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A Question of Trust: Post-Truth Paradigms and the Challenge to Financial Regulation

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MONASH BUSINESS SCHOOL

Thought Leadership in the Financial Sector

CONTENTS

1. ABSTRACT

Trust in institutions is falling at an alarming rate, the cause and consequence of democratic rejection of strategies to deal with the Global Financial Crisis. Irrespective of whether rule or principles based forms of regulation were privileged each failed to address the erosion of core normative anchors. Blindsided by the factors that led to the GFC, the policy response, based largely on technical solutions, has done little to restore trust. As will be shown, it further eroded it. The result is an existential crisis for the liberal state and the international regulatory order. Rebuilding trust requires substantial refashioning of purpose buttressed by change in the role and function of industry codes of conduct. Without anchoring commitment to broader social purpose these codes they risk exacerbating the distrust they are ostensibly designed to ameliorate. The article explores these dynamics through an extended analysis of proposed changes to the Australian Bankers Association Code of Conduct. It argues that despite rhetorical commitment to a social licence to operate, the lack of an explicit normative dimension undermines authority and legitimacy.

2. INTRODUCTION

Trust constitutes having firm belief in the reliability, truth or ability of someone or something, a belief in another's integrity. It is both personal and relational; an attitude and belief; and, if warranted, a virtue.[1] It is also the glue of economic and social development.[2] The foundation of trust in the western liberal state, however, is under threat.[3] The triumph of electoral populism and rejection of establishment parties, platforms and candidates is evident in France (where candidates from neither mainstream party advanced to the second-round presidential run-off), the United Kingdom (which rejected continued membership of the European Union in a plebiscite dogged by accusations of misinformation and manipulation), and the United States (where Donald Trump, a real-estate developer and reality television star with no prior political or military experience split the Republican Party before defeating Hilary Clinton). Each success derives, in part, from alienation. As Christine Lagarde of the International Monetary Fund has put it, there is a deeply-held popular belief in a 'lack of control' over a 'system [that] is somehow against them.'[4] Equally weakening is warranted faith in two critical components of professional and institutional trustworthiness: competence and honesty.[5]

The distrust is most pronounced between financial institutions and society but, crucially, also apparent within them. Disturbingly, internal confidence in capacity and willingness of senior management to ensure ongoing warranted commitment to stated values tapers in tandem with an employee's length of tenure.[6] Moreover, general distrust in the banking system's commitment to societal values is evident in countries that did not face catastrophic collapse in the aftermath of the Global Financial Crisis (GFC).[7] In Australia, for

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[1] G Hosking, *Trust: A History* (Oxford, 2014) 27-28.

[2] See D North, *Institutions, Institutional Change and Economic Performance* (Cambridge, 1990); D North: *Understanding the Process of Economic Change* (Princeton, 2005).

[3] Executive Summary, *2017 Edelman Trust Barometer* (New York, 15 January 2017) 2 available at http://www.edelman.com/trust2017/

[4] C Jones and A Barker, 'Draghi Makes Appeal for Those Left Behind,' *Financial Times*, 14 September 2016, 4.

[5] See O O'Neill, 'What Is Banking For,' (Speech delivered at the Federal Reserve Of New York, New York City, 16 October 2016), available at http://www.bankingstandardsboard.org.uk/remarks-by-baroness-onora-oneill/.

[6] British Banking Standards Board, *Annual Review 2016-2017* (London, March 2017), 21 (citing survey evidence).

[7] For Canada, see J Bradshaw, 'Federal Watchdog to Review Banks' Sales Tactics,' *Toronto Globe and Mail*, 15 March 2017, available at http://www.theglobeandmail.com/report-on-business/canadian-watchdog-to-

example, the imposition of an additional levy of $1.5bn per annum on the five biggest domestic banks from 1 July 2017 was not justified on risk. The stated rationale pivoted on budget disrepair and belief that public dissatisfaction with the banking sector made the major banks an easy target.[8] The decision, introduced without prior consultation, reflects the self-inflicted failure of the banks to address acknowledged culture failures.[9] Paradoxically, the problem and the government solution also reflects the past weakness of the state in mediating the relationship between the corporation and society, a wicked governance problem that extends far beyond Australia's shores.[10]

The perceived failure of regulatory systems to hold to account those within the financial system who by accident, omission or design undermined legitimacy and authority has weakened collective trust in regulated, regulators and political oversight. Ongoing contestation over responsibility and the weakening traction of normative anchors combine

review-banks-sales-tactics/article34309072/; for Australia, see House of Representatives Standing Committee on Economics, *Review of the Four Major Banks* (Canberra, November 2016), iii ('Australians should be able to trust that their bank will act in their best interests when they turn to them for help. It is clear that in some cases this has not happened.').

[8] J Eyers, 'Banking on Popularity,' *Australian Financial Review*, 13-14 May 2017, 12-13; see also I Narev, 'New Impost Hits Wrong Targets,' *Australian Financial Review*, 13-14 May 2017, 14-15 (in which the Commonwealth Bank of Australia CEO notes caustically that 'no doubt the proposed levy has been designed to perform well in the opinion polls…This is an opportunistic play to grab more revenue, not a matter of increasing trust in the banks:' at 15.

[9] P Coorey, T Boyd and J Eyers, 'Banks Warned Tax Rate Could Rise,' *Australian Financial Review*, 12 May 2018, 1, 8 at 8 (quoting Shane Elliot, CEO of ANZ that the budget measure was an inevitable reflection of 'a shattered relationship between the banks and the Parliament.' According to Elliot, 'it's self-inflicted to some degree by the industry with individual issues as we became an easy target as a result.').

[10] Hosking, above n1, 108; see also O Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38 *Journal of Economic Literature* 595 at 597. Williamson notes that analysis of this 'level one' component of social theory is conspicuous by its absence with regulatory studies. The other three levels comprise institutional arrangements viewed primarily through property rights and positive political theory, governance mechanisms through transaction cost economics and resource allocation frameworks generally examined through agency theory. For canonical interpretations, see J Schumpeter, *Capital, Socialism and Democracy* (New York, 1943), 137 (noting that the stock market is a poor substitute for the Holy Grail); see also K Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (New York, 1944), noting that the separation of state and market through a policy of non-intervention is itself an interventionist strategy.

with increased cynicism to create an existential crisis.[11] There is, however, a profound risk that while populist measures such as the punitive tax imposition on banking profitability in Australia may contribute to budget repair, it may also set damaging precedents on the formation of credible and stable banking and broader regulatory policy as well as sovereign risk.[12] Taken together, the trust deficit suggests an imperative for the corporation itself to carefully and fully delineate its duties and responsibilities, if only to defend itself from rapacious or ill-defined intervention.[13]

The duties and responsibilities of the corporation in advancing societal welfare are as complex as they are unresolved. Indeed, globalisation, implicit subsidies and tax arbitrage, and rapid technological change add to uncertainty. Crucially, these problems extend far beyond the esoteric world of financial derivatives and the morals of the trading floor. Manufacturing offshoring, base erosion and profit-shifting upend the logic of the trickle-down economy. It is indicative, for example, that Apple's most innovative product may well be its tax strategy, subject to investigation and official derision in Australia,[14] Europe,[15] and the United States.[16] Apple is by no means alone. The technology sector as a whole deploys

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[11] W Streeck, *How Will Capitalism End* (London, 2017), 17 ('I interpret the coexistence of a shared sense of crisis with diverging concepts of the nature of that crisis as an indication that traditional economic and sociological theories have today lost much of their predictive power.')

[12] This is particularly apparent in the Australian example, where a technical briefing on the scope of the levy descended into chaos, see T Boyd, 'Treasury's Embarrassing Tax Debacle,' *Australian Financial Review*, 12 May 2017, 40; see also D Crowe, 'Big New Tax Robs Banks – And Who's Next,' *The Australian*, 12 May 2017, 14; P Kelly, 'Politics Knocked Off Course by the Populist Drumbeat,' *Weekend Australian*, 13-14 May 2017, 1, 15, 18.

[13] Less commented on in the Australian budget was the provision of additional powers to the Australian Prudential Regulation Authority to impose civil penalties of up to $200m for non-compliance with reporting obligations, power to cap executive pay and delay payment of bonuses for up to five years and the blocking of senior appointments within institutions, see S Morrison, 'Budget Speech 2017-2018' (Speech delivered at Parliament of Australia, Canberra, 9 May 2017).

[14] Economic References Committee, *Corporate Tax Avoidance: You Cannot Tax What You Cannot See* (Canberra, August 2015) 24 (noting Apple paid an effective tax rate of 4% in 2013-204, making a payment of $80m on revenues of $6bn.

[15] European Commission, *On State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) Implemented by Ireland on Apple* (Brussels, 30 August 2016) (criticising Ireland for failing to collect corporate tax as an illegal form of state aid).

[16] Permanent Subcommittee on Investigations, *Offshore Profit Shifting and the U.S. Tax Code – Apple* (Washington, DC, 21 May 2013), 3 ('Apple has sought the Holy Grail of tax avoidance, offshore corporations

aggressive tax minimisation strategies.[17] Robotics and artificial intelligence demonstrate the critical dynamic of contemporary capitalism remains 'creative destruction.'[18] Moreover, it is by no means clear that we are more than fleetingly aware of technological innovation on employment patterns and personal and workplace relations.[19] Indeed, whether it is even possible to control or regulate effectively the pace and nature of change is a matter of acute debate.[20]

The result is a fracturing of normative coherence, essential for warranted trust in our institutions.[21] The structural weakening contributes to the dramaturgical turn in contemporary politics. In an era of uncertainty, those offering simplistic but nonetheless definitive solutions give the illusion of strength and purpose, none more so than President Trump himself. Looking back, the problematic identified by Edward Mason in 1960 about the role of corporations in modern society seems touchingly simplistic. Then he argued the relationship the corporation and modern society 'and attending circumstances have confronted us with a long series of questions concerning rights and duties, privileges and immunities, responsibility and authority, that political and legal philosophy have not yet assimilated.'[22] To this list we can add the transactional costs and legitimacy implications associated with a decline in generalised trust.

The solution to the trust deficit in finance, in part, rests in designing systems that apportion blame for trust erosion and impose sanctions proportionately, fairly and reasonably. To be effective these must apply across the regulatory gamut, from self-regulation through to command-and-control measures. Critically, each approach must be aligned to an overarching and agreed purpose (i.e. the stability and integrity of the financial system). Blameworthiness offers, as a consequence, an essential conceptual and practical

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that it argues are not, for tax purposes, resident anywhere in any nation,' according to Senator Carl Levin, Chairman of the Subcommittee, who described Ireland, its main European base, as a tax haven.).

[17] See A Creighton, 'Technology Giants Paying 1% Tax,' *Weekend Australian*, 20-21 May 2017, 1,2.

[18] Schumpeter, above n10, 83.

[19] See C Frey and M Osborne, 'The Future of Employment: How Susceptible are Jobs to Computerisation?' (2017) 114 *Technological Forecasting and Social Change* 254.

[20] See J Bleich, 'Keynote Address,' (Speech delivered at Universities Australia Conference, Canberra, 1 March 2017) 7 (citing the director of Google's technology incubator that technological change is 'simply going so fast now no one can control where it is taking us.').

[21] P Sztomka, *Trust: A Sociological Theory* (Cambridge 1999), 122-25; see also Hoskings, above n1, 33.

[22] E Mason, 'Introduction,' in E Mason (ed), *The Corporation and Modern Society* (Cambridge, MA, 1960), 19; for original formulation of the problem of separation and control, see A Berle and G Means, The Modern Corporation (New York, 1932).

counterpart to trustworthiness. It allows for more accountable systems of oversight. In this framework promises matter; breaking them have (or should have) consequences. The unresolved question is how to do it. It is counter-productive, for example, to advance unenforceable solutions based on stated commitments to change. Too often these have failed, not least in the finance sector itself.[23]

Traditionally, for example, policymakers reformulated and strengthened professional, corporate and industry-driven codes of conduct to address evidence of scandal.[24] The failure of such initiatives to rebuild trust derives from rising public scepticism on their purpose and efficacy. The scale of the intervention required to stabilise the finance system (and concomitant failure to recognise the pain of austerity on communities far removed from the sector) played into (equally powerful if unobserved) cultural narratives distrustful of government.[25] The approach is no longer sustainable.

This article explores how these dynamics play out in finance sector, not only the most distrusted in the *2017 Edelman Trust Barometer* but critical to the decline in trust in political and regulatory institutions precisely because of perceived complicity in privileging symbolic rather than substantive reform. This problem has been magnified by the role of technology platforms in transforming the speed and direction of public discourse. Part II examines how this digital disruption and active manipulation through social media platforms attenuated the trust deficit across the liberal world. Part III assesses the implications on the theory and

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[23] See, for example, M Agius et al, 'Financial Leaders Pledge Excellence and Integrity,' *Financial Times*, 29 September 2010, available at http://www .ft.com/intl/cms/s/0/eb26484e-cb2d-11df-95c0-00144feab49a.html#axzz2C8HKL1jb. ('Ultimately, it is the responsibility of the leaders of financial institutions – not their regulators, shareholders or other stakeholders – to create, oversee and imbue their organizations with an enlightened culture based on professionalism and integrity. As leaders of financial institutions, we recognize and accept this personal responsibility,' Marcus Agius and sixteen other senior executives argued. Personal commitment, in the form of statements of intent or indeed oaths may in themselves not offer more than well-intentioned platitudes.

[24] Without a normative anchor, however, these are unlikely to gain traction within communities of practice, see R Moorhead and V Hinchly, 'Professional Minimalism: The Ethical Consciousness of Commercial Lawyers' (2015) 42 *Journal of Law and Society* 387. This leaves aside the more complicated question of whether banking, for example, can even be considered a profession, see British Parliamentary Commission on Banking Standards, *Changing Banking for Good* (Westminster, 2013), 295; for a less sceptical approach, see D Kingsford-Smith, T Clarke and J Rogers, 'Banking and the Limits of Professionalism' (2017 40 *University of New South Wales Law Journal* 411.

[25] This was particularly acute in the United States, where the gaming of democracy derived from a thirty-year campaign in which challengers ran on the basis of opposing government, see Bleich above n20.

practice of governance. Part IV explores how the praxis has influenced corporate and regulatory strategies in Australia, with particular reference to a substantive revision of the Australian Bankers Association Code of Conduct. Part V evaluates whether and how the code (and others like it) could be augmented by integration with an explicit normative commitment to a social licence. It is argued that this negotiated social licence, an essential bedrock of self-regulation, does not displace formal regulatory oversight but complements legal obligation thereby providing warranted commitment to ongoing ethical conduct. Part VI concludes.

3. THE DECLINE IN TRUST

Trust is essential for cooperation and coordination for material mutual benefit, lowering transaction costs and providing an essential mechanism to facilitate exchange. It can be found in two distinct social settings. The first is particularised to specific social, political and demographic communities; the second is generalised within an overarching society.[26] The drivers of each form differ. Particularised trust focuses on specific and relatively closed networks. These networks bifurcate between those we know (or think we know) and outsiders. They pivot on pessimism that those outside a given network may not share cote value systems and cannot, therefore, be relied upon.[27] Generalised trust, on the other hand, which may not be warranted, is critical to societal order and development. It is informed by intrinsic belief in the trustworthiness of strangers. It reflects optimism that risk can be managed (and or insured against) and that breaches can and are punished by social and institutional sanctions.[28] The grounds for such optimism are eroding, not least because of how social media shapes the nature and perception of risk in post-industrial society.[29]

The uncertainty over the nature and salience of risk within and across targeted salient communities can prompt and fuel resentment, fear and scepticism. As a consequence, it further erodes generalised trust and heralds a retreat to past (idealised) certainties.[30] From terrorism, to uncontrolled migration to climate change, to systemic bank failure, these risks, however, are global, increasingly unpredictable, and incapable of being insured against.[31] Nowhere is that risk (and fear) more apparent than in the governance of

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[26] T Yamigishi and M Yamagishi, 'Trust and Commitment in the United States and Japan' (1994) 18 *Motivation and Emotion* 129.

[27] J Williams, 'What So Many People Don't Get About the US Working Class,' *Harvard Business Review*, November 2016, available at https://hbr.org/2016/11/what-so-many-people-dont-get-about-the-u-s-working-class (arguing that it is essential to differentiate the 'poor' from the working lower class and how the latter revile, in particular, the professional classes).

[28] See J Mansbridge, 'Altruistic Trust,' in M Warren (ed) *Democracy and Trust* (Cambridge 1999), 290-309.

[29] See F Manjoo, 'Zuckerberg Realises the Dangers of the Social Media Revolution He Helped Start,' *Sydney Morning Herald*, 5 May 2017 (reprinting article that first appeared in the *New York Times Magazine*), available at http:///www.smh.com.au/business/media-and-marketing/zuckerberg-realises-the-dangers-of-the-social-media-revoultion-he-helped-start-20170505-gvz28p.html. (with nearly 2 billion people using Facebook every month and 1.2 billion daily Facebook 'has become the largest and most influential entity in the news business, commanding an audience greater than that of any American or European television news network, any newspaper in the Western world and any online news outlet.').

[30] See U Beck, *The Risk Society* (Cambridge, 1986).

[31] U Beck, *The World at Risk* (Cambridge, 2007).

financial markets and public perception of its efficacy and purpose. Since 2012, the global corporate communications and advisory firm Edelman has been canvassing public opinion on trust. The headline findings and longitudinal trends are striking. The *2017 Edelman Trust Barometer* finds public opinion has become susceptible to concern over the trustworthiness of business, government, media and the non-government organization sectors.[32]

Notwithstanding the volatility and malleability of what constitutes opinion, [33] the decline in trust can be self-reinforcing within and between communities, especially if and when fears are targeted through platform technologies.[34] The situation is most acute in western-style democracies (including, for example, Australia, which did not suffer a single catastrophic banking collapse but where questioning of political and regulatory authority is matched with a significant decline in confidence).[35]

Technology did not cause this distrust but has contributed to its rapid increase. Information, access to it and its manipulation are long-recognised drivers of political theatre,[36] often with the privileging of symbolic over substantive policy outcomes.[37] Taken together, they can and often do generate a negative feedback loop.[38] It is indicative, for example, that across the globe a 'person like you' has similar standing to academic or technical experts (60% trust).[39] By contrast statements issued by a non-governmental organisation representative have a global ranking of 43%, a chief executive officer 37%, boards of directors 35% and a government official 29%).[40] What is particularly striking is a

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[32] *2017 Edelman Trust Barometer*, above n3.

[33] See M Edelman, *The Politics of Misinformation* (Cambridge, 2001), 52-70 (noting 'we constantly speak of "public opinion" there is no such entity. Instead there are segments of the population that construct, maintain, and police the beliefs and actions of their members:' at 56).

[34] Manjoo, above n 29.

[35] Levels of distrust in media is significantly higher in Australia than the global average, see S Spurr, 'Trust Free-Falls in Land Down Under,' *Edelman Online*, 21 February 2017, available at http://www.edelman.com/post/trust-free-falls-in-the-land-down-under/ .

[36] M Edelman, *Constructing a Political Spectacle* (Chicago, 1988).

[37] M Edelman, *The Symbolic Use of Politics* (Urbana, 1964).

[38] See A Swift, 'Americans Trust in Mass Media Sinks to New Lows,' *Gallop*, 14 September 2016, available at http://www.gallop.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx; see also Manjoo, above n29 ('with its huge reach, Facebook has begun to act as the great disseminator of misinformation and half-truths swirling around the rest of the media. It sucks up the lies from cable news and Twitter, then precisely targets [through its news feed function] each lie to the partisan bubble most receptive to it.').

[39] Edelman, above n3, 11

[40] Ibid, 2-3.

generalised distrust within lower class levels of the professional classes, seen as self-serving facilitators of their own interest in collusion with corporate interests than neutral advisers committed to advancing the interests of clients and constrained by obligation to an ill-defined public interest (e.g. upholding the rule of law).[41] Nowhere is this more apparent than in journalism where content is tailored to preferences and increasingly delivered without editorial intervention. The implications on the quality of deliberative discourse are enormous. Not only is ignorance fanned but politicians have become increasingly hostage to the politics of every shortening news cycles. Short-termism is a problem as acute in political as well as corporate circles.

Trust and distrust are by their very nature fluid social phenomena.[42] Relative salience is based on personal experience and evaluation of past performance. The process is mediated by personal networks and communication channels. There is much to commend in how the spatial, structural and temporal nature of these networks is mutating in the digital age. New media platforms can, and often do, engage, enrich and empower communities. They can also distort and disparage contrarian thinking. As such, technology platforms are more than neutral enablers. They are critical intermediating drivers of social relations in the contemporary world.[43] The privileging of search engines over curated content, preference for

[41] See J Rogers, D Kingsford Smith and J Chellow, 'The Large Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40 *University of New South Wales Law Journal* 218; for disconnect between professional obligation and ethical practice, see J Coffee, *Gatekeepers: The Professions and Corporate Governance* (Oxford, 2006).

[42] F Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York, 1995), 353 (acknowledging that liberal democracy and capitalism remain the essential, indeed the only framework for the political and economic organization of society.' Fukuyama notes that trust regeneration is one of the key issues facing western governments, while underplaying the role of the market itself in contributing to this very distrust.).

[43] See R Waters, M Garrahan and T Bradshaw, 'Harsh News About Fakes News for Google, Facebook and Twitter,' Financial Times, 21 November 2016, available at https://www.ft.com/content/2910a7a0-afd7-11e6-a37c-f4a01f1b0fa1 (quoting a technology investor that 'these platforms are central to our democracy. Something has started to go wildly wrong,' The same article cites Robert Thomson, Chief Executive of News International that "these companies are in digital denial. Of course, they are publishers and being a publisher comes with the responsibility to protect and project the provenance of news. The great papers have grappled with that sacred burden over decades and centuries, and you can't absolve yourself from that burden or the costs of compliance by saying, 'We are a technology company.'); for indicative defence from Twitter, see Evidence to the Home Affairs Committee (14 March 2017) (A Pickles), Q470 ('Let us be absolutely clear: we are never going to get to a point where internet companies pre-moderate content for the 400 hours of YouTube going up every day and for the 500 million tweets that go up every day. If you want pre-moderation of internet platforms, there may well be no internet platforms. I think we need to be very, very clear about

free over paid subscription services, and increasingly entrenched belief that all media agendas are self-serving amplify an increasingly hollow echo chamber.[44] We all rely on the perceived neutrality of the search and share functions. Whether this is advisable is moot. Duty and responsibility over the content they disseminate raises profound questions for media outlets and technology corporations alike.[45] These include the inadvertent role of search engines and social media platforms in dissemination of hate and extremism,[46] and 'fake news' i.e. media reporting that intentionally distorts (and not for satirical purposes).[47] Their ranking of news sources can play a subtle role in informing public debate.[48] The separation of opinion from reporting, the mainstay of editorial imperatives in the world's

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how we discuss this, because there is a scale challenge. The positive benefits that our platforms bring and technology brings—yes, it comes with serious challenges. Yes, it brings out some of the worst in society and it brings to light things that we would all rather did not happen. But the idea that you can pre-emptively detect things and then remove them before they have been posted—we are never going to get to that point, and I think we need to be honest about that.').

[44] See also American Press Institute, 'Who Shared It: How Americans Decide What to Trust on Social Media,' (The Media Insight Project, Chicago, April 2017), 4 (noting that the identity of the sharer has demonstrable effect across all trust indicators, including factual basis, canvassing of diverse points of view, relative ease of finding relevant information.).

[45] For review, see Briefing, 'The Data Economy: Fuel of the Future,' *The Economist*, 6 May 2017, 14-17.

[46] Home Affairs Committee, *Hate Crime: Abuse, Hate and Extremism Online* (HC 609, Westminster, 25 April 2017), 4 (noting exponential increase in hate and extremism with 1,209 prosecutions in 2014 under the Communications Act compared to 143 in 2004. In evidence to the committee Google has noted a 25% increase year on year in flagged content uploaded onto YouTube platform under its self-governing notice and takedown procedures, ibid.). For discussion of the procedure, which is designed to capture breaches on content uploaded at the level of 400 hours per minute, see Evidence to the Home Affairs Committee, 14 March 2017 (P Barron), available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/hate-crime-and-its-violent-consequences/oral/48836.pdf.

[47] See H Allcott and M Genzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31 *Journal of Economic Perspectives* 211 at 222 (reporting survey evidence in October-November 2016 that only 10.1% of traffic to traditional news sites derived from social media referral compared to a referral rate of 41.8% for items hosted by fake new sites. In an indication of the relative sophistication of search engines, traditional media sources directed 30.6 of referrals while fake news sources peaked at 22%).

[48] Edelman, above n3, 11 (finding that 'nearly 6 in 10 believe search engines over human editors, 53% do not regularly listen to people or organizations with whom they disagree and are nearly four times more likely to ignore information that supports a position they do not believe in.').

major newspapers, from the *Wall Street Journal* to *The Guardian*, has lost traction.[49] Public service broadcasters have not been immune to these forces as the culture wars re-ignite in areas as disparate as climate change, migration and financial regulation. Equally, the role played by activist NGOs is problematic in terms of corrupting the integrity of the science on which they rely.

Looking forward, without demonstrable evidence that business takes on board as yet to be defined social obligation there is reason to expect further decline.[50] Contestation is likely only to increase as purpose remains ill-defined. In part, this can be traced to an expectations gap between stated commitment to values and evidence that fealty to them underpin corporate, regulatory or political strategy.[51] In a stark warning, Edelman concludes that 'free markets can work for all [only] if business works with the people, not just sells to them.[52]

The danger is not unacknowledged, not least by the technology providers themselves. In a recent manifesto, Mark Zuckerberg of Facebook conceded that 'social media is a short-form medium where resonant messages get amplified many times. This rewards simplicity and discourages nuance. At its best, this focuses messages and exposes people to different ideas. At its worst, it oversimplifies important topics and pushes us towards extremes.'[53] Zuckerberg makes the point that ideology plays a limited role within Facebook communities (presumably on the basis of calculation, although the data on which he relies does not accompany the manifesto).[54] The implications, however, are increasingly apparent in the dynamics of political theatre, particularly in the United States and Australia, as we shall turn to presently. First, however, it is necessary to examine how the privileging of

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[49] In the interests of full disclosure, the author worked as an investigative producer in news and current affairs for a range of national and international broadcasters, including the BBC, for thirteen years prior to entering the academy.

[50] Edelman, above n3, 10-11.

[51] Ibid, 9 (reporting that 57% of respondents for the United States believe the system to be failing, 59% in Australia, while the UK registers 60%, and Italy and France 72%. Singapore, by contrast shows dissatisfaction levels of 35% while the United Arab Emirates shows only 19% feel the system is not working for social benefit).

[52] Ibid, 3.

[53] M Zuckerberg, 'Building Global Community,' *Facebook*, 16 February 2017, available at https://www.facebook.com/notes/mark-zuckerberg/building-global-community/10154544292806634/ ; see also Majoo, above n29.

[54] See P Howard and R Gorwa, 'Facebook Must Detail Political Interferences,' *Australian Financial Review*, 23 May 2017, 45 (noting the gatekeeper function that Facebook could play through public disclosure of privately-held data).

particularised trust exacerbates the confidence deficit. In order to ascertain whether to trust it is essential to first understand how and on what basis we make these decisions in the first place.

For the past decade, researchers at Yale Law School have been wrestling with the question of indeterminacy in cause and effect of regulatory intervention. They find that polarisation on policy questions structures across distinct social groups, [55] Moreover, within these groups there are remarkable degrees of coherence on disparate contested issues, irrespective of level of educational attainment. This continuity is traced to the power of prior cultural commitments.[56] In periods of uncertainty, contestation and distrust, it is inevitable, therefore, that citizens may heave towards and implicitly deploy a heuristic framework conditioned by deeply held personal beliefs. This is consistent with the empirical findings reported in the *Edelman Trust Barometer*. The result is that both framing and responses to public policy are susceptible to cultural factionalism. The relative strength of these factions depends on the power of hierarchical or egalitarian cleavages, linked to the power of individualist preferences over communitarian impulses.[57]

This filtering reflects cognitive-dissonance avoidance, i.e. the need to minimise the risk of staking out a position at variance with one's settled sense of identity, a risk magnified by its individual affect and how group dynamics channel and further shape bias assimilation.[58] In the discrete field of business regulation as in gun control similar results pertain. Survey data, for example, upheld the hypothesis that 'egalitarians and solidarists perceived business regulation to be conducive to economic solidarity, herarchialists and individualists destructive of it.'[59] Recent anthropological studies of cultural groups in rural Ohio,[60] Wisconsin,[61] and Louisiana[62] confirm the power of cultural cognition in understanding

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[55] D Kahan and D Braman, 'Cultural Cognition and Public Policy' (2006) 24 *Yale Law and Policy Revie*w 147.

[56] Ibid, 148 ('[C]ulture is prior to facts in the cognitive sense that what citizens believe about the empirical consequences of those policies derives from their cultural worldviews. Based on a variety of overlapping psychological mechanisms, individuals accept or reject empirical claims about the consequences of controversial polices based on their vision of a good society.').

[57] M Douglas and A Wildavsky, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (Berkeley, CA, 982), cited in Kahan and Braman, above n51, 151.

[58] See, for example, G Akerlof and W Dickens, 'The Economic Consequences of Cognitive Dissonance' (1982) 72 *American Economic Review* 307, cited in Kahan and Braman, above n55, 153; see also C Sunstein, 'Deliberative Trouble: Why Groups Go to Extremes' (2000) 110 *Yale Law Journal* 71.

[59] Kahan and Braham, above n55, 157.

[60] JD Vance, *Hillbilly Elegy: A Memoir of a Family and Culture in Crisis* (New York, 2016).

[61] A Goldstein, *Janesville: An American Story* (New York, 2017).

and dealing with economic uncertainty.[63] One consequence is not only deepening resentment but also a sharpening of ideological cleavages. 'Taking Back Control' and 'Making America Great' are much more than effective advertising slogans. They synthesise and simplify complexity while providing a route map to orient populist agendas that appear to traverse party lines.

The echo chamber is further amplified by how technological change simultaneously builds and binds geographically disparate social networks, magnifies bias assimilation and filters out contrarian views, a failing acknowledged by Zuckerberg.[64] Given the importance of cultural cognition, therefore, reliance on empirical evidence alone can be futile or indeed counter-productive.[65] Indeed expertise can be seen as evidence of complicity, as evidenced in the Brexit Referendum in the United Kingdom, when a Cabinet Secretary noted that the country had enough of experts.[66] Similarly the characterisation by Hilary Clinton that many Trump supporters were deplorable did much to offend powerful cultural groups. It also facilitated those within the Trump campaign that characterised the primary problem as stemming from an uneasy coalition between the forces of globalisation, inept or malleable

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[62] A Hochschild, *Strangers in Their Own Land: Anger and Mourning on the American Right* (New York, 2016).

[63] For more overtly political accounts see J Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* (New York, 2016); G Packer, *The Unwinding: An Inner History of the New America* (New York, 2013); D Goodhart, *The Road to Somewhere: The Populist Revolt and the Future of Politics* (London, 2017) (noting that the rise of far-right populism is most associated with and entrenched within countries with high levels of social provision); for graphic autobiographical discussion of how this manifests itself in rural France, see E Louis, *The End of Eddy* (New York, 2017); J Sunyer, 'Marine Le Pen, My Mother and Me,' Life and Arts, *Financial Times*, 1-2 April, 2017, 3.

[64] See Zuckerberg, above n53 ('Some of the most obvious ideas, like showing people an article from the opposite perspective, actually deepen polarization by framing other perspectives as foreign. A more effective approach is to show a range of perspectives, let people see where their views are on a spectrum and come to a conclusion on what they think is right. Over time, our community will identify which sources provide a complete range of perspectives so that content will naturally surface more.'). Nowhere does Zuckerberg outline how this will be done, see Y Noah Harari, 'A Facebook World,' Life and Arts, *Financial Times*, 25-26 March 2017, 1.

[65] See I Ayres and J Donoghue, 'Shooting Down the "More Guns, Less Crime" Hypothesis' (2003) 55 *Stanford Law Review* 1193, 1296 ('Over time, a body of empirical research can disentangle thorny issues of causation and lead toward consensus.').

[66] H Mance, 'Britain Has Had Enough of Experts, Says Gove, *Financial Times*, 4 June 2017, 1 ('People in this country have had enough of expert…I'm not asking the public to trust me. I'm asking them to trust themselves.'), available at https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c.

politicians and a corporatist failed and failing media addicted to the purveying of false news.[67]

The result, while plausible in the original sense of the world, is powerfully seductive. Moreover, it is nothing short of a sustained assault on the liberal democratic state.[68] It is significant, for example, that reliance on the logic of professionalism may be fact exacerbate the distrust precisely because in their mediating role lawyers, doctors and those who aspire to professional status are regarded as a self-interested group that prey on rather than serve their clients.[69] The pre-election and post-inauguration strategies adopted by Donald Trump and his closest advisors, including open feuding with media outlets and ad-hominem attacks, serve strategic as well as tactical imperatives.[70] The project is nothing short of revolutionary, guided by the avowedly Leninist strategic communicator, Stephen Bannon, principal media advisor to the Trump presidency.[71] Taking Bannon's claim of the necessity for revolutionary action against globalism, the administrative state and the corporatist media at face value,[72] it is worth recalling Lenin's own advice on destabilising the state:

> [W]e are not children to be fed on the thin gruel of "economic" politics alone; we want to know everything that others know, we want to learn the details of *all* aspects of political life and to take part actively in every single political event. In order that we may do this, the intellectuals must talk to us less of what we already know and tell us more about what we do not yet know and what we can

[67] See T Harford, 'The Problem with Facts,' *Financial Times*, 11-12 March 2017, 18-19.

[68] Similar appeals animate political debate in France, see T Juddah, 'Lost in France,' Review Supplement, *Australian Financial Review*, 5 May 2017, R1, 6-7 (noting the fear of centrist candidate that a high turnout linked to anger and resentment could unleash popular nationalism, thereby destroying French commitment to the European project itself: at R6).

[69] See Williams, above n27; see also S Kuper, 'The Despair of the White Working Class,' Life and Arts, *Financial Times*, 13-14 May 2017, 1, 18; for application to the professions, see Coffee, above n41.

[70] See J O'Brien, *Wall St on Trial* (Chichester 2002); J O'Brien, *Redesigning Financial Regulation* (Chichester, 2007); J O'Brien, *Engineering a Financial Bloodbath* (London, 2009).

[71] 'Trump and Bannon Pursue a Vision of Autocracy,' Der Spiegel, 6 February 2017, available at http://www.spiegel.de/international/world/trump-and-bannon-pursue-a-vision-of-american-autocracy-a-1133313.html.; see also C Brook, 'A Hollywood Story: Did the Movies Really Make Steve Bannon?' *The New Yorker*, 1 May 2017, 34-45.

[72] G Thrush, 'Blistering Speech at CPAC Follows Bannon's Strategy,' *New York Times*, 24 February 2017, available at https://www.nytimes.com/2017/02/24/us/politics/trump-conservative-political-action-conference-speech.html?&hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news.

> never learn from our factory and "economic" experience, namely, political knowledge. You intellectuals can acquire this knowledge, and it is your *duty* to bring it to us in a hundred- and a thousand-fold greater measure than you have done up to now; and you must bring it to us, not only in the form of discussions, pamphlets, and articles (which very often – pardon our frankness – are rather dull), but precisely in the form of vivid *exposures* of what our government and our governing classes are doing at this very moment in all spheres of life.[73]

It would be foolhardy to ignore the strategic purpose behind Trump's undoubted mastery of digital communication. Ignorance is no longer a barrier to perceived validity of opinion or exercise of authority. Expertise, as we have seen is increasingly seen as an indication of elitism.[74] Accusations of 'fake news' and 'failing institutions' blunt questioning and raise doubt over provenance. These short-term strategies can fuel resentment and further erode communities of trust.[75] When accompanied by shortened attention time-spans and downgrading and the filtering out of contrarian thinking, they risk displacing reasoned debate and may contribute to a further erosion of the relative standing of each participant within increasingly polarised distrusting communities.[76]

A salient case was the speech marking President Trump's first one hundred days in office.[77] Using signature plays from the campaign, the president denigrated what he termed the

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[73] V Lenin, *What is to Be Done* (Moscow, 1904).

[74] See 'T Nichols, 'How America Lost Faith in Expertise – And Why That's a Giant Problem,' *Foreign Affairs*, March/April 2017, 60-73 (noting that in 2015 nearly a third of Republican respondents advocated the bombing of Agrabah – the fictional country featuring in the Disney movie Aladin.)

[75] For discussion of the role Bannon has played in this process in the united States, see Brook, above n65; for discussion of how the model traversed the globe through Bannon's role as secretary of the board of Cambridge Analytics, see, C Cadwalladr, 'The Great British Brexit Robbery: How Our Democracy Was Hijacked,' *The Observer*, 7 May 2017, available at https://www.theguardian.com/technology/2017/may/07/the-great-british-brexit-robbery-hijacked-democracy.

[76] See generally, C Sunstein, *#republic: Divided Democracy in the Age of Social Media* (Princeton, 2017); see also D Remnick, 'Obama Reckons With a Trump Presidency,' *The New Yorker*, 28 November 2016, available at http://www.newyorker.com/magazine/2016/11/28/obama-reckons-with-a-trump-presidency (citing President Obama that the new media ecosystem means that everything is true and nothing is true.').

[77] D Trump, '100 Days in Office' (Speech delivered at Harrisburg, PA, 28 April 2017) ('Media outlets like CNN and MSNBC are fake news…They are a disgrace.'); for indicative media reaction, see S Volk and M Berman, 'Trump Opens 100-day Rally Assailing Media Gathered for Correspondents' Dinner,' *Washington Post*, 29 April 2017; M Gerson, 'Trump's 100-th Day Speech May Have Been the Most Hate-Filled in Modern History,' *Washington Post*, 1 May 2017; see also D Politi, 'Trump's 100 Day Speech Mimics His Presidency: Rambling,

disgrace of the national media political reporting, singling *CNN*, *MSNBC* and the *New York Times* for vitriolic criticism, noting poll evidence of distrust in media coverage and suggesting systemic bias underplayed his achievements in office, a classic form of blame displacement and central to the construction of political spectacle in the United States.[78] Irrespective of one's stance on Trump, there are major practical, ethical and policy problems associated with this approach to governance. First, the president's curtailment of administrative discretion (on grounds of prior alleged fecklessness) may limit options in the event of a repeat crisis. Second, the retreat to protectionism under the guise of 'Making America Great' may have unintended consequences on international regulatory coordination, a hallmark of the Financial Stability Board response to the GFC.[79] Third, and as consequence, the administrative and regulatory state, the foundation of contemporary inter-governmental trust, faces a crisis as existential in form and impact as that facing financial capitalism itself. As a consequence, credibility (and therefore, authority and legitimacy) diverts from dispassionate experts upholding the sanctity of an evidence-based approach to policymaking – the ideal of the regulatory state. Fourth, the assault has theoretical as well as practical implications, to which we now turn.

Lies and Egomania,' *Slate*, 1 May 2017; 'Trump's 100 Day Boasts,' *FactCheck.org*, 1 May 2017; L Qiu, Fact-Checking President Trump Through His First 100 Days, *New York Times*, 28 April 2017;

[78] See M Edelman, above n36.

[79] T Geithner, 'Are We Safe Yet: Managing Financial Crises' (2017) 95 *Foreign Affairs* 45.

4. THE IMPLICATIONS OF TRUST EROSION ON GOVERNANCE

The dynamics that created the Global Financial Crisis and its aftermath, as the noted sociologist Wolfgang Streeck has opined, are complex and indeterminate.[80] What is clear, however, is that the foundational strength of the associational governance paradigm, pioneered by Streeck (and his co-author Philippe Schmitter) has weakened.[81] The paradigm implies that co-regulation will ensure substantive compliance rather than regulatory arbitrage and gaming.[82] Unfortunately, the theoretical advantages did not match empirical evidence. The erosion of the normative foundations of regulatory theory and practice occurs just as the administrative process itself faces a sustained authority attack from within as well as a legitimacy assault from a disaffected general public.[83]

`The trifecta forces renewed reflection on how to mediate the relationship between state and market and the role to be played by the corporation. [84] The scale of the challenge has been acknowledged but as yet only at the level of rhetoric. The British Prime Minister, Theresa May, justified a green paper on corporate governance reform, for example, in the following terms:

> For people to retain faith in capitalism and free markets, big business must earn and keep the trust and confidence of their customers, employees and the wider public. For many ordinary working people – who work hard and have paid into the system all their lives - it's not always clear that business is playing by the same rules as they are. And when individual businesses lose the confidence of the public, faith in the business community as a whole diminishes – to

[80] Streeck, above n11.

[81] W Streeck and P Schmitter, 'Community, Market, State – And Associations: The Prospective Contribution of Interest Governance to Social Order,' in *Private Interest Government: Beyond Market and State* (London, 1984), 1-29.

[82] See J Braithwaite, 'Cultures of Redemptive Finance,' in J O'Brien and G Gilligan (eds) *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Oxford, 2013); for original formulation see I Ayres and J Braithwaite, *Responsive Regulation* (Oxford 1992).

[83] For unsurpassed rationale for the regulatory state, see J Landis, *The Administrative Process* (New Haven, 1938); for exploration of its progressive weakening in an era of globalization, see J O'Brien, *The Triumph, Tragedy and Lost Legacy of James M Landis* (Oxford, 2014).

[84] See D Millon, 'Communitarianism in Corporate Law: Foundations and Law Reform Strategies' in L Mitchell (ed), *Progressive Corporate Law* (Boulder, CO, 1995), 1-34; see also E Orts, 'The Complexity and Legitimacy of Corporate Law' (1993) 50 *Washington & Lee Law Review* 1565 (noting 'corporate law involves the simultaneous pursuit and coexistence of a number of ends or purposes, with the mix a preponderance of different values depending on particular legal context': at 1565).

> the detriment of all. It is clear that in recent years, the behaviour of a limited few has damaged the reputation of the many. It is clear that something has to change. [85]

Similarly, Mark Carney, the Governor of the Bank of England has placed commitment to a 'social licence to operate' at the normative core of the Fair and Effective Market Review in the UK and by extension international regulatory reform.[86] Each approach reflects an abandonment of the shareholder-dominant model. Both place, in rhetorical terms, societal obligation at the core of corporate and regulatory decision-making. In part this reflects a perennial debate. Finding a mechanism to direct and control the corporation has long been central to corporate law theory. Moreover, hubris notwithstanding, public disaffection shows technocratic elites have been as vulnerable to cognitive bias as any other social network.[87] In some ways, therefore, the turn towards populism (albeit potentially manipulated) is a lagged response to an equally ideationally driven agenda that, first, facilitated the un-anchoring of global finance and second, conditioned the range of acceptable responses to its inevitable collapse.

The history of financial markets is littered with examples of manias and bubbles, unrealistic and unsustainable hopes dashed on the shores of reality. Seen in this context, the debt bubble that led to the GFC is remarkable only in degree. Political cynicism, corporate opportunism, normative myopia and inattention of all actors to the complexity of change informed the gradual erosion of restraint in the lead up to the GFC.[88] There is much

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[85] T May, 'Introduction from Prime Minister,' Department for Business, Energy and Industrial Strategy Green Paper on Corporate Governance Reform (Whitehall, November 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf

[86] J O'Brien, G Gilligan, A Roberts and R McCormick, 'Professional Standards and the Social Licence to Operate: A Panacea for Finance or an Exercise in Symbolism' (2015) 9 *Law and Financial Markets Review* 222.

[87] N Fligstein and L Dauter, 'The Sociology of Markets' (2007) 33 *Annual Review of Sociology* 21; see, more generally, P Bourdeieu, *The Logic of Practice* (London, 1990). Bourdieu's central insight is to point to the importance of *habitus*, the complex social and physical institutional geography in which communities of practice assimilate, judge and constantly adjust practice.

[88] Lord Adair Turner, 'Reforming Finance: Are We Being Radical Enough' (Speech delivered at Clare College, University of Cambridge, 18 February 2011), 3 (noting 'we must understand' the crisis as one of markets and systems rather than of specific institutions); see also A Sen, 'Introduction', in Adam Smith, *The Theory of Moral Sentiments* (first published 1759; Oxford, 2009) vii-xxiv (noting that neglect of Smith's opus has led to stunted appreciation of the complexity and 'plurality of human motivations, the connections between ethics and economics and the co-dependent – rather than free-standing – role of institutions in general and free markets in particular in the functioning of the economy': at viii); see also J Cassidy, *When Markets Fail* (New York,

truth in the adage that we experience the world not how it is but as we are. These are far from esoteric concerns. They reflect the fact that a central function of politics is to construct beliefs than allocate or adjudicate competing values.[89]

The combination of mechanisms, processes and principles generate what political scientists term a Structured Action Field (SAF).[90] Power within a SAF is determined by the salience of the ideational terms of reference, the coherence of the underpinning vision, values and norms and the degree to which the interaction between both appear to provide beneficial outcomes. Once established, such a field is remarkably resilient, particularly if framed by the inculcation of a Shared Mental Model.[91] Inefficiencies (or indeed illegalities) can be–and often are–ignored, downplayed or addressed by the application of what appears to be more stringent rules or the more granular articulation of overarching principles. This dynamic is particularly apparent in corporate governance and financial regulation reform.[92] More often than not, however, these same initiatives tend to privilege the politics of symbolism.[93] By 2007 the ideational structure had become almost impervious to challenge,

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2009), 337 ('Between the collapse of communism and the outbreak of the subprime crisis, an understandable and justified respect for market forces mutated into a rigid and unquestioning devotion to a particular, and blatantly unrealistic, adaptation of Adam Smith's invisible hand').

[89] Edelman, above n33, 33.

[90] See Bourdieu, above n87.

[91] A Denzau and D North, 'Shared Mental Models: Ideologies and Institutions' (1994) 47 *Kyklos* 3; for application of the model to neo-liberalism, see R Roy, A Denzau and T Willet (eds) *Neo-liberalism: National and Regional Experiments with Global Ideas* (London, 2007).

[92] K Keasey, H Short and M Wright, 'The Development of Corporate Governance Codes in the United Kingdom,' in K Keasey, S Thompson and M Wright (eds), *Corporate Governance: Accountability, Enterprise and International Comparisons* (Chichester, 2005), 21; for global perspective, see J Hill, 'Evolving "Rules of the Game" in Corporate Governance Reform' in J O'Brien (ed), *Private Equity, Corporate Governance and the Dynamics of Capital Market Regulation* (Chichester, 2007), 29-54.

[93] A case in point is Sarbanes-Oxley, the *Public Company Accounting and Investor Protection Act* (2002). Introduced in the aftermath of the Enron and conflicts of interest in analyst research scandals, it privileged a rules based approach to regulation. Rather than being seen as an early warning sign, the travails facing the US system were themselves arbitraged. The City of London exploited the unease of business, additional audit costs and litigation risk costs by suggesting an alternative framework based on the articulation of principles. Both practitioners and regulatory officials argued that the model could provide and did offer alternative and better oversight. The primary supporting evidence proffered for this derived from positive testing but the absence of an accounting scandal in the United Kingdom, see D Kershaw, 'Evading Enron: Taking Principles Too Seriously in Accounting Regulation' (2005) 68 *Modern Law Review* 594.

points – tellingly only retrospectively – made public by practitioner[94] and academic economists. [95] The material and ideational certainties associated with the privileging of this model financial capitalism eroded with the severity of the GFC. The testimony provided by Alan Greenspan in 2008 of a flaw in his 'ideological reasoning' punctured the self-referential belief in the power of free-markets to self-correct.[96] It is not altogether waspish to conclude that the ethical deficit engendered by the GFC reflected the triumph rather than the failure of banking culture and its narrow articulation of what constituted obligation.

The externalities associated with introducing the austerity agenda to bail out large swathes of the financial sector in many developed countries made matters considerably worse. It also demonstrates the need to resolve the existential conflict between enabling and communitarian approaches to corporate law and financial regulation. The claim by the Goldman Sachs chief executive, for example, that the bank was doing 'God's work' is a carefully circumscribed one.[97] Apparent success was measured by short-term *efficiency* criteria (e.g. lower transaction costs, expansion of corporate profits, increased shareholder returns). These retrospectively justified and legitimated the innovation. The potential negative externalities were glossed over or ignored. The fallout impacted negatively the *responsibility* and *legitimacy* as well as long-termer *efficiency* dimensions. Throughout the crisis and beyond, as we moved from the great moderation to the institutionalization of the politics of austerity, senior bankers expressed carefully couched regret. At no stage did any accept responsibility.[98] Instead a narrow technical defence was proffered.

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[94] C Borio, 'The Financial Crisis of 2007-? Macroeconomic and Policy Lessons' (Speech delivered to the G20 Workshop on the Global Economy, Mumbai, 24-26 May 2009), 13

[95] R Rajan, Faultines: *How Hidden Fractures Still Threaten the World Economy* (Princeton, 2010), 3; see also E Dash and J Creswell, 'Citigroup Saw No Red Flags Even as It Made Bolder Bets,' *New York Times*, 23 November 2008, A1 (quoting an April 2008 interview in which Rubin argued: 'In hindsight, there are a lot of things we'd do differently. But in the context of the facts as I knew them and my role, I'm inclined to think probably not'). This reprised an argument made in his autobiography on the financial reporting scandals at the turn of the millennium; see R Rubin, *In an Uncertain World* (New York, 2003), 337 ('The great bull market masked many sins, or created powerful incentives not to dwell on problems when all seemed to be going well—a natural human inclination').

[96] Evidence to the House Committee on Oversight and Government Reform, Washington, DC, 23 October 2008 (A Greenspan).

[97] J Arlidge, '"I'm Doing God's Work," Meet Mr. Goldman Sachs,' *The Sunday Times*, 8 November 2009, 4.

[98] See, for example, A Hornby and Lord Stevenson, 'Memo to Treasury Select Committee' Westminster, 10 February 2009, 38 (in a joint statement the CEO and Chairman of HBOS stated they were 'profoundly sorry' but

As the immediate crisis banks receded, the remedial strategies were framed even more aggressively. To preserve the sanctity of contract, there was a stated need to uphold terms entered into freely (if misguidedly). Moreover, a similar rationale justified the payments of market-determined bonuses to executives then working in *de facto* nationalised institutions. Second, the privileging of *caveat emptor* facilitated the transference of responsibility. Equally understandably, both sets of strategies fueled public resentment. The failure to prosecute senior executives and privileging of deferred prosecutions, notable for the weakness of the contractual terms, added to a sense of frustration. It is thus no surprise that meagre redistribution failed to grasp the public attention or its trust.[99]

Undoubtedly, any successful proposal to extend responsibility and accountability to those involved in product design rather than clarifying the enabling conditions governing marketing and sale would constitute a seismic shift in the structure of the financial services industry, in particular banking. Specifically, it would breach the self-referential logic of private law. The integration of more interventionist normative objectives with enabling ones may also significantly change the ethical boundaries of global finance.[100] What can, however, no longer be doubted is the need to recalibrate not only the parameters of finance but the habitus in which it operates. It is this imperative that informs the deployment of revised codes of conduct at both national and international level. It is essential, therefore, to ascertain the extent to which national and international policy responses demonstrate empathy or the elevation of symbolism. The importance rests on whether the code model, derived from application in other sectors, can form a template for a more effective deliberative exchange that could, in turn, have broader application. The results are not encouraging. They are not necessarily fatal, however, if accompanied by warranted commitment to a negotiated social licence to operate that is continually and externally validated.

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claimed unprecedented global circumstances affected virtually all the top banks in the world but HBOS specifically').

[99] J Lanchester, 'Brexit Blues,' *London Review of Books*, 15 July 2016, 3-6, 3 ('Making economic arguments to voters who feel oppressed by economics is risky: they're quite likely to tell you to go fuck yourself. That in effect is what the electorate did to the almost comic cavalcade of sages and bigshots who took the trouble to explain that Brexit would be ruinous folly: Obama, Lagarde, Carney, the IMF, the OECD, the ECB, and every commentator and pundit you can think of. The counter-argument wasn't really an argument but a very clever appeal to emotion, to the idea that the UK could "Take back control."').

[100] For discussion of the use of technology on the production of LIBOR, which was consistently manipulated within and across financial institutions, see *D MacKensie, Material Markets: How Economic Agents Are Constructed* (Oxford, 2009).

The utility of code development is explored below through an extended case study in regulatory re-design - the Australian Bankers Association Code of Conduct. It addresses primarily the retail and commercial sector within a self-regulatory framework. It is designed to rebuild trust and confidence on the basis of a voluntary promise that transcends legal obligation. As will be shown, its efficacy, however, is questionable in the absence of an explicitly agreed social purpose. Unless accompanied by a commitment to a non-calculative social contract, the code risk privileging symbolism. As a consequence, it risks intensifying the very distrust problem it is designed to ameliorate.

5. A CODE OF RESTRAINT? SELF-REGULATING BANKING

Notwithstanding rising distrust of the finance sector, an independent report commissioned by the Australian Bankers Association into the efficacy of its code of conduct was met with media indifference on its delayed release. Three days later, the announcement that the organisation's incoming chief executive would be the former Labor Queensland premier, Anna Bligh, sparked considerable controversy. The gap speaks volumes about the lack of trust in the banking sector's stated commitments to change; the political gamesmanship surrounding financial regulation; and, frankly, the privileging of personality over substance in media coverage. Notwithstanding her lack of experience in banking and its regulation, Bligh's appointment was broadly welcomed.[101] She could, it was reported, be trusted because of her (unquestioned and unquestionable) personal integrity and proven leadership skills. Bligh reinforced this perception. Change was necessary, possible, and inevitable. Sufficient proof, she claimed, of the industry's intent and commitment. More revealingly, she signalled how the sector was moving inexorably, if slowly, towards acceptance that stated commitments were no longer sufficient.[102] Very deliberately the challenge was framed in language culled from the Prime Minister, Malcolm Turnbull:[103] 'Our social licence to operate is more fragile now than it's been for a long time, so what we need to do is take strong remedial action to regain the trust and respect of the Australian people,' she argued, an indication of how quickly and adroitly the politician passed through the revolving door from politics to business.[104] Her job now is not to represent the people but the most powerful sectoral interest in the country, engaged in an increasingly difficult attempt to stave off a

[101] A Ferguson, 'Anna Bligh Will Win Where Bankers Failed,' *Sydney Morning Herald*, 17 February 2017, available at http://www.smh.com.au/business/banking-and-finance/anna-bligh-will-win-where-bankers-failed-20170217-guflt4.html. An influential Fairfax journalist, Adele Ferguson noted Bligh's distance from the sector as confirming evidence of capacity to make a meaningful difference. The discrepancy between Ferguson's repeated calls for a reluctant government to convene a royal commission - itself Federal Labor policy - and the ABA's rear guard campaign to resolve the trust deficit through enhanced self-regulation alone – was downgraded.

[102] R Gluyas, 'Banks will Lift Their Game: New ABA Chief Anna Bligh, ' *Weekend Australian*, 18 February 2017, available at http://www.theaustralian.com.au/business/financial-services/banks-will-lift-their-game-new-aba-chief-anna-bligh/news-story/0ddba3cf945b31fdc0b50d13b7dc7ecf

[103] M Turnbull, 'Address to Westpac 199th Anniversary,' (Speech delivered at Westpac Bank, Sydney, 6 April, 2016) (Banks 'operate under a social licence and that is underwritten by public confidence and trust.'); for discussion of the role of the social licence in finance, see O'Brien et al, above n86.

[104] Gluyas, above n102.

royal commission of inquiry. Nowhere is that interest more clearly enunciated than in the proposed revisions to the code of conduct, the key terms of which were accepted by the ABA in advance of Anna Bligh actually starting the job.[105]

Critically, the proposed code is designed primarily to facilitate enhanced voluntary engagement rather than perform an investigatory or punitive function.[106] This is not to suggest that the reforms provide mere symbolic reassurance. There is much to recommend in the report. If more finely calibrated, the recommendations have the capacity to change banking practice and, in so doing, improve public confidence. The proposed architecture is both sound and strong. The problem is that so much of the detail is absent, as is an articulation of the purpose of banking and the attempt to limit its application to the retail sector.[107] Maintaining silos is no way to address a systemic problem. Substantive change requires articulation of what precise promises the sector is prepared to countenance. It also necessitates discussion of how the social licence model consciously canvassed by Bligh will interact with legislative obligation within an overarching licencing regime, particularly if the sector wishes endorsement (as it claims) from the market conduct regulator.

For both the ABA and its chief executive – who also lacks experience in code development, refinement, development and enforcement – the risks and opportunities could not be higher. Those risks were underscored by the independent reviewer, whose own conclusion is that it would be 'the worst of outcomes for the signatory banks to go to great effort and cost to produce a better, voluntarily strengthened Code – only to have it howled

[105] Australian Bankers Association, 'Code of Banking Conduct – Response of Australian Bankers' Association to Review Final Recommendations,' (Sydney, 28 March 2017), 2 ('The Code will articulate the values of the banking industry, expanding on and explaining the commitment to act fairly and reasonably, and in a consistent and ethical manner. The Code will contain a more prominent and clear commitment to ethical behaviour.').

[106] Ibid (In its response, the ABA makes explicit its goal that the 'customers find the Code easy to read and navigate and understand their rights and responsibilities.').

[107] In the Australian context, the trust deficit is also manifest in the wholesale sector, see for example, *Wingecarribee Shire Council v Lehman Brothers Australia* (in liq) [2012] FCA 1028 at 662 (According to the Court, the council believed that it 'had the best of both worlds: principal protection and increased interest. For Grange [a wholly owned subsidiary of Lehman Brothers], this manner of allaying risk averse, financially unsophisticated council officers' fears of CDOs, was as easy as shooting fish in a barrel'.). The unresolved policy question focuses on whether the conduct complained of in relation to Grange derived from a suboptimal culture within an individual firm. Although a significant actor in the Australian marketplace, Grange was not the sole facilitator of the placing of complex instruments in investor portfolios. In this crucial respect the judgment in *Wingecarribee Shire Council v Lehman Brothers Australia* raises more questions than it answers.

down.'[108] The signalling is important. While there is recognition the banking sector has a responsibility beyond maximising shareholder value, and is a significant but nonetheless dependent part of a complex financial eco-system, there is (as pointed out) no agreement on what that responsibility actually is or should be. The industry response to date does little to move the discussion forward.

Effective code development and operation pivot on voluntary but binding promises, informed by explicit acknowledgement of changed social expectations. Left undetermined by the ABA is how to measure, evaluate and rank very different expectations beyond acknowledging that underpinning guidelines should result from a credible accepted process for consulting with stakeholders with multiple conflicting interests. The ABA remains silent on how it is going to achieve this beyond the proposed appointment of a further independent consultant and a rather generic commitment to engagement.[109] More concretely, the ABA seeks the active approval of the Australian Securities and Investments Commission, a process that gives legitimacy to its endeavours to change banking culture.[110] The criteria are not particularly stringent. They include clarity, comprehensive coverage, prior consultation on priorities and inclusion of stakeholder concerns, effective and independent administration, monitoring, enforceability and effective remedies. What is unclear, however is how the ABA intends to satisfy them. The problems are particularly apparent on the questions of oversight and enforcement.

As presently constituted, oversight falls on a three-member Code Compliance Monitoring Committee, paid for by the ABA but employed under the auspices of the Financial Ombudsman Service, with secretariat support provided on an ad-hoc basis by FOS personnel. The structure is based on an evaluation of annual compliance statements provided by member banks alongside independent inquiries directed by the CCMC. The proposed solution is 'for the CCMC to evolve away from the idea of being a quasi-regulator

[108] P Khoury, *Independent Review - Code of Banking Practice* (Sydney, 31 January 2017), 14, available at http://cobpreview.crkhoury.com.au/wp-content/uploads/sites/2/2017/02/Report-of-the-Independent-Review-of-the-Code-of-Banking-Practice-2017.pdf.

[109] ABA, above, n105, 3.

[110] Ibid. Much more stringent criteria are required for the Professional Standards Council regime in Australia that reviews code efficacy on the basis of number of claims, nature of claims and extent to which the code of conduct is robust enough to deal with it; for discussion see J O'Brien, 'Professional Obligation, Ethical Awareness and Capital Market Regulation,' in N Morris and D Vines (eds) *Capital Failure* (Oxford, 2014), 209-233. It is another question whether banking can be even conceived as a profession, a question that has raised considerable scepticism in other jurisdictions, see British Parliamentary Commission on Banking Standards, *Changing Banking for Good* (Westminster, 2013), vol I, paras 897-611.

towards being more of a mechanism for community assurance through active monitoring and promoting higher standards and continuous improvement of banking practice.'[111] This, it is argued, can be achieved through a tripartite strategy that acknowledges no role in providing individual redress but instead prioritises the investigative/analytical effort on gathering evidence of systemic non-compliance; providing industry and the community with investigative, statistical and analytical information demonstrating the level of compliance with the Code and identifying any trends and potential problem areas; and supporting continuous improvement of banking practice by providing feedback as to the effectiveness of the implementation of the Code.' The draft report does not recommend either expulsion or setting of fines for breaches. The ABA concurs with this approach. As such it is missing an opportunity to demonstrate warranted trust.

The rationale given is the duplication of data and purpose. One of the major problems to be addressed, however, is that code violations are not collected, assessed and evaluated within an integrated purpose-built database. It is precisely for this reason that the Professional Standards Council model has proved so robust. A case in point was the PSC's temporary refusal to renew the limited liability indemnity insurance of the Institute of Chartered Accountants precisely because it was not immediately apparent that the code of conduct governing members was sufficient to address an increase in the number and range of claims against members.[112]

While it is undoubtedly the case that there are conceptual and practical questions surrounding the categorization of banking as a profession, there is no impediment to ensuring data is collected and collated so that counterparties have confidence in the stated commitment to cultural change associated with code revision. To do otherwise preordains failure. There are ancillary risks to the market conduct regulator if it endorses the proposed changes to the code as outlined by the ABA. It risks giving a patina of legitimacy to a reform process that potentially flatters to deceive. Given the perilous state of trust in the political system and regulatory governance, this is a risk too great to bear at a time in which its reputation is in tatters (in large part through political unwillingness to give it the power to

[111] Khoury, above n108, 183-184.

[112] See O'Brien, above n110.

enforce effectively).[113] Credible reform necessitates linking the code to a social licence that complements legal obligation.

[113] See Senate Economic References Committee, *Lifting the Fear and Suppressing the Greed: Penalties for White-Collar Crime and Corporate and Financial Misconduct in Australia* (Canberra, 23 March 2017); see also K Chester, *Fit for the Future: A Capability Review of the Australian Securities and Investments Commission* (Canberra, 4 December 2015), 77 (finding ASIC inward-looking, risk-averse and reactive and all too quick to rely on funding restraints to justify flaws in its own cultural framework).

6. THE SOCIAL LICENCE AS REGULATORY TOOL

The potential transformative power of the social licence in finance as elsewhere rests on the introduction, socialisation and secured agreement of the sector to more expansive interpretations of corporate responsibility. Failure to pay attention to social and externalised conduct costs has become a major drain on the material and reputational resources. Re-framing corporate responsibility as a 'social licence' suggests an enhanced definition of institutional purpose. This, however, should not be misunderstood. What is on offer is not the freedom for industry alone to unilaterally set, police and determine efficacy of standards once offered by the associational governance model. Rather, it is an invitation to verify stated commitment through a negotiated binding compromise. It is indicative, for example, that Streeck, one of the most influential political and regulatory sociologists of his generation, has revoked fealty to his own associational model, as has his equally influential Australian colleague John Braithwaite. Instead, both have advocated beginning a more substantive normative dialogue informed by common commitment. Smart regulation cannot, after all, take place in a normative vacuum. It is in this context that the SLTO provides such potential transformative traction.

The social licence is a description of the pressure facing a business in the event that it has lost public support and therefore legitimacy, prompting the business risk of formal rejection of a specific project or more invasive oversight. It is also a model for effective community engagement and how to retain legitimacy, credibility and trust.[114] The unresolved question focuses in what are or should be the determinants of obligation and how they could or should be measured and evaluated in order to build warranted trust and address an acknowledged accountability deficit? A holistic examination includes an evaluation of the interaction between legal obligation and voluntary commitment to higher ethical standards set out in internal and industry codes of conduct; the role to be played by administrative regulatory and enforcement agencies and the courts in event of discrepancy between stated commitment and actual practice; and the impact of the number and nature of claims against the corporation on self-regulatory, associational and command and control regulatory frameworks. Crucially, if trust is to be restored the process must be open, transparent and linked explicitly to a re-conception of purpose.

[114] R Boutilier and I Thomson, 'Modelling and Measuring the Social Licence to Operate: Fruits of a Dialogue Between Theory and Practice,' Social Licence, 2011, available at http://socialicense.com/publications/Modelling%20and%20Measuring%20the%20SLO.pdf; see also I Thomson and R Boutilier, 'Social License to Operate' in P Darling (ed), *SME Mining Engineering Handbook* (Littleton, CO, 2011), 1779-1796.

Designed correctly, the SLTO can be an example of guided enlightened self-interest, linked to long-term sustainability but, crucially, owned by industry itself. As such, it offers a strengthened form of 'meta-regulation' in which political and regulatory authorities can and indeed ***should***, as representative of societal interests, play a framing role. Arguably if not gamed, this approach remains the 'smartest' and most effective form of regulation. It remains unresolved whether gamesmanship is continuing and what can be done to reduce impact? What has not been done, to date, has been to link the financial regulation agenda directly to the UN and OECD frameworks on corporate responsibility. This is a critical failing. These protocols potentially provide a solid basis for the evaluation of a growing regulatory and public policy imperative and serve five interlinked purposes. They 1) reduce creative compliance; 2) provide for warranted commitment to high ethical standards and legitimate institutional purposes; 3) enhance the effectiveness of deterrence; 4) improve accountability; and 5) reduce institutional and systemic risk. In so doing they address the very problems and solutions identified by industry but not necessarily followed through as a consequence of sub-optimal design.

If SLTO is to become viable as a risk-management tool or institutional strategy and confidence-building measure to protect self-promoted commitment to probity and integrity, it is important to examine appropriate legal and regulatory structures, and to evaluate the effectiveness of and interaction between self-regulation, co-regulation and mandated prescription. This is essential in design and application. There are technical and normative rationales for such an approach. The commitments must be intrinsic (i.e. the underpinning values that anchor the social compact must be internalized and believed by communities of practice). If viewed as an encumbrance, the entire artifice crumbles. Without strong and broadly accepted normative foundations there is a risk that we build a Potemkin façade. Sturdier supports are, therefore, essential, with applicability across sectors. Given the fact that the public is calling for increased accountability it is no longer credible for those being called to account to set, monitor and report on the accountability standards themselves.

Reform initiatives that help inculcate restraint and safeguard the integrity of markets by market participants themselves is a long-standing if not necessarily remembered goal of regulatory intervention.[115] The aim, therefore, is not to impose a culture template but ensure that espoused culture is in fact lived and confidence in stated commitment warranted. This is an essential public good and critical driver for economic growth and financial stability. Evaluation if not resolution of these issues in turn, has the capacity to deliver more sustainable practical outcomes (e.g. build confidence in corporate and industry self-

[115] See n83 above and accompanying text..

regulatory governance models, enhance accountability, advance regulatory objectives and reduce systemic risk).

These questions have been magnified since the GFC, the origins of which can be traced back to three inter-linked phenomena: flawed governance models; misapplied models of financing; and defective regulatory structures. The failure of specific instruments of regulatory control, the evidence of widespread creative compliance and the inability of unwillingness of market participants to price risk generated a meta-crisis, which resulted in a loss of confidence, on the part of investors and the general public, in the accountability mechanisms demanded of the purveyors of financial products. It did so because first, its severity and cost impacted negatively on sovereign capacity, socialising the cost of prior private recklessness. Second, the privileging of technical solutions to essentially normative problems, accompanied by the failure to hold senior executives accountable, contributed to a decline in the authority of national and international regulatory actors.

This raises a complex series of questions over appropriate domain, degree of interaction and cohesion between approaches take by disparate regulatory agencies and the extent to which reliance on greater disclosure or the development of literacy programs are in themselves sufficient. These strategies failed, ultimately, because of the unwillingness or inability of state actors to challenge the logic of a discrete form of capitalism. The decision to exit the European Union and the decision to trust Donald Trump may well reflect ignorance and manipulation. They are also valid expressions of the democratic will that signal a broader collapse of confidence in expertise in general with national, regional and international institutions of governance across the globe. Urgent action is required to address the trustworthiness deficit. To be effective, however, trust must be warranted. There is little point building on foundations of sand. A remedial strategy based on condescension or demonisation is unlikely to rebuild social trust.[116] Merely telling people they are misguided and that there is no alternative but trusting expertise is insufficient. Instead a true social licence necessitates the combination of technical and normative measures. In other words, the precise indicators must be linked to an overarching sense of institutional purpose for which deviation can and will be punished. This lies at the core of generalised trust and it is the failure of effective sanction that exacerbated the decline, warranted as it happens.

[116] See Harford, above n67.

7. CONCLUSION

The success of anti-establishment forces across Europe and beyond reflects the power associated with empathy; the hearing of pain as it were. It may well be the case that tapping of anger reflects the power of charlatans. Something more fundamental is also at play. We ignore it at our peril. The fixation on the bifurcation between rules and principles in capital market governance as in other sectors overlooks the crucial mediating effect of social norms in guiding conduct.[117] It is more than facetious, for example, for the former head of the Financial Services Authority in the United Kingdom to opine that principles based regulation does not work with people with no principles. Equally, technology industries must accept that with power comes responsibility.

The deployment of the social licence in the extractive industries has had variable impact, its efficacy undermined by lack of application across a single institution never mind the sector as a whole. Nevertheless, the engagement it offers is a useful point of departure. Codes of conduct may have a buttressing role to play but only when they act as a lynchpin to a broader renegotiated social contract. Australia is in a unique position to advance a calibration of its regulatory regime precisely because it did not have a catastrophic crisis. Unlike the United States, which has embarked on an inward-looking trajectory or the United Kingdom or Europe, each engrossed in crisis rather than strategic management, Australia can play a vital demonstration role in regulatory redesign. Self-regulation may remain at its core but only if accompanied by an explicit (and negotiated) commitment to societal obligation. As the Edelman survey warns business has an opportunity to rebuild trust and a defined interest in advancing it. Not doing so makes it vulnerable to ridicule and costly tax implications. Neither offer a credible path forward. The social licence to operate does but only if the promises made – at individual, corporate and sector levels – have substance and are enforceable. If my word is indeed my bond breaking it must accrue a reputational and material cost.

[117] D Vaughan, *The Challenger Launch Decision: Risky Technology, Culture and Deviance at NASA* (Chicago, 1996) 78 (noting how 'patterned behaviour' can lead to the normalisation of deviance). Less removed ethnographic accounts of finance can be found in the work of actor-network theorists, see MacKensie, above n100.