

“Doing the Job That’s Required”?: Social Licence to Operate and Directors’ Duties

Vivienne Brand* and Rosemary Teele Langford†

Abstract

Reactions to Rio Tinto Limited’s blasting activities in Western Australia’s Juukan Gorge in 2020 demonstrated the significance of social licence to operate (‘SLO’) for Australian companies, illustrating the dramatic reputational damage that can flow from lawful but controversial company decisions. Since SLO was first used at a World Bank meeting in 1997, its prominence has grown rapidly. A highly controversial proposal by the Australian Securities Exchange to encourage SLO reporting by listed entities brought the concept into sharp focus for Australian companies. While it has become increasingly clear that stakeholder concerns are part of the matrix of issues directors must, and indeed do, take into account when making decisions, uncertainty has continued to surround the contours of the evolving relationship between directors’ duties and stakeholder interests. This article offers a doctrinal and empirical analysis of the current relationship between directors’ duties in Australia and SLO, elucidating the increasing relevance of SLO for contemporary director practice, but also the complexity of the decisions that directors are called on to make. Judgements on SLO-related issues are among the hardest that directors face, but nonetheless may have become an essential part of ‘doing the job that’s required’ of a director.

Please cite this article as:

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



This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International Licence (CC BY-NC 4.0).

As an open access journal, unmodified content is free to use with proper attribution. Please email sydneylawreview@sydney.edu.au for permission and/or queries. © 2022 Sydney Law Review and authors. ISSN: 1444-9528

* Associate Professor, College of Business, Government and Law, Flinders University, South Australia, Australia. Email: vivienne.brand@flinders.edu.au; ORCID iD: <https://orcid.org/0000-0002-5418-8788>.

† Professor, Melbourne Law School, University of Melbourne, Victoria. Email: rosemary.langford@unimelb.edu.au; ORCID iD: <https://orcid.org/0000-0001-5304-3416>.
The authors are grateful for the excellent research assistance provided by Jordan Tutton in the preparation of this article.

I Introduction

Reactions to the blasting activities of Rio Tinto Limited ('Rio Tinto') in Western Australia's Juukan Gorge in 2020 have demonstrated the significance of social licence to operate ('SLO') and related concepts for Australian company directors, illustrating the dramatic reputational damage that can flow from lawful but controversial company decisions.¹ The controversy has led to a Federal Parliamentary Inquiry into the destruction of the Gorge's 46,000 year old caves,² with recommendations for legislative reform.³ Notably, the Chair of the Inquiry stated that 'corporate Australia can no longer ignore the link between its social licence to operate and responsible engagement with Indigenous Australia'.⁴ In the wake of the destruction of the Juukan Gorge, Rio Tinto has reportedly been attempting to rebuild its relationship with local Indigenous owners, undertaking 'arguably the most closely watched and high-profile "stakeholder engagement" between a global mining company and Indigenous owners of land in the world'.⁵ Rio Tinto's experience has been described as 'the ultimate case study for defining a social licence to operate'.⁶

¹ 'Timeline: Rio Tinto's Sacred Indigenous Caves Blast Scandal', *Reuters* (online, 3 December 2020) <<https://www.reuters.com/article/us-australia-mining-indigenous-timeline-idUSKBN28D0OC>>.

The power of SLO factors to influence corporate conduct was similarly evident in Woolworths Ltd's 2021 decision to abandon highly contentious plans to develop a Dan Murphy's alcohol outlet in Darwin. Woolworths Ltd's action followed extensive controversy over the proposed store's location close to Aboriginal communities, and despite approval for the development having been given by the Northern Territory's Liquor Licensing Commissioner: Dominic Powell, 'Woolworths Axes Dan Murphy's Store in Darwin After Review', *The Sydney Morning Herald* (online, 29 April 2021) <<https://www.smh.com.au/business/companies/woolworths-axes-controversial-darwin-store-after-review-finds-failings-20210429-p57ncm.html>>. The Dan Murphy development was reportedly linked to Rio Tinto's Juukan Gorge actions by community groups: Dominic Powell, "'No Different to Juukan Gorge": Controversial Darwin Dan Murphy's Store Approved', *The Sydney Morning Herald* (online, 18 December 2020) <<https://www.smh.com.au/business/companies/no-different-to-juukan-gorge-controversial-darwin-dan-murphy-s-store-approved-20201218-p56ooh.html>>; Sue Mitchell, 'Woolworths Dumps Plan for Dan Murphy's Store in Darwin, For Now', *The Australian Financial Review* (online, 29 April 2021) <<https://www.afr.com/companies/retail/woolworths-dumps-dan-murphy-s-mega-store-in-darwin-20210429-p57ndi>>. A full independent report is now available: Danny Gilbert, Nigel Browne, Heather D'Antoine, Roland Houareau and Neil Westbury, *Independent Panel Review into the Proposed Dan Murphy's Development in Darwin* (Report, 28 April 2021) <<https://www.woolworthsgroup.com.au/page/community-and-responsibility/corporate-responsibility-news-updates/people/independent-panel-review-into-the-proposed-dan-murphy%E2%80%99s-development-in-darwin/>>.

² Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia*; Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Sites at Juukan Gorge* (October 2021) ('*Final Juukan Gorge Report*').

³ Among other recommendations, the Final Report recommended urgent amendment of Commonwealth legislation on Aboriginal and Torres Strait Islander heritage protection and biodiversity legislation, and legislation of a new framework for cultural heritage protection at national level: see *Final Juukan Gorge Report* (n 2) xxv–xxvii [7.13]–[7.89], 186–209 [7.7]–[7.125].

⁴ Warren Entsch, 'Juukan Gorge: Investing in Social Responsibility' (Media Release, Joint Standing Committee on Northern Australia, 16 November 2020).

⁵ Tony Boyd, 'Apologetic Rio Works on Social Licence to Operate', *The Australian Financial Review* (online, 19 January 2021) <<https://www.afr.com/chanticleer/regaining-rio-s-social-license-to-operate-20210119-p56v4y>>.

⁶ *Ibid.*

SLO became a major concern for Australian business in the wake of a proposal by the Australian Securities Exchange ('ASX') to integrate an SLO reporting obligation in its 2019 revision of the *ASX Corporate Governance Principles*.⁷ Despite the ultimate removal of SLO references from the ASX's revision, SLO and related ideas such as reputational risk remain a significant regulatory trend. In replacing the phrase 'social licence' with 'reputation' and 'standing in the community', the ASX Corporate Governance Council ('ASX CGC') commented that these concepts were 'essentially synonymous',⁸ pointing to the continued relevance of these underlying concepts. Judicial authority is now available to demonstrate the significance of reputation concepts for the purposes of Australian directors' statutory duty of care. Other recent developments in the law have also reinforced the importance of SLO concepts.⁹ At an international level, the Trust in Business Initiative of the Organisation for Economic Co-operation and Development ('OECD') has asserted that 'maintaining the social licence to operate [has] never been higher on the business agenda'.¹⁰

Given the growing significance of SLO for corporate decision-making in Australia, both doctrinal and empirical examination of the relationship between SLO and directors' duties is timely.¹¹ Little is known about the perceptions of Australian directors as to the relationship between the duties they owe and SLO concepts.¹² Drawing on doctrinal analysis and the findings of a qualitative investigation of director perceptions,¹³ this article provides novel insight into the role of social licence concepts in contemporary director practice. It demonstrates that the law is increasingly aligning itself with SLO concepts, particularly through the vector of reputation. It reports director perspectives that are consistent with the law's trajectory, showing that for many (but not all) directors, SLO judgements are now a matter of 'doing the job that's required of you' (I02).¹⁴ Director responses also make clear the complexity of the highly discretionary, situational judgements that directors

⁷ ASX CGC, *Corporate Governance Principles and Recommendations* (4th ed, 27 February 2019) ('*ASX Corporate Governance Principles* (2019)').

⁸ Elizabeth Johnstone, 'Launch of the 4th Edition of the Corporate Governance Principles & Recommendations: Address by the Chair of the ASX Corporate Governance Council' (Speech, 27 February 2019) 4 <<https://www.asx.com.au/documents/asx-compliance/ej-speech-press-version.pdf>>.

⁹ See Part III of this article.

¹⁰ Organisation for Economic Co-operation and Development ('OECD'), *OECD Trust in Business Initiative* (Web Page) <<https://www.oecd.org/investment/trust-business.htm>> (as of 10 March 2021).

¹¹ For earlier doctrinal work on this issue see Rosemary Teele Langford, 'Social Licence to Operate and Directors' Duties: Is There a Need for Change?' (2019) 37(3) *Company and Securities Law Journal* 200 ('Need for Change'); Pamela Hanrahan, 'Corporate Governance, Financial Institutions and the "Social Licence"' (2016) 10(3) *Law and Financial Markets Review* 123 ('Corporate Governance'); Pamela Hanrahan, 'Corporate Governance in These "Exciting Times"' (2017) 32(2) *Australian Journal of Corporate Law* 142 ('Exciting Times'); Pamela Hanrahan, 'On Compliance' in Pamela Hanrahan and Ashley Black (eds), *Contemporary Issues in Corporate and Competition Law Essays in Honour of Professor Robert Baxt AO* (LexisNexis Butterworths, 2019) 182.

¹² This point is developed in Part IV of this article.

¹³ A collaborative study co-funded by Flinders University and CSIRO (Flinders University OH-00222-Reciprocal Ethics Clearance, 10 July 2019), described further in Part IV. Details are available from the first author. Use of that data here does not imply that CSIRO or Flinders University endorse the views expressed by the authors in this article.

¹⁴ Where participants in the Flinders University–CSIRO study are quoted in this article, that source is indicated in the text by '(I##)'. The number refers to the anonymous designation given to each interviewee. See Part IV of this article for further information.

are called on to make in relation to SLO factors, and provide valuable insights into the controversy caused by the ASX's SLO proposals. This empirical data on how directors understand and operationalise their legal duties is especially insightful for understanding these important issues. There is limited empirical research on the work of company directors, particularly from qualitative, context-sensitive methods of investigation, so this research presents an original and novel perspective on directors' duties scholarship.

Part II of this article reviews the development of social licence concepts in Australia and internationally, describing the definitional issues associated with the term and illustrating significant growth in its use in recent years. Part III provides a doctrinal analysis of current Australian directors' duties in relation to SLO, with a detailed explication of both the statutory and general law duty of care and duty to act in good faith in the interests of the company. Part IV reports the directors' duties-related findings of an empirical study and provides an analysis of those findings in light of the doctrinal analysis. The article then concludes.

II Social Licence to Operate

An agreed description of SLO is problematic; despite significant increase in the use of the term, ongoing debate has occurred as to its precise meaning.¹⁵ At its broadest, SLO has been described by an OECD official as the public's expectation of business that it will 'do the right thing'.¹⁶ In academic terms, more than two decades of attention to the concept of SLO has not generated a comprehensive definition.¹⁷ SLO has been linked to concepts of corporate citizenship, social sustainability, the social contract, reputation and legitimacy.¹⁸ The dynamic nature of SLO has also been identified, given its capacity to reflect 'the quality and strength of the relationship between an industry and a community of stakeholders' over a period of time.¹⁹ It has been said that it is important that companies are 'responsive to the changing nature of societal approval and acceptance' if they wish to maintain their SLO.²⁰ These dynamic reputational components of SLO are particularly relevant in the context of

¹⁵ John R Owen and Deanna Kemp, 'Social Licence and Mining: A Critical Perspective' (2012) 38(1) *Resources Policy* 29, 30; Langford, 'Need for Change' (n 11) 200–2.

¹⁶ Greg Medcraft, 'Panel Remarks' (Speech, Panel Discussion on the Human Centred Business Model, IMF/World Bank Spring Meeting, 11 April 2019), quoted in Justin O'Brien, 'Editorial: Corporate Culture and the Search for Authenticity' (2019) 13(2–3) *Law and Financial Markets Review* 77, 77.

¹⁷ Jim Cooney, 'Reflections on the 20th Anniversary of the Term "Social Licence"' (2017) 35(2) *Journal of Energy & Natural Resources Law* 197; Peter Edwards, Justine Lacey, Stephen Wyatt and Kathryn JH Williams, 'Social Licence to Operate and Forestry: An Introduction' (2016) 89(5) *Forestry: An International Journal of Forest Research* 473.

¹⁸ Nina Hall, Justine Lacey, Simone Carr-Cornish and Anne-Maree Dowd, 'Social Licence to Operate: Understanding How a Concept Has Been Translated into Practice in Energy Industries' (2015) 86 *Journal of Cleaner Production* 301; Justine Lacey, Peter Edwards and Julian Lamont, 'Social Licence as Social Contract: Procedural Fairness and Forest Agreement-Making in Australia' (2016) 89(5) *Forestry: An International Journal of Forest Research* 489; Richard Parsons, Justine Lacey and Kieren Moffat, 'Maintaining Legitimacy of a Contested Practice: How the Minerals Industry Understands Its "Social Licence to Operate"' (2014) 41 *Resources Policy* 83.

¹⁹ Kieren Moffat, Justine Lacey, Airong Zhang and Sina Leipold, 'The Social Licence to Operate: A Critical Review' (2016) 89(5) *Forestry: An International Journal of Forest Research* 477, 480–1.

²⁰ Hall et al (n 18) 302.

evolving Australian directors' duties and the implications of reputation risks, as is shown in Part III.

Part of the reason for SLO's lack of definitional clarity is its relatively rapid evolution. Since the phrase was first coined at a World Bank meeting in 1997 it has been used in an ever-widening range of contexts.²¹ Although SLO emerged first in mining discourse, its usage expanded quickly,²² including into regulatory spaces. The Parliamentary Joint Committee ('PJC') on Corporations and Financial Services noted in its 2006 report on *Corporate Responsibility: Managing Risk and Creating Value*²³ ('PJC Corporate Responsibility Report') that

[t]he concept of a company's "community" or "social" "license to operate" was raised in several submissions. By effectively engaging with the communities in which they operate, companies gain tacit permission to continue in operation.²⁴

The PJC on Corporations and Financial Services included the concept of SLO as one of an enumerated list of drivers of corporate responsibility decision-making.²⁵ Subsequent regulatory,²⁶ academic²⁷ and journalistic²⁸ attention has been given to the SLO concept at an international level as well as within Australia. In particular, the 2018–19 Banking Royal Commission operated as an 'an impetus for heightened shareholder focus on matters such as social licence to operate and community

²¹ Geert Demuijnck and Björn FASTERLING, 'The Social License to Operate' (2016) 136(4) *Journal of Business Ethics* 675; Justine Lacey, Richard Parsons and Kieren Moffat, *Exploring the Concept of a Social Licence to Operate in the Australian Minerals Industry: Results from Interviews with Industry Representatives* (CSIRO Report EP125553, October 2012) <<https://doi.org/10.4225/08/5852dc54dc765>>.

²² John Morrison, *The Social License: How to Keep Your Organization Legitimate* (Springer, 2014); Justin O'Brien, *Trust, Accountability and Purpose: The Regulation of Corporate Governance* (Cambridge University Press, 2019); David Rouch, *The Social Licence for Financial Markets: Reaching for the End and Why It Counts* (Palgrave Macmillan, 2020).

²³ Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Final Report, June 2006) ('PJC Corporate Responsibility Report').

²⁴ Ibid 32 [3.62]. Shortly afterwards, the analogous concept of 'licence to operate' was used in the Corporations and Markets Advisory Committee's report: Corporations and Markets Advisory Committee (Cth), *The Social Responsibility of Corporations* (Report, December 2006) 43, 46 fn 81, 110. PJC Corporate Responsibility Report (n 23) 32 [3.62].

²⁵ Karin Buhmann, 'Public Regulators and CSR: The "Social Licence to Operate" in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136(4) *Journal of Business Ethics* 699. See also, for instance, O'Brien et al who have described social licence to operate as 'emerging as the preferred strategy of the Bank of England': Justin O'Brien, George Gilligan, Alex Roberts and Roger McCormick, 'Professional Standards and the Social Licence to Operate: A Panacea for Finance or an Exercise in Symbolism?' (2015) 9(4) *Law & Financial Markets Review* 283, 283.

²⁶ See, eg, Sally Wheeler, 'Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social Licence to Operate' (2015) 19(6) *The International Journal of Human Rights* 757; O'Brien (n 16); Langford, 'Need for Change' (n 11); Hanrahan, 'Corporate Governance' (n 11); Hanrahan, 'Exciting Times' (n 11); Vicky Comino, "'Corporate Culture" is the "New Black": Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?' (2021) 44(1) *University of New South Wales (UNSW) Law Journal* 295.

²⁷ William Wright and Tracy Blackwell, 'Stock Exchanges Can Reunite Society with Capitalism', *The Daily Telegraph* (London, 12 June 2019), citing concerns 'over the social licence to operate that is fundamental to sustainable capitalism'; Patrick Durkin, 'Purpose is the Business Buzzword of 2018: Here's Why', *The Australian Financial Review* (online, 3 July 2018) <<https://www.afr.com/work-and-careers/management/purpose-the-business-buzzword-of-2018-20180605-h10zr7>>.

expectations'.²⁹ It appears SLO has now moved into the mainstream corporate sphere.³⁰

In Australia, this shift was most evident in draft 2019 revisions to Australia's *ASX Corporate Governance Principles*. The proposal by the ASX CGC to include a SLO component in the 4th edition of the *ASX Corporate Governance Principles* represented a watershed moment in the use of SLO as a corporate governance concept, and drew sustained attention to the term.³¹ Its adoption would have represented the first formal reliance on SLO in a national corporate regulatory structure internationally.³² The ASX CGC proposed to revise the Principles 'to recognise the fundamental importance of a listed entity's social licence to operate and the need for it to act lawfully, ethically and in a socially responsible manner in order to preserve that licence'.³³ Principle 3 had previously provided that '[a] listed entity should act ethically and responsibly'.³⁴ The ASX CGC proposed 'substantial changes to Principle 3 and the supporting recommendations and commentary to address matters to do with values, culture and social licence to operate'.³⁵ The ASX CGC suggested Principle 3 be reworded as '[a] listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner'.³⁶ The ASX CGC also proposed that the commentary accompanying Principle 3 be amended 'to acknowledge that a listed entity's social licence to operate is one of its most valuable assets and that it can be lost or seriously damaged if the entity or its officers or employees are perceived to have acted unlawfully, unethically or in a socially irresponsible manner'.³⁷

The ASX CGC sought feedback specifically on 'whether the proposed amendments to Principle 3 and the accompanying commentary deal adequately with governance-related concerns related to an entity's values, culture and social licence to operate'.³⁸ Amendments were also proposed to the commentary accompanying

²⁹ Australian Securities and Investments Commission ('ASIC'), *Annual General Meeting Season 2018* (ASIC Report No 609, 31 January 2019) 3. See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1; Tony Boyd, 'It's the Social Licence, Stupid', *The Australian Financial Review* (Melbourne, 22 May 2018) 40.

³⁰ See, eg, Buhmann (n 26); ASX CGC, *Review of the ASX Corporate Governance Council's Principles and Recommendations: Public Consultation* (Consultation Paper, 2 May 2018) <<https://www.asx.com.au/documents/asx-compliance/consultation-paper-cgc-4th-edition.pdf>> ('*Public Consultation*'); OECD (n 10). For industry comment, see Bryan Horrigan, 'Does Corporate Performance Now Include a Social Licence to Operate?', *Australian Institute of Company Directors* (Comment, 20 December 2018) <<http://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/governance-driving-performance/does-corporate-performance-now-include-a-social-licence-to-operate>>.

³¹ The 2018 Banking Royal Commission created a simultaneous set of demands for Australian corporations to pay more regard to reputational issues in particular: see *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (n 29) vol 1, 15–16.

³² Australia has for some time been a leading jurisdiction for corporate governance reform: Bernard Mees and Sherene A Smith, 'Corporate Governance Reform in Australia: A New Institutional Approach' (2019) 30(1) *British Journal of Management* 75.

³³ ASX CGC, *Public Consultation* (n 30) 6.

³⁴ ASX CGC, *Corporate Governance Principles and Recommendations* (3rd ed, 27 March 2014) 19.

³⁵ ASX CGC, *Public Consultation* (n 30) 15.

³⁶ *Ibid* 15.

³⁷ *Ibid*.

³⁸ *Ibid* 10.

Principle 7 in relation to recognising and managing risk. It was proposed that the commentary to Recommendation 7.4 include acknowledgement 'that a listed entity's "social licence to operate" is one of its most valuable assets'.³⁹ Commentary accompanying Principle 8, dealing with companies' obligations to remunerate fairly and responsibly, was also to be amended by 'adding a reference to the impact on the entity's social licence to operate if it is seen to pay excessive remuneration to directors and senior executives'.⁴⁰

These proposals attracted significant negative commentary. In particular, SLO's lack of definitional certainty led to criticism of its use in a regulatory context. Opponents argued that the concept of 'social licence' was 'highly subjective and will be interpreted differently by different stakeholders',⁴¹ and that the lack of an agreed objective definition of SLO would add unnecessary complexity and uncertainty to the work of directors.⁴² The Law Council of Australia submitted that the concept of SLO 'is too vague and uncertain to serve as the touchstone for an important piece of regulatory policy',⁴³ arguing that commentary in the Principles should use precise language and settled concepts in order to avoid the risk of 'undermining the normative force of the Principles'.⁴⁴ Concern was also expressed that use of the social licence phrase could cause 'particular difficulties ... for listed entities legitimately operating in particular sectors that some parts of society are opposed to'.⁴⁵ The SLO concept was labelled 'politically correct nonsense'⁴⁶ and attention was drawn to the potential for the commentary on Principle 3 to risk 'creating confusion'.⁴⁷

Following intense industry pressure,⁴⁸ all references to SLO were removed from the final version of the ASX CGC's Principles. At the time, Council Chair Elizabeth Johnstone, described the SLO proposals as '[o]verwhelmingly, the most

³⁹ Ibid 18.

⁴⁰ Ibid 19.

⁴¹ AICD, Submission to ASX CGC, *Review of ASX Corporate Governance Principles & Recommendations* (27 July 2018) 6 [4.1].

⁴² Patrick Durkin, 'Governance Council Retreats on Industry Super's "Social Licence" Push', *The Australian Financial Review* (online, 7 August 2018) <<https://www.afr.com/work-and-careers/management/governance-council-backs-down-on-industry-supers-social-licence-push-20180806-h13lc7>> ('Governance Council Retreats').

⁴³ Law Council of Australia, Submission to ASX CGC, *Review of ASX Corporate Governance Principles & Recommendations* (30 July 2018) 8 [45].

⁴⁴ Ibid 2 [6].

⁴⁵ Johnstone (n 8) 4.

⁴⁶ Attributed to senior director David Murray, in Joanna Mather, 'ASX Governance Council Dumps "Social Licence to Operate" from Guidance', *The Australian Financial Review* (online, 27 February 2019) <<https://www.afr.com/work-and-careers/management/asx-governance-council-dumps-social-licence-to-operate-from-guidance-20190225-h1bp43>>.

⁴⁷ AICD (n 41) 6 [4.2].

⁴⁸ Patrick Durkin, 'Board Outrage over Push to Have a Social Licence', *The Australian Financial Review* (online, 1 August 2018) <<https://www.afr.com/work-and-careers/management/board-outrage-over-push-to-have-a-social-licence-20180731-h13doa>>; Jennifer Hewett, 'Murray Dares to Say What Others Won't', *The Australian Financial Review* (Melbourne, 3 August 2018) 4; Simon Evans and Patrick Durkin, "'Social Licence" Threatens Corporations', *The Australian Financial Review* (Melbourne, 3 August 2018) 1. See also Michael Roddan, 'Resist Social Obligation Push: Bradley', *The Australian* (Canberra, 3 October 2019) 17; Scott Atkins and Kai Luck, 'ESG Could Paralyse Firms', *The Australian* (Canberra, 28 October 2019) 22.

commented upon and polarising’ of the suggested revisions.⁴⁹ Principle 3 of the Council’s final Principles was instead reworded to provide that a ‘listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly’.⁵⁰ Rather than referencing social licence, the accompanying commentary instead notes ‘the need for the entity to preserve and protect its *reputation* and *standing in the community* and with key stakeholders, such as customers, employees, suppliers, creditors, law makers and regulators’.⁵¹

Notwithstanding the ASX CGC’s response to the controversy caused by the proposed amendments, the wider evidence of SLO’s general significance for Australian directors remains clear,⁵² and the need for directors to have regard to social licence and related concepts when discharging their duties has been widely commented on.⁵³ The following Part analyses the evolving contours of those obligations in the context of SLO.

III Directors’ Duties and Social Licence to Operate

The interaction between directors’ duties and social licence to operate is most relevant in the context of the core duties to act with care and diligence and to act in good faith in the interests of the company. This Part briefly outlines the contours of these duties before critically analysing the connection between these duties and considerations that are encompassed within the concept of SLO (‘SLO considerations’). It should be noted at the outset that there is no separate duty (in a legal sense) on directors to ensure that a company maintains its SLO or to make decisions consistent with the concept of SLO. In this respect, there is an important role for laws dealing with matters connected with SLO such as occupational health and safety, the environment, human rights, modern slavery, consumer protection and protection of Indigenous heritage.⁵⁴ Directors should be cognisant of such laws given the potential liability that may be imposed upon breach.

A *Duty of Care and Diligence*

The duty of care and diligence arises at common law and equity and under s 180 of the *Corporations Act 2001* (Cth). Section 180(1) provides:

⁴⁹ Johnstone (n 8) 4.

⁵⁰ ASX CGC, *ASX Corporate Governance Principles* (2019) (n 7) 16.

⁵¹ Ibid 16 (emphasis added).

⁵² See the discussion in Part III of this article.

⁵³ Langford, ‘Need for Change’ (n 11). See also Hanrahan, ‘Corporate Governance’ (n 11); Hanrahan, ‘Exciting Times’ (n 11). Similarly, in October 2019 ASIC’s Corporate Governance Taskforce released its report on director oversight of non-financial risk in large financial services companies, drawing attention to the very significant financial implications of inadequate supervision of reputational risk, among other factors: ASIC Corporate Governance Taskforce, *Director and Officer Oversight of Non-Financial Risk* (ASIC Report 631, October 2019) <<https://asic.gov.au/regulatory-resources/find-a-document/reports/corporate-governance-taskforce-director-and-officer-oversight-of-non-financial-risk-report/>>.

⁵⁴ The legislation proposed by the *Final Juukan Gorge Report* (n 2) is a case in point: see above n 3.

A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) were a director or officer of a corporation in the corporation's circumstances; and
- (b) occupied office held by, and had the same responsibilities within the corporation as, the director or officer.

As can be seen from the wording of s 180, the duty of care is situational in that courts will take into account factors such as the corporation's circumstances, as well as the director or officer's office and responsibilities.⁵⁵ The duty thus has objective and subjective elements. Compliance with the duty of care is not measured by the outcome of a decision — it has long been recognised that directors are not liable for breach of the duty of care merely by reason of making a mistake and that risk-taking is part of directorial decision-making.⁵⁶

A prevalent use of s 180 is a form of liability known as 'stepping stones', which applies where a company breaches (or risks breaching) the law and a director or officer allows, or fails to prevent, the breach.⁵⁷ Stepping stones liability highlights the importance of directors and officers complying with legal requirements pertaining to SLO factors. Failure to do so may result in liability under specific legislation or potentially under s 180.

A popular approach to the application of the duty of care is to weigh the potential benefits of a contemplated course of action against the potential risks.⁵⁸ In this respect, it is increasingly recognised that non-financial factors and risks must be taken into account. The relevance of non-financial factors was recognised by Edelman J in *Australian Securities and Investments Commission v Cassimatis (No 8)* in his Honour's consideration of what the interests of the company can be considered to encompass:

A corporation has a real and substantial interest in the *lawful* or *legitimate* conduct of its activity independently of whether the illegitimacy of that conduct will be detected or would cause loss. One reason for that interest is the corporation's reputation. Corporations have reputations, independently of any financial concerns, just as individuals do. Another is that the corporation itself exists as a vehicle for lawful activity. For instance, it would be hard to imagine examples where it could be in a corporation's interests for the

⁵⁵ See, eg, *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 397 [100] (Brereton J); *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185, 229 [201] (Wigney J); *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 330 [165] (Middleton J).

⁵⁶ See, eg, *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640, 654 [72] (Robson J); *Termite Resources NL (in liq) v Meadows (No 2)* (2019) 370 ALR 191, 228 [184] (White J). Note also *Corporations Act 2001* (Cth) s 180(2).

⁵⁷ See, eg, *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525, 567 [216] (Beach J).

⁵⁸ See *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, 584 [450]–[451] (Beach J). See also *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209, 301–3 [479]–[487] (Edelman J) ('*Cassimatis (No 8)*'); *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 140 [7238] (Austin J); *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623, 628–9 [22]–[23] (Gordon J).

corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable and was reasonably considered by the director to be virtually undetectable during a limitation period for liability.⁵⁹

Edelman J's comments also demonstrate the fact that recent years have seen increased recognition of the importance of a company's reputation in the application of the duty of care, particularly in light of the increasing relevance of social media. His Honour's comments should not be confined to the application of the duty of care, but are also pertinent in the application of the duty to act in good faith in the interests of the company (discussed in the Part IIIB below).

Edelman J also clarified that, in balancing the risk of harm against the potential benefit of a particular act or omission, a court will not balance or weigh these factors as though by a common metric. Thus, an economically justifiable decision to release a large amount of toxic waste based on the fact that the cost of disposing of the waste lawfully outstripped the cost of a penalty could still result in a breach of s 180 by the director(s) concerned.⁶⁰ Edelman J's judgment was upheld on appeal.⁶¹

B *Duty to Act in Good Faith in the Interests of the Company*

The duty to act in good faith in the interests of the company (the 'best interests duty'), which arises at general law and under s 181(1)(a) of the *Corporations Act 2001* (Cth), requires directors to act in good faith in what they consider to be the interests of the company. The duty regulates the exercise of discretion by directors⁶² — it is not an absolute duty to act in the interests of the company, dependent on the success of a particular transaction or transactions.⁶³

There has been debate as to whether the duty is subjective, objective or a combination of both. The better view is that the duty is subjective in that it is for directors to identify the interests of the company. In so doing, they must give actual consideration to the interests of the company. Objective factors can be used to determine whether the director honestly believes the decision is in the interests of the company (that is, to test credibility). The court is also entitled to inquire if the decision is one that no reasonable director would consider to be in the interests of the company — in which case the court may find that there is a breach of duty.⁶⁴ This allows directors leeway and reflects courts' reluctance to interfere in directors' decision-making.

⁵⁹ *Cassimatis (No 8)* (n 58) 301 [482]. See also 302 [483].

⁶⁰ *Ibid* 302 [485].

⁶¹ *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533 (Greenwood, Rares and Thawley JJ) ('*Cassimatis (FCAFC)*'). Special leave to appeal was refused: *Cassimatis v Australian Securities and Investments Commission* [2020] HCA 51, 158.

⁶² In *Re Smith and Fawcett Ltd* the Court held that directors 'must exercise their discretion bona fide in what they consider — not what a court may consider — to be the interests of the company': [1942] Ch 304, 306 (Lord Greene MR, Luxmore and Asquith LJ agreeing at 309).

⁶³ See *Australian Securities and Investments Commission v Lewski* (2018) 266 CLR 173, 202 [71] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

⁶⁴ See *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1, 583–4 [4619] (Owen J); Rosemary Teele Langford and Ian M Ramsay, 'Directors' Duty to Act in the Interests of the Company: Subjective or Objective?' [2015] (2) *Journal of Business Law* 173.

There is increasing recognition of the permissibility, and in fact necessity, of directors considering and at times protecting the interests of stakeholders other than shareholders in acting in good faith in the interests of the company.⁶⁵ Indeed, in many cases, the company's interests align with those of stakeholders so that it is in the interests of the company as a commercial entity and in the interests of shareholders to consider, and even protect, stakeholder interests in many situations. Moreover, many SLO considerations have now become financial factors. As stated by Keay:

There is significant literature on the fact that having regard for stakeholders can benefit the company. Take, for instance, having regard for employee interests. Human resources are critical to all companies and consideration for employee interests can be key in attracting, retaining and motivating good employees. All this could lead to greater employee loyalty, morale, motivation, retention and identification with the company itself which can benefit the company, in that it is likely to lead to higher productivity and less costs in addressing employee discontent and the need to replace employees leaving the company ...⁶⁶

However, the best interests duty does not permit promotion of stakeholder interests with no link to corporate benefit. This bottom line ensures accountability so that directors are not at liberty to pursue their own interests or favour their own favourite social or political causes using company funds. This also ensures that directors' decisions are not based on which stakeholder voices are loudest and most persistent.

C *Differences between Statutory and General Law Duties*

Although the content of each of the general law duty of care and diligence and duty to act in good faith in the interests of the company is similar to the content of the equivalent statutory duties, the public aspects of the statutory duties have been increasingly recognised and emphasised.⁶⁷ Courts have recognised that these duties do not just protect shareholders — they protect the public as well.⁶⁸ This is reflected in the fact that civil penalty consequences (including pecuniary penalties and disqualification) flow from breach and that there is public enforcement of the duties by the corporate regulator, the Australian Securities and Investments Commission

⁶⁵ See, eg, see *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (n 29) vol 1, 401–2.

⁶⁶ Andrew Keay, *Directors' Duties* (LexisNexis, 4th ed, 2020) 166 [6.99].

⁶⁷ See, eg, Jason Harris, Anil Hargovan and Janet Austin, 'Shareholder Primacy Revisited: Does the Public Interest Have Any Role in Statutory Duties?' (2008) 26(6) *Company and Securities Law Journal* 355; Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42(1) *Federal Law Review* 217; Dimity Kingsford Smith, 'Australian Directors' Duties: Are They Public Duties?' (Conference Paper, Supreme Court of New South Wales, Corporate and Commercial Law Conference, 2018); Rosemary Teele Langford, 'Statutory Duties and Ratification: Untangling the Maze' (2021) 15(1) *Journal of Equity* 126.

⁶⁸ See, eg, *Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574, 654–5 [381] (McColl JA); *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507, 523 [32] (Gleeson CJ and Heydon J); *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* (2005) 53 ACSR 305, 315 [33]–[34] (Palmer J); *International Swimwear Logistics Ltd v Australian Swimwear Co Pty Ltd* [2011] NSWSC 488, [106], [109] (Ward J).

(‘ASIC’).⁶⁹ The extent of the public nature of the duties has been subject to scrutiny and debate recently,⁷⁰ with key aspects including ensuring high standards of behaviour by directors and protecting the public who deal with companies (from loss). This gives rise to the possibility that stakeholder interests and SLO considerations may well be more relevant in the application of the statutory duties, although the extent of this relevance is still unclear.

D *Relevance of Social Licence to Operate Factors in the Application of the Duties*

Among the factors and interests that directors need to consider in complying with these duties are SLO considerations. These are now an integral part of decision-making that complies with the duty of care and diligence and the best interests duty. In some circumstances, it will also be necessary to investigate such factors and interests including by commissioning expert advice. However, decision-making still needs to be grounded in the interests of the company — there still needs to be a nexus with corporate benefit. The yardsticks have, however, widened in terms of what is of benefit to (and in the interests of) the company and how close the nexus with corporate benefit must be. This widening is due to changes in societal values and attitudes, and changes in investor demand, which in turn affect the boundaries of the concept of SLO. In addition, information about companies is more readily available, particularly with the advent of social media.

In some circumstances, SLO considerations may conflict. For example, in making a decision as to whether or not to shut down a factory that is not making large profits and is also producing pollution, directors face conflicting stakeholder interests and conflicting SLO considerations. For example, it would be in the interests of employees and the local community (in one sense) for the factory to stay open in terms of keeping jobs and thus creating business for local businesses. On the other hand, it would be in the interests of the environment and the local community (in another sense) to cease the pollution. What this example also brings out is that, while there may be no positive duty associated with SLO, at the very least the concept of SLO provides justification for directors who do take into account SLO considerations. This is particularly due to the widening of the concept of the company’s interests, as well as the recognition of the importance of reputation and of investor concerns and demands. The example also highlights the continued relevance of corporate benefit as the ‘bottom line’ in decision-making and the reference point for balancing and mediating competing SLO considerations (or stakeholder demands).

Directors’ responses to such scenarios, and the steps they should take to comply with their duties, are also dependent on the circumstances. Such circumstances include the type and nature of the company (which are factors specifically mentioned in s 180 of the *Corporations Act 2001* (Cth) and also shape what companies’ interests are for the purposes of the best interests duty), as well as

⁶⁹ See, eg, *Cassimatis (No 8)* (n 58) 296 [453]–[455] (Edelman J), upheld on appeal in *Cassimatis (FCAFC)* (n 61).

⁷⁰ See, eg, *Cassimatis (No 8)* (n 58) 296 [453]–[455] (Edelman J); *Kingsford Smith* (n 67).

the nature of the SLO consideration and its likely impact. For example, small individually transgressive SLO actions will inevitably cause less damage to reputation, and therefore to the interests of the company, than significant high-profile actions such as Rio Tinto's extensive blasting in the Juukan Gorge. In that case, the very significant impact of the company's actions enables the decision to be more clearly classified as a threat to reputation. In addition, reporting obligations are increasing transparency in relation to companies' SLO-related decisions. The potential social media impact of an issue (and, particularly, its impact on the company's reputation) may heighten its relevance. What is also clear is that, ultimately, a social licence decision for a board is situational. The interests of one company might necessarily include particular attention to employees (such as in situations in which it is difficult to attract sufficient trained talent), but with another it might be capacity to attract institutional investors (which will likely be irrelevant for other companies such as small family companies). This means that decisions are contextual and that it is not possible to specify one set of yardsticks that will apply in all situations.

At the same time, as noted above, the duties of care and diligence and to act in good faith in the interests of the company are not absolute duties that require directors to reach the optimal outcome. Rather, they require directors to exercise care and diligence in giving good faith consideration to the interests of the company and to the factors and considerations relevant to those interests. Making a mistake or causing damage to the company's interests does not, on its own, occasion a breach of duty.

IV Qualitative Insight into Director Perceptions

While a few high-profile directors' views were canvassed in the media at the time of the proposed changes to the *ASX Corporate Governance Principles*, overall little is known about directors' views in relation to this important concept. This absence of empirical evidence concerning Australian directors' attitudes to social licence and related concepts reflects an international lack of research examining directors' social responsibility decision-making in general. For example, scholars are only now beginning to investigate the connections between boards of directors and corporate social responsibility ('CSR').⁷¹ Qualitative work in relation to boards has been particularly sparse,⁷² despite the potential for non-quantitative methods to contribute in-depth perspectives not otherwise available to researchers.⁷³ There is also a clear

⁷¹ Jan Endrikat, Charl de Villiers, Thomas W Guenther and Edeltraud M Guenther, 'Board Characteristics and Corporate Social Responsibility: A Meta-Analytic Investigation' (2020) 60(8) *Business & Society* 2099.

⁷² Kathyayini Rao and Carol Tilt, 'Board Composition and Corporate Social Responsibility: The Role of Diversity, Gender, Strategy and Decision Making' (2016) 138(2) *Journal of Business Ethics* 327, 328, 343. For a rare example of qualitative work with boards in the context of corporate governance practice, see John Roberts, Terry McNulty and Philip Stiles, 'Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom' (2005) 16(S1) *British Journal of Management* S5.

⁷³ Particularly in emergent fields and those associated with ethics issues: Andrew Crane, 'Are You Ethical? Please Tick Yes or No: On Researching Ethics in Business Organizations' (1999) 20(3) *Journal of Business Ethics* 237. The value of qualitative work is that '[o]pen-ended, particularly in-

need for research into the thinking of non-executive directors, whose work within boards otherwise remains ‘completely invisible’.⁷⁴ Qualitative investigation of Australian boards, particularly in connection with corporate social responsibility-related issues, is even rarer.⁷⁵

The only empirical work in relation to Australian directors’ perceptions of social licence concepts is a quantitative 2018 study by the Australian Institute of Company Directors (‘AICD’) and KPMG.⁷⁶ This research, which predated the ASX’s proposed use of social licence in the *ASX Corporate Governance Principles*, investigated directors’ views on trust and related issues, including SLO concepts. The study noted ‘an important shift’ in Australian directors’ attitudes, with directors ‘starting to ask questions about their organisation’s social licence to operate’.⁷⁷ It also pointed to the financial risks associated with loss of a social licence, noting that ‘[a]ggrieved and cynical communities can withdraw their social licence of organisations that lose or exploit their trust — with potentially devastating financial, legal and regulatory impacts.’⁷⁸ Social licence was identified as a crucial factor in building trust for an organisation,⁷⁹ and the Chairman of the AICD noted that ‘[t]he social licence to operate is absolutely essential to ongoing community support [for organisations]’.⁸⁰

Some quantitative evidence of Australian directors’ perceptions is available in relation to wider stakeholder and sustainability debates. Anderson and colleagues have investigated directors’ perceptions of their ability to take into account stakeholder interests while complying with their directors’ duties.⁸¹ They found that directors saw the law of directors’ duties as allowing them discretion to take into account non-shareholder stakeholder interests.⁸² Klettner, Clarke and Boersma have reported a content analysis study of Australian companies’ sustainability disclosures.⁸³ Their research reported a ‘developing acceptance amongst large corporations that efforts towards improved corporate sustainability are not only

depth, questioning offers the possibility that respondents will nominate outcomes not envisioned by the researcher’: Vivienne Brand, ‘Empirical Business Ethics Research and Paradigm Analysis’ (2009) 86(4) *Journal of Business Ethics* 429, 431.

⁷⁴ Roberts, McNulty and Stiles (n 72) S20.

⁷⁵ The only other extant study would appear to be Sainty’s unpublished doctoral work reporting a ‘qualitative examination of members of corporate boards and their beliefs, practices and influences to capture the institutional complexity and inherent tensions at the CG/CSR interface’: Rosemary Sainty, ‘Honouring the Tensions: Corporate Boards at the Interface of Corporate Governance and Corporate Social Responsibility’ (PhD Thesis, University of Technology Sydney, 2017) 318.

⁷⁶ KPMG and Australian Institute of Company Directors (‘AICD’), *Maintaining the Social Licence to Operate: 2018 KPMG–AICD Trust Survey* (Report, 2018) <<https://aicd.companydirectors.com.au/advocacy/research/maintaining-the-social-licence-to-operate-2018-kpmg-aicd-trust-survey>>.

⁷⁷ Ibid 11.

⁷⁸ Ibid.

⁷⁹ Ibid 17.

⁸⁰ Ibid 5, quoting Graham Bradley, Graincorp Chairman.

⁸¹ Malcolm Anderson, Meredith Jones, Shelley Marshall, Richard Mitchell and Ian Ramsay, ‘Shareholder Primacy and Directors’ Duties: An Australian Perspective’ (2008) 8(2) *Journal of Corporate Law Studies* 161.

⁸² Ibid 171–2.

⁸³ Alice Klettner, Thomas Clarke and Martijn Boersma, ‘The Governance of Corporate Sustainability: Empirical Insights into the Development, Leadership and Implementation of Responsible Business Strategy’ (2014) 122(1) *Journal of Business Ethics* 145.

expected but are of value to the business'.⁸⁴ Earlier empirical insight is also offered by the *PJC Corporate Responsibility Report*, which aimed to investigate 'the extent to which organisational decision-makers [had] regard for the interests of stakeholders other than shareholders, and the broader community'.⁸⁵ The PJC reported 'evidence that many companies are integrating the consideration of broader community interests into their core business strategies, rather than treating these issues as an add-on or a side show'.⁸⁶ The Committee also noted that the concept of social licence was raised in a number of submissions, identifying the need for companies to engage effectively with the communities in which they operate.⁸⁷

In light of the growing significance of SLO, and the fact that directors have key responsibility for the implementation of SLO decision-making in corporations, this lack of in-depth insight into the views of Australian directors represents a significant gap in our knowledge. This Part reports the director-related findings of a qualitative study of Australian directors' perceptions of SLO and related trust concepts undertaken in the immediate aftermath of the rejection of the ASX's controversial SLO proposals. In particular, it describes directors' perceptions of the relationship between their duties and SLO concepts, filling a lacuna on this important issue.

Directors' views reported in this article offer valuable insight into the operation of the duty of care and best interests duty in contemporary corporate practice. This illuminates the relationship between current doctrinal understandings and the application of those principles. The findings confirm that, consistently with the evolving legal framework, SLO and related concepts are highly relevant to current director activity, with directors referring to those concepts as part of their 'business as usual'. Crucially, directors thought that recognition of these concepts was consistent with the duties they owe. The data also make clear, however, the complexity of the associated decision-making. Part IVA–B below outlines the research project's design, its sample and the method of analysis, with a discussion of the study's findings in relation to directors' duties.

A Research Design, Sample and Analysis

The study was undertaken in late 2019 and early 2020 with 24 respondents, and used in-depth semi-structured interviews as the key inquiry tool. Interviews addressed a range of participants' perceptions of SLO and related trust concepts. As part of a larger project, respondents were asked how directors perceived the connection between their duties at law and SLO, and whether those duties limited their capacity as directors to respond to SLO factors.⁸⁸ Targeted recruitment of participants for the research was undertaken through non-probability, voluntary sampling with

⁸⁴ Ibid 145, 161.

⁸⁵ *PJC Corporate Responsibility Report* (n 23) vii.

⁸⁶ Ibid xiii.

⁸⁷ Ibid 32. See also Corporations and Markets Advisory Committee (Cth), *The Social Responsibility of Corporations* (Summary of Submissions, December 2006) 38–40 [1.5.11].

⁸⁸ The results of the wider study are described in Vivienne Brand, Justine Lacey and Jordan Tutton, 'Social Licence as a Regulatory Concept: An Empirical Study of Australian Company Directors' (2023) 46(1) *University of New South Wales (UNSW) Law Journal* (forthcoming).

assistance from Australia's peak industry body for directors (the AICD), professional networks and snowball sampling. Particularly where face-to-face interviews are relied upon, personal introductions obtained as the study progresses provide a valuable recruiting mechanism,⁸⁹ and this is true also of obtaining hard-to-reach participants. Targeting of a desired cohort is consistent with qualitative approaches where '[q]ualitative researchers must characteristically think purposively and conceptually about sampling'.⁹⁰ Directors generally, and particularly public company directors, are often reluctant to publicise their views on contentious issues, and may have limited availability for participation in research projects. There are well known difficulties associated with obtaining access to elite populations for interview purposes,⁹¹ and this could be expected to particularly be the case where interview content is highly sensitive. In light of this context, access issues were identified as a likely limitation on the study. Director willingness to participate (on the basis of assured confidentiality) was, however, high.

Sixteen of the interviewees in the study were male and eight were female, a ratio that is approximately representative of the current gender distribution on Australian listed boards.⁹² Respondents were widely experienced and all but one participant was a currently serving director; that person operated as a senior officer with board experience. The vast majority of participants were non-executive directors. Respondents were linked to more than 80 companies ranging in size from smaller proprietary companies to large publicly-listed organisations with market capitalisations up to, and in excess of, A\$50 billion; a number of individual directors sat on multiple boards. Several were highly influential directors, with representation from a number of ASX Top 50 and ASX Top 100 companies.⁹³ Respondents were also sourced from smaller entities, with less exposure to contemporary debates in relation to SLO and *ASX Corporate Governance Principles* reform proposals. The industries from which participants were drawn included manufacturing, consultancy, resources, food and beverages, technology, banking and financial services, and energy.

The interview guide was developed from a precedent guide used in prior SLO studies in mining and energy industries.⁹⁴ Developments included adaptations to reflect both the ASX SLO proposals and the emerging corporate regulatory context within which the interviews took place. Interviews were recorded, contemporaneous

⁸⁹ Vivienne Brand and Amy Slater, 'Using a Qualitative Approach to Gain Insights into the Business Ethics Experiences of Australian Managers in China' (2003) 45(3) *Journal of Business Ethics* 167, 170.

⁹⁰ A Huberman and M Miles, 'Data Management and Analysis Methods' in Norman K Denzin and Yvonna S Lincoln (eds) *Handbook of Qualitative Research* (SAGE Publications, 1994) 428, 441.

⁹¹ William S Harvey, 'Strategies for Conducting Elite Interviews' (2011) 11(4) *Qualitative Research* 431; Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 193–4.

⁹² As at 30 November 2021, 28.7% of board members on ASX All Ordinaries companies were women: AICD, *Board Diversity Statistics* (Web Page, 8 December 2021) <<https://aicd.companydirectors.com.au/advocacy/board-diversity/statistics>>.

⁹³ The S&P/ASX 50 Index 'comprises the 50 largest stocks by market capitalisation in Australia': ASX, *Capitalisation Indices* (Web Page) <<https://www2.asx.com.au/investors/learn-about-our-investment-solutions/indices/types/capitalisation-indices>>. The ASX 100 Index similarly represents a category of larger stocks. Variations in market capitalisation affect which stocks are represented in these categories at points in time.

⁹⁴ Parsons, Lacey and Moffat (n 18); Hall et al (n 18).

notes were made by the interviewer, transcripts were prepared by an independent party and all transcripts were reviewed for accuracy by the interviewer. Descriptive analysis informed by grounded theory was employed to analyse the data.⁹⁵ Themes were thus drawn from the transcripts in order to generate theoretical insights from those themes, in distinction to testing of existing theory. Interview transcripts were subjected to a systematic, verifiable analysis of themes and ideas by a research team, and coding was cross-checked and verified across the team. Computer Assisted Qualitative Data Analysis Software ('CAQDAS') was used to document and facilitate retrieval of coded content. Almost all directors who were approached were willing to participate in the study and were generous in the time they made available for the research. A number have continued to be interested in the study's findings and to follow the outputs of the research, suggesting a level of interest in the issues under investigation.

B *Results and Discussion*

Consistent with the evolving legal framework discussed in Part III, directors' responses largely confirmed the significance of SLO and related concepts to directors' work. Indeed, these ideas were described by some as simply part of their 'business as usual' activity. Directors also perceived consideration of SLO and related concepts as consistent with their directors' duties, and particularly their obligation to act in the best interests of the company. However, despite many participants affirming the relevance of the concept, there was no clear consensus on the definition of SLO. Some directors saw it as too imprecise and too subjective to operate as an externally imposed regulatory requirement. This demonstrates the nuanced nature of director responses on this issue. It was also apparent that a broad range of factors were relevant in any SLO-related judgements. These include the need to consider the timeframe over which a decision would play out, to distinguish between consumer-facing organisations and business-to-business entities, and the significance of geographical SLO factors for corporate activities that have a physical footprint. Consistently with the doctrinal analysis in Part III, reputation in particular was identified as an important aspect of directors' duties, SLO and related concepts, and participants noted the way in which SLO reacted to circumstances.

1 *Social Licence to Operate as Part of 'Doing the Job'*

Broadly speaking, directors demonstrated a clear awareness of the relevance of SLO and related concepts such as reputation and trust, although a few objected to the phrase 'SLO' itself. One director commented that 'all I can say is, boards are really taking it seriously' (I19). Another director said 'I think social licence is every day ... it's business as usual, it has to be. It's in everything' (I23). The majority of directors saw SLO-related concepts as intrinsic to normal business operations. Many

⁹⁵ Kathy Charmaz, 'Grounded Theory: Objectivist and Constructivist Methods' in Norman K Denzin and Yvonna S Lincoln (eds) *Handbook of Qualitative Research* (SAGE Publications, 2nd ed, 2000) 509; Anselm Strauss and Juliet Corbin, 'Grounded Theory Methodology: An Overview', in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (SAGE Publications, 1994) 273.

directors emphasised that taking into account all the impacts of board decisions was simply part of what they did as directors; one director said: ‘I’ve never sat there and gone, oh, should we screw our employees or should we make more money? Mmm. Those decisions just don’t come up’ (I23).

Overall, the perspective taken by many is encapsulated in the response of the director who indicated that ‘meeting the expectations of the community is actually good business as well and you can’t achieve your long term objectives for your owners without taking into account all of the relevant stakeholders’ (I10). This understanding is broadly consistent with the approach taken by the *PJC Corporate Responsibility Report*. It is also consistent with the findings of Klettner, Clarke and Boersma’s 2012 study of Australian companies’ sustainability disclosures, which reported a developing corporate acceptance of the value of sustainability activities for businesses.⁹⁶ These views are also largely in line with evidence from the KPMG and AICD 2018 study indicating the significance of SLO issues for contemporary directors.⁹⁷ Significantly, the views expressed by directors also align with the evolving doctrinal position, and its increasing recognition of the relevance of stakeholder perspectives and reputational factors.⁹⁸

2 *Social Licence to Operate Relevance Seen as Consistent with Directors’ Duties*

Consistently with the view that SLO and related concepts were intrinsic to directors’ work, the majority of respondents did not perceive directors’ duties as operating as a restriction on social licence decisions. Most directors’ views broadly accorded with the finding of the 2006 *PJC Corporate Responsibility Report* that the existing legal framework for directors’ duties was ‘sufficiently open to allow companies to pursue a strategy of enlightened self interest’.⁹⁹ This finding is also consistent with earlier quantitative work by Anderson and colleagues that found ‘an overwhelming majority (94.3%) of directors believed that the law of directors’ duties was broad enough to allow them to take into account the interests of stakeholders other than shareholders’.¹⁰⁰ As one director put it: ‘I don’t see any of the duties restrict us from doing it [that is, SLO] —quite the contrary I think if anything we just feel more obligation to’ (I08). Another referred to social licence issues and directors’ duties as being ‘intertwined’ (I10), while a third described directors’ duties as ‘sit[ting] in parallel’ to social licence requirements, and as supporting them (I01).

In discussing the statutory formulation of the best interests duty, one respondent argued that the ‘legal posts are quite wide’ and that people often misread the *Corporations Act 2001* (Cth):

They’ve read that as being in the best interests of shareholders, and that is not what it says. It says it’s in the best interests of the company, and that’s been interpreted as being, clearly it has to be for the benefit of the general body of

⁹⁶ Klettner, Clarke and Boersma (n 83).

⁹⁷ KPMG and AICD (n 76) 10, 12.

⁹⁸ See Part III of this article.

⁹⁹ *PJC Corporate Responsibility Report* (n 23) xiv.

¹⁰⁰ Anderson et al (n 81) 172.

shareholders. But it goes further. It doesn't then mean you don't look at all these other things. (I03)

Another very experienced director explained their thinking in this way:

[A]s a company director, your obligation is to act in the best interests of the company, and in doing so, you take into account all the different factors there, and all of your decisions, you are weighing up all the different stakeholders and the different factors, and that's where this concept of social licence comes in. (I22)

This 'weighing up' idea was identified by this director as a key component of the practical application of directors' duties: 'I think that "in the best interests of the company" serves us well, because you do have to weigh different things up ... based on what you know at that point in time' (I22).

A requirement to be explicit about the weighing-up process was described by one of the most experienced and high-profile directors in the sample, indicating the connection between the director's perception of their duties and the need to be very clear about the judgement processes involved in SLO considerations:

[S]ometimes you actually may decide well in this situation I'm not going to prefer the customer I am going to prefer the bottom line but I'm going to say so. You're explicit about the decisions that you make. I think in any sort of commercial enterprise it's quite open to you to make those decisions. You just need to be explicit about it. (I13)

The connection between wider stakeholder interests and directors' duties was expressed by another highly experienced senior director in this way:

I've never interpreted the notion that you owe your duties to the shareholders primarily, as inconsistent with their interest in the long term of you being a good corporate citizen and earning the respect of the communities of which you operate, your employees, you know your suppliers, all those things. (I14)

One director pointed to the need to ensure that any SLO-related decision had some form of connection with the company. This respondent identified a key distinction between 'issues that have no connection with the company' and the SLO-type issues that were considered by this director's board, which 'would generally have a connection with the company' (I03). This director perceived the latter as relevant to the requirements of the acting-in-the-best-interests-of-the-company test, because they had 'a connection between the decision, the issue and the company, some connection' (I03). A similar test was raised by other directors, who indicated the need for a direct connection between a company's reputation or business and its social licence or corporate social responsibility actions.

Interestingly, one of the senior directors dismissed the simplicity of the argument that stakeholder and shareholder interests tend to 'eventually' align, arguing 'that's just not true. You do have to make deliberate preferential decisions around your different constituents' (I13). This director's perspective points to the complexity of SLO issues for boards and reinforces the emphasis on 'balancing' and 'weighing' activities evident in many responses.

Perhaps the clearest expression of the idea that directors' duties are consistent with recognising SLO principles occurred in the following comment of another of the most senior directors interviewed:

I have no doubt that to fulfil my duty, to act in the best interests of the company and for proper purposes, and in good faith, means having regard to all stakeholder interests, environment, social issues, as well as shareholders. So, there's certainly no restraint at all, and I think courts, certainly are just going to confirm that the momentum is all going in the right way. (I04)

The perspective enunciated by this director appears to recognise that directors' decisions need to take account of stakeholder voices, but cannot do so in the absence of the corporation's own specific circumstances. Notably, this formulation and the preceding quotes implicitly recognise the need to have primary regard to the best interests duty. As discussed in Part III, the best interests duty does not allow promotion of stakeholder interests with no link to corporate benefit.

3 *Lack of Consensus on Definition*

However, despite the perceived importance of the concepts underlying SLO, respondents demonstrated a divergence of opinion on whether or not 'social licence to operate' was a well-understood term. While several directors indicated the phrase had a clear meaning for them, others saw it as interchangeable with, or easily confused with, similar terms such as CSR and environmental, social and governance ('ESG'). One highly experienced director referred to the multiplicity of terms as representing 'a big blur' for many directors (I08). As another said, 'I've got no idea what it means ... that's what pretty much everyone says' (I10). Some directors felt that the lack of agreed definition of 'social licence' left it open to being manipulated by special interest groups. This risk has also been recognised by Gunningham, Kagan and Thornton in commentary on the potential for social licence obligations to facilitate action by 'extremist elements'.¹⁰¹ More than one respondent pointed to the difficulty of directors being held to account in relation to a concept that appeared to lack formal definition. As noted, this argument also represented a major criticism of the proposed use of the term in *ASX Corporate Governance Principles*.¹⁰²

4 *Range of Relevant Factors*

The data reveal a wide range of factors to which directors have regard when exercising their duties in relation to SLO-type issues. These include the timeframe over which a decision might be expected to play out. One of the most experienced directors in the sample did not 'think there's any question that when companies consider the longer term interest of the company and shareholders they need to consider the interests of every constituency and ... that's an absolute truth' (I14). By contrast, another very senior director referred to the strong pressure from investment funds to focus more on short-term gains: '[I]t's about maximising return' (I02).

¹⁰¹ Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29(2) *Law & Social Inquiry* 307, 338.

¹⁰² Durkin, 'Governance Council Retreats' (n 42).

Some directors also raised the distinction between a consumer-facing rather than a business-to-business ('B2B') organisation, with SLO-related factors such as trust seen as more important for consumer-facing entities. One director explained the distinction in this way:

[T]he ones who are worried about trust are usually the ones who are customer focused; so if you're dealing with consumers yes, you need to worry about this because the last thing you want is some sort of campaign against you for some reason [whereas] if you are purely B2B as a business I suspect you're a lot less concerned about that trust factor, you're more concerned with just getting on and doing the job. (I09)

Geographical presence was also identified as influencing decision-making. For example, a director whose experience was in construction pointed to the critical need to have local acceptance of a company's operations where they were physically present in a community, rather than having a less tangible activity base:

So there's always a sort of — a negotiation with the local community that you impact on, because really they are hosting you in their environment. ... You have to have a social licence to operate, because otherwise local communities make it very difficult for you to get things done ... [but] if you're in a consumer facing organisation where you're selling products or services, the concept is probably a little more nebulous. (I21)

These insights help to clarify the reasoning process directors engage in when undertaking SLO-related analyses, and illustrate the situational nature of many of those judgements. As discussed in Part III, both the duty of care and best interests duty have the capacity to accommodate these subjective, nuanced factors. Crucially, however, these factors may conflict,¹⁰³ adding significant complexity to the judgements required of directors when considering SLO factors.

5 *Reputation is Crucial*

A company's reputation was identified by many respondents as a key concept in relation to SLO. This is consistent with both the growing importance of reputation in the application of directors' duties¹⁰⁴ and the ASX CGC's choice of the term 'reputation' as an alternative to use of SLO in its 4th edition of the *ASX Corporate Governance Principles*. As noted above, the Principles now describe 'the need for the entity to preserve and protect its *reputation* and *standing in the community* and with key stakeholders, such as customers, employees, suppliers, creditors, law makers and regulators'.¹⁰⁵ Similarly, one director identified the interrelationship of the concepts of reputation and SLO in this way (echoing elements of Keay's analysis cited in Part III):¹⁰⁶

[W]ith all due respect to some of my colleagues, I didn't feel like social licence to operate extended what might be expected of us, as directors in a modern corporation anyway, because at a minimum, all of the areas where social licence to operate might get you into difficulty, many of them are

¹⁰³ See Part IIID above.

¹⁰⁴ See Part III above.

¹⁰⁵ See n 51 and accompanying text.

¹⁰⁶ See above n 66 and accompanying text.

reputational risks which have an impact on your business, they have an impact on the engagement of your staff, so to just separate it out to me, means you're not doing the job that's required of you, as a director. (I02)

The volatility of reputational factors was also highlighted by some directors. One respondent referred to the rapidity with which a company's reputation could be affected by events, saying 'it takes years to build trust, and one day to lose it' (I21). This is particularly so in the context of social media — an emerging factor in director liability — a perspective consistent with the evolving legal framework for directors' duties discussed in Part III.¹⁰⁷ In part, it also reflects a potential corollary to Edelman J's description in *Cassimatis (No 8)* of the importance of company compliance with the law. As noted above, Edelman J has identified that it is difficult 'to imagine examples where it could be in a corporation's interests for the corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable'.¹⁰⁸ Insights from directors in this study indicate that it may be equally hard to imagine examples where it could be in the corporation's interests for the corporation to engage in seriously reputationally-damaging conduct even if that conduct was highly profitable and was reasonably considered by the director to be lawful.

6 Nuance in the Data

Some contrary views in relation to the relevance of SLO and its consistency with contemporary directors' duties were apparent, both for directors in the sample and also reportedly for others in the wider director environment. One very senior director rejected the relevance of SLO as a descriptive concept, commenting 'I ignore social licence to operate because I think it's meaningless' (I16). However, while suggesting the term itself was problematic, this director did not reject the underlying need to take into account related concepts:

[I]n the interest of the long term viability of any entity, you've got to take into account the quality of your products, how your customers feel about your products, your reputation in the community. You've got to be a good place to work, so your — so you can compete for talent. (I16)

Another very experienced director identified the lack of relevance that many of their colleagues placed on formal directors' duties formulations at all. This is a timely reminder that not all directors pay as much attention to statutory and general law descriptions of directors' duties as lawyers and academics might. This director suggested that his colleagues, 'if they've ever heard "licence to operate", wouldn't know what it meant, and would have a fuzzy idea about what is in the best interests of the company, even though we've had that sort of test for, you know, a hundred-odd years' (I04). Another director accepted the importance of SLO concepts, but remained concerned about the unintended consequences that might flow from formal regulatory adoption of the concept: '[T]his concept of social licence, I think is an

¹⁰⁷ Recent research indicates that 'social media is becoming an important factor in the forced CEO transitions, which are happening due to a broad spectrum of ESG reasons': Tony Boyd, 'Lessons from Forced CEO Exits', *The Australian Financial Review* (online, 20 May 2021) <<https://www.afr.com/chanticleer/lessons-from-forced-ceo-exits-20210519-p57tbd>>.

¹⁰⁸ *Cassimatis (No 8)* (n 58) 301 [482].

important and valuable one, but to codify it could create undesired and unforeseen second and third order consequences' (I22). These dissenting views in relation to SLO operate as a reminder of the complexities that can arise in relation to the interactions between SLO and directors' duties.

C *Key Insights from the Empirical Evidence*

A number of key insights are apparent in the empirical evidence. It is clear from director responses in the empirical study that SLO and related concepts were seen as core issues for most respondents, and that directors' views largely aligned with the evolving doctrinal position on this point. However, some directors were unhappy about potential limits being placed on their exercise of director discretion through the formal imposition of an obligation to comply with a concept (that is, SLO) that does not enjoy a clear or agreed definition. Overall, there is no doubt that SLO concepts are complex, nuanced, and highly situational. This is true regardless of the perspective taken by directors and irrespective of whether SLO ought to be an externally imposed regulatory device or remains an internally-applied mechanism.

Factors such as the timelines over which a decision would play out, the presence of a consumer component to a company's operations, and the impact of a company's physical presence in a community were acknowledged in interviews. This again highlights the situational nature of SLO-related decision-making. The complexity of those situational judgements is apparent in the range of relevant factors raised by directors, the level of judgement required, the significant impact decisions could have on company operations and the potential for devastating impacts to arise very quickly. Significantly, respondents saw no inconsistency between the discretionary considerations required by SLO concepts and applicable directors' duties. While little emphasis was placed on specific duties, the best interests duty was referred to by many directors. This affirms the key relevance of the bottom line requirement that promotion of stakeholder interests not occur without a link to corporate benefit.

The data in this study also reveal that directors are aware of the complexity of the challenges SLO presents, particularly in relation to the trading-off of competing benefits and risks. As one director expressed it: '[T]he hardest things you do, as a director ... are things that are in the grey ... it'd be so easy if things were clear-cut and no-brainers' (I22). These insights again align with doctrinal descriptions of the expectations placed on directors, which recognise there is significant room for error in the complex decision-making tasks imposed on directors. Inherent in the exercise of director discretion is the need to balance competing demands and factors within the company's specific situational context: 'it is the function of the board and management to identify, balance and reconcile ... obligations ... according to each corporation's "values proposition"'.¹⁰⁹

Identification, balancing and ultimate reconciliation of competing demands may be increasingly difficult in an age of heightened reputational risk and social media pressures. In this respect, it is important to note that 'reasonable minds may

¹⁰⁹ Hanrahan, 'Exciting Times' (n 11) 148.

differ'.¹¹⁰ Moreover, as stated in Part III above, directors are not subject to absolute duties that require the achievement of an optimal outcome. Making a mistake or causing damage to the company's interests does not, on its own, occasion a breach of duty. The data in the empirical study indicate that directors are sanguine about the need to undertake the nuanced reasoning required by SLO and related concepts. That is, the exercise of complex discretion is expected — as difficult as that may sometimes be. In the words of one respondent: 'You [are] supposed to make some hard calls at times, and you get paid for it, so for God's sake, get on and do it' (I01).

The high degree of judgement inherent in SLO-related assessments, together with a lack of consensus as to the definition of SLO, help explain why formalisation of SLO caused so much controversy. An attempt at codification appears to have been seen by some directors as limiting the exercise of their core discretion, and some saw the concept as too imprecise and too subjective to work as an externally imposed regulatory yardstick in any event. These perceptions are consistent with criticism at the time of the ASX CGC's proposals that the formal introduction of SLO into the Principles might create 'confusion about the general law and statutory duties of directors under the *Corporations Act*'.¹¹¹

V Conclusion

In 2006, the *PJC Corporate Responsibility Report* introduced SLO to the general corporate regulatory environment in Australia,¹¹² but noted that corporate responsibility was still in its 'developmental stages'.¹¹³ The doctrinal and empirical analyses presented in this article confirm that this development has continued and matured. These analyses also demonstrate the place of SLO concepts as an intrinsic component of the suite of factors to which contemporary directors must, and do, have regard in discharging their duties. Directors' own perceptions of their obligations in relation to SLO clearly demonstrate the significance attributed to SLO and related concepts by respondents. Directors were very attuned to these concepts.

However, it is also clear that SLO judgements are nuanced, requiring the exercise of complex discretion on the part of directors. These judgements may be difficult to make. In addition, the consequences in terms of reputational damage can be sudden and very significant, as the recent Juukan Gorge example amply demonstrates. The discretionary aspect of SLO-related decision-making, dealing as it does with 'things that are in the grey', appears to be part of the reason why the proposed ASX CGC's formalisation of SLO caused so much controversy.

¹¹⁰ Ibid, citing *RBC Investor Services Australia Nominees Pty Limited v Brickworks Ltd* (2017) 348 ALR 605, 616 [42] (Jagot J):

The courts recognise that it is the responsibility of the directors to weigh the competing considerations with which they will be routinely confronted and determine what is in the best interests of the company as whole. They recognise also that as the task of the directors is evaluative it is necessarily one about which reasonable minds may differ.

¹¹¹ AICD (n 41) 6 [4.2]. See also Law Council of Australia (n 43) 10 [63], 10–11 [69].

¹¹² The concept was identified in a number of submissions to the PJC inquiry into corporate responsibility and triple-bottom-line reporting: *PJC Corporate Responsibility Report* (n 23) 52 [4.33].

¹¹³ Ibid xix.

Despite the inherent complexity, the nuanced reasoning required and the multi-factorial nature of SLO judgements, many directors in this study appeared accepting of the need to engage with SLO-related decision-making. There is also strong alignment between respondents' views and the doctrinal analysis of the evolving legal position as to the relevance of SLO and related concepts. While SLO decisions may be difficult, for many directors these decisions are no more than a matter of 'doing the job that's required of you'.

