

THE PRIVATE PROVISION OF ESSENTIAL FINANCIAL SERVICES AND THE CORPORATE SOCIAL RESPONSIBILITIES OF BANKS AND INSURANCE COMPANIES

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Lack of access to both basic credit and basic insurance products have been recognised as two key aspects of financial exclusion in Australia. The neoliberal, or economic liberal, approach to corporate regulation, focusing on profit maximisation, free markets, and limited regulatory intervention, has led to suboptimal social outcomes. This is because of the impacts of financial exclusion, and in this article an argument is made for requiring some profit sacrifice by banking and insurance corporations, to provide basic financial services — as essential services — in accordance with their corporate social responsibilities. The article considers regulatory reform to support such profit sacrifice.

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I INTRODUCTION

This article will explore the corporate social responsibilities of private corporations, which are providing what should be regarded as essential services in the context of a modern consumerist society. Those services are the provision of basic credit and basic insurance products for financially excluded Australians. The article asks whether private corporations (such as banks and insurance companies) should bear these costs on the basis that they enjoy the privilege of being licensed to provide essential services to predominantly profitable customers. Also, and alternatively, this article will ask whether the government should compensate these private corporations (at least in part) for the economic loss they suffer as a result of having to provide unprofitable services. The article also considers regulatory reform to support the provision of potentially unprofitable services.

Given that the exercise of corporate social responsibility by banks and insurance companies in providing these essential services might involve some profit sacrifice, this article considers the extent to which profit sacrifice by private corporations might be justified in the interests of a broader stakeholder group (beyond shareholders). There has been much debate in recent years as to whether Australian corporate law should be amended to explicitly permit directors to take into account broader stakeholder interests in their corporate decision-making.¹ Some argue that the debate has been unnecessary as directors already do take into account broader stakeholder interests, and further, that directors are free to do so because courts will not interfere with directors' judgments so long as directors are not acting in their own self-interest.² Over a decade ago, two government inquiries determined that corporate social responsibility should be voluntary as it is 'not possible to mandate good corporate behaviour,' and that there was no need for regulation to encourage or require corporate social responsibility as corporations have sufficient basis to behave responsibly under a 'business case'.³ There was a clear sense in the reports coming out of those inquiries that while corporations

¹ See, eg, Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1) *UNSW Law Journal* 291; See, eg, Philip Lynch, 'Human Rights and Corporate Social Responsibility: An Australian Perspective' (2005) 1(4) *The Corporate Governance Law Review* 402.

² Marshall and Ramsay, above n 1, 316.

³ Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (1 December 2006) 7, 78; Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (2006) 35-36.

may choose to engage in profit sacrificing activity where this is relevant to their business interests, 'this is not to suggest that companies bear some form of obligation to tackle wider problems facing society, regardless of the relevance of those problems to their own business'.⁴ I argue below, however, that such an obligation does arise where private actors are enabled to provide essential services.

The question of law reform is revisited here in considering the imposition of obligations upon corporations to meet the credit and insurance needs of potentially unprofitable customers. As recognised by Braithwaite in the context of a responsive regulatory approach, 'we need tough-minded regulatory institutions that can shift to a hard-headed approach when virtue fails, as it often will'.⁵ The neoliberal approach to corporate regulation, focusing on profit maximisation, free markets and limited regulatory intervention in the operation of those markets,⁶ has led to suboptimal social outcomes as exemplified by the global financial crisis. The neoliberal approach which supports financial firms whose conduct caused the global financial crisis, is said to perpetuate because of the significant continued economic and political power and influence of those firms.⁷ The neoliberal approach is also a factor in those aspects of financial exclusion attributable to access exclusion, whereby unprofitable consumers are excluded from access to products or services;⁸ therefore an argument is made for requiring some profit sacrifice by banking and insurance corporations to provide basic financial services. That is, as essential services, in accordance with their corporate social responsibilities. This article will explore what reform might be effective to provide banking and insurance corporations with what has elsewhere been termed 'the authority to do good'.⁹

The article commences with a description of financial exclusion in Australia and its consequences. As will be noted, vulnerable, low-income Australians are most likely to experience financial exclusion, particularly in regard to a lack of access to basic small

⁴ Corporations and Markets Advisory Committee, above n 3, 78.

⁵ John Braithwaite, 'Responsive Business Regulatory Institutions' in Charles Sampford and Tony Coady (eds), *Business, Ethics and the Law* (1993) 83, 85.

⁶ Colin Crouch, *The Strange Non-Death of Neoliberalism* (Polity Press, 2011) 98.

⁷ Ibid 175.

⁸ Andrew Leyshon and Nigel Thrift, 'Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States' (1995) 20(3) *Transaction of the Institute of British Geographers, New Series* 312, 314.

⁹ Stephanie Moulton, 'The Authority to Do Good: Publicly Responsible Behavior among Private Mortgage Lenders' (2012) 72(3) *Public Administration Review* 430, 430.

amount credit products, and basic, appropriate home contents and car insurance. Financial exclusion with regard to both credit and insurance can exacerbate the disadvantaged and vulnerable and can have significant social and economic consequences.

Basic credit and insurance products can be conceptualised as essential services, adopting the European approach to ‘services of general economic interest’.¹⁰ It is argued that people should not be denied access to such services on the basis of price. Deference to the “free market” under neoliberal doctrine is questionable where goods or services are essential for financial and social inclusion, and the market fails to deliver those goods or services in a manner which is accessible to, and appropriate for, all people. There is also an argument that a right to ‘services of general economic interest’ should be regarded as a human right. This is premised on an argument that human rights extend beyond the protection of civil and political rights to economic and social rights, satisfying what Habermas describes as the ‘moral promise to respect the human dignity of every person equally’.¹¹

What role, then, should banks and insurance companies play in ensuring the provision of essential credit and insurance services to potentially unprofitable customers? The article will conclude with an overview of possible strategies to effectively address the problem of financial exclusion with regard to basic credit and insurance products in Australia, involving contributions to be made by banks and insurance companies in accordance with their corporate social responsibilities.

II FINANCIAL EXCLUSION AND ITS CONSEQUENCES

In Australia, according to the most recent and apparently the last of a number of comprehensive annual studies measuring financial exclusion in Australia, as of 2013, 16.9 per cent of the Australian adult population were either fully excluded or severely excluded from financial services. Fully excluded individuals (who made up 1 per cent) had no financial services products whereas severely excluded individuals (who made up

¹⁰ Thomas Wilhelmsson, ‘Services of General Interest and European Private Law’ in Charles Rickett and Thomas Telfer (eds), *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press, 2003) 149, 154–155.

¹¹ Jurgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’ (2010) 41 *Metaphilosophy* 464, 469.

the balance 15.9 per cent) had only one financial services product.¹² The three basic financial services products considered in the relevant study were: a day-to-day transaction account, access to a moderate amount of credit, and basic insurance. Being able to access a 'moderate amount of credit' was defined in the study as having ownership of a credit card, without stipulating a particular amount of credit.¹³ While measuring access to credit by reference to access to a mainstream credit card is clearly not a perfect measure, the authors of the study note that 'if a consumer has a credit card, they would generally qualify for other forms of mainstream credit. The rate of credit card ownership closely tracks the general rate of mainstream credit use in Australia'.¹⁴ Only 2.3 per cent of the population were without a day-to-day transaction account, whereas a total of 56.7 per cent were without access to basic mainstream credit and a total of 18.7 per cent were without access to basic insurance.¹⁵ Clearly, a lack of access to basic credit is the greatest concern in Australia, while a lack of access to insurance is a reasonably large concern.

The position where one in six people in Australia were either fully or severely excluded from access to basic financial services has remained the case between 2006 and 2013 and, most likely, beyond.¹⁶ Those who were fully or severely financially excluded were predominantly low income and disadvantaged — for example being unemployed, having had low levels of education, and higher than average incidences of mental illness.¹⁷ While the usual characteristics of financially excluded people have been identified, the causes of financial exclusion are complex and variable. One recognised cause is 'access exclusion', which relates to the providers' decision not to offer products or services to unprofitable consumers, while another is 'price exclusion' where products are priced so as to be beyond the reach of some consumers.¹⁸ It is likely that access exclusion is at play in relation to a lack of access to mainstream credit, while price exclusion is a factor that

¹² Chris Connolly, *Measuring Financial Exclusion in Australia* (Centre for Social Impact, University of New South Wales, for National Australia Bank, 2014) 5.

¹³ *Ibid* app 2.

¹⁴ *Ibid*.

¹⁵ *Ibid* 9.

¹⁶ Kristy Muir, Axelle Marjolin and Sarah Adams, *Eight Years on the Fringe: What Has It Meant to Be Severely or Fully Financially Excluded in Australia?* (Centre for Social Impact, University of New South Wales, for National Australia Bank, 2015) 5.

¹⁷ *Ibid*.

¹⁸ Leyshon and Thrift, above n 8, 314.

leads to exclusion from basic insurance products and also raises concerns regarding the appropriateness of products currently on offer.

What are the consequences of exclusion from access to basic, appropriate credit and insurance products? With respect to credit, it is noted that credit is widely used in modern consumerist societies and equality of access to such credit is an important goal in that context. Financially excluded consumers will often be on low incomes and need access to small amount credit in order to purchase or replace essential household items or to meet emergency bills.¹⁹ Where people cannot meet their credit needs by accessing services from mainstream providers, they will rely on informal networks or turn to high cost alternative credit providers that may fail to adhere to responsible lending obligations.²⁰ This can exacerbate financial distress and over-indebtedness and can sometimes lead to mental health problems, violence, and crime. This in turn can have significant social and economic consequences, including burdening public health and legal aid systems.²¹ There are also clear links between financial exclusion pertaining to credit access, and social exclusion, resulting for example from an inability to purchase a computer for a child to do homework on, or to buy suitable clothing, or to pay for transport to attend a job interview.²² Essentially, a lack of access to appropriate credit can exacerbate disadvantage, both financially and socially. As noted by Ramsay:

Differing patterns of credit use and access to credit may act as a potential 'multiplier' of advantage and disadvantage in society potentially heightening social divisions ... Exclusion from access to credit may therefore mean both economic exclusion from markets ... and also exclusion from a central aspect of public expression in modern society.²³

In relation to a lack of access to basic insurance, it has been noted that low income Australians are likely to be uninsured. This is due to such factors as cost, a lack of facilities

¹⁹ Elaine Kempson, *In or Out? Financial Exclusion: A Literature and Research Review* (Financial Services Authority, 2000) 55.

²⁰ See, eg, Australian Securities and Investments Commission, 'Payday Lender Nimble to Refund \$1.5 Million following ASIC Probe' (Media Release, 16-089MR, 23 March 2016) <<https://asic.gov.au/about-asic/media-centre/find-a-media-release/2016-releases/16-089mr-payday-lender-nimble-to-refund-15-million-following-asic-probe/>>.

²¹ Department of Trade and Industry, UK, *Fair Clear and Competitive: The Consumer Credit Market in the 21st Century* (DTI, UK, White Paper, 2003) 76-78.

²² Chant Link and Associates, *A Report on Financial Exclusion in Australia* (ANZ, 2004) 94.

²³ Iain Ramsay, 'Consumer Credit Law: Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177, 181.

that enable payment of insurance premiums in instalments, and an absence of appropriate products in the market which provide suitable levels of cover for people on low incomes.²⁴ A lack of access to appropriate, basic insurance cover tends to exacerbate the vulnerability of low income Australians in that they are not protected, in the sense of being able to replace property in the event of damage to their home or belongings.²⁵

III A CONCEPTUALISATION OF BASIC CREDIT AND INSURANCE PRODUCTS AS ESSENTIAL SERVICES

Given the impacts of financial exclusion arising from a lack of access to appropriate, basic credit and insurance products, it is argued that credit and insurance products should be regarded as essential products, the provision of which should in some way be guaranteed. One way in which such products might be guaranteed is by imposing a mechanism such as the universal service obligation upon their providers.²⁶ In the Australian context, for example, universal service obligations have been applied to telecommunication services, although limited to telephone services, on the basis that a lack of telephone access will lead to social exclusion.²⁷

Underlying the imposition of universal service obligations is recognition of the increasing tendency in neoliberal markets for essential goods and services to be provided by private providers.²⁸ While neoliberalism favours “free markets” and is therefore assumed to favour limited regulatory intervention in those markets, it has been argued that neoliberalism in fact fosters interventionist regulation to protect the interests of ‘giant firms’ such as banks and insurance companies, rather than the interests of individuals.²⁹ That is to say, rather than neoliberalism resulting in an absence of, or a limited amount of, regulation of the market, it has in fact created a regulatory structure which favours large corporations. For example, corporate pursuit of profit is encouraged under section

²⁴ Genevieve Sheehan and Gordon Renouf, *Risk and Reality: Access to General Insurance for People on Low Incomes* (Brotherhood of St Laurence, 2006) 7–16; Claire Whyley, James McCormick and Elaine Kempson, *Paying for Peace of Mind* (Policy Studies Institute, 1998) 2.

²⁵ Consumer Action Law Centre, *A Fair Go in Insurance* (1 April 2011) Consumer Action Law Centre, <<https://consumeraction.org.au/fair-go-in-insurance/>>; Sheehan and Renouf, above n 24, 1.

²⁶ Hans Micklitz, ‘Universal Services: Nucleus for a Social European Private Law’ in Marise Cremona (ed), *Market Integration and Public Services in the European Union* (Oxford University Press, 2011) 63–102.

²⁷ Australian Communication and Media Authority, *USO Obligations* (25 May 2016) Australian Communication and Media Authority <<http://www.acma.gov.au/Industry/Telco/Carriers-and-service-providers/Obligations/universal-service-obligation-obligations-i-acma>>.

²⁸ Lynne Chester, ‘The Participation of Vulnerable Australians in Markets for Essential Goods and Services’ (2011) 68 *The Journal of Australian Political Economy* 169, 169.

²⁹ Crouch, above n 6, 98.

181 of the *Corporations Act 2001* (as amended) (Cth), in requiring directors to act in the 'best interests of the company'.³⁰ Access and exclusion problems arise when deference to the "free market", itself created by a certain style of regulatory regime supportive of large corporations, leads to individuals being unable to pay the market price for these goods and services. Where a service should be construed as an essential service, it has been argued that the individuals excluded from access should be conceptualised as citizens rather than consumers, entitled to access those services regardless of their ability to pay the market price.³¹ Consistent with this suggested distinction between citizen rights and consumer rights, it has been argued that there should also be a distinction between market consumption on the one hand, whereby market-based approaches to the provision of goods and services might be adequate, and social consumption on the other hand, whereby goods or services are essential for social inclusion.³²

The question is then: what characteristics should cause a service to be categorised as an essential service which citizens are entitled to access? In Europe, essential services which should attract universal service obligations have come to be referred to as both 'universal services' and 'services of general economic interest'.³³ Under article 36 of the Charter of Fundamental Rights of the European Union, 'the Union recognises and respects access to services of general economic interest as provided for in national laws and practices'.³⁴ Wilhelmsson explains services of general economic interest as services necessary to enable a person to live a "normal" life in the context in which they live. Wilhelmsson goes on to explain that:

Many financial services and information society services are now central to the infrastructure of society, and the consumer cannot reasonably be expected to live without them. These aspects of those services can be treated as social rights in the same way that services provided by 'traditional' public utilities are.³⁵

In referring to access to financial services as necessary for a "normal" life, it is acknowledged that this approach is consistent with the 'unprecedented financialisation'

³⁰ *Corporations Act 2001* (Cth) s 181.

³¹ Ran Greenstein, 'Social Rights, Essential Services, and Political Mobilization in Post-Apartheid South Africa' (2006) 29 *Journal of Consumer Policy* 417, 418.

³² *Ibid* 423.

³³ Micklitz, above n 26, 63–102.

³⁴ *Charter of Fundamental Rights of the European Union* [2000] OJ C 364/1, art 36.

³⁵ Wilhelmsson, above n 10, 154–155.

in recent decades, which has prioritised financial over non-financial outcomes, financial services over trade and commodity production, and which has led to a perhaps undesirable increase in the scale and profitability of the financial services market.³⁶ It is the financialisation of housing, whereby subprime mortgages were packaged for financial investors, which has been blamed for the global financial crisis.³⁷ One might ask whether there has in fact been a financialisation of welfare, whereby access to the necessities of life for vulnerable, low income consumers now requires the involvement of financial services. Paradoxically, this financialisation, because it involves a privatisation of services which are then provided by profit-seeking corporations, has at the same time led to exclusion from those services for those who are most vulnerable, and least profitable, as outlined above.

In any event, the reality is that financial services, such as the provision of basic credit and insurance products, are necessary to enable a person to lead a normal life in a modern consumerist society such as Australia. The conceptualisation of financially excluded Australians as citizens, with rights to access essential financial services notwithstanding market barriers such as lack of affordability, gives rise to practical considerations regarding which entities should bear the costs of providing potentially unprofitable services. Should private corporations, such as banks and insurance companies, bear these costs on the basis that they enjoy the privilege of being licensed to provide essential services to predominantly profitable customers? Or should the government compensate these private corporations, at least in part, for the economic loss they suffer as a result of having to provide unprofitable services? In the absence of clear regulatory requirements for banks and insurance companies to sacrifice profits to meet the needs of financially excluded citizens, is it even possible under Australian corporate law for boards of directors to agree to such profit sacrifice without breaching their directors' duties? The potential role of banking and insurance corporations in ensuring access to appropriate basic credit and insurance products will be considered in the next section.

³⁶ Susan Christopherson, Ron Martin and Jane Pollard, 'Financialisation: Roots and Repercussions' (2013) 6 *Cambridge Journal of Regions, Economy and Society* 351, 355.

³⁷ Costas Lapavitsas, 'Financialised Capitalism: Crisis and Financial Expropriation' in Costas Lapavitsas (ed), *Financialisation in Crisis* (Brill, 2012) 15.

IV THE ROLE OF THE CORPORATES

Should private entities such as banking corporations and insurance corporations be compelled to bear the costs of unprofitable service provision on the basis of their corporate social responsibilities? The concept of corporate social responsibility arises out of an understanding that corporations have responsibilities beyond those owed to shareholders: that there are responsibilities owed by corporations to serve broader stakeholder interests such as those of employees and customers, as well as concerns regarding the environment, and general public welfare. There are a number of possible bases for this assertion, two of which will be explored in this article. The first is an argument that corporate activities may give rise to externalities, whereby the costs of a corporation's activities are borne by society rather than the company, and therefore duties are owed to society by that corporation. The second is an argument which highlights the *raison d'être* of shareholder theory as being to address the separation of ownership and control problems in corporate structures (and thus requiring management to ensure the corporation maximises profit for the owner shareholders). Shareholder theory informs Australian corporate law and requires a corporation (through the mechanism of its board of directors) to focus on profit-making to benefit corporate owners or shareholders. This has been referred to as a 'shareholder primacy' approach.³⁸ The argument is that shareholder theory ignores the "other separation problem", namely separation of production and consumption which is also present in an economy dominated by large corporations as producers, and which can only be addressed by adopting a stakeholder theory model. Relevant to this second argument is the concept of a social contract to which corporations such as banks are said to be parties. The "externalities" argument is an economic argument which counters the "economic efficiency" argument that otherwise supports shareholder theory. The economic efficiency argument provides that corporate pursuit of profits for the benefit of shareholders is efficient in the sense of being financially beneficial to society. This forms part of a broader neoliberal argument supporting the "free economy" or "free market" undistorted by government interference (or at least government interference which

³⁸ See, eg, David Yosifon, 'The Social Relations of Consumption: Corporate Law and the Meaning of Consumer Culture' (2015) *Brigham Young University Law Review* 1309, 1328.

interferes with profit-making), as being of optimal benefit to society.³⁹ This argument cannot always be maintained, given that the pursuit of profits by one corporate entity may in some circumstances be of little or no benefit to society at large, due to externalities whereby the costs of the corporation's activities are borne by society rather than the corporation. As discussed above, the costs to society and individuals of financial exclusion can be significant, including burdens to social welfare, health, and legal systems. One might argue that this is an externality arising as a result of the banking and insurance sectors' choices to pursue profitable customers and not provide appropriate credit and insurance products to those whom they regard as less profitable customers. Conversely, where a corporate entity acts specifically to contribute to the social good (for example by providing appropriate services to low income consumers), then financial benefits such as decreased reliance on social welfare, fewer bankruptcies, and so forth, may well follow. Indeed, one reason that has been given for allowing and encouraging the exercise of corporate social responsibility by corporations is that aggregate social welfare may be higher than where corporations adhere to a model of pure profit maximisation.⁴⁰

In relation to a failure of shareholder theory to address the 'separation of production and consumption problem', this argument acknowledges that following the industrial revolution and the increase in production of goods and services by corporations, there has arisen a separation between the production and consumption of goods and services which has led to a consumer agency problem.⁴¹ Whereas shareholder theory and Australian corporate law address the problem of separation of ownership and control within corporations, the consumer agency problem can only be addressed by taking a broader stakeholder theory approach to corporate governance and regulation. Those who must consume the goods and services provided by corporations, in circumstances where they have no control over the production and supply of those goods and services, must be afforded protections so that their interests are not exploited. This must particularly be the case where the services being provided by corporations are essential, or quasi-essential, services. Where corporations are given government support for

³⁹ John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press, 1995) 305-346.

⁴⁰ Forest L Reinhardt, Robert N Stavins and Richard H K Vietor, 'Corporate Social Responsibility through an Economic Lens' (Working Paper, NoRWP08-023, Harvard Kennedy Law School, April 2008) 219, 25-26.

⁴¹ Yosifon, above n 38.

providing these services (for example in the form of a licence to operate and supportive policies to maintain a well-functioning sector), there is said to be a social contract which requires reciprocity from the corporations and which provides corporations with 'a moral framework for engaging in economic activities'.⁴² In the context of banking corporations, banks should be required to fulfil obligations to benefit society in return for government support for their commercial operations.

Under Australian corporate law,⁴³ corporate directors owe duties to act in the best interest of the corporation and that duty has been traditionally defined as one to act in the best financial interests of the 'shareholders as a whole', meaning the best financial interests of the corporation.⁴⁴ There is little obvious scope for profit sacrifice in that formula. Arguments can be made that it is in the best financial interests of a corporation to maintain a strong reputation and to be perceived as legitimate and as a good corporate citizen, but there is no doubt that activities which have the effect of sacrificing corporate profits would be open to challenge by disgruntled shareholders.⁴⁵ Further, there is a concern that arguments around the potential for voluntary corporate social responsibility ('CSR') driven purely by reputational concerns, will lead only to tokenistic corporate responses. This has been referred to as the "business case" view of CSR which is, according to Shamir, an example of the "de-radicalization" of CSR through being "hijacked" by capitalist entities.⁴⁶ Shamir notes that, as previously public roles have been taken over by private corporations, societal concerns regarding the conduct of corporations have increased, and corporations have had to respond to that.⁴⁷ Shamir refers to 'various corporate strategies designed to prevent the use of law as means for bringing about greater corporate accountability', and a process whereby 'corporations have assertively embarked on the Social Responsibility bandwagon, gradually shaping the very notion of Social Responsibility in ways amenable to corporate concerns'.⁴⁸ As a

⁴² Tara Nair, 'Commercial Microfinance and Social Responsibility: A Critique' (2010) 45(31) *Economic and Political Weekly* 32, 36.

⁴³ *Corporations Act 2001* (Cth) s 181.

⁴⁴ See, eg, *Greenhalgh v Arderne Cinemas* [1945] 2 All ER 719; See, eg, *Woolworths v Kelly* (1991) 22 NSWLR 189, 226 (Mahoney JA); See, eg, Therese Wilson, 'The Pursuit of Profit at All Costs: Corporate Law as a Barrier to Corporate Social Responsibility' (2005) 30(6) *Alternative Law Journal* 278.

⁴⁵ See discussion in Wilson, above n 44.

⁴⁶ Ronen Shamir, 'The De-Radicalization of Corporate Social Responsibility' (2004) 30(3) *Critical Sociology* 669, 670.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* 671, 676.

result, CSR has come to be regarded as a matter for voluntary initiative, concerned with furthering the strategic “business case” for corporations.

Even with the best of intentions on the part of corporate boards, there is a possible disconnect between the boardroom deliberations that occur within the legal reality of directors’ duties, and the more public rhetoric when it comes to corporate social responsibility. This tension has perhaps led to a somewhat constrained application of corporate social responsibility principles, explained in the following terms:

[C]orporate law forbids directors from giving supportive voice to policies that would aid non-shareholding stakeholders at the expense of shareholders. Square pegs of social responsibility that cannot fit the round hole of shareholder primacy are left unplaced in the corporate conscience ... The combination of forced speaking, on behalf of shareholders, and forbidden speaking, about non-shareholders, gives shape to a particular kind of knowledge and practice, and precludes others. It keeps directors thinking carefully about the shareholder interest, and thinking only casually about non-shareholder interests.⁴⁹

It would be possible to reshape Australian corporate law to give explicit permission to boards of directors to consider broader stakeholder interests, for example by following the UK model, or the “public benefit corporations” model. The UK model is contained in section 172 of the *Companies Act 2006* (UK) and requires directors to consider broader stakeholder interests when acting in a way most likely to promote the success of the company for the benefit of its members as a whole,⁵⁰ for example by considering the impact of the company’s operations on the community and the environment.

The “public benefit corporations” model has been adopted in Delaware in the US under section 365(a) of its *General Corporation Law*.⁵¹ Under that legislation, where corporations elect to become “public benefit corporations”, their boards are required to take into account non-financial, broader stakeholder interests when making decisions and are protected (from accusations of breach of duty) when doing so. The relevant provision states that:

⁴⁹ Yosifon, above n 38, 1332.

⁵⁰ *Companies Act 2006* (UK) c 2, s 172.

⁵¹ *General Corporations Law*, ch 1, § 365(a), Del Laws 1, 90.

The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.⁵²

Amendments to Australian corporate law giving companies the option of becoming “public benefit corporations” where they are providers of services of general economic interest, would explicitly enable Australian corporations to construct their activities in accordance with a stakeholder theory of the corporation. This could extend to allowing profit sacrificing activities where this is in the interests of a broader stakeholder group, including individuals who require access to private corporate services. A proposal along these lines has been put forward by not-for-profit organisation, B Lab, to amend the *Corporations Act 2001* (as amended) (Cth) to provide an option for corporations to register as ‘benefit companies’,⁵³ which ‘will be required to include a binding corporate purpose in their constitution requiring the company to create a material positive impact on society and the environment’.⁵⁴

Directors of benefit companies would have positive duties to consider the interests of non-financial stakeholders. The benefit companies would also be required to report annually on their overall social and environmental performance.⁵⁵

It should be noted, however, that financial exclusion remains a problem in the UK and the US notwithstanding such regulatory measures, suggesting that more targeted measures are necessary.⁵⁶

An alternative model would be the introduction of regulation directed specifically at banks and insurance companies requiring the provision of appropriate, affordable, basic credit and insurance products to address ongoing financial exclusion in Australia, perhaps through the imposition of universal service obligations. Given that directors must ensure that corporations comply with the law, there is no risk that they would be

⁵² Ibid.

⁵³ *Corporations Act 2001* (Cth).

⁵⁴ B Lab Australia & New Zealand, *The Benefit Company* (2018) <<https://www.benefitcompany.org/>>.

⁵⁵ Ibid.

⁵⁶ Centre for Social Impact (for National Australia Bank), *A Global Snapshot of Financial Exclusion* (NAB, 2014) 48–49.

found to have breached directors' duties when acting to ensure legal compliance, even where some profit sacrifice results.

There is then a question as to whether government should play a role in subsidising the costs of potentially unprofitable corporate activities. Such subsidisation occurred in the US in the lead up to the global financial crisis, whereby government-sponsored enterprises underwrote mortgage backed securities in order to attract funds for mortgage lending.⁵⁷ Of course, this did not end well when commercial enterprises "followed suit" and were willing to invest in riskier, subprime mortgage loans with a view to receiving higher returns.⁵⁸

An example of government subsidisation which might operate in the basic credit and basic insurance markets would involve governments paying compensation to banks and insurance companies for the profits sacrificed as a result of providing those products to low income consumers. Another possibility is for the government to subsidise financially excluded citizens through an additional welfare payment to enable them to access the financial service notwithstanding that it is offered at a high cost. The difficulty with both of these suggestions is the reliance on increased social welfare. It is argued by one commentator that the welfare state in western liberal democracies is likely to have grown as far as is possible while maintaining continued public and political support.⁵⁹ Should that be the case, a response which does not involve increasing welfare in order to facilitate access to credit and insurance products is more likely to attract support. This makes the corporate profit sacrifice model on the basis of corporate social responsibility an attractive one, perhaps with some limited government subsidisation under a government program to address financial exclusion, as opposed to direct provision of increased welfare payments.

There are some current examples of the corporate sector engaging in the provision of appropriate credit and insurance products targeted at vulnerable, low income, financially excluded Australians, although these occur in partnership with community sector

⁵⁷ Peter J Wallison and Bert Ely, *Nationalizing Mortgage Risk: The Growth of Fannie Mae and Freddie Mac* (American Enterprise Institute for Public Policy Research, 2000) 5.

⁵⁸ Martha Poon, 'From New Deal Institutions to Capital Markets: Commercial Consumer Risk Scores and the Making of Subprime Mortgage Finance' (2009) 34 *Accounting, Organizations and Society* 654, 654–5.

⁵⁹ Christopher Pierson, *Beyond the Welfare State: The New Political Economy of Welfare* (Polity Press, 2006) 237.

organisations which are well placed to understand and work with the target group. It is suggested that banking and insurance corporations could be required to expand upon these models, either alone, or in expanded partnerships with the community sector, to better meet the needs of financially excluded individuals. Government could financially support an expansion of these partnership programs, with the proviso that any government investment is matched by the partnering corporate.

With respect to relevant community sector programs, the StepUP loan has been offered by Good Shepherd Microfinance (previously known simply as a part of Good Shepherd Youth and Family Service) in partnership with National Australia Bank since 2004.⁶⁰ These loans are for up to \$3000 with a current applicable interest rate of 5.99 per cent per annum, and a repayment period of between six months and three years. The loans are for cars, car repairs, household items, computers, and medical and dental services. To be eligible for a StepUP loan, a person must be a Centrelink Health Care cardholder or a Pension Concession Card Holder or a Family Tax Benefit Part A recipient.⁶¹

Good Shepherd Microfinance has now also entered into a partnership with Suncorp Insurance to offer an insurance product designed for people on low incomes, called 'Essentials by AAI'.⁶² The product is for car and home contents insurance, and Suncorp has established a dedicated call centre for the product. Policy holders can be covered for \$10 000 or \$20 000 for home contents and for up to two cars valued at \$3000 and \$5000. Policy holders can choose to pay fortnightly, monthly, or annually, and can pay out of their Centrelink payments. The cost of the home contents insurance ranges between \$4 per week and \$9 per week depending upon the level of cover, and from between \$5.50 per week and \$13 per week for car insurance.⁶³

These forms of microfinance and micro-insurance which involve corporations working with the community sector, potentially with the assistance of government grants and other subsidies, can overcome concerns that have been raised with regard to the

⁶⁰ Good Shepherd Microfinance, *Compare Loans* (2017) <<http://goodshepherdmicrofinance.org.au/compare-loans/>>.

⁶¹ Ibid.

⁶² Essentials by AAI, *Everyone Deserves Simple & Affordable Insurance* (2018) Essentials by AAI <<https://www.essentialsbyaai.com.au/>>.

⁶³ Good Shepherd Microfinance, *Insurance for People on Low Incomes Wins Product and Innovation of the Year* (21 October 2015) <<http://goodshepherdmicrofinance.org.au/media/insurance-for-people-on-low-incomes-wins-product-and-innovation-of-the-year/>>.

increasing commercialisation of microfinance products. Whereby private investors have been encouraged to invest in microfinance companies, a conflict of interest inevitably arises between the companies' duties to vulnerable, low income borrowers, and to their investors. This has resulted in high interest rates being charged on micro-loans, and a focus on profitability over improving the living conditions of the poor.⁶⁴ These are not features of the Good Shepherd Microfinance models outlined above.

V CONCLUSION

In this article, I have described the problem of financial exclusion in Australia, as it relates to access to basic credit and insurance products. Access to these products, it has been suggested, should be regarded as essential in a modern consumerist society, adopting the European definition of services of general economic interest.

The neoliberal context, which underpins corporate law in Australia, encourages corporations to pursue profit in the best interests of shareholders. It is argued that banking and insurance corporations should in fact be required to sacrifice profit in order to provide access to appropriate, affordable, basic credit and insurance products for vulnerable, low income consumers. Such profit sacrifice would be justified on the basis of those corporations' corporate social responsibilities. This will serve to both avoid externality costs to society, and to address the consumer agency problem.

This could be achieved by legislatively imposing universal service obligations on banks and insurance companies with regard to these services and might at least be enabled by amendment of section 181(1) of the *Corporations Act 2001* (Cth)⁶⁵ to explicitly permit consideration of broader stakeholder interests beyond those of shareholders in corporate decision-making. I have taken issue with the recommendations of government inquiries and research that argue against the need for any legislative reform of this type,⁶⁶ on the basis of a constrained application of corporate social responsibility principles by corporations under the current regime.

⁶⁴ Nair, above n 42, 35.

⁶⁵ *Corporations Act 2001* (Cth) s 181(1).

⁶⁶ See, eg, Corporations and Markets Advisory Committee, above n 3; See, eg, Parliamentary Joint Committee on Corporations and Financial Services, above n 3; See, eg, Marshall and Ramsay, above n 1.

There is a question as to whether government should provide some form of subsidisation to banks and insurance companies in recognition of their profit sacrifice, whether in the form of direct payments or tax incentives. Although if the corporate social responsibility argument is accepted, then government subsidy should be unnecessary. A form of subsidisation in the case of insurance would be an increase in social welfare to individuals to enable the purchase of insurance at market prices. Although, as discussed, suggestions involving an expansion of social welfare may not receive political or popular support. Government could also play a role in providing financial support to community sector organisations which undertake microfinance or micro-insurance activities, with the proviso that government investment is matched by the corporations partnering with the community sector organisations. The partnership model is an attractive one because it brings together the skill of community sector organisations of engaging effectively with the target market, with the skill of banks or insurance companies of being able to develop and provide credit or insurance products.

Under any of these models, the engagement of banking and insurance corporations in the provision of basic credit or basic insurance products is necessary and must be required of these corporations in order to properly address financial exclusion in Australia. A regulatory framework which will potentially require profit sacrificing activities by these corporations will achieve social outcomes superior to those derived from a singular pursuit of profits.

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