Submission to the ASX CGC on Its Principles and Recommendations 5th Edition Consultation Draft

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Overview and Summary of This Submission[2]

1. Does the Corporate Governance Principles and Recommendations Consultation Draft (5th Edition) (**Draft 5th Edition**) from the ASX Corporate Governance Council (**ASX CGC**) go too far away from a commonly assumed shareholder-centric norm in corporate governance? In particular, does it do so at the undue expense of shareholder-centred 'Profit', in accommodating the needs of 'People' (eg non-shareholding 'stakeholders', such as customers, employees, creditors, and society – ie the 'S' in environmental, social, and governance (**ESG**) considerations), 'Planet' (eg environmental eco-systems, nature risk, and climate change risk – ie the 'E' in ESG), and 'Principle' (eg company values, business ethics, legality, and good governance – ie the 'G' in ESG), to use some terms popularised in earlier 'triple bottom line' literature and used more recently in published work for *The Future of the Corporation* Project[3] by The British Academy? Alternatively, does it not go far enough? A fair and balanced assessment of the Draft 5th Edition lies somewhere between the two extremes suggested by those questions. It has some strengths, some fatal weaknesses, some fixable weaknesses, and some other areas also ripe for revision.

2. In summary, as a guide for what follows, this Submission makes a number of key suggestions for the ASX CGC's consideration in finalising the Draft 5th Edition. This Submission focuses primarily upon Consultation Questions 8, 9, 10, and 11, although its analysis and suggestions straddle most of the Draft 5th Edition's and the Consultation Questions' underlying premises. The ASX CGC should hold its nerve and maintain its position against any push-back on revised Principles, Recommendations, and Commentary about the Draft 5th Edition's enhanced treatment of stakeholder engagement, and ESG risks. It should do the same on enhanced requirements for companies to act legally, ethically and responsibly, and to disclose in a de-identified way the outcomes of material breaches of a code of conduct.

3. To that extent, the author of this Submission's response to Consultation Questions 8, 9, and 10 is to support fully what the Draft 5th Edition recommends in the subject matter of Questions 8 and 9, as well as the aim and some of the content of the subject matter of Question 10. For reasons that will become clear in this Submission, the author of this Submission believes that Recommendation 3.3 and its accompanying Commentary need some further consideration and revision in their approach and

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[2] This Submission contains material that draws from and will be elaborated and revised in an upcoming commissioned book by its author. The author of this Submission acknowledges the assistance of his personal research assistant and Monash University law student, Tim Grant, in preparing this Submission. Nothing in this Submission purports to represent the views of any employers or bodies with which its author is or has been associated. Where an important point, topic, or quotation has important work to do in different parts of this Submission, not least in 'connecting the dots', it might appear more than once, for the ease of reference for readers in the discussion at hand.

[3] See the series of papers published in a supplementary issue of the Journal of the British Academy in 2018, accessible here: https://www.thebritishacademy.ac.uk/publishing/journal-british-academy/6s1/.

substance, none of which detracts from unqualified support for including reference to a company's stakeholders and having a stakeholder engagement plan.

4. At the same time, the ASX CGC should consolidate its position for the good of corporate governance regulation by making further revisions that work with and do not go against the grain of what the Draft 5th Edition proposes. In particular, it should say and clarify more about its intent on its adopted position on shareholder primacy and value, and explain more about how its Principles and Recommendations align with that adopted position. It should also revert to the 4th Edition's inclusion of corporate purpose as an essential requirement and one of an equal order with other key elements of corporate governance that appear in the Draft 5th Edition, such as corporate 'culture', 'values', and 'objectives'. If it does not do so, then at the very least it needs to make more use of the 'purpose (if articulated)' formula used in some but not all places in the Recommendations and Commentary, for the better guidance of all users of these standards.

5. Finally, in light of the various indicative references to relevant sources of international and national 'hard' law and 'soft' law on corporate governance, and the options for curating such material for the accessibility and use of participants in the Australian corporate governance ecosystem, the ASX CGC could consider ways to develop and contribute to such a pathfinding platform or tool. Options for doing so are discussed at the end of this Submission, under the rubric of Consultation Question 19.

6. Accordingly, this Submission to the ASX CGC's public consultation primarily addresses:
    a. the Draft 5th Edition's divergence from the 4th edition in the treatment of corporate purpose, and the implications of that divergence for a number of its Principles and Recommendations;
    b. the enhanced requirements in the Draft 5th Edition that are the subject of Consultation Question 8;
    c. the Draft 5th Edition's treatment of stakeholder relationships in corporate governance, associated Principles and Recommendations on that topic, and in particular Consultation Questions 9 and 10;
    d. Consultation Question 19's acceptance of other suggestions and recommendations for consideration;
    e. the inescapable need to develop a background theory and working approach to the conceptual and substantive elements of the law underpinning the Draft 5th Edition and its implementation;
    f. the benefit for the Draft 5th Edition of doing further tightening and revision of the relationship in practice between its:
        i. *primary* corporate governance orientation (especially shareholder primacy and value as the chosen end point of good corporate governance, in contrast to corporate 'purpose', given the stand that the Draft 5th Edition takes on the fundamental corporate governance debate about 'purpose');
        ii. *secondary* corporate governance features and concepts (eg corporate 'objectives', 'culture', 'values', 'stakeholders', and 'ESG' considerations); and
        iii. *tertiary* corporate governance mechanisms (eg board charters, statements of values, stakeholder engagement processes, and codes of conduct);
    g. where the law and literature both stand on important terms and their use in the Draft 5th Edition, such as a company's best interests, shareholders as a whole, stakeholder interests, and ESG risks and disclosure;

h. an analysis of important corporate governance sources of guidance that are referenced in the Draft 5th Edition, especially a published legal opinion commissioned by one of the ASX CGC members (ie **Walker-Ng Legal Opinion**)
i. the implications of the diversity and proliferation of reference sources cited in the Draft 5th Edition; and
j. the need in the evolution of official corporate governance guidance and commentary, and the proliferation of secondary sources referenced in the draft 5th Edition (eg Australian laws, judicial decisions, foreign laws, draft Commonwealth Bills, official Australian and international standards, comparable corporate governance codes, published legal opinions etc), for a more systematic and authoritative curating of relevant material for compliance and advisory purposes.

Corporate Governance Background and Scene-Setting

Shareholder Supremacy and Value as the Draft 5th Edition's Guiding Light

7. Some of the important background context for corporate governance standard-setting in the Draft 5th Edition can be distilled as follows. The Draft 5th Edition does not arise and cannot be assessed in a vacuum. Contemporary corporate governance in Australia and comparable jurisdictions is fixated to one degree or another upon the notions of shareholder supremacy/primacy and value. Like the 4th Edition before it, the Draft 5th Edition is no exception. Indeed, such notions are so accepted as fundamental premises of self-evident and clear meaning and operation that their various permutations in the Draft 5th Edition do not even warrant mention and definition in the Glossary, or much elaboration in the body of the Draft 5th Edition.

8. Yet, the vehemence and certainty with which the Draft 5th Edition embraces 'shareholder value' as if it were a fixed, timeless, and absolute proposition, as distinct from an offshoot of the rise of shareholder supremacy more than 50 years ago in association with the much-quoted ideas of Milton Friedman (**Friedman Doctrine**), is not matched by a unanimous consensus or even optimal clarity in corporate governance literature and standard-setting about precisely what 'shareholder value' means and requires, at least in terms of ample guidance for giving effect to it in regulatory instruments such as the Draft 5th Edition.

9. On that aspect, the point of this Submission is that business success in society and accompanying corporate governance requirements are neither fully nor satisfactorily explained by references to shareholder supremacy/primacy and value. Parts of the Draft 5th Edition are equally consistent with purpose-based and stakeholder-sensitive theories too, making its assumption about the universal correctness and acceptance of shareholder-centric approaches and rhetoric even more theoretically unsound and conceptually problematical. Any counter-response that rests upon corporate ideology and theory being beyond the legitimate scope of the Draft 5th Edition simply underscores the particular corporate ideology and theory adopted by the Drat 5th Edition, with all of the intellectual baggage that goes with it.

10. Whatever might be said on all sides of the debate about the necessity and desirability of doing more than the Draft 5th Edition does to engage and align multiple dimensions of its overall orientation, substance, and implementation, it is undeniable that the Draft 5th Edition goes into much more granular detail as a matter of process about some levels and aspects of corporate governance (such as

equity, diversity, and inclusion (**EDI)** factors, gender diversity targets, board charters, codes of conduct, stakeholder engagement processes, and ESG risks and disclosures) than it does as a matter of substance about other levels and aspects of corporate governance (such as 'shareholder value', 'corporate purpose', and what it actually means to 'have regard to' (or 'take account of') all stakeholders,[4] including shareholders).

11. Here, differences of ideology, theory, and resultant orientations and mindsets matter. For example, what does 'sustainable value' – for investors, for the entity, and/or for various corporate constituencies really mean and require by way of corporate governance, and what does it mean in practice to 'have regard to' often conflicting or incommensurable stakeholder interest and concerns? The way in which a theory of shareholder supremacy and requirements under it 'have regard to' stakeholder considerations is different from what a theory of stakeholder pluralism and associated requirements might do. The same can be said of the amorphous concept, 'shareholder value', as illustrated by the fragmenting of that concept into Friedmanite 'shareholder value', 'enlightened shareholder value' (especially in the UK), 'shareholder value' under systems of 'stakeholder capitalism' and 'responsible capitalism', and the various terminological manifestations of sustainable (shareholder) value in the Draft 5th Edition.

12. So, if official corporate governance standards such as the Draft 5th Edition are going to use such concepts, about which there is still much lack of clarity concerning their meaning and decision-making methodology, as shorthand references for ends or means in corporate governance, it is best to be consistent in the use of that terminology and with a clear understanding of the background legal parameters that prescribe, proscribe, and permit the full range of decision-making considerations for directors, who have a duty to decide and act in the best interests of the company.

13. The ASX CGC need look no further than the *Final Report of The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*[5] by Commissioner Hayne for confirmation of the dangers of short-termism, the amorphous and practically unhelpful nature of references to concepts such as shareholder primacy and value, the non-reducibility of a company's best interests to shareholder-centric interests and financial metrics, and the error of treating shareholder and non-shareholder interests as inherently being in conflict. The referencing of the Hayne Royal Commission in the Draft 5th Edition also raises a related question in practice about awareness, curating, and use of the proliferation of available reference sources for meaningful guidance of all participants in Australia's corporate governance of listed entities, which is addressed with suggestions at the end of this Submission, going to Consultation Question 19.

The Banking Royal Commission and the Draft 5th Edition

14. Any Australian regulator, lawyer, or businessperson who doubts that the hitherto widespread consensus about shareholder value and primacy is under serious challenge need only read Commissioner Hayne's final report on misconduct in banking, superannuation, and financial services. After all, if the theory of shareholder value and primacy supposed by some to be wholly entrenched in Australian law and practice is to prevail in the post-Hayne environment, its supporters must be able to

[4] ASX CGC, 2024a: Principle 3 and Recommendation 3.3.
[5] Hayne, 2019a.

distinguish it from corporate profit-maximisation at all costs, or at least the kinds of lax corporate governance oversight, unlawfulness, conflicts of interest, unethical actions, and deprioritisation of public and consumer interests exposed by Commissioner Hayne, yet purported to be justified by some Banking Royal Commission participants by references to shareholder value.

15. The Hayne Royal Commission exposed irresponsible banking behaviour, and the whole corporate sector is still navigating its way through the post-Hayne world, without a clear roadmap for the changing landscape. Commissioner Hayne exposed a widespread banking culture and mindset of minimalist compliance, treated as simply 'a cost of doing business', and resulting in the sacrifice of responsible oversight, lawfulness, and customer interests at the altar of short-term institutional profit-maximisation and individual remuneration-enhancement.[6]

16. Seen through Commissioner Hayne's eyes, too many organisations under his scrutiny did 'as little as they thought they have needed to do to meet their legal obligations', producing 'occasions when profit has been allowed to trump compliance with the law, and many more occasions where profit trumped doing the right thing by customers'.[7] The risks that short-termism runs under cover of 'shareholder value' produce corporate behaviour that is destructive even of shareholder value. Claims about pursuing shareholder primacy and value as the guiding principle for business start to ring hollow when business conduct is found to be unethical, illegal, and clearly in disregard of the best interests of a company over the long run and its shareholders as a whole, especially when those interests include preservation of a corporate brand and reputation for ethical, honest, fair, and lawful behaviour.

17. In response to his Interim Report's conclusions about scrutinised financial services organisations having chosen 'to give priority over the interests of customers and above compliance with the law', some people justified prioritising the pursuit of profit as a necessary consequence of 'the fact that a financial services entity is ultimately accountable to its shareholders'.[8] Commissioner Hayne specifically subjected that claim to additional scrutiny, in ways that arguably reshape the landscape of Australian debate about shareholder wealth-generation and its preconditions and limits. All of this is essential background context for understanding and evaluating the Draft 5th Edition's reliance upon shareholder-centric notions of 'long-term sustainable value'.[9]

18. Commissioner Hayne neither reduces nor confines boardroom responsibility to the various 'forms of accountability' to shareholders. He points to the 'systematically important' status of 'the largest financial services entities' and their 'long-term stability' for 'the proper performance of the national economy'. In doing so, he emphasises that 'the boards of those entities must have regard to those enduring requirements', which are 'neither wholly captured by nor completely reflected in the day-to-day share price of the entity or some measurement of "total shareholder return" over some period'.

19. Focusing explicitly upon directors' duties, Commissioner Hayne says:[10]

> Directors must exercise their powers and discharge their duties in good faith in the best interests of the corporation, and for a proper purpose. That is, it is the *corporation* that is the focus of their duties. And that demands consideration of more than the financial returns that will be available to shareholders in any

[6] Hayne, 2018: 55.
[7] Hayne, 2018: 55.
[8] Hayne 2019a: 401.
[9] ASX CGC, 2024a: 24 (Principle 3).
[10] Hayne, 2019a, 402-403; original emphasis.

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 …

20. Commissioner Hayne's statements go to five considerations that preclude an exclusively shareholder-centric focus. First, at least large corporations and their best interests implicate public interests as well as corporate constituency interests. Secondly, the focus of directors' duties is the corporation itself, not simply shareholders as a constituency. Thirdly, the corporation's best interests are not calculable simply by reference to the financial interests of those recorded in a shareholding register at a given date or for a relevant accounting period. Fourthly, shareholder value and financial returns are not the only considerations for directors in evaluating a company's best interests. Fifthly, supposed conflicts between shareholder and customer/stakeholder interests in the short term are usually resolvable by looking at their interests over a longer time horizon, although such a view is also problematical in terms of the legitimate interests of investors in having effective control and oversight of the actions and motivations of company directors and managers.[11]

21. Reasonable proponents of shareholder primacy accept that it has limits, including (but not necessarily limited to) the Friedmanite concession of the trumping quality of good governance, legality, business ethics, and fair competition. It does not authorise the sacrifice or abuse of legally protected or otherwise recognised non-shareholder interests, simply for the sake of shareholder gain. It does not prevent non-shareholder interests relevantly being considered in some way. It does not require directors to act only in ways that produce short-term financial returns for shareholders, whatever might be said about the pressures caused by conventional remuneration measures.

22. It does not provide a readily accessible criterion for corporate decision-making at a sufficient level of granularity for practical use in the vast array of contexts and circumstances in which decisions about the best interests of a corporation and its members are relevant under the law. It does not mean that shareholders have the absolute right to dictate courses of action to directors, excuse their non-compliance with the law, or approve actions against the interests of particular constituencies (eg creditors) in particular circumstances (eg insolvency or near-insolvency). Its prevalence has also facilitated 'toxic' corporate behaviour and effects.[12]

23. Wherever anyone stands on the spectrum of possible meanings and methodologies associated with 'shareholder value', Commissioner Hayne makes a number of important points clear about corporate law and governance that form a baseline against which the Draft 5th Edition's provisions about 'shareholder value', stakeholder engagement, board performance and remuneration, and 'long-term sustainability' can be assessed. First, Commissioner Hayne confirms that no pursuit of profit by a company though unethical and illegal means and at the expense of paying customers could ever be justified properly on the grounds of shareholder interests and accountability.[13] The Friedman doctrine's reliance upon inherent 'rules of the game' for companies in the marketplace that respect legal, ethical, and market norms is to similar effect.

24. Secondly, Commissioner Hayne confirms that corporate boards only meet the requirements of their directors' duties and other legal obligations by considering a wide range of decision-making factors,

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[11] As discussed in: Belinfanti and Stout, 2018.
[12] Stout, 2003.
[13] Hayne, 2019a: 401.

which are not reducible to or measurable by a range of financial metrics focused exclusively upon shareholder gain:[14]

> (T)he requirements are neither wholly captured by nor completely reflected in the day-to-day share price of the entity or some measurement of 'total shareholder return' over some 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. The best interests of the corporation cannot be determined by reference *only* to the current or most recent accounting period. They cannot be determined by reference only to the economic advantage of those shareholders on the register at some record date. Nor can they be judged by reference to whatever period some of those shareholders think appropriate for determining *their* results. (original emphasis)

25. Finally, Commissioner Hayne rejects the oppositional and zero-sum framing of the relationship between shareholder interests and other stakeholder interests, and suggests that such framing distracts attention from a proper boardroom focus upon a long-term horizon that renders moot most (if not all) arguments about the capability and desirability of shareholding and non-shareholding interests trumping each other:[15]

> It is *not* right to treat the interests of shareholders and customers as *opposed*. Some shareholders may have interests that are opposed to the interests of other shareholders or the interests of customers. But that opposition will almost always be founded in differences between a short term and a longer-term view of prospects and events. Some shareholders may think it right to look only to the short term.
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> The longer the period of reference, the more likely it is that the interests of shareholders, customers, employees and all associated with any corporation will be seen as converging on the corporation's continued long-term financial advantage. And long-term financial advantage will more likely follow if the entity conducts its business according to proper standards, treats its employees well and seeks to provide financial results to shareholders that, in the long run, are better than other investments of broadly similar risk … *In the longer term, the interests of all stakeholders associated with the entity converge.* (emphasis added)

26. The point of this discussion for assessment of the Draft 5th Edition is as follows. The undoubted shareholder-centric nature of various shareholder rights and controls under Australian corporate law and governance does not automatically require company directors to decide and act in favour of what would most advantage a designated cohort of shareholders at a designated point in time according to a designated set of financial metrics. Such a realisation renders references to 'shareholder value' problematic if viewed in such simplistic and reductionist terms.

27. Put another way, and made relevant to the Draft 5th Edition, company directors cannot approach and fulfil Principle 1 ('Lay solid foundations for management and oversight'), Principle 3 ('Instil a culture of acting lawfully, ethically and responsibly'), Principle 6 ('Respect the rights of security holders'), and Principle 7 ('Recognise and manage risk'), with an outlook, mindset, and informational base that, in a blinkered fashion, exclusively treats 'shareholder value', a company's best interests, and sustainable corporate success as each being equivalent to and co-extensive with shareholder gains and benefits exclusively over a given period of reference.

[14] Hayne, 2019a: 401-402.
[15] Hayne, 2019a: 402.

28. The Hayne Commission fall-out is not something simply to ride out anytime soon. What Commissioner Hayne revealed and recommended goes beyond exposing the limits of tunnel vision about shareholder primacy and value, cashing and firing up the regulators, rooting out a few rotten apples, and stopping clear but isolated breaches of the law, before returning to business as usual for everyone else in the business sector. While COVID-19 paused some subsequent political, regulatory, and business actions in light of it, its referencing by the ASX CGC in the Draft 5th Editions brings its insights and suggestions back into focus.

State of Australian Corporate Law and Governance

29. The Draft 5th Edition must also be interpreted and applied against the underlying Australian law on corporations and their governance. For example, In terms of other aspects of the legislated and general corporate law in Australia (**corporate law**) underpinning the Draft 5th Edition, especially about the relationship between shareholding and non-shareholding interests in corporate governance, Australian and UK courts have spent decades grappling with conceptualising the coherent basis for company directors to consider and prioritise creditor interests over shareholder interests in the context of actual or looming corporate insolvency – is there a separate duty (however imperfect) of some kind to creditors or is this aspect accommodated under duties to the company?[16]

30. To foreshadow and summarise the analysis that follows, Australian corporate law and governance accepts that: a company's directors must act in its best interests; directors' duties are owed to the company and not to any particular corporate constituency (whether shareholders always, creditors sometimes, or anyone else whenever); and directors can (and sometimes must, at least where doing so is in the best interests of the company, which is often co-extensive with the best interests of its shareholders) take appropriate account of stakeholder interests. While noting that '(t)he debate about the separation, if any, between the interests of the company and the interests of the shareholders continues', Australia's second most senior judge on the High Court of Australia (**HCA**), Justice Michelle Gordon, concludes that 'it is at least arguable that a board considering the interests of a broad range of stakeholders … is doing no more than acting for the benefit of a corporation in accordance with existing Australian law', although she concedes that '(w)hat is not clear is whether or to what extent under Australian law directors *must* take into account interests of not only shareholders but also "customers, employees and all associated with any corporation" including suppliers and creditors'.[17]

31. Justice Gordon's summary of Australian law and its uncertainties resonates with some of the requirements of the Draft 5th Edition. She also poses a question that, in effect, stress-tests both what it means to take appropriate account of stakeholder interests *and* the different treatment of corporate purpose in the transition from the 4th Edition to the Draft 5th Edition, and the best approach for future iterations:[18]

> Stakeholders are not uniform and balancing their respective interests is invariably difficult. Does identification of corporate purpose drafted by reference to what a corporation does, where it does it, how it does it, why it does it and who is affected provide a base – a better base – for informed corporate decision-

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[16] See the discussion, for example, in Australia in *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239, and in the UK in *BTI 2014 LLC v Sequana SA & Ors* [2022] UKSC 25.
[17] Gordon, 2023: 21, 24; original emphasis.
[18] Gordon, 2023: 24-25.

making, for the balancing of competing interests in the short, medium and long term and for better and informed regulation and, possibly, enforcement of corporate governance?

32. 'There is a strong line of Australian authority that *appears* to provide strong support for the shareholder primacy theory',[19] according to currently the third most senior judge on the HCA, Justice James Edelman. The qualifier (ie 'appears') is an important one. In the same extra-judicial analysis of the theory and content of Australian corporate law, Justice Edelman also describes the problems that are inherent in: shareholder primacy and value; the construct of taking account of the interests of any one corporate constituency (ie shareholders and other stakeholders alike); and a less than fulsome treatment of corporate purpose:[20]

> There is a *further* problem with acceptance of shareholder primacy in the form of a free-standing duty to consider the interests of shareholders *or* stakeholders. A duty to consider the 'interests of 'shareholders' would require either a determination of the needs of the shareholders as a group, or the imputation of a common *purpose* shared amongst them all. Yet shareholders may have a variety of idiosyncratic purposes. Further, in a listed company, the shareholder group composition is ever changing. Even an attempt to identify a lowest common denominator of a return on investment runs into difficulties of the extent of the desired return, whether the shareholders desire a steady dividend income or long- or short-term growth.
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> The *only* coherent general measure of objective shareholder expectation is to consider what a reasonable shareholder expects of the directors. And the answer to that question objectively must be that a reasonable shareholder expects the directors to fulfil the *purposes* of the company, as determined by the corporate constitution.

33. At the very least, there is an infelicity of fit between some of those extra-judicial statements and the Draft 5th Edition's actual treatment, engagement, and non-engagement of the identified fault lines, and what remedial work might still be done on the Draft 5th Edition and, if not there, in future editions. It is necessary to probe aspects of Australian corporate governance law and regulation further in this Submission, when evaluating particular concepts and requirements underpinning it, as assumed or used in the Draft 5th Edition. These and similar deep dives into Australian corporate governance law and regulation, for the purpose of assessing the degree of correlation with requirements in the Draft 5th Edition, fall under the catch-all nature of Consultation Question 19.

34. At the turn of the century, the HCA confirmed a series of general propositions about corporations under Australian law. In particular, the HCA confirmed a company's separate legal status from its shareholders, the common connection between a company's best interests and how that affects shareholders, the general shareholder-centric (but not shareholder-exclusive or absolute shareholder-determinative) orientation of corporate law, and the practical but limited sense of ownership of the company by its shareholders, through their collective shares and associated rights in the company:[21]

> It may be readily accepted that 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

[19] Edelman, 2020: 210; emphasis added.
[20] Edelman, 2020; emphasis added.
[21] *Pilmer v Duke Group Ltd (In Liq)* [2001] HCA 31 at [18] (per McHugh, Gummow, Hayne, and Callinan JJ); see also: *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239, [4389].

company. But the company is a separate legal entity and the question … is what damage (if any) did *it* suffer … The question is *not* whether shareholders … were adversely affected. (original emphasis)

35. Beyond those general propositions as supported by high legal authority, Australian corporate (including corporate governance) law and regulation supports the following discrete propositions, as a baseline for what underlies or appears in corporate governance standards such as the Draft 5th Edition. First, while Australian corporate law does not explicitly endorse any particular theory of corporations for interpreting and applying the general and statutory law of corporations, and in particular does not require profit-maximisation and shareholder advantage above all else, it nevertheless is broadly consistent with a shareholder-centric but not shareholder-exclusive view of corporations.

36. If it were otherwise, and the theory of corporate supremacy matched corporate law and practice completely, shareholder interests would always exclude or dominate all other considerations, to the point that directors' duties would always require maximised profit-making for shareholder advantage to prevail in all circumstances and at all times. Even otherwise conservative US Supreme Court justices concede that 'modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so'.[22]

37. Secondly, a company's directors must act and decide with due care and diligence, and in good faith and in the best interests of the company, as required under sections 180 and 181 of the Corporations Act. The AICD's stated public position is that those directors' duties permit consideration of non-shareholder interests, and that no additional changes in legislation are needed to enable company directors to consider non-shareholder, reputational, and other relevant interests of companies.[23]

38. Thirdly, and regardless of what flows from the limited sense of a company being 'owned' by its shareholders while also being a separate legal entity from them, the shareholder-centric nature of companies under corporate law means that consideration of shareholder interests by a company's directors is pivotal in company affairs. A company's directors must properly take account of the interests of its shareholders as a whole in deciding and acting in the company's best interests. In that regard, the Walker-Ng Legal Opinion cited in the Draft 5th Edition says, with particular regard to sections 181, 232, and 233 of the Corporations Act:[24]

> (T)here is, as a practical matter, little scope for the directors of a company to argue that they are acting in its best interests when they are conducting the affairs of the company contrary to the interests of its members as a whole. Accordingly, even if the 'best interests' duty were a duty to act in good faith in the interests of a company as a commercial entity distinct from its shareholders, the interest of shareholders would be a central, if not the central, consideration to which the directors must have regard.

39. Fourthly, a company's best interests are not always or automatically the same as what most financially advantages its shareholders exclusively at a given point in time. As the Walker-Ng Legal Opinion indicates, 'it is not correct to say that the interests of a company should be seen as being one and the same as the interest of its shareholders for all purposes and in all contexts'.[25] Similarly, in a case cited

[22] *Burwell v Hobby Lobby Stores Inc* 573 U. S. _ (2014) (Alito J, delivering the opinion of the Court).
[23] AICD, 2022.
[24] Walker-Ng Legal Opinion, 2022: [6].
[25] Walker-Ng Legal Opinion, 2022: [12].

in the Walker-Ng Legal Opinion, *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)*, Justice Owen similarly says that '(i)t is, in my view, incorrect to read the phrases "acting in the best interests of the company" and "acting in the best interests of the shareholders" as if they meant exactly the same thing'. So, whatever 'shareholder value' means and requires of company directors, it does not require such a crude and overly simplistic approach to boardroom decision-making.

40. Fifthly, it will commonly be the case that a company's best interests coincide with the best interests of its shareholders as a whole over the long run – and the interests of its other stakeholders too, from that long-term perspective. Here, it is important not to make assumptions, based upon a mono-dimensional focus upon shareholders alone. Where the best interests of the company are fully co-extensive with shareholder advantage, a causal relation between the two concepts is commonly assumed, even though courts and commentators alike highlight that such assumed linear causality is a misconception. One thing does not necessarily follow from the other, and indeed the bi-polar framing is part of what leads to the error in thinking and practice.

41. For authoritative statements to that effect, recall here Commissioner Hayne's pithy but nonetheless accurate observation that a company's best interests are not reducible to 'a binary choice' between shareholders and other stakeholders. Similarly, in the words of Justice Owen:[26]

> (I)t is almost axiomatic to say that the content of the [best interests] duty may (and usually will) include a consideration of the interests of shareholders. But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored.

42. Sixthly, in the light of such authoritative pronouncements, it is therefore uncontroversial for the Walker-Ng Legal Opinion to conclude as follows:[27]

> Directors *may* thus consider the long-term interests of the company and its shareholders, as well as the potential impact of any reputational risks, given that such risks may constitute a very real threat to *shareholder value*. It is through the lens of these matters, which supply *a link* to the interests of shareholders, that directors *may*, in our opinion, have regard to the interests of customers, employees and the community at large in making decisions for and on behalf of companies.

43. Seventhly, a company's directors can lawfully take account of the interests of the company's other stakeholders insofar as they relate to the company's profitability and success, and must take them into account as relevant considerations in deciding and acting in the company's interests and where otherwise legally compelled to do so, whether directly or indirectly. Eighthly, there are circumstances where the interests of other stakeholders lawfully and absolutely prevail over the interests of shareholders (eg creditors' interests and statutory priorities of debts in winding up companies).

44. Ninthly, it is lawful for company directors to make a decision in the long-term best interests of a company and all of its stakeholders (including shareholders) as a whole, even if that decision seems to advantage other stakeholders over some or all shareholders in the short or near term. Tenthly, abstract and interpretative concepts such as 'shareholders as a whole' are not necessarily reducible to an actual

[26] *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239, [4395], also quoted in the Walker-Ng Legal Opinion, 2022: [14].
[27] Walker-Ng Legal Opinion, 2022: [7].

cohort of shareholders at a particular point-in-time, except where the law otherwise requires, as it arguably does in Australian corporate governance law and regulation in sections 232 and 233 of the Corporations Act, for example.

45. One important upshot of the legal summary above is that, whatever else might be said about the pros and cons of the Draft 5th Edition's treatment of non-shareholder interests, the ASX CGC is not only within the law and entitled to include non-shareholder interests and enhance non-shareholder engagement, risk assessment, and other requirements in the way that the Draft 5th Edition does. It would also be a significant retrograde step, and one that is inconsistent with corporate governance law and regulation as well as authoritative scholarship and other commentary about it, to remove or downgrade the relatively minor and non-controversial requirements in stakeholder-related corporate governance enshrined in the Draft 5th Edition, whatever the number and nature of objections to such treatment of stakeholder interests in this Consultation phase. At the very least, such objections would need to be stress-tested against further argument and evidence, given the commonality and acceptance of stakeholder considerations in corporate governance law, regulation (including official standard-setting), and commentary in Australia and comparable jurisdictions.

46. In no way do those suggested requirements, which any company could always opt out of anyway given their 'comply or explain' nature, legitimise fears of stakeholder-based consideration for the company's interests in following the requirements of the Draft 5th Edition. Rather, they provide acceptable and minimalist ways and processes (even if not yet the best ways and processes) for company directors taking an integrated approach to relevant shareholding, non-shareholding, and other (eg reputational) interests in the various dimensions and elements of corporate governance to which its Principles and Recommendations collectively speak. For these and other reasons in this Submission, its author answers Consultation Questions 9 and 10 by broadly supporting what appears in the Draft 5th Edition about them.

Ongoing Corporate Governance Controversies

47. The Draft 5th Edition enters its public consultation phase at a time when there is lingering controversy about the compromises over explicit recognition of a company's social licence to operate in the 4th Edition, as well as new controversy in Australia and elsewhere about the mandatoriness and desirability of *both* equity, diversity, and inclusion (**EDI**) criteria in corporate board membership and company policies *and* ESG considerations in corporate and investment decision-making. In addition, a new version of the timeless debate about corporate purpose has arisen in the interval between the 4th Edition and the Draft 5th Edition, as exemplified by outcomes and authoritative insights from The British Academy's *The Future of the Corporation* Programme led by Professor Colin Mayer from Oxford University's Said Business School, and stimulating expert debate and commentary in Australia and elsewhere, with an apparent watering down of corporate purpose in corporate governance requirements in the transition from the 4th Edition to the Draft 5th Edition. It is not clear whether or not there is any causal connection between these developments.

48. Finally, the Draft 5th Edition falls for assessment and comparison in areas of key controversy with comparable corporate governance regulation and practice elsewhere (eg the UK), proposed legislation referenced in it (eg mandatory climate-related and sustainability reporting), and the surrounding environment of political, business, and public reaction to the Draft 5th Edition as a piece of business regulation and standard-setting. For example, the business community and its peak representative

bodies and other advocates (including commercial lawyers and commentators whose views and advocacy are co-extensive with the interests of the business community) are engaged in a new wave of proactive public advocacy and criticism, targeting what they see as overly burdensome 'red tape' and now 'green tape' regulation on a number of fronts, including reaction in some quarters against the Draft 5th Edition.[28]

49. In short, like advocacy and critique on all sides of the corporate governance debate, the business sector's advocacy and critique and the other commentaries for and against it and the Draft 5th Edition, are inherently political and commonplace in their targeting of so-called 'red tape' and 'green tape'. Much of the rhetoric over-states the true position, as does much of the media commentary and critique, including that aimed at the ASX CGC and its member organisations.

50. Again, the ASX CGC should hold its nerve on where it has landed with the Draft 5th Edition, as an evolving standard-setting instrument, from the 4th Edition onwards, at least in terms of its enhanced treatment of de-identified disclosure of code of conduct breaches, stakeholder engagement, and treatment of EDI and ESG, none of which are as radical or counter-productive as some critics suggest. It should resist, and has ample justification in comparative standards and literature elsewhere for resisting, any public calls in this consultation phase to rewrite particular chapters of an ongoing and 'evolutionary' story authored by the ASX CGC, at least on those aspects. The continuing story must be coherent, consistent, and credible.

51. Indeed, if there is to be any further revision, it would need to start from the point of recognising that the pendulum has already swung too far away from explicit (although not implicit) recognition of a company's social licence to operate (admittedly amongst its other licences to operate), unpacking of the meaning and operation (and flaws and limits) of 'shareholder value' under the various Principles and Recommendations (and associated Commentary) beyond what currently appears in the Draft 5th Edition, and absolute (not conditional) reassertion of corporate purpose as an essential element of good corporate governance, in its own right and in its interactions with other essential elements and their practicalities, as even reflected in the Draft 5th Edition's imperfect compromise on the essentiality of corporate purpose.

52. In particular, in contrast to its compromise on explicitly including a company's social licence to operate in the final version of the 4th Edition, the ASX CGC should hold the line in the face of any calls, driven by any sectoral lobbying pressures and hyperbolic public overstatements and oversimplification, to

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[28] Eg B. Black, 'Bashing Big Business is in Vogue, But It's No Help to the Economy', *The Australian*, 8 April 2024, 11 ('(H)ere in Australia, we are allowing business to become the permanent punching bag [and] are dangerously close to making it taboo to run a business well and turn a profit'); Editorial, 'Good Profits Make for Jobs and a Prosperous Nation', *The Australian*, 8 April 2024, 10 ('Profit, regrettably, has become a dirty word in some sections of the nation's body politic … The Business Council of Australia's campaign to reverse the demonization of profit is timely.'); J. Albrechtsen, 'Why is There No Tough Nut Left in Corporate Australia', *The Australian*, 6 March 2024 (online) ('The pursuit of warm, fuzzy, feel-good idealism at the cost of sound economic policy and good sense … is equally reflected by the way boards obsess over environmental, social and governance [sic] while apparently spending much less time worrying about profit and loss statements or balance sheets.'); and J. Albrechtsen, 'Corporate Australia Falls Prey to DEI, ALP Puppet Masters', *The Australian*, 13 March 2024 (online) ('The embarrassing failings of corporate Australia and the strangling influence of enormously prescriptive and inflexible corporate gatekeepers are now becoming material and mainstream economic issues … (T)he structures of Australian corporate governance force boards to distract themselves with social and political agendas that include diversity, equity and inclusion measures … Cue the thoroughly clueless ASX Corporate Governance Council and its latest draft principles for listed companies … The corporate governance council is responsible for enforcing doctrinaire DEI and ESG policies that have hobbled listed companies [and] (t)hese failures have been aided and abetted by the standard setter for corporate boards, the Australian Institute of Company Directors.').

abandon or dilute its proposed measures in the Draft 5th Edition relating to EDI, ESG, and stakeholder relevance and engagement, especially when there is a credible case to be made that the problem is not that those measures go too far; rather, in some instances (eg on corporate purpose's essentiality, and the contributions of stakeholders to 'sustainable value'), there are reasonable arguments that they do not go far enough.

53. At the same time, all evaluative approaches to the Draft 5th Edition and its adequacy and scope for improvement must avoid overly simplistic, ill-informed, and unreflective contrasts between shareholder interests and the interests of non-shareholders, as well as framing and treating those sets of interests as inherently exclusive or competitive ones. Neither shareholders nor other stakeholders are monolithic or homogenous constituencies of any single or common interest. Even a supposed commonality of financial interest is a function of a given time period of investment in a company with a particular purpose, competitive differentiation, and set of opportunities and risks. Nor are particular considerations such as corporate reputation, climate and the environment, and the catch-all category of the interests of society, of the same order and identifiability as other stakeholder considerations, if they are even properly categorizable as 'stakeholder'-related considerations and constituencies in the first place.

54. In particular, proper consideration of the interests of non-shareholding stakeholders in corporate governance arrangements must avoid the common zero-sum error of associating the promotion of 'shareholder interests' with responsible corporate profitability, and the promotion of 'non-shareholder interests' with socio-economic justice at the expense of corporate profitability. Committing that error means falling prey to what Commissioner Hayne described as a 'bi-polar' framing error. Supporters of each of the two main oppositional schools of thought in corporate governance – ie shareholder primacy and stakeholder pluralism – all commonly agree that proper corporate governance requires some taking of appropriate account of non-shareholder interests as well as shareholder interests, in forming views about what is actually in the best interests of a company overall. They just disagree, and often fundamentally, on precisely how shareholder and non-shareholder interests relate to each other and corporate success in society, and what that means for how company directors actually 'have regard to' (or 'take account of') all relevant corporate constituencies.

55. Importantly, this area of common agreement between opposing theories of the corporation has implications for Consultation Questions 9 and 10. It provides a strong reason on its own for keeping and not diluting or removing the stakeholder-related revision of Principle 3 and accompanying Recommendations that enhance, in the evolution of standard-setting from the 4th Edition to the draft 5th Edition, the relevance and treatment of non-shareholder interests in corporate governance requirements and guidance for listed entities.

56. Finally, both the structure of decision-making for corporate boards about notions such as 'shareholder value', 'best interests of the company, and shareholders as a whole', and those terms themselves, are intrinsically conceptual in nature.[29] In reality, all of the following - company directors, their legal advisers, and those who regulate (including law-makers and courts) and set standards for companies (including the ASX CGC) – are forever working with the interplay between ideological, theoretical conceptual, and operational aspects of corporate governance requirements, and how that multi-

[29] See the later discussion in this Submission about the structure for corporate decision-making outlined in the Walker-Ng Legal Opinion, 2022: [7].

dimensional mix of factors plays out in advocacy positions, mindsets, and compliance approaches in corporate governance. The Draft 5th Edition is immersed in that broader context.

Comparative Approaches to Corporate Governance

Theoretical Starting Points in Understanding, Evaluating, and Implementing the Draft 5th Edition

57. The 2008 judgment of Justice Owen, former HIH Royal Commissioner, in the Bell Group litigation, and as cited in the AICD-commissioned Walker-Ng Legal Opinion also cited in the Draft 5th Edition, is a convenient and contemporary starting point for understanding the Australian law of corporate governance that informs concepts used and applied in the Draft 5th Edition:[30]

> *Modern theories of corporate governance rest (at least in part) on the proposition that an objective of the corporation is to increase shareholder value.* But especially in large corporations with many shareholders ranging from experienced investor institutions to 'mums and dads', there may be practical difficulties in identifying the 'interests of shareholders' as the fixing point against which to identify a duty. Sectional interest may have to be taken into account and balanced. In this respect I adopt the comment in Heydon JD, 'Directors' Duties and the Company's Interests' in Finn, P. '*Equity and Commercial Relationships*' (1987), 134-135:
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>> The duty which is owed to the company is not to be limited to, or to be regarded as operating alongside, a duty to advance the interests of shareholders. *There is no superadded duty to shareholders* … And *the directors' duty to the company is not to be limited to the duty to consider shareholders*, because, for example, businessmen [sic] in their daily talk reveal that they are constantly considering, without impropriety, interests other than those of the shareholders. To consider only the short-term interests of the present shareholders would mean that every dollar available for dividend should be paid out; that no attempt to re-invest funds or expand the company's market by price cutting could be allowed.
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>> The law prevents directors from exercising their powers merely to maintain control, or otherwise advance their self interest, or *to advance third party interests*, or to effectuate some bye motive. But *the law permits many interests and purposes to be advantaged by company directors*, as long as there is a purpose of gaining in that way a benefit to the company. (footnotes omitted)
>
> This is where the relevant distinction lies. It is, in my view, incorrect to read the phrases 'acting in the best interests of the company' and 'acting in the best interests of the shareholders' as if they meant exactly the same thing. To do so is to misconceive the nature of the fiduciary relationship between a director and the company. And it ignores *the range of other interests* that might (again, depending on the circumstances of the company and nature of the power to be exercised) legitimately be considered. On the other hand, it is almost axiomatic to say that the content of the duty may (and usually will) include a consideration of the interests of shareholders. But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored. (emphasis added)

58. At the very least, those clearly correct judicial statements of legal principle provide no comfort or basis for critics of the Draft 5th Edition to argue successfully against inclusion or for dilution of its enhanced recognition of stakeholder interests and engagement in corporate governance standards, in the

[30] *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239, [4394]-[4395].

'evolutionary'[31] transition from the 4th Edition to the Draft 5th Edition. This is also important in answering Consultation Questions 9 and 10 about the amplified inclusion of stakeholder engagement in the Draft 5th Edition.

59. It is not seriously tenable for any regulator, business leader, commercial lawyer, lobby group, or media commentator to argue that theory-building in the design and operation of the Draft 5th Edition is unnecessary and avoidable in understanding, evaluating, and implementing that standard-setting instrument. After all, a concept such as 'shareholder value' is inherently conceptual, as is a concept such as what constitutes a company's best interests. Neither concept is self-explanatory in its meaning and operation.

60. The Draft 5th Edition represents a particular body of thinking and sets of choices about approaches to corporate governance. It is difficult to see how any meaningful evaluation of its underlying premises and the resultant starting approach to corporate governance standard-setting can occur without proper attention to all of the following – namely: experiential insights (especially from the regulatory, business, and consumer sectors); comparative insights (especially from comparable jurisdictions and their regulated markets); and expert insights (including from academics and other commentators) about the inherent ideological, jurisprudential, theoretical, conceptual, commercial, and practical dimensions of the Draft 5th Edition, and its knock-on issues and effects in its implementation and impact.

61. We cannot simply assume without further interrogation that what resulted in corporate success in society centuries ago in an earlier industrial era, characterised by scarce sources of financial capital and plentiful sources of human, natural, and social capital, as well as efficient production of goods and services in local businesses often run by owner-managers in local areas and communities, automatically represents the conditions, context, and content of enduring business success in society today, for a spectrum of business that includes borderless multinational companies (**MNCs**) and small-to-medium business enterprises (**SMEs**) alike. Similarly, the conditions and context under which the Friedman Doctrine and shareholder primacy achieved prominence and shaped the content of corporate governance concepts, practices, and norms more than 50 years ago are not the conditions and contexts that prevail now. Moreover, it is entirely possible that both the Friedman Doctrine and the associated theory of shareholder primacy (and 'shareholder value') were each as flawed and incomplete then as they are now in capturing the complex reality of business success in society for companies and their boards. To the extent that the Draft 5th Edition takes sides in such debates, it comes with intellectual baggage.

62. Even leading advocates of shareholder supremacy and value accept that, like the impact of shifting tectonic plates on the planet, the societal premises supposedly supporting shareholder supremacy and value could shift in ways that affect the limits and ongoing efficacy of that theory. The co-authors of the landmark turn-of-the-century work on 'the end of history for corporate law', Professors Hansmann and Kraakman from Harvard University, accept that changes in notions of social efficiency might have that effect.[32] In correspondence with other academics, Milton Friedman conceded inconsistencies in his

[31] This is how ASX CGC Chair, Elizabeth Johnstone, self-described this transition at a public webinar launching the Draft 5th Edition's public consultation phase.
[32] Hansmann and Kraakman, 2011.

own exposition of his theory, and accepted limits upon it based upon company directors sometimes having public obligations that trumped their obligations to shareholders.[33]

63. Leading Australian corporate law scholars[34] and judges[35] have pointed to considerations such as the rise of transnational business regulation and the public dimensions of corporate law as major limits upon the worth of shareholder primacy as a sound theory of the corporation and its governance. Leaders of the revitalised notion of corporate purpose in corporate law and governance, such as Oxford University's Professor Mayer, highlight the impact that changes in the scarcity of financial capital versus environmental capital, for example, have upon building and revising the theories used to justify concretised corporate governance arrangements.[36] The same might be said about changes in other factors such as the ebb and flow in the significance of each of societal effectiveness (versus societal efficiency), productive efficiency, intergenerational equity, geopolitical security, and societal and market challenges in the age of multiple existential threats.

64. So, at the outset, as one amongst other justified entry points into this public consultation's exercise of evaluation, we need a shorthand way to view and understand corporate governance standards, from both the inside out and the outside in. The world's societies and corporations alike use and depend upon various forms of capital, especially *human* (including intellectual and labour-intensive) capital, *social* (including cultural and moral) capital, *economic* (including financial and market-related) capital, *regulatory* (including legal and justice-related) capital, and *natural* (including environmental and climate-related) capital.

65. Each of those different dimensions of capital has its cognate in different corporate licences to operate including, at least from a political and global standpoint, a company's social, legal, political, economic, environmental, and even inter-generational licences to operate. The public consultation surrounding the 4th Edition produced much heat but little light about an ultimately abandoned proposal to incorporate explicitly a company's social licence to operate. The ASX CGC should not compound that error, alongside the error of watering down requirements about corporate purpose from the 4th Edition to the Draft 5th Edition, by stepping back from the position that it takes in the Draft Edition on the requirements that are the focus of Consultation Questions 8, 9, and 10.

66. Under international, national, and sub-national legal orders, all 'hard' laws (even corporate, competition, and consumer laws) justifiably have and serve particular social policies and public interests. In no system worldwide can a company succeed ahead of its competition simply by complying with the law and having the same overriding purpose as its competitors of making as much money at all points in time for all of its different shareholding sub-constituencies. No serious advocate of shareholder supremacy as *the* correct theory of corporate governance argues that shareholder gain must be achieved even at everybody else's expense, although many such advocates do not accept that companies should internalise the costs of producing their goods and services, unless they are legally compelled to do so.

67. In the battle of ideologies and theories about the corporation and its governance between shareholder-based, stakeholder-based, and any other positions, crude and absolute forms of

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[33] Carson, 2018.
[34] Welsh et al, 2014.
[35] Justice Edelman in *ASIC v Cassimatis (No 8)* [2016] FCA 1023.
[36] Mayer, 2018.

shareholder supremacy can be dismissed from further consideration. Like Australian corporate law, the Draft 5th Edition reflects a shareholder-centric (but not shareholder-exclusive) stance on the corporate governance spectrum, and adopts its associated offshoot of 'shareholder value', about which there can be different views as to its meaning and operation, even among its adherents – none of which is acknowledged or addressed meaningfully in the Draft 5th Edition. It is no real answer to that criticism to say that it is not necessary for the Draft 5th Edition to do that work to any degree, when such work is implicated in various ways in grappling with various Principles, Recommendations, and associated Commentary.

Flaws in Design in Standard-Setting – The Shareholder-Stakeholder Spectrum

68. The Draft 5th Edition devotes more attention to stakeholders and their relationship to corporate governance than does the 4th Edition. It is right to do so, regardless of the underlying theory of corporations and corporate law and governance to which anyone subscribes. Accordingly, it is worth spending some time considering the nature and limits of analysis along a shareholder-stakeholder spectrum of theory and practice.

69. The Draft 5th Edition straddles three major fault lines that cut across its revised and new Principles and Recommendations. First, at the macro-level of analysis of corporate governance theory informing corporate governance regulation and practice, there is one key question flowing from the Draft 5th Edition's adoption of 'shareholder value' as its continuing touchstone. Whatever 'shareholder value' means and whatever else for which it might act as a proxy in terms of the overall point of corporate law and governance, is 'shareholder value' fully co-extensive with the theory of shareholder supremacy and profit-maximisation commonly associated with the Friedman Doctrine? Alternatively, is a company's success and enduring profitably attributable to achievement of its corporate *purpose* and raison d'etre (ie reason for being), in which shareholder gain is only the 'by-product' of profitable corporate success involving a range of considerations, and not the main game in its own right, as non-Friedmanites such as Professor Colin Mayer argue? In other words, it matters what underlying theory is adopted or packed into corporate governance, because underlying or assumed corporate governance understandings and mindsets frame and shape corporate governance standard-setting and practice.

70. Secondly, at the meso-level of constituencies (eg shareholders versus other stakeholders), sub-constituencies (eg different cohorts of both shareholders and other stakeholders), and other non-constituency-based factors in corporate governance (eg corporate reputation, nature risk and climate change, and 'circular economy' navigation, which are different in kind from and not reducible to any particular human constituency or sub-constituency), all of which are referenced one way or another in the Draft 5th Edition, what are the relationships, priorities, and contingencies surrounding those elements in boardroom consideration? In other words, how do shareholding and non-shareholding interests and other relevant considerations come together and in what ordering when assessing a company's 'best interests', 'shareholder value', and even the related and abstract notion of 'the interests of the shareholders *as a whole*', which is not automatically or inevitably the same as the interests of a given cohort of shareholders on the record at a given time, assuming that there even is an identifiable common interest of all such shareholders.

71. Thirdly, at the micro-level of analysis of particular ways of consulting and engaging stakeholders, respecting shareholder rights, constructing board charters and corporate codes of conduct, accommodating EDI and ESG considerations, managing various kinds of material risks, and recognising and rewarding performance – to reference the kinds of granular (or 'nitty gritty') areas and

mechanisms of corporate governance – does the Draft 5th Edition contain the right coverage, consideration, and balance of such things? At the very least, is there a reasonable basis for the ASX CGC's landing point in the transition from the 4th Edition to the Draft 5th Edition on such things, accepting that reasonable minds might reasonably and agreeably disagree about them?

72. Finally, there are other complications to confront in corporate governance theorising and framing. Across the globe, most of the public, media, and academic commentary about shareholder primacy and stakeholder pluralism proceeds as if the correct background understanding of the corporation and its proper governance that underpins any law or regulatory instrument on corporate governance (such as the draft 5th Edition) requires a choice along a spectrum on which those two conceptions of corporate governance are natural end points as bi-polar opposites.

73. Further, in the absence of unanimity or even mass consensus about what each of those two conceptions mean and require of corporate boards in practice, any use of those concepts and terms associated with them requires further work. On many occasions, the language of each of shareholder primacy and shareholder pluralism is simply a rhetorical device or proxy for a wide range of other and largely unstated propositions that nevertheless underlie the interpretation and application of any piece of corporate governance law and regulation. At times, such terms cloak and obscure more than they illuminate and guide. In the face of that background reality, which informs and shapes the working understanding of all participants in the corporate law and governance ecosystem, it is even more important than usual for standard-setting instruments (such as the Draft 5th Edition) to be clear, consistent, and coherent in the use of concepts such as 'shareholder value', 'stakeholders', and 'sustainability', and their derivatives in the instrument concerned.

74. The Draft 5th Edition clearly endorses and uses terminology commonly associated with notions of shareholder primacy and value, both alone and in association with other terms relating to overall corporate success, although such notions are not further defined or explained in detail. The main problem with using such notions is that they come with a lot of inherited baggage from the scholarship and regulation surrounding them, not least because of their association with shareholder-centric theories, and still without conceptual clarity and marketplace unanimity about their precise meaning and decision-making methodology, let alone their limits and downsides.

75. More particularly, the use of such notions in the Draft 5th Edition must be interpreted against the background of how corporate governance law and regulation treats both shareholder and other stakeholder interests. That treatment has twin aspects. It includes important limits upon shareholders being regarded collectively as the alter ego of the company, in all contexts and for all purposes. It also includes the conditions under which non-shareholder interests and other factors (eg corporate reputation) are legitimate considerations in corporate governance.

76. At the most basic level of understanding, a successful company in society achieves sustainable profitability in providing a product or service that meets a particular societal need or addresses a particular societal problem. The collection of interests that come together in making different kinds of company-specific investments of different kinds of capital – eg financial capital, human capital, and social capital – are grouped under labels such as 'shareholder interests' and 'non-shareholder interests' (or 'non-shareholding stakeholders' or 'other stakeholders'). The corporate governance standards and practices for a company must properly accommodate, prioritise, and weigh the diverse set of company-

specific investments of different kinds of capital made collectively by dispersed set of shareholders and other stakeholders.

77. As Professor Mayer's works substantiate, a company's continuing success and profitability in meeting and addressing its chosen societal need or problem is what enables it to provide and optimise different kinds of benefits that match different kinds of investments in the company, thereby providing incentives for existing and future company-specific investments to endure. In short, a successful company strives to meet the revealed purposes in its company constitution to which the company's various constituencies are committed, and to keep its various constituencies satisfied and invested in it. The idea that such outcomes are achieved through a singular, absolute, and unbounded focus upon what will produce most financial gain for an exclusive set of constituents and no others only needs to be stated for it to be exposed as an ideologically unrealistic, morally compromised, conceptually problematic, and practically unworkable account of corporate success in society. It is as equally flawed as the proposition that adding stakeholder interests into the corporate governance mix inevitably and unacceptably sacrifices corporate profitability. No serious theory of shareholder supremacy subscribes to such simplistic and wrong views about stakeholder considerations.

78. To contextualise this issue for some of the Draft 5th Edition's requirements: the biggest fear of opponents of stakeholder-sensitive corporate governance is that, if corporate boards can consider stakeholder considerations (and, by extension, ESG considerations) in their decisions and actions on behalf of their company, it leaves the way open for company directors to advance or benefit non-shareholder interests at the expense of shareholders, whose contribution of financial capital (but not all forms of capital) to the company entitles them, so such opponents say, to be regarded in a meaningful economic sense (although certainly not in a legal sense) as the 'owners' of the company and the constituency in whose interests the directors must govern the company. Such fears simply replay today, in the context of debates about successive drafts of the ASX CGC corporate governance standards, some decades-long fears from supporters of shareholder supremacy and the Friedman Doctrine about stakeholder pluralism's supposed erosion of efficient production and use of financial capital, presumed excesses of corporate managerialism, and separation of ownership (by shareholders) from control (by boards and managers).

79. Yet, in every case where a point-in-time decision seems to favour non-shareholders over shareholders, it will never be unjustified on that basis alone. It will be legally, economically, and socio-ethically problematic if the company's directors have no reasonable basis for thinking that their decision actually is in the best interests of the company and its sustainable profitability in the long run, and hence its capacity to advantage shareholders as well as others in relationships with the company. Even if that decision turns out to be misguided and the company suffers financial loss as a result, courts give company boards a margin of appreciation in decision-making and are slow to second-guess commercial decisions. The law supports that margin of appreciation for directors in a number of ways, through various safe harbours and business judgment defences.

80. Moreover, where stakeholder considerations of one kind or another are intertwined with corporate financial success, corporate boards who do not consider relevant stakeholder interests and have adequate processes to facilitate consideration of stakeholder concerns and interests in board decision-making risk being in breach of directors' duties and disabling themselves from reliance upon otherwise applicable defences. In other words, company directors *can* always consider relevant stakeholder considerations in appropriate ways, and *must* do so under pain of breach of directors' duties where

stakeholder considerations affect or inform the best interests of the company. To that extent, the Draft 5th Edition mainly lands on the right mark. Its position on that issue is supported to that extent by the Walker-Ng Legal Opinion.

81. It is neither necessary nor desirable for corporate governance standards to descend into too much prescription or detail about criteria for decision-making by corporate boards about a company's best interests and by extension any permissive or necessary consideration of stakeholder interests. Still, the conditioning of references to 'shareholder value' by reference to qualifying descriptions such as a company's 'long-term sustainability' points to notions such as 'shareholder value' (as a proxy for 'sustainable value') being more complex and nuanced in their determination by corporate boards than crude shareholder primacy dictates.

82. So, at least some kind of reference to stakeholder considerations in at least some circumstances, and their relationship to both shareholder interests and the best interests of the company, is essential in all proper assessments of 'sustainable value' and 'shareholder value' alike. That conclusion alone justifies the ASX CGC's decision to enhance stakeholder-related processes and other requirements in the Draft 5th Edition, whatever praise or criticism its particular way of doing so attracts. Finally, it is a much more nuanced and complex exercise than simply focusing exclusively upon any particular corporate constituency, at least in tabulating and then comparing and contrasting designated sets of shareholder and other stakeholder interests, even if such an exercise were possible.

83. After all, there might not be a single, collective, and commensurable set of shareholder interests, let alone a similar combined set of shareholder and non-shareholder interests, that constitutes a company's best interests, except perhaps the enduring capability of the company (in which they have all made particular kinds of company-specific investments of different kinds of capital) successfully achieving its reason(s) for being (otherwise known as its 'purpose(s)') and hence being in a position to provide ample benefits for all of its stakeholders.[37] Even if financial gain is taken as the common denominator of shareholder interests, it is clear that there can be conflicts of interests amongst and between different shareholding cohorts,[38] and that 'short-term investors want boards to manage corporations in ways that are quite different from what longer-term investors prefer'.[39]

84. In light of those authoritative opinions and commentaries, there are at least six (6) key contexts in which taking proper account of stakeholder interests by corporate boards does and should happen as a matter of good corporate governance. Accordingly, the ASX CGC is completely justified in enhancing Australia's corporate governance standards for listed companies by reference to the 'ends' of considering stakeholder interests and the 'means' of doing so. Its position in doing so is well-supported by judicial decisions, relevant legislation, other official and industry regulation, published legal opinions, expert commentary, and comparable corporate governance codes elsewhere. Those six (6) contexts are:
    a. where stakeholder interests are directly protected under law (eg statutory protection of employee and creditor interests in particular circumstances, even at the expense of shareholder primacy);

[37] Eg Mayer, 2018.
[38] Rock, 2013.
[39] Stout, 2013: 2017.

b. where an obligation to consider stakeholder interests is directly mandated by law (eg mandated consideration of non-shareholder interests under directors' duties in the UK, and mandated negotiation with native title holders under Australian statutory native title law);
c. where stakeholder interests and rights are implicated in other protection of interest and rights under the law (eg human rights-protection);
d. where consideration of stakeholder interests is not automatically mandated but is necessary to fulfil another legal obligation (eg where taking account of stakeholder interests furthers a company's best interests in the long term, as stated in various authoritative cases and the Walker-Ng Legal Opinion);
e. where consideration of stakeholder interests is neither mandated directly nor required in meeting another legal obligation by a company, but enhances official exercises of discretion in a company's favour (eg social/environmental audits and impact statements in pursuit of land-related development and applications); and
f. where engagement with stakeholders and other forms of stakeholder consideration in corporate decision-making and reporting are required or recommended under corporate governance standards, against the background of legal compliance and permissibility in considering stakeholder interests (eg as under corporate governance standards in the USA, UK, and the Draft 5th Edition);

85. Conceptually, the scope for consideration by company directors of stakeholder interests is at its most limited (as under the theory of shareholder primacy at its most absolute point) if such consideration is confined only to circumstances where shareholders also gain or benefit – a characterisation that one publicly accessible legal opinion commissioned by the AICD attributes to the corporate law of Delaware.[40] The scope (as distinct from mandatoriness or even lawfulness) for consideration by company directors of stakeholder interests is at its highest when viewed from the standpoint of what best advances those interests in their own right and at large in society, regardless of their relationship back to the company and even at the expense of shareholders in the long run.

86. Such an extreme scenario captures what some opponents of stakeholder pluralism and supporters of the Friedman Doctrine most fear and resist in corporate governance standard-setting, even though no reasonable advocate of stakeholder consideration in corporate governance could support such an extreme proposition, not least because of its likely illegality. The unreasonableness of this high-water mark in consideration and advancement of stakeholder interests is reinforced by the contrast and limit supplied by the Walker-Ng Legal Opinion, that '(t)he *Corporations Act* leaves little scope for directors to contend that they are acting in good faith in the best interests of a corporation when, at the same time, they are acting contrary to the interests of the members as a whole'.[41]

87. The ASX CGC need look no further for unequivocal support for the proposition that taking account of stakeholders interests is mandatory in at least some legal contexts (and hence suitable for mention in corporate governance standards and arrangements) than the published legal opinion commissioned by the AICD and already cited as an authoritative source in the Draft 5th Edition.[42] In that legal opinion, Bret Walker SC and Gerald Ng reinforce the connection between consideration of stakeholder interests, a company's best interests, and legal obligations towards stakeholders, as follows:[43]

[40] Allens >< Linklaters, 2022: 1.
[41] Walker-Ng Legal Opinion, 2022: [19].
[42] ASX CGC, 2024a: 27, n 39.
[43] Walker-Ng Legal Opinion, 2022: [25], [40].

> It may be that regard to the interests of persons such as customers, employees, suppliers and the local community in which a company conducts business, at least insofar as these persons may be the subject of the company's legal obligations, is *not merely permissible, but mandatory* … There is no reason why directors could not have regard to the interests of customers, employees and the community more generally, provided that there is a rational justification for doing so by reference to the long-term interests of the company, including its interest in avoiding reputational harm. Indeed, insofar as the company owes obligations under statute or the general law that bear upon the interests or welfare of customers, employees or the community, it may be that *directors are obliged to consider those obligations and those interests in making decisions* on behalf of the company. (emphasis added)

88. In another legal opinion commissioned by the AICD and available in a website link in a document cited by the draft 5th Edition,[44] leading law firm Allens >< Linklaters[45] examined the 'best interests' duty under the law governing company directors in five (5) comparable jurisdictions (ie Australia, UK, Canada, New Zealand, and Delaware (USA)), and the scope in each jurisdiction (called 'Comparator Jurisdictions' in the quoted passages that follow) for consideration of stakeholder interests under applicable directors' duties. Allens >< Linklaters conclude as follows:

89.

> In summary, the best interests duty in Australia and the Comparator Jurisdictions are founded on the centrality of shareholder interests.
>
> While this is the case, in each jurisdiction the duty *permits* (or, in the case of the United Kingdom, *requires*) *the consideration of other stakeholder interests*. The distinction between each jurisdiction is the extent to which these interests can influence directorial decision-making when complying with the best interests duty. (emphasis added)

90. In short, while much has been made in corporate governance law and commentary about a presumed zero-sum competition between shareholder interests and other stakeholder interests, that presumed starting premise is the wrong one, and deflects attention from the proper entry point for consideration of shareholder and non-shareholder interests. In all cases, the triangular relationship between shareholder interests, non-shareholder interests, and a company's best interests, and hence consequential corporate legal obligations including directors' duties, are not considered simply as a zero-sum competition between shareholder and other stakeholder interests. Reiterating the words of Commissioner Hayne in his Final Report for the Banking Royal Commission:

> Regardless of the period of reference, the best interests of a company cannot be reduced to a binary choice … Pursuit of the best interests of a financial services entity is a more complicated task than choosing between the interests of shareholders and the interests of customers.

91. Still, trying to simplify the complexity of sustainable corporate value-creation and its dynamic cross-cutting interactions amongst and between different internal and external constituencies, by front-end preferencing of the interests of any single corporate constituency amongst shareholders and other stakeholders in corporate strategizing and decision-making, is fraught with insurmountable difficulty. It misconceives what is necessary for enduring corporate success in society. It is therefore the wrong rationale and starting point for any corporate governance standard-setting and actions implementing such standards. It wrongly conflates the enabling outcomes of corporate success with what is truly

[44] ASX CGC, 2024a: 27, n 39.

[45] In the interest of full disclosure, the author of this Submission was employed by Allens >< Linklaters from 1991 to 2012.

necessary to achieve those outcomes. It risks undue fixation upon a particular constituency to the exclusion of others whose contributions and interactions with the wrongly privileged constituency and one another are crucial for corporate success in society. It puts the blinkers on corporate boards in terms of their line of sight, focus point, and time horizon or, put another way, keeps their eye on the scoreboard and not on the game, where the match is really won.

92. In other words, the business of business is not really absolute shareholder supremacy and gains at the expense of other constituencies, competitors, and the systems that make such gains feasible. Properly understood and applied, the societal 'rules of the game' to which the Friedman Doctrine and other commentators refer are not mere negative constraints on absolute and unbridled profit-making above all else and regardless of the consequences for any other concerns, but rather a reflection of norms that are accepted and essential for business and human prosperity, whether viewed ideologically, socially, legally, commercially, or otherwise. In other words, much as anyone's right to free speech in society reaches its natural limit and is exhausted at the point where someone falsely yells 'fire!' in a theatre or 'shark!' at the beach, a company's legitimate right to make profits ceases and hence does not proceed beyond the point that threatens, exploits, or corrupts the interests and systems whose existence and functioning make possible the profit-making capacity of that company and others in the first place. This has implications for the internalisation and externalisation of the costs of profit-making, whose evaluation is changeable, as premises change that underlie prevailing theories about corporations and their governance.

93. In what world is it ever morally, socially, and even economically acceptable to say that the interests of any individual person (eg employee, customer, or creditor) or human group (eg employees, customers, or creditors) who make an investment of some kind in a company have no inherent importance and warrant no recognition in their own right as aspects of human dignity and flourishing in that action and how it is treated by that company, but only instrumental significance as interests to be recognised and accommodated (and hence respected) only insofar as they matter to or derive from what another constituency (eg shareholders) expects and receives in benefitting its interests? Even in such a world, what rational *and* acceptable incentive[46] would there be for any member of any constituency treated as simply an object in someone else's orbit to make an investment of any kind of capital in that company, and what economic, legal, political, and other societal system or world could survive for long in continuing reliance upon such investments in such conditions?

94. Finally, in what world does worshipping shareholder supremacy as if it were an immutable law of nature automatically and exclusively make someone a supporter of responsible corporate profit-making, while failing to worship at the altar of corporate supremacy automatically renders someone an anarchical supporter of socio-economic justice for non-shareholders at the expense of corporate profit-making and socio-economic justice for shareholding 'owners' of corporations, or even a heretical opponent of the entire system of shareholder capitalism? In other words, whatever shareholder primacy means and requires that could preserve it as a decent and overarching theory of corporations and their governance, it is theoretically unsound, morally unacceptable, legally problematic, economically flawed, and practically unworkable if it truly requires human non-shareholder interests to be deprioritised, subjugated, and instrumentalised in the ways described above.

[46] It might be 'rational' for a human slave without any power or other realistic choice (other than revolt and insurrection) to submit (although it would not be a truly free choice) to an owner and receive food and housing in providing their human labour, but it would not be 'acceptable', and any theory, law, government, business, or society that allowed it would be morally bankrupt.

95. Put another way, if the multiple side-effects of any or particular forms of shareholder supremacy and its offshoots (eg short-termism in corporate board horizons) are as 'toxic' as some commentators[47] and corporate victim-survivors describe, no viable version of shareholder supremacy can require corporate governance that produces or tolerates such 'toxic' side-effects of corporate action, regardless of related debates about companies externalising costs and consequences for others within the limits of the law, and about the desirability and capability of non-shareholders protecting their interests through contractual and political rather than corporate mechanisms. Whatever 'sustainable value' for investors means in the Draft 5th Edition, as interpreted against a vast body of normative guidance from legal, financial, regulatory (including policy), and academic sources, it does not mean simply maximising profits, improving share prices, declaring dividends, and increasing shareholder gains for an existing cohort of shareholders at a given point in time in the short or near term, at least not as a means of achieving corporate success in society.

96. Nor does it mean from the same perspective either a single-minded focus upon financial capital, maximising profit, and shareholder interests to the exclusion of interests, risks, and opportunities concerning non-shareholders that affect corporate governance and success or, conversely, prioritising and advancing non-shareholder interests over shareholder interests unless the best interests of the company require it in particular circumstances and timelines. Examples of the latter include the priority of creditor interests over shareholder interests the closer that a company approaches insolvency, the lawful capacity of boards to argue and vote in the company's interest against a takeover with an inflated share price inducement to existing shareholders, the discretion of boards not to spend all nett profit on declared dividends and to divert some of it to reputation-enhancing initiatives involving enhanced training and well-being for employees and local communities of business operation, and board responses to ESG-sensitive shareholder proposals that increase costs and decrease investment returns in the short-term for the sake of reasonably anticipated reputational enhancement and increased profitability in the long term.

97. So, as a fundamental matter of standard-setting and regulation, no realistic account of corporate success in society can start with shareholder interests alone and end with 'shareholder value' achieved, whatever that amorphous term actually means on the page of any standard and requires of company boards in fulfilling it. Moreover, the demonstrably harmful effects of a crude and impoverished understanding and application of shareholder primacy – eg abuses of corporate power (eg human rights abuses), short-term outlooks (eg corporate bonuses based only upon quarterly and annual share market results), governance gaps (eg corporate profits and shareholder gains derived from lax regulation or even illegality), socio-economic short-sightedness (eg taking financial shortcuts affecting human services and safety alike), and human and environmental disasters (eg failures to invest sufficient profits in human and environmental protection) – show that enduring corporate success in society is the exact opposite of even short-term financial gain for a particular point-in-time cohort of shareholders in such circumstances, who literally take their money and run before their unsustainable gravy train is exposed and closed.

98. Societies neither fashion nor facilitate responsible business conditions, fair markets, principled investment, commercial morality, legal compliance, and good corporate governance for enduring companies to suit investors who make money by investing when a company is not behaving in ways

[47] Eg Stout, ??: ??.

that match the economic, ethical, legal, and other societal preconditions for conducting business with a corporate culture of 'acting lawfully, ethically and [otherwise] responsibly', to use important language from the Draft 5th Edition, and whose financial gain is only secured by disinvesting before any unethical, illegal, fraudulent, or other harmful and reputationally damaging corporate conduct is discovered, exposed, and remedied. The unethical, illegal, and otherwise irresponsible and reputation-damaging conduct in banking and financial services that was exposed by the Hayne Royal Commission in short-term profit-making at the expense of customers and sound organisational governance in more than one of Australia's major banking and financial institutions betrays any purported claim of adherence to 'shareholder value', and in no way reflects what is properly at stake and in scope when properly 'weighing' shareholding and non-shareholding interests in the balance.

99. Shareholder supremacy is commonly posited as a bulwark that prevents boards advancing the lawful interests of non-shareholders at the expense of advancing the lawful interests of shareholders. It does not absolutely preclude benefits to non-shareholders if that also advantages shareholders. However, a decision or action in either case is not justified by the absolute rightness of advancing shareholder interests or non-shareholder interests where shareholder interests are also advantaged, and the absolute wrongness of benefitting non-shareholders at the expense of shareholders. This is because, all things considered, a corporate board that elects to confer benefits upon non-shareholders at the expense of shareholders - if that is a true and complete characterisation of what occurs – is acting unlawfully, unethically, and irresponsibly, for a reason that matters.

100. Either what appears to advantage non-shareholders to the apparent disadvantage of shareholders in the short term is something that in reality also has sufficient advantages for shareholders in the long term to merit justification, in which case the situation is not correctly viewed as one of preferencing non-shareholders over shareholders at all, or else the justification turns on something other than or in addition to the interests of either constituency, considered simply as a constituency on its own. On that issue, especially in its walking back of 'corporate purpose' requirements, the Draft 5th Edition takes a step closer to a Friedmanite conception of shareholder primacy and value, and away from what commentators such as Prof Mayer, Sir Adrian Cadbury, and the author of this Submission argue is the correct understanding of the basis of corporate success and corporate governance giving effect to it.

The Draft 5th Edition and the Friedman Doctrine

101. Even one of the most famous and quoted advocates of shareholder primacy and value in the last 50 years, Milton Friedman, recognised that it has necessary limits. For Friedman, those limits were grounded in accepted governance, ethical, legal, and market norms. In his landmark book, Capitalism and Freedom, Friedman outlined his position and the only qualifications to it, as follows. He outlined his basic position, in the 40th anniversary edition of his landmark work, *Capitalism and Freedom*, as follows:[48]

> Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible. This is a fundamentally subversive doctrine. If businessmen do have a social responsibility other than making maximum profits for stockholders, how are they to know what it is?

[48] Friedman, 2002: 133.

102. He elaborated upon his basic position, stating that the only social responsibility of business in a free market economy is 'to use its resources and engage in activities designed to increase its profits *so long as it stays within the rules of the game*, which is to say, engages in open and free competition, without deception or fraud'.[49] In addition to identifying competitive, ethical, and legal 'rules of the game' for corporations in *Capitalism and Freedom*, Friedman reinforced those constraints in his famous 1970 New York Times article, whose title succinctly summarises his world-view, 'The Social Responsibility of Business is to Increase Its Profits'.

103. In another much-quoted passage, Friedman stated that the fundamental responsibility of a corporate executive as an 'employee' of the investors, who are the true 'owners' of a company, is 'to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom'. It is sufficient to note in passing that there is an inherent tension in the Friedman Doctrine between urging company directors to confine themselves to a financial focus *and* for one corporate constituency alone (ie shareholders), while also acknowledging that the 'rules of the game' for company directors are set by society (ie stakeholders), from different sources and not by governments and official regulators alone and, further, without acknowledging and addressing the inevitable interaction between the various 'rules of the game' for business.[50] Even blind or blinkered belief in the Friedman Doctrine has its natural limits and gaps.

104. The Friedman Doctrine provides an ideological, conceptual, and practical justification for shareholder primacy and value as a superficially attractive and simple guiding light for company directors. According to that doctrine, boardroom directors with a single-minded focus upon (and only upon) shareholder value maximise profit-making through efficient production of goods and services while following accepted ethical, legal, market, and governance parameters, within a system of corporations and industries doing likewise in a way that collectively and meaningfully enhances overall societal well-being and prosperity. On this view, everything else as an alternative horizon for company directors beyond shareholder value is either derivative from it (eg advancement of non-shareholder interests) or else excluded from it (acting like a government or charity). It purports to offer a single, simple, universal, and hence superficially attractive criterion of financial gain for investors over a relevant time horizon as the touchstone for company directors.

105. The historical context in which Friedman framed his concept of the rules of the game for business is not the same context for Australian business now, more than 50 years later, and at the beginning of a different industrial era. Even timeless debates about the right balance between political and economic freedom (eg no social licence to operate for business beyond the current law?), state-regulated and free markets (eg too much red and green tape?), and totalitarianism and democracy (eg collective needs and goals versus individual rights, including property rights and freedom to contract) ebb and flow in terms of where those who have and wield power and influence of different kinds land in legal and other standard-setting for business. Nor does or should the *context* then completely direct the *content* of those rules of the game now. But that does not automatically mean that the concept of the rules of the game for business success in society is a closed category, inherently unviable, or lacks utility, especially when the context changes, even assuming that the Friedman Doctrine and its version(s) of 'shareholder value' are correct, and not inherently limited, incomplete, or otherwise

[49] Friedman, 2002: 133.
[50] For discussion on this point, see: Cadbury, 2006.

flawed, at least in terms of a theory of corporations and corporate governance capable of underpinning regulatory instruments such as the Draft 5th Edition.

106. Even the notions of 'legal', and other 'responsibility', under both the Friedman Doctrine's 'rules of the game' and the Draft 5th Edition's use of such terms, are conditioned by particular conceptions of 'the law' informing those correlative notions of responsibility. Corporate governance literature and standard-setting has evolved from fixating upon the corporate law alone, towards embracing the contemporary reality of corporate governance norms from 'hard' and 'soft' law. The diverse reference points and sources of 'hard' and 'soft' law in corporate governance that are footnoted as guidance points, from which company directors might choose in meeting or justifiably diverging from the Draft 5th Edition's requirements, simply evidence the broad view of the applicable law that now prevails, whatever theory of the corporation and its governance is held or under scrutiny. (The proliferation of references sources of 'hard' and 'soft' law of corporate governance, as referenced in the Draft 5th edition itself, raises questions about knowing and accessing the full range of such material, adding force to the suggestions at the end of this Submission.)

107. Similarly, the common distinction made between 'mandatory' and 'voluntary' standards and responsibility is predicated upon a series of underlying propositions about what it means for a standard to be of one kind or the other, and also what is packed into the notion of 'responsibility'. The mainstream view of standards and responsibility concerning corporations is that the only or at least primary 'responsibility' that really matters is one that is enforceable against a corporation and its officials, under the law, as made by judges and legislated by law-makers, enforced by regulators, and adjudicated by courts. In the end, the distinction and surrounding debate between 'mandatory' and 'voluntary' standards is really a distinction and debate about the source, relevance, weight, and associated qualities of the standards and norms to which corporations are both bound and responsive, in terms of social and market ordering of behaviour. Engaging in that debate requires an underlying framework or working theory for doing so.

108. Friedman's caveats can be understood in two ways, although the author of this Submission believes that there is really only way of understanding them, because one subsumes the other. To explain: the first, easiest, and deflective response is to say that no further theorising is necessary, in understanding what the rules of the game are for business, because the only rules of the game that could possibly qualify, as constraints upon unbridled business profit-making, abuse of corporate power and influence, and externalisation of corporate costs and harms upon other people including the environment and future generations, to give the abstract rules of the game a human face, are those that achieve a level of demonstrable mass acceptance. After all, nobody seriously argues that the law, business ethics, market norms, industry customs, and good corporate governance practices are anything other than universally accepted premises in regulating market economies and individual industries.

109. However, there is an alternative and better view. Even a caveat that relies upon mass acceptance as a precondition still has an underlying ideological or otherwise theoretical basis, and for that a conceptual framework and working theory are still needed, even if it is simply to justify a criterion of mass acceptance for something to become part of the 'rules of the game' in the first place. So, at that point, it becomes necessary to go deeper, to ask whether accepted ethical, legal, market/industry, and governance norms are merely the most easily recognisable and illustrative examples of limits on abuse of corporate power and influence and also unbridled corporate profit-making and externalisation of costs and harms, what underlying criteria they and possibly other limits might meet, and what those

other limits might be. For example, might a broader conception of socio-economic effectiveness and well-being, in an era where financial and non-financial measures approach equal sophistication, open up more potential sources of the societal rules of the game for business than a narrow conception of economic and productive efficiency? In addition, how might existential threats such as climate catastrophes, geopolitical insecurity, mass pandemics, intergenerational inequity, and other injustices feature in that evaluation, as part of the new 'normal' for business in the 21st century?

110. Just as the Friedman Doctrine is expressed by its author to be subject to 'the rules of the game' for business, which calls for an inherently theoretical and justified account of what is in and out of scope on that score, a similar need arises when other evaluations are made about the adequacy or deficiency of something in corporate law and governance. For example, claims in the financial media and by business lobbying groups that there is too much red and green tape for business presuppose an identifiable working theory and criteria for deciding how much is too much or too little. Put another way, there is at least some degree of ideological, theoretical, and conceptual work involved in argumentation about the Draft 5th Edition and its approach and contents, which affect the ASX CGC's decisions to stay with or refine anything in it.

111. The limits and weaknesses of the Friedman Doctrine, and its impact upon associated notions of shareholder primacy and value, have been exposed by more than one notable commentator and high-level judge. In one of the landmark works resulting from his leadership of the collaborative project for the British Academy, Professor Mayer reinvigorates the long-standing idea of corporate purpose, while pointing out the inherent weaknesses of the Friedman Doctrine and its championing of shareholder primacy, as follows:[51]

> Why do companies exist? The question is so fundamental that it is barely ever asked or, when it is, the Friedman Doctrine is cited as the answer: to make money for shareholders … (N)early all policy in the post-WW2 period has been directed towards enhancing it: competition policy, monopoly regulation, investor protection, corporate governance, and corporate law all take this as their fundamental premise. After more than fifty years since the Friedman doctrine first appeared, we should therefore be nearing a state of nirvana. Instead, on the contrary, trust in business, government, and regulation has never been lower.
>
> …
>
> (T)he Friedman doctrine is not a law of nature. On the contrary, it is unnatural; nature abhors it, if only because it has been the seed of nature's destruction. If it ever deserved to have its time, the Friedman doctrine has had it. It is not the business paradigm of the twenty-first century, and as long as we continue to believe it to be so, the greater will be the damage it inflicts on our societies, the natural environment, and ourselves. Few social science theories are both so significant and misconceived as to threaten our existence but that is precisely what the Friedman doctrine is doing in the twenty-first century.

112. More than ever before, local advocates of shareholder primacy need to confront the full implications of the limits to that theory conceded by its late 20th century champion, Milton Friedman. Citing the assumed current state of corporate law at a high level of generality and chanting mantras about shareholder value does not get us very far in governing multinational corporations straddling whole economies and legal systems, with shareholding profiles and stakeholding factors as diverse as society itself.

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[51] Mayer, 2018: 2, 5, and 8.

113. As the most famous late 20th century advocate of shareholder value, Milton Freidman still accepted that maximising shareholder wealth has its limits. As highlighted in the quoted passages and analysis above, he conceded that well-governed businesses still must stay within the rules of good governance, fair industry competition, business ethics, and just laws. Australia experienced the recent Banking Royal Commission because too many financial institutions breached all four of those Friedmanite constraints of governance, competitiveness, ethics, and legality. In doing so, they also failed to act in the best interests of their shareholders. Such Friedmanite concessions presuppose an underlying conceptual basis for identifying the nature, source, and authority of legitimate constraints upon maximising shareholder profits, which simply returns us to the deep debate about corporations and their purposes and constituencies.

114. Justice James Edelman's recent contribution to the NSW Supreme Court's Commercial and Corporate Law Conference goes straight to the heart of the important Friedmanite caveat and its connection back to shareholder value:[52]

> One mantra for the shareholder primacy theory is Milton Friedman's classic statement that '… there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits *so long as it stays within the rules of the game*, which is to say, engages in open and free competition without deception or fraud'. The words that I have emphasised reveal an immediate qualification upon the notion that the duty to the corporation can always be equated with acting in the interests of its shareholders. However, it might be doubted whether the rules of the game involve only open and free competition without deception or fraud.

115. Put another way, the caveats (or limits) on shareholder value and profit-making are at a secondary level. Their undoubted existence presupposes an underlying rationale at a primary level about the purpose of the corporation, and what it means as a principled business to avoid short-term profit-maximisation at all costs and to engage in sustainable profit-making 'within the rules of the game', which include at a higher level of abstraction how and why any company pursues its unique competitive advantage and market positioning to make profits in solving the problems of the planet without adding harm to people and the planet, to use the terminology employed by Oxford University's Professor Mayer. Needless to say, that higher level of abstraction is neither reducible nor subsidiary to the lower level of abstraction at which lawyers typically and rightly worry about things such as the legal consequences of enhancing the statement of purpose in a company's governing documents. Macro-level analysis and micro-level analysis are simultaneously engaged and integrated.

116. In addition, Justice Edelman goes on to explore the link between such Friedmanite limitations and the undoubted reality that 'a corporation has an interest in the lawful or legitimate pursuit of its purposes', such that no serious circumstance could ever arise 'where it could be in a corporation's interests for the corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable and was reasonably considered by the director to be virtually undetectable'.[53] In other words, higher public policies and interests might also be engaged.

117. He also identifies that 'the Chicago school conception of maximising profits for shareholders is itself dependent upon an identification of the *purpose* of the corporation [because] a corporation which

[52] Edelman, 2020: 211.
[53] Justice Edelman, referring to his judgment in *ASIC v Cassimatis* (No 8) [2016] FCA 1023, [454], [457], [482].

operates for the purpose only of investing in very conservative investments will maximise profits in a different universe from a corporation which operates for the purpose of engaging in a highly risky venture'.[54] This adds force to the argument for making corporate purpose a crucial part of corporate governance, and not the optional but desirable extra that the Draft 5th Edition makes of it. Moreover, directors' duties have a public character, given their enshrinement in legislation (ie the Corporations Act) as mandated obligations, amenability to investigation and enforcement by an official regulator (ie ASIC), contribution to Commonwealth revenue through pecuniary penalties when breached, loss through public disqualification from holding office as a director, and non-susceptibility to simple shareholder ratification.[55]

118. Such comments neatly dovetail with Commissioner Hayne's public comments in 2019, reiterating the thrust of his Banking Royal Commission report about the meaning of the best interests of a corporation, which are not reducible to a crude zero-sum competition between shareholder and non-shareholder interests:[56]

> First, I think the relevant law is clear.
>
> Directors must act in the best interest of the company. 'Best interests' is not one-dimensional – it is not determined *only* by share price movement or 'total shareholder return' over a period. [original emphasis]
>
> 'Best interests' does not present a binary choice between the interests of shareholders and the interests of others (whether customers, employees or society more generally).
>
> The longer the period of reference, the more the interests of all affected by a company's actions will converge in pursuit of the long-term financial advantage of the enterprise.
>
> Second, international opinion is also clear.
>
> International opinion is now firmly behind the need for all entities with public debt or equity to respond to climate change issues in their Governance, their Strategy, their Risk Management and their Metrics and Targets and, importantly, to record their responses to the issues in their financial reports. The work of the Bank of England and the FSB's Taskforce on Climate-related Financial Disclosures both forms and reflects that opinion.
>
> Third, the position of Australian regulators is clear.
>
> ASIC, APRA and the Reserve Bank have all recently made plain the significance each of those bodies attaches to climate-related issues.
>
> The inevitable consequence of the three points I have made about the law, international opinion and domestic regulators is that, in Australia, a director acting in the best interests of the company must take account of, and the board must report publicly on, climate-related risks and issues relevant to the entity. [emphasis added]

119. For completeness, Commissioner Hayne's comments preceded recently proposed Commonwealth climate-related disclosure laws, which give them extra force. His comments above are probably the

[54] Edelman, 2020: 211-212; emphasis aded.
[55] *ASIC v Cassimatis (No 8)* [2016] FCA 1023, [457] (Edelman J).
[56] Hayne, 2019b.

clearest and most succinct integration available of the law of directors' duties and other obligations with the evolving body of climate-related law. They are at least consistent with the recognition in Recommendation 7.4 of the Draft 5th Edition that sustainability risks, environmental risks, and climate-related risks require attention and disclosure where they are material risks for a company. Legally, there is no walking back from that position in the Draft 5th Edition.

120. The preceding discussion about the 'rules of the game' for companies is not an esoteric debate. It has relevance for the Recommendations and Commentary in the Draft 5th Edition, as follows. As highlighted by the architect of the Cadbury Report and later codes on corporate governance, Sir Adrian Cadbury, in his endorsement of CSR and criticism of the Friedman Doctrine, Milton Friedman's reference to the 'rules of the game' for business is a two-edged sword. Friedman's position rests upon company directors focusing upon the economic dimensions of business and maximising financial gain for shareholders, and leaving political and social responsibilities to others, all while still playing by the 'rules of the game'.

121. However, as Cadbury further notes, the difficulty for Friedman is that a complete separation between economics, politics, and society is impossible for companies, including in relation to staying within the boundaries of the 'rules of the game'. In Cadbury's own explanation of the inherent dilemma under the Friedman Doctrine, the inescapable problem for Friedmanites is that Friedman 'would restrict companies to a narrowly defined commercial role, leaving the interaction between business and society to the political process [but] the reference to staying within the rules of the game, would not appear to qualify the injunction to focus solely on the pursuit of profitability, because those rules are set externally by society'.[57]

122. Cadbury's conclusion about the Friedman doctrine's practical limits and difficulties for company directors, which no number of ritual incantations of 'shareholder value' can dissipate, is as follows:[58]

> The difficulty for boards of directors considering whether or how to put Milton Friedman's advice into action lies in its deceptive simplicity. It is not possible to isolate the economic elements of corporate decisions from their social consequences, because companies are part, and an essential part, of the fabric of society.

123. A similar Friedman-like dilemma arises for company directors under the Draft 5th Edition, in at least three aspects:

a. operationalising the requirement 'of acting lawfully, ethically and responsibly', having instilled a 'culture' to that effect, under Principle 3;
b. attending to ESG risks and disclosures, especially the 'S' in ESG, under Recommendation 7.4; and
c. developing and implementing stakeholder engagement processes, under Recommendation 3.3.

124. Here, at a conceptual level, the notions of ethicality and responsibility must have some work to do, beyond mere compliance with the law, and sourced and measured beyond the boundaries of the law too. Similarly, under Friedman's concept of the rules of the game for business in society, the pursuit of corporate profit-making for the financial benefit of shareholders must still respect governance, ethical, legal, and market norms. By what standard is acting 'ethically' or 'responsibly' to be judged, and by

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[57] Cadbury, 2006: 7.
[58] Cadbury, 2006: 8.

what measures, for example? In both cases, it is not sufficient to say that norms of corporate governance, business ethics, accepted market behaviours, and industry custom are simply a 'given'. They must still be sourced, identifiable, applicable, and measurable. Still, they are far more difficult to ascertain than relevant laws.

125. The Draft 5th Edition is alert to this problem of sourcing non-legal norms of relevance to corporate governance, at least to some degree, not least in its suggestion that '(e)ntities may also wish to consider published guidelines when considering what constitutes responsible business conduct [relating to] for example, human rights, rights of Aboriginal and Torres Strait Islander peoples, combatting bribery and corruption, technology, competition and taxation matters'.[59] The emerging and broader problem of proliferation of relevant risk identification and reporting and disclosure templates and tools, and other sources of non-legal 'rules of the game' for business that matter in corporate governance, awaits a more fulsome answer. This issue is relevant to discussion and recommendations at the end of this Submission, about options for curating relevant sources of guidance concerning the ASX CGC standards as they evolve.

Interim Summary

126. The relevance of all of this for evaluation of the adequacy and worthiness of the Draft 5th Edition is as follows. Standard-setting frameworks and principles do not exist in a vacuum. They are designed and applied within articulated or unarticulated assumptions and working approaches to good corporate governance that unavoidably make assumptions, adopt premises, take positions, guide decisions, and otherwise frame corporate governance arrangements (and corporate compliance and reporting about them) in practice.

127. Proponents of the Friedman Doctrine and shareholder primacy, and corporate governance standard-setters and participants who assume the correctness of those theoretical positions in how they decide and act, do so in the face of considerable and authoritative views to the contrary. The intertwining between the Friedman Doctrine, shareholder primacy, and shareholder value for more than half a century cannot be denied and cannot be rewound, in both cases particularly in the rise of short-termism and abuse of corporate power.

128. In reality, there is no value-neutral position in difference of views about corporate governance. All corporate governance standards are in service to one theory of corporate governance or another, unstated or otherwise. Ideological mindsets and working background theories about the true conditions for business success in society inform norms and practices of corporate governance. There is no effective way to opt out of the various debates that go to the heart of corporate governance in setting standards about it, because the set standards reinforce and operate within one conceptual map of the corporate governance domain or another.

129. The Draft 5th Edition is no exception. Even within its own frame of reference as an 'evolutionary' and not 'revolutionary' sets of standards, and whatever comparable regulatory instruments do or do not do on this score, the Draft 5th Edition could still do more than it does to acknowledge the complex business reality outlined above, articulate what it means by 'shareholder value' and what that notion

[59] ASX CGC, 2024: 26 (Recommendation 3.2, Commentary).

does and (importantly) does *not* involve or require in practice, and better guide company directors on how to navigate the operation and limits of 'shareholder value'. It is a missed opportunity to distil, even if only in appropriate Commentary, the essence and basic propositions of the position under Australian corporate law that justify the invocation of 'shareholder value' as the apex of corporate governance, not least for the guidance of company directors. There is a stark difference between the minimal amount of attention given to explaining and articulating value-based notions as the assumed ultimate outcome, on one hand, and the considerable attention given to the interaction between key elements of corporate governance and their attendant requirements in process-based steps, on the other, as if the latter flowed inevitably and in a self-evident way from the former.

130. Yet, if the growing mass disquiet with the Friedman Doctrine and its offshoots is correct, 'shareholder value' remains an invoked mantra, a misnomer, a cloaking device, a morally and economically flawed notion, and a fundamental and harmful misconception of the true business of successful business in society. Despite the bulk of what has been written about it, there is no readily identifiable reference point for its meaning and application. It means different things to different people, although it obviously is not a concept that is completely at large. 'Sustainable value' for investors is neither defined nor explained much in the Draft 5th Edition, despite being the lynchpin and declared point of its collective Principles, Recommendations, and Commentary.

131. Despite rhetorical and shorthand references to it, judicial exposition of Australian corporate law does not really mandate shareholder primacy and value in any absolute sense as an overarching theory of the corporation and corporate governance, and one capable of explaining and justifying everything in the law about companies and the point of their existence. There is a disconnect in accepting the undeniable reality that Australian corporate law is shareholder-centric in giving shareholders legal rights and controls in company matters that others do not have, and proceeding without more to the conclusion that a notion like 'shareholder value' accounts for everything necessary in business success and corporate governance underpinning it. Put another way, Australian corporate law does not come with an instruction manual about the theory underlying the law and how to interpret and apply that law in light of that theory. Judicial and extra-judicial references to 'shareholder value' are soft and abstract judicial support at best, either commonly referencing the use of the term in documents and practice or else otherwise assuming rather than stress-testing the concept and its relationship to the law.[60]

132. Further, the judicial and extra-judicial discussions of it in the context of a company's best interests, directors' duties, and co-extensiveness between shareholder interests and a company's interests in situations of solvency are explicable on more than one basis, as are requirements to take meaningful account of non-shareholder interests, which is consistent with shareholder primacy, stakeholder pluralism, co-determination, team production theory, and other theories of the corporation and corporate governance. In short, a theory, term, and corporate governance requirement that treats non-shareholders as relevant only to the extent that shareholders gain, even at non-shareholders' expense, and that also insufficiently illuminates and accommodates features of good corporate governance and business success in society that are not encapsulated in 'shareholder value', at least as conventionally understood, is deficient as both a means and an end.

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[60] Eg *Pilmer & Ors v Duke Group Ltd (In Liq) & Ors* [2000] HCATrans 157; *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* [2001] FCA 1761; *Seven Network Ltd v News Ltd* [2007] FCA 1062; and *RBC Investor Services Australia Nominees Pty Ltd v Brickworks* Ltd [2017] FCA 756.

133. But the point of the theorising and use concerning 'shareholder value' is that it is not a self-evident and self-executing notion, and its choice of orientation affects its implementation and standard-setting requirements about it. If 'shareholder value' is an end-product of something else other than 'shareholder value' as a usable means and criterion in its own right to that same end, then 'shareholder value' is not a complete and comprehensive point of focus in corporate governance. Put another way, if 'shareholder value' hides and obscures more than it reveals and guides about what is needed for and results from corporate success in society, in achieving and dispensing benefits in different ways for a variety of corporate constituencies, and without serving one constituency alone, with attendant expectations that non-corporate law and other forms of socio-political ordering will take care of non-shareholder interests, then 'shareholder value' is a misguided and misleading distraction, and one that is not worthy of being given prominence as the ultimate end of corporate governance, as signified in the Draft 5th Edition.

134. Theorising matters, especially when a standard-setting instrument such as the Draft 5th Edition puts so much stock in the concept of 'shareholder value' as *the* concept underpinning Australian corporate law and governance and their practice. It is the presumed holy grail guiding company directors and yet the emperor in fact has no clothes, to mix metaphors. Further, using it as a premise and purporting to frame and then apply requirements founded upon it in such standard-setting documents, such as requiring company boards to aim for long-term sustainable shareholder value is fraught with danger, inadequacy, and incoherence. As Professor Colin Mayer writes in 2024:[61]

> Corporate governance is not just about aligning the interests of leaders with shareholders. It is the process by which profitable problem-solving purposes are implemented … The problem is not just a horizon one but what and whose horizon … The reasons why these discussions about the length and breadth of interests of investors are unsatisfactory is that they do not address the central question, which is not whether investor horizons are sufficiently long or broad but whether they have real intrinsic interests in the wellbeing of others not just in the intrinsic benefit they derive from others. That is blatantly not the case in an enlightened shareholder value view of the firm …

135. All of this means that there are fault lines that remain completely unexamined and with grave ramifications for anyone meaningfully trying to come to grips with the Draft 5th Edition's requirements. In particular, there are grave problems created by taking an absolutist view in worshipping at the altar of shareholder-centricity, making 'shareholder value' the point of corporate decision-making and reporting, downgrading corporate purpose, splitting shareholder and stakeholder engagement as a matter of form, and otherwise failing to recognise that 'the corporation should be recognised for what it is – a rich mosaic of different purposes and values [and] a user of a range of inputs to produce an even greater number of outputs'[62], in a way that can never be captured fully by shareholder supremacy or stakeholder pluralism, or any of their offshoots, such as 'shareholder value' in the case of shareholder supremacy.[63] Of course, it is possible to identify these weaknesses in the Draft 5th Edition while also acknowledging its strengths in recognising the importance of stakeholder engagement and ESG considerations in corporate governance, as well as the importance of notions of legality, ethicality, and responsibility for corporate boards.

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[61] Mayer, 2024: 114, 121-122.
[62] Mayer, 2018: 4.
[63] Mayer, 2018: 23.

136. At the same time, none of this means that, this late in the peace, there is any realistic expectation that the inadequate treatment of the true basis for corporate success involving good corporate governance in the Draft 5th Edition will be accepted by the ASX CGC or rectified for the finalised 5th Edition. However, it is something that should feed into early planning and drafting of the 6th Edition, no matter who drafts it.

Strengths and Weaknesses of the Approach and Design of the Draft 5th Edition

137. The draft 5th Edition does not yet speak in a completely clear, consistent, and coherent voice about the best interests of a company and how its corporate governance principles and recommendations assist boards in understanding and acting upon that foundational collective interest. Its injunction to company directors is 'to build sustainable value for security holders of the entity', by also 'having regard to the interests of the entity's key stakeholders, as appropriate'.[64] Under it, sustainable shareholder value is the goal, and its achievement requires consideration of both shareholding and non-shareholding interests, as they relate to the company.

138. First, whatever 'sustainable value for the security holders' means conceptually and in practice in the Draft 5th Edition, it certainly does not mean that the interests of shareholders alone are automatically equated and completely co-extensive with the interests of the company in achieving that goal. Nor does it mean that company directors are absolutely required to act in the interests of any particular corporate constituency in its own right, whether shareholders or other stakeholders (eg creditors, customers, or employees). This is made clear by the background paper and consultation questions for the draft 5th Edition, at least in relation to what company directors might do with non-shareholder interests, as follows:[65]

> New Recommendation 3.3 proposes that an entity should *have regard to* its key stakeholder interests. It does not require an entity *to act in* the interests of its key stakeholders [and] an entity's consideration of the interests of its other stakeholders should be consistent with the long-term interests of security holders. (emphasis added)

139. The emphasis is upon the importance and mechanisms of stakeholder engagement, given that 'there has been an increasing recognition of an entity's relationships with its internal and external stakeholders' since the 4th Edition's commencement in early 2019.[66] While nothing turns on the sequencing of editions and the surrounding corporate governance ecosystems from time to time, proper consideration of non-shareholders has been a mainstream part of corporate governance scholarship and standard-setting for decades. Accordingly, a company 'should have regard to the interests of the entity's key stakeholders', and have processes of stakeholder engagement and board reporting that relate to them.[67] Having regard to involvement with its key stakeholders is stated to be 'in the best interests of an entity'.[68] The stated set of potential stakeholders is broad and diverse. It includes 'security holders', but they are specifically carved out of the recommendation governing stakeholder consideration and engagement, with shareholder rights being governed by a different set of recommendations.

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[64] Recommendation 1.1, Commentary: 11.
[65] ASX CGC, 2024b: 9.
[66] ASX CGC, 2024b: 9.
[67] Recommendation 3.3.
[68] Recommendation 3.3, Commentary: 27.

140. In comparison to the 4th Edition, Principle 3 is maintained and reframed in the Draft 5th Edition as follows: 'A listed entity should instil and continually reinforce a culture of acting lawfully, ethically and responsibly, within the organisation and in its dealings with external stakeholders, to create long-term sustainable value'. Some of its features are worth noting, in the exercise of evaluating whether it should stay, go, or be further revised. First, it is good that this Principle is more than just a means and has a substantive end in sight – namely, 'to create long-term sustainable value'. This undoubtedly correct formulation and terminology appears in more than one place in the Draft 5th Edition.[69] In other places, however, there is fuzziness and slippage of terminology. Elsewhere, for example, sustainable value for the listed entity becomes 'sustainable value *for the security holders of the entity*', all while 'having regard to the interests of the entity's key stakeholders'.[70]

141. Combining any notions of 'sustainable value', shareholder value, interest of shareholders as a whole, and long-term horizons, most often in the Commentary under particular Principles and Recommendations,[71] diverges from a common notion and terminology about the overall point of corporate governance as envisaged by the Draft 5th Edition's requirements. Moreover, it introduces complicating additions and baggage about which there is considerable disagreement in comparable corporate governance standard-setting and expert commentary. The point is subtle but important, and the Draft 5th Edition can still be tweaked and remedied in light of it.

142. Nobody could reasonably disagree, and different theories of the corporation and corporate governance might accommodate, the proposition that a company board should aim at achieving sustainable value over time for their company, thereby enabling the company to benefit a broad range of its corporate constituencies. However, there is considerable doubt and disagreement over whether or not the singular point of corporate governance is to benefit one corporate constituency alone, with everything else flowing from and being subservient to that primary focus. Adding in 'for its security holders' in alignment with 'sustainable value' does not seem to add much, if anything, to the equation and the designated requirements. The instructions become fuzzier when other and different combinations of terms are used, as when the notion of 'best interests' is explicitly tied to the listed entity (not its shareholders), along with the instruction of 'having regard to the interests of the entity's key stakeholders', in places that otherwise differentiate between shareholding and non-shareholding stakeholders.[72]

143. Secondly, while it is also pleasing to see this Principle recognise some of the key features of corporate governance recognised in comparable regulation and literature, such as the importance of 'culture' and 'stakeholders', this is another area of the 5th Edition where more explicit reference to corporate 'purpose' could usefully be added, consistently with what is proposed. This point is further referenced and discussed at different points and in different contexts throughout this Submission.

144. Thirdly, it is also good that Principle 3's object of focus is internal and external, because a company's reputation and success turn upon how well it manages all of its crucial relationships. Fourthly, its explicit recognition of the importance of 'acting lawfully, ethically, and responsibly'

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[69] ASX CGC, 2024a: 5, 10, 24.
[70] ASX CGC, 2024a: 11; emphasis added.
[71] Eg ASX CGC, 2024a: 11, 25.
[72] Note the different formulations and terminology on these points, for example, in ASX CGC, 2024a: 24, 25, 27.

implicitly recognises that corporate success requires more than minimal legal compliance and maximal profit-making for shareholders, with neither being ends in themselves.

145. Fifthly, as with the legal requirement for a financial services licensee to act 'efficiently, honestly and fairly',[73] the cited elements of this Principle are best read together, as they constitute a collective and holistic whole that comprises particular signified strands. That is an important point in understanding and applying its requirements. Whether those elements are read together or individually, on any reading of them it is clear that:

  a. good corporate governance engages norms beyond legal and regulatory norms, with clear official sources;
  b. the coverage of corporate responsibility in good corporate governance includes (but is not limited to) a company's 'legal' responsibility; and
  c. some of the identified strands of good corporate governance – such as complying with business ethics and engaging with all stakeholders – have sources of authority and guidance that are more diffuse than those governing 'legal' and 'regulatory' responsibility.

146. To highlight the relevance and connecting points for other discussions in this Submission: norms of legal, ethical, and otherwise responsible corporate behaviour are part of 'the rules of the game' under the Friedman Doctrine. It is good that the Draft 5th Edition acknowledges these particular and important 'rules of the game' for corporate success in society, as enabled through good corporate governance. Their mention in the Draft 5th Edition can be treated as comprehensive or simply illustrative of what matters outside the strict letter of the law for good corporate governance.

147. On either view, the twin notions of acting 'ethically' and 'responsibly' cast a wide net over a broad range of potential sources of norms and guidance, even on the ASX CGC's preferred evident approach of leaving as much discretion and judgment as possible to corporate boards about whether (or not) and how they comply with the various Principles and Recommendations. The levels of understanding and justification that are involved reflect or require consideration and argument that is inherently ideological, theoretical, or conceptual in nature, whether recognised as such or not and, where recognised, engaged in as a matter of degree rather than kind. In reality, the separate and related enterprises of understanding, evaluating, implementing, and reforming corporate governance standards of any kind are never really reducible to a simplistic compliance mindset of 'just do what the standards say, OK; you don't need to think or argue about it'.

148. For corporate boards and their advisers, mindful and reflective compliance with corporate governance requirements, as informed by a background or working understanding or theory of corporate governance, is always better than mechanical and tick-a-box process-driven compliance, as even recognised by the uses made of corporate 'culture', 'values', 'objectives', 'stakeholders', and even 'purpose' in the Draft 5th Edition. Further, an abstract theory and concept such as shareholder primacy and value presupposes some kind of working theory or understanding in striving to achieve it and complying (or not) with processes directed towards its fulfilment.

149. Finally, as with other Recommendations, the Recommendations giving effect to Principle 3 adopt a process-centric approach, understandablyin the expectation that good governance outcomes flow from good governance processes. Recommendation 3.1 requires a disclosed statement of corporate 'values'.

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[73] Corporations Act 2001 (Cth): section 912A.

Recommendation 3.2 requires a ‘code of conduct’ for boards and senior officials, processes to inform a board of any material breaches of the code of conduct, and de-identified disclosure of any such breaches and remedial actions. Recommendation 3.3 requires stakeholder consideration and engagement, including through ‘*having processes* for the entity to engage with them and to report material issues to the board’ (emphasis added). Recommendation 3.4 continues the process-centric requirements in the form of having a DEI ‘policy’, setting objectives for ‘gender diversity’, and reporting particular kinds of DEI outcomes.

150. Whatever the weaknesses and limits of the draft 5th Edition, and not just from any particular stakeholder perspective but overall, it has many strengths and desirable features too. While it remains conventionally shareholder-centric and often uses the language of shareholder value, it is not shareholder exclusive in its focus and it does not represent pure and absolute shareholder supremacy in corporate governance arrangements, decisions, and conferral of resources and benefits, at least not in its crudest forms.

‘Corporate Purpose’ – An Uneasy Transition from the 4th Edition to the Draft 5th Edition

151. Corporate purpose lies at the heart of corporate governance in the UK, under revised corporate governance standards commencing 2025. In Australia, the 4th Edition thought corporate purpose was important in corporate governance standard-setting, required companies to state their corporate purpose, and linked that to a number of other features of corporate governance. The Draft 5th edition walks back significantly from that position.

152. At the outset, it is therefore fair to ask a number of key questions. Is the corporate governance ecosystem in the UK really so radically different from Australia’s that what is regarded as a fundamental and interconnected part of corporate governance in the UK can be regarded as a marginalised and optional add-on extra for corporate governance in Australia? Both countries follow the principle-based approach of ‘comply or explain’ (or ‘if not, why not?’) in their respective corporate governance standards, so the justification (if any) for Australia’s position must lie elsewhere.

153. It is also fair to ask what (if anything) has changed in Australia, in the five-year interval between the commencement of the 4th Edition and the public release of the Draft 5th Edition, to warrant such a fundamental suggested change in approach to the importance and uses of purpose in corporate governance? Public, expert, and lobby group commentary to the contrary about corporate purpose cannot be an adequate reason on its own.[74] Moreover, many companies will have articulated their corporate purpose(s) in compliance with the 4th Edition, as signalled by the use of the ‘purpose (if articulated)’ formula in walking back that requirement in the Draft 5th Edition.

154. Finally, given that the Draft 5th Edition still identifies uses to be made in corporate governance if a board charter makes explicit the corporate purpose of a company, surely the identified and approved uses of a stated corporate purpose add impetus to the desirability of mainstreaming rather than marginalising corporate purpose in corporate governance standard-setting and arrangements.

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[74] Eg Bathurst, 2019: [13]-[23]; and A. Wooldridge, ‘Business School Blather Can’t Beat Real-World Know-How’, *The Australian Financial Review*, Review, 2R, 3 May 2024: ‘(T)he great US business schools … are either stuck on hold in stakeholder land or determined to replace the vague rhetoric of stakeholder capitalism with the even vaguer rhetoric of “corporate purpose”’.

155. The current and next stages of Australian legal and business debate about corporate governance and responsibility involve grappling with the notion of corporate purpose and the extent of its overlap with social purpose, as articulated in the contributions of Professor Mayer and Sir Adrian Cadbury alike. Such a timeless and fundamental debate also implicates the Friedman Doctrine, which tries (unsuccessfully, in the end) to disconnect economic considerations for a company's governance for its supposed 'owners', as the supposed true focus of corporate governance, from political and social expectations of companies, and even deflects necessary legal protection of non-shareholding stakeholders to non-corporate law.

156. A purpose-based approach to rethinking corporate law and practice, along the lines advocated at the NSW Supreme Court's Annual Corporate Law Conference in late 2019 by the leader of The British Academy's *Future of the Corporation* Programme, Professor Mayer, must engage for better or worse with the widespread acceptance of shareholder primacy and value as the dominant paradigm in Australian regulatory, business, and legal thinking about corporations. It must also relate to the various ways in which the purpose of a corporation matters under corporate law, as elucidated by Justice James Edelman in his paper at the same conference.

157. In the view expressed by Prof Mayer and flowing from the multi-contributor and inter-disciplinary work under The British Academy on its Programme, explicitly purpose-based corporations become successful and gain competitive advantage by solving a societal problem that enables 'Profit' without harm to 'People' and 'Planet'. On this view, privileging one corporate constituency (ie shareholders) is problematic – a view that has engaged corporate theorists back and forth for a long time. Others might frame the debate in terms where different 'stakeholder and stewardship conceptions of corporate purpose' are in play,[75] along with the different manifestations of corporate purpose in various parts of corporate law.

158. In discourse about corporate purposes, there is a need to avoid the lowest common denominator of one conventional lawyerly entry point, where the object of the exercise is to interrogate and capture a concept by defining it, stating it at the requisite level of abstraction, and thereby broadening, qualifying, or limiting it according to the practical need at hand, always viewing it through the threefold prism of obligation, liability, and risk. The work of The British Academy's ground-breaking Future of the Corporation programme accommodates but is not confined to that particular lawyerly focus and its constrained conception of corporate purpose.

159. In the field of corporate law, this lawyerly tendency is possibly driven, at least in part, by residual memory of the old corporate ultra vires doctrine,[76] under which an action contrary to a company's best interests risked being declared void from the outset as an absence of capacity, or else voidable from a particular point in time as an abuse of corporate power or authority. If company directors were alleged to have acted contrary to a company's overarching purpose, so the fear goes, their actions would be voidable at the very least, subject to safeguards for outsiders dealing with the company, as under the indoor management rule. The worlds of purpose and authority are presumed to collide.

[75] O'Brien, 2019: 33-34.

[76] Bathurst, 2019: [8], [17].

160. As former NCW Chief Justice Bathurst remarked in 2019, in response to the work of Professor Colin Mayer and his colleagues on reinvigorating corporate purpose in recasting (some might say reconfiguring) corporate law and practice:[77]

> First, what will be the legal consequences of requiring a corporation to state a 'purpose' in the manner envisaged? As I have mentioned, for a long time, the powers of a corporation were constrained by a statement of its purpose in its memorandum of association. Naturally, this created an incentive to define the purposes of the corporation as widely as possible to avoid its actions being held *ultra vires*. While I understand that Professor Mayer and his colleagues do not intend to resurrect the doctrine in this form, I think that there is a danger that the similar problems could arise under a different guise'. (original emphasis)

161. The foregoing corporate legal history and lawyerly scepticism arising from it explain in part why section 124 of the Corporations Act 2001 (Cth) and its predecessors state: 'A company's legal capacity to do something is not affected by the fact that the company's interests are not, or would not be, served by doing it', and why section 129(4) contains a displaceable presumption that a company's officers (including directors) are properly performing their duties to the company (including directors' duties). Conventional lawyerly scepticism of grand concepts such as 'purpose' as free-standing legal controls and limits upon power is evident former NSW Chief Justice Bathurst's caution that 'any proposed solution based upon embedding a notion of "purpose" within the modern corporation must be able to demonstrate that it has advantages that … other solutions do not possess'.[78]

162. Under Australian corporate law, company constitutions can incorporate their corporate purposes and any restrictions on the exercise of corporate powers.79 Moreover, and again in deference to the discarded doctrine of corporate ultra vires, '(a)n act of the company is not invalid merely because it is contrary to or beyond any objects in the company's constitution'.[80]

163. Some potential rationales for downgrading the priority and mandatoriness of corporate purpose in successive iterations of the ASX CGC standards are not good rationales. It is not sufficient to say that corporate purpose is not required under the corporate law and therefore should not be mandated in the Draft 5th Edition. That kind of argument is too strict with the idea that nothing should appear in the Draft 5th Edition that goes beyond the conclusively decided law. After all, the law is multi-dimensional. It consists nowadays of both 'hard' law and 'soft' law. It prescribes, proscribes, and permits. If it is permitted under the corporate law, it can be the subject of appropriate standard-setting. Moreover, there are other Recommendations that, strictly speaking, go beyond what the law absolutely mandates, but are within the scope of what the law permits.

164. Admittedly, the work of The British Academy on future corporate law and governance has both descriptive and normative aspects in its recommendations about corporate purpose. As the HCA's Justice Gordon notes in her 2023 Harold Ford Memorial Lecture:*81*

> However, as the [British Academy's 'Future of the Corporation's] programme's eight principles of purposeful business demonstrate, the recommendations were not confined to the expression of corporate purposes and the consequences of embedding them in company constitutions … To that end, the report included a raft of recommendations directed at shareholders, directors, financiers, regulators and governments to both

[77] Bathurst, 2019: [17].
[78] Bathurst, 2019: [17].
[79] Corporations Act, section 125(1), as commented upon in: Bathurst, 2019: [18].
[80] Corporations Act, section 125(2).
[81] Gordon, 2023: 11.

strengthen accountability for corporate purposes and promote more effective implementation of corporate purposes.

The British Academy's system-level review recognised that in the regulatory network applicable to the conduct and governance of corporations, corporate law is but one of many nodes.

165. The twofold opportunity missed in the commentary for the Draft 5th Edition is to address some of the questions of clarification and guidance (eg about 'a listed entity's values' and the interests and measures involved in setting them) raised by Justice Gordon in her Lecture, as well as to address how corporate purpose conditions the range of interests considered, the relevant time horizon, and the attendant risks involved. Justice Gordon addresses and summarises an admirable and easily grasped view of the utility of corporate purpose in corporate governance standard-setting that is not yet reflected to the same degree in the Draft 5th Edition:[82]

> Encouraging or obliging companies to identify the purposes that they seek to pursue in the short, medium and long term is the first step towards companies identifying not only why they exist but also what are the immediate and longer-term risks from pursuing those purposes. Connecting a statement of purpose with identification of risk may inhibit adoption of a boundless laundry list of purposes because the wider the list of purposes the longer and more diverse the list of risks. But identification of purpose is just one aspect to be addressed. Careful identification of the content of the legal obligations informed by that purpose is no less important.

166. Professor Colin Mayer's articulation of the integration of corporate purpose, values, and governance throws into sharp relief what is lacking in the draft 5th Edition's piecemeal and fragmented compromise package about those crucial and intertwined elements:

> Corporate governance is about the structure and conduct of the ownership and control of companies to fulfil corporate purpose. … It governs how the purpose and values of the business are translated into actions in the organisation that are transmitted into value for investors. … (T)he absence of purpose from the centre of corporate governance is a primary reason why firms fail to deliver on purpose.

167. Interestingly, Professor Mayer's view dovetails with the view of corporate purpose from Sir Adrian Cadbury – the architect of the modern Anglo-Australian approach to corporate governance codes. Writing about the relationship between CSR, corporate purpose, and the Friedman Doctrine, Cadbury says:[83]

> Milton Friedman states that the social responsibility of companies is to make as much money for stockholders as possible. There are a number of problems with this deceptively simple definition … Even the injunction to make as much money as possible for stockholders can only be interpreted operationally in relation to a finite period of time … An added complication is that Milton Friedman assumes that shareholders hold, or should hold, a single, common objective that of requiring the company to make as much money as possible for them. One does not need to have chaired the annual general meeting of a publicly quoted company to appreciate the unreality of treating shareholders as a homogenous group …
>
> (T)he argument that all publicly-quoted companies should focus on making as much money for their shareholders as possible fails, because not all shareholders share the same aims and the aims of at least some of them will include social as well as financial considerations … (T)he social responsibilities of companies are but one component of their responsibilities … What differentiates companies and gives them their individuality is the precise balance which they strike between their various responsibilities. The focus of attention should perhaps begin to switch to the totality of corporate responsibilities and away from but one

[82] Gordon, 2023: 20.
[83] Cadbury, 2006: 5, 8, 19, 20, 21.

aspect of them, however important. What matters to society is the manner in which companies exercise their responsibilities as a whole.

168. In short, the key problem with shareholder supremacy and value and Friedman-like counter-responses alike is that advocates of those positions want to have their cake and eat it too. They want to treat anything that can be characterised as less than full financial advantage for the cohort of shareholders that matters on their preferred time horizon as being an unjustified and productively non-efficient advantaging of other stakeholders and a 'diversion of resources away from [and] at the expense of the shareholders'.[84] They want to capture and characterise stakeholder-sensitive considerations as being only relevant in an instrumental sense, as matters that serve and are incidental to shareholder interests as a whole. Where the time horizon is broadened to take account of a diverse range of constituencies and reputational concerns, they argue that this orientation is just shareholder-centricity under a different guise. Echoing Friedman, they are quick to label any corporate consideration of how societal goals might relate to a company's business and success as lying beyond a company's core business as a business.

169. Further, they assume an homogeneity about shareholder interests as a whole that is commonly absent in practice and provides no certainty about the balancing of various interests that boards regularly undertake. They are apt to discount or externalise the costs and risks of doing business where they can. Manifestations such as 'shareholder value', and even 'enlightened shareholder value' and 'sustainable shareholder value', are still all shareholder-centric in nature and focus, whatever their other similarities and differences. They are all free-standing concepts of open-ended and changeable meaning, but which all suffer from the fatal defect that their orientation is structured around shareholder-centricity as not even the first among equal considerations for companies, but rather the defining orientation, distracting attention from crucial questions about the methodology and practice of deciding what exactly is in the best interest of a company over the long run. 'Shareholder value' and its offshoots are jurisprudentially unsound, conceptually opaque, and operationally unclear. They have an assumed and self-evident meaning and operation, rather than a defined and explained one in the Draft 5th Edition and its predecessor.

170. In early official guidance for company directors after enactment of the UK Companies Act 2006, the relevant minister summarised the UK Government's 'enlightened shareholder approach' in a way that also highlighted the overarching importance of corporate purpose(s):[85]

> There was a time when business success in the interests of shareholders was thought to be in conflict with society's aspirations for people who work in the company or in supply chain companies, for the long-term well-being of the community and the protection of the environment. The law is now based on a new approach. Pursuing the interests of shareholders and embracing wider responsibilities are *complementary* purposes, not *contradictory* ones. (emphasis added).

171. For the present point, given the general similarity of directors' duties in both the UK and Australia, but for the explicit mandatory consideration of non-shareholder interests under the philosophy of 'enlightened shareholder value' in the UK, it is revealing that the 4th Edition contains a much simpler, better, and overarching summary and alignment of corporate purposes with other essential aspects of corporate governance than what appears in the Draft 5th Edition, and has been deleted from it:

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[84] Cadbury, 2006: 16.

[85] Quoted in UNEP, 2009: 23

Values create a link between the entity's purpose (why it exists) and its strategic goals (what it hopes to do) by expressing the standards and behaviours it expects from its directors, senior executives and employees to fulfil its purpose and meet its goals (how it will do it).

172. The Draft 5th Edition tales a position mid-way between making corporate purpose mandatory and alternatively voluntary. It permits and even recommends (but no longer mandates) that companies formulate and publicise their purposes. Yet one struggles to find in the awkward 'cut and paste' on corporate purpose in the Draft 5th Edition an equally clear statement of the integration and alignment of corporate 'purpose', 'culture', 'values', 'goals', and 'objectives'. Moreover, for those who worry that, despite its 'comply or explain' nature, all editions of the ASX CGC standards set default positions from which companies find it hard to diverge in reality, in the face of combined investor and stakeholder pressure, and who have included corporate purposes explicitly in their board charters or corporate constitutions as a result, the change in the treatment of corporate purpose from the 4th Edition to the Draft 5th Edition hardly makes the game worth the candle.

173. The change in approach to corporate purpose from the 4th Edition to the Draft 5th Edition can be summarised as follows. Having and stating a corporate purpose is presently mandatory under the 4th Edition but will become merely recommended and non-mandatory under the Draft 5th Edition. Awkwardly, something that could have been omitted under the 'comply or explain' approach and hence its omission justified, however unsatisfactorily given the importance of corporate purpose everywhere else in the corporate governance world, now is downgraded to a recommended optional extra, and can therefore be maintained for those companies who already have it, not least because of its requirement under board charters in the 4th Edition.

174. Corporate purpose is accordingly downgraded, diluted, *and* delinked from other essential corporate governance requirements. The opt-in approach on corporate governance denies the reality that companies have overriding purposes, whether expressly articulated or not, which also structure, condition, and align with other equally important aspects of corporate governance. It is incoherent as a matter of substance to move from a position that accepts the equal and fundamental importance of corporate purpose along with other features of corporate governance, to a position as a matter of form and drafting where corporate purpose can officially be absent and the requirements for alignment of essential corporate governance elements (ie purpose (if stated), objectives, goals, values etc) exhibit a 'Swiss cheese model' approach when it comes to purpose.

175. The structure of the transition from the 4th Edition to the Draft 5th Edition on corporate purpose is as follows. First, the mandatoriness of corporate purpose is removed from the relevant Recommendations and commentary. This immediately creates a twin dilemma for the drafters of the Draft 5th Edition, as follows. What is to be done with the interim reality that many companies complying with the 4th Edition will have explicitly stated corporate purposes? Further, what is to be done with ancillary Recommendations in the 4th Edition that, assuming the presence of a mandated corporate purpose, state requirements about handling the relationship between corporate purposes and other corporate governance requirements?

176. Secondly, and perhaps in partially recognising and addressing the first dilemma, corporate purpose becomes a *recommended* but *not mandated* requirement. As noted above, what was a clear but undesirable opt-out requirement in the 4th Edition under the 'comply or explain' approach now

becomes, well not quite a pure opt-out requirement but a hybrid in the middle of that spectrum – ie something that is recommended but not required, in the abstract. The problem comes in giving effect to that middle approach under an otherwise 'comply or explain' structure that accommodates the change of treatment on corporate governance largely as a 'cut and paste' exercise as a matter of form, in terms of the previous drafting from the 4th Edition.

177. Thirdly, and as a result where they arise, the express references to corporate purpose in ancillary Recommendations and Commentary are reworded to accommodate their occurrence in board charters and other requirements, which are already commonly structured to indicate the relationship between essential components of corporate governance, including corporate purpose where it appears in relevant documents for disclosure. In other words, the reworking of corporate purpose is approached purely as an ancillary drafting exercise, whenever corporate purpose is already explicitly mentioned.

178. Fourthly, and as a further result of this strictly legalistic approach to the drafting, and possibly of a political compromise amongst ASX CGC members on corporate purpose that its treatment evidences, other requirements from the 4th Edition that equally indicate aspects of alignment of explicit and essential corporate governance features (eg ensuring that a company's values align with its corporate purpose, where stated, and also its objectives, goals, and approach to risk) are not revised in the Draft 5th Edition to accommodate corporate purpose, if corporate purpose is not explicitly mentioned in the relevant Recommendations and Commentary. This produces an uneven and disjointed approach to the association and alignment of corporate governance elements that are commonly present in more than one Recommendation. Some examples follow, merely to illustrate the point.

179. Recommendation 1 contains the lynchpin for everything else on corporate purpose that appears in the Draft 5th Edition. Under Recommendation 1.1, a board charter should contain material that properly reflects the company board's responsibility for 'deciding whether to define the entity's purpose and, if so, approving that purpose', 'monitoring the culture within the entity, including its alignment with the entity's purpose (if articulated), values, strategic objectives and risk appetite', and 'satisfying itself that the entity's remuneration policies are aligned with the entity's purpose (if articulated), values, strategic objectives and risk appetite'.

180. Curiously, despite the crossover in explicitly mentioned items that are also explicitly associated with one another in a number of board charter requirements (eg 'values', 'culture', 'objectives' and 'risk'), there is no reference to corporate purpose, even contingently, in stated board responsibility for 'approving the entity's statement of values and code of conduct, to underpin a desired culture within the entity that supports the creation of long-term sustainable value' and 'overseeing management in its implementation of the entity's strategic objectives, instilling of the entity's values and desired culture, and performance generally'.

181. Nobody apart from participants properly knows what happens inside the deliberations of the ASX CGC in advance of the Draft 5th Edition. However, at face value, it seems that:

a. explicit mandatory references to corporate purpose are transformed into explicit contingent references to it;
b. new text that did not appear in the 4th Edition, but which might suitably have included explicit contingent reference to corporate purpose does not do so, by and large; and
c. pre-existing text from the 4th Edition that did not mention corporate purpose at all, still does not mention corporate purpose, by and large, even where it is of the same order as text that

now contains a contingent reference to corporate purpose (ie through the 'purpose (if articulated' formula), where previously corporate purpose was a mandated requirement.

182. In the interests of consistency and coherence, especially when key elements of corporate governance are specified and connected to one another, why use the 'purpose (if articulated)' formula in some parts but not others worthy of similar treatment? The answer cannot simply be to avoid excessive duplication of that short formula as a matter of form when it is relevant as a matter of substance. Why leave it out of the requirement to '(l)ink the [diversity and inclusion] policy to the organisation's statement of values',[86] especially when it is part of the requirement in a code of conduct to '(e)xpress or cross-reference the organisation's purpose (if articulated) and values', for example, given the intersections on 'values'?[87] There is value in mentioning things explicitly where relevant, so that users of the Draft 5th Edition know precisely what is in and out of scope in meeting its requirements, and are otherwise steered in the right direction when trying to follow the set requirements, especially on key features of corporate governance and how they relate to one another. Both that need and the equal significance of corporate purpose amongst corporate governance elements are explicitly recognised in the requirement that '(t)he listed entity should identify and regularly review the entity's key stakeholders, having regard to the entity's purpose (if articulated), values, strategic objectives and risk appetite [and] consider a form of stakeholder engagement program appropriate for the entity and its circumstances'.[88]

183. Other parts of the Commentary could usefully benefit from an explicit contingent reference to corporate purpose, using the 'purpose (if articulated)' formula; for example:
   a. 'Remuneration of executives should align their interests with the entity's values, strategic objectives and risk appetite, and the creation of long-term sustainable value for security holders';[89] and
   b. '…the need to ensure that the incentives for executive directors and other senior executives encourage them to pursue the growth and success of the entity without rewarding conduct that is contrary to the entity's values, strategic objectives or risk appetite'.[90]

184. The structural awkwardness and gaps caused by the fragmented approach to corporate purpose, purely as a matter of drafting form let alone as a matter of contingent substantive requirements, are apparent from the knock-on effects in other Recommendations and Commentary, in service to Principle 1, Recommendation 1.1, and their associated Commentary, as follows.

185. Under Recommendation 3.1 in both the 4th Edition and the Draft 5th Edition: 'A listed entity should articulate and disclose its values'. But the hierarchy and mandatoriness of what are commonly regarded as primary corporate governance features are different in the transition from the 4th Edition to the Draft 5th Edition. If corporate purpose moves from being a mandatory inclusion that, as accepted under the 4th Edition and in much of the corporate governance literature, in substance structures and conditions other requirements, to become a recommended but nevertheless contingent feature – prioritised as such and relevant only where specifically mentioned from one edition to the next – the demotion of corporate purpose has real significance and knock-on effects, unless remedied from here.

[86] ASX CGC, 2024:30.
[87] ASX CGC, 2024: 27.
[88] ASX CGC, 2024: 28 (Recommendation 3.3, Commentary).
[89] ASX CGC, 2024: 48 (Principle 8).
[90] ASX CGC, 2024: 49 (Recommendation 8.1, Commentary).

186. For example, it is now the case that mandated requirements going to corporate ‘values’, ‘culture’, ‘objectives’, and ‘goals’ are neither of equal prominence to corporate purpose (because it is no longer absolutely required) nor conditioned in any way by it (for the same reason). Yet it is unwieldy for those features to signify one set of qualities, priorities, and relations now for companies with an explicit corporate purpose and a different set for companies without it. This is apparent from the proposed commentary for Recommendation 3.1:

> Values should be aligned with the entity’s purpose (if articulated), strategic objectives and risk appetite.
>
> As a result, a listed entity should also consider articulating its purpose. Purpose is usually broader than a business model, and may evolve over time. It can assist an entity to define its time horizons when developing strategy. Where purpose also reflects responsible business conduct relevant to the entity’s activities, this may more effectively drive ethical, lawful and responsible behaviour.
>
> The board should approve an entity’s statement of values, and model behaviour and decision-making consistent with those values.

187. On that approach, and whatever the other merits in that approach, corporate purpose is secondary in importance to other absolute necessities in corporate governance, both in its own right and in conditioning and interacting with other key features and ancillary requirements of corporate governance. The highest that the suggestion goes is to consider having a statement of corporate purpose. Other things (eg ‘responsible business conduct’) are merely reflected in it *if* so articulated, not driven by it. Indeed, corporate purpose is merely derivative from such things, at least on the current wording.

188. At the same time, corporate purpose bears an unclear stated relationship to other things of stand-alone importance – eg corporate ‘strategy’ and ‘time horizons’ for that strategy – given that a corporate purpose need not be included at all. In its place, alignment with ‘values’ embodied in a ‘statement of values’ becomes the touchstone. Corporate purpose is relegated to something that is merely ‘broader than a business model’, thereby further downplaying and undermining the significance and role of corporate purpose that is recognised clearly in other corporate governance commentary and standard-setting worldwide. Australia becomes an outlier on this score, despite dual-listed and other Australian companies operating transnationally in regulated markets with a different approach.

189. Similarly, Recommendations and associated Commentary that could usefully benefit from even an explicit contingent reference to corporate purpose do not seem to have been reviewed through that lens in making changes from the 4th Edition to the Draft 5th Edition. Put another way, why have a contingent reference to corporate purpose when equally significant features of corporate governance are mentioned in some parts of the Draft 5th Edition, but not others? What is the rationale that explains when corporate purpose is featured contingently and when it is not?

190. For completeness in this discussion of corporate purpose and how the Draft 5th Edition’s treatment of it needs tweaking at the very least, if not recasting in view of the 4th Edition’s treatment of corporate purpose, given that the Draft 5th Edition also explicitly recognises and amplifies risk management and disclosure requirements concerning ESG, it is worth noting that there is authoritative

Australian commentary highlighting the links between corporate purpose, culture, values, and ESG. In the annual Harold Ford Memorial Lecture in 2023, the HCA's Justice Gordon stated:

> (F)ocusing only on ESG issues – however defined – may be too narrow. ESG issues raise broader and deeper questions about corporate purpose and corporate governance. (emphasis added)

So, on a strict approach to compliance with the Draft 5th Edition's requirements, and despite its inclusion of requirements on ESG, the result is that only the boards of listed entities with a disclosed purpose are steered by the Draft 5th Edition towards any consideration of a triangulated relationship between ESG, corporate purpose, and corporate governance that the second most senior judge on the HCA identifies as a crucial one. Under an otherwise meritorious regulatory approach of not duplicating or exceeding in the Draft 5th Edition the boundaries of existing corporate law and regulation, this instance cries out for attention and reinforces the case for review of the treatment of corporate purpose *and* its relationship to other identified features and specific requirements, in finalising the Draft 5th Edition.

191. Needless to say, there is no reasonable basis for saying that ESG risk management and disclosure is not a suitable topic for inclusion in the Draft 5th Edition, regardless of the ultimate outcome of the Australian Government's proposed climate-related disclosure laws, if at least one HCA judge already accepts that ESG issues have entered the mainstream in corporate governance, and that their consideration is already implicit in the law. The World Economic Forum's 2019 statement referenced by Justice Gordon in her extra-judicial speech, The Universal Purpose of a Company in the Fourth Industrial Revolution, is to similar effect on the fundamental connection between corporate purpose and ESG:

> The *purpose* of a company is to engage *all* its stakeholders in shared and sustainable value creation. In creating such value, a company serves not only its shareholders, but *all* its stakeholders – employees, customers, suppliers, local communities and society at large. The best way to understand and harmonise the divergent interests of all stakeholders is through a shared commitment to policies and decisions that strengthen the long-term prosperity of a company … Performance must be measured not only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives. (emphasis added)

Such standard-guiding comments underscore and reinforce the following point. the point. Sustainable corporate value-creation that attracts all shareholders and other stakeholders to make company-specific investments is not truly won through the lens of the flawed and otherwise limited Friedmanite Doctrine and notions of 'shareholder value' that embody it. The Draft 5th edition takes an assumed and non-value-neutral stance on this fundamental aspect of corporate governance in the literature and comparable standard-setting elsewhere, but does not yet sufficiently engage with it. In the spirit of the 'evolutionary' approach to corporate governance standard-setting that is otherwise exhibited in the Draft 5th Edition, the singular 'devolutionary' treatment of corporate purpose between editions can and should be remedied to some extent in revision of the Draft 5th Edition, prior to being reviewed in full in preparation for the Draft 6th Edition.

192. Justice Gordon's treatment of corporate purpose as an integral part of corporate governance, including its encapsulation of issues of ESG and performance, can also be contrasted, for example, with

the absence of corporate purpose from the commentary in the Draft 5th Edition about how key corporate governance elements combine:[91]

> Performance extends to financial and non-financial performance, including whether an individual has acted in accordance with the entity's values and code of conduct and otherwise demonstrated and promoted the entity's desired culture. This should be reflected in remuneration outcomes.

193. The Draft 5th Edition borrows language associated with each of shareholder supremacy and stakeholder pluralism, while remaining steadfastly a product of the former theory. Under revised Recommendation 1.1, for example, a company's 'strategic objectives' under board oversight 'to build sustainable value for security holders of the entity' also involves 'having regard to the interests of the entity's key stakeholders, as appropriate'. It is not alone in its primary orientation around shareholder supremacy, as corporate governance codes in many countries do likewise.[92]

194. Successive UK corporate governance codes still reflect the conception of corporate governance and guiding influence of the Cadbury Commission from the late 20th century, and their comparative relevance and benchmarking for equivalent Australian standard-setting remain strong. So, it is worth noting in reviewing the Draft 5th Edition what the architect of Cadbury-based corporate governance codes says about the Freidman doctrine, shareholder supremacy, and CSR, as addressed throughout this Submission.

195. The updated UK Corporate Governance Code to apply from 2025 has an opening section entitled 'Board leadership and company purpose', which endorses principles that a company board's role 'is to promote the long-term sustainable success *of the company*, generating value for shareholders *and* contributing to wider society', and that '(t)he board should establish the company's *purpose*, values and strategy, and satisfy itself that these and its culture are all aligned'.[93] This inclusion and formulation of corporate purpose and its fundamental and explicit alignment with other key features is far superior to the Draft 5th Edition's disjointed treatment of corporate purpose and its adverse knock-on effects for other requirements. That characterisation holds despite any other differences in requirements between the UK and Australia. Further, the singular focus upon 'shareholder value' in Australia locks this country into a focus and standard for achieving business success that is subtly but significantly different from the UK's better focus upon the company's success and not how only one corporate constituency gains, in recognising that the board's role is as described above.

196. The seminal significance of corporate purpose underpinning everything else in corporate governance in the UK is starkly driven home by the accompanying Corporate Governance Guidance, in a section headed 'Purpose':[94]

> An effective board defines the company's purpose and sets a strategy to deliver it, underpinned by the values and behaviours that shape its culture and the way it conducts its business. … A company's purpose is the reason for which it exists. A well-defined purpose will help companies to articulate their business model, and develop their strategy, operating practices and approach to risk. A board which is clear about its

[91] ASX CGC, 2024a: 15 (Commentary, Recommendation 1.6).
[92] Mayer, 2018: 19.
[93] FRC, 2024a: 6; emphasis added.
[94] FRC, 2024b: [9]-[10].

purpose, and the corporate culture needed to deliver that purpose, often finds it easier to engage with its shareholders and wider stakeholders.

197. So, in short, corporate purpose is central to corporate governance, at least in a country with the closest similarity to Australia in its corporate law and governance. Corporate purpose is inextricably connected to a company's corporate 'culture', 'strategy', 'values', and 'business model' and operations. It informs and aids both shareholder and non-shareholder engagement.

198. By comparison in Australia, in the 4th Edition, corporate purpose is similarly front and centre in corporate governance. Under Recommendation 1.1, a company board for a listed company has responsibility under its reportable corporate charter for, amongst other things, 'defining the entity's purpose and setting its strategic objectives' as well as 'satisfying itself that the entity's remuneration policies are aligned with the entity's purpose, values, strategic objectives and risk appetite'. In other words, corporate purpose is not only a given, but is also intertwined with 'culture', 'values', and 'objectives' in corporate governance, as well as distinguishable from those features, including 'objectives'. In other words, corporate purposes differ from corporate objectives and operate in a cross-cutting way in a company's corporate governance, with strong connections to other features of a company's corporate governance.

199. Conversely, in the draft 5th Edition, corporate purpose is downgraded in importance and becomes an optional (albeit desirable) extra, at least relative to other aspects of corporate governance that are absolutely required. Under its board charter, a company's board become responsible for 'deciding whether to define the entity's purpose and, if so, approving that purpose', and 'satisfying itself that the entity's remuneration policies are aligned with the entity's purpose (if articulated), values, strategic objectives and risk appetite'.[95] Those revisions do more than simply make an articulated corporate purpose an optional item. They delink corporate purpose from its fundamental association with corporate 'culture', 'strategic objectives', 'values', 'governance practices', 'performance', and stakeholder (including shareholder) engagement. It is absent from the new recommendations and commentary surrounding 'sustainable value for security holders'. Further, it is strange treatment of such an important notion in corporate governance literature and regulation elsewhere, and even stranger when positioned within the structure of the 'comply or explain' approach: having a corporate purpose is not required anymore, although it is still desirable, but a company can disagree with that proposition and explain why. It is as if the topic of corporate purpose has been treated between the two editions mainly as a drafting exercise as a matter of form.

200. More broadly, in his 2018 book flowing from his steering of The British Academy's work on *The Future of the Corporation* Project, *Prosperity: Better Business Makes the Greater Good*, Professor Mayer highlights the deficiency in conventional Anglo-American approaches to corporate governance codes, from which the Draft 5th Edition also suffers:[96]

> Corporate governance is currently viewed as serving one function: addressing the 'agency problem' of aligning the interests of the management of companies with their owners – the shareholders. Recommendations regarding board composition, separation of chairmen and chief executives, remuneration, auditing, risk management, reporting, and investor relations are all designed to ensure that companies are run for the benefit of their investors. … It is fundamentally misconceived. *The purpose of*

[95] Recommendation 1.1, Commentary: 10.
[96] Mayer, 2018: 19.

corporate governance is not and should not be predominantly to promote shareholder interests; it is to promote the interests of the firm as a whole and, in particular, to assist it with *achieving its corporate purposes*. (emphasis added)

201. He then states succinctly the essential elements of corporate governance that need to be aligned and integrated to achieve corporate success, in a way that exposes the folly of the Draft 5th Edition's split choice to mandate some essential features for a board charter that all relate to one another as well as corporate purpose, while walking back from mandating (while still urging the desirability of) the inclusion and integration of corporate purpose in it:[97]

> *A company's governance is indeterminate so long as its purposes are undefined*, and once they are then its governance is determined by its purposes, not the interests of any one party. *Shareholders are one but only one component in the delivery of purpose*, and corporate governance should reflect the balancing of theirs as against other parties' interests in the promotion of purpose. All of board composition, chairmanship, leadership, remuneration, auditing, and reporting should be focused on what the company exists to do and the relations that it needs to form with all of its stakeholders, including shareholders but not excluding others. (emphasis added)

202. Professor Mayer's view points to the undeniable connection and need for integration of corporate purpose, culture, values, objectives, and strategies for effective corporate planning, operations, and governance. Sir Adrian Cadbury's extensive corporate governance leadership and standard-setting experience also lead him to avoid blind adherence to the Friedman Doctrine and to see the limits of shareholder primacy and value, and to urge upon companies and their boards that '(t)he focus of attention should perhaps begin to switch to *the totality of corporate responsibilities* and away from but one aspect of them [ie shareholders], however important [because] (w)hat matters to society is the manner in which companies exercise their responsibilities *as a whole*'.[98] The Cadbury view of corporate governance gains in accuracy about the true complexity and dynamics of corporate governance what it loses in adherence to simplistic but flawed and practically unhelpful reliance and skewed focus upon a company's shareholding constituency. The same cannot be said of the Draft 5th Edition. Cadbury, Mayer, and others are no mere lightweights in the corporate governance world, and their views contrast with corporate purpose's treatment in the Draft 5th Edition, where corporate purpose no longer has the same prominence as other essential features of corporate governance that are explicitly mandated and extensively referenced in accompanying Recommendations and Commentary (eg 'values', 'culture', and 'objectives').

203. In sum: instead of inclusion, integration, and alignment of stated corporate purposes as the primary and collective conditioner of everything else in corporate governance, the Draft 5th Edition walks back from the treatment of corporate purposes in the 4th Edition. It disconnects stated corporate purposes from other essential elements of corporate governance features (and the Principles and Recommendations in the Draft 5th Edition concerning them), and exhibits a fragmented rather than integrative approach to consideration and engagement of shareholder and non-shareholder interests. It does so to the point of conceding that shareholders are also stakeholders and then inconsistently abstracting shareholders out of a recommendation (ie Recommendation 3.3) on stakeholder consultation that services a principle (ie Principle 3) that otherwise promotes a holistic approach that is inclusive of *all* stakeholders including shareholders (which is not the same as treating all stakeholders

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[97] Mayer, 2018: 19.
[98] Cadbury, 2006: 21; emphasis added.

equally in conferring benefits) in embedding a corporate culture of 'acting lawfully, ethically and responsibly'. The approach has flaws and limits that are already identifiable from comparable corporate governance instruments and knowledge. It can and should be revised in finalising the Draft 5th Edition to apply from 2025, and exhaustively overhauled in the 6th Edition.

204. Again, a critic can accept the good intent of the Draft 5th Edition to identify in process-based mode the ways in which shareholder and stakeholder engagement are different (albeit related), to the point of having separate recommendations for investor and stakeholder engagement, and still decry the non-holistic and awkward result of the particular way in which the Draft 5th Edition does it. In other words, what the Draft 5th Edition gains by splitting shareholder-focused and other stakeholder-focused Principles and Recommendations to provide additional focus, detail, and clarity for specific and different mechanisms of engagement and consideration for each sub-constituency, it then loses in focus, detail, and clarity about integrated consideration of all relevant sub-constituencies and other factors (eg reputational impacts) in governance mechanisms that facilitate decisions about a company's best interests.

205. The resulting unhelpful situation for directors seeking holistic guidance is exacerbated by the lack of recognition about the multiple contexts and ways in which it is necessary to 'have regard to' stakeholder interests, where following process-based requirements about having stakeholder engagement plans is a necessary but not sufficient condition. It is possible to offer more and better recognition and guidance on the complex reality facing directors, while still leaving them with considerable choice and latitude in doing so. Put another way, the loop needs to be closed on both fronts, in the interest of better holistic guidance in practice. As with its treatment of 'shareholder value', the proof lies in the relative time and words spent on some matters and not others in the Draft 5th Edition.

206. Ultimately, the downgrading of corporate purpose from an essential and interconnected feature with others in the corporate governance mix, to an optional (albeit desirable) extra in a company's reportable corporate governance arrangements, is out of sync with a considerable part of the literature and practice driven by the essentiality of corporate purpose under the 4th Edition. The scepticism amongst some Australian commercial judges, commercial lawyers, and (presumably) ASX CGC members about the usefulness of official statements of corporate purpose is not a sufficient justification for watering down requirements about corporate purpose from the 4th Edition to the Draft 5th Edition, even more so given that a company can still opt to have a stated corporate purpose which, if present, the draft 5th Edition accepts will, along with other features, condition a board's evaluation of company remuneration policies.[99] Nevertheless, the abandonment of the anchoring and conditioning of such recommendations and principles in corporate purposes, combined with the separation and fragmentation of principles and recommendations about shareholder and non-shareholder engagement, and the inevitable connections between them, together constitute a step backwards in the evolution of Australian corporate governance standard-setting. It is a step that should be reversed.

Orthodox Doctrinal Position on a Company's Best Interests

207. A company board that complies with the Draft 5th Edition's requirements about shareholders and other stakeholders, DSI and ESG, and the achievement of sustainable long-term value for a purposeful

[99] ASX CGC, 2024a: 10 (Recommendation 1.1, Commentary).

company must do so in ways that also meet a company's best interests, and consistently with the duties, defences, and broader obligations upon directors. The Draft 5th Edition references a published legal opinion by one of its members upon the issue of the 'best interests' duty of directors. That ASX CGC member has commissioned other published legal work on the same issue. There is also published and equally authoritative legal opinions on the legal position of company directors in avoiding greenwashing and managing and disclosing climate-related risks, consistently with directors' duties and a company's best interests. Those latter legal opinions are not referenced in the Draft 5th Edition, but deserve to be referenced in the finalised version of the raft 5th Edition, given the regulator and other prominence that they have achieved, and their additional capacity to guide directors on matters covered by the Draft 5th Edition.

208. The existence of all of these published legal opinions and others of their ilk to come has additional relevance for the suggestions about the need for curation and access of relevant material tat appear at the end of this Submission. For now, it is sufficient in assessing the Draft 5th Edition to say more about its reference to the Walker-Ng Legal Opinion, and what it offers by way of additional and authoritative (albeit generalised) guidance to company directors and their legal advisers, if read together with the Draft 5th Edition.

209. While Australian corporate law appears to endorses a form of shareholder primacy and value in particular contexts, it also recognises that shareholder primacy and value is only part of the equation in regulating the relationship between the interest of a company, the responsibilities of its board, and the interests of all shareholding and non-shareholding constituencies who invest financial, human, intellectual, and social capital in a company.[100] The mainstream legal view is that non-shareholding interests can be considered by directors, where they relate to the interests of the company, as articulated by Justice Dyson Heydon more than 30 years ago, at a time when he was a leading commercial barrister:[101]

> The duty which is owed *to the company* is *not* to be limited to, or to be regarded as operating alongside, a duty to advance the interests of shareholders … And the directors' duty to the company is not to be limited to the duty to consider shareholders, because, for example, businessmen [sic] in their daily talk reveal that they are constantly considering, without impropriety, interests other than those of the shareholders … (T)he law permits many interests *and purposes* to be advantaged by company directors, as long as there is *a purpose* of gaining in that way a benefit *to the company* … Our law perhaps goes less far than American in permitting consideration of such abstract matters as the national economic interest, the wishes of the government or the advancement of the environment. But if those matters had a link with the interest of the company they could be considered.

210. The mainstream regulatory view is that directors have a legal responsibility to manage stakeholder interests, climate change risks, non-financial risks, and ESG considerations impacting upon a company's best interests. Speaking at the 2019 NSW Supreme Court Corporate and Commercial Law Conference, the former ASIC Deputy Chair, Daniel Crennan QC, confirmed that:[102]

> In Australia, company directors are required to act with due care and diligence and in the best interest of the company: ss 180 and 181 of the Corporations Act.

[100] Harris, 2018.
[101] Heydon, 1987: 135-136; emphasis added.
[102] Crennan, 2019.

> When taking a long-term view, factoring in the interests of a multitude of stakeholders as well as the company's reputation is arguably consistent with considering the best interests of the company.
>
> If a director fails to act in the best interests of the company with respect to non-financial risks, environmental, social and governance (ESG) issues might impact future cash flows, asset values, intangible assets such as reputation and, ultimately, the longevity of the company.
>
> Mismanagement of these non-financial risks may readily become a financial risk over time.

211. In short, the orthodox Australian corporate law position, as expounded in judgments and extra-judicial scholarship on the topic, can be summarised in a few basic propositions, as follows:[103]

   a. Directors owe their legal obligations to the corporation, not to any particular corporate constituency, and their primary obligation is to act in the best interests of the corporation as a going concern;

   b. The interests of the shareholders as a whole are treated as being co-extensive with the best interests of the corporation as a going concern, at least for many purposes under corporate law;

   c. Company directors and other corporate officers can legitimately take account of other stakeholder interests (eg creditors, employees, and customers) to the extent that those interests align with the interests of the shareholders as a whole, but not for the purpose of advancing those non-shareholding interests in their own right (and unrelated to their functional relevance to the best interests of the company);

   d. The law places limits on the capacity of shareholders to direct the board (eg to declare dividends), excuse unlawful behaviour (eg to ratify actions in breach of legislated standards), and prioritise shareholder over non-shareholder interests (eg creditors' interests as the corporation approaches insolvency);

   e. Company directors risk breaching their directors' duties and reliance on applicable defences if they do not properly take account of non-financial risks (eg climate change risk management and disclosure) as well as financial risks, and have appropriate regard to ESG considerations; and

   f. To the extent indicated by those propositions, Australian law broadly reflects a view of corporations that is more in accord with shareholder primacy and value than competing theories of the corporation.

212. So, whatever criticisms are levelled at the Draft 5th Edition for its treatment of stakeholder considerations and relationships under Principles 3 and 7 and elsewhere, a number of things are clear. There is no legitimate basis for any criticism whose point is that stakeholder considerations automatically dilute corporate profit-making and shareholder financial gains. Those are best regarded as straw cases and stalking horses for other self-interests in corporate governance debates. However, Australian corporate law's rhetorical support in particularised contexts for shareholder primacy and value, and associated notions such as a company's best interests and the interests of the shareholders *as a whole*, still allows room for stress-testing under the current law whether or not (i) corporate success is attributable wholly to a search for 'shareholder value' and (ii) there is an actual link and complete co-extensiveness between 'shareholder value' and a company's best interests.

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[103] See also: Harris, 2018.

213. Whatever the Draft 5th Edition does or does not say about such things, they are important corporate governance matters in practice for company directors and their legal advisers and official regulators. Any publicly available guidance that bears upon them, such as the Walker-Ng Legal Opinion, with the additional advantage and force of being endorsed explicitly by the AICD and implicitly by the ASX CGC through its referencing of this source in the Draft 5th Edition, is worthy of some attention.

The AICD-Commissioned 'Best Interests' Legal Opinion and the Draft 5th Edition

214. As it is referenced with apparent approval in the Draft 5th Edition, what the Walker-Ng Legal Opinion104 commissioned by the AICD says about boardroom approaches to decision-making under the umbrella of 'shareholder value' is worth some highlighting and comment:[105]

> We should state at the outset that like the AICD, we do not see any need for legislative amendment in order to ensure that the decision-making processes of company directors can accommodate consideration of the interests of such classes of persons as the customers of a company, or its employees, or members of the community in which the company conducts its business … Having regard to ss 232 and 233 of the Corporations Act, there is, as a practical matter, little scope for the directors of a company to argue that they are acting in the best interests when they are conducting the affairs of the company contrary to the interests of its members as a whole. Accordingly, …*the interests of shareholders would be a central, if not the central, consideration to which the directors must have regard.*
>
> Nonetheless, both the general law and statute have allowed directors considerable latitude in identifying the best interests of a company and its shareholders, provided that their decision-making is rational, in the sense that it is not so unreasonable that no reasonable board of directors would have made the decision in question. Directors may thus consider *the long-term interests of the company and its shareholders*, as well as the potential impact of any *reputational risks*, given that such risks may constitute a very real threat to *shareholder value*. It is *through the lens of these matters*, which supply *a link to the interests of shareholders*, that directors may, in our opinion, have regard to the interests of customers, employees and the community at large in making decisions for and on behalf of companies.

215. The AICD considered that there was sufficient doubt about such matters to commission the Walker-NG Legal Opinion in the first place. It is worth unpacking, highlighting, and commenting upon this important and publicly available legal opinion for corporate governance standard-setting and practice under the Draft 5th Edition. First, it provides *a structure* for boardroom decision-making and advice. Nobody gets to 'shareholder value' simply by identifying and lining up a large set of equally *relevant* (although not necessarily equally *important*) interests in scope, and then simply extrapolating from them collectively or otherwise ordering them in terms of their supposed connection to 'shareholder value'.

216. One trap to avoid or navigate in relying upon such a generalised opinion is that notions such as 'shareholder value', 'best interests of the company /shareholders as a whole', and 'weighing' or 'balancing' of interests can convey the misleading impression that there actually is a single, identifiable, and collective interest or set of interests that commensurates the range of diverse interests, values, and factors in scope. Of course, anything can be brought into some kind of ordering in relation to other considerations, either where there is genuine commensurability of considerations (eg comparing

[104] Accessible at the AICD website.
[105] Walker-Ng Legal Opinion, 2022: [6]-[7].

apples with apples or comparing oranges with oranges) or else, in situations of genuine incommensurability (eg comparing apples with oranges in terms of best fruits), bringing the otherwise incommensurable interests into some sort of comprehensible ordering by choosing a particular measure or criterion that brings them into some kind of alignment (eg deciding which of apples or oranges are the *sweetest* fruit, or the *most numerous* fruit in pictures online worldwide, or the *most-mentioned* fruit in fairy tales (eg Sleeping Beauty), and so on). Similarly, many collections of diverse shareholder interests, non-shareholding interests, and shareholding and non-shareholding interests together, are incommensurable in reality.

217. Secondly, the layering and structure of levels of consideration for company directors who follow the Walker-Ng Legal Opinion seems to be as follows. No reasonable judge will second-guess the commercial judgment of company directors, assessed against the criterion that it is not an irrational decision (ie one that no reasonable board could possibly contemplate and implement), even if the judge (or another company board) might have reached a different commercial decision on the merits. This cuts company directors considerable slack in court in the face of any challenge, and allows for a considerable margin of directorial discretion or error. Once various safe harbours, business judgment defences, and other safeguards available to company boards (eg expert reports and advice to inform boardroom deliberations) are added to the decision-making equation, corporate decision-making becomes more navigable under the law than some lobby groups, special interest groups, and public and media commentaries would lead everyone to believe.

218. Thirdly, company directors are lawfully entitled to adopt a long-term view and to consider a company's reputation in their boardroom decision-making. Why? The supplied answer is that long-term views (importantly, about the collective interest of a company and its shareholders) and reputational considerations are integral in decision-making about 'shareholder value'. Of course, for reasons outlined elsewhere in this Submission, the relevant time period is only one factor in determining 'shareholder value' or a company's best interests. That's the 'why'; what about the 'how'?

219. On the 'how' aspect, the Walker-Ng Legal Opinion frames the consideration of all non-shareholder interests (ie 'the interests of customers, employees and the community at large') through the composite focal point ('lens') of 'the long-term interests of the company and its shareholders', together with 'any reputational risks', as a particularly important factor affecting 'shareholder value'.[106] That decision-making framework and its broad boundary-markers still allow for a diversity of actual decision-making paths and potential outcomes, within the commercial judgments of a company's individual directors, given that directors' duties attach to individual directors.

220. The process of decision-making that it involves is not simplistic collation, induction, deduction, extrapolation, head-counting, or syllogistic reasoning. No tick-a-box template or decision-making algorithm is feasible as a replacement for commercial judgment, which is always conditioned by particular contexts and circumtances. If it were, almost anyone could be a company director, and the role would attract neither the risks nor the rewards available to company directors. Boardroom decision-making on corporate governance matters is far more nuanced, complex, and multi-layered than what could be captured in a simple tool or universal set of checklist criteria.

[106] Walker-Ng Legal Opinion, 2022: [7].

221. Like the technique of the law of equity and the 'matrix of factors' approach in much contemporary legislation (eg statutory unconscionability), it requires consideration of all relevant factors in scope and the best judgment in all of the circumstances. In corporate governance, that best judgment is about the best interests of the company overall, which is not reducible on any authoritative view to focusing and deciding exclusively by reference to one supposedly homogenous or monolithic corporate constituency/sub-constituency interest or another (if identification of such an interest is even possible), with all other considerations ignored or marginalised. Using conclusionary labels like 'best interests' and 'shareholder value' commonly hides rather than reveals the process of boardroom consideration and decision-making involved. The flip side of that reality is that there is sometimes (maybe often) mor than legally acceptable option available to company boards facing difficult decisions. So, there is a natural limit to the level of meaningful guidance available for company directors from framework-setting documents such as the Walker-Ng Legal Opinion and standard-setting instruments such as the Draft 5th Edition.

222. Fourthly, other features of the Walker-Ng Legal Opinion are also worth noting in the context of the Draft 5th Edition. The Legal Opinion draws attention to what sections 232 and 233 of the Corporations Act mean for any discussion of 'shareholder value' and 'best interests' of the company and/or its shareholders as a whole. The collections of interests and cohorts referenced by such notions can be viewed in the abstract or alternatively can be time-bound. For example, in theory a notion such as 'the best interests of the shareholders as a whole' might be interpreted in the abstract as a proxy for a company's best interests, which in turn might be interpreted as a proxy for an outcome that best addresses the considerations and interests embodied in share-holding factors, other stakeholding factors, and broader non-constituency factors. In addition, such abstract notions could embrace both current *and* future shareholders, and of *all* kinds. So, uninstructed by the Corporations Act, there are issues about the range of interests in scope, the present and future members of any relevant cohort, and the correlation between a cohort's collective interests and the company's interests.

223. However, as indicated in the Legal Opinion, the important work that sections 232 and 233 do for Australian corporate governance is to ground consideration of notions of a company's interests by reference to an identifiable point-in-time cohort of constituents, and *their* interests as a whole. They supply an additional reason for characterising the Australian system of corporate governance as being shareholder-centric in its legal and regulatory focus, but that is still different from being shareholder-exclusive in boardroom deliberations and benefit-conferral. Moreover, the combined effect of sections 232 and 233 arguably is to preclude the reference in section 232 to 'the interests of the members as a whole' from being interpreted in either of the two abstract ways described above.

224. Why? Section 232 conditions its reference to 'the interests of the members as a whole' by reference to present-day actual and deemed shareholders. Such framing does not mean that only present-day shareholders matter in boardroom calculations. However, for the reasons given in the Walker-Ng Legal Opinion, no lawful directorial decision that purports to be a decision in the company's best interests can be contrary to the interests of the present-day actual or deemed shareholders, at least under Australian corporate law. While it is possible that it could be reasonably foreseeable now – say, in the context of a company moving from one form of energy to another over time in the energy industry - that the collective interests of the current *and* future shareholders as a whole at a much later point in time, and for the purpose of a long-term view of 'shareholder value', might be different from the interests of the present shareholders alone in a present-day decision, such a point would need to be tested. Otherwise, consideration of 'shareholder value' under that body of law and regulatory

instruments such as the Draft 5th Edition is framed and conditioned accordingly. This is a not inconsiderable factor in the Australian model of corporate governance, especially in comparison with other jurisdictions and for the purpose of debates about theories of the corporation under Australian conditions.

225. Fifthly, and most importantly, the Walker-Ng Legal Opinion also publicly confirms, for company directors' collective peace of mind, that boardrooms must consider and accommodate various relevant stakeholder considerations, in the ways contemplated by the Draft 5th Edition, when they are compelled directly or indirectly to do so under the law, in meeting their directors' duties and other legal obligations. The Walker-Ng Legal Opinion frames that point in the following way:[107]

> It may be that regard to the interests of persons such as customers, employees, suppliers and the local community in which a company conducts business, at least insofar as these persons may be the subject of the company's legal obligations, is not merely permissible, but mandatory. Speaking in relation to the duty in s 180(1) of the *Corporations Act*, … Edelman J in *Cassimatis* proceeded to say this:
>
> > "the foreseeable risk of harm to the corporation which falls to be considered in s 180(1) is not confined to financial harm. It includes harm to *all* the interests of the corporation. The interests of the corporation, including its reputation, include its interests which relate to compliance with the law." (original emphasis)

226. Finally, the Walker-Ng Legal Opinion removes two common distractions in Australian corporate governance debates and commentary, which should no longer be entertained in debating and implementing the Draft 5th Edition. In terms of the first common distraction, it does not matter under Australian corporate law whether or not companies are separate commercial entities from the collectivity of their shareholders, at least for the purpose of deciding a company's best interests, because the interest of those shareholders are integral in any evaluation of a company's best interests. The proper focus needs to shift from 'whether' to 'how'.

227. In terms of the second common distraction, if *every* relevant stakeholder interest and other reputational consideration for company directors can legitimately be reframed one way or another as a relevant consideration in deciding a company's best interests on a long-term view, then most (if not all) of the increasingly sterile argument about supposed competition between shareholder and other stakeholder interests, and over what timeframe, completely falls away. That conclusion is even more inevitable once it is accepted, as the Walker-Ng Legal Opinion urges, that:

a. there is no legal doubt at all that company directors can consider relevant non-shareholding and reputational factors in deciding a company's best interests;
b. company directors have no lawful capacity to decide contrary to the interests of shareholders as a whole, with the real focus of debate shifting to what that interpretative construct (ie 'the interests of shareholder *as a whole*') and related constructs (eg 'shareholder value') actually mean in practice;
c. 'company directors …have considerable leeway in identifying the best interests of a company, including *the time horizon* by reference to which those interests are to be assessed and the precise nature of the interest sought to be advanced or protected, whether they be purely financial or reputational or otherwise';[108] and

[107] Walker-Ng Legal Opinion, 2022: [25].
[108] Walker-Ng Legal Opinion, 2022: [28] (emphasis added).

d. both shareholder and non-shareholder interests share at least one fundamental feature in common, which is that their interests (whatever they are) and the advancement and protection of those interests are *legally* relevant in terms of their connection to the company and its best interests as a functional correlation, and not simply at large and in their own right.

228. Significantly, the Walker-Ng Legal Opinion concludes that, if a company's reputation is a major asset as well as a consideration in long-term shareholder value, it follows that 'one can readily envisage how the taking of steps to address such risks can be rationally justified by reference to the long-term interest of the shareholders*, even though they may not result in immediate profit and might be thought to confer more ascertainable benefits on persons other than shareholders*, such as customers, employees or members of the community in which the company conducts its commercial and other activities'.[109] (emphasis added)

229. It all comes down to this. Such comments are, of course, completely consistent with conventional accounts of 'shareholder value', at least those accounts that do not rely upon a crude reductionism of that notion, exclusively requiring short-term financial benefit for existing shareholders in every boardroom decision. However, they are also consistent with a view in which profit-making and shareholder gain are products and offshoots of successful pursuit of some higher corporate purpose(s), and neither the goals nor the means of corporate success themselves, as argued by scholars and commentators such as Professor Mayer, in both descriptive and normative mode. Indeed, how could it be otherwise, if the legal position is best encapsulated in the threefold proposition that directors' duties are owed to the company, the best interests of a company are not reducible to absolute and exclusive priority for maximising profit and shareholder benefit in every boardroom decision, and company directors have considerable freedom and discretion in how they consider relevant shareholding, non-shareholding, and reputational factors and over what relevant timeframe?

230. The Walker-Ng Legal Opinion is not the only publicly available legal opinion of relevance to company directors for guidance in meeting their director's duties and in considering matters such as ESG considerations and climate-related risk and disclosure under the Draft 5th Edition. As outlined later in this Submission, there are a number of published Australian legal opinions on directors' duties, defences, and broader obligations in managing and reporting climate risk and nature risk. Indeed, it would be fair to say that any lawyer advising on the subject matter of all such opinions needs to be aware and take account of those opinions in their formal legal advice. They form part of a growing set of available reference material in implementing the Draft 5th Edition's Principles and Recommendations, and for inclusion and reference in associated Commentary, in present and future editions. We have reached a tipping point in the awareness, curation, and use of such material. This is addressed in the concluding part of this Submission.

Ramifications of the ASX CGC's Reference to 'Soft' Law and Commentary on Corporate Governance

231. In a legal world that operates through 'hard' law and 'soft' law, with what ae commonly presumed to be cognate bi-polar extremes respectively of 'mandatory' standards and 'voluntary' standards, and even 'rule-based' and 'principle-based' standards, the Draft 5th Edition is a piece of voluntary, principle-based, soft law. Only listed companies need to engage with it and, even then, the 'comply or explain' approach allows for an explained departure from its stated requirements.

[109] Walker-Ng Legal Opinion, 2022: [31].

232. Of course, all of those bi-polar extremes are oversimplifications. They also gloss over some important realities. As many business leaders and their advisers fear, opting out of the requirements and trying to justify that divergence has to satisfy shareholders and other stakeholders who, along with regulators, increasingly view such standards as presumptive good practice and not to be departed from lightly. They view them as de facto defaults, having more than displaceable presumptive effect. In addition, such standards for the business sector are increasingly translated across to and set the standard for other sectors, with appropriate modifications. Moreover, in a legal and regulatory environment where 'soft' law that is fit for purpose and standardised can be elevated under a mass consensus to become 'hard' law, the nature, characteristics, and adoption of such standards has knock-on consequences for those governed by them.

233. Like its predecessor, the Draft 5th Edition contains a multitude of reference points on corporate governance in addition to the law of the land. Examples appearing in the Draft 5th Edition include:

a. current and proposed corporate legislation (eg Corporations Act, and the Treasury Laws Amendment Bill: Climate-Related Financial Disclosure);
b. relevant court decisions (eg *ASIC v Healey* [2011] FCA 717)
c. related legislation (eg anti-discrimination laws, Workplace Gender Equality Act, and Modern Slavery Act);
d. published legal opinions (eg Bret Walker SC and Gerald Ng, 'The Content of Directors' "Best Interest" Duty (22 February 2022));[110]
e. relevant international 'soft' law and regulation (eg OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, United Nations Guiding Principles on Business and Human Rights (UNGPs), and standard-setting by the International Integrated Reporting Council);
f. relevant public inquiries (eg the Banking Royal Commission under Commissioner Hayne);
g. governmental and departmental guidance and reports (eg from the Australian Human Rights Commission, Workplace Gender Equality Agency, and the Department of Industry, Science and Resources)
h. other relevant Australian regulation (eg ASX Listing Rules, ASX Compliance Notes, ASIC Guidance Notes, APRA Reports, ACCC Guides, and Australian Standards); and
i. non-governmental, peak body, and other authoritative industry guidance (eg from Governance Institute of Australia, Australian Council of Superannuation Investors, Australian Institute of Company Directors (AICD), Institute of Internal Auditors – Australia, Auditing and Assurance Standards Board, Australian Investor Relations Association, The Ethics Centre, Chartered Accountants Australia and New Zealand, Global Compact Network Australia, KPMG Australia, UTS, Law Council of Australia, Herbert Smith Freehills, and Reconciliation Australia).

234. <u>One</u> ongoing issue in successive iterations from the ASX CGC is ensuring that the Principles, Recommendations, and Commentary do not outpace the state of the law. Indeed, one of the public objections made by many in the business sector and the corporate law community to the formal

[110] It is noteworthy that, despite the relevance of climate-related risk and disclosure under the Draft 5th Edition and the availability of multiple authoritative legal opinions in the public domain about it, co-authored by Noel Hutley SC and Dr Sebastian Hartford Davis together or with others, the Draft 5th Edition contains no reference to such opinions, although it does reference the AICD-commissioned Walker-Ng Legal Opinion. In the interest of full disclosure, the author of this Submission discloses that he knows both of the barristers who ae first-mentioned above, and was part of a background reference group for one of the clients commissioning some of those opinions.

inclusion of any reference to a company's 'social licence to operate' in the 4th Edition was that notion's assumed open-endedness and over-reach in terms of the law at the time. On the analysis in this Submission, there is an open question about whether or not notions such as shareholder primacy and value, and their manifestation in propositions in the Draft 5th edition connecting sustainable entity for a listed entity to a designated constituency, belong in the same category.

235. A second and emerging issue is where the ASX CGC standards become accepted as the default benchmark for good corporate governance. The consequence is that justified divergence from them becomes harder to achieve in practice, even under a 'comply or explain' approach, because of market reactions from institutional investors, shareholder representative bodies, and others to anything other than strict compliance with what the ASX CGC has endorsed. This issue does and must affect what the ASX CGC says, how far it goes in stipulating requirements, and what it leaves open as choices for company boards in their particular industry and organisational contexts.

236. A third and also emerging issue is where the courts use something recommended or said in the ASX CGC standards to develop the law in a surprising way, at least in some quarters of the corporate governance domain. Any cause for any concern here is not limited to the ASX CGC standards alone, given the proliferation of external sources and reference points cited in them that a court might use to interpret the law on undetermined issues and to develop the law accordingly. So, the proliferation of cited corporate governance material and templates in the ASX CGC standards from time to time needs to be considered from this perspective as well.

237. This fear is real but also commonly over-stated. It is true that the ASX CGC standards are being cited in Australian cases. However, at least at the level of the High Court of Australia, that citation has been uncontroversial to this point, simply using them to acknowledge basic and readily accepted elements of corporate governance.[111] Still, the potential is there. Referencing both CSR and the emerging importance of 'soft' commercial law, in the context of the controversy surrounding the draft 4th Edition's original proposal, later abandoned, to include explicit acknowledgement of a company's so-called 'social licence to operate', former NSW Chief Justice Tom Bathurst told a global audience of lawyers in 2018 that 'it seems increasingly likely that either what have traditionally been soft law principles will be translated into hard legal obligations under a principles-based approach, or that existing soft law obligations, which still serve important regulatory functions, will expand in scope'.[112]

238. A fourth and also emerging problem is the proliferation of reference points from multiple governmental and other sources that are referenced in successive iterations from the ASX CGC, as illustrated above. Obviously, there is some significant value in the ASX CGC helping those who comply with its standards to identify relevant frameworks and guidance for compliance, while also leaving the choice of the method and tool to company directors. At the same time, as seen in other areas of national and international regulation, such proliferation of connected standards, sources, and frameworks can reach a saturation point or worse in accessibility of guidance and ease of compliance. Further, the ASX CGC's identification and citing of any one reference point of any kind confers at least some status upon it and accompanying implicit reassurance that, if the ASX CGC cites it and a company uses it, it is harder to criticise it for doing so if things turn bad.

[111] Eg *ASIC v King* [2020] HCA 4.
[112] Bathurst, 2018: [59].

239. The next section of this Submission considers options for better tracking of such material and guidance for company directors, advisers, and regulators alike. It is predicated upon the demonstrable reality that we have reached a tipping point in the proliferation of useful corporate governance reference points, and their subsequent revision or removal, to justify a discussion in the context of a public consultation about the Draft 5th Edition, about what would best serve the guidance and efficient tracking of relevant material for all participants in Australia's corporate governance ecosystem.

240. This need is evident from the terms of the Draft 5th Edition itself. For example, in addition to other parts of the Draft 5th Edition that signal the need to reference and the availability of suitable sources of external guidance for implementing its requirements, the Draft 5th Edition notes the following, in the context of managing and reporting ESG risks under Recommendation 7.4:

> Listed entities should consider ongoing developments in sustainability standard setting when making disclosures under this Recommendation. Where no relevant standard as yet applies to the entity, entities may wish to consider global standards in developing their thinking on the material risk issues and metrics that may be relevant to their organisations. (It may also assist in developing reporting which will become expected of listed entities that are within larger supply chains.)

241. As outlined above, the Draft 5th Edition references a broad range of national and international material of indicative significance in corporate governance, including Commonwealth legislation, reported cases, official regulation, relevant 'soft' law, published legal opinions, international standards, Australian standards, governmental and rother official regulatory guidance, public inquiry reports, and guidance from industries, peak bodies, and multi-stakeholder coalitions. In various parts, it signals the need to track relevant changes in the law and other standard-setting. So, in closing, what are the options for tracking all material of the multiple kinds cited indicatively in the Draft 5th Edition, how is this best done, and by whom?

242. *One option* is to leave it all to individual companies and their internal and external advisers to track down. This is not the best option, given the range and proliferation of material referenced, nationally and globally. Further, some degree of authoritative curation for everyone's benefit is better than leaving everyone to struggle with doing it alone and at their own cost. Suh an option is neither efficient nor effective.

243. A *second option* is to have authoritative curation of relevant material done by the ASX CGC itself, with its member organisations, alone or in partnership with others (eg academic institutions, peak bodies, regulators etc). This raises ancillary questions about authoritativeness and resourcing limits of any one organisation. It is an option that could be adopted regardless of whether or not the ASX ever delegates to others the task of drafting successive iterations of the ASX CGC standards themselves.

244. A *third option* is to move towards authoritative restatements and commentaries on corporate governance, of the kind commonly done in the USA (eg ALI Restatement of the Law, Corporate Governance). Such documents have attracted praise and criticism alike. However, in the absence of a regulatory, legal, and judicial history of developing and using such sources in Australia, this option is unlikely to get traction, except in a very limited pilot form. That would be no bad thing. The Draft 5th Edition shows what can be done when regulatory, industry, and academic audiences collaborate at scale.

245. A *fourth option*, to be combined in one permutation of it with the second or third options, is for a consortium led by a number of universities, alone or in collaboration with the ASX CGC as one partner amongst others, to take on this work as a partially publicly funded and ongoing research project of sufficient mas and scale to service the needs of the various participants in the Australian corporate governance regulatory system. The Australian Research Council (ARC) funds a number of academic grant schemes that involve partners from government and business, for example, including large-scale projects with significant infrastructure.

246. Such a collaborative research-focused enterprise could, for example:
   a. develop an accessible online platform;
   b. track and monitor relevant developments;
   c. curate and house relevant sources;
   d. document changes in the ASX CGC corporate governance standards over time, and the rationales (including legal and regulatory changes) informing those changes over time;
   e. provide approved annotations and commentary about Principles and Recommendations, and to inform associated Commentary;
   f. outline suggested connections between successive iterations of the ASX CGC standards and other relevant sources;
   g. link to comparable corporate governance codes and guidance material in other jurisdictions;
   h. commission necessary evidence-based and stakeholder-informed research to inform successive iterations of the ASX CGC standards and reviews of their effectiveness, in a cycle of continuous improvement;
   i. assist in public consultation processes in developing successive iterations of the ASX CGC standards; and
   j. build and coordinate networks for the benefit of the participants in Australian corporate governance law-making, regulatory reform, and practical standard-setting.

This option has advantages in terms of mass, scale, expertise, and perspective. It complements successive iterations of the ASX CGC standards. It still enables sufficient controls, while being more inclusive and rigorous in gathering and stress-testing various perspectives and experiences. It would allow the Australian Government through the ARC to contribute to focused funding of something that is genuinely in the national interest in terms of the large mas of regulators, industries, companies, investors, consumers, creditors, and others who have a common interest in the efficiency and effectiveness of corporate governance standards for listed entities.

Concluding Remarks

247. This is a long Submission, and necessarily so, given its coverage of a range of matters that are integral in assessing the Draft 5th Edition in its public consultation phase. In that sense, all roads lead to Rome.

248. There is much to like and praise in the Draft 5th Edition, and any fair and balanced evaluation of it must do so. It is an improvement upon the 4th Edition in some areas, but not all.

249. There is also much to criticise in the Draft 5th Edition, and the critique and praise stand together. At present, it looks and reads too much like a compromise draft. As a result, in some areas it falls between two stools.

250. In short, when finalising the Draft 5th Edition for use from 2025 onwards, the author of this Submission suggests, where appropriate under Consultation Question 19, that the ASX CGC should:

  a. hold the line on its basic position about codes of conduct breaches, ESG and DSI, and stakeholder engagement, whatever other suitable revisions it might make in light of the public consultation (see Consultation Questions 8, 9, and 10);
  b. restore the requirement to incorporate a corporate purpose or, at the very least, revise appropriate Recommendations and Commentary to give it more prominence and guidance, even in its contingent 'purpose (if articulated)' formula;
  c. engage with and articulate more fully where it stands on the underlying theoretical and conceptual premises and issues canvassed in this Submission and what they mean for its corporate governance standard-setting, in a revised edition or in planning for the 6th edition; and
  d. consider and choose options for curating relevant sources of 'hard' and 'soft' law and commentary referenced in the Draft 5th Edition, and making them and further and future regulation and commentary about them more publicly and readily accessible, for the benefit of all listed entities and other participants in the Australian corporate governance eco-system.

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