

limitation would apply to other aspects of tort law beyond negligence, the authorial choices are sufficient to show how the theory works.

Yet if I have a qualm with the book, it is that there are quite a few places where detail is lacking. For example, in places we are told that some commentators have defended a position but their identity is not always revealed (e.g. p. 21). The thorny issue of wrongful life is dispatched in four sentences and no authorities are cited on the topic (p. 108). A discussion of the standard of care states that it “should take account of risks assessed relative to ordinary common knowledge, and disregard risks that are apparent only on the basis of specialist or esoteric knowledge, at the time of the interaction” (p. 97). This might be true in a general sense but ignores the *Bolam* test (and will not be very reassuring to anyone entering a hospital). There are also a few places where a general rule is stated without exceptions being indicated or where the description is imprecise. For example, tort law is said to be concerned with “rights with respect to harm to or interference with person or property” (p. 1) but this phrasing does not capture the economic interests that tort law protects against interference. Elsewhere, it is said that “The law traditionally makes a distinction between causing harm and failing to provide a benefit. There is no claim for failing to provide a benefit, even, it would seem, in an extreme case such as failing to rescue a baby drowning in a shallow pool” (p. 110). True, but there are well-established exceptions to this general rule. It might seem like nit-picking to fault an author for failing to add words like “including” or “usually” but these minor omissions soon began to add up.

That said, when one takes a step back from the micro and focuses on the macro, the work has a compelling central argument with some effective application of the theory to the doctrine. Jaffey therefore succeeds in his aim of suggesting a new approach to these debates and so *Justice in Private Law* makes a useful contribution to the private law literature that will be of interest to scholars working in the area.

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Social Enterprises in Asia: A New Legal Form. By ERNEST LIM. [Cambridge University Press, 2023. xvii + 196 pp. Hardback £85.00. ISBN 978-1-108-83815-3.]

In recent decades, there has been a rise in the prevalence of social enterprises worldwide. Social enterprises are business organisations operated with a social or environmental mission. Different to conventional businesses which are aimed towards the pursuit of profit, the basic objective of social enterprises is to provide for social benefit. This is achieved through a business enterprise, with profits ploughed back for attainment of the enterprise’s particular social goals. Social enterprises play an increasingly vital role in addressing problems such as socioeconomic inequality and in working towards environmental sustainability. This is done, for instance, by providing employment and training to the disadvantaged, by making available affordable goods and services to neglected

sectors in society and in supporting and promoting fair trade producers and suppliers. Crucial for the optimal operation of social enterprises in the attainment of their social goals is the nature and form of the enterprise that can be adopted under the law. Ernest Lim's book, *Social Enterprises in Asia: A New Legal Form*, provides an important contribution to the literature in arguing for and elucidating a new legal form in the Asian context tailored for such enterprises to facilitate achievement of social goods.

Social Enterprises in Asia expounds a specific legal form for social enterprises in the particular context of four common law jurisdictions in Asia, namely Singapore, Hong Kong, Malaysia and India. As noted by Lim, there is presently no special legal form for social enterprises in these jurisdictions. The usual types of business vehicles have accordingly been utilised by social enterprises in these countries or territories, usually through the most common type of business form, the private company limited by shares. Lim argues that such existing business forms are not wholly conducive for social enterprises in achieving their social objectives.

The basic problems arise because of conflicts of interest, which Lim analyses in Chapter 1. First, there may be conflicts arising between the social entrepreneurs (directors or managers of the social enterprise) and the investors who fund the enterprise. Such conflicts arise where there is misalignment between the degree of commitment to the social goals of the enterprise as between these two categories of stakeholders. Second, conflicts of interest may arise between pro-social investors and for-profit investors. Different investors may have different personal objectives: for example, while some investors may prioritise the social mission of the enterprise, others might place greater importance in earning profits, with social benefit merely a means to their profit-driven ends. Third, there could be conflicts between the social entrepreneurs and consumers/clients/intermediaries. For example, pro-social consumers might have concerns on the extent to which the social entrepreneurs may be adhering to the social goals of the enterprise. Similar concerns may also arise on the part of "clients" such as the Government who provides funding through grants, and also intermediaries such as crowdfunding platforms who provide a channel for sourcing funds from others.

A central argument in Lim's book is that the existing legal forms used by social enterprises in the Asian jurisdictions considered fail to adequately address the various conflicts of interest that may arise. This leads to detrimental outcomes as "the transformative potential of social enterprises is not unleashed" (p. 44). Lim notes that other jurisdictions, such as the UK and the US, do have special legal forms that may be adopted by social enterprises. However, he argues that these (community interest companies in the UK and public benefit corporations or social purpose corporations in the US) also suffer from particular deficiencies. Accordingly Lim proposes a new legal form for adoption for the various Asian jurisdictions rather than simply replicating UK or US models. Lim puts forward his proposed new legal model for social enterprises through a framework consisting of five criteria: (1) corporate purpose; (2) directors' duties; (3) decision-making powers; (4) reporting, impact measurement and certification; and (5) tax benefits and distribution of dividends and assets.

Chapter 2 examines corporate purpose, namely the central purpose of social enterprises "to promote social benefit using business models while being

financially viable” (p. 47). The potential problem, in relation to corporate purpose, is that social enterprises may deviate from their social goals or otherwise subordinate social benefit to profit. According to Lim, risks of such circumstances arising manifest themselves in the three different types of conflicts of interest discussed in Chapter 1 (as outlined above). Lim contends that the current corporate laws of the four Asian jurisdictions do not facilitate prioritisation of social purposes above profit, and indeed may prevent social enterprises from doing so particularly where pursuit of social benefit conflicts with the pursuit of profit. A core reason why this might be the case is because of the traditional approach of the common law in treating the fiduciary duty of directors to act in the interests of the company to mean the financial interests of the members. The problems in non-alignment of directors’ duties with the social mission of social enterprises is analysed in Chapter 3 of the book.

Taking Hong Kong as an example, Lim is correct to note that in general the profit maximisation principle applies in the governance of Hong Kong companies under the common law. There is, of course, possibility for the social purposes of a social enterprise to be set out as objects of the company in the company’s constitution. On the face of it, this should bind the company. But as Lim observes, there are limits in the ability of members to enforce the constitution as they may only do so in respect of articles which confer on members rights in their capacity as members. Lim accordingly takes the view that even if the social mission of a social enterprise operating through the corporate form is set out in the company’s objects, it might be difficult for pro-social members (investors) to seek to enforce the objects as against directors should the latter act to maximise financial gain over attainment of social goals. The legal positions regarding corporate purpose in Singapore, Malaysia and India are not precisely the same as in Hong Kong, but Lim argues that similar problems also arise in those jurisdictions.

There is, however, a possibility to argue that the common law may be flexible enough to enable enforcement of social objects so as to override the profit maximisation principle that otherwise generally applies. For example, there is case law authority in Hong Kong affirming that the directors’ duty to act in the interests of the company also encompasses a duty to act in accordance with the company’s constitution. Moreover, Hong Kong companies are required by statute to comply with any objects clause in the constitution and members have a right to bring an action under the statute (Companies Ordinance, s. 116) to restrain the company from acting contrary to an objects clause, albeit that this right of action is not permitted to restrain performance of legal obligations already entered into by the company. Compare also the UK Supreme Court decision in *Children’s Investment Fund Foundation (UK) v Attorney-General* [2022] A.C. 155, which held that members of charitable companies limited by guarantee owe a fiduciary duty of loyalty to the charitable purposes or objects of the company. This principle has also been accepted by the Hong Kong Court of Appeal to reflect Hong Kong law: *Lam Kin Chung v Soka Gakkai International of Hong Kong Ltd.* [2022] 4 HKC 202. There may be scope for arguing that the principle also applies to social objectives of a social enterprise as set out in its constitution. On the above analysis, not only are directors’ fiduciary duties modified by the corporate constitution such that they need to uphold the social purposes of the

company, but members are also required to do so in their decision-making in general meeting.

Although the above arguments may be made (to various degrees in the different jurisdictions) to enable companies to prioritise social benefit over profit maximisation where the social objectives are set out in the company's constitution, Lim is right to say that the present legal regimes in the Asian jurisdictions remain unsatisfactory in facilitation of social enterprises for the following reasons as set out in the book. First, even if the view that the law does allow prioritisation of social objects is arguable, the current state of the case law is not sufficiently certain. Without clear legal guidance, directors of social enterprises might not necessarily seek to uphold social goals over profit-driven goals. Second, it is possible for members (typically by way of special resolution) to alter the constitution to remove the social purpose clauses. This may happen in the context of the second type of conflict of interest that Lim discusses, such as where new majority investors are brought in who might turn out to prioritise the making of gains on their investments rather than in upholding social goals of the enterprise. Third, a legal regime that by default aligns directors' duties with the social mission of social enterprises would reduce transaction costs for social entrepreneurs and investors who seek to ensure that the social purposes of the enterprise are prioritised.

Under the new legal form for social enterprises proposed in the book, social enterprises would be required under a mandatory rule to adopt the following corporate purpose: "on the whole, the pursuit and delivery of social benefit is prioritised over profit-making except where doing so will have a material and adverse effect on the financial viability of the social enterprise" (p. 44). The proviso is added in recognition of the fact that a social enterprise's survival also depends on financial success and that continued provision of social benefits by the enterprise is predicated on viability of the enterprise as a going concern. In respect of directors' duties, there should be a secondary mandatory rule that the meaning of the company's interests in the directors' duty to act in the interests of the company (and also the meaning of "proper purposes" in the directors' fiduciary duty to exercise powers for proper purposes) must be equated with the above corporate purpose. These rules address the first two criteria in Lim's proposed framework.

For the other three criteria (discussed in Chapters 4 to 6, respectively), Lim argues for the following. In respect of decision-making, this should not be restricted to directors and members as under company law generally. Rather, beneficiaries of the social enterprise should also be given governance rights. Lim suggests that some flexibility should be given for enterprises to choose the specific model to be adopted, which may be: (1) an advisory panel consisting of beneficiaries; (2) a director appointed from the advisory panel; (3) an independent, non-executive director appointed to represent beneficiaries' interests; and (4) beneficiaries having a right to appoint directors by giving them shares in the company. Lim also proposes the option of setting up an independent regulator with powers to act for the protection of beneficiaries' interests. As regards reporting, impact measurement and certification, Lim proposes that: (1) the publication of annual reports containing particular information about the social enterprise must be mandated; and (2) social enterprises should be required to

engage in a three-step self-reflective process to assess whether, and if so which, impact measurement tools are to be used. Finally, on dividends and tax benefits: (1) there needs to be a cap on distributions to shareholders by way of a legally imposed maximum percentage of assets that can be used to benefit shareholders; and (2) tax incentives should be provided for social enterprises, whether by way of benefits to investors or to the social enterprises themselves.

To conclude, *Social Enterprises in Asia* provides a major contribution to the literature on social enterprises by putting forward a new legal form tailored to the purposes of such enterprises. It is directly relevant and should be considered by stakeholders in the four Asian jurisdictions examined in the book, but the issues analysed are also relevant for other jurisdictions as well, including the UK and the US whose regulatory models are critiqued in the book.

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The Corporate Diversity Jigsaw. By AKSHAYA KAMALNATH. [Cambridge University Press, 2022. x + 219 pp. Hardback £49.99. ISBN 978-1-00907-163-5.]

In her research monograph, *The Corporate Diversity Jigsaw*, Akshaya Kamalnath, an Associate Professor at the Australian National University College of Law, delivers a thought-provoking and comprehensive examination of the multifaceted issue of diversity in corporate governance. The book presents a meticulously researched and nuanced perspective on a topic of growing importance in the corporate world. The author's rigorous approach, supported by substantial evidence, provides a balanced and nuanced exploration of diversity, unveiling the intricacies often concealed within what is often portrayed as a black-and-white issue.

The book is structured into three distinct parts, each contributing to a deeper understanding of the complexity of diversity in corporate settings. In Part I, Kamalnath challenges traditional definitions of diversity, advocating for a more expansive perspective that encompasses aspects beyond gender and race. She convincingly argues for the inclusion of educational and professional backgrounds and age diversity as vital components of a genuinely diverse corporate environment. Additionally, the author highlights the importance of extending the focus on diversity beyond the boardroom to all levels of the organisation, including corporate culture, board, management, the workforce and external consultants providing advice to the board members. This viewpoint challenges prevailing discourse focusing mainly exclusively on diversity on the boards.

The focus on various types of diversity provides a nuanced approach to the topic. The diversity rubric (p. 30) provides a two-pronged approach to dividing understanding of diversity into Prong 1 – Identity diversity relating to race, sex, age, ethnicity, nationality, etc. and Prong 2 – Cognitive/viewpoint diversity with two main indicators of experience and qualifications. The main recommendation relating to Prong 1 is the importance of maintaining an inclusive work culture to get maximum value from Prong 1 diversity. In order to obtain maximum value