

**ASSESSING BENEFIT CORPORATION LEGISLATION AS A  
MODEL FOR REFORM OF CORPORATIONS LAW IN  
AUSTRALIA**

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## **ABSTRACT**

This paper explores whether and how corporations law reforms should occur in Australia. Guided by various theories of political science and business ethics literature, the paper investigates the US Benefit Corporation Legislation 2010, and its corollaries in other countries, as a possible model of corporate governance that formally allows corporations to advance, both, for-profit goals and societal benefits as corporate purpose by engaging in political CSR activities. To date, such a structure has not been explored for Australian corporate law; it therefore, addresses a novel approach.

Australia has a substantial history of inquiries and academic scholarship questioning if the current corporations law framework permits corporations to take into account non-shareholder interests and if not, whether it should be reformed to allow decision-makers to do so. There is a growing body of literature advocating the stakeholder approach to corporate governance. Against this, others argue that the current structure offers sufficient latitude to businesses for providing public goods and addressing the public interest of all its stakeholders. Government inquiries have been unable to come to a conclusion that satisfies all parties. Although the growing literature points to possible reforms, a stalemate has resulted in no reforms in Australia.

## **The Existing Australian Corporate Governance Framework does not Encourage a Political CSR Approach**

A large number of existing studies conducted by leading Australian corporate law academics like Redmond (2016), Grossman (2005), Marshall & Ramsay (2012), and Bottomley (2018) suggest that the Australian corporations law currently support shareholder primacy norm as the governance norm that leaves little room for the corporations to carry out social or public functions within the scope of law. There has been a range of government inquiries (CAMAC, 2006; PJC, 2006), and there is a growing literature pointing to possible reforms. However, a stalemate has resulted in no reforms in Australia while other countries have taken significant steps towards tempering the shareholder primacy model (Bottomley, Hall, Spender & Nosworthy, 2018: 60).

Drawing on my research so far, I identify two reasons for the stalemate that has resulted in no reforms in this area: 1) there is no clear theory of corporate governance underpinning reforms proposals and 2) second, and flowing from this, there is an assumption that companies must be either stakeholder focused or shareholder focused which precludes corporations from considering broader corporate goals. Such an analysis lay the foundation for testing two hypotheses. First, Political Corporate Social responsibility (CSR), an emerging theory which brings together political theory and CSR, is a possible theory that could underpin the search for appropriate reforms. Political Corporate Social Responsibility refers to the expansion in the scope of corporate activities through which states and firms mutually provide public goods and address the public interest in a way that is democratically accountable. It is concerned with the processes that not only comply with law but also shape it (Whelan, 2017). Though Political

CSR is a vast field, I only grapple with those aspects that are relevant to corporate governance. These aspects represent the way companies act in the public benefit; provide public goods by sharing responsibility with the state without undermining state's democratic legitimacy; encourage stakeholder participation, perform legal obligations and uphold values of accountability, transparency, fairness and trust (Frynas & Stephens, 2015: 502).

A political theory lens was chosen based on the understanding that the corporations were first established under Roman law to practice public functions (Salter, 2019: 16; Mayer, 2018, 2019). It is relatively recently – in around the last 60 years – that corporations have become more shareholder driven (known as shareholder primacy) (Mayer, 2018, 2019). This focus on shareholder profits to the exclusion of others has been linked in the literature to inequality, environmental degradation and mistrust (Mayer, 2018, 2019). Guided by various theories of political science and business ethics literature, this proposition has been partially tested in my Ph.D. dissertation.

The second hypothesis is, that the Benefit Corporation model – which has been enacted in the US and other jurisdictions - may overcome the limiting assumption regarding corporate purpose concerning the gap between, on the one hand, the growing concern for the social performance of companies, and the absence of a legal model, on the other. A benefit corporation is a new corporate structure, instituted in US corporate law in 2010, that jettisoned the old US corporate culture of focusing on profit maximization for shareholders, but provides equal standing to the achievement of social and environmental objectives (Murray, 2018). Benefit-corps shift the narrow focus on profits to a triple bottom-line orientation –planet, people and profit (Montgomery, 2016).

Though government inquiries in Australia asked if all for-profit companies should be governed by new company law, in the US, the Benefit Corporation exists side-by-side with the traditional corporate model in corporate law. When a firm is incorporating, it can choose between the two models. Both are for-profit models (Alexander, 2018:2). Those companies that balance economic considerations with social objectives are best suited to the Benefit Corporation form of incorporation. To date, however, no empirical research has been conducted that has explored a similar structure for Australian corporate law area (B Lab Australia & New Zealand 2017). Moreover, while Hiller's assessment establishes that the Benefit Corporation structure implements and supports CSR (Hiller, 2013: 295); there has been no account of whether this legislation extends the corporate purpose to the political role of business corporations.

Since the paper conceives of the corporation as a political entity, in as much as it is an economic entity, it cannot study corporate law in isolation from other actors and elements of the global regulatory system (Redmond, 2016: 22). In terms of actors, the state and corporate, both, actors need to engage with each other to meet most pressing societal challenges (Ruggie, 2011: 9). Besides, at the global level, there are three distinct governance systems that, together, regulate corporate behaviour in a global economy like Australia – 1) the public law that includes both international and human rights law and domestic corporate law; 2) private/civil regulation of businesses involving affected stakeholders, NGOs, Civil Society etc and; 3) corporate governance system which internalizes the elements of the other two in a corporation (Redmond, 2016: 22; Ruggie, 2011: 9). The public and the private governance systems play mutual reinforcing roles that compensate for each other's weaknesses and collectively produce 'a more comprehensive and effective global regime' (Redmond, 2016:22; Ruggie, 2011: 9). However, companies are subject to the domestic law of states where they are incorporated and operate, which is jurisdictional- bound and entity-centred' (Redmond, 2016:32), while businesses are

global in the scope of their operations, license and responsibilities (Ruggie, 2014). This is the gap in the governance system of corporations when seen from the political lens. Such obstructions result in confusion for directors, and hesitancy regarding the pursuit of social objectives along with profits (Mocsary, 2016: 1319).

Building on these ideas, what is needed is a formal governance arrangement for Australia, that disassociates itself from shareholder primacy approach and commits to broader corporate goals, in order to address the previously-noted uncertainties surrounding corporate duties and responsibilities. This requirement makes more sense now than ever before, when Australian corporate law faces sharp criticism in the global economy for inhibiting corporate directors and other officers from investigating, enforcing and redressing the breach of corporate obligations beyond the law to have regard to human rights such as Right to Respect (Redmond, 2016: 24).

### **Approach to Conducting Research in this Study**

The approach which drives my research is based on the premise that there are regulatory gaps in the Australian corporate law area because corporations law does not address the ‘hesitancy of directors to take into account the interests of all stakeholders and not just shareholders’ (Social Impact Hub, 2014: 5; Mocsary, 2016: 1325). There is a lack of transparency in the provisions of the primary state legislation *Corporations Act 2001* (Cth) in terms of which purpose is the company serving (Bottomley et al., 2018: 61). From this perspective, the study assesses whether the Benefit Corporations Legislation model is a possible way forward as a model for reform of Australian corporations law that provides for dual-model corporate governance and accountability.

The research is conducted in three phases: the first phase reviews the literature to adduce the need for corporate reforms in Australia. The second phase develops a ten-factored conceptual

framework of political CSR's corporate governance aspects, and the third phase employs the conceptual framework to assess Benefit Corporation Legislation as a political model of corporate governance in Australia. I adopt a multi-method qualitative approach to answer the broader research question of this study: Is there a demand for reform of Corporations Law in Australia that could prioritise both shareholder profits and social benefit, and be accountable to both? If so, can Benefit Corporation Legislation act as a model for reform of Corporations law in Australia? My choice of methods-empirical, doctrinal and comparative-is informed by the theoretical and empirical approach and constructed in a way that achieves the goal of this research project.

The research has two contributions. *First*, this research outlines ten factors which focus on long-term profits, legal obligations, broader corporate goals, corporate accountability, stakeholder participation, shared state/corporation responsibility, regulation, transparency, fairness and trust-building as principles of political CSR's corporate governance aspects. *Second*, the paper assesses the suitability of the Benefit Corporation Legislation as a corporate governance model for Australia that could equally prioritise shareholder primacy and social benefit as the corporate objective, and be accountable to both.

The implications for the field of law and business ethics are discussed.

## **Theoretical Underpinning – Political Corporate Social Responsibility Framework**

The conceptual framework of this study focuses on the current political CSR narrative, which emerges from number of theoretical constructs that improve the understanding of the underlying processes and conditions (Whelan, 2012: 719). I build off this ten-factored framework to identify the features of the proposed political model of corporate governance that would commit to both economic and social mission. Viewed in this way, the framework provides a starting point for empirical research to investigate whether the existing Benefit Corporation Legislation, in the US and elsewhere, can be a political model that could sufficiently accommodate the new political role of Australian corporations that extends the corporate purpose to social objectives. The factors, drawn from the framework, act as principles of political CSR. The components of this theory-informed normative framework are:

1. Fair Distribution of Resources, Power and Rights
2. Stakeholder Participation
3. Shared State/Business Responsibility of Public Good
4. Long-term Profits
5. Broader Corporate Goals
6. Legal Obligations – Respect for Spirit of Law
7. Shared Governance – Public, Corporate and Civil
8. Democratic Accountability
9. Transparency through Reporting
10. Trust Building

I apply an integrated approach to the concept of Political CSR, by combining descriptive and normative elements, to allow for ‘more robust and richer theory building’ (Frynas & Stephens, 2015: 502). For doing so, I associate the idea of political CSR with a specific normative agenda that is informed by Rawls Theory of Justice (Distributive Justice principle & Habermas work

on Democratic Deliberation) (Rawls, 2005; Whelan, 2012: 719; Habermas, 1996); Stakeholder theory (Frynas & Stephens, 2015: 502); Legitimacy theory (Detomasi, 2007: 321; Whelan, 2012: 719); Institutional theory (Ungericht and Hirt, 2010; Frynas & Stephens, 2015: 502); concepts of Corporate Citizenship (Tempels, Blok and Verweij, 2017: 105); Corporate Constitutionalism (Bottomley et al, 2018: 60; Corbett and Spender, 2009: 149) and Young's Social Connection and Political Responsibility (Young, 2004: 365; Wickert, 2016: 792). Such political theory approach, in the corporate milieu, is employed to consider questions such as: What is the best interest of a company? What is the purpose of a company? How can companies consider all stakeholder's interests? (Bottomley, 1997: 277).

Within the debate on political CSR and corporate governance, these theories build a research framework that critically analyses some of the key assumptions of the current political CSR scholarship in the context of Benefit Corporation Legislation as a political model. Particularly, this framework revolves around two key assumptions that are theoretically informed to be accepted across all levels of analyses:

- 1) Reforms are needed in governmental regulations and corporate governance structures to accommodate the new political roles of corporations (Whelan, 2012; Neron, 2013).
- 2) Corporations are motivated to engage in political CSR activities because of three reasons: a) long-term profit-focused and instrumental reasons (Assländer and Curbach, 2017; Tempels et al., 2017: 93); b) ethical and moral rationale (Young, 2006; Wickert, 2016: 792) and; c) governance rationale that focuses on addressing the democratic deficit caused due to the conflicting interests of citizens with their economic interests that compel the political CSR debate to turn to democratic corporate governance (Tempels et al., 2017: 96; Hussain & Moriarty, 2018: 526).

## **Future Work: Benefit Corporation Assessment**

B Lab, a non-profit organization, asked the US state legislatures to adopt a statute they drafted called the Model Benefit Corporation Legislation (MBCL) that contained several provisions requiring the US corporations to adopt a broader fiduciary model (Alexander, 2017: 3). The proposal was that when a state adopts the MBCL or similar statutory provisions, corporations created under that state's general corporation law can opt into the new provisions and become 'Benefit Corporations' (Alexander, 2017: 3). Benefit Corporation is a novel corporate entity that enabled a social innovation referred to as 'profit and purpose' (Rozenchwajg 2017). The statute offers the viable option, to shareholder primacy, of stakeholder-oriented governance for corporations without impugning traditional shareholder rights (Alexander, 2017: 4). The state of Maryland passed the first benefit corporations act to bridge the gap between the contemporary legal framework of the US corporations and the growing industry of hybrid social ventures (Alexander, 2017: 4). Although all Benefit Corporation Legislations are based on MBCL, the adopting states legislatures make significant modifications as required by the law (Loewenstein 2013).

This model provides a clear framework and legal certainty to company directors to pursue a broader social purpose alongside profitability (Alexander 2017). Based on Hiller's (2013: 295) assessment, Benefit Corporation structure implements and supports CSR. However, there has been no account of whether this legislation extends the corporate purpose to the political role of business corporations. Planned future work includes assessing the Benefit Corporation Legislation, in the US, and elsewhere through the lens of the ten-factored framework of corporate governance aspects of Political CSR.

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