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Dear Ms Fox

I'm writing in my capacity as an independent scholar to comment on the discussion paper "Shareholder Primacy: Is There a Need for Change? I wish to make four substantive comments.

Four substantive comments

First, I commend the Institute for publishing a lucidly expressed, informative and solidly grounded paper.

Second, the paper correctly makes the point that the influence of corporate activity on the environment is a matter of contemporary policy concern. However, not one of the identified participants in the roundtables appears to have participated in a science-based role. This is not to doubt their depth of expertise in other fields, or to allege that none have been trained in science. It is simply to note that environmental governance and the reasons for the invisibility of environmental distress have been subjects well canvassed within the scientific literature. The roundtables would no doubt have benefited from input from scholars who are deeply familiar with this literature and with the crisis that humanity is facing through loss of its life support systems.

Third, the paper presents four "different approaches to ensuring stakeholder interests are taken into account" (page 18). Two approaches require changes to corporations law and two do not. This same four-part classification appears again on page 26.

This depiction of the four approaches as alternatives is incorrect. Using the classification on page 26, option 4 applies by default regardless of any of the other options. Governments always have and always will have a role in protecting the interests of stakeholders: that is the function of government. This role can be fulfilled by legislation or by other "forms of social policy" including taxation, grants, advocacy, subsidies and a wide range of other tools. The paper in reality presents just three options: no change to corporations law (which equates to option 4); a permissive clause or a directive clause.

My fourth point is that the paper misses an opportunity to differentiate between the property-creating power of government (by which corporations are registered); and the regulatory power (by which corporations' activities are moderated after they are created). This distinction does not in any way invalidate the main themes presented in the paper;

instead, it strengthens the paper's argument that it is within the power of governments to alter the corporations law by which companies are permitted to come into existence.

I have explained this argument in more detail in a scholarly paper, copy attached. This paper argues that, given that governments' create corporations, their permission can be conditional. This is the simplest and most direct method of controlling corporations' behaviour. A breach of a condition of existence renders the corporation liable to de-registration, a more powerful penalty than third-party regulation by a range of other government entities that cannot influence the existence of the corporation.

This argument is entirely consistent with options 2 or 3 - a permissive clause or an explicit clause. It simply bolsters the logical justification for either of these options.

The article attached has been submitted to a scholarly journal and therefore is not in the public domain. I request that you hold this article confidential for the time being, even if you publish this covering letter.

Responses to questions

Option one

I do not agree with this option. First, the scale of corporations' misdeeds is too great and the need for remedy too urgent to allow concern about stakeholders to trickle through the corporate sector at its present rate. The Friedman view that the public interest is served if shareholders are served and if the business is simply allowed to create profits is comprehensively invalid and merely reflects the amoral perspective of orthodox economics. No ethical code, from the Hebrew Scriptures or the Greeks onwards, holds that traders have no obligation to society other than to make money for themselves.

Further, the view that concern for stakeholders is in the long-term consistent with shareholder primacy (therefore the problem will take care of itself) is in effect the do nothing option. Although cases can be cited where generous and ethical behaviour has fed into improve profitability, there is no obvious reason why this must always be the case - in other words, there is no normative basis for this correlation and no theoretical justification. This in effect reflects the current weakness of "corporate social responsibility" - it lacks a normative foundation and depends upon the goodwill and ethics of key leaders within the company.

Option two

This option is legitimate but is weak and will scarcely improve on the status quo. It places the onus upon directors to reconcile conflicting pressures from a range of types of stakeholder. Companies are not well positioned to make these broad economic, social and environmental judgements in the public interest, as Mansell has argued in the paper referenced. While the permitted ethical behaviour remains optional, companies will be tempted to default to the simplest and most straightforward interpretation, which is shareholder primacy.

Option three

This is the preferred option. It makes explicit the original intention of corporations law, that it granted the right for corporations to exist, for the purpose of providing goods and services to the community. Only a clause as strong as this will rein in the activities of

aggressive international corporations. It would legitimise a more detailed explication of ethical behaviour including environmental responsibility.

In the short term, it could lead to a flight of capital as companies de-registered in Australia and re-registered in countries with less onerous requirements for registration. This is likely to be a short-term problem only, as the precedent could propagate through other countries. It is a threat that the big companies in particular repeatedly make to governments when confronted with proposals to increase taxes or statutory obligations.

I recommend that the Institute urge governments to call corporations' bluff on this aspect: given that a substantial proportion of the multinationals avoid tax on the profits they make in Australia (as contemporary revelations by investigative journalist have shown), they are in no position to lecture governments and the nation would be financially better off without them.

Option four

As explained above, this is not really an alternative to the other three options but applies anyway. It is unnecessary in this response to detail a range of regulatory and non-regulatory tools as the Discussion Paper is not the vehicle by which they will be introduced.

I commend the Institute for providing the public with the opportunity to comment on this well-researched and progressive paper.

Yours faithfully



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Mansell, S.F. 2013. *Capitalism, Corporations and the Social Contract: a Critique of Stakeholder Theory*. Cambridge: Cambridge University Press.

Allocation or Regulation: Reasserting Society's Control Over Corporations Through Tenure

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Abstract Corporations are a social and legal construct. They cannot exist without limited liability and other protections deemed necessary for modern commercial activity. The original justification for corporations was to supply goods and services at a scale beyond local enterprise. This notion of serving the community has been lost and corporations' duty is now seen as increasing shareholder value, which can reduce to funnelling wealth from society to the investor class. Given this modern business orthodoxy, in the absence of statutory directions otherwise, a company is obliged to prioritise commercial forces over ethical ones. Corporate social responsibility becomes an appeal to morality and is doomed to fail. It is open to the legislature to adjust the statutory regime. Serving the public interest can be made a purpose or an objective. By analogy with land law, the simplicity of embedding responsibilities as a condition of registration is contrasted with third-party regulation.

Keywords corporation as property; public interest; conditions of registration; corporate purpose, regulation.

BACKGROUND AND RATIONALE

Purpose and scope of this analysis

The purpose of this research is to discover a normative foundation for “corporate social responsibility” and so derive a method of embedding this outlook into business orthodoxy. It was triggered by twin observations: first, that business corporations can be detrimental to the well-being of communities; and second, that the literature does not explain how, under the conventional wisdom of shareholder primacy, a company can justify any public-spirited activity that does not directly or indirectly contribute to the organization's profitability.

Corporate social responsibility (CSR) embraces the economic, social and environmental responsibilities of limited liability corporations, including but extending beyond their legal obligations. “Legal obligations” embraces the minimum standard required by the common law and statute law.

In this paper we define stakeholders broadly to include all of humanity, as would seem necessary given the global constituency of corporations (climate change is only one manifestation but

sufficient to prove the point). We therefore contrast two models, *investor primacy* and *stakeholder primacy*. The term “public interest” loosely approximates “stakeholder primacy”.

Australian corporations law

In framing the Constitution which took effect on 1 January 1901, the six colonies ceded some powers to the new Commonwealth. Responsibility for real property, management of natural resources and community regulation lies with the States. Responsibility for creating and regulating corporations now lies with the Commonwealth, after the States “referred” (delegated) their separate powers, resulting in the national *Corporations Act 2001*.

The Act at section 124 grants to a company the legal capacity and power of an individual. Section 180 shields directors and officers from having to justify their actions at common law by deeming them to have acted with diligence, if their judgements are made in good faith for a proper purpose and avoid conflicts of interest. Section 181 obliges a director or officer to discharge their duties “in good faith in the best interests of the corporation”. Notably, this does not specify “the best interests of the *shareholders*”, let alone the interests of other stakeholders. On the other hand, nowhere is there any suggestion that the interests of the corporation equate to creating wealth for shareholders.

CSR has not been mainstreamed into the culture of business in Australia. The prevailing mindset is that corporations’ primary duty is to serve the financial interests of the shareholders, with ethical and environmentally responsible behaviour being a means to that end. All manner of corporate activities are viewed through the lens of “Will this increase shareholder value?” Business leader Sam Walsh’s claim “It is all about shareholder value... That is why we exist” (Freed 2013) is typical.

Corporate purpose and public good

Many authors have noted that the corporate form was originally conceived as a vehicle for furthering the public interest (Hartmann 2002, Rowe 1995). Rowe noted that the original corporations were regulatory agencies, such as local governments. This concept would nowadays be regarded as any meeting of business executives as laughable. The major purpose of any business is taken to be to create profit, although there are exceptions: the CSR movement is making its mark. Some major corporations include commitments to achieving public and environmental benefits in their corporate purpose. Burson-Marsteller & IMD (2013: 4) observed that “business leaders are rapidly realising that companies cannot do business on a failing planet” but also concede that “few are shifting away from the sole short-term profit focused dictated by capital markets...”.

Several trends have exacerbated the malign influence of corporations. Through globalization, corporations can shift their operations around the world without any loyalty to the state that incorporates them. Institutional investors have become short-term speculators, rather than committed long-term investors (Strine 2010: 5-6).

It is unnecessary to detail the ills for which corporations can nowadays be blamed. Suffice to mention Enron, Ok Tedi and Freeport, Bhopal, James Hardie’s continuing sale of asbestos decades after its hazardous nature ought to have been known and the Murdoch press’s proselytising for war in Iraq and against action on global warming. That the first four names are sufficient by themselves

to describe the ills is testament to the scale of the damage caused. Kelly (2001) observed that much of the management literature dismisses sins of this kind as aberrant examples of good corporations making mistakes. If indeed these ills are aberrations, remedies lie in promulgation of ethics, training and enforcement of regulations. But if the malign effects are systemic, only a systemic remedy will be adequate.

REVIEW AND ANALYSIS OF THE LITERATURE

A review of scholarly and semi-popular literature has left the authors unconvinced that corporate social responsibility at present has a sufficiently normative foundation. The notion that investors' interests should reign supreme became widely accepted only in the 1990s although the idea "began percolating at the University of Chicago and on a few other campuses in the 1960s and 1970s..." (Fox 2013). No doubt Milton Friedman's famous essay articulating this outlook had influence beyond its scholarly merit.

Mansell (2013) argues that the corporation has no mandate to reconcile the competing claims of diverse stakeholders – nothing comparable to the mandate enjoyed by an elected government. Given that the interests of stakeholders (employees, suppliers, consumers, governments and so on) are disparate; and given that corporations are structured to be accountable to shareholders, there is no way around this problem. Also, he cannot find a theoretical justification for stakeholder theory: assertions by scholars that corporations "ought" to have responsibility to their stakeholders are insufficient. Stakeholder theory politicises the corporation. We find this argument persuasive.

Mansell accepts "fairness" as normative, deriving from the ancient philosophers and particularly Kant, but this doesn't really solve the problem, as it applies to individuals and one cannot quickly jump across to the corporate form with its powerful accountability to shareholders without some better theoretical linkage. He concludes that while Friedman may not be correct in claiming that the obligations of business are limited to creating profitable economic activity, stakeholder theory in its then-current condition does not overturn investor primacy.

In one sense, Mansell's dismissal of stakeholder primacy shares common ground with Stout's (2012, 2013) dismissal of investor primacy: the corporation has a life of its own independently of both sectors. Stout argued that once a corporation is established, it is no longer merely an assembly of individual shareholders. In law at least, other classes of stakeholder have prior or preferential legal claims on the assets of the corporation: employees, creditors and taxing authorities, so these parties must have a commensurably large stake in the satisfactory conduct of the corporation.

The obligation upon the managers to act in the interest of the corporation is central to the concept of a corporation and cannot be easily abandoned without doing violence to the entire structure of modern business. But there is an ethical vacuum unless "acting in the interest of the corporation" is defined to include CSR and to subordinate raw profit-seeking to some higher purpose. At present, in Australian law, the broader responsibilities are undefined and highly contestable.

Nothing in this paper suggests that attempts to articulate codes of practice for business based upon morality or good citizenship are weak or relativist. Their vulnerability lies in being pitted against the investor primacy viewpoint. If managers are convinced that they are obligated to create value for

shareholders, ethics becomes a variable means and loses its normative status. This situation is amenable to remedy. Ethics will always be voluntary and aspirational; to be obligatory, it must by definition be given legal force.

LAND TENURE AS A MODEL FOR GIVING STATUTORY EFFECT TO CSR

The corporation as property

Most commentary in this field portrays the role of the state as that of a “regulator” who imposes restrictions in the public interest upon a corporation which is otherwise seen as autonomous. Post-registration restrictions take the form of, for example, pollution and environmental controls, workplace health and safety standards, town planning and taxation. They are commonly described by the pejorative term “regulatory burden”. So long as a corporation pays its taxes, fulfils the letter of its permit and observes the statutory procedures, it can claim that it has fulfilled its public obligations. It is not difficult to see the shortcomings of this model. Regulations always impose a minimum standard, not an optimum.

This conceptualisation overlooks the role of the state as the creator of the form of property known as a corporation. The primary statutory body which administers the corporations regime is the Australian Securities and Investment Commission (ASIC) which universally is described in business and public commentary as the “regulator”. Yet ASIC also has the role of “allocator” or creator of companies. A company has no rights or responsibilities at law until it is registered. The act of registration creates the entity which then has substantive societal and commercial value. There is no charge for creating this asset, apart from an administrative fee.

That a corporation is a form of property is stated by a number of authors such as Mansell (2013). To examine the validity of this conception, we have turned to the law relating to property as published by the Department of Lands and its successors in the State of Queensland. This clearly explains that the “state” has several different dimensions, coercive and non-coercive. By disaggregating them it is possible to find a pathway for normalising CSR.

State land administration in Queensland

In various publications during the 1990s and 2000s (for example, DNRM 2002) , the Department has presented the following model of property.

Statutory processes

After the “state” took possession of all property in the colony, it made land and mineral resources available for development according to this sequence:

- the state *allocates* the property to a potential user, by *proprietary* mechanisms such as leasehold and freehold titles or mineral leases. They are contractual in nature and permit access, occupation or possession. They are always conditional. They also alter the legal “interest” in the land and allow their conditional right of possession to be transferred from one person to another. This power derives from the state’s assumed original ownership;

- a public authority *regulates* the development and use of the property, through *regulatory* mechanisms such as planning schemes and environmental licensing. They are coercive in nature. This power derives from the state's authority to legislate on behalf of its people;

Non-statutory processes

- the property-holder *manages* it to achieve personal goals, by voluntary *custodial* mechanisms, such as works and maintenance. This power derives from the title or from common law after title is granted;
- public authorities *facilitate development* on private property by *development* mechanisms, such as joint ventures to build dams and construct infrastructure. This power derives from their statutory responsibilities or from contract law;
- public authorities (along with other groups and individuals) *assist* the property-holder to adopt desired practices, by voluntary *advisory* mechanisms such as extension or incentives for energy efficiency. No specific powers are needed to authorise this activity.

In summary, so long as they do not exceed the proprietorial rights they enjoy as holders of the resource, property-holders are at liberty to use and manage, within the framework of the imposed regulatory restrictions and any contractual obligations they take on.

The above terms of course are capable of several meanings. "Allocation" here means transfer of ownership and does not mean quite the same thing as in the phrase "allocation of scarce resources" used in economics to refer to market-mediated exchange of financial as well as physical resources. "Regulation" is often loosely applied to any statutory activity by governments. Some mechanisms cross the boundaries. For example, observance of a voluntary industry code of management practice can help a property-holder to demonstrate that some regulatory obligation has been satisfied.

Despite these ambiguities, this classification is explanatory in three main ways: it differentiates the range of mechanisms on the basis of their inherent legal characteristics and origins; it explains property-holders' prerogatives; and it differentiates the mechanisms that property-holders can apply by themselves from those that need governmental action.

The reason why CSR is currently underpowered now stands in sunlight: *the state can but does not set conditions of use when it creates the form of property known as a corporation.* The (national) corporations law grants a corporation the right to trade with limited liability, unlimited life and power to transfer its shares – but at present declines to exercise its prerogative to set out economic, social or environmental obligations as a condition of registration.

There is no theoretical reason why the state should abdicate from this potential tool. Indeed, the tool of allocation has a number of advantages over the tool of post-facto regulation. First, it is direct and transparent and dates from the time of establishment of the property – it is not imposed retrospectively on a property-holder who is already conducting commercial activity. Second, it is a condition of existence and cannot be in tension with some prior assumed right. Third, contravention can justify forfeiture of the right of existence. Fourth, the conditions are administered by the body that creates the property and not by a different level of government.

Allocation would tacitly shift the onus back to the corporation to comply with the conditions of registration as distinct from post-facto regulation which in case of dispute places the onus upon the regulatory authority to prove malfeasance.

Withholding and withdrawal

For land, tenure-related mechanisms are direct and simple. The form and conditions of tenure specify at the outset the rights of the landholder and *withhold* those which remain with the State. Regulatory controls then moderate the landholder's rights by *withdrawing* those which would otherwise be associated with the respective form of tenure (Holmes 1994, 1996). It is more contentious to *withdraw* rights than to *withhold* them. This is a case for retaining tenure powers where re-assignment of a parcel in some different way at a future time could achieve a substantial public policy outcome.

Put somewhat loosely, leasehold or conditional freehold enables the State to set *positive* obligations by specifying the forms of development and use that are permissible or even mandatory; whereas regulatory controls usually set *negative* obligations by specifying activities that are prohibited.

Free market orientation

Contrary to first impressions, a tenure-based control is not coercive but more-or-less voluntary. A system based upon *voluntary* acceptance of *individually tailored contracts* spelling out *direct* and *transparent* mutual obligations in a landlord-tenant relationship is more closely aligned in its essence to the free-market approach lauded by business than a system of *government regulation* imposed by *third party* authorities afterwards.

In theory, such a system could dispense with a corpus of third-party social and environmental regulation, although in practice this will be difficult because responsibilities do not all lie in the same jurisdiction. In Australia, most social and environmental regulation lies with the States while corporations law lies with the Commonwealth. In the United States, most companies are incorporated by the States and some environmental obligations are federal. The mix will be different for each jurisdiction.

Property titles are or can be conditional

Leasehold titles are well understood as granting only circumscribed rights to occupation or possession. Yet even freehold titles (the most complete form of alienation from the state) are conditional, in all Australian States. When issuing a grant, the state retains the ownership of any minerals, petroleum, gas or (in Queensland since 1992) quarry materials and allocates them by a separate procedure, usually to different parties. Freehold land granted under the *Aboriginal Land Act 1991* cannot be sold by the owners. Early grants reserved indigenous timber for building ships and bridges. In other words, the conditions that the State may insert into any instrument of property can range from more or less none to extensive, with leasehold and freehold being broad categories upon a continuum.

Examination of some of the conditions that are routinely included in pastoral leases in Queensland gives a hint of the conditions that might be placed upon a corporation. These include a limitation on

purpose, a duty of care, an obligation to give information, a periodic review of performance and power to issue a remedial action notice if land is being used beyond its capabilities.

Philosophical origins of property

Modern Western conceptions of the nature of property can be traced to two English philosophers John Locke and Jeremy Bentham. Locke in 1690, arguing against the oppression implicit in the doctrine of the divine right of kings, proposed instead that men had been created as sovereign individuals with inherent, God-given rights to life, liberty and *property*. This philosophy gave birth to some profoundly influential currents of thought. It positioned government as an instrument to protect the property (and other) interests of individuals, not as a threat to them. It visualised property as an original, root entity, comparable with individual life and liberty as a basic right in the state of nature. Locke's model was adopted in 1789 in the French revolutionary *Declaration of the Rights of Man and the Citizen*.

Bentham in 1791 derided as “nonsense upon stilts” the Lockean notion that people enjoyed “natural rights” including property independently of the state. The only rights people possessed were those that the state chose to enforce. Property was the creation of the state.

History has not been kind to Locke's notion that *property* is a pre-existing right independently of civil law. The establishment of limited liability corporations showed that rights could originate through human agency. Although James Madison, a drafter of the US Constitution, personally was convinced that private property rights were a guarantee of civil liberties, the US founding fathers decided to omit reference to “property” as one of the inalienable rights of man endowed by the Creator (leaving “life, liberty and the pursuit of happiness”) on the grounds that property was legitimately alienable by the state.

In Australia, a constitutional monarchy, the authority of parliament to create, abandon, repossess or reconfigure property – or civil rights – reigns supreme, subject only to royal prerogative and the Constitution.

Applying the analogy

Davies and Naffine (2001: 69) observed that the corporation, “interestingly, is both person and property”. The privileges of personhood are well accepted but the implications of being seen as a form of property have escaped most commentators. Like real property, in a modern society a corporation is created upon registration by the state. If the state's active consent for this action is required, then logically the state must have a discretion to refuse. If it can refuse or approve, then logically it can place conditions upon its consent. If the statute is silent on this question, then the common law arguably would authorise the state to condition its consent. If the statute specifically prevents the state from conditioning its consent, then this can be changed.

DISCUSSION

Stakeholder theorists face two major difficulties in establishing normativity in practice. One is the surreal nature of normativity in principle, which has no absolutes in the manner of the arithmetic

absolutes of profit statements. The second is that investor primacy has taken root and has commanded the high ground. To dislodge this will require external power.

Legislation can overcome both difficulties. Legislation establishes what is normative in practice and supersedes or crystallises appeals to deeper ethical principles. Although there may be fierce debates while it is negotiated, after passage it subsumes those contests along with previous legislation and establishes a new frame of reference.

Within the Western tradition, it is possible to find a normative foundation for individual ethics, though it inevitably will remain somewhat generalised and abstract. Exhortations against dishonesty, deceit, theft, racial or religious discrimination and oppression of the powerless can be found in the wisdom of the ancients, the Ten Commandments, the Sermon on the Mount and professional codes of ethics. These mainly cover procedural fairness and conflict of interest rather than substantive policy questions, although many or most professional codes include an obligation to serve the public interest, an element which can extend beyond procedural fairness. These bind practitioners within their organization but may place the individuals in the invidious position of having to reconcile a public-spirited code on the one hand with the organization's imperatives on the other, if the organization is not under the same code.

This analysis seeks a model that will apply to the corporation as an entity and will transcend the personal morality of the individuals within it.

There is a straight-forward method of rendering any statement of business ethics or CSR as normative *in practice*: legislate for it. When government steps in and embeds a code of behaviour in statute or makes observance a condition of licensing or registration, the code becomes normative *pro tem* in that jurisdiction for all persons directly subject to it. A good deal of the literature examined on this subject consists of jurisdiction-specific pontification about where responsibilities and accountabilities for corporate behaviour currently lie. While useful for informing those contemplating change, once change is invoked, the platform for analysis has a new datum.

Significantly, after extensive public debate, the United Kingdom declined to embed corporate social responsibility into *Companies Act 2006* as a purpose of companies. It did require directors to have regard to six elements of CSR, but made them subordinate to the obligation “to promote the success of the company for the benefit of its members as a whole” (s.172).

Four fundamental premises

To construct a normative model, it will be helpful to first establish some normative principles on which an analysis can be anchored. Four are proposed here.

Corporations are creatures of the state

Wikipedia's pithy statement “Corporations exist as a product of the corporate law” neatly summarises reality. It is law that invests a corporation with limited liability enabling it to trade without the fear of enterprise-destroying claims for damages against its shareholders. It is law that specifies that ownership is subdividable and shares can be traded independently. It is law that grants rights comparable to those available to natural persons. It is law that legitimises business judgements

exercised in good faith. As there is no global government, every corporation is grounded in the statutory regime of its host nation and exists by the grace of that nation's government.

The implication of this premise is that governments can spell out civic obligations to business – in economic terms, articulate the bounds of the market.

It is in the public interest to establish corporations

Business straddles the boundary between private and public interest. In commercial businesses, after-tax profits are captured by private individuals and firms but the prospect of profit is an engine of economic progress. Every society depends upon profitable economic activity and it is in the public interest for firms to be profitable, subject to a number of qualifications. Large businesses bring economies of scale and harvest raw materials and services from a wide catchment. Business on anything larger than a local scale requires a corporate form.

Business requires a clear understanding of its rights and obligations

The extent to which businesses are expected to fulfil economic, social and environmental responsibilities beyond their minimum statutory obligations is unclear. The contemporary opacity of CSR allows some firms to escape with minimalist responsibilities and others to be thereby disadvantaged. Trust in business corporations is declining (in Australia at least) and this represents a serious reputational challenge for business. CSR that derives from the chairman's or chief executive officer's personal predilections is fragile. Further, well-intentioned directors and executives need to be protected from ruthless investors who push commercial objectives over ethical ones. Only an obligation built into statute or a universally endorsed code of practice can offer this protection, and a voluntary code of practice, even if recognized in statute, is more vulnerable.

Corporations exist for public purposes

One does not need to consult references to form this conclusion (although some are itemised above). It is difficult to conceive that a democratic government would create a regime with the express purpose of funnelling wealth from the pockets of producers, suppliers, customers and citizens into the pockets of the managerial and investor classes. Although governments do indeed at times legislate to the benefit of the already-wealthy, it is anti-intuitive that the entire body of corporations law has been created for that specific purpose. Given that the pre-eminent method of measuring shareholder value is a resultant of stock price plus dividends, then the objective of "creating shareholder value" can mean nothing more than extracting profits from the public at large for the enrichment of shareholders.

The state grants or gifts the property inherent in a corporation free of charge to the corporation except for an administrative fee, further evidence that this action has a public interest purpose.

This premise contradicts the prevailing orthodoxy that now goes beyond Friedman's assertion that the business of business is business (that is, to conduct economic activity in the name of the *corporation*) to asserting that wealth in the hands of *the wealthy* is a driver of economic progress: a version of the trickle-down theory which has been thoroughly repudiated in economics circles.

Wording of a new provision

The entire edifice of investor primacy with all its anti-social downstream consequences can be overturned by a simple generic statement of the purpose of the corporation. This could be expressed in a couple of ways. For example:

“Every corporation registered under this Act has a twin purpose: to serve the public interest by supplying goods or services or xxxx in an ethically responsible and sustainable manner; and also to create value for shareholders.” Language could be inserted at xxxx to confine or limit the scope of the corporation’s activities if required. The principle that corporations must strive to be profitable can be articulated, but as only one of the two limbs.

An alternative or additional wording based not upon defining the purpose of the corporation but on moderating its conduct could be:

“Every corporation registered under this Act has a duty of care for the economy, society and environment of any community in which it conducts operations.” The concept of “duty of care” is well established in law and the courts have a long history of interpreting it. Certainly, duty of care is variable, depending on the resultant of scientific knowledge, community and elite opinion at a given place and time.

More precise would be a provision that calls up a detailed code of practice that would be either prescribed in legislation; or would have independent reputation such as the Global Compact for Business or the Earth Charter. Such a provision might be worded as follows:

“Every corporation registered under this Act is required as a condition of registration to observe the ten principles of the Global Compact in all its activities, wherever conducted.”

The intention of the legislation would not be to allow governments or third parties to embark on rounds of litigation to punish corporations who fail in their duty of care. It would be to change the mindset of managers at the outset, to establish a frame of reference to shape all activity and behaviour of the corporation. An offence would be portrayed as a breach of the trust placed in the corporation to act according to its original charter.

An even simpler provision would be to specify that a corporation’s registration expires automatically after five years unless it is recommended for renewal by a citizens’ jury. This might be unworkable for companies expecting to undertake major capital investments such as building infrastructure or opening mines with a lifetime of decades.

Of course, any of these strategies would no doubt be strongly contested by business. Global businesses that intend to operate across borders would threaten to incorporate in a jurisdiction that did not attempt such structural changes. Jurisdictions could compete against each other on the basis of weakness of conditions of registration, just as the US state of Delaware currently attracts businesses because of its perceived business-friendly corporate regime.

This paper does not explore the practical difficulties of gaining sufficient public or sectoral support to enact a community-friendly regime. No doubt a phased or incremental approach, confined initially to new corporations operating domestically, would be necessary. No doubt also, some

business representatives would concede that business globally now has a reputational problem. The approach outlined in this paper seeks to remedy this problem at its source. It simply seeks to give clarity to the social license to operate, an instrument that is widely accepted but remains ill defined.

The notion that commercial enterprise serves the community is in fact deeply embedded in the economics discipline, so a statute simply specifying that is arguably entirely palatable to mainstream economics. The contemporary view that business rather exists to create value for investors has evolved over time. It is entirely feasible that it can evolve in a different direction.

Business can be reminded that a large corpus of the environmental and social legislation that it finds burdensome has been enacted to restrain business corporations from pursuing their profit motive at the expense of society's other objectives. In other words, it could be more efficient and transparent to withhold the right to injure workers and pollute the environment, than it is to tacitly allow that behaviour through corporate autonomy and then withdraw the right later by third party regulation.

Retrospectivity

Legislation could even be retrospective, serving to insert a new CSR obligation into the constitution of existing companies, but this would risk attracting claims for compensation if it were sufficiently directive to require companies to expend money in compliance that they otherwise would not have incurred. Retrospectivity arguably is a breach of the notional contract signed by an applicant and the state at the time of registration.

There are however precedents for retrospective legislation of this kind. In 1994, the Queensland Department of Lands inserted the following clause in the section dealing with State leasehold land:

“199. All leases, licences and permits are subject to the condition that the lessee has the responsibility for a duty of care for the land.”

No compensation was payable. This substantially extended the common law duty of care, which prevents a landholder from damaging the *property* of neighbours and other landholders, but is more or less silent on the welfare of the *land* itself.

CONCLUSIONS

A corporation is a legal structure established by a society to provide goods and services or to perform some other socially useful function. That the corporation is an instrument established to give effect to a society's agenda follows directly from its status as a creature of law.

What might a polity do to support ethical, responsible managers in avoiding harm to the communities that allow them to exist? It could legislate to place their public interest responsibilities on a firm foundation with statutory force rather than rely upon the individuals to uphold personal ethical standards against the pressure of other individuals in their sector who have only profit in mind. The simplest, most powerful and most transparent statutory instrument is the charter of registration. As the state's approval is discretionary, that approval can be conditional. The scope for framing a contract of registration is as wide as the polity determines that it should be.

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