

Week 1: The Concept of Corporate Governance

What is corporate governance?

- “The framework of rules, relationships, systems and processes within which authority is exercised and controlled within corporations. It encompasses the mechanisms by which companies and those in control are held to account.” - Governance Institute of Australia
- “the mechanisms, processes, practices, and relations by which corporations are controlled and operated by their boards of directors, managers, shareholders, and stakeholders.” - Wikipedia
- “the system that directs and controls an organisation. It is the framework that ensures an organisation can meet its mission effectively.” - Australian Institute of Company Directors
- Directors and company officers play an essential role in establishing and maintaining the standard of a company’s corporate governance
- Driver of the operations and performance of a company. The term ‘corporate governance’ is broad and has many components including relationships between stakeholders, frameworks, decision making and responsibility
- Underlying assumptions in theories of the Corporation and Corporate Governance:
 - Nature of the corporation / What is a corporation?
 - Purpose of the corporation / Why does the corporation exist?
 - Interaction between public and private spheres / what if any should the limits be on corporate behaviour?
- Different views and answers to these questions result in different theories of CG
- Theories are important both legally and practically:
 - Influence how we interpret corporate behaviour
 - Influence how laws are written and enforced vis a vis the corporation

History of the corporation

- Companies Created by Charter – East India Trading Company (granted a Charter by QEII)
- 1807 – First limited liability company in France
- 1855 and 1862 – Limited Liability Company established in Britain
- 1930s – agency conflict between shareholders and managers was recognised in corporate theory
- 1970s – increased regulation of corporations including audit requirements focused on accountability of management to shareholders
- 1980s and 1990s – large scale corporate scandals and collapse, increased recognition of other stakeholders.
- 2000s + Corporate Social Responsibility, Corporate Citizenship, Business Ethics, Business and Human Rights, Social License to Operate, rethinking the role of the Corporation in society...

Variations by jurisdiction

- Europe vs. US / UK / Aus – employee interests represented at board level and greater recognition of the importance of stakeholders beyond the shareholders.
- US vs. UK / Aus – proscriptive corporate law rules compared to principles-based approach in UK and Aus.

Three key factors

1. The relationship between the three primary organs of the corporation
2. The relationship between the corporate entity and the other stakeholders
3. The purpose of the corporation

- 'A journey not a destination...' - King, 2009
- King Reports and Code (2002 – 2009 – 2016) in South Africa
 - Required for Listing on JSE
 - Leadership, ethics, corporate citizenship, reporting, and stakeholder relationships
 - 'international best practice'
- ASX Principles and Recommendations (2003 – 2010 – 2014 – 2019):
 - Apply to ASX listed companies on an "if not why not" basis;
 - 8 principles including: acting lawfully, ethically and responsibly; disclosure and reporting; fair and responsible remuneration...

Shareholder primacy vs inclusive approaches

- Shareholder Primacy – maximising shareholder wealth. Governance based on accountability of management to shareholders.
- Enlightened Shareholder Value – a softer approach acknowledging stakeholders in so far as they benefit shareholder value maximisation.
- Alternative Approaches – Corporate Social Responsibility, Corporate Citizenship, Business Ethics, Social Licence to Operate ...
- Corporate law frameworks are anchored in view of the corporation as a profit generating entity focused on creating wealth for shareholders
- HOWEVER, other legal obligations and regulatory frameworks continue to develop which moderate and constrain the scope of the profit motive.

Why should we care?

- Increased Focus on Ethics, Responsibility and Citizenship:
 - Good Corporate Governance is important for company value and shareholder profits through time;
 - Corporate structures are increasingly complex and have global implications and impact;
 - Corporate Governance failures are costly to shareholders and stakeholders
 - Descriptive Value... Understanding how and why corporations act the way they do.
 - Normative Value... Making suggestions for how corporations should act and how such behaviour could be encouraged.
 - Positive Potential & Potential for Harm
 - Jobs and opportunities vs. labour and human rights abuses
 - Innovation vs. monopoly and corruption
 - Entertainment vs. misinformation, apathy and consumerism

Key terms and ideas

- The Corporation as a Separate Legal Entity
- Limited Liability accelerate the evolution of the corporation and the potential for agency conflict between management and shareholders.
- Two key organs of a Corporation: 1) shareholders; 2) board of directors
- Corporate Governance: systems, rules, processes and interactions that impact corporate decisionmaking, corporate action and corporate accountability.
- Stakeholders: — Employees, customers, creditors, communities; governments; environment and wider society

- Ideas and Approaches: — Shareholder Primacy — Enlightened Shareholder Value — Corporate Social Responsibility — Business Ethics — Corporate Citizenship — Social License to Operate

Readings: The evolution of corporate governance, corporate theories, corporate governance principles and some contemporary debates and issues

1.2 Definition of corporate governance

- The system of regulating and overseeing corporate conduct and of balancing the interests of all internal parties (for example, shareholders and employees) and other parties (for example, external stakeholders, governments and local communities) who can be affected by the corporation's conduct, to ensure responsible behaviour by corporations, requiring of them to have regard to the corporation's corporate social responsibility and to create long-term sustainable growth for the corporation.
- The most important elements of this definition are that corporate governance:
 - (1) is the system of regulating and overseeing corporate conduct
 - (2) takes into consideration the interests of internal stakeholders and other parties who can be affected by the corporation's conduct
 - (3) aims at ensuring responsible behaviour by corporations
 - (4) requires that corporations must have regard to their corporate social responsibilities
 - (5) aims at creating long-term, sustainable growth for the corporation

1.4 Difficulties in defining 'corporate governance' precisely

- Organic and flexible, constantly evolving in response to a changing corporate environment
- The Australian Securities Exchange ('ASX') Corporate Governance Council continued the trend to define corporate governance more precisely by including references to setting and achieving specific objectives, the monitoring of risk, and the optimisation of performance in the 2003 ASX Principles of Good Corporate Governance and Best Practice Recommendations.
- The framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations. It encompasses the mechanisms by which companies and those in control are held to account → Justice Owen in the HIH Royal Commission Report (2003)
- A set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined → G20/OECD Principles of Corporate Governance (2015)

1.5 Origins of the corporate governance debate and changing views

1.5.1 Origins and developments in the 1900s

1.5.1.1 Prominence of the corporate governance debate

- 2021 Lund and Pollman illustrated clearly that the concept of corporate governance developed alongside the shareholder primacy movement
- 1919 in the US case of Dodge v Ford Motor, decided in the State of Michigan → 45 A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to the change of the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.
- This has served as the guiding principle for American boards since 1919 and was confirmed as good law in 1986 in the Delaware case of Katz v Oak Industries, only a year after the much discussed case of Smith v Van Gorkom where it was again confirmed that directors also owe fundamental duties to shareholders →

Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in Del.C. § 141(a), that the business affairs of a Delaware corporation are managed by or under its board of directors ... In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders ...

1.5.1.2 Myths exposed: Shareholders as ‘owners’ of the corporation and directors as ‘agents’ of the ‘shareholders principals’

- Shareholders were previously considered to be the dominant stakeholders as far as directors’ fiduciary duties were concerned. Thus they were described as the ‘owners of the company’
- The notion that shareholders were the ‘owners’ of the corporation went unchallenged for many decades. However, the legal basis of the shareholders being the owners of the corporation came under intense scrutiny when in-depth historic research revealed that shareholders’ ‘company-ownership claim’ was more based on the historic development of the corporate form, as influenced by the law of partnership, joint stock companies and unincorporated deed of settlement companies, rather than on sound legal grounds. Post, Preston and Sachs sum up the fallacy of past perceptions well under the heading ‘Inaccuracy of the “ownership” model and its implications’: Shareowners hold securities, but they do not own the corporation in any meaningful sense, nor are they the only constituents vital to its existence and success. The notion that shareowner interests should dominate those of all other corporate constituents is inconsistent with the observed behaviour of successful firms. Therefore, the conventional shareowner-dominant model of the corporation is unrealistic, as well as normatively unacceptable
- Directors have just one principal and that is the company as a separate legal entity.
- Furthermore, it was a weak argument to defend the shareholder primacy theory based on the fact that directors cannot serve more than one master
- The shareholder primacy theory has at times also been defended based on the fact that ‘agency costs’ would be much higher if it is not left to the shareholders, as ‘principals,’ to enforce directors’ duties on behalf of the company.

1.5.1.3 The Friedman legacy: ‘Shareholder capitalism’

- Friedman branded those not believing in profit maximisation for shareholders as the purpose of the corporation as believers in socialism → [B]usinessmen (who speak eloquently about the ‘social responsibilities of business in a free enterprise system’) believe that they are defending free enterprise when they declaim that business is not concerned ‘merely’ with profit but also with promoting desirable ‘social’ ends; that business has a ‘social conscience’ and takes seriously its responsibilities for providing employment, eliminating discrimination, avoiding pollution and whatever else may be the catchwords of the contemporary crop of reformers ... In fact they are – or would be if they or anyone else took them seriously – preaching pure and unadulterated socialism. Businessmen who talk this way are unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades
- Those defending ‘Friedman capitalism’ are quick to point out his qualification in the last sentence of the first paragraph quoted above, but they hardly ever emphasise his disregard for corporations’ responsibilities towards their employees, expressed in his 1970 declaration, and his brushing off the significance of corporations’ responsibilities as ‘eliminating discrimination’ and ‘avoiding pollution’.

1.5.2 Changing views about shareholder primacy

1.5.2.1 New insights regarding the impact of corporations

- Was observed more pertinently that there were other stakeholders in a company: that if the only purpose of a company was 'the maximisation of profits for the shareholders' society could suffer tremendously - poor working conditions for workers, exploitation of the environment, pollution and so on would lead to a 'world on fire' as John Coats expresses well, there are two sides of the coin in capitalism: it has created huge benefits for humanity – wealth, health, and much longer life spans – along with inequality, misery, and the existential threat of climate change

1.5.2.2 Shareholder primacy challenged

- Over time the traditional position regarding shareholder primacy began to be challenged more forcefully, with statements such as 'managerial accountability to shareholders is corporate law's central problem, corporate law is currently in the midst of crisis, because of the exhaustion of the shareholder primacy model, 'shareholder dominance should be questioned' and 'shareholder primacy theory is suffering a crisis of confidence.
- The dominant role of shareholders has been embedded in Western corporate law models through some of the first modern corporate law legislation, such as the introduction of the English Joint Stock Companies Act 1844.

1.6.3.6 Neglect of non-shareholder interests and poor corporate culture

- Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd → there is a legitimate community expectation that Australian financial institutions will develop and maintain a good corporate culture which ensures that their staff do not engage in illegal, unethical and unprofessional conduct and do not act in disregard of the interests of their customers. The Australian public is entitled to expect that Australia's major corporations act as exemplary corporate citizens wherever in the world they may operate
- Under Principle 6 ('Respect the rights of security holders'), stakeholders are again only mentioned in passing: A listed entity's investor relations program may also run in tandem with a wider stakeholder engagement program involving interactions with politicians, bureaucrats, regulators, unions, employees, consumer groups, environmental groups, local community groups and other stakeholders.

1.6.3.7 The price of neglecting non-shareholder interests: The James Hardie case

- In 2017, Hanrahan cited the *James Hardie* case to highlight a shift in corporate culture from mere legal compliance to a broader focus on social purpose and stakeholder interests. She questioned whether all corporations should have a culture of "doing the right thing," and who defines what that means—but did not answer, pointing instead to the *James Hardie* case as a harsh example of shareholder primacy.
- In this case, James Hardie directors failed to support employees suffering from asbestos-related illnesses, arguing that their legal duty was solely to act in the best interests of shareholders. Legal advice they received suggested they could not contribute more than their strict legal obligations unless it benefitted shareholders. This narrow interpretation of directors' duties led to morally questionable decisions. Although political and public pressure eventually led to some justice for victims, the case illustrates how a rigid, shareholder-focused view of corporate law can cause severe harm and ignore broader social responsibilities.

1.6.3.7 The price of inaction and the case for law reform in Australia

- In the context of the long running James Hardie litigation, it is surprising that two reports in 2006 concluded that no law reform was required as far as the meaning of the 'best interests of the corporations is concerned'

- **UK Influence and Ineffectiveness of s 172:** Both the 2006 Australian Parliamentary and CAMAC reports rejected adopting a UK-style provision (s 172 Companies Act 2006), which supports 'enlightened shareholder value'. However, recent evaluations show that s 172 has had little real effect in promoting stakeholder-inclusive governance.
- **Illusion of Flexibility in Australian Law:** Although Australian corporate law is said to allow directors to consider broader interests, in practice, companies often prioritise profit maximisation and shareholder returns, as exposed in the Hayne Royal Commission reports.
- **Judicial Trends:** Recent court decisions in Australia show increasing recognition of stakeholder interests, reinforcing the argument that statutory reform is needed to require directors to consider non-shareholder impacts.
- **Global Developments:** Emerging stakeholder-focused reforms in the U.S. further justify the need for Australia to update its legal definition of acting in the “best interests of the corporation.”
- **Call for Reform:** Legal scholars argue that continuing to equate “the corporation” with “shareholders as a whole” is outdated and harmful, and that statutory change is necessary—not only in Australia, but in all common law jurisdictions still following this narrow interpretatio

Reading: Corporate Governance Principles, policies and practices

All corporate entities need governing

- This includes profit-oriented companies, both public and private, joint ventures, cooperatives, partnerships and not for profit organisations such as community organisations, charities and academic institutions as well as governmental corporate entities and quangos

The separation of ownership from operations

- In the early days, limited-liability companies were relatively small and uncomplicated.
- Shareholders were drawn from the wealthier classes and could attend or be represented in annual general meetings of the company.
- They were relatively close to the companies in which they had invested. In those days, there were no chains of financial institutions, pension funds, hedge funds, brokers, or agents between investors and the boardroom.

Cultural component of corporate governance

- The United States rule-based model, which relies on regulation and the law to ensure that companies adhere to the requirements requirements. of state and federal policies and regulator's requirements. This model uses the unitary board, with both executive and outside, non-executive directors.
- The UK/Commonwealth have voluntarily principles model, which requires companies to report that they followed a corporate governance code or explain why they have not. This model also adopts a unitary board.
- The continental form the executive European board, two-tier model, in which the roles of the executive directors which is overseen by the supervisory directors representing board of non-executive shareholder and employee interests.

Developments in corporate governance in the early 21st century

- At the start of the 21st century, corporate governance appeared to be progressing globally, with many countries adopting codes of best practice for listed companies.
- There was optimism, especially in the U.S., that the world would align with the American corporate governance model and accounting standards (US GAAP).

- However, this optimism quickly collapsed with major corporate scandals—most notably Enron, followed by WorldCom, Tyco, and others—revealing deep failures in financial transparency and governance.
- These scandals also led to the downfall of Arthur Andersen, one of the world’s top auditing firms. Similar issues arose globally, including in the UK (Marconi, British Rail), Australia (HIH), and Europe (Parmalat, Vodafone Mannesmann).
- These events exposed weaknesses in the U.S. rules-based system (US GAAP), which allowed for manipulation, and highlighted a need for more principle-based, ethical governance. Public confidence in corporate leadership was shaken, with directors increasingly viewed as self-interested and irresponsible.
- In response, the U.S. introduced major reforms:
 - **2001:** A Blue Ribbon Commission recommended stronger board independence, committee charters, and risk and financial oversight.
 - **2002:** The **Sarbanes-Oxley Act (SOX)** imposed strict new governance and auditing rules—such as banning loans to directors, requiring shareholder approval of stock options, mandating independent audit committees, and regulating auditor relationships.
 - **2003:** The SEC and stock exchanges implemented new listing rules in line with SOX.
- Corporate governance reforms also extended beyond listed companies. In the late 1990s and early 2000s, governance principles were applied to unlisted companies and non-profit sectors, including charities, educational institutions, medical bodies, and government-owned corporations. Governance codes began shaping these sectors as well, demonstrating the broadening influence of corporate governance principles.

New frontiers for corporate governance

Growing corporate complexity

- Harvard Business School research conducted after the global financial crisis found that recent boardroom failures differed from earlier scandals like Enron and WorldCom. While the latter were driven by misconduct and led to legislative responses like the Sarbanes-Oxley Act, more recent failures were largely due to increasing corporate complexity.
- The study revealed a consensus among directors that improving board performance should come from within the board itself—not through government regulation. It rejected a “one size fits all” approach, stressing the need for tailored governance practices based on each company's unique context.
- The research identified six key areas for board-level improvement:
 1. Clarifying the board’s role
 2. Gaining better information and deeper company understanding
 3. Strengthening relationships with management
 4. Overseeing corporate strategy
 5. Ensuring management development and succession
 6. Enhancing risk management practices.

Changes in ownership patterns

- Originally, shareholders were closely connected to the companies they owned, often just one step removed from the board of directors. This is still true in small or start-up companies. However, in modern markets, a complex chain of intermediaries—such as pension funds, hedge funds, and index funds—now separates individual investors from the companies they invest in.
- This layered structure makes it difficult for ultimate investors to influence corporate governance or uphold the original intent of ownership. Additionally, practices like share lending and private equity takeovers further complicate accountability and transparency. As a result, fostering effective shareholder engagement and maintaining strong investor relations has become increasingly challenging.

Board responsibility for enterprise risk management and business continuity

- Companies add value in different ways to achieve their corporate goals.
- Added value might lie in the global upstream supply chain, their technological expertise, product uniqueness and brand image.
- In other cases their market position, the downstream distribution network, access to finance, managerial expertise or reputation might be the foremost consideration.
- Failure in a critical area can expose a company to strategic risk and even threaten business continuity.

Week 2: Stakeholders & Corporate Social Responsibility

What is corporate governance?

“Essentially, corporate governance is about the way power is exercised over corporate entities. It covers the activities of the board and its relationships with those managing the enterprise, and with the shareholders or members, as well as with the external auditors, regulators, and other legitimate stakeholders.”

- Tricker, 2019 p4

“The purpose of corporate governance is to help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies.”

- G20/OECD, 2015

Stakeholders in law and practice

Shareholders

- Own shares in a company
- Can realise profits from the company in the form of dividends or increased share value
- Given certain rights and powers under the *Corporations Act 2001* (Cth) including through the contractual relationship established by a company’s constitution s140
- Entitled to participate in decision making at general meetings

Stakeholders

- “Stakeholders are groups with an interest in an organisation who are likely to be affected by the actions of an organisation, or whose actions can impact the operation or business model.”
- AICD 2021
- “entities or individuals that can reasonably be expected to be significantly affected by the organization’s activities, products, and/or services; and whose actions can reasonably be expected to affect the ability of the organization to successfully implement its strategies and achieve its objectives.”
 - CAMAC 2006
- “the objective of corporate governance has moved away from the narrow interests of shareholders and financiers to those of the stakeholder...The stakeholders are those groups without whose support the corporation would cease to exist. They include employees, customers, suppliers, banks and, where appropriate, government and governmental agencies.”
 - *Hanrahan (2022) citing the Victorian Royal Commission into Crown Resorts, 2021*

The role of stakeholders

- All stakeholders have an interest in the sustained and successful operation of corporations;
- Sustainability in Corporate Governance discourse does not refer only to environmental sustainability;
- Sustainability in Corporate Governance refers to decisions that improve the operation of the corporation, increase wealth creation, and ensure continued operations through time;

- Sustainability is a key interest of all stakeholders (including shareholders) AND sustainability is key to ensuring stakeholders' interests are included in corporate decision making.

Stakeholders and the law

Corporate law and agency conflicts

- Managers vs shareholders
- Minority vs majority shareholders
- Corporate vs third parties/shareholders
- The law in different jurisdictions gives different weight to each conflict AND different weights to different stakeholders

Sources of law

- Corporate Law is not the only source of law relevant to mediation of agency conflicts and corporate stakeholders: employment law; contract law; health and safety law; consumer law; environmental law; international law and soft law...
- No direct reference to stakeholders in the *Corporations Act 2001* (Cth).
- Directors' Duties are one avenue for increasing stakeholder consideration through the framework of the Corporations Act.
- Shareholder Rights under the Corporations Act also provide an avenue for motivating stakeholder consideration – but equally these rights may constrain the board in considering external stakeholders.
- Expansion of the ASX Corporate Governance Principles and Recommendations has been controversial – development of a 5th edition was recently abandoned.
- Variation across previous editions of the Governance Principles regarding stakeholders – always framed from a risk management perspective.
- REMEMBER – Governance Principles apply on a “comply or explain” basis and ONLY to ASX listed firms.

Organisational liability

- *Modern Slavery Act,*
- *Australian Consumer Law*
- Employment Law
- *Environmental law*
- *Tax law, AML/CTF Act,*
- *Criminal Code (bribery and failure to prevent bribery, fraud, insider trading)*
- *Import/export laws...*

Directors duties

- Duty of care and diligence (s 180)
- Duty to act in good faith for proper purpose (s 181)
- These duties are owed to the company as a whole - NOT directly to shareholders.
- Therefore, directors' may be liable for a failure to consider stakeholders that subsequently impacts the company.

United States & Pluralism

- Limited legal recognition and growing normative pressure to consider stakeholder interests as part of the 'corporate constituency'.
- L3Cs - Low profit companies

- Variable interpretation and preferencing of external stakeholders - [Republican backlash against ESG consideration for investment decisions and Biden's Presidential Veto.](#)

United Kingdom & Enlightened Shareholder Value

- s172 *Companies Act 2006* - Directors MUST act in the interests of the company and MAY 'have regard' for the interests of stakeholders in so far as they align with those of shareholders.

European Union & CSR

- Origins of CSR as beyond law
- Shift towards mandatory approach and focus on responsibility and detailed reporting requirements

The OECD Approach

- OECD Principles of Corporate Governance mention stakeholders 43 times – with Part IV titled “the role of stakeholders in corporate governance”
- ‘The governance framework should recognise the interests of stakeholders and their contribution to the long-term success of the corporation.’

CSR: challenges and opportunities

Benefits of recognising stakeholders

- “[E]ven in areas where stakeholder interests are not legislated, many firms make additional commitments to stakeholders, and concern over corporate reputation and corporate performance often requires the recognition of broader interests.”
 - OECD, 2015 p34
- “Ideally, CSR is a win-win scenario, whereby companies increase their profitability and society benefits at the same time.”
 - EU 2009 p46
- “Companies must be deliberate and committed to embracing purpose and serving all stakeholders – your shareholders, customers, employees, and the communities where you operate. In doing so, your company will enjoy greater long-term prosperity, as will investors, workers, and society as a whole.”
 - Larry Fink (Black Rock Capital 2020)

Intrinsic and extrinsic CSR

Social entity theory

- Grounded in moral or ethical considerations
- Based on recognition of the power and influence of corporate actors in society and subsequent responsibility stemming from this position
- Not recognised in law and problematic from the perspective of corporate value maximisation

Extrinsic CSR/instrumental approach

- Recognising social and environmental impacts is ultimately good for shareholders and corporate value creation in the long term;
- Assumes that stakeholder interests and shareholder interests will usually be aligned if the appropriate timeframe is selected for assessment;
- Assumes that corporations cannot afford to ignore stakeholder interests – a weak assumption considering the power of corporate actors and the outsourcing of corporate accountability under this model.

The James Hardie Case

- James Hardie Industries restructured its operations and underfunded an asbestos compensation trust, while publicly claiming victims would be fully supported.
- ASIC brought legal proceedings for misleading disclosures and breach of directors' duties under the Corporations Act.
- Consequences
 - High Court upheld s180 and s181 breaches and imposed civil penalties and disqualification orders.
 - Reputational damage and intense public scrutiny
 - James Hardie fully funded the compensation trust, despite no legal mandate
- Insight → Collectively, external stakeholders can affect company value with real governance impacts – even if catalyst actions were legal.

Rio Tinto

- Legal destruction of a 46,000 year old Aboriginal heritage site in the Pilbara despite objections from traditional owners
- Consequences
 - Global outrage
 - CEO and senior executive resignation
 - Shareholder revolt and governance overhaul of Rio Tinto
 - Parliamentary inquiry and cultural heritage law reform
- Insight → legal compliance is not always enough - stakeholder harm that breaches community expectations can collapse board legitimacy and corporate trust

PWC

- **PwC Australia – Tax Leak Scandal & Public Trust**
- Senior PwC partner misused **confidential Treasury information** to help clients avoid new anti-tax avoidance laws and marketed this intelligence to clients.
- **Consequences:**
 - CEO **resigned**; multiple partners expelled
 - Government **banned PwC from federal contracts**
 - Independent Senate Inquiry revealed serious governance, culture, and risk oversight failures
- **Key Governance Lesson** → Organisational integrity is a governance issue — when stakeholder trust collapses, so does access to markets, contracts, and legitimacy.

Directors duties and stakeholder consideration

- *“Although there is not yet any case where the courts have recognised a CSR duty for directors based on community expectations, developments in Australia make CSR a relevant issue for directors, and probably inevitable for them to take it seriously. If they do not, this is at their own peril, especially if ignoring their social responsibilities causes the corporation to suffer serious reputational harm.”*
 - Textbook ch3
- *“There will inevitably be situations in which the interests of shareholders and other participants will clash, even when the interests of shareholders are viewed as long-term ones...This requires a choice...An appeal to the ‘interests of the company’ will not resolve the issues, unless it is first decided whether ‘the company’ is to be equated with its shareholders alone...or shareholders plus other participants.”*

- UK Company Law Steering Group 1999

Textbook chapter 2

2.2 A move towards an all-inclusive, multistakeholder approach: Stakeholder capitalism

2.2.1 Some significant recent US developments

Since 2018, there have been key developments in the U.S. reflecting a shift towards stakeholder capitalism:

- **Larry Fink and BlackRock's Influence:**

Larry Fink, CEO of BlackRock, began championing the idea that companies must pursue a *social purpose* alongside profit. In his 2018 letter, he urged companies to:

- Create long-term value.
- Serve all stakeholders: shareholders, employees, customers, and communities.
- Reflect on questions about community impact, environmental responsibility, workforce diversity, technological adaptation, retraining, and employee retirement preparedness.

- **2019 Letter – ‘Purpose and Profit’:** Fink’s 2019 letter emphasized *sustainable, long-term growth* and explicitly mentioned stakeholder responsibilities, moving beyond his earlier focus on financial returns alone.

- **Backlash Against Stakeholder Focus:**

- BlackRock’s shift triggered backlash, particularly from U.S. Republicans who:

- Threatened to pull billions in investments.
- Launched campaigns urging boycotts of BlackRock over its ESG commitments.

- **Political Pushback on ESG:** In 2023, House Republicans passed legislation to reverse a Department of Labor rule permitting retirement funds to consider ESG factors in investment decisions. President Biden vetoed the bill, maintaining support for ESG consideration

2.2.2 The US Business Roundtable’s endorsement of stakeholder capitalism

- **Business Roundtable (BRT) Redefines Corporate Purpose (2019):**

In a landmark move, the BRT shifted from a **shareholder primacy** model to a **stakeholder-oriented** approach. Its revised statement on “*the purpose of a corporation*” emphasized broader responsibilities to all stakeholders, not just shareholders.

- **Backlash from Shareholder Groups:** The American Council of Institutional Investors (CII) opposed the change, arguing that it *downplayed shareholders’ roles* by referencing them only as capital providers, not owners.

- **Reaffirmation and Global Support:**

- In 2020, the BRT reaffirmed its commitment to this **stakeholder capitalism** model.
- Klaus Schwab (World Economic Forum) endorsed the approach in his 2021 book *Stakeholder Capitalism*.
- The World Economic Forum continues to promote this model as part of a more sustainable, inclusive global economy.

- **Growing Momentum:** The BRT’s 2019 statement sparked significant debate and was widely seen as a **major shift in U.S. corporate governance**, indicating that stakeholder capitalism is gaining traction both in the U.S. and globally.

2.2.3 2020 and beyond: ‘A Fundamental Reshaping of Finance’ and ‘The Power of Capitalism’?

- **Larry Fink’s 2020–2022 Letters to CEOs:** Fink, CEO of BlackRock, continued to champion **stakeholder capitalism**, linking it directly to **long-term profits and sustainability**.

- **2020 Letter – “A Fundamental Reshaping of Finance”**: Fink presented a **business case** for a transparent, stakeholder-focused model, arguing it’s essential for long-term corporate success.
- **2021 Letter**: Emphasised that **sustainability and stakeholder engagement** lead to **better returns**.
- **2022 Letter – “The Power of Capitalism”**:

Fink:

- Asserted that trust and alignment with stakeholder values are **essential to attract talent and customers**, especially younger generations.
- Warned that companies ignoring stakeholder needs will **struggle to compete**.
- Rejected claims that stakeholder capitalism is political or “woke,” calling it **true capitalism** based on mutually beneficial relationships.
- Reinforced that stakeholder capitalism enhances **capital efficiency, long-term profitability, and sustainable value creation**.

In essence, Fink argued that **corporate success now depends on meeting the needs of all stakeholders**, not just shareholders, marking a deeper and more deliberate shift in modern corporate governance.

2.2.4 A refreshing approach

- **Recognition of Stakeholders**: The growing emphasis on **non-shareholder interests**—whether called stakeholder capitalism, an all-inclusive, or multistakeholder approach—is welcomed and aligns with the book’s long-standing position since 2005.
- **Relevance in the Fourth Industrial Revolution**: This approach is especially crucial in light of rapid technological change and societal shifts driven by the **Fourth Industrial Revolution**.
- **Klaus Schwab’s Perspective**: Schwab highlights that if humanity acts courageously and collectively for the **common good**, we can:
 - Sustain progress in **human development**.
 - Address **negative externalities** such as environmental damage and inequality.
 - Ensure **technological benefits are widely distributed**.
 - Empower people through technology, rather than letting it control or displace them.
 - Involving all stakeholder groups is seen as essential to meeting the **complex global challenges** ahead.

2.3 Global impact of the new direction towards an all-inclusive stakeholder/stakeholder capitalism approach

2.3.1 Winds of change noted in Australia

BRT’s Policy Shift Acknowledged:

The Business Roundtable’s move toward stakeholder capitalism was recognised in Australia as a **“major policy change”**, but the **Australian Institute of Company Directors (AICD)** cautioned against conflating U.S. and Australian systems, noting **directors’ duties differ** across jurisdictions.

Directors’ Duties in Australia:

- The meaning of the duty to act in the **“best interests of the corporation”** remains a **live issue**.
- The AICD’s *Forward Governance Agenda* is exploring how directors should consider **stakeholder, ethical, and societal interests** in practice.
- However, public **trust in directors** has been damaged—especially following the **Hayne Royal Commission reports (2018–2019)**, which exposed serious misconduct in banking and financial services.

Reality of Shareholder Primacy:

Ross Grantham noted that most Australian companies still adopt a **shareholder primacy** model, where success is defined by **financial returns to shareholders**.

- Among 100 companies reviewed, most listed **maximising shareholder returns** as their primary goal.

Director Uncertainty and the Need for Guidance:

- **91% of directors** surveyed by AICD said they wanted **more guidance** on balancing stakeholder engagement with legal duties.
- Yet, earlier research (Marshall & Ramsay, 2012) found that **more than half of directors** believed acting in the company's best interests required **balancing all stakeholder interests**
- Few directors believed they were obligated to prioritise only **short- or long-term shareholder interests** exclusively.

Conclusion: There is still **significant uncertainty** among Australian directors, and **clearer statutory guidance or reform** may be needed to help them confidently incorporate stakeholder considerations into corporate governance practices.

2.4 Challenges in Moving Away from a Shareholder Primacy Model

2.4.1 Shareholder Capitalism Still Deeply Embedded in the US

- The U.S. legal system continues to prioritise **shareholder primacy**, reinforced by cases like *Dodge v Ford*, *Katz v Oak Industries*, and *Smith v Van Gorkom*.
- Legal change would require unlikely **federal or state legislative reform**.
- Scholars like Lund and Pollman argue that a **substantial systemic shock** would be needed to shift the model.
- Despite stakeholder rhetoric, **shareholder capitalism remains dominant** in Anglo-American systems.

2.4.2 Directors' Duties Owed to the Company as a Separate Legal Entity

- In **Australia**, directors' duties are interpreted as acting in the best interests of **shareholders as a whole**.
- There's confusion over how to factor in stakeholder interests — only **legislative reform** can clarify this.
- **South Africa's King IV Code** offers a useful model: directors owe duties to **the company as an entity**, which includes stakeholder interests.
- The **UK case BTI v Sequana** supports this "entity theory," stating directors should use **commercial judgment** to balance stakeholder interests.
- The prioritisation of interests should be **contextual and flexible**, left largely to the discretion of directors.
 - The position taken in King IV is that 'directors owe their duties to the company and the company alone as the company is a separate legal entity from the moment it is registered until it is deregistered ... e company is represented by several interests and these include the interests of shareholders, employees, consumers, the community and the environment. us requiring directors to act in good faith in the interests of "the company" cannot nowadays mean anything other than a blend of all these interests, but first and foremost they must act in the best interest of the company as a separate legal entity ... An interest that may be primary at one particular point in time in the company's existence may well become secondary at a later stage

2.5 'Essential' Principles of Corporate Governance

- There is no universal list of core principles; they evolve with context and challenges.
- Examples:

- **King Reports (South Africa):**
 - *King II (2002)*: discipline, transparency, accountability, fairness, social responsibility, etc.
 - *King III (2009)*: emphasis on leadership, sustainability, and citizenship.
 - *King IV (2016)*: inclusiveness, integrated thinking, and long-term value creation.
- **ASX Corporate Governance Principles (Australia):**
 - Started with 10 principles in 2003, reduced to 8 by 2019, with ongoing refinements.

2.6 Does Good Corporate Governance Add Value?

2.6.1 Former Scepticism

- In earlier decades, corporate governance was sometimes seen as a **compliance burden** or distraction from business performance.

2.6.2 The Business Case for Good Governance

- Today, there's strong **empirical evidence** linking good governance to:
 - Sustainable growth
 - Better stakeholder trust
 - Stronger performance in crises (e.g., GFC)
- **Corporate Social Responsibility (CSR)** and ESG are now integral to governance.
- Investors increasingly demand **transparency, sustainability, and stakeholder focus**.

2.7 Broader Trends Impacting Corporate Governance

2.7.1 General

- Governance must adapt to **global, technological, and social changes**.

2.7.2 The Fourth Industrial Revolution

- Technologies like **AI, digital platforms, and remote work** are transforming business operations.
- This era requires boards to be **digitally literate, adaptive**, and aware of **cyber risks**.
- **Zuboff's "Surveillance Capitalism"** warns of growing digital risks and erosion of predictability.
 - Mindful of the various denitions and academic arguments used to describe the rst three industrial revolutions, I believe that today we are at the beginning of a fourth industrial revolution. It began at the turn of this century and builds on the digital revolution. It is characterized by a much more ubiquitous and mobile internet, by smaller and more powerful sensors that have become cheaper, and by articial intelligence and machine learning.

2.7.3 Widening Inequality

- There's growing concern over the **increasing wealth gap**.
- Inequality threatens **social stability** and long-term business sustainability.

2.7.4 Issues of Capital Allocation

- Many public corporations are **not reinvesting profits** equitably.
- There's rising criticism of buybacks and executive bonuses over **employee welfare and innovation**.

2.7.5 The Great Reset

- The **World Economic Forum's "Great Reset"** calls for a shift towards:
 - Inclusive capitalism
 - Climate-conscious decision-making

- Redefining corporate purpose to include societal wellbeing

Textbook Chapter 3

3.2 A shareholder versus stakeholder focus: a contradiction and false dichotomy?

- A corporation is a separate legal entity and the directors owe their duties to the corporation as a separate legal entity - these are now firmly embedded principles of corporate law at least in Australia and all common law jurisdictions.
 - [I]f the directors of a company were held to be responsible to shareholders and the various stakeholders groups alike, then what would be the corporate objective? How could the board function effectively if there were a multiplicity of different objectives, no one of which took priority over the others? ... is could actually lead to quite a dangerous situation where directors and managers were not really accountable.
- *Salomon v Salomon & Co Ltd*

3.3 Corporate Social Responsibility (CSR)

3.3.1 Background and inappropriate perceptions

- Since the 1970s, **profit maximisation** for shareholders dominated corporate governance.
- Over time, focus shifted toward **CSR and financial performance**, forming a '**business case**' for a stakeholder-oriented approach.
- By the mid-2000s, CSR was reframed as a **strategic business tool** for engaging stakeholders.
- From **2018 onwards**, the stakeholder model and CSR have been widely **defended** as essential to long-term success (as seen in Sections 2.2.2 and 2.6).
- However, CSR has long faced **criticism** for being vague, especially regarding how it aligns with directors' duties to act in a company's best interests (a concern since the 1930s *Berle-Dodd* debate).
- A notable critique came in **2006** from **John Green**, ex-CEO of Macquarie Bank, who:
 - Described CSR as "**mushy,**" "**fluffy,**" and like quicksand.
 - Mocked CSR as based on false caricatures of unethical corporate elites.
 - Ironically, his comments came **just before** the major scandals in banking that led to the **Royal Commission** into misconduct in the financial services industry.

This highlights the tension between **traditional shareholder-focused views** and the growing push for **ethical, stakeholder-inclusive governance**.

3.3.2 Rising prominence of CSR

- **CSR has endured** since the 1930s despite fluctuating support and definitions.
- It has now moved from the **margins to the mainstream** of corporate policy.
- Modern definitions view CSR as "**the responsibility of enterprises for their impacts on society**", encompassing voluntary efforts to address **social, environmental, and business concerns** in dealings with stakeholders.
- The idea of corporations as "**good corporate citizens**" is widely supported in literature and practice, particularly since the 1990s.
- There's a clear shift away from the narrow focus on **profit maximisation for shareholders** toward the belief that corporations—especially large public ones—have a **responsibility to serve the public good and build a better society**.
- As a result, there's now a strong **expectation** for companies to **demonstrate responsible behaviour in practice**.

3.4 Disclosure of and reporting on non-financial matters: A powerful corporate governance tool or a smokescreen?

3.4.1 Demonstrating good CSR practices

- **ESG Reporting** is now the broad umbrella term for **non-financial corporate reporting**, covering **Environmental, Social, and Governance** issues.
 - When the focus is specifically on the **'Social' (S)** aspect, it's often referred to as **CSR reporting**.
 - Terminology overlaps, and there's **no strict distinction** between ESG, CSR, and other non-financial reporting labels.
- As CSR disclosure became more common, scholars explored **theoretical frameworks** to justify it:
 - **Stakeholder Theory**: Seen as a strong justification—companies disclose to meet stakeholder expectations.
 - **Legitimacy Theory**: Corporations seek to maintain their **"social licence to operate"** by showing they align with societal norms and values.
 - **Social Contract Theory** and **Signalling Theory** were also explored.
- **Omran and Ramdhony** argue that ongoing, voluntary disclosure helps companies maintain **legitimacy, credibility, and trust** with society.
- While CSR reporting was largely **voluntary** in the mid-2000s, momentum was building toward **mandatory social and environmental disclosure**, which is explored further in the next section.

3.4.2 Mandatory reporting

- [T]he distinction between reporting and disclosure is relevant here and comes from linguistic and practical roots. To report means 'to give a formal or official account or statement of' something. erefore, reporting has to do with corporations providing periodic accounts of their activities to interested stakeholders. Alternatively, to disclose means 'to make known or public' and 'expose to view'. erefore, disclosure occurs when unknown or secret information is voluntarily made public by a corporation or involuntarily uncovered by other actors.

3.4.3 Voluntary reporting initiatives

- **From the mid-2000s**, investors and stock exchanges began expecting **ESG (Environmental, Social, Governance) disclosures** from corporations.
- Several major initiatives and frameworks emerged to guide **non-financial reporting**, including:
 - **Global Reporting Initiative (GRI)** – active since the late 1990s.
 - **Sustainability Accounting Standards Board (SASB)**
 - **International Accounting Standards Board (IASB)**
 - **IFRS Foundation**
- However, the **proliferation of organisations and standards** led to significant **confusion and inconsistency** for companies, investors, and stakeholders. All parties sought ESG reporting that is:
 - **Stakeholder-inclusive**
 - **Sustainable in context**
 - **Material**
 - **Complete**
- **Recent efforts toward harmonisation:**

- In **August 2022**, the **IFRS Foundation consolidated the Value Reporting Foundation (VRF)** and created the **International Sustainability Standards Board (ISSB)** to build a global baseline for sustainability disclosures.
 - In **July 2023**, the **International Organization of Securities Commissions (IOSCO)** endorsed the ISSB's sustainability-related financial disclosure standards.
 - These moves mark progress toward a **single, standardised global ESG reporting framework**.
- The **IFRS Foundation and GRI** have also launched a **Sustainability Innovation Lab**, indicating a shared commitment to unifying ESG reporting practices.

In essence, the world is moving from fragmented voluntary ESG reporting to a **more structured and standardised global approach**.

3.4.4 Non-financial reporting, smokescreening, greenwashing and greenscreening

- There is **growing momentum** to move from **voluntary** ("nice to do") to **mandatory** ("must do") ESG and non-financial reporting.
- Investors now demand **reliable disclosures** on **human, natural, and social capital** to support **responsible investment decisions**.
- The **Integrated Reporting (IR) Framework** promotes reporting not just on financial capital, but also:
 - Human capital
 - Intellectual capital
 - Manufactured capital
 - Natural capital
 - Social and relationship capital
- **Pigatto et al.** critically assess voluntary non-financial disclosure (VRD), identifying key issues:
 - **Inconsistent motivation** across companies results in **uneven and unreliable disclosures**.
 - Voluntary disclosures are often **superficial**, lacking depth and genuine transparency.
 - Many companies adopt frameworks like IR **accidentally or performatively**, rather than strategically.
 - Such practices risk being "**window-dressing**" or "**puffery**" — designed to impress rather than inform.
- Pigatto et al. urge:
 - Less **investor-centric rhetoric**, and
 - More **substantial, honest reporting** that critically engages with reporting frameworks.
- While ESG reporting is **improving among ASX200 companies**, there's still **skepticism**:
"Are we getting the full story or just the good story?"

Overall, the trend favours **more formalised, transparent, and meaningful ESG disclosures**, but challenges of credibility, consistency, and authenticity remain.