Benefit corporations – a case study of the US and lessons for Australia

Prepared for B Lab Australia by the Social Impact Hub
October 2014
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October 2014

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Foreword

The Social Impact Hub brings together university students and industry, non-profits, social enterprises and foundations to develop and conduct a variety of applied projects in the field of social impact under the supervision of industry experts. The Social Impact Hub aims to develop the pipeline of social change agents, whilst providing non-profits and social businesses access to high quality, industry-standard consulting, policy, research, advocacy and advisory services.

This report has been written by students at the University of New South Wales Faculty of Law, Australia, as part of completing an academic course at the Social Impact Hub. The Social Impact Hub would like to acknowledge the significant contributions of the university students who conducted the research and drafted this report, namely Claire Achermann, Bettina Forde and Michael Ouzas. Thank you to all the people and organisations that contributed their knowledge, insights and experience to the development of this report. In particular, we thank William H Clark, partner at Drinker Biddle & Reath, for sharing his perspective on the US experience with us. Thanks also to the project partner, B Lab Australia, and specifically Mele-Ane Havea and Alicia Darvall, whose insights have enlivened a number of dimensions of this project.

This report addresses a number of key questions related to the case for the benefit corporation legal structure in Australia: what is benefit corporation legislation, why does it matter, what is the situation in the United States and what could or should happen in Australia?

We hope this report will inform the discussion and be a useful resource for B Lab Australia and the broader business and legal community. If it is decided that such a legal structure is needed in Australia, it is also hoped that this report will assist in the planning of the next steps along the road to legislative change.

The benefit corporation is one innovative solution to help meet the growing challenges facing business and society today and in the future. We look forward to being part of the next stage of this important journey to redefine success in business.

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Founder and Director, Social Impact Hub

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Executive Summary

Benefit corporations: using the power of business to solve social and environmental problems

Benefit corporation legislation is a new corporate form in a number of US states. The distinguishing feature of a benefit corporation is the legal duty to create general public benefit in addition to financial return. Intentional creation of social and economic benefit differentiates the benefit corporation from traditional for-profit and non-profit entities. Benefit corporation legislation has emerged against a backdrop of global trends demanding greater accountability and transparency from business and challenging the role business can and should play in society.

Benefit corporation legislation in the US

As at October 2014, benefit corporation legislation has been passed in 26 US states and Washington DC since 2010. Case studies on the legislation in California, Delaware and Maryland and specific benefit corporations in those states demonstrate the varying degrees that the model benefit corporation legislation has been adopted as a result of business and political consensus: from the highly flexible nature of Delaware’s legislation to the unique Californian legislation.

There were two major forces that led to the development of the benefit corporation: first, the view that existing US Corporation Law does not accommodate for-profit, mission driven companies, and second, market demand by consumers, investors and social entrepreneurs.

The legislation addresses the hesitancy of directors to take into account the interests of all stakeholders, not just shareholders, when making decisions, for fear of not fulfilling their fiduciary duty of profit maximisation for shareholders. It also distinguishes between an ethical (a truly ‘good’) company and simply good marketing.

The need for benefit corporation legislation in Australia

B Lab – the non-profit behind the campaign for legislative change and the B Corp certification system in the US has recently established a presence in Australia and New Zealand and was officially launched in September 2014 with 42 founding certified B Corps. Taken within the context of a growing social enterprise sector and a consumer base progressively concerned with social and environmental impact, the arrival of B Lab in Australia serves as a timely inflection point for the consideration of the need for similar legislative change in Australia.


This report finds that the introduction of benefit corporation legislation into Australian law would be beneficial from the perspective of both businesses and directors. Businesses with a social or environmental purpose will be able to enshrine this purpose in the ‘DNA’ of the company, and also legitimately distinguish themselves from competitors. It may help businesses attract investors, attract and retain talent, and also protect their mission as the company grows, or as new management or new investors are brought in.

The growth and adoption of this new corporate form in Australia could also help promote a new set of values focused on corporate social responsibility within the business sector. Importantly, for directors, it will provide them with the comfort they require to take public benefit and non-shareholder stakeholder interests into account without risking personal liability.

**Achieving legislative change: lessons for Australia**

A campaign for legislative change demands critical thinking and strategic action to build support in government, legal and business communities.

Obstacles and enhancers in the enactment of the legislation in the US provide lessons for Australia. First, the political context and choice of legislators in the US played a crucial role in ensuring that the legislation was passed. Australia needs to ensure that politicians who have a strong legal background, relationships with business and gravitas are chosen to promote the case for benefit corporations. It is also important to consider the timing of the political cycle and work with key government departments to add legitimacy to the case for benefit corporations.

Secondly, the Bar Association in many US states opposed the legislation on the basis that any additional obligations imposed on directors may encroach on their flexibility. Such resistance is evidence of the need to gain the support of key legal bodies including the Australian Bar Association and the Law Council of Australia and to educate law firms and corporate lawyers.

Thirdly, a key enhancer of the US legislative process was support from the business community in encouraging legislation and increasing its profile. The community of B Corps in the US was central in building support for the legislation and will likely also play a key role in increasing public awareness of benefit corporations in Australia.
Background

The benefit corporation is a new corporate form that enables for-profit businesses to consider social and environmental impact in addition to financial performance. The global movement to implement benefit corporation legislation has been largely driven by B Lab, a US based non-profit organisation. B Lab’s mission is to ‘solve social and environmental problems’ through ‘the power of business’. The benefit corporation is a new corporate form that changes corporate fiduciary duty, permitting companies to create shareholder value and social value.

B Lab drives systemic change through three initiatives:

1) Certified B Corporations (B Corps): a corporate certification for sustainable businesses and social enterprises that meet higher standards of social and environmental performance and legal accountability;
2) B Analytics: a ratings platform that drives capital to impact investments by assessing the social and environmental performance of companies and funds; and
3) Benefit corporations: a new corporate form that changes corporate fiduciary duty, permitting companies to create shareholder value and social value.

This report focuses on the third initiative – benefit corporations. It is important to differentiate between a B Corp and a benefit corporation – a benefit corporation is a legal status regulated by the state whilst a Certified B Corp is a for-profit business that has received a certification conferred by B Lab that recognises a company’s adherence to a minimum standard of creating public benefit over the previous year and voluntarily meeting rigorous standards of transparency, accountability and sustainability.

B Lab was founded in June 2006 by Jay Coen Gilbert, Bart Houlahan (who both ran a $250 million basketball footwear and apparel company) and Andrew Kassoy (who was a partner and private equity investor at MSD Capital). The founders identified that existing corporate law limited directors from considering the needs of non-financial stakeholders and began imagining a corporate entity that could ‘meet the needs of entrepreneurs and investors seeking to use business as a force for good’. The founders worked with William Clark, a partner at law firm Drinker Biddle & Reath, to draft the Model Benefit Corporation Legislation. In 2010, Maryland became the first US State to pass benefit corporation legislation. In just four short years, the legislation has now been successfully enacted in 26 US States and Washington DC, with a further 14 currently reviewing the legislation.

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4 Performance Requirements, Certified B Corporation <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements>.
5 The B Corp Declaration, Certified B Corporation, <http://www.bcorporation.net/what-are-b-corps/the-b-corp-declaration>.
As a 2014 Skoll Award recipient, B Lab has been recognised with a $1.25 million grant for its efforts in ‘challenging the status quo by building a new sector, legal structure, and standards; empowering a community of certified B Corps; and advancing public policies that enable companies to create financial, social and environmental value for both its shareholders and for society.’\(^8\) In addition to 25 US States having passed benefit corporation legislation, over 1,000 B Corps have now been certified and over 16,000 companies use its tools.\(^9\) B Lab is now focused on accelerating the global adoption of this model to redefine success in business. This has seen the establishment of B Lab in 34 countries as at June 2014, including South America, Canada, Europe and Australia & New Zealand. B Lab Australia was founded in 2012 and as of August 2014, 42 companies have been certified as B Corps in Australia. This report is focused on the legal aspects of benefit corporations and specifically how similar legislation to the benefit corporation legislation enacted in certain states of the US may be implemented in Australia.

The benefit corporation differs from other forms of hybrid companies. It is more rigid than a Low-Profit Limited Liability Company (L3C) and is subject to greater review. California offers another alternative, the Flexible Purpose Corporation, through its Corporate Flexibility Act 2011 which allows corporations to function as a normal business with an added ‘special purpose.’\(^10\) In contrast to benefit corporations, flexible purpose corporations are not required to assess or report against a third party standard and need not pursue a general public interest purpose. The benefit corporation also differs from the UK’s Community Interest Company (CIC) in that it is ‘subject to no government regulation of its purposes or activities.’\(^11\) Further detail on these other hybrid forms can be found in Appendix 1.

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\(^8\) Announcing the 2014 Skoll Awardees, Skoll Foundation, <http://www.skollfoundation.org/skoll-entrepreneurs/announcing-the-2014-skoll-awardees>. Each year, the Skoll Foundation awards “transformative leaders who are disrupting the status quo, driving large scale change... Each awardee received a $1.25 million three year core support investment to scale their work and increase their impact.”

\(^9\) Certified B Corporation, http://www.bcorporation.net


The US case study
The case for benefit corporation legislation

Forces leading to the development of the benefit corporation

Consideration of the forces that led to the development of benefit corporation legislation provide context for the case for implementation of this new legal form. Broadly speaking, there are two major forces that led to its development:

1. Existing US Corporation Law does not accommodate for-profit, mission driven companies; and
2. Market demand by consumers, investors and social entrepreneurs.

Prior to the existence of benefit corporation legislation, the scope for business to consider public benefit was limited by the legal obligations for directors to act solely in the best interest of shareholders. In the wake of the global financial crisis, a sluggish global economy and reports of corporate greed and corruption, concerns have been raised about the activity and ethics of the modern corporation with its singular focus on profit maximisation. In addition, or perhaps in response, a growing number of organisations are operating their core business with a focus on generating public benefit as well as financial return. This has seen a rapid rise in the supply and consumer demand for corporations to take greater responsibility for their social and environmental impacts. Both of these forces are examined in more detail below. After being principally driven by consumer and investor demand, benefit corporation legislation has now attracted broad support from entrepreneurs, investors, legal experts, citizens and policy makers.

Inadequacies of existing US corporations law

The legislation addresses two main problems in the US corporations law sphere:

1. The hesitancy of directors to take into account the interests of all stakeholders, not just shareholders, when making decisions, for fear of not fulfilling their fiduciary duty of profit maximisation for shareholders; and
2. The lack of distinction between an ethical (a truly ‘good’) company and good marketing.

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These problems are directly addressed by the US benefit corporation model legislation, which states that:

1. Directors must consider the interests of non-financial stakeholders in addition to shareholders when making decisions;\(^{17}\)
2. Businesses must choose at least one public benefit purpose and strive to achieve a material positive impact on the society and the environment;\(^{18}\) and
3. The impact of companies in these areas is to be assessed annually against a third party standard.

An additional rationale for the enactment of benefit corporation legislation in the US is the absence of a legal structure that enables the many ‘ethical’ businesses that exist to realise their potential to impact society in a positive manner. Despite over 50,000 corporations identifying a desire to create a social or environmental benefit, they are unable to realise this aspiration due to the dominance of profit maximisation and shareholder primacy.\(^ {19} \) This limits the ability of directors and companies to be socially focused unless they operate as a not-for-profit or charity, which hinders their ability to attract capital. This is an unappealing alternative for the majority of those organisations looking to benefit society and create profit simultaneously. The legislation has substantially redefined directors’ fiduciary duties by requiring social goals to be linked to fiduciary responsibility. As a result, it is expected that directors and officers of benefit corporations will be less concerned about potential liability for breaching their duties by pursuing the dual mission and will therefore be more likely to take social risks.\(^ {20} \)

The benefit corporation legislation creates a bridge between the not-for-profit and the for-profit sectors of the business world and in doing so opens the door for ‘good’ companies to benefit society through their vast resources without sacrificing their ability to maintain or even maximise their financial interests. This new corporate entity is an innovation that aims to address the limitations and inflexibility of corporations law by permitting directors to take into account all stakeholders, not just shareholders. It also provides the public with more transparent knowledge of truly ‘ethical’ companies by distinguishing benefit corporations from those traditional corporations that are solely financially-motivated.\(^ {21} \) The increasingly prominent profile of entrepreneurs pursuing dual purposes is likely to create demand for benefit corporation status by providing a legal entity that it seems will be increasingly used to operate socially focused organisations.\(^ {22} \)

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It is important to note that the legal requirement only creates additional rights for shareholders to hold directors and officers accountable to consider the interests of all stakeholders. It does not increase liability, as these expanded rights are limited to shareholders exclusively. Anecdotal evidence from the US indicates that this legislative change has not affected premiums for directors and officers insurance.\(^{23}\) If anything, the insurers believe their risk has decreased, as it removes the ambiguities that exist in the directors’ duties in a traditional company.

**Market demand and the business case for incorporation as a benefit corporation**

Accelerating consumer and investor demand has led to the formation of a substantial marketplace for companies that are using the power of business to solve social and environmental problems. A growing number of consumers align their purchases with their values. Approximately 68 million US consumers have a preference for making purchasing decisions based upon their sense of social and environmental responsibility.\(^{24}\) Further studies show that 49% of Americans have boycotted companies whose behaviour is perceived not to be in the best interests of society.\(^{25}\) Also, 78% of buyers of consumer products and services such as telecommunications and banking indicated they would switch to a brand that is socially responsible assuming equal price and quality.\(^{26}\) There are further statistics in the table below.

This clear preference for supporting ‘good companies’ extends to the choice of employment - 69% of employees consider the social and environmental track record of the company in deciding where to work.\(^{27}\) Masters in Business Administration graduates especially (an overwhelming 88%) have indicated a willingness to accept lower pay to work for a company that has ethical business practices.\(^{28}\)

In relation to investment, the social responsible investing (‘SRI’) movement has grown over the past thirty years to almost ten percent of US assets under management (roughly $2.3 billion).\(^{29}\) SRI investors avoid unethical companies (e.g. tobacco, alcohol and gaming stocks) and reward socially or environmentally responsible companies in each industry sector. Some influence behaviours of corporations through shareholder resolutions or other forms of activism. Others, known as impact investors, seek to create more direct social or environmental impact through targeted direct equity and debt investments in properties or businesses such as community banks, micro finance institutions or social venture funds investing globally across developed and emerging markets.\(^{30}\) A JP Morgan report in November 2010 estimated the size of this market opportunity in emerging markets

\(^{23}\) Phone interview with William H. Clark, Jr – partner at Drinker Biddle & Reath LLP, Philadelphia, Pennsylvania.


\(^{25}\) Ibid.

\(^{26}\) Ibid.

\(^{27}\) Ibid.

\(^{28}\) Ibid.

\(^{29}\) Ibid.

\(^{30}\) Ibid.

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in five sectors (housing, rural water delivery, maternal health, primary education and financial services) to be between $400 billion and $1 trillion.\(^{31}\) Additionally, demand for impact investments among US high net worth individuals is estimated at $120 billion.\(^{32}\)

There is also strong market demand from social entrepreneurs. Although there is no reliable data on 'social enterprise' company revenues, an aggregation of businesses belonging to membership associations generally identified with the sustainable business movement reveals a marketplace of over 30,000 social entrepreneurs with over $40 billion in revenues in the US.\(^{33}\)

The benefit corporation legal structure encourages businesses to examine their supply chains and employment policies, and perhaps encourages companies to employ members of the local community and use local suppliers, even if this choice is more costly.\(^{34}\) It is expected that any reciprocal increase in costs to consumers will not dampen demand, but have a positive impact due to the increasing importance of social and environmental sustainability in consumer choice.\(^{35}\)

Recent research demonstrates that American consumers are concerned about the impact that companies are having on society and are therefore demanding more socially responsible and accountable organisations.\(^{36}\) The characteristics of benefit corporations offer a formal way for consumers to evaluate a company’s impact and choose corporations that are committed to sustainability as well as being able to easily differentiate between ethical companies and those who are claiming superficial social benefits or ‘green-washing’.\(^{37}\)

\(^{31}\) Ibid.
\(^{32}\) Ibid.
\(^{33}\) Ibid.
\(^{34}\) Ibid.
\(^{35}\) Ibid.
\(^{36}\) Ibid, 597.
\(^{37}\) Greenwashing is defined as a an attempt to appear environmentally responsible through misleading or fraudulent marketing which makes a company appear to be more environmentally responsible than they actually are. This practice can involve misleading words or graphics, vagueness in claims, exaggeration and omission of helpful information. Diana Ross & D William Deck Jnr, Student Guide to Greenwashing (2011) <http://www.westga.edu/~bquest/2011/greenwashing11.pdf>.
The business case for becoming a benefit corporation can be summarised as follows:

<table>
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<th>Benefit</th>
<th>Rationale</th>
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| Legal structure differentiates from pretenders (many of whom may be competitors) | • This could lead to a competitive advantage in the marketplace.  
  • Some of the evidence that supports this assertion includes:  
    o Over 90% of Americans believe corporations need to be concerned with more than just the bottom line and should consider social and environmental issues\textsuperscript{38}  
    o 31% believe businesses should change the way they operate to align with greater social and environmental needs\textsuperscript{39}  
    o 82% of US consumers report that whether and to what extent a company supports an issue influences where they shop and what they buy\textsuperscript{40}  
    o 89% of US consumers are likely to switch brands to one that is associated with a good cause, given similar price and quality\textsuperscript{41}  
    o Only 16% believe companies can make significant progress towards social and environmental issues\textsuperscript{42}  
    o 25% of consumers believe they themselves can have a significant impact through their purchases\textsuperscript{43}  
    o 90% would stop buying a product if they learned of a company’s irresponsible or deceptive business practices\textsuperscript{44} |
| Attract investors                                                      | • Increasing numbers of mission aligned investors seeking to invest in shared value businesses that ensure long-term viability  
  • Increase investor confidence  
  • Evidence of a growing number of ethical and impact investors seeking investible enterprises\textsuperscript{45} |
| Attract and retain talent                                              | • Employees increasingly want purposeful work, and may be more attracted to work for a company where the directors have to legally consider public benefit  
  • According to Harvard Business Review, millennials (making up 50% of the global workforce) seek work that is personally fulfilling and connects to a larger purpose:  
    o A sense of purpose is the key to job satisfaction; employees who say they have the opportunity to make a direct social and environmental impact through their |

\textsuperscript{38} Cone Communications, ‘2013 Cone Communications Social Impact Study’ (2013)  
\textsuperscript{39} Cone Communications and Echo, ‘2013 Cone Communications/Echo Global CSR Study’ (2013)  
\textsuperscript{40} Cone Communications, ‘2013 Cone Communications Social Impact Study’ (2013)  
\textsuperscript{41} Ibid.  
\textsuperscript{42} Cone Communications and Echo, ‘2013 Cone Communications/Echo Global CSR Study’ (2013)  
\textsuperscript{43} Ibid.  
\textsuperscript{44} Ibid.  
\textsuperscript{45} Attract Investors, Certified B Corporation, <http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/attract-investors>
| Protect mission | • The legal structure protects the mission as the company grows, or as new management or new investors are brought in, or even as the ownership changes. |

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48 Ibid.
49 Engagement levels of 45-65% indicate the workforce is indifferent to organisational success or failure, whilst engagement levels of over 65% represent a high performing culture
Criticisms of the benefit corporation form

Existing law is adequate

Opponents of the benefit corporation form argue that the rationale in favour rests on the mistaken assumption that existing corporate law prevents directors from considering non-shareholder interests, thus raising questions about the genuine need for the introduction of a new legal entity. Supporters of the existing law contend there are no explicit legal restrictions preventing directors from considering the impact of their corporate decision-making on external stakeholders or society at large. It has been argued that the primary rationale for the new legislation rests on the misconception that existing law compels companies to unwaveringly maximise shareholder return, when in reality, corporate decisions are largely a function of choice rather than law.50

Given the increasing demand for corporate social responsibility and accountability, there are many companies already successfully operating using socially responsible practices under the existing for-profit structure. With the growing number of certifications available and the movement towards greater transparency with the release of ‘sustainability’ reports, it is argued that the benefit corporation form is not required.51

Vague definitions of public benefit and third party standards

Academics and some non-profit industry groups and associations that oppose the benefit corporation legislation have argued that the requirement for ‘general public benefit’ is poorly defined and not sufficiently clear to serve as a measurable, attainable goal.52

Moreover, the determination of whether an organisation’s activities actually provide a public benefit is left to an unregulated ‘third-party standard-setter’. This has the potential to create a market of organisations that certify the standards of benefit corporations including rating agencies, government advisory firms or existing product certifiers.53 The role of these potential groups is not clear and there is a concern regarding the involvement of these third party organisations in ensuring the provision of public benefit after incorporation.54

53 Ibid.
54 Ibid.
Additionally, the legislation has been criticised for its vague third party standard requirements. The legislation arguably provides little guidance on the content of the standards, how they should be applied, how often and by whom, instead only stating that they should be independent and transparent.\textsuperscript{55} The statutes provide no baseline to the standards these third parties should reference when conducting the evaluation.\textsuperscript{56}

**Lack of accountability and enforceability**

Some governance experts and associations are concerned that the lack of clarity and enforceability of the standards renders the new form vulnerable and directors may exploit the corporate form to achieve their own ends.\textsuperscript{57} The benefit corporation rests on the premise that it will fulfil its social purpose in an effective manner. However, the model laws do not appear to have a mechanism to ensure legitimacy.\textsuperscript{58}

In addition, there is arguably a lack of accountability to shareholders who can only hold directors responsible through their voting rights or by initiating benefit enforcement proceedings.\textsuperscript{59} This concern could be addressed through additional regulation of internal governance, including oversight of a company’s social goals by a dedicated benefit director and external regulation to prevent abuse of the corporate form.\textsuperscript{60}

The practical implication of involving other stakeholders in the model has also been questioned. The model legislation does not appear to create any enforceable benefit for non-shareholder stakeholders, as they do not have any legal or voting recourse.\textsuperscript{61} Despite shareholder interests no longer needing to take priority, this corporate form does not encompass a true stakeholder-centric model.\textsuperscript{62}


\textsuperscript{56} Dana Brakman Reiser, ‘Benefit Corporations—A Sustainable Form of Organization?’ (Research Paper, No. 293, Brooklyn Law School, September 2012)


\textsuperscript{60} K & R Wilburn, ’The Double Bottom Line: Profit and Social Benefit’ (2014) 57 *Business Horizons* 16.


\textsuperscript{62} Ibid.
Key trends in the adoption of the benefit corporation legislation

As of October 2014, 26 states in the US and the District of Columbia have successfully enacted legislation recognising the benefit corporation, and a further 14 are currently reviewing the legislation. The passing of legislation in the US was marked by both obstacles and enhancers, which posed both challenges to the legislation as well as support in its implementation.

Factors that enabled the passing of the legislation

States that have been successful in passing the benefit corporation legislation generally exhibit one, if not many, of the below trends:

• Strong legislative support;
• Support from influential local business leaders;
• Advocacy from B Lab;
• A strong community of certified B Corps;
• Collaboration between B Lab and key industry bodies such as the American Sustainable Business Council; and
• Strong civilian activism (through petitions such as Care2).

Strong backing from key legislators has been critical to the successful passing of the legislation. The state of Maryland highlights this clearly. Democrat Senator Jamie Raskin was an ideal sponsor of the legislation that unanimously passed the Senate, making Maryland the first state to implement the legislation. As a Professor of Constitutional Law at the American University, Washington D.C., Raskin had both the legal nous to appreciate the importance of the benefit corporation legislation and the credentials and expertise to command the respect of his peers on the subject. Furthermore, his genuine passion and commitment was significant given the innovative and pioneering nature of the legislation.

In almost all states, strong support from the business community played a vital role in raising the profile of the legislation and influencing public opinion. Pioneering businesses, including Patagonia and Plum Organics (see case studies in the next section), championed the need for, and the benefits of, becoming a benefit corporation, helping to popularise the legislation. Additionally, the prominent public profile of B Lab and the growing certified B Corp community rallied further momentum for change. Key industry bodies, such as the American Sustainable Business Council, advocated for the legislation in several states. There was often a cohesive effort between industry bodies, companies and the B Corp community.

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64 Care2 is a social action network focused on delivering content on healthy living and enabling engagement with socially responsible issues. Boasting over 16 million members, Care2 also owns and operates www.thepetitionsite.com, the petition arm of the network. In the past 12 months, www.thepetitionsite.com has acquired over 24 million signatures on a range of issues including human rights and animal welfare.
Obstacles to the passing of the legislation

The Bar Association, as the central regulator of the legal profession in the US, proved to be a significant barrier to the adoption of the benefit corporation legislation. William H Clark, who drafted the model legislation, observed that as a conservative and traditional institution, the Bar Association was resistant to the change the benefit corporation legislation represented. The Association was concerned about the potential disruption to the legal and business industries. In particular, corporate lawyers, who advocated their corporate clients’ interests, were apprehensive that the additional obligations posed on directors might erode their flexibility in management.

Analysis of key states

It is helpful to examine the significant trends and strategies in detail in relation to a number of key states. The following section, organised in chronological order, highlights the factors in each state that helped the successful passage of the legislation. A complete table with all states is provided in Appendix 3.

MARYLAND

Maryland pioneered the adoption of benefit corporation legislation, becoming the first to successfully pass legislation on 14 April 2010. The success in large part was due to the efforts of Democrat Senator Jamie Raskin. As a Professor of Constitutional Law at the American University’s College of Law, Raskin appreciated the highly innovative nature of benefit corporations and was a passionate supporter of the legislation. Senator Raskin’s commitment to benefit corporations and the respect he commanded in the Senate saw the legislation pass unanimously. Additionally, strong support from key business figures, such as Jim Epstein, Chairman of EFO Capital Management and Brandon White, CEO of Lateral Line, was vital in the adoption of the legislation in Maryland, illustrating two of the key trends common to states that have passed benefit corporation legislation.

NEW YORK

In New York, the joint efforts of Assembly Speaker Sheldon and Senator Squadron, in collaboration with the support of organisations and business was key to the passing of benefit corporation legislation on 12 December 2011, making it the seventh state to recognise the new corporate entity. Organisations including the American Sustainable Business Council, Local First Ithaca and

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65 Phone interview with William H. Clark, Jr – a partner at Drinker Biddle & Reath LLP, Philadelphia, Pennsylvania. Mr Clark drafted the model benefit corporation legislation.
67 EFO Capital Management is an investment management and consulting firm based in Washington D.C. EFO Capital Management is an investment management and consulting firm based in Washington D.C. Lateral Line is a company specialising in anglers and fishing apparel.
Singlebrook Technology were among the legislation’s key supporters while Buffalo First! actively lobbied Buffalo Council Members for the adoption of the benefit corporation legislation.

**CALIFORNIA**
The successful adoption of the benefit corporation legal form in California demonstrated all of the enabling factors identified above. The American Sustainable Business Council, in tandem with B Lab, was fundamental in gaining support for the legislation that was passed on 1 January 2012. Additionally, the legislation was supported by 250 local businesses and leading American companies including B Corp Patagonia, lending substantial weight to the campaign. The petition website, Care2, mobilised the support of more than 3,000 citizens from the general community by encouraging individuals to lobby their government representatives for the implementation of the benefit corporation legislation.

**LOUISIANA**
The collaboration between the New Orleans Business Alliance and B Lab was vital in the success of the benefit corporation legislation in Louisiana, which was passed on 1 August 2012. The New Orleans Business Alliance realised the significant advantages of the corporate form for attracting social enterprises to the state and the compatibility of the values of the benefit corporation with the ethos of existing businesses. Strong legislative support by Representative Leger and Representative Ortego saw the legislation pass unanimously in Louisiana.

**MASSACHUSETTS**
In Massachusetts, the collective effort by politicians, lobbying groups and support from the business community were pivotal in the success of benefit corporation legislation, which was signed into law on 7 August 2012. The bill was introduced by Senator Joyce and lobbying groups assisted in gathering support for the legislation. Additionally, the bill was heavily supported by several other legislators and Governor Deval Patrick. The benefit corporation also attracted support from influential businesses, including Dimagi Inc and the Dancing Bear Baking Company. Such efforts were all instrumental in the successful passage of the benefit corporation bill.

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73 Dimagi Inc. is a for-profit social enterprise aimed at delivering technology to developing communities based in Boston, MA.
74 Dancing Deer Baking Company is a baked goods company based in Boston, MA. Dancing Deer Baking Company became a benefit corporation in December 2012.
A key strategy employed by Senator Joyce was to introduce the benefit corporation bill as part of another legislative package to hasten the legislative process.

**OREGON**

As the state with the second highest concentration of certified B Corporations in the United States, the backing of the local business community was vital in the implementation of benefit corporation legislation in Oregon. The state’s 37 certified B Corps were responsible for employing 2,869 people and injecting over $309 million into the Oregon economy. Combined with the support of key business figures such as Bill Campbell, Equilibrium Capital Group, Eric Friedenwald-Fishman, Metropolitan Group and the Oregon Business Alliance, the benefit corporation legislation received strong bi-partisan support and was signed into law by Governor John Kitzhaber on 18 June 2013.

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75 Tony Green, Record Number of Oregon Businesses Register as Benefit Companies on Day 1 of New Law (2 January 2014) Oregon Secretary of State Kate Brown < http://oregonsosblog.us/2014/01/record-number-oregon-businesses-register-benefit-companies-day-1-new-law/>. 
Case studies
California
The implementation of benefit corporation legislation in California

How the legislation was introduced

THE FIRST ATTEMPT
The driving force behind the advocacy of the new legal form in California was demand from local companies wishing to maintain their competitive edge as ‘a national leader in the growing green economy’.76 There was a lack of flexibility in the corporate legal structure to allow for the pursuit of social and environmental goals in addition to profit maximisation.77 In 2008, B Lab, in conjunction with law firm Hanson Bridgett and the New Voice of Business, sought to introduce assembly bill 2944 (AB 2944) into Californian law.78 The bill aimed to amend the California Corporations code in relation to the ‘fiduciary duties applicable to corporate directors of all California corporations’.79 The bill sought to create a non-shareholder constituency statute that included an ability to consider environmental impacts.80 AB 2944 received significant support from business groups in the state including the Silicon Valley Leadership Group and the San Francisco Chamber as well as many individual businesses. However, the Californian State Bar Association and the Chamber of Commerce opposed the bill, principally ‘because it would have imposed a new governance standard on all California corporations without the consent of the corporation or its shareholders’.81 Governor Schwarzenegger vetoed the bill, but he acknowledged the issues raised by the bill and indicated interest in a new corporate form.82 It was thought that the legislation as it was then proposed altered the existing corporate form in a way that created ambiguity around directors’ duties.

THE SUCCESSFUL BENEFIT CORPORATION BILL
The benefit corporation bill that was ultimately successful, AB 361, was the result of a drafting and lobbying collaboration between a number of businesses, politicians, lawyers and civil society groups. The members of the founding group represented a variety of industries and included RSF Social Finance, Method, AlterECO, New Resource Bank, the American Sustainable Business Council and two law firms, Wendell Rosen Black & Dean and Hanson Bridgett.83 The American Business Council and B Lab were also crucial in gaining support for the bill.

77 Ibid.
79 The Corporations Committee of the Business Law Section of the State Bar of California, letter to Jared Huffman, AB 361 (26 April 2011) 2 <http://www.thecorporatecounsel.net/nonMember/docs/04_26_11_AB361.pdf>.
80 Ibid.
81 Ibid.
82 Ibid.

B Lab Report 23
In addition, over 250 local businesses along with leading American companies such as Patagonia added substantial weight to the cause. The petition website Care 2 mobilised the support of more than 3,000 citizens from the general community by encouraging individuals to lobby their government representatives for the implementation of the benefit corporation legislation.  

**Political Support**

Democrat Representative Jared Huffman provided key political support for the new legislation. Huffman was introduced to the concept of benefit corporations through his annual ‘here should be a law...’ contest where entrants pitch the case for new laws. Huffman intuitively understood the gap in Californian corporate law, so he commenced working with B Lab to draft the legislation. The legislation was modelled on other states and as explained above, a coalition of business associations, legal scholars and legislators were involved in the process of adapting the law to suit California. There was some criticism from Republican Party members, who were concerned that such a law would lead to the introduction of differential tax rates. The California State Bar Association and representatives from the non-profit sector also raised concerns. Despite this criticism, the legislation was passed in October 2011 and came into effect on 3 January 2012.

**Impact of the legislation**

As the changes to the legislation are relatively new, the actual impact on business and society is not yet well understood. Impact can only be discussed in terms of outputs and outcomes at this stage. On the opening day of registration twelve businesses filed papers to become benefit corporations. These corporations included Patagonia, Green Retirement Plans and Thinkshift Communications. There are now over 180 benefit corporations in California.

**Company case study: Patagonia, California**

**Background**

Founded in 1973 by Yvon Chouinard, Patagonia has evolved from a small company that produced tools for climbers, to manufacturing high-end outdoor sporting gear and apparel for men, women and children. Patagonia is a subsidiary of The Lost Arrow Corporation, based in Ventura, California.

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87 Ibid.


90 Benefit Corp Information Center, Find a Benefit Corp, <http://benefitcorp.net/find-a-benefit-corp/search>.

and sells its products throughout the world both online and in stores. Patagonia employs around 1,350 people, including its newly appointed CEO Rose Marcario and generates around USD$600 million in annual revenue.\textsuperscript{92}

Patagonia operates under the premise that they ‘build the best product, cause no unnecessary harm, [and] use business to inspire and implement solutions to the environmental crisis.’\textsuperscript{93} This is demonstrated by the commitment made by Chouinard to donate 1 per cent of their total sales or 10 per cent of their profits to environmental groups. They are also involved with the Common Threads Initiative, Conservation Alliance and Bluesign Standard as part of their environmental sustainability and conservation program.\textsuperscript{94} Patagonia ensures all their products are produced in safe, fair, legal and humane working conditions throughout their supply chain.\textsuperscript{95}

**IMPACT OF ADOPTING THE BENEFIT CORPORATION FORM**

After becoming a certified B Corp in 2011,\textsuperscript{96} Patagonia became very involved in the process of introducing benefit corporation legislation into Californian law. When the legislation came into effect on 3 January 2012, the company was among one of the first to adopt the new corporate form.\textsuperscript{97}

Chouinard has been consistently supportive of the legislation saying that it ‘creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises and even changes in ownership by institutionalizing the values, culture, processes and high standards put in place by founding entrepreneurs.’\textsuperscript{98} By adopting this structure Chouinard believes that Patagonia’s business model has been enshrined into law and it now has a mechanism to protect the company’s core values during succession as well as create quantified measurement of environmental, social and governmental values.\textsuperscript{99} Chouinard commented that this is ‘the start of the revolution because the existing paradigm isn’t working any more. This is the future.’\textsuperscript{100}

Delaware
The implementation of benefit corporation legislation in Delaware

How the legislation was introduced

Public Benefit Corporation Legislation (SB 47, 147th General Assembly) was introduced in the Delaware General Assembly with bi-partisan support on 18 April 2013 and was passed unanimously on 17 July 2013. Key players that contributed to the successful adoption of the bill included the Delaware Bar, Chancery Court and elected officials who worked with B Lab for a number of years to examine and evaluate options for introducing similar legislation (previously enacted in California and 12 other states). B Lab was instrumental in connecting Delaware officials and corporate lawyers to directors of Certified B Corporations to discuss the benefits business and society could derive from such legislative change. The support of the Court of Chancery – the state’s court for settling corporate disputes – and its eminence in corporate America was essential in gathering further support for the bill. The detail about how the bill varies from the model legislation is contained in Appendix 2.

Ultimately, the successful bill’s primary sponsor was Democrat Senator David Sokola. He was joined by Representative Byron Short (also a Democrat) in supporting the legislation that has come to be known as the ‘Public Benefit Corporation’ – the only state to use this term.

Impact of the legislation

With more than 50% of US companies and 64% of the CNN Fortune 500 highest grossing companies operating in the US incorporated in the state of Delaware, it is the corporation capital of the US. This standing means that it significantly impacts the views of legislators in other US states. In fact, B Lab co-founder, Jay Coen Gilbert believes Delaware will be the ‘tipping point’ that catalyses other states to embrace the adoption of the new legislation.

Due to its recent implementation, there is little publicly available information on how the new legislation has affected the corporate legal scene in Delaware. In the first three months after the introduction of the legislation, 55 public benefit corporations were either incorporated or converted

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105 Ibid.  
to public benefit corporations.\textsuperscript{107} This is a seemingly minute number compared to Delaware’s almost one million corporations, however the number of benefit corporations is projected to outnumber California over the first twelve months of its relevant effective legislation.\textsuperscript{108}

The ‘public benefit’ that Delaware public benefit corporations are bound to provide and adhere to is almost identical to the benefit set out under the Internal Revenue Code (IRS) Section 501(c)(3) which is used to exempt non-profit organisations from federal income taxes.\textsuperscript{109} As such, most public benefit corporations in Delaware could be incorporated as a non-profit organisation and avoid taxation. It is possible that the corporations that have opted into the new public benefit corporation form to date have done so in order to establish a sustainable business model that is not reliant on tax-exempt donations like a standard charity.\textsuperscript{110} Another reason for incorporation or conversion as a public benefit corporation rather than a non-profit is to avoid the strict IRS regulations that force a company to prove its reliance on donations, as opposed to a sustainable business model, in order to gain access to tax-exemption.\textsuperscript{111}

**Company case study: Plum Organics, Delaware**

**BACKGROUND**

Plum Organics is a US baby food producer founded in 2007 by CEO Neil Grimmer, Gigi Lee Chang, and Sheryl O’Loughlin.\textsuperscript{112} The company had 62 employees as of February 2013, a number that is likely to have risen since the company’s acquisition by the Campbell Soup Company in September 2013 and the expected continuation of the 43 per cent annual growth in the baby food industry from 2010 to 2012.\textsuperscript{113} In 2012, Plum Organics was the fastest growing brand in baby food in monetary value and in percentage growth, experiencing 135 per cent growth.\textsuperscript{114} The company’s target market are parents who are seeking a healthy alternative for their children and who are dissatisfied with current options for baby food – the bright packaging is designed to introduce children to healthy foods they would otherwise ignore.\textsuperscript{115} Plum Organics is also very committed to creating public benefit, for example by donating one Super Smoothie (an organic blend of fruits, veggies, and grains) to a disadvantaged child for every order placed on the Plum Organics website, an initiative to help fortify the diets of malnourished children.\textsuperscript{116}

\textsuperscript{107} Ibid.  
\textsuperscript{108} Ibid.  
\textsuperscript{109} Ibid, 72.  
\textsuperscript{110} Ibid, 72.  
\textsuperscript{111} Ibid, 72  
\textsuperscript{112} Plum Organics (February 2013) Forbes <http://www.forbes.com/companies/plum-organics/>.  
**Impact Of Adopting The Benefit Corporation Form**

As Delaware’s Public Benefit Legislation was only enacted in July 2013, Plum Organics was originally founded as a standard for-profit company. However, the organisation, alongside eight others, was the first in Delaware to adopt the new Public Benefit Corporation Form on 1 August 2013.\(^{117}\)

According to Grimmer, the conversion of the company to a public benefit corporation ‘meant the added leverage of a model that places impact and profits in the same sentence. Like The Full Effect program, which was launched this year to target 16 million kids who go without daily meals every day.’\(^{118}\) There is little publicly available information on the impact that the conversion has had on Plum Organics, however co-founder and CEO, Neil Grimmer, has stated that the specific social purpose requirement has been ‘a natural extension of how we do business.’\(^{119}\) Ostensibly, Plum Organic’s focus on providing food for malnourished children and their eco-conscious approach to packaging would have qualified as the specific public benefit required under the new legislation.\(^{120}\)

This classification as a public benefit corporation allows the company to pursue their longstanding goal to benefit non-financial stakeholders, predominantly underprivileged children, without the risk of being sued by financial stakeholders (shareholders) for not maximising profit.

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\(^{118}\) Ibid.


\(^{120}\) DEL. CODE ANN. tit. 8 § 362(a)(1) (West 2013).
Maryland
The implementation of benefit corporation legislation in Maryland

How the legislation was introduced

The implementation of benefit corporation legislation in Maryland was marked by strong bi-partisan political support, leadership from the business community and a willingness to embrace the innovative and pioneering corporate structure. Jim Epstein, Chairman of EFO Capital Management, was among the earliest supporters of benefit corporations and was responsible for connecting B Lab to Maryland Senator Jamie Raskin, in November 2009. Within 30 days of meeting B Lab, Senator Raskin introduced House Bill 1009 to the Maryland legislature. Those who gave testimony included Laura E. Jordan, Esq, Managing Principal, The Capital Law Firm and Amy Kincaid, Principal, ChangeMatters. B Lab, in conjunction with William H. Clark, Principal, DrinkerBiddle, was responsible for drafting the legislation. The legislation, sponsored by Senator Raskin and Senator Brian Frosh (both members of the Democratic Party), was successfully passed in the House 125-13 and was passed unanimously in the Senate. The bill was signed into law by Maryland Governor Martin O’Malley on 13 April 2010 and became effective on 11 October 2010.

Impact of the legislation

On 1 October 2010, the day registration opened to allow companies to register as benefit corporations, eleven local businesses signed on for the new corporate legal status. Among the first to register were The Big Bad Woof and Blessed Coffee, two local businesses in the Maryland area. Since the legislation was passed in 2010, over 80 companies have elected to become benefit corporations in Maryland.

Company case study: The Big Bad Woof, Maryland

BACKGROUND
Founded in March 2005, The Big Bad Woof is a pet retail store based in Maryland with a strong community focus. It is dedicated to supplying premium, organic produce for pets and supplying....

121 B Corporation, Our History <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history>.
124 Ibid.
125 Ibid.
environmentally friendly items, Fair Trade goods and merchandise sourced from local partners.\textsuperscript{128} Owned by Pennye Jones-Napier and Julie Paez, the small retail company employs 1-10 staff and has two locations in Takoma Park, Washington DC and Hyattsville, Maryland, with a third to open in Silver Spring, Maryland.\textsuperscript{129}

The Big Bad Woof advocates a triple bottom line approach to their business, recognising the importance of environmental sustainability and the community as well as profit. This is illustrated in the company’s strong community ties with local suppliers and its partnerships with animal rescue organisations including the Humane Society of the United States, the Washington Humane Society, the Washington Animal Rescue League and Greyhound Rescue to run adoption events in-store and to advocate for animal welfare.\textsuperscript{130} Additionally, The Big Bad Woof runs monthly Woof Clinics aimed at educating pet owners on pet health, nutrition, training and offers interest-free store accounts for regular customers currently unable to pay for their purchases.\textsuperscript{131}

**Impact of adopting the Benefit Corporation Form**

The Big Bad Woof was the first business to become a benefit corporation in Maryland and the US and changed to the new legal structure on the first day of registration in October 2010.\textsuperscript{132} For owner Penny Jones-Napier, the decision to become a benefit corporation was a natural extension of the company’s existing dedication to sustainable and ethical business practices: ‘We feel strongly that doing good helps increase bottom line profits... There should be a standard in being able to say that you can run a business well, give back to the community and make a profit.’\textsuperscript{133} Becoming a benefit corporation was a way to ensure that the company remained faithful to its ethos of sustainable and ethical business practices by making its values legally binding. According to Jones-Napier, ‘There has to be a social benefit tied to the corporate status. So, it’s a for-profit company, but it ties into a social mission, which fits us like a glove.’\textsuperscript{134} For The Big Bad Woof, the decision to become a benefit corporation has paid off, with support from customers and the local community as well as healthy profits. The Big Bad Woof was on track for an annual turnover of $1.4 million in 2012\textsuperscript{135} and turned to the crowd-funding platform Clovefest for their third store in Silver Spring, Maryland.\textsuperscript{136}

Australia
The need for legislative change in Australia

Directors’ duties

**PROFIT MAXIMISATION VS PUBLIC BENEFIT**

Under current Australian corporations law, directors are bound by strict duties to act with care, skill and diligence, in good faith and in the best interests of the company as a whole. The duty of directors to act in the best interests of the company directly relates to present and future shareholders as well as creditors, who expect that directors’ decision-making will be largely focused on making profits, not creating social impact.

In addition, the current legislation lacks any protective mechanism for directors wishing to create public benefit. This leaves directors vulnerable to personal liability and accusations of breach of fiduciary duties by the Australian Securities and Investment Commission (ASIC), liquidators and other corporate regulators. To consider public benefit, directors must show a clear and rational connection between the creation of shareholder value and the achievement of greater social impact. This precludes directors from including social impact as a consideration alongside or in lieu of profit if shareholder value is compromised.

Given the level of scrutiny corporations face from shareholders and the media, it is of little surprise that directors only consider public benefit to the level that is necessary to operate in the market whilst maintaining a competitive edge. This is further reinforced by the absence of case law in Australia that offers a precedent to reassure directors about their liability if they take public benefit into account.

Without legislative change, it is highly unlikely that directors will be comfortable in considering public benefit as part of their core business. The enactment of benefit corporation legislation would give directors of benefit corporations the confidence to pursue a general public benefit with the peace of mind that they are still fulfilling their fiduciary duties and not personally liable. According to a prominent former company director,

‘Protection [for directors seeking to act in the interests of other stakeholders] would be beneficial because there is no doubt that the threat of a shareholder suit - even if we get

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139 Nicholas Miller & Jonathan Garland, Clayton Utz, ‘Small Giants- B Corporation Advice’, 28 September 2012; WH Clarke & Larry Vranka, ‘The Need and Rationale for the Benefit Corporation: Why it is the legal form that best addresses the needs of social entrepreneurs, investors, and, ultimately, the public’ 26 January 2012.
140 WH Clarke & Larry Vranka, 'The Need and Rationale for the Benefit Corporation: Why it is the legal form that best addresses the needs of social entrepreneurs, investors, and, ultimately, the public’ 26 January 2012.
141 Ibid.
Benefit corporation legislation would provide directors with the comfort required.

**Stakeholder Interests**

Under the current legal framework, directors are not liable to non-shareholder stakeholders for failing to consider their interests. The only avenues available to third parties seeking a legal remedy are section 1324 of the Corporations Act or limited provisions in other legislation. Stakeholders usually have little scope to bring an action under section 1324, as it is a requirement that the company’s constitution must already include a clause that mandates third party interests or general public benefit to be taken into account. Even with such a clause, the requirements to be granted standing are strict and difficult for a non-shareholder to prove.

Further, courts typically appreciate that directors have discretion to recognise and support stakeholder interests as long as they can be justified in terms of the best interests of the company. However, there is no Australian case law regarding this issue. Without benefit corporation legislation, there is a risk of litigation if directors decide to include stakeholder interests in their decision-making. Given this ambiguity about the risk of potential liability, legal advisers will also be unlikely and unwilling to endorse such a decision by directors.

**The Constitution**

There is no prohibition against modifying a company constitution to include a general public benefit clause or to permit or require directors to take non-shareholder interests into account. Despite the fact there is no penalty for failing to comply with such a clause, directors are unlikely to be comfortable fulfilling such an obligation without legislative change. This is primarily because the impreciseness and legal ambiguity of the meaning of these terms leaves directors potentially vulnerable to accusations of breach of their duties from ASIC, liquidators and other corporate regulators. Further, as above, the absence of any case law in Australia on the issue of such a clause in a company constitution provides little comfort to directors who are considering amending the constitution to specify such interests should be taken into account.

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143 Ibid.
147 Corporations Act (Cth) 125(2).
149 Ibid.
CORPORATE SOCIAL RESPONSIBILITY

There has been increasing emphasis placed on the importance of corporate social responsibility (CSR) for directors. The practice of CSR has now become mainstream in large corporations as a means of legitimising their operation in the market, maintaining a competitive advantage, as a risk mitigation strategy and for ensuring the long-term sustainability of the organisation.

In Australia, James Hardie’s treatment of its asbestos mass tort liability serves to highlight the repercussions of failing to recognise the importance of third party interests. This incident ‘thrust the responsibility of corporations into the spotlight’ by demonstrating the adverse reaction and damage that neglect of third party interests can cause to public image and reputation.

With the growing sensitivity of the impact of corporations on the environment and external stakeholder, directors can no longer be one-dimensional in their approach to business. Decisions must balance traditional risk management strategies and short-term profits with long-term viability. In today’s highly networked society, the use of mainstream media channels and social media can powerfully and publicly spotlight corporate activity that negatively impacts the environment or society. With the increasing public pressure for directors to consider the impact of companies on society, it is inevitable that creating public benefit will increasingly form part of company’s strategy. Arguably, this rise of CSR causes confusion for directors in relation to how best to enact their fiduciary duties. Change to Australian law is required to encourage and permit public benefit to be explicitly considered.

The business case

There are a number of aspects to the business case for using the benefit corporation legal structure, many of which are explained above in relation to the US. These include the differentiation from ‘pretenders’ (many of whom may be competitors), attracting investors, attracting and retaining talented employees, and protecting the mission. Arguably, these advantages for US businesses would be similar in the Australian market, although much of the market research that strengthens the business case for benefit corporations has been conducted in the US. Australian specific consumer market research would help to strengthen the business case for such a legal structure and build the momentum for legislative change in Australia. The limited Australian evidence is outlined in the table below.

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151 Ibid.
152 Ibid.
153 Ibid.
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<th>Proposed Benefit</th>
<th>Rationale</th>
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| Differentiate from pretenders        | • Rise of ‘citizen actionism’ – individuals seek deeper involvement with social issues and expect brands and corporations to provide the means of engagement and participation. This could lead to a competitive advantage in the marketplace. Some of the Australian evidence that supports this assertion includes:  
  o 16% of consumers switched products or services in the last year due to its support of a charity or cause.  
  o 83% of Australians claim it is important for businesses to address social and community issues.  
  o 58% of Australians state they would switch brands if a different brand of similar quality supported a good cause.  
  o 57% of Australians purchase products that support a good cause at least once a year.  
  o 59% of Australians are more likely to advocate a brand that supports a good cause over one that doesn’t.  
  o 52% of Australians would help a brand promote products or services if the brand supports a good cause.  
  o However, Australian brands need to communicate their commitment to purpose – only 29% believe businesses are performing well in addressing social issues.                                                                                                                                                                                 |
| Attract investors                    | • In 2005, AMP Capital Investors published an analysis of the corporate social responsibility rating technique used to manage its Sustainable Future Australian Share Fund. By applying its rating technique to the financial performance of the 300 listed Australian companies over a 10 year period, it determined that companies with a higher corporate social responsibility rating outperformed companies with a lower corporate social responsibility rating by more than 3% p.a. over a 4 and 10 year period.                                                                                                                                                                       |

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158 Ibid.
159 Ibid.
160 Ibid.
161 Ibid.
162 Ibid.
Attract and retain talent

- There is significant research outlined in the US section that employees are more attracted to work for, and stay longer with, an organisation that they know contributes positively to the community. There is a need for further research about Australian employee behaviour.

Protect mission

- The legal structure protects the mission as the company grows, or as new management or new investors are brought in, or even as the ownership changes.

The benefit corporation legal structure can be financially rewarding for companies for the reasons outlined above, as well as improve corporate governance and create social benefit. It also works in tandem with B Corp certification to distinguish companies claiming social benefit through deceptive marketing from those actually creating a real and measurable benefit. Buzz words such as ‘green’, ‘responsible’ and ‘sustainable’ are increasingly losing their meaning, whilst ‘benefit corporation’ and ‘B Corp’ signify a legal responsibility in the first case and a vigorously assessed social responsibility in the second. Consumers can therefore distinguish between ‘good’ companies and good marketing, knowing that they are aligning their spending power with their values by buying products through benefit corporations without being overwhelmed by the current trend of ‘green washing.’

A broader benefit of the benefit corporation legal form is the message its adoption by a company, especially a start-up, sends to the broader corporate world. A clear set of values, emphasised by this corporate form, can help forge the identity of a new company and alert investors looking for socially responsible investing opportunities to the potential of the company. In this way, benefit corporation status can be a signal that leads to investment from ‘ethical’ sources that would otherwise be disinterested in supporting the company.

The case against enacting benefit corporation legislation

The most compelling argument against legislative change in Australia mirrors US sentiment – that there is no need for a new legal entity - as existing Australian corporate law does not prevent directors from considering external stakeholders, the environment or society at large. The Corporations Act in its current form does not preclude the consideration of stakeholder interests and general public benefit, provided that they are reconcilable within an evolving understanding of the interests of the company.

Further, the requirement that Australian companies comply with other legislative schemes such as environmental protection laws, occupational health and safety regulations and industrial relations laws means that directors are already bound to look beyond traditional shareholder interests when

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making decisions.\footnote{167} Outside of company law, there are other regulatory instruments, such as the ASX Guiding Principles, which require company directors to give regard to stakeholder interests and general social benefit as an element of fulfilling their duty to act in the best interests of the company.\footnote{168} It is argued that the reputational damage that flows from a failure to comply with these regulations reinforces the mechanisms already in place to ensure general public benefit.

Corporate decision making today often includes a consideration of long term strategy and duties owed to future shareholders, meaning that directors may automatically consider non-shareholder interests and how they can create positive social impact as part of the development of corporate strategy. Australian companies are increasingly doing more than the legal minimum for non-shareholder stakeholders in an effort to be seen as ‘good citizens’ by the general public.\footnote{169} With stakeholder interests and creation of general public benefit being intertwined with company interests, it has arguably become an inevitable part of doing what is in the best interests of the company. Such an argument makes the introduction of benefit corporation legislation seem unnecessary.

Finally, it has been suggested that an amendment to the Corporations Act that would require the interests of stakeholders to be considered and creation of social benefit would create uncertainty for directors by imposing conflicting obligations to multiple groups.\footnote{170} Arguably the benefit corporation legislation overcomes this issue by creating a distinct corporate form, which defines directors’ duties with sufficient clarity to remove any confusion or ambiguity.

\begin{thebibliography}{9}
\item \footnote{167} R Baxt, ‘Corporate law a fragile structure’, \textit{The Australian Financial Review}, 19 November 2004, 55.
\item \footnote{168} James McConvill, ‘Directors duties to stakeholders: A reform proposal based on three false assumptions’, (2005) 18 \textit{Australian Journal of Corporate Law}.
\item \footnote{169} S Bartholomeusz, ‘New Director Plans Could Backfire’, \textit{The Age}, 6 April 2005.
\item \footnote{170} John A Purcell & Janice A Loftus, ‘Corporate social responsibility: Expanding directors’ duties or enhancing corporate disclosure’ (2007) 21 \textit{Australian Journal of Corporate Law}.
\end{thebibliography}
Achieving legislative change: lessons for Australia

Despite the differences in corporate regulation between the US and Australia, the US experience highlights a number of key lessons for the passage of benefit corporation legislation in Australia. This section outlines a number of strategies that are likely to facilitate the successful enactment of legislative change in Australia at a federal level.

First, additional research is required to properly understand the specific needs and demands of the Australian business, consumer and investor market. This greater level of country-specific insight would inform the drafting of the proposed legislation, and also the creation of a targeted education and awareness raising strategy.

Secondly, advocates for legislative change must identify and work with key political players who have capacity to garner support for legislative change in parliament. The political climate can heavily influence the likelihood of success and should be considered when gauging the appropriate timing for a campaign. The experience in the US illustrates the importance of the political context on the achievement of benefit corporation legislation. In addition, the timing of the political campaign is even more crucial in Australia than the US as the benefit corporation legal form would need to be passed at a federal level and ideally entail only a single attempt. This contrasts with the US where legislation was passed on a state-by-state basis, conferring greater flexibility and also allowing for multiple attempts to pass the legislation.

Thirdly, support from the majority of the legal community is important for the successful enactment of the legislation. Corporate lawyers and the legal profession were among the major opponents of benefit corporation legislation in several US states. Many corporate lawyers expressed resistance to the legislation out of concern for the possible implications for clients they represented. In the case of California, securing the support of the Bar Association was critical to the ultimate passage of the legislation. In addition to securing support of regulatory bodies and professional organisations in Australia, the US experience suggests that education and awareness-raising are important components of gaining support for benefit corporation legislation among the legal community.

Fourthly, support from the business community is crucial. The formidable size of the B Corp community in the US was an important source of support for the legislation and a key driver for change. The influence of the B Corp community had grown to such an extent that legislators and politicians could not ignore the call for benefit corporations. The momentum amongst Australia businesses is growing quickly and this needs to continue to encourage action from the political community.

Finally, building interest among the general public is another important step in garnering support for benefit corporation legislation.
‘Branding’ the legislation

The terminology used to identify and describe the proposed legislative changes in Australia can ultimately impact on its level of uptake and utility. The state of Delaware broke away from the standard typology, instead using the term ‘public benefit corporation’ to describe the new entity. The lack of clear distinction between the benefit corporation and its non-profit equivalent has caused much of the general public to mistakenly assume benefit corporations in Delaware have charitable purposes.

In Australia, the choice of name for the legislation is crucial to most effectively increase awareness of the availability of the benefit corporation legal structure and encourage businesses to adopt the corporate form. Additionally, from the point of view of consumers and the general public, ensuring clarity and consistency in the name choice would assist in increasing the public profile of benefit corporations.

An additional factor to consider in choosing a name is the advantages and disadvantages of clarifying the difference between certified B Corps and benefit corporations in Australia. It appears that B Lab in the US intentionally used similar language to conflate the concepts. It is questionable whether this conflation is desirable in the Australian context. Given the certified B Corps community is still largely unknown in the broader Australian market, confusion between the two categories would be likely to occur as they both grow in prominence.
Appendices
 Appendix 1 - Table of hybrid corporate forms

<table>
<thead>
<tr>
<th>Corporate Form</th>
<th>Purpose Statement</th>
<th>Key Features</th>
<th>Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Benefit Corporation</strong></td>
<td>Benefit corporations must pursue a ‘general public benefit’, meaning a material, positive impact on society and the environment. They can also pursue a specific public benefit such as preserving the environment, improving human health or increasing the flow of capital to entities with a public-benefit purpose.</td>
<td>Directors are required to consider the impact of their decisions on shareholders, employees, subsidiaries, suppliers, customers, the community, society and the local and global environment. Additional reporting requirements are minimal. Benefit corporations only have to publish an annual report on their website, detailing how they met their chosen standards.</td>
<td>Benefit corporations achievement of their objectives is measured against an independent third-party standard. The legislation does not specify a particular standard, but legislative guidelines generally provide that standards should be comprehensive, credible, transparent and developed by an independent entity that has no material or financial interest in the use of the standard.</td>
</tr>
</tbody>
</table>

(US based)
| Community Interest Company (CIC) (UK based) | CICs must pass an initial Community Interest Test (CIT) conducted by the Registrar. The company must continue to pass this test for the duration of its life. CICs must include a community interest statement declaring that its activities will be carried on for the benefit of the community and how this will be achieved.  

The CIC takes on the form of a limited liability company and needs to make profits to support its activities, maintain assets, generate dividends and contribute to the community. This form aims to meet the needs of organisations that trade with a social purpose or carry on other activities that benefit the community. CICs are subject to an asset lock. This means that:  

- They cannot transfer assets for less than full market value unless subject to an exemption  
- Dividends paid to shareholders and Interest paid on loans to financiers will be subject to a cap which ensures that a profit is made  
- On dissolution any surplus assets must be transferred to another asset locked body once all liabilities have been met. 

The purpose of the asset lock is to ensure that the assets of a CIC are retained by the company to either support its activities or otherwise benefit the community. Investments in CIC shares are limited by a maximum return determined by a regulator. 

An annual report must be filed including its accounts. This ensures transparency and that those benefiting from the CIC's activities are being properly recognised as stakeholders. The report must also detail how the CIC meets its community interest objectives. |
| Low-Profit Limited Liability Company (L3C) (US based) | L3Cs must accomplish one or more charitable or educational purposes and be formed solely to achieve those purposes. L3C form is a limited liability company that combines features of the corporation and, for taxation purposes, the partnership. The profits generated by an L3C are default taxed at the member level on the members' investments. 

The State of Utah is the only State that requires an L3C to file a report annually during the month it was formed or authorised to conduct business. |

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176 Ibid.  
177 Ibid.  
178 Ibid.  
179 Ibid.  
<table>
<thead>
<tr>
<th>Flexible Purpose Corporation (US based)</th>
</tr>
</thead>
</table>
| **L3C businesses** are not restricted by the amount of profit that they can make, but there can be no significant purpose that involves profit maximisation.\(^\text{181}\) It can also not have a significant goal of accomplishing political or legislative objectives.\(^\text{182}\)  

The purpose of these organisations is to enable private charitable foundations to make investments in L3Cs & retain the tax advantages associated with the investment. |
| **individual tax return.** |
| **Flexible Purpose Corporation** need not specifically identify a broad, general public interest purpose. It is only required to identify one or more special purposes in addition to normal business objectives.\(^\text{183}\) It can also choose to promote positive or minimise adverse short term or long-term effects of its activities on employees, suppliers, customers, creditors, community, society and the environment. |
| **FPCs are able to specify the duration of their existence and can limit or restrict the business of the FPC so long as those limitations are aligned with its stated purpose.**\(^\text{185}\) There is no requirement to be assessed or report against a third party standard. FPCs are required however to provide detailed reports (both annual and special reports) on a regular basis.  

Each year the directors and officers must establish objectives for measuring the corporation’s efforts to achieve its special purpose and write an analysis of the previous year’s efforts, known as the Management Discussion and Analysis.\(^\text{186}\)  

Shareholders alone police a FPC’s compliance with their objectives through voting power or derivative action. |

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\(^{186}\)
## Appendix 2 - Comparison of model legislation and individual state legislation

<table>
<thead>
<tr>
<th>Corporate Purpose</th>
<th>Overarching Language</th>
<th>Model legislation</th>
<th>Delaware Public Benefit Corporation</th>
<th>Maryland</th>
<th>California</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Businesses required to create general public benefit defined as ‘a material positive impact on society and the environment, taken as a whole’</td>
<td>Businesses required to ‘operate in a responsible and sustainable manner’</td>
<td>Businesses are required to create a general public benefit, defined as a ‘material, positive impact on society and the environment, as measured by a third party standard, through activities that promote a combination of specific public benefits’.</td>
<td>Businesses are required to create a general public benefit which is defined as a material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation’</td>
</tr>
<tr>
<td>Flexibility</td>
<td></td>
<td>Permitted to choose one or more specific public benefit purposes</td>
<td>Required to choose one or more specific public benefit purposes</td>
<td>Required to achieve a general public benefit through a combination of specific public benefits. The list of specific public benefits is inclusive. It includes: preserving the environment, promoting the arts, sciences or advancement of knowledge and the accomplishment of any other particular benefit for society or the environment.</td>
<td>The article of a benefit corporation may, but are not required, to state a specific public benefit. This includes providing low-income or underserved individuals or communities with beneficial products or services, preserving the environment, improving human health, increasing the flow of capital to entities with a public benefit purpose and the accomplishment of any other particular benefit for society or the environment.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Directors Accountability</th>
<th>Overarching Language</th>
<th>Directors are required to consider impact of decisions on all stakeholders</th>
<th>Directors are required to balance pecuniary interests of stockholders and the best interests of those materially affected by the corporation’s conduct.</th>
<th>Directors should consider, in determining the best interests of the benefit corporation, the effects of the decision on stockholders, employees and the workforce (including subsidiaries), customers and community and societal considerations including the global and local environment and any other factors the director believes should be considered.</th>
<th>Directors must consider the impacts of any action on employees, customers, the community, the local and global environment, the short term and long-term interests of the corporation and the ability of the corporation to accomplish its public benefit purpose.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Flexibility</td>
<td>Directors are required to consider named specific public benefit purpose(s)</td>
<td>Directors are required to balance named specific public benefit purpose(s)</td>
<td>Directors to consider the effects on stockholders, employees, customers and community and societal considerations in its reasonable assessment of the best interests of the benefit corporation.</td>
<td>Directors are not required to give priority to any particular factor or person unless the corporation so states in its articles.</td>
</tr>
</tbody>
</table>

| Public Transparency     | Overarching Language | Required to report publicly annually an assessment of overall impact on all stakeholders against a third party standard | Required to report to stockholders biennially with an assessment of impact on the interests of those materially affected by the corporation’s conduct | Benefit corporations must deliver an annual report to stockholders addressing the ways it pursued its general public benefit, its specific public benefit and the extent to which the general and specific public benefit was created. It must also include any circumstances that have hindered the creation of its public benefit and an assessment of its societal and environmental performance, measured by the | The corporation must assess its overall social and environmental performance annually to shareholders and the public using an independent third-party standard. This includes reporting on how it pursued its general public benefit goals and any circumstances that hindered the creation of that benefit. The statement must be sent to shareholders and posted on the company’s website. |

B Lab Report
| Flexibility | Required to report publicly annually an assessment of impact on any named specific public benefit purposes | Required to report to stockholders biennially an assessment of impact on any named specific public benefit purpose(s) and permitted to report publicly more frequently using third party standard and/or certification | Reports are to be delivered to each stockholder within 120 days of the end of the benefit corporation’s financial year. The most recent reports must also be publicly available on the company’s website. | within 120 days following the end of the fiscal year. The assessment does not need to be audited or certified by a third party. The criteria and standard development process must be made publicly available. | Required to report annually how the benefit corporation pursued any specific public benefit goals during the year and any circumstances that hindered the creation of the public benefit. The statement must be sent to shareholders and posted on the company’s website within 120 days following the end of the fiscal year. |
## Appendix 3 - States which have successfully enacted legislation

<table>
<thead>
<tr>
<th>State</th>
<th>Status of legislation</th>
<th>Legislation</th>
<th>Sponsors</th>
<th>Supporters</th>
<th>Key strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Passed, effective December 31 2014</td>
<td>SB1238</td>
<td>Rep. Forese</td>
<td>Seed Spot</td>
<td>Fundraising by Seed Spot</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Rep. Pierce</td>
<td></td>
<td>Arizona lobbyist firm Goodman Schwartz Public Affairs enlisted to obtain support for the legislation¹⁸⁷</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Rep. Thorpe</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>Effective</td>
<td>HB1510</td>
<td>Rep. Whitaker</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Rep. Ferguson</td>
<td></td>
<td></td>
</tr>
<tr>
<td>California</td>
<td>Effective</td>
<td>AB361</td>
<td>Assembly member Huffman</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Flexible purpose legislation</td>
<td></td>
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<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Support by leading businesses and community leaders¹⁸⁸</td>
</tr>
<tr>
<td>Colorado</td>
<td>Passed, effective April 1 2014</td>
<td>HB13-1138</td>
<td>Rep. Lee</td>
<td>The Alliance for a Sustainable Colorado, UL, LLC (Underwriters Laboratories) SB 182, UL, LLC (Underwriters Laboratories) SB 003, Green America</td>
<td>Joint effort by the Alliance for a Sustainable Colorado, Colorado businesses and B Lab¹⁹¹</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Sen. Kefalas</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>Effective</td>
<td>SB47</td>
<td>Sen. Sokola</td>
<td>B Lab</td>
<td>Support by Gov. Markell, the Delaware State Bar Association, the Delaware Court of Chancery and the Secretary of State¹⁹²</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Effective</td>
<td>SB 298</td>
<td>Sen. Ihara</td>
<td>Gary Hooser</td>
<td>Support from legislators</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Sen. Chun Oakland</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Sen. Green, Sen. Solomon</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


¹⁹⁰ Ibid.


<table>
<thead>
<tr>
<th>State</th>
<th>Effective</th>
<th>Bill Number</th>
<th>Champions</th>
<th>Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>Louisiana*</td>
<td>HB1178</td>
<td>Rep. Leger, Rep. Ortego</td>
<td>New Orleans Business Alliance</td>
<td>Joint effort by the New Orleans Business Alliance and B Lab. Assistance by GNO Inc. in the passage of legislation through the Senate194</td>
</tr>
<tr>
<td></td>
<td>HB1009</td>
<td></td>
<td></td>
<td>Joint effort by B Lab and Senator Raskin</td>
</tr>
</tbody>
</table>

194 Shareable, Louisiana Becomes 8th State To Approve B Corps <http://www.shareable.net/blog/louisiana-becomes-8th-state-to-approve-b-corps>.
<table>
<thead>
<tr>
<th>State</th>
<th>Effective</th>
<th>Bill No</th>
<th>Sponsor(s)</th>
<th>Joint effort by</th>
<th>Support from leading businesses</th>
<th>Support from legislators</th>
</tr>
</thead>
<tbody>
<tr>
<td>Massachusetts</td>
<td>Effective</td>
<td>H4352</td>
<td>Sen. Joyce, Preserve Social (k) Dimagi</td>
<td>Joint effort by the American Sustainable Business Council and Senator Joyce</td>
<td>Support from leading businesses</td>
<td>Support from legislators</td>
</tr>
<tr>
<td>New York</td>
<td>Effective</td>
<td>A4692-a S79-a</td>
<td>Speaker Silver, Sen. Squadron, ASBC, Buffalo First, Local First Ithaca, NYS B Corps, Singlebrook Technology</td>
<td>Joint effort by B Lab, Buffalo First and the American Sustainable Business Council</td>
<td>Support from leading businesses</td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>State</th>
<th>Effective</th>
<th>Bill Number</th>
<th>Sponsor (Representative)</th>
<th>Sponsor Details</th>
<th>Support from leading businesses¹²²</th>
<th>Support from the Oregon Business Association¹²³</th>
</tr>
</thead>
</table>

¹²² Tony Green, Record number of Oregon businesses register as benefit companies on day 1 of new law, (2 January 2014) Oregon Secretary of State Kate Brown <http://oregonsosblog.us/2014/01/record-number-oregon-businesses-register-benefit-companies-day-1-new-law/>.  
<table>
<thead>
<tr>
<th>State</th>
<th>Status</th>
<th>Bill No.</th>
<th>Represented by</th>
<th>Support from</th>
</tr>
</thead>
<tbody>
<tr>
<td>Utah</td>
<td>Passed, effective May 13 2014</td>
<td>SB133</td>
<td>Sen. Valentine</td>
<td>Support from leading businesses and community leaders[206]</td>
</tr>
<tr>
<td>Vermont</td>
<td>Effective</td>
<td>S.263</td>
<td>Sen. Shumlin, Sen. Miller</td>
<td>Support from leading businesses and community leaders[208]</td>
</tr>
<tr>
<td>Virginia*</td>
<td>Effective</td>
<td>HB2358</td>
<td>Delegate McClellan, Delegate Brink, Delegate Cline, Delegate Dance, Delegate Herring, Delegate Kory, Delegate Lingamfelter</td>
<td>Support from leading businesses[209]</td>
</tr>
</tbody>
</table>

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207 Ibid.


Support from leading businesses and community leaders |

* Passed unanimously

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