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Abstract
After the corporate collapses of Enron, Swissair, Daewoo Group, WorldCom, HIH, Oneself etc the talk about ethics in business matters has become nearly as clamourous as making profit.2 Companies, universities, law schools, newspapers and politics focus on ethics in a distinctive way. Therefore, it is not surprising that the World Wide Web is full of guidelines, reports, ethical fitness seminars and advice as to why and how company directors should act ethically (Google shows 5,110,000 results 'for director ethics' and 28 Mio. results for 'business ethics'). A whole business ethics industry provides help to develop ethical behaviour. The mission of this industry is, 'to promote ethical behaviour in individuals, institutions, and through research, public discourse, and practical action'.3 It remains unclear what ethics in business matters means, however. The aim of this article is to analyse (a) the demand of more director ethics in the lights of classical philosophy, (b) the search for new ethical guidelines for directors and its reasons and, (c) the main elements of director ethics in the post-Enron-era.

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business ethics, company directors

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What's all the talk about Directors' Ethics?

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After the corporate collapses of Enron, Swissair, Daewoo Group, WorldCom, HIH, Oneself etc the talk about ethics in business matters has become nearly as clamourous as making profit.[2] Companies, universities, law schools, newspapers and politics focus on ethics in a distinctive way. Therefore, it is not surprising that the World Wide Web is full of guidelines, reports, ethical fitness seminars and advice as to why and how company directors should act ethically (*Google* shows 5,110,000 results 'for director ethics' and 28 Mio. results for 'business ethics'). A whole business ethics industry provides help to develop ethical behaviour. The mission of this industry is, 'to promote ethical behaviour in individuals, institutions, and through research, public discourse, and practical action'.[3] It remains unclear what ethics in business matters means, however. The aim of this article is to analyse (a) the demand of more director ethics in the lights of classical philosophy, (b) the search for new ethical guidelines for directors and its reasons and, (c) the main elements of director ethics in the post-Enron-era.

I THE PROBLEM WITH MATCHING THE CLASSICAL MEANING OF 'ETHICS' WITH BUSINESS

In all great civilisations, philosophers have sought answers for situations where values are in conflict (ethical dilemmas). According to the well known classical philosophy, one does act 'ethically' when one acts morally, correctly and honourably. The term 'moral' expresses what is 'based on people's sense of what is right or just, not on legal rights and obligations'.[4]

While these definitions of ethics assist our understanding of what director ethics could mean,[5] there is little guidance for directors in these philosophic nostrums. What is right in business? What is wrong? The main goal of business is to build up and maintain a

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[2] Jennifer Barett, 'An Ethical Dilemma', *Newsweek*, 19 February 2003.

[3] Institute for Global Ethics, Mission Statement, <http://www.globalethics.org/> at 27 June 2005.

[4] *The Oxford Paperback Dictionary* (3rd ed, 1979).

[5] See also Andrew Stark, 'What's the Matter with Business Ethics?' (May-June 1993) *Harvard Business Review* 1.

healthy company. Under these circumstances, right and wrong are relative. Classical moral philosophy lacks concrete help for directors' decisions.

Seeking ethical guidelines for business decisions is compared to 'nailing Jello to a Wall'.[6] This image is striking, because moral philosophy is based on the ideal of altruism. It focuses on activities where self-interest does not rule.[7] Own actions should be primarily helpful to other people. No or little interest should come from these efforts.[8] In business, profit and self-interest play the most important roles. The reconciliation of profit motives and classical ethical imperatives seem more or less impossible. At the least 'it is a highly tricky matter'.[9] Academics as well as professionals recognize this. They have tried to find new ways to translate ethics into practical business applications. The aim of this new approach is not only to squeeze out 'bad apples' but to optimize organizational structures to ensure sound corporate actions as well as the realization of interest and profit.[10]

II REASONS FOR THE INCREASED DEMAND OF DIRECTOR ETHICS

To understand the search to find more ethical guidelines for corporate officers you have to look into the recent history of corporate scandals. Following the recent scandals, shareholders, investors and politicians required that companies should be guided more trustfully and reliably from top to bottom. This increase in the demand for more trust and security is not surprising.[11] Most of the collapses were as a result of management misinterpretations, inadequately designed controls, oversight, simple and not-so-simple accounting mistakes and a 'culture that appears to have encouraged pushing the limits'.[12]

The uniform conclusion, though, was, director ethics have to be improved.[13] As a consequence, new regulations demand the implementation of such ethics in the daily

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6 Ibid.
7 Andrew Stark, above n 5, 4.
8 *WIKIPEDIA, The free Encyclopaedia*, <http://en.wikipedia.org/wiki/Altruism> at 29 June 2005.
9 Laura L Nash, above n 5, 7.
10 Joanne B Ciulla, above n 5, 7.
11 Mark S Schwartz, Thomas W Dunfee and Michael J Kline, 'Tone at the Top: An Ethics Code for Directors?' (2005) 58 *Journal of Business Ethics* 79-80.
12 A Greenspan, 'Infectious greed' the new corporate sin' 18 February 2000, <http://www.happinessonline.org/InfectiousGreed/p2.htm> at 1 July 2005.
13 Michael Kirby, 'The company Director: Past, Present and Future', Speech at the Australian Institute of Company Directors, Tasmanian Division, 31 March 1998, <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_company.htm> at 7 June 2005; Jim Corkery, *Directors' Powers & Duties* (Longman Professional, 1997) 55 ff.

business of a company's life. Examples of this are the 'Principles of Good Corporate Governance and Best Practice Recommendations', section 3.1, from the Australian Stock Exchange Corporate Governance Council[14] and the *Sarbanes-Oxley Act*, s 406a, that requires companies adopt a code of ethics for senior financial officers.[15] Analysts focus on the fact that shareholders place a high degree of trust in the hands of directors by giving them the power to run 'their' company.[16] The directors are not only seen as agents of the company but also as trustees and fiduciaries.[17] Therefore, the analysts emphasize that directors should not only be bound by legal regulations, but also by professional ethical obligations that extend beyond compliance with the law.[18]

Furthermore, the increased focus on ethical standards is as a result of companies realising that ethics pay,[19] thus creating a new basis for competition in the market.

III THE SEARCH FOR ETHICAL BUSINESS GUIDELINES BEYOND LAW

The reasons for the scandals are well known. However, the question still remains, 'How to implement more director ethics into companies?' Business ethicists tried different ways to discover ethical guidelines for corporate officers 'without ruining career and company'.[20] The result is that business ethics now generally is understood as a specific process.[21] This process normally begins with the setting up of programs within the company (a) to build awareness of ethics, (b) to recognise ethical issues, (c) to articulate values and goals, and (d) to adopt an ethical code which applies either to all employees or only to the directors. The outcome in general is a 'code of ethical conduct for directors'[22] or a set of 'corporate governance principles'. These codes reflect the ethical values of a company. This way of defining ethics has some advantages. Firstly, it can improve the

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14 See <http://www.shareholder.com/visitors/dynamicdoc/document.cfm?CompanyID=ASX&DocumentID=364&PIN=&pagenum=28&keyword=Type%20keyword%20here> at 29 June 2005.

15 See <http://news.findlaw.com/hdocs/docs/gwbush/sarbanesoxley072302.pdf> at 28.06.2005.

16 See *Report of the HIH Royal Commission*, section 6.2, the board of directors, <http://www.hihroyalcom.gov.au/finalreport/Chapter%206.HTML> at 29 June 2005; Mark S Schwartz, Thomas W Dunfee and Michael J Kline, above n 11, 86; Corkery, above n 13, 55.

17 See Corkery, above n 13, 54-6.

18 *Report of the HIH Royal Commission*, above n 16, section 6.2.7, conflicts of interest.

19 Andrew Stark, above n 5, 2, Mark S Schwartz, Thomas W Dunfee and Michael J Kline, above n 11, 89.

20 Joanne B Ciulla, *Business Ethics*, cited without year and page number in Andrew Stark, above n 5, 7.

21 Dave Kinnear, *Ethics as a Business Process*, <http://change-management-consulting.com/html/ethics_process.html>, at 20 June 2005.

22 See, eg, Walt Disney's Codes of Conduct for Directors, <http://corporate.disney.go.com/corporate/codes_of_conduct.html>, at 30 June 2005.

knowledge of employees and directors. Secondly, the outcome can be revised, optimised and simplified. Thirdly, unwanted individual 'morality' can be guided away from a personal understanding to a (different) company's understanding of ethics.[23] To find ethics through an internal process seems to be successful. It is estimated that 95% of Fortune 500 companies have installed an ethics program for their company.[24]

Both the process and the result are astonishing. What previously took philosophers years to conclude is now dealt with by companies within a three-day seminar about director ethics. The problem is that a code itself, which can be articulated, is not ethical. However, it appears that many believe that codes can change the behaviour of directors. Such a belief can lead to self-deception. Without commitment to enforce and supervise ethical behaviour a code will remain mere window-dressing.

IV MAIN PRINCIPLES AND KEY ELEMENTS OF THE DIRECTORS CODE OF ETHICS

Different model codes[25] divide principles of director ethics into sections like (a) compliance and reporting, (b) personal conflicts of interest, (c) public disclosure,(d) compliance with laws, rules and regulations, (e) corporate opportunities, (f) confidentiality, (g) fair dealing, (h) equal employment opportunity and harassment, (i) protection and proper use of firm assets, (j) correct financial statements and other records.[26] If we reduce these sections to abstract principles of ethical behaviour, the following ones can be recognised:

To be loyal [27]

'Loyal' means to act in the best interest of the company. Directors should avoid self-dealing or taking advantage of corporate opportunities and insider trading and they should primarily look after the interests of the company.[28]

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23 Dave Kinnear, above n 21.

24 See Business for Social Responsibility, *Overview of Business Ethics*, <http://www.bsr.org/CSRResources/IssueBriefDetail.cfm?DocumentID=48815> at 7 June 2005.

25 See, for example, the Code of Ethics from NOVARTIS, <http://www.novartis.com/about_novartis/en/code_conduct_financial.shtml> at 11 July 2005.

26 See for example RALCORP, http://www.ralcorp.com/directorcodeofethics.htm, Hummingbirds Code of ethics, http://www.hummingbird.com/about/governance/index.html?cks=y, both at 7 June 2005.

27 See Herman Siebens, *Concepts and Working Instruments for Corporate Governance*, Journal of Business Ethics 39 (1/2), 112; Mark S Schwartz, Thomas W Dunfee, Michael J Kline, above n 11, 90 with further references.

28 See also Corkery, above n 13, 60 ff.

To be honest

'Honesty' includes being truthful and forthright as well as candid and open.[29] It includes speaking frankly and not presenting half-truth or 'other linguistic device intentionally used to create misunderstanding'.[30] Furthermore, directors shall effect full, fair, accurate, timely and understandable disclosure[31] and exercise their powers for the purpose for which they are conferred.[32]

To be responsible

The literature says this means, 'to be present and participate in the meetings of the board, to prepare and study thoroughly the documents received, to read the reports carefully, to observe the duty of discretion towards sensitive differences of opinion or pieces of information within the board, to avoid contradictory interests and to inform the chairman of the board at the first occasion'.[33]

To act in compliance with laws and regulations

Most codes emphasize that directors should act as good citizens and respect the law. Furthermore, directors must ensure compliance structures are implemented and effected, so that wrongdoings are discovered, reported and dealt with.[34]

To act fairly

In codes of ethics directors are often told to 'treat others and make decisions on the basis of fairness'.[35] In the literature, fairness includes equal treatment of interests of majority and minority shareholders as well as making fair decisions on executive compensation

[29] Mark S Schwartz, Thomas W Dunfee, Michael J Kline, above n 11, 91; Frank Navran and Edward L Pittman, *Corporate Ethics and Sarbanes-Oxley*, Wall Street Lawyer 2003-07, <http://www.ethics.org/resources/wslawyer.html>, at 07.04.2005.

[30] Mark S. Schwartz, Thomas W. Dunfee, Michael J. Kline, above n 11, 91.

[31] Frank Navran and Edward L Pittman, *Corporate Ethics and Sarbanes-Oxley*, above n 29.

[32] See Corkery, above n 13, 61 with further references.

[33] Herman Siebens, above n 27, 112 and Mark S. Schwartz, Thomas W Dunfee, Michael J. Kline, above n 11, 91, A.L. Minkes, MW Small, SR Chatterjee, A.L. Minkes, MW Small, SR Chatterjee, *Leadership and Business Ethics: Does It Matter? Implications for Management*, Journal of Business Ethics (1999), Vol. 2, 329 with further references.

[34] Frank Navran and Edward L. Pittman, above n 29; Mark S. Schwartz, Thomas W. Dunfee, Michael J. Kline, above n 11, 94.

[35] Mark S. Schwartz, Thomas W. Dunfee, Michael J. Kline, above n 11, 94

and hiring and firing.[36] This is a wide term and the meaning is indistinct. Nevertheless, in the literature regarding modern business ethics it is an important element.[37]

To be upright

This means that directors should ensure that their actions are in accordance with the principles and values of the company.[38] Decision making should be predictable, certain and consistent.[39]

V CONCLUSION

Helpful global reflection about the duties of directors

The most important outcome of the discussion regarding director ethics is deciding what can be demanded from directors. It is now recognized worldwide that honesty, loyalty, fairness, integrity, responsibility and citizenship are essential duties of directors. These key principles are nothing else than common sense, one might conclude. But the vigorous debate about what ethical behavior should be suggests that common sense is not all that common.

Lots of old wine in new bottles

For many years the key principles and 'ethics' binding directors were known as directors' fiduciary duties. The call for directors, who are aware of their full responsibility, to have a consciousness of social responsibility as well as an ability to view things as a whole, is nothing other than putting old wine in new bottles. It is a reincarnation of the long known legal duties of care and loyalty and the duty to act in the best interest of the company and avoid actual and potential conflicts of interest. The term 'director ethics' is really a rebadging of the 'old' duties.

Ethics – the Jack of all trades

Thirdly, the hope is raised that, with more applied ethics, problems of all kinds can be solved. Unfortunately, most of the company scandals were not based on ignored ethics

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36 Ibid.
37 Ibid.
38 Ibid.
39 See Herman Siebens, above n 27, 112.

but on ‘unintelligent, occasionally … stupid behavior that focused on supposed short-term advantages without considering mid - and long-term consequences’.[40] The cause of scandals often lay less in neglected ethics and more in not acting intelligently.[41] Regrettably, codes of ethics and training in ethics cannot change this.

Real policy change or a good multimedia show?

It is hard to believe that the same people who misbehaved a few years before, probably more or less in the same way as the directors of Enron etc did, will embrace or even recognize business ethics. However, thanks to the new found business ethics industry, it has become easier to set up codes of ethics and to show how ethical a company is. The main motivation to set up codes of ethics is to fulfill the post-Enron call for regulations (Sarbanes-Oxley etc). It has been largely a well-produced multimedia show, which primarily tried to calm down the pressure and defend positions and salaries. Sufficient and affordable remedies for shareholders in this area are still missing. Many commitments to an ethical path will prove to be paper pledges. Nevertheless, these codes will make it easier to isolate wrongdoers.

From abstract codes to more ethical decisions

Most of the business ethics debate is not user-friendly; it is too broad, too theoretical and impractical.[42] Codes of ethics, of themselves, will not improve director ethics in business matters. There are, though, new approaches which show a promising way forward. In its principles and precepts, the Canadian Directors College[43] advises:

> *(1) Directors should invite difference and dissent on the board. It is their duty and obligation to discuss and seek for alternative perspectives on all issues coming to the board.*
>
> *(2) Directors should commit to financial reporting that is more than just compliant. The financial reporting has truly to reflect the financial state of the company and is not just an accounting game to show the best results.*

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40 Klaus Leisinger, *Corporate Ethics and international Business: some Basic Issues, Novartis Foundation for Sustainable Development*, 02.07.1994, http://www.novartisfoundation.com/en/articles/business/business_corporate_ethics.htm#business_corporate_ethics_introduction, at 04.07.2005.

41 Ibid.

42 See also Andrew Stark, above n 5, 5.

43 Boardroom report, Director Ethics, Vol 3, Issue 6, April 2005, 7.

(3) Directors should balance the short-term and long-term consequence of their decisions. Decisions that favour short-term gains at the expense of the long-term health of the company are no longer acceptable.

(4) Directors should exercise independent judgement and appropriate due-diligence. It is not longer good enough to rely on the information management provides: directors must pursue aggressive discovery of the facts and engage in rigorous due-diligence in board decisions.

(5) Directors must make decisions free of personal objectives.

Precepts like these can help directors, and public and private monitors, to focus on boardroom behaviour.

Though the term 'ethics' seems hard to pin down and can often be classified as simple common sense, it is a newly emerging topic that is not going away any time soon. It is considered a 'hot topic' both in universities and in the corporate environment. The real question is: does business ethics actually pay? This is the query that sceptics have the most trouble with when discussing the importance of incorporating ethics into business. The truth is it can be measured. Though not easily done, evaluating the effects of ethics in business is possible. For example, a UK study chose seven indicators: market value added, economic value added, price earnings ratio, return on capital employed, have a code of ethics, ratings for managing socio/ethical risks and being cited consistently in the annual list of Britain's Most Admired Companies.[44] This study concluded that companies that had implemented a code of ethics 'have produced profit/turnover ratios 18% higher than those without a similar commitment.' These businesses generated considerably more economic added value, market value and experienced far less volatile price earning ratios suggesting that these companies are a more 'secure investment in the long term.'[45]

Though this is just one study, more have been done and have pointed to the correlation between companies adhering to codes of ethics and long-term success for the business. James Collins and Jerry Porras' *Built to Last: Successful Habits of Visionary Companies* concludes:

> Visionary companies pursue a cluster of objectives, of which making profit is only one – and not necessarily the primary one. Yes, they seek profits, but

[44] Simon Webley, Elise More, *Does Business Ethics Pay?* (1st ed, 2003).

> they're equally guided by a core ideology – core values and a sense of purpose beyond just making money. Yet, paradoxically the visionary companies make more money than the purely profit-driven comparison companies.

The problem does not lie in the inability to codify ethics, but rather in incorporating ethics into business correctly. Not knowing how to do this is the cause of all the doubt about its efficacy. Consequently, the new question should be: how do you properly implement ethics into a business? Good leaders will understand that 'if approached by the proper degree of care and sophistication, the very *process* of developing these Codes can have a profoundly positive effect on the culture of an enterprise.'[46]

Firstly and importantly, the code must reflect the organization's culture or else it will fail. Next, to ensure success, the code must be properly administered. This means that when choosing who should administer it, the following considerations must be well thought-out: (1) accountability is clearly assigned, (2) the designated administrator has the organizational stature necessary to facilitate enforcement, and (3) it is assigned to someone who does not have a propensity to engage in illegal or unethical activity.[47] Subsequently, involving everyone is essential. It is also a crucial and often missed step to review the company's code of ethics and the viability of its administration. Simply assuming that creating a code will be sufficient is unreasonable.

It is not describing or quantifying ethics that is the problem. The inability of some directors to understand that simply hiring an 'ethics manager' and creating a code that deals in generalities and is improperly overseen and reviewed is woeful. Directors must look at what they want their company to be, how they would like it to be perceived and how to make ethics a 'way of life' for the entire organization. Put bluntly, 'be they ethics audits, codes or 'ethics fitness seminars,' none of the numerous pseudo-products of the ethics industry will restore integrity to commerce…what [CEOs] need is the character to do the right thing.'[48]

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[45] *Ibid.*
[46] Simon Longstaff, *Ethics and Retail Banking* (1994) St James Ethics Centre http://www.ethics.org.au/things_to_read/articles_to_read/banking_and_finance/article_0043.shtm> at 5 December 2005.
[47] *Ibid.*
[48] Simon Longstaff, *Business Ethics: An Essential Ingredient in Corporate Governance* (1996) St James Ethics Centre http://www.ethics.org.au/things_to_read/articles_to_read/governance/article_0087.shtm at 5 December 2005.

How can this be achieved? Put in simple terms, through education. Students at the Harvard Business School were interviewed and they suggested that 'if ethics didn't come up in regular business classes, it must not be important in the broader business world.'[49] As a result, top schools such as the Northwestern University's Kellogg School of Management are looking into pertinent topics such as whether 'codes of conduct' that companies have really work, or are they 'merely window dressing.'[50] Schools are becoming conscious that ethical training is important in the post-Enron era and they realize that 'it will take more than another round of ethics classes.'[51] This is why they are offering 'value assertiveness' training, developing and teaching more comprehensive models for measuring business success, asking Wall Street and business consultants to do their part, fighting the tendency to define 'corporate social responsibility' as good works and finally, encouraging the development of skills for real life.[52] In addition, Harvard has implemented a groundbreaking Leadership, Ethics and Corporate Responsibility program in its business school. A book written about this new initiative asserts, 'sophisticated research went into its approach, timing and appropriate interventions for working with students and faculty.'[53] 'This program has introduced a required course into the curriculum, four new electives have been added, course heads have begun to integrate issues of ethics and corporate responsibility into the first year curriculum and a large percentage of students have enriched the life of the community through public service.'[54]

In other words, 'ethics,' in the business sense, is being taken seriously. With any luck, the more it is researched, discussed and analysed, the better educated directors will become at handling this complex topic. Just because it is multifarious and does not come effortlessly, it cannot be spurned or ignored, for it is an important ingredient of the ultimate success of an organization.

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[49] Judith Samuelson, *Business Ethics After Enron* (2002) Ford Foundation Report <http://www.fordfound.org/publications/ff_report/view_ff_report_detail.cfm?report_index=349>?> at 5 December 2005.

[50] Paul Singer, *Business Schools Add Ethics in Wake of Corporate Scandals* (2002) Associated Press State & Local Wire http://www.kellogg.northwestern.edu/news/hits/020816ap.htm at 5 December 2005.

[51] Judith Samuelson, *Business Ethics After Enron* (2002) Ford Foundation Report <http://www.fordfound.org/publications/ff_report/view_ff_report_detail.cfm?report_index=349>?> at 5 December 2005.

[52] *Ibid.*

[53] Thomas R Piper, Mary Gentile, Sharon D Parks, *Can Ethics be Taught? Perspectives, Challenges, and Approaches at Harvard Business School* (1st ed, 1993).

[54] *Ibid.*