No company is an Island[1]

– "social licence to operate" in the context of corporate performance outcomes –

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Precis of Paper

(a) Corporations do not exist in isolation from the society that they serve.

(b) Corporations are virtual creations of legislative mandate to serve the betterment of society and are bound by the laws of the land, which laws respond to society's evolving values and mores.

(c) Corporations and their business endeavours are also impacted by market factors which too respond to society's evolving values and mores.

(d) To allow corporations to optimally serve the betterment of society, it is essential for there to be a common understanding of what is the proper role and contribution of the limited liability corporation in society.

(e) This paper examines these issues and explains the dynamic inter-relationship between corporate performance outcomes and the licence, in its various guises, conferred by society to meet evolving community needs and dictates.

(f) Recognising the dynamic tensions that arise between corporate economic outcomes and society's social/environmental concerns, this paper then proposes a model to describe this inter-relationship as well as a matrix to assist in the overall measurement of corporate performance outcomes as part of a symbiotic economic/social paradigm.

Outline of Paper

[1] Note 1 – with apologies to English writer John Donne and his 1624 seminal work Devotions Upon Emergent Occasions – "No man is an island entire of itself, every man is a piece of the continent, a part of the main …"

Part A Introduction

The confluence of several recent events in 2018 has disrupted thinking in the corporate boardrooms of Australia and questioned the prevailing orthodoxy of Australia's generally accepted governance practice:

- the proceedings of the Hayne Royal Commission into misconduct in the financial sector;
- the APRA report into the CBA's governance arrangements;
- the release by the ASX Corporate Governance Council of its consultation draft for the 4th Edition of its corporate governance principles and recommendations, particularly in the context of a corporation's "social licence to operate";
- the bold statements by David Murray, as the incoming board chair of the AMP (the ethics and governance of which having been maligned by the Hayne Royal Commission), questioning the value and influence of the work of the ASX Corporate Governance Council, and championing not only the distinct segregation of the roles of board and management but also the prioritisation of CEO centricity in the governance and management of corporations.[2]

This disruption has again raised questions concerning:

- the legitimacy of unbridled corporate economic endeavour in the context of societal values and mores;
- trust and confidence in the ethics of corporate endeavour, along with other institutions in our society;
- the proper role of the limited liability corporation in society and whether or not a broader duty to society at large should be owed by directors and officers beyond the company itself and its immediate stakeholders;
- the role and responsibility of the company board in assuring cultural integrity for those who are involved in the company's business and activities.

In particular the thorny and ethereal question of a corporation's "social licence to operate" has loomed large in media reports, in social advocacy and in governance circles.

The importance of the question is undeniable, yet the question is not new. It is a question that has dogged informed governance debate for decades as is evident in the analysis in Part 2 of this paper including from:

- Milton Friedman (USA) in the 1970's;
- Sir Adrian Cadbury (UK) in the 1990's;
- Ian Dunlop of AICD (Australia) in 2001 (at around the time of the HIH collapse);
- CAMAC (Australia) in 2006 (in its consideration of "corporate social responsibility");
- Financial Reporting Council (UK) in 2016;
- King IV (South Africa) in 2016.

Accordingly this current debate encompasses a sense of de ja vu, albeit the descriptors of the tensions arising have changed from time to time. Likewise the call to action by David Murray is viewed by some as a revisitation of Ground Hog Day[3], in its apparent reversion to concepts of CEO primacy and non-executive director passive oversight.

This paper seeks to find legitimacy in the views and perspectives of all players to the debate so as to suggest a market driven dynamic model which finds balance in the complex interplay between economic and social outcomes of corporate activity for the betterment of society as a whole.

[2] Note 2 – refer Australian Financial Review 2 August 2018 – Simon Evans, Patrick Burkin, Joanna Mather.

[3] Note 3 – a situation in which a series of unwelcome or tedious events appear to be recurring in exactly the same way (Wikipedia)

Part B Understanding the Proper Role of the Limited Liability Corporation

B1. Preliminary observations

In 2012 the Australian Institute of Company Directors (**"AICD"**) published a White Paper entitled "Mind the Expectation Gap"[4]. The paper remains contemporary today. The paper primarily addressed the difference in what the general public perceives to be, what the law prescribes to be, and what contemporary corporate governance practice recommends to be, the proper role and responsibility of the non-executive director. In a following paper[5] the same author posited that if the "expectation gap" is at least to be narrowed, if not bridged, then it is essential that all sectors of society share a relatively common understanding of what is the proper role of the limited liability corporation in our society.

Corporations are virtual creations designed primarily, but not exclusively, to deliver economic outcomes for the betterment of their members and society. Through legislation and regulation, they are conferred a statutory licence to exist and operate by society, with general acceptance that the limited liability corporation has delivered significant benefit to mankind and its standard of living.

As commented upon by the Corporations and Markets Authority Committee (CAMAC) in 2006[6]

"The success of the corporate entity as a vehicle for harnessing capital and human, physical and intellectual resources to productive ends has resulted in the corporation becoming the predominant form of private sector business organisation and one that is frequently adopted for non-profit and state-owned bodies as well. The corporate structure has:

> *"permitted people to raise capital from the public, to invest it without, in most cases, a danger of personal risk and to engage in entrepreneurial activity which, otherwise, would probably not occur." (The Hon. Justice Michael Kirby, the Company Directors Past, Present and Future 1995)"*

Corporations have become increasingly powerful and influential in our society as the juggernaut twins of capitalism and globalisation have continued their march.

From this, questions as to the "legitimacy" of aspects of commercial corporate endeavour have been raised, with society re-assessing the relatively open scope of a corporation's statutory licence to operate.

Except to the extent where shareholder returns and value align and correlate with broader social outcomes, the legitimacy of commercial corporations is largely found in narrower economic terms, with their primary remit being the creation of employment, the payment of taxes, the production or delivery of goods and/or services having social or economic utility, and the delivery of economic returns for reinvestment in the business enterprise and for distribution to security holders (including superannuation and pension funds "owned" by general members of society), thus spreading prosperity amongst the community. Under Australian laws, shareholders are entitled to insist upon corporations in which they have invested to deliver these outcomes.

Until recent decades, a commonly endorsed view of the primary role of corporations was typified by the US economist and author Milton Friedman when he provocatively asserted:

> *"Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible."*[7]

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[4] Note 4 –Steven Cole ISBN 978-0-9871903-3-0

[5] Note 5 – "Bridging the Expectation Gap – aligning corporate performance expectations" Steven Cole 2013 www.colecorporate.com.au/publications

[6] Note 6 – CAMAC (December 2006) The Social Responsibility of Corporations (Section 1.1)

[7] Note 7: Milton Friedman "Capitalism and Freedom" (University of Chicago Press – 1962)

This view, at least in absolute terms, has lost its currency, with corporations and society now interacting in many ways that influence their respective behaviours and actions in other than purely economic terms. These interactions create a self-adjusting mechanism which, over time, should place the dynamic tension between unrestricted corporate economic activity and the community's social requirements in relative balance as part of a symbiotic economic/social paradigm.

In 2001, AICD CEO Ian Dunlop in his paper "Governance, Ethics and Corporate Responsibility – Where to from here?" stated:

> *"Business talks frequently about the licence to operate, meaning the activities which societies allow business to undertake as a private profit-making enterprise. But that licence to operate has been discussed thus far in limited economic terms, not encompassing the concepts of wider authority and trust.*
>
> *Corporations do not have authority in the same way that government and other political and religious institutions have. A corporation has a remit to act as a commercial enterprise, not a social, political or moral authority. Corporations have power, but essentially it is economic power, not political or social power.*
>
> *Part of the process of redefining legitimacy in times of great uncertainty must be far greater self-regulation along with the adoption of higher ethical standards, greater transparency and disclosure. This applies not just to corporations but equally to governments and institutions in general.*
>
> *Some companies are well advanced in addressing these issues. This is reflected in the extensive reporting on environmental, social and global issues now being generated by these organisations, in addition to traditional financial reporting – the triple bottom line. These companies recognise that changing societal values require greater community engagement than hitherto, along with genuine commitment to sustainable development notwithstanding the adjustment costs it may incur.*
>
> *More conservative views, both corporate and investor, argue that if board attention is diverted from a strict focus on the bottom line of increasing shareholder value, directors are being derelict in their duty and accountability is lost.*
>
> *In practice the two views may not be that far apart. But the former view recognises that given changing societal values, shareholder value will not be generated without far greater attention to these wider issues. In essence there is no disagreement on the ultimate objective of increasing shareholder value, rather on the means of getting there. Those who get it right will gain significant competitive advantage."*

In more contemporary and international contexts, especially if Australia is to align itself with the comity of OECD like nations, the following commentaries from the UK and South Africa may be of relevance.

- *[UK] - "Companies do not exist in isolation. They need to build and maintain successful relationships with a wide range of stakeholders in order to prosper. These relationships will be successful and enduring if they are based on respect, trust and mutual benefit.*

  Business reputation is still recovering from the impact of the global financial crisis and continuing examples of poor corporate behaviour. As we have seen, cultural failures damage reputation and have a substantial impact on shareholder value. Intangible assets such as intellectual property, customer base and brand now account for over 80 percent of total corporate value, compared to under 20 percent 40 years ago. This shift magnifies the impact on total value when a reputational crisis occurs. This is a challenge for boards, which must find ways to understand and influence the factors which affect culture and behaviours.

  The debate about the role of business in society is directly linked to the way in which companies create and sustain long-term value for the benefit of a wide range of stakeholders……. We [the FRC] are not suggesting changes to the current flexible framework of corporate governance. While legislation, regulation and codes influence individual and corporate behaviour, they do not ultimately control it.[8]

[8] Note 8 – Corporate Culture and the Role of the Boards - Financial Reporting Council (UK) 2016

- *[South Africa] - "Organisations operate in a societal context, which they affect and by which they are affected. There is an inter-dependency between organisations and society; their fates are intertwined. As the World Business Council for Sustainable Development stated: "Business cannot ultimately succeed in a society that fails" (World Business Council of Sustainable Development)*

  This idea of interdependency is supported by the African concept of Ubuntu – "I am because you are; you are because we are". Ubuntu implies that there should be a common purpose to all human endeavour (including in the corporate form) which is based on service to humanity. As a logical consequence of this inter-dependency, one person benefits by serving another. This is also true for a juristic person, which should serve its own as well as the broader society of stakeholders.

  Corporate citizenship is about an organisation's status in the broader society. It is an inevitable consequence of being an integral part of society. As a corporate citizen an organisation has rights, but also obligations and responsibilities towards society.

  Corporate citizenship involves how an organisation uses its resources, and how it balances its needs with those of society, to achieve positive lasting outcomes for the organisation itself, society and the environment. By being a responsible corporate citizen, the organisation demonstrates recognition that its future is intertwined with the future of the economy, society and the natural environment."[9]

Sir Adrian Cadbury of the UK also commented upon the concept of the social responsibility of companies.[10] He considered the views of Milton Friedman but concluded:

> *"it is not possible to isolate the economic elements of business decisions from their social consequences, because companies are part of the social system."*

He argued that even the concept of making as much money for shareholders as possible begs the question – over what period of time? He suggested that the more a corporation plans and invests for the future, the more impossible it becomes to maintain a simple separation between economic and social goals, as these investments must involve a combination of social as well as economic judgments.

Implicit in the licence to operate granted by society to corporations, is the right of society to withdraw, or qualify, that licence to operate if society perceives the corporation is not adequately serving society's needs. The freedom of the operation of companies is therefore dependent upon their delivering corporate outcomes which are consistent with that which society may expect and demand from time to time.

Given the current tension that exists in society as to what is the proper role of the commercial corporation and the underlying "culture" that should underpin corporate endeavour, both corporate Australia and society need to find common ground as to what it is that corporations can do best, not only to achieve desired corporate outcomes, but also to contribute to the overall well-being of society. Unless that common ground can be found, then those in charge of commercial corporations may behave and seek to deliver outcomes for their organisations and their constituent shareholders which are inconsistent with society's expectations. This in turn may ultimately lead to a qualification, greater regulation, or even withdrawal of the corporation's licence to operate conferred by society, possibly to the detriment of the betterment of society given the rationale for the creation of the limited liability corporation in the first place.

Both corporate Australian and society need to find the "sweet spot" or balance as to what is that proper role.

This aspect was also commented upon by CAMAC in the following terms:[11]

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[9] Note 9 – King IV – Institute of Company Directors in Southern Africa (noting the broad influence of "King" in Indian Rim countries and further afield)

[10] Note 10: "The Company Chairman", Sir Adrian Cadbury, Directors Books (UK) 2nd Edition 1995.

[11] Note 11 – Refer Note 6 above

"The prominent role of companies in the provision of goods and services, and the perceived reach of corporate activities and influence, have also given rise to concerns about the impact of corporate conduct on broader community interests (including, for example, through environmental effects) and the transparency and accountability of the way in which companies conduct their affairs. Questions have been raised about whether corporations have a responsibility to society going beyond their role as participants in the economic system. There may be underlying concerns too about divergence between the social responsibility of an individual acting on their own account and the collective responsibility of individuals acting in a corporate or other organisational environment.

Current interest in these matters within Australia and elsewhere is reflected in the efforts of companies themselves to explain better their own practices and contributions to society, in calls by community groups and others for improved practices, more information or more regulation, in the growth of self-styled ethical investment funds and in legislative measures to regulate ever more aspects of corporate behaviour."

Fundamentally, the commercial corporation exists primarily, but not exclusively, for economic reasons and its primary social deliverables are:

- the provision of employment;
- the contribution of taxes;
- the production of goods and/or services for the utility of society; and
- the spreading of prosperity amongst the community.

Critical to this is that commercial corporations should operate efficiently and productively to deliver a surplus for reinvestment in the corporation's operations and to deliver a dividend to its investors. Interestingly, those same investors are in fact part of society, especially through superannuation and pension funds.

There is no conflict between social responsibility and the obligation on corporations to use scarce resources efficiently and to be profitable – an unprofitable business is likely to be a burden on society with insolvency risk to its creditors, employees, contractors, shareholders and broader societal members.

Members of society must appreciate the multiple guises with which they deal with corporations every day. Not surprisingly members of society simultaneous may interface with corporations as employees, as customers, as suppliers of goods or services, as community neighbours and as investors (directly or indirectly through superannuation and pension funds). Directors and officers of corporations are also members of society with similar interface roles with corporations as any other member of society. A mature appreciation of these various interface roles, and a balancing of reasonable expectation outcomes when dealing with the corporation under each of these different guises, is essential. A superior outcome for a member of society in one role (e.g. as an employee supporting across the board wage increases for all employees), may have a corresponding negative reciprocal impact on that same member of society under a different guise (e.g. as an investor in the corporation through their superannuation savings due to the reduced corporate profit, or even corporate survival, that an increase in operating expense may lead to).

B2. Sir Adrian Cadbury's 3 levels[12]

Sir Adrian Cadbury identified three distinct levels of corporate responsibility or social licence:

(a) At a base level, corporations have responsibility: to meet their obligations at law to shareholders, to employees, to customers, to suppliers and to society; to generate employment; to pay taxes; and to meet other statutory obligations (e.g. OH&S, environmental, privacy etc). There are severe sanctions for corporations, and by derivation their directors and officers, failing to meet these base level requirements. In the context of Abraham Maslow's[13] "hierarchy of needs", in organisational psychological

[12] Note 12 – Refer Note 10 above.

[13] Note 13: Motivation and Personality 1954 Abraham Maslow 3rd Edition, Harper and Row Publishers

terms, these might be regarded as the "physiological" or "hygiene" needs of the corporation.

(b) At a secondary (or higher) level of responsibility, corporations should be concerned with the results of the carrying out of their activities. These include the productive, effective and efficient use of resources (physical, financial, human and social), avoiding undue damage to the environment in which the corporation operates, and avoiding harm to the society, and its values, in which the corporation operates (e.g. adhering to business and community accepted industry standards and codes, even if they do not have legislative force).

Other than at a lowest common denominator level, these higher order requirements may be more aspirational than obligatory and mandatory. In particular they go to a corporation's productivity, reputation and business/social standing, and therefore have both economic and social relevance. These responsibilities go beyond merely meeting the corporation's base level legal and regulatory requirements. They respond to the catch-cry of a company being a "good corporate citizen" or having "corporate social responsibility".

(c) Sir Adrian Cadbury then asked the question whether there is a third level which goes beyond both the base and the secondary levels or responsibility. This third, or "self-actualising" level (to again use Maslow terminology), might be posed by the questions:

- Do corporations have a moral imperative to discharge?
- Do corporations have a responsibility or role to shape, or modify (hopefully by way of improvement), the framework of society in which they operate?

Certainly this third level posited by Sir Adrian conjures notions of an outreach for corporations to contemplate the wider and longer term moral consequences of their actions and decisions beyond their own proximate needs and economic well-being. It implies corporations should build awareness into their decision making processes so that the corporation forms an integral and influential part of the society of which it is a part, and a contributor to the development of the social mores which inform that society.

Sir Adrian Cadbury was uncertain as to this third level of responsibility but welcomed enlightened discussion on it.

The first 2 levels of responsibility identified by Sir Adrian appear to be relatively non-contentious. They would appear to maintain the status of the commercial corporation as a "responsible servant" of society in support of and responsive to the corporation's "social licence to operate", rather than as an active and influential participant in shaping the development of the social mores which inform society.

From a Utopian perspective this third level might see the commercial corporation:

- maintaining its primary, but not exclusive, economic raison d'etre;
- through innovative strategies, finding its competitive commercial advantage in corporate outcomes which are both economically sustainable and complementary to the reasonable and legitimate requirements of society, in the form of a beneficial social legacy, community dividend or benefit beyond direct economic gain for the corporation itself.

In response it could also see society and its members:

- respecting commercial corporations which commit to such an approach;
- supporting such corporations in terms of the various guises with which the members of society may interface with such corporations;
- ameliorating any short term self-interest they may have, which might otherwise be inconsistent with such respect and support, for the greater overall outcome to be delivered.

However, perhaps also there is risk of a darker Dystopian perspective if this third level was embarked upon having regard to the following:

(a) Boards and CEO's respectively govern and manage corporations and determine the allocation of the corporation's resources. However, such corporations (and those in charge of them) do not have the authoritative legitimacy of governments or the cultural legitimacy of certain other institutions of society.

(b) The question needs to be asked "should such resources be deployed towards social moral objectives, as determined at the personal whim of such boards and CEO's, even if there appears to be minimal or no direct (or even indirect) likely benefit to the corporation and its shareholders from the exercise?"

(c) Alan Joyce's, as CEO of QANTAS, (and others') recent corporate positioning on marriage equality for the LGBTIQ community may be a contemporary example, although perhaps defensible as an anti-discrimination stance with relevance to QANTAS's business operations. The question could be asked – would there have been legitimacy if the position taken was the promotion of euthanasia?

(d) With the massive resources available to some corporates, their social influence and political power can be significant – take for example the WA mining lobby's recent self-interest resistance to proposed changes to resource taxes/royalties. The advocacy was strong and influential. The integrity of the messaging was questionable on many counts.

(e) Corporate boards and CEO's are not chosen representatives of the broader community. Their views may or may not be reflective of the views even of their shareholders, especially on social issues. Yet they exercise significant control over the allocation of the corporation's resources. As commented upon earlier by Ian Dunlop, corporations have a remit to act primarily as commercial enterprises. They do not have social, political or moral authority.

(f) The "moral hazard" to society of such power and influence needs to be considered if those in control of commercial corporations are to be encouraged to be active and influential participants in shaping the development of the social mores which inform society (which mores are then relevant in the extent to which society is prepared to continue to extend to corporations their "licence to operate").

B3. Reflections

Care needs to be taken as to the extent to which society (perhaps naively), and special interest groups (perhaps by design), may seek to define, or re-define, the proper role of the corporation in society in the guise of prescribing the requirements of a corporation's "social licence to operate". Any purported setting or re-setting of the proper boundaries of corporate endeavour must maintain legitimacy in the context of the core business and socially productive competencies that the corporate model has to offer in the interests of all relevant stakeholders.

If there is to be any new setting or re-setting of the proper boundaries of corporate endeavour, either by regulatory intervention, by judicial decision concerning the duties of corporations and their directors and officers, by society through the exercise of informal powers of influence, or by prescriptive requirements concerning a corporation's "social licence to operate", then it should only be done in the full knowledge of the trade-offs that would be involved depending on which way the pendulum, from the existing status quo, may be encouraged to move.

The views of CAMAC[14] are instructive in this respect:

> *"The social responsibility of corporations should be considered in the context of their overall economic and other contributions to society, as well as any negative impacts. These contributions include the supply of goods and services, the generation of wealth for shareholders, the payment of taxes and the provision of employment, all of which go to strengthening the economy and improving community living standards. On the other hand, negative aspects of corporate business operations and the way they are conducted, whether in relation to creditors, employees, local communities, the environment or otherwise, need to be taken into account.*
>
> *Companies should also be judged in terms of their compliance with applicable laws, including environmental and other statutes designed to promote or protect aspects of the public interest. How their business practices and internal standards are designed to promote compliance with the 'spirit' as well as the 'letter' of the law, or other emerging community expectations, may also be taken into account.*

[14] Note 14 – refer Note 6 above

Beyond that, a well-managed company will generally see it as being in its own commercial interests, in terms of enhancing corporate value or opportunity, or managing risks to its business, to assess and, where appropriate, respond to the impact of its activities on the environmental and social context in which it operates. Companies that fail to do so appropriately may jeopardise their commercial future.

The 'business' approach does not involve inappropriate compromise or subordination by directors of the interests of shareholders to those of other interest groups. Rather, awareness of relevant environmental and social considerations is part of any strategy to promote the continuing well-being of the company and to maximise shareholder value over the longer term. The relevance of particular social or environmental matters will vary, depending on the nature of a company's business.

Consistent with the business approach, directors may sometimes choose to go further, where they see it as relevant to their business interests, in promoting particular societal values or goals or in seeking solutions to challenges facing their industry and the community. But this is not to suggest that companies bear some form of obligation to tackle wider problems facing society, regardless of the relevance of those problems to their own business."

Getting the balance right is the key to finding that common ground, without the risk of unintended consequences which have the potential to materially damage the national economic and social well-being.

Part C Social Licence to Operate – An Empowered Market Perspective[15]

C1. The Model

As explained in Part B, there is informed national and international acceptance that corporations and society interact in ways that influence their respective actions and resulting corporate performance outcomes. This paper posits that this creates a virtuous self-adjusting cycle which places the dynamic tensions between unbridled corporate economic objectives and social/environmental concerns in relative balance as part of a symbiotic economic/social paradigm. This is shown in the "Corporate Performance Outcomes Model" (refer Part D). The Model is based on the following principles:

(1) Corporations are virtual statutory creations designed primarily to deliver economic outcomes for the betterment of society. Society, through legislation and regulation, gives the mandate for corporations to exist and operate. The power is also with society, through legislation and business regulation, to expressly temper, qualify or modify/control the extent of that mandate.

(2) Various sections of society have power to influence the behaviour of corporations to deliver outcomes aligned to the objectives of each of those discrete sections of society. Consistent with classic Pavlovian conditioning principles of reward and punishment[16], the responses whether positive or negative, of sections of society to corporations and their performance outcomes, contributes towards the conditioning of corporations and their behaviour.

(3) Sections of society are empowered with levers and tools with which to modify or influence corporate action (e.g. an investor's ability to buy or sell a corporation's shares; an employee's ability to commit or withhold his/her services; a consumer's/supplier's ability to support or boycott a corporation or its products; a social advocate's ability to generate publicity having impact upon a corporation's reputation, brand or products). These levers and tools can have either subtle or profound effects on a corporation and its future performance. In a developed democratic and socially connected nation such as Australia, where a high level of information flow exists and the powers of various sections of society are attuned, the interactions between corporations and society create relatively finely balanced outcomes.

(4) Armed with responses (actual or anticipatory) from the various sections of society, the directors and officers of a corporation will assess and weigh the relevance of these responses or inputs:

   (a) in the definition of the corporation's values and culture;

   (b) in the formulation of its objectives and mission;

   (c) in the development of its strategies and risk management plans and their implementation; and

   (d) in the manner in which it operates its business and deals with its stakeholders.

(5) For corporations with differing objectives and value bases, or for corporations at differing stages of their evolution with differing pressures and drivers for "corporate performance outcomes" (however that may be defined depending upon the corporation and its unique circumstances), variable relevance and weighting of the demands of each section of society (and the impact of the reward/punishment outcomes that may be imposed by that section through the exercise of the levers/tools available to it) may apply.

(6) The interaction and fusion of:

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[15] Note 15 – with respect to Part B of this paper, due acknowledgment is given to a paper entitled "Corporate Social Responsibility – an Empowered Market Perspective" (2006) by Steven Cole and Eve Regnard.

[16] Note - psychologistworld.com/behaviour/pavlov-dogs-classical-conditioning

- these societal expectations and responses;
- the corporation's resources and strategic inputs;
- the corporation's corporate governance practices;

give rise to the "corporate crucible" – the dynamic medium in which all these expectations, resources, strategies and practices are synthesised by the corporation and its board which ultimately result in "corporate performance outcomes".

(7) Generally such corporate performance outcomes can be categorised under the following outcome headings:

(a) Financial

(i) Short term (say 0-2 years)

- dividends / distributions
- today's/tomorrow's share price movement
- perceived NPV of future prospects for the corporation

(ii) Long term (say 2-7 years)

- sustainable profitability
- total sustainable shareholder returns
- strategic outcomes achieved

(b) Non-Financial

(i) Internal

- human resource policies/employee standing
- occupational health and safety practices
- corporate integrity and ethical standing
- constructive culture

(ii) External

- community resource depletion (eg. environmental, heritage)
- community exploitation (eg. human rights / social equity)
- constructive societal contribution/engagement (eg. community, education, health, charity, the arts, sport etc)

(8) Yet equal weighting will not apply to all of these outcomes. The weightings are both variable and dynamic:

- in the eye of the section of society making the assessment, depending upon the importance placed by that societal sector on the relevant performance outcome (eg. investors may place a higher weighting on a corporation's financial performance; regulators are likely to place a higher weighting on regulatory compliance; 'pro-green' consumers/investors are likely to place a higher weighting on the corporation's environmental performance; employees are likely to place a higher weighting on the corporation's workplace practices);
- in the eye of the corporation (and its board and decision makers) depending upon its espoused mission, values and culture, and strategic objectives, and the corporation's perception as to which sections of society are its most relevant and influential stakeholders.

The weighting also may vary depending on the other contemporary business and societal issues then impacting either the section of society or the corporation.

(9) Each section of society will reward or punish (as applicable) the corporation by utilising the levers/tools at its disposal, to seek to influence the corporation either:

- in furtherance of its performance outcomes;

- in contradiction to such outcomes; and/or
- in furtherance of other outcomes.

(10) Corporations seeking to optimise their performance outcomes will naturally be striving to find the “right strategic balance” between each of their Financial and Non-Financial performance outcomes that overall will:

- be most beneficial to the attainment by the corporation of its strategic objectives, consistent with its culture and principles of operation; and
- best satisfy the sections of society that it perceives are most relevant to it, so that they exercise the levers/tools available to them for the benefit of the corporation or in reward of the corporation’s performance outcomes (or at least not in a manner adverse to those outcomes).

(11) History and logic each attest that there is no perfect “corporate performance outcome” which is likely to satisfy everyone – although equally history attests that some performance outcomes are either more or less favoured than others by different sections of society.

However as the principles and philosophies of each sector of society are not necessarily consistent, or even aligned with one another and may even be diametrically opposed to one another in many cases, levers/tools may be being simultaneously exercised by different sections of society to deliver contrary messages of approbation and sanction to the corporation and its performance outcomes.

(12) And so back to the corporate crucible for the corporation (through its board and senior executives), to assess and weigh these messages or inputs, and as applicable, to modify corporate endeavour, behaviour and performance outcomes as a consequence.

And so continues the cycle!!

C2. The Roles and Powers of Key Sections of Society

Consumers/Suppliers

Consumer spending is a function of both self-interested motivations and responses to particular agendas and concerns. The success of the ‘buy Australian” campaign, for instance, shows the importance of factors unrelated to the intrinsic merits of a particular product in positively influencing consumer spending. In many cases the position taken by consumers to a particular issue also can have a determinative negative effect (consider for instance the pro-organic and anti GM food campaigns, or the consumer influence in the boycott of fur products or products manufactured utilising “sweat shop” or “modern slavery” labour). Suppliers also exert market power through their preparedness to do, or not to do, business with a corporation and if so at what price and on what terms.

Investors

Investors, like consumers, respond to a wide range of factors which may or may not be directly relevant to, or have proportionate impact upon a corporation’s financial bottom line. The correlation is not as simple as adverse action or publicity having an immediate effect on share prices. While this is sometimes the case, such as upon the break of the news concerning the nature of the AMP’s corporate practices disclosed at the Haynes Commission of Enquiry in 2018, in other cases, allegations of questionable corporate conduct may be overshadowed by other events affecting the corporation (for example in 1995 when the British media accused Shell of complicity in human rights abuses in Nigeria, although it had a marked impact upon Shell’s brand, maybe through other market influences, it had minimal effect on Shell’s share price – in fact the share price rose around the same time following the announcement of a $1.2 billion LNG project, which price rise may or may not have been greater had it not been for news of the human rights abuse).

The real impact investors have in matters of corporate performance outcomes and society’s licence to operate stems from the interaction between responsible action and sustainable long term activity which has prospective economic utility convertible to positive financial returns (for example the growing investment in sustainable energy, or the diversification of business lines away from “risk” businesses eg. those associated with the potentially adverse health and social outcomes of tobacco or gambling exposure). The rapid growth of "ethical" investment funds is another example of investor influence and corporate response to that influence.

Employee/Contractors

Corporations can only act through the services of their officers, employees and contractors. Employees and contractors exert influence not only in the manner and effectiveness of their service delivery, or through the withdrawal of their services (eg. resignation, industrial action or boycott), but also at executive employee level, directly in the formulation of corporate policy. The role of the trade union movement in collective bargaining and marshalling of employee action is material in this effect.

Regulators

The impact of regulatory action is multifaceted. For corporations that fall foul of regulatory controls, there is both a direct and measurable cost, and ongoing indirect costs through reputational damage and the need to incur management time and costs in remedial action – the tarnish to corporations named by the ACCC for anti-competitive trade practice prosecution, or by ASIC for continuous disclosure or financial product integrity breaches, can be significant.

The ultimate powers of the regulators are self-explanatory – typically fines, remediation orders, withdrawal of licence to operate a particular business, or even banning orders or ultimately the incarceration of its officers and directors (depending on the nature of the offensive conduct). The effects are on not only those corporations targeted directly, but also on all those who find themselves in a similar position, resulting in greater internal rigour amongst all corporations, and their boards and executives, at each public expose of failing by others, or at each fresh round of regulatory change. ASIC Chair James Shipton's recent stated commitment to strengthen ASIC's enforcement powers and penalties is instructive as to ASIC's belief in the relevance of the severity of penalty in modifying behaviour.

Societal Norm Influencers including the Media

The consumer/suppliers, investors, employees/contractors and regulators are also joined by special interest advocacy groups (and their spokespersons) in society, whether they be formally or informally constituted, that draw the attention of the consumers/suppliers, investors, employees/contractors and regulators in a particular direction or to a particular cause or circumstance. Third world "sweat shop" or "modern slavery" factories, inhumane export of animals, the destruction of the world's rainforests, climate change issues and discriminatory work practices have been brought to the attention of the world's consumers/suppliers, investors, employees/contractors and regulators through the voice of varied groups founded on their own particular view of good and evil. The consumer/suppliers, investors, employees/contractors and regulators have then themselves responded, based on each of their own agendas.

C3. Directors' and Officers' Duties

Both at common law and under ss. 180 and 181 of the Corporations Act 2001 (Cth) directors and officers are generally obliged to act and discharge their duties:

- with care and diligence;
- in good faith in the best interests of the corporation;
- for a proper purpose.

Accordingly any director or officer who purports to act in disregard of considerations that materially impact on the corporations' performance outcomes (be they financial or non-financial), not only does so in breach of those duties, but does so at his/her own, and the corporation's, peril. No further legislative mandate, or regulatory duty to honour a "social licence to operate", is necessary for directors and officers to consider and have regard to such matters in the proper discharge of their duties.

Certainly any ASX listed corporate board which keeps as a closely held secret, share price sensitive information concerning either the corporation's financial or non-financial performance outcomes, is likely to be in breach of its continuous disclosure obligations under ASX Listing Rule 3.1 and s.674 of the Corporations Act, resulting in risk of prosecution, stock exchange listing suspension and class action litigation.

Even if the information is not share price sensitive, contemporary shareholder and prospective investor expectations demand reasonably open and transparent communication flows and accountability of such matters. These expectations are largely met by the great majority of public listed companies, and industry accepted good corporate governance practice demands no less. No further regulated prescriptive reporting regime of "social licence to operate" information by corporations is necessary or warranted.

C4. Reflections

It would indeed be regrettable if the self-fulfilling power of this virtuous corporate performance outcomes Model as depicted in Part D was to be subverted by over indulgence of exercise of power and authority by regulators (or quasi or de facto regulators such as the ASX through its Listing Rules or the ASX Corporate Governance Council through its Corporate Governance Principles and Recommendations) to prescribe a "social licence to operate" duty upon corporations (and/or their directors and officers), and thus risk unduly tilting the balance and self-regulatory integrity of the Model.

There is in play a self-adjusting cycle which consistently works to balance the dynamic tensions between:

- unbridled corporate economic endeavour (to the detriment of other sectors of society);
- sustainable economic development and financial returns;
- the interests of a corporation's stakeholders; and
- the broader values of our society.

That cycle is generally currently seen to be working to temper corporate commercial extravagance with the demands of broader community and stakeholder interests, and sustainable social and economic development requirements.

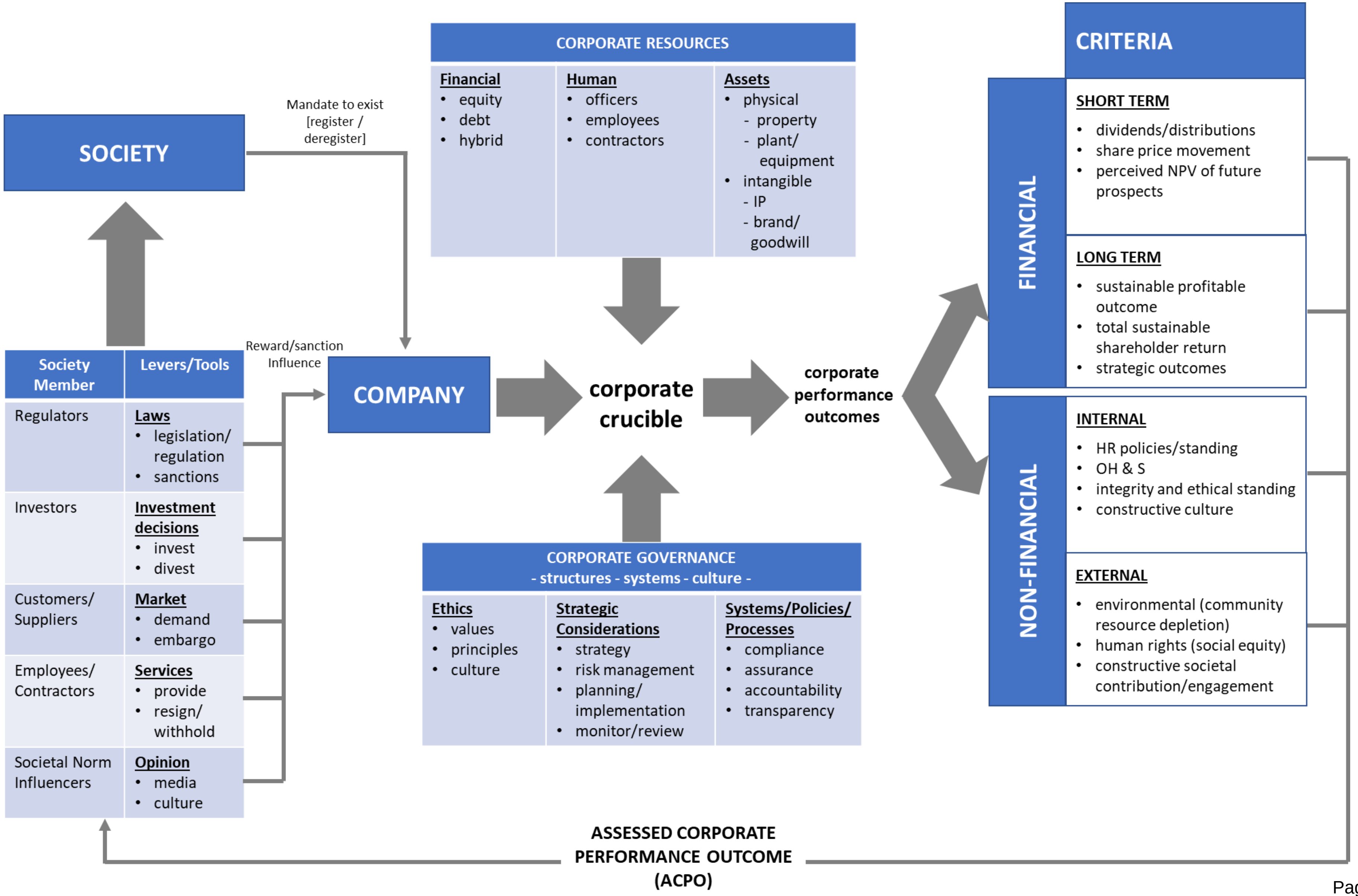
It is strongly submitted that it would be inappropriate for our regulatory and quasi or de facto regulatory masters, through aggressive further prescriptive intervention, to exert the levers/tools available to them across all corporations generally (the exercise of which levers/tools they are accountable for to the general public), for expediency and by way of over reaction to recent events that may have been perpetrated by a narrow class and percentage of corporate Australia (albeit economically influential). Consequences of such actions could create imbalance in the self-adjusting virtuous cycle of the corporate performance outcomes model – perhaps to the detriment of society as a whole which has benefited from the social/economic miracle of the limited liability corporation for many decades.

At the same time there is need for at least some sections of corporate Australia also to take heed of the Model and the licence to operate conferred by society upon them, not only for risk of adverse responses by society to their own operations and corporate outcomes, but also the risk of resultant imbalance to the Model generally with negative impact across Australia's economic and social/environmental welfare generally.

And so to revert to John Donne's classic work that inspired the title to this paper (refer Note 1), all corporations (and their directors and officers) must "never send to ask for whom the bell tolls; it tolls for thee".

Part D

(1) The Corporate Performance Outcomes Model ("Model")



Part D

(2) The Model's Measurement Matrix

A. High level conceptual measurement Principles

The Model, incorporating the Measurement Matrix addendum, seeks to facilitate a high level holistic assessment of a corporation's performance outcomes in the context of the corporation's interface with the society of which it is part. It does so by providing a crude measurement matrix to allow:

(a) raw score assessments (albeit subjectively made with some guidance provided) are given against high level corporate performance outcome criteria:

(i) financial

- short term
- long term

(ii) non-financial

- internal
- external

(b) "weighting" (albeit subjectively made with some guidance provided) of the perceived importance of each of those criteria by society;

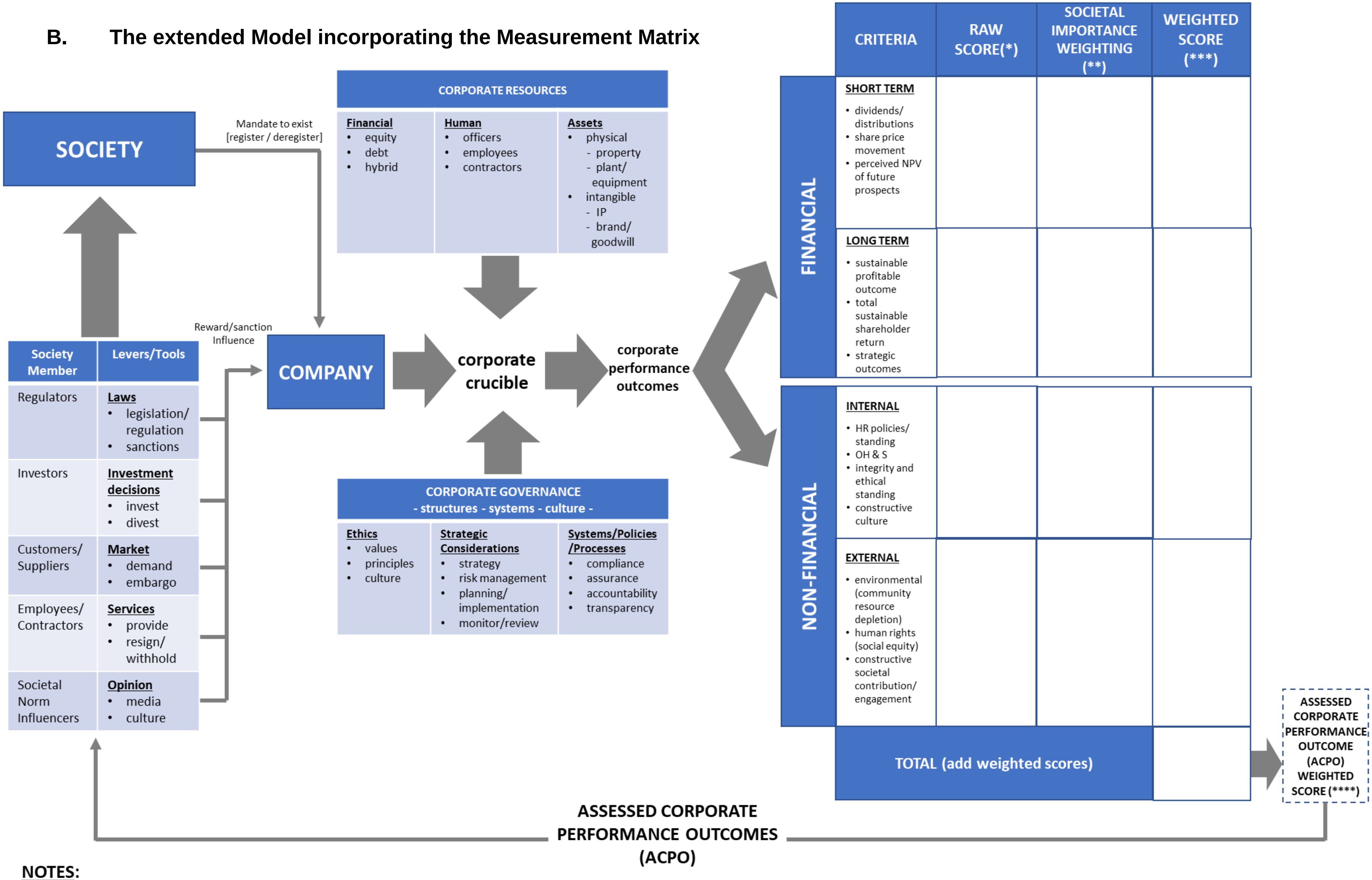
(c) the multiplication of each raw score against the perceived societal importance weighting to give a "weighted score" for each criterion mentioned in (a) above;

(d) the aggregate of all 4 of the "weighted scores" to give an "Assessed Corporate Performance Outcome ("**ACPO**");

(e) a scale against which to consider the corporation's ACPO which may assist the corporation (and its directors and officers) in considering the strategies and policies that the corporation may wish to adopt and implement in the context of the corporation's social licence to operate and any risks posed to the corporation arising therefrom.

The Notes to the Model's extended measurement matrix in B below include the suggested scoring systems and their benchmarking for the purposes of considering the ACPO as mentioned in paragraph (e) above.

B. The extended Model incorporating the Measurement Matrix



NOTES:

(*) Score (based on actual and perceived performance) within a range of +/- 2:
- very poor (-2)
- poor (-1)
- fair/average (0)
- good +1
- very good (+2)

(**) Score (based on perception of relative importance of criteria) within a range:
- LOW relative importance (1)
- MEDIUM relative importance (2)
- HIGH relative importance (3)

(***) Multiply raw score by societal importance weighting

(****) ACPO
<0 – below base level acceptability (significant improvement warranted)
0 – base level acceptability
>0 – above base level acceptability (but still opportunity for improvement)