2025 Harold Ford Memorial Lecture (27 August 2025)

Directors' Duties and Politics

The Honourable Justice Simon Steward, A.C.[1]

1. Dean Foster, members of the faculty, distinguished guests, friends and colleagues, I am very grateful to have been asked to deliver the 2025 Harold Ford Memorial Lecture. When I was taught company law at the Melbourne Law School in the 1980s, Professor Ford was still an occasional lecturer. He had retired in 1984. His book on company law, which I purchased in 1987 and which I retain in my chambers, was mandatory reading and remains easily one of the best ever textbooks on the law. It was written in the most sublimely lucid prose.

2. Professor Ford was recruited to this law school by that wonderful and insightful Dean of Law (and later Governor-General of Australia), Sir Zelman Cowen, G.C.M.G., G.C.V.O., P.C., Q.C. My grandmother, who met Sir Zelman at my father's graduation from the Melbourne Law School in the mid-1950s, always described Sir Zelman as that "very nice man". Professor Ford, of course, succeeded Sir Zelman as Dean.

3. My lecturer in company law here as an undergraduate was a brand new legal academic. She is now Professor Dame Sarah Worthington K.C. and is a deputy High Court judge in the Chancery Division in England. She was the Downing Professor Emeritus of the Laws of England at the

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[1] Justice of the High Court of Australia. I wish very much to thank my associate, Mr James Morgan, for all his important assistance in the preparation of this lecture and paper.

University of Cambridge and is now a Professor of Law at the London School of Economics and Political Science. She remains a Professorial Fellow of this University. Suffice to say she was a superb lecturer in company law.

4. The topic of tonight's lecture invites consideration of when the board of a public company can use a corporate entity to promote their own political views or social values. My focus is confined to public companies; a privately owned company is more easily subordinated to its controllers, subject to the law. Moreover, a distinction must be drawn between the use of a company to promote political or social values when to do so promotes the profitability of the corporate entity, whether in the long or short term, as against such a use which is unrelated, or not sufficiently related, to the financial prosperity of the corporation. A good example of the former was when certain mining companies campaigned (at a cost of over $22 million) almost 15 years ago against the introduction of a Mining Resource Rent Tax.[2]

5. In that respect, it is important to recall that a company has no feelings. In the case of a company limited by shares, it was invented to regulate the exposure to risk of an investing shareholder. I am reminded, in that respect, of the following description of a corporation given by Windeyer J in

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[2] See, for example, Mark Davis, 'A snip at $22m to get rid of PM', *Sydney Morning Herald* (2 February 2011).

Commissioner of Taxation of the Commonwealth of Australia v Casuarina Pty Ltd:[3]

> "A proprietary company may well seem to be, in reality, merely the trade-name in which a man carries on some part of his affairs. But by a following of correct legal forms the name becomes in law a thing. Formalism produces a legal substance, and its 'owner' can by careful bookkeeping get all the advantages, be they limited liability, relief from taxation or other benefit, which the law annexes to his sedulous use of the corporate name. A company like Casuarina may be called prestigious in the proper sense of the word, and the accountants called prestigiators. This and other metaphorical descriptions, dummy, puppet, alias, alter ego and the like come readily to mind: but they remain descriptive not definitive of legal consequences."

6. This lecture is in part inspired by recent events. In 2023, I spoke to two directors of a company who told me that they were under great pressure to announce their company's position on the referendum that was held in that year. Given that the company had no ability to cast a vote, I asked why such pressure had emerged, and whether such an announcement by the company would improve the financial performance of its business. They did not know one way or the other. I do not know what they ultimately decided to do. And I did not ask where the pressure had come from.

Recent experience of company engagement in political debates

7. Recent years have seen a sharp rise in so-called "corporate social responsibility" (or "CSR"). There has emerged a growing view that "corporations can no longer carry out business activities solely for profit",

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[3] (1970) 127 CLR 62 at 77.

but rather "have broader responsibilities beyond management of the impact of their activities on other stakeholders" and "are increasingly expected to be active stakeholders in solving society's problems while generating economic value".[4] As Professor Jean du Plessis has explained:[5]

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

8. This is increasingly being seen when publicly traded corporations advocate for particular positions in contentious political and social debates, sometimes with no ostensible connection to their business. It takes many forms, spanning from mere corporate speech in support of that cause, all the way through to substantial expenditure of company funds and resources in pursuit of some social objective. There is a growing view that companies are not only free to do so, but indeed socially obligated to do so. In 2020, in an interview with the *Sydney Morning Herald* and *The Age*, the Secretary-General of the International Chamber of Commerce defended the right of companies to lead the way in such debates – arguing that boardrooms had a "bigger purpose than just profit" and that "[t]here is an expectation by

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4 Adefolake Adeyeye, 'Corporate social responsibility: Lessons for Australia' (2019) 37(2) *Company and Securities Law Journal* 66 at 67.

5 Jean Jacques du Plessis, 'Corporate social responsibility and "contemporary community expectations"' (2017) 35(1) *Company and Securities Law Journal* 30 at 37.

employees that, in the absence of leadership from the political class, the leaders of business should stand up".[6]

9. One need not look far to find an abundance of examples. But perhaps two notable examples stand out in the recent history of this country. First, the successful 2017 plebiscite regarding same-sex marriage. Second, the unsuccessful 2023 referendum regarding the "Indigenous Voice to Parliament" which I adverted to earlier.

10. The same-sex marriage plebiscite was marked by a wealth of support from the corporate world, with hundreds of companies signing up to the marriage equality campaign – including major listed companies such as the "big four" banks, Google, Telstra, Optus and Qantas.[7] Some saw this as reflecting a sea change in Australian companies' willingness to engage in social and political debate; for example, the national director of Australian Marriage Equality was relevantly reported as saying that "corporates were once too shy to align themselves with such a social issue", but that "it is these same companies that are now jumping on the bandwagon in the name

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[6] Bevan Shields, 'Companies will fill leadership vacuum on climate, ICC chief warns', *Sydney Morning Herald* (21 February 2020).

[7] See, for example, 'Gay marriage: Australia's businesses take out full-page ad backing same-sex partnerships', *ABC News* (29 May 2015); Misa Han, 'Corporates come out in support of gay marriage', *Australian Financial Review* (2 September 2015); Callum McDermott, 'Australia's Institutions and Businesses Are Backing Marriage Equality at Every Level', *Broadsheet* (18 September 2017); Andrew Clark, 'Same sex marriage vote: Behind the "Yes" business campaign', *Australian Financial Review* (16 November 2017).

of diversity and inclusion for staff and customers".[8] He went on to say that "CEOs and boards had lingering concerns about whether they may be too political but when we explained that [they are] values everyone can share, those concerns tend[ed] to evaporate".[9] In that respect, the co-chair of Australians for Marriage Equality later said:[10]

> "There was a real vacuum in leadership in Canberra at the time but corporates showed leadership. They were willing to put their names behind it because staff were calling out for it. Diversity inclusion is getting to be a very big thing for our corporates."

11. Similarly, some time later, there was no shortage of corporate support for the "Indigenous Voice to Parliament", sometimes simply known as the "Voice". The Uluru Statement from the Heart was initially received with a joint corporate response "hear[ing] your call for the establishment of a First Nations Voice enshrined in the Constitution", made by a collective that purported to "represent 14 diverse organisations across a range of sectors" and counted amongst their number, for example, Lendlease, IAG and Herbert Smith Freehills Kramer.[11] In many instances, corporate support for

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8 Misa Han, 'Corporates come out in support of gay marriage', *Australian Financial Review* (2 September 2015).

9 Misa Han, 'Corporates come out in support of gay marriage', *Australian Financial Review* (2 September 2015).

10 Andrew Clark, 'Same sex marriage vote: Behind the 'Yes' business campaign', *Australian Financial Review* (16 November 2017).

11 See, for example, 'Uluru Statement from the Heart: Our position', *Lendlease* (Web Page) <www.lendlease.com/au/about-us/diversity-and-inclusion/reconciliation-action-plan/uluru-statement-from-the-heart/>; 'Australian organisations unite to support Uluru Statement from the Heart', *Herbert Smith Freehills Kramer* (Web Page, 29 May 2019) <https://www.hsfkramer.com/news/2019-05/australian-organisations-unite-

the "Voice" went beyond mere rhetoric; for example, both Telstra and Qantas were also vocal proponents of "The Voice", with Qantas displaying the "Yes23" logo on several of its aircraft, and also providing free flights as a form of practical support for the campaign (echoing similar support which Qantas gave to the same-sex marriage plebiscite campaign several years earlier).[12]

12. Notably, the Chair of Qantas would subsequently say that corporate Australia "did itself no favours" in its vocal support for the "Voice" and that "the pendulum has maybe swung too far" in increased corporate involvement in divisive social and political issues.[13] But at least at the time, it was said that "[t]he Australian business community is clearly behind the Voice".[14] Indeed, at the time of the referendum, 65 percent of the top 20 ASX-listed companies had put their support behind the "Voice" – including all "big four" banks, Coles, Woolworths, Wesfarmers and BHP.[15]

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to-support-uluru-statement-from-the-heart>; 'Australian organisations welcome Federal Government referendum pledge', *IAG* (Web Page, 11 July 2019) <https://www.iag.com.au/newsroom/community/australian-organisations-welcome-federal-government-referendum-pledge>.

[12] Amelia McGuire, 'Qantas takes Voice support to the skies', *Sydney Morning Herald* (14 August 2023).

[13] Holly Truelove, 'Qantas chair says involvement in the Voice was "too far"', *News.com.au* (11 March 2025).

[14] Nyunggai Warren Mundine, 'Can woke corporates tell us what the Voice will achieve', *Australian Financial Review* (20 September 2022).

[15] Michelle Bowes, 'Where Australia's top businesses stand on the Voice to Parliament vote', *News.com.au* (6 September 2023).

13. Indeed, such was the degree of corporate pressure mounted during the referendum that many said that companies owed a positive obligation to advocate in favour of the "Voice". By way of example, in August 2023 three leaders of the Business Council of Australia advocated in the *Australian Financial Review* for the role of businesses in the "Voice" debate – arguing that "business has a legitimate responsibility to step up and demonstrate leadership on key social and economic matters that affect the economic and social fabric of the nation" and that "[w]hen it comes to the referendum on an Indigenous Voice, many businesses have strong views, and they have a legitimate voice in this debate". Indeed, they went on to go as far as saying that "business not only has a right to share this view [in favour of the "Voice"] with the broader community, but an obligation to do so".[16]

14. But how is one to reconcile such corporate engagement in political debate with the overriding duties of loyalty owed by directors to their company? Putting to one side whether one personally agrees with a political position for which a given company advocates – does a director risk breaching their duties to their company where they deploy company resources to promote that position (particularly where, as is sometimes the case, that position has no apparent tangible benefit to the company or its shareholders)?

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16 Tim Reed, Jennifer Westacott, Danny Gilbert, 'Business has a legitimate stake in the Voice debate', *Australian Financial Review* (3 August 2023). See also Tim Reed, Jennifer Westacott, Danny Gilbert, 'Business has role to play in Voice debate', *Business Council of Australia* (Web Page, 3 August 2023) <www.bca.com.au/business_has_role_to_play_in_voice_debate>.

15. The question is not one which had received substantial attention in Australian jurisprudence on directors' duties, but has increasingly been the subject of academic and public discussion.[17] Indeed, in 2017, Justice Geoffrey Nettle, speaking extrajudicially to address this very memorial lecture,[18] relevantly said the following:[19]

> "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, for example, the campaigns of Qantas and Australian and New Zealand Banking Corporations Ltd in favour of same-sex marriage, Westpac Banking Corporation's widely publicised refusal to fund the Adani coal project, the decision 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, 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."

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17 See, for example, Anthony Gray, 'Corporations and their contributions to public debates' (2020) 36 *Australian Journal of Corporate Law* 66; Janet Albrechtsen, 'Activist Chief Executives Are "Stealing" from Shareholders', *The Australian* (26 February 2020).

18 An amended version of Nettle J's Harold Ford Memorial Lecture was published in the *Melbourne University Law Review*: Geoffrey Nettle, 'The changing position and duties of company directors' (2018) 41(3) *Melbourne University Law Review* 1402.

19 Justice Geoffrey Nettle, 'The changing position and duties of company directors' (2018) 41(3) *Melbourne University Law Review* 1402 at 1420.

16. His Honour's words are just as true today as they were at the 2017 Harold Ford Memorial Lecture. Similar commentary can be seen in the academic discourse since that time, to which our discussion today will add.

The purpose of the company and shareholder primacy theory

17. Before we turn to discuss the substance of Australian directors' duties, it is important to revisit the purpose of the corporation to which directors owe their loyalty. This is, of course, critical context which must inform analysis of what is expected of directors.

18. For as long as there have been corporations, there has been debate as to the nature of their purpose. The predominant view (albeit one which has been subject to many challenges, particularly with the rise of CSR) is known as the "shareholder primacy theory" – which is to the effect that directors are to exercise their powers for the benefit of (i.e. in the pursuit of profit for) their shareholders, and no-one else.

19. The famous and early expression of this theory came in the form of the article published by Professor Adolf Berle in 1931 in the *Harvard Law Review*, in which he argued that "all powers granted to a corporation or to the management of a corporation ... are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears".[20] This prompted a public debate with Professor Merrick Dodd spanning

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[20] A A Berle, Jr, 'Corporate powers as powers in trust' (1931) 44 *Harvard Law Review* 1049 at 1049.

several years. Professor Dodd initially responded to Professor Berle's article the next year, arguing that – although "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" – it is nevertheless:[21]

> "[U]ndesirable, even with the laudable purpose of giving stockholders much-needed protection against self-seeking managers, to give increased emphasis ... to the view that business corporations exist for the sole purpose of making profits for their stockholders. ... [P]ublic opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function, that this view has already had some effect upon legal theory, and that it is likely to have a greatly increased effect upon the latter in the near future."

20. And yet shareholder primacy theory would continue to have no shortage of ardent proponents in the years that followed. Perhaps one standout was the renowned economist (and Nobel Prize winner) Milton Friedman – who over his life advocated for the so-called "Friedman Doctrine". In his famous book *Capitalism and Freedom* (published in 1962), he argued 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 game, which is to say, engages in open

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[21] E Merrick Dodd, Jr, 'For whom are corporate managers trustees?' (1932) 45 *Harvard Law Review* 1145 at 1146-1148. See also Professor Berle's response: A A Berle, Jr, 'For whom corporate managers are trustees; a note' (1932) 45 *Harvard Law Review* 1365. Decades later, in the 1950s, Professor Berle conceded the Professor Dodd's view had prevailed, "at least for the time being": Adolf A Berle, Jr, *The 20th Century Capitalist Revolution* (Harcourt, Brace and Company, 1954).

and free competition without deception or fraud".[22] Conversely, Friedman described as a "fundamentally subversive doctrine" the proposition that corporate officials owe any "social responsibility" other than the pursuit of profit. He questioned:[23]

> "If businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is? Can self-selected private individuals decide what the social interest is? Can they decide how great a burden they are justified in placing on themselves or their stockholders to serve that social interest? Is it tolerable that these public functions of taxation, expenditure, and control be exercised by the people who happen at the moment to be in charge of particular enterprises, chosen for those posts by strictly private groups? If businessmen are civil servants rather than the employees of their stockholders then in a democracy they will, sooner or later, be chosen by the public techniques of election and appointment. And long before this occurs, their decision-making power will have been taken away from them."

21. The extent to which the pursuit of profit for shareholders ought to assume primacy continues to be a matter of debate and controversy to this day. That debate assumed even greater prominence in recent years in the wake of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.[24] There,

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[22] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962) at 133. See also Milton Friedman, 'A Friedman Doctrine: The social responsibility of business is to increase its profits', *New York Times* (13 September 1970).

[23] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962) at 133-134.

[24] Jason Harris, 'Shareholder primacy, in changing times' (Conference Paper, Corporate and Commercial Law Conference: Directors' Duties, Corporate Culture and Corporate Governance, 20 November 2018); Governance Institute of Australia, *Insights: Governance issues arising from the Financial Services Royal Commission* (Report, February 2019); Shelley

Commissioner Kenneth Hayne A.C. K.C. relevantly observed that "many of the case studies considered in the Commission showed that the financial services entity involved had chosen to give priority to the pursuit of profit over the interests of customers and above compliance with the law".[25] Commissioner Hayne went on to say that the focus of directors' duties:[26]

> "[D]emands consideration of more than the financial returns that will be available to shareholders in any particular period. Financial returns to shareholders (or 'value' to shareholders) will always be an important consideration but it is not the *only* matter to be considered."

22. In this respect, it is useful to observe that the United Kingdom's *Companies Act 2006* (UK) includes express provision (at s 172) for directors to have regard in the discharge of certain duties to the interests of non-shareholder stakeholders, including, for example "the interests of the company's employees", the company's impact "on the community and the environment" and "the desirability of ... maintaining a reputation for high standards of business conduct". That statutory provision reflects what has been described in the UK as "enlightened shareholder value", being the concept that to achieve the "basic goal" of profit for shareholders, directors "need to take a properly balanced view of the implications of decisions over

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Dempsey, 'The Hayne debrief – beyond shareholder primacy', *Australian Institute of Company Directors* (online, 11 February 2019) <www.aicd.com.au/good-governance/company-shareholders/primacy/the-hayne-debrief-beyond-shareholder-primacy.html>.

[25] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, 1 February 2019) vol 1 at 401.

[26] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, 1 February 2019) vol 1 at 402 (emphasis in original).

time and foster effective relationships with employees, customers and suppliers, and in the community more widely", which is "most likely to drive long-term company performance and maximise overall competitiveness and wealth and welfare for all".[27] Importantly however, while s 172 puts beyond question that regard may be had to those non-shareholder interests, it is said that they should "be seen in a hierarchal way" and are "subordinate to the requirement to promote the success of the company for *the benefit of the members* – their interests are primary".[28] As Trower J recognised in *ClientEarth v Shell plc*: "s.172 imposes a duty to act in the way the director concerned considers in good faith would be most likely to promote *the success of [the company] for the benefit of its members as a whole*, having regard, amongst other matters, to an identified list of considerations".[29]

23. No equivalent express provision exists within the counterpart Australian legislation (to which we will turn shortly). And yet, nevertheless, that non-shareholders' interests have relevancy in the discharge of directors' duties certainly appears to be the predominant view amongst Australian directors themselves; an empirical study published in the *University of New South Wales Law Journal* in 2012 revealed that 55 percent of surveyed directors understood their duty to mean that they *must* balance the interests of all company stakeholders (not just shareholders alone), and 94.3 percent

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[27] Department of Trade and Industry (UK), *Company Law Reform* (White Paper, March 2005) at 20-21.

[28] Andrew Keay, *Directors' Duties* (LexisNexis, 4th ed, 2020) at 141 [6.36], 180 [6.145] (emphasis in original).

[29] [2023] EWHC 1897 (Ch) at 9 [20(i)] (emphasis added). See also *ClientEarth v Shell plc* [2023] WEHC 1137 (Ch).

believed that the law was broad enough to *allow* them to take into account interests other than just shareholders.[30] Similar views were expressed in 2006 by the Corporations and Markets Advisory Committee and the Parliamentary Joint Committee on Corporations and Financial Services (the "Joint Committee").[31] And to similar effect, the Honourable Neil Young K.C. in 2015 in an address to a Supreme Court Corporate Law Conference in Sydney, argued that:[32]

> "Under Australian law, directors' duties are owed to the corporation as a distinct legal and commercial entity. The interests of the corporation include, but are not limited to, the interests of the body of shareholders. Circumstances may arise where the interests of the shareholders are the most important interest for the directors to take into account in discharging their duty ... But that is very different from the proposition, which is unsound, that directors owe their duty to shareholders so that they are required, in general, to maximise shareholder value."

24. But while it may be that directors *can* validly take into account other stakeholders' interests, it is typically thought that the interests of shareholders are (and traditionally were) a company's highest priority. As Professor du Plessis noted in 2017, despite the rise of CSR, "[p]resently, the shareholder

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30 Shelley Marshall and Ian Ramsay, 'Stakeholders and director's duties: law, theory and evidence' (2012) 35(1) *University of New South Wales Law Journal* 291 at 304.

31 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (Report, December 2006) at 111-113; Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate responsibility: Managing risk and creating value* (Report, June 2006) at xiii-xiv.

32 Neil Young, 'Must directors maximise shareholder value? The Australian experience' (Speech, Supreme Court Corporate Law Conference 2015, 8 September 2015) at 43 [119].

primacy model still underpins Australia's company law model".[33] Thus, a 2018 survey of the S&P/ASX 100 revealed that 83 percent of those companies identified the interests of shareholders as their top priority in their business objectives.[34] The authors of that survey observed that "this highlights a clear trend among large listed Australian companies to prioritise shareholders above other stakeholders".[35] Indeed, the authors observed that "[t]he majority of [the largest] companies in all three [of Australia, the United Kingdom and the United States] prioritise the interests of shareholders".[36]

25. That much is certainly consistent with the balance of authority concerning directors' duties. As a matter of authority – while directors are permitted to take into consideration non-shareholder stakeholder interests, it

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[33] Jean Jacques du Plessis, 'Corporate social responsibility and "contemporary community expectations"' (2017) 35(1) *Company and Securities Law Journal* 30 at 30.

[34] 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 at 102.

[35] 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 at 102.

[36] 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 at 110.

is often said that the courts have "tended to grant primacy to shareholders' interests" in interpreting the duties owed by directors.[37]

26. This is readily apparent from Australia authorities dating back even as far as the early years of federation. In *Australian Metropolitan Life Assurance Co Ltd v Ure*, Isaacs J said that directors' powers must be exercised "for the purpose for which it was conferred, not arbitrarily or at the absolute will of the directors, but honestly *in the interest of the shareholders as a whole*".[38] In *Peters' American Delicacy Co Ltd v Heath*, Dixon J said that the "company as a whole" to which directors owe their duties "consist[ed] of all the shareholders".[39] To similar effect, in *Ngurli Ltd v McCann*, Williams A-CJ, Fullagar and Kitto JJ accepted that the "company as a whole" to which directors owe their duties "means the corporators as a general body"[40] (and "corporators" in this context means shareholders).[41] In

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[37] Governance Institute of Australia, *Shareholder Primacy: Is There a Need for Change?* (Discussion Paper, 2014) at 3, 5. See also Jason Harris, 'Revisiting the legal basis of shareholder primacy', *Governance Institute of Australia* (online, 2019) <www.governanceinstitute.com.au/news_media/revisiting-the-legal-basis-of-shareholder-primacy/>.

[38] (1923) 33 CLR 199 at 217 (emphasis shifted).

[39] (1939) 61 CLR 457 at 512.

[40] (1953) 90 CLR 425 at 438, quoting *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 291 (per Evershed MR).

[41] *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324 at 474 [748] (per Elliott J).

Pilmer v The Duke Group Ltd (in liq), McHugh, Gummow, Hayne and Callinan JJ said that it was a "basic proposition[]" that:[42]

> "... directors and other officers of a company must act in the interests of the company as a whole and that this will usually require those persons to have close regard to how their actions will affect shareholders. It may also be readily accepted that shareholders, as a group, can be said to own the company."

27. As Ward J (as her Honour then was) said years later in 2011 in *International Swimwear Logistics Ltd v Australian Swimwear Company Pty Ltd*: "[t]he consideration as to whether directors have complied with their duties involves a determination of whether the conduct diverged from the interests of the company's shareholders".[43] Her Honour then went on to expressly refer to the "shareholder primacy norm".[44]

28. Similar support for shareholder primacy can likewise be drawn from authorities in both the United Kingdom and the United States. As Bowen LJ of the UK Court of Appeal said in *Hutton*:

> "It is not charity sitting at the board of directors, because as it seems to me charity has no business to sit at boards of directors *qua* charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not

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[42] (2001) 207 CLR 165 at 178 [18].

[43] [2011] NSWSC 488 at [102].

[44] [2011] NSWSC 488 at [102].

a very philanthropic garb) charity may sit at the board, but for no other purpose."[45]

29. To similar effect, the Supreme Court of Michigan held in *Dodge v Ford Motor Co* – a case which has since been "said to have manifested the legal mandate of the shareholder primacy theory"[46] – that:[47]

> "[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."

30. Of course, the relationship between a director and their company is well-established to be fiduciary in nature.[48] The duty owed by a fiduciary is one of loyalty which is "unequalled elsewhere in law".[49] Mason J famously said in *Hospital Products Ltd v United States Surgical Corp*, the "critical feature" of such a fiduciary relationship is that "the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other

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[45] (1883) 23 Ch D 654 at 673.

[46] Governance Institute of Australia, *Shareholder Primacy: Is There a Need for Change* (Discussion Paper, 2014) at 6.

[47] 170 NW 668 (Mich, 1919) at 684 (per Ostrander CJ).

[48] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 96 (per Mason J).

[49] *Moffat v Wetstein* (1996) 135 DLR (4th) 298 at 315 (per Granger J). See also *Meinhard v Salmon* (1928) 164 NE 545 at 546 (per Cardozo CJ).

person in a legal or practical sense".[50] Directors are accordingly obligated to place the company's interests ahead of their own. The company must always come first.

Australian directors' duties

31. As you all know, the various duties owed by Australian directors at common law and equity are now largely codified by the *Corporations Act 2001* (Cth). For present purposes, the core duties prescribed by ss 180 and 181 of the *Corporations Act* are of greatest relevance.

32. Pursuant to s 180(1) of the *Corporations Act*, directors must discharge their duties with the degree of care and diligence that a reasonable person would exercise. The standard of care and diligence required by s 180(1) is "fixed as an objective standard identified by reference to two relevant elements": (a) the corporation's circumstances; and (b) the office and responsibilities within the corporation that the officer in question occupied.[51] Importantly, this is subject to the "business judgment rule" in s 180(2), which provides that a director meets the requirements of s 180(1) (and equivalent duties at common law and equity) where they make a business judgment if they: (a) make the 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 to the extent they reasonably

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50 (1984) 156 CLR 41 at 96-97 (per Mason J).

51 *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 at 476 [18] (per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 483 [42] (per Heydon J).

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

33. Section 181 of the *Corporations Act*, again as most of you know, provides that directors must exercise their powers and discharge their duties in good faith in the best interests of the company, and for a proper purpose. This relevantly engages many of the same concepts as s 180's business judgment rule.

34. The question then is: can the requirements of these duties be reconciled with the growing corporate propensity to engage in potentially divisive public issues unrelated to the pursuit of profit?

Reasonable care and diligence

35. A director's failure to exercise reasonable care and diligence may take many forms – and may, of course, overlap with breaches of a director's other duties.[52] The question of whether a director has or has not exercised a reasonable degree of care and diligence is "answered by balancing the foreseeable risk of harm against the potential benefits that could reasonably have been expected to accrue to the company from the conduct in question".[53] Relevantly, the foreseeable risk of harm for the purpose of this

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[52] See, for example, *Australian Growth Resources Corporation Pty Ltd v Van Reesma* (1988) 13 ACLR 261; *Australian Innovation Ltd v Petrovsky* (1996) 21 ACSR 218.

[53] *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 449-450 (per Ipp J).

test extends beyond financial harm alone, and includes the risk of harm to all the interests of the company, including its reputation – recognising that "[c]orporations have reputations, independently of any financial concerns, just as individuals do".[54]

36. How does one reconcile this with the growing propensity for directors to position their companies to take a stand on a potentially divisive social issue – with the corresponding risk to the company's reputation that this necessarily entails? A well-known example of such reputational damage emerged in 2017, with PepsiCo's notorious advertisement in which Kendall Jenner calmed tensions between marching protestors and police, by offering a can of Pepsi to an officer – alluding to the then-current events of the Black Lives Matter movement – which PepsiCo said was intended to "project a global message of unity, peace and understanding". That advertisement was pulled from air after less than 24 hours, in the wake of widespread backlash with lasting damage to the PepsiCo brand.[55]

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[54] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 at 301-302 [480]-[483] (per Edelman J). An appeal from that judgment was dismissed by the Full Court of the Federal Court of Australia in *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533, in which Thawley J said to similar effect (at 640-641 [459]) that "[t]he balancing exercise is not necessarily confined to commercial considerations or to a comparison of monetary consequences, but extends to considering all of the interests of the corporation, including its continued existence and its interest in pursuing lawful activity".

[55] Daniel Victor, 'Pepsi pulls ad accused of trivialising Black Lives Matter', *New York Times* (5 April 2017); 'Pepsi pulls controversial Kendall Jenner ad, saying it "missed the mark"', *ABC News* (online, 6 April 2017) <www.abc.net.au/news/2017-04-06/pepsi-pulls-kendall-jenner-ad-amid-social-media-outcry/8420656>; Toria Rainey, 'For companies, talking

37. And of course there is always a danger that such engagement in the contentious social issues of the day may carry a risk to more than just reputation and brand alone. It is increasingly well-recognised that "[t]he risks of political posturing are also unpredictable and increasing".[56] One sees more and more public calls for consumers to boycott certain companies for their stances on divisive political issues. In that respect, Professor Fisch of the University of Pennsylvania and Professor Schwartz of the University of Utah relevantly observed that:[57]

> "If the boycotting customers outnumber those that the corporation gains by appealing to new customers who share the corporation's views, then the statement is a net loss. As noted above, some controversy is good for business. But too much can be a disaster. Moreover, politics is a high risk branding strategy precisely because it appeals to stakeholders who are particularly sensitive to political signalling and therefore more likely to turn on a company if they are not satisfied with its political position than those who are drawn by a corporation's workplace practices or product quality."

38. Last year, for example, saw the Opposition Leader call on consumers to boycott Woolworths for its decision to pull its Australia Day merchandise from sale (in the wake of growing political challenges to the public holiday)

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politics or opining on social issues can be like stepping on a landmine', *BU Today* (online, 23 July 2020) <www.bu.edu/articles/2020/for-companies-talking-politics-or-opining-on-social-issues-can-be-like-stepping-on-a-landmine/>.

56 Jill E Fisch and Jeff Schwartz, 'How did Corporations get stuck in politics and can they escape?' (2024) 3(2) *University of Chicago Business Law Review* 325 at 344.

57 Jill E Fisch and Jeff Schwartz, 'How did Corporations get stuck in politics and can they escape?' (2024) 3(2) *University of Chicago Business Law Review* 325 at 343-344.

– asserting that Australians want companies to "stay out of politics".[58] Perhaps a more pronounced boycott example was that faced by Bud Light in 2023, in the wake of the its promotion with a transgender influencer and activist, known for detailing her transition on TikTok.[59] In the months following that promotion, Bud Light's sales saw a substantial decline, as much as 28% lower in the three months that followed (compared to the same time period in previous years).[60] The performance and stock price of the owner of the Bud Light brand dropped sharply in parallel, which some commentators attributed to the decline of Bud Light.[61]

39. In the circumstances, it is increasingly difficult to conceive of the risk of reputational and/or pecuniary blowback as not being “foreseeable” in the sense required by the test for s 180(1). The risk of reputational harm and consumer backlash looms large for those companies bold enough to engage

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58 Gus McCubbing, '"Veggies with a side of morality": Liberals back Woolies war', *Australian Financial Review* (12 January 2024).

59 Amanda Holpuch, 'Behind the backlash against Bud Light', *New York Times* (21 November 2023) ,www.nytimes.com/article/bud-light-boycott.html>.

60 Jura Liaukonyte, Anna Tuchman, Xinrong Zhu, 'Lessons from the Bud Light boycott, one year later', *Harvard Business Review* (online, 20 March 2024) <hbr.org/2024/03/lessons-from-the-bud-light-boycott-one-year-later>; 'Bud Light fumbles, nbut inclusive advertising is here to stay', *CBS News* (online, 26 April 2023) <www.cbsnews.com/news/bud-lite-inclusive-ads-dylan-mulvaney/>.

61 Caitlin O'Kane, 'Bill Gates' foundation buys Anheuser-Busch stock worth $95 million after Bud Light financial fallout', *CBS News* (online, 7 September 2023) <https://www.cbsnews.com/news/bill-gates-buys-bud-light-anheuser-busch-stocks/>.

in the political sphere. Can it be said that any benefits to the company adequately balance against such risk?

40. Of course, this is certainly not to say that a company may never take risks. The nature of investment and business is fundamentally one of risk – and a company facing adverse consequences for its conduct (in circumstances where those risks have not paid off) does not, of itself, mean that the directors have failed to exercise reasonable care and diligence. As Robson J said in *Australian Securities and Investments Commission v Lindberg*, "[a] company run on basis that no risks were ever taken would be unlikely to be successful".[62] Ipp J also recognised as much in *Vrisakis v Australian Securities and Investments Commission*, when his Honour said:[63]

> "[T]he mere fact that a director participates in conduct that carries with it a foreseeable risk of harm to the interests of the company will not necessarily mean that he has failed to exercise a reasonable degree of care and diligence in the discharge of his duties. The management and direction of companies involve taking decisions and embarking upon actions which may promise much, on the one hand, but which are, at the same time, fraught with risk on the other."

41. But there is a threshold at which the risk/benefit analysis might render such corporate engagement in divisive political debate unreasonable – particularly given the potential "benefit" to the company is here so very

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[62] *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640 at 654 [72] (per Robson J).

[63] (1993) 9 WAR 395 at 449 (per Ipp JA).

difficult to define. As Thawley J observed in *Cassimatis v Australian Securities and Investments Commission*:[64]

> "It is to be accepted that companies are often formed and operated to permit the taking of risks that individuals may not be willing to assume themselves and that it is of the essence of commercial activity to take risks. However, it must also be recognised that the company fiction did not evolve to facilitate unlawful risky activity without personal responsibility."

42. Indeed, it is a breach of a director's duty of reasonable care and diligence to allow his or her company to enter into a transaction or arrangement that has no reasonable prospect of producing a benefit to it.[65] So then, what exactly is the potential "benefit" that here weighs against risk the company endures when entering into political debates?

43. It must be emphasised, that one is here only concerned with the potential benefit that may accrue to the *company* – not any potential benefit to those in the wider world personally affected by the social or political issue(s) in question. Certainly, there is no doubt that major listed companies wield the power to – for better or worse – materially influence change in the world. As Professor Bryan Horrigan recently wrote in his new book published just this month, *Corporate Social Responsibility in an Age of Existential Threats*: "the future of human and other life on this planet depends to a great extent on what the public, private, professional, university and civil society sectors do in the twenty-first century, alone and together, to

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64 (2020) 275 FCR 533 at 641 [459] (per Thawley J).

65 See, for example, *Gamble v Hoffman* (1997) 24 ACSR 369 at 373-381 (per Carr J).

address existential threats and other global challenges" and "[c]orporations are a central part of that global enterprise".[66] Professor Horrigan goes on to argue that "it is difficult to imagine the world successfully addressing its global threats and challenges without involving the business sector and others with social licences to operate"[67] and "[e]xistential threats to humanity and the planet force us to lift our sights to a worldwide perspective about the societal role of corporations".[68] When it comes to influencing the discourse on social and political issues, Professors Fisch and Schwartz have observed:[69]

> "When a well-known corporation speaks out about important causes, it can galvanize support for them. Corporations are large and powerful, and they control resources that enable their positions to be politically influential. These resources allow corporations both to coordinate and to amplify the voices of their executives, employees, customers, and investors."

44. Whether one sees this as a positive or negative in any given circumstances may depend on your personal stance on the particular political cause behind which a company seeks to throw its weight. But, any such "benefit" to a particular social cause or the wider world is, at least, and on one view, under the current law, probably not directly relevant when

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[66] Bryan Horrigan, *Corporate Social Responsibility in an Age of Existential Threats* (Monash University Publishing, 2025) at 1.

[67] Bryan Horrigan, *Corporate Social Responsibility in an Age of Existential Threats* (Monash University Publishing, 2025) at 2.

[68] Bryan Horrigan, *Corporate Social Responsibility in an Age of Existential Threats* (Monash University Publishing, 2025) at 83-84.

[69] Jill E Fisch and Jeff Schwartz, 'How did Corporations get stuck in politics and can they escape?' (2024) 3(2) *University of Chicago Business Law Review* 325 at 328.

analysing a director's duty to exercise reasonable care and diligence. As Edelman J recognised in *Cassimatis* (at first instance), while a contravention of s 180(1) may constitute both a private and a public wrong,[70] it has long been the "dominant understanding" that the duty of reasonable care and diligence is "owed *to the corporation*" (as opposed to the public at large).[71] Thus, any benefit that weighs in the analysis must be one accruing, not to the wider community, but to the company itself.

45. But the potential benefit to the company and its shareholders in these situations can be somewhat more difficult to define. To the extent that any such benefit of a commercial nature exists, it might typically be thought of as one of a *marketing* nature. At least some commentators observe that "[a]s partisan polarization deepens, companies see an opportunity to draw in consumers on the basis of strongly held political identities", by way of "messaging [that] cultivates loyalty among a devoted set of customers with matching beliefs".[72] Professors Fisch and Schwartz characterise this as corporations which adopt "a political position in the good faith belief that the

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[70] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 at 296-297 [455]-[457].

[71] *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209 at 300 [474] (emphasis in original). Edelman J noted that this was the "dominant understanding" (and expressed, at 300 [474]-[477]) several arguments in support of that understanding, but ultimately held that it was "not necessary in this case to reach a [concluded view] about the extent to which, if at all, the s 180(1) duty of care and diligence applies to the exercise of powers and the discharge of duties other than those conferred by, or owed to, the company": at 301 [478].

[72] Max Zahn, 'Companies increasingly using politics in marketing, but there are risks: Experts', *ABC News* (online, 23 August 2022) <abcnews.go.com/Business/companies-increasingly-politics-marketing-risks-experts/story?id=88238066>.

position will provide a net benefit to corporate value, whether through the greater sale of its products, its ability to attract workers, or by enhancing its reputation with government officials".[73] This is sometimes described as a policy of "enlightened self-interest" (very similar to the "enlightened shareholder value" concept in the UK referred to above), in the sense of companies operating as "good citizens" – not because it is the "right" thing to do of itself – but rather:[74]

> "[T]o be sustainable in the long term: to manage reputation risk, to be profitable, to be able to hire suitably qualified staff, to identify and satisfy customer needs and to be welcome members of the communities affected by their activities."

46. In the "greenwashing" space, one sees growing concerns of overzealous corporate pursuits of such self-interest yielded by pursuit of social justice, in the form of what are sometimes said to be "misleading and deceptive disclosures employed by financial institutions to entice environmentally conscious investors into purchasing their financial products that, in reality, fall short of meeting the expected [environmental, social and governance] or green credentials".[75] Just last year, in *Australian Securities*

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[73] Jill E Fisch and Jeff Schwartz, 'How did Corporations get stuck in politics and can they escape?' (2024) 3(2) *University of Chicago Business Law Review* 325 at 345.

[74] See, for example, John Colvin, Bob Baxt, Submission of Australian Institute of Company Directors to Governance Institute of Australia, *Shareholder primacy: Is there a need for change?* (2 December 2014) at 2.

[75] Cecilia Das, Prafula Pearce and Tenielle Heson, 'What's green and ethical about greenwashing in the promotion of financial products' (2023) *New Zealand Law Journal* 400 at 401, quoted in Australian Securities and Investments Commission v LGSS Pty Ltd [2024] FCA 587 at [1] (per O'Callaghan J).

and Investments Commission v LGSS Pty Ltd, O'Callaghan J found that a trustee of a superannuation fund had made false or misleading statements, and engaged in conduct liable to mislead the public, by making representations as to the scope of its investments in respect of gambling, tobacco, oil tar, coal and Russia.[76] Such instances of "greenwashing" are of course concerning, but may be put to one side for present purposes.

47. If such self-interest is indeed the cynical, but commercially legitimate, purpose of directors when wading into divisive public debates, it sits very uncomfortably with the corporate messaging which typically and ostensibly underpins those efforts. Companies engaging in such issues typically purport to do so, not on the basis that it will yield commercial advantage, but that it is earnestly the right thing to do in a moral sense. Certainly, in the case of the "Voice" referendum, the widespread corporate support was (at least publicly) premised on the notion that the "Voice" would be of benefit to the wider community; for example, speaking out in response to the Uluru Statement from the Heart, the CEO and Managing Director of IAG said: "[t]his is an opportunity for positive change that will benefit First Nations peoples and communities – and the wider Australian community".[77] That is, of course, wholly unsurprising – a corporation must, at least publicly, come across as earnest to reap any marketing benefits. As Professors Fisch and Swartz have written: "a corporation's effort to associate with a political position may

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[76] [2024] FCA 587.

[77] 'Australian organisations welcome Federal Government referendum pledge', *IAG* (Web Page, 11 July 2019) <https://www.iag.com.au/newsroom/community/australian-organisations-welcome-federal-government-referendum-pledge>.

increase its vulnerability if that position is viewed as disingenuous".[78] But if there is no breach of the reasonable care and diligence duty (in that there is a benefit to the company which outweighs the attendant risk) – there must necessarily be a fundamental conflict between what the company publicly says is its intent, and its true (more commercial) purpose. I will return to this issue in discussion of the "proper purpose" of directors.

Business judgment rule

48. If a director's decision to engage their company in the battleground of divisive political debate does constitute a *prima facie* breach of their reasonable care and diligence duty, the next question that necessarily arises is: can they avail themselves of the protection of s 180(2)'s business judgment rule? This remains (as with much in this area) an open question, and would often turn on the facts and evidence of the particular judgment(s) made by the director in a given matter. But with that said, there are at least two overarching observations that should here be borne in mind.

49. First, as Austin J recognised in *Australian Securities and Investments Commission v Rich*, the business judgment defence may only be invoked where a decision has been "consciously made" – in that the director has actively "turned his or her mind to the matter".[79] One can wonder whether a given corporate's contribution to political debate is necessarily the result of a

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[78] Jill E Fisch and Jeff Schwartz, 'How did Corporations get stuck in politics and can they escape?' (2024) 3(2) *University of Chicago Business Law Review* 325 at 344.

[79] (2009) 236 FLR 1 at 151 [7277].

truly intentional and considered business judgments, in which the pecuniary pros and cons of the action have been meaningfully weighed against one another. Or is it the case that such action is merely a consequence of social inertia – with directors jumping on a "bandwagon" with insufficient thought as to the consequences.

50. Second, amongst other requirements, the business judgment rule is engaged only where the director *rationally* believed that the judgment was in the best interests of the corporation. Austin J said in *Rich* that while the director's reasoning process need not be "objectively a convincing one", his or her belief that the judgment was in the company's best interests must be "supported by a reasoning process sufficient to warrant describing it as a rational belief"; it cannot be that "no reasonable person in their position would hold [that belief]".[80] If the evidence in a particular case establishes that the corporate's potentially divisive political input had no prospect of yielding a material benefit to the company, one wonders whether the responsible director(s) could overcome this rationality threshold.

Good faith in the best interests of the corporation

51. May I next turn to the issue of good faith. Does a director act in good faith in the best interests of the company (for the purpose of s 181 of the *Corporations Act*) where they engage the company's resources to advocate

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[80] (2009) 236 FLR 1 at 154 [7289]-[7290].

for a particular political or social cause – particularly one in which the company has no clear pecuniary interest?

52. The test in this respect is "whether an intelligent and honest man in the position of the directors of the company could not have reasonably believed that the transaction was in the best interests of the company having in mind the interests of the [company as a whole]".[81] Relevantly, this duty has been held to include, *inter alia*, "that directors (1) must exercise their powers in the interests of the company, and must not misuse or abuse their power; [and] (2) must avoid conflict between their personal interests and those of the company".[82]

53. While it is often said – particularly in the wake of the widespread rise of CSR – that directors *should* be obliged to consider, in the exercise of their duties, the interests of employees, customers and the community, no such obligation is positively imposed on directors by common law or legislation in Australia.[83] But while directors may not owe any positive obligations to

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81 *Australian Securities and Investments Commission v Sydney Investment House Equities Pty Ltd* (2008) 69 ACSR 1 at 14 [41] (per Hamilton J); *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465 at 471 (per Giles JA).

82 *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373 at 400 [106] (per Brereton J); *Chew v The Queen* (1991) 5 ACSR 473 at 499 (per Malcolm CJ).

83 Ian M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, 2nd ed, 2023) at 521-522 [7.28].

take such external interests into account, it does not follow that that directors *cannot* choose to do so.[84]

54. It thus would be wrong to contend that a company can only validly make only expenditures that are directly related to the pursuit of profits for its shareholders. Certainly, while profit is the company's ultimate goal, the authorities on the giving of gifts by companies make it clear that directors are free to pursue a policy of "enlightened self-interest" – in the sense of investing in corporate responsibility and philanthropy on the basis that it may contribute to the long term viability of the company – albeit that they may not be too "generous" with company resources where there is no prospect of commercial advantage to the company.[85] The position as a matter of Australian authority was concisely expressed by Professors Shelley Marshall and Ian Ramsay as follows:[86]

> "[A]s a general proposition, acting in the best interests of the company generally means acting in the interests of shareholders as a general body. The directors are able, but not required, to consider the interests of non-shareholder stakeholders, and where they do, such consideration needs to be done with a view to the benefit of the shareholders."

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84 Ian M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, 2nd ed, 2023) at 522 [7.29].

85 Ian M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, 2nd ed, 2023) at 522-523 [7.29], citing *Hutton v West Cork Railway Co* (1883) 23 Ch D 654; *Re George Newman & Co* [1895] 1 Ch 674.

86 Shelley Marshall and Ian Ramsay, 'Stakeholders and director's duties: law, theory and evidence' (2012) 35(1) *University of New South Wales Law Journal* 291 at 298.

55. That view that directors may validly have regard, in the discharge of their "best interests" obligations, to the interests of the broader community is echoed in several government inquiry reports. In 2006, the Corporations and Markets Advisory Committee said that the established formulation of directors' duties already "allows directors sufficient flexibility to take relevant interests and broader community considerations into account".[87] In doing so, the Committee relevantly also said that: "the courts, through their interpretation of the law, including the requirement in s 181 of the Corporations Act for directors and others to act in the 'best interests of the company', can assist in aligning corporate behaviour with changing community expectations".[88] In the same year, the Joint Committee similarly concluded that the *Corporations Act* already "permits directors to have regard for the interests of stakeholders other than shareholders", and accordingly recommended that a related amendment to the directors' duties provisions was not required.[89] The Joint Committee said that this was on the basis that:[90]

> "The committee considers that an interpretation of the current legislation based on enlightened self-interest is the best way forward for Australian corporations. There is nothing in the

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87 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (Report, December 2006) at 7.

88 Corporations and Markets Advisory Committee, The Social Responsibility of Corporations (Report, December 2006) at 111.

89 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate responsibility: Managing risk and creating value* (Report, June 2006) at 37 [4.78].

90 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate responsibility: Managing risk and creating value* (Report, June 2006) at 37 [4.76]-[4.77].

> current legislation which genuinely constrains directors who wish to contribute to the long term development of their corporations by taking account of the interests of stakeholders other than shareholders. An effective director will realise that the wellbeing of the corporation comes from strategic interaction with outside stakeholders in order to attract [certain advantages].
>
> The committee considers that more corporations, and more directors, should focus their attention on stakeholder engagement and corporate responsibility. However it is clear from this chapter that any hesitation on the part of corporate Australia does not arise from legal constraints found in the Corporations Act. ...".

56. Notably, a similar view in support of such "enlightened self-interest" also pervades in the United States. In the American Law Institute's recent "tentative draft" Restatement of the Law of Corporate Governance, it said – regarding a corporation's objective to "enhance economic value" for the benefit of shareholders – the following:[91]

> "[T]hat economic objective does not mean that the directors or officers must maximize shareholder value in the short term. On the contrary, long-run profitability and shareholder gain are often at the core of the economic objective. Activity that entails a short-run cost to achieve an appropriately greater long-run profit is therefore not a departure from the economic objective. An orientation toward lawful, ethical, and public-spirited activity will normally fall within the economic objective. The modern corporation by its nature creates interdependencies with a variety of groups with which the corporation has legitimate concern, including employees, customers, suppliers, and members of the communities in which the corporation operates. The long-term profitability of the corporation generally depends on meeting the fair expectations of such groups. Short-term profits may properly be subordinated to the recognition that responsible maintenance of these interdependencies is likely to contribute to long-term corporate profit and shareholder gain. Accordingly, the corporation, in its conduct, may typically take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business, and it may

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91 American Law Institute, *Restatement (Tentative Draft) of the Law: Corporate Governance* (2024) at § 2.01.

devote a reasonable amount of resources to public-welfare, humanitarian, educational, and philanthropic purposes."

57. But where then, does the dividing line lie? If, for example, Qantas – when offering free flights in support of the "Voice" campaign – had gone as far as dedicating a significant part of its operating budget to that altruistic cause, would the directors have been in breach of their obligation to act in the best interests of the company? There must come a threshold at which the company strays too far from the pursuit of profit for its shareholders. Where exactly that threshold may be when it comes to corporate political and social engagement, is a matter which remains to be tested before the Australian courts.

Proper purpose

58. What of a director's duty to act for a "proper purpose"? This has been described as "one of the main means by which equity enforces the proper conduct of directors".[92]

59. It is worth noting that the law regarding the significance of a director's subjective intention, in contrast to an objective assessment of the director's conduct, is somewhat unsettled.[93] But at least insofar as concerns the "proper purpose" limb of a director's duties, the predominant view is that the test is to

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[92] *Eclairs Group Limited v JKX Oil & Gas plc* [2015] All ER 641 at 659 [37] (per Lord Sumption).

[93] Westlaw AU, *Corporations Legislation* (online at 11 July 2025) Corporations Act 2001, 'Chapter 2D Officers and employees' at [CA.181.40].

be approached objectively; as Black J observed in *Re Colorado Products Pty Ltd*: "the bulk of authority indicates that question [of proper or improper purpose] is to be determined objectively".[94] To similar effect, Barker J relevantly held in *MG Corrosion Consultants Pty Ltd v Gilmour* that "the question whether or not a director acts for a proper purpose ... or for an improper purpose ... is primarily determined objectively involving an assessment by the Court of the relevant circumstances".[95] That such an objective perspective is brought to bear in this space is of course critical; as Bowen LJ remarked in *Hutton v West Cork Railway Co*:[96]

> "*Bona fides* cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bona fide* yet perfectly irrational".

60. Honest or altruistic behaviour by a director will not, of itself, avail the director of a proper purpose. As Santow J said in *Australian Securities and Investments Commission v Adler*, "the standard of behaviour required by s 181(1) is not complied with by subjective good faith or by a mere subjective belief by a director that his purpose was proper, certainly if no reasonable director could have reached that conclusion".[97] It follows, therefore, that a director's earnest pursuit of a noble social cause will not

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94 (2014) 101 ACSR 233 at 365-366 [419]-[421].

95 [2014] FCA 990 at [541] (per Barker J). See also, for example, *Australian Securities & Investments Commission v Adler* (2002) 168 FLR 253 at 414 [740] (per Santow J); *Sandy v Yindjibarndi Aboriginal Corp RNTBC [No 4]* (2018) 126 ACSR 370 at 393 [87] (per Pritchard J).

96 (1883) 23 Ch D 654 at 671.

97 (2002) 168 FLR 253 at 414 [738].

avail him of a proper purpose, unless those same efforts have some objective likelihood of yielding meaningful benefit to the company

61. The majority of the leading authorities regarding the "proper purpose" limb concern takeovers of companies – and in particular, the extent to which the conduct of the directors attempting to thwart a hostile takeover of their company may be in breach of their duty to act for a proper purpose.[98] Jurisprudence directly on the issue of a proper purpose by directors who express views on contentious political matters and/or devote company resources towards the same is sparse.[99] But breaches of the proper purpose duties in this respect very much remains a live and credible (but largely untested) possibility. Indeed, even as far back as its report in 2006, the Corporations and Markets Advisory Committee contemplated the possibility – and said:[100]

> "The courts have not closely considered what, if any, limits the 'proper purpose' requirement imposes on directors in taking into account the broader environmental and social context in their decision-making. *A possible example of an improper purpose would be a corporate donation provided to gain recognition for the directors personally rather than the corporation.*"

62. One may reason by analogy to the existing authorities in this space. One such decision is that of the Court of Appeal of the Supreme Court of

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98 Ian M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, 2nd ed, 2023) at 535 [7.35].

99 Anthony Gray, 'Corporations and their contributions to public debates' (2020) 36 *Australian Journal of Corporate Law* 66 at 88.

100 Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (Report, December 2006) at 92 (emphasis added).

New South Wales in 1987 in *Advance Bank Australia Ltd v FAI Insurances Ltd*,[101] which concerned the expenditure of company funds in the context of a conflict over Board positions. Whereas the existing Board of the company favoured the reappointment of several retiring directors of the company, the respondent (a shareholder) sought to appoint new directors. The existing Board authorised the expenditure of company resources on a marketing campaign urging the existing shareholders to reappoint the retiring directors – including by sending a letter to the shareholders and through telephone solicitation.

63. A majority of the Court of Appeal (Kirby P, with whom Glass JA agreed) held that the directors' conduct "was a clear abuse of their authority as directors" and was "pursued for the [improper] primary purpose of securing the re-election of the retiring directors".[102] In that respect, Kirby P relevantly observed that in such (election or proxy solicitation) cases: "the heightened risk of a confusion between private interest and the best interests of the corporation (or corporate purposes) requires scrupulous conduct on the part of directors".[103] While the comparison is, of course, imperfect – one might draw an analogy between this conclusion and those circumstances where companies deploy their resources in the pursuit of a (perhaps noble) cause that, while of great personal significance to the director(s), is of no

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[101] (1987) 9 NSWLR 464.

[102] (1987) 9 NSWLR 464 at 491. The Court of Appeal was unanimous in its conclusion that the relevant appeal should be dismissed, but for different reasons. In contrast to Kirby P and Glass JA, Mahoney JA did "not accept that ... the directors ... abused their power or that what they did was for the primary purpose of securing the re-election of their colleagues": at 496.

[103] (1987) 9 NSWLR 464 at 485.

obvious pecuniary consequence to the company's interests. Indeed, Kirby P went on to state the principle – which feels in many ways apt to our present circumstances – that in election and proxy solicitation cases:[104]

> "... an excess or abuse of powers may occur where the directors (a) expend an unreasonable sum of the company's moneys; (b) expend moneys of the corporation on material relevant only to a question of personality and not relevant to corporate policy; or (c) otherwise act in a manner which is excessive or unfair in the circumstances, having regard to the corporate purpose to be attained".

64. His Honour's reasoning also illustrates some of the evidentiary difficulties that are likely to arise when it comes to directors establishing a proper purpose for their corporate political speech. His Honour relevantly said, with respect to the communications made to shareholders: "[t]he very emotional quality of the letter [sent by the Board], and even more so of the telephone solicitation ... casts doubt upon the claim that the primary purpose of the directors was to advance the best interests of the [company]".[105] So too is it likely to be when arguing that directors had a proper purpose for the company's political engagement. As I noted earlier, companies' political advocacy is often emotionally charged, and typically (at least publicly) premised on the notion that it is the "right" thing to do. One would rarely see a public declaration that a company supports a controversial political cause because it is in their own self-interest – but unless such self-interest

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[104] (1987) 9 NSWLR 464 at 485.

[105] (1987) 9 NSWLR 464 at 486.

represents the ultimate object, the issue of proper purpose may become fraught with difficulty.

Recent United States cases

65. While there are relatively limited Australian authorities which are directly on point to the present issue, several recent cases coming out of the United States of America warrant our attention.

Simeone v The Walt Disney Company

66. One such example is the 2023 decision of the Court of Chancery of the State of Delaware in *Simeone v The Walt Disney Company*.[106] The dispute in this case emerged from Disney's public political stance in opposition to Florida's "House Bill 1557", otherwise known as the "Don't Say Gay" legislation, which prohibits teachers from discussing certain topics related to sexual orientation and gender identity.[107]

67. Disney initially remained largely silent on the controversial Bill, for which it received substantial internal and external criticism. But subsequently, on the same day that the Governor of Florida signed the Bill into law, Disney released a public statement in firm opposition to the Bill – going as far as to say that Disney's "goal as a company is for this law to be repealed by the legislature or struck down by the courts, and we remain

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[106] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023).

[107] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 959.

committed to supporting the national and state organizations working to achieve that".[108]

68. The consequences which Disney faced as a company in the wake of that political stance were substantial. The Governor and other Florida politicians took issue with Disney's conduct, and took action against the company. Relevantly, prior to that time, Disney had enjoyed the extraordinary entitlement to self-govern (akin to the ability of a sovereign state) the land on which its Disney World Resort in Florida was built. That entitlement was conferred by the *Florida's Reedy Creek Improvement Act*, which formed the "Reedy Creek Improvement District", being a special district of 25,000 acres (on which Disney World was constructed), which granted Disney the same authority and responsibility as a country government – including, for example, the authority to levy taxes, write building codes, and develop and maintain its own infrastructure. Those extraordinary benefits were taken from Disney, when the Florida House of Representatives promptly voted to dissolve the special districts.[109]

69. In the wake of this reprisal (amongst other government action against Disney), the company's stock price fell sharply from $145.70 per share on 1 March 2022 to $91.84 per share on 14 July 2022 (i.e. around a 37% fall in approximately a four-month period). Disney's stock price would later fall

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[108] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 959-961.

[109] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 961-962.

even further to $86.75 per share on 9 November 2022, being the day on which the Governor of Florida was re-elected.[110]

70. Against that background, the plaintiff (a Florida-based Disney shareholder) made a demand, pursuant to § 220 of the Delaware General Corporation Law, to compel inspection of certain books and records of Disney – on the basis that "officers and directors of Disney may have breached their fiduciary duties to the Company and its stockholders by, *inter alia*, failing to appreciate the known risk that the Company's political stance would have on its financial position and the value of Disney stock" and that the directors and officers "plac[ed] their own political views ahead of their duties to act in the best interests of Disney and its stockholders".[111]

71. Vice Chancellor Will held that the plaintiff did not meet the standard for a § 220 inspection for three reasons. First, the "purposes" asserted in his demand were not the plaintiff's purposes – rather, the purposes claimed were "pretextual" and improperly "lawyer-driven", in circumstances where the plaintiff was solicited to make the demand (and funded) by the Thomas More Society (a "public interest law firm championing Life, Family and Freedom"). While they were said to be "entitled to their beliefs", a § 220 suit (designed to address the plaintiff's interests as a stockholder) was "not a vehicle to advance them". Second, the plaintiff did not provide a credible

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[110] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 962-963.

[111] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 963.

basis from which to infer possible wrongdoing. Third, Disney provided the plaintiff with all necessary and essential documents.[112]

72. The second conclusion is of particular interest for present purposes. The plaintiff had contended that Disney's decision to express public opposition to the Bill, despite the Governor's warning not to do so, amounted to a potential breach of fiduciary duty by the Board and certain officers. The Court relevantly held that a decision by the Board to speak (or not speak) on public policy issues is "an ordinary business decision" that falls within the "significant discretion to guide corporate strategy — including on social and political issues".[113] Her Honour held that while the plaintiff disagreed with the business decision to speak out, that was not evidence of wrongdoing warranting a § 220 inspection.[114] In that respect, Vice Chancellor Will went on to say:[115]

> "[T]his case exemplifies the challenges a corporation faces when addressing divisive topics—particularly ones external to its business. Individual investors have diverse interests—beyond their shared goal of corporate profitability—and viewpoints that may not align with the company's position on political, religious, or social matters. Yet stockholders invest with the understanding that the board is empowered to direct the corporation's affairs. The board may delegate implementation to

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[112] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 966-974.

[113] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 958, 969.

[114] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 968-973.

[115] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 969-970.

> management, but it alone bears the ultimate responsibility for establishing corporate policy."

73. Her Honour did not consider the adverse consequences ultimately endured by Disney as being indicative of a breach of directors' fiduciary duties. Her Honour acknowledged that Disney's decisions here may have "turned out poorly in hindsight"[116] and said:[117]

> "Perhaps the Board could have avoided political blowback by remaining silent on HB 1557. At the same time, doing so could have damaged the company's corporate culture and employee morale. The weighing of these key risks by disinterested fiduciaries does not evidence a potential lack of due care, let alone bad faith."

74. Her Honour found that:[118]

> "Far from suggesting wrongdoing, the evidence here indicates that the Board actively engaged in setting the tone for Disney's response to HB 1557. The Board did not abdicate its duties or allow management's personal views to dictate Disney's response to the legislation. Rather, it held the sort of deliberations that a board should undertake when the corporation's voice is used on matters of social significance."

75. This case exemplifies that, at least in Delaware, corporate decisions to speak out on contentious social and political issues enjoy the same business judgement protections which exist for more orthodox commercial decisions. That defence assumes even greater significance in Delaware, where the courts have historically tended to give deference to the exercise of business

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[116] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 969.

[117] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 972.

[118] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 970.

judgements by directors. The Australian courts, by comparison, have and in recent times, tended towards a more interventionist stance. In the years since the Australian business judgment rule in s 180(2) was introduced, there have been "only two cases in which a director or company executive has been successful in an application to obtain [its] benefit".[119]

76. But in any event, it is important to emphasise that even Delaware's business judgment rule requires that a given company actively turn its mind to the potential risks and advantages of engaging in such corporate speech. Here, the evidence revealed that Disney's engagement on this political issue was not made lightly — but rather Disney's Board deliberated meaningfully and "actively engaged in setting the tone for Disney's response to HB 1557".[120] This is consistent with the view of some commentators that:[121]

> "If the company purports to take positions on external public policy, its positions should result from a deliberative process of the board of directors based on the direct relevance of the policy question to the company, and not just reflect the personal view of the CEO without board backing. The full board should have to weigh and bear responsibility for any corporate position, as that somewhat improves the likelihood that the position will be one more likely to accord with a broader consensus of company stockholders and workers and increases the accountability of the board."

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[119] Ian M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis, 2nd ed, 2023) at 427 [6.29], citing *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1 and *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502.

[120] *Simeone v The Walt Disney Company*, 302 A 3d 956 (Del, 2023) at 970.

[121] Leo Strine, 'Good corporate citizenship we can all get behind? Towards a principled, non-ideological approach to making money the right way' (2023) 78(2) *Business Lawyer* 329 at 366.

Spence v American Airlines

77. A further recent example emerging from the United States is the decision of the District Court of the Northern District of Texas (Fort Worth Division) earlier this year in *Spence v American Airlines, Inc*.[122]

78. This case concerned a class action claim brought against American Airlines and its Employee Benefits Committee ("EBC"), alleging breaches of fiduciary duties owed under the *Employee Retirement Income Security Act 1974* ("*ERISA*") – by the investment of employees' retirement assets towards environmental, social and governance ("ESG") objectives. The plaintiff argued that the defendants breached their fiduciary duties by utilising BlackRock as its investment manager, who were said to have harmed the financial interests of retirement plan participants "due to pursuing socio-political outcomes rather than exclusively financial returns".[123]

79. The *ERISA* relevantly "establishes the minimum requirements for the fiduciaries who manage retirement investments and imposes accountability should those fiduciaries fail to act in the best financial interests of the retirement plan",[124] including by imposing fiduciary duties of (*inter alia*) of loyalty and prudence. BlackRock is, as is well known, a leading publicly traded investment management firm, and here was the investment manager for all of the passively managed funds in American Airlines' employee

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[122] *Spence v American Airlines, Inc*, 775 F Supp 3d 963 (Tex, 2025).

[123] *Spence v American Airlines, Inc*, 775 F Supp 3d 963 (Tex, 2025) at 972.

[124] *Spence v American Airlines, Inc*, 775 F Supp 3d 963 (Tex, 2025) at 972.

retirement plan. When agreeing to serve as investment manager, BlackRock "committed to discharging its duties solely in the best interest of the Plan's participants and beneficiaries, as well as for the exclusive purpose of providing financial benefits of the Plan's managed assets".[125] But against that backdrop, BlackRock pursued a "non-pecuniary ESG investment strategy",[126] including through proxy voting (i.e. a strategy designed to advance ESG interests, as opposed to providing financial benefits to the plan's assets), which American Airlines did nothing to stop. In that respect, Judge O'Connor defined ESG investing as "a strategy that considers or pursues a non-pecuniary interest as *an end* itself rather than as a means to some financial end".[127]

80. Judge O'Connor held that the defendants had breached their fiduciary duty of *loyalty*, but not their duty of *prudence*. His Honour held that:[128]

> "The facts here compellingly established fiduciary misconduct in the form of conflicts of interest and the failure to loyally act solely in the Plan's best financial interests. BlackRock's ESG influence is evident throughout administration of the Plan. *The belief that ESG considerations confer a license to ignore pecuniary benefits is mistaken. ERISA does not permit a fiduciary to pursue a non-pecuniary interest no matter how noble it might view the aim.* Plaintiff therefore proved by a preponderance of the evidence that American disloyally acted with an intent to benefit a party other than Plan participants and

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[125] *Spence v American Airlines, Inc*, 775 F Supp 3d 963 (Tex, 2025) at 987-988.

[126] *Spence v American Airlines, Inc*, 775 F Supp 3d 963 (Tex, 2025) at 991.

[127] *Spence v American Airlines, Inc*, 775 F Supp 3d 963 (Tex, 2025) at 997 (emphasis in original).

[128] *Spence v American Airlines, Inc*, 775 F Supp 3d 963 (Tex, 2025) at 1011 (emphasis added).

> in a manner that was not wholly focused on the best financial benefit to the Plan."

81. Importantly, Judge O'Connor distinguished between a company supporting particular social values, for the purpose profit making, as against expressing such support when there is no sufficient connection with the financial health of a business. His Honour considered the former to be unremarkable. The distinction was illustrated by his Honour with a number of examples. This is one of them:[129]

> "An energy company spends significant amounts of money on infrastructure, social programs, and education initiatives in a third-world country that houses some of its oil fields. These social expenditures are seemingly unrelated to the oil and gas industry. In response, an investment manager chooses to start investing in the company shortly after these social expenditures. If the reason for investing in the company is because these social expenditures are viewed as reasonably reducing, for example, the material risk of government expropriation of the oil fields or mitigating against other types of impactful labor strife, this is not ESG investing because the focus is fundamentally fixed on maximizing a financial benefit. But if the reason is due to the belief that the company has a responsibility to improve the society in which it operates notwithstanding the lack of or reduced economic benefit to the company, such a non-pecuniary consideration would qualify investments based on these social expenditures as a form of ESG investing."

82. To the best of my knowledge, this case is the first directly to address the interplay between corporate ESG initiatives and the fiduciary duties owed by employee benefit plans (certainly it is the first with respect to the American *ERISA*). It is clear that going forward fiduciaries under the *ERISA* must carefully scrutinise any ESG investment strategies. So too it must be

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[129] *Spence v American Airlines, Inc,* 775 F Supp 3d 963 (Tex, 2025) at 986.

with the fiduciary duties owed by directors who engage company resources in the pursuit of a social cause that, while noble, is of no pecuniary benefit to the company and its shareholders.

Conclusion

83. In conclusion, in 2020, Australian academic Professor Andrew Gray, observed that while "doctrines of corporate social responsibility and concepts of a social licence can be utilised to give some social legitimacy to corporate social advocacy ... it is strongly arguable that such advocacy is at odds with directors' underlying legal obligations".[130] Professor Gray went on to write that it is:[131]

> "[Q]uite 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."

84. With corporate Australia's feet now firmly planted in the arena of controversial political and social debates, it may only be a matter of time until the propriety of that conduct (as a matter of compliance with directors'

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130 Anthony Gray, 'Corporations and their contributions to public debates' (2020) 36 *Australian Journal of Corporate Law* 66 at 68.

131 Anthony Gray, 'Corporations and their contributions to public debates' (2020) 36 *Australian Journal of Corporate Law* 66 at 98.

duties) is meaningfully tested in litigation. We must wait to see what the Australian courts make of this issue in the years to come.

85. Thank you for listening to me.