CONCLUSION

The employees of the firm are individually and collectively an important asset of any organisation, and their wellness is critical. In terms of Australian corporate law and governance principles, however, the board already has its remit set out in terms of established legal principles; its duty (both fiduciary and in tort) is clear at law. It owes its primary duty to the company as a whole, and by extension to the shareholders. To

⁴⁶ Young and Marais, above n 4, 16.

⁴⁷ Ibid.

⁴⁸ I Ioannou and G Serafeim, ‘The Consequences of Mandatory Corporate Sustainability Reporting’ (Harvard Business School Working paper No 11-100, August 2014).

⁴⁹ Suzanne H Benn, ‘The Drivers of Change’, in Guler Aras and Coral Ingley (eds), *Corporate Behaviour and Sustainability: Doing Well by Being Good* (Routledge, 2017) 187.

⁵⁰ Ibid 187.

⁵¹ BUPA, *Workplace Health in Australia: BUPA Benchmark Survey 2015*

<<https://www.bupa.com.au/.../BupaP3/.../2015%20Bupa%20Workplace%20Health%20Report.pdf>>.

impose further 'red tape' and corporate information gathering, even if apparently in pursuit of a measurement of collective wellness, may ultimately be a distraction. At this point, the proposed wellness index gives rise to a range of complex unintended consequences, providing further challenges to the already complex environment of the Australian boardroom.