

Submission to Social Impact Investing Discussion Paper

In response to question 1

The main barrier to growing a social impact investing market in Australia, understood as investments made with the intention of generating measurable social and/or environmental outcomes in addition to financial return, may well be the shareholder primacy norm of corporate governance. This norm has come to be interpreted as a duty to maximise shareholder value (Purpose of the Corporation Project, 2016) and it causes a significant problem for social impact investing because a strict application of this theory would mean, for example, that an investment that returns a 5% profit but creates negative externalities for society must be preferred, all other things being equal, to an investment that returns 4.9% profit but creates positive externalities for society. The latter fails to maximise shareholder value (Deakin, 2010).

Whilst there is significant argument over whether or not shareholder value maximisation is a legal norm or merely a social norm there is no evidence that shareholders are any better off, in fact they may be worse off (Stout, 2014, Martin, 2011). There is however broad agreement that it is the main barrier to companies behaving more sustainably (Sjåfjell, 2012, Sjåfjell, 2014).

The discussion paper references the Corporations and Markets Advisory Committee report. Caution is needed in relying too heavily on this report because it belongs to a different age of business. It was published in 2006 at about the time that Facebook opened up for non-campus use, before the first iPhone or Android were released and before twitter was spun off (Friedman, 2016). Importantly it was before the global financial crisis and, accordingly, is informed by none of the learnings that we have now been able to glean about the unintended consequences of shareholder primacy thinking in corporate governance, some of which I have previously noted (Halburd, 2015)

As Deakin (2010, p.1) has observed the corporation is “the basic organisational unit of the market economy”. It therefore seems unlikely that Australia could develop a social impact investing market ,at any meaningful scale, without addressing the shareholder primacy norm of corporate governance. One relatively simple way to start that process would be to amend the Corporations Act to allow for businesses to voluntarily adopt benefit company status. Benefit company legislation has passed in more than half of the States of the USA where it has achieved overwhelming bipartisan support. Italy has made the necessary amendments to its company law and other countries are considering following suit.

The UK Government recently established an advisory panel to report into mission-led business, which it defined as a business 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 stakeholders. This type of business would be the perfect vehicle for creating a flourishing social impact investment market in Australia. The advisory panel delivered 10 recommendations late last year (Mission Led Business Review, 2016). One of those recommendations was that:

"...government should explore the introduction of "benefit company" status in English law ... This would provide a clear signal that government wishes to enable and encourage mission-led businesses. Over the long-term, a consistent approach would make it easier for consumers, investors and commissioners to identify those businesses and, if appropriate, reward or encourage them."

Without the legal option for our corporations to adopt benefit company status Australia risks falling behind other company law jurisdictions and deprives our business leaders of the perfect vehicle for accelerating our social impact investment market. It would be a disaster for Australia if, in a race to the top, we saw Australian businesses incorporating and engaging in impact investing overseas due to regulatory arbitrage.

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