SOCIAL LICENCE AS A REGULATORY CONCEPT: AN EMPIRICAL STUDY OF AUSTRALIAN COMPANY DIRECTORS

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Growth of 'social licence to operate' ('SLO') may reflect an evolution of the stakeholder-shareholder debate, and an expansion of the power of employees, investors and society generally, described by the smart regulatory model as third-party or 'surrogate' regulators of corporate activity. Despite the broad implications of SLO for regulation, little is known about the perceptions of company directors in relation to SLO. This article reports on an empirical investigation of Australian directors' perspectives, undertaken after the Australian Securities Exchange's proposal to formalise regulatory use of SLO. Directors' responses provide support for theoretical models of third-party regulators. They identify SLO and concepts of trust, relationships and reputation as important and, crucially, part of the future. However, responses also reveal potential limitations in SLO's contours that impact its use as a regulatory concept. Regulatory systems must account appropriately for the complex phenomenon of SLO, so its potential benefits are harnessed effectively.

I INTRODUCTION

The concept of corporate social licence to operate ('SLO') emerged in mining contexts in the 1990s, expanded rapidly,[1] and is now moving into mainstream

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A collaborative study co-funded by Flinders University and CSIRO, this research was approved by CSIRO's Social Science Human Research Ethics Committee in line with the guideline specified in the National Statement on Ethical Conduct in Human Research (083/19) with a reciprocal ethics clearance granted by Flinders University's Social and Behavioural Research Ethics Committee (OH-00222). The authors thank the participants who provided their insights and time to this research project. We are grateful to Emerita Professor Kathy Mack for her thoughtful suggestions on an earlier version of this article, as well as the comments of anonymous referees.

1 See John Morrison, *The Social License: How to Keep Your Organization Legitimate* (Palgrave Macmillan, 2014) <https://doi.org/10.1057/9781137370723>; Justin O'Brien, *Trust, Accountability and Purpose: The Regulation of Corporate Governance* (Cambridge University Press, 2019) <https://doi.org/10.1017/9781108781138>; David Rouch, *The Social Licence for Financial Markets: Reaching for the End and Why It Counts* (Palgrave Macmillan, 2020) <https://doi.org/10.1007/978-3-030-40220-4>.

corporate regulation.[2] Growth in attention to SLO is part of a wider questioning of the impact of corporations on society, and the evolution of the stakeholder-shareholder debate, as a narrow emphasis on shareholder returns shifts towards a growing expectation that corporate actions will take into account impacts on a range of stakeholder interests and society as a whole.[3]

Within this debate, the broader emergence of the SLO concept may represent a turning point by implicitly recognising the shifting of a level of regulatory influence from within the corporation to external 'surrogate' or societal regulators of corporate activity. Increasing regulatory attention to SLO and its potential impact on business was evident in Australia when the Australian Securities Exchange's Corporate Governance Council ('ASX CGC') proposed formalising reference to SLO in its Corporate Governance Principles.[4] This proposal was highly controversial[5] and ultimately unsuccessful, suggesting there may be limitations to SLO's usefulness as a regulatory concept and raising questions as to the place of SLO in the relationship between companies, the law and society.

Understanding company directors' views on SLO is essential to assessing the potential significance of SLO's intersection with corporate regulatory systems.[6] Directors directly affect corporate decision-making[7] and are the focus of key legal responsibilities in relation to corporate operations.[8] However, the only existing research into directors' perceptions of SLO is quantitative and predates the proposed changes by the ASX CGC.[9] There is a need for qualitative methods to enable in-depth understanding of boards' decision-making processes in relation to broader

2 ASX Corporate Governance Council, 'Review of the ASX Corporate Governance Council's Principles and Recommendations: Public Consultation' (Consultation Paper, 2 May 2018) 6, 15, 18, 19 ('Public Consultation'); Karin Buhmann, 'Public Regulators and CSR: The "Social Licence to Operate" in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136(4) *Journal of Business Ethics* 699 <https://doi.org/10.1007/s10551-015-2869-9>; 'OECD Trust in Business Initiative', *Organisation for Economic Co-operation and Development* (Web Page) <https://www.oecd.org/fr/corruption/trust-business.htm>.

3 See Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness' (2012) 35(1) *University of New South Wales Law Journal* 317; Rosemary Teele Langford, 'Use of the Corporate Form for Public Benefit: Revitalisation of Australian Corporations Law' (2020) 43(3) *University of New South Wales Law Journal* 977, 983 ('Use of the Corporate Form for Public Benefit') <https://doi.org/10.53637/ERYJ2395>; Lucian A Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106(1) *Cornell Law Review* 91 <https://doi.org/10.2139/ssrn.3544978>.

4 ASX Corporate Governance Council, 'Public Consultation' (n 2).

5 Patrick Durkin, 'Board Outrage over Push to Have a Social Licence', *The Australian Financial Review* (online, 1 August 2018) <https://www.afr.com/work-and-careers/management/board-outrage-over-push-to-have-a-social-licence-20180731-h13doa>.

6 See Rosemary Teele Langford, 'Social Licence to Operate and Directors' Duties: Is There a Need for Change?' (2019) 37(3) *Company and Securities Law Journal* 200.

7 Jan Endrikat et al, 'Board Characteristics and Corporate Social Responsibility: A Meta-Analytic Investigation' (2021) 60(8) *Business & Society* 2099 <https://doi.org/10.1177/0007650320930638>.

8 See, eg, *Corporations Act 2001* (Cth) ss 180–4.

9 Australian Institute of Company Directors and KPMG, *Maintaining the Social Licence to Operate: 2018 KPMGAICD Trust Survey* (Report, 2018) <https://webarchive.nla.gov.au/awa/20180325100037/https://aicd.companydirectors.com.au/advocacy/research/maintaining-the-social-licence-to-operate-2018-kpmg-aicd-trust-survey> ('*AICD and KPMG Report*').

social issues[10] and this is particularly so in relation to the nascent field of SLO and its regulatory impact. This article reports Australian company directors' views on the role and usefulness of SLO at a distinctive point in time, in light of the proposed revisions to the ASX Corporate Governance Principles. Through a qualitative interview-based investigation of the perspectives of 24 highly experienced Australian company directors, the article reveals a nuanced understanding of how SLO already functions and impacts on business, including concerns about the formal inclusion of SLO in regulatory structures. Overall, director views provide evidence of an evolution of corporate regulatory relationships especially in relation to third-party surrogate regulators.

This research also provides empirical evidence of the salience of themes visible in SLO literature but not previously examined in the context of directors, including the importance of corporate reputation, transparency and the maintenance of relationships with stakeholders and society as a whole. By addressing this important gap in understanding SLO, corporate conduct and regulation, this article offers an original theoretical analysis of SLO in the context of smart regulation,[11] a construct with a particular emphasis on the supplementing effect of third-party regulators. This research highlights SLO's capacity to profoundly shift influence from within the corporation to outside stakeholders, who present diverse and potentially conflicting demands. Crucially, this research maps ways SLO can have both regulatory-enhancing and regulatory-compromising effects. Given the growing impact of SLO factors on our regulatory systems, this analysis is timely.

The article is arranged as follows. Part II gives a brief description of the proposal for and subsequent rejection of the formal regulatory use of SLO in the revisions of the ASX Corporate Governance Principles. Part III provides an analysis of the evolving shareholder-stakeholder debate on the corporation's place in society and third-party regulatory theory, each in relation to SLO. Part IV describes the design and findings of a qualitative investigation of Australian company director perceptions of SLO, revealing the complexity of this key decision-making cohort's thinking on SLO. These views identify the significance of SLO's ambiguity, its impact on power structures and the complex range of variables SLO entails, but

10 Kathyayini Rao and Carol Tilt, 'Board Composition and Corporate Social Responsibility: The Role of Diversity, Gender, Strategy and Decision Making' (2016) 138(2) *Journal of Business Ethics* 327, 328 <https://doi.org/10.1007/s10551-015-2613-5> (the authors remarking that 'more rigorous qualitative studies … are essential as this type of research enables the researcher to investigate the real world which in turn helps in gaining a deeper understanding of the relationships among key subjects … and of the decision making processes that take place'). For rare examples of qualitative work with boards see John Roberts, Terry McNulty and Philip Stiles, 'Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom' (2005) 16(S1) *British Journal of Management* S5 <https://doi.org/10.1111/j.1467-8551.2005.00444.x>; Rosemary Sainty, 'Honouring the Tensions: Corporate Boards at the Interface of Corporate Governance and Corporate Social Responsibility' (PhD Thesis, University of Technology Sydney, December 2017).

11 Smart regulation 'refer[s] to an emerging form of regulation that seeks to harness not just governments but also business and third parties to provide policy alternatives that include, but often go beyond, direct regulation': Neil Gunningham and Cameron Holley, 'Next-Generation Environmental Regulation: Law, Regulation, and Governance' (2016) 12 *Annual Review of Law and Social Science* 273, 280 <https://doi.org/10.1146/annurev-lawsocsci-110615-084651>. The concept is discussed further in Part III(B).

also confirm the fundamental importance of SLO and related concepts of trust, relationships and reputation. Part V then analyses the regulatory implications of SLO's contours in light of the empirical insights, showing the significance of power shifts, information needs, diverse demands and impacts on civil structures for SLO as a regulatory concept. This analysis points to the difficulties of effectively coordinating regulatory efforts by the state with third-party pressure. Crucially, this analysis demonstrates the need for regulatory systems to account appropriately for the complex phenomenon of SLO in order that its benefits are harnessed and its limitations addressed. Part VI concludes.

II THE AUSTRALIAN SECURITIES EXCHANGE AND SOCIAL LICENCE DISCLOSURE

In 2018, the ASX CGC proposed integrating the term 'social licence to operate' into its Corporate Governance Principles as part of a periodical revision of the Principles,[12] generating significant controversy in relation to this 'contentious phrase'.[13] This aspect of the ASX CGC proposals was '[o]verwhelmingly, the most commented upon and polarising' of all of the suggested revisions.[14] The ASX CGC's Corporate Governance Principles provide a series of recommended practices for entities listed on the ASX, nested under eight key Principles. These recommendations are not mandatory but rather require compliance on an 'if not, why not' basis, where listed entities that choose not to comply with them must explain why they have not adopted a particular recommendation.[15] Given their significant role in Australian corporate governance practice, it is generally accepted that the Principles 'serve a regulatory function'[16] and form part of the legal structure within which directors operate, with direct capacity to influence director behaviour.[17] Proposed 2018 amendments introduced specific reference to

12 See ASX Corporate Governance Council, 'Public Consultation' (n 2); ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Consultation Draft, 4th ed, 2 May 2018) <https://www.asx.com.au/documents/asx-compliance/consultation-draft-cgc-4th-edition.pdf> ('Consultation Draft').

13 Joanna Mather, 'ASX Governance Council Dumps "Social Licence to Operate" from Guidance', *The Australian Financial Review* (online, 27 February 2019) <https://www.afr.com/work-and-careers/management/asx-governance-council-dumps-social-licence-to-operate-from-guidance-20190225-h1bp43>; Durkin (n 5).

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

15 ASX Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (4th ed, February 2019) 2.

16 Law Council of Australia, Submission to ASX Corporate Governance Council, *Review of ASX Corporate Governance Principles and Recommendations* (30 July 2018) 2 [6]. See also Dimity Kingsford Smith, 'Governing the Corporation: The Role of "Soft Regulation"' (2012) 35(1) *University of New South Wales Law Journal* 378.

17 Vivienne Brand, 'Connections between Ethics and Directors' Duties in Australia' in Adolfo Paolini (ed), *Research Handbook on Directors' Duties* (Edward Elgar, 2014) 239, 259–60, 267 <https://doi.org/10.4337/9781781004418.00018>.

SLO in connection with three separate Principles: Principle 3 *Instil the desired culture*, Principle 7 *Recognise and manage risk* and Principle 8 *Remunerate fairly and responsibly*.[18]

Commentary in relation to Principle 3 noted that '[a] listed entity's "social licence to operate" is one of its most valuable assets', and that preserving an entity's social licence requires regard to the views of a range of stakeholders.[19] An accompanying list of actions that might be regarded as appropriate conduct for corporations was included together with a recommendation that companies articulate and disclose their core values. The draft Principles noted that '[g]iven the importance of an entity's social licence to operate' a statement of core values would 'usually include a commitment by the entity to complying fully with its legal obligations and to acting ethically and in a socially responsible manner'.[20] Reference to the significance of SLO considerations was also included in associated recommendations on anti-bribery and corruption policies.[21] Commentary on Principle 7 clarified that a company's social licence could 'be lost or seriously damaged if the entity conducts its business in a way that is not environmentally or socially responsible'.[22] The Principles then recommended that companies disclose whether or not they had any material environmental or social risks, and expressly linked those risks to SLO. In relation to Principle 8 (dealing with remuneration), proposed new commentary noted the implications for a company's social licence where the company was 'seen to pay excessive remuneration to directors and senior executives'.[23]

The effective impact of these proposals was to impose an obligation on Australian listed companies to report on their SLO-related policies and risks (or to explain why they were not doing so). As noted, extensive controversy ensued in relation to this innovative proposal to create a formal link between SLO and reporting requirements for listed companies. The Law Council of Australia submitted that the concept of SLO 'is too vague and uncertain to serve as the touchstone for an important piece of regulatory policy',[24] arguing that commentary in the Principles should use precise language and settled concepts in order to avoid the risk of 'undermining the normative force of the Principles'.[25] This view was consistent with the only available judicial commentary on the term in an Australian context. A tentative view on the use of the term was expressed by the Federal Court in *No TasWind Farm Group Inc v Hydro-Electric Corporation [No 2]*,[26] where the

18 ASX Corporate Governance Council, 'Public Consultation' (n 2) 4, 6–7, 10, 15, 18–19; ASX Corporate Governance Council, 'Consultation Draft' (n 12) 25, 43, 48.
19 ASX Corporate Governance Council, 'Consultation Draft' (n 12) 25.
20 Ibid 25–6.
21 Ibid 28.
22 Ibid 43.
23 Ibid 45.
24 Law Council of Australia (n 16) 8.
25 Ibid 2.
26 [2014] FCA 348. In that proceeding, the applicant claimed against the respondent energy company for engaging in misleading or deceptive conduct. The judgment concerns the respondent's application for security for costs.

Court commented briefly on the meaning of 'social licence' in an interlocutory judgment. Relevantly, the applicant claimed the respondent company represented that it would obtain such a licence before proceeding with a proposed wind farm development. Kerr J remarked:

> I harbour considerable doubt that what is conveyed by the notion of 'social licence' can be identified with such precision as would enable a court to conclude that any particular practice fell within or outside of its scope. It seems to me arguable that the notion of 'social licence' may be better understood as construct of social and political discourse rather than of law and that it is potentially too amorphous and protean in nature to be applied as the criterion for a judicial declaration.[27]

Similarly, amongst formal industry responses, the Australian Institute of Company Directors argued against the inclusion of references to SLO in the Principles, arguing the concept was subjective and would introduce complexity and uncertainty.[28] Overall, significant commentary in financial and general media was directed to the proposal, much (but not all) of it negative.[29]

In the wake of this resistance, the ASX CGC replaced the phrase SLO with 'reputation' and 'standing in the community', commenting that these concepts were 'essentially synonymous' with SLO.[30] In substituting alternative terms for SLO the Council noted concern the phrase could cause difficulties for corporations 'legitimately operating in particular sectors that some parts of society are opposed to' such as 'the gaming, alcohol, tobacco [and] fast food' sectors.[31] This suggests that SLO may be used to represent the degree of social permission accorded to particular activities and that such permission may also be at risk of being revoked by external parties, irrespective of the formal legal permissions that might also be in place for those activities. The final position reached by the ASX CGC suggested that SLO was not a term deemed readily useful or useable in regulatory terms.

III THEORETICAL CONCEPTS

Two principal strands of theoretical work inform this study. The first is research on the long-running stakeholder-shareholder debate and SLO. The second is corporate regulatory theory, with a focus on responsive and flexible forms of regulation, particularly 'smart regulation', a model with significant capacity to contribute to an understanding of the place of SLO in contemporary regulation of companies' relationships with society.

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27 Ibid [38].

28 Australian Institute of Company Directors, Submission to ASX Corporate Governance Council, *Review of ASX Corporate Governance Principles and Recommendations* (27 July 2018) 2.

29 Michael Roddan, 'Resist Social Obligation Push: Bradley', *The Australian* (Sydney, 3 October 2019) 17; John Durie, 'Boards Can't Shirk Responsibility', *The Australian* (Sydney, 3 October 2019) 28.

30 Johnstone (n 14) 4.

31 Ibid.

A Stakeholders and SLO

Scholarly investigation of the role of business in society, including a company's responsibilities to its stakeholders beyond its shareholders, has spanned more than six decades.[32] Debate in recent years has questioned the appropriate purpose of companies, and hence the legitimate focus of director attention.[33] The key issue has continued to be whether companies primarily exist to further the interests of their shareholders or are obliged, legally or for reputational reasons, to take into account stakeholder and wider societal interests.[34] This is a question of fundamental importance to modern societies, given the dominance of the corporate form.

Arguably, an earlier ascendency in shareholder primacy is now giving way to a stronger focus on stakeholders. Recent evidence suggests a mainstream shift towards the stakeholder perspective and its emphasis on non-shareholder constituencies of the corporation.[35] In 2019, the powerful United States Roundtable on Business asserted that although 'each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders'.[36] This announcement was met with scepticism[37] but also an acknowledgement that the statement represents 'a significant shift';[38] in the same vein, influential Chief Executive Officer Larry Fink opined that corporations that lack a sense of purpose will 'lose the license to operate from key stakeholders'.[39] It may be that '[t]he

32 Angeli Weller, 'Exploring Practitioners' Meaning of "Ethics," "Compliance," and "Corporate Social Responsibility" Practices: A Communities of Practice Perspective' (2020) 59(3) *Business & Society* 518 <https://doi.org/10.1177/0007650317719263>; Shelley Marshall and Ian Ramsay, 'Corporate Purpose: Legal Interpretations and Empirical Evidence' in Thomas Clarke, Justin O'Brien and Charles RT O'Kelley (eds), *The Oxford Handbook of the Corporation* (Oxford University Press, 2019) 168, 168–73 <https://doi.org/10.1093/oxfordhb/9780198737063.013.7>.

33 Rosemary Teele Langford, 'Purpose-Based Governance: A New Paradigm' (2020) 43(3) *University of New South Wales Law Journal* 954, 965–76 <https://doi.org/10.53637/TDWS1787>; Langford, 'Use of the Corporate Form for Public Benefit' (n 3); Andrew Ross Sorkin, 'How Shareholder Democracy Failed the People' *The New York Times* (online, 21 August 2019) <https://www.nytimes.com/2019/08/20/business/dealbook/business-roundtable-corporate-responsibility.html>.

34 See generally Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 1962); E Merrick Dodd, 'For Whom are Corporate Managers Trustees' (1932) 45(7) *Harvard Law Review* 1145 <https://doi.org/10.2307/1331697>; Andrew Smith, Kevin D Tennent and Jason Russell, 'Berle and Means's *The Modern Corporation and Private Property*: The Military Roots of a Stakeholder Model of Corporate Governance' (2019) 42(2) *Seattle University Law Review* 535; R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Pitman Publishing, 1984).

35 Bebchuk and Tallarita (n 3). See also Malcolm Anderson et al, 'Shareholder Primacy and Directors' Duties: An Australian Perspective' (2008) 8(2) *Journal of Corporate Law Studies* 161, 167–70 <https://doi.org/10.1080/14735970.2008.11421526> (survey research involving Australian company directors finding that 'shareholders constitute the stakeholder group accorded the highest priority by the directors' (at 166), but the items regarded most important to directors did not relate specifically to shareholders (rather they specifically related to customers/clients and employees)).

36 Business Roundtable, 'Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"' (Media Release, 19 August 2019).

37 Bebchuk and Tallarita (n 3) 126.

38 Sorkin (n 33).

39 Letter from Larry Fink, 12 January 2018, reproduced in Larry Fink, 'A Sense of Purpose', *Harvard Law School Forum on Corporate Governance* (Blog Post, 17 January 2018) <https://corpgov.law.harvard.edu/2018/01/17/a-sense-of-purpose/>.

recent wave of anti-corporate sentiment and political upheaval suggests that the corporate purposes debate … [is] at a watershed moment'.[40]

Stakeholderism has a long provenance beginning particularly with the work of Merrick Dodd and strategic management theorist Milton Freeman.[41] Dodd identified the view that those who manage corporations ought to 'concern themselves with the interests of employees, consumers, and the general public' in addition to shareholders.[42] In corporate regulatory terms, this imposes a complex obligation on directors to reconcile competing interests. A frequent criticism of this approach is that it reduces the accountability of boards by diffusing the measures by which a board can be tested.[43] By contrast, a simple profit-maximisation model may enable corporate directors to be clear as to their aims and could eliminate 'the distractions and costs associated with having to reconcile conflicting interests'.[44] Stakeholderism's critics have also pointed to the potential for it to obstruct reforms that could deliver meaningful stakeholder protection by obscuring 'the critical need for external interventions to protect stakeholders via legislation, regulation, and policy design', with resultant risk of societal harm.[45]

In corporate usage, SLO initially took hold in the extractive industries, including forestry and mining,[46] but has since spread well beyond those origins and is now being adopted by civil society and other stakeholders more broadly.[47] Thus SLO is no longer limited to a type of operation's or company's relationship with an individual community, but rather can be assessed in the context of a company's or even an industry's wider operations with society.[48] More recent conceptualisations of SLO suggest that a company may have multiple SLOs, reflecting diversity

40 Martin Petrin, 'Corporate Management in the Age of AI' [2019] (3) *Columbia Business Law Review* 965, 1020 <https://doi.org/10.7916/cblr.v2019i3.5118>.

41 Dodd (n 34); Freeman (n 34). See Bebchuk and Tallarita (n 3) 103–6.

42 Dodd (n 34) 1156.

43 Bebchuk and Tallarita (n 3); Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Evidence' (2012) 35(1) *University of New South Wales Law Journal* 291, 294.

44 Petrin (n 40) 1021.

45 Bebchuk and Tallarita (n 3) 92.

46 Kieren Moffat et al, 'The Social Licence to Operate: A Critical Review' (2016) 89(5) *Forestry* 477 <https://doi.org/10.1093/forestry/cpv044> ('SLO: A Critical Review'); Rod McCrea, Andrea Walton and Talia Jeanneret, 'An Opportunity to Say No: Comparing Local Community Attitudes toward Unconventional Gas Development in Pre-approval and Operational Phases' (2020) 69 *Resources Policy* 101824 <https://doi.org/10.1016/j.resourpol.2020.101824>.

47 Peter Edwards et al, 'Trust, Engagement, Information and Social Licence: Insights from New Zealand' (2019) 14(2) *Environmental Research Letters* 024010 <https://doi.org/10.1088/1748-9326/aaf33c> ('Trust, Engagement, Information and Social Licence'); Ninitha Koya, Bree Hurst and Juliet Roper, 'In Whose Interests? When Relational Engagement to Obtain a Social License Leads to Paradoxical Outcomes' (2021) 47(1) *Public Relations Review* 101987 <https://doi.org/10.1016/j.pubrev.2020.101987>; Libby Lester, 'Media and Social Licence: On Being Publicly Useful in the Tasmanian Forest Conflict' (2016) 89(5) *Forestry* 542 <https://doi.org/10.1093/forestry/cpw015>; Fiona Haines et al, 'Countering Corporate Power through Social Control: What Does a Social Licence Offer?' (2022) 62(1) *British Journal of Criminology* 184 <https://doi.org/10.1093/bjc/azab049>.

48 Kieren Moffat et al, 'Understanding the Social Acceptance of Mining' in Sumit K Lodhia (ed), *Mining and Sustainable Development: Current Issues* (Routledge, 2018) 27 <https://doi.org/10.4324/9781315121390>.

amongst its stakeholders;[49] and suggest that the *social* licence should be seen as one of three 'licences' granted by stakeholders in a company, each licence 'both protect[ing] and represent[ing] the public interest' (with the others being an actuarial licence and a political licence).[50]

This shift brings with it significant potential complexity, particularly in relation to the ordering of competing societal interests. However, despite the academic attention given to SLO over two decades,[51] a comprehensive and agreed definition has remained elusive. SLO has been linked to concepts of corporate citizenship, social sustainability, the social contract, reputation and legitimacy,[52] reflecting concern as to an industry's or a corporation's relationship with a broader range of stakeholders. SLO has been said to be a dynamic measure, reflecting 'the quality and strength of the relationship between an industry and a community of stakeholders'[53] over a period of time and based on a range of factors. Further, to maintain SLO, industry must be 'responsive to the changing nature of societal approval and acceptance',[54] since the provision of a licence is part of an ongoing process or relationship, not a single-instance event. SLO's links to reputation and changing circumstances were highlighted in the Law Council of Australia's submission on the ASX's proposed Corporate Governance Principles, with the Law Council questioning if SLO was 'nothing more than reputation in these times of a 24-hour news cycle and nowhere to hide thanks to social media?'.[55]

Crucially, SLO's distinctive contribution is the idea that stakeholders have the power to influence corporate activities,[56] shifting an element of the locus of

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49 See Bree Hurst, Kim A Johnston and Anne B Lane, 'Engaging for a Social Licence to Operate (SLO)' (2020) 46(4) *Public Relations Review* 101931:1–9, 2 <https://doi.org/10.1016/j.pubrev.2020.101931>; David Jijelava and Frank Vanclay, 'Legitimacy, Credibility and Trust as the Key Components of a Social Licence to Operate: An Analysis of BP's Projects in Georgia' (2017) 140(3) *Journal of Cleaner Production* 1077, 1084 <https://doi.org/10.1016/j.jclepro.2016.10.070>.

50 Sara Bice, Martin Brueckner and Christof Pforr, 'Putting Social License to Operate on the Map: A Social, Actuarial and Political Risk and Licensing Model (SAP Model)' (2017) 53 *Resources Policy* 46, 48–9 <https://doi.org/10.1016/j.resourpol.2017.05.011>. See also Martin Brueckner and Marian Eabrasu, 'Pinning Down the Social Licence to Operate (SLO): The Problem of Normative Complexity' (2018) 59 *Resources Policy* 217 <https://doi.org/10.1016/j.resourpol.2018.07.004>.

51 Jim Cooney, 'Reflections on the 20th Anniversary of the Term "Social Licence"' (2017) 35(2) *Journal of Energy & Natural Resources Law* 197 <https://doi.org/10.1080/02646811.2016.1269472>; Peter Edwards et al, 'Social Licence to Operate and Forestry: An Introduction' (2016) 89(5) *Forestry* 473 <https://doi.org/10.1093/forestry/cpw036> ('Social Licence to Operate and Forestry').

52 Bice, Brueckner and Pforr (n 50); Nina Hall et al, 'Social Licence to Operate: Understanding How a Concept Has Been Translated into Practice in Energy Industries' (2015) 86 *Journal of Cleaner Production* 301 <https://doi.org/10.1016/j.jclepro.2014.08.020>; Justine Lacey, Peter Edwards and Julian Lamont, 'Social Licence as Social Contract: Procedural Fairness and Forest Agreement-Making in Australia' (2016) 89(5) *Forestry* 489 <https://doi.org/10.1093/forestry/cpw027>; Richard Parsons, Justine Lacey and Kieren Moffat, 'Maintaining Legitimacy of a Contested Practice: How the Minerals Industry Understands Its "Social Licence to Operate"' (2014) 41 *Resources Policy* 83 <https://doi.org/10.1016/j.resourpol.2014.04.002>.

53 Moffat et al, 'SLO: A Critical Review' (n 46) 480–1.

54 Hall et al (n 52) 302.

55 Law Council of Australia (n 16) 8 [45].

56 Robert G Boutilier, 'Frequently Asked Questions about the Social Licence to Operate' (2014) 32(4) *Impact Assessment and Project Appraisal* 263 <https://doi.org/10.1080/14615517.2014.941141>. Cf Haines et al (n 47), analysing how 'investing meaning in terms such as the social licence … enable it to

influence from *within* the corporation to *outside* the corporation.[57] Early work by Gunningham, Kagan and Thornton has been influential in describing SLO as 'the demands on and expectations for a business enterprise that emerge from neighborhoods, environmental groups, community members, and other elements of the surrounding civil society',[58] implicitly acknowledging the increasing power of wider society in company-community exchanges. Australian industry research has suggested '[a]ggrieved and cynical communities can withdraw the social licence of organisations that lose or exploit their trust – with potentially devastating financial, legal and regulatory impacts'.[59] A formal licence is 'a permit from an authority to own or use something, do a particular thing, or carry on a trade':[60] similarly, SLO appears to imply *approval* by those external to the corporation, rather than a more internally-controlled set of responses to external pressures, and focuses on fundamental issues of the legitimacy of a business enterprise. That is, SLO introduces an aspect of social permission, realised via the acceptance or approval granted to the corporation and its activities by stakeholders or elements of society as a whole, with immediate real world consequences. In short, it is about a corporation's 'right to exist'.[61]

These broader developments in relation to stakeholderism and SLO have not as yet been widely integrated into formal legal structures governing director conduct in Australia, despite Australia often being at the forefront of developments in directors' duties. Australia was the first common law jurisdiction to legislate for directors' duties (in 1896), the first to introduce public enforcement of those duties (in 1958) and Australian statute has also long recognised the 'social significance' of the role of directors.[62] However, at present, shareholder primacy remains a feature of the law to which Australian company directors are subject.[63] The legal structures

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represent more expansive systems of accountability surrounding corporate conduct in the context of a democratic society': at 196.

57 RM Colvin, G Bradd Witt and Justine Lacey, 'Power, Perspective and Privilege: The Challenge of Translating Stakeholder Theory from Business Management to Environmental and Natural Resource Management' (2020) 271 *Journal of Environmental Management* 110974 <https://doi.org/10.1016/j.jenvman.2020.110974>.

58 Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go beyond Compliance' (2004) 29(2) *Law & Social Inquiry* 307, 308 <https://doi.org/10.1111/j.1747-4469.2004.tb00338.x> ('Social License and Environmental Protection').

59 *AICD and KPMG Report* (n 9) 11.

60 'Meaning of Licence in English', *Lexico* (Web Page, 22 November 2022) <https://web.archive.org/web/20220322022512/https://www.lexico.com/definition/licence>.

61 Robert A Kagan, Neil Gunningham and Dorothy Thornton, 'Explaining Corporate Environmental Performance: How Does Regulation Matter?' (2003) 37(1) *Law & Society Review* 51, 69 <https://doi.org/10.1111/1540-5893.3701002> ('Explaining Corporate Environmental Performance').

62 RCA Higgins, 'Regulatory Enforcement of Directors' Obligations: Aspects of Proceeding Against, and Defending, Directors in Regulatory Proceedings' (Seminar Paper, Joint Australian Academy of Law and NSW Bar Association Seminar, 22 February 2021) 1 [2]–[3] <https://academyoflaw.org.au/event-4151112>; *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 291–5 [429]–[445] (Edelman J).

63 Jean du Plessis and Andrea Anastasi, 'Corporate Governance and Corporate Social Responsibility' (2020) 37(7) *Company & Securities Law Journal* 495.

prescribing directors' duties are particularly significant in framing corporate behaviour. Given directors' crucial role in setting company direction, directors' legal obligations directly influence companies' relationships with the societies in which they operate. Directors are 'placed at the apex of the structure of direction and management of a company … [t]he role of a director is significant as their actions may have a profound effect on the community, and not just shareholders, employees and creditors'.[64] The ASX CGC's proposed incorporation of SLO into formal regulatory structures sits within this context, representing a potentially powerful step in the explicit recognition of SLO's regulatory significance.

B SLO, Smart Regulation and Third-Party 'Surrogate' Regulators

SLO has wide regulatory implications; the 'social expectations of business and their influence on the SLO permeate the way regulators seek to influence business conduct'.[65] SLO provides 'a particularly powerful point of leverage' in allowing community and environmental advocacy groups to operate as 'watchdogs and de facto regulators'.[66] Buhmann has pointed to the significance of SLO in the development of both the United Nations' 'Protect, Respect and Remedy' Framework[67] and the Guiding Principles on Business and Human Rights.[68] The 2008 Framework explicitly identifies SLO as a component of effective transnational regulation of corporations.[69] SLO has been described by a senior Organisation for Economic Co-operation and Development regulator as 'far more powerful than government or regulators', given the impact of unethical conduct on perceptions of corporations and consequential impacts on investor, employee and consumer behaviour.[70] Nonetheless, the ASX CGC's recent unsuccessful attempt to introduce SLO as a formal regulatory term points to complexities in its use, and to the need for a better understanding of its regulatory implications.

Regulation 'refers to means used to influence the behavior of regulated actors'.[71] Early exploration of the potential of 'distributed regulatory capacities' was undertaken by Ayres and Braithwaite in their seminal work on responsive

64 *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 297 [14] (Middleton J).
65 Buhmann (n 2) 709.
66 Gunningham, Kagan and Thornton, 'Social License and Environmental Protection' (n 58) 336–7.
67 John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008).
68 John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011). See Buhmann (n 2).
69 Ruggie (n 67) 16–17 [54].
70 James Eyers, '"Absolute Rubbish": Medcraft Slams Hayne', *The Australian Financial Review* (online, 11 April 2019) <https://www.afr.com/companies/financial-services/commissions-ban-absolute-rubbish-medcraft-20190410-p51cnr>.
71 Kevin E Davis, Benedict Kingsbury and Sally Engle Merry, 'Indicators as a Technology of Global Governance' (2012) 46(1) *Law & Society Review* 71, 78 <https://doi.org/10.1111/j.1540-5893.2012.00473.x>, citing John Braithwaite, Cary Coglianese and David Levi-Faur, 'Can Regulation and Governance Make a Difference?' (2007) 1(1) *Regulation & Governance* 1 <https://doi.org/10.1111/j.1748-5991.2007.00006.x>.

regulation.[72] Ayres and Braithwaite identify the capacity of regulators to escalate through a range of responses to contraventions by a regulatee, increasing the strength and coerciveness as necessary. In their highly influential regulatory pyramid diagram,[73] Ayres and Braithwaite position collaborative and dialogue-based approaches at the base of the pyramid, moving to more demanding and punitive regulatory responses as necessary.[74] Ayres and Braithwaite suggest that ultimately the capacity to revoke a company's licence to operate will be necessary in any regulatory model, as a 'big gun' to ensure compliance.[75] A further contribution of the responsive regulation model is the attention it gives to the role of public interest groups and their capacity to increase the 'regulatory capacity of a society'.[76] Though not uncontroversial,[77] responsive regulation has been widely accepted as an influential regulatory theory over an extended period of time.[78]

Gunningham and Sinclair's work on smart regulation develops responsive regulation's ideas and focuses on the value of harnessing government, business and third parties in 'a form of regulatory pluralism that embraces flexible, imaginative and innovative forms of social control'.[79] In doing so, it reflects increased attention to the value of third parties, as '[r]egulatory scholars have increasingly observed that it is not only public regulatory agencies and official enforcement action that motivate and enforce businesses' compliance with the law'.[80] Thus, smart regulation and later iterations of responsive regulation[81] emphasise that the state is not the only possible enforcement agency in a regulatory system. Rather, other parties may be capable of operating as surrogate regulators, allowing for multiple points of regulatory intervention by a range of actors and so facilitate improved

72 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992), cited in Peter Drahos and Martin Krygier, 'Regulation, Institutions and Networks' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017) 1, 5 <http://dx.doi.org/10.22459/RT.02.2017.01>.

73 Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59, 62 <https://doi.org/10.1111/j.1468-2230.2008.00681.x>; Christine Parker, 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7(1) *Regulation & Governance* 2, 4–6 <https://doi.org/10.1111/rego.12006>.

74 Ayres and Braithwaite (n 72) 35–6 (Figure 2.1), 39 (Figure 2.3).

75 Ibid 35–6, 53.

76 Drahos and Krygier (n 72) 5.

77 Baldwin and Black (n 73).

78 Parker (n 73); Jonathan Kolieb, 'When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond' (2015) 41(1) *Monash University Law Review* 136, 136–7.

79 Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press, 2017) 133, 133 <http://dx.doi.org/10.22459/RT.02.2017.08> ('Smart Regulation'); see also Neil Gunningham, 'Roadmaps and Regulation: Sustainable Finance in Australia' (2020) 37(4) *Environmental and Planning Law Journal* 459 ('Roadmaps and Regulation').

80 Vibeke Lehmann Nielsen and Christine Parker, 'To What Extent Do Third Parties Influence Business Compliance?' (2008) 35(3) *Journal of Law and Society* 309, 309 <https://doi.org/10.1111/j.1467-6478.2008.00441.x>.

81 Gunningham, 'Roadmaps and Regulation' (n 79).

outcomes for society as a whole.[82] Gunningham and Sinclair emphasise that 'informal mechanisms of social control often prove more important than formal ones', identifying the regulatory impact of 'trading partners and the supply chain; commercial institutions and financial markets; peer pressure and self-regulation through industry associations; internal environmental management systems and culture; and civil society in myriad different forms'.[83] In particular, smart regulation specifically recognises that non-state controls may work better than state sanctioning in some domains.[84] Understanding the role played by third parties is therefore important to ensuring a well-designed regulatory matrix.

Originally conceived in the context of environmental regulation, smart regulation has attracted significant attention from national and transnational regulators and policymakers.[85] However, smart regulation and SLO as a formal regulatory term have not been previously discussed in an explicit way, and the significance of third-party surrogate regulation in the SLO context has not been adequately explored. Buhmann has noted that the regulatory aims of government may be supported by the mobilisation of SLO, and that 'smart regulation' and the use of a 'smart mix' of regulatory measures can be seen in work by the European Union and others.[86] However, no reference is made to the literature on smart regulatory principles or responsive regulation, and their identification of the important place of third-party surrogate regulators, or smart regulation's potential to assist in understanding the wider regulatory impact of SLO. Similarly, Gunningham and other authors have given attention to the capacity of SLO to have important regulatory effects,[87] but not in the context of the smart regulatory paradigm and the focus it gives to the efficacy of surrogate regulators. Smart regulatory theory is used in this article to draw attention to, and to assist in analysing, the role of third-party regulators, particularly in light of apparent industry concern about SLO as a formal regulatory device.

In describing the multipartite regulatory system provided for by smart regulation, Gunningham and Sinclair conceptualise a three-sided pyramid, with each face representing a separate source of regulatory control.[88] The first face comprises regulation by the state, the second represents self-regulation by

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82 Neil Gunningham and Darren Sinclair, 'Designing Environmental Policy' in Neil Gunningham and Peter Grabosky (eds), *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 375, 389 ('Designing Environmental Policy'); Gunningham and Sinclair, 'Smart Regulation' (n 79). See also Brian Preston, 'Regulatory Organization' in Emma Lees and Jorge E Viñuales (eds), *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019) 719, 735 <https://doi.org/10.1093/law/9780198790952.003.0032>.

83 Gunningham and Sinclair, 'Smart Regulation' (n 79) 134. See also Preston (n 82) 735–42 (analysing the role of surrogate regulators in the context of environmental regulation).

84 Baldwin and Black (n 73) 65.

85 See, eg, Gunningham and Sinclair, 'Smart Regulation' (n 79); Judith Hanebury, 'Smart Regulation: Rhetoric or Reality?' (2006) 44(1) *Alberta Law Review* 33 <https://doi.org/10.29173/alr348>.

86 Buhmann (n 2) 702, 708–9.

87 Gunningham, Kagan and Thornton, 'Social License and Environmental Protection' (n 58); Kagan, Gunningham and Thornton, 'Explaining Corporate Environmental Performance' (n 61); Dorothy Thornton, Robert A Kagan and Neil Gunningham, 'When Social Norms and Pressures Are Not Enough: Environmental Performance in the Trucking Industry' (2009) 43(2) *Law and Society Review* 405 <https://doi.org/10.1111/j.1540-5893.2009.00377.x> ('Social Norms').

88 Gunningham and Sinclair, 'Smart Regulation' (n 79).

the regulated entity, and the third face is constituted of regulation by a variety of third-party or 'surrogate regulators',[89] both commercial and non-commercial, such as consumers, suppliers, banks and insurers.[90] A benefit of multiple surrogate regulators is the consequential increase in the number and frequency of mutually reinforcing regulatory signals reaching regulated entities,[91] and the impact of these non-state actors offers significant theoretical potential.[92]

Gunningham and Sinclair identify several regulatory design principles that underpin their tripartite model of smart regulation.[93] While a full review of these principles is beyond the scope of this article, particularly relevant in the context of SLO is:

- the importance of empowering third parties to operate as effective regulators in the service of society's regulatory aims.[94] In some circumstances, empowered third parties can fulfil functions of 'promoting, formulating, administering, and enforcing … laws and regulations';[95] and
- '[m]aximising opportunities for "win-win" outcomes' that can flow from a regulatory intervention that encourages regulatees to move beyond bare compliance.[96] Gunningham, Kagan and Thornton give the example of a 'win-win' outcome arising in the context of environmental protection: 'if it was more cost effective for a company to reduce waste than install pollution-abatement equipment, it made economic sense to reduce pollution by investing in waste-reduction methods'.[97]

These design principles, focusing as they do on the relationships between the regulated entity and surrounding stakeholders, hold valuable potential to inform a regulatory understanding of the value of SLO in contemporary corporate activity.

The need to ensure third parties are appropriately empowered has implications for the design of regulatory systems, particularly in relation to information asymmetries that may reduce third-party awareness of undesirable corporate activity. While non-government organisations can operate as 'effective surrogate regulators', their 'effectiveness is often constrained by the quality of the information they have access to'.[98] In this context, rapid developments in social media may be

89 Ibid.
90 Gunningham and Sinclair, 'Designing Environmental Policy' (n 82) 389.
91 Ibid.
92 Parker (n 73) 6, 8–9.
93 See especially Gunningham and Sinclair, 'Smart Regulation' (n 79) 134–5. See also Gunningham and Sinclair, 'Designing Environmental Policy' (n 82).
94 See Gunningham and Sinclair, 'Smart Regulation' (n 79) 135.
95 Preston (n 82) 735. Preston then analyses how environmental non-government organisations and community associations fulfil those functions in the context of environmental laws and regulation: at 735–8. See also Lorraine Cherney and Adrian Cherney, 'Regulation beyond the State: The Role of Non-State Actors' in Lennon YC Chang and Russell Brewer (eds), *Criminal Justice and Regulation Revisited: Essays in Honour of Peter Grabosky* (Routledge, 1st ed, 2018) 19 <https://doi.org/10.4324/9781315174044> (outlining how surrogate regulators are used, and their limits, in drug control and gambling).
96 See Gunningham and Sinclair, 'Smart Regulation' (n 79) 135.
97 Gunningham, Kagan and Thornton, 'Social License and Environmental Protection' (n 58) 308 n 1.
98 Neil Gunningham, 'Sustainable Finance in Australia: Compliance, Enforcement and Surrogate Regulation' (2020) 37(5) *Environmental and Planning Law Journal* 585, 602.

significant. Fast-paced (and largely unregulated) social media information flows are increasing rapidly, so that corporations may have less control of important narratives. The proliferation of information through social and other digital media has created novel channels of information flow and additional mechanisms for influence between communities and the companies they seek to influence.[99] Social media itself can be viewed as a form of empowerment for third-party stakeholders, offering a surveillance mechanism in relation to a company's SLO[100] and facilitating the dissemination of information about both pro and antisocial corporate activities. This disintermediation of information flows has the potential to empower interested stakeholders to act as more effective surrogate regulators, particularly where some level of formal disclosure by corporations on their socially-relevant activities is also mandated. Medcraft, a former Australian Securities and Investments Commission Chair, has commented that 'the world is changing [and] the power of social media is empowering those who can drive real change'.[101]

C Summary on Theoretical Perspectives

A key test of any regulatory theory is whether it assists regulators in addressing practical challenges.[102] As stakeholder perspectives of the corporation continue to assume greater prominence, regulators will increasingly need to account for their role when designing regulatory systems. Smart regulation can help regulators understand the impact of SLO factors on corporations, enabling refinement of strategies that harness the potential contribution of third-party surrogate regulators.

For example, attention to distributed regulatory capacities and the place of empowered third parties might suggest the need for regulatory interventions that enhance corporate reporting obligations and hence, facilitate third-party access to corporate information on prosocial factors, in the way proposed by the ASX's Corporate Governance Principles revisions. It might also lead to increased regulatory support for transmission of third-party concerns to corporations through mandating of stakeholder engagement strategies, in order that societal concerns are heard. Improved communication of concerns to regulators would also support the regulatory impact of third parties, consistent with existing trends to enhance

99 *AICD and KPMG Report* (n 9) 14–15; Edwards et al, 'Trust, Engagement, Information and Social Licence' (n 47).

100 Justin O'Brien et al, 'Professional Standards and the Social Licence to Operate: A Panacea for Finance or an Exercise in Symbolism?' (2015) 9(4) *Law and Financial Markets Review* 283, 283 <https://doi.org/10.1080/17521440.2015.1114707>; Edwards et al, 'Trust, Engagement, Information and Social Licence' (n 47) 4, 7; Toni GLA van der Meer and Jeroen GF Jonkman, 'Politicization of Corporations and their Environment: Corporations' Social License to Operate in a Polarized and Mediatized Society' (2021) 47(1) *Public Relations Review* 101988:1–10, 4, 7–8 <https://doi.org/10.1016/j.pubrev.2020.101988>.

101 See Justin O'Brien, 'Medcraft's Mission to Change the World', *The Australian Financial Review* (online, 12 April 2019) <https://www.afr.com/companies/financial-services/medcraft-s-mission-to-change-the-world-20190410-p51cnl>, quoted in Justin O'Brien, 'Corporate Culture and the Search for Authenticity' (2019) 13(2–3) *Law and Financial Markets Review* 77, 78 <https://doi.org/10.1080/17521440.2019.1612618>.

102 Baldwin and Black (n 73) 59.

the regulatory role of whistleblowers,[103] for instance. Alternatively, drawing on smart regulation's design principle that 'win-win' outcomes can flow from regulatory interventions that encourage regulatees to engage in prosocial activity beyond mere compliance, decisions might be made about increased reliance on self-regulatory systems. The presence of powerful surrogate regulators focused on SLO might be expected to increase the incentives for corporations to move beyond compliance.[104] While evidence suggests that industry self-regulation has historically under-performed as a regulatory tool,[105] SLO's expansion may help to shift that perception, as corporate decision-makers become increasingly responsive to pressures from surrogate regulators.

The research described in this article offers insight into the perspectives of directors in relation to a proposed formal regulatory use of SLO that would have integrated reporting obligations with SLO for the first time and would also have increased industry self-regulatory pressures. Given the significance of directors' views, this study therefore provides valuable support for the design of corporate regulatory systems that incorporate SLO. Third party surrogate regulation is an influential and growing regulatory force that intersects with SLO in ways we do not yet fully understand. Making effective use of that force necessitates an improved understanding of the interplay between SLO and director thinking.

IV AN EMPIRICAL STUDY OF SLO

This Part describes an empirical study of Australian director attitudes to SLO. Part IV(A) provides a description of the design of the study and Part IV(B) describes and discusses the study's findings.

A Research Design

This article describes an interview study undertaken in the wake of the 2018 proposal to include SLO in the ASX Corporate Governance Principles and the subsequent debate and rejection of this proposal. This sequence of events provided a unique opportunity to examine the privately held views of Australian company directors in relation to SLO at a crucial point in time.

1 Participant Sample

Targeted recruitment of participants for the research was undertaken via a non-probability, voluntary sampling method through Australia's peak industry body

103 Vivienne Brand, 'Corporate Whistleblowing, Smart Regulation and Regtech: The Coming of the Whistlebot?' (2020) 43(3) *University of New South Wales Law Journal* 801 <https://doi.org/10.53637/RPLT3947>.

104 Kagan, Gunningham and Thornton, 'Explaining Corporate Environmental Performance' (n 61).

105 Frances Bowen, 'Marking Their Own Homework: The Pragmatic and Moral Legitimacy of Industry Self-Regulation' (2019) 156(1) *Journal of Business Ethics* 257 <https://doi.org/10.1007/s10551-017-3635-y>.

for directors, professional networks and snowball sampling.[106] The targeting of the desired cohort is consistent with qualitative approaches where '[q]ualitative researchers must characteristically think purposively and conceptually about sampling'.[107] Almost all respondents (20 of 24) were non-executive directors and many were directors of high-profile public companies. Three of the other four were executive directors of the entities on whose boards they sat, and a fourth was a senior executive with board and SLO experience. Several respondents were amongst Australia's most experienced senior directors; approximately a third had a level of public profile and most had lengthy experience as non-executive directors.

Of the 24 directors interviewed for this research, 16 were male and 8 were female.[108] Respondents were widely experienced and represented the boards of more than 80 companies ranging in size from smaller companies to large publicly-listed organisations with market capitalisations in excess of AUD50 billion. The industries from which directors were drawn included manufacturing, consultancy, resources, food and beverages, technology, banking and financial services, and energy. As a group, these directors stood to be directly impacted by the ASX CGC's proposed integration of SLO into its Corporate Governance Principles.

Directors of corporations, particularly large, public corporations, are commonly reluctant to publicise their views on contentious issues, are often subject to significant time demands and have limited availability for participation in research projects.[109] The difficulties of obtaining access to elite populations for interview purposes are well-known,[110] and public company directors could be expected to represent a particularly difficult sample to reach, given the complexities associated with their position. The sensitivity of issues being discussed in the study meant access issues were identified as a likely limitation on the study. However, directors were generally very willing to make themselves available. All directors participated on the basis of confidentiality.

2 Interviews and Analysis

The key inquiry tool used in this study was in-depth semi-structured interviews addressing a range of aspects of directors' perspectives on SLO and its impact on the

106 Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (SAGE Publications, 5th ed, 2011) 104–12.

107 A Michael Huberman and Matthew B Miles, 'Data Management and Analysis Methods' in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (SAGE Publications, 1994) 428, 441. Cf M Scott Donald and Suzanne Le Mire, 'Independence in Practice: Superannuation Fund Governance through the Eyes of Fund Directors' (2019) 42(1) *University of New South Wales Law Journal* 300, 308–9 <https://doi.org/10.53637/GWML7532>.

108 Approximately representative of Australian boards – 28.7% of board members on ASX All Ordinaries companies are women as of 30 November 2021: 'Board Diversity Statistics', *Australian Institute of Company Directors* (Web Page) <https://aicd.companydirectors.com.au/advocacy/board-diversity/statistics>.

109 Cf Donald and Le Mire (n 107) 309–10.

110 William S Harvey, 'Strategies for Conducting Elite Interviews' (2011) 11(4) *Qualitative Research* 431 <https://doi.org/10.1177/1468794111404329>; Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 193–4 <https://doi.org/10.1057/978-1-137-52159-0>.

contemporary corporation. The interview guide used in this research was developed by the first and second authors on the basis of a precedent interview guide used by the second author in previous studies of SLO in mining and energy industries,[111] and adapted to target the ASX SLO proposals and corporate regulatory emerging issues. The guide contained open-ended questions together with general background questions and formed the basis of all interviews. Foci of inquiry included the directors' understandings of the term SLO, its relationship to concepts such as trust, and their perceptions of the future significance of these issues. Overarching questions were supplemented by transition questions, with clarifying and probing questions aimed at obtaining more accurate and in-depth responses.

Interviews were conducted by the first author in person and by telephone from August 2019 – January 2020. All interviews were recorded, contemporaneous notes were made by the interviewer, transcripts were made by an independent third party and reviewed by the interviewer for accuracy. Interviews typically took between 30 and 60 minutes per respondent. In line with the established principles of saturation,[112] the sampling process was terminated when new concepts were no longer being identified in the interviews. Interview transcripts were subjected to a systematic, verifiable analysis of themes and ideas by the authors and a research assistant. This involved assigning axial codes to ideas or reactions, with subcategories of a particular theme being assigned a code to indicate that they were nested under a larger idea or concept. Coding was cross-checked and verified across the author and research assistant group and NVivo, a form of Computer Assisted Qualitative Data Analysis Software ('CAQDAS'), was used to document and facilitate retrieval of coded content. Use of CAQDAS enabled distance to be gained from the detail of the transcripts, facilitated sorting and linking of data segments and allowed for comparison of viewpoints.[113] Throughout, analysis occurred against the context of researcher awareness of the corporate and professional contexts of the interviewees.

A range of potential limitations apply to this research, including particularly the risk that respondents were influenced to give prosocial responses by the presence of the researcher in interviews (by indicating for instance that SLO issues were of concern to them or over-reporting the extent to which their companies responded to SLO factors).[114] Further, respondents in this study were drawn from a range of industries and corporate scale. Investigation of director views of SLO within subsets of industry would provide useful insight into variations in perceptions across corporate demographics; some existing evidence is available to suggest SLO pressures may be much lesser in smaller firms, for instance.[115] However, these possible limitations sit within the context of the novelty of the research reported here.

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111 Hall et al (n 52); Parsons, Lacey and Moffat (n 52).

112 Greg Guest, Arwen Bunce and Laura Johnson, 'How Many Interviews Are Enough? An Experiment with Data Saturation and Variability' (2016) 18(1) *Field Methods* 59 <https://doi.org/10.1177/1525822X05279903>.

113 Bettina van Hoven and Anneriek Poelman, 'Using Computers for Qualitative Data Analysis: An Example Using NUD.IST' (2003) 27(1) *Journal of Geography in Higher Education* 113 <https://doi.org/10.1080/03098260120084403522>.

114 Cf Donald and Le Mire (n 107) 310.

115 Thornton, Kagan and Gunningham, 'Social Norms' (n 87) 405.

B Results and Discussion

The discussion of results is organised into the following four broad themes: (1) the potential ambiguity of SLO, and especially the potential for it to shift a locus of influence or power, and the significance of that ambiguity for SLO's role in regulatory relationships; (2) despite these complexities, the perception of SLO as intrinsic to 'business as usual' and so the need to address its concerns as inherent in contemporary business activity; (3) the importance of trust, relationships and reputation in managing those concerns; and (4) the range of variables that are inherent in SLO as originally conceived and as amplified by SLO's current expansion. This discussion is followed by an analysis of the regulatory implications of SLO's contours as illuminated in these four themes.

1 Social Licence as Ambiguous and Shifts in the Locus of Power

Respondents did not agree on a single definition of SLO. Some directors in the study believed SLO was a well-defined term, but this was a minority view. These respondents were generally more relaxed about SLO's implications, suggesting for instance: 'I don't mind social licence to operate, because it's very clear what it means' (I21).[116] Another director emphasised the 'external permission' element of SLO: 'I tend to like social licence as opposed to corporate social responsibility because the former implies something you need to earn or receive from an external group. Whereas the latter – it implies something you choose to do and tell people about because it's what you think is right' (I07). One director also demonstrated an awareness of the issues for the definition of SLO raised by SLO's expansion from single industry/single location applications to more generic environments: 'You have to have a social licence to operate, because otherwise local communities make it very difficult for you to get things done … if you're in a consumer-facing organisation where you're selling products or services the concept is probably a little more nebulous' (I21).

By contrast, other directors saw SLO as similar to terms such as Environmental, Social and Governance ('ESG') but without a clear distinction; as one said, 'I've got no idea what it means … that's what pretty much everyone says' (I10). Another group of directors believed SLO was not capable of definition. These directors feared the power it might give to particular groups of stakeholders. One respondent expressed concern that this ambiguity was part of the term's appeal to some proponents: 'I don't think social licence to operate is definable. And the cynic in me says that a lot of the advocates for social licence to operate like that it's not definable. And don't want it to be definable' (I16).

Participants' lack of consensus on a definition of SLO is consistent with descriptions of the nebulousness of the term in the literature.[117] From a corporate regulatory design perspective, the vagueness of SLO holds risk for corporations. A key concern is that the term's ambiguity may cloud its effectiveness as a formal

116 Where participants are quoted in this article, that source is indicated in the text by '(I##)'. The number refers to the anonymous designation given to each interviewee.

117 Cooney (n 51).

regulatory device.[118] The lack of a clear definition was a major criticism of the ASX CGC's proposed use of SLO in its Corporate Governance Principles,[119] and concerned some directors in this study, who saw the capacity of the term to be used to variously and opportunistically serve the different agendas of companies, the state, activists and others.[120] One commented on the controversial ASX SLO proposals that 'I had colleagues who were up in arms, because their view was it was too uncertain, and how would you know when different people want different things, how, as a company could we ever possibly assess if that's palatable or not' (I03).

SLO appeared to be viewed with suspicion by some directors who perceived it as a potentially revocable authority, with decision-making power held by external parties. Licence revocability was implicit in the ASX's proposed Principle 7's commentary, which noted a company's social licence could 'be lost or seriously damaged if the entity conducts its business in a way that is not environmentally or socially responsible'.[121] This shift in the influencing power of external stakeholders was acknowledged but viewed as problematic if the implications of that shift were ambiguous and particularly if contradictory of formal permissions. Contrasting ideas such as the ASX's preferred 'reputation' and 'standing in the community' with social licence, one respondent described the difference as being a question of 'what does the community think of you, versus you only exist because the community allows you to … social licence to operate [is] a permission', noting that 'if companies are using the existence of that [corporate] structure to behave in a way that doesn't help society, then they should not be allowed to exist' (I03).

Some directors spoke of their concern that militant, non-representative sections of the community could in effect 'weaponise' SLO, taking companies hostage in pursuit of particular social aims. One director implicitly acknowledged the potential for SLO to shift the dynamic from companies choosing to demonstrate responsibility to companies being required to be responsible at risk of removal of an intangible 'licence', commenting that '[i]t's an open door to special interest groups, to challenge what decisions are being made by corporations' (I13). Another contrasted the importance of being responsive to stakeholders with the risks of being held hostage by them: '[s]o should you as a director be hostage to the interests of a certain group that doesn't represent your entire business, no. Should you as a director be responsive to the interests of a special interest group that could affect your business, yes' (I07).

The perspective that SLO's ambiguity is part of its appeal to certain interest groups is in line with Gunningham, Kagan and Thornton's argument that SLO creates the risk that systems to empower social licensors could, if poorly designed, enable 'small extremist elements' to hijack processes.[122] This capacity to use SLO in what might be described as undemocratic ways has been identified in the

118 Law Council of Australia (n 16) 8 [45].
119 Durkin (n 5).
120 Moffat et al, 'SLO: A Critical Review' (n 46).
121 ASX Corporate Governance Council, 'Consultation Draft' (n 12) 43.
122 Gunningham, Kagan and Thornton, 'Social License and Environmental Protection' (n 58) 338.

literature.[123] However, importantly, notwithstanding divergent views on SLO's definition, there was evidence of a wide belief in SLO's importance across the diverse group of industry participants in this study. This is consistent with earlier research on SLO in more specific industry domains,[124] emphasising the regulatory relevance of the term. It was also clear that not all directors saw SLO as problematic or as an additional burden, indicating concerns are not uniformly held.

2 Social Licence Concepts as Intrinsic to 'Business as Usual' and as Part of the Future

Overall, notwithstanding contention in relation to the definition of SLO and the risks inherent in use of the term, there was consensus amongst directors that third-party stakeholders were an important reference point in contemporary director decision-making. This idea can be summarised as the sense that, for many directors, SLO amounts to 'business as usual' (I16, I17 and I23), or 'social licence is every day' (I23), again consistent with evidence of the growth in stakeholderism. Suggesting that SLO operates at a fundamental level of legitimacy, as essential as daily 'hygiene' – in the sense that a lack of SLO would remove a company's right to exist and was therefore non-negotiable – one director said 'people use CSR [Corporate Social Responsibility] to describe their charity intentions, the additional things that companies do to make the world a better place …[whereas] social licence to operate is the hygiene factor' (I03). Another director pointed to the intrinsic nature of wider SLO concepts by suggesting that 'unless you are considering the complete ecosystem in which you are operating then you aren't acting in the best interests of the company and your shareholders' (I14). These views are consistent with the ASX CGC's comment, at the time of removing SLO from its revisions, that '[a]lmost all investor interest groups, accounting bodies and standards setters strongly supported the concept of "social licence to operate" and the recognition of broader stakeholder accountability'.[125]

Directors often expressly identified the current and future significance of SLO and related trust concepts for their companies, anticipating they would become even more important over the next decade. Noting the growth in awareness of stakeholder debates amongst the director community, one director said 'I feel as though we're at the tipping point of directors becoming much more aware of this debate' (I04); another said, 'all I can say is, boards are really taking it seriously' (I19); a third indicated that 'I think there's going to be continued emphasis on corporate social responsibility, ESG, whatever you want to call it' (I16). One of the most senior directors, when asked where these issues would trend in the next decade, responded without hesitation, 'Oh more of it, more of it' (I14), while another said 'I don't think there's any turning back' (I05). In short, the long-term relevance of third-party regulatory concepts was evident in director responses.

123 Edwards et al, 'Trust, Engagement, Information and Social Licence' (n 47); Moffat et al, 'SLO: A Critical Review' (n 46); Morrison (n 1) 26–7.

124 Hall et al (n 52); Lacey, Edwards and Lamont (n 52); Parsons, Lacey and Moffat (n 52).

125 Johnstone (n 14) 4.

A concrete illustration of the everyday links some directors saw between stakeholder views and a company's decision-making processes arose in relation to attracting and retaining employees. The significance of millennials' employment preferences was noted by a number of respondents, reflected in this comment: 'we try and get the best people out of the market, so our reputation as an employer of choice … of not just trying to make a buck but caring about what we're doing and why we're doing it [is very important]' (I12).

Recognising that (potential) employees might increasingly influence corporate behaviour in prosocial ways was also illustrated in the comments of a highly experienced and very senior director. Discussing the prospective impact of younger generations on future incorporation of SLO issues into corporate activity this director predicted that: 'the talent will lead the way', and that although it was not just millennials who cared about the ethos of the companies they worked for, 'millennials are more vocal about it' (I24).

3 Social Licence and Trust, Relationships and Reputation

Conceptions of reputation, trust, communication and relationship building were particularly important in directors' understandings of management of SLO concepts and pointed to the need for ongoing work with the community. Directors referred to trust as 'part of your insulation against … attacks from special interest groups' (I07) and commented that 'trust lies at the heart of [a] social licence' (I11). One director noted that their board discusses trust 'all the time' and that it was fundamental to relationships with customers, employees and shareholders (I14). Many directors emphasised the importance of engagement and communication in ensuring good relations between the company and stakeholders and the value of listening to those impacted by the company's operations. As one high-profile director put it, there is a need to ensure there is conversation not just 'in the echo-chamber … of the board' (I22). Respondents also referred repeatedly to concepts of communication and listening, suggesting for instance that 'good companies do have … avenues where they talk to different stakeholder groups' (I21). SLO requires constant monitoring and in the words of one respondent, who pointed to the risks of a company not being in touch with what he termed its 'social value' or 'social capital' as a pre-emptive or self-protective mechanism, '[i]t kills you by stealth. So if you are not feeling the pulse of that social value – that you are either creating or diminishing – bit by bit it kills you off' (I17).

What social licence meant in practice for another director was expressed this way, once again emphasising the key themes of trust, and of listening to the community:

> [y]eah I mean I think trust is the key word with social licence to operate. And communication – trust and communication. So to have a social licence to operate, you do need to understand community expectations. And that – I think in the time I've been in the business community expectations have changed as much as technology almost. I mean what was acceptable in the 80s in the business world is definitely not acceptable now. On a whole range of things. I just think there is a much higher level of governance, there's a much higher expectation of diversity and inclusion. There's a much higher expectation around environmental impact. There's so many things that have changed in that time. So you need to be listening

> all the time to the community. And you need to be … communication's a two-way thing. I think, yep, it's very important that you have a way of monitoring where – if you talk about social licence to operate, you're really talking about to operate in the community. So you really need to understand where the community [is at] (I21).

Respondents' views are consistent with the findings of a quantitative study of Australian directors' trust perceptions that reported 94.1% agreement with the idea that trust was important to the sustainability of the organisations they governed and that communicating and engaging is the most critical factor for building trust.[126] As noted by Gunningham, Kagan and Thornton, firms can be 'deeply concerned about preserving their "reputation capital"'[127] and threats to a company's reputation, brand and profits have been recognised as a major motivator in corporate efforts to manage social licences.[128] Emphasis by directors on the need for engagement and communication with stakeholders reflects references in the SLO literature to '[t]he importance of listening, engaging and participation … as contributing to a workable, long-term relationship',[129] since dialogue is 'an integral part of attaining and maintaining a social licence to operate'.[130] The role of transparency in relationship building with stakeholders, identified by directors in this study, offers new empirical support for related literature, and from the novel perspective of company director perceptions.

The potential to use SLO to protect against so-called 'hijacking' or licence revocation by special interest groups was reflected in participants' responses indicating that the deliberate creation of trust by companies, for instance, could be 'part of your insulation against … attacks from special interest groups' (I7). Gunningham, Kagan and Thornton note the capacity for this kind of 'investment in the community' to enable companies to minimise the risk of hostage-taking by extremists.[131] Relationships with external interest groups could mitigate the risk of revocation of a social licence, retaining the locus of decision-making power within the corporation. In corporate regulatory theory terms, the capacity for boards to achieve positive corporate outcomes through high levels of reputation-enhancing, prosocial, compliance in this way could be seen as an example of smart regulation's 'win/win' design principle,[132] where both the corporation and the community benefit from the pressure on the corporation to achieve SLO-enhancing outcomes.

The responsiveness of reputational factors to shifts in community sentiment demonstrates a particular characteristic of SLO as a regulatory concept: it is far more immediate than most other forms of intervention. SLO requires constant monitoring and is an 'every day' matter (I23), part of 'business as usual' (I16, I17, I23); it is a form of authorisation that requires regular renewal and continual

126 *AICD and KPMG Report* (n 9) 10.
127 Gunningham, Kagan and Thornton, 'Social License and Environmental Protection' (n 58) 319.
128 Moffat et al, 'SLO: A Critical Review' (n 46) 482.
129 Hall et al (n 52) 306.
130 Lucy Mercer-Mapstone et al, 'Conceptualising the Role of Dialogue in Social Licence to Operate' (2017) 54 *Resources Policy* 137, 137 <https://doi.org/10.1016/j.resourpol.2017.09.007>.
131 Gunningham, Kagan and Thornton, 'Social License and Environmental Protection' (n 58) 338.
132 Gunningham and Sinclair, 'Smart Regulation' (n 79) 135.

evaluation.[133] Hence the impact of its loss can be immediate, particularly in the fast-paced age of social media. In the words of one respondent, 'the last thing you want is some kind of campaign against you' (I09). However, there is also the potential for the highly responsive nature of SLO to militate against effective regulatory outcomes. SLO's dynamism may lead to outcomes that are piecemeal or knee jerk, or that are disproportionate, or too closely linked to acute issues lacking ongoing significance. The immediacy of negative impacts on corporate reputation was summarised by one director this way: 'it takes years to build trust, and one day to lose it' (I21).

4 Social Licence and Variability

The complexity of SLO decision-making was evident in the range of variables directors drew attention to. Illustrating the potential complexity of social licence concerns within even a single stakeholder category, investor pressures in relation to profits and time horizons were felt in diametrically opposed ways by different directors. Although investment funds hold a direct interest in corporations as shareholders, their investment selections reflect the concerns of their investors and ultimately a range of stakeholders and, while varied, might be expected to reflect growth in the significance of stakeholder perspectives. Consistent with the literature on this, some respondents emphasised the need to accommodate prosocial pressures from some institutional investors, who have, in the words of one respondent 'been the instrument of a lot of very good changes' (I11). A respondent who sat on boards with mandates for the investment of billions of dollars commented that investment managers were 'not looking for short-term gains, what they're looking for is … sustainable value creation over the medium to long term' and that this director's boards were 'looking for the strategy from the CEO for the long-term, not the short-term gain' (I04). By contrast, others pointed to pressure from large investors to produce good short-term profits rather than to have regard to wider perspectives, since for fund managers and institutional investors, as one director put it, 'it's about maximising return' (I02).

A number of directors perceived the need to take into account a company's impacts on stakeholders as inherent in longer-term perspectives of the company's business prospects, highlighting the importance of time horizons. As one of the most experienced directors in the sample expressed it, 'I don't think there's any question that when companies consider the longer-term interest of the company and shareholders they need to consider the interests of every constituency and … that's an absolute truth' (I14). This analysis was put forward not only by directors who were sympathetic to the SLO concept but also those who distrusted the term, one of whom spelt out the links between time horizons and wider social considerations this way:

> On a board of directors, you could sort of rip customers off, and make an absolute squillion in year 1 or 2. But you'd find by year 3 you didn't have a business. So in the interests of the long term viability of any entity you've got to take into account the quality of your products, how your customers feel about your products, your reputation in the community (I16).

133 Moffat et al, 'SLO: A Critical Review' (n 46) 482.

These tensions reflect the complexity of the assessments directors are required to make and that are inherent in SLO's implicit incorporation of diverse stakeholder interests. Directors' references to the significance of industry funds' perspectives on time horizons are also consistent with the presence of influential investor representative bodies in Australia,[134] offering confirmation of the impact of these – potentially contradictory – third party demands on regulatory outcomes.

Geographic variability was also identified by a respondent as adding complexity to SLO's operation, noting that once a local community is no longer the focal reference point 'the concept is probably a little more nebulous' (I21). Ongoing expansion of SLO beyond particular sets of operations or a company's relationship with an individual community into an industry's wider operations makes identification and ranking of various stakeholders' interests complex,[135] and for some researchers has prompted recognition that a company may require multiple SLOs or SLOs of different 'scales'.[136]

Despite the need to take into account diverse time frames, varying stakeholder concerns and geographic variability being seen as part of 'business as usual', these factors illustrate the breadth of issues to which directors have regard when considering SLO concepts – with concomitant complex obligations to reconcile competing interests and resultant accountability concerns.[137] These issues are particularly acute where the measure relates to the fundamental legitimacy of the corporation's business model as may be the case in terms of SLO. Perversely, this complexity could shift the focus from corporate-enhancing behaviours to corporate-survival behaviours, with a reduction in overall prosocial outcomes. SLO may not only add to the general complexity of director decision-making, however; it may ask directors to make powerful decisions about what a good society is, implicit in any need to choose between competing interest groups. The potentially undemocratic implications of this shift for society were emphasised by one director who commented:

> People love to think that whatever section of interest they have, they have the absolute right … and you have no licence to operate … I think it actually undermines the very nature of civil society where we as a whole have to balance those interests (I18).

V THE REGULATORY IMPLICATIONS OF SLO

This article suggests that:

- the expansion of SLO's ambit;
- SLO's distinctive contribution of the idea that stakeholders have *direct* influencing power;[138]

134 Bernard Mees and Sherene A Smith, 'Corporate Governance Reform in Australia: A New Institutional Approach' (2019) 30(1) *British Journal of Management* 75 <https://doi.org/10.1111/1467-8551.12298>.

135 O'Brien et al (n 100) 285.

136 See Hurst, Johnston and Lane (n 49) 2.

137 Bebchuk and Tallarita (n 3); Marshall and Ramsay (n 43).

138 Boutilier (n 56); Haines et al (n 47) 196.

- the arrival of a tipping point in the stakeholder-shareholder debate; and
- perhaps also the disintermediating impact of social media,

all combine to suggest a shift in the regulatory relationship between corporations and society. SLO appears to have the potential to transform the way companies and communities interact, creating 'a new type of governance'.[139] In particular, SLO could evidence a new level of third party surrogate licensing capacity, building on smart regulatory conceptions of third parties as an important source of corporate regulatory authority.

This study offers key evidence of the workings of these theoretical design principles at the level of director thinking, fleshing out SLO's contours and demonstrating the importance of SLO and its relation to third-party regulators. It also points to the need for a better understanding of the potential and the limitations of SLO as a regulatory concept, in order that regulatory systems can take account of its growth effectively. Drawing on the empirical analysis, the following discussion addresses four elements of direct relevance to corporate regulatory design: firstly, the shift in power implicit in SLO as a regulatory concept; secondly, the practical need for effective information flow and the risks of asymmetries; thirdly, the diversity of demands inherent in SLO; and fourthly, the implications of SLO for decision-making mechanisms. This section suggests these factors point to the complexity inherent in effective coordination of regulatory efforts by the state and third-party pressures.

A The Shift in Power

This study provides evidence of deep concern on the part of some directors that SLO will, or has the capacity to, shift the locus of some corporate decision-making power away from the corporate itself, distinguishing SLO from the wider stakeholder debate within which it sits. This potential shift may engender industry resistance and limit SLO's efficacy as a formal tool. By contrast, more established concepts of stakeholderism do not necessarily bring with them this implicit power shift, since stakeholderism 'does not advocate granting stakeholders the right to vote or to sue … but rather relies … on well-meaning corporate leaders using their discretion to incorporate stakeholder interests into their objectives'.[140] Similarly, concepts such as 'reputation' and 'standing in the community', used by the ASX CGC to replace SLO, and described as 'synonymous' with SLO,[141] do not imply the capacity for third parties to revoke a corporation's authority to operate. SLO's use of the concept of a 'licence', and its location of licensing capacity within society, imply an empowering of stakeholders at the expense of the licenced body (the corporation) and a consequential loss of discretion on the part of the directors who control that corporation. This shift would have legal and social consequences, and some director discomfort with a formal regulatory recognition of these changes is perhaps unsurprising.

139 Hall et al (n 52) 307.
140 Bebchuk and Tallarita (n 3) 164.
141 Johnstone (n 14) 4.

Ayres and Braithwaite have argued that to be fully effective, a corporate regulatory system ultimately requires the capacity to revoke a company's licence to operate,[142] since a regulatory approach based only 'on persuasion and self-regulation will be exploited when actors are motivated by economic rationality'.[143] SLO may introduce the potential to attach licence revocation to stakeholder concerns, putting Ayres and Braithwaite's 'big gun' in society's hands. If formalised, this would appear to strengthen the role of third-party surrogate regulators as a fully effective corporate regulatory device but would also be likely to stimulate corporate unrest at the risk of 'hostage taking' by militant stakeholders and hence engender industry resistance.

Further, the dynamism of SLO, where industry must be 'responsive to the changing nature of societal approval and acceptance'[144] provides a form of regulation able to facilitate immediate responses, creating pressure on a company to adjust behaviour more quickly than would be possible using more formal regulatory networks. However, SLO's sensitivity to events, demonstrating what might be termed a form of hyper-dynamism, could be problematic and may lead to 'knee-jerk' inappropriate responses by corporations subjected to fast-moving reputational risks.

That the ASX's proposed regulatory recognition of SLO caused controversy is explicable in terms of its solidification of this shift in power and a resultant crystallisation of some of the complexities in the use of SLO as a regulatory tool. This political sensitivity is suggestive of the limitations of SLO as an explicit regulatory device and indicates that formal adoption of SLO as a regulatory concept may be unlikely in the near term.

B The Need for Information Flows

The most significant practical factor affecting SLO's efficacy may be the extent to which adequate information flows can be engineered. For SLO to achieve regulatory aims, communities need to be sufficiently informed in relation to corporate activities, so they can bring efficacious regulatory pressure to bear. This analysis is in line with smart regulation's identification of the need for third-party regulators to be 'empowered'. That is, if third-party surrogate regulators are expected to contribute effectively to corporate regulation, those expectations need to be supported by well-designed information flows as part of the regulatory system.

'Corporations are "repeat players" in regulatory conversations'[145] and may have a better understanding of regulatory requirements than the societies in which they operate. Provision for enhanced and appropriate disclosure and regulation of information provision can help offset information asymmetries between repeat

142 Ayres and Braithwaite (n 72) 35–6, 53.

143 Ibid 19.

144 Hall et al (n 52) 302.

145 Tim Dorlach and Paul Mertenskötter, 'Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label' (2020) 54(3) *Law and Society Review* 571, 579 <https://doi.org/10.1111/lasr.12495> (citations omitted), quoting Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95, 123 n 72 <https://doi.org/10.2307/3053023>.

player corporations and stakeholders. Carefully designed corporate reporting obligations are likely to be a relevant regulatory factor here, invoking market sanctions through the enabling of monitoring action by civil society and through the imposition of both social and economic sanctions.[146] Transparency could take many forms, some of which are already familiar in corporate legal systems. Companies are increasingly required to report on activities of key interest to social campaigners, such as modern slavery or climate impacts, as governments harness corporate disclosure rules to achieve social aims.[147] Continued growth in the mandating of disclosures seems likely.

In addition to conventional forms of disclosure by corporations, regulatory systems may need to engage with the accuracy of unmediated social media information flows and their potential impact on stakeholders. Increased attention is being given to the relevance of social media to corporate activity following the use of social media platforms to orchestrate retail investor share purchasing behaviour.[148] As the power of social media in relation to regulatory environments has become clear, calls have been made for greater state intervention, including regulatory presence on social media platforms.[149] These concerns have direct relevance for the potential impact of SLO and other forms of third-party surrogate activity, as disintermediation of information provision reduces corporate power to control narratives and increases the speed with which accurate *and* misleading information reaches interested stakeholders. Further, SLO-enhancing activities may be heavily promoted by corporations via social media to conceal antisocial behaviour or may obscure the need for more formal policy or regulatory intervention, as has been argued in the context of stakeholder approaches generally – with resultant harm to the interests of stakeholders and society.[150] The drafting of corporate legislation and accompanying regulation will likely need to take into account shifts in the significance of stakeholder views and the impact of enhanced and disintermediated information flows. Empowering surrogates so that the pressure they exert on companies supports rather than militates against society's regulatory aims will be crucial and will not be simple.

Notably, the ASX's proposed SLO reforms to its Corporate Governance Principles would have formalised a direct reporting obligation in relation to SLO for the first time, presumably increasing the flow of information to, and empowerment of, surrogate regulators across a spectrum of concerns. Despite the controversy

146 Buhmann (n 2) 709.

147 Barnali Choudhury, 'Social Disclosure' (2016) 13(1) *Berkeley Business Law Journal* 183; Margaret Cusenza and Vivienne Brand, '"A Tiger Without Teeth"? The Forthcoming Review of the *Modern Slavery Act 2018* (Cth) and the Place of "Traditional" Penalties' (2021) 38(3) *Company and Securities Law Journal* 152.

148 John Herrman, 'Seen as a Joke until They're Not', *The New York Times* (New York, 31 January 2021) 1; Paul Oudin and Javier Paz Valbuena, 'Is Reddit the New Bloomberg Chat? GameStop, Short Sellers and Social Media', *Oxford Business Law Blog* (Blog Post, 3 February 2021) <https://www.law.ox.ac.uk/business-law-blog/blog/2021/02/reddit-new-bloomberg-chat-gamestop-short-sellers-and-social-media>.

149 Aleks Vickovich, 'ALP Wants ASIC to Play Bigger Social Media Role', *The Australian Financial Review* (Sydney, 2 February 2021) 26; Jemima Whyte and Jonathan Shapiro, 'The Sharemarket: From a Casino to a Video Game', *The Australian Financial Review* (Sydney, 6 February 2021) 22.

150 Bebchuk and Tallarita (n 3).

surrounding the ASX's proposal, responses from the directors in this study provide empirical evidence that these directors did not reject the underlying relevance of SLO concepts nor the need for a level of disclosure by their companies in relation to corporate activities. Directors also held clear views as to the significance of community views to their decision-making. The data in this study suggests that the imposition of obligations to report on matters relevant to SLO, without direct reference to the SLO concept, would not have generated the same industry resistance. Indeed, for a number of respondents in this study, internal corporate motivations actually favoured transparency, in order to build more effective relationships with stakeholders and to offer a bulwark against future potential loss of stakeholder trust. These are positive signs, indicating the regulatory potential of SLO to harness corporation's own prosocial disclosure instincts in the aims of the state.

C The Diversity of Demands

The third regulatory insight drawn from the data relates to the complexities raised by the potential diversity of demands captured by SLO. Comments from directors in this study indicated the difficulties some directors foresaw in managing obligations to diverse stakeholders and shareholders if SLO were to be formalised, as proposed in the ASX's Corporate Governance Principles. That is, increased integration of SLO into regulatory systems could intensify legal ambiguity raised by existing stakeholder-shareholder debates.[151] The application of SLO concepts to an issue clearly becomes more complex as variables increase (eg, more diffuse locations, more diffuse time periods, more diffuse stakeholders). This reality potentially limits SLO's efficacy as a regulatory tool.[152] Smart regulation predicts that a benefit of multiple surrogate regulators is an increase in the number and frequency of mutually-reinforcing regulatory signals reaching regulated entities.[153]

Consistently with this analysis, director statements confirming the significance of a range of signals, from employees, the community and investors, and over varying timelines, demonstrate the potential for frequent and *mutually-reinforcing* social licence signals from a variety of sources to assist in regulatory aims. However, some evidence in this study in relation to the impact of institutional investors is suggestive of *mutually-interfering* signals in relation to an assessment of the longer-term societal impacts of corporate conduct. For instance, where employee interests (in continued employment, for example) conflict with the interests of the environment, director decision-making in relation to SLO impacts will be complex and difficult and may lead to the prioritisation of certain stakeholders' interests.

The potential for third parties to be acting at odds, rather than in concert, is an aspect of SLO as regulation that requires greater normative and empirical investigation.[154] The most significant challenge for smart regulation – and distributive

151 Ibid; Marshall and Ramsay (n 43).

152 In their empirical research, Jijelava and Vanclay summarise that '[c]ommunities are never homogenous and consequently multiple SLOs will always be required … SLO should therefore always be considered as a holistic and multi-dimensional concept': Jijelava and Vanclay (n 49) 1084.

153 Gunningham and Sinclair, 'Designing Environmental Policy' (n 82) 389.

154 See Brueckner and Eabrasu (n 50) 223–4.

regulation generally – may be the coordination of government and third-party pressure,[155] something that is necessary to deliver on smart regulation's conception of escalating regulatory pressure being brought to bear by government, business and third parties acting together. This coordination problem is a clear challenge to SLO's regulatory effectiveness, with potential to operate as a significant limitation on its role in mediating the relationship between companies and the environments in which they operate.

D Civil Structures and (Un)Democratic Decision-Making

Relatedly, there is no necessary consistency between the views of some groups within the community and wider social norms or legal controls. This raises issues in relation to SLO pressures that might prove to be no more than undemocratic demands lacking broader societal support. Third-party surrogate regulators are conceived of within the responsive regulatory paradigm as doing good work where they reinforce society's expectations. Stakeholder interests may not always be prosocial.

Shifting a degree of licensing negotiation from the state-company interface to the corporation's board-society interface, as envisioned by SLO, may represent a realignment of civil structures. Potentially, it asks directors to reconcile and manage much more complex competing priorities than they have traditionally encountered. While experienced in assessing and responding to diverse factors of relevance to the companies they govern, boards might reasonably feel at sea in managing the increased breadth of divergent and equally worthy stakeholder claims that SLO appears to encompass, and there are implications for civil society in asking them to do so.[156] Similar difficulties have been recognised in other empirical studies of SLO: Brueckner and Eabrasu remark that SLO may '[generate] insoluble disagreements [because] its normative layer allows opposite moral perspectives to formulate dissenting claims'.[157] An unclear aspect of the regulatory work to be done by third party surrogates is whether they are supporting legal compliance, or also encouraging 'beyond compliance' behaviour.[158]

This lack of clarity is significant where the demands of competing surrogate regulators conflict, with resultant uncertainty for corporate decision-makers, who may be operating in the absence of socially determined normative provisions or laws. To the extent that third parties work to enforce agreed legal constraints on corporations (eg, comply with modern slavery prohibitions, meet employment

155 Baldwin and Black (n 73); Neil Gunningham, 'Compliance, Enforcement, and Regulatory Excellence' in Cary Coglianese (ed), *Achieving Regulatory Excellence* (Brookings Institution Press, 2016) 188 ('Compliance, Enforcement, and Regulatory Excellence').

156 For a detailed treatment of the relationship between directors' duties and SLO considerations, drawing on aspects of the data reported here, see Vivienne Brand and Rosemary Teele Langford, '"Doing the Job That's Required?" Social Licence to Operate and Directors' Duties' (2022) 44(1) *Sydney Law Review* 111.

157 Brueckner and Eabrasu (n 50) 224. See also Melanie (Lain) Dare, Jacki Schirmer and Frank Vanclay, 'Community Engagement and Social Licence to Operate' (2014) 32(3) *Impact Assessment and Project Appraisal* 188, 190 <https://doi.org/10.1080/14615517.2014.927108>.

158 Of the kind described, for instance, by Kagan, Gunningham and Thornton, 'Explaining Corporate Environmental Performance' (n 61).

standards, avoid breaches of pollution controls) there is presumably less room for inconsistent regulatory demands. Complexity arises when non-mandated prosocial behaviours are 'required' by special interest groups but are at odds with the demands of other interest groups pursuing alternative prosocial agendas. Crucially, it is with this beyond-law grey area that SLO seems principally concerned, since by definition a corporation's legal licence to operate is not in question. This tension is reflected in the ASX CGC's reference to criticisms that SLO could cause 'particular difficulties … for listed entities legitimately operating in particular sectors that some parts of society are opposed to'.[159] Further, directors may lack adequate mechanisms for collating and comparing stakeholder attitudes, impacting their ability to appropriately discriminate between them. Directors know that 'it's very important that you have a way of monitoring' community views (I21) and systems for measuring corporations' social capital are evolving quickly, but the sophisticated processes we rely on to funnel society's views in modern democracies may not yet be adequately replicated in corporate stakeholder management.[160]

E Summary on Regulatory Implications

Taken as a whole, the factors discussed in this section point to some of SLO's limitations as a regulatory concept, despite the clear relevance to directors of the concepts it encompasses and the potential it offers surrogate regulators in a well-functioning relationship between society and the corporation. As noted, the most significant challenge for smart regulation – and distributive regulation generally – may be the effective coordination of government and third-party pressure.[161] This study evidences some of the difficulties of coordinating those pressures in the context of SLO, which is a common finding in other empirical studies of SLO where stakeholder interests are diverse or at odds with one another.[162] Those difficulties are apparent in the resistance likely to be engendered by any formalisation of third-party 'licensing' capacity as well as the need for effective information flows in relation to corporate activities in order for SLO to achieve prosocial outcomes. They are also evident in the risks of widely diverse and competing stakeholder demands, and the possible impact on civil structures of SLO's apparent licensing aspect. These suggest the significant theoretical and practical issues in relying on SLO as a formal regulatory tool. The expectations society places upon SLO's regulatory efficacy may need to be attenuated by a recognition of these potential shortcomings.

F Future Research

Given the under-researched nature of director perceptions of SLO and its potential regulatory significance, much remains to be investigated, but two themes can be considered here. As noted, the impact of competing third-party interests

159 Johnstone (n 14) 4.

160 As some interviewees confirmed, some companies already use a range of methods to collect and track similar data. These might include reputation metrics or net promoter scores.

161 Baldwin and Black (n 73); Gunningham, 'Compliance, Enforcement, and Regulatory Excellence' (n 155).

162 Brueckner and Eabrasu (n 50); Dare, Schirmer and Vanclay (n 157); Jijelava and Vanclay (n 49) 1084.

offers a rich vein of regulatory research, given the diffuse nature of SLO's ambit, and this may well be so in governance studies generally, beyond the remit of the corporation. A further key area for future research and analysis lies in how information flows to third-party regulators might be best facilitated and regulated to ensure empowerment of those surrogates, especially in social media environments. The effectiveness of any smart regulatory model will depend in large part on the efficiency and accuracy of information flows, and evidence in this study that SLO is already doing de facto regulatory work emphasises the advantages in designing these flows well.

VI CONCLUSION

Attention to SLO and the concepts it encompasses is growing and formalising. These developments have implications for the regulatory relationship between companies and society that are not as yet well understood. The perspectives of directors reported in this study offer novel insight into some of those implications and provide an opportunity to analyse some of the regulatory implications of SLO. Directors' responses provide support for theoretical models of the regulatory value of third-party surrogates. The empirical material reported in this article identifies SLO and concepts of trust, relationships and reputation as important, as intrinsic to 'business as usual' and as part of the future of respondents' companies. Crucially however, insights gained from this study also reveal a range of potential limitations that impact on SLO's use as a regulatory concept.

These limitations include the likely resistance engendered by any attempt to formalise SLO as a regulatory tool, the clear need for well-designed information flows to enable SLO to operate effectively, the difficulties of accommodating diverse (and potentially contradictory) stakeholder factors and the potential impacts on civil systems of SLO's 'licensing' characteristic. These insights make clear the difficulty of coordinating regulatory efforts by the state and third parties in an effective way, but also highlight smart regulation's capacity to help conceptualise some of the issues that SLO's normative complexity generates. The insights demonstrate the need for regulatory systems to account appropriately for the contours of the complex phenomenon of SLO. Doing so will address SLO's limitations, but also ensure that its potential benefits as a regulatory concept are harnessed, particularly its capacity to describe the crucial importance of diverse stakeholder interests and recognise a degree of power outside the corporation. In turn, there will be increased opportunities to coordinate responses from the state, the corporation and third-party surrogates in the service of genuinely prosocial outcomes.