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Directors' Duties And Stakeholder Interests: A Convergence Towards A Common Law 'Enlightened Shareholder Value' Model?

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DIRECTORS' DUTIES AND STAKEHOLDER INTERESTS: A CONVERGENCE TOWARDS A COMMON LAW 'ENLIGHTENED SHAREHOLDER VALUE' MODEL?

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Abstract

The recent release of a new 'Statement on the Purpose of a Corporation' by the US Business Roundtable signed by 181 CEOs, who have committed to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders – have reignited the Berle-Dodd debate about whether companies should be accountable to their shareholders or wider stakeholders. This follows similar 2018 corporate governance reforms in the UK, Australia and Singapore. Such reforms appear to denote a shift from a corporate governance model based upon 'shareholder primacy' to one that is more stakeholder-oriented. A closer examination, however, would reveal different regulatory approaches adopted by each jurisdiction with respect to resolving the agency costs between the company and its various constituencies.

Drawing primarily on the experiences of the US, UK, Australia and Singapore, this paper provides a comparative overview of the regulatory developments in these jurisdictions to ascertain how each jurisdiction is moving towards an 'enlightened shareholder value' model in respect of the extent to which directors are required to take into account the interests of the company's stakeholders in corporate decision-making. It discusses the implications of these developments with respect to the potential for convergence towards a new common law 'enlightened shareholder value' model. In this respect, it is argued that we are witnessing the start of a nascent shift toward a new corporate form(s) which reflects varying 'degrees' of stakeholder orientation along a spectrum bookended by the 'shareholder primacy' model on one end, which represents the leitmotif in the common law at least until recently, and the 'shareholder enlightened value' model on the other. On this basis, this challenges the notion of the end of history that had suggested the triumph of the 'shareholder primacy' model as the standard normative corporate form.

I. INTRODUCTION

The Berle-Dodd debate[1] over the objectives of the corporation still resonates in corporate governance debates till this day. The orthodox position – often referred to as the "shareholder primacy" model – is that shareholders are the primary beneficiaries of the company and therefore directors' duties should be exercised in the shareholders' interest. This would require the maximization of shareholder value. Such a model is characteristic of companies with dispersed shareholders often found in common law jurisdictions such as the US and UK (i.e. the Anglo-Saxon "outsider" model).[2] In contrast, the stakeholder "insider" model, which is prevalent in companies in civil law jurisdictions in continental Europe and Asia with concentrated shareholdings, requires directors to take into account not simply shareholders' interests, but the interests of other stakeholders which may affect or be affected by the company, including employees, creditors, customers, suppliers and the wider community.[3] Along with

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[*] Research Associate, Centre for Asian Legal Studies, Faculty of Law, National University of Singapore.
[1] Berle argued that "all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears.": A. A. Berle, Jr., "Adolf A. Berle, "Corporate Powers as Powers in Trust" (1931) 44 Harv L Rev 1049 at 1049. In response, Dodd contended that "If the unity of the corporate body is real, then there is reality and not simply legal fiction in the proposition that the managers of the unit are fiduciaries for it and not merely for its individual members, that they are, in Mr. Young's phrase, trustees for an institution rather than attorneys for the stockholders.": E. Merrick Dodd, Jr., "For Whom Are Corporate Managers Trustees?" (1932) 45 Harvard Law Review 1145 at 1160.
[2] Marina Martynova and Luc Renneboog, "An International Corporate Governance Index" in *The Oxford Handbook of Corporate Governance*, Douglas Michael Wright, et al (eds) (Oxford: Oxford University Press, 2013)
[3] Ibid. Amir N. Licht, "Culture and Law in Corporate Governance" in Jeffery N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) 129 at

the globalization of capital markets and the increasing recognition of issues concerning corporate governance, the "shareholder primacy" model came to be seen as the dominant model for modern corporations.[4] Consequently, Henry Hansmann and Reinier Kraakman, in an article titled "The End of History for Corporate Law," proclaimed that "there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value", with the likely convergence towards this single standard model.[5]

While most extant corporate governance research has been shareholder-centric, contemporary debates in corporate governance have shifted towards the need to balance the needs of multiple stakeholders systematically within an overarching system of governance in light of the collapse of companies like Enron and the financial crisis in 2008 and the increasing recognition of corporate social responsibility.[6] In this regard, the challenge of corporate governance lies in minimizing the agency costs involving the conflict between the company's shareholders and its stakeholders by ensuring that the company does not behave opportunistically towards these stakeholders, such as expropriating creditors, exploiting employees or misleading customers.[7]

Consequently, recent corporate governance reforms in the US and other common law jurisdictions like the UK, Australia and Singapore, in particular the emergence of the "enlightened shareholder value" (ESV) principle, have increasingly challenged the credibility and apparent supremacy of the "shareholder primacy" model and the notion of the "end of history" itself. The ESV principle requires directors to take into account non-shareholder interests as a means of enhancing shareholder value over the long term and was first introduced as a central element in UK corporate governance and has since attracted significant interest in other common law jurisdictions, including the US, Australia, Canada, Hong Kong and South Africa.[8] These developments may be seen to be a response to mitigate the negative externalities brought about by globalization and the excesses of capitalism, which resonates with the current income inequality debates and populist themes in many democracies today.

Drawing primarily on the recent regulatory developments primarily in the US, UK, Australia and Singapore, this paper seeks to ascertain the extent to which each jurisdiction may be moving towards an ESV model in respect of the extent to which directors are required to take into account the interests of the company's stakeholders in corporate decision-making. In this regard, the extent of convergence within corporate law is always difficult to measure[9] and may be separated into convergence in "form" or "function".[10] This paper focuses on the extent of convergence in *form*, or at least a shift, in terms of

143. See Martin Gelter, "The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance" (2009) 50 Harvard International Law Journal 129; Mark Roe, Political Determinants

[4] Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (New York: Routledge, 2013) at 16

[5] Henry Hansmann and Reinier Kraackman, "The End of History for Corporate Law" in Jeffrey N. Gordon and Mark J. Roe (eds), *Convergence and Persistence in Corporate Governance* (Cambridge: Cambridge University Press, 2004) 33 at 33.

[6] Corporate social responsibility is defined by the European Commission as "the responsibility of enterprises for their impacts on society" whereby "[e]nterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders": European Commission, A Renewed European Union Strategy 2011-2014 for Corporate Social Responsibility, COM (2011) 681, para 3.1.

[7] Reinier Kraackman, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford: Oxford University Press, 2017) at 29-30.

[8] Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (New York: Routledge, 2013)

[9] Jeffrey N. Gordon, "Convergence and Persistence in Corporate Law and Governance" in Jeffery N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) 28

[10] Ronald J. Gilson, "Globalizing corporate governance: convergence in form or function" in Convergence and Persistence in Corporate Governance, Jeffrey N. Gordon and Mark J. Roe (eds.) (Cambridge: Cambridge University Press, 2004) 128

the formal rules underlying the director's fundamental fiduciary duty to act *bona fide* in the best interests of the company towards the ESV model. It is argued that we are witnessing the start of a nascent shift toward a new corporate form(s) which reflects varying "degrees" of stakeholder orientation along a spectrum bookended by the "shareholder primacy" model on one end, which represents the leitmotif in the common law at least until recently, and the "shareholder enlightened value" model on the other. On this basis, this challenges the notion of the end of history that had suggested the triumph of the "shareholder primacy" model as the standard normative corporate form.

This paper proceeds as follows: Part II provides a brief overview of the "shareholder primacy" theory and stakeholder theory; Part III discusses the recent key regulatory developments in the US, UK, Australia and Singapore, along with other common law jurisdictions; Part IV ascertains the potential for convergence, or at least a shift from the "shareholder primacy" model, toward the "enlightened shareholder value" model within common law jurisdictions; and Part V concludes.

II. COMPETING THEORIES OF THE FIRM

During the height of the "shareholder primacy" model, Milton Friedman famously said, "There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[11] Importantly, however, he did go on to state that business has an obligation to conform "to the basic rules of the society, both those embodied in law and those embodied in ethical custom."[12] In a similar vein, the contractarian theory of the corporation posits that directors are contractual agents of the shareholders with fiduciary obligations to maximize shareholder wealth.[13] In contrast, the objective of stakeholder theory which is largely attributed to Ed Freeman is to create value for "those who can affect or are affected by [the actions of companies]" – that is, stakeholders, which include customers, employees, suppliers, communities, and creditors.[14] This is similar to the "team production" theory which argues that wealth maximization should not be the overriding concern, and corporate decision-making should balance the interests of all stakeholders, including shareholders, against one another.[15]

The "shareholder primacy" model has continued to be the prevalent theory in academic literature and business practice. It is defended on the basis that it is essential to have a single, measurable corporate objective in order to hold corporate directors accountable. Stephen Bainbridge argues that "[i]f directors were allowed to deviate from shareholder wealth maximization, they would inevitably turn to indeterminate balancing standards, which provide no accountability. As a result, directors could be tempted to pursue their own self-interest."[16] Freeman noted, however, that taking into account stakeholder interests and managing stakeholder relationships is not about corporate social responsibility but because it is necessary in order to maximise profits and for value creation.[17]

Following from the above, the ESV model was developed in the course of the review and reform of the UK Companies Act by the Company Law Review Committee (CLRC) around 2000, which will be elaborated in Part III below. As opposed to a radical departure from the "shareholder primacy" model, the ESV model may be seen as building on the premises of the "shareholder primacy" model by

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[11] Milton Friedman, "The Social Responsibility of Business is to Increase its Profits, *NY Times Magazine* (13 September 1970) 6

[12] Ibid at 6.

[13] Stephen M Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 Nw. U.L.Rev. 547

[14] R. Edward Freeman, et al., *Stakeholder Theory: The State of the Art* (Cambridge: Cambridge University Press, 2010) at 9

[15] Margaret M. Blair and Lynn A. Stout, "A Team Production Theory of Corporate Law" (1999) 85 Virginia Law Review 247

[16] Stephen Bainbridge, "A Duty to Shareholder Value" *New York Times* (16 April 2015).

[17] R. Edward Freeman, et al., *Stakeholder Theory: The State of the Art* (Cambridge: Cambridge University Press, 2010) at 10-12.

recognizing that corporate performance in the long-term depends not simply on capital contribution from shareholders and the management of directors but the company's relationships with its customers, employees, suppliers and the wider community.

Simply put, under the ESV model, directors should have regard to non-shareholder interests, in addition to shareholder interests, *only* as a means of enhancing shareholder value over the long term. On this basis, ESV comprises four elements: (i) directors of a company are required to act *bona fide* in the best interests of the company; (ii) the best interests of the company refers to the enhancing the long-term shareholder value (as opposed to short-term shareholder value maximization); (3) in considering what the best interests of the company are, the directors are to consider the interests of the company's stakeholders (i.e. parties who have an interest in the company's performance and activities), which may include employees, suppliers, customers, creditors, regulators, the government, and the wider community as part of their overriding duty to ensure that the best interests of the company are served; (4) shareholder control and director management of the company are retained.

The features of the ESV model are summarized well by the US Business Roundtable in its announcement in August 2019 of its release of a new "Statement on the Purpose of a Corporation" signed by 181 CEOs as follows:[18]

> "While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders. We commit to:
>
> - Delivering value to our customers. We will further the tradition of American companies leading the way in meeting or exceeding customer expectations.
>
> - Investing in our employees. This starts with compensating them fairly and providing important benefits. It also includes supporting them through training and education that help develop new skills for a rapidly changing world. We foster diversity and inclusion, dignity and respect.
>
> - Dealing fairly and ethically with our suppliers. We are dedicated to serving as good partners to the other companies, large and small, that help us meet our missions.
>
> - Supporting the communities in which we work. We respect the people in our communities and protect the environment by embracing sustainable practices across our businesses.
>
> - Generating long-term value for shareholders, who provide the capital that allows companies to invest, grow and innovate. We are committed to transparency and effective engagement with shareholders."

III. RECENT DEVELOPMENTS IN COMMON LAW JURISDICTIONS

The corporate governance regime under the common law is premised on the principle of "shareholder primacy". The directors of the company, as agents of the shareholders, are subject to the fiduciary duty to act *bona fide* in the best interests of the company (i.e. the "best interests duty"), which has traditionally referred to the interests of the company's shareholders collectively. In practical terms, this often means whether the commercial interests of the company as a corporate entity are advanced as determined subjectively by the board.[19] Whilst a duly-incorporated company is given separate legal personality from its shareholders, shareholders are accorded a pre-eminent position within the company through exclusive participative and interventionist rights, such as the right to vote in general meetings and to appoint and remove a director.[20] As contributors of capital, shareholders were effectively treated

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[18] The Business Roundtable, "Statement on Corporate Governance" (September 1997), http://archives-financialservices.house.gov/media/pdf/032002fr.pdf

[19] *Re Smith and Fawcett, Limited* [1942] 1 Ch 304 (CA) 306

[20] Pearlie Koh and Hwee Hoon Tan, "Directors' Duties in Singapore: Law and Perceptions" in Asian Journal of Comparative Law (Forthcoming).

as the company's "owners" of the company[21] for whose ultimate benefit the company is run.[22] In this connection, this approach towards directors' duties has been followed in other common law jurisdictions such as Australia and Singapore, the company law of which is based on English common law.[23]

Further, under the business judgment rule, the courts generally do not interfere with the commercial decisions of the board so long as it acts in a *bona fide* manner. Except in the case where the company is insolvent or near insolvency, in which case, creditors' interests need to be taken into account, directors are permitted but are not legally required to consider the interests of other stakeholders of the company.[24] This has often been taken to mean that directors are permitted, or even required, to pursue short-term profit maximization for the benefit of the company's shareholders. Subsequent cases, however, have deviated from this narrow approach of profit maximization. The courts have thus recognized that what amounts to "the company's interests" is likely to vary in different contexts[25] and may be distinct from the shareholders' interests.[26] Some have, therefore, questioned whether the common law actually imposes a legal obligation on directors to maximize shareholder value.[27] Arguably, the common law has always been acknowledged that the reality of corporate decision-making in promoting the interests of the company often requires directors to consider and balance a wide range of interests.[28] On this basis, the best interests duty is not incompatible with the duty to have regard to the interests of stakeholders so long as directors do so with the objective of advancing the best interests of the company as a corporate entity.

A. United States

In the United States, which is often associated with the UK model of "shareholder primacy",[29] at least 41 states have adopted constituency or stakeholder statutes which expressly authorize directors to consider stakeholder interests, including employees, customers, suppliers, creditors and local communities and typically permits the board to prioritize the shareholders' long-term financial interests over short-term shareholder value.[30] Further, under Delaware law, which is the law of incorporation for most of the largest companies in the US, shareholder value maximization by the board is not required save in certain circumstances such as takeover situations.[31] Over the past decades, the political climate has also changed as a result of the economic crisis and globalization, with increasing negative sentiment

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[21] *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 (Court of Chancery), 203.
[22] *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 (CA) 291.
[23] Pearlie Koh and Hwee Hoon Tan, "Directors' Duties in Singapore: Law and Perceptions" in Asian Journal of Comparative Law (Forthcoming).
[24] Lornho Ltd v Shell Petroleum Co Ltd [1980] 1 WLR 627
[25] *Brady v Brady* [1988] BCLC 20 at 40.
[26] *Fulham Football Club Ltd v Cabra Estates plc* [1994] 1 BCLC 363 at 379
[27] D Attenborough, "How Directors Should Act When Owing Duties to the Companies' Shareholders: Why We Need to Stop Applying Greenhalgh" (2009) International Company and Commercial Law Review 339 at 343-346. He asserts that "[a]s a positive matter, UK company law does not and never has imposed a legal obligation to maximize shareholder value".
[28] See Richard Williams, "Enlightened Shareholder Value in UK Company Law" (2012) 35(2) UNSW Law Journal 360.
[29] The US model may be more accurately described as a "director primacy" system given that directors are relatively insulated from shareholder pressure compared to the UK. See Stephen M. Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 Nw. U. L. Rev. 547
[30] David Millon, "Enlightened shareholder value, social responsibility and the redefinition of corporate purpose without law" in P. M. Vasudev and Susan Watson (eds.), *Corporate Governance after the Financial Crisis* (Cheltenham: Edward Elgar Pub., 2012) at 73
[31] See for example *Paramount Communications, Inc. v Time* 571 A.2d 1140 (Del. 1989) and *Revlon, Inc. v MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986). See also *Dodge v Ford* 204 Mich. 459, 170 N.W. 668 (1919); Cynthia A. Williams, "Corporate Social Responsibility and Corporate Governance" in Jeffery N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) 634 at 674.

over the loss of jobs to foreign countries and the amassing of wealth in the hands of managers.[32] Katharine Jackson argues that "[i]t is, therefore, realistic to expect that the American public corporation can once again be bent by society to serve some social purposes."[33]

In this light, in addition to the release of a new "Statement on the Purpose of a Corporation" by the US Business Roundtable in August 2019, the Accountable Capitalism Act was introduced in the US Senate by Democratic frontrunner Elizabeth Warren in 2018 and it proposes that corporations with more than $1 billion in annual revenue be required to obtain a federal corporate charter that would require directors to consider the interests of all major corporate stakeholders in company decisions. In 2015, the Securities Exchange Commission adopted a final rule pushed by labor unions pursuant to section 953(b) of the Dodd-Frank Act that requires public companies to disclose the ratio of the compensation of its chief executive officer (CEO) to the median compensation of its employees from 2018 unless excluded, along with similar developments in the UK.[34] Despite the US' historical antipathy toward "socialism" (as used here in the broad sense), the recent Democratic debates have revealed how populist pressures have moved the party's center of gravity left, with a greater emphasis on the role of the state in regulating market economies, protecting the weakest sectors of society, reducing poverty and inequality under the capitalist framework, protecting the environment and strengthening labor unions. This parallels similar historical developments in Europe, and is in stark contrast with the traditional deregulated, everyone-for-himself, free-market American model, which had contributed to economic development in the US since the 1950s.

B. United Kingdom

The UK is one of the few jurisdictions which has imposed a prescriptive requirement reflecting the ESV principle in the form of a legislative requirement under section 172 of the Companies Act 2006, which came into force in 2007 following a wide-ranging review of UK company law by the CLRC.[35] The provision states:[36]

> "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
>
> (3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

In its review, the CLRC acknowledged that the common law required directors to operate companies for the benefit of shareholders but argued that the overall objective of wealth generation and competitiveness for the benefit of all can best be achieved through:

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[32] Katharine V. Jackson, "Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis" at 329 and 352

[33] Ibid.

[34] SEC, Pay Ratio Disclosure, 17 C.F.R. Parts 229 and 249 (2015).

[35] Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Developing the Framework (London, 2000).

[36] The previous legislative formulation under section 309 of the Companies Act 1985 which was repealed had provided that the matters to which directors are to have regard to "include the interests of the company's employees in general, as well as the interests of its members".

(i) an "inclusive" approach to directors' duties which requires directors to have regard to all the relationships on which the company depends and to the long and short term implications of their actions, with the view to achieving company success for the benefit of shareholders as a whole; and

(ii) wider public accountability through improved company reporting, which for public and very large private companies will require the publication of a broad operating and financial review explaining the company's performance, strategy and relationships with employees, customer and suppliers as well as the wider community.[37]

In doing so, it proposed the introduction of the ESV principle, under which directors are obliged "to achieve the success of the company for the benefit of shareholders by taking proper account of all the relevant considerations for that purpose. These include a proper balanced view of the short and long term; the need to sustain effective ongoing relationships with employees, customers, suppliers and others; and the need to maintain the company's business reputation and to consider the impact of its operations on the community and the environment."[38] The UK government accepted the proposal and stated that the ESV principle "is most likely to drive long-term company performance and maximise overall competitiveness and wealth and welfare for all" and added that the statement of duties "reflects modern business needs and wider expectations of responsible business behavior".[39]

Crucially, the CLRC rejected the stakeholder theory as manifested in the "pluralist" approach, under which directors would "become empowered, or obliged, to set interests of others above those of shareholders where wider interests required".[40] This was on the basis that the "pluralist" approach would, *inter alia*, confer an unpoliced policy discretion on directors, constitute an attempt to achieve external benefits often better secured through specific legislation, and enable directors to frustrate takeover bids against the wishes of shareholders where the wider public interest requires it.[41] Further, a "pluralist" duty would undermine the duty of loyalty to the company, the duty to comply with the limits and purposes as set out in the company's constitution, and the institutional relationship between directors and shareholders.[42]

Further, the Companies Act 2006 introduced the requirement for certain companies to produce a business review, which since been replaced by the requirement by companies not subject to the small companies' regime to produce a strategic report as part of the director' report "to inform members of the company and help them assess how the directors have performed their duty under section 172 (duty to promote the success of the company)".[43] The business review must contain "a fair review of the company's business" which must, "to the extent necessary for an understanding of the development, performance or position of the company's business, include — (a) analysis using financial key performance indicators, and (b) where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters",[44] and in the case of a quoted company must include, "information about — (i) environmental matters (including the impact of the company's business on the environment), (ii) the company's employees, and (iii) social,

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[37] Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Developing the Framework (London, 2000), Executive Summary, para 7.
[38] Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Developing the Framework (London, 2000), Chapter 2, para 2.19
[39] Department of Trade and Industry, Company Law Reform White Paper (London 2005) at 20-21
[40] Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Developing the Framework (London, 2000), Chapter 2, para 2.12
[41] Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Developing the Framework (London, 2000), Chapter 3, para 3.24
[42] Company Law Review Steering Group, Modern Company Law for a Competitive Economy: Developing the Framework (London, 2000), Chapter 2, para 3.27-3.31
[43] Section 414C(1)
[44] Section 414C(4)

community and human rights issues, including information about any policies of the company in relation to those matters and the effectiveness of those policies."[45]

Notwithstanding the new legislative formulation, it has been argued that it is by no means certain that this has changed the extent to which stakeholder interests have been taken into account, with some suggesting that the contrary has been achieved, with the subjective nature of the duty embedding the concept of "shareholder primacy" more firmly than before.[46] This is not least due to the fact that this duty is not enforceable by stakeholders and only shareholders can pursue a derivative action[47] or petition for a court order on the basis of unfair prejudice.[48] Arguably, such criticisms are mistaken given that the ESV principle was not intended to displace the overarching director's duty of advancing corporate objective of advancing the interests of the company, which for all intents and purposes in most cases refers to the maximization of shareholder value. Instead, it simply requires that the board takes into account stakeholder interests, in addition to shareholders' interests. As the Explanatory Notes to section 172 provide, "It will not be sufficient to pay lip service to the factors, and, in many cases the directors will need to take action to comply with this aspect of the duty. At the same time, the duty does not require a director to do more than good faith and the duty to exercise reasonable care, skill and diligence would require, nor would it be possible for a director acting in good faith to be held liable for a process failure which would not have affected his decision as to which course of action would best promote the success of the company."[49]

Nevertheless, it is not entirely clear whether the intent of the provision has been achieved. The UK government has reported that the "changes thus far appear to represent more of an evolution rather than revolution, but changes have placed renewed emphasis on directors' responsibilities and on planning for the longer term."[50] Subsequent case law has suggested that the provision serves as a reminder that directors should at least give proper consideration to the interests of stakeholders even if ultimately the board needs to determine what is in the best interests of the company for the benefit of its members.[51]

More recently, in a further shift towards a more stakeholder-oriented model, Theresa May expressed apparent support for some form of co-determination in the UK during her inaugural speech as incoming British Prime Minister in July 2016:[52] Such a development appears to emulate practices in civil law jurisdictions, notably Germany, which requires 50 percent employee representation on the supervisory boards of large corporations. The new UK Code of Corporate Governance, which took effect from 1 January 2019, has reaffirmed the ESV principle by highlighting the importance of promoting "the long-term sustainable success of the company, generating value for shareholders and contributing to wider

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[45] Section 414C(7)(b)
[46] David Collison, *et al.*, "Financialization and Company Law: A Study of the UK Company Law Review" (2014) 25 Critical Perspectives on Accounting 5; Andrew Keay, The Enlightened Shareholder Value Principle and Corporate Governance (New York: Routledge, 2013) at 289-292.
[47] Section 260
[48] Section 994
[49] Paragraph 328
[50] Samantha Fettiplace and Rebecca Addis, "Department for Business, Innovation and Skills: Evaluation of the Companies Act 2006, Volume One" (2 August 2010) at 163, online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31655/10-1360-evaluation-companies-act-2006-volume-1.pdf
[51] *R (People & Planet) v. HM Treasury* [2009] EWHC 3020 (Admin); *Shepherd v Williamson* [2010] EWHC 2375 (Ch)
[52] "I want to see changes in the way that big business is governed. The people who run big businesses are supposed to be accountable to outsiders, to non-executive directors, who are supposed to ask the difficult questions, think about the long term and defend the interests of shareholders… In practice, they are drawn from the same narrow social and professional circles as the executive team and – as we have seen time and time again – the scrutiny they provide is just not good enough. So if I'm prime minister, we're going to change that system – and we're going to have not just consumers represented on company boards, but workers as well." Andrew Sparrow, Jessica Elgot and Rob Davies, "Theresa May to Call for Unity, Equality and Successful Exit from EU" *The Guardian* (11 July 2016)

society."[53] It has introduced a new requirement that: "In order for the company to meet its responsibilities to shareholders and stakeholders, the board should ensure effective engagement with, and encourage participation from, these parties."[54] The board should also "ensure that workforce policies and practices are consistent with the company's values and support its long-term sustainable success" and the workforce "should be able to raise any matters of concern."[55] Pursuant to this, the "board should understand the views of the company's other key stakeholders and describe in the annual report how their interests and the matters set out in section 172 of the Companies Act 2006 have been considered in board discussions and decision-making."[56]

To engage with the workforce, the code prescribes that the company should either have a director appointed from the workforce, a formal workforce advisory panel or a designated non-executive director, or otherwise explain what alternative arrangements it has in place and why it considers them to be effective.[57] The code also provides that there "should be a means for the workforce to raise concerns in confidence and – if they wish – anonymously. The board should routinely review this and the reports arising from its operation. It should ensure that arrangements are in place for the proportionate and independent investigation of such matters and for follow-up action."[58] The UK Code of Corporate Governance applies to companies on a premium listing on a "comply-or-explain" basis.[59]

Further, the UK parliament has introduced Companies (Miscellaneous Reporting) Regulations 2018, under which large companies must include a statement in their strategic report of how the directors have complied with their duty to have regard to the matters in section 172(1) (a)-(f) of the Companies Act 2006 when performing their duties., which must be made available on a website maintained by or on behalf of the company.[60] In addition, companies with more than 250 UK employees would be required to include a statement in their directors' report summarising how the directors have engaged with employees, how they have had regard to employee interests and the effect of that regard, including on the principal decisions taken by the company in the financial year.[61] Large companies, being those which meet two of the three following requirements: turnover of more than £36 million; balance sheet total of more than £18 million; and more than 250 employees, would need to include a statement in their directors' report summarising how the directors have had regard to the need to foster relationships with suppliers, customers and others, and the effect of that regard, including in relation to principal decisions taken during the financial year. In view of the foregoing reforms, it appears that the UK is looking to inject new life into and strengthen the implementation of the ESV principle in view of earlier criticisms of its lack of efficacy.

C. Australia

As with the UK, Australia's corporate governance regime rests on the principle of "shareholder primacy" and the best interests duty[62] is generally correlated with the duty to act in interests of the shareholders. However, the court *in Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* observed that:

> "*This does not mean that the general body of shareholders is always and for all purposes the embodiment of 'the company as a whole'. It will depend on the context, including the type of company and the nature of the impugned activity or decision. And it may also depend on whether the company is a thriving ongoing entity or whether its continued existence is problematic.* In my view, the interests of shareholders and the

[53] Principle A
[54] UK Corporate Governance Code (July 2018) issued by the Financial Reporting Council, Principle D.
[55] Principle E
[56] *Ibid.*, Provision 5.
[57] *Ibid.*
[58] Provision 6
[59] FCA Handbook, LR 9.8.6(5)-(6)
[60] Regulations 4-5
[61] Regulation 13
[62] Corporations Act 2001, section 181

> company may be seen as correlative not because the shareholders are the company but, rather, because the interests of the company and the interests of the shareholders intersect … It is, in my view, incorrect to read the phrase 'acting in the best interests of the company' and 'acting in the best interests of the shareholders' as if they meant exactly the same thing … it is almost axiomatic to say that the content of the duty may (and usually will) include a consideration of the interests of shareholders. *But it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored.*"

Therefore, when the company is financially distressed the director has the duty to have regard to the interests of creditors, even though this duty is owed to the company.[63] In recent times, however, there has been increasing public debate as to whether directors should have regard to the interests of a wider class of stakeholders, especially after the controversial restructuring of James Hardie Ltd in the late 1990s for the purpose of minimizing the company's exposure to liabilities arising from the production and distribution of asbestos products on the basis that this was to the benefit of the company's shareholders.[64]

Subsequently, the Corporations and Markets Advisory Committee (CAMAC) was requested by the Australian government in 2005 to consider and report on, inter alia, whether the Corporations Act be revised to clarify the extent to which directors may take into account, or be required to take into account, the interests of specific classes of stakeholders or the broader community when making corporate decisions. In its report, CAMAC stated:[65]

> "The environmental and social matters referred to in the debate on corporate social responsibility are really factors that directors should already be taking into account in determining what is in the best interests of their corporation in its particular circumstances…The Committee considers that the current common law and statutory requirements on directors and others to act in the best interests of their companies…are sufficiently broad to enable corporate decision-makers to take into account the environmental and other social impacts of their decisions, including changes in societal expectations about the role of companies and how they should conduct their affairs."

Crucially, it left the door open for further development of the law by the courts to take into account stakeholders' interests: "the courts, through their interpretation of the law, including the requirement in s 181 of the Corporations Act for directors and others to act in the 'best interests of the company', can assist in aligning corporate behavior with changing community expectations."[66]

Prior to the CAMAC report issued in 2006, a parallel inquiry was conducted by the Parliamentary Joint Committee on Corporations and Financial Services (PJC) on the same issues. The PJC recommended the "enlightened self-interest" interpretation of directors' duties, under which directors may consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation.[67] It stated:[68]

> "The committee considers that an interpretation of the current legislation based on enlightened self-interest is the best way forward for Australian corporations. There is nothing in the current legislation which genuinely constrains directors who wish to contribute to the long term development of their corporations by taking account of the interests of stakeholders other than shareholders. An effective director will realise that the wellbeing of the corporation comes from strategic interaction with outside stakeholders in order to

[63] *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722

[64] Jason Harris, Anil Hargovan and Michael Adams, *Australian Corporate Law* (Chatswood NSW: LexisNexis, 2018) at 445-446

[65] Corporations and Markets Advisory Committee, "The Social Responsibility of Corporations Report" (December 2006) at para 3.12

[66] Ibid.

[67] Parliamentary Joint Committee on Corporations and Financial Services, "Corporate responsibility: Managing risk and creating value" (June 2006) at para 4.32

[68] Ibid at para 76-4.77

> attract the advantages described earlier in this chapter. The committee considers that more corporations, and more directors, should focus their attention on stakeholder engagement and corporate responsibility. However it is clear from this chapter that any hesitation on the part of corporate Australia does not arise from legal constraints found in the Corporations Act. As the problem is not legislative in nature, the solution is unlikely to be legislative in nature."

While this did not bring about legislative changes, the inquiries indicated that directors are expected to take into account the interests of wider stakeholders in their decision-making and consequently "softened" the concept of shareholder primacy.[69] In fact, in an empirical study conducted after the inquiries, it was found that 94.3 per cent of directors believed that the existing law of directors' duties allows them to take into account the interests of stakeholders other than shareholders while 55 per cent believed that acting in the best interests of the company means balancing the interests of all stakeholders, even though the company and shareholders were ranked highest in priority.[70]

Further, Australia's current third edition of the Corporate Governance Principles and Recommendations, which applies to listed companies[71] on an "if not, why not" basis, sets out stakeholder interests as part of the requirements by the listed entity to act ethically and responsibly and establish a sound risk management framework.[72] In a further shift towards a more stakeholder-oriented model, the ASX Corporate Governance Council in 2018 proposed that the Corporate Governance Principles and Recommendations be amended to set out the requirement for the listed entity to have regard to the views and interests of "a broader range of stakeholders" as part of its "social licence to operate" and the requirement to instil and reinforce a culture "of acting awfully, ethically and in a socially responsible manner", which would include adopting a code of conduct for its directors, senior executives and employees, a whistleblower policy and an anti-bribery policy.[73] Apart from the disclosure requirements under the Corporate Governance Principles and Recommendations,[74] sustainability reporting is generally voluntary[75] save for certain reporting requirements set out in the Corporations Act.[76]

D. Singapore

Under Singapore law, the requirement for a director to "act honestly" under section 157(1) of the Companies Act has been held to enshrine the best interests duty,[77] which has traditionally referred to the interests of the company's shareholders collectively.[78] In practical terms, this often means whether the commercial interests of the company as a corporate entity are advanced as determined subjectively by the board.[79] The Companies Act, however, permits, but does not prescribe, directors to have regard to "the interests of the company's employees generally, as well as the interests of its members".[80] Except

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[69] Alice Klettner, Thomas Clarke and Michael Adams, "Corporate Governance Reform: An Empirical Study of the Changing Roles and Responsibilities of Australian Boards and Directors" (2010) 24 Australian Journal of Corporate Law 148

[70] Shelley Marshall and Ian Ramsay, "Stakeholders and Directors' Duties: Law, Theory and Evidence" (2012) 35 UNSW Law Journal 291

[71] Listing Rule 4.10.3

[72] Corporate Governance Principles and Recommendations (3rd edition) issued by the ASX Corporate Governance Council, Principles 3 and 7.

[73] Corporate Governance Principles and Recommendations (4th edition, Consultation draft) issued by the ASX Corporate Governance Council, Principle 3.

[74] See in particular Recommendation 7.4

[75] See Parliament of Australia, "Sustainability Reporting" (19 November 2010) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/ClimateChangeold/responses/economic/sustainability

[76] Sections 299(1)(f) and 299A(1)(c)

[77] *Ho Yew Kong v Sakae Holdings Ltd* [2018] 2 SLR 333; [2018] SGCA 33 at [134].

[78] *Re S Q Wong Holdings (Pte) Ltd* [1987] SLR(R) 286; [1987] SGHC 58 at [36].

[79] *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] 4 SLR(R) 162; [2004] SGHC 158; *ECRC Land Pte Ltd v Ho Wing On Christopher* [2004] 1 SLR(R) 105.

[80] Companies Act, section 159.

in the case where the company is insolvent or near insolvency, in which case, creditors' interests need to be taken into account,[81] directors are not legally required to consider the interests of other stakeholders of the company. The courts have, however, recognized that what amounts to "the company's interests" does not simply mean profit maximization or profit maximization by any means.[82] Directors may also prefer the company's interests "as a commercial entity over the interests of the shareholders and employees as individuals".[83] This is reflected in a recent study which found that a large majority of directors in Singapore surveyed disagreed that the best interests duty required a director "to consider only the interests of the shareholders", with a similar majority agreeing that a "director is permitted to take into account the interests of stakeholders other than shareholders when performing this functions".[84]

Following the recent review of the Singapore Code of Corporate Governance by the Corporate Governance Council, the Monetary Authority of Singapore (MAS) issued the revised Code of Corporate Governance on 6 August 2018, which will take effect for annual reports covering financial years commencing from 1 January 2019. The 2018 code, which applies to Singapore-listed companies on a "comply-or-explain" basis, has introduced a new principle as follows: "The Board adopts an inclusive approach by considering and balancing the needs and interests of material stakeholders, as part of its overall responsibility to ensure that the best interests of the company are served."[85] As stated in the consultation paper issued by the MAS, a company's stakeholder engagement with respect to its "ability to foster and maintain effective relationships with not just shareholders but also other stakeholders such as employees, customers, suppliers, creditors, regulators, and the broader community" influences its long-term success.[86] In this regard, the Consultation Paper to the Code of Corporate Governance made reference to the G20/OECD Principles of Corporate Governance (2015), as well as Australia's corporate governance code, amongst others.[87]

The requirement under 2018 code for the board to have regard to the interests of material stakeholders, however, is arguably circumscribed by the vague nature of the principle – it is not entirely clear what "considering and balancing the needs and interests of material stakeholders" would entail in practice. Further, notwithstanding the broad nature of the Stakeholder Principle, the supporting provisions and Practice Guidance appear to limit its potential scope by requiring only companies to put in place means by which they may engage and communicate with their material stakeholders from an investor or public relations perspective.[88] When viewed in light of comparative developments, this requirement contemplates less stakeholder participation or board accountability to stakeholders as compared with the corresponding requirements in the UK and Australia. Instead, stakeholder engagement pursuant to the 2018 code is stated by the Corporate Governance Council to serve as a "complement" to and "form part of the basis of" companies' sustainability reports;[89] on this basis, it may be viewed as an extension of a company's existing disclosure requirements under the sustainability reporting framework with respect to the manner in which its business is conducted with respect to environmental, social and governance factors.[90]

Further, under the revised Listing Manual, listed companies are now required to comply with the principles of the 2018 code or where their practices vary from any provisions therein, to "explicitly state, in its annual report, the provision from which it has varied, explain the reason for variation, and

[81] *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089; [2010] SGCA 31.
[82] *Ho Kang Peng v Scintronix Corp Ltd* [2014] 3 SLR 329 at [40].
[83] *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2010] SGHC 163 at [162].
[84] Pearlie Koh and Hwee Hoon Tan, "Directors' Duties in Singapore: Law and Perceptions" in Asian Journal of Comparative Law (Forthcoming).
[85] Code of Corporate Governance (6 August 2018), Principle 13.
[86] Consultation Paper on Recommendations of the Corporate Governance Council, issued 16 January 2018 at 18.
[87] *Supra* note 2.
[88] *Supra* note 1, Provisions 13.1-13.3; Practice Guidance issued 6 August 2018, Practice Guidance 13.
[89] Response to Feedback Received on Recommendations of the Corporate Governance Council, issued 6 August 2018 at 21; Practice Guidance issued 6 August 2018, Practice Guidance 1.
[90] Rules 711A and 711B of the Mainboard Rules; Practice Note 7.6 Sustainability Reporting Guide.

explain how the practices it had adopted are consistent with the intent of the relevant principle".[91] Such disclosures may make companies more responsive to the concerns of influential stakeholders and lead to positive improvements in corporate behaviour, even if in practical terms, such results may be limited as the 2018 code is not enforceable in itself and the board is ultimately answerable to the company's shareholders and would therefore be naturally driven by the company's financial results and shareholder value as the primary factor in its commercial decision-making.

E. Other Common Law Jurisdictions

Amongst the common law jurisdictions, Canada was the first to grant legislative recognition to non-shareholder constituencies with respect to the remedies available under the Canada Business Corporations Act, which imposes the duty of directors and officers to "act honestly and in good faith with a view to the best interests of the corporation".[92] The Supreme Court of Canada has recognized that, in determining the nature of the best interests of the corporation, the directors may be obliged to consider various other factors, apart from shareholder value maximization "may be relevant in determining what directors should consider in soundly managing with a view to the best interests of the corporation" and "it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment".[93]

There has also been a discernible shift towards a model stakeholder-oriented corporate model in other common law jurisdictions. During the statutory reforms in India in 2013, for example, section 166(2) of the Companies Act, 2013 was enacted, which reads: "A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment."[94] In South Africa, the Department of Trade and Industry published a policy paper which proposed that "a company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies".[95] The Companies Act,[96] however, which came into force in 2011, contains the traditional director's duty to act "in the best interests of the company", but commentators have argued that when read in accordance with the legislative purpose of reaffirming "the concept of the company as a means of achieving economic and social benefits",[97] the duty should be interpreted to include the interests of stakeholders.[98]

Similarly, Malaysia's Companies Act was amended in 2007 and requires the director to exercise his powers "for a proper purpose and in good faith in the best interest of the company",[99] prior to which the Corporate Law Reform Committee took the ESV approach in its review and stated that it "supports the proposition that a company must be a good corporate citizen and for the long-term, sustainability of a company must foster a relationship with its stakeholders," but was "of the view that social obligations

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[91] Rule 710 of the Mainboard Rules and Catalist Rules.

[92] P.M. Vasudev, "The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward" (2012) 41 Hofstra Law Review 399

[93] *Peoples Department Stores Inc. (Trustee of) v. Wise* (2004), 244 D.L.R. (4th) 564 (S.C.C.) at para 24; *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 at para. 66

[94] Mihir Naniwadekar and Umakanth Varottil, "The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis", CLB Working Paper Series, No.16/03, August 2016, http://law.nus.edu.sg/clb/wps.html.

[95] Department of Trade and Industry, "South African Company Law for the 21st Century Guidelines for Corporate Law Reform" (May 2004) at 26

[96] Act no. 71 of 2008

[97] Section 7(d)

[98] Sulette Lombard and Tronel Joubert, "The Legislative Response to the Sharheolders v Stakeholders Debate: A Comparative Overview" (2014) 14 Journal of Corporate Law Studies 211 at 221

[99] Section 213(1)

of the company should not be incorporated in the Companies Act 1965".[100] In the new Malaysian Code on Corporate Governance, which took effect in 2017 and applies to listed companies on an "apply or explain an alternative" basis and to non-listed entities including state-owned enterprises, small and medium enterprises (SMEs) on a recommendatory basis, states that "[t]he board is collectively responsible for the long-term success of a company and the delivery of sustainable value to its stakeholders" and "should set the company's values and standards, and ensure that its obligations to its shareholders and other stakeholders are understood and met."[101]

IV. PROSPECTS FOR CONVERGENCE TOWARDS A COMMON LAW ESV MODEL

There are a number of factors that point towards the trend towards a more stakeholder-oriented model in common law jurisdictions. First, the role of "global governance" standards by organizations such as the Organisation for Economic Co-operation and Development (OECD) and Financial Stability Board (FSB) have played an influential role towards harmonizing corporate governance reforms at an international level especially after the Asian financial crisis in 1997-1998 and global financial crisis in 2008-2009.[102] The G20/OECD Principles of Corporate Governance (2015), for example, states that "The board is not only accountable to the company and its shareholders but also has a duty to act in their best interests. In addition, boards are expected to take due regard of, and deal fairly with, other stakeholder interests including those of employees, creditors, customers, suppliers and local communities. Observance of environmental and social standards is relevant in this context."[103]

Second, the increasing recognition of corporate social responsibility has contributed to greater stakeholder consciousness amongst corporations. As Cynthia Williams and John Conley argued, institutional pressures demanding greater disclosure of corporate social and environmental information have contributed to the breakdown of the historical unified Anglo-American "shareholder primacy" model and the convergence towards a more stakeholder-oriented model centering around the UK's ESV model.[104]

Third, the previous sharp distinction between shareholder and stakeholder models, generally associated with common law and civil law jurisdictions, is also collapsing as globalization and increasing cross-border mergers and investments mean that multinational companies do not simply belong to one of these models but have to incorporate elements of both models.[105] Fourth, there has been growing public discontent over the challenges posed by globalization and the excesses of capitalism which has led to job losses and wealth concentration that has arguably led to many populist movements we witness today. This has arguably led to a paradigm shift in the way we view companies and their relationships with stakeholders today. Google, for example, has had to contend with competing demands from its employees and profit maximization over the issue of whether it should create a censorship search engine

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[100] Corporate Law Reform Committee, "A Consultative Document On Clarifying and Reformulating On Clarifying and Reformulating the Directors the Directors' Role and Duties" (August 2006) at para 4.7

[101] Securities Commission, "Malaysian Code of Corporate Governance" (April 2017), Principle A

[102] Jeffrey N. Gordon, "Convergence and Persistence in Corporate Law and Governance" in Jeffery N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) 28 at 47-51

[103] OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris. http://dx.doi.org/10.1787/9789264236882-en, Principles IV and VI. See also Financial Stability Board, "Thematic Review on Corporate Governance: Peer Review Report" (28 April 2017), http://www.fsb.org/2017/04/thematic-review-on-corporate-governance/; Basel Committee on Banking Supervision, "Corporate governance principles for banks" (July 2015), https://www.bis.org/bcbs/publ/d328.pdf

[104] Cynthia A. Williams; John M. Conley, An Emerging Third Way - The Erosion of the Anglo-American Shareholder Value Construct (2005) 38 Cornell Int'l L.J. 493

[105] Mathias M. Siems, "Taxonomies and Leximetrics" in Jeffery N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018)

in its expansion in China, the world's biggest internet market.[106] Facebook has also been criticized for putting profits over liberal democracy for alleged corporate lobbying might to deflect responsibility for the spread of inflammatory content amidst allegations that Russian manipulation of the 2016 US elections.[107]

Finally, it may also be argued that the shift towards a less shareholder-centric model is simply an acknowledgment of modern business reality and practices. Jack Welch, the former CEO of GE and long-time proponent of shareholder value maximization, declared in 2009 that shareholder value is "the dumbest idea in the world. Shareholder value is a result, not a strategy... your main constituencies are your employees, your customers and your products…managers and investors should not set share price increases as their overarching goal" and added that "short-term profits should be allied with an increase in the long-term value of a company."[108] In a Harvard Business Review article by two distinguished Harvard Business School professors, shareholder value maximization is described as "flawed in its assumptions, confused as a matter of law, and damaging in practice." Instead, the "interests of the corporation are distinct from the interests of any particular shareholder or constituency group."[109] In this light, the ESV model may be seen as a natural evolution of the traditional common law "shareholder primacy" model in line with changing times.

While there are indications of a common trend toward the ESV model as a general principle at least on a teleological level with the UK at the forefront, there are also concurrent factors which lean towards divergence in terms of the extent and pace of reforms and the type of regulatory approach undertaken by each jurisdiction towards any shift towards the ESV model. This is seen in the regulatory reforms undertaken in the US, UK, Australia and Singapore thus far. For each jurisdiction, we can identify disclosure or sustainability reporting as a common regulatory requirement or practice at least for listed companies.

Unlike the US and Singapore, however, the proposed reforms in Australia go further than simply recommending corporate engagement with stakeholders by including putting in place internal company policies, such as a code of conduct for directors and employees to reinforce an ethical and socially responsible culture and a risk management framework to manage environmental and social risks. The UK has in turn placed the duty for directors to consider stakeholders' interests on a firm statutory footing and has mandated extensive disclosures for compliance with this duty and has also recommended some form of codetermination on the boards of listed companies. It is also likely that each jurisdiction would have its own reasons and priorities with respect to a shift towards an ESV model. The differences in the

[106] Julia Carrie Wong, "Google employees sign letter against censored search engine for China" (27 November 2018), https://www.theguardian.com/technology/2018/nov/27/google-employees-letter-censored-search-engine-china-project-dragonfly

[107] Rana Foroohar, "Facebook put profits above care for liberal democracy" The Financial Times (18 November 2018)

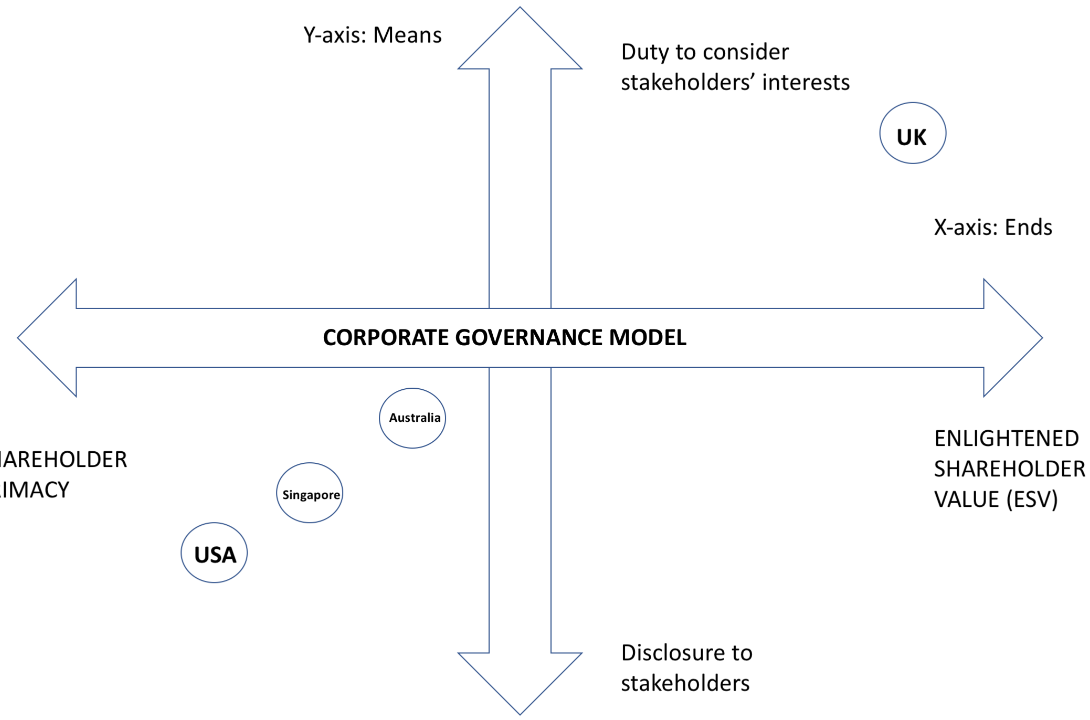
[108] Francesco Guerrera, "Welch condemns share price focus" The Financial Times (13 March 2009), https://www.ft.com/content/294ff1f2-0f27-11de-ba10-0000779fd2ac#axzz1eiLpL2PZ

[109] Joseph L. Bower and Lynn S. Paine, "The Error at the Heart of Corporate Leadership" (May-June 2017) Harvard Business Review, https://hbr.org/2017/05/the-error-at-the-heart-of-corporate-leadership

pace and extent of reforms may be attributed to political differences,[110] differences in ownership patterns[111] and types of shareholders,[112] and the result of path dependencies.[113]

Going forward, it is possible to posit that differences in corporate governance systems, even between common law and civil law countries, are likely to be of degree than structurally different conceptions.[114] On this basis, it may be possible to hypothesise that we are witnessing the start of a nascent shift toward a new corporate form(s) which reflects varying 'degrees' of stakeholder orientation along a spectrum bookended by the 'shareholder primacy' model on one end, which represents the leitmotif in the common law at least until recently, and the 'shareholder enlightened value' model on the other. Here, if we analogise from Stephen Bainbridge's distinction between the "means" and "ends" of corporate governance[115] and regard the ESV model as the "ends" which the current ongoing reforms are seeking to achieve and the varying regulatory strategies adopted in each jurisdiction as the "means" to which we may achieve such "ends", we may view the current trends in the US, UK, Australia and Singapore (at least in the case of listed companies) using the following illustration:

FIGURE 1



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[110] Mark J. Roe, *Political determinants of corporate governance: political context, corporate impact* (Oxford: Oxford University Press, 2003)
[111] See Martin Gelter, "The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance" (2009) 50 Harvard International Law Journal 129
[112] Jeffery Gordon argues that the stability-minded shareholders, such as family groups, governments and institutional investors may prefer a long-term approach in the way companies are run, as opposed to efficiency-minded shareholders which would be more profit-minded and cost conscious. Jeffrey N. Gordon, "Convergence and Persistence in Corporate Law and Governance" in Jeffery N. Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) 28 at 54
[113] Lucian Arye Bebchuk and Mark J. Roe, "A Theory of Path Dependence of Corporate Ownership and Governance" (1999) 52 Stanford Law Review 775
[114] Mathias M. Siems, *Convergence in Shareholder Law* (Cambridge: Cambridge University Press, 2008) at 396
[115] Stephen M. Bainbridge, "Director Versus Shareholder Primacy: New Zealand and USA Compared" (2014) NZ Law Review 551

The differences in the contextual characteristics between common law jurisdictions will continue to influence their relative developments toward the ESV model. In this sense, the trend towards a more stakeholder-oriented model challenges the "end of history" thesis that had suggested the triumph of the "shareholder primacy" model as the standard normative corporate form. [116] However, in a subsequent article, Hansmann and Kraakman clarified that the 'standard shareholder-oriented model' (SSM) "does not impose upon corporate managers a legal obligation to maximize financial returns to shareholders without regard to the consequences for third parties. Rather, the SSM simply requires that corporate managers act as faithful agents of the corporation's shareholders. That is, managers should do what the shareholders, as a group, would prefer them to do…Shareholders presumably do not want their corporate managers to cheat customers, abuse workers, or foul the environment even if doing so would be both legal and profitable. Managers, consequently, are not in violation of their duties under the SSM if they follow conventional morality in acting fairly and even generously toward constituencies other than shareholders."[117] They also left the door open in acknowledging that "the more difficult part is to work out the details in implementing the SSM and continually re-adapting it to an ever-changing environment". If we accept this expanded definition of the 'standard shareholder-oriented model', one may then argue that the current regulatory reforms may be seen as compatible with the SSM model in so far as the ESV principle only requires directors to take into account non-shareholder interests as a means of enhancing shareholder value over the long term.

V. CONCLUSION

It is of course impossible to predict whether this trend towards the ESV model would come into fruition or is just a passing phase. As with all socio-legal developments, any change in the status quo is usually a consequence of changing social and economic events. It is also apparent that the regulatory approaches undertaken by the different jurisdictions towards a more stakeholder-oriented model is still in a state of flux. It is also impossible to ignore that shareholders will continue to occupy a preeminent position within the company as they should or that shareholder pressure is likely to remain an influential factor in corporate decision-making not least because of financial globalization and managerial self-interest.[118] Nevertheless, it is possible to hypothesize that at least for the near to medium term, the strict traditionalist "shareholder primacy" model prevalent in varying degrees in many common law jurisdictions will evolve to a more stakeholder-oriented one even though there will never be perfect uniformity with respect to the regulatory approaches taken or the corporate model in each jurisdiction.

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[116] Leonard I. Rotman, "Debunking the "End of History" Thesis for Corporate Law"; Adam Winkler, "Corporate Law Or The Law Of Business?: Stakeholders And Corporate Governance At The End Of History"

[117] Henry Hansmann and Reinier Kraakman, "Reflections on the End of History for Corporate Law"

[118] Cynthia A. Williams; John M. Conley, An Emerging Third Way - The Erosion of the Anglo-American Shareholder Value Construct (2005) 38 Cornell Int'l L.J. 493