

TOPIC 1: Corporate Social Responsibility

Traditional stance is SHAREHOLDER THEORY:

- Maximizing profits for the benefit of the shareholders = Core of **Ford Motor case**: the ultimate measure of a Co's success is the extent to which it enriches it SH's
- Shareholder: owns part of a company through shares. Sometimes called "**value base maximisation**" – mgmnt should first & foremost look to shareholder value.
- Profit-maximisation for SH as professed by Bernard McCabe**: "[B]usiness should confine itself to fulfilling its economic function". Also believes that improving society is Gov's role not corporates & as long as you don't engage in fraud or breach competition rules, there still should be only one social responsibility of bus: to use its resources & engage in activities designed to increase it profits. **Milton Friedman** = Co's purp is to max returns to SH's & doesn't have resp 2 soci
- This was also the basis for rule in: **Dodge v Ford Motor Co (1919)**
 - Ford was lowering the price of his cars to make them more available to the public, increasing worker salaries and giving greater employee benefits, however, decreased dividends to expand Co. SH's objected: Co is sep person
 - Held**: Crt said he could not lower consumer prices & raise E'ee salaries as he should operate Co in the best interests of its SH's & they must stay informed. The ultimate measure of a Co's success is extent to which it enriches its SH's

Problems with SHAREHOLDER THEORY:

SH value theory led to: pervasive short-termism; diverted human & finacd resources from needed investments in innovtn; dispirited both E'ees & managers, generated "bad profits" that undermined customer loyalty; caused excessive "financialization" of the economy, making it vulnerable financial crashes; incentivized CEOs to become financial engineers & Co's to lose their entrepreneurial mojo; undermined the economic recovery from the Global Financial Crisis; Scandals at Enron, Tyco International and VW serve as evidence of the failure of the shareholder theory

Why does the debate exist? Revolves around the conduct of multinational & transnational corps (MNEs) & large private "firms", which b/c of their size, can signif influence domestic & international policy & the communities where they operate. There is a perceived deficiency of national & international law remedies of corp accountability. Supporters of CSR argue that the efficient functioning of global markets depends on socially responsible business conduct. **VW Example: Facts:** VW intentionally programmed turbocharged direct injection (TDI) diesel engines to activate certain emissions controls only during lab emissions testing. Programming caused vehicles' carbon output to meet US standards during regulatory testing but emit 40 x's more carbon in real-world driving. **Outcome:** Share price & market collapsed, but now bounced back. Perhaps not as visual as Exxon ppl more forgiving?

New approach is CSR/STAKEHOLDER THEORY: Prior planning not intervention!

Definition: CSR is corp responsibility, citizenship, sustainable respons busi & corp social performance. Enforced by self regulation. "Corporates" view their obligation is to extend beyond the statutory obligation to comply with legislation and sees organisations voluntarily taking further steps to improve the quality of life for employees and their families, consumers, local community, society at large, the environment, as well as on the traditional stakeholders = all about **Ppl, Planet Profit**

Doing good now in vogue as a way of achieving profits through +ve brand image

Freeman represents the alternative to SH theory in that the **Mgrs task is to protect the various rights of all stakeholders**= Stakeholder: interested in the performance of a company for reasons other than just stock appreciation (ex: employees).

Shared Value: Balance CSR w profits (a Co is a member of society and their profits depend on other members of society). Share value – increasing wealth of the entity, improving market value of shares, long term objectives – goodwill, sales, services, quality of product/ service; balance btw CSR and profit max.

Supported by: Kraakman: "the appropriate goal of corporate law is to advance the aggregate welfare of a firm's shareholders, E'ee's, suppliers, and customers without undue sacrifice – and, if possible, with benefit - to third parties such as local communities and beneficiaries of the natural environment". In other words, **corporate law should pursue "overall social efficiency"**. **Pope Francis wrote in '16:** "Once more, we need to reject a magical conception of the market, which would suggest that **problems can be solved simply by an increase in the profits of Co's or indivd's**. Is it realistic to hope that those who are obsessed w maximising profits will stop to reflect on the envrntml damage which they will leave behind 4 future genos?"

Ben and Jerry's Example: Controversy erupted over the sale of popular & socially conscious ice cream company to Unilever, a "giant multinational focused on bottom line". However, now **Paul Polman CEO has re-focused on CSR** & ranked 38 this year on Fortune's list of the World's Most Admired Companies Top 50 All-Stars & French government pinned a knighthood on him, not for his ability to drive profits but for his vociferous global campaigning to rein in climate change.

Problems with STAKEHOLDER THEORY: 1. Argenti I believes that Co's which try to be all things to all people or to benefit stakeholders "are not only at a huge competitive disadva, they are also **literally unmanageable**". 2. **Litigation/Breaches to D's duties** to act in best interest of the Co (**s181**);distracting mgmnt from achieving commercial success & consuming resources that would otherwise be available to SH's & E'ees 3. Difficulty of considering "mute" stakeholders (the natural environ- ment) and "absent" stakeholders (such as future generations or potential victims) 4. Is it in the best int of Co which is a sep entity?.., in today's age, **cant be a purist as the Gov has dictated certain Co tasks must be performed that sits away at pure profit maximisation eg WH&S/EEO/Trade Practices**

International Frameworks for CSR/Enforcement & Benefits

Originally 'enforced' by self-regulation. Now:

- Soft law encouraging involvement of Co's in CSR:**

The OECD Guidelines for Multinational Enterprises: Recommnd's of principle /standards for responsible business conduct, "the governance framework should recognise that the interests of the corp are served by recognising the interests of stakeholders and their contrib to long-term success of the corp". Australia is an adhering country). Covers business ethics on human rights, environment, etc.

UN Global Compact: drives effective business practices that deliver social, economic and environmental gains, increases the alignment between the objectives of the international community and those of the private sector, follow 10 principles under human rights, labour, environment and anti-corruption

Paris Agreement: ratified 6 November 2016 so Co's; have obli to assist gov to meet their renewable energy targets and so although may be breach to care and diligence duties (**s180 & 181**), if they fail in target then they may potentially be accused of breaching their duties by acting contrary to a United Nations resolution (as the directors were in **ASIC v Plugge**)
 - Legislature: s172 of UK Companies Act 2006:** Duty to promote the success of the Co: 1) must have regard (amongst other matters) to – a) **likely long-term consequences** of any decision; b) interests of employees; c) need to foster Co's bus r/ships w suppliers, customers and others, d) impact on community and enviro; e) desirability of maintaining a reputation for high stds of bus conduct, and f) need to act fairly (ie union rings). Also **2010 UK Parliamentary Committee Report** – recommends UK Govt develop standards that UK businesses must meet to comply w respon to respect HR & "human rights due diligence". May face legal liability in UK for breaches of HR occurring within UK and extraterritorially.
- State of law in Aus:** Aust has **s181(1) CA** noting **best interests of Co- affirms profit maximisation but open to board**. eg: Short-term profit maximisation may not enhance SH value; eg. if a business reduces costs & makes sub standard products for quick profit- loses reputation & competitive advantage- also if bus neglect investment & research, or mistreats motivated and expert employees.
- As long as D's based gift/donations on a reasonable basis** (ie wishing to avoid breaching a UN agreement/continued viability in sector), **then wont have breached duty of care if they were reasonable D's exercising care and diligence, (s180(1)) in a similarly sized corporation and similar circumstances (s180(1)(a)) holding the same responsibilities (s180(1)(b)) would have made the same decision(ASIC v Vines)**. If didn't, then as long as decision was made in good faith, for a proper purpose, and the Directors had no material personal interest, D's informed themselves to the extent they believed was appropriate, believed their decision was rational and based it on an arguable reasoning process, then would be protected by business judgment rule (**s180(2)**).
- "New transparency" makes social media an impt force.** Qu whether Ford Motor Co would be decided diff. However – note **limitations to giving – 1)** blind gifts (no way of drawing benefits), **2)** things that do not relate to your bus at all eg **Exxon Mobil:** Exxon took headline approach to global warming – profit max. Refused to follow rival oil Co's in committing large-scale capital investment to enviro friendly tech such as wind & solar. SH revolt demanded a change. Exxon now has significantly invested in green energy 2 retain market share & profits etc

Corporate Tax- is this in the best interests of the corporation?:

- Companies like Google and Apple pay little tax. **The Great Rationalisation** is that companies can make better use of the funds.
- Paying tax does help improve brand, not a direct contribution to society.
- Craig Emerson (former Minister for Trade +Com) – hauling MNCs before a Senate committee ... may not be pretty, but it's pretty effective at "exposing the insidious demolition of Australian Co's income tax base.
- Are Co's entitled to minimise tax? Here raise **concession theory**- Corp has some debt to society that philanthropic giving may pay off. Shield of ltd liability is a "concession" by society, like the "Co given privilege" comment in **AP Smith** (Princeton). Cooke J in **Nicholson v Permacraft** (NZ): "ltd liability is a privilege."

Payment of Workers: 7Eleven... publicised in media, complaints about price paid to workers. New levels of transparency & fines for breaching.

CSR as global issue: CSR can have a transnational emphasis- integrating domestic regimes within international laws and global institutions.

TOPIC 2: Types of Business Structures

Start-up Companies

Start ups are looking for a bus structure that is easy set up, has low establishment & ongoing costs, has ltd liability, effective tax arrangements & attracts investors & customers (as getting sufficient \$'s/financing is a start ups biggest issue) & finally startup friendly but flexible for when my business grows. **ADD WHAT X WANTS**

Partnership

- Adv:** Easy & relatively cheap to set up, regulated by legislation, case law and K, no regulator, flexible, allows for secrecy as document as non-discloseable, easy to raise \$'s as multiple P's, firm doesn't pay tax (P's only on income
- Disad:** P's jointly liable for each others debts & obli's jointly & severally liable for torts committed in ordinary course of business & for misapplication of monies, shares cannot be transferred, cant enter own financing agreements, P's are A's for each other, some P's may be limited to certain \$'s, P's may face unlimited personal liability of private assets, must agree in order to add partners, issues with deaths and winding up = **Always advise on a partnership agreement**

Unincorporated/Unincorporated Associations

- Per ss(1) Associations Incorporations Act 1981 (Qld):** An association can be formed if: (a) has 7+ members (b) is NOT a Corp, Pshp **AND (c) is not for profit!**
- Adv:** Unincorporated = No formalities, inexpensive to set up, private & confi prot'n of info. **Incorporated** = can K in association name, can borrow \$, enter K's, buy prop, gain government funding, perpetual succession, limited legal liability.
- Disad:** Unincorporated = **No perpetual succession/interest not transferable**, committee members may be sued personally (but can offset against \$'s of club). **Incorporated** = expenses from annual audit requirements/filing returns, compliance with legislation, should take out public liability insurance.
- Used for clubs, no board, established by K, no governing legislation, NFP
- Has to fail w/ recognised purp eg social, religious, educat'nl, artistic, political**
- Can become Incorporated:** Used for growth, sep legal entity, needs rules, can sue and be sued, becomes regulated per **ss(1) Associations Incorporations Act 1981**

Franchise

- Adv:**benefit from existing name & reputn = increases chance of smll bus success, can compete w bigger comp's as has economies of scale, access to group marketing/advertising etc, access 2 estab'd/proven bus model, access to mgt support/training, may b easier to secure finance
- Disad:** Being locked into binding F agreement, F'or opening new F'ees in same area, F'ors locking F'ees in to set ↑prices for stock or spec'fng goods to be sold, inadeq. assistance from F'or, misrep. by F'or

Private (Pty) vs Public (Ltd) Companies – Corps Act 2001 (Cth)

Proprietary (Pty) (Private) Companies: s112 AND s113 CA (Per s45A(2) & (3))		must satisfy min 2/3 requirements
- Must have share capital - Shareholders = 1-50 - Directors = Min. 1 (1 AU resident: s201A(1)) Advantages: less onerous reporting obligations, tax advantages as tax on dividends = PAYG, easier to secure finance/funding/raise capital, easier division of shares Diff btw smll & lrg: s292 large have 2 lodge audit fin representations with ASIC	Small = s45A(2) → Revenue < \$25m → Assets < \$12.5m → Employees < 50 Small = s45A(3) → Revenue ≥ \$25m → Assets ≥ \$12.5m → Employees 50+	→ Limited by shares: 112(1) (liab of SH's is ltd 2 contribution made or extent of any unpaid shares). If Co issues a call, unpaid shares must be paid limited. Co debts not debts of mem's so SH's not pers liable. only liability to extent of unpaid shares in event of liquidation → Unltd w share capital: 112(1)
	Public Companies: s112 Shareholders = 1 - unlimited Directors = Min. 3 (2 AU residents: s201A(2)) Finance = CAN get \$'s from public Must have AGM & lodge acct w ASIC Must have a Secretary Disadvantages: financial affairs v public, expensive to set up, complex reporting req's, signifcant disclosure Investment obli's = if D's fail duty may be pers liable	Listed → Limited by shares: 112(1) → Limited by guarantee 112(1) (liability is ltd to contribution amount guaranteed in case of liquidation (usually NFP) → Unlimited w share capital 112(1) → No liability Company (sole objects (mining purposes s112(1) & (2))
	Un-listed	

'Limited' (Private) Company Name

- Co ltd by shares (s112(1) ...** ltd to the amount (if any) unpaid on the shares respectively held by them
- Opting for Pty Ltd Co (**s45A(1) & 113**) means as Co grows have room to expand into public Co (**ss9 & 112**) and/or having subsidiary Co's which won't bring down the mother Co if it fails.
- Co is separate from its individual shareholder members (**Salomon v Salomon**). Means the SH's **have limited liability** (for unpaid consideration owed by them to the corporation for shares) ie. SH's are not personally liable for debts of the corporation (creditors may not impose liability on them). This ability to limit liability exposure is one of its main advantages over other structures.
- Existence continues unchanged even if id of participants changes.
- Advantages:** 1) Diff tax, favourable rate of 30% vs higher marginal tax rates applying to individuals 2) As a startup have ability of favourable tax incentives & grants made available by State/Cth gov's 3) Appeals the most to investors & will therefore allow **X, Y & Z** to bring on new investors more easily by issuing shares to them in return for capital or taking funds on through loan arrangements directly with the funder.
- Disad:** 1) More expensive & effort to set up, ongoing compliance costs, require **X, Y & Z** to become familiar w various tax & legal reporting obli's & has the biggest loss of control as business operations are controlled by D's, but ultimately owned by SH's. Only need 1 D, but each can be a D and would recommend if each contribute =ly. Alt if one (or more of them) provides a greater contribution then they should get D status while the other(s) get employee or SH status (with a lower class of shares). They have the option to have a sole-director company. If 1 has bus background encourage him to be the MD.

B-Corporations ie Benefit Corps

- New type of Co that uses power of business to solve social & enviro problems (ie. aiming towards the green investments)
- Certified B Corps have undertaken the B Impact Assessment, scored over 80, and have signed a term sheet that declares that they will consider all stakeholders.
- New to Aus (originated in US) but movement aiming to have voluntary structure expand D's duties to require D's to consider the interests of all STKH's & report on social and environmental performance as well as financial indicators
- Dual responsibility/nature (ie. hybrid business entity): profit maximisation and creating public societal value eg **SilverChef**: visionary Qld Co who is B cert'd.
- Advantages:** 1) Legly protects entrepreneur's social goals by mandatg considerts other than just profit 2) **Sustainability Improves Performance** 3) Public Market Investors are focused on ESG Factors "Strong governance, along with effective mgmt of environmental & human capital factors, increases the likelihood that Co's will perform over the long-term and manage risk effectively." 4) **Talent Acquisition & Retention:** "Millennials will grow to 75% of the workforce by 2025, 77% say their

Co's purpose was part of the reason they chose to work there." 5) Disclosure: Non financial info is now pivotal "64% of investors say businesses do not adequately disclose non-financial risks & nearly ½ of investors would rule out investment based on certain non-financial disclosures".

Disad: 1) **Expanded reporting requirements** 2) **Uncertainty.** It is unclear how Crt's will interpret their mandates to not only seek profits, but also to consider potential benefits to society – will this be a breach to **s181(1)** with D's exercising their power + discharging their duties (a) in **good faith in best interests of the corp**

Not For Profit (NFP)

Primary purpose of NFP's is to pursue a goal or special interest other than cpmmr profit for its members. Purpose/primary objective may be charitable, social, educ'tl prsnl or religious eg schools, Uni's churches, sporting clubs & membshp org's for industry profns. Surplus generated by NFP must be put towards advancing the purpose for which the organisation was established; not distributed to members.

NFPs are often established as public Co's ltd by guarantee or incorporated Assoc's

Gender Equity

- Accord to AICD's as at 30/6/17 % of women on ASX 200 boards is 25.4%, w a total of 13 boards in the ASX 200 still not having any women on their boards
- Unlike Norway (who has a 40% gender quota & Germany (30%) and Iceland (Co' w 50+ employees must have a 40% quota), AUS has no mandated gender quota, we have a similar system to US: 'comply or explain' policy and gender reptg obli's ∴, ALP currently have gender quota of 40% female MPs, w goal of increasing quota to 50/50 w/ 10yrs and Westpac 50% by end of 2016.

Adv: Accord'g to The Workplace Gender Equality Agency, more diverse representn on boards foster a more ethical corporate culture, reduces fraud & enhances corp governance/risk mgmnt. In 2007, Co's w at least 3 female Ds made CSR donat's 28% more than Co's w/o which again would attract CSR minded investors. More diverse teams have higher profitability & greater client satisfcn than non-diverse teams, & firms w higher levels of gender diversity outperform the market & reflect SH diversi

Disad: Could be viewed as circumventing princpl of workplace progression through indiv merit, could be seen as a breach to **s181(1)** w D's breaching obli to act in gooc faith in best interests of the corp & need to be careful not to discriminate on basis of sex as unlawful per Sexual Discrimination Act.

Shares

Different Class of Shares

- There are usually **ordinary & preference shares**. Most shares are **ordinary share**: have no special rights or privileges attached to them: Ord SH's participate fully ir voting, dividends and dissolution. Carry equal rights unless specified otherwise.
- Preference shares** carry special rights and you can have multiple types of pref shares each with diff rights attached to them but they must be all equal rights attached to all types of shares in that class. Common ways classes may differ: 1) entitlement to dividend, 2) right to priority in paymt of dividend, 3) voting rights (say parents share = 100 votes/kids = 1 vote) 4) right to priority of repayment of capital on Winding Up, 5) right to participate in a distrib of surplus assets on WU
- Matter for the Co since does not affect creditors or other outsiders – but if Co differentiate between rights of different classes under **s254A(2) CA** when Co issues preference shares, it must set it out in Consti, the rights attached to them w respect to payment of capital, participation in surplus assets, profits, dividend and must give distinguishing name eg A-class shares/B-class shares.
- Capel Finance** - "some comparative advantage".

VC Investors will often only invest through preference shares as it gives these investors a liquidation preference in the event of a sale. Preference shares are a way of ensuring that investors get repaid their initial investment before founders and employees get anything. Obviously if you can avoid issuing preference shares, and simply issue ordinary shares, that's great for you and your cofounders.

****If contributing equally to the Co, Ds should be issued equal classes of shares (unless contributions change)! A Co going public would give their founders/ executives/angle investors "preferred" shares,** which could have a voting factor of 10x. This gives the founding members of Co a higher vote & is a great instrument against hostile takeovers (a compet buying lots of shares to get the maj. of shares).

Rights Issues of Shares

An invitation to existing SH's to purchase additional new shares in the Co for a discounted price to the current trading price. Allows companies to raise money for debt payments, fund acquisitions and growth strategies.

Floating the Co in an Initial Public Offering (IPO) – Going public to raise \$'s

- The legal process where a Co goes from being privately to publicly held. The floating process makes shares available for purchase by the public on a public investment exchange of country eg NY SE. Sale of stock prevly privtly held is IPC
- Details of prop'd offering are disclosed to potential buyers in a prospectus
- Receiving public funds then restricts the Co on what they can do eg Google, 19/08/13, started @ \$85 a share, has now risen by more than 900% AND Facebook on 18/05/12, offered 421,233,615 shares at a price of \$38 per share and raised \$16.007 billion through that offering.
- Alibaba broke records with its \$25 billion IPO in 09/14. Alipay in 17/18
- Market cap ("total equity") of a Co is the total market value of Co's outstanding shares eg Apple = \$730b, Alphabet no2= \$580b, MS No 3 = \$497b, Tesla = \$47.8b