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The Limits to Corporate Social Responsibility

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Preface

This thesis was motivated by my career experience managing corporate sustainability programmes and reporting. The corporate practice is abundant with manuals advising how to engage with communities, implement sustainability programmes, conduct materiality assessments, and record data. That operational information routinely stressed a ‘business case for ESG’, but I grew suspicious of the evidence and, more importantly, it did not explain what to do when there was pressure for activity that plainly had no business case. I began to feel uneasy about how priority issues were being selected when I could not locate the decision-making processes—nor identify the decision-makers. Public materials did not often engage with questions about how conflicts between values were to be resolved, other than what seemed to be hand-waving about consultation. Internal consultation invariably found staff and managers placed their highest priority on health and safety but external engagement and materiality assessments rarely mentioned those issues outside of external impacts of hazardous operations. I worried that virtue seemed to be assumed without engaging with the rich philosophical and moral history of ethical questions or the economics behind decisions. Meanwhile, demand for reporting documentation grew to the point that I hired staff to fill out forms. Information collected had little connection to social outcomes. It seemed to me that, if business was really to make a difference, better answers were needed. I decided to look into the mixture of law, corporate management, politics, philosophy, and economics that were playing out in businesses around the world. That curiosity resulted in this thesis. I am grateful to the University of Waikato for allowing me into its study programme and for my supervisors’ counsel. Along the way, my wife supported me to abandon my career and allow me time to study. The economics of our choice will never make sense, so perhaps this study is not just descriptive but substantive evidence that worthwhile purpose can be found outside financial return. I am more grateful than I can express.

John Pagani

29 April 2026.

The Limits to Corporate Social Responsibility

Abstract

This thesis asks what limits New Zealand law places on the scope of corporate social responsibility (CSR). It asks how far directors may go with shareholders' funds, how they should choose between competing social and environmental purposes, and when shareholders or stakeholders can hold them to account. I conclude that CSR is concerned with outcomes for the firm rather than for society. New Zealand law adopts neither profit maximisation nor stakeholder theories of social responsibility. The entity primacy model means that the most important limit on CSR is the duty to act in good faith in the best interests of the company. Stakeholder interests may be considered to the extent that they are instrumental to the company's success. A firm may voluntarily pursue wider social and environmental stakeholder interests at cost to the value of the firm when its constitution or business context allows. Social norms and community expectations form part of directors' duty to act in the company's best interests. I show that stakeholders and their interests cannot be adequately identified. One consequence is that accountability for decisions and for outcomes may be reduced when stakeholder interests are considered. If a recent amendment to directors' duties allows discretion to sacrifice firm value for undefined social outcomes, then corporate value will be affected even if the discretion is never exercised. I analyse theories that argue CSR is largely presentational and alternatively that existing legal tools can be used to make social responsibility commitments effective. By comparing those theories to examples of CSR instruments, I find support for both theories. CSR cannot be defined with sufficient precision to measure its effectiveness. Therefore, CSR cannot be shown to produce better social outcomes than alternative models such as regulation, and claims that investors can 'do well by doing good' cannot be supported. Stakeholders cannot use remedies in the Companies Act 1993, but anti-social behaviour may be reviewable and shareholders have remedies for decisions that are not rationally connected to the purpose of the business.

Chapter I

A. Introduction

On 17 February 2025, the chief executive officer of Genesis Energy, a major electricity generation and retail business,¹ told a public forum, “I utterly reject that Genesis acts solely in its shareholder interest.”² Genesis was acting in the broader interests of the country, he said, by using hundreds of millions of dollars of working capital for a coal stockpile “to back up the entire energy system with no guarantee of ever being paid for that.” The decision to stockpile coal for the national interest was not supported by shareholders. “In fact, most of our shareholders tell us to stop doing that...”³ This study enquires into the questions of law that arise from a firm’s decision to preference the broader interest of the country over the wishes of its shareholders. How far may it go with their funds, and how is the choice made between conflicting considerations such as the national interest in energy security and the national interest in minimising emissions from coal? On what basis may a firm’s decisions and activity affect the interests of outsiders?

The research question that this thesis seeks to answer is: What are the limits to the scope of corporate social responsibility (CSR) activities in New Zealand? The thesis seeks to describe the discretion a firm has when it considers CSR activities, how it should choose which social and environmental purposes to pursue, how it should resolve conflicts between stakeholder interests, and the points at which shareholder funds cannot be used for the interests of others. The relevance of this enquiry is that the boundaries and limits of social responsibility are unclear in public guidelines. For example, the United Nations Global Compact encourages adoption of ten ‘universal sustainability principles’ for corporate citizenship.⁴ The New Zealand stock exchange says it is considered ‘mainstream’ for companies and entities to report on “environmental, social and governance factors” (ESG) and responsible investment.⁵ A director looking for guidance will be concerned to know the legal issues to be weighed in assessing and managing environmental and social factors. A director needs to know not just the

¹ NZX *Genesis Energy* (NZX, online, <nzx.com>).

² I Llewellyn “Some home truths about deindustrialisation and the energy sector” *BusinessDesk* (17 February 2025).

³ Malcolm Johns in Llewellyn (2025), above n 2.

⁴ United Nations Global Compact *About the UN Global Compact* (United Nations, New York, 2000).

⁵ NZX *Guidance Note. NZX ESG Guidance* (NZX, Wellington, 31 October 2025). ‘ESG’ is defined in the document as “environmental, social and governance factors” at 3.

content of sustainability principles but also the limits of corporate citizenship responsibilities if those conflict with their responsibilities to manage the corporate fund. Firms are often urged to take voluntary responsibility for social outcomes.⁶ The need to understand limits has become more important as CSR has become much more prevalent. A 2021 survey of 325 fund managers found 80 per cent said ESG was an important factor in their investment decision-making. About half said they were willing to divest from companies that did not take sufficient action on ESG.⁷ Product Disclosure Statements⁸ of the ten largest KiwiSaver retirement funds⁹ each include statements and policies about responsible investing. Only one made a clear statement that socially responsible investing could affect returns.¹⁰ If it is accepted that a firm has moral and legal responsibilities to wider social interests, the legal question is the boundaries of those powers and the basis for the exercise of social power by private firms. Those entrusted with powers to use capital pooled in a firm are subject to duties. Limits exist to the powers of directors and managers to use a firm's resources as they wish. A firm is also subject to forces that make some social responsibility inevitable. As McBarnet observes, the description of CSR as 'voluntary' is misleading:¹¹

The adoption of CSR policies by business has taken place in a very specific context. If CSR is self-governance by business, it is nonetheless self-governance that has received a very firm push from external social and market forces. From the start, 'voluntary' CSR has been socially and economically driven.

⁶ For a discussion distinguishing voluntary initiatives (or 'corporate citizenship') from formal regulation of corporate activity, see Lisa Whitehouse "Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A New Approach to Regulating Corporate Social Power?" (2003) 3(3) *Glob Soc Policy* 299 at 300-301.

⁷ PricewaterhouseCoopers LLP *PwC's Global Investor Survey The Economic Realities of ESG* (December 2021).

⁸ The purpose of a product disclosure statement is "to provide certain information that is likely to assist a prudent but non-expert person to decide whether or not to acquire the financial products" (Financial Markets Conduct Act 2013, s 49). Section 48 requires any person making a regulated offer of debt or equity securities to prepare (s 48(1)(a)), and lodge with the Registrar of Financial Service Providers (s 48(1)(b)), a product disclosure statement.

⁹ Regulated retirement savings funds. Largest by number of members. Bruce Pitchers *Canstar New Zealand's Top 10 KiwiSaver Funds* (11 March 2025).

¹⁰ BT Funds Management (NZ) *Westpac KiwiSaver Scheme Product Disclosure Statement* (25 September 2024).

¹¹ Doreen McBarnet "Corporate Social Responsibility Beyond Law, Through Law, For Law: The New Corporate Accountability" in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge, 2007) at 9.

Firms affect their wider social, environmental and economic context, and those affect the firm. When managers make decisions about their firms' responsibility for social or public interests, those interests can conflict. Mixed questions of fact, law, economics, management strategy, philosophy, and ethics have to be weighed. This thesis seeks to outline how New Zealand firms must weigh the interests and issues involved.

Climate change is an example where corporate laws and directors' duties have been found wanting for the task of meeting a complex challenge.¹² The literature enjoys a somewhat richer discussion of climate than other issues in the CSR canon. The topic has been recently legislated,¹³ and a 2021 study found over 30 'work streams' involving New Zealand agencies related to 'sustainable' finance.¹⁴ For these reasons, this study aims to make its contribution by investigating the broader palette of social and environmental topics that concern business (although one topic relevant to this study is the question of why certain issues have more salience than others.)

This thesis finds that the most important limit to corporate social responsibility in New Zealand law is that directors must act in the best interests of the company and for a proper purpose. Social interests may be considered as far as they serve the interest of the company. It is possible for a company's interests to include stakeholder interests independently of shareholder interests in corporate value, even at cost to corporate value, where there is authority in a constitution or other business context. Much of the literature about social responsibility of business conflates instrumental social responsibility with profit maximisation. Instrumental social initiatives are undertaken to further the interests of the corporation. Those interests are not always maximisation of profit. Corporates can legitimately have other purposes and powers can be exercised for purposes other than maximising shareholder value. But I conclude that firms'

¹² Patricia Keeper "The mainstreaming of climate change and the impact on directors' duties" (2021) 13/14 J Austl Law Acad Assoc 1.

¹³ See, for example, Climate Change Response Act 2002, Climate Change Response (Zero Carbon) Amendment Act 2019, Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021, Climate Change Response (Emissions Trading Reform) Amendment Act 2020 and Climate Change Response (Tort Liability) Amendment Act 2026.

¹⁴ Including Council of Financial Regulators' climate and financial inclusion workstreams, work on green bonds by the Financial Markets Authority, Bank of International Settlements Green Bonds, a climate-related work stream at the Reserve Bank of New Zealand, participation in the International Organisation of Securities Commissions Sustainable Finance Network, a Sustainable Agriculture Finance Initiative, Department of Internal Affairs Impact Initiative, UN Environment Programme Sustainable Finance Forum and Aotearoa Circle Sustainable Finance Forum. (Ministry of Business, Innovation and Employment *International Developments in Sustainability Reporting* (Occasional Paper, 2021) at 12.)

discretion to consider stakeholders is bounded. To allow unconstrained discretion to pursue stakeholder interests would be to remove the established rules of accountability for using corporate funds. I show that discretion to act in favour of stakeholders at cost to the firm affects the value of a firm even if the discretion is never exercised.

The remainder of this Introduction sets out the structure of this thesis. In Chapter *II* I describe the prevalence of CSR and explanations for why references to social responsibility have become more common in recent decades. The chapter rejects explanations that CSR has become more common because companies are making the world worse. Instead, there has always been a tension over the extent to which the corporate form involved responsibility to society beyond obligations to investors who contribute their capital in expectation of a return. The prevalence of modern CSR is explained as an example of firms responding to community expectations.

Chapter *III* is in three parts that conform to the three main competing theories of the responsibilities corporates should have for interests of constituencies outside the business. It starts with Milton Friedman's position that the social responsibility of business is to increase its profit.¹⁵ As that is described in the literature as the dominant theory of the firm, I present criticism of it, and the response of supporters of shareholder value maximisation. The following two parts outline theories of entity primacy and normative stakeholder theories.

Chapter *IV* analyses directors' obligation in the Companies Act 1993 to act in good faith in the best interests of the company. The requirement is the most important limit on CSR. I present an argument that the case to consider stakeholders' interests can amount to an argument for attributing the interests of stakeholders to the interest of the company. Expansion of the rules of attribution is problematic for common law liability. Ideas of 'giving back' to the community are problematic for fiduciary duties, the corporate veil and who comprises the community. I outline an insight that legal obligations arise because they are created by reliance of one party on another. If obligations arise from membership of the community, they should be owed to the community and not merely resolved between parties. The second part of the chapter discusses an amendment that provides for a discretion to consider 'environmental, social and governance' matters. I argue that the effect of the provision is unresolved and it is uncertain whether it allows firms to sacrifice value to avoid imposing costs on society where those externalities are known by the firm not to be damaging to its value. I conclude that, in preference to the provision, a more effective mechanism for protecting community interests and achieving social and environmental outcomes is

¹⁵ Milton Friedman "The Social Responsibility of Business is to Increase Its Profits" *New York Times Magazine* (online ed, New York, 13 September 1970).

regulation and common law liability. A provision in the Companies Act 1993 is also analysed in Chapter *V*: the duty to use powers for a proper purpose. I conclude ‘proper purpose’ is understood by looking to the purpose for which a power is conferred, which is in turn informed by corporate purpose. Although the default purpose is usually aligned with the interests of shareholders and the company as an entity, wider corporate purpose is possible. The duty to use powers for a proper purpose is a firm limit to CSR.

An original contribution of this study is its analysis of the effectiveness of CSR compared to theories about its purpose. Chapters *VI* and *VII* present original analysis of six expressions of social responsibility, five of which are New Zealand examples: a speech by a Justice of the Supreme Court listing a selection of CSR concerns, CSR requirements in a supplier contract, a near mandatory industry advertising code, gender diversity reporting requirements in the stock exchange Listing Rules, and a voluntary industry code of practice that conflicts with the terms of a contract and with an internal CSR policy. The sixth expression of CSR analysed is the regulation of CSR-related terms in European finance. I compare these examples to theories about the effectiveness of CSR—one theory argues that CSR is therapeutic, presentational window-dressing. Another argues that CSR can be made effective by using existing legal tools. I find support for both positions. I also conclude that the selection of topics in the CSR canon is political and reflects a contestable assessment by practitioners of social norms and community expectations.

The finding that CSR cannot be shown to be effective at achieving social outcomes has consequences for reviewability of CSR and for ‘ethical’ and ‘responsible’ investment. I show that it is not possible to measure CSR effectiveness because it is not possible to define it. The consequence is that claims that ‘ESG’ investment can ‘do well by doing good’ are problematic. Fund managers acting to grow their funds by marketing contested ESG qualities need to be aware of their duties to investors, which do not necessarily align with fund managers’ incentives.

Chapter *VIII* focuses on the circumstances in which shareholders can review a firm’s decision to undertake CSR activities that cost the firm value or stakeholders can seek review of a decision that affects their interests. Claims by stakeholders to compel social responsibility have not been successful in New Zealand even where there is a statutory provision stating that the firm must be socially responsible. Courts may review whether the process by which directors reached a decision was adequate but will not interfere with a board’s subjective view of a firm’s best interest unless a decision is not capable of rational connection to a business interest, or directors do not consider the interests of the business. Stakeholders do not have access to the remedial machinery in the Companies Act 1993, but corporate activity that is socially irresponsible, or not rationally connected to the business purpose, is vulnerable to review. The circumstances in which CSR is reviewable change with business phases, with less room to consider the interests of stakeholders when a firm is close to insolvency or involved in a

takeover. Obligations in international human rights instruments and customary international law may also be a source of review. Principles of proportionality are suggested as a model for giving weight to constituent stakeholders' interests.

The thesis concludes that a principled approach exists to describe the limits of voluntary CSR: the law in New Zealand is entity primacy. It is the responsibility of boards to act in the best interests of the firm. It will usually be in the best interests of firms to assess corporate social responsibility through a lens of how it supports the success of the business. The responsibility to the best interests of the firm involves more than a financial calculation. Social norms and community expectations are projected onto businesses and it will be a breach of the duty of care to ignore those. Corporate citizenship is an element of how firms secure legitimacy for their business activity. They are inherently involved in assessments of social and environmental context, resolving conflicts between priorities and between stakeholders, and deciding how much corporate value can be used in considering stakeholders' interests. One of the main consequences that flow from this conclusion is that CSR is not adequately described as being motivated by social outcomes. It is concerned with outcomes for the firm. I make recommendations for reform of the 'ESG' funds management industry to require evidence of social and environmental benefits as a condition for being described as ethical or responsible. I contend that would be better for both social outcomes as well as ethically-motivated investors.

B. *Terminology*

The broad area of corporate environmental and social activities suffers from proliferating titles and definitions. Definition of what is meant by various terms is a central problem in this thesis, and so it is necessary to set out certain usages for the terms corporate social responsibility, firms, stakeholders, and economic value.

1. '*Corporate Social Responsibility*' or '*CSR*'

This study uses the terminology '*Corporate Social Responsibility*', '*CSR*' or '*social responsibility*'. CSR is the dominant term in the literature, but no more susceptible to definition because of that. Haynes, Murray and Dillard write that corporate responsibility is a contested concept. "We cannot even agree upon a common definition of the term much less the practical application of the ideas."¹⁶ Votaw says the concept

¹⁶ Kathryn Haynes, Alan Murray and Jesse Dillard "Corporate social responsibility – a research agenda" in Haynes, Murray, and Jesse Dillard (eds) *Corporate Social Responsibility* (Edward Elgar Publishing, Cheltenham, 2013) at 3.

“means something, but not always the same thing to everybody.”¹⁷ His taxonomy of alternative uses includes: legal responsibility or liability, ethical expression of socially responsible behaviour, socially conscious activity, a ‘causal’ sense of being ‘responsible for’, and charitable contributions.¹⁸

[M]any of those who embrace it most fervently see it as a mere synonym for ‘legitimacy’, in the context of ‘belonging’ or being proper or valid; a few see it as a sort of fiduciary duty imposing higher standards of behaviour on businessmen than on citizens at large.

One attempt to consolidate common features identified 37 definitions of corporate social responsibility.¹⁹ The absence of a shared definition is a problem in common with other variations in terminology such as ‘ESG’.²⁰ A definition of CSR is not attempted here because one of the main findings of this thesis is that the elusiveness of definition is a defining feature of the topic. The general meaning refers to social and environmental matters other than those connected to a firm’s production of goods and services.²¹

Other terms commonly employed include ‘non-financial’, ‘ESG’ (for Environmental, Social, Governance), ‘Sustainability’ and ‘Triple Bottom Line’. The terms Enlightened Social Value, corporate citizenship, public benefit and social licence to operate also

¹⁷ D Votaw “Genius Becomes Rare” in D Votaw and SP Sethi (eds) *The Corporate Dilemma: Traditional Values and Contemporary Problems* (Prentice Hall, Englewood Cliffs, NJ, 1973) at 1, cited in Whitehouse, above n 6 at 301.

¹⁸ Votaw, above n 17 at 11.

¹⁹ Alexander Dahlsrud, “How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions” (2006) 15 Corp Soc Respons Environ Manag 1.

²⁰ Quinn Curtis, Jill Fisch and Adriana Z Robertson “Do ESG Mutual Funds Deliver on Their Promises?” (2021) 120 Mich L Rev 393 at 401, citing United States SEC Commissioner Elad L Roisman *Keynote Speech at the Society for Corporate Governance National Conference* (virtual conference, <sec.gov>, 7 July 2020): “There is little consensus on what falls within the definition of ESG.”

²¹ Various attempts to express CSR as responsibility to a broader range of ‘stakeholders’ than firms’ shareholders can be seen in, among many others: Andrew Crane and others *The Oxford Handbook of Corporate Social Responsibility* (Oxford Handbooks Online, Oxford, 2009) at 3-5; McBarnet (2007), above n 11 at 9; Archie B Carroll “Corporate Social Responsibility: Evolution of a Definitional Construct” (1999) 38(3) Bus & Soc 268 at 292; and D Matten and J Moon “‘Implicit’ and ‘Explicit’ CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility” (2008) 33 Acad Manag Rev 404 at 405.

appear in the literature. They are alluded to here, but they tend not to be the formal terms used in legal instruments.²²

‘*Non-financial*’ is the term used in section 17 of the Financial Reporting Act 2013, which deals with financial reporting standards. Non-financial matters within scope are set out at s 17(2)(a):

- (i) an entity’s governance:
- (ii) an entity’s strategic direction and targets:
- (iii) the social, environmental, and economic context in which an entity operates:
- (iv) any other matter relating to an entity’s performance or position.

The phrase ‘corporate social responsibility’ is preferred in this study to distinguish the topic from those parts of the statutory scope of ‘non-financial’ that are uncontroversial considerations (‘strategic direction’, ‘economic context’). It is also relevant to note the comment in the European Union corporate sustainability reporting directive that, “Many stakeholders consider the term ‘non-financial’ to be inaccurate ... because it implies that the information in question has no financial relevance. Increasingly, however, such information does have financial relevance.”²³

The term ‘*Environmental, Social, Governance*’ or ‘*ESG*’ was adopted by the United Nations Global Compact in 2004 to describe initiatives related to integration of environmental, social and corporate governance issues in asset management, securities

²² For a full literature review see Alessandro Migliavacca *Accounting for Sustainable Business: Integrating CSR and ESG Principles* (Online ed, Routledge, London, 2025). A widely cited overview of concepts of corporate social responsibility is Marcel van Marrewijk “Concepts and Definitions of CSR and Corporate Sustainability” (2003) 44(2–3) *J Bus Ethics* 95. See also the discussion below in Chapter II Part A, citing at n 2 Dahlsrud (2006), above n 19; and an exhaustive list of sources of definitions in Andrew Crane, Dirk Matten and Laura Spence “What is CSR? Concepts and Theories” in Crane, Matten and Laura Spence (eds) *Corporate Social Responsibility* (2nd ed, Routledge, Oxon, 2014) 67 at 73–74, 97–104 and 127–132.

²³ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU.

brokerage services and associated research functions.²⁴ In New Zealand the stock exchange states:²⁵

Often, the terms ESG, non-financial reporting and corporate social responsibility are used interchangeably. We have elected to use the term ESG, for the purposes of this guidance note, because it is a commonly used term.

‘ESG’ has been described as shorthand for a “dizzily broad array” of topics.²⁶ It has “been treated as a synonym or subset of CSR or sustainability.”²⁷ The term corporate social responsibility is preferred in this study. ESG does not clearly distinguish environmental and social components from issues related to *governance*. In addition, the roots of the expression ESG are in the Global Compact collaboration between the financial industry and the United Nations.²⁸ The term CSR has roots more clearly in the conduct of firms in addition to the investment aspects of firms’ behaviour.

‘Sustainable’ and ‘sustainability-related’ have been adopted by the Financial Markets Authority as of May 2026 “to capture instances when issuers seek to incorporate factors beyond strict financial performance, including values, as part of their investment strategy.”²⁹ In this study, ‘sustainability’ is avoided because the term might be read as narrowly associated with environmental concerns, when the inquiry also encompasses wider social issues. The scope of sustainability is uncertain.³⁰ A United Nations World Commission on Environment and Development statement is often cited as a definition of sustainability: “Development that meets the needs of the present without

²⁴ The Global Compact *Who Cares Wins: Connecting Financial Markets to a Changing World* (United Nations Global Compact, 2004) at vii.

²⁵ NZX *Guidance Note. NZX ESG Guidance* (31 October 2025) at 3. See also Financial Markets Authority *Corporate Governance in New Zealand. Principles and Guidelines* (2018) for non-listed companies.

²⁶ Amanda Rose “A Response to Calls for SEC-Mandated ESG Disclosure” (2021) 98 Wash U L Rev 1821 at 1822.

²⁷ Elizabeth Pollman “The Making and Meaning of ESG” (2024) 14 Harv Bus L Rev 403 at 407.

²⁸ Pollman, above n 27 at 414.

²⁹ (Financial Markets Authority *Sustainability-related Disclosure Guidance* (Guidance Note, May 2026) at 4). The terms replaced its previous use of ‘integrated financial product’, which it used because, it said, terms such as ‘ethical’, ‘responsible’, ‘sustainable’, ‘green’ and Environmental, Social and Governance (ESG) “while commonly used, do not have commonly shared meanings.” (Financial Markets Authority *Disclosure Framework for Integrated Financial Products* (Financial Markets Authority–Te Mana Tātai Hokohoko, December 2020) at 4.

³⁰ See van Marrewijk, above n 22 at 101, for a discussion of the relationship between corporate sustainability and social responsibility.

compromising the ability of future generations to meet their own needs.”³¹ The statement is broad enough that it is difficult to identify any activity that would be excluded.

‘*Triple Bottom Line*’ is another term that attempts to define activity motivated by purposes other than profit maximisation.³² An example from the Bank of New Zealand describes a triple bottom line framework as “a useful starting point to begin thinking about the longer-term value of your business. It might even put into perspective what success could mean for you and your business.”³³ Its triple bottom line ‘framework’ comprises profit (in an accounting sense as a proxy for cash flow), planet (or environmental initiatives to positively contribute to or protect the environment), and people (‘social measures’ meaning how a business treats its ‘people and its stakeholders’). The ‘triple bottom line’ terminology captures the same concepts as Corporate Social Responsibility, but CSR is preferred to isolate the ‘planet’ and ‘people’ components from the ‘profit’ element.

Where the terms ‘triple bottom line’, ‘sustainability’, ‘ESG’ or ‘non-financial’ and related terms are used in source documents, they may be used in discussion for consistency.

2. *Firms*

An organisation that produces goods and services using factors of production such as labour, land, and capital can be defined as a firm by its legal status or its economic activities.³⁴ ‘Firm’ is generally used here because it is neutral with regard to legal structure. ‘Company’ is used in the specific sense of duties applying through the Companies Act 1993. ‘Corporate’ is obviously intrinsic to CSR but it is avoided because it implies management separation from ownership and legal personality, which are topics under discussion. Other forms of enterprise, including unincorporated joint ventures, partnerships and managed investment funds, may control as much capital and operate similarly to a joint stock incorporation with identical effects on outside

³¹ United Nations Secretary-General World Commission on Environment and Development *Report of the World Commission on Environment and Development, Our Common Future* (United Nations, New York, 4 August 1987) at 24.

³² John Elkington *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Capstone Publishing, Oxford, 1997). Norman MacDonald “Getting to the Bottom of ‘Triple Bottom Line’” (2004) 14(2) *Bus Ethics Q* 243.

³³ Bank of New Zealand *Annual Reports and Disclosure Statement* (Year ended 30 September 2024).

³⁴ Oliver Hart, “Thinking about the Firm: A Review of Daniel Spulber’s *The Theory of the Firm*” (2011) 49(1) *J Econ Lit* 101 at 102.

stakeholders. ‘Firm’ captures all of those. ‘Business’ is imprecise between the entity and its activity, so that expression is generally used in this thesis to mean the activities, in senses such as ‘business case’, ‘business model’ and business operations (the ‘business of the firm’.)

3. *Stakeholders*

The definition of stakeholders is one of the topics of enquiry because of the need to identify to whom corporate responsibility is owed. The term ‘stakeholder’ was coined at the Stanford Research Institute in 1963 to describe groups who have a *stake* in the actions of the corporation including shareholders, staff, customers, suppliers, lenders, the environment and society.³⁵ The *Davos Manifesto* defines stakeholders as “employees, customers, suppliers, local communities and society at large.”³⁶ The list is similar to that adopted by the United States Business Roundtable *Statement on the Purpose of a Corporation*, although the latter adds shareholders.³⁷ The term is used generally throughout the thesis in the sense adopted by Watson (2018) of “those persons who participate in the company by making firm-specific investments or those persons who the activities of the company impacts on.”³⁸ The definition of stakeholder is explored in more depth in Chapter III.

4. *Economic value*

The meaning of a company’s value is contested.³⁹ In some theories of the company, the economic value of costs and benefits that the firm imposes on stakeholders are attributed to the firm or taken to include social and environmental values that are not financially measurable.⁴⁰ For example, the *Davos Manifesto* states that the “sustained value” of a firm is assessed not only by its value to shareholders, but to all its

³⁵ R Edward Freeman and David Reed “Stockholders Stakeholders: A New Perspective on Corporate Governance” (1983) XXV(3) *Cal Manage Rev* 88 at 89. [Emphasis in original].

³⁶ Klaus Schwab *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution* (World Economic Forum, 2 December 2019, <weforum.org>).

³⁷ Business Roundtable *Statement on the Purpose of a Corporation* (press release, Washington DC, 19 August 2019): “customers, employees, suppliers, communities and shareholders.”

³⁸ Susan Watson “Corporate Legal Personality” in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) 47 at 61.

³⁹ See Witold Henisz and Robin Nuttall “Valuation of ESG and Digital Initiatives” in T Koller, M Goedhart and D Wessels (eds) *McKinsey Valuation* (7th ed, John Wiley & Sons, Hoboken, New Jersey, 2020) 85.

⁴⁰ P Schreck *The Business Case for Corporate Social Responsibility* (Physica-Verlag Springer, Heidelberg, 2009) 2.3 at 25.

stakeholders.⁴¹ For the purpose of this study, unless clear from the context, reference to a firm's value means measurable net present financial value, whether calculated by discounted cashflows, relative valuation, options pricing, liquidation value, replacement cost, or some other methodology. A *risk* of value reduction is assumed to be materially indistinguishable from a realised reduction in financial value. It is also assumed that an opportunity cost attaches to any choice, such that any choice involves foregoing an alternative. 'Long-term' interests are assumed to be calculable and comparable by following the principle of discounted cashflows to calculate net present value.⁴² The assumption that decision-makers will not make decisions that create large social costs underlies corporate financial theory: "There will never be an objective set of decision rules that perfectly factor in societal concerns, simply because many of these concerns are difficult to quantify and are subjective."⁴³

⁴¹ Schwab above n 36. See also C Handy, "What's a Business For?" in Paul J Zak (ed) *Moral Markets: The Critical Role of Values in the Economy* (Princeton University Press, 2008) 328 at 336.

⁴² See Henisz and Nuttall, above n 39 at 32, and Aswath Damodaran *Applied Corporate Finance* (4th ed, John Wiley & Sons, Hoboken, New Jersey, 2014) at vi. Damodaran describes a methodology for calculating discounted cash flow valuation at 516.

⁴³ Damodaran, above n 42 at 48.

Chapter II

A. Introduction.

CSR is difficult to define and there is no widely agreed definition. The field of study has been described as ‘conceptual anarchy’.¹ That has been no obstacle to a substantial increase in attention to social responsibility among corporates, investors and regulators.² This chapter demonstrates the extent of that increase and explains the origins of CSR. Part B describes the prevalence of activity described as CSR-related and a rapid increase in the use of CSR-related terms, internationally as well as in New Zealand, around the turn of the century. CSR may have begun to decline recently. Part C outlines the evolution of obligations in law towards interests other than shareholders and theories of the firm. From the earliest cases involving the modern corporate form there has been debate about whether separate legal personality invited a social role as well as a profit-making function. Part D asks why CSR has become more prevalent. The question is important to the theories of CSR that will be examined in Chapter *III*. One theory prominent among promoters of CSR is that CSR emerged as a response to globalisation and deteriorating social and economic conditions. This theory is rejected. I argue that neither profit maximisation nor stakeholder theory have an adequate explanation for an increase in CSR. The explanation that best fits the research evidence about how CSR is practised is that it grew because of changing community expectations and increasing sophistication in corporate communications. CSR emerged to move the emphasis from government regulation of corporate conduct to control by firms, and interests such as consultancies, funds and NGOs. Consequently, this thesis argues, a more important question must be answered than whether firms should focus only on profit or on social roles: whether corporations and investment funds are the right decision-makers for achieving social and environmental outcomes. The chapter concludes by previewing the conclusion that social responsibility is more impactful, efficient, and accountable in the hands of regulation and legislation in our democratic structure.

¹ Pierre-Yves Neron “Business and the Polis: What Does It Mean to See Corporations as Political Actors?” (2010) 94 J Bus Ethics 333 at 333.

² For example, see George Serafeim “ESG: Hyperboles and Reality” (Harvard Business School Research Paper Series Working Paper No 22-031, 8 November 2021) at 2.

B. Prevalence of CSR

The term Corporate Social Responsibility was coined in 1953 by United States economist Howard Bowen.³ A distinguishing characteristic of CSR is that it defies definition.⁴ Dahlsrud (2006) identified and analysed 37 definitions of corporate social responsibility.⁵ Five features were ‘predominantly congruent’: environmental impacts, social relationships, socio-economic factors, stakeholders, and voluntariness (actions not prescribed by law).⁶ The voluntary feature of CSR implies that a firm’s social and environmental performance should exceed regulatory minimum standards, “but what is the optimal performance above regulatory requirements or when no regulations exist? The definitions answer this by pointing towards the stakeholders.”⁷ Definitions of the ‘stakeholders’ are vague. So are definitions of how their concerns should be taken into account.⁸ If the definition of stakeholders and how to take account of their concerns is vague then a definition of performance expectations towards them is equally insubstantial. This matters because one of the core issues in the law of corporate social responsibility is the issue of to whom duties and obligations are owed by the company, and how those duties vary according to category of stakeholder.

There has been a significant increase in the use of CSR-related terms at least since the turn of the century.⁹ Growing consumer interest is evidenced by a growing market for CSR-related investment funds. Evidence of growth was described in *Australian*

³ HR Bowen *Social Responsibilities of the Businessman* (Harper & Row, New York, 1953).

⁴ Comprehensive reviews of attempts to define CSR include Andrew Crane, Dirk Matten and Laura Spence “What is CSR? Concepts and Theories” in Crane, Matten and Laura Spence (eds) *Corporate Social Responsibility* (2nd ed, Routledge, Oxon, 2014) at 66; and MS Schwartz and AB Carroll “Integrating and Unifying Competing and Complementary Frameworks: The Search for a Common Core in the Business and Society Field” (2008) 47(2) *Bus & Soc* 148.

⁵ Alexander Dahlsrud, “How Corporate Social Responsibility Is Defined: An Analysis of 37 Definitions” (2006) 15 *Corp Soc Respons Environ Manag* 1.

⁶ There was a 97 per cent probability that any three of those ‘dimensions’ feature in any definition. Dahlsrud (2006), above n 5 at 5.

⁷ Dahlsrud (2006), above n 5 at 6.

⁸ For a foundational definition of stakeholders see R Edward Freeman “Stakeholder Management: Framework and Philosophy” in Andrew Crane, Dirk Matten & Laura Spence (2014), above n 4 at 140. The question of who is a stakeholder is explored in more depth in Chapter III, Part D, 1.

⁹ Doreen McBarnet “Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability” in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge, 2007) at 10.

Securities and Investments Commission v Vanguard Investments Australia.¹⁰ In that proceeding a fund management firm was fined for greenwashing its ‘ethically conscious’ and ‘Socially Responsible Investing’ products. Evidence stated A\$622 billion was invested in ‘ES&G strategies’, of which \$65 billion was said to be “invested in core ESG products in Australia”.¹¹ In 2001, one out of every eight dollars in professionally-managed funds globally (US\$2.32 trillion out of US\$19.9 trillion) was invested in a portfolio using a social responsibility screen.¹² By 2025, industry research showed ‘sustainability’ reporting was part of ‘business as usual’ for most of the world’s largest 250 firms and the top 100 in each jurisdiction.¹³ The most popular set of reporting standards is the Global Reporting Initiative, against which 77 per cent of the world’s 250 largest companies by revenue report.¹⁴ Later chapters will describe initiatives by the global benchmark for corporate reporting and the European Union to adopt a “high-quality, comprehensive global baseline of sustainability disclosures focused on the needs of investors and the financial markets.”¹⁵ A 2024 survey of 547 managers in 30 countries and territories by a management consultancy to assess firms’ readiness for the European Union’s reporting initiative found that 76 per cent believed it would lead to firms considering sustainability in decision making to a greater extent. Around half believed it would benefit their firm through environmental performance (51 per cent), improved engagement with stakeholders (49 per cent), and risk mitigation (48 per cent).¹⁶ While the 2024 survey reported on *corporates*, an earlier survey of 325 *fund managers* by the same consultancy in 2021, found 80 per cent said ‘ESG’ was an important factor in their investment decision-making, and about half said they were willing to divest from firms that did not take sufficient action on environmental, social

¹⁰ *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd (No 2)* [2024] FCA 1086 [*ASIC v Vanguard*].

¹¹ *ASIC v Vanguard*, above n 10 at [47](c).

¹² Social Investment Forum *2001 Report on Socially Responsible Investing Trends in the United States* (2001, Social Investment Forum) at 4, cited in Kevin Campbell and Douglas Vick “Disclosure Law and the market for corporate social responsibility” in McBarnet, Voiculescu and Campbell (eds) (2007) above n 9, 241 at 260.

¹³ John McCalla-Leacy and Jan-Hendrik Gnändiger “The move to mandatory reporting” *Survey of Sustainability Reporting* (KPMG International, 2024) at 7.

¹⁴ ‘G250’ companies, as assessed by KPMG International based on 2023 Fortune 500 ranking. KPMG (2023), above n 13 at 33.

¹⁵ International Sustainability Standards Board; Directive (EU) 2022/2464 of the European Parliament and of the Council, 14 December 2022.

¹⁶ PricewaterhouseCoopers LLP *Global CSRD Survey 2024* (<pw.com>, 13 June 2024) Although PwC describes the survey as global, sixty per cent of companies had EU headquarters.

and governance issues.¹⁷ The examples demonstrate widespread international adoption of corporate social responsibility objectives and claims. Firms believed that reporting leads to corporate benefits as well as substantively beneficial outcomes. Later chapters will test firms' views about substantive outcomes against the evidence.

A similar pattern of CSR uptake can be identified in New Zealand. Keeper (2021) explained evolving pressures on directors from investors and other stakeholders to consider non-financial matters.¹⁸ Examples of sustainability issues being mainstreamed include enactment of the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021, which she says reflects the evolution of our understanding of climate change “from a purely ‘ethical issue’ or ‘environmental externality’ to an issue that poses foreseeable financial risks and opportunities for companies across short, medium and long-term horizons.”¹⁹ Around 200 large financial institutions covered by the Financial Markets Conduct Act 2013 are required to make climate-related disclosures.²⁰ Keeper argues that further corporate law reform is required to respond to climate change. The Financial Reporting Act 2013 provides for the External Reporting Board²¹ to issue financial reporting standards that relate to “the social, environmental, and economic context in which an entity operates.”²² A review of the Product Disclosure Statements²³ of the ten largest KiwiSaver funds by number of members²⁴ demonstrates that statements and policies about responsible investing are disclosed by the largest funds.²⁵ Only one made a clear statement that socially responsible investing could affect returns, warning that, “This approach leads to fewer

¹⁷ PricewaterhouseCoopers LLP *PwC's Global Investor Survey. The Economic Realities of ESG* (<pw.com>, December 2021).

¹⁸ Patricia Keeper “The mainstreaming of climate change and the impact on directors' duties” (2021) 13/14 *Journal of the Australasian Law Academics Association* 1 at 14.

¹⁹ Keeper, above n 18 at 2.

²⁰ Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021.

²¹ An independent Crown entity responsible for developing and issuing reporting standards on accounting, audit and assurance, and climate. External Reporting Board 2023/24 *Te pūrongo a tau Annual Report* (2024) at 62.

²² Financial Reporting Act 2013 s 17(2)(a)(iii).

²³ The purpose of a product disclosure statement is “to provide certain information that is likely to assist a prudent but non-expert person to decide whether or not to acquire the financial products” (Financial Markets Conduct Act 2013, s 49). Section 48 requires any person making a regulated offer of debt or equity securities to prepare (subs (1)(a)), and lodge with the Registrar of Financial Service Providers (subs (1)(b)), a product disclosure statement.

²⁴ Bruce Pitchers *Canstar New Zealand's Top 10 KiwiSaver Funds* (canstar.co.nz, 11 March 2025).

²⁵ Detailed results by provider available from by author.

investments to choose from, which may mean forgoing some financially profitable investment opportunities.”²⁶

New Zealand’s largest domestic investment fund, the New Zealand Superannuation Fund,²⁷ decided in 2017 to exclude certain investments related to carbon emissions from oil, gas and coal, although it characterised the decision as risk management, not values-based.²⁸ The Fund has signed a responsible investment charter called the Stewardship Code for Aotearoa New Zealand (Stewardship Code), along with other signatories collectively comprising most of the New Zealand investment industry’s assets under management and over \$2.6 trillion of assets globally.²⁹ Code signatories undertake to incorporate material ESG matters in their investment decision making.³⁰ The ‘Code’ defines material ESG matters as those that are expected to have a significant positive or negative impact on the long-term value of an issuer or an investment. Examples include climate change, biodiversity and ecosystem health, pollution prevention and control, human rights, modern slavery, supply chains, community engagement and impact, Te Ao Māori, Te Tiriti o Waitangi, equitable and sustainable outcomes for tangata whenua, sound issuer governance, high standards of ethical behaviour, diversity, and executive remuneration.³¹ The Code encourages signatories to consider how they incorporate Te Tiriti into stewardship activities, explain how they identify, assess, and manage ESG, describe how ESG impacts investment decisions and stewardship practices, disclose which ESG matters have been prioritised, and disclose the extent to which such matters are considered in investment decisions.³² The Stewardship Code says it is intended to complement existing regulatory requirements, and not to impose legal obligations or constitute legal advice.³³ The principles do not describe a method by which those matters listed are selected or changed, nor accountability for achieving them, nor how to weight the substantive matters against

²⁶ BT Funds Management (NZ) *Westpac KiwiSaver Scheme Product Disclosure Statement* (25 September 2024).

²⁷ The New Zealand Superannuation Fund is a Crown fund established by s 37 New Zealand Superannuation and Retirement Income Act 2001.

²⁸ New Zealand Superannuation Fund, *NZ Super Fund, Carbon reduction Q&A* (Press release, 15 August 2017).

²⁹ *Aotearoa New Zealand Stewardship Code* (Stewardship Code Aotearoa New Zealand, Auckland, 2022) [*Stewardship Code*].

³⁰ *Stewardship Code*, above n 29, Principle 3.

³¹ *Stewardship Code*, above n 29, Principles at 8.

³² *Stewardship Code*, above n 29, Principles at 8.

³³ *Stewardship Code Aotearoa New Zealand Guiding Principles for Responsible Investment Stewardship in Aotearoa New Zealand* (Aotearoa New Zealand Stewardship, Auckland, 2022) at 2.

each other where they conflict, nor against other corporate purposes including pursuit of returns on investment. No evidence appears to be available evaluating the outcomes and impacts for the objectives stated in comparison to alternative policy interventions. Later chapters will discuss whether instruments such as the Code are effective or merely ‘therapeutic’ and presentational, and whether they have legal effect despite being described as non-binding.³⁴

While voluntary corporate activity has developed through initiatives such as the Stewardship Code, the regulatory and legislative context in New Zealand has also recently changed. For example, the government required default KiwiSaver funds to exclude investment in ‘fossil fuels’ from December 2021.³⁵ The Companies Act 1993 was amended in 2023 to add a new “environmental, social, and governance” provision.³⁶ The New Zealand Government has announced the development of a “Sustainable Finance Taxonomy” intended to help direct capital into low carbon emissions activities “restoring nature, and upholding the rights and interests of Indigenous Peoples of the land, while avoiding negative consequences to other environmental or social outcomes.”³⁷ Other examples of governance guidelines about CSR issued in New Zealand and internationally include guidelines issued by the NZX,³⁸ Financial Markets Authority,³⁹ OECD,⁴⁰ International Standards Organization,⁴¹ and the United Nations Global Compact.⁴²

The examples demonstrate that CSR practice is prevalent among New Zealand and international firms, and has received attention from soft law regulation, as well as

³⁴ See Chapter VI, Part A, 1; Anna Aseeva *From Corporate Social Responsibility to Corporate Social Liability* (Hart Publishing, Oxford, 2021); Stephen Bainbridge *Corporate Governance after the Scandals and the Financial Crisis* (Oxford University Press, Oxford, 2012) 34.

³⁵ Hon Grant Robertson & Hon Kris Faafoi (responsible ministers) “Default KiwiSaver changes support more responsible investment” (press release, 1 March 2020).

³⁶ The provision is the subject of analysis in Chapter IV.

³⁷ Centre for Sustainable Finance “Public consultation opens on the Aotearoa New Zealand Sustainable Finance Taxonomy” (press release, 16 June 2025).

³⁸ NZX *Guidance Note: ESG Guidance* (NZX Limited, Wellington, 31 October 2025).

³⁹ Financial Markets Authority *Sustainability-related Disclosure Guidance* (Guidance Note, May 2026).

⁴⁰ OECD *Corporate Responsibility. Private Initiatives and Public Goals* (OECD Publishing, Paris, 2001).

⁴¹ International Organization for Standardization *ISO 26000:2010 – Guidance on social responsibility* (Geneva, 2010).

⁴² United Nations *Global Compact Guide to corporate sustainability* (United Nations, New York, 2015).

formal initiatives. While CSR activity can be shown to be widespread, there is also evidence of an emerging challenge to corporate social responsibility. In April 2025, the Financial Times newspaper reported on data from analytics firm Morningstar showing abnormal outflow of investment from ‘ESG’ funds:⁴³

Investors pulled a record amount from ‘sustainable’ funds in the first quarter of the year, in an early sign that the US backlash against environmental, social and governance-based investing is going global.

It reported that United States investment in ‘sustainable’ funds had declined for 10 consecutive quarters. Asian investment reduced by net US\$8.6 billion, “by far the highest withdrawal figure ever seen”, and net European investment declined by US\$1.2 billion. It is possible that a change in the European Union’s regulation of how funds describe themselves caused a significant proportion of the change by influencing funds to change their names.⁴⁴ Morningstar identified 335 sustainability funds that changed their names during the first quarter of 2025, including 116 that dropped ‘ESG-related’ terms.⁴⁵ The world’s largest asset manager, BlackRock, which manages US\$11.5 trillion of investor funds, announced in January 2025 that it would leave the Net Zero Asset Managers Initiative.⁴⁶ Another of the world’s largest fund managers, Vanguard, left the Initiative in 2022.⁴⁷ Evidence of the extent of withdrawal from sustainable investment is mixed. FTSE Russell, a firm that provides market indices for fund managers, reported a 2024 survey of 303 asset owners in 15 countries that claimed 74 per cent of asset owners surveyed were implementing or evaluating sustainable investment considerations in their investment strategy.⁴⁸

One way to test for evidence of a backlash to CSR in New Zealand is the performance of labelled bonds, which are instruments for financing projects that have environmental

⁴³ Steve Johnson “ESG fund outflows hit record as sustainable investing backlash grows” *Financial Times* (online edition, London, 25 April 2025).

⁴⁴ See Chapter VI, Part A, 4.

⁴⁵ Johnson (2025), above n 43.

⁴⁶ Ross Kerber, “BlackRock quits climate group as Wall Street lowers environmental profile” *Reuters* (10 January 2025). Members of the initiative pledge to use their votes at corporate meetings to support the goal of net zero greenhouse gas emissions by 2050.

⁴⁷ Ross Kerber and Noor Zainab Hussain “Vanguard quits net zero climate effort, citing need for independence” *Reuters* (8 December 2022).

⁴⁸ Stephanie Maier (FTSE Russell Global Head of Sustainable Investment) “Asset owners remain positive about sustainable investment” *Sustainable Investment: 2024 global survey findings from asset owners* (FTSE Russell, 2024).

or social aims.⁴⁹ SustainableFitch, a bond ratings firm, says that in 2024, the value of labelled bonds increased compared to 2023, but at a slower rate of increase than in the previous three years.⁵⁰ The value of labelled bonds fell sharply in Australia from 2023 to 2024, where the value of green, social, sustainability and sustainability-linked loans fell below their 2021 value. The decline appears to be linked to market saturation, with sudden increase in take-up after products launched exhausting the pipeline of available investment and projects. Fitch said declines in value may be linked to broader global economic and policy uncertainty such as geopolitical tensions and inflation.

C. Evolution of Corporate Law and Social Responsibility

Part C will look at the historical background to the evolution of corporate social responsibility, the formation of corporate law and the role of obligations towards interests other than those of shareholders as it evolved. A theme that emerges, in this part and the next chapter, is that theories of CSR emerge from theories of the corporation. The idea of social obligations toward stakeholders of a firm has been a feature since the corporation first appeared. The earliest corporations were municipal and ecclesiastical corporations governed by charters and church law respectively. Davoudi, McKenna and Olegario (2018) show that the early modern corporation was a social entity:⁵¹

The global chartered trading companies of the 17th to 19th centuries, backed by the imperial ambitions of their governments, were mandated to increase trade and economic prosperity, but were simultaneously expected to provide employment, housing, and medical and educational services in their trading localities.

Legal personhood emerged in 1612 in *The Case of Sutton's Hospital*.⁵² The heirs of Thomas Sutton, a coal merchant who had left his estate for a school and hospital he founded, argued that a charity lacked the legal personality to receive property. Sir Edward Coke found that common law corporations existed in the abstract separate from their members. The principle of separate personality had allowed the first chartered business corporation, the English East India Company, to be established as a persona

⁴⁹ Labelled bonds comprised 33 per cent of New Zealand's bond market from January 2015 to March 2025. Sustainable Fitch (an affiliate of Fitch Ratings) *Sustainable Insight State of Play: Australia and New Zealand Sustainable Finance in 2025* (Online newsletter, 28 April 2025) at 2. The total market comprised 25 bonds in 2024, totalling approximately US\$4.1 billion.

⁵⁰ SustainableFitch (2025), above n 49. SustainableFitch does not clearly report the size of the increase.

⁵¹ Leonardo Davoudi, Christopher McKenna and Rowena Olegario "The historical role of the corporation in society" (2018) 6 JBA 17 at 18.

⁵² *The Case of Sutton's Hospital* (1612) 10 Co Rep 23a, 77 ER 960.

ficta (existing in the abstract as a legal person in its own right).⁵³ *Salomon v Salomon*⁵⁴ would later affirm that a company is at law a different person from the owners of its share capital. In the predominantly agricultural US economy of 1800, corporations mainly existed to facilitate public services such as turnpikes, bridges, canals, banking, colleges, hospitals, and guilds. Only eight out of 335 corporations then in existence were manufacturers. The common form of ‘private gain-seeking’ business was a partnership. The link to social provision was broken in the 19th century. Rapid expansion of economic activity needed financial resources too vast for simple partnerships. That resulted in the need to separate managerial expertise from the provision of capital.⁵⁵ Legal personality separate from shareholders was affirmed by the United States Supreme Court in 1886.⁵⁶ Johnson (2018) argues that the arrival of distinctive legal personhood for the corporation did not lead to corporate law ‘paying heed to a broad-gauged corporate responsibility’. Instead, the field turned inward, toward a preoccupation with managerial duties, which were then directed primarily toward shareholders and away from others.⁵⁷

In English law, the ability to benefit interests other than those of shareholders was established by *Hampton v Price’s Patent Candle Co* in 1876.⁵⁸ The case established the principle that a company could benefit others where to do so instrumentally benefited the company. Courts would not necessarily interfere if directors decided to award other employees or local communities with benefits or gratuities that go beyond the strict limits of the company’s legal obligations. The proviso was that the ultimate objective in awarding those benefits was “getting the greatest profit from the business of the company that is possible”.⁵⁹ In 1883, the court in *Hutton v West Cork Railway Co*⁶⁰

⁵³ Susan Watson *The Making of the Modern Company* (Hart Publishing, Oxford, 2022) at 3.

⁵⁴ *Salomon v Salomon and Co Ltd* [1897] AC 22 (HL).

⁵⁵ Lyman Johnson “Corporate law and the history of corporate social responsibility” in Harwell Wells (ed) *Research Handbook on the History of Corporate and Company Law* (Edward Elgar Publishing, United Kingdom, 2018) 570 at 571. [Johnson (2018)]. See also the 1932 text Adolf Berle and Gardiner Means *The Modern Corporation and Private Property* (New edition, Routledge, London, 1991) at 119: “[T]he past century has seen the corporate mechanism evolve from an arrangement under which an association of owners controlled their property on terms closely supervised by the state to an arrangement by which many men have delivered contributions of capital into the hands of a centralised control.”

⁵⁶ *Santa Clara v S Pac RR Co* 118 US 394 (1886).

⁵⁷ Johnson (2018), above n 55 at 573.

⁵⁸ *Hampton v Price’s Patent Candle Co* (1876) 24 WR 754.

⁵⁹ Walter Horwitz “Historical Development of Company Law” 1946 LQR 375.

⁶⁰ *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.

limited the ability to benefit interests other than those of shareholders to matters reasonably incidental to the carrying on of the business. The court held that directors must act in the best interest of the company and could not use company funds for purposes that do not benefit the company.⁶¹

In the period between *The Case of Sutton's Hospital* in 1612 and *Hampton in 1876*, Adam Smith wrote *The Theory of Moral Sentiments*⁶² and the economics text, *The Wealth of Nations*.⁶³ Three insights relevant to the present discussion were features of his commentary: First, that individuals pursuing their own self-interest in free markets unintentionally promote the public good:⁶⁴ “By pursuing his own interest, he frequently promotes that of the society more effectually than when he really intends to promote it.” Second, business activity in the pursuit of self-interest is morally legitimate so long as it is consistent with justice and social sympathy, and does not harm others. Markets could only function within a framework of justice and moral norms.⁶⁵ “Smith was deeply concerned that moral sentiments and justice, not merely greed, should guide economic actors.”⁶⁶ Third, he criticised the joint-stock company and legal personality because the separation of ownership from management meant managers of other people's money would not be as careful as they would with their own funds and would not be properly accountable.⁶⁷ The significance of this history is that, as Bainbridge (2014) argues, debates about corporations' social responsibility today live on as the progeny of earlier arguments about whether corporations have a “social service as well

⁶¹ *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 at 665-6.

⁶² Adam Smith *The Theory of Moral Sentiments* (Indianapolis, Liberty Classics, 1976).

⁶³ Adam Smith “An Inquiry into the nature and causes of the wealth of nations” (1776) in Michael Lewis (ed) *The Real Price of Everything* (Sterling, New York, 2007) 22.

⁶⁴ Adam Smith “An Inquiry into the nature and causes of the wealth of nations” (1776) in Michael Lewis (ed) *The Real Price of Everything* (Sterling, New York, 2007) 22 at 312.

⁶⁵ Thomas Donaldson and Lee Preston “The Stakeholder Theory of the Corporation” (1995) 20(1) *Acad Manag Rev* 69. See also Jerry Evensky *Adam Smith's Moral Philosophy: A Historical and Contemporary Perspective on Markets, Law, Ethics, and Culture* (Cambridge, Cambridge University Press, 2005) at 144: “Smith's system of natural liberty is not a laissez-faire system: it is a system embedded within a moral and legal framework that constrains and guides individual behavior” (at 136) and “Smith feared that left unchecked, merchants and masters could do harm to society; hence the need for institutional and moral constraints.”

⁶⁶ Geoffrey Brennan and AMC Waterman *Economics and Religion* (Boston, Kluwer Academic Publishers, 1994) at 41. See also Amartya Sen *On Ethics and Economics* (Basil Blackwell, Oxford, 1987), who argues Smith's moral philosophy is essential to understanding his economics because markets require ethical norms.

⁶⁷ Donaldson and Preston (1995), above n 65, and Sen (1987) above n 66.

as a profit-making function”.⁶⁸ Johnson (2018) says corporate personhood “goes to very basic concerns about what, apart from law compliance, corporations should recurrently do to be responsible citizens in a thriving economy.”⁶⁹ As Watson (2022) explains, the artificial legal person is a subject of rights and duties.⁷⁰ The thesis of this study is that theories of CSR emerge from these views about the proper rights and duties of a legal person.

D. Why has CSR become more common?

This section will discuss why CSR has increased in prevalence in recent decades. References to a concern for social responsibility as a function carried out by firms, as distinct from corporate philanthropy and the social consequences of corporate structure, began to be more commonly discussed in the 1930s and 1940s.⁷¹ In the 1930s, Adolf Berle and Merrick Dodd argued the merits of shareholder-centric and stakeholder-centric views in the Harvard Law Review.⁷² A Google Books Ngram survey of mentions of social responsibility shows the use of the phrase *corporate social responsibility* became common from about the mid-1960s, and increased sharply from the mid-1990s.⁷³ About a decade later, the variation ‘ESG’ began to increase sharply, possibly to make an emphasis on *environment* more explicit.

A central question is why its prevalence increased over this period. One possibility is that CSR evolved as firms adapted to public pressure from corporate scandals.⁷⁴ Another view points to the power and potential impacts on society of firms. It is argued

⁶⁸ Stephen Bainbridge “Director versus Shareholder Primacy: New Zealand and USA Compared” (2014) NZ L Rev 551 at 552 n 3, citing E Merrick Dodd Jr “For Whom Are Corporate Managers Trustees?” (1932) 45 Harv L Rev 1145 at 1147.

⁶⁹ Johnson (2018), above n 55 at 590.

⁷⁰ Watson (2022), above n 53 at 3.

⁷¹ Archie Carroll “Corporate Social Responsibility. Evolution of a Definitional Construct” (1999) 38(3) Bus & Soc 268 citing at 269: Chester Barnard *The Functions of the Executive* (Harvard University Press, Cambridge, Massachusetts, 1938); JM Clark, *Social Control of Business* (McGraw-Hill, New York, 1939) and Theodore Kreps “Measurement of the social performance of business” in Temporary National Economic Committee *Monograph No 7: An Investigation of Concentration of Economic Power* (United States Government Printing Office, Washington, DC, 1940).

⁷² Adolf A Berle Jr “Corporate Powers as Powers in Trust” (1931) 44(7) Harv L Rev 1049; Dodd above n 68.

⁷³ Google Ngram is an internet search tool that shows the frequency of mention of certain phrases in a selection of published texts.

⁷⁴ McBarnet (2007), above n 9 at 9.

here that those explanations are insufficient because a theory that explains an increase needs to demonstrate a condition causing the change. Corporate scandals and broad corporate powers are not new or coincident with the rapid rise of CSR. In Chapter VI, a theory of political CSR will be advanced that explains that firms have been stepping into a gap created by social and economic trends such as globalisation, deregulation and privatisation in Western economies. Firms (especially trans-national corporations) sought legitimacy through CSR because of the weakening of previous restraints on firms' behaviour.⁷⁵ Klaus Schwab (2021) explains that a form of capitalism in which companies take into account the needs of all their stakeholders, and society at large, was common in the post-war decades in the West. There was a strong sense that local companies were embedded in their surroundings. Managers lived in the same community where goods were produced. Sourcing, production, and selling, took place locally.⁷⁶ He suggests CSR developed as a response to erosion of socio-cultural restraints. For example, manufacturing plants were no longer vertically integrated and managers no longer lived in communities affected by their decisions. CSR emerged to replace former socio-structural constraints.

The evidence that globalisation weakened restraints on corporate accountability is contested.⁷⁷ The interaction between globalisation and corporate accountability is illustrated in a comparison of the production of two globally significant products a century apart: the motor car in the early twentieth century and the cellular phone in the twenty-first. As production processes evolved and globalised, restraint and control by a single government's authority was replaced by distributed regulation. Whereas the

⁷⁵ A Scherer and G Palazzo "The New Political Role of Business in a Globalized World" (2011) 48 JMS 899 at 909; A Scherer and G Palazzo "Globalization and Corporate Social Responsibility" in Andrew Crane and others *The Oxford Handbook of Corporate Social Responsibility* (Oxford Handbooks Online, Oxford, 2009) at 413; Jean-Jacques du Plessis, Umakanth Varottil and Jeroen Veldman (eds) *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Online ed, Springer International Publishing, Cham, Switzerland, 2018) at 101; Néron (2010), above n 1.

⁷⁶ Klaus Schwab and Peter Vanham *Stakeholder Capitalism: A Global Economy That Works for Progress, People and Planet* (Wiley, Hoboken, New Jersey, 2021) at 10-15. For further development of these arguments see Hevina Dashwood "The Rise of Corporate Social Responsibility as a Global Norm Informing the Practices of Economic Actors" in H Hansen-Magnusson and A Vetterlein (eds) *The Rise of Responsibility in World Politics* (2020) Cambridge University Press 167; and Latapí Agudelo and others "A Literature Review of the History and Evolution of Corporate Social Responsibility" (2019) 4 Int J Corp Soc Responsib 1.

⁷⁷ "Globalisation" in this context refers to interdependence of the world's economies through cross-border trade and flows of investment, information and technology. Melina Kolb *What Is Globalization?* (Peterson Institute for International Economics, <piie.com>, 2024).

Ford Motor Company located the management, design, and production, of the Model T car at a single campus in Michigan near to steel manufacture,⁷⁸ today the production of the iPhone involves 50 countries and thousands of suppliers.⁷⁹ Globalised production has made Apple Inc subject to oversight by *more* governments than was Ford. For example, Apple's reporting about stakeholder impacts includes compliance with the European directives on corporate sustainability reporting⁸⁰ and with s 172 of the United Kingdom's Companies Act 2006. It reports on the long-term impact of decisions, the interests of employees, and "the need to nurture business relationships, the impact on the community and environment, and the need to maintain a reputation for high standards of business conduct."⁸¹ Those two regulatory measures are compelled by government, not voluntary provision of public goods. In comparison, in *Dodge v Ford* the Ford Motor Company was successfully sued by the Dodge brothers for, they claimed, making business decisions that served interests other than maximising the value of their shares.⁸² The case became the authority for 'shareholder primacy' in the United States, and will be revisited in later chapters.⁸³ The examples show both Ford and Apple made efforts to demonstrate social responsibility and both were held to account by processes of law. Apple, subject to diverse regulatory jurisdictions, is subject to regulatory CSR constraints and performance standards. Ford, subject to only one jurisdiction, was judicially restrained from pursuing an objective other than profit. The globalisation of production demonstrated in two influential American corporate giants of their time has arguably *increased* corporate accountability, not reduced it. In summary, while production processes have become more complex and trans-national through globalisation, the evidence does not unequivocally support the proposition that regulatory oversight has weakened.

However, there is evidence of an association between CSR activity and a political, legal, cultural and economic trend towards diffusion of rights and responsibilities

⁷⁸ Shari Eli, Joshua K. Hausman and Paul Rhode *The Model T* (Working Paper, National Bureau of Economic Research, Cambridge, MA, 2023).

⁷⁹ Apple Inc *Mapping of the Apple Supply Chain* (Report on alignment with the United Nations Guiding Principles on Business and Human Rights, 2024).

⁸⁰ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU as regards corporate sustainability reporting.

⁸¹ Apple Inc *Section 172 Statement* (Extract from the company accounts and reports of Apple (UK) Limited for year ended 28 September 2024) at 3.

⁸² *Dodge v Ford Motor Co* 204 Mich 459, 170 NW 668, 3 ALR 413 (Mich 1919) 1. [*Dodge V Ford*]

⁸³ The interpretation of *Dodge V Ford* as good authority for shareholder primacy in the United States is today contested.

among governments, companies, NGOs and others.⁸⁴ Conley and Williams (2005) cite research showing that jurisdictions such as the United States and the United Kingdom have a stronger tradition of separating management from shareholders. They have tended to rely more on market valuation and financial transparency and tend to impose lighter CSR disclosure obligations.⁸⁵ In contrast, in European jurisdictions, ownership is more dominated by families, dominant shareholders and banks. There, the stakeholder concept of the firm has been more dominant and the most expansive disclosure regulations have been implemented. For example, the European Union's corporate sustainability reporting directive of 2022 states there is a gap between users' information needs and the sustainability information provided by firms. It says NGOs, communities, "and other stakeholders" affected by firms' activities, are less able to hold firms accountable for their impacts on people and the environment. Investors are less able to channel resources to activities that address and do not exacerbate social and environmental problems, which "could have negative impacts on the efficient functioning of the social market economy."⁸⁶

A related argument sees CSR increasing because of rising concern about the state of the world.⁸⁷ See for example a best-selling text by Colin Mayer arguing business is "the source of inequality, deprivation, and environmental degradation, and the problems are getting worse."⁸⁸ He says businesses engage "in a form of 'unjust enrichment' and profiting at the expense of others."⁸⁹ Good firms are out-competed by bad firms that do not so that capital flows from good to bad firms.⁹⁰ In New Zealand, the NZX states that, "Climate change and depletion of resources mean investors, may consider sustainability

⁸⁴ John Conley and Cynthia Williams "Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement" (2005) 31 J Corp L 1 at 2, citing at n 4 Ruth Aguilera and Gregory Jackson "The Cross-National Diversity of Corporate Governance: Dimensions and Determinants" (2003) 28 Acad Manag Rev 447.

⁸⁵ The authors observed that, in 2006, the United Kingdom appeared to be diverging from US practice, and companies were required to identify and disclose material social and environmental risks. The development may have resulted from the United Kingdom's then membership of the European Union.

⁸⁶ See Directives, above n 80.

⁸⁷ See, for example, the long list of miseries in JD Margolis and JP Walsh "Misery Loves Companies: Rethinking Social Initiatives by Business" (2003) 48 Admin Science Q 268.

⁸⁸ Colin Mayer *Prosperity: Better Business Makes the Greater Good* (eBook ed, Oxford University Press, Oxford, 2018) at 19.

⁸⁹ Colin Mayer "Understanding Corporate Purpose: Bringing Clarity to Corporate Purpose, Success and Law" (2024) 55 VUWLR 357 at 358.

⁹⁰ Meyer (2024) at 359.

as an important factor when making investment choices”.⁹¹ A ‘sustainable finance’ proposal for CSR reform stated,⁹²

Our current financial system is contributing to environmental degradation and entrenching inequality across many measures; we are rapidly consuming finite pools of natural and social capital to produce financial capital. Simply put – this is unsustainable.

Klaus Schwab’s list of concerns spans social, environmental, and economic challenges. They include climate change, rising inequality, debt, the fragility of public health systems exposed by COVID-19, and a shift in values among citizens who demand that companies stand for more than profit.⁹³ In another version of this argument, Mayer, Strine and Winter (2020) list the concerns as sustainable growth, fair treatment of workers, and the elimination of externalities that slow economic growth, and harm human health and welfare.⁹⁴ Edward Rock describes a post-2008 upsurge of populism and political polarisation leading to legislative deadlock and disillusionment about the possibility of legislation to address societal issues.⁹⁵

There are problems with these explanations. Developments post-2008 do not align well with the increase in attention to CSR. Political paralysis is not universal across liberal democracies where appetites for CSR have increased, including New Zealand.⁹⁶ If the case for considering stakeholders is based on deteriorating social and environmental outcomes, then the claim is empirically unsound at the aggregate level. Social and economic conditions are not generally worse than in the past, nor are they continuing to worsen. The claim that business activity is a general cause of damage is also weak. Over the past two centuries, as globalisation has intensified and the modern corporate

⁹¹ NZX Limited *Guidance Note: NZX ESG Guidance* (NZX Limited, Wellington, October 2025) at 6.

⁹² Aotearoa Circle Sustainable Finance Forum *Aotearoa New Zealand’s Sustainable Finance: Roadmap for Action: Final Report* (The Aotearoa Circle, Auckland, November 2020) at 14.

⁹³ Klaus Schwab and Peter Vanham (2021), above n 76 at 21-55, developing a framework of “The Issues of the World Economy Today” in Robert Fogel and others “The Scientific Methods of Simon Kuznets” in Robert William Fogel et al (eds) *Political Arithmetic: Simon Kuznets and the Empirical Tradition in Economics* (University of Chicago Press, Chicago, 2013) 89.

⁹⁴ Colin Mayer, Leo Strine and Jaap Winter “The Purpose of Business is to Solve Problems of Society, Not to Cause Them” in Luigi Zingales, Jana Kasperkevic and Asher Schechter (eds) *Milton Friedman 50 Years Later* (Stigler Centre, University of Chicago, Chicago, 2020) at 65.

⁹⁵ Edward Rock “For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose” (2021) 76(2) *The Business Lawyer* 363 at 367.

⁹⁶ The point is not pursued here. If political deadlock were an explanation, the resulting outcome is a legitimate democratic choice. Were CSR pursued to route around democratic decision-making, that would have consequences for the legitimacy of outcomes.

form has evolved, every measure of human development has steadily improved.⁹⁷ The proportion of people living in extreme poverty (less than US\$1.90 per day) has steadily fallen from 79 per cent to nine per cent with corresponding increases in economic welfare at every income level. The proportion of the global population who have attained a basic education has increased from 17 per cent to 86 per cent. Literacy has increased from 12 per cent of adults to 87 per cent. Political freedom has increased from no full franchise democracies to 54 per cent of the world's population living in a democracy. Vaccinations have risen from none to 81 per cent. The proportion of children who die before they are five years old has fallen from 43 per cent to four per cent. The trend has generally accelerated over the past forty years, rather than slowing as economies have globalised. It has continued since the global financial crisis in 2008 and the pandemic.⁹⁸ Although climate change may be an exception, pollution levels usually begin to decline as countries become wealthier.⁹⁹ Environmental damage follows a U-shaped path where pollution tends to increase with economic growth in low-income economies, up to an income threshold, and then improve as countries invest in cleaner technologies and stronger environmental regulations.¹⁰⁰

The above is not to make a contentious argument that the world is free of defects, nor to attribute causality to the correlation. The argument is that if the case for CSR is that the social cost of business activity may outweigh its benefits, then the premise of general social and environmental decline is flawed. If the case for why CSR is needed or for why it is occurring is that modern firms *in general* cause deterioration in

⁹⁷ Max Roser *The short history of global living conditions and why it matters that we know it* (Online resource, Our World in Data, 2016). See also Homi Kharas *The Rise of the Global Middle Class: How the Search for the Good Life Can Change the World* (Brookings Institution Press, Washington, DC, 2023) and Michael O'Hanlon *A Vision and Policy Agenda for a Safer World* (Policy paper, Brookings Institution, Washington DC, 2025) at 2

⁹⁸ Max Roser "The World is Awful. The World is Much Better. The World Can Be Much Better" (Online resource, Our World in Data, 2022 (updated 2024).)

⁹⁹ Noting climate change may be partially attributable to corporate emissions, but it may be difficult to attribute mainly to corporate activity as state-owned and controlled national oil companies produce the majority of oil and gas and control around 90 per cent of the world's oil and gas reserves: Patrick Heller and David Mihalyi *Data-Driven Insights into National Oil Companies* (National Resource Governance Institute, 2019).

¹⁰⁰ Gene M Grossman and Alan B Krueger "Economic Growth and the Environment," (1995) 110 (2) Q J Econ 353.

outcomes, then the long-term statistical evidence does not support those claims.¹⁰¹ Hansmann and Kraakman state that a comparison of models across different countries “lends credence to the view that adherence to the standard model promotes better economic outcomes.”¹⁰² The evidence may show that progress in human development is the result of sophisticated social and environmental institutions and regulation. Mayer (2018) states, “It was the market and exchange rather than the corporation that was the source of economic prosperity.”¹⁰³ Whether state regulation or markets and exchange (or a combination of them) cause progress, neither is of itself an argument for corporates to conduct themselves in a more stakeholder-oriented way. The point is that social outcomes are progressing, not deteriorating. The conclusion of this thesis from the above is that social and environmental decline does not adequately explain the rise in CSR. This is an important insight because the argument for stakeholder consideration frequently assumes a premise of social and environmental decline.¹⁰⁴

The possibility is left open that particular firms may undertake damaging activity. Shapira and Zingales show an example where a firm, DuPont, opted to pollute even though it was aware of and assessed potential sanctions in tort, regulation and reputation. This was “rational wrongdoing”. A conscious decision to continue polluting maximised shareholder value (ex ante), even though it was socially inefficient.¹⁰⁵ The authors surmise that, since the decision to pollute was not a product of incompetence or myopia, but rather a calculated, rational decision, and that it was detected only because of a rare combination of low-probability events, it is possible that examples of socially harmful corporate behaviour may be endemic. This could logically hold true even while firms in general contribute positively to broader economic and social outcomes. However, if it is the case, then leaving calculations of socially responsible conduct to firms themselves would leave decision making with firms that are rationally incentivised not to be responsible. This part enquires into theories for why CSR has become more prevalent. The evidence that it may be efficient for some firms to behave

¹⁰¹ See James D Gwartney and others *Economic Freedom of the World: 2025 Annual Report* (Fraser Institute, Vancouver, 2025) arguing that countries with more economic freedom have substantially higher per-capita incomes, produce more goods and services per person, and have better environmental quality.

¹⁰² Henry Hansmann and Reinier Kraakman “The End of History for Corporate Law” (2001) 89(2) *Georgetown L J* 439 at 451-2.

¹⁰³ Mayer (2018), above n 88 at 65.

¹⁰⁴ Examples above at n 87 to n 94.

¹⁰⁵ Roy Shapira and Luigi Zingales *Is pollution value-maximising? The DuPont case* (Working Paper, National Bureau of Economic Research, Cambridge MA, 2017).

in a socially inefficient way requires that their behaviour is generally undiscovered. It is insufficient in itself to explain widespread increase in CSR activity.

It is possible that CSR is a response to declining trust, and that trust is declining because of cynical anti-social behaviour. Further evidence would be needed to demonstrate an increase in anti-social behaviour and then to explain why the increase in anti-social behaviour resulted in more CSR but not an increase in detection of anti-social behaviour. Chapter *VII* shows that ‘responsible investment’ fund management appears to allocate investment to larger firms rather than to smaller ones and concentrates investment into a tiny number of extremely large technology firms. Funds are allocated, in effect, according to the principle that certain types of firm cause harm, such as industrial manufacturing and resources businesses. The case that certain types of business are more socially desirable than others is not quite a case for changing the way businesses in general behave in relation to stakeholders. Nor does it explain why CSR emerged when it did. The dominance of enormous technology companies has coincided with the rise of CSR. If the impact of large manufacturing explained a need for CSR, then CSR would be expected to recede as those companies’ dominance receded.¹⁰⁶ That is the reverse of what has happened.

Barzuza, Curtis and Webber trace the rise of CSR to shifting demand. “In particular, corporate stakeholders, and the millennial generation in particular (though not exclusively), are increasingly willing to act on preferences regarding social, environmental, and worker-welfare consequences of corporate actions.” Stakeholders have consequently been able to influence firm behaviours, forcing managers to attend to changing social expectations to preserve traditional firm value while also “altering traditional notions of firm value.”¹⁰⁷ A further, complementary explanation for the emergence of CSR is that it resulted from trends in corporate communications and reputation management rather than from substantive non-commercial social and environmental circumstances.¹⁰⁸ Conley and Williams (2006) used techniques of anthropology, linguistics, and business ethnography, to catalogue the language, behaviours and motivations of CSR practitioners. They aimed to assess what

¹⁰⁶ It is not thought plausible that CSR explains why technology companies have supplanted the manufacturing companies of a century ago in developed economies. It may be plausible that the causality runs the other way.

¹⁰⁷ Michal Barzuza, Quinn Curtis and David H Webber “ESG and Private Ordering” (2022) 1(1) *U Chi Bus L Rev* 1 at 14.

¹⁰⁸ The argument is summarised by McBarnet, above n 9.

practitioners seek to accomplish, and whether they achieve their ends.¹⁰⁹ Conley and Williams' empirical research found disclosure beyond legal requirements and "engagement" with a wide range of stakeholders was widespread in practice. They concluded that firms treat both their interaction with stakeholders and their reporting as opportunities to shape and control debate about their conduct. "Rather than redressing the power imbalance between corporations and civil society, these processes may be reinforcing it in subtle but effective ways."¹¹⁰ In this argument, CSR emerged to move the emphasis from traditional government regulation of corporate conduct to a profoundly paternalistic process in which 'powerless people' are spoken for by unelected representatives who form a new class of CSR professionals in firms, consultancies, funds and NGOs. CSR participants (stakeholders and the individuals within firms who consult stakeholders) have come by their positions by a process that has none of the hallmarks of liberal democracy. They are unaccountable because, "Representatives who are not chosen by their constituents cannot be removed by them, either."¹¹¹ This explanation could hold true while there has also been a response to changing social expectations.

The aim of this section has been to explain why CSR has become more prevalent. The explanation that is consistent with the research evidence is that it has emerged not as a response to the state of the world, or because of anti-social corporate behaviour, but as a response to regulation and social expectations. That explanation is consistent with the instrumental, entity-primacy theory of CSR that will be introduced in Chapter *III*. In that chapter, it will be shown that the classic theories of CSR are often positioned as a choice between shareholder value or community contribution. Whether CSR is a complement to regulation or a subtle impediment is a theme of the remainder of this thesis. However, if pro-social activity is used strategically as an alternative to regulation then a different discussion comes into focus. The analytical issue is not only whether corporates behave in responsible ways or not, however responsible is defined, but accountability for social outcomes. The argument is that CSR is used to displace

¹⁰⁹ Conley and Williams, above n 84 at 8. The argument that CSR is "presentational" and "therapeutic" is set out in Chapter *VI, A I*, citing Bainbridge (2012), above n 34 at 34.

¹¹⁰ Conley and Williams (2005), above n 84 at 61.

¹¹¹ Conley and Williams (2005), above n 84 at 62.

regulation, and in practice as an opaque system of rules imposed by institutions that have no democratic mandate.¹¹²

There is a big difference between laws which are properly debated, which are passed with a democratic mandate, which are enforced through due process, which are clearly worded, which are transparent, which are targeted specifically at the problem they are trying to solve ... and the system of peer pressure which ESG scores seek to exert.

It is worth briefly introducing examples of this argument in the New Zealand context. A defining feature of policy-making on contentious issues in New Zealand is that government and legislative processes are designed to weigh contentious public policy issues, and decisions are subject to scrutiny and public opinion.¹¹³ Board decisions taken behind closed doors. When directors take into account stakeholder interests, “delicate political questions about societal wealth allocation and redistribution are shifted from an open political process involving the legislature to a private, hidden process involving managers.”¹¹⁴ Land (2024) objects to the risk that “a particular political agenda is advanced by stealth, when a transparent democratic consideration of the issues may not have supported that agenda.”¹¹⁵ Where directors go beyond instrumental CSR and make decisions based on ‘ESG’ factors at cost to shareholder and corporate wealth, they are “acting as drivers of social change when the proper policymakers on matters of social reform are our democratically elected Parliament.”¹¹⁶ Compared to democratic processes, “directors are not suited to evaluating and remedying issues that impact society as a whole,”¹¹⁷ and “lack both the ‘political legitimacy’ and the competency to make such determinations.”¹¹⁸

¹¹² Ross Clark *Corporate Cancel Culture. How ESG came to rule our investments* (Policy Exchange, London, 2025) at 45. For a further discussion of this topic see Gond, Kang and Moon “CSR, Partnerships, and Self-Regulation” in Crane, Matten and Spence (2014), above n 4; and SustainAbility and UN Global Compact Office *Gearing Up: From Corporate Responsibility to Good Governance and Scalable Solutions* (SustainAbility, London, 2004)

¹¹³ Jack Hodder “One Advocate’s Opinions – The ‘Least Dangerous Branch’? Predictability and Unease” [2024] NZ L Rev 423 at 438 and 441.

¹¹⁴ John Land “Corporate Purpose and the Impact on Equitable Remedies, Economic Growth and Democracy” (2024) 55 VUWLR 497 at 522, citing Lynda J Oswald “Shareholders v Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause” (1998) 24 J Corp L 1 at 26.

¹¹⁵ Land (2024), above n 114 at 517.

¹¹⁶ Land (2024), above n 114 at 513.

¹¹⁷ Land (2024), above n 114 at 518.

¹¹⁸ Land (2024), above n 114 at 519.

To illustrate the issue of power to make decisions about driving social reform, consider the example of ‘Robber Barons’ of the Gilded Age.¹¹⁹ Some of the wealthiest industrialists of their day, such as Andrew Carnegie and John D Rockefeller, each applied part of their own fortune to philanthropy. Carnegie accumulated extreme wealth and then set out to give most of it away to improve the “general condition of the people”.¹²⁰ Rockefeller became perhaps the wealthiest business owner in history by founding Standard Oil and obtaining a near monopoly over the United States’ oil refineries and pipelines.¹²¹ His philanthropy ranged from founding the University of Chicago to underwriting the work of missionaries and relief workers. The pair’s wealth was accumulated through business practices seen at the time as so rapacious that some charitable organisations refused to take their money.¹²² The concern was the unaccountable exercise of immense power, even if exercised at times for the benefit of wider social purposes. The concern was described in a 1933 United States Supreme Court *dissent* by Justice Brandeis. He compared the power conferred by large corporations to feudalism and rule by plutocracy:¹²³

The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth, is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power.

The vast scale and power of the era’s industrialists eventually provoked protests leading to antitrust legislation and greater regulatory scrutiny.¹²⁴ The relevance here is that firms started by Rockefeller and Carnegie and their peers responded by implementing ‘corporate welfare plans’ even as they acted against the interests of workers, consumers, and the environment. “Explicit in political reaction to corporate power was the divergence between the corporation, with legal personhood, that could exploit workers

¹¹⁹ Matthew Josephson *The Robber Barons: The Great American Capitalists, 1861–1901* (New York, Harcourt, Brace and Co, 1934).

¹²⁰ Andrew Carnegie *Gospel of Wealth And Other Timely Essays* (The Century Co, New York, 1901) at 18.

¹²¹ See generally Ron Chernow *Titan: The Life of John D. Rockefeller, Sr* (2nd ed, Random House, New York, 2004).

¹²² Josephson (1934), above n 119.

¹²³ *Louis K Liggett Co v Lee* (1933) 288 US 517 at 565.

¹²⁴ Davoudi (2018), above n 51 at 18.

and consumers even while donating large sums to charitable causes.”¹²⁵ The argument here is that social responsibility has always been part of the mechanism by which corporate power is legitimised and long pre-dates the modern practice of CSR.

Choices about what counts as responsible provoke a question about who chooses, and why they choose a particular activity. Consider the example of Sir Titus Salt, a figure who clearly supported the fundamental idea embedded in corporate social responsibility, “that business corporations have an obligation to work for social betterment.”¹²⁶ The example presents a counterfactual possibility that, if CSR is instrumental and successful, the results may be disastrous. Salt’s choice of social improvement was unquestionably progressive for its day though now appears quaint. In 1851, he owned a mill in Bradford, then the world’s textile capital and the most polluted town in England. Factories churned out so much sulphurous smoke, and so much effluent polluted the local river, causing cholera and typhoid, that life expectancy was only 20 years.¹²⁷ Sir Titus considered that the work of a good employer included the physical, material *and moral* improvement of the workers. He also wished to promote Christian moral virtue among them. This is today inconsistent with a pluralist community.¹²⁸ He created the town of Saltaire to provide housing, fresh water, a church, school, and hospital for his staff. This improved the wellbeing of his staff but it was an ineffective mechanism for improving the wellbeing of the general population. It was environmental *regulation* that improved the welfare of working folk of Bradford.¹²⁹ No conclusion is drawn here about Salt’s intentions. The example is intended to highlight that an assessment of CSR involves implicit calculations about the best methods of pursuing positive outcomes. It cannot be assumed that CSR initiatives have a net benefit even where they are motivated by good intentions. The goal sought (for example, promotion of ‘Christian moral virtue’) is contestable. So, too, is the effectiveness of the mechanism to achieve universally shared outcomes such as improved sanitation. Like the Robber Barons, Salt may have been motivated in part by an intention to weaken social activism about workers’ living conditions in industrial cities. Later chapters will argue that the selection of CSR issues is inherently political, creating legal issues about

¹²⁵ Davoudi (2018), above n 51 at 18.

¹²⁶ N Craig Smith “Corporate social responsibility: Whether or how?” in Andrew Crane, Dirk Matten and Laura J Spence (2014) above n 4, citing John Styles *Titus Salt and Saltaire: Industry and Virtue* (Shipley, England, Salts Estates Ltd, 1994) at 12-13.

¹²⁷ Smith, above n 126 at 36.

¹²⁸ Only around a third of modern Bradford identifies as Christian and nearly as many are Muslim. United Kingdom Office for National Statistics *Census 2021* (Dataset TS030, 29 November 2022).

¹²⁹ Specifically, the United Kingdom’s Clean Air Act 1956.

how the power to choose objectives is mandated, accountability for the selection of issues and goals, and the mechanism for changing them.

In New Zealand, there may be less force behind the critique of corporate power. There are comparatively few publicly listed corporates, incorporated companies are more likely in New Zealand to be closely held, and shareholders appear to have greater practical ability to organise in ways that control management.¹³⁰ It will be seen in later chapters that the Companies Act 1993 provides firms in New Zealand with flexibility, and imposes duties to consider social norms and community expectations. Those duties are available to support a modern Sir Titus to undertake a strategy of using corporate funds, including those of shareholders, to support health and wellbeing of staff in the interest of the business itself. Modern New Zealand law might intervene to prevent the addition of ‘Christian moral virtue’ as a condition of extending employment benefits, demonstrating that the law imposes limits to ethical and political judgements. Both the judgements and limits are intrinsic to voluntary CSR initiatives.

It is consistent with democratic concepts to grant discretion over how to use corporate resources. Criticism that CSR challenges democratic accountability is perhaps overstated because CSR is limited by instrumental utility and the firm’s best interests. It will be argued below that some social expectations are projected onto firms. Directors must use their discretion to make subjective judgements about the nature and limits of those expectations. If the policy objective is to limit externalities from business activity, or to require firms to contribute directly to social outcomes, then the insight that will emerge below is that existing tools in law, including regulation, are more efficient and effective than CSR. Two unresolved issues from this chapter are, first, whether firms have a merely private role, or whether there are public (or social) roles for firms as well; and, second, whether the focus should be on substantive social outcomes, or on the *mechanism* by which social outcomes are considered. Theories about these issues are the focus of the next chapter.

¹³⁰ See Bainbridge (2014), above n 68 at 569-573.

Chapter III

A. Introduction

Why does CSR exist? If CSR has benefits for firms, and adds value for shareholders, the reason it exists is economic. But if it has limited financial benefits on average, why is it observed in the world?¹ The question and the associated normative choice, between economic value maximisation and social and environmental outcomes, were satirised in a famous Joel Pett cartoon, in which an audience member at a climate conference objects to a list of environmental benefits from reducing greenhouse gas emissions by asking, “What if it’s a big hoax and we create a better world for nothing?”²

Theories of why businesses practise social responsibility are entwined with theories of what they should do, how they really behave and theories of the purpose of the corporation. These theories are the theme of this chapter. It looks at theories of whether firms should pursue any social objectives, who is bearing the costs or receiving benefits where they occur, and, normatively, where the costs and benefits should fall. There are many theories in the literature. Those analysed in this chapter are derived from models outlined by the Supreme Court in *Madsen Ries v Cooper (Debut Homes)*³ and the categories described in a foundational 1990 article by David Millon:⁴ shareholder

¹ Markus Kitzmueller and Jay Shimshack “Economic Perspectives on Corporate Social Responsibility” (2012) 50(1) J Econ Lit 51.

² Joel Pett “What if it’s a big hoax and we create a better world for nothing?” (*USA Today*, 13 December 2009).

³ *Madsen Ries v Cooper* [2020] NZSC 100, [2021] 1 NZLR 43 [*Debut Homes*] per Glazebrook J in obiter at [28]-[30].

⁴ David Millon “Theories of the Corporation” (1990) 39 Duke L J 201.

primacy,⁵ entity primacy,⁶ and stakeholderism.⁷ Millon argued that the most important divide in theories of the corporation is between public and private notions of corporate purpose. A private law conception is concerned with internal relations among shareholders and management. A public theory focusses on accountability to the public interest (in a wide sense that includes environmental interest). Three theories stem from the public-private divide in corporate law. In one, the corporation is a contractual arrangement between individual members, such as managers acting as agents for shareholders. Since shareholders are at an information and organisational power disadvantage, the role of corporate law is mainly to protect their interests. An example of this view in New Zealand is Land (2024). He says the role of the corporate form is to promote a “method of business organisation that is conducive to the efficient operation of markets and economic growth.”⁸ This theory of the company holds that the social contribution of a business is business, and that firms contribute to social economic welfare by their business activity. The Law Commission’s principal report that led to the passage of the Companies Act 1993 refers to the “economic and social benefits of company form”.⁹ The Act’s long title states its purpose includes: “(a) to reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks.” In this model, the role of the corporate form and

⁵ See Henry Hansmann and Reinier Kraakman “The End of History for Corporate Law” (2001) 89 Geo LJ 439; Stephen Bainbridge *The Profit Motive: Defending Shareholder Value Maximization* (Cambridge University Press, Cambridge, 2023) at ch 10; and Thomas Clarke “The impact of financialisation on international corporate governance: the role of agency theory and maximising shareholder value” (2014) 8 LFMR 39.

⁶ I Esser and JJ du Plessis “The Stakeholder Debate and Directors’ Fiduciary Duties” (2007) 19 SA Merc LJ 346; Andrew Keay “Ascertaining The Corporate Objective: An Entity Maximisation and Sustainability Model” (2008) 71 MLR 663; Susan Watson “Moving beyond Virtue Signalling: Corporate Sustainability for New Zealand” in Beate Sjøfjell and Christopher M Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, Cambridge, 2020) 176; and Luh Luh Lan and Loizos Heracleous “Rethinking Agency Theory: The View from Law” (2010) 35 Acad Manag Rev 294.

⁷ R Edward Freeman *Strategic Management: A Stakeholder Approach* (Pitman, Boston, 1984). R Phillips, Edward Freeman and Andrew Wicks “What Stakeholder Theory is Not” (2003) 13 Bus Ethics Q 479; Thomas Donaldson and Lee E Preston “The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications” (1995) 20 Acad Manag Rev 65.

⁸ John Land “Corporate Purpose and the Impact on Equitable Remedies, Economic Growth and Democracy” (2024) 55 VUWLR 497 at 506.

⁹ Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at [22].

corporate governance is to manage an agency problem. Milton Friedman summarised the agency problem:¹⁰

The corporate executive would be spending someone else's money for a general social interest. Insofar as his actions in accord with his 'social responsibility' reduce returns to stock holders, he is spending their money. Insofar as his actions raise the price to customers, he is spending the customers' money. Insofar as his actions lower the wages of some employees, he is spending their money. The stockholders or the customers or the employees could separately spend their own money on the particular action if they wished to do so. The executive is exercising a distinct 'social responsibility,' rather than serving as an agent of the stockholders or the customers or the employees, only if he spends the money in a different way than they would have spent it.

The modern law and economics school is less concerned by the problem of self-dealing philanthropy than Friedman was because abuse of an agency power would destroy value with the result that investors would intervene.¹¹ (The empirical claim that market constraints reliably discipline managers is strongly disputed.¹²) It can be efficient for shareholders to choose to contribute to their society through the corporation rather than individually because distributing earnings as dividends for individual shareholders, which they then donate themselves, introduces an inefficient and unnecessary extra step.¹³ A model of corporate governance set up to manage power and agency costs between providers of financial capital and managers, and between large and small shareholders, is challenged by Zingales (2000).¹⁴ He says the model is an outdated explanation of how modern firms actually work. As firms have de-integrated their asset ownership and production, human capital along with other intangibles has become more important. Power and rents are not concentrated; "they are sprinkled throughout the

¹⁰ Milton Friedman "The Social Responsibility of Business is to Increase Its Profits" *New York Times Magazine* (online ed, New York, 13 September 1970) 1970.

¹¹ Henry Butler and Fred McChesney "Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation" (1999) 84 *Cornell L Rev* 1195 at 1208-1211.

¹² Bebchuk, Fried and Walker "Managerial Power and Rent Extraction in the Design of Executive Compensation" (2002) 69 *U Chicago L Rev* 751.

¹³ Einer Elhauge "Sacrificing Corporate Profits in the Public Interest" (2005) 80 *NYU L Rev* 733; and Frank Easterbrook and Daniel Fischel "The Corporate Contract" (1989) 89 *Columbia L Rev* 1416; Easterbrook and Fischel *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, Massachusetts, 1991). There is empirical evidence of that explanation for why firms practice CSR: Kitzmueller and Shimshack (2012), above n 1 at 76.

¹⁴ Luigi Zingales "In Search of New Foundations" (2000) 55(4) *J Fin* 1623 at 1630 at 1647-8.

[organisation and] even outside the legal boundaries of the firm.”¹⁵ But in the traditional model, board powers and duties are not set up to manage these intangibles. The classical model relegates stakeholders to the status of ‘externalities’ when in reality they are intrinsic to the firm’s value.¹⁶ In Zingales’ alternative the residual value of all claims on the firm is to be measured by the contribution of all stakeholders to the value generated by the firm’s activity.¹⁷ Share capital is owned but not human capital. Therefore, the surplus value created by the firm is to be divided not just among equity and debt holders. It should be shared with non-financial stakeholders such as employees, customers, suppliers who create network advantages, and communities that provide legitimacy and infrastructure. The appropriate role of governance is not to mediate between shareholders, or between shareholders and management, but to mediate between all contributors. The central role of shareholders, as claimants to residual value, is relegated to become only one class of contributors, not the only one. At the heart of the difference between the shareholder value school and the stakeholderist positions is power and accountability. In the shareholder model, directors are entrusted with shareholders’ capital and have a duty to them. In a stakeholder model, the company’s public purpose entails governance assuming duties outside the firm. In the shareholder model, the public issue is how firms can be held to account for their public impacts. In the public model, the private issue is how to hold directors to account for their management of capital. I argue in this chapter that stakeholder theories do not adequately explain how much corporate value may be sacrificed in stakeholder interests, and that shareholder primacy theories do not accurately describe the law in New Zealand. The position in law is that duties of the board are to the best interests of the firm as an entity. Its interest will usually align with the interest of shareholders, but will sometimes require consideration of stakeholders where that is instrumental to the interests of the firm. One outcome of this conclusion is that the focus of stakeholder and profit-maximising positions on the role of the company is not a satisfactory framework to address the objective of corporate social responsibility. The underlying issue is the mechanism to achieve CSR objectives and whether the firm, and voluntary CSR activity by firms, is a suitable mechanism for pursuing CSR objectives compared to alternative institutions and models such as regulation.

¹⁵ Zingales (2000), above n 14 at 1648.

¹⁶ Zingales (2000), above n 14 at 1647–8.

¹⁷ For a summary of theorists developing the approach see Virgile Chassagnon “The Law and Economics of the Modern Firm: A New Governance Structure of Power Relationships.” (2011) 134(2) *Revue d’économie industrielle* 25 (open ed translation).

B. “The Social Responsibility of Business is to Increase Its Profits.”

“The social responsibility of business is to increase its profit” was the title of a 1970 newspaper opinion column by Milton Friedman arguing that the primary responsibility of business is to “make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”¹⁸ “Profit maximisation” is the result of the firm’s responsibility to its owners, although not a separate goal.¹⁹ The shareholder primacy school argues that firms contribute to society by being profitable, which benefits society more than direct social initiatives. “The fact that the company is selling products for more than they cost the company to produce is an important signal that it is creating social wealth.”²⁰ Profit is said to enhance human welfare by incentivising experimentation, “which leads to breakthrough technologies, medicines, or consumer services.”²¹ Profits are a rough indication of the sum of social benefit.²²

How might one try to estimate the contribution that a business makes to the general welfare over any given period? An obvious answer is: by putting a value on the benefits that arise from its operations, and then subtracting from this the estimated associated costs. ...Profits are the difference between the two flows, revenues minus costs. Hence they are a *prima facie* measure of the good that a business is doing for people in general. ...That they typically accrue to shareholders is not the point.

In 2001, Henry Hansmann and Reinier Kraakman declared “the end of history for corporate law.” There was no serious competitor to shareholder primacy as “the standard model of corporate governance” and a broad normative consensus that

¹⁸ Friedman (1970), above n 10.

¹⁹ Milton Friedman *Capitalism and Freedom* (University of Chicago Press, Chicago, 1962) at 133. The phrases ‘profit maximisation’ and its near synonyms ‘shareholder primacy’ and ‘shareholder value maximisation’ do not appear in Friedman’s 1970 column—although ‘profit maximisation’ does appear, once, in his 1962 book.

²⁰ Larry E Ribstein “Accountability and Responsibility in Corporate Governance” (2006) 81 Notre Dame L Rev 1431 at 1464 in Land (2024), above n 8 at 509.

²¹ Christina Parajon Skinner “Cancelling Capitalism?” (2021) 97 Notre Dame L Rev 417 at 429 in Land (2024), above n 8 at 508.

²² David Henderson *Misguided Virtue: False Notions of Corporate Social Responsibility* (Institute of Economic Affairs, London, 2001) at 157. See also Land (2024), above n 8 at 509 n 50 citing Eugene Rostow “To Whom and for What Ends is Corporate Management Responsible?” in Edward Mason (ed) *The Corporation in Modern Society* (Harvard University Press, Cambridge (Mass), 1959) 46 at 63; and Ribstein (2006), above n 20: “The fact that the company is selling products for more than they cost the company to produce is an important signal that it is creating social wealth.”

“shareholders alone are the parties to whom corporate managers should be accountable.”²³ This “canonical law and economics account” regarding the social responsibility of firms²⁴ is said to command wide acceptance among both economists and lawyers and to have been the dominant position in academia and business at least from the mid-1980s to the early 2000s.²⁵

This chapter begins with profit maximisation because of its dominance in the literature. This discussion of the school proceeds as follows: First, I explain the modern shareholder primacy theory of the firm. One difficulty for the theory is the problem of why CSR exists. In the second part of this section, I review shareholder primacy explanations for why CSR is practised. I then turn to a stakeholder critique of profit maximisation. A New Zealand critique of profit maximisation says it does not adequately address social issues and Māori business. I will set out objections and reply to those points. I explain that the problem for the stakeholderist objection is the difficulty of determining which stakeholders should be considered and how to mediate between them. I conclude that profit maximisation is not the law in New Zealand. The standard of what CSR activity a firm should concern itself with, and what social constraints must be observed, is the firm’s best interests. The standard is better conceived in the entity primacy model of the firm than in a shareholder-primacy model. Profit maximisation nevertheless provides a useful base for analysis of entity primacy and the stakeholder position.

Modern corporate finance theory views the firm as a ‘nexus of contracts’.²⁶ Stakeholders who are not employees, customers, or suppliers are unlikely to have a

²³ Hansmann and Kraakman (2001), above n 5 at 451.

²⁴ The phrase is from Elhauge (2005), above n 13 at 736. (Elhauge argues the school is mistaken both descriptively and normatively.)

²⁵ Louis Zingales “Friedman’s Legacy: From Doctrine to Theorem” in Luigi Zingales, Jana Kasperkevic and Asher Schechter (eds) *Milton Friedman 50 Years Later* (Stigler Centre, University of Chicago, Chicago, 2020) at 131. In 2025, Friedman’s column had been cited at least 9220 times on Google Scholar.

²⁶ Michael C Jensen and William H Meckling “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure” (1976) 3 J Fin Econ 305; and Easterbrook and Fischel (1989), above n 13. See also David Millon “Radical Shareholder Primacy” (2014) 10 U St Thomas LJ 1013, 1013–14 (2014), cited ‘with approval’ but ‘not adopted’ by Bainbridge (2023), above n 5 at n 51. Millon draws a distinction between ‘traditional’ shareholder primacy, which aligns to entity primacy described in Part C below, and ‘radical’ shareholder primacy in which management must maximise the return on shareholder investments in the short term even at the expense of possibly losing long-

contractual nexus. The nexus of contracts makes directors the agents of shareholders, with obligations to those shareholders collectively. Since impacts on stakeholders of the firm’s activity are addressed through the risk of tortious liability, regulatory constraint, or damage to profitability from stakeholder backlash, shareholders are the only ones who bear the cost of decisions. The theory holds that firms should therefore be governed to maximise shareholders’ value.²⁷ The approach unequivocally “justifies shareholders’ supremacy, and it eliminates (at least from a theoretical point of view) the possibility of any inefficiency.”²⁸ The firm need not seek to sustain itself into the future. The future is valued according to net present value, and if the present (discounted) cost of a future-oriented activity does not exceed the present (discounted) value of returns, then the activity should not be undertaken, even to the extent of closing a firm down where further activity would destroy shareholder value. The availability of a short-term perspective could mean, for example, that an oil producing firm, forced by regulation to internalise the social cost of its customers’ carbon emissions from use of its product, could cease business and return funds to shareholders, whereas a firm that takes a ‘long-term’ view without internalising its social cost would seek to sustain itself.

A problem for shareholder primacy is why voluntary CSR exists. If firms make their social contribution by investing capital as profitably as possible, and markets in equilibrium with complete information and perfect competition maximise economic welfare, then the theory says a firm would be competed out of business (or investors would intervene) if its CSR activity destroyed value. Either the central premise of the school is incomplete, or the conditions assumed (equilibrium, perfect information, and competition) do not widely exist.

One possible explanation for an increase in CSR around the turn of the century is that there was a backlash to aggressive takeover activity that expanded as a result of shareholder primacy in the 1980s and 1990s. Lyman Johnson (1993) says the “norm” of shareholder primacy came closest to realisation then and collapsed politically when its practical implications, such as job losses and concentration of wealth and power, were most in evidence.²⁹ Vasudev (2012) advanced an argument along similar lines in the New Zealand context, stating “recent events and corporate failures” reveal the

term value. For an example of a further taxonomy, see Tim Connor and Andrew O’Beid “Clarifying Terms in the Debate regarding ‘Shareholder Primacy’” (2020) 35 Aust J Corp L 276. The concepts in the Connor and O’Beid taxonomy are useful for the purpose of discussing what is meant by shareholder primacy, but for present purposes their categories are absorbed in other definitions.

²⁷ Zingales (2000), above n 14 at 1632.

²⁸ Zingales (2000), above n 14 at 1633.

²⁹ Lyman Johnson “New Approaches To Corporate Law” (1993) 50 Wash & Lee L Rev 1713 at 1716.

limitations of “the market ideology” of the 1980s and 1990s” (recent events at the time included the global financial crisis and high profile corporate scandals). These events “stress the importance of promoting a more responsible culture of governance.”³⁰ For shareholder primacy, political backlash to takeover activity is a feature of concentrated losses having more political salience than dispersed gains. Takeover activity is capital being reallocated to its most valuable purpose. Associated job losses have to be weighed against job creation and welfare enhancements that result elsewhere in the economy from creative destruction, and those are unknowable. A firm cannot know how to identify the social benefits it is to prioritise, or whether its ‘responsible’ activity has a collective action problem (in which activity that may be beneficial if one person does it but becomes harmful if everyone does it). For example, a firm must decide how much resource to allocate to decreasing its air pollution. Further decreases in pollutants may involve high costs but only a small improvement in air quality. At some point of foregoing returns or incurring cost to reduce its air pollution the firm may (in the example) inefficiently reduce the net quantum of economic resource available to reduce air pollution.³¹ If employees in takeovers are the concern, would that extend to the employees of suppliers? How are the interests of employees in multiple jurisdictions to be balanced when investment is moved from one location to another? If the question is answered by consulting stakeholders, the mandate of those in the consultation process is questionable and unaccountable.³² For the ‘canonical’ shareholder primacy school, the problem is non-trivial and unsolvable. Economic welfare requires a limiting principle and a mechanism to weigh trade-offs. The mechanism that efficiently determines the optimal allocation of capital is competitive market pricing.

For some in the shareholder primacy-profit maximising school, business is fundamentally an economic institution, not a moral or social one.³³ The question of whether there is a moral component to business decisions is relevant to stakeholder critiques of profit maximisation. The inevitability of moral judgement is the insight behind a philosophical movement that sees the corporation as a political institution and CSR obligations to attend to the interests and opinions of stakeholders as a political

³⁰ PM Vasudev “Corporate stakeholders in New Zealand – The present, and possibilities for the future” (2012) 18 NZBLQ 1 at 20. A version of the article also appears in PM Vasudev & S Watson (eds) *Corporate Governance after the Financial Crisis* (Edward Elgar, Cheltenham, 2012) 120.

³¹ Henderson (2001), above n 22 at 110.

³² John Conley and Cynthia Williams “Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement” (2005) 31 J Corp L 1.

³³ Theodore Levitt “The Dangers of Social Responsibility” (1958) 36(5) Harvard Bus Rev 41.

framework.³⁴ Acceptance of a moral component to business policies and activities poses a question for ‘ethical’ and ‘responsible’ criteria in CSR ratings and standards: whose moral system is being applied, and what is the basis for choosing another, or any, definition of morality? Within the profit maximising school, Milton Friedman argues that a moral dimension is present. In his moral construct, freedom from compulsion is both a moral value in itself, and a moral way to organise society. Voluntary bargaining in free markets is the purest expression of freedom. People transact with each other only when they see themselves gaining an advantage from their trade. The freedom to trade produces both economic benefits and personal welfare benefits.³⁵ Adam Smith saw a moral benefit to society from pursuit of economic self-interest through market trade in which participants unknowingly benefit society. His system of natural liberty is not laissez-faire. “It is a system embedded within a moral and legal framework that constrains and guides individual behavior.”³⁶ He believed that merchants left unchecked would harm society in the absence of institutional and moral constraints.³⁷ Ethical behaviour was necessary to efficient trade, not an expression of it.³⁸

In one variation of the shareholder primacy school, decisions about CSR should be a discretion for business judgment. Courts cannot reliably figure out what maximises profits. Watts (2022) comments:³⁹

One can have no confidence that the world could be improved, let alone the planet saved by having judges assess whether directors had taken enough account of the perils faced by the environment. There *are* no obvious stopping points.

Profit maximisation’s conclusion, that a market determination is optimal, is criticised for being a normative position, not a rule of law. Firms have both implicit and explicit legal discretion to prioritise public interest over profits in some circumstances. The

³⁴ Pierre-Yves Néron “Business and the Polis: What Does It Mean to See Corporations as Political Actors?” (2010) 94 J Bus Ethics 333 at 334.

³⁵ The moral component is a theme of his 1962 text *Capitalism and Freedom*, above n 19.

³⁶ Jerry Evensky *Adam Smith’s Moral Philosophy: A Historical and Contemporary Perspective on Markets, Law, Ethics, and Culture* (Cambridge, Cambridge University Press, 2005) at 136.

³⁷ Evensky, Above n 36 at 144.

³⁸ Adam Smith expresses scepticism about moral behaviour where management is separated from ownership in Adam Smith “An Inquiry into the nature and causes of the wealth of nations” (1776) in Michael Lewis (ed) *The Real Price of Everything* (Sterling, New York, 2007) 22; See Harvey James and Farhad Rassekh “Smith, Friedman, and Self-Interest in Ethical Society” (2000) 10 Bus Ethics Q 659.

³⁹ Peter Watts *Directors Powers and Duties* (3rd ed, LexisNexis, Wellington 2022) at 182.

school focuses only on the economic relationships between corporate participants and ignores the legal nature of the company.⁴⁰ Slight variations in the nexus of contracts model can introduce other stakeholders as residual claimants, upon whom the firm externalises costs. The ability to externalise some costs has been described as the “original sin” of the corporate form and the “dark side” of two features that underpin modern capitalism: limited liability and pooled investment.⁴¹ By granting investors a concession to externalise some costs of investment onto other constituencies, society causes firms to invest in higher risk projects than would the firm’s creditors. Those activities could have a positive value for the investor even though they have negative net social costs.⁴²

CSR may be economically efficient for overall economic welfare in some circumstances even if it is not profit maximising for the firm undertaking it. Elhauge (2005) notes that, if shareholders have a preference for social outcomes, they have a collective action problem that makes it difficult to act on their moral impulses.⁴³ CSR can match the preferences of shareholders and stakeholders, including customers. That view is supported in a literature review that found 10 to 30 per cent of large firms externally certified as engaging in CSR may undertake CSR at some extra cost to meet marginal demand from socially conscious customers who are prepared to pay more for their preference, while other firms do not undertake costly CSR activity to meet the distribution of demand from customers.⁴⁴ Hart and Zingales (2017) show that even if sacrificing corporate profits would benefit society as a whole, it may not benefit the corporation itself because much of the benefit may spill over to others who do not share in the cost of the sacrifice. As a result, firms will under-provide socially beneficial actions relative to the social optimum.⁴⁵

⁴⁰ Susan Watson and Lynn Buckley “Directors’ positive duty to act in the interests of the entity: Shareholders’ interests bounded by corporate purpose” (2024) 24 (1) JCLS 233 at 243.

⁴¹ Zingales (2020), above n 25 at 131; and Bainbridge (2023), above n 26 at 8. See also Susan Watson *The Making of the Modern Company* (Hart Publishing, Oxford, 2022), who adds double-entry bookkeeping and separate legal personality to the list of features underpinning the modern corporate.

⁴² Bainbridge (2023), above n 5 at 9.

⁴³ Elhauge (2005), above n 13 at 740 and 820, and Einer Elhauge “The Inevitability and Desirability of the Corporate Discretion to Advance Stakeholder Interests” (2021) 106 Cornell L Rev 1819 at 1822.

⁴⁴ Kitzmüller and Shimshack (2012), above n 1 at 74.

⁴⁵ Oliver Hart and Luigi Zingales “Companies Should Maximize Shareholder Welfare Not Market Value” (2017) 2(2) J Law Finance Account 247.

A stakeholder critique of the ‘canonical’ school is put forward by Stout (2012), who argues that profit-maximising and shareholder primacy endanger investors, employees, customers, and communities. It leads managers to focus myopically on short-term earnings, discourages investment and innovation, and causes companies to indulge in reckless, sociopathic, and irresponsible behaviour.⁴⁶ Stout argues that the school misunderstands the law as well as the reality of how firms behave. Her legal criticism is particular to United States corporate law: that nothing in United States law requires firms to profit maximise and she disputes the authorities that have been cited as examples of a requirement to profit maximise. If firms are not owned by shareholders but own themselves, the principal-agent problem does not apply because a firm’s shareholders are not the principal and managers are not employees of shareholders. From these foundations, the firm is as obliged to consider other stakeholders as it is to consider shareholders, and to consider other objectives as it considers profitability. The point that shareholders own their capital and not the firm is rejected by Rock as “largely beside the point when considering the objective of the corporation”. The bundle of rights termed ‘ownership’ is a separate question from whether the best description of the corporate form is managed for the benefit of shareholders.⁴⁷ Another shareholder primacy response to Stout is that any corporate purpose other than creating value for shareholders is “inconsistent with the mainstream of United States corporate law”, and that a shareholder-centric conception of corporate purpose is preferable to a conception in which directors function as referees among stakeholder interests.⁴⁸ Stout’s ‘stakeholder’ view of the firm is explored in Part D.

A New Zealand version of the Stout critique of shareholder wealth maximisation, by Watson et al (Watson (2023)) argues that:⁴⁹

Against a backdrop of structural inequality and environmental degradation, and in an economy where Māori perceptions of business and many small-to-medium-enterprises already recognise value beyond tangible and financial, the currently

⁴⁶ Lynn Stout *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Kindle Edition, Berrett Koehler, San Francisco, 2012). See also Joel Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, New York, 2004), who argues that relentless pursuit of profit has “psychopathic attributes.”

⁴⁷ Rock (2021), above n 47 “For Whom Is the Corporation Managed in 2020? The Debate over Corporate Purpose (2021) 76(2) The Business Lawyer 363 at 377.

⁴⁸ Bainbridge (2023), above n 5.

⁴⁹ Susan Watson et al “Reimagining the company in Aotearoa New Zealand” (2023) 30(3) NZULR 473.

orthodox shareholder-primacy ‘property’ conceptualisation of the company is ripe for reconsideration.

That argument makes a case for changing the corporate law framework. The basis for re-conceptualising the company is that a “property conception of the corporation is virtually impossible to reconcile” with mātauranga Māori (Māori values and worldview) and economic practices that existed prior to European arrival. Those include whanaungatanga (relationships based on whakapapa), mana (authority, power, influence and control over management of natural resources) and utu (fair and responsible exchange).⁵⁰ The paper argues that an entity-based conception allows firms to pursue multiple forms of value, not just financial. Since the firm as an entity would be recognised as existing separately from its corporate constituencies, it is able to choose to consider and prioritise the interests of stakeholders such as “a river, forest, or a group of people rather than the capital contributed by shareholders.”⁵¹

Two difficulties with the critique are analysed here. One is the recommendation that the corporation needs to be reformed to allow a more expansive and permissive view of corporate purpose. Cassidy (2021) makes a similar argument, stating that tikanga provides an appropriate framework for New Zealand non-Māori entities by focusing on “long-term goals” and “balancing economic, cultural and environmental factors.”⁵² She asks whether New Zealand corporate governance should be informed by Māori values. The difficulty for the argument is that the existing Companies Act 1993 and other corporate regulation does not restrict such a view of purpose.⁵³ It is common for

⁵⁰ Citing at n 84 and n 85 Mānuka Hēnare *Ngā tikanga me ngā ritenga o te ao Māori: standards and foundations of Māori Society* (Royal Commission on Social Policy, 1988); Mānuka Hēnare “Tapu, Mana, Mauri, Hau, Wairua: A Māori philosophy of vitalism and cosmos” in John Grim (ed) *Indigenous traditions and ecology: the interbeing of cosmology and community* (Harvard University Press, Cambridge (Mass), 2001) at 197; and Mānuka Hēnare “The economy of mana” in David Cooke and others (eds) *Beyond the free market: Rebuilding a just society in New Zealand* (Dunmore, Auckland, 2014) at 65.

⁵¹ Stakeholder conceptions of the firm are discussed in Part D. In their paper, Watson et al (2023) also outline a proposal for an instrumental justification for CSR. Part C, below, argues that entity primacy is the position of New Zealand law.

⁵² Julie Cassidy “‘Frankenstein Incorporated’ v Social Citizen: Learning from Māori Tikanga in Framing New Zealand Corporate Governance Principles” in Robert Joseph and Richard Benton (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2021) 205 at 218. [Cassidy (2021)].

⁵³ Examples of regulation of communally-owned assets being regulated consistently with tikanga are listed by Cassidy (2021), above n 52 at 214-216, citing Robert Joseph “Māori Governance and Business Organisations” in Susan Watson and others *The Law of Business Organisations* (Palatine Press, Auckland, 2009) at 815-820. See also Chapter V.

companies incorporated under the Companies Act 1993 to be used as part of corporate structures adopted by iwi and hapū for commercial and charitable purposes.⁵⁴ Incorporation offers “benefits ... in terms of separate legal personality and perpetuity of existence.”⁵⁵ Watson’s paper itself provides many examples of Māori enterprise and Māori values being incorporated into Māori business practice under existing law, and reports enterprises firmly committed to social and cultural outcomes of satisfied employees and community reciprocity.⁵⁶ Cassidy (2021) notes the financial value of the Māori economy and forecasts that Māori assets could be worth \$100 billion by 2030.⁵⁷ Since a Māori corporate economy exists, the law today must be compatible with existing practice within Māori business. Profit maximisers might not object to an entity set up with an explicit mātauranga Māori purpose where shareholders choose to forego higher returns, as long as investors freely choose that outcome. (In a purist version, profit maximisers would argue that shareholders would only forego higher returns where the economic value of the purpose exceeds the frictional costs of shareholders using their returns from the firm to fund the outcome sought.) As those interested in ‘Māori business practice’ may pool their funds in a firm registered under the Companies Act 1993, and lawfully pursue that purpose, the objection that the existing Act standardises profit maximisation and needs to be changed is a non sequitur.

The second difficulty emerges from the proposal that directors would be allocated the task of mediating between stakeholder interests. Directors are to weigh interests, which creates a question of whose interests should prevail when they conflict, who should bear any costs, and how to decide the proportion of shareholder returns that may be sacrificed for a stakeholder’s interest. In a shareholder-oriented model, directors concern themselves with profitability and the interests of stakeholders such as employees and the environment are recognised in regulation, not discretion. The Watson (2023) criticism of profit maximisation asks whether a forestry company that creates ‘slash’ as a negative externality should cease to operate if that results in loss of

⁵⁴ See examples described in Natalie Coates “Infusing Tikanga into Corporate Maori Governance Entities in the Current Legal Framework” in Joseph and Benton (eds) (2021), above n 52 at 138-139.

⁵⁵ Elizabeth Macpherson “Iwi Companies” in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) at 111.

⁵⁶ Citing at n 99 Binder Dijker Otte *Māori business: Survey report* (BDO, Wellington, 2020) and Michael Belgrave “Beyond the Treaty of Waitangi: Māori Tribal Aspirations in an Era of Reform” (2014) 49 J Pac Hist 193.

⁵⁷ Cassidy, above n 52 at 213, citing at n 78 New Zealand Trade and Enterprise *Māori Economy Investor Guide* (June 2017) at 5.

employment in impoverished regions.⁵⁸ The regional economic consequences and trade-offs involved in ending operations that create slash are unknowable in classical economic theory and modern financial theory. If the trade-off between environmental and employment outcomes were managed through regulation, that would allow democratic management of other stakeholders’ interests. Regulation also provides a democratic mechanism for correcting decisions. Regulation allows for management of consequences (for example, a regulatory authority could facilitate alternative employment for displaced workers). If corporate legislation is to be reformed to allow greater discretion for corporates to consider stakeholders, then the relevant question is whether discretion for companies would better produce the social outcomes sought than an alternative, regulatory, mechanism. It will be argued below in this study, in chapters IV and V, that regulation and expanded use of existing legal tools are preferable tools for achieving social goods, where those are seen as desirable, rather than re-conceptualising the corporate form.

In a law and economics analysis, when negative externalities such as slash become economically significant enough, a system of property rights to control those externalities will be efficient.⁵⁹ Reforming corporate law to allow greater discretion to consider stakeholders is not cost-free. Interventions that produce suboptimal capital allocation reduce net economic welfare. When there is uncertainty surrounding a potential transaction (through intercession on behalf of stakeholders), parties will price in the risk of that uncertainty, leading to higher transaction costs. In turn, this means that fewer transactions are likely to occur and that overall output and economic welfare is reduced.⁶⁰ The consequence of this insight is that the possibility of consideration of stakeholders reduces economic welfare even if the discretion is exercised to achieve the same result as if the discretion did not exist. The shareholder primacy claim is that, where directors exercise their discretion in the interest of stakeholders, gains for stakeholders come at the expense, ultimately, of unknown alternative stakeholders. They lose the indirect economic welfare effects of trade and efficient capital allocation. In shareholder primacy, pursuit of corporate social responsibility will produce inefficiency and reduce overall economic welfare. A stakeholderist response to the law

⁵⁸ “Slash” is tree waste left behind after plantation forestry pruning and harvest.

⁵⁹ Harold Demsetz “Toward a Theory of Property Rights” (1967) 57 *Am Econ Rev Papers & Proceedings* 347, at 351-353. See also OE Williamson *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (Free Press, New York, 1985) and DC North *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge, 1990), cited in Oxera Consulting *The economic value of English law: Report prepared for LegalUK* (LegalUK, London, 2021).

⁶⁰ See R Posner *Economic Analysis of Law* (9th ed, Wolters Kluwer, Boston, 2014) at 33-34.

and economics objection is that discretion allows firms the flexibility to respond to the complexity involved in balancing ethical, social, and reputational interests.⁶¹ The stakeholderist critique of shareholder primacy is concerned about the ability of shareholder primacy to manage social cost while maintaining economic benefits. Stakeholderism seeks social outcomes beyond those generated by a firm's economic activity.⁶² Any reduction in efficiency is offset by social gains.

In summary, the 'canonical' school provides clear mandates, controls, and limits on CSR. These are achieved potentially at the cost of negative externalities and foregone public goods. The profit maximising justification is that economic welfare roughly coincides with profit and is maximised by the efficient allocation of capital through trade. Whether outcomes of economic activity are desirable or not is a subjective judgement. Classical economics views the outcome of free economic exchange as intrinsically moral. This study argues that concerns for different social outcomes than those that arise from corporate pursuit of profit are the proper and routine role of regulation. It will be argued in this study that it should not be supposed that corporates themselves will be good at making judgements about social outcomes. However, social norms of behaviour are projected onto firms and firms are obligated to make judgements about those constraints. Those behavioural constraints include questions of whether externalities are justified and the nature of participation in the firm by stakeholders other than shareholders. It is argued in this study that the standard of what CSR activity a firm should concern itself with, and what social constraints must be observed, is the best interests of the firm. The standard is better conceived in the entity primacy model of the firm than in a shareholder-primacy model. The entity primacy model is the subject of the next section.

C. Entity Primacy and Instrumental 'Enlightened Shareholder Value'

Entity primacy accepts that firms should be profitable and adds that a firm may pursue profitability by managing social licence, risks, reputation and other effects on 'stakeholders'.⁶³ CSR is justified to the extent that it furthers the interests of the firm.

⁶¹ Elhauge (2021), above n 43 at 1822.

⁶² See Watson and Buckley (2024), above n 40.

⁶³ The literature is abundant with examples of theorists and practitioners making the instrumental case that CSR is necessary for business success. In addition to sources discussed in this chapter, see John Kay *The Corporation in the Twenty-First Century* (Online ed, Yale University Press, New Haven, CT, 2025); Sanjai Bhagat and Glenn Hubbard *Should the Modern Corporation Maximise*

This is the instrumental or 'business case' for CSR: that socially responsible corporate behaviour is justified by value accretion or financial returns. CSR is seen as a combination of responding to market pressure, protecting a valuable brand from reputational damage, saving money through cost-saving (such as by eliminating waste), or accessing market opportunities, all of which contribute to profit-making. Often instrumentality is expressed as mutual benefit or "shared value" in which "a meaningful benefit for society ... is also valuable to the business."⁶⁴

The basis of entity primacy is separate legal personality, which is established in New Zealand by s 15 of the Companies Act 1993. It provides that a company is a legal entity *in its own right separate from its shareholders*. Writing extra-judicially, the Chief Justice and colleagues commented that entity primacy is "arguably mandated" by companies legislation in New Zealand and Australia. "Directors act as the guardian and representative of the company itself, rather than acting for the owners of the entity," allowing stakeholders to be a "focus" as long as doing so "favours the interests of the company in the long run."⁶⁵ Watson and Buckley (2024) agree with the conclusion, from both historical analysis and recent authority, that the good faith and best interests duty of directors is owed to the corporation as an entity separate from its shareholders. They state that those duties mean: "When operationalising the duty, the default position is that directors will act in the best interests of shareholders as a whole."⁶⁶

Entity primacy differs from the profit maximisation school described in Part B because entity primacy explicitly recognises interests other than shareholders have a *stake* in the firm's success. Whereas the profit maximisation theory sees social benefit as incidental to economic efficiency, entity primacy sees that as inadequate and CSR is identified as a strategy for profitable business success. In this instrumental view, CSR is often expressed as a recipe for both business success and for stakeholder success as well.⁶⁷ In shareholder primacy, the interests of the firm are conflated with the interests of

Shareholder Value? (AEI Economic Perspectives, September 2020); James Post, Lee Preston and Sybille Sauter-Sachs *Redefining the Corporation: Stakeholder Management and Organizational Wealth* (Stanford Business Books, Stanford, 2002); and Rosabeth Moss Kanter "How Great Companies Think Differently" (2011) 89(11) Harv Bus Rev 66.

⁶⁴ Michael Porter and Mark Kramer "Strategy and Society: The link between competitive advantage and corporate social responsibility" (2006) 84(12) Harv Bus Rev 78.

⁶⁵ Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (Paper prepared for the Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019) at [114].

⁶⁶ Susan Watson and Lynn Buckley (2024), above n 40 at 241 citing *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2022] 3 WLR 709 [139] per Lord Briggs as the most recent authority.

⁶⁷ Archie Carroll "Carroll's Pyramid of CSR: Taking Another Look" (2016) 3 Int J Corp Soc Responsib 1.

shareholders, whereas in entity primacy the interests of the firm and shareholders overlap but are not an identity. In a judgment about whether to preference shareholders or the firm itself, in entity primacy the firm must be preferred. The choice will usually be of relevance in relation to creditors, but the concept also accommodates consideration of a body of interests greater than those of shareholders alone.

The requirement to act in the best interests of the firm precludes acting in the interests of stakeholders other than instrumentally. Resources may be used to create benefit for the stakeholder if doing so coincides with or creates benefit for the firm of equal or greater value to the resources so deployed. If a firm is required to take stakeholder interests into account at *cost* to the firm, then the model is not entity primacy but a stakeholder model, which is discussed in the next section. Efficient use of resources in entity primacy differs from efficiency in shareholder primacy by adding shareholder preference as an explanation for social responsibility. CSR may be an efficient way to match preferences of shareholders and stakeholders.⁶⁸

The instrumental case for considering stakeholders is founded both on the social benefits for those stakeholders, and benefit to firms from a stakeholder orientation.⁶⁹ The case for instrumentalism can be difficult to disentangle from stakeholderism, as can be seen in an OECD corporate governance recommendations statement that “stakeholders play an important role in contributing to the long-term success and performance of the corporation.”⁷⁰ In corporate governance principles, boards are expected to:⁷¹

take due regard of, and deal fairly with, other stakeholder interests including those of employees, creditors, customers, suppliers and local communities. Observance of environmental and social standards is relevant in this context.

⁶⁸ Easterbrook and Fischel (1991), above n 13 at 34 describe the company as the most efficient form for collective pursuit of a purpose, but the purpose need not be wealth maximisation. See empirical evidence of that explanation for CSR in Kitzmueller and Shimshack (2012), above n 1.

⁶⁹ Among a vast literature mixing instrumental CSR and stakeholderism, important contributions for present purposes include Klaus Schwab and Peter Vanham *Stakeholder Capitalism: A Global Economy That Works for Progress, People and Planet* (Wiley, Hoboken, New Jersey, 2021); Susan Watson et al (2023), above n 49; Archie Carroll “The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders” (1991) 34 *Bus Horizons* 39; and Lynn Stout (2012) above n 46.

⁷⁰ Organisation for Economic Cooperation and Development *OECD Principles of Corporate Governance* (OECD Publishing, Paris, 2004) at 12.

⁷¹ OECD “VI. The Responsibilities of the Board” in OECD (2024, above n 70 at 58.

The combination of responsibility to the stakeholder and instrumental advantage to the firm can be analysed as a dynamic relationship—the firm has effects on stakeholders and stakeholders have effects on the firm. This relationship renders the term ‘externalities’ incomplete. In this present taxonomy, instrumentalist and stakeholder-benefit concepts are distinguished: Stakeholderism recognises both the firms’ effects on stakeholders and stakeholders’ effects on firms. In contrast, instrumentalism and entity primacy are concerned with stakeholders’ effects on the firm; the duty to act in the best interests of the firm precludes a weighting or mediation between stakeholder interests except instrumentally to weigh or assess the benefit for the firm. If a firm is socially responsible because that is what is demanded by its customers, investors and suppliers, then the firm should alter its behaviour if stakeholder preferences change—even if the underlying social or environmental need is unchanged. The societal effects of its social activity are not the point; the concern is the instrumental success of the firm.

The subtleties in different models for firms’ relationships with stakeholders can be seen in debate over a landmark 2019 statement by the United States Business Roundtable. The business lobby group changed its view of the purpose of corporations from its previous position “that corporations exist principally to serve shareholders”. It had argued in 1997 that the interests of stakeholders are relevant only as a ‘derivative’ of the duty to shareholders. Balancing the interests of shareholders against the interests of other stakeholders, it said, fundamentally misconstrues the role of directors.⁷² Boards would have “no criterion for resolving conflicts between interests of stockholders and of other stakeholders or among different groups of stakeholders.”⁷³ In its new approach, signatories to the Business Roundtable Statement committed to lead their companies for the benefit of “all stakeholders”—specifically, customers, employees, suppliers, communities and shareholders.⁷⁴ The statement was interpreted on publication to mean that “big business would take a holistic view of its responsibilities recognising that all of us participate in a shared endeavour to facilitate human flourishing.”⁷⁵ The Business

⁷² Business Roundtable *Statement on Corporate Governance* (Washington DC, September 1997) at 3.

⁷³ Business Roundtable (1997), above n 72 at 4.

⁷⁴ Business Roundtable *Statement on the Purpose of a Corporation* (press release, Washington DC, 19 August 2019).

⁷⁵ Ann Lipton “Will the Real Shareholder Primacy Please Stand Up?” (2024) 137 Harv L Rev 1584.

Roundtable appeared to backtrack almost immediately after publication, issuing a clarification following criticism:⁷⁶

The Statement is not a repudiation of shareholder interests in favor of political and social goals. Rather, the Statement reflects the fact that for corporations to be successful, durable and return value to shareholders, they must consider the interests and meet the fair expectations of a wide range of stakeholders in addition to shareholders.

As Lipton (2024) interprets the second statement: “Corporations would continue to function as a vehicle for increasing shareholder wealth; other constituencies would be accommodated only as *instruments to achieve that end*.”⁷⁷ An instrumental view of CSR is also the best reading of a 2006 report to the Australian government on CSR [*Market Advisory Report*], which stated:⁷⁸

Those in charge of a company’s affairs should have an interest in managing external impacts of the business in relation to the environment, human rights and other matters that may impinge on the success of the business.

The *Market Advisory Report* considered firms would be distracted from their purpose for no real gain if they were to “place greater emphasis on a particular issue that some groups may consider important for the community overall, but that is not germane to the company’s business.” Firms should operate openly and accountably, use resources productively, comply with relevant regulatory requirements, and engage with social and environmental issues. Questions about who comprises ‘society’, and their expectations, are to be resolved in the *Market Advisory Report*’s view by firms using their judgment and balancing interests, views and expectations of investors, employees, customers, local communities and other interest groups. Firms should ensure they do not reflect the viewpoint of only one on that list. This model of mediating stakeholder interests is

⁷⁶ Business Roundtable, *Redefined Purpose of a Corporation: Welcoming the Debate* (press release, Washington DC, 25 August 2019) A notable irony is that stinging criticism was levelled by the Roundtable’s stakeholders in the business community, including Council of Institutional Investors “*Council of Institutional Investors Responds to Business Roundtable Statement on Corporate Purpose*” (Press Release, Washington DC, 19 August 2019): “The statement undercuts notions of managerial accountability to shareholders, in CII’s view.” See also Stephen Bainbridge “Making Sense of the Business Roundtable’s Reversal on Corporate Purpose” (2021) 46 J Corp L 285.

⁷⁷ Lipton (2024), above n 75 at 1585. [Emphasis added.] See also Lucian Bebchuk and Roberto Tallarita “The Illusory Promise of Stakeholder Governance, (2021) 106 (7) Cornell L Rev 91 and the response in Elhauge (2021), above n 43 at 1844–1846.

⁷⁸ Corporations and Markets Advisory Committee *The Social Responsibility of Corporations* (Report to the Australian Government, 2006) at iv.

framed instrumentally, as a method for business success. A similar sentiment is expressed in the Davos Manifesto:⁷⁹

The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders—employees, customers, suppliers, local communities and society at large. The best way to understand and harmonize the divergent interests of all stakeholders is through a shared commitment to policies and decisions that *strengthen the long-term prosperity of a company*.

Since the entity model requires that CSR has instrumental benefit, evidence that CSR does have a benefit to the firm is in issue. The substantive evidence of that is discussed in Chapter VII. Three alternatives are logically possible:

- a. That firms inevitably *reduce* their value (at least in aggregate, on a risk-adjusted basis) by pursuing policies and activities thought to be beneficial to society and the environment and that go beyond the minimum standards of conduct required or what is germane to the business. Law and economics theory, and the theory of profit maximisation, will hold that firms reduce their value by undertaking activities that go beyond the minimum standards of pro-social conduct required.
- b. Second, that firms are likely to *increase* their value by undertaking pro-social activity. Instrumental theory will hold that firms undertake pro-social activity where it increases their value. Kitzmüller and Shimshack (2012), who conducted empirical research about CSR, found some evidence that instrumental CSR can be an optimal firm strategy where shareholders themselves may be willing to trade profits for CSR, and that explains why at least some firms adopt CSR activity.⁸⁰ An example is where shareholders prefer spending money on CSR rather than increasing bonus payments for top management. They find firms do undertake CSR instrumentally to manage regulatory risk (but they are sceptical of the size of the effect), and they could not find convincing evidence that CSR motivated by reputation had a significant effect on firms' value.
- c. Third, that whether or not value is increased is a matter for judgment, which management (responsible to directors) are free to make with broadly unfettered discretion (save for issues of recklessness and solvency).

⁷⁹ Klaus Schwab *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution* (World Economic Forum, 2 December 2019). [Emphasis added.]

⁸⁰ Kitzmüller and Shimshack (2012), above, n 1.

The third position—that whether CSR affects firm value is for directors to judge—does not resolve whether a firm may or should undertake activities that it knows to be value-reducing. The issue was debated in response to the 2019 Business Roundtable Statement in a dialogue between Lucian Bebchuk and Roberto Tallarita (2021) and Einer Elhauge (2021).⁸¹ The participants are members of the Harvard law faculty and the debate is specifically relevant to profit maximisation and stakeholder governance in United States corporate law. Nevertheless, the debate is an important insight into competing theories of corporate governance and theorists' interpretation of empirical outcomes compared to outcomes predicted by theory. Bebchuk and Tallarita noted the 2019 Business Roundtable statement is unclear about whether stakeholders might be protected beyond what would indirectly benefit shareholders, and unclear about how to trade-off conflicting stakeholder interests.⁸² They found that executives who signed the Business Roundtable statement generally did not require board approval, indicating there was no change of strategy. They conclude that signatory firms viewed their stakeholder responsibilities as instrumental to the best interests of the firm. Elhauge replies that corporate law “had long confirmed the existence of a corporate discretion to sacrifice corporate profits to protect stakeholders.”⁸³ He argues there is hardly any difference between an express discretion to sacrifice corporate profits to benefit stakeholders and a discretion to do so whenever a conceivable link to long-term shareholder value could be claimed.⁸⁴ Further empirical evidence was added from an analysis of the high-profile acquisition of Twitter by Elon Musk (Bebchuk (2023)).⁸⁵ The analysis found that, when negotiating the sale, Twitter's leaders chose to disregard the interests of the company's stakeholders and to focus exclusively on the interests of shareholders and the corporate leaders themselves. Twitter's leaders “elected to push under the bus” employees' interests, “as well as the mission statements and core values to which Twitter had pledged allegiance for years.” Bebchuk (2023) says the example does not support stakeholder governance theories.⁸⁶ Instead, it supports the view that

⁸¹ Above n 74.

⁸² Bebchuk (2021), above n 77 at 129.

⁸³ Elhauge (2021), above n 43 at 1845.

⁸⁴ Elhauge (2021), above n 43 at 1845.

⁸⁵ L Bebchuk, K Kastiel and A Toniolo “How Twitter Pushed Stakeholders Under The Bus” (2023) 28 *SJLBF* (2023) 307. [Bebchuk (2023)].

⁸⁶ Bebchuk (2023), above n 85, citing in support of stakeholderism: Schwab (2019), above n 79; Tamara Belinfanti and Lynn Stout “Contested Visions: The Value of Systems Theory for Corporate Law” (2018) 166 *U Pa L Rev* 579; Elhauge (2021), above n 43; Stavros Gadinis and Amelia Miazad,

corporate leaders are incentivised not to serve stakeholders beyond what would serve shareholder value. The findings are said to be consistent with the view that corporate mission and purpose statements are mostly for show.⁸⁷ For present purposes, the relevance is the evidence that claims of instrumental consideration of stakeholders are cynical in practice. Corporates in reality do not exercise their discretion in favour of stakeholders, despite claims and corporate values statements. Those who wish to see firms consider stakeholders need to find other tools than board discretion to consider the best interests of the firm.

This section has outlined an entity primacy theory of CSR. In entity primacy, firms may consider stakeholder interests where it is in the best interest of the firm to do so. Corporate leaders have wide discretion to determine whether an activity is germane to the firm's business and whether a decision adds value. The weakness of instrumental theories for CSR is the contested evidence that instrumental approaches are used cynically. The section has argued that entity primacy is the position for corporate governance in New Zealand. If it is stipulated that *some* CSR does add to profitability, the remaining question is whether a firm may also undertake activities that *knowingly detract* from profitability; If so, what is the limit to its profit reduction? The next section looks at theories that say that stakeholder interests should be considered outside of the best interests lens.

D. Stakeholderism, or the Company as Social Entity

1. Stakeholders.

'Stakeholderism' attempts to capture an elusive relationship outside the formal description of business but inside the group of relationships and effects that are involved in business activity.⁸⁸ In the version of stakeholderism used here, a firm may undertake activity in the interests of a wider group of stakeholders even though the CSR activity in question is known by the firm to reduce returns to shareholders. A New Zealand example is an advocacy group's call for "equal importance" for planet, people and profit in a sustainable financial system. It is said firms can have negative impacts "often in the pursuit of short-term financial return. These impacts are significant regardless of

"Corporate Law and Social Risk" (2020) 73 Vand L Rev 1401; Colin Mayer *Prosperity* (Oxford University Press, Oxford, 2018); Alex Edmans *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (Cambridge University Press, Cambridge 2020), and Rebecca Henderson *Reimagining Capitalism in a World on Fire* (PublicAffairs, New York, 2020).

⁸⁷ Bebchuk (2023), above n 85 at Part V.

⁸⁸ The phrase is from Carroll (1991) above n 69 and Carroll (2016), above n 67. Examples of 'increasingly influential' concepts of stakeholderism are cited by Bebchuk (2023), above n 85.

the financial benefit provided to shareholders.”⁸⁹ In one version of stakeholderism, an intangible social (or environmental) stake in a firm creates rights for stakeholders affected by a firm’s activities. Firms have a plurality of independent constituencies and directors must balance a plurality of ends. In another version of stakeholderism, directors may use their judgement to choose to put the interests of stakeholders ahead of those of the firm.⁹⁰ The difference between the two versions is whether the firm has a duty or a right to consider stakeholders.

When the term ‘stakeholder’ originated at the Stanford Research Institute in 1963 it meant “those groups without whose support the organisation would cease to exist.”⁹¹ Freeman (1983) published a foundational text defining the role of stakeholders in the firm as “groups and individuals who can affect, or are affected by, the achievement of an organization’s mission”.⁹² As Bainbridge (2023) says, this definition is so broad as to be essentially meaningless, noting Freeman himself has said that it means that some firms would count terrorist groups as stakeholders.⁹³ Although Freeman defends including extremists, on the grounds that strategies need to be put in place for factors that can affect the operation of the business, the justification stretches the definition of ‘social responsibility’ and amounts to, at most, an instrumental definition. A “narrower and thus more useful definition” of non-shareholders who are stakeholders, from Bainbridge, gets closer to the stakeholder governance and law issues: stakeholders are those “whose business relationship with the company gives rise to implicit claims of good faith and fair dealing.” Examples are car buyers who have an implicit claim to continued servicing and employees being treated fairly when seeking promotion.⁹⁴ ‘Implicit claims’ are a concept from corporate finance to describe the role of non-investor stakeholders whose claims “have no legal standing, but rather arise out of the

⁸⁹ The Aotearoa Circle *Sustainable Finance Forum. Roadmap for Action. Final Report* (2020) 8 at 3.

⁹⁰ Elhauge (2005), above n 13.

⁹¹ Cited in Edward Freeman *Strategic Management: A Stakeholder Approach* (Cambridge University Press, Cambridge, 2010) at 53; Edward Freeman “Stakeholder Management: Framework and Philosophy” in Crane, Matten and Spence (eds) *Corporate Social Responsibility* (2nd ed) Oxon and New York, Routledge, 2014) at 140.

⁹² Edward Freeman & David Reed “Stockholders and Stakeholders: A New Perspective on Corporate Governance” (1983) 25 *Cal Manage Rev* 88 at 89.

⁹³ Freeman (2014) above n 91 at 140; Bainbridge (2023), above n 5 at 8.

⁹⁴ Bainbridge (2023), above n 5 at 15, citing Bradford Cornell and Alan Shapiro “Corporate Stakeholders, Corporate Valuation, and ESG” in *The CLS Blue Sky Blog* (online article, <clsbluesky.law.columbia.edu>, 10 December 2020).

tacit promises to stakeholders that every firm must make as part of its ongoing operations.”⁹⁵

The question of who is a stakeholder is a regulated and formal part of corporate reporting for many large firms. Firms subject to the European Union’s *Corporate Sustainability Reporting Directive* are required to define and identify stakeholders and the nature of their interests.⁹⁶ Firms must conduct a ‘double materiality analysis’ to disclose how firms are affected financially by social and environmental factors, and how firms affect society and the environment (the assessment is ‘double’ because it assesses both the firm’s effects on others and others’ effects on the firm.) In 2024, consulting firm KPMG reported that 78 per cent of the largest 250 companies in the world use materiality assessments.⁹⁷ The Directive leaves the definition of impacts and stakeholders to firms to judge.

2. *The firm as a concession*

The justification for requiring firms to take account of stakeholders’ interests is that the corporate form is seen as a ‘concession’ that exists because society allows its defining features. As Watson (2018) explains:⁹⁸

Concession theory posits that the company exists and has corporate legal personality because the state or crown, either directly or through an incorporation statute, permits it to exist. The corporation is a legal person that owes its existence to a concession by the state. A legal person is capable of bearing rights and duties (although legal persons do not automatically have rights and duties). Legal persons

⁹⁵ Bradford Cornell and Alan Shapiro “Corporate Stakeholders and Corporate Finance” (1987) 16(1) *Fin Manag* 5.

⁹⁶ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance) [*Corporate Sustainability Reporting Directive (CSRD)*] and Directive 2014/95/EU Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [*Non-Financial Reporting Directive (NFRD)*].

⁹⁷ John McCalla-Leacy and Dr Jan-Hendrik Gnändiger *The move to mandatory reporting. Survey of Sustainability Reporting 2024* (KPMG International, 2024). The proportion appears to have fallen from the proportion in a 2013 survey, when KPMG said 79 per cent of G250 companies performed materiality assessments: Yvo de Boer *The KPMG Survey of Corporate responsibility reporting 2013* (KPMG International Cooperative, 2013) at 53.

⁹⁸ Susan Watson “Corporate Legal Personality” in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) 63 at 66.

need not be human beings or even contain human beings; they can be *persona ficta*.

The firm, shareholders, and society, benefit because the corporate form reduces the costs and frictions of raising and managing capital, lowers risk for investors, and raises overall investment in the economy.⁹⁹ In exchange for the concession, owners surrender the right to have the firm controlled in their sole interest and the community may demand that the corporation serve not only the owners, but all of society. “Various groups in the community should benefit from the income of corporate activity on the basis of public policy rather than private cupidity.”¹⁰⁰

It has been argued that the concession view of the firm as a privilege granted by the state may have “lost its vitality” once general incorporation statutes from the mid-19th century made incorporation a right if a process was followed, and as the state began to regulate for social interests.¹⁰¹ An updated interpretation of the exchange of the corporate form for responsibility to wider interest than shareholders is a ‘participant’ theory of the company.¹⁰² Shareholders give up ownership rights over the corporate fund when they contribute capital, and they have no right to demand a distribution. Watson (2018) argues, “Residual ownership rights only come into play when the company is liquidated and no longer exists as a juridical person.” For this reason, the focus of the board should be on the generation and distribution of value of the corporate fund (which is owned by the company itself as a juridical person). “Value extends beyond financial capital to other forms of value enclosed in the fund.” These forms of value include value contributed by stakeholders, making them participants in the firm whose interests must be considered by the board.¹⁰³

⁹⁹ R Posner “Corporations, Secured and Unsecured Financing, Bankruptcy” in *Economic Analysis of Law* (9th ed, Wolters Kluwer, Boston, 2014) 533 at 540-544.

¹⁰⁰ A Berle and G Means *The modern corporation and private property* (Commerce Clearing House, New York, 1932). See citation and summary by Jessica Palmer “Understanding the Director’s Fiduciary Obligation” (2006) 12 NZBLQ 315 at 320.

¹⁰¹ William W Bratton Jr “The ‘Nexus of Contracts’ Corporation: A Critical Appraisal” (1989) 74(3) *Cornell L Rev* 407 at 435; Watson (2018), below n 102 at 65, citing CA Cooke *Corporation, Trust and Company: An Essay in Legal History* (Harvard University Press, Cambridge (Mass), 1951) at 187.

¹⁰² Susan Watson “The Corporate Legal Person in Context” in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington 2018) 47 at 56.

¹⁰³ Watson (2018), above n 102.

In the view that the firm is a private nexus of contracts,¹⁰⁴ firms would carry on anyway if the law were to decree that corporations no longer existed, corporations in practice operate by means of contract and agency relationships.¹⁰⁵ In that nexus of contracts view, law does not create corporations but accords them automatic legal recognition when a certain level of organisational coherence is reached, such as decision-making capability and continuity of experience.¹⁰⁶ Watson (2018) responds that “corporate legal personality and status as a juridical person cannot be accessed through contracting between shareholders, but only through a form of contract with the State.” Once this point is conceded, the contractual basis for the company falls apart at the centre.¹⁰⁷ Barrett (2025) proposes a ‘neo-concession’ model “to meld the State’s unique power to grant legal personality (and limited investor liability) with its comprehensive human rights obligations.”¹⁰⁸ In his model, directors and shareholders “are expected to be ‘competent citizens’ who understand and act in accordance with their situation in a human rights-informed political community.”¹⁰⁹ The neo-concession approach is not adopted in this study. One reason is that Barrett’s argument proceeds from a fundamental premise of ‘humanism’, meaning personal liberty must be combined with social responsibility. “Humanism ventures to build a world on the idea of the free person responsible to society.”¹¹⁰ The premise thus assumes the link to social responsibility that this study investigates. Another reason for not adopting the approach is that it is intentionally normative. Barrett argues that firms are mere instruments for achieving human ends and should not be directly included within the scope of human rights such as the right to religious beliefs.¹¹¹ Whatever the merits of the case for distinguishing corporate rights from the rights of natural persons, the New Zealand Bill of Rights Act 1990 applies to legal as well as natural persons.¹¹² As will be discussed in Chapter IV, the logic of fictional legal personality is based in the idea of attributing

¹⁰⁴ Jensen and Meckling (1976), above n 26 at 302.

¹⁰⁵ Bratton (1989), above n 101 at 436.

¹⁰⁶ J Barrett *Human Rights Law and Corporate Regulation. A Neo-Concession Approach* (Routledge, Abingdon, Oxon, 2025) [Barrett (2025)] at 32, citing Michael J Phillips “Reappraising the Real Entity Theory of the Corporation” (1994) 21(4) Fla St U L Rev 1061 at 1068–69. See also a discussion of nexus of contracts and concession theories of the firm in Bratton (1989), above n 101 at 434.

¹⁰⁷ Watson (2018), above n 102 at 58.

¹⁰⁸ Barrett (2025), above n 106 at 6.

¹⁰⁹ Barrett (2025), above n 106 at 6.

¹¹⁰ Barrett (2025), above n 106 at 4, citing at n 18 Humanists International *Amsterdam Declaration 2002* (Noordwijkerhout, Netherlands, 2002).

¹¹¹ Barrett (2025), above n 106 at 25–26.

¹¹² Bill of Rights Act 1990, s 29.

the rights of others to the legal entity. Attribution of rights is analogous to attributing to the firm liabilities and obligations of natural persons, such as when a manager or director incurs a debt or liability on behalf of the firm.¹¹³ It is a short step to conceive of individuals bundling their rights together and attributing them to a separate legal entity for the purpose. Barrett's neo-concessionary theory depends on a view that, without it, stakeholders are legally excluded in legal structures where a firm has separate legal personality, and this operates to exclude consideration of matters such as worker exploitation and environmental degradation.¹¹⁴

“Shareholders are not the only corporate stakeholders but, under the UK-heritage model, other than directors, they comprise the only group of stakeholders that has some say in the running of a company.”

That statement is not accepted in this study as an accurate summary of legal responsibility. It will be shown that a firm must have regard to certain stakeholders who can affect the business. In many cases their ‘say’ can trump those of shareholders (for example, when required by specific legislative provision.) Instruments such as the duty of care require consideration of stakeholder views (if not interests) in particular circumstances. Ignoring stakeholders in the running of the company altogether will present legal risks and liability in some cases, such that directors could potentially fail their duties of care.¹¹⁵ Furthermore, there is no Companies Act 1993 impediment to a constitution providing stakeholders a role within a company.¹¹⁶ The relevance is that, since stakeholders do have some interest in the firm, the crucial question for any theory of the firm, whether concession theory or a nexus of contracts theory, is the nature of the social interest in the firm and the optimal instrument for expressing that social interest.

¹¹³ Sometimes called “organic theory” in the sense of “the entity...having ‘organs’ who, in the case of the board and the shareholders collectively, could bind the entity not as agents but as part of the entity itself. Corporations, so conceived, could incur tortious and criminal liability through these “official” organs.” (Watson (2018), above n 102 at 59, citing at n 54 Michael J Phillips “Reappraising the Real Entity Theory of the Corporation” (1994) 21 Fla S U L Rev 1061 at 1069-1070 and *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7, [1995] 2 AC 500 (PC).)

¹¹⁴ Barrett (2025), above n 106 at 47.

¹¹⁵ Companies Act 1993 s 137 defines the duty as the care, diligence, and skill that a reasonable director would exercise in the same circumstances.

¹¹⁶ See chapter IV discussion of examples of firms that make provision for stakeholder interests either in their constitutions or in the context that defines the purpose for which powers may be exercised.

The stakeholderist position has weaknesses. Shareholders own the capital contributed to the firm (whether or not they own the firm).¹¹⁷ The owners of capital set conditions and constraints on the use of their contributed capital, which will usually include a residual share of earnings from its use and investment into the purpose for which it was raised. (Those conditions can be varied by a firm's constitution and contractual agreement among shareholders.) The stakeholderist position focuses on the use to which capital is put and the powers of control over it, but a theory is not complete if it does not describe the relationship between those powers and the terms under which the shareholder contributes capital in the first place. If the terms of the bargain are unsuitable, the capital might not be provided.¹¹⁸ Watson's view that shareholders' residual rights to the corporate fund "only come into play when the company is liquidated and no longer exists as a juridical person,"¹¹⁹ refers to legal rights of control over the fund. But capital is contributed in the first place on the basis of those rights as well as expectations about the board's management of the contributed value. As Land (2024) notes, it is because shareholders repose trust and confidence in directors that courts have released directors from their fiduciary obligations only with the consent of shareholders.¹²⁰ The United Kingdom Supreme Court described this principle as "nearly as old as company law itself."¹²¹ The more capital that is used to serve social purposes, the less capital will be contributed to the corporate form and stakeholder interests are served less if less capital is contributed. If capital is to be conscripted for wider social or stakeholder purposes, then what accounting is made inside the firm, or more widely within the economy, for the purpose for which the capital is contributed or the potential that the capital is not contributed? The concession or participant argument contains no clear principle limiting the quantum of returns sacrificed to serve public interests.

It is also unclear that the objective of a corporation is affected as stated by the question of whether shareholders own their shares and not the corporation.¹²² As Rock notes, it would be incorrect to say that the beneficiaries of a trust are the owners of the trust. The

¹¹⁷ Stout (2012), above n 46 at 35 (ch 3), who says (in the United States), "from a legal perspective, shareholders do not, and cannot, own corporations. *Corporations are independent legal entities that own themselves*". [Emphasis in original].

¹¹⁸ Land (2024), above n 8, citing Frank H Easterbrook and Daniel R Fischel "Voting in Corporate Law" (1983) 26 JLE 395 at 403 and Robert Charles Clark *Corporate Law* (Little, Brown and Company, Boston, 1986) at 389.

¹¹⁹ Watson (2018), above n 102.

¹²⁰ Land, above n 8 at 498-499.

¹²¹ *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2022] 3 WLR 709 at [196].

¹²² Stout, above n 46.

usefulness of a trust as legal form depends on that distinction, yet trustees are charged with managing the trust for the benefit of the beneficiaries. The issue of whether the entity is owned by shareholders or owns itself is a separate question to whether it is managed for the benefit of shareholders.¹²³

Another weakness is that the conclusion does not necessarily flow from the premise. A premise of the stakeholderist position is that the corporate form is an exchange of corporate form for stakeholders' interests (or more narrowly for stakeholders' contribution of value). The conclusion is that firms have a discretion to act for stakeholders. While the theory that the corporate form exists as an exchange for social benefit is a coherent normative justification for regulation and taxation of corporates in stakeholder or public interests, it does not follow that decisions about particular responsibilities or ethical approaches should be discretionary. The concession premise leads at least as much to an argument for taxation, regulation and compliance obligations. Concession theory has the task of explaining why tax and regulation are insufficient mechanisms for serving the public interest and for choosing which externalities and public benefits society should accept and trade-off. Elhauge (2021) attempts this by adopting the shareholder primacy foreseeability problem, stating that "minimizing total agency costs requires giving managers a business judgment rule deference that necessarily confers such profit sacrificing discretion."¹²⁴ He argues that even optimal legal sanctions are necessarily imperfect and require supplementation by social and moral sanctions.¹²⁵ In this analysis, "pure" profit-maximisation would worsen corporate conduct by overriding these social and moral sanctions. Limits in foreseeability are a concern shared with the shareholder primacy theory, but the conclusion drawn in concession theory is different. In stakeholderism, directors have a lawful discretion to sacrifice some profits to serve public interests because discretion is an efficient strategy for managing the foreseeability problem.¹²⁶ Concession and discretion are seen as not only inevitable but desirable.¹²⁷

¹²³ Rock (2021), above n 47 at 377.

¹²⁴ Elhauge (2005), above n 13 at 733.

¹²⁵ Elhauge (2021), above n 43. Elhauge repudiates (at 1821) the characterisation of his position as advocating 'ordinary understandings of stakeholderism' because it does not advocate giving stakeholders more power over corporate decisions or requiring corporate leaders to further stakeholder interests. Nevertheless, his article expressly proceeds on the basis it is consistent with stakeholderism.

¹²⁶ Elhauge (2005), above n 13.

¹²⁷ Elhauge (2021), above n 43 at 1822.

In a New Zealand context it has been argued that material risks need to be evaluated in light of all relevant stakeholders' interests, "not just those of the company and current shareholders."¹²⁸ Balancing ethical, social, and reputational interests is complex. The state deals with complexity through its concession of corporate form. In this view, "corporate governance includes 'the entire network of formal and informal relations involving the corporate sector and their consequences for society in general'."¹²⁹ Corporate governance accountability is said to include "self-regulation and the norms of so-called 'best practice.'"¹³⁰ Separate personality and limited liability convey a broad discretion to preference stakeholder interests and choose between competing stakeholder claims. "If the state makes available the possibility of incorporation it is entitled to ask for something in return."¹³¹ The 'something' in return for limited liability is a responsibility to operate in the public interest'.¹³² The ancillary proposition is that firms have significant power to impose risks and externalities on society.¹³³

If a requirement to consider stakeholder interests is founded in a concession of the legal form, then the relevant comparison is not with society granting no privilege at all. The relevant question is how much of a privilege the corporate form offers compared to alternative business structures.¹³⁴ A range of enterprise forms have been preferred to the limited liability corporation at various times, including general partnership, limited partnership, trust, and limited liability partnership.¹³⁵ To rest CSR on the exchange for the concession of a shareholder-based corporate form is to exclude those entities from corporate social responsibility constraints. Their existence is not owed to that

¹²⁸ Cassidy (2021), above n 52, citing at n 10 Financial Markets Authority *Corporate Governance in New Zealand: Principles and Guidelines* (2014) at 3.

¹²⁹ Cassidy, above n 52 at 206, citing Kevin Keasey, Steve Thomson and Mike Wright *Corporate Governance — Economic, Management and Financial Issues* (Oxford University Press, New York, 1997) at 2.

¹³⁰ Cassidy, above n 52 at 207, citing John Farrar *Corporate Governance: Theories, Principles and Practice* (3rd ed, Oxford University Press, South Melbourne, Vic, 2008) at 4.

¹³¹ Barrett (2025), above n 106 at 26, citing at n 26, Eva Micheler *Company Law: A Real Entity Theory* (Oxford University Press, Oxford, 2017) at 17.

¹³² Barrett (2025), above n 106 at 30, citing at n 14 David L Cohen "Theories of the Corporation and the Limited Liability Company: How Should Courts and Legislatures Articulate Rules for Piercing the Veil, Fiduciary Responsibility and Securities Regulation for the Limited Liability Company" (1998) 51 *Oklahoma L Rev* 427 at 444.

¹³³ Colin Mayer, Leo Strine and Jaap Winter "The Purpose of Business is to Solve Problems of Society, Not to Cause Them" in Zingales, Kasperkevic and Schechter (2020), above n 25 at 65. The arguments are expanded at greater length in Mayer (2019), above n 86.

¹³⁴ Peter Watts *Directors' Powers and Duties* (3rd ed) (LexisNexis, Wellington, 2022) at 181.

¹³⁵ Rock (2021), above n 47 at 392.

concession. Yet entities such as partnerships can be large. A global accounting firm can have annual revenues of as much as US\$70 billion.¹³⁶ Blackstone began as a limited partnership. Standard Oil was a trust until it was broken up.¹³⁷ It is concluded from this that excluding firms of scale is inconsistent with proponents' concern to make firms responsive to stakeholder preferences.

Other defences of a discretion to consider stakeholders include that shareholders themselves often place some value on the interests of others.¹³⁸ Shareholders have collective action problems that can prevent them from taking action to further non-monetary objectives.¹³⁹ Since contracts might not anticipate future contingencies, it may be efficient to empower corporate leaders to enter into legally unenforceable "implicit contracts". In implicit contracts, stakeholders provide value to the corporation based on a legally unenforceable expectation that managers will have discretion to reciprocate later. Requiring shareholder profit-maximisation at each moment in time would require corporate leaders to renege on those implicit undertakings. 'Implicit contracts' would be implicitly prevented from inducing stakeholders to provide value to the corporation, which would have the "self-defeating effect of lowering shareholder profits ex ante."¹⁴⁰

Besides the question of what gives society the right to have its preferences taken into account, the converse is also relevant: What gives the firm the right to impact society? Posing the latter question on its own undercuts the practice of "double materiality" (the process of identifying both a firm's impact on society and society's impact on the firm). Double materiality begins with an instrumental requirement to disclose impacts of firms' activities so they can be understood by investors and stakeholders such as staff and suppliers.¹⁴¹ A focus on what gives firms the right to impose impacts on society severs the other half of the double materiality inquiry—stakeholders' impact on the firm. There is no logical impediment, but to accommodate it is to undermine a key premise of stakeholderism in practice.

¹³⁶ Stephen Foley "Deloitte's global revenue growth picks up despite sluggish performance in Europe" *Financial Times* (online edition, New York in New York, 1 October 2025).

¹³⁷ Rock, above n 47 at 392.

¹³⁸ Elhauge (2021), above n 43 at 1822.

¹³⁹ Elhauge (2021), above n 43 at 1822.

¹⁴⁰ Elhauge (2021), above n 43 at 1822-23.

¹⁴¹ European Union *Corporate Sustainability Reporting Directive* (CSRD) (EU) 2022/2464 [2022] OJ L 322/15.

In the view of this study, the response to the question ‘What gives the firm the right to impact society?’ is that society makes the concession of the corporate form to allow society to obtain the benefits of pooled capital. Reading legal personhood as a limitation would be inconsistent with the reason for the concession of legal personhood in exchange for public and private benefits. Since society accepts the exchange of limited liability for public benefits, society is prepared to accept *some* externality. The issue then becomes one of degree, and of which externalities society is prepared to accept. The mere fact of the legal fiction does not provide helpful answers beyond the residual, somewhat minor, observation that legal personhood is not of itself inconsistent with circumscribing rights. However, the instrument by which duties are imposed is relevant. A duty is imposed on a firm if it is required to consider stakeholder interests. There is no corresponding right or duty attached to stakeholders. To adopt an Hohfeldian approach to jural relations, stakeholders have a claim-right (a correlative duty on the firm), not a liberty.¹⁴² A claim-right that belongs to no definite claimant, and where the content cannot be specified, is a right with little if any content and the associated duty must be equally empty. A general stakeholder right, in which neither stakeholders nor their interests are defined, is the same as removing fetters on the discretion to choose stakeholders and interests. It would mean firms may consider matters they would not consider in a model of strict accountability to shareholders and directors would be able to exercise their judgement for the benefit of an unspecified stakeholder. The result can only amount to a weakening of directors’ accountabilities. Once directors are freed of their responsibilities to a specific entity, whether the company itself or its shareholders, any benefit to stakeholders would only be incidental to the happy banquet at which directors and managers would be free to dine.

The point can be tested. Bebchuk and Tallarita (2021) analysed the performance of corporate leaders at exercising their discretion for stakeholders’ benefit in American states that adopted statutes authorising (or in some cases requiring) directors and managers to consider and protect the interests of stakeholders.¹⁴³ They found that the incentives of corporate leaders are robustly associated with the interests of shareholders (though they do not fully overlap), even though statute allows them to protect stakeholders. Directors and managers were not in practice incentivised to protect stakeholders beyond what would be served by an instrumental approach to shareholder value maximisation and did not in practice use their discretion to benefit stakeholders.

¹⁴² Wesley Newcomb Hohfeld “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26(8) Yale LJ 710. See also N Jamieson “A Legal Logic for public and Private Rights” (2003) 10(3) Otago LR 371.

¹⁴³ Bebchuk and Tallarita (2021), above n 77.

Their conclusion aligns with the conclusion of this section that stakeholderism would make corporate leaders freer in their decision making:¹⁴⁴

Indeed, these expected consequences might at least partly motivate the support for stakeholderism by some corporate leaders and their advisors. For them, support for stakeholderism may well be strategic: an attempt to advance a managerialist agenda dressed in stakeholder clothing to make it more appealing to the general public and to gain support for it from those concerned about corporate externalities.

Related research found evidence that corporate leaders are more aligned with shareholders than with stakeholders in mergers and acquisitions. Directors and managers negotiated significant benefits for shareholders in the form of premiums to market value, and they obtained significant financial and employment benefits for themselves. But they did not negotiate for constraints on the ability to fire staff after the deal was completed, nor negotiate protections for suppliers, customers, and creditors. Protections for headquarter communities were rare and unenforceable.¹⁴⁵ The research relates to corporate law and conditions in the United States, where incentives may be different to the incentives on corporate leaders in New Zealand and research is conducted in the context of a debate over profit maximisation in United States corporate law and the scope and effectiveness of constituency statutes.¹⁴⁶ There does not appear to have been research in New Zealand analogous to the Bebchuk and Tallarita findings. The topic is a potential area for further investigation. For example, an Institute of Directors survey reported that “90 per cent of boards considered stakeholder interests as a core responsibility.”¹⁴⁷ A “climate leaders” pledge committed signatories to “Embed climate considerations such as nature, inclusive transition, adaptation, and te ao Māori perspectives into business strategy.”¹⁴⁸ The sentiment in both examples is analogous to sentiments tested by Bebchuk and Tallarita against actual corporate behaviour. A comparison of non-signatories’ behaviour against signatories’ subsequent

¹⁴⁴ Bebchuk and Tallarita (2021), above n 77 at 157.

¹⁴⁵ Lucian Bebchuk, Kobi Kastiel and Roberto Tallarita “For Whom Corporate Leaders Bargain” (2021) 94 S Cal L Rev.

¹⁴⁶ For the battlelines in this United States debate, see Elhauge (2021), above n 43; Stout (2012), above n 46; Bebchuk and Tallarita (2021), above n 77; and S Bainbridge “Why We Should Keep Teaching *Dodge v Ford Motor Co*” (2022) 48 J Corp L 77 at 116. The evidence about the effectiveness of statutes permitting consideration of stakeholder interests is explored further below in Chapter IV.

¹⁴⁷ Institute of Directors in New Zealand *Director Sentiment Survey 2021* (November 2021).

¹⁴⁸ Climate Leaders Coalition *Statement of Ambition* (Climate Leaders Coalition, 2025).

amendments to board charters and changes in remuneration practice would provide New Zealand evidence to compare to the American findings.

In the absence of further research, the available evidence supports the theory that a voluntary version of stakeholderism is empty beyond the instrumental approach described in the previous subsection. As Bebchuk and Tallarita (2021) put it, the discretionary version of stakeholderism raises illusory hopes that corporate leaders would protect stakeholders. It is concluded from this section that, to the extent that shareholders want to advance stakeholder interests, relying on favourable exercise of voluntary discretion by directors and managers is ineffective.

3. Requiring stakeholder consideration

The alternative to a voluntary discretion, if a duty exists at all, must be a regulated requirement to consider stakeholder preferences instead of relying on discretion and has been promoted by many stakeholderist theorists. Bebchuk and Tallarita analyse fixing incentives by tying pay to stakeholder interests and stakeholder voting in elections of directors.¹⁴⁹ They conclude those reforms would be difficult, costly, and of doubtful value. In a New Zealand context, Vasudev calls for “institutional engineering” that recognises companies as socio-economic institutions.¹⁵⁰ Mayer, Strine and Winter (2020) call for the imposition of requirements on institutional investors to represent the “real interests of their human investors” in sustainable growth, fair treatment of workers, and the elimination of externalities that slow economic growth, and harm human health and welfare.¹⁵¹ In practice, employee rights, environmental constraints, and customer service and health and safety obligations, are routinely set out in statute and common law. A category of right that is suitable for an obligation for companies and also not a suitable subject for regulation or common law rights and obligations does not appear to exist.

A necessary element of stakeholderism is that stakeholder preferences should be considered even if doing so would destroy value. This is because, if funders (lenders and shareholders) do not forego a part of their returns in providing for stakeholder interests, then the justification for CSR is instrumental and, conversely, a requirement for a firm to provide for stakeholders requires that funders may forego some their

¹⁴⁹ Bebchuk & Tallarita (2020), above n 77 at 154-156.

¹⁵⁰ Vasudev (2012), above n 30.

¹⁵¹ Colin Mayer, Leo Strine and Jaap Winter “The Purpose of Business is to Solve Problems of Society, Not to Cause Them” in Zingales, Kasperkevic and Schechter (2020), above n 25 at 65.

returns in favour of stakeholders. If it is left up to stakeholders whether to preference stakeholders at the expense of shareholders, then the incentive issue is plain.

If the alternative is to require firms to consider stakeholder interests, then (assuming stakeholders and their interests can be identified) the question is whether that would produce more welfare than a discretion to consider them. An example in a New Zealand context is an argument that “social, cultural, economic and environmental factors” are equally important on the basis that an economic bottom line does not fit within a Māori corporate governance framework. Instead, a quadruple bottom line is more appropriate.¹⁵² The classical theory holds that public benefits flow from the business activity itself with no further social intervention. Adam Smith famously observed that the social benefits from a firm’s activity are incidental:¹⁵³ “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.” Public benefits are the sum of these self-interested benefits. The point here is not that Smith’s observation is incapable of reply; Katrine Marçal has pointed out that Adam Smith’s dinner was served to him daily not by his butcher, brewer and baker, but by his mother.¹⁵⁴ The point is that division of labour and trade produces incidental public benefit, whether it is performed by butcher, baker, cook or by parent, by allocating resources to their highest value use. In classical theory, distraction from that efficient use of resources reduces value. An alternative model must show a public benefit greater than the incidental public benefits of private transactions. Gains in public benefit must outweigh any loss to total welfare caused by preferring the public outcome. The calculation is assumed in the ‘Pareto optimal’ classical model.¹⁵⁵ A single firm on its own cannot fully evaluate the public benefit or social costs of its own decisions.

To illustrate the difficulty of a firm attempting to consider social cost, consider the quotidian example of traffic congestion. Activity such as online selling may impose a

¹⁵² Jade Newton “Reconciling Traditional Forms of Māori Governance with Models of Western Corporate Governance” (2019) 6 PILJNZ 15 at 21, citing Tony Burton *The Treasury Approach to the Living Standards Framework* (The Treasury, 22 February 2018).

¹⁵³ Adam Smith “An Inquiry into the nature and causes of the wealth of nations” (1776) book 1, chapter 2, in Michael Lewis (ed) *The Real Price of Everything* (Sterling, New York, 2007) at 30.

¹⁵⁴ Katrine Marçal *Who Cooked Adam Smith’s Dinner? A Story about Women and Economics* (Pegasus Books, New York 2016, translated by Saskia Vogel from the original published in 2012).

¹⁵⁵ Andreu Mas-Colell, Michael Whinston and Jerry Green *Microeconomic Theory* (Oxford University Press, Oxford, 1995) at 310.

social cost if home shopping leads to an increase in the number of delivery trips.¹⁵⁶ Could socially responsible activity by retail or delivery firms reduce the externality and impact on other traffic? The answer is well-known to game theory.¹⁵⁷ Even a socially responsible retailer or delivery firm that voluntarily manages its own routes and delivery times to reduce congestion will be undercut by others, such as free riders who take the most advantageous route or new entrants into the market who absorb capacity. The relevance is that even the most socially-minded firm cannot fully internalise social cost. The point extends beyond road capacity. Once scarcity is accepted—the quantum of available resources is limited, whether water, road capacity, or clean air—choices must be made about the uses to which those resources are put. Some uses produce greater benefits than others, whether measured in economic output, social welfare, or the avoidance of environmental harm. Some processes are more efficient than others and so produce more benefit for the same inputs. Stakeholder theorists argue that public interest extends beyond purely economic outcomes,¹⁵⁸ but that does not fully answer the point: Some processes and activities are more efficient than others, and so produce more benefits for the same inputs regardless of how benefit is defined.

Once the concept of public benefits is accepted as including non-economic outcomes, what is counted as benefit is uncertain and the power to decide what counts becomes crucial. Regulating for firms to provide for stakeholder outcomes cannot be assumed to be a better model even for stakeholders. It is argued here that it is not enough to assert a normative claim that stakeholders generally should have an entitlement to the resources provided by a firm's funders. A mechanism is needed to measure the sum of payoffs generated by the firm less the opportunity cost of the inputs used.

4. *Economic case for stakeholderism*

The economic case for stakeholderism sees the central issue of the firm as bargaining power, skills, and social legitimacy. The traditional mechanism is the valuation of the firm derived from its assets and profits. In the Introduction to this chapter I set out a critique that argues the traditional model does not describe how the modern firm

¹⁵⁶ Mainly due to the increased number of delivery trucks required, even though personal shopping trips may decrease. Auckland Transport and others *The Congestion Question: Defining congestion* (Draft Working Paper version D, February 2019) at 3.6.2.

¹⁵⁷ Robert Rosenthal "A class of games possessing pure-strategy Nash equilibria" (1973) 2 Int J Game Theory 65.

¹⁵⁸ Colin Mayer, Leo Strine and Jaap Winter (2020), above n 151 at 65.

actually functions.¹⁵⁹ In this economic case for stakeholderism, the central role of shareholders, as claimants to residual value, is relegated to become only one class of contributors, not the only one. No one “owns” the firm in a meaningful sense because human capital is essential and can’t be fully contracted or owned by the firm. Share capital is owned but not human capital, so the surplus value created by the firm is to be divided not just among equity and debt holders but also shared with non-financial stakeholders such as employees, customers, suppliers who create network advantages, and communities that provide legitimacy and infrastructure.¹⁶⁰

The literature does show that valuations depend on intangibles such as knowledge, data, brands, and organisational capital, and those are largely excluded in accounting standards. This leads to gaps between book and market values.¹⁶¹ The existence of this discrepancy is a reporting and comparability issue. Market values are higher because markets are valuing intangibles such as the cost of building up capabilities, the value of goodwill, reputation, and networks and also valuing expectations of future earnings and difficulty of developing alternatives. It is true that not all contributions can be subject to contracts but in the absence of coercion all contributions are voluntary. The stakeholder model needs to be able to explain how the contribution of stakeholders would be valued differently than in the orthodox model. In orthodox theory, staff are paid and receive satisfaction for their work. Competitive bargaining between employers and workers drives wages toward the marginal product of labour, producing an efficient allocation of returns from production.¹⁶² Compensation can be a share of the firm’s value or wages, but in orthodox theory a share of the value and wages amount to the same value, so somehow forcing a greater share of the firm’s value can only reduce net economic value available for both shareholders and employees. The orthodox model assumes competitive labour markets, which is an assumption refuted by stakeholderists. The contest between the stakeholder and orthodox positions thus could be framed as a contest about the competition and the adequacy of bargaining power as a mechanism for distributing the value that a firm generates.

¹⁵⁹ See Luigi Zingales “In Search of New Foundations” (2000) 55(4) J Fin 1623 at 1630 at 1647–8. For other versions of this argument see Mayer (2018), above n 86; and Kay, above n 63.

¹⁶⁰ Zingales (2000) at 1645.

¹⁶¹ European Financial Reporting Advisory Group (EFRAG) *A Literature Review on the Reporting of Intangibles* (EFRAG, 2023).

¹⁶² Gregory Mankiw *Principles of Economics* (10th ed, Cengage Learning, Boston, 2024) 381-403.

5. *How is the firm to mediate between interests?*

At the core of stakeholderism is vagueness about the method by which the firm is to mediate between interests, as Bebchuk and Tallarita have described:¹⁶³

[A]dvocates of stakeholderism have commonly avoided the difficult issue of determining which groups should be considered stakeholders, leaving this decision to the discretion of corporate leaders, and tended to overlook the ubiquity of situations that present trade-offs between the interests of some stakeholders and long-term shareholder value.

In response, Mayer has argued that trade-offs are ubiquitous in governance, and the judgments between stakeholder interests required of directors should not be viewed as an anathema but a fundamental function of a board.¹⁶⁴ Mayer's rebuttal aims to develop an alternative model and does not rebut the empirical finding that firms do not preference stakeholders even in jurisdictions where the law entitles them to. Among suggestions for alternative models to mediate stakeholder interests, prominent examples include hybrid governance such as multi-stakeholder boards, shared governance between investors and employees, and broader fiduciary duties.¹⁶⁵ For example, a version of the theory would have shareholders vote on the broad outlines of corporate policy including pro-social activity.¹⁶⁶ In New Zealand the Institute of Directors has called for the inclusion of a provision in company constitutions permitting boards to consider stakeholders in decision-making.¹⁶⁷ The Aotearoa Circle (2020) produced a 'roadmap' calling for "System Change" and reconsidering the status quo.¹⁶⁸ It sets out proposed reforms based on expanding requirements for what must be considered by directors, reporting, prudential regulation of risk, and enabling actions.¹⁶⁹

If stakeholders are to be part of governance, those who are defined on the basis of their contribution to the firm's value are not necessarily aligned with the firm's potential

¹⁶³ Lucian Bebchuk and Roberto Tallarita "The Illusory Promise of 'Stakeholderism'. Why Embracing Stakeholder Governance Would Fail Stakeholders" (*Promarket*, 8 September 2020.)

¹⁶⁴ Colin Mayer "Shareholderism Versus Stakeholderism: A Misconceived Contradiction. A Comment on 'The Illusory Promise of Stakeholder Governance by Lucian Bebchuk and Roberto Tallarita'" (2022) 107(5) *Cornell L Rev* 1859.

¹⁶⁵ See Katharine Jackson "Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis" (2011) 7 *Hastings Bus LJ* 309.

¹⁶⁶ Hart and Zingales, above n 45.

¹⁶⁷ Institute of Directors *Stakeholder governance: A call to review directors' duties* (2011) at 14.

¹⁶⁸ Above n 89 at 8 [3].

¹⁶⁹ Above n 89 at 9–10.

impacts on wider society. Three simple examples illustrate: consider the example of a software technology firm that proposes to build a new data centre, which would consume a large proportion of energy for a neighbourhood and may increase power prices.¹⁷⁰ Other consumers will be affected by higher power prices and pressure on water supplies, but if they are not customers of the software firm they will not have a say in the hybrid governance model. Consider a pharmaceutical firm that discovers a vaccine for river blindness that cannot be commercially marketed. The potential victims of river blindness do not know who they are, may not know of the existence of the firm, and cannot plausibly be part of decision-making about whether to supply the drug. Or consider a community that neighbours an airport, where both the firm and the residents know each other; Residents neighbouring the airport, who would be affected by parking congestion if the airport decided to maximise profits from parking, do not make any direct contribution to the airport's value and therefore could not be considered in the universe of stakeholders (or, if they were, the universe is close to including the entire world.) These three examples demonstrate that even if capable of delivering efficient resource allocation, governance by preference aggregation is not administratively feasible across heterogeneous ethical views and misaligned financial claims.

It is doubtful that stakeholder governors would be more proficient at the task of mediating between stakeholder preferences than if governance were hierarchical with directors appointed by shareholders at the apex. In the absence of clarity about which claims prevail and a limiting principle, there would by definition be no means to resolve entrenched disagreement, and interest-group capture and self-interest would be incentivised (if not inevitable). For an alternative view, see Blair and Stout (1999) who recognise the collective action problem and propose the board of directors as a mediating hierarchy acting not as agent of shareholders but operating as a neutral, fiduciary decision-maker balancing the interests of the production "team".¹⁷¹ Although the wholesome purity of neutrality is appealing, the Bebchuk and Tallarita research demonstrates that such a model might not be different in practice to removing the requirement to act in the interests of a specified stakeholder. Palmer (2006) points out that a fiduciary duty makes no sense in the absence of a 'to whom' the duty is owed.¹⁷²

Another issue is that the traditional shareholder model is not the only alternative model for delivering outcomes *for stakeholders*. Charitable and regulatory interventions are

¹⁷⁰ Carla Walker and Ian Goldsmith "From Energy Use to Air Quality, the Many Ways Data Centers Affect US Communities" (Research paper, World Resources Institute, 2025).

¹⁷¹ Margaret Blair and Lynn Stout "A Team Production Theory of Corporate Law" (1999) 85 VA L Rev 247.

¹⁷² Palmer (2006), above n 100.

more common. Defence of stakeholderism appears to be almost exclusively argued as an alternative to profit maximising firms. But there appears to be nothing in the literature to demonstrate that CSR is the preference of stakeholders ahead of alternative models and charities are subject to stringent regulation, including a strict separation between public and private benefit.¹⁷³ Stakeholder preference proponents could reply that stakeholderism is not the same as philanthropy but that merely leaves open the question of who is making the decision about whether to pursue social ends through a charity or through a firm's responsiveness to social need. The point is substantive, not merely a categorisation issue, because there does not appear to be evidence in the literature that stakeholderism delivers better outcomes than pursuing social outcomes through philanthropic foundations or regulation. (The point may be a fruitful topic for further investigation.)

In summary, it is argued here that, once separated from the instrumental arguments for considering stakeholders' interests, stakeholderism is not merely a description of the discretion exercised by boards, nor a call for change in the way firms exercise discretion. It is an alternative to regulation and philanthropy at least as much as an alternative to profit maximisation. If regulation of discretion to require more consideration of stakeholders is sought, further evidence is needed to show that it would produce better outcomes than other potential interventions. To the extent that stakeholders are seen to comprise at least part of a firm, there are pathways in which the composition of firms may be differently recognised in New Zealand. If firms (or the interests that contribute equity capital to them) wish to be responsive to stakeholder preferences, they may implement a multi-stakeholder model within the New Zealand Companies Act 1993. In addition, the definition of the firm's best interests may be expanding to include accommodation of more stakeholder interests, especially related to *mātauranga Māori* (Māori worldview), climate, and human rights. These two pathways are considered in the next chapters.

¹⁷³ Juliet Chevalier-Watts *The Law of Charity* (2nd ed, Thomson Reuters New Zealand, Wellington, 2020).

Chapter IV

A Introduction

This chapter is concerned with duties to act in good faith and the best interests of the company in relation to a firm's social and environmental stakeholders. The chapter is structured in two main parts. Part B discusses the obligation to act in the best interests of the company, and the interaction with consideration of stakeholder interests. Part C explores a recent amendment to the best interests duty, s 131(5) of the Companies Act 1993, which provides for a discretion to consider 'environmental, social and governance' matters.

Part B.1 shows that the Companies Act 1993 enacts an entity primacy model and a duly constituted company is a separate entity from its stakeholders and shareholders. The requirement to act in good faith in the best interests of the company is the most important limit on CSR. The part discusses the mix, in theories of responsibility to stakeholders, of matters of business strategy, obligations to stakeholders at cost to corporate value, and actions that prioritise stakeholder interests over company interests. In Part B.2, I argue that stakeholderism can amount to an argument for attributing the interests of stakeholders to the interest of the company. Expansion of the rules of attribution is problematic for fiduciary duties and rules of proximity in common law liability. Ideas of 'giving back' to the community are problematic in corporate law for duties, the corporate veil and clarity of who is meant by the 'community'. Obligations or duties are created by reliance of one party on another, and liability to stakeholders can exist where negligence exists, but a general obligation to treat others with care in everything we do is a political theory, not a legal one. It is a theory that obligations arise from membership of a collective or community. A further theory is therefore required to explain why those obligations should be settled between the parties rather than by the collective.

Part C.1 explains the legislative background to s 131(5) and the attempt to introduce consideration of 'environmental, social and governance' matters into directors' duties. The section argues that the provision is inconsistent with other duties in s 131. The effect of the provision is unresolved. It is uncertain whether the provision allows for the firm to sacrifice value to avoid activities where it imposes costs on the environment and society that are caused by the firm, avoidable by it, and known by the firm not to be damaging to its value. Part C.2 finds that comparable stakeholder provisions have been ineffective in the United Kingdom, Canada and the United States. Analysis of the provision in a hypothetical takeover context concludes it is ineffective in New Zealand as well. I conclude that outcome is desirable. If the provision allowed directors to

decline value-enhancing takeover bids on indeterminate environmental and social grounds the effect would be to damage the value of shareholdings in the firm even if no takeover offer were ever made. A more effective mechanism for protecting community interests and achieving social and environmental outcomes is regulation and common law liability.

B Companies Act 1993, s 131

1. Good faith and the best interests of the company

A company incorporated in the form set out in Part 2 of the Companies Act 1993 has legal personality separate from its shareholders, and perpetual existence.¹ The statute grants “full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction,” with “full rights, powers, and privileges,” subject only to provisions of the Companies Act 1993 and other enactments and to general law.² Since a company has separate legal personality as “a legal entity in its own right separate from its shareholders,”³ the scheme of the Act imposes entity primacy. A company need not have a constitution,⁴ but may adopt one that limits powers but it may not expand them.⁵ Directors are defined by s 126 of the Companies Act 1993 and their powers to manage and direct the company are conferred by s 128,⁶ subject to any modification or limit in the company’s constitution.⁷ Directors must act in good faith and in what they believe to be the best interests of the company.⁸ The meaning of “best interests” of the company is not defined in the statute. Comparable provisions exist in the United Kingdom,⁹ the

¹ Companies Act 1993, s 15.

² Companies Act 1993, s 16(1).

³ Companies Act 1993, s 15.

⁴ Companies Act 1993, s 26.

⁵ Companies Act 1993, s 16(2).

⁶ Subsections (1) and (2).

⁷ Companies Act 1993, s 128(3).

⁸ Companies Act 1993, s 131(1). The Law Commission is reviewing is reviewing “the core duties” of directors under the Companies Act 1993. Law Commission *Review of Company Directors’ Duties and Liabilities Underway* (press release, 21 August 2025).

⁹ Companies Act 2006, s 172(1) duty to “promote the success of the company for the benefit of its members as a whole”.

United States,¹⁰ Canada,¹¹ and Australia.¹² The duty to act in the company's best interests is owed to the company.¹³

The duty to act in good faith and the best interests of the company is the “core” or “central” fiduciary duty of directors.¹⁴ The duty to act in good faith and the best interests of the company was seen in the past as aligning the best interests of the company with the best interests of the shareholders as a whole.¹⁵ As a matter of logic, a duty to act in the best interests of the company will *prima facie* preclude acting in the interests of anyone else, whether or not defined as stakeholders, except to the extent that stakeholder interests overlap with the interests of the company. Interests that directors should have regard to include the interests of members (that is, shareholders), creditors (as the residual claimants when the company is insolvent or nearly insolvent), and the interests of the corporation as a commercial enterprise.¹⁶ Provisions in s 131 relate to subsidiaries, holding companies, and employees. Section 131(5) allows for consideration of “environmental, social, and governance matters”. Further obligations to consider stakeholders exist in other statutes and common law relating to (among others) climate change, human rights, and modern slavery. These are discussed below in chapter *VI*. This chapter argues that, in considering the interests of the company and

¹⁰ Model Business Corporation Act 2016, § 8.30(a) duty to act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation.

¹¹ Business Corporations Act RSC, 1985, s 122(1)(a) duty to act honestly and in good faith with a view to the best interests of the corporation.

¹² Corporations Act 2001 (Cth), s 181(1)(a) duty to exercise powers and perform duties in good faith in the best interests of the corporation.

¹³ Section 169(3)(d). *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA) per obiter of Cooke J at 249–250; *Sojourner v Robb* [2006] 3 NZLR 808 (CA) at [92]; *Debut Homes Ltd (in liq) v Cooper* [2020] NZSC 100, [2021] 1 NZLR 142 at [29] [*Debut Homes*]; and *Percival v Wright* [1902] 2 Ch 421 (CA). See also *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at [4395].

¹⁴ *Mainzeal Property and Construction Ltd (in liq) v Yan* [2023] NZSC 113 at [117]. [*Mainzeal*]; *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 at [77] [*Sequana*]. John Land “Defining the Scope of the Fiduciary Duty to Act in the Best Interests of the Company after *Sequana*: Remember the Remedial Implications” (2024) 27 NZBLQ 227 at 228, citing Rosemary Teele Langford “The Duty of Directors to Act Bona Fide in the Interests of the Company: A Positive Fiduciary Duty? – Australia and the UK Compared” (2011) 11 JCLS 215 at 234; and noting at 228 n 3 earlier commentary questioning whether the duty was fiduciary: Matthew Conaglen “The Nature and Function of Fiduciary Loyalty” (2005) 121 LQR 452 at 456–458. See also below, n 89, discussing whether aspects of the duty of care are not part of the fiduciary duty of loyalty.

¹⁵ *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, [1950] 2 All ER 1120; *Sequana* above n 14.

¹⁶ Ian Murray and Rosemary Teele Langford “The Best Interests Duty and Corporate Charities: The Pursuit of Purpose” (2021) 15(1) Journal of Equity 92 at 103.

its shareholders, directors will in some cases have a *duty* to consider the interests of stakeholders. In other circumstances it will be *permissible* to consider stakeholder interests.¹⁷ Permissible considerations are relevant to the core enquiry of this thesis, which is an investigation of the limits of consideration of stakeholders. Directors' duty to act in the best interests of the firm does not extend to protection and promotion of stakeholder interests independently of the interests of the company.¹⁸ This duty to act in the best interests of the firm is the most important limit on a company's corporate social responsibility activities and consideration of stakeholder interests.

As seen in Chapter *III*, consideration of corporate social responsibility can be analysed as a matter of obligation, business judgment about strategy, or a matter of trading-off a firm's value to achieve a pro-social objective or to accommodate a stakeholder interest. It is trite law that the first of these, compliance obligations, must be observed even at cost to shareholders. Judgement about the second of these, best business strategy for the firm, is squarely within a company's "full capacity to carry on or undertake any business or activity" provided for in s 16(1) of the Companies Act 1993. It will be shown below that the courts will generally defer to business judgement. The analytical uncertainty is over the circumstances when directors may consider benefit to wider stakeholder interests that they know (subjectively) are likely to *reduce the firm's value*. Discussion of trading off value for stakeholder interests can merge into discussion of obligations and business judgement. An example can be seen in a passage from Glazebrook J, speaking extra-judicially in 2019 (Glazebrook (2019)):¹⁹

Directors must act in the best interests of the company. In performing this task, boards *must consider* and take into account the interests of wider stakeholders, including the community generally, as well as the interests of shareholders.

Boards *must consider* stakeholders where there is a specific compliance obligation to stakeholders, such as provisions of the Fair Trading Act 1986. Consideration of consumer protection legislation is in the best interest of the company in an indirect sense that observing compliance obligations is in the company's best interests. 'Must' is less precise when applied to normative considerations, such as where Glazebrook (2019) compares multinationals' tax minimisation strategies with community

¹⁷ Jean-Jacques du Plessis "Corporate Social Responsibility and 'Contemporary Community Expectations'" (2017) 35 CSLJ 30.

¹⁸ Rosemary Teele Langford "Best Interests: Multifaceted but not Unbounded" (2016) 75 Cambridge LJ 505 at 525.

¹⁹ Susan Glazebrook *Meeting the challenge of corporate governance in the 21st century* (Speech to Corporate Law Teachers Association Conference, Auckland, 3–5 February 2019) at 42 [Glazebrook (2019)] (Emphasis added).

expectations of corporate behaviour.²⁰ *Must* boards consider stakeholders when tax planning?²¹ The modal verb is more easily analysed as an expression of moral urgency, closer to the sense of ‘you must come to dinner’, than as a juridical obligation.²² The Glazebrook (2019) passage further states that “those with some stake in the company (including society as a whole)” *should* be taken into account. This *requirement* can be “grounded in ethical or moral principles or purely on business grounds, or on a mixture of the two.”²³ For present purposes, the use of ‘requirement’ and ‘should’ in the passage elides an important distinction between ethical principles and strategic or instrumental purposes. Instrumental business purposes, by definition, do not involve sacrifice of value. A moral obligation, if it exists, occurs whether or not performance adds value. To assert a moral principle is to assert that a behavioural standard exists independently from self-interest.²⁴ There is no question that ethical interests can be applied where they overlap with instrumental benefit (forming a ‘mixture of the two’). The question at issue is whether economic value may permissibly be sacrificed when ethical and instrumental considerations do not overlap. In what circumstances, if any, may (or *must*, or *should*) ethical considerations apply if there is no instrumental benefit to the firm’s value? In Land’s analysis, the proposition that ethical or social responsibility matters can override consideration of shareholder wealth maximisation is inconsistent with the approach to the best interests duty in New Zealand corporate law and Commonwealth case law:²⁵

²⁰ Glazebrook (2019), above n 19 at 20. See on this point Prem Sikka “Smoke and mirrors: corporate social responsibility and tax avoidance” in Kathryn Haynes, Alan Murray and Jesse Dillard (eds) *Corporate Social Responsibility: A Research Handbook* (Edward Elgar Publishing, Cheltenham, 2013) 53 at 76.

²¹ A general anti-avoidance provision has been in New Zealand tax legislation since 1878. See *Inland Revenue Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007* (IS 23/01, 3 February 2023). Glazebrook (2019), above n 19 notes that tax statutes are interpreted purposively, like any other statute, citing at n 87 Ross Carter (ed) *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 234–236.

²² For a further example, see “Everybody must get stoned” in Bob Dylan *Rainy Day Women #12 & 35* (Columbia Records, 1966).

²³ Glazebrook (2019), above n 19, at 2, citing Liliana Eraković and others “Board of Directors and Stakeholders: Building Bridges of Understanding” (2017) 23 NZBLQ 202 and Watson and Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) at 54–56.

²⁴ The argument that self-interest is a non-moral motive is adopted by both Immanuel Kant *Groundwork of the Metaphysics of Morals* (Project Gutenberg, online, 1785); and John Stuart Mill *Utilitarianism* (Project Gutenberg, online, 1861).

²⁵ John Land “Corporate Purpose and the Impact on Equitable Remedies, Economic Growth and Democracy” (2024) 55 VUWLR 497 at 500–501. Land uses the expression ‘ESG’ because the article analyses s 131(5), which is the subject of the next section.

Considering ESG matters even where such matters do not assist in the maximisation of profit does not align well with a duty based on protecting the interests of the residual claimants to a company's assets (shareholders, and in some cases, creditors), or a duty based on maximising the value of the corporate fund.

The traditional approach in Commonwealth case law is instrumental. Interests of parties other than shareholders may permissibly be considered only where that provides benefit to the ongoing business of the company and shareholders.²⁶ Land locates the limit to considering CSR in the fiduciary duty of loyalty, which is owed to shareholders because they entrust directors with their capital.²⁷ Breach of fiduciary duty gives rise to special remedies not available in the context of non-fiduciary duties. Examples of remedies for breach of fiduciary duties include rescission of contracts and liability of third parties for knowing receipt or dishonest assistance.²⁸ The availability of those remedies would be affected if directors could prejudice the interests of the residual claimants of a company by considering the interests of stakeholders. The relevance for present purposes is that directors' duty to act in good faith in the best interests of the firm does not extend to protection and promotion of stakeholder interests independently of the interests of the company outside of the exceptions discussed below.

2. Attribution

This section presents an argument that considering the interests of stakeholders at cost to the financial value of the firm amounts to an argument for attribution of stakeholder interests to the company itself. A duty to stakeholders outside of existing common law and statutory obligations would require an expansive and problematic interpretation of the rules of attribution. I conclude that the fiduciary duty of directors and proximity

²⁶ Land (2024), above n 25 at 501 citing *Hutton v West Cork Railway Co* (1883) 23 ChD 654 (CA); *Parke v Daily News* [1962] Ch 927 (Ch); and noting that s 132 of the Companies Act 1993 authorises payments to employees on the sale or cessation of the company's business.

²⁷ Land (2024), above n 25 at 504, citing Geraint W Thomas "The duty of trustees to act in the 'best interests' of their beneficiaries" (2008) 2 J Eq 177; and Lord Nicholls "Trustees and their Broader Community: Where Duty, Morality and Ethics Converge" (1996) 70 ALJ 205 at 211.

²⁸ Land (2024), above n 25 at 505, citing at n 35 examples of contracts said to be entered into in breach of the duty to act in the best interests of the company: *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 (NSWCA) at 730; *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157, (2012) 89 ACSR 1; *Mernda Developments Pty Ltd (in liq) v Alamanda Property Investments No 2 Pty Ltd* [2011] VSCA 392, (2011) 86 ACSR 277 at [47]–[48] and [56]; *Netglory Pty Ltd v Caratti* [2013] WASC 364 at [364], [389]–[391] and [759]; *Australian Growth Resources Corp Pty Ltd (recs and mgrs appt'd) v Van Reesema* (1988) 13 ACLR 261 (SASC) at 271; *Lindgren v L & P Estates Ltd* [1968] Ch 572 (CA); and *Bishop Warden Property Holdings Ltd v Autumn Tree Ltd* [2018] NZCA 285, [2018] 3 NZLR 809 at [18], n 3.

rules in tort and contract, as currently composed, do not accommodate a general expansion of attribution of stakeholder interests to the company. However, the development of the law may be favouring an expansion of the rules of attribution to accommodate stakeholderism.

A corporation has no real interests of its own. It is a legal fiction and its interests can only be determined by attributing the interests of others to it as if they were the interests of the company.²⁹ This ontological attribution is analogous to the process by which *acts* of natural persons (such as managers) can be attributed to the company. The company cannot *do* anything because it is a fiction; people acting as if they were the firm act in ways that are attributed to the company. The logic of attribution was expressed by the Privy Council in *Meridian Global Fund's Management Asia Ltd v Securities Commission*:³⁰

[T]here would be little sense in deeming...a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called “the rules of attribution”.

In a stakeholder attribution model, stakeholders' interests are among the interests of the firm itself and not just aligned with the interests of the firm. The attribution arises analogously with the way duties and benefits under a trust are attributed. It is established law of fiduciary duties that where costs are incurred while acting properly for a beneficiary, those costs are attributed to the beneficiary and an administrator acting in a fiduciary capacity can reclaim costs.³¹ On the same basis as costs are attributable, profits made by acting for a beneficiary are attributable to that beneficiary. Fiduciaries may not enrich themselves at the expense of a person to whom costs are attributable. One argument of stakeholderism is that firms impose costs on stakeholders and stakeholders contribute to the firm's creation of value.³² By analogy, costs imposed

²⁹ Neil Campbell “The Fundamentals of Company Law” in Watts, Campbell and Hare *Company Law in New Zealand* (2nd ed, LexisNexis NZ, Wellington, 2016) at 28; Edward Iacobucci “Indeterminacy and the Canadian Supreme Court's Approach to Corporate Fiduciary Duties” (2009) 48 Can Bus LJ 232 at 235. See also Palmer (2006), a director's fiduciary duty makes no sense in the absence of a ‘to whom’ the duty is owed: Jessica Palmer “Understanding the Director's Fiduciary Obligation” (2006) 12 NZBLQ 315 at 320.

³⁰ *Meridian Global Fund's Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 at 11, [1995] 2 AC 500 (PC) at 506 per Lord Hoffmann.

³¹ Lionel Smith *The Law of Loyalty* (OUP, Oxford, 2023) at 181–182.

³² Margaret Blair and Lynn Stout “A Team Production Theory of Corporate Law” (1999) 85 Va L Rev 247.

on stakeholders could be attributed to the firm. It would be reasonable to attribute to the firm costs imposed on stakeholders because it is the firm that earns the benefit. Profits made through stakeholders' goodwill, 'social licence', or contribution could be attributed to stakeholders on the same basis. A stakeholder such as a supplier, customer or employee is compensated in contract but value can be contributed to the firm, and costs can be imposed by the firm on stakeholders, outside of the nexus of contract. Seen this way, the objectives of stakeholderism are frustrated not by profit maximisation but juridically through principles that restrict allocation of costs outside of established jural relationships.³³

The attribution principle could overcome two fundamental objections to stakeholder consideration: the basis on which to choose stakeholders and balance their interests; and the limiting principle required to determine how much of a company's value may be foregone in the service of stakeholder interests. The question of who is a stakeholder would be resolved by determining those upon whom the firm imposes costs,³⁴ and those who contribute to the firm. The problem of how to balance stakeholder interests would be addressed by allocating interests in proportion to the cost imposed by the firm's activity or the contribution made. The quantum of resources attributable would be matched to the quantum of costs imposed on stakeholders. If the cost to the firm outweighed its benefit from imposing the cost then the activity would not be in the firm's interest. In this model, efficiency would determine the distribution of costs and benefits. "Economic efficiency requires that all defendants exercise care at levels which minimise total expected cost which includes both the possible loss and the expense of providing care."³⁵ The result would be an efficient net distribution of economic welfare since any diminution of the firm's value from allocating benefit to stakeholders would be aligned to the costs the firm imposed and the contribution those stakeholders make. Attribution would fill a gap where neither tort law nor contract provides a remedy. If costs to stakeholders were attributed to the firm, then the director's duty to consider the interests of the company would require an assessment of those costs. The argument here is that, when a concern for stakeholder interests is asserted, the intended meaning is to attribute stakeholders' interests to the company's interests so that they comprise a part of the duty to act in the best interest of the company. The good faith and best interests

³³ See *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241 per Lord Goff at 280.

³⁴ Jeroen Veldman "Responsibility and the Modern Corporation" in Jean du Plessis, Umakanth Varottil and Jeroen Veldman (eds) *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (online ed, Springer, Cham, 2018) 101 at 104–105.

³⁵ See Conrad Blyth and Basil Sharp "The Rules of Liability and the Economics of Care" (1996) 26 VUWLR 91 at 106.

duty in s 131 is fiduciary,³⁶ and the attribution of costs and benefits under a trust is fiduciary,³⁷ but the attribution of interests itself is conceptually severable from fiduciary loyalty. A duty may be attributable without being a duty of loyalty.

To the extent that stakeholderism proposes a normative duty applying where corporate activity has effects on stakeholders, it would expand the tort principle of proximity beyond the current status of obligations to stakeholders.³⁸ The expansion would be particularly novel in respect of attribution of community goodwill or social licence. There are significant issues with modifying the general principle of proximity to impose vicarious liability. The principle was expressly rejected by the Supreme Court in *Debut Homes* where the Court held that considerations applying when the company is insolvent are similar to those applying to other stakeholders.³⁹ Creditors' interests must be considered when a company is insolvent or nearing insolvency, but duties are owed to the company itself, not to creditors.⁴⁰ If the interests of stakeholders are similar to those of creditors, the duty remains to the interests of the company, even if other interests must be considered. Land (2024) argues standard remedies for breach of fiduciary duty, such as rescission of contracts, would be affected if a director acted contrary to the interests of the residual claimants of the company (that is, if they acted in favour of stakeholders over shareholders). "[W]ould normal remedies for breach of a fiduciary duty of loyalty simply not apply?"⁴¹ The relevance is that, once the interests of stakeholders were attributed to the company, directors' accountability to shareholders would be diluted. The response to this objection is that it insufficiently takes into account costs that may be externalised by a firm, and may undervalue or under-compensate the contribution that stakeholders make to its success. This is perhaps the broad model Justice Glazebrook was thinking of when she observed that one justification for taking into account stakeholder interests is that:⁴²

³⁶ Above n 14.

³⁷ Lionel Smith (2023), above n 31.

³⁸ Claims based on 'relational financial loss' have been allowed in New Zealand where there has been foreseeable damage to the property of others. See *Williams v Attorney-General* [1990] 1 NZLR 646 (CA).

³⁹ *Debut Homes*, above n 13 at [32].

⁴⁰ *Debut Homes*, above n 13 at [31] n 17.

⁴¹ Land (2024), above n 25 at 505, citing *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* CA70/05, 3 August 2005 at [91] as an example of a (successful) application for interim injunction to prevent action alleged to be in breach of s 131.

⁴² Above n 19 at 2, footnote omitted, emphasis added.

[B]usinesses require a social licence to operate, which means that companies must give back to the community that allows them to operate and which *often does not charge them the full cost* of doing business.

Important issues are raised in that paragraph. First, the relationship between business operations and the community is expressed as an exchange or concession. The community allows the business to operate and the business gives back. As shown above in chapter III, the view that the community ‘allows’ a business to operate is contested. Second, the statement embeds an assumption about the corporate veil. If ‘social licence to operate’ is contingent upon giving back *the full cost of doing business*, then liability is not clearly limited. Third, the nature of the ‘community’ to whom companies must give back is ambiguous. It could mean those stakeholders upon whom the business imposes costs or it could mean the wider community that grants the licence to operate. To which of those is the obligation owed? Fourth, is the duty to give back enforceable? The imperative—*must*—suggests responsibility and potential enforceability, in which case the obligation exists outside of contract or a cause of action in tort or equity.

Existing obligations between parties in contract, tort and equity restrict attribution of costs outside jural relationships. Justice Tipping, writing extra-judicially, has stated that *reliance* is the component vital to creating obligation in a relationship, in tort and equity and to a lesser extent in contract.⁴³ One party creates a duty in the other by reliance on that party. “The parties are then both morally and legally ‘bound’ to each other in the sense of being obliged to do what they have agreed to do.”⁴⁴ A party to a contract ‘assumes’ a duty to the counterparty. Duties of care in tort impose liability for economic harm outside contract. Whether there is sufficient proximity depends on whether it is reasonable for one party to *rely* on the other to take care.⁴⁵ In equity, courts will find a duty where a relationship entitles one party “to rely on and to place trust and confidence in the other.”⁴⁶ Whether one party is entitled to rely on another in this way “involves *both moral and legal considerations*.”⁴⁷ In tort, proximity does not necessarily lead to a duty of care, but where a person negligently causes foreseeable harm to a person in a sufficiently proximate relationship, “the community will generally expect what is then

⁴³ A Tipping “Obligations in Contract, Tort and Equity: Reliance, Responsibility, and the Moral Dimension” (2021) 52(3) VUWLR 643. See also *Watson v Dolmark Industries Ltd* [1992] 3 NZLR 311 (CA).

⁴⁴ Tipping (2021), above n 43 at 644.

⁴⁵ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

⁴⁶ Tipping (2021), above n 43 at 646.

⁴⁷ Tipping, above n 43, at 646, emphasis added.

seen as a moral obligation to be recognised as a legal obligation.”⁴⁸ But, as Dworkin has pointed out, we have no general moral duty to treat other members of our community with equal care and concern in everything we do.⁴⁹ Most people believe governments, acting as the “community personified”, have this duty “and we might hope to find in this pervasive public responsibility some explanation why we as individuals sometimes have that duty as well.”⁵⁰ In Dworkin’s theory, social obligation is inherent to membership of a community rather than resulting from voluntary contracts and consent.⁵¹ Governments have the duty to help one’s neighbour, acting as the “community personified.” If the term *stakeholder* is substituted for neighbour, then social obligation can be seen as a choice between collective or individualised duties. An argument for attribution of stakeholder interests could develop the view that the choice of sufficient proximity is a matter of moral ‘obligation’, and not only legal considerations. It is a political choice to restrict attribution of costs to jural relationships in contract, tort and equity. However, if stakeholderism is to rest on this case, then it must also explain why duties that arise from membership of a community are to be resolved between the parties, rather than collectively. To simplify the point: if duties to stakeholders are inherent as ‘social licence’, then the logic places the obligation to stakeholders more on governments as the community personified rather than on rules of tort, contract and equity that regulate interaction between individuals.

This section has argued that the stakeholder argument for expanding obligations to consider stakeholders can amount to an expansion of the rules of attribution. The interests of stakeholders could be attributed to the firm based on contextual relationships of reliance beyond contract, tort, equity, compliance obligations, and instrumentalism. See, for example, the exploration of obligations in legal instruments such as tort, contract and equity below in Chapter VI.⁵² Significant unresolved issues would occur if interests were attributed to expand obligations in this way. The conclusion is that the interests stakeholderism seeks to protect fit better as obligations to be regulated by the government, acting as the ‘community personified’. The next

⁴⁸ Tipping, above n 43 at 647.

⁴⁹ R Dworkin *Taking Rights Seriously* (revised ed, Harvard University Press, Cambridge (Mass), 1978) at 180-183. But contra, see Lord Atkin’s dictum in *Donoghue v Stevenson* [1932] AC 562 (HL). See also Tipping (2021) above n 43: “A moral duty to help one’s neighbour does not, in itself, give rise to a legal duty.”

⁵⁰ Dworkin 1978, above n 49.

⁵¹ R Dworkin *Law’s Empire* (Harvard University Press, Cambridge, Mass, 1986) at 198-201 and 206-211.

⁵² See for example the discussion of a rule of attribution in the context of global supply chains in the discussion of Corporate Social Liability.

section looks at conflicts in duties to shareholders, and stakeholders such as employees and creditors.

3. *Best interests of the company and the interests of others in case law*

The duty to act in the best interests of the company was the subject of Supreme Court decisions in *Debut Homes* and *Mainzeal Property and Construction v Yan (Mainzeal)*.⁵³ In *Debut Homes*, a sole director was found to have breached his duties. At a time when the company was insolvent, he had embarked on a course of action that had the effect of repaying present creditors, which would leave debts incurred while continuing to operate unpaid. The Supreme Court accepted a subjective standard for business judgment, saying courts are not well equipped to second-guess business decisions. If they tried to, they would be judging directors' decisions with the benefit of hindsight.⁵⁴ However, there were four "exceptions and qualifications to the subjective test" requiring consideration of other stakeholders:⁵⁵

- (a) where there is no evidence of actual consideration of the best interests of the company;⁵⁶
- (b) where, in an insolvency or near-insolvency situation, there is a failure to consider the interests of creditors;⁵⁷
- (c) where there is a conflict of interest or where the action was one no director with any understanding of fiduciary duties could have taken ...;⁵⁸ and,

⁵³ *Debut Homes*, above n 13; *Mainzeal*, above n 14.

⁵⁴ *Debut Homes* at [112].

⁵⁵ *Debut Homes* at [113].

⁵⁶ Citing *Re HLC Environmental Projects Ltd (in liq)* [2013] EWHC 2876 (Ch), [2014] BCC 337 at [92(b)].

⁵⁷ Citing Morison's *Company Law* (online ed, LexisNexis, Wellington) at [24.13], based on *Nicholson v Permakraft (NZ) Ltd* and *Sojourner v Robb* both above n 13.

⁵⁸ Citing *Australian Growth Resources Corp Pty Ltd (in rec and stat man) v Van Reesema* (1988) 13 ACLR 261 (SASC); *Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd* [1927] 2 KB 9 (CA); *Adtraction Marketing Ltd (in liq) v Ehrenfeld* [2018] NZHC 2777; *Holland Corporate Ltd v Holland* [2015] NZHC 1407; *Vercauteren v B-Guided Media Ltd* [2011] NZCCLR 9 (HC); *Peace and Glory Society Ltd (in liq) v Samsa HC* Auckland CIV-2007-404-700, 2 December 2008; and *Delegat v Norman* [2012] NZHC 2358 at [103].

(d) where a director's decisions are irrational.⁵⁹

The paragraph at issue in *Debut Homes* was (b), making most of the rest of the passage obiter dicta. Elsewhere in the judgment, in further obiter dicta, the court set out shareholder primacy, entity primacy, and stakeholder theories of corporate governance. The interests of employees, creditors and the wider public were examples of “wider considerations beyond maximising profits.”⁶⁰ The Court said considerations applying when the company is insolvent or nearing insolvency are similar to those applying to other stakeholders.⁶¹ The interests of creditors that need to be considered are those interests that may be prejudiced if a company becomes insolvent. The duties are owed to the company itself, not directly to creditors.⁶² While creditors' interests must be considered when a company is insolvent or nearing insolvency, there is not an independent, enforceable duty owed to them.⁶³ Since the interests of wider stakeholders are “similar” to those applying with respect to insolvency, the obiter comments suggest that there are similar interests of the wider public that must be considered where directors subjectively believe those stakeholder interests to be prejudiced. There is no independent, enforceable general duty owed to prejudiced stakeholders. Shareholders are not able to prevent directors from making allowance for stakeholder interests as long as the allowance does not threaten insolvency, the consideration is rational, and “directors cannot subjectively believe they are acting in the best interests of the company if they have failed to consider the interests of the company.”⁶⁴ To summarise: the prejudiced interests of stakeholders *may* be considered, but there is not a general *duty* to them.

Australian authorities have considered a similar statutory duty to exercise powers and perform duties in good faith in the best interests of the corporation. Teele Langford (2019) states that directors' duties there do not extend to promotion of stakeholder

⁵⁹ Citing *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 (CA) at 671 per Bowen LJ; *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157; and *Hayes v Willoughby* [2013] UKSC 17, [2013] 1 WLR 935 per Lord Sumption at [14].

⁶⁰ *Debut Homes*, above n 13 at [28]–[32], citing Watson and Taylor (2018), above n 23 at [3.2]; and Edward Rock *For Whom is the Corporation Managed in 2020? The Debate Over Corporate Purpose* (2021) 76(2) *The Business Lawyer* 363 at 367.

⁶¹ *Debut Homes*, above n 13 at [28]–[32].

⁶² *Debut Homes*, above n 13 at [31] n 17.

⁶³ *Arnerich v DHC Assets* [2021] NZCA 225 at [112].

⁶⁴ *Debut Homes*, above n 13 at [114].

interests with no link to corporate benefit or the interests of the company.⁶⁵ Examples of stakeholder interests with no such nexus would be donations to a cause or charity where a director does not subjectively believe there could be a benefit to the firm. She gives the example of sponsorship of political and social causes that provoke public opposition to the firm.⁶⁶ The position is consistent with the entity primacy view stated by the court in its outline of competing corporate governance models in *Debut Homes*.⁶⁷ It is notably consistent with the approach taken by the Law Commission in its report on reform of corporate law.⁶⁸ *Debut Homes* was affirmed in *Mainzeal*, where a passage from the Supreme Court of the United Kingdom in *BTI 2014 LLC v Sequana SA*⁶⁹ was quoted at length.⁷⁰ The Court's concern in *Sequana*, as in *Mainzeal*, was an insolvency issue and the position between creditors whose debts were incurred at different times prior to and during insolvency. Issues of creditor priority are out of scope, but the reasoning in *Sequana* is founded on the duty to act in the interests of the company:⁷¹

[47] ... the interests of its shareholders as a whole, understood as a continuing body, can be treated as the company's interests for the purposes of the directors' duty to act in its interests. It is the shareholders whose interests are affected by fluctuations in its profits and reserves, as they are the persons entitled to share in its distributions and its surplus assets.

The default position following *Mainzeal* and *Debut Homes* is that the best interests of the company will generally be the interests of the shareholders and do not extend to promotion of stakeholder interests with no link to corporate benefit. Where directors see advantage to the firm from considering stakeholder interests, they have wide discretion bounded by rationality.

⁶⁵ Rosemary Teele Langford "Social Licence to Operate and Directors' Duties: Is There a Need for Change?" (2019) 37 Co Secur LJ 200 at 210.

⁶⁶ See discussion below, Chapter V, Part A 4 discussing polarisation and the Anheuser-Busch 'Bud Light' controversy.

⁶⁷ *Debut Homes*, above n 13 at [30], citing Susan Watson "What More can a Poor Board Do? Entity Primacy in the 21st Century" (2017) 23 NZBLQ 142.

⁶⁸ Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at [194]. The Commission's proposal to make the duty of good faith a *fundamental* duty within a hierarchy of duties was not ultimately enacted in the Companies Act 1993. See Law Commission (2025), above n 8, announcing a forthcoming review of directors' duties.

⁶⁹ *Sequana*, above n 14.

⁷⁰ *Mainzeal*, above n 14 at [177]-[179].

⁷¹ *Sequana*, above n 14 at [47].

Other pathways through which the interests of stakeholders might enter calculation of the company's interests are: s 131(5) of the Companies Act 1993, which provides for considerations other than "profit maximisation"; the proper purpose duties found in s 133 of the Companies Act 1993 and in equity; and interests that operate because of common law and regulatory obligations. The first of those will now be analysed. Purpose is the subject of the next chapter. Common law and regulatory boundaries are the subject of Chapter *VI*.

C Section 131(5)

1. "Matters other than the maximisation of profit"

A new subsection was inserted into the Companies Act 1993 by the Companies (Directors' Duties) Amendment Act 2023 (2023 No 43):

(5) To avoid doubt, in considering the best interests of a company or holding company for the purposes of this section, a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters).

The provision as introduced listed five non-exhaustive stakeholder or CSR considerations: recognising Treaty principles, reducing adverse environmental impacts, upholding high standards of ethical behaviour, fair and equitable employment practice, and recognising the interests of the wider community.⁷² The Bill was amended following consideration by Select Committee, which reported that the considerations listed were already permissible and the original drafting could confuse directors by giving the impression some issues should be given more weight than others.⁷³ The reference to principles of the Treaty of Waitangi could cause confusion because the Treaty relationship is between the Crown and Māori and does not typically include private entities.⁷⁴ The Committee said the draft could create inconsistencies with other statutory provisions, such as the Incorporated Societies Act 2022, which uses analogous

⁷² Companies (Directors Duties) Amendment Bill 2021 (75–1).

⁷³ Companies (Directors Duties) Amendment Bill 2023 (75–2) (Economic Development, Science and Innovation Select Committee, select committee report).

⁷⁴ See M Piripi and B Peat "Corporate Purpose Through a Māori Lens" (2024) 55(3) VUWLR 371 at III, arguing that Treaty references in 'contexts that do not engage the Māori-Crown relationship' are confusing, dilute the significance of references to the Treaty principles in appropriate contexts and, while potentially well-meaning, amount to little more than window-dressing. The authors suggest explicit authority to consider tikanga when considering the best interests of a company would be a more appropriate way to introduce a Māori lens to decision-making. In Chapter *V*, I argue that companies law already facilitates tikanga.

duties. Power to make provision for the benefit of employees is authorised by s 132 of the Companies Act 1993 and many other Acts provide for employment practices (whether fair and equitable or otherwise).⁷⁵ The lengthy list of statutes affecting employment practice points to the intricacy of balancing employer and employee rights.⁷⁶ The draft of s 131(5), if enacted, may have shifted the balance to the employer's view of what is fair and equitable in the employment relationship. That would occur because directors' discretion in the Companies Act is subjective⁷⁷ and would be no less subjective in respect of fair and equitable employment practices. The Select Committee reported that amending the text would "dispel uncertainty about directors' duties in cases where financial or profit-related considerations appear to be in conflict with ESG-related ones."⁷⁸ Buckley (2024) also calls the provision as enacted a "clarification of the company's best interests."⁷⁹

I argue that the provision as enacted is not clarifying and does not dispel uncertainty. The scope of "environmental, social, and governance matters" is no more precise than the clauses deleted from the considerations in the draft at first reading. The "avoidance of doubt" and "best interests of a company" wording suggests the intention was to codify a hierarchy of duties.⁸⁰ The phrasing could be interpreted to mean that maximisation of the company's value remains the principal objective in a hierarchy, while environmental and social matters are to be pursued where they are instrumental to that. However, it is uncertain whether a hierarchy of that nature is the intention of the provision. Buckley and Underwood have written in defence of the provision that the wording, "although nuanced in some sense, was a significant step forward in

⁷⁵ See the Employment Relations Act 2000, Holidays Act 2003, Wages Protection Act 1983, Minimum Wage Act 1983, Parental Leave and Employment Protection Act 1987, Equal Pay Act 1972, Screen Industry Workers Act 2022, Sharemilkers Agreement Act 1937, Shop Trading Hours Act 1990, Volunteers Employment Protection Act 1973, Worker Protection (Migrant and Other Employees) Act 2023, and the Trade Unions Act 1908.

⁷⁶ Compare, for example, 'fair and equitable employment practice' with the Employment Relations Act 2000 Part 1 generally, and specifically s 4, requiring parties to an employment relationship to "deal with each other in good faith."

⁷⁷ *Debut Homes*, above n 13 at [112]. The Court discusses "a number of exceptions and qualifications to the subjective test" at [113], none of which are relevant to the present discussion.

⁷⁸ Economic Development, Science and Innovation Select Committee (2023), above n 73.

⁷⁹ Lynn Buckley "The Influence of Corporate Purpose on Directors' Interpretations of Their Duty to Act in Good Faith and in the Best Interests of the Company" (2024) 55(3) VUWLR 437 at 442.

⁸⁰ See above n 68; and Buckley (2024), above n 79: "There is no hierarchy of directors' duties—this suggestion by the Law Commission was not adopted—but the duty to act in good faith and in the best interests of the company remains fundamental," citing Law Commission *Company Law Reform: Transition and Revision* (NZLC R16, 1990) at [55], and *Mainzeal*, above n 14, at [117].

signalling that profit maximisation should not necessarily be the only goal moving to enshrine stakeholder interests.”⁸¹ That interpretation would make stakeholder interests parallel to financial value, rather than subject to it. As Land argues, a Court might read the provision as authorising consideration of environmental and social matters *at the expense of* the company’s value. If the provision allows boards to consider ESG matters even where that would prejudice shareholder interests, Land says, the result would be “unprincipled, economically undesirable and undemocratic.”⁸² He says the section “is capable of interpretation as a provision intended to drive social change.”⁸³ If social change is the intention, then it departs from the original, instrumental, focus of the United Nations Global Compact that proposed ‘ESG’ as a mechanism for enhancing corporate profitability and shareholder wealth.⁸⁴ Another commentator to fault the provision is Meyer (2024), who says the subsection lacks “clarity, certainty and predictability about corporate purpose, how this should be measured and to whom the company would be accountable for its implementation.”⁸⁵ Meyer supports the principle that corporates should have pro-social purposes, but he says s 131(5) fails to address the problem of the potential for maximisation of profit to be at the expense of environmental and social matters. The provision requires judges to opine on the merits of the environmental and social matters that businesses prioritise. It involves directors in making decisions about matters that should be left to politicians. He expects the provision will require new laws and regulations to clarify the duties of directors.⁸⁶

Prior to the adoption of s 131(5), even the narrowest interpretation of profit maximisation entitled directors to consider whether environmental and social matters would make the company more profitable. At the time s 131(5) was enacted, there was

⁸¹ Lynn Buckley and Peter Underwood “NZ took the lead on director duties reform. Why are we set on giving it up?” (online post <newsroom.co.nz> 13 September 2024).

⁸² Land (2024), above n 25 at 503.

⁸³ Land (2024), above n 25 at 503.

⁸⁴ The Global Compact *Who Cares Wins: Connecting Financial Markets to a Changing World* (United Nations Global Compact, 2004) at vii; Elizabeth Pollman “The Making and Meaning of ESG” (2024) 14 Harv Bus L Rev 403 at 414.

⁸⁵ Colin Mayer “Understanding Corporate Purpose: Bringing Clarity to Corporate Purpose, Success and Law” (2024) 55 VUWLR 357 at 368.

⁸⁶ Meyer (2024), above n 85 at 368. For further discussion of the provision see: Lynn Buckley “Directors’ duty of loyalty and ESG considerations: Aotearoa New Zealand’s controversial ‘Companies (Directors’ Duties) Amendment Act 2023’” (2024) 39 Aust Jnl of Corp Law 323; and Selwyn Gordon Coles “The Companies (Directors Duties) Amendment Bill” [2022] NZLJ 99.

not a general legal duty for directors to maximise profits in New Zealand.⁸⁷ The words “maximisation of profit” do not appear elsewhere in the Act. The provision could be read, therefore, as implementing a default purpose of maximising corporate value where no such default purpose necessarily existed prior to enactment. In my view the phrase “may consider matters other than ...” is ambiguous. It could be read as authorising other objectives alongside profit maximisation. It could also be read as *precluding* profit maximisation. The words ‘other than’ in the phrase “a director may consider matters other than the maximisation of profit” can be read as matters *exclusive of* profit maximisation. If the intention is to allow directors to consider maximisation of profit *alongside* other matters, s 131 nowhere says so.

The permissive phrasing of s 131(5), “may” consider governance matters, does not align with the mandatory phrasing of duties related to governance elsewhere in the Act. ‘Governance matters’ are mandatory considerations. They must be considered whether the company profits or not. An example of a mandatory governance matter is directors’ statutory duty of care:

137 Director’s duty of care

A director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation, —

- (a) the nature of the company; and
- (b) the nature of the decision; and
- (c) the position of the director and the nature of the responsibilities undertaken by him or her.

By s 169(3)(h), the duty of care in s 137 is owed to the company. Section 131(5) states that in considering the best interests of a company a director may consider governance matters. It is not easy to reconcile a discretion to consider governance matters with a duty of care, diligence and skill. In the context, the governance discretion intended appears to mean the concept sometimes referred to as ‘social licence to operate’. In this view of governance responsibilities, sustained and responsible monitoring of the social and environmental impact of the firm is seen as an essential responsibility of corporate

⁸⁷ See Peter Watts “Shareholder primacy in corporate law – a response to Professor Stout” in PM Vasudev and Susan Watson (eds) *Corporate Governance after the Financial Crisis* (Edward Elgar Publishing, 2012) 42 at 43.

governance.⁸⁸ Public acceptance of corporate activity is said to depend on the perceived integrity and corporate behaviour of the firm.⁸⁹ In the social licence model, social and environmental impacts *on* the firm (monitored as part of prudent management) and social and environmental impacts *of* the firm affect each other. Environmental matters, in particular, are seen as financial issues for firms and therefore environmental *impacts* are conflated with governance because they are subject to directors' duty of care. Notably, monitoring of the social and environmental impact of the firm is usually expressed as mandatory and not discretionary as in s 131(5). The logic of a discretion is as follows:⁹⁰

- A firm's activities may have social or environmental impacts on others outside the firm. Those impacts create a risk of a strongly negative public opinion or regulatory reaction.
- The reaction affects social consent that allows the firm to conduct its business.
- Directors may assess whether activities having these impacts outside the firm are a risk to the company's operations or value *in addition to* liability that could be incurred directly from the firm's operations.
- It is permissible for directors to mitigate risk by managing impacts at cost to the company—even if the substantive activity does not directly pose a risk to the company.
- This cycle of impact and reaction should be considered as a matter of governance.

It is not clear that this logic of discretionary social licence adds much to the duty of care. Section 137 makes management of risk, including indirect risk, a routine part of

⁸⁸ Teele Langford (2019), above n 65 at 202, citing Thomas Clarke *International Corporate Governance: A Comparative Approach* (2nd ed, Routledge, London, 2017) 411.

⁸⁹ See, for example, Glazebrook (2019), above n 19 at 2-3.

⁹⁰ For expositions of this logic see John Morrison *The Social License: How to Keep Your Organization Legitimate* (Palgrave Macmillan, Basingstoke, 2014); Neil Gunningham "Corporate environmental responsibility: law and the limits of voluntarism" in D McBarnet, A Voiculescu and T Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge, 2007) 476 at 481; and Kathleen Wilburn and Robert Wilburn "Achieving Social Licence to Operate Using Stakeholder Theory" (2011) 4 J Int Bus Ethics 3.

the mandatory duty of care.⁹¹ Directors must have “at least a general understanding of the business of the company and the effect that a changing economy may have on the business” and stay informed about the company’s operations.⁹² A board that fails to address systemic risks can fail in its duties.⁹³ Management of risks from or to third parties outside contractual relationships is routinely anticipated in risk management frameworks. ‘Risks’ affecting a business may be indirect, reputational, regulatory, nature-sourced, or associated with social ethics. Those categories do not alter the structure of an orthodox risk management framework or the methodology of evaluating and managing them.⁹⁴ In an orthodox risk management framework, a firm seeks to understand the likelihood and consequence of specific risks. It then manages the causes of those risks and determines how much residual risk to accept.⁹⁵

The risks that might potentially be handled in a different way than in an orthodox risk management approach are those not assessed as risks to the firm. Corporate resources might be used to manage risks and internalise costs imposed on the environment and socially where those costs are proximate to the firm, caused by the firm, remediable or avoidable by the firm, but believed by directors not to be damaging to the firm. The difficulty with this interpretation of responsibilities to stakeholders is that it would require an expansion of duties well beyond the case law. Directors’ duties to manage risk to creditors have been the subject of many judgements.⁹⁶ As noted above, the Supreme Court in *Debut Homes* said considerations of other stakeholders are ‘similar’ to those applying when a company is insolvent or nearing insolvency.⁹⁷ The interests of creditors need to be considered as a company nears insolvency. It would be consistent to consider the interests of stakeholders as a company nears insolvency on the same

⁹¹ *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 held that a risk is foreseeable if it is “real”, not “far-fetched or fanciful”. *Sequana*, above n 14, concerned the degree of risk that directors may accept consistently with their duty of care. Land, above n 14, argues that a careless failure by directors to recognise risk (of insolvency in the case of *Sequana*) is not a breach of fiduciary duty. It should not therefore give rise to associated remedies (such as rescission of contracts), although negligence may give rise to other remedies for breach of the duty of care.

⁹² *Daniels v Anderson* (1995) 37 NSWLR 438 (NSWCA). See also *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC).

⁹³ *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255 (Cooke J), reviewed on appeal and reinstated at the Supreme Court, but leaving this principle intact.

⁹⁴ International Organisation for Standardization *ISO 31000:2018 Risk management — Guidelines* (ISO, Geneva, 2018) [ISO].

⁹⁵ ISO, above n 94, stating that risks are “proactively treated with the appropriate resources and supported by the right level of expertise and top management.”

⁹⁶ See *Debut Homes*, above n 13; *Mainzeal*, above n 14; and *Sequana*, above n 14.

⁹⁷ *Debut Homes*, above n 13 at [28]–[32]. See also above, text to n 59.

basis. But it would be inconsistent to manage ‘environmental and social’ risks that are believed by directors not to be damaging to the firm.

2. Does s 131(5) matter?

Provisions comparable to s 131(5) allowing for consideration of social licence and stakeholder interests (or, in some cases, requiring it) have been adopted in the United States, Canada and the United Kingdom. The provisions are sometimes known in the United States as constituency statutes and in the United Kingdom as “enlightened shareholder value.”⁹⁸ It has been claimed that, in the United States at least, constituency statutes aim to “allow directors to justify takeover defences by invoking purported concerns about the effect of a takeover on non-shareholder constituencies.”⁹⁹ This subsection will outline examples of provisions and examine their application in the takeover context.

The United Kingdom Companies Act 2006, s 172 requires directors to act in the way subjectively considered most likely to promote the success of the company for the benefit of its members. In doing so, directors must have regard to the long term, employees, suppliers and customers, the community and the environment, reputation and fairness between shareholders. Meyer (2024) says the UK provision differs from New Zealand’s. The UK provision retains the sole focus of directors on promoting the success of the company for the benefit of its shareholders. He states that the provision clarifies the social and environmental issues that directors should consider. Governments and regulators determine where directors are required to act on their considerations.¹⁰⁰ Research for the United Kingdom government found the provision “had minimal impact on the way companies make decisions.” Directors believed “their primary obligation was to run the business for the benefit of the shareholders whilst having regard to a range of stakeholder interests,” and in a conflict between priorities their concern “was ultimately to shareholder interests.”¹⁰¹ Scholarly reviews of the

⁹⁸ Andrew Keay and Taskin Iqbal “The Impact of Enlightened Shareholder Value” (2019) J Bus Law 304. See also R Williams “Enlightened Shareholder Value in UK Company Law” (2012) 35 UNSW Law Journal 360; Andrew Keay *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge, New York, 2013); and Taskin Iqbal *The Enlightened Shareholder Value Principle and Corporate Social Responsibility* (Routledge, London, 2022) at 56.

⁹⁹ See S Bainbridge “Why We Should Keep Teaching *Dodge v Ford Motor Co*” (2022) 48 J Corporation L 77 at 116.

¹⁰⁰ Meyer (2024), above n 85 at 369.

¹⁰¹ Ipsos *Director Perceptions of Section 172: Research Findings* (Research Report for United Kingdom Department for Business and Trade, London, 2025) at iv–v.

provision have found it ineffective in changing how directors manage stakeholders' interests.¹⁰²

A comparable provision is found in Canada's Business Corporations Act RSC 1985 s 122(1.1), introduced in 2019. It provides a similar non-exhaustive list of stakeholder interests that directors and officers may consider when assessing the best interest of the company. The codified duties followed two decisions about corporate purpose that expressly authorised companies to consider the interests of stakeholders in preference to those of shareholders.¹⁰³ Those cases were concerned with stakeholder interests in a takeover. Canadian analysis has suggested that the statutory provisions, and the authorities they codify, have confirmed that shareholder primacy is not the law in Canada. Nevertheless, "the jurisprudence also does little to bolster the position of other stakeholders. The biggest beneficiaries appear to be boards and managers ...".¹⁰⁴ The extra discretion directors have been given has insulated them from breach of duties claims and helped to protect their positions in takeovers.¹⁰⁵ One study found there have been no cases where directors have been found to have breached their duty to a non-shareholder stakeholder.¹⁰⁶

In the United States, 32 states have enacted constituency statutes comparable to s 131(5).¹⁰⁷ Massachusetts' statute is a typical example where, in determining the best interest of a company:¹⁰⁸

a director may consider the interests of employees, suppliers, creditors and customers, the economy of the state, the region and the nation, community and societal considerations, and the long-term and short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

¹⁰² See Rosemary Teele Langford *Company Directors' Duties and Conflicts of Interest* (Oxford University Press, Oxford, 2019) at 21; Barnali Choudhury and Martin Petrin "Stuck in Neutral? Reforming Corporate Purpose and Fiduciary Duties" (2023) 67(3) Can Bus LJ 381 at 390. Somewhat mixed results are reported in a review of literature by Iqbal (2022), above n 98 at 91-97.

¹⁰³ *Peoples Department Stores v Wise* [2004] 3 SCR 461, (2004) 244 DLR (4th) 564 (SCC) at 42; *BCE Inc v 1976 Debentureholders* [2008] SCC 69, [2008] 3 SCR 560 at [81] [*BCE*].

¹⁰⁴ Choudhury and Petrin (2023), above n 102, at 398.

¹⁰⁵ Choudhury and Petrin (2023), above n 102, at 398.

¹⁰⁶ Choudhury and Petrin (2023), above n 102, at 400, citing Christopher Tingle and Keith Spackman, "Do Corporate Fiduciary Duties Matter?" (2019) 4 Ann Corp Gov 272.

¹⁰⁷ As at 2019. Lucian Bebchuk and Roberto Tallarita "The Illusory Promise of Stakeholder Governance" (2021) 106(7) Cornell L Rev 91 at 116.

¹⁰⁸ Massachusetts General Laws ch 156B, § 8.30(a)3 (2023).

Constituency statutes proliferated following accelerated takeover activity in the 1980s and 1990s and a pivotal decision for directors' duties in *Revlon Inc v MacAndrews & Forbes Holdings Inc (Revlon)*.¹⁰⁹ During a takeover, directors' roles "changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."¹¹⁰ Concern for non-stockholder interests was inappropriate, although directors could "consider whether concern for stakeholders would redound to the benefit of the shareholders."¹¹¹ The status of *Revlon* as an authority for subjugating the interests of stakeholders to shareholder value is disputed. While lines of debate replicate the shareholder primacy/stakeholder dichotomy,¹¹² *Revlon* is accepted even by critics of shareholder primacy as applicable United States law (although critics of shareholder primacy view the decision as narrowly confined to directors' responsibilities during takeovers).¹¹³

To determine whether constituency statutes extend the limits of CSR, it is necessary to ask whether they make much difference. United States cases in which constituency statutes have been invoked are rare. Despite having been enacted for over 25 years in most states, constituency statutes had been cited in only 15 out of 32 states by 2020, and it is reported there have been no cases in the United States "in which the statutes have been dispositive of the result."¹¹⁴ The conclusion is that "there is no evidence that constituency statutes have had any effect on director behavior."¹¹⁵ Based on this international experience, is there reason for confidence that s 131(5) makes much difference? The answer will turn on whether directors may sacrifice value to achieve a stakeholder benefit. In the United States, constituency statutes generally do not expressly authorise directors to sacrifice value in order to benefit stakeholders. They have been described as "tie-breakers" that allow for the interests of non-shareholder constituencies "when doing so does not harm shareholders in any demonstrable

¹⁰⁹ *Revlon Inc v MacAndrews & Forbes Holdings Inc* 506 A 2d 173 (Del 1986) [Revlon].

¹¹⁰ *Revlon* at 182.

¹¹¹ Bainbridge, above n 99, at 105.

¹¹² See Ann Lipton "Book Review: Will the Real Shareholder Primacy Please Stand Up?" (2024) 137 Harv L Rev 1584.

¹¹³ Lynn Stout *The Shareholder Value Myth* (Berrett-Koehler Publishers, San Francisco, 2012) at 32.

¹¹⁴ Bainbridge, above n 99, citing Jitendra Aswani and others *The Cost (and Unbenefit) of Conscious Capitalism* (unpublished manuscript, 2021).

¹¹⁵ Bainbridge, above n 99, at 119 citing Julian Velasco "The Fundamental Rights of the Shareholder" (2006) 40 UC Davis L Rev 407 at 464. See also Rock (2021), above n 60 citing at n 43 George Mocsar "Freedom of Corporate Purpose" (2016) BYU L Rev 1319 at 1359-62.

way.”¹¹⁶ Underwood and Buckley conclude that “directors are not only permitted, but effectively encouraged, to default to a focus on shareholder interests and consequently profit maximisation.”¹¹⁷ They arrive at that conclusion because of “the absence of a robust framework for balancing competing interests.” This study does not accept their conclusion that the result is profit maximisation,¹¹⁸ but the point holds for entity primacy. It is the conclusion arrived at in a passage in *Sequana* that has not (yet) been adopted or rejected in New Zealand:

So long as a company is financially stable, and is therefore able to pay its creditors in a timely manner, the interests of its shareholders as a whole, understood as a continuing body, can be treated as the company’s interests for the purposes of the directors’ duty to act in its interests.¹¹⁹

To discover whether constituency statutes are effective in New Zealand following the enactment of s 131(5), it is worth analysing the obligation of directors evaluating a takeover. Consider the hypothetical forestry firm above in Chapter *III B*, weighing a takeover offer from an entity that intends to stop clear-felling and manage the forest sustainably. In this example, a cost could be imposed on the affected local economy as a consequence of the takeover proceeding, even if the narrow net financial value of the takeover is positive. Prior to the passage of s 131(5), the best interests of the firm in a takeover broadly coincided with the interests of shareholders.¹²⁰ For example, directors of a target company could not issue shares for the purpose of defeating a takeover.¹²¹ Does s 131(5) go further in allowing for the social and environmental impacts of ceasing forest felling to be considered? If s 131(5) means anything then it allows directors to consider that it is in the interests of the firm to sustain the local economy

¹¹⁶ Bainbridge above n 99, at 118 citing J Macey “A Close Read of an Excellent Commentary on *Dodge v Ford*” (2008) 3 Va L and Bus Rev 177 at 180.

¹¹⁷ Underwood and Buckley, above n 81 at 27.

¹¹⁸ In my opinion, the authors appear to conflate instrumental CSR with profit maximisation, but their analysis is also consistent with entity primacy.

¹¹⁹ *Sequana*, above n 14 at [47]. Land (2024), above n 14 at 233 says the Supreme Court’s decision in *Mainzeal*, above n 14 is “consistent with this general approach” (although not a s 131 case). See Winkelmann CJ and William Young J in *Mainzeal* at [142]: “the interests of a solvent company and its shareholders are sufficiently aligned to see the duties owed to the company as requiring directors to have regard to the interests of shareholders.”

¹²⁰ Subject to s 132, which provides for directors to make provision for the benefit of employees in connection with the company ceasing to carry on the whole or part of its business. See Takeovers Regulations 2000.

¹²¹ See *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC); and D Tompkins “Directing the Directors: the Duties of Directors under the Companies Act 1993” [1994] 2 Waikato L Rev 13.

and employment. Directors of the target forestry firm would potentially be authorised to decline a value-enhancing offer if they believed accepting it cost jobs and damaged the local economy. Since there is no framework for weighing sustainable forestry against community welfare, they could decline the offer even if they believed acceptance would benefit shareholders and the environment. Neither the environmental interest nor shareholders would have recourse. In this example, shareholders' entitlement to some of the residual value of the firm would be effectively appropriated.¹²²

Subsection 131(5) does not displace the necessity of considering the best interests of the company. To decline the value-enhancing takeover offer, directors would need to identify a nexus between their assessment of the social outcome and the interests of the company. That would be difficult since the company would not be a continuing entity. It would not suffer consequences of a negative reaction. It would have been taken over.¹²³ In my conclusion, therefore, directors could not decline the takeover offer in this scenario. At least in a takeover context, s 131(5) would be ineffective. In my view, this outcome is desirable in economics as well as in law and equity. First, the outcome is consistent with the equitable duty of loyalty. One reason that the interests of the company are associated with shareholder interests, as in this example, is that shareholders entrust their money to the directors. The fiduciary duty of loyalty arises because it is shareholders who repose their trust and confidence in the directors. "By taking on the position of director, a director undertook to exercise the powers that shareholders agreed they should have."¹²⁴ Second, beyond the duty of loyalty, the outcome is generally likely to be desirable from an accountability point of view. If the offer were declined, no one could be sure whether directors were rejecting the offer out of self-interest in keeping their positions. Third, the outcome is desirable in an economic analysis of the firm even outside of an immediate takeover context. If s 131(5) allowed the offer to be declined, investors would know that directors could *potentially* decline a value-maximising takeover on indeterminate grounds. Some

¹²² Appropriation of shareholder value is presumably the quality Professor Watts intends when he describes recognition of stakeholder interests as "socialism": Peter Watts *Directors' Powers and Duties* (3rd ed, LexisNexis, Wellington, 2022) at 181.

¹²³ If there were a negative reaction damaging social licence in a success case, that would be a consideration for the bidding firm.

¹²⁴ Land (2024), above n 25 at 498 citing Francis Dawson "Acting in the Best Interests of the Company—For Whom Are Directors 'Trustees'?" (1984) 11 NZULR 68 at 78. As Land observes at n 3, directors' powers are conferred now by s 128 of the Companies Act 1993. Shareholders retain control over powers conferred on directors via the constitution and the default rights to appoint and remove directors (ss 153 and 156).

allowance would therefore be assumed for the risk that full liquidation value would not be realised. The price investors would be prepared to pay for the firm's shares would be rationally affected and the value of the firm discounted even if directors never weigh an offer. Section 131(5) therefore has a theoretical economic effect on the residual value of the company, reducing shareholders' value, independently of whether a takeover offer is ever made and independently of whether a firm applies a social licence approach.¹²⁵

3. *Concluding reflections on s 131(5)*

The considerations in s 131(5) do not sit easily within the Companies Act 1993 because the Act is not conceived to facilitate environmental and social interests. It was conceived to regulate capital management through the company form. It is concerned with containing the risk of abuse of power by directors and preserving the benefits, for investors and for society in general, of characteristics such as legal personality, limited liability, transferability of interests and flexibility of form.¹²⁶ The Law Commission concluded that a Companies Act was not the appropriate vehicle for "social reforms" such as worker participation in management and environmental goals, which "should be pursued through specific legislation imposed upon all employers and business enterprises."¹²⁷ The Law Commission explicitly stated it was "not attracted to" a general social responsibility provision in companies legislation analogous to s 4(1)(c) of the State-Owned Enterprises Act 1986, which requires a state-owned business to have "regard to the interests of the community in which it operates." That section was anyway held to be unenforceable by judicial review or civil action in *Auckland Electric Power Board v Electricity Corp.*¹²⁸ The Law Commission's view is consistent with Rock's 'traditional view' that social problems have other solutions,¹²⁹ and with the 2001 essay by Hansmann and Kraakman declaring the end of history for corporate law.¹³⁰

¹²⁵ The argument being advanced is not specifically made by Damodaran but derived from Aswath Damodaran *Applied Corporate Finance* (4th ed, John Wiley & Sons, Hoboken, New Jersey, 2014) at 18-19 and at 26, citing J Karpoff P Malatesta "The Wealth Effects of Second-Generation State Takeover Legislation" (1990) 25 J Fin Econ 291.

¹²⁶ Law Commission (1989), above n 68 at [21] to [23].

¹²⁷ Law Commission (1989), above n 68 at [19].

¹²⁸ *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551 (CA) at 11, upheld on appeal in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).

¹²⁹ Rock (2021), above n 60 at 368.

¹³⁰ Hansmann and Kraakman (2001), above n 46 at 441.

The most efficacious legal mechanisms for protecting the interests of non-shareholder constituencies ... lie outside of corporate law. For workers, this includes the law of labor contracting, pension law, health and safety law, and antidiscrimination law. For consumers, it includes product safety regulation, warranty law, tort law governing product liability, antitrust law, and mandatory disclosure of product contents and characteristics. For the public at large, it includes environmental law and the law of nuisance and mass torts.

The first reading draft of s 131(5) attempted a list of ‘interests of non-shareholder constituencies’ comparable to those listed by Hansmann and Kraakman. The Select Committee recommended against their adoption after finding the definitional difficulties were intrinsic and not merely a matter of drafting. The attempt to cure imprecision by removing examples from the provision has not helped to clarify it. In 2024 the Government announced its intention to repeal s 131(5).¹³¹ Legislation has not been introduced at time of writing and the Law Commission has since announced a review of directors’ duties.¹³²

¹³¹ Andrew Bayly *Improving fairness and ease of doing business* (Minister of Commerce news release, 15 August 2024); Ministry of Business, Innovation and Employment “Modernising the Companies Act 1993 and Making Other Improvements for Business” (Cabinet paper, 15 August 2024) at [18].

¹³² Law Commission *Review of company directors’ duties and liabilities underway* (media release, 21 August 2025).

Chapter V

A. Introduction

This chapter investigates duties in s 133 of the Companies Act 1993 and in equity to exercise powers for a proper purpose as those duties relate to consideration of CSR and stakeholder interests. The Act provides:

133 Powers to be exercised for proper purpose

A director must exercise a power for a proper purpose.

In this chapter I explain that a proper purpose is understood by looking to the purpose for which powers are conferred, which courts will determine by looking to the company's constitution or other contextual circumstances. 'Proper purpose' can also be inferred from the *purpose* of the firm, in the sense of its 'objective'.¹ The duty to use powers for a proper purpose overlaps with the duty to act in the best interests of the firm, but there are occasions when it is proper for directors to use powers for CSR purposes even when that is not in the narrow best interests of the firm. An example is where powers have been conferred for a purpose such as producing 'profitable solutions to the problems of people and planet'. As a default, however, I conclude that the duty to use powers for a proper purpose is a limit to CSR. Directors cannot use their powers to further their own social, moral or political views outside of the best interest of the firm, at least where the purpose of the firm is profit.² An example of an improper CSR purpose would be donations to political candidates to further a director's political views rather than to promote the interests of the firm.

B. Section 133

'Proper purpose' is not defined in s 133. Justice Tompkins, writing extra-judicially shortly after the provision was enacted, said that a director trying to find out what s 133 means would be left in the dark. "Of all the enacted directors' duties, this is likely to be the most troublesome."³ The duty to use powers for proper purposes and the duty to act in the best interests of the company have often been combined or been seen as

¹ See the taxonomy of synonyms of corporate purpose in Mathias Siems "'Corporate Purpose' as a False Friend: A Bibliometric Analysis" (2024) 55 VUWLR 381 at 405.

² See John Land "Corporate Purpose and the Impact on Equitable Remedies, Economic Growth and Democracy" (2024) 55 VUWLR 497 at 504.

³ David Tompkins "Directing the Directors: The Duties of Directors under the Companies Act 1993" (1994) 2 Wai L Rev 13 at 20.

overlapping, but some commentary says that more recently the two duties are seen as separate.⁴ The relevance is that directors who are not motivated by self-interest, and who act in what they believe to be the best interests of the company, might nevertheless be motivated by an improper purpose, with the consequence that decisions may be invalidated.⁵ It is also possible that the “business of the company and the generality of shareholders” must sometimes be subordinated to the interests of individual shareholders.⁶

In addition to being a statutory provision, the duty to exercise powers for a proper purpose is a rule of equity. As s 133 inherently lacks clarity, it is necessary to refer to the case law and equitable principles that preceded codification to give the provision content.⁷ The equitable rule is that powers conferred on directors should be used only for the purpose for which they were conferred.⁸ The duty to exercise powers for a proper purpose is fiduciary.⁹ Breach of a fiduciary duty can invalidate a decision. It is a requirement of the fiduciary duty of good faith to use powers for ‘proper motives’, honestly, and not for ulterior purposes.¹⁰ The use of powers for purposes other than those for which they are conferred is an abuse of powers.¹¹

The Law Commission’s 1989 report on reform of company law identified that case law about proper purpose has usually been concerned with issues internal to the company such as issuing shares to defeat a takeover.¹² The Commission proposed addressing those internal issues narrowly through provisions to control the power to issue or transfer shares. It proposed omitting a proper purpose clause from its draft Bill.¹³ The

⁴ Andrew Keay *Directors’ Duties* (3rd ed, LexisNexis, Bristol, 2016) at 5.14.

⁵ Peter Watts *Directors’ Powers and Duties* (3rd ed, LexisNexis, Wellington, 2022) at 11.3.1; Lynne Taylor and Susan Watson “Duties of Directors – Proper Purpose” in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) 553 at 555.

⁶ Watts (2022), above n 5 at 11.1.

⁷ Jonathan Barrett “Text, Context and Constitutions: Directors’ Fundamental Duties in Aotearoa New Zealand” (2024) 55 VUWLR 419; Watson and Taylor (2018) 553, above n 5.

⁸ R Nolan “The Proper Purpose Doctrine and Company Directors” in B Rider (ed) *The Realm of Company Law* (Kluwer, London, 1998) 1, citing *Spackman v Evans* (1868) LR 3 HL 171; *Re Smith & Fawcett Ltd* [1942] Ch 304; *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246.

⁹ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 [*Eclairs*].

¹⁰ *Re Smith & Fawcett Ltd*, above n 8.

¹¹ Keay (2016), above n 4 at 5.11.

¹² Law Commission *Company Law Reform and Restatement* (NZLC R9, 1989) at 508.

¹³ Law Commission, above n 12.

statute as enacted did not fully follow the Commission's recommendations on these points. Since the draft was stated to implement the common law position, and the draft recommendations were not fully legislated as recommended, the statutory position can be seen as a variation from the common law.¹⁴ The result is that the common law sometimes is said to require more of directors than "simply to exercise the relevant power in what they consider are the best interests of the company." The relevance to CSR is that the common law duty to act for a proper purpose can be a limit on directors' powers even when they believe an activity is in the interests of the company.

Several cases serve to illustrate issues in considering stakeholder interests and the exercise of powers for a proper purpose separately from the best interests of the company. In *Hogg v Cramphorn*, directors of a grain and seed company acted to protect the interests of stakeholders—employees.¹⁵ The company was the subject of a takeover attempt by an entity that had no experience of the industry. Directors genuinely believed the takeover would be bad for the company and for employees.¹⁶ They created a trust for employees and lent it money to acquire shares. The directors' purpose in issuing shares with sufficient voting power to defeat the takeover was held to be an improper use of their power to issue shares. They had a duty to use their powers for the purpose for which they were intended. Acting to avoid a takeover was not a proper purpose even if directors were acting in good faith and what they believed to be the company's best interests. *Hogg v Cramphorn* was not followed in the Canadian case *Teck Corp v Millar*.¹⁷ Teck wished to acquire a company to develop a mine. The defendants preferred to develop the land with a third party and shares were issued to defeat Teck's majority holding. Directors were found to have genuinely believed on reasonable grounds that they acted in the best interest of the company. The Court found that "a decent respect for other interests lying beyond those of the company's shareholders"

¹⁴ Watts (2022), above n 5, at 11.3.1.

¹⁵ *Hogg v Cramphorn Ltd* [1967] Ch 254 (Ch).

¹⁶ In New Zealand, s 132 of the Companies Act 1993 provides that, where a company ceases business, directors' duty in s 131 (to act in good faith and in what the director believes to be the best interests of the company) does not limit their powers to make provision for the benefit of employees. Making provision for employees is unlikely to extend to issuing shares with the purpose of defeating a takeover. The point is not developed here. Part 6A of the Employment Relations Act 2000 provides for the interest of specified employees in a takeover. See also cases relating to implied terms and duties to employees in a takeover and redundancy prior to the passage of that Act: *Brighouse Ltd v Bilderbeck* [1995] 1 NZLR 158 (CA), overruled in *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA).

¹⁷ *Teck Corp v Millar* (1973) 33 DLR (3d) 288 (BCSC).

would not lead to a finding that directors had breached their fiduciary duties.¹⁸ *Teck v Millar* was itself distinguished in *Howard Smith Ltd v Ampol*,¹⁹ a case that also involved the issue of shares to defeat a takeover. The Privy Council held that issuing shares for the predominant purpose of turning a majority interest into a minority one was an improper use of the power. It established a test for determining whether powers have been exercised for a proper purpose, which was later upheld in the United Kingdom Supreme Court in *Eclairs Group Ltd v JKX Oil & Gas*.²⁰ Courts will first ascertain the purpose for which the power is conferred, which will usually be inferred from the “mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court’s understanding of the business context.”²¹ The Court said powers conferred in the company’s articles are rarely expressed in the instrument that confers the power. “It was not expressed in the instrument in any of the leading cases about the application of the proper purpose rule to the powers of directors,” but it would usually be “obvious from its context and effect why a power has been conferred.”²²

Courts examining the exercise of power for a stakeholder purpose have expressed deference to the business judgement of directors. In *Peoples Department Stores Inc v Wise*, Canada’s Supreme Court accepted “as an accurate statement of the law” that it may be proper for directors to consider the interests of stakeholders alongside those of shareholders.²³ Specific stakeholders included staff, suppliers, creditors, consumers, governments and the environment. The Court cited with approval a statement in *Teck Corp v Millar* that “a decent respect for other interests lying beyond those of the company’s shareholders” would not lead to a finding that directors had breached their fiduciary duties.²⁴ *Peoples Department Stores* was affirmed in *BCE Inc v 1976 Debentureholders*.²⁵ The Court said it falls to directors to resolve conflict between the interests of stakeholders and the interests of the corporation. Directors had “a fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”²⁶ On those Canadian authorities, directors do not have an enforceable fiduciary obligation

¹⁸ *Teck Corp v Millar*, above n 17 at 314.

¹⁹ Above n 9. See also *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 293.

²⁰ *Eclairs*, above n 9. In *Eclairs* the relevant duty involved the fiduciary duty of trustees.

²¹ At [30].

²² At [31].

²³ *Peoples Department Stores v Wise* [2004] 3 SCR 461, (2004) 244 DLR (4th) 564 (SCC) at 42.

²⁴ *Teck Corp v Millar*, above n 17 at 314.

²⁵ *BCE Inc v 1976 Debentureholders* [2008] SCC 69, [2008] 3 SCR 560 at [81].

²⁶ At [81].

to stakeholders but they do have discretion to consider stakeholders. It is left to the business judgment discretion of boards to decide which shareholder and non-shareholder interests should be taken into account and to what extent when advancing the interests of the company. The approach is seen as shifting the focus from the outcome of the exercise of a power to how the decision was made.²⁷ The Canadian authorities can be distinguished in New Zealand and have been criticised.²⁸

The duty to exercise powers for the purpose for which they are conferred has also arisen in New Zealand in relation to discretionary powers under a contract. In *BNZ v Christian Church Community Trust (Gloriavale)*,²⁹ a contract for provision of banking services was set aside by the bank. Entities associated with the Gloriavale community had been found in the Employment Court to have breached human rights of employees. The bank viewed that conduct as a breach of its internal human rights policy and gave notice of intention to terminate the banking relationship. The Gloriavale entities argued for an implied ‘default’ term of good faith when a discretion is exercised under a contract.³⁰ The Court in *Gloriavale* did not need to decide whether the default rule exists in New Zealand. If it did exist, it would require a discretion under a contract to be exercised rationally, in good faith, and not arbitrarily.³¹ However, even if good faith is a default implied term, the judgment said courts will be slow to require a proper purpose for the exercise of a discretion in the fiduciary sense of honesty and good faith.³² The relevance here is that the Court indicated it would look to the instrument conferring the power (that is, the contract) to determine whether the power had been exercised for a proper purpose. In *Gloriavale*, the instrument was found to confer the power to act in the decision-maker’s self-interest. On the reasoning in the case, it is my opinion that, if a default implied term exists requiring good faith in decisions where a contract grants a discretion, then it is possible that consideration of stakeholder interests could be

²⁷ Edward Iacobucci “Indeterminacy and the Canadian Supreme Court’s Approach to Corporate Fiduciary Duties” (2009) 48 Can Bus LJ 232.

²⁸ See Watts (2022), above n 5 at 11.3.2, who avers that the reasoning in *Teck v Millar* is “egregious from beginning to end.”

²⁹ *BNZ v The Christian Church Community Trust & Others* [2024] NZCA 645 [*Gloriavale*]. The case was an interlocutory application, seeking an injunction to prevent the bank from closing Gloriavale’s accounts while the substantive issues were heard at appeal. The applicants needed to demonstrate they had a seriously arguable case to be heard at appeal.

³⁰ Based on the UK case *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

³¹ *Gloriavale*, above n 29 at [135].

³² *Gloriavale*, above n 29 at [123], citing Paul Davies and Philip Sales “Controlling contract discretions: Wednesbury reasonableness, good faith and proper purposes” (2024) 140 LQR 106 at 125–126.

implied. The reason for this conclusion is that assessment of good faith requires assessment of the matters considered in exercising the power and whether those matters were considered in good faith. The bank's real purpose for exercising its power was its belief that Gloriavale's conduct breached the bank's human rights policy. The human rights of Gloriavale's employees are stakeholder rights. Since it is unresolved whether implied contractual terms are part of New Zealand law, it is also unresolved whether there is a requirement to assess stakeholder interests in good faith when exercising a power under a contract.

In *Gloriavale*, the Court found that the power to terminate the contract was conferred by the contract for the purpose of maintaining the decision-maker's liberty to act in its own interests. Self-interested exercise of a power sits awkwardly with duties of good faith. However, a power under a contract is not a fiduciary power. At equity, if the motivating purpose is personal enrichment, the power will be susceptible to invalidity.³³ This point was examined by the Supreme Court of Western Australia in *Permanent Building Society (in liq) v Wheeler*. The case is directly relevant to directors who consider stakeholder interests for genuinely pro-social reasons. The directors of a building society approved loans to companies associated with a fellow director in circumstances that were not in the best (financial) interests of the society. The directors' purpose was to prevent the collapse of a firm in circumstances that, they believed, would have caused further damage to the financial community. The Court held a genuinely altruistic motivation did not transform an improper exercise of power into a proper one. The test was not whether directors acted honestly or in good faith, but whether the power was exercised for the purpose for which it was conferred. Under this authority, a director who acts in consideration of the interests of stakeholders out of genuine conviction is in no better position than one who acts from mixed motives. It is not relevant whether the stakeholders are employees, customers, the environment, or the wider community. The doctrine of proper purpose focuses on the purpose for which the power was conferred—not on the desirability of the end intended by those exercising the power.³⁴ The case law on proper purpose demonstrates there are occasions when directors must exercise their powers for interests that they genuinely believe are not in the best interests of the company, and the interests of shareholders in general.

³³ *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 at 137.

³⁴ Nolan, above n 8 at 16.

C. Corporate purpose.

Watts (2022) argues that s 133 and the equitable concepts on which it is based apply only in the context of shareholder rights. Other than in those internal contexts, “[there is] only one purpose attached to directors’ powers, namely the good of the company.”³⁵ My argument in this section is that the crucial question is what is meant by ‘the good of the company’. The cases cited in the previous section demonstrate that directors must act for a proper purpose even on occasions when they do not believe it is in the best interests of the firm to do so. That leaves the problem of how proper purpose in s 133 differs from the duty in s 131 to act in good faith in the company’s best interests. The logic must be as follows:

- a. proper purpose of a power is determined from the purpose for which a power was conferred;
- b. the purpose for which the power was conferred is determined primarily by the company's constitution and the nature of the specific power, informed by business purpose and context;³⁶
- c. the business purpose and context may include stakeholder interests or CSR purposes.

On the basis of this logic, my argument is that it is necessary to turn to a *company’s* purpose to understand whether powers have been exercised for a *proper* purpose. This section is structured as follows: first, I review ambiguities in usage of the term corporate purpose. Second I show that the Companies Act 1993 is consistent with establishing a company for a pro-social (or pro-stakeholder) corporate purpose. I present examples of companies established for pro-social purposes. The examples show that a company established for social purposes may exercise powers for those purposes. Third, I show examples of directors acting for improper purposes where they use their powers to advance their own political and moral views separately from the interest of the company.

Analysis of the term ‘corporate purpose’ in the legal literature finds its use is ambiguous.³⁷ Corporate purpose can mean a “higher level” corporate purpose, which is the concept associated with debate about the purpose of business generally, and a

³⁵ Watts (2022), above n 5 at 11.3.1.

³⁶ *Eclairs*, above n 9.

³⁷ Siems (2024), above n 1 at 405.

“second or lower level” purpose, which refers to the particular purpose(s) of an individual company.³⁸ Corporate purpose is sometimes used to mean an enforceable legal obligation, a comply-or-explain rule, and sometimes a recommendation or a discretionary ethical rule.³⁹ ‘Purpose’ is also used in the corporate social purpose sense intended by the expression that the purpose of business is to produce profitable solutions to the problems of people and planet.⁴⁰ In other examples, corporate purpose refers to “delivering value to our customers”, “investing in our employees”, “dealing fairly and ethically with our suppliers”, “supporting the communities in which we work” and “generating long-term value for shareholders”.⁴¹ Buckley (2024) found that New Zealand directors are often influenced by their understanding of their corporation’s purpose.⁴² She interviewed professional directors to understand whether corporate purpose informs directors’ interpretations of their duty to act in good faith and in the best interests of the company. The questions of corporate purpose in her enquiry concerned “the role of companies as responsible corporate citizens in the pursuit of broader societal objectives.”⁴³ Scope for interpretation exists because of the emphasis on a director’s subjective belief about their company’s best interests, the focus in entity primacy on the interests of the company itself, and courts’ deference to directors’ business judgement. Where directors subjectively believe ‘broader societal or environmental’ interests to be in the best interests of their company they may prioritise decisions that further those interests.⁴⁴

if directors, when exercising their powers and performing their duties, must do so in good faith and in the best interests of their company, and if their interpretation

³⁸ Rosemary Teele Langford “Corporate Purpose: Meaningful Change or Marketing Tool?” (2024) 55 VUWLR 527 at 528–530, citing Dorothy Lund and Elizabeth Pollman “Corporate Purpose” in Jeffrey Gordon and Wolf-George Ringe (eds) *Oxford Handbook of Corporate Law and Governance* (2nd ed, OUP, Oxford, 2025).

³⁹ Siems (2024), above n 1 at 405.

⁴⁰ Colin Mayer *Prosperity: Better Business Makes the Greater Good* (eBook ed, Oxford University Press, Oxford, 2018) at 18. See also Siems, above n 1 at 383 citing Colin Mayer *Capitalism and Crises: How to Fix Them* (Oxford University Press, Oxford, 2024) at 219–247 on the role of law and regulation to uphold a “common purpose”.

⁴¹ Martin Lipton, William Savitt and Karessa L Cain “On the Purpose of the Corporation” (<corpgov.law.harvard.edu>, 27 May 2020) Harvard Law School Forum, cited in Siems, above n 1 at 383.

⁴² Lynn Buckley “The Influence of Corporate Purpose on Directors’ Interpretations of Their Duty to Act in Good Faith and in the Best Interests of the Company” (2024) 55(3) VUWLR 437 at 440.

⁴³ Buckley (2024), above n 42 at 447.

⁴⁴ Buckley (2024), above n 42 at 449.

of that duty is shaped by their corporation's purpose, a consequence may be more socially responsible behaviour on the part of businesses.

The conception of corporate purpose in that passage mirrors the lines of debate between shareholder primacy and stakeholderism. Buckley's statement that corporate citizenship involves "broader societal objectives"⁴⁵ involves an assumption that those objectives may legitimately be selected by corporates, and that they exist separately from "maximisation of returns for current shareholders." Many businesses think of their purposes in a more instrumental way. For example, New Zealand Trade & Enterprise⁴⁶ advice about corporate purpose statements suggests that, "Purpose is an organisation's reason for being" and "Purpose can become an organising idea for the entire business: vision, strategy culture, hiring, product and more."⁴⁷ Examples it provides as templates to emulate emphasise that corporate purpose is often expressed as an organising principle of businesses: "To organise the world's information and make it universally accessible and useful" (Google); "To spread ideas" (TED); and "We help small businesses thrive worldwide" (Xero).⁴⁸ While those purposes could be described as broader societal objectives, they are better understood as statements that help firms to focus on what *business activities* they undertake and which they do not. In contrast to Buckley, Jill Fisch and Steven Davidoff Solomon question whether firms should have a purpose at all.⁴⁹ They are sceptical that corporate purpose can serve a useful function either as a legal constraint on managerial discretion or as a tool to promote the interests of stakeholders over those of shareholders. Instead, they argue that the role of "an articulated, measurable, and enforceable corporate purpose" is to enable a variety of constituencies with differing interests and objectives to select companies they want to identify with. It also allows those constituencies to navigate the terms of that association through contract or regulation. Buckley sees the relationship between corporate purpose and a director's duty to act in good faith and in the best interests of the company as an avenue to "operationalise corporate purpose." Fisch and Solomon's 'instrumental view' of corporate purpose focuses on "the role of purpose as a voluntary tool to facilitate the

⁴⁵ Above n 42.

⁴⁶ "The New Zealand Government's international business development agency." (<nzte.govt.nz> *About us*).

⁴⁷ NZTE *What's your company's purpose statement?* (Online resource, <nzte.govt.nz>).

⁴⁸ NZTE, above n 47. It also states that "a positive impact on people and planet" can increase a company's 'potential'.

⁴⁹ Jill Fisch and Steven Davidoff Solomon "Should Corporations Have a Purpose?" (2021) 99 *Tex L Rev* 1309; Buckley (2024), above n 42, does cite this study, at n 1.

goals of corporate participants rather than a regulatory instrument to promote specific public policies.”

Many examples exist of proposals to reform ‘purpose’ to accommodate wider public benefits. An example is the British Academy’s proposal to require firms to specify and implement whatever purposes they deem appropriate and explicitly align fiduciary duties of directors with those purposes.⁵⁰ Another example is a proposal to interpret the purpose for which powers were conferred to include sustainability purposes.⁵¹ In New Zealand, an example is a proposal to amend directors’ duties to require directors to have mandatory regard to the natural environment as a recognised stakeholder interest, going beyond mere permission to consider environmental factors.⁵² In an Australian context, analysis of governance duties comparable to New Zealand’s found reasons to be sceptical that law reform is needed to accommodate a wider social purpose.⁵³ McConvill and Joy show that corporate law and directors’ duties do not prevent directors from considering a wider social purpose. “[T]here is no justifiable conceptual or pragmatic reason why the achievement of sustainable development cannot be positioned alongside profit maximisation as the primary objective of the company.” Their conclusion follows the lines of the instrumental argument that directors will have a proper purpose when they consider social and environmental impact if those considerations are plausibly connected to the interests of the company. That instrumental argument depends on a connection to the firm’s value. The instrumental argument for considering wider social purpose is different to the enquiry into whether powers are used for a proper purpose. The proper purpose enquiry does not depend on whether the stakeholder consideration is plausibly connected to company value. It is the purpose for which the power was conferred, not any instrumental benefit to the company, that determines whether the proper purpose test is satisfied. This section was introduced with Watts’ view that issues of proper purpose arise only in the context of shareholder rights. My conclusion is that the weight of opinion is that the proper purpose enquiry is wider than that. The question in determining whether powers have

⁵⁰ British Academy *Reforming Business for the 21st Century: A Framework for the Purpose of the Corporation* (British Academy, London, 2018).

⁵¹ Beate Sjøfjell and Jukka Mähönen “Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy” (University of Oslo Faculty of Law Legal Studies Research Paper Series No 2022-43, University of Oslo, 2022).

⁵² Julia Maskill “Extending Directors’ Duties to the Natural Environment: Perfect Timing for Greener Companies in Aotearoa New Zealand?” (2016) 22 *Auckland U L Rev* 281.

⁵³ James McConvill and Martin Joy “The Interaction of Directors’ Duties and Sustainable Development in Australia: Setting Off on the Uncharted Road” (2003) 27 *Melbourne U L Rev* 116.

been used for a proper purpose is what purpose the power was conferred for, and powers may be conferred for wider purposes. The next section demonstrates examples.

D. Examples of companies established for a purpose other than profit.

This section will show examples of constitutions and contexts where powers are conferred for non-financial purposes. Section 16(2) of the Companies Act 1993 provides that the constitution of a company may restrict the capacity of the company or its rights, powers, and privileges. Powers and limitations on powers may also be inferred “from the court’s understanding of the business context.”⁵⁴ An example where context may modify powers is post-settlement governance entities (PSGEs) that establish companies under the Companies Act 1993 to hold assets transferred as part of settling a Treaty claim. Companies held within PSGEs are both commercial entities and vehicles that have collective, whakapapa-based accountability expressed in concepts such as tikanga norms and whanaungatanga.⁵⁵ They can be seen as instruments through which tikanga concepts are expressed in a contemporary economic form.⁵⁶ Tikanga “includes customs or behaviours that might not be called law but rather culturally sponsored habits,” and whanaungatanga is “the fundamental law of the maintenance of properly tended relationships.”⁵⁷ Practical expressions of these purposes might include environmental considerations; procurement, training and employment opportunities; the importance of the marae; and retention of land.⁵⁸ Beyond PSGEs, some Māori entities directly refer to tikanga in the dispute resolution sections of their formal governance documents, both internally within the entity as well as externally in dealings with outside entities.⁵⁹ The relevance is that the purpose for which powers are conferred on directors of companies held by PSGEs is consistent with disciplines of corporate governance in the Companies Act 1993 and common law, and they also provide a powerful example of modifying powers because of context. If a purpose such as

⁵⁴ *Eclairs*, above n 9 at [30].

⁵⁵ M Piripi and B Peat “Corporate Purpose Through a Māori Lens” (2025) 55 VUWLR 371.

⁵⁶ See Mason Durie *Te Mana Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Auckland, 1998).

⁵⁷ Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Waikato L Rev 1 at 3. See also Natalie Coates “Infusing Tikanga into Corporate Maori Governance Entities in the Current Legal Framework” in Robert Joseph and Richard Benton (eds) *Waking The Taniwha* (Thomson Reuters New Zealand Ltd, 2021) at 137.

⁵⁸ M Piripi and B Peat, above n 55.

⁵⁹ See Linda Te Aho “Corporate Governance: Balancing Tikanga Māori with Commercial Objectives” (2005) 23 Yearbook of New Zealand Jurisprudence 300, cited in Joseph and Benton (2021), above n 57 at 139.

governing by tikanga values is specified in the constitution of a company, then s 134 requires directors to comply with it. A failure to consider that constitutionally-defined purpose when exercising powers will be an improper use of powers because the purpose for which the powers are conferred is in part defined by the constitution. It is argued here that the cultural elements of a PSGE, including Treaty settlement, the court's incorporation of tikanga into law,⁶⁰ and the collective accountability structure together provide clear contextual circumstances to satisfy the method in *Eclairs* of ascertaining purpose.⁶¹ There is a strong argument that the surrounding circumstances of a PSGE are sufficient to be comparable to a constitutional provision with respect to determining proper purpose.

Two further examples, People's Coffee and Gas Industry Co, demonstrate constitutions that define purposes that are not plausibly in the narrow financial interests of the shareholders. The constitution of a closely held Wellington firm, People's Coffee International, states the purpose of the company "is to deliver long-term returns to shareholders whilst having an overall positive impact on society and the environment."⁶² Directors must consider, among other inclusions, likely long-term consequences of decisions and acts of the company, the impact of its operations on the community and the environment, its ability to create a positive impact on society, and the environment.⁶³ While the constitution of People's Coffee includes shareholder returns as one objective among several, Gas Industry Company's constitution does not admit of shareholder returns at all. It states the company's principal purpose "is to perform the functions and duties, and exercise the powers, of the industry body under Part 4A of the Gas Act."⁶⁴ When it exercises those regulatory powers, its constitution specifies the company's principal objective is "to ensure that gas is delivered to existing and new customers in a safe, efficient, and reliable manner."⁶⁵ The company must issue shares on application to industry participants.⁶⁶ Although the company may declare a dividend, the Board may levy an annual fee in respect of any share, which funds the company's operations.⁶⁷

⁶⁰ *Smith v Fonterra* [2024] NZSC 5.

⁶¹ *Eclairs*, above n 9 at [30].

⁶² Cited in Jonathan Barrett "Is Conflict Between Progressivism and Shareholding Inevitable?" (2025) 28 NZBLQ 64.

⁶³ People's Coffee *Constitution*, cl 3.1, cited in Barrett (2025) above n 62.

⁶⁴ Gas Industry Company Limited *Constitution* at 4.1.

⁶⁵ At 4.2(a).

⁶⁶ At 7.1 and in accordance with s 43ZL(2)(e) of the Gas Act 1992.

⁶⁷ At cl 28(1).

There is nothing in the Companies Act 1993 that prevents the objectives of People's Coffee or Gas Industry Company, or a purpose aligned with tikanga considerations, or matters of sustainability or stakeholder interests and CSR, from forming part of the constitution of a company.⁶⁸ People's Coffee and Gas Industry Company demonstrate that a power may be conferred for a purpose other than shareholders' benefit. By operation of s 169(3)(g), the s 133 proper purpose duty is owed to the company, meaning a failure to consider a constitutionally-embedded stakeholder purpose is enforceable through the company or by derivative action.

There is also case law limiting powers of a fiduciary to make decisions based on their own social, moral or political views outside of context and constitutional authorisation. The limitation applies at least to trustees making investment decisions where other investments would be more financially advantageous where the purpose of a trust is the provision of financial benefits.⁶⁹ Land (2024) gives the following examples: In *Cowan v Scargill*,⁷⁰ trustees of a mineworkers' pension scheme were obliged to invest trust funds to yield the best return despite the objection of some trustees to investments in oil and overseas investments. In *Martin v City of Edinburgh District Council*,⁷¹ trustees breached their duty by not taking professional advice and not applying their minds to whether divestment of South African investments when applying a council anti-apartheid policy would be in the best interests of beneficiaries. In *Harries v The Church Commissioners for England*,⁷² the Court refused to make a declaration requiring trustees to exclude certain investments on moral grounds where that would risk significant financial detriment to trust funds.⁷³ The duty to use powers for a proper purpose does not extend to promotion of stakeholder interests that have no link to the interests of the company. Nexus to the company is wide. Teele Langford gives the examples of gender diversity or investment in renewable energy as linked to corporate

⁶⁸ Subject to s 16(2). A company's constitution may restrict the capacity of the company or its rights, powers, and privileges but not expand them.

⁶⁹ Land (2024), above n 2 at 504.

⁷⁰ [1985] Ch 270 (Ch) at 287–289.

⁷¹ [1988] SCLR 90 (Court of Session) at 96.

⁷² [1992] 1 WLR 1241 (Ch) at 1246–1252.

⁷³ These cases have been criticised as examples of the judiciary substituting its political views where the responsibility better sits with parliament: John Griffith *The Politics of the Judiciary* (5th ed, Fontana, London, 1997). See discussion of New Zealand context of that argument in Jack Hodder "Employment Contracts, Implied Terms and Judicial Law-Making" (2002) 33(3-4) VUWLR 895.

benefit.⁷⁴ While wide, there remains a limit. The duty does not extend to stakeholder interests that have no link to the interests of the company:⁷⁵

Examples of promotion of stakeholder interests with no ... nexus would be a donation of funds to a cause or charity with no benefit to the company in terms of publicity; or financial sponsorship of a political or social cause that resulted in (or had the potential to result in) public opposition to the company. The accountability framework sees directors' core common law and equitable duties as being owed to the company and not to stakeholders or shareholders.

E. "Purpose" conclusion

The aim of this chapter has been to investigate duties to exercise powers for a proper purpose as those duties relate to consideration of CSR and stakeholder interests. Directors are required by statute and rules of equity to exercise their powers for a proper purpose. Directors can fail to act for a proper purpose even when they act in what they subjectively believe to be the best interests of the company. Proper purpose is not defined and the difference with the best interests of the company is elusive. Commentators have wrestled with whether the duty is separate from the best interest test only in respect of internal matters or it has a wider application. My conclusion is that the duty is applicable more widely and determined by the instruments conferring the powers. The principle of looking to the purpose for which a power is conferred has been applied in the context of a discretion under a contract. Corporate purpose will inform the question of whether powers have been used for a proper purpose. Corporate purpose may be discovered in the instrument conferring powers, such as a constitution or it may be obvious from the context. The default is likely to be that proper purpose will be assessed as aligned with the interests of shareholders and the company as an entity. However, wider corporate purpose is possible and it will be proper to use powers to apply corporate resources in that context. While courts will respect discretion in assessment of corporate purpose, they have been prepared to limit the exercise of powers for CSR purposes. The case law has drawn firm lines against the use of powers by a fiduciary to pursue their own moral and political objectives outside of an explicit mandate. The duty to use powers for a proper purpose is a firm limit to CSR.

⁷⁴ Rosemary Teele Langford "Social Licence to Operate and Directors' Duties: Is There a Need for Change?" (2019) 37 *Co Secur L J* 200 at 210.

⁷⁵ Teele Langford (2019), above n 74 at 210.

Chapter VI

Chapters IV and V discussed the limits that directors' duties place on a firm's CSR. This chapter turns from those internal limits on powers to obligations exogenous to the firm that can be enforced in the interests of stakeholders. A related question is explored of why some issues fall within the CSR canon while others do not. The reason is that CSR reflects practitioners' understanding of community expectations. These social norms of behaviour explain why extrinsic obligations exist outside of formal law.

Part A sets out two theories about the effectiveness of CSR. The first is "corporate social liability". The theory explains voluntary CSR as therapeutic and presentational. It argues for liability along global value chains, with liability in proportion to a firm's influence over harm. The second theory views CSR as capable of being made effective. In a "regulating contracts" model, existing private law tools could be applied to make public CSR commitments enforceable. The two theories are then tested against examples that show enforceable instruments are more effective than voluntary CSR.

Part B looks at obligations to stakeholders that go beyond compliance. A list of duties to stakeholders outlined in a speech by Justice Glazebrook is analysed as a representative example of the CSR canon. I then analyse CSR terms in an example of a supplier contract. I show that the terms set priorities between competing stakeholders. While most terms can be defended as being in the purchasing party's interests, there is a point where use of resources for CSR purposes is not rationally connected to the firm's best interests.

In Part C I explain how CSR issues come to be chosen. I outline an argument that firms gain legitimacy by filling regulatory gaps left by the state. Courts set the duty of care by reference to community expectations. Some sacrifice of value may be required to meet those expectations. Sensitive judgment is needed to identify community expectations when opinion is polarised. I conclude that activity that is ancillary to the firm's purpose and reduces its returns may be justified if it reflects a broad community consensus. An activity known to risk the firm's viability is unjustified.

A. Models of corporate social liability and regulating contracts

Keith Davis, a founder of corporate social responsibility as a discipline, states:¹

¹ Keith Davis "The Case for and against Business Assumption of Social Responsibilities" (1973) 16(2) Acad Mgmt J 312 at 313.

“... [S]ocial responsibility begins where the law ends. A firm is not being socially responsible if it merely complies with the minimum requirements of the law, because this is what any good citizen would do.”

Two theories are outlined here of where the law ends. A “corporate social liability” approach argues voluntary CSR is merely therapeutic and concerned with presentation. It proposes the law should step in to compel good citizenship by imposing *corporate social liability*. A “*regulating contracts*” model is less sceptical about CSR commitments. The model proposes that law already contains tools needed to make CSR into enforceable legal obligations. There is some overlap between the theories. Following sections will examine these two theories against the effectiveness of a range of examples of quasi-legal or soft law instruments that promote CSR objectives. It will be shown that more enforceable instruments are more effective than voluntary CSR.

1. *Corporate Social Liability*

Anna Aseeva (2021) coined “corporate social liability” to distinguish enforceable legal liability from discretionary responsibility.² In her analysis, the legal architecture of separate corporate personality, limited liability, and privity of contract, has created legal distance between multinational corporations and harms caused in global value chains. Voluntary CSR standards, codes of conduct, and initiatives such as ISO standards,³ the UN Global Compact,⁴ and OECD Guidelines⁵ were conceived to improve governance of globalised value chains, but failed. They are a tool for “therapeutic disclosure”—managing *perceptions* of CSR without creating enforceable obligations or remedies.⁶ A similar point is advanced by Bakan (2004), who describes profit-seeking behaviour of firms as ‘psychopathic’ because in part, he says, CSR initiatives frequently serve as superficial window-dressing.⁷ Aseeva’s solution is transnational regulation, liability

² Anna Aseeva *From Corporate Social Responsibility to Corporate Social Liability* (Hart Publishing, Oxford, 2021).

³ International Organisation for Standardization *ISO 26000:2010 — Guidance on Social Responsibility* (ISO, Geneva, 2010).

⁴ United Nations *United Nations Global Compact* (New York, 2000); UN Global Compact *The Ten Principles of the UN Global Compact* (Revised ed, United Nations, New York, 2000).

⁵ OECD *Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing, Paris, 2023).

⁶ Aseeva (2021), above n 2, at 66, 131 and 192, citing Stephen Bainbridge *Corporate Governance after the Scandals and the Financial Crisis* (Oxford University Press, Oxford, 2012) 34.

⁷ Joel Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, New York, 2004). See also Lucian Bebchuk and Roberto Tallarita “The Illusory Promise of Stakeholder Governance” (2021) 106(7) Cornell L Rev 91.

and duties of care, and “a somewhat general trans-national duty founded in ... domestic tort and civil remedies and international business and human rights frameworks.”⁸ Contracts and commercial relationships would be assessed over time, generating a legally cognisable relationship of dependence rather than a one-off exchange. Industry-wide regulation would allocate rights and duties along the entire value chain. She cites as a promising example expanded liability in *Chandler v Cape*⁹ where a parent firm was found liable for the health and safety of its subsidiary’s employees even though it was not established that the parent was involved in the subsidiary’s policies.¹⁰

The core idea of corporate social liability attributes liability commensurate with the influence of the firm in causing harm, with a presumption of liability for harm occurring within the sphere of influence of “lead firms”. An example is the binding Bangladesh Accord on Fire and Building Safety.¹¹ The Accord is an enforceable agreement between global brands and trade unions, which was created after a garment industry disaster in which more than 1,100 workers were killed. Since Aseeva’s monograph was published, several initiatives in Europe have implemented features of corporate social liability. For example, France adopted a *Loi de vigilance* (2017) which requires firms with more than 5,000 French staff, or more than 10,000 globally, to implement a vigilance plan covering their subsidiaries and supply chains and imposes civil liability. By 2024, the law had resulted in 30 formal notices and 13 suits.¹² The European Union has adopted a Corporate Sustainability Due Diligence Directive applying to firms with more than 5,000 employees and turnover exceeding €1.5 billion, which imposes a reasonable expectation standard for responsibility toward issues in supply chains and requires a climate transition plan.¹³ Senior United Kingdom, European and Canadian courts have

⁸ Aseeva (2021), above n 2, at 152.

⁹ [2012] EWCA Civ 525.

¹⁰ Aseeva (2021), above n 2, at 117. On cases of extra-territorial liability see *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013).

¹¹ *2018 Accord on Fire and Building Safety in Bangladesh* (signed May 2018, replacing the *2013 Accord on Fire and Building Safety in Bangladesh*).

¹² Clara Gérard-Rodriguez *Eight Years of the Duty of Vigilance Law: Lessons Learned from French Courts* (Global Rights Compliance, 17 June 2025).

¹³ Directive (EU) 2024/1760 (CSDDD).

upheld the principle of extra-territorial liability for human rights abuses and environmental damage.¹⁴

In New Zealand, the Court of Appeal in *James Hardie Industries v White* held it was arguable that a parent company incorporated in Ireland and the Netherlands owed a duty of care in respect of its subsidiary's operations in New Zealand.¹⁵ Further obligations may be found in international human rights instruments.¹⁶ These may be a mechanism that expands stakeholder rights in New Zealand in a manner proposed by Aseeva (2021). Where international human rights instruments are incorporated into domestic law, they cannot easily be displaced as a consideration. See for example, the High Court's strong endorsement of the United Nations' *Guiding Principles* as a "broadly supported and relevant international standard" in the very recent case, *Nazzal v Guardians of New Zealand Superannuation*.¹⁷ See also *Mohamed v Guardians of New Zealand Superannuation*, in which the United Nations' *Global Compact* and the *Principles for Responsible Investment* were described as "international benchmark standards."¹⁸ In *Mohamed*, the applicant sought to have the investment fund exclude investment in farms in New Zealand that use phosphate from Western Sahara. The judicial review application was not successful and its relevance was to the statutory investment criteria of the Guardians of New Zealand Superannuation. However, the obiter is relevant to stakeholders' ability to review or restrain corporate decisions. The Judge expressed scepticism about the use of judicial review proceedings for collateral purposes to promote Saharawi rights and independence.

¹⁴ See the Dutch Shell Nigeria cases (Court of Appeal, The Hague): *Oguru-Efanga v Royal Dutch Shell plc* ECLI:NL:GHDHA:2015:3586; *Dooh v Royal Dutch Shell plc* ECLI:NL:GHDHA:2015:3587; *Royal Dutch Shell plc v Akpan* ECLI:NL:GHDHA:2015:3588. In *Vedanta Resources plc v Lungowe* [2019] UKSC 20, Zambian villagers were able to sue in English courts for environmental damage caused by a Vedanta subsidiary. See also examples of cases involving extra-territorial liability for human rights abuses mentioned below, in section 5(b): *AAA & others v Unilever Plc and Unilever Tea Kenya* [2018] EWCA Civ 1532; *Choc v Hudbay Minerals Inc* 2013 ONSC 1414.

¹⁵ *James Hardie Industries plc v White* [2018] NZCA 580.

¹⁶ Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (Paper prepared for the Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019) [Winkelmann (2019)] cites *International Covenant on Civil and Political Rights* 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3; *UNEP Climate Change and Human Rights*; and *United Nations Environment Programme Climate Change and Human Rights* (December 2015).

¹⁷ *Nazzal v Guardians of New Zealand Superannuation* [2026] NZHC 681 at [92] citing United Nations *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN Doc HR/PUB/11/04, January 2012).

¹⁸ *Mohamed v Guardians of New Zealand Superannuation* [2021] NZHC 512.

2. Regulated contracts and soft law instruments

Anna Beckers (2015) takes an alternative view of corporate social responsibility codes. She argues they are a crucial component of the regulatory architecture for globally operating companies. She says they introduce a concept of “regulatory contracts” into contracting relationships.¹⁹ Corporate responsibility codes represent not merely an agreement subject to general rules of contract interpretation and private law remedies, but also a new form of rights and duties that fulfil firms’ functions as regulating political actors.²⁰ National private law can enforce codes as legal obligations through three mechanisms: contract law, estoppel, and fair-trading obligations. Contracts can give rise to claims for breach of contract and misrepresentation. Commitments to “ethically sourced,” “sustainably produced,” and “fair trade certified,” when published in annual reports, sustainability statements, advertising, and on websites, can become terms of contracts and implied warranties when they are published and communicated between the corporation and stakeholders. In the New Zealand context, Vasudev (2012) has also argued that statements in corporate governance documents “would be ‘representations’ in common law and reliance on such representations can give rise to legal consequences.”²¹

Enforcement of the nature Beckers recommends would require an expansion of rules of liability. Beckers argues that promissory estoppel can arise when CSR commitments are publicised and consumers, local communities, NGOs, and employees, predictably and reasonably rely on them.²² While estoppel is generally a shield rather than a sword and requires an existing legal relationship between the parties,²³ the argument is that courts should be willing to extend the doctrine to recognise that public CSR commitments generate a voluntary assumption of responsibility. A claim of estoppel was made in *BNZ v The Christian Church Community Trust*.²⁴ Gloriavale entities argued that the bank’s conduct of a banking relationship over many years amounted to a representation, on which the customer reasonably relied, that the bank would continue to provide banking services. They claimed it would be unconscionable for BNZ to

¹⁹ Anna Beckers *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart Publishing, Oxford, 2015) at 8.1.

²⁰ Beckers (2015), above n 19, at 8.2.1.

²¹ P Vasudev “Corporate stakeholders in New Zealand – the present, and possibilities for the future” (2012) 18 *NZ Bus LQ* 1 at 7.

²² Beckers (2015), above n 19, at 3.1.4.2.

²³ Citing *Combe v Combe* [1951] 2 KB 215 (CA); *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

²⁴ *BNZ v The Christian Church Community Trust & Others* [2024] NZCA 645 [*Gloriavale*].

depart from the assumption that the parties' relationship would continue, subject to the Gloriavale entities complying with the BNZ standard terms.²⁵ The BNZ agreed that customer-specific circumstances could conceivably give rise to a collateral contract or an estoppel. On the facts, no reliance was present and there was no serious question to be tried in relation to estoppel.²⁶ For present purposes, the case demonstrates that promissory estoppel is a possible but not a promising basis on which corporates might be held to account for public promises.

An alternative approach that Beckers suggests is to develop the law of negligent misrepresentation from *Hedley Byrne v Heller* to create a claim for parties who rely on a commitment to their detriment.²⁷ An equivalent doctrine of *culpa in contrahendo* and *Vertrauenshaftung* (liability for breach of legitimate reliance) in German law recognises pre-contractual and extra-contractual duties arising from the creation of justified expectations.²⁸ The approach would require a substantial expansion of the doctrine of estoppel or tort rules of proximity to take effect in New Zealand.

The third mechanism through which misleading commercial practices could be enforced, after contract and estoppel, is through fair trading and consumer legislation. The argument is that CSR commitments made in advertising, websites, and corporate reporting, form part of the undertakings on which consumers may be assumed to rely. This argument suggests extending consumer protection beyond the contracting parties to confer a benefit upon third parties that can be derived "from the phrasing or the surrounding circumstances." New Zealand's consumer protection legislation such as the Fair Trading Act 1986 may provide much of the potential liability and protection that Beckers proposes.²⁹

Beckers' approach is something of a middle way between mandatory and 'default' voluntary approaches to CSR because it introduces liability for compliance codes but leaves a firm generally free to choose whether to adopt a CSR code. Once a firm tells stakeholders it has adopted a code, it has created legitimate expectations on which

²⁵ *Gloriavale* at [173].

²⁶ *Gloriavale* at [181].

²⁷ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

²⁸ Beckers (2015), above n 19, at 3.1.4.1.

²⁹ Examples include Consumer Guarantees Act 1993, Credit Contracts and Consumer Finance Act 2003, Gambling Act 2003, Privacy Act 2020 and Weights and Measures Act 1987.

stakeholders are entitled to rely and which they are entitled to enforce.³⁰ In contrast, Corporate Social Liability analysis argues that private enforcement will always be patchy, case-by-case, and insufficient. It argues that the regulatory contracts model Beckers proposes is subject to juridical obstacles such as privity, the need for a direct legal relationship, the difficulty of establishing loss, and the problems of forum in transnational cases.

B. Duties in common law and statutory obligations to stakeholders

1. Judicial expressions of responsibility to stakeholders

The Companies Act 1993 does not replace or abolish common law and equitable duties, but largely restates them and common law duties continue to exist alongside the statutory regime.³¹ An exhaustive list of duties is not attempted here. This section is concerned with how topics come to be regarded as within the CSR category. To illustrate the range of potential obligations to stakeholders extending beyond statutory compliance, examples can be drawn from several cases and extra-judicial comments. In *Pokere v Bodger-Ōuri*,³² the Māori Land Court said trustees of Te Ture Whenua Māori Act trusts have a *duty* to consider and apply tikanga Māori, in addition to their general trustee duties; *Smith v Fonterra* affirmed that tikanga Māori can be a mandatory consideration.³³ Other examples of obligations include customary international law duties relating to human rights and climate change.³⁴

³⁰ See also D McBarnet and M Kurkchiyan “Corporate Social Responsibility through Contractual Control? Global Supply Chains and ‘Other Regulation’” in D McBarnet, A Voiculescu and T Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge, 2007) 59.

³¹ *Benton v Priore* [2003] 1 NZLR 564 (HC) at [46]. See P Watts in P Watts, N Campbell and C Hare (eds) *Company Law in New Zealand* (2nd ed, LexisNexis NZ, Wellington, 2016) at 373, also citing *Ilion Technology Corp v Johannink* HC Auckland CIV-2004-404-3358, 3 February 2006 at [69].

³² *Pokere v Bodger-Ōuri* 1A3 (2022) 459 Aotea MB 210 (459 AOT 210).

³³ *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 at [187]. See also *Ellis v R* [2022] NZSC 114; and New Zealand Law Commission *He Poutama* (NZLC SP24, Te Aka Matua o te Ture — Law Commission, Wellington, 2023), discussing tikanga Māori generally in New Zealand law.

³⁴ Helen Winkelman, Susan Glazebrook and Ellen France (2019), above n 16 at [18] citing Malcolm Shaw *International Law* (8th ed, Cambridge University Press, Cambridge, 2017) at 60; and James Brownlie’s *Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 22.

A lengthy list of examples of corporate governance responsibilities to stakeholders was outlined by Justice Glazebrook in a 2019 extra-judicial address (Glazebrook (2019)).³⁵ The point here is not to review the substance of the stated issues or the scope of obligations she outlined. Some examples outlined have been the subject of subsequent developments in law. The aim is to understand a representative example of issues described as falling within the CSR canon that may be subject to common law powers and obligations to stakeholders beyond statutory provisions:

- a. Litigation to assert employment rights in relation to the “gig economy”, in which workers are classified “as independent contractors rather than as employees to lower overhead costs, provide flexibility and maximise profit.”³⁶
- b. Issues relating to the workplace included discrimination and harassment, whistleblower protection, worker representation on boards, diversity in corporate governance and “excessive remuneration for CEOs, senior managers and directors, particularly in industries where there have been redundancies or extensive outsourcing.”
- c. Community stakeholder issues included conflict between a profit purpose and consumer rights, especially relating to “retail consumers who have negligible bargaining power.” Failing to act responsibly and ethically to consumers could result in reputational damage and regulatory compliance costs. Slightly further from the direct business relationship, corporate sponsorship of sports and charitable causes could be defended to build a reputation.
- d. In environmental concerns, climate change has been the subject of proceedings, in which the Supreme Court is considering whether the tort of public nuisance extends to carbon emissions by large corporates.³⁷ Other significant environmental litigation mentioned in Glazebrook (2019) includes deforestation associated with palm oil production, and duties of consultation and participation that can arise from the role of Māori as kaitiaki (guardians) of the environment and potential recognition of legal personhood in the Whanganui River.³⁸

³⁵ Glazebrook (2019), above n 19.

³⁶ Subsequently, in 2025, the Supreme Court determined the employment status of Uber drivers: *Rasier Operations BV and others v E Tū Inc and another* [2025] NZSC 162.

³⁷ See *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5. Subsequently overridden by Climate Change Response (Tort Liability) Amendment Act 2026.

³⁸ Te Awa Tupua Act 2017, s 14.

- e. Trans-national issues include tax minimisation strategies, modern slavery, worker exploitation and the corporate veil. The corporate veil references involve cases in which claims were made against multi-national parent companies relating to abuse and environmental damage by subsidiaries.³⁹
- f. Ethical and moral reasons for undertaking CSR may not always have a nexus to the best interests of a firm, although it might be hoped that they will usually overlap. She noted that domestic violence could have an economic cost to business and that businesses could have “*ethical and moral motives*” for participating in a family violence initiative.⁴⁰ Justice Glazebrook’s point recognises that moral motivations are separate from self-interested motivations. The same can be said for wider consideration of issues on the basis of corporate citizenship, in the sense of contribution to community welfare.⁴¹

Although the content of the Glazebrook (2019) list above is far from an exhaustive description of topics in which a firm may have social responsibility obligations, it is selected because it appears to be a typical list of topics. There does not appear to be a common principle linking those topics and explaining why corporate governance should consider the particular selection. There is a progressive-liberal cast to the issues identified there,⁴² although that is not to suggest the ultimate philosophical approach the Judge or courts would adopt in deciding cases on the issues. It is simply to record that another jurist might have selected issues seen as having more salience in a conservative canon, such as faith, crime and public safety, security, institutions of marriage and family, freedom of speech, democracy, individual rights, or the nation state. Another example of the way issues are subject to selectivity is that sustainability as a topic is often valued within a CSR framework, to the extent that CSR and sustainability are sometimes used interchangeably.⁴³ In energy policy and impacts, sustainability is an important component but it is one of three, alongside energy security

³⁹ *Choc v Hudbay Minerals Inc* 2013 ONSC 1414; *Vedanta Resources plc v Lungowe* [2019] UKSC 20; *AAA & others v Unilever Plc and Unilever Tea Kenya* [2018] EWCA Civ 1532. In New Zealand, see *James Hardie Industries plc v White* [2018] NZCA 580.

⁴⁰ Glazebrook (2019), above n 19 at 16 (emphasis added).

⁴¹ See A Crane and D Matten “Incorporating the corporation in citizenship” (2008) 18(1) *Bus Ethics Q* 27 and Jean-Jacques du Plessis and others *Principles of Contemporary Corporate Governance* (3rd ed, Cambridge University Press, 2015) 12.

⁴² For an example of public opinion research grouping topics by salience to political typologies, see Pew Research Centre *How the political typology groups view major issues* (<pewresearch.org>, 9 November 2021). See also the section below on political polarisation.

⁴³ M van Marrewijk “Concepts and Definitions of CSR and Corporate Sustainability” (2003) 44 *J Bus Ethics* 95. See Chapter 1.

and equity, in a ‘trilemma’ framework used by the World Energy Council (a UN-accredited global energy policy network), in which no limb of the trilemma can be advanced without influencing the others.⁴⁴ The point is that it would be selective to highlight only sustainability within a CSR framework, and not equally security or equity.⁴⁵ To take another example of selectivity among topics, a law and economics approach to stakeholder interests would analyse them in the context of economic relationships, freedoms, property, efficiency, utility and welfare of stakeholders rather than through their rights and obligations.⁴⁶ The argument here is that the choice of issues and the values applied are contestable. Different values and choices could be made about issues or about the role of the corporation.

2. Corporate expressions of obligations to stakeholders

This section turns to examples of firms making decisions about which issues to include within CSR activity. A common example of a firm expressing or imposing CSR obligations is the inclusion of standard terms in a supply contract.⁴⁷ Among many CSR terms that might be found in a supplier contract (non-exhaustively), these are some:⁴⁸

- Maximise the efficient use of energy, water and raw materials;
- Pay workers lawful wages and freely allow them lawful rights to form and join (or refrain from joining) unions;
- Comply with relevant local legislation and environmental approvals;

⁴⁴ World Energy Council *Policies for the Future: 2011 Assessment of Country Energy and Climate Policies* (World Energy Council, London, 2011); World Energy Council *World Energy Trilemma Index* (World Energy Council, London, 2024).

⁴⁵ The objective here is to describe the phenomenon of selection, not to rank the merits of any particular choice.

⁴⁶ This argument is developed in Henry Hansmann and Reinier Kraakman “The End of History for Corporate Law” (2001) 89(2) *Georgetown Law Journal* 439; Theodore Levitt “The Dangers of Social Responsibility” (1958) 36(5) *Harv Bus Rev* 41; Stephen Bainbridge *The Profit Motive: Defending Shareholder Value Maximization* (Cambridge University Press, Cambridge, UK, 2023).

⁴⁷ For discussion of the prevalence of standard supply contract terms, see D McBarnet and M Kurkchian (2007), above n 30.

⁴⁸ The terms in this example are found in the University of Waikato — *Supplier Code of Conduct*. McBarnet and Kurkchian, above n 30, identify difficulty in accessing confidential supplier contracts. This example is used because the document is publicly available on the University’s website and terms are assumed to be typical of terms found in a standard contract between a large entity and its suppliers.

- Not be convicted or investigated in relation to modern slavery practice, or be publicly named by any organisation alleging the supplier has engaged in modern slavery practices;
- Be able to demonstrate how carbon emissions associated with their direct business are actively being managed and how low carbon options can be offered as an alternative option.

The terms have political CSR characteristics because they are directed at stakeholder economic and social interests and fit the example of an enforceable (“regulating”) contract in which a corporation uses its powers to fill governance gaps in social relationships. The contract creates a hierarchy of priority between stakeholder interests. The supplier, the supplier’s workers, and the environment, can all be seen as stakeholders of the purchaser because they are affected by the purchaser’s business activity. The supplier’s interests are contractually subjected to those of its employees and the environment. While theories of CSR often focus on the purchaser’s discretion to consider stakeholder interests, the contract demonstrates that there is also selection of priority *between* stakeholders with competing interests. In the example of this particular contract, the priority between stakeholders is determined by the purchaser’s discretion and bargaining within the contract. In law and economics theory, firms will only contractually agree terms that benefit stakeholder interests where to do so is efficient among the bargaining parties.⁴⁹ The purchaser and supplier may both profit from agreeing to meet customer demand for the composition of their production. The contractual terms might be in the best interests of the purchaser even if they are not in the interests of the supplier.⁵⁰ For example, contractual terms may protect the purchaser’s reputation, increasing the overall value of the firm by allowing it to attract more customers or recruit staff, even while it reduces the supplier’s financial returns under the particular contract. If the net benefit for the supplier under the contract is less than the cost of compliance with its terms, then the supplier will decline to enter the contract or may seek compensation under the contract for the cost. The purchaser would proceed with the term only if the extra cost is less than the assumed instrumental

⁴⁹ Michael Jensen and William Meckling “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure” (1976) 3 *J Financ Econ* 305; Frank Easterbrook and Daniel Fischel “The Corporate Contract” (1989) 89 *Columbia L Rev* 1416; Frank Easterbrook and Daniel Fischel *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, Massachusetts, 1991). See Jonathan Macey “An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties” (1991) 21 *Stetson L Rev* 23.

⁵⁰ Michael Porter and Mark Kramer “Creating Shared Value” (2011) 89(1-2) *Harvard Bus Rev* 62; Michael C Jensen “Value Maximization, Stakeholder Theory, and the Corporate Objective Function” (2002) 12(2) *Bus Ethics Q* 235.

benefit.⁵¹ In law and economics analysis, the scope of CSR terms is limited by the net economic welfare of the entities calculating self-interestedly their best interests. The interest of the supplier employees do not directly enter the calculation between the purchaser and supplier; their interests are protected by employment legislation and their own contractual bargaining with their employer. In this analysis, a term could survive in standard contracts despite reducing net economic returns to the purchaser and supplier only if the contracting parties were not in a competitive market. It is possible that shareholders prefer environmental and social matters to wealth maximisation and the company is the most efficient form for collective pursuit of that purpose.⁵² There is empirical evidence of that explanation for why firms practise CSR.⁵³

Turning to the content of the contract terms, the reference to ‘maximising efficient use of resources’ could be argued to have instrumental benefit to both purchaser and supplier as an expression of a cost-saving procurement strategy.⁵⁴ Cost-management strategies of the supplier might be relevant to the purchaser’s estimate of ongoing risks of deliverability under the contract. Terms that aim to promote social and environmental interests may be instrumental where they are a preference of the purchasing firm’s consumers. For example, there is evidence that a coffee retailer selling fair trade and organic coffee achieves a price premium over otherwise similar products. A proportion of electricity consumers choose to pay an average price premium for renewable energy products.⁵⁵ Both cost saving and meeting consumer demand from one part of the market are profit maximising. Paying lawful wages, and compliance with local legislation and environmental approvals, are contractual expressions of statutory compliance obligations that are imposed on the supplier independently of the contract. They are examples of what Aseeva (2021) labels corporate social liability.⁵⁶ Including them in a contract may help to protect the purchaser from liability and associated costs in the event of a supplier’s breach of regulatory obligations. Those terms may also be a

⁵¹ More precisely, if the cost of a provision is less than the net present value of the probability-weighted extra risk that costs could be imposed on the purchaser were the term not included.

⁵² Easterbrook and Fischel (1991), above n 49.

⁵³ Markus Kitzmueller and Jay Shimshack “Economic Perspectives on Corporate Social Responsibility” (2012) 50(1) *J Econ Lit* 51 [Kitzmueller and Shimshack (2012)] .

⁵⁴ Porter and Kramer (2011), above n 50.

⁵⁵ Markus Kitzmueller and Jay Shimshack (2012), above n 53, citing respectively Maria Loureiro and Justus Lotade “Do Fair Trade and Eco-Labels in Coffee Wake Up the Consumer Conscience?” (2005) 53(1) *Ecological Economics* 129; and Lori Bird, Claire Kreycik and Barry Friedman “Green Power Marketing in the United States: A Status Report” (National Renewable Energy Laboratory Technical Report NREL/TP-6A2-46581, 2009).

⁵⁶ Aseeva (2021), above n 2.

mechanism to help protect the firm from reputational damage caused by the actions of suppliers even when the purchaser is not legally responsible. The “quintessential” case of a firm making cost savings by outsourcing production, then experiencing reputational damage from exploitative working conditions at a supplier’s manufacturing plant, involves Nike. Independent manufacturers of Nike-branded athletic shoes and apparel were found to be using child labour, exploiting staff, and paying below-minimum wages.⁵⁷ Nike was subject to public criticism even though it was not responsible in law. Its suppliers had breached both Nike’s supplier terms and local law.⁵⁸ The question whether to include a ‘Nike term’ in a supplier contract is a matter of discretion for directors acting in what they subjectively believe to be the best interests of the firm.⁵⁹ The assessment of the contractual term is also bounded by community expectations about standards of employment practice, especially in regards to exploitation. However, there is a dark irony that the discretion whether to include the term need not involve an assessment of whether its inclusion produces a substantive outcome for stakeholders. Even if consumers prefer a pro-social outcome, the discretion to include the term is exercised according to the best interests of the purchasing firm, not necessarily the best interests of the exploited workers. Kitzmueller and Shimshack (2012) conducted a literature review of the relationship between the CSR performance of firms producing in developing countries and the presence of exports to OECD countries, citing the Nike example.⁶⁰ They found “no evidence that consumer preferences in developed countries influence social performance by producers in developing countries.” That finding makes the rational nexus to the purchasing firm’s best interests difficult to establish. However, the shield for directors is likely to be several-fold: the consumer expectations standard accommodates reasonable working conditions for the entire global value chain, the duty of care requires that directors try to avoid the reputational consequences of the Nike episode and the business judgment rule allows directors to argue that they agree only terms they subjectively assess to be

⁵⁷ G Knight and J Greenberg “Promotionalism & Subpolitics: Nike and Its Labor Critics” (2002) 15(4) *Manage Commun Q* 541.

⁵⁸ Doreen McBarnet “Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability” in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge, 2007) 9 at 15.

⁵⁹ Directors’ assessment of best interests is subjective: *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA) and *Debut Homes Ltd (in liq) v Cooper* [2020] NZSC 100, [2021] 1 NZLR 142 [*Debut Homes*].

⁶⁰ Kitzmueller and Shimshack (2012), above n 53 at 76.

in the firm's interests. The term achieves the aims set out by Beckers (2015) for a regulatory contract.

Other contractual terms in the list above have less direct instrumental benefit to the firm's financial value but meet community expectations and social norms of behaviour standards. The modern slavery provision aligns with Australia's *Modern Slavery Act 2018*.⁶¹ A modern slavery provision has not been legislated in New Zealand, although it has support from the investment funds industry,⁶² suggesting the term is consistent with the duty of care of a reasonable director in the same circumstances.⁶³ It is possible that the funds industry's support for modern slavery legislation expresses a community expectation about corporate behaviour. It may also be evidence that investors believe that investor initiative alone is insufficient to resolve the issue. The contractual term's restriction on being *investigated* or being *publicly named* in an *allegation* of modern slavery subordinates natural justice interests of the supplier to the purchaser's reputation. The term has a commercial nexus to the purchaser—it expresses a business strategy of managing risks to the purchaser's reputation and potential liabilities. It is therefore straightforward instrumental entity primacy although it is also consistent with an interpretation that it is consideration of a social impact other than profit maximisation in line with community expectations. It is an expression of corporate governance stepping into a social governance gap in recognition that the global value chain can facilitate exploitation.⁶⁴ The term requiring the supplier to allow a unionised workforce probably goes no further than Part 3 of the Employment Relations Act 2000, which protects, at s 7(a), freedom to form and belong to a union. But a provision could be more problematic if it were known to the purchaser to involve paying higher prices. An example could be if a 'Living Wage' term resulted in higher wages for employees of the supplier and higher labour costs for the supplier, effectively transferring value from shareholders of the purchaser to employees of the supplier. Whether a term might result in higher costs is a matter for subjective business judgement.⁶⁵ If we assume that the purchaser does know that a term would result in higher supplier wages, which would be passed through to it, there would need to be some basis on which the purchaser could

⁶¹ The *Modern Slavery Act 2018* (Cth): the long title states its purpose is to require large entities to report on the risks of modern slavery in their operations and supply chains and their actions to address those risks.

⁶² See (untitled) Letter from Harbour Asset Management and ten other investment firms and two peak bodies to Hon Brooke van Velden (Minister of Workplace Relations and Safety, 25 January 2024).

⁶³ Companies Act 1993, s 137.

⁶⁴ For discussion of exploitation in the global value chain, see John Ruggie *Protect, Respect and Remedy: A Framework for Business and Human Rights* (2008) UN Doc A/HRC/8/5.

⁶⁵ Following *Debut Homes*, above n 59.

say that higher wages for the supplier are in the purchaser's best interest. It may be a stretch to argue that a term that promotes staff conditions and retention for the supplier is within the best interests of the purchaser. Perhaps attracting staff to the purchaser by being perceived as a 'good corporate citizen' would suffice. 'Active management of carbon emissions' may fall into the same category. At some point the policy may go beyond the directly instrumental. Putting aside for now whether climate issues may be a mandatory obligation, there is a boundary beyond which allocating further resources from the purchasing firm to reducing emissions, or higher supplier wages, has no rational nexus to the purchasing firm's best interests. There is a point at which the nexus may be absent, even if managing carbon emissions and promoting good employment practices in the value chain is a matter of broad community consensus. As a matter of the mathematics of opportunity cost, resource allocated under this term is resource that cannot be allocated in some other way to promote the desired social outcome. On what basis may shareholder funds be used in that way? On what grounds are selections of issues and stakeholder interests made? It is likely that the community expectations standard and the Companies Act 1993, s 131(5) are intended to make a difference here, allowing interests of employees and the climate to be considered. If s 131(5) makes a difference to the ability of firms to consider those interests, it does not provide insight into how much value can be accounted for by providing for stakeholders. The contractual provision is likely to meet a standard of the duty of care and be shielded from successful challenge if the quantum of value at stake is ancillary to the main business purpose, and seen as a purpose which has broad community consensus.

C. Political CSR and Community Expectation

1. Political CSR

Since the range of issues described as CSR is selective, an explanation is needed for how they are chosen. One theory is that firms (especially multinational firms) have social obligations that go beyond those of individuals because the modern, deregulated state and globalised value chains have hollowed out the nation state and reduced its ability to regulate. In particular, national governments' regulation of border-spanning operations, supply chains and environmental impacts of trans-nationals is ineffective. Inter-governmental institutions are too weak to fill the gap. CSR rules and standards, codes of conduct, and other instruments fill a gap left by the absence of statutory obligations to affected communities and other stakeholders. Scherer and Palazzo's theory of political CSR is that firms attain their legitimacy and corporate citizenship by

stepping into the gap.⁶⁶ They obtain legitimacy by acting transparently, considering stakeholders, contributing to the provision of public goods, and protecting fundamental rights through codes of conduct.⁶⁷ CSR issues are chosen not only because firms must manage internal pressures such as risks or their assessments of the instrumental value of CSR activity as a profit-making strategy. They are also chosen because firms manage external factors, which include community pressures and social norms of behaviour. It is these norms and judgements about community expectations that determine the range of issues. Political selectivity is inherent in the process because firms are stepping into a quasi-government structural role where community values and choices might otherwise have been made through processes of political sorting. As Beckers (2015) argues, CSR is not an extension of law into a private law domain of corporate governance, but the law embedding social norms of behaviour.⁶⁸

2. Community expectations

This section explains that legal standards in social responsibility obligations are set by reference to community expectations. Although there is substantial discretion for firms under the business judgment rule, Beckers' idea of embedded social norms of behaviour may be recognised where firms' decisions involve inherent policy choice. Courts look to community expectations when they determine the duty of care relating to how much social responsibility a firm should accept, and when stakeholders' rights are to be considered. The logic is as follows:

- The duty of care requires firms to comply with obligations and requires directors to act for proper purpose and in the best interests of the firm.

⁶⁶ A Scherer and G Palazzo "The New Political Role of Business in a Globalized World" (2011) 48 *JMS* 899 at 909. See also discussion of theories of political CSR in Pierre-Yves Néron "Business and the Polis: What Does it Mean to See Corporations as Political Actors?" (2010) 94 *Journal of Business Ethics* 333 and an earlier summary of theories in Andreas Rasche and others "Corporations as Political Actors: A Report on the First Swiss Master Class in Corporate Social Responsibility" (2008) 80 *J Bus Ethics* 151.

⁶⁷ Andreas Georg Scherer and Guido Palazzo "Globalization and Corporate Social Responsibility" in Andrew Crane and others (eds) *The Oxford Handbook of Corporate Social Responsibility* (Online ed, Oxford University Press, Oxford, 2015); and Jeroen Veldman "Responsibility and the Modern Corporation" in Jean du Plessis, Umakanth Varottil and Jeroen Veldman (eds) *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Online ed, Springer International Publishing, Cham, Switzerland, 2018) 101.

⁶⁸ Beckers (2015), above n 19 at 8.2.1.

- Sometimes a firm's obligations and its best interests will involve internalising community expectations about norms of behaviour and ethical and moral standards.
- Within that boundary of community expectations, courts will leave discretion to business judgement. The business judgment rule is that directors are protected from breaching the duty of care and due diligence if they act in good faith for proper purpose.⁶⁹

If a legitimate community interest is identified, and directors apply good faith, due care and skill in determining their course, they “will not lightly be found negligent just because, with hindsight, different decisions ought to have been made.”⁷⁰ Glazebrook (2019) stated one reason for a business judgment rule is that boards regularly balance various considerations and options where there is not one obvious ‘right’ answer. Litigation would involve courts in reviewing “business decisions [that] are rarely one dimensional.”⁷¹ The rule is codified in Australia in s 180(2), *Corporations Act 2001* (Cth), which defines business judgment as “any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.” Although no equivalent provision exists in New Zealand, the business judgment rule is likely to be applied in a similar way, applying broad deference to the exercise of discretion in matters of business operations. However, the limit to the discretion will be where business operations have effects on stakeholders.

The standard of care required when considering the effect of business operations on stakeholders' interests is the standard expected by the community and social norms of behaviour. In the Australian case *Australian Securities and Investments Commission v Rich*, the Court said it had a role “to articulate and apply a standard of care that reflects contemporary community expectations.”⁷² In that case the issue was community expectation about the degree of care, skill and diligence that a director would bring to the role. Professor du Plessis, in response to *Rich v Australian Securities and Investments Commission*, said community expectations develop alongside evolving

⁶⁹ Peter Watts *Directors' Powers and Duties* (3rd ed, LexisNexis, Wellington, 2022) at 9.3, citing *Australian Securities and Investment Commission v Mitchell (No 2)* FCA 1098, (2020) 146 ACSR 328 at [12].

⁷⁰ Watts, above n 69 at 9.3.

⁷¹ Glazebrook (2019), above n 19 at 4.

⁷² *Australian Securities and Investments Commission v Rich* [2003] NSWSC 85 at [71]. The judgment was overturned by the High Court of Australia in *Rich v Australian Securities and Investments Commission* [2004] HCA 42, but its discussion of community expectations is intact.

norms of corporate governance. The contemporary community expectation is that the standard of care includes “a requirement that corporate directors and officers cause a corporation to act in a socially responsible manner, both as a good citizen and as a good governor.”⁷³ The standard of community expectations was applied in the Supreme Court in New Zealand in *Attorney-General v Family First (Family First)*.⁷⁴ That case concerned whether charitable activities counted as political advocacy. The relevance here is the dicta in Justice Williams’ concurring opinion. He said the Court would look for a “broad consensus in the community about the utility of the purpose in terms of its contribution to social cohesion and well-being, and its consistency with underlying societal values.”⁷⁵ Once the community expectations standard is accepted, the question is how it is to be discerned. Austin J in *Australian Securities and Investments Commission v Rich* said that, when a standard of care is articulated by reference to community expectations, those community expectations should be discerned by seeking empirical evidence.⁷⁶

It seems to me preferable for the Court to embark upon this task with a measure of [empirical assistance] than to choose the only other alternative, namely to rely on unassisted armchair reflection.

In my argument, whether an activity benefits the community and whether it is ancillary to a firm’s purpose are not only a matter for directors’ personal preference or their judgement about what is in the interest of the firm. They are a matter in which a reasonable assessment must be made about social norms, community expectations, and whether a broad community consensus supports the purpose.

3. *Contentious issues*

The community expectations standard leaves open the question of how a firm is to make a judgement about ethical, moral or politically contentious issues when there is polarisation over contentious issues. An example can be seen in a controversy that affected Anheuser-Busch after it involved a ‘transgender influencer’ in social media marketing of its ‘Bud Light’ brand, at the time the largest-selling beer brand in the

⁷³ Jean-Jacques du Plessis “Corporate Social Responsibility and ‘Contemporary Community Expectations’” (2017) 35(1) *Company and Securities LJ* 30 at 37 n 56, citing Suzanne Corcoran “The Corporation as Citizen and as Government: Social Responsibility and Corporate Morality” (1997) 2 *Flinders J L Reform* 53 at 63 n 2.

⁷⁴ *Attorney-General v Family First New Zealand* [2022] NZSC 80 at [9] [*Family First*].

⁷⁵ *Family First* at [179].

⁷⁶ *Australian Securities and Investments Commission v Rich*, above n 72, cited by du Plessis, above n 73 at 37.

United States.⁷⁷ A boycott among a section of Bud Light consumers resulted from the initiative and Bud Light sales fell by 28 per cent compared to prior years. The degree of impact that a boycott has on a brand is affected by the intensity of political polarisation among customers and how their views accord or conflict with the brand's stance on social or political issues.⁷⁸ Brands whose customers are evenly distributed along a political spectrum or cluster near the centre are more vulnerable to boycotts because a stance on any polarising CSR issue can alienate large numbers of customers. Brands whose customers skew "near the ends of the spectrum" are less likely to anger customers (and may benefit) from taking positions that align with their customers' views. A proportion of consumers choose brands according to the brand's political values and perceived CSR performance.⁷⁹ Certain types of consumer are more likely to be involved in boycotts of products. They are more educated, affluent and active, higher income, more likely to shop online, more environmentally aware, interested in community issues and likely to stay up to date with news and current affairs.⁸⁰ That profile of the potential boycotter in many parts of the world conforms to liberal-progressive (but not redistributive) political preferences. The alignment possibly explains why some CSR issues have more salience than others among the CSR practitioner community. The characteristics of those consumers who choose brands for the brand's political values and perceived CSR performance support findings that CSR practitioners share a common cultural outlook.⁸¹ This suggests a need for caution about assuming where a community consensus may exist.

The argument here, in summary, is that CSR is inherently politically selective. When a firm considers CSR and stakeholders it will need to consider the context the firm operates in and the nature of its consumer base, not just the preference of directors (or managers). The duty of care will involve weighing objectively the expectation of the community and the risks associated with polarisation. If directors know that a backlash may result from a decision, causing consumer boycotts and reduced sales, the duty of care will require directors to proceed cautiously. They may nevertheless have a shield

⁷⁷ Jura Liaukonyte, Anna Tuchman and Xinrong Zhu "Lessons from the Bud Light Boycott, One Year Later" (*Harv Bus Rev*, 21 March 2024).

⁷⁸ Liaukonyte, Tuchman and Zhu, above n 77.

⁷⁹ See Kitzmueller and Shimshack, above n 53 at 76. While intensity of demand varies across markets, about 10 to 30 per cent of companies serve consumers with strong feelings about socially responsible consuming.

⁸⁰ Morning Consult *Boycott Risk & Brand Exposure* (market research into 500,000 consumers and 3,000 brands, Morning Consult, Washington, 2025).

⁸¹ John Conley and Cynthia Williams "Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement" (2005) 31 *J Corp L* 1.

if their activity can be characterised as having a purpose where there is a community consensus that the outcome is beneficial, such as human rights or an enhanced environment.⁸² Consider a firm that, out of moral conviction, opts to run the Bud Light advertisements knowing in advance a consumer boycott is likely, or a firm declining on ethical grounds to sell its products to a foreign country involved in a war on the grounds that the New Zealand community regards the war as unjust and illegal. If, in that scenario, the boycott is so severe, or the market that the firm withdraws from is so important to the firm's profitability that the firm collapses, that would breach the duty of care. The position is summarised by du Plessis by analogy from the law relating to corporate donations and ex gratia payments:

Directors will be held liable under the insolvent trading provisions if they spend company money on CSR programs, initiatives and activities when the company was insolvent ... or the money spent on these measures renders the company insolvent.

There is distance between collapse of a firm on one hand and a reduction in profitability on the other. If a firm does not recover its cost of capital, the law and economics school expects a firm in a competitive market would be competed out of its market (and even if it isn't, it destroys economic value).⁸³ If there is a range between business collapse and being competed out of business, and risk to rate of return on capital, then there may be room for business judgment. On the basis of the argument here, a decision that is known to risk collapsing the firm in the absence of a possible positive outcome, is likely to be reckless. But an activity ancillary to the main business purpose that merely reduced value or reduced returns could be justified if courts assessed that the purpose conformed to a broad community consensus.

D. Summary

This chapter examined the limits to CSR that come from outside the firm. The corporate social liability and regulating contracts models disagree about whether voluntary CSR can be made to work. It was shown that CSR commitments are effective when they can be enforced, whether by statute, extended tort liability, contract, or fair-trading legislation. The topics usually counted as CSR share no common principle. Their selection is political, because firms gain legitimacy by filling gaps that regulation leaves

⁸² *Family First*, above n 74.

⁸³ P Schreck *The Business Case for Corporate Social Responsibility* (Physica-Verlag Springer, Heidelberg, 2009); Witold Henisz and Robin Nuttall "Valuation of ESG and Digital Initiatives" in T Koller, M Goedhart and D Wessels (eds) *McKinsey Valuation* (7th ed, John Wiley & Sons, Hoboken, New Jersey, 2020).

open and must choose which gaps to fill. That choice is not unconstrained. Courts set the duty of care by reference to community expectations, so directors must assess those expectations objectively rather than apply their own values. The supplier contract shows that most CSR terms can be justified as serving the purchasing firm's interests. The analysis also shows that at some point further spending on stakeholders has no rational connection to those interests. Where a purpose has broad community consensus and is ancillary to the business, directors may accept some loss of value in pursuing it. Where the community is polarised, they must weigh the risk of backlash with care. A decision known to risk viability of the firm is likely to breach the duty of care. The next chapter asks whether CSR instruments are effective at achieving outcomes.

Chapter VII

A. Introduction

The previous chapter outlined two theories that argue for more effective approaches to achieving CSR: the corporate social liability model is founded in a view that voluntary CSR is therapeutic and ineffective. The regulating contracts model argues that voluntary CSR is capable of being made effective using existing legal tools. It also showed examples of applied CSR issues. This chapter is concerned with whether CSR is effective. It presents original research into management of the social role of firms through context-specific soft law instruments. Standards, formal guidelines, and codes of practice set out mandatory considerations or processes. They differ from fully voluntary CSR undertakings because substantive issues are determined exogenously from the firm, but the response can vary according to the firm's choices. Compliance obligations such as disclosure of impacts and processes for considering the interests of others are imposed out of recognition that firms' activities have consequences for others. Those issues can be distinguished from issues where government regulates to remove firm discretion, such as minimum wages or air pollution standards.

This chapter proceeds in two parts. Part A looks into specific examples of context specific CSR instruments. Four examples are chosen that represent the variety of instruments at the boundary between mandatory and voluntary CSR. They are suitable to test the Beckers and Aaseva theories of corporate social liability and the effectiveness of regulating contracts. The first example is the *Advertising Standards Code*, an example of an industry code that is not statutory but has near universal adoption and effectiveness. The next is gender diversity in the share market's rules. This is an example that has both mandatory and voluntary aspects. It highlights tension about whether CSR is instrumental or should be undertaken even at a cost to the firm. The third example explores an entirely voluntary industry code discussed in *BNZ v Christian Church Community Trust (Gloriavale)*.¹ The case illustrates the interaction between a CSR instrument (the industry code) and hard contract law. It also highlights conflict between two different types of CSR instrument—the voluntary *Code* and an internal corporate human rights policy. The fourth example looks at a regulation of CSR in Europe of the use of terms such as 'sustainable finance' and 'ESG'. The example

¹ *BNZ v The Christian Church Community Trust & Others* [2024] NZCA 645 [*Gloriavale*].

analyses the effectiveness of mandatory disclosures that have discretionary components.

Part B of this chapter looks at measurement of CSR and its marketing to the public through investment funds. It finds that CSR cannot reliably be defined with sufficient specificity to be measured. The consequence is that questions about whether CSR substantively adds value to firms cannot be answered. Selection of issues within investment ratings processes is not transparent and do not assist investors to achieve ethical or socially responsible outcomes. I show possible consequences for investment fund management arising from the divergence between financial products substance and investor concern for outcomes. I conclude that corporate social responsibility is not shown to be effective at bringing about positive social and environmental results. Initiatives with stronger legal accountability and enforcement are more effective.

1. *Advertising Standards Code*

The *Advertising Standards Code* is an example of an industry code that is not statutory but has an enforcement-like effect due to near universal adoption and compliance. It applies to all advertisements placed in any media.² The decision about whether to adopt the *Code* is made by advertising media (including creative agencies), not by the firm that is promoting itself. The firm, as the entity paying for the advertisement, is bound by the *Code* upon entering a contract to purchase advertising. The voluntary component is the media industry adoption of the *Code*. Privity of contract between complainant and advertiser is not required. *Code* provisions are grouped under two principles:³

Principle 1: Social Responsibility.

Advertisements must be prepared and placed with a due sense of social responsibility to consumers and to society.

Principle 2: Truthful Presentation.

Advertisements must be truthful, balanced and not misleading.

² Advertising Standards Authority *Advertising Standards Code* (Advertising Standards Authority, Wellington, effective 1 February 2019). See also Alcohol Advertising and Promotion Code, Children's Advertising Code, Financial Advertising Code, Food and Beverage Advertising Code, Gambling Advertising Code, and Therapeutic and Health Advertising Code.

³ Advertising Standards Code, above n 2.

Rules applied under Principle 1, Social Responsibility, range over matters such as privacy, consent, and safety. Guidelines within the Rules are expressed in the modal form, such as “Advertisements must not exploit, degrade, denigrate, demean or objectify any person or group of people or any products, services, objects or places.”⁴ and “Advertisements must not depict or encourage environmental damage or degradation.”⁵ The *Code* creates obligations that are enforceable by stakeholders and the wider community outside contract or an existing relationship. An example of potential liability was an action brought by consumer and environment groups⁶ in 2023 against fuel retailer Z Energy. Z had published advertisements stating, “We’re in the business of getting out of the petrol business,” and claiming Z was on track to achieving carbon reduction targets. At the time of publication, sales of petrol were increasing, along with greenhouse gas emissions from end users of the oil-based products it sold. The claim was settled with an apology and no admission of liability.⁷ The effect of the action was to end the advertising, not to reduce the substantive supply of petrol.

The example is a paradigm of Beckers’ regulating contracts model outlined in the previous chapter.⁸ It will be recalled that her argument is that corporate social responsibility codes embed social norms of behaviour into corporate governance. She argued that codes need to be given legal strength through consumer protection legislation. The Z litigation shows the *Advertising Standards Code* is effective in introducing liability and in withdrawing the advertisement that breached the standard. It was ineffective in changing the underlying emissions, but that is not the purpose for which the *Code* is designed.

2. Gender diversity in the NZX Listing Rules

Gender diversity at senior levels of firms has social effects beyond the corporation itself. For example, where women are under-represented on boards or in executive management (compared to the proportion of women in the population), their economic and social equality with men is disadvantaged. The Ministry for Women puts the interest at stake: “An equity or equalities perspective requires that a range of people are

⁴ Rule 1(c).

⁵ Rule 1(i).

⁶ Consumer NZ, The Environmental Law Initiative, and Lawyers for Climate Action NZ Inc.

⁷ Z Energy *Z Energy and NGOs Settle Greenwashing Legal Claim* (Media Statement, 2 November 2025).

⁸ Anna Beckers *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart Publishing, Oxford, 2015).

represented across all aspects of the labour market, including at board level.”⁹ Human rights legislation prohibits discrimination against women in the workplace.¹⁰ For present purposes, it is assumed that firms under discussion comply with the Human Rights Act 1993 and do not deliberately discriminate against appointing women. Women hold fewer directorships than men on boards of NZX-listed companies.¹¹

Sharemarket rules require listed firms to disclose the gender composition of their boards and management at the beginning and end of each financial year.¹² Mandatory obligations are set out in the *Listing Rules*, and recommendations in the *NZX Corporate Governance Code (Code)*.¹³ Firms must disclose whether they have complied, give reasons if they have not, and outline alternative arrangements. Recommendations are accompanied by ‘Commentary’, which is stated to be voluntary.¹⁴ The *Code* recommends that firms adopt a written diversity policy, that the policy should include measurable objectives for achieving diversity, and firms should assess progress towards achieving the targets.¹⁵ The *Code* fits the category of soft law CSR instruments that differ from fully voluntary CSR undertakings because the content is determined outside individual firms. The basis of the policy is to allow investors and stakeholders to understand the source, scope, risks and benefits of the provisions. The *Code* explicitly links its content to “stakeholders”.¹⁶

⁹ Ministry for Women *Increasing the Representation of Women on Private Sector Boards. A review of Initiatives in Selected Countries* (Discussion Paper, 2016).

¹⁰ Section 21(1)(a) Human Rights Act 1993.

¹¹ Women comprise 31 per cent of director positions on NZX boards, including 37 per cent on the largest 50 by market capitalisation and 26 per cent on firms outside the top 50. (NZX Limited *NZX Gender Diversity Statistics for the Year Ended 31 December 2023* (NZX Limited, Wellington, 2024).

¹² NZX Limited *NZX Listing Rules* (NZX Limited, Wellington, 31 January 2025) at 3.8.1(c). [*Listing Rules*] The obligation applies to firms listed on the Main Board, other than foreign exempt firms.

¹³ NZX Limited *NZX Corporate Governance Code* 1.7 (NZX Limited, Wellington, January 2025) at 4 [*Code*].

¹⁴ The *Code* also includes a provision at 4.4 that recommends firms provide non-financial disclosure, “including considering environmental, social and governance factors”, explain how they are measured and align with strategies. The provision is relevant to this section but, for clarity, the focus is limited to the provisions relating to diversity.

¹⁵ For the largest 20 listed firms by market capitalisation, the *Code* specifies a recommended measurable objective for achieving gender diversity: not less than 30 per cent of the board should be male and not less than 30 per cent female. (Recommendation 2.5, *Code* (2025) at 15).

¹⁶ *Code* (2025) at 6a states that the basis of the ‘comply or explain’ regime is to ensure ‘investors and other stakeholders’ receive appropriate information to allow a meaningful dialogue with boards and management about corporate governance. (Emphasis added) Stakeholders are not defined.

Issues arise because the boundary between mandatory and ‘voluntary’ compliance may not be a bright line, and because there are weaknesses in the alignment of the *Code* and the accompanying *Guidance Note*. The *Guidance Note* states the contents of the policy are optional:¹⁷

While NZX is not prescribing quotas, issuers may wish to adopt numerical targets if they consider that it is in their best interests. If an issuer does commit to a particular target, NZX would expect it to report against that target in its annual report in compliance with rule 3.8.1(d). However, NZX is not mandating the adoption of targets.

Does the *Guidance Note*’s repeated framing of targets as not mandatory have much effect? The *Guidance* itself says it is directed at providing assistance in determining how to design policies and report.¹⁸ Consider a hypothetical case of a firm declining to follow the recommendation. The firm is obligated to disclose that the recommendation had not been followed and to give sufficient reasons.¹⁹ The board must approve the “alternative governance practice”.²⁰ In doing so, directors must exercise care, diligence, and skill of a reasonable director in the same circumstances.²¹ If the *Code* functions as a statement of how a reasonable director of a listed firm would approach matters, then a director cannot easily ignore the recommendation. There is room to argue, for example, that the firm could not find suitable directors with the requisite skills and therefore could not achieve the diversity target, or to argue that a policy is not needed because the objective is already met by the firm. It may be difficult for an S&P/NZX 20 firm to argue that a quota target produces a suboptimal outcome for shareholders. If this interpretation is correct, then the *Code* recommendation might be better described as a rule with limited discretionary exceptions.

The Commentary to the *Code* asserts that “gender diversity on boards is associated with better financial performance.”²² If the Commentary is correct that numerical targets have a positive financial effect, then it must be in the best interests of the firm to adopt a numerical target unless ‘best interests’ do not coincide with better financial performance. However, the *Guidance* refers to firms adopting numerical targets “if they

¹⁷ NZX *Guidance Note: Diversity Policies and Disclosure* (NZX Limited, Wellington, 1 April 2023).at 2.4. [*Guidance*] (Emphasis added.)

¹⁸ *Guidance* (2023), above n 17 at 3.

¹⁹ *Listing Rules*, above n 12, Rule 3.8.1.

²⁰ *Listing Rules*, above n 12 Rule 3.8.1(b).

²¹ Companies Act 1993, s 137.

²² *Code* (2025), above n 13 at 16.

consider that it is in their best interests.” The implication is that better financial performance might, in some cases, not be in the interests of the firm.

Law and economics scholarship argues that there is not a direct association between the diversity of a firm’s management and its financial performance because, if there were, it would mean that firms were not profit-maximising.²³ The *Code* cites two authorities for its proposition that gender diversity is associated with better financial performance. One is a 2015 study by management consultancy McKinsey.²⁴ McKinsey’s findings were later tested by others who could not replicate the results. The authors caution about relying on McKinsey’s findings to support the view that publicly traded firms can deliver improved financial performance if they increase the diversity of their executives.²⁵ The other citation in the *Code* to support the proposition that gender diversity is associated with better financial performance is a 2021 paper by the United Kingdom Financial Reporting Council and others.²⁶ It found a positive and statistically significant correlation from 2001 to 2019 between the gender diversity of boards and EBITDA margin observed in following years, but the study is a problematic authority for the citation in the *NZX Code*. It does not demonstrate a causal link between diversity and performance and it found that diversity alone is insufficient to unlock the benefits of diverse perspectives. A 2015 meta-analysis of 140 research studies of the relationship between female board representation and performance found a positive relationship with accounting returns but no significant relationship with market performance. Other research has found no relationship to performance at all.²⁷ Both the 2021 Financial Reporting Council study and the earlier meta-analysis suggest that the culture of the board and active inclusion, rather than numerical composition, affect how well diverse

²³ H Demsetz “The structure of ownership and the theory of the firm” (1983) 26 J Law Econ 375 and H Demsetz and K Lehn “The structure of corporate ownership: Causes and consequences” (1985) 93 J Polit Econ 1155.

²⁴ *Code* (2025), above n 13 at 15 n 7, citing V Hunt, D Layton and S Prince *Why diversity matters* (McKinsey & Company, 2015).

²⁵ Jeremiah Green and John Hand “McKinsey’s Diversity Matters/Delivers/Wins Results Revisited” (2024) 21(1) Econ J Watch 28. A broader study by S Bermiss, J Green, and J Hand “Racial/ethnic misrepresentation of and bias against minority executives” (2024) 7(1) JERP (2024) 7(1) 45 also tested McKinsey’s findings and could not find a statistically significant link between racial and ethnic diversity and financial performance.

²⁶ Financial Reporting Council, London Business School Leadership Institute and SQW *Board diversity and effectiveness in FTSE 350 companies* (Financial Reporting Council, 2021).

²⁷ Stephanie Creary et al *When and Why Diversity Improves Your Board’s Performance* (Harvard Bus Rev, 2019). Publications finding a positive relationship between financial performance and diversity are listed in the bibliography of Ministry of Women (2016), above n 9 at 89–94.

boards perform their duties, but a culture of inclusion is not a recommended component of the NZX policy despite its prominent role in the sources.²⁸

The substantive question of whether diversity improves financial performance is out of scope. The significance for present purposes is that it shows limits to pursuing CSR through a mix of compulsory (disclosure) and voluntary (substance) initiatives. The attempt to ‘fit’ gender diversity into a financial performance metric subordinates rights to their contribution to the bottom line and contentious statistics, rather than being about fairness and rights rooted in human equality. If diversity were stated as a goal to be pursued as a matter of fairness, then the complicating issue of the firms’ best interests would not arise.²⁹

To the extent that listing rules are policy tools for implementing social outcomes, there is a broader issue of mandate and accountability. A comparable ‘comply or explain’ rule for gender diversity was added to the United Kingdom’s *Listing Rules* by its Financial Conduct Authority in 2022.³⁰ The targets have been criticised by Policy Exchange (a Conservative-aligned think tank) as “a textbook example of how public bodies can use their powers to create pseudo-laws without the consequences ever having to be properly debated.”³¹ It said the *Listing Rules* evolved from a mechanism to help ensure “proper corporate behaviour”, and to protect investors, into “a subtle tool for social change.” The criticism hinges partly on a view of which corporate behaviours are ‘proper’, but there is an issue of how the policy process mediates the viewpoints advanced by Policy Exchange compared to alternative points of view. For present purposes, it is suggested that legitimacy and social norms require a meaningful mandate. While the NZX consults on the *Listing Rules*, the process involves members

²⁸ Evidence that the NZX is aware that the authorities are a weak basis for the recommendation is hinted at by the redaction of the adjective ‘authoritative’ from the declarative statement that, “Authoritative research concludes gender diversity is associated with better financial performance.” The statement was amended in 2023 to “Research concludes...”. (NZX Limited *Tracked changes version of amendments to the NZX Gender Diversity Code* (NZX Limited, Wellington, 1 April 2023).

²⁹ For a statement of diversity as fairness, see Ministry for Women *Increasing the Representation of Women on Private Sector Boards. A review of Initiatives in Selected Countries* (Discussion Paper, 2016): “An equity or equalities perspective requires that a range of people are represented across all aspects of the labour market, including at board level.”

³⁰ Financial Conduct Authority *Diversity and inclusion on company boards and executive management* (Policy Statement PS22/3, Financial Conduct Authority, United Kingdom, April 2022) at [1.29], amending Financial Conduct Authority *Handbook* (as at April 2022); Financial Conduct Authority *Listing Rules* (UK, Financial Conduct Authority *Handbook*, as at April 2022).

³¹ Ross Clark *Corporate Cancel Culture. How ESG came to rule our investments* (Policy Exchange, London, 2025) at 14.

of the NZX. If the policy is intended to promote wider social outcomes, the mandate of NZX members to use their power for social policy goals depends on a view that it is appropriate for firms to exercise an unaccountable power in the interest of stakeholders.

Another issue arises when firms are regulated as social entities through stock market rules: the requirements are inconsistent with requirements applying to other, comparable firms that operate in New Zealand that are not subject to the *Listing Rules*. Only around a quarter of the largest 200 firms in New Zealand by revenue are listed on the NZX.³² In contrast, in the United States, around 190 of the largest 200 firms are traded on the NYSE or Nasdaq stock markets,³³ with the consequence that most large firms there are subject to similar rules.³⁴ Among New Zealand's 612,417 businesses, 97 per cent are 'small' (employing fewer than 20 people).³⁵ Only 1410 firms out of 5 million registered companies in the United Kingdom are listed on the London Stock Exchange or public markets, and of those fewer than 500 were non-investment companies.³⁶ If the purpose of diversity initiatives is to achieve a social outcome, then a rule that applies to one in four large firms, and 0.008 per cent of all New Zealand firms (or 0.01 per cent of United Kingdom firms), will have limited effect. Where it imposes a cost (it is not clear that gender diversity does impose a cost), then the rule creates a disadvantage for those firms subject to the rule compared to other firms. The principle of legality that like cases should be treated alike is strained by the inconsistency because the rule distinguishes between like-sized firms on the somewhat irrelevant basis of where their capital is traded.³⁷

I conclude from this example that the *Code* is ineffective at promoting a substantive CSR outcome. In the previous chapter, Aaseva argued that CSR Codes are therapeutic

³² Deloitte New Zealand *Deloitte Top 200 Index* (Deloitte New Zealand, Auckland, 2024).

³³ Stock Analysis (Data accessed from Stock Analysis online database, August 2025).

³⁴ Different markets apply different listing rules, but NYSE and Nasdaq have similar voluntary regimes for diversity. Nasdaq previously imposed a mandatory rule, requiring firms to have one director who identifies as female and another who is a member of an underrepresented minority group or is 'LGBTQ+'. The rule was struck down in a Federal Appeal Court decision in December 2024. *Alliance for Fair Board Recruitment v Securities and Exchange Commission* 21–60626 (5th Cir 2024).

³⁵ Ministry of Business, Innovation and Employment and Statistics New Zealand *Data for Business: Small Business Facts — Number of Businesses by Employee Size Group* (online resource, <business.govt.nz>, 2025).

³⁶ J Hardman and G Ramírez Santos "Empirical Evidence for the Continuing Need to 'Think Small First' in UK Company Law" (2023) 24(1) *Eur Bus Org L Rev* 117.

³⁷ Arguably, this point is mitigated by the firms' decision to list, which implies an assessment that benefits of the rules outweigh costs.

rather than effective mechanisms for achieving substantive outcomes.³⁸ The NZX *Code* supports her view in important ways. Although diversity requirements are imposed extrinsically from the firms subject to the rules, the rules are developed in consultation with the firms rather than with the wider public. The claims of effectiveness in the *Code* and associated documents do not sustain a case for effectiveness. Accountability for the effectiveness of the rules is unconvincing. However, the rules are effective for the companies subject to them because they impose consequences for breach of disclosure obligations. It is not clear whether the voluntary quotas are effective as rules, despite statements that they are guidelines. The *Code* indicates some force to Beckers' argument that it is an example of societal standards embedding themselves in corporate governance.

Analogous issues potentially arise from other CSR instruments that provide guidance to voluntary judgement. Examples include provision for the External Reporting Board to issue non-binding guidance on disclosures relating to “the social, environmental, and economic context in which an entity operates;”³⁹ guidelines on governance ‘best practice’ published by the Institute of Directors in New Zealand;⁴⁰ *Principles for Responsible Investment*;⁴¹ and guidelines about corporate social responsibility published by the OECD,⁴² the International Standards Organization,⁴³ and the United Nations.⁴⁴ Those publications may be interpreted as authoritative guides to the standard of care that should be exercised by directors. If they were so interpreted, they would comprise a regime that is close to compulsory for considering social responsibility and at least partially discretionary for judging how to implement it. In the very recent case

³⁸ Anna Aseeva *From Corporate Social Responsibility to Corporate Social Liability* (Hart Publishing, Oxford, 2021).

³⁹ Financial Reporting Act 2013 s 17(2)(a)(iii). The External Reporting Board is an independent Crown entity responsible for developing and issuing reporting standards on accounting, audit and assurance, and climate, for entities across the private, public, and not-for-profit sectors. (External Reporting Board *Te pūrongo ā-tau 2023/24: Annual Report* (External Reporting Board, Wellington, 2024) at 62.)

⁴⁰ S Arcus (ed) *The Four Pillars of Governance Best Practice for New Zealand Directors* (2nd ed, Institute of Directors in New Zealand, Wellington, 2021).

⁴¹ Principles for Responsible Investment *The Six Principles for Responsible Investment* (United Nations, New York, 2006).

⁴² Organisation for Economic Co-operation and Development *Corporate Responsibility: Private Initiatives and Public Goals* (OECD Publishing, Paris, 2001).

⁴³ International Organization for Standardization *ISO 26000:2010—Guidance on Social Responsibility* (International Organization for Standardization, Geneva, 2010).

⁴⁴ United Nations Global Compact *Guide to corporate sustainability* (United Nations, New York, 2015).

Nazzal v Guardians of New Zealand Superannuation, the High Court held that the United Nations' *Guiding Principles on Business and Human Rights (Guiding Principles)*⁴⁵ were close to a mandatory consideration for the Guardians of New Zealand.⁴⁶ The case was an application for judicial review related to investment decisions by the Guardians, and turns on statutory interpretation related to the investment policies of the New Zealand Superannuation Fund,⁴⁷ but the relevance is that the Court said "there appears to be consensus in the evidence that the *Guiding Principles* are broadly supported and relevant international standards."⁴⁸ Even though the *Guiding Principles* were not legally binding, they are referenced in a 2022 trade agreement between New Zealand and the United Kingdom as "internationally recognised standards, guidelines, and principles of corporate social responsibility."⁴⁹ The decision supports the contention in this section that such instruments are likely to be interpreted as authoritative guides to the standard of care that should be exercised by directors, and a regime that is close to compulsory for considering social responsibility.

3. Voluntary Code of Conduct

This Part is investigating examples of context specific CSR instruments to assess their effectiveness compared to predictions that voluntary instruments are either therapeutic or can be made effective if given effect by existing legal tools. The previous sections investigated stock exchange rules that have a discretionary component and a near-mandatory industry code. This section turns to obligations under a voluntary *Code of Banking Practice (Code)*,⁵⁰ and its interaction with a contract and with a bank's internal

⁴⁵ United Nations *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UN Doc HR/PUB/11/4 (January 2012)

⁴⁶ *Nazzal v Guardians of New Zealand Superannuation* [2026] NZHC 681 [*Nazzal*].

⁴⁷ The Guardians of New Zealand Superannuation is a Crown Entity that manages a sovereign wealth fund with approximately \$86 billion in assets. *Nazzal*, above n 46, at [1].

⁴⁸ *Nazzal* at [92].

⁴⁹ *Nazzal* at [91].

⁵⁰ New Zealand Banking Association Te Rangapū Pēke *What you can expect from your bank. The Code of Banking Practice* (New Zealand Banking Association, Wellington, April 2021) [*Code of Banking Practice* or *Code*]. From 31 March 2025, banks were required by the Financial Markets (Conduct of Institutions) Amendment Act 2022 [*CoFI*] to comply with a fair conduct principle under a new subpart 6A introduced into the Financial Markets Conduct Act 2013. It does not appear to be possible to contract out of *CoFI*. The analysis here is concerned only with the application of the voluntary *Code* and does not review the effect the *CoFI* provision would have had, had it been applicable at the time.

human rights policy. The issues were tested in the Court of Appeal judgment in *Gloriavale*.⁵¹

a. Facts and Decision

Entities associated with the Gloriavale religious community were found in the Employment Court to have violated the human rights of employees.⁵² The Bank of New Zealand (BNZ) wrote to Gloriavale stating that it intended to close 83 accounts associated with 16 Gloriavale entities on the grounds that the entities had breached the bank's human rights policy.⁵³ Gloriavale obtained an interim injunction to prevent this,⁵⁴ and the bank appealed. The case was an interlocutory application. To sustain the injunction ahead of substantive hearing, Gloriavale had to establish it had a seriously arguable case. BNZ's contract with Gloriavale stated that it could close or suspend an account "for any reason". The parties agreed that a contract to provide banking services could be terminated with reasonable notice in the absence of express contrary agreement or statutory impediment.⁵⁵ The Gloriavale entities claimed the express terms of the contract, properly interpreted, required BNZ to have a reason to close the accounts. The reason could not be founded on a mistake of fact, nor be unreasonable, capricious, or arbitrary. Reasonable could not include requiring customers to meet standards of unpublished and non-notified policies of which they were not aware.⁵⁶ The Court found there was no serious case to be argued at trial and lifted the injunction.⁵⁷

⁵¹ *Gloriavale*, above n 1.

⁵² *Courage v Attorney-General* [2022] NZEmpC 77, (2022) 18 NZELR 746.

⁵³ *Gloriavale*, above n 1 at [42].

⁵⁴ *Christian Church Community Trust v Bank of New Zealand* [2022] NZHC 3271 and *Christian Church Community Trust v Bank of New Zealand* [2023] NZHC 2523, [2023] 3 NZLR 190.

⁵⁵ *Gloriavale*, above n 1 at [5] and [91], citing *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16, [2009] 1 WLR 1405 in which the Privy Council set aside an injunction restraining a bank from closing a customer's account, giving as authority *Paget's Law of Banking* 13th ed (2007) at 153, to find that in the absence of express contrary agreement or statutory impediment, a contract by a bank to provide banking services to a customer is terminable upon reasonable notice. (Mark Hapgood *Paget's Law of Banking* (13th ed, Sweet & Maxwell, London, 2007).

⁵⁶ *Gloriavale*, above n 1 at [8]. The Gloriavale entities said the bank did not engage with their efforts to correct inaccuracies on which the decision was based or their steps to remedy the practices of concern. They said the Employment Court findings did not apply to most of the Gloriavale entities (at [44]).

⁵⁷ *Gloriavale*, above n 1 at [103].

[I]t is not implicit in the requirement that BNZ have “any reason” for closing an account that the reason must be a good reason, or a valid or well-founded reason, or a reason relating to the operation of the customer’s account. “Any reason” means what it says.

b. The Code of Banking Practice.

The issue for present purposes is the interaction between the terms of the contract and the role of the voluntary *Code of Banking Practice*.⁵⁸ The *Code* could be interpreted as an undertaking to customers and stakeholders in the wider public that the signatories will conduct their business by treating customers in a socially responsible way. It is possible to imagine that the Court could have reached a different result if it had decided that, by signing the *Code* and describing it as an agreement, the BNZ voluntarily constrained its interpretation of its contractual commitments and its conduct in respect of stakeholders.

The BNZ states on its website, “We agree to follow the Code as a minimum standard in our relationship with you,”⁵⁹ and, “We agree to: treat you fairly and reasonably ...”.⁶⁰ The *Code* itself states that it doesn’t form part of the terms and conditions of the banking relationship. It states that participating banks *agree* to follow good banking practices as a minimum standard. Under a prominent headline, “We will treat you fairly and reasonably,” it undertakes that signatory banks will act fairly, reasonably, and in good faith, in a consistent and ethical way (although it qualifies fair and reasonable, but not good faith, consistency or ethical treatment). “What’s fair and reasonable depends on the circumstances, including our conduct and yours, and our terms and conditions, the law, and good banking practice.”⁶¹ The *Code* could conceivably be read as a guide to interpretation of the contract terms and conditions. In that interpretation, the statement that the *Code* is an agreement to act in good faith and ethically would not be a ‘part’ of the terms, in the sense of a new term. It would be, instead, a clarification of the meaning of the terms were this approach taken. The bank did not accept that view in its pleadings. The “main thrust of BNZ’s appeal,” was that the BNZ had an express unilateral right to terminate the banking relationship and the Court agreed.⁶²

⁵⁸ *Code of Banking Practice*, above n 50.

⁵⁹ Bank of New Zealand *Corporate Governance* (Bank of New Zealand, <bnz.co.nz>, 1 May 2025.)

⁶⁰ Bank of New Zealand, above n 59.

⁶¹ *Code of Banking Practice*, above n 50 at 3.

⁶² *Gloriavale*, above n 1 at [54].

The *Code* had some effect, because complaints could be made to the Banking Ombudsman,⁶³ although this reasoning means the BNZ discharged its responsibility under the *Code* by allowing the customer to complain. The Court said the protection for customers “is the constraint provided by its competitors in the banking market, not any constraint provided for in the contract itself.”⁶⁴ For example, the bank is free to set whatever interest rates it thinks fit in its own commercial interests without consulting with its customers or considering their interests, and the protection for customers is not found in the contract—it lies in their ability to move their custom to another bank. It found the Gloriavale entities accepted the website language and the *Code* when they maintained their accounts and did not move to a competitor, and from that point those ‘agreements’ formed a part of the ongoing context of the banking relationship. The Court’s reasoning on this point is doubtful. If there was an ongoing series of decisions to remain with the bank as contract terms were unilaterally changed, then the ongoing decisions included the decision to remain with the bank after it signed the *Code*. The Court’s reluctance to imply the *Code* into its interpretation of the contract suggests a preference for hard law contract over the soft law instrument. The point has consequences for the regulating contracts model that suggests soft law instruments need to be given legal effect. The Court’s decision reveals a preference not to allow soft law instruments to become interpretive tools. My conclusion is that CSR instruments will be ineffective in a contest against a hard law instrument, such as a contract. The voluntary Code has the characteristics of presentational and therapeutic window-dressing described in the corporate social liability critique.

c. Conflict of stakeholder instruments

The objective here is to investigate a conflict between the *Code* and the human rights policy that the BNZ stated had been breached by Gloriavale. The human rights policy was developed by the BNZ’s parent group.⁶⁵ It was accessible on the parent bank’s website but not on BNZ’s.⁶⁶ The questions here are the basis for the choice of which of two social responsibility instruments takes precedence, and the decision-maker’s power

⁶³ *Gloriavale*, above n 1 at [110].

⁶⁴ *Gloriavale*, above n 1 at [98].

⁶⁵ Bank of New Zealand’s parent company is the National Australia Bank Ltd. (Bank of New Zealand, above n 59.)

⁶⁶ *Gloriavale*, above n 1 at [82] n 41. It was not recorded in the judgment that BNZ’s *Principles for Responsible Banking 2023 Self-assessment*, which is published on its website, contains a link to the policy at [4], along with the description: “BNZ has an equivalent local policy incorporating the requirements of the Group Human Rights Policy and the Group Social Impact Policy.” (Bank of New Zealand, above n 59.)

to choose which instrument to apply. How would a customer, a regulator, an NGO with an interest in the bank's behaviour and reputation, a shareholder, or potential investor, predict which of the *Code* or the policy would take priority in determining the bank's conduct? One solution could be for the instruments themselves (the policy and the *Code*) to describe the approach a decision-maker bank would take in a conflict. The courts will usually try to give effect to both instruments when agreements overlap or conflict. The approach has been described by the Chief Justice and colleagues in an extra-judicial paper in a passage relating to overlapping contractual terms or in different documents recording the same transaction:⁶⁷

the court must read down the apparent scope or effect of one (or both) to resolve [the conflict]. Courts will usually try and make sure that some effect is given to each clause but sometimes that is not possible.

The court will only rule one instrument to be ineffective if an interpretation cannot give reasonable consistency to the terms.⁶⁸ Whether the BNZ's human rights policy and the *Code* are documents referring to 'the same transaction' stretches the language, but the principle is that the courts will try to interpret relevant instruments bearing on a contract consistently with each other. The interpretation here is given further weight by the unqualified pledge in the *Code* to treat customers "consistently". My conclusion is that, where CSR documents conflict, the Courts should try to give effect to both. This would allow soft law instruments to have more effect as regulating contracts. Giving effect to both would have required the Court to have reviewed the bank's decision to terminate the contract. The case reveals limitations in giving effect to soft law instruments. It shows that the effectiveness of stakeholder-oriented instruments is in the hands of firms, not stakeholders. One consequence is that assertions about the effectiveness of documents such as the *Code* and internal stakeholder policies are vulnerable to challenge under consumer protection legislation. Claims that either instrument is effective must not be misleading.⁶⁹ The case strongly supports a regulating contracts model in which stakeholder protection is founded in contracts, consumer protection and fair-trading rules, rather than in managerial discretion.

⁶⁷ Helen Winkelmann, Susan Glazebrook and Ellen France *Contractual Interpretation* (Paper prepared for the Asia Pacific Judicial Colloquium, Singapore, 2019) at [32] citing *Totara Investments Ltd v Crismac Ltd* [2010] NZSC 36, [2010] 3 NZLR 285.

⁶⁸ Helen Winkelmann, Susan Glazebrook and Ellen France, above n 67 at [33] n 56 citing *BG Checo International Ltd v British Columbia Hydro & Power Authority* [1993] 1 SCR 12 at [9].

⁶⁹ Fair Trading Act 1986, s 9.

4. Regulation of the description of 'sustainable finance'

This section continues the theme of investigating the effectiveness of context-specific CSR instruments. The example here is Europe's mandatory rules covering the way in which 'financial products' can be marketed as socially responsible. The rules are mandatory but leave discretion to firms about how to implement social responsibility aims.

The European "*Sustainable Finance Action Plan*" comprises regulations, directives and standards that aim to promote capital investment into 'sustainable' activities and standardise the way 'ESG' factors are integrated into risk management processes. The *Sustainable Finance Disclosure Regulation: Level 1 (SFDR)*,⁷⁰ introduced in 2021, provided for classification of financial products into those with environmental and social characteristics with no sustainability objective ('light green'),⁷¹ those with a sustainability objective ('dark green'),⁷² and all others.⁷³ Investment managers offering defined financial products such as investment funds must disclose how they take sustainability risks into account, their substantive risk assessments, the environmental and social characteristics of funds, the sustainability indicators used, principal adverse impacts (PAIs), and how well they "do no significant harm" (DNSH) to any environmental or social investment objectives. There is a process to explain whether any investments are aligned with the EU Taxonomy of environmental, social and sustainable investment objectives and characteristics.⁷⁴

Guidelines for the use of 'ESG' and sustainability-related terms in investment fund names were released in 2024, with a deadline to comply of May 2025. A European

⁷⁰ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317/1. [SFDR]. The *SFDR* can be contrasted with the *Corporate Sustainability Due Diligence Directive* [CSDDD] (Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L 1760), which is a directive affecting corporations not investment funds, and imposes due diligence duties on in-scope firms, requiring them to identify and mitigate human rights abuses and environmental impacts.

⁷¹ *SFDR*, above n 70, Article 8.

⁷² *SFDR*, above n 70, Article 9.

⁷³ *SFDR*, above n 70, Article 6.

⁷⁴ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198/13.

Securities and Markets Authority study found that two thirds of funds with 'ESG' terms in their names responded to the Guidelines by changing their names. More than half updated their investment policies.⁷⁵ Funds with higher exposure to fossil fuels were more likely to remove regulated sustainability and 'ESG' terms from their names. Funds retaining use of regulated terms in their names reduced their portfolio share of fossil-fuel holdings more than other funds. Passive index funds were much more likely to drop regulated terms. Those that changed policies were likely to make explicit references to exclusions and their screening methodologies. The study concluded that fund names were better aligned with investment strategies, and investors benefited from reduced greenwashing.

Significant issues and resource costs have been associated with identifying relevant sustainability indicators and timely data collection. Measurement of positive impacts and avoided negative externalities was seen as "non-trivial".⁷⁶ To be a 'sustainable investment', a fund must contribute to environmental or social objectives or not significantly harm any of those, but the minimum requirements that qualify as a "contribution" to the objectives are not defined. Funds carry out their own assessments and disclose their underlying assumptions.⁷⁷

The self-assessment approach has not been an unqualified success. The regulator, the European Securities and Markets Authority, has proposed phasing out the definition of "sustainable investments". It says market participants have too much discretion, which undermines the objective of being able to compare them in a transparent way and increases the risk of greenwashing.⁷⁸ A process of change has begun, which will place an EU Taxonomy at the core of the framework. The Taxonomy is a classification system that defines environmental activities and makes more allowance for 'transition

⁷⁵ European Securities and Markets Authority *Impact of ESMA Guidelines on the use of ESG or sustainability-related terms in fund names* Regulation (EU) 1095/2010 amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, Article 32 *Assessment of market developments, including stress tests* (Report on Trends, Risks and Vulnerabilities Risk Analysis, European Securities and Markets Authority Economics, Financial Stability and Risk Department, 17 December 2025).

⁷⁶ Vanessa Müller and Anna Illarionova "Sustainable Finance Disclosure Regulation: getting ready for 'level II' application" (EY, <ey.com>, 26 May 2023).

⁷⁷ European Securities and Markets Authority *Consolidated questions and answers (Q&A) on the SFDR (Regulation (EU) 2019/2088) and the SFDR Delegated Regulation* (Commission Delegated Regulation (EU) 2022/1288) (JC 2023 18, Joint Committee on Sustainable Finance, 4 November 2025).

⁷⁸ European Securities and Markets Authority *Sustainable investments: Facilitating the investor journey - A holistic vision for the long term* (ESMA Opinion, <esma.europa.eu>, 24 July 2024).

finance'. All funds would be required to disclose specific sustainability information, regardless of a fund's purpose.

The SFDR is an example of mandatory rules that leave a discretion to firms about how to implement socially responsible aims. The experience is a significant example of the uncertainties associated with defining CSR concepts (these are further discussed in Part B). My conclusion is that the SFDR demonstrates that a combination of mandatory disclosure, with voluntary *discretion* about whether to invest in certain activities, can change behaviour and potentially produce effective policy outcomes. However, discretion and voluntary *assessment* of terms such as 'ESG' and 'sustainable' may be unworkable in practice. The example of funds changing their names when use of CSR terms was regulated supports claims that CSR is presentational and window dressing. The attempt to regulate funds does not support the effectiveness of voluntary CSR assessment. There is mixed support for whether firmer regulation, closer to the model Beckers proposes, is substantively effective. Compliance costs appear high and it is too early to conclude whether disclosure rules are effective at changing underlying CSR behaviour.

5. Summarising examples in Part A.

The *Advertising Standards Code*, *NZX Recommendations*, *Gloriavale*, and the *SFDR*, are examples of a mix of voluntary and mandatory regulation for social responsibility. Voluntary discretion may have more force than appears on the face of the *NZX Listing Rules*. Disclosure requirements in the SFDR drove significant policy results, but discretionary self-assessment may be ineffective. Soft rule-like policy in a Code of Conduct may be less subject to predictability, scrutiny, and review, than black letter rules. Freedom of contract may conflict with and override the interests of stakeholders. The most effective instrument reviewed was the most prescriptive and enforceable: the *Advertising Standards Code*. 'Voluntary' or 'soft-law' regimes for considering the interests of stakeholders may not be transparent to stakeholders, while the mandate for implementing them is an under-developed area of attention. If the approach in the *Gloriavale* interlocutory application is followed, contractual discretion could become a mechanism to pick and choose social responsibilities and override published, voluntary social responsibility commitments. Mandatory rules potentially provide more transparency and predictability at the expense of flexibility.

B. Measurement

Theories about CSR and its limits depend to some extent on views about whether CSR is effective in changing the behaviour of firms and in promoting social responsibility outcomes. This chapter is concerned with that question. This part investigates effectiveness by looking into measurement of CSR and its marketing to the public. It shows that measurement is fundamental to the investment and funds management industry. This Part shows that CSR cannot reliably be defined with sufficient specificity to be measured. Content of CSR measurement is arbitrary and inconsistent. Since it can't be measured, CSR cannot be shown to be effective, whether effectiveness is defined as substantive social and environmental outcomes, financial or CSR performance of firms, or performance of investment motivated by CSR (sometimes called 'ethical' or 'ESG' investment.) The conclusion is that CSR cannot be shown to be effective for achieving substantive outcomes and CSR cannot be defended as more effective than regulation.

A substantial literature exists analysing the financial performance of firms with high CSR ratings compared to other firms. To review evidence about the performance of socially responsible firms and funds, it is necessary to identify what is being measured. There is no single, unambiguous, universally accepted measure of CSR and financial and economic performance. NZX *Guidance (ESG Guidance)* states that a definitive list of ESG issues does not exist and a list would not be possible or desirable because it would soon go out of date.⁷⁹ The *ESG Guidance* refers to 38 issues from the United Nations-supported *Principles for Responsible Investment (PRI)*⁸⁰ and advises firms to manage or balance issues by taking "a holistic view of how their business aligns" with them.⁸¹ If holistic alignment is somewhat meaningless, the *ESG Guidance* does not further clarify.⁸² The *ESG Guidance* also presents an example list of a dozen issues from the FTSE Russell process for "scoring environmental, social, and governance risk

⁷⁹ NZX *Guidance Note: NZX ESG Guidance* (NZX Limited, Wellington, October 2025) at 4 [*ESG Guidance*].

⁸⁰ *ESG Guidance*, above n 79 at 4, citing at 5 *The Six Principles for Responsible Investment* (Principles for Responsible Investment, New York, 2006).

⁸¹ *Guidance*, above n 79 at 5.

⁸² The alignment between this statement and the duty to act in the best interests of the business is also problematic.

and performance.”⁸³ FTSE Russell is one among many agencies providing competing ratings criteria.⁸⁴ Authors studying the ‘ESG variable’ use data and ratings provided by different agencies.⁸⁵ There are over 600 rating providers.⁸⁶ The purpose of ratings indices is to provide information to investors about firms so that fund managers can configure investment portfolios. A 2020 survey found that ‘ESG’ ratings are the most frequently referenced source of information that institutional investors rely on to gauge CSR performance.⁸⁷ Proprietary criteria are inconsistent between providers. Ratings firms use statistical methods, corporate reporting and proprietary tools to categorise or score firms.⁸⁸ Ratings disagree “to an extent that leaves observers with considerable uncertainty as to how good the company's ESG performance is.”⁸⁹ Sources of divergence in ratings include the set of attributes analysed, weightings of attributes, measurement,⁹⁰ and time scale. As the main tool used to measure CSR, ratings do not

⁸³ At 4. FTSE Russell’s model in fact uses 300 ‘ESG’ metrics.

⁸⁴ The ESG Guidance does not explain its choice of FTSE Russell’s selection of issues. It also describes the Principles for Responsible Investment (PRI) list of issues as “more comprehensive.” The list does not correspond to the six PRI principles.

⁸⁵ Andrea Tenucci, Sarfraz Nazir and Enrico Supino *Pitfalls in the ESG and corporate financial performance relationship: interpreting the existing literature* (Paper presented to 2nd EIASM Interdisciplinary Workshop on Sustainability and ESG Dynamics, Parma, Italy, 2025).

⁸⁶ Quinn Curtis, Jill Fisch and Adriana Robertson “Do ESG Mutual Funds Deliver on Their Promises?” (2021) 120 Mich L Rev 393 at 403. Large ratings providers cited by David Larcker et al “ESG Ratings: A Compass Without Direction” (*Stanford Closer Look Series*, Stanford Graduate School of Business, 2 August 2022) include FTSE Russell (London Stock Exchange Group and Financial Times), MSCI (which includes specialist ratings providers GMI Ratings and Carbon Delta), ISS ESG, Sustainalytics (Morningstar), Refinitiv (ThomsonReuters, London Stock Exchange Group), S&P Global, Vigeo Eiris (Moody’s Investor Services), HIP, and TruValue Labs (FactSet Research). The European Securities and Markets Authority found that the ESG rating providers most frequently mentioned by entities that use them were, in descending order: MSCI, followed by Morningstar/Sustainalytics, ISS, S&P, Moody’s/VE, Refinitiv, RepRisk, CDP and Bloomberg, FactSet/Truevalue Lab, EcoVadis, ICE and Carbon4Finance, and Maplecroft: European Securities and Markets Authority *Outcome of ESMA Call for Evidence on Market Characteristics of ESG Rating and Data Providers in the EU* (ESMA22-328-603, 24 June 2022).

⁸⁷ Other sources of information about CSR performance are direct company engagement, sustainability reports, in-house research, corporate filings, and media. (Larcker (2022), above n 86 at 4, citing SustainAbility, *Rate the Raters 2020: Investor Survey and Interview Results*” (March 2020) and Natalie Kenway “Investors ‘Overly Reliant’ on ESG ratings,” *ESG Clarity* online, <esgclarity.com>, 23 May 2022).

⁸⁸ For examples of methodologies, see the appendices in Larcker (2022), above n 86.

⁸⁹ Florian Berg, Julian F Kölbel and Roberto Rigobon “Aggregate Confusion: The Divergence of ESG Ratings” (2022) 26 Rev Fin 1315 at 1323.

⁹⁰ Berg, Kölbel and Rigobon, above n 89.

measure whether CSR activities affect *outcomes*. CSR ratings summarise issues as diverse as levels of greenhouse gas emissions, supply chain labour standards, and board and management diversity, into yardsticks. Ratings agencies have to make decisions or assumptions about criteria, and assign weightings to materiality across firms and industries. Some indices compare relative performance within industries while others are concerned with absolute metrics. This section argues that the process reduces moral decisions to mathematical algorithms, and retail consumers are unlikely to be informed about what is being measured or the content of investments offered under various CSR labels.

To see how issues relating to index composition and variables affect screening for CSR, consider United States Government Bonds. Over \$2 trillion was invested in treasury inflation-protected (TIPS) bonds in 2025 and most investment funds using ratings criteria will either use TIPS as cash deposits or use instruments that directly or indirectly base pricing for cash, debt and stocks on them.⁹¹ How is a ratings index, or CSR fund manager, to assess the social and environmental impact of lending to the United States government? It is contended here that an index cannot meaningfully assign a metric to government spending on arms, nor revenue earned from royalties and taxes on fossil fuels, gambling, and alcohol, to list some categories of metric that typical fund managers claim to screen.⁹² As another example, consider the composition of the FTSE4Good index.⁹³ The index in May 2025 was dominated by technology firms.⁹⁴ Setting aside the intrinsic qualities of those firms, there is cause for scepticism whether an index is genuinely selecting for the ethical qualities that a retail saver may assume when it was composed of 1850 firms, with a combined US\$51.4 trillion market capitalisation at May 2025 (about twice the gross domestic product of the United States).⁹⁵

Defining what is meant by CSR is inescapably inconsistent. The inevitability of inconsistency leads to persistent uncertainty in ratings classification. FTSE Russell's

⁹¹ BlackRock iShares *Mechanics of TIPS and TIPS ETFs* (BlackRock, New York, 2025), citing United States Treasury *Monthly Statement of the Public Debt*.

⁹² Not to mention 'involvement in public controversies.'

⁹³ An index measuring the sharemarket performance of firms selected according to proprietary environmental, social and governance criteria. FTSE Russell *FTSE4Good Index Series. Overview* (LSEG FTSE Russell, London, 2025).

⁹⁴ Microsoft Corp, Nvidia, Apple Inc, Alphabet, Broadcom and Taiwan Semiconductor Manufacturing were in the top 10 constituents. The others were financial firms Visa and Mastercard, and pharmaceutical firm Lily (Eli) & Co).

⁹⁵ FTSE Russell (2025), above n 93. 'Trillion' is used to mean a million multiplied by a million.

model uses 300 ESG metrics, Refinitiv uses 630. S&P Global analyses 1,000 data points.⁹⁶ One consequence of the significant scope for discretion about what counts as social responsibility and how to measure it is that studies find low correlation across ratings providers and within individual components. Disagreement between ratings rises when companies increase their disclosure.⁹⁷ A 10 per cent increase in corporate disclosure is associated with a 1.3 to 2 per cent increase in ESG score variation among major ratings providers.⁹⁸ Larcker (2022) comments, “This [dis-correlation] is perhaps surprising if ESG ratings are supposed to measure the same construct.”⁹⁹ Berg et al (2022) found that divergence is more pronounced in specific sub-categories than at the aggregate level. “Improving scores with one rating provider will not necessarily result in improved scores at another.”¹⁰⁰ Disagreement between providers is so severe that for some measurements, rating agencies reach not merely different but opposite conclusions even for categories that measure straightforward facts that are easily obtained from public records.¹⁰¹ In one infamous example, electric car manufacturer Tesla received a top ESG rating among automobile manufacturers from MSCI and a bottom ESG rating from FTSE Russell.¹⁰²

As lists of issues assessed in ratings criteria grow, the potential for conflict between the issues grows, the source of authority for weighting issues becomes more contestable, and absences from the list become more conspicuous. In *Principles for Responsible Investment* lists of issues cited by NZX’s *ESG Guidance*, issues such as fair prices, economic equality, and non-exploitation of private information do not appear.¹⁰³ The arbitrariness of issue-selection and materiality in ratings assessments can be seen in the example of cobalt. Cobalt is a critical element in lithium-ion battery technologies used

⁹⁶ Larcker (2022), above n 86 at 4.

⁹⁷ D Christensen, G Serafeim, A Sikochi “Why is Corporate Virtue in the Eye of The Beholder? The Case of ESG Ratings” (2022) 97(1) Account Rev 147.

⁹⁸ Kristen Senz “What Does an ESG Score Really Say About a Company?” (*Working Knowledge*, Harvard Bus Sch, 21 July 2021).

⁹⁹ At 6 citing Kevin Prall “ESG Ratings: Navigating Through the Haze” (CFA Institute Research and Policy Center, <rpc.cfainstitute.org>, 10 August 10 2021); and Elroy Dimson, Paul Marsh and Mike Staunton “Divergent ESG Ratings” (2020) 47 J Portf Manag 75.

¹⁰⁰ Berg et al (2022), above n 89 at 1326.

¹⁰¹ Berg et al (2022), above n 89 at 1327.

¹⁰² James Mackintosh “Is Tesla or Exxon More Sustainable? It Depends Whom You Ask” (Wall St J, online ed, 17 September 2018.)

¹⁰³ Above n 79.

in electric vehicles (as well as mobile phones).¹⁰⁴ Almost three quarters of the world's cobalt is mined in the Democratic Republic of the Congo.¹⁰⁵ Human rights abuses in cobalt production there include exploitation of tens of thousands of children as young as five years old.¹⁰⁶ Abuses in the supply chain continue,¹⁰⁷ despite the practice having been widely reported for a decade.¹⁰⁸ Comparable human rights issues have been claimed in aluminium production for vehicle manufacture.¹⁰⁹ In a 'Materiality Map' published by the Sustainability Accounting Standards Board,¹¹⁰ human rights and community relations are not assessed as material for 'auto parts' manufacturers. Exclusion means human rights and community relations may permissibly be excluded from consideration in the ratings of a car parts supplier.¹¹¹ Since materiality metrics exclude human rights from 'auto parts' manufacturing, CSR and ESG ratings will usually fail to screen for the cobalt issue. Corporates supplying cobalt-inclusive mobile phones have been conferred some of the highest ESG ratings. The example illustrates that issue selection is obviously contestable and ratings agencies' decisions about how to treat issues under a 'social responsibility' materiality mandate are little understood.

The example also shows that ratings are unsuitable for measuring real impact. They are susceptible to capturing 'greenwashing' behaviour (what companies say about their performance, rather than their substantive performance). "[I]nvestors focusing on high ESG-rated companies may unknowingly increase their greenwashing risk exposure, and academics may use misleading information to assess greenwashing risk."¹¹² NGOs working on supply chain certification report widespread use of ethical marketing claims

¹⁰⁴ Adamas Inside *Top 5 EV Makers by Cobalt Deployed in 2020* (<adamasintel.com>, Toronto, 19 March 2021).

¹⁰⁵ The Faraday Institution *Building a Responsible Cobalt Supply Chain* (2023) 7 Faraday Insights 1 (January 2023).

¹⁰⁶ Jocelyn Zuckerman "For Your Phone and EV, a Cobalt Supply Chain to a Hell on Earth" (*Yale Environment* 360, Yale School of the Environment, 30 March 2023).

¹⁰⁷ Or Salama *The current state of child labour in cobalt mines in the Democratic Republic of the Congo* (Humaniam, <humanium.org> 27 May 2025).

¹⁰⁸ Annie Kelly "Children as young as seven mining cobalt used in smartphones, says Amnesty" *The Guardian* (online edition, 19 Jan 2016).

¹⁰⁹ Human Rights Watch *Aluminum: The Car Industry's Blind Spot* (<hrw.org>, New York, 22 July 2021).

¹¹⁰ Part of the International Sustainability Standards Board, <sasb.org>.

¹¹¹ SASB Materiality Finder. <sasb.org/standards/materiality-finder>.

¹¹² Manuel Kathan and others "What you see is not what you get: ESG scores and greenwashing risk" (2025) 74 Fin Res Lett 106710.

based on weak evidence and flimsy certification.¹¹³ The issues are deeper than ‘greenwashing’ and ‘fairwashing’.¹¹⁴ Even with good intentions, ratings cannot satisfactorily assess materiality, the main stakeholders, or alignment of actions to serve stakeholder preferences.¹¹⁵ Porter, Serafeim and Kramer (2019) report the example of an ‘ESG scorecard’ that asked for the “volume of fossil fuels used”.¹¹⁶ It captured all of Walmart’s logistics fuel usage, but none of Amazon’s outsourced delivery.¹¹⁷ Walmart has more control over its distribution model and therefore its total carbon footprint. The question captured a business model, not ‘fossil fuel’ usage related to purchases, and may have been misleading because carbon intensity of purchases is significant in the final part of the product journey from retailer to home. Fuel usage is therefore dependent on the number of items a shopper buys at once. Customers shopping in-store tend to purchase more items, reducing the incremental carbon footprint per item.¹¹⁸ The example shows that how ratings metrics are measured contains hidden and potentially arbitrary assumptions about what is measured.

When data required for assessments is not available or reported in different ways, ratings agencies need to adopt techniques and policies to fill in the gaps. Approaches differ across decision-makers. MSCI deals with missing data by assuming the industry average. FTSE chooses to incentivise disclosure by assuming performance is the worst in the peer group. Others use statistical techniques.¹¹⁹ Methodological choices change (“data rewriting is an ongoing rather than a one-off phenomenon”), leading to large swings in ratings and examples of firms with high scores achieving higher than average ratings in rewritten data but not in the original.¹²⁰ Divergent ratings can confuse if consumers and fund managers do not understand what is being measured or the difference between business models. The chief executive of one major ratings provider,

¹¹³ Fairtrade Australia and New Zealand *Making sense of fair claims: Fairtrade, fair trade, direct trade & fairwashing* (<fairtradeanz.org>, Fitzroy, Victoria, 4 December 2025).

¹¹⁴ The term is from Fairtrade Australia and New Zealand (2025), above n 113.

¹¹⁵ Lisa Hehenberger and Chiara Andreoli “Impact measurement and the conflicted nature of materiality decisions” (2024) 68 *Curr Opin Environ Sustain* (Article 101436).

¹¹⁶ Michael Porter, George Serafeim and Mark Kramer “Where ESG Fails” *Institutional Investor* (online ed, 16 October 2019).

¹¹⁷ Walmart and Amazon are by some distance the two largest retailers in the world by revenue: *National Retail Federation NRF Top 100 Retailers 2025* (<nrf.com>).

¹¹⁸ Porter, Serafeim and Kramer (2019), above n 116 at 7.

¹¹⁹ Larcker (2022), above n 86 at 5.

¹²⁰ Larcker (2022), above n 86 at 5.

MSCI, has acknowledged that investors, “have no idea that his ratings, and ESG overall, gauge the risk the world poses to a company not the other way around.”¹²¹

Funds depend on ratings to configure portfolios. The examples above demonstrate that issues about classification, data uncertainty and materiality (or relevance) are fundamental and intrinsic to ratings. It is unlikely a retail investor will understand the full implications and what claims about CSR measurements mean.

More than 20 stock exchanges around the world have pledged to introduce guidance on sustainability reporting as part of the Sustainable Stock Exchanges Initiative.¹²² It is not clear that regulation can remove uncertainty in classification of CSR activity, however regulation does make the source of authority for decisions transparent and accountable. The European Sustainable Finance Disclosure Regulation [*SFDR*] defined CSR terms in regulation.¹²³ Its purpose was that funds would “attract significant interest and stand out to investors by using sustainability or ESG-related terms in their names.”¹²⁴ As described in Part A, above, the SFDR proposes to change to an approach of requiring disclosure of sustainability information under a sole, common reference point (“EU Taxonomy Regulation”).¹²⁵ The global benchmark for corporate reporting, the International Financial Reporting Standards Foundation (IFRS), has introduced IFRS Sustainability Disclosure Standards.¹²⁶ IFRS S1 was adopted in January 2024. It requires an entity to disclose information about sustainability-related risks that affect the entity’s cash flows, its access to finance, or cost of capital.¹²⁷ In New Zealand, the External Reporting Board (XRB) has delegated to the Sustainability Reporting Board

¹²¹ Cam Simpson, Akshat Rathi, and Saijel Kishan “The ESG Mirage” *Bloomberg BusinessWeek* (online ed, 10 December 2021).

¹²² Daniel Meech and Tom Bayliss *International Developments in Sustainability Reporting* (Occasional Paper, Ministry of Business, Innovation and Employment, 2021) at 22.

¹²³ Regulation (EU) 2019/20881 on sustainability-related disclosures in the financial services sector.

¹²⁴ At [2.1.1].

¹²⁵ European Securities and Markets Authority *Sustainable investments: Facilitating the investor journey - A holistic vision for the long term* (ESMA Opinion <esma.europa.eu> 24 July 2024).

¹²⁶ *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information* (International Sustainability Standards Board, London, 2025). The standards are developed by the International Sustainability Standards Board (ISSB).

¹²⁷ IFRS Foundation *IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information* (IFRS Sustainability Standards Navigator, <ifrs.org>, 2025). Disclosures include governance processes, controls and procedures, strategy for managing sustainability-related risks, processes to identify, assess, prioritise and monitor risks, and performance in relation to related risks, including progress towards any targets the entity itself has set, or required by law. IFRS S2 sets similar standards for disclosures of information about climate-related risks.

the authority to issue non-binding guidance about climate-related disclosures and non-financial reporting, defined as “reporting which describes the economic, environmental, social, and cultural impacts of an entity’s activities.”¹²⁸ In addition to the Sustainability Reporting Board’s activity, a 2021 study found over 30 ‘work streams’ involving New Zealand agencies related to ‘sustainable’ finance.¹²⁹ (Many have since concluded.) An example of a “voluntary conceptual reporting framework” is *He Tauira*,¹³⁰ which aims to supplement formal reporting requirements and facilitate reporting in which entities articulate “their long-term intergenerational impacts on people and the planet.”¹³¹ It is intended for “the perspectives and needs of Māori reporting entities.”¹³² *He Tauira* uses concepts from te ao and mātauranga Māori and the metaphor of the wharenui¹³³ to capture ideas of interconnectedness, intergenerational thinking and decision-making aligned with the entity’s values. Although adoption of *He Tauira* is voluntary, an entity using *He Tauira* must also comply with relevant reporting regulations. One legal effect is that directors have a formal shield if they adopt techniques and mechanisms *He Tauira* describes; a director deploying the concepts can point to the document as a standard for exercising their powers for a proper purpose,¹³⁴ and performing their duties with the care, diligence, and skill of a reasonable director.¹³⁵

¹²⁸ The Financial Reporting Act 2013 s19A provides for the External Reporting Board to issue non-binding guidance relating to non-financial reporting. The Sustainability Reporting Board also provides advice to the parent on international trends and standards, including the Task Force on Climate-related Financial Disclosures and Global Reporting Initiative.

¹²⁹ Including Council of Financial Regulators’ climate and financial inclusion workstreams, work on green bonds by the Financial Markets Authority, Bank of International Settlements Green Bonds, a climate-related work stream at the Reserve Bank of New Zealand, participation in the International Organisation of Securities Commissions Sustainable Finance Network, a Sustainable Agriculture Finance Initiative, Department of Internal Affairs Impact Initiative, UN Environment Programme Sustainable Finance Forum and Aotearoa Circle Sustainable Finance Forum. (Ministry of Business, Innovation and Employment (2021) above n 122 at 12).

¹³⁰ External Reporting Board *He Tauira* (External Reporting Board, Wellington, 2025).

¹³¹ John Kensington and Joe Hanita “He kupu whakataki | Foreword” *He Tauira* (2025), above n 130 at 2.

¹³² *He Tauira*, above n 130 at 8.

¹³³ Communal house on a marae. “Te ao” and “mātauranga Māori” translate as worldview and knowledge. (John C Moorfield *Te Aka: Māori-English, English-Māori Dictionary and Index* (new expanded ed, Pearson, Auckland, 2011.)

¹³⁴ Companies Act 1993 s 133.

¹³⁵ Companies Act 1993 s 137.

a. The measurement problem for the CSR business case

Examples above illustrate a range of regulatory efforts to define, influence and regulate aspects of the interface between CSR, regulation and capital markets. Where different results are obtained depending on which measurement variables are used, a problem is created for empirical research comparing the performance and financial results of firms to their degree of social responsibility. Comparison is further complicated by selected timeframes for comparison, and by variable approaches to accounting or market-based financial measures. What is being measured can vary between profitability, stock price, volatility, risk, or some other variable and estimates of future earnings.¹³⁶ Uncertainty about substantive performance is incompatible with claims that investors can ‘do well by doing good’ or that “Social responsibility and sustainable profit go hand in hand.”¹³⁷ It is argued here that it is not knowable with reasonable certainty whether CSR improves returns, reduces them, or makes no difference. Claims about performance depend on contestable assumptions and evaluation criteria. The importance of this point is that, if the connection between CSR and financial performance is broken, then the instrumental justification for CSR is flawed. CSR might be in the interest of other stakeholders and defensible in a social entity conception of the firm, but the concern here is the consequence of interventions based on the view that, *ceteris paribus*, financial returns are improved through CSR.

The ‘business case for CSR’ is that a firm can enhance its value by pursuing policies and activities thought to be beneficial to society and the environment that go beyond the minimum standards of conduct required by general law.¹³⁸ In 2007, Campbell and Vick studied the average performance of ethical funds between June 1998 and June 2003. The performance of the funds self-described as ethical was found to be “inferior to the performance of the UK Stockmarket as a whole (represented by the FTSE All Share Index) and to non-ethical funds, whether measured as a one-year, three-year or

¹³⁶ Aswath Damodaran *The Dark Side of Valuation: Valuing Young, Distressed, and Complex Businesses* (2nd ed, FT Press, Upper Saddle River (NJ), 2015).

¹³⁷ Among a large literature making this claim, see AB Carroll and KM Shabana “The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice” (2010) 12 Int J Manag Rev 85; Simon Zadek *Doing Good and Doing Well: Making the Business Case for Corporate Citizenship* (The Conference Board Research Report, New York, 2000) 1282; and Jan Mischke, Lola Woetzel, and Michael Birshan *The necessity of doing well by doing good* (McKinsey Global Institute, 12 April 2021).

¹³⁸ This ‘business case’ was outlined in chapter III.

five-year investment.”¹³⁹ However, they observed that ethical funds had greater risk because there were fewer firms included in the index. Correcting for that greater risk may be problematic since “ethical funds typically are not well diversified and are subject to the confounding effects of ‘small firm’ bias.”¹⁴⁰ Comparing the performance of individual ethical *firms* (that is, not the performance of funds holding the companies), the authors found that evidence of weaker performance was not statistically significant. The inference is that funds composed of high-performing companies with high ethical ratings may not outperform, but some individual companies with high ratings may do. Other research has demonstrated outperformance by investment indices designed to track the performance of companies by screening according to CSR criteria. The FTSE4Good All-World Index¹⁴¹ showed a 5-year rate of return of 99.3 per cent, or 14.8 per cent per annum, compared to 91.5 per cent or 13.9 per cent per annum for the FTSE All-World Index,¹⁴² albeit with a slightly higher volatility.¹⁴³ Overall, the evidence of a link between CSR ratings and performance is mixed. A literature review of over 1,100 peer-reviewed papers and meta-analyses on ‘ESG’ and ‘sustainable’ investing concluded that the financial performance of CSR investments on average was indistinguishable from conventional investing.¹⁴⁴ Ratings firms marketing their ratings, and funds marketing investment products, are incentivised to report favourable results and suppress unfavourable ones. Two studies found that indices created by ratings firms

¹³⁹ Kevin Campbell and Douglas Vick “Disclosure Law and the market for corporate social responsibility” in Doreen McBarnet (ed) *The New Corporate Accountability. Corporate Social Responsibility and the Law* (Cambridge University Press, Cambridge, 2007) at 261 and 275.

¹⁴⁰ Campbell and Vick (2007), above n 139 at 276.

¹⁴¹ FTSE Russell *FTSE4Good Index Series. Overview* (online, 2025). Above n 197.

¹⁴² A comparable index of 4225 firms in which no screen was applied.

¹⁴³ Volatility is sometimes used as a proxy for inherent risk in the index. Returns calculated by FTSE Russell and not reviewed for a selective timeframe bias.

¹⁴⁴ Ulrich Atz and Others “Does Sustainability Generate Better Financial Performance? Review, Meta-analysis, and Propositions” (2023) 13 J Sust Fin Invest 802. But see Florian Berg et al, “ESG Confusion and Stock Returns: Tackling the Problem of Noise” (NBER Working Paper No 30562, 2022), which finds evidence of improved performance in analysis across multiple firms. Further mixed evidence cited by Larcker (2022), above n 86, includes: Ravi Bansal, Di (Andrew) Wu and Amir Yaron “Socially Responsible Investing in Good and Bad Times” (2022) 35 Rev Fin Stud 2067; Elizabeth Demers and others “ESG Didn’t Immunize Stocks During the COVID-19 Crisis, But Investments in Intangible Assets Did” (2021) 48 J Bus Fin Acc 433; and Florencio Lopez-de-Silanes, Joseph McCahery and Paul Pudschedl “ESG Performance and Disclosure: A Cross-Country Analysis” (2019) SSRN Working Paper No 481/2019.

outperformed prior to launch, only to underperform after their launch dates, possibly because they are created by back-testing that is not valuable for prediction.¹⁴⁵

b. CSR measurement and risk

There is weak evidence in the literature that the stock prices of firms with the poorest CSR ratings are more volatile than stocks with the highest ratings. This may mean that CSR ratings provide a measure of the riskiness of securities that is complementary to traditional statistical risk models.¹⁴⁶ Risk to the investor, in this context, is relative risk compared to other potential investments. It does not capture potential risks that are being externalised to wider society, a concept pertinent to CSR.

Consider the concentration of capital into the four largest firms in the FTSE4Good index,¹⁴⁷ which were the four largest firms in the world by market capitalisation in 2025. In 2024 and 2025, the combined market capitalisation of Nvidia, Apple, Microsoft and Alphabet increased by US\$7.3 trillion.¹⁴⁸ To put the colossal scale of the value increase in perspective, the first ever trillion-dollar valuation was reached only in 2018. It is possible that the size of the firms is less an outcome of their CSR characteristics than that they are technology businesses at a time of historic, economy-wide reallocation of capital into information technology. Part of the increase in value may have been the four stocks' inclusion in large, passive index funds, with increased demand for passive indices driving up stock prices. Perhaps demand has increased partly because of their inclusion in the FTSE4Good index, so that as more investors seek socially responsible investments, the more the price of those investments rise and concentrate capital valuations.¹⁴⁹ Whatever the cause, the increase has been so large and so rapid that some experts describe the valuations as a 'bubble'¹⁵⁰ that could lead to losses equivalent to roughly 70 per cent of American gross domestic product and a

¹⁴⁵ Larcker (2022), above n 86 citing Michael Schröder "Is There a Difference? The Performance Characteristics of SRI Equity Indexes" (2007) 34 J Bus Fin Acc 331 and Elroy Dimson, Paul Marsh and Mike Staunton "Divergent ESG Ratings" (2020) 47 J Portf Manag 75.

¹⁴⁶ Larcker (2022), above n 86 Citing Jeff Dunn, Shaun Fitzgibbons and Lukasz Pomorski "Assessing Risk Through Environmental, Social and Governance Exposures" (2018) 16 JOIM 4.

¹⁴⁷ FTSE Russell (2025), above n 93.

¹⁴⁸ Data sourced from Nasdaq (Nasdaq, <nasdaq.com>, as at 1 February 2026).

¹⁴⁹ It is conjectured here that stakeholder governance played no measurable role in their value accretion.

¹⁵⁰ Itay Goldstein "Is there an AI bubble and what happens if it bursts?" (In Nathi Magubane (ed), *Penn Today*, 16 December 2025).

further 20 per cent of global gross domestic product.¹⁵¹ Whether or not there is a ‘bubble’ and whether or not a stock market price correction occurs, the change in valuation creates a financial risk. The *risk* is an externalised cost because it has real world consequences even if a correction does not mature. More prudent or risk averse investors shift savings to reduce stock market exposure at the potential cost to their returns and retirement savings. If there were a market correction, then the effects on the real economy would be an externality. Herding investment into a very few enormous corporates with extreme valuations concentrates capital investment at a cost to wider society, including reduction in capital available to other firms. There could be few more potentially impactful examples of externalisation of costs to the rest of the world from financial investments. Costs are externalised to wider society even from within funds and indices designed to bring about socially responsible outcomes. It is open to an investment strategy motivated by social concern to adopt an alternative policy that excludes assets that pose a globally externalised risk.

c. Social and environmental impact

Relative financial performance of CSR is determined by the composition of ratings indices and the definitions used but discussion above shows that the compositional boundaries of ratings are arbitrary. Where a firm aims to deliver social and environmental outcomes even at the cost of returns, then the relevant measurement is not financial performance but the relative impact of its investment. In this section we will see that the issue is acute for investment funds in particular.

The Responsible Investment Association Australasia states that it “is dedicated to ensuring capital is aligned with achieving a healthy society, environment and economy.” That claim of member funds’ intentions can be compared to the practice of the industry. The evidence is that fund managers offer responsible funds for the market opportunity rather than for ‘healthy society, environment and economy’. This was demonstrated in *Australian Securities and Investments Commission v Vanguard Investments Australia (Vanguard)*. The case was about ‘greenwashing’ the substantive compliance of Vanguard’s ethical investment funds, which were found to be not robustly compliant with relevant standards.¹⁵² The relevance here is that the case disclosed the motivation for offering ethical investment funds was not the social impact.

¹⁵¹ Gita Gopinath “Gita Gopinath on the crash that could torch \$35trn of wealth” (*The Economist* 15 October 2025)

¹⁵² *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd (No 2)* [2024] FCA 1086. [*Vanguard*].

It was the business value to the fund manager.¹⁵³ Vanguard is one of the world's largest fund managers.¹⁵⁴ The evidence that it was pursuing a market opportunity rather than impact on society, the environment and the economy aligns with the comments published in 2021 by Tariq Fancy, a former chief investment officer for sustainable investing at another of the world's largest investment managers, BlackRock.¹⁵⁵ He stated that sustainable investment funds are profitable for fund managers because they earn higher fees than non-CSR products and investor interest is rapidly growing, but claims of outperformance are motivated by the financial incentives for fund managers and researchers: "[T]here's always money to be made from telling people what they want to hear," he said.¹⁵⁶ The Vanguard and BlackRock evidence shows that CSR funds are marketed on the basis that they earn superior financial returns. The research presented in this section shows that those claims of outperformance cannot be verified. Where fund managers also make claims about the *social* effectiveness of funds, that does not appear to be a genuine motivation (at least at two of the world's biggest fund managers), and also cannot be verified.

Fancy (2021) says the 'theory of change' of CSR-focused financial products is that funds own less of polluters and fewer shares in firms rated low on CSR indices, so investment into CSR-funds aggregates into market divestment.¹⁵⁷ But the theory is flawed, he argues, because ten per cent of the market not buying a firm's stock is not the same as ten per cent of customers not buying a firm's product. If a fund manager divests from a stock, others who are happy to own it would bid up the price to a fair value. In contrast, consumer boycotts "always matter" for firms with slim profit margins

¹⁵³ *Vanguard* [47 (d)].

¹⁵⁴ Vanguard's Ethically Conscious Fund had 959 investors at 16 February 2021 and the value of the funds under management was in excess of \$1.1 billion. (*Vanguard* at [46]); Emma Dunkley "Vanguard passes \$1tn in assets outside US" *Financial Times* (London, 25 January 2026).

¹⁵⁵ BlackRock owns more than 5 per cent of all companies traded on the S&P 500, an index of the 500 largest United States firms by market capitalisation.

¹⁵⁶ Tariq Fancy *The Secret Diary of a Sustainable Investor* (<medium.com>, 21 August 2021). Mr Fancy's post was widely re-published in financial media and business schools, including *The Economist* magazine (Tariq Fancy "Tariq Fancy on the failure of green investing and the need for state action" *The Economist* (online ed, London, 4 November 2021)); the *Financial Times* (Patrick Temple-West and Kristen Talman "The whistleblower who calls ESG a deadly distraction" *Financial Times* (online ed, London, 13 August 2021)), and the *Wall Street Journal* (William Power "Does Sustainable Investing Really Help the Environment?" *Wall Street Journal* (online ed, New York, 7 November 2021). See also Lori Butterfield "Tariq Fancy on Why We Need to Pull the Moral Cloak of Responsibility Away from Business" *Stanford Business Corporations and Society Initiative*, (video interview, <casi.stanford.edu>, 15 February 2023).

¹⁵⁷ Fancy, above n 156.

and high fixed costs. Evidence supporting the theory can be found in Berk and van Binsbergen (2025), who estimate that CSR divestment has a negligible impact on the cost of capital for targeted firms.¹⁵⁸

The competing theory is that investment in highly rated stocks reduces the cost of capital for those firms and increases the relative cost of capital for low-rated firms, which should result in more ‘good’ firms and economic activity and less ‘bad’. There is evidence that market premiums increase and demand for stocks declines when there is greater uncertainty about CSR performance.¹⁵⁹ The risk-adjusted investment performance of portfolios that exclude fossil fuel production companies does not significantly differ from unrestricted portfolios, and divesting from fossil fuel production does not result in financial harm to investors.¹⁶⁰ However, evidence has been reported that divestment campaigns have not been successful in inflicting significant economic damage on firms involved in the coal, oil and gas industries, although they have been successful in mobilising public opinion against them.¹⁶¹ (The point is directed at the financial consequence, not the value of activism.) Berk and van Binsbergen (2025) conclude that, instead of divesting, ‘socially conscious’ investors should invest and exercise their rights of control to change corporate policy.¹⁶² The difficulty is the assumption of the content of ethical and socially-conscious outcomes. Assume that investors attempt to achieve change by pooling their investment into an ethical activist fund, which has the purpose of positively influencing stakeholder impacts. How would the ethical activist fund calculate the share of value that will be attributable to those stakeholders versus investors? Even if the pooled investment fund could discern the common intention of investors into it, how is it to mediate between stakeholders? May a CSR-oriented ethical investment firm reject a value-enhancing offer for its shares in a takeover from a purchaser that is known to disfavour the social and environmental policies that caused the fund to invest? The judgement involved cannot be said to be objective. An example of the difficulty of mediating between

¹⁵⁸ Jonathan Berk and Jules van Binsbergen “The Impact of Impact Investing” (2025) 164 *J Financ Econ* 103972.

¹⁵⁹ See Larcker (2022), above n 86, citing Doron Avramov and others “Sustainable Investing with ESG Rating Uncertainty” (2022) 145(2) *J Financ Econ* 642.

¹⁶⁰ Auke Plantinga and Bert Scholtens “The financial impact of fossil fuel divestment” (2021) *Climate Policy* 107.

¹⁶¹ Berk and van Binsbergen, above n 158; T Hansen and R Pollin “Economics and climate justice activism: assessing the financial impact of the fossil fuel divestment movement” (2020) 80(4) *Rev Soc Econ* 423; and Laura Thomas-Walters and others “The impacts of climate activism” (2025) 63 *Curr Opin Behav Sci* 101498.

¹⁶² Berk and van Binsbergen (2025), above n 158.

stakeholder preferences has been political pressure on Norway's sovereign wealth fund, the world's biggest, to end exclusion of defence companies such as Boeing, Airbus, Lockheed Martin, and Honeywell from its investment universe. Critics assert that it is hypocritical for a Nato member to be restricted from buying stock in companies from which it buys defence equipment.¹⁶³ It is contended here that the judgement involved will be indistinguishable from a choice determined by the fund manager's appetite for controversy, and that is an issue relevant to the fund managers' interest in the fund and not the fund investors' appetite for impact.

A responsible investment fund has limited tools for selecting out companies that have exposure to claims from stakeholders. As has been demonstrated above, ethical ratings do not measure impact. Firms with the least exposure to claims from stakeholders will be likely to be those that most disaggregate production, especially to entities and jurisdictions veiled from scrutiny. The outcome will be that capital-light, disaggregated firms, such as those in software and those that outsource production will be preferred by responsible investment funds, and if they consequently have a lower cost of capital it will arguably not be because they are intrinsically more responsible firms. There is evidence that larger, capital-light firms receive higher CSR ratings.¹⁶⁴

This chapter demonstrated that effectiveness of CSR, and of standards or policies, is not a convincing explanation for why some topics are associated with social responsibility rather than others. This Part found CSR cannot reliably be defined with sufficient specificity to be measured. Uncertainty about the content of CSR is not incidental, but a defining characteristic. Measures are so intrinsically flawed that questions about whether it substantively adds value to firms cannot be answered. Selection of issues within ratings processes is not transparent and reflect proprietary assessments of risks to firms, not investors' preferences for ethical or socially responsible outcomes. Neither theory nor evidence provides convincing support for claims that corporate social responsibility is effective at bringing about positive social and environmental results.

¹⁶³ Richard Milne "Norway urged to drop 'crazy' ban on investment in defence companies" *Financial Times* (online ed, London, 30 March 2025). See also Mari Novik, Mary McDougall and Harriet Agnew "Asset managers race to set up European defence funds" *Financial Times* (online ed, London, 30 March 2025).

¹⁶⁴ Larcker (2022), above n 86, at 5.

Chapter VIII

Reviewability

1. Introduction

The focus of this chapter is the circumstances in which shareholders can review a firm's decision to undertake CSR activities that cost the firm value, or stakeholders can seek review of a decision that affects their interests. Judicial review of a firm's decisions is a wide-ranging topic.¹ Restrictions on justiciability and reviewability of corporate decisions are an awkward fit with activity conducted for public purposes. Other entities operating in public policy, such as branches of executive government and charities, must work within constraints in law that limit freedom of action. In general, public law constrains the exercise of public powers to the purpose for which the power is given. It would be perverse if firms were the only class of entity excluded from constraints on the exercise of powers in the public realm. A former Chief Justice, writing extra-judicially, has strongly supported the view that private law is as amenable to review as public law, stating that "legality, reasonableness and fairness in the conduct of public functions may be sought in judicial review by anyone with standing."² The common law always pays close attention to power and its abuse wherever it is found.³

The supervisory jurisdiction is concerned with discretion—with the choices legitimately available to those whose conduct may affect the rights of others. When reasonableness or other standards are preconditions for liability under statute or common law, the court is undertaking essentially the same supervisory function as in the case where it holds those exercising public powers within bounds that are reasonable. These essentially supervisory standards are applied throughout the private law actions with which the law of obligations is concerned.

The heart of the law of obligations is the facts that bring the obligation into existence. "Upon what facts do obligations arise? Or, synonymously, what are their causative events?"⁴ The relevance here is that there is a strong argument that the courts will not stay out of judicial review of corporate activity simply because of the form of entity.

¹ See generally James Farmer KC "The Interaction of Public and Private Law" 30 *NZULR* 359.

² Sian Elias "Public Actors and Private Obligations – a Judicial Perspective" (Speech to the University of Hong Kong Faculty of Law Obligations VII Conference, Hong Kong, 18 July 2014).

³ At 8.

⁴ Elias (2014), above n 2 at 15, citing Peter Birks "Definition and division: a meditation on Institutes 3.13" in P Birks (ed) *The Classification of Obligations* (Oxford University Press, Oxford, 1997) at 17.

Their concern is abuse of power. This will usually operate to limit the ability of firms to offload costs as externalities on others in the community. Chief Justice Elias also summoned Cooke P's extra-judicial comment to the effect that the more an activity has public effects, the more amenable it will be to judicial review.⁵

2. When the Court will decline to intervene in business decisions

In *Hutton v West Cork Railway Co*, the Court invalidated an ex gratia payment to staff and directors after the firm had been sold and ceased business. There could be no rational benefit to the company:⁶

The law does not say that there shall be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

Where there is a rational connection courts will not intervene in directors' judgment of a firm's interests and spending will not be subject to second guessing by the courts. See *Carlen v Drury*: "This Court is not to be required on every Occasion to take the Management of every Playhouse and Brewhouse in the Kingdom."⁷ Shareholders and creditors seeking judicial review of a boardroom decision face an "uphill task."⁸ Authorities have held that, save for disloyalty, courts will not review shareholders' or directors' decisions. Directors are not required to give reasons for their decisions or consider relevant matters. They may be liable for failing to exercise due care and skill if their decisions cause financial damage, "but such liability is unconnected with judicial review."⁹ Authorities where courts have said they will not intervene include *Burland v Earle*, where the Privy Council held that:¹⁰

It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.

⁵ At 16, citing Sir Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46 at 70.

⁶ *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 (CA) at 673. See also *Parke v Daily News Ltd* [1962] Ch 927, where ex gratia payments to employees made redundant when the business was sold were ultra vires because they were not made for the benefit of the company.

⁷ *Carlen v Drury* (1812) 1 Ves and B 149 at 158.

⁸ D Tompkins "Directing the Directors: The Duties of Directors under the Companies Act 1993" (1994) 2 *Waikato L Rev* 13.

⁹ Peter Watts *Directors' Powers and Duties* (3rd ed, LexisNexis, Wellington, 2022) at 5.5.2.

¹⁰ *Burland v Earle* [1902] AC 83 (PC) at 93. See also *Percival v Wright* [1902] 2 Ch 421: directors owe their duties to the company, not to individual shareholders or other constituencies.

In *Nicholson v Permakraft*, Cooke P in the Court of Appeal advanced a more qualified doctrine, that directors have “a legitimate sphere of discretion”:¹¹

Given good faith and a decision which could reasonably be regarded as in the interests of the company as a whole and not likely to cause loss to the creditors, the matter was one for the directors, not the Court.

A standard of reasonable regard for the interest of the company introduces a question of whether decisions may be challenged where they are not reasonably in the interests of the company. The principle that courts will not disturb directors’ bona fide exercise of a discretion was expanded in the British Columbia Supreme Court in a takeover case, *Teck v Millar*, to include consideration of the interests of employees, creditors, consumers, governments, and the environment.¹² *Teck v Millar* was cited approvingly by the Supreme Court of Canada in *Peoples Department Stores Inc v Wise*,¹³ in a decision Professor Watts has criticised for being “slightly reasoned.”¹⁴ In *BCE Inc v 1976 Debentureholders*, Canada’s Supreme Court explicitly endorsed the principle that firms will not be reviewed for considering stakeholder interests.¹⁵ *Teck v Millar* was distinguished in *Howard Smith v Ampol Petroleum Ltd*, of which more below, on the reasoning that *Teck v Millar* concerned best interests but in *Howard Smith v Ampol Petroleum Ltd* the decision involved the use of powers for a proper purpose.¹⁶

Two recent United Kingdom cases have rejected challenges to directors’ decisions. In *McGaughey v Universities Superannuation Scheme*, beneficiaries of a retirement income scheme sued for failing to have a credible plan to divest investments from fossil fuels.¹⁷ There was a similar outcome in a shareholder derivative claim in *ClientEarth v Shell*.¹⁸ The cases have limited applicability to New Zealand because they were decided on the United Kingdom companies statute and the court’s assessment that other remedies were available. The courts confirmed that corporate decisions about how to respond to climate risk fall within boards’ statutory discretion under the United

¹¹ [1985] 1 NZLR 242 (CA).

¹² *Teck Corp v Millar* (1973) 33 DLR (3d) 288 (BCSC).

¹³ [2004] 3 SCR 461.

¹⁴ Peter Watts *Directors Powers and Duties* (3rd ed, LexisNexis, Wellington 2022) at 5.7.

¹⁵ *BCE Inc v 1976 Debentureholders* [2008] SCC 69. The approach was subsequently codified in Canada’s companies statute.

¹⁶ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC) at 832.

¹⁷ *Lawrence Ewan McGaughey & Anor v Universities Superannuation Scheme Limited & Ors* [2023] EWCA Civ 873.

¹⁸ *ClientEarth v Shell plc* [2023] EWHC 1897 (Ch).

Kingdom's *Companies Act 2006*. The relevance is the use of derivative claims to drive boards' climate-related decision-making, and the judicial statement on the limits of litigating climate issues and compelling CSR through company law mechanisms. (In New Zealand, the Supreme Court in *Smith v Fonterra* was prepared to accept private law liability for climate change, but in tort not as a derivative action.¹⁹ The tort action has subsequently been overridden by legislation.)²⁰

Claims by *stakeholders* to compel social responsibility have not been successful in New Zealand even where there is a statutory provision stating that the firm must be socially responsible. In *Auckland Electric Power Board v Electricity Corp of NZ Ltd* the Court of Appeal held that a statutory provision requiring a state-owned enterprise to exhibit a sense of social responsibility was unenforceable by judicial review or civil action.²¹ The provision reads:²²

4 Principal objective to be successful business

(1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be—

(a) as profitable and efficient as comparable businesses that are not owned by the Crown; and

(b) a good employer; and

(c) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

The Court said the provision did not confer power “in any true sense” because language such as “having regard to” the interests of the community in which a firm operates was “not expressed in the conventional language of obligation.”²³ The decision was criticised by the late Professor Taggart, who pointed out there was no support in the statute for the single-minded pursuit of profit without regard to social costs. The “*principal*” objective was to operate as a successful business. “If Parliament had

¹⁹ *Smith v Fonterra* [2024] NZSC 5.

²⁰ Climate Change Response (Tort Liability) Amendment Act 2026.

²¹ *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd* [1994] 1 NZLR 551 (CA) at [11].

²² State-Owned Enterprises Act 1986, s 4(1)(c).

²³ At [15].

intended it to be the sole objective it could have easily said so.”²⁴ His approach was not accepted and the decision of the Court of Appeal was affirmed at the Privy Council.²⁵ The case turned on statutory interpretation and the Courts’ view that disputes should have been addressed between the parties in contract law, not judicial review. By analogy, general companies would be no more susceptible to review to require them to consider stakeholders. The reasoning is relevant: the Court pointed to the subjectivity involved in weighing business decisions as a reason to avoid making social responsibility justiciable. Although critical of the Court of Appeal’s reasoning, Taggart agreed that “the inability of the commentators to agree on virtually anything in the CSR debate” meant that, if social responsibility is a mandatory consideration, assessments of “weight or the balancing of interests” should not be justiciable “unless the limits of reason are exceeded.”²⁶

3. When the Court will intervene in business decisions

In *Hedley v Albany Power Centre* Wild J said courts would review whether the process by which directors reached a decision was adequate.²⁷ The case does not allow review of the substantive merits of the choice made between properly identified and assessed options. The judgment is authority that directors will fail in their duty to act in a company’s best interests if they fail to take into account all relevant considerations before making a decision. The relevance here is that the potential for judicial review is opened if the relevant considerations include stakeholder interests. Professor Watts (2022) views the dicta in *Hedley* as misconceived.²⁸ He nevertheless recommends that directors protect themselves from a charge of negligence by considering a range of options and the advantages and disadvantages of each before acting, although the mere fact of not considering an option or range of considerations should not expose them to challenge.

Further authority for review of a board’s decisions is found in *Howard Smith v Ampol Petroleum Ltd*, where, as in other cases where business judgment is at issue, there was “no appeal on merits from management decisions to courts of law.”²⁹ Courts would not

²⁴ Michael Taggart “State-owned enterprises and social responsibility: A contradiction in terms” [1993] *NZ Recent L Rev* 343 at 349–350.

²⁵ *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC).

²⁶ Taggart, above n 24, at 356.

²⁷ *Hedley v Albany Power Centre* [2005] 2 NZLR 196 (HC).

²⁸ Watts (2022), above n 9 at 5.5.2.

²⁹ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC) at 832.

“assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.” However, in that case the Privy Council said Courts may look into the “primary” or “substantial” purpose for which a power was exercised. The Supreme Court in *Debut Homes* held that courts will not interfere with a board’s subjective view of a firm’s best interest unless a decision is not capable of rational connection to a business interest, or directors do not consider the interests of the business.³⁰

In the takeover situation, the position changes significantly. Refusing to recommend a bid that offers a premium exceeding the value of the target’s activities requires justification. Consider a hypothetical forestry firm that becomes the target for a takeover by a bidder who intends to clear fell. The target firm does not state a purpose in its governance documents such as ‘operating a forest business to protect trees from clear-felling.’ The board of the target could decline a takeover offer if the offer price was inadequate or to protect shareholders’ interests in future value. Declining a profitable takeover for the environmental outcome could be vulnerable to challenge. Provisions in the Takeovers Code would also restrict the target board from taking action that would frustrate a Code offer without shareholder approval.³¹

4. *Review for stakeholder impacts and outcomes*

The remedial machinery in the Companies Act 1993 is not available to external stakeholders. Derivative action³² and oppression³³ are available to shareholders and former shareholders but not to employees, creditors (other than when insolvent or near to it), communities, or environmental groups. A stakeholder who objects to a corporate decision has no cause of action under the Companies Act 1993. However, there may be pathways in tort. Writing extra-judicially, the Chief Justice and two colleagues have observed that climate change is a burgeoning area in which corporations featured

³⁰ *Debut Homes Ltd (in liq) v Cooper* [2020] NZSC 100, [2021] 1 NZLR 142 at [113] [*Debut Homes*]. Also where there is in an insolvency or near-insolvency situation, and where there is conflict of interest, circumstances not relevant to the present discussion.

³¹ Takeovers Regulations 2000, cl 38(1)(a): if a code company has received a takeover notice or has reason to believe that a bona fide offer is imminent, the directors must not take any action, in relation to the affairs of the company, that could result in the offer being frustrated.

³² Companies Act 1993, s 165.

³³ Companies Act 1993, s 174.

prominently.³⁴ The justices clearly prepared the ground to add common law remedies to the climate law toolkit, stating no single institution has the legal jurisdiction and authority aligned with the global scope of climate change.³⁵ The “short-term nature of elected parliaments means effectiveness in regulating climate change is – or at least has been thus far – curbed.”³⁶ The High Court in *Thomson v Minister for Climate Change Issues* said that courts had a role to play in the issue.³⁷ As noted above, 2026 legislation prevents civil lawsuits against companies over greenhouse gas emissions.³⁸ The relevance here is that the principles outlined previously in climate litigation may be applied in the context of stakeholder issues.

Courts will make decisions about wider public policy and will not stay out just because an issue has a complex and poly-centric policy component, although the Supreme Court has emphasised that judicial development of common law powers and duties should be congruent with the legislative framework: “[W]here the legislation properly construed shows that a balance has been struck by the legislature between conflicting policy considerations, that balance must be respected by the courts.”³⁹ However, the court also sees complex, policy-laden issues as a reason to intervene, not stay out. In *Smith v Fonterra* the Supreme Court said, “The common law, where it is not clearly excluded, responds to challenge and change in a considered way, through trials involving the testing of evidence.”⁴⁰ Liability in tort requires a cognisable harm, a causal relationship to harm and sufficient proximity, which limits the reach of stakeholder considerations. Directors could breach their duty of care by failing to consider and respond to risks that

³⁴ Helen Winkelmann CJ, Susan Glazebrook and Ellen France JJ “Climate Change and the Law” (Paper presented to the Asia Pacific Judicial Colloquium, Singapore, 28–30 May 2019) [Winkelmann (2019)] at [38].

³⁵ Above n 122, at [6], citing Richard Lazarus “Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future” (2009) 94 *Cornell L Rev* 1153 at 1160.

³⁶ At [6], citing Geoffrey Palmer “Can Judges Make a Difference: The Scope for Judicial Decisions on Climate Change in New Zealand Domestic Law” (2018) 49 *VUWLR* 191 at 193.

³⁷ Winkelmann (2019), above n 34, at [59]; *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160.

³⁸ Climate Change Response (Tort Liability) Amendment Act 2026 amended the Climate Change Response Act 2002 to insert a new s 271 creating a statutory bar on tort liability for climate change effects.

³⁹ *Yan v Mainzeal Property and Construction Ltd (in liq)* [2023] NZSC 113 at [180] citing *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2022] 3 WLR 709 at [47].

⁴⁰ *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5 at [172]. The dicta on this point is untouched by the measures in the Climate Change Response (Tort Liability) Amendment Act 2026 that specifically ended those proceedings.

later harm the company.⁴¹ Although is no longer tort liability for risks from climate-related emissions, directors still have a duty of care. Risks related to physical infrastructure from weather events cannot be ignored.⁴²

Obligations in international human rights instruments and customary international law may also be a source of review.⁴³ *Nazzal v Guardians of New Zealand Superannuation*⁴⁴ and *Mohamed v Guardians of New Zealand Superannuation*⁴⁵ are examples of international agreements being held to be relevant considerations in relation to investment decisions, and a mandatory consideration in some circumstances. Those cases both relate to statutory responsibility of the investment fund, but the principle may establish broader responsibilities related to international instruments. One foundation for review could be the reasoning, associated with David Bilchitz and Laura Ausserladscheider Jonas: stakeholder interests are not merely relevant considerations. Fundamental rights to be treated as intrinsically valuable.⁴⁶ Their view is that the problem of how directors can balance multiple intrinsically valuable but conflicting interests is resolved through a principle of proportionality. The authors draw on German and European human rights tradition to suggest a doctrine of proportionality. The doctrine can be applied to analyse whether the aim pursued is legitimate, whether the measure suits the aim, whether there is an alternative available and whether the benefits of the measure outweigh the costs to any stakeholder right affected. The model is normative and is not part of New Zealand law. However, proportionality is suggested as a useful theory for further analysis as a model that could shield directors against accusations that they have given insufficient weight to some particular constituent stakeholder's interests. Watts (2022) says the argument in reality

⁴¹ Winkelmann (2019), above n 34, at [117] citing Karen Bubna-Litic "Corporate Social Responsibility: Using Climate Change to Illustrate the Intersection between Corporate Law and Environmental Law" (2007) *EPLJ* 253 at 267.

⁴² Winkelmann (2019), above n 34, at [117].

⁴³ See Malcolm Shaw *International Law* (8th ed, Cambridge University Press, Cambridge, 2017) at 106–112 and 126–130 and Winkelmann (2019), above n 34, citing *International Covenant on Civil and Political Rights* 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3; UNEP *Climate Change and Human Rights*; and *United Nations Environment Programme Climate Change and Human Rights* (December 2015).

⁴⁴ *Nazzal v Guardians of New Zealand Superannuation* [2026] NZHC 681 at [92] citing United Nations *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UN Doc HR/PUB/11/04, January 2012).

⁴⁵ *Mohamed v Guardians of New Zealand Superannuation* [2021] NZHC 512.

⁴⁶ David Bilchitz and Laura Ausserladscheider Jonas "Proportionality, Fundamental Rights and the Duties of Directors" (2016) 36(4) *Oxford Journal of Legal Studies* 828.

relies on the “sheer expense of court proceedings keeping the number of cases within manageable proportions.”⁴⁷

5. Reviewability related to funds management

The potential for judicial review related to CSR is particularly relevant to funds management. Over a quarter of climate-related cases newly filed globally in 2024 sought to challenge climate considerations or CSR by corporates and governments.⁴⁸ Although there is no longer liability in New Zealand for emissions-related climate change effects, the potential for review on the merits of investment decisions is relevant. See the examples mentioned above in Chapter V in relation to the duty to use powers for a proper purpose: *Cowan v Scargill*,⁴⁹ *Martin v City of Edinburgh District Council*,⁵⁰ and *Harries v The Church Commissioners for England*.⁵¹ In each of those cases, the courts intervened in investment decisions that were affected by the political or social responsibility views of trustees. In Texas, in *Spence v American Airlines*, a pilot sued alleging breach of fiduciary duties under the Employee Retirement Income Security Act 1974.⁵² It was claimed the scheme put social and political priorities ahead of financial returns by investing retirement savings with fund managers that pursued CSR agendas through proxy voting and shareholder activism. The case is specific to US law and the particular legislation. It is notable for present purposes that the remedy was a permanent injunction prohibiting CSR-motivated proxy voting or stewardship

⁴⁷ Above n 172, at 5.7.

⁴⁸ Catherine Higham and Joana Setzer *Global Trends in Climate Change Litigation: 2025 Snapshot* (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, June 2025). Of 226 cases filed in 2024, 60 were classified “as involving an argument not aligned with climate goals” such as corporate “environmental/social/governance (ESG) agendas.” The database counted a total of 2,967 cases filed globally to late 2024.

⁴⁹ [1985] Ch 270 (Ch).

⁵⁰ [1988] SCLR 90 (Court of Session).

⁵¹ [1992] 1 WLR 1241 (Ch).

⁵² *Spence v American Airlines* United States District Court for the Northern District of Texas, 4:23-cv-00552-O, filed 2023.

activities on behalf of the plan. There have also been suits by state attorneys-general against fund managers.⁵³

Fund managers have duties analogous to those of directors of companies. A duty of good faith is required by the Financial Markets Conduct Act 2013, s 143(1)(a), and a duty to act in the best interests of investment scheme participants by s 143(1)(b)(i). The provisions cannot be contracted out of.⁵⁴ Fama and Jensen demonstrated that the incentives of fund managers are not perfectly aligned with investor returns.⁵⁵ They are compensated through fee structures tied to the value of assets under management, among other metrics. Larger funds generate higher fee income and reputational benefits for managers, but attracting more scheme participants does not unambiguously benefit existing investors. Therefore, if the purpose of a responsible investment policy is marketing, then that might not be in the best interests of investment scheme participants. There would need to be a belief that a responsible investment policy is likely to produce superior risk-adjusted returns. As seen in the previous chapter, that would be a dubious claim.

Fund managers may need to disclose that they use ‘responsible investing’ as a risk management strategy, not a strategy to facilitate social outcomes. Using responsible investment criteria as a proxy for risk could raise questions about why responsible investment criteria perform as a better proxy for risk than a simpler measure of risk. If companies that receive better CSR assessments are also rated as financially riskier, and investors in such companies accept more risk for the same return, that may be an efficient way for investors to achieve pro-social outcomes.⁵⁶

⁵³ *State of Texas v BlackRock Inc* US District Court for the Eastern District of Texas, 6:24-cv-00437, filed 27 November 2024. The named plaintiffs are the attorneys-general of Texas, Alabama, Arkansas, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, West Virginia and Wyoming. The defendants are BlackRock Inc, The Vanguard Group Inc, and State Street Corporation. Very recently, Vanguard settled and agreed to pay \$29.5 million: Ross Kerber “In Texas, Vanguard settles antitrust suit for \$29.5 million and renewed passivity pledges” (Reuters, 27 February 2026).

⁵⁴ s 177.

⁵⁵ E Fama and M Jensen “Agency Problems and Residual Claims” (1983) 26(2) *J Law Econ* 327.

⁵⁶ The seminal argument that social responsibility criteria decreases the level of diversification in the portfolio is in Andrew Rudd “Social Responsibility and Portfolio Performance” (1981) 23(4) *Cal Manage Rev* 55. Rudd argues that socially responsible investment criteria narrow the investable universe, necessarily decreases diversification, producing greater variation in returns and increased investment risk, and that therefore, social responsibility constraints increase portfolio risk. The topic of returns to CSR is revisited in Part E of this chapter. See also, GC Landi and others “Embedding sustainability in risk management: The impact of environmental, social, and governance ratings on corporate financial risk” (2022) 29 (4) *CSR and Env Manag* 1096.

The best interest of investors in a fund that has the purpose of ‘responsible investing’ is probably to make responsible investments, not to maximise returns. There is still likely to be a requirement to disclose how much of investors’ funds are at risk from the strategy compared to a strategy of maximising returns. Responsible investing is less likely to be in the best interest of investors in a general purpose investment fund such as default and generic KiwiSaver retirement funds (other than for the purpose of managing risk.) The difficulty may be acute for investment screens that assess impacts from customers’ use of products made by companies that funds invest in. An example is disinvestment from Caterpillar because of the use by the Israel Defense Forces of Caterpillar bulldozers in Palestinian territories.⁵⁷ In the absence of a specific fund purpose, in which an investor has chosen a fund because of its investment screen (for example, because it has been established to pool investment funds in firms that do not export to Israel), then divestment is not easily described as being in the best interests of the fund.

Adequacy of disclosure will be a relevant issue. In the example above, a default fund would not appear to have a discretion to adopt a ‘boycott and divest’ policy. If it divested, it would need to believe that divestment would improve risk-adjusted post-fee returns. Broad policies, for example a policy against investment in countries that breach human rights, might not constitute sufficient disclosure but may be enforceable on review.⁵⁸ For disclosure to be adequate, there may need to be a nexus between the promoted human rights screen and the substantive outcome. Divestment from Caterpillar in the example would have to have a demonstrable consequence for human rights, not merely an impact on Caterpillar’s corporate activity. Unless investors know what they are buying, with some predictability, then managers’ discretion over social outcomes would risk substituting for investors’ best interests.

Higher fees associated with ‘ethical’ investment screening may be a further issue. Higher fees would not themselves be reviewable but they affect returns and therefore

⁵⁷ See Richard Milne “Norway’s oil fund sells Caterpillar stake over Israeli allegations” *Financial Times* (online ed, London 26 August 2025); Aimee Look and Joe Wallace “Norwegian Wealth Fund Ditches Caterpillar Over Israel’s Bulldozer Use” *Wall Street Journal* (online edition, New York, 26 August 2025). The example is to demonstrate an instance of a fund making this decision on stated ‘ethical’ grounds. The lawfulness of the Norwegian fund’s investment decisions is not investigated. It can be argued that the disinvestment was value destructive: the fund owned 1.17 per cent of Caterpillar at the time of disinvestment, worth US\$2.1 billion. Caterpillar’s share price rose over the following three months from \$431.40. to \$573.73 on 26 November 2025, suggesting the fund forwent a value accretion of US\$690 million (figures from <markets.ft.com>). Caterpillar did not stop supplying its products to the end user.

⁵⁸ See *Nazzal v Guardians of New Zealand Superannuation* [2026] NZHC 681.

the best interest of the investor. If fund managers breach their fiduciary duty of loyalty to investors by not acting in investors' interests, the remedy is rescission of their decisions, as well as potential liability for losses. In the absence of a sufficiently stated purpose, higher fees for screening and greater risk associated with a screening policy would need to be likely to be offset by outperformance to be in the interest of the investor. As shown in the previous chapter, evidence that ethical or responsible investment policies improve risk-adjusted post-fee returns is weak at best.

The position relating to the responsibilities of fund managers and trustees under the Financial Markets Conduct Act 2013 merits further study. The particular focus should be to identify mechanisms that are capable of addressing the agency problem between managers' interest in growing the fund by marketing, and investors' interests in both performance and understanding what their funds are invested in. Further questions for research include alternative regulatory options such as restrictions on the use of ethical investment terms. The suitability of the European taxonomy model for disclosing content may be one viable option to consider. Another question is the adequacy of explanation to investors about the problem of defining what is meant by ethical investment and the consequent difficulty of measuring fund performance. New Zealand courts would likely apply a doctrine of community consensus and social norms. Tools such as the *Principles for Responsible Investment* and the United Nations *Global Compact* possibly give grounds for investment decisions that embed community expectations. It is uncertain whether a suit in New Zealand would be successful if it sought to claim a fund, or a corporate, expended too much shareholder resource on CSR.

6. *Summary*

Courts are indicating a willingness to review corporate decisions relating to impacts on stakeholders and to hold boards accountable for a duty of care that incorporates a sense of social responsibility to the wider community. This chapter set out to enquire whether judicial review is available to shareholders to restrict companies from considering stakeholders, or to stakeholders to compel consideration of their interests. The chapter concludes that the merits of a CSR decision will not be reviewable if it is rationally connected to business interests and made in good faith and within the powers of directors. Rationality, the duty of care and the duty to act for a proper purpose are substantial exceptions that allow consideration of CSR at cost to the firm where it is intended to meet community standards.

Corporate activity that is socially irresponsible, or not rationally connected to the business purpose, is vulnerable to review. The circumstances in which CSR is reviewable change with business phases, with less room to consider the interests of

stakeholders when a firm is close to insolvency or involved in a takeover. One possible model for considering community interests is that suggested by Taggart in relation to the social obligation of state-owned enterprise.⁵⁹ Although that is a statutory provision, a hierarchy model he proposed could be compatible with a best interests test: first, to have regard to the interests of the community. Once “regard” has been had to those wider social interests, the business should try to accommodate them consistently with the overriding objective of operating a successful business.

⁵⁹ Taggart, above n 24.

Chapter IX

Conclusion

The objective of this thesis was to investigate the limits of voluntary CSR and describe the powers of a firm when it considers corporate social responsibility. It has concluded that a principled approach exists to describe the limits of voluntary CSR: the law in New Zealand is entity primacy. It is the responsibility of boards to act in the best interests of the firm. It will usually be in the best interests of firms to assess corporate social responsibility through a lens of how it supports the success of the business.

Shareholder returns can be earned by good corporate citizenship, enlightened shareholder value approaches, or social licence to operate. All of those are variations of an instrumental approach, in which CSR is a profit-maximisation strategy. The responsibility to the best interests of the firm involves more than a financial calculation. We have seen in this thesis that social norms and community expectations are projected onto businesses and it will be a breach of the duty of care to ignore those. Firms need to secure legitimacy for their business activity and practising corporate citizenship is an element of how they go about it. The process will inherently involve them in assessments of social and environmental context, resolving conflicts between priorities and between stakeholders, then deciding how much corporate value can be used in considering stakeholders' interests. The calculation of how much corporate resource to dedicate to CSR is limited by what is in the firm's best interests. Stakeholder interests need not always be considered. The example of a takeover is one where the responsibility is to maximise economic value. Not all firms are established with the objective of maximising financial value. Some firms are established with social, environmental, or cultural purposes. In those firms, the best interests of the firm are determined by those non-financial purposes. If investors wish to establish a firm for pro-social purposes there is no obstacle to doing so.

One of the main consequences that flow from this conclusion is that CSR is not adequately described as being motivated by social outcomes. It is concerned with outcomes for the firm. The debate in the literature between shareholder primacy and stakeholderism is largely misplaced in New Zealand. Shareholder primacy is not the New Zealand position. The principle of entity primacy is that shareholders will generally benefit from the priority of the best interests of the firm. Firms may include stakeholders in their purpose. They may choose to optimise value by considering stakeholders and, to the extent that consideration of stakeholders forms part of community expectations and social norms of business operations, there is a duty to consider their interests.

This thesis has argued that voluntary stakeholderism has little substantive meaning in practice outside of the interest of the firm. Social benefit, in contrast, is the rather everyday business of governments and regulatory institutions accomplished through taxation, employment law, resource management rules, climate policy, standards, tort and equity. Sometimes it is accomplished through incentives and assistance. Sometimes it is the outcome of moral suasion. But it cannot reliably be said to be the outcome of CSR when the objective of CSR is the best interest of the firm itself.

Firms may be pushed by social norms, or more simply by social pressure, to consider ethical, social and environmental outcomes. For firms themselves, decisions about how to respond to expectations and pressure involve assessment of the firm's interests, but those assessments are inherently political choices, as evidenced by the sometimes risky decisions that must be made about fraught and contentious issues. The selection of issues that are prioritised in CSR has a political cast in which accountability is unsatisfactory in the voluntary CSR model.

One of the most troubling findings of this thesis is that voluntary CSR instruments do not have much effect or point unless they are given regulatory teeth. They have instrumental presentational value for firms but social and environmental outcomes require obligation. 'Voluntary' or 'soft-law' regimes for considering the interests of stakeholders may not be transparent to stakeholders, while the mandate for implementing them is an under-developed area of attention. Though the area would benefit from more research, the more that regulatory instruments such as international standards and regulatory codes apply, the more effective they appear to be at delivering social outcomes. The policy result from the introduction of sustainability disclosure standards in Europe illustrated the point. When discretion about the composition of ethical funds was left to fund managers, the results were expensive and unsatisfactory. When the rules were changed to require disclosure with a taxonomy determined by regulators, compliance improved.

The example is related to another troubling finding from this research, which is the inability to define the content of responsible corporate behaviour. Precision about the meaning of both pro-social and anti-social behaviour is elusive. One consequence is that, if responsibility can't be defined then matters such as responsible investment cannot be reliably measured, and without reliable measurement claims about performance are difficult to defend. If there is not adequate precision about the social outcome sought by responsible investment then social outcomes cannot be demonstrated. Responsible investing criteria are proprietary and inconsistent between providers, selection of scored criteria is arbitrary and unaccountable, the process reduces moral decisions to mathematical algorithms, and retail consumers are unlikely to be informed about what is being measured or the content of investments offered

under various CSR labels. The flaw is the inherent impossibility of reducing issues, ethics, and value judgments to a numerical score. This thesis showed that the responsible funds industry makes public claims that its objectives are healthier people and environment. Ratings tools that measure corporate activity do not directly measure those outcomes or surface complicated trade-offs. They measure a proxy for risk. Even if it were accepted that ratings drive firm behaviour (it is not accepted), that is not the same as driving social outcomes, much less optimal social outcomes. Investment tends to be driven into indices dominated by a tiny number of tech firms. The main factors in the choice of those firms are not their intrinsic social contribution but the nature of their business. Herding is itself risky. The firms that are assessed to have low environmental impact are also the firms that have extreme valuations that some experts believe create a risk to global GDP.¹ The mere risk of market correction itself is an externality that damages the wealth of savers who have to take action to avoid it. Extraordinary power and wealth amassed by a handful of individuals has political and social consequences, yet inequality, power and wealth are not prominent in the CSR and responsible investment lexicon.

The recommendation for reform is that regulators should step in to require evidence of defined net present social and environmental benefits as a condition for being described as ethical or responsible and as a concession for the higher fees that are involved in political selectivity. It is contended in this conclusion that social outcomes as well as ethically motivated investors would both be better served if those investors chose lower-fee indices composed of the largest firms (which would deliver a similar portfolio to a responsible investment screen) then contributed the savings in fees directly to charities accountable for outcomes. Charitable foundations with clear accountability for objectives and consequences for failure, and clarity for investors about their risks and the outcomes sought, are an improvement over the fund management model. Another reform would be to label so-called ethical and ‘responsible’ investment ‘Politically Selective Investment’. The reason is that it is not possible to discern how responsible and ethical choices are being made. The correlation in choices between ratings agencies and definitions of CSR is low enough to be meaningless. There is no reason in principle why environmental impacts should have more salience in ratings than salaries, inequality, prices, or competition, all of which are social impacts of business. Accurately describing the political selectivity going on would help to surface the contestability of choices and emphasise the need for mandate and transparency in

¹ Those valuations are unlikely to be connected to the ratings.

agenda setting. For firms themselves, there is no reason in principle why environmental impact is more salient than views about other social impacts of business activity.

The thesis demonstrated that political selection of issues is inevitable. It is the result of firms acting in their best interests, seeking legitimacy, managing risk of regulatory or judicial intervention and carrying out their duty to take into account social norms of behaviour and community expectations. The process of choice involved is inherently political.

The social contribution of business can be mis-described. Since Adam Smith and David Ricardo, economics has recognised that the benefits of trade extend beyond the immediate parties to a transaction—that self-interested exchange, through specialisation and comparative advantage, generates broader social welfare. If stakeholder theorists are correct that their classic description fails to describe externalised costs from business then it is appropriate for those outcomes to be regulated, either by internalising them to the firm or by controlling relationships between firms and stakeholders. Legislatures weigh issues such as employment conditions and the consequences for employment. The issue that courts grapple with is how to weight those issues in common law. The mechanism of attribution could create a claim for a share of benefits on the basis of potential liability for externality costs. However, the insight of classical economics is that it is not possible for a firm to know the true impact of all of its activity and therefore some proximity will always be part of the common law. Where calculation of costs is likely to be unfeasible, or unlikely to be recoverable in judicial proceedings, the appropriate mechanism is public regulation. Many examples of this exist, from climate change to taxation.

Willingness to expand the law to do practical justice, rather than being limited by the heads of tort or equity, has been advocated by senior members of the judiciary. The former Chief Justice said the law of obligations, which attaches to public officials and public bodies, should apply in private law to correct wrongs, “respond to claims of private right and the needs of the societies we live in”:²

The need to address the contracting state seems likely to advance the long-term project of bringing law and equity properly together. If so, it will offer opportunities to build on Australian experience with fiduciary doctrine and estoppel and New Zealand experience with the full range of

² Elias CJ “Public Actors and Private Obligations – a Judicial Perspective” (Speech to the University of Hong Kong Faculty of Law Obligations VII Conference, Hong Kong, 18 July 2014).

remedies derived from common law, equity, or statute to fit the needs of the case and do practical justice.

Doing practical justice is a case for effective obligation, not for voluntary CSR. The need for law to step in where the contracting state has created a need for remedies is a useful summary of the limits of CSR.

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