

Article

Accepted Australian Journal of Corporate Law 2024

Corporate purpose as committing, communicating and contracting: Perspectives from B Corps

Alice Klettner*

Corporate purpose, in the sense of a pro-social organisational mission, has been touted as a potential solution to the long-standing debate between shareholder primacy and stakeholderism. This article explores the purpose of corporate purpose from a business perspective by drawing on empirical evidence from B Corps. These firms have voluntarily chosen to adopt a model of purpose-oriented corporate governance, entrenching this in their corporate constitution. This article shows that the value in this model arises through committing, communicating and contracting. It helps the firm to commit to a pro-social purpose, communicate this to others and thereby build contractual relationships with all types of stakeholders that reinforce its purpose. A progressive version of the contractarian theory of the firm best explains the potential of corporate purpose while also predicting its limitations. This has implications for legal reform, suggesting that any mainstreaming of corporate purpose must leave room for differentiation.

* Associate Professor Alice Klettner, UTS Business School, University of Technology Sydney. I would like to acknowledge Dilek Cetindamar and Rosemary Sainty for their support in conducting this research and their work in developing a separate management-oriented article (forthcoming) which looks at the processes involved in implementing stakeholder governance. I would like to thank B Lab Australia and Aotearoa New Zealand for assisting in obtaining interviews and, of course, the interview participants themselves for their time and valuable insights.

Introduction

Corporate purpose (defining a company's reason for being) has been framed as the new solution to long-lasting problems of corporate governance and responsibility.¹ It has been posited as a way to resolve the ongoing debate between shareholder primacy and stakeholder-oriented corporate governance that has prevailed since the 1930s.² Prioritising shareholders can encourage ruthless pursuit of profit yet taking into account the needs of every stakeholder might be an impossible task. It is a debate that swings back and forth as political and management ideologies change, recognising that both approaches have their problems.³ Hence, no side ever wins conclusively and we try to find an in-between position that might function effectively. Over the last decade or so, the favoured approach has been termed enlightened shareholder-value, effectively a long-term version of shareholder primacy which permits directors to take environmental and social issues into account if this is also good for shareholders in the long-term.⁴ However, with problems such as climate change, species extinction and modern slavery increasingly front of mind, this approach is seen by many as insufficient.⁵ Around the world, incremental amendments to corporate laws and corporate governance codes reflect growing acceptance of the need to more formally integrate social and environmental factors into corporate decision-making.⁶ However, for the most part, the detail of how to do this is still left to the discretion of the board. Directors' legal duties simply require them to act in the best

¹ G Davis, 'Corporate Purpose Needs Democracy' (2021) 58(3) *Journal of Management Studies* 902; C Mayer, 'The Future of the Corporation and the Economics of Purpose' (2021) 58(3) *Journal of Management Studies* 887 (The Future of the Corporation and the Economics of Purpose); A Raz, 'A Purpose-Based Theory of Corporate Law' (2020) 65(3) *Villanova Law Review* 523.

² A A Berle, 'Corporate Powers as Powers in Trust' [1931] *Harvard Law Review* 1049; E Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' [1932] *Harvard Law Review* 1145.

³ S Clegg et al, "'Open Purpose": Embracing Organizations as Expressive Systems' (2021) 2(4) *Organization Theory* 1.

⁴ A Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge, 2012).

⁵ K Levillain and B Segrestin, 'From Primacy to Purpose Commitment: How Emerging Profit-with-Purpose Corporations Open New Corporate Governance Avenues' (2019) 37(5) *European Management Journal* 637; Mayer, 'The Future of the Corporation and the Economics of Purpose' (n 1).

⁶ D Kershaw and E Schuster, 'The Purposive Transformation of Corporate Law' (2021) 69(3) *The American Journal of Comparative Law* 478.

interests of the company. Can corporate purpose help them to understand exactly what the best interests of the company are?

The article recognises that, while scholars debate theoretical models, millions of corporations around the world are governed very effectively by their boards of directors who take a common-sense approach to balancing the needs of their stakeholders. This is particularly true of businesses that have actively chosen to pursue both profit and a pro-social purpose through certifying as a B Corp. This article presents findings from a series of interviews with leaders of B Corps with the aim of better understanding the advantages and challenges of voluntarily choosing to entrench corporate purpose and stakeholder governance into the corporate constitution. It draws out the practical relevance of the debate between shareholder primacy and stakeholder governance recognising that there are two main reasons for trying to find some middle ground.⁷ The first is a public interest reason around society's expectations for corporate behaviour. The second is a private business reason around strategic clarity.

Firstly, it is not in the public interest to see irreversible damage done to communities or the environment in the search for profit. In Australia, we have had Rio Tinto blasting ancient Indigenous sites; while logging of native forest is endangering many species including the iconic koala.⁸ Many human health problems, such as opioid addiction and obesity can also be placed at the feet of profit-seeking corporations.⁹ The quest for shareholder value, the pressure to meet profit forecasts and continual market monitoring of share prices is undoubtedly a major cause of this damaging and often immoral behaviour.¹⁰ Whether recklessly or knowingly,

⁷ See also J Almandoz, 'Inside-out and Outside-in Perspectives on Corporate Purpose' (2023) 8(2) *Strategy Science* 139.

⁸ E Pearson, 'Heartbreak in the Juukan Gorge: Embarrassingly out of Kilter Law Destroys 46,000-Year -Old Aboriginal Sacred Sites' (2020), 25 *Art Antiquity & Law* 147; L Cox 'Continued logging of NSW koala habitat is 'a profound tragedy', conservationist says' *The Guardian*, 18 March 2024.

⁹ Davis (n 1).

¹⁰ T Clarke, 'The Contest on Corporate Purpose: Why Lynn Stout Was Right and Milton Friedman Was Wrong' (2020) 10(3) *Accounting, Economics, and Law: A Convivium* 20200145; Davis (n 1); J A Martin and F C Butler, 'The Purpose of the Modern Corporation: A Holistic View' (2020) 36(3) *Strategic Direction* 4.

powerful corporations can and do make decisions that result in damage to the environment or society. This is the public interest reason for exploring corporate purpose. If all companies were required to publicly express a pro-social (or at least a non-damaging) purpose and stick to it, could this improve corporate responsibility and provide consequences for irresponsibility?

Secondly, the private business reason — not all corporate leaders are comfortable with the status quo. A small proportion are exploring alternative governance structures that reduce the legal uncertainty of existing models, particularly when it comes to the duties of directors.¹¹

New generation entrepreneurs, or those who have witnessed the worst effects of shareholder primacy, are looking for a new model that expressly permits (or even requires) them to prioritise the pursuit of social and environmental goals whilst also being economically successful.¹² In some countries, these progressive leaders have the option of setting up their enterprise using a specialised ‘profit-with-purpose’ business structure.¹³ For example, over 35 states in America have legislated to create a legal structure known as the benefit or public benefit corporation.¹⁴ In France, the ‘société à mission’, permits a company to embed a specific social or environmental purpose into its by-laws.¹⁵ However, in Australia and other countries where these legal structures are not available, social entrepreneurs or leaders wishing to follow a more sustainable path are restricted to a standard corporate structure. Yet they are searching for ways to provide clarity around their corporate purpose and to implement governance structures that balance stakeholders’ needs. This is the business reason for exploring corporate

¹¹ B H McDonnell, ‘Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations’ (2014) 20 *Fordham Journal of Corporate and Financial Law* 19.

¹² K Westaway, *Profit & Purpose: How social innovation is transforming business for good*, (2014) John Wiley & Sons, New Jersey

¹³ Levillain and Segrestin (n 5).

¹⁴ A Klettner, ‘Finding the Balance between Profit and Purpose: Should Australia Create a Legal Structure for Social Enterprise?’ (2019) 47(5) *Australian Business Law Review* 335.

¹⁵ Levillain and Segrestin (n 5).

purpose. How might purpose help them to balance a pro-social mission in combination with pursuit of profit?

One answer to this second question is to go through a voluntary certification process set up by the global not-for-profit organisation, B Lab. Across the world, increasing numbers of companies have chosen to go through this process to become a certified B Corp, committing them to the B Lab model of ‘business for good’.¹⁶ In some countries, B Corp certification is tied to use of a locally available legal business structure, such as the benefit corporation. In other countries, including Australia and New Zealand, certification requires companies to amend their corporate constitution to include two clauses: (1) a commitment to corporate purpose (in its broad sense of public benefit); and (2) a commitment to stakeholder governance (balancing stakeholders’ interests). B Corps therefore provide a very helpful example of how business might function in a more responsible and purposeful fashion.¹⁷

This article draws on the experience of a sample of B Corp leaders to explore the potential of corporate purpose as a way of directing corporate governance. The aim of this research is to understand how the B-Corp model changes corporate governance in a practical sense — what value does it provide and what challenges does it raise? Thus the research aims to contribute primarily to the second question above, of how corporate purpose can help companies to implement a corporate governance system that balances profit with social or environmental factors. Yet the findings of the research also inform the first, wider public interest question. If we can better understand the way existing models of purpose-led governance function, it will

¹⁶ At the time of writing there were over 8500 B Corps globally and over 700 in Australia and Aotearoa New Zealand: see *Certified B Corporation* (Webpage) <<https://bcorporation.com.au/what-bcorp/>> (accessed 14 June 2024).

¹⁷ J Gehman, M G Grimes and K Cao, ‘Why We Care about Certified B Corporations: From Valuing Growth to Certifying Values Practices’ (2019) 5(1) *Academy of Management Discoveries* 97.

place us in a much stronger position when designing regulation that might apply to all companies.

The article progresses as follows. First, it provides a short background to the concept of corporate purpose and the development of its contemporary form. Next, I explain the context for the research — the B Lab model of purpose-oriented governance and some of the literature on profit-for purpose legal structures. I then draw on the findings of interviews with leaders of B Corps in Australia and New Zealand to understand how they are implementing corporate purpose and the value it provides them. Lastly, I propose that a progressive version of the contractarian theory of the firm best explains the purpose of corporate purpose. I draw out the advantages and limitations of this approach and its implications for legal reform.

II Corporate purpose and theories of the firm

The resurgence of interest in corporate purpose across the business world has, not surprisingly, run parallel to a resurgence of interest in academia.¹⁸ It is a topic with roots in many disciplines including law, history, politics, philosophy, economics and management.¹⁹ This article, although intended to contribute to the legal literature, does so by drawing ideas from other disciplines, particularly management and economics.

A Contemporary definitions of corporate purpose

First, it is important to define the meaning of corporate purpose used in this article because the term has been construed in several different ways. Most of these ways are consistent with the Macquarie dictionary meaning of purpose as ‘the reason for which something is done or created or for which something exists’. This is always at the core of corporate purpose but it can be

¹⁸ S Kaplan, ‘The Promises and Perils of Corporate Purpose’ (2023) 8(2) *Strategy Science* 288; Clegg et al (n 3).

¹⁹ G George et al, ‘Purpose in the For-Profit Firm: A Review and Framework for Management Research’ (2023) 49(6) *Journal of Management* 1841.

defined either at a very high, broad level as something relevant to all corporations; or at a more local, specific level relevant to a particular organisation and its goods or services.²⁰ In the legal literature, corporate purpose is usually explored at the high level where it can or could be entrenched in law, for example, the purpose of the corporation is to create value (whether that be for all stakeholders or primarily for shareholders). In management, however, corporate purpose is more commonly examined at an organisational level, for example, to provide certain goods or services in a particular way. This means it is often related more to internal strategy than external obligations. George et al recognise this distinction determining that corporate purpose can be seen as either goal-based, stemming from the organisations' specific mission or strategy; or duty-based, responding to societal expectations, values and ethics.²¹

What we see in the modern formulation of corporate purpose is an attempt to combine the two: strategic mission and public duty, with both elements shifting away from pure profit-making.²² Corporate purpose is organisation-specific and has a pro-social element, shifting corporate objectives away from shareholder primacy towards stakeholderism and sustainability.²³ As George et al state, purpose is used to 'define a firm's benevolent and pluralistic approach to its stakeholders'.²⁴ Colin Mayer who has championed the economic arguments for corporate purpose describes it as 'solving society's problems in a way that is profitable without being harmful'.²⁵ Other definitions include, 'a concrete goal or objective for the firm that reaches beyond profit maximisation';²⁶ or 'an overarching, relevant, shared ethical vision of why a

²⁰ W Ocasio, M Kraatz and D Chandler, 'Making Sense of Corporate Purpose' (2023) 8(2) *Strategy Science* 123; Raz (n 1).

²¹ George et al (n 19).

²² Ocasio, Kraatz and Chandler (n 20); M Besharov and B Mitzinneck, 'The Multiple Facets of Corporate Purpose: An Analytical Typology' (2023) 8(2) *Strategy Science* 233.

²³ R Henderson and E Van den Steen, 'Why Do Firms Have "Purpose"? The Firm's Role as a Carrier of Identity and Reputation' (2015) 105(5) *American Economic Review* 326; I MacNeil and I M Esser, 'Corporate Purpose as a Conduit for Sustainability in Corporate Governance' in *Routledge Handbook of Private Law and Sustainability*, M Silva et al (Eds) (Routledge, 2024); Ocasio, Kraatz and Chandler (n 20).

²⁴ George et al (n 19).

²⁵ C Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press, 2018) (*Prosperity*); Mayer, 'The Future of the Corporation and the Economics of Purpose' (n 1).

²⁶ Henderson and Van den Steen (n 23).

company exists and where it needs to go'.²⁷ The UK Financial Reporting Council has explained it does not see purpose as an aim in itself but as a moral compass through which profitability is pursued.²⁸ Thus the contemporary understanding of corporate purpose, and the meaning used in this article, is that corporate purpose incorporates an element of pro-social benefit as well as being linked to an organisation's goals.

B Effects (or purpose) of corporate purpose

A corporation, as a legal entity created by statute, has always had an economic purpose which is to bring investors together to further business enterprise. The aim of the corporation is not simply to make profits but to create contracting efficiencies and reduce the organising costs of doing business.²⁹ Much of the time, corporate law is focused on reducing agency costs by mitigating the self-interested opportunism that can occur when an agent (such as a manager) has more power and information than a principal (a shareholder). Corporate law also facilitates contracting efficiencies through reporting requirements that encourage the revelation of information. Adding corporate purpose in its modern form into the mix is not directed at fixing agency problems but it may contribute to creating contracting efficiencies through its signalling effects. The economics literature often characterises the firm as a 'nexus of contracts' or a nexus for contracting.³⁰ A clearly defined corporate purpose may alter the background conditions for these contracts, influencing the choice of terms towards more stakeholder-friendly arrangements.³¹

²⁷ CB Bhattacharya et al, 'Corporate Purpose and Employee Sustainability Behaviors' (2022) *Journal of Business Ethics* 1.

²⁸ MacNeil and Esser (n 23).

²⁹ J Armour, H Hansmann and R Kraakman, 'What is Corporate Law?' in *The Anatomy of Corporate Law: A Comparative and Functional Approach*, R Kraakman et al (Eds) (Oxford University Press 2009).

³⁰ Above, at n 29. S Deakin, 'The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise' (2012) 37(2) *Queens Law Journal* 339.

³¹ J Boatright, 'Contractors as Stakeholders: Reconciling Stakeholder Theory with the Nexus-Of-Contracts Firm' (2002) 26(9) *Journal of Banking & Finance* 1837; W Henisz, 'The Value of Organizational Purpose' (2023) 8(2) *Strategy Science* 159; F Easterbrook and D Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991).

As Clegg et al state, ‘the focus of purpose is supposed to enable organizations simultaneously to do well and do good’. Purpose in this sense has motivational power and in theory can provide a clear direction for the firm.³² In the management literature, it has been shown to drive sustainability behaviours in employees;³³ and build a responsible reputation and identity.³⁴ Hollensbe et al consider corporate purpose has a role to play in rebuilding trust in the business society relationship.³⁵

Edward Freeman, the father of stakeholder theory, sees corporate purpose as a tool for balancing stakeholder interests. Freeman emphasises that trade-offs between different stakeholders are not inevitable, rather it is possible to find a balance that creates as much value as possible for all stakeholders.³⁶ Freeman identifies corporate purpose as the ‘key idea that holds this value creation mindset together’, speaking to the ‘hearts and minds of key stakeholders’ and thereby making sustained success more likely.³⁷ If stakeholder governance is the notion that the concerns of all stakeholders should be brought into the governance of the firm;³⁸ corporate purpose can give direction on how to do this. It might counter the criticisms of stakeholder governance that claim that it is impossible in practice because it leaves directors without a clear goal or accountability.³⁹ This of course will depend on whether effective accountability and enforcement mechanisms are built up around corporate purpose.⁴⁰ Currently these are very limited, yet in the case of B-Corps the regular impact assessment and re-certification process provides some form of safeguard for authenticity.

³² Clegg et al (n 3).

³³ Bhattacharya et al (n 27).

³⁴ Henderson and Van den Steen (n 23).

³⁵ E Hollensbe et al, ‘Organizations with Purpose’ (2014) 57(5) *Academy of Management Journal* 1227.

³⁶ R E Freeman, ‘Managing for Stakeholders: Trade-Offs or Value Creation’ (2010) 96(1) *Journal of Business Ethics* 7.

³⁷ Above, at 8.

³⁸ K Greenfield, ‘Defending Stakeholder Governance’ (2007) 58(4) *Case Western Reserve Law Review* 1043.

³⁹ L A Bebchuk and R Tallarita, ‘The Illusory Promise of Stakeholder Governance’ (2020) 106 *Cornell Law Review* 91.

⁴⁰ See R T Langford, ‘Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law’ (2020) 43(3) *University of New South Wales Law Journal* 977.

Levillain and Segrestin explain how purpose-oriented governance enables decoupling between the corporation's control and its purpose.⁴¹ A purpose statement, especially if entrenched in the corporate constitution, distinguishes corporate interests as different from shareholders' interests. It has the potential to shift the focus of the company away from shareholder value towards defined corporate objectives that directors must pursue. In this sense, purpose also aligns with Blair and Stout's team production theory of the corporation — it provides guidance for directors, as the mediating hierarchy, on how to balance or prioritise stakeholders.⁴²

Another sector that provides helpful insights into the effects of corporate purpose is the charitable sector. As explained by Langford, purpose has always been vital for charities in maintaining their status and registration (and associated tax-benefits). A similar form of purpose-based governance for commercial entities could be achieved within current legal frameworks, playing a role in interpreting directors' duties. As Langford states, 'at the very least purpose could play a motivating, connecting and signalling role in the corporate sphere'.⁴³

C Criticisms of corporate purpose

Corporate purpose has been criticised both for being too restrictive (which of course is why original ideas of company objects and the doctrine of ultra vires were abolished)⁴⁴ yet also too malleable. Clegg et al criticise all instrumental or goal-based views of corporate purpose, whether shareholder, stakeholder or socially focused, as too restrictive in a world full of flux. They argue that purpose can and should be a transformative idea, a dynamic process rather than a goal, open to possibilities.⁴⁵ In a practical sense, this means that companies should be free to

⁴¹ Levillain and Segrestin (n 5).

⁴² M Blair and L Stout, 'Team Production in Business Organizations: An Introduction' (1999) 24 *The Journal of Corporation Law* 743.

⁴³ R Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954 at 955.

⁴⁴ LE Talbot, 'Critical Corporate Governance and the Demise of the Ultra Vires Doctrine' (2009) 38(2) *Common Law World Review* 170.

⁴⁵ Clegg et al (n 3).

adjust the way they balance the needs of different stakeholders based on changing contingencies.

In the field of entrepreneurship, researchers have also questioned the fixing of purpose based on the fact that it needs to evolve over time.⁴⁶ Empirical work shows that purpose statements and actual purposeful organising are often decoupled and that the success of introduction of purpose depends on the time at which it is introduced. Formalising purpose too early in a venture can be detrimental to the viability of the organisation.⁴⁷

Davis comes from the opposite direction, pointing out that a flexible, malleable purpose is weak, ‘when purpose and shareholder value get into a boxing ring ... bet on shareholder value every time’.⁴⁸ Even a goal-based purpose linked to a corporate mission is weak compared to the clarity of increasing shareholder value. For this reason, Davis is sceptical that B Corps or benefit corporations provide a scalable model that can withstand the pressures of a stock market listing. He points out that there have only ever been one or two B Corps that have managed to go public in the US. This raises the question of how we might strengthen purpose to give it a fighting chance against these market pressures. Davis’ idea, inspired by recent values-based protests, is to enable workplace democracy, to give more decision-making power to workers. Yet, it is not clear that workers will be any better than executives in sticking to an ethical purpose in all circumstances. Of course, the cooperative is a legal structure which provides this kind of democracy but which, like B Corporations, has remained popular only in small, niche areas.⁴⁹

⁴⁶ P Muñoz, G Cacciotti and B Cohen, ‘The Double-Edged Sword of Purpose-Driven Behavior in Sustainable Venturing’ (2018) 33(2) *Journal of Business Venturing* 149.

⁴⁷ Above, at n 46.

⁴⁸ Davis (n 1) at 907.

⁴⁹ M Duffy and C Shi, ‘The Curious Case of Stakeholder Ownership: Theoretical Insights into the Niche Persistence of the Cooperative and Mutual Form across Advanced Economies’ (Working Paper) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359271> (accessed 24 July 2024).

Davis argues that legal regulation of corporate purpose will inevitably struggle due to the increasingly intangible and global nature of modern business as compared to the local nature of law.⁵⁰ He sees corporate law as only one element in a systems design problem. Mayer also questions whether regulation alone can correct the market failures that shareholder primacy has brought about.⁵¹ The question becomes whether corporate purpose is a variable – an input to the way a company is governed — or whether it is an output of the institutions, both legal and market-based, in which the corporation must operate.⁵² This is key to consideration of legal reform. Although the general view is that current corporate law in Australia does not prevent purpose-oriented governance, there may be other barriers within the wider market environment that provide hurdles to mainstreaming the concept of purpose. For B Corps, purpose is an input — a variation to the standard corporate constitution, yet external factors may place limits around its implementation and effects.

III Legal means of entrenching corporate purpose

Corporate purpose in its modern form for commercial enterprise is not yet a statutory concept in Australia. Efforts by B Lab in 2017 to lobby for legislative change to create a legal structure similar to the United States benefit corporation were unsuccessful.⁵³ Arguments put forward at the time were that a separate structure was unnecessary. The Australian Institute of Company Directors (AICD), for example, relied on the 2006 decisions by both the Corporations and Markets Advisory Committee (CAMAC) and the Parliamentary Joint Committee on

⁵⁰ Davis (n 1) at 903.

⁵¹ Mayer, 'The Future of the Corporation and the Economics of Purpose' (n 1).

⁵² MacNeil and Esser (n 23).

⁵³ I Ramsay and M Upadhyaya 'The Failed Attempt to Enact Benefit Company Legislation in Australia and the Rise of B Corps' in *The International Handbook of Social Enterprise Law: Benefit Corporations and Other Purpose-Driven Companies*, H Peter, C Vargas Vasserot and J Alcalde Sliva (Eds) (Springer, 2023).

Corporations and Financial Services that directors' duties were broad enough to permit them to take stakeholder interests and broader community considerations into account.⁵⁴

The research presented in this article was triggered by B Lab's decision to cease lobbying for legislative change and take a different approach. From 2020, in order to maintain or obtain their certification, Australian B Corps were required by B Lab to amend their corporate constitution to include two clauses: firstly, a commitment to corporate purpose and secondly, a commitment to stakeholder governance. These amendments to the constitution must be made by way of a special resolution, meaning the agreement of 75% of shareholders. Model clauses were provided by B Lab, though variation to extend these is acceptable:

Purpose clause:

The purpose of the Company is to deliver returns to shareholders whilst having an overall positive impact on society and the environment.

Stakeholder clause:

In discharging their duties under this constitution, the Corporations Act and the general law, the directors or other officers of the Company:

a. will include in their consideration the following factors:

- i. the likely consequences of any decision or act of the company in the long term; and*
- ii. the interests of the company's employees; and*
- iii. the need to foster the company's business relationships with suppliers, customers and others; and*
- iv. the impact of the company's operations on the community and the environment; and*
- v. the desirability of the company maintaining a reputation for high standards of business conduct; and*
- vi. the interests of the members of the company; and*
- vii. the ability of the company to create an overall positive impact on society and the environment; and*

b. Need not give priority to a particular factor referred to in paragraph (a) over any other factor (included in paragraph (a) or otherwise).

At the time of writing, there were over 700 B Corps certified in Australia and New Zealand with most now including these clauses in their constitutions.⁵⁵ The B Corp certification has

⁵⁴ CAMAC, *The Social Responsibility of Corporations* (Report, December 2006); Parliamentary Joint Committee on Corporations and Financial Services Report on Corporate Responsibility, June 2006.

⁵⁵ Note 16 above; Deadlines for changing the constitution were variable depending on next certification date, see 'The B Corp purpose and stakeholder governance requirement' (Webpage), <<https://bcorporation.com.au/purpose-and-stakeholder-governance-requirement>> (accessed 2 August 2024).

become increasingly popular in recent years as a trusted label for profit-with-purpose. Indeed, Australia and New Zealand is the fastest growing region for B Corps. Before moving to Part IV to explore empirical evidence of the effect that these clauses have had on the governance of B Corporations, it is helpful to review other models of purpose-oriented governance emerging internationally as they provide further insights into the intended purpose of corporate purpose.

In the United States, B Lab's lobbying efforts to create a new legal structure combining profit and purpose were effective and at least 35 states now have legislation that creates the option of setting up as a benefit corporation or public benefit corporation.⁵⁶ These are statute-based legal structures and should not be confused with the term B Corp which is simply a certification achieved through an assessment process. Yet in the United States, the two are connected — to certify as a B Corp, entities are required to use the benefit corporation legal structure where it is available. This structure incorporates several features that distinguish it from a standard for-profit company: first, a benefit corporation must have a purpose beyond pursuing profit; second, it must regularly report on how the purpose has been pursued; third, officers and directors of a benefit corporation have a duty to consider and pursue the interests of stakeholders other than shareholders.⁵⁷ The model legislation upon which many benefit corporation statutes are based did not go through a full process of debate like most model legislation resulting in several problems which have gradually been resolved through variations to the legislation in the core states such as Delaware. For example, companies are no longer required to have an overall material positive impact on society and the environment (which can be quite hard to achieve). Instead, they can identify one or more specific benefits that the company wishes to pursue.⁵⁸ The most recent amendments to the Delaware statute — which

⁵⁶ Klettner (n 14).

⁵⁷ McDonnell (n 11).

⁵⁸ M J Loewenstein, 'Benefit Corporations: A Challenge in Corporate Governance' (2013) 68(4) *Business Lawyer* 1007.

came into force in 2020 — make it easier for standard companies to convert to a public benefit corporation (PBC), reducing the voting threshold from 90% to a two-thirds majority.⁵⁹ The hope is that this will attract larger firms to become B Corps, as currently, like in other countries, the majority are small to medium enterprises. In 2020, there were three publicly traded Delaware PBCs, Laureate Education, Lemonade and Vital Farms — all of which were also Certified B Corps. Littenberg et al note the increase in subsidiaries of large corporates becoming public benefit corporations. This we see in Australia too, with Unilever ANZ recently certifying as a B Corp.

Much of the legal literature in the United States debates whether benefit corporations are really necessary, analysing whether the same result could be achieved through standard corporate law provisions.⁶⁰ The argument that these new structures are superfluous in a legal sense is strong yet it is hard to ignore the symbolic nature of developments. Benefit corporations make a public statement about social enterprise, they are active rather than passive about their mission, and thereby alter external perceptions of corporate purpose.⁶¹ This is where the management literature helps to explain the signalling effects of the choice of business structure. As Thornsberry states, ‘While many debate the need for the benefit corporation legal status, the fact is that it has already become a part of the corporate code in forty percent of the nation’s states’.⁶² Certainly there is a real desire amongst entrepreneurs, investors, employees and consumers for this type of hybrid structure. It appears to be fuelled by two factors: firstly, concerns over personal liability; and secondly, a desire to communicate the organisation’s special purpose. Directors — taking into account social or environmental causes — no longer

⁵⁹ M Littenberg, E Oldshue and B Pifer, ‘Delaware Public Benefit Corporations - Recent Developments’ (Conference Paper, Harvard Law School Forum on Corporate Governance, 31 August 2020).

⁶⁰ D G Yosifon, ‘Opting out of Shareholder Primacy: Is the Public Benefit Corporation Trivial’ (2016) 41 *Delaware Journal of Corporate Law* 461.

⁶¹ J Haskell Murray, ‘Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes Symposium Articles’ (2012) 2 *American University Business Law Review* 1.

⁶² S Thornsberry, ‘More Burden than Benefit - Analysis of the Benefit Corporation Movement in California’ (2013) 7(1) *Journal of Business, Entrepreneurship and the Law* 159.

have to be concerned that they could be sued for not maximising shareholder wealth at all times.⁶³ Thus, in the United States, benefit corporations are seen to free business decision-makers from the uncertainty of existing legal duties. As Liao comments, ‘the American benefit corporation has been heralded as the innovative solution to the shareholder primacy model of governance’.⁶⁴ Yet benefit corporation statutes do not go so far as to give this wide group of stakeholders any enforceable rights.⁶⁵ They dull the rights of shareholders but do not greatly improve the rights of other stakeholders.⁶⁶

As a comparison, in the United Kingdom, the situation for companies wishing to become B Corps is similar to Australia. Although there are legal structures available for social enterprise in the UK including the community interest corporation (CIC), these can be too restrictive commercially with features such as an asset lock that limits the dividends that can be distributed.⁶⁷ B Lab therefore does not insist on any particular structure but requires companies to amend their articles of association to include two clauses similar to those required in Australia and New Zealand.⁶⁸ B Lab in the UK is lobbying for the Better Business Act which would amend s 172 of the Companies Act 2006 which — despite expressly including a list of non-shareholder stakeholders as relevant to directors’ decision-making — has been interpreted as still giving shareholders priority.⁶⁹ The Better Business Act would alter this to require companies to not only benefit shareholders but also benefit wider society and the environment.⁷⁰ The UK has also brought purpose into its corporate governance code for listed

⁶³ D Brakman Reiser and S A Dean, ‘Financing the Benefit Corporation’ (2016) 40 *Seattle University Law Review* 793.

⁶⁴ C Liao, ‘A Critical Canadian Perspective on the Benefit Corporation’ (2016) 40(2) *Seattle University Law Review* 683.

⁶⁵ MacNeil and Esser (n 23).

⁶⁶ J Blount and K Offei-Danso, ‘The Benefit Corporation: A Questionable Solution to a Non-Existent Problem’ (2012) 44(3) *St Mary’s Law Journal* 617.

⁶⁷ Klettner (n 14); D Brakman Reiser, ‘Benefit Corporations-a Sustainable Form of Organization’ (2011) 46 *Wake Forest Law Review* 591.

⁶⁸ MacNeil and Esser (n 23).

⁶⁹ Above, at n 68.

⁷⁰ See *Better Business Act* (Webpage) <betterbusinessact.org> (accessed 24 July 2024).

companies, suggesting that directors should establish the company's purpose (without defining what this means).⁷¹

In France, a new law was introduced in 2019 revising the definition of a corporation with regard to corporate purpose. The law introduces the notion of a corporation's 'raison d'être' and affords the possibility for any corporation to assign social or environmental purposes to itself in its by-laws.⁷² Although the result is similar to the B Lab model, the reasons behind it are quite different. It was not developed to clarify the liability of directors as they are not under fiduciary duties in the same way as in Anglo-American jurisdictions. Rather the law was designed to align the legal concept of the corporation with the more practical concept of collective enterprise, to encourage firms to innovate to solve public problems rather than being restricted by short-term shareholder value.⁷³ In this sense, the law reform was directed at harnessing the creative potential of private enterprise rather than clarifying responsibilities at organisational level. Each company must set up a Mission committee, different from its board committees (and including one employee) to monitor the execution of the corporate purpose. An independent third party also verifies the execution of the Mission establishing a written opinion annexed to the annual report of the Mission Committee. At the time of writing there were 628 registered sociétés à mission.⁷⁴

This review of purpose-with-profit structures available internationally shows that the purpose of purpose can vary across jurisdictions. In the US, directors' individual liability was a concern whereas in France purpose is hoped to set free the creativity of enterprise to solve grand

⁷¹ Above, at n 70.

⁷² B Segrestin, A Hatchuel and K Levillain, 'When the Law Distinguishes between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose' (2021) 171(1) *Journal of Business Ethics* 1.

⁷³ Above, at n 72.

⁷⁴ See *Société À Mission* (Webpage) <societeamission.com> (accessed 14 June 2024).

challenges. Now we move to Australia and New Zealand to explore the value that companies here see in implementing purpose.

IV Empirical evidence from B Corporations

The perspectives of 20 leaders of B Corps in Australia and New Zealand provide the empirical data for this article.⁷⁵ These are representatives of companies that have actively chosen to pursue purpose-oriented governance. The aim in speaking with them was to discover the purpose of purpose for them, with a focus on the recent process of changing their constitution to include the purpose and stakeholder clauses detailed above. A business perspective on issues of corporate law is essential in understanding the likely effects of potential legal reform.⁷⁶

A Methodology

A semi-structured interview protocol was used to explore the ways B Corps defined, understood and implemented both corporate purpose and stakeholder governance and how the constitutional changes required by B Lab had, or would, impact on their decision-making and governance processes. Each interview was conducted via Zoom, recorded and the audio then transcribed whilst ensuring participant anonymity. As shown in *Table 1*, the B Corps in the sample ranged from small founder-led companies with no employees, to large multi-national companies and spanned all kinds of industries. All B Corps were primarily for-profit businesses that would not necessarily class themselves as social enterprises but had a strong social or environmental element to their business whether that comprised eco-friendly products or innovative employee wellbeing initiatives.

⁷⁵ This research received approval from the UTS Ethics Committee — Approval No: ETH21-5893.

⁷⁶ N Andrews, 'Professor Roman Tomasic and Socio-Legal Studies in Australian Corporate and Securities Law' (2023) 38(3) *Australian Journal of Corporate Law* 275; V Schnure Baumfield, 'Stakeholder Theory from a Management Perspective: Bridging the Shareholder/Stakeholder Divide' (2016) 31(1) *Australian Journal of Corporate Law* 187.

In terms of limitations of the methodology, qualitative research of this type enables rich understanding of a phenomenon but the sample is not large enough to draw meaningful comparisons across industry sectors or different firm sizes. The fact that interviewees chose to participate in the research (and chose to become B Corps) means that the research may have a positive bias as it would not capture firms who fail to make the constitutional changes and therefore do not recertify. A final limitation of this approach is the fact that implementation of corporate purpose and stakeholder governance cannot be separated from the B Corp certification process which provides a level of accountability and hence motivation to improve.

The interviews elicited rich data and strong themes emerged early on giving confidence that, at 20 interviews, theoretical saturation had been reached.⁷⁷ The data analysis was conducted in the software Nvivo using the principles of thematic analysis.⁷⁸ This article presents findings relevant to its research question — exploring the value that B Lab’s required constitutional changes provide for B Corps, with a view to understanding what this means for legal theories of the firm and potential wider legal reform.⁷⁹

Table 1: B Corp Sample

	Industry sector	Size/employees	Role of interviewee
1	Retail	2	Founder director
2	Leisure	62	Sustainability officer
3	Business services	23	CFO
4	Community services	28	Founder director
5	Financial services	302	Sustainability officer
6	Educational services	174	CFO
7	Business services	79	COO
8	Marketing	29	Founder director
9	Marketing	72	Founder director

⁷⁷ G A Bowen, ‘Document Analysis as a Qualitative Research Method’ (2009) 9(2) *Qualitative Research Journal* 27.

⁷⁸ V Braun and V Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77.

⁷⁹ Extended analysis on how purpose is operationalised and implemented in B Corps is intended to be published in a management journal where it can contribute to debates on how stakeholder governance can be achieved in practice.

10	Business services	1	Founder director
11	Construction	30	Sustainability officer
12	Construction	16	Founder director
13	Retail	29	Founder director
14	Retail	100	Legal counsel
15	Marketing	25	Founder director
16	Financial services	41	Founder director
17	Business services	5	Founder director
18	Retail	160	Sustainability officer
19	Business services	2	Founder director
20	Manufacturing	20	Founder director

B Findings

In answer to the question of what purpose can do for companies and how it adds value, the interviews revealed that the main role that corporate purpose plays is to act as an ethical compass. It does this both proactively in setting strategy but also in making decisions, particularly the difficult decisions that involve weighing up the interests of different stakeholders.

And when there are situations requiring extra attention, so difficulty with clients or difficulty in teams, then [the purpose] is a good guiding point to take a breath and think, ‘Well, is there a problem with the way we’re working? What can we do? Let’s go back to the basics.’ And it gives everyone kind of like a baseline to return to. (Interviewee 7)

It embeds pro-social values into the company’s reason-for-being. Just as the norm of shareholder primacy has given direction to profit-seeking corporate governance, a values-based purpose gives direction to stakeholder governance. As Freeman (2010) suggested, it provides a tool for implementing stakeholder governance. In combination with purpose, stakeholder governance comprises an approach towards achieving a pre-defined objective that all stakeholders can be made aware of. That approach may prioritise certain stakeholders or set out a fair balance. Thus, a commitment to stakeholder governance, together with an organisational-specific purpose, gives the firm its direction. This direction flows through from major strategic decisions to smaller operational decisions:

I think it's like, if the North Star is in the right area, and our people move towards the North, and all of the bigger things have been decided around the North Star, then the smaller actions and tactical things fall in line. (Interviewee 8)

However, this does not explain why purpose ought to be a legal construct rather than simply a mission or vision for the firm. The detailed analysis of the data drew out three overlapping reasons why the entrenchment of purpose into the constitution was important for these companies: (1) commitment to purpose; (2) communicating purpose; and (3) contracting in ways that support, reinforce and extend that purpose.

1 Commitment to purpose

Formalising the commitment to purpose and stakeholder governance — in the constitution or otherwise — was important in permitting and ensuring consistency in strategic decision-making as well as conferring legitimacy on stakeholder-oriented decisions.

Our company needed to formalise what its true purpose and beliefs are and what is our foundation, what is our makeup, and then align to it and stick to it throughout the years (Interviewee 13)

It gives everybody the sense that they can make decisions based on the commonly understood principles and they won't be shut down for doing that (Interviewee 11)

Companies were keen to avoid mission drift, whereby a purpose is diluted or weakened over time, and felt that the changes to the constitution would make this much less likely.

I do think it entrenched how we operate and I think it will make it much harder in the future to not operate that way. It's never been an issue to date. But I think anytime you make a change to the Constitution it kind of locks things in (Interviewee 17)

Indeed, one of the larger companies explained that in a recent tough period for the business they saw how easily the purpose could be diluted and they were working on building it back more strongly. Several interviewees saw the value in having something to ensure that they are held to account particularly when 'things are a bit tight, or when we're busy' (Interviewee 9).

Founders wanted to feel that the values of the company would continue on if and when they were no longer with the company or if it started to grow very fast or was taken over. They were

concerned to ensure that the foundations they had built, and their philosophy of business, would be passed on. The option of locking this into the business gave them a sense of security for the future:

So I think in that way you can make sure this goes further, rather than it doesn't just stop with you, with the founders of the business. (Interviewee 1)

2 Communicating purpose

Corporate purpose is used proactively to reduce potential stakeholder conflicts through clear communication or signalling of expectations. If potential future customers, employees, suppliers or investors are fully aware of the firm's purpose, they can make an informed choice about whether to contract with the firm. In other words, the proactive signalling of corporate purpose permits stakeholder self-selection or attraction of supportive stakeholders. This is very different from the reactive process of responding to stakeholder needs often described in the stakeholder management literature.⁸⁰ Purpose reveals and communicates important information to stakeholders thereby making contracting more efficient.

Interviewees explained that a clear purpose increases the likelihood of attracting investors who accept the company's balanced mission, thereby reducing the likelihood of future conflict. The legal changes in the constitution show investors that the company is serious about entrenching the purpose into the future.

I think embedding it into the legal sort of thing, so say for example in the future we want to expand, and we want to grow, we want to borrow capital. I think having it embedded there, if somebody comes in, they know this is what they're coming to. (Interviewee 1)

We did do a cap raise and we bought in some new shareholders this year. I think because this was in our constitution, that would obviously have an impact on what type of shareholders we can bring in. (Interviewee 2)

⁸⁰ F Bowen, A Newenham-Kahindi and I Herremans, 'When Suits Meet Roots: The Antecedents and Consequences of Community Engagement Strategy' (2010) 95(2) *Journal of Business Ethics* 297.

Another benefit of formalising and communicating purpose identified by participants was that it helps firms to attract and retain employees who value pro-social action and are aligned with corporate values.⁸¹ . It plays a role in setting and communicating a specific organisational culture. In other words, it is a communication of the likely terms of the contract which can both attract and repel potential employees.

So it's almost like a big umbrella that is like, this is the type of company that we are, is this where you would like to work and spend time? (Interviewee 7)

I guess there's a there's a natural filtering there as well. Those people wouldn't apply if they didn't resonate with something, with respect to what we have in place. (Interviewee 18)

Communication of corporate purpose was also directed to customers and suppliers, often to pre-empt any conflicts and ensure everyone was on the same page. This might be achieved through marketing or through pre-contract discussions.

Certainly with this marketing rebrand we're going to say it loud and proud, 'This is who we are, and this is what we do, and we're unashamed about it.' That brings the right type of clients to us. (Interviewee 8)

We've got a new client kit, an onboarding kit, and it's all about how we work and why we are different from other agencies and how you can work best with us. (Interviewee 15)

3 Contracting to reinforce and extend purpose

Communication of purpose is closely linked to the terms on which the corporation ultimately contracts with its stakeholders. Interviewees explained how their corporate purpose would influence their relationships with various stakeholders or determine whether they entered into a relationship at all.

So hiring of staff, the training of staff, the well-being programs around the staff, the type of client we work with, the type of work we do with that client, the way that we go about our day to day business, who we work with in terms of supplies. It goes to everything that we do. (Interviewee 8)

The process of stakeholder governance for them did not always involve resolving a conflict in favour of one stakeholder or another, rather there was a search for balance through discussion,

⁸¹ Henderson and Van den Steen (n 23),

compromise and innovation. For example, rather than turn down a client whose business may have impacts that conflict with the B Corp's purpose, participants would try to influence and change client behaviour by negotiating novel contractual terms.

We need to be able to have some positive impact on your organization for us to be able to feel good about it and to sell it internally. And so we got them to agree that they would go carbon neutral for their website (Interviewee 9)

This idea of influencing others was another strong theme. B Corp leaders felt that they had the ability to educate and have impact through their operations and their relationships with stakeholders. They wanted other firms to copy their practices and spread new ways of doing business, 'it's a massive industry that we're trying to have this outsized impact on' (Interviewee 17). Influence through both supply chains and customers was evident with participants explaining how they had educated suppliers or clients, for example, on using more sustainable materials:

Educating clients, like simple things about thermal performance between timber doors and windows, and aluminium doors and windows. Explaining what a volatile organic combat compound is (Interviewee 12)

We had so many suppliers who made an effort, who moved on and looked for paper tapes instead of plastic (Interviewee 1)

Thus, B Corps are engaged in long-term relationship-building and close levels of engagement with like-minded suppliers, customers and investors, guided by a mutuality of purpose. Communication leads to negotiation and ultimately the solidifying of contractual agreements that reinforce and extend the organisation's purpose. Engagement involves a two-way discussion rather than a one-way offer, permitting the building of transformational relationships based on collaboration and learning.⁸²

⁸² Above, at n 80.

V A contractarian view of corporate purpose and concluding remarks

My argument in this article, based on both the literature and empirical evidence presented above is that the purpose of corporate purpose, and the value it provides, at least in the context of B-Corps, is best explained using a version of contractarian theory. This is a data-driven theory as called for by Deakin.⁸³ Contractarian theory sees the firm as a nexus of contracts or, importantly, as a nexus *for* contracts, which organise business activity and are formed primarily through private ordering yet with some state interaction.⁸⁴ The corporation has always been a legal structure that enables investors to join together with the aim of profit, hence the contractarian view has generally been associated with a shareholder-primacy view of the corporation.⁸⁵ Yet, as seen above, the bundle of contracts that makes up the corporation is much wider. It includes contracts with employees, with customers, suppliers and lenders. A progressive contractarian view of the firm, with contract defined in its broadest sense, takes into account all of these contracts.⁸⁶ Viewing the concept of a contract in its loosest sense, I would argue there is also a contract (even if termed a social contract or social licence) between a corporation and the local community or environment.⁸⁷ Indeed, integrative social contracts theory explains the firm as being part of a community to which it is bound through implicit social contracts based on civic morals.⁸⁸ Other contracts in existence might include formal licences given by public bodies that regulate the responsibilities of the corporation. Thus, like Boatright, I include public law ‘agreements’ in the concept of contract;⁸⁹ and do not assume

⁸³ Deakin (n 30).

⁸⁴ D Attenborough, ‘Empirical Insights into Corporate Contractarian Theory’ (2017) 37(2) *Legal Studies* 191.

⁸⁵ Raz (n 1); G M Hayden and M T Bodie, ‘The Uncorporation and the Unraveling of “Nexus of Contracts” Theory’ (2010) 109 *Michigan Law Review* 1127; E F Fama and M C Jensen, ‘Separation of Ownership and Control’ (1983) 26(2) *The Journal of Law and Economics* 301.

⁸⁶ Attenborough (n 83); Boatright (n 31).

⁸⁷ V Brand and R Teele Langford, ““Doing the Job That’s Required”?: Social Licence to Operate and Directors’ Duties’ (2022) 44(1) *Sydney Law Review* 111.

⁸⁸ Clegg et al (n 3); T Donaldson and T W Dunfee, ‘Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory’ (1994) 19(2) *The Academy of Management Review* 252.

⁸⁹ Boatright (n 31).

the contractarian view means absolute freedom of choice.⁹⁰ This bundle or nexus of contracts creates the corporation in its operational sense and defines its relationships with a full range of stakeholders.⁹¹ Deakin might describe this bundle of rules and norms defining rights to the corporation as a ‘commons’,⁹² yet the nexus of contracts is more complex and detailed, accepting that some stakeholders have more power than others. Importantly, however, there is nothing about this bundle of contracts that insists that shareholders have priority.⁹³ Thus, I do not use the contractarian view of the firm as a justification for preserving shareholder-primacy, quite the opposite. I believe this view of the firm can help to explain and operationalise choices around corporate purpose and prioritisation of non-shareholder stakeholders. Nor do I consider this view of the firm negates the identity of the corporation as a legal person.⁹⁴ Indeed, the corporate person is core to the nexus of contracts, sitting at its centre, enabling coordination and direction.⁹⁵

A Advantages of a contractarian model

The advantage of viewing the corporation this way is that the nexus of contracts can be set up in a unique way for each corporation, aligned to achieve its specific corporate purpose, within the bounds of public law. As seen above, what corporate purpose does for B Corps is to guide and frame the nexus of contracts to entrench and support a chosen pro-social mission. It provides firms with some choice in how they set up their ‘default rules’ for corporate governance without necessarily requiring a different legal business structure.⁹⁶ Incorporating

⁹⁰ Hayden and Bodie (n 84).

⁹¹ Boatright (n 31); C WL Hill and T M Jones, ‘Stakeholder Agency Theory’ (1992) 29(2) *Journal of Management Studies* 131.

⁹² Deakin (n 30).

⁹³ L A Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler, 2012).

⁹⁴ Raz (n 1).

⁹⁵ J Mahony, ‘Corporate Personhood and Fiduciary Duties as Critical Constructs in Developing Stakeholder Management Theory and Corporate Purpose’ (2023) 8(2) *Strategy Science* 212; Armour, Hansmann and Kraakman (n 29) who refer to a nexus *for* contracts.

⁹⁶ Armour, Hansmann and Kraakman (n 29).

purpose into the nexus of contracts changes the balance of power between stakeholders. In the management literature these changes in the power of stakeholders have been conceptualised as changes to stakeholder salience and legitimacy.⁹⁷ Recognising that they are based on changes to the nexus of contracts is helpful in understanding how they change and develop. For example, George et al note that internal drivers such as the values of the firm's founders are perpetuated only if embedded in the organisation's systems including their hiring practices.⁹⁸ This research confirms that B-Corps are careful to communicate their purpose to potential employees to attract only those with aligned values. Equally, we see that the effect of the constitutional changes is to ensure that the investors in a B Corp are freely agreeing to its special mission when they invest.⁹⁹ Indeed, they may only be agreeing to invest because of the special mission. Both investors and entrepreneurs need assurance that their interests will remain aligned and the choice of a benefit corporation or B Corp certification can assist with this, building trust and preventing 'mission drift'.¹⁰⁰ This commitment to purpose will become increasingly important for investors as ESG investing (with a focus on environmental, social and governance issues) and pursuit of the UN Sustainable Development Goals (SDGs) becomes more mainstream. Investors will need contractual assurance that investee companies will remain committed to their chosen ESG objectives and aligned to relevant SDGs. Indeed, the move towards stewardship, sustainable finance and the mainstreaming of ESG may be the

⁹⁷ R K Mitchell, B R Agle and D J Wood, 'Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts' (1997) 22(4) *Academy of Management Review* 853.

⁹⁸ George et al (n 19).

⁹⁹ Blount and Offei-Danso (n 66); D Brakman Reiser, 'Theorizing Forms for Social Enterprise' (2012) 62(4) *Emory Law Journal* 681.

¹⁰⁰ R Gulati and F Wohlgezogen, 'Can Purpose Foster Stakeholder Trust in Corporations?' (2023) 8(4) *Strategy Science* 270; A Ebrahim, J Battilana and J Mair, 'The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations' (2014) 34 *Research in Organizational Behavior* 81.

market or system change that shifts all companies towards consideration of pro-social purpose.¹⁰¹

The choice of certifying as a B-Corp is most often explained using stakeholder theory, as a move away from a shareholder-focused model of corporate governance to one that takes into account the interests of a wider range of actors.¹⁰² The contractarian view is more helpful than stakeholder theory in several ways. Firstly, it moves us away from heavy reliance on the balancing ability of the board of directors.¹⁰³ Purpose becomes entrenched in the nexus of contracts, setting priorities and guiding decision-making across the whole organisation. Conceptually, this gives stakeholder governance more of a networked nature rather than something achieved only through board decision-making. It also retains flexibility as contracts can be altered and negotiated depending on circumstances. It is even possible that the nexus of contracts might assist in balancing multiple purposes to enable a multi-objective approach to managerial decision making as imagined by Mitchell et al.¹⁰⁴ Stakeholder theory tends to place organisations as reactive to stakeholder interests whereas a contractarian view, and the signalling or communication processes identified above, permits proactive filtering or selection of stakeholders, thereby reducing potential stakeholder conflicts. These signalling processes reduce information asymmetry, facilitating less costly contracting.¹⁰⁵

Davies refers to Mayer's suggestion that the articles of association could have an impact outside of the company itself as a 'radical extension' of corporate purpose,¹⁰⁶ yet the evidence

¹⁰¹ D Katelouzou and A Klettner, 'Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential' in *Global Shareholder Stewardship: Complexities, Challenges and Possibilities*, D Katelouzou and D Puchniak (Eds) (Cambridge University Press, 2022); MacNeil and Esser (n 23).

¹⁰² Blount and Offei-Danso (n 66).

¹⁰³ Blair and Stout (n 42).

¹⁰⁴ R K Mitchell et al, 'Stakeholder Agency and Social Welfare: Pluralism and Decision Making in the Multi-Objective Corporation' (2016) 41(2) *Academy of Management Review* 252.

¹⁰⁵ Armour, Hansmann and Kraakman (n 29); McDonnell (n 11).

¹⁰⁶ P L Davies, 'Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements' (Law Working Paper No 666/2022, European Corporate Governance Institute) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4285770> (accessed 24 July 2024); Mayer, *Prosperity* (n 25).

presented here suggests it is already occurring through B Corporations. Their pro-social orientation is influencing the nature of contracts with other stakeholders such as clients and employees and in some cases even changing industry norms. The contractarian view can help explain this extension of purpose through supply chains and customers. The nexus of contracts view is therefore helpful both theoretically and practically.¹⁰⁷

B Limitations of a contractarian model

Of course there are limitations to a contractarian model of the firm. Power differentials may prevent truly equitable agreements. Here public law, in terms of employment, environment and consumer law can help to create a fairer balance. When it comes to the inclusion of social contracts in the model, these are for the most part unenforceable, founded on trust rather than law, which takes time to build yet can be lost in an instant.¹⁰⁸ Thus these contracts are not so much about protection of stakeholders or providing them with legal rights. They rely on external accountability mechanisms including reputation damage and the B Corp certification process.

Indeed, without the B Corp certification, purpose has the ability to align with either shareholder-primacy or stakeholder theory (as corporate law in Australia is not seen to insist upon or prevent either). What is achieved by the B Corp certification, the French *société à mission* or benefit corporation legislation, is to ensure that corporate purpose is not simply profit-seeking. Without this additional requirement, corporate purpose could be a purely short-term profit-seeking purpose rather than one that prioritises a social or environmental mission.¹⁰⁹ Thus, the point of corporate law reform towards purpose may be to provide this public interest element as one of the many ways that public law can influence the scope of contracts.

¹⁰⁷ Hayden and Bodie (n 84).

¹⁰⁸ Mayer, 'The Future of the Corporation and the Economics of Purpose' (n 1).

¹⁰⁹ Raz (n 1).

If choice of legal structure remains available, contractarian theory also explains the limits of corporate purpose as observed by Davies and others.¹¹⁰ In many companies, shareholders are unlikely to agree to B-Lab style amendments to the constitution. Where there is choice, there will always be a subset of investors whose primary concern is to maximise financial returns.

C Policy implications

A better understanding of the business reasons for implementing corporate purpose can help us in a law and policy sense, to design legal frameworks that foster better corporate behaviour and support sustainable enterprise. B Corps and legal structures such as benefit corporations have been criticised because they do not remove the problems of shareholder primacy — they simply create a two-track system where businesses can choose their level of responsibility.¹¹¹ They will not stop the damage that the current model permits. Commentary in North America around the benefit corporation model questions its necessity and is critical of the consequences of the separation of business into ‘good’ and ‘bad’ streams.¹¹²

Yet, the evidence presented in this article, exploring the commitment, communication and contracting benefits of a purpose-oriented legal structure highlights some of the advantages of the ‘good’ track. Businesses that have chosen to certify as B Corps are very much attracted to the idea of differentiating themselves and the advantages that communicating their purpose can have, especially in the current environment of greenwashing. Murray and Thornsberry although not convinced by the benefit corporation, recognise that it alters external perceptions around the corporation and that this has business value, as evidenced by the number of states and companies that have adopted the benefit corporation structure.¹¹³ In the United States, the

¹¹⁰ Davies (n 105).

¹¹¹ V Baumfield, ‘How Change Happens: The Benefit Corporation in the United States and Considerations for Australia’ in *Creating Corporate Sustainability: Gender as an Agent for Change*, B Sjäfjell and I Fannon (Eds) (Cambridge University Press, 2018) p 188.

¹¹² Yosifon (n 60); Liao (n 64).

¹¹³ Murray (n 61); Thornsberry (n 62).

popularity of benefit corporations is seen to be driven by two factors: the clarity that it gives around directors' duties; and the communication or branding benefits that it provides.¹¹⁴ Kim and Schifeling confirm that B Corp certification provides a way to demonstrate a firm is not greenwashing and importantly it also aligns the firm with the founders' beliefs.¹¹⁵ This article shows how these signals translate into contractual terms that can further the pro-social aims of the enterprise. This suggests that the more mainstream corporate social responsibility becomes, the more companies will see certification or legal entity choice as a method of differentiation. Here we see that the two tracks may be what these pro-social businesses want — they believe in the social movement that is B Lab and the drive towards business for good and wish to commit to this and communicate it clearly to the world. Thus, although it is important to nudge all business towards sustainability and responsibility, it is important to leave options for the most progressive companies to distinguish themselves.

¹¹⁴ M Cho, 'Benefit Corporations in the United States and Community Interest Companies in the United Kingdom: Does Social Enterprise Actually Work' (2016) 37 *Northwestern Journal of International Law and Business* 149; Littenberg, Oldshue and Pifer (n 59).

¹¹⁵ S Kim and T Schifeling, 'Good Corp, Bad Corp, and the Rise of B Corps: How Market Incumbents' Diverse Responses Reinvigorate Challengers' (2022) 67(3) *Administrative Science Quarterly* 674.