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*The future of the Australian business corporation: a legal perspective*

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**Introduction**

In his 1793 *Treatise on the Law of Corporations*, Stewart Kyd remarked "[a] corporation being merely a political institution, it can have no other capacities than such as are necessary to carry into effect the purposes for which it was established; it cannot therefore be considered as a moral agent subject to moral obligation."<sup>1</sup> Two centuries later, the purposes of a corporation remain central to issues that can arise from its actions. But the central point of my response this afternoon is that it does not follow from the premise, namely that a corporation cannot have capacities other than to carry out its purposes, that it cannot be a moral agent subject to moral obligation. This is one aspect of why Professor Mayer's project is so valuable.

The idea that a corporation may have moral responsibilities to a wider subsection of the community than just its shareholders is not new. Although it is actually much older than this, the debate is best known for having started in the early 1930s, when Berle and Merrick Dodd wrote of the challenges of identifying whom should be the beneficiaries of directors' exercises of corporate power.<sup>2</sup> At least over the last eight decades, the debate has focused heavily on comparisons between the shareholder primacy theory, namely the theory that a company exists for the purpose of generating profits for shareholders, and the stakeholder theory, being the theory that directors of companies must consider and accommodate a broader range of stakeholder interests including employees, contracting counterparties, communities affected by the operations of the company, and the public more broadly.<sup>3</sup>

In more recent times, there have been attempts to reconcile the shareholder and stakeholder theories on the basis that a corporation could justify acting according to the stakeholder theory because by doing so it could ensure long term financial success by having social licence to operate, thereby minimising the amount of applicable regulation and the

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<sup>1</sup> Kyd, *A Treatise on the Law of Corporations* (1793) vol 1 at 70-71.

<sup>2</sup> Berle, "Corporate powers as powers in trust" (1931) 44 *Harvard Law Review* 1049; Merrick Dodd, "For whom are corporate managers trustees" (1932) 45 *Harvard Law Review* 1145.

<sup>3</sup> See, for example, Green, "Shareholders As Stakeholders Changing Metaphors Of Corporate Governance" (1993) 50 *Washington and Lee Law Review* 1409; Bainbridge, "In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green" (1993) 50 *Washington and Lee Law Review* 1423; Strine, "Making it easier for directors to 'Do the right Thing?'" (2014) 4 *Harvard Business Law Review* 235. See also Hanrahan, "Corporate governance in these 'exciting times'" (2017) 32 *Australian Journal of Corporate Law* 142 at 142 fn 6; Hanrahan, "Corporate Social Responsibility" (2019) 36 *Corporate and Securities Law Journal* 665 at 667 fn 18.

gusto of regulatory enforcement.<sup>4</sup> An even broader view, and one which might be thought to underpin some laws regulating the operation of corporations, is the “communitarian” theory which focuses more heavily, and sometimes solely, on ethics and fairness rather than long term financial success.<sup>5</sup> A corporation must do the right thing because it holds a position of power and privilege in society, and directors must act to that same end.

These discussions have been recently at the forefront of public discourse overseas. United States Senator Elizabeth Warren has proposed legislation that would create enforceable moral obligations for large corporations. Senator Warren's argument is that the privilege of corporate personality should come with moral obligations that if left unfulfilled may result in the loss of corporate status.<sup>6</sup> The Business Roundtable, which includes Senior Executives of large corporates from Amazon to Xerox, recently signed a "Statement of Purpose of a Corporation", an aspirational commitment to all stakeholders, specifically identifying customers, suppliers, employees, communities and, lastly, shareholders.<sup>7</sup> This was almost immediately admonished by the Council of Institutional Investors.<sup>8</sup>

In Australia, there have been similar debates following the recent focus has been upon banking and financial services institutions in the wake of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. In his interim report, Commissioner Hayne made observations to the effect that "much, if not all of the conduct identified in the first round of hearings can be traced to entities preferring pursuit of profit to pursuit of any other purpose".<sup>9</sup> While Commissioner Hayne acknowledged that the officers of those companies had a duty to their shareholders to pursue profit, he said that doing so has "a significant temporal dimension. The duty is to pursue the long-term advantage of the enterprise" and that this "entails preserving and enhancing the reputation of the enterprise as engaging in the activities it pursues efficiently, honestly and fairly." The Commissioner concluded that observation by noting "lest there be any doubt, it also entails obeying the law". He expressed the view that a corporation "must do more than not break the law. It must seek to do 'the right thing'".<sup>10</sup>

As we have heard from Professor Mayer, in 2018 the British Academy began a large scale multidisciplinary review of the corporation, the progress of which is summarised in

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**4** Hanrahan, "Corporate governance in these 'exciting times'" (2017) 32 *Australian Journal of Corporate Law* 142 at 149-150.

**5** Keay, "Tackling the issue of the corporate objective: An analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'" (2007) 29 *Sydney Law Review* 577 at 586-587, 588; Gordon Smith, "The Shareholder Primacy Norm" (1998) 23 *Journal of Corporation Law* 277 at 281.

**6** The Economist, *Big business is beginning to accept broader social responsibilities* (22 August 2019). See also, *Accountable Capitalism Bill 2018*; Warren, *Accountable Capitalism Act Bill Summary* (2018).

**7** Business Roundtable, *Statement on the Purpose of a Corporation* (Press release, August 2019).

**8** Council of Institutional Investors, *Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose* (Press release, 19 August 2019).

**9** Australia, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report* (2018) vol 1 at 54.

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

*Reforming Business for the 21st Century*.<sup>11</sup> One core concept expressed in the work so far is the need for a clearly defined corporate purpose, as distinct from both profitability and social purpose, and embracing aspects of each.<sup>12</sup> The suggestion has prescriptive and proscriptive elements: profiting by solving problems and avoiding profiting by creating problems. Professor Mayer contends that there ought to be a legal requirement for corporations to specify their corporate purpose, and for that statement of purpose to be demonstrably delivered upon and incentivised. In relation to enterprises which perform public or quasi-public functions, like banks, utilities and those with significant market power, Professor Mayer proposes that the law require that corporate purposes align with social purposes.<sup>13</sup>

In this response, I do not propose to enter the debate about the utility of a legal or regulatory change to the nature and content of a purpose that might be required to be expressed by a corporation. Instead, I will focus upon the existing state of the law. The questions of great importance that Professor Mayer and others are considering should be assessed against the backdrop of the current legal environment. I will focus upon two basic legal questions that underpin our current framework. First, why does corporate purpose matter for human actors, particularly directors and other company officers? Secondly, how can corporate purposes be identified and what do they mean?

### **1. Why does corporate purpose matter for human actors?**

From the perspective of legal duties, one important reason why the purpose of a corporation is important to human actors is because it can shape the content of the duties that the directors and human actors owe in the management of the corporation. For instance, the purpose for which powers are conferred is an important consideration in assessing whether conduct has met the relevant standard of care for the purposes of a director's liability for negligence, under s 180 of the *Corporations Act* and at general law,<sup>14</sup> including as part of the "circumstances" of the corporation and an incident of the business judgment rule.<sup>15</sup> The focus of an inquiry into whether a director exercised their powers and fulfilled their duties with reasonable care and skill in all of the circumstances requires consideration of the purpose for which the power or duty was conferred.

Another example of the role of the purpose of a corporation in shaping the duties of human actors arises because corporate purpose determines the interests of the corporation which, in turn, shapes the directors' fiduciary duties. In *Breen v Williams*, in a passage in the judgment of Gaudron and McHugh JJ, later cited with approval by McHugh, Gummow, Hayne and Callinan JJ<sup>16</sup>, their Honours said that "[i]n this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests." In relation to duty of loyalty in the *Corporations Act*, in *Australian Securities and Investments Commission*

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<sup>11</sup> The British Academy, *Reforming Business for the 21st Century* (2019).

<sup>12</sup> The British Academy, *Reforming Business for the 21st Century* (2019) at 16.

<sup>13</sup> Mayer, "The future of the corporation: toward humane business" (2018) 6 *Journal of the British Academy* 1 at 11-12.

<sup>14</sup> *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187 at 235-236.

<sup>15</sup> *Corporations Act 2001* (Cth), s 180(1)(a), (2)(a).

<sup>16</sup> *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165 at 198.

*v Lewski*<sup>17</sup>, the High Court of Australia, in a judgment to which I was a party, spoke of the duty in these terms:

"Although the duty is not satisfied merely by honesty, it is a duty to act in the best *interests* of the members rather than a duty to secure the best *outcome* for members. Key factors in ascertaining the best interests of the members are the purpose and terms of the scheme, rather than "the success or otherwise of a transaction or other course of action."

An article cited in that passage was written by the late Lord Nicholls of Birkenhead based on a paper he delivered in Australia.<sup>18</sup> Lord Nicholls said of the trustee's duty to act in the best interests of the trust that "to define the trustee's obligation in terms of acting in the best interests of the corporation is to do nothing more than formulate, in different words, a trustee's obligation to promote the purpose for which the trust was created". The same reasoning could be applied to a director's duty to act in the best interests of the corporation.

Perhaps the most direct effect that corporate purposes have upon the conduct of human actors arises because the purposes of the corporation can shape the scope of the authority that its officers have to act. The duties of corporate officers to act "for proper purposes"<sup>19</sup> include duties to act properly within the scope of authority: "[i]mpropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do."<sup>20</sup>

Once this association between purpose and authority is understood, it can immediately be seen that one of the most fundamental roles for corporate purpose is to ascertain the authority of company actors. This association, and the accompanying duty, is not confined to directors of corporations. The law generally requires people invested with power to exercise their powers for purposes for which they are conferred, or, as it is sometimes expressed, not to exercise the powers for ulterior purposes. Examples of this include the exercise of executive powers, both those conferred by statute<sup>21</sup>, and, at least arguably, as has recently been demonstrated by the attempt at proroguing the Westminster Parliament, those connected with common law powers<sup>22</sup>. Other examples include the exercise of powers conferred upon shareholders by a corporate constitution<sup>23</sup>, powers conferred upon a trustee<sup>24</sup>, and contractual

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<sup>17</sup> (2018) 93 ALJR 145 at 161 [71]; 362 ALR 286 at 304.

<sup>18</sup> Nicholls, "Trustees and their Broader Community: Where Duty, Morality and Ethics Converge" (1996) 70 *Australian Law Journal* 205 at 211.

<sup>19</sup> See *Corporations Act 2001* (Cth), s 181(b); *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 289-90.

<sup>20</sup> *R v Byrnes* (1995) 183 CLR 501 at 515. See also *Angas Law Services Pty Ltd (In liq) v Carabelas* (2005) 226 CLR 507 at 531 [65]; *Australian Securities & Investments Commission v Lewski* (2018) 93 ALJR 145 at 161-162 [75]; 362 ALR 286 at 305.

<sup>21</sup> *Thompson v Randwick Municipal Council* (1950) 81 CLR 87 at 105-106.

<sup>22</sup> *R (on the Application of Miller) v The Prime Minister* [2019] UKSC 41 at [30], [58], [61].

<sup>23</sup> *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 438. See also *SGH Ltd (formerly known as Suncorp Building Society Ltd) v Commissioner of Taxation* (2002) 210 CLR 51 at 71-72 [29].

<sup>24</sup> *Mercanti v Mercanti* (2016) 50 WAR 495 at 541 [228], 544 [240]-[245]. See also *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 209; *Edge v Pension Ombudsman* [1998] Ch 512 at 535.

powers.<sup>25</sup> This brings me to the second point of this paper. That is how corporate purposes can be identified and what they mean.

## 2. How can corporate purposes be identified and what do they mean?

I turn then to the question of how corporate purpose is to be identified and the consequences of the approach taken by the law. I will consider this in four parts. First, I will explain the meaning of corporate purpose and its relationship with attribution generally. Secondly, I will explain how rules of interpretation and construction apply in the identification and application of corporate purpose. Thirdly, I will explain how those rules operate where there is no clear or express statement of purpose. Finally, I will consider the consequence of this approach for shareholder primacy theory and the notion of the corporation as a vehicle solely for the pursuit of profit.

### (a) *Corporate purpose and attribution*

When we speak of the purpose of a natural person we invariably mean the person's subjective reason for acting. But a corporation is not a natural person with a real will and life. But nor is it a fiction. A fiction, as Jeremy Bentham explained, involves a "wilful falsehood".<sup>26</sup> It is a conscious deeming of something to be that which it is not.<sup>27</sup> A corporation is not a fiction because it is not deemed to be a natural person with real, subjective intentions and purposes. Rather, it is a construct, just like a Parliament, or a community, or even a sports team.

We can attribute outcomes to the construct of a corporation, just as we attribute outcomes to a Parliament, a sports team, or a community. We can say "Parliament passed a new law concerning the environment" or, perhaps less likely, "the Fremantle Dockers scored a record number of goals and won the football game", and "the astonished community came together and celebrated". So too, we can say "the corporation entered an agreement" or "the corporation polluted the environment". The difference between a construct as a purposeful actor and a natural person as a purposeful actor is that the acts *and* the purposes of the construct are both objective whereas a natural person's acts are objective but purposes are subjective.<sup>28</sup>

Let me illustrate by reference to Parliament. We might say that Parliament passed a law concerning the environment with the purpose of reducing pollution. That statement relies upon the objective acts of voting in each House of Parliament but it does not rely upon the subjective views of the Parliamentarians. The statement could be made even if every member of Parliament testified that they had not read the Bill and only voted in favour of it because that was what their party had told them to do. In each case involving acts by a construct, whether the construct be a Parliament, a community, a sporting team or a corporation, we therefore require rules for the attribution of acts and purposes. As Lord Hoffmann said in

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<sup>25</sup> See e.g. *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203 at 217 [72]; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 368; *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at 1669 [18].

<sup>26</sup> Bentham, "A Fragment on Government" in Bowring (ed), *The Works of Jeremy Bentham* (1843) vol 1 at 243.

<sup>27</sup> Burton, "Introduction to the Study of Bentham's Works" in in Bowring (ed), *The Works of Jeremy Bentham* (1843) vol 1 at 41.

<sup>28</sup> *Unions NSW v New South Wales* (2019) 93 ALJR 166 at 200 [169]; 363 ALR 1 at 45.

*Meridian Global Funds Management Asia Ltd v Securities Commission*<sup>29</sup>, "[t]here is in fact no such thing as the company as such, no *ding an sich*, only the applicable rules. To say that a company cannot do something means only that there is no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company."

The rules of attribution will not always be found in a single written source. Consider a sporting example. Some of the rules of attribution for an Australian Rules Football game will be written down. With various exceptions, the Fremantle Dockers will score a goal if a player kicks the ball between the two centre posts. Other rules of attribution will be implied, often as a result of background social assumptions. Also giving the example of a sporting team, John Finnis explained the implied attribution of a purpose of a sporting team to win the game:<sup>30</sup>

"The purpose of the team is to win. Individual members have many other purposes, some, at times, more or less sharply at odds with winning. To understand the game as a social act, one must bear in mind the social purpose, and not be distracted by the irrelevant aspects of the individual players' purposes. Conceivably, every member of the team, for personal reasons, may secretly wish to lose the game (without being too obvious about it). Even so, the social act of the team's play retains its purpose: to win."

Likewise, a corporation may have written rules that govern the attribution of acts and purposes to it. As to acts, the corporate constitution might provide which officers have actual authority to act. As to purposes, it might contain an express statement of its purposes. Implications can also be made. The social and corporate context of the constitution might require it to be interpreted to provide implied authority for an officer to act in a particular way. Upon reading the constitution as a whole, in light of its social context, a purpose might also be implied. The ultimate task in determining the rules for attribution of objects of the company is the same as the task for determining the rules of attribution of acts. It is a task that depends upon the process of interpretation. This is particularly important in non-routine cases. Again, as Lord Hoffmann said in *Meridian Global Funds Management Asia Ltd v Securities Commission*<sup>31</sup>, in cases where a special rule of attribution is required it "is always a matter of interpretation ... One finds the answer to this question by applying the usual canons of interpretation".

***(b) The application of rules of interpretation to identify purpose***

As with the interpretation of any written document,<sup>32</sup> and in particular a contract,<sup>33</sup> the task of identifying corporate purpose involves reading the text in its context. The text is read as a reasonable reader would understand the words in light of the purpose of the notional, that is constructed, speaker. The reasonable reader has all the background knowledge reasonably

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<sup>29</sup> [1995] 2 AC 500 at 507.

<sup>30</sup> Finnis, *Intention & Identity* (2011) at 87.

<sup>31</sup> [1995] 2 AC 500 at 506-507.

<sup>32</sup> *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at 1993 [16].

<sup>33</sup> *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640-641 at 656 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117 [49]-[50].

available to a person in that position.<sup>34</sup> By s 140 of the Corporations Act, a corporation's constitution is a contract between the company and the members, the company and each officer, and the members as between themselves. Since the statutory abolition of the ultra vires doctrine, a corporate constitution should be interpreted in a manner akin to the interpretation of a commercial contract.<sup>35</sup> In the interpretation of commercial contracts, the meaning of the words are determined by reference to what a reasonable businessperson in the position of the parties would understand them to mean.<sup>36</sup> Generally speaking, extraneous facts are admissible to interpret a contract if they could reasonably be known by a reasonable businessperson in the position of the parties at the time the instrument is created.

Although the general principles of contract interpretation apply generally to interpretation of a corporate constitution, the addressee of the constitution is not the reasonable businessperson in the position of the parties. Instead, it is anyone who wishes to inspect the constitution, including those who wish to subscribe, both immediately and in the future. Hence, the consideration of extrinsic circumstances is more constrained than by reference to all those matters which a reasonable businessperson in the position of the parties to a contract would be expected to know.<sup>37</sup> In *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd*<sup>38</sup> a Full Court of the Federal Court of Australia held that it was permissible for the trial judge to have had regard to a superseded version of the company's articles, because they were public documents readily ascertainable by third parties<sup>39</sup>, and a majority held it was permissible to have regard to the materials provided to the general meeting that voted to amend the articles that were in the nature of explanatory materials regarding the amendments,<sup>40</sup> due to the small and stable shareholder group. For listed public companies, examples of documents that could provide evidence of purpose as admissible extrinsic sources will include explanatory statements where a constitutional change is proposed as part of the business of a members' meeting and a prospectus disclosure which describes the purpose for which capital is raised.

The nature of the corporation and its business can also be an admissible extrinsic circumstance as a notorious fact even if it is not expressed in the text of the constitution. For instance, if a state owned company provides essential services such as utilities or banking,

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**34** *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at 1993 [16]. See also *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 at 698-699; *Byrnes v Kendle* (2011) 243 CLR 253 at 284 [98], citing *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at 1112 [14].

**35** *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1 at 13 [55], 25 [114].

**36** *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [47].

**37** *Attorney-General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at 1998 [36]. See also *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 at 698-699; *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1 at 7 [24]; *HNA Irish Nominee Ltd v Kinghorn* (2010) 78 ACSR 553 at 563 [42]; *Donaldson v Natural Springs Australia Ltd* [2015] FCA 498 at [150]; *Coeur De Lion Investments Pty Ltd v President's Club Ltd* [2017] QCA 309 at [34]-[35].

**38** (2006) 156 FCR 1.

**39** *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1 at 15 [66], 28 [125], 51 [256].

**40** *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1 at 28 [126], 51 [257]-[258].

these facts might tend toward interpretations of the constitution that invoke purposes other than merely profitability.

***(c) Determining purpose where there is no clear or express statement***

The level of generality at which the purpose is expressed will be important<sup>41</sup>. For example, if the purpose of the company is expressed only as "mining operations" then all manner of ways to extract resources may be permissible. If the purpose of the company is expressed as "gold mining", the field narrows. If the purpose of the company is gold mining in the State of Western Australia, the field narrows even further.

A modern trend, lamented by Lord Wrenbury in 1918 in *Cotman v Brougham*,<sup>42</sup> is the expression of purpose in broad terms, or, as in *Cotman v Brougham* itself, not at all. In such cases the lack of any expressed purpose might be accompanied by a very broad conferral of power on the company or its officers to manage and transact company business. If corporate purpose is expressed at a high level of generality, in an open textured way, or perhaps not expressed at all then purpose must be implied. At a very high level of generality the essential purpose might be nothing more than for the company to be a vehicle for the conduct of business. However, although that essential purpose might not change, it might become constrained over time in its application. For instance, assume that a corporation's constitution has no textual indicators as to its purpose and only an ABN number for a name. Assume further that it confers on the directors all of the powers necessary to carry out the business of the company. That is a wide, open textured phrase. What is the business of that company? More importantly, what is *not* the business of the company? Some light might be shed by the notorious historical facts leading up to the incorporation:<sup>43</sup> for instance what was the business immediately prior to and immediately after its inception? But there might be no prior business. The purpose of the company, to transact business, will remain but it is possible that over time the company might come to apply that purpose in a narrower way. As a matter of law, it could then be argued that the duties of directors is not merely to transact business but to do so according to the narrower field of conduct of the company.

A similar approach applies after statutes are interpreted. This is what is meant by the well accepted principle that statutes are "always speaking". So, as was said in *The Queen v Aubrey*, the application of the broad words "to inflict harm" could alter over time by reference to subsequent developments in medical knowledge.<sup>44</sup> So too, "[s]ocial, economic and political matters ... are increasingly integrated"<sup>45</sup> into the determination of contemporary applications of the essential meaning, such that "changes in our understanding of the natural world, technological changes, changes in social standards ... and changes in social attitudes"<sup>46</sup>

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<sup>41</sup> *R v A2* [2019] HCA 35 at [171].

<sup>42</sup> *Cotman v Brougham* [1918] AC 514 at 523.

<sup>43</sup> See, e.g. *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at 696 [10] quoting *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 822; *R v G* [2004] 1 AC 1034 at 1054 [29]; *Re Lambie* (2018) 263 CLR 601 at 612-615; *R v A2* [2019] HCA 35 at [172]-[173].

<sup>44</sup> (2017) 260 CLR 305 at 320 [24].

<sup>45</sup> *Spence v Queensland* (2019) 367 ALR 587 at 666 [292].

<sup>46</sup> *Owens v Owens* [2017] 4 WLR 74 at 11 [39]. See also, *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at 695 [9]; *R v Gee* (2003) 212 CLR 230 at 241 [7]; *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR



may have bearing on the field of application of a widely expressed provision. So too, these matters can be relevant to the field of application of a widely expressed corporate purpose as the company applies that purpose over time.

***(d) Shareholder primacy theory and the corporation as a vehicle for the pursuit of profit***

There is a strong line of Australian authority that appears to provide strong support for the shareholder primacy theory. For instance, there are regular statements equating the best interests of the company with the best interests of the shareholders<sup>47</sup>, unless a company is insolvent, in which case creditors' interests may also be considered<sup>48</sup>. These statements originally appeared in authorities relating to protection of minority interests from acts of the majority. Supplanted into the sphere of directors' duties, the duty to act in the best interests of the company is often applied, in shorthand, to a duty to act in the best interests in of shareholders.

However, the express words of s 181 provide that the directors must discharge their duties "in good faith in the best interests *of the corporation*". The directors' statutory and general law duties are expressed as owed to the company and not expressed as owed to the shareholders or creditors<sup>49</sup> unless there is some special circumstance which creates fiduciary relationship between a director and shareholder. It is true that, as Lord Evershed MR explained, the company as a whole usually describes "the corporators", that is the shareholders<sup>50</sup> "as a general body"<sup>51</sup>. It is also true that the interests of the company and the shareholders generally intersect. There is usually broad concurrence between the financial interests of the shareholders and the company.<sup>52</sup> But, the ultimate statutory and equitable command has always been for the duties of the directors to *the corporation*.

One mantra for the shareholder primacy theory is Milton Friedman's classic statement that "... 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*

113 at 145 [138]-[142]; *Roodal v Trinidad* [2005] 1 AC 328 at 341 [13]; *R v A2* [2019] HCA 35 at [143]-[144], [169]-[170].

<sup>47</sup> See, *Australian Metropolitan Life Assurance Company Ltd v Ure* (1923) 33 CLR 199 at 217; *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 512; *New South Wales Rugby League v Wayde* (1985) 1 NSWLR 86 at 96; *Kinsela v Russell Kinsela Pty Ltd (In liq)* (1986) 4 NSWLR 722 at 730; *Maher v Honeysett & Maher Electrical Contractors Pty Ltd* [2005] NSWSC 859 at [44], quoted in *Chahwan v Euphoric Pty Ltd* (2008) 245 ALR 780; *Huang v Wang* (2016) 114 ACSR 586 at 597 [59].

<sup>48</sup> *Kinsela v Russell Kinsela Pty Ltd (In liq)* (1986) 4 NSWLR 722 at 730; *Walker v Wimborne* (1976) 137 CLR 1 at 7.

<sup>49</sup> *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1 at 533 [4389], 540 [4418]. See also *Bell v Lever Bros Ltd* [1932] AC 161 at 228; *Esplanade Developments Ltd v Dinive Holdings Pty Ltd* [1980] WAR 151 at 157; *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 178-179.

<sup>50</sup> *Provident International Corporation v International Leasing Corporation Ltd* [1969] 1 NSWLR 424 at 437.

<sup>51</sup> *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 281

<sup>52</sup> *Bell Group Ltd (in liq) v Westpac Banking Corporation [No 9]* (2008) 39 WAR 1 at 534 [4393]; *Ashburton Oil NL v Alpha Minerals NL* (1971) 123 CLR 614 at 620.

*game*, which is to say, engages in open and free competition without deception or fraud."<sup>53</sup> The words that I have emphasised reveal an immediate qualification upon the notion that the duty to the corporation can always be equated with acting in the financial interests of its shareholders. However, it might be doubted whether the rules of the game involve only open and free competition without deception or fraud. In *ASIC v Cassimatis (No 8)*,<sup>54</sup> I said that a corporation has an interest in the lawful or legitimate pursuit of its purposes. One reason for this is that a corporation's reputation could be at stake when its business is not conducted lawfully. But more fundamentally, it is a basal assumption that a company will act lawfully, just as natural persons are expected to act lawfully. As I said in *Cassimatis*, it is hard to image an example "where it could be in a corporation's interests for the corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable and was reasonably considered by the director to be virtually undetectable".<sup>55</sup> Put in terms of interpretation of the corporation's constitution, a reasonable reader of the constitution, against a background of expectations as to how businesses operate and ought to operate, will understand that the corporation will act lawfully. Indeed, without other contextual factors, this assumption or expectation of lawful activity may be the only universal minimum content of corporate purpose.

Even putting to one side the additional implication of legality of action, the Chicago school conception of maximising profits for shareholders is itself dependent upon an identification of the purpose of the corporation. For instance, a corporation which operates for the purpose only of investing in very conservative investments will maximise profits in a different universe from a corporation which operates for the purpose of engaging in a highly risky venture. It is questionable whether a pension fund, established for the express purpose of providing a small but highly stable income, could lawfully invest exclusively in high risk endeavours. But it is also questionable whether a corporation established as an aggressive hedge fund with a goal of large profits and substantial risks could lawfully invest exclusively in government bonds.<sup>56</sup> Similarly, the applied purpose for a corporation described by Professor Mayer as a "sin stock" cannot, by its very nature and against the backdrop of reasonable expectations, be expected to pursue the same purposes as, for example, a not-for-profit corporation which promotes ethics or altruism as its core function.

There is a further problem with acceptance of shareholder primacy in the form of a free-standing duty to consider the interests of shareholders or stakeholders. A duty to consider the "interests of shareholders" would require either a determination of the needs of the shareholders as a group, or the imputation of a common purpose shared amongst them all. Yet shareholders may have a variety of idiosyncratic purposes.<sup>57</sup> Further, in a listed company, the shareholder group composition is ever changing. Even an attempt to identify a lowest common denominator of a return on investment runs into difficulties of the extent of the desired return, whether the shareholders desire a steady dividend income or long or short term growth.

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<sup>53</sup> Friedman, *Capitalism and Freedom* (1962) at 133 (emphasis added).

<sup>54</sup> *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209.

<sup>55</sup> *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 at 301 [482].

<sup>56</sup> *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75 at 127 [269]-[271]. See also *Speight v Gaunt* (1883) 9 App Cas 1 at 19; *Learoyd v Whiteley* (1887) 12 App Cas 727 at 733; *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 at 1282.

<sup>57</sup> *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1 at 534 [4394].

The only coherent general measure of objective shareholder expectation is to consider what a reasonable shareholder expects of the directors. And the answer to that question objectively must be that a reasonable shareholder expects the directors to act to fulfil the purposes of the company, as determined by the corporate constitution. Put another way, "[a] careful prospective shareholder...may wish to know, before he subscribes for his shares, to what potential financial liabilities in relation to the company he will be exposed. For this purpose, he will be entitled to direct his attention to the memorandum and articles of association of the company as registered."<sup>58</sup> Once again, we are back with an interpretation of the purpose of the company from its constitution.

By favouring the fulfilment of stated and objectively construed purposes over the subjective goals of a fluid group of members, directors and shareholders alike gain certainty. Directors have defined boundaries to best contemplate how they are expected to act and shareholders are under no misapprehension as to how their capital will be applied. In that sense, understood in light of the statutory, common law and equitable duties of the directors to the company, there is consent from all involved to pursue the stated purposes and an understanding that extraneous or inconsistent ends will not be pursued.

## Conclusion

In conclusion, let me summarise these themes and draw them back to the paper presented by Professor Mayer.

In an article more than 20 years ago that derived from a paper given in Australia exploring these themes in the context of trust purposes, Lord Nicholls of Birkenhead said that "[i]f the trust was created to confer financial benefits on individuals, a decision not to maximise those financial benefits but to promote moral objectives upon which widely differing views are held is, by definition, not to advance the purposes of the trust and, hence, is not in the best interests of the beneficiaries of the trust".<sup>59</sup> As was typical of his Lordship, this apparent endorsement of the theory of shareholder primacy carried careful internal qualifications. The trust must be one whose purpose is only to confer financial benefits. And the moral objectives to which he referred were those upon which widely differing views are held. This apparent endorsement of shareholder primacy leaves open the vast array of circumstances where profit is not the only purpose of the corporation and where moral objectives are not widely disputed or, even more clearly, where they have been instantiated into legal duties.

One battleground in the present state of the law therefore lies in the identification and application of corporate purpose in these many cases where profit is not the only purpose. However, the ability of corporations to choose whether and how to express their purposes means that while purpose is important, it is often difficult to discern. Whether or not one agrees with the Academy's proposal that purposes be expressly stated, and have components of "producing profitable solutions" and "not profiting from harm", the proposal has the

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<sup>58</sup> *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 at 699. See also *Cotman v Brougham* [1918] AC 514 at 522.

<sup>59</sup> Nicholls, "Trustees and their Broader Community: Where Duty, Morality and Ethics Converge" (1996) 70 *Australian Law Journal* 205 at 211.

potential to create more objectively discernible and certain norms of conduct if its consequence were to be that companies placed greater focus upon a more precise definition of their objects. The express provision of corporate purposes can provide for increased certainty. Directors would have greater clarity in the application of the rule that the exercise of a power can be authorised for purposes in one company that might ordinarily be seen as extraneous or otherwise impermissible in another.<sup>60</sup> If a company is to be strictly a profit generating vehicle for the benefit of its members by lawful means, then, subject to any additional minimum content envisaged by the British Academy, that could be provided in the constitution. Equally, a constitution may provide that social purposes may be pursued at the cost of profitability. Any perceived or actual lack of alignment between corporate and social purpose will be obvious to all participants, and if considered undesirable, the misalignment can be addressed through political and social responses.

Professor Mayer also proposes that corporate purposes must express how a company will profit by problem solving and how it will not create problems in order to profit. To the extent that this proposal is envisaged as a legislative minimum, entrenching some universal minimum content to corporate purpose, then the extent of the restriction either in the purpose or in its application might depend upon the level of abstraction at which the purpose is expressed. In any event, there would, rightly, remain a role for implication. And, most fundamentally, principles of interpretation will continue to be central to ascertaining corporate purpose and thus to shaping the conduct of the human actors.

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<sup>60</sup> *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 291.