**SEBASTIAN ELLICE**

# SHOULD SHAREHOLDERS HAVE THEIR "SAY ON CLIMATE"? AN INVESTIGATION INTO THE INTRODUCTION OF A MANDATORY SHAREHOLDER VOTE ON COMPANIES' CLIMATE STRATEGIES

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***Abstract***

*This paper investigates the introduction of a "Say on Climate" shareholder vote on companies' climate strategies in New Zealand. Established by Chris Hohn and The Children's Investment Fund in 2020, the Say on Climate initiative has been rapidly gaining momentum internationally. As climate change continues to be one of the leading topics of discussion in the business community, shareholders of companies are becoming increasingly aware of the financial risk climate change poses to their investment. This paper argues that shareholders, particularly institutional investors, are in a unique position to positively change companies' approach to reducing emissions. A "Say on Climate" shareholder vote provides shareholders with a mechanism to voice concerns and take action on companies' climate strategies. The vote would allow shareholders to hold the company to account and ensure plans are in place to manage the risks that will undoubtedly manifest in the climate-threatened future.*

***Key words:*** *"Say on Climate"; "Climate Change"; "Environmental, Social and Governance"; "Company Law; "Corporate Governance"; Shareholder Activism"*

## *I Introduction*

Climate change presents a crisis unlike any humanity has faced before. With emissions continuing to rise, and last year being tied for the warmest in recorded history, we are hurtling towards a dangerous threshold where the effects of climate change may be irreversible.[1] Addressing this crisis demands a response on all levels, not only from governments and individuals, but from the companies who are disproportionately contributing to the crisis we face.

As the consequences of climate change become more apparent, climate change is beginning to be recognised as a real threat to the future viability of companies' operations.[2] This has led to shareholders becoming more involved in corporate governance and putting pressure on companies to operate in a more sustainable manner.[3]

This paper attempts to harness shareholders' concern for their investment, by proposing a mechanism they can use to put pressure on companies to operate more sustainably. This mechanism is a mandatory shareholder vote on companies' climate strategies (or climate "action plans").[4] While simple, I argue this vote has the potential to effectively challenge the way companies operate, by facilitating shareholder pressure on company boards to implement frameworks for managing climate-related issues. Of course, this mechanism will not mitigate the effects of climate change alone. However, it is one of many steps that may be taken to secure the ultimate goal of a sustainable future.

In Part II of this paper, I will provide a general overview of the causes of climate change, and the impact climate change is having on the environment. I will also refer to the New Zealand Government's response to this impending crisis, including the recent steps that

[1] National Aeronautics and Space Administration "2020 Tied for Warmest Year on Record, NASA Analysis Shows" (15 January 2021) NASA <www.nasa.gov>.

[2] Philipp Krueger, Zacharias Sautner and Laura Starks "The Importance of Climate Risks for Institutional Investors" (2020) 33 RFS 1067 at 1067.

[3] See generally Peter Reali, Jennifer Grzech and Anthony Garcia "ESG: Investors Increasingly Seek Accountability and Outcomes" (25 April 2021) Harvard Law School Forum on Corporate Governance <https://corpgov.law.harvard.edu>.

[4] The terms "climate strategies" and "climate action plans" will be used interchangeably in this paper. Both refer to documents that set out the way the company is preparing to mitigate the effects of climate change, including reducing the emission of greenhouse gases.

have been taken as part of New Zealand's commitment under the Climate Change Response Act 2002. Part III will examine the role companies have in the Anthropocene, highlighting the disproportionate contribution a small number of companies make towards emissions, both globally and in Aotearoa. Part III will also detail how fundamental aspects of the company model have facilitated unsustainable business practice.

Part IV will debate whether it is appropriate to use company law to address climate change. Other ways of addressing climate change, including external environmental regulation, will be discussed. I will briefly set out existing areas of company law that have been used to promote sustainability within the company, including directors' duty provisions. The approach taken by other scholars researching how company law may be used to address environmental concerns will also be canvassed. I argue that the influence companies have on the environment, the economy, and society more generally, provides a unique opportunity for company law to be used to address some of the issues climate change presents.

Part V will introduce the "Say on Climate" initiative that forms the basis of this paper's proposal, detailing the three key goals of the initiative, the prominent companies that have adopted Say on Climate proposals, and the similarity Say on Climate has with the "Say on Pay" campaign. In Part VI, after discussing the important role shareholders have in the Say on Climate initiative, I find shareholders —particularly institutional investors— will be motivated to exercise the influence they have over companies, to ensure companies in their portfolio are taking steps to mitigate the financial risk presented by climate change. I find that this paper's proposal, a mandatory shareholder vote, provides shareholders with a mechanism through which they are able to engage with the company on the best steps forward.

Part VII will look specifically at the Say on Climate initiative in a Aotearoa New Zealand context. Noting the evidentiary difficulties, I argue that the mandatory shareholder vote should apply to all New Zealand companies that are large listed issuers of equity and debt securities. Part VII will go on to consider: the benefits of a mandatory shareholder vote, whether such a vote would be effective in New Zealand, and the existing mechanisms that are available to shareholders to voice concerns regarding companies' response to the risks presented by climate change.

In Part VIII, I examine the issues and potential consequences of introducing a shareholder vote. In Part IX, I will offer some practical suggestions for how a mandatory shareholder vote on companies' climate strategies could be implemented in practice. This includes amendments to the Companies Act 1993 and the New Zealand Stock Exchange (NZX) Listing Rules.

## *II The Climate Crisis*

In general terms, "climate change" refers to the warming of the climate, predominantly due to anthropogenic emission of greenhouse gases.[5] The commonly reported greenhouse gases include: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride and nitrogen trifluoride.[6] Greenhouse gases cause climate change by intercepting radiation and redirecting it back to the Earth, warming the earth's surface.[7] While the "Greenhouse Effect" is a naturally occurring process, the anthropogenic emission of greenhouse gases has accelerated the warming of the Earth at a dangerous rate.[8]

The increased amount of greenhouse gas emissions since the pre-industrial era has unequivocally been caused by human activities.[9] In Aotearoa, emissions have increased by 26 per cent since 1990, continuing to increase by a further two per cent[10] between 2018–2019.[11] The continued emission of greenhouse gases has dramatically affected

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[5] The Intergovernmental Panel on Climate Change *Climate Change 2021: The Physical Science Basis: Summary for Policymakers* (2021) at 5.

[6] Ministry for the Environment *New Zealand's Greenhouse Gas Inventory 1990–2019* (April 2021) at 2.

[7] National Institute of Water and Atmospheric Research "What are greenhouse gases?" NIWA <https://niwa.co.nz>.

[8] See generally Fred Taylor "The greenhouse effect and climate change" (1991) 54 Rep Prog Phsy 881; Colin Goldblatt and Andrew Watson "The runaway greenhouse: implications for future climate change, geoengineering and planetary atmospheres" (2012) 370 Phil Trans R Soc 4197; and Syukuro Manabe "Role of greenhouse gas in climate change" (2019) 71 Tellus A 1.

[9] The Intergovernmental Panel on Climate Change, above n 5, at 5.

[10] Ministry for the Environment, above n 6, at 1.

[11] New Zealand's greenhouse gas emissions fell by 4.8 percent in 2020. However, this was largely driven by the fall in transport emissions reflecting the impact of COVID-19. See Statistics New Zealand "Transport drives down total greenhouse gas emissions in 2020" (8 April 2021) <www.stats.govt.nz>.

the Earth's climate. The Intergovernmental Panel on Climate Change's latest report found that each of the last four decades has been successively warmer than any decade that preceded it since 1850.[12] Global surface temperature has increased faster since 1970 than in any other 50-year period over the last 2000 years, and the global mean sea level has risen faster since 1900 than any preceding century in the last 3000 years.[13]

The consequences of the continued emission of greenhouse gases and the warming of the climate are severe. Physical consequences include: flooding, droughts and wildfires, accompanied by regional and geopolitical conflicts that are bound to ensue from the forced displacement of those from climate-threatened regions.[14] The science is damning. To limit global warming, all greenhouse gas emissions need to be drastically curbed, particularly carbon dioxide emissions, which have been the target of many government policies.[15]

The New Zealand Government has been taking steps to address climate change. In 2019, the Climate Change Response (Zero Carbon) Amendment Act was enacted to fulfil the commitment New Zealand made under the 2015 Paris Agreement, which was to limit global warming to no more than 1.5°C above pre-industrial levels.[16] The current Labour Government has recently declared a climate emergency, committing to urgent action towards reducing emissions.[17] The Financial Sector (Climate-Related Disclosures and Other Matters) Amendment Bill, currently before Parliament, is another piece of legislation put forward as part of the Government's commitment to reach net-zero emissions of all greenhouse gases[18] by 2050.[19] Despite these recent measures, Aotearoa is not on track to meet He Pou a Rangi (the Climate Change

[12] The Intergovernmental Panel on Climate Change, above n 5, at 5.
[13] At 9.
[14] Christopher Wright and Daniel Nyberg *Climate Change, Capitalism, and Corporations: Processes of Creative Self-Destruction* (Cambridge University Press, Cambridge, 2015) at 11.
[15] See generally He Pou a Rangi | Climate Change Commission *Ināia tonu nei: a low emissions future for Aotearoa* (31 May 2021) and The Intergovernmental Panel on Climate Change, above n 5.
[16] (21 May 2019) 738 NZPD 11027.
[17] (2 December 2020) 749 NZPD 237.
[18] Excluding biogenic methane.
[19] Ministry for the Environment "Greenhouse gas emissions targets and reporting" (May 2021) <https://environment.govt.nz>.

Commission's) recommended emissions budgets,[20] or the 2050 targets set in the Climate Change Response (Zero Carbon) Amendment Act 2019.[21] This demonstrates the need for continued action towards emissions reduction in New Zealand.

## *III Companies and Climate Change*

### A The Role of the Company in the Anthropocene

Companies are pervasive in the modern global economy. Many companies have become enormous economic organisations, bringing in revenues larger than some countries.[22] While the effects of climate change are felt by all, a very small number of companies are responsible for the vast majority of greenhouse gas emissions.[23] In fact, 62 per cent of the global industrial emission of carbon dioxide and methane from 1751 to 2015 can be traced to the activities of only 100 companies (illustrated in Appendix 1).[24] The fossil fuel industry lies at the heart of this problem, with the industry being responsible for 91 per cent of all global industrial greenhouse gas emissions in 2015.[25]

While the lack of mandatory reporting[26] makes it difficult to determine the proportion of companies responsible for the emission of greenhouse gases in Aotearoa, anecdotal evidence suggests that just over 100 companies account for almost 60 per cent of New Zealand's gross greenhouse gas emissions.[27]

### B Problems with the Company Model

There are of course other key contributors to greenhouse gas emissions beyond the activities of companies. Emissions are caused by a range of essential activities,

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[20] He Pou a Rangi | Climate Change Commission, above n 15, at 12.
[21] Climate Change Response Act 2002, s 5Q.
[22] Guillermo Jimenez and Elizabeth Pulos *Good Corporation, Bad Corporation: Corporate Social Responsibility in the Global Economy* (Open SUNY Textbooks, New York, 2016) at 1.
[23] Marco Grasso "Oily politics: A critical assessment of the oil and gas industry's contribution to climate change" (2019) 50 ERSS 106 at 110.
[24] At 110.
[25] Paul Griffin *The Carbon Majors Database CDP Carbon Majors Report 2017* (CDP, July 2017).
[26] This is likely soon to change. The Financial Sector (Climate-Related Disclosures and Other Matters) Amendment Bill, currently before Parliament, will require captured companies to disclose information about climate-related risks and opportunities to potential investors.
[27] Climate Leaders Coalition "First Anniversary Snapshot 2018/2019" (1 August 2019) <www.climateleaderscoalition.org.nz>.

including transport, waste disposal and the generation of electricity.[28] However, businesses run through companies are uniquely placed towards unsustainable business practice, partially due to fundamental structural characteristics of the company model.

Two such characteristics of the company are its separate legal personality and the limited liability of shareholders.[29] While the majority of companies do not intend to cause environmental harm, the separate legal personality and limited liability characteristics reduce companies' exposure to environmental liabilities.[30] This weakens the incentives for companies to prevent environmental harm.[31] As a result, the cost of environmental harm is not borne by those who caused it, but is dispersed among other stakeholders, including employees, the surrounding community and society at large.[32]

## *IV Using Company Law to Address Climate Change*

Given the disproportionate contribution companies make to the climate crisis, there is a valid concern that in using company law to respond to climate change, we are relying on those responsible for climate change to also help solve the problem. If the company model is, in fact, geared towards unsustainable business practice, should we really be asking companies to be the ones to respond to climate change?

Different schools of thought exist regarding the status of company law in addressing environmental concerns. Some scholars consider that the interests of non-shareholder constituencies (such as the environment) should be protected outside of company law,

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[28] Ministry for the Environment, above n 6, at 7.

[29] John Armour and others "What is Corporate Law?" in Reinier Kraakman and others *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, Oxford University Press, Oxford, 2017) 1 at 5.

[30] Pat Akey and Ian Appel "The Limits of Limited Liability: Evidence from Industrial Pollution" (2021) 76 Journal of Finance 5 at 50. See generally George Dent "Limited Liability in Environmental Law" (1991) 26 Wake Forest L Rev 152; Beate Sjåfjell and Christopher Bruner "Corporations and Sustainability" in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, Cambridge, 2019) 3; and Michael Faure *Environmental Liability of Companies* (European Parliament's Committee on Legal Affairs, PE 651.698, May 2020).

[31] Akey and Appel, above n 30, at 6.

[32] At 50.

perhaps through external environmental regulation.[33] Other scholars believe that company law has a key role in combatting climate change by shifting businesses towards sustainable operations.[34] There are also different approaches taken when researching how company law may be used to address environmental concerns. Some approaches look to promote sustainability from within the company, using existing company law provisions, while others take a more transformational approach that seeks to challenge the current company model.

An example of an approach taken within the company, using existing company law, is the use of directors' duty provisions. In New Zealand, directors' duties are contained in the Companies Act 1993. Daniel Kalderimis and Nicola Swan, in a legal opinion for the Aotearoa Circle's 2019 Sustainable Finance Forum, considered whether the directors' duty provisions in the Companies Act may be used to force directors to consider the impact of their decisions on the environment.[35] Kalderimis and Swan concluded:[36]

> …the directors' duties of loyalty and care are relevant to determining the extent to which directors must take account of climate change considerations in their decision-making.

Kalderimis and Swan also considered that the duties on directors require them to:[37]

1. Identify the foreseeable risk of financial harm to the company presented by climate change;
2. Periodically assess the nature and extent of this risk, including seeking and critically evaluating advice as necessary; and

[33] Henry Hansmann and Reinier Kraakman *The End of History for Corporate Law* (Discussion Paper, Harvard Law School, 2000) at 10.
[34] Beate Sjåfjell and Benjamin Richardson "The future of company law and sustainability" in *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, Cambridge, 2015) at 318.
[35] Daniel Kalderimis and Nicola Swan *Sustainable Finance Forum: Legal Opinion 2019* (The Aotearoa Circle, 2019).
[36] At 14.
[37] At 14.

3. Decide whether to take action in response, taking into account the likelihood of the risk occurring and possible resulting harm.

A recent development in this area is the Companies (Directors Duties) Amendment Bill, which was drawn for consideration on 23 September 2021. The Bill seeks to amend s 131 of the Companies Act, to make it clear that directors may, when determining the best interests of the company, take into account recognised environmental, social and governance factors.[38] A particular factor for directors to consider is "reducing adverse environmental impacts".[39]

In many respects this amendment is similar to the directors' duty provisions in the United Kingdom. Section 172 of the United Kingdom's Companies Act 2006 provides that directors must act in a way that he or she considers will promote the success of the company for the benefit of its members as a whole.[40] However, in doing this, directors must also have regard to, inter alia, the impact of the company's operations on the community and the environment.[41]

Using directors' duty provisions to mitigate climate change may be considered an internal method, as it looks to address climate change from within the company itself. Initiatives such as corporate social responsibility (CSR) schemes, social enterprise and hybrid companies would also fit into this category, as they use the current company model as a vehicle for positive social change.[42] Directors' duties differ from initiatives such as CSR schemes, because they involve external regulation of corporate behaviour, as opposed to companies voluntarily shifting their business model. That said, using directors provisions duties may also be considered an internal method, as these

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[38] Companies (Directors Duties) Amendment Bill 2021 (75-1), cl 4.
[39] Clause 4.
[40] Companies Act, s 172(1)(d) (UK).
[41] Section 172(1). See generally Lisa Benjamin "The Duty of Due Consideration in the Anthropocene: Climate Risk and English Directorial Duties" (2017) 90 CCLR 90; and Lord Sales, Supreme Court Justice of the United Kingdom "Directors' duties and climate change: Keeping pace with environmental challenges" (speech to the Anglo-Australasian Law Society, Sydney, 27 August 2019).
[42] See generally Ofer Eldar "The Role of Social Enterprise and Hybrid Organizations" [2017] Columbia Bus Law Rev 92.

provisions are used to change decision making from within the company.[43] By providing shareholders with a mechanism to address climate concerns, this paper's proposal may also be considered an internal method.

While I argue that both external regulation and internal responses from within the company are required to address climate change, research conducted into this area suggests "intra-organisational factors such as…the integration of climate change into risk management, exhibit the greatest influence on corporate climate action".[44] This illustrates the importance of investigating responses from within the company to address climate change, as internal methods can be more effective in shaping corporate behaviour than external climate policies.[45]

Some scholars adopt a higher level approach that looks beyond existing company law provisions, questioning whether and how the company, as the dominant business form, can fit into a sustainable future.[46] This approach is taken by scholars such as Beate Sjåfjell and Christopher Bruner, who have written extensively on how the corporate form may be "redefined" to operate in a more sustainable way.[47] Sjåfjell proposes introducing the concept of "planetary boundaries" to corporate law and governance, where companies are required to create sustainable value within non-negotiable ecological limits.[48] Sjåfjell writes that redefining corporate purpose to align with the creation of sustainable value within planetary boundaries "…has the potential to shift corporations away from 'business as usual' short-term maximization of returns for investors into drivers of a new and truly sustainable economy".[49]

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[43] Blanaid Clarke "The role of board directors in promoting environmental sustainability" in Beate Sjåfjell and Benjamin Richardson (eds) *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, Cambridge, 2015) at 173.
[44] Matthias Damert and Rupert Baumgartner "External Pressures or Internal Governance – What Determines the Extent of Corporate Responses to Climate Change?" (2018) 25 Corp Soc Responsib Environ Mgmt 473 at 483.
[45] At 483.
[46] Beate Sjåfjell "Redefining the Corporation for a Sustainable New Economy" (2018) 45 Journal of Law and Society 29 at 36.
[47] See generally Beate Sjåfjell and Christopher Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, Cambridge, 2019).
[48] Sjåfjell, above n 46, at 42.
[49] At 42.

The different approaches taken when using company law to address climate change highlights the tension between making incremental changes within the current system, or making large scale, institutional changes, which seek to transform the way companies operate. This tension is not exclusive to company law, but exists throughout the climate change literature.[50] Directors duty provisions and other forms of regulation within the current system may be considered small scale, incremental changes, while the approach taken by Sjåfjell and Bruner is more transformational.

This paper's proposal is an incremental change. A mandatory shareholder vote on companies' climate strategies is not a radical suggestion demanding a complete overhaul of the current corporate form. Rather, the proposal works within the current system, relying on the traditional understanding of the theory of shareholder primacy,[51] which provides that maximisation of shareholder profit is the sole purpose of companies.[52]

There is perhaps a valid argument that while profit maximization for shareholders remains the overarching goal of the company, attempting to encourage companies to prioritise environmental concerns will prove difficult.[53] However, as will be discussed in Part VI of this paper, climate change is beginning to become a serious financial risk to investment, which means companies may soon be forced to prioritise environmental concerns in order to maximise shareholder value.

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[50] See Mark Pelling *Adaptation to Climate Change: From Resilience to Transformation* (Routledge, Oxford, 2011); and Johan Munck af Rosenschöld and Jaap Rozema "Moving from incremental to transformational change in climate adaptation policy? An institutionalist perspective" in Carina Keskitalo and Benjamin Preston (eds) *Research Handbook on Climate Change Adaptation Policy* (Edward Elgar Publishing, Northampton (Massachusetts), 2019) 91.

[51] Kalderimis and Swan, above n 35, at 19.

[52] Sjåfjell, above n 46, at 38.

[53] Beate Sjåfjell "Regulating Companies as if the World Matters: Reflections from the Ongoing Sustainable Companies Project" (2012) Wake Forest L Rev 112 at 118.

### A How Company Law Fits Within Other Methods of Addressing Climate Change

It is also important to recognise that company law does not operate in a silo, but works alongside other methods of addressing climate change from outside the company. These external methods of addressing climate change are also important. They place external control on economic activity, as opposed to changing the norms within the inner institutional structures of companies.[54] An example of these external methods is the raft of environmental regulations that have been enacted globally in recent decades.[55] New Zealand's Emissions Trading Scheme (ETS), introduced in 2008, is an example of such regulation. Catherine Leining and Suzi Kerr describe the ETS as operating through:[56]

> …set[ting] a regulatory limit on emissions by covered sectors and translat[ing] that limit into a market price which changes behaviour to reduce emissions. Obligated parties are required to surrender to the government a tradable emission unit for each tonne of emissions for which they are liable. The government limits the supply of emission units into a trading market which then sets the emission price based on unit supply and demand. The cost to obligated parties of surrendering emission units gets passed on across the supply chain, raising the relative cost of higher-emission goods and services, making lower emission behaviour more competitive, and creating an incentive for businesses and consumers to reduce or avoid emissions.

While regulations such as New Zealand's ETS have been the principle policy response to climate change in the past, they suffer from certain deficiencies.[57] This is evidenced by the fact that global environmental conditions have continued to deteriorate drastically, despite these regulations being in effect for some time.[58] More generally, scholars have criticised the efficacy of environmental law due to its political-economic

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[54] Benjamin Richardson and Beate Sjåfjell "Capitalism, the sustainability crisis, and the limitations of current business governance" in *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge University Press, Cambridge, 2015) at 13.
[55] At 12.
[56] Catherine Leining and Suzi Kerr *A guide to the New Zealand Emissions Trading Scheme* (Ministry for the Environment, August 2018) at 2.
[57] See Catherine Leining, Suzi Kerr and Bronwyn Bruce-Brand "The New Zealand Emissions Trading Scheme: critical review and future outlook for three design innovations" (2020) 20 Climate Policy 246.
[58] Richardson and Sjåfjell, above n 54, at 12.

context.[59] In particular, the fact that government legislators often succumb to political pressure and lobbying by interest groups.[60]

This does not mean that there is no place for environmental regulation in combatting climate change. In fact, environmental regulation remains an important tool available to reduce emissions. However, given the issues associated with external environmental regulation, and its failure to stop the continued degradation of the planet to this point, more tools are necessary to adequately respond to the risk posed by climate change.[61]

Internal methods that seek change within companies operate alongside any external methods such as New Zealand's ETS. This means that the constraints imposed on directors through directors' duty provisions, or the votes made by shareholders under this paper's proposal, fit underneath any further external methods of addressing climate change imposed through regulation. Again, this demonstrates that a combination of different approaches and methods, taken by a range of different actors, is necessary to successfully mitigate the effects of climate change.

## *V The "Say on Climate" Initiative*

This paper's proposal, a mandatory shareholder vote on companies' climate strategies, derives from the goals of the "Say on Climate" initiative. The Say on Climate initiative was established by Chris Hohn, founder of The Children’s Investment Fund (TCI),[62] a hedge fund holding over USD 35 billion in assets.[63] Hohn has used shareholder activist tactics to make TCI one of the most profitable hedge funds in the world.[64] Hohn has championed the Say on Climate initiative by putting pressure on companies he owns shares in to voluntarily adopt the Say on Climate proposals.[65] If the company refuses to

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[59] At 13.
[60] At 13.
[61] At 12.
[62] Tim Human "TCI goes global with ‘say on climate’ campaign" (27 November 2020) IR Magazine <www.irmagazine.com>.
[63] Antoine Gara "Billionaire Chris Hohn Explains Why Increased Disclosure Will Force Companies To Cut Their Carbon Emissions" (9 March 2020) Forbes <www.forbes.com>.
[64] Gara, above n 63.
[65] Gara, above n 63.

adopt the proposals, Hohn has demonstrated his willingness to use his position to force the company to put its climate plan to a vote at the company's annual general meeting (AGM).[66]

The Say on Climate initiative has three key goals. These are to make companies:[67]

(1) Disclose emissions and present this disclosure to shareholders;
(2) Develop a plan to manage these emissions and present this plan to shareholders; and
(3) Allow shareholders to make an annual advisory vote on the plan and performance relative to the plan.

Ideally, companies will adopt all three of the Say on Climate goals. However, in practice different organisations have chosen to focus on different aspects of these goals. For example, there has been a particular focus in many jurisdictions on ensuring companies develop a credible climate plan. Say on Climate has provided a blueprint for what constitutes a credible plan (see Appendix 2).[68] Some organisations, including the Australasian Centre for Corporate Responsibility (ACCR), have chosen to focus on changing corporate behaviour by encouraging companies to embed an annual shareholder vote on climate transition plans within the company constitution.[69] This paper has a slightly different focus again, taking a law reform approach to whether a shareholder vote on companies' climate strategies should be made mandatory in Aotearoa. This demonstrates that there is scope within the Say on Climate initiative to take different approaches to achieve the three core goals.

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[66] Matt Wirz "British Hedge Fund Billionaire Takes Climate Fight to S&P 500" (28 January 2021) The Wall Street Journal <www.wsj.com>.
[67] Say on Climate "Shareholder Voting on Climate Transition Action Plans" <www.sayonclimate.org>.
[68] Say on Climate "Essential Components of a Climate Action Plan presentation" (July 21 2020) <https://sayonclimate.org>.
[69] Patrick Durkin "Boards brace for ‘say on climate’ resolutions" (April 7 2021) Australian Financial Review <www.afr.com>.

## A Support for the Initiative

The Say on Climate initiative is rapidly building momentum from within the business community.[70] In July 2021, 53 investors managing over USD 14 trillion in assets made an investor position statement via the Institutional Investors Group on Climate Change.[71] This statement called upon the listed companies in the investor's portfolios to:[72]

(a) Disclose a net-zero transition plan;
(b) Provide a routine vote on the implementation of the net-zero transition plan; and
(c) Identify the directors responsible for net-zero transition planning.

As of 30 June 2021, shareholders in 19 companies in Europe[73] and 10 companies in the Asia Pacific region, had made climate-related (including Say on Climate) resolutions at the 2021 company AGMs.[74] Several notable companies have already voluntarily adopted the Say on Climate proposals, by disclosing climate-related strategies and putting these to an advisory shareholder vote.[75] Some of these companies include:

### *1 Aena*

A company that has been considered as a successful case study of the shareholder vote being implemented is the Spanish airport operator, Aena.[76] In October 2020, Aena became the first major company to adopt the practice of publishing an annual climate

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[70] Bentley Kaplan, Florian Sommer and Gillian Mollod "Say on Climate and Deluge in the Delta" (podcast, 18 September 2021) The ESG Weekly <www.msci.com>.
[71] Institutional Investors Group on Climate Change "Investor Position Statement: A call for Corporate Net Zero Transition Plans" (30 July 2021) <www.iigcc.org>. See also Sara Feijao " Global investors with $14 trillion call for shareholder vote on companies' climate plans" (2 August 2021) Linklaters <www.linklaters.com>.
[72] Institutional Investors Group on Climate Change, above n 71.
[73] IHS Markit *The significance of say-on-climate resolutions: Part 1 - A European overview* (11 August 2021).
[74] IHS Markit *The significance of say-on-climate resolutions: Part 3 - An Asia Pacific overview* (8 September 2021).
[75] Chris Hohn and Andrew Behar "Say On Climate: Net-Zero with Annual Shareholder Votes – A Global Movement" (16 March 2021) Proxy Preview <www.proxypreview.org>.
[76] Aena "Who we are" <www.aena.es>.

transition action plan and putting this to a shareholder vote.[77] This came after Chris Hohn used his shareholding in Aena to put forward a shareholder resolution, requiring Aena to publish a comprehensive climate transition action plan, and to put this to an advisory shareholder vote on an annual basis.[78] Despite Aena's management initially voting against the plan, 98 per cent of shareholders, including the world's largest asset management firm BlackRock, and proxy advisory firms Institutional Shareholder Services (ISS) and Glass Lewis, voted in support of the annual vote.[79]

*2 Rio Tinto*

Somewhat closer to home, Australian mining and energy giant Rio Tinto committed to putting their climate change report to an advisory vote at the 2022 AGM.[80] Simpson Thompson, Chairman of the Rio Tinto board, said the vote "will give shareholders the opportunity to express their views on our overall climate change strategy and implementation".[81]

*3 Unilever*

Unilever is one of the world's largest consumer goods companies, owner of well-known brands such as Dove and Ben and Jerry's. The Unilever board has committed to putting its climate transition action plan before shareholders, seeking a non-binding, advisory vote.[82] Unilever Chief Executive Officer (CEO), Alan Jope, has said:[83]

> It’s the first time a company of our size has voluntarily committed to putting its climate plans before a shareholder vote. We are doing this to be transparent about our plans, and to strengthen engagement and dialogue with our investors. As governments around the world wake up to the full implications of the climate crisis and start to regulate and price emissions, we are confident that

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[77] Sonia Medina and Chris Hohn "Say on Climate: Shareholder voting on climate transition action plans" (Children's Investment Fund Foundation webinar, 19 November 2020).
[78] Medina and Hohn, above n 77.
[79] Medina and Hohn, above n 77.
[80] Simon Thompson "Rio Tinto Limited AGM – Address by the Chairman" (6 May 2021) at 2.
[81] At 2.
[82] Alan Jope "Why we're putting our climate plans to a shareholder vote" (22 March 2021) Unilever <www.unilever.com>.
[83] Jope, above n 82.

> early and ambitious climate action will drive superior performance and create value for all our stakeholders.

Shareholder advocacy organisations have played a significant role in putting forward Say on Climate proposals at company AGMs. For example, the ACCR has put forward multiple shareholder resolutions at Australian energy companies' AGMs.[84] This pressure from ACCR has resulted in prominent Australian energy companies, including Oil Search, Santos, Origin Energy and Woodside Petroleum, agreeing to provide shareholders with an advisory vote on the company's climate strategies.[85]

As of 10 September 2020, no New Zealand companies had publicly adopted Say on Climate proposals. However, given the progress made in Europe, North America and Australia, it is likely only a matter of time before a proposal for a mandatory shareholder vote on companies' climate strategies comes across the board tables of New Zealand companies.

### B Similarities with the "Say on Pay" Campaign

The Say on Climate initiative is similar to the "Say on Pay" campaign that gained traction internationally in 2007.[86] The Say on Pay campaign sought mandatory shareholder votes on CEO's remuneration,[87] largely in response to public outcry over the size of CEO's pay packages.[88] This led to legislative changes being made around the world, including the United Kingdom,[89] Australia[90] and the United States.[91]

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[84] IHS Markit, above n 74; and Australasian Centre for Corporate Responsibility "Say on Climate" <www.accr.org.au>.

[85] Australasian Centre for Corporate Responsibility, above n 84.

[86] Paul Hodgson "A Brief History of Say on Pay" (September 2009) Ivey Business Journal <https://iveybusinessjournal.com>.

[87] David Larcker and others *Ten Myths of Say on Pay* (Stanford University, CGRP-26, 28 June 2012) at 1.

[88] Randall Thomas and Susan Watson "Should New Zealand Adopt Say on Pay" (2013) 19 NZBLQ 111 at 111.

[89] Companies Act 2006 (UK), s 439.

[90] Corporations Act 2001 (Cth), s 250R(2).

[91] Dodd-Frank Wall Street Reform and Consumer Protection Act Pub L No 111-203, § 951, 124 Stat 1376 at 1899 (2010).

It is difficult to predict whether a Say on Climate shareholder vote would be effective in encouraging companies to operate more sustainably. As will be discussed in further detail below, the Say on Climate vote relies on shareholder engagement on climate-related issues, in addition to companies' response to this engagement. This is why a comparative analysis with the Say on Pay shareholder vote is useful, as the operation of the Say on Pay vote helps to evaluate whether a Say on Climate vote would be effective.

The legislative response in the United States to the Say on Pay campaign came through the Dodd-Frank Wall Street Reform and Consumer Protection Act (better known as the 'Dodd-Frank Act'). The Dodd-Frank Act requires public companies to provide shareholders with an advisory vote, to approve or disapprove the compensation paid to certain company executives during the prior fiscal year.[92] Commentators considered that the Say on Pay votes mandated by the Dodd-Frank Act brought about greater attention by company management to shareholder concerns, increased shareholder interest in voting on corporate governance, and a broader dialogue on pay issues between company management and shareholders.[93]

Outside of the response to the Dodd-Frank Act, research conducted into the relationship between executive compensation, corporate governance and Say on Pay, found that company boards do make changes to compensation plans in light of concerns expressed by shareholders through the Say on Pay vote.[94] While this impact has been labelled "modest", it demonstrates that the Say on Pay vote has nonetheless proven to be an effective tool.[95]

The operation of the Say on Pay vote is a complex topic that has led to much scholarly review.[96] While a full investigation into the operation of Say on Pay falls outside the

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[92] At 1899. See also Thomas and Watson, above n 88, at 131.
[93] Thomas and Watson, above n 88, at 131.
[94] Fabrizio Ferri and Robert Göx "Executive Compensation, Corporate Governance, and Say on Pay" (2018) Foundations and Trends in Accounting 12 at 91.
[95] At 91–92.
[96] See generally Ferri and Göx, above n 94; Thomas and Watson, above n 88; Kym Sheehan *The Regulation of Executive Compensation* (Edward Elgar Publishing, Northampton (Massachusetts) 2012);

scope of this paper, the apparent success of the Say on Pay campaign, both in terms of the legislative response and the effect it has had on decisions relating to executive remuneration, may give credence to the possibility of a similar reform being made in response to the Say on Climate initiative.

### *1 Executive remuneration disclosure requirements*

Executive remuneration is also relevant to this paper's proposal due to the similarities between the director's remuneration disclosure requirements in the New Zealand Companies Act, and the incoming climate-related disclosure requirements in the Financial Sector (Climate-Related Disclosures and Other Matters) Amendment Bill. The Companies Act requires the total of the remuneration and the value of other benefits received by directors from the company to be stated in the company's annual report.[97] Additional requirements are prescribed by the New Zealand Stock Exchange's (NZX) Listing Rules.[98] The Listing Rules state that no remuneration[99] may be paid to directors "without prior authorisation by an ordinary resolution".[100]

If passed, the Financial Sector (Climate-Related Disclosures and Other Matters) Amendment Bill will introduce disclosure requirements that will require certain companies to disclose information about the risks and opportunities presented by climate change.[101] The disclosure and voting requirements on director's remuneration demonstrates that it is possible for changes to be made to facilitate a similar mechanism for shareholders to approve companies' climate strategies.

## *VI The Important Role of Shareholders*

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and Fabrizio Ferri and David Maber "Say on Pay Votes and CEO Compensation: Evidence from the UK" (2013) Review of Finance 17.

[97] Companies Act 1993, s 211(1)(f).

[98] NZX Listing Rules (10 December 2020), r 2.11.

[99] But see rr 2.11.3–2.12.2 for exceptions.

[100] Rule 2.11.1

[101] (15 April 2021) 751 NZPD 2219.

## A The Role of Shareholders in the Say on Climate Initiative

The role shareholders have in the Say on Climate initiative cannot be understated. Like the Say on Pay vote, a Say on Climate vote is a neutral tool, in that its effectiveness depends on what shareholders have to say on companies' climate strategies.[102] Therefore, by providing shareholders with the ability to vote on companies' climate strategies, the expectation is that this will promote positive change in companies' approach to emissions disclosure and planning.[103] Of course, this relies on a number of assumptions. If given the ability, will shareholders take the time to vote? And why will shareholders be concerned about companies' climate strategies, provided they are getting a return on their investment? The following part of this paper will attempt to answer these questions, by discussing what kind of shareholders would vote on companies' climate plans, the reasons why shareholders should be given this power, and why shareholders will be motivated to hold companies accountable over their climate strategies.

## B Financial Capitalism and Institutional Investors

Before discussing the role of shareholders in the Say on Climate initiative, it is necessary to first describe the rise of a particular type of shareholder, the institutional investor. The influence of the company in the 20th and 21st centuries reflects the rise of financial capitalism. Financial capitalism refers to the production of capital through the circulation of money within the financial system.[104] Increased globalisation has led to financial capital being the dominant mode of capital accumulation, facilitated by the use of financial markets by large financial institutions and multinational companies.[105] These companies have utilised international financial markets for financing, allowing them to grow into the behemoths they are today.

Raising capital through the financial markets has also seen the rise of institutional investors.[106] The term "institutional investor" encompasses superannuation funds,

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[102] Ferri and Göx, above n 94, at 92.

[103] Australasian Centre for Corporate Responsibility, above n 84.

[104] Yang Dian and Ouyang Xuanyu "The Rise and Impact of Financial Capitalism: A Sociological Analysis of New Forms of Capitalism" (2021) 41 Social Sciences in China 24 at 28.

[105] At 28.

[106] At 28.

investment companies, insurance companies, banks and charitable foundations.[107] However, in this paper, institutional investors will refer specifically to investment companies that invest money on behalf of others.[108]

Today, institutional investors own the bulk of publicly listed company shares.[109] A study conducted on publicly listed companies in the United States, found that 32 per cent of public companies in 2015 had at least one institutional investor who owned at least 10 per cent of the shares.[110] BlackRock, Vanguard and State Street are the world's largest institutional investors.[111] These firms' combined holdings made them the largest investor of 88 per cent of all companies in the Standard and Poor's (S&P) 500 in 2018.[112] Evidence from New Zealand (discussed in further detail in Part VII) also supports this trend, with a large portion of equity in companies listed on the NZX being owned by institutional investors.[113]

### C Shareholder's Power and Control

The prevalence of institutional investors has changed the governance dynamics in large publicly listed companies.[114] Aotearoa is generally considered a "shareholder primacy" jurisdiction.[115] Traditionally, this has referred to the belief that maximisation of shareholder profit is a company's sole purpose.[116] However, shareholder primacy does

[107] Aik Win Tan and Trish Keeper *Institutional Investors and Corporate Governance: A New Zealand Perspective* (Working Paper, Victoria University of Wellington, 2008) at 3.
[108] At 3.
[109] Brian Cheffins *The Rise and Fall (?) of the Berle-Means Corporation* (Research Paper, University of Cambridge, 2018) at 3.
[110] Kathleen Kahle and René Stulz "Is the US Corporation in Trouble?" (2017) 31 JEP 67 at 81.
[111] Chris Flood "Top 10 institutional investors fuel market volatility, study finds" (8 August 2020) Financial Times <www.ft.com>.
[112] Fiona Morton and Herbert Hovenkamp "Horizontal Shareholding and Antitrust Policy" (2018) 126 Yale L J 2027 at 2028, n 6.
[113] Krishna Reddy and Andrea Butler "Institutional Investors, Firm Performance, and the Prospects for Socially Responsible Investing: Evidence From New Zealand" in Suzanne Young and Stephen Gates (eds) *Institutional Investors' Power to Change Corporate Behaviour: International Perspectives* (Emerald, Bingley (UK), 2013) 149 at 150.
[114] Cheffins, above n 109, at 3.
[115] Kalderimis and Swan, above n 35, at 19.
[116] Sjåfjell, above n 46, at 38.

not only refer to shareholder maximisation of profit, but also the substantial governance powers shareholders have.

In New Zealand, shareholders are given certain powers under the Companies Act. These powers include the ability to approve major transactions,[117] to adopt, alter or revoke the company's constitution,[118] and to appoint or remove directors.[119] Shareholders exercise these powers by voting at company meetings[120] on ordinary[121] or special resolutions.[122] Shareholders also have a broad power under s 109 of the Companies Act to question, discuss, or comment on the management of the company at company meetings.[123] These powers, in addition to the large shareholding institutional investors often have, provides these shareholders with the ability to effectively control the direction companies take, including the way companies respond to climate change.[124]

This does, however, assume that shareholders are willing to exercise these powers and become involved in the governance of the company. This may not always be the case. In fact, some investors, particularly retail investors, are generally considered to be "rationally apathetic".[125] This means that most retail investors will not take part in corporate governance, preferring to defer to management and company boards or rely on larger, more active shareholders.[126] Shareholder's apathy is considered rational, as the small amount of shares many retail investors own means the cost incurred by participating in the governance of the company often far exceeds any potential increase in the value of their investment.[127]

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[117] Companies Act 1993, s 129.
[118] Section 106.
[119] Section 156.
[120] This may be at the annual general meeting (per s 120) or at a special meeting of shareholders (per s 121).
[121] Section 105.
[122] Section 106.
[123] Section 109.
[124] John Bogle *The Battle For The Soul Of Capitalism* (Yale University Press, New Haven, 2006) at 74.
[125] Retail investors are usually considered individuals who purchase shares on their own account, rather than through an investment business. See the Financial Markets Conduct Act 2013, s 35.
[126] Kobi Kastiel and Yaron Nili "In Search of the 'Absent' Shareholders: A New Solution to Retail Investors' Apathy" (2016) 41 Del J Corp L 55 at 57.
[127] At 57.

Rational apathy is not necessarily limited to retail investors. Institutional investors have also traditionally taken a relatively passive stance on governance issues.[128] In 2017, BlackRock supported directors' stance on resolutions 91 per cent of the time, State Street 86 per cent, and Vanguard 94 per cent.[129] This suggests that while shareholders —particularly institutional investors— have the power to take control of companies, they have rarely been willing to exercise this control.[130]

*1 What shareholders will vote on climate strategies?*

The traditional passivity of shareholders is beginning to change, particularly concerning shareholders' position on companies' Environmental, Social and Governance (ESG) practices.[131] While there is limited evidence relating to New Zealand companies, international evidence suggests that shareholders are taking a more active role in governance issues relating to climate-related matters. A survey conducted in 2021 by strategic advice and shareholder service firm Morrow Sodali found that:[132]

> Engagement and voting are the primary avenues for investors to express their views and hold companies to account. Investor appetite is therefore growing for access and engagement with boards on ESG matters.

BlackRock recently demanded that the companies they are invested in develop a climate plan, release emissions data and put in place emissions reduction targets.[133] In a letter to the CEO's of companies BlackRock invests in, Larry Fink, BlackRock's CEO, warned that BlackRock:[134]

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[128] Cheffins, above n 109, at 66.
[129] At 66.
[130] At 66.
[131] Reddy and Butler, above n 113, at 151.
[132] Kiran Vasantham and others *Institutional Investor Survey 2021* (Morrow Sodali, 11 May 2021) at 7.
[133] Simon Jessop, Mathew Green and Ross Kerber "Show us the plan: Investors push companies to come clean on climate" (24 February 2021) Reuters <www.reuters.com>.
[134] Larry Fink "Larry Fink's 2020 Letter to CEOs: A Fundamental Reshaping of Finance" (2020) BlackRock <www.blackrock.com>.

> …[will] be increasingly disposed to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices and plans underlying them.

A notable example of shareholder participation on ESG issues is the recent shareholder vote at ExxonMobil, one of the world's largest oil and gas companies. A majority of ExxonMobil's shareholders (including BlackRock and Vanguard) recently voted to replace two of ExxonMobil's directors[135] with directors nominated by a small climate activist hedge fund, Engine No.1.[136] Engine No.1 called on ExxonMobil's shareholders to "Reenergize Exxon", after shareholder returns at ExxonMobil were minus 15 per cent over the last decade.[137] While Engine No.1 owned only a fraction of Exxon's shares (0.02 per cent), it was able to gather the support of institutional investors such as BlackRock and Vanguard (who together owned around 15 per cent of Exxon's shares) to vote to replace the directors.[138] This move, made against one of the largest emitters of greenhouse gases in the world, is an example of institutional investors putting pressure on publicly listed companies to address environmental concerns.[139]

Because institutional investors' shareholding is often dispersed over thousands of different companies, there is a high resource cost involved in undertaking the required due diligence to vote on issues at each company's AGM.[140] For this reason, institutional investors will often employ proxy advisory firms who specialise in giving proxy-

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[135] Hugh Morrison "Carbon-major shareholders take action on sustainability, for long term value" (1 July 2021) Simpson Grierson <www.simpsongrierson.com>.

[136] Climate Action 100+ "In Stunning Vote, Shareholders Elect Two New Directors Put Forth By Shareholders at ExxonMobil, Seeking Climate Expertise and Action" (26 May 2021) <www.climateaction100.org>.

[137] Samanth Subramanian "Engine No. 1: The little hedge fund that shook Big Oil" (29 May 2021) Quartz <https://qz.com>.

[138] Subramanian, above n 137.

[139] Kai Liekefett and others "Shareholder Activism and ESG: What Comes Next, and How to Prepare" (29 May 2021) Harvard Law School Forum on Corporate Governance <https://corpgov.law.harvard.edu>.

[140] Chester Spatt "Proxy Advisory Firms, Governance, Failure, and Regulation" (2021) 10 RCFS 136 at 137.

voting[141] advice.[142] This means that proxy advisory firms, such as ISS and Glass Lewis, hold considerable influence over voting decisions made by institutional investors, through the advice they provide on corporate governance issues.[143] Both Glass Lewis and ISS have released guidelines on their approach to giving proxy advice on environmental issues.[144] Glass Lewis have said:

> On a case-by-case basis, we will consider supporting well-crafted proposals requesting that companies report their greenhouse gas ("GHG") emissions and adopt a reduction goal for these emissions.

ISS's policy recommendation is to:[145]

> Vote for shareholder proposals seeking information on the financial, physical, or regulatory risks it faces related to climate change – on its operations and investments, or on how the company identifies, measures, and manage such risks.

Despite institutional investors and proxy advisory firms making commitments to engage in climate-related governance issues, there have been concerns regarding the lack of action taken on these commitments.[146] BlackRock, in particular, has been criticised for failing to move fast enough in using its shareholder power to accelerate climate action from the companies it invests in.[147] BlackRock's Big Problem, a network

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141 In New Zealand the ability to vote by proxy is prescribed by sch 1 cl 6 of the Companies Act 1993. A proxy vote is a delegation of voting authority made to a representative on behalf of the original vote holder.

142 Spatt, above n 140, at 137.

143 Pedro Matos *ESG and Responsible Institutional Investing Around the World: A Critical Review* (eBook ed, CFA Institute Research Foundation, 2020) at 49.

144 Institutional Shareholder Services "New Zealand Proxy Voting Guidelines Benchmark Policy Recommendations" (19 November 2020) <www.issgovernance.com>.

145 Institutional Shareholder Services "United States Proxy Voting Guidelines: 2021 Policy Recommendations (27 December 2020) <www.issgovernance.com> at 60.

146 Attracta Mooney "BlackRock vows to back more shareholder votes on climate change" (10 December 2020) Financial Times <www.ft.com>.

147 BlackRock's Big Problem "Expand pro-climate engagement and voting" <https://blackrocksbigproblem.com>.

of climate activist groups, has launched a campaign to pressure BlackRock to better align their business practice with a climate-safe world.[148]

An example of the potential hypocrisy from BlackRock is its refusal to support shareholder resolutions at Australian energy companies Woodside Energy and Santos, which called for emission targets in line with the 2015 Paris Agreement.[149] This refusal came just months after Larry Fink's letter warned that climate change may bring about a "fundamental reshaping of finance".[150] This being said, BlackRock did support 54 per cent of all ESG shareholder proposals in the second half of 2020, after determining that these proposals were aligned with maximising long-term value.[151]

While progress still needs to be made, institutional investors, and the proxy advisory firms providing them with advice, are increasingly choosing to use their voting power to become involved in governance issues, particularly issues that involve the threat of climate change.

### *2 Why will they vote on climate strategies?*

The reason why shareholders will vote on companies' climate strategies is simple. Climate change presents a key risk to the performance of investor's portfolios.[152] In this sense, investors will engage in decisions relating to companies' climate strategies, as they have a financial motive to do so. Investors will look to incorporate climate risks into their investment decisions, either to pursue higher returns by mitigating the costs of climate change, or to ensure lower risk to the investment.[153]

The risks presented by climate change may be divided into two categories. The first are the physical risks, including uncertainty over compromised assets, threatened natural

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[148] BlackRock's Big Problem, above n 147.
[149] Attracta Mooney "Activists fear BlackRock only paying lip service to climate change" (17 May 2020) Institute for Energy Economics and Financial Analysis <https://ieefa.org>.
[150] Fink, above n 134.
[151] BlackRock "Net Zero: A Fiduciary Approach" (26 January 2021) <www.blackrock.com>.
[152] Krueger, Sautner and Starks, above n 2, at 1067.
[153] At 1085.

resources, supply chain interruptions, coastal property devaluation,[154] and insurance liabilities.[155] In addition to the physical risks posed by climate change, there are also transitional risks associated with the commitment 196 countries (including New Zealand) made under the 2015 Paris Agreement, to limit global warming to below 1.5°C above pre-industrial levels.[156]

To uphold the commitments made under the Paris Agreement, adjustments will need to be made to support the move towards a lower carbon economy.[157] Greenhouse gas emissions made by companies will continue to be targeted, taxed and regulated by governments in the future.[158] Companies who fail to formulate a plan to address emissions will not only incur direct losses, but may also damage their competitive position and harm their relationship with consumers.[159]

The cost of capital is a further financial risk to consider, especially for carbon intensive companies. The cost of capital typically refers to the return that is expected by those who provide the company with capital.[160] Companies with higher exposure to the risks posed by climate change are more likely to face higher costs of capital.[161] In particular, climate change risks may impact the cost of debt capital, as financial institutions may charge carbon intensive companies higher rates of interest, or choose not to lend to these companies at all.[162]

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[154] Kalderimis and Swan, above n 35, at 3.
[155] Mark Carney "Breaking the tragedy of the horizon – climate change and financial stability" (speech to the insurance market Lloyd's of London, London, 29 September 2015) at 4.
[156] Paris Agreement on Climate Change [2016] ATS 24 (opened for signature 22 April 2016, entered into force 4 November 2016).
[157] Carney, above n 155, at 4.
[158] Medina and Hohn, above n 77.
[159] Medina and Hohn, above n 77.
[160] Amy Gallo "Refresher on Cost of Capital" (30 April 2015) Harvard Business Review <https://hbr.org>.
[161] Jeong hwan Park and Jung hee Noh "Relationship between Climate Change Risk and Cost of Capital" (2018) 23 GBFR 66 at 68. See Mark Sharfman and Chitru Fernando "Environmental Risk Management and the Cost of Capital" (2008) 29 SMJ 569–592.
[162] Sudheer Chava "Environmental Externalities and Cost of Capital" (2014) 60 Management Science 2223 at 2241.

Some financial institutions have already ceased lending to certain companies. New Zealand banks such as The Co-operative Bank, Kiwibank and TSB Bank do not currently lend to fossil fuel companies.[163] Westpac ceased lending to coal mining companies in 2020, and does not intend to recommence financing this sector.[164] More generally, banks are beginning to recognise the risk climate change poses to lending, and are investigating whether companies have viable plans in place to address these risks before they lend.[165]

A survey conducted by Krueger, Sautner and Starks in 2020, found that investors have identified the risks presented by climate change, and understand the financial implications it may have for their portfolio.[166] Cyrus Taraporevala, President and CEO of State Street, has said:[167]

> We [State Street] seek to analyse material issues such as climate risk, board quality, or cybersecurity in terms of how they impact financial value in a positive or a negative way. That's the integrative approach we are increasingly taking for all of our investments.

Beyond the financial risk presented by climate change, shareholders may also have non-financial motivations for voting on companies' climate strategies. The Krueger, Sautner and Starks survey also found that considerations about climate risks may reflect the investment managers' personal preferences or their perceived moral or ethical obligations.[168] Reputation —both the company's and the investors— is another strong motive behind investors incorporating climate risks into portfolio decisions.[169] Investors are aware of the effect damage to a company's reputation can have on their

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[163] 350 Aotearoa *Bankrolling the Climate Crisis* (November 21, 2018) at 2.
[164] Westpac *Westpac NZ Climate Risk Report* (November 2020) at 5.
[165] See Margaret Peloso and others "Credit for Climate Action" (8 April 2021) Harvard Law School Forum on Corporate Governance <https://corpgov.law.harvard.edu>.
[166] Krueger, Sautner and Starks, above n 2, at 1104.
[167] Kiran Vasantham and others, above n 132, at 9.
[168] Krueger, Sautner and Starks, above n 2, at 1058.
[169] At 1070.

portfolios, and therefore demand greater transparency and accountability to allow them to manage these risks.[170]

It is also important to recognise that engaging directly with companies is not the only way investors may choose to address the financial risk climate change presents to their portfolios. Investors may also choose to exclude certain companies from their portfolio based on specific minimum ESG criteria.[171] This approach is known as "negative investment screening".[172] The Krueger, Sautner and Starks survey found that screening was frequently used by investors, with 24 per cent of the survey respondents using exclusionary screening as a climate risk management approach.[173] Obviously investors who use screening as an approach will not be in the position to engage with companies' climate strategies, as they will not be shareholders of these companies. Nonetheless, it is important to recognise that direct engagement is not the only approach investors take to mitigate climate-related risks.

To summarise this part of the paper, shareholders are in a position to direct the company to develop a plan to mitigate the financial risks presented by climate change. Not only are they in the position to do so, the financial risk posed by climate change will motivate shareholders to exercise their influence, overcoming the traditional apathy shareholders have taken to governance issues. This paper's proposal, a mandatory vote on companies' climate strategies, provides a mechanism for shareholders to engage with the company on the best steps forward in the company's response to climate change.

## *VII Say on Climate in New Zealand*

To this point, this paper has discussed the Say on Climate initiative generally, considering the support for the initiative overseas and the important role of shareholders. The following part of this paper will look specifically at whether a

[170] Gordon Clark and Tessa Hebb "Why should they care? The role of institutional investors in the market for corporate global responsibility" (2005) 37 Environment and Planning 2015 at 2028.
[171] Amir Amel-Zadeh and George Serafeim "Why and How Investors Use ESG Information: Evidence from a Global Survey" (2018) 74 FAJ 87 at 94.
[172] At 94.
[173] Krueger, Sautner and Starks, above n 2, at 1087.

shareholder vote on companies' climate strategies should be made mandatory in Aotearoa.

### A Evidence from New Zealand

While the Say on Climate initiative has gained momentum overseas, New Zealand has a different corporate governance system to countries such as the United States. A key difference is the relative size[174] of companies listed on the NZX, compared to that of companies listed on, for example, the New York Stock Exchange.[175] A consequence of this difference in size is that companies in the United States often have more dispersed shareholding, with a larger presence of institutional investors and proxy advisory firms.[176]

There is limited evidence on the proportion of shares owned by institutional investors in New Zealand.[177] Unpublished research from 2007 found that institutional investors owned approximately 51 per cent of shares in New Zealand listed companies, although this figure will likely have changed in the 14 years since that research was conducted.[178] A review conducted by the Treasury in 2015 on the KiwiSaver fund manager market dynamics and allocation of assets in New Zealand found that institutional investors owned, on average, 40 per cent of NZX10[179] company shares.[180]

The 2020 Equity Ownership Survey, conducted by New Zealand wealth management firm JB Were, surveyed 60 NZX listed companies that accounted for 96 per cent of the

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[174] The market capitalisation of the New York Stock Exchange's listed companies currently exceeds $24 trillion, compared to the market capitalisation of NZX's listed companies being approximately $186 billion.

[175] See Kat Tretina and Benjamin Curry "NYSE: What is The New York Stock Exchange?" (9 April 2021) Forbes Advisor <www.forbes.com/advisor> and NZX "NZX Main Board (NZSX)" (23 September 2021) <www.nzx.com>.

[176] Thomas and Watson, above n 88, at 134.

[177] Tan and Keeper, above n 107, at 2.

[178] At 2.

[179] NZX10 companies are the 10 largest companies in the S&P/NZX 50 Index. The small number of companies in this review means it is problematic to use the review's findings as authoritative evidence for the proportion of shares owned by institutional investors in New Zealand.

[180] Andreas Heuser and others *Review of the KiwiSaver Fund Manager Market Dynamics and Allocation of Assets* (Treasury, September 2015) at 21.

S&P/ NZX All Index market capitalisation.[181] The survey found that 27.2 per cent of shares in these companies were owned by managed funds (including KiwiSaver investment funds) based in New Zealand.[182] Offshore owners held 39.3 per cent of equity in the companies surveyed.[183] As the JB Were survey did not identify what proportion of offshore owners were institutional investors, the 39.3 per cent figure would include other types of investors, such as foreign retail investors.

While this data does not provide an exact account of the presence of institutional investors in New Zealand, it does demonstrate that institutional investors own a significant portion of equity in New Zealand companies. The next consideration is whether these institutional investors are willing to become engaged in climate-related governance issues. Preliminary research conducted in this area suggests that institutional investors in New Zealand are following the trend overseas.[184] The Investor Group on Climate Change surveyed 38 institutional investors in Australia and New Zealand to determine investor attitudes towards climate change.[185] The survey found that investors considered climate change a strategic focus within their portfolios, with portfolio wide net-zero emission targets becoming the norm.[186]

While shareholders in New Zealand companies are becoming more aware of the risks posed by climate change, more research is required to gain a better understanding of shareholder engagement on these issues. The success of this paper's proposal is contingent both on the presence of institutional investors in Aotearoa, and the extent of shareholder engagement on climate-related governance issues. Despite institutional investors in overseas markets beginning to engage and participate in governance issues involving climate change, the limited data relating to shareholders of publicly listed companies in New Zealand makes it difficult to ascertain whether there would be the same engagement.

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[181] JB Were *Equity Ownership Survey New Zealand 2020* (15 December 2020) at 1.
[182] At 4.
[183] At 1.
[184] Kalderimis and Swan, above n 35, at 12.
[185] The Investor Group on Climate Change *2020 Net Zero Investment Survey* (September 2020) at 3.
[186] At 2.

### 1 KiwiSaver

Some of the largest institutional investors in New Zealand are KiwiSaver investment fund managers. The most recent data indicates that KiwiSaver funds hold $86.7 billion in assets.[187] Of these assets, $9.137 billion are listed shares in New Zealand companies.[188] From this information it is evident that KiwiSaver funds own a significant portion of equity in New Zealand companies. Therefore, it is important to determine whether KiwiSaver fund managers would engage with a Say on Climate vote.

Recent changes have been made to KiwiSaver schemes to support more responsible investment. In March 2020, the Government announced that default KiwiSaver funds will exclude investment in fossil fuels,[189] with these changes due to take effect from 1 December 2021.[190] Despite these changes being made, there is a lack of evidence to suggest that KiwiSaver investment fund managers are engaging with companies in their funds on climate-related issues.[191] The new changes require default KiwiSaver funds to adopt a "screening" approach to manage climate-related risks, forcing them to divest[192] from fossil fuel companies.[193] However, this does not necessarily mean KiwiSaver fund managers are engaging with the companies they currently invest in on climate-related issues.[194]

This may present issues for this paper's proposal. KiwiSaver investment fund managers are an important player in New Zealand's investment landscape. If these fund managers

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187 Reserve Bank of New Zealand "Kiwisaver: Assets by sector (T43)" (25 August 2021) <www.rbnz.govt.nz>.

188 Reserve Bank of New Zealand, above n 187.

189 Grant Robertson and Kris Faafoi "Default KiwiSaver changes support more responsible investment" (press release, 1 March 2020).

190 Grant Robertson and David Clark "KiwiSaver default provider scheme improvements slash fees, boosts savings" (press release, 14 May 2021).

191 Sam Stubbs "Is a lack of activist shareholders hurting KiwiSaver?" *Stuff* (online ed, Auckland, 4 January 2021).

192 Divestment refers to the reduction of shareholding in certain companies, particularly fossil fuel companies, in favour of other climate-friendly, or at least climate-neutral, alternatives. See Julie Ayling and Neil Gunningham "Non-state governance and climate policy: the fossil fuel divestment movement" (2017) 17 Climate Policy 131.

193 Robertson and Faafoi, above n 189.

194 Barry Coates "Your biggest climate impact might be your Kiwisaver" *Stuff* (online ed, Auckland, July 21 2021).

remain passive and/or unwilling to engage on governance issues such as companies' climate strategies, it may undermine the effectiveness of a Say on Climate shareholder vote in Aotearoa.

### B Building on an Existing Framework

An advantage of introducing a shareholder vote on companies' climate strategies in New Zealand, is that there is an existing framework to build upon. A key aspect of the Say on Climate initiative is encouraging companies to adequately disclose their emissions and present this to shareholders.[195] Aotearoa is set to become one of the first countries in the world to make climate disclosure requirements mandatory for certain companies. These requirements are contained in the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (the Bill). The Bill will amend the Financial Markets Conduct Act 2013,[196] the Financial Reporting Act 2013[197] and the Public Audit Act 2013,[198] introducing mandatory climate-related disclosures for certain businesses.[199] The Bill will require companies to disclose clear, comparable, and consistent information about the risks and opportunities presented by climate change.[200] The Bill is significant for this paper's proposal for two reasons. Firstly, the Bill has the potential to facilitate a vote by shareholders on companies' climate strategies. The disclosure requirements are expected to be based on recommendations made by the Taskforce on Climate-Related Financial Disclosures (TCFD).[201] The TCFD's recommendations include disclosures relating to "strategy" and "risk management".[202] The TCFD proposes that disclosures relating to strategy will involve:[203]

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[195] Say on Climate, above n 67.
[196] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (30-2), cl 3.
[197] Clause 21.
[198] Clause 36.
[199] Clause 7.
[200] (15 April 2021) 751 NZPD 2210.
[201] At 2219.
[202] Task Force on Climate-related Financial Disclosures *Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017) at 14.
[203] At 14.

> [The company] [d]isclos[ing] the actual and potential impacts of climate-related risks and opportunities on the organisation's businesses, strategy, and financial planning where such information is material.

The TCFD propose that disclosures relating to risk management will require the company to "disclose how the organisation identifies, assesses, and manages climate-related risks".[204] In New Zealand, the exact disclosure requirements are to be developed by the External Reporting Board.[205] However, the requirements are expected to be based on the TCFD's recommendations, which means companies under the regime will likely be required to identify climate-related risks, and develop strategies to manage these risks.[206] These strategies or climate plans could then be put to shareholders to vote on at the company's AGM.

The Bill is also significant for this paper's proposal as it demonstrates the New Zealand Government's willingness to take steps to regulate corporate behaviour in light of climate change.[207] Successive New Zealand Governments have traditionally been hesitant to intervene in the private sector, especially since the 1980s.[208] However, the disclosure requirements in the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill demonstrates a willingness by the Government to regulate company behaviour in light of climate change. While introducing a mandatory shareholder vote on companies' climate strategies may have not been feasible in the past, recent legislative changes reflect a shift in attitude, which makes the implementation of a shareholder vote in New Zealand more realistic.

## C What New Zealand Companies will the Vote Apply to?

An important consideration when investigating whether to make a shareholder vote on companies' climate strategies mandatory, is what companies would be captured under the regime. New Zealand's economy is overwhelmingly populated by small

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[204] At 14.
[205] (15 April 2021) 751 NZPD 2210.
[206] At 2219.
[207] At 2209.
[208] Toby Boraman "NZ politics' soft neoliberal underbelly" (19 September 2017) Massey University <www.massey.ac.nz>.

enterprises.[209] In fact, businesses with less than 20 employees represent 97 per cent of all firms in New Zealand.[210] Although all companies, regardless of size, should be making changes to address climate change, requiring companies who run businesses in this category to conduct a shareholder vote on climate strategies would be unnecessary. Many of these businesses will be run by closely held, owner-operated companies that are responsible for a fraction of the emission of greenhouse gases in New Zealand.

A mandatory vote may also present an unnecessary burden for smaller businesses. The Economic Development, Science and Innovation Select Committee (the Select Committee), when reporting on the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill, recognised that climate reporting and planning is a "new process" that "require[s] complex analysis", which will be harder for smaller businesses.[211] Not only is climate disclosure and shareholder voting a financial burden for smaller businesses, in some cases it may be entirely impractical and illogical.[212] For businesses run through a "one-person company", a mandatory shareholder vote would effectively require the director to develop a plan, then vote on the plan themselves. For obvious reasons, this would undermine the exercise, as it eliminates the accountability mechanism within the vote.

Instead, a shareholder vote would be more effective for large companies, which have more dispersed shareholding and emit a larger amount of greenhouse gases. While imperfect, limiting the vote to apply to companies listed on the NZX would capture these types of companies.

Limiting the vote to NZX listed companies would also create a degree of consistency with the disclosure requirements in the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill. In its current form, the Bill only requires certain

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[209] Ministry of Business, Innovation and Employment "Small businesses" <www.mbie.govt.nz>.
[210] Ministry of Business, Innovation and Employment, above n 209.
[211] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (30-2) (select committee report) at 3.
[212] At 3.

entities to meet the disclosure requirements, including "large" listed issuers[213] of equity and debt securities.[214] Ideally, there would be consistency between the disclosure requirements and any requirement to put companies' climate strategies to a shareholder vote. Otherwise, a situation may arise where a company (for example, a private company) is required to put forward a climate strategy at the AGM that they were not otherwise obligated to prepare.

This being said, there has been some debate as to the correct threshold for reporting entities.[215] The Ministry of Business, Innovation and Employment (MBIE), in their *Climate-Related Financial Disclosure Discussion Document*, recommended that the disclosure regime apply to all listed companies, "to provide useful information to investors and shareholders to facilitate good economic decision-making".[216] MBIE admitted that "large greenhouse gas emitters and other entities of scale would not be within scope unless they were listed issuers", but that these private companies "may receive direct and indirect pressure from insurers and capital-providers to identify and manage climate-related risks and opportunities".[217]

The version of the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill submitted to the Select Committee imposed disclosure requirements on all listed issuers of equity and debt securities.[218] However, the Select Committee recommended changing the definition of a "climate reporting entity", to limit it to "large listed issuers".[219] Large listed issuers would include issuers with a market capitalisation over $60 million.[220] As of 23 September 2021, this would include 136 of the 185 companies listed on the NZSX.[221] This demonstrates that the threshold for disclosure

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[213] For equity securities, an "issuer" refers to the company to which the security relates. See the Financial Markets Conduct Act 2013, s 11.

[214] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (30-2), cl 7.

[215] See (15 April 2021) 751 NZPD 2223–2224.

[216] Ministry for the Environment and Ministry of Business, Innovation and Employment *Climate-Related Financial Disclosure: Understanding Your Business Risks and Opportunities Related to Climate Change* (Ministry for the Environment, Discussion Document ME 1763, October 2019) at 38.

[217] At 38.

[218] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (30-1), cl 7.

[219] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (30-2) (select committee report) at 3.

[220] At 3.

[221] NZX, above n 175.

requirements, and therefore the shareholder voting requirements, is a topic of debate that may be subject to change. If later changes are made to the Bill in this area, the shareholder voting requirement would be expected to mirror these changes, extending to include non-listed companies who meet the reporting entity threshold if necessary.

### D What are the Benefits of Introducing a Mandatory Shareholder Vote on Companies' Climate Strategies?

#### *1 Ensuring managerial accountability for climate-related strategies*

While the mandatory disclosure of emissions is a step in the right direction,[222] relying on companies and shareholders to voluntarily take action in light of climate-related disclosures does not go far enough in ensuring companies are appropriately responding to the risks posed by climate change.[223] This is why the goals of the Say on Climate initiative go beyond disclosure of emissions, to include the development of a climate action plan, and a shareholder vote on the plan at the company's AGM.

A vote is an effective means for shareholders to communicate with the company, as company boards are more likely to listen and respond to shareholder's concerns when these concerns are put to a vote at the company's AGM.[224] In this respect, an annual shareholder vote provides a strong accountability mechanism for companies' climate change responses.[225] In the words of Mark Carney, former Bank of England Governor, the vote will "…establish a critical link between responsibility, accountability and sustainability".[226]

An annual shareholder vote provides an accountability mechanism by giving shareholders an opportunity to engage with the management and board of directors of the company, to ensure the company is taking appropriate steps to address climate

[222] Kaplan, Sommer and Mollod, above n 70.
[223] Medina and Hohn, above n 77.
[224] See David Yermack "Shareholder Voting and Corporate Governance" (2010) 2 Annu Rev Financ Econ 103; and Medina and Hohn, above n 77.
[225] Say on Climate "Guide for Asset Owners" <www.sayonclimate.org>.
[226] Simon Jessop, Matthew Green and Ross Kerber " U.N. envoy Carney backs annual investor votes on company climate plans" *Reuters* (Online ed, London, 9 November 2020).

risks.[227] Managerial accountability has been identified by institutional investors and proxy advisory firms as a key benefit of shareholder votes. Vanguard have said:[228]

> We generally view advisory proposals as one of several mechanisms for shareholders to provide feedback through their voice and vote, and to ensure accountability of company boards and management.

Glass Lewis have said:[229]

> …[companies and investors] mutually benefit from mechanisms that allow for engagement on issues related to climate and that allow shareholders to register concerns regarding how companies manage this important issue.

The Say on Climate vote has been criticised by some companies, including Charter Communications, who claim it is a "unnecessary and an ineffective use of time and resources", as Charter "already reports on environmental issues and plans to publish a greenhouse-gas emissions target before its stockholder meeting".[230] While some companies, such as Charter, may report on emissions and "plan" on publishing emissions targets, without a vote, there are few accountability mechanisms to ensure such targets are met. If shareholders are unable to hold companies accountable over their climate action — or inaction — Chris Hohn believes "companies will do as little as they can get away with and whatever they can get away with".[231]

The financial risk climate change presents to shareholders' investment justifies having strong accountability mechanisms in place, to ensure shareholders are able to hold the

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[227] Vanguard "Vanguard Investment Stewardship Insights: How we evaluate Say on Climate proposals" (May 2021) <https://investor.vanguard.com>.
[228] Vanguard, above n 227.
[229] Courteney Keatinge "Say on Climate Votes: Glass Lewis Overview" (27 April 2021) Glass Lewis <www.glasslewis.com>.
[230] Matt Wirz "U.S. Companies Resist Activist Investor’s Climate Campaign" *Wall Street Journal* (Online ed, New York, 30 March 2021).
[231] Medina and Hohn, above n 77.

company's management and board to account.[232] There is little use in disclosing emissions and setting targets and goals if there is not a plan in place to achieve these goals, nor a commitment to execute the plan.[233]

Depending on when the company adopted the shareholder vote, shareholders may either consider the efficacy of the proposed plan at the company's AGM, or assess whether the plan has been executed successfully by the company in the year prior. If shareholders are unhappy with the performance of the plan, they may expect to see these deficiencies addressed. If the plan's deficiencies have not been addressed, shareholders may look to replace the company's directors with those who are willing and able to better perform the plan.[234] This demonstrates how the shareholder vote provides an incentive for companies to develop a viable plan to address climate change, and a strong accountability mechanism to ensure this plan is followed.

*2 Setting a consistent standard for all captured companies*

While the Say on Climate campaign has seen a number of companies committing to allow shareholders to vote on their climate plan, the uptake of the initiative is sporadic, reliant on companies voluntarily taking action. A key goal of the recent climate-related financial disclosure requirements was to promote "reporting that is clear, comparable and consistent [to] promote business certainty".[235] In a similar vein, a clear voting requirement that applies to all captured companies will ensure shareholders are given the same opportunity to vote on information relating to companies' response to climate change.

The certainty provided by a mandatory vote on climate plans, as opposed to other methods such as shareholder resolutions, is a key benefit of the shareholder vote. Shareholder resolutions often involve demands for a targeted, specific set of information, whereas a Say on Climate vote considers the company's climate strategy more generally. Of course, what the company's climate strategy is will vary for each

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[232] Felix Jaeger "Say No to Climate Change, Say Yes to 'Say on Climate'" (13 July 2021) Oxford Business Law Blog <www.law.ox.ac.uk>.

[233] Medina and Hohn, above n 77.

[234] Shareholders may use the power they have to remove directors under the Companies Act 1993, s 156.

[235] Ministry for the Environment and Ministry of Business, Innovation and Employment, above n 216, at 34.

company.[236] However, a mandatory vote allows for a higher degree of consistency across companies, as opposed to ad hoc shareholder resolutions, the content of which will vary considerably. The certainty and consistency that comes with a Say on Climate vote for all captured companies, would allow institutional investors to adopt best practice guidelines, which may also ameliorate some of the concerns regarding shareholders making uninformed decisions due to a lack of time and knowledge.[237]

Making the vote mandatory for certain companies also ensures that *all* companies who meet the threshold are required to put their climate strategies to a shareholder vote. While some companies have voluntarily committed to adopting the Say on Climate proposals, many have not. A mandatory vote means some companies are not able to fall through the cracks. Companies that have already voluntarily adopted the shareholder vote will not have to change the way they operate. These companies are likely already having an open dialogue with shareholders, and are adequately planning to mitigate the effects of climate change. However, making the vote mandatory would set a standard, ensuring all captured companies are doing the same.

### *3 Putting the climate first*

Lastly, a mandatory shareholder vote puts climate change at the front and centre of companies' agendas. While concerns involving the climate are undoubtedly raised at company AGMs already, the extent to which these concerns are addressed will vary.[238] These concerns may also be lost among the other matters of importance that are discussed at AGMs.[239] Having a clear, separate, and formal avenue to evaluate climate strategies that allows shareholders to express concerns, helps ensure issues relating to climate change are prioritised.[240]

This is particularly important for companies who may not be as concerned with their impact on the climate as they should be. Some companies may address climate change

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[236] Medina and Hohn, above n 77.

[237] Masja Zandbergen "SI Opener: Putting climate action plans to a vote – a Say on Climate!" (24 June 2021) Robeco <www.robeco.com/en>.

[238] See generally IHS Markit, above n 73.

[239] Zandbergen, above n 237.

[240] Australasian Centre for Corporate Responsibility "Say on Climate" ACCR <www.accr.org.au>.

at AGMs to appease shareholders, or to improve public perception of the company, without taking any meaningful steps to reduce emissions.[241] Companies may include climate strategies at this year's AGM, but not the next. An annual, mandatory vote not only provides shareholders with a mechanism to ensure real progress is being made, but ensures that issues relating to climate change feature consistently at every AGM, regardless of the company's current leadership or strategic direction. Given the nature and scale of the issue that is climate change, and the continued risk it poses to investment, putting climate-related concerns first is essential.

More generally, a mandatory shareholder vote is one of many steps that may be taken to help New Zealand achieve its goal of getting to net-zero emissions of all greenhouse gases by 2050.[242] By committing to achieving net-zero emissions, the Government has demonstrated its willingness to put the climate first.[243] A manifestation of this intent was the declaration of a climate emergency in December 2020.[244] However, the Government also recognised that this is a declaration that needs to be supported by "ongoing, continual action and activity".[245] A mandatory shareholder vote on companies' climate strategies may be considered an example of such action.

## E Would the Vote be Effective?

### *1 Shareholders do not have the time or knowledge*

The success of a shareholder vote hinges on shareholders being in the position to make a meaningful contribution at company AGMs, in relation to the company's climate plan or strategy. One of the main questions surrounding the Say on Climate initiative is whether shareholders are in the position to judge the ambition, feasibility and suitability of companies' climate strategies.[246] This, in turn, has led to concerns that the vote may

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[241] James Norrington "Activists gear up for a fight over green-washing at AGMs" *Investors Chronical* (Online ed, London, 21 April 2021).
[242] Climate Change Response Act 2002, s 5Q.
[243] (15 April 2021) 751 NZPD 2209.
[244] (2 December 2020) 749 NZPD 237–238.
[245] At 239.
[246] Kaplan, Sommer and Mollod, above n 70.

result in some shareholders who lack the capacity or expertise to make informed decisions "rubber stamping" climate strategies.[247]

Climate change disclosures and strategies will often be long and complex documents.[248] Expecting shareholders to be well versed on the intricate details of the risks presented to the company, as well as the adequacy of the company's response, may be unrealistic. If shareholders rubber stamp climate strategies, this risks undermining the effectiveness of a shareholder vote, as the company's management and directors will not be held accountable for the company's progress (or lack of). As an example, the recent Say on Climate vote at Shell was supported by the majority of shareholders and approved at the AGM, despite the plan being criticised for not being aligned with the goals set in the Paris Agreement.[249] This demonstrates that providing uninformed shareholders with the ability to vote risks the approval of substandard climate plans.

Another concern specifically related to institutional investors is that these investors, who have shares in thousands of companies, will be unwilling to expend the time, or energy, understanding this information.[250] There is a real risk that institutional investors will rely solely on management's stance, or on advice from proxy advisory firms.[251] A corollary of this concern is that proxy advisory firms, such as ISS and Glass Lewis, may be given a disproportionate degree of influence over issues relating to companies' climate strategies.[252]

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[247] Keatinge, above n 229.
[248] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill 2021 (30-2) (select committee report) at 3.
[249] Kaplan, Sommer and Mollod, above n 70. See also Ron Bousso "Shell shareholders increase pressure for further climate action" *Reuters* (Online ed, London, 18 May 2021); Sam Meredith "Oil giant Shell secures investor backing for its energy transition strategy, but a growing minority rebel" *CBNC* (Online ed, London, 18 May 2021); and Susanna Rust "11% vote against Shell energy transition strategy, 30% for Follow This" *IPE* (Online ed, London, 19 May 2021).
[250] Robert Eccles "Here is My Say On 'Say on Climate" (5 January 2021) Forbes <www.forbes.com>.
[251] Thomas and Watson, above n 88, at 124.
[252] At 124.

This being said, statements from some institutional investors suggest this is not the case.[253] In fact, institutional investors such as BlackRock have entire teams dedicated to carefully scrutinising companies climate plans.[254] Shareholders can also look to investor coalitions such as Climate Action 100+[255] and the Institutional Investors Group on Climate Change[256] for additional expertise when making decisions relating to companies' climate strategies.[257] If institutional investors fail to take steps to acquire the necessary knowledge or expertise to make informed decisions, Chris Hohn takes a hard-line approach, suggesting that "[these managers] need to go, because they will ultimately be losing you [shareholders] money".[258]

Once again, it is difficult to know whether shareholders in New Zealand will have the time or knowledge to make informed decisions on companies' climate strategies. Shareholders of New Zealand companies may not be as large or sophisticated as institutional investors in overseas markets. Therefore, they may not have the resources available to put themselves into a position to adequately understand the information in companies' climate plans.

### *2 What companies are the target of the vote?*

A potential criticism of the Say on Climate vote is that it may not be effective for companies whose shareholders are not motivated to vote, and not needed for companies whose shareholders are. In companies where shareholders are engaged in climate issues, it is likely the company has already taken steps to address climate change within the business, without the need for a shareholder vote. Companies who have not taken steps to address climate change may not have come under pressure from shareholders to do so. Introducing a mandatory vote may not change this lack of engagement, relegating the vote to a "tick-box" exercise.

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[253] See BlackRock "Our 2021 Stewardship Expectations" <www.blackrock.com>; and Vanguard, above n 227.
[254] Medina and Hohn, above n 77.
[255] Climate Action 100+ "How We Work" <www.climateaction100.org>.
[256] Institutional Investors Group on Climate Change "Our Work" <www.iigcc.org>.
[257] Kaplan, Sommer and Mollod, above n 70.
[258] Medina and Hohn, above n 77.

This criticism relies on a few key assumptions. The first is that shareholders' views on climate issues generally align with the company's management and its board. The second is that the company’s management and board is responsive to shareholders' views on climate issues. Evidence collected from companies in Europe suggests that these assumptions may be incorrect. Of the 17 companies analysed in the IHS Markit Report that voted in 2021 on resolutions related to the climate, five of these resolutions came from shareholders.[259] Management from these companies recommended votes against all five resolutions.[260] This demonstrates that there may be companies with shareholders who are engaged and willing to contribute on ways the company can address climate change, but management and directors are not responsive to their concerns.

### *3 "Greenwashing"*

A further concern is that companies may adopt a shareholder vote on climate strategies as a way of outwardly appearing to be environmentally conscious, in order to deflect attention away from carbon intensive activities.[261] Greenwashing is a valid concern. Even if a shareholder vote is introduced, companies may prepare plans that set long-term,[262] unambitious targets, making it difficult for shareholders to hold the company accountable.[263]

This concern may be exacerbated by the fact that shareholder votes have so far only been advisory, which may allow companies to use the Say on Climate initiative to receive good publicity, without taking any meaningful action as a result of the vote.[264] However, as will be discussed in further detail in Part IX, New Zealand shareholders have the ability to ensure the company is taking meaningful steps, even if the vote is advisory, through the powers given to them in the Companies Act.

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259 IHS Markit, above n 73.

260 IHS Markit, above n 73.

261 Garnet Roach "Say-on-climate proposals used by some to simply appear progressive, warns SquareWell" (15 July 2021) IR Magazine <www.irmagazine.com >.

262 Eccles, above n 250.

263 Say on Climate, above n 68.

264 Roach, above n 261.

Whether the vote will be used by companies to appear more environmentally conscious than they really are, will likely depend on the content of the climate plan or strategy. Provided the plan contains some minimum, essential components, the accountability mechanism the vote provides should be enough to offset any greenwashing concerns. If companies are required to produce a plan that sets targets that are science based and working towards net-zero emissions and a 1.5°C outcome, shareholders will be able to ensure the company is making changes to meet these targets, rather than using the plan and vote to deflect attention away from carbon intensive activities.[265]

## F What Existing Mechanisms are Available to Shareholders, and are They Sufficient?

A key consideration when determining whether to introduce a shareholder vote on companies' climate strategies, is whether existing mechanisms sufficiently allow shareholders to voice concerns, and ensure the company is responding to the risks presented by climate change. There are currently no express statutory requirements in New Zealand for companies to either develop a climate strategy, or to put this strategy to a vote at the AGM. There are, however, the following mechanisms available to shareholders.

### *1 Shareholder resolutions*

Under the Companies Act, shareholders have the ability to exercise their powers at the company's AGM,[266] through an ordinary[267] or special resolution.[268] Shareholders are able to put forward a proposal to raise for discussion or resolution at the AGM.[269] Therefore, shareholders can bring a proposal relating to the company's climate strategy and vote on this proposal by ordinary resolution, which is approved by a majority of the votes cast at the AGM.[270]

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[265] Medina and Hohn, above n 77.
[266] Section 104.
[267] Section 105.
[268] See s 106. Special resolutions are only required when shareholders exercise certain powers, and would likely not be relevant for proposals relating to a company's climate strategy unless this involved changes to the company's constitution.
[269] Schedule 1 cl 9.
[270] Section 105.

So far, filing shareholder resolutions has been the most common way shareholders have engaged with companies over issues relating to climate change. Ahead of the 2021 AGMs for S&P 500 companies in the United States, 126 climate-related shareholder resolutions were filed.[271] There is also evidence from New Zealand that investors are increasingly pursuing shareholder resolutions that seek corporate action on climate change risk.[272] This demonstrates that shareholders are using the existing mechanisms available to them, to attempt to bring about change within the companies they are invested in.

Shareholder resolutions are currently the only mechanism available to shareholders to implement the Say on Climate initiative within companies. There are currently two ways companies can adopt the Say on Climate proposals. One is through the company voluntarily committing to a shareholder vote, the other is through a shareholder resolution asking the company to adopt the vote. While the Say on Climate campaign is petitioning for the shareholder vote to be made mandatory, in the short term they have been asking shareholders to submit proposals that ask companies to adopt a Say on Climate vote.[273] A template shareholder resolution that has been developed by Say on Climate is included in Appendix 3.[274]

Making the vote mandatory would mean shareholder resolutions are no longer required to implement the vote. This is important, as shareholder resolutions have, so far, had varying degrees of success in getting companies to adopt the Say on Climate vote. A reason for this is that institutional investors appear to be willing to vote on proposals asking for a shareholder vote, but will not make these proposals themselves.[275] This means other shareholders, such as non-government organisations and activist shareholders, are the ones having to file the resolutions.[276]

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[271] Reali, Grzech and Garcia, above n 3.
[272] Kalderimis and Swan, above n 35, at 12.
[273] Medina and Hohn, above n 77.
[274] Say on Climate, above n 68.
[275] Medina and Hohn, above n 77.
[276] Medina and Hohn, above n 77.

Even if a shareholder resolution relating to a Say on Climate vote is filed, these resolutions may not be successful. According to Kalderimis and Swan, formal shareholder actions taken in New Zealand to demand better climate strategies have been largely unsuccessful.[277] Shareholder proposals at Auckland International Airport's (AIA) and Meridian Energy's respective 2017 AGMs were convincingly rejected, the resolution at AIA receiving 0.92 per cent support from shareholders and the resolution at Meridian receiving 1.5 per cent support from shareholders.[278]

This is also supported by evidence from overseas. In Europe, none of the five Say on Climate resolutions put forward by shareholders were successful, whereas of the 13 companies whose management submitted their own strategies, the average level of support reached 96.29 per cent.[279] This figure may be slightly misleading, as it does not take into account situations where shareholders had informally put pressure on company management to put forward a proposal relating to a shareholder vote, as was the case in Aena.[280]

This evidence may suggest that relying on ad hoc shareholder resolutions is ineffective in directing companies towards more sustainable behaviour. A mandatory vote at the company's AGM, specifically on the company's climate strategy, eliminates any issues with relying on shareholders to file a resolution at every AGM. The vote may prompt a shift away from the traditional process of company boards not supporting shareholder resolutions on climate matters, towards a structured regime that is more effective than shareholder resolutions in securing the necessary change.[281]

### *2 Removing directors of the company*

A particular resolution available to shareholders in New Zealand is an ordinary resolution to remove directors who have demonstrated an inability to provide

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[277] Kalderimis and Swan, above n 35, at 12.
[278] At 12, n 63.
[279] IHS Markit, above n 73.
[280] Medina and Hohn, above n 77.
[281] Michelle Bennett and others "The 'Say On Climate' - what do boards need to know?" (16 June 2021) Allens <www.allens.com.au>.

shareholders with an adequate climate strategy for the company.[282] The Say on Climate vote would not be mutually exclusive from voting to remove directors.[283] Shareholders would still have the ability to remove directors, in addition to voting against the company's climate plan. The benefit of having a specific vote on the plan, rather than relying on a vote removing directors, is that it allows the company to know exactly what shareholders are voting against.[284] Removing directors is a far more convoluted and disruptive way of expressing dissatisfaction with the company's climate strategy, than a vote directly on the strategy itself.

### *3 Section 109*

Section 109 of the Companies Act provides that a meeting of shareholders may pass a resolution relating to the management of a company. However, s 109(3) states that this resolution will not be binding, unless the company's constitution provides otherwise. While there is an absence of case law on this issue, a company's climate strategy would likely relate to the management of the company, allowing shareholders to use s 109 to pass a non-binding resolution relating to this strategy.

Resolutions under s 109 are a viable mechanism through which shareholders can put pressure on company boards to take action against climate change. However, there is little evidence on the use of s 109 by shareholders on climate-related issues, which may be due to the non-binding nature of resolutions under this section. Section 109 has the potential to be better utilised than it currently is. The section was specifically intended to provide shareholders with an opportunity to call directors to account on matters relating to the management of the company.[285] In effect, this is what a separate provision requiring the company to put its climate strategy to shareholders at an AGM is attempting to do. The difference is that a separate provision would introduce a formal procedure that happens every year, specifically relating to the company's climate plan, without relying on shareholders to pass a resolution under s 109.

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[282] Companies Act 1993, s 156.
[283] Medina and Hohn, above n 77.
[284] Medina and Hohn, above n 77.
[285] Law Commission *Company Law Reform and Restatement* (NZLC R9, 1989) at 111.

## *VIII Some Issues and Potential Consequences Associated with Introducing a Mandatory Shareholder Vote*

### A It Gives Shareholders too Much Strategic Oversight

Generally, shareholders are not responsible for, and do not participate in, the day-to-day operation of the company.[286] It is usually the directors and management of the company who are responsible for the strategic direction the company takes.[287] Therefore, it is questionable whether a strategically nuanced decision, such as the viability of a companies' climate strategy, should be put to a shareholder vote instead of being decided by the company’s board.[288] By providing shareholders with this ability, there is a concern that shareholders may be given too much strategic oversight over the company's operations, which may shift the balance of power within the company.[289] Directors may feel constrained in their ability to make decisions relating to the management of the company, if they are required to get shareholder's approval on the company’s climate strategy.

Directors will also have to consider the impact a mandatory vote has on their existing directors' duties. A mandatory vote may put directors in a difficult position, where shareholders have expressed their views on a climate plan that may not, in the director's opinion, be in the best interests of the company.[290] Directors have to consider whether the recommendations made by shareholders are possible with the company's current allocation of resources, balancing the current business objectives and obligations towards various stakeholders.[291]

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[286] Companies Register "What it means to be a shareholder" New Zealand Companies Office <www.companiesoffice.govt.nz>.
[287] Companies Act 1993, s 128.
[288] Kaplan, Sommer and Mollod, above n 70.
[289] Vanguard, above n 227.
[290] Ravipal Bains, Gavyn Backus and Andjela Sabet "'Say on Climate' – Key Considerations in Implementing Shareholder Votes on Climate" (16 July 2021) McMillan <https://mcmillan.ca>.
[291] Bains, Backus and Sabet, above n 290.

### B Will NZX Companies Move to the Australian Securities Exchange?

A potential consequence of introducing a mandatory shareholder vote is that captured companies may choose to list on the Australian Securities Exchange (ASX) instead of the NZX. At the time of writing, 64 New Zealand companies were listed on the ASX, including notable companies such as Xero, Aroa and Laybuy.[292] New Zealand companies are already attracted to the ASX, due to the larger amount of capital available and the success companies such as Xero have enjoyed since listing on the ASX.[293] While it is questionable whether introducing a shareholder vote on climate strategies would be such a burdensome requirement that companies would de-list from the NZX, it is a possibility. Given the willingness New Zealand companies have already demonstrated to list on the ASX, the incoming disclosure requirements and a mandatory shareholder vote may be the final straw that causes some companies to move.

A related concern is that a mandatory shareholder vote for listed companies may further disincentivise companies from listing on the NZX. Very few companies have listed on the NZX in recent years, with there being three initial public offerings in 2020,[294] two in 2019 and zero in 2018.[295] This may be due to a range of different factors, including the regulatory compliance costs associated with listing on the NZX,[296] the growth of private equity and low interest rates. However, placing further regulation on NZX company behaviour by introducing a mandatory shareholder vote on climate strategies may further deter private companies from going public.[297]

## *IX Implementing a Mandatory Shareholder Vote on Companies' Climate Strategies*

The following part of this paper will briefly canvass the practical considerations that accompany introducing a shareholder vote on companies' climate strategies. This will

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[292] Australia Securities Exchange "ASX in New Zealand: creating a global profile for Kiwi companies" <www2.asx.com.au>.

[293] Yolanda Redrup "New Zealand companies flock to the ASX" (17 August 2020) Australian Financial Review <www.afr.com>.

[294] NZX *NZX Full Year 2020 Results Investor Presentation* (17 February 2021) at 13.

[295] Rachel Dunne and Roger Wallis *New Zealand Equity Capital Markets: Trends and insights* (Chapman Tripp, January 2020) at 2.

[296] See NZX "NZX Issuer Fee Schedule" (1 July 2020) <www.nzx.com>.

[297] Dunne and Wallis, above n 295, at 10.

include discussing how shareholders will vote, whether the vote should be binding or advisory, and the details of the plan shareholders will vote on. Finally, the legislative changes necessary to implement the vote will also be set out.

### A How Will Shareholders Vote?

Voting on the company's climate strategy would take place in accordance with the requirements in sch 1 of the Companies Act. For companies not listed on the NZX, this may be problematic. This is because under cl 5 of sch 1 of the Act, the chairperson of the company meeting may determine the method of voting, unless a poll is demanded. If a poll is not demanded, the vote may take place through the showing of hands of those present at the meeting.[298] This has the potential to cause issues for a shareholder vote on climate strategies, as it requires institutional investors and proxy advisory firms to be physically present at the meeting.[299] This issue may be mitigated by cl 5(4), which allows shareholders (who meet certain requirements) to demand a poll.[300] If a poll is taken, votes must be counted according to the votes attached to the shares of each shareholder, either present in person, or by proxy voting.[301]

If, however, the shareholder vote only applies to NZX listed companies (as is proposed in this paper), this issue would not hinder the effectiveness of the shareholder vote. This is because NZX listed companies have additional voting requirements under the NZX Listing Rules. Rule 6.1 of the Listing Rules requires "Voting at a meeting of Financial Product holders [to] be conducted by poll". While it may need to be determined exactly what companies the shareholder vote applies to, if the vote applies to large listed issuers, shareholders will be able to vote on these listed companies' climate strategies by poll at companies' AGMs.

### B Should the Vote be Binding or Advisory?

An important practical consideration is whether the outcome of the shareholder vote would be binding on the company board, or whether it would merely be advisory. Companies who have adopted the Say on Climate initiative have so far only committed to giving shareholders an advisory, or non-binding vote. An advisory vote ameliorates

[298] Companies Act 1993, sch 1 cl 5.
[299] Thomas and Watson, above n 88, at 135.
[300] Companies Act 1993, sch 1 cl 6(4).
[301] Schedule 1 cl 6.

some of the concern related to giving shareholders too much strategic oversight over the company. However, if companies are not required to take any formal action as a result of the vote, the vote may become a box-ticking exercise, undermining the importance of having a robust climate strategy.

Shareholders binding the board on matters relating to climate strategies would likely exceed the powers shareholders are given under the Companies Act. Section 128 of the Act provides that the business and affairs of the company are to be managed by the board. Allowing shareholders to bind the board of the company on strategic decisions, such as the company's climate action plan, likely goes too far, impinging on director's role as the day-to-day custodians of the company.[302] Chris Hohn and Say on Climate have recognised the need to maintain the advisory nature of the shareholder vote, so that "shareholders will not be taking the position of the board".[303]

While there may be concerns that an advisory vote is "toothless", an advisory vote does allow shareholders to express their concerns and direct the company to make changes.[304] A crucial aspect of the Say on Climate vote is creating an open dialogue on climate issues between shareholders and the company, which can still be achieved through an advisory shareholder vote.[305] While the company's board may not be required to adopt these recommendations, the board would also be aware of the power shareholders have to replace directors.[306] For this reason, the board would likely take the outcome of the vote seriously, even if it is only advisory.

### C Companies' Climate Strategies or "Climate Action Plan"

A crucial aspect of the Say on Climate initiative is the "climate action plan" that shareholders vote on at companies' AGMs. While this paper's focus is introducing a shareholder vote, a successful shareholder vote would not be possible without a credible

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[302] See generally Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, Lexis Nexis, 2015) at 230–232.
[303] Medina and Hohn, above n 77.
[304] Australian Shareholders' Association "Advisory shareholder resolutions" (26 April 2019) <www.australianshareholders.com.au>.
[305] Medina and Hohn, above n 77.
[306] Companies Act, s 153. See also David Raudkivi "First-step analysis: shareholder activism and engagement in New Zealand" (23 May 2020) Lexology <www.lexology.com>.

climate plan or strategy to vote on. It is expected this would be an area that would be developed further, should a shareholder vote be made mandatory in New Zealand.
There are different ways to develop a credible climate action plan. One approach is to prescribe the essential components of the plan through legislation or regulation. This has the benefit of ensuring all companies that meet the threshold have plans that contain certain minimum requirements. The issue with prescribing details of the plan is that every company is different. The ways in which companies address climate change will vary greatly, dependant on the businesses' unique characteristics.[307] For this reason, the Say on Climate initiative has proposed that shareholders and advisors should be the ones to advocate for the details of the plan.[308] This way, the plan can be tailored to meet the needs of each company.

While companies will likely have to develop and refine the exact details of the plan over time, more important is ensuring companies are taking some steps to reduce emissions and mitigate the effects of climate change. There may initially be some issues with the plan, however, an imperfect plan is better than no plan at all.[309] Some standardisation would be necessary, otherwise it would be difficult for investors to clearly assess and compare a company's strategy with other companies in their portfolio.[310]

If a shareholder vote is introduced, legislation or regulation supporting the vote may need to be enacted. This may include a requirement for certain companies to develop a climate action plan, leaving enough flexibility and scope in the legislation or regulation to allow the company and its shareholders to tailor the details of the plan to the company’s needs. Some jurisdictions have already introduced such legislation. Part of Spain's Climate Change and Energy Transition Law requires companies to have climate action plans, with emission reduction targets to be achieved over a five-year period.[311] In New Zealand, the plan may incorporate aspects of the disclosure requirements under

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[307] Medina and Hohn, above n 77.
[308] Medina and Hohn, above n 77.
[309] Medina and Hohn, above n 77.
[310] Kaplan, Sommer and Mollod, above n 70.
[311] European Climate Foundation "Topping off a decade of work: Spain adopts its first Climate Law" (31 May 2021) <https://europeanclimate.org>.

the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill, in addition to any further essential components, such as those set out in Appendix 2.

## D Legislative Changes

### *1 Companies Act 1993*

Introducing a shareholder vote on companies' climate strategies may require some small amendments to be made to the Companies Act. For example, s 109 (management review by shareholders) could be amended to specify that shareholders of certain companies should be given the opportunity to question, discuss, or comment on the climate strategy or plan developed by the company.

Another option could be amending s 211 of the Companies Act. Under s 208, certain companies must prepare an annual report.[312] Section 211 prescribes the contents of this report. Section 211 could be amended to include a requirement that companies who come under the disclosure and/or mandatory shareholder vote regime, are required to attach the climate action plan to the annual report. A further provision may be included to specify that shareholders are to be given the opportunity to vote on this plan, perhaps in pt 7 of the Companies Act, which details shareholder's rights and obligations.

### *2 NZX Listing Rules*

A shareholder vote on companies' climate action plans or strategies could also be implemented by making changes to the NZX Listing Rules. Section 2 of the rules (governance requirements) could be amended to include a requirement for shareholders to be given an opportunity to vote on listed companies' climate strategies. This rule may be similar to the current rules on directors' remuneration. Rule 2.11 of the Listing Rules requires directors' remuneration to be authorised by an ordinary resolution of shareholders. The same could be done with companies' climate action plans, requiring these plans to also be authorised by an ordinary resolution of shareholders.

The shareholder vote could be supported by making changes to the disclosure requirements set out in s 3 of the Listing Rules. Like s 211 of the Companies Act, r 3.6 requires listed companies to prepare an annual report. Rule 3.7 prescribes the contents of the report. Rule 3.7 or r 3.8 (further annual report content for issuers of equity

[312] The companies that are required to prepare an annual report are set out in s 208(1)(a)–(d).

securities) could be amended to require companies to attach climate action plans to the annual reports.

While the NZX Listing Rules do not have the status of regulations, NZX has a range of enforcement powers under r 9.9.3 to ensure compliance.[313] These powers include: cancelling the listing of the issuer; cancelling, halting or suspending the quotation of any or all of the issuer's quoted financial products (such as equity securities); and referring the conduct of any director to the NZX Markets Disciplinary Tribunal or any statutory or governmental authority.[314]

## *X Conclusion*

Climate change is not merely a topical issue. It is a real, constant threat. Unless this threat is addressed and managed, catastrophic consequences will undoubtedly ensue. As such, climate change will continue to feature in the decision making of governments, company boards and individuals. To reduce emissions to the extent necessary, a response is needed from different disciplines, sectors, and industries. This paper has explored the role companies and their shareholders have to play in this crisis. While companies are some of the biggest culprits behind global warming, the increased environmental awareness of shareholders, and the expectations shareholders are beginning to place on company boards, may offer a glimmer of hope, suggesting companies are prepared to change the way they do business.

This paper has approached the overarching goal of corporate sustainability using the framework put forward by the Say on Climate initiative. This is a framework that relies on shareholders putting pressure on company boards by introducing mechanisms such as a shareholder vote on climate strategies at AGMs. This paper has investigated whether such a vote should be made mandatory in Aotearoa. The New Zealand Government has demonstrated a commitment to act on climate change, illustrated by the Financial Sector (Climate-related Disclosure and Other Matters) Amendment Bill that is currently before Parliament.[315] However, while important, more than

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[313] NZX Listing Rules (10 December 2020), r 9.9.3.

[314] Rule 9.9.3.

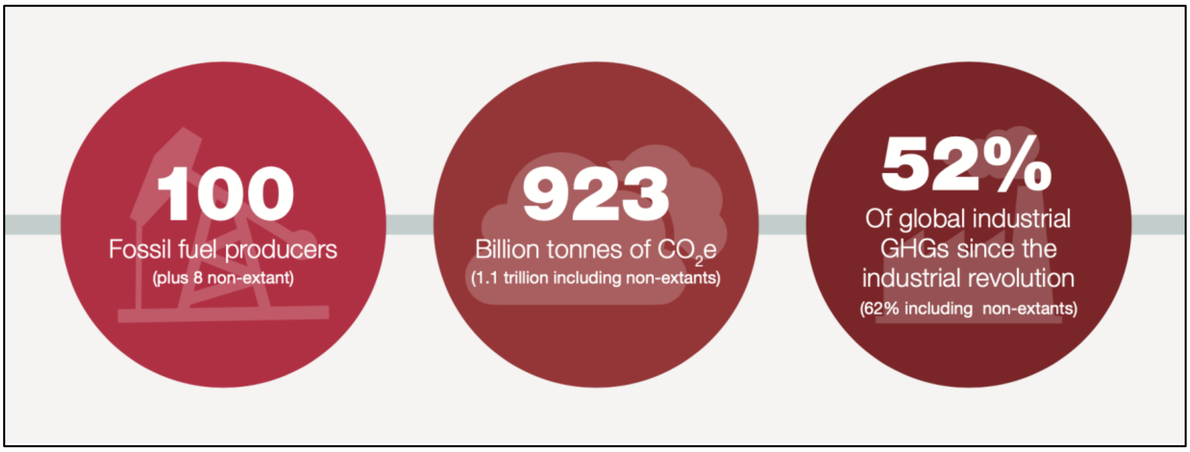
[315] Ministry for the Environment and Ministry of Business, Innovation and Employment, above n 216, at 5.

reporting and disclosure is necessary. If shareholders have demonstrated that they are willing to step up and demand positive change, a mandatory vote on climate strategies may be the next step that should be taken in the adaptation of New Zealand's economy in light of our climate threatened future.

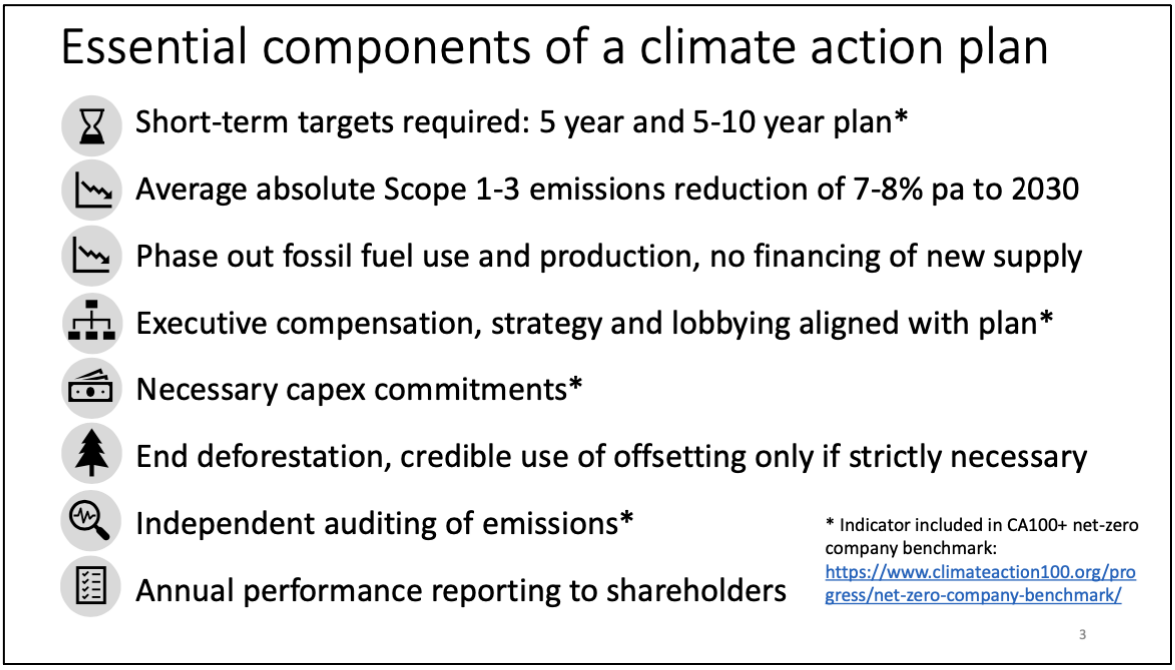
A shareholder vote may be considered a small response to an immense issue. However, it forms part of a larger response that reconsiders the way companies operate in the future. As He Pou a Rangi noted in their inaugural report to the Government; "To achieve a cleaner, greener, healthier and more sustainable future, no emission reduction is too small – or too soon."[316]

[316] He Pou a Rangi | Climate Change *Commission*, above n 15, at vii.

## *XI Appendix 1: Fossil Fuel Companies' Greenhouse Gas Emissions*




## *XII Appendix 2: Say on Climate Essential Components of a Climate Action Plan*



## *XIII Appendix 3: Say on Climate Template Shareholder Resolution*

RESOLVED, that shareholders of [Name of Company] (“[Name]” or the “Company”) request that the Board of Directors of the Company disclose at each annual meeting of shareholders, as soon as reasonably practicable but no later than 90 days after this Meeting, and thereafter no later than the date the Company disseminates its proxy statement in connection with each subsequent annual meeting, a report disclosing the Company’s greenhouse gas emission levels (the “Emissions”) in a manner consistent with the Task Force on Climate-related Financial Disclosure recommendations as well as any strategy that the Company may have adopted or will adopt to reduce the Emissions in the future, including any Emissions’ progress made year over year (the “Reduction Plan”), and provide shareholders with the opportunity, at each such annual meeting (starting at the next annual meeting), to express non-binding advisory approval or disapproval of the Reduction Plan.

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### *2 Australia*

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### *3 United Kingdom*

Companies Act 2006.

### *4 United States*

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## *Word Count*

The text of this paper (including substantive footnotes, excluding table of contents, footnotes, appendices and bibliography) comprises approximately 14,654 words.