CRITIQUE AND COMMENT

CORPORATE GOVERNANCE: BIG IDEAS AND DEBATES?

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Traditional conceptions of corporate governance are being challenged by recent events and debates in and outside Australia. Developments such as the Business Roundtable's 2019 restatement of corporate purpose, the World Economic Forum's Davos Manifesto as well as the ways in which companies and their directors are expected to identify, supervise, manage, and disclose environmental, social and governance issues, are causing corporations, directors and other stakeholders to stop and ask: what is the purpose of the corporation; what kinds of interests and consequences should directors consider when making decisions; and how far ahead should they look?

Australian responses have been fragmented and uncertain, permeated by soft law. What lessons may be drawn from other jurisdictions, such as the United Kingdom and the United States? How, and to what extent, should corporate law in Australia address the purposes and activities of a corporation and then require, or permit, the identification, supervision, management and disclosure of risk when those purposes and activities intersect with or affect the interests of shareholders, asset owners, financiers, regulators, governments and communities? Or is a whole of law response required which adopts a system-level view and review of the regulatory network affecting corporate conduct and governance in shaping the modern corporation and its role in society?

CONTENTS

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I Introduction

Emeritus Professor Harold Ford AM, rightly, has been described as a doyen of Australian corporations law and trusts law.[1] The description as a doyen properly reflects his work, large and enduring, as a teacher, scholar, author, and adviser to government. I say large and enduring because all that he did as a teacher, scholar, author and adviser to government influenced and continues to influence generations of law students, legal practitioners, judges and government. Although not taught by him, I was and remain a student and beneficiary of his work and wisdom. It is therefore a great honour and privilege to deliver the Harold Ford Memorial Lecture for 2023.

Recent events and debates in and outside Australia about corporate governance may be seen as suggesting that company directors and the law about directors are facing new and different challenges. Many of those debates have been framed by reference to environmental, social and governance ('ESG') issues, issues that arguably challenge traditional conceptions of corporate governance. The question I pose in this lecture is what can Australia learn from these debates legally, practically, and commercially?

I cannot and will not try to give a comprehensive answer to that question. There are simply too many possible issues and answers.

My chief focus will of course be on legal issues. But legal, practical, and commercial considerations necessarily intersect and overlap.

As will appear, the legal issues that emerge from the question I have identified must be understood in Australia recognising that there may be differences — a disconnect — between corporate activity (what companies and their boards are actually doing), the content of applicable legal obligations, and the ability of regulators and others to enforce or seek legal redress — and thereby effect change — in relation to those activities measured against applicable legal obligations.

As will also appear, focusing only on ESG issues — however defined[2] — may be too narrow. ESG issues raise broader and deeper questions about corporate

[1] See, eg, Chief Justice Marilyn Warren, 'Corporate Structures, the Veil and the Role of the Courts' (2016) 40(2) *Melbourne University Law Review* 657, 658.

[2] See, eg, Elizabeth Pollman, 'The Making and Meaning of ESG' (Working Paper No 659/2022, European Corporate Governance Institute, October 2022) 1; Martin Lipton, 'On the Debate

purpose and corporate governance. In this lecture I will focus on ideas of principle at a high level of generality. Those ideas do not provide any resolution for any particular dispute, the resolution of which will depend upon the factors and circumstances of that dispute.

Three ideas keep arising in any debate about corporate governance and directors' duties: what is the purpose of the corporation; what kinds of interests and consequences should directors consider when making decisions; and how far ahead should they look?

None of those questions are novel. But new and different answers may be emerging as increasing emphasis is given to how companies are governed and to the responses companies can or should have to ESG issues. And if new and different answers are emerging it is because the kinds of interests and consequences which directors should consider are seen as wider than they once were and, relatedly, directors are being asked to look beyond the immediate short-term as may be reflected in metrics like share price, total shareholder return or reported profit for the latest accounting period. These two causes — the wider interests and consequences to be considered, and the longer horizon — are then seen as provoking further issues about prioritisation of interests and increased focus on a need for identification, supervision, management and disclosure of risk, especially where a particular interest or interests, and the applicable time frame, diverge from other relevant interests.

So, what are the events and debates?

II Recent Events and Debates about Corporate Purpose

There has been a lot of discussion and thought, including in the United States ('US') and the United Kingdom ('UK') to name just two jurisdictions,[3] about corporate purpose and governance in recent years which builds upon debates that have occurred throughout the 20th and 21st centuries.

regarding ESG, Stakeholder Governance, and Corporate Purpose', *Harvard Law School Forum on Corporate Governance* (Forum Post, 14 March 2023) <https://corpgov.law.harvard.edu/2023/03/14/on-the-debate-regarding-esg-stakeholder-governance-and-corporate-purpose/>, archived at <https://perma.cc/5HQY-YEPT>.

[3] There have also been significant developments of this kind in the European Union: see, eg, *Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector* [2019] OJ L 317/1; *Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting* [2022] OJ L 322/17. See also EY, *Study on Directors' Duties and Sustainable Corporate Governance* (Final Report, July 2020) 1, which was prepared for the European Commission Directorate General for Justice and Consumers.

The most obvious change that has occurred in the US recently is the Business Roundtable's 2019 restatement of corporate purpose ('2019 Business Roundtable Statement').[4] Understanding the nature and extent of that change calls for an understanding of some matters of history.

In 1932, as the Great Depression continued, Professor Merrick Dodd urged the view that the management of large companies bore a duty (after ensuring no more than a 'fair' rate of return to shareholders) to ensure that the company was operated 'in the public interest'.[5] He identified three relevant groups: stockholders, employees, and customers and the general public.[6] Adolf Berle (one of those consulted by Franklin D Roosevelt about the New Deal)[7] offered the contrary view, urging that historically, and as a matter of law, corporate managements were required to run the affairs of the corporation in the interests of the security holders.[8] Even so, Berle concluded his note on Professor Dodd's view by saying:

> Most students of corporation finance dream of a time when corporate administration will be held to a high degree of required responsibility — a responsibility conceived not merely in terms of stockholders' rights, but in terms of economic government satisfying the respective needs of investors, workers, customers, and the aggregated community. Indications, indeed, are not wanting that without such readjustment the corporate system will involve itself in successive cataclysms perhaps leading to its ultimate downfall.[9]

And by 1954, Berle could write that the 'controversy' between himself and Dodd had been settled, at least for the time being, 'squarely in favor' of Dodd's

[4] 'Business Roundtable Redefines the Purpose of a Corporation To Promote "an Economy That Serves All Americans"', *Business Roundtable* (Web Page, 19 August 2019) <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>, archived at <https://perma.cc/A7Y5-76HQ> ('2019 Business Roundtable Statement'). Cf Business Roundtable, 'Statement on Corporate Governance' (White Paper, September 1997) 1–3.

[5] E Merrick Dodd Jr, 'For Whom Are Corporate Managers Trustees?' (1932) 45(7) *Harvard Law Review* 1145, 1154, quoting Owen D Young (Speech, Park Avenue Baptist Church, January 1929), as quoted in John H Sears, *The New Place of the Stockholder* (Harper & Brothers Publishers, 1929).

[6] See above n 5.

[7] Albin Krebs, 'Adolf A Berle Jr Dies at Age of 76: Lawyer, Economist, Liberal Leader Aided Presidents', *The New York Times* (New York, 19 February 1971) 1.

[8] AA Berle Jr, 'For Whom Corporate Managers *Are* Trustees: A Note' (1932) 45(8) *Harvard Law Review* 1365, 1365.

[9] Ibid 1372.

contention that directors' exercise of corporate 'powers were held in trust for the entire community'.[10]

Debates of this general kind have continued ever since the 1932 exchange of views between these two very considerable company lawyers.[11] But for the last decades of the 20th century and for the early years of this century, shareholder primacy seemed to be the dominant view.[12]

The dominance of this view can be traced to the 1970 publication, in *The New York Times*, of Professor Milton Friedman's essay titled 'A Friedman Doctrine: The Social Responsibility of Business Is To Increase Its Profits'.[13] In that essay, Friedman wrote that businessmen who said that business is not concerned 'merely' with profit but also with promoting desirable 'social' ends were 'preaching pure and unadulterated socialism' and were 'unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades'.[14]

For more than three decades, Friedman's conclusion that the sole role of the corporation is to maximise profits (if not the political explanations he offered in support of that conclusion) dominated the thinking of many

[10] Adolf A Berle Jr, *The 20th Century Capitalist Revolution* (Harcourt, Brace and Company, 1954) 169.

[11] See, eg, William T Allen, 'Our Schizophrenic Conception of the Business Corporation' (1992) 14(2) *Cardozo Law Review* 261; Stephen M Bainbridge, 'In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green' (1993) 50(4) *Washington and Lee Law Review* 1423 ('In Defense of the Shareholder Wealth Maximization Norm'); Henry Hansmann and Reinier Kraakman, 'The End of History for Corporate Law' (2001) 89(2) *Georgetown Law Journal* 439; Lynn A Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75(5) *Southern California Law Review* 1189; Jean Jacques du Plessis, 'Corporate Governance, Corporate Responsibility and Law' (2016) 34(3) *Company and Securities Law Journal* 238; Tim Connor and Andrew O'Beid, 'Clarifying Terms in the Debate regarding "Shareholder Primacy"' (2020) 35(3) *Australian Journal of Corporate Law* 276, 283–7.

[12] See, eg, Bainbridge, 'In Defense of the Shareholder Wealth Maximization Norm' (n 11) 1423–5; Hansmann and Kraakman (n 11) 440–1; Colin Mayer, 'The Future of the Corporation: Towards Humane Business' (2018) 6 (Supplementary Issue 1) *Journal of the British Academy* 1, 3–4; Martin Lipton, 'The Friedman Essay and the True Purpose of the Business Corporation', *Harvard Law School Forum on Corporate Governance* (Forum Post, 17 September 2020) <https://corpgov.law.harvard.edu/2020/09/17/the-friedman-essay-and-the-true-purpose-of-the-business-corporation/>, archived at <https://perma.cc/PUP8-TZ5Z> ('The Friedman Essay'); Connor and O'Beid (n 11) 283–7.

[13] Milton Friedman, 'A Friedman Doctrine: The Social Responsibility of Business Is To Increase Its Profits', *The New York Times* (New York, 13 September 1970). Though it has been suggested that Friedman's essay in *The New York Times* was not a fundamental departure from conventional wisdom at the time: see generally Brian R Cheffins, 'Stop Blaming Milton Friedman!' (2021) 98(6) *Washington University Law Review* 1607.

[14] Friedman (n 13) 33.

corporate leaders, lawyers, academics, investors, and asset managers in the US and beyond.[15]

For some at least, however, the 2008 global financial crisis revealed the inadequacy of focusing only on short-term maximisation of shareholder returns at the expense of sustainable growth, innovation, and systemic financial stability.[16]

The ideas put forward by Friedman must be understood against two underlying considerations: profit can be measured; and changes in profit can be observed. There is, therefore, a seductive appearance of objective mathematical precision in taking profit and changes in profit as a test of corporate performance. Friedman's conclusion suggested simplicity and certainty. Company boards and managers could focus on only one narrowly defined objective — profit maximisation. But, of course, 'profit' is a concept calling for judgement and what significance can or should be attached to some change in profit over time is also a matter for judgement because it is much affected by what has caused the change over the time chosen for consideration. Put in different terms, the Friedman doctrine's focus was not merely short-term but concealed an economic calculus — maximising profits — which by itself is almost meaningless. All profit-making activity involves risk. The Friedman doctrine, even in the short-term, can only be understood as one that means 'maximising profits with a given appetite for risk'.

These difficulties and qualifications could be (and often were) ignored. Instead, because profit is computed at least annually, the immediately obvious time for comparison is year-on-year and immediate attention could always be directed to the 'headline number'. Debates about the causes and significance of whatever change was seen to have occurred could be pushed to one side.

More importantly, short-term performance of the company became the touchstone of success.[17] And this was justified on the basis that the company making profit served the interests of the shareholders 'who own[ed] the

[15] See Ronald Chen and Jon Hanson, 'The Illusion of Law: The Legitimacy Schemas of Modern Policy and Corporate Law' (2004) 103(1) *Michigan Law Review* 1, 42; Antony Page, 'Has Corporate Law Failed? Addressing Proposals for Reform' (2009) 107(6) *Michigan Law Review* 979, 979–80; Mayer (n 12) 3–4; Lipton, 'The Friedman Essay' (n 12).

[16] Andrew Keay, 'Risk, Shareholder Pressure and Short-Termism in Financial Institutions: Does Enlightened Shareholder Value Offer a Panacea?' (2011) 5(6) *Law and Financial Markets Review* 435, 437–9; Sheila Bair, 'Lessons of the Financial Crisis: The Dangers of Short-Termism', *Harvard Law School Forum on Corporate Governance* (Forum Post, 4 July 2011) <https://corpgov.law.harvard.edu/2011/07/04/lessons-of-the-financial-crisis-the-dangers-of-short-termism/>, archived at <https://perma.cc/NS8D-E6Q7>; Lynne L Dallas, 'Short-Termism, the Financial Crisis, and Corporate Governance' (2012) 37(2) *Journal of Corporation Law* 265, 267–78.

[17] See, eg, above n 16.

corporation'.[18] The generality and apparent simplicity of those ideas — serving the interests of shareholders who 'owned' the company — obscured so much that might bear upon a company's continued success over time. It treated shareholders as a homogeneous block having identical reasons to own the shares they did with identical time horizons. It then treated the members as synonymous with and identical to the corporation despite the corporation having distinct
legal personality.[19]

Two other considerations reinforced the attention to short-term performance. For many decades, senior corporate executives have been paid in a way that ties significant parts of their remuneration to short-term performance measures. The most obvious measures to choose have been profit and share price (or some compound measure like total shareholder return). And both are measures preferred by hedge funds and other passive investment vehicles which make important parts of their profits from trading shares in ways that allow realisation of short-term gains resulting from short-term fluctuations in share price. Hence those shareholders favour short periods for performance measurement and fixing of variable remuneration. Unsurprisingly, then, the executives who stand to gain from short-term gains may make their business decisions in ways that will lead to gains of that kind.

This was the context in which the Business Roundtable reconsidered its statement about corporate purpose. What is the Business Roundtable? Why do its views about corporate purpose matter?

The Business Roundtable describes itself as 'an association of more than 200 chief executive officers ['CEO'] of America's leading companies [whose] members develop and advocate directly for policies to promote a thriving US economy and expanded opportunity for all Americans'.[20]

[18] Friedman (n 13) 33.

[19] Cf *Salomon v A Salomon & Co Ltd* [1897] AC 22, 30, 33–4 (Lord Halsbury LC, Lord Morris agreeing at 54), 42–3 (Lord Herschell, Lord Morris agreeing at 54), 51 (Lord Macnaghten, Lord Morris agreeing at 54), 56 (Lord Davey, Lord Morris agreeing at 54); *The Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290, 309 (Isaacs J); *New South Wales v Commonwealth* (2006) 229 CLR 1, 97 [121] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*'); *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, 175 [3]–[4] (Gleeson CJ), 186 [38] (Gummow J), 227 [183] (Hayne J), 247 [243] (Callinan J).

[20] 'About Us', *Business Roundtable* (Web Page) <https://www.businessroundtable.org/about-us>, archived at <https://perma.cc/YA7M-DT9S>.

Since 1978, the Business Roundtable has periodically issued principles of corporate governance.[21] The documents issued before 2019 largely endorsed principles of shareholder primacy — that corporations exist principally to serve shareholders.[22] But in August 2019, the Business Roundtable redefined the purpose of the corporation. It said:

> While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:
>
> - Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
> - Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.
> - Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.
> - Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.
> - Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders.
>
> 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.[23]

The statement was signed by 181 CEOs.[24]

Later that year, the World Economic Forum adopted a similar position in its new Davos Manifesto titled 'The Universal Purpose of a Company in the Fourth

[21] 'Our Commitment', *Business Roundtable* (Web Page) <https://www.businessroundtable.org/ourcommitment>, archived at <https://perma.cc/DT7M-J75F>.

[22] Ibid.

[23] Ibid.

[24] '2019 Business Roundtable Statement' (n 4).

Industrial Revolution' ('Davos Manifesto 2020').[25] The opening paragraph of the manifesto reads, in part:

> The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders — employees, customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company.[26]

Relevantly, the manifesto also states that a

> company is more than an economic unit generating wealth. It fulfils human and societal aspirations as part of the broader social system. *Performance must be measured not only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives*.[27]

The stakeholders were not only identified and to be considered but were described as essential. But none of those identified commitments to stakeholders can be measured in the same way as profit can be measured.[28] How and to what extent a company meets any of these commitments will be a matter for judgement about which reasonable minds may well differ. But together the commitments recorded in the statements of the Business Roundtable and the World Economic Forum marked a sharp turn away from the Friedman doctrine — at least in language, if not in action.[29]

[25] Klaus Schwab, 'Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution', *World Economic Forum Agenda* (Web Page, 2 December 2019) <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>, archived at <https://perma.cc/M4HS-LQV9>.

[26] Ibid [A].

[27] Ibid [B] (emphasis added).

[28] See, eg, Lucian A Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106(1) *Cornell Law Review* 91, 127, which described the '2019 Business Roundtable Statement' (n 4) as 'remarkably vague as to the nature and content of the commitment that is being made'.

[29] See, eg, Lucian A Bebchuk and Roberto Tallarita, 'Will Corporations Deliver Value to All Stakeholders?' (2022) 75(4) *Vanderbilt Law Review* 1031, 1037, which explained that 'a substantial majority of the companies explicitly stated that their joining the [Business Roundtable] Statement did not require and was not expected to bring about any changes in their treatment of stakeholders'. See also Robert Reich, 'The Biggest Business Con of 2019: Fleecing Workers While Bosses Get Rich', *The Guardian* (online, 29 December 2019) <https://www.theguardian.com/commentisfree/2019/dec/29/boeing-amazon-business-ethics-robert-reich>, archived at <https://perma.cc/UH8W-GMFC>; Bebchuk and Tallarita, 'The Illusory Promise

Is the change as radical as it seems to be?

An important clue may be found in the last sentence of the 2019 Business Roundtable Statement on the purpose of a corporation which relates the commitment (to deliver value to all stakeholders) to an outcome that looks to the future — 'the *future* success of our companies'.[30] Couple that with the reference to generating '*long-term* value for shareholders' and it is evident that the statement sees the purpose of a corporation as demanding a more distant horizon than the next (annual or other) statement of financial results.[31]

This claimed change in focus and horizon was very significant. It marked a sharp turn away from how ideas of shareholder primacy had been understood and applied. I say understood and applied because there is no compelling prudential reason why a corporation determined to measure its performance only by reference to profit could not treat comparisons from year to year as less significant than comparisons over much longer periods. But this was not what shareholder primacy was seen as demanding. It was seen as demanding maximisation of profit at every point; nothing more and nothing less.

The 2019 Business Roundtable Statement was released at a time when there had been increased attention given in the UK to questions about corporate purpose.

In May 2016, the Big Innovation Centre[32] published an interim report titled *The Purposeful Company*.[33] The steering group for the centre's work included representatives of the Bank of England, large corporations, and leading business schools.[34] The central thesis of the report was that '[p]urpose is key to corporate and economic success'.[35] It concluded that

> British companies are inadequately organised around clear corporate purposes that unite all stakeholders in common goals and values. The economic costs of this are huge, potentially exceeding £130bn a year.[36]

of Stakeholder Governance' (n 28) 124–39; Bainbridge, 'In Defense of the Shareholder Wealth Maximization Norm' (n 11) 311–16, 318.

30 '2019 Business Roundtable Statement' (n 4) (emphasis added).

31 Ibid (emphasis added).

32 This group, launched in 2011, describes itself as 'a hub of innovative companies and organisations, thought leaders, universities and "what works" open innovators': Big Innovation Centre, *The Purposeful Company* (Interim Report, May 2016) 2 ('*The Purposeful Company (Interim Report)*').

33 Ibid. See also Big Innovation Centre, *The Purposeful Company* (Policy Report, 2017).

34 Big Innovation Centre, *The Purposeful Company (Interim Report)* (n 32) 2.

35 Ibid 4.

36 Ibid.

In 2017, The British Academy began what it called its Future of the Corporation programme to explore the role of business in society.[37] The programme ran over four years, concluding with a final report published in 2021.[38] The British Academy describes the Future of the Corporation programme as having 'combined research from a range of academic disciplines with insight from senior business and policy leaders'.[39]

The programme's initial research 'highlighted trust in business and its impact on people and the environment along with globalisation and technological disruption as drivers of a shifting view of business' and was seen as suggesting 'a need to develop a new, more human framework for the corporation around well-defined and aligned purposes, complemented by ethical cultures and commitments to trustworthiness'.[40] This led to the development of eight principles for purposeful business:

> *Corporate law* should place purpose at the heart of the corporation and require directors to state their purposes and demonstrate commitment to them.
>
> *Regulation* should expect particularly high duties of engagement, loyalty and care on the part of directors of companies to public interests where they perform important public functions.
>
> *Ownership* should recognise obligations of shareholders and engage them in supporting corporate purposes as well as in their rights to derive financial benefit.
>
> *Corporate governance* should align managerial interests with companies' purposes and establish accountability to a range of stakeholders through appropriate board structures. They should determine a set of values necessary to deliver purpose, embedded in their company culture.
>
> *Measurement* should recognise impacts and investment by companies in their workers, societies and natural assets both within and outside the firm.
>
> *Performance* should be measured against fulfilment of corporate purposes and profits measured net of the costs of achieving them.

[37] 'Future of the Corporation', *The British Academy* (Web Page, 2017) <https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/>, archived at <https://perma.cc/YD6K-X9B4>.

[38] The British Academy, *Policy & Practice for Purposeful Business: The Final Report of the Future of the Corporation Programme* (Report, 2021) 5 ('*Policy & Practice for Purposeful Business*').

[39] 'Future of the Corporation' (n 37).

[40] Ibid.

> *Corporate financing* should be of a form and duration that allows companies to fund more engaged and long-term investment in their purposes.
>
> *Corporate investment* should be made in partnership with private, public and not-for-profit organisations that contribute towards the fulfilment of corporate purposes.[41]

The programme understood the purpose of business as 'creating profitable solutions for problems of people and planet, and not profiting from creating problems'.[42] Though, the final report recognised that '[f]ew companies take up the option that exists within the law to adopt purposes beyond promoting shareholder interests, and there is insufficient appreciation and enforcement of directors' duties under the law'.[43] It recommended that governments should 'put purpose at the heart of company law and the fiduciary responsibility of directors'.[44]

However, as the programme's eight principles of purposeful business demonstrate, the recommendations were not confined to the expression of corporate purposes and the consequences of embedding them in company constitutions. The programme's final report acknowledged that comprehensive reform would require 'a coherent set of policies and practices to be adopted by government, regulators, business and investors'.[45] As the authors of the report observed, '[s]ystemic change needs systematic solutions'.[46] To that end, the report included a raft of recommendations directed at shareholders, directors, financiers, regulators and governments to both strengthen accountability for corporate purposes and promote more effective implementation of corporate purposes.[47]

The British Academy's system-level view recognised that in the regulatory network applicable to the conduct and governance of corporations, corporate law is but one of many nodes.[48] And it highlights that corporate law directly and indirectly influences and intersects with other nodes in the regulatory

41 The British Academy, *Policy & Practice for Purposeful Business* (n 38) 11 (emphasis added).

42 Ibid 6.

43 Ibid.

44 Ibid 7.

45 Ibid 16.

46 Ibid.

47 Ibid 7.

48 Luca Enriques, Alessandro Romano and Thom Wetzer, 'Network-Sensitive Financial Regulation' (2020) 45(2) *Journal of Corporation Law* 351, 354. See generally Tamara Belinfanti and Lynn Stout, 'Contested Visions: The Value of Systems Theory for Corporate Law' (2018) 166(3) *University of Pennsylvania Law Review* 579.

network, including the behaviours of shareholders, asset owners, financiers, regulators and governments, in important ways. One reason these influences are important is because they must be understood if the regulatory network relevant to the conduct and governance of corporations is to address effectively systemic problems including, but not limited to, environmental crises and financial instability.[49]

These developments in the US and the UK have to be understood in the context provided by the applicable law.

In the US, where corporate law is state-based, many states (although not Delaware) have corporate constituency statutes which specifically permit directors to consider non-shareholder interests.[50] For example, the provision in New York law provides that, in taking action, a director is entitled to consider the long-term and short-term interests of the corporation and its shareholders and the effects that the corporation's actions may have in the short-term and long-term upon a number of matters, including employees, customers, creditors, and the ability of the corporation to contribute to the communities in which it does business.[51]

In the UK, the developments have to be understood against the provisions of s 172 of the *Companies Act 2006* (UK) ('*UK Companies Act*') which, as enacted, provided for the so-called 'enlightened shareholder value model':

> 172 Duty to promote the success of the company
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members *as a whole*, and in doing so have regard (amongst other matters) to —
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,

[49] See Enriques, Romano and Wetzer (n 48) 354.

[50] Jason Harris, 'Shareholder Primacy in Changing Times' (Conference Paper, Supreme Court of New South Wales Corporate and Commercial Law Conference, 2018) 16; American Law Institute, *Restatement (Tentative Draft No 1) of Corporate Governance* (April 2022) 25 ('*Restatement of Corporate Governance (Tentative Draft)*').

[51] NY Business Corporation Law § 717(b) (McKinney 2024).

> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.[52]

Notice the express reference to 'the long term'. Notice the references to the benefit of the members 'as a whole' and to acting fairly as between members. Notice, too, the obligation to have regard to employees, suppliers, customers, the impact of the company's operations on the environment and maintaining a reputation for high standards of business conduct.[53] Finally, notice the modification for directors to promote the success of the company by acting to achieving purposes *other than* the benefit of members, where or to the extent that the company has such a purpose.

This being the statutory framework in the UK, it is unsurprising that matters of the kind mentioned in the 2019 Business Roundtable Statement and the World Economic Forum's Davos Manifesto 2020 can be accommodated with (and are to a significant degree reflected in) *The United Kingdom Corporate Governance Code 2018* ('*UK Corporate Governance Code*').[54] Principle A of the *UK Corporate Governance Code* identifies the role of the board as being 'to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society'.[55] And Principle B explains that

[52] *Companies Act 2006* (UK) s 172 (emphasis added) ('*UK Companies Act*'). See generally Richard Williams, 'Enlightened Shareholder Value in UK Company Law' (2012) 35(1) *University of New South Wales Law Journal* 360.

[53] Section 414CZA of the *UK Companies Act* (n 52) requires UK companies, other than small- and medium-sized companies, to include a 'section 172(1) statement' in their strategic reports for a financial year describing how the directors have had regard to the matters set out in ss 172(1)(a)–(f) when performing their duty under s 172. However, the Financial Reporting Council has reported that some investors have found that certain s 172(1) statements are of a 'boilerplate' nature and are 'not connected to the business model or strategic issues': Financial Reporting Council, *Reporting on Stakeholders, Decisions and Section 172* (Report, July 2021) 49.

[54] Financial Reporting Council, *The UK Corporate Governance Code* (Report, July 2018) ('*UK Corporate Governance Code*').

[55] Ibid 4.

the 'board should establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned'.[56]

The *UK Corporate Governance Code* is published by the Financial Reporting Council ('FRC') (a body that regulates auditors, accountants and actuaries, and sets the UK's corporate governance and stewardship codes).[57] The functions of the FRC derive from several sources. It has direct statutory powers in relation to audit regulation and some statutory powers delegated by the Secretary of State; some functions are supported by statutory obligations imposed on others to meet FRC requirements or participate in arrangements the FRC provides.[58] Some of its functions have no statutory backing but 'derive their authority from widespread support from, and voluntary arrangements' with stakeholders.[59]

Compliance with the *UK Corporate Governance Code* is voluntary.[60] The Financial Conduct Authority's listing rules require listed companies to report on their compliance with the code on a 'comply or explain' basis.[61] But the FRC's development of governance principles has not been confined to large listed entities. In late 2018, the FRC published *The Wates Corporate Governance Principles for Large Private Companies* ('*Wates Corporate Governance Principles*'),[62] to provide 'a framework to help large private companies raise their standards of corporate governance'.[63] And now, in 2023, the Better Business Act campaign, a movement supported by over 2,000 UK businesses as well as the UK Institute of Directors,[64] is advocating for amendments to be made to s 172, among others, such that the obligation in that section would be reframed as that to 'act in the way the director considers, in good faith, *would be most likely to advance*

[56] Ibid.

[57] 'About the FRC', *Financial Reporting Council* (Web Page) <https://www.frc.org.uk/about-us/>, archived at <https://perma.cc/6SNU-TB3P>.

[58] 'Role and Responsibilities', *Financial Reporting Council* (Web Page, 25 September 2023) <https://www.frc.org.uk/about-the-frc/role-and-responsibilities>, archived at <https://perma.cc/WW79-Z5TK>.

[59] Ibid.

[60] *UK Corporate Governance Code* (n 54) 1.

[61] Ibid 1–2; Financial Conduct Authority, *Listing Rules* (at 20 April 2022) rr 9.8.6(5)–(6).

[62] Financial Reporting Council, *The Wates Corporate Governance Principles for Large Private Companies* (Report, December 2018).

[63] 'The Wates Corporate Governance Principles for Large Private Companies', *Financial Reporting Council* (Web Page, 4 October 2023) <https://www.frc.org.uk/directors/corporate-governance/governance-of-large-private-companies>, archived at <https://perma.cc/K68C-RWSL>.

[64] 'About The Better Business Act', *Better Business Act* (Web Page) <https://better-businessact.org/about/#theact>, archived at <https://perma.cc/289K-KH8C>.

the purpose of the company'.[65] In pursuit of the campaign's stated ambition to ensure its 'proposals are included in all the main parties' manifestos' ahead of the UK general election, in April 2023 the campaign hosted a reception at Westminster attended by Members of Parliament, policy makers and business leaders.[66]

Three other international institutions and events must be mentioned. First, the Financial Stability Board ('FSB'), established after the 2009 Group of 20 ('G20') Summit in London, is an international body that monitors and makes recommendations about the global financial system.[67] The FSB's Task Force on Climate-related Financial Disclosures ('TCFD') has done a lot of work developing recommendations[68] about the types of information that companies should disclose 'to support investors, lenders, and insurance underwriters in appropriately assessing and pricing … risks related to climate change'.[69] The TCFD's recommendations are built around four 'thematic areas' — governance, strategy, risk management, and metrics and targets.[70] Together these four areas represent core elements of how companies work.

Second, in November 2021 at the United Nations Climate Change Conference in Glasgow, the International Financial Reporting Standards Foundation ('IFRS') announced the formation of the International Sustainability Standards Board ('ISSB') to build upon earlier recommendations of the TCFD and establish a 'comprehensive global baseline of sustainability disclosures for the capital markets'.[71] The IFRS describes itself as 'a not-for-profit, public interest

[65] Better Business Act, 'The Better Business Act' (Draft Amendments) (emphasis added) <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf>, archived at <https://perma.cc/3CTR-ZVDP>. See also 'Wake Up to Better Business', *Better Business Act* (Web Page, 26 April 2023) <https://betterbusinessact.org/wake-up-to-better-business/>, archived at <https://perma.cc/VJW4-KBDP>.

[66] 'Wake Up to Better Business' (n 65).

[67] *Charter*, Financial Stability Board (at 19 June 2012) <https://www.fsb.org/wp-content/uploads/FSB-Charter-with-revised-Annex-FINAL.pdf>, archived at <https://perma.cc/ZWZ7-UQF2>.

[68] Task Force on Climate-related Financial Disclosures, *Recommendations of the Task Force on Climate-Related Financial Disclosures* (Final Report, June 2017) 13–23 ('*TCFD Recommendations*').

[69] 'About', *Task Force on Climate-related Financial Disclosures* (Web Page) <https://www.fsb-tcfd.org/about/>, archived at <https://perma.cc/33DU-4T45>.

[70] Ibid.

[71] 'ISSB Delivers Proposals That Create Comprehensive Global Baseline of Sustainability Disclosures', *International Financial Reporting Standards Foundation* (Web Page, 31 March 2022) <https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures/>, archived at <https://perma.cc/LX5T-ZLU2>.

organisation established to develop high-quality, understandable, enforceable and globally accepted accounting and sustainability disclosure standards'.[72] The ISSB is now finalising its own general requirements for an entity to disclose sustainability-related financial information,[73] as well as specific information about its climate-related risks and opportunities ('*Climate-Related Disclosures Exposure Draft*').[74] Those requirements are expected to be published by July 2023.[75] It should be noted that later this year the revised *G20/OECD Principles of Corporate Governance* will also be issued.[76]

Separately, the American Law Institute ('ALI') is currently working on a restatement of the law of corporate governance. It published its first tentative draft in 2022 ('*Restatement of Corporate Governance (Tentative Draft)*').[77] A key provision of the proposed restatement — § 2.01 — deals with 'the objective of a corporation'.[78] It states that 'the objective of a corporation is to enhance the economic value of the corporation, within the boundaries of the law' and distinguishes between 'common-law jurisdictions' (such as Delaware) and 'stakeholder jurisdictions' (which have 'constituency statutes').[79] In common law jurisdictions, the enhancement of the economic value of the corporation is for the benefit of the corporation's shareholders, and in doing so, a corporation *may* consider other stakeholders such as employees, customers, the community and the environment.[80] In stakeholder jurisdictions, the enhancement of the

[72] 'Introduction to the IFRS Foundation', *International Financial Reporting Standards Foundation* (Web Page) <https://www.ifrs.org/sustainability/knowledge-hub/introduction-to-the-ifrs-foundation/>, archived at <https://perma.cc/5CUE-Z5NN>.

[73] International Sustainability Standards Board, *General Requirements for Disclosure of Sustainability-Related Financial Information* (Exposure Draft, ED/2022/S1, March 2022) 5–6 ('*General Requirements Exposure Draft*').

[74] International Sustainability Standards Board, '*Climate-Related Disclosures*' (Exposure Draft, ED/2022/S2, March 2022) 5–7 ('*Climate-Related Disclosures Exposure Draft*').

[75] Since the delivery of this lecture, the ISSB's *General Requirements for Disclosure of Sustainability-Related Financial Information* and its *Climate-Related Disclosures* standards have been published: International Sustainability Standards Board, *General Requirements for Disclosure of Sustainability-Related Financial Information* (Report, June 2023); International Sustainability Standards Board, *Climate-Related Disclosures* (Report, June 2023).

[76] Since the delivery of this lecture, the revised *G20/OECD Principles of Corporate Governance* have been published: Organization for Economic Cooperation and Development, *G20/OECD Principles of Corporate Governance* (Report, 2023) <https://www.oecd.org/en/publications/g20-oecd-principles-of-corporate-governance-2023_ed750b30-en/full-report.html>, archived at <https://perma.cc/LLK7-YQ4C>.

[77] American Law Institute, *Restatement of Corporate Governance (Tentative Draft)* (n 50).

[78] Ibid 25–58.

[79] Ibid 25.

[80] Ibid.

economic value of the corporation is for the benefit of shareholders and, to the extent permitted by state law, other stakeholders.[81]

What lies behind all of these recent events — the 2019 Business Roundtable Statement, the Davos Manifesto 2020, the FRC's *UK Corporate Governance Code* and *Wates Corporate Governance Principles*, the TCFD, the ISSB, as well as s 172 and the ALI's *Restatement of Corporate Governance (Tentative Draft)* — is a fundamental shift in the understanding of corporate purpose and corporate governance. It is certainly a marked shift in how corporate purpose and governance is talked about. It remains to be seen whether the developments will result in material changes — legally, practically or commercially — to how companies are governed, corporate purposes are identified, stakeholder interests are considered, and risk is identified, supervised, managed and disclosed.[82] In any event, the changed understanding of corporate purpose demonstrates that there is greater recognition that what corporations do affects not only the economy and the hip pocket of shareholders but the health and wellbeing of society more generally both now and long into the future.[83]

III The Australian Setting

The question for us in Australia is how, if at all, does Australian corporate law about directors' duties intersect, reflect and accommodate these ideas and debates?

The most relevant Australian directors' duties to consider for present purposes are:

- the 'best interests' and 'proper purpose' duties in s 181(1) of the *Corporations Act 2001* (Cth) ('*Corporations Act*'), which require directors and officers to exercise their powers and discharge their duties 'in good faith in the best interests of the corporation' and 'for a proper purpose'.[84] Although s 181 treats this as a single duty, it is in fact a compound duty which contains separate obligations of best interests and proper purpose;[85] and
- the 'care and diligence' duty in s 180 of the *Corporations Act*, which requires that a director or other officer exercise their powers and discharge their

[81] Ibid.

[82] See generally Bebchuk and Tallarita, 'Will Corporations Deliver Value to All Stakeholders?' (n 29).

[83] The British Academy, *Policy & Practice for Purposeful Business* (n 38) 15.

[84] *Corporations Act 2001* (Cth) s 181(1) ('*Corporations Act*').

[85] See, eg, *Strategic Management Australia AFL Pty Ltd v Precision Sports & Entertainment Group Pty Ltd* (2016) 114 ACSR 1, 19 [87] (Sifris J); *Re IW4U Pty Ltd (in liq)* (2021) 150 ACSR 146, 152 [30] (Gleeson J).

> duties with the degree of care and diligence that a reasonable person would exercise in the same position.

Both of these duties have equivalents in the general law; the difference is in the remedies.[86] Sections 180 and 181 are civil penalty provisions,[87] meaning that the potential consequences for breach include declarations, disqualification, pecuniary penalties, relinquishment and compensation,[88] and criminal liability may also be imposed for breach of s 181 if the director is reckless or dishonest.[89]

Australian law, however, contains no direct analogue to many of the codes, principles or provisions mentioned earlier. The 'best interests' duty contains no list of mandatory considerations to inform that concept or give effect to that duty. Does this matter? How much weight will our statutory framework of directors' duties bear? If they are consistent with giving effect to purposes and considerations of the kind now described in the US and UK provisions and by the other statements and recommendations I have mentioned, do they *oblige* directors to do so? If they do not, should they? There has been little exploration in the case law of when a purpose for acting will be beyond those purposes that are 'proper'. Acting for personal reasons will not be for the purposes of the corporation. But what about acting for purposes that are contrary to the basic constituents of the corporation? Would a director of a corporation with environmental objects be acting for proper purposes if the company invested in a highly profitable project that is known to cause major pollution?

As will be seen, Australian law may accommodate some of these developments, but the directors' duties do not expressly require or permit directors to consider matters of the kind set out in the UK and may not permit, or at least may inhibit, them doing so in given circumstances.

It may be useful to develop these points about the operation of Australian law by reference to five matters referred to in s 172 of the *UK Companies Act*:

- Corporate purpose — how should boards conceive of corporate purpose?
- Shareholders — what is meant by the company or members 'as a whole' and fairness 'between' members?

[86] RP Austin and IM Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 450 [8.035].

[87] *Corporations Act* (n 84) s 1317E(3) item 1.

[88] Ibid ss 206C (disqualification power), 1317E (declaration power), 1317G (pecuniary penalties), 1317GAB (relinquishment orders), 1317H (compensation orders).

[89] Ibid s 184(1).

- Other stakeholders — should boards consider the interests of employees, customers, suppliers and creditors? Are there others whose interests can or should be considered?
- The public interest — should boards take account of environmental effects or other public interest considerations?
- Horizon — how far ahead should boards be looking?

As will soon appear, these matters overlap.

A *Corporate Purpose*

Australian law makes limited reference to corporate purpose. Old requirements to state the objects of the company[90] failed in the face of companies stating their objects as widely as they could to avoid possible applications of principles of ultra vires.[91] There is now no general obligation to include a reference to corporate purpose in the company constitution.[92] And if a company elects to include an objects clause in its constitution, s 125(2) of the *Corporations Act* provides that an act of the company will not be invalid because the act contravened, or is beyond, an object in the company's constitution.

Now, perhaps due in part to that change, the closest many Australian companies come to identification of corporate purpose appears to be a vision or mission statement designed more as a public relations tool than a statement informing why the entity exists, what it seeks to achieve and how it is governed.

[90] See, eg, *Ashbury Railway Carriage & Iron Co Ltd v Riche* (1875) LR 7 HL 653, 664 (Lord Cairns LC); *Companies Act 1981* (Cth) s 37(1)(b), as at 30 June 1982.

[91] See, eg, *Cotman v Brougham* [1918] AC 514, 517 (Lord Finlay LC, Lord Atkinson agreeing at 519, Lord Parker agreeing at 519), 524 (Lord Wrenbury); Nicholas Bourne, 'Drafting Objects Clauses and *Ultra Vires*' (2004) 25(10) *Business Law Review* 258, 258; Paul J Omar, 'Powers, Purposes and Objects: The Protracted Demise of the Ultra Vires Rule' (2004) 16(1) *Bond Law Review* 93, 102.

[92] Though where a company is registered as a no liability company pursuant to s 112 of the *Corporations Act* (n 84), it must have a clause in its constitution explaining that the company is formed exclusively for 'mining purposes': at s 112(2)(b). Similarly, where a company is registered under ch 2 of the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) and wishes to delete the word 'Limited' from its name pursuant to s 150(1) of the *Corporations Act* (n 84), it must have a statement of charitable purpose: see *Charities Act 2013* (Cth) s 12. Similarly, s 299A(1)(c) of the *Corporations Act* (n 84) requires a directors' report for a financial year to contain information that would allow members of the listed entity to make an informed assessment of the 'business strategies' of the entity reported on. The Australian Securities and Investments Commission suggests that the directors' report would likely need to set out an entity's 'business objectives' to satisfy the obligation in s 299A(1)(c): Australian Securities and Investments Commission, *Effective Disclosure in an Operating and Financial Review* (Regulatory Guide No 247, August 2019) 18 [RG 247.57] ('*Regulatory Guide 247*').

Such statements shed little light on the practical content of directors' duties. We are a long way from the Future of the Corporation programme's proposal that we use 'systems of measurement and accounting for company purposes and ensure that financial reports reflect costs and profits of delivering them'.[93]

Australian laws not requiring companies to identify their purpose may leave a gap to be filled. For all except not-for-profit or charitable entities or no liability companies, many boards may fill that gap by framing the purpose as solely to enhance the economic value of the corporation for the shareholders.

That said, the fourth edition of the ASX's *Corporate Governance Principles and Recommendations*, published in 2019, recommended for the first time that a 'listed entity should articulate and disclose its values'.[94] This recommendation was in line with the third of eight principles identified by the ASX Corporate Governance Council, that a 'listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly'.[95]

The ASX Corporate Governance Council commentary on those principles and recommendations explains that a listed entity's values are

> the guiding principles and norms that define what type of organisation it aspires to be … creat[ing] a link between the entity's purpose (why it exists) and its strategic goals (what it hopes to do) by expressing the standards and behaviours it expects from its directors, senior executives and employees to fulfil its purpose and meet its goals.[96]

The Council further states that

> [i]n formulating its values, a listed entity should consider what behaviours are needed from its officers and employees to build *long term sustainable value for its security holders*. This includes the need for the entity to preserve and protect its reputation and standing in the community and with key stakeholders, such as customers, employees, suppliers, creditors, law makers and regulators.[97]

Is the reference to a listed entity's values something less than what a corporation does, where it does it, how it does it, why it does it and who is affected by what it does? If so, why? But whether the answer is yes or no, many issues appear to be left unaddressed: must a corporation ask these questions; how, or by reference to what standard, is a corporation to answer these questions; whose

[93] The British Academy, *Policy & Practice for Purposeful Business* (n 38) 36.

[94] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, February 2019) 16 (recommendation 3.1).

[95] Ibid 2.

[96] Ibid 16.

[97] Ibid (emphasis added).

interests are to be taken into account in formulating the answers; and what consequences do those answers have for corporate governance and directors' duties in the short, medium and long term? As will become apparent, the same questions repeatedly arise.

This commentary can be compared with the Future of the Corporation programme's proposal that

> [c]ompanies place purpose at the heart of their annual reporting and demonstrate to their stakeholders how their ownership, governance, strategy, values, cultures, engagement, measurement, incentives, financing and resource allocation deliver it.[98]

This commentary can also be compared with the programme's recommendation that '[o]wners, boards and executives take responsibility for overseeing the adoption and implementation of corporate purposes', including through measuring, reporting, and basing the company's incentives and remuneration on, the fulfilment of corporate purpose.[99]

Encouraging or obliging companies to identify the purposes that they seek to pursue in the short, medium and long term is the first step towards companies identifying not only why they exist but also the immediate and longer-term risks from pursuing those purposes. Connecting a statement of purpose with identification of risk may inhibit adoption of a boundless laundry list of purposes because the wider the list of purposes the longer and more diverse the list of risks. But identification of purpose is just one aspect to be addressed. Careful identification of the content of the legal obligations informed by that purpose is no less important.

B *Shareholders*

The debate about the separation, if any, between the interests of the company and the interests of its shareholders continues.[100]

Because companies are abstract right- and duty-bearing entities, the temptation to draw comparisons with natural persons is very strong. It is

[98] The British Academy, *Policy & Practice for Purposeful Business* (n 38) 20.

[99] Ibid.

[100] See, eg, Austin and Ramsay (n 86) 479–82 [8.090]–[8.095]; Harris (n 50) 11–15; Bret Walker and Gerald Ng, 'The Content of Directors' "Best Interest" Duty' (Memorandum of Advice, Australian Institute of Company Directors, 24 February 2022) 5 [13]–[15]. See also *Ngurli Ltd v McCann* (1953) 90 CLR 425, 438 (Williams ACJ, Fullagar and Kitto JJ); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 178–9 [18] (McHugh, Gummow, Hayne and Callinan JJ); *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1, 533–4 [4392]–[4395] (Owen J).

unsurprising then, that when we speak of directors owing duties to the company, we seek to personify the beneficiaries of that obligation as the 'members' as if all shareholders were natural persons. And it is often tempting to frame the kinds of outcome to be sought or avoided in pursuit of the interests of members as some generalised statement of desires attributed to some or all of those members.

Steps of that kind are apt to mislead or confuse.

Articulating the content of the 'best interests' and 'proper purpose' duties must stop at a level of abstraction which points towards what would *breach* the duty or would amount to an *improper* purpose. Going beyond that seeks to gloss the statutory language and if that is done, error beckons. That is, like the case law, which inevitably focuses on whether there has been a *breach* of the relevant duty or duties concerned, it will usually be more profitable to look at the 'best interests' and 'proper purpose' duties through the lens of what is not best interests and what is not proper purpose.

When that is done, the matters mentioned in s 172 of the *UK Companies Act* — in particular the references to 'members as a whole' and 'fair[ness] … between members' — are seen to fit neatly within the best interests and proper purpose duties. They fit neatly within those concepts in the sense that not taking account of the interests of one group of members may well constitute a failure to act in the best interests of the company and preferring the interests of one group of members to the exclusion of the interests of another group may well be, as the well-known decision in *Mills v Mills* demonstrates, to act for an improper purpose.[101]

What s 172 is providing is a more particular identification of whose interests must be considered than may be conveyed by saying only that it must be in the best interests of the company. That latter concept — 'best interests' of the company — does not expressly tell a director to take account of the various interests referred to in s 172(1). It might be understood as referring to the best interests of the company having regard to all those who are interested in the company rather than trying to identify some notion of 'members as a whole'.

C *Other Stakeholders*

What about considering the interests of other stakeholders like employees, customers, suppliers and creditors?

[101] (1938) 60 CLR 150, 164 (Latham CJ), 170 (Rich J, Evatt J agreeing at 188), 175–9 (Starke J), 186–8 (Dixon J).

Unsurprisingly, this question has been the subject of wide and ongoing debate. At one end of the spectrum, those who subscribe to Friedman's doctrine would readily deny the consideration of such interests to the extent that it detracts from the attainment of profit.[102] At the opposite end of the spectrum, those with a communitarian perspective are likely to support affording each set of interests equal weight in acknowledgement that the corporation is drawn from, and reliant upon, the community it operates within and serves.[103] Other commentators contend that companies should not build into their core business the concerns of too many stakeholders because doing so risks organisational overload.[104] Instead, companies should build a deeper understanding of the societal challenges and stakeholders most critical to their business and focus on those.[105] The spectrum of views is large.

Whether and when a company and its board should consider the interests of creditors has long been controversial.[106] The Supreme Court of the UK considered the issues recently in *BTI 2014 LLC v Sequana SA*.[107] These issues have been and will be litigated here. I therefore say nothing more about them.

What about other stakeholders? Unlike the UK, there is no legislation in Australia that expressly *obliges* directors to consider the interests of employees, customers and contractors when making decisions in the best interests of the company.[108]

Of course, companies are subject to specific laws that are aimed at protecting some stakeholder interests — environmental protection, occupational health and safety, employment and industrial relations, consumer protection and

[102] Hansmann and Kraakman (n 11) 440–1. See also Bebchuk and Tallarita, 'The Illusory Promise of Stakeholder Governance' (n 28) 110.

[103] Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach"' (2007) 29(4) *Sydney Law Review* 577, 586–7, citing Margaret M Blair and Lynn A Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) *Virginia Law Review* 247. See also William W Bratton Jr, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74(3) *Cornell Law Review* 407, 450–1.

[104] Sir Ian Davis and Daniel Litvin, 'CEOs Need a Much Sharper Focus on Social Challenges, Argue Ian Davis and Daniel Litvin', *The Economist* (online, 16 May 2023) <https://www.economist.com/by-invitation/2023/05/16/ceos-need-a-much-sharper-focus-on-social-challenges-argue-ian-davis-and-daniel-litvin>.

[105] Ibid.

[106] Justice KM Hayne, 'Directors' Duties and a Company's Creditors' (2014) 38(2) *Melbourne University Law Review* 795, 799–802; Susan Glazebrook, 'Meeting the Challenge of Corporate Governance in the 21st Century' (2019) 34(2) *Australian Journal of Corporate Law* 106, 110; Andrew Keay, 'The Director's Duty To Take into Account the Interests of Company Creditors: When Is It Triggered?' (2001) 25(2) *Melbourne University Law Review* 315, 319–21.

[107] [2024] AC 211.

[108] Austin and Ramsay (n 86) 490 [8.120].

whistleblower laws, to name a few. As I will address shortly, directors may breach their duties if they disregard such laws or fail to take appropriate steps to ensure that the company complies with those laws.

Apart from where a specific stakeholder or stakeholder interest is the subject of direct regulation, whether and how a company *can* or *should* consider the interests of stakeholders like employees, customers and suppliers will almost always intersect with what s 172(1)(e) of the *UK Companies Act* describes as 'the desirability of the company maintaining a reputation for high standards of business conduct'. A company that is seen not to treat employees, customers or suppliers well will not enjoy a reputation for high standards of business conduct. It will lose the trust of its stakeholders, sometimes referred to as a business' social licence to operate.[109] Whether, when and how that reputation affects the company's financial performance will be much affected by the market or markets in which the company operates. But the time, effort, and money that so many companies devote to burnishing their reputations suggest that they see close links between reputation and performance.

At general law, directors are given considerable latitude to determine where the company's interests lie and how they are to be served. Subject to limited review by courts, it is for the directors to determine what are the best interests of the company.[110] This principle is also reflected in the *Corporations Act* — under s 180(2), a director or officer 'who makes a business judgment is taken to meet' the 'care and diligence' duty,[111] and their equivalent general law duties, if they, among other things, 'rationally believe that the judgment is in the best interests of the corporation'[112] — and a belief is deemed to be 'rational' unless it is one that 'no reasonable person' in the director's position would hold.[113]

It remains important to observe, however, that

> [t]he longer the period of reference, the more likely it is that the interests of shareholders, customers, employees and all associated with any corporation will be seen as converging on the corporation's continued long-term financial advantage. And long-term financial advantage will more likely follow if the entity conducts its business according to proper standards, treats its employees well and

[109] See, eg, Rosemary Teele Langford, 'Social Licence To Operate and Directors' Duties: Is There a Need for Change?' (2019) 37(3) *Company and Securities Law Journal* 200, 200–2; Vivienne Brand and Rosemary Teele Langford, '"Doing the Job That's Required"?: Social Licence To Operate and Directors' Duties' (2022) 44(1) *Sydney Law Review* 111, 114–18.

[110] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493 (Barwick CJ, McTiernan and Kitto JJ).

[111] *Corporations Act* (n 84) s 180(1).

[112] Ibid s 180(2)(d).

[113] Ibid s 180(2).

> seeks to provide financial results to shareholders that, in the long run, are better than other investments of broadly similar risk.[114]

All this being so, it is at least arguable that a board considering the interests of a broad range of stakeholders in the manner I have described is doing no more than acting for the benefit of the corporation in accordance with existing Australian law.[115]

That directors may take a broad view of the 'best interests' duty is consistent with the empirical evidence assembled by Marshall and Ramsay in their 2012 paper about directors' understanding of their duties and responses to what was then called the 'corporate social responsibility' movement.[116] But more than a decade later, the issues examined in that paper remain unresolved, and as will be seen, remain uncertain in the face of continuing debate, discussion and diverse regulatory responses.

What is not clear is whether or to what extent under Australian law directors *must* take into account interests of not only shareholders but also 'customers, employees and all associated with any corporation' including suppliers and creditors. Nor is it clear *how* that question is to be answered recognising that corporations operate in complex environments and face a multitude of overlapping rules and risks. Stakeholders are not uniform and balancing their respective interests is invariably difficult. Does identification of corporate purpose drafted by reference to what a corporation does, where it does it, how it does it, why it does it and who is affected provide a base — a better base — for informed corporate decision-making, for the balancing of competing interests in the short, medium and long term and for better and informed regulation and, possibly, enforcement of corporate governance?[117]

[114] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019) vol 1, 403.

[115] See, eg, Walker and Ng (n 100) 3 [7], 12–13 [31], 15–16 [40]; Australian Institute of Company Directors, *Directors' 'Best Interests' Duty in Practice* (Practice Statement, July 2022) 4 ('*AICD Best Interests Duty Practice Statement*'); Joe Longo, 'Chair's Remarks at the AICD Australian Governance Summit 2023' (Speech, Australian Institute of Company Directors' Australian Governance Summit, 2 March 2023) <https://asic.gov.au/about-asic/news-centre/speeches/chair-s-remarks-at-the-aicd-australian-governance-summit-2023/>, archived at <https://perma.cc/Z4NW-LNAT>.

[116] Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1) *University of New South Wales Law Journal* 291, 295, 304.

[117] See Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954, 957–60.

D *The Public Interest*

The fourth of the five topics I suggest arises from s 172 of the *UK Companies Act* is the public interest. The public as a stakeholder has interests that raise distinct issues. For example, do the 'best interests' and 'proper purpose' duties permit or require a board to consider 'the impact of the company's operations on the community and the environment'?[118] More generally, do those duties permit or require a board to consider that kind of ESG issue?

Boards must apply reasonable care and diligence to identify, supervise, manage and disclose risks to the company's business.[119] The issues with which I am concerned are those which are material to long-term performance of the company — its sustainability and its long-term value creation. Two examples may make the point, one a social issue, the other environmental. A company selling harmful, poor value or otherwise inappropriate products to vulnerable consumers can be framed as a social issue and thus an ESG issue. Similarly, a company lawfully, but harmfully, disposing of hazardous waste from its manufacturing processes may be framed as an environmental issue. Both are steps which may contribute to the company's profit, but each is an act that can be framed as an ESG issue (and in ways that are damaging to the company's reputation).

Framing the issue as an ESG issue does not dictate the outcome. That is, recognising that the issue is an 'ESG issue' — or might be labelled as an 'ESG issue' — is not a trump card that obliges the board to stop or modify the practice in question.

In either of the cases mentioned, the 'best interests' duty may well be understood as obliging the board to take reasonable care to identify and recognise the risks *arising* from continued pursuit of a relevant practice and then, according to the nature and intensity of the risks identified, take some action in response. But it will be the nature and intensity of the risk *to the company* that will be of central importance.

This is not consistent with s 172 of the *UK Companies Act* insofar as that provision requires a board to look beyond risks *to the company* and consider the impact of the company's operations on the community and the environment. And the Australian 'best interests' duty may not be consistent with the ALI's *Restatement of Corporate Governance (Tentative Draft)*, which permits a corporation to consider the impact of its operations on the community and

[118] *UK Companies Act* (n 52) s 172(1)(d).

[119] *Corporations Act* (n 84) s 180(1).

the environment when pursuing the objective of enhancing its economic value for shareholders.[120]

That said, there is of course direct legislation and regulation in Australia aimed at the protection of specific stakeholders and the environment from the impacts of corporate activity. For example, the new 'general environmental duty' in Victoria, which came into effect in July 2021, requires a 'person who is engaging in an activity that may give rise to risks of harm to human health or the environment from pollution or waste' to 'minimise those risks, so far as reasonably practicable'.[121] A person who is conducting a business or undertaking will also be deemed to have contravened the general environmental duty in certain circumstances, including where the person fails, so far as reasonably practicable, to 'use and maintain systems for identification, assessment and control of risks of harm to human health and the environment from pollution and waste that may arise in connection with the activity'.[122] Breach of this obligation may result in civil penalties,[123] and, where committed in the course of a business or undertaking, criminal penalties,[124] both for companies and for directors and other officers.[125]

Failure to comply with specific laws for stakeholder or environmental protection may also result in liability for directors under the 'care and diligence' and 'best interests' directors' duties. As Edelman J observed in *Australian Securities and Investments Commission v Cassimatis [No 8]*,

> [a] corporation has a real and substantial interest in the *lawful* or *legitimate* conduct of its activity independently of whether the illegitimacy of that conduct will be detected or would cause loss. One reason for that interest is the corporation's reputation. … Another is that the corporation itself exists as a vehicle for lawful activity. … [T]he foreseeable risk of harm to the corporation which falls to be considered in s 180(1) is not confined to financial harm. It includes harm to *all* the interests of the corporation … including its reputation, includ[ing] its interests which relate to compliance with the law.[126]

It is useful to explore these issues of public interest further by reference to what has come to be called the 'Caremark' doctrine in the US. In 1996, in *Re*

120 American Law Institute, *Restatement of Corporate Governance (Tentative Draft)* (n 50) 25.

121 *Environment Protection Act 2017* (Vic) s 25(1); Victoria, *Victoria Government Gazette*, No S 124, 16 March 2021.

122 *Environment Protection Act 2017* (Vic) s 25(4)(b).

123 Ibid ss 314(1), (3) item 1.

124 Ibid ss 25(2)–(3).

125 Ibid s 350.

126 (2016) 336 ALR 209, 301–2 [482]–[483] (emphasis in original).

Caremark International Inc Derivative Litigation, the Delaware Court of Chancery considered what duties directors have to oversee the company's activities.[127] The 'Caremark' oversight obligation was said to be rooted in a director's duty to act in good faith and be reasonably informed about the corporation.[128]

In 2019, in the *Marchand v Barnhill* ('*Blue Bell*') case, the Supreme Court of Delaware said that 'directors have a duty "to exercise oversight" and to monitor the corporation's operational viability, legal compliance, and financial performance' and that a 'board's "utter failure to attempt to assure a reasonable information and reporting system exists" is an act of bad faith in breach of the [directors'] duty of loyalty'.[129] The facts of that case are revealing.[130] Blue Bell's only product was ice cream. There was a listeria outbreak. After eating some of Blue Bell's ice cream, customers got sick, some died. The company operated in a highly regulated environment.[131] It was subject to government inspection and oversight. The company had in place some safety manuals and commissioned audits from time to time.[132] But none of that showed that the board implemented any reporting system to monitor food safety or the company's operational performance. The Court held that the fact that Blue Bell complied with some regulations did not foreclose the inference that '[t]he directors' lack of attentiveness rose to the level of bad faith indifference required to state a *Caremark* claim'.[133] The Court said that '[i]f *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care'.[134] It is the 'failure to make that effort' that constitutes a breach of the duty of loyalty.[135]

The issue in *Blue Bell* was whether the directors had made a good faith effort to address what had to be 'one of the most central issues at the company: whether it is ensuring that the only product it makes — ice cream — is safe to eat'.[136] There was no board committee that addressed food safety; there were no

[127] 698 A 2d 959, 966–70 [3–5]–[10] (Allen C) (Del Ch, 1996) ('*Caremark*').

[128] Ibid 970 [10].

[129] 212 A 3d 805, 809 (Strine CJ for the Court en Banc) (Del, 2019) ('*Blue Bell*'), quoting ibid 971 [11].

[130] *Blue Bell* (n 129) 810–15 (Strine CJ for the Court en Banc).

[131] Ibid 810.

[132] Ibid 822–3 [12].

[133] Ibid 823 [12], citing *Caremark* (n 127).

[134] *Blue Bell* (n 129) 824 [12] (Strine CJ for the Court en Banc), discussing *Caremark* (n 127).

[135] *Blue Bell* (n 129) 824 [12] (Strine CJ for the Court en Banc).

[136] Ibid 822 [10, 11].

regular processes or protocols obliging management to keep the board apprised of food safety compliance practices, risks or reports.[137]

Facts of this kind may well found a claim under existing provisions of Australian law — a claim that there had been a failure to meet the 'care and diligence' duty in s 180(1).[138] In 2009, Austin J noted that discharge by directors of their 'oversight' duties under s 180(1) of the *Corporations Act* was not protected by the business judgment rule under s 180(2) because the failure to discharge those duties did not involve any 'business judgment' or 'decision to take or not to take action'.[139] Rather, Austin J suggested such a failure would amount to neglecting to deal with proper safeguards or turn one's mind to what safeguards there should be.[140] Even where a director has made a 'business judgment', subsequent cases have reinforced the propositions that a director has the onus of proving that they made the judgement in good faith for a proper purpose and where that onus is not discharged the defence cannot be established.[141]

But even if that is right, the kind of analysis made in *Caremark* and later cases may raise quite difficult questions about how those ideas fit with 'best interests' duties and 'proper purpose' requirements. The risk considered in the *Blue Bell* case went to the heart of Blue Bell's business. How do best interests and proper purpose duties (or duties of care and diligence) intersect with other kinds of risk?

Good corporate governance may require boards to identify, supervise, manage and disclose identifiable risk, but is this required by law? If so, what kinds of risk are to be addressed? What is the risk matrix to be adopted — risks to whom? Risks of what intensity? Risks of what likelihood and proximity? And over what time horizon? These questions point to a disconnect between corporate purpose, corporate governance and the content and enforcement of the law.

[137] Ibid.

[138] See, eg, ASX, *Continuous Disclosure: Listing Rules 3.1–3.1B* (Guidance Note 8, 5 June 2021) 93–4, citing *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253, 346–7 [372] (Santow J) ('*Adler*'), and *Caremark* (n 127).

[139] *Australian Securities Investments Commission v Rich* (2009) 236 FLR 1, 151 [7278] (Austin J) ('*Rich*'), citing American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (American Law Institute Publishers, 1994) vol 1, 175 § 4.01.

[140] *Rich* (n 139) 151 [7277] (Austin J), citing *Adler* (n 138) 356 [406] (Santow J).

[141] See, eg, *Australian Securities and Investments Commission v Fortescue Metals Group Ltd* (2011) 190 FCR 364, 427 [197]–[198] (Keane CJ, Emmett J agreeing at 431 [216], Finkelstein J agreeing at 431 [218]); *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, 589 [485] (Beach J). See also Justice Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1402, 1415–17.

E *Horizon*

What about the last of the matters raised by s 172 — horizon?[142] Ignoring long-term consequences and looking *only* to the short term may as easily found a case of breach of the Australian provisions as it would of s 172(1)(a) of the *UK Companies Act*, despite there being no express mention in the Australian provisions of directors needing to take account of the long-term consequences of a decision.

On the investment side, by failing to consider the interests of long-term investors, Australian asset owners may not satisfy the *Australian Asset Owner Stewardship Code* ('*ACSI Code*') published by the Australian Council of Superannuation Investors.[143] That *ACSI Code* states that signatories should 'encourage better alignment of the operation of the financial system and regulatory policy with the interests of *long-term investors*'.[144] The *ACSI Code* is voluntary and where a signatory is not acting in compliance with one of the *ACSI Code*'s principles, the signatory must explain why that is so.[145] Considering the criticisms which have been made of Australia's stewardship codes,[146] further work in this area may assist in bringing Australia into line with asset stewardship practices internationally.[147] Such work could also support the proposal of the Future of the Corporation programme that '[f]inancial institutions steward investments in companies to promote companies' purposes'.[148]

While stewardship codes which emphasise long-term corporate value may provide some comfort to directors who are considering how a decision may affect the interests of shareholders to whom the code or codes apply, many

[142] *UK Companies Act* (n 52) s 172(1)(a).

[143] Australian Council of Superannuation Investors, *Australian Asset Owner Stewardship Code* (Report, May 2018) ('*ACSI Code*'). While primarily directed to superannuation funds, the *ACSI Code* is intended to apply to asset owners, including endowments and sovereign wealth funds: at 5.

[144] Ibid 12 (principle 5) (emphasis added). See also Financial Services Council, *Principles of Internal Governance and Asset Stewardship* (FSC Standard No 23, July 2017) 4; Financial Reporting Council, *The UK Stewardship Code* (Report, 23 October 2019) which states that '[s]ignatories' purpose, investment beliefs, strategy, and culture enable stewardship that creates long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society': at 8 (principle 1).

[145] *ACSI Code* (n 143) 4, 30.

[146] Natania Locke, 'Australian Investor Stewardship and Global Themes in Stewardship Regulation' (2020) 38(1) *Company and Securities Law Journal* 28, 44–5; Tim Bowley and Jennifer G Hill, 'Stewardship and Collective Action: The Australian Experience' in Dionysia Katelouzou and Dan W Puchniak (eds), *Global Shareholder Stewardship* (Cambridge University Press, 2022) 417, 419–22.

[147] Locke (n 146) 44–5.

[148] The British Academy, *Policy & Practice for Purposeful Business* (n 38) 43.

uncertainties remain. The economic value of a corporation can be identified at any time. But when deciding whether the value of the enterprise will be enhanced over time, one must consider whether the change in value that might be achieved is sustainable for an economically significant period of time. Those questions — what value, what measure and what is an economically significant period of time — and the answers to those questions, are not straightforward.

Corporate purpose may have a role to play in assisting with framing the questions and the answers. At present, the purpose of the activities of the corporation is not defined and the contents of the legal obligations (governing the activities and the decisions made) are opaque or arguably not fit for purpose. Unsurprisingly, this limits the capacity of regulators to adequately respond. I will leave it to others to consider whether giving regulators new powers to 'hold directors and controlling owners to account for their corporate purposes' is an idea which holds any merit.[149] The regulatory impact of such existing legal obligations is, however, reduced if the time between the activity and any enforcement, whether by regulator or private litigation, is too long to effect a change in behaviour. And that still leaves very large questions about whose interests are to be considered and how the effect on those interests is to be measured and remedied.

IV Responses and Observations

How Australian companies should respond to or deal with these issues — how Australian companies should identify, supervise, manage and disclose identifiable risk — remain current matters of unresolved controversy. These issues in Australia are not new. The Australian responses so far are unsurprisingly fragmented and anything but unified and certain.

Two areas illustrate this uncertainty. First, discussion and guidance on the extent to which directors can and should consider interests other than shareholder interests. Second, the identification, supervision, management and disclosure of environmental risks, particularly climate risks.

Turning to that first area — there have been a number of inquiries and consultations in Australia into the meaning of 'best interests of the company' and the degree to which it accommodates interests other than shareholder

[149] See ibid 26.

interests.[150] In 2005 and 2006, there were two parallel inquiries.[151] While each inquiry came to the same conclusion — that no reform was necessary because the existing law was sufficiently broad — each adopted different interpretations of the scope of the 'best interests' duty.[152]

The Parliamentary Joint Committee on Corporations and Financial Services ('PJC') was of the view that there was 'no need to change the existing legal framework, because it is currently sufficiently open to allow companies to pursue a strategy of enlightened self interest'.[153] The PJC said that it preferred the interpretation of directors' duties that

> acknowledges that investments in corporate responsibility and corporate philanthropy can contribute to the long term viability of a company even where they do not generate immediate profit. … [D]irectors may consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation. … [F]orward thinking directors, motivated by an enlightened approach to the company's self-interest, can undertake activities which contribute to social wellbeing and environmental protection, and which are clearly in the best interests of the company from a commercial perspective.[154]

The Corporations and Markets Advisory Committee ('CAMAC') agreed with the PJC that no reform was required, taking the view that, '[t]he established formulation of directors' duties allows directors sufficient flexibility to take relevant interests and broader community considerations into account' and '[c]hanges of a kind proposed from time to time do not provide meaningful clarification for directors, yet risk obscuring their accountability'.[155] The CAMAC however took a less expansive view of the 'best interests' duty — that it obliged directors to act in the best interests of the shareholders generally, although directors could take into account other interests if this benefited the shareholders as a whole.[156]

[150] See, eg, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (Report, November 1989) 43–4 [4.23]–[4.24], 61–99 [5.1]–[6.56].

[151] Corporations and Markets Advisory Committee, Parliament of Australia, *The Social Responsibility of Corporations* (Report, December 2006) ('*CAMAC Report*'); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Report, June 2006) ('*PJC Report*').

[152] See Rosemary Teele Langford, 'Best Interests: Multifaceted but Not Unbounded' (2016) 75(3) *Cambridge Law Journal* 505, 521–2 ('Best Interests'); Austin and Ramsay (n 86) 27–9 [1.390.3].

[153] *PJC Report* (n 151) xiv.

[154] Ibid 52 [4.32].

[155] *CAMAC Report* (n 151) 7.

[156] Ibid 81, 85, 107.

The Governance Institute of Australia issued a discussion paper in 2014 titled 'Shareholder Primacy: Is There a Need for Change?', and in April 2019, the Australian Institute of Company Directors released a consultation paper titled 'Forward Governance Agenda: Lifting Standards and Practice'.[157] In 2022, the Australian Institute of Company Directors sought and published advice from counsel on questions including whether the law, as it now stands, requires directors to take account of the purposes of the company and the interests of stakeholders other than shareholders and creditors.[158] The advice included that the meaning of 'the interests of the company' may be different under the general law and the *Corporations Act*,[159] and that it may be not merely permissible, but mandatory, to have regard to the 'interests of persons such as customers, employees, suppliers and the local community in which a company conducts business, *at least insofar as these persons may be the subject of the company's legal obligations*'.[160] Following the publication of that advice, the Australian Institute of Company Directors issued a practice statement which explained that '[a]s a guiding principle, directors should take a long-term view of where the company's interests lie, while seeking to maintain as respectful and transparent a relationship as possible with stakeholder groups'.[161]

Clearly the issue of when and how directors may and must consider stakeholder or 'third-party' interests is an area of ongoing debate and uncertainty.

Second, there is the developing area of the identification, supervision, management and disclosure of ESG risks. A lot has been written.

From time to time since 2016, the Centre for Policy Development, an independent policy institute, has sought and published opinions of counsel on the extent to which the 'care and diligence' duty permits or requires Australian directors to respond to climate risks. In 2016, the opinion focused on the existence of a duty;[162] in 2019, the opinion argued that the risk of liability for

[157] Judith Fox, 'Shareholder Primacy: Is There a Need for Change?' (Discussion Paper, Governance Institute of Australia, 2014); Australian Institute of Company Directors, 'Forward Governance Agenda: Lifting Standards and Practice' (Consultation Paper, April 2019).

[158] Walker and Ng (n 100) 1–2 [5].

[159] Ibid 15–16 [40].

[160] Ibid 9 [25] (emphasis added).

[161] *AICD Best Interests Duty Practice Statement* (n 115) 4.

[162] Noel Hutley and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties' (Memorandum of Opinion, Centre for Policy Development and Future Business Council, 7 October 2016) 2 [1] ('2016 Hutley Opinion').

directors was rising exponentially;[163] and in 2021, the focus of the opinion shifted to how the duty is discharged.[164]

In terms of disclosure, in April 2011, the Australian Securities and Investments Commission ('ASIC') published *Prospective Financial Information* ('*Regulatory Guide 170*') giving guidance to issuers of financial products on ASIC's 'approach to the use of prospective financial information (including financial forecasts and projections) in a disclosure document or Product Disclosure Statement'.[165] *Regulatory Guide 170* drew a distinction between short-term estimates (not exceeding two years) relating to an existing business and prospective financial information for a longer period.[166] The latter class of information, it was said, 'may require independent or objectively verifiable sources of information to establish that there are reasonable grounds to provide it'.[167]

As I explained earlier, the ASX Corporate Governance Council has issued *Corporate Governance Principles and Recommendations*. The latest edition, published in February 2019, *recommends* that listed entities disclose whether they have any 'material exposure to environmental or social risks' and, if they do, 'how [the entity] manages or intends to manage those risks'.[168] 'Material exposure' in this context is defined as meaning 'a real possibility that the risk in question could materially impact the listed entity's ability to create or preserve value for security holders over the short, medium or *longer term*'.[169] And the commentary to the recommendation explains that '[h]ow an entity manages

[163] Noel Hutley and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties' (Supplementary Memorandum of Opinion, Centre for Policy Development, 26 March 2019) 9 [22].

[164] Noel Hutley and Sebastian Hartford-Davis, 'Climate Change and Directors' Duties' (Further Supplementary Memorandum of Opinion, Centre for Policy Development, 23 April 2021) 18–19 [49].

[165] Australian Securities and Investments Commission, *Prospective Financial Information* (Regulatory Guide No 170, April 2011) 1 ('*Regulatory Guide 170*').

[166] Ibid 15 [RG 170.39].

[167] Ibid 15 [RG 170.41].

[168] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (n 94) 27 (recommendation 7.4). The ASX Corporate Governance Council recommends that, where an entity has material exposure to climate change risk, they make the disclosures recommended by the Task Force on Climate-related Financial Disclosures: at 28. In addition, the Governance Institute of Australia has produced a guide for entities to make climate change risk disclosures in accordance with the *Corporate Governance Principles and Recommendations* (n 94): see Governance Institute of Australia, *Climate Change Risk Disclosure: A Practical Guide to Reporting against ASX Corporate Governance Council's Corporate Governance Principles and Recommendations* (Report, February 2020) 2 ('*GIA Climate Change Risk Disclosure Guide*').

[169] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (n 94) 27 n 63 (emphasis added).

environmental and social risks can affect its ability to create long-term value for security holders'.[170]

In August 2019, ASIC published *Effective Disclosure in an Operating and Financial Review* ('*Regulatory Guide 247*') stating that a company's operating and financial review

> should include a discussion of environmental, social and governance risks where those risks could affect the entity's achievement of its *financial* performance or outcomes disclosed, taking into account the nature and business of the entity and its business strategy.[171]

Regulatory Guide 247 states that each risk disclosed should 'be described in its context (eg why the risk is important … and its potential impact on the entity's financial prospects)' and accompanied by 'relevant associated analytical comments (eg whether the risk is expected to increase or decrease in the foreseeable future)', as well as how management will control or manage risk factors within its control.[172] The guide states ASIC's view that 'the risk of being found liable for a misleading or deceptive forward-looking statement is minimal' provided, among other things, 'the statements are properly framed … [as] being based on the information available at [the] time', the 'statements have a reasonable basis, which involves good governance at [the] board level for signing off on the statements' and 'there is ongoing compliance with continuous disclosure obligations when events or results overtake forward looking statements'.[173]

In June 2022, ASIC published Information Sheet 271 titled, and on, 'How To Avoid Greenwashing when Offering or Promoting Sustainability-Related Products' issued by funds.[174] ASIC states that the 'principles' in it 'may apply to other entities that offer or promote financial products that take into account

[170] Ibid 27 (emphasis added).

[171] *Regulatory Guide 247* (n 92) 19 [RG 247.64] (emphasis in original). Companies are required to make operating and financial review disclosures in annual reports: *Corporations Act* (n 84) s 299(1). Annual reports are required to 'contain information that members of the listed entity would reasonably require to make an informed assessment of', among other things, 'the business strategies, and prospects for future financial years of the entity reported on': at s 299A(1)(c). Reporting entities are required to comply with Australian accounting standards: at s 296(1).

[172] *Regulatory Guide 247* (n 92) 19–20 [RG 247.65].

[173] Ibid 22 [RG 247.78].

[174] Australian Securities and Investments Commission, 'How To Avoid Greenwashing when Offering or Promoting Sustainability-Related Products' (Information Sheet 271, June 2022) <https://asic.gov.au/regulatory-resources/financial-services/how-to-avoid-greenwashing-when-offering-or-promoting-sustainability-related-products/>, archived at <https://perma.cc/5V6B-5FNE>.

sustainability-related considerations'.[175] In the Information Sheet, '[t]o help improve the quality of disclosure', ASIC recognises and encourages voluntary disclosure in accordance with the TCFD framework[176] — that is, the framework made
by the FSB's Task Force on Climate-related Financial Disclosures which I referred to earlier.[177]

More recently, in December 2022, Commonwealth Treasury released its *Climate-Related Financial Disclosure* consultation paper building on the work of the TCFD.[178] Treasury's consultation paper notes that several jurisdictions are contemplating, or have introduced, mandatory requirements for large companies to disclose climate-related risks in line with the TCFD's recommendations, and that these developments 'create a potential guidance gap for Australia'.[179] To that end, the consultation paper's stated purpose was to focus on climate disclosure reforms, as part of a broader initiative by government to 'introduce standardised, internationally-aligned reporting requirements for businesses to make disclosures regarding governance, strategy, risk management, targets and metrics — including greenhouse gasses'.[180]

In the same month, the Australian Council of Superannuation Investors published an opinion on the potential liability of directors for forward-looking statements under the ISSB's *Climate-Related Disclosures Exposure Draft*.[181] As I mentioned, the finalised version of the ISSB's *Climate-Related Disclosures* standard is expected to be published by July 2023.[182] The advice addressed three

175 Ibid.

176 Ibid.

177 *TCFD Recommendations* (n 68).

178 Treasury (Cth), *Climate-Related Financial Disclosure* (Consultation Paper, December 2022).

179 Ibid 5. For example, New Zealand and the UK recently passed legislation which made climate-related financial disclosures mandatory for certain businesses: *Financial Sector (Climate-Related Disclosures and Other Matters) Amendment Act 2021* (NZ), amending *Financial Markets Conduct Act 2013* (NZ); *The Companies (Strategic Report) (Climate-Related Financial Disclosure) Regulations 2022* (UK) SI 2022/31. The US, Switzerland and Singapore are developing similar mandatory disclosure requirements: ibid 5.

180 Treasury (Cth), *Climate-Related Financial Disclosure* (n 178) 5.

181 SH Hartford-Davis and K Dyon, 'Advice Regarding Potential Liability of Directors under the ISSB Draft Standards for Forward Looking Statements' (Advice, Australian Council of Superannuation Investors, 16 December 2022), discussing *Climate-Related Disclosures Exposure Draft* (n 74). See also Australian Council of Superannuation Investors, 'ISSB Standards "Consistent with Existing Requirements" for Company Directors, Legal Opinion Confirms' (Media Release, 6 February 2023) <https://acsi.org.au/media-releases/issb-standards-consistent-with-existing-requirements-for-company-directors-legal-opinion-confirms/>, archived at <https://perma.cc/7N67-JP3B>.

182 See above n 75.

questions: whether the requirements in the *Climate-Related Disclosures Exposure Draft* presented '*heightened* liability risks to company directors of publicly-listed corporations' compared to those under prevailing disclosure laws; to what extent a 'safe harbour' attaching to such forward-looking disclosures was 'necessary or desirable in order to manage liability exposure risks for directors'; and '[w]hat general principles of governance practice should be followed by directors in order to minimise liability concerns associated with forward-looking statements made under' the *Climate-Related Disclosure Exposure Draft*.[183]

My purpose in mentioning these disparate developments is not to examine or comment on their particular content or to provide any resolution for any particular dispute, the resolution of which will depend upon the factors and circumstances of that dispute. Rather, it is to make the following eight observations.

First, melding what has been published into a coherent, readily understood and explained set of principles informing what directors must do and what they can do is not easy. The ideas come from different sources and are all at different stages of development. Some are no more than guidance;[184] some are inconsistent one with the other.[185] Do we adopt the lowest or highest common denominator,[186] especially when different government agencies appear to rely on different standards and recommendations?

The reality that the legal landscape of corporate governance is permeated by soft laws presents problems and opportunities. Such permeation may undermine the law's certainty and capacity to be understood: important aspects of the rule of law. But a legal landscape permeated by soft laws also presents opportunities. Soft law can develop much faster than legislation or case law and may be more dynamic and responsive to shifts in societal perspectives and advancements in technology and knowledge. It may also more quickly achieve a significant degree of consistency across jurisdictions. That is evident from the widespread adoption of the recommendations of the TCFD.[187] Does that have anything to say about the preferred model to be adopted in Australia?

[183] Hartford-Davis and Dyon (n 181) 1–2 [4] (emphasis in original), discussing *Climate-Related Disclosures Exposure Draft* (n 74).

[184] See, eg, ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (n 94); *GIA Climate Change Risk Disclosure Guide* (n 168).

[185] See, eg, *Regulatory Guide 170* (n 165); *Regulatory Guide 247* (n 92); *General Requirements Exposure Draft* (n 73); *Climate-Related Disclosures Exposure Draft* (n 74).

[186] By way of example, compare the following sources: *General Requirements Exposure Draft* (n 73); *Climate-Related Disclosures Exposure Draft* (n 74); *TCFD Recommendations* (n 68).

[187] Task Force on Climate-related Financial Disclosures, *2022 Status Report* (Report, October 2022) 54–67.

Second, it is equally difficult to say whether, and to what extent, the provisions and publications that form part of the current Australian corporate governance landscape *assume* that existing law *permits* directors to take account of the interests of non-shareholders or obliges them to do so.[188] This may be due to the open-textured nature of the statutory provisions and the proliferation of soft law guidance such as the ASX Corporate Governance Council's *Principles and Recommendations*, ASIC regulatory guides and information sheets, ASX listing rules guidance notes, TCFD recommendations and ISSB standards. And soft law has been used in past cases concerning directors' duties to inform how a reasonable director would conduct themselves.[189] The uncertainty about if, and if so to what extent, the interests of non-shareholders are to be considered may also be attributable to the absence of bright lines between financial and non-financial risks in modern corporate governance, particularly when a long-term perspective is adopted.

Third, at least some of the questions posed in these first two observations are more readily answered in other jurisdictions because corporate law in those jurisdictions deals expressly with those questions. On the other hand, Australia may have a greater volume of specific laws and regulations designed to protect the environment and some other stakeholder interests than other jurisdictions which means those matters may need to be considered to ensure compliance with those laws, and to discharge directors' 'best interests' and 'care and diligence' duties. Directors and companies have no choice except to comply with those laws. Is that a better model? If so, this means those matters may need to be considered to ensure compliance with those laws, and to discharge directors' 'best interests' and 'care and diligence' duties.

Fourth, are the only risks to be considered by directors risks affecting enhancement of the economic value of the corporation? Are risks to community and the environment relevant? Are those risks relevant *only* if they are risks that may affect the economic value of the corporation? If directors may consider any or all of these risks, must they? Arguably, many so-called 'ESG risks' have a significant financial dimension and consequently cannot be ignored by directors even on the strictest interpretation of shareholder primacy.

Fifth, it is foreseeable that public disclosure of some forms of ESG information may be mandated. Disclosures with respect to climate change risk[190]

[188] See, eg, Hutley and Hartford-Davis, '2016 Hutley Opinion' (n 162) 22 [51]; Walker and Ng (n 100) 9 [25], 15–16 [40].

[189] See, eg, *Australian Securities and Investments Commission v Rich* (2003) 174 FLR 128, 145–7 [68]–[72] (Rich J); *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 336–40 [192]–[208] (Middleton J).

[190] See generally Treasury (Cth), *Climate-Related Financial Disclosure* (n 178).

and the gender pay gap[191] are two examples. How will the regulatory framework balance the competing objectives of comparability and usefulness to ensure that the disclosures best inform the market?

Sixth, any consideration of risk looks ahead and often demands making financial predictions in the short, medium and long term. Are principles of the kind described in *Regulatory Guide 170* to apply more broadly? In what circumstances should ESG issues be disclosed in a company's operating and financial review under *Regulatory Guide 247*? Is the general law prohibiting misleading and deceptive conduct to apply?[192] If so, what evidence will be necessary to establish 'reasonable grounds' for making representations as to future ESG matters?[193] Or are these matters to be regulated only through the provisions governing the obligations of directors? Will directors be able to avail themselves of the business judgment rule? And is good faith and honesty to be the sole measure of what directors do, or is there to be some external and objective norm or standard? Do we need to revisit whether new safe harbour provisions are necessary or desirable in the short, medium or long term and, if so, what principles should determine the purpose and dimensions of that harbour?

Seventh, how, if at all, should the framing of these questions and the answers to them relate to the need for, and appropriate identification of, corporate purpose?

Eighth, these observations, these questions, are not just a debate about legal theory. Research suggests that purposeful companies achieve better financial performance.[194] Uncertainties about directors' legal obligations, and thus their liabilities, increase the costs of doing business.[195] The dual — and often

[191] *Workplace Gender Equality Act 2012* (Cth) s 15A; Workplace Gender Equality Agency (Cth), *A Roadmap to Closing the Gender Pay Gap* (Explainer FAQ, September 2023) <https://www.wgea.gov.au/sites/default/files/documents/March_2023-WGEA_REFORMS-A_Roadmap_to_Closing_the_Gender_Pay_Gap.pdf>, archived at <https://perma.cc/TWU8-2SWM>.

[192] *Corporations Act* (n 84) s 1041H; *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA ('*ASIC Act*'); *Competition and Consumer Act 2010* (Cth) sch 2 s 18 ('*Australian Consumer Law*').

[193] See *Corporations Act* (n 84) s 769C(1)(b); *ASIC Act* (n 192) s 12BB(1)(b); *Australian Consumer Law* (n 192) s 4(1)(b).

[194] See, eg, Harvard Business Review Analytic Services, *The Business Case for Purpose* (Report, 2015) 5; Claudine Gartenberg, Andrea Prat and George Serafeim, 'Corporate Purpose and Financial Performance' (2019) 30(1) *Organization Science* 1, 13; Anette von Ahsen and Kevin Gauch, 'Opportunities and Challenges of Purpose-Led Companies: An Empirical Study through Expert Interviews' (2021) 25(3) *Corporate Reputation Review* 198, 203–4.

[195] Increased costs of directors' and officers' insurance is one example: see, eg, Domini Stuart, 'Straighten Up and Fly Straight', Australian Institute of Company Directors (Web Page, 1 February 2023) <https://www.aicd.com.au/board-of-directors/duties/directors-and-officers-insurance/straighten-up-and-fly-straight.html>, archived at <https://perma.cc/45TK-7NV9>.

competing — concerns of over-regulation and uncertainty are real. Some suggest these uncertainties discourage people from taking up directorships.[196] Would eliminating the uncertainties, or even some of them, bring economic and other benefits?

V Conclusion

In 2023, what is now believed to be a company's purpose, and thus what are its interests, appears to have fundamentally changed. Is it now time in Australia to mirror what is happening in the UK and the US? Or, should we be aiming higher to reflect better the place which companies now have not only in the economic life of the country but the place they have more broadly in our society? Is it time to be as bold as the Victorian legislature was in 1958 — when this State was the 'first … in the English-speaking world'[197] to enact a publicly enforceable statutory duty requiring a director to 'at all times act honestly and use reasonable diligence in the discharge of the duties of his office'[198] — and enact a law that deals directly with corporate purpose, horizon and risk and how those are properly to be reflected in directors' duties and the law of corporate governance more generally?

These questions have to be answered knowing whether and to what extent there is, and may in practical terms necessarily has to be, a disconnection between all three elements — activity, obligation and enforcement. Or, put in different terms, can it be said with the appropriate level of certainty that activity, obligation and enforcement proceed from the same known and suitable premises? One might ask: how and to what extent should corporate law — directors' duties and corporate governance — address the purposes and activities of a corporation and then require, or permit, the identification, supervision, management and disclosure of risk when those purposes and activities intersect with or affect the interests of shareholders, asset owners, financiers, regulators, the community and governments? Or is it time to ask whether there is a need for a whole of law response which adopts a system-level view and review of the regulatory network affecting corporate conduct and governance[199] in shaping the nature and conduct of the modern corporation and its role in society?

[196] See Langford, 'Best Interests' (n 152) 523, citing Australian Institute of Company Directors, *The Honest and Reasonable Director Defence* (Report, 2014).

[197] Rosemary Teele Langford, Ian Ramsay and Michelle Welsh, 'The Origins of Company Directors' Statutory Duty of Care' (2015) 37(4) *Sydney Law Review* 489, 511. See also Justice Wallace and J McI Young, *Australian Company Law and Practice* (Law Book, 1965) 393.

[198] *Companies Act 1958* (Vic) s 107(1).

[199] See, eg, Enriques, Romano and Wetzer (n 48) 353–4.

In the preface to the first edition of *Principles of Company Law*, Professor Ford wrote that '[o]ver the years company legislation, like most enacted law of long standing, has attracted to itself new provisions to meet felt needs of various periods'.[200] As the 50th anniversary of the first edition approaches, perhaps it is time to ask whether the provisions of the *Corporations Act*, or the law more generally, will or needs to attract new provisions to meet the 'felt needs' of this period.

[200] HAJ Ford, *Principles of Company Law* (Butterworths, 1974).