Corporations and their contributions to public debates

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Corporations are increasingly contributing to controversial public debates. This raises important questions regarding the purpose of a corporation, where a range of views have been expressed, including the shareholder primacy theory, stakeholder primacy theory, communitarian notions, and concepts of corporate social responsibility. This article argues that there are real questions surrounding the legitimacy of such contributions. It also considers directors' legal responsibilities under the Corporations Act, and considers arguments that directors may be in breach of these obligations by devoting company resources in pursuit of social ends. It also considers arguments that corporations have a protected freedom to contribute to political discussion, before concluding that if parliament so wished, it could legislate to make it clear that corporations are, or are not, legally entitled to devote resources towards the pursuit of non-profit objectives, including social causes. In the absence of such clarification, there are significant legal doubts over the efficacy of such behaviour.

I Introduction

Recent times have seen increased participation by corporations in important and controversial public debates. For example, corporations took public positions on the 2017 plebiscite on same-sex marriage in Australia, the federal government's proposed religious freedom legislation, and have taken public positions on climate change and environmental issues. Corporations have publicly advocated for legal change and reform on particular matters of social policy of great importance to the nation. Recently, Secretary-General of the International Chamber of Commerce ('ICC') John Denton was cited as defending the right of business to publicly express views on climate change and diversity in the workplace. He referred to the stated goal of the ICC to have a maximum 1.5 degree increase in the average global temperature and a policy of zero net emissions by 2050. He was quoted as stating that it was important that business had 'a bigger purpose than just profit'.[1]

Justice Nettle of the High Court alluded to this issue in a recent address, raising potential legal issues associated with such advocacy:

> One also reads in the financial press of an increasing predilection on the part of Australian public company directors to pursue communitarian causes with no necessary connection to the improvement of shareholder value. Consider ... the campaigns of Qantas and ANZ in favour of same-sex marriage, Westpac Banking Corporation's widely publicised refusal to fund the Adani coal project, the decision

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1 Bevan Shields, 'Companies Will Fill Leadership Void on Climate, ICC Chief Warns', *The Sydney Morning Herald* (21 February 2020); for a more critical view see Janet Albrechtsen, 'Activist Chief Executives Are "Stealing" from Shareholders', *The Australian* (26 February 2020).

> by Westfarmers-owned Blackwood to phase out fossil fuels in its commercial distribution business, and the campaigns of other companies to encourage the adoption of the Finkel recommendations for a clean energy target. Yet, in contrast to the position in the United Kingdom,[2] in Australia there is no legislative indication that communitarian causes fall within the realm of business judgments entrusted to directors. And, potentially, that may make a difference if and when Australian directors who deploy company resources to promote communitarian causes are called out for it.[3]

It is important to clarify at the outset what this article is about and what is not about. Specifically, it is not about whether this author personally agrees with particular public positions taken by corporations on important matters of social and public policy. As an example, in 2017 many corporations, including Telstra and Qantas, publicly expressed their support for same-sex marriage.[4] If it matters, this author privately supported their position. It is not the purpose of the article to consider whether the author personally agrees with the stance that any particular organisation took on any of these contentious policy matters. That is considered irrelevant. Rather, this article is concerned with the legal position of a corporation that publicly espouses particular causes and uses a company's resources to do so. Is this a legitimate use of shareholders' money? Could directors be argued to have breached their duties to the company in engaging in such activity? Should the corporations legislation be amended to provide further clarity in this area? Further, this article is not about the issue of corporate philanthropy, for instance a company donating money to the bushfire recovery effort in Australia, or other causes.[5] Nor is it about questions concerning company *reporting* of their activity in areas not directly related to their business.[6]

The topic of this article relates to what some call corporate social responsibility and/or, relatedly, what some call all a 'social licence' for business to operate. To the extent that it is agreed that corporations do have a corporate social responsibility and/or such a licence, what does it entail? Does it include speaking out about contentious social issues? How does it fit, if at all, with orthodox theories of the company, and corporate regulation? This

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2 The references to the position in the United Kingdom companies legislation will be discussed later in this article. However, essentially s 172 of the *Companies Act 2006* (UK) expressly permits directors to have regard to a broad range of stakeholders in pursuit of an 'enlightened shareholder value' approach.

3 Justice Geoffrey Nettle, 'The Changing Position and Duties of Company Directors' (2018) 41(3) *Melbourne University Law Review* 1402, 1420.

4 Andrew Penn, 'Renewing Our Active Position on Marriage Equality', *Telstra Exchange* (Web Page, 18 April 2016); Paige Cockburn, 'Same-Sex Marriage: Qantas CEO Alan Joyce Urges "Good Businesses" to Support "Yes" Vote', *ABC News* (online, 25 August 2017) <www.abc.net.au/news/2017-08-25/alan-joyce-calls-for-businesses-to-support-same-sex-marriage/8842332> (the article refers to Mr Joyce outlining Qantas' position at the release of its annual financial results).

5 Tony Ciro and Bulend Terzioglu, 'Corporate Philanthropy in Australia: Evidence from Australia's Top 100 Listed Firms' (2017) 32(1) *Australian Journal of Corporate Law* 27.

6 Gill North, 'Corporate Management and Communication of Environmental and Social Risks in Australia: Pressures Are Mounting' (2018) 33(2) *Australian Journal of Corporate Law* 227; Thomas Clarke, 'The Evolution of Directors' Duties: Bridging the Divide between Corporate Governance and Corporate Social Responsibility' (2007) 32(3) *Journal of General Management* 79.

article will seek to answer these questions. Somewhat surprisingly, they have not been clearly resolved in either the case law or the statute law in Australia,[7] despite obvious (potential) tensions between directors' duties, at least traditionally conceived, and these broader concepts.

It is the theme of this article that doctrines of corporate social responsibility and concepts of a social licence can be utilised to give some social legitimacy to corporate social advocacy. However, it is strongly arguable that such advocacy is at odds with directors' underlying legal obligations.

This article is structured as follows. Part II considers competing theories on the purpose of a corporation, including the shareholder primacy theory, stakeholder primacy theory, and communitarian theories, and their links to concepts of corporate social responsibility and/or social licence to operate. Some practical difficulties with (legally) imposing such obligations upon corporations are identified. Part III considers directors' duties in the corporations legislation and case law, with a particular focus on contributions by a corporation to contentious public policy debates. Part IV considers the extent to which a corporation might be said to have a 'human right' to engage in political speech. The article then reaches some conclusions.

II The purpose of a corporation — Competing theories

Perhaps surprisingly, given that companies have been a feature of business for so many years, there remains conjecture and confusion on a fundamental point — what is the purpose of a company? At its most basic, the question is whether the purpose of a company is simply to make profit for its owners, or whether it has/could have broader, social purposes that may be quite distinct from profit-seeking. In that event, there would ideally be some clarity around cases where objectives may clash; in other words, they suggest that directors should make different, irreconcilable decisions, depending on which objective they seek to meet. There is a related debate, which may not be totally independent of the above conversation, as to the social utility of a corporation. Some view the corporation as the creator of vast improvements to the human condition;[8] others have a much darker view.[9] Though this debate is an old one, it is a continuing one, and of some significance to the subject matter of this article.

A Shareholder primacy theory

The most famous debate on this fundamental point occurred in the 1930s in the *Harvard Law Review*. Professor Berle espoused what is generally regarded

7 Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness' (2012) 35(1) *University of New South Wales Law Journal* 317, 324.

8 Andrew Lumsden and Saul Fridman, 'Corporate Social Responsibility: The Case for a Self-Regulatory Model' (2007) 25(3) *Company and Securities Law Journal* 147, 148: 'undoubtedly, the capacity of the limited liability corporation to facilitate large-scale enterprise has contributed greatly (some would say more than any other device) to the rapid improvement in the human condition (at least materially) in the last two centuries'.

9 Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2005).

as the traditional view of the purpose of a corporation.[10] This is the theory that the powers granted to the management of a corporation were a trust, exercisable only for the benefit of the shareholders and no-one else.[11] One of the benefits of such an approach is its simplicity. Professor Berle was clearly worried with the practical consequences if it were to become the position that the corporation's managers owed obligations to a range of different stakeholders. He opined that if this became the position, management would have 'absolute' control over the company,[12] with serious consequences for shareholders. He criticised those who articulated a broader view of a director's responsibilities to have regard to a range of interests when exercising powers. If that were the case, a large number of interests would press claims from a range of quarters. He claimed that such suggestions were not clear, and thus could not be practically enforced. He was presumably alluding to situations where there could be a clash or conflict between the interests of various stakeholders, where no clear suggestion had been made (or perhaps, could reasonably be made) as to how a director was to reconcile such a clash.[13] He claimed that the result of making directors take into account a range of interests, other than that of shareholders, would be 'an invitation not to law or orderly government, but to a process of economic civil war'.[14] Berle's theory has come to be described as the *shareholder primacy theory*.

Its adherents include renowned economist Milton Friedman.[15] Friedman argued that on many occasions, if a manager were to act in accordance with a 'social responsibility', they would be acting contrary to the interests of the company they purported to manage. If they did not increase the price of their goods or services, for altruistic reasons, this would not (or may not) be in the corporation's best interests. If they did spend significant quantities of money on pollution reduction beyond that required by legislation, they may not be

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10 E Merrick Dodd, Jr, 'For Whom Are Corporate Managers Trustees?' (1932) 45(7) *Harvard Law Review* 1145, 1146–7: 'it is undoubtedly the traditional view that a corporation is an association of stockholders formed for their private gain and to be managed by its board of directors solely with that end in view'.

11 AA Berle, Jr, 'Corporate Powers as Powers in Trust' (1931) 44(7) *Harvard Law Review* 1049, 1049: 'all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, ... are necessarily and at all times exercisable only for the rateable benefit of all the shareholders'. This view is reflected in cases such as *Hutton v West Cork Railway Co* (1883) 23 Ch D 654, 673 ('*Hutton*'):

> the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company ... charity has no business to sit at boards of directors qua charity. There is .. a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb ... charity may sit at the board, but for no other purpose ...

To like effect *Dodge v Ford Motor Co* (1919) 170 NW 668 (Mich, 1919).

12 AA Berle, Jr, 'For Whom Corporate Managers are Trustees: A Note' (1932) 45(8) *Harvard Law Review* 1365, 1367: 'when the fiduciary obligation of the corporate management and control to stockholders is weakened or eliminated, the management and control become for all practical purposes absolute'.

13 Ibid.

14 Ibid 1369.

15 Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962) 133: 'there is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud'.

acting in the corporation's best interests. If they hired unqualified long-term unemployed people to work at the company, in an effort to reduce long-term poverty, rather than better-qualified people, they would not be acting in the corporation's best interests. He said that corporate managers did not have the right to spend corporate money, except in order to increase shareholder wealth. Friedman said there was nothing wrong with altruism, but those who wished to do so should act individually, rather than pressure corporations to do so. According to Friedman, corporations should not practise altruism through other people's money.[16]

Examples of the shareholder primacy theory are readily available in the case law,[17] reflecting its orthodoxy within corporate law.

One of the clear reasons for the shareholder primacy theory was agency costs.[18] Briefly, these are the costs incurred because those who make decisions as to the running of the company are different and separate from the owners of the company.[19] Agency costs reflect the risk that the decision-makers will make decisions that are not in the best interests of the company as a whole, including shareholders, because of the separation of ownership and control.[20] One way in which the law seeks to minimise these costs is by imposing fiduciary duties on company directors.[21] A fiduciary duty makes clear that those who owe such duties must give primacy to the interests of those for whom they act, rather than their own interests, or other third party interests. They must avoid the actuality, or reasonable possibility, of a conflict of interest between those to whom they owe the obligation, and their own

16 Milton Friedman, 'The Social Responsibility of Business Is to Increase Its Profits', *The New York Times* (13 September 1970) 32, 33; see also David Birch and George Littlewood, 'Corporate Citizenship: Some Perspectives from Australian CEOs' [2004] (16) *Journal of Corporate Citizenship* 61.

17 Eg, *Dodge v Ford Motor Co* (n 11) 684:

> a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes ...

Examples in the Australian case law will be discussed later in the article.

18 For a critical view, see British Academy, *Principles for Purposeful Business* (Report, 2019) 23 where it is stated: 'corporate governance is traditionally viewed in the context of solving the agency problem of aligning the interests of management with those of shareholders. However, there has been growing recognition this is not the appropriate formulation of corporate governance'.

19 At least traditionally, it is said that shareholders of a company own the company: *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 178 (McHugh, Gummow, Hayne and Callinan JJ), although this is sometimes challenged: Jean J du Plessis, 'Directors' Duty to Act in the Best Interests of the Corporation: "Hard Cases Make Bad Law"' (2019) 34(1) *Australian Journal of Corporate Law* 3, 17–20.

20 Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305; Eugence F Fama, 'Agency Problems and the Theory of the Firm' (1980) 88(2) *Journal of Political Economy* 288.

21 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J), 116 (Wilson J), 141 (Dawson J). There is some backdating involved here, since it is true that fiduciary obligations preceded recognition of agency costs (by that name).

personal interests.[22] Imposition of a fiduciary responsibility reflects that one person is placing trust in another, and that the party placing such trust is vulnerable to an abuse of that trust.[23] In order to minimise this risk, the law imposes fiduciary obligations. The shareholder primacy theory has also been justified on other grounds, including efficiency, and the argument that other stakeholders are able to protect their interests through contractual terms, unlike shareholders.[24]

B Wider theories of the purpose of a corporation — Stakeholder primacy theory and/or communitarian approaches

Dodd responded to the work of Berle.[25] He acknowledged that Berle's position reflected the traditional view of a corporation.[26] However, he claimed that public expectation of corporations was changing:

> Public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of the view of the business corporation as an economic institution which has a social service as well as a profit-making function.[27]

Dodd claimed that the law was approaching a view that regarded all business as affected with a public interest.[28] As an example of this, he claimed the law was approaching a position whereby employers owed a duty of care to employees not only to not injure or overwork them, but to provide them with economic security.[29] He referred to 'contemporary discussion of the need for a planned economic order ultimately result(ing) in a more stabilized system of production and employment', predicting this would involve further modification of the sole focus on shareholder approach.[30]

Dodd's remarks have obvious connections with the broader corporate social responsibility movement, which argues that businesses have broader responsibilities than what black and white law might suggest, including to their communities and the environment in which they operate. Corporate social responsibility will be discussed in more detail later in the article. A very recent example of it is found in the Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2018). There Commissioner Hayne concluded that a corporation 'must do more than not break the law. It must seek to do "the right thing"'.[31]

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22 *Pilmer v Duke Group Ltd (in liq)* (n 19) 199 (McHugh, Gummow, Hayne and Callinan JJ).

23 *Hospital Products Ltd v United States Surgical Corporation* (n 21) 68 (Gibbs CJ), 96 (Mason J).

24 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, 583–4.

25 Dodd (n 9).

26 Ibid 1147.

27 Ibid 1148.

28 Ibid 1149.

29 Ibid 1151.

30 Ibid 1152.

31 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 55.

The Final Report suggests that the obligations of those responsible for corporate governance extend beyond the interests of shareholders at any given time.[32] This raises important questions regarding the extent to which society might reasonably expect corporations to act in a 'morally correct' manner, and the extent (if any) to which this could be legislated. Hanrahan claims that:

> A surprisingly common misconception is that the purpose of a corporation is to generate wealth for shareholders and the duty of its board and management is to maximise shareholder wealth. Of course, this is a nonsense.[33]

Of course, there is a significant difference between asserting that something *should* be so and stating that it *is* so. For example, the British Academy recently stated its normative position that the Friedman view of a corporation's purpose as being to increase profits whilst complying with the 'rules of the game' had 'serious deficiencies and is no longer tenable as a framework for business in the 21st century'.[34]

The views of Dodds and others have come to be known as the *stakeholder primacy theory*, under which directors are to prioritise the interests of identified stakeholders, as opposed to non-stakeholders. There is conjecture as to who should be classified as a stakeholder.[35] This differs from the shareholder primacy theory because under that theory the only really important stakeholder group is that of shareholders. Under the stakeholder primacy theory, there are multiple groups of stakeholders, only one of which is the shareholder group.

Depending on how stakeholders are defined,[36] another theory may be utilised — the *communitarian theory*. According to this theory, the corporation is (or should be) run so as to take account of the effect of corporate decisions on the broader community.[37] These are not necessarily

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32 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) 402.

33 Pamela Hanrahan, 'Companies, Corporate Officers and Public Interests: Are We at a Legal Tipping Point?' (2019) 36(8) *Company and Securities Law Journal* 665, 666; see also James McConvill and Martin Joy, 'The Interaction of Directors' Duties and Sustainable Development in Australia: Setting Off on the Uncharted Road' (2003) 27(1) *Melbourne University Law Review* 116, 117: 'corporations should reflect the moral values of contemporary society'. Many others take a different view, including Jean Jacques du Plessis, 'Corporate Social Responsibility and "Contemporary Community Expectations"' (2017) 35(1) *Company and Securities Law Journal* 30, 30: 'the shareholder primacy model still underpins Australia's company law model'.

34 British Academy, *Reforming Business for the 21st Century: A Framework for the Future of the Corporation* (Report, 2018) 10. The report acknowledges, correctly, that 'most current measures of corporate purpose are accounting measures of material and financial capital and profit': at 17.

35 Supreme Court of New South Wales, *Directors' Duties, Corporate Culture and Corporate Governance* (Corporate and Commercial Law Conference, 20 November 2018) 5.

36 This is because it is possible to argue that the 'community' is in fact a stakeholder, notwithstanding the infinite range of individuals comprised within it, all with their own views and values.

37 Jason Harris, 'Shareholder Primacy in Changing Times' (Conference Paper, Supreme Court of New South Wales Corporate and Commercial Law Conference, 20 November 2018) 5: communitarian corporate law scholars provide a variant of stakeholder theory by directing corporate governance requirements to require management to consider the effect of corporate decisions on the broader community, including the effect on the

confined to considerations that would maximise shareholder value.[38] There is a clear contrast between this theory and that of the others presented. Under the shareholder primacy theory, directors accord primacy to the interests of shareholders. Under the communitarian theory, directors specifically have regard to the interests of members of the community. It is far broader than a focus on shareholders, and it is broader than the stakeholder primacy theory, because stakeholders are typically discrete groups, for example creditors or employees. Whereas the communitarian theory focuses (or may focus, it is possible the focus might be on the corporation's 'immediate' community, however defined) on society in general, on the assumption it is possible to generalise about whether a particular decision would or would not benefit 'the community', or would be of most value to the community, among the various options possible.

They have some parallels with the so-called constituency statutes in the United States, which seem to confirm that directors need not give primacy to any particular constituency, including shareholders.[39] The United Kingdom companies legislation has adopted something of a third way, with s 172 of its *Companies Act 2006* (UK) affirming the primacy of shareholder interests, but expressing that in the course of making such decisions, directors may have regard to a broad range of factors.[40]

There may or may not be some merit in Dodd's suggestions, and it must be acknowledged that both authors were writing at the start of the Great Depression where the very foundations of capitalism were being seriously questioned. That having been said, Dodd's observations (hopes) about a planned economic order resulting in stabilised production and employment, which seems to have some hallmarks of a socialist ideology involving state ownership of the means of production as part of a centrally planned economy, have not come to pass in the United States. That country has primarily remained a capitalist, free market economy, although the presidential primaries leading up to the 2020 presidential election suggest that hopes of an evolution to a more socialist-type system of government remain in public discourse. Further, his article did not provide detail about what the proposed

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environment and local communities in proximity to the company's operations, not just specific stakeholders such as shareholders and employees. Communitarian scholarship also requires directors to focus on relationships that the company has with its communities, and in doing so to look beyond the narrow category of contractual relationships and economic exchanges to include non-economic values such as trust, mutual respect and interdependence ...

38 Eg, W Leung, 'The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests' (1997) 30(4) *Columbia Journal of Law and Social Problems* 587; Gregory Scott Crespi, 'Rethinking Corporate Fiduciary Duties: The Inefficiency of the Shareholder Primacy Norm' (2002) 55(1) *Southern Methodist University Law Review* 141; Gavin Kelly and John Parkinson, 'The Conceptual Foundations of the Company: A Pluralist Approach' (1998) 2 *Company Financial and Insolvency Law Review* 174.

39 See for discussion Eric W Orts, 'Beyond Shareholders: Interpreting Corporate Constituency Statutes' (1992) 61(1) *George Washington Law Review* 14.

40 Some favour its introduction in Australia: Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954.

'social service' or 'public interest' obligation might entail in respect of a corporation. It is difficult to define such concepts with clarity.[41]

These views of Dodds and others regarding possible broader purposes of a corporation are closely linked with modern notions of corporate social responsibility and a social licence to operate, to which this article now turns. Could the contribution of a corporation to debate on a contentious matter of social policy be justified on the basis of that organisation's social responsibility or social licence, if any? As indicated, it is possible to utilise these notions to give social legitimacy to corporate social advocacy.

C Corporate social responsibility

There is by now much literature on the notions of corporate social responsibility ('CSR'), and the extent to which companies should be required to act in accord with it. Deloitte defines CSR as 'organisational practices that address the impact of an organisation on business, society and the environment or seek to create positive societal value through core business'.[42] This definition seems to focus on externalities caused by the organisation's operations that are otherwise not attributed to the corporation. Others limit corporate social responsibility in a similar way to externalities that the corporation's lawful activities impose on others.[43]

However, wider conceptions of CSR well beyond the question of externalities are also found. The World Business Council for Sustainable Development defined CSR in terms of 'the commitment of business to contribute to sustainable economic development working with employees, their families, the local community and society at large to improve their quality of life'.[44] Adeyeye stated that:

> corporations can no longer carry out business activities solely for profit. Corporations have broader responsibilities beyond management of the impact of their activities on other stakeholders. Corporations are increasingly expected to be active stakeholders in solving society's problems while generating economic value.[45]

It is argued that corporations should be required to act in accordance with the 'moral values' of society.[46] Jean du Plessis states that:

> There is indeed nowadays a real community expectation that companies should be

41 Marina Nehme and Claudia Koon Ghee Wee, 'Tracing the Historical Development of Corporate Social Responsibility and Corporate Social Reporting' (2008) 15(1) *James Cook University Law Review* 129, 135.

42 *Progress, Prospects and Impact: How Business Is Preparing for the Modern Slavery Act* (Annual Review, 2018).

43 Andrew Johnston, 'Facing up to Social Cost: The Real Meaning of Corporate Social Responsibility' (2011) 20(1) *Griffith Law Review* 221.

44 Richard Holme and Phil Watts, *Corporate Social Responsibility: Making Good Business Sense* (Report, January 2000).

45 Adefolake Adeyeye, 'Corporate Social Responsibility: Lessons for Australia' (2019) 37(2) *Company and Securities Law Journal* 66, 67.

46 James McConvill and Martin Joy, 'The Interaction of Directors' Duties and Sustainable Development in Australia: Setting off on the Uncharted Road' (2003) 27(1) *Melbourne University Law Review* 116, 118; Mia Rahim, 'Raising Corporate Social Responsibility: The "Legitimacy" Approach' (2012) 9 *Macquarie Journal of Business Law* 66, 102, 102–3.

> good corporate citizens and should take their corporate social responsibilities very seriously. In other words, there are community expectations that corporations act in a responsible way to ensure long-term, sustainable growth that does not harm the environment or society.[47]

The Parliamentary Joint Committee on Corporations and Financial Services defined CSR as a company

> considering, managing and balancing the economic, social and environmental impacts of its activities. It is about companies assessing and managing risks, pursuing opportunities and creating corporate value, in areas beyond what would traditionally be regarded as a company's core business ...[48]

The Corporations and Markets Advisory Committee acknowledged that corporate social responsibility did not have precise meaning:

> Some descriptions focus on corporate compliance with the spirit as well as the letter of applicable laws regarding corporate conduct. Other definitions refer to a business approach by which an enterprise takes into account the impact of its activities on interest groups (often referred to as stakeholders) including, but extending beyond, shareholders, and balances longer term societal impacts against shorter-term financial grains. These societal effects, going beyond the goods or services provided by companies and their returns to shareholders, are typically divided into environmental, social and economic impacts.[49]

Company decision-makers might argue that it is part of their corporate social responsibility to take positions on contentious social issues, and to publicly advocate those positions. This might be considered to be part of being a 'good corporate citizen' or 'doing the right thing', given that many, including the company's staff and customers, as well as members of the broader community, may be affected by these issues in one way or another, or have a strong interest in them.

D Social licence to operate

This is defined in the consultation draft of the 4th edition of the ASX *Corporate Governance Principles and Recommendations*. After suggesting a requirement that corporations should act lawfully, ethically and in a socially responsible manner, the draft continued:

> A listed entity's 'social licence to operate' is one of its most valuable assets. That licence can be lost or seriously damaged if the entity or its officers or employees are perceived to have acted unlawfully, unethically or in a socially irresponsible manner. Preserving an entity's social licence to operate requires the board and management of a listed entity to have regard to the views and interests of a broader range of stakeholders than just its security holders, including employees, customers, suppliers, creditors, regulators, consumers, taxpayers and the local communities in

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47 Du Plessis, 'Corporate Social Responsibility and "Contemporary Community Expectations"' (n 33) 37.

48 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Report, June 2006) 4 [2.7].

49 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (Report, December 2006) 13.

> which it operates ... security holders understand this and expect boards and management to engage with these stakeholders and to be, and be seen to be, 'good corporate citizens'.[50]

The references to social licence to operate do not appear in the final version of these principles, issued in 2019.

Company decision-makers might argue that it is part of their 'social licence to operate' to take positions on contentious social issues, and to publicly advocate those positions. This might be considered to be part of being a 'good corporate citizen' or 'doing the right thing' given that many, including the company's staff and customers, as well as members of the broader community, may be affected by these issues in one way or another, or have a strong interest in them.

I will now explain some difficulties with attempts to incorporate into corporations regulation any requirement of corporate social responsibility and/or conceptions of a social licence to operate.

E Conflict of interests

It is difficult to expect directors to reconcile cases where the best interests of shareholders might conflict with what some might regard to be in the public interest, or conducive to the corporation's 'social service',[51] even if such concepts can be defined with some precision, which is considered doubtful. Injecting such concepts into the realm of corporate law is particularly troubling. Above all else, business seeks certainty, or as much certainty as possible, in terms of legal frameworks. It is highly doubted that such certainty will be possible with concepts such as corporate social responsibility, social service, 'doing the right thing' or being 'good corporate citizens'.

Further, possible conflict among (or between) this proposed range of obligations is readily imaginable.[52] It is quite possible that Dodd's admonition to corporations to provide employees with 'economic security' means there is less profit available to distribute to shareholders. How would Dodd suggest that directors reconcile this conflict? It might be 'socially responsible' to employ long-term unemployed individuals. However, they might be unqualified for the position. Should the company prioritise its (possible) social responsibility to reduce the ranks of the long-term unemployed, or its desire to attract the best staff? The business might be profitable if the prices for the company's services or goods is at a certain level. However, consumer welfare

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50 See also Thomas Clarke, *International Corporate Governance: A Comparative Approach* (Routledge, 2nd ed, 2017) 412:

> increasingly in the future, the licence to operate will not be given so readily to corporations and other entities. A licence to operate will depend on maintaining the highest standards of integrity and practice in corporate behaviour. Corporate governance essentially will involve a sustained and responsible monitoring of not just the financial health of the company, but the social and environmental impact of the company.

51 Helen Anderson and Wayne Gumley, 'Corporate Social Responsibility: Legislative Options for Protecting Employees and the Environment' (2008) 29(1) *Adelaide Law Review* 29, 36.

52 David Silverstein, 'Managing Corporate Social Responsibility in a Changing Legal Environment' (1987) 25(3) *American Business Law Journal* 523, 539: 'the problem is that, in some situations, the profit-maximization and social welfare approaches lead to different and conflicting management strategies'.

might be maximised if the price were lower. Which should guide those deciding what price the company should charge?

These are simple examples, and many more could be given. This is considered enough to show the inherent difficulties involved when it is suggested that directors owe obligations to a range of stakeholders.[53] Company law expert Bob Baxt succinctly summarised some of the inherent difficulties associated with a possible conflict of duties and the precarious position of directors:

> If directors are expected to run the activities of their companies with the interests of the community at the forefront of their obligations, then they must have adequate protection in the law (and from the courts), that should shareholders feel they are not receiving the same level of dividends they had been accustomed to, the directors will not be in breach of those duties.[54]

Clearly, the potential for a clash between principles of corporate social responsibility and the shareholder primacy theory is real and significant. This is clearly articulated by Lansdowne and Segal:

> Directors should be enabled to take account of other interests so that a decision made bona fide which has the effect of favouring consumers over shareholders and employees, for example, could not normally be impeached in the courts.[55]

To be clear, this comment is not quoted because I agree that, in the event of a clash, the interests of consumers should prevail over that of shareholders. It is quoted to demonstrate the clear scope for a conflict between duties, and how easily notions of corporate social responsibility can sideline the traditional view of a directors' obligations and the primacy it accords to shareholders' interests.

Further, having read broadly through a range of literature said to support a corporate social responsibility model and/or a re-orientation of directors' duties away from a shareholder focused model in favour of a broader range of considerations, I am yet to encounter a satisfactory resolution of this conflict problem, where the interests of shareholders are or may be in conflict with these broader 'societal' or 'community' interests. In my respectful view, this is a fatal weakness in the argument of those who seek to reform the law by reducing the focus on shareholders' interests, in pursuit of broader, ill-defined goals.

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53 Leonard Sealy, 'Directors' "Wider" Responsibilities: Problems Conceptual, Practical and Procedural' (1987) 13(3) *Monash University Law Review* 164, 175–6:

> where duties are owed to persons with potentially opposed interests, the duty bifurcates and fragments so that it amounts ultimately to no more than a vague obligation to be fair; and (however much we may delude ourselves) this kind of fairness, especially in a commercial context, is not a justiciable issue ... in recognition of this, company law ... must acknowledge that it has no mechanism to ensure the fulfilment of obligations of social responsibility ... the interests of consumers, the environment, welfare and the causes of equal opportunity, good race relations and so on can only be furthered by positive legislation extraneous to company law ...

54 Robert Baxt, 'Avoiding the Rising Floods of Criticism: Do Directors of Certain Companies Owe a Duty to the Company?' (2000) 16(11) *Company Lawyer* 42.

55 Robyn Lansdowne and Jillian Segal, 'The Social Responsibility of Modern Corporations' (1978) 2(4) *University of New South Wales Law Journal* 336, 344.

F Concerns about legitimacy

Opponents of CSG, particularly the broader definitions which require corporations to pursue social policy and objectives deemed by some to be desirable, question the legitimacy of corporations pursuing such goals. It is argued that important public policy questions are best left for the political arena. The idea is that we have a representative government which fairly represents all views in society, and that it is the representative government which is best placed to attempt to reconcile all the competing interests in formulating social policies. It is argued that it is dangerous and undesirable for corporations to attempt to enter this territory. Corporations are not, and are not designed to be, representative of the community in which they operate.

Further, the expertise and ability of corporate managers to properly assess community attitudes and values is highly questionable. This is not typically where the skill set of a corporate manager lies, and it is perhaps unfair and highly problematic to expect them to take on this role.

Lumsden and Fridman adopt a similar position:

> Corporate law is not the appropriate mechanism to use for purposes of general community regulation. Imposing an expectation that corporations act for the benefit of the community amounts in many ways to outsourcing functions of government. It is the role of the legislative and judicial branches of government to determine entitlements and how best to protect them. To expect this of corporate management is both unfair and unwise.[56]

It is also argued that typically managers' performance is assessed according to financial considerations. It is possible that these mechanisms could be broadened to pursuit of social goals and agendas, but it would be difficult to measure these accurately, and to avoid bias in assessment. It might also possibly provide undesirable cover for a manager to pursue their own private interests as opposed to those of the company.[57]

Lord Wedderburn spoke of these dangers:

> There is considerable evidence to suggest that management of the big enterprise responds more frequently by trying to alter public opinion rather than to follow it. Moreover, any system of company law constructed on such a basis (permitting managers to make decisions based on their conscience) would leave the directors effectively free from control, at any rate unless they were both crooked and careless, deprived of the guideline of profit for shareholders, but given an 'ambitious amalgam' for their 'trusteeship', without any logical framework to guide and

56 Andrew Lumsden and Saul Fridman, 'Corporate Social Responsibility: The Case for Self-Regulatory Model' (2007) 25(3) *Company and Securities Law Journal* 147, 173; similarly Sealy, 'Directors' "Wider" Responsibilities' (n 53) 176.

57 These arguments are succinctly summarised in Julia Tolmie, 'Corporate Social Responsibility' (1992) 15(1) *University of New South Wales Law Journal* 268, 282–3; see also Silverstein (n 52) 535; and 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, 1445: 'profit-seeking frees us from having to make controversial value judgments'. Bainbridge refers to the 'very real risk that some corporate directors and officers will use nonshareholder interests as a cloak for actions taken to advance their own interests'.

> legitimate management .. management of even moderate intelligence can use it to do most of what it wishes to do.[58]

In sum, the corporate form is not the appropriate vehicle through which to pursue social or political agendas, and it is unfair to expect or ask management to make decisions on such a basis. A manager's decision on this basis is arguably illegitimate.

G Subjectivity and uncertainty

Given that what CSR entails often in the eye of the beholder, even if managers' performance were to be assessed against such goals, it is possible it would little influence actual manager behaviour. This is because a manager's performance, if it includes CSR, will likely include other more traditional and tangible performance measures, such as profitability. Faced with a range of performance criteria, some at least with the advantage of certainty and measurability such as profitability, as opposed to others which are highly uncertain and subjective, it is rational for a manager to focus on those that are objectively measurable, like profitability. A study by Ramsay and Sandonato confirms this. These researchers compared the stated business objectives of leading companies in Australia, the United States and United Kingdom. It should be stated at this point that legislation in the United Kingdom specifically entitles directors to consider the interests of non-shareholders in making decisions. Further, many states of the United States have similar legislation. There is no equivalent in Australian legislation. One might have expected that these legislative provisions in the United Kingdom and United States might have shifted corporate focus away from shareholder wealth and profitability, in favour of less tangible 'social benefits', and that this might have been reflected in performance measures for individual managers. However, Ramsay and Sandonato found that across the three jurisdictions, objectives of profit maximisation remained dominant.[59] This means that either managers' performance measures have not been updated to allow them to take into account a broader range of interests in pursuit of CSR type objectives, or that they have, but they have not materially shifted the focus of most companies. As a result, even if it is accepted that CSR should be added to a manager's performance obligations, it might not lead to tangibly different performance results.

In summary, while those who advocate a broader purpose of corporations use arguments such as corporate social responsibility and/or a social licence to operate to support their view, there are considerable conceptual difficulties with embracing such concepts. At the macro level, these include chronic problems of a possible conflict in the various interests to which decision-makers are required to have regard. With no easy resolution possible, and indeed arguments that community interests should outweigh shareholders'

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58 Lord Wedderburn, 'The Social Responsibility of Companies' (1985) 15(1) *Melbourne University Law Review* 4, 13.

59 Ian Ramsay and Belinda Sandonato, 'An Analysis of the Business Objectives of the Largest Listed Companies in Australia, the United Kingdom and the United States' (2018) 36(1) *Company and Securities Law Journal* 98, 110: 'the majority of companies in all three jurisdictions prioritise the interests of shareholders'.

interests unsurprisingly being pressed, questions remain about the legitimacy of corporations acting in such a way, as well as problems of subjectivity and uncertainty. We will now turn to the interplay between corporate social responsibility and the social licence to operate, in the specific context of corporations speaking out about social policy matters, and requirements under the existing corporations legislation in Australia. It will be seen that there is a significant possibility of incompatibility between corporate social advocacy and directors' underlying legal obligations, at least as presently understood in corporations law.

III What does the *Corporations Act* require of directors?

A Outline of obligations

Before considering the specific statutory obligations, we should acknowledge the general reluctance of courts to second guess judgments of company directors. Courts are generally reluctant to find against a director or directors based on business decisions they made, taking the reasonable view that directors are often in the best position, as presumably experienced business decision-makers, to determine what to do in a particular situation.[60] Courts are not generally staffed by those experienced or skilled in business management. Thus, a reluctance to interfere in business decisions and/or to judge that a director has acted contrary to the law is clearly evident, and defensible, in the case law in this area.[61]

That having been said, directors do not have unlimited powers. In an effort to minimise the agency costs that otherwise might arise due to the separation of ownership and control inherent within a company, the law imposes statutory duties upon company directors, largely analogous to the common law duties they are recognised as owing to others, particularly shareholders. These duties recognise that a director owes fiduciary obligations, and must show that they have acted in accordance with the best interests of the company of which they are a director, completely subordinating any personal interest they may have in the relevant matters.

Sections 180 and 181 of the *Corporations Act 2001* (Cth) are the main operative provisions. Section 180 requires a director to act with reasonable care and diligence.[62] This is an objective standard.[63] A legislated business judgment rule in s 180(2) protects directors who (a) make a judgment in good faith for a proper purpose; (b) do not have a material personal interest in the subject matter of the judgment; (c) inform themselves about the subject matter

60 *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832 (Lord Wilberforce).

61 *Shuttleworth v Cox Brothers & Co* (*Maidenhead*) *Ltd* [1927] 2 KB 9, 23 (Scrutton LJ); *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260, 280 (Kirby P); Jean J du Plessis, 'Directors' Duty to Use Their Powers for Proper or Permissible Purposes' (2004) 16(3) *South African Mercantile Law Journal* 308, 324.

62 The section states: 'a director ... must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director ... in the corporation's circumstances'.

63 *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465, 476 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 483 (Heydon J).

of the judgment to the extent they reasonably believe to be appropriate; and (d) rationally believe the judgment is in the best interests of the corporation.

Section 181 states that directors must act in good faith in the best interests of the corporation, and for a proper purpose. A broad view has been taken of this type of power, permitting directors to take into account a range of considerations:

> Directors in whom are vested the right and the duty of deciding whether the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.[64]

Notice that an argument about proper purpose and best interests can be conflated, in that when a director is not acting for a proper purpose (ie, is pursuing purposes other than those for which they were conferred with power), they may not be acting in the best interests of the company either. However, the requirements are separately expressed in s 181 — a director must show both that they acted in the best interests of the corporation and for a proper purpose. It is clearly possible that one, but not both, of these are met on given facts.

Best interests of the corporation

Past cases tended to suggest that a subjective test is applied to the good faith in the interests of the corporation aspect, and an objective test in relation to purpose.[65] However, recently the High Court has recently suggested that an objective test might also attend the good faith in the best interests of the corporation aspect:

> The loyalty duty requiring a director to act in the best interests of the corporation is not purely subjective (the Court then cited to the judgment of Bowen LJ in *Hutton v West Cork Railway Co* (1883) 23 ChD 654) ... as Bowen LJ said of the equitable progenitor from which this statutory duty was developed and adapted, otherwise a wholly irrational but honest director could conduct the affairs of the company by 'paying away its money by both hands in a manner perfectly bona fide yet perfectly irrational'.[66]

This is consistent with an observed trend in corporations law away from giving directors 'the benefit of the doubt' or imposing light tests upon them,

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64 *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co No Liability* (1968) 121 CLR 483, 493 (all members of the court).

65 *Westpac Banking Corporation v Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1, 353 (Drummond AJA).

66 *Australian Securities and Investments Commission v Lewski* (2018) 266 CLR 173, 202 [71] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 203–4 [74]–[75]. The Court expressed a similar view, on provision with slightly different wording, elsewhere. For instance, interpreting a requirement that a director not make improper use of their position, the High Court interpreted the word 'improper' objectively. It would include the exercise of powers in circumstances where the director ought to know they had no authority to act as they did, and acting contrary to how a reasonable person would expect a director to act given their knowledge of the duties, powers and authority of the position of director and the circumstances of the case: *R v Byrnes* (1995) 183 CLR 501, 514–15 (Brennan, Deane, Toohey and Gaudron JJ). Members of the High Court expressed agreement with this position in *Doyle v Australian Securities and Investments Commission* (2005) 227 CLR 18, 29 (Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ).

such as simple honesty, or requiring a director to act with reasonable skill, having regard to their personal knowledge and skill. Sometimes, it has been said that the court will only intervene where the decision was one that no reasonable director could have made.[67] There is now recognition that tests in this area should have a significant objective component, determining whether a director has acted reasonably in the circumstances, not having regard to the directors' personal circumstances, but having regard to notions of a reasonable director. As a result, this means that courts are more readily finding that directors have breached their legal obligations to the company.[68]

Compare, for instance, the difference in sentiment in two cases. In *Re Smith and Fawcett Ltd* Lord Greene MR stated that where articles of a company confer discretion on a director, they 'must exercise their decision bona fide in what they consider — not what a court may consider — is in the interests of a company'.[69] In *Re City Equitable Fire Insurance Co Ltd*[70] Romer J stated that a company director was only expected to bring to bear that level of skill that could be reasonably expected from a person with their knowledge and skill. Statutory reform of corporate law in Australia in the 1980s and 1990s ushered in a different approach, embracing an objective test.[71] This was recently reflected in the statements by the High Court of Australia in *Australian Securities and Investments Commission v Lewski*,[72] discussed above, indicating that the requirement of loyalty is not judged merely by a subjective test.

There is significant support in the Australian case law for the proposition that the statutory requirement that directors act in the best interests of the corporation means in the interests of shareholders. In other words, there is substantial support for the shareholder primacy theory.[73] This is evident in, for example, *Ngurli Ltd v McCann*,[74] *The Australian Metropolitan Life Assurance Co Ltd v Ure*,[75] *Peters' American Delicacy Co Ltd v Heath*,[76] and *Mills v Mills*.[77]

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67 *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62, 74.

68 LS Sealy, '"Bona Fides" and "Proper Purposes" in Corporate Decisions' (1989) 15(3–4) *Monash University Law Review* 265, 265–6.

69 [1942] Ch 304, 306.

70 [1925] Ch 407, 428–9.

71 See for discussion Nettle (n 3) 1407–12.

72 *Australian Securities and Investments Commission v Lewski* (n 66).

73 Jason Harris, 'Revisiting the Legal Basis of Shareholder Primacy' (2019) 71(2) *Governance Directions* 76, 79: 'there appears to be considerable authority, both under statutory and at general law to support shareholder primacy in Australian company law'.

74 (1953) 90 CLR 425, 438, Williams ACJ, Fullagar and Kitto JJ stating that the phrase 'company as a whole' in the context of directors' duties does not mean the company as a commercial entity distinct from its shareholders, citing with evident approval the judgment of Evershed MR in *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291 ('*Greenhalgh*') that 'the phrase the company as a whole (in the context of to whom directors' duties are owed) does not ... mean the company as a commercial entity as distinct from its corporators. It means the corporators as a general body'. The word 'corporators' here means shareholders: *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324, 474 [748] (Elliott J).

75 (1923) 33 CLR 199, 217 where Isaacs J stated that directors' powers were to be exercised honestly in the interests of shareholders as a whole.

76 (1939) 61 CLR 457, 512 where Dixon J stated that the company as a whole, in the context

It should be conceded that some judgments have also taken a different position.[78] A single judge decision of the Supreme Court of British Columbia concluded that:

> If they (the directors) observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, in my view, leave directors open to the charge that they have failed in their fiduciary duty to the company.[79]

There is academic support in Australia for this approach. Corporate law scholar Jason Harris also appears to favour directors taking a broader range of interests into account, other than merely shareholders.[80] The Corporations and Markets Advisory Committee thought that directors could take into account a range of interests.[81] A similar line has been taken by corporate law scholar

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of directors' duties, consisted of all shareholders. In *Pilmer v Duke Group Ltd (in liq)* (n 19) 178, McHugh, Gummow, Hayne and Callinan JJ noted that 'directors and other officers of a company must act in the interests of the company as a whole and ... this will usually require those persons to have close regard to how their actions will affect shareholders. It may also readily be accepted that shareholders, as a group, can be said to own the company'.

77 (1938) 60 CLR 150, 163–4 (Latham CJ). A paper by Jason Harris also contains references to state authorities to this effect: Harris, 'Shareholder Primacy in Changing Times' (n 37) 9–10.

78 Eg, *Bell Group (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1, 534 [4393]–[4395] where Owen J stated, discussing *Greenhalgh* (n 74), that 'it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need to be directed or that the legitimate interests of other groups can safely be ignored': *Bell Group (in liq) v Westpac Banking Corporation [No 9]* (n 78) [4395]); *Australasian Annuities Pty Ltd (in liq) (recs and mgrs apptd) v Rowley Super Fund Pty Ltd* (2015) 318 ALR 302, 316–17 [57] (Warren CJ), 348 [221] (Garde AJA); *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 549 [57] (Handley JA, Priestley and Stein JJA agreeing); *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (n 74) 474 [749] (Elliott J): 'in more recent times the view has been expressed that the general body of shareholders does not always, and for all purposes, embody "the company as a whole"'.

79 *Teck Corporation Ltd v Millar* (1972) 33 DLR (3d) 288, 314 (Berger J) ('*Teck*'). The Privy Council did refer with apparent approval to this decision in *Howard Smith Ltd v Ampol Petroleum Ltd* (n 60) 836–7, but the reference was to a different passage in the judgment of Berger J. The same goes for the reference of Wilson J in *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 305 to the *Teck* decision (n 79). I do not regard a sentence in the judgment of Middleton J in *Australian Securities and Investments Commission v Healey* (2011) 196 FRC 291, 297 [14] as an equivalent to the statement in *Teck* (n 79). There Middleton J stated that 'the role of a director is significant as their actions may have a profound effect on the community and not just employees and creditors'. Merely acknowledging that directors' actions can affect the community does not necessarily translate to support for a suggestion that directors should take such interests into account in making their decisions, in my view.

80 Harris, 'Shareholder Primacy in Changing Times' (n 37) 15–16; Harris, 'Revisiting the Legal Basis of Shareholder Primacy' (n 73). See also Dyson Heydon, 'Directors' Duties and the Company's Interests' in Paul Finn (ed), *Equity and Commercial Relationships* (Lawbook, 1987) 134–5.

81 Corporations and Markets Advisory Committee (n 49) 7: 'the established formulation of directors' duties allows directors sufficient flexibility to take relevant interests and broader community considerations into account. Changes of a kind proposed from time to time do not provide meaningful clarification for directors, yet risk obscuring their accountability'.

Jean du Plessis.[82] Note that, particularly in the writing of this professor, this is a normative position being taken, not purporting to explain the authorities as they stand, but suggesting that a new approach *ought* be taken.[83]

On the other hand, it is said that the Australian *Corporation Act 2001* (Cth) requires directors to pursue profit maximisation for the benefit of shareholders.[84] This reflects the orthodox view of a company.[85] Further, as indicated by the empirical work of Ramsay and Sandonato, this is

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82 Du Plessis, 'Corporate Social Responsibility and "Contemporary Community Expectations"' (n 33) 30: 'The Australian company law model should instead be aimed at ensuring that corporations act responsibly and focus on long-term and sustainable growth that does not harm the environment or society generally'; du Plessis, 'Directors' Duty to Act in the Best Interests of the Corporation' (n 19) 26: 'as part of current corporate law theory, it is recognised that there are a range of other significant interests that should be considered by directors when it is expected of them to "exercise their powers and discharge their duties in the best interests of the corporation"'. He contrasts that with the current actual position in Australian law: Jean Jacques du Plessis, 'Shareholder Primacy and Other Stakeholder Interests' (2016) 34(3) *Company and Securities Law Journal* 238, 242: 'there is no doubt that the shareholder primacy theory still underpins our corporate law model'.

83 Du Plessis, 'Shareholder Primacy and Other Stakeholder Interests' (n 82) 242:

> the fact that shareholder primacy is so dominant does not mean that we should see it as so fundamental that we do not strive for law reform ... there are several other interests, also referred to as representing the interests of other stakeholders, that require more significant recognition and that should be high on the agenda for future corporate law reform ...

84 Robert Langton and Lindsay Trotman, 'Defining "the Best Interests of the Corporation": Some Australian Reform Proposals' (1999) 3(2) *Flinders Journal of Law Reform* 163, 176: 'it is submitted that the phrase "best interests of the company" (the way in which s 181 describes the duty that a director owes to the company) should be equated in Australia with 'ruthless profit maximisation over some unspecified period'; du Plessis, 'Corporate Social Responsibility and "Contemporary Community Expectations"' (n 33) 30: 'presently the shareholder primacy model still underpins Australia's company law model'.

85 Wedderburn (n 58) 9–10: 'the company's interests are still measured primarily by the judiciary, not in terms of different constituencies of persons, but as represented by the interests of present and future members of the company ... this is the legal structure of profit maximization, and the same philosophy seems still to be alive in Australia'; Bob Baxt, *Duties and Responsibilities of Directors and Officers* (Australian Institute of Company Directors, 18th ed, 2005) 42: 'the basic rule is clear: the law recognises that it is impossible for a person to serve many masters and a director does not have to do so. As the shareholders or members appoint the directors to run their company the directors owe their duty to them and to future shareholders'. In *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209 ('*Cassimatis*'), Edelman J declined to express a view as to whether a director's duties were confined to the corporation which they manage, or extended beyond that to consider other interests. This reflects some ambiguity regarding the nature of the duties owed in s 180 of the *Corporations Act 2001* (Cth), specifically whether they are private in nature, public in nature, or some hybrid. A view that they are more private in nature, notwithstanding public enforcement and public imposition of penalties for breach, would support a position that the duty is confined to the company. In *Cassimatis* (n 85), Edelman J stated that the 'dominant understanding' of s 180 and its predecessors was that they were concerned with duties owed to the corporation. See also James Edelman, 'The Future of the Australian Business Corporation: A Legal Perspective' (Conference Paper, Supreme Court of New South Wales Corporate and Commercial Law Conference, 29 October 2019) 9. A view that they are more public in nature would support a position that the duty extends beyond the company to accommodate other interests. For a (possible) example of this broader view, see BH McPherson, 'Duties of Directors and the Powers of Shareholders' (1977) 51(7) *Australian Law Journal* 460, 468–9: 'the directors' duty to the company is not limited to the duty to consider shareholders'.

overwhelmingly how Australian managers see their role. Congruence between legal obligation and practical reality is considered critical, particularly in business law. Their survey of the largest Australian companies found that, according to their written objectives, 83% regarded the interests of shareholders as their top priority.[86]

At present, this makes it somewhat problematic for a corporate board wishing to pursue a CSR agenda. This is reflected in the observation that:

> There is no evidence that the costs to companies of engaging in CSR do not exceed the benefits which the company receives. The benefits to society are also questionable ... if a company gives a charitable donation, the money this consumes could be used in number of alternative ways which could also have a positive impact on society — in reducing the cost to consumers of its products, in paying higher wages or in paying larger dividends. The donation may not be the most economically efficient or effective way of achieving the specified social objective ... (further) engaging in CSR may complicate the focus of corporate decision making and distract firms from the activities which may benefit society the most — creating a strong business with secure jobs as well as favourable returns to shareholders, resulting in economic growth for society ... adoption of CSR could .. come at a cost of financial viability for (small to medium companies), or have the effect of inhibiting the growth of their business.[87]

Worthington states that despite the broad wording of ss 181 and 182, a director might fall foul of such provisions, even in the absence of an objects clause, where decisions they made were 'gratuitous and self-serving rather than directed towards the company's ends'.[88] Bob Baxt wrote of the 'difficulties facing companies whose shareholders demand that companies produce profits if sometimes part of the profits of the company are spent on altruistic endeavours (whether political or otherwise)'.[89]

This creates difficulties for companies spending money to pursue social causes. This is because it is not clear that such spending is for the benefit and best interests of the company. The most that can be said is that such spending may provide the company with a slight benefit. However, on the other hand, in respect of those who disagree with the view the company has expressed, it may have a very negative consequence for the company, in terms of lost customers, as well as possible loss of advertisers, loss of suppliers etc. It may be difficult for directors to demonstrate that the spending of such company funds was in fact for the best interests of the corporation. The recent example of Israel Folau is a salient example, with the difficulties that Rugby Australia

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86 Ramsay and Sandonato (n 59) 102. In sharp contrast see Hugh Alexander Grossman, 'Refining the Role of the Corporation: The Impact of Corporate Social Responsibility on Shareholder Primacy Theory' (2005) 10(2) *Deakin Law Review* 572, 595: 'shareholder primacy theory appears to be no longer relevant to the current business environment'.

87 Helen Anderson, 'Corporate Social Responsibility: Some Critical Questions for Australia' (2005) 24(2) *University of Tasmania Law Review* 143, 165–6. Anderson also notes the danger that corporations may be tempted to 'jump on the bandwagon' of causes considered topical at precise points of time, without having substantial attachment to the cause, but at a superficial level, wishing to be seen to be doing the right thing: at 144.

88 Sarah Worthington, 'Directors' Duties, Creditors' Rights and Shareholder Intervention' (1991) 18(1) *Melbourne University Law Review* 121, 124.

89 Baxt, *Duties and Responsibilities of Directors and Officers* (n 85) 54.

got itself into by establishing a position on a particular social issue, and then attempting to enforce it amongst its playing ranks.

In this light, it is also more difficult for a company director to argue that taking a public position on a matter of contentious social policy was for the best interests of the company, as required by s 181(1)(a). The Court of Appeal in *Hutton v West Cork Railway Co* ('*Hutton*')[90] stated that a company making voluntary payments would need to clearly show benefit to the company (the case is discussed further below). This is not exactly the same as a company making public comments about a contentious matter of public policy, or devoting resources to publicly expressing such a position, but the analogy may be close enough. Both involve the non-essential allocation of company funds. It might be incumbent then on a company expressing such views, and devoting resources to do so, to clearly show the benefits to be derived by the company and its shareholders,[91] as opposed to mere assertion of such benefits. Requiring a company to clearly show such benefits, rather than requiring a complainant to show lack of benefit, might be useful in this regard, as Plowman J suggested in *Parke v Daily News Ltd* ('*Parke*').[92] This is to deter decision-makers from seeking to further their own (no doubt strongly held, sincere) views on contentious social policy causes, but using company resources to do so. This is a classic agency cost problem with which corporate law is primed to deal.

If it is the case that 'the best interests of the company should be equated in Australia with ruthless profit maximization over some unspecified period',[93] it is not clear how a company director could show that comment on contentious matters of public policy would be in the company's best interests.

As the New South Wales Court of Appeal noted in *Advance Bank Australia Ltd v FAI Insurances Ltd* ('*Advance Bank*') (to be discussed further below),[94] it is readily possible to imagine that there is a conflict between the personal wishes and beliefs of the directors, and the best interests of the company, when the directors use company power on 'political causes', defined broadly.[95] The matter was also considered in *Peel v London and North Western Railway Co*.[96] There the Court of Appeal validated the expenditure of company funds to inform shareholders of relevant facts concerning a dispute involving company policy, the views of directors, and a request for support at an upcoming meeting. All members of the Court of Appeal validated the expenditure. In so doing, the judges made some points considered pertinent here. Fletcher Moulton LJ validated the use of the money for such purpose, because it met an obligation that the directors as managers of the company had to give

90 *Hutton* (n 11).

91 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, 207 gives, as an example of a breach of directors' duties, 'donation of funds to a cause or charity with no benefit to the company in terms of publicity; or financial sponsorship of a political or social cause that resulted in (or had the potential to result in) public opposition to the company'.

92 [1962] Ch 927 ('*Parke*').

93 Langton and Trotman (n 84) 176. The authors add that there is a non-rebuttable legal presumption that shareholders seek (only) the maximisation of profits: at 178.

94 (1987) 9 NSWLR 464 ('*Advance Bank*').

95 Ibid 485 (Kirby P, Glass JA agreeing).

96 [1907] 1 Ch 5.

shareholders their informed view about matters of policy closely tied to company business. Directors were applying their business experience to guide shareholders as to an upcoming decision. This was a legitimate use of company funds.[97] Buckley LJ agreed.[98] He also noted:

> Cases often arise in which the board in power are anxious to maintain themselves in power, in order to procure their own re-election, or to drive a policy not really in the interests of the corporation, but for some private purpose of their own, down the throats of the corporators (shareholders) at a general meeting, and in which they issues at the expense of the company (material) for the purposes of attaining that object ... (this decision should not be cited) as any authority for justifying the action of the directors. The point here decided is that directors bona fide acting in the interests of the corporation, and not to serve their own interests, are entitled and bound to inform the corporators in matters affecting the corporate interests, and any expenses reasonably incurred in so doing may be borne out of the funds of the company.[99]

In sum, on a shareholder primacy theory, it is considered to be difficult for company directors to be able to demonstrate that the decision to allocate funds towards corporate social advocacy is one taken in the best interests of the company.

Proper purpose/s

On the matter of proper purposes, it will often be the case that particular decisions or actions of directors are motivated by a range of purposes. In such cases, the questions is whether any improper purpose was causative of the decision or action.[100] In other words, the courts consider whether the decision would have been made or the action taken in the absence of the improper purpose.[101] Further, the mere fact that, in promoting the company's interests, the directors also promoted their own, does not necessarily mean the directors have acted improperly.[102] At the other end, the mere fact that directors did not make a decision or undertake an action for reasons of self-interest does not mean they have necessarily met their legal obligations.[103]

Courts have indicated a preparedness to carefully consider claims by company officers to have acted in accordance with proper purposes:

> When a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial, an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it,

97 Ibid 16–17.
98 Ibid 18–19.
99 Ibid 21.
100 *Whitehouse v Carlton Hotel Pty Ltd* (n 79) 294 (Mason, Deane and Dawson JJ).
101 In *Mills v Mills* (n 77) 165, Latham CJ considered what was the 'moving cause' of the directors' activity, citing Lord Shaw in *Hindle v John Cotton Ltd* (1919) 56 Sc LR 625; to like effect Dixon J: *Mills v Mills* (n 77) 186).
102 *Hirsche v Sims* [1894] AC 654, 660–1.
103 *Howard Smith Ltd v Ampol Petroleum Ltd* (n 60) 834 (Lord Wilberforce).

> particularly when the action they took was unusual or even extreme.[104]

It is, of course, quite possible that a person could meet the 'good faith' requirement but not the proper purpose requirement.[105] The courts have applied an objective test to determine whether or not a director is, or directors are, acting for a proper purpose. It is not sufficient that the person honestly believes that they are acting in the best interests of the company.[106] The High Court determined this in the context of an attempt by directors to act to dilute majority voting rights of a particular shareholder. The court viewed that this was a breach of a director's fiduciary obligations to the company, on the basis that was not part of a director's function to favour one shareholder, or group of shareholders, over another.[107]

It is generally accepted that the onus is on the one alleging the exercise of powers for improper purposes to prove their claims.[108] However, there has been a suggestion that, in the case of gratuitous payments being made, the onus is on those who authorised it to defend and justify it.[109] It is possible this could be applied in the case of a company devoting resources to adopting a particular social cause, or simply publicly espousing a view on a contentious topic of public policy.

Many of the cases dealing with questions of proper purpose have involved the actions of directors in seeking to thwart takeovers, and/or decisions in relation to shares. There are fewer in the context of directors making decisions to express views on particular matters, and/or to devote resources to communicate such views. However, the limits of a corporation's powers to spend money in a way that it sees fit have been considered. Though in a different factual context, these are considered relevant to cases of companies spending money to express views on social matters. What links the two situations is that companies are spending money gratuitously. What the courts said in those cases about companies spending money gratuitously is thus considered relevant to the current situation involving the spending of money gratuitously to express views about social matters.

Such spending was considered in *Hutton*.[110] In that case, in the course of the windup of a company, it was resolved to pay compensation to company

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104 Ibid 832 (Lord Wilbeforce).

105 *Whitehouse v Carlton Hotel Pty Ltd* (n 79) 293 (Mason, Deane and Dawson JJ). Sealy notes that

> the modern emphasis on 'proper purposes' has let in criteria which give judges of an interventionist inclination far greater scope to go into the evidence, to assess matters objectively, and in effect to impose their own views. What is novel is not the approach, but the frequency with which it is now invoked. When the emphasis was on bona fides ... and a judicial attitude of laissez-faire prevailed, it was very hard indeed to upset the subjective opinion of the directors or of the majority that what they were deciding was in the interests of the company; but the 'proper purposes' test virtually obliges the decision-makers to go into the witness box and justify their actions and ... to run the risk that their evidence may be rejected ...

LS Sealy, '"Bona Fides" and "Proper Purposes" in Corporate Decisions' (n 68) 277.

106 *Whitehouse v Carlton Hotel Pty Ltd* (n 79) 293 (Mason, Deane and Dawson JJ).

107 Ibid 290 (Mason, Deane and Dawson JJ).

108 *Howard Smith Ltd v Ampol Petroleum Ltd* (n 60).

109 *Parke* (n 92) 942 (Plowman J).

110 *Hutton* (n 11).

officers, for likely loss of employment, as well as to pay some money to the company directors, who had never been compensated for their time. A majority of the Court of Appeal (Cotton and Bowen LLJ) found that the resolutions were invalid, as being beyond power. The actual decision of the Court in that case is of less interest here, because it turned on the fact that the company was being wound up, which is not a feature of the current context of discussion.

Bowen LJ spoke of the 'natural' limit on a company's spending, that it had to be reasonably related to the carrying on the company's business. He said the relevant test for validity was 'what was reasonably incidental to, and within the reasonable scope of carrying on, the business of the company'.[111] He acknowledged that some flexibility was required, that directors were not limited to authorising payments that they were legally obliged to make. He summarised his views thus:

> The law does not say that there are to be no cakes and ale, but there are to be no cakes or ale except such as are required for the benefit of the company.[112]

This decision is somewhat noteworthy, occurring as it did at an early time of company law, where notions of laissez-faire and limited regulation of business structures were paramount. In this light, a stated limit on the power of company directors is significant. It is likely the case remains good law.[113]

In the case of *Re Lee, Behrens and Co Ltd*,[114] the court considered the question of the legality of ex gratia payments made to the wife of the former managing director of the company. Eve J there stated that such payments were only valid where the transaction was reasonably incidental to the carrying out of the relevant business, was bona fide, and was carried out for the benefit and prosperity of the relevant company. This approach was accepted and applied by Plowman J in *Parke*.[115] Plowman J added there that ex gratia company payments were generally not legitimate, and that the motives of the payment and the objects intended to be achieved were relevant. He concluded the onus was on those defending the payment to justify it.[116] He said this approach applied in cases where a company made 'voluntary' payments.[117]

As has been noted elsewhere, there is nothing specific in the *Corporations Act* which currently requires directors to adopt principles of corporate social responsibility.[118] Suzanne Corcoran states:

> The (*Corporations Act*) considers the corporation as essentially private, with an

111 Ibid 671.

112 Ibid 673. After referring to the *Hutton* decision (n 11), Lord Wedderburn referred to the 'reflection that the directors' knuckles will be sharply rapped by the judges if their altruism can be shown to have overlooked the primary interests of the shareholders': Wedderburn (n 58) 17.

113 Elizabeth Klein and Jean J du Plessis, 'Corporate Donations, the Best Interest of the Company and the Proper Purpose Doctrine' (2005) 28(1) *University of New South Wales Law Journal* 69, 71.

114 [1932] 2 Ch 46.

115 *Parke* (n 92).

116 Ibid 954.

117 Ibid 961.

118 Grossman (n 86) 576: 'corporations laws in Australia provides no provisions for social welfare but determinately adopts Berle's shareholder primacy norm'.

> essentially private purpose, the creation of profit. As a general principle our corporate law does not acknowledge that social responsibility is a legitimate concern of business corporations (except with respect to specific statutory mandates around industrial relations or the environment) ... it is a laissez-faire statute which promotes a rule of strict profit maximization. It actively discourages corporate concern for social welfare when social welfare must be purchased at a cost to profit maximisation, even where the social welfare is that of its own employees ... a consistent stream of case law .. has confirmed that the business corporation is responsible to its shareholders and should not pursue social ends except where social goals serve an overriding profit motive.[119]

As noted above, the Privy Council stated in *Howard Smith Ltd v Ampol Petroleum Ltd*[120] that where there is an issue about the purpose/s for which directors have acted, the court considers whether a particular requirement was not urgent or crucial. If it were not urgent or critical, the Court will seriously test the assertions of directors that the action were taken for that purpose, particularly if it were unusual or extreme. It is submitted that it is generally not 'urgent or critical' for companies to participate in public debates about social matters. I would state that company participation in public debates remains unusual, if not extreme. Thus, according to the Privy Council, particular scrutiny is applied, to determine whether directors were really acting for the purpose asserted or were acting for ulterior purposes. As applied to the current situation, it becomes a question as to whether directors really did make that contribution to social debate for the purposes of the company (in other words, to increase profitability or, perhaps more nebulously, its 'brand' or 'image'), or whether it was in fact for other purposes. These might include the moral vanity of the directors, or a strongly held personal view about the matter which the directors wish to amplify with the resources of the company at their disposal.

It is clearly possible that a court could find that the directors were not acting for proper purposes, as required by s 181(1)(b). As stated above, the orthodox position in the literature is that the *Corporations Act* reflects a shareholder primacy theory. The survey evidence suggests, overwhelmingly, that is how managers in fact see their role. That is their purpose, in terms of the law, and in terms of how they see their role. It is then questionable when directors have apparently taken a broader view of their role, by apparently taking into account a broader range of stakeholders in making their decisions. This might lead to a finding they have acted for an improper purpose, contrary to s 181(1)(b). These concerns are exacerbated when we take into account the literature that suggests that corporate social responsibility motivated measures often do not provide clear benefits to the company. This would only strengthen an argument that the directors, by pursuing such activity, are not acting for a

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119 Suzanne Corcoran, 'The Corporation as Citizen and as Government: Social Responsibility and Corporate Morality' (1997) 2(1) *Flinders Journal of Law Reform* 53, 53–4. This position receives support in an article by Pamela Hanrahan, 'Corporate Governance in These "Exciting Times"' (2017) 32(2) *Australian Journal of Corporate Law* 142, 148:

> in the end .. directors' powers must be exercised in the corporate interest and not to advance another's interest especially at the expense of the corporation. Allowing or requiring a company limited by shares to prioritise other interests would require law reform in Australia ...

120 *Howard Smith Ltd v Ampol Petroleum Ltd* (n 60).

proper purpose. In other words, when directors engage in activity that has not shown to be in the clear interests of the company, including spending of money to pursue social causes, they are acting for improper purposes.

The court has considered the validity of the authorisation of company expenditure in another context, namely a battle over board positions. This was considered in the New South Wales Court of Appeal decision in *Advance Bank*.[121] Essentially, the case concerned the retirement of five of the nine directors of the appellant company. The existing board favoured their re-appointment. However, an existing shareholder, the respondent, wished to appoint four new directors to the board. The existing board resolved to write to existing shareholders urging that they vote to re-appoint the retiring directors, and authorised a marketing campaign involving a telemarketing company contacting existing shareholders with a similar message. This involved the expenditure of corporate monies. There are some similarities and some differences between the situation in this case and the situation that is the focus of this article. Both involve boards authorising expenditure of moneys to achieve particular policy objectives. On the other hand, in the *Advance Bank* case, the 'cause' was much closer to the everyday business of the company, whereas in the situation the subject of this article, the cause is much less clearly linked to the business.

That said, all members of the New South Wales Court of Appeal found that the company had acted unlawfully. Kirby P, with whom Glass JA agreed, made several observations considered pertinent in the current context. Firstly, he stated that while nothing per se prohibited companies from getting involved in elections or solicitation for votes, there was a heightened risk of a confusion arising between the best interests of the company, and private interests. Awareness and management of this confusion would be extremely important in such cases.

Kirby P also noted different pertinent arguments as to the conduct of the directors in this case, given it was common ground that the directors had acted bona fide and honestly. Kirby P said one pertinent issue was whether the directors had acted for proper purposes. Another was whether the directors were guilty of an abuse of power. He indicated that an abuse of power would occur where directors (a) expended unreasonable quantities of company money; (b) it was spent on material relevant only to a question of personality and not relevant to company policy; or (c) otherwise had acted in a way that was excessive or unfair, given the corporate purpose sought to be achieved.[122]

On the first question, Kirby P concluded that the directors had not acted for a proper purpose.[123] In so doing, he applied an objective standard, rather than a subjective standard.[124] Kirby P reached this conclusion after noting that the directors had authorised a great deal of emotive and misleading material to be placed before shareholders. The material presented was designed to achieve a particular end, namely the re-election of the retiring directors. It was not an objective presentation of the pros and cons of retaining the existing directors

121 *Advance Bank* (n 94).
122 Ibid 485–6.
123 Ibid 486.
124 Ibid.

as against having new directors. Rather, it was electioneering material, not material designed to permit shareholders to make a fully informed decision when they cast their vote. This concern was exacerbated in a situation of a real possible conflict between the personal position of a director and the duty they owed to the company they served.[125] Mahoney JA reached a similar conclusion.[126]

In the alternative, Kirby P considered whether the directors were guilty of an abuse of power. He found that they were, for similar reasons.[127] They had confused their personal interests and advantage with fiduciary duties they owed to the company and its shareholders. Kirby P warned that, for these reasons, company expenditure on matters relating to a company election should be kept to an absolute minimum, limited to providing essential information, in an objective and balanced manner, to permit shareholders to make an informed decision. This might often include giving both sides to an argument and permitting all sides an opportunity to make arguments to the shareholders.[128]

This case has important implications for the current question. Again, it strongly suggests caution when directors are minded to spend company money on pursuing social causes. As the Court said there, the risk of a possible confusion between company purposes and private purposes is high.[129] One of the concerns noted by Kirby P, with whom Glass JA agreed, was the presentation of a one-sided view, using emotive and misleading language. If this were applied in the context of a corporation's contributions to social debate, it would weigh against the corporation publicly espousing support of a particular view, or at the very least, not doing so without a full airing of a range of views. My knowledge of these matters is that corporations typically do not do this — they espouse a particular view on a social policy matter, not a balanced consideration of a range of views. Thus, the *Advance Bank* precedent suggests a real risk that such spending is determined to be not for proper purposes and/or an abuse of position by the relevant directors. It is acknowledged that the factual scenario arising in *Advance Bank* is somewhat

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125 Ibid 485–7.

126 Ibid 496:

> I agree that what was done pursuant to the directors' purposes went beyond what could properly be done in pursuance of them ... Kirby P, in his judgment, has referred to the facts relevant to the soliciting of votes by telephone and to what was done by way of personal attendances. I agree in general that, in some respects, what was done wenth beyond what should properly be done within the principles to which I have referred ...

127 Ibid 487–8. It is said that when assessing allegations of abuse of power,

> the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason ...

Hindle v John Cotton Ltd (n 101) 630–1 (Viscount Finlay).

128 *Advance Bank* (n 94) 489–90.

129 Space restrictions here preclude me from discussing, as a separate issue, the question of directors and the extent to which issues with their fiduciary duties might also be engaged by such a situation.

different to the current context. However, there are material similarities and, on one view, it might be even harder in the current context to demonstrate that spending on public communications is for a proper purpose, because the object of the spending is even further removed from company business than was the case in *Advance Bank*.

In conclusion, there is considered to be a significant question mark over the legality of company directors spending company money to espouse particular views. This is because it would be difficult in many cases for such directors to demonstrate that the spending was in the company's best interests, applying the shareholder primacy theory, and that the spending was for proper purposes.

B Possible law reform

Having said that, if the Commonwealth Parliament wishes to clarify that it is legitimate for directors to have regard to a broad range of stakeholders, including non-shareholders, then it is possible for it to legislate expressly to this effect. In so suggesting, I acknowledge that various reviews have been conducted concerning the extent to which the expression of the scope of directors' duties needs to be clarified in Australia. All have determined that the existing provisions should be retained, on the basis they are sufficiently broad and flexible to protect directors who engage in legitimate activities, and that no amendment to the law is required.[130] Of course, this might change if a court found that those who authorised a company to participate in contentious public debates were in breach of their obligations under the *Corporations Act*.

In contrast, regulators in the United Kingdom and many of the United States have reached quite different conclusions. In the United Kingdom, it was determined that specific statutory reform to the company law was required to emphasise the broad range of considerations and factors, and stakeholders, to which directors might legitimately have regard in making decisions.[131] Section 172 states that directors must act in ways they consider in good faith will likely promote the success of the company for the benefit of shareholders, having regard to various stated factors. These include the long-term consequences of a decision, the interests of the company's employees, need to foster relationships with third parties, impact on the community and environment, desirability of maintaining a reputation for strong ethical standards, and the need to act fairly as between members of the company. This is known as the 'enlightened shareholder value' approach.[132] It is a departure from traditional regulation in this area, by specifically expressly endorsing consideration of a range of stakeholder interests, though ultimately tying it back to a more traditional emphasis on shareholder value. Legislation in many of the United States goes even further, specifically authorising a director to consider those other than the shareholders in making board decisions, and not

130 Parliamentary Joint Committee on Corporations and Financial Services (n 48); Corporations and Markets Advisory Committee (n 49); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Company Directors' Duties* (Parliamentary Paper No 395, November 1989).

131 *Companies Act* (n 2).

132 See for discussion Keay (n 24) 588–96.

necessarily tying these decisions to shareholder value. The British Academy in its 2019 report has set out an agenda for (further) law reform in that jurisdiction, criticising the 2006 model and suggesting changes to permit directors to (overtly) favour stakeholders over shareholders.[133]

Thus, the Australian Parliament would have options to legislate in the direction found in the United Kingdom and some of the United States, if it wished to permit company directors to take account of these broader interests and, by implication, to contribute publicly to current policy debates.

IV Corporations and the 'human right' of speech

Finally, those managing a corporation may argue that the corporation has human rights, including a right to contribute to political discussion. Australian law protects freedom of speech indirectly. Firstly, it is a common law right, which means that it exists to the extent that Parliament takes it away. Secondly, the principle of legality applies. This means that in the event of ambiguity, a law will be presumed not to abrogate fundamental legal rights like freedom of speech. Thirdly, the High Court has discerned in the Australian Constitution an implied freedom to political communication. This is a negative freedom, meaning that it is a defence to an action by another, as opposed to a source of positive rights. It moulds both the common law and statute law. Both must be read in the light of the implied freedom of political communication. In the current instance, it might be argued that the law regarding directors' duties, including both the common law and relevant provisions of the *Corporations Act*, must be interpreted having regard to the freedom of the corporation to engage in political discussion. However, this begs the question of the extent to which corporations actually have rights and freedoms that are enjoyed by individuals.

The High Court of Australia has considered this question on a few different occasions. In *Environmental Protection Authority v Caltex Refining Co Pty Ltd*[134] by a majority of 4-3 the High Court found that the privilege against self-incrimination did not apply to corporations.[135] It is the reasoning by which the court reached that position that is of most interest here.

The court considered the history of the privilege, including why it was developed. It found that the privilege was developed to prevent individuals, on pain of physical punishment or religious ex-communication, from being compelled to testify.[136] It was not developed historically with corporations in mind, and they could not be subject to physical punishment or ex-communication.[137] It also considered the modern rationale of the privilege,

133 British Academy, *Principles for Purposeful Business* (n 18) 20, referring to s 172 and its 'enlightened shareholder value' approach, then stated: 'the problem this creates is that it does not permit directors to further interests of stakeholders at the expense of shareholders and it does not provide protection to companies that promote purposes beyond shareholder value'.

134 (1993) 178 CLR 477.

135 Ibid (Mason CJ, Brennan, Toohey and McHugh JJ, Deane Dawson and Gaudron JJ dissenting).

136 Ibid 497–8 (Mason CJ and Toohey J), 516 (Brennan J).

137 Ibid 498 (Mason CJ and Toohey J).

including respecting the dignity of individuals.[138] This reasoning did not apply to corporations. The court noted the privilege was recognised in international human rights instruments, but only in respect of individuals, as opposed to corporations.[139] Because of the history of the right, its rationale, and its description in current international human rights instruments, a majority of the court found that the right should not be applied to corporations.

Adopting a similar approach with respect to freedom of speech, this right evolved from earlier times where governments threatened, prosecuted and punished those who dared to criticise it. A system of prior restraint existed until 1694, under which those who wished to publish something had to get the approval of the Archbishop of Canterbury or York first. Copyright laws served as a proxy for government control over speech. While a Hobbesian view of government prevailed, it was thought governments needed strong powers to control and put down dissent and criticism.[140] However, momentum built for recognition of a right to speech, particularly in the context of Parliament and parliamentarians. Development of a social contract approach to governance meant greater recognition of the rights of the citizenry to contribute to public debate and discussion.[141] By 1832, prosecutions for seditious libel had practically ceased,[142] and by 1868, the common law recognised a right to freedom of speech as fundamental.[143] It should be noted that these developments occurred at a time when the corporate form was rare, with modern company law dating from the industrial revolution of the mid-19th century. It is thus fair to say that the right to free speech was not created with corporations in mind. It was created to stop individuals from being prosecuted for seditious libel, treason and other criticism of the government. It was recognised as fundamental to democracy and the kind of social contract upon which government was based.[144] Corporations do not vote. At international level, freedom of speech tends to be expressed to apply to persons.[145]

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138 Ibid 514 (Brennan J), 545 (McHugh J).

139 Ibid 499 (Mason CJ and Toohey J).

140 Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) 152:

> every free man has an undoubted right to say what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity ... to punish ... any dangerous or offensive writings which (are) ... of a pernicious tendency is necessary for the preservation of peace and good order ...

141 Philip Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37(3) *Stanford Law Review* 661, 752.

142 Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1904) 373.

143 *Wason v Walter* (1868) LR 4 QB 73, 93 (Cockburn CJ).

144 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 547 (Lord Keith).

145 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10 ('*European Convention on Human Rights*'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 19.

In terms of rationales, there is a vast literature on the rationales for freedom of speech. Leading philosopher John Stuart Mill justified freedom of speech on the basis of the search for truth, and individual self-development through being exposed to a range of ideas and thoughts.[146] Meiklejohn tied it in closely with self-government, and permitting citizens to make informed decisions about their government representatives.[147] Oliver Wendel Holmes Jr developed notions of the marketplace of ideas.[148] It is much more difficult to apply these rationales to the freedom of speech of corporations. We do not expect self-development of corporations if they speak. On one view, it is irrelevant to the democratic argument for freedom of speech, since corporations cannot vote.

Of course, there is the argument that the speech of corporations does further these goals, because it permits *others* to continue the search for truth, allows *others* to self-develop through exposure to a range of ideas, allows *others* to make informed decisions about government and political issues, and places ideas in the marketplace for *others* to consider. The strongest argument that corporations should have freedom of speech is that permitting others to hear what the corporation has to say assists in relation to the rationales for freedom of speech, not that the rationales apply to the corporation itself. This was the kind of argument accepted in 1992, when the High Court considered a challenge by a corporation to laws restricting political advertising. The challenge was successful, on the basis of the implied freedom of political communication, but this was not on the basis that the corporation had a right to speak, but that individuals had the freedom to receive the information that the corporation provided.[149] Similarly in *Unions NSW v New South Wales*,[150] the High Court recognised that those who were not electors themselves could legitimately seek to influence public opinion about particular important matters of public policy, and that this could amount to 'political communication' protected by the implied freedom. In *McCloy v New South Wales*,[151] the Court seemed to prefer to characterise regulation of corporate

146 John Stuart Mill, *Utilitarianism, on Liberty, Considerations on Representative Government* (Geraint Williams ed, Everyman, 1993).

147 Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1960).

148 *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J dissenting).

149 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. Having said that, members of the Court did extend the freedom to third parties not directly involved in the political process:

> freedom of communication in relation to public affairs and political discussion cannot be confined to communication between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. This is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion ...

At 139 (Mason CJ). Deane and Toohey JJ noted that the ability of 'special interest groups' to contribute to political discussion was protected by the freedom: at 175; Gaudron J said the freedom applied to 'members of society generally': at 212.

150 (2013) 252 CLR 530.

151 (2015) 257 CLR 178.

donations to individuals as a burden on the speech of those individuals, as opposed to (indirectly) a burden on the speech of the companies precluded from, or limited as to, making a donation to candidates of their choice.

In sum, one way or the other, either arguing that corporations have a direct freedom of political communication, or that they have one indirectly because others have a freedom to hear what the corporation has to say, the court will accord some protection for the freedom of corporations to contribute to discussion about political matters. In this way, the freedom of speech has a dimension missing from the privilege against self-incrimination, in that the speech of the corporation potentially impacts on the position of others, in a way that is not apparent in the self-incrimination context.

Of course, freedom of political communication is not an absolute. If the court finds that a law (for example, a law that specifically precludes a corporation from allocating resources towards debate about political matters), or a law regarding directors' duties that effectively prohibits directors from expending resources towards such ends, this does not automatically mean the law is invalid. The court would then apply both compatibility and proportionality testing to the law. Under compatibility testing, the court would determine whether the impugned measure was passed for a legitimate objective consistent with representative and responsible government. Under proportionality testing, the court would determine whether the impugned measure was suitable, necessary and adequate in its balance. A law will be suitable if it is rationally connected to the purpose of the provision. It will be necessary if there is no other obvious and compelling alternative to achieve the legitimate objective with a less restrictive impact on the freedom. It may be adequate in its balance, having regard to the importance of the objective it seeks to further, compared with the impact on the freedom.[152]

It may be, for instance, that the court accepts that although the existing directors' duties do impose restrictions on the ability of a corporate to 'speak' (for instance, the directors would have to show it was in the best interests of the company to do so, and it was for a proper purpose), that these restrictions are suitable, necessary and adequate in balance. The argument here might rely partly on what was said above about the legitimacy issues surrounding a corporation contributing to public policy debates, and possible subjectivity and uncertainty concerns. These concerns might, in effect, justify the restrictions on a corporation 'speaking' about public policy issues.

V Conclusion

This article has considered the contentious question of corporations contributing to contentious public policy discussions, and the application of relevant principles of corporations and human rights law to determine the legality of corporations doing so. The dominant theory of corporations legislation in Australia remains the shareholder primacy theory, despite suggestions that the purpose of corporations may be broader than this. While some have advocated principles of corporate social responsibility and/or the social licence of a corporation to operate, these do not find particular voice in

152 Ibid 194–5 (French CJ, Kiefel, Bell and Keane JJ).

current corporations legislation or case law. Thus, the representatives of a corporation that have spoken out on the company's behalf in relation to a contentious social issue, perhaps using company resources to do so, may have difficulty in legally justifying their behaviour on the basis of corporate social responsibility. The corporations legislation makes clear that company directors must act reasonably, in good faith, in the best interests of the corporation, and for a proper purpose. While courts are understandably reluctant to second-guess decisions of company directors, they are increasingly prepared to do so, in application of an objective standard.

It is considered quite possible that a court might carefully scrutinise a situation where company directors have authorised a representative of the company to contribute a company view about a contentious social issue, and/or authorised the expenditure of a company's resources to do so. While the company directors may have honestly believed they were doing the 'right thing', it is possible a court might find that the decision was not in the best interests of the corporation and/or was not made for a proper purpose. This is particularly the case if the court requires directors to show the propriety, and not complainants the impropriety, of a particular course of action. Directors may struggle to present convincing evidence that such an incursion into a contentious public policy area is in fact in the best interests of the corporation, or for a proper purpose, particularly if the shareholder primacy theory is accepted. No case of which the author is aware has so decided this yet, in the context of such contributions to debate. No doubt, it will be raised for consideration at some stage.

In the alternative, if the Commonwealth Parliament wishes to specifically authorise corporate decision-makers to enter into such debates, as part of a broader conception of directors' obligations than has traditionally been the case, then it may wish to do so. This has clearly occurred in the United Kingdom and the United States, and evidently there is a push in the former jurisdiction for a more radical departure from a traditional conception of directors' duties. However, any change in this regard in Australia should be prompted by the legislature, as opposed to courts or agitation by academics. The article also considered the possibility that corporations might be able to assert something of a free speech right. In Australia, this is given common law protection and (limited) constitutional protection. It might be argued that citizens within a democracy have a right to hear a range of views on contentious political matters, including views funded by corporations. However, this freedom is not absolute, and the Commonwealth, if its corporations legislation is challenged on this basis, might legitimately argue that de facto limits on the ability of a corporation to contribute to public debate are necessary, suitable and adequate in their balance, due to real questions around the legitimacy, subjectivity and uncertainty surrounding corporate speech.