‘Recklessness, Hubris, & Greed’: Defining Accountability for Directors of Large Private Companies

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'…my success is not but through Allah' The Holy Qur'an 11:88

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Abstract

Accountability has been seen as a panacea, for curbing the unfettered power of individuals, with appropriate checks and balances. It has become mainly synonymous with regulating the behaviour of directors and the corporate governance of companies. Whilst there has been copious research regarding the accountability of directors in public limited companies, the accountability of directors of large private companies (LPCs) has not been explored. Although, when a corporate scandal/collapse has occurred; there is an acceptance that the accountability of directors was absent. However, there is little agreement on defining, developing and maintaining the modern concept of accountability. This research bridges this gap, by answering the central question of how directors of large private companies (LPCs) in the UK should be held accountable for their actions and decisions. As a result, it proposes a new theory of accountability termed 'Holistic Accountability' tailored to directors of LPCs.

The generalisation of accountability definitions makes way for 'Holistic Accountability' due to the unique nature of LPCs. Indeed, some of the reasons why the accountability of directors of LPCs is needed are evidenced by three case studies which show that directors of LPCs can freely engage in illegal/questionable conduct. In considering which constituent is best placed to hold directors of LPCs accountable, the government stands out as the only possible constituent. Therefore, the current regulatory framework is examined to determine whether it enables the holistic accountability of directors of LPCs through the Financial Reporting Council (FRC) and the Pensions Regulator (TPR).

The research finds that the focus of the FRC and TPR on financial reporting and pension schemes respectively fails to adequately fulfil each of the holistic accountability elements. In this regard, the roles of the Securities & Exchange Commission (SEC) and the Australian Securities & Investments Commission (ASIC), are also considered to determine what lessons could be learned in respect of the holistic accountability of directors in LPCs in the UK. The gaps identified in holding directors of LPCs holistically accountable through the current framework are also addressed, by building on some of the effective measures taken by both the SEC and ASIC for holistic accountability. For each of the proposals, recommendations for future research are put forward. Accordingly, the thesis concludes a UK corporate regulator should be established to enforce the holistic accountability of directors of LPCs. Failure to do so would mean the exacerbation of the current 'black-box' issue and further corporate collapses and scandals as a result of director misconduct.

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CHAPTER 1
INTRODUCTION

1.0 Introduction

On Monday 25 April 2016, British Home Stores Limited (BHS) collapsed and officially entered administration.[1] With almost 11,000 employees, more than 160 stores and a reported pension deficit of £571 million affecting around 20,000 pensioners, it was the biggest corporate collapse of the decade.[2] As a result of the collapse, it transpired that BHS had been 'run as a personal fiefdom by a dominant individual'[3], with the collapse triggered by 'gross failures of corporate governance'[4], and the directors having 'authority without accountability'.[5] Indeed, the former Work and Pensions Committee chairman Frank Field MP stated that '[f]or a company with a big social and economic footprint like BHS it is simply not enough to be accountable… particularly when one shareholder owns most of the stock.'[6] All of this signalled there could be a problem with holding directors of Large Private Companies (LPCs) accountable for what they do, or do not do.

This problem of accountability of directors of LPCs is further evidenced by the fact that ICSA: The Governance Institute, set out suggestions, to the then Prime Minister, Theresa May, on how she could reform governance at private companies following the collapse of BHS.[7] The Institute of Directors (IoD) also called for a review of the corporate governance of unlisted companies since there is a public interest in how they are run.[8] These interventions gave rise to the hope that a review of how large privately-owned companies are governed would be undertaken to increase public and investor

[1] Graham Ruddick and others, 'BHS collapses into administration as rescue deal fails' (*The Guardian,* 25 April 2016) <https://www.theguardian.com/business/2016/apr/25/bhs-heading-for-administration-as-rescue-deal-fails> accessed 15 January 2022.
[2] Gavin Matthews, 'What governance lessons should we learn from the demise of BHS?' (*Womble Bond Dickinson*, 6 September 2016) <https://www.womblebonddickinson.com/uk/insights/articles-and-briefings/what-governance-lessons-should-we-learn-demise-bhs> accessed 15 January 2022.
[3] Ibid.
[4] Ben Woods, 'MPs demand clampdown on private companies to prevent 'another BHS'' (*The Independent*, 11 February 2017) <https://www.independent.co.uk/news/business/news/bhs-philip-green-mps-private-companies-pensions-arcadia-a7574876.html> accessed 15 January 2022.
[5] Paul Hodgson, 'BHS: asset strippers, chancers, and governance failures' (*Compliance Week*, 10 August 2016) <https://www.complianceweek.com/bhs-asset-strippers-chancers-and-governance-failures/10487.article> accessed 15 January 2022.
[6] Woods (n.4).
[7] Matthews (n.2).
[8] Ibid.

confidence in them.[9] In essence, both ICSA and IoD wanted to see directors of LPCs being held accountable, having recognised that accountability was absent in respect of directors of such companies. However, despite these suggestions and reviews, nothing has been done to ensure that directors of LPCs are made (more) accountable.

It is submitted, the government have acknowledged the absence of accountability, of directors of LPCs, by advocating for there to be a strengthening of corporate governance, and in turn accountability, in the UK's largest LPCs.[10] For example, the Department for Business, Energy and Industrial Strategy and the Insolvency Service, in its Call for Evidence titled Insolvency and Corporate Governance, made proposals to ensure that directors of companies meet the standards required of them[11]. This would be through the further development of the stewardship of shareholders, a greater degree of transparency over group structures and dividend policies, as well as holding directors of dissolved companies to account if they have failed in the carrying out of their duties.[12]

However, while these proposals were introduced in 2018, they have not amounted to anything substantial. That said, while it may be clear what accountability can do, it is less clear as to the effect a lack of accountability might have. There cannot be the promotion of a concept if, while its objectives may be known, its practical effect remains unexplored.

Before discussing accountability, it is important to briefly turn to the role of directors in LPCs. In the United Kingdom (UK), the role of a director is of significant importance. UK company law requires private limited companies (Ltd companies) to have at least one director and public limited companies (Plcs) must have at least two.[13] The Companies Act 2006, defines a director as any person occupying the position of director, by whatever name called[14].' The legal definition of a director is so broad that even individuals with *some* senior responsibilities, such as Head of Human Resources or Head of Finance, are at risk of being caught out by the provision. This is even though such individuals may not even be appointed as directors, they are known as de facto

[9] Matthews (n.2).
[10] Department for Business, Energy and Industrial Strategy, 'Insolvency and Corporate Governance' (*Gov.uk*, August 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf> accessed 23 November 2019.
[11] Ibid.
[12] Department for Business, Energy and Industrial Strategy (n.10).
[13] Companies Act 2006, s.7.
[14] Companies Act 2006, s.250.

or shadow directors.[15] Directors may act individually, or if there is more than one director, they may act collectively as the 'board'. Importantly, they will sometimes control the company's operations by delegating their authority to middle and senior management.

In addition, the make-up of UK businesses means that generally, businesses fall into one of three categories: small, medium, and large. Such categorisation depends on the company's number of employees, its turnover, and the balance sheet total. In the UK, the majority of companies fall within the small & medium enterprise segment.[16]

1.1 The 'Black-box' Problem

There is a systemic problem of accountability within LPCs, in the context of holding directors accountable. The 'black-box' nature of LPCs means that governance issues only come to light, when the company is on the brink of or has entered, insolvency.[17] In essence, this black-box situation means there is an absence of knowledge of LPCs' internal workings. There are several reasons for this. For example, little external oversight enables directors to control the companies as their own fiefdoms. As LPCs can make use of corporate reporting exemptions, the true financial position of LPCs is not likely to be known, unless there is an investigation or when it enters insolvency. Indeed, corporate governance is not likely to be at the forefront of the minds of directors and officers of LPCs, because there will usually be no need to attract external investment. The absence of a listing on a Stock Exchange means that the fulfilment of additional requirements, or potential shareholder activism, is likely to be minimal.

The omission of including and considering LPCs in governance research is clearly established, by the fact that the majority, if not all, research has focused on public companies and the accountability of their directors.[18] This is perhaps because LPCs do not rely upon the public equity markets to raise capital.[19] There is also more

[15] Companies Act 2006, s.250.
[16] Matthew Ward, 'House of Commons: Business Statistics, Briefing Paper 06152' (*Parliament UK*, 22 January 2021) <https://researchbriefings.files.parliament.uk/documents/SN06152/SN06152.pdf> accessed 5 September 2021.
[17] Jessica Fino, 'Debate corporate accountability' (*Economia*, 5 September 2017) <https://economia.icaew.com/opinion/september-2017/debate-corporate-accountability> accessed 19 October 2018.
[18] Elke Hellinx, 'Steeplechase in the boardroom: the obstacles for non-executive directors to fulfil their role in public companies' [2017] 38(1) Company Lawyer 15; Andrew Keay, *Board Accountability in Corporate Governance* (1 edn, Routledge Research in Corporate Law 2015) 72-109.
[19] Financial Reporting Council, 'The Wates Corporate Governance Principles For Large Private Companies'(*Wates.co.uk*, December 2018) <https://www.wates.co.uk/wp-

information available on Plcs within the public domain when compared to LPCs. This is despite many LPCs resembling Plcs in size and financial clout, with the likelihood of having an equivalent economic footprint and possessing similar risks to a wide range of stakeholders.[20]

1.1.1 The Wates Corporate Governance Review for Large Private Companies

In the House of Commons Business, Energy, and Industrial Strategy Committee report on corporate governance, it was highlighted that there was a need for better transparency and accountability for LPCs, and by extension its directors. The report recognised the:

> 'arguments in favour of greater transparency and accountability for private companies are based on the premise that those with a significant presence in the community should be required to report on non-financial matters for the benefit of employees and other stakeholders.'[21]

As a result, the Wates Review[22] into improving corporate governance standards for LPCs was born. However, the Wates Review is nothing more than an attempt at a 'quick fix', that is unlikely to yield significant results. For example, its six principles, applied on a voluntary basis, are defective. There is no incentive to comply with the principles, partially or fully. This is despite the introduction of a legislative requirement by the Wates Review to provide a corporate governance statement disclosing the corporate governance measures undertaken.[23] The principles only apply to LPCs with more than 2000 employees, a turnover of more than £200 million, and a balance sheet of more than £2 billion, resulting in a significant number of LPCs falling through the cracks. The Wates Review's voluntary and legislative measures[24] can be applied to all private companies and not just those defined in the review, resulting in '…an excessively light-touch for large private companies.'[25]

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content/uploads/2018/12/Wates-Corporate-Governance_Screen_2018-2.pdf> accessed 2 February 2019.

[20] Ibid.

[21] Business, Energy and Industrial Strategy Committee, *Corporate Governance*, (HC 2016-17, HC 702) para 69.

[22] Financial Reporting Council (n.19).

[23] The Companies (Miscellaneous Reporting) Regulations 2018, reg 14.

[24] ICAEW, 'ICAEW Representation 112/18: The Wates Review into Corporate Governance Principles for Large Private Companies ' (*ICAEW,* September 2018) <https://www.icaew.com/-/media/corporate/files/technical/icaew-representations/2018/icaew-rep-112-18-wates-corporate-governance-principles.ashx> accessed 2 February 2019.

[25] Ibid.

In contrast, accountability concerns of LPCs are not a significant problem for some jurisdictions. In Australia, the Australian Securities and Investments Commission (ASIC) acts as a corporate regulator enforcing company and financial services laws to protect various stakeholders.[26] In the UK, there is no corporate regulator, so directors of LPCs can continue to exploit the lack of accountability and governance for their own benefit. It must be noted that accountability cannot just be bolted on.[27] Accountability has to consider the makeup and context in which a company operates, as well as navigating through potential accountability blockers. However, before accountability can be considered, it is important to understand what the term LPC means.

1.1.1.2 Defining a Large Private Company (LPC)

The definition of LPCs, as outlined in the Companies Act 2006 and the Wates Review[28], fails to reach all LPCs because they strictly restrict the definition. As a result, the principles may well become another version of the UK Corporate Governance Code[29], for public companies, where '…there remains substantial room for improvement as a large proportion still opt for the bare minimum, complying only with the rules but not fully embracing the principles of the code.'[30] This is concerning given LPCs' significant corporate and economic power. For example, Britain's Top 100 private companies, as reported by Linklaters Top Track 100, have delivered record combined sales of £237bn and record profits of £28bn.[31] LPCs also employ around 980,000 people equating to 3 percent of the UK's workforce.[32] Therefore, a new definition that encompasses all LPCs is needed to ensure the absence of accountability is properly addressed.

The definition for LPCs proposed here is companies having some, but not all, individuals as both a director and shareholder, with a turnover of more than £632,000

[26] Australian Securities & Investments Commission, 'ASIC' (*ASIC*, 9 October 2018) <https://asic.gov.au/>accessed 24 October 2018.
[27] Fino (n.17).
[28] The Companies (Miscellaneous Reporting) Regulations 2018, reg 14.
[29] Financial Reporting Council, 'The UK Corporate Governance Code' (Financial Reporting Council, July 2018) <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF> accessed 3 February 2019.
[30] Sarah Gordon, 'Third of UK businesses do not meet corporate governance requirements' (*The Financial Times,* 13 November 2016) <https://www.ft.com/content/c56c86a0-a80c-11e6-8898-79a99e2a4de6>accessed 3 February 2019.
[31] Iain Fenn & John Lane, 'Top Track 100 - Britain's Top 100 private companies' (Linklaters, 5 July 2021) <https://www.linklaters.com/en/insights/publications/2020/july/top-track-100-britains-top-100-private-companies> accessed 5 September 2021.
[32] Ibid.

but not exceeding more than £5bn, with at least 10 workers up to a maximum of 15,000 workers. The imposition of a minimum turnover allows for the removal of single-employer entities. These are usually personal service companies, set up by an individual to receive payment for contract/agency work. Companies that fall within this definition are likely to be an integral part of a large supply chain and have a large economic footprint and a wide range of stakeholders. Accordingly, the deployment of this definition means the gaps inherent in previous definitions are remedied.

The rationale for having a maximum turnover and employee number restrictions within the definition is because it is based on the Britain's top 100 private companies. The majority of the companies on this list are caught by the definition. It is accepted that there will be *some* LPCs that will fall outside of the definition. However, it is posited that companies above the maximum turnover and employee number restrictions, as a matter of natural growth, are likely to transition into the Plc sphere either by re-registration or as an indirect result of acquiring a Plc. It is also worth noting that company turnover and employee numbers are significant variables, so just because an LPC is not caught by the definition initially, there is no guarantee that will remain the case in the future.

The issue of defining LPCs is not the only problem for the Wates Principles. In February 2022, The Wates Corporate Governance Principles for Large Private Companies: The Extent, Coverage and Quality of Corporate Governance Reporting were published. This report provided the first in-depth review of the application of the principles.[33] It found that only 348 companies were applying the principles, representing arguably a small percentage of the total number of LPCs.[34] It also found that LPCs did not provide an explicit statement to indicate a practical adoption of the Wates Principles, with explanations simply indicating an application of the Wates Principles was common.[35]

Only general information was provided relating to the accountability of directors, and the processes in place to review the governance processes. This includes clarification of the relationship between the company and its owners and the lines of accountability for the board as a whole. Whilst it is accepted that the principles are still in their infancy,

[33] Financial Reporting Council & others, 'The Wates Corporate Governance Principles for Large Private Companies: The Extent, Coverage and Quality of Corporate Governance Reporting' (*Financial Reporting Council*, 22 February 2022) <https://www.frc.org.uk/getattachment/e8759f3d-d189-448e-979a-f6bb6d335c83/The-Wates-Corporate-Governance-Principles-for-Large-Private-Companies_Februrary2022.pdf> accessed 5 May 2022.
[34] Ibid.
[35] Financial Reporting Council & others (n.33).

with LPCs only completing their first reporting cycle[36], it is fair to say that the future does not look bright for the principles.

The problem with LPCs is not novel. There have been numerous calls for an increase in directorial accountability and by extension, trust, and transparency.[37] This is critical not just to LPCs, but for companies as a whole[38], to, inter alia, discourage directorial wrong-doing.[39] However, there has been a wholesale failure to address failures in the corporate governance of LPCs[40], with the government coming under criticism. Indeed, British Home Stores Ltd[41] and Sports Direct Ltd[42], fitting the proposed definition of an LPC, and discussed later, serve as prime examples. Defining accountability in the context of directors of LPCs is difficult because no generally accepted definition has emerged.[43] The concept of accountability has been applied so nonchalantly, arguably to the point of thoughtlessness.[44]

The problem of defining accountability is further exacerbated by the fact that it is not clear who should be held accountable. To whom is accountability owed, what mechanism of accountability should be used, and whether someone should have the responsibility to ensure accountability takes place. Indeed, the entire notion of accountability (and what it means for directors of LPCs) is unclear as to its meaning and elements.[45] It is submitted that directors should be held accountable, because they are a crucial component of corporate governance, with their actions having a profound effect on shareholders, among others.[46] In practice, little has been done to '…increase

[36] Ibid.
[37] Department for Business, Innovation and Skills, 'Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business' (*Gov.uk*, April 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/304297/bis-14-672-transparency-and-trust-consultation-response.pdf> accessed 7 September 2018.
[38] Andrew Keay and Joan Loughrey, 'The framework for board accountability in corporate governance' [2015] 35(2) Legal Studies 252, 254.
[39] Vanessa Finch, 'Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance ' [1994] 57(6) Modern Law Review 880, 881.
[40] Rob Davies, ' 'Recklessness, hubris and greed' – Carillion slammed by MPs' (*The Guardian,* 16 May 2018) <https://www.theguardian.com/business/2018/may/16/recklessness-hubris-and-greed-carillion-slammed-by-mps> accessed 10 October 2018.
[41] Peter Bailey, 'It looks like corporate governance is starting to toughen up (at last)' [2018] 409 Company Law News Letter 2.
[42] Company Lawyer, 'Corporate governance inquiry launched by House of Commons select committee' [2017]38(1) Company Lawyer 24.
[43] KEPA, 'Corporate Accountability ' (*KEPA.fi,* March 2014) <https://www.kepa.fi/sites/kepa.fi/tiedostot/julkaisut/corporate-accountability.pdf> accessed 8 September 2018.
[44] Keay & Loughrey (n.38) 254.
[45] Ibid 255.
[46] Keay & Loughrey (n.38) 255.

boardroom accountability and transparency…'[47] to '…crack down on directors behaving irresponsibly…'[48], ensuring the highest standards of behaviour in those who lead, manage and control LPCs.[49] Despite many consultations and some 'quick fix' measures to uphold standards of behaviour in directors, corporate scandals and catastrophes in LPCs do not seem to be waning.[50]

This absence of accountability and governance within LPCs has been years in the making.[51] Indeed, this failure has been followed by the collapse of many LPCs, prompting parliamentary committees to call for '…greater governance of large private companies.'[52] For example, when BHS collapsed, dividends totalling £414m had previously been paid to its prior owners, and it was described as 'one of the biggest corporate scandals of modern time'[53], with the directors representing the '…apogee of weak corporate governance.'[54] Sports Direct Ltd, a subsidiary of Sports Direct International Plc, was found to be paying workers below the national minimum wage, coupled with '…working practices…closer to that of a Victorian workhouse…'[55], with Mike Ashley, the face of Sports Direct and its Chief Executive Officer (CEO), facing calls to be held accountable for these failings.[56]

Consequently, the lack of accountability directors of LPCs face, coupled with the omission of defining accountability, has resulted in the perfect storm enabling directors of LPCs to act without being accountable and not being held culpable where appropriate.

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[47] Ibid.
[48] Gov.UK, 'New powers to give greater protection to staff and small suppliers in insolvent businesses ' (*Gov.uk,* 20 March 2018) <https://www.gov.uk/government/news/new-powers-to-give-greater-protection-to-staff-and-small-suppliers-in-insolvent-businesses> accessed 8 July 2018; Prof. Chizu Nakajima, 'Corporate failures and governance - the ongoing debate' [2018] 39(5) Company Lawyer 137.
[49] Ibid.
[50] Angus Young 'Frameworks in regulating company directors: rethinking the philosophical foundations to enhance accountability' [2009] 30(12) Company Lawyer 355.
[51] Ibid.
[52] Sinead Moore, 'Committee calls for greater accountability following BHS collapse' (*Economia*, 13 February 2017) <https://economia.icaew.com/news/february-2017/work-and-pensions-committee-calls-for-greater-accountability-and-transparency-following-bhs-collapse> accessed 24 October 2018.
[53] Jessica Fino, 'MPs recommend Philip Green be stripped of his knighthood' (*Economia*, 20 October 2016) <https://economia.icaew.com/news/october-2016/mps-recommend-philip-green-be-stripped-of-his-knighthood-bhs-dominic-chappell> accessed 24 October 2018.
[54] Sarah Butler, 'BHS collapse: the key players and what the report says about them' (*The Guardian,* 25 July 2016) <https://www.theguardian.com/business/2016/jul/25/bhs-collapse-key-players-mps-report-sir-philip-green> accessed 24 October 2018.
[55] Business, Innovation and Skills Committee, *Employment practices at Sports Direct*, (HC 2016-17, HC 219).
[56] Ibid.

1.2 The Removal of Directors

Given the non-existence of accountability in relation to directors of LPCs, it is accepted that this difficulty can be offset by the fact that directors of LPCs can be removed from their position.[57] This legal power ensures shareholders can step in to safeguard the company's financial position and respond to imprudent managerial behaviour.[58] Therefore, such power(s) could be utilised to hold directors of LPCs accountable. However, this is easier said than done. It is also worth pointing out that only shareholders possess the power to remove directors, and not other stakeholders such as creditors, employees, customers amongst others, where an accountability gap also exists. The possibility of removal does not have a "…significant effect on the accountability of directors or the influence shareholders have over a [Ltd] company's affairs'[59]. The ability to remove directors is severely hindered by the fact that shareholders must be organised and be able to coordinate their efforts. One shareholder is not enough to engineer a vote to remove a director unless they have a majority shareholding.

It is submitted that shareholders would be reluctant to propose such a vote. If a shareholder were to act alone, they would have to internalise the financial cost, enabling other shareholders to benefit from any benefit subsequently gained. A coalition, while reducing transaction costs[60], is difficult when considering the dispersed ownership of many LPCs. Where there is concentrated ownership, it would be logistically easier, despite still being unrealistic, to form a coalition. This is because some shareholders may have, differing priorities, an unwillingness to (part) fund action that has an uncertain success rate, and/or they may have a favourable relationship with the current board.

The formation of a coalition is a protracted process. In particular, it means the grouping of different interests and agendas, inevitably meaning that there will be fissures and exits. Some shareholders may need convincing but given that an LPC is not subject to an extensive corporate reporting regime, information required to support a coalition

[57] Companies Act 2006, s.168.
[58] Andrew Keay, 'Company directors behaving poorly: disciplinary options for shareholders' [2007] (Sep) Journal of Business Law 656, 657.
[59] Carsten Gerner-Beuerle, Philipp Paech, Edmund Philipp Schuster, 'Study on Directors' Duties and Liability' (*LSE*, April 2013) <http://eprints.lse.ac.uk/50438/1/__Libfile_repository_Content_Gerner-Beuerle,%20C_Study%20on%20directors%E2%80%99%20duties%20and%20liability(lsero).pdf> accessed 15 September 2018.
[60] Keay (n.58) 660.

may be difficult and/or expensive to obtain. There may be some shareholders not willing to allow the LPC's wealth to decline while action is organised. There are other issues such as shareholders having underlying alliances with certain directors, the efforts of the coalition may also become public knowledge with some shareholders working against the coalition. The scale and damage of publicity will depend on the size of the LPC, but the spotlight on its actions will not be as vigorous as that of a Plc.[61]

The information that may be required by prospective members of a coalition is a further problem, given that LPCs are exempt from holding an Annual General Meeting (AGM).[62] Generally, only shareholders are allowed to AGMs, making difficult for other stakeholders to obtain information from directors of LPCs. Despite this, some LPCs may be required by the Articles of Association (AoA) to hold an AGM, although it is not impossible to amend them.[63] For example, research by Ernst & Young showed, that outside of the Financial Times Stock Exchanges (FTSE) 100 and 250 Indexes, in 2017 18.56% of companies held AGMs using them as a method of passing, rejecting resolutions[64], or even amending the articles. Out of the 26 resolutions put forward in 2017 to amend the articles, 15 were lost and 11 were a close call falling within 10% of the required majority[65].

Aside from voting on resolutions, shareholders may also decide not to re-elect directors. However, re-election, as Bebchuck states, in the context of Plcs and equally applicable to LPCs is:

> '…largely a myth. Attempts to replace directors are extremely rare, even in firms that systematically under-perform over a long period of time. By and large, directors nominated by the company run unopposed and their election is thus guaranteed. The key for a director's re-election is remaining on the firm's slate'.[66]

The absence of accountability in LPCs is further evidenced by the fact that it is questionable whether LPCs would hold AGMs given the administrative burden. There

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[61] Ibid 661.
[62] Jennifer Adams, 'AGMs: Get the details right' (*Accounting WEB,* 5 September 2011) <https://www.accountingweb.co.uk/practice/skills/agms-get-the-details-right> accessed 16 September 2018.
[63] Companies Act 2006, s.281 – s.361.
[64] Ernst & Young, 'AGM Trends 2017' (*EY*, September 2017) <https://www.ey.com/Publication/vwLUAssets/ey-agm-trends-2017/$FILE/ey-agm-trends-2017.pdf> accessed 27 October 2018.
[65] Ibid.
[66] Lucian Bebchuck, 'The Case for Increasing Shareholder Power' [2005] 118(3) Harvard Law Review 833.

are likely to be more issues than those outlined above, regarding the removal and replacement of directors. As Keay concisely states, removing a director is a difficult feat, as it may be viewed as not feasible, too expensive, or too precarious. Consequently, shareholder action may be hindered even when the company is struggling.[67]

1.3 Shareholder Proceedings

Aside from removing directors of LPCs, shareholders can launch a derivative claim against directors where the latter have committed breaches of duty and other improper actions. This is likely to happen in situations where a director's or the board's course of conduct, or action, falls below the required legal standard.[68] However, this is unlikely to replace or be sufficient in place of accountability. Other stakeholders cannot launch such an action, with legal protections geared and weighted towards shareholders only. Indeed, the courts have been careful not to interfere with the in-house management of companies, as they take the view that shareholders are better positioned to determine internal matters within the company.

The oft-quoted statement in the courts is that '[t]his Court is not to be required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom.'[69] The majority of shareholders will usually decide whether individual shareholders can pursue litigation in the name of the company, with the courts' approach to agree on what the majority of shareholders have decided. This means a minority shareholder may find itself barred from contesting a matter.[70] This is perhaps why so few derivative actions have been permitted by the courts.[71]

Minority shareholders may decide to bring an unfair prejudice (or claim of oppression) petition.[72] Company law is based on a model of democracy whereby the majority view prevails, but where this marginalises minority shareholders, with their views ignored and interests damaged, there has to be some form of recourse. Section 994 of the Companies Act[73] allows for a member to petition the court where the company's affairs

[67] Keay (n.58) 675.
[68] Companies Act 2006, Part 11.
[69] *Carlen v Drury* (1812); 35 ER 61, [63] (Lord Eldon LC) (Chancery); Julia Tang, 'Shareholder Remedies: Demise of the Derivative Claim?' [2012] 1(2) UCL Journal of Law and Jurisprudence 178,180.
[70] Ibid.
[71] Andrew Keay, 'Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006' [2016] 16(1) Journal of Corporate Law Studies 39.
[72] Companies Act 2006, s.994.
[73] Companies Act 2006, s.994.

are being conducted or have been conducted in a manner that is unfairly prejudicial to the interests of members or of some part of its members, or that an actual or planned act or omission is or would be prejudicial.[74]

Neither of these shareholder actions can be a replacement or solution for the lack of accountability regarding directors of LPCs, or indeed in regard to the gap in accountability between directors and other stakeholders. These actions are plagued with practical obstacles such as difficulties for shareholders to establish whether a director has committed a wrong[75], or to obtain permission from a court to enable them to commence derivative proceedings or be able to fund actions. Minority shareholders may find that a petition for relief against unfair prejudice requires a high threshold to be satisfied.[76] In both cases, shareholders instigating the action are likely, for the most part, to be liable for the legal costs of such action, making either type of proceeding an unattractive prospect.

1.4 Research Question

As indicated above, the role of directors is important. In this regard, there has been copious research regarding the accountability of directors in Plcs. Nevertheless, the accountability of directors in LPCs has not been explored. As a result, the following research question is posed:

> How should directors of LPCs in the UK be held accountable for their actions and decisions?

1.4.1 Aim and Sub-Research Questions

This thesis aims to:

i) Define accountability in respect of directors of large private companies, determine which constituent is best-placed to hold directors accountable and whether an alternative framework would better enable the accountability of directors of LPCs.

[74] Companies Act 2006, s.994 (1).
[75] John Lowry and Arad Reisberg, *Pettet's Company Law: Company Law & Corporate Finance* (4th edn, Pearson 2012) 275.
[76] Companies Act 2006, s.995.

To achieve the above aim, the following sub-research questions will require answering:

i) What is the historical basis of accountability and how does that relate to the concept of accountability?

ii) How should accountability for directors of LPCs be defined and why is accountability important for directors of LPCs?

iii) What are the consequences of a lack of (or absence) holding directors of LPCs accountable?

iv) Which constituent, if any, is best-positioned to hold directors of LPCs accountable, and why?

v) What powers exist under UK corporate law and, if any, how do they empower the constituent identified to hold directors of LPCs accountable?

vi) Would an alternative framework, which may require legislative reform, better enable the accountability of directors of LPCs?

1.4.2 Methodology

To address the above issues, the proposed research will be conducted on a qualitative basis, using a doctrinal approach. There will be a particular focus on the examination and analysis of legislation, case law, academic literature, and online sources. For example, the legal databases Westlaw, Lexis Nexis, and Hein Online will be used to review legislation and subsequent commentary. The legal databases will also be used to find appropriate case law and journal articles. Academic journals such as the Journal of Business Law, Journal of Corporate Law Studies, and Law Quarterly Review, among others, will be considered.

Online sources such as websites, forums, and blogs will also be used to ensure the research remains current in the modern corporate environment. However, such online sources will be limited, with a focus on official websites to ensure the information is credible. Alongside this, statistics from organisations such as Companies House, the Department of Business Energy & Industrial Strategy, and the Office of National Statistics (ONS) will also be used and analysed.

1.4.3 Originality

This thesis is original in three distinct ways. Firstly, finding that the accountability narrative is inconsistent, with much of the emphasis placed on Plcs which are already subject to extensive (legal) regulatory controls, it proposes a theory of accountability specifically for directors of LPCs, terming it 'holistic accountability'. In doing so, it furthers the current body of academic literature to ensure the accountability of directors of LPCs.

Secondly, many constituents have been promoted as being able to hold directors of LPCs accountable, but this thesis finds that nearly all of them have shortcomings which make them unable, and in some cases unwilling, to hold directors of LPCs accountable. The body of literature has tended to focus on a specific, or a certain group of, constituents which should hold directors of LPCs accountable, but it has not considered which constituent is best-placed based on its accounting power and for LPCs. This thesis goes further by identifying which constituent would be best placed to hold directors of LPCs accountable.

Thirdly, and finally, the thesis examines the Financial Reporting Council (FRC) and The Pensions Regulator (TPR). This is done to test each organisation's ability to enforce the proposed theory of accountability for directors of LPCs. It finds that several flaws exist which make the unsuitable to enforce holistic accountability. Using the United States Securities Exchange Commission and the Australian Securities & Investments Commission, it ascertains elements which could be extrapolated to further the accountability of directors of LPCs, making this thesis one of the first to evaluate the strength of the UK's corporate law framework and make proposals to strengthen its accounting power in respect of directors of LPCs.

1.4.4 Thesis Outline

The thesis will comprise a total of eight chapters. Chapter 1 consists of a statement of the context in which the research is undertaken, the research questions posed, the aim, objectives, and the methodology employed. Chapter 2 explores the concept of accountability, tracing its historical roots and reviewing accountability in the modern context.

Chapter 3 examines the task of defining accountability for directors of LPCs and the importance of accountability, in the context of corporate governance. In particular, it proposes a new theory of accountability theory named 'Holistic Accountability'. This

involves a two-fold responsibility of honesty and legal obligation, with knowledge, examination, and outcome as the elements. Chapter 4 features three case studies of LPCs, exploring the effect of a lack of accountability and subsequent consequences.

Chapter 5 examines the normative issue of which constituent (if any) should hold directors of LPCs accountable. In assessing this issue, consideration is given to the shareholder primacy theory[77], the stakeholder theory,[78] and the concession theory[79]. The Chapter examines possible constituents against the accountability definition constructed by the thesis. This seeks to ascertain which constituent is likely to be best placed to hold directors of LPCs accountable.

Chapter 6 examines the regulatory framework to ascertain if the current set-up, as far as accountability is concerned, can hold directors of LPCs sufficiently accountable. It does this by examining each entity against the elements of the thesis definition of accountability. The United States Securities Exchange Commission and the Australian Securities and Investments Commission are examined to ascertain if any elements could be extrapolated to further the accountability definition proposed in the thesis for directors of LPCs and to improve accountability in relation to UK companies.

Chapter 7 will address any gaps identified in holding directors of LPCs accountable for their actions and decisions and constructing proposals for strengthening each element of the thesis definition of accountability. The Chapter will also ascertain the type of powers and structure needed to enforce the thesis definition of accountability, and it will also examine the limitations and shortcomings of the proposals submitted in the thesis, as well as putting forward recommendations for future research. Finally, Chapter 8 brings the entire thesis together and serves as the conclusion.

[77] Lynn A. Stout, 'The Toxic Side Effect of Shareholder Primacy' [2013] 161(7) The University of Pennsylvania Law Review 2003; See also, Andrew Keay, 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' [2010] 7(3) European Company and Financial Law Review 370.
[78] R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge University Press 2010) 24.
[79] Stefan J. Padfield, 'Corporate Social Responsibility & Concession Theory' [2015] 6(1) William & Mary Business Law Review 1, 21.

CHAPTER 2
WHAT IS ACCOUNTABILITY

2.0 Introduction

This chapter seeks to explore and define the concept of accountability. In doing so, it seeks to understand the historical basis of accountability and examine how this relates to the concept of accountability. This is important because it is only by understanding the concept of accountability, can it be ascertained what is entailed in holding directors of LPCs accountable. When discussing LPCs, it is important to note the thesis definition as all privately held companies having some, but not all, individuals as both director and shareholder, having a turnover of more than £632,000, not exceedingly more than £5bn and at least 10 workers up to a maximum of 15000 workers.

To meet the above aim, the first part explores the concept of accountability by examining its historical roots, demonstrating the move away from the original conception of accountability. The second part examines the concept of accountability, and what it currently means. The third part considers responsibility, and its definition, given its importance as a prerequisite to accountability occurring. Finally, the fourth part examines the key elements of accountability, such as transparency, standards, justifications, and consequences. In doing so, it acknowledges there is a lack of consensus regarding the elements of accountability, with little evidence to suggest the aforementioned elements have delivered their purposes.[80] As a result, it advocates for a reformulation of accountability, along with its elements, to achieve the objective of holding directors of LPCs accountable.

2.1 What is Accountability?

For many years, but arguably more vociferously in recent times, the term accountability has featured prominently in several areas of society, specifically in the legal sphere. For example, although it is still in the nascent stage as a scholarly research field[81], its mounting popularity means it has appeared and has been associated with elements of

[80] Ferry Laurence and others, 'Accountability and Transparency in English Local Government: Moving from 'Matching Parts' to 'Awkward Couple'?'[2015] 31(3) Financial Accountability & Management 345, 348.
[81] Raymond Plant, (Lord Plant of Highfield), 'A Public Service Ethic and Political Accountability' [2003] 56(4) Parliamentary Affairs 560.

financial accounting[82], and public governance[83] amongst others.[84] Despite accountability being deemed as a 'high currency'[85] and as '…one of those golden concepts that no one can be against'[86], there is still so much that is unknown about this concept which does nothing to define and clarify the nature of accountability.[87] This is possibly because the literature covering accountability has either opted not to explain what the concept of accountability is, or there has been the assumption that those reading such literature will deduce what it is.[88] Perhaps because accountability is difficult to articulate, when one sees it, one knows what it is.[89]

Since the early 2000s, it has become a kind of cure-all solution for the problems associated with managing certain, or complex, environments, or at least the perception of doing so is given.[90] Indeed, a study of the usage of the word accountability showed that from 1990 to 2009, its usage had increased by one thousand percent in newspapers[91], demonstrating its perceived importance. This is even though the features required for accountability to occur are unclear.

2.2 The Historical Origins of Accountability

Before discussing the modern concept of accountability, it is important to consider the historical context of accountability. This is so that the modern concept of accountability can be better understood. The origins of accountability are considered to be Anglo-Norman, stemming back to William I's Norman Conquest of England in 1066 when he required all feudal landowners, lords, and nobles to render a count of what they

[82] Danielle Hanna Rached, 'The Concept(s) of Accountability: Form in Search of Substance' [2016] 29(2) Leiden Journal of International Law 317.
[83] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' [2007] 13(4) European Law Journal 447, 448.
[84] Angela T. Hall and others, 'An accountability account: A review and synthesis of the theoretical and empirical research on felt accountability'[2017] 38(2) Journal of Organizational Behaviour 204.
[85] Keay (n.18) 34.
[86] Amir N. Licht, 'Accountability and corporate governance' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=328401> accessed 9 December 2018.
[87] Hall and others (n.84).
[88] Keay (n.18) 34.
[89] Licht (n.86).
[90] Christine Cooper and Joanne Johnston, 'Vulgate accountability: insights from the field of football' [2012] 25(4) Accounting, Auditing & Accountability Journal 602, 604.
[91] Ibid 603.

possessed.[92] When William I assumed the throne, it was built upon a system that devolved considerable power to local lords.[93]

The lords were the class of individuals who were the powerful elite charged with the task of ensuring the land allocated to them by the monarchy produced the required agricultural stock by the lower classes.[94] By 1085-86, William I started to assert his all-inclusive claim to the English kingdom[95], not for taxation purposes, but rather so that they could be assessed and listed by royal agents in the Doomsday Book.[96] This was of critical importance in the relationship between the ruler (William I) and the ruled (landowners, nobles and lords).[97] It strengthened the monarchy through centralised auditing and semi-annual account-giving[98], especially in respect of expenditure.[99] After all, it was '…born out of a conquering monarch's need to foster a sense of responsibility and obligation among the autonomous agent upon whom his rule depended.'[100] In essence, accountability possesses a historical link to accounting specifically bookkeeping and the recording of financial transactions periodically.[101]

William I, in requiring all landowners, nobles, and lords to provide a count was perhaps the earliest form of curbing their power but this was only in respect of their financial expenditure. This accountability was a mechanism for determining modes of wielding power and of responses to power.[102] Accountability has moved away from this form of accountability used by William I, that is from its financial accounting origins and has now been adapted into the realms of other disciplines. The type of account historically given was of a numerical nature and not a statement. From the shackles of feudal England, accountability has grown to become a concept in its own right, moving on

[92] Bovens (n.83) 450.
[93] Melvin J. Dubnick, 'Situating Accountability: Seeking Salvation for the Core Concept of Modern Governance' (25 February 2007) <http://mjdubnick.dubnick.net/papersrw/2007/situacct.pdf> accessed 6 March 2019.
[94] R. A. Bryer, 'Accounting for the Social Relations of Feudalism' [1994] 24(95) Accounting and Business Research 209, 217.
[95] Dubnick (n.93).
[96] Bovens (n.83) 449.
[97] Roy L. Heidelberg, 'Political Accountability and Spaces of Contestation' [2017] 49(10) Administration & Society 1379, 1380.
[98] Bovens (n.83) 450.
[99] Joy Marie Moncrieff, 'Reconceptualizing Political Accountability' [1998] 19(4) International Political Science Review 387, 389.
[100] Dubnick (n.93).
[101] Bovens (n.83) 449.
[102] Amir N. Licht, 'Accountability and corporate governance' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=328401> accessed 9 December 2018 20.; Keay and Loughrey (n.38) 258.

from the recording of financial transactions to the giving of statements about the conduct of others.

The word accountability was not used by William I, or during his reign. It is worth noting that accountability comes from the Latin word 'computare' which means 'to count'. To be accountable required a person to produce a count of the properties or money left in his care.[103] However, the language spoken by William I was French and so the term meaning 'to count' in French, would be 'compter'. During William I's time, both French and Latin entered the English language.[104] French was the language of the court and the upper classes, and Latin was spoken between members of the clergy and men of learning. Latin words were introduced through writings which made Latin easier to come directly into spoken English.[105] In comparison, the French language presented issues when introducing French words into the English language.[106]

This is perhaps why the word accountability was not used in the English language until the 13th century.[107] Interestingly, Spanish, German, Dutch, Japanese or even French have no precise corresponding word for accountability.[108] German and Spanish do not differentiate linguistically between responsibility and accountability[109]. Aguilera points out that the word accountability does not exist per se in most romance languages such as Italian and Spanish, and nor does it exist in other languages like Hebrew or Russian, with it often translated as responsibility.[110] It is fair to say that accountability, not least linguistically, poses problems as to its meaning. Consequently, accountability has been so far removed from its original purpose that it further problematises the concept of accountability.

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[103] Dario Castiglione, 'Accountability' (*Britannica,* not known) <https://www.britannica.com/topic/accountability> accessed 5 March 2019.
[104] Abu Leila Rita, 'Latin Influence on English Language' (not known) <http://acta.bibl.u-szeged.hu/36402/1/nyelvtudomany_49_50_005-018.pdf> accessed 6 March 2019.
[105] Ibid.
[106] Rita (n.104).
[107] Gary I. Seidman, 'The origins of Accountability: Everything I know about the Sovereign's immunity, I learned from King Henry III' [2004] 49(2) St Louis University Law Journal 393.
[108] Carol Harlow, *Accountability in the European Union* (1 edn, Oxford University Press 2003) 15; Mark Bovens, 'Public Accountability: A framework for the analysis and assessment of accountability arrangements in the public domain; (not known) <www.qub.ac.uk/polproj/reneg/.../Bovens_Public%20Accountability.connex2.doc> accessed 6 March 2019; L. O'Connell, 'Program Accountability as an Emergent Property: The Role of Stakeholders in a Program's Field'(2005) 65(1) Public Administration Review 86.
[109] Ibid.
[110] Ruth V. Aguilera, 'Corporate governance and director accountability: an institutional comparative perspective' [2005] 16(1) British Journal of Management 44.

2.3 The Concept of Accountability

Before delving into the concept of accountability, it is worth outlining some of the accountability terminologies that are referred to within this chapter. In discussing accountability, as also mentioned by many commentators[111], the accountor is defined as the one giving an account and the accountee is defined as the other taking the account respectively. This thesis accepts these terms and definitions. However, accountability as a mechanism used historically for the reporting of financial dealings has become and is still, in the modern context, 'elusive'.[112] Many modern accountability definitions bear testament to this, with there being little agreement on how to define, develop and sustain the modern concept of accountability.[113]

Modern accountability encounters other words such as responsibility, fidelity, and answerability which can stand in for the term.[114] Bovens notes that accountability serves as a '…conceptual umbrella that covers various other distinct concepts, such as transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity.'[115] There may be some truth in this notion as it may stand to resolve multiple objectives[116], but this only creates further ambiguity, demonstrating the synonymic quality as to the meaning of accountability.[117]

The academic literature and definitions reveal little about what the modern notion of accountability seeks to achieve. Accountability has lost some of its former straightforwardness and has come to require constant clarification and increasingly complex categorisation.[118] It has become '…an underexplored concept whose meaning remains evasive, whose boundaries are fuzzy, and whose internal structure

[111] Harald Bergsteiner and Gayle C. Avery, 'A theoretical responsibility and accountability framework for CSR and global responsibility' [2010] 1(1) Journal of Global Responsibility 8; Thomas Schillemans, 'Accountability in the Shadow of Hierarchy: The Horizontal Accountability of Agencies' [2008] 8(2) Public Organization Review 175; Rached (n.82) 317; Keay (n.18).
[112] Amanda Sinclair, 'The chameleon of accountability: forms and discourses' [1995] 20 (2/3) Accounting, Organisations and Society 219.
[113] Thomas P. Holland, 'Board Accountability: Lessons from the Field' [2003] 12(4) Nonprofit management & Leadership 409, 410.
[114] Dubnick (n.93).
[115] Bovens (n.83) 449.
[116] Jamil Salmi, 'The Growing Accountability Agenda: Progress or Mixed Blessing?' [2015] 50 International Higher Education 4.
[117] Dubnick (n.93).
[118] Richard Mulgan, 'Accountability': An ever-expanding concept' [2000] 78(3) Public Administration 555, 555.

is confusing'.[119] What appears to be obvious and achievable, is mired in difficulty with complications around how it should be assessed.[120] Consequently, while accountability may provide a power-limiting toolbox that allows for a variety of permutations, this tells us very little about the tangible configurations, the specific principles and the types of situations it should apply to or the purpose(s) it should fill.[121]

There are many definitions of accountability, concerning which there is no unanimous agreement. For example, accountability has been defined as "the giving and demanding of reasons for conduct"[122], and '…the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.'[123] It is accepted that there is some agreement on what accountability serves to do. Some commentators such as Keay[124], Ireland-Piper[125], and Goodhart[126] agree accountability serves as a mechanism to perhaps scrutinise, potentially reward, or punish and limit arbitrariness and exploitation in the exercise of power[127], bringing it to socially acceptable levels.[128]

There is also majority agreement, if not unanimity, that an element of accountability is 'associated with the process of being called 'to account' to some authority for one's actions'[129] and some commentators mention the notion of giving an account[130] either implicitly or explicitly. For example, Bergsteiner & Avery's accountability definition directly states the providing of an account as 'the accountee is the entity that has to account to an accountee, or multiple accountees, for having caused, instigated or

[119] Andreas Schedler, 'Conceptualizing Accountability', in Schedler and others (eds), *The Self-restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 13.
[120] Raymond Siu Yeung Chan and others, 'Achieving accountability through a triumvirate approach: a way forward?' [2019] 40(1) Company Lawyer 20, 21.
[121] Rached (n.82) 318; Michael Goodhart, 'Democratic Accountability in Global Politics: Norms, not Agents' [2011] 14(1) The Journal of Politics 45.
[122] J. Roberts and R. Scapens, 'Accounting systems and systems of accountability – understanding accounting practices in their organisational contexts' [1985] 10(4) Accounting, Organizations and Society 443.
[123] Edward Rubin, 'The Myth of Accountability and the Anti-Administrative Impulse' [2005] 103(8) Michigan Law Review 2074, 2119.
[124] Keay (n.18).
[125] Danielle Ireland-Piper, *Accountability in Extraterritoriality: A Comparative and International Law Perspective* (Edward Elgar Publishing 2017) 70.
[126] Goodhart (n.121).
[127] Ireland-Piper (n.125).
[128] Keay (n.18).
[129] G. W Jones, 'The search for local accountability', in S Leach (ed), *Strengthening local government in the 1990s* (Longman 1992) 49; Mulgan (n.118).
[130] Tom Willems and Wouter Van Dooren, 'Coming to terms with accountability: Combing different forums and functions in a multidimensional way' (not known) <https://ecpr.eu/filestore/paperproposal/79d2738d-62e7-4991-a1af-6dcd19dccbca.pdf> accessed 10 March 2019.

contributed to some outcome.[131] Hall et al, define accountability as '…the capacity for holding people answerable for their own decisions and actions.'[132] These definitions refer to what is termed as 'accounting for information.'[133] However, the 'account-giver' must present their identity in relation to the settings within which they act.

Accountability is a mechanism that includes subjective and objective evaluations, with a focus on ex post accountability. For example, the accountor, when accounting, would base the account as subjectively as possible focusing on their decisions, and actions being put in a positive light. Whereas, the accountee would be looking at the decision or action taken, objectively, considering the circumstances as a whole. These evaluations are ex post, that is after the event.[134] Kearn's definition of accountability focuses on ex post accountability. He defines accountability as 'holding individuals and organisations responsible for performance measured as objectively as possible'.[135] This suggests that performance must occur or be demonstrated for accountability to take place. Accountability is not as simple as just giving an account, with several elements binding together the notion of accountability. Consequently, the elements that bind accountability, if it is to be defined and achieve its objective, require consideration.

2.4 Responsibility: A Prerequisite to Accountability

It is well-established in the academic literature that responsibility without accountability is illogical. Responsibility must precede accountability, and generally, accountability cannot be recognised until responsibility has been implemented.[136] Indeed, accountability has been described as the 'ultimate responsibility'[137]. Therefore, to understand the concept of accountability, responsibility must also be defined and understood. This is problematic because the term given prominence is also, to some extent, difficult to define.[138]

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[131] Bergsteiner and Avery (n.111).
[132] Ibid.
[133] John Uhr, 'Redesigning Accountability: From Muddles to Maps' [1993] 65(2) The Australian Quarterly 1, 4.
[134] Hall and others (n.84) 206.
[135] Kevin P. Kearns, 'The Strategic Management of Accountability in Nonprofit Organizations: An Analytical Framework' [1994] 54(2) Public Administration Review 185, 186.
[136] Max Scheler, *Formalism in Ethics* (5 edn, Northwestern University Press 1973); Bergsteiner and Avery (n.111).
[137] Dr S. S. Khanka, *Business Ethics and Corporate Social Responsibility* (S Chand & Co 2014) 112.
[138] Melvin Dubnick, 'Accountability and the promise of performance: In Search of the Mechanisms' [2005] 28(3) Public Performance & Management Review 376, 380.

The wide variety of definitions and interpretations the term responsibility can represent can change. For example, it may be context-dependent, with responsibility relating to the type of responsibility in play, ranging from legal, ethical, moral or job function.[139] While responsibility can be given, received, presumed, or even shared[140], legal frameworks are in constant change and virtues are never going to be homogenous. Such frameworks are likely to reflect the period in which it is used. Similarly, job functions and/or job descriptions, are also likely to change periodically, with levels of responsibility changing over time.

An individual may bring about increased responsibility, a decrease in responsibility, or a change of responsibility from legal responsibility to a social responsibility which are both distinct. Schlenker states that there are six distinct types of responsibility, namely obligation, causality, mental state, social roles, mental or physical capacity, and answerability.[141] The types of responsibility identified by Schlenker are too verbose and semantically confusing, at least in respect of accountability, making them unworkable without further detail.

Some commentators such as Bergsteiner and Avery state, regarding accountability, that the appropriate type of responsibility is moral, judged and felt responsibility.[142] They define felt responsibility as '…the extent to which individuals feel capable of and compelled to take useful action toward a desired result.'[143] Dose and Klimonski define it as '…a state in which an individual perceives an obligation for a situation or event referring to the exercise of responsibility in regards to future actions'.[144] Both definitions describe responsibility as one that is exercised in respect of future actions.

Other commentators, such as Cummings and Anton, define felt responsibility in such a way that it can be applied either ex ante or ex post adding further confusion.[145] Sinclair defines accountability as a relationship in which people are required to explain and take responsibility for their actions: "the giving and demanding of reasons for

[139] Bergsteiner and Avery (n.111).
[140] Khanka (n.137) 113.
[141] B. Schlenker, 'Personal responsibility: applications of the triangle model' Research in Organizational Behavior [1997] 19 241, 242.
[142] Bergsteiner and Avery (n.111).
[143] Thomas S Bateman and Kieran O'Connor, 'Felt responsibility and climate engagement: Distinguishing adaptation from mitigation' [2016] 41Global Environmental Change 206, 207.
[144] Jennifer J. Dose and Richard J. Klimoski, 'Doing the Right Thing in the Workplace: Responsibility in the Face of Accountability' [1995] 8(1) Employee Responsibilities and Rights Journal 35, 36.
[145] Ibid.

conduct".[146] This definition does not mention responsibility as a prerequisite, but as a requirement of accountability taking place. It fails to define what kind of responsibility an individual should take for their actions, whether morally, legally, or socially.

In any case, the definitions regarding responsibility only demonstrate that it has '…a nebulous quality'[147], making it impossible to produce a clear and generally acceptable list of criteria for responsibility regarding accountability.[148] As a result, defining responsibility is as difficult as defining accountability.

2.5 Accountability: The Key Elements

Just as defining accountability and responsibility is problematic, so is attempting to understand the elements that make up accountability. Whilst it is clear that several elements constitute accountability, what they are, is a matter for discussion. Davies states that the elements of accountability are: setting standards, obtaining an account, and judging of the account and consequences.[149] Whereas Wood, considering it in regards to leader accountability, states the elements are: a willing acceptance of the responsibilities inherent in the leadership position to serve the well-being of the organization, implicit or explicit expectation that the leader will be publicly linked to his/her actions, words, or reactions, expectation that the leader may be called on to explain his or her beliefs, decisions, commitments, or actions to constituents.[150] Although Wood does not specifically include any element of consequence, the deconstruction of the elements comes with the disclaimer that people who do not provide an acceptable justification for their actions will suffer consequences.[151]

Grant and Keohane specifically refer to sanctions, including those relevant to their explanation of accountability, as 'standards, information and sanction'[152]. Holland describes it as '…identifying to whom accountability is due, understanding and reconciling expectations that may be both legitimate and divergent, setting reasonable

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[146] Amanda Sinclair, 'The Chameleon of Accountability: Forms and Discourses' [1995] 20 2/3 Accounting, Organizations and Society 219, 221.
[147] Schlenker (n.141).
[148] Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organizations* (Cambridge University Press 1998) 28.
[149] Anne Davies, *Accountability: A public law analysis of governance by contract* (Oxford University Press, 2001) 81.
[150] J. A. Wood, Jr and Bruce E. Winston, 'Toward a New Understanding of Leader Accountability: Defining a Critical Construct' [2005] 11(3) Journal of Leadership & Organizational Studies 84, 85.
[151] Ibid.
[152] Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics ' [2005] 99(1) American Political Science Review 29.

standards, providing accessible information by which to assess compliance, and modelling or demonstrating integrity in decisions and actions.' [153] Keay also identifies elements such as disclosure, justification, questioning, assessment, and consequences.[154] Park and Kramarz refer to the elements as procedures, identifying elements such as transparency, justification, reasoning, monitoring and evaluation.[155]

The problem with these elements is that they are very general and focus on accountability more broadly. For accountability to be contextualised to target a specific objective, a more bespoke approach to the elements of accountability is needed. That being said, for this thesis, transparency, standards, justification, and sanctions will be discussed as the elements of accountability. The discussion of these elements is only a result of the fact they are common denominators, in various guises, within the accountability literature.

2.5.1 Transparency

Transparency is seen as '…the essence of accountability'[156]. Generally, it means to view the conduct of someone that makes decisions or rules and other data visible from the outside.[157] It has been linked to 'openness' or a willingness to provide all the information required as a way of answering for one's conduct.[158] It is related to the disclosure or propagation of information, preventing secrecy, but transparency may fail to ensure effective communication with others.[159] Therefore, transparency and accountability must be distinguished from one another, as one does not automatically produce the other.[160]

This element requires the openness of information, in an account-giving scenario, which may prove difficult. Transparency has to be balanced and not overly excessive to the point that it may be deemed as surveillance.[161] For example, transparency in this

[153] Holland (n.113).
[154] Keay (n.18) 36-53.
[155] Teresa Kramarz and Susan Park, 'Accountability in Global Environmental Governance: A Meaningful Tool for Action?' [2000] 16(2) Global Environmental Politics 1, 7.
[156] Wayne Cameron and Victorian Auditor-General, 'Public accountability: Effectiveness, equity, ethics' [2004] 63(4) Australian Journal of Public Administration 59,61.
[157] Christopher Hood, 'Accountability and Transparency: Siamese Twins, Matching Parts, Awkward Couple?' [2010] 33(5) West European Politics 989
[158] Ibid 993-994.
[159] Jesse Dillard and Eija Vinnari, 'Critical dialogical accountability: From accounting-based accountability to accountability-based accounting'[2018] Critical Perspectives on Accounting 1, 16.
[160] Jonathan Fox, 'The uncertain relationship between transparency and accountability' [2007] 17(4-5) Development in Practice 663, 668.
[161] Ibid 663.

regard would require '...avoiding the obfuscation strategy of accountability avoidance'[162], with Hood's view being that effective accountability and transparency do not always run smoothly together.[163] This can be attributable to information costs and subjectivity. For transparency to be considered key to the accountability process, there must be access to, or the provision of, complete information.

Many would agree that the summoning of a senior civil servant to a Select Committee of Parliament can be seen as an accounting process. For that accounting process to be successful, the Committee must have complete information. The reliance on obtaining full information from the accountor means that they may hold back certain pieces of information, only revealing pieces of information which may put them in a certain light. This is because the Select Committee may view certain things in isolation, and this is where it is up to the accountor to provide those missing parts. There may be reliance on reports, risk assessments or oral statements. But they are only likely to give a glimpse of the whole story.

In the absence of the Select Committee on the frontline, commissioning daily reports, and regularly monitoring individuals; reliance on an accountor's perspective of the whole story will not provide everything that is needed to achieve effective accountability. There has to be a willingness from the accountor to provide full information. Accountors will have the power to reveal information in real-time, where something can be done, or after the event where nothing can be done, to offset any (potential) damage.

Statistics and written evidence cannot be contradicted and can be, largely dependent on their author, of an objective nature. However, a related issue to such information costs is the element of subjectivity. In some instances, there may be some contradiction with other statistics and written evidence refuting the prior written evidence. It is assumed that caution and a balanced judgment would be exercised in respect of believing the most credible source. For example, academic literature over news articles, or parliamentary reports over internet blogs. How oral statements are presented, can be said to be the accountor's 'take' on things and is regarded as subjective.[164]

This muddies the waters in the accounting process because the objective element cannot be above the subjective element. This is particularly, when the objective

[162] Wood and Winston (n.150) 89.
[163] Hood (n.154) 992.
[164] Keay (n.18) 44-45.

element, in the form of reports, and statistics amongst others, is only likely to provide a part of the wider picture. The rest comes from the subjective element - the accountor – and balancing two versions of the same story will prove difficult. While both narratives must be taken in equal balance, it is difficult with full transparency to see how this could work in practice. This is perhaps why Hood questions '…the value of transparency as an all-purpose recipe for improving the quality of governance and accountability...'.[165]

As Dando and Swift state, greater transparency is not enough to build trust and does not equate to more effective accountability.[166] It is, however, accepted that transparency, whether explicit or implicit, is still required but needs to be supplemented by or amalgamated with other elements.

2.5.2 Standards

The second element comprises standards. These may be internally, or externally, set and against which the accountor will need to explain or justify their conduct.[167] This, therefore, begs the question as to whether accountability can be generalised across different contexts, given that standards can be set externally. Standards will be an explicit criterion against which individuals will account. They are unlikely to be universal, as they will depend on factors such as the role and level of responsibility. For example, an employee will account for their annual performance using the standards compiled by the department of human resources. This will be based on the objectives, delivery, and behaviours identified for their particular role. Accountability, an independent organisation that promotes accountability, states in its AA1000 series, that accountability is defined as 'to explain or justify the acts, omissions, risks, and dependencies for which an organization is responsible to people with a legitimate interest'.[168]

Keay states that this implies some form of relationship between the accountor and the accountee[169], and rightly so because accountability is seen as a social 'mechanism'.[170] Messner states that the 'motive for being accountable is never simple, unadorned self-interest. It entails a constitutive relation to others beyond simple contractual

[165] Hood (n.157) 992.
[166] Nicole Dando and Tracey Swift, 'Transparency and Assurance Minding the Credibility Gap' [2003] 44(2-3) Journal of Business Ethics 195, 195.
[167] Keay (n.18) 45.
[168] Francesco Perrini, Developing Corporate Social Responsibility (Edward Elgar Publishing 2006) 100.
[169] Keay (n.18) 45.
[170] Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' [2010] 33(5) West European Politics 946, 948.

relations'[171] This suggests that the basic foundation rests upon contractual relations, perhaps a contract of employment, or a director's service agreement, with the listed rights and responsibilities fleshing out the contractual relationship.

Standards set the basis of what is expected in respect of performance or behaviour. While these are commendable considerations, standards are evidence of the fact they emerge as developing needs and fluctuating circumstances of human conduct. But the nature of human conduct is often fickle, inconsistent, ambiguous, and impulsive.[172] Standards will prescribe a certain set of values or norms, acting as a filtering process, allowing some people to pass and some to fail.

For example, all employees, doing the same work, will generally have the same standards to meet. But depending on how they answer during the accounting process, could mean they are subject to different outcomes. This is particularly likely where individuals have a long-standing relationship with the accountee, are trusted or have prior performance. Literature shows that accountability under these subtexts allows for individuals to be subject to lower levels of accountability, creating the opportunity to engage in dysfunctional or counterproductive behaviours.[173]

There is also the potential for the accountor and accountee, due to their personal/professional relationship, to endorse standards, but implicitly strike a deal directly with each other. [174] This can be demonstrated when an employee is on good terms with their manager. But despite doing little, or nothing at all, because of that very relationship, may get a good performance rating or be in line for a performance bonus. Often, standards will provide subjectivity with any effect likely to be limited in respect of capturing the accountor's duties.[175] As a result, standards as an element of accountability are likely to be inadequate.

2.5.3 Justifications

The third element – justifications – has been described as '…answerability in the form of justification'.[176] It is important in helping to ensure accountability is not reduced

[171] Keay (n.18) 45.
[172] Thomas A. Schwandt, 'Quality, Standards and Accountability: An Uneasy Alliance' [2012] 3(2) Education Enquiry 217,218.
[173] Hall and others (n.84) 208.
[174] Jennifer Rubenstein, 'Accountability in an Unequal World' [2007] 69(3) The Journal of Politics 616, 618.
[175] Fox (n.160) 663.
[176] Mark E. Warren, 'Accountability and Democracy' in Bovens and others (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014) Chapter 4.

solely to situations in isolation, such as decision importance or the level of personal involvement.[177] For example, Hall et al state that it means that '…one will be called upon to answer for the beliefs or actions of others with contingent outcomes based on the sufficiency of the justification'.[178] Xiao defines accountability as the '…implicit or explicit expectations that one may have to provide reasons for his or her beliefs, feelings or actions to others.'[179] Other definitions substitute justification for an explanation, such as '…a relationship in which people are required to explain and take responsibility for their actions…[180] In essence, it is for the accountor to ensure they can provide justifications, relating to decisions or actions taken when questioned. However, there are two problems to obtaining justifications: the first is the actual obtaining of a justification. The second is ascertaining whether that justification is wholly accurate when given on an ex post basis.

Justifications need to be obtained when considering the integrity of a decision or action. However, there is a tendency for this stage of accountability to be taken for granted.[181] An accountor will not give justifications for every decision or action taken. This will be done in a forum or in a formal setting, where the sole objective is to hold the accountor accountable. The accountor needs to feel compelled to justify their actions, and they must do so in a manner that enables the accountee to pass judgment. Justifications that are informal, voluntary, or only provide background information, do not amount to justifications.[182] Accountors may also provide excuses framed as justifications, admitting that a decision and/or action was wrong, but then seek to absolve themselves of any responsibility.[183] Therefore, it is problematic for the accountee to extract a valid justification, as an excuse can also be termed, depending on the situation and context, as a justification.

Where a justification has been provided without full transparency, it is difficult for the accountee to know when the justification is accurate. The benefit here for the accountor is that they can elude accountability or influence their explanation. If an accountor is held accountable for a decision they intend to make, they will often resort to identifying

[177] Ibid.
[178] Hall and others (n.84) 208.
[179] Erte Xiao, 'Justification and conformity' [2017] 136 Journal of Economic Behavior and Organization 15, 16.
[180] Sinclair (n.146).
[181] Madalina Busuoic and Martin Lodge, ' Reputation and Accountability Relationships: Managing Accountability Expectations through Reputation'[2016] 77(1) Public Administration Review 91, 92.
[182] Tom Willems and Wouter Van Dooren, 'Coming to Terms with Accountability' [2012] 14(7) Public Management Review 1011, 1017.
[183] Keay (n.18) 45-46.

and '…utilizing the most easily defensible options…'[184]. If they are held accountable for a decision they have made, accountees are more likely to engage in '…retrospective rationality…'[185]; that is defensive bolstering, attempting to use justifications to give a good reason for their behaviour, even if that behaviour is not satisfactory.[186]

Accountors may make verbose statements, which could be treated as justifications, but they have nothing of substance in respect of explaining and/or addressing their conduct. In this regard, the justification element may only allow for a back-and-forth dialogue, amounting to 'an ongoing process of account-giving and account-taking.'[187] This does nothing to hold accountors accountable because the constant giving and taking of accounts do not provide a clear answer as to whether the justification provided was correct, incorrect or if further action is warranted. While further questioning by the accountee may provide a useful indicator of the accuracy of a justification, it is more likely that questions will lead to more questions and/or the accountor may try to misdirect the accountee through non-answers.

2.5.4 Consequences

The final and perhaps most important element of accountability is the imposition of consequences. Consequences are important because it is effectively culminating the accountability process. If the accountability process has been conducted properly, the right consequences should inevitably follow. The accountability process's purpose, other than holding individuals and entities accountable, is to impose a consequence. Grant[188], Keohane[189] and Philips[190], succinctly state that accountability functions to expose and sanction two sorts of abuses: the unauthorised or illegitimate exercise of power and decisions that are judged by accountability holders to be unwise or unjust.[191] Further, one person, A, is accountable to another, B, if two conditions are met. The first is an understanding that A is obliged to act in some way on behalf of B. The second is B is empowered by some formal institutional or perhaps informal rules to sanction or reward A for her activities or performance in this capacity.[192]

[184] Hall and others (n.84) 208.
[185] Ibid.
[186] Hall and others (n.84) 208.
[187] Rached (n.82) 323.
[188] Grant and Keohane (n.152) 29.
[189] Ibid.
[190] Mark Philp, 'Delimiting Democratic Accountability' [2009] 57(0) Political Studies 28, 29.
[191] Grant and Keohane (n.152) 29.
[192] Philp (n.190).

The word consequence is defined by the Oxford Dictionary as '[a] result or effect, typically one that is unwelcome or unpleasant.'[193] Many commentators have included consequences as a significant element of accountability, with it being framed in many definitions. However, the problem is that consequences are usually ex post, and it is unclear whether the imposition of consequences aids the accountability process. This can only be determined by the definition of accountability, which will be discussed later. Some commentators view consequences as a deterrent to prevent and discourage misconduct by regulating the accountor's behaviour[194] and by respecting the independence of the accountee[195] to impose consequences. This is perhaps by ensuring that the accountor is aware of the adverse nature of actions that may or will be taken against them, should they make a detrimental decision or undertake an adverse action.

It is fair to say that 'accountability is a logically complex construct that interacts with characteristics of the decision maker and properties of the task environment to produce an array of effects—only some of which are beneficial'[196]. The benefit of consequences within the accountability process can only exist when there is a whole range of possible consequences at the disposal of the accountor.[197] Some commentators, such as Heidelberg, state that the goal of accountability is to construct, by completely controlling situations, a perfect system of accountability so that consequences are irrelevant.[198] Although this would prove impossible as it may potentially stifle creativity, innovation, general free will, and choice.

It is also important to note that, some commentators state that consequences do not necessarily have to have a negative effect, because'…situations can be classified as `good' or `bad'. When it is the former, then credit and possible reward can follow, and with the latter, blame and possible punishment can result'.[199] However, for this thesis, the term consequence will be looked at as negative. This is because it usually has a negative connotation, and it is argued the term reward usually connotes a positive result.

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[193] Oxford Dictionary, 'Consequence' (*Oxford Dictionary,* not known) <https://en.oxforddictionaries.com/definition/consequence> accessed 13 February 2019.
[194] John Kaler, 'Responsibility, Accountability and Governance' [2002] 11(4) Business Ethics: A European Review 327, 328.
[195] Dubnick (n.93).
[196] Neal P. Mero and others, 'A Field Study of the Antecedents and Performance Consequences of Perceived Accountability' [2014] 40(6) Journal of Management 1627, 1628.
[197] Willems and Dooren (n.182) 1016.
[198] Heidelberg (n.97) 1384.
[199] Kaler (n.194).

Accountees may impose a consequence in two scenarios. The first is where an accountor is appraised based on their decision with the ambiguity of the reasoning provided not yet resolved. The second is where the accountor may be appraised after the ambiguity has been resolved. The result of which is either positive or negative. Accountors may make different decisions if they know they are being held accountable to accountees based on the outcome of their decision, as opposed to being held accountable based on their decision only.[200] Research conducted, in the context of investment strategies, showed that ex post accountability manifested the accountor's interests were not in line with the accountee's, but ex ante accountability led to more careful and constant investment strategies which were more aligned with that of the accountee.[201] As a result, where ex post accountability takes place, it can be of little value in ensuring the accountability of directors, in so far as the implementation of consequences is concerned.

As aforementioned, the four elements discussed are by no means the only elements which have been regarded as forming part of accountability. It is submitted that all four elements will not necessarily form and enforce accountability homogenously. Indeed, there are even uncertainties with each of the elements which require clarification, making them unsuitable in the context of accountability of directors of LPCs. Therefore, to define accountability for directors of LPCs, a comprehensive re-think of what elements are required is needed.

2.6 Accountability for Directors of LPCs: A New Accountability Theory

It is submitted that a wholesale re-thinking of defining accountability for directors of LPCs accountable is needed. As a result, this thesis will propose a new theory of accountability for directors of companies titled 'Holistic Accountability'. The theory will be explored in detail later, but for now, it is worth noting that holistic accountability is tailored toward directors of LPCs. It consists of a two-fold test of honesty and legal obligation. Once the two-fold responsibility is established upon directors of LPCs, the elements of holistic accountability take place. The elements are knowledge, examination, and outcome.

Knowledge involves the knowledge possessed by directors, and examination involves a higher level of analysis when looking at the decisions and actions of directors.

[200] Monique M. H. Pollmann and others, 'Risk taking by agents: The role of ex-ante and ex-post accountability'[2014] 123(3) Economic Letters 387 – 390.
[201] Ibid.

Outcome is the end-stage of holistic accountability, whereby directors can be subject to a wide range of actions or decisions such as endorsement, acceptance, reward and even consequences.

2.7 Summary

This chapter has explored the historical basis of accountability and how this relates to the concept of accountability. It has been found that the historical basis of accountability, initiated by William I's Norman Conquest of England in 1066, was simply a requirement for all feudal landowners, lords, and nobles to render a count of what they possessed.[202] This type of account was of a numerical nature and not a statement of action. The concept of accountability has moved on from the recording of financial transactions to the giving of statements about the conduct of others.

The concept of accountability has gathered numerous definitions, but there is little agreement on how to define, develop and sustain the modern concept of accountability.[203] Indeed, many accountability definitions are generalised making it difficult to identify a suitable accountability definition for directors of LPCs. What is clear is that accountability is 'associated with the process of being called 'to account' to some authority for one's actions'[204] and commentators[205] mention the notion of giving an account.[206] In addition to giving an account, several elements bind the notion of accountability together. Within the literature, several elements have been espoused as making up accountability, with the most common being transparency, standards, justification, and sanctions and each was explored with shortcomings identified.

Consequently, these accountability elements have not delivered their objectives[207] collectively to ensure sufficient accountability. As a result, given this ambiguity and uncertainty around the concept of accountability, it is submitted, a new definition of accountability is proposed along with its elements, to hold directors of LPCs accountable. This definition/theory of accountability is termed, 'Holistic Accountability'. The next chapter will now look to detail and explore holistic accountability, as the definition of accountability for directors of LPCs.

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[202] Bovens (n.83) 450.
[203] Holland (n.113).
[204] Jones (n.129) 49; Mulgan (n.118).
[205] Ibid; Willems and Dooren (n.130); Bergsteiner and Avery (n.111); Uhr (n.133).
[206] Ibid.
[207] Laurence & others (n.80).

CHAPTER 3
DEFINING ACCOUNTABILITY FOR DIRECTORS OF LARGE PRIVATE COMPANIES

3.0 Introduction

This chapter defines accountability for directors of large private companies (LPCs). It also provides the rationale for why accountability is important for directors of LPCs. As previously outlined, the conflicting accountability elements and definitions put forward by the academic literature does nothing to clarify accountability for directors of LPCs. The difficulty in properly understanding what accountability is unsustainable. This makes it difficult to apply accountability to specific individuals or groups. The generalisation of accountability definitions means to define accountability, in the context of directors of LPCs, we need to start at the beginning.

To meet the above aim, the first part of this chapter defines accountability as far as directors are concerned. The first part provides an overview of 'Holistic Accountability' as the proposed definition of accountability for directors of LPCs. The second part explores, in detail, holistic accountability's two-fold responsibility of honesty and legal obligation, and its elements of knowledge, examination and outcome.

The second part discusses the importance of accountability, in the context of the corporate governance, of LPCs. It does this by examining some of the reasons why accountability is necessary. The reasons articulated are those with which nearly all commentators are in unanimous agreement. The first is the concept of agency[208] with Keay[209], Diego[210], Styhre[211], Choudhury[212], Moore[213] and Loughrey[214], putting it at the forefront of any discussion regarding accountability within corporate governance. The second is the makeup of the board[215]. The third is the vulnerability of shareholders, a

[208] Keay (n.18) 73.
[209] Michael C. Jensen and William H. Meckling, 'Theory of the firm: Managerial Behavior, agency costs and ownership structure ' [1976] 3 Journal of Financial Economics 305.
[210] Diego Asensio-López and others, 'Corporate governance and innovation: a theoretical review' [2018] 28(3) European Journal of Management and Business Economics 266, 267.
[211] Alexander Styhre, 'Corporate governance varieties Locke and Hegel's philosophy of right and the roots of corporate governance traditions' [2018] 26(3) International Journal of Organizational Analysis 582, 589.
[212] Barnali Choudhury and Petrin Martin, 'Corporate governance that 'works for everyone': promoting public policies through corporate governance mechanisms' [2018] 18(2) Journal of Corporate Law Studies 381.
[213] Marc Moore, 'Whispering Sweet Nothings": The Limitations of Informal Conformance in UK Corporate Governance ' [2009] 9(1) Journal of Corporate Law Studies 95, 98.
[214] Joan Loughrey, 'Breaching the Accountability Firewall: Market Norms and the Reasonable Director ' [2014] 37(3) Seattle University Law Review 989, 996.
[215] Keay (n.18) 83.

reason espoused by Keay[216], Blair and Stout[217]. The fourth is the legitimisation of power, advocated by Moore[218], Borowiak[219] and Keay[220]. The fifth, and final reason, is the effectiveness of the board advocated by Hurt[221] and Keay[222]. Finally, the third part of the chapter concludes, by summarising 'holistic accountability' for directors of LPCs and its place within corporate governance.

3.1 Holistic Accountability: An Overview

Before holistic accountability is discussed in detail, it is worth outlining and briefly explaining its key components. Holistic accountability is accountability tailored to the directors of LPCs. As previously mentioned, an LPC for the purposes of this thesis is defined as companies having some, but not all, individuals as both a director and shareholder, with a turnover of more than £632,000 but not exceeding more than £5bn, with at least 10 workers up to a maximum of 15,000 workers. It puts forward a two-fold test of honesty and legal obligation, because it submits that simply being honest is not enough, for a director to be subject to holistic accountability, there must be a legal obligation upon that director. The thesis defines honesty as:

> 'the obligation to be wholly truthful and forthcoming to the company in all its matters whether directly or indirectly, not omitting anything which would bring that truthfulness into question.'

Once the two-fold responsibility is established upon directors of LPCs, the elements of holistic accountability take place. The elements are knowledge, examination, and outcome. Knowledge involves the knowledge possessed by directors, examination involves a higher level of analysis when looking at the decisions and actions of directors. Outcome is the end-stage of holistic accountability, whereby directors can be subject to a wide range of actions or decisions such as endorsement, acceptance, reward and even consequences. Having provided an overview of holistic

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[216] Ibid 91.
[217] Margaret M. Blair and Lynn A. Stout, 'A Team Production Theory of Corporate Law' [1999] 85(2) Virginia Law Review 247, 314.
[218] Marc T. Moore, *Corporate Governance in the Shadow of the State* (Hart Publishing 2013) 215.
[219] Craig T. Borowiak, 'Accountability Debates: The Federalists, the Anti-Federalists, and Democratic Deficits' [2007] 69(4) Journal of Politics 998.
[220] Keay (n.18) 95.
[221] A. Christine Hurt, 'The Duty to Manage Risk' [2014] <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1159&context=faculty_scholarship> accessed 19 December 2021.
[222] Keay (n.18) 103.

accountability, the discussion will now turn to consider the two-fold responsibility and each element in detail.

3.2 The Two-Fold Test: Responsibility

Previous literature has taken the position that accountability cannot be recognised until responsibility has been implemented.[223] This notion is accepted by this thesis. However, this then poses the question: what type of responsibility must directors of LPCs be subject to, to be held accountable? This thesis contends that directors of LPCs must be subject to a two-fold responsibility, to be held accountable. This departs from the view that accountability is needed simply because directors of LPCs hold significant power, and therefore accountability can limit arbitrariness and exploitation in the exercise of that power[224]. The reason for this is that holding power forms part of the reason why accountability is needed. There has to be something else that forms part of responsibility which, when brought together, allows for accountability to take place. The two-fold responsibility compromises two elements: honesty and legal obligation.

3.3 Honesty

The concept of honesty is arguably something that has been alluded to within some of the previous literature. But this has not been carved out or explored. For example, Sinclair notes that Australian literature on accountability involves honesty and openness.[225] Perhaps Sinclair is referring to honesty in general terms. As far as the English meaning is concerned regarding honesty, it involves being truthful and, its opposite dishonesty involves lying or withholding information. It is submitted that lying can be explicit by telling a lie, or implicit by refraining to disclose information and therefore withholding something. It was discussed, earlier in the thesis, that openness is a willingness to provide all the information required as a way of answering for one's conduct.[226]

In this regard, when taken together, it may mean to be truthful and provide information that answers for one's conduct. Day and Klein state that it '…involves the generation of a social consensus about what counts as good conduct and acceptable performance'[227], they also use this as a definition of accountability. It is fair to say that

[223] Scheler (n.136).
[224] Ireland-Piper (n.125); Bergsteiner and Avery (n.111).
[225] Sinclair (n.112) 221.
[226] Hood (n.157) 993-994.
[227] P. Day and R. Klein, *Accountabilities Five Public Services* (Tavistock 1987) 64.

'good conduct' has multiple facets, but it is generally easily recognisable. For example, if you abide by the law, that itself is a form of good conduct. Whereas acceptable performance is problematic because it is subjective depending on the individual/accountee judging it.

The problem of ascertaining whether a director of an LPC is dishonest or not is contentious. This is because honesty and its counterpart, dishonesty, are complex elements, from a legalistic view. The purpose now is to ascertain whether dishonesty can be identified. Only when dishonesty can be identified, can honesty be ascertained. *R v Ghosh*[228], in criminal cases, sets out the test for dishonesty. It concerned a locum surgeon who had claimed fees for work carried out by others and/or had been carried out by the National Health Service. The judge directed the jury to apply their standards of honesty as to whether he was dishonest under the Theft Act 1968.[229]

On appeal, to the Court of Appeal, the Court reformulated the test for dishonesty. It stated that it was not to be determined wholly subjectively by the jury applying their standards of honesty because s.1(1) of the Theft Act 1968 acting dishonestly described not a course of conduct but a state of mind. This could not be established independently of the knowledge and belief of the accused. As a result, the Court of Appeal stated the correct test was 1) whether the accused's actions had been dishonest according to the ordinary standards of reasonable and honest people, and 2) if so, whether the accused himself had realised that his actions were, according to those standards, dishonest. This is referred to as the two-limb test. A sincere belief by the defendant that he was morally justified in acting as he did, was no defence if he knew that ordinary people would consider such conduct to be dishonest.[230]

While dishonesty within the criminal law sphere has focused on the objective and subjective test, the same cannot be said in the corporate context. In this area, cases of dishonesty have often been related to trusts law, in particular dishonest assistance, knowing receipt, and breach of fiduciary duty. For example, in *Royal Brunei Airlines Sdn Bhd v Tan*,[231] a Privy Council case regarding dishonest assistance, Lord Nicholls stated that irrespective of the criminal law or other contexts concerning dishonesty, the subjective standard applied to cases of dishonesty. This was because honesty has a subjective element as it is a description of the type of conduct assessed in light of what the individual knew at the time, distinct from what a reasonable individual would have

[228] [1982] EWCA Crim 2.
[229] Theft Act 1968.
[230] *Ghosh* (n.228).
[231] [1995] 2 AC 378 [74] (PC).

known or appreciated.[232] Indeed while labels can be attached to certain types of conduct[233], the test for dishonesty was held to be objective because the trustee's state of mind was immaterial if the assistant is himself dishonest.[234]

It was accepted that honesty has an element of subjectivity, but the subjective features of honesty did not mean that individuals were free to set their own standards of honesty in specific situations. The standard of honest conduct was not subjective, because honesty is not a discretionary measure with higher or lower values affording to the moral standards of each individual. If a person knowingly appropriates another's property, there would be a finding of dishonesty even if they see nothing wrong in that behaviour.[235]

In *Twinsectra v Yardley*[236] a case concerning breach of trust, it was held that the test for dishonesty:

> 'requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.'[237]

The House of Lords interpreted the *Royal Brunei*[238] judgment as having established a dual subjective/objective test with Lord Hutton referring to it as the 'combined test'.[239] This was because the principles laid down by *Royal Brunei*[240] require 'more than knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, a consciousness that one is transgressing ordinary standards of honest behaviour'[241]. In essence, *Twinsectra* can be distinguished from *Royal Brunei* because it rejected a purely subjective standard (a person's own

[232] Ibid.
[233] *Royal Tan* (n.231) [390].
[234] Ibid.
[235] *Royal Tan* (n.231) [389].
[236] *Twinsectra v Yardley* [2002] UKHL 12.
[237] Ibid [36] (Hutton L).
[238] *Royal Tan* (n.231).
[239] *Twinsectra* (n.236) [20] (Hoffmann L).
[240] *Royal Tan* (n.231).
[241] *Twinsectra* (n.236) [20]; Patricia Shine, 'Dishonesty in civil commercial claims: a state of mind or a course of conduct?' [2012] 1 Journal of Business Law 29, 32.

standard of honesty) as well as a purely objective standard (dishonest conduct by the ordinary standards of honest people).[242]

In *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd*[243], another Privy Council case concerning dishonest assistance confirmed that the proper test was:

> '…whether a person was consciously dishonest in providing assistance required him to have knowledge of the elements of the transaction which rendered his participation contrary to ordinary standards of honest behaviour, but did not require him to have reflections on what those normally acceptable standards were'[244].

In *Abou-Rahmah v Abacha*[245], again involving dishonest assistance, the Court of Appeal clarified the test of dishonesty as:

> 'the defendant had the requisite knowledge, and that the defendant had acted in a way that was contrary to normally acceptable standards of honest conduct, thereby satisfying an objective test of dishonesty. It was not a requirement of the standard of dishonesty that the defendant should be conscious of his wrongdoing.'[246]

This may be something 'capable of embracing a failure to act in a commercially acceptable way" or "sharp practice of a kind that falls short of outright dishonesty" apart from "dishonesty itself".[247] In any case, it was seen as clarifying the law on the test for dishonesty, by reading *Royal Brunei*[248] and *Twinsectra*[249] together with *Barlow Clowes*[250] giving guidance as to the proper interpretation of English law.[251]

The Lordships clarified that while a dishonest state of mind is a subjective mental state, the standard by which the law determines dishonesty is objective. If only standards

[242] Mark Pawlowski, 'The legal pendulum swings back' [2007] <https://gala.gre.ac.uk/id/eprint/1430/1/Pawlowski_TELTJ83_p20-22_(2).pdf> accessed 4 December 2022.
[243] [2005] UKPC 37.
[244] Ibid.
[245] [2006] EWCA Civ 1492.
[246] Ibid.
[247] *Abou-Rahmah* (n.245) [42]
[248] *Royal Tan* (n.231).
[249] *Twinsectra* (n.236).
[250] *Barlow Clowes* (n.243).
[251] *Abou-Rahmah* (n.245) [68].

deem an individual's mental state as dishonest, it is irrelevant as to standards of the individual judges.[252]

In *Starglade Properties Ltd v Nash*[253], the Court Appeal stated the:

> '…relevant standard was the ordinary standard of honest behaviour. Just as the subjective understanding of the person concerned as to whether his conduct is dishonest was irrelevant, so also it is it irrelevant that there might be a body of opinion that regarded the ordinary standard of honest behaviour as being set too high. Ultimately, it was for the court to determine what that standard was and to apply it to the facts of the case.'[254]

In the criminal context, *R v Ghosh*[255] had clarified and settled the test for dishonesty in criminal cases using the two-limb test of both a subjective and objective nature respectively. In relation to civil proceedings, things are less clear with *Royal Brunei*[256] stating a purely objective approach to dishonesty. *Twinsectra*[257] rejected this, favouring a dual subjective/objective test.[258] *Barlow Clowes*[259] favoured an objective test discarding subjective elements of the individual's state of mind. *Abou-Rahmah*[260] applied the *Barlow Clowes*[261] test. In *Starglade Properties Ltd*[262], the Court of Appeal determined that there was a single standard of honesty that was to be objectively determined by the court, considering the knowledge of the defendant. This effectively reconciled both *Twinsectra*[263] *and Barlow Clowes*[264]. By using a combined test, *Starglade Properties*[265] followed the *Barlow Clowes*[266] approach rooted in *Twinsectra*[267], but with the added element of considering the knowledge of the defendant.[268]

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[252] *Barlow Clowes* (n.243) [10].
[253] [2010] EWCA Civ 1314.
[254] Ibid.
[255] *Ghosh* (n.228).
[256] *Royal Tan* (n.231).
[257] *Twinsectra* (n.236).
[258] Ibid [20] (Hoffmann L).
[259] *Barlow Clowes* (n.243).
[260] *Abou-Rahmah* (n.241).
[261] *Barlow Clowes* (n.243).
[262] *Starglade Properties* (n.253).
[263] *Twinsectra* (n.233).
[264] *Barlow Clowes* (n.243).
[265] *Starglade Properties* (n.253).
[266] *Barlow Clowes* (n.243).
[267] *Twinsectra* (n.236).
[268] Sarah Garvey, 'Test for dishonest assistance in commercial dealings' (*Allen & Overy,* 13 January 2011) <http://www.allenovery.com/publications/en-gb/Pages/Test-for-dishonest-assistance-in-commercial-dealings.aspx> accessed 21 September 2019.

These cases demonstrate the muddied approach to the test for dishonesty in respect of commercial dealings. The problems with the test for dishonesty started with *Ghosh*[269]. For example, a definition of dishonesty was not provided, which meant that judges and juries were left to give 'dishonesty' a meaning they believed was appropriate. This essentially gave judges uncontrolled discretion over its meaning and application, resulting in the test being based on moral and/or ethical values, rather than a legal test. This also meant that some individuals may be acquitted on similar facts upon which others would be convicted. It was presumed that judges and juries were socially homogeneous with recognised and communal standards, with the test risking more trials as defendants had little to lose by pleading 'not guilty' and hoping that the dishonesty element was not made out.

The second limb of the *Ghosh*[270] test of whether the accused realised that his actions were dishonest, allowed individuals to escape liability, where a mistake of fact had been made regarding the modern standards of honesty. The test also placed much of the weight on the opinion of the accused to the detriment of the victim. But criminal law does not usually excuse individuals who believe their conduct would be acceptable to others.[271]

The shaky foundations of *R v Ghosh*[272] rendered problems with the dishonesty test for civil proceedings, as '[d]ishonesty and knowledge (of some sort) are like the chicken and the egg'.[273] The application of both dishonesty and knowledge to be applied in practice remains challenging. Robert Hunter, previously head of Allen and Overy's fraud group, stated that in respect of *Twinsectra*[274]:

> '[j]udicial squeamishness is an inescapable by-product of civil law liabilities that require dishonesty as a criterion for the defendant's liability … Tests requiring proof of 'dishonesty' in civil proceedings carry too much emotional baggage.'[275]

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[269] *Ghosh* (n.228).
[270] Ibid.
[271] Katherine Hardcastle, 'Righting another 'wrong turn'? Dishonesty in Ivey v Genting: Part II' (*6KBW College Hill,* 10 December 2017) <https://blog.6kbw.com/posts/righting-another-wrong-turn-dishonesty-ivey-v-genting-part-ii> accessed 22 September 2019; *Law Commission, Fraud and Deception (Law Com No. 155, 1999).*
[272] *Ghosh* (n.228).
[273] *Three Rivers DC v Governor and Company of the Bank of England (No.3)* [2000] 2 WLR 15 [62] (HL).
[274] *Twinsectra* (n.236).
[275] Shine (n.241) 33.

This is perhaps because *R v Ghosh*[276] had the accidental consequence that the more distorted an individual's standard of honesty, the less likely they were to be found criminally responsible for (objectively) dishonest behaviour.[277]

The differing interpretations of the test for dishonesty have meant that liability regarding dishonesty has been few and far between. For example, *Royal Brunei*[278] suggests that in establishing the generally acceptable standard, the court would need to consider all the conditions known to the individual(s) at the time together with their personal attributes. But *Barlow Clowes*[279] referred to actual and imputed knowledge in deciding whether an individual's conduct was subjectively dishonest.[280] In *Abou-Rahmah v Abacha*[281], the level of commercially unacceptable conduct with references to 'dishonest' assistance and 'bad faith' complicates matters because it is unclear what separates dishonesty from bad faith.[282]

This is one of the main reasons why judges and commentators expressed discontent with the state of affairs relating to dishonesty in civil proceedings. For example, Lee states '[i]t remains for future courts to embark upon a fuller discussion of whether, and, if so, how, to substantiate this inherently malleable objective standard.'[283] Leveson LJ stated that it was of some concern if the concept of dishonesty, in respect of civil liability varied to any clear extent from the concept as understood in the criminal law. He felt in his judgement that the Court of Appeal needed to revisit the issue.[284]

The opportunity Leveson LJ wanted, presented itself in the form of *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club).*[285] The facts surrounded Phil Ivey, a world-renowned professional gambler, who played Punto Banco, a form of baccarat, over two days winning over £7 million. When the casino found out that Ivey had been using a practice called "edge-sorting" which was dependent on noticing small physical variances in the edges of the cards, they refused to pay out the winnings. He was able to adopt the practice by claiming to be superstitious, thus coaxing the croupier to use the same pack of cards and to turn "lucky" cards around and increasing his

[276] *Ghosh* (n.228).
[277] Amy Edwards, 'Re-defining criminal dishonesty: why does it matter?' (*Allen & Overy,* 06 November 2017) <http://www.allenovery.com/publications/en-gb/Pages/Re-defining-criminal-dishonesty-why-does-it-matter.aspx> accessed 22 September 2019.
[278] *Royal Tan* (n.231) [74].
[279] *Barlow Clowes* (n.243).
[280] Rebecca Lee, 'Dishonesty and bad faith after Barlow Clowes: Abou-Rahmah v Abacha' [2007] March Journal of Business Law 209, 210.
[281] *Abou-Rahmah* (n.241) [42].
[282] Lee (n.280).
[283] Ibid 211.
[284] *Starglade Properties* (n.253) [42-44] (Leveson LJ).
[285] [2017] UKSC 67.

chances of winning. Ivey sued the casino on the basis that he believed "edge-sorting" was an honest technique.[286] The question was whether Phil Ivey had 'cheated' within the meaning of s.42[287], thus breaking his implied contract with the casino. The High Court found in favour of the casino[288], with the Court of Appeal upholding the decision before the case made its way to the Supreme Court.[289]

The Supreme Court, when arriving at their judgment, did not feel it was necessary to define cheating, describing it as a '…impossible task'. [290] The appropriate question that required answering was '...whether cheating necessarily requires dishonesty as one of its legal elements.'[291] Although it was stated that dishonesty is not required to establish cheating, operating to only obscure matters[292], Lord Hughes stated that '…if it was necessary for dishonesty to be an element of cheating in gambling, it was satisfied on the facts of this case.'[293]

Taking the opportunity to reformulate the test for dishonesty and overrule *R v Ghosh*[294], the Supreme Court stated that the correct test for dishonesty is: 1) the actual state of the individual's knowledge or belief as to the facts (subjective test) and 2) whether the relevant conduct would be considered to be dishonest by the standards of ordinary people (objective test).[295] This did not require that the individual must appreciate that the conduct was dishonest by those standards[296] but it is based upon the defendant's actual knowledge or belief as to the facts. The Court confirmed that the civil test is to be applied universally with directions no longer to be given based on the *R v Ghosh*[297] test.[298]

This newly formulated test, borrowed from *Barlow Clowes*[299], looks at the individual's actual mental state subject to an objective standard for dishonesty. This differs vastly from *R v Ghosh*[300] because an individual's belief could undermine an objective standard, but the approval of the civil test remedies this issue by removing the

[286] Ibid.
[287] Gambling Act 2005, s.42.
[288] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2014] EWHC 3394.
[289] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2016] EWCA Civ 1093.
[290] *Ivey* (n.285).
[291] Ibid [47].
[292] *Ivey* (n.285).
[293] Mark Galli, 'Oh my Ghosh: Supreme Court redefines test for dishonesty in Ivey v Genting Casinos' [2018] 29(2) Entertainment Law Review, 55, 57.
[294] *Ghosh* (n.228).
[295] *Ivey* (n.285).
[296] Galli (n.293).
[297] *Ghosh* (n.228).
[298] Galli (n.293).
[299] *Barlow Clowes* (n.243).
[300] *Ghosh* (n.228).

requirement for the individual to recognise that their conduct is considered to be dishonest by objective standards.[301] Some commentators, such as Clough, state that this new era in defining the legal concept of dishonesty creates a more definitive and helpful approach for juries to adopt. [302] Whilst there is no rational or principled basis for the meaning of dishonesty, to differ, according to whether it arises in a civil action or a criminal prosecution, the fact remains: "[d]ishonesty is a simple, if occasionally imprecise, English word.'[303]

3.3.1 Ascertaining Dishonesty in Holistic Accountability

It is submitted that *Ivey* [304] sets a more uniform standard of what is considered dishonest, rather than whether the individual considered the behaviour dishonest according to the standards of society.[305] Mulgan, when distinguishing between professional and personal accountability, in the context of public accountability, refers to honesty, fairness, and justice as general moral values, but does not further develop the role honesty may have to play in accountability.[306] Maybe, he did not want to define it rigidly or perhaps because honesty is something that everyone can recognise. Finer looks at responsibility which '…may mean an inward sense of moral obligation.'[307] Whereas Turem and Newman put forward that, at least as a whole, honesty is an essential but not sufficient condition for a full accountable system.[308] It is submitted that accountability in itself requires some level of honesty for it to work in practice. Before the discussion can continue, it is important to understand what is meant by honesty for holistic accountability.

The Oxford Dictionary defines honesty as '[t]he quality of being honest'[309], and honesty as '[f]ree of deceit; truthful and sincere'[310] or '[m]orally correct of virtuous'[311]. The Cambridge Dictionary defines honesty as 'the quality of being honest'[312] and honesty

[301] Galli (n.293).
[302] Joanne Clough, 'Giving up the Ghosh: Ivey (Appellant) v Genting Casinos (UK) Ltd trading as Crockfords (Respondent)' [2018] 236(0) Criminal Lawyer 2,3.
[303] *Ivey* (n.285) [63].
[304] Ibid.
[305] *Ghosh* (n.228).
[306] Mulgan (n.118) 558-560.
[307] Ibid.
[308] Edward Newman Ph.D. and Jerry Turem PhD. 'The crisis of accountability' [1974] 19(1) Social Work 5.
[309] The Oxford dictionary, 'Honest ' (*The Oxford Dictionary,* not known) <https://www.lexico.com/en/definition/honest> accessed 10 June 2019.
[310] The Oxford dictionary, 'Honesty' (*The Oxford Dictionary,* not known) <https://www.lexico.com/en/definition/honesty> accessed 10 June 2019.
[311] Ibid.
[312] The Cambridge Dictionary, 'Honest ' (*The Cambridge Dictionary*, not known) <https://dictionary.cambridge.org/dictionary/english/honest>accessed 10 June 2019.

as 'telling the truth or able to be trusted and not likely to steal, cheat, or lie.'[313] While these definitions provide insight, further clarity is to be added if they are to be included as part of a director's responsibility. In regard to directors and honesty, the first element of responsibility, it might be recalled that this thesis will use the following working definition of honesty: 'the obligation to be wholly truthful and forthcoming to the company in all its matters whether directly or indirectly, not omitting anything which would bring that truthfulness into question.'

The notion of honesty is important in every kind of accountability relationship. Directors as employees and/or fiduciaries employees have a responsibility, to be honest. For example, employees have a responsibility, to be honest with their employer and this will usually form part of the implied terms of the contract of employment. In cases, where either the employee or employer is not honest, it could potentially lead to a breach of mutual trust and confidence in the relationship.[314] The fact is just because individuals, or in this case directors, have a responsibility, to be honest, does not necessarily mean they will be. This may be the case with directors that command considerable power but are not necessarily limited to only them. Individuals who feel they have something to lose or feel that by being honest will portray a negative image or perception of themselves, thinking that this may damage them personally or professionally, and so they may intentionally blur the lines between fact and fiction.

For example, a study conducted by the University of East Anglia found that honesty is less significant to a country's economic growth, but the credence of honesty is motivated by psychological features such as self-projection.[315] As a result, even if an LPC is doing well financially, if directors feel that something may bring them adverse publicity or lower their standing within the business community, or in society in general, they are likely to be less forthcoming and open with the truth.

In the previous section, dishonesty and the test for dishonesty were considered. In doing so, it showed that while previously the test for dishonesty in criminal and commercial dealings was contentious, *Ivey*[316] now unifies the dishonesty test for both criminal and civil proceedings. In situations where the honesty of directors of LPCs is in doubt, the test could be utilised to ascertain whether directors of LPCs are being

[313] The Cambridge Dictionary, 'Honesty' *(The Cambridge Dictionary,* not known) <https://dictionary.cambridge.org/dictionary/english/honesty>accessed 10 June 2019.
[314] *Malik and Mahmud v Bank of Credit and Commerce International SA* [1997] UKHL 23.
[315] University of East Anglia, 'Study finds honesty varies significantly between countries' (*Phys.org*, 16 November 2015) <https://phys.org/news/2015-11-honesty-varies-significantly-countries.html> accessed 10 June 2019.
[316] *Ivey* (n.285).

dishonest. This would not only provide clarity as to the test for dishonesty but would also clearly identify dishonesty.

3.4 Legal Obligation

In addition, and as mentioned earlier, directors of LPCs have a responsibility, to be honest. Although there is nothing in the legislation that especially points to this. That being said, directors are classed as being 'fit' or 'unfit' as per the Companyhi Directors Disqualification Act.[317] As there is no definition of what constitutes a 'fit' director, it is submitted, that it is not too great a leap to say that dishonest directors would be regarded as 'unfit'.[318] Francis, Wilks & Jones, the law firm, state that dishonest conduct leads to director disqualification, with the court looking at the entirety of the circumstances but submitting that dishonesty, along with fraud, requires a higher level of proof.[319] However, there also has to be clarity on what directors of LPCs need to be honest for, or about.

The legal landscape for directors of LPCs is very broad. The Companies Act[320] governs nearly every aspect of company law from formation, directors' duties, and reporting requirements to reorganisations. The Insolvency Act[321], the Small Business, Enterprise, and Employment Act[322] and the Enterprise and Regulatory Reform Act[323], among others, also govern the way directors of LPCs conduct their operations and actions.

Alongside hard-law, there is a combination of soft-law such as the recent Wates Principles, which introduced six principles to be adopted by LPCs. This included a legislative requirement introduced for LPCs with more than 2000 employees, a turnover of more than £200 million and a balance sheet total of more than £2 billion to provide a corporate governance statement disclosing their corporate governance measures.[324] The Principles cover the majority of the upper limit of the thesis definition of LPCs, but they fail to catch private companies at the lower limit, with a turnover of more than £632,000 and at least 10 workers.

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[317] Company Directors Disqualification Act 1986.
[318] Company Directors Disqualification Act 1986.
[319] Douglas McEvoy, 'Director disqualification for dishonest conduct' (*Francis Wilks & Jones*, not known) <https://www.franciswilksandjones.co.uk/director-disqualification-for-dishonest-conduct/> accessed 10 December 2022.
[320] Companies Act 2006.
[321] Insolvency Act 1986.
[322] Small Business, Enterprise and Employment Act 2015.
[323] Enterprise and Regulatory Reform Act 2013.
[324] The Companies (Miscellaneous Reporting) Regulations 2018, reg 14.

It is important to note and address the fact that the Financial Reporting Council (FRC) which operates the corporate governance system and regulates the auditing industry has been subject to criticism. As a result, it is unlikely to have any success in policing the corporate governance of companies and in turn any legal responsibilities of directors of LPCs. For example, the review of the FRC led by John Kingman, Chairman of Legal & General, found that the 'almost powerless'[325] organisation has '…spent most of its… life in obscurity…'[326], ultimately concluding that it is '…[a]…house…built on weak foundations.'[327]

The recommendations made by the report were to be taken forward by the government with the previous Secretary of State for Business, Energy and Industrial Strategy, Greg Clark, confirming plans to replace the FRC with a new independent statutory regulator with more robust powers[328], potentially, as the review suggests, known as the Audit, Reporting and Governance Authority (ARGA). It is posited, that this will go some way in ensuring that criticisms faced by the FRC are addressed.

Much of the literature focuses on the law as legal accountability and not as part of a responsibility. For example, Dillard and Vinnari refer to it as '…formal mechanisms such as courts wherein the power holder has to justify its actions relative to pre-specified rules.'[329] Although, the courts will not hold someone accountable but will either decide whether to sanction either through civil or criminal means. Bovens identifies legal accountability as '…the most unambiguous type of accountability…'[330] as it focuses on detailed standards through legal rules.[331] Romzek and Dubnick define legal accountability as the relationship between two relatively autonomous parties involving a formal or implied fiduciary (principal/agent) agreement between the public agency and its legal overseer.[332] Grant and Keohane identify legal accountability as one of the types of accountability in the political sphere.[333] Koliba, Mills and Zia define

[325] Sir John Kingman, 'Independent Review of the Financial Reporting Council' (*Gov.uk*, December 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf> accessed 11 June 2019.
[326] Ibid.
[327] Kingman (n.325).
[328] Department for Business, Energy & Industrial Strategy, 'Independent review of the Financial Reporting Council (FRC) launches report' (*Gov.uk*, 18 December 2018) <https://www.gov.uk/government/news/independent-review-of-the-financial-reporting-council-frc-launches-report>accessed 11 June 2019.
[329] Dillard and Vinnari (n.159) 10.
[330] Bovens (n.108).
[331] Ibid.
[332] Barbara S. Romzek and Melvin J. Dubnick, 'Accountability in the Public Sector: Lessons from the Challenger Tragedy' [1987] 47(3) Public Administration Review 227, 229.
[333] Grant and Keohane (n.152) 29.

legal accountability as '…law and other explicit standards such as due process, substantive rights, and legal agreements found in a binding contractual arrangement.'[334]

Interestingly, Bovens acknowledges that legal accountability is not an actual mechanism of accountability. It does not intrinsically operate through procedures in which the accountor accounts to the accountee to justify their conduct in an accountability forum.[335] McKernan also acknowledges law as a legal responsibility stating that while legal responsibility operates 'over an abyss'[336], this helps 'obscure the abyss or fill in its absence of foundation, stabilizing a chaotic process of change in what are called conventions.'[337]

The position espoused by this thesis that directors are also subject to a legal obligation finds further weight in legislation and case law. For example, directors are required to promote the success of the company[338], and they are required to exercise reasonable care, skill and diligence[339] among other duties. Chan, McCalman and Young concur that laws and prescriptive legal requirements are more powerful than governance codes, as they obligate directors to "do their job"[340] or act in such a way that would ensure they are accountable to the company.[341] For example, Middleton J stated in *Australian Securities and Investment Commission v Healey*[342], regarding the responsibilities of directors, specifically concerning the duty of care and skill that:

> '[e]ach director is placed at the apex of the structure of direction and management of a company. The higher the office that is held by a person, the greater the responsibility that falls upon him or her.… What each director is expected to do is to take a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her.'[343]

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[334] Christopher J. Koliba and others, 'Accountability in Governance Networks: An Assessment of Public, Private, and Nonprofit Emergency Management Practices Following Hurricane Katrina' [2011] 71(2) Public Administration Review 210, 213.
[335] Bovens (n.108).
[336] John Francis McKernan, 'Accountability as aporia, testimony and gift' [1 November 2011] 23 Critical Perspectives on Accounting 258, 270.
[337] Ibid.
[338] Companies Act 2006, s.172.
[339] Companies Act 2006, s.174.
[340] Chan and others (n.120) 22.
[341] Ibid.
[342] [2011] FCA 717.
[343] Ibid [14-20] (Middleton J).

These responsibilities are such that if taken properly are likely to increase accountability. This is not because they are legal responsibilities, but rather due to their detailed and thorough nature; they encourage accountability. Examples of increasing accountability can be seen from the effective carrying out of directors' duties[344], and reporting requirements which do not only include the reporting of financial information but of previous, current, and future risks and concerns to the company as envisaged by the directors.

Some commentators such as Farrar argue that '[t]he law only provides a basic framework of procedure and accountability'[345]. With respect, this thesis is not concerned with accountability in the form of a legal framework, but as a framework for responsibility. However, it does recognise that corporate law in general does indeed, in whichever endeavour, provide only a rudimentary base. It is posited that this is because it is merely prescriptive such as directors' duties, in particular, the duty to avoid conflicts of interest.[346] This is one of the reasons why the law generally always needs to be updated and introduced to take account of changes (whether good or bad) in the corporate environment. It is acknowledged that other enhancements such as rules and codes help develop the basic legal framework into one that is workable. This is because they reinforce the law and its purpose. Young argues that the law '…should always be the centre of corporate governance and directors'…regulation.'[347]

This is clear to see with many rules and codes having legal grounding. For example, the UK Corporate Governance Code must be applied by companies with a premium listing of shares, as obligated by the Listing Rules, rule LR 9.8[348]. This is given statutory authority by s 2(4)(a) of the Financial Services and Markets Act 2000[349]. The Wates review, for LPCs, introduced a legislative requirement to provide a corporate governance statement disclosing their corporate governance measures.[350] This shows that enhancements such as rules and codes have to have a grounding in legislation and/or case law before they can be considered as strengthening accountability, or in this case, the legal obligation for accountability to occur. As Young notes, even soft-law, not grounded in law, has limitations.[351]

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[344] Companies Act 2006, s.171 – 177.
[345] John Farrar, *Corporate Governance: Theories, Principles and Practice* (3rd edn, Oxford University Press 2008) 345.
[346] Companies Act 2006, s.175.
[347] Young (n.50) 355.
[348] The Financial Conduct Authority, 'Annual Financial Report' (*Financial Conduct Authority, 2015*) <https://www.handbook.fca.org.uk/handbook/LR/9/8.html> accessed 12 June 2019.
[349] Financial Services and Markets Act 2000, s.2 (4) (a).
[350] The Companies (Miscellaneous Reporting) Regulations 2018, reg 14.
[351] Young (n.50) 357.

As a result, this two-fold responsibility of honesty and legal obligation is important because it is needed for directors of LPCs. The working definition of honesty as 'the obligation to be wholly truthful and forthcoming to the company in all its matters whether directly or directly, not to omit anything which would bring that truthfulness into question' is also important. This would require directors to ensure that anything they say, do, advocate, or opine is truthful or grounded in fact. The reason is that a director is usually a large personality, often seen as the face of the company. The more power, the greater the level of honesty there should be. It is often greed, ambition, and a wish for power[352], particularly from delinquent directors, that arguably promote an element of dishonesty resulting in the weakening of accountability. At the very least, it promotes misleading accountees.

While honesty is important, the question then arises as to what honesty should entail, and that is where directors' legal obligation comes in. The law is very prescriptive and detailed especially on matters concerning directors and in general company law. Indeed, corporate scandals have a way of being followed by the making of a range of laws, listing rules, guidelines, and best practices.[353] However, the rigidity of the law coupled with the honesty of directors is likely to increase accountability, especially when considering that much of the law compels the accountor to comply with the threat of some form of consequence. In this regard, when coupled with honesty, it is effective in bringing about order and helping to shape the behaviour of directors of LPCs by placing a responsibility on them to behave in a certain way or have regard to certain factors.[354]

This two-fold responsibility does not mean directors being honest and doing the bare minimum to meet their legal obligations. It requires directors to contemplate, at least in good faith, what a particular obligation requires of them, how they intend to meet that legal obligation and how will they demonstrate they have met it. Although discussed later, it is worth noting that Sir Philip Green did not abide strictly by s.172[355], in promoting the success of the company for the benefit of its members as a whole, when deciding to sell BHS to Dominic Chappell, given that the sale was used to offload the pensions deficit.

[352] Stewart Hamilton and Alicia Micklethwait, *Greed and Corporate Failure: The Lessons from Recent Disasters* (Palgrave Macmillan 2006) 183.
[353] Young (n.50) 356.
[354] Ibid 359.
[355] Companies Act 2006, s.172.

The first part of the responsibility, honesty, will look to ascertain if the directors of LPCs are not being dishonest. In the event directors of LPCs did the bare minimum, if a question is asked by an accountee, the proof will be in the answer. This is why the working definition of honesty - 'the obligation to be wholly truthful and forthcoming to the company in all its matters whether directly or directly, not to omit anything which would bring that truthfulness into question' – is framed widely for this particular reason.

3.5 Knowledge

Thus far the importance of responsibility within accountability has been discussed. This is in an acceptance of the fact that without responsibility, there can be no accountability. In doing so, responsibility has been defined for directors of LPCs, as a two-test responsibility of honesty and legal obligation. Honesty consists of the following working definition for directors of LPCs, as 'the obligation to be wholly truthful and forthcoming to the company in all its matters whether directly or directly, not to omit anything which would bring that truthfulness into question'. Legal obligation is effectively the totality of legislation that directors of LPCs are subject to. Taken together both honesty and legal obligation constitute the two-fold responsibility imposed upon directors of LPCs. Having put forward the responsibility of directors of LPCs, it is now time to turn towards the consideration of the elements of holistic accountability.

The first element of holistic accountability is knowledge. Knowledge can be defined as 'the state of knowing about or being familiar with something'.[356] Therefore, knowledge, or lack of knowledge, of directors is considered very important. The Institute of Directors (IoD) which provides support, representation, and standards for directors' state that the role of directors, or the board collectively, is that they:

> '…[are]… required to be sufficiently knowledgeable about the workings of the company to be answerable for its actions, yet able to stand back from the day-to-day management of the company and retain an objective, longer-term view.'[357]

Although the IoD fails to define what is meant by 'sufficiently'. It is submitted, from the wording that sufficiently must include all of the workings of the company.

[356] The Cambridge Dictionary, 'Knowledge' (*The Cambridge Dictionary,* not known) <https://dictionary.cambridge.org/dictionary/english/knowledge> accessed 13 July 2019.
[357] Institute of Directors, 'What is the role of the board?' (*Institute of Directors,* 25 September 2018) <https://www.iod.com/services/information-and-advice/resources-and-factsheets/details/What-is-the-role-of-the-board> accessed 13 June 2019.

The knowledge possessed by directors of LPCs can span from overall knowledge of the LPC, and business operations as well as when directors know something specific. In the context of this thesis, the element of knowledge is focused on when directors know something specific. Before this is discussed further, it is worth briefly discussing the wider nature of knowledge. Knowledge as an element is not something new in the corporate governance field. It has been applied in many different ways to govern the behaviour of directors. However, knowledge has not been mentioned explicitly in the accountability literature as an important element.

For example, Stanton broadly accepts knowledge as integral to directors, with the gathering of information serving as a strong understanding of the background, so directors understand the implications of the decisions they make.[358] McKernan states that a decision is extra, in comparison to all the knowledge collected and reasoning done in preparation for making that decision.[359] Solomon states that specific knowledge is required to play a role within a company if it is to operate efficiently.[360] So, there is support within the academic literature for knowledge as an element of (holistic) accountability.

The legislation governing directors is the most definitive when it comes to the specific knowledge of directors. For example, directors are subject to the duty to - in good faith - promote the success of the company for members as a whole having regard to several factors such as long-term consequences, interests of employees, and the desirability of maintaining a reputation of good standards of business conduct amongst others.[361] However, promoting the success of the company can only be achieved if directors have specific knowledge enabling them to have regard to the factors outlined by the duty. Directors are also required to exercise reasonable care, skill and diligence[362] of a reasonably diligent person, together with the skill and experience actually possessed by them.[363] This results in a two-fold test for knowledge, with a general level of skill required for all directors under the first part of the test, and a second part of the test requiring a higher standard of knowledge for directors who may possess specialist skills such as accounting or legal skills.

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[358] Thomas Stanton, *Why Some Firms Thrive While Others Fail: Governance and Management Lessons from the Crisis* (Oxford University Press 2012) 206.
[359] McKernan (n.336) 262.
[360] Jill Solomon and Aris Solomon, *Corporate Governance and Accountability* (John Wiley & Sons Ltd 2004) 85.
[361] Companies Act 2006, s.172.
[362] Companies Act 2006, s.174.
[363] Companies Act 2006, s.172.

In *Re Brian D Pierson (Contractors) Ltd*[364], which confirmed the second part of the test requiring a higher standard of knowledge, Hazel Williamson QC, sitting as a deputy High Court judge, stated that '[i]t is the directors of the company who had, or ought to have had, fullest knowledge of the relevant facts.'[365] She also went on to state that:

> '…[t]he office of director has certain minimum responsibilities and functions, which are not simply discharged by leaving all management functions and consideration of the company's affairs to another director without question…the function of 'directing' on its own requires some consideration of the company's affairs to be exercised.'[366]

From this, three key points can be taken, the first is directors need to have complete knowledge of facts when making decisions, or at the very least a working knowledge of company affairs when doing so. Secondly, the function of a director requires, at the very least, 'some' consideration of company affairs to be exercised but arguably no consideration can occur without having knowledge. Finally, the expertise of a director can enhance his or her power, which leads to a greater need for accountability. [367]

The provision of wrongful trading[368] may apply when a company has gone into insolvent liquidation, and some time before the commencement of the winding-up of the company, that is the person knew or ought to have concluded there was no reasonable prospect that the company would avoid insolvent liquidation. The person must be a director at that time and possess specific knowledge to be caught by the provision. Although the two-fold test for knowledge would still apply[369], that is the general standard of a director's duty to exercise reasonable care, skill, and diligence.[370]

For example, courts may refer to the company's annual accounts[371] and whether they acquired expert advice to determine whether directors knew or ought to have concluded. In other words, courts will look at whether directors had the knowledge or should have had the knowledge.[372] Put simply, the knowledge of directors plays an important part in holding them accountable.

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[364] [1999] BCC 26 (HC).
[365] Ibid [54].
[366] *Re Brian D Pierson* (n.364) [54].
[367] Dillard and Vinnari (n.159) 10.
[368] The Insolvency Act 1986, s.214.
[369] Companies Act 2006, s.174.
[370] Companies Act 2006, s.174.
[371] Companies Act 2006, s.447 (a).
[372] Andrew Keay, *Company Directors' Responsibilities to Creditors* (1st edn, Routledge, Cavendish 2006) 27.

In *Re Phoenix Contracts (Leicester Ltd)*[373], an unfair prejudice claim[374] was upheld when a director, who was also a shareholder, was suspended and later made redundant after having contacted and informed a potential client that the company was being investigated by the Office of Fair Trading. Proudman J stated that the director could not be criticised for wanting to ensure that the agreement was not obtained by the use of collusive activities, regardless of whether it meant that the Company might lose the contract altogether.[375]

The director, in this case, was balancing the harmful consequences of his conduct in respect of a major client and the likely damage to company employees if the contract was not gained, against the company's reputation as a whole. Section 172, the duty to promote the success of the company[376], allowed for the director's subjective judgment, exercised in good faith.[377] This specific knowledge, even though it may seem prima facie harmful to company prospects, was subjectively used to limit reputational damage. This implies that as long as directors can demonstrate 'some benefit' to the company by using the knowledge possessed that is enough to satisfy the 'good faith' requirement.

In *Re Burnham Marketing Services Ltd*[378], a director of two companies appointed two managing directors. The companies became insolvent after failing to remit Crown monies, amongst other matters. It was stated that as the director with sole control to dictate company strategy, meant that he should have kept '…a close eye and a tight rein over those he had appointed'[379]. However, to keep a close eye over the appointed, directors must possess the required knowledge. In this case, the director did not know what was going on within the companies. It was noted that there was no dishonesty involved and the director had made attempts to put matters right.

These cases provide insight into situations where directors use/do not use specific knowledge. At the other end of the spectrum, there are examples of directors selling companies in the knowledge they will fail leaving behind debts of £1.3 billion with £571 million in pension liabilities[380], employing appalling working practices in the company

[373] [2010] EWHC 2375 (Ch).
[374] Companies Act 2006, s.994.
[375] *Re Phoenix Contracts* (n.369) [102-105] (Proudman J).
[376] Companies Act 2006, s.172
[377] *Re Phoenix Contracts* (n.369)) [104] (Proudman J); *Re Smith and Fawcett* Limited [1942] Ch 304 (CA) [306] (Lord Greene MR).
[378] [1993] BCC 518 (CC).
[379] Ibid.
[380] Emilio Casalicchio, 'Former owner of failed BHS 'threatened to kill' CEO' (*Politics Home*, 8 June 2016) <https://www.politicshome.com/news/uk/economy/business-

warehouses and apparently '…turning a blind eye to conditions… in the interests of maximising profits'[381] or at the very least a demonstration of '…serious corporate governance failings...'[382]. The above show clear examples of specific knowledge, or lack of it, is crucial to directors of LPCs having a proper understanding of corporate governance issues. It is fair to say that knowledge in respect of holding directors accountable is a problem that needs to be addressed.[383]

3.6 Examination

The second element of holistic accountability is examination. The term examination is defined by the Cambridge Dictionary as 'the act of looking at or considering something carefully in order to discover something.'[384] It is fair to say that justification, as detailed previously, when contrasted with examination, is, in essence, providing a reason for ex post conduct. Justification is a problematic element because while a justification can be obtained by an accountee, ascertaining the truthfulness of that justification is quite another matter.

Examination, as an element, is something more than just the accountee accepting an excuse from the director (accountor) for their conduct. It requires accountees closely reviewing and dissecting answers from accountors, thus enabling a higher level of analysis. For example, the Oxford Dictionary defines examine as 'to look at somebody/something closely, to see if there is anything wrong or to find the cause of a problem.'[385] It is also worth noting that examination, and examine, are synonyms of scrutiny and scrutinise, respectively.

Many accounting forums have inadvertently used this element. For example, the Institute for Government, a think tank working to make government more effective, states that for centuries parliament has delegated tasks to the House of Commons and

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regulation/news/75933/former-owner-failed-bhs-threatened-kill-ceo> accessed 11 August 2019.

[381] Simon Goodley, 'Mike Ashley running Sports Direct like 'Victorian workhouse' (*The Guardian,* 22 July 2016) <https://www.theguardian.com/business/2016/jul/22/mike-ashley-running-sports-direct-like-victorian-workhouse> accessed 11 August 2019.

[382] Ibid.

[383] Owen Gough, 'Limited company directors fail to understand basic business concepts' (*Small Business*, 7 February 2017) <https://smallbusiness.co.uk/lack-limited-directors-knowledge-2536711/> accessed 13 June 2019.

[384] Cambridge Dictionary, 'Examination ' (*Cambridge Dictionary,* not known) <https://dictionary.cambridge.org/dictionary/english/examination>accessed 24 August 2019.

[385] Oxford Dictionary, 'Examine ' (*Oxford Dictionary,* not known) <https://www.oxfordlearnersdictionaries.com/definition/english/examine>accessed 24 August 2019.

House of Lords Select Committees '…enabling certain members to scrutinise specific issues of public policy, or to examine scandals or disasters.'[386] The collapse of Carillion plc was described as the biggest corporate failure in recent history.[387] The company was a facilities management and construction firm with several subsidiaries functioning as LPCs. It was met with a fast-tracked investigation being conducted by the Insolvency Service. This meant that additional time was to be devoted to '…an investigation into why the company failed including a closer examination of the role play by the former directors'[388].

In regard to LPCs, the retailer British Home Stores (BHS) which went into liquidation was subject to an investigation. The joint administrators responsible for winding up the business hired the leading law firm Jones Day '…to scrutinise transactions by the retailer while it was controlled by Dominic Chappell and Sir Philip Green.'[389] This suggests an examination as an element is arguably more likely to yield some form of accountability. This is despite justification being more established within the accountability literature.

It is submitted that some of the criticisms which plague the justification element of accountability could easily be resolved by bringing about a more workable definition of accountability, for directors of LPCs. For example, when brought together with the above elements of accountability, where justification would allow for directors to give a good reason for their behaviour, even if that behaviour is not satisfactory[390], examination would push further for holistic reasoning. This includes consideration of alternatives, weighing up of advantages and disadvantages of particular actions or decisions and the short-term and long-term implications of the decision or action taken. This would enable accountees to fully understand the situation and context in which the decision or action was taken, enabling them to hold directors (accountors) accountable.

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[386] Institute for Government, 'Select Committees ' (*Institute for Government,* not known) <https://www.instituteforgovernment.org.uk/publication/parliamentary-monitor-2018/select-committees> accessed 24 August 2019.
[387] Rob Davies, 'Former directors face questioning over Carillion's collapse' (*The Guardian,* 6 August 2018) <https://www.theguardian.com/business/2018/aug/06/former-directors-face-questioning-over-carillions-collapse> accessed 24 August 2019.
[388] Ibid.
[389] Graham Ruddick, 'Law firm investigating VW emissions scandal hired to examine BHS' (*The Guardian,* 11 August 2016) <https://www.theguardian.com/business/2016/aug/11/law-firm-jones-day-investigating-vw-emissions-scandal-hired-to-examine-bhs-philip-green> accessed 24 August 2019.
[390] Hall and others (n.84) 208.

Where justification would allow for 'an ongoing process of account-giving and account-taking'[391], examination would require the accountee to ask different types of questions such as open, closed, leading, recall and process and funnelling questions. This would enable accountability to take place, even if the accountor is not willing to give a detailed explanation. The different types of questions used would allow for the extraction of enough information so that judgement can be passed, even when evasive techniques to limit or provide misleading information are used and given. There are many examples where an effective examination in an accounting forum has led to the disclosure of information that would not otherwise have been disclosed. For example, the House of Commons Work and Pensions Committee's investigation into the liquidation of BHS.[392]

BHS is not the only example. The director of Sports Direct, Mike Ashley, also felt the intensity of the Business, Innovation and Skills Committee regarding its employment practices at its Shirebrook warehouse. During the oral evidence session, for the first time on record, Ashley accepted that '…workers had been paid below the minimum wage, as a result of the unpaid, compulsory searching of all workers at the Shirebrook warehouse.'[393] This is despite the reputational damage it may have caused Sports Direct. Ashley also stated that '…one of the reasons I agreed to come—whether or not I think I ought to or not is a different subject—is to make a difference'[394]. The findings of the Committee prompted Sports Direct to conduct a review regards its employment practices, by its independent legal advisers within 90 days, after the sitting of the committee, to report on its progress. This is perhaps indicative of the idea that Select Committees, as an accounting forum where examination is an element of the accountability process, can pass judgement more effectively as well as become agents of change.

There are other accounting forums where the use of examination as an element of accountability has yielded the ability to pass some form of judgement. For example, when the police investigate a crime, the use of examination enables them to decide whether or not an individual, or individuals, should be referred to the Crown Prosecution Service. Employers use examination when they hold fact-finding meetings with employees to ascertain whether alleged misconduct or breach of HR policies, has taken place. As a result, examination allows accountees to pass judgement in a

[391] Rached (n.82) 323.
[392] Work and Pensions and Business, Innovation and Skills Committees, *BHS*, (HC 2016-17, HC 54).
[393] Business, Innovation and Skills Committee (n.55) para 38.
[394] Ibid para 9.

plethora of situations because, unlike justification, it enables accountees to probe accountors further than simply asking for a justification and attempts to get the root of the reasoning behind a particular decision or action.

3.7 Outcome

Much of the literature on accountability regarding the passing of judgement has focused on the end-result of the imposition of consequences. For example, Dubnick and Yang state that '…large portion of the literature focuses on cross pressures of accountability and their potential negative consequences.'[395] Dillard and Vinnari when defining accountability state that:

> '[a]ccounting is a system and craft for making visible the activities of an actor. Accountability implies constraining or giving up power by providing information, being transparent regarding decision-making, actions, and outcomes and being subjected to consequences of the evaluation thereof.'[396]

They go on to state that '…. accountability is meaningless without some value set by which responsible actions can be defined and evaluated and with which meaningful consequences are associated.[397] Other definitions, such as Woods' definition of accountability as previously highlighted above, do not include consequences in the definition but add that they play a big part in the accountability process.[398] It is worth noting that the position of this thesis is that consequence is associated with a negative outcome therefore the term consequence will be looked at in the negative.

This suggests accountability has to have some element of consequences, or perhaps that accountability is almost synonymous with the element of consequences. However, the imposition of consequences is not the only objective of accountability. It is noted that some of the accountability literature uses the term consequence in a neutral form. For example, Bovens succinctly states:

> '…[m]any accountability arrangements are not focused on finding fault with actors – forums will often judge positively the conduct of actors

[395] Melvin J. Dubnick and Kaifeng Yang, 'The Pursuit of Accountability: Promise, Problems, and Prospects' (2010) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1548922> accessed 1 September 2019.
[396] Dillard and Vinnari (n.159) 4.
[397] Ibid 7.
[398] Wood and Winston (n.150) 85.

> and may even reward them. I therefore use a somewhat more neutral expression: the actor may face consequences.[399]

Akpanuko and Asogwa state that '…the enforcement of reward or consequences to remedy contravening behavior.'[400] Willems and Van Dooren state that '…[a] full appreciation of accountability should, therefore, include the whole range of possible consequences (from strong to weak) at the disposal of the account-holder.'[401] But they fail to define what they mean by their spectrum of strong to weak. For example, does strong mean consequences with adverse effects and weak mean consequences with a positive effect? Dillard and Vinnari leave the term consequences more open-ended putting forward that:

> '[c]onsequences may take many forms. They can be positive or negative, rewards or sanctions, internal or external, material or psychological/socialization, ex-post or ex-ante depending on the circumstances and local context, etc.'[402]

Despite being broad, it does nothing to clarify and detail the nature of consequences concerning accountability. The above commentators, in various ways, acknowledge that the imposition of consequences is not the only objective of the accounting process. They submit that consequences need not have a negative connotation, but they fail to entertain and put forward an alternative to consequences.

The Oxford Dictionary defines outcome as 'the result or effect of an action or event'[403]. The Cambridge Dictionary defines it as 'a result or effect of an action, situation, etc.'[404] Interestingly, both definitions contain two words – result and effect – but they have separate meanings. For example, where result looks at the production or realisation of a particular action; effect looks at the appearance or impression of the action. Thus, it is contended that 'outcome(s)' is an alternative to consequences for several reasons not least because this thesis is of the view that consequences are not an accurate element for including the possibility of positive results (or judgements). Not every

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[399] Bovens (n.170) 952.
[400] Essien E. Akpanuko and Ikenna E. Asogwa, 'Accountability: A Synthesis' [2013] 2(3) International Journal of Finance and Accounting 164, 167.
[401] Willems and Dooren (n.182) 1016.
[402] Dillard and Vinnari (n.159) 7.
[403] Oxford Learners Dictionaries, 'Outcome' (*Oxford Learners Dictionaries*, not known) <https://www.oxfordlearnersdictionaries.com/definition/english/outcome?q=outcome> accessed 4 September 2019.
[404] Cambridge Dictionary, 'Outcome' (*Cambridge Dictionary,* not known) <https://dictionary.cambridge.org/dictionary/english/outcome> accessed 4 September 2019.

accounting forum will impose consequences, so it is logical to adopt an element that will show the variety of outcomes directors of LPCs may be subject to. This eliminates the current subjugation of negativity surrounding accountability as a forum solely concerned with imposing consequences, although that could indeed be an outcome.

Outcome as an alternative element to consequence gains further weight when we examine some of the situations where directors of LPCs, through a range of accounting forums, have not been the subject of the imposition of negative consequences. Rather, it has been a judgement of endorsing a particular action or decision or rewarding it. For example, in 2013, BT Group plc's consumer division, BT consumer, bought Champions league rights for £900m.[405] This was widely thought to be 'excessive'[406] and 'over the odds'[407]. It is unclear whether shareholders had been consulted before the submission of the bid. One thing clear was though that shareholders did not reject or criticise but rather silently accepted it. This 'silent acceptance' can be said to be an endorsement of this particular action but no actual reward or consequence at least in the short-term anyway.

In 2019, the retailer Debenham Retail Ltd, part of Debenhams plc, saw its chairman and chief executive ousted from the board after two key shareholders voted against their reappointment. The reason behind this was since the appointment of the chairman in April 2016, Debenhams' shares had lost 90 percent of their value, following a succession of profit warnings coupled with profits falling from more than £100m to just £32m.[408] Indeed, analysts stated that 'I don't think he [chief executive] was especially engaged by the magnitude of the problems until recently'.[409] While the financial difficulties cannot be understated, it is clear that at least in this particular situation, when it came to holding the board accountable, shareholders did not hesitate to punish them for the company's financial performance. This is even though the surge in online retailing coupled with increased overheads and increased competition may have also had a part to play in Debenhams' financial difficulties. In the end, shareholders held the board accountable by ousting them. In the case of Richer

[405] Denise Roland and Ben Rumsby, 'BT boss denies overpaying for Champions League rights' (*The Telegraph,* 9 November 2013) <https://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/10438210/BT-boss-denies-overpaying-for-Champions-League-rights.html> accessed 1 September 2019.
[406] Ibid.
[407] Roland and Rumsby (n.405).
[408] Jonathan Ely, 'Mike Ashley ousts CEO and chairman from Debenhams board' (*The Financial Times,* 10 January 2019) <https://www.ft.com/content/d834bc8e-14da-11e9-a581-4ff78404524e> accessed 4 September 2019.
[409] Ibid.

Sounds Ltd, Julian Richer, its founder was able to extract a sum of £9.2 million as a cash bonus[410], because of how the business was being run and decisions made. It is also worth noting that £3.5 million of that amount was to employees as loyalty bonuses. This outcome was due to several reasons. For example, Richer Sounds Ltd has ethical principles of '…being decent, honest and truthful'[411]. It gives 15% of its profits to charity and paid its suppliers as well as its tax obligations transparently and on time. [412] The company also bans zero-hours contracts and pays the Living Wage as a company policy. [413]

It is clear that while most of the literature on accountability focuses on consequences as a negative, some of the literature does state that consequences can be good or bad. This leaves the backdoor open for a wide range of judgements that fall within the scope of consequence within the accounting process. However, they fail to define or at least clarify the various consequences that be imposed. In regard to directors of LPCs, the element of outcome allows for many different judgements to be imposed and do not tarnish the accounting process as negative. It leaves open the process in which directors are to be held accountable resulting in an outcome that can be good, bad, or indifferent.

3.8 Corporate Governance & Accountability

Furthermore, the accountability of directors (of LPCs) has featured prominently in the context of corporate governance. For example, Licht states that any form of governance will assume accountability.[414] This is perhaps because there can be no governance without accountability. Indeed, some commentators have gone further and stated the definition of corporate governance itself means directors being held accountable, stating it is: 'the problem of holding key executive decision-makers in…. companies accountable for their actions.'[415] That being said, BEIS, previously known as the Department for Business, Innovation & Skills sees accountability as an essential element of corporate governance. In its Call for Evidence paper, it stated that:

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[410] Elias Jahshan, 'Richer Sounds founder pays staff £35m in cash bonuses' (*Retail Gazette*, 14 May 2019) <https://www.retailgazette.co.uk/blog/2019/05/richer-sounds-founder-hands-over-control-to-staff-pays-them-bonuses/> accessed 24 January 2023.
[411] Sam Barker, 'Tycoon boss hands workers bonuses worth up to £20,000 as he gives away fortune' (*The Daily Mirror*, 25 September 2021) <https://www.mirror.co.uk/money/richer-sounds-boss-gave-staff-25064724> accessed 24 January 2023.
[412] Ibid.
[413] Barker (n.411).
[414] Licht (n.102); Keay (n.18) 20.
[415] Keay, ibid, 23-24.

> The board of directors manages the company on behalf of its owners, the shareholders. In doing so, the board carries out key tasks such as: establishing and maintaining vision, mission and values: deciding strategy and structure: and accounting to shareholders and being responsible to stakeholders.'[416]

As a result, the accountability of directors (of LPCs) is an intrinsic part of corporate governance, without accountability there can be no governance (in whatever form that may be). However, it is important to understand what is meant by the term corporate governance. The term has its roots in Latin which mean '…to steer or give direction'[417], but there is no consensus as to the definition of the term with many commentators providing various definitions.

The Report of the Committee on the Financial Aspects of Corporate Governance, ('The Cadbury Report') defines it as 'the system by which companies are directed and controlled'[418], Keay and Loughrey define it as 'a means to establish a system of control between the board and management as well as accountability from the board to the shareholders'[419]. Moore defines corporate governance as '…the social problem of holding powerful decision-makers in large *economic* organisations accountable for their actions, in order to legitimise their continuing possession and exercise of power.'[420] Blair defines it more broadly as 'the whole set of legal, cultural, and institutional arrangements that determine what…corporations can do, who controls them, how that control is exercised, and how the risks and returns from the activities they undertake are allocated.'[421] In essence, the overarching theme of these definitions is that of a system of control for those that hold power to direct what they can or cannot do.

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[416] Keay (n.18) 23-24; Department for Business, Innovation and Skills,' A long-term focus for corporate Britain: call for evidence' (*Gov.uk*, 25 October 2010) <https://www.gov.uk/government/consultations/a-long-term-focus-for-corporate-britain-a-call-for-evidence> accessed 29 January 2022.

[417] Chris Cornforth and Naomi Chambers, 'The role of corporate governance and boards in organisational performance' in Walsh and others (eds), *Connecting Knowledge and Performance in Public Services: From Knowing to Doing* (Cambridge University Press 2010) 99.

[418] Adrian Cadbury, 'The Report of the Committee on the Financial Aspects of Corporate Governance' (*European Corporate Governance Institute,* 1 December 1992) <http://www.ecgi.org/codes/documents/cadbury.pdf>accessed 10 February 2019.

[419] Keay and Loughrey (n.38) 256.

[420] Moore (n.215) 35.

[421] Nor Zalina Mohamad Yusof, 'Context Matters: A Critique of Agency Theory in Corporate Governance Research in Emerging Countries' [2016] 6(7) International Journal of Economics and Financial Issues 154, 155.

Corporate governance has been seen as a way of helping to sustain company wealth creation, help companies manage risks, protect the existing value and aid further value-creation[422]. It has become an important concept in the way all companies operate and how they are managed. In this regard, while corporate law has allowed for a rigid corporate system to be developed and enabled its enforcement, coupled with case law to substantiate and clarify legislation, corporate governance has been and is subject to incessant modifications and ongoing scholarly debate.[423] For example, corporate governance may involve changes to the law, it may also include codes of practice or proposing systems of self-regulation.[424] Its far-reaching nature has meant that many factors have influenced the concept of corporate governance, such as ownership structure, the makeup of shareholders, and the functioning of the board of directors have all become within the scope of corporate governance.[425]

It is posited that corporate governance has become synonymous with accountability. Therefore, corporate governance has been expanded to cover almost every aspect of a company (an LPC). Some examples of wide-ranging definitions include: '… improving a company's relationships with shareholders and stakeholders. It involves the law, business practice and business culture.'[426] Cornforth and Chamber refer to corporate governance as '…the structures, systems and processes concerned with ensuring the overall direction, control and accountability of an organisation.'[427] The Organisation for Economic Co-operation and Development (OECD), an international organisation focused on influencing policies to an array of social, economic, and environmental challenges, of which the UK is a member, states:

> "Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the board and management to pursue objectives that are

[422] Simon Lowe, 'Driving good governance through accountability' (*Grant Thornton*, 25 June 2019) <https://www.grantthornton.co.uk/insights/five-principles-of-good-governance-accountability/> accessed 4 October 2019.
[423] Styhre (n.211) 587.
[424] The Rt Hon Lady Justice Arden DBE, 'UK Corporate Governance after Enron' [2003] 3(2) Journal of Corporate Law Studies 269, 269.
[425] Asensio-López and others (n.210).
[426] Ibid.
[427] Cornforth and Chambers (n.417).

> in the interests of the company and its shareholders, and should facilitate effective monitoring."[428]

This is by far the most substantive and detailed definition of corporate governance. It is difficult to define corporate governance due to its all-encompassing nature and similar undertones, to other definitions. However, it must be noted that corporate governance is an ambiguous concept, with no clear definition, with definitions either focusing on corporate governance in general or dealing with specific matters.[429]

Aside from the accountability of directors of LPCs, there are many reasons why the need for corporate governance has been espoused so much. For example, it has been said to improve the standards of business. These standards may involve meeting (or even exceeding) legal or voluntary requirements of a financial or regulatory nature. It may also increase the standards of behaviour for management. This may be through the board (directors collectively) by ensuring that the strategies and objectives set are clear to shareholders and relevant stakeholders.

Good corporate governance also allows companies, specifically LPCs, to access either national or international investment as it gives investors assurance that the company is being run transparently because good/strong governance controls are in place. The need for investors to invest money may be for the expansion of current business operations or to diversify the company. This then can lead to increased company and financial performance. The majority of the UK's national wealth comes from the private sector, and so to safeguard the wealth created, and its sustainability, good corporate governance has often been seen as the way to ensure that the UK, although not free from corporate scandals, takes steps in reducing corporate abuse from directors.[430]

Accountability within corporate governance has become a prominent theme in Anglo-American corporate governance.[431] Having taken centre stage within the corporate governance of companies, it has been presented as a panacea for almost every ill that confronts a company.[432] This is perhaps because accountability has been seen as the way forward in ensuring the long-term success of a company[433]. For example, Keay

[428] OECD, 'OECD Principles of Corporate Governance' (*OECD*, 2004) <www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf> accessed 10 February 2019.
[429] Yusof (n.421).
[430] Rt Hon Lady Justice Arden Dbe (n.424).
[431] Moore (n.213) 95.
[432] Dillard and Vinnari (n.159) 2.
[433] Abbie Robinson, 'The Wates Corporate Governance Principles for Large Private Companies' (*Eversheds Sutherland,* 7 August 2018) <https://www.eversheds-

argues that good corporate governance has been said to be widely attributed to companies when it focuses on the accountability of directors, and this arguably serves as a foundation for success with respect to all other values of corporate governance.[434]

Indeed, The Cadbury Report stated, '[t]he issue for corporate governance is how to strengthen the accountability of boards of directors to shareholders.'[435] The Cadbury Report goes a little bit further stating that: '[boards]… must be free to drive their companies forward, but exercise that freedom within a framework of effective accountability. This is the essence of any system of good corporate governance.'[436] The White Paper on Modernising Company Law before the introduction of the Companies Act 2006 stated it is "crucial to effective corporate governance that the owners of the company hold the directors to account for the company's performance"[437]. As a result, accountability can be said to be fundamental to what corporate governance is about and to what a director does.[438]

It is worth mentioning that there are some contentious issues regarding accountability. This thesis does not seek to discuss them in detail but briefly highlight them. For example, some commentators have argued that accountability can destroy innovation, business activity, and encumber the authority of directors.[439] However, the reasons for holding directors accountable for their conduct and decisions leads to good corporate governance, thus outweighing the reasons against it.[440] At best, they provide grounds for consideration in ensuring accountability is balanced with the need to facilitate innovation, business activity and authority of directors.

There are many grounds for the need for accountability within corporate governance. For example, it may be due to directors' tolerance to risk, the difference of opinions, a lack of experience[441], and the legitimisation of power as accountability can be viewed as a legal and democratic value[442]. Although there are several reasons, there are five common reasons, where there is agreement amongst commentators, as to why

sutherland.com/global/en/what/articles/index.page?ArticleID=en/Corporate_secretarial_unit/wates-corporate-governance-principles-070818> accessed 10 February 2019.

[434] Andrew Keay, 'Exploring the rationale for board accountability in corporate governance' [2014] 29 Australian Journal of Corporate Law 115, 130

[435] Cadbury (n.418) 6.1.

[436] Ibid.

[437] Department of Trade and Industry, Modernising Company Law, White Paper (London: DTI 2002), para. 2.37; Ciaran O' Kelly, 'History begins: shareholder value, accountability and virtuous state' [2009] 60(1) Northern Ireland Law Quarterly 35, 38

[438] Chan and others (n.120) 21-22.

[439] Keay (n.434).

[440] Ibid.

[441] Keay (n.434).

[442] Ibid 136.

accountability is required within corporate governance. These include the problem of agency[443], with Keay[444], Diego[445], Styhre[446], Choudhary[447], Moore[448] and Loughrey[449] putting it at the forefront of any discussion regarding accountability within corporate governance. The second is the makeup of the board[450]. The third is the vulnerability of shareholders espoused by Keay[451] and Blair and Stout[452]. The fourth is the legitimisation of power, advocated by Moore[453], Borowiak[454] and Keay[455]. The fifth, and final reason, is the effectiveness of the board advocated by Hurt[456] and Keay[457]. It is for these reasons that the behaviour of directors[458] results in corporate governance deficits which require accountability. [459]

3.8.1 The Agency Problem

The agency theory has been labelled as '...the standard working assumption underlying corporate governance systems around the world.'[460] The extensive presence of the agency problem in different organisations, and settings, has also made it one of the most important theories in finance and economic literature.[461] In essence, the theory, in respect of LPCs, is that directors are delegated the power to manage company affairs (as agents), and they are liable to account to shareholders (as their principals) for how they exercise that power[462], as the shareholders are regarded as the true owners of the company.[463] However, there is a risk that the agents, as rational actors, will shirk or self-deal, that is exercise their power in a way that furthers their interests rather than those of the principals due to a lack of an incentive to maximise

[443] Keay (n.18) 73.
[444] Jensen and Meckling (n.209) 305.
[445] Asensio-López and others (n.210).
[446] Styhre (n.211).
[447] Choudhury and Martin (n.212).
[448] Moore (n.213).
[449] Loughrey (n.214).
[450] Keay (n.18) 83.
[451] Ibid 91.
[452] Blair and Stout (n.217).
[453] Moore (n.218) 215.
[454] Borowiak (n.219).
[455] Keay (n.18) 95.
[456] Hurt (n.221).
[457] Keay (n.18) 103.
[458] Iris H-Y Chiu and Dionysia Katelouzou, 'Making a case for regulating institutional shareholders' corporate governance roles' [2018] 1 Journal of Business Law 67, 82.
[459] Ibid.
[460] A. N. Licht, Corporate *Governance.* in*, Handbook of Key Global Financial Markets, Institutions, and Infrastructure* (Elsevier 2013) 370.
[461] Brahmadev Panda and N.M. Leepsa, 'Agency theory: Review of Theory and Evidence on Problems and Perspectives' [2017] 10(1) Indian Journal of Corporate Governance 74, 75.
[462] Loughrey (n.214).
[463] Keay and Loughrey (n.38) 262.

the interests of the shareholders. [464] As a result, there is a need to introduce accountability to ensure that the agents' interests are aligned with that of the shareholders.[465]

Framed in the context of Plcs, Berle and Means initiated the agency theory[466], when ownership was observed as a simple matter.[467] While this thesis concerns LPCs, the agency theory, as mentioned above can occur in any situation where there is a delegation of decision-making, thus holding good for LPCs as well as Plcs.

Jensen and Meckling further developed elements of the agency theory. They define the agency relationship as, "… a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision-making authority to the agent"[468]. Although, an agency can ascend in any situation requiring cooperative work. The relationship between directors in the majority of LPCs, fit the characterisation of a pure agency relationship, meaning that they are closely linked with agency problem due to the separation of ownership and control.[469] The accountability of behaviour is arguably a universal feature of human association, but it is posited that it operates particularly and discreetly in the field of corporate governance. [470]

The problem with such a relationship is that "[i]f both parties to the relationship are utility maximizers there is good reason to believe that the agent will not always act in the best interests of the principal.'[471] The agent will seek to, arguably, do as little work as possible whilst trying to gain as much reward as possible. While the principal will try to ensure that the agent does as much work as possible in managing the affairs of the company to further the value and return of the principal's investment. The principal may incentivise the agent in various ways such as share options, bonuses, remuneration, and sustain monitoring costs which are intended to limit the deviant activities of the agent. But it is almost impossible for the principal, at zero cost, to guarantee that the agent will make optimal decisions from the principal's

[464] Ibid.
[465] Keay and Loughrey (n.38) 262.
[466] Adolfe A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (2 edn, Transaction Publishers 1991).
[467] Lynne L. Dallas, 'Two Models of Corporate Governance: Beyond Berle and Means Symposium: Issues in Corporate Governance ' [1988] 22(1) University of Michigan Journal of Law Reform 19; O' Kelly (n.437).
[468] Jenson and Meckling (n.209) 308.
[469] Ibid 309.
[470] Anita L. Allen, "2003 Daniel J. Meador Lecture: Privacy Isn't Everything: Accountability as a Personal and Social Good" [2003] 54 Alabama Law Review 1375, 1377.
[471] Jenson and Meckling (n.209) 308.

perspective.[472] It is also worth noting that the effectiveness of stock-based incentives remains inconclusive. Some commentators point out the detrimental aspects of stock options such as short-termism, deferred investments, and the adoption of manipulative practices.[473]

The Cadbury Report implicitly referred to agency problems, stating that there could be a risk of deviant conduct.[474] It states that it could be alleviated by ensuring that all parties in the governance procedure are as accountable as possible.[475] Indeed, studies have shown that directors are highly likely to consider their interests, or second to only those of customers.[476]

It is also fair to say that when the financial performance of a company is strong, directors may cash in by reducing social expenditures to take benefit of the chance to increase their short-term gains. On the other hand, when financial performance deteriorates, directors may attempt to offset this by appearing to justify their unsatisfactory results by engaging in visible social programmes.[477] In the words of Oliver Williamson, the American economist, directors are 'opportunistic actors given to self-interest seeking to guile'[478], defining the concept of opportunism as 'the incomplete or distorted disclosure of information, especially to calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse'.[479]The English philosopher, Jeremy Bentham, opined that '[t]he more strictly we are watched, the better we behave'[480], this can be said to be true for directors.

Consequently, as an attempt to address the problematic nature of agency, between directors and shareholders, the instrument of accountability, proves to be invaluable

[472] Ibid.
[473] Rezual Kabir and others, 'Do Managers Act Opportunistically Towards the End of Their Career?' [2018] 56 (Sep) Journal of International Financial Markets, Institutions and Money 218, 220.
[474] Cadbury (n.418); Keay (n.18) 76.
[475] Ibid.
[476] Lee E. Preston and Douglas P. O' Bannon, 'The Corporate Social-Financial Performance Relationship ' [1997] 36(4) Business & Society 419, 423-424.
[477] Ibid.
[478] Keay (n.18) 75.
[479] Geoffrey M. Hodgson, 'Opportunism is not the only reason why firms exist: why an explanatory emphasis on opportunism may mislead management strategy' [2004] 13(2) Industrial and Corporate Change 401, 402.
[480] Staffan I. Lindberg, 'Mapping accountability: core concept and subtypes' [2013] 79(2) International Review of Administrative Sciences 203, 208.

as a method of controlling agency costs.[481] It mitigates agency costs between directors and shareholders.[482]

Many scientific studies have shown that selfishness is proliferating in society.[483] As human beings first, and directors second, studies have shown that, selfishness and self-interest are inherent within human nature. For example, using the classic Prisoner's Dilemma which looked to test the willingness of individuals to set aside self-interest for the greater good, researchers found that being selfish was more advantageous, however short-lived the benefit may be.[484] Similarly, when individuals are fixated on the success of others, for example when directors are focused on the success of other directors, they are more likely to behave selfishly. Studies have shown that the approach of comparing others' successes and failures, prompts individuals to engage in conduct that is focused on their gain.[485]

If selfishness, as an inherent part of human nature, ruled over everything, then companies would have never become a fruitful endeavour, and shareholders would not give up millions, sometimes billions, in human and financial capital to an overtly selfish board of directors.[486] While selfishness and self-interest do play a part, it is not the case that all directors, as agents, will be opportunistic all of the time.[487] To say so, would do a huge disservice to a significant number of directors who work day and night to ensure the companies they manage to prosper. Many commentators, in this regard, have failed to either detail or recognise that while most agents are engaged in '…business-as-usual with little or no thought to opportunism, most of the time,'[488] it is not that most individuals or directors are opportunistic most of the time.[489] It is the mere threat of self-dealing and opportunistic behaviour, even if it is a small number of directors, that is significant.[490] This is what accountability seeks to alleviate.

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[481] Natalya Mosunova, 'The content of accountability in corporate governance' [2014] 2(3) Russian Law Journal, 116, 117.
[482] P. J. McKnight and C. Weir, 'Agency costs, corporate governance mechanisms and ownership structure in large UK publicly quoted companies: a panel data analysis' [2009] 49(2) The Quarterly Review of Economics and Finance 139, 157.
[483] Matthew Robinson, 'Are People Naturally Inclined to Cooperate or Be Selfish?' (*Scientific American,* 1 September 2014) <https://www.scientificamerican.com/article/are-people-naturally-inclined-to-cooperate-or-be-selfish/> accessed 19 October 2019; Stephanie Pappas, 'Conflicts of Interest: Are Humans Inherently Selfish?' (*Live Science,* 23 February 2017) <https://www.livescience.com/57991-conflicts-of-interest-science-humans-selfish-cooperation.html> accessed 19 October 2019.
[484] Ibid.
[485] Pappas (n.473).
[486] Margaret M. Blair and Lynn A. Stout, 'Director Accountability and the Mediating Role of the Corporate Board' [2001] 79(2) Washington University Law Review 403, 438.
[487] Hodgson (n.479).
[488] Ibid.
[489] Hodgson (n.479) 403.
[490] Ibid.

The second criticism of the agency theory is that it intrinsically accepts that shareholders are owners of the company[491], as without shareholders being owners, directors would not be the agents of shareholders. It attaches weight to the fact that simply owning shares in a company gives the shareholders a stake of ownership within the company. However, there is a failure to realise that:

> '…the modem depersonified corporation represents not merely a dilution of shareholder corporate property rights but the demise of the means of production as private property to which notions of 'ownership', with their connotations of exclusivity and exclusion, are applicable.'[492]

In essence, shares in a company only represent a set of rights, with the suggestion that there is no attachment of ownership. Indeed, in English Law, *Salomon*[493] held the company is by itself a separate legal entity, separate, from its shareholders. In *Short*,[494] it was stated that 'shareholders are not, in the eye of the law, part-owners of the undertaking…'[495]. The Companies Act[496] obligates directors to promote the success of the company for the benefit of members as a whole.[497] This is perhaps because the entirety of shares represents the legal personality separate from shareholders. This duty, and all others[498], are owed to the company and not to shareholders.[499] Some commentators have also argued that if directors were to be the agents of shareholders, it would be futile to distinguish directors from junior and senior managers.[500] Perhaps because in some shape or form, the agency theory would apply to all individuals in every decision regarding the company.

It is fair to say that shareholders would not be treated any more favourably than customers, despite the service or goods the company provides arguably being owned by them. Shareholders would not be liable for the actions of the company and nor can the profit or assets of the company be used to satisfy shareholders' debts.[501] If

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[491] Keay (n.18) 76.
[492] Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' [1999] 62(1) The Modern Law Review 32, 55.
[493] *Salomon v Salomon* [1897] A.C. 22 (HL).
[494] *Short and Others v Treasury Commissioners* [1948] 1 K.B. 116 (CA).
[495] Ibid.
[496] Companies Act 2006.
[497] Companies Act 2006, s.171.
[498] Companies Act 2006, s.171-177.
[499] Companies Act 2006, s.170.
[500] Keay (n.18) 78.
[501] John Kay, 'Shareholders think they own the company — they are wrong' (*The Financial Times*, 10 November 2015) <https://www.ft.com/content/7bd1b20a-879b-11e5-90de-f44762bf9896> accessed 19 October 2019.

shareholders were owners, when the company goes into liquidation, shareholders would be able to be first in line to recoup the capital provided. But this is not the case. Shareholders are the last, as residual claimants, to claim back, if any, of the capital invested in the company. Whereas if shareholders were deemed to be owners, in the conventional sense, they would be able to appropriate all company assets financial and otherwise. It is also the case, in the absence of enforcing their personal rights[502], if shareholders initiate legal proceedings against directors, they do so in the name of the company and not in their own name.[503]

Shareholders are also unable to control what the company does, despite owning shares. They are unable to compel directors to act in a certain manner or undertake a particular course of conduct. Despite all the arguments that they are not owners of the company in the truest sense of the word, the company is a silent legal entity whereby whilst directors manage its affairs, it is the shareholders that provide the parameters of that management via the articles of association and subsequent amendments.[504]

3.8.2 Makeup of the Board

The composition of the board of directors is of great significance to corporate governance. Usually, the chairman and executive directors will consist of full-time appointments. However, as part of corporate governance, there has been a push, over the past twenty years, to appoint non-executive directors (NEDs). NEDs have been described as the 'corporate governance success story of the decade.'[505] NEDs have been seen as 'guardians' of the corporate good, monitoring and questioning the actions of executive directors and managers and ensuring that the company acts in a 'responsible' manner.[506]

The Review of the role and effectiveness of non-executive directors by Derek Higgs, ('The Higgs Report') detailed the remit of NEDs, stating NEDs are to challenge and contribute to the progress of business strategy, scrutinise the performance of management, monitor the reporting of performance and ensure that financial information is accurate and that financial controls and systems of risk management are

[502] Companies Act 2006, s.994.
[503] Companies Act 2006, s.260.
[504] Companies Act 2006, s.281–s.361.
[505] Sally Wheeler, 'Non-Executive Directors and Corporate Governance' [2009] 60(1) Northern Ireland Law Quarterly 51, 52.
[506] Christopher Pass, 'Corporate governance and the role of non-executive directors in large UK companies: an empirical study' [2004] 4(2) Corporate Governance 52, 53.

vigorous and secure.[507] In essence, the role of NEDs is, that of an accountee, to hold directors accountable for their actions and conduct.

The Higgs Report also stated that NEDs should govern suitable levels of remuneration of executive directors and have a key role in appointing, and where necessary removing, senior management and in succession planning.[508] More recently, the Wates review into corporate governance principles for LPCs[509] stated that companies should consider the value of appointing independent non-executive directors to offer constructive challenge.[510]

The emphasis on NEDs within corporate governance comes from a legal and commercial standpoint.[511] NEDs are seen as an important assurance of integrity and accountability.[512] The inclusion of NEDs on company boards means that the interests of those who have invested in the company will be protected, as they will monitor directors[513] and reduce agency costs through improved alignment of director and shareholder interests.[514] For example, NEDs have been thought to '…restrain management pursuit of the quiet life, wasteful expenditure on executive perks like private jets, as well as empire-building or following discretionary objectives through mergers or the refusal to return cash to shareholders.'[515] Although, the role of a NED in small businesses is likely to be less about corporate governance, and more about adding credibility, business experience and making commercial introductions.[516] There is no evidence which firmly concludes improvements in corporate governance, or accountability, occurred when companies acquired more NEDs with stronger responsibilities.[517]

The Higgs Report[518] exposed substantial problems in the recruitment and use of NEDs, against the backdrop of public outcry about the risk of corporate failures.[519]

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[507] Derek Higgs, 'Review of the role and effectiveness of non-executive directors' (*ECGI,* January 2003*)* <https://ecgi.global/download/file/fid/9424> accessed 2 October 2019.
[508] Julie Froud and others, 'Everything for Sale: How Non-Executive Directors Make a Difference' [2008] 56(1) The Sociological Review 162, 165-166.
[509] Financial Reporting Council (n.19).
[510] Ibid.
[511] The Companies (Miscellaneous Reporting) Regulations 2018.
[512] Pass (n.506).
[513] Ibid.
[514] Froud and others (n.508).
[515] Ibid.
[516] James Hurley, 'Adding a non-executive to a small business ' (*The Telegraph*, 2 June 2010) <https://www.telegraph.co.uk/finance/businessclub/7797185/Adding-a-non-executive-to-a-small-company.html> accessed 27 October 2021.
[517] Froud and others (n.508).
[518] Higgs (n.507).
[519] Froud and others (n.508).

Unfortunately, these concerns remain true today. For example, the typical age of NEDs is 60 plus.[520] Albert Nash, chief executive of Harvey Nash, a recruitment consultancy, states that young NEDs (those below 60 years of age) are not considered because:

> '…they've got no life or business experience and they don't grasp the governance aspects, which take time and you understand as you get older. They don't have the maturity to step back and support when they need to.'[521]

This is an interesting take on the demographics of NEDs. Indeed, the reality is that many individuals who have never served on a company board before, actually make up 34 percent of NEDs.[522] It is submitted, as Murray Steele, director and presenter of the Financial Times Non-Executive Director Diploma programme states, the role of a NED is '…for a lucky, gifted amateur who might be in the right Masonic lodge or went to the right school.'[523] But some argue that the straightforward weakness is the lack of skill, knowledge, and relevant experience in recruitment at and around the board level.[524]

The independence of NEDs has been touted as one of the most valuable elements. Research conducted by Ernst and Young, now known as EY, found that networking and word-of-mouth were the most important sources for recruiting NEDs.[525] The good image that goes with appointing NEDs is tainted with company boards relying upon the 'usual suspects'[526], focusing on who they are (which is quite often friends, or friends of friends) rather than what their skill set and experience consist of, and how it can be of value to the company.[527]

The time commitment required by NEDs can be a contentious point, posing issues such as information asymmetry. For example, if NEDs spend significant time carrying

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[520] Lindsay Cook, 'Have you got what it takes to be a non-executive director?' (*The Financial Times*, 1 March 2018) <https://www.ft.com/content/87bed6b0-14bb-11e8-9e9c-25c814761640> accessed 1 November 2019.
[521] Peter Whitehead, 'Non-executive director: a task for which no one is qualified' (*The Financial Times*, 10 April 2013) <https://www.ft.com/content/33ec6b3e-9099-11e2-a456-00144feabdc0> accessed 1 November 2019.
[522] Cook (n.520).
[523] Ibid.
[524] Anthony Fitzsimmons, 'How to help non-executive directors see through a chief's charms' (*The Financial Times,* 17 May 2018) <https://www.ft.com/content/2877e126-47ae-11e8-8ee8-cae73aab7ccb> accessed 1 November 2019.
[525] Linda Holbeche and Valerie Garrow, 'The Rise of Non-Executive Director ' (*Roffey Institute*, 2005) <https://www.roffeypark.com/wp-content/uploads2/Non-Executive-Director-report-Full.pdf> accessed 1 November 2019.
[526] Ibid.
[527] Holbeche and Garrow (n.525).

out their duties, it risks the possibility that they may become too involved in the daily operations of the company, questioning their independence. Equally, it may also be to increase their understanding of the company and its board.[528] Conversely, as Gary Dixon, chairman of the Association of Independent Non-Executive Directors argues, less time spent means little understanding and a lack of adding value as a NED, with a superficial view being formed.[529] In this regard, it is fair to say that finding the right balance poses difficulties.

It is conceded that NEDs will not spend every minute of the day monitoring the company and/or holding directors accountable, but the lack of time spent could mean a lack of understanding of what is going on within the company. Interestingly, Louis Dixon, CEO of the Non-Executive Directors' Association, states that '[s]ensible NEDs…look to build a balance of, say, three corporate roles and two personal interests, which are not-for-profit, charity or public sector roles.'[530] However, NEDs' time would very much be thin on the ground, because:

> '…the role of NED goes far beyond what is in the job description', previously, while NEDs might have formed part of a good governance' box-ticking exercise, the role of a NED has advanced and the expectations from both the company and its stakeholders are now far larger.[531]

The final issue on NEDs relates to their remuneration. In the past ten years, NED compensation has increased by 41 percent to £67,655.[532] The Institute of Directors (IoD) states that NED pay ranges from £38,000-£105,000, the top-end figure reserved for £3bn companies and above, with £38,000-£40,000 more likely amongst SMEs.[533] Gibbs notes that higher remuneration is likely to result in NEDs taking on more appointments, enabling them to reap the rewards of such positions for their benefit[534] without monitoring or holding directors accountable. In any case, NEDs '… represent the apogee of weak corporate governance… content to provide a veneer of

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[528] Nick Martindale, 'A look at the NED's changing role' (*Economia,* 9 November 2018) <https://economia.icaew.com/features/november-2018/a-look-at-the-neds-changing-role> accessed 1 November 2019.
[529] Ibid.
[530] Martindale (n.528).
[531] Ibid.
[532] Cook (n.520).
[533] Institute of Directors, 'How to become a non-executive director' (*Institute of Directors,* 5 June 2018) <https://www.iod.com/news/news/articles/How-to-become-a-non-executive-director> accessed 1 November 2019.
[534] David Gibbs, 'Dealing with Self-Interest Among Non-Executive Directors' [2015] May/June 2015(139) Board Leadership 4.

establishment credibility… while happily disengaging from the key decisions…[receiving]… considerable salar[ies]…'.[535]

3.8.3 Vulnerability of Shareholders

Moreover, accountability has also sought to address the vulnerability of shareholders. Vulnerability, in this context, is defined as shareholders with unequal bargaining power, due to the percentage of equity held and/or resources at their disposal, amongst others. It might be of some surprise that (at least some) shareholders may be treated as vulnerable. Shareholders have often been seen as siphoning off benefits from other stakeholders, such as workers in respect of redundancies and creditors perhaps in respect of lower interest rates or longer periods in which to make payments. They have also been seen as externalising their costs.[536] For example, while shareholders have provided the initial capital, it is highly likely that to fund either the development of existing operations or diversification of current operations, external capital in the form of loans from banks and other financial entities would have been sought.[537]

However, there are some shareholders, whose vulnerable position, perhaps a reflection of their value as a shareholder, would mean that they may be treated less favourably when compared with other shareholders. It is this inequality of shareholder power that accountability seeks to balance when holding directors accountable.

In the majority of LPCs, there are different types of shareholders. For example, institutional investors will usually consist of banks, pensions and/or insurance funds. Small shareholders may be individuals, small investment vehicles, or even founding directors who have decreased their shareholding, and the like. The larger the shareholder, the more likely it is that they will be able to further their interests when compared with smaller shareholders.

Larger shareholders are more likely to have significant input in the present and future direction of the company, because they are likely to have a '…cosy and informal…'[538] relationship with the board, depending on them for information and explanations.[539] These shareholders may encourage certain actions or decisions which may only benefit them rather than all of the shareholders. Indeed, some commentators have

[535] Work and Pensions and Business, Innovation and Skills Committees (n.392) para 136.
[536] Min Yan, *Beyond Shareholder Wealth Maximisation: Towards a More Suitable Corporate Objective for Chinese Companies* (1st edn, Routledge 2017) 59.
[537] Ibid.
[538] Deborah Hargreaves, *Are Chief Executives Overpaid? (The Future of Capitalism)* (1st edn, Polity 2019).
[539] Keay and Loughrey (n.38) 266.

said, at least concerning executive pay, it is unrealistic to rely on shareholders to effect lasting change.[540]

Many of these shareholders will also have several shareholdings in many different industry trade sectors. As a result, it is unlikely that they will be able to effectively monitor the board and hold directors accountable for actions indirectly affecting smaller shareholders who may not be able to exert much influence. As such shareholders will be detached from the company, often based internationally, and have very little input into the company's inner workings.

The very nature of shares, that is the ability to buy and/or sell them almost instantaneously, means that some shareholders may only hold shares for a small period and have little interest in the goings-on of the company.[541] However, it is those shareholders who may hold on to shares for a longer period who are likely to see the effects of non-governance. It has been claimed that there has been no real concerted effort by shareholders to make a comprehensive set of changes.[542]

It is noted that the FRC introduced the Stewardship[543] Code targeted at furthering shareholder involvement in companies, as well as the accountability of directors. However, even the FRC's revised Stewardship Code has unsuccessfully tried to alleviate these concerns. For example, it has '…quickly become a tick-box exercise with fund managers still acting as absentee landlords of investee companies. Britain needs to reclaim the mantle of being global leader in stewardship'[544]. Sacha Sadan, Legal and General Investment, Director of Corporate Governance, states that '[f]or the UK to be at the forefront of good stewardship. . . requires a broader perspective of how the industry works.'[545] However, this is unlikely to be the case because shareholder-based governance is 'not well-founded in either theory or practice'[546].

3.8.4 Legitimisation of Power

Accountability as a mechanism for the legitimisation of power is needed because, when power and authority are conferred on an entity or individual, it must go together

[540] Hargreaves (n.538).
[541] Ibid.
[542] Hargreaves (n.538).
[543] Financial Reporting Council, 'THE UK STEWARDSHIP CODE 2020' (*Financial Reporting Council*, 2019) <https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf> accessed 9 November 2019.
[544] Owen Walker, 'Beacon of British stewardship needs a brighter flame' (*The Financial Times,* 26 January 2019) <https://www.ft.com/content/1a3a57be-5c15-3e03-bae0-10bd5804bf20> accessed 2 November 2019.
[545] Ibid.
[546] Hargreaves (n.538).

with a system of checks or some mechanism involving accountability.[547] Indeed Dubnick and Yang state that '…accountability is a core -- if not defining -- characteristic of democratic regimes.'[548] This is perhaps because it allows for the facilitation of legitimacy in many ways such as '… through transparency and efficiency, diminishing arbitrary rule or supporting other aspects of good governance.'[549] Accountability is a necessary precondition for legitimacy to occur[550], in respect of those who hold power and influence.[551] It is a reflection of how well their authority is perceived.[552] The legitimacy of any governance plan is also complementary to democracy to any claim of governing in the public and private sectors.[553] For example, casting votes at a general election is part of a democratic society, but it also provides legitimacy because it is a demonstration of the will of the general public.

Black defines legitimacy as social credibility and acceptability as 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.'[554] Keay refers to legitimisation as '…the process whereby an organization justifies to a peer or superordinate system its right to exist.'[555] Galoppin states that '…authority refers to the social status one has within a group: The extent to which a government has a grip on its citizens, the pecking order in a group of primates, or even the reporting lines on an organization chart.'[556] Indeed, some examples of this, in the context of LPCs, include the AGM. This is where the board will look to justify key events and issues to shareholders. The election (or re-election) of directors which shareholders will vote to appoint, provides directors with the legitimacy of the authority which will be bestowed upon them.

It is submitted that in a totalitarian regime, where there is no legitimacy of authority, while authority can be a response to disobedience, disobedience can also be a response to authority.[557] Legal regimes (civil and criminal) have established a significant degree of legitimacy where the majority of the population presumes that the

[547] Keay (n.18) 95.
[548] Dubnick and Yang (n.395).
[549] Philp (n.190) 47.
[550] Luc Galoppin, 'Legitimacy leads to Accountability' (*Online Magazine for Organizational Change Practitioners,* 19 September 2016) <http://www.reply-mc.com/2016/09/19/legitimacy/> accessed 2 November 2019.
[551] Bovens (n.170) 954.
[552] Galoppin (n.550).
[553] Dubnick and Yang (n.395).
[554] Julia Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes' [2008] 2(2) Regulation & Governance 137,144.
[555] Keay (n.18) 95.
[556] Galoppin (n.550).
[557] Ibid.

justice system is accomplished and likely to handle cases in a fair and just way.[558] In this regard, bringing an individual to justice, or holding them accountable, becomes highly respected for its own sake.[559] In the corporate context, the presence of legitimacy provides trust for shareholders and other stakeholders that directors can be trusted to deal with company matters[560] because otherwise suspicion would be cast as to the actions of the board. The presence of legitimisation through accountability provides shareholders with an element of certainty that the use of the power/authority will be regulated, and abuse of this power will be subject to some form of consequence.[561]

Some definitions of accountability have addressed the notions of power and legitimacy. Before these are discussed, it is important to understand that there are two different types of powers. There is the power to do something[562] and another is the power over something or someone.[563] Legitimacy, and in turn, accountability allows for directors to have a certain degree of power in respect of company affairs. This is the power to do something, and shareholders have the power over them. Indeed shareholders '…possesses a legitimate right to inquire into the reasons behind opinions or decisions.'[564] Akpanuko and Asogwa go a little further stating it brings about '[t]he possibility for the principal to interrogate the steward and to *question* the adequacy of the information or the legitimacy of the conduct.[565] Although, in some instances, directors yield weightier power given that they determine the direction of the company, and control when dividends will be paid, as well as the value of those dividends.

Further definitions also hold accountability as the prerequisite of legitimacy. For example, Moore defines corporate governance, and perhaps accountability more generally, as '…the social problem of holding powerful decision-makers in large *economic* organisations accountable for their actions, in order to legitimise their continuing possession and exercise of power.'[566] This implies that for power to be continually exercised, legitimacy must underlie it. Blair defines accountability as '…the whole set of legal, cultural, and institutional arrangements that determine what…corporations can do, who controls them, how that control is exercised, and how

[558] Dubnick and Yang (n.395).
[559] Ibid.
[560] Keay (n.18) 97.
[561] Licht (n.102); Keay and Loughrey (n.38) 258.
[562] Keay (n.18) 99.
[563] Ibid.
[564] Wood and Winston (n.150) 90.
[565] Akpanuko and Asogwa (n.400) 166.
[566] Moore (n.218) 35.

the risks and returns from the activities they undertake are allocated.'[567] It is submitted that the control that Blair mentions is accountability. Only from accountability or some mechanism that involves an element of accountability, can legitimacy flow to allow for the power of the board to be accepted.

3.8.5 Effectiveness of the Board

The different sizes and nuances of boards of companies have meant that accountability plays a major role in ensuring that boards work effectively, for the success of the company. For example, the accretion of power to a single director, or a small number of directors, means that more monitoring will be required. Where there is a large board there is likely to be a lack of communication and consistency which may allow for agency problems to manifest. [568] Thus, while scrutiny operates on a regular basis, strong corporate governance measures are never-ending, perhaps because an operative board is more than a collective of its individual members.[569] This chimes with a global survey of 1,110 directors worldwide, conducted by McKinsey, which suggested that value can flow from improving the way in which boards work.[570] A strong attitude towards accountability will not only serve to ensure the board carries out its role in the most efficient way, but also protect the board and the company's reputation.[571]

It should therefore come as no surprise that 'greater accountability will mean improved performance'.[572] there has always been an implicit relationship between accountability and performance[573], with the view that accountability will, inter alia, increase performance[574]. This relationship has deep and fixed roots in a directorial tradition crossing several centuries[575]. The performance referred to is that of the board because when the board performs its role well, the increased performance of the company is

[567] Yusof (n.421).
[568] C. Jose Garcia Martin and Begona Herrero, 'Boards of directors: composition and effects on the performance of the firm' [2018] 31(1) Economic Research 1015.
[569] Emma Andrews, 'Board accountability is a key element of strong corporate governance' (*Grant Thornton*, 9 May 2017) <https://www.grantthorntonni.com/news-centre/board-accountability-is-a-key-element-of-strong-corporate-governance/> accessed 8 November 2019.
[570] Martin Hirt and others, 'A time for boards to act' (*McKinsey & Company*, 26 March 2018) <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/a-time-for-boards-to-act> accessed 29 January 2022.
[571] Andrews (n.569).
[572] Dubnick (n.138); Frank J. Thompson and Norma M. Riccucci, 'Reinventing Government' [1998] 1 Annual Review of Political Science 231.
[573] Ibid 377.
[574] Dubnick (n.138) 376.
[575] Ibid 378.

only likely to follow. However, the board is only likely to perform well if they know either continuously and/or at certain points, they will be held to account for their conduct, which may carry the risk of being imposed with a range of outcomes.

Some definitions of accountability do include performance as an intrinsic part. For example, Rouse defines it as '[a]ccountability is an assurance that an individual or an organization will be evaluated on their performance or behaviour related to something for which they are responsible.'[576] The Greenbury Report on Directors Remuneration[577] focused on accountability and enhanced performance arguably because it may have opined that accountability may be related to good performance of the board and its effectiveness. Indeed, Roger Barker, Head of Corporate Governance, at the (IoD), states that it is reasonable for directors to be held accountable[578], but argued that the IoD would like to see more accountability for directors.[579] This may be because they are largely aware of the benefits accountability brings to the role of the board and their ability to function successfully.

However, accountability for the board is not without its problems. This is especially the case when the board may make decisions or undertake a course of conduct which in turn, they will be accountable for. [580] For example, attempting to find a balance between respecting the authority of the board and holding the board accountable proves difficult in theory and practice[581]. Although Moore puts forward the view that authority and accountability are not equally offsetting organisational governance qualities,[582] he argues that decisional authority is not tenable unless it is accompanied by instruments for ensuring the accountability of authority-holders for unrestricted decisions.[583]

While accountability is professed to be counterproductive to the authority of the board, Moore states that its ultimate purpose is to endure, rather than restrain, the board's power.[584] Perhaps because accountability would ensure that the board do not engage

[576] Margaret Rouse, 'Accountability' (*Whatis*, November 2014) <https://whatis.techtarget.com/definition/accountability> accessed 26 December 2018.
[577] Andrew Keay, 'Stewardship theory: is board accountability necessary?' [2017] 59(6) International Journal of Law and Management 1292, 1304-1305.
[578] Emma Sheppard, 'Industry welcomes director accountability proposals' (*Drapers*, 3 September 2018) <https://www.drapersonline.com/news/industry-welcomes-director-accountability-proposals/7031952.article> accessed 7 September 2018.
[579] Ibid.
[580] Ann M. Scarlett, 'A better approach for balancing authority and accountability in shareholder derivative litigation' [2008] 57(1) University of Kansas Law Review 39, 40
[581] Ibid 41.
[582] Marc Moore, 'The (Neglected) Value of Board Accountability in Corporate Governance' (2015) University of Cambridge Faculty of Law Research Paper No. 9/2015,7, accessed 8 November 2019.
[583] Ibid.
[584] Moore (n.582).

in any questionable conduct. More powerfully, he submits that accountability is a necessary pre-condition of the board's continuing authority.[585] Again, this goes back to the notion that no individual or collective body that has some form of power vested in them, is free from at least some form of accountability.

3.9 Summary

This chapter has defined accountability for directors of LPCs. In doing so, it has put forward a new theory of accountability tailored to directors of LPCs named holistic accountability. It involves a two-fold test of honesty and legal obligation, along with knowledge, examination, and outcome as the elements. Each component has been explored in-depth to provide a clear understanding of what holistic accountability entails. For example, knowledge has been given significant importance through literature, legislation, and case law, making clear that knowledge, or lack of it, is crucial to holding directors of LPCs accountable. Examination allows for a much more investigative approach, with the accountee able to ask different types of questions, thus reducing possible evasion from accountors. Outcome allows for accountability to remain open with an outcome that can be good, bad, or indifferent.

The second part of the chapter has addressed the importance of accountability in LPCs in the context of corporate governance. It has been found that despite corporate governance being an ambiguous concept[586], there are many grounds for the need for the accountability of directors of (LPCs). In this regard, it discussed the most common grounds of agency[587], makeup of the board[588], the vulnerability of shareholders[589], the legitimisation of power[590] and the effectiveness of the board.[591] It finds that whilst all of the grounds are valid, there are some flaws in their advocation. For example, the agency theory tars all directors with the same brush (of shirking/self-dealing). NEDs are supposed to provide oversight and monitor directors, but many have never served on a company board before[592], coupled with difficulty in attaining the right balance in respect of time.

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[585] Ibid.
[586] Yusof (n.421).
[587] Keay (n.18) 73.
[588] Ibid 83.
[589] Keay (n.18) 91; Blair and Stout (n.217).
[590] Moore (n.218) 215; Borowiak (n.219); Keay (n.18) 95.
[591] Hurt (n.221); Keay, ibid, 103.
[592] Cook (n.520).

Having defined accountability for directors of LPCs, and explored the importance of accountability in LPCs, the theoretical underpinning of accountability, and accountability itself, several flaws have been brought to light. The next chapter will now look at the practical impact of the absence of accountability. Using three LPCs as case studies will provide a practical understanding of what could follow from the absence of accountability of directors of LPCs.

CHAPTER 4
THE CONSEQUENCES OF THE LACK OF ACCOUNTABILITY

4.0 Introduction

This chapter demonstrates the consequences of the absence of holding directors of Large Private Companies (LPCs) accountable, through the lens of three LPCs. Recently, there has been a new attitude towards accountability arguably to reflect its impact on business.[593] Government consultation papers have long advocated that the ownership and control of UK companies should be aligned with the accountability of the individuals who exercise that control.[594] The arguments for this, amongst others, have been to have a level playing field and environment which promotes growth[595], protects the interests of various shareholders, enhances corporate performance, and increases shareholder value.[596] It has been opined that there has to be trust in a system that holds accountable the minority of directors who misbehave, shielding the interests and character of the majority who do not.[597] A lack of accountability or even the perception of an accountability deficit can weaken the belief placed in the legal framework that the majority of directors will be protected from the minority.[598]

Accountability requires a detailed exploration of actual board behaviour and opening the '…black box of the boardroom.' [599] This is a difficult endeavour because it requires an understanding of the board's decision-making processes, internal communication structures and norms and external interactions and pressures.[600] As a result, some of the features of the legal personality of the company structure may lead to a perception

[593] PricewaterhouseCoopers, 'Accountability in changing times' (*PwC*, 2017) <https://www.pwc.co.uk/audit-assurance/assets/pdf/ftse-350-reporting-opportunities.pdf> accessed 23 November 2019.
[594] Department for Business, Skills and Innovation, 'Transparency & Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business' (*Gov.uk*, April 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/304297/bis-14-672-transparency-and-trust-consultation-response.pdf> accessed 23 November 2019.
[595] Ibid.
[596] Jeffrey Unerman and Brendan O'Dwyer, 'The business case for regulation of corporate social responsibility and accountability' [2007] 31(4) Accounting Forum 332.
[597] Department for Business, Skills and Innovation (n.594).
[598] Ibid.
[599] Morten Huse, 'Accountability and Creating Accountability: a Framework for Exploring Behavioural Perspectives of Corporate Governance' [2005] 16(1) British Journal of Management 65, 72.
[600] Ibid.

that there is a lack of accountability regarding the individuals who control the affairs of the company.[601]

To demonstrate the impact of the absence of accountability, this chapter will look at three LPCs. The first part will examine BHS Group Ltd, trading as British Home Stores. The second part will examine Sports Direct Limited. The third part will examine Wonga Group Limited, operating through WDFC UK Limited. For each of these case studies, there will be an examination of the failure of accountability of the directors of these LPCs, and the resultant outcome for these LPCs. The fourth part will look at some of the themes that collectively run through what has happened with these three companies. Finally, the fifth part will summarise the key points.

4.1 BHS Group Limited

BHS Group Ltd, known as British Home Stores (BHS), was a department store that operated through 163 stores nationwide.[602] In April 2016, the company collapsed into administration.[603] In December 2016, it was placed into liquidation.[604]

4.1.1 History

BHS started life in Brixton, South London, in 1928, by a group of American Entrepreneurs.[605] It was set up to sell household items[606], amongst other things such as lighting and had self-service cafes and food departments[607]. Items sold cost no more than a shilling (5p) which, at the time, was double BHS's rival, Woolworths', which had a maximum price of sixpence.[608] Indeed the company launched with the promise that nothing would cost more than a shilling.[609] BHS was arguably targeting the higher end

[601] Department for Business, Skills and Innovation (n.594).
[602] BBC News, 'BHS: A history of a High Street stalwart' (*BBC News,* 2 June 2016) <https://www.bbc.co.uk/news/business-36436576> accessed 19 December 2019.
[603] Mark Kleinman, 'BHS creditors get £36m payout two years after chain's collapse' (*Sky News*, 28 January 2018) <https://news.sky.com/story/bhs-creditors-get-36m-payout-two-years-after-chains-collapse-11226790> accessed 19 December 2019.
[604] Zoe Wood, 'BHS placed into liquidation after pressure from biggest creditor' (*The Guardian*, 2 December 2016) <https://www.theguardian.com/business/2016/dec/02/bhs-liquidation-pressure-biggest-creditor-ppf-philip-green-frank-field> accessed 4 May 2022.
[605] BBC News (n.602).
[606] Ibid.
[607] FT Reporters, 'BHS history: the retailer's rise and fall' (*The Financial Times*, 26 April 2016) <https://www.ft.com/content/86cea7e2-0b91-11e6-b0f1-61f222853ff3> accessed 19 December 2019.
[608] BBC News (n.602).
[609] Emily Gosden, 'BHS history: from British Home Stores in Brixton to 180 stores nationwide' (*The Telegraph*, 25 January 2015) <https://www.telegraph.co.uk/news/shopping-and-consumer-news/11368680/BHS-from-British-Home-Stores-in-Brixton-to-180-stores-nationwide.html> accessed 19 December 2019.

of the market, trying to emulate the success of Woolworths.[610] BHS then raised its maximum price of one shilling to five-shilling (25p) which allowed it to expand its offering and sell home furnishings such as drapery.[611] It began to grow rapidly, and this growth, in 1931, was followed by a listing on the London Stock Exchange.[612]

BHS' success continued after listing on the London Stock Exchange, with its focus on offering 'quality and value for money'[613]. By the end of 1960, it employed more than 12,000 and had 94 stores nationwide.[614] Over the 1970s, BHS added 30 locations to its retail estate.[615] The success enjoyed by BHS allowed it to enter into a joint venture with supermarket giant J. Sainsbury Ltd to create 'hypermarkets'.[616] BHS was considered to be a 'strong and efficient'[617] chain, with earnings increasing from £161.8 million in 1975 to £366.4 million, and its net income rose from £18.6 million to £41.8 million during that same period.[618] Some commentators such as Gary Warnaby, Professor of Marketing, state that BHS' 'advances in trading profit had been due as much to cost containment as to sales growth'.[619] BHS's back-office operations such as distribution and data processing were highly lauded for their efficiency.[620] In 1985, BHS began to franchise its brand aboard, providing products and provisions, with the first store franchise opening in Gibraltar.[621]

In the early 1980s, the UK entered a recession forcing BHS to merge with Habitat and Mothercare forming Storehouse plc; creating a retail giant headed by Terence Conran. BHS was seen as a key acquisition that transformed Conran's chain of Habitat stores worth £62.7 million, into an international retail group with more than £1 billion in annual sales, with seven retail companies and more than six million square feet of retail space.[622] By the end of the 1980s, the retail environment started to take a nosedive and this, coupled with Storehouse plc's attempt to appeal to a younger market, rather than the core mature market, resulted in the company having to weather two takeover

[610] FT Reporters (n.607).
[611] BBC News (n.602).
[612] Ibid.
[613] Funding Universe, 'Bhs plc History' (*Funding Universe*, not known) <http://www.fundinguniverse.com/company-histories/bhs-plc-history/> accessed 19 December 2019.
[614] Ibid.
[615] Funding Universe (n.613).
[616] Ibid.
[617] Funding Universe (n.613).
[618] Ibid.
[619] Funding Universe (n.613); Gary Warnaby, 'Storehouse ' [1993] 21(3) International Journal of Retail & Distribution Management 27.
[620] Ibid.
[621] Funding Universe (n.613).
[622] Ibid.

threats and the October 1987 stock market crash. From 1987 to 1989, pre-tax profits dropped from £130 million to £11.3 million. This arguably contributed to a high turnover of chief executives, for both BHS and its parent company, Storehouse plc.[623]

By the 1990s, Storehouse plc started to undergo a programme of cost-cutting. This started with focusing on BHS, as it brought in the majority of revenues for the group. David Dworkin, an American executive with experience at several upmarket department stores, became chief executive officer and chairman of BHS. Using his experience, he brought with him US-made clothing and retailing strategies and cut the jobs of 900 middle managers in an attempt to rationalise the organisation.[624]

In 1992, Dworkin rose to leadership roles at Storehouse plc. While revenues remained flat at circa £750 million, pre-tax profits tripled from £22.1 million in 1992 to £77.4 million in 1996.[625] Further cost-cutting came in the form of suppliers and distribution along with company-sponsored clothing, modelling and television advertising campaigns, and a focus on establishing franchise stores spanning 12 countries, with countries such as China and Russia in the company's sights. From a one-price store to a complete department store, and with economic recovery setting in on the British retail landscape and a devoted leadership team, BHS looked self-assured for profitable growth leading up to the millennium.[626]

4.1.2 Sale of BHS to Sir Philip Green

The company renamed itself and switched between public and private ownership.[627] In 2000, BHS became part of Sir Philip Green's empire for £200 million, with Green serving as director until its demise.[628] This empire consisted of the Arcadia Group of retailers which included Topshop and Burton amongst others. Green was convinced he had the skills to secure its future and make it the basis of an extensive retail empire[629], stating that he had the aim of being 'the Best in the High Street'.[630] In May

[623] Funding Universe (n.613).
[624] Ibid.
[625] Funding Universe (n.613).
[626] Ibid.
[627] James Phillips, 'The Big Read: The Inside Story of The BHS Schemes' Journey to Buyout' (*Professional Pensions*, 8 February 2019) <https://www.professionalpensions.com/feature/1012571/-read-inside-story-bhs-schemes-journey-buyout> accessed 19 December 2019.
[628] Ibid.
[629] Sarah Butler, 'How Philip Green's family made millions as value of BHS plummeted' (The Guardian, 25 April 2016) <https://www.theguardian.com/business/2016/apr/25/bhs-philip-green-family-millions-administration-arcadia> accessed 19 December 2019.
[630] Gosden (n.609).

2000, as a director, Green also issued BHS with a £19.5 million subordinated loan, earning nearly £10 million in interest payments in the following years.[631] Perhaps because of the earlier cost-cutting programme, there was a healthy increase in profits during the early period of Green's tenure. But while dividends were paid in those early years, the total dividends paid by BHS Ltd were £414 million between 2002 and 2004, almost double the post-tax profits of £208 million. The parent company, BHS Group, also paid dividends of £423 million in this period.[632]

BHS was not the only company, in this period at least, paying dividends in excess of profits but rather the measure of these dividends was significantly higher, as a percentage of net profits than its competitors such as Primark and Marks & Spencer.[633] It is not clear whether this had the potential of breaching s.277 of the Companies Act[634], given that such dividends could have been unlawful because insufficient profits existed within BHS to cover the amounts paid. Green did not consider the dividends to be '…improper or unwarranted'[635], because BHS was profitable and the dividends were conservative.[636] Indeed, a fellow shareholder, Robin Saunders, viewed the dividends as justified.[637] This was because the dividends were to be seen in the context of BHS's profitability at the time of payment rather than the subsequent loss-making period.[638]

In December 2001, BHS sold 12 of its stores to Carmen Properties Ltd for £105.9 million, renting them back for £12 million a year. Interestingly, Green and his immediate family were also the owners of Carmen Properties Ltd. Over the next 11 or so years, BHS paid £141 million in rent to Carmen Properties Ltd.[639] BHS also operated two retirement schemes, one for its retail staff and one for its senior managers.[640] Both pension funds were of the defined benefits category, often called gold-plated pensions, paying out a protected income that rose every year.

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[631] Sarah Butler, 'BHS pension: why the regulator wants Sir Philip Green to contribute more' (*The Guardian*, 25 March 2016) <https://www.theguardian.com/business/2016/mar/25/bhs-pension-regulator-sir-philip-green-analysis> accessed 19 December 2019.
[632] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 9.
[633] Ibid para 10.
[634] Companies Act 1985, s.277.
[635] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 11.
[636] Ibid.
[637] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 11.
[638] Ibid.
[639] Edward Curwen, 'Five issues at the heart of the BHS story' (*BBC News*, 29 April 2016) <https://www.bbc.co.uk/news/business-36175250> accessed 19 December 2019.
[640] Work and Pensions and Business, Innovation and Skills Committee (n.392).

In 2005, Green paid himself a record dividend of £1.3 billion from Arcadia Group Ltd.[641] The Arcadia Group Ltd was also controlled by Green, and the dividend was described as 'the biggest pay cheque in British corporate history.'[642] Interestingly, this was only made possible through a major corporate restructuring and loans of around £1 billion[643], more than four times the group's pre-tax profits of £253m.[644] When Green took over, the pension funds showed a combined surplus of £43 million. But by 2006, when BHS started experiencing performance struggles, the surplus had turned into a £7.3 million deficit at best and £281.6 million at worst. This included the costs outsourced to an insurance company, in the event BHS ceased to exist, to pay the benefits.

For BHS, problems slowly started to increase. For example, there were long waiting times for the general maintenance of stores with a lack of investment in stores. More generally, there was little in respect of store updates and refreshes.[645] It is submitted that some of the later deterioration, of the pension funds, can be attributed to the 2008 global financial crisis. However, the biggest catalyst was Green's '…parsimonious treatment of BHS's pension-fund members…. in stark contrast to his generosity towards its shareholders, including his family.'[646]

4.1.3 The BHS Pensions

Green had unusually been closely involved with the pension funds. For example, he made introductions between his personal advisers, who lacked pension experience, to the pension trustees, with the trustees seeking Green's consent for even the slightest changes.[647] In 2006, he persuaded the trustees to invest £40 million, double what they wanted to, with Goldman Sachs. By the end of the year, it was noted that Goldman Sachs had 'got off to a poor start' in relation to the investments that had consumed the £40 million cash injection.[648] By the end of 2007, Goldman Sachs had lost 22 percent over three months. Green made significant attempts to ensure that the pension funds

[641] Julia Finch, 'Philip Green pays himself record £12bn' (*The Guardian*, 21 October 2005) <https://www.theguardian.com/business/2005/oct/21/executivesalaries.executivepay> accessed 19 December 2019.
[642] Ibid.
[643] Work and Pensions and Business, Innovation and Skills Committee (n.392) paras 10-11.
[644] Finch (n.641).
[645] Oliver Shah, Damaged Goods: The Rise and Fall of Sir Philip Green (Penguin UK 2018) 152.
[646] Ibid.
[647] Shah (n.645).
[648] Ibid.

reached just their targeted returns, in a concerted effort to pay in as little as possible, rather than arguably reduce the deficit.[649]

In 2009, BHS Group became part of Green's Arcadia Group, Taveta Investments (No.2) Limited ultimately controlled by his wife, Lady Tina Green, but BHS's pension funds came with a deficit of £166 million.[650] As a result, he proposed a recovery plan that would contribute only £6.5 million per year to the plan and by 2012 would rise to £10 million per year when the deficit reached £233 million.[651] A year after the BHS and Arcadia Group merger, sales had fallen below £800 million, resulting in a pre-tax loss of £7.2 million.[652] By 2012, sales had dropped to less than £700 million and losses had shot up to £116 million. BHS was a financial disaster, but the financial accounts legally masked the actual extent of the company's pension woes.[653] In October 2012, after the triennial pension review, Green refused to pay more than £10 million into the pension fund to reduce the deficit, with no further uplifts.[654] This resulted in a 23-year recovery plan, longer than the industry average of 12 years.

The Pension Regulator (TPR) started to keep a watchful eye on the pension schemes. TPR was created to guard the benefits of pension scheme members while ensuring minimal hostile impact on sustainable employer growth.[655] Its regulatory powers mean that it can ensure that employers do not avoid/evade their responsibilities to their pension schemes.[656] Although TPR intervened, expressing dismay at the length of the recovery time and deterioration of BHS's fiscal strength, 'events outran the lumbering watchdog'.[657]

By 2013, BHS had made an annual loss of £70 million.[658] In November 2013, Green approached Neville Kahn, an insolvency specialist at Deloittes, telling him that 'he needed to get rid of it.'[659] Perhaps this was because '[t]he BHS pension deficit was

[649] Shah (n.645).
[650] Jim Edwards, "Bullshit from 10 years ago': How the BHS pension fund collapsed while Sir Philip Green made £307 million' (*Business Insider*, 26 July 2016) <https://www.businessinsider.com/sir-philip-green-bhs-pension-fund-2016-7?r=US&IR=T> accessed 19 December 2019
[651] Ibid.
[652] Shah (n.645).
[653] Ibid.
[654] Shah (n.645).
[655] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 18.
[656] Ibid para 31.
[657] Shah (n.645).
[658] Ben Chu, 'BHS: What's the real story behind the collapse of the 88-year-old department store?' (*The Guardian,* 25 April 2016) <https://www.independent.co.uk/news/business/news/bhs-whats-the-real-story-behind-the-collapse-a7000166.html> accessed 19 December 2019.
[659] Phillips (n.627).

hanging around Green's neck like a lead weight'.[660] As a result, Project Thor was initiated, a code name for the planned solvent restructuring of BHS.[661] The restructuring included: writing off intra-group debt, renegotiating with landlords and suppliers, and restructuring the two BHS pension schemes.[662] The scheme was designed to reduce the effect of the pensions deficit by cutting member benefits to just above the threshold of the Pension Protection Fund (PPF) compensation.[663] In January 2014, it proposed and promoted those members with pension pots below £18,000 to take cash lump sums.[664] Individuals that did not take up this option, or those with pension pots exceeding £18,000 would be transferred into a new scheme which would be above the threshold of the PPF compensation but significantly lower entitlements would accrue.[665]

Green proposed a one-off contribution of around £54 million, at a time when both pension schemes had a combined deficit of £225 million. This meant that ultimately it was scheme members which would have to bear the loss of, around three-quarters, due to the pension schemes restructure.[666] However, the proposal to create the new scheme and bulk transfer members to that new scheme, with lower benefits, was '…effectively doomed from the start.'[667] This is because such bulk transfers necessitated consent from each pension member, making it almost certain that the richest members (those with more than £18,000) would benefit the most.[668]

Chris Martin, the newly elected chair of trustees of the BHS pension schemes and managing director of Independent Trustee Services[669] was presented with the Project Thor proposal and shared it with other trustees.[670] Martin was told that Green was no longer willing to support BHS. If the Project was not accepted and implemented then this would result in BHS's insolvency along with the pension schemes going into the PPF.[671] Following this, there was a period of consultation between the trustees, now advised by KPMG, and Green, advised by Deloitte.[672] One major disagreement was

[660] Ibid.
[661] Work and Pensions and Business, Innovation and Skills Committee (n.392) paras 27-35.
[662] Ibid.
[663] Phillips (n.627).
[664] Ibid; Work and Pensions and Business, Innovation and Skills Committee (n.392) para 28.
[665] Ibid.
[666] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 28.
[667] Phillips (n.627).
[668] Ibid.
[669] Joanna Bourke, 'BHS pension chairman paid £250,000 despite troubles' (*The Evening Standard*, 25 April 2016) <https://www.standard.co.uk/business/bhs-pension-chairman-paid-250000-despite-troubles-a3256531.html> accessed 19 December 2019.
[670] Phillips (n.627).
[671] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 28-30.
[672] Ibid.

regarding the potential values of the pension schemes on insolvency occurring to establish whether it was more advantageous to agree and implement Project Thor, or to enter insolvency.[673]

However, apprehensions surrounding the proposal were raised by trustees as it has not been 'properly addressed or thought through'.[674] The experimental nature meant it was unlikely to be passed by TPR, with its timeline to deliver being 'overly-optimistic'[675]. The possibility of inevitable insolvency had yet to be established and while there was significant pressure to complete due diligence, there had been a failure to provide necessary data.[676] It seemed as if there was pressure from Green for the trustees to agree to Project Thor, with Martin stating that the trustees would not be 'bumped into agreeing'.[677]

As discussions continued, the trustees wanted Green, via BHS, to put in more money than previously stated.[678] Martin determined that the pension funds' estimate and BHS's estimate constituted a difference of around £40 million.[679] It was perhaps clear that this was something Green was never going to agree to.

TPR possess two key powers concerning the treatment of pension funds often called 'anti-avoidance' or 'moral hazard' powers. The first is a contribution notice which requires the employer to pay into the pension fund.[680] The second is financial support directions (FSD), which requires the employer to put into place financial support for the pension fund.[681]

TPR, instead, suggested to the trustees whether using the regulator's moral hazard provisions would be more beneficial than that of Project Thor and in August 2014, discussed this option with Green.[682] However, this required further information resulting in the trustees, receiving details from TPR, on the type of information to request to ascertain whether the use of its powers was warranted.[683] The information

[673] Work and Pensions and Business, Innovation and Skills Committee (n.392) paras 29-31.
[674] Ibid.
[675] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 29.
[676] Ibid.
[677] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 27.
[678] Phillips (n.627).
[679] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 30.
[680] The Pensions Regulator, 'Anti-avoidance powers' (*The Pensions Regulator,* not known) <https://www.thepensionsregulator.gov.uk/en/about-us/how-we-regulate-and-enforce/anti-avoidance-powers> accessed 19 December 2019.
[681] Ibid.
[682] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 31.
[683] Ibid.

required was dividend data, intragroup payments including rents and rates, and the use of BHS as security for purchases/debts dating back to 2000.[684]

TPR wrote to Martin on 4 September 2014. On 5 September 2014, through his adviser Neville Kahn, the trustees were advised by Green that he had decided to 'pause' Project Thor. Some of the reasons cited were BHS wanted to recognise their Christmas performance and understand political issues such as the Scottish independence referendum as well as the Russian annexation of Crimea.[685] In the end, Green decided not to pursue Project Thor any further.[686]

Both TPR and the trustees became concerned because '…the main Scheme…[was]…so significantly under-funded and therefore a risk to the PPF'[687], as the deficit would only continue to rise. The trustees started to mitigate any further financial risk by de-risking fund assets and preparing for Green to give the go-ahead on continuing Project Thor talks.[688] What was clear was that the continuation of BHS as a going concern was no longer sustainable.[689] While the trustees did what they could to obtain the information required in respect of anti-avoidance, a prerequisite of TPR signing off any following proposal, Green maintained his refusal to provide it.[690]

4.1.4 The Sale to Retail Acquisitions Limited

In early 2015, discussions between Green and the trustees seemed to have ended until Green initiated communications about a possible solvent sale of the company.[691] However, all went quiet, with the trustees remaining aware of 'mutterings in the press'[692] about a possible sale. In February 2015, Martin was told by Kahn and Paul Budge, Arcadia Group's Finance Director, that Project Thor had proved to be expensive, and this was the primary reason for Green's decision to sell.[693] Martin was told that Retail Acquisitions Ltd (RAL), controlled by Dominic Chappell, was the favoured buyer and that Goldman Sachs was leading the finance procedure with RAL demonstrating a statement of means to the tune of £35 million.[694] Martin was also

[684] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 31.
[685] Phillips (n.627).
[686] Work and Pensions and Business, Innovation and Skills Committee (n.392) paras 32-33.
[687] Ibid.
[688] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 33.
[689] Ibid.
[690] Work and Pensions and Business, Innovation and Skills Committee (n.392) paras 33-35.
[691] Ibid para 27.
[692] Phillips (n.627).
[693] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 36.
[694] Ibid para 37.

informed that as a requirement of the offer, £120 million was being provided by RAL as working capital.[695]

In ascertaining whether RAL could meet their obligations, Martin was told that £10 million in annual pension contributions would be split equally, between Green (through Taveta Investments (No.2) Ltd) and Chappell (via RAL) for three years, as previously proposed in the twenty-three year recovery plan. There was also a £20 million floating charge created over BHS stock and an assignment of £80 million of Arcadia Group's intercompany loan to BHS.[696] However, after the sale, the trustees were told the support package would be a £40 million loan secured by a fixed and floating charge, with £15 million of contribution support. Ultimately, neither proposal was not formalised because Green held back assignment until discussions with TPR were resolved.[697]

RAL agreed to proceed on the basis that a resolution along the line of Project Thor could be reached, perhaps because the viability of the business was threatened in the absence of some form of restructuring.[698] However, Grant Thornton, appointed by RAL to conduct due diligence, noted that while non-pension information was freely provided, pension-related information provided was limited.[699] RAL's legal advisers, Olswang, based on the minimal information provided, noted that the pensions deficit was 'anywhere between £250 million and £500 million…' which was 'far too large for a group that is this size that is loss making'[700]. On 11 March 2015, RAL bought BHS for £1[701], and with the obligation for RAL to, as soon as reasonably possible '…agree and implement a compromise on the pension scheme…'.[702] Post-sale, on 25 March 2015, TPR issued demands for documents, under its section 72 information powers.[703] The Pension Regulator had launched a formal investigation into BHS.[704]

BHS continued to trade as a going concern, and this did not change even with RAL as the new owner.[705] RAL intended to make BHS profitable within two years, armed with a business plan composed of BHS's management team and Green's finance team.[706] They sought to do this by realising £26.7 million in property-related savings, closing

[695] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 37.
[696] Ibid para 38.
[697] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 38.
[698] Ibid para 30.
[699] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 41.
[700] Ibid.
[701] Curwen (n.639).
[702] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 57.
[703] Ibid; See also, Pensions Act 2004 s.72.
[704] Phillips (n.627).
[705] Ibid.
[706] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 138.

loss-making stores and making improvements of £23.9 million through trade initiatives.[707] However, these numbers were negligible when it came to the issue of the pensions deficit, which was far higher and needed urgent attention.

In November 2015, the plan to tackle the pensions deficit was known as Project Vera, in the process of being developed by Grant Thornton. It became quite clear that finding a credible solution to the pensions' deficit was critical to BHS's short-term survival. RAL, together with Martin and BHS's Chief Executive Officer and Chief Financial Officer, discussed the possible refinancing of BHS through an asset-backed loan. But this depended on finding a solution to the pensions' deficits, which would also incidentally enable credit finance, increasing cash balances. However, Project Vera was dependent on a cash injection to the pension schemes of around £100 to £200 million and the only dependable source of this finance was Green.[708] Without further financing, there was no possibility of a new scheme working out. By December 2015, matters got worse with trading reduced, no further financing and no resolution to the deficits, and it became clear that other options must be considered.[709]

In January 2016, during discussions with Green and TPR, Martin asked Green about a possible contribution of £120 million. Green refused to do so unless TPR dropped its anti-avoidance investigation. In the absence of any further financing, particularly a cash injection into the pension schemes, insolvency was the only option available.[710] In February 2016, Green made clear that he was not willing to inject money to enable Project Vera to work.[711] In March 2016, BHS proposed a Company Voluntary Arrangement (CVA). Even though the CVA reduced the total BHS rent bill by £30 million and so, as advised by Grant Thornton, in April 2016, and BHS sold its Oxford Street store, this was not enough for BHS to survive.[712] On 22 April 2016, rumours started to occur that BHS was on the verge of administration.[713] On 25 April 2016, Duff and Phelps were appointed as administrators.[714]

[707] Ibid para 140.
[708] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 144.
[709] Phillips (n.627).
[710] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 145.
[711] Ibid.
[712] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 142.
[713] Emma Haslett, 'Timeline: A blow-by-blow account of how BHS' demise unfolded' (*CITY AM*, 2 June 2016) <https://www.cityam.com/timeline-a-blow-by-blow-account-of-how-bhs-demise-unfolded/> accessed 19 December 2019.
[714] Ibid.

On 27 April 2016, Dominic Chappell, director of RAL, was preparing a bid to buy back BHS.[715] There were rumours that there were more than 30 reported bidders interested in buying BHS.[716] Over the coming weeks, many other bidders were named such as IKEA and Hilco Capital as future potential owners of BHS, but it seemed that despite all the interest, no firm sale had been agreed upon. On 2 June 2016, Duff and Phelps ended calls for bidders, perhaps because no one was willing to buy BHS as a profit-making endeavour, so BHS was to be wound down putting at risk 11,000 jobs.[717] FRP Advisory was appointed as liquidators, with liquidation seen as the best way forward in terms of recovery for the pension schemes and other creditors.[718]

The PPF, a government-backed scheme that supports collapsed pension schemes, took over the BHS pension schemes.[719] As the pensions are classed as unsecured creditors, the maximum they would receive is around 8p in the pound from the sale of BHS's assets.[720] To make matter worse, the PPF was the largest unsecured creditor, as a result of taking on the BHS pensions, with an estimated claim of £571 million.[721]

4.2 SPORTSDIRECT.COM Retail Limited

SPORTSDIRECT.COM RETAIL LIMITED, trading as Sports Direct, is a sports retailer with over 540 stores that has developed into a retail empire spanning clothing and acquiring various sports clothing brands.[722] In December 2019, it forecasted profits of up to £390.3 million, with pre-tax profits increasing 58 percent to £101.8 million in the first half of the 2019/20 financial year, with 15 percent of that increase coming from the Sports Direct business.[723]

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[715] Haslett (n.713).
[716] Ibid.
[717] Haslett (n.713).
[718] Wood (n.604).
[719] Patrick Collinson, 'What is the Pension Protection Fund and will BHS sink it?' (*The Guardian,* 25 April 2016) <https://www.theguardian.com/business/2016/apr/25/pension-protection-fund-bhs-retirement-ppf> accessed 19 December 2019.
[720] Wood (n.604).
[721] Ashley Armstrong, 'Liquidators finally seize control of BHS' (*The Telegraph*, 2 December 2016) <https://www.telegraph.co.uk/business/2016/12/02/liquidators-finally-seize-control-bhs/> accessed 19 December 2019.
[722] Statista, 'Number of sports retail stores operated by Sports Direct in the United Kingdom (UK) from fiscal year 2012 to 2019' (*Statista*, August 2019) <https://www.statista.com/statistics/439676/sports-direct-sports-retail-store-numbers/> accessed 21 December 2019.
[723] Sarah Butler, 'Mike Ashley: more House of Fraser stores likely to close' (*The Guardian,* 16 December 2019) <https://www.theguardian.com/business/2019/dec/16/sports-direct-profits-house-of-fraser-stores-close> accessed 21 December 2019.

4.2.1 History

In 1982, Mike Ashley, after leaving school at 16, started trading on the high street.[724] Ashley then turned to playing squash and then as a squash coach, starting Sports Direct with a single store in Maidenhead called 'Mike Ashley Sports[725], funded by a £10,000 loan from his parents.[726] Following the success of the store, he then grew the brand, without access to the capital markets.[727] In 1996, he rebranded to 'Sports Soccer' and acquired the sports brand, Donnay. As a sole trader, until at least 1997, Ashley was able to completely avoid media attention, because he was not required to file accounts with Companies House.[728] On 21 July 1997, Ashley incorporated a company called 'Sports Soccer Limited'.[729] In 2000, Sports Soccer began its expansion with its first international stores located in Belgium.[730]

Ashley's reclusive character changed when he turned whistle-blower to the Financial Conduct Authority (FCA), then known as the Office of Fair Trading (OFT), regarding the fixing of replica football shirts, proceeding to give formal evidence in 2011.[731] In 2002, Sports Direct continued to acquire brands such as Lillywhites and Lonsdale and by 2004, it had increased to 150 stores adding brands such as Dunlop, Slazenger, Carlton and Karrimor. In 2005, Sports Direct acquired the brands, Campri, LA Gear, No Fear, Title, Voodoo Dolls and, in 2006, international fashion brand Kangol.[732] Ashley often targeted companies which were having financial difficulties.[733] With the acquisition of the brands came a major rebranding of all stores renaming them 'Sports World'.[734] Ashley pushed his ethos of a '…into a pile-it-high, sell-it-cheap bazaar…'[735]

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[724] Management Today, 'How Mike Ashley's reputation went south' (*Management Today,* 17 May 2016) <https://www.managementtoday.co.uk/mike-ashleys-reputation-went-south/article/1388496> accessed 18 January 2020.
[725] Sports Direct, 'Company History ' (*Sports Direct,* not known) <https://www.sportsdirectplc.com/about-us/company-history.aspx> accessed 18 January 2020.
[726] Kevin B. Johnston, 'The Story Behind Sports Direct Founder Mike Ashley' (*Investopedia*, 22 September 2019) <https://www.investopedia.com/investing/sports-direct-founder-mike-ashley-story/> accessed 18 January 2020.
[727] Management Today (n.724).
[728] Ibid.
[729] Companies House, 'SPORTSDIRECTCOM RETAIL LIMITED' (*Companies House*, not known) <https://beta.companieshouse.gov.uk/company/03406347> accessed 18 January 2020.
[730] Sports Direct (n.725).
[731] Management Today (n.724).
[732] Sports Direct (n.725).
[733] Management Today (n.724).
[734] Sports Direct (n.725).
[735] Simon Goodley, 'Sports Direct's Mike Ashley: nasty or nice?' (*The Guardian,* 17 January 2014) <https://www.theguardian.com/football/2014/jan/17/sports-direct-mike-ashley-newcastle-united-profile> accessed 18 January 2020.

for brands which '…once suggested quality, but...[were]…now stretched across ever-wider product ranges.'[736]

The success of Sports World, through the acquiring of financially stressed brands and selling them for higher profit margins, was credited to '…[revolutionising] the supply chain…'.[737] In February 2007, Ashley took the holding company, then called Sports World International Ltd, now called Frasers Group[738], public.[739] Ashley floated 43 percent of Sports Direct at 300 pence a share, making him around £929 million.[740] However, since then, the parent company, under which Sports Direct is a private subsidiary has been buying back its shares, with Ashley, a majority shareholder, holding over 62 percent of the shares.[741] It must be noted that Sports Direct Retail is a private limited company, with Frasers Group Plc serving as its retail group and parent company name. By 2009, the company had established leadership in sports retail marketing with sales of over £1 billion.[742]

It is submitted that Ashley is and has been the key driver in the success of Sports Direct. Ashley tends to surround himself with close associates, including family members which has led to it being described as 'a mafia-like family'[743] and 'inner circle.'[744] It has been said that these individuals, who comprise his 'inner circle', are those who he trusts implicitly, and they are the only ones that know key answers.[745] As a result of their loyalty to Ashley, these senior executives rarely speak publicly.[746]

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[736] Ibid.
[737] Goodley (n.735).
[738] Jim Robertson, 'Sports Direct is no more as Mike Ashley wins vote – Now Frasers Group with immediate effect' (*The Mag*, 18 December 2019) <https://www.themag.co.uk/2019/12/sports-direct-is-no-more-as-mike-ashley-wins-vote-now-frasers-group-with-immediate-effect-newcastle-united/> accessed 18 January 2020.
[739] The Guardian, 'Sports Direct: timeline' (*The Guardian,* 24 July 2007) <https://www.theguardian.com/business/2007/jul/24/12> accessed 18 January 2020
[740] Ibid.
[741] Attracta Mooney and Jonathan Eley, 'Sports Direct's largest minority shareholder shows faith in Ashley' (*The Financial Times*, 17 August 2019) <https://www.ft.com/content/24177338-c01d-11e9-89e2-41e555e96722> accessed 18 January 2020.
[742] Sports Direct (n.725).
[743] Luke Tigby, 'The many faces of Mike Ashley: Deal maker, drinker, disruptor' (*Retail Week,* 23 July 2016) <https://www.retail-week.com/7032432.article?authent=1> accessed 18 January 2020.
[744] Ibid.
[745] Tigby (n.743).
[746] Simon Goodley and Jonathan Ashby, 'A day at 'the gulag': what it's like to work at Sports Direct's warehouse' (*The Guardian,* 9 December 2015) <https://www.theguardian.com/business/2015/dec/09/sports-direct-warehouse-work-conditions> accessed 18 January 2020.

In 2010, the majority of retailers were battling the 2008 financial crisis with some entering into insolvency.[747] However, Sports Direct forecasted profits of 'at least' £155 million to the end of April 2010. In the 26 weeks prior to October 2009, pre-tax profits hit £72 million, an increase of 39 percent on the same period in 2008. It was suggested this due to its …value-led offering'.[748] In 2014, Sports Direct delivered another record performance of an annual rise of 15 percent in pre-tax profits of £239.5 million up to April 2014. Again, this was said to be due to the '…core strategy…[of]… offering… customers a wide range of products which represent exceptional quality and unbeatable value.'[749] Sports Direct were not just offering a wide range of products at exceptional value, but something much more than that, especially for the majority of its workforce at least anyway.

4.2.2 Channel 4 Dispatches & The Guardian Investigation

On 27 April 2015, Dispatches: The Secrets of Sports Direct was aired on Channel 4. Reporters went undercover in the company's Shirebrook Warehouse, also serving as the company's headquarters, spanning a length of a total of 14 football pitches, to investigate the true cost of the company's discounted goods that have and are continuing to make billions.[750] The warehouse houses 200 permanent employees, and over 3,000 agency workers, employed via two agencies, The Best Connection and Transline Group.[751] The investigation found appalling work practices that '…enables the majority of workers in both the warehouse at Shirebrook and at the shops around the UK to be treated without dignity or respect.'[752] Indeed, the Dispatches programme found that the'… Shirebrook operated as a sweatshop, with Victorian working conditions.'[753] The human cost of Sports Direct was unravelled, and it was not pretty reading for its billionaire owner who relied upon cheap labour for Sports Direct to make increased profits year after year.

[747] Mick Brown, 'Financial Crisis: High Noon on the High Street ' (*The Telegraph*, 12 June 2009) <https://www.telegraph.co.uk/finance/financialcrisis/5487218/Financial-crisis-high-noon-on-the-high-street.html> accessed 18 January 2020.
[748] This is Money, 'Sports Direct delivers 39% profits rise and hoists full-year forecasts' (*This is Money,* 10 December 2009) <https://www.thisismoney.co.uk/money/article-1234709/Sports-Direct-delivers-39-profits-rise-hoists-year-forecasts.html> accessed 18 January 2020.
[749] BBC News, 'Sports Direct profits up 15% to £240m' (*BBC News*, 17 July 2014) <https://www.bbc.co.uk/news/business-28340131> accessed 18 January 2020.
[750] Channel 4, 'Sports Direct - investigation reveals harsh working conditions' (*Channel 4*, 27 April 2015) <https://www.channel4.com/press/news/sports-direct-investigation-reveals-harsh-working-conditions> accessed 18 January 2020.
[751] Business, Innovation and Skills Committee (n.55) para 1.
[752] Ibid para 75.
[753] Business, Innovation and Skills Committee (n.55) para 2.

The programme uncovered poor working conditions. For example, all of the agency staff were employed on zero-hours contracts. There was also a 6- strike policy in operation, giving workers precarious job security, with strikes (black marks) being issued for errors, toilet breaks, poor housekeeping, and unexplained dead time, amongst other things.[754] Interestingly, it also found that:

> 'Sports Direct are very astute at keeping their name out of the press so very often you find yourself settling on the way into the court, and then it becomes very difficult then. It's inevitably enshrined in a confidentiality clause, with an amount of money that the employee themselves, the worker themselves, sees as being beneficial, enough at least to settle the case. And on that basis we can't then pursue it through the tribunal, we don't get a precedent, we don't get to make a public story.'[755]

This explains why these concerns did not come to light earlier. This is even though 'Inside Out', a BBC current affairs programme found, through a Freedom of Information request, that between January 2013 and December 2014, 76 ambulance and/or fast responder paramedic cars were sent to the postcode of Sports Direct Shirebrook distribution centre.[756]

The issues started at the door, which is why the warehouse is locally referred to as 'the gulag'[757]. When entering the warehouse, workers were required to, for security reasons, scan their fingerprints.[758] Sports Direct also had a specified list of around 802 banned clothing brands for staff. In the event, that workers were wearing any of the 802 brands, security guards would pull workers aside and workers would be searched down to their underwear[759], without pay, at the start of every shift.[760] It is fair to say that, such searches would take considerable time although at any given time, particularly during the busiest shifts, there were circa 2000 workers onsite.[761] But this did not matter, because if workers clocked in 1 minute late, or clocked off 1 minute

[754] Channel 4 (n.750).
[755] Ibid.
[756] Business, Innovation and Skills Committee (n.55) para 2.
[757] Goodley and Ashby (n.746).
[758] Ibid.
[759] Goodley and Ashby (n.746).
[760] Luke Primarolo, 'Wanted: Mike Ashley – Is this high noon for Sports Direct?' (*Stronger Unions*, 22 March 2016) <https://strongerunions.org/2016/03/22/wanted-mike-ashley-is-this-high-noon-for-sports-direct/> accessed 18 January 2020.
[761] Goodley and Ashby (n.746).

early, they would be docked 15 minutes' pay.[762] This meant that some workers would resort to waiting until the exact moment their break was due but as one employee stated: '[i]f they see you waiting to clock out, you can get into a lot of trouble.'[763]

The 6-strike policy consisted of strikes for matters such as 'errors'[764], 'excessive/long toilet breaks'[765], 'play'[766], 'time wasting'[767] and 'wearing branded goods'[768] amongst others. If a worker got 6 strikes in 6 months, they would be sacked.[769] As the majority of workers were agency workers, living under constant threat of dismissal without notice, workers were careful to ensure they did not do anything that jeopardised their livelihood. Workers were just grateful for having a job, as they had been warned of the rules from the start. For example, the documentation provided by The Best Connection, specifically its welcome letter, to new starters stated that: '[y]our performance onsite will be monitored and if you do not meet the expectations of Sports Direct then your assignment will be terminated'.[770] The Transline Group documentation stated that: 'Transline reserves the right to end an assignment at any time without reason, notice or liability'.[771]

As the majority of workers were EU nationals, particularly from eastern European backgrounds, it became easy for the agencies to employ them as a means of cheap labour, as the majority spoke very little English.[772] Indeed, inside the building, all signs and messages were translated from English to Polish.[773] Furthermore, testimonies from workers about the lengths they took to ensure they did not get sacked make for grim reading. Between January 2010 to April 2016, there were 115 incidents which included '…an amputation of a finger, a fractured neck, a crushed hand, and hand, wrist, back and head injuries.'[774] Out of the 115 incidents, 50 incidents were categorised as 'life threatening', and these included: 'chest pain, breathing problems, convulsions, fitting and strokes, and five calls from women suffering pregnancy

[762] Ibid.
[763] Goodley and Ashby (n.746).
[764] Ibid.
[765] Goodley and Ashby (n.746).
[766] Ibid.
[767] Goodley and Ashby (n.746).
[768] Ibid.
[769] Goodley and Ashby (n.746).
[770] Ibid.
[771] Goodley and Ashby (n.746).
[772] Ibid.
[773] Goodley and Ashby (n.746).
[774] Business, Innovation and Skills Committee (n.55) para 58.

difficulties, including one woman who gave birth in the toilet in the warehouse'.[775] One worker stated:

> 'I was off sick for a few weeks because of ill health. I was sending in sick notes from the doctor. The day I was due to start back to work I received an email laying me off, with no explanation, just paid off and a pay statement.'[776]

Another worker stated that the picking of products is timed to the second, even though the aisles are full of pickers, making it impossible. If the picking of products is late by a second, the worker still had to '…suffer humiliation over the Tannoy, with…[her]…name called out so that everybody knew.'[777] Another worker was '…forced to talk about her periods publicly…'[778] as she had been off sick after consistently working 12-hour shifts.[779]

Sports Direct had also broken its promise of recruiting local people for at least 80 percent of the jobs. In reality, the majority went to eastern European workers, and people employed locally came to 30 percent.[780] Workers had to work for free, despite clocking out at the official end time by as much as 1 hour, so wages were kept under budget.[781] They were also required to work for free for at least 3 hours, especially those on zero-hour contracts, those that refused were not offered work the following day.[782] Area managers sent out emails at the start of the week and whichever store manager did the least number of hours per week would get a lecture for not showing commitment and/or dedication, and if you were not doing at least a minimum of 55 hours per week were met with an email consisting of '…a full blown rant….'[783] for all other store managers to also see as well.[784] There were also allegations of permanent contracts offered to workers in return for sexual favours[785], and workers who went on maternity

[775] Zlata Rodionova, 'The 7 most shocking testimonies from workers at Sports Direct' (*The Independent,* 22 July 2016) <https://www.independent.co.uk/news/business/news/sports-direct-mike-ashley-worker-conditions-minimum-wage-ian-wright-investigation-a7149971.html> accessed 18 January 2020.
[776] Ibid.
[777] Rodionova (n.775).
[778] Ibid.
[779] Rodionova (n.775).
[780] Ibid.
[781] Rodionova (n.775).
[782] Ibid.
[783] Rodionova (n.775).
[784] Ibid.
[785] Rodionova (n.774); See also, Business, Innovation and Skills Committee (n.55) para 19.

leave were transferred onto zero-hours contracts upon return, losing benefits and job security.[786]

The sheer importance of human capital becomes clear when it comes to Sports Direct's distribution and logistics operations, but it is also the most abused. Ashley has focused on '…building a retail machine whose cogs almost entirely consist of people'[787], with some calling it '…voodoo retailing…'[788]. This process '…is so valuable it is envied by at least one of the country's most respected retail veterans.'[789] The process can reroute products that are not selling to outlet stores and its online store whilst keeping stock which does sell well in stores. Indeed, one former colleague conceded that it is difficult to see how '…this key system could possibly work without lots of cheap labour doing menial jobs.'[790]

4.2.3 Sports Direct's Internal Review

On 18 December 2015, Ashley announced that Sports Direct would voluntarily review all agency worker terms and conditions[791], perhaps because Ashley was told that the company was a 'bad advert for British Business'.[792] Indeed, Chuka Umunna, the former Labour Shadow business secretary stated that: '[t]his Sports Direct review is overdue but has the whiff of a pupil marking its own homework. Sports Direct should get an independent third party to do their review into workers' rights - the company has a lot to learn.'[793] Despite Ashley attempting to mitigate the reputational risk and damage of the working practices revelations by attempting to show he was willing to do something about it, this did not stop MPs from taking a more detailed interest in the company.

4.2.4 Select Committee Inquiry

Due to the media coverage of Sports Direct's work practices, the House of Commons Business, Innovation and Skills Committee launched an inquiry into Sports Direct's

[786] Croner-i, 'The National Minimum Wage — lessons from Sports Direct' (*Croner-i*, 12 January 2017) <https://app.croneri.co.uk/feature-articles/national-minimum-wage-lessons-sports-direct> accessed 18 January 2020.
[787] Goodley and Ashby (n.746).
[788] Ibid.
[789] Goodley and Ashby (n.746).
[790] Ibid.
[791] Business, Innovation and Skills Committee (n.55) para 4.
[792] BBC News, BBC News, 'Sports Direct to review worker rights' (*BBC News*, 18 December 2015) <https://www.bbc.co.uk/news/business-35130394> accessed 18 January 2020.
[793] Julia Kollewe, 'Sports Direct: Mike Ashley to oversee review of agency staff's conditions' (*The Guardian*, 9 December 2015) <https://www.theguardian.com/business/2015/dec/18/sports-direct-mike-ashley-to-oversee-review-of-agency-workers-conditions> accessed 18 January 2020.

working practices.[794] On 15 March 2016, Ashley was formally summoned to attend before MPs to be questioned over Sports Direct's working practices.[795] However, Ashely refused, stating that:

> '[m]y current intention is that I will not attend Westminster on 7 June as I believe the proposal by [BIS select committee chairman] Iain Wright MP – whom I have offered to meet in Shirebrook – is an abuse of the parliamentary process. I therefore intend to challenge the attendance order issued by the BIS committee and I will be sending a formal reply to the committee in due course.'[796]

Ian Wright responded by stating that '[d]oes Mr Ashley, owning and operating a business in a parliamentary democracy, see himself as being beyond such public scrutiny? What has he got to be frightened of?'[797] Amidst the threats of possible contempt of parliament order, Ashley relented and attended the committee hearing on 7 June 2016.[798]

During the hearing, Ashley apologised for the bottlenecks at security checkpoints '…expressing remorse…'.[799] The committee did not pursue this line of inquiry further, because Ashley admitted that Sports Direct was the subject of an ongoing investigation related to National Minimum Wage (NMW) failings because of the compulsory searching of all workers. [800] Interestingly, this was the first time, on record at least, that Ashley admitted that workers had been paid below the National Minimum Wage.

The hearing also ascertained that Sports Direct '…exerts a strong grip...'[801] over The Best Connection and Transline Group. Indeed, The Best Connection's proportion of turnover from Sports Direct was under 10 percent, and Transline Group's was 10

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[794] Business, Innovation and Skills Committee (n.55) paras 7-9
[795] Sarah Ellson, 'Declining a Select Committee "invitation"' (*Fieldfisher*, 29 March 2016) <https://publicregulatoryblog.fieldfisher.com/2016/declining-a-select-committee-invitation> accessed 18 January 2020.
[796] BBC News, 'Sports Direct boss Mike Ashley to miss Commons committee' (*BBC News*, 3 June 2016) <https://www.bbc.co.uk/news/uk-england-derbyshire-36445919> accessed 18 January 2020.
[797] Ibid; See also, Business, Innovation and Skills Committee (n.55). paras 7-9.
[798] BBC News (n.796).
[799] Business, Innovation and Skills Committee (n.55) para 38.
[800] Ibid para 37-38.
[801] Sinead Moore, 'Ashley must be held accountable for "disturbing" working practices at Sports Direct, committee says' (*Economia*, 22 July 2016) <https://economia.icaew.com/news/july-2016/ashley-must-be-held-accountable-for-working-practices-at-sports-direct-says-committee> accessed 18 January 2020.

percent or £20 million.[802] However, aside from providing'…flexible workforces…'[803], they also provided, or facilitated, several services.

For example, for workers which did not have bank accounts, Transline Group provided pre-paid debit cards, but they came with fees such as a £10 one-off fee, a £10 monthly management fee, a cash withdrawal fee of £0.75p, £1.50 fee for a paper statement and £0.10p for text message updates.[804] Insurance services were also provided in respect of personal accidents with workers being subject to deductions. Salary sacrifice schemes were also in operation which enabled workers to be paid a mixture of wages and expenses which then lowered national insurance contributions.[805] The committee hearing noted that:

> '....it is irresponsible, if not reckless, that Sports Direct pays….The Best Connection and Transline, when these agencies do not seem to have a basic understanding of employment law and practices.'[806]

The inquiry went further stating that representatives from both agencies which appeared before the committee[807] '…gave woefully poor, and in some cases, incorrect, evidence.'[808] Ashley conceded and admitted that '…Sports Direct had grown too big for him.'[809] He stated that he was willing to do whatever it took for Sports Direct to correct its working practices. Ian Wright, the committee chairman, stated that what he had heard was 'extremely disturbing'[810] and the evidence he had heard:

> '…points to a business whose working practices are closer to that of a Victorian workhouse than that of a modern, reputable high street retailer. For this to occur in the UK in 2016 is a serious indictment of the management at Sports Direct and Mike Ashley, as the face of Sports Direct, must be held accountable for these failings.'[811]

[802] Business, Innovation and Skills Committee (n.55) para 24.
[803] Ibid para 12.
[804] Business, Innovation and Skills Committee (n.55) para 39.
[805] Ibid para 44.
[806] Business, Innovation and Skills Committee (n.55) 3.
[807] Moore (n.801).
[808] Business, Innovation and Skills Committee (n.55) 3.
[809] Ibid.
[810] Business, Innovation and Skills Committee (n.55) 3.
[811] Ibid para 77.

Ashley told the hearing '[y]ou are not pushing against a closed door with me'.[812] From this, it was apparent, at least prima facie, that a change for the better would be taking place.

4.2.5 Her Majesty's Revenue & Customs and The National Minimum Wage

In January 2016, Her Majesty's Revenue & Customs (HMRC) initiated a National Minimum Wage (NMW) investigation into Sports Direct.[813] Perhaps because former government minister, Nick Boles, made clear, in December 2015, that if the company had flouted labour laws, it would face consequences.[814] As the enforcement authority for National Minimum Wage, HMRC's investigation quantified that The Best Connection owed £469,273 to 2,558 workers, Transline Group owed £310,302 to 1,421 workers and Sports Direct owed £167,036.24 to 383 workers.[815] In total, this amounted to £946,611.24, and on average each worker obtained around £217.01, in back pay.

In addition, penalties levied ranged from 50 percent to 200 percent depending on the pay reference periods identified on the Notices of Underpayment where an NMW underpayment was identified. As part of NMW enforcement, Sports Direct were also publicly named. Interestingly, however, HMRC did not levy '…the biggest fine possible on Sports Direct – which would amount to double the wages owed, nearly £2m.'[816]

4.2.6 The Recommendations of Sports Direct's Internal Review

After Ashley's commitment to put things right, announced on 18 December 2015 and then reiterated, at the committee hearing, he asked city law firm Reynolds Porter Chamberlain (RPC) to conduct a review of Sports Direct's working practices.[817] As part of that review, published on 6 September 2016, recommendations were made, including actions that had already been taken to correct working practices.[818] For example, the report recommended that: the six-strike policy be suspended and

[812] Business, Innovation and Skills Committee (n.55) para 21.
[813] Sarah Butler, 'Sports Direct and its staffing agencies paid workers £1m too little' (*The Guardian*, 8 December 2017) <https://www.theguardian.com/business/2017/dec/08/sports-direct-and-its-staffing-agencies-paid-workers-1m-too-little> accessed 18 January 2020.
[814] Kollewe (n.793).
[815] Butler (n.813).
[816] Ibid.
[817] Reynolds Porter Chamberlain LLP 'Working Practices Report' (*Sportsdirectplc*, 6 September 2016) <https://www.sportsdirectplc.com/~/media/Files/S/Sports-Direct/documents/sports-direct-international-plc-working-practices-report-6-sep-2016.pdf> accessed 18 January 2020
[818] Ibid.

replaced with the disciplinary procedure for permanent employees;[819] workers be given the choice to select between zero-hours contracts or guaranteed hour contracts; at least 10 agency workers are transferred to Sports Direct every month.[820]

4.2.7 Broken Promises & (The New?) Sports Direct

It seemed that Sports Direct had turned a corner and had started to clean up its image. Despite calls for Mike Ashley to be held accountable and subsequent publishing of recommendations at Ashley's behest, it seemed that was not the case. Whilst it can be argued that the committee appearance was Ashley being held accountable, it was nothing more than a fact-find, rather than Ashley being held accountable. Indeed, on 5 September 2017, it was reported that it was '… business as usual…' for Sports Direct.[821] The trade union, Unite, had found that '…there was no evidence that Sports Direct was moving significant numbers of agency staff at its warehouse into direct employment.'[822] Workers had also raised health and safety concerns regarding, '…crowded isles, defective warehouse equipment and products stacked dangerously high.'[823]

From 7 September 2016, a day after the publishing of the independent report by RPC, to 5 September 2017, according to a Freedom of Information request, there had been 11 accidents at the Shirebrook warehouse. These ranged from '…numerous back and head injuries and three "major" injuries, including a fractured hand, damage to and potential loss of sight in one eye and a head injury, which led to a loss of consciousness.'[824]

It, therefore, became clear that there was '..an arrogance and a contempt, actually, at the very highest level of this business….there is no place for these kinds of 19th century working practices in 21st century Britain.' But unfortunately, there was and arguably still is, at least for Sports Direct. Despite calls for Ashley to be held accountable for these failings. A former colleague summed up Mike Ashley stating:

[819] Reynolds Porter Chamberlain LLP (n.817).
[820] Sarah Butler, 'Sports Direct fails to meet 2016 pledge on working conditions' (*The Guardian*, 5 September 2017) <https://www.theguardian.com/business/2017/sep/05/sports-direct-fails-2016-pledge-zero-hours-shirebrook-mike-ashley> accessed 18 January 2020.
[821] Ibid.
[822] Butler (n.820).
[823] Ibid.
[824] Butler (n.820).

> ‘His modus operandi is pretty pitiful. You meet, when he'll always be eating or drinking something, but he'll be pretty courteous. You shake hands and agree on the next steps. And then the next day you read an attack on yourself in the media.’[825]

> ‘Some people are attack dogs to your face, which is easier to read. He was far nicer in person than you'd expect. Afterwards, he is far nastier.’[826]

In the pursuit of increased profits, Sports Direct cut corners when it came to abiding by workplace health and safety laws. Not only that, but it made employees (and indirectly agency workers) pay for this through the underpayment of NMW. It is submitted Ashley was a key figure in enabling this to occur. Despite promises to the Select Committee and appointing external advisers to undertake a review of the work practices, nothing was achieved. Indeed, as noted earlier, shortly after, it was business as usual. Mike Ashley, in his own words, sums up Sports Direct succinctly stating that: ‘…when people are getting under scrutiny. Sports Direct creates a lot of attention. A lot of noise.’[827]

4.3 Wonga Group Limited

Wonga was a pay-day loans company offering short-term loans at exorbitant interest rates. On Thursday 30 August 2018, it went into administration.[828]

4.3.1 History

In October 2006, Errol Damelin, a South African entrepreneur, worked as a corporate finance banker at an Israeli investment bank. He had made a name for himself as a savvy investor in start-up companies.[829] Having previously, founded and built a sales company specialising in cable and wire, Damelin turned his sights to payday lending,

[825] Gordon Parks, ‘Gordon Parks: Mike Ashley for Rangers? All he's given Newcastle United is Geordie sores’ (*Daily Record*, 18 August 2014) <https://www.dailyrecord.co.uk/opinion/sport/gordon-parks-mike-ashley-rangers-4068357>accessed 27 January 2023.
[826] Ibid.
[827] Sky News, ‘Sports Direct's Mike Ashley on not having anything to hide, auditors and the high street’ (11 September 2019) <https://www.youtube.com/watch?v=C7G9rkyWyN0> accessed 18 January 2020.
[828] Patrick Collinson and Rupert Jones, 'Wonga collapses into administration' (*The Guardian*, 30 August 2018) <https://www.theguardian.com/business/2018/aug/30/wonga-collapses-into-administration> accessed 18 January 2020.
[829] Kate Bassett, 'Money machine: Errol Damelin, Wonga' (*Real Business*, 2 January 2011) <https://realbusiness.co.uk/money-machine-errol-damelin-wonga/> accessed 18 January 2020.

seeing there was a '…clear demand for short-term loans…'[830], perhaps because the UK unsecured lending market was estimated to be worth more than £60 billion.[831] Damelin founded Wonga, a UK payday loan company providing instant short-term loans to help individuals bridge the gap from payday to payday. Wonga provided decisions instantly to potential borrowers and if approved, the cash would be deposited into the borrower's bank account in less than 15 minutes.[832]

Wonga was touted as an expedient service for an '…internet-savvy group of consumers, the Facebook generation, people who are used to getting things fast'[833] and '…one of a new breed of digital innovators in the finance industry'[834] which would 'leave traditional lenders eating dust'.[835] The concept was so well-received that some private equity investors such as Greylock Partners, and Balderton Capital, amongst others, were keen to provide funding.[836]

By July 2008, after a soft launch in 2007 at which over 50,000 applications were received, Wonga was fully launched with a workforce of 37 staff and a development team based in Ukraine.[837] Potential borrowers were able to control the size, length and cost of their loan with first-time applicants having the ability to borrow up to £400.[838] It was perhaps the convenience of being able to obtain a loan quickly, day or night, which saw one million people visit its website, with approved applications hitting numbers in the hundreds and thousands.[839] Although Damelin stated that only 15 percent of first-time applicants are accepted.[840] Between 2009 and 2010, turnover was reported to be £73 million, and Damelin was reported to have taken home £1.6 million.[841] Wonga also launched an iPhone application that would allow individuals to borrow on the move in a matter of minutes.[842]

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[830] Ibid.
[831] Bassett (n.829).
[832] Ibid.
[833] Amelia Gentleman, 'Wonga: the real cost of a payday loan' (*The Guardian*, 1 March 2012) <https://www.theguardian.com/business/2012/mar/01/wonga-real-cost-payday-loan> accessed 18 January 2020.
[834] Sean Farrell, 'Where did it all go wrong for Wonga?' (*The Guardian*, 7 August 2018) <https://www.theguardian.com/business/2018/aug/07/wonga-loans-where-did-it-all-go-wrong> accessed 18 January 2020.
[835] Bassett (n.829).
[836] Ibid.
[837] Hilary Osborne, ' Wonga timeline: from good start to bad loans' (*The Guardian*, 21 April 2015) <https://www.theguardian.com/business/2015/apr/21/wonga-timeline-from-good-start-to-bad-loans> accessed 18 January 2020.
[838] Bassett (n.829).
[839] Gentleman (n.833).
[840] Bassett (n.829).
[841] Gentleman (n.833).
[842] This is Money, 'Need some wonga? New loan company launches iPhone credit app - with MASSIVE interest rates' (*This is Money*, 15 January

By 2011 revenues had increased to £185 million, with a profit of £45.8 million and a loan book of 2.5 million customers.[843] By 2012, profits were increasing to £1 million a week and its loan book increased by over 50 percent.[844] As a result, it was touted as having a floatation value of more than $1 billion.[845] Although Wonga's financial performance was reported to be down to 'digital savvy'[846] consumers, it is worth remembering that between 2008 and 2012, the global financial crisis was hitting people hard with record job losses and a drop in living standards never seen since the Great Depression.[847]

4.3.2 Interest Rates

The true cost of a loan is usually hidden in the detail. For Wonga, this was true, because to use its service, there was a cost not even remotely comparable to that of high street banks and other lending institutions. Indeed Damelin described and wanted customers to think of Wonga as a '…black-cab service' stating that '[t] tube or bus will be cheaper but, every now and then, a taxi's more convenient, if more expensive.'[848] An individual looking to borrow from Wonga would find themselves lumbered with an interest rate of up to 3000 percent as an annual percentage rate.[849] For example, borrowing £1,000 could turn into a debt of £2,861 within 6 months if not repaid swiftly.[850]

Wonga did not require any information as to the nature of the application, as long as an individual could provide their basic details, a loan was approved. This form of lending became very popular notwithstanding the exorbitant interest rates.[851] Indeed it was reported that '…extending expensive credit…to people who are unable to get money through conventional, cheaper means' is how Wonga became profitable.[852]

2010) <https://www.thisismoney.co.uk/money/article-1243435/Need-wonga-New-loan-company-launches-iPhone-credit-app--MASSIVE-rates.html> accessed 18 January 2020.
[843] Farrell (n.834).
[844] Hilary Osborne, 'Wonga profits rise by 36% to £62m' (*The Guardian*, 3 September 2013) <https://www.theguardian.com/business/2013/sep/03/wonga-profits-rise-62m> accessed 18 January 2020.
[845] Farrell (n.834).
[846] Osborne (n.844).
[847] Miles Brignall, 'Archbishop of Canterbury wants to 'compete' Wonga out of existence' (*The Guardian*, 25 Jul 2013) <https://www.theguardian.com/money/2013/jul/25/church-england-wonga> accessed 18 January 2020.
[848] Bassett (n.829).
[849] This is Money (n.842).
[850] Ibid.
[851] Gentleman (n.833).
[852] Ibid.

The average profile of a typical Wonga borrower was individuals aged 35, with an average income of £20,400, 76 percent having no savings, and 34 percent having an average of £177 in savings.[853] 68 percent struggled to pay their bills and had incurred around £4,700 in unsecured debt.[854] The problem was that the majority of these customers could be termed as '…vulnerable…'.[855] For example, one borrower was a 47-year-old nurse, who was recovering from an injury sustained at work, but when he went down to half-pay, with no other form of credit, was forced to borrow from Wonga.[856] Another individual was unemployed and reliant upon disability benefits, and as her benefits did not cover the cost of living, she resorted to loans from Wonga to buy food, and in the process had taken out around 6 loans over a few months.[857]

It did not stop there, with Wonga even targeting students by marketing its loans as an alternative to government student loans due to the short-term period in which the money can be paid back.[858] However, a key difference between the two loans was that one had an interest rate of 4,214 whilst the other had an interest rate of 1.5 percent.[859] The Helen Kennedy Foundation, an educational charity that provides financial support to students remarked that Wonga had noticed a 'great commercial opportunity to prey on student hardship'.[860]This is why Wonga was described as '…immoral and unjust'[861].

Despite the notion that Wonga only made a net profit of £15 on every loan which equated to around 5p for every £1 borrowed[862], Wonga failed to realise that the majority of, if not all, Wonga borrowers did not have the realistic option of avoiding financial penalties because '…they…[were]… dealing with a clientele who doesn't have that choice.'[863] Peter Tatton, a consumer policy officer at Citizens Advice, stated that: '[p]eople using these types of loan can't afford them in the first place, can't pay them back and end up

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[853] Kevin Peachey, 'Wonga's legacy of nearly 400,000 mis-sold loans' (*BBC News*, 30 September 2019) <https://www.bbc.co.uk/news/business-49878277> accessed 18 January 2020.
[854] Ibid.
[855] Richard Partington, 'UK's biggest payday lender Wonga 'on the brink of collapse'' (*The Guardian*, 26 August 2018) <https://www.theguardian.com/business/2018/aug/26/uks-biggest-payday-lender-wonga-on-the-brink-of-collapse> accessed 18 January 2020.
[856] Gentleman (n.833).
[857] Ibid.
[858] Sarah Harris, ''Loan shark' firm targets students: 4,000% interest offered as alternative to student loans' (*Daily Mail*, 12 January 2012) <https://www.dailymail.co.uk/news/article-2085448/Loan-shark-firm-Wonga-targets-students-4-000-offered.html> accessed 18 January 2020.
[859] Ibid.
[860] Harris (n.858).
[861] The Herald, 'Hearts' loan firm sponsor is immoral, says Kirk chief' (*The Herald*, 29 May 2011) <https://www.heraldscotland.com/business_hq/13030636.hearts-loan-firm-sponsor-is-immoral-says-kirk-chief/> accessed 18 January 2020.
[862] Osborne (n.844).
[863] Gentleman (n.833).

by taking multiple loans'.[864] Though, this did not stop Wonga, in June 2013, increasing its interest rate by 1,600 per cent to 5,853 percent.[865] This £2 billion industry, it seemed, was reaching record heights despite condemnation from even the Archbishop of Canterbury,[866] Justin Welby, who told Damelin that ''we're not in the business of trying to legislate you out of existence, we're trying to compete you out of existence'[867], promoting the use of credit unions instead.[868] However, despite all the criticism, it did not seem like there was a change on the horizon.

4.3.3 The Office of Fair Trading Inquiry

The now-defunct, Office of Fair Trading (OFT), started to investigate Wonga after it transpired that they had adopted aggressive debt collection practices.[869] Between 2008 and 2010, Wonga sent letters to non-paying customers alleging that they had committed fraud. In particular, it targeted customers who had made a payment and then asked their bank to retract it, along with customers which had already entered into a debt repayment plan.[870] The OFT found that Wonga had done this 'without appropriate justification'[871] because there was insufficient evidence to suggest fraud had been committed. [872] The OFT also found that Wonga had given workers a telephone script that told customers that if they worked in the public or financial sector, the terms of their employment did not allow them to go into debt.[873]

Wonga was let off with a reprimand and with a warning that if there were any further instances of such letters being sent out, they would face a fine of up to £50,000 for

[864] Bassett (n.829).
[865] Hilary Osborne, 'Wonga increases its typical APR by 1,600%' (*The Guardian*, 21 June 2013) <https://www.theguardian.com/money/2013/jun/21/wonga-increases-apr-1600> accessed 18 January 2020.
[866] Brignall (n.847).
[867] Ibid.
[868] Brignall (n.847).
[869] James Hurley, 'Wonga warned by OFT over "aggressive" debt collection' (*The Telegraph*, 22 May 2012) <https://www.telegraph.co.uk/finance/personalfinance/9282720/Wonga-warned-by-OFT-over-aggressive-debt-collection.html> accessed 18 January 2020.
[870] Hilary Osborne, 'OFT criticises Wonga debt collection practices' (*The Guardian*, 22 May 2012) <https://www.theguardian.com/money/2012/may/22/oft-criticises-wonga-debt-collection> accessed 18 January 2020.
[871] Hurley (n.869).
[872] Osborne (n.870).
[873] Vicky Shaw, 'Wonga attacked for customer letters' (*The Independent*, 22 May 2012) <https://www.independent.co.uk/news/business/news/wonga-attacked-for-customer-letters-7778539.html> accessed 18 January 2020.

each instance.[874] Wonga also claimed that the telephone scripts had not been used since 2010.[875]

4.3.4 Fake Letters

With the OFT defunct and some of its responsibilities passed on to the Financial Conduct Authority (FCA), in June 2014, it emerged that further letters had been sent to customers. These letters, sent between October 2008 to November 2010, sent to 45,000 customers threatened legal action. However, the reason as to why the FCA stated that it was 'unfair and misleading' was not only because this put great strain on customers to make repayments they could not afford, but rather because the law firms[876] - Barker & Lowe or Chainey D'Amato – were bogus. The names of the bogus law firms were, in fact, names of Wonga employees who had been used to create the law firms.[877] To make matters worse, Wonga also added extra charges to customers' accounts to cover the administration fees of posting the letters.[878]

Wonga was fined £2.6 million by the FCA and required to pay compensation to around 45,000 customers. This meant that customers were paid £50 each for distress and inconvenience, as well as Wonga, refunding any legal charges.[879] The total amount paid out to customers was estimated to be £10 million.[880] In some instances, where customers had overpaid Wonga, that money was to be returned with interest at 8 percent in line with the rate used by the FCA.[881] Wonga also released a statement stating that they no longer continued this practice and employees involved in the sending of letters were no longer with Wonga, whilst those that were, had no responsibility for this.[882]

[874] Ibid.
[875] Shaw (n.873).
[876] Luke MacGregor, 'Wonga to pay 26 million pounds compensation for fake legal letters' (*Reuters*, 18 December 2012) <https://uk.reuters.com/article/us-wonga-fine/wonga-to-pay-2-6-million-pounds-compensation-for-fake-legal-letters-idUKKBN0F00T420140625> accessed 18 January 2020.
[877] Rupert Jones, 'Wonga to pay £26m compensation for fake debt firm letters' (*The Guardian*, 25 June 2014) <https://www.theguardian.com/money/2014/jun/25/wonga-compensation-bill-unfair-misleading-practices> accessed 18 January 2020.
[878] MacGregor (n.876).
[879] Jones (n.877).
[880] Rupert Neate, 'Wonga profits halve after customer damages payouts' (*The Guardian*, 30 September 2014) <https://www.theguardian.com/business/2014/sep/30/wonga-profits-halve-customer-damages> accessed 18 January 2020.
[881] Jones (n.877).
[882] Ibid.

Martin Lewis, a consumer finance journalist and founder of the website MoneySavingExpert.com, stated that: [u]sing lawyers as fake as its puppets, then having the stomach to charge people for it, is a thuggish tactic, aimed at scaring and intimidating people who are already struggling.'[883] It is laudable that some action was being taken, but it was insignificant when compared to the real misery Wonga caused especially when their practices resulted in the death of a teenager, hours after Wonga had cleared out his account.[884]

In October 2014, Wonga was reported to have given 375,000 people loans worth a total of £220 million that it should never have given in the first place. The FCA stepped in and Wonga wrote off the debts of 330,000 people who were more than 30 days in arrears. The other 45,000 could repay their loan without interest or charges levied.[885] For the first time, Wonga was starting to struggle financially. Wonga's 2013 profits dropped to £39.7 million, down by 53 percent when compared with £84.5 million in 2012. This was unimportant as, in October 2014, it was reported that just after Damelin quit as chief executive in December 2013, he had cashed in £17 million worth of shares at £3.75 a share.[886]

4.3.5 The Interest Rates Cap

In November 2014, as part of a separate investigation into the pay-day lending sector[887], the FCA announced that they would be setting limits on payday lending interest rates. It introduced a cap of 0.8 percent per day, which meant that interest and fees must not exceed more than 0.8 percent per day of the total amount borrowed.[888]

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[883] Metro, 'Wonga sent fake letters to scare customer ' (*Metro*, 25 June 2014) <https://metro.co.uk/2014/06/25/wonga-sent-fake-letters-to-scare-customer-4776108/> accessed 18 January 2020.

[884] Nadia Khomami, 'Teenager killed himself hours after Wonga cleared out his account' (*The Guardian*, 25 September 2015) <https://www.theguardian.com/business/2015/sep/25/teenager-killed-himself-wonga-cleared-out-account> accessed 18 January 2020.

[885] Lisa Bachelor and Rupert Neate, 'Wonga writes off debts for 330,000 customers' (*The Guardian*, 3 October 2014) <https://www.theguardian.com/money/2014/oct/02/wonga-writes-off-customer-debt> accessed 19 January 2020.

[886] Rupert Neate, 'Wonga founder cashed in £17m of shares shortly after quitting as CEO' (*The Guardian*, 23 October 2014) <https://www.theguardian.com/business/2014/oct/23/wonga-founder-17m-shares-quit-errol-damelin> accessed 19 January 2020.

[887] Competition & Markets Authority, 'Payday lending market investigation' (*Gov.uk*, 24 February 2015) <https://assets.publishing.service.gov.uk/media/54ebb03bed915d0cf7000014/Payday_investigation_Final_report.pdf> accessed 19 January 2020.

[888] Financial Conduct Authority, 'FCA confirms price cap rules for payday lenders' (*FCA*, 11 November 2014) <https://www.fca.org.uk/news/press-releases/fca-confirms-price-cap-rules-payday-lenders> accessed 19 January 2020.

It also capped default fees at £15, and there was a total cap of 100 percent which means that borrowers must not have to pay more than the total amount borrowed in interest and fees.[889] However, Wonga, despite changing the structure of its interests and fees to become compliant with the FCA rules, was still able to charge an annualised interest rate of 1,509 per cent.[890] Despite the high-interest rate, in 2014, it reported an annual loss of more than £37 million, and its losses doubled, in 2015, to over £80 million.[891] Between 2016 and 2017, payday loans, not all related to Wonga, however, tripled to more than 10,529 despite the interest rate cap.[892]

4.3.6 Administration & Beyond the Grave

On Thursday 30 August 2018, Wonga collapsed into administration with a book debt of £400 million owed from 200,000 customers.[893] Grant Thornton was appointed as its administrator.[894] The collapse was due to the company being hit with compensation claims from customers who were mis-sold loans.[895] Each claim cost Wonga a £550 processing fee, which was seen as a major reason for its collapse, irrespective of the merits of the claim.[896] Many critics rejoiced at Wonga's demise, with Martin Lewis stating:

> '[n] Normally when firms go bust, the fear is diminished competition. Not here. Wonga's payday loans were the crack cocaine of debt – unneeded, unwanted, unhelpful, destructive and addictive. Its behaviour was immoral, from using pretend lawyers to threaten the vulnerable, to pumping its ads out on children's TV.'[897]

However, for Wonga's customers who were mis-sold loans the nightmare had just begun.

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[889] Ibid.
[890] Rupert Jones, 'Wonga cuts cost of borrowing, but interest rate still 1,509%' (*The Guardian*, 16 December 2014) <https://www.theguardian.com/business/2014/dec/16/wonga-cuts-cost-borrowing-interest-rate> accessed 19 January 2020
[891] Chris Johnston, 'What's gone wrong with payday lender Wonga?' (*BBC News*, 27 August 2018) <https://www.bbc.co.uk/news/business-45322061> accessed 19 January 2020.
[892] Ibid.
[893] Johnston (n.891).
[894] Collinson and Jones (n.828).
[895] Ibid.
[896] Collinson and Jones (n.828).
[897] Martin Lewin, 'Martin Lewis on the demise of Wonga' (*MoneySavingExpert*, 30 August 2018) <https://www.moneysavingexpert.com/pressoffice/2018/08/martin-lewis-on-the-demise-of-wonga/> accessed 19 January 2020.

After its collapse, 10,500 customers were waiting upon rulings from the Financial Ombudsman, but as Wonga had collapsed, their finances were being 'damaged from beyond the grave'[898]. This prompted the then chair of the Treasury Committee, Nicky Morgan, to directly write to Grant Thornton requesting an update in respect of the volume of, processing an average payout of claims.[899] From Grant Thornton's response, it was clear that the problem was bigger than previously thought.[900] Indeed, there had been 560,982 claims by the end of August 2019, and by the time of the September 2019 deadline, it was expected to rise even further, with around 389,621 eligible for compensation payments.[901] However, Grant Thornton revealed that only £41 million had been set aside for customers,[902] and while customers were owed an average of £1181, they would likely receive £118 instead.[903]

When Damelin first started Wonga he stated that '[i]t's a controversial sector – and I'm okay with that'[904]. Despite calls from James Daley, founder of consumer website Fairer Finance, stated:

> '[w]hat about the directors who have cashed in and walked off? Hundreds of millions of pounds have been lent and they have made profit on the back of it. Shouldn't we be holding them to account?'[905]

The fact is that it is '…very difficult to prosecute people for behaving within the law.... [the directors] …made hay while the sun shone and will depart with their ill-gotten gains'.[906] Indeed it is fair to say that despite acting as a 'legal loan shark[s]'[907] The

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[898] Kevin Peachey, 'Wonga causing damage 'from beyond the grave'' (*BBC News*, 27 February 2019) <https://www.bbc.co.uk/news/business-47370747> accessed 19 January 2020.
[899] Nicky Morgan, 'Wonga compensation claimants "left to fend for themselves", warns Committee' (*Parliament UK*, 27 February 2019) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news-parliament-2017/chairs-comments-committee-publishes-correspondence-from-fca-17-19/> accessed 19 January 2020.
[900] Ibid.
[901] Kalyeena Makortoff, 'Wonga customers' average compensation payout may be just £118' (*The Guardian*, 9 October 2019) <https://www.theguardian.com/business/2019/oct/09/wonga-customers-average-compensation-payout> accessed 19 January 2020.
[902] Ibid.
[903]Jasmine Andersson, 'Wonga claim: customers mis-sold loans 'could only get 10% of what they are owed in payout'' (*inews*, 9 October 2019) <https://inews.co.uk/news/business/wonga-claim-payout-update-loans-mis-sold-refund-compensation-657713> accessed 19 January 2020.
[904] Bassett (n.829).
[905] Karen Attwood, 'Wonga crisis: Payday lenders forced to shut up shop' (*The Independent*, 5 October 2014) <https://www.independent.co.uk/money/loans-credit/payday-lenders-forced-to-shut-up-shop-9774990.html> accessed 19 January 2020.
[906] Ibid.
[907] Harris (n.858).

directors '…will not be held accountable for the misery their companies have inflicted on borrowers.'[908] In this regard, there does need to be much more scrutiny around individuals who run organisations in the UK.[909]

4.4 Common Themes: What do these Case Studies Demonstrate?

Even though each of these LPCs was a separate company, the absence of accountability means that they share several commonalities, not least the issue of accountability itself. In this regard, this section will draw upon some of those common themes. Perhaps the first, and arguably the most important, factor is that for all three LPCs, the directors focused on were/are also majority shareholders. However, this does not mean that director delinquency will only occur in LPCs which are controlled by directors who also happen to be majority shareholders. It is worth noting that any LPC where accountability is absent, provides an opportunity for such misconduct to occur. It is submitted that this opportunity is present at all LPCs and, in some cases, such an opportunity is exploited by directors.

The second factor was a lack of internal controls – checks and balances. There was no evidence of intervention from other directors or indeed non-executive directors. By and large, Green, Ashley and Damelin were able to conduct the affairs of their respective LPCs in whichever manner they saw fit. Indeed, in some instances, there was explicit (and implicit) agreement. For example, in BHS both Green & Saunders believed it was reasonable to take dividends in excess of profits[910] and in Sports Direct, Ashley's close associates, who also served as fellow directors, agreed or went along with how the company treated its workers as well as its agency staff.[911] This goes to show that ultimate control was with those individuals who were not only directors but also majority shareholders. That said, the same could occur for individuals which are chief executives and have dominant personalities. Indeed, there is nothing to suggest that exploitation of the absence of accountability cannot occur in the latter scenario.

The third factor was that during the course of the collapse and scandals of the LPCs, there was no intervention either internally or externally, perhaps because there is no corporate regulator in the UK. This meant that was a vacuum as far as accountability was concerned. The LPCs continued to be managed without any form of audit to

[908] Attwood (n.905).
[909] Ibid.
[910] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 11.
[911] Business, Innovation and Skills Committee (n.55) para 10-23.

ascertain exactly what was going on at an operational level. Instead, what happened was that these directors of LPCs continued behaving in what some might perceive to be a reckless manner, and carrying out actions, in some cases, to evade future potential liability and continuing to profit from such conduct. This enabled the directors of LPCs to inflict serious economic and reputational damage not just to the LPC, but also to its stakeholders. When there was an intervention, in BHS's case, at the beginning of the triennial pension review, and for Sports Direct, after the Guardian investigation, the damage had already been done, and government agencies such as TPR and HMRC were effectively sleeping at the wheel.

The fourth factor is that despite such revelations, the directors of these LPCs have not been held accountable, and where they have, it has not been sufficient. In essence, it has either been too late when little could be done and/or bargains were made for cooperation, that benefited the directors. This only served to make directors feel more emboldened in undertaking misconduct without regard for any negative consequences, which are few and almost non-existent in practice.

The fifth, and final, factor is that LPCs, at least those that are operating as a going concern such as Sports Direct, have continued to undertake an unlawful, and sometimes questionable, course of conduct. This is despite making promises to the contrary and being summoned to attend and provide evidence at a Select Committee Hearing. From this, it becomes clear that the government, and/or its delegated agencies, lacked the necessary powers to ensure directors of LPCs are held accountable. In sum, the corporate landscape provided the optimum conditions for directors of LPCs to behave however they wish without fear of recourse.

4.5 Summary

This chapter has demonstrated the consequences of a lack of (or absence of) accountability for directors of LPCs. It is submitted that the case studies show directors of these LPCs have largely been able to do whatever they wish, even though such conduct was illegal and/or questionable. From these case studies, it is clear that arguably some form of accountability for directors of LPCs comes when it's too late and the damage is done. And even then, such accountability forums are only fact-finding missions, rather than attempting to hold directors properly. Indeed, in the cases of BHS and Sports Direct, the respective committee reports served only to uncover the

facts, rather than impose any consequence. The very nature of LPCs has enabled the '…chronic lack of accountability… be…failures years in the making.'[912]

In this regard, '[r]esponsible businesses don't just materialise from nowhere'[913], and this is the case with LPCs, and in particular around their directors. The absence of accountability does not produce responsible LPCs but rather a repetition of scandals and collapses involving directors of LPCs. Each of these LPCs and their respective directors could have been stopped before significant damage had been caused but that did not happen.

In BHS, the alarm bells should have started to ring as soon as it transpired that it was unlikely that BHS would be able to fulfil its pension scheme obligations. For Sports Direct, its reliance on labour meant that failures in paying NMW and the subsequent investigation by HMRC coupled with a Select Committee appearance was still not enough, given that Sports Direct was still found to be paying below the NMW. It seems Ashley had a blatant disregard for anything but profit. For Wonga, its pursuit of making profits meant excessive interest rates and aggressive debt collection practices, amongst other illegal/questionable practices. Ultimately, Damelin knew exactly what he was doing given that arguably he saw all of this as a good commercial opportunity without any accountability.

Looking at the case studies collectively, some common themes run through all three case studies. It is again stressed that where accountability is absent, this provides an opportunity for misconduct to occur. It is submitted that this opportunity is present at all LPCs, and in some cases, such an opportunity is exploited. Therefore, while these case studies demonstrate what the absence of accountability can lead to, it also shows that shareholders are not fit or able to hold directors of LPCs accountable. There are two key reasons for this. The first is that shareholders may also be directors as was the case in all three of these case studies, but secondly, dividend payments can be seen as keeping shareholders at bay without engaging with directors and holding them accountable.

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[912] Anca Thomson, 'After Carillion – where now for corporate accountability?' (*Financial Director*, 8 February 2019) <https://www.financialdirector.co.uk/2019/02/08/after-carillion-where-now-for-corporate-accountability/> accessed 19 January 2020.

[913] Fiona Gooch and Tom Wills, 'Directors' duties and creating a more accountable corporate culture' (*Traidcraft Exchange,* 12 April 2017) <https://traidcraftexchange.org/traidcraft-in-depth/2017/4/12/directors-duties-and-creating-a-more-accountable-corporate-culture> accessed 1 February 2020.

As a result, for directors of LPCs to be held accountable, the case studies make clear that shareholders are not suitable constituents, as they have demonstrated themselves to be unfit to hold directors accountable. Therefore, to ascertain which constituent would be best-placed to hold directors of LPCs accountable, all of the possible constituents must be considered and examined to determine whether they are competent to do so. The next chapter will consider these preferred constituents and the theoretical basis for their advocation and determine whether they can enforce holistic accountability.

CHAPTER 5
HOLDING DIRECTORS ACCOUNTABLE: WHO COULD, WHO SHOULD AND HOW?

5.0 Introduction

This chapter will focus on examining the normative issue of which constituent (if any) is best placed to hold directors of LPCs accountable. It does this by examining the constituents favoured by some of the most popular corporate governance theories to act as accountees. The Companies Act 2006, in particular section 172, requires directors to act in a way which promotes the success of the company for the benefit of its members as a whole whilst having regard for employees, suppliers, creditors, customers and the community amongst others. This failure to identify by whom directors should be held accountable '…helps to create an unaccountable corporate culture'[914] with '…weak, toothless, diminished forms of accountability…regarded as acts of window dressing rather than real restraints on power'.[915] Indeed, no single constituent is identified as to whom directors should be accountable.

As a result, this chapter will consider the preferred constituents against the thesis definition of accountability, termed as 'holistic accountability', with its elements of knowledge, examination, and outcome, to ascertain the likelihood of directors being held accountable. Firstly, the shareholder primacy theory[916] will be discussed and its preferred constituent: shareholders will be examined as the likely accountees. Secondly, the stakeholder theory[917] will be discussed along with its preferred constituents: employees, creditors, and customers. Thirdly, concession theory[918] will be discussed along with the examination of the government as its preferred constituent. In doing so, the Companies Investigation Branch (CIB) will also be discussed as a potential preferred accountee.

Finally, this chapter will seek to determine which constituent, of the candidates considered, is likely to be best placed to hold directors of LPCs holistically accountable.

[914] Ibid.
[915] Schedler (n.119) 16.
[916] Stout (n.77); See also, Keay (n.77).
[917] Freeman (n.78).
[918] Padfield (n.79) 21.

5.1 The Theories & Their Preferred Constituents

For an individual or entity to be held accountable, it must not only be defined but its composition must also be understood. Corporate governance theories have espoused a variety of conceptualisations, with some gaining widespread popularity. Those that have gained popularity, as stated above, have tried to define the very nature of a company and more importantly the governance of its relationships in different ways. In this part of the chapter, these theories will be examined along with their preferred constituent to ascertain their suitability to fulfil holistic accountability.

5.2 The Shareholder Primacy Theory

The shareholder primacy theory was first advocated, arguably indirectly, by Berle and Means when they introduced the idea that shareholders are a corporation's true owners.[919] Its roots were embedded in the intellectual concept that shareholders were ultimate owners and sole residual claimants in companies, implying that economic efficiency is best served when directors maximise the wealth of shareholders.[920] It also offered a simple story to the complex question - what are corporations for?[921] While E. Merrick Dodds recognised that it was the traditional view, with which he disagreed, that directors managed a company for the private gain of the shareholders.[922] This approach was further developed by, the economist, Milton Friedman who stated that the social responsibility of corporate officials is to make as much money for shareholders as possible and the manager is the agent of the individuals who own the corporation and his primary responsibility is to them.[923] Friedman stated that corporations have no other purpose than maximising profits for their shareholders.[924] The theory essentially expressed the notion that shareholders have the priority interest in the economics and governance of a company.[925]

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[919] Adolfe A. Berle Jr. and Gardiner C. Means, *The Modern Corporation and Private Property* (The Macmillan Company 1933) 380.
[920] Lynn A. Stout, 'On the Rise of Shareholder Primacy, Signs of its Fall, and the Return of Managerialism (in the Closet) Berle IV: The Future of Financial and Securities Markets: The Fourth Annual Symposium of the Adolf F Berle, Jr Center on Corporations, Law & Society' [2013] 36(2) Seattle University Law Review 1169, 1174.
[921] Ibid 1176.
[922] Keay (n.77) 373.
[923] Lenore Palladino, 'The American Corporation is in Crisis—Let's Rethink It' (*Boston Review*, 2 October 2019) <https://bostonreview.net/forum/lenore-palladino-american-corporation-crisis%E2%80%94lets-rethink-it> accessed 19 September 2020.
[924] Ibid.
[925] Robert J. Rhee, 'A Legal Theory of Shareholder Primacy' [2018] 102(5) Minnesota Law Review 1951, 1951.

The theory posits that shareholders have ownership rights to elect, and/or remove directors and to protect shareholder interests against directorial self-dealing.[926] It is incumbent on directors to serve as agents of shareholders and promote their interests by creating and maximising shareholder wealth.[927] The theory has been widely accepted.[928] For example, the tenet of shareholder primacy has been particularly welcomed in Anglo-American markets perhaps because shareholders take solace from the theory when feeling threatened that other models of governance may challenge their place in the corporate pecking order.[929]

There are two parts to the theory.[930] The first is that the objective of the company should be to maximise shareholder wealth, and secondly, shareholders should have ultimate control of the corporation.[931] The theory regards directors as having the narrow responsibility of safeguarding and developing the interests and investments of shareholders, and should a conflict arise between shareholder interests and non-shareholder interests, then shareholder interests should be prioritised.[932] The actions that directors can take to safeguard and develop the interests and investments of shareholders can be anything that is deemed lawful.[933]

Indeed Keay posits that a possible reason for directors adhering to the law when generating wealth for shareholders might be explained by the fact that failure to comply with the law may endanger the financial position of shareholders.[934] As shareholders are the residual claimants, they are given monitoring authority to encourage them in detecting and punishing self-dealing and shirking, because their reward will vary exactly with their success as monitors.[935] Bainbridge puts forward the view, therefore, that shareholders should act as the firm's ultimate monitors.[936] Perhaps because by doing so, their monitoring efforts are likely to maximise their returns.

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[926] George Dallas, 'Shareholder primacy: Is this concept fit for purpose?' (*Ethical Boardroom*, Winter 2018) <https://ethicalboardroom.com/shareholder-primacy-is-this-concept-fit-for-purpose/> accessed 19 September 2020.
[927] Ibid.
[928] Rhee (n.925) 1955.
[929] Dallas (n.926).
[930] Stephen M. Bainbridge, 'Director v Shareholder Primacy in the Convergence Debate' [2002] 16(1) Global Business & Development Law Journal 45, 45-46; Keay (n.77) 375.
[931] Bainbridge, ibid.
[932] Keay (n.77) 376.
[933] Ibid.
[934] Keay (n.77) 376.
[935] Bainbridge (n.930) 56.
[936] Ibid.

Shareholder primacy has found some traction because of the Michigan Supreme Court decision in *Dodge v Ford Motor Company*[937]. In this case, the court stated that 'a business corporation is organised and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.'[938] This seemed to give legal precedent to the notion that shareholder interests must be at the forefront of the minds of directors when running the company. This alleged legal link arguably enabled the importation of the theory to companies in the UK. Although there is an argument that shareholder primacy was present in the UK before *Dodge v Ford Motor Company*[939] given that UK company law was shackled by partnership law, that is treating joint stock companies as an adjunct to partnership law.[940] This further fuelled the ownership myth and the legal remnants which sustained this and resulted in treating company and shareholders as, in crucial aspects, synonymous.[941]

However, determining that shareholders are the only constituent in whose interests the company should be managed, suggests that they are the only constituent to whom directors should be accountable; the theory has been vehemently criticised. Indeed, many experts have stated that the theory does not safely allow for assuming companies are run best when they are managed based on shareholder wealth creation and ultimate control.[942] For example, shareholder short-termism, short-sighted management[943] and shareholder differences[944] amongst others have been criticisms that have plagued the theory and they will form the basis for the discussion below.

5.2.1 Shareholder Short-Termism

Shareholder short-termism is defined as **'…**corporate managers, responding to pressure from investors or acting to bolster their own position, avert their attention and exert their energies to achieving short-term profitability, virtually eschewing longer-term considerations.'[945] Duruigbo defines it as '…shareholders' penchant for quick returns on investment…[resulting in putting]… pressure…[on directors]… to be fixated on

[937] 204 Mich 459.
[938] *Ibid.*
[939] *Dodge* (n.937).
[940] Jonathan Mukwiri, 'Myth of Shareholder Primacy in English Law' [2013] 24(2) European Business Law Review 217,220
[941] Ibid.
[942] Lynn A. Stout, 'Why We Should Stop Teaching Dodge v Ford' [2008] 3(1) Virginia Law & Business Review 164, 174.
[943] Keay (n.77) 405.
[944] Ibid 406.
[945] Emeka Duruigbo, 'Tackling Shareholder Short-Termism and Managerial Myopia' [2012] 100(3) Kentucky Law Journal 531, 531.

short-term results, even at the expense of long-run performance.'[946]Although many other definitions do exist. For example, EY defines shareholder short-termism as '…the excessive focus of decision-makers on short-term goals at the expense of longer-term objectives. Short-termism results in insufficient attention being paid to the strategy, fundamentals and the long-term value creation of a firm or an institution.'[947]

The underlying tone in all three definitions is that directors use their energy and attention to achieve short-term gains and/or profitability at the expense of long-term gains and sustainability. This is often done by directors in the pursuit of shareholder wealth creation, arguably no matter how sustainable or unsustainable it might be.

The link between shareholder wealth creation and shareholder short-termism becomes clear when considering that in the effort to create shareholder wealth, the only intrinsic method is effectively increasing the bottom line. Indeed, the pursuit of shareholder returns, at the expense of other stakeholders, has '…led to greater profits, generating enormous wealth for investors and the executives whose rewards have been increasingly tied to shareholder returns.'[948] For example, the payment of dividends, as a percentage of profits, provides a short-term gain. When this is done at the expense of company growth, this reduces long-term wealth creation thus hindering LPCs' long-term financial viability.[949]

Ireland states that '…the desire to 'unlock shareholder value' has generated downsizing, re-engineering, spinning-off and outsourcing, and seen labour come more than ever to be treated as nothing more than an expendable commodity.'[950] The most usual scenario, at least in the public company arena, is when dividends are paid to shareholders which are often more than pension contributions.[951] In 2015, companies part of the Financial Times Stock Exchange 100 Index (FTSE 100) paid £71 billion to shareholders.[952] In comparison, only £13.3 billion was paid towards their pension

[946] Ibid 536.
[947] EY, 'Short-termism in business: causes, mechanisms and consequences' (*EY*, 2014) <https://www.ey.com/Publication/vwLUAssets/EY_Poland_Report/%24FILE/Short-termism_raport_EY.pdf> accessed 21 September 2020.
[948] Andrew Edgecliffe-Johnson, 'Beyond the bottom line: should business put purpose before profit?' (*The Financial Times*, 4 January 2019) <https://www.ft.com/content/a84647f8-0d0b-11e9-a3aa-118c761d2745> accessed 26 September 2020.
[949] Keay (n.77) 391.
[950] Paddy Ireland, 'Shareholder primacy and the distribution of wealth ' [2005] 68(1) Modern Law Review 49,70.
[951] Zlata Rodionova, 'FTSE 100 companies paid five times more in dividends than into pensions' (*The Independent*, 16 August 2016) <https://www.independent.co.uk/news/business/news/ftse-1000-comapanies-shareholders-pensions-deficit-bhs-tata-steel-a7193136.html> accessed 26 September 2020.
[952] Ibid.

schemes[953], demonstrating the expendability of arguably a key constituent. It is fair to say that such a scenario is easily extrapolated in the realms of LPCs.

5.2.2 Short-Sighted Management

The second issue with the theory is that it enables directors to direct their focus and attention on short-term benefits to the point of being pre-occupied with it.[954] While this '…managerial myopia…'[955] is a disputed fact there is sufficient reason to believe it exists.[956] The reason for this as shareholders can elect (or dismiss) directors, it is in the favour of directors to act in a myopic manner if that brings in returns for shareholders. In doing so, directors are likely to make short-term decisions that may increase returns, but it will either put the company in a precarious position or impair its ability to remain innovative and competitive in the marketplace. For example, in a US survey of 401 top financial executives, 80 percent said they would decrease spending on 'discretionary' activities such as marketing and research and development to meet short-term goals.[957] It perhaps does not help that shareholders will judge directors on current financial performance, therefore, rewards on gains are more likely to be on a short-term basis allowing directors to move on at least until before negative consequences transpire.[958]

Another problem that exacerbates short-sighted management is the vesting periods of shares. It is common for directors to already possess shares, especially in LPCs. While directors can be awarded shares, they also can buy shares at a discounted rate and/or also have a certain percentage of shares given to them as part of their overall remuneration. Research conducted by Deloitte showed that, at least in FTSE 100 companies, directors hold more than 500 percent of their salaries in shares and that the median shareholding for directors was 630 percent of directors' salaries. [959] It is fair to say this situation is not likely to be dissimilar in LPCs. The problem with this is that by holding shareholders, directors may be inclined to inflate financial information to

[953] Rodionova (n.951).
[954] Keay (n.77) 405.
[955] Duruigbo (n.945) 535.
[956] Ibid.
[957] Natalie Mizik and Robert Jacobson, 'The Cost of Myopic Management' (*Harvard Business Review*, July-August 2017) <https://hbr.org/2007/07/the-cost-of-myopic-management-2> accessed 27 September 2020.
[958] Ibid.
[959] Deloitte, 'Directors' remuneration in FTSE 100 companies' (*Deloitte*, October 2018) <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/tax/deloitte-uk-tax-your-guide-directors-remuneration-in-ftse-100-companies.pdf> accessed 28 September 2020.

increase share prices if they, or other directors on the board, are ready to sell or exercise divestment of their share options.[960]

This problem is further intensified because directors are often subject to short vesting periods, of 3 or 5 years, usually supported by short-termist shareholders, in which they are not able to divest their shares. This incentivises directors to adopt a short-term outlook that is beneficial to them, and shareholders, even if it is unfavourable in the long-term.[961] Indeed, in 75 percent of performance-related share plans, the earliest release of shares was 5 years, up 15 percent when compared with the previous year.

A 5-year share performance plan is arguably too short a time frame for directors to make decisions based on the long-term. It encourages the opposite because directors will be attuned to the fact that decisions based on the short-term are likely to have an advantageous impact in respect of share plan maturity. On another level, directors may also decide to delay certain actions or decisions based on announcing them just before their share plans mature. In any case, there is and has been, a prevalence of a standard 'one size fits all' incentive framework for directors, which serves to encourage short-sighted behaviour.[962]

5.2.3 Shareholder Differences

Finally, the theory also treats all shareholders the same as rational economic actors, but it fails to acknowledge that shareholders are to be seen as a large, diverse, varied and changing market.[963] Indeed Keay notes that some shareholders may focus on achieving capital appreciation in share value, and others may look for dividend income.[964] Although Kokkinis states that most shareholders display a short-term attitude[965], he refrains from saying all shareholders. Perhaps this is because it is taken as read that there will always be some shareholders who may not take a short-term view but may instead take a medium-term, or a long-term view approach. Some shareholders who hold shares in other companies will not necessarily have the same aims as shareholders who only hold shares in one company.[966] This may be due to many reasons such as investment experience, tax advantages and personal financial

[960] Duruigbo (n.945) 570.
[961] Ibid.
[962] Deloitte (n.959).
[963] Daniel J. H. Greenwood, 'Fictional Shareholders: 'For Whom is the Corporation Managed,' Revisited' [1996] 69(3) Southern California Law Review 1021, 1026; Keay (n.77) 407-408.
[964] Keay, ibid, 406.
[965] Andreas Kokkinis, 'Shareholder Short-Termism in the UK: The Kay Review and The Potential Role of Corporate Law' [2014] 11(3) Corporate Ownership & Control 166, 167.
[966] Keay (n.77) 406.

liquidity. In any case, it can be said that a director's role is to ensure alignment for all shareholders for fair representation, in general, of all shareholders.[967]

The theory also fails to acknowledge that different categories of shareholders will have different attitudes to risk-taking. For example, an institutional shareholder is arguably more like to have a higher tolerance to risk, than say an individual minority shareholder.[968] One reason for this may well be that institutional shareholders will be able to yield more power allowing them to control and influence directors and internal decision-making processes, as well as understand the bigger picture. On the other hand, minority shareholders will possess very little information making it unlikely that they are willing to take risks because of the lack of information and control they can yield.

In the Plc sphere, institutional shareholders, through the Investment Association, a trade body representing large investors, have pushed for directors to hold shares for at least two years after departure from their role as directors.[969] This was aimed at '…ensuring…[directors]… focus on the long-term success of the business'[970] and '… encourage the right type of behaviours from executives in post… when they leave they are not leaving the company in a bad shape.' This not only demonstrates the power yielded by institutional shareholders but also ensures that risk-taking is not without consequence especially considering that some have called for 80 percent of directors' salaries to be held at share value after departure.[971]

It is fair to say that, despite acceptance, the shareholder primacy theory is not without its flaws. Indeed, the premise of shareholder primacy, as ultimate monitors, does not stand up to scrutiny. This is especially the case when considering some of the flaws present. However, in practice, the reality may well be different, and shareholders may well be able to hold directors accountable. In this regard, the ability of shareholders to hold directors accountable will now be examined in regard to 'holistic accountability'.

[967] Ibid 407.
[968] Keay (n.77) 407.
[969] Attracta Mooney, 'UK businesses prepare to face off with shareholders over pay' (*The Financial Times*, 4 March 2020) <https://www.ft.com/content/33fe6698-58a3-11ea-a528-dd0f971febbc> accessed 2 October 2020.
[970] Ibid.
[971] Mooney (n.969).

5.2.4 Shareholders

There has been a lively debate about whether shareholders, who are often regarded by many as owners of the company, should, and could, hold directors accountable.[972] The root of this stems from three arguments. The first is that shareholders are the legal owners of the corporation; they bear a significant risk and finally, they are the residual claimants.[973] This is perhaps because it is often said by some that the '…separate entity status is a legal fiction and that there are real people with real interests involved.'[974] The separate entity status has been affected by shareholders through the process of incorporation and as a result of that incorporation their interests, and arguably the interests of the company are now intertwined, not to mention the amount of money that they may have invested. It is also fair to say that as legal owners, the balance of rights is likely to be heavily in their favour against other constituents[975], possessing the ability for shareholders to direct the '…very purpose ...' of companies.[976]

Interestingly, The Cadbury Report stated that '…shareholders as owners of the company elect the directors to run the business on their behalf and hold them accountable for its progress.'[977] Although this seems to suggest that shareholders as owners elect directors, as a sort of sub-owner, to manage the company, effectively allowing directors to deal with the shareholders' property as they see fit.

5.2.4.1 The Ownership Argument

Some commentators opine that directors should only be held accountable to shareholders and specifically for maximising the value of shareholders above all other stakeholders.[978] The Cadbury Report further states that '…directors are accountable to their shareholders, through the quality of the information which they provide… and shareholders through their willingness to exercise their responsibilities as owners.'[979] However, it is unclear what information would be deemed of quality and how it would

[972] Keay and Loughrey (n.38) 261.
[973] Virgile Chassagnon and Xavier Hollandts, 'Who are the owners of the firm: shareholders, employees or no one?' [2014] 10(1) Journal of Institutional Economics 47, 52.
[974] Julian Velasco, 'Shareholder Ownership and Primacy ' [2010] (3) University of Illinois Law Review 897, 904.
[975] Ibid 901.
[976] Velasco (n.974) 902.
[977] Cadbury (n.418).
[978] Blair and Stout (n.486) 404; David Millon, 'Radical Shareholder Primacy' [2013] 10(4) University of St Thomas Law Journal 1013.
[979] Cadbury (n.418).

translate into shareholders exercising their responsibilities because there would be a knowledge gap. There is a strong possibility that directors will have the means to pick and choose the information they wish to provide or make available, allowing them not to be wholly honest despite their legal obligation. This knowledge gap would hinder holistic accountability because this would mean that shareholders are not able to examine the information. If they can examine and come to an outcome, it does not necessarily mean the outcome will be the right one.

Ireland makes the distinction that shareholders do not own the company but the capital, from which the company has come into existence.[980] It is this assumption that means that it is questionable that shareholder interests should take a considerable, or even exclusive, right in regard to the running of the company.[981] Although, Grantham puts forward the view that the centrality of shareholder interests is not borne from the view that shareholders are deemed to be owners of the company, but rather from '…a concern with the accountability of management.'[982] The view that shareholders are the most important constituent that could hold directors accountable is grounded in the idea that '…it is an efficient corporate governance mode.'[983] But the term efficient is open to interpretation because, for some, it could also mean inexpensive.

It is unlikely that shareholders will possess the time and absorb the costs of examining directors. This is especially the case when considering that they may have other shareholdings, or may be passive, which was one of the prime reasons for the drafting of the Stewardship Code. If the company is increasing turnover and paying out dividends, shareholders may take that as an indicator that all is well, which may not necessarily be the case.

The claim that shareholders are owners poses some problems. For example, *Short v Treasury Commissioners*[984] held that shareholders were not in the eyes of the law owners of the undertaking, and this was later reaffirmed in *Her Majesty's Commissioners of Inland Revenue (Respondents) v. Laird Group plc*[985]. Honore puts forward an eleven-stage test for determining ownership which includes: the right to possess, the right to use, the right to manage, the right to income, the right to the

[980] Ireland (n.492) 33.
[981] Ibid.
[982] Ross Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders' [1998] 57(3) The Cambridge Law Journal 554, 569.
[983] Antoine Reberioux, 'Does shareholder primacy lead to a decline in managerial accountability?' [2007] 16(2) Cambridge Journal of Economics 171.
[984] *Short* (n.494).
[985] [2003] UKHL 54.

capital, the right to security, the incident of transmissibility, the incidence of absence of term, the prohibition of harmful use, liability to execution and residuary character.[986]

Of these eleven tests, the relationship between the company and its shareholders only satisfies two of the minor tests, three are partly satisfied, and six are not satisfied at all.[987] While ownership may well have been the principal explanation and defence for the dominant role of shareholders in business activities[988], the reality is that ownership is linked to share rights only. Once those rights have been satisfied, there is no residual claim to ownership, as the entitlement of shareholders is then exhausted. [989] Therefore, shareholders are merely owners of certain rights in and against the company[990], resulting in the 'traditional logic of ownership'[991] being broken. The ability for shareholders to claim exclusive, or dominant, accountability of directors on the basis of owning shares, of the modern corporation, is a myth.[992]

In addition to the ownership argument, advocating shareholders as the ones to whom directors are accountable is grounded on the assumption that they are better placed, as providers of risk capital, to protect their investment. This is by making sure that a competent board is in place and holding directors accountable by ensuring that actual strategies are in play to develop, or further develop, corporate performance as well as enduring sustainability. [993]

For example, Hermes Investment Management, an investment management firm, was given access to reports, letters, transcripts, and telephone conversation reports of 41 companies in which Hermes had invested in.[994] This showed that between 1998 to 2004, when shareholders had engaged either publicly or privately with the board, this led to actual outcomes. This led the researchers to conclude that '… shareholder activism can produce corporate governance changes that generate significant returns for shareholders.'[995] It is questionable as to what '…significant returns…'[996] entails, as

[986] Geoffrey M. Hodgson, 'Editorial introduction to 'Ownership' by A M Honore (1961)' [2013] 9(2) Journal of Institutional Economics 223, 231-241.
[987] John Kay, 'Shareholders think they own the company — they are wrong' (*The Financial Times*, 10 November 2015) <https://www.ft.com/content/7bd1b20a-879b-11e5-90de-f44762bf9896> accessed 28 February 2020.
[988] Grantham (n.982) 554.
[989] Ibid 564.
[990] Grantham (n.982) 564.
[991] Ibid 574.
[992] Kay (n.987).
[993] Chris Mallin and Andrea Melis, 'Shareholder rights, shareholder voting, and corporate performance' [2012] 16(2) Journal of Management & Governance 171.
[994] Ibid 173.
[995] Mallin and Melis (n.993) 173.
[996] Ibid.

it could just mean increased dividends, but this is not enough for holistic accountability to occur.

5.2.4.2 Shareholder Engagement

In regard to listed companies, low levels of shareholder engagement have often been reported. In 2021, Grant Thornton reported in their corporate governance annual review, that shareholder engagement had increased to 61 percent, up by 7 percent when compared to 2020.[997] It is argued that holistic accountability requires much higher shareholder engagement in relation to examining the conduct and decisions of directors, with current levels of shareholder engagement not likely to be sufficient. If shareholders are not willing/unable to hold directors of LPCs accountable currently, then holistic accountability is unlikely to be of use. Although the FRC introduced, as recommended in the 2009 Walker review[998] on corporate governance in UK banks and other financial institutions, a Stewardship Code[999] designed at furthering shareholder participation in companies.

However, despite revisions to the Stewardship Code in September 2012 and more recently in 2020[1000], it has been said that '…stewardship is more bandied about and maybe it's raising consciousness in some people's minds, but it hasn't made a massive difference'[1001]. This is perhaps because shareholders treat it as a tick-box exercise or are simply not willing to spend the time and effort in holding directors holistically accountable. Indeed, while it has 'changed firm-level activity but…[it]… has not altered individual behaviours.'[1002] This suggests not all shareholders are willing to engage with directors, fitting well with Paul Lee's remark, an adviser at the International Corporate Governance Network, regarding the 2020 revised code, that: 'This is an opportunity for

[997] Grant Thornton, 'Corporate Governance Review 2021' (*Grant Thornton*, 24 June 2022) <https://www.grantthornton.co.uk/insights/corporate-governance-review-2021/> accessed 3 January 2023.
[998] David Walker, 'A review of corporate governance in UK banks and other financial industry entities' (*National Archives*, 26 November 2009) <https://webarchive.nationalarchives.gov.uk/+/http:/www.hm-treasury.gov.uk/d/walker_review_261109.pdf> accessed 30 May 2020.
[999] Financial Reporting Council, 'The UK Stewardship Code' (*Financial Reporting Council*, July 2010) <https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf.pdf> accessed 30 May 2020.
[1000] Financial Reporting Council, 'The UK Stewardship Code' (*Financial Reporting Council*, December 2019) <https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf> accessed 30 May 2020.
[1001] CIMA Global, 'Is the Stewardship Code fit for purpose? A field study of engagement by asset management firms' (*CIMA Global*, March 2019) <https://www.cimaglobal.com/Documents/Thought_leadership_docs/Academic-research/4841-stewardship-code-research-report.pdf> accessed 30 May 2020.
[1002] Ibid.

the stewardship code to set a higher hurdle that not everyone is going to be able to leap over.'[1003]

5.2.4.3 The Articles of Association

Shareholders, through the Articles of Association (AoA), can set parameters on the behaviour of directors arguably thus holding them holistically accountable. The legal personality of a company, as the holder of rights, moves the articles of association from being merely an agreement to something similar to a constitution of a state, with it being the mechanism by which the company delegates its authority.[1004] For example, generally, a company's articles of association provide directors with broad management powers.[1005] One way in which shareholders can set parameters on how directors ought to exercise powers, thus holding them holistically accountable, is by amending the articles of association.[1006]

This would enable shareholders to hold directors accountable by either restraining or removing, some powers they feel may provide directors with unfettered discretion. But the problem with this is that for directors to be held holistically accountable, there has to be information symmetry, which is unlikely, given the information directors will have in their possession. Shareholders 'cannot usurp the powers which by the articles are vested in the directors...,'[1007] until the articles are amended, and even if all shareholders agreed to assume control, this would not be binding on the board until the amendment has taken effect.[1008] Therefore any outcome in respect of holistic accountability may require possible AoA amendments.

The AoA also have the ability for shareholders to claim accountability of directors as falling as part of their role. This is perhaps because there is no requirement that amending the articles must actually benefit the company, and so even when it benefits shareholders it may still be valid[1009], as long as a reasonable person thought it was in

[1003] Owen Walker, 'UK stewardship code in line for significant overhaul' (*The Financial Times*, 5 January 2020) <https://www.ft.com/content/e581e639-0ab9-3fbe-aed6-39f7a9b20734> accessed 30 May 2020.
[1004] Grantham (n.982) 565.
[1005] Keay and Loughrey (n.38) 260.
[1006] Ibid; The Companies (Model Articles) Regulations 2008, Sch.1
[1007] *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 (CA) Greer LJ; Grantham (n.982) 566.
[1008] Grantham, ibid.
[1009] *Re Charterhouse Capital Ltd* [2015] EWCA Civ 536; Norton Rose Fulbright, 'Amendments to articles of association' (*Norton Rose Fulbright*, October 2015) <https://www.nortonrosefulbright.com/en/knowledge/publications/78833779/amendments-to-articles-of-association> accessed 28 February 2020.

the company's best interests.[1010] This is likely to strengthen holistic accountability because shareholders could include provisions that may force directors to provide them with further knowledge, allow for extensive examination and provide a well-reasoned outcome. However, there is a requirement that to alter the AoA, a special resolution must be passed by a majority of at least 75 percent of shareholder votes by either a written resolution signed by shareholders or casting votes at a general meeting of shareholders.[1011] But there are two problems associated with this.

The first is getting together enough votes for the amendment to be approved, requiring a coalition of shareholders. The information to persuade other shareholders may be costly to obtain or may not be obtainable at all.[1012] The second problem is that different shareholders may have different ideas about how to use the AoA to ensure holistic accountability.

5.2.4.4 Claiming Oppression

A claim of oppression (or unfair prejudice) allows a member (shareholder) to petition the court for relief on the grounds the company's affairs are being conducted or have been conducted in a manner that is unfairly prejudicial to the interests of members or of some part of its members, or that an actual or planned act or omission is or would be prejudicial.[1013] This is a wide-ranging method of accountability because members can petition for action in respect of past, present and future actions or omissions. But interestingly, they do not have to have been members when the action occurred but can pursue action upon becoming a member after the event. It is also the case that 'all three terms – "acts", "omissions" and "affairs" – are to be widely construed, although they must, be acts, omissions or affairs of the company in question.'[1014] The affairs of the company are interpreted 'liberally'[1015], with all areas of the company's affairs and business matters included.[1016]

This is unlikely to do anything for holistic accountability. Although, this would mean anything the board does may have the ability to fall into the affairs of the company, thus making it quite a powerful protection for shareholders to hold the board

[1010] *Re Charterhouse Capital Ltd* (n.1008*); Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656 (CA).
[1011] Companies Act 2006, s.283.
[1012] Keay (n.58) 656.
[1013] Companies Act 2006, s.994(1).
[1014] *VB Football Assets v. Blackpool Football Club (Properties) Ltd* [2017] EWHC 2767 (Ch) [308]*; Re Unisoft Group Ltd* (No. 3) [1994] BCLC 609 (HC) [611].
[1015] *Re Neath Rugby Ltd (No. 2)* [2009] 2 BCLC 427 (HC) [50].
[1016] *VB Football Assets* (n.1014) [309].

accountable. This protection is only powerful for small companies and is highly unlikely to work in LPCs or listed companies. The costs involved in bringing proceedings pose a major obstacle.[1017] While legislation permits listed companies to bring proceedings for oppression, shareholders of listed companies are more likely to opt for selling their shares than to resort to potentially costly litigation. [1018] This is why the majority of oppression cases have involved private companies.

5.2.4.5 Derivative Action

Similarly, disgruntled shareholders may decide to proceed with a derivative claim.[1019] Such a claim would enable them to bring an action against directors in respect of actual or proposed action or omission, regarding negligence, default, breach of duty or trust.[1020] The derivative claim exists to make directors accountable for what they do, and as a way of giving teeth to the monitoring of the board shareholders may take on.[1021] It has three components that need to be satisfied and they include: the action is brought by a member of the company, the cause of action is vested in the company and relief is sought on the company's behalf.[1022] This enables shareholders to pursue the board for any wrong committed.[1023] The threat of this may well persuade the board to act transparently and refrain from questionable conduct.

However, it is a representative action, and it requires shareholders to speak on behalf of the company, and, in a sense, for the entirety of shareholders. It is unlikely that all shareholders will allow one shareholder to speak on their behalf, because they may hold different viewpoints, or blame may be laid on other shareholders for allowing the action/omission, negligence, or breach of duty/trust to occur. As a result, from 1 October 2007 up until 1 April 2016, only 24 derivative claims applications were made in the UK[1024] working out to be an average of 2.82 cases a year.[1025] As Keay notes, since then, the body of claims is still not substantial, resulting in the number of instances in which a shareholder has succeeded in gaining permission to continue a claim being low since 2007 and this remains to be so.[1026]

[1017] Keay (n.58) 678-679.
[1018] Ibid; *Re Blue Arrow Plc* [1987] B.C.L.C. 585 (HC).
[1019] Companies Act 2006, Part 11
[1020] Companies Act, s.260(3); Insolvency Act 1986. s.212.
[1021] Keay (n.71) 42.
[1022] Companies Act 2006, s.260; John Lowry and Arad Reisburg, *Pettet's Company Law: Company Law & Corporate Finance* (4th edn, Pearson 2012) 251.
[1023] Ibid 275.
[1024] Andrew Keay, *Directors Duties* (2020 edn, Jordan Publishing) para 14.8; Keay (n.71) 41.
[1025] Ibid para 14.8.
[1026] Keay (n.1024) para 14.8.

5.2.4.6 Shareholder Dividends

As long as shareholders are given a return on their investment in the form of dividends it is highly likely they will not be concerned with how directors are operating. It is also likely that some shareholders would use holistic accountability as a way of increasing the bottom line and dividends but fail to hold the behaviour and conduct of directors accountable. For example, in November 2019, it was reported that shareholder pay-outs at FTSE 100 companies increased by 56 per cent between 2014 to 2018, with companies sustaining dividends and share buybacks 'regardless of company performance'[1027] and irrespective of the financial and operational position of the companies.[1028] Indeed, some companies paid shareholder dividends even when they had made a loss.[1029]

This has led to claims that the private sector is focused on protecting shareholder benefits more so than workers' wages or investments in companies.[1030] While the above may apply to FTSE 100 companies, this can also be applied to LPCs. This is evidenced by the fact that in the first three months of 2019, dividends paid to holders of all UK shares jumped to nearly a 16 percent high, putting shareholders on track for £100 billion in pay-outs in 2019 alone.[1031]

The ability of shareholders to hold directors holistically accountable is severely hindered. This is a systemic problem within the private sphere, where pay-outs are used as a means of keeping shareholders at bay allowing directors to evade examination of their conduct and actions. This is especially exacerbated by the fact that the cost of legal proceedings would fall to the shareholder(s) instigating the claim, which if successful, would enable other shareholders to free-ride without having contributed to the legal costs. This, therefore, will make shareholders think twice before initiating such claims because of the precarious financial situation such action may put them in.

While the protections offer some degree of confidence to shareholders to hold directors accountable, it is fair to say that that is all they offer. Using the protections, and indeed

[1027] Phillip Inman, 'Shareholder payouts have risen 64 times faster than wages – TUC' (*The Guardian*, 14 November 2019) <https://www.theguardian.com/money/2019/nov/14/shareholder-payouts-wages-tuc> accessed 29 February 2020
[1028] Ibid.
[1029] Inman (n.1027).
[1030] Ibid.
[1031] Inman (n.1027).

satisfying their requirements is a difficult feat, making the remedies protection in name only.

5.3 The Stakeholder Theory

The stakeholder theory emerged as a response to theories that advocated a shareholder-centric approach. The notion of stakeholders having importance within companies was first espoused by Dodd[1032] and in modern times by Freeman.[1033] The term stakeholder can be seen as an obvious play on the word shareholder.[1034] The precise origins of the theory are difficult to accurately determine.[1035] Freeman's view was that '…our current theories are inconsistent with both the quantity and kinds of change that are occurring in the business environment of the 1980's…A new conceptual framework is needed.'[1036] The model essentially questioned the conventional supposition that the quest for profits is the foremost management concern.[1037] This was arguable because company management was based upon an understanding of the past, rather than the future and in response to the business environment of yesteryear rather than the present.[1038]

Since its introduction, many commentators have stated that companies need to identify and act according to the needs of all their stakeholders.[1039] This has been termed organisational accountability and has been defined as:

> '…the readiness or preparedness of an organization to give an explanation and a justification to relevant stakeholders for its judgments, intentions, acts, and omissions when appropriately called upon to do so.'[1040]

It is fair to say that this evaluation is used synonymously with accountability and can be seen as an examination and subsequent judgement, of what the organisation, and

[1032] Charles M. Elson and Nicholas J. Goossen, 'E Merrick Dodd and the Rise and Fall of Corporate Stakeholder Theory' [2017] 72(2) Business Lawyer 735.
[1033] R. Edward Freeman, *Strategic management: A stakeholder approach* (Cambridge University Press 9 March 2010) 24.
[1034] R. Edward Freeman and John McVea, 'A Stakeholder Approach to Strategic Management' (2001) Darden Business School Working Paper 01/02, accessed 5 June 2020.
[1035] R. Edward Freeman and David L Reed, 'Stockholders and Stakeholders: A New Perspective on Corporate Governance' [1983] 25(3) California Management Review 88, 89.
[1036] Freeman and McVea (n.1034).
[1037] André O Laplum and others, 'Stakeholder Theory: Reviewing a Theory That Moves Us' [2008] 34(6) Journal of Management 1152, 1153.
[1038] Freeman (n.1033) 1.
[1039] Andreas Rasche and Daniel E. Esser, 'Stakeholder Management to Stakeholder Accountability' [2006] 65(3) Journal of Business Ethics 251, 251.
[1040] Ibid 252.

indirectly, its directors are doing. As a result, this new conceptual framework was about channelling managerial energies in the right way.

Some commentators such as Dodds, and eventually Berle, came to the notion that corporate power is held in trust for the entire community[1041], arguably making the case for accountability being one to be decided by the community, although it is unclear what is meant by the entire community. In any case, Freeman defines stakeholders as:

> '…any group or individual who can affect, or is affected by the achievement of a corporation's purpose. Stakeholders include employees, customers, suppliers, banks, environmentalists, government and other groups who can help or hurt the corporation.'[1042]

But it can be said that supporting the organisation is different to holding it accountable. Unless of course, support of the organisation is acceptance of its actions or omissions, and withdrawal of that support means non-acceptance of those actions or omissions.

Commentators such as Argandona[1043], Rowley[1044] and Philips and others[1045] have all advocated the stakeholder theory, albeit with different nuances, as the most convincing theoretical view of what the nature of a company is and who should hold it accountable, even if it is quite broad. An element that sets apart the stakeholder theory from others is the fact that it is 'explicitly and unabashedly moral'.[1046] The theory argues that stakeholders are to be granted more importance than shareholders, because some stakeholders' relationship with the company remains instrumental, due to the power they wield than simply shareholders alone[1047] such as creditors. It is by having this power that stakeholders can hold directors accountable.

Indeed, Johnson and Millon see the company as a community of constituents with shared and competing interests, with a company having a social obligation not just to shareholders but also to non-shareholder stakeholders.[1048] The place occupied by

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[1041] Tom C. W. Lin, 'Incorporating Social Activism' [2018] 98(6) Boston University Law Review 1535, 1563.
[1042] Freeman (n.1033) vii.
[1043] Antonio Argandoña, 'The Stakeholder Theory and the Common Good' [1998] 17(9-10) Journal of Business Ethics 1093.
[1044] Tim Rowley, 'A normative justification for stakeholder theory' [1998] 37(1) Business & Society 105.
[1045] Robert Phillips and others, 'What Stakeholder Theory Is Not' [2003] 13(4) Business Ethics Quarterly 479.
[1046] Ibid 481.
[1047] Phillips and others (n.1045) 481.
[1048] Lin (n.1041) 1556.

stakeholders coupled with the company having a social obligation makes stakeholders best placed to hold directors accountable.

Interestingly, Greenfield notes that requiring companies to attend to a broader range of stakeholders would make companies more like people and make them better citizens.[1049] This is because a company, and its directors, are restricted in shirking behaviour due to the degree of accountability directors find themselves under from various stakeholders. However, the theory is not without its problems. For directors to be held holistically accountable, it must be clear to whom they should be held accountable, but the theory is silent on this. There are key flaws inherent in the theory which provide it with shaky foundations for it to stand as a theoretical basis. For example, there is a failure to accurately define the term stakeholder[1050], and this implies a requirement for all stakeholders to be treated equally[1051].

The theory has not been deemed a credible alternative to agency theory. The stakeholder theory provides the excuse for directors of LPCs by allowing the agency problem to continue, given the number of possible stakeholders, directors of LPCs could be held accountable to.[1052] The various number of stakeholders directors of LPCs could be held accountable to means that stakeholders would not be able to effectively hold directors accountable. Directors, in theory at least, could provide different reasonings and each stakeholder could come to a different outcome, enabling directors to evade the truth. It is these key flaws that will form the basis of examining whether the theory is suitable in respect of advocating that stakeholders hold directors of LPCs accountable.

5.3.1 Defining Stakeholders

For the theory to hold weight, there must be clarity as to whom directors of LPCs are accountable. However, there are numerous definitions of what constitutes a stakeholder.[1053] Freeman admits that '…there is just too much ambiguity in the definition of the central term for it ever to be admitted to the status of theory.'[1054] This is even though Freeman's definition is framed broadly. The trouble is that for stakeholders to hold directors accountable, the term must be clearly defined so that

[1049] Ibid 1595.
[1050] Samantha Miles, 'Stakeholder: Essentially Contested or Just Confused?' [2012] 108 Journal of Business Ethics 285, 285.
[1051] Phillips and others (n.1045) 488.
[1052] Ibid 483.
[1053] Miles (n.1050).
[1054] Bidhan L. Parmar and others, 'Stakeholder Theory: The State of the Art' [2010] 4(1) The Academy of Management Annals 403, 406.

the accountee(s) can be identified. Miles notes that there are 55 definitions covering 75 publications.[1055]

Commentators such as Gray define it as any human agency[1056], Starik defines it as any naturally occurring entity[1057], Hendry defines it as moral actors[1058] and Orts and Strudler define it as participants.[1059] The closest the theory gets to defining the term is explaining commonalities between all the propounded definitions, which is that a stakeholder is someone with interests at stake in relation to the workings of the business.[1060] Indeed, the term stakeholder is devoid of any clear definition, with no single generally accepted definition[1061]

However, it is worth noting that two distinct threads emerge: the claimant and influencer definition of what a stakeholder is.[1062] Claimants are defined as stakeholders who have a claim to the company, whereas influencers are stakeholders that are affected by the workings of the company.[1063] The claimant stakeholder requires some kind of claim on the services of the company, and the influencer with only the capacity to influence the working of the company, and a hybrid of the two allow for both of these requirements.[1064] From this distinction, it is clear that both types and indeed a hybrid of the two can hold directors accountable because both wield influence. Arguably, a hybrid of the two may be in a stronger position but that could cover virtually everyone even through a casual association.

In attempting to determine who a stakeholder is, Freeman's definition, as the chief propagator of the theory[1065] opens the door to every single individual and entity as a stakeholder. Going by this, it could include shareholders, employees, the government, suppliers' creditors, environmental groups, competitors, and investors amongst others. In this regard, it can be posited that section 172 of the Companies Act[1066] provides a workable structure. However, while the provision specifically mentions success for

[1055] Miles (n.1050) 285.
[1056] Ibid 289.
[1057] Miles (n.1050) 289.
[1058] John Hendry, 'Economic contacts versus social relationships as a foundation for normative stakeholder theory' [2001] Business Ethics: A European Review, 10(3) 223, 225.
[1059] Miles (n.1050) 289.
[1060] John Kaler, 'Morality and Strategy in Stakeholder identification ' [2002] 39(1/2) Journal of Business Ethics 91, 93.
[1061] Emerson Wagner Mainardes and others, 'Stakeholder theory: issues to resolve' [2011] 49(2) Management Decision 226, 228.
[1062] Yves Fassin, 'The Stakeholder Model Refined' [2009] 84(1) Journal of Business Ethics 113, 116.
[1063] Ibid 113.
[1064] Kaler (n.1060) 91.
[1065] Phillips and others (n.1045) 479.
[1066] Companies Act 2006, s.172.

members, outlining factors when doing so, it does not move away from shareholder primacy.[1067] Interestingly, Freeman puts forward the view that there is no need to go beyond this general stakeholder analysis[1068] because by accounting for as many stakeholders as possible, it becomes adequately generalisable[1069], but this generalisation makes the theory unworkable.

Kaler also acknowledges this stating that there is no limit to who might count as a stakeholder, as any type of interaction with a company is capable of influencing or being influenced by its workings.[1070] Although legislative provisions could be drafted to counter this, it would be difficult to envisage where the line would be drawn. In recognising this, Kaler calls for an '…exclusive rather than inclusive definition'[1071] but omits to at least outline which type of stakeholder should hold directors accountable.

In keeping with the moral aspect of the theory, that is identifying moral or philosophical guidelines for the operation of the company[1072], Philips states that '…some stakeholders merit greater moral consideration in managerial decision-making than others.'[1073] He breaks them down into two groups: normative and derivative stakeholders.[1074] Normative stakeholders are described as those to which the company has a moral obligation, of fairness over and above others by simple virtue of them being human and a company should be managed in consideration of those stakeholders to whom the company has positive obligations.[1075] Derivative stakeholders are those whose actions and/or claims must be taken into account by the board because of the obligations owed to others.[1076] It is unclear how the company would decide to whom it has a moral obligation.

In short, Philip argues that stakeholders which are human are owed a duty and arguably it is those who should hold directors accountable. On the other hand, derivative stakeholders only have to be considered in decision-making. However,

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[1067] Collins C. Ajibo, 'A Critique of Enlightened Shareholders Value: Revisiting the Shareholders' Primacy Theory' [2014] 3 Manchester Review of Law, Crime and Ethics 115, 117.
[1068] Miles (n.1050).
[1069] Eric W. Orts and Alan Strudler, 'The ethical and environmental limits of stakeholder theory' [2002] 12 (2) Business Ethics Quarterly 215, 218.
[1070] Kaler (n.1060) 95.
[1071] Ibid 92.
[1072] Thomas Donaldson and Lee E. Preston 'The stakeholder theory of the corporation: Concepts, evidence and implications' [1995] 20(1) The Academy of Management Review 65, 71.
[1073] Robert Philips, 'Stakeholder Legitimacy' [2003] 13(1) Business Ethics Quarterly 25, 29-30.
[1074] Ibid.
[1075] Philips (n.1073) 31.
[1076] Ibid.

Philips omits outlining situations where there are more than normative stakeholders, or where normative stakeholders have different priorities. Indeed, Philips accepts that this categorisation '…cannot be entirely determinate in the abstract…'[1077]. As a result, defining stakeholders, in respect of holding directors accountable remains ambiguous.

5.3.2 Stakeholders to be Treated Equally

The rationale behind the equal treatment of all stakeholders is that it allows for a means of control that stakeholders can use to direct the actions of management.[1078] However, it does not provide a basis for prioritising stakeholders and fails to suggest an approach on how to deal with all stakeholders arguing that it would be unrealistic to provide '…checklists and guidelines… to help… [companies]…address their unique tensions'.[1079] The stakeholder theory seems to suggest that the interests of stakeholders must be balanced equally despite each company's uniqueness and mode of operation.

Indeed, Sternberg states that 'in maintaining that all stakeholders are of equal importance to a business and that business ought to be answerable equally to them all, stakeholder theory confounds business with government'.[1080] This is not necessarily a bad thing, but stakeholders, based on Freeman's definition, are unlikely to work as one when holding directors accountable because of their differing agendas and priorities, unlike the government which has a constitutional convention of collective responsibility.[1081]

Freeman dismisses Sternberg's notion of treating stakeholders equally as '…a meritocratic interpretation of stakeholder balance…'.[1082] Sternberg is not the only commentator that has expressed such a view. Stakeholder theorists, Donaldson and Preston, also imply the notion of equality between shareholders stating that '…focus of interest…has been the proposition that corporations practising stakeholder

[1077] Philips (n.1073) 38.
[1078] Chris Hill and Neil Crombie, 'Accountability to Stakeholders in a Student-Managed Organisation' (*Core.ac.uk*, not known) <https://core.ac.uk/download/pdf/35464101.pdf> accessed 18 July 2020.
[1079] Venkataraman Nilakant and Jane Buckingham, *Managing Responsibly: Alternative Approaches to Corporate Management and Governance* (1st edn, Routledge 2016) 79.
[1080] Elaine Sternberg, *Corporate Governance: Accountability in the Marketplace* (Institute of Economic Affairs 1998) 50.
[1081] Ketaki Zodgekar, 'Collective responsibility' (*Institute for Government,* 4 November 2019) <https://www.instituteforgovernment.org.uk/explainers/collective-responsibility> accessed 18 July 2020.
[1082] Phillips and others (n.1045) 480.

management will, other things being equal, be relatively successful.'[1083] Indeed, if the theory is unabashedly moral, some form of equality must be at the forefront of the company's mind or at least conceptualised theoretically. But this runs the risk of conceptualising equality universally which is unbefitting to the individuality of each company, as well as disregarding the fact that morals are never going to be homogenous, so entangling the stakeholder theory with morality is dangerous ground.

5.3.3 Allows the Agency Problem to Continue

The theory has also been accused of ignoring the agency problem, a key reason why the holistic accountability of directors in LPCs is required in the first place. For example, Buckingham and Nilakant state that '…stakeholder theory has been criticized for ignoring agency problems between managers and shareholders…'.[1084] Even Freeman and others note that the theory:

> '…provides unscrupulous managers with a ready excuse to act in their own self-interest thus resurrecting the agency problem that the shareholder wealth maximization imperative was designed to overcome.'[1085]

By having directors accountable to several stakeholders, a difficult task ensues because stakeholders will have different agendas, priorities, and tolerances to risk, therefore the focus will be on different issues making holistic accountability atomistic and disjointed.

This has the tendency to result in stakeholders missing, or directors omitting, the real reasons as to why decisions were taken in the first place.[1086] Sternberg states that the theory effectively finishes accountability because a company that is accountable to all is not really accountable to anyone.[1087] To counter this, Freeman and others state that accountability is increased because directors held accountable to a number of constituents allow for the justification of a decision to be examined.[1088] However, they omit to outline their conceptualisation of what they believe accountability to be. The stakeholder theory relies on stakeholders forming a coalition, with the assumption that the same level of information will be provided to all stakeholders without any gaps.

[1083] Donaldson and Preston (n.1072) 67.
[1084] Nilakant and Buckingham (n.1079) 78.
[1085] Phillips and others (n.1045) 484.
[1086] Ibid.
[1087] Sternberg (n.1080) 51f.
[1088] Phillips and others (n.1045) 484.

Different stakeholders will wield different power so their ability to obtain information will differ if the information wanted is not readily available. It is also posited that forming a coalition to hold directors accountable requires external stakeholders and internal stakeholders to know each other, with some having to concede their own bargaining power. However, if some stakeholders believe they can hold directors accountable in line with their own agenda and priorities, then forming a coalition will be unlikely.

Due to these flaws, it has been argued that the stakeholder holder theory has no hard basis, neither in the economic theory of the firm nor in traditional ethical theories.[1089] While the theoretical side may have no basis, it is unclear if, from a practical point of view, some stakeholders may be able to hold directors holistically accountable. In this regard, employees, creditors, and customers will be examined to ascertain if each of these stakeholders could hold directors accountable under the thesis definition of accountability.

5.3.4 Employees

In LPCs or any type of company for that matter, its workforce is of significant importance. Indeed, some commentators, such as McDonnell, have argued for the encouragement of an employees' role in corporate governance.[1090] perhaps because, as Paine and Srinivasan state, '…. corporations are influential actors in society with responsibilities not just to shareholders, but also to employees…'[1091] This becomes clear when considering, that in September 2021, the Office for National Statistics (ONS), reported that there were just over 27 million individuals who worked in the private sector.[1092] The ONS also reported that between October 2019 to December 2019, labour productivity measured by output per hour had risen by 0.3 percent.[1093] This might well be a small increase, but from an economic point of view, it can generate significant revenues for companies.

[1089] Fassin (n.1062) 116.
[1090] Brett McDonnell, 'Strategies for an Employee Role in Corporate Governance The Sustainable Corporation' [2011] 46(3) Wake Forest Law Review 429.
[1091] Lynn S. Paine and Suraj Srinivasan, 'A Guide to the Big Ideas and Debates in Corporate Governance' (*Harvard Business Review*, 14 October 2019) <https://hbr.org/2019/10/a-guide-to-the-big-ideas-and-debates-in-corporate-governance> accessed 9 October 2020.
[1092] Tom Evans, 'EMP02: Public and private sector employment' (*Office of National Statistics*, 13 December 2022) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/publicandprivatesectoremploymentemp02> accessed 3 January 2023.
[1093] Richard Campbell, 'Labour productivity, UK: October to December 2019' (*Office of National Statistics*, 7 April 2020) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/labourproductivity/bulletins/labourproductivity/octobertodecember2019#main-points> accessed 3 January 2023.

The literature makes substantial mention of employees in respect of director accountability. For example, Mulgan states that the accountability of directors falls to shareholders and employees.[1094] Mulgan may have said this because, in other countries such as Germany and China, there is a two-tier board system, one board consists of the directors and the other of representatives of employees and shareholders, as a way of providing checks and balances, and, thus, as a method for monitoring directors.

Another reason for Mulgan's view may be that shareholders will have a high-level view of the company. On the other hand, employees are likely to have a much more detailed understanding of how the company is being managed at an operational level. This questionably equates the two on an equal footing in respect of holding directors accountable. Perhaps because of each constituent's importance with one providing the capital and the other either providing the service or making the product, the company is a profitable venture. Blair and Stout argue that employees make a 'firm-specific' investment which provides them with a stake in the economic health of the company, through capital such as knowledge and skills which may be more valuable to the current employer.[1095]

It is posited that employees spend significantly more time at work than they do at home, creating a psychological link that may well align the success of the company with their own professional success. Research conducted by Ambius, an office landscaping firm, showed that British workers spend more time at their desk/workstation than they do in bed, relaxing at home or even outdoors.[1096] It can also be said that directors will often delegate tasks and responsibilities to senior managers and other employees, making employees a vital element of corporate machinery.[1097]

5.3.4.1 Section 309: Companies Act 1985

Before the introduction of the Companies Act 2006, there was an express provision that directors are '…to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its

[1094] Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Springer 2003) 3.
[1095] Blair and Stout (n.486) 414.
[1096] Sara Bean, 'UK office workers spend limited time outside and over half complain of lack of fresh air' (*Workplaceinsight*, 11 May 2018) <https://workplaceinsight.net/uk-office-workers-spend-limited-time-outside-and-over-half-complain-of-lack-of-fresh-air/> accessed 11 February 2020.
[1097] Blair and Stout (n.486) 425.

members.'[1098] It is interesting to note that only employees were explicitly singled out under the Companies Act 1985 as a constituent with which directors had to have regard in addition to members. Perhaps this was because of their importance in ensuring the success of the company. Indeed, case law recognised that the provision had broadened the view of the company as more than just the total sum of its members.[1099]

In *Re Saul D Harrison & Sons*[1100], it was held that directors of a struggling company were lawfully entitled to take account of the benefits to employees of the business alongside shareholder interests in the company becoming profitable. Despite the express inclusion of employees being laudable, this did not have a significant impact on the corporate law landscape.[1101] This is because no directors ever faced liability for failing to consider the interests of employees, and it is also doubtful whether a remedy could be realistically ordered.[1102]

Some commentators such as Johnston state that the obligation was only procedural with directors having the ability to disregard employees when it was not compatible with the company's or shareholders' interests.[1103] This is perhaps why Sealy criticised it as '…either one of the most incompetent or one of the most cynical pieces of drafting on record.'[1104] While the provision asserted wider scope, in practice it was futile because the broader corporate governance system created ever-greater weight to prioritise the short-term interests of shareholders, and the obligation for employees could not be enforced by employees.

5.3.4.2 The Right to Strike

It is recognised that one way for employees to hold directors accountable may be to challenge directors in a private setting. This can range from having an informal conversation and raising a formal grievance to mediation.[1105] *Webster and Licorish state that grievances '…*often entrench the dispute or ratchet up the tension…'[1106] and that it is usually '…the first step in a legal system…. a route towards the employment

[1098] Companies Act 1985, s.309(1).
[1099] *Fulham Football Club Ltd. v. Cabra Estates plc* [1992] 1 BCLC 363 (CA) [379].
[1100] [1994] BCC 475 (CA) [483].
[1101] Andrew Johnston, 'The Shrinking Scope of CSR in UK Corporate Law' [2017] 74(2) Washington and Lee Law Review 1001, 1024.
[1102] Ibid.
[1103] Johnston (n.1101) 1025.
[1104] Ibid 1024-1027.
[1105] Emma Webster and Deborah Licorish, 'Grievances do more harm than good' (*Yess Law*, 24 January 2018) <https://workingfamilies.org.uk/workflex-blog/grievances-do-more-harm-than-good/> accessed 11 October 2020.
[1106] Ibid.

tribunal, not resolution.'[1107] However, depending on the seniority of the employee, the majority are unlikely to have any contact with directors, as it will be dealt with through the line management chain. Issues which require the raising of grievances are likely to be individualistic issues affecting an individual rather than the entire workforce.

As a result, depending on the issue at hand, employees may approach their recognised trade union. Trade unions have often been able to organise, through collective bargaining, holding companies, and in turn, directors to account by initiating changes such as control over working hours, terms and conditions and more importantly providing employees with a voice at work by being fairly rewarded and helping companies to survive difficult times.[1108] Employees when facing problems at work are also able to access legal advice either without charge or at a subsidised cost.

The most important element for employees when joining a recognised trade union is striking. This is especially the case when considering that in companies with 50 or more employees, union membership increased by 31 percent.[1109] To hold directors holistically accountable, employees can strike as an expression of dissatisfaction over the current state of affairs, making it clear that change is wanted.[1110] This is often for issues that affect the entire workforce, rather than an individual employee which is dealt with down the grievance route.

Although it is accepted this is usually wider than just the accountability of directors, with that being achieved indirectly, and perhaps secondary to concerns raised. Employees will often strike when their needs and wants go unanswered or unheeded.[1111] This often means that both the trade unions and the company must negotiate a deal, which in the majority of circumstances requires compromise on both sides, even if it means negotiating a new normal.[1112]

However, a cause for concern is whether employees would possess all the information necessary. For example, usually when controversial matters affecting the workforce

[1107] Webster and Licorish (n.1105).
[1108] TUC, 'Why join a union?' (*TUC*, not known) <https://www.tuc.org.uk/why-join-union> accessed 11 February 2020.
[1109] Carl Roper, 'Trade union membership is growing, but there's still work to do' (*TUC*, 31 May 2018) <https://www.tuc.org.uk/blogs/trade-union-membership-growing-there%E2%80%99s-still-work-do> accessed 31 May 2020.
[1110] Melanie Simms, 'Why workers go on strike' (*The Conversation*, 23 March 2018) <http://theconversation.com/why-workers-go-on-strike-93815> accessed 28 February 2020.
[1111] Woodruff Imberman, 'Who Strikes—and Why?' (*Harvard Business Review*, not known) <https://hbr.org/1983/11/who-strikes-and-why> accessed 28 February 2020.
[1112] Simms (n.1110).

are announced the groundwork has already been laid, and employees are given a superficial consultation. It is also worth mentioning that in the majority of circumstances, employees will use striking as a way of holding directors accountable is often related to internal issues such as reward, remuneration and contract changes, and not the way that the company performs. This will not always be something that is in the public domain but is likely to affect primarily employees.

In nearly all cases where employees take any action, it is about their own pay and working conditions.[1113] Other issues which are more company-orientated are likely to fall through the gaps because information is fragmented amongst different employees resulting in a key element of holistic accountability: knowledge becoming unachievable. It is only holding directors accountable in so far as issues that directly affect employees and so is not the holistic accountability of directors that is actually required. Nearly all strikes revolve around a fairly technical employment issue which often develops a momentum of its own becoming a catalyst for a wider expression of dissatisfaction between the changing bargains made by the employer and employee.[1114]

A major factor in enabling employees to hold directors holistically accountable is trade union membership. However, trade union membership in the private sector fell to 23.1 in 2021, down from 23.7 percent in 2020.[1115] Membership of a trade union, while heavily concentrated in the public sector, accounted for just 13.5 percent of employees in the private sector as members with unions almost completely absent in low-pay industries.[1116] In the next two decades, around 3 million union members are set to retire and because there is a struggle to recruit younger workers, it is almost inevitable that union membership is set to further decline.[1117]

A possible explanation for this put forward by Chivers and others is that social media used by labour movements has become a vital tool in attracting support for matters

[1113] Ibid; Victoria Waldersee, 'We asked economists whether strikes really work' (*Our Economy*, 7 September 2017) <https://www.ecnmy.org/engage/we-asked-economists-whether-strikes-really-work/> accessed 12 October 2020.
[1114] Simms (n.1110).
[1115] Department for Business, Energy and Industrial Strategy, 'Trade Union Membership: Statistical Bulletin ' (*Gov.uk*, 25 May 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1077904/Trade_Union_Membership_UK_1995-2021_statistical_bulletin.pdf> accessed 3 January 2023.
[1116] Joe Dromey, 'Fall in trade union membership linked to rising share of income going to top 1%' (*IPPR*, 10 June 2018) <https://www.ippr.org/news-and-media/press-releases/fall-in-trade-union-membership-linked-to-rising-share-of-income-going-to-top-1> accessed 6 March 2020.
[1117] Ibid.

such as fair pay and better working conditions with social media replacing the traditional trade union.[1118] They specifically single out Twitter as a key outlet that has assisted in bringing about such results.[1119]

Consequently, the ability to strike comes into doubt. While some commentators, in 2017, stated that strike action in the private sector had increased by 80 percent in 2018, due to the loss in the number of working days[1120], the number of stoppages was actually greater.[1121] For example, in 2011, 41 percent of stoppages were from the private sector. However, by 2014, this increased to 56 percent.[1122] since then various pieces of legislation have made the ability to strike difficult through provisions included in the Trade Union Act 2016.

That being said, there has been strike action in respect of certain issues. For example, in a public company context, Amazon workers staged walkouts on Black Friday and Cyber Monday over the treatment of workers.[1123] Demonstrations took place in Amazon's London head office in Shoreditch as well as other locations. This was due to health and safety issues when working in unsafe conditions, with more than 600 ambulances being called to Amazon warehouses over a three-year period.[1124] The message employees wanted to give through the walkouts was 'Amazon workers want [owner] Jeff Bezos to know they are people – not robots" and '[i]ts about time Mr Bezos showed empathy with the very people that have helped build his vast empire and make sure it is not a Black Friday for Amazon workers.'[1125]

Perhaps by mentioning Jeff Bezos, arguably the public face of Amazon, the message resonates with a larger audience when compared with just mentioning the directors of

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[1118] Economic and Research Council, 'A new generation of young workers is engaging with trade unions and strike action through social media, says a new study' (*Economic and Social Research Council,* 31 October 2018) <https://esrc.ukri.org/news-events-and-publications/news/news-items/a-new-generation-of-young-workers-is-engaging-with-trade-unions-and-strike-action-through-social-media-says-a-new-study/> accessed 22 August 2020.
[1119] Ibid.
[1120] Rob Moss, 'Private sector strike days jump 80%' (*Personnel Today*, 4 December 2017) <https://www.personneltoday.com/hr/private-sector-strike-days-jump-80/> accessed 6 March 2020.
[1121] Peter Hoskin, 'How the private sector goes on strike more and less than the public sector' (*Conservative Home*, 4 January 2016) <https://www.conservativehome.com/to-the-point/2016/01/how-the-private-sector-goes-on-strike-more-and-less-than-the-public-sector.html> accessed 6 March 2020.
[1122] Ibid.
[1123] Joe Curtis and James Warrington, 'Black Friday backlash: Amazon and GMB dispute protest numbers at UK warehouses' (*City AM*, 29 November 2019) <https://www.cityam.com/black-friday-backlash-workers-strike-at-uk-and-german-amazon-warehouses/> accessed 28 February 2020.
[1124] Ibid.
[1125] Curtis and Warrington (n.1123).

the UK Amazon subsidiary. By doing so, the walkouts put pressure on Amazon to defend its position, because they were being held broadly accountable by Amazon employees for their omissions. In any case, once the walkouts became public knowledge questions were being asked, and it is those at the top of the Amazon hierarchy who needed to provide the answers.

It is also worth noting that from the summer of August 2022 to January 2023, the UK has seen significant strike action regarding pay from across the public and private sectors.[1126] This is in response to the current cost of living crisis which has seen inflation increase to around 10 percent.[1127] Given that inflation has hit a 40-year high, this strike action only reinforces the view that the strikes are a result of a singular issue of pay rather than the misconduct of directors of LPCs.[1128] Therefore, this is unlikely to signify that striking can bring about the holistic accountability of directors of LPCs.

5.3.4.3 The 2016 Corporate Governance Reform Green Paper

Aside from collective action, the Trades Union Congress (TUC), a federation of over 50 trade unions, published a report in September 2013 arguing that the corporate governance of companies requires urgent reform.[1129] The TUC proposed that the UK puts in place its own system of worker representation up to and including board level.[1130] It argued that such a mechanism for workers' voices would be beneficial for several reasons.[1131] However, it is worth noting that the idea in itself was not something new. In 1977, the Bullock Report on Industrial Democracy opined that workers should be members of a company board, but that never happened.[1132] This was despite the fact it was seen as a way of meeting 'twin aims of effective employee participation and

[1126] James Robinson, 'Fresh wave of strikes set for January - here's who is taking action, when and why' (*Sky News*, 3 January 2023) <https://news.sky.com/story/fresh-wave-of-strikes-set-for-january-heres-who-is-taking-action-when-and-why-12778841> accessed 3 January 2023.
[1127] Chris Giles, 'UK inflation hits 40-year high of 10.1%' (*The Financial Times*, 19 October 2022) <https://www.ft.com/content/dec290b0-dc52-4486-81c7-2173188e281b> accessed 3 January 2023.
[1128] Robinson (n.1126).
[1129] TUC, 'Workers on Board the case for workers' voice in corporate governance' (*TUC*, September 2013) <https://www.tuc.org.uk/sites/default/files/Workers_on_board.pdf> accessed 28 February 2020.
[1130] Ibid.
[1131] TUC (n.1129).
[1132] Nils Pratley, 'Theresa May's plan to put workers in boardrooms is extraordinary' (*The Guardian*, 11 July 2016) <https://www.theguardian.com/politics/nils-pratley-on-finance/2016/jul/11/theresa-may-plan-workers-boardroom-reform-extraordinary-tories> accessed 28 February 2020.

efficient management'.[1133] For example, workers' interests' are an area affected by the decisions made by company boards and so it is a matter of fairness that they are represented within those discussions.

It is also the case that workers bring a range of front-line and other experiences in respect of how the company operates, and this deep insight is crucial to a variety of strategic and operational considerations central to board decision-making.[1134] In 2016, Theresa May, then the main contender for the Conservative leadership, stated that: [i]f I'm prime minister…we're going to have not just consumers represented on company boards, but workers as well'.[1135]

The Green paper suggested four possible ways, open for consultation, that could enable employees to have a prominent voice on boards.[1136] These included i) creating a stakeholder advisory panel, enabling boards to hear directly from employees initiate discussions on topics they feel are important with senior executives/board involvement[1137], ii) designate existing non-executive directors with a specific remit to ensure that the employee voice is being heard with possible involvement from the HR director, or board-level equivalent[1138] to add value to board discussions[1139], iii) appoint individual stakeholder representatives to the board to provide a longer-term perspective and improve employee engagement from the bottom to the top[1140] and iv) develop reporting requirements in relation to stakeholder engagement by developing something akin an annual strategic review about how consideration is given to employees and other stakeholder interests [1141] with board be encouraged to provide comprehensive information, so they can be held to account.[1142]

While all four proposals were in some respects innovative, the only proposal to gain some traction and publicity was proposal two: designate existing non-executive directors to ensure that the employee voice is heard. This is perhaps because the

[1133] Wanjiru Njoya, 'The problem of income inequality: Lord Wedderburn on fat cats, corporate governance and workers' [2015] 44(3) Industrial Law Journal 394, 423.
[1134] TUC (n.1129).
[1135] Pratley (n.1132).
[1136] Department for Business Energy & Industrial Strategy, 'CORPORATE GOVERNANCE REFORM' (*Gov.uk*, November 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf> accessed 28 February 2020.
[1137] Ibid.
[1138] Department for Business Energy & Industrial Strategy (n.1136).
[1139] Ibid.
[1140] Department for Business Energy & Industrial Strategy (n.1136).
[1141] Ibid.
[1142] Department for Business Energy & Industrial Strategy (n.1136).

outcome of the consultation resulted in many respondents raising significant concerns about all of the proposals[1143], leading to their abandonment.

Despite the Prime Minister, of the time, Theresa May advocating employee representation on company boards during her leadership election campaign, she had a volte-face on the matter. After her successful campaign, a few months later, in November 2016, she stated that the measures would not be obligatory and there were '…other ways of helping workers' voices to be heard on boards, such as the appointment of non-executive directors.'[1144] The Confederation of British Industry (CBI), a nonprofit organisation that represents around 19,000 businesses lobbied and was able to kill off May's proposal. The then-Secretary of State for Business, Energy & Industrial Strategy stated:

> 'We have this legal tradition of having a unitary board, not delegates of groups but function for the whole interests of the company. That has been successful so I would not want to mandate the replacement of something that had been successful.'[1145]

It is posited that the proposition did have the possibility of holding directors accountable as all the key elements would have been satisfied. The problem is whether one board member on their own would have the ability to effect holistic accountability. It would also be of interest to ascertain Mr Clark's definition of successful or at least his measure of success, when considering countries where there are workers on boards, there is often better investment decision-making, aligned with the long-term success of the company.[1146]

Declining trade union membership and tougher employment laws have meant that employers could continue to '…hold the whip hand over their employees.'[1147] A report

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[1143] Department for Business Energy & Industrial Strategy, 'CORPORATE GOVERNANCE REFORM' (*Gov.uk*, August 2017) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf > accessed 13 October 2020.

[1144] Adam Mcculloch, 'Businesses are resisting worker representation on boards' (*Personnel Today*, 3 May 2019) <https://www.personneltoday.com/hr/businesses-resist-worker-representation-on-boards/> accessed 6 March 2020

[1145] Jessica Elgot, 'UK government defends apparent U-turn over workers on boards' (*The Guardian*, 29 November 2016) <https://www.theguardian.com/business/2016/nov/29/government-defends-apparent-u-turn-over-workers-on-boards> accessed 31 May 2020.

[1146] Ibid.

[1147] Larry Elliott, 'Theresa May misses a trick after U-turn over workers on boards' (*The Guardian*, 10 June 2018) <https://www.theguardian.com/business/2018/jun/10/theresa-may-misses-a-trick-after-u-turn-over-workers-on-boards> accessed 6 March 2020.

titled ‘Companies Choose Not to Appoint Employees on Boards’ found that the main reasons cited by companies as to why they're not willing to embrace employee participation at board level were because of workforce sizes, the inability for one voice to represent the masses, conflicts of interests and delay in decision-making.[1148] Delays in decision-making may be because employee directors would holistically hold directors accountable through obtaining knowledge, examining it and then coming to an outcome. Instead of the original proposal, May’s government proposed legislation requiring companies with 250 or more employees, to publish the ratio of pay between the chief executive and the average worker, but again no requirement for employees to be put on company boards.[1149] It is fair to say that over time ‘[l]eaving everything in the hands of shareholders has led to short-termism and failure. The problem with May’s proposals was not their radicalism: it was that they did not go far enough’.[1150]

Despite employees being a large class constituent, it is clear that they are not valued to the same extent as perhaps other constituents. This is evidenced by the fact that while previously employee interests were required to be considered by directors explicitly (under Companies Act 1985, s.309), it remained a futile provision until its revocation. While there are several methods that employees can effect change, generally speaking, strike action, or the threat of it is usually the way forward because it is nearly always limited to responding to changes that directly affect them such as pay and working conditions. The only glimmer of hope was May’s proposal of enabling employees to have a prominent voice on boards.[1151] However, they have been watered down, making employees an unlikely constituent in holding directors holistically accountable.

5.3.5 Creditors

The majority of, if not all, LPCs will require external finance and other credit at some point. This could be for reasons such as expansion, diversification or supporting expensive projects as well as simply running the business. For example, in May 2019, LPCs within the real estate, professional services and support activities sector had gross lending of around £4 billion.[1152] Almost 27 percent of small-medium enterprises

[1148] Mcculloch (n.1144).
[1149] Ibid; BBC News, 'Firms will have to justify pay gap between workers and bosses' (*BBC News*, 10 June 2018) <https://www.bbc.co.uk/news/business-44417629> accessed 6 March 2020.
[1150] Elliott (n.1147).
[1151] Department for Business Energy & Industrial Strategy (n.1136).
[1152] Chris Lilley, 'Business loan statistics' (*Finder*, 8 February 2020) <https://www.finder.com/uk/business-loan-statistics> accessed 28 February 2020.

were reported as being financed by loans, and net lending to small businesses in 2018 was £26.6 billion.[1153]

In any case, such sizeable finance means both secured and unsecured creditors, but more specifically secured creditors, will often provide the bulk of the lending that would warrant security requiring creditors to take a more detailed and critical view of the LPCs they invest in. It is posited that this will be to ensure they see repayment of the finance with interest. Depending on the amount loaned, and the value of the security, lenders are likely to be complacent if it is clear that the value of the security will offset the loan.

In respect of holding directors accountable generally, creditors may well look at the composition of the board, have a certain set of conditions that need to be met, or simply be willing to lend based on a previous track record. It is also likely that creditors may look at including restrictive covenants in loan deals which may prohibit directors may from dealing in certain assets or taking further loans. It is worth noting that the directors do have a duty to consider the interests of creditors[1154] but this is only '…a form of creditor protection, inhibiting companies from externalising the cost of their debt at the time of financial distress'[1155].

Creditors may only be able to hold the board accountable in respect of financial information which relates to lending, provided that the company makes its agreed payments. For example, lenders may state that debt to equity ratio cannot be increased by a certain percentage, or they make it a condition that directors need to provide certain financial information periodically or restrict expansion activities and pay-outs to shareholders.[1156]

Creditors may well be able to hold directors holistically accountable, but this is only likely to be in relation to the financial position. As a result, creditors may be able to influence the strategic direction of the company, as well as look to hold the board to account but only insofar as it affects the full repayment of a loan. This could be done by vetoing certain financial decisions or suggesting different courses of action.[1157] In specific relation to LPCs, there will likely be concentrated ownership and as a result of

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[1153] Ibid.
[1154] Companies Act 2006, s.172(3)
[1155] *BTI 2014 LLC v Sequana S.A* [2022] UKSC 25*:* Andrew Keay, 'Promotion of the Success of the Company - Section 172 (Guildhall Chambers, 23 April 2010) <http://www.guildhallchambers.co.uk/files/2Directors_Duties_ProfKeay.pdf> accessed 14 February 2020.
[1156] Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 361.
[1157] Jonathan Eley, 'Debenhams lenders reject Sports Direct rescue plan' (*The Financial Times*, 8 April 2019) <https://www.ft.com/content/4a2faa42-5a09-11e9-939a-341f5ada9d40> accessed 22 August 2020.

this, creditors may also be able to manipulate the board more easily than where there is dispersed ownership so that their interests are prioritised.[1158] However, this is only likely when an LPC requires an unusually large amount of capital or is suffering financial difficulty and requires external funding to save it from insolvency.

At the other end of the spectrum, creditors may also when supplying goods and/or services extend credit based on payment within 30 days. However, it is well-known that creditors have often had to wait more than 120 days to get what is owed.[1159] Smaller firms may have to agree to unfavourable terms to win a contract or sign away rights to claim the approved interest from late-paying customers, currently 8 percent over the Bank of England base rate coupled with also a lack of resources to chase late payments.[1160] It is posited these creditors are highly unlikely to hold directors holistically accountable, as they will not have the money, time or resources and the amount they are owed will outstrip the costs of holding directors accountable.

For large loans, it is not uncommon for creditors to command some form of security. For example, banks will look to obtain some form of security when lending to LPCs, in the form of a fixed and/or floating charge. This allows creditors to be sure that should the LPC experience financial difficulties or enter liquidation, they will be able to recoup either the full, or majority, of the loan. The benefit of this is that because the fixed charge is on a particular asset, the company is not able to dispose of it until they have paid off the loan with interest in full, or deal with it in any way. This provides an element of certainty and is usually enough for the creditors, so they do not need to hold directors holistically accountable. Generally, creditors will be satisfied with the fixed charge as the ultimate guarantee that their interest is protected, and so are not likely to involve themselves in the affairs of the business or hold directors accountable for their conduct or omission.

In exceptional cases, creditors may hold directors accountable generally by appointing representatives to the board. This may be a condition of the lending arrangement. This would allow creditors to hold directors holistically accountable, but there is a cost element involved. However, any prospective directorial liability may also be placed upon them with creditors being wary of this as it could bring about not just legal action but also reputational damage. It is also worth noting that discussions at every board

[1158] Finch and Milman (n.1156) 361.
[1159] Rebecca Ellinor Tyler, 'Time's up for late payers' (*CIPS*, 11 October 2019) <https://www.cips.org/supply-management/analysis/2019/october/times-up-for-late-payers/> accessed 30 May 2020.
[1160] Ibid.

meeting would not revolve around creditor interests and so many may see it as a futile attempt. In any case, it is unlikely that creditors would be willing to hold directors accountable, especially when they may have a fixed charge (and floating charge) over company assets and goods as security to cover the loan. The appointing of a representative to the board would not be feasible considering the cost and time elements.

5.3.6 Customers

Without customers, directly or directly, a company is not able to thrive and be profitable. Customers may take the form of other businesses or individuals. They hold the ability to either vote with their feet or with their money. However, since the advent of social media, they now also have the power to influence not only from where they buy but also from where others buy.[1161] For example, The Deloitte Consumer Review, The Growing Power of Consumers conducted in May 2014, found that customers which look for information on social media regarding companies from which they buy goods or services ranged from 4 percent to 13 percent across 14 different sectors. Whereas customers who researched companies via internet search engines ranged from 12 percent to 42 percent.[1162] Customers, by using social media, see it as a way to create an accountability mechanism for companies, and indirectly directors, in respect of uncovering unfair treatment at 80 percent, promoting transparency at 70 percent, and amplifying issues at 65 percent amongst others.[1163]

Customers could hold directors accountable, indirectly, by causing reputational damage. Many LPCs are prompted by the fear of negative publicity which may not just impact the bottom line, but also future revenues.[1164] A tweet or viral campaign can attract the attention of the mainstream press which allows things to happen at a much faster pace. This also forces companies to respond how they see fit, usually stating what they have done to rectify the situation.[1165] Weber Shandwick, a public relations

[1161] Deloitte, 'The Deloitte Consumer Review' (*Deloitte*, 2014) <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/consumer-business/consumer-review-8-the-growing-power-of-consumers.pdf> accessed 28 February 2020.
[1162] Ibid.
[1163] David Kirkpatrick, 'Study: Millennials hold brands more accountable on social media' (*Marketing Dive*, 24 August 2017) <https://www.marketingdive.com/news/study-millennials-hold-brands-more-accountable-on-social-media/503376/> accessed 28 February 2020.
[1164] Eliza Mills, 'How consumers hold businesses accountable' (*Market Place*, 3 November 2017) <https://www.marketplace.org/2017/11/03/how-consumers-hold-business-accountable/> accessed 28 February 2020.
[1165] Ibid.

firm, found that customers will primarily boycott certain companies to change the way the company does business stood at 36 percent, and 35 percent wanted to harm the reputation of the company.[1166] Interestingly, the desire to impact sales fell further down the list of motivations at 18 percent.[1167] However, customers cannot hold directors holistically accountable, because nearly all boycotts are related to a company policy, spending or investments.[1168] It is these issues, in isolation, that customers are seeking to hold directors accountable for, and not for their overall conduct or decision-making.

Some examples show the power of customers possibly holding directors accountable for specific issues. For example, as a result of corporate governance issues and employee relations among others, Sports Direct shares dropped to £2.30, with Mike Ashley's stake, as majority shareholder, worth around £750 million against a company valuation of £1.23 billion.[1169] This is a stark contrast when compared to a year earlier when the same shares were worth £4 each and Ashley's shareholding was worth £1.25 billion and the company was worth over £2 billion.[1170]

Another example is Arcadia Group, where customers started a popular campaign on Twitter asking people to boycott Arcadia brands and stores. This was in response to findings that Sir Philip Green had used an injunction to stop the media from publishing sexism and harassment allegations against him.[1171] It can be said that the business community does not like controversy or anything unpopular with customers[1172]. Sports Direct's share price and the Arcadia boycotting campaign show that customers are willing to emphasise the need for change in respect of specific issues they believe need to occur in respect of business leaders and they are not afraid to do so.[1173]

[1166] Weber Shandwick and KRC Research, 'Battle of the Wallets: The Changing Landscape of Consumer Activism' (*Weber Shandwick*, 2018) <http://webershandwick.co.uk/wp-content/uploads/2018/01/Battle-of-the-wallets-report-UK.pdf> accessed 28 February 2020.
[1167] Ibid.
[1168] Mills (n.1164).
[1169] David Murtagh, 'Protests and boycotts impacting on Mike Ashley and Sports Direct wealth' (*The Mag*, August 2019) <https://www.themag.co.uk/2019/08/protests-and-boycotts-impacting-on-mike-ashley-and-sports-direct-wealth-newcastle-united/#disqus_thread> accessed 28 February 2020.
[1170] Ibid.
[1171] Daniel Thomas, 'Sir Philip Green businesses face boycott over harassment claims' (*BBC News*, 26 October 2018) <https://www.bbc.co.uk/news/business-45988584> accessed 28 February 2020.
[1172] Murtagh (n.1169).
[1173] Thomas (n.1171).

At any given time, according to Ethical Consumer, a consumer activist magazine, there are around 66 active ongoing boycotts.[1174] Professor Brayden King at Northwestern University's Kellogg School of Management, states that while this provides a message about a company to consumers, a boycott can also send a message about the company's leadership to its shareholders as '…[i]nvestors may perceive that a CEO's inability to resolve a conflict may be indicative of a bigger leadership problem at the company.'[1175] Indeed, for every day a company's boycott was in the news, its share price declined but while this is specifically in respect of public companies, parallel effects on annual profits may be a consequence for LPCs. However, the longevity and effect of boycotts come into question when a 2003 boycott of French wines resulted in a 26 percent drop in sales but had little long-term effects on France's wine industry or its politics.[1176] In fact, within 6 months sales returned to the same path as they had before the boycott.[1177]

It is not disputed that customers are the lifeline of companies. However, it is important to understand the limitations of the effect that customers can and will have on holding directors holistically accountable. For example, customers will not have complete access to information on the inner-workings of the company, and therefore may lack pertinent knowledge. Any attempt to hold directors accountable, or the company as a whole, will be focused on an issue, or a series of linked issues such as working practices[1178] or bullying/harassment claims[1179], or faulty products/services bought.

It is also worth noting that customer boycotts are only likely to occur if issues, which customers care about, are in the media spotlight. Boycotts can usually be stopped, or at least limited in their effect, once the directors, or the company, release a statement, usually through the media, to either distance itself from the controversy, or to condemn it and state what they will be doing to tackle it.

[1174] Bruce Watson, 'Do boycotts really work?' (*The Guardian*, 6 January 2015) <https://www.theguardian.com/vital-signs/2015/jan/06/boycotts-shopping-protests-activists-consumers> accessed 28 August 2020.
[1175] Ibid.
[1176] Watson (n.1174).
[1177] Ibid.
[1178] Diana B, 'Boycott Sports Direct shops' (*38 Degrees*, not known) <https://you.38degrees.org.uk/petitions/boycott-sports-direct-shops> accessed 14 March 2020.
[1179] Annie Corcoran, 'You should have boycotted Topshop before – now we've heard the allegations against Philip Green, there's no excuse not to' (*The Independent*, 25 October 2018) <https://www.independent.co.uk/voices/philip-green-sexual-harrasment-injunction-metoo-parliament-topshop-a8601626.html> accessed 14 March 2020.

Perhaps the biggest flaw in enabling customers to hold directors accountable is that while a boycott may seem to hold directors accountable, it requires a significantly large number of customers to participate. Indeed, Larry Chavis states that for strong engagement to occur, boycotts must be well-planned with a clear, strategic purpose.[1180] This is difficult to do because it requires an element of co-ordination and requires all of the individuals involved to either be against the conduct or omission or at least feel strongly about it. Maurice Schweitzer, states that '[m]ost boycotts lack a sustained effort… and people lose interest or stop paying attention.'[1181] So another problem is that while boycotts may work in the short-term, in the long-term they are unlikely to do so, and as a result are unlikely to affect directors seriously. Customers may boycott for a short amount of time, but they likely will in the end go back to that company and its products/services.

For example, despite Sports Direct being severely reprimanded for their working practices, by 2019, profits were still soaring.[1182] There are several reasons for this such as the cost of the product/service versus its competitors, the quality of the product/service, its availability from other companies and the convenience of getting it from other companies. In the end, it is submitted, that customers will normally look to hold directors accountable over specific issues through boycotts but revert after some time, making it unlikely that a boycott will hold directors holistically accountable.

From the above, it is clear that many stakeholders could hold directors holistically accountable. However, having the ability to hold directors accountable and actually doing so are two very different things. In discussing each constituent, it can be said there are undertones of accountability that are exclusive not only to that individual constituent but also to their particular circumstances. This means that accountability is taking place in a vacuum. Allowing each constituent to hold directors' accountable means creating ambiguity regarding what behaviour is essential to satisfy different mechanisms with different goals.[1183] This could mean that focusing on information relevant to that particular constituent means more important information may be ignored.[1184]

[1180] Watson (n.1174).
[1181] Michael Livingston, 'Q&A: Here's when boycotts have worked — and when they haven't' (*LA Times*, 1 March 2018) <https://www.latimes.com/nation/la-na-boycotts-history-20180228-htmlstory.html> accessed 28 August 2020.
[1182] Jessica Clark, 'Sports Direct shares soar on profit jump' (*City AM*, 16 December 2019) <https://www.cityam.com/sports-direct-revenue-up-after-premium-lifestyle-sales-jump/> accessed 14 March 2020.
[1183] Keay and Loughrey (n.38) 272.
[1184] Ibid 273.

It is fair to say that in some situations the problem could overlap, and this may involve a number of constituents attempting to hold directors accountable. However, each of the constituents may have a different agenda or priority making accountability ineffective. As a result, it is perhaps questionable as to whether each or a number, of these constituents, could or even should hold directors holistically accountable.

5.4 The Concession Theory

The shareholder primacy theory and the stakeholder theory have inherent defects which, arguably, mean that they do not constitute an answer to the accountability issue. Therefore, it is unclear who should hold directors holistically accountable and why they should do so. However, the concession theory reconciles the shareholder primacy theory and the stakeholder theory because it allows for the consideration of stakeholders' interests when they are actually in conflict with the wealth maximisation objective.[1185] The concession theory holds the answer as to whom directors should be held accountable.

The concession theory postulates that a company exists and has corporate legal personality through the crown or state because incorporation statutes permit its existence. The company in essence owes its existence to a concession by the state.[1186] The term concession is defined as '[a]…special right or privilege that is given to someone.'.[1187] The theory takes '…a top-down view that political states 'grant' firms the right to exist, with the primary focus on government as law giver.'[1188] In this regard, the concession theory is '…the only one that legitimizes presumptive deference to state regulation.'[1189] The theory is also known as the 'artificial entity' theory.[1190]

[1185] Department of Business Law and Taxation (BLT) Faculty of Business and Economics, Monash University, 'A SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES INQUIRY INTO CORPORATE RESPONSIBILITY' (*APH*, not known) <www.aph.gov.au › committee › submissions › sub39_pdf> accessed 26 July 2020.
[1186] Susan Mary Watson, 'The corporate legal person' [2019] 19(1) Journal of Corporate Law Studies 137, 142.
[1187] Collins, 'Concession' (*Collins Dictionary*, not known) <https://www.collinsdictionary.com/dictionary/english/concession> accessed 10 June 2020.
[1188] Watson (n.1186).
[1189] Stefan Padfield, 'Rehabilitating Concession Theory' [2014] 66(2) Oklahoma Law Review 327, 329.
[1190] Padfield (n.79) 1.

The process of incorporation can be said to originate from statute. [1191] Previously, companies were created by the state through specially enacted legislative acts or special charters although this has now been phased out.[1192] This state grant of corporate status as a privilege underlines the state's right to regulate the process of incorporation its use, and those who use it.[1193] While previous methods of incorporation involved letter patents, charters or discrete statutory instruments, the current method is only different in respect of process, and as Watson states, quite rightly, corporate personality remains a concession of the state.[1194] It retains presumptive authority to regulate companies in exchange for granting rights, such as limited liability amongst others, to its incorporators.[1195] Indeed, Pettet states that by controlling incorporation, the state was able to check the power of groups within, akin to holding them accountable, and through an endorsement process, facilitated by a royal charter or registration under a state-controlled system, thus achieving acknowledgement and acceptability.[1196]

This creation which owes its survival to the state is primarily why it invites the legitimacy of '…state-based corporate regulation.'[1197]. Watson argues that the concession of legal personhood as a result of incorporation, although remaining in place until the mid-nineteenth century, has survived even in its current modified form and still applies to the modern company.[1198] This is despite the notion that concession conceptions have been considered to have died away once incorporation statutes made incorporation a right once a process was followed.[1199] Indeed, there have been many commentators, such as Padfield[1200] and Horwitz[1201], that have advocated the accountability of directors by the state, based on the concession theory within different contexts.

[1191] Larry E. Ribstein, 'Limited Liability and Theories of the Corporation' [1991] 50(1) Maryland Law Review 80, 85.
[1192] Watson (n.1186) 142.
[1193] Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (1 edn, Routledge 2007) 42.
[1194] Watson (n.1186) 164.
[1195] Padfield (n.1189) 333.
[1196] Ben Pettet, *Company Law* (2 edn, Pearson 2005) 48.
[1197] Bottomley (n.1193).
[1198] Watson (n.1186) 164.
[1199] Ibid 145.
[1200] Stefan Padfield, 'Corporate Social Responsibility & Concession Theory' [2015] 6(1) William and Mary Business Law Review 1.
[1201] Morton J. Horwitz, 'Santa Clara Revisited: The Development of Corporate Theory' [1986] 88(2) West Virginia University Law Review 173.

The first notion of a company being linked to some form of regulation was in the US case *Dartmouth College v. Woodward*[1202], where it was stated that:

> '[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.'[1203]

Although Bratton argues that the notion of 'concession' was received from English law, with the special charter as the central mode of corporate formation, this concession-based theory correctly described American corporate practice.[1204] At the EU member-state level, the Court of Justice of the European Union in *Case 81/87 Daily Mail and General Trust* [1205] stated that:

> 'it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.'[1206]

In Australia, as well as New Zealand, an outcome of incorporation - limited liability – was alluded to be a direct result of the state. For example, in *Nicholson v Permakraft*[1207], Cooke J stated that: '…limited liability is a privilege. It is a privilege healthy as tending to the expansion of opportunities and commerce, but it is open to abuse.'[1208] Although this privilege, as Mackie states, reduced the availability of limited liability as of right through the Limited Liability 1855.[1209]

Bonham and Soberman state that incorporation exists only for legal and business expediency[1210], with its existence being controlled by the state. Watson states that all incorporations with status as a legal person were a concession, as they could not be

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[1202] (1819) 17 U.S. 481 (US SC).
[1203] Ibid [74].
[1204] William W. Bratton, Jr., 'The New Economic Theory of the Firm: Critical Perspectives from History' [1989] 41(6) Stanford Law Review 1471, 1484.
[1205] [1988] ECR 5483.
[1206] Ibid [19].
[1207] *Nicholson v Permakraft (NZ) Ltd* (1985) 3 A.C.L.C. 453.
[1208] Bottomley (n.1193).
[1209] Colin Mackie, 'From Privilege to Right: Themes in the Emergence of Limited Liability' [2011] 21(4) Juridical Review 293, 293.
[1210] Roman Tomasic and others, *Corporations Law in Australia* (2nd edn, Federation Press 2002) 53.

created without the King resulting in the creation being only permitted to exist by the Crown.[1211] However, now largely symbolic, again it is the government that allows for its existence through legislation. Indeed, this was the underlying view of Marshall CJ when he stated that:

> '[t]he objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; this benefit constitutes the consideration, and in most cases, the sole consideration of the grant.'[1212]

This argument finds further weight considering that the government has allowed the courts, although in rare circumstances, to wind up companies when it is just and equitable to do so.[1213] Perhaps, because the legal and business expediency of incorporation has ceased to exist. This demonstrates that the government controls every aspect of company formation, operation, and dissolution.

However, it must be noted that the theory has been significantly criticised by advocates of the nexus of contracts theory as they see '…incorporation as only involving what private individuals could (and would) effectively do through contract.'[1214] For example, Ribstein argues that limited liability as a result of incorporation '[… should be regarded as a product of private agreements, and not a state-conferred privilege.[1215] Others have stated it to be an unfit representation of the modern company.[1216]

Commentators such as Orts state that '…the concession theory does not comport with modern economic reality.'[1217] Adegbulu confines the theory to the realms of history stating that …[the]… concession theory, though largely of historical interest, is also of some utility because it enables an understanding of the historical role of corporations even in contemporary times with an increasing emphasis placed on the private character and nature of corporations have played in society.'[1218] But whilst it may have historical importance it is not disputed that a company is a creation of the state,

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[1211] Watson (n.1186) 145.
[1212] Stefan Padfield, 'The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization' [2017] 19(1) Tennessee Journal of Business Law 415, 445.
[1213] Insolvency Act 1986, s.122(1)(g).
[1214] Ribstein (n.1191) 130.
[1215] Ibid.
[1216] Bottomley (n.1193) 44.
[1217] Eric W. Orts 'The Complexity And Legitimacy Of Corporate Law' [1993] 50(4) Washington and Lee Law Review 1565, 1567-1568.
[1218] Opemiposi Adegbulu, 'Making corporate law great again: Deconstructing and identifying public interest in corporate theories and corporate entity theories' [2019] 33(3) Australian Journal of Corporate Law 316, 330.

therefore it can be said that the concession theory is '…inherently receptive to regulating…[companies]'[1219] resulting in the accountability of directors.

The denial of the concession theory, as a sound theoretical basis for the identification of whom should hold directors of LPCs accountable, is premature and arbitrary. This is especially the case when considering that the shareholder primacy and stakeholder theories present major flaws resulting in them being not workable, certainly from an accountability perspective. Despite the concession theory's deep origins in the accountability of directors, some commentators have stated that '[a] strong version…[of the theory]… attributes the corporation's very existence to state sponsorship. A weaker version sets up state permission as a regulatory prerequisite to doing business'[1220]

The theory is also silent about what goes inside a company i.e., it does not conceptualise why or how companies are managed.[1221] However, below it will be demonstrated each of these concerns can be allayed because the theory is workable and allows for clear identification of whom directors should be accountable to.

5.4.1 State Sponsorship

From the beginning, there has always been an element of state sponsorship in respect of the incorporation of companies. In this context, the term 'state sponsorship' can be defined as government, or state, acceptance of incorporation. For example, while previously special charters and grants were required to give life to a company, that is not the case anymore. The incorporation of a company is now contained within general legislation such as the Companies Act[1222], and save for some requirements, anyone can incorporate a company. Tomasic and others note argue that 'it is irrelevant in a legal system that permits ready registration of companies.'[1223]

Ribstein states, although from a US perspective, that '[r]ecognizing that incorporation or other formalities are not prerequisites to obtaining the protection of limited liability has broad theoretical and practical implications.'[1224] However, simply because

[1219] Abdurrahman Kayıklık, 'How Elizabeth Warren Is Reviving the Concession Theory of the Corporation' (*The CLS Blue Sky Blog*, 1 November 2019) <https://clsbluesky.law.columbia.edu/2019/11/01/how-elizabeth-warren-is-reviving-the-concession-theory-of-the-corporation/#_ftnref3> accessed 11 June 2020.
[1220] Bratton (n.1204) 1475.
[1221] Tomasic and others (n.1209) 55.
[1222] Companies Act 2006, Part 2.
[1223] Tomasic and others (n.1210) 54.
[1224] Ribstein (n.1191) 83.

legislation dictates a method of incorporation does not necessarily mean that everyone can incorporate a company. In the UK, the government also places additional restrictions in respect of the types of company names that can be used[1225] and the criteria for appointment directors[1226] amongst others.

The above criticisms do not detract from the main point that state sponsorship is still required. Watson submits that '…the acquirers acquire the mask of incorporation for the company. Rather than seeking a concession from the state or crown as in the past, the mask is acquired by carrying out the steps necessary to meet the requirements for incorporation set out in a statute.'[1227] In the UK, at least some requirements need to be fulfilled, as previously detailed and without fulfilment of these requirements, a company cannot be incorporated. All entities, such as limited companies, limited liability partnerships and charitable incorporated organisations especially those that want to obtain the protection of limited liability need to fulfil certain formalities and requirements.[1228]

By having state sponsorship, the government can change certain matters in relation to companies thus changing what directors should be accountable for. For example, in regards to the now abolished ultra vires doctrine, in *Ashbury Railway Carriage & Iron Co v Riche*[1229], Lord Hatherley stated that 'the legislature has said that, you may meet together, and form yourselves into a company, but in doing so you must tell all who may be disposed to deal with the objects for which you have been associated.'[1230] Stating that the legislature, or government, has said the above shows the true power that the government holds in holding directors accountable if they were previously required to tell all in respect of the objects.

In the Australian High Court case of *Northside Developments Pty Ltd v Registrar-General*[1231], Brennan J stated that a company's 'existence, capacities and activities are only such as the law attributes to it.'[1232] As a result, because of state sponsorship, it is the law that dictates the direction and accountability of companies and, therefore,

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[1225] Companies Act 2006, Part 4; Company, Limited Liability Partnership and Business (Sensitive Words and Expressions) Regulations Company 2014; Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015.
[1226] Companies Act 2006, Part 10
[1227] Watson (n.1186) 164.
[1228] Gov UK, 'Setting up a social enterprise' (*Gov.uk*, not known) <https://www.gov.uk/set-up-a-social-enterprise?step-by-step-nav=37e4c035-b25c-4289-b85c-c6d36d11a763> accessed 24 June 2020.
[1229] [1874-1880] ALL ER Rep Ext 2219 (HL) [2230].
[1230] Ibid; Tomasic and others (n.1210) 54.
[1231] *Northside Developments Pty Ltd v Registrar-General* (1990) 8 ACLC 611 (Aus. HC) [626].
[1232] Ibid.

the accountability of directors through legislation such as the codified directors' duties.[1233]

For example, in June 2019 BEIS opened the consultation on corporate transparency and register reform. Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, noted that '…the transparency we require of UK corporate bodies is a consequence of those bodies being granted limited liability.'[1234] It is posited that 'we' is likely to mean the government. The consultation explored whether more information should be required '…about the people registering, running and owning companies and other limited liability entities…'.[1235] Although, this depends on what further information is required to fulfil the above and how it will then be used for accountability purposes may assist in holding directors holistically accountable. This also suggests that if incorporation is wanted, then information as and when required should be provided to the government. It is worth bearing in mind that it is the government that dictates an increase or decrease in regard to the information required. This implies that the government, to some extent, is arguably a de facto regulator.

An example of this is when companies fail to file their statutory accounts before the end of the period which can result in a late filing penalty being imposed on the company[1236], directors serving at the time can also be personally liable for a £5,000 fine, as well as potential disqualification under the unfitness criteria.[1237] The government can also strike off companies from the companies register. This government is the de facto regulator through the legislation and soft-law it sets and implements, stating that '[t]he strength of the UK's business environment is founded on our regulatory frameworks, a key element of which are those governing corporate entities.'[1238] Therefore, the implementation of legislation allows for the government to regulate the accountability of directors because where it believes company law falls short, it either legislates or introduces soft-law, to fill the void.

[1233] Companies Act 2006, ss.171-177.
[1234] Department for Business, Energy & Industrial Strategy, 'CORPORATE TRANSPARENCY AND REGISTER REFORM: Consultation on options to enhance the role of Companies House and increase the transparency of UK corporate entities' (*Gov.uk*, 5 May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819994/Corporate_transparency_and_register_reform.pdf> accessed 19 June 2020.
[1235] Ibid.
[1236] Companies Act 2006, s.453
[1237] Company Directors Disqualification Act 1996, ss. 6, 12c.
[1238] Department for Business, Energy & Industrial Strategy (n.1234).

While the government sponsors the existence of a company by allowing incorporation, it can also 'unsponsor' the company in certain situations. In this regard, 'unsponsor' can mean to prohibit individuals from incorporating companies or look behind the result of incorporation –a separate legal entity– to hold directors broadly accountable. Indeed, in *Bank of Tokyo Ltd v Karoon*[1239], Goff LJ stated that 'we are concerned not with economics but with law. The distinction between the two is fundamental'.[1240] This effectively means that commercial dealings and economics are separate when it comes to law. For example, the government has provided legislation to allow for the investigation of situations where a company, or its directors, may be concealing facts.

While previously thought of as veil-piercing, as in *Hashem v Shayif*[1241], it was stated that veil piercing is only to be a last resort and can only occur when '…the company…[is]… being used by its controller in an attempt to immunise himself from liability for some wrongdoing which existed entirely *dehors* the company.'[1242] In perhaps extreme circumstances, the Secretary of State for BEIS can unsponsor a company by petitioning the court to wind a company on the grounds of public interest.[1243] This is sometimes coupled with personal claims against current/former directors both financial and for director disqualification.[1244] However, it is worth noting that the term public interest is not actually defined within the legislation, but can be said to broadly cover health, welfare, finances and the public at large.[1245]

In regards to the statutory provisions, they include consideration of the making of pre-incorporation contracts, that is when the company has not yet been formed, which means that the promoter assumes personal liability for it unless a new contract is formed once incorporation has taken place.[1246] Section 15, of the Company Directors Disqualification Act[1247], is just one example of the ability of the government to hold directors accountable, by making clear that a disqualified director, if involved in a company when disqualified, is liable to pay compensation, thus taking away limited liability. The fraudulent trading provision imposes personal liability on any person, often

[1239] [1987] A.C. 45 (CA).
[1240] Ibid [486] (Goff LJ).
[1241] *Hashem v Shayif & Anor* [2008] EWHC 2380 (Fam).
[1242] Ibid [199].
[1243] Insolvency Act 1986, s.124.
[1244] Insolvency Act 1986, s.124.
[1245] Sue Brumby, 'Served with a Public Interest Winding Up Petition?' (*Francis Wilks & Jones*, not known) <https://www.franciswilksandjones.co.uk/site/our_services/debt_claims/winding_up_petitions/served-with-an-public-interest/> accessed 10 August 2020.
[1246] Companies Act 2006, s.51; *Kelner v Baxter* (1866-67) L.R. 2 C.P. 174 (CP)
[1247] Company Directors Disqualification Act 1986, s.15.

the directors, who knowingly carries on a company's business with the intent to defraud creditors and or for any other fraudulent purpose.[1248] The wrongful trading provision gives rise to directors' liability, which knew or ought to have known that the insolvent liquidation of the company was inevitable and did not take every step to minimise the loss to creditors.[1249] These examples represent instances where the government can 'unsponsor' a company, and/or regulate the company and its directors.

It does not stop there. The government is always looking for other ways to unsponsor companies and hold directors accountable through legislation. For example, the Finance Act 2020 enables HMRC to issue notices to directors jointly and severally liable for company tax liabilities if they have been involved in tax avoidance or evasion[1250], described as '…an unprecedented extension of piercing the corporate veil…'[1251]. This state sponsorship means that, at any time, the government can effectively regulate companies and their directors through the introduction of legislation, and also by lifting the veil, to stop what it believes is abuse or misuse of the corporate form, even though some, rightly or wrongly, may see it as something different. This also includes the government having the ability to strike companies off the register.[1252]

Previously, it was thought that the common law provisions allowed for veil-piercing in instances where it was a sham/façade or impropriety. [1253] *Prest v Petrodel Resources Ltd*[1254] clarified the case law. Lord Neuberger identified the concealment principle and the evasion principle. The concealment principle does not involve piercing the veil but rather allows the courts to identify the identity of individuals to learn the facts that the corporate structure is concealing.[1255] It is a mechanism for holding directors accountable personally for the actions they instigate through a corporate structure. On the other hand, the evasion principle allows for veil-piercing on the basis that there is a legal right against the person in control of the company which exists autonomously of the company's involvement, and the company is formed so that the separate legal personality of the company will overthrow the right or frustrate its enforcement.[1256]

[1248] Insolvency Act 1986, s.213.
[1249] Insolvency Act 1986, s.214.
[1250] STEP, 'UK anti-phoenixing legislation will pierce corporate veil' (*STEP*, 30 September 2019) <https://www.step.org/news/uk-anti-phoenixing-legislation-will-pierce-corporate-veil#gsc.tab=0> accessed 20 June 2020.
[1251] Ibid.
[1252] Insolvency Act 1986, s.124A.
[1253] *Jones v Lipman* [1962] 1 WLR 832 (HC).
[1254] [2013] UKSC 34.
[1255] Ibid [28].
[1256] *Prest* (n.1254) [28].

This again can be seen as a way of holding directors accountable because the separate legal personality is disregarded if the company is formed to remove a prior legal right. Statutory provisions along with the common law allow for the government to police some of the effects of allowing everyone to use and obtain the corporate form, and in doing so, enables them to impose liability on those directors responsible for the expression of the corporate personality which is unwanted by the government.

5.4.2 The State's Permission

The second strand of the argument is the notion that State permission is required as a regulatory prerequisite for a company to exist and carry on. The requirements in respect of obtaining limited liability through the incorporation of a company, have been alluded to or discussed previously in the chapter and it's not intended to rehearse those arguments. But, the state does, it is argued, control who can incorporate a company and who is not allowed to do so. While you can incorporate Ltd, plcs, LLPs, LPs and companies by guarantee, individuals cannot pick and choose which elements they want and which they want to disregard. For example, an individual cannot incorporate a plc and state that they want it to be limited by guarantee. The state specifies which types of ordering can be incorporated and the associated features of each one. It is important to note that rights do not exist unless the government permits the group to incorporate and obtain legal corporate personality.[1257]

While it has been previously discussed that this permission is almost always granted save in some circumstances, it should be noted that '[p]rivate ordering was always a privilege and that privilege is subject to erosion. The government was there from the beginning, allowing private ordering to exist. But what is given can be taken away …'[1258]. It is this element of taking away the private ordering which shows that the government is still very much in control and can dictate the very nature of incorporation. The primary example of this is the articles of association. Companies House is where individuals can incorporate companies, but when incorporation takes place, it is often the case that model articles of association (AoA) will apply, as dictated by law.[1259] These are prescribed by law.[1260] When going through the process of incorporation on Companies House, the model AoA is the default option, unless amended AoA are submitted.

[1257] Beth Nosworthy and others, *Contemporary Australian Corporate Law* (Cambridge University Press 2017) 46.
[1258] Padfield (n.1189) 348.
[1259] The Companies (Model Articles) Regulations 2008.
[1260] Companies Act 2006, ss. 18-20.

The AoA will often state the details of directors, statement of capital, shareholdings, directors' meetings, conflicts of interest, voting at general meetings and dividends and distribution.[1261] This model AoA is the minimum viable product that is required but again it is the government that has dictated this. It is accepted that often companies will change the model articles and implement changes that suit the company and perhaps consider expansion such as that of the company or its board. But it is the case that directors cannot change everything and are not able to make changes that erode certain key provisions, particularly if it relates to legislative duties/standards, and while they are allowed to amend certain provisions or add new provisions, this is all within the parameters which the government will allow.

Therefore, while a company may well be subject to private ordering, it is private ordering where directors are regulated in the way in which they can manage a company and are free to do as they want. The hand of the government always has a part to play and thus reducing the complete free will of the private ordering to do as it wants, because the state determines the future of the company thus arguably enabling holistic accountability.

5.4.3 The Absence of Conceptualising the Inner-Workings of a Company

The concession theory, it has been argued, remains silent on the inner-workings of a company and this criticism has been noted above. However, it is implicit within the theory that corporate law '…governs the inner-working of corporations and thus it is corporate law that legitimizes and limits the exercise of corporate power within the corporation.'[1262] It is important to note that when this thesis refers to corporate law in this context it refers to the whole body of corporate power including its soft-law mechanisms. But it requires directors, and the board collectively, to follow the spirit of corporate law for it to be effective. The spirit of corporate law can mean different things to different people. For example, to economists it may mean efficiency, to directors it may mean increased red tape, and to shareholders, it may mean legal protection for their investment. In this context, it can be defined as holding directors holistically accountable.

[1261] The Companies (Model Articles) Regulations 2008.
[1262] Orts (n.1217) 1621.

There are many examples of where corporate law, in the main, governs almost all areas of corporate life including the accountability of directors. For example, Orts states that corporate law answers many questions implicitly if not explicitly because it:

> '…embraces a number of different kinds of economic and social values. Often, economic considerations prevail, but in many areas corporate law also takes to heart other ethical, legal, and political principles.'[1263]

Therefore, corporate law can take on the reality of the modern company and a variety of boards and enable it to perform optimally. The UK corporate law framework is so copious that it can take almost every situation into account and provide some form of an answer. Often the answer, if taken in the spirit in which the legislation was drafted, is most likely to yield a correct answer.

It is fair to say that companies and boards are complex creatures and so each will go through unique circumstances, and each will be guided by a board that may have different decision-making processes. However, corporate law is, generally, equally applicable to all companies. In this regard, law, at least in the UK, covers compulsory windings up[1264] company voluntary arrangements[1265] and voluntary windings up[1266], and administration.[1267] The Companies Act 2006 provides legislation from the very start of forming a company[1268] to dissolution[1269], taking into account and covering issues such as regulating the behaviour and standard required of directors[1270], protecting shareholders[1271] and other stakeholders[1272] as well as regulating company names stating which are to be restricted or prohibited.[1273]

Soft-law methods such as the Stewardship Code[1274], and the Wates Principles[1275], although a method of self-regulation, provide directors with the ability to follow the law and use soft-law with inbuilt discretion to guide them to optimal outcomes. However,

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[1263] Ibid 1622.
[1264] Insolvency Act 1986, s.73.
[1265] Insolvency Act 1986, s.1.
[1266] Insolvency Act 1986, s.84.
[1267] Insolvency Act 1986, Schedule B1.
[1268] Companies Act 2006, s.7.
[1269] Companies Act 2006, s.1000ff.
[1270] Companies Act 2006, ss.170-177.
[1271] Companies Act 2006, s.994; Part 11.
[1272] Companies Act 2006, s.172(1).
[1273] Companies Act 2006, s.53.
[1274] Financial Reporting Council (n.999).
[1275] Deloitte, 'Governance in brief' (*Deloitte*, December 2018) <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/audit/deloitte-uk-governance-in-brief-wates-principles-december-2018.pdf> accessed 28 February 2020.

as with the law, both sets, come with tests and guidelines that ought to be adhered to. It has been said that directors who do not understand the law, because of its complex nature, are not able to follow it accurately. While this is accepted, often the majority, if not all directors, will have the ability to obtain external counsel which allows them to understand the rules whilst also enabling directors to be held accountable.

As a result, it is posited that the concession theory identifies the only credible constituent, the government/state, in holding directors accountable. There are three key reasons for this. While incorporation is now seen as a right, it is the government that controls the incorporation process, and it would not be difficult to add additional requirements or unsponsor the company, post-incorporation. Secondly, the government dictates the behaviour and direction of companies and directors. Finally, in novel situations, the government can bridge gaps by introducing legislation so the result of incorporation - limited liability and separate legal entity -is not misused. However, the ability of the government to hold directors holistically accountable cannot be fully ascertained without it being examined to see if it could be a practical reality.

5.4.4 Government

The government is ultimately responsible for various sectors such as the economy and business. In this regard, the former Secretary of State for Business, Energy and Industrial Strategy, Andrea Leadsom MP, had responsibility for developing and delivering an inclusive industrial strategy and leading the government's relationship with business.[1276] In fact, in a speech to the Institute of Directors (IoD) on 29 January 2020, Leadsom stated that '…when business falters, the UK suffers; when business succeeds, the UK will prosper.'[1277] Perhaps as a result of this, or because of the importance of business generally, the department, under various designations, has brought about many consultation papers which in turn have led to the introduction/reformation of legislation.

The government has held directors broadly accountable or at least impacted the accountability of directors. In some cases, it has been to further strengthen the accountability of directors. In other cases, it has simply been to either ease or clarify the obligations of directors so that directors can comply more easily.

[1276] Gov.uk, 'Secretary of State for Business, Energy and Industrial Strategy' (*Gov.uk*, not known) <https://www.gov.uk/government/ministers/secretary-of-state-for-business-energy-and-industrial-strategy> accessed 28 February 2020.
[1277] Gov.uk, 'Andrea Leadsom addresses businesses at the Institute of Directors' (*Gov.uk*, 30 January 2020) <https://www.gov.uk/government/speeches/andrea-leadsom-addresses-businesses-at-the-institute-of-directors> accessed 28 February 2020.

5.4.4.1 Consultations

The government has attempted to achieve its accountability objectives by subjecting directors and companies to a 'command and control'[1278] strategy. It has sought to make directors accountable through legislation or court intervention specifying what should/should not happen, and impose consequences for failure to uphold these parameters.[1279] For example, in March 2012, the then-coalition government announced a consultation around executive pay and enhanced shareholder voting rights as a way to address failings in the corporate governance framework.[1280] As a result of that consultation, in June 2012, a new model of enhanced shareholder voting rights was announced and was to be taken forward in legislation.[1281]

The three focuses of the consultation were empowering shareholders through enhanced voting rights, greater transparency in directors' remuneration reports and working with investors and businesses to promote best practices on pay-setting.[1282] Perhaps the empowerment of shareholders was determined to be key because '…pay and performance… was an important contributor to long term, sustainable growth'[1283] , but the flaws in respect of shareholders holding directors holistically accountable are only further exacerbated.

As a way of holding directors accountable, BEIS recommended, in its report, 'Executive rewards: Paying for success,' that remuneration committees should set publish and explain a cap on executives' annual remuneration. This was because executive remuneration has always been framed as '…a primary requirement of accountability of agents to owners'[1284], thus suggesting shareholder primacy-based accountability. This notion is further strengthened by the fact that by increasing shareholder

[1278] Grantham (n.982) 585.
[1279] Ibid.
[1280] Department for Business, Innovation & Skills, 'Executive Pay: Consultation on Enhanced Shareholder Voting Rights' (*Gov.uk*, June 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/207452/12-918-executive-pay-consultation-shareholder-voting-responses.pdf> accessed 28 February 2020.
[1281] Ibid.
[1282] Department for Business, Innovation & Skills (n.1280).
[1283] Ibid.
[1284] Charles Harvey and others, 'Executive remuneration and the limits of disclosure as an instrument of corporate governance' [2019] Not known (Not known) Critical Perspectives on Accounting <https://doi.org/10.1016/j.cpa.2019.06.003> accessed 12 April 2020.

empowerment, especially regarding executive remuneration, the balance has shifted between board authority and accountability.[1285]

Remuneration committees with access to pay information can police management contracts so that financial incentives reward good performance, and sanctions punish poor performance, improving both performance and accountability.[1286] Arguably, because shareholders' votes on remuneration allow for shareholders to reward or chastise the board for their actions which can affect the board in the strongest way possible. However, shareholder votes are likely to be swayed if dividends are paid, as often shareholders will use dividends as a benchmark of company performance, resulting in reduced examination in respect of holistic accountability.

In April 2014, another consultation was announced regarding transparency and trust to enhance the transparency of UK company ownership and increase trust in UK business.[1287] The outcome of the consultation resulted in the creation of a central register of UK beneficial ownership information, prohibition on the use of corporate directors save in some circumstances and increasing the likelihood of creditors being compensated for loss incurred as a result of director misconduct.[1288]

At first glance, this can be viewed as a direction to companies rather than holding directors accountable, but it can also be seen as enabling directors to be held accountable for their actions for the mistreatment of creditors, by strengthening the redress mechanisms for creditors.[1289] So that in the event, the misconduct of directors affects creditors, directors will in some way, shape or form be held accountable for their actions. However, it can be argued that directors will not generally be able to pay any compensation order and are far more likely to seek to embrace bankruptcy.

In November 2016, a corporate governance reform green paper was published, as a means of '…raising the bar for governance standards in the largest privately held companies.' Following on from the green paper, the Wates Review into corporate governance principles for large private companies was brought into effect.[1290] On the other hand, where companies have publicly voiced concerns over existing legislation, there has been consideration given to making changes even though the current status

[1285] Jingchen Zhao and Zhihui Li, 'The Regulatory Framework of Executive Remuneration: Contributions from Shareholder Activism and Board Accountability' [2019] 15(2) Hastings Business Law Journal 203,223.
[1286] Harvey and others (n.1284).
[1287] Department for Business, Skills and Innovation (n.594).
[1288] Department for Business, Skills and Innovation (n.594).
[1289] Ibid.
[1290] The Companies (Miscellaneous Reporting) Regulations 2018.

quo would mean they are falling foul of that particular law.[1291] So, there are clear examples of the government having the ability to hold directors accountable either directly through legislation, soft-law, or indirectly through reformations to existing law.

5.4.4.2 Soft-Law

In recognition of the limitations of legislation and judicial involvement, the government has turned to other methods such as soft-law and light-handed regulation, to bring about desired conduct or outcomes.[1292] This has often been through using a model of consultations leading towards codes of best practices backed by the veiled threat of legislation.[1293] For example, in early 2018, a review was commissioned by the Secretary of State for Business, then Greg Clarke, carried out by Sir John Kingman (known as the Kingman Review) in response to accounting controversies and corporate collapses specifically concerning the regulation of the UK audit market.[1294]

The government accepted the majority of the recommendations within the report, specifically the creation of a new statutory body with the power to authorise changes to company accounts, protect the interests of customers by setting high standards of corporate governance by holding companies, and in turn directors to account, amongst others.[1295]

The body was to be known as the Auditing, Reporting and Governance Authority (ARGA). ARGA is to possess greater powers in cases of corporate collapses with the ability to require explanations from companies and in the gravest cases publish a report regarding the company's conduct and management.[1296] Although from a financial perspective only, this could hold directors holistically accountable, but the body is still yet to become operational. Instead, the only progress made was to formalise a plan to

[1291] Francis Churchill, 'Government reconsidering minimum wage rules as Iceland faces £21m bill' (*People Management*, 7 January 2019
) <https://www.peoplemanagement.co.uk/news/articles/government-reconsidering-minimum-wage-rules-iceland-faces-bill> accessed 28 February 2020.
[1292] Grantham (n.982) 585.
[1293] Harvey and others (n.1284).
[1294] Caroline Binham and Jim Pickard, 'John Kingman hits out at drift in reform of UK accountancy' (*The Financial Times*, 15 October 2019) <https://www.ft.com/content/42e27cee-ef6c-11e9-ad1e-4367d8281195> accessed 28 February 2020.
[1295] Gov.uk, 'Audit regime in the UK to be transformed with new regulator' (*Gov.uk*, 11 March 2019) <https://www.gov.uk/government/news/audit-regime-in-the-uk-to-be-transformed-with-new-regulator> accessed 28 February 2020.
[1296] Ibid.

streamline the governance of the FRC, and adoption of The Regulators' Code and Managing Public Money and internal FRC operation.[1297]

The ability of ARGA to hold directors holistically accountable is put in further doubt, when taking into account that on 19 December 2019, the Queen's speech, opening parliament after the 2019 general election, only included a 'vague reference'[1298] to the proposals for ARGA.[1299] The reason stated was that while there was a commitment to legislation (for the powers of the new regulator) and this could only be done 'when time allows'.[1300] This was seen as an excuse because other matters were included in the Queen's speech.[1301] Kingman stated, in his letter to the Financial Times, that it 'is just a pity that audit reform does not yet command the same priority. When the next audit or corporate scandal comes along, as it will, we surely need a better answer than 'we didn't have time'.[1302]

In February 2020, it was stated that the BEIS will give a clear indication of plans for ARGA by the end of March 2020.[1303] Sir Jon Thompson, the current CEO of the FRC, stated that '[t]he strategy builds a bolder, more forceful regulator that will act with pace in supervising and holding companies to account…I am determined we use our powers to the fullest, to respond to corporate governance challenges.'[1304] However, it is unlikely that Thompson will not be able to use those powers at least in the medium-term.[1305]

Another example of soft-law is the Wates Corporate Governance Principles, which large private companies can use on a 'apply or explain' approach.[1306] They are designed as a tool to help LPCs (as defined by the Wates Review) '…look themselves in the mirror, to see where they have done well and where they can raise their corporate governance standards to a higher level.'[1307] However, it is unlikely that

[1297] Financial Reporting Council, 'Update on the FRC Transformation Programme' (*Financial Reporting Council*, 1 May 2020) <https://www.frc.org.uk/news/may/update-on-frc-s-transformation-programme> accessed 10 March 2022.
[1298] Jim Pickard, 'UK government under attack for vague commitment to audit reform ' (*The Financial Times*, 24 December 2019) <https://www.ft.com/content/8c7b3e98-233f-11ea-b8a1-584213ee7b2b> accessed 28 February 2020.
[1299] Ibid.
[1300] Pickard (n.1298).
[1301] Ibid.
[1302] Pickard (n.1298).
[1303] Sara White, 'Plans for ARGA audit regulator due by end March' (*Accountancy Daily*, 6 Feb 2020) <https://www.accountancydaily.co/plans-arga-audit-regulator-due-end-march> accessed 28 February 2020.
[1304] Ibid.
[1305] White (n.1303).
[1306] Deloitte (n.1275).
[1307] Ibid.

directors will be held holistically accountable, at least without external assessment, because they are required to look at themselves critically when ultimately they will have made the decisions and carried out actions.

The focus is, at least from the government commissioning the report, that '…while no law or set of principles could remove the risk of serious corporate failings, a code of corporate governance for large private companies…'[1308] can '….raise awareness of good practice and, over time, help to improve standards of corporate governance in private companies, large and small.'[1309] This is arguably an attempt by the government to regulate directors through soft-law measures with the possible aim of directors avoiding hard-law enforcement for their conduct. Even though the corporate governance green paper stated that the principles should mention strengthening the employees' voices and other non-shareholder interests at a board-level, the principles did not mention this at all.[1310] This is despite being a key opportunity to implement elements of the stakeholder theory, and perhaps even dispel/clarify some of its flaws such as defining stakeholders and the role of stakeholders. The ICAEW dismissed the principles stating that they were 'a placeholder pending changes to the broader landscape.'[1311]

The Institute of Chartered Accountants in England and Wales (ICAEW) dismissed the principles because they don't even meet the government's intended aim, on the basis that they '…fail to meet its stated aim of ensuring high standards of corporate governance among large private companies.'[1312] It believed that they should have followed the '…tried and tested Corporate Governance Code…' (CGC), because this would have '…resulted in higher and more appropriate expectations…' required of these companies.'[1313]

Other criticisms also include no assessment of the board, its size, composition, and the efficacy of the chair.[1314] This is important in respect of holistic accountability

[1308] Financial Reporting Council, 'The Wates Corporate Governance Principles for Large Private Companies ' (*FRC*, December 2018) <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf> accessed 28 February 2020.
[1309] Business, Energy and Industrial Strategy Committee (n.21) 31.
[1310] Julia Irvine, 'ICAEW says Wates principles don't meet government aims' (*ICAEW*, September 2018) <https://www.icaew.com/technical/corporate-governance/codes-and-reports/wates-principles/page-specific-elements/useful-links/icaew-says-wates-principles-dont-meet-government-aims> accessed 28 February 2020
[1311] Ibid.
[1312] Irvine (n.1310).
[1313] Ibid.
[1314] Tomorrow's Company, 'Response to the Consultation on the Wates' Corporate Governance Principles for Large Private Companies' (*FRC*, not

because it goes directly against knowledge and legal responsibility. The Chartered Governance Institute, known as ICSA, stated that principles possess several flaws such as shareholder relationships because shareholders take a greater risk than those investing in Plcs. After all, private companies are not subject to the same standards of governance.[1315] Therefore, it is submitted that stakeholders of LPCs are more at risk than stakeholders of Plcs, but there is very little in the principles that embrace this. By using soft-law methods, the government is essentially making shareholders responsible for making directors accountable despite there being various practical examples of their inability to do so.

5.4.4.2.1 Soft-Law versus Hard-Law

As mentioned earlier, the effects of soft-law and hard-law have been widely debated. Therefore, it is worth briefly discussing what soft-law and hard-law are, as well as each of their merits. Soft-law can be defined as a set of 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects'[1316]. Whereas hard-law can be defined as '…legal obligations are binding on the parties involved and which can be legally enforced before a court.'[1317]

Although it is accepted that there may be many other mechanisms, such as 'informal agreements'[1318], 'non-binding norms'[1319], and 'legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.'[1320] It is submitted that they centre on soft-law being voluntary and not enforceable in a court of law, and hard-law being non-voluntary and being enforceable in a court of law.

The main benefits of soft-law include flexibility[1321], low pre-agreement transaction costs[1322] and handling uncertainty[1323]. For example, rules on a soft-law basis are more likely to be adopted as they are non-binding, as well as the fact that they are easily

known) <https://www.frc.org.uk/getattachment/b7c70554-2822-44a0-8cd2-af155921e93e/Tomorrows-Company-response;.aspx> accessed 28 February 2020.
[1315] Irvine (n.1310).
[1316] Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques ' [1993] 56(1) Modern Law Review 19, 32.
[1317] European Center for Constitutional & Human Rights, 'Hard law/soft law' (*European Center for Constitutional & Human Rights*, not known) <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> accessed 14 August 2022.
[1318] Elis Tarelli, 'The Strengths and Weaknesses of Soft Law As a Source of International Financial Regulation' (2009) < https://ssrn.com/abstract=1467842>accessed 14 August 2022.
[1319] Ibid.
[1320] Tarelli (n.1318).
[1321] Ibid.
[1322] Tarelli (n.1318).
[1323] Ibid.

amendable and renounceable.[1324] There are also likely to be low transaction costs, given that there is no need for complex negotiations and protracted consultations.[1325] Soft-law also handles uncertainty as it can accommodate emerging and complex issues without the need for potential reputational costs.[1326] However, such flexibility is likely to weaken the ability of the government to commit itself to implementing such soft-law. Low transaction costs also enable (negative) interpretations leaving wider scope than intended. Not only that, but hard-law alternatives to handling uncertainty dilute the government's drive to ensure compliance with legislation.

Turning to hard-law, whilst it is accepted that there is a lack of flexibility, that comes with trade-offs around government motivation, credibility, and drivers. While soft-law has high post-agreement transaction costs, hard-law does not, because legislative provisions will be certain with the courts able to adjudicate on disputed issues, enabling further details.[1327] The same can be said for handling uncertainty, with the ability to amend legislation as ambiguity turns into clarity.[1328] Therefore, hard-law is a much better method of requiring directors of LPCs to act in a certain manner than to ask voluntarily through soft-law.

5.4.4.3 The Insolvency Service

The government is also able to hold directors accountable through the Insolvency Service, an executive agency of the Department for Business, Energy and Industrial Strategy. Its remit includes supporting companies in financial distress, tackling financial directors and maximising returns to creditors.[1329] Policy papers have noted that government action is needed to ensure that directors who transgress are held accountable and minimise the unintended consequences of limited liability such as inadequate standards of behaviour or posing a risk to other companies and/or the public.[1330] The government has often emphasised that this means tackling unacceptable conduct by directors, and taking enforcement action expeditiously by government bodies best placed to do so.[1331]

[1324] Tarelli (n.1318).
[1325] Ibid.
[1326] Tarelli (n.1318).
[1327] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' [2003] 54(3) International Organization 421, 422.
[1328] Ibid.
[1329] Gov.uk, 'The Insolvency Service' (*Gov.uk*, not known) <https://www.gov.uk/government/organisations/insolvency-service> accessed 28 February 2020.
[1330] Department for Business, Skills and Innovation (n.594).
[1331] Department for Business, Innovation & skills, 'Final Stage Impact Assessments to Part B of the Transparency and Trust Proposals (Director Disqualification Regime)' (Gov.uk, 24 April

The Insolvency Service is one agency that has often been singled out as having formal responsibility for this. The government has often relied upon the service to ensure it holds delinquent directors to account, discouraging directors from misconduct and resulting in the ability to enable optimal levels of risk-taking and investment in business markets.[1332] The Insolvency Service enables the government via hard law to hold directors accountable through holding directors accountable for company collapses. For example, Dominic Chappell, director of RAL which purchased BHS, was disqualified from serving as a company director for 10 years, after the Insolvency Service pursued disqualification proceedings against him.[1333] It also launched a legal bid to disqualify eight former directors of Carillion plc, 'in the public interest'.[1334]

Individuals subject to disqualification are generally disqualified as directors as a direct result of the work of the Insolvency Service, arguably with the majority of investigations stemming from the obligation of liquidators to report on the conduct of directors of insolvent companies through the online service. [1335] Therefore, if the Insolvency Service do not initiate an investigation, it is unlikely that such individuals would have been subject to disqualification. In one particular instance, the then Secretary of State for the former Department for Business Innovation & Skills, Sajid Javid, took '…the rare move of fast-tracking a full investigation...'[1336] into the collapse of BHS to specifically consider the degree of conduct of the directors of BHS which led to its insolvency.[1337] Before Javid announced that he had written to the Insolvency Service, it was arguably unheard of and certainly, no other company insolvency had prompted a fast-tracked investigation.

2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/324713/bis-14-908b-impact-assessments-part-b-director-disqualification-regime-transparency-and-trust.pdf> accessed 30 May 2020.

[1332] Ibid.

[1333] Mark Kleinman, 'Former BHS owner Chappell gets 10-year directorship ban' (*Sky News*, 5 November 2019) <https://news.sky.com/story/former-bhs-owner-chappell-gets-10-year-directorship-ban-11854818> accessed 13 May 2022.

[1334] Richard Partington, 'Legal bid launched to ban ex-Carillion directors from top boardroom roles' (*The Guardian*, 13 January 2021) <https://www.theguardian.com/business/2021/jan/13/legal-bid-launched-ban-ex-carillion-directors-top-boardroom-roles> accessed 13 May 2022.

[1335] Company *Directors* Disqualification Act 1986, s.7a.

[1336] James Quinn and Ashley Armstrong, 'Sajid Javid orders Government investigation into collapse of BHS' (*The Telegraph*, 3 May 2016) <https://www.telegraph.co.uk/business/2016/05/03/sajid-javid-orders-government-investigation-into-collapse-of-bhs/> accessed 28 February 2020.

[1337] Reuters, 'Britain to fast-track investigation into BHS collapse' (*Reuters*, 3 May 2016) <https://www.reuters.com/article/britain-retail-bhs/britain-to-fast-track-investigation-into-bhs-collapse-idUSL5N180604> accessed 28 February 2020.

There is an argument to be made that the Government should hold directors accountable because it controls the Insolvency Service which could enforce such accountability. However, the Insolvency Service is only able to investigate companies once they have become insolvent most likely when it is alleged the insolvency has occurred due to the (mis)conduct of directors. It is posited that most investigations are only initiated when a company enters insolvency and usually into compulsory liquidation, which is often too late, as holistic accountability is ex ante, or when the commencement of formal insolvency procedures puts a spotlight on the directors' conduct.[1338]

In *R v Seager (Mornington Stafford)*[1339], the purpose of disqualification was described as so:

> '…that only reasonably competent, responsible and honest people act as company directors' and '…shareholders and employees of companies, those who trade with companies… can be protected from possible fraud, incompetence and regulatory failings by people who are supposedly directing companies.'[1340]

Holistic accountability would allow companies to prosper that otherwise could become insolvent due to director (mis)conduct. But the Insolvency Service spends money on investigating directors of insolvent companies rather than looking at ways in which they ought to stop them from becoming insolvent in the first place. While this would prevent individuals from becoming directors of other companies, it does not detract from the fact that (economic) damage has already been done by these individuals. It is accepted that there always will be delinquent directors, but it is argued that the approach taken is ineffective. To ensure that the behaviour of directors is satisfactory would require the Insolvency Service to act ex-ante, rather than ex-post, reducing the possibility of creating a loophole where the majority of insolvent companies will most likely slip through the net.

Holistic accountability is a factor in ensuring companies do not enter into insolvency due to the conduct of directors, as it is ongoing, it enables misconduct to be picked up

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[1338] Jonathan Munnery, 'Investigations and Enforcement: Advice for directors' (*Real Business Rescue*, 5 February 2020) <https://www.realbusinessrescue.co.uk/company-director-advice/investigations-and-enforcement-advice-for-directors-being-investigated-by-the-insolvency-service#:~:text=Investigations%20into%20director%20conduct%20are,be%20in%20the%20public%20interest.> accessed 18 August 2020.

[1339] [2009] EWCA Crim 1303.

[1340] Ibid.

more quickly. The Insolvency Service is dependent on fees and asset recoveries from insolvent companies, but often there is no prospect of recovering fees from insolvent companies; it is hamstrung by its obligation to provide services.[1341] Therefore, it comes as no surprise that in 2013 it required a cash injection from the government as it headed for a deficit of between £5 million to £7 million.[1342] Indeed, between 2010 to 2015, the Insolvency Service spent just over £94 million on disqualifying directors.[1343] While the cost of disqualifying directors, who might otherwise go on to become directors of other companies, cannot be quantified, there is a possibility that the potential for such damage to be mitigated through disqualification.

The problems faced by the Insolvency Service result from the fact that the agency is obligated to provide a service no matter what the financial outcome. It acts as a regulator for insolvent companies because the UK does not have a corporate regulator to oversee companies. For example, in Australia, the Australian Securities and Investments Commission (ASIC) acts as an integrated regulator enforcing and regulating company and financial services law and encompassing insolvency law. It is fair to say that some types of work carried out by the Insolvency Service in the UK, are carried out by ASIC on a much bigger and more detailed scale.[1344]

For example, ASIC's enforcement outcomes from 1 April 2022 to 30 June 2022, had brought 139 criminal charges with 27 individuals/companies charged in criminal proceedings.[1345] It had also commenced 7 civil penalty cases, with 40 currently before the courts with AU$145.8 million in penalties imposed by the courts.[1346] Some of the notable civil cases which ASIC commenced and in respect of the breach of directors' duties include *ASIC v Healey*[1347] and *ASIC v Avestra Asset Management Ltd*[1348]. Ramsay and Saunders note that '…ASIC is changing governance standards through

[1341] Jim Pickard, 'Insolvency Service on verge of insolvency' (*The Financial Times*, 13 March 2013) <https://www.ft.com/content/4f09429e-8bcf-11e2-8fcf-00144feabdc0> accessed 28 February 2020.
[1342] Ibid.
[1343] Email from Lynne Convery (The Insolvency Service) to author (4 August 2016).
[1344] Australian Securities and Investment Commission, 'ASIC' (*Australian Securities and Investment Commission,* not known) <https://asic.gov.au/> accessed 30 May 2020.
[1345] Australian Securities and Investment Commission, 'REP 733 ASIC enforcement and regulatory update: April to June 2022' (*Australian Securities and Investment Commission*, 28 July 2022) < https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-733-asic-enforcement-and-regulatory-update-april-to-june-2022/> accessed 3 January 2023.
[1346] Ibid.
[1347] (2011) 196 FCR 291.
[1348] (2017) 348 ALR 525 (FCA).

litigation… with a strong success rate, proving a contravention in 83% of cases brought, and in a wide range of factual situations.'[1349]

In a 3 month period in 2022, ASIC has been successful in disqualifying or removing individuals from directing companies, and it had started 60 investigations and had 148 investigations ongoing.[1350] In comparison to the Insolvency Service and considering that Australia has fewer people and companies, this is a laudable effort.

In sum, while government involvement has shaped the regulatory framework in which companies and directors operate, it has failed to ensure directors are held accountable. Shareholder remedies, mentioned earlier, do little to fix this because of the number of shareholders required to build a coalition and the costs associated with taking action. Despite the Insolvency Service having the ability to hold directors broadly accountable, the make-up and operation of the agency mean that their involvement comes at a time when it is too late, and the company has entered liquidation when any accountability of directors is unlikely to lead to a fruitful outcome. Holistic accountability would attempt to ensure they pick up misconduct earlier and thus reduce not only damage caused but ensure companies remain a going concern. This is in stark contrast to the ASIC which, not just has more successful outcomes, but often acts ex ante rather than ex-post, it is the latter which is how the Insolvency Service operates. It is clear that there is far more potential than is currently being used.

5.4.4.4 The Companies Investigation Branch: A Suitable Constituent

In the UK, there is no entity, governmental or otherwise, that can hold directors holistically accountable, and enforce it, aside from the non-executive agency, The Insolvency Service. However, as previously discussed, there are issues with this as they are only likely to get involved if liquidators have grave concerns in respect of directors' conduct, unless, of course, it relates to the disqualification of directors which is the remit of the Secretary of State for Business, Energy and Industrial Strategy. Indeed, it is agreed that '[n]o-one seriously questions the need for an effective watchdog to ensure good corporate behaviour...'.[1351] But there has been a failure by

[1349] Ian Ramsay and Benjamin Saunders, 'An Analysis of the Enforcement of the Statutory Duty of Care by the Australian Securities and Investments Commission' [2019] 36(6) Company and Securities Law Journal 497.
[1350] ASIC (n.1345).
[1351] Francis Kean and Neil Cooke, 'The Surprise "Knock On The Door"' (*Mondaq*, 18 June 2007) <https://www.mondaq.com/uk/CorporateCommercial-Law/49428/The-Surprise-Knock-On-The-Door> accessed 14 March 2020.

the Insolvency Service largely due to its remit, to effectively tackle wrong-doing, at least early on.

The Secretary of State for Business, Energy and Industrial Strategy also has the discretion to pursue investigations into a company if there are grounds for suspicion of misconduct, or any other reasons which give rise to concerns.[1352] The exercise of discretion by the Secretary of State for Business, Energy and Industrial Strategy cannot be attacked unless it can be demonstrated that they were 'so prejudiced against someone' that the investigation was carried out for an ulterior purpose'.[1353] It is unlikely that such a threshold can be met, making it very difficult to evade, frustrate, or stop an investigation.[1354]

While there is hard-law in the form of legislation and soft-law in the form of self-regulation in place, this only serves to provide the parameters for the behaviour and conduct of directors. It is accepted that the Insolvency Service can enforce accountability, but again, it is futile to hold directors of insolvent LPCs accountable ex post when holistic accountability is much more valuable when it is done during the lifetime of an LPC.

It can be argued that the possibility of disqualification and related compensation orders[1355] may provide sufficient deterrence, the primary aim of disqualification is the protection of the public. This is not to say that the disqualification of directors who misbehave is not a good deterrent, but rather the damage is often irreversible because accountability has occurred at too late a stage. However, if it is known that the Insolvency Service is unlikely to investigate unless the company goes into compulsory liquidation, then some directors may feel that they are unlikely to be pursued and as a result, the aim of protecting the public is not achieved.

In the absence of a government, or non-governmental regulator for the accountability of directors, it falls on shareholders, employees, creditors, and customers to hold directors accountable. One constituent holding directors accountable may mean other constituents feel their interests are not being taken into account, with some constituents there being a power imbalance, over others to hold directors accountable. Due to their exclusive interests mean that holistic accountability of directors is absent, and while some constituents may be able to influence boards, it is unlikely that they would be able to hold directors accountable.

[1352] Ibid.
[1353] *R v Secretary of State for Trade, ex p Perestrello* [1981] QB 19.
[1354] Kean and Cooke (n.1351).
[1355] Company Directors Disqualification Act 1986, ss.15-16.

As a result, for directors to be held accountable, it should not be down to the constituents but rather to an individual or entity which does not have its own agenda, priorities, or conflicts of interest with other constituents. It should be an individual or entity which is entirely separate from an LPC. The key question, therefore, is whether this can be achieved through the Companies Investigation Branch (CIB).

5.4.4.4.1 The Companies Investigation Branch

Through BEIS, the method of the Companies Investigation Branch (CIB) is:

> 'to take a proportionate and realistic view of issues brought to…[their]… attention, and to investigate aspects of corporate behaviour which might harm both the business community and the public generally.'[1356]

Finch and Milman state that its objective is to safeguard the public from dishonest or otherwise wayward companies and their directors and employees.[1357] In essence, the CIB's role is to broadly hold directors accountable allowing for a broad definition of public interest to be inferred. It is important to note that, the main objective of the CIB is to ensure that the company stops conducting business or continuing a course of conduct that is deemed to be destructive but may not necessarily be illegal.[1358] The CIB's investigative powers are provided for under section 447 of the Companies Act 1985 coupled with section 453A.[1359] Interestingly, section 447 has been one of the very few provisions of the Companies Act 1985 that remain in force.

The start of an investigation under s.447 begins with a complaint that has been made usually by the public. Once the complaint is received, an internal assessment is conducted.[1360] At this early stage, there is no contact or involvement from the company the complaint is about, but once the complaint has been 'vetted' via a background check and it has been decided that there is 'good reason' to conduct an investigation, it is then authorised by the Secretary of State.[1361] Although complaints are received from the public, there is nothing to suggest that constituents of an LPC cannot instigate a complaint. According to statistics published for the year ending March 2006, 3,702

[1356] Kean and Cooke (n.1351).
[1357] Finch and Milman (n.1156) 464.
[1358] Ibid.
[1359] Kean and Cooke (n.1351).
[1360] Ibid.
[1361] Kean and Cooke (n.1351).

complaints were received resulting in the initiation of 148 investigations being carried out under section 477.[1362]

Directors have to cooperate with the CIB as long as the appropriate documentation is shown to them. The powers of CIB allow them to request documents, defined as information recorded in any form, either in a hard copy or in a form in which a hard copy can be readily obtained. The Companies (Audit, Investigations and Community Enterprise) Act 2004 strengthened the powers of the CIB by including an extensive power allowing investigators to not only obtain documents in a hard copy or digital format, but also the ability to require information as the investigator may specify.[1363] Investigators can also require third parties to produce information/documents relevant to the investigation. There is no statutory requirement for the company to be notified of third parties requests made.

It has been said that financial information such as auditors' files is a common request. This may seem to suggest that the CIB is interested in the financial health of the company rather than other issues. However, as there are no set criteria as to when a complaint ought to be initiated or will be investigated this does not seem to be the case. Further, an individual who makes a disclosure to an investigator will not be liable for breach of confidence[1364] also suggests that a broad range of complaints are considered.

While the CIB has been proactive in opening investigations, they have been hesitant to confirm when an investigation has been concluded. Kean and Cooke state that there seems to be a policy of '…wishing to avoid being seen to have issued a clean bill of health to a company in case problems are subsequently uncovered.'[1365] Although information can be requested under data laws, this proves difficult given that public authorities enjoy certain qualified exemptions. CIB investigators possess the ability to impose several sanctions. For example, if there are issues found but there is no basis for formal action, an informal letter may be sent; formal letters may also be sent depending on the situation and circumstances. The CIB can also commence disqualification proceedings against the director(s) or provide information to criminal authorities with possible criminal sanctions against the company and/or directors. Perhaps in more extreme cases, they can apply to the court for a winding-up order and put the company into compulsory liquidation.

[1362] Ibid.
[1363] Kean and Cooke (n.1351).
[1364] Ibid.
[1365] Kean and Cooke (n.1351).

As a result, while the CIB has been identified as a possible impartial and independent entity that could hold directors of LPCs accountable, it is accepted that changes may well be required to ensure it can hold directors holistically accountable. For example, some of the issues that would need to be addressed are the fact that the CIB can only initiate an investigation when a complaint is received, and it is uncertain as to whether they can investigate all complaints. The current makeup of the provision is likely to require amendments if it is to act as an accountee, along with a broad categorisation of when a company can be investigated, and a further review of extra powers that may be required as a minimum.

Therefore, it may be more beneficial to start afresh with a new body, if holistic accountability is to be enforced properly, considering that there may be a perception that this is the same old CIB going through a rebrand/structural change. In this regard, operational and legislative amendments are unlikely to yield any significant results, further echoing the need for the introduction of a new and impartial body/entity.

5.5 Summary

This chapter has examined the normative issue of which constituent is best placed to hold directors of LPCs accountable. Having focused on three of the most pertinent theories and their preferred constituent(s), it has been found that each theory has its flaws. The government stands out as the only possible constituent, but this is not without the need for reform. For example, the shareholder primacy theory obligates directors to focus on short-term benefits.[1366] As long as dividends are paid out, shareholders will not be concerned with the behaviour of directors. The stakeholder theory has no firm basis, either in the economic theory of the firm or in traditional ethical theories.[1367]

While the concession theory is silent on how it conceptualises the inner-workings of a company, the only credible constituent is the government through the Companies Investigation Branch (CIB). The state has sponsored incorporation with a company's 'existence, capacities and activities…only such as the law attributes to it.'[1368] The state also gives permission for private ordering to exist and as this has been given, it can also be taken away.[1369] The Insolvency Service can hold directors of LPCs

[1366] Keay (n.77) 407.
[1367] Fassin (n.1062) 116.
[1368] *Northside Developments Pty Ltd v Registrar-General* (1990) 8 ACLC 611 [626].
[1369] Stefan Padfield, 'Rehabilitating Concession Theory' [2014] 66(2) Oklahoma Law Review 327, 348.

accountable, but this is done ex post, whereas holistic accountability is ex ante. That said, the Insolvency Service is obligated to provide a service, no matter what the financial outcome or the level of service.

To be a suitable constituent, the legislative provisions and operational procedures governing the CIB would require significant amendments. In this regard, to remove the perception that it is the same old CIB, merely going through a rebrand/structural change; for holistic accountability to be properly enforced, there is a need for the introduction of a new and impartial body/entity. Before this is explored further, it is worth considering whether the current regulatory framework enables the holistic accountability of directors of LPCs.

CHAPTER 6
REGULATING HOLISTIC ACCOUNTABILITY: IS THE CURRENT FRAMEWORK SUITABLE?

6.0 Introduction

This chapter examines the current regulatory framework that exists under corporate law. It will evaluate if and how it empowers the government to hold directors of Large Private Companies (LPCs) accountable. It will do this by examining the current accountees against the elements of holistic accountability: honesty, legal obligation, knowledge, examination, and outcome. It will also consider the roles of the United States Securities Exchange Commission (SEC) and Australia's Australian Securities & Investments Commission (ASIC). This will determine what potential lessons are to be learned in respect of the holistic accountability of directors in LPCs in the UK.

In the UK, some organisations act as accountees for particular areas of the regulatory landscape that exists for LPCs, such as the Financial Reporting Council (FRC) and The Pensions Regulator (TPR). These entities have often been described as '[t]he key regulators.'[1370] The role of these entities is quite narrow as they conduct enforcement of a particular aspect of commercial/corporate life.[1371] But criticisms such as being 'asleep at the wheel'[1372] and having a '…relaxed attitude and…[being]…too close to the businesses which they are supposed to be regulating'[1373] have followed. In contrast, jurisdictions such as the United States have the Securities Exchange Commission (SEC)[1374], and Australia has the Australian Securities and Investments Commission (ASIC)[1375], both of which act as accountees. They have wide-ranging responsibilities and powers more aligned, arguably, to the enforcement of holistic accountability of directors.

As a result, this chapter will ascertain if the current regulators, the FRC and TPR, can hold directors holistically accountable. To do so, the FRC and TPR will be examined against the elements of holistic accountability: honesty, legal obligation, knowledge,

[1370] Business, Energy and Industrial Strategy and Work and Pensions Committees, *Carillion*, (HC 2017-19, HC 769) 5
[1371] Pensions Act 1995; Financial Services Act 2012.
[1372] Amy Austin, 'FRC found to be 'asleep at the wheel' over audit, says Reeves' (*Accountancy Daily*, 2 April 2019) <https://www.accountancydaily.co/frc-found-be-asleep-wheel-over-audit-says-reeves> accessed 21 January 2021.
[1373] Ibid.
[1374] Securities Exchange Act of 1934, s.4; Trust Indenture Act 1939, Investment Advisers Act 1940, Investment Company Act 1940, Sarbanes-Oxley Act 2002, Dodd–Frank Wall Street Reform and Consumer Protection Act 2010.
[1375] Australian Securities and Investments Commission Act 2001.

examination, and outcome. The first part will examine the roles and powers of the FRC. The second part will focus on the roles and powers of TPR. The reason why these regulators will be discussed is that outside of the constituents who could hold directors accountable, these organisations are the only external bodies which enable some level of accountability in respect of the actions of directors of LPCs.

The third and fourth parts of the Chapter will examine the United States SEC and the Australian ASIC. These parts will examine the function, remit, and powers of these organisations as accountees in their respective jurisdictions. This, again, will be undertaken through the lens of holistic accountability to determine whether certain elements could be extrapolated to further the holistic accountability of directors in the UK. Finally, the chapter will ascertain and examine the gaps within UK regulators in enforcing the holistic accountability of directors of LPCs. It will also analyse some of the elements that could be utilised from the international examples to further aid the holistic accountability of directors of LPCs.

6.1 The Current Regulatory Framework

There have been elements of the regulatory framework which have been designed to hold directors accountable to prevent certain forms of misconduct from being carried out. However, the response from the regulatory framework has often been too little or too late or there has been no response at all. For example, the FRC has been described as 'toothless'[1376] regarding regulating auditors and TPR has been criticised as being 'feeble'[1377], for failing to use its power despite threatening to do so seven times, in a particular case.[1378] These criticisms have been drawn as a result of each organisation's work, but in respect of holistic accountability, it is unclear what each organisation has to offer, and it is this aspect that requires examination.

The criticisms shine a light, on the inadequacy of previous work undertaken by the FRC and TPR, it is not clear what they have to offer in respect of holistic accountability. Although, there may well be elements from each of the bodies which may allow for the holistic accountability of directors of LPCs and assist in providing the foundation and scope of the type of mechanism or entity that can enforce holistic accountability.

[1376] Anna Menin, "Utterly inadequate': Experts slam watchdog's Big Four audit split' (*City AM*, 6 July 2020) <https://www.cityam.com/utterly-inadequate-audit-experts-slam-watchdogs-big-four-audit-split/> accessed 18 November 2020.
[1377] Damian Fantato, 'Pensions Regulator responds to MPs' criticism' (*FT Adviser*, 12 July 2018) <https://www.ftadviser.com/pensions/2018/07/12/pensions-regulator-responds-to-mps-criticism/> accessed 18 November 2020.
[1378] Ibid.

6.2 The Financial Reporting Council

The FRC was established in 1990 and is a company limited by guarantee. It was formed to regulate auditors, accountants, and actuaries. It also drafts the UK Corporate Governance Code and the Stewardship Code. One of its key objectives is to promote transparency and integrity in commercial dealings, with the FRC's work aimed at investors and others who rely on company reports, audits, and risk management.[1379] It is also the UK Competent Authority for statutory auditors and the disciplinary body for accountants and actuaries in public interest cases.[1380]

The majority of the funding for the FRC comes from the auditing profession as required under Schedule 10 of the Companies Act.[1381] It also charges large private entities, with a turnover of £500m or more, amongst others, a preparer's levy.[1382] The structure of the FRC, whilst being governed by its board, is supported by two governance committees: audit and people committees, two business committees: Codes and Standards Committee and the conduct committee as well as three advisory councils: corporate reporting, audit and assurance and actuarial.[1383]

The main role played by the FRC is its responsibility for enforcement action regarding audit firms and individual auditors, misconduct by accountants and accountancy firms, and misconduct by individual actuaries in public interest cases.[1384] To carry out this function, the FRC has a case examination and enquiries team (CEE) which identifies cases through intelligence-gathering activities such as internal referrals, referrals from other regulators and/or public bodies and complaints from members of the public.[1385] Once a referral comes in, it is then allocated to one of the disciplinary teams: the Audit Enforcement Procedure, Accountancy Scheme and the Actuarial Scheme. It is these individual streams which then begin to investigate the merits of the allegations and

[1379] Financial Reporting Council, 'About the FRC' (*FRC*, not known) <https://www.frc.org.uk/about-the-frc> accessed 18 November 2020.
[1380] Financial Reporting Council, 'ANNUAL ENFORCEMENT REVIEW 2019' (*FRC*, July 2019) <https://www.frc.org.uk/getattachment/b8622ccd-5264-41d6-8053-9986fba531c0/2353_Annual-Enforcement-Review-v6-1-Final-Web.pdf> accessed 19 November 2020.
[1381] Companies Act 2006, Sch 10.
[1382] Financial Reporting Council, 'Funding' (*FRC*, not known) <https://www.frc.org.uk/about-the-frc/funding> accessed 19 November 2020.
[1383] Financial Reporting Council, 'FRC Structure' (*FRC*, not known) <https://www.frc.org.uk/about-the-frc/structure-of-the-frc> accessed 18 November 2020.
[1384] Financial Reporting Council (n.1379).
[1385] Ibid.

bring the issue to a close by either constructive engagement, a process for addressing concerns without full enforcement action, or through enforcement action.[1386]

6.2.1 FRC Functions

The powers of the FRC are piecemeal. For example, many of the powers the FRC holds are either explicit in legislation or based on an understanding between it and the Recognised supervisory body (RSB) or a Recognised qualified body (RQB).[1387] The RSB is a supervisory body whilst the latter is seen as offering a recognised qualification for audit work. But while the FRC undertakes some statutory duties in their execution, it is not bound by any statutory duties.[1388] Much of its powers and responsibilities in relation to company annual accounts and auditing stem from EU Law.[1389] Although it remains unclear what the position is following the UK exit from the European Union and the end of the transition period.

The functions of the FRC are as follows: issuing accounting standards[1390], addressing inadequate or conflicting interpretations of accounting standards based on the consensus reached by the FRC[1391] and setting standards and giving guidance in respect of external audits[1392]. It also sets actuarial standards which are based upon a memorandum of understanding between the FRC and the actuarial profession.[1393] This also involves independent oversight of the regulation of the auditing profession[1394] and the regulation and registration of third-country auditors.[1395] The FRC also has independent supervision of auditors general[1396], monitors the quality of audits of economically significant entities and determines sanctions following failures found

[1386] Financial Reporting Council (n.1379).
[1387] Financial Reporting Council, 'The FRC and its Regulatory Approach' (*FRC*, January 2014) <https://www.frc.org.uk/getattachment/de950642-4c6d-4909-b965-5707108fc55a/TheFRCanditsRegulatoryApproach.pdf> accessed 23 November 2020; Financial Reporting Council, 'FRC Roles and Responsibilities, Schedule of Functions and Powers' (*FRC*, June 2017) <https://www.frc.org.uk/getattachment/67835f0e-e4c2-4d2a-9aeb-e57feed885be/FRC-Roles-Responsibilities-Schedule-of-Functions-Powers-June-2017.pdf> accessed 23 November 2020.
[1388] Kingman (n.325).
[1389] Edward Walker-Arnott QC (Hon), 'The Kingman Review' [2019] 40(6) Company Lawyer 179, 179.
[1390] Companies Act 2006, s.464
[1391] Financial Reporting Council (n.1379).
[1392] Companies Act 2006, Sch 10
[1393] Financial Reporting Council (n.1379)
[1394] Companies Act 2006, s. 1252, Part 42.
[1395] Companies Act 2006, ss. 1252, 1239 -1247.
[1396] Companies Act 2006, ss. 1228, 1229, 1238.

during monitoring inspections which amount to an appropriate independent arrangement that an RSB must participate in.[1397]

It also has independent oversight of the regulation of the accountancy profession as some of the accountancy bodies, such as the Association of Chartered Certified Accountants, the Institute of Chartered Accountants of Scotland, the Chartered Institute of Public Finance and the Institute of Chartered Accountants in England and Wales, have given their commitment to either implement FRC recommendation or explain, in writing, reasons for not doing so.[1398]

Financial information such as directors' reports, by public and large private companies, is also within the remit of FRC to ensure companies comply with Companies Act requirements.[1399] The FRC, as the prescribed body also monitors compliance to ensure accounting rules associated with listing rules are complied with.[1400] It also provides independent investigations and a discipline scheme for issues relating to accountancy firms or members of the accountancy bodies when it affects the public interest, based on the 'appropriate independent arrangement'. [1401]

The term 'appropriate independent arrangement' amounts to the arrangements made by the FRC, in respect of independent monitoring as set out in legislation.[1402] The same scheme is also operated for the actuarial profession based on the MoU between the FRC and the actuarial profession.[1403] Furthermore, it monitors and maintains the UK corporate governance code and its related guidance as well as the stewardship code and its associated guidance.[1404]

6.2.2 FRC Powers

The powers of the FRC, as well as the range of sanctions available to tribunals, are contained within the Accountancy Scheme sanctions guidance[1405], Audit Enforcement

[1397] Companies Act 2006, Sch 10 (13) (23).
[1398] Financial Reporting Council (n.1379).
[1399] Companies Act 2006, ss. 456-457.
[1400] Companies (Audit, Investigations etc) Act 2004, s.14.
[1401] Companies Act 2006, Sch 10 (16-24).
[1402] Companies Act 2006, Sch 10 (13 & 23).
[1403] Financial Reporting Council (n.1379).
[1404] Ibid.
[1405] Financial Reporting Council, 'Accountancy Scheme Sanctions Guidance' (*Financial Reporting Council*, April 2018) < https://www.frc.org.uk/getattachment/776f0f4c-b3c5-4de8-a5b0-2b3bac45f778/Accountancy-Scheme-Sanctions-Guidance-(April-2018).pdf> accessed 24 November 2020.

Procedure sanctions policy[1406] and the Actuarial Scheme sanctions guidance[1407]. Aside from the Audit Enforcement Procedure sanctions policy, the powers of the FRC come into effect if a member or member firm has committed an act of misconduct[1408] or if there has been a failure to comply with the Accountancy Scheme[1409] or the Actuarial Scheme. It is worth noting that the powers of the FRC only apply to accountants, statutory auditors, and actuaries, and not directors of LPCs. It is fair to say that, at least for the majority, if not all, of LPCs, the Chief Financial Officer (CFO), or equivalent, will be a qualified accountant and/or auditor. For example, the CFO of Sports Director, Chris Wootton is a chartered accountant.[1410] The former finance director of BHS, Kathryn Morgan, is also a finance professional.[1411] And Paul Miles, former finance director of Wonga, is also a seasoned finance professional.[1412]

In particular, the obligations of members are to cooperate fully with the appointed executive council or tribunal. This also includes individuals that may act on behalf of the conduct committee as part of the FRC. Members are also required to provide any information either orally or in writing and permit the inspection and taking of documents and other information relevant to the issue under investigation. This also includes compliance with any such notice within 14 days or any longer period permitted by the executive council.

[1406] Financial Reporting Council, 'Sanctions Policy (Audit Enforcement Procedure)' (*Financial Reporting Council*, April 2018) <https://www.frc.org.uk/getattachment/32b190e5-fbed-4530-8433-5b22cc6b631e/Sanctions-Policy-Audit-Enforcement-Procedure-(April-2018).pdf> accessed 24 November 2020.

[1407] Financial Reporting Council, 'Actuarial Scheme Sanctions Guidance' (*Financial Reporting Council*, April 2018) <https://www.frc.org.uk/getattachment/31f62ef0-3d5d-42eb-9dcb-98a8552fa0df/Actuarial-Scheme-Sanctions-Guidance-(April-2018).pdf> accessed 24 November 2020

[1408] Financial Reporting Council (n.1405).

[1409] Financial Reporting Council, 'The Accountancy Scheme' (*Financial Reporting Council*, 8 December 2014) <https://www.frc.org.uk/getattachment/c77917fc-269e-4488-b1ae-ba3662d3d460/The-Accountancy-Scheme-Dec-2014.pdf> accessed 24 November 2020.

[1410] Sportsdirectplc, 'Leadership' (*Sportsdirectplc*, not known) <https://www.sportsdirectplc.com/about-us/leadership.aspx> accessed 10 December 2020.

[1411] Joanna Bourke, 'BHS: Picking over the bones of the retailer one year on from collapse' (*The Evening Standard*, 12 April 2017) <https://www.standard.co.uk/business/bhs-picking-over-the-bones-of-the-retailer-one-year-on-from-collapse-a3513461.html> accessed 26 November 2020.

[1412] Rupert Neate, 'Wonga appoints debt management expert as new finance director' (*The Guardian*, 16 October 2014) <https://www.theguardian.com/business/2014/oct/16/wonga-payday-loans-hires-finance-director-paul-miles#:~:text=Wonga%2C%20the%20controversial%20payday%20lender,its%20new%20chief%20financial%20officer.> accessed 26 November 2020.

The FRC defines misconduct as:

> 'an act or omission or series of acts or omissions, by a Member or Member Firm in the course of his or its professional activities (including as a partner, member, director, consultant, agent or employee in or of any organisation or as an individual) or otherwise, which falls significantly short of the standards reasonably to be expected of a Member or Member Firm or has brought, or is likely to bring, discredit to the Member or the Member Firm or to the accountancy profession.'[1413]

In regard to the Audit enforcement scheme, the imposition of sanctions stems from EU legislation, in particular the Statutory Auditor and Third Country Auditor Regulations[1414], implementing EU Audit Regulation No: 537/2014 and Directive 56/2014. This requires effective systems of investigations and sanctions to "detect, correct and prevent inadequate execution of the statutory audit".[1415] This is particularly so when there has been a breach of the Statutory Auditor and Third Country Auditor Regulations[1416], the EU Audit regulation[1417] or the Companies Act[1418]. A possible reason why the Accountancy Sanctions Scheme and the Actuarial Scheme differ from the Auditing Sanctions Scheme is that the latter is based upon legislation, and the former is not, existing only by mutual consent of the RSBs and RQBs.

The imposition of sanctions by an FRC tribunal, consisting of 3 or 5-panel members, following an FRC investigation, differs in respect of the objectives it is supposed to achieve. For example, the purposes of sanction for the Accountancy Scheme and the Actuarial Scheme are effectively the same. Both the Accountancy Scheme and the Actuarial Scheme state that the schemes' purposes are ensuring that members declare and uphold proper standards of conduct and maintain and enhance the quality and reliability of accountancy/actuarial work. Members must also maintain and promote public and market confidence as well as protect the public from members

[1413] Financial Reporting Council (n.1409).
[1414] Statutory Auditor and Third Country Auditor Regulations 2016.
[1415] Financial Reporting Council (n.1406).
[1416] Statutory Auditor and Third Country Auditor Regulations 2016.
[1417] Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts (Text with EEA relevance) [2014] OJ L 158/196; Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (Text with EEA relevance) [2014] OJ L 158/77.
[1418] Companies Act 2006.

whose conduct has fallen significantly short of the standards. This is so that it deters members of the accountancy/actuarial profession from committing misconduct.[1419]

The commonality between the accountancy, actuarial and auditing schemes is that the primary purpose is'…not to punish, but to protect the public and the wider public interest.'[1420] For statutory auditors, the purpose is slightly different perhaps because it considers EU and domestic legislation when setting the purpose of sanctions for the auditing profession. For Auditors, the scheme's purpose is to ensure that the declaration and upholding of conduct standards amongst members and firms ensure the quality and reliability of future audits. This also includes maintaining and promoting public and market confidence in Statutory Auditors, as well as protecting the public from auditors and firms whose conduct has fallen below the relevant standard. And as with the accountancy scheme, it also seeks to deter auditors and firms from breaching the Relevant Requirements relating to statutory audit.[1421]

The relevant requirements that the sanctions refer to essentially mean compliance with the Statutory Auditor and Third Country Auditor Regulations[1422], the EU Audit Regulation[1423] and the Companies Act[1424]. In regard to all three regimes, it is clear that a broad nature of sanctions is available. However, how that relates to the holistic accountability of finance directors, albeit a very narrow form of holistic accountability, (who may also be qualified accountants), is a matter that requires examination.

6.2.3 Honesty & Legal Obligation

The FRC does not currently do anything to hold directors of LPCs holistically accountable, as their focus is obviously on accountants and auditors. Some LPCs may employ a finance director who is a qualified accountant, where accountability would fall into the FRC. But some LPCs may also outsource the entirety of their finance work negating the need for a finance director. Other LPCs may outsource certain elements of finance work, such as those that are not eligible for an audit exemption.[1425] The first element of holistic accountability is: honesty, and its working definition of the obligation

[1419] Financial Reporting Council (n.1409); Financial Reporting Council (n.1407).
[1420] Ibid; Financial Reporting Council (n.1406).
[1421] Financial Reporting Council (n.1409); Financial Reporting Council (n.1407); Ibid.
[1422] Statutory Auditor and Third Country Auditor Regulations 2016.
[1423] Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts (Text with EEA relevance) [2014] OJ L 158/196; Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (Text with EEA relevance) [2014] OJ L 158/77.
[1424] Companies Act 2006.
[1425] Companies Act 2006, Part 16.

to be wholly truthful and forthcoming to the company in all its matters whether directly or directly, not to omit anything which would bring that truthfulness into question', is, therefore, a little problematic.

Once a decision has been made to investigate an allegation, or allegations, the case is transferred to the enforcement division and handed to the appropriate stream. It is at this stage that the investigations commence, and communication and correspondence are exchanged between FRC and the auditing firm. However, unless the accountant, or auditor, is employed by the LPC, it is unlikely that auditors would be able to provide any meaningful information apart from what they will have been told by the directors. In instances, where it is the director, in the finance function of a company, being investigated apart from assessing the quality and accuracy of financial information submitted, there is no way of checking the veracity of the information provided.

Aside from problems with the honesty element, there are also deficiencies regarding legal obligation. For example, for an organisation to have some level of credibility, particularly concerning enforcement, it is submitted that there must be some form of legislative grounding. In the context of the FRC, this would enable directors to understand the scope and objectives of what is required and how they can fulfil their duties. However, as Edward Walker-Arnott QC points out, the FRC's '… jurisdiction in relation to auditors is based on statute, much of its critical role in relation to accounting (for example the disciplining of accountants in public interest cases) has no statutory basis.'[1426]

This is perhaps why enforcement action is open to challenge and there is a reluctance, to investigate directors who are not members of the accountancy, auditing, or actuarial professions. Instead, FRC has made increased use of constructive engagement in matters relating to poor work or breaches of standards rather than strict enforcement.[1427] Constructive engagement allows for remedial action to take place, potentially on an informal basis, in less serious cases to address failures and mitigate risks.

The second issue is the FRC's failure to hold directors of LPCs accountable for accounting issues. It is accepted that even if the FRC did hold directors accountable for accounting issues, it would be narrow accountability, and not holistic accountability

[1426] Walker-Arnott QC (Hon) (n.1389).
[1427] Pat Sweet, 'FRC fines fall in favour of 'constructive engagement'' (*Accountancy Daily,* 3 August 2020) <https://www.accountancydaily.co/frc-fines-fall-favour-constructive-engagement> accessed 20 November 2020.

because such accountability would only focus on financial reporting. This signals the lack of accountability, broadly speaking, which directors of LPCs have been subject to. This is where the FRC falls short. For example, it fails to take into account that the duty to prepare annual accounts is obligatory on all directors as a collective responsibility.[1428] While the majority of the powers of directors hold can be delegated, various sections of the Companies Act specifically state that the annual report and accounts assert that they are approved by the board.[1429] Case law also labours the point that there is a need for the accountability of directors in the preparation of accounts.[1430]

In *Secretary of State for Trade and Industry v Thornbury*[1431], it was stated that '[d]irectors owed both collegiate and individual duties of responsibility. Lack of financial awareness or of a basic obligation by a director to familiarise himself with the company's financial position…[is]… no defence.'[1432] In *Secretary of State for Trade and Industry v Griffiths & others*[1433], Lord Woolf MR stated that while collective responsibility of the board of directors is of importance to corporate governance under English company law, it is based on individual responsibility.[1434] Each director owes duties to the company to inform themselves about the affairs of the company, and while some delegation of responsibility is permissible, an abrogation of responsibility is not.[1435] Given this, the FRC fails to hold directors of LPCs accountable as these are persons who should be accountable and have a legal obligation for the preparation, approval, and submission of key financial documents.

The FRC does not hold directors of LPCs accountable despite the Companies Act[1436] enabling the court to hold directors personally liable where a declaration is found to be defective and make a cost order along with expenses incurred in the preparation of revised accounts.[1437] But this provision has never been used as there has never been an application to the court for the revision of defective accounts.[1438] This is unsurprising when considering that the FRC will only pursue and hold accountable members of the accountancy, auditing and actuarial professions, but not directors of LPCs.

[1428] Walker-Arnott QC (Hon) (n.1389) 180.
[1429] Companies Act 2006, ss. 393, 414(1), 414(d), 419, 422; Ibid.
[1430] *Secretary of State for Trade and Industry v Thornbury* [2008] B.C.C. 768 (HC); *Secretary of State for Trade and Industry v Griffiths & others* [1998] B.C.C. 836 (CA).
[1431] Ibid.
[1432] *Secretary of State for Trade and Industry* (n.1430) [769] (HHJ Kaye QC).
[1433] *Secretary of State for Trade and Industry* (n.1430).
[1434] Ibid [842] (Lord Woolf MR).
[1435] *Secretary of State for Trade and Industry* (n.1430) [842] (Lord Woolf MR).
[1436] Companies Act 2006.
[1437] Companies Act 2006, s.456
[1438] Walker-Arnott QC (Hon) (n.1389) 182.

It is argued this is why the Kingman Review stated that the '…current position is inadequate in holding 'non-member directors to account for any part they have played in a serious reporting or audit-related failure.'[1439] This essentially means that requiring the holistic accountability of directors of LPCs, even if they authorise defective accounts, is not within the remit of the FRC. We now turn to consider the work of the FRC and how it stacks up against the elements of holistic accountability for directors.

6.2.4 Knowledge

The concept of knowledge is defined, as previously mentioned, by the IoD, as requiring directors to be '…sufficiently knowledgeable about the workings of the company to be answerable for its actions, yet able to stand back from the day-to-day management of the company and retain an objective, longer-term view.'[1440] An interesting point to note is that the IoD does not differentiate between finance directors and 'other' directors, and instead applies the above to the board as a whole. This suggests that while the FRC have an obvious interest in finance directors, who have accounting or financial qualification, falling into the regulatory remit of the FRC, all directors should have arguably the same level of knowledge, although it is accepted that those in finance or even HR roles will have more specialised technical knowledge. However, there is a failure in not granting the FRC a broader remit, of being able to speak with and hold the board accountable, meaning that the element of knowledge cannot be fully realised.

It is unacceptable that even though all directors are collectively required to prepare annual accounts[1441], with approval by the board as a whole[1442], accountability is, and only could be, imposed, by the FRC on a finance director, or equivalent. For example, if all directors are required to sign off financial accounts, then, they should all be held accountable. This is particularly important because knowledge regarding the workings and operations of the company is not held in a vacuum by financial directors only. LPC boards are also likely to have sales directors, in respect of the cost of sales, margins and marketing directors regarding marketing budgets, amongst others, which will also indirectly contribute to the financial accounting of the company. The board, as a

[1439] Kingman (n.325).
[1440] Institute of Directors (n.357).
[1441] Walker-Arnott QC (Hon) (n.1389) 180.
[1442] Companies Act 2006, ss. 393, 414(1), 414(d), 419, 422; Ibid.

collective, are a valuable source of knowledge which contributes to strategy, decision-making and ultimately the execution of decisions.[1443]

It is this collective knowledge which initiates conduct translating into financials and so input from all directors is required. No single director, regardless of whether a finance director, will have the comprehensive knowledge and information necessary for the preparation and submission of financial reports unless such information is provided by other directors and the board as a whole.[1444] As a result, the position taken by the FRC, targeting only finance directors which a financial qualification, when arguably they only have partial knowledge and enable non-accountability for the rest of the board, does not bring about holistic accountability for directors.

The second problem is that if finance directors with limited knowledge are only able to carry out their role with knowledge and information from the board, then it is unclear why the directors individually and as a whole are immune to investigation from the FRC. If the FRC is to conduct a meaningful investigation and obtain the knowledge and information required to ascertain why a failure has occurred in respect of corporate reporting, then the entire board should be interviewed by the FRC during an investigation as it has complete knowledge.

In 2018, the FRC signed off the quality of audit reports of café chain Patisserie Valerie, 6 months before it transpired that the company had overstated its financial position[1445], giving the auditors' work on accounts a '…clean bill of health…'.[1446] These examples make clear that it is unlikely that each of the accounts reviewed would have been done with the FRC having the knowledge required to conduct a satisfactory audit.

Indeed, the FRC stated in its 2020 annual statistics that a third of company audits fell significantly short of the required standards.[1447] Therefore, going by FRC's statistics,

[1443] Carmen Barroso-Castro and others, 'Board members' contribution to strategy: The mediating role of board internal processes' [2017] 23(2) European Research on Management and Business Economics 82, 82.
[1444] Ibid 85.
[1445] Jonathan Eley, 'Patisserie Valerie overstated total financial position by £94m' (The *Financial Times*, 16 March 2019) <https://www.ft.com/content/22691314-47ed-11e9-bbc9-6917dce3dc62> accessed 2 December 2020.
[1446] Tabby Kinder, 'Patisserie Valerie revealed £40m fraud after FRC cleared audit' (*The Times*, 14 January 2019) <https://www.thetimes.co.uk/article/caf-chain-revealed-40m-fraud-after-frc-cleared-audit-rkfj508dw> accessed 2 December 2020.
[1447] Financial Reporting Council, 'REPORT AND FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 MARCH 2020' (*Financial Reporting Council*, 16 July 2020) <https://www.frc.org.uk/getattachment/d3201f4b-2946-4e50-aa27-3a131ae17750/Annual-Report-2019-20.pdf> accessed 2 December 2020; Jim Armitage, 'Shock as audits of companies done by major accountants fall short in a third of

in at least one of the four investigations above, the FRC should have found a significant discrepancy, but it failed to do so. As a result, this suggests one of two things, either FRC is incompetent, or it simply is not able to obtain the knowledge needed to conduct a worthwhile investigation.

This is perhaps why the Kingman Review recommended that non-member directors, directors who are not within the current remit of the FRC, should follow the principles of the Audit Enforcement scheme with the same requirements for action to be taken.[1448] Kingman suggested that the successor to the FRC, ARGA, should set out the appropriate requirements or statements of responsibilities in regard to auditing and corporate reporting so that directors are individually accountable for their roles.[1449] The Audit Enforcement Scheme is operated differently when compared to the accountancy and actuarial scheme, perhaps because knowledge, both company-related and audit-related, will generally be, to some extent, homogenous. Some directors are likely to have broad knowledge in respect of company operations but more in-depth experience in the area of their responsibilities. For example, a marketing director is likely to have a deeper knowledge of the marketing function. Aside from this being a narrow form of accountability, it is not possible to enforce holistic accountability using a regime which was introduced to meet legislative requirements not related to accountability.

To make the proposal work, Kingman suggests that corporate reporting should include information about the individual responsibilities of directors. Perhaps, so they can be held accountable for the information they contribute to the board. This is not a viable solution because there is no specification as to the type of information and the degree of detail that would be required. It is also unclear whether directors would be required to explain their board responsibilities, provide an explanation of what information they provided or provide reasoning as to why they believed the corporate reporting was accurate. It is questionable whether directors would be willing to provide such information voluntarily. There is evidence to suggest that this is unlikely to work in practice.

In regards to the UK Corporate Governance Code's comply or explain mechanism, deviations from the Code have resulted in directors/boards engaging in the practice of boilerplating that is '…employing generic, non-specific statements that provide little

cases' (*The Evening Standard*, 14 July 2020) <https://www.standard.co.uk/hp/front/audit-accountants-big-four-ey-deloitte-kpmg-pwc-a4497566.html> accessed 2 December 2020.
[1448] Kingman (n.325).
[1449] Ibid.

information.'[1450] Boilerplate statements have been overly used by companies, with an FRC study in 2011 stating that '…some companies continued to give only perfunctory explanations - and at times no explanation at all.'[1451] There is nothing to suggest the same cannot, or will not occur for corporate reporting purposes. In the end, for directors, just as with the comply or explain mechanism, it may not be the case of ascertaining how much of a sufficient explanation, or knowledge, is given, but rather how much they can get away with.[1452]

6.2.5 Examination

The work of the FRC, undoubtedly, requires examination in the first instance. For example, when a complaint from the public or a referral from another organisation comes in, it is examined to ascertain the merits of the complaint/referral. However, many of the investigations that the FRC has conducted have been of questionable value.[1453] This is for several reasons, not least because it has taken 'an excessively consensual approach to its work.'[1454] From the inception of a complaint/referral and to their conclusion, there has been a lack of, if any, examination of not just finance directors but also of corporate accounts.[1455] The same can also be said of voluntary investigations undertaken by the FRC.[1456] However, it does not stop there.

There have also been failures to adequately pick up on poor audits arguably down to the lack of examination undertaken[1457], as well as the fact that the individuals who were/ are members of FRC committees could be deemed as having a conflict of interest in many instances resulting in, it is posited, issues to be 'brushed under the carpet.'[1458] The FRC is not as proactive as it claims to be. For example, it conducts Annual Quality Reviews (AQRs), which involve reviewing a sample of audits annually for large audit firms.[1459] However, this is done on a voluntary basis which does not allow examination to take place because directors can pick and choose what they provide auditors with. As the board is the one paying the auditors' fees, there is unlikely to be any questioning. There is a clear issue with AQRs because it does not consider

[1450] Andrew Keay, 'Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight?' [2014] 34(2) Legal Studies 279, 290.
[1451] Ibid.
[1452] Keay (n.1450) 292-293.
[1453] Business, Energy and Industrial Strategy Committee, *The Future of Audit,* (HC 2017-19, HC 1718) para 7.
[1454] Ibid para 221.
[1455] Business, Energy and Industrial Strategy Committee (n.1453) para 251.
[1456] Ibid.
[1457] Business, Energy and Industrial Strategy Committee (n.1453).
[1458] Ibid para 225.
[1459] Business, Energy and Industrial Strategy Committee (n.1453) para 249.

commercial judgements made, which require information from directors, to give an accurate reflection of the company's financial position, resulting in a '… further reflection of the opacity of current audit regulation.'[1460] Information provided by directors, to auditors, for corporate reporting is also problematic when it comes to hardcopy, electronic records and processes.

For a comprehensive examination to occur, it is fair to say that all three types of information need to be examined so that an audit trail, as well as a comprehensive view, can be achieved. But this does not seem to be the case with the FRC. For example, Carillion plc, the largest ever liquidation in UK corporate history, was able to have its electronic files 'augmented' in relation to audits carried out before its liquidation. This effectively meant that they were able to reframe electronic information to suit the audit.[1461] It can be said that this may be an isolated example, but in fact, this is just one example of a complete failure in competent examination.

There are other examples of where the FRC has failed to conduct a thorough examination. For example, the investigation of Halifax Bank of Scotland (HBOS) resulted in no action even though the investigation 'raised questions about the adequacy of the nature and extent of some of the audit procedures.'[1462] Less than 18 months before Carillion plc went into liquidation, the FRC's Financial Reporting Lab reported that the company's dividend disclosures were an example of 'good practice'.[1463] To make matters worse, the FRC reviewed its own review into the Patisserie Valerie which effectively means '… the regulator is…[also].. in effect, marking its own homework.'[1464] Reviews undertaken by FRC do not outline/detail the kind of examination that takes place, nor is any indication as to what documents are reviewed, how they are reviewed, what is accepted, what is questionable and what is rejected.

The mere fact that the FRC is reviewing its own work raises concerns about the lack of examination (and independence) especially when these reviews are not published.[1465] In essence, the lack of examination conducted by the FRC means that it … is much more likely to shut its eyes to questionable practices and roll over to have

[1460] Ibid para 251.
[1461] Business, Energy and Industrial Strategy Committee (n.1453) para 251.
[1462] Ibid para 223.
[1463] Stephen Bouvier, 'Carillion disclosures used as 'good practice' 12 months before bankruptcy' (*IPE*, 18 May 2018) <https://www.ipe.com/carillion-disclosures-used-as-good-practice-12-months-before-bankruptcy/10024749.article> accessed 7 December 2020.
[1464] Business, Energy and Industrial Strategy Committee (n.1453) para 224.
[1465] Ibid para 249-250.

its tummy tickled'[1466], 'happy to walk away after securing box-ticking disclosures of information'[1467]. It is also worth questioning whether there is an unwavering willingness not to examine auditing issues simply because of personal and/or professional relationships.

Out of the 109 respective members of the FRC board and its various committees, 34 are current, or former, partners of the big four accountants, PricewaterhouseCoopers (PwC), Deloitte, KPMG and EY.[1468] This represents 37 percent representation of 'the big four.' The majority of LPCs will usually have one of the big four to do their corporate reporting. Many of these firms develop such client relationships, wanting to remain as auditors, that there may be the temptation to overlook certain things or take matters at face value without examining them further. There have been various examples of this occurring such as Bank of Credit and Commerce International, after money laundering and widespread fraud was exposed, Tyco International Ltd where directors siphoned hundreds of millions to fund their lavish lifestyles and Enron, where company accounts through creative accounting suppressed huge debts off its balance sheets plunging it into liquidation.[1469] Therefore, it is worth questioning whether they would be examined and be willing to implicate their firm.

Indeed, two commentators opine that 'I don't think people overlook wrongdoing at clients because they are worried about their bottom line. But they make decisions that will enable them to sustain a relationship.'[1470] It is perhaps these decisions which contribute to the lack of examination. One PwC employee states that they will '[b]uild the relationships where the client would never want to leave PwC.'[1471] Perhaps that could also mean turning a blind eye to some questionable practices. Indeed, many firms prefer to '…kowtow to audit clients…rather than challenge them.'[1472] It is fair to say that partners are aware of this, but many may still have allegiances to their

[1466] Patrick Hosking, 'The Financial Reporting Council: a watchdog that doesn't bite' (*The Times*, 16 October 2017) <https://www.thetimes.co.uk/article/the-financial-reporting-council-a-watchdog-that-doesn-t-bite-ltqrjdh2k> accessed 7 December 2020.
[1467] Bouvier (n.1463).
[1468] Business, Energy and Industrial Strategy Committee (n.1453) para 225.
[1469] Sean Farrell, 'The world's biggest accounting scandals' (*The Guardian*, 21 July 2015) <https://www.theguardian.com/business/2015/jul/21/the-worlds-biggest-accounting-scandals-toshiba-enron-olympus> accessed 27 January 2021; George J. Benston and Al L. Hartgraves, 'Enron: what happened and what we can learn from it' [2002] 21(2) Journal of Accounting and Public Policy 105.
[1470] Madison Marriage and Jonathan Ford, 'A dangerous dance: when auditors are too close to the client' (*The Financial Times*, 28 August 2018) <https://www.ft.com/content/29a029a0-a7b2-11e8-8ecf-a7ae1beff35b> accessed 8 December 2020.
[1471] Ibid.
[1472] Marriage and Ford (n.1470).

current/old firms and based on this refuse to further challenge or examine concerns thoroughly.

6.2.6 Outcome

The FRC has been described as 'toothless'[1473] and 'useless'[1474]. This is particularly the case when it comes to outcomes. The entire purpose of outcomes is not just to pass a bad judgement that is a negative, a consequence, but rather it is to allow for a wide range of responses to the accounting process. However, it is realistic to be alive of the fact there will often be bad judgements. It also requires all parties to actually be held accountable. However, as previously stated, directors with no financial qualifications are not under the jurisdiction of the FRC. The other problem is, at least in the case of the FRC, that finance directors, more particularly auditors, see these bad judgments as an 'occasional rebuke or fine from the regulator…merely…as the cost of doing business.'[1475]

If outcomes from the FRC are seen as a mere business cost, it is fair to say that they do not hold any weight as a deterrent or provide a true accountability process. The FRC's '…plodding approach to investigation and its records of levying what are seen as Mickey Mouse fines'[1476], means that clearly, outcomes are not working if there is an inherent failure in them being deficient, or they are seen as so lenient that they implicitly encourage misconduct.

There are many examples of where the outcomes have simply been deficient, or where the FRC has not fully utilised the powers, they possess. For example, it is '…far too timid'[1477] and not '…interventionist.'[1478] This is demonstrated by the fact that in 2019/20, out of 88 cases, 31 were resolved using constructive engagement, a softer approach for arguably minor failings.[1479] Perhaps because the FRC was not willing to get

[1473] Madison Marriage and Jonathan Ford, 'Too close for comfort: the incestuous ties that bind auditors and watchdogs' (*The Financial Times*, 20 August 2018) <https://www.ft.com/content/e129b888-a088-11e8-85da-eeb7a9ce36e4> accessed 8 December 2020.
[1474] Ibid.
[1475] Marriage and Ford (n.1470).
[1476] Ibid.
[1477] Business, Energy and Industrial Strategy Committee (n.1453) para 223.
[1478] Ibid para 223.
[1479] Financial Reporting Council, 'Annual Enforcement Review 2020' (*FRC*, July 2020) <https://www.frc.org.uk/getattachment/d299042a-f14f-40eb-8889-7b44818cf53b/Annual-Enforcement-Review.pdf> accessed 10 December 2020.

entangled in litigation, or perhaps because that is an easier route to put matters to rest without enforcing different outcomes such as undertaking and exclusions.

It is also worth mentioning that an examination of the FRC's investigations between 2014 to 2020, found some common themes. For example, the FRC found that there was little audit partner involvement and over-delegation to junior staff, disorganised audit work, failure to look at the bigger picture, being too close to management, failure to involve the audit quality assurance partner and the use of the auditors' own experts and specialists.[1480] Interestingly, a recurring theme was '…failure to obtain sufficient appropriate audit evidence and failure to exercise professional scepticism.'[1481] The problem while there is an outcome, irrelevant of its strength, the majority of these themes also implicate arguably directors of LPCs, yet there is no examination, or outcome, for them.

There is also the issue of fines which seems to be the FRC's preferred way of dealing with investigations. In the majority of cases, it is clear that a fine is the outcome of the accounting process. For example, from 2017 to 2020, £74.9 million in fines pre-discount was imposed, with discounts of between 15 percent to 32 percent given for cooperation and early settlement. The FRC's consistent reliance on fines means that in 2017/18, out of a total of 11 financial and non-financial sanctions, only 2 resulted in exclusions.[1482] This means that in 9 cases, FRC did not fully utilise its powers, plumping for a less stringent outcome even though auditors are not worried about financial penalties especially if they see it as just a cost of doing business.

While Elizabeth Barrett, FRC director of enforcement, states that the purpose of sanctions is to 'improve behaviour'[1483] and '…deter bad behaviour and send a message to the market….'[1484] because '[a] large fine that has both a monetary and reputational impact is important.'[1485] This does not seem to be the case when considering that the Big Four accountancy firms increased revenues by 7 percent to £2.3 billion in 2019, a 1.7 percent increase in auditing income when compared to the previous year.[1486]

[1480] Sweet (n.1427).
[1481] Ibid.
[1482] FRC (n.1479).
[1483] Tabby Kinder, 'UK watchdog triples fines on accountancy firms' (*The Financial Times*, 31 July 2019) <https://www.ft.com/content/594c8bf2-b2e8-11e9-8cb2-799a3a8cf37b> accessed 10 December 2020.
[1484] Ibid.
[1485] Kinder (n.1483).
[1486] Tabby Kinder, 'Big Four's audit income jumps as firms raise prices' (*The Financial Times*, 16 October 2020) <https://www.ft.com/content/28ef75fe-9ad1-4317-84a7-96679f083a2d> accessed 10 December 2020.

It is also worth noting that the Kingman Review did recommend that while ARGA's remit should also include directors, irrespective of whether they hold financial qualifications, a wider range of sanctions should also be imposed. For example, requiring the company to make a 'rapid formal response' in regards to potential risks and recommending to shareholders that change is considered by the board, more particularly the Chief Executive Officer (CEO), Chief Financial Officer (CFO), chair of the audit committee, or reconsider payment of dividends.[1487] These outcomes are welcomed but they are only in respect of corporate reporting, and not a wide range of conduct that holistic accountability seeks to hold directors of LPCs accountable.

There are questions about the level of influence ARGA can initiate given such drastic changes, especially when considering that, generally speaking, shareholders are only ever concerned with the company's bottom line. It is fair to say that while these outcomes are bold, without statutory backing and shareholders having confidence in ARGA, as they are just recommendations, they are unlikely to be of any use in practice, given they are only likely to be targeted toward corporate reporting.

From the above, it is clear that the FRC cannot hold directors of LPCs holistically accountable, and this is not just from a legislative standpoint, which is also flawed. For example, the FRC can obtain information from directors who have financial qualifications and are members of the finance professions, but it overlooks the fact that all directors contribute to the compilation and approval of corporate reporting. The FRC is unable to effectively conduct examinations because it is held back by potential conflicts of interests coupled with the inability to obtain different types of information and is instead reliant upon auditors and companies to provide information for its checks. It is also the case that any outcome, especially for auditors, is just seen as the cost of doing business.[1488] It, therefore, fails to deter auditors from misconduct if they know all they will get is a 'slap on the wrist' from the FRC, as it will usually only result in a fine. Despite the common issues implicating directors of LPCs, there FRC is not able to examine their conduct or impose an outcome. Consequently, the FRC is an entity which is unfit to hold directors of LPCs holistically accountable.

6.3 The Pensions Regulator

The Pensions Regulator (TPR) is a non-departmental body sponsored by the Department for Work and Pensions (DWP). It replaced the Occupational Pensions

[1487] Ibid.
[1488] Marriage and Ford (n.1470).

Regulatory Authority on 6 April 2005. TPR's predecessor was established by the Pensions Act 1997 as the regulator of workplace pensions. Its role is to work with employers, and those that run pensions so the public can save for their retirement in confidence.

TPR aims to be '…a strong, visible regulator…[to]… build people's confidence in pensions.'[1489] TPR also makes sure that companies/employers put their employees in a pension scheme and pay money into it. It is responsible for ensuring that workplace pensions are run properly, reducing the risk of pension schemes ending up in the Pension Protection Fund (PPF), the lifeboat for the pensions of insolvent companies. It also makes sure that employers balance the needs of their pension schemes alongside the needs of their companies.[1490] The most important thing about the TPR is that it can pursue any individual, such as employers, controlling shareholders and other companies directly or indirectly under control.[1491]

TPR's 2020/2021 priorities were supporting pension schemes to deliver benefits realised through the COVID-19 pandemic and protecting all pension savers and all types of pension schemes through active and targeted regulatory interventions.[1492] It also includes: providing clarity, and promoting high standards of trusteeship, governance and administration, as well as intervening where necessary so pensions can achieve funding delivery on pension promises. TPR is also to ensure that employees have the opportunity to save into a workplace pension through automatic enrolment, and it is to continue to build a regulator skilled at meeting the future challenges faced.[1493]

6.3.1 TPR Functions

TPR's ultimate function is its legal obligation to ensure compliance with employer automatic enrolment duties and relevant employment safeguards as outlined in the Pensions Act 2008 such as the protection of employment rights[1494] and protection of employee benefits of workplace pensions schemes.[1495] TPR's regulatory approach is

[1489] The Pensions Regulator, 'What we do and who we are' (*The Pensions Regulator,* not known) <https://www.thepensionsregulator.gov.uk/en/about-us/what-tpr-does-and-who-we-are#5fed9f778190400487a4d0c86a4be594> accessed 10 December 2020.
[1490] Ibid.
[1491] Mark Stamp, 'Sir Philip Green: villain or victim? An analysis of the circumstances leading up to the administration of the BHS Group' [2017] 38(6) Company Lawyer 180, 183.
[1492] The Pensions Regulator (n.1489).
[1493] Ibid.
[1494] Pensions Act 2008, s.55.
[1495] The Pensions Regulator, 'Our approach to regulating' (*The Pensions Regulator,* not known) <https://tpr-prdsitecore-uksouth-cd.azurewebsites.net/en/about-us/how-we-regulate-

the '…bedrock of…[its]… operating model.'[1496] It focuses on setting clear standards and ensuring that employers understand what they are being measured against.[1497] It also looks to identify risks early through monitoring, supervision and proactive interventions.[1498]

TPR uses regulatory interventions as a way of driving compliance, as well as working with stakeholders such as the Financial Conduct Authority (FCA), Pension Protection Fund (PPF) and Her Majesty's Revenue & Customs (HMRC).[1499] TPR uses supervision to monitor pension schemes which means that they have contact with employers, among others. This enables TPR to monitor pensions schemes, outline what is expected and act quickly where concerns are raised, taking into account the Regulators' Code as set out in the Legislative and Regulatory Reform Act[1500].

6.3.2 TPR Powers

TPR's powers fall into three categories. They are information gathering, regulatory and enforcement action and anti-avoidance powers.[1501] To gather information about potential risks, TPR uses employer declarations/pension schemes/returns, whistleblowing reports, funding information and pension documents and notifiable event reports. The Pensions Act[1502] places a duty on employers and trustees to notify TPR when certain events occur as contained in the Pensions Regulator (Notifiable Events) Regulations.[1503] There are several notifiable events but it is worth noting that the main purpose of the notifiable events report is to give TPR notice of a potential call on the Pension Protection Fund.[1504] This is particularly so when the employer becomes insolvent or suffers a qualifying insolvency event, and where the level of funding in the pension scheme is below the level that would be required to be the same as the compensation offered by the PPF.[1505] TPR also does its own research and analysis as well as publishing thematic reviews.[1506] It also shares information with other public bodies which may have an interest such as the PPF, HMRC, DWP and FCA.[1507]

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and-enforce/our-approach-to-regulating#8ffd78a4a25d431aa523dbe4fdd451d3> accessed 11 December 2020.

[1496] Ibid.
[1497] The Pensions Regulator (n.1495).
[1498] Ibid.
[1499] The Pensions Regulator (n.1495).
[1500] Legislative and Regulatory Reform Act 2006.
[1501] The Pensions Regulator (n.1495).
[1502] The Pensions Act 2004, s.69.
[1503] The Pensions Regulator (Notifiable Events) Regulations 2005.
[1504] The Pensions Regulator (Notifiable Events) Regulations 2005, reg 2.
[1505] The Pensions Regulator (Notifiable Events) Regulations 2005.
[1506] The Pensions Regulator (n.1495).
[1507] Ibid.

TPR's anti-avoidance powers can be broken down into two key powers: contribution notices[1508] (CN) and financial support directions (FSD)[1509] which are used against employers and parties connected or associated with the employer. A broad and open category. The powers are used in situations where actions are undertaken to stop the triggering of or recovery of all or part of a section 75 debt due to the pension scheme to secure pension members' benefits in full.[1510]

A section 75 debt is triggered when an employer ceases to employ active members of the pension scheme at a time when at least one other employer continues to employ active members. The actions must cause a 'material detriment' to the pension scheme's ability to provide member benefits and the employer is not able to provide the necessary resource, resulting in support being put in place for the pensions scheme.[1511] The purpose of the two powers is to not just protect member benefits, but also to reduce the number of compensation claims to the PPF.[1512] As with the FRC, we now turn to consider the work of the TPR and how it stacks up against the elements of holistic accountability for directors.

The Determinations Panel is a committee of TPR and deals with all matters referred by TPR investigation teams on the use of TPR powers. It operates operating independently[1513], with separate membership and legal support.[1514] Its role is to make independent and impartial decisions based on the investigation at hand.[1515] The panel is not involved in the investigation of a case. The panel consists of, appointed by the TPR, a chair and six individuals nominated by the chair.[1516]

6.3.3 Honesty & Legal Obligation

For TPR, honesty as an element of holistic accountability is problematic. For example, TPR's work depends on directors to volunteer information and be honest on their own accord. A large part, if not all, of TPR's compliance work, is reliant upon the Notifiable

[1508] The Pensions Act 2004, s.38.
[1509] The Pensions Act 2004, s.43.
[1510] The Pensions Regulator, 'Anti-avoidance powers' (*The Pensions Regulator*, not known) <https://tpr-prdsitecore-uksouth-cd.azurewebsites.net/en/about-us/how-we-regulate-and-enforce/anti-avoidance-powers#4ba219d55bfe4a32be9160ab603ad4f5> accessed 11 December 2020; The Pensions Act 1995, s.75.
[1511] Ibid.
[1512] The Pensions Regulator (n.1510).
[1513] The Pensions Regulator, 'Determinations Panel' (*The Pensions Regulator*, not known) <https://tpr-prdsitecore-uksouth-cd.azurewebsites.net/en/about-us/how-we-regulate-and-enforce/determinations-panel> accessed 11 December 2020.
[1514] Ibid.
[1515] The Pensions Regulator (n.1513).
[1516] Ibid.

Events Regime (NER)[1517], which puts the onus on directors to inform TPR when there has been a material change affecting the company pension schemes. It is posited that directors of LPCs are unlikely to notify TPR of material changes, as doing so is likely to be further down their list of priorities. Given this state of affairs, from the case studies discussed in Chapter 4, in particular BHS Ltd, it is clear that events tend to outrun the TPR. [1518] It is submitted, that directors are not likely to self-report and even if they were to, it is highly likely that the pension schemes would end up falling under the PPF.

TPR is also hesitant in challenging directors of LPCs when it comes to making payments to the company pension schemes. This is particularly the case when it comes to arranging payment proposals to plug pension scheme deficits. TPR fails to ascertain the degree of honesty of directors as to the amount they can pay into under-funded pension schemes. This has effectively resulted in TPR accepting proposals that are in excess of 10 years in length, despite evidence suggesting that such a timeframe can be shortened.

In regards to legal obligation, it is laudable that TPR can pursue any individual, from directors, and shareholders to connected companies, either directly or indirectly.[1519] This is beneficial because it not only expands legal obligations to de facto directors, amongst others, but it provides the perception that no individual or company is safe from being held liable for the mismanagement of pension schemes. Unfortunately, this is as good as it gets because TPR is only focused on directors' misconduct and/or mismanagement of pension schemes. It is submitted that the majority of cases involving directors of LPCs are unlikely to involve pension schemes and so this is a very narrow form of legal obligation as a responsibility and not the kind of accountability that holistic accountability intends for directors of LPCs.

6.3.4 Knowledge

TPR has several methods to extract knowledge from the board, exemplified by the information powers it currently holds. However, as with the FRC, it is quite narrow as it only pertains to information regarding the pension scheme(s) operated by the employer. Even then, TPR has been criticised as being 'reactive'[1520], 'slow-moving'[1521]

[1517] The Pensions Regulator (Notifiable Events) Regulations 2005.
[1518] Shah (n.645).
[1519] Stamp (n.1491).
[1520] Ibid 184.
[1521] Stamp (n.1491) 184.

and not showing 'more urgency'[1522] in engaging with company boards and, if any, pension scheme trustees. TPR has also been criticised as not having '…help[ed to] find a solution, for whatever reason'[1523] and its regulatory process '…not fit for the current commercial world'.[1524] Indeed there are many examples of where TPR has failed to obtain the necessary knowledge from directors which has led to it failing to have a '…more interventionist approach.'[1525]

TPR's information powers are arguably heavily reliant upon the notifiable events regime (NER).[1526] The NER requires directors, the board, to provide information under the NER, rather than TPR proactively attempting to obtain information from companies and which could affect the pension scheme(s). This enables the board to provide just enough information to meet its obligations, but not enough for TPR to have a good understanding or act decisively. By putting the obligation on the board, TPR can effectively be out of the loop on receiving or obtaining key information.

For example, the sale of BHS to Retail Acquisitions Ltd was only uncovered by TPR when it was reported by Sunday Newspapers even though it had been actively engaging with the company and its pension scheme trustees to gain further information.[1527] The sale would have had a material impact on the pension schemes, but even with the NER in place, TPR was unable to extract this information from the board. It also begs the question as to what other knowledge, or information, TPR was lacking because directors were able to evade information requests.

The increased information powers, part of the Pension Scheme Act 2021, are unlikely to bear fruit when it comes to the need for the holistic accountability of directors of LPCs, not least because they only focus on a company's pension scheme(s). For example, powers to compel individuals to attend an interview[1528] are likely to also have the presence of legal counsel limiting the ability of TPR to extract meaningful information. The ability for TPR to enter company premises is not adequate as it will only allow them entry, it is unclear if TPR would be able to take any documentation away or what exactly TPR would do once they have entered the premises. It is fair to

[1522] Ibid.
[1523] Work and Pensions and Business, Innovation and Skills Committee (n.392) para 46.
[1524] Ibid.
[1525] Stamp (n.1491) 184.
[1526] The Pensions Regulator (Notifiable Events) Regulations 2005.
[1527] Caroline Overton, 'TPR and the BHS pension schemes – (not quite) the last word…' (*Pension Talk*, 6 July 2017) <https://www.pensionstalk.co.uk/tpr-and-the-bhs-pension-schemes-not-quite-the-last-word/> accessed 14 December 2020.
[1528] Pensions Scheme Act 2021.

say that the majority of boards, of LPCs, out of courtesy would allow TPR to enter but providing TPR with information would be another matter.

An extension of NER requiring detailed information[1529] is commendable, but it only works in practice if is coupled with evidence to back up the information provided, which is something the proposed powers do not encompass, making it highly like that these powers are unlikely to enable the TPR to be provided with the information they need to conduct a fruitful investigation.

6.3.5 Examination

Aside from not using its information powers to extract knowledge from directors, TPR has also failed to examine the behaviour of directors, as well as the circumstances that have led to the pension scheme(s) being jeopardised. For example, TPR has been criticised as having '…a passive, reactive mindset…[t]hey do not seek to influence corporate decision-making with the realistic threat of intervention.'[1530] It is also '…unable and unwilling to take adequate steps to ensure that pensions promises…[are]…met.'[1531] These criticisms hold true when considering that the House of Commons Work and Pensions Committee acknowledged that TPR intervention is '…clunky and can be concentrated at stages when a scheme is in severe stress or has already collapsed.'[1532] This does not do anything to aid holistic accountability, even in respect of pension schemes.

There is an unwillingness not just to question, but for TPR to get involved early on in the process so that pension schemes and their benefits can be salvaged. This failure in regard to examination is down to two key issues: the first being a failure to question and examine the actions of directors that have led to the pension scheme(s) becoming exposed and the second: accepting the proposed actions of directors without further examination of whether they could provide further reparations to the scheme(s).

TPR has failed to consider the actions of directors which have arguably resulted in endangering the pension scheme(s). For example, in Carillion's case, between 2011 to 2016, it paid out £441 million in dividends compared to £246 million in pension

[1529] Pensions Scheme Act 2021
[1530] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) para 214.
[1531] Ibid para 180.
[1532] Work and Pensions Committee, *Defined benefit pension schemes,* (HC 2016-17 HC 55) 4.

scheme deficit payments.[1533] TPR failed to offer any form of examination over the company's dividend policy, despite giving the company guidance stating that the company should consider dividend policy as part of the pension scheme recovery plan.[1534] It is worth noting that TPR signed off pension valuations with funding plans on two occasions, in 2008 where there was a deficit of £327 million and in 2011 where there was a deficit of £617 million.[1535]

TPR's defence, in allowing dividend payments to take place was in meeting its statutory objective of lessening the adverse effect of the growth of employers in respect of pension regulation.[1536] This is despite the chairman of the pension scheme trustee's understanding from the finance director, Richard Adam, that funding pension schemes was a 'waste of money'.[1537] If TPR had properly examined the actions of directors then the damage could have been minimised. Instead, '…Carillion's pension schemes were not dumped as part of a sudden company sale; they were underfunded over an extended period in full view of TPR.'[1538]

The questioning and examination of proposed actions are also problematic. TPR is an '…organisation where a tentative and apologetic approach is ingrained.'[1539] The entire purpose of TPR, it is argued, is to ensure that employer-sponsored pension schemes do not end up in the PPF lifeboat making the UK taxpayer liable for funding the statutory member benefits. However, it seems unconcerned by this because there has been a complete failure to either question or follow up on actions proposed by directors to make good on deficient pension schemes, or to even check those actions had indeed been carried out.

For example, at least in Carillion's case, TPR only decided to launch an investigation once the company had gone into liquidation. Despite knowing, for several years, the difficulty placed upon the company's pension scheme(s), it only decided to open a full investigation when there was no realistic chance that it would '…in any way protect

[1533] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) para 18.
[1534] Ibid para 139.
[1535] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) para 25-30.
[1536] Ibid para 139.
[1537] Nick Reeve, 'Carillion: TPR could pursue former directors for recoveries' (IPE, 23 February 2018) <https://www.ipe.com/carillion-tpr-could-pursue-former-directors-for-recoveries/10023371.article> accessed 20 July 2022.
[1538] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) para 187.
[1539] Ibid.

pensioners from being consigned to the PPF.'[1540] This not only enabled directors to do as they wish without checks and balances but also allowed them to cover their actions until of course the company became so unsustainable that it was forced to be put in liquidation.

6.3.6 Outcome

As a result of its lack of knowledge and examination, the outcomes of TPR's investigations are less than satisfactory, with some arguing that'…its bark is worse than its bite.'[1541] This is certainly true for the majority if not all of the cases it has investigated. It can be argued because of the first two elements (knowledge and examination), TPR has not been able to exercise its powers as well as it could to save pension schemes and member benefits. The number of cases it has investigated has declined over the years, from 263 cases in 2005/06 to 10 in 2016/17[1542], perhaps because LPCs, in particular, have realised that '…threats from TPR are hollow: it is a paper tiger…. [because]…[t]here is little incentive…to avoid being subject to powers that TPR has very rarely deployed with success.'[1543]

Holistic accountability, although not confined to the narrow space of pensions, is based on the ability to hold directors of LPCs accountable and ensure a wide range of outcomes are deployed. Although, it can also be argued that the purpose of outcome is to enhance accountability more generally. Where this is not possible, or there is an unwillingness to do so means that the accountability process has failed.

Pension scheme members have increased arguably with an increase in pension schemes, assisted by the Pensions Act and automatic enrolment.[1544] In 1953 the private sector had 3.1 million active pension scheme members, but in 2018 this increased to 11 million.[1545] Despite this increase, TPR's investigations have not increased, and outcomes have not fared any better. Since its inception, TPR has only issued three warning notices, not seen a single case through to the imposition of a

[1540] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) para 143.
[1541] Overton (n.1527).
[1542] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) para 185.
[1543] Ibid.
[1544] Pensions Act 2008, s.3.
[1545] Kevin Buckthought, 'Occupational pension schemes in the UK' (*Office of National Statistics*, 13 January 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/pensionssavingsandinvestments/datasets/occupationalpensionschemessurvey> accessed 20 July 2022.

contribution schedule, an alternative to one agreed upon by the company and the pension scheme, its section 231 power.[1546]

TPR seems to be unwilling to impose an outcome. Its biggest test of justifying its existence came in the form of Carillion and even then, it threatened the company seven times but never turned its warnings into action. These warnings were made in 2013 and 2014, so there is a chance that the damage to the pension schemes may have been limited had TPR made good on its warnings.

TPR's biggest alleged success came from BHS. It was clear from the investigation and parliamentary report that followed after its demise that '[t]he main purpose of the sale was to postpone BHS' insolvency to prevent a liability to the schemes falling due while it was… owned by the Green family, and/or that the effect of the sale was materially detrimental to the schemes.'[1547] If the examination element of holistic accountability had been carried out properly, this would have been evident to TPR early on in their investigation. While TPR asserted that this was a success, the fact is that the situation was so dire that MP Ian Wright stated that 'Green took the rings from BHS's fingers, beat it black and blue, starved it of food and water, put it on life support, and then wanted credit for keeping it alive.'[1548] It was after public outcry and condemnation that Sir Philip Green agreed to contribute £363 million to the BHS pension scheme(s).

The Business, Energy and Industrial Strategy and Work and Pensions Committees were quite clear that '…Sir Philip Green's settlement with the BHS pension schemes as evidence that TPR's anti-avoidance powers can be effective' was not accurate because '…that settlement was driven primarily by considerable public, press and parliamentary pressure.'[1549] This further demonstrates that TPR failed in various ways not least because they could not even enforce their own warnings, but because they had their own work done for them by the press and Parliament.

It is not clear what using further powers in respect of outcomes is likely to achieve when existing powers are rarely being used. While the new powers are commended as laudable outcomes, financial penalties of £1 million are likely to be seen as small

[1546] Pensions Act 2004, s.231.
[1547] BBC News, 'Sir Philip sold BHS to dodge pension cost, says regulator' (*BBC News*, 27 June 2017) <https://www.bbc.co.uk/news/business-40421414> accessed 21 December 2020.
[1548] Zoe Wood, 'MPs back motion to strip Sir Philip Green of his knighthood' (*The Guardian*, 20 October 2016) <https://www.theguardian.com/business/2016/oct/20/philip-green-labelled-billionaire-spiv-in-commons-debate-on-knighthood> accessed 21 December 2020.
[1549] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) para 186.

change and that is on the basis that TPR will pursue such a claim which going by its track record is not likely.[1550] It is also worth noting that the civil powers held by the TPR are under-used. Therefore, the introduction of criminal powers, which require a higher burden of proof will probably not be utilised. While they may act as a deterrent for (some) LPC directors, it is good to be used as such, if at some point when situations demand, the deterrent is used.[1551]

6.4 The Key Problems

For the FRC and TPR, BHS and Carillion were a '…test of the regulatory system'.[1552] But because this regulatory system focuses solely on financial reporting and pension schemes, it cannot even hold directors accountable in respect of financial reporting and pension schemes. Therefore, for holistic accountability, something different and something more than the current set-up is needed, not least because these regulators do not execute the holistic accountability criteria. There have been calls for government reform but as discussed previously '…its responses have been cautious, largely technical, and characterised by seemingly endless consultation.[1553]

TPR theoretically has some strong powers. But there are several concerns evident when it comes to holding directors of LPCs holistically accountable. Firstly, TPR fails to provide the deterrent needed, not least because TPR's work is focused exclusively on pension schemes. Secondly, TPR is reliant upon the NER, reducing its ability to be proactive because of its dependency on companies to notify them of material effects. TPR fails to adequately question and examine the conduct of directors which may have led to a material detriment and instead accepts what the board says without question. Thirdly, there is also a tendency to start examining the conduct of directors when it is too late, often when the pension scheme needs to go into PPF.

Finally, while TPR will have been actively investigating the pension schemes, but it is unwilling to impose an outcome, demonstrated by the fact that it has never imposed a contributions schedule. The success of the BHS pensions schemes getting a cash injection from Sir Philip Green is wrongly attributed to the TPR, as it was a result of public outcry. It is not clear what further powers will contribute to TPR, when the very

[1550] Pensions Scheme Act 2021.
[1551] Pensions Scheme Act 2021.
[1552] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) para 193; Pensions Scheme Act 2021.
[1553] Bouvier (n.1463).

foundation of the powers, the TPR, is inherently weak in holding directors of LPCs holistically accountable.

6.5 International Examples

Despite the calls for reform and condemnation of such collapses, neither the government nor any political party, has outlined what is needed for accountability to occur. For accountability, it is clear that the current set-up is not fit for purpose but there is nothing specified by the government as to what is required for (holistic) accountability to occur in respect of directors of LPCs. It seems other jurisdictions have taken a different approach coupled with differing remits and powers on enforcing accountability for directors of companies. In the US and Australia, state regulators have varied responsibilities which enable accountability to take place. Indeed, Ramsay and Saunders state that the Australian Securities & Investment Commission (ASIC)'…has had a significant impact on governance standards applicable to directors and officers of companies'[1554] and Doty describes the US Securities Exchange Commission (SEC) as a ''standard-setter.' [1555]

This is significant because both jurisdictions have many similarities to the UK. For example, the corporate cultures are similar as well as having a common law legal system, much of which was exported from the UK. It is, therefore, worth exploring the makeup and nature of these regulators as this can form an outline of the kind of regulator that may be required to enforce holistic accountability on directors of LPCs.

6.6 Securities & Exchange Commission

The SEC was established under the Securities Exchange Act.[1556] It has a three-fold mission of protecting investors, '…maintain fair, orderly, and efficient markets; and facilitate capital formation.'[1557], In essence, it acts as an accountee for companies, given its responsibilities. It must be noted from the outset that the SEC is a large organisation and not everything it does is directly, or indirectly, relevant to the enforcement of holistic accountability of directors of LPCs. Therefore, only elements

[1554] Ramsay and Saunders (n.1349).
[1555] James R. Doty, 'The Role of Securities and Exchange Commission in an Internationalized Marketplace' [1992] 60(6) Fordham Law Review 77, 79.
[1556] Securities Exchange Act 1934.
[1557] US Securities and Exchange Commission, 'About the SEC' (*US Securities and Exchange Commission*, 22 November 2016) < https://www.sec.gov/about.shtml> accessed 24 December 2020.

which have a direct impact, and which have the potential to be utilised in the UK will form the basis of discussion.

6.6.1 SEC Functions

The SEC has five divisions: corporate finance, investment management, examinations, trading and markets, economic and risk analysis, and enforcement.[1558] In particular, the examinations divisions are tasked with improving compliance, preventing fraud, monitoring risk and informing policy. This is then used by the SEC to pursue misconduct amongst other things.[1559] The enforcement division conducts investigations into violations of securities law and prosecutes civil suits in the federal courts as well as its administrative proceedings.[1560]

The focus of the organisation is on four key areas: transparency, enforcement, capital adequacy and disclosure.[1561] Transparency is supported by the SEC because it enables market participants to be provided with market data to assess securities and make informed market decisions.[1562] Its enforcement actions also mean that, when individuals seek to employ or take advantage of fraudulent practices, it can protect investors and US markets through law enforcement both domestically and through international cooperation.[1563] It ensures that firms have capital adequacy so that firms can wind down without causing damage to other market participants or reducing confidence in the securities market.[1564] Disclosures relate to the SEC's resolve in accounting disclosures that enable sound investment decisions, in this regard it operates similarly to the FRC in the UK, and foster quality accounting standards which are of adequate quality so informed investment decisions take place.[1565]

There is a common misapprehension that only US public companies are subject to SEC oversight as it relates to securities, however, this is not accurate. Those

[1558] US Securities and Exchange Commission, 'SEC Divisions Homepages' (*US Securities and Exchange Commission*, 17 December 2020) <https://www.sec.gov/divisions.shtml> accessed 24 December 2020.
[1559] US Securities and Exchange Commission, 'Divisions of Examinations' (*US Securities and Exchange Commission*, 16 April 2020) < https://www.sec.gov/exams> accessed 24 December 2020.
[1560] US Securities and Exchange Commission, 'Divisions of Enforcement' (*US Securities and Exchange Commission*, 14 April 2015) < https://www.sec.gov/page/enforcement-section-landing> accessed 24 December 2020.
[1561] Doty (n.1555).
[1562] Ibid 79-80.
[1563] Doty (n.1555) 81.
[1564] Ibid 84-85.
[1565] Doty (n.1555) 86-89.

companies that are equivalent to LPCs also are subject to SEC oversight, albeit only in relation to securities, because it has the authority to investigate all companies which seek to raise capital from US investors.[1566]

Interestingly the anti-fraud provisions contained in statute[1567], are wide-ranging covering securities not listed on a national exchange, regardless of whether they are public or private, meaning that responsibility lies with all companies for any false/misleading statements made as part of the offering process.[1568] On average, in a year, the SEC investigates 11 percent of publicly listed companies.[1569] As the SEC looks to protect US investors, the term is defined broadly, thus covering directors who purchase shares in private companies. It is noted that the SEC is responsible for enforcing insider trading, market manipulation rules, regulations for broker-dealers, regulations for investment advisors, and disclosures by mutual funds and other investment funds, amongst others. This where it focuses the bulk of its enforcement activities. However, it has the ability to take enforcement action against (large) private companies, although rare, this is usually in respect poor or inaccurate disclosure during a securities offering or poor annual reporting.[1570]

6.6.2 SEC Powers

The SEC can obtain information regarding possible investigations from a variety of sources. It can use market surveillance activities, tip-offs, complaints referrals from other agencies and media reports.[1571] The powers of the SEC are where it stands out, in comparison to other state regulators. It can also interview witnesses and review records. SEC staff can also compel witnesses by subpoena to testify and produce

[1566] Nicholas Bolton, 'SEC enforcement is not just a public company concern: What private companies need to know' (*Willis Towers Watson*, 18 November 2019) <https://www.willistowerswatson.com/en-US/Insights/2019/11/sec-enforcement-is-not-just-a-public-company-concern-what-private-companies-need-to-know#:~:text=your%20D%26O%20policy.-,Private%20companies%20are%20subject%20to%20SEC%20oversight%20too%2C%20and%20this,raise%20capital%20from%20U.S.%20investors.> accessed 24 December 2020.
[1567] Securities Act 1934, s.10.
[1568] Bolton (n.1566).
[1569] Terrance Blackburne and others, 'Undisclosed SEC investigations' (2020) Jacobs Levy Equity Management Center for Quantitative Financial Research Paper, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507083> accessed 29 December 2020.
[1570] US Securities and Exchange Commission, 'SEC Announces Enforcement Results for FY22' (*US Securities and Exchange Commission*, not known, 2022) <https://www.sec.gov/news/press-release/2022-206> accessed 10 May 2023.
[1571] US Securities and Exchange Commission, 'How Investigations Work' (*US Securities and Exchange Commission*, 27 January 2017) < https://www.sec.gov/enforce/how-investigations-work.html> accessed 25 December 2020.

records, data and other relevant data.[1572] Interestingly, the SEC can by, having a warrant and affidavit, enter company premises and seize original records.[1573] As companies in the US do not have the privilege of the Fifth Amendment right to not self-incriminate, theoretically speaking, information pertaining to the company can also, by extension implicate company directors.[1574]

The powers it has can be broken down into civil action and administrative action.[1575] In respect of civil action, it can apply for an injunction to prohibit acts or practices that violate the law or SEC rules.[1576] It can seek penalties or return of illegal profits (disgorgement) with the ability of the court to disqualify or suspend a director.[1577] It can also apply to have an individual's assets frozen by a federal court on an emergency basis so that as much money as possible can be returned.[1578]

In regard to administrative action, cases are heard by an administrative law judge (ALJ), independent of the SEC.[1579] The ALJ will preside over the hearing, consider all the evidence put forward and recommend a sanction.[1580] Both the SEC and the defendant can appeal either some or all of the decisions. Such sanctions can include cease and desist orders, suspension/revocation, disqualification/censures as well as civil penalties and disgorgement.[1581] The work of the SEC, as accountees, requiring accounting will now be considered through the elements of holistic accountability.

6.6.3 Honesty & Legal Obligation

The SEC, through its whistleblowing programme, can ascertain whether directors of LPCs are being honest.[1582] This is backed up by the fact that financial incentives

[1572] Ibid.
[1573] Gabriel L. Imperato, Esq., 'What to do when the government knocks in the United States' (*Corporate Compliance*, 18-22 March 2016) <https://assets.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/EuroCEI/2016/301_A4_2.pdf> accessed 25 December 2020.
[1574] Ibid.
[1575] US Securities and Exchange Commission, 'Divisions of Enforcement' (*US Securities and Exchange Commission*, 27 January 2017) < https://www.sec.gov/enforce/how-investigations-work.html > accessed 24 December 2020.
[1576] Ibid.
[1577] US Securities and Exchange Commission (n.1575).
[1578] US Securities and Enforcement Commission, '2020 Annual Report Division of Enforcement' (*US Securities and Enforcement Commission*, 2 November 2020) <https://www.sec.gov/files/enforcement-annual-report-2020.pdf> accessed 28 December 2020.
[1579] US Securities and Exchange Commission (n.1575).
[1580] Ibid.
[1581] US Securities and Exchange Commission (n.1575).
[1582] US Securities and Enforcement Commission, 'SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program' (*US Securities and*

offered by the SEC to whistleblowers only assist in strengthening their case against directors because it enables the SEC to have an avenue to substantiate possible misconduct claims. The value of a financial incentive also depends on the level of the economic value of potential misconduct. Therefore, whistleblowers will want to ensure that they provide as much information as possible to obtain the maximum financial reward. In addition, the SEC's ability to compel witnesses to testify and produce records[1583] means that it can determine whether the directors' version of events is honest or not.

Moving to legal obligation, the SEC can pursue a wide spectrum of misconduct. Whilst it is accepted that not all of the SEC's remit is likely to apply to directors of LPCs, the fact is that this wide spectrum enables it to pursue directors for many different types of misconduct, rather than just one particular aspect. In doing so, it enforces legal obligation on directors of LPCs, because if directors of LPCs investigated, the SEC may not pursue them for the reasoning of the original investigation but may do for other misconduct which comes to light, under their remit.

6.6.4 Knowledge

To extract knowledge from directors, the SEC has many tools at its disposal. For example, in 2020, the SEC received over 23,0000 tip-offs, complaints and referrals.[1584] However, it is the whistle-blower programme that is the most pertinent in ensuring the efficacy of the SEC. It was created to '…incentivize individuals to report high-quality tips to the Commission and assist the agency in its efforts to combat wrongdoing and, as a result, better protect investors and the marketplace.'[1585] The parameters of the programme are contained in statute.[1586] It encourages individuals to report possible violations of law by protecting their identity and not disclosing any information which could compromise their identity being known.[1587] Perhaps because employees are in the best position to expose and avert violations.[1588] There is further encouragement

Enforcement Commission, 23 September 2020) <https://www.sec.gov/news/press-release/2020-219#:~:text=The%20SEC's%20whistleblower%20program%20was,protect%20investors%20and%20the%20marketplace.> accessed 28 December 2020.

[1583] US Securities and Exchange Commission (n.1571).

[1584] US Securities and Enforcement Commission (n.1578).

[1585] US Securities and Enforcement Commission (n.1582).

[1586] Dodd–Frank Wall Street Reform and Consumer Protection Act 2010.

[1587] Dodd–Frank Wall Street Reform and Consumer Protection Act 2010, ss. 748, 922, 924.

[1588] Iskra Miralem, 'The SEC's Whistleblower Program and Its Effect on Internal Compliance Programs ' [2011] 62(1) Case Western Reserve Law Review 333, 336-337.

because a whistleblower report which leads to successful enforcement puts the whistle-blower in line for a financial reward.

Since the programme was established in 2012, circa US$676 million has been paid to 108 individuals. Neither the budget of the SEC nor government funds are affected by such payments because the programme is funded entirely by financial penalties paid by violators which are held in a scheme called the Investor Protection Fund (IPF).[1589]

The SEC's ability to obtain knowledge from directors is also enhanced by its ability to interview witnesses and obtain records by subpoena.[1590] This is because the SEC is not required to demonstrate that the required documents are actually relevant to an investigation, but rather show 'reasonable belief' that the records sought are relevant to the investigation, which means that anything that touches a matter under investigation is fair game to force.[1591] It is also worth noting that in actions filed to enforce subpoenas, US federal courts have also always ruled in favour of the SEC[1592], perhaps because showing 'reasonable belief' is a low threshold that the SEC can satisfy. The ability for the SEC to turn up to company premises with a warrant to enter and seize records[1593] is also likely to enable knowledge to be obtained because it not only catches a company and its directors off-guard but allows for the SEC to obtain wide-ranging information in its original form, as it is likely that any warrant will be broad to enable for the comprehensive seizure of information.

An interesting point is that despite a company being a legal person, the inability of it to claim the Fifth Amendment of the right not to self-incriminate[1594] means that directors who use the company as a vehicle for misconduct are like to get caught out because of the SEC's ability to obtain information which could implicate them.

6.6.5 Examination

The problem for the SEC is that the examination is ex-post meaning once a claim of misconduct has been received, rather than an active ex-ante approach. Issacharoff

[1589] US Securities and Enforcement Commission, 'SEC Issues Record $114 Million Whistleblower Award' (*US Securities and Enforcement Commission*, 22 October 2020) <https://www.sec.gov/news/press-release/2020-266> accessed 25 December 2020.
[1590] US Securities and Exchange Commission (n.1571).
[1591] *Feiner v. U.S. S.E.C.,* 914 F. Supp. 2d 474, 478 (S.D.N.Y. 2012) (US DC); Daniel Nathan and others, 'Jay-Z thrusts SEC subpoena enforcement into the spotlight: A look at recent trends and considerations' [2019] 2(3) Journal of Financial Compliance 284, 285.
[1592] Ibid.
[1593] Imperato, Esq. (n.1573).
[1594] Ibid.

states therefore that enforcement only occurs if and when claims of wrongdoing surface.[1595] Therefore, while there the SEC can fully examine cases, it is usually cases where it is likely that enforcement has occurred. However, there are three key factors which enable the SEC to fully examine cases of violations. These factors include: effective triage, pursuing (almost) all violations and examining third parties. The factors not only highly increase the chance of catching misconduct but also act as a deterrent to the wider market.

There are two key reasons for this. The first is that the SEC has been established since 1934, whereas in the UK the FRC and the TPR were established in 1990 and 1997 respectively. Therefore, it has had the time to hone its investigatory techniques. But the second reason, and it is posited that this is the overarching reason for its success in examining all claims is because of its use of the 'broken windows' theory.[1596]

The previous SEC chairperson, Mary Jo White, launched the enforcement initiative 'broken windows'.[1597] This is essentially the SEC pursuing all types of violations big and small.[1598] This is one of the goals of the SEC's enforcement programme.[1599] White states that '…when a window is broken and someone fixes it – it is a sign that disorder will not be tolerated.'[1600] Indeed it can be said that the approach '…draws heavily on SEC enforcement and examination resources…[with]… the SEC enforcement division's approach…best described as one of "zero tolerance.'[1601] This zero-tolerance arguably allows not just for each case to be considered, but also for it to be thoroughly examined.

The SEC's method of investigation considers every single claim referred. For example, once a claim is received it opens a 'matter under inquiry' (MUI). Each claim undergoes this triage process but it is noted that the threshold is low. Perhaps while such inquiries

[1595] Samuel Issacharoff, 'Regulating after the Fact' [2007] 56(8) DePaul Law Review 375, 380
[1596] Todd Ehret, 'SEC's advanced data analytics helps detect even the smallest illicit market activity' (*Reuters*, 30 June 2017) <https://uk.reuters.com/article/bc-finreg-data-analytics/secs-advanced-data-analytics-helps-detect-even-the-smallest-illicit-market-activity-idUSKBN19L28C> accessed 29 December 2020.
[1597] Ibid.
[1598] Ehret (n.1596).
[1599] Morrison Foerster, 'A Primer on SEC Investigations and Enforcement Actions Related to Financial Reporting and Accounting Cases' (*Morrison Foerster*, 2014) <http://media.mofo.com/files/uploads/Images/140122-SEC-Investigation-Handbook.pdf> accessed 30 December 2020.
[1600] Ehret (n.1596).
[1601] Ibid.

are viewed as preliminary, each claim requires as much pre-examination as possible. Where evidence is particularly robust, the SEC can directly open an investigation.[1602]

Indeed between 1992 to 2010, the SEC closed around 45 percent of matters under inquiry without the need for a full investigation[1603], suggesting that the other 55 percent were subject to a full investigation. This is a considerable feat when considering that for 2020, the SEC received over 23,000 claims.[1604] By conducting pre-examination the SEC is not just able to focus on the claim at hand, but it is also able to, at least hypothetically, look at other issues which may be in the realms of misconduct or violations. This is further exemplified by the fact that the SEC has a higher disclosure standard in respect of financial reporting which puts the equivalent of LPCs, as well as plcs, at a greater prospect of enforcement.[1605]

The work done behind an MUI is considerable. For example, a request is made to the company to provide information voluntarily. This request also includes an obligation that the company discontinue its automated document destruction policies and preserve all information which could be relevant to the inquiry.[1606] This is perhaps because the SEC recognises that such destruction policies could be used to destroy incriminating evidence. The SEC may even decide to have an interview with the company or hold an interview with key executives.[1607] This not only ensures that each claim is given due consideration but also acts as a deterrent and informs the market that each claim will be considered in-depth, and not just looked at superficially and disregarded.

This is in stark contrast with the FRC and TPR because their initial review of a claim will not generally result in such a detailed initial examination of a claim. Not only that but for this to occur, at least for the FRC, a consensual approach is required. If the company refuses to cooperate, the SEC will almost always issue a subpoena obligating the company to provide the requested information.[1608] In doing so, the

[1602] David H. Solomon and Eugene F. Soltes, 'Is 'Not Guilty' the Same as 'Innocent'? Evidence from SEC Financial Fraud Investigations' <https://ssrn.com/abstract=3402780> accessed 29 December 2020.
[1603] Blackburne and others (n.1569).
[1604] US Securities and Enforcement Commission (n.1578).
[1605] John C. Coffee 'Law and the Market: The Impact of Enforcement' Columbia Law and Economics Working Paper No. 304 (2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=967482> accessed 29 December 2020.
[1606] Morrison Foerster (n.1599).
[1607] Ibid.
[1608] Morrison Foerster (n.1599).

company is aware that one way or another, the SEC will get the information they require.

In some instances, a company may volunteer to conduct an inquiry of its own. This goes some way to show the SEC, that their claim(s) is unfounded but also to settle matters more quickly.[1609] By doing so, the company not only can find any violations but also assures the SEC that it was not done with intent which will sit well when considering the sanctions that ought to be imposed. In short, it will look favourably on the company in the medium-term.[1610] The SEC is therefore astute in this manner because it understands that '[i]nvestors do not want someone who ignores minor violations, and waits for the big ones that bring media attention. ... [T]hey want someone who understands that even the smallest infraction have victims....'[1611]

This is perhaps why there is no de minimis policy in place, as it provides assurance publicly that where there is a claim of a violation there will be examination. This not only provides assurance but deters companies from assuming that small violations are not likely to be uncovered or investigated. Indeed, it is fair to say that the possibility of small infractions being uncovered is perhaps what may keep companies complying and arguably go even further than the law dictates to demonstrate compliance.

6.6.6 Outcome

The SEC can obtain knowledge although the majority of its work is reliant on whistleblowers. Claims made in respect of violation are given their due consideration with each of them being investigated although ex-post, but arguably this does not seem to affect the outcomes achieved by the SEC. For example, in 2020, the SEC awarded US$175 million to 39 whistleblowers the highest fiscal amount and the highest number of individuals awarded in any fiscal year, in the 8 years the scheme has been in force.[1612] From the latest enforcement report, it clear is that a wide range of outcomes are implemented and it is fair to say that when compared to previous years and this seems to be only on the increase[1613], with directors being held accountable for a wide range of misconduct. It is argued that this could be attributed to the whistleblower

[1609] Ibid.
[1610] Morrison Foerster (n.1599).
[1611] Andrew Stephenson, 'No securities law violation is too small for the SEC' (*Crowdcheck*, 10 February 2014) <https://www.crowdcheck.com/blog/no-securities-law-violation-too-small-secv> accessed 30 December 2020.
[1612] US Securities and Enforcement commission, 'SEC Division of Enforcement Publishes Annual Report for Fiscal Year 2020' (*US Securities and Enforcement Commission*, 2 November 2020) <https://www.sec.gov/news/press-release/2020-274> accessed 31 December 2020.
[1613] US Securities and Enforcement Commission (n.1578).

programme, as the awards and numbers of whistleblowers have increased, and so have their annual results.

In 2020, the SEC brought a total of 715 enforcement actions. Out of the 715, 405 actions were standalone (brought by the SEC alone) in federal court or administrative proceedings, 180 actions were follow on actions based on the actions of other US regulators, and 130 actions were to deregister companies who omitted to file their SEC filings.[1614] This not only shows a willingness of part of the SEC to initiate legal proceedings against directors but provides a deterrent to other directors, and, by extension, companies that misconduct will be punished.

Aside from legal action, in 2020, penalties and disgorgement totalled US$4.68 billion with US$1.101 billion coming from penalties and US$3.589 billion from disgorgement.[1615] This represents an 8 percent increase, of US$330 million, from 2019. [1616] The average financial settlement of a case investigated by the SEC was around US$530,000.[1617] Although the financial breakdown in respect of what was levied on directors, and what was levied on companies, the fact is the SEC, in comparison to the FRC and TPR, has had much more success imposing outcomes. In the absence of a more detailed analysis, this shows that while there may be no improvement in accountability, the SEC is getting effective in enforcing compliance.

It is worth noting that the SEC annual report does not mention the total number of cases investigated, nor does it detail the number of cases where no misconduct was found and therefore arguably no outcome was imposed on directors. Despite the outcome element of holistic accountability not being one that only symbolises punishment or consequence, as the SEC is an organisation that acts ex-post it is fair to say that in the majority of cases it investigates, there will be a punishment or consequence imposed. However, it is not clear how many cases, or what percentage of cases, had no outcome whatsoever. This is a key concern because it portrays SEC as a reactive, rather than a proactive, organisation. In any case, the statistics are impressive when compared to the FRC and TPR.

[1614] Ibid.
[1615] US Securities and Enforcement Commission, '2020 Annual Report Division of Enforcement' (*US Securities and Enforcement Commission*, 2 November 2020) <https://www.sec.gov/files/enforcement-annual-report-2020.pdf> accessed 04 February 2021.
[1616] Ibid.
[1617] US Securities and Enforcement Commission (n.1615).

The SEC is a large organisation with significant manpower. But this is not why the SEC arguably excels in regulating the US corporate landscape. The point to note is that it has a statutory basis, and its powers are derived from statute rather than from the Memoranda of Understanding. For example, its remit extends to all companies which offer securities both publicly and privately. The SEC's range of powers means that it can act quickly on alleged director misconduct, although that is not to say further powers would not be welcomed. Its extensive information powers work because they provide an adequate monetary incentive which encourages whistleblowing. Not only that, but the threshold for the SEC to subpoena information is low which means that anything that touches a matter under investigation is fair game to enforce.[1618]

The SEC's 'broken windows' approach enables examination to occur because every single instance of misconduct is enforceable, as well as the fact that it casts its net wide enough to pursue gatekeepers who have assisted in the misconduct. As a reactive organisation, the majority, if not all, of its outcomes have resulted in either legal proceedings and/or penalties and disgorgement. As a result, while it could be a more proactive organisation, its performance in holding directors accountable is certainly better than the FRC and TPR.

6.7 Australian Securities & Investments Commission

The Australian Securities and Investments Commission (ASIC) is Australia's corporate, financial services, markets and consumer credit regulator. It is a publicly funded independent statutory body established by the Australian Securities and Investments Commission Act 1989 and continues its existence under the Australian Securities and Investments Commission Act 2001. ASIC carries out most of its work under the Corporations Act 2001. It implements a '…broad range of legislation relating to corporate governance, financial services and market integrity.'[1619]

ASIC's role is to uphold, facilitate and improve the financial system and the entities that reside within it, promote confidence and participation of investors and consumers and implement the law effectively.[1620] Its role is also to ensure information about companies and other entities is available to the public as soon as possible and take

[1618] *Feiner* (n.1590); Nathan and others (n.1591).
[1619] Ian Ramsay and others, 'Banning Orders: An Empirical Analysis of the Dominant Mode of Corporate Law Enforcement in Australia' [2017] 39(4) Sydney Law Review 501, 501.
[1620] Australian Securities and Investments Commission, 'Our role' (*Australian Securities and Investments Commission,* not known) <https://asic.gov.au/about-asic/what-we-do/our-role/> accessed 7 February 2021.

whatever action is needed, as long as it is necessary to enforce and give effect to the law.[1621] ASIC implements laws such as the Business Names Registration Act 2011, the Insurance Contracts Act 1984 and the National Consumer Credit Protection Act 2009.[1622] It also administers parts of the Banking Act, Life Insurance Act and Retirement Savings Accounts Act.[1623]

Previously known as the National Companies and Securities Commission, ASIC is known informally known as Australia's 'company law watchdog'.[1624] Since its inception, ASIC's role has developed but its primary role has been the '…administration and enforcement of the corporations legislation.'[1625] ASIC describes itself as a 'law enforcement agency'[1626] that 'use[s] enforcement to deter misconduct'.[1627] ASIC's public interest role of promoting a stable and secure financial system means that it is not only given wide powers to carry out this function[1628] but equally an extensive workforce is provided.

6.7.1 ASIC Functions

ASIC is headed by a chair and a deputy chair, with 3 commissioners providing assistance. There are 11 different areas each headed by an executive director which forms the make-up of ASIC. The areas include strategy, financial services and wealth, markets, assessment and intelligence and registry.[1629] Financial Services and Enforcement and Markets enforcement make up the offices of enforcement.[1630] Aside from that, there are three commission specialist teams which comprise: corporate affairs, risk and audit. ASIC's internal support function consists of supervision, chief

[1621] Ibid.
[1622] Business Names Registration Act 2011; Insurance Contracts Act 1984; National Consumer Credit Protection Act 2009.
[1623] Banking Act 1959; Life Insurance Act 1995; Retirement Savings Accounts Act 1997; Australian Securities and Investments Commission, 'Laws we administer' (*Australian Securities and Investments Commission,* not known) < https://asic.gov.au/about-asic/what-we-do/our-role/laws-we-administer/> accessed 7 February 2021.
[1624] Vicky Comino, 'Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem' [2009] 33(3) Melbourne University Law Review 802, 802.
[1625] Ibid.
[1626] Ramsay and others (n.1619).
[1627] Ibid.
[1628] Margaret Hyland, 'Who is Watching the Watchdog?: A Critical Appraisal Of ASIC's Administrative powers' [2009] 2 Journal of the Australasian Law Teachers Association 29, 29-30.
[1629]Australian Securities and Investments Commission, 'ASIC organisational structure' (*Australian Securities & Investments Commission*, 1 February 2021) <https://download.asic.gov.au/media/5945286/asic-corporate-structure-updated-1-feb-2021.pdf> accessed 20 July 2022.
[1630] Ibid.

legal office and operations.[1631] ASIC is clearly well-structured but it is worth noting that the majority of its annual budget, approximately 70 percent, goes towards surveillance and enforcement of the law it implements. As a result, it can be said that, arguably, the largest areas are that of the offices of enforcement where the majority of ASIC's budget is invested.

6.7.2 ASIC Powers

ASIC has been able to '…derive very wide powers…'[1632] from both the Corporations Act and the Australian Securities and Investments Commission Act. Perhaps because the legislation has not been drafted restrictively giving ASIC an advantage, or because parliament intended to provide such powers due to ASIC's evolved role than simply just being a corporate regulator. For example, ASIC has wide powers in respect of information gathering, powers of investigation and the ability to conduct hearings to comply with natural justice.[1633] It can also seek criminal and civil sanctions as well as impose administrative sanctions such as infringement notices and enforceable undertakings.[1634]

ASIC's information powers must be used for a 'proper purpose'[1635] which ASIC states essentially means advancing an enquiry.[1636] The two main information-gathering powers fall into two categories which include: surveillance and investigation.[1637] ASIC defines surveillance as '…activities that involve gathering and analysing information

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[1631] ASIC (n.1629).
[1632] Hyland (n.1628) 30.
[1633] Ibid.
[1634] Hyland (n.1628) 30; *Infringement notices provide a regulatory tool for ASIC to address less serious breaches of the continuous disclosure obligations. They are designed to provide a fast and effective regulatory response that is proportionate and proximate in time to the alleged breach. The matter will be dealt with in a timely way, while still providing significant protection to the disclosing entity.* Australian Securities and Investments Commission, 'RG 73 Continuous disclosure obligations: Infringement notices' (*Australian Securities and Investments Commission*, 31 October 2017) < https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-73-continuous-disclosure-obligations-infringement-notices/> accessed 23 July 2022; *Court enforceable undertakings contain a set of undertakings from parties who contravene the legislation ASIC administer, that ASIC may accept and that are enforceable in a court. ASIC may accept court enforceable undertakings as an alternative to, or in conjunction with, other enforcement action.* Australian Securities and Investments Commission, 'About the court enforceable undertakings register' (*Australian Securities and Investments Commission*, July 2022) https://asic.gov.au/about-asic/asic-investigations-and-enforcement/about-the-court-enforceable-undertakings-register/> accessed 23 July 2022.
[1635] Australian Securities and Investments Commission, 'ASIC's compulsory information-gathering powers' (*Australian Securities and Investments Commission*, not known) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-compulsory-information-gathering-powers/#require-production> accessed 8 February 2022.
[1636] Ibid.
[1637] Australian Securities and Investments Commission (n.1635).

on a particular entity or entities to test and ensure compliance with the law.'[1638] Surveillance can be carried out on a reactive basis, in response to a complaint or concern, or on a proactive basis, to examine an industry issue or practice.[1639] For example, surveillance allows ASIC to monitor companies which show signs of economic distress or directors perhaps in breach of their duties. In regard to investigation powers, when misconduct is suspected, it is referred to the enforcement team to commence a formal investigation.

When a formal investigation is initiated, this enables ASIC to use its information-gathering powers.[1640] The difference between the two categories is surveillance allows for a certain degree of information to be provided, whereas for investigation there is a broader range of powers which can be used. For example, surveillance only allows ASIC to inspect documents and compel the production and/or disclosure of information.[1641] Whereas, investigation allows for the use of all powers such as conducting an examination, seeking reasonable assistance and if required obtaining search warrants.[1642] In essence, surveillance can be seen as a light-touch approach whereas investigation can be seen as more in-depth.

The initiation of an investigation means that ASIC can require the production of documents[1643], inspect documents, require disclosure of information, require the attendance of senior executives (directors), compel assistance to an investigation and apply for a search warrant.[1644] ASIC can also agree to enforceable undertakings given by directors and others which enable ASIC to restrict the activity or operation of an individual as opposed to taking legal proceedings.[1645] Enforceable undertakings can be described as a promise enforceable in court.[1646] It is effectively another method of alternative dispute resolution.[1647] Infringement notices are an administrative tool with each regime having a different penalty liability attached.[1648] From March 2019, the penalty regime was strengthened with the maximum civil penalty of AUS$1.11 million

[1638] Ibid.
[1639] Australian Securities and Investments Commission (n.1635).
[1640] Ibid.
[1641] Australian Securities and Investments Commission (n.1635).
[1642] Ibid.
[1643] Australian Securities and Investments Commission Act 2001, Part 3.
[1644] Australian Securities and Investments Commission (n.1635); Australian Securities and Investments Commission, Part 3.
[1645] Australian Securities and Investments Commission Act 2001, s.93a.
[1646] Marina Nehme, 'Enforceable Undertaking: A Restorative Sanction?' [2010] 36(2) Monash University Law Review 108, 108.
[1647] Ibid.
[1648] Australian Securities and Investments Commission, 'Fines and penalties' (*Australian Securities and Investments Commission*, not known) < https://asic.gov.au/about-asic/asic-investigations-and-enforcement/fines-and-penalties/> accessed 8 February 2021.

or three times the benefit obtained and detriment avoided.[1649] For companies, the penalties are either AUS$11.1 million, three times the benefit obtained and detriment avoided or 10 percent of a company's annual turnover capped at AUS$555 million.[1650]

Interestingly, ASIC, through legislation, can recover the costs of the investigation if the individual in question has been convicted of an offence or a judgement is awarded or any other court order is made against the individual.[1651] ASIC is then able to either make an order that the individual pay for the entire investigation or a specified part. This also includes the remuneration of ASIC staff involved in the investigation. It also allows ASIC to claim travel expenses when interviewing witnesses, the cost of legal counsel and the cost of employing experts if required.[1652]

It must be noted that this is different to litigation costs which will often be awarded by the court. Directors can seek a review of the decision by the Administrative Appeals Tribunal. The AAT can, among other things: confirm the decision; vary the decision or set the decision aside and replace it with its own decision. This is very different to the FRC, TPR or even the SEC because they have to absorb their costs through the constraints of their annual budgets.

ASIC can also pursue directors for breach of duty, this means that shareholders do not have to bear the financial burden of initiating proceedings. While each of these organisations may well be awarded costs in respect of litigation, ASIC is the only organisation that can also, by law, seek to recover the actual cost of the investigation. This arguably goes some way in ensuring money is not tied up in one large investigation, but also inflicts financial damage on delinquent directors. The work of ASIC, as Australia's corporate accountee, will now be considered in respect of requiring accounting and the elements of holistic accountability.

6.7.3 Honesty & Legal Obligation

ASIC has several tools at its disposal to ascertain the honesty of directors, far better than the FRC and TPR. Starting from its information-gathering powers, it can ascertain honesty using surveillance and in cases where the honesty of directors cannot be determined, it can progress to investigation powers. This allows for a wide range of powers to be used such as the production of records, directors' interviews and

[1649] The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019.
[1650] The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019.
[1651] Australian Securities and Investments Commission Act 2001, s.91.
[1652] National Consumer Credit Protection Act 2009, s.319.

obtaining search warrants. Having these two distinct information-gathering powers means that surveillance can be used as a precursor to ascertain the honesty of directors of LPCs, whereas investigation can be used for a more detailed examination. Taken together, ASIC is in a strong position not only to ascertain the honesty of directors of LPCs but also to challenge directors of LPCs, if such honesty is in doubt.

Turning to legal obligation, ASIC has a legislative foundation which provides it with credibility.[1653] Using legislation, it can enforce legal obligations imposed on directors of LPCs. ASIC is assisted in this by the fact that, since its inception, it has not only received wider powers, but its remit has also increased, with it becoming an overarching corporate regulator which means that, in theory at least, it can enable the compliance of legal obligations over directors, therefore making them liable for almost all kinds of conduct.

6.7.4 Knowledge

ASIC's information powers are split into surveillance and investigation. To obtain knowledge, ASIC can ascertain which categorisation is likely to enable them to provide meaningful information. For example, while surveillance only provides for ASIC to test or determine a risk, this can yield enough evidence as to whether there is an issue that requires further investigation. This then allows for further information powers to be utilised. In its most recent enforcement outcomes, from January 2020 to June 2020, ASIC instigated 99 investigations, but no breakdown is given as to how the investigations started i.e., through surveillance or investigation. The proactive element of surveillance enables information to be gathered much more quickly. It also means that information can be acted on much more quickly as it is being gathered and monitored on a real-time basis with little scope for error.

By being proactive, ASIC not only arguably ensures that companies do not inflict significant maximum damage, especially when they are going through financial difficulty, but also allows ASIC to step in before decisions which cause concern are made. This is perhaps why, in 2019, Australia reported 7362 company liquidations[1654]

[1653] Australian Securities and Investments Commission Act 1989; Australian Securities and Investments Commission Act 2001.
[1654] Australian Securities and Investments Commission, 'Australian insolvency statistics' (*Australian Securities and Investments Commission*, February 2021) <https://download.asic.gov.au/media/5946030/asic-insolvency-statistics-series-1-published-february-2021.pdf> accessed 10 February 2021.

and the UK reported a total of 17196 company insolvencies (across all regimes)[1655], but as noted later the population of Australia is smaller compared to that of the UK.

ASIC's ability to require the production of documents[1656] means it can request information. The request is made by serving a section 33 notice[1657] for the production of information specified within the notice. When this occurs, it provides a reasonable time for production, considering the type and extent of records required.[1658] Information also includes electronic as well as hardcopy information.[1659] But this comes with a caveat that in some instances it may require records to be provided immediately, possibly in cases where wrongdoing is imminent and/or financial damage is highly likely.

Information sheet 242 provides an overview of ASIC's document production guidelines to assist the voluntary or compulsory production of information to ASIC. This covers every piece of documentation that would pertain to knowledge.[1660] For example, it includes hard copy and electronic information as well as the metadata that underpins the information. It also details the providence of email chats, telephone conversations, text messages, audio/video files, encrypted files and databases.[1661] There is an incentive for directors to provide the requested information, not because they are legally obligated to do so, but rather because ASIC can pass on costs if the guidelines in the information sheet are not adhered to, even if the individual has not been convicted of an offence, no order has been made in court or even if they are not subject to the investigation, costs may be passed on.[1662]

Directors can also be required to attend an examination subject to the issuance of a notice.[1663] These interviews take place under oath or affirmation. ASIC can interview anyone in conjunction with the investigation. Indeed, one former individual with the

[1655] The Gazette, 'UK company insolvency statistics for 2019' (*The Gazette*, 31 January 2020) <https://www.thegazette.co.uk/insolvency/content/103498> accessed 10 February 2021.
[1656] Australian Securities and Investments Commission Act 2001, Part 3.
[1657] Australian Securities and Investments Commission Act 2001, s.33.
[1658] Australian Securities and Investments Commission, ' ASIC's compulsory information-gathering powers' (*Australian Securities and Investments Commission*, February 2021) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-compulsory-information-gathering-powers/#require-production> accessed 10 February 2021.
[1659] Australian Securities and Investments Commission, ' ASIC's document production guidelines' (*Australian Securities and Investments Commission*, February 2021) < https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-document-production-guidelines/> accessed 10 February 2021.
[1660] Ibid.
[1661] Australian Securities and Investments Commission (n.1658).
[1662] Ibid.
[1663] Australian Securities and Investments Commission (n.1635); Australian Securities and Investments Commission Act 2001, Part 3.

ASIC remarks that 'oh it's fantastic, we can interview anyone and get what we need'[1664], suggesting ASIC engages in caprice, although having wide powers is arguably significant to ASIC's success.

ASIC is not required to provide a detailed list of questions that will be asked apart from the general nature of what is being investigated. The interviewee is allowed legal representation and a recording of the meeting is made. Schofield-Georgeson's study based on interviews with former ASIC officials and corporate lawyers finds, as one investigator put it that 'they were scared shitless of [compulsory] examination transcripts.'[1665] It is clear to see why when interviewees are required to answer questions put to them, regardless of whether it results in incrimination or the imposition of a penalty.

As interviewees do not know what questions will be asked, some will likely trip up. The examination remains confidential unless it has to go to open court or there are other interested parties in the case. However, interviewees can claim legal professional privilege as long as they can explain why it applies, which is more difficult than just asserting legal privilege as a defence. Indeed, the view of lawyers representing directors in ASIC interviews is that:

> 'we actively encouraged them to say as little as possible. Good memories weren't encouraged either … forgetfulness was a big thing … I said 'if you're going to take time to relax, you're better off relaxing in court … you're walking into a pit of vipers here and everything you say is being documented and recorded and used against you in every single way possible'[1666]

It is arguably clear that ASIC's information-gathering powers can gather knowledge from directors that these powers are fit to see off such contrivance.[1667] ASIC is also able to apply for a search warrant and previously this only related to books and records, and telecommunication stored on a service provider's equipment.[1668] It is worth noting that between January 2011 to June 2017, around 200 search warrants were executed, translating to around 28 search warrants a year. This is a regularly used information

[1664] Eugene Schofield-Georgeson, 'Coercive Investigation of Corporate Crime: What Investigators Say' [2020] 43(4) University of New South Wales Law Journal 1405, 1419-1420.
[1665] Ibid 1416.
[1666] Schofield-Georgeson (n.1664) 1421.
[1667] Ibid.
[1668] Australian Securities and Investments Commission (n.1658).

power. However, recent legislation has extended the remit of search warrants, perhaps because of their success, but only for criminal offences.[1669]

ASIC can now search and seize information that was not previously known as well as anything relevant or suspected to be relevant to the investigation.[1670] Ancillary powers have also been developed to ensure ASIC's information powers meet modern technology. ASIC can now take photographs and video recordings of searches, operate electronic equipment to access data onsite, move devices to another place for processing and operate seized devices to access data.[1671] Interestingly, it can receive intercepted communications from an interception agency but cannot intercept communication itself.[1672] All in all, it can be said that the current information powers ASIC holds can obtain knowledge from directors, however, these additional powers do further aid that because they are very likely to come into use especially when it comes to honing its focus on serious corporate misconduct in the modern corporate environment.[1673]

6.7.5 Examination

As discussed, ASIC has an arsenal of information-gathering powers which are highly likely to obtain knowledge from directors of LPCs. However, simply having the information is not enough. There must be sufficient examination of the information and/or individuals for an outcome to be ascertained, and for holistic accountability to occur. ASIC, arguably, seems to have mastered the examination of information and interviews of directors to enable it to come to an outcome. It does this in two ways. For example, the effective gathering of information and examination of directors. Both elements, when put together, ensure that ASIC, as an accountee, can have all the knowledge at hand to ascertain misconduct and bring the accountability process to a conclusion through the imposition of an outcome.

ASIC can provide a broad outline of the information they require. This information can include information held overseas by the company or any third-party entity. By

[1669] The Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020 (Cth).
[1670] The Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020 (Cth).
[1671] The Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020 (Cth).
[1672] The Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020 (Cth).
[1673] Rani John and others, 'Wire taps and search warrants: ASIC's new powers' (*Ashurst*, 6 April 2020) <https://www.ashurst.com/en/news-and-insights/legal-updates/wire-taps-and-search-warrants-asics-new-powers/> accessed 11 February 2021.

providing broad information requests, ASIC can cast its net wide enough to ascertain if there any misconduct has occurred. For directors, and companies unwilling to adhere to such requests means that they risk committing an offence, with individuals liable for imprisonment for up to two years. If this is not enough to persuade directors, ASIC has proven that it is willing to initiate legal proceedings.

In *ASIC v Maxi EFX Global AU Pty Ltd*[1674], the company failed to produce the records requested by ASIC, arguing that the request was too broad and unclear and that ASIC was not permitted to demand information held overseas by third parties. ASIC sought a court order for the company to comply. It was held that there was no reasonable basis for the argument that the notice lacked clarity. Although, that was a general requirement it 'is not to be applied in a precious, over-technical or hypercritical way'.[1675] therefore, the request was not impermissibly broad simply because it required the providence of a large number of documents.[1676] This is in stark contrast to, for example, TPR and the FRC, where there would be hesitancy to initiate legal proceedings and instead, they would make several requests.

ASIC's ability to (quickly) initiate legal proceedings for records among other issues, shows that they do not allow directors or companies to obstruct them in any way. This aids the examination element because it not only makes clear to the directors/company that legal arguments are not likely to work, but also that ASIC will get to the bottom of any concern they have. Even if that means going to court to obtain an order for the records to be provided. It also ensures that directors are not able to destroy (or misplace) any information which may incriminate them simply because they are either not willing to provide the information or it is held by a third party. This again is in stark contrast with the FRC and TPR, which are likely to, and have, accepted the excuses of directors as to why information is not available or simply does not exist.

In regard to the interview of directors, although the defence of legal privilege is available to directors when ASIC is questioning them, It is important to note that ASIC limits the role of a lawyer in ASIC examinations. This not only enables ASIC to extract as much information from directors and ask probing questions but ensures that lawyers do not in any way obfuscate the extraction and analysis of information. For example, lawyers cannot interfere with the hearing of its progress, interrogate ASIC officers or question evidence produced and cannot remind directors, or other witnesses to claim

[1674] *ASIC v Maxi EFX Global AU Pty Ltd* [2020] FCA 1263.
[1675] Ibid.
[1676] *ASIC* (n.1673); See, Tony Stumm, 'Why is ASIC interested in you?' (*Carter Newell*, April 2015) <https://www.carternewell.com/page/Publications/Archive/Why_is_ASIC_interested_in_you/> accessed 17 February 2021.

privilege.[1677] It is also the case that where directors do claim privilege, ASIC does not readily accept it without good reason and is willing to challenge it via legal proceedings.

In *ASIC v RI Advice Group Pty Ltd*[1678], the company claimed legal privilege over an internal report that the company claimed was prepared for legal advice. ASIC challenged this and it was held by the court that the company's evidence was not sufficient to establish its claim. This was because the lawyer claiming privilege was not the lawyer that had originally compiled the report. Not only that but the CEO had closely been involved in the creation of the report. Along with this, the company had previously provided copies of the document to ASIC and had been in discussions regarding the provision of legally privileged data.[1679] This not only adds to the examination element but further strengthens it because ASIC has demonstrated that it is willing to use whatever legal means necessary to ensure that it can receive information and review it and not just allow directors to whitewash their conduct.

6.7.6 Outcome

From the above, it is clear that ASIC not only has strong information powers but is also able to examine directors of LPCs to fulfil the process of holistic accountability. It is accurate to say that Australia'… has a reasonably sound record in relation to the enforcement of its corporations laws.'[1680] Perhaps this is because of the intrinsic ability of ASIC to hold directors of LPCs holistically accountable. The regulator's ability to remain active in pursuing breaches of the law and enforcing minimum standards of corporate behaviour[1681] has arguably ensured that the process of holistic accountability results in an outcome.

To this end, there are many different outcomes that ASIC has been able to impose, from criminal proceedings, penalties, and civil penalty orders to enforced undertakings. It is fair to say that depending on the type of misconduct ASIC has been given the powers to deal with it effectively. Indeed, in its 2020 enforcement outcomes, it has obtained many outcomes ranging from prosecutions, civil penalties, bannings

[1677] Ibid.
[1678] *ASIC v RI Advice Group Pty Ltd* [2020] FCA 1277.
[1679] Daniel Faber, 'ASIC Adopts Assertive Approach to Information-Gathering Powers and Challenging Privilege Claims' (*Jones Day*, December 2020) <https://www.jonesday.com/en/insights/2020/12/asic-adopts-assertive-approach-to-information-gathering-powers> accessed 18 February 2021.
[1680] Bob Baxt, 'Corporate Governance - Is This the Answer to Corporate Failure' [2003] 29(2) Monash University Law Review 234, 260.
[1681] Jillian Segal, 'Corporate Governance: Substance over Form' [2002] 25(2) University of New South Wales Law Journal 320, 345.

(disqualifications), infringement notices, and compensation, to court-enforceable undertakings.[1682]

It is unclear if ASIC either through surveillance or investigation provides companies with a clean bill of health. It is also unclear how surveillance is conducted in practice when it is being done on a proactive level. In particular, it is unclear how companies are chosen for surveillance to test concerns and whether they are provided with a conclusive decision as to their conduct. Out of the 99 investigations in 2020, 18 individuals were subject to criminal proceedings with 233 criminal charges laid, roughly equating to just over an 18 percent strike rate.[1683] However, if strict liability offences are taken into account, with 94 individuals, this increases to 100 percent.[1684] In regards to civil penalties, AUS$12 million was imposed with 23 civil penalty cases, with 74 bannings, 2 infringement notices and AUS$536, 000 in infringement penalties paid, and AUS$160 million given in compensation to investors and remediation.[1685] Although it is unclear how long each investigation spans as this is not made clear in the enforcement report.

The investigations that ASIC do carry out, arguably, result in an accountability outcome. By using a range of outcomes, it is clear that ASIC can hold directors of LPCs (holistically) accountable. This success can be attributed to the raft of information-gathering powers as well as the proactive element of their work. However, ASIC, arguably investigates, more companies as a percentage of the total companies than the UK does. While there are no statistics on the number of companies subject to surveillance, as reactive or proactive work is carried out, it is clear that there is extensive work done before opening a full investigation when considering the outcomes ASIC has achieved through the investigations it has opened. Small businesses account for nearly 70 percent of ASIC's total enforcement outcomes, with approximately 89 percent of its outcomes as criminal.[1686]

ASIC tends to take a criminal enforcement approach to major breaches such as insider trading and market manipulation, whereas alleged contraventions of market integrity rules and continuous disclosure contraventions are likely to be dealt with via

[1682] Australian Securities and Investments Commission, 'ASIC enforcement update January to June 2020' (*Australian Securities and Investments Commission*, 22 September 2020) <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-666-asic-enforcement-update-january-to-june-2020/> accessed 14 February 2021.
[1683] Ibid.
[1684] Australian Securities and Investments Commission (n.1682).
[1685] Ibid.
[1686] Ian Ramsay and Miranda Webster, 'ASIC enforcement outcomes: trends and analysis' [2017] 35(5) Company and Securities Law Journal 289, 305.

infringement notices.[1687] In doing so, it is fair to say that ASIC aligns the outcome of the accountability process with the seriousness of the offence identified through its information gathering and examination of directors' conduct.

ASIC's ability to respond to instances of novel misconduct has also increased. In the modern corporate environment where technology is being relied upon more than ever, it is highly likely that more complex, sophisticated and arguably technology-driven misconduct is likely to be undertaken by directors of LPCs. In this regard, ancillary powers have been developed to ensure that information powers the ability to examine directors.[1688] Matters are made slightly easier because ASIC only has to prove 'reasonable suspicion' which case law has considered as something which 'involves something more than mere speculation'[1689] but 'does not need to be as high as a belief based on reasonable grounds.'[1690] The difficulty in negating this would be that the opponent bears the burden.[1691]

As a result, it can seize a wider range of material and use intelligence gained from other electronic sources. The advantage that ASIC has is the ability to have these powers, where required, reviewed and further developed through legislation passed by parliament. This enables ASIC to become a more effective regulator through the ability to collect a wide range of information, examine it and put this towards an outcome, thus allowing for the accountability of directors of LPCs. For ease, the table below summarises the functions, powers and enforcement of each organisation.

[1687] Ibid 311.
[1688] The Financial Sector Reform (Hayne Royal Commission Response – Stronger Regulators (2019 Measures)) Act 2020 (Cth).
[1689] *Goldie v Commonwealth of Australia* [2002] FCA 433 [48-49].
[1690] *Howarth v ASIC* (2008) 101 ALD 602; [2008] AATA 278 [134].
[1691] King & Wood Mallesons, 'ASIC's new direction powers or draconian powers? – navigating the proposal' (*King & Wood Mallesons*, 10 February 2021) <https://www.kwm.com/en/au/knowledge/insights/financial-services-royal-commission-asics-new-direction-powers-20200210> accessed 21 February 2021.

6.8 Summary of Functions, Powers, and Enforcement of Regulators

Entity	Function	Powers	Enforcement
FRC	• Issues accounting standards. • Addresses inadequate or conflicting interpretations of accounting standards. • Sets standards and gives guidance in respect of external audit. • Independent oversight of the regulation of the accounting, auditing, and actuarial professions. • Monitors compliance with accounting rules associated with listing rules. • Independent investigations and discipline schemes for issues relating to accountancy firms or members of the accountancy bodies. • Monitors and maintains the UK corporate governance code and stewardship code.	• Accountancy Scheme sanctions guidance. • Audit Enforcement Procedure sanctions policy. • Actuarial Scheme sanctions guidance.	• Fines. Exclusions. • Requirements & undertakings.
TPR	• Ensure compliance with employer automatic enrolment duties and relevant employment safeguards. • Set clear standards and ensure that employers understand what they are being measured against. • Identify risks early through monitoring, supervision, and proactive interventions.	• Information gathering. • Regulatory and enforcement action. • Anti-avoidance powers.	• Contribution notices. • Financial support directions.
SEC	• Protect investors to maintain fair, orderly, and efficient markets; and facilitate capital formation.	• Market surveillance activities. • Tip-offs. • Complaints. • External agency referrals. • Interview witnesses. • Review records. • Compel witnesses by subpoena to testify and produce records, data and other relevant data. • Enter company premises and seize original records.	• <u>Civil action.</u> 1) Injunctions. 2) Penalties. 3) Disgorgement. 4) Director Disqualification. • <u>Administrative Action</u> 1) Cease & Desist orders. 2) Suspension/Revocation.
ASIC	• Uphold, facilitate and improve the financial system and the entities that reside within it. • Promote confidence and participation of investors and consumers and implement the law effectively. • Ensure information about companies and other entities is available to the public as soon as possible. • Take whatever action is needed to enforce and give effect to the law.	• Information gathering powers. • Ability to conduct hearings to comply with natural justice. • Require the production of documents. • Require disclosure of information • Require attendance to be examined. • Compel assistance to an investigation. • Apply for a search warrant	• Criminal Sanctions. • Civil Sanctions. • Disqualifications. • Compensations. • Penalties. • Infringement notices. • Court-enforceable undertakings. • Recovery of investigation costs.

6.9 Learning Lessons from Abroad: What could the UK do Better?

The FRC and TPR in the UK are not able to hold directors of LPCs (holistically) accountable. This is not just because each focuses on specific areas such as corporate reporting and pensions respectively, but because of the flaws inherent in their establishment and operation. This means each is unable to hold directors accountable. This has been well demonstrated above. The piecemeal approach taken by the UK means that there is no overarching regulator that looks, specifically, at the misconduct of directors of LPCs and holds them holistically accountable. Things can fall through the cracks.

This is in stark contrast with the SEC and ASIC. For example, both the SEC and ASIC have broad remits, covering insider trading and securities law, but they are also able to hold directors of LPCs (holistically) accountable. It is fair to say that, regarding holistic accountability, several factors have enabled stronger powers to provide for better examination. This has contributed to the process of holistic accountability taking place effectively in respect of directors of LPCs.

6.9.1 Obligations Enshrined in Law

From the above, as demonstrated by the SEC and ASIC, obligations enshrined in law are a starting point in respect of the (holistic) accountability of directors of LPCs. The parameters for which individuals can be held accountable and what they can be held accountable for have been defined by law. Yet, in the UK, the FRC has no legal jurisdiction for much of its enforcement work[1692] , much of which is based upon MoUs.[1693] It is also the case, at present, that the FRC cannot pursue directors unless they have qualifications which provide membership to a Recognised supervisory body or a Recognised qualified body.[1694]

TPR's legal obligation is arguably stronger because it is enshrined within legislation[1695] and it can pursue directors and connected individuals and entities.[1696] In comparison, the SEC has a much wider remit from corporate reporting and insider trading to securities trading.[1697] It is also able to pursue directors of LPCs as well as gatekeepers

[1692] Walker-Arnott QC (Hon) (n.1389).
[1693] Financial Reporting Council (n.1387).
[1694] Ibid.
[1695] Pensions Act 2008, s.55; The Pensions Regulator (n.1495).
[1696] The Pensions Act 2004, s.38; The Pensions Act 2004, s.43.
[1697] Securities Exchange Act 1934.

such as accountants and lawyers. ASIC has about the same remit and is also able to hold directors accountable as well as gatekeepers.

As the legal obligation for the SEC and ASIC is enshrined in law and their broad remit allows for the accountability of both directors and gatekeepers, if directors are not wholly truthful, or the test for honesty is not satisfied in good faith, arguably when taking into account, the knowledge element of holistic accountability, it will often become clear to both agencies. As a result, it is plain that the UK is lacking a clear legislative foundation which not only allows directors to be held holistically accountable but also provides the remit of the scope of what directors can be pursued for and whether connected third parties could also be pursued.

6.9.2 Powers

In relation to the above, not only is the legislative foundation important but also the kind of powers that can be exercised to enable the elements of holistic accountability through compelling compliance. For example, the ways in which information can be (legally) extracted, the type of examination than can occur and the types of outcomes that can be imposed. The FRC and TPR have broadly similar powers. While the FRC can issue reprimands, undertakings and penalties, TPR can issue penalties in the form of CNs and FSDs, although each serves different purposes. It is also the case that examination powers for both organisations are extremely lacking with them requiring directors to 'consent'. While there have been various proposals to overhaul the powers, each organisation has[1698], it is unlikely that each organisation will use the new powers any more than they used the old powers.

In regard to the SEC and ASIC, the powers of both organisations go much further than the FRC and TPR powers in the UK. For example, the SEC can not only interview witnesses, but they can also, by subpoena, require them to testify, produce records, and other relevant data.[1699] It can also enter company premises and seize original records, subject to an affidavit. [1700] Aside from this, it can seek penalties and disgorgement amongst other actions.[1701] Interestingly, ASIC can monitor companies through surveillance or investigation. Not only can ASIC require the production of documents[1702] it can also oblige assistance to an investigation and apply for a search

[1698] Kingman (n.325).
[1698] Institute of Directors (n.357); Pensions Act 2021.
[1699] US Securities and Exchange Commission (n.1571).
[1700] Imperato, Esq. (n.1573).
[1701] US Securities and Exchange Commission (n.1575).
[1702] Australian Securities and Investments Commission Act 2001, Part 3.

warrant.[1703] The fines issued by ASIC are some of the harshest, with them being 10 percent of annual turnover capped at AUS$555 million.[1704] Where ASIC stands out, is its ability to recover not just legal costs but also the costs of its investigation which none of the FRC, TPR or SEC can do.[1705] It can be said that an element of the success of the SEC and ASIC is its extensive powers and this is something that would only further enhance the holistic accountability of directors in UK LPCs.

6.9.3 Stronger Information Powers

It is clear, that as part of the holistic accountability process, knowledge plays an important part. However, this element is not fully utilised by the UK, because the knowledge of directors is not being fully extracted. For example, the FRC is only able to obtain knowledge from those under the auspices of the RSBs and RQBs. But that does not necessarily mean that the FRC will be able to get a detailed picture of the board's decision-making processes, as they are only targeting one cog of a bigger machine. TPR's information is based on the NER regime which, in itself, is a cause for concern as it puts the onus on directors to inform TPR of material changes making the definition of 'material change' a highly elastic concept.[1706] Along with the FRC, TPR also has a lack of 'proactive engagement'[1707] which means that it will request information after the event when the is a real potential some of it may have been destroyed or 'created' to fit the directors' version of events.

In contrast, the SEC primarily relies on whistleblowers to provide information in a timely fashion which results in a prosecution, by providing a financial incentive. [1708] This is obviously a better method but it relies upon individuals taking a risk, although that has not dissuaded individuals when considering the amount paid to whistleblowers. ASIC's approach is better because it is based upon a proactive approach which informs its investigative methods through surveillance and the utilisation of requesting records to review before initiating a full enquiry. The UK would benefit, through the holistic accountability of directors in LPCs, by potentially employing a hybrid model of both

[1703] Australian Securities and Investments Commission (n.1634); Australian Securities and Investments Commission, Part 3.
[1704] The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019.
[1705] Australian Securities and Investments Commission Act 2001, s.91.
[1706] The Pensions Regulator (Notifiable Events) Regulations 2005.
[1707] Pensions Act 2021.
[1708] US Securities and Enforcement Commission (n.1581); US Securities and Enforcement commission, 'SEC Issues Multiple Whistleblower Awards Totaling Over $36 Million' (*US Securities and Enforcement Commission*, 18 December 2020) <https://www.sec.gov/news/press-release/2020-325> accessed 28 December 2020.

allowing for the incentivisation of whistleblowers so that they come forward, as well as a proactive approach to ensure that the entity, holding directors of LPCs holistically accountable, can be an effective monitor of corporate conduct by being alive to signals of misconduct.

6.9.4 Stronger Examination

For holistic accountability to work, knowledge plays a part. But, in the absence of the information and directors, that either create and/or compile that information and execute decisions based upon it, being examined, it is futile. It is posited that an organisation charged with holding directors holistically accountable is not able to carry out its role, and examination, if it works on a consensual basis, such as the FRC. It is also the case that FRC does not actually examine directors but auditors who will only rely upon information given by directors. There is also a question mark over the independence of the FRC and auditors when considering that the majority of the senior leadership were previous employees of large accounting firms, resulting in arguably a hesitancy to implicate their former peers. TPR, on the other hand, possesses a passive mindset with no real intention to influence decision-making.[1709] Rather than examining the actions and conduct of directors, it employs a '…tentative and apologetic approach'[1710], which does it no favours because it allows directors to steer the investigation avoiding any examination of them.

In the US, the SEC examines all allegations of misconduct[1711] although on an ex-post basis which is problematic. This arguably allows for examination because it allows the SEC to look at conduct which may border on misconduct. It also can interview directors as well as gatekeepers[1712] which enhances the SEC's position to gain a well-rounded picture of the goings-on. ASIC whilst also having the ability to interview directors, does not allow for the interference of legal counsel[1713] and nor does it readily accept the defence of legal privilege, and requires an answer to all of its questions.

These factors of examination of a non-consensual approach, investigation of all allegations and the interview of directors, are required for the holistic accountability of directors of large private companies. Although any implementation would require

[1709] Pensions Act 2021.
[1710] Business, Energy and Industrial Strategy and Work and Pensions Committee (n.1370) para 187.
[1711] Ehret (n.1596).
[1712] Stephenson (n.1611).
[1713] Stumm (n.1676).

further enhancement so that the issue of ex-post accountability is minimised in favour of a greater ex-ante approach.

6.9.5 Outcome

One of the purposes of holistic accountability is to enable a number of outcomes. While all four organisations can impose some form of outcome, the majority of the outcomes are similar for all organisations and some of the outcomes are stronger than others. For example, FRC, TPR, SEC and ASIC all impose penalties. Although the organisations differ in some instances TPR can issue a contribution notice, whereas the SEC can obtain disgorgement. While all the organisations discussed can impose an outcome, many of which can be seen as a punishment if and when they are imposed, none of the organisations has done, or has the ability, to give directors, the board as a collective, or even the company a clean bill of health.

The entire purpose of an outcome as an element of holistic accountability is so that the perception of accountability as negative can be countered. This is because the imposition of an outcome will not always result in a consequence or punishment but rather may enable acceptance, praise and/or reward. Although to what extent a regulator is to reward good corporate governance is debatable. However, the current set-up does not provide for this, and nor are there any elements from the international examples which could provide this and therefore could be exported to the UK.

6.10 Summary

This chapter has examined the current regulatory framework to ascertain whether it empowers the government to hold directors of LPCs. It has done this by evaluating it against the elements of holistic accountability. It has also looked at the SEC and ASIC, as international examples, to see what potential lessons could be learned in respect of the holistic accountability of directors in LPCs. It has been found that both the FRC and TPR fall short of holding directors of LPCs holistically accountable. They only focus on corporate accounting and pension schemes respectively and fail to adequately fulfil each of the holistic accountability elements. Indeed, it is fair to say that even in their current constitution, they have failed to hold individuals or entities accountable.

Looking at the SEC and ASIC, as international examples, each has a solid legal basis for the accountability of directors, amongst others, for the enforcement of corporate laws. Each has had considerable success in obtaining knowledge as well as having strong examination powers resulting in strong outcomes. Some of the key takeaways

include providing a legal basis for obligations, further information powers to aid knowledge, as well as stronger examination powers and the reformulation of outcomes to ensure that judgements are not only focused on a form of punishment. Taking these points on board to ensure the holistic accountability of directors of LPCs, arguably means a reformation of the current UK corporate landscape, because it is simply not enough for an (inadequate) focus on corporate reporting and pension schemes.

Consequently, two questions remain and require answers, and these will be discussed in the next chapter. The first is the type and set-up of the structure required to ensure the holistic accountability of directors of LPCs. Secondly, the work of the SEC and ASIC needs further consideration when ascertaining how directors might be held more accountable, strengthening the elements, identified via the SEC and ASIC, and how they ought to be incorporated within that set-up.

CHAPTER 7
HOW DIRECTORS OF LARGE PRIVATE COMPANIES COULD BE HELD HOLISTICALLY ACCOUNTABLE IN THE UK

7.0 Introduction

Having highlighted the current gaps in holding directors of LPCs holistically accountable in the UK, there must be wholesale reform. This chapter will address the gaps identified, building on the lessons learned through the operations of the SEC and ASIC. It will propose a way forward to better enable the holistic accountability of directors of LPCs. There is a failure to acknowledge that directors of LPCs have become more emboldened due to a lack of accountability, becoming '…exemplars of the distorted mores of the modern world.'[1714] There is no clear solution about how this should be tackled with some directors of LPCs seeing the companies they control as '…personal fiefdoms, with scant regard to the conventions of the outside world.'[1715] Indeed, '[q]uite what needs to be done appears to elude government.'[1716]

To address the gaps, the first part will focus on honesty, and where the definition of honesty could be incorporated into the corporate framework. The second part will consider legal obligation and if any changes are required to the current body of law which places a responsibility on directors, due to much of the law being focused on specific elements such as duties[1717] and reporting requirements[1718]. The third part will examine knowledge and issues that currently exist obtaining knowledge from directors of LPCs and it will look to use aspects from both the SEC and ASIC in plugging the gaps. The next part will consider examination, ascertaining if elements of examination used by the SEC and ASIC can be used for holistic accountability.

The fifth part will examine outcome and determine whether the current range of outcomes satisfy holistic accountability as a comprehensive mechanism and not just one of consequence or punishment. It will focus on strengthening holistic accountability drawing from the discussions and elements identified by the SEC and ASIC. In evaluating the above, the limitations and weaknesses of the proposals put forward will also be examined. The chapter provides a brief discussion and an outline of

[1714] Simon Kelner, 'Philip Green acted legally Morality is not a factor' (*iNews*, 25 July 2016) <https://inews.co.uk/opinion/columnists/philip-green-acted-legally-morality-not-factor-15553> accessed 20 June 2021.
[1715] Ibid.
[1716] Jeremy Drew, 'Why we Need a Super Regulator' (*British Retail Consortium*, 15 May 2020) <https://brc.org.uk/news/the-retailer/why-we-need-a-super-regulator/> accessed 30 March 2021.
[1717] Companies Act 2006, ss.170-177.
[1718] Companies Act 2006, Chapter 4.

recommendations for future research that are identified as a result of directors of LPCs being held holistically accountable. The following part will ascertain the types of powers and structures required to enforce holistic accountability, as well as whether a general corporate regulator is needed in the UK. Finally, there is a summary.

7.1 Holistic Accountability

For the discussion below, it is worth revisiting the definition of holistic accountability. This is so that a more detailed discussion of each of the elements can be properly understood. It is not intended to explore or explain the definition but to simply provide a brief overview. It will be recalled that holistic accountability has three elements, along with its two-fold responsibility of honesty and legal obligation. A working definition of honesty has also been proposed. The first element is knowledge, specifically the knowledge of directors and how this could be obtained to use as part of the holistic accountability process. The second is examination which looks at the actions and decisions to determine or validate decision-making processes, as well as scrutinise those decisions. The final part of holistic accountability is outcome which is essentially the result of the holistic accountability process.

7.1.1 Honesty

The notion of honesty and its role in accountability has been discussed at length in previous chapters and it is not intended to rehearse the same. However, it is important to note that in the accountability process, a personal sense of honesty, integrity and fairness will be in play making it difficult to separate honesty from a personal sense and a professional one.[1719] For example, an individual sense of accountability will depend on personal values and individual conscience. Therefore, personal honesty may not require certain standards to be upheld, whereas professional honesty may do so. Not only that, but all directors are different. Each director will have a different upbringing, background, culture and awareness of what they perceive to be right or wrong. Reliance upon an individual director's interpretation of honesty is, likely to differ from board to board and company to company. Therefore, there is a need for an objective view of honesty.

7.1.1.2 Legal Obligation

The working definition of honesty applicable to all directors proposed is: the obligation is to be wholly truthful and forthcoming to the company in all its matters whether directly

[1719] Mulgan (n.118) 558-560.

or directly, not omitting anything which would bring that truthfulness into question.' In dissecting this definition, several features come to light. The first aspect is obligation and these can take various forms. For example, there can be social obligations, moral obligations and legal obligations. Although the Cambridge Dictionary defines obligation as 'the fact that you are obliged to do something.'[1720], the Oxford Dictionary takes into account the latter two obligations stating it to be like '[a]n course of action to which a person is morally or legally bound; a duty or commitment.'[1721] Therefore, it is fair to say that an obligation is essentially something that one is either persuaded or required to do, in many different contexts.

The question then arises as to what kind of obligation the definition of honesty requires. There has to be a universal standard of honesty, otherwise individual interpretations are likely to take place. The onerous and/or pertinent duties and responsibilities of directors have often been legislated for in statute. For example, the appointment and removal of directors[1722], reporting requirements[1723] and directors' duties[1724] amongst others are all contained in statute. It is also fair to say that something which is required by law often has a better effect when compared to self-regulation or voluntary action, although it is accepted that the effects of hard-law versus soft-law are strongly debated.[1725] It not only constrains self-serving auto-interpretation, but assists with coherence between individual commitments, and provides direction on accepted modes of legal discourse, all helping to limit opportunistic behaviour.[1726]

A legal obligation is more likely to encourage directors of LPCs, rather than an obligation of a voluntary nature. For example, voluntary obligations, in comparison to mandatory duties are the moral work product of directors.[1727] In this regard, the moral work product is likely to be intrinsically different from director to director and from board to board. There is also the possibility of non-compliance with a voluntary obligation

[1720] Cambridge Dictionary, 'Obligation' (*Cambridge Dictionary,* not known) <https://dictionary.cambridge.org/dictionary/english/obligation> accessed 2 April 2021.
[1721] Lexico, 'Obligation' (*Lexico*, not known) <https://www.lexico.com/definition/obligation> accessed 2 April 2021.
[1722] Companies Act 2006, Part 10.
[1723] Companies Act 2006, Chapter 4.
[1724] Companies Act 2006, Chapter 2.
[1725] Kishanthi Parella, 'Hard and Soft Law Preferences in Business and Human Rights' (2020) AJIL Unbound < https://doi.org/10.1017/aju.2020.33> accessed 30 July 2022.
[1726] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' [2000] 54(3) International Organization 421, 427.
[1727] Aditi Bagchi, 'Voluntary Obligation and Contract' [2019] 20(2) Theoretical Inquiries in Law 433, 436.

because there is no consequence. After all, it is seen as something additional to what is already required (mandatory).

Where there has been an attempt to comply with a voluntary, or self-regulatory, obligation, directors of LPCs may decide only to fulfil the obligation to the letter, rather than follow the spirit of the obligation. This only serves as an attempt to comply with rather than fully embrace the obligation, in the absence of statutory backing. It is conceded that success will vary but is still likely to be more effective when compared to a voluntary (or self-regulated) obligation.

Having discussed the benefits of having the obligation of honesty in statute, it is now important to ascertain why the working definition of honesty ought to be included within the legislation. Economists state that the law provides a deterrence with legal sanctions influencing behaviour.[1728] Gillespie state that people, or, in this context directors of LPCs, obey (to a lesser or greater extent), as they see it as a legitimate authority.[1729] However, Professor Richard McAdams states that the law works as a focal point to assist people to avoid conflict or other undesirable situations. He states that the law works without sanctions or legitimacy because it is simply a way to coordinate with people.[1730] Although the first part is agreed in respect of avoiding conflicting situations, the second is questionable given that not following the law must give rise to sanctions for people to be incentivised to follow it. If there is no detriment to not doing something, in this case following the law, then there is nothing to compel individuals to follow it.[1731] The fact remains that having a legal definition of what constitutes honesty is likely to provide benefits within the holistic accountability process.

In previous iterations of the common law that have been codified, within the corporate law sphere at least, the aim has always been for clear and authoritative guidance that directors can rely upon and will '…bind the courts…. be consistently applied combined with the need to clarify the law in the areas of uncertainty and to make good the defects.'[1732] By having a legal definition of honesty, not only would mean the definition would be clear but it would also ensure that all directors are aware of the honesty standard required of them leaving little room for discretion and/or lenient interpretations. For example, the courts may work through aspects of the definition,

[1728] Becky Beaupre Gillespie, 'Why Do People Obey the Law?' (*The University of Chicago Law School*, 13 January 2015) <https://www.law.uchicago.edu/news/why-do-people-obey-law> accessed 2 April 2021.
[1729] Ibid.
[1730] Gillespie (n.1728).
[1731] AD Woozley, 'Legal Duties, Offences, and Sanctions' [1968] 77(308) MIND 461, 464.
[1732] Department of Trade and Industry, 'Modern company law, for a competitive economy: final report' (Department of Trade and Industry, 2001).

particularly concerning whether directors have been forthcoming and whether their conduct did/did not bring that truthfulness into question.

It is noted that what constitutes a lenient interpretation as well as the rigidity of applying honesty would have to be determined by the courts, perhaps through a test case, especially within the commercial context. The importance of a legal definition gains further traction when considering that the board and companies generally are heavily involved in lobbying government(s) and are at the forefront of public consultations when new legislation or changes to legislation are proposed. Indeed lobbying, at least in Britain, can be '…considered by some to be the "the most developed" in Western Europe'[1733] this is despite '…inadequate rules governing disclosure of lobbying activities.'[1734]

There have also been instances previously, where legislation has been drafted to oblige directors to not only conduct themselves in a certain way but also have regard to certain elements. For example, the duty to promote the success of the company[1735] legally obligates directors of, both private and public limited, companies to promote the success of the company for the benefit of the members as a whole. In doing so, directors much act in good faith and have regard to several factors such as long-term effects, employees, and relationships with suppliers and customers among others. This is not the only example where a provision is interpreted by the courts requiring directors to act honestly.

7.1.1.3 Testing (Dis) Honesty

Aside from having a legal obligation as well as a legal definition of honesty, it is also important directors are tested on the obligation and against the definition in respect of whether they are being honest or dishonest. In this regard, whenever there has been a duty or obligation imposed on directors, there has nearly always been a statutory test to ascertain whether a director has fulfilled their duties adequately. There has been extensive case law on a common law basis, assisting the statutory test. For example, in regard to directors' duties, in ascertaining compliance with the same, a test of 'good faith' has been legislated through the codification of the duties as well as the common law good faith test.[1736]

[1733] Amy Melissa McKay and Antal Wozniak, 'Opaque: an empirical evaluation of lobbying transparency in the UK' [2020] 9(1) Interest Groups & Advocacy 102, 116.
[1734] Ibid.
[1735] Companies Act 2006, s.172.
[1736] Companies Act 2006, ss.170-178.

While it is accepted that there is no definition of what constitutes good faith, with that being left to the courts to determine, the fact that there is an aid to some degree in how a director should act in good faith. Indeed, the statute also provides for this by the 'good faith' test**[1737]**. By codifying this test, not only is there extensive case law which can be referred back to but also moving forward there is consensus and clarification on the nature of the test and how it ought to be applied in cases.

As a result, it is proposed that there be an honesty test codified in legislation to ascertain if directors are indeed being honest. The only clear way to do this would be to take the dishonesty test reformulated in *Ivey*[1738]. The test for dishonesty, in this case, was essentially 1) the actual state of the individual's knowledge or belief as to the facts and 2) whether the relevant conduct would be considered to be dishonest by the standards of ordinary people.[1739] While this test for dishonesty is based on the common law, there is no reason not to have it codified in statute as has previously been done for the sake of clarification. It is worth pointing out that the dishonesty test is based upon the previous dishonesty test in *R v Ghosh*[1740], the position of which was referred to in many cases in respect of dishonesty.

In instances where the law, specifically common law, is unclear, there have always been attempts to codify those laws so that clarity is achieved, and enforcement of those laws is in alignment with what Parliament intended. Although, it is debatable as to whether codification works, at least in the short-term, arguably the long-term benefits are clear.[1741] In the absence of codification, the government has issued guidance on current law to provide that clarity. In other instances, secondary legislation has been used to plug the gaps of primary legislation so that law cannot only be enforced but also operated as well as make amendments. Statutory instruments also serve a similar purpose by allowing Parliament to make changes to existing laws.[1742] This is one of the most frequently used types of legislation with approximately 3500 being drafted and around 1000 being considered by parliament.[1743]

[1737] Companies Act 2006, s.178
[1738] *Ivey* (n.285).
[1739] Ibid.
[1740] *Ghosh* (n.228).
[1741] David Cabrelli, 'The reform of the law of directors duties' in UK company law' [2008] <http://www.law.ed.ac.uk/includes/remote_people_profile/remote_staff_profile?sq_content_src=%2BdXJsPWh0dHAlM0ElMkYlMkZ3d3cyLmxhdy5lZC5hYy51ayUyRmZpbGVfZG93bmxvYWQlMkZwdWJsaWNhdGlvbnMlMkYxXzQ4NV90aGVyZWZvcm1vZnRoZWxhd29mZGlyZWN0b3JzZHV0aWVzaW51a2NvLnBkZiZhbGw9MQ%3D%3D> accessed 31 May 2022.
[1742] UK Parliament, 'What is Secondary Legislation?' (*UK Parliament*, not known) <https://www.parliament.uk/about/how/laws/secondary-legislation/> accessed 17 May 2021.
[1743] Ibid.

For example, directors' duties, regulated by the common law and equity, were codified to provide clarity to directors as to their obligations. Indeed, Lady Arden, speaking extra-judicially, argues that codification was supposed to make the law more accessible to directors and their advisors, with evidence from empirical research undertaken for the Law Commissions showing extensive support amongst directors for a statutory statement.[1744] Other examples also include the reformation of judicial review to '…to clarify existing law…'[1745] and clarification of electronic verification requirements for gambling operators and other regulated businesses.[1746]

Therefore, it is clear that a test for (dis)honesty is required. Legislation has usually allowed for various tests to be conducted to ensure the correct type of behaviour is followed. It would not be difficult to have a test for dishonesty when considering that the recent decision of *Ivey*[1747] clarifies much of the common law test as stated in *R v Ghosh*.[1748] The test, confirmed by subsequent case law, not only provides greater certainty in determining dishonesty, it reconciles all of the case law both criminal and civil surrounding it. Legislating the test would only bring further clarity as to its longevity and wording. Not only this, but there are clear examples of when Parliament has codified common law concepts, clarified or made amendments to existing legislation, which demonstrates that Parliament is willing to step in to clarify law when it needs, but also that it can be achieved if required.

The codification of the test would not only achieve greater clarity but would reduce the potential ability for nuanced interpretations of the test. Although the test for dishonesty has been contextualised for directors of LPCs for this thesis, it does not have to be solely limited to them, because the test is far more comprehensive. The test for dishonesty can be applied universally thus distinguishing honesty from dishonesty.

[1744] Mary Arden, 'Companies Act 2006 (UK): A New Approach to Directors' Duties' (2015) Common Law and Modern Society: Keeping Pace with Change <https://doi.org/10.1093/acprof:oso/9780198755845.003.0016> accessed 30 July 2022.
[1745] Ministry of Justice, 'Reform of Judicial Review: the Government response (*Ministry of Justice*, April 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228535/8611.pdf> accessed 30 July 2022.
[1746] Guy Wilkes, 'The UK Government clarifies electronic verification requirements for gambling operators and other regulated businesses' (*Mischon De Reya*, 12 October 2020) <https://www.mishcon.com/news/the-uk-government-clarifies-electronic-verification-requirements-for-gambling-operators-and-other-regulated-businesses> accessed 17 May 2021.
[1747] *Ivey* (n.285).
[1748] *Ghosh* (n.228).

7.1.1.4 Differentiating between Criminal & Civil (Dis) Honesty

There is further weight added to the argument of codification when considering that, previously, criminal and civil dishonesty were treated differently. For example, in civil proceedings, it was accepted that the correct test of dishonesty was as stated and refined, in *Barlow Clowes International Ltd v Eurotrust International Ltd*.[1749] This is because a dishonest state of mind is a subjective mental state. The standard by which the law determines dishonesty is objective. If the standards deem an individual's mental state dishonest, it is irrelevant to the standards of the individual judges.[1750] This is even though dishonesty, '…like the elephant…is characterised more by recognition when encountered than by definition.'[1751] Inevitably, this resulted in an '…unprincipled divergence between the test for dishonesty in criminal proceedings and the test of the same concept when it arises in the context of a civil action'[1752], resulting in a two-tiered test.

However, *Ivey*[1753] has brought both the criminal and civil law, on dishonesty, in alignment. Perhaps because when something is honest or dishonest, it should not depend on the forum in which the argument takes place. Judges hearing cases in the civil and regulatory arena, post-Ivey, have been persuaded by *Ivey*[1754]*.* For example, in *General Medical Council v Dr Kennedy Krishnan*[1755], it was stated that *Ivey*[1756] was the test that should be applied. In *Director of Public Prosecutions v Vicky Patterson*[1757], Sir Brian Leveson, on the possibility of the Court of Appeal preferring *R v Ghosh*[1758] due to its expression in obiter, stated that '…given the terms of the unanimous observations of the Supreme Court expressed by Lord Hughes, who does not shy away from asserting that Ghosh does not correctly represent the law, it is difficult to imagine the Court of Appeal preferring Ghosh to Ivey in the future.'[1759]

The test propounded by *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)*[1760] is sufficient in civil proceedings. Despite the obiter nature of the comments in *Ivey*[1761], *R*

[1749] *Barlow Clowes* (n.243).
[1750] Ibid [10].
[1751] *Ivey (n.285) [48]*.
[1752] Ibid [57].
[1753] *Ivey (n.285).*
[1754] Ibid.
[1755] [2017] EWHC 2892 (Admin) [24].
[1756] *Ivey* (n.285).
[1757] [2017] EWHC 2820 (Admin).
[1758] *Ghosh* (n.228).
[1759] *DPP* (n.1757) [16].
[1760] *Ivey* (n.285).
[1761] Ibid.

v David Barton and Rosemary Booth[1762] since then have confirmed, in the Court of Appeal, that the dishonesty test in *Ivey* [1763] was indeed the preferred test.[1764] It is therefore fair to say that it is almost certain, that the dishonesty test in *Ivey*[1765] is to be accepted in civil proceedings. This adds further weight to the fact that the test should indeed be codified seeing as it is likely to be accepted in criminal, civil and regulatory proceedings. Given this, the courts would still be free to develop the concept given the fact-sensitivity in each case that is put before it.

7.2 Knowledge

Knowledge plays an important part in holistic accountability because of the intimate link between the director(s) and the company as well as its significance to accountability more generally.[1766] From the previous chapter, it was demonstrated clearly that the FRC and TPR cannot obtain knowledge from individual directors, or collectively, the board. For example, the FRC is not able to hold directors liable, without them holding relevant accounting or financial accounting qualifications, accountable despite the board as a whole being required to prepare annual accounts.[1767] This is exacerbated by the fact that the FRC employs a reactive approach by asking the public to provide information through complaints or receiving referrals from other organisations.

Another issue with the FRC is its Annual Quality Reviews (AQRs) sampling audits from auditing firms which are done voluntarily and do not give a proper insight into the decision-making of the board or a company's financial position.[1768] TPR is also reactive because it relies upon boards to comply with the notifiable events regime[1769], putting the onus on boards to inform TPR with a lack of 'proactive engagement'[1770]. All this, when taken together, represents arguably a lamentable failure on the part of the current UK corporate landscape to hold directors holistically accountable for areas in which there is already enforcement.

[1762] [2020] EWCA Crim 575.
[1763] *Ivey* (n.285).
[1764] Julian Jones, 'Clarification of the Test for Dishonesty in Criminal Law: R v David Barton and Rosemary Booth [2020] EWCA Crim 575' (*Park Square Barristers*, 30 April 2020) <https://www.parksquarebarristers.co.uk/news/clarification-test-dishonesty-criminal-law-r-v-david-barton-rosemary-booth-2020-ewca-crim-575/> accessed 17 May 2021.
[1765] *Ivey* (n.285).
[1766] Higgs (n.507); *Re Brian D Pierson* (n.366); Solomon & Solomon (n.360).
[1767] Walker-Arnott QC (Hon) (n.1389) 180.
[1768] Business, Energy and Industrial Strategy Committee (n.1453) para 249-251.
[1769] The Pensions Regulator (Notifiable Events) Regulations 2005.
[1770] Pensions Act 2021.

7.2.1 Whistleblowing in the UK

There is a need for a centralised, or at least a more formal approach, to whistleblowing and in turn whistleblowers. For clarity, the term whistleblowing can be defined as reporting wrongdoing or certain types of wrongdoing.[1771] Misceli and Near define it as '[t]he disclosure by organization members (former or current) of illegal, immoral and illegitimate practices under the control of their employers to parties and organizations that may be able to effect action'.[1772] Officially, in UK Legislation, however, it is defined as 'making a disclosure in the public interest'[1773]. There was a big emphasis on whistleblowing in the UK as it came as a result of tragedies such as the Clapham Rail Crash[1774] and the collapse of Barings Bank[1775], where it was realised that employees knew of the dangers but had been too scared to sound the alarm or raise the matter publicly or with the right people.

As a result, the Nolan Committee on Standards in Public Life[1776] in 1995 recommended that unless a safe and acceptable method of reporting concerns was relayed to employees, it was unlikely that employees would raise the alarm. This resulted in whistleblowers being provided with statutory protection.[1777]_In the UK, the Public Interest Disclosure Act[1778] allows individuals to make a 'protected disclosure'. A protected disclosure is one in which an individual has a reasonable belief that a criminal offence has been committed, will be or is likely to be committed.[1779] It also covers where an individual is failing, or likely to fail, a legal obligation and/or a miscarriage of justice has occurred or is likely to occur.[1780] The health and safety of an individual, and the

[1771] Gov.UK, 'Whistleblowing for employees' (*Gov.uk*, not known) <https://www.gov.uk/whistleblowing> accessed 17 May 2021.
[1772] Peter B. Jubb, 'Whistleblowing: A Restrictive Definition and Interpretation' [1999] 21(1) Journal of Business Ethics 77, 84.
[1773] National Audit Office, 'Government whistleblowing policies' (*National Audit Office*, 15 January 2014) <https://www.nao.org.uk/report/government-whistleblowing-policies/> accessed 17 May 2021.
[1774] Protect Advice, '1988 Clapham Junction rail disaster' (*Protect,* not known) <https://protect-advice.org.uk/timeline/1988-clapham-junction-rail-disaster/> accessed 26 December 2022.
[1775] Bloomsbury Square, 'The Importance of Whistleblowing Laws' (*Bloomsbury Square Employment Law*, 25 August 2021) < https://bsquarelaw.co.uk/2021/08/25/the-importance-of-whistleblowing-laws/> accessed 26 December 2022.
[1776] Lord Nolan, 'Standards in Public Life: First Report of the Committee on Standards in Public Life Volume 1: Report' (*Gov.Uk*, May 1995) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336919/1stInquiryReport.pdf> accessed 26 December 2022.
[1777] National Audit Office (n.1770); The Public Interest Disclosure Act 1998.
[1778] The Public Interest Disclosure Act 1998.
[1779] The Public Interest Disclosure Act 1998, Part IVA.
[1780] The Public Interest Disclosure Act 1998, Part IVA.

environment is likely to be or has been damaged and information about any of these matters has been, is being or is likely to be deliberately concealed.[1781]

It is also the case that, as a matter of good practice, many companies have their whistleblowing policies aligned with the Public Interest Disclosure Act.[1782] Some employers, most notably, those who may work in regulated sectors such as financial services or insurance, or are listed on the London Stock Exchange, have separate obligations such as that of the Corporate Governance Code requiring arrangements to be in place for staff to raise concerns.[1783]

Employment Tribunal statistics show that employees are willing to 'blow the whistle'[1784]. For example, from 2015 to 2020, there was a 141% increase in whistleblowing claims. Around 2 out of 5 claims are successful as claims are uncapped, with no statutory limit for compensation. There was a 40% increase in 2018/19, perhaps because of the abolition of tribunal fees in 2017.[1785] There is a basic framework already in place for the introduction of a whistleblowing scheme to aid holistic accountability.

7.2.2 UK Whistleblowing Legislation

Considering the whistleblowing framework already in existence in the UK, it is clear that there is scope for whistleblowing to assist in holistic accountability. In the previous chapter, there was discussion regarding the SEC's use of whistleblowing and the success it had achieved through this, and it is clear that there are benefits to be had. It is fair to say that whistleblowing '…plays the important role of helping to fill the gaps in the regulatory system that is designed to check the abuse of organizational power.'[1786]

Therefore, it is important that the creation of a whistleblowing programme specifically targets those individuals who are likely to hold or have their possession, knowledge or information which could help hold directors of LPCs holistically accountable. A key reason for this is that LPCs, and their boards, by their nature, are not likely to volunteer

[1781] The Public Interest Disclosure Act 1998, Part IVA.
[1782] The Public Interest Disclosure Act 1998.
[1783] Andreas White, 'Whistleblowing: Legal Q&A' (*Personnel Today*, 13 March 2007) <https://www.personneltoday.com/hr/whistleblowing-legal-qa-2/> accessed 17 May 2021.
[1784] Simon Rowse and Laura Farnsworth, 'A Surge in Employment Tribunals' (*Safecall*, 4 November 2020) <https://www.safecall.co.uk/en/resource-centre/latest-news/2020/november/a-surge-in-employment-tribunals/> accessed 17 May 2021.
[1785] Ibid.
[1786] Robert J. Paul and James B. Townsend, 'Don't kill the messenger! Whistle-blowing in America — A review with recommendations' [1996] 9(2) Employee Responsibilities and Rights Journal 149, 149.

or be compelled to provide information outside of what is required. For example, a study by the Informatic Corporation found that 68 percent of companies were not prepared to open up access to their data, with 43 percent citing concerns such as corporate privacy, 32 percent as protection of intellectual property and 29 percent as mismanagement of online data.[1787]

In this regard, individuals such as employees and suppliers, but more specifically employees are well-positioned to 'blow the whistle' as they will often be privy to confidential information, and the more senior an employee is the more likely that is to be the case. This is perhaps why the Public Interest Disclosure Act[1788] provides specific protection to employees. For example, it provides automatic protection to employees, but the definition of workers is and has been widely construed. A worker is defined as 'an individual who has entered into or works under… a contract of employment or any other contract.'[1789] However, the definition of worker is extended in respect of whistleblowing to include agency workers and individuals supplied by an intermediary provided that the terms are not substantially agreed upon by the individual themselves, ruling out those who work on a self-employed basis.[1790]There is an argument to be made that even those on a self-employed basis may be covered if the contractor 'substantially determines or determined the terms on which he [or she] is or was engaged'.[1791] Nevertheless, a wide scope is given to individuals to be classified as workers for whistleblowing within the legislation.

The government has given employees, who blow the whistle, significant protection. For example, they have a statutory right not to suffer detriment after having made a protected disclosure.[1792] If a worker does suffer detriment, then it is, if they are relieved of their job, classed as unfair dismissal. Normally, unfair dismissal can only be claimed if the worker has been employed by the employer for at least two years (this is known as the qualifying period). However, this does not need to be satisfied if the employee is claiming unfair dismissal as a result of whistleblowing.[1793] Unlike other forms of employment tribunal claims, where caps on compensation exist, there is no cap on compensation awarded by an employment tribunal if it is unfair dismissal as a result of

[1787] Charles Arthur, 'Businesses unwilling to share data, but keen on government doing it' (*The Guardian*, 29 July 2010) <https://www.theguardian.com/technology/2010/jun/29/business-data-sharing-unwilling> accessed 17 May 2021.
[1788] The Public Interest Disclosure Act 1998.
[1789] Employment Rights Act 1996, s.230(3).
[1790] Employment Rights Act 1996, s.43K(1)(a)(ii)).
[1791] Employment Rights Act 1996, s.43K(2).
[1792] The Public Interest Disclosure Act 1998, s.47b.
[1793] The Public Interest Disclosure Act 1998, s.103a.

whistleblowing, and making a protected disclosure.[1794] It is clear that there is a substantive framework already in place for whistleblowing, and it becomes clear to see why. In the previous chapter regarding the case studies, whereas part of their job, they are complicit (advertently or inadvertently) in wrong-doing.

In BHS, employees were the first to notice the additional delay in the maintenance of its stores as well as a lack of investment in stores, updating and refreshing them.[1795] In Sports Direct, it was workers who were subjected to incidents such as 'chest pain, breathing problems, convulsions, fitting and strokes, and five calls from women suffering pregnancy difficulties, including one woman who gave birth in the toilet in the warehouse'.[1796] And in Wonga Ltd, employees on the instruction of the employer adopted aggressive debt collection techniques[1797] and sent customers letters threatening legal action classed by the FCA as 'unfair and misleading' as the names of employees had been used to create bogus law firms.[1798] As a result, throughout these examples, the role of the employee plays a significant part in enabling, and/or being privy, to such decisions and practices, making a clear case for an employee-led whistleblowing programme.

7.2.3 Creating a Whistleblowing Programme

The creation of a (publicised) whistleblowing programme would assist in the holistic accountability of directors of LPCs. Such a creation would allow for the transfer of company knowledge on a much broader scale, more particularly from employees who are likely to have intricate knowledge. Although the FRC does accept and consider complaints from the public, this is not sufficient as it is unlikely the public would have the level of knowledge required to assist in the holistic accountability of directors. On the other hand, employees will not only have the knowledge but are more likely to know the instigation of said (mis)conduct, when it started, what was done and how long it lasted. In some cases, the very same employee(s), who whistleblow, may have also had a minor or major role to play in enabling the (mis)conduct.

It is unclear why employees may decide to whistleblow. There has been extensive academic research done to ascertain why whistleblowers decide to speak up. Although it is not within the scope of the thesis to ascertain the reasoning behind this, it is worth

[1794] The Public Interest Disclosure Act 1998, s.4.
[1795] Shah (n.645).
[1796] Rodionova (n.775).
[1797] Hurley (n.869).
[1798] Jones (n.877).

noting this is a debated area. For example, where it is out of moral concerns for the well-being of others[1799], upholding a moral principle or value[1800], or out of vengeance and/or personal gain.[1801] The upside to this is that employees do whistleblow, regardless of their reasoning, and it is clear there are benefits to encouraging employees to speak out whatever their reasons.

It is advocated that an approach similar to, but more suited to the UK corporate environment, the one employed by the SEC whistleblowing programme is embraced. It can be said that the whistleblowing programme is largely successful with the majority of the SEC's enforcement work being instigated by whistleblowers. This is not something new. Indeed, Emily Pasquinelli, Acting Chief of the SEC's Office of the Whistleblower states that '[w]histleblowers play a critical role in an investigation, whether at the outset or during the course of an investigation.'[1802] The SEC received more whistleblowing reports in 2018 than in any other previous year. Even ASIC relies, to a degree, upon whistleblowers.[1803] For example, ASIC has several dedicated web pages and information sheets on whistleblowing ranging from guidance on what types of whistleblowing reports ASIC can accept to the protections available to whistleblowers.[1804]

Recently, the Australian Corporations Act 2001 was expanded to include greater protections for whistleblowers, such as a mandatory requirement for public companies, proprietary (private) companies and trustees of Australian Prudential Regulation Authority (ARPA) pension schemes to have a whistleblower policy from 1 January 2020.[1805] This seems to suggest two things. The first is that ASIC values the

[1799] P. Cailleba and S.C. Petit, 'The whistleblower as the personification of a moral and managerial paradox' [2018] 21(1) M@n@gement 675.
[1800] A. Baumert and others, 'Interventions against norm violations: Dispositional determinants of self-reported and real moral courage' [2013] 39(8) Personality and Social Psychology Bulletin 1053.
[1801] Thomas M. Devine and Donald G. Aplin, 'Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection Special Focus: Whistleblowers and the Public Interest' [1986] 4 Antioch Law Journal 5.
[1802] Steven J. Pearlman and Pinchos Goldberg, 'SEC Awards Four Whistleblowers More Than $31 Million' (*Proskauer*, 20 May 2021) <https://www.whistleblower-defense.com/2021/05/20/sec-awards-four-whistleblowers-more-than-31-million/> accessed 24 May 2021.
[1803] Knowledge@ Wharton, 'https://knowledgewhartonupennedu/article/whistleblowers-in-business/' (*Wharton University of Pennsylvania*, 5 November 2019) <https://knowledge.wharton.upenn.edu/article/whistleblowers-in-business/> accessed 27 May 2021.
[1804] Australian Securities & Investments Commission, 'Whistleblowing' (*ASIC*, not known) <https://asic.gov.au/about-asic/asic-investigations-and enforcement/whistleblowing/>accessed>accessed 30 July 2022.
[1805] Ibid.

contribution provided by whistleblowers to inform its activities, but also serves as a method of promoting individuals to become whistleblowers in the first instance.

It is not intended to explore the mechanics and intricacies of how a whistleblowing scheme should or would operate for LPCs. However, it is worth noting that it is likely that a centralised approach would be required at least at a governmental level so that the information is provided promptly and to the right place. In the majority of cases, whistleblowers will likely want to remain anonymous, and indeed ASIC do allow anonymous reports to be provided[1806], so the security of the identity of the whistleblower and the information provided will be of paramount importance. The key point is incentivising employees to become whistleblowers and provide protected disclosures in the first instance, and this is something that requires serious consideration.

7.2.4 Incentivising Whistleblowers

One of the key considerations for would-be whistleblowers is the potential consequences of making a disclosure. Given that, as Anvari and others note, there is a potential for high personal costs[1807], with this being found to be a negative predictor of whistleblowing intentions.[1808] Costs such as retaliation, social exclusion and income loss amongst others are like to contribute to a sense of powerlessness to effect meaningful change.[1809] As a result, there has to be a clear incentive for employees, both junior and senior to whistleblow. The potential to face personal costs has to be counteracted so employees want to whistleblow and report wrongdoing.

In this regard, it is advocated those employees who blow the whistle on misconduct are given compensation should they provide information which leads to a successful conclusion and assists in such an investigation.

The SEC has had, since 2011, a whistleblowing programme. Much of its success can be attributed, at least on a reactive basis, to the programme. Indeed, recently, more than US$31m was given to 4 whistleblowers '[demonstrating]… that whistleblowers with specific, credible information who significantly contribute to the success of an existing investigation may be eligible for an award.'[1810] Since its creation, it has

[1806] Australian Securities & Investments Commission (n.1804).
[1807] Farid Anvari and others, 'The social psychology of whistleblowing: An integrated model' [2019] 9(1) Organizational Psychology Review 41, 42.
[1808] Ibid 55; Susan Ayers and Steven E. Kaplan, 'Wrongdoing by Consultants: An Examination of Employees' Reporting Intentions' [2005] 57(2) Journal of Business Ethics 121.
[1809] Anvari and others (n.1807) 49.
[1810] Pearlman and Goldberg (n.1802).

received more than 40,000 tips, and in the fiscal year ending September 2020, the SEC received more than 6,900 tips, a single-year record.[1811] It has also since the start of the programme awarded US$863 million to 162 individuals, including over US$250 million in the first 8 months of the 2020-21 fiscal year.[1812] The figures average over US$74 million to 14 whistleblowers each year.

There are many examples of governments compensating whistleblowers. For example, The False Claims Act[1813] rewards whistleblowers in respect of claims of contractors defrauding the government, and the US Internal Revenue Service awards whistleblowers who report tax fraud.[1814] It is also worth noting that the UK's HM Revenue & Customs (HMRC) operate, by law[1815], a whistleblowing scheme for those who provide 'exceptionally helpful information'[1816] regarding tax fraud and evasion.[1817] Indeed, in 2017/18, HMRC paid out £343,500 to individuals.[1818] These awards do not just offset the personal cost of whistleblowing by providing monetary compensation but provide an added incentive which to some extent minimises the personal and financial loss blowing the whistle may come with.

ASIC does have a whistleblowing programme but does not provide a financial incentive.[1819] This is perhaps because of its ability to conduct surveillance, monitor companies in distress, as well as ask for certain information means that it can be proactive. It does, however, encourage whistleblowers to seek compensation through the courts, if loss, damage, or injury is sustained as a result of blowing the whistle. ASIC puts the responsibility on the whistleblower to bring an action for compensation but protections in respect of legal costs are given in the event the action brought is unsuccessful. Nevertheless, the mere fact that it has a whistleblowing scheme is telling of the importance it attaches to employees coming forward to report misconduct. Although ASIC does display an element of leniency if an employee, voluntarily self-reports their involvement in corporate misconduct, by considering their cooperation.

[1811] Mengqi Sun, 'SEC Whistleblower Program Shows Value of Speaking Up, Departing Chief Says' (*Wall Street Journal*, 16 April 2021) <https://www.wsj.com/articles/sec-whistleblower-program-shows-value-of-speaking-up-departing-chief-says-11618607640> accessed 31 May 2022.
[1812] Pearlman and Goldberg (n.1802).
[1813] The False Claims Act 1863.
[1814] Knowledge@ Wharton (n.1803).
[1815] Commissioners for Revenue and Customs Act 2005, s.26.
[1816] Pedro Gonçalves, ' HMRC paid £350,000 for tax fraud tip-offs' (*International Investment*, 2 May 2019) <https://www.internationalinvestment.net/news/4002057/hmrc-paid-gbp350-tax-fraud-tip-offs> accessed 27 May 2021.
[1817] Ibid.
[1818] Gonçalves (n.1816).
[1819] Australian Securities & Investments Commission (n.1804).

The current whistleblowing framework in the UK is quite advanced in respect of defining a 'protected disclosure' and in terms of the protections that it provides. The creation of a broader whistleblowing programme, targeted toward directors of LPCs, using the framework is highly likely to aid the holistic accountability of directors of LPCs. This is particularly important given the significant role employees have in blowing the whistle. Due to the potential cost faced by would-be whistleblowers, the correct incentives must be given, and in this regard, it is advocated that the SEC model is followed, and monetary compensation is provided. There should also be the ability to request records and in the most serious cases, the ability to seize them, ensuring that most of the knowledge held is extracted. All of this, when taken together, will aid the knowledge element of holistic accountability.

7.2.5 Whistleblowing Programme Underpinned by Statute

Three key issues are identified as possible shortcomings or problems. For a centralised whistleblowing scheme to work, these would need to be addressed. Although, there may well be weaknesses that may become apparent after implementation which would need to be refined on an ongoing basis. The first matter is having a centralised whistleblowing programme, the second is the drafting of the legislation and the third is the incentivising of whistleblowers and the fourth of the application of the ability to request (or seize) company records.

The possibility of having a centralised approach to the whistleblowing programme Is not something new, with many governmental departments employing such an approach. For example, the Department for Work & Pensions is responsible for welfare, pensions and child maintenance policy[1820], and the Department for Health and Social Care is responsible for leading the nation's health and social care take such an approach.[1821] The Corporate Finance Institute state that the advantages of a centralised approach mean that there is a clear chain of command, a focused vision, reduced costs and quicker implementation of decisions and improved quality of work.[1822] However, these departments have been in existence, in one iteration or

[1820] Gov.uk 'About us' (*gov.uk*, not known) <https://www.gov.uk/government/organisations/department-for-work-pensions/about> accessed 30 July 2022.
[1821] Gov.uk 'About us' (*gov.uk*, not known) <2022https://www.gov.uk/government/organisations/department-of-health-and-social-care/about#our-responsibilities> accessed 30 July.
[1822] Corporate Finance Institute, 'Centralization' (*Corporate Finance Institute*, not known) <https://corporatefinanceinstitute.com/resources/knowledge/strategy/centralization/> accessed 4 July 2021.

another, for many years and so their operations have been refined over that time and indeed political will, as well as financial capital (tax revenues), have assisted.

In regard to the whistleblowing programme, the first thing to consider would be what type of centralised approach would be employed. For example, would it be in the form of a separate government department dealing only with (all) whistleblowing issues or a non-executive agency such as the Insolvency Service? It is also worth questioning whether there would be the political will to see this to fruition. The external mechanisms of who would be responsible for the running of the programme, a member of parliament or a senior civil servant would also need to be considered. This is alongside the consideration of whether the workforce would consist of the civil service, either redeployed or recruited when considering the pressing issues of the COVID-19 pandemic and Britain's exit from the European Union. It is fair to say the centralised approach along with who would carry out the work would be a primary consideration.

A centralised approach, in whichever form it may take place, would also require the triaging of whistleblowing reports. This is problematic because there would have to be consideration of whether the centralised whistleblowing programme considers all whistleblowing reported to the government or simply ones that have a corporate governance concern. Not only that but an effective triage process would require all claims to be thoroughly investigated. It is worth bearing in mind whether there would be sufficient manpower to be able to cope with demand as well as ensure that each whistleblowing report is referred to accordingly. A related question would be whether the necessary information gateway (information-sharing agreements) already exists or would whether they would require drafting before information can be shared.

7.2.6 Drafting the Legislation

For the whistleblowing programme to have weight and clarity, it would need to be drafted into legislation. However, this poses several problems. For example, the legislation would need to clarify the centralised approach advocated earlier and how this allows for interaction with other government departments/agencies. Indeed, a similar exercise took place in 2005, when Inland Revenue and HM Customs & Excise merged to become HM Revenue & Customs through the Commissioners for Revenue and Customs Act.[1823] But the difference is both departments were pre-existing and therefore it may have been easier to merge the two organisations given that their former remits were clear.

[1823] Commissioners for Revenue and Customs Act, (CRCA) 2005.

The whistleblowing programme is something entirely new and so would require a lot more thought about how to bring all of it together through legislation. There would need to be consideration given as to whether amending/repealing legislation is required. This would determine whether the whistleblowing programme can accept and retain whistleblowing reports, as well as whether other government departments can accept and potentially investigate them.

A second problem aside from the actual programme would be to ensure that the intrinsic nature of whistleblowing, such as the Employment Rights Act (ERA)[1824], sufficiently covers disclosures made by employees. As holistic accountability covers all types of misconduct by directors of LPCs, all issues about conduct (potentially wider afield) must come under the scope of a protected disclosure so that employees are sufficiently covered as well as the fact that all concerns raised are covered. Not only that but potential changes may also be required under the Public Interest Disclosure Act[1825], so they fall under the public interest disclosure element. It is accepted, that with the definition of public interest having been covered earlier, the definition is debatable. Therefore, it may be worthwhile to attempt an exercise at producing guidance and/or legislation so that the public interest can be satisfied more easily. Although this is likely to be difficult given the fact it is likely to be fact-sensitive and applied to each disclosure individually.

7.2.7 Incentivising the Idea of Whistleblowing

The success of the whistleblowing programme arguably hinges on, in the main, incentivising employees to whistleblow. However, in the majority of situations where there is a financial incentive, it is susceptible to abuse. In this regard, it is worth considering whether there is a need to explicate the amount (or percentage) of financial reward a whistleblower is likely to receive within the legislation. the difficulty with this is that it assumes an entitlement to the reward without regard to other factors such as any involvement of the whistleblower in the misconduct, the timeframe in which the whistleblowing report was made amongst others and to what extent the disclosure played in the detecting and investigating of the misconduct. As a result, it is worth considering whether the development and operation of a monetary award system for successful results/convictions are discretionary, rather than taken as of right.

[1824] Employment Rights Act (ERA) 1996.
[1825] The Public Interest Disclosure Act 1998.

The first issue with this is how any monetary award would be funded in the UK, as it does not have a specific Investor Protection Fund, which the SEC does have.[1826] It is also worth considering whether there would be political appetite given how, currently at least, the COVID-19 pandemic has stretched public finances through the various employee financial support and loans to businesses offered to stabilise the economy. Therefore, it is worth questioning whether the government would be willing to invest public money into the whistleblowing programme, particularly in incentivising whistleblowers, if public finances are already in a parlous state.

It is also worth considering whether there would be hesitancy because a negative perception may be given by it, after all the US and the UK are not the same, despite the many common similarities. This is perhaps why the HMRC-operated whistleblowing scheme has not been publicised.[1827] Nonetheless, given that HMRC has a legislation-based whistleblowing scheme, it should not be (at least politically) difficult to understand the need for such a scheme.

Another possible shortcoming is that it is susceptible to abuse, with the possibility of contrived situations being created in the hope of obtaining whistleblowing money. There are possibilities of fraud taking place as well as other illegal acts. However, careful planning and elements to mitigate this should reduce the possibility. Nevertheless, this is a question as to what degree of investment into the programme would enable this. Clearly, manpower (workforce), IT systems as well as sufficient scrutiny around the finances in respecting amounts gone out and to whom, would be required but the more money invested is likely to put better checks and balances in place, rather than taking a 'bare-minimum' approach, as can often be the case, it is posited, in government departments.

There is also the question of what exactly the monetary awards would entail. For example, whether they would be set amounts, amounts based on a sliding scale with respect to factors such as cooperation provided, amongst others, or would it be a percentage based on the economic damage averted? Whilst the first two options are arguably straightforward, the third may pose some problems. It is not always possible to determine the economic damage, or to do so is likely to come to mean arriving at an arbitrary figure. This coupled with the fact that the funding would need to be addressed periodically to ensure there is enough money to pay monetary awards means that depending on the funding avenue obtained, there is likely to be scrutiny when awards are paid. Therefore, determining the proportionality of the monetary awards in line with

[1826] US Securities and Enforcement Commission (n.1589).
[1827] Gonçalves (n.1816).

the information, cooperation and (possibly) subsequent conviction requires further fleshing out.

7.2.8 Strengthening the Whistleblowing Programme

The imposition of a legislative whistleblowing programme raises several questions which need addressing before progress can be made toward formulating such a programme. Initially, the Public Interest Disclosure Act[1828] would need to be explored to ascertain if it allows for some form of a centralised whistleblowing programme or whether supplementary/additional legislation is required. Once that has been established, the existing body of employment would need to be reviewed to ensure nothing conflicts with employment rights among other matters. The concept of 'protected disclosures' would also need to be reviewed in light of holistic accountability given the broad nature of possible whistleblowing reports to ensure employees have adequate protection as whistleblowers. In line with 'protected disclosures', the notion of 'public interest' would also need to be considered.

In particular, defining the concept, or at the very least, providing some form of guidance that allows for determining what is under the remit of 'public interest'. The pertinence of this cannot be understated as whistleblowers would need to meet the threshold of both concepts to gain protection and so both require equal consideration. As a result, the questions that flow from this are as follows:

For example, some of the initial questions that would need addressing are:

I. Does the Public Interest Disclosure Act 1998 provide (some) basis for the formulation of a centralised whistleblowing programme? If so, does such scope allow for it to be amended through statutory instruments to include the programme?

II. In the alternative, how would additional legislation pertaining to the centralised whistleblowing programme interact with the Public Interest Disclosure Act 1998?

III. What interaction (if any) would, there be with the amended Public Interest Disclosure Act 1998, or additional legislation with employment law legislation?

[1828] The Public Interest Disclosure Act 1998.

IV. Would the above-mentioned interaction allow employee disclosures to be deemed as ‘protected disclosures’ in the public interest given the broad nature of holistic accountability and the ability for employees to report on almost anything likely to cause damage?

V. If a wide interpretation is not possible ensuring all types of reports are protected, then should consideration be given to amending the Public Interest Disclosure Act 1998 to include this?

VI. Given the nature of ‘public interest’ and its ambiguity, is there a case to be put forward in defining the term through legislation? If not, is it likely that some form of governmental guidance would assist in determining what could come under ‘public interest’?

The payment of monetary awards to whistleblowers is important and so it would need to be explored and established to whom the responsibility should fall in ensuring payment of those awards. The whistleblowing scheme would also need to set limits on the monetary amounts and how that translates into awards payable. If government control and oversight of the scheme, and by extension payment of awards is not viable, then exploration of whether it would advantageous to have something akin to the Investor Protection Fund (IPF). It is also worth considering if something like an IPF is attractive to the feasibility of payments. This is especially when considering at least in the initial stages where the seed money would come from to pay whistleblowers until the funds are built up by penalties. Finally, consideration would also be needed in respect of checks and balances and the reduction (or elimination) of fraud and fraudulent claims. In this regard, the following would need to be addressed.

I. Who would bear the responsibility of paying monetary awards to whistleblowers? Would it be the government or a governmental organisation on behalf of the government?

II. How would the scheme operate? Would it be a fixed monetary amount based on a sliding scale (dependent on factors) or a percentage based upon damage averted?

III. Would it be worthwhile exploring – in the event of a lack of political will in paying monetary awards to whistleblowers – something akin to SEC’s IPF?

IV. In the alternative, how feasible would it be for whistleblowers to be paid monetary awards out of collected penalties?

V. What checks and balances would be in place to ensure that fraudulent claims and contrived situations do not benefit? How is this likely to work in practice?

7.2.9 Ability to Request (or Seize) Company Records

In addition, to obtaining knowledge from directors of LPCs, there must be the ability to request records as well as seize them at the earliest time possible, rather than requesting information once a formal investigation is initiated. It is fair to say that, given the nature of LPCs, aside from mandatory filing requirements, knowledge intricate to potential wrong-doing and the ability to hold directors holistically accountable will be held on company servers and in hard copy. The creation of a whistleblowing policy alone is unlikely to suffice alone because it is unrealistic and impractical to solely rely upon employees' whistleblowing especially when considering that high-flying senior employees will usually be remunerated very well. Therefore, there must be a way to request and/or seize company information.

In this regard, it is submitted that there must be a method by which company records, outside of mandatory filings with Companies House, can be obtained. Records such as board meeting minutes, telephone logs, and internal emails amongst others irrespective of format, must be made available. Potential concerns around privacy can be allayed given that there is an exemption for sharing data, necessary for the prevention or detection of unlawful acts[1829], and General Data Protection Regulations' transparency obligations and most individual rights can be overridden if such consent would prejudice the prevention or detection of crime or the apprehension or prosecution of offenders.[1830]

The availability of such records must not hinge upon some evidence of actual wrongdoing, but simply require suspicion, and be seen as a proactive approach to stopping wrong-doing in the first place. Although the requirement of a search warrant would provide a sufficient safeguard against abuse.[1831] The exemption of prevention/detection of crime within data protection legislation would prove favourable given that this could be used as a defence. It must also not be predicated on initiating a formal investigation although it is accepted that there must be some form of audit trail. This can work in practice as exemplified by ASIC when they are conducting surveillance, allowing for knowledge to be gathered on a real-time basis.

[1829] Data Protection Act 2018, Sch 1.
[1830] Data Protection Act 2018, Sch 2.
[1831] Data Protection Act 2018, Sch 1.

There must also be a facility to enter company premises and seize company records. The Companies Investigation Branch, SEC and ASIC can request (or seize) records, having legislative powers to do so.[1832] From the literature reviewed, there is no evidence that this promotes evasive behaviours such as the adoption of different corporate structures or reduced usage of electronic communications. Whilst this can be seen as a draconian measure, such a severe option must be available if required. However, obtaining knowledge using this method would require evidence of actual wrongdoing so that directors of LPCs can be held holistically accountable. Again, it is not intended to go into the mechanics of how such a request would be considered, who would consider it and the threshold that the evidence would have to satisfy. Suffice it to say, there would be a need for evidence of imminent harm and failure to stop it would risk allowing severe harm caused, or evidence may be destroyed, by directors of LPCs.

7.2.10 Requesting (or Seizing) Records

It is submitted that LPCs are likely to hold both hardcopy and electronic data. Metadata that sits under electronic data must be sufficiently captured by law. Indeed, this becomes more important when considering that in 2021, 40 percent of UK businesses are expected to be cloud-only, with 70 percent looking to become cloud-only businesses in the future. Although a breakdown of the private company/public company divide is not highlighted, it is fair to say that given the obvious cost benefits as well as the emergence of flexible working being adopted by companies[1833], a significant proportion of LPCs can be included within these statistics.

Legislation which provides the ability to request (or seize) records will need to be able to define – fluidly – what the terms 'records' mean. This is particularly so when records can be held in many different formats and held in various places. The problem is whether the law can play catch up with developments in the technology sector developing new ways in which records can be created, held and archived. Indeed, Barlow states that '[i]t is difficult to find the balance between passing laws quickly to keep pace with new technology and waiting to gain a thorough understanding to create accurate legislation. When the law hastily tries to catch up, the consequences can be

[1832] The Crimes Act 1914.
[1833] Rob O'Connor, 'Wates adopts company-wide flexible working' (*Infrastructure Intelligence*, 23 June 2021) <http://www.infrastructure-intelligence.com/article/jun-2021/wates-adopts-company-wide-flexible-working> accessed 31 July 2022; Zoe Wickens, '33% of employees will look for another job if denied flexible working' (*Employee Benefits*, 26 May 2021) <https://employeebenefits.co.uk/33-employees-look-another-job-denied-flexible-working/> accessed 31 July 2022.

terrible and long-lasting.'[1834] As a result, the fluidity of defining the term records is likely to be a complex exercise.

In respect of seizing records, although it is to be done in situations where there is evidence of imminent harm and failure to stop it would risk allowing severe harm caused, or evidence may be destroyed by directors, the problem is these terms are subjectively allowing for varying interpretations. The threshold that would need to be met would also need to be determined as to whether it's a legislative threshold e.g., based on economic damage or particular factors such as potential malfeasance[1835] or transactions at undervalue.[1836] Although it may be that the terms enable subjective interpretations, it allows for fact-sensitivity. But inconsistent applications leading to the seizing of records are likely to lead to legal proceedings which could hinder holistic accountability.

As discussed previously, company records are likely to be held in a plethora of different ways, not least because of a shift to cloud computing to save costs and ensure efficiencies. Therefore, all types of records must be caught whether hardcopy and/or digital are caught by any proposed definition. Given the continuous advancement of technology, there would also be a need for a periodic revisit of this definition to ensure it is in alignment with technology. Consideration would also be required in understanding how the changing nature of data will ensure an overarching obligation on directors to provide company records.

Another issue to consider is the definition of company premises. This is particularly regarding those LPCs which may have more than one corporate office. Other variables also include the use of virtual head offices, service addresses and regional corporate offices. In this regard, it is important that a definition of what constitutes company premises is determined. In practice, this will enable the seizure of company records that may be in several different offices rather than in one singular place.

In entering company premises, it is also worth clarifying the circumstances in which this should occur. It is not advocated that this occur in every investigation, so clarification is required as to what (possible) criteria or circumstances this should follow. In the event of 'imminent harm' and/or 'risk allowing severe harm to be caused',

[1834] Suzie Miles, 'Does the Law Need to Develop Faster to Keep up with Changes in Technology?' (*Ashfords*, 9 November 2015) <https://www.ashfords.co.uk/news-and-media/general/does-the-law-need-to-develop-faster-to-keep-up-with-changes-in-technology> accessed 31 July 2022.
[1835] The Insolvency Act 1986, s.212.
[1836] The Insolvency Act 1986, s.238.

as possible contenders, defining what they are to constitute is needed if relying upon these to not only enter premises but also ensure consistency across investigations.

I. What falls (or should fall) under the definition of company records? Given the ever-changing format of data, should there be specific examples provided for clarity? If so, would there be a periodic revisit of the definition to ensure it aligns with technology?

II. How would the changing format of data be translated into ensuring an overarching obligation remaining on directors of LPCs to provide company records?

III. In regards to entering company premises, how is 'company premises' to be defined (registered office or any premises under the control of the company)?

IV. Under what circumstances should there be a (legal) right to enter company premises? Should it be dependent on a set criterion or exercised on a case-by-case basis?

V. In the case of set criteria, should there be a definition of what 'imminent harm' and 'risk allowing severe harm to be caused' constitutes?

7.2.11 Summary

This section has discussed the need for honesty and a legal obligation to be imposed on directors of LPCs. It has also discussed the benefits and drawbacks of soft-law versus hard-law in respect of legal obligations. In determining honesty, it has been argued that codification of the dishonesty test in *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)*[1837] is needed. The distinction between criminal and civil honesty is also discussed, submitting that *Ivey* is likely to be accepted in both criminal and civil proceedings. The element of knowledge is discussed in relation to whistleblowing and the whistleblowing framework in the UK has been considered. Taking this account, it puts forward the proposal of creating a whistleblowing programme and how potential whistleblowers could be incentivised. It argues for such a whistleblowing programme to be enshrined in statute.

There has also been some discussion around the drafting of such legislation and some of the concerns that would need to be addressed. It also looked at how financial incentives for whistleblowers could be funded, and how potential abuse of financial

[1837] *Ivey* (n.285).

incentives could be mitigated. It went on to discuss how, given the issues raised above, the whistleblowing programme could be strengthened, with some potential questions for further research.

Further, the ability to request/seize records, regardless of format, was also discussed. In addition to this, the ability to enter company premises to seize records is also discussed. It also recognises some of the difficulties of the law catching up to the pace of technology and the fluidity of the term 'record(s)'. Finally, some potential research questions are proposed for further research.

7.3 Examination

The transfer of knowledge also needs to be accompanied by a thorough examination. Knowledge coupled with examination allows for the decision-making process and rationale to be subjected to scrutiny enabling a judgement to be passed. The examination of the decisions and actions taken by directors of LPCs has to be much more stringent than it currently is. There is virtually no examination taking place with the current set-up of the FRC and TPR and there is no other entity doing this. For example, FRC has not even been able to properly examine corporate accounts (its primary responsibility). [1838]

There have been conflicts of interest at every turn, as a significant number of its workforce was previously employed by medium and/or large accountancy firms. [1839] It has reviewed its own work[1840], conducting a box-ticking exercise serving no real purpose[1841]. The effect of the work of TPR has not been any different. TPR can be summed up as having 'a passive, reactive mindset…[t]hey do not seek to influence corporate decision-making with the realistic threat of intervention'[1842] and being an '…organisation where a tentative and apologetic approach is ingrained.'[1843]

This does not do anything for the holistic accountability of directors of LPCs, especially when these are arguably the most important companies which require extensive examination. As a result, this thesis advocates that a 'broken windows' approach is utilised as a demonstration of 'zero tolerance.'[1844] It also puts forward that there must

[1838] Business, Energy and Industrial Strategy Committee (n.1453) para 249-251.
[1839] Ibid para 225.
[1840] Business, Energy and Industrial Strategy Committee (n.1453) para 249-251.
[1841] Bouvier (n.1463).
[1842] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370) 5.
[1843] Ibid para 187.
[1844] Todd Ehret, 'SEC's advanced data analytics helps detect even the smallest illicit market activity' (*Reuters*, 30 June 2017) <https://uk.reuters.com/article/bc-finreg-data-analytics/secs-

be proactivity through the use of surveillance.[1845] It also submits that directors of LPCs should be interviewed and that in the effort to hold directors of LPCs holistically accountable via examination, there must also be a focus on gatekeepers as has been done by the SEC. These gatekeepers include accountants, auditors, and lawyers. Doing so would ensure that professionals who enable, or facilitate misconduct are punished and this would act as a deterrent to others. Although, it is accepted that it may be difficult, but not impossible, given that lawyers enjoy legal privilege. By doing so, these factors will enable examination to take place so that directors of LPCs can be held holistically accountable.

7.3.1 A Zero-Tolerance Approach

For examination to work, each allegation of misconduct (which would result in the holistic accountability of directors of LPCs) needs to be considered. This in itself requires a zero-tolerance approach. Such an approach makes clear that there is no de minimis approach when considering potential allegations and nor is only a certain type of company in a certain sector being targeted. This approach would mirror that of the 'broken windows' theory.[1846] In this regard, each claim must be given due consideration. This consideration cannot simply be based on an examination of information from currently held open-source such as Companies House or other information such as credit reports. By having this approach, it sends a clear message that it does not matter what violation occurs, minor or major, whether it has a small or large effect, each will ensure the holistic accountability of directors of LPCs.

It is submitted that one way to achieve this would be to request information from the company (and by extension from directors). Using a model similar to the SEC although slightly refined, all claims must be triaged and then examined. How this would be done is first there would be a receipt of the claim. If the information comes from a whistleblower, then the whistleblower should undergo a confidential interview to ascertain further details and possible records held if any. In the absence, of a whistleblower, such a triage would have a low threshold. At this point, the company in question could be contacted and requested that it cease all destruction of company information. [1847]

advanced-data-analytics-helps-detect-even-the-smallest-illicit-market-activity-idUSKBN19L28C> accessed 29 December 2020.

[1845] Australian Securities and Investments Commission (n.1635).

[1846] Ehret (n.1596).

[1847] Morrison Foerster (n.1599).

For example, if a company has been investigated in the past 90 days, then it is unlikely (although not certain) that any further violations have occurred and so may warrant no further investigation unless compelling evidence is received. Further, there should also be an ability for records to be requested related to the potential misconduct. This would have the ability to potentially uncover other misconduct not reported. Once the records have been examined and there is (some) evidence of misconduct, then matters would progress to a formal investigation, potentially requiring further records and interviews with directors. This is not intended to be a detailed guide to the process or procedure of the examination undertaken but serves merely as a high-level overview.

7.3.2 Surveillance – A Proactive Approach

It is also important when undertaking holistic accountability, especially the element of examination that there has to be a proactive approach. Indeed, holistic accountability is grounded in an ex ante approach. If there isn't, then damage will have already been done, or records destroyed, ex post is unlikely to enable the holistic accountability of directors of LPCs. In previous chapters, the case studies have demonstrated that the misconduct of directors has often been over a significant period. For example, the BHS debacle arguably started in 2005 when Sir Philip Green decided to pay himself a £1 billion dividend, amongst amounts in subsequence years[1848] Sports Direct and its employment agencies underpaid workers on national minimum wage by nearly £1 million.[1849] However, if there had been a proactive approach taken to examine such issues, then it is fair to say that the damage could have been mitigated or at least stopped at the earliest possible opportunity.

One way in which an active approach can be taken is to use ASIC's method of surveillance, although slightly modified. For example, ASIC defines surveillance as '…activities that involve gathering and analysing information on a particular entity or entities to test and ensure compliance with the law' [1850] , done on a reactive basis as a response or on a proactive basis to examine a concern.[1851] This thesis advocates a more tailored definition of surveillance for directors of LPCs. The definition it puts forward is: 'proactive activities that involve gathering and analysing information on a

[1848] Julia Finch, 'Philip Green pays himself record £12bn' (*The Guardian*, 21 October 2005) <https://www.theguardian.com/business/2005/oct/21/executivesalaries.executivepay> accessed 27 May 2021.
[1849] Butler (n.813).
[1850] Australian Securities and Investments Commission (n.1635).
[1851] Ibid; Bouvier (n.1463).
[1851] Business, Energy and Industrial Strategy and Work and Pensions Committees (n.1370).

particular entity to ascertain compliance with the law'. This is because surveillance, as posited in this thesis, would only be on a proactive basis rather than a reactive basis.

There are many situations in which surveillance could bring about the holistic accountability of directors. For example, if surveillance, and examination, had occurred then the majority of the situations such as the payment of a £1 billion dividend or the underpayment of wages to workers would have likely been identified much earlier.

The approach posited would be a far cry from the current box-ticking and reactive mindset that is embedded in the current corporate landscape.[1852] The above are not the only examples of where a proactive approach is required in respect of examination. For example, in respect of Carillion, TPR knew about the underfunding of pension schemes over a significant period.[1853] For a proactive approach to be carried out, very little knowledge would be required to be initiated. This could be from a newspaper headline, company records or even arguably a report of an anomalous profit warning. Again, it is not intended to go into the mechanics of when a proactive approach concerning examination would be required, but it is accepted that some form of guidelines or triage process would be required. This would ensure that resources are used efficiently and that companies are justly subject to interference.

7.3.3 Interviewing Directors

As company records are only likely to provide a high-level view, it, therefore, becomes important to go back to the source, or creator(s) of the information to further examine the detail of those records or verify the authenticity of the knowledge. This effectively means directors, or collectively the board, of LPCs. In this regard, it becomes important to interview directors. Both the SEC and ASIC can interview directors. However, ASIC seems to have substantial experience in this respect. For example, ASIC, after having documented their findings,[1854] can tailor their questions and obtain further knowledge and examine without the benefit of preparation.[1855] As everything is being documented and recorded, ASIC can use the interview as a way of getting directors to slip up, allowing ASIC to see off contrivance.[1856]

It is also interesting to note that both the SEC and ASIC do not allow for legal protections to overshadow the interview process. The same approach is advocated for holistic accountability. For example, ASIC limits the role counsel can play in the

[1852] Bouvier (n.1463).
[1853] Pensions Act 2021; Ibid.
[1854] Schofield-Georgeson (n.1664) 1416.
[1855] Ibid 1421.
[1856] Schofield-Georgeson (n.1664) 421.

examination and is willing to challenge claims of legal professional privilege[1857] as demonstrated in *ASIC v RI Advice Group Pty Ltd.*[1858] Similarly, companies in the US are also unable to rely upon the 5th Amendment right not to self-incriminate[1859], which means that if a company is implicated in misconduct, it is highly likely that directors will be held accountable for it.

It is not submitted that every instance of misconduct mandates or requires interviews with directors to hold them holistically accountable, but rather serious instances are likely to warrant interviews and also to meet the requirements of fairness. It is not also intended to define the term 'serious' for interviews with directors as it will depend on the facts and circumstances of each case.

Having the ability to interview directors is not something new. Indeed, something similar has been mooted for the Audit Reporting and Governance Authority (ARGA), and its (potential future) ability to require 'rapid explanations' from directors in respect of reporting matters. The problem is that such 'rapid explanations' may only be required by companies (rather than directors individually or collectively) and are only for a specific element – that being reporting matters.[1860] Given the wide-ranging proposals set out for ARGA, it is fair to say that the impact such proposals are likely to have, means that '…it's undeniable that if implemented, the recommendations could be disruptive to all audit firms, big and small.'[1861] However, it is precisely because of such innovative recommendations that ARGA has been difficult to bring into operational effect.

Similarly, the problem, for holistic accountability at least, is obligating directors to attend an interview. It is questionable whether directors of LPCs would be willing to (voluntarily) attend an interview. Therefore, it is clear that there must be something that obliges them to do so. However, how to do so is problematic without hard law. Although it can be argued that failure to attend an interview may fall under s.172(1)(e) – the duty to promote the success of the company and in particular having regard to the desirability of the company to maintain a reputation for high standards of business

[1857] Stumm (n.1676).
[1858] *ASIC* (n.1678).
[1859] Imperato, Esq. (n.1573).
[1860] Department for Business, Energy & Industrial Strategy, 'Restoring trust in audit and corporate governance' (*gov.uk*, March 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970676/restoring-trust-in-audit-and-corporate-governance-command-paper.pdf>accessed 5 August 2022.
[1861] Chris Jewers, 'What is ARGA? Brydon makes recommendations for stronger audit regulator' (*Accountancy Age*, 2 January 2020) <https://www.accountancyage.com/2020/01/02/what-is-arga-brydons-recommendations-for-stronger-audit-regulator/> accessed 5 August 2022.

conduct.[1862] This would mean that current law may enable such an obligated approach, however, this is a very nuanced interpretation, and it is fair to say that at some point (without clarity) it may be subject to a legal challenge.

As a result, a key weakness is whether the introduction of hard law would be possible to obligate directors and if so, the type of requirement it would create and how it would be drafted. It is also worth noting that such drafting would have to cater for situations where there is a blanket refusal to attend an interview and how such hard law would grapple with such instances. In instances where interviews do take place, maintaining a balance between being assertive and probing and considering human rights legislation is likely to be a tricky balancing act. This is especially the case where legal protection such as legal privilege is questioned. For example, it is posited that a shrewd director may put forward arguments of denial of human rights such as article 6 - the right to a fair trial[1863] and Article 8 – the right to a private and family life, home, and correspondence.[1864] Indeed, however far-fetched such a claim may be, there is a possibility that directors may decide to use creative arguments.

Therefore, it may be worthwhile considering the potential implication of any challenges to the minimisation of legal advice and proportionate objection to the defence of legal professional privilege, in light of potential claims. In doing so, appropriate training and drafting of operational guidance for individuals carrying out such interviews may be worthwhile in mitigating such arguments and arguably eliminating their effectiveness. Although, the possibility of challenges in the form of refusal to answer questions among others, are likely to remain despite mitigation.

7.3.4 Gatekeepers

It is fair to say that when a company board decides on an arguably questionable (or illegal) course of conduct, it does not do this alone. There is often an army of gatekeepers such as law firms and accountancy firms that can effectively be described as enabling directors of LPCs to do so. These gatekeepers are 'reputational intermediaries'[1865] as they pledge their reputational capital to vouch for information others cannot easily verify.[1866] For example, the strategies undertaken in BHS were advised on by the law firm Olswang which advised Retail Acquisitions Ltd, assisted by

[1862] Companies Act 2006, s.172(e).
[1863] Human Rights Act 1998, Sch 1 (6).
[1864] Human Rights Act 1998, Sch 1 (8).
[1865] John C. Coffee Jr., 'Understanding Enron:It's about Gatekeepers, Stupid' (2002) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=325240> accessed 19 September 2022.
[1866] Ibid.

accountancy firm Grant Thornton, and Linklaters advised Arcadia Group and therefore Sir Philip Green[1867] Indeed they were described as being 'all culpable'.[1868] This is because they were '…heavily incentivised to progress the deal'.[1869] By relying 'solely on each other's presence', these advisers were able to '…provide an expensive badge of legitimacy to people who would otherwise be bereft of credibility.'[1870]

This essentially meant that examination (and/or validation) of information and records was non-existent with there being a tendency to forego certain requirements or brush over certain matters to conclude matters in haste amounting to 'cursory checks'.[1871]

In this respect, the SEC's ability to investigate gatekeepers should be embraced. Although, while it is submitted that they should be investigated, it is not submitted that they should be pursued with the evidence and outcome of any investigation to be referred to the gatekeeper's regulatory body. This is because the purpose of investigating gatekeepers is not only to enforce holistic accountability as that is only for directors of LPCs but rather it is to enable further examination and also ascertain which other LPCs may have an issue with compliance. While there is an argument that gatekeepers are surrogate regulators[1872], and therefore using them will improve effectiveness and efficacy, given the complex environment LPCs operate within.[1873]

The fact is in some circumstances such gatekeepers are willing to turn a blind eye or assist in the pursuit of charging fees. Once established, holistic accountability can take place in respect of these LPCs. It is not intended to discuss the method of the information regarding the (mis) conduct of a gatekeeper will be passed on to its regulatory body, suffice to say it will involve information gateways so that information can be passed securely and legally, whilst ensuring that gatekeepers are also held accountable by their regulatory body.

The element of examination can be seen as a number of actions which collectively bring about the holistic accountability of directors of LPCs. It requires a zero-tolerance approach with the implication that all concerns regarding the conduct of directors will

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[1867] Rachel Moloney, 'Linklaters and Olswang named as MPs criticise "all culpable" BHS advisers' (*The Lawyer,* 25 July 2016) <https://www.thelawyer.com/issues/online-july-2016/linklaters-olswang-named-mps-criticise-culpable-bhs-advisers/> accessed 27 May 2021.
[1868] Ibid.
[1869] Moloney (n.1867).
[1870] Rose Walker, 'Olswang and Linklaters criticised by MPs for 'cursory checks' on BHS sale' (*Law.com International*, 25 July 2016) <https://www.law.com/international-edition/2016/07/25/olswang-and-linklaters-criticised-by-mps-for-cursory-checks-on-bhs-sale/?slreturn=20210428073353> accessed 27 May 2021.
[1871] Ibid.
[1872] Neil Gunningham and Darren Sinclair, Smart Regulation. in Peter Drahos (ed), *Regulatory Theory* (ANU Press 2017) 133.
[1873] Ibid.

be examined. There is no, as it were, de minimis approach. There must also be a proactive approach to holistic accountability when conducting an examination. This is because quite often, by doing so, concerns regarding conduct are more likely to be picked and the risk of its effect mitigated.

It is also important that when misconduct comes to light that directors of LPCs are interviewed so that further knowledge can be extracted from them without the benefit of preparation. In instances, where gatekeepers such as law firms and accountancy firms aid the (mis)conduct of directors of LPCs, they must be also brought to account through referral to their regulatory bodies and other clients (other LPCs) are held holistically accountable.

The investigation of gatekeepers, aside from directors, is problematic. This is due to two factors, the definition of a gatekeeper and the regulatory bodies that already regulate gatekeepers. In dealing with defining gatekeepers, the problem is that the term is very broad. Coffee states that auditors, lawyers, securities analysts and credit rating agencies can all be termed as gatekeepers.[1874] For example, Stephen M. Cutler, former director of enforcement at the SEC, states that he regards gatekeepers as sentries of the marketplace, and these include:

> '…the auditors who sign off on companies' financial data; the lawyers who advise companies on disclosure standards and other securities law requirements; the research analysts who warn investors away from unsound companies; and the boards of directors responsible for oversight of company management.'[1875]

There is a possibility that the gatekeeper definition as envisaged by the SEC can be adopted although it would be a worthwhile exercise to determine the term gatekeeper from a UK perspective given the differences between the two countries.

The second issue is the majority of gatekeepers already have regulatory bodies which can discipline them for misconduct among other matters. For example, by taking directors and research analysts out of the definition, accountants/auditors can be disciplined by the FRC, soon to be ARGA. Solicitors can be disciplined by Solicitors Regulation Authority and barristers, by the Bar Standards Board. Therefore, work would be required to ascertain the exact remit of how holistic accountability refers to

[1874] Merritt B. Fox, 'Gatekeeper Failures: Why Important, What to Do' Michigan Law Review 106 (6) [2008] 1089.
[1875] Stephen M. Cutler 'The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program' (*SEC*, 20 September 2004) <https://www.sec.gov/news/speech/spch092004smc.htm> accessed 5 August 2022.

information relating to potential culpability. It is also the case that clear terms of reference would need to be agreed upon regarding how such cases are investigated, given the zero-tolerance approach.

This is likely to pose considerable problems given that each regulatory board is likely to have different remits, powers, and investigatory methods. Therefore, attempting to bring that in to ensure that gatekeepers are held (holistically) accountable is like to cause friction and differing thresholds of initiating investigations. As a result, it is important that gatekeepers are defined accurately (whether in guidance or legislation) and alignment with the different regulatory bodies of gatekeepers is also required.

7.3.5 Strengthening Examination as an Element of Holistic Accountability

In the UK, the legislative definition of 'director' covers any individual occupying the position of director, by whatever name called.[1876] However, this brings about two concerns. The first is whether the definition is alluding to individuals who are registered with Companies House as directors, or not registered as directors but may sit on the board. The second issue is whether senior employees (who may sit on the board) and make important decisions are caught by this definition. Although it is submitted that they could be tried as de facto or shadow directors, there would need to be sufficient evidence to point to this. Once this has been determined, then the obligation of attending an interview can be determined. As a result, questions that flow from this are:

I. What should the term 'director' cover? Should it only cover members of the board, or those individuals working for LPCs titled as directors?

II. How should directors of LPCs be obligated to attend an interview? Could such an obligation be subsumed as part of directors' duties, or does it require something more substantial in the form of legislation?

III. What interaction (if any) would there be with potential human rights legislation in respect of challenging legal professional privilege?

It is also important that gatekeepers are defined to ascertain the scope and number of regulatory bodies that should be involved in the transfer of information and evidence. However, the position and format of the definition require consideration to ensure that the widest net is cast as well as ensuring it catches all key enablers of corporate (mis)conduct. It is also the case that not all data will need to be shared. That said,

[1876] Companies Act 2006, s.250.

some (or the majority) of information will need to be shared, but there would need to be clear parameters in place that the information is shared on a need-to-know basis. By providing said information, it would also need to be clear as to what kind of responsibility would enable regulatory bodies to investigate gatekeepers. In this regard, the following questions are posed:

I. Who is defined to be a gatekeeper? Should that definition be guidance only, or something more rigid, like legislation?

II. To what extent should there be data-sharing gateways with gatekeepers' regulatory bodies?

III. What responsibility should holistic accountability request/obligate regulatory bodies to investigate gatekeepers?

7.4 Outcome

Outcome as the final element of holistic accountability allows for a wide range of results. These do not just have to be negative but can be positive. This goes some way to allaying the entire accounting process as negative. The FRC, TPR, SEC and ASIC all have similar powers when it comes to imposing an outcome, ranging from penalties to civil action. Through the holistic accountability process, there is an implicit focus on the negative aspect of holistic accountability resulting in a narrow range of outcomes. In all four organisations, the only outcome has been a negative one (penalties/sanctions). Holistic accountability allows for a wide range of outcomes, and one of those outcomes should allow for giving a company 'a clean bill of health.' This could take place in the form of a statement in the companies' annual account, and/or as part of a formal closure letter of the investigation.

It is also the case that penalties (due to their negligible nature) are unlikely to hurt, but will affect, directors of LPCs (as an outcome) as in most cases, as they have the means to pay them. Therefore, it is put forward that directors of LPCs are subject to penalties based on each of their salaries/dividends of the company, based on the year of the offence. This is likely to hurt directors of LPCs much more than a £250,000 fine or £500,000. While the FRC and TPR operate under the guise of legislation and are, to some extent, restricted by what they can and cannot do. It is submitted that for severe offences, directors of LPCs are subject to criminal sanctions.

7.4.1 Giving a Clean Bill of Health – Holistic Accountability Balance Sheet

If holistic accountability allows for a range of outcomes, then clearly one that is a good outcome should also be included. Going through the holistic accountability process, it is fair to say that not every company will face consequences, and in some cases, there may be no misconduct and no evidence of any misconduct to hold directors of LPCs liable. As a result, holistic accountability must cater for this by ensuring that it can come to a wide range of outcomes or the various situations in which it is required. One way in which holistic accountability could provide a company with a clean bill of health could be something akin to a Balance Sheet, also known as a statement of financial position, used for accounting purposes.

It is proposed that once the process of holistic accountability has determined that there is no case (no evidence of misconduct) to answer regarding directors of LPCs, rather than leaving without certainty of outcome. A balance sheet approach should be adopted. This would enable a 'good' outcome to be achieved thus enabling holistic accountability to provide for a range of outcomes. For example, the primary purpose of a balance sheet is to show the financial position of a company at a given point ('as at') in time.

This element could be extrapolated, and it would show the degree of compliance of directors of LPCs at a given point (at the outcome stage) of holistic accountability. Indeed, the use of balance sheets allows for a meaningful analysis of a company's financial position[1877] and the same can be done for holistic accountability. It would not be intended to be a compulsory document that would need to be filed with Companies House, but a mention of it would need to be made in the Annual Accounts so that there is a 'public' record. Not only that but should the directors change, then this can be a reference point, for this amongst others.

It is also the case for other offences in respect of directorial misconduct where directors are held (holistically) accountable, such as wrongful trading[1878] or duty to consider the interests of creditors[1879], which would also be assisted. For example, both (arguably) require specific points in time as to when they should, or are, triggered. Wrongful trading is triggered when directors knew or ought to have known that it was inevitable

[1877] Miron Vasile Cristian Ioachim, 'Financial Balance – An Important Objective for the Stakeholders in Romania's Energy Sector' [2015] 30(1) Procedia Economics and Finance 324.
[1878] Insolvency Act 1986, s.214.
[1879] Companies Act 2006, s.172(3).

that the company was going to go into liquidation[1880] and the duty (or, more correctly, 'obligation') to consider the interests of creditors requires some form of financial distress although it is unclear as the case law regarding this has diverging interpretations.[1881]

Although the court did recently try to bring clarity to the duty in *BTI 2014 LLC v Sequana S.A*[1882] stating that it arises 'when directors know or should know that the company is or is likely to become insolvent' [1883] with David Richards LJ (as he was then) stating, obiter, that creditors' interest were '…paramount…'[1884] trumping that of shareholders.[1885] While the subsequent appeal to the Supreme Court was dismissed[1886], the Supreme Court did not accept David Richards LJ's formulation. This is unsurprising given the nature of these types of cases, each will be judged through its unique circumstances. As a result, this holistic accountability balance sheet could solve these issues, by ascertaining timeframes of financial distress, compliance with liabilities and directors' compliance with their duties. This is especially the case if misconduct occurs after the clean bill of health is given. If crafted properly, such a balance sheet can solve a plethora of issues.

It is not intended to provide criteria as to what a holistic accountability balance sheet would need to contain. Although, it goes without saying that the conduct for which directors of LPCs are being investigated would need to be a primary feature. Aside from this, it is very much open as to what can be included. Some of the documents that could be investigated, without providing an exhaustive, could include corporate reporting information and internal company information. In any case, the open nature provides the creativity for the fashioning of a document that not only provides certainty of outcome for directors of LPCs where no misconduct is found but also provides a reference point if and when misconduct occurs, it can be used to hold directors holistically accountable.

[1880] Insolvency Act 1986, s.214 (2).
[1881] *Gwyer v London Wharf (Limehouse) Ltd* [2002] EWHC [2748] (Ch) [74]; *Re MDA Investment Management Ltd* [2003] EWHC 227 (Ch) [70]*; Grove v Flavel* (1986) 4 ACLC 654 (Aus SC) [663].
[1882] [2019] EWCA Civ 112*: BTI 2014 LLC v Sequana SA and others* UKSC 2019/0046.
[1883] Ibid.
[1884] *BTI 2014 LLC* (n.1882).
[1885] Latham & Watkins, 'UK Court of Appeal: When to Trigger the Creditor Duty Shift' (*Latham & Watkins*, 3 April 2019) <https://www.lw.com/thoughtLeadership/lw-uk-court-of-appeal-when-to-trigger-the-creditor-duty-shift> accessed 5 June 2021.
[1886] *BTI 2014 LLC* (n.1882).

7.4.2 Penalties as a Percentage of Total Remuneration

In previous instances where fines have been levied on LPCs, and by extrapolation, on directors, it is clear to see that in nearly all cases, there has been a willingness, and arguably ease, to pay them. For example, Sports Direct was easily able to pay the penalty due to up to 200 percent of its failure to pay the National Minimum Wage (NMW), but only as recently as 2020, it was found to be a breach of NMW legislation once again. It was reported in The Guardian that workers at the company's Shirebrook warehouse are unable to leave the building during their 30-minute unpaid break, which effectively means that workers' pay was below NMW.[1887]

It is clear that previous lessons were not learnt, with the penalties involved in breaking NMW, deemed as negligible because they were minuscule compared to the profit Sports Direct made. It is unclear when the NMW penalties were paid to HMRC, but in the two years, 2017 and 2018, it could have been paid in, Sports Direct reported profits of over just over £3.2 billion and £3.3 billion respectively.[1888]

The concept of penalties is nothing new, although its basis would need to be broadened to include the total remuneration of directors of LPCs' salary and dividends. For example, Martin Jones, audit partner for UHY Hacker Young, who signed off Laura Ashley the homeware chain's audit, was personally fined £45,000 for audit breaches.[1889] It is argued that had this type of outcome and calculation been applied to Sports Direct, or indeed any other company, there would have been a laser focus on not getting things wrong again the next time.

On a similar note, the same, regarding the effectiveness of penalties, can be said for gatekeepers. KMPG were fined £18.5 million for four audits that fell below the required standard and Grant Thornton, already facing multiple audit enquiries, had a £4 million fine relating to two separate audits.[1890] Despite this, failings still exist as the level of

[1887] Simon Goodley, 'Sports Direct may be paying less than minimum wage, investigation show' (*The Guardian*, 23 July 2020) <https://www.theguardian.com/business/2020/jul/23/sports-direct-undercover-minimum-wage-mike-ashley> accessed 30 May 2021.
[1888] Frasers Group Plc, 'Frasers Group Plc' (*Companies House*, various dates) < https://find-and-update.company-information.service.gov.uk/company/06035106/filing-history?page=6> accessed 22 August 2022.
[1889] Financial Reporting Council, 'Sanctions against UHY Hacker Young LLP and Martin Jones in relation to Laura Ashley Holdings plc' (*Financial Reporting Council*, 22 July 2022) <https://www.frc.org.uk/news/july-2022/sanctions-against-uhy-hacker-young-llp-and-martin> accessed 22 August 2022.
[1890] Sara White, 'Regulator hands out record £43m fines for bad audit' (*Accountancy Daily*, 31 July 2019) <https://www.accountancydaily.co/regulator-hands-out-record-ps43m-fines-bad-audit> accessed 5 June 2021.

penalties charged to make the enablement of misconduct and the misconduct of directors make it a worthwhile option.

One of the key reasons why this is likely to affect directors of LPCs, rather than a determined penalty sum is due to several reasons. This is perhaps why ASIC recently increased its civil penalties for individuals and companies. Under the new penalty regime, the maximum civil penalty for individuals at AU$1.11 million or three times the benefit obtained, and detriment avoided. The maximum civil penalty for companies is the greater of AU$11.1 million, three times the benefit obtained, and detriment avoided or 10% of annual turnover capped at currently AU$555 million.[1891] However, a remuneration-based penalty is more likely to hurt the personal pockets of directors, making them think twice about pursuing a course of misconduct.

7.4.3 The Use of Criminal Sanctions

For the more severe misconduct, it is proposed that penalties based upon remuneration are unlikely to be enough because it would give the impression that the only outcome will be monetary. In this regard, criminal sanctions would be better placed to deal with such misconduct. By paying a penalty (whether based upon total remuneration or not), it would still be questionable as to whether directors would engage in such errant behaviour, due to the seriousness of the misconduct in question. As a result, criminal sanctions are likely to act as a more effective deterrent, as well as ensure that the most damaging conduct has the harshest consequences.

Indeed, Bierschbach and Stein put forward that criminal liability triggers extra-legal sanctions. For example, these can include loss of morale, damage to reputational and corporate image, damage to relationships with customers and suppliers and bars to future business[1892] The scope of these extra-legal penalties often overshadows that of formal legal penalties. Perhaps because not only are directors able to pay the penalty but also once paid, the matter is forgotten. It is worth addressing that repeated infractions may not necessarily be dealt with penalties every time but rather dealt with under the fitness criteria as part of the Company Director Disqualification Act[1893], depending on the conduct in question.

In some areas such as pensions, this is perhaps why criminal sanctions have been introduced. For example, the Pension Schemes Act[1894] introduces criminal sanctions

[1891] Crimes Act 1914.
[1892] Richard A. Bierschbach and Alex Stein, 'Overenforcement' [2005] 93(6) Georgetown Law Journal 1743, 1771.
[1893] Company Directors Disqualification Act 1986, Sch 1.
[1894] Pension Schemes Act 2021.

for directors who mis-administer (often through misconduct) company pension schemes. Perhaps because pension schemes involve significant amounts of money, can wreak financial damage on hundreds if not thousands of members, and then it is left to the taxpayer to foot the bill. This is arguably why there has been the political will to attempt to curb the severest of misconduct and hold directors of LPCs accountable. However, it does not have to stop there, and this example shows that it is possible (if there is sufficient political will) for an outcome of holistic accountability to include criminal sanctions other than fines.

Criminal sanctions, in the UK, already exist for fraudulent trading[1895], so it is fair to say that the scope of criminal sanctions needs to be increased so directors of LPCs can be held holistically accountable. It is also worth noting that for certain misconduct the SEC can bring criminal charges such as insider trading[1896] and ASIC can pursue criminal charges for breaches of directors' duties, false or misleading disclosure and dishonest conduct.[1897] It is not intended to discuss the types of criminal offences that could be created or indeed how they should be drafted. But rather there is a need for criminal sanctions to be part of the range of outcomes for the holistic accountability of directors of LPCs to ensure that the most damaging of conduct are met with the harshest of consequences.

It is acknowledged that the use of criminal sanctions means satisfying a heavier burden of proof (beyond reasonable doubt), whereas civil penalties require a more lenient burden of proof (on the balance of probabilities). This is primarily why criminal sanctions would be reserved for the most damaging misconduct. It is accepted that this may mean that not all cases of significant misconduct, worthy of criminal sanctions, would be successfully prosecuted, due to the heaviness of the burden. However, if nothing else, the presence of criminal sanctions may deter some directors from undertaking a detrimental course of conduct.

7.4.4 Holistic Accountability – A Balance Sheet Approach

In instances where no misconduct is identified, employing a balance sheet approach, as discussed previously, means that there are some deficiencies in the application of such an approach. In particular, there are three key issues which would need addressing before its application. The first issue is whether the annual accounts provide adequate positioning of the balance sheet and enable possible legislation

[1895] Companies Act 2006, s 993.
[1896] Securities Exchange Act of 1934, s.10 and s.16.
[1897] The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019.

changes to accommodate it. The second issue is what ought to be contained in the balance sheet for a well-rounded view to be included within the annual accounts. The third issue is whether such a document would enable directors to be caught under the wrongful trading provision[1898] and/or the duty to protect the interest of creditors.[1899]

The first issue is arguably the most pertinent, for the reason that the holistic accountability balance sheet would need to be in public view, as it is posited that it would be just as important as the confirmation statement and the annual accounts. The annual accounts contain a plethora of information. The annual accounts comprise the balance sheet, a profit and loss account., notes about the account and a directors' report.[1900] In this regard, it is fair to say that the annual accounts provide a suitable place for the holistic accountability balance sheet to feature in.

There are various examples where instances such as a possible holistic accountability process may warrant explanation in the annual accounts. For example, Sports Direct, in its 2017 annual report and accounts, made clear mention of the National Minimum Wage (NMW) investigation, outcome and its review as detailed in the Working Practices Report. However, this is not just limited to the private sector. The Depart for Work & Pensions, recently, in its set of accounts for the 2020-21 financial year, explained how a payment of £87.9m was made to HMRC, following historic errors made by DWP in assessing the tax status of its contractors.[1901]

It is accepted that initially, at least, it would be problematic for two reasons. Firstly, there are various legislative exemptions that private companies can take advantage of such as reporting requirements which means that their annual accounts are unlikely to contain extensive information resulting in the possibility that the proposed is unlikely to be included. The second is that accounts are normally prepared under the International Financial Reporting Standards and/or the New UK Generally Accepted Accounting Practice. Therefore, amendments to these may be necessitated, so that consistency is achieved although it is unclear how easy/difficult that would be.

The second issue is that there may be legislative amendments, or changes, required to bring in companies that were previously exempt from providing extensive annual

[1898] Insolvency Act 1986, s.214.
[1899] Companies Act 2006, s.172(3).
[1900] Gov.uk, 'Prepare annual accounts for a private limited company' (Gov.uk, not known) <https://www.gov.uk/annual-accounts> accessed 22 August 2022.
[1901] Caroline Donnelly, 'DWP hit with £879m tax bill by HMRC over 'historic' IR35 status contractor assessment errors' (*Computer Weekly,* 23 July 2021) <https://www.computerweekly.com/news/252504412/DWP-pays-HMRC-879m-after-IR35-review-reveals-historic-contractor-tax-status-assessment-errors> accessed 22 August 2022.

reports, considering that a holistic accountability balance sheet is a required document if one is provided after an investigation has concluded. It is accepted that this is likely to be controversial and will not sit well with the government or businesses, considering that the exemption was created so that companies are not burdened by administrative work and/or red tape.

The second problem is what ought to be included within the holistic accountability balance sheet, which then needs to be included in the annual accounts. While there has been brief mention of some of the possible elements such as records reviewed, the creativity which can be used to fashion the document means that it is very much a document unique to each LPC to which it is issued. The problem is that each balance sheet likely contains categories of different information which may make it difficult to interpret the outcome on a case-by-case basis. A unique document is likely to be subjective because the content and details are based on the view of the individual compiling it.

At the same time, having a standardised document is also not helpful because it does not appreciate the uniqueness of each LPC, its board, records, processes, and systems. This effectively means that the information contained in the annual accounts for each LPC is likely to be different because the information provided in the holistic accountability balance sheet will differ. Although a possible solution to this would be to have a minimum viable product (MVP) and then any uniqueness can be added to that. However, there is a question mark as to what a possible MVP could and would look like, given the possibility it may contribute to a 'box-ticking' exercise rather than assist holistic accountability.

7.4.5 Charging Penalties Based upon Remuneration

As previously mentioned, the possibility of charging directors of LPCs penalties based on their remuneration has been advocated. However, the application of such a penalty regime has three weaknesses. The first is to what types of conduct should such a penalty be applied and whether it should be applied on a sliding scale. Secondly, the drafting of the penalty for its introduction into legislation. Thirdly, finally, ensuring payment by companies/directors of LPCs especially when financial hardship may occur is claimed.

In dealing with the first issue, a penalty of up to 10 percent of remuneration is a clear deterrent as well as an outcome, but for it to be an effective deterrent, it needs to work in practice. It is clear that simply a 10 percent penalty for every type of misconduct will be harsh and disproportionate. Therefore, it would need to be ascertained as to what

type of misconduct should hit a 10 percent penalty. In ascertaining this, it is posited that the most harmful, and economically damaging is most likely to attract this. However, these terms, it is accepted are subjective making it difficult to ascertain the types of conduct that fall in this category.

A related issue is whether there should be a sliding scale based on harmful, economic damage and cooperation provided by directors of LPCs. in this regard, the penalty would automatically start at 10 percent and then based on the factors would be reduced. In either case, there is work needed to flesh out the possible categories of misconduct for a 10 percent penalty and/or the use of a sliding scale in ascertaining a penalty starting from a maximum of 10 percent.

The second issue regarding the drafting of the penalty into legislation is also problematic. There is a possibility of using some of the text as contained, relating to penalties, in the Competition Act.[1902] However, if there are (mitigating factors) that require consideration when levying a penalty, the reflection would be required to ascertain what those factors are likely to be, what their interaction with the penalty looks like and the legal definition of each factor. It is also worth noting that each is likely to be afforded a wide interpretation based on the fact that it is likely to (significantly) reduce a potential penalty, resulting in many defences being mounted for the inclusion of as many factors as possible.

Where there is still disagreement, certainty will likely be sought through the courts. For example, in the competition case, *McCann Limited v Competition and Markets Authority*[1903], an appeal was made regarding the amount of penalty alongside other issues. Consequently, the drafting of the legislation regarding the penalty will need to be robust with detailed justification regarding why the penalty has been levied and the reasoning behind the amount.

Finally, it may be the case that the levying of the penalty is likely to cause financial distress to directors of LPCs Therefore, directors of LPCs may argue that they are unable to pay, as doing so may put them in a financially precarious position. While payment arguably may be made payable through an instalment plan, this is unlikely to provide the deterrent effect that is required. Although it can be argued, if necessary, that the payment of the debt (once due) can be pursued through the courts, this will

[1902] Competition Act 1998, s.36(8).
[1903] [2020] CAT 28.

only increase costs (at least initially) for both sides. As a result, guidance around the payment of the penalty may be required regarding its enforcement.

7.4.6 Drafting New Criminal Sanctions

It is recognised that there are already some criminal offences within legislation but is also fair to say that they are under-used. Generally, such criminal offences tend to focus on the conduct of directors of LPCs once the company has gone into liquidation. It must be noted that it is not intended to create a criminal offence for every adverse outcome of holistic accountability. However, there needs to be a harsher deterrent for those directors of LPCs who cause significant damage. This is irrespective of challenges around satisfying the weightier burden of proof (beyond reasonable doubt), given it could act as a deterrent to other directors.

The drafting and shaping of those criminal offences as well as their interaction with other offences, both civil and criminal, which are already in existence, is something which is outside the scope of this thesis. Nevertheless, new criminal offences must be created for directors to ensure not only conduct is punished but a wide range of unlawful misconduct does not go unaccounted for.

From the above, it is clear that some of the proposals espoused in respect of holistic accountability possess weaknesses and, in some instances, limitations. By making clear, what those deficiencies are, the thesis has provided a level of clarity that means should the proposals be examined further, these areas can be further explored as a means of plugging the gaps they present. Not only that but detailing the weaknesses/limitations show that some of the issues presented are not insurmountable.

However, with further work they can be overcome to ensure successful legislative and operational implementation. Some examples of this include legislating a whistleblowing programme, incentivising whistleblowers to come forward, legally obligating directors to provide an interview and penalties of up to 10 percent of directors' remuneration. As a result, whilst these proposals strengthen the holistic accountability of directors of LPCs, it is clear that further research is required to ensure the viability of these proposals.

7.4.7 Strengthening Outcome

The holistic accountability balance sheet as a way of giving directors of LPCs a clean bill of health must include many key elements. However, given the unique nature of

each board, and by extension, each LPCs, standardisation will not always be possible. However, it is not clear and nor do the limitations of this thesis allow for extensive exploration of what elements would be suitable. There is also a need to be an exploration of whether such a document is not only best placed to be included within the annual accounts but where that is even possible, given the statutory nature of the annual accounts.[1904] If it is not possible, then an alternative would need to be considered, given that it ought to be a public document. Consequently, some of the exploratory questions include:

I. Given the uniqueness of each board and LPCs, what elements should the holistic accountability balance sheet include?

II. Does the legislation around annual accounts permit additional documents, in this context, the holistic accountability balance sheet?

III. If not, considering the public nature of the holistic accountability balance sheet, where else would it be best placed?

As previously mentioned, the concept of penalties is not controversial, rather the amount and what the penalty is based on, at least in this context, is likely to be. While the Competition Law penalties are based on turnover, competition law is a well-established field with input as a result of the UK's former membership of the European Union. On the other hand, holistic accountability is a new concept and so establishing penalties will take time. Indeed, wording from the Competition Act[1905] can be revised but, given that it was drafted over 20 years ago, now is arguably the time to refresh it. In an exploration of the legislating of penalties and enforcing them, several concerns need to be addressed. For example, the type of conduct that attracts the penalty and whether a sliding scale should be considered, drafting of the penalty in legislation and navigating through ensuring payment by directors of LPCs. In ascertaining these answers, the following questions require consideration:

I. What type of conduct is likely to attract such a penalty? How should this be determined?

II. Is a sliding scale a suitable method? If so, what would the elements of the sliding scale look like? Or would another measure be appropriate? If so, what would that appropriate measure look like?

[1904] Companies Act 2006, Chapter 4.
[1905] Competition Act 1998, s.36(8).

III. In drafting the penalty within the legislation, to what extent can the competition law penalty regime assist insofar as the wording of the provision?

IV. When enforcing penalties would there be consideration of the likelihood of receiving payment from directors of LPCs?

V. If so, how would it be ascertained if an LPC, and by extension, its directors, can pay the penalty?

VI. If a penalty is likely to cause financial hardship to an LPC, what would be the way forward to resolve the settlement of the penalty as well as ensure the future financial viability of the LPC?

While there are already criminal sanctions for corporate misconduct in certain contexts, it is clear that wider criminal sanctions are required. For example, ASIC can bring charges for false or misleading disclosure and dishonest conduct among others.[1906] Given the broad nature of holistic accountability, and the many ways in which directors of LPCs can bring about damage, it is clear that exploration of wider criminal sanctions is required to plug the gaps current legislation presents. It is accepted that it is not possible to legislate for every possible offence that could/can be committed by directors of LPCs, nor is it advocated that all improper actions be deemed criminal, with some suitable for civil action. Nonetheless, there are likely to be some actions which would only be suitable for criminal sanctions. It is these actions that require further exploration and subsequent drafting into legislation. In this regard, the following questions would need to be answered:

I. What types of misconduct are not already covered by the current body of legislation?

II. What types of misconduct is holistic accountability likely to encounter and can those types of misconduct be dealt with under the current criminal sanctions for directors of LPCs? If not, do those gaps lend themselves to be drafted as criminal sanctions?

III. If so, would the drafting be in the form of a statutory instrument or be included as part of a separate piece of legislation?

7.5 Holistic Accountability: Structure & Powers

[1906] The Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019.

For holistic accountability to be enforced, it is clear that a structure is needed to enable holistic accountability not just to be enforced but also carried out. In this regard, the Companies Investigation Branch (CIB), was identified as a possible contender to enforce holistic accountability. However, from the examination of the SEC and ASIC, it is clear something much more transformative, specific, and targeted is required. Whilst certain factors such as the ability to receive hard copies and electronic records can be taken away, as with the SEC and ASIC, a new, clear, and untainted structure is required for directors of LPCs to perceive holistic accountability as a proper deterrent.

This is not to say that the reformation of the CIB is impossible. The problem with reformation means already having a strong foundation to develop (and build in holistic accountability). It is argued the CIB does not have a strong foundation and reforming it is likely to cost more money than it is worth. A new structure would be better suited to holistic accountability because rather than building in holistic accountability, this presents an opportunity to design in holistic accountability, so its enforcement regarding directors of LPCs is effective.

Many aspects of the CIB also sit uncomfortably with holistic accountability. For example, the CIB can only investigate companies if it is in the public interest[1907] which is problematic because having this as a basis means that some LPCs, and their boards, are likely to fall through gaps because this can be seen as a subjective standard. Although ASIC also uses the concept of public interest, albeit with broad usage. Not only that but the CIB can make an application to the court to wind up a company. The problem with this is that some LPCs are likely to be profitable, with the only problem being delinquent directors.

Therefore, this is unlikely to be necessary in the majority of cases. In situations where the actions of directors have resulted in the liquidation of the company, the CIB are unable to investigate and will usually refer it to the Insolvency Service, from which previous chapters have gathered is not fit for purpose because it works on ex post basis rather than an ex-ante basis. To simply reform the CIB in the hope that holistic accountability is enforced is unrealistic, given the sweeping changes it makes in comparison to the current work done by the CIB.

This then brings about another issue of the legislative basis a body would have for enforcing holistic accountability. It is posited that part of the success of the SEC and ASIC has resulted from the fact they both have a legislative from which they can hold

[1907] Finch and Milman (n.1156) 464.

directors, amongst others, accountable for a wide variety of failures/misconduct. For example, the legislative basis of the SEC and ASIC is premised upon the Securities Exchange Act[1908] and Australian Securities and Investments Commission Act respectively.[1909] As discussed in previous chapters, legitimacy is key for accountability to occur[1910] and so the entity that is doing the accounting must have legitimacy for it to be taken seriously, and arguably this can only occur through a legislative underpinning. It is not intended to discuss the wording to be used in the drafting of such a provision but rather the fact that for the enforcement of holistic accountability, the entity enforcing needs to have a legislative basis.

There is a need for the suite of additional measures such as the creation of a whistleblowing programme, surveillance, and interviewing directors to be also drafted into legislation. This would not only solidify the measures and their operation but also serve to clarify the parameters under which they can be used, reducing confusion, and allowing for their effective use. It is also fair to say that having these powers on a legislative footing would almost eliminate any consensual approach to holistic accountability thus ensuring that is done authoritatively, impartially, and effectively. it is not intended to discuss how each measure would operate in detail and/or how any possible issues may be countered. Suffice it to say that it is accepted that the measures, arguably are strong but there are weaknesses which will require polishing so that they achieved their intended outcomes.

7.6 Does the UK need a Corporate Regulator?

Given that the current corporate framework is not fit for purpose, it is worth exploring whether the (holistic) accountability of directors of LPCs could be achieved through the introduction of a corporate regulator. While the SEC exists in the US, and the ASIC in Australia, there is nothing akin to them in the UK. ASIC provides a good basis for introduction given that Australian corporate law and practice are very similar to the UK and much less complicated.[1911] Therefore, the UK government is likely to be interested in the Australian regime.[1912] It is worth noting that there have been calls for an Australian-style corporate regulator, perhaps because it adds credibility to a nation's

[1908] Securities Exchange Act of 1934, s.4; Trust Indenture Act 1939, Investment Advisers Act 1940, Investment Company Act 1940, Sarbanes-Oxley Act 2002, Dodd–Frank Wall Street Reform and Consumer Protection Act 2010.
[1909] Australian Securities and Investments Commission Act 2001.
[1910] Bovens (n.170) 954.
[1911] Andrew Keay & Michelle Welsh, 'Enforcing breaches of director' duties by a public body and antipodean experiences' [2015] 15(2) Journal of Corporate Law Studies 255, 265
[1912] Ibid 269.

oversight of corporate affairs[1913], and corporate scandals have highlighted the absence of accountability. For example, Jeremy Drew, co-head of retail at the law firm, RPC, states that:

> 'I talk to MPs, the regulators and companies going through administration or buying what's left of them and it's clear something bold is needed. It's astonishing…[that companies] … can be in trouble for years and there's no apparent intervention.'[1914]

It is submitted that a proactive regulator by making relevant inquiries in real-time and being able to act, before companies become insolvent[1915], would be far more effective. Indeed currently, '[a]llowing large enterprises to stumble towards collapse without intervention is needless.'[1916] Jeremy Drew points toward the possibility of a regulator making a difference with a broader remit stating that '[i]n Australia, the financial regulator has a corporate governance remit.'[1917] A corporate regulator would focus the minds of directors of LPCs, with rogue directors being stopped or discouraged. The prospect of an energetic corporate regulator turning up to inspect the book would also prompt directors of LPCs to rethink their actions. Although, it is accepted that having a corporate regulator has both benefits and drawbacks.

7.6.1 The Benefits of a Corporate Regulator for Holistic Accountability

Aside from strengthening holistic accountability, there are other clear benefits of having a corporate regulator in the UK. Ultimately there have to be other benefits, either direct or indirect, for the government to have the impetus to think more boldly about the (holistic) accountability of directors of LPCs. It is not intended to detail all the benefits but merely highlight the key ones. Some of those key benefits include public authority involvement[1918], deterring directors[1919], accountability[1920] and investor protection[1921].

Having a corporate regulator in the UK, a public authority means that an objective entity can make more rational decisions. For example, a public authority would be able to assess the merits of a particular claim, and this would mean directors of LPCs would

[1913] Keay and Welsh (n.1911) 269.
[1914] Drew (n.1715).
[1915] Ibid.
[1916] Drew (n.1715).
[1917] Ibid.
[1918] Andrew Keay, 'The Public Enforcement of Directors' Duties: A Normative Inquiry' [2014] 43(2) Common Law World Review 89, 108.
[1919] Ibid 109.
[1920] Keay (n.1918) 111.
[1921] Ibid 112.

be more receptive to concerns rather than if shareholders raised the same concerns.[1922] Officials investigating directors of LPCs will have significant experience and expertise and this will be further developed and refined as time goes on thus further aiding the examination element of holistic accountability.[1923]

Turning to deterring directors, UK company law has in place legal protections for shareholders in the form of derivative actions and oppression actions but both are not practical given the obstacles as mentioned earlier in the thesis. Therefore, enforcement action by an independent public body would encourage LPCs to comply with the law because it would send a message that misconduct (in any form) will not be tolerated.[1924] Indeed, a study by Michelle Welsh indicates that enforcement by ASIC was an important element in encouraging companies to engage in complying with the law.[1925]

Unsurprisingly, accountability is also seen as a benefit of having a corporate regulator. It is submitted that as shareholders are not able to hold directors of LPCs accountable, a corporate regulator would be able to do it because it would hold directors accountable for their actions and omissions requiring them to explain and justify their actions.[1926] Investor protection is vital if financial markets are to develop.[1927] LPCs at some point during their existence will likely access financial markets.

Therefore, to instil confidence there have to be sufficient protections in place ensuring directors will be held accountable. Jackson and Roe argue that 'the best evidence does not warrant rejecting public (or private) enforcement as vital for investor protection in supporting financial markets.'[1928] A corporate regulator would enable investors to invest more freely knowing that misconduct by directors LPCs will not go unpunished and make the UK corporate framework more attractive to potential investors.

7.6.2 Drawbacks of a Corporate Regulator

[1922] Keay (n.1918) 108.
[1923] Ibid.
[1924] Keay (n.1918) 108.
[1925] Michelle Welsh, 'New Sanctions and Increased Enforcement Activity in Australian Corporate Law: Impact and Implications' [2012] 41(2) Common Law World Review 134, 136; See also, Keay (n.1911) 111.
[1926] Ibid.
[1927] Keay (n.1918) 112.
[1928] Howell E. Jackson and Mark J. Roe, 'Public and private enforcement of securities laws: Resource-based evidence' [2009] 93(2) Journal of Financial Economics 207, 209; See also, ibid.

Given that a corporate regulator would significantly change the UK corporate framework, it is worth briefly outlining the key disadvantages a corporate regulator is likely to bring. This is not intended to provide a detailed view but make a brief mention of key criticisms in the context of holistic accountability, and whether these could be resolved, at least cursorily. In regard to the disadvantages of public enforcement of directors, Keay outlines the fact that some see the following as possible disadvantages: company law is private law[1929], public enforcement is suboptimal[1930], burdening of the public purse[1931], cost[1932], relieving shareholders of responsibility[1933] and limiting-decision making[1934].

It is accepted that company law is private law but this as a reason for little public intervention[1935] is not convincing. In the context of holistic accountability, it is submitted that even private law requires oversight given the inherent deficiencies this thesis has touched on which corporate law possesses. Corporate law is treated as private law in the United States as well as in Australia, but this has not stopped these jurisdictions from having greater oversight. Public enforcement allegedly being suboptimal does not hold water because, as previously discussed, both ASIC and SEC have been able to successfully enforce corporate law without adverse effects or vehement criticism about their respective operations.[1936]

The burdening of the public purse has already occurred given that the government has to cover the demise of pension schemes through the Pension Protection Fund and employee statutory redundancy pay for a defined period. However, it is accepted that ultimately the taxpayer would be funding the actions of private persons – shareholders.[1937] In some instances, this would be more cost-effective than allowing LPCs to fail, resulting in the taxpayer having to fund the social security of employees, as well as the financial fall-out of collapsed LPCs. It is also worth noting that some shareholders will be vulnerable and unable to take action, as previously discussed, and therefore the cost is justified as the protection of shareholders, as well as other stakeholders, is paramount if capital is to flow freely for investment.[1938] There are other ways of raising capital so that the public pursue can accommodate a corporate

[1929] Keay (n.1918) 92.
[1930] Ibid 96.
[1931] Keay (n.1918) 99.
[1932] Ibid 101.
[1933] Keay (n.1918) 103.
[1934] Ibid 107.
[1935] Keay (n.1918) 92.
[1936] Ibid 98.
[1937] Keay (n.1918) 99.
[1938] Ibid.

regulator that would require innovative thinking but one way may be to use the money raised through penalties.

Turning to the issue of relieving shareholders of their responsibility, it is clear that shareholders are not exercising their responsibility as they ought to, and therefore agency costs will have arguably increased. Indeed, as Keay notes, having a corporate regulator '…does not appear to have stopped shareholders bringing actions. Actions by Australian shareholders are not plentiful, but more actions are being taken than in the UK, notwithstanding the power ASIC has.'[1939] The limit on decision-making essentially means that limits could be placed on a corporate regulator, as a public body, which could undermine its independence.[1940]

However, any interference will be subject to parliamentary scrutiny as well as the fact some of the most important work is done by public bodies and therefore special arrangements would likely be in place to mitigate such interference.[1941] Another concern is the possibility of bribery of officials, but this is a non-issue because bribery can occur in nearly every area of work life, but the UK has strong bribery laws that mandate an employer to have adequate anti-bribery procedures in place. It is also the case that officials will normally have to get decisions ratified through senior management resulting in a strong audit trail that will weed out extreme cases.

The position of this thesis is that holistic accountability would be strengthened by a corporate law regulator. There are many benefits as well as criticisms. From an objective public authority to deterring directors and protecting investors, it is clear such benefits cannot be overlooked if directors of LPCs are to be held accountable through a corporate regulator. However, there are clear criticisms, but these can be easily mitigated, not least because the Australian experience provides a baseline as to the likely effects of a corporate regulator and provide lessons learned in the UK. In the end, holding directors of LPCs accountable and preventing misconduct is better than an unsatisfactory cure,[1942] which is what the UK currently has.

7.7 Summary

This chapter has sought to address the gaps identified in holding directors of LPCs holistically accountable. In doing so, it has built on some of the effective measures

[1939] Keay (n.1918) 104.
[1940] Ibid 107.
[1941] Keay (n.1918) 107.
[1942] Drew (n.1715).

taken by both the SEC and ASIC and uses those measures within the elements of holistic accountability. For example, regarding the honesty element, it has argued for a legal approach in constructing a statutory definition of honesty for directors of large private companies. For knowledge, it has proposed creating a centralised whistleblowing programme and for the entity enforcing holistic accountability, the legal ability to request and/or seize records.

In relation to examination, it has proposed having a zero-tolerance approach. In effect, this means the examination of each allegation no matter how minor/major it may seem. It has also advocated for a proactive approach and in this respect has suggested surveillance, an ASIC method in examining a concern, or testing compliance with the law. The interviewing of directors has also been suggested, with legal professional privilege claims to be challenged. It has also advocated for gatekeepers to be investigated although this should be done by the respective regulatory body.

For outcome, it has advocated for a holistic accountability balance sheet, for those directors of LPCs, where the outcome can be deemed as a 'clean bill of health', which is to be made available within LPCs' annual accounts. It has also advocated for penalties of up to 10 percent of the total remuneration of directors and criminal sanctions for the most damaging conduct. In putting forward those proposals, it is acknowledged that there are some weaknesses and limitations for all, if not most, of these proposals.

There would need to be clarity around the exact nature of a centralised whistleblowing scheme. The legislation underpinning is also likely to be examined and scrutinised given its (possible) interaction with the current body of law. The incentivising of whistleblowers is also problematic given the various ways in which monetary awards can be calculated. Legislation around requesting or seizing records is also likely to be difficult considering the fluidity of the term records, as well as conscripting instances where seizure of records is likely to be appropriate.

The obligation of directors of LPCs to be interviewed in conjunction with challenging potential instances of legal professional privilege given human rights legislation. The investigation, and referral, of gatekeepers, is also challenging given that the term is not strictly defined. For outcome, it is not clear whether the annual accounts enable possible changes given it is a document mandated by statute as well as concerns around what ought to be included within the balance sheet for a well-rounded view. Remuneration-based penalties also pose a problem in determining how much should

be levied and in what instances should the entire 10 percent of total remuneration be levied, coupled with how the penalty should be drafted in legislation.

In instances, where a director of an LPC argues they are not able to pay such a heavy penalty, threatening their financial viability, it is unclear whether the penalty would still be enforced, or a compromise reached. Criminal offences, as the harshest outcome, would need to be ascertained as well as drafted, given the broad nature of holistic accountability.

For each of these proposals, the chapter has put forward recommendations for future research. In doing so, it has attempted to outline some of the initial questions that would need to be answered to make the holistic accountability of directors of LPCs workable. In conducting this exercise, it has not outlined every single issue, but rather some of the most obvious and pertinent ones, accepting that further questions are likely to flow from this and mitigations are likely to be needed from unwanted indirect effects.

The well-rounded thinking from advocating proposals, to examining their weaknesses/limitations and areas of further research has served to ensure that the holistic accountability of directors of LPCs is workable and effective. It does not claim to solve all the problems but rather puts forward that holistic accountability is likely to be more effective than the previous/current setups, allowing for directors of LPCs to refrain from misconduct.

Finally, it has explored the structure and powers needed to enforce holistic accountability, looking at some of the legislative and operational obstacles that exist in enabling holistic accountability to be enforced. In doing so, it has put forward the viability of the inception of a corporate regulator in the UK. It has discussed some of the benefits this is likely to bring as well as outlined the criticisms and mitigations. Importantly, it has concluded that the UK requires a corporate regulator to enforce the holistic accountability of directors of LPCs.

CHAPTER 8
CONCLUSION

Accountability has been seen as 'high currency'[1943] and as '…one of those golden concepts that no one can be against'.[1944] It has been regarded as a way to curb the unfettered power of individuals, with appropriate checks and balances. In the context of directors of LPCs, accountability is of paramount importance because, directors of LPCs enjoy significant control and power, and it has been seen as controlling the excesses of power. Accountability purports to resolve several issues such as mitigating the agency issue, reducing the possibility of directors self-dealing and shirking and aligning directors' interests with that of shareholders.[1945] This is in addition to addressing the vulnerability of shareholders and allowing the board to operate effectively[1946], amongst others.[1947] However, there is a problem with defining accountability with the promotion of several different definitions.

Therefore, this thesis has answered the central question of how directors of LPCs in the UK should be held accountable for their actions and decisions. This question has followed from a clear need for accountability. In the course of answering the central question, it has examined the concept of accountability and formulated a new theory of accountability in relation to the role of directors of LPCs. It has examined and evaluated the consequences of a lack of (or absence) of holding directors of LPCs accountable. It has also identified the constituent who is best-positioned to hold directors of LPCs accountable. After identifying the government as the best-positioned constituent, this thesis has examined the powers under UK corporate law and their shortcomings to ascertain whether they empower the constituent identified to hold directors of LPCs accountable. Accordingly, it has advocated for a corporate regulator in the UK to hold directors of LPCs accountable.

Tracing the historical roots of accountability has meant that the modern concept of accountability is different to what was previously envisaged. There is clear ambiguity about what accountability means and its elements. Indeed, this thesis found many commentators putting forward their own versions, but with little evidence to suggest these accountability elements have delivered on their purposes.[1948] Given this

[1943] Rached (n.82).
[1944] Bovens (n.83) 448.
[1945] Keay and Loughrey (n.38) 262.
[1946] Dubnick (n.138) 377.
[1947] Keay (n.18) 73-91,103; Blair and Stout (n.217); Borowiak (n.219); Hurt (n.221).
[1948] Laurence & others (n.80).

ambiguity, it has established a new definition of accountability, along with its elements, which is required to hold directors of LPCs accountable.

As a result, it proposes 'holistic accountability' as the accountability standard for directors of LPCs. It consists of a two-fold test of honesty and legal obligation with the following elements: knowledge, examination, and outcome. It not only articulates accountability in the context of directors of LPCs but is cognisant of their unique nature and challenges.

For honesty, a working definition as 'the obligation to be wholly truthful and forthcoming to the company in all its matters whether directly or indirectly, not to omitting anything which would bring that truthfulness into question', is proposed. The dishonesty test in *Ivey*[1949] would enable one to ascertain whether directors are being honest, using the above working definition. The importance of legal obligation (under legislation/case law) is also noted. Knowledge is also recognised as an element given that knowledge, or lack of it, is crucial to holding directors of LPCs accountable. The element of examination imposes a much more investigative approach regarding holistic accountability. Outcome allows for all types of results, rather than simply negative consequences.

In addition, accountability has been linked to corporate governance, posing as a solution for dealing with some of its common issues. The most common grounds for this include the existence of agency[1950], makeup of the board[1951], vulnerability of shareholders[1952], legitimisation of power[1953] and effectiveness of the board.[1954] It has also been contended that accountability also addresses the vulnerability of shareholders.[1955]

Having discussed accountability in the context of directors of LPCs, the effect of accountability and what this means in practice has been explored. Three LPCs, namely BHS Group Ltd, Sportsdirect.com Retail Ltd and Wonga Group Ltd, are used as case studies to provide a practical understanding of what could follow from the absence of accountability of directors of LPCs. These case studies are examined to understand what went wrong and the involvement of directors. Indeed, accountability has been aligned with individuals who exercise control of companies, with corporate scandals

[1949] *Ivey (n.285).*
[1950] Keay (n.18) 73.
[1951] Ibid 83.
[1952] Keay (n.18) 91; Blair and Stout (n.217).
[1953] Moore (n.215); Borowiak (n.219); Keay (n.18) 95.
[1954] Hurt (n.221); Keay (n.18) 103.
[1955] Keay, ibid, 73.

and collapses flaring up around the lack of accountability.[1956] Directors of LPCs have largely been able to do whatever they wish, even though such conduct was illegal and/or questionable.

From the case studies, some form of accountability for directors of LPCs comes when it is too late, and the damage is done. Collectively, some common themes run through all three case studies. The absence of accountability provided an opportunity for such misconduct to occur and be exploited. It also demonstrates that shareholders are not fit or able to hold directors of LPCs accountable. This is because shareholders may also be directors, as was the case in all three of these case studies, but also because dividend payments can be seen as a way of keeping shareholders at bay without engaging with directors and holding them accountable. Therefore, constituents more than just shareholders must be examined, given their evident unsuitability to be unfit to hold directors accountable.

In examining the issue of which constituent should hold directors of LPCs holistically accountable, three of the most pertinent theories and their preferred constituent(s) were discussed. They were the shareholder primacy theory[1957], the stakeholder theory[1958], and the concession theory.[1959] However, each of the theories and their preferred constituent(s) possess short-comings making it difficult, without reformation, to single out any one of these theories and their preferred constituent(s) as suitable to hold directors of LPCs accountable That said, the concession theory is perhaps the most effective when it comes to holding directors of LPCs accountable, with the government as the best-placed constituent. That said, clarity is needed on how the government would effectively hold directors of LPCs accountable, and the form this would take place.

Further, the concession theory puts forward that a company owes its existence to a concession by the state.[1960] In this regard, the concession theory identifies the only credible constituent as the government through the Insolvency Service and the Companies Investigation Branch (CIB). However, while the government has subjected directors and companies to a 'command and control'[1961] strategy, it has used soft-law significantly backed by the veiled threat of legislation.[1962] Ultimately, this has put the

[1956] Gooch and Wills (n.913).
[1957] Stout (n.77); See also, Keay (n.77).
[1958] Freeman (n.78).
[1959] Padfield (n.79) 21.
[1960] Watson (n.1186) 142.
[1961] Grantham (n.982) 585.
[1962] Harvey and others (n.1284).

onus on shareholders to hold directors of LPCs accountable, despite shareholders not doing so.

The CIB is identified as a possible constituent, but this would require significant changes. The CIB's role centres on stopping companies from continuing a course of conduct that is deemed to be destructive but may not necessarily be illegal.[1963] Therefore, the CIB will require legislative provisions and operational procedures. However, in doing so, there may be a perception that it is the same old CIB, going through a rebrand/structural change; for holistic accountability to be properly enforced, there is a need for the introduction of a new and impartial body/entity.

In examining the current regulatory framework, The FRC and TPR are examined against holistic accountability, with both organisations falling short of holding directors of LPCs holistically accountable. The focus of both organisations lies solely on corporate accounting and pension schemes respectively. These shortcomings are further exacerbated when considering that they both fail to adequately fulfil each of the holistic accountability elements. The case studies discussed also demonstrate that they have failed to hold individuals or entities accountable.

Turning to the international examples, the SEC and ASIC each have a solid legal basis for the accountability of directors, amongst others, for the enforcement of corporate laws. Each has had considerable success in obtaining knowledge as well as having strong examination powers resulting in strong outcomes. Some gaps exist in the UK corporate space resulting in several lessons that can be learnt from the development of the SEC and ASIC. Some of the key takeaways include: providing a legal basis for legal responsibility, further information powers to aid knowledge, as well as stronger examination powers and the reformulation of outcomes to ensure that judgements are not only focused on a form of punishment. Taking these points on board to ensure the holistic accountability of directors of LPCs, means a reformation of the current UK corporate landscape because having a(n) (inadequate) focus on corporate reporting and pension schemes is not enough.

Holistic accountability requires much more than just the enforcement of corporate reporting and pension schemes, with a focus on the entire conduct of directors of LPCs. The SEC and the ASIC provide some examples of strengthening holistic accountability for directors of LPCs, but they do not fill all the gaps. Consequently, two questions remain and require answers, the first being the type and set-up of the structure required to ensure there exists holistic accountability of directors of LPCs and the second how

[1963] Finch and Milman (n.1156) 464.

the elements, identified via the SEC and ASIC, that strengthen holistic accountability ought to be incorporated within that set-up.

In answering these gaps, this thesis builds on some of the effective measures taken by both the SEC and ASIC and uses those measures within the elements of holistic accountability. For example, regarding the honesty element, it has argued for a legal approach in advocating for a statutory definition of honesty for directors of LPCs. For knowledge, it has proposed creating a centralised whistleblowing programme and for the entity enforcing holistic accountability, the legal ability to request and/or seize records. For examination, it has proposed, having a zero-tolerance approach. In effect, this means the examination of each allegation no matter how minor/major it may seem.

It has also advocated for a proactive approach and in this respect has suggested surveillance, an ASIC method in examining a concern, or testing compliance with the law. The interviewing of directors has also been suggested, with legal professional privilege claims to be challenged and advocated for gatekeepers to be investigated via their respective regulatory bodies.

In respect of outcome, it has advocated for a holistic accountability balance sheet, for those directors of LPCs, where the outcome can be deemed as a 'clean bill of health', which is to be made available within LPCs' annual accounts. It has also advocated for penalties of up to 10 percent of the total remuneration of directors and criminal sanctions for the most damaging conduct. In putting forward those proposals, it acknowledges and addresses weaknesses and limitations for all, if not most, of these proposals.

For each of the proposals, recommendations have been put forward for future research. This exercise has not outlined every single issue, but rather some of the most obvious and pertinent ones, accepting that further questions are likely to flow from this and mitigations are likely to be needed from unwanted indirect effects. It does not claim to solve all the problems but rather puts forward that holistic accountability is likely to be more effective than the previous/current setups, allowing for directors of LPCs to refrain from misconduct. Examining the weaknesses/limitations, as well as future areas of research, ensures that the holistic accountability of directors of LPCs is workable and effective.

This thesis has explored the structure and powers needed to enforce holistic accountability, looking at some of the legislative and operational obstacles that exist in enabling holistic accountability to be enforced. As result, it has put forward the viability

of the inception of a corporate regulator in the UK, like that of the ASIC. It has outlined some of the benefits this is likely to bring as well as highlighting the criticisms and mitigations. Importantly, it has concluded that the UK needs a corporate regulator to enforce the holistic accountability of directors of LPCs.

The writer is of the view that a UK corporate regulator should be established to enforce the holistic accountability of directors of LPCs. Failure to do so would mean the exacerbation of the current 'black box' issue and further corporate collapses and scandals as a result of director misconduct. Having examined preferred constituents and their respective theories, it is clear that only the government would be able to hold directors of LPCs accountable. In this regard, it proposes a UK corporate regulator to oversee LPCs. The thesis acknowledges that some of its proposals require further fleshing out and submits questions for further research to ensure directors of LPCs are held holistically accountable, and these are matters that would be well-worth investigating in the future.

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