[Florida Tax Review](https://scholarship.law.ufl.edu/ftr)

[Volume 23](https://scholarship.law.ufl.edu/ftr/vol23) [Article 5](https://scholarship.law.ufl.edu/ftr/vol23/iss1/5)

Saving the Planet by Cutting Corporate Taxes: A Comparative Case Study Analysis

Roberta Mann
University of Oregon School of Law

Fiona Martin
University of New South Wales

Bill Butcher
University of New South Wales

FLORIDA TAX REVIEW

Volume 23 *2019* *Number 1*

Saving the Planet by Cutting Corporate Taxes: A Comparative Case Study Analysis

by

*Roberta Mann, Fiona Martin, and Bill Butcher**

Abstract

This Article examines corporate tax trends in the context of the pressing global issue of climate change. Multinational corporations play a huge role in the global economy. We argue that the role of for-profit corporations should not be limited to making short-term profits for their shareholders. If corporations benefit from corporate tax reductions, some of that benefit should be shared with society. This Article explores the connection between climate change and corporate activity through a new lens: corporate tax policy. It expands the current inquiry about the impact of taxes on corporations by connecting that discussion to the impact of multinational corporate activity on the

* Roberta F. Mann is the Mr. & Mrs. L.L. Stewart Professor of Business Law at the University of Oregon School of Law and the 2018 ATAX Fellow at the University of New South Wales School of Taxation and Business Law. She would like to thank the University of New South Wales for research support for this project. She would also like to thank Ethan McDonald for expert research assistance (University of Oregon Law graduate 2019, University of Florida Tax LLM graduate 2020). Dr. Fiona Martin is Professor at the University of New South Wales School of Taxation and Business Law. Bill Butcher is Senior Lecturer at the University of New South Wales School of Taxation and Business Law. We are grateful for the helpful comments of Richard Winchester, the participants at the 2018 Global Conference on Environmental Taxation, and the participants at the University of Gavle Workshop on Sustainable Taxation. All errors are our own.

global environment. To date, while research has been done on the interaction between corporate tax avoidance and corporate social responsibility, no research has examined the connection between the global trend of corporate tax rate cuts and the increasingly important influence of corporate environmental social responsibility. This Article begins to fill that gap by making a qualitative inquiry into the interaction between effective corporate tax rates, corporate tax cuts, and corporate social responsibility.

I. Introduction

2017 was a terrible year for wildfires around the world.[1] Australia, New Zealand, the United States, Canada, Europe, Chile—even Siberia—all experienced significant fire activity.[2] 2018 was the fourth warmest year on record, following 2016, 2015, and 2017.[3] Scientists attribute increasing wildfire activity, drought, and higher temperatures to climate change.[4] Yet, all around the world, governments weaken environmental protections.[5] In 2017, the United States withdrew from the Paris Climate Agreement.[6] In 2014, Australia repealed its carbon pricing scheme.[7] When governments fail to protect the environment, other economic

---

1. *See* Kendra Pierre-Louis, *This Is How Much of the World Is Currently on Fire*, Popular Sci. (Aug. 4, 2017), https://www.popsci.com/global-wildfire-maps; Charli Shield & Ruby Russell, *Climate Change Sets the World on Fire*, Deutsche Welle (Aug. 24, 2018), https://p.dw.com/p/2iTSn.

2. Australian Associated Press, *Christchurch Fire Forces 1,000 People to Flee Their Homes*, Guardian (Feb. 15, 2017), https://www.theguardian.com/world/2017/feb/16/christchurch-fire-forces-1000-people-to-flee-their-homes; Melissa Davey, *Crews Battle New South Wales Bushfires Amid 'Catastrophic' Conditions*, Guardian (Feb. 12, 2017), https://www.theguardian.com/australia-news/2017/feb/12/catastrophic-bushfire-conditions-threaten-nsw-as-heatwave-continues; Shield & Russell, *supra* note 1. As this Article was going to the printer at the end of 2019, Australia experienced its worst fire season ever, with reports describing it as "a blast furnace." Livia Albeck-Ripka et al., *'It's Going to Be a Blast Furnace': Australian Fires Intensify*, N.Y. Times (Jan. 2, 2020), https://nyti.ms/37r7e7p.

3. John Schwartz & Nadja Popovich, *It's Official: 2018 Was the Fourth-Warmest Year on Record,* N.Y. Times (Feb. 6, 2019), https://nyti.ms/2UGxF2s.

4. Shield & Russell, *supra* note 1.

5. Bill Laurance, *Around the World, Environmental Laws Are Under Attack in All Sorts of Ways*, Conversation (May 30, 2017), https://theconversation.com/around-the-world-environmental-laws-are-under-attack-in-all-sorts-of-ways-77590.

6. Chris Mooney, *Trump Withdrew from the Paris Climate Deal a Year Ago. Here's What Has Changed.*, Wash. Post (June 1, 2018, 10:26 AM), https://www.washingtonpost.com/news/energy-environment/wp/2018/06/01/trump-withdrew-from-the-paris-climate-plan-a-year-ago-heres-what-has-changed/?noredirect=on&utm_term=.dcc14d8774bb.

7. Michelle Innis, *Environmentalists Denounce Repeal of Australia's Carbon Tax*, N.Y. Times (July 17, 2014), https://nyti.ms/1yvJHvc.

actors have the opportunity to play a greater role. This Article addresses the questions: should multinational corporations play a role in saving the planet? Can corporate tax cuts encourage multinational corporations to save the planet?

Some multinational corporations (MNCs) have a greater economic impact than some countries—for example, in 2015, Walmart[8] had larger revenues than Australia.[9] Large economic entities like MNCs can therefore help protect the environment by engaging in environmental corporate social responsibility. A growing literature has developed on the topic of enforcement crowding out altruism,[10] and we argue that this literature may apply to the idea of corporate social responsibility (CSR). If the government requires social responsibility, by imposing a carbon price or by otherwise increasing tax liabilities to pay for social goods, does that reduce the corporate social response? Similarly, would reducing regulations and corporate tax liability increase the social response?

Until 2017, the United States and Australia had significant differences in their corporate tax rates. Since 2017, the United States has moved closer to Australia in its corporate tax rate and also in its international tax system. Like the United States, Australia has recently reduced its corporate tax rates.[11] In both the United States and Australia, corporations use tax strategies to reduce their effective tax rates (ETRs).

---

8. Walmart is one of the entities chosen for analysis in this Article.

9. Duncan Green, *The World's Top 100 Economies: 31 Countries; 69 Corporations*, World Bank: People, Spaces, Deliberations Blog (Sept. 20, 2016), http://web.worldbank.org/archive/website01603/WEB/WORLD_S_.HTM (analyzing a study by Global Justice Now). Walmart's 2015 revenue was $482 billion U.S. dollars; Australia's was $426 billion U.S. dollars. *Corporations vs Governments Revenues: 2015 Data*, Global Just. Now, http://www.globaljustice.org.uk/sites/default/files/files/resources/corporations_vs_governments_final.pdf (last visited Nov. 24, 2019).

10. *See, e.g.*, Daniel Ariely, Predictably Irrational: The Hidden Forces That Shape Our Decisions (1st ed. 2008) (discussing the social contract vs. the market contract and the daycare situation); Roland Bénabou & Jean Tirole, *Incentives and Prosocial Behavior*, 96 Am. Econ. Rev. 1652 (2006).

11. In Australia for the 2017–2018 taxable year, the corporate tax rate will be 27.5% for companies that have both their annual turnover under $25 million and 80% or less of their assessable passive income such as income from interest or rent. *Changes to Company Tax Rates*, Austl. Tax'n Off., https://www.ato.gov.au/rates/changes-to-company-tax-rates/ (last updated June 5, 2019). In future years, the corporate tax rate will progressively reduce to 25%

The United States and Australia both face environmental challenges and government responses to those challenges have been lacking. Investors increasingly expect corporations to perform on environmental, social, and governance metrics. Therefore, we argue that our examination of CSR activities by MNCs is both timely and significant. Using a case study approach, we examine corporate tax burdens as a factor in firms' investment in sustainability, using sustainability metrics as a proxy for environmental CSR. According to analysis by the N.Y.U. Stern School of Business, in 2017, MNCs in the retail industry faced a relatively high ETR (34%), while enterprises in the coal (5%) and information technologies sectors (16%) faced lower ETRs.[12] In 2018, the retail industry average effective tax rate declined to 21.66%, while the coal and information technology sectors had effective tax rates similar to 2017.[13] We therefore compare selected MNCs headquartered in the United States and Australia on ETR and CSR metrics within these three different industry categories. We will examine corporate sustainability reports and data on ETRs of the companies and attempt to draw conclusions on characteristics of companies that score well on environmental CSR and how these companies are affected by the legal and tax systems under which they operate. We will compare the U.S. and Australian systems, identify best practices, and offer recommendations for encouraging sustainability investments by corporations.

This Article undertakes a doctrinal legal research approach together with comparative legal research methodology and an examination of published company reports in three industry groups to compare corporate ETRs and environmental CSR for selected companies headquartered in the United States with comparable companies headquartered in Australia. The authors consider that this comparison makes a worthwhile contribution to the literature due to the scarcity of such comparative research, the recent changes to the nominal corporate tax rate in the United States and moves to reduce the corporate tax rate in Australia, as well as the economic and social significance of environmental CSR, particularly in light of environmental challenges faced by both countries.

---

and the turnover threshold increase to under $50 million. MNCs with turnovers of $50 million or greater will still pay tax at the 30% rate.

12. *Tax Rates by Sector*, N.Y.U. Stern Sch. Bus. http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/taxrate.htm (last visited Nov. 24, 2019) (click through to global dataset archive for data from 2017 and 2018).

13. *Id.*

The Article begins with a short explanation of the research methodology used, and then moves to a general definition of corporate social responsibility, followed by a comparison of corporate social responsibility in each jurisdiction. Next, the Article examines research by both U.S. and Australian scholars on tax compliance and social responsibility. It continues with an examination of the corporate tax systems in both jurisdictions. Finally, it concludes with an evaluation of the environmental social responsibility actions taken by specific companies in the United States and Australia.

II. Research Methodology

This Article begins with discussion and analysis of the legal and policy concept of CSR in the United States and Australia and the legal rules relating to corporate taxation in the United States and Australia using a doctrinal legal research methodology. The Article then takes a comparative legal research approach to these issues.

Doctrinal legal research is often described as "the systematic exposition, analysis and critical evaluation of legal rules and their relationships."[14] As such, it involves a study of existing and proposed developments in legislation, case law, and academic commentary. This research approach traditionally involves the examination in a systematic way of existing law. It can, however, be enhanced and made richer through a comparative legal research methodology. This may explain why the examination of the law of other countries has been a common feature of doctrinal research in the last 40 years.[15]

Comparative legal research has been defined as "the science or practice of identifying, explaining, or using the similarities and differences between two or more legal systems or their constituent parts."[16]

---

14. *Statement on the Nature of Legal Research—May and October 2005*, Council Austl. Law Deans, https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf (last visited Nov. 24, 2019) (citing Dennis Pearce et al., Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission, at paras. 9.10–.15 (1987)).

15. Theunis Roux, *Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour*, 24 Legal Educ. Rev. 177, 194–95 (2014).

16. David S. Clark, *Comparative Law Methods in the United States*, 16 Roger Williams U. L. Rev. 134, 134 (2011).

We argue that the United States and Australia make good comparators because they are both sophisticated democracies, have well developed corporate tax systems, and an established concept of CSR as discussed in Part III. These countries also have a common legal heritage, the English common law.

In Parts IV and V, we draw out significant differences between the two jurisdictions when we compare the taxation of MNCs headquartered in the United States and Australia. We selected three industry categories to examine for sustainability efforts for their distinctively different ETRs as demonstrated in Part VI: retail, coal mining, and information technology. The U.S. companies selected are Walmart Stores, Inc., CONSOL Energy, and Google. The Australian companies selected are Wesfarmers, Whitehaven Coal Limited, and Isentia. We chose these companies because they are all publicly traded, have multinational operations, and are listed in the specific industry categories in the N.Y.U. Stern ETR database that we have chosen to analyze. We analyze the publicly available corporate reports for each of these companies to assess their engagement in CSR.

III. What Is Corporate Social Responsibility?

Corporate social responsibility is defined in many ways. Although most definitions of CSR include environmental, social, and governance elements,[17] there is a spectrum of views on CSR. According to one view, CSR is limited to socially beneficial corporate actions that do not directly produce financial benefit to the corporation or its owners. This strict view may face legal constraints—under the shareholder primacy theory, corporate management has a fiduciary duty to maximize profits, and if CSR reduces profits, that constitutes a violation of fiduciary duty.[18] However, shareholder primacy, while considered a fundamental tenet of corporate law, has little legal authority and might be viewed as a norm

17. Int'l Org. for Standardization, Guidance on Social Responsibility: ISO 26000, at 4 (2010), https://www.iso.org/standard/42546.html.

18. Forest L. Reinhardt & Robert N. Stavins, *Corporate Social Responsibility, Business Strategy, and the Environment,* 26 Oxford Rev. Econ. Pol'y 164, 166 (2010) (citing Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. Times Mag. 32 (Sept. 13, 1970), https://nyti.ms/1LSk9ku).

rather than a legal obligation.[19] Corporate managers and directors can almost always escape sanction for alleged failure to maximize profits by asserting the business judgment rule.[20] The business judgment rule, applied in both the United States and Australia, provides corporate directors with some protection from liability based on a breach of directors' duties on the grounds of failure to maximize profits, provided that the board acted in good faith.[21]

The strict or pure view of CSR excludes any actions that benefit the owners of the corporation.[22] However, for several reasons, it is difficult to assess whether corporations engage in pure CSR.[23] Behaving in a socially responsible manner may benefit shareholders in nonfinancial ways. As noted in the *Harvard Business Review*, "if investors have some objectives other than money, there is no reason why a company's board should ignore them and pursue only profit maximization. The fiduciary duty a board has to a company's shareholders is to maximize their welfare, not just the value of their pocketbook."[24] Moreover, whether an action is considered "pure" CSR may depend on whether the corporate board takes a short-term or long-term perspective on profit maximization.[25] Engaging in environmental CSR can mitigate various types of risk, including risk of credit rating downgrades.[26] Moreover, empirical research has established a positive relation between CSR

---

19. Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 Minn. L. Rev. 1951, 1953 (2018).

20. S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 Hofstra L. Rev. 93 (1979).

21. Rhee, *supra* note 19, at 1961. While available to Australian directors, the business judgment rule affords less protection than in the United States. Jason Harris & Anil Hargovan, *Still a Sleepy Hollow? Directors' Liability and the Business Judgment Rule*, 31 Austl. J. Corp. L. 319 (2017).

22. Reinhardt & Stavins, *supra* note 18, at 168; *see also* Leonardo Becchetti, *Corporate Social Responsibility: Not Only Economic and Financial Performance* 3 Fin. & Bien Commun 152 (2007).

23. Reinhardt & Stavins, *supra* note 18, at 170.

24. Oliver Hart & Luigi Zingales, *Serving Shareholders Doesn't Mean Putting Profit Above All Else*, Harv. Bus. Rev. (Oct. 12, 2017), https://hbr.org/2017/10/serving-shareholders-doesnt-mean-putting-profit-above-all-else.

25. Reinhardt & Stavins, *supra* note 18, at 168, 170.

26. Jessica Williams & Noémie de la Gorce, *Environmental and Social Risk: A Material Impact*, Brink (July 2, 2018), http://www.brinknews.com/environment-and-social-risk-a-material-impact/.

and shareholder value.[27] Recently, the Business Roundtable, a group representing more than 100 of the biggest companies in the United States,[28] issued a statement redefining shareholder primacy, indicating that businesses bear responsibilities to all stakeholders, not just shareholders.[29] Pertinent to the topic of this Article, the statement provides that the undersigned businesses commit to "protect the environment by embracing sustainable practices across our businesses."[30] The statement concludes, "Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country."[31]

Reuven Avi-Yonah notes that the same three theories of the corporation have persisted throughout the 2000-year history of corporations.[32] These three theories are the artificial entity theory, the real entity theory, and the aggregate theory. Avi-Yonah notes that each of these theories has different implications for the legitimacy of "pure" CSR.[33]

The artificial entity theory views a corporation as an entity created by laws of the state and therefore having some obligation to the state.[34] Under the artificial entity theory, CSR is appropriate if it mitigates harms caused by the corporation, even if the corporation is not legally responsible.

The real entity theory regards the corporation as a citizen, like an individual.[35] Under this view, the corporation can have

27. Allen Ferrell et al., *Socially Responsible Firms*, 122 J. Fin. Econ. 585 (2016).

28. Jena McGregor, *Group of Top CEOs Says Maximizing Shareholder Profits No Longer Can Be the Primary Goal of Corporations*, Wash. Post (Aug. 19, 2019, 6:18 PM), https://www.washingtonpost.com/business/2019/08/19/lobbying-group-powerful-ceos-is-rethinking-how-it-defines-corporations-purpose/.

29. *Statement on the Purpose of a Corporation*, Bus. Roundtable (Aug. 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf.

30. *Id*.

31. *Id*.

32. Reuven S. Avi-Yonah, *Corporate Taxation and Corporate Social Responsibility*, 11 N.Y.U. J.L. & Bus. 1, 14 (2014).

33. *See id*. at 12.

34. *Id*. at 19.

35. *Id*. at 15.

philanthropic motivation, and therefore CSR is appropriate if it benefits society, irrespective of whether the corporation had any role in creating the societal ill.

In the United States, the currently dominant theory of the company is the aggregate or nexus-of-contracts theory. This view argues that CSR is an illegitimate attempt by managers to tax shareholders without their consent and leads to managers being unaccountable to the shareholders that elected them.[36] Indeed, the Chancellor of the Delaware Chancery Court opined that any other view constitutes "naïveté."[37] Under the aggregate theory, which is akin to the shareholder primacy view, "pure" CSR is inappropriate because it reduces shareholder benefit.[38] This view, if taken to its ultimate conclusion, would prohibit corporations from engaging in pure CSR. If that were the case, all social responsibility functions would be borne by government. However, government might not always be effective in dealing with market failures and externalities. Governments can be corrupt and inefficient, so CSR that provides public goods may be essential to preserve social welfare.[39]

Australian law requires corporate directors to exercise their powers and discharge their duties in good faith in the interests of the corporation and for a proper purpose.[40] According to Pamela Hanrahan:

36. *Id.* at 13.

37. Leo Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135, 135 (2012). Leo Strine, Jr., formerly Chancellor of the Delaware Chancery Court (now Chief Justice of the Delaware Supreme Court), also wrote:

> [T]he continued failure of our societies to be clear-eyed about the role of the for-profit corporation endangers the public interest. Instead of recognizing that for-profit corporations will seek profit for their stockholders using all legal means available, we imbue these corporations with a personality and assume that they are moral beings capable of being "better" in the long-run than the lowest common denominator.

Id. at 135–136.

38. Avi-Yonah, *supra* note 32, at 13.

39. Ferrell et al., *supra* note 27.

40. *Corporations Act 2001* (Cth) s 181 para 1 (Austl.).

> The board should look beyond maximising shareholder wealth in the short term in deciding where the corporation's interests lie. This includes taking into account the likely impact of corporate decisions and actions on all relevant stakeholders. Indeed, if a director fails to consider the impact of a corporation's actions on other stakeholders and thereby exposes the corporation to risks flowing from that impact, he or she may fall short of the required standard of care.[41]

Australian law does not allow corporate directors to prioritize non-corporate interests at the expense of the corporation but arguably takes a broader view of what corporate interest may entail. The idea of "social license" appears akin to the "artificial entity" view of the corporation. The social license operates as an unwritten contract, under which the corporation agrees to act in accordance with "community expectations and which acknowledges that businesses have a shared responsibility with government, and more broadly society, to help facilitate the development of strong and sustainable communities."[42] This view of the corporation would be more amenable to CSR activities.

There is another alternative to corporate shareholder primacy. New organizational forms use a different corporate governance approach that "explicitly endorses the notion of triple-bottom line business—simultaneous pursuit of social and environmental values in balance with economic profit."[43] Over 2,500 companies in more than 50 countries have obtained B corporation certification,[44] which is a "third-party audited designation for companies that meet standards of social and

---

41. Pamela Hanrahan, *Corporate Governance in These 'Exciting Times,'* 32 Austl. J. Corp. L. 142, 147 (2017).

42. *Id.* at 149 (quoting Minerals Council of Austl., Enduring Value: The Australian Minerals Industry Framework for Sustainable Development (2005)).

43. Suntae Kim & Todd Schifeling, *Varied Incumbent Behaviors and Mobilization for New Organizational Forms: The Rise of Triple-Bottom Line Business amid Both Corporate Social Responsibility and Irresponsibility* 1, 6 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2794335.

44. *About B Corps*, Certified B Corporation, https://bcorporation.net/faq-categories/about-b-corps (last visited Nov. 24, 2019).

environmental performance, accountability, and transparency."[45] Any company may seek B corporation certification by completing the B Impact Assessment and meeting the requirements for integrating stakeholder consideration into its governance structure.[46] Thirty-seven of the 50 states in the United States have enacted benefit corporation legislation.[47] Benefit corporations are not necessarily certified B corporations.[48] Benefit corporation status is self-reported and generally requires amendment of corporate governing documents and for the corporation to "provide a 'general public benefit' defined by a 'material positive impact.'"[49] Becoming a state benefit corporation insulates the corporate board from some shareholder lawsuits by explicitly allowing the corporation to consider all stakeholder interests, including the community, environment, and employees, when making business decisions.[50] Corporations may seek B certification to "publicly claim an identity as an organization interested in both shareholder and stakeholder success."[51] For several reasons, our analysis does not focus on B corporations or benefit corporations. The vast majority of MNCs have not sought to be benefit corporations. Therefore, a study of benefit corporations would not illustrate why MNCs engage in CSR.

Further, we seek to isolate tax rates as a contributor to CSR activities. The corporate tax systems in the United States and Australia do not differentiate benefit corporations from any other corporate form. By eschewing the "pure" definition of CSR, the debate about the proper role of the corporation is no longer necessary. We have established that it is unlikely that a corporate board would be held liable for breach of fiduciary duty for engaging in CSR.[52] Therefore, we do not need to

---

45. Yale Ctr. for Bus. & the Env't et al., Just Good Business: An Investor's Guide to B Corps 10 (2018), https://cbey.yale.edu/sites/default/files/Just%20Good%20Business_An%20Investor%27s%20Guide%20to%20B%20Corps_March%202018.pdf [hereinafter Yale Ctr. et al.].

46. *Certification*, Certified B Corporation, https://bcorporation.net/certification (last visited Nov. 24, 2019).

47. Yale Ctr. et al., *supra* note 45, at 9.

48. *Id.*

49. *Id.* at 12.

50. *Id.*

51. Suntae Kim et al., *Why Companies Are Becoming B Corporations*, Harv. Bus. Rev. (June 17, 2016), https://hbr.org/2016/06/why-companies-are-becoming-b-corporations.

52. *See supra* note 21 and accompanying text.

adhere to a "pure" definition of CSR. For purposes of this Article, we adopt the following definition of CSR: voluntary firm actions designed to improve social or environmental conditions, whether or not profit maximizing. In the case of environmental CSR, this could encompass voluntary emissions reductions and making sustainable choices in supply chains and transportation.[53]

A. How Do Corporations Engage in CSR?

Corporations have many options for engaging in CSR. The accounting firm Grant Thornton surveyed 2,500 business leaders around the world, inquiring about why and how corporations engage in CSR.[54] Respondents cited cost management as the most significant driver of CSR activities, followed by client or customer demand, brand building, and employee recruitment and retention.[55] In particular, 77% of U.S. respondents and 68% of Australian respondents cited cost management as the most important factor in CSR engagement.[56] Reducing the use of resources generally reduces cost while at the same time increasing sustainability, leading to the triple-bottom line.[57] Donating money or products to local charities was cited as the most popular CSR activity in the United States, with 93% of respondents reporting that activity.[58] Other reported CSR activities included participating in community activities, improving energy efficiency or waste management, changing products

---

53. *See infra* text accompanying note 252 (describing Walmart's efforts at increasing the efficiency of its trucking fleet).

54. *Corporate Social Responsibility: Beyond Financials*, Grant Thornton (2014), https://www.grantthornton.global/globalassets/1.-member-firms/global/global-assets/pdf/corporate-social-responsibility.pdf.

55. *Id.* at 4.

56. *Id.* at 5.

57. *See* Kim & Schifeling, *supra* note 43.

58. *Corporate Social Responsibility*, *supra* note 54, at 9. It should be noted that the recent reduction in the corporate tax rate may discourage charitable giving by reducing the tax saving for each dollar donated. At a 35% tax rate, the corporation saves $350 for each $1,000 donated. At a 21% tax rate, the corporation saves only $210 for each $1,000 donated. *See also* Alex Brill & Derrick Choe, *Charitable Giving and the Tax Cuts and Jobs Act*, Am. Enter. Inst. Econ. Perspectives (June 2018), https://www.aei.org/wp-content/uploads/2018/06/Charitable-Giving-and-the-Tax-Cuts-and-Jobs-Act.pdf (predicting a four percent decline in charitable giving).

to reduce environmental impact, and calculating the company's carbon footprint.[59] Fifty-three percent of Australian companies calculated their carbon footprint, while only 38% of North American companies made that calculation.[60] However, over 2,000 U.S. businesses have joined the "We Are Still In" movement, pledging to continue to support climate action to meet the Paris Agreement.[61]

Disclosure or reporting on CSR activities is increasingly important for corporations. It is also important for this Article, because we will use corporate reports to assess the environmental CSR of our selected companies. While disclosure does not ensure environmental action, and may even be considered "green-washing,"[62] it encourages awareness and is supported by various organizations, including the European Union and the United Nations. The EU Non-Financial Reporting Directive requires large companies in the EU to disclose social, environmental, and diversity information.[63] The United Nations Sustainable Stock Exchanges (SSE) Initiative published model guidelines for environmental, social, and governance (ESG) reporting, noting that promoting "greater transparency of high-quality ESG information . . . contribut[es] to the achievement of national and international sustainable development commitments and priorities, such as the UN Sustainable Development Goals."[64] Other guidelines include the Global

---

59. *Id.* at 2.

60. *Id.* at 11.

61. *"We Are Still In" Declaration*, We Are Still In, https://www.wearestillin.com/we-are-still-declaration (last visited Nov. 24, 2019).

62. "Green-washing" refers to a deceptive claim that a company's products and activities are more environmentally friendly than they are. *See* Hope M. Babcock, *Corporate Environmental Social Responsibility: Corporate "Greenwashing" or a Corporate Culture Game Changer?*, 21 Fordham Envtl. L. Rev. 1, 3 (2010) (stating that information disclosure programs are largely ineffective because of lack of monitoring and absence of sanctions for failure to carry out reported CSR initiatives).

63. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1.

64. Sustainable Stock Exchs. Initiative, Model Guidance on Reporting ESG Information to Investors 7–8 (2015), http://www.sseinitiative.org/wp-content/uploads/2017/06/SSE-Model-Guidance-on-Reporting-ESG.pdf. The UN Sustainable Development Goals can be found at

Reporting Initiative (GRI) Sustainability Reporting Standards[65] and the International Organization for Standardization (ISO) ISO:26000 Guidance on Social Responsibility.[66] Ninety-two percent of U.S. companies published corporate responsibility reports in 2017, up from 87% in 2015.[67] In contrast, 77% of Australian companies published corporate responsibility reports in 2017, down from 81% in 2015.[68] In the United States, the Securities and Exchange Commission (SEC) requires public companies to disclose climate change risks, and while that is not exactly the same as CSR reporting, it does provide valuable information and perhaps encourages companies to engage in environmental CSR to mitigate those risks.[69] The SEC guidance references the GRI

---

http://www.undp.org/content/undp/en/home/sustainable-development-goals.html (last visited Nov. 27, 2019), and include several environmental elements, such as climate action, affordable and clean energy, and responsible consumption and production. According to a KPMG survey, 31% of the largest U.S. companies link CR reporting to sustainable development goals. José Luis Blasco et al., *The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017*, KPMG 42 (2017), https://home.kpmg.com/content/dam/kpmg/campaigns/csr/pdf/CSR_Reporting_2017.pdf.

65. GRI 101: Foundation 2016, Glob. Reporting (2016), https://www.globalreporting.org/standards/gri-standards-download-center/gri-101-foundation-containing-standard-interpretation-1/.

66. Int'l Org. for Standardization, *supra* note 17.

67. Blasco et al., *supra* note 64, at 15.

68. *Id.* at 16.

69. Commission Guidance Regarding Disclosure Related to Climate Change, SEC Release nos. 33-9106, 34-61469 & FR-82, 75 Fed. Reg. 6290 (Feb. 8, 2010) [hereinafter SEC Guidance]. The KPMG survey explains:

> Climate-related risk disclosure is very different from reporting carbon emissions or environmental impacts. It's about turning the telescope around, understanding the impact of a changing climate on the company and asking searching questions. Does the company need to move its operations? Is its supply chain vulnerable to weather events? Will it be [ ] able to take out insurance in future? Should it change its business model entirely?

Blasco et al., *supra* note 64, at 36 (statement of Wim Bartels, TCFD Member & Partner, Corp. Reporting, KPMG Neth.).

sustainability reporting framework.[70] The Australian Stock Exchange (ASX) has published guidelines for voluntary corporate responsibility (CR) reporting.[71]

Business sectors show different rates of CR reporting. Of the three sectors we examine in this Article, the mining sector's CR reporting declined, from 83% in 2015 to 80% in 2017;[72] the technology sector's CR reporting stayed at 79% in both 2015 and 2017;[73] and the retail sector's CR reporting increased from 58% in 2015 to 63% in 2017.[74] With respect to climate change disclosures in particular, only 49% of the 250 largest companies surveyed by accounting firm KPMG acknowledge financial risks of climate change in their reporting.[75] A higher percentage of large retail firms (67%) acknowledge climate risk in their financial reporting.[76] KPMG's analysis suggests that "world-leading retailers are more likely to be aware of the potential impact of climate change on their complex global supply chains."[77]

In the following sections, we will discuss how various stakeholder groups and the public view CSR.

B. How Do Shareholders View CSR?

This section examines how shareholders view MNCs' obligation to engage in CSR. Investment companies own almost one-third of

---

70. SEC Guidance, *supra* note 69, at 9.

71. ASX Corp. Governance Council, Review of the ASX Corporate Governance Council's Principles and Recommendations: Public Consultation (2018), https://www.asx.com.au/documents/asx-compliance/consultation-paper-cgc-4th-edition.pdf (consulting on proposals to update and issue a fourth edition of its *Corporate Governance Principles and Recommendations* through July 27, 2018); ASX Corp. Governance Council, Corporate Governance Principles and Recommendations (3rd ed. 2014), https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf. The Council received 100 submissions. *Review and Submissions*, ASX, https://www.asx.com.au/regulation/corporate-governance-council/review-and-submissions.htm (last visited Nov. 26, 2019).

72. Blasco et al., *supra* note 64, at 20.

73. *Id.*

74. *Id.*

75. *Id.* at 34.

76. *Id.*

77. *Id.* at 35.

U.S. equities, making them shareholders with significant power over corporations.[78] BlackRock is the second largest investment company in the United States, managing $6 trillion in investments.[79] Larry Fink, BlackRock's chairman and chief executive officer, in his 2018 annual letter to corporate leaders, urged companies to "benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."[80] He exhorts company leaders to take a long-term view of financial performance. Fink's letter goes to the heart of why corporations should engage in social responsibility, making specific mention of environmental social responsibility, stating that companies must ask themselves "how are we managing our impact on the environment?" and noting that to sustain financial performance, companies must be aware of how broad structural trends, including climate change, can affect the potential for corporate growth.[81] Most significantly, Fink notes that as many governments fail to prepare for the future, "society increasingly is turning to the private sector and asking that companies respond to broader societal challenges."[82]

Fink writes that without making these changes in attitude, companies will waste time on proxy fights at the cost of the long-term prosperity of their investors.[83] Also pertinent to this Article, Fink discusses the recent tax changes in the United States, saying, "In the United States, for example, companies should explain to investors how the significant changes to tax law fit into their long-term strategy. What will you do with increased after-tax cash flow, and how will you use it to create long-term value?"[84]

Shareholder proposals also indicate their views of corporate responsibility. Researchers from the Harvard Business School found

---

78. Inv. Co. Inst., 2017 Investment Company Fact Book 13 (57th ed. 2017), https://www.ici.org/pdf/2017_factbook.pdf.

79. Robert Lenzner, *BlackRock's $6 Trillion and the Social Purpose of Corporations*, Forbes (Jan. 17, 2018, 2:59 PM), https://www.forbes.com/sites/robertlenzner/2018/01/17/blackrocks-6-trillion-and-the-social-purpose-of-corporations/#22fb6510a1e6.

80. Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BlackRock (Jan. 2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

increasing shareholder activism on sustainability issues.[85] Shareholder activism can be viewed as "private politics."[86] Rather than attempting to achieve change through the public political process, private politics involves attempts at direct influence on corporate actors.[87] In addition to well-publicized protest movements like Occupy Wall Street[88] about income inequality, the Stop Keystone XL Pipeline[89] about climate change, and the Adani coal mine protest[90] about protecting the Great Barrier Reef, shareholder proposals on ESG issues have more than doubled in the past 20 years.[91] ESG-focused shareholder proposals rarely receive majority support, but researchers observed that company performance on the subject of the "failed" proposal nonetheless generally improved.[92]

One study specifically found that direct shareholder appeals to management on environmental issues led to an increased likelihood of management adopting the requests.[93] The analysis focused on the Carbon Disclosure Project (CDP), a London-based non-governmental

---

85. Jyothika Grewal et al., *Shareholder Activism on Sustainability Issues* 1 (July 6, 2016), http://ssrn.com/abstract=2805512.

86. Emily M. Reid & Michael W. Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies*, 30 Strategic Mgmt. J. 1157, 1160 (2009).

87. *Id.* at 1157.

88. *See, e.g.*, Michael Levitin, *The Triumph of Occupy Wall Street*, Atlantic (June 10, 2015), https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/.

89. *See, e.g.*, Keith Schneider, *Nebraska Regulators Have Approved a New Route for the Keystone XL Pipeline. But Will It Ever Be Built?*, L.A. Times (Nov. 21, 2017, 3:00 AM), https://www.latimes.com/nation/la-na-keystone-xl-pipeline-20171121-story.html (discussing the Keystone XL project that was designed to transport 830,000 barrels of tar sands oil from northern Canada to Nebraska, and sparked years of protests by Native Americans and environmentalists).

90. Kabir Agrawal, *Adani's Australia Story: Why Thousands of People Are Protesting a $16-Billion Coal Mine*, Wire (Oct. 23, 2017), https://thewire.in/business/adanis-australia-story-thousands-people-protesting-16-billion-coal-mine.

91. Grewal et al., *supra* note 85, at 2. Nearly 40% of all shareholder proposals submitted to Russell 3000 companies related to ESG issues. *Id.* at 7.

92. *Id.* at 4.

93. Reid & Toffel, *supra* note 86, at 1158.

organization (NGO) that represents more than 300 institutional investors with a combined $57 trillion under management.[94] Forty-four percent of the Standard & Poor's 500 Index companies responded to CDP's request to disclose information about risks and opportunities posed by climate change, planned strategies to address those risks and opportunities, and company-wide greenhouse gas (GHG) emissions by providing at least part of the requested information.[95] The carbon-related disclosures made by these companies greatly exceeded those required by law or common practice.[96]

These studies show that corporate shareholders are concerned with more than the bottom line. Failure to manage environmental issues exposes a company to regulatory and financial risk.[97] In addition, shareholders want the companies in which they invest to be good citizens, protecting the environment as well as making profits.[98] Eighty-five percent of investment managers who responded to a survey cited client demand as a motivation for ESG investment strategies.[99] According to the most recent report on sustainable investment trends by the Forum for Sustainable and Responsible Investing, there has been a 33% increase in investors considering ESG factors since 2014.[100] Environmental investment factors apply to almost 90% of the $8.72 trillion of professionally managed ESG investments.[101] The report cites climate change concerns as the most significant environmental factor, and investments that consider climate change criteria have increased more than fivefold since 2014.[102]

Law professor Susan Gary clearly explains why ESG factors increasingly inspire investors. She writes,

> One reason for the growth in awareness of ESG factors is the concern over climate change. Climate change

---

94. *Id.*
95. *Id.*
96. *Id.*
97. Williams & de la Gorce, *supra* note 26.
98. Forum for Sustainable & Responsible Investing, Report on US Sustainable, Responsible and Impact Investing Trends 2016 (11th ed. 2016), https://www.issuelab.org/resources/26132/26132.pdf.
99. *Id.* at 15.
100. *Id.* at 12.
101. *Id.* at 13. Authors' calculations determined the 90% figure as: $7.79 trillion/$8.72 trillion = 89.33%.
102. *Id.* at 16.

> threatens to alter social, economic, and environmental structures. Investors worry not only about effects on the quality of life, but also on the impact climate change will have on investments. For example, changes in regulations on the burning of fossil fuels may affect the value of companies with oil, gas, and coal reserves. Climate change may also affect both supply chains and markets. Attempts to address climate change through investment choices can protect a portfolio against risk (oil and gas investments may lose value if regulations curtail extraction) and may protect the overall investment structure in a more general way, by focusing on long-term value rather than short-term returns.[103]

In summary, many shareholders expect that companies will engage in environmental CSR. We will next examine another important stakeholder group, employees.

C. How Do Employees View CSR?

Corporations are influenced by the views of their employees, most obviously by senior executives but also by rank-and-file employees.[104] Employees "want a sense of pride and fulfillment from their work, a purpose and importantly a [company] whose values match their own."[105] For example, at Advanced Micro Devices, "green team" employees participated in the Northwest Earth Institute EcoChallenge, working together to reduce carbon dioxide emissions, plastic waste, and save water.[106] Ninety-six percent of the team members agreed that being able

---

103. Susan N. Gary, *Values and Value: University Endowments, Fiduciary Duties, and ESG Investing*, 42 J.C. & U.L. 247, 251, n.11 (2016).

104. Assâad El Akremi et al., *How Do Employees Perceive Corporate Responsibility? Development and Validation of a Multidimensional Corporate Stakeholder Responsibility Scale*, 44 J. Mgmt. 619 (2018).

105. Jeanne Meister, *The Future of Work: Corporate Social Responsibility Attracts Top Talent*, Forbes (June 7, 2012, 11:03 AM), https://www.forbes.com/sites/jeannemeister/2012/06/07/the-future-of-work-corporate-social-responsiblity-attracts-top-talent/#4bb954f3f954.

106. Deborah McNamara, *Changemaker Interview: Advanced Micro Devices Makes Big Impact with EcoChallenge*, Nw. Earth Inst. (Feb. 6, 2017), https://web.archive.org/web/20170207012847/https://www.nwei.org/amd

to contribute to a cause while at work improved their commitment and level of engagement to their core job function and to the company.[107]

Employee satisfaction increases if corporate behavior is consistent with employee values. Under the "psychology of work" theory, organizational values that "complement family and social values" are a component of "decent work."[108] CSR can also enhance employee recruitment and retention.[109] Of course, employees are individuals with differing values, but the research cited above indicates that the employee stakeholder group finds CSR important.

D. How Does Society View CSR?

This section explores public expectations for CSR in the United States and Australia. In the United States, there is a growing public expectation that corporations have an obligation to "do good."[110] In a seminal article about environmental CSR, Hope Babcock writes that "public opinion . . . has finally changed to the extent that it is more accepting of the fact that a corporation is 'an economic institution which has a social service as well as a profit-making function.'"[111] A recent study finds that 81% of Americans believe corporations should act to address societal

---

-blog-post/. Northwest Earth Institute has recently moved to a new website (ecochallenge.org (last visited Nov. 27, 2019)) and not all the content on its prior website has been added.

107. Meister, *supra* note 105.

108. Ryan D. Duffy et al., *The Psychology of Working Theory*, 63 J. Counseling Psychol. 127, 130 (2016).

109. Deborah E. Rupp et al., *Applicants' and Employees' Reactions to Corporate Social Responsibility: The Moderating Effects of First-Party Justice Perceptions and Moral Identity*, 66 Personnel Psychol. 895, 896 (2013).

110. Glob. Strategy Grp., Business & Politics: Do They Mix? (2016), https://www.globalstrategygroup.com/wp-content/uploads/2016/12/2016-GSG-Business-and-Politics_Do-They-Mix_Fourth-Annual-Study.pdf.

111. Babcock, *supra* note 62, at 25. Babcock is quoting Kuras who is quoting Dodd. *See* Ruth O. Kuras, *Corporate Social Responsibility: A Canada-U.S. Comparative Analysis*, 28 Man. L.J. 303, 305 (2002) ("Public opinion, which ultimately makes law . . . is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function. . . ." (quoting E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1148 (1932))).

issues.[112] This is clearly a broader group than shareholders, as only 54% of Americans own corporate stock.[113] The protest movements described previously illustrate public perception that corporations should act in the public interest.[114] Overall, Americans support environmental protection, but there is a significant and growing partisan divide, with Democrats favoring environmental regulations and a majority of Republicans agreeing with the statement that stricter "environmental laws and regulations cost too many jobs and hurt the economy."[115]

With respect to Australian attitudes on CSR, a 2018 YouGov Omnibus study revealed that 87% of Australians strongly supported CSR.[116] This study found that the environment was a significant concern for consumers, with 58% of Australians believing businesses had a responsibility to prevent environmental damage in their supply chain.[117] Fewer individual Australians own corporate stock than their U.S. counterparts, with figures varying from 25%[118] to 37%.[119] However, in Australia, a significant number of individuals own shares through the investment in corporate stock by their superannuation (retirement) funds.[120]

---

112. Glob. Strategy Grp., *supra* note 110, at 4.

113. Jeffrey M. Jones, *U.S. Stock Ownership Down Except Among Older, Higher-Income*, Gallup (May 24, 2017), https://news.gallup.com/poll/211052/stock-ownership-down-among-older-higher-income.aspx.

114. *See supra* text accompanying notes 88–90.

115. Monica Anderson, *For Earth Day, Here's How Americans View Environmental Issues*, Pew Res. Ctr. (Apr. 20, 2017), http://www.pewresearch.org/fact-tank/2017/04/20/for-earth-day-heres-how-americans-view-environmental-issues/.

116. *58% of Aussies Believe Businesses Have a Responsibility to Prevent Environmental Damage*, YouGov Austl. (Jan. 4, 2018, 12:00 PM), https://au.yougov.com/news/2018/01/04/businesses-and-environmental-damage/.

117. *Id.*

118. Caitlin Fitzsimmons, *Why Most Australians Don't Invest in Shares*, Sydney Morning Herald, https://www.smh.com.au/money/investing/why-most-australians-dont-invest-in-shares-20171208-h01m2v.html (last updated Dec. 8, 2017) (citing "a survey by comparison site Finder").

119. Deloitte Access Econ., ASX Australian Investor Study (2017), https://www.asx.com.au/documents/resources/2017-asx-investor-study.pdf.

120. A 2018 report states that Australian superannuation funds own almost half of the shares on the Australia stock market. Sam Jacobs,

Despite the strong public attitudes about CSR, real change in Australia's corporate sector appears to be modest.[121] The 2014 annual report of the Australian Centre for Corporate Social Responsibility (ACCSR), which reviewed the period 2000 to 2012, commented, "Sustainability made some real progress over the 2000–2012 period, but has travelled many steps backward in Australia, very quickly."[122] ACCSR has now merged with Deloitte and in 2018 reported some improvement by the member companies in most areas of CSR.[123] The UN Global Compact,[124] an international network that uses a principles-based approach to sustainability, was more pessimistic. The 2017 Australian Annual Report states that some progress over the last two years has been made with Sustainable Business Goals, but more needed to be done across all sectors.[125] Of real concern is the 2018 report that only 23% of

---

Super Funds Now Own Almost Half of the Australian Stock Market, Bus. Insider Austl. (Mar. 13, 2018, 5:01 PM), https://www.businessinsider.com.au/australian-super-funds-now-own-almost-half-of-the-australian-stock-market-2018-3. In 2010, domestic institutional investors owned approximately 40% of the Australian market, foreign investors a further 40%, and households about 16%. *See* Susan Black & Joshua Kirkwood, *Ownership of Australian Equities and Corporate Bonds*, Res. Bank Austl. Bull., Sept. quarter 2010, at 25, 27.

121. Stephanie Schleimer & John Rice, *Australian Corporate Social Responsibility Reports Are Little Better than Window Dressing*, Conversation (Oct. 3, 2016, 7:42 PM), https://theconversation.com/australian-corporate-social-responsibility-reports-are-little-better-than-window-dressing-66037.

122. Austl. Ctr. for Corp. Soc. Responsibility, The State of CSR in Australia and New Zealand Annual Review 2014 (2014), https://www.cavill.com.au/wp-content/uploads/2016/07/K-ACCSR-2014-State-of-CSR-in-Australia-and-New-Zealand.pdf.

123. Deloitte, Progress, Prospects and Impact: How Business is Preparing for the Modern Slavery Act 2018 (2018), https://www2.deloitte.com/content/dam/Deloitte/nz/Documents/risk/2018_state-csr-report-final.pdf.

124. An Australian network was established in 2009. *See* Glob. Compact Network Austl., http://www.unglobalcompact.org.au/about/gcna (last visited Nov. 27, 2019).

125. Glob. Compact Network Austl. Ltd., Annual Report 2017, at 3 (2017), http://www.unglobalcompact.org.au/new/wp-content/uploads/2017/10/2017-Annual-Report.pdf.

Australian corporate decision makers had social responsibility as a top priority.[126]

In 2014, the Nielsen Global Survey of CSR was conducted and polled more than 30,000 consumers in 60 countries throughout Asia-Pacific, Europe, Latin America, the Middle East, Africa, and North America.[127] More than half (55%) of these respondents reported that they were willing to pay extra for products and services from companies that are committed to positive social and environmental impact.[128] This was an increase from 50% in 2012 and 45% in 2011. The report does not provide a breakdown of responses by country, but regionally Asia-Pacific at 64% exceeded the global average, and North America was comparatively lower at 42%.[129]

The next section will explore a possible link between taxes and CSR. We will review existing studies that examine whether corporations that engage in tax reduction strategies are more or less likely to engage in CSR.

IV. Tax Compliance and CSR

Although this is the first article to study the relationship between statutory corporate tax rates and CSR, several scholars have explored the link between tax compliance and CSR. Reuven Avi-Yonah examined whether publicly traded corporations have a duty to their shareholders to minimize taxes by any legal means.[130] He concludes that the answer is no and, moreover, that aggressive tax planning is inconsistent with CSR.[131] Corporations may attempt to use shareholder primacy theory to justify aggressive tax planning (e.g., use of tax shelters), arguing that reducing tax liability enhances shareholder value by increasing corporate

---

126. *Employees Want Business to Have a Social Conscience: But Are Employers Listening?*, Deloitte (Apr. 19, 2018), https://www2.deloitte.com/au/en/pages/media-releases/articles/employees-business-social-conscience-employers-listening-190418.html.

127. Nielsen, Global CSR Report: Doing Well by Doing Good 15 (June 2014), http://www.fairtrade.travel/source/websites/fairtrade/documents/Nielsen_Global_CSR_Report_June_2014_.pdf.

128. *Id* at 5.

129. *Id.*

130. Avi-Yonah, *supra* note 32, at 1.

131. *Id.*

profits.[132] An oft-cited case states, "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[133] However, the taxpayer lost that case, and the decision was affirmed by the U.S. Supreme Court because she did not have a business purpose for the particular structure of the transaction—it was solely for tax avoidance.[134] Moreover, courts have held that shareholders cannot challenge a corporate board's decision on grounds that it failed to lawfully avoid taxes and that corporations have no duty to lawfully avoid paying taxes.[135]

Two studies, one from the United States[136] and the other from Australia,[137] came to different conclusions about the relationship between tax avoidance and CSR. While carefully noting that they did not seek to prove causation, the U.S. researchers found a negative relationship between tax payments and CSR, stating that the "evidence is consistent with corporate tax payments and CSR acting as substitutes because firms view taxes as detracting from social welfare and/or because they engage in CSR, in part, to offset negative perceptions associated with low tax payments."[138] In contrast, the Australian researchers found that more socially responsible firms were *less likely* to engage in tax avoidance behavior.[139]

Whether tax planning constitutes tax avoidance may be in the eye of the beholder. The two studies cited above used different metrics

---

132. *Id.* at 28.

133. Gregory v. Helvering, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935). A LexisNexis search shows 304 citing opinions. LexisNexis search term "69 F.2d 809," search performed Aug. 14, 2018.

134. 69 F.2d at 811.

135. Kamin v. Am. Express Co., 387 N.Y.S.2d 993 (N.Y. App. Div. 1976) (holding that shareholders cannot challenge a board's decision on the specific grounds that it failed to lawfully avoid taxes); *see also* Freedman v. Adams, 2012 WL 1345638, at 13 (Del. Ch. 2012); Seinfeld v. Slager, 2012 WL 2501105, at 3 (Del. Ch. 2012).

136. Angela K. Davis et al., *Do Socially Responsible Firms Pay More Taxes?*, 91 Acct. Rev. 47 (2016).

137. Roman Lanis & Grant Richardson, *Is Corporate Social Responsibility Performance Associated with Tax Avoidance?*, 127 J. Bus. Ethics 439 (2015).

138. Davis et al., *supra* note 136, at 48–49.

139. Lanis & Richardson, *supra* note 137, at 441.

for tax avoidance. The U.S. study used a five-year average ETR,[140] while the Australian study used tax disputes, defined as being "involved in a major tax dispute involving federal, state, local or non-US government authorities, or was involved in a controversy over its tax obligations which raised public concern."[141] The simple fact that an MNC has a lower ETR than the statutory rate in its home country does not, however, necessarily mean that it has engaged in aggressive tax planning. That an MNC has not been involved in a tax dispute likewise does not mean that it has NOT engaged in aggressive tax planning. Both studies used essentially the same database for assessment of CSR activities.[142] The U.S. study also examined the relationship between corporate lobbying on taxes and CSR, noting, "Because tax lobbying is a means to reduce tax payments, the relation between CSR and tax lobbying provides evidence about whether socially responsible firms view tax payments as contributing to or detracting from social welfare."[143]

Generally, the key determinant of whether a transaction constitutes tax avoidance is whether the transaction has economic substance, aside from the tax benefits.[144] In particular, transactions between related parties, like parent corporations and their subsidiaries, have a high potential for tax manipulation because they can engage in profit shifting between related parties located in different tax jurisdictions. The profit-shifting tax strategy deliciously named "Double Irish with a Dutch Sandwich," used by MNCs including Apple and Google, reportedly

---

140. Davis et al., *supra* note 136, at 53. Another Australian study generally supports that conclusion, with some limitations, finding that the relationship between CSR and tax avoidance held true for Asian (including Oceania) firms but not at significant levels for North American, European, or U.K. firms. Stewart Jones et al., *The Relationship Between CSR and Tax Avoidance: An International Perspective*, 32 Austl. Tax F. 95, 121 (2017). However, they were reviewing an earlier version of the Lanis & Richardson study (2012), which used only a small sample of Australian firms. *Id.* at 99. The Lanis & Richardson study, *supra* note 137, uses a sample of U.S. firms.

141. Lanis & Richardson, *supra* note 137, at 444.

142. Both studies used the KLD/MSCI database. *See* Davis et al., *supra* note 136, at 53; Lanis & Richardson, *supra* note 137, at 440.

143. Davis et al., *supra* note 136, at 53.

144. *See* Leandra Lederman, *(W)hither Economic Substance?*, 95 Iowa L. Rev. 389 (2010) (explaining the economic substance doctrine and providing the economic substance doctrine's history).

reduced Apple's 2011 cash-paid tax rate to 9.8%.[145] Apple, Google, and other multinational technology companies have a superior opportunity to engage in this tax strategy because their profits derive from intellectual property. In contrast, Wal-Mart's 2011 cash paid tax rate was 24%, about average for non-tech companies.[146]

Profit shifting as a tax strategy has received international criticism. The Organisation for Economic Co-operation and Development (OECD) estimates that profit shifting causes between USD 100 billion and 240 billion in lost government revenue each year.[147] In response, the OECD has developed a multilateral convention designed to limit base erosion and profit shifting (BEPS).[148] The convention has been signed by 90 countries as of October 30, 2019, including Australia.[149] An International Monetary Fund (IMF) working paper explains some of the main mechanisms of profit shifting, including transfer mispricing and strategic location of intellectual property (IP).[150]

The arm's length principle requires that goods and services transferred between related parties are priced as if the transfer occurred between unrelated parties. Although most countries use the arm's length principle, transfer mispricing happens, particularly in the case of

---

145. Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. Times (Apr. 28, 2012), https://nyti.ms/2kn3uiD.

146. *Id.*

147. OECD, *Background Brief: Inclusive Framework on BEPS* 7 (2017), https://www.oecd.org/ctp/background-brief-inclusive-framework-for-beps-implementation.pdf; Sebastian Beer et al., *International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots* (Int'l Monetary Fund, Working Paper No. 18/168, 2018), https://www.imf.org/en/Publications/WP/Issues/2018/07/23/International-Corporate-Tax-Avoidance-A-Review-of-the-Channels-Effect-Size-and-Blind-Spots-45999.

148. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, OECD, http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (last visited Nov. 27, 2019).

149. *Id.* However, the United States has not signed the convention. A U.S. Treasury official explained that the United States did not sign because "the bulk of the multilateral instrument is consistent with U.S. tax treaty policy that the Treasury Department has followed for decades." Kevin A. Bell, *Treasury Official Explains Why U.S. Didn't Sign OECD Super-Treaty*, Daily Tax Rep. (BNA), June 8, 2017 (quoting deputy international tax counsel Henry Louie).

150. Beer et al., *supra* note 147.

intellectual property, because there are no comparable third-party transactions.[151] This allows MNCs to reduce their global tax liability by charging low prices for exports sold from subsidiaries in high-tax countries to subsidiaries in low-tax countries, or high prices for source material sold by subsidiaries in low-tax countries.[152]

Australia has seen its fair share of tax planning and avoidance activities by MNCs over the last decade. The most significant case in the transfer pricing area involved Chevron Australia Holdings Pty Limited and its wholly owned U.S. subsidiary, which was incorporated in Delaware. Chevron Australia was unsuccessful in its dispute with the Australian Taxation Office (ATO) and, after losing at the Federal Court[153] and Full Federal Court[154] levels, eventually settled the matter with the ATO in 2017.[155] The likely result of this decision is that other foreign multinationals, particularly in the resources and energy sector, will be dissuaded from trying to take excessive deductions on loans from related companies overseas. There are more than $400 billion of these loans in Australia,[156] and the ATO has already reached several out-of-court settlements.[157]

---

151. *Id.*

152. *Id.*

153. *Chevron Austl Holdings Pty Ltd v Comm'r of Taxation [No. 4]* [2015] FCA 1092 (23 October 2015) (Austl.). The proceedings were exceedingly complex and involved: under the *Income Tax Assessment Act 1936* (Cth) (Austl.), the issue of arm's length consideration where a taxpayer, Chevron Australia, has acquired property under an international agreement; under the ITAA97, the cross-border transfer pricing rules; and the transfer pricing rules in Australia's double tax agreements, particularly the Convention Between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion (the United States convention).

154. *Chevron Austl Holdings Pty Ltd v Comm'r of Taxation* (2017) 251 FCR 40 (Austl.).

155. Joanna Mather, *Chevron Abandons High Court Appeal Bid Against ATO*, Fin. Rev. (Aug. 18, 2017, 5:38 PM), https://www.afr.com/news/policy/tax/chevron-abandons-high-court-appeal-bid-against-ato-20170818-gxz52c.

156. *Id.*

157. *Id.* Another recent tax case in Australia, *Orica Ltd v Comm'r of Taxation* [2015] FCA 1399 (7 December 2015) (Austl.), also involved intra-group debt of a domestic MNC, highlighting that the use of intra-group debts is popular for both foreign and domestic MNCs. This case was eventually

To combat further tax avoidance by MNCs, Australia has also introduced two anti-avoidance regimes.[158] The first is referred to as the multinational anti-avoidance law (MAAL) and commenced December 11, 2015.[159] The second is referred to as the diverted profits tax (DPT).[160] The DPT applies to the income years from July 1, 2017, onwards and imposes a tax of 40% of the tax avoided.[161] Both regimes are aimed at striking down arrangements that have no economic substance, such as transfer mispricing, and that are entered into by significant global entities.[162]

Another way to reduce the global tax of an MNC is by strategically moving intellectual property to subsidiaries resident in low-tax countries.[163] Companies can conduct their research and development (R&D) activities in one country and transfer the ownership of the patent that is subsequently created to another country where the resulting income streams will be taxed at a lower rate by using strategies like the Double Irish with a Dutch Sandwich.[164]

---

decided on the general anti-avoidance provision in Australia, *Income Tax Assessment Act 1936* (Cth) pt IVA (Austl.), different grounds to the *Chevron* case. *See also* Antony Ting, *Base Erosion by Intra-Group Debt and BEPS Project Action 4's Best Practice Approach—A Case Study of Chevron*, 2017 Brit. Tax Rev. 80 (2017).

158. *Income Tax Assessment Act 1936* (Cth) pt IVA (Austl.). It should be noted that Australia only has federal income tax and not state income tax.

159. *Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015* (Cth) (Austl.), now incorporated into *Income Tax Assessment Act 1936* (Cth) pt IVA s 177DA (Austl.).

160. It is contained in *Income Tax Assessment Act 1936* (Cth) pt IVA ss 177H–177R (Austl.).

161. *Id.* s 177P; *Practice Statement Law Administration PS LA 2017/2: Diverted Profits Tax Assessment*, Austl. Tax'n Off., https://www.ato.gov.au/law/view/document?DocID=PSR/PS20172/NAT/ATO/00001&PiT=99991231235958 (last visited Nov. 27, 2019).

162. MNCs with annual global income of AUD $1 billion or more. *Income Tax Assessment Act 1997* (Cth) s 995.1 (Austl.).

163. Beer et al., *supra* note 147.

164. The Double Irish turns U.S. profits from intellectual property into tax-deductible royalty payments. The U.S. parent company forms a subsidiary in Ireland and grants European rights to its intangible property to the Irish subsidiary. The Irish subsidiary markets the products in Europe, creating Irish income. Thus, all the European income that would have been taxed in the United States under pre-Tax Cuts and Jobs Act (TCJA) law, is taxed in

Before 2018, the United States had one of the world's highest statutory tax rates, at 35%.[165] As Kimberly Clausing noted, "as tax rates increase, more tax avoidance activity occurs, as firms have increased incentives to take steps that reduce their tax burden."[166] Arguably, lowering the statutory rate should reduce tax avoidance behavior. The 2017 Tax Cuts and Jobs Act (TCJA) lowers the U.S. corporate statutory tax rate from 35% to 21%, effective for years 2018 and beyond.[167] If the reduction in the corporate tax rate increases after-tax corporate profits, then perhaps corporations will use some of the savings to engage in CSR.[168] On the other hand, if MNCs can achieve ETRs lower than the statutory rate by using tax avoidance strategies, it is hard to see why

---

Ireland instead. Then the Irish company moves its headquarters to Bermuda, thereby avoiding Irish tax. Bermuda has no corporate tax. No Irish tax, no Bermuda tax, and no U.S. tax. The U.S. parent then forms a second Irish subsidiary that elects to be treated as a disregarded entity rather than a corporation.

The first Irish company (now in Bermuda) can license products to the second Irish company for royalties. The net result is one low 12.5% Irish tax compared to 35% in the United States. Even this tax can be reduced, since the royalties going to the Bermuda company are deductible. The Dutch Sandwich starts with a Double Irish, and then adds a third subsidiary in the Netherlands. Instead of licensing the parent's products directly to the second Irish subsidiary, the Bermuda-based subsidiary grants them to the Dutch subsidiary, which pays the third subsidiary. Ireland does not tax money as it moves between European countries. The Netherlands charges a modest fee for moving the money from the Netherlands company to the Bermuda subsidiary. *See, e.g.*, Robert W. Wood, *How Google Saved $3.5 Billion from Paper 'Dutch Sandwich*,' Forbes (Dec. 22, 2016, 9:09 AM), https://www.forbes.com/sites/robertwood/2016/12/22/how-google-saved-3-6-billion-taxes-from-paper-dutch-sandwich/#241412ed1c19.

165. Jane G. Gravelle, Cong. Research Serv., R41743, International Corporate Tax Rate Comparisons and Policy Implications 3 (2014), https://fas.org/sgp/crs/misc/R41743.pdf.

166. Kimberly A. Clausing, *Multinational Firm Tax Avoidance and Tax Policy*, 62 Nat'l Tax J. 703, 707 (2009).

167. Pub. L. No. 115-97, § 13001, 131 Stat. 2054, 2096 (2017) (amending I.R.C. § 11).

168. Early evidence shows that a majority of the tax cut savings has been used to fund stock buybacks from shareholders. Emily Stewart, *Corporate Stock Buybacks Are Booming, Thanks to the Republican Tax Cuts*, Vox (Mar. 22, 2018, 8:50 AM), https://www.vox.com/policy-and-politics/2018/3/22/17144870/stock-buybacks-republican-tax-cuts; *see also* Matt Phillips,

they would stop—except that the new legislation also includes some new base erosion measures.[169]

The next section will provide a brief overview of the U.S. and Australian corporate tax systems.

V. Corporate Tax Systems in the United States and Australia

A. U.S. Corporate Tax System

The cornerstone of the U.S. corporate tax system is double taxation—the corporation pays tax on its income,[170] and if it makes a distribution of earnings to its shareholders, the shareholders also pay tax on the dividend, generally at a 15% rate.[171] Before 2018, the U.S. corporate tax rate was 35% and U.S. MNCs paid U.S. taxes on income wherever in the world it was earned—a so-called worldwide tax system. State of incorporation defines the residency of a corporation, a critical concept under a worldwide tax system.[172] Income earned indirectly by U.S. corporations from the foreign operations conducted by their foreign corporate subsidiaries was generally not subject to U.S. tax until the income was distributed to the U.S. parent corporation, thereby deferring the U.S. tax on those indirect foreign earnings. The pre-2018 law contained two main anti-deferral regimes: the controlled foreign corporation (CFC) rules of subpart F[173] and the passive foreign investment company (PFIC)

Trump's Tax Cuts in Hand, Companies Spend More on Themselves Than Wages, N.Y. Times (Feb. 26, 2018), https://nyti.ms/2sTnbDK.

169. The new base erosion measures are the GILTI tax on global intangible low-taxed income (I.R.C. § 951A) and the BEAT (I.R.C. § 59A)—base erosion anti-abuse tax. *See also* Jim Tankersley, *Tax Havens Blunt Impact of Corporate Tax Cut, Economists Say*, N.Y. Times (June 10, 2018), https://nyti.ms/2M8PnZ7 (suggesting that corporate tax cuts will not have a significant effect on profit shifting). The tax haven affiliates of U.S. MNCs are on average five times more profitable than their non-haven affiliates. U.S. MNC affiliates in Ireland, Luxembourg, Bermuda and the Caribbean have profits-to-wage ratios above 500%. Thomas Tørsløv et al., *The Missing Profits of Nations* (Nat'l Bureau of Econ. Research, Working Paper No. 24701, 2018), https://gabriel-zucman.eu/files/TWZ2018.pdf.

170. I.R.C. § 11.

171. I.R.C. §§ 1(h)(11), 316 (defining dividend).

172. I.R.C. § 7701(a)(30).

173. I.R.C. §§ 951–64.

rules.[174] These regimes are still in place and exist in tandem with the new rules, which allow certain dividends paid by foreign corporations to their U.S. corporate shareholders to escape U.S. taxation.[175]

Complex rules determine the source of income.[176] Under a so-called territorial tax system, income sourced in a foreign country is not taxed in the home country, often by the mechanism of a participation exemption, which allows foreign subsidiaries to pay tax-free dividends to home country owners.[177] While the 2017 tax legislation purportedly changed the U.S. international tax scheme from a worldwide system to a territorial system, some disagree with that characterization.[178]

An initial estimate shows that the United States will lose over USD $800 billion in revenue over the next 10 years because of the corporate tax changes most pertinent to the sectors we study.[179] While

---

174. I.R.C. §§ 1291–98.

175. I.R.C. § 245A.

176. I.R.C. §§ 861–65.

177. Joint Comm. on Tax'n, 112th Cong., JCX-33-11, Background and Selected Issues Related to the U.S. International Tax System and Systems That Exempt Foreign Business Income 8 (2011).

178. *See* Daniel Shaviro, *The New Non-Territorial U.S. International Tax System—Part 1*, 160 Tax Notes 57 (July 2, 2018).

179. Joint Comm. on Tax'n, 115th Cong., JCX-67-17, Estimated Budget Effects of the Conference Agreement for H.R. 1, the "Tax Cuts and Jobs Act" Fiscal Years 2018—2027 (2017). This Joint Committee report on estimated budget effects for 2018–2027 contains the following additional information:

Provision	**Revenue Impact (USD Billions)**
21% corporate tax rate	–1,348.5
Repeal corporate alternative minimum tax	–40.3
Expand bonus depreciation	–86.3
Limit interest deduction	253.4
Repeal deduction for domestic production income	98
Participation exemption for taxation of foreign income (territoriality)	–223.6
Taxation of deferred income	338.8
GILTI tax	112.4
Patent box deduction	–63.8
Base erosion and anti-abuse tax	149.6
Total	**–810.3**

overall the tax changes are a big benefit for MNCs, some sectors will fare better than others.[180] Analysts predict that the retail sector will benefit significantly, with one article reporting that Walmart should get a "big[] boost."[181] Technology companies may see tax increases from one of the new base erosion provisions—the global intangible low taxed income tax, or GILTI.[182] The tech industry also suffered a big one-time tax hit from TCJA's repatriation tax.[183] The coal industry does lose an important deduction—the domestic production income deduction[184]—but analysts still rate TCJA a win for coal, not the least because the bill did not include a carbon tax as a revenue raiser.[185]

B. Australia's Corporate Tax System

The Australian tax system taxes a company on the taxable income that it earns during the 12-month income year.[186] Like the U.S. system, a company is a separate entity from its shareholders, and therefore, income earned by a company is taxable to the company.[187] Company income is also taxed at a flat rate regardless of the company's level of income.[188] However, unlike the U.S. system, Australia uses a dividend imputation

---

180. Bloomberg, *These Are the Corporate Winners and Losers in the GOPs Final Bill*, Fortune (Dec. 16, 2017), http://fortune.com/2017/12/16/gop-tax-bill-winners-and-losers/.

181. Laura Davison, *Retailers, Banks, Hotels to See Tax Reform Boost: Analysts*, Daily Tax Rep. (BNA), Dec. 27, 2017.

182. Alison Bennett, *'GILTI' Worries: Four Industries Facing Tax Base Erosion Provision*, Daily Tax Rep. (BNA), May 9, 2018.

183. Jesse Drucker, *Companies Warn of Hits from Tax Cuts: Don't Be Fooled*, N.Y. Times (Jan. 4, 2018), https://nyti.ms/2EV3yNH (reporting that Google's repatriation tax bill will exceed $7 billion).

184. I.R.C. § 199 (2017) (repealed).

185. Emily Atkin, *The Tax Bill's Gift to Big Coal*, New Republic (Dec. 25, 2017), https://newrepublic.com/article/146388/tax-bills-gift-big-coal.

186. *Income Tax Assessment Act 1997* (Cth) s 995.1 (Austl.) (defining a company); *id.* s 4.15 (determining how taxable income is calculated).

187. *Id.* ss 6.5, 6.10, 9.1.

188. For the 2017–18 income year, it is 30% for companies with an aggregated turnover threshold of $25 million or greater and 27.5% for companies with an aggregated turnover threshold of less than $25 million. *Changes to Company Tax Rates*, *supra* note 11. It is reducing progressively to 25%;

system to ensure that shareholders receive a credit for corporate tax paid when they receive dividends. This tax is then offset against the investor's own tax payable, and therefore, the investor pays only the excess of her own tax rate (if any) over the corporate rate. Dividends paid to Australian investors thus effectively face only one level of tax.[189] Australia's headline rate is not comparable with that of the United States as U.S. dividends, unlike Australia's, are double-taxed.[190]

The payment of dividends characterizes the return on investment to shareholders of the company. The directors are the ones who determine how great the dividend will be and when it is payable.[191] This means that if the directors decide against the payment of dividends and prefer instead to reinvest the profit in the business, then the directors are unlikely to breach their duties. But the distribution of dividends has important tax implications and also, due to the dividend imputation system, has significant impact on investor behavior.[192]

The dividend imputation system works by including after-tax income paid by companies to their shareholders (dividends) in the shareholders' assessable income.[193] The dividend imputation system only applies if the company paying the dividend is an Australian resident at the time of payment.[194] The purpose of this system is to pass on a 'credit' to shareholders for the Australian tax that the company has paid on the profits from which distributions are made. Dividends that have this tax credit attached are referred to as "franked dividends."[195] Under the imputation system, the Australian tax originally paid by the company is treated as if it were an advance payment of the shareholder's ultimate tax liability.[196] If a company decides to distribute dividends to its

---

however, MNCs with turnover of $50 million or more will remain at the 30% tax rate. *Id.*

189. Peter Swan, *Investment, the Corporate Tax Rate, and the Pricing of Franking Credits* (31st Australasian Fin. & Banking Conf. 2018, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3222115.

190. *Id.*

191. *Corporations Act 2001* (Cth) s 254U (Austl.).

192. Swan, *supra* note 189.

193. *Income Tax Assessment Act 1997* (Cth) ss 995.1, 960.120 (Austl.); *Income Tax Assessment Act 1936* (Cth) s 6 (Austl.).

194. *Income Tax Assessment Act 1997* (Cth) ss 202.5, 202.2 (Austl.).

195. *Id.* s 200.15.

196. *Id.* s 200.1.

shareholders, it may also decide to attach a tax credit (franking credit) to this dividend. The amount of the credit depends on how much company tax has been paid.[197]

The tax credit on the investor's dividend will be credited against their ultimate tax liability. This liability depends, in the case of individual investors, on their marginal tax rate. With corporate investors, it will be the current corporate tax rate of either 27.5% or 30%.[198] The tax credit can be set against the investor's tax payable or received as a cash refund if it exceeds the institutional or personal tax liability. This is particularly significant for superannuation funds as they are taxed at 15%, ensuring that, with a corporate tax rate of 30%, the funds receive a large cash payment as well as the franking credit on the dividends they receive.[199] To benefit from the system, a shareholder (individual or company) should generally be a resident of Australia.[200]

---

197. Australia's Future Tax System: Report to the Treasurer: Part 2: Detailed Analysis B1 (2009), https://treasury.gov.au/sites/default/files/2019-10/afts_final_report_part_2_vol_2_consolidated.pdf.

198. *Changes to Company Tax Rates*, *supra* note 11.

199. *Dividend Imputation—Its Rationale and Its Impact on Superannuation Outcomes*, Ass'n Superannuation Funds Austl. 8 (2015), https://www.superannuation.asn.au/ArticleDocuments/359/ASFA_Dividend-imputation.pdf.aspx?Embed=Y.

200. *Income Tax Assessment Act 1997* (Cth) ss 207.65, 207.70, 207.75, 207.75(2) (Austl.).

An entity that receives a distribution also satisfies the ***residency requirement*** at the time the distribution is made if the entity at that time:

(a) is a company or an individual; and

(b) is a foreign resident; and

(c) carries on business in Australia at or through a permanent establishment of the entity in Australia, being a permanent establishment within the meaning of:

(i) a double tax agreement (as defined in Part X of the *Income Tax Assessment Act 1936*) that relates to a foreign country and affects the entity; or

As a result of the dividend imputation system, company income tax effectively acts as a withholding tax on company profits that represent a return to either the savings of Australian investors or the labor of owner-operators of businesses that operate through companies.[201] As the majority of investors in Australian-listed companies are Australian superannuation funds, it also encourages those listed companies to pay as much tax in Australia as possible.[202]

In the 2017–2018 Budget, the Australian Federal Government argued that a lower corporate tax rate would promote business investment through raising the return from investing in Australia.[203] The Government also argued that a lower corporate tax rate would raise productivity and real wages.[204] Parliament has approved a reduction in the corporate tax rate for enterprises with an aggregated income of less than $25 million and less than 80% of income from passive investment to 27.5% for the 2016–17 income year.[205] This rate will ultimately

---

> (ii) subsection 6(1) of that Act, if there is no such agreement; and the distribution is attributable to the permanent establishment.

Id. s 207.75(2).

201. Australia's Future Tax System, *supra* note 197. There are also complex tax avoidance arrangements to prevent streaming of dividends to different classes of shareholders. However, a discussion of those rules is outside the scope of this Article.

202. Hue Hwa Au Yong et al., *Off-Market Buybacks in Australia: Evidence of Abnormal Trading Around Key Dates*, 14 Int'l Rev. Fin. 551, 554 (2014). Furthermore, low marginal tax rate investors such as superannuation funds benefit from participating in share buybacks (both on and off-market), especially when using capital losses to offset other short-term capital gains. *See* Christine Brown & Kevin Davis, *Taxes, Tenders and the Design of Australian Off-Market Share Repurchases*, 52 Acct. & Fin., 2012 supp., at 109.

203. David Taylor, *Corporate Tax Cuts: What Are the Key Issues in the Debate?*, ABC (Mar. 28, 2018, 11:50 PM), http://www.abc.net.au/news/2018-03-29/corporate-tax-cuts-explained/9600004.

204. The Australian Treasury argues that corporate tax cuts will increase economic activity. *See* Philippa Henty et al., *US Corporate Tax Reform: Implications for the Rest of the World* (Nov. 2017), https://treasury.gov.au/sites/default/files/2019-03/p2017-t234104-US-Corporate-Tax-Reform.pdf.

205. *Treasury Laws Amendment (Enterprise Tax Plan) Act 2017* (Cth) (Austl.).

reduce to 25%. However, MNCs with turnover of $50 million or greater will still pay tax at the 30% rate.[206]

Now that the Article has set the stage by comparing United States and Australian laws and policies on CSR and corporate taxes, the next section will use a case study approach and compare selected U.S. and Australian MNCs on sustainability metrics. We will examine their corporate reports to assess each company's engagement in corporate environmental social responsibility. Each part of the following section will first describe the industry in general and then focus on each selected company, before reaching general conclusions.

VI. Comparison of U.S. and Australian MNCs on Sustainability Metrics

A. Coal Sector

Coal is a worldwide commodity.[207] Most coal is purchased by power plants using long-term contracts.[208] While coal continues to be the largest fuel source for electricity generated in the United States, its influence has markedly declined. For example, while the United States has the world's largest coal reserves, constituting 27% of the world's total coal resource, competition from inexpensive natural gas has caused a drop in domestic coal production.[209] In 2007, 47.6% of electricity generation was from coal. In 2013, 40.1% of electricity generation was from coal.[210] In 2017, the percentage dropped to 29.9%.[211]

---

206. *Changes to Company Tax Rates*, *supra* note 11.

207. Int'l Energy Agency, Coal Information: Overview 6 (2018).

208. *Coal Explained: Coal Prices and Outlook*, U.S. Energy Info. Admin., https://www.eia.gov/energyexplained/index.php?page=coal_prices (last visited Sept. 27, 2019).

209. Marc Humphries & Molly F. Sherlock, Cong. Research Serv., R43011, U.S. and World Coal Production, Federal Taxes, and Incentives 6 (2013), https://fas.org/sgp/crs/misc/R43011.pdf.

210. Molly F. Sherlock & Jeffrey M. Stupak, Cong. Res. Serv., R41953, Energy Tax Incentives: Measuring Value Across Different Types of Energy Resources 14 (2015), https://fas.org/sgp/crs/misc/R41953.pdf.

211. *What Is U.S. Electricity Generation by Energy Source?*, U.S. Energy Info. Admin., https://www.eia.gov/tools/faqs/faq.php?id=427&t=3 (last updated Oct. 25, 2019).

Australia generated 63% of its electricity from coal in 2016, an increase of three percent over the previous year.[212] In 2017, Australia was the world's second largest coal exporter, amounting to 27.6% of coal exports on a tonnage basis.[213] The United States came in fourth place, although its coal exports increased by 61% since 2016.[214] China is the most significant importer of coal, although India imported more U.S. coal than China in 2017.[215]

Although individuals and businesses are the ultimate end users of the electricity generated by coal, most coal is purchased by utilities. Some consumers may be aware of the source of the energy that generates the electricity they use, but that information is not universally available on utility bills in the United States or Australia.[216] A majority of Americans are aware of climate change and support reductions in fossil energy use.[217] Most Australians want more renewable power in their energy mix.[218] Even if consumers are aware of the source of the energy, they may not know how or be willing to take action to change the source of the energy provided by their local utility.[219] Due to these factors, coal companies are unlikely to face consumer pressure to become more sustainable. With an average effective tax rate of less than five percent, coal

---

212. Austl. Dep't of the Env't & Energy, Australian Energy Update 2017, at 9 (2017), https://www.energy.gov.au/sites/g/files/net3411/f/energy-update-report-2017.pdf.

213. Int'l Energy Agency, *supra* note 207, at 3.

214. *Id.* at 4.

215. *Id.* at 8.

216. Consumers in the United States can find energy source information by visiting the Environmental Protection Agency's Power Profiler website at https://www.epa.gov/energy/power-profiler (last visited Nov. 29, 2019).

217. Christine Horne & Emily Huddart Kennedy, *The Power of Social Norms for Reducing and Shifting Energy Use*, 107 Energy Pol'y 43, 45 (2017).

218. Paul Karp, *Most Australians Want More Renewables to Help Lower Power Prices—Poll*, Guardian (Aug. 5, 2018, 2:00 PM), https://www.theguardian.com/australia-news/2018/aug/06/most-australians-want-more-renewables-to-help-lower-power-prices-poll.

219. *See, e.g.*, *Find Green-e Certified Products*, Green-e, https://www.green-e.org/certified-resources (last visited Nov. 29, 2019) (providing a list of certified green power alternatives in various states in the United States); *see also* GreenPower, https://www.greenpower.gov.au/ (last visited Nov. 29, 2019).

companies may not expect to benefit much from lowered nominal corporate tax rates. Our analysis of the sustainability efforts reported by two coal mining companies, one in the United States and the other in Australia, follows.

1. United States

CONSOL Energy is a coal producer and exporter based in Pennsylvania. Its Pennsylvania Mining Complex has the capacity to produce approximately 28.5 million tons of coal per year,[220] about four percent of U.S. total production.[221] CONSOL also operates the Baltimore Marine Terminal, with an export capacity of 16 million tons of coal annually.[222] CONSOL's website extols its environmental responsibility, stating, "We believe long-term utilization of our coal across the world is vital," and "we are focused on minimizing our impacts, maximizing water reuse, reducing process air emissions and restoring mine properties."[223]

CONSOL published its most recent sustainability report in 2018, using the GRI Sustainability Reporting guidelines.[224] CONSOL uses an environmental management system (EMS) based on ISO 14001 guidelines.[225] CONSOL considers compliance with environmental laws and regulations to be a core value.[226] CONSOL's report goes beyond strict compliance, stating, "[W]e continue to voluntarily investigate and implement environmental controls that will facilitate continued, compliant coal production."[227] Moreover, CONSOL developed sustainability goals for water conservation and biodiversity management.[228]

---

220. *Welcome*, CONSOL Energy, http://investors.consolenergy.com/ (last visited Nov. 29, 2019).

221. Int'l Energy Agency, *supra* note 207, at 4.

222. *Marine Terminal*, CONSOL Energy, http://www.consolenergy.com/operations/marine-terminal (last visited Nov. 29, 2019).

223. CONSOL Energy, Fuel the World for a Better Tomorrow: 2018 Corporate Sustainability Report 1, 13 (2018), http://www.consolenergy.com/consolcoal/media/CNXCML/2018crr.pdf.

224. *Id.* at 3. GRI standards are referenced *supra* note 65.

225. CONSOL Energy, *supra* note 223, at 13. ISO standards are referenced *supra* note 66.

226. CONSOL Energy, *supra* note 223, at 13.

227. *Id.*

228. *Id.* at 17–18.

2. Australia

Whitehaven Coal is the largest Australian-owned producer of high-efficiency, low-emission power station coal, based in New South Wales, with additional operations in Queensland.[229] One of the "pillars" of Whitehaven's corporate culture is "[s]ocial and environmental responsibility."[230] The report emphasizes coal's role in improving living standards by providing low cost energy.[231] The report notes that Whitehaven produces "high quality coal" that is "washed" for improved quality.[232] The report also explains, "Where applicable, disturbed land is generally rehabilitated to align with pre-mining vegetation communities such as pasture, woodland and forest."[233] The report acknowledges coal's contribution to climate change, stating, "We recognise the production of coal and coal-fired generation are associated with greenhouse gas emissions and we are aware of our responsibilities to help preserve the environment for current and future generations. As a major coal producer, we also recognise our responsibility to continue providing the energy people need."[234]

The report asserts that Whitehaven's high-quality coal enabled Japan, Korea, and Taiwan to reduce their carbon emissions by 30%.[235] The report ties their sustainability efforts to shareholder value, stating that they "advocate for policies that are environmentally effective, economically efficient and do not erode shareholder value."[236] The annual report also notes that the majority of the company's tax liabilities are paid in Australia and that they comply with all prevailing tax laws in the jurisdictions in which they operate.[237]

---

229. Whitehaven Coal, Whitehaven Coal Annual Report 2018 (2018), http://www.whitehavencoal.com.au/wp-content/uploads/2018/09/WVN_224754_Annual-Report-2018_LR_FA-3.pdf. Whitehaven does not publish a separate sustainability or corporate responsibility report. This information is drawn from the 2018 Whitehaven Annual Report.

230. *Id* at 3.

231. *Id* at 30.

232. *Id.* at 26.

233. *Id.* at 53.

234. *Id.* at 30.

235. *Id.*

236. *Id.*

237. *Id.* at 31.

The annual report contains a "sustainability" section, which states that their "goal is to reduce [their] environmental footprint wherever possible, including through more efficient use of resources such as energy and water."[238] The reported performance data indicates, however, that Whitehaven is using more energy, more water, and that their GHG emissions have almost doubled since 2015.[239] Their energy intensity use also increased, albeit slightly.

3. Summary of Coal Company Reports

In their respective reports, both companies are putting the best face on a polluting industry. CONSOL's report noted the performance of their coal, stating that its coal has "the best-in-class energy content (as measured in Btu per pound) compared to most other coals produced in the U.S. and worldwide, along with reasonably low levels of impurities such as ash and sulfur."[240] Whitehaven's report emphasized the societal benefits of providing coal at a low cost but provided clear environmental data that indicated Whitehaven's coal operations were causing further environmental damage.

B. Retail Sector

Retail trade makes up about five percent of total U.S. gross domestic product.[241] In 2016, the approximately 3.8 million U.S. retail establishments had about $2.6 trillion in sales.[242] The "year-over-year" retail sales for October 2018 showed an increase of five percent, with an 11.4% increase in online sales.[243] Australian retailing plays a similar

---

238. *Id.* at 5.

239. *Id.* at 42.

240. CONSOL Energy, *supra* note 223, at 4.

241. U.S. Bureau of Econ. Analysis, *Value Added by Private Industries: Retail Trade as a Percentage of GDP (VAPGDPR)*, FRED, https://fred.stlouisfed.org/series/VAPGDPR (last visited Nov. 29, 2019).

242. *Retail Service Spotlight: The Retail Service Industry in the United States*, SelectUSA, https://www.selectusa.gov/retail-services-industry-united-states (last visited Nov. 29, 2019).

243. Kimberly Amadeo, *U.S. Retail Sales Report, Current Statistics, and Recent Trends*, Balance, https://www.thebalance.com/u-s-retail-sales-statistics-and-trends-3305717 (last updated Aug. 27, 2019).

role in the Australian economy to that played by the U.S. retail industry in the U.S. economy.[244]

Unlike the coal industry, retail companies have direct interaction with end-use consumers. Much research has been done to identify the "green consumer," who seeks to purchase goods that have a minimal impact on the environment.[245] We anticipate that retail companies will emphasize their environmental social responsibility to attract these green consumers. Moreover, the retail industry has been subject to significantly higher effective corporate tax rates and therefore will benefit from lower nominal corporate rates.[246]

1. United States

Walmart is a dominant player in the world retail market, serving nearly 270 million customers each week in more than 11,700 stores in 28 countries.[247] Walmart is listed as a "key player[] to watch" in the 2019 State of Green Business Report, which cites its demands to suppliers to "design products with more recycled content, and with reuse and recyclability in mind."[248] Walmart's 2018 Global Responsibility Report details its significant sustainability efforts, highlighting Project Gigaton, an initiative launched in 2017 to work with suppliers to remove a gigaton of emissions from its supply chain by 2030.[249] Walmart notes that 90% of its total

244. Barbara Farfan, *The Largest Australian Retailers*, Balance (Oct. 29, 2018), https://www.thebalancesmb.com/largest-australian-retailers-2892105.

245. Philip S. Morrison & Ben Beer, *Consumption and Environmental Awareness: Demographics of the European Experience*, *in* Socioeconomic Environmental Policies and Evaluations in Regional Science: Essays in Honor of Yoshiro Higano 81 (Hiroyuki Shibusawa et al. eds., 2016).

246. *See* Davison, *supra* note 181.

247. Walmart, 2018 Global Responsibility Report 2 (2018), https://s2.q4cdn.com/056532643/files/doc_downloads/ESG/WAL-071_2018_GRR_Full_Book%5b1%5d.pdf.

248. Greenbiz Group, 2019 State of Green Business 50, 53 (2019), https://www.greenbiz.com/report/2019-state-green-business-report. The chairman of the Greenbiz Group, Joel Makower, states that the report's goal is to "step back from the daily headlines to take stock of progress, or lack thereof, in corporate sustainability practices." *Id.* at 3.

249. *Id.* at 17.

GHG emissions come from its supply chain.[250] Under Project Gigaton, Walmart will seek sustainability commitments from its supplies in six key goal areas: energy, agriculture, waste, packaging, deforestation, and product use.[251] Walmart also aims to reduce emissions in its own operations by 18% by 2025 through increasing energy efficiency of its buildings, powering 50% of its operations with renewable energy by the end of 2025, improving the performance of its refrigeration systems, and maximizing the sustainability of its trucking fleet.[252] Walmart reaffirmed its commitments in its 2019 Environmental, Social, and Governance Report, further promising "to work with our U.S. private-brand suppliers to [a]chieve 100% recyclable, reusable or industrially compostable packaging in all Walmart private-brand products by 2025."[253] Walmart is a signatory to the "We Are Still In" declaration, pledging to abide by the Paris Climate Accord.[254] Walmart's Chief Sustainability Officer stated the company's broad vision of sustainability, writing, "[O]ur approach to environmental, social and governance (ESG) issues goes beyond minimizing our own footprint or mitigating risk. We take a more assertive approach: sparking collective action to transform the retail sector for environmental, social and economic sustainability."[255]

Walmart reaped significant benefits from the 2017 corporate tax rate cut, reportedly saving at least $1.6 billion for the first three quarters of 2018, compared with what it would have paid under its previous effective rate.[256] Walmart also increased the starting wage for employees to $11 per hour, up from $10 per hour in 2016.[257] While Walmart

---

250. *Id.* at 127.

251. *Id.* at 128.

252. *Id.* at 56.

253. Walmart, 2019 Environmental, Social & Governance Report 19 (2019), https://corporate.walmart.com/media-library/document/2019-environmental-social-governance-report/_proxyDocument?id=0000016c-20b5-d46a-afff-f5bdafd30000.

254. Walmart, *supra* note 247, at 55.

255. *Id.* at 4.

256. Jim Tankersley, *Trump's Tax Cut One Year Later: What Happened?*, N.Y. Times (Dec. 27, 2018), https://nyti.ms/2RmKtNq.

257. Emily Stewart, *Walmart Is Paying $20 Million to Shareholders. With That Money, It Could Boost Hourly Wages to over $15*, Vox, https://www.vox.com/business-and-finance/2018/5/25/17379730/walmart-stock-buyback-worker-wages (last updated May 30, 2018, 1:43 PM).

linked the wage increase to tax reform, it did not comment on whether the corporate tax cut would affect its sustainability investments.[258]

2. Australia

Wesfarmers was Australia's largest private employer until it spun off its Coles supermarket division in November 2018.[259] Wesfarmers' over 200,000 employees are mostly located in Australia. Wesfarmers operates primarily through its retail subsidiary groups, including Kmart, Target, Officeworks (office supplies), and Bunnings (hardware stores).[260] Retail revenues comprised 92% of Wesfarmers total 2018 revenues, with the remainder coming from its industrial division.[261]

Wesfarmers' sustainability report highlights the benefit its commitment to the environment provides to its shareholders. The managing director stated, "We believe sustainability is an opportunity to drive strong and long term shareholder returns."[262] The chairman stated, "We aim to achieve satisfactory return for shareholders by . . . taking care of the environment and making sure that we are environmentally conscious in all our activities."[263] The sustainability report cites as material issues sourcing ("we strive to source products in a responsible manner while working with suppliers to improve their social and environmental practices") and environment ("we strive to reduce the emissions intensity of our businesses and improve their resilience to climate change").[264] Wesfarmers reduced emissions intensity by six percent overall, driven by energy efficiency programs at its Coles, Kmart, and Officeworks divisions.[265] Wesfarmers uses shadow carbon pricing, a method of

---

258. Walmart, *supra* note 247, at 215.

259. Chris Pash, *Wesfarmers Is About to Lose Its Title as Australia's Largest Private Employer*, Bus. Insider Austl. (Oct. 16, 2018, 9:30 AM), https://www.businessinsider.com.au/australia-largest-private-employer-in-australia-2018-10.

260. Wesfarmers, Wesfarmers Sustainability Report 2018 (2018), https://sustainability.wesfarmers.com.au/media/2467/sustainability_website_2018.pdf.

261. *Id.* at 6–7. Wesfarmers sold its Curragh coal mine in 2018. *Id.* at 2.

262. *Id.* at 5.

263. *Id.* at 3.

264. *Id.* at 4.

265. *Id.* at 31.

investment decision analysis that adds a hypothetical carbon price to market prices for goods that involve significant carbon emissions.[266] The shadow carbon price helps ensure that Wesfarmers investment decisions reflect environmental costs and that its carbon footprint is reduced in a cost-effective manner.[267] Significantly, Wesfarmers anticipates that "a formal tradeable price on carbon will be re-introduced in Australia at some time in the medium-term."[268] As Wesfarmers distributes a fully franked dividend,[269] the concern about future carbon pricing is more likely to drive corporate sustainability actions rather than concern about the corporate tax rate.[270] Franked dividends, as described earlier, transfer a tax credit related to corporate taxes paid to the shareholder.[271]

3. Summary of Retail Company Reports

As anticipated, the retail company reports put a greater emphasis on the sustainability of their products and supply chains than the coal companies. However, interesting differences exist between Walmart and Wesfarmers. Walmart appears to be reaching out to environmentally conscious consumers and investors, seeking to be a leader in sustainability. While also addressing consumers' concerns, Wesfarmers appears to be more focused on investor returns and eventual governmental action on climate change.

C. Technology Sector

Some believe that the technology sector has driven economic growth and productivity over the past several decades.[272] Technology companies such as Apple, Microsoft, and Google regularly appear in the top

---

266. *Id.* at 33.

267. *Id.*

268. *Id.*

269. Dividends can be fully franked, partly franked (with a commensurately lower tax credit attached for the shareholder), or unfranked (with no tax credit attached). *See supra* note 195 and accompanying text.

270. Wesfarmers, *supra* note 260, at 8.

271. *See supra* note 195 and accompanying text.

272. *See* Lawrence M. Rausch, *High-Tech Industries Drive Global Economic Activity*, Nat'l Sci. Found. (July 20, 1998), https://www.nsf.gov/statistics/issuebrf/sib98319.htm.

companies worldwide for market capitalization.[273] Technology companies have also been in the forefront of using tax minimization strategies, as discussed previously.[274] The technology sector covers a broad range of companies,[275] some of which have a significant consumer presence and others that operate largely behind the scenes.[276] The two companies selected for our analysis, Alphabet (the parent company of Google) and Isentia, exemplify both ends of that spectrum.

1. United States

Google[277] is one of the world's most valuable companies, and its brand enjoys top recognition worldwide.[278] Google processes over 40,000 searches per second, according to their own statistics.[279] It holds over 65% share of global internet searches.[280] With 1.2 trillion annual searches, it would be hard to find anyone with internet access who is not aware of Google.[281] While internet searching is Google's first and best-known product, its core products also include Android, Maps, Chrome, YouTube,

---

273. *The 100 Largest Companies in the World by Market Value in 2019*, STATISTA, https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-value/ (last updated May 2019) (showing tech companies Apple, Amazon.com, Alphabet, Microsoft, Facebook, and Alibaba at the top of the list).

274. *See* Duhigg & Kocieniewski, *supra* note 145.

275. *See* Stephanie Stone, *Why Every Company Is a Technology Company*, FORBES (Jan. 23, 2017, 9:00 AM), https://www.forbes.com/sites/forbestechcouncil/2017/01/23/why-every-company-is-a-technology-company/#4742803457ae.

276. The NYU Stern ETR database used to select the companies examined does not include a "technology" category. The companies examined are in the software (internet) category in the Stern database.

277. We will primarily use "Google" to refer to both Google and its parent company Alphabet.

278. Micah Lally (Sept. 26, 2019), *30 of the Most Recognizable Brand Logos of All Time*, BLULEADZ, https://www.bluleadz.com/blog/30-of-the-most-recognizable-brand-logos-of-all-time.

279. *Google Search Statistics*, INTERNET LIVE STATS, http://www.internetlivestats.com/google-search-statistics/ (last visited Nov. 29, 2019).

280. *Id.*

281. *Id.*

Google Play, and Gmail.[282] Each of Google's core products has more than 1 billion monthly active users.[283]

Google's 2018 environmental report states its commitment to "building sustainability into everything we do, making smart use of the earth's resources, and creating products with the planet in mind."[284] Google's most significant environmental impact comes from energy consumption.[285] Google has been carbon neutral since 2007.[286] Its environmental report describes a threefold strategy for maintaining carbon neutrality: aggressive pursuit of energy efficiency, matching energy consumption with renewable energy purchases, and purchasing carbon offsets for any remaining emissions.[287] Google achieved 100% renewable energy matching in 2017—Google is the world's largest corporate purchaser of renewable energy.[288] Google's environmental report asserts, "By pioneering new energy purchasing models that others can follow, we've helped drive wide-scale adoption of clean energy."[289] Google also claims to drive positive environmental impact in other ways: by designing efficient data centers; creating sustainable workplaces; and empowering users with technology.[290]

Google's 14 data centers use, on average, 50% less energy than a typical data center.[291] In 2017, only nine percent of data center waste was sent to landfills.[292] By matching data center electricity consumption with renewable energy, Google reduced its embedded water use by 86% on average compared with buying grid power.[293]

Much of Google's office space meets LEED standards for energy efficiency.[294] At its Bay Area headquarters, Google has implemented

---

282. Google, Google Environmental Report 2018, at 3 (2018), https://storage.googleapis.com/gweb-sustainability.appspot.com/pdf/Google_2018-Environmental-Report.pdf.

283. *Id.*

284. *Id.* at 6.

285. *Id.* at 8.

286. *Id.* at 30.

287. *Id.*

288. *Id.* at 24.

289. *Id.* at 26.

290. *Id.* at 12.

291. *Id.* at 18.

292. *Id.*

293. *Id.* at 19.

294. *Id.* at 34.

"science-based Habitat Design Guidelines" designed to restore local ecology and improve access to the outdoors for Google employees and the community.[295] Google encourages employees to commute by sustainable transportation choices, such as the Google shuttle, public transportation, biking, and walking.[296]

The unique nature of Google's business enables it to make the final sustainability claim: its technology enables users to save energy and mitigate climate change. In the words of Google's environmental report: "A global challenge requires a global response. We strive to meet the vast challenge posed by climate change by working to empower everyone—businesses, governments, nonprofit organizations, communities, and individuals—to use Google technology to help create a more sustainable and resource-efficient world."[297]

Google backs up this breathtaking claim by referring to energy savings from businesses using Google Cloud and Gmail, individuals managing energy by the Nest thermostat, travelers finding more sustainable transportation via Google Maps, and better understanding of the planet by scientists using geospatial data generated by Earth Engine.[298] Project Sunroof mapped 67 million rooftops to access solar energy potential.[299]

Why does Google appear to be such a sustainability leader? Clearly, Google's actions are subject to scrutiny by its consumers and investors. The State of Green Business Report notes that Google embeds sustainability teams in several of its business units, which enables integration of sustainability with functionality.[300] Good corporate behavior may be part of its corporate identity, at least at the start. Google's founders Sergey Brin and Larry Page coined Google's unofficial motto: "Don't be evil."[301] When Google became Alphabet in 2015, the motto

---

295. *Id.*

296. *Id.* at 36.

297. *Id.* at 40.

298. *Id.* Google Earth Engine provides researchers with simple access to Google's "massive cloud and computational capabilities" for large-scale geospatial analysis. *Id.* at 44.

299. *Id.* at 43.

300. Greenbiz Group, *supra* note 248, at 14.

301. Daniel Roberts, *Alphabet Drops Google's Famous 'Don't Be Evil' Motto*, Fortune (Oct. 5, 2015), http://fortune.com/2015/10/05/alphabet-google-evil/.

was dropped from Alphabet's code of conduct, although it remained in Google's code of conduct until May 2018.[302] Furthermore, Google's sustainability image does not appear to hurt its profitability—on the contrary, Google touts its own products as encouraging sustainability.

2. Australia

Isentia, unlike Google, is not a huge worldwide company with substantial consumer presence. Founded in Sydney in 1982 as a press-clipping agency, Isentia provides "technologically advanced search products" used by over 5,000 clients worldwide, serviced by 18 offices across the Asia-Pacific region.[303] Isentia's client mix is about three-quarters corporate accounts, with the remainder being media organizations and government agencies.[304] Isentia produces media analysis reports that provide "clearly defined benchmarks, improved media connections, increased budgets and changes in public policy."[305] A sample media analysis report from Isentia's website tracks the coverage of Tesla's grid storage proposal for South Australia.[306] Isentia stated that its reports allow clients to demonstrate effectiveness, establish benchmarks and measure key performance indicators, manage breaking issues, and understand the media landscape.[307] According to Isentia's 2018 annual report, it operated at a loss in its June 2016 to June 2017 year and earned a modest profit in its June 2017 to June 2018 year.[308] Its annual report

---

302. *Id.*; *see also* Christopher Carbone, *Google Drops 'Don't Be Evil' Motto*, Fox News (May 21, 2018), https://www.foxnews.com/tech/google-drops-dont-be-evil-motto.

303. *Isentia, Overview*, ITVIEC, https://itviec.com/companies/isentia (last visited Nov. 29, 2019).

304. Isentia, 2018 Environmental, Social and Governance Report: Our Vision for a Greater Tomorrow 3 (2018), https://www.isentia.com/wp-content/uploads/2019/06/18_085-ESG-Report-2018-1.pdf.

305. Isentia, Power Play: The Elon Musk Tweet That Flicked the Switch, Media Analysis Report 7 (2017), http://pages.isentia.com/rs/114-HJX-968/images/Elon_Musk_Report_Isentia.pdf.

306. *Id.*

307. *Id* at 7.

308. Isentia, 2018 Annual Report 38 (2018), https://www.isentia.com/wp-content/uploads/2019/06/2018-Isentia-Annual-Report.pdf.

notes franking credits,[309] which as described previously, reduce the incentive to avoid corporate taxes.[310]

Isentia does not have "manufacturing or production assets which impact the environment in a material way."[311] Isentia's sustainability report was prepared using the GRI G4 sustainability reporting guidelines.[312] In its sustainability report, Isentia notes that it is transitioning to cloud-based data management to save energy.[313] Isentia's head office building has energy efficient features, including energy efficient lighting, rooftop solar, and water saving features such as a rainwater storage tank and efficient plumbing fixtures.[314] Isentia has also reduced its office waste by minimizing paper use, using recycled paper, and recycling ink and printer byproducts.[315] Isentia provides bike storage for employees to reduce their reliance on automobile transport.[316]

3. Summary of Technology Company Reports

Comparing a mega-company like Google to a small multi-national company like Isentia on sustainability metrics is a difficult task. However, Isentia and Google meet our selection criteria: both are listed in the same category of the N.Y.U. Stern database of effective corporate tax rates. Isentia is based in Australia and Google is based in the United States. Google's sustainability report details significant actions with positive environmental impact, but many can also be traced to profitability.[317] Google is also a famous user of tax avoidance strategies—and not only to avoid U.S. taxes.[318]

---

309. *Id.* at 76.

310. *See supra* notes 189, 197, and accompanying text.

311. Isentia, *supra* note 304, at 5.

312. *Id.* at 1; *see also supra* note 65 (explaining the Global Reporting Initiative).

313. Isentia, *supra* note 304, at 5.

314. *Id.*

315. *Id.*

316. *Id.*

317. *See, e.g.*, *supra* note 297 and accompanying text.

318. Jeremy Kahn, *Google's 'Dutch Sandwich' Shielded 16 Billion Euros from Tax*, Bloomberg (Jan. 2, 2018, 4:39 PM), https://www.bloomberg.com/news/articles/2018-01-02/google-s-dutch-sandwich-shielded-16-billion-euros-from-tax.

Conclusion

The conclusion to this Article circles back to altruism. Voluntary corporate actions to benefit the environment could be construed as philanthropy.[319] Corporations engage in philanthropy to satisfy the altruistic demands of stakeholders—shareholders, employees, consumers, and regulators.[320] While enforcement may well drive out altruism, incentives operate in the opposite direction.[321] Researchers predict that recent U.S. tax reform changes will discourage charitable contributions.[322] On the individual side, a significant increase to the standard deduction and limits on the ability to itemize deductions are anticipated to reduce the federal tax subsidy for charitable giving by about one-third.[323] On the corporate side, the cut in the corporate tax rate from 35% to 21% reduces the value of charitable contribution deductions.[324] From that perspective, reducing corporate tax rates would have a negative impact on CSR. Critics may validly argue that it is too early to assess the full impact of the U.S. corporate tax rate changes, which have only been in effect for one year. Indeed, economist Alan Auerbach, discussing the complexity of the changes in the TCJA, recently wrote:

> Assessing the net impact of these provisions on investment is very challenging, as it requires one to account for the interaction of a broad range of provisions,

---

319. M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 Colum. L. Rev. 571, 574 (2009). "[A] firm's decision to limit pollution to a greater extent than that required by law is as much charity as a gift to the opera. . . ." *Id.* at 580.

320. *Id.* at 584.

321. *Id.* at 587; *see also* Bénabou & Tirole, *supra* note 10, at 1653 ("[T]here is also much evidence to support the basic premise of economics that incentives work. . . .").

322. *The Tax Policy Center's Briefing Book: How Did the TCJA Affect Incentives for Charitable Giving?*, Tax Pol'y Ctr., https://www.taxpolicycenter.org/briefing-book/how-did-tcja-affect-incentives-charitable-giving (last visited Nov. 29, 2019).

323. *Id.*

324. For example, a corporate charitable contribution of $10,000 in 2017 reduced corporate tax liability by $3,500. In 2018, the same contribution would only reduce tax liability by $2,100.

> with little evidence regarding many behavioral responses. The task is much more difficult than for the case of a simple cut in the corporate tax rate, the conceptual experiment that many have in mind when predicting the effects of corporate taxation on production, investment, and wages.[325]

Nonetheless, given the large potential environmental impact of MNCs, we believe that our exercise is timely and appropriate. Furthermore, we hope to inspire future researchers to continue in this quest.

The appropriate role of CSR depends on which theory of the corporation we adopt. As discussed earlier in this Article, there are three prominent theories of the corporation: artificial entity theory, the real entity theory, and the aggregate theory.[326] A recent book by law professor Kent Greenfield examined the role of the corporation in light of the U.S. Supreme Court's decision, *Citizens United v. Federal Election Commission*, which held that corporations have free speech rights like people do.[327] That case, and the statement by then U.S. presidential candidate Mitt Romney that "corporations are people, my friend,"[328] raised a debate about whether corporations should be treated as persons. As Greenfield explained, Romney was criticized for his comment because it seemed wrong to assert that corporations, as artificial entities, were entitled to constitutional rights meant to protect people.[329] However, Greenfield further explained that the *Citizens United* decision did not find that corporations were people but rather that corporations were associations of citizens, and the rights of the corporation must be recognized in order to protect the citizens associated with the corporation.[330]

---

325. Alan J. Auerbach, *Measuring the Effects of Corporate Rate Cuts*, J. Econ. Persp., Fall 2018, at 97, 115.

326. *See supra* note 32 and accompanying text.

327. Kent Greenfield, Corporations Are People Too (And They Should Act Like It) (2018); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 301 (2010).

328. Ashley Parker, *'Corporations Are People,' Romney Tells Iowa Hecklers Angry over His Tax Policy*, N.Y. Times (Aug. 11, 2011), https://www.nytimes.com/2011/08/12/us/politics/12romney.html.

329. Greenfield, *supra* note 327, at 60.

330. *Id.*

Greenfield argued that treating corporations as people, with the obligations of people, would best serve society.[331] This view, like the "real entity" view of the corporation, favors long-term decision-making over short-term decision-making. Greenfield noted:

> One reason why short-termism is a real problem springs from the fact that the discount rate of shareholders is higher than that of society. Much of one's calculus about the present depends on how one values the future, and the amount one values the future is captured in the "discount rate." From a shareholder's perspective, benefits gained in the future will be discounted to a present value. The present value of a long-term gain or loss depends on the rate at which such future amounts are reduced to a current value—the discount rate. As a financial matter, the higher the discount rate, the less future gains and losses will matter in the present.[332]

A study by the Center for American Progress highlighted the market failure of short-termism, finding that markets excessively discounted future earnings, thereby preventing companies from making profitable investments.[333] Market failures can cause companies to make the wrong decisions for themselves and society. Government policy can correct market failures. The Center for American Progress made two tax policy recommendations to correct short-termism: change the tax preference for executive compensation by requiring that equity options take longer to vest and lengthen the holding period for preferential capital gains.[334]

---

331. *Id.* at 226.

332. *Id.* at 219.

333. Marc Jarsulic et al., *Long-Termism or Lemons: The Role of Public Policy in Promoting Long-Term Investments*, Ctr. for Am. Progress 6 (Oct. 2015), https://cdn.americanprogress.org/wp-content/uploads/2015/10/21060054/LongTermism-reportB.pdf.

334. *Id.* at 14; *see also* I.R.C. § 162(k) (executive compensation); I.R.C. § 1222(3) (definition of long-term capital gains).

Action on climate change is also affected by discount rates, short-termism, and market failure.[335] Corporations take voluntary environmental actions in part to discourage governments from enacting potentially more restrictive regulations or to be ready for such regulation. For example, consider Wesfarmers' use of a "shadow" carbon price.[336] A 2006 working paper found that state intervention in the form of a hypothetical pollution tax would potentially crowd out corporate responsibility but at the same time improve the environment.[337] This might suggest that government imposition of a carbon tax would be preferable to relying on corporate social responsibility to protect the environment. Under the current U.S. federal administration, a carbon price seems unlikely.[338] Events such as the Paris gas tax protests show that "we cannot argue for climate policy in a vacuum, ignoring the dangerous political moment we are in, when the anger of working people is being misappropriated by demagogues."[339] However, the recent shift of the U.S. House of Representatives to Democratic control may provide an opportunity for serious government action on climate change, with House Democrats announcing a "Green New Deal" calling for the United States to become carbon neutral by 2030.[340]

Corporate environmental decisions are shaped by stakeholder demand and likely government action; threat of regulatory pressure could enhance corporate environmental responsibility. So far, the evidence shows that the most significant reaction to reducing corporate

---

335. *See* David A. Weisbach & Cass R. Sunstein, *Climate Change and Discounting the Future: A Guide for the Perplexed*, 27 Yale L. & Pol'y Rev. 433 (2009). "[E]missions of greenhouse gases today hurt future people. Correspondingly, reductions in emissions today help future generations through reduced fluctuations in the climate." *Id.* at 439.

336. *See supra* note 266 and accompanying text.

337. Jérôme Ballet et al., *Taxation and the Crowding-Out Effect of Corporate Social Responsibility*, Sciences de l'Homme et de la Société (Nov. 14, 2006), https://halshs.archives-ouvertes.fr/halshs-00113856.

338. *See* Justin Gillis, *Forget the Carbon Tax for Now*, N.Y. Times (Dec. 27, 2018), https://nyti.ms/2Ric9Df.

339. *Id.*

340. Lisa Friedman & Glenn Thrush, *Liberal Democrats Formally Call for a 'Green New Deal,' Giving Substance to a Rallying Cry*, N.Y. Times (Feb. 7, 2019), https://nyti.ms/2DY7q1Q.

tax rates is share buybacks.[341] Share buybacks will not enhance sustainability—it is what companies do when they don't have anything better to do with their profits.[342] The likely conclusion is that a reduction in corporate tax rates fails to encourage corporate environmental social responsibility. A more promising path is for governments to provide incentives for corporations to take a long-term view of both profits and obligations.

341. Jamie Condliffe, *The Stock Market's Next $1 Trillion Milestone: Buybacks*, N.Y. Times (Aug. 6, 2018), https://nyti.ms/2OMsBrh.

342. Emily Stewart, *Stock Buybacks, Explained*, Vox (Aug. 5, 2018, 3:14 PM), https://www.vox.com/2018/8/2/17639762/stock-buybacks-tax-cuts-trump-republicans.