

27 February 2017

Housing Unit Manager
Social Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: socialimpactinvesting@treasury.gov.au

Dear Sir/Madam,

Social Impact Investing Discussion Paper

Please find attached B Lab Australia and New Zealand's submission in response to the Australian Government's Social Impact Investing Discussion Paper.

We welcome Treasury's focus on developing the impact investing market and are thankful for the opportunity to contribute to this important work.

We would welcome the opportunity to discuss our response with you further. Please don't hesitate to contact Rebecca Rozencwajg, Government Relations and Policy Advisor on (03) 8534 8021 or rebecca.r@bcorporation.com.au.

Yours sincerely



Alicia Darvall
Executive Director
B Lab Australia and New Zealand



B Lab Australia and New Zealand Submission Social Impact Investing Discussion Paper February 2017

Thank you for the opportunity to consult on the Australian Government's role in developing the social impact investing market in response to the Social Impact Investing Discussion Paper dated January 2017 (**Discussion Paper**).

1. Introduction

About B Lab Australia and New Zealand

B Lab was established in 2006 in the United States as a not-for-profit organisation whose mission is to build a global movement of people using business as a force for good. B Lab does this through a number of tools, including:

- An online impact assessment where businesses can “measure what matters”;
- A certification for businesses (known as B Corp certification); and
- Creating an enabling policy and legal environment for mission driven companies and their investors; including the development of a new corporate form (the benefit corporation/company) that removes impediments to creating social benefit alongside shareholder value.

B Lab's Australian subsidiary, B Lab Australia and New Zealand Limited, was founded in 2013. Further details about B Lab are available at ATTACHMENT A.

B Lab Australia and New Zealand's Response to the Discussion Paper

Our response will address questions one (1), two (2), three (3), four (4), eleven (11) and twenty eight (28).

As noted in the Discussion Paper, “social impact investing is an emerging, outcomes based approach that brings together governments, service providers, investors and communities to tackle a range of social issues”. Each of these stakeholders contributes to the creation of the impact investment market and the social and environmental good that can be created through that market.

Prior to addressing the abovementioned questions, we would like to further clarify the definitions and assumptions we hold, particularly in relation to the role of government and the understanding of service providers, including social enterprises.

Role of government

As the Discussion Paper outlines, the Australian Government has a critical role to play in creating an **enabling environment** for a robust impact investment market, both in its capacity as a **regulator** and as a **funder**.

Our responses will focus primarily on the Government's role as a **regulator**, and in particular on how the Government can introduce legislative and structural measures to best support the growth of the impact investment market by:

- **introducing** initiatives that **enable the growth** of impact investing; and
- **removing** barriers and impediments that **prevent the growth** of impact investing.

We believe the Government can best grow impact investing in Australia by introducing modest amendments to the *Corporations Act 2001* (Cth), to create a voluntary legal framework for businesses whose purpose includes both profit making and the public good. A company which "opts in" to these amendments will be known as a "benefit company", and will be subject to a modified regime of directors' duties and reporting requirements. Since 2010, the "benefit company" (or benefit corporation as it is known), has been introduced in all major US jurisdictions, including Delaware, New York and California, and is currently under active consideration by governments in Western Europe and South America.

Adopting the benefit company framework would bring Australia in line with innovation trends internationally, particularly in the US and UK. It would also provide impact investors with the assurances that will assist them to confidently invest in businesses that are legally compelled to create and publicly report on positive social and environmental impact. This in turn will open up more investment opportunities and enable growth in the impact investment market.

Definition of service providers

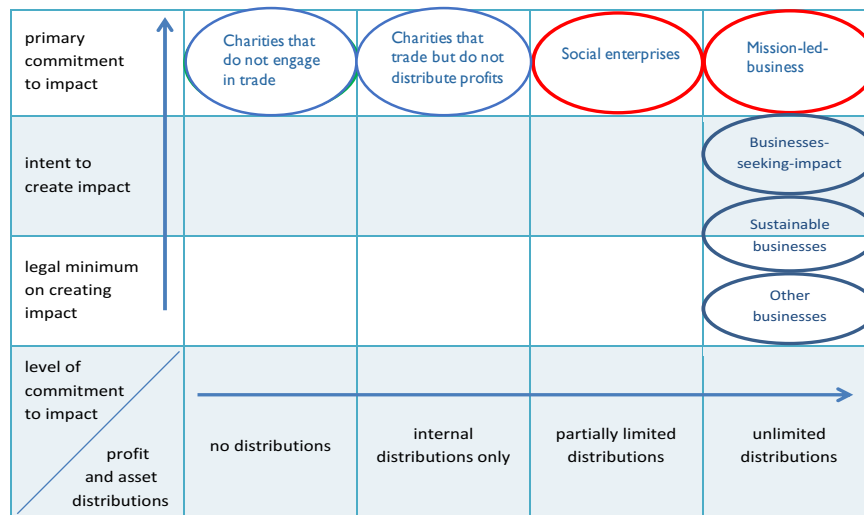
The Discussion Paper refers to 'service providers' as 'the organisations or social enterprises delivering the intervention to the client group' and refers to 'social enterprises' as a major recipient of social impact investing.

Social enterprises are defined within the discussion paper as "businesses which aim to achieve both financial return and social outcomes".

We believe it is important to recognise that businesses which fall within this definition of 'social enterprises' fall into two categories:

1. Businesses where the economic activities engaged in by the business are designed to address a social issue (for example STREAT, as outlined within the Discussion paper); and
2. For-profit businesses that operate with an intention to create positive social and environmental impact as a central purpose of their business. We have used the terminology 'Mission-led business' to describe this later category and we would like to contribute additional and complementary detail to the definition of social enterprise, so as to explicitly include mission led businesses as part of the impact investment ecosystem and as a "service provider" contributing to the growth of the impact investing market. The overlap and coexistence of social enterprises and mission led businesses is best set out in this visual representation below adapted from the work of the Social Impact Investment Taskforce that was established under the UK's presidency of the G8.

Combining social impact and profitable business – the co-existence of social enterprises and mission led businesses



Adapted from: Social Impact Investment Taskforce Subject Paper of the Mission Alignment Working Group: [Profit with Purpose Businesses](#), 2014 with modified language to reflect the emergence of the term 'Mission-led-business' to describe profit-with-purpose-businesses.

Mission led business

Internationally, there is a growing understanding of the value of **mission led businesses: profit driven businesses that make a powerful commitment to social impact.**

As widely understood, mission led businesses fit the Discussion Paper's definition of "social enterprises", in that they are businesses which aim to achieve both financial return and social outcomes.

The UK independent advisory panel report on Mission Led Businesses, requested by the UK Government as part of the Mission-Led Business Review 2016,¹ has defined such a business as one that:

- (i) can fully distribute its profits;
- (ii) identifies an intention to have a positive social impact as a central purpose of its business;
- (iii) makes a long-term or binding commitment to deliver on that intention through its business and operations; and
- (iv) reports on its social impact to its stakeholders².

Mission led business and the impact investment market

Mission led businesses play an important role within the social impact investing market. Mission led businesses operate across diverse industries and sectors and commit to contributing positively to society and environment through their operations, with good governance and transparency being key characteristics. These companies are using the power of business to create a positive impact on the world and generate a shared and durable prosperity for all. As understood in this way, mission led businesses are an important part of the social impact investment market, and often act as a 'service provider' in addressing social and environmental challenges.

From an investor's perspective, mission led businesses are an attractive investment to those investors who are seeking to create impact through their financial investment decisions. By investing in mission led businesses, investors can successfully blend financial returns with social and environmental impact.

Mainstreaming the impact

The emerging movement of mission-led business is part of a global cultural shift that is changing the relationship between business and society and the way "success" is defined in business. We envision a world where all businesses compete to be the best for the world, not just the best in the world. In our view, mission led businesses are the leaders in this shift, demonstrating best practices for flourishing in the new economy. Over recent years there has been a shift in the way that founders, entrepreneurs and business leaders think about social impact and a growing belief that business can be used as a force for positive social impact³.

¹ Advisory Panel to the Mission-led Business Review 2016, [On a Mission in the UK Economy](#), UK, p2

² Advisory Panel to the Mission-led Business Review 2016, [On a Mission in the UK Economy](#), UK, p2

³ For more information see The Deloitte Millennial Survey, Deloitte, (2017)

We believe that enabling and supporting the growth of such businesses is central to moving our entire economy to a more conscious, connected and responsible way of operating.

B Lab is an organisation that exists to grow, enable and promote mission led business. Accordingly, we will focus our response on the government’s role as market regulator (as set out in the Discussion Paper) in supporting and growing mission led businesses in their role as “service providers” (as set out in the Discussion Paper) and as part of the wider aim of supporting and growing the social impact investing market in Australia.

2. Overview of Social Impact Investing

Question 1 – What do you see as the main barriers to the growth of the social impact investing market in Australia? How do these barriers differ from the perspective of investors, service providers and intermediaries?

We see the future growth of the social impact investing market as directly related to the growth of mission led businesses.

Accordingly, we would like to address Question 1 specifically from the perspective of the role of **investors** and **service providers** (particularly mission led business).

Investors

We contend that currently investors are hesitant to invest in mission led businesses, as there is no framework to provide certainty in regards to a company’s commitment to social and environmental impact. This is particularly the case at the point of a change of control event or transition of a business through a growth phase or to new ownership.

There are also currently high due diligence costs associated with impact investing that we believe prevent the growth of the social impact investing market in Australia.

Service providers

We contend that the current legal system creates uncertainty for mission led businesses. This uncertainty is a barrier to the propagation of mission led businesses, which is a major barrier to growth of the social impact investing market.

We believe **legislative amendment** (as further detailed in the response to question 2 below) **is required to truly catalyse the growth of the mission led business.**

We argue specifically that there is uncertainty in the area of a director's obligation to prioritise shareholder interests over the interests of other stakeholders, such that it acts as a **barrier to growth**. Although the Discussion Paper points to a lack of evidence that this is the case, we would respectfully argue that this issue remains unresolved and that the Australian legal system creates uncertainty for companies that seek to use the power of business to solve social and environmental problems. Legislative amendment is required to remove the uncertainty facing directors of for-profit companies who wish to favour the interests of non-shareholder stakeholders. This uncertainty acts as a practical and legal impediment to the growth of mission led business.

These views are supported by many prominent lawyers, including Professor Ian Ramsay, Harold Ford Professor of Commercial Law and Director of the Centre for Corporate Law and Securities Regulation at The University of Melbourne. A testimonial from Professor Ramsay can be found in ATTACHMENT E.

Legal Uncertainty

At common law, directors of Australian companies are obliged to "act in the interests of the company as a whole". The phrase "the company as a whole" has been interpreted to mean the financial wellbeing of the shareholders as a general body, with directors also being obliged to consider the financial interests of creditors when the company is insolvent or near insolvent. This is sometimes referred to as the "shareholder primacy" norm.

Although directors of Australian companies may choose to take the interests of employees, customers, suppliers and the community into account, directors face considerable legal uncertainty as to whether they are properly discharging their statutory and fiduciary duties should they choose to favour non-shareholder stakeholder interests over the financial interests of shareholders.

Although it is technically possible under the existing Corporations Act for an Australian company to modify its constitution and include an articulation of a social or environmental purpose, there is little guidance in statute or at common law for directors who wish to consider the interests of non-shareholder stakeholders. In practice, directors will not stray far from the "shareholder primacy" norm.

In a change of control situation or other major corporate transaction (e.g. capital raising, substantial divestment, merger or major growth phase), the interests of a company's shareholders are customarily the sole concern of directors, even where the corporate transaction may otherwise negatively impact on non-shareholder stakeholders.

In the absence of specific legislative guidance, it will remain very difficult for company directors to properly ascertain whether they are acting within the statutory duties owed to the company whilst pursuing a social or environmental good.

Question 2 - What do you see as the future for social impact investing in Australia: for example, can you foresee the development of new structures for social impact investing?

As articulated in the Discussion Paper, Government has an opportunity to create an enabling environment for social impact investment by introducing initiatives which will promote growth of the impact investing market.

As mentioned above, we see the future growth of the social impact investing market as directly related to the growth of mission led businesses. We argue that this growth (both of mission led business and subsequently the impact investing market) would be best supported by the introduction of a new 'opt-in' corporate form for mission led business, referred to as **the benefit company**.

Introducing the Benefit Company

We believe the growth of the social impact investment market could be promoted by introducing modest amendments to the *Corporation Act 2001 (Cth) (Act)* to create a voluntary legal framework for mission led businesses whose purpose includes both profit making and the public good. A company which “opts in” to these amendments will be known as a **“benefit company”**, and will be subject to a modified regime of directors’ duties and reporting requirements.

This benefit company structure is based on the ‘benefit corporation’⁴, which was conceived in the US, as a way to compensate for uncertainty and limitations in US company laws which limited the extent to which directors could pursue both profit and purpose in existing business. A benefit corporation has two core purposes: to make a profit and also create a material positive impact on society and the environment, thus enshrining the triple bottom-line principles of profit, people and planet in statute and in a company’s constitution.

In early 2015, B Lab Australia and New Zealand formed a working group comprising academics, lawyers, business leaders and governance experts (ATTACHMENT B) to assess the need of establishing a regulatory framework and to facilitate the introduction of the benefit company in Australia. The working group concluded that the Australian legal system creates uncertainty for mission led businesses and drafted proposed amendments to the Act (ATTACHMENT C) and an explanatory memorandum (ATTACHMENT D), based on the Model Legislation developed in the US.

⁴ Benefit corporation website: www.benefitcorp.net. To align with the existing terminology used in Australia’s corporations law and to more clearly distinguish the new corporate form, the term “benefit company” is suggested for use in Australia

The three key characteristics of the benefit company are:

- A binding corporate purpose in the company's constitution requiring the company to create "a material positive impact on society and the environment", taken as a whole, from the business and operations of the company" (known as "general public benefit");
- Expanded directors' duties to require directors to consider the interests of non financial stakeholders in addition to the financial interests of shareholders; and
- Reporting publicly at regular intervals on overall social and environmental performance⁵.

Currently 30 US states have adopted B Lab's model legislation based on these three characteristics. Legislation has also been enacted in Italy and formally introduced in Argentina and Colombia. In addition to Australia, legislation is being drafted in the United Kingdom, Brazil, Canada, Chile, Portugal and Taiwan. In each jurisdiction, the legislation sits alongside the existing corporate law and registration as a benefit company is voluntary.

In the six years since the Benefit Corporation legislation was first introduced in the US, the number of companies taking up this corporate form has grown tremendously. There are now close to 5,000 benefit corporations, with both the start-up community and existing mission led businesses embracing this corporate form. A high profile example is Patagonia, a privately owned outdoor apparel and accessories retailer, which has revenues of over US\$500 million. Its founder Yvon Chouinard was attracted to the benefit corporation structure because it "institutionalized the values, culture, processes and high standards of his company, and allowed these to remain constant through capital raisings or a future change of ownership"⁶. Within the last month, Laureate Education, Inc. became the first benefit corporation to conduct a successful initial public offering.

As noted above, Governments around the world are considering enacting benefit company legislation as the legal framework and governance structure it provides has had proven success in increasing the impact of mission led businesses. The recent UK Mission Led Business Review report explicitly included a recommendation for "Government to explore the introduction of a 'benefit company' status in English law"⁷ (Recommendation 9), in order to "provide a clear signal that government wishes to enable and encourage mission led businesses"⁸. Furthermore, the Mission

⁵ White Paper entitled 'The need and rationale for the benefit corporation: why it is the legal form that best addressed the needs of social entrepreneurs, investors and ultimately the public

⁶ Tozzi J, 'Patagonia Road Tests New Sustainability Legal Status', 2012, Bloomberg <http://www.bloomberg.com/news/2012-01-04/patagonia-road-tests-new-sustainability-legal-status.html> 30 September 2013

⁷ On a Mission in the UK Economy: Current state of play, vision and recommendations from the advisory panel to the Mission-led Business Review <https://www.gov.uk/government/publications/advisory-panel-to-mission-led-business-review-final-report>

⁸ On a Mission in the UK Economy: Current state of play, vision and recommendations from the advisory panel to the Mission-led Business Review <https://www.gov.uk/government/publications/advisory-panel-to-mission-led-business-review-final-report>

Alignment Working Group that supported the Social Impact investment Taskforce Established by the G8 included a series of legislative recommendations that countries should implement to promote social impact investment and the growth of a more sustainable and inclusive economy, including a recommendation to create legal forms, such as the benefit corporation, that protect the social mission of impact driven businesses⁹.

The benefit company - good for impact investing

By introducing the benefit company amendments, the Government would provide a clear signal that the government wishes to enable and encourage mission led businesses to grow and prosper.

The amendments positively protect directors who wish to make decisions that may not be financially advantageous to shareholders but are consistent with the company's expanded purpose of creating value for all stakeholders. Modifying the liability risk for directors and obliging them to consider the 'general public benefit' is fundamental to encouraging directors to make decisions that are in line with shared value and responsible profit generation.

Furthermore, the benefit company amendments will provide legal guidance to truly embed the company's mission into its constitution, thereby providing certainty for shareholders, directors and officers as to the company's governance obligations and what would be considered 'in the company's interests' at the point of a change of control event. This framework will offer directors legal protection to stay mission driven through corporate succession, capital raising and changing of ownership.

Not only would benefit company status help to grow the market of 'social enterprises' but it would also make businesses more attractive to impact investors, as it offers protection for company directors to consider society and the environment on equal footing with financial returns, while also offering accountability and transparency around a company's mission. **This gives investors the critical assurances they need to confidently commit funds and ensure that businesses remain accountable to their mission in the future.** Benefit company status also provides an additional level of certainty during investor due diligence, as benefit companies produce an annual benefit report, which describes the extent of (and success or failure of) their qualitative activities aimed at producing general public benefit.

The benefit company form signals to impact investors that a company has committed to the mission to create positive social and environmental impact. There is evidence in the US market that investors are attracted to the benefit corporation form when looking for investment opportunities: benefit corporations have been

⁹ Social Impact Investment Taskforce, 'Profit with Purpose Businesses' – Subject paper of the Mission Alignment Working Group, September 2014
<http://www.socialimpactinvestment.org/reports/Mission%20Alignment%20WG%20paper%20FINAL.pdf>

able to raise venture capital from mainstream investors;¹⁰ and many of the most high profile US funds have a benefit corporation in their portfolio¹¹. The benefit corporation has also proven to be successful in the public market, with Laureate Education successfully completing its IPO In February 2017 and in doing so providing the opportunity for private retail investors to have access to mission aligned governance.

Question 3 - Are there any Australian Government legislative or regulatory barriers constraining the growth of the social impact investing market?

As articulated in the Discussion Paper, the Government has an opportunity to create an enabling environment for social impact investment to grow through removing barriers that constrain the growth of the market.

As mentioned above, we see the future growth of the social impact investing market as directly related to the growth of the movement of mission led businesses.

Furthermore, we contend that the current legal system creates uncertainty for mission led businesses and is therefore a barrier to the propagation of mission led businesses.

As set out in our response to Question 1, we argue specifically that there is uncertainty in the area of a director's obligation to prioritise shareholder interests over the interests of other stakeholders, such that it acts as a barrier which constrains growth. Although, the Discussion Paper points to a lack of evidence that this is the case, for the various reasons articulated in our response to Question 1, we would respectfully argue that this issue remains unresolved and that legislative guidance is required.

As stated above, in the absence of specific legislative guidance, it will remain difficult for company directors to properly ascertain whether they are acting within the statutory duties owed to the company by reference to the "general public benefit" which is the core feature of the benefit company.

Importantly, the benefit company in Australia will be a voluntary "opt-in" model for existing public or private companies limited by shares. It will require very limited modifications to the Corporations Act (please refer to the draft amendments to the Corporations Act set out in ATTACHMENT C).

¹⁰ Including Andreessen Horowitz, Benchmark, Founders Fund and First Round Capital

¹¹ Including Sequoia Ventures, Andreessen Horowitz, First Round Capital, Founders Fund, Khosla Ventures, Union Square Ventures, and Benchmark

3. Role of the Australian Government

Question 4. What do you see as the role of the Australian Government in developing the social impact investing market?

The Government has an important role to create an enabling environment for mission led businesses to grow and prosper. In its role as regulator, it can introduce legislative and structural measures to better support the growth of the impact investment market. This approach is two-fold:

- **introducing** initiatives that **enable the growth** of the impact investment market; and
- **removing** barriers and impediments that **prevent the growth** of the impact investment market

By adopting the benefit company amendments, the Government would provide a clear signal that the government wishes to enable and encourage mission led businesses to grow and prosper. The benefit company framework would also provide certainty of a company's governance obligations, particularly as to what matters are properly considered to be 'in the company's interests'. This would give impact investors the critical assurances they need to confidently commit funds and ensure that businesses remain accountable to their mission in the future. This will open up more investment opportunities for impact investors and enable growth in the impact investment market.

More generally, B Lab Australia and New Zealand supports the views in the submissions made by Impact Investing Australia and Philanthropy Australia, particularly in terms of the Australian Government playing a role in building the market for impact investing. This could be achieved by providing funding to create Impact Capital Australia and by providing funding for capacity building support for organisations seeking to become investment ready.

4. Australia's Social Impact Investing Principles

Question 11 – We are seeking your feedback on the four proposed principles for social impact investing.

B Lab Australia and New Zealand does not propose to discuss this matter in detail, however we believe that the principles outlined do need to be restructured in order to promote the stated objective of market development and we support the suggested approach detailed by Impact Investing Australia in their submission.

5. Reducing Regulatory Barriers – Legal Structures

Question 28 - Have you faced a legal impediment as a director of a social enterprise from making a decision in accordance with the mission of the enterprise, rather than maximising financial returns, that only a change in the legal structure could resolve? If so, what amendment to Commonwealth legislation, regulation or ASIC guidance would you consider is needed to address this problem?

As we have detailed above, we believe the Government has an opportunity to create an enabling environment for social impact investment to grow and also an obligation to remove barriers that constrain the growth of the market.

Please refer to our response to Questions 1 and 2 for detail which is directly relevant to this question.

As set out in our response to Question 1, we argue specifically that the current legal system creates uncertainty for directors who may decide to prioritise shareholder interests over the interests of other stakeholders, and we believe this acts as a barrier to the movement of mission led businesses.

We are supported in this view by the work of B Lab Australia and New Zealand’s policy working group that comprised academics, lawyers, business leaders and governance experts (ATTACHMENT B). This group has specifically focussed on this matter and concluded that modest amendments to the Corporations Act to create the voluntary ‘benefit company’ framework (detailed in our response to question 2) would address this concern. The policy working group has drafted proposed amendments to the Act (ATTACHMENT C) and an explanatory memorandum (ATTACHMENT D).

There is widespread support among the Australian legal, business and investor community for these amendments. We have attached a selection of testimonials to demonstrate this support (ATTACHMENT E) including from:

- **Professor Ian Ramsay**, Harold Ford Professor of Commercial Law and Director of the Centre for Corporate Law and Securities Regulation at Melbourne Law School, The University of Melbourne
- **Allan English**, Founder and Executive Chairman, Silverchef Ltd (ASX:SIV)
- **Phil Vernon**, Managing Director, Australian Ethical Ltd (ASX:AEF)
- **Dan Madhavan**, Chief Executive Officer, Impact Investing Australia
- **Christopher Lock**, Chief Executive Officer, Impact Investment Group
- **Will Richardson**, Chief Investment Officer, Giant Leap Fund
- **Pablo Berruti**, Responsible Investment Association Australasia

ATTACHMENT A: About B Lab

B Lab is a not for profit organisation whose mission is to build a global movement of people using business as a force for good. Business is a leading force in global markets and has the capacity to be a powerful tool, alongside government and the not for profit sector, in creating a shared and durable prosperity for all particularly those least served by existing market structures. When B Lab's vision is realised: business leaders will be rewarded for creating positive social and environmental impact; workers will have access to high quality, durable jobs; underserved populations will experience economic justice; and all stakeholders will benefit from a better way to do business.

In less than ten years, B Lab has become a recognised leader in the field of responsible business, driving companies to elect high levels of performance, accountability, and transparency. Over 40,000 companies in 43 countries are using B Lab's standards to manage their impact. Over 2000 of these are recognised as Certified B Corporations—companies meeting the highest levels of performance. 31 U.S. jurisdictions and the country of Italy have adopted B Lab's new corporate statute, and the G7 has recommended that countries around the globe follow suit.

In addition to being honored as a Skoll Entrepreneur and a recipient of the John P. McNulty Prize, B Lab has been recognized in almost every major business publication (including Forbes, Fortune, The New York Times, The Economist, The Guardian, The Wall Street Journal, and Fast Company) for driving a global culture shift to redefine success in business.

B Lab works to accomplish its objective by advancing concrete, positive, and integrated solutions to systemic problems. These problems include:

- A lack of standardised, cross industry performance standards to help business leaders, employees, consumers and policy makers differentiate between good companies and just good marketing;
- A lack of tools to guide companies toward more responsible practices, allowing them to both benchmark and improve;
- Existing corporate and fiduciary laws that require businesses and investors to prioritise short-term returns at the exclusion of the value created for all; and
- A fragmented marketplace lacking collective voice and reliable data that prevents companies, investors, policymakers, and stakeholders from scaling a more just and inclusive private sector.

B Lab's unique innovation is that it simultaneously drives institutional, behavioral, and policy change by empowering entrepreneurs and all their stakeholders as the agents of change

It does this specifically by:

- Building a community of leaders through the becoming a Certified B Corporation (B Corp). B Corp's are companies that meet rigorous standards of social and environmental performance, transparency, and accountability throughout their business. In layperson's terms: B Corporation Certification is to a company what Fair Trade Certification or Rainforest Alliance Certification is to a product, a third-party assessment of its social and environmental impact and a tool to identify top performers. B Corporations are leaders of the global movement to use business as a force for good, providing inspiring stories, compelling data, and pioneering leadership. B Corps create a global demonstration affect that business can benefit society and, collectively, are a powerful constituency to drive institutional change;
- Helping all companies (including those that have yet to embark on social and environmental improvement) Measure What Matters: their impact on the people, communities, and ecosystems they touch. Through partnerships with investors, government, multinational corporations, and business associations, B Lab promotes use of its standards through two online tools: the B Impact Assessment, an online guide that assesses a company's impact across stakeholders, and B Analytics, a data aggregation tool that allows these partners to manage impact at scale.
- Creating an enabling policy and legal environment for mission driven companies and their investors; including the development of a new corporate form (the benefit corporation) that removes impediments to creating social benefit alongside shareholder value. Without such protections, even companies trying to serve the world's poor are often beholden to profit maximisation and short-term returns. These cultural and legal expectations limit even impact focused companies from being able to do so in the long term.

B Lab's Australian subsidiary, B Lab Australia and New Zealand Limited, was founded in 2013.

Attachment B: Members of Benefit Company Proposed Amendments Working Group

Alicia Darvall	Executive Director	B Lab Australia & New Zealand
Mele-Ane Havea	Strategy Chair	Small Giants B Lab Australia & New Zealand
Ashleigh Wall	Special Council	Harwood Andrews Lawyers
Bronwyn Baird	Management Consultant	B Cubed
Greg Ridder	Principal	Ridder Consulting
Rosemary Addis	Chair	Impact Investing Australia
William H Clark Jr	Partner	Drinker Biddle, Philadelphia
Sam Morrissey	Corporate Lawyer	Clayton Utz
Phil Vernon	Managing Director	Australian Ethical Investment
Stuart Palmer	Head of Ethics Research	Australian Ethical Investment
Professor Ian Ramsay	Harold Ford Professor of Commercial Law and Director of the Centre for Corporate Law and Securities Regulation	Melbourne Law School, University of Melbourne
Dan Simmonds	Managing Principal	Harwood Andrews Lawyers
Chris Halburd	Lawyer	Skinner and Associates

ATTACHMENT C

Benefit Company - Proposed Amendments to the *Corporations Act 2001* (Cth)

1. Definitions

Section 9

- 1.1 **Benefit company** has the meaning given by section 45C(1).
- 1.2 **Benefit enforcement proceedings** has the meaning given in section 247F(1) of this Act.
- 1.3 **General public benefit** means a material positive impact on society and the environment, taken as a whole, assessed against a third party benefit standard, resulting from the business affairs of the company.
- 1.4 **Specific public benefit** means the conferring of a particular benefit on society or the environment but does not include general public benefit.
- 1.5 **Third party benefit standard** means a standard for defining, reporting and assessing the social and environmental performance of a benefit company that:
- (a) assesses the effects of the business affairs of the company upon the matters listed in section 190C(1);
 - (b) is developed by an entity that is:
 - (i) not a related entity of the benefit company; and
 - (ii) prescribed by regulations made for the purposes of this definition.

2. Substantial Modifications to the *Corporations Act*

2.1 45C *Benefit companies*

(1) [**Criteria for a benefit company**] A company is a benefit company if:

(a) it is a:

(i) proprietary company limited by shares;

(ii) public company limited by shares; or

(iii) public company limited by guarantee to which section 111K does not apply;

(b) it has a constitution;

(c) its constitution contains the general public benefit purpose required by section 125A of this Act; and

(d) it is not a deductible gift recipient.

(2) [**Company must notify ASIC**] If a company is a benefit company upon registration or becomes a benefit company following registration in accordance with this section, it must notify ASIC that it is a benefit company.

(3) [**Benefit company status does not affect other obligations**] Except so far as the contrary intention appears, a reference in this Act to a benefit company does not affect the company's rights or obligations under this Act.

2.2 125A *Constitution of a benefit company*

(1) [**General public benefit and specific public benefit**] A benefit company must have a purpose of creating general public benefit in its constitution and may have a purpose of creating one or more specific public benefits in its constitution.

(2) [**Contrary acts not invalid**] An act of a benefit company is not invalid merely because it is contrary to or beyond the general public benefit purpose or a specific public benefit purpose in its constitution.

2.3 190C *Application of Division to a benefit company*

(1) [**Consideration of interests**] In discharging the duties set out in this Division, the directors or other officers of a benefit company:

(a) must consider:

(i) the likely consequences of any decision or act in the long term;

(ii) the interests of the company's employees;

(iii) the need to foster the company's business relationships with suppliers, customers and others;

(iv) the impact of the company's operations on the community and the environment;

(v) the desirability of the company maintaining a reputation for high standards of business conduct;

(vi) the interests of the members of the company; and

(vii) the ability of the company to create its general public benefit and any specific public benefit purpose in its constitution; and

(b) need not give priority to a particular matter referred to in paragraph (a) over any other matter, unless the benefit company has stated in its constitution that the directors or other officers must give priority to certain matters related to the accomplishment of its general public benefit purpose or any specific public benefit purpose in its constitution.

(2) [**Interaction with other sections of this Act**] The consideration of the matters set out in subsection (1) by the directors and the other officers of a benefit company does not of itself:

(a) constitute a breach of sections 180, 181, 182, 183 or 184 of this Act;

(b) prevent a director or other officer from relying on section 180(2) of this Act;

(c) authorise a person to do an act which would be inconsistent with any section of this Act or a rule of law requiring the person to consider or act in the interests of creditors of the company;

(d) entitle a person (other than ASIC) to make an application to the Court to grant an injunction under section 1324 of this Act;

(e) entitle a Court to make an order under Part 2F.1 of this Act; or

(f) entitle a person to bring proceedings or intervene in any proceedings under Part 2F.1A of this Act.

(3) **[Liability for a failure to achieve general public benefit or specific public benefit]** No director or other officer of a benefit company can be liable under this Act or the general law for the failure of a benefit company to pursue or create general public benefit or any specific public benefit.

2.4 **Part 2F.5 Benefit enforcement proceedings**

247F Bringing, or intervening in, benefit enforcement proceedings

(1) **[Meaning of benefit enforcement proceedings]** Benefit enforcement proceedings are any proceedings for the failure of a benefit company to:

(a) pursue or create general public benefit purpose or any specific public benefit purpose in its constitution; or

(b) comply with section 300C of this Act.

(2) **[Who may bring proceedings]** A person may bring benefit enforcement proceedings on behalf of a benefit company, or intervene in any benefit enforcement proceedings to which the benefit company is a party for the purpose of taking responsibility on behalf of the benefit company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if the person is:

(a) a member or group of members with at least 5% of the votes that may be cast at a general meeting of the benefit company; or

(b) an officer of the benefit company.

ASIC may bring benefit enforcement proceedings on behalf of a benefit company.

(3) **[Proceedings must be in company name]** Benefit enforcement proceedings brought on behalf of a benefit company must be brought in the company's name.

(4) **[Applying for and granting leave]** Section 237 of this Act applies to benefit enforcement proceedings in full as if each reference to proceedings in that section was a reference to benefit enforcement proceedings.

247G Orders the Court can make in relation to benefit enforcement proceedings

(1) **[Court may make orders]** The Court can make the following orders under this section that it considers appropriate in relation to the benefit company:

(a) an order that the company's existing constitution be modified or repealed, including to remove the general public benefit purpose and any specific public benefit purpose from the company's constitution;

(b) an order requiring the company to comply with section 300C of this Act;

(c) an order that an officer of the benefit company do an act specified in section 190C(1)(a) of this Act; and

(d) an order requiring the company to notify ASIC that the company is no longer a benefit company.

(2) [**Order altering constitution**] If an order made under this section repeals or modifies a benefit company's constitution, or requires the benefit company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:

(a) the order states that the company does have the power to make such a change or repeal; or

(b) the company first obtains the leave of the Court.

2.5 300C *Annual benefit report*

(1) [**Obligation to publish**] A benefit company must publish an annual benefit report on its website. If the benefit company does not have a website, the benefit company must send a physical copy of the annual benefit report to its members.

(2) [**Contents of annual benefit report**] The annual benefit report for a financial year must:

(a) contain a narrative description of:

(i) the ways in which the benefit company pursued its general public benefit purpose during the year and the extent to which general public benefit was created;

(ii) the ways in which the benefit company pursued each specific public benefit in its constitution during the year and the extent to which a specific public benefit was created; and

(iii) details of any matter or circumstance that has significantly affected the creation by the benefit company of general public benefit and each specific public benefit in its constitution (if any); and

(iv) refer to likely developments in the benefit company's operations in future financial years and the expected impact of those developments on the general public benefit purpose and each specific public benefit purpose in its constitution; and

(b) an assessment of the overall social and environmental performance of the benefit company against a third party benefit standard which:

(i) has been applied consistently with any application of that standard in a prior annual benefit report; or

(ii) is accompanied by an explanation of the reasons for any inconsistency in the application of that standard when compared with the immediately prior annual benefit report.

(3) [**Publication deadline**] Subject to subsection (4), the time for publication of the annual benefit report is:

(a) for a benefit company which is a public company or a large proprietary company, within 4 months after the end of the company's financial year; or

(b) for a benefit company which is a small proprietary company, within 6 months after the anniversary of the company's registration.

(4) **[No publication for 2 years after registration]** A benefit company is not required to publish an annual benefit report until the end of the second full financial year or second full calendar year (as applicable) after the company's registration.

(5) An offence based on subsection (1) or (3) is an offence of strict liability.

3. Consequential Amendments to the Corporations Act
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- 3.1 Section 125(1) and section 125(2) are both amended to include the words "Subject to section 125A" at the beginning of each subclause.
- 3.2 Section 136(5) is amended to include the words "This also applies to a benefit company." after the words "has not yet been determined".
- 3.3 A note is inserted after section 136(5) as follows: "**Note:** A benefit company must have a constitution (see sections 45C and 125A)."
- 3.4 Schedule 3 is amended to include a new item in the table as follows:

Item	Provision	Penalty
103AB	Section 300C(1) and (3)	5 penalty units

4. Proposed Regulations

1.0.02B Third party benefit standard

(1) For the definition of ***third party benefit standard*** in section 9 of the Act, an entity must:

- (a) meet the requirements listed in subregulation 1.0.02B(2); and
- (b) be prescribed in subregulation 1.0.02B(3).

(2) An entity which develops a third party benefit standard must meet the following requirements:

(a) have access to the necessary expertise to assess the overall social and environmental performance of a business;

(b) make the following information publicly available on the entity's website:

(i) the criteria considered when measuring the overall social and environmental performance of a business;

(ii) the relative weightings, if any, of those criteria;

(iii) the identity of the officers and members of the entity that developed and controls revisions to the third party benefit standard;

(iv) the process by which revisions to the third party benefit standard are made; and

(v) the revenue and sources of funding for the entity, with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest; and

(c) not more than one-third of the officers and members of the governing body of the entity are officers, members or employees of any of the following:

(i) an association of businesses operating in a specific industry the performance of whose members is assessed against the standard;

(ii) businesses from a specific industry or an association of businesses in that industry; or

(iii) a business whose performance is assessed against the standard.

(3) The following entities are prescribed:

(a) *[to be inserted following appropriate public consultation]*.

ATTACHMENT D

Benefit Company - Proposed Amendments to the *Corporations Act 2001* (Cth): Explanatory Memorandum

1. Overview

- 1.1 The proposed benefit company amendments (**Amendments**) to the *Corporations Act 2001* (Cth) (the **Act**) are intended to establish a regulatory framework to facilitate the introduction of the benefit company in Australia. The benefit company regime includes:
- (a) the eligibility requirements for a benefit company (*Part 3*);
 - (b) that the directors and other officers must consider a range of matters when discharging their statutory duties (*Part 4*);
 - (c) the process for enforcing compliance by a benefit company with the general public benefit purpose and any specific public benefit purposes in its constitution (*Part 5*); and
 - (d) the annual reporting process for a benefit company (*Part 6*).
- 1.2 The benefit company framework is intended to give shareholders a choice. It does not create any additional administrative or compliance requirements for companies which don't want to adopt the benefit company framework. The Amendments are intended to provide companies with the flexibility to adopt a structure that suits their purpose, and deliver transparency and adequate protection from legal liability whilst doing so.
- 1.3 Further consequential changes to other Commonwealth legislation may be needed. This will require further review of other legislation.
- 1.4 The Corporations Regulations 2001 (Cth) (**Regulations**) should be amended to set out the criteria which applies to those entities which will establish the third party standard for assessing the performance of a benefit company. The suggested additions to the Regulations will require further refinement following public consultation.

2. Background and Introduction

- 2.1 In the United States in 2008, a new type of for-profit company limited by shares was conceived, known as the 'benefit corporation'. The benefit corporation has been introduced via legislative amendment in more than half of all US states over the past five years.
- 2.2 A benefit corporation has two core purposes: to make a profit and to create a public benefit. Recognising the limits of voluntary action by companies, the benefit corporation enshrines the triple bottom-line principles of 'profit, people and planet'ⁱ in statute and in a company's governing documents, representing a significant shift in corporate law and governance practice.
- 2.3 The benefit corporation modifies directors' duties and imposes reporting requirements beyond those of a traditional limited liability company.
- 2.4 The benefit corporation is not to be confused with the voluntary 'B Corp' certification awarded by a not-for-profit organisation, B Lab (the Australian subsidiary of which is B Lab Australia & New Zealand Limited), to companies that meet particular standards of verified social and environmental performance, public transparency and legal accountability.ⁱⁱ While there are a great many certified B Corps which are also benefit corporations, it is equally possible in many US jurisdictions to be legally incorporated as a benefit corporation without being a certified B

Corp. Further, there are many certified B Corps in jurisdictions outside the US (including Australia) where the benefit corporation does not yet exist as a recognised legal form.

- 2.5 In order to more clearly delineate B Corps from the statutory benefit corporation (as it is called in many states in the US), the term 'benefit company' has been adopted for the proposed Australian legislation.
- 2.6 For close to a century, academics and others have debated whether a corporation is solely responsible to ownership interests, or whether it also possesses obligations to benefit the welfare of other stakeholders.ⁱⁱⁱ Fundamental to this question is the role of the shareholder.
- 2.7 Many corporate law theorists argue that a shareholder is the only person that 'owns' a corporation in any sense.^{iv} The shareholder contributes equity in return for this ownership stake. Those who take a 'shareholder primacy' view argue that in return for this investment, all the benefits of the corporation's activities should flow to the shareholder.^v The alternative 'stakeholder primacy' view contends that corporations owe obligations to both shareholders and the community, that incorporation is a privilege bestowed solely by the state which carries significant advantages (limited liability and perpetual succession) and in turn society is justified in expecting the corporation to act in the general public interest.^{vi}
- 2.8 At common law, directors of Australian companies are obliged to 'act in the interests of the company as a whole'.^{vii} The phrase 'the company as a whole' has been interpreted to mean the financial well-being of the shareholders as a general body, with directors also being obliged to consider the financial interests of creditors when the company is insolvent or near-insolvent.^{viii}
- 2.9 The authors of Ford, Austin & Ramsay's Principles of Corporations Law state that, although it is sometimes said that directors should be obliged to consider the interests of employees, customers, contractors and the community when making decisions for the company, "there is no case law or corporations legislation in Australia that imposes that obligation".^{ix} The authors go on to state that "[a]lthough there may be no direct legal obligation in company law on directors to take other interests into account, it does not follow that directors cannot choose to do so".^x
- 2.10 Nonetheless, the ability of directors of Australian companies to take into account extraneous interests is not untrammelled. The decided cases in this area indicate that management may implement a policy of enlightened self-interest on the part of the company, but may not be generous with company resources when there is no prospect of commercial advantage to the company.^{xi}
- 2.11 Under this approach, although Courts may adopt a more flexible attitude towards the application of directors' statutory duties (including the business judgement rule) which may offer some legal protection for directors when making decisions that don't maximise shareholder profits, if there is no connection between a business decision and shareholder value, then that decision will itself be open to shareholder criticism.
- 2.12 In the absence of specific legislative guidance, it would be very difficult for company directors to properly ascertain whether they are acting within the statutory duties owed to the company by reference to the 'general public benefit' which is the core feature of the benefit company. Further, without legislative guidance, third parties (such as ASIC or liquidators) may be in a position to argue that directors had neglected to consider certain aspects of the 'general public benefit' and were therefore in breach of their statutory duties.
- 2.13 The shareholder wealth maximisation principle remains the 'light on the hill' in modern corporate decision-making.^{xii} As a consequence, the legal structure of the company itself gives rise to a somewhat irreconcilable tension. Directors have a practical duty (perhaps more perception than legal obligation) to act in the financial interests of a company's shareholders.

- 2.14 Whilst directors continue to be saddled with this profit-maximisation duty (whether perceived or otherwise) directors can only consider public or non-shareholder interests to the extent that they do not materially impact on the corporation's bottom line (and therefore shareholder returns), or to the extent that some other long-term commercial benefit accrues to shareholders. This constrains the ability of directors in a traditional company structure to consider non-shareholder interests, and creates a disharmony between profit-making activities and the active consideration of wider stakeholder interests.
- 2.15 Australian companies are free to adopt voluntary codes and corporate social responsibility measures to achieve sustainability targets or deliver social justice outcomes. However, these measures do not remove the practical legal uncertainty which directors are forced to confront when considering non-shareholder interests. The proposed benefit company amendments to the Act attempt to address this uncertainty by placing both profit-making and the public good at the forefront of the purpose of the corporation.

3. Benefit Company Eligibility Requirements

Detailed explanation of new law

- 3.1 The amendments do not create a separate additional type of company. Rather, the amendments prescribe particular actions which must be taken by a company (which can be a new company or an existing company) if it wishes to adopt an additional status as a benefit company **[Item 2.1, section 45C(1)]**.
- 3.2 A company which elects to adopt benefit company status must be a proprietary company limited by shares, a public company limited by shares or a public company limited by guarantee which is not registered with the *Australian Charities and Not-for-profits Commission (ACNC)* and to which section 111K of the Act does not therefore apply. A benefit company cannot be any other type of company **[Item 2.1, section 45C(1)(a)]**. A fundamental characteristic of the benefit company is that it should exist to make a profit and should be able to distribute that profit to its members. Therefore, the structure of a company limited by shares (whether public or proprietary) is most appropriate, as this type of company retains the ability to pay and distribute profits to its members under the existing provisions of the Act. However, the company limited by guarantee is also used as a legal structure to operate some large trading businesses in Australia which do not distribute profits to members but which are not charitable organisations. In order to allow as many companies as possible to have the opportunity to adopt benefit company status, public companies limited by guarantee which fall outside section 111K of the Act (and are therefore not registered with the ACNC) can elect to become benefit companies **[Item 2.1, section 45C(1)(a)]**. This provision recognises that benefit company status may be equally appropriate for a smaller, closely-held private company as for a larger, publicly-listed company, or for a significant operating entity structured as a company limited by guarantee (for example, in the health or utilities sector). This is particularly the case given that less than 5% of Australian companies are incorporated as public companies limited by shares. Creating an additional type of company (for example, a 'benefit company limited by shares') would necessitate significant amendments to the Act and would be likely reduce the appeal of this structure for Australian businesses.
- 3.3 A benefit company cannot be an entity which itself is entitled to receive tax deductible gifts, as these entities are typically charitable or benevolent institutions. **[Item 2.1, section 45C(1)(d)]**. A fundamental characteristic of a benefit company is that it should pursue profitable enterprise.
- 3.4 A benefit company must have a constitution **[Item 2.1, section 45C(1)(b)]**. This applies even to a proprietary company which may otherwise have elected to be governed by the replaceable rules under the Act rather than have a separate constitution **[Items 3.2 and 3.3, section 136(5)]**. This requirement recognises that one of the core features of a benefit company is the adoption of the general public benefit purpose in its constitution. Despite increasing the administrative and compliance costs for a proprietary company which desires to adopt benefit company status, this is an appropriate requirement to impose given the importance of the constitution to a benefit company.

- 3.5 The constitution of a benefit company must contain the general public benefit purpose **[Item 2.1, section 45C(1)(c)]**. The general public benefit purpose requires the company to include in its constitution an object that the company will have a material positive impact on society and the environment, taken as a whole, assessed against a third party benefit standard, resulting from the business affairs of the company **[Item 1.3, section 9]**. This object requires the directors and other officers of the benefit company to consider all of the effects of the company's business affairs and activities on society and the environment, with such consideration to be informed by the matters set out in section 190C(1) **[Item 2.3, section 190C(1)]**. The 'third party benefit standard' requires the company to engage with a third party which is not a related entity of the benefit company and which will apply a standard for assessing the performance of the benefit company in creating general public benefit **[Item 1.5, section 9]**. The third party will need to meet a set of criteria set out in the Regulations and will need to be prescribed in the Regulations as being permitted to carry out such an assessment. The 'business affairs' of the benefit company has the meaning given by the existing section 53AA of the Act.
- 3.6 A proprietary company limited by shares or a public company must notify ASIC upon modifying its constitution to become a benefit company, or upon registration if it is a benefit company from registration **[Item 2.1, section 45C(2)]**. ASIC must be notified within 14 days of the date on which an existing company adopts benefit company status **[Item 3.2, section 136(5)]**.
- 3.7 A company which adopts benefit company status is still required to comply with all the usual obligations which are imposed on that company and its directors and other officers by the Act, unless those obligations are expressly modified by another section of the Act **[Item 2.1, section 45C(3)]**.
- 3.8 An existing company may adopt benefit company status by amending its constitution to include the general public benefit purpose, or by adopting a constitution which includes the general public benefit purpose **[Item 2.2, section 125A(1)]**. The process for an existing company to amend its constitution or adopt a new constitution for the purpose of becoming a benefit company remains the same as set out in the existing section 136(1) of the Act, which requires the company to pass a special resolution of members. Under section 136(1), a special resolution is one that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution.
- 3.9 In addition to general public benefit, a benefit company may also include an object in its constitution of creating one or more specific public benefits. Specific public benefit means the conferring of a particular benefit on society or the environment, but does not include general public benefit. A benefit company is not required to include the creation of a specific public benefit as an object in its constitution but may do so **[Item 2.2, section 125A(1)]**. A specific public benefit may include:
- (a) providing low income earners or disadvantaged communities or individuals with beneficial services;
 - (b) promoting economic opportunities for individuals or communities beyond that which occurs in the ordinary course of business;
 - (c) conserving or restoring the environment (either generally or in relation to a specific environment);
 - (d) improving the health or wellbeing of individuals or communities;
 - (e) promoting the arts, sciences or the advancement of knowledge;
 - (f) facilitating funding for other entities with a purpose to benefit society or the environment; or
 - (g) conferring any other particular benefit on society or the environment.

- 3.10 If a benefit company does any act which is contrary to or does not advance the general public benefit or a specific public benefit, that act is not invalid **[Item 2.2, section 125A(2)]**. The concept and form of this new provision is similar to the concept and form already used in the existing section 125(2) of the Act, thereby providing greater certainty for persons applying this new provision.

4. Mandatory Consideration of Interests by Directors

Detailed explanation of new law

- 4.1 The directors and other officers of a benefit company are still subject to all the duties imposed on them by the Act and under the general law. However, in discharging these statutory and fiduciary duties, the directors and other officers of a benefit company are required to consider a specific list of matters **[Item 2.3, section 190C(1)]**. This provision does not derogate from already developed case law surrounding the application of existing duties of directors under the Act and at general law. **[Item 2.3, section 190C(2)(a)]**. Rather, it defines the scope of those duties for the directors and other officers of a benefit company when making decisions for the benefit company, in the context of the existing law.
- 4.2 In discharging the duty to exercise care and diligence under section 180, a director or other officer must consider each of the matters listed in section 190C(1)(a). Similarly, in discharging the duty to act in good faith in the best interests of the corporation and the duty to act for a proper purpose under section 181, a director or other officer must consider each of the matters listed in section 190C(1)(a). A director or other officer is not required to do more than the duty to act in good faith and the duty to exercise care and diligence would require, but in doing so must have regard to the matters listed in section 190C(1)(a).
- 4.3 This construct, and the list of matters in section 190C(1)(a), provides directors and other officers with statutory protection from any alleged breach of their existing statutory and general law duties merely because a decision has been made which fails to maximise shareholder value or optimise financial returns for shareholders, but which focuses on other benefits which may accrue to the company, its employees, customers, suppliers, the environment or the community. This is a core feature of the benefit company.
- 4.4 The matters to be considered by the directors and other officers of a benefit company closely follow the matters set out in section 172 of the *Companies Act 2006* (UK) with some exceptions **[Item 2.3, section 190C(1)(a)]**. Adopting with some variation the approach which has been used in the UK will provide benefit companies and Australian practitioners with a greater degree of certainty when applying and interpreting the matters in section 190C(1). The list of matters is not an exhaustive one and additional matters may properly inform the discharge by directors and other officers of their statutory and fiduciary duties.
- 4.5 Each matter in the list of matters in section 190C(1)(a) requires the directors and other officers of a benefit company to take into account the likely impact or effect of an act or decision on that matter. The requirement for the directors and other officers to consider each matter does not require one particular matter to be given priority or favour over another **[Item 2.3, section 190C(1)(b)]**. However, the constitution of the benefit company may specifically require the directors and other officers to give priority to a particular matter when seeking to pursue the company's general public benefit purpose or a specific public benefit. For example, a benefit company operating in a particular industry may give priority to a matter which arises more commonly in that industry. Any matter listed in section 190C(1)(a) which refers to a particular group (for example, the 'interests of the company's employees', or the impact of the company's operations 'on the community') does not require the directors and other officers of the benefit company to consider particular individuals, but rather the impact on that group collectively of any decision made by the directors and other officers **[Item 2.3, section 190C(1)(a)]**.

- 4.6 The benefit company amendments to the Act are not intended to interfere with the other provisions of the Act which apply to proprietary companies or public companies respectively. Accordingly, by considering the matters set out in section 190C(1), the directors and other officers of a benefit company are not in breach of, or otherwise acting inconsistently with, other provisions of the Act **[Item 2.3, section 190C(2)]**. As noted above, the consideration of those matters does not constitute a breach of sections 180 (the duty to act with due care and diligence) or 181 (the duties to act in good faith in the best interests of the corporation and to act for a proper purpose) **[Item 2.3, section 190C(2)(a)]**. Directors and other officers may still rely on the business judgement rule in section 180(2) when discharging their obligations under section 190C(1) **[Item 2.3, section 190C(2)(b)]**. The interests of creditors are also given priority to any other consideration when directors are discharging their duties in a near insolvency or insolvency situation **[Item 2.3, section 190C(2)(c)]**. This reflects the paramountcy of the company's obligations to its creditors, notwithstanding its benefit company status.
- 4.7 The mechanism for enforcing compliance by directors and other officers with section 190C(1) is dealt with indirectly, via the benefit enforcement proceedings regime, rather than under the existing mechanisms which are available to ASIC, shareholders and other persons under the Act. No person other than ASIC is entitled to bring proceedings under section 1324 of the Act **[Item 2.3, section 190C(2)(d)]** merely as a result of the directors or officers of a benefit company considering, or failing to consider, the matters in section 190C(1). Similarly, a Court is not entitled to make orders just by the fact of the directors and officers of a benefit company considering the list of matters in section 190C(1), and no person is entitled to bring proceedings or intervene in proceeding under Part 2F.1A of the Act for the same reason **[Item 2.3, section 190C(2)(e)-(f)]**. The benefit company amendments to the Act are not intended to expand the scope of the existing members' rights and remedies provisions in the Act, but rather to establish a separate regime for enforcing rights relating to the benefit company in its capacity as a benefit company **[Item 2.4, Part 2F.5]**. Nonetheless, if ASIC determines that it can bring proceedings to obtain an injunction under section 1324 as a result of the directors or other officers considering the matters set out in section 190C(1) then it may do so. The rights of enforcement for members and officers on behalf of the benefit company are set out in the new Part 2F.5 **[Item 2.4, Part 2F.5]**.
- 4.8 Directors and other officers are required to discharge their existing statutory and fiduciary duties, the scope of which is informed by the mandatory considerations in section 190C(1). Provided that directors and other officers comply with these provisions, the mere failure by a benefit company to achieve general public benefit or one or more specific public benefits set out in its constitution does not make the directors and officers personally liable for such failure. Rather, the appropriate remedy is against the benefit company itself under section 247G of the Act **[Item 2.4, section 247G(1)]**. This is consistent with the current approach to directors' statutory duties. For example, provided that a director or other officer acts with due care and diligence (and in accordance with his or her other obligations), that person shall not be liable for a mere failure of the company to make a profit.

5.	Benefit Enforcement Proceedings
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Detailed explanation of new law

- 5.1 Benefit enforcement proceedings can be brought against a benefit company on two grounds, being a failure of the benefit company to pursue or create general public benefit or a specific public benefit purpose in its constitution, or a failure to comply with the reporting obligations in section 300C **[Item 2.4, section 247F(1)(a) and (b)]**. This recognises that the benefit company should be responsible to ASIC, shareholders and other persons in the usual way for its underlying obligations under the Act (i.e. those which are not specifically related to its benefit company status). The benefit company's liability should therefore be limited to those core elements of its status as a benefit company.
- 5.2 In a similar manner to the existing section 236 of the Act, benefit enforcement proceedings are brought as a statutory derivative action on behalf of a company, and to assist persons in

applying this new provision, the language in this new provision 247F(2) is intended to be substantially similar to the existing language in section 236(1) of the Act **[Item 2.4, section 247F(2)]**.

- 5.3 Standing to bring benefit enforcement proceedings is limited to a single member or group of members with at least 5% of the votes that may be cast a general meeting of the benefit company. **[Item 2.4, section 247F(2)(a)]**, or to an officer of the benefit company **[Item 2.4, section 247F(2)(b)]**. The 5% threshold is consistent with the threshold for members who can call a general meeting of a company under section 249D of the Act, and will reduce the possibility of minority recalcitrant members bringing baseless proceedings in the name of the company. This is deliberately narrower than the standing currently given to all members to bring a derivative action under section 236 of the Act.
- 5.4 Benefit enforcement proceedings will be subject to the same procedural requirements as derivative proceedings brought under Part 2F.1A of the Act, and to this effect section 237 of the Act is to apply to benefit enforcement proceedings as if each reference to a proceeding in section 237 was a reference to a benefit enforcement proceeding **[Item 2.4, section 247F(4)]**. A person applying to bring proceedings must therefore satisfy the Court of the matters in section 237(2) of the Act, including that the applicant is acting in good faith and that it is in the best interests of the company (and therefore its members) that the application be granted. This is a key reason why the right to bring benefit enforcement proceedings is a derivative rather than a personal one.
- 5.5 In recognising the principle expressed in paragraph 5.1 above, namely that benefit enforcement proceedings should be limited to those matters which apply only to a benefit company, rather than those which apply to the company more generally, the range of orders which the Court may make in respect of benefit enforcement proceedings is limited **[Item 2.4, section 247G(1)]**. The orders available to the Court are as follows:
- (a) an order modifying or repealing the benefit company's constitution, including to remove the general public benefit purpose and remove or alter a specific public benefit purpose **[Item 2.4, section 247G(1)(a)]**. The Court should have the power to strip a company of its benefit company status where it fails to pursue or create general public benefit, or have the power to modify any specific public benefit if it is not being pursued or created;
 - (b) an order requiring the company to comply with its obligations to publish an annual benefit report on its website (or send a physical copy of the report to its members if it does not have a website) and include in that report the content which is required by section 300C(2) **[Item 2.4, section 247G(1)(b)]**. The Court may specifically enforce this requirement;
 - (c) an order that an officer of the benefit company do an act specified in section 190C(1)(a) of the Act **[Item 2.4, section 247G(1)(c)]**. Although under section 190C(3) an officer cannot be liable for the benefit company's failure to create or pursue general public benefit or a specific public benefit, the officer can be liable for a failure to consider the matters in section 190C(1). ASIC has standing to directly enforce this against directors and other officers via its right to bring an action under section 1324 of the Act. In bringing benefit enforcement proceedings, a person may also seek an order from the Court requiring an officer to consider a matter in section 190C(1) of the Act; and
 - (d) an order requiring the benefit company to notify ASIC that it is no longer a benefit company **[Item 2.4, section 247G(1)(d)]**. This recognises the inherent power of the Court to remove a company's status as a benefit company.
- 5.6 Where a Court makes an order modifying or repealing all or part of a benefit company's constitution under section 247G(1), it is appropriate that the protections provided by section 233(3) are extended to such an order made by the Court **[Item 2.4, section 247G(2)]**.

Accordingly, the language of section 233(3) is substantially similar to the language of this new provision.

6. Annual Benefit Report

Detailed explanation of new law

- 6.1 Each benefit company must publish a benefit report on its website on an annual basis, or send a physical copy of a benefit report to its members if the benefit company does not have a website **[Item 2.5, section 300C(1)]**. A benefit company which is a public company or a large proprietary company must publish its annual benefit report within 4 months after the end of the company's financial year **[Item 2.5, section 300C(3)(a)]**. This is consistent with the current deadline imposed under sections 315 and 319 of the Act respectively for the lodgement of a company's financial statements. In recognition of the additional administrative and compliance burden on small proprietary companies which may otherwise not lodge financial statements with ASIC or their own members, the period to publish an annual benefit report is 6 months after the anniversary of the company's incorporation **[Item 2.5, section 300C(3)(a)]**. A benefit company which is within 2 years of its date of registration is only required to publish an annual benefit report within the time period under section 300C(3) once the company's second full calendar year or second full financial year has elapsed. This grace period recognises the administrative and compliance burden on a start-up company which is a benefit company from the time of its incorporation **[Item 2.5, section 300C(4)]**. However, disclosure of a benefit company's progress against the general public benefit purpose and any specific public benefit purpose is critical to the benefit company's transparency to all stakeholders, and therefore each benefit company must publish an annual benefit report.
- 6.2 There are two core components of the annual benefit report. The first is a narrative description of four matters which are somewhat similar to those matters on which the directors of a reporting entity are required to comment under section 299 of the Act **[Item 2.5, section 300C(2)(a)]**. The matters are:
- (a) the ways in which the benefit company pursued its general public benefit purpose and the extent to which general public benefit was created **[Item 2.5, section 300C(2)(a)(i)]**. This requires the company to describe which of its activities created or was reasonably expected to create general public benefit, and to describe the general public benefit which was actually created;
 - (b) the ways in which the benefit company pursued each specific public benefit in its constitution and the extent to which each specific public benefit was created **[Item 2.5, section 300C(2)(a)(ii)]**. This requires the company to describe which of its activities created or was reasonably expected to create each specific public benefit, and to describe the specific public benefits which were actually created;
 - (c) details of any matter or circumstance that has significantly affected the creation by the benefit company of general public benefit and each specific public benefit in its constitution **[Item 2.5, section 300C(2)(a)(iii)]**. This information should be described in a similar manner to the information which would be contained in an annual directors' report by reason of section 299(1)(d) of the Act; and
 - (d) the likely developments in the benefit company's operations in future financial years and the expected impact of those developments on the general public benefit purpose and each specific public benefit in its constitution **[Item 2.5, section 300C(2)(a)(iv)]**. This information should be described in a similar manner to the information which would be contained in an annual directors' report by reason of section 299(1)(e) of the Act.

- 6.3 The second core component of the annual benefit report is an assessment of the overall social and environmental performance of the benefit company against a third party benefit standard **[Item 2.5, section 300C(2)(b)]**. The third party benefit standard must be developed by a third party which meets the set of criteria set out in the Regulations, and which is prescribed in the Regulations for that purpose. This will ensure that the standard is applied with independence and objectivity. Assessing each benefit company against an independent and regulated third party standard gives the benefit company credibility and allows external stakeholders (including members) to form a judgement as to whether the benefit company is creating general public benefit or a specific public benefit.
- 6.4 A third party benefit standard must be applied consistently across each annual benefit report **[Item 2.5, section 300C(2)(b)(i)]**. If the third party benefit standard is not applied consistently, there is potential for stakeholders to be misled about changes in the general public benefit or a specific public benefit which is being created from year to year. Any inconsistency in the application of a third party benefit standard must be explained **[Item 2.5, section 300C(2)(b)(ii)]** and reasons must be given for any such inconsistency.
- 6.5 A failure to publish an annual benefit report or a failure to publish within the specified timeframe in section 300C(3) constitutes a strict liability offence under the Act, the penalty for which is 5 penalty units. This recognises the importance of the reporting requirement.

7. Consequential Amendments

Detailed explanation of the new law

- 7.1 Sections 125(1) and 125(2) are amended to include the words "Subject to section 125A" at the beginning of each subclause. This amendment is to avoid any confusion as to the application of sections 125 and 125A to a benefit company.
- 7.2 Section 136(5) is amended to include the words "This also applies to a benefit company". This creates the obligation on the benefit company to lodge its constitution with ASIC within 14 days of adopting or modifying it, even where the benefit company is a proprietary company limited by shares and would otherwise not be required to do so.
- 7.3 Section 136(5) is amended to insert a note that "A benefit company must have a constitution (see sections 45C and 125A)". This note confirms that a proprietary company which adopts benefit company status must have a constitution notwithstanding that it may otherwise elect to rely on the replaceable rules under the Act.
- 7.4 The table in Schedule 3 is amended to include subsections 300C(1) and (3) in the list of specified penalty provisions.

ⁱ Elkington J, 1999, 'Cannibals With Forks: The Triple Bottom Line of 21st Century Business', Capstone.

ⁱⁱ 'About B Lab', B Lab, available at <www.bcorporation.net>.

ⁱⁱⁱ Early notable works are Berle A A, 1931, 'Corporate Powers as Powers in Trust', 44 *Harvard Law Review* 1049; Berle A A, 1932, 'For Whom Corporate Managers Are Trustees: A Note', 45 *Harvard Law Review* 1365; Dodd E M, 1932, 'For Whom Are Corporate Managers Trustees?', 45 *Harvard Law Review* 1145.

^{iv} For further discussion see Ford, Austin & Ramsay's Principles of Corporations Law, Online Looseleaf, LexisNexis Australia, [1.380] to [1.390].

^v Dodd, 'For Whom Are Corporate Managers Trustees?', above n iii, 1147-48.

^{vi} *Ibid* 1162.

^{vii} Corporations and Markets Advisory Committee, "The Social Responsibility of Corporations", December 2006, pp. 84-85.

^{viii} *Ibid*.

^{ix} Ford, Austin & Ramsay's Principles of Corporations Law, Online Looseleaf, LexisNexis Australia, [8.120].

^x *Ibid* at [8.130].

^{xi} *Ibid*.

^{xii} Bainbridge S M, 2003, 'Director Primacy: The Means and Ends of Corporate Governance', 97 *Northwestern University Law Review* 547, 577-83.

ATTACHMENT E: Letters of Support

We have included letters of support for the proposed benefit company amendments from:

- **Professor Ian Ramsay**, Harold Ford Professor of Commercial Law and Director of the Centre for Corporate Law and Securities Regulation at Melbourne Law School, The University of Melbourne
- **Dan Madhavan**, Chief Executive Officer, Impact Investing Australia
- **Christopher Lock**, Chief Executive Officer, Impact Investment Group
- **Will Richardson**, Chief Investment Officer, Giant Leap Fund
- **Pablo Berruti**, Responsible Investment Association Australasia
- **Phil Vernon**, Managing Director, Australian Ethical Ltd (ASX:AEF)
- **Allan English**, Founder and Executive Chairman, Silverchef Ltd (ASX:SIV)



THE UNIVERSITY OF
MELBOURNE

27 September 2016

Proposed benefit company amendments to the Corporations Act

I write to support the amendments to the Corporations Act proposed by B Lab Australia and New Zealand that would allow for benefit companies in Australia. These are companies that, while making a profit, have the public benefit of creating a material positive impact on society and the environment. Since early 2015 I have been a member of an advisory group established by B Lab Australia and New Zealand which has prepared these amendments.

The difficulty for those who wish to establish a benefit company is that the duty imposed on directors to act in the interests of the company has been interpreted to mean that directors should act in the interests of shareholders and that actions taken by directors should generally be linked to the interests of shareholders. This means there is uncertainty in how the existing law of directors' duties would apply to benefit companies and this discourages the establishment of benefit companies.

The proposed amendments assist directors by providing that when directors of a benefit company make decisions to advance the company's public benefit, they do not contravene their duties. A benefit company must have a purpose of creating a public benefit in its constitution – which means that for an existing company, shareholders must approve the company becoming a benefit company.

Yours sincerely

Professor Ian Ramsay

Professor Ian Ramsay
Harold Ford Professor of Commercial Law
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26 September 2016

To Whom It May Concern,

PROPOSED BENEFIT COMPANY LEGISLATION

As representatives of the investor community, we are writing to express our support for the proposed 'benefit company' amendments to the Corporations Act 2001, which would provide a legal framework for entrepreneurs and investors who wish to build and invest in businesses that pursue both profit and purpose.

We strongly believe that investments can successfully blend financial returns with social and environmental impact. Indeed, impact investments of this nature can make a significant contribution to society and the economy at large.

Within the domestic context, the first survey of Australian investors on impact investing (initiated by the Australian Advisory Board on Impact Investing), shows growing investor interest and suggests that there is at least an additional A\$18 billion in capital available to be deployed over the next 5 years, just from investors already active in the market.

It is pivotal that Government adopts innovative policy and legislative frameworks, such as the 'benefit company', to help accelerate this growth and stimulate new investment opportunities.

Benefit company status would make businesses more attractive to investors as it offers protection for company directors to consider society and the environment on equal footing with financial returns, while also offering accountability and transparency around a company's mission.

This is an important step in the evolution of the role of business in society and would give investors the critical assurances they need to confidently commit funds and ensure that businesses remain accountable to their mission in the future.

We believe the proposed benefit company legislation is a cost free framework that will drive significant growth of investment in purpose driven businesses that don't just make money, but add value to the economy, environment and community.

We urge you to consider the proposed amendments favourably.

Yours sincerely,



Pablo Berruti
Chairman
Responsible Investment Association Australasia



Christopher Lock
Chief Executive Officer
Impact Investment Group



Dan Madhavan
Chief Executive Officer
Impact Investing Australia



Will Richardson
Chief Investment Officer
Impact Investment Group and the Giant Leap Fund

14 November 2016

Benefit Company legislative amendments

I am writing to encourage your careful consideration of the proposed benefit company amendments to the Corporations Act which have been developed by a working group established by B Lab Australia and New Zealand. Australian Ethical Investment participated in this working group.

The Benefit Company embodies a sustainable approach to business which recognises the responsibility of companies to their many stakeholders, from shareholders, employees and customers through to society-at-large. This is not a new idea: Australian Ethical Investment has lived this understanding of the role of business since we were established 30 years ago. We re-affirmed this when we became a B Corp in 2014.

Our own experience demonstrates that this approach to business is aligned with the long term interests of all company stakeholders. Unfortunately many directors and executives feel constrained by narrower understandings of their fiduciary duties, and often choose not to pursue strategies which promise better outcomes for all. The proposed Benefit Company changes to the law give shareholders the option to remove this perceived constraint and let companies thrive by building successful sustainable businesses which maximise value for society.

I am very happy to provide further information about our perspective and support for these changes.

Yours sincerely



Phil Vernon
Managing Director
pvernon@australianethical.com.au



11 November 2016

PROPOSED BENEFIT COMPANY LEGISLATION

I am writing to express my support for the proposed voluntary 'benefit company' amendment to the Corporations Act 2001 that B Lab Australia and New Zealand is proposing. By opting in to becoming a 'benefit company', businesses like Silver Chef Limited (Silver Chef) will be able to create a solid foundation for long term mission alignment and therefore continue to build a sustainable business which maximises value for both shareholders and society.

By way of background, Silver Chef started as a privately owned company 30 years ago, providing funding to customers in the hospitality industry through a rent-try-buy model. This model has now been extended into the non-hospitality market, specifically transportation and construction equipment funding. Silver Chef has achieved significant growth over this time, growing from an initial valuation of \$11 million when first listed on the ASX in 2005, to our current market capitalisation of \$370 million. We now operate throughout Australia, New Zealand and Canada, with over 400 employees and more than 30,000 customers.

A major contributor to the sustained success of Silver Chef is our focus on achieving a broader social purpose. Through dividends, weekly employee and over 8,000 customer contributions matched by the company, we have succeeded in taking over 893,000 people out of poverty through contributions to Opportunity International. This is significant progress towards our goal of taking 1.5 million people out of poverty by 2020. We believe in using the power of business to solve social and environmental problems and continually evaluate how our business practices impact our employees, our community, the environment and our customers. To this end, we have become a certified B Corporation and are one of a small number of publicly listed companies globally that have achieved this accreditation.

The proposed benefit company amendments will provide a legal framework to protect Silver Chef from the dilution of mission aligned shareholders. The changes will enable our company's broader social objectives to be embedded into our constitution and will expand our director duties to take into account the interests of non financial stakeholders in addition to the financial interests of shareholders, should a situation of shareholder control occur.

We believe the success and ongoing growth of Silver Chef based on its broader social purpose and achievements is an example to entrepreneurs, both current and future, that the effectiveness of a for-profit company can be measured in more ways than just short-term financial measures. Becoming a benefit company will allow us certainty to pursue a broader social purpose alongside profitability and help catalyse a shift in how business success is defined.

Silver Chef Limited

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I urge you to consider the proposed amendments and am happy to provide further information about our support for these changes.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Allan English', written in a cursive style.

Allan English
Founder and Executive Chairman
Silver Chef Ltd