MARGARET PATRICIA WELLS

WESTERN COMPANY LAW AND TIKANGA MĀORI: A VALUES-BASED ANALYSIS

LAWS 521: RESEARCH PAPER

Submitted for the LLB(Honours) Degree

Faculty of Law — Te Kauhanganui Tātai Ture
Te Herenga Waka — Victoria University of Wellington

2021

Table of Contents

Abstract

The tension between western company law and tikanga is evident on examination of the values and principles that underlie the two legal systems. Western company law values power and control, profit maximisation, and avoidance of liability. These conflict with tikanga values like mana and kaitiakitanga, which are founded on notions of obligation and resource preservation. This paper discusses these differences in values, and identifies that despite them, many Māori businesses practice their tikanga and infuse it into their corporate governance structures. This paper provides examples of such Māori businesses, with a focus on iwi entities. This paper proposes that under German company law, tikanga values are better reflected than under Aotearoa's company law, due to Germany's codetermined dual board structure. Though such a comparison is inherently limited, it serves to prove that the integrity of western company law structures can be maintained while simultaneously undergoing adaptation to better adhere to tikanga values. As the Supreme Court has recently recognised tikanga as a valid source of law in Aotearoa, the question of how to infuse tikanga into existing legal structures is highly relevant.

Tikanga – western company law – codetermination – dual board structure

I Introduction

All legal systems are underpinned by fundamental values and principles that shape the law's development and direction. While values of power and control, profit maximisation and avoidance of liability are justified and valid under western company law, this paper proposes that these values are misaligned with tikanga Māori. This paper seeks to analyse western corporate governance structures to draw out key underlying values and analyse them in comparison to values and principles in tikanga Māori. Though the two legal systems are fundamentally different, this paper finds that where practicable Māori businesses utilise the flexibility of the law to modify corporate governance structures and develop company policy to better adhere to tikanga. This paper proposes that the codetermined dual board structure under German company law is slightly more aligned with tikanga values than the western company law governing Aotearoa.

The first section of this paper will provide a definition of tikanga Māori and some of its key values. The second section will establish and discuss values underpinning western company law and compare them against a tikanga Māori framework. The third, fourth and fifth sections of this paper will discuss the challenges to incorporating tikanga Māori into corporate governance structures, and how Māori entities have done so, with a particular focus on iwi entities. The fifth and sixth sections of this paper will outline German codetermination laws and discuss their similarities and differences to corporate governance under tikanga Māori.

The purpose of this paper is not to map out the interaction and tension between western company law and tikanga to completion. The author acknowledges that a full comparative analysis of western company law and tikanga requires a longer word count and substantially more knowledge than the author possesses.

The author wishes to emphasise that her experience and knowledge of tikanga Māori is limited, and still developing. The author is not tangata whenua and has not received any formal education on tikanga outside of her own research. The author wishes to acknowledge that a deeper understanding and experience of tikanga would be necessary to use a tikanga Māori framework more extensively and conclusively. While thorough research informs this paper, and the author has made a genuine attempt to ensure the information and analysis around tikanga is accurate and culturally appropriate, the author acknowledges that as a pākehā, it is

inherently limited because she has no lived experience as tangata whenua in Aotearoa. She apologises for any gaps within this paper that may be present as a result of this.

II Tikanga

A The First Law of Aotearoa

This section will provide a definition of tikanga Māori (hereby referred to as tikanga) and some of its values so that the reader is well placed to understand its analysis against western company law. While this section will not provide an exhaustive definition of tikanga, it seeks to produce a definition that will supply the reader with a level of understanding necessary to engage with this paper. It must be recognised that tikanga varies between different iwi and hapū; it is "law designed for small, kin-based village communities".[1] Because of this, tikanga throughout this paper will be discussed at a general level from a values perspective, rather than in reference to specific tikanga.

Tikanga is the first law of Aotearoa New Zealand (Aotearoa), brought to Aotearoa from the Pacific a thousand years ago.[2] The word "tika" means "to be right", and the suffix "nga" turns "tika" into a noun.[3] Tikanga is commonly understood by Pākehā as Māori law, but it transcends any western conceptions of law. Tikanga can be viewed as a means of social control, a system of conduct and principles, the correct way of doing things, or a combination of all of these ideas.[4] It is "a system comprised of practices, principles, processes and procedures, and traditional knowledge".[5] In this way tikanga includes more than what Pākehā understand to be law; it encompasses customs and standards of behaviour as well.[6] Though founded on principles, tikanga is not an unstructured, completely open source of law.[7] It retains a flexible nature, but the concept of certainty is still present within tikanga.[8]

[1] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 WkoLawRw 1 at 3.
[2] At 2.
[3] At 2.
[4] Hirini Mead *Tikanga Maori (Revised Edition): Living by Maori Values* (2nd ed, Huia (NZ) Limited, New Zealand, 2016) at 14.
[5] Carwyn Jones "Tikanga Māori in NZ Common Law" *Law Talk* (online ed, New Zealand, Spring 2020) at 20.
[6] Williams, above n 1, at 3.
[7] Natalie Coates "Infusing Tikanga into Corporate Māori Governance Entities in the Current Legal Framework" in Robert Joseph and Richard Benton (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2021) 137 at 141.
[8] At 141.

Though tikanga and western law are not "co-extensive ideas"[9], the Supreme Court in *Ellis v R* recently confirmed that tikanga is in fact a valid source of law in Aotearoa.[10] Therefore, though tikanga and western law may appear to be quite literally worlds apart, they both inform Aotearoa's legal system. Comparing, contrasting, and analysing the different values and principles underpinning the two sources of law is important to gain an understanding of why they are different and where their differences come from. This serves to later explore the present and future incorporation of tikanga into western company law, and the challenges associated with doing so.

The remainder of this section will briefly outline and provide a definition of the tikanga Māori values that will be used in analysis against western company law values. Because it is beyond the scope of this paper to outline the values and principles of tikanga in entirety, this section will define and discuss the ones directly relevant to a comparative analysis with western company law, and German codetermination laws.

B Mana, Tapu, Kaitiakitanga and Whanaungatanga

An individual's mana relates to their position within a social group, and the relationships within that social group are dictated and managed by the importance of mana.[11] Translated into English, mana has several different meanings, including authority, control, influence, power and prestige.[12] Mana is a supernatural force not just found in people – places and objects can also have mana. Leaders within a community have mana, and mana can be derived from whakapapa (lineage).[13] Mana "gives a person the authority to lead, organise and regulate communal expeditions and activities, and make decisions regarding social and political matters".[14] One may draw their mana from their ancestors, but mana can also be derived from an individual's personal achievements.[15] Under tikanga, an individual's mana gives them power and rights but also a set of leadership obligations towards those the individual leads.[16]

[9] Williams, above n 1, at 3.
[10] *Peter Hugh McGregor Ellis v R* [2019] NZSC 49 at [3] – [4]. See generally Carwyn Jones, above n 5, at 20.
[11] Mead, above n 4, at 32.
[12] At 32.
[13] At 32.
[14] John C Moorfield "mana" Māori Dictionary <www.maori dictionary.co.nz>.
[15] Moorfield, above n 14.
[16] Williams, above n 1 at 3.

A tribe empowers their chief by giving him or her mana, and consequently this mana spreads to the tribe, and their land, water and resources.[17]

Tapu is a fundamental concept of tikanga and te ao Māori.[18] Tapu can be understood as a spiritual and sacred force that under tikanga must be respected and cared for at all times.[19] Tā Joseph Williams understands tapu as "both a social control on behaviour and evidence of the indivisibility of the divine and profane".[20] It exists everywhere in the world, from living beings to inanimate objects.[21] The concept of tapu is inseverable from the concept of mana, and one affects the other.[22] The more prestige attached to a person, event, or object, the more tapu and mana it has.[23] Professor Dame Anne Salmond writes that prior to the signing of te Tiriti o Waitangi and the colonisation that followed, "mana was understood as proceeding from the ancestor gods and tapu was the sign of their presence in the human world".[24]

Kaitiakitanga has sometimes been translated to or conflated with guardianship, but it is a broader concept not capable of being understood using a single word in the English language.[25] Kaitiakitanga can be understood as "the obligation to care for one's own".[26] Kaitiakitanga "embraces social and environmental dimensions. Human, material, and non-material elements are all to be kept in balance."[27] In te ao Māori, people are born as kaitiaki or stewards, instilled with mana, and are therefore subject to and empowered with a lifelong duty to care for and conserve the natural environment.[28] As articulated by Williams, "no right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource."[29] Tikanga dictates that kaitiakitanga necessarily protects and cares for that which is deemed tapu,

[17] Moorfield, above n 14.
[18] Williams, above n 1 at 3.
[19] Mead, above n 4, at 32.
[20] Williams, above n 1 at 3.
[21] Mead, above n 4, at 33.
[22] At 32.
[23] Moorfield, above n 14.
[24] Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 23.
[25] Merata Kawharu "Kaitiakitanga: A Maori Anthropological Perspective of the Maori Socio-Environmental Ethic of Resource Management" (2000) 109 J Polyn Soc 349 at 349.
[26] Williams, above n 1, at 3.
[27] Kawharu, above n 25, at 349.
[28] P Porter *Four Themes of Māori Leadership, Te whakaarotanga o ngā whakatōranga o ngā mātua, ngā tupuna: Capturing the thoughts of the elders* (The Mira Szászy Research Centre, 2009) as cited in Chellie Spiller and others "Wise Up: Creating Organizational Wisdom Through an Ethic of Kaitiakitanga" (2011) 104 J Bus Ethics 223.
[29] Williams, above n 1, at 4.

because kaitiakitanga "incorporates a nexus of beliefs that permeates the spiritual, environmental and human spheres".[30]

As indigenous people, Māori are kaitiaki of Aotearoa. They have a vested interest in caring for and protecting Aotearoa's taonga and that which is deemed tapu.[31] This interest extends to Aotearoa's natural resources, which Māori consider are tapu in the sense that they are a taonga tuku iho nō ngā tupuna (a gift passed down from Māori ancestors).[32] Kaitiakitanga is also associated with mana, as the retention and development of mana depends on those with mana whenua caring for their land, water, and natural resources.[33]

Whanaungatanga relates to (though is not confined to) family, relationships, kinship and caring.[34] It has been described as "the basic cement that holds Māori together"[35], and though it changes depending on the context, it always involves inter-related value processes.[36] Whanaungatanga is fundamental to tikanga and te ao Māori. The centrality of whanau and whakapapa to tikanga and te ao Māori is such that the meaning of whanaungatanga unfolds from its attachment to different contexts rather than in an established definition.[37]

III Foundational Concepts of Western Company Law

In order to compare and contrast western company law with tikanga, it is necessary to identify key foundational principles that underpin western company law. The need for a principle-based analysis arises from the fact that tikanga is guided strongly by values and principles.[38] Values are so central to tikanga that a decision contravening tikanga values may be rejected by the community even if it is accordant with a tikanga-based directive.[39] By comparing what western company law and tikanga value, and the way that they interact with concepts like power, care,

[30] Kawharu, above n 25, at 351.
[31] Williams, above n 1, at 4.
[32] Heritage New Zealand "Māori Heritage – Ngā Taonga Tuku Iho nō Ngā Tūpuna" <www.heritage.org.nz>.
[33] Moorfield, above n 14.
[34] See William McNatty and Tom Roa "Whanaungatanga: an illustration of the importance of cultural context" (2002) 3 Jpmd 88.
[35] J E Ritchie *Becoming bicultural* (Huia Publishers and Daphne Brasell Associates Press, Wellington, 1992) at 67.
[36] McNatty and Roa, above n 34, at 91.
[37] At 90.
[38] Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZ L Rev 1 at 4; and Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) 10 Yearbook of New Zealand Jurisprudence 24 at 24.
[39] Williams, above n 1, at 3.

and responsibility, it becomes evident that the two legal structures are foundationally very different.

A Power and Control

Western company law places high value on control – how to obtain it, who holds it, and to what extent. Company law affords power to make management decisions about the company to its board of directors.[40] Much company law scholarship proposes that the shareholders own the company, and employ directors to act on their behalf.[41] This is known as the principal-agent model of the company.[42] This model assumes that the shareholders in a company are the firm's residual claimants: they are entitled to the profits generated by the company after the company has satisfied its contractual obligations.[43]

An opposing school of thought views the principal agent model as misleading. It proposes that the shareholders do not own the company, but rather own stock or corporate security in the company.[44] Shareholders do not enjoy control over the company's assets, nor access to the company's profits, but for the declaration of a dividend by the company's directors.[45] Shareholders lack even more control over the business and its assets in companies where share ownership is widely dispersed.[46] In large public companies with thousands of shareholders, an individual possessing a few shares has realistically no control over the company at all.

Who, then, truly controls the company? For the purposes of this paper it is sufficient to proceed on the assumption that it is the shareholders who have influence over the company similar, though perhaps not akin to, ownership, and that directors possess managerial decision-making power. The principal agent model illustrates this division of control and power well. While division within scholarship on this area is important, it is not the objective of this paper to engage in more than a brief discussion of the contention.

---

[40] Companies Act 1993, s 128.
[41] Milton Friedman "The Social Responsibility of Business Is to Increase Its Profits" *New York Times Magazine* (New York, 13th September 1970) at 32 – 33; and Margaret M Blair "Team Production in Business Organizations: An Introduction" (1999) 24 J Corp L 743 at 743.
[42] At 743.
[43] At 743.
[44] Lynn A Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy" (2002) 75 S Cal L Rev 1189 at 1190.
[45] At 1191; and Companies Act 1993, ss 52 – 53.
[46] Adolph A Bearle and Gardiner C Means *The Modern Corporation and Private Property* (Transaction Publishers, New Jersey, 1932) at 78 – 84

It can be concluded that in effect, the shareholders and directors wield power and possess control over the company. It is important to establish this because the placement of power and control directly dictates the interests of whom the company acts for. Directors are statutorily required to exercise power over the company for the benefit of the shareholders.[47] In Aotearoa, they are burdened by the duty to act in good faith and for the best interests of the company under section 131 of the Companies Act.[48] It is generally accepted that making money is in the best interests of the company, and shareholders directly benefit when the company turns a profit. Directors therefore effectively have a duty to the shareholders to create profit for the company, profit which will in turn flow through to the shareholders through dividends received. It may be argued that acting in a socially responsible way and considering the needs of other stakeholders is actively beneficial to the company and therefore within the scope of s 131,[49] however a more accepted view is likely that s 131 creates an obligation for directors to act in the interests of the shareholders. Shareholders also have the power to remove directors under s 156 of the Companies Act, increasing the incentive on directors to act in shareholders' interests.[50] Power and control make shareholders important stakeholders, whose interests are generally prioritised.

The significance of power and control under western company law can be further understood by reference to the stakeholders who do not have it. Most workers have little power under western company law. They are at the mercy of the relevant regulatory scheme which provides varied degrees of protection depending on the jurisdiction. Workers do have the option to unionise in many jurisdictions, though in the countries leading manufacturing output union presence and minimum labour standards are weak. China accounts for 20 percent of global manufacturing output, and the United States comes in a close second, contributing 18 percent.[51] Independent unionising is illegal in China, and although the All-China Federation of Trade Unions exists, the aid it provides to workers is seriously limited.[52] Working conditions are also

[47] Companies Act 1993, s 131.
[48] Section 131.
[49] Chastity Heyward "The Growing Importance of Social responsibility in Business" *Forbes* (New Jersey, 18th November 2020).
[50] Companies Act 1993, s 156.
[51] Darrell M West and Christian Lansang "Global manufacturing scorecard: How the US compares to 18 other nations" (Brookings, 10 July 2018) at 4. See generally Leith Huffadine "New Zealand has a long history of going on strike. Now, it's a complex issue" *Stuff* (New Zealand, 30 May 2018).
[52] See Seung Wook Baek "The changing trade unions in China" (2000) 30 J Contemp Asia 46 at 47 – 48; and Ruixue Bai "The Role of the all China Federation of Trade Unions: Implications for Chinese Workers Today" (2011) 14 J Labor Soc 19.

poor in the United States, where federal law sets the minimum wage at just USD 7.25 per hour.[53] This connection between those mistreated and their lack of power demonstrates the high value placed on power under western company law.

The environment is another stakeholder that suffers greatly for want of power under western company law. Up until recently, western company law has not given any thought to its systematic and efficient destruction of the environment to produce profit. Research from 2019 revealed that 20 companies contribute a third of the world's carbon emissions.[54] Even now that collectively the world is more environmentally conscious, it could be argued that merely performative efforts are being made to lessen companies' impact on the environment, with key contributors of emissions unwilling to commit to serious change but rather engaging in corporate greenwashing.[55] The environment as a stakeholder for business activity is a relatively new concept, and among the greenwashing there is progress being made to carve out a legal avenue through which to hold companies to account for their destruction of the planet.[56] However the general failure to consider the effects of company activity on the environment is reflective of the fact that the environment is powerless under western company law, and this means it is mistreated.

Power is valued under tikanga, but tikanga does not permit those with power to wield it in an unconstrained way at the expense of the powerless. Within western company law one must have power to have their interests protected – an absence of power has a significant and detrimental impact. Under tikanga, mana denotes not only power but an equal set of responsibilities, often to care for stakeholders without power.[57] Actions that cause the people to prosper increase one's mana, denoting on those who hold mana an obligation to exercise it with careful regard to their people.[58] The concept of power or mana is therefore important in both tikanga and western company law, but in very different ways.

---

[53] Fair Labor Standards Act 29 USC § 206.
[54] Richard Heede "Update on Carbon Majors 1965 – 2018" (Climate Accountability Institute, 9 December 2020) at 1.
[55] William S Laufer "Social Accountability and Corporate Greenwashing" (2003) 43 J Bus Ethics 253 at 255.
[56] Melanie Earley "Fonterra, Genesis Energy and Z will go to trial for 'failing' to protect against effects of climate change" *Stuff* (New Zealand, 8 March 2020).
[57] Williams, above n 1, at 3.
[58] T Huriwai and M Baker *Manaaki: Mana enhancing and Mana protecting practice* (Te Rau Matatini, 2016) at 5; and Ross Bowden "Tapu and Mana: Ritual Authority and Political Power in Traditional Maori Society" (1979) 14 Pac Hist Rev 50 at 60.

Western company law allows for a far more unfettered exercise of power than tikanga, and conversely under tikanga values like mana mean that power carries with it corresponding responsibilities. While western company law does place some obligation on companies to consider stakeholders, for example through minimum labour standards, the culture behind the concept of obligation presents very differently than in tikanga. The western attitude adopted by most companies is to fulfil only the minimum obligations that are enforced by law, but values like mana and whanaungatanga indicate that this individualistic approach is foreign tikanga.[59] Under tikanga fulfilling the obligations that accompany mana are a source of honour, pride, and actually uphold the individual's mana, rather than being a profit hindering inconvenience.[60]

A western perspective may argue that the different understanding of the concept of power or mana under tikanga demonstrates that the value of power is far greater in western company law because it can be used without the same restraint. However, this perspective frames power as holding value only if it can be used to procure as much benefit as possible to one party, without a requirement to consider the needs of others. A tikanga perspective may argue that power actually holds value *because* it carries a set of responsibilities as well as rights, thereby transforming ordinary power into mana, something greater. Both legal systems value power, but in starkly different ways, causing radically different standards and expectations of behaviour.

B Profit Maximisation

This paper proposes that a second key theme or value within western company law is profit, and specifically profit maximisation. Companies operate in an economy where creating profit is their primary objective, and this paper argues that all other interests and concerns are regularly ignored in the pursuit of maximum profit. Profit and profit maximisation are terms used here to refer broadly to all kinds of exploitation of resources to make money.

The value of profit and profit maximisation ties in with Milton Friedman's shareholder primacy theory – the notion that because the shareholders own the company, the company owes its first and greatest obligation to the interests of the shareholders.[61] The board of directors who are responsible for the management of the company are incentivised to maximise profit as much

[59] Williams, above n 1, at 5.
[60] Moorfield, above n 14.
[61] Friedman, above n 41, at 32 – 33.

as possible for the shareholders as the key stakeholders of the company: the parties who have personally invested their own funds into the business.[62] A primary focus on generating profit demonstrates the primacy of shareholders and their interests.

Modern academic scholarship is divided on the question of who the company is obliged to serve. Some academics disagree with Friedman's contention that the company is beholden only to its shareholders, and have argued that the company should consider all those impacted by its actions when making decisions.[63] This idea, that there may be other parties that the company should seriously consider in its behaviour, is known as stakeholder theory, a concept championed and developed primarily by philosopher Edward Freeman.[64] Such an obligation on the company may encompass stakeholders like the environment, workers, and consumers themselves. Though no western legal theory truly reflects or embodies tikanga, stakeholder theory is slightly more aligned with tikanga than shareholder primacy theory. Stakeholder theory encourages the consideration of groups who may not possess the same power as the shareholders and is more reflective of the stewardship approach to using resources inherent in the tikanga value of kaitiakitanga.

Despite the emerging presence of stakeholder theory in business today, on the balance this paper argues that it does not do a great deal to dispute the fact that the shareholders who fund the business have the incentive and the power to force a focus on profit maximisation.[65] Profit maximisation often comes at the expense of some other stakeholder, and when it does, shareholder primacy theory and stakeholder theory are at odds. Issues like greenwashing subsequently arise – in order to appease demands for conscious consumption, companies seek to present their activity in a light that makes their impact on other stakeholders appear less harmful than it actually is.[66] Clever marketing along with widespread, unadmitted consumer apathy combine together to create the perfect climate for companies to pull out their "green" card and falsely present as environmentally conscious.

---

[62] At 33.
[63] Andrew L Friedman and Samantha Miles "Developing Stakeholder Theory" (2002) 39 J Management Studs 1; and R Edward Freeman and others *Stakeholder Theory: The State of the Art* (Cambridge University Press, New York, 2010).
[64] R Edward Freeman *Strategic Management: A Stakeholder Approach* (Pitman, London, 1984).
[65] See Earley, above n 56.
[66] Laufer, above n 55, at 255.

Popular athletic apparel retailer Lululemon provides an example of a company appearing at the surface to engage in stakeholder theory and manage the needs of the environment in their production, while actually doing the opposite. The brand charges a premium for their apparel and claims to be "a model for community-led sustainability".[67] However, production of Lululemon apparel produces nitrous oxide, a greenhouse gas 300 times more deadly than carbon dioxide, and the brand uses fabrics that are extremely unrecyclable.[68] Lululemon and countless other companies have found a way to acquire the advantages of both stakeholderism and shareholder primacy – to present as environmentally conscious and attract environmentally conscious consumers, while reaping the financial benefits that come with a business model that exploit the environment. These companies are able to operate under the guise of being forward thinking brands that encompass stakeholder theory over shareholder primacy theory in their business, while actually maximising profit without genuine and meaningful regard to stakeholders beyond the shareholders. This demonstrates how central the value of profit maximisation is to western company law, even with today's apparent global appetite for sustainability.

This paper proposes that profit maximisation as it presents in western company law is an unfamiliar concept in tikanga. The ethos behind the value of kaitiakitanga squarely opposes profit maximisation at the expense of people and planet. Kaitiakitanga requires an actor, as a steward of the environment, to have genuine regard for the welfare of others and the resources they use.[69] This does not mean tikanga opposes using resources to produce profit for a company, but this paper argues that it is the attitude of "profit over people and planet" that is foreign to tikanga. The notion of stewardship and care are unfamiliar to the value of profit maximisation that underpins shareholder primacy theory.

This paper argues that the incorporation of kaitiakitanga into business practice, especially on a large scale, is fundamentally difficult because tikanga and western company law are founded on vastly different values. A crucial difference between a tikanga perspective and a western company law perspective is that tikanga places value not only on rights, but on the corresponding obligations that accompany those rights.[70] Conversely western company law

[67] Lululemon "Our Sustainability" <www.lululemon.co.nz/en-nz/home>.
[68] Katie Gu "Lululemon: Hiding Its Abuses Under the Guise of Being Green" (26 January 2021) Climate Conscious < www.medium.com/climate-conscious>.
[69] Kawharu, above n 25, at 350.
[70] Porter, above n 28, at 224.

seeks to determine how to acquire and exercise as many rights as possible without breaking the law. Western company law is primarily concerned with the question of how much a company can get away with in order to create as much profit as possible, rather than the question of to whom the company owes obligations as a result of possessing power. It is evident that the concept of genuine care is foreign to western company values.

The principle of kaitiakitanga is unfamiliar to western company law because it maintains that resources must be cared for, not exploited.[71] This approach, imported into the business context, is more reconcilable with stakeholder theory than shareholder primacy theory. However, this section has sought to demonstrate that the genuine and meaningful incorporation of stakeholder theory is scarce in western company law, substituted for misleading greenwashing to appease customers. That is not to say that environmentally conscious organisations that genuinely operate using stakeholder theory do not exist. They do, but this paper argues that they are few and far between, and their positive impact on the environment does not come close to outweighing the detrimental impact by the activity of companies unconcerned with resource conservation.

C Avoiding Liability

The final principle or value found in western company law that this paper will analyse is the avoidance of and sheltering from liability and responsibility. Avoiding liability is used in this paper broadly to refer to the mechanisms employed and lengths gone to by companies to eschew themselves from as much liability to consumers and workers as possible.

The concept of liability avoidance is an integral part of how companies run and how the economy works. The principle of limited liability or the Salamon principle upholds the separate legal personality of the company.[72] As a separate legal person, the company may hold assets, sue and be sued in its own name.[73] This protects shareholders from creditors seeking recourse to their personal assets if the company were to liquidate, thereby encouraging shareholder investment.[74] Because shareholder investment is how a company can fund its ventures, and as

[71] Mere Roberts and others "Kaitiakitanga: Maori perspectives on conservation" (1995) 2 Pac Conserv Bio 7 at 12.
[72] Alastair Hudson *Understanding Company Law* (2nd ed, Taylor and Francis Group, Oxfordshire, 2017) at 25.
[73] Robert R Keatinge and others "The limited liability company: a study of the emerging entity" (1992) 47 Bus Lawyer 375 at 398.
[74] Hudson, above n 72, at 25.

a society we generally want to encourage innovation and business activity, the limited liability principle is necessary for the economy to operate successfully. However, it is an example of how deeply western company law values the evasion of liability for any wrong a company has committed, regardless of where responsibility truly lies. The value of avoidance of responsibility is strongly related to both power and control and profit maximisation. Only through avoiding responsibilities and obligations to others as much as possible can an environment be created where shareholder primacy operates to maximise profit at all costs.

Nike's sweatshop scandal is a useful example of how the principle of liability avoidance operates under western company law. The issue of Nike's alleged sweatshop use arose after an article was published which included the pay stub of a worker in one of the factories that produced Nike garments.[75] According to the pay stub, the worker earned 14 cents an hour.[76] This ignited widespread and long-lasting global outrage over Nike's supply chain and the workers it exploited.[77] The scandal marked a significant, but not permanent, fall from grace by Nike, which at the time held much public confidence, and was a regular high scorer in Fortune magazine's "most admired corporations" ratings.[78] Nike denied it was at fault and sought to avoid taking any responsibility for the situation.[79] It argued the workers were lucky to have their jobs, the problem was not Nike's concern, and that nevertheless they were dealing with the issue and working to create better conditions for their employees.[80] The Nike sweatshop example demonstrates the strongly held attitude in western company law that a company should deny responsibility for its wrongdoings as much as possible.

Tikanga values of mana and kaitiakitanga do not align well with the notion of liability avoidance. An obligation to care and protect others underlies both mana and kaitiakitanga.[81] The idea of leadership under tikanga at its core implies a responsibility to those being led, and kaitiakitanga is based on the premise of guardianship over one's own.[82] It may be argued that

[75] Robert J Bies and Jerald Greenberg "Justice, Culture and Corporate Image: The Swoosh, the Sweatshops, and the Sway of Public Opinion" in Martin J Gannon and Karen L Newman *The Blackwell Handbook of Cross-Cultural Management* (Blackwell Publishers Ltd, New Jersey, 2002) 320 at 321.
[76] At 321.
[77] Nicholas D Kristof and Sheryl Wudunn "Two Cheers for Sweatshops" *The New York Times Magazine* (New York, 24 September 2000) at 71.
[78] Bies and Greenberg, above n 75, at 324.
[79] At 321.
[80] At 321.
[81] Williams, above n 1, at 3.
[82] At 4.

a company that strongly adhered to values of tikanga would unlikely be in the position of Nike in the first place, accused of vastly neglecting those it has at least some kind of responsibility to. If a company that valued tikanga were in Nike's position, its approach would be influenced by mana and kaitiakitanga. This would likely to lead to the company accepting responsibility for its wrongdoing and making changes to protect those stakeholders that should already be under the company's protection.

IV Challenges of Incorporating Tikanga into Corporate Governance Structures

The preceding section has demonstrated that western company law and tikanga operate from vastly different foundational values. The dominance of western company law in Aotearoa has resulted in a commercial environment that prevents the flourishing of tikanga in business. Despite this, Māori businesses, trusts and iwi are and have been for some time incorporating tikanga into their commercial practice and corporate governance structures. Though this paper highlights and discusses the differences between the two legal systems, it acknowledges that the substantial Māori economy is already carving out a place for tikanga in business despite the impact of colonisation.[83] This section will discuss the legal tools used by Māori entities to incorporate tikanga into their corporate governance. These entities and their commitment to tikanga stand to prove that although the values underpinning tikanga are different from those at the core of western company law, the recognition of tikanga in Aotearoa's corporate law is possible.

A What Makes a Business Māori?

It is necessary to define what is meant by a Māori business in the context of this paper. Academics, the government, and Māori entities themselves hold differing views on what constitutes a Māori business. Within his extensive definition of Māori business, Sir Mason Durie proposes an overarching question: to what extent does the business contribute to Māori development and advancement?[84] While acknowledging that there is no complete set of principles or defining criterion to identify what makes a business Māori, Durie recommends asking if the business returns dividends to Māori, affirms the Māori cultural identity, creates

[83] Coates, above n 7, at 138.
[84] Garth Harmsworth *Report on the incorporation of traditional values/tikanga in contemporary Māori business organisation and process* (Landcare Research, October 2005) at 20.

employment for Māori and generates Māori wealth economically or in terms of human capital.[85]

In its 2006 thinking paper, Te Puni Kōkiri explored the characteristics, themes and values of 30 Māori businesses.[86] All 30 of the businesses included in the study identified that tikanga was an important part of its identity as Māori, but no definitive model was put forward by the paper to proscribe how much weight should be placed on tikanga, and what this should look like practically.[87] This is reflective of the fact that tikanga changes depending on iwi, hapū, and circumstances.[88] To expect tikanga obligations on all businesses in Aotearoa to be the same and capable of being set out by an exhaustive set of rules is a western approach that does not fit well in a tikanga framework. For the purposes of this paper, Māori business can be understood broadly using a combination of these two definitions. A Māori business is a business that is led by Māori, creates value for Māori and works to implement tikanga into its activities.

Iwi business ventures make up a significant sector of the Māori economy, and a number will be used as case studies further on in this paper. Lump sum cash payments and land transfers received by iwi in Crown settlement packages provided a strong foundation for iwi to enter commercial spaces. Iwi enterprises make up the top five of Deloitte's top 10 Māori Businesses index, ranked by total asset value within a particular year.[89] There is an expectation on iwi leaders to provide for iwi members – their mana carries with it an obligation to exercise it for the good of their people.[90] In this context companies are viewed as a means to an end; they are the vehicles used to generate benefit for an iwi.[91]

Before discussing how tikanga is incorporated into the corporate governance structures of Māori entities, it is useful and necessary to first outline the challenges faced by Māori entities pursuing this end. Colonisation continues to impede the ability of Māori to live according to tikanga and te ao Māori. Examples of active suppression of Māori culture include efforts by

[85] At 20.
[86] Te Puni Kōkiri *Hei Whakamārama i ngā Āhautanga o te Tūrua Pō – Investigating Key Māori Business Characteristics for Future Measures: Thinking Paper* (Te Puni Kōkiri, 2006).
[87] At 8.
[88] Williams, above n 1, at 3.
[89] Deloitte *Analysis of the Top 200 Firms and Top 10 Māori Businesses* (April 2020) at 31.
[90] Bowden, above n 58, at 60.
[91] Linda Te Aho "Corporate Governance: Balancing Tikanga Māori with Commercial Objectives" (2005) 8 YB NZ Juris 300 at 305.

the crown to remove Māori education from the school curriculum, the conversion of many Māori to Christianity and the long-held political and social belief that the social development Aotearoa meant rejecting te ao Māori and turning toward a western way of living.[92] Without colonisation and its devastating effect, this paper would not be necessary. It is therefore important to acknowledge the role colonisation plays in the difficulty of incorporating tikanga into western corporate governance structures.

B The Commercial Environment

A key problem associated with trying to operate a company while also adhering to tikanga or indeed any indigenous law traces back to the fundamental differences between the two sources of law, as outlined in the prior sections of this paper. The entire commercial environment created both directly and indirectly by western company law plays a role in forming barriers to the infusion of tikanga. It is useful to set out the commercial environment companies trying to incorporate tikanga must operate in, to demonstrate how the challenges they have to face are ingrained not just in law but in social behaviour and norms.

The global commercial environment and the behaviour patterns of the people that interact in it inevitably reward and enhance western company law values. Western company law created the global commercial environment we know today to operate according to its values and principles, and most companies have in the past and probably will in the future adhere to these values and principles. This means continuing to value maximising profit for shareholders over meaningful consideration of the needs of wider stakeholders, and exploiting those who do not hold power, like workers and the environment.

Western company law values are not only observed by companies, but they are upheld in consumer behaviour patterns. The race to the bottom prevails and is participated in because consumers, in general and at least historically, value low prices and convenience over other factors like a product's environmental impact or the welfare of the workers who produced it.[93] Though conscious consumption is on trend, this paper argues that consumer apathy is rife worldwide and within Aotearoa. Fast fashion and takeaway coffee cups are still staple parts of

[92] Mead, above n 4, at 12.
[93] See Patrick De Pelsmacker, Liesbeth Driesen and Glenn Rayp "Do Consumers Care About Ethics? Willingness to Pay for Fair-Trade Coffee" (2005) 39 JCA 363; and Graham Page and Helen Fearn "Corporate Reputation: What Do Consumers Really Care About?" (2005) 45 J Advert Res 305.

many New Zealander's lifestyles, despite the widely available information detailing not just how damaging these can be to the environment, but how there are viable alternatives.[94] While this does not directly relate to the incorporation of tikanga into company law, the apathy of the public toward capitalist consumer culture reinforces western values, which can inevitably be at the expense of erasing tikanga approaches to company law. The relationship between western company law and consumers is self-reinforcing; each rely on the other to survive and maintain their respective behaviour patterns.

While consumer behaviour does generally uphold western company law values, sustainable business enterprise is an emerging sector of the economy that has garnered public support. The presence of environmentally conscious businesses can be expected to grow in the future, as governments look to make good on their promises of environmental change and legislate to support sustainable commercial activity and disincentivise the harming of the environment.[95] Whether it is in fact a case of "too little, too late" is another (rather disheartening) question. Despite the advent of change, it remains true that for most of us, our everyday behaviour contributes to the upholding of western company law values and the consequential if indirect suppression of tikanga values.

Because Aotearoa's commercial environment is not facilitative of the practice of tikanga, infusing tikanga into a company's corporate governance structure is not something that can be achieved in isolation, or be segmented off from the rest of the company's activity. Presently, a commercial environment exists that disadvantages companies trying to incorporate tikanga into their corporate governance. By infusing tikanga into business practice, Māori businesses are adding more stakeholders to their corporate governance structure, thus rejecting a shareholder primacy approach. The stakeholder approach means that considering the interests of tikanga is likely (although not always) going to come at the expense of the interests of the shareholders, because in many companies it is unlikely the two interests will be aligned. Case studies have shown that where companies endeavour to adopt a tikanga based approach at any level of their business, it works best when the shareholders themselves support this.[96] It follows that it is

[94] See Gordana Rodden "Handle with care: Fighting the tide of fast fashion" *Stuff* (online ed, Auckland, 9 February 2020); and Amber-Leigh Woolf "New Zealand landfills are becoming full of unloved clothes as 'fast fashion' grows" *Stuff* (online ed, New Zealand, 21 July 2019); and Alice Neville "Why it's time to break up with the disposable cup" *The Spinoff* (online ed, Auckland, 26 February 2020).
[95] Robyn Walker "The great ute FBT debate" *Deloitte Tax Alert* (online ed, New Zealand, August 2021).
[96] See Harmsworth, above n 84.

easier for iwi entities to adhere to tikanga, as generally the iwi or its trust owns a commercial subsidiary through which to conduct business.[97] The infusion of tikanga-conscious stakeholders and shareholders remedies the issue of diverging interests, and a byproduct of this unity is that shareholder primacy is actually upheld because the shareholders support the tikanga based approach, so one combined interest is actually being pursued.

C The Who

Though authentically and meaningfully infusing tikanga into business is difficult because of its inherent differences to western company law, a lack of suitably qualified people to assist in the process is also a barrier to incorporating tikanga. Aotearoa's colonial education system and the efforts made over decades to erase Māori language and culture has meant that though a company may have Māori directors, the people they seek advice and support from such as consultants may not be well placed to provide advice in accordance with tikanga.[98] It is a symptom of colonialism that there are not more suitably qualified people with enough knowledge of tikanga support Māori businesses.

Diversity of skill set among Māori professionals themselves is another problem inherent in infusing tikanga into corporate governance structures. It is generally the case that those appointed on to boards of companies, Māori or not, are appointed on the basis of their commercial expertise. However, these people are often not well equipped with knowledge about matters of tikanga.[99] Therefore the already small pool of individuals with adequate knowledge of tikanga is diluted further in search of those who also possess commercial acumen. A partial remedy to this is the appointment of a kaumātua onto the board of an entity. The kaumātua brings a specific tikanga based perspective and advocates for the business to operate in a way that aligns with tikanga.[100] This solution has been widely adopted by school boards in Aotearoa by establishing a kaumātua position to ensure that the board fulfils its responsibility to "establish a meaningful and ongoing relationship with the local Māori communities, hapū, and iwi and with Māori employees so that proper consultation may take

[97] See TDB Advisory *Iwi Investment Report 2020* (TDB Advisory, 6 February 2021).
[98] Te Aho, above n 91, at 301.
[99] At 310.
[100] At 310.

place".[101] Marae also incorporate kaumātua into their governance structures, often prescribing in their trust board charters that at least one trustee position is to be filled by a kaumātua.[102]

Among Māori business professionals and academics there is disagreement about the question of who – who, and more specifically what kind of person, should sit on boards of Māori entities. As outlined, there is a widely held view that the number of people possessing all of the ideal qualities is small.[103] The perceived absence of "all-rounders" to fill board positions can cause disagreement among those involved in a company about who, in lieu of the perfectly qualified candidate, should fill key roles. Criticism has been made that appointing a director without enough knowledge of tikanga may see a Māori company become more commercialised, pushing aside questions of tikanga.[104] Conversely, primarily appointing as board members only those with in depth awareness and knowledge of tikanga may create more issues, as Māori businesses are still required to turn a profit.

The appointment of only those with a high level of tikanga knowledge creates diversity issues and adds to allegations of nepotism: that some Māori entities only appoint relatives into key positions and that the recruitment process is not transparent.[105] In apprehension of the next generation of Māori who, with efforts being made nationally to decolonise and indigenise the education system, may receive greater opportunities to connect with tikanga, a balancing act must be performed. In lieu of a sufficient population of individuals with both high-level business knowledge and tikanga knowledge, appointing a kaumātua onto the board creates board diversity while ensuring both commercial interests and tikanga are protected.

The corporate governance structure of North Island iwi Ngāti Porou mai i Pōtikirua ki te Toka a Taiau (Ngāti Porou) provides an example of the challenges in finding appropriate board members for Māori entities. Ngāti Porou's trust is the sole shareholder in its commercial subsidiary, Ngāti Porou Holding Company.[106] The trust deed permits up to 40% of the Holding Company's board of directors to consist of the Trust's board members, but Ngāti Porou noted

[101] NZPPTA and NZSTA "Guidelines to Assist Boards of Trustees to Meet Their Good Employer Obligations to Māori" (May 2015) New Zealand School Trustees Association <www.nzsta.org.nz> at 2.
[102] At 9.
[103] Te Puni Kōkiri "What is Governance" <www.tpk.govt.nz>.
[104] Matthew Rout and John Reid *Tribal Economies – Ngāi Tahu: An Examination of the Historic and Current Tītī and Pounamu Economic Frameworks* (Ngāi Tahu Research Centre, 2019) at 104.
[105] Te Puni Kōkiri "What is Governance" <www.tpk.govt.nz>.
[106] See TDB Advisory, above n 97, at 11.

that "it was decided to appoint those who had commercial expertise" – though all directors do whakapapa to Ngāti Porou.[107] It is not possible from the information available to conclude that Ngāti Porou chose to appoint as board members people with commercial expertise *instead* of people with apt knowledge of tikanga, but the example stands to prove the difficulties faced by iwi and other Māori entities in finding board members that possess both.

D The Difficulty in Attempting to Follow Two Systems of Law

It is inherently challenging for Māori businesses to practice their tikanga while adhering to western company law requirements, and former must always yield to the latter. Different Māori businesses incorporate tikanga into their corporate governance structures to different degrees, depending not only on who owns and operate the business, but also the kind of work the business undertakes.[108] Research conducted in 2010 at Massey University revealed challenges Māori businesses reported facing when attempting to incorporate tikanga into their operations. Some entities noted that their industry was such that the structure of their business was determined by heavy legislative regulation, impeding on their freedom to incorporate tikanga.[109] Others reported that compliance costs and other expenses faced by their business posed challenges, and if the business relied on natural resources to operate, significant government policy impacted their autonomy.[110]

The impact of western company law on mana whenua (territorial rights) serves to demonstrate how legal compliance impedes the practice of tikanga in a commercial environment. Mana whenua is distorted through the land determination processes of the Māori Land Court.[111] It is further damaged when the ownership of land is determined through shareholding.[112] The notion of individualistic ownership inherent in the western concept of shareholding is foreign to tikanga and te ao Māori and leaves many Māori "with a sense of alienation and loss".[113] This shows the difficulty inherent in practicing tikanga under a western law framework, and how

[107] Ngāti Porou mai i Potikirua ki te Toka a Taiau "Ngāti Porou Holding Company" <www.ngatiporou.com>.
[108] Te Puni Kōkiri, above n 74, at 8; and Rāwiri Tinirau and Annemarie Gillies "Turupoutia Tō Piki Amokura: Distinguishing Māori Values and Practices in Contemporary Māori Businesses and Organisations" in Joseph S Te Rito and Susan M Healy *Kei Muri I te Awe Kāpara he Tangata Kē: Recognising - Engaging,. Understanding Difference:4th International Traditional Knowledge Conference 2010* (Knowledge Exchange Programme of Ngā Pae o te Māramatanga, Auckland, 2010) 357 at 358.
[109] Tinirau and Gillies, above n 108, at 362.
[110] At 362.
[111] At 362.
[112] At 362.
[113] At 362

western company law must often be adhered to at the expense of practicing tikanga; it is difficult for the two to coexist.

These legislative barriers are reflective of the inherent disadvantage faced by Māori entities wishing to incorporate tikanga into commercial structures dominated by western company law values. This perspective has a degree of irony to it, because western legal thinking generally views western company law as flexible. From a te ao Māori view western company law is the opposite, with research suggesting that it "fails to allow for other cultures to flourish, and Māori find it difficult to 'be' and 'remain' Māori in many instances".[114] It is evident that under Aotearoa's current legal framework, tikanga is forced to operate tightly within boundaries set by western law and must always compromise in the event of conflict. It is against this contextual background that the role tikanga plays currently in western legal frameworks can be examined and discussed.

V The Place of Tikanga in Corporate Governance

This section will outline examples of Māori entities and the way they have modified western company law structures in order to recognise and practice tikanga. This section will discuss the organisational forms used by Māori entities, the role of the shareholder, and nominee directors. The commercial operations of iwi Te Rūnanga o Ngāi Tahu (Ngāi Tahu), Ngāti Porou and Waikato-Tainui will be discussed as case study examples of Māori businesses upholding tikanga in a western legal context.

Many Māori businesses practice their tikanga where western law permits them to do so. Research conducted in 2010 at Massey University reported that all case studies used to compile the report incorporated some form of tikanga into their business activities.[115] Much of the tikanga embedded into companies was in business policies and everyday practices rather than structure, and companies reported finding innovative ways to include tikanga in activities.[116] An example noted was one company's use of modern technology to enter oceans and fish, yet maintaining the custom of offering up the season's first catch to Tangaroa.[117] The report noted that while businesses infuse tikanga into their operations where feasible, if there is a conflict

[114] At 362
[115] At 360.
[116] At 360.
[117] At 360.

between traditional company law practices and tikanga, tikanga will be compromised.[118] Some businesses noted the difficulty in meeting stakeholder expectations while also working to adhere to tikanga.[119] This is demonstrative of the inherent struggle of infusing two legal systems together, and way that the prevalence of colonialism advances western company law.

A The Shareholder Role Infused with Tikanga

By modifying the nature of the shareholder role, Māori entities are better placed to adhere to tikanga, because of the implications the shareholder role has on the concept of ownership. Under western legal theory shareholding denotes ownership, yet individual ownership and even ownership itself as it presents in western law is a concept unfamiliar to te ao Māori and tikanga.[120] Research into sustainability and Māori business in 2010 reported that Māori businesses looking to be sustainable needed to take a multidimensional approach to their governance, where there is no single bottom line for boards of directors.[121] The research noted the difficulty many Māori businesses face in juggling many different sets of priorities – reaching social, environmental and cultural goals is only possible once a business is financially viable.[122] As a result, Māori businesses often modify their corporate governance structures to align better with tikanga – for example, placing iwi in the roles of shareholders and beneficiaries.[123] As outlined, this is a common corporate governance structure utilised by iwi entities.[124] By placing those looking to preserve tikanga in shareholder roles, the objectives of profit making and upholding tikanga are both more achievable, as the two interests merge. Communal ownership and distribution of resources, and non-transferability out of collectives are further examples of how traditional business structures are altered to a more tikanga based approach.[125]

Wakatū Incorporation demonstrates Māori businesses adapting the role of the shareholder to better reflect tikanga. Wakatū is a Māori owned business with both a national and international presence operating across many different sectors: aquaculture, fisheries/seafood, wine,

[118] At 362.
[119] At 362.
[120] Williams, above n 1, at 5.
[121] Bob Frame, Richard Gordon and Claire Mortimer (eds) *Hatched: The Capacity for Sustainable* Development (Landcare Research, January 2010) at 100.
[122] At 100.
[123] At 101.
[124] See TBD Advisory, above n 97.
[125] Frame, Gordon and Mortimer, above n 121, at 101.

horticulture, forestry, commercial property and tourism.[126] Regarding the place of tikanga in its business, Wakatū stated that the whakapapa of their business and the whakapapa of their stakeholders are the same, and this guides the company's decision making.[127] This reflects the approach of other Māori businesses studied, and the report notes that although they use western company structure to manage their affairs, "tikanga gives us our policies and procedures".[128] Māori make up the company's shareholder base, and are highly influential in the strategic direction of the business.[129] Hierarchically these shareholders rank higher than management and staff and are relied on to ensure Wakatū's cultural values are upheld and followed.[130] Wakatū is an example of a Māori business combining shareholder primacy theory with stakeholder theory. By placing culturally competent people in positions of power and influence, a Māori company can focus on generating profit while simultaneous ensuring that tikanga values are upheld wherever practicable.

B Nominee Directors

Iwi working collaboratively together on business ventures is common in the Māori economy.[131] In industries like forestry and fisheries this reflects the importance of tikanga values like kaitiakitanga; it is important for iwi to retain their relationship with a resource and fulfil their obligations toward it.[132] In order to blend this tikanga in with western company law, often nominee directors will be appointed by each shareholding iwi, tasked with articulating and protecting the views and interests of the appointing iwi shareholder.[133]

The concept of nominee directors initially appears problematic because each director is likely to face a conflict of interest between advocating for the appointing iwi shareholder and their s 131 duty to act bona fide in the interests of the company.[134] However the exception in s 131(4) to this duty is thought to achieve a balance and allow directors to act in the interest of their nominating iwi shareholders in some limited situations.[135] Under s 131(4) of the Companies Act, if expressly permitted to so by the constitution of the company, a nominee director

[126] At 31.
[127] At 75.
[128] At 32.
[129] At 32.
[130] At 32.
[131] Te Aho, above n 91, at 310.
[132] Williams, above n 1, at 4.
[133] Te Aho, above n 91, at 310.
[134] Companies Act 1993, s 131.
[135] Te Aho, above n 91, at 311; see also *Dairy Containers Case Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (HC).

exercising powers associated with carrying out a joint venture may act in a way he or she believes to be in the interests of the shareholder, even though this may not be in the best interest of the company.[136] In *Re Broadcasting Station 2GB Pty Ltd* the Supreme Court of New South Wales held that the nominee director may do so to the extent that advancing the interests of the shareholder does not breach the duties owed by the director to the company.[137] This approach was later applied by Mahon J in the Supreme Court (now the High Court) in *Berlei Hestia (NZ) Ltd v Fernyhough*.[138] The exception under s 131(4) is limited by the other duties the director owes to the company and the requirement for an empowering provision in the constitution, and the s 131(4). However, it appears to allow Māori entities some flexibility when forced to adapt their tikanga practice of stewardship to a western company law model.

VI Iwi Entities and Tikanga

The commercial activities of iwi in Aotearoa are used as case studies in this paper because they provide practical examples of how tikanga can be incorporated into large scale business operations. They demonstrate how iwi groups as shareholders in a company can make considerations of tikanga more straightforward, how tikanga can be incorporated into decision making processes, and the place of tikanga in dispute resolution.

A Tikanga in Decision Making

Ngāi Tahu and Ngāti Porou both utilise corporate governance structures that facilitate the infusion of tikanga. While these corporate governance structures are western, their design means that acknowledgment and adherence to tikanga is attainable.

South Island iwi and economic powerhouse Ngāi Tahu is the largest iwi in Aotearoa by asset base, possessing $1.8 billion in assets as at the end of the 2019 financial year.[139] The rohe (territory) of Ngāi Tahu covers the majority of the South Island, and as of 2020 the iwi had 68,000 members.[140] Ngāi Tahu will be used to refer to the iwi's post-settlement governance entity. A post-settlement governance entity refers to the legal entity an iwi claimant utilises to

[136] Companies Act 1993, s 131(4)
[137] *Re Broadcasting Station 2GB Pty Ltd* [1965] NSWLR 1648 (SC) at 1663.
[138] *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150 (SC) at 166.
[139] TDB Advisory, above n 97, at 5.
[140] At 5.

represent them in dealings with the Crown, and hold the redress the iwi receives from the Crown.[141]

Part of Ngāi Tahu's Te Tiriti o Waitangi settlement package from the Crown in 1997 included $170 million in cash.[142] In total Ngāi Tahu received $471 million in redress from the Crown. The iwi's states their vision "is that commercial success is the wind in the sails of our tribal development."[143] Today, the iwi's commercial activities are largely managed by Ngāi Tahu Holdings Corporation Ltd (NTHC), the investment company owned and operated Ngāi Tahu Charitable Trust.[144] Ngāi Tahu is the Trust's sole trustee.[145] The iwi possesses a significant commercial portfolio across five subsidiary companies: Ngāi Tahu Capital, Ngāi Tahu Farming, Ngāi Tahu Property, Ngāi Tahu Seafood and Ngāi Tahu Tourism.[146]

North Island iwi Ngāti Porou is the fifth wealthiest iwi in Aotearoa by asset ownership, with its portfolio worth $259 million.[147] Ngāti Porou will be used to refer to the iwi's post-settlement governance entity. Located in the Gisborne region, Ngāti Porou settled with the Crown in 2012 and received a settlement package worth $110 million.[148] Following this settlement Ngāti Porou established three subsidiaries. Ngāti Porou Holding Company (NPHC) is the iwi's commercial subsidiary, Ngāti Porou Hauora was established as a primary care provider, and Toitu Ngāti Porou is charitable trust subsidiary of Ngāti Porou tasked with the cultural development of the iwi.[149]

The previously discussed benefits of tikanga-focused groups in shareholder positions are demonstrated in the corporate governance structures of Ngāi Tahu and Ngāti Porou. Ngāi Tahu is the sole trustee of the Ngāi Tahu Charitable Trust, which owns and operates NTHC.[150] Similarly, NPHC is Ngāti Porou's commercial subsidiary.[151] Rather than attempting to consider the interests of a range of stakeholders while trying to remain constitutionally

[141] Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: Healing the past, building a future* (Office of Treaty Settlements, 2008) at 67.
[142] TDB Advisory, above n 97, at 5.
[143] Te Rūnanga o Ngāi Tahu "Ngāi Tahu Commercialism" <www.ngaitahu.iwi>.
[144] Frame, Gordon and Mortimer, above n 121, at 102.
[145] TDB Advisory, above n 97, at 5.
[146] At 5.
[147] At 5.
[148] At 11.
[149] Ngāti Porou mai i Potikirua ki te Toka a Taiau "Our Story" <www.ngatiporou.com>.
[150] TDB Advisory, above n 97, at 11.
[151] At 19.

beholden to the shareholders, this governance structure means that the interests of different stakeholders are all capable of preservation, because the interests of shareholders are diversified far beyond profit. This structure simultaneously rejects shareholder primacy while also adhering to it. Shareholders retain primacy, but they have a spectrum of objectives spanning topics like cultural development, resource preservation, and health and wellbeing.[152]

With regard to Ngāti Porou's commercial endeavours, NPHC manages the iwi's assets. In NPHC's constitution, the company states that it will undertake its commercial activities "solely for the benefit of" the Toitu Ngāti Porou Charitable Trust beneficiaries, to advance the purposes of the trust.[153] NTHC has modified a number of the replaceable rules found in the Companies Act 1993 to better suit the company's (and therefore the iwi's) purposes. This includes a provision in the constitution, empowered under s 128(3) of the Act, that limits the management power of the Board.[154] This provision states that directors' management powers are subject to the requirement that when exercising this power, directors "shall have particular regard to any statement of strategic intent, policy, principles, guidelines or recommendations" presented to the Board by the Trust.[155]

These examples demonstrate that although western company law's flexibility is less accessible for Māori, iwi have utilised it to create an opportunity to incorporate tikanga into corporate governance structures and high-level decision making where appropriate. While it is not possible to source board meeting minutes and pinpoint exactly what decisions were made in adherence to these requirements to act for the benefit of and in consideration of the trusts, the way these iwi invest back into the community to benefit their people demonstrates compliance. For example, in the 2020 financial year Ngāi Tahu invested $8.1 million in Ngāi Tahutanga (culture and identity), funding "projects designed to meet the specific cultural objectives of whanau, including building cultural knowledge, encouraging cultural practices and leadership".[156] Similarly in the 2020 financial year Toitu Ngāti Porou spent at total of $677,000 investing into the community in the form of initiatives such as marae funding and education

[152] Te Rūnanga o Ngāi Tahu Group *Annual Report 2019-2020* (October 2020) at 18 – 49.
[153] Ngāti Porou mai i Potikirua ki te Toka a Taiau "Ngāti Porou Holding Company Limited Constitution" (18 June 2012) <www.ngatiporou.com> at 8.
[154] Te Rūnanga o Ngāi Tahu Group "Constitution of Ngāi Tahu Holdings Corporation Limited" (April 2016) at 15.
[155] At 15.
[156] Te Rūnanga o Ngāi Tahu Group, above n 152, at 18.

scholarships.[157] This indicates that the decisions made by iwi to ensure their corporate governance structures better recognise tikanga are being upheld, and is demonstrative of the notion that the company arm of the iwi generates profit and the trust arm distributes it for the benefit of the iwi.

While iwi may use western company law structures like the company model with trustee shareholders, they do so in a way that creates a place for tikanga in decision making. This allows Māori companies some space to recognise and abide by their cultural values, while also participating in the colonial capitalist system they are forced to operate within.

B Tikanga in Dispute Resolution

The dispute resolution process of iwi Waikato-Tainui, "Hohou Te Rongo", is founded on tikanga principles.[158] Hohou Te Rongo was adopted relatively recently in 2015, by amendment to the rules of Te Whakakitenga o Waikato Inc, Waikato-Tainui's representative tribal organisation and trustee of its post-settlement governance entity.[159] Triennially, each of Waikato-Tainui's 68 marae nominate two representative members on to Te Whakakitenga.[160] Waikato-Tainui is the third largest iwi in Aotearoa by population size, and the second largest by total asset value.[161] It was the first iwi to settle with the Crown in 1995, and it received a total of $170 million in redress.[162]

The Houhou Te Rogno process has marae at its centre and is based heavily on notions of collectivism, upholding tikanga values. Under the Hohou Te Rongo process a member's dispute must both obtain and retain support from their marae in order to be addressed.[163] The dispute is then adjudicated by a panellist selected from a Standing Committee of between eight and 12 panellists.[164] Three of the Panellists are required to possess legal experience, and all panellists must have the requisite knowledge of Waikato-Tainui's tikanga.[165] This allows tikanga to not only form the process of dispute resolution, but be able to play a central role in

[157] Te Runanganui o Ngāti Porou *Ripoata A Tau 2020* (October 2020) at 27.
[158] Coates, above n 7, at 142.
[159] At 142.
[160] At 142.
[161] TDB Advisory, above n 97, at 5.
[162] At 27.
[163] Coates, above n 7, at 142.
[164] At 142.
[165] At 142.

the dispute's outcome.[166] Disputes incapable of resolution by a Panellist move to mediation and then arbitration, processes which are also overseen by a Panellist.[167]

Houhou Te Rongo applies equally to all disputes within Waikto-Tainui, ensuring consistency and clarity.[168] The prescriptive nature of the dispute resolution process is beneficial because it provides those considering undergoing the process a degree of certainty, one of the objectives of codified western law, yet the process leaves space for tikanga to maintain a strong presence.[169] The importance of individuals proficient in tikanga knowledge has been a recurring theme throughout this paper, and Houhou Te Rongo is no different; the role of the Panellist is crucial to ensuring tikanga is considered throughout a dispute resolution.[170]

This section has sought to demonstrate the place for tikanga in corporate governance that is being carved out by Māori entities, particularly iwi, throughout Aotearoa. A spectrum of challenges are associated with this task: company law is not particularly flexible in accommodating tikanga, the economy promotes commercial activity that is underpinned by western values, and there is a lack of Māori business people with sufficient tikanga knowledge. Notwithstanding these difficulties, tikanga informs much Māori business activity where western law allows space to do so.

VII Dual Board Structure in Germany

The final section of this paper will examine the dual board structure in Germany and the country's codetermination laws in comparison with Aotearoa's unitary board structure. This paper proposes that Germany's corporate governance structure is more reflective of the values underpinning tikanga than the western structure used in Aotearoa. This section will detail the German corporate governance structure which departs from comparable jurisdictions like Aotearoa and the United States by using a dual, rather than unitary, board structure. This comparison demonstrates that although it is inherently difficult to fuse indigenous law and western law, there is scope to adapt corporate governance systems and utilise the law's flexibility to better recognise and adhere to tikanga.

[166] At 142.
[167] At 142.
[168] At 142.
[169] At 142.
[170] At 143.

A The Dual Board Structure Introduced

As the name suggests, the key defining feature of a dual board structure that differentiates it from a unitary board structure is that there are two boards instead of one: a management board and a supervisory board.[171] The management board is made up of executive directors who make decisions about the company's goals, objectives, and execute the actions necessary to achieve these goals and objectives.[172] The additional supervisory board oversees the policies and decisions of the management board, and consists of non-executive directors – directors that are viewed as more independent as they do not work in any other capacity for the company.[173] By comparison, the executive directors fill roles such as that of the Chief Executive Officer, and are also involved in the day to day affairs of the company.[174]

Aotearoa and comparable jurisdictions such as the United States and the United Kingdom conversely utilise a unitary or one-tier board structure.[175] This means that one single board of directors is entrusted with both the managerial and supervisory duties of the company. The board generally consists of the Chief Executive Officer, the Chairman of the board, and a number of Independent Directors.[176] In an effort to ensure the board remains independent, the Chief Executive Officer is usually the only executive that also sits on the board.[177] Unitary board structures are used in twice the number of jurisdictions than their opposing counterparts.[178]

B Germany's Historical Background

In order to understand and analyse Germany's dual board structure, it is valuable to briefly discuss the political, social and legal environment that led to the country's form of corporate governance. Though Germany has only been a unified state since 1870, the country's corporate governance dates back to introduction of the Stock Corporation Act 1843, during which the area known today as Germany was the state of Prussia.[179] This Act created limited liability for

[171] Sytse Douma "The Two-Tier System of Corporate Governance" (1997) 30 LRP 612 at 612.
[172] At 613.
[173] At 613.
[174] At 613.
[175] Institute of Directors New Zealand and Minter Ellison Rudd Watts "Always on duty: the future board" <www.minterellison.co.nz> at 7.
[176] At 6.
[177] At 6.
[178] OECD "OECD Corporate Governance Factbook 2019" (2019) <www.oedc.org> at 14.
[179] Peter Muchlinski "The Development of German Corporate Law until 1990: An Historical Reappraisal" (2013) 14 German LJ 339 at 346; and Markus Roth *Corporate Boards in European Law: A Comparative Analysis* (OUP Oxford, Oxford, 2013) at 276.

joint stock companies and introduced a unitary board model for Prussian corporations; the concept of the supervisory board was not yet utilised.[180] The Common German Commercial Code 1861 instituted optional dual board structure for stock exchange listed companies in 1861, following on from the Netherlands who did so in the 17th century.[181]

Germany became a unified state in 1871 under the leadership of Otto von Bismarck, the founder of the German empire and its first chancellor.[182] The country's unification and the demand for access to the limited liability structure drove the establishment of a unified system of German corporate law, underpinned by the notion of free incorporation.[183] A suite of legal reform ensued, and the dual board structure was made mandatory for "Aktiengesellschaft", public listed companies with at least EUR 50,000 in share capital.[184] The dual board structure was not required for private companies, but was later made mandatory for companies that had one or more general partners but were limited by shares.[185] It is of interest to note that the inception of the dual board system in Germany was not driven by the notion of supervisory codetermination by workers that it is symbolic of today.[186] Ideas about the supervisory board as a vehicle for the improvement of workers' rights came decades later, and did not receive statutory recognition until the 1920's.[187]

The next relevant stage in German corporate governance law for the purposes of this paper was post World War 1. This period was marked by considerable and radical change in ideas around German corporate law, as the nation was tasked with rebuilding itself after the devastating effects of the lost war.[188] Socialist thinking gained traction, a brief and unsuccessful revolution unfolded, and anti-capitalist sentiments were only strengthened by economic crises in 1924 and 1929.[189] To strike a balance between the demands of socialist labour unions and employers, in

[180] Muchlinski, above n 179, at 347; and Waweru Cynthia Njeri "Corporate Governance for State Corporations: A Case for the Two-Tier Board Structure" (LLB Thesis, Strathmore University Law School, 2017) at 23.
[181] Julian Franks, Colin Mayer and Hannes F Wagner "The Origins of the German Corporation – Finance, Ownership and Control" (2006) 10 Rev Financ 537 at 540; and Jean du Plessis and Otto Sandrock "The rise and fall of supervisory codetermination in Germany?" (2005) 2 ICCLR 67 at 71.
[182] Frank Lorenz Müller "Man, Myth and Monuments: The Legacy of Otto von Bismarck (1866-1898)" (2008) 38 EHQ 626 at 628; and; VL Stepanov "The Social Legislation of Otto von Bismarck and Worker Insurance Law in Russia" (2008) 47 RSH 71 at 77.
[183] Muchlinski, above n 179, at 348; and Njeri, above n 180, at 23.
[184] du Plessis and Sandrock, above n 181, at 71.
[185] Muchlinski, above n 179, at 351.
[186] du Plessis and Sandrock, above n 181, at 71.
[187] At 71.
[188] Muchlinski, above n 179, at 362.
[189] At 362.

1937 a compromise was reached in the form of a number of law changes.[190] Among these labour reforms were codetermination laws providing workers the opportunity to nominate candidates onto their company's supervisory board.

Following Germany's next defeat in World War II and subsequent occupation, the labour unions in the more western areas of the country saw an opportunity to further advocate for workers' rights.[191] This was supported by American and British influences, who were eager to dismantle the companies that had funded the war against them and forced many Holocaust victims into slavery.[192] This appetite for change led to even more reforms in favour of workers, including an agreement that 50% of the supervisory board of companies in the coal and steel industry would be made up of representatives from the labour unions.[193] In the 1960's and 70's, Germany established Social Democratic chancellors, and further reform was enacted. Labor legislated for 50% of non-executive directors in all publicly limited companies with more than 2000 employees to be sourced from works councils and unions – a law passed under what is now known as the Codetermination Act 1976.[194]

German corporate governance law still utilises a dual board structure today, departing from the corporate governance structure used in Aotearoa.[195] In keeping with civil law tradition, the foundations of German corporate law are found in statutory regulations and the German Corporate Governance Code.[196] Rather than adopting a uniform approach, the law mandates either a unitary or dual board structure depending on the type of company. This statutory framework allows partnerships, foundations, and associations to use a dual board structure at their own discretion.[197] The Stock Corporation Act 1965 made dual board systems mandatory for limited companies, and these companies are permitted very little opportunity to divert from the statutory composition and tasks.[198]

---

[190] David Block and Anne-Marie Gerstner "One-Tier v Two-Tier Board Structure: A Comparison Between the United States and Germany" (paper presented to Global Research Seminar: Comparative Corporate Governance and Financial Regulation, University of Pennsylvania Carey Law School, 2008) at 28.
[191] Muchlinski, above n 179, at 366; and Njeri, above n 180, at 24.
[192] Muchlinksi, above n 179, at 369; and Gilbert Kreijger "Why German corporate governance is different" (28 April 2018) Handelsblatt Today <www.handelsblatt.com>.
[193] Kreijger, above n 192.
[194] Hans-Joachim Mertens and Erich Schanze "The German Codetermination Act of 1976" (1979) 2 J Comp Corp L & Sec Reg 75 at 78.
[195] Block and Gerstner, above n 190, at 21.
[196] At 22.
[197] At 22.
[198] At 22; and Njeri, above n 180, at 23.

C The Role and Makeup of the Management Board and the Supervisory Board

A quantity of the supervisory board is selected by shareholders at the annual meeting, and can be removed by a 75% majority vote unless the Articles of Association stipulate an alternative majority.[199] Under codetermination laws if a company has between 500 and 2000 employees, workers will select a third of the members of the supervisory board, and this climbs to half if the company has above 2000 employees.[200] A minimum of 30 percent of the supervisory board is required to be female in publicly listed companies governed by codetermination laws.[201] Aside from these required quotas, the supervisory board is generally selected on the grounds of commercial acumen as in unitary board systems.[202]

Part of the role of the supervisory board is to supervise the decisions of the management board after they are made.[203] The supervisory board will review annual reports and financial statements, and supervise the external auditing process when it occurs.[204] The supervisory board also has a role in the management's future decision making in an indirect manner.[205] The supervisory board is empowered to specify actions that can only be taken if management receives the prior consent of the board, such as decisions that significantly impact the company's asset management or future projected income.[206] Other ways in which the supervisory board may impact the activities of the management board include creating remuneration incentives.[207] Finally, the supervisory board is tasked with the job of performing a high level sweep across all facets of the company to assess whether the interests of a range of different participants in the company from employees to creditors are being looked after and balanced with each other.[208]

---

[199] At 24; and Deloitte "The German Supervisory Board: A Practical Introduction for US Public Company Directors" (2021) <www.deloitte.com>.
[200] Block and Gerstner, above n 190, at 24.
[201] At 25.
[202] At 25.
[203] Jörn M Andreas, Marc Steffen Rapp and Michael Wolff "Determinants of director compensation in two-tier systems: evidence from German panel data" (2012) 6 Rev Manag Sci 33 at 35.
[204] Block and Gerstner, above n 190, at 25.
[205] Njeri, above n 180, at 25.
[206] Block and Gerstner, above n 190, at 26.
[207] At 26.
[208] At 26.

The supervisory board appoints directors onto the management board and are empowered to dismiss the directors on the management board with sufficient cause.[209] The main task of the management board is to run the business and represent the company.[210] The management board decides the strategic focus of the company, manages its human resources, and generally oversees the day-to-day operation of the company.[211]

VIII Dual Board Structure, Codetermination and Tikanga

A The Value and Purpose of the German Comparison with Tikanga

This paper proposes that Germany's dual board structure is more reflective of the values and principles underpinning tikanga than Aotearoa's unitary board structure. German law therefore demonstrates that although infusion is hard to achieve, it is possible to amend Aotearoa's company law to better recognise and make space for tikanga. Prominent Māori jurists argue that:[212]

> "finding space for tikanga to operate within the constraints of the state legal system is a co-option of culture that undermines tinorangatiratanga, can distract from the assertion of the authority of tikanga in its own right and is therefore a vehicle for further assimilation and is part of the continuing story of colonisation."

Alternative perspectives suggest that incorporating tikanga into Aotearoa's colonial legal system serves to indigenise the system, and because Māori are present in the commercial legal system, it is better for tikanga to also have a presence in the system than be absent.[213] It is not the place of this author to comment on the correctness of either perspective. That is a question for Māori. Notwithstanding this, the author has confined the scope of this paper to the exploration of how tikanga could be incorporated into Aotearoa's legal system as it exists today, rather than as part of the destruction and subsequent rebuilding of a new legal system. It is necessary to note that this paper does not intend to conflate German law with tikanga or suggest that German codetermination laws inadvertently practice some form of tikanga. Rather,

[209] At 23.
[210] Njeri, above n 180, at 2.
[211] Block and Gerstner, above n 190, at 24.
[212] Coates, above n 7, at 152. See also Moana Jackson "Justice and Political Power: Reasserting Māori Legal Processes" in Kayleen M Hazelhurst (ed) *Legal Pluralism and the Colonial Legacy* (Ashbury Publishing, Idaho, 1995) at 244; and Ani Mikaere "How will the future generations judge us? Some thoughts on the relationship between Crown law and tikanga Māori" (paper presented to the Ma te Rango te Waka ka Rere: Exploring a Kaupapa Māori Organisational Framework, Te Wānanga o Raukawa, Otaki, 2006).
[213] Coates, above n 7, at 152.

this paper uses German law to demonstrate how corporate governance structures in Aotearoa can be altered to better reflect tikanga and move away from western company law values.

This section discusses the benefits of the German dual board structure as a system in which the underlying principles are more reflective of tikanga values than Aotearoa's current corporate governance structure. It does not suggest that a dual board structure would directly allow the practice of tikanga to be more accessible to workers and companies. Rather, this paper examines company law from a values perspective, and proposes that a dual board structure is more reflective of tikanga values like mana and kaitiakitanga.

This paper uses German dual board structures and codetermination laws to demonstrate the possibility of better aligning Aotearoa's company law with tikanga because they are an effective way of holding shareholders and directors accountable.[214] It provides a more robust way of controlling a company's behaviour than, for example, the enlightened shareholder approach, which largely depends on the readiness of shareholders to trade short-term financial gain for the long-term greater good.[215] Further, it aptly demonstrates how legal structures may be altered to encourage stakeholderism in Aotearoa's corporate governance, which this paper argues will inevitably lead to the promotion of tikanga values.

B The Role of Stakeholderism under German Corporate Law

The German dual board structure and its codetermination laws are more reflective of a stakeholder approach to corporate governance than the unitary board structure used in Aotearoa. Though the supervisory board functions to protect the interests of the shareholders, codetermination laws mean that the makeup of the supervisory board is conducive to a stakeholder approach to corporate governance.[216] By empowering employees to decide between a third or half of the people that make up the supervisory board, they are able to influence the direction of the company and therefore demand that their interests be considered along with the interests of the shareholders.[217]

[214] Block and Gerstner, above n 190, at 131.
[215] Virginia Harper Ho "'Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide" (2010) 36 J Corp Law 60 at 62.
[216] Douma, above n 171, at 613.
[217] Andreas, Rapp and Wolff, above n 203, at 36.

As discussed, this paper proposes that a stakeholder approach naturally aligns more with tikanga than shareholder primacy, because ideas and values central to tikanga like mana and kaitiakitanga can be better upheld when the interests of more than just the small group of shareholders are considered. Allowing workers to vote their own candidates onto the supervisory board provides a practical way to ensure that the company considers the voice of workers when making important decisions. Central to the idea of mana is the notion of obligation toward those around you.[218] Codetermination means that the management board are forced to behave in a way that aligns more with mana, because it gives the management board a responsibility toward workers that it can be held accountable for. Similarly, from the perspective of workers as resources, the management board is forced to observe stewardship obligations toward these employees, a responsibility reminiscent of kaitiakitanga.

German codetermination laws have established an approach to corporate governance more reminiscent of stakeholderism than Aotearoa law, by allowing employees to select who will fill a number of the seats on the supervisory board. Under codetermination laws workers are legitimate stakeholders that have a tangible vehicle through which to protect their interests. This leans slightly more toward ideas of collectivism and obligation, inevitably creating space to better uphold tikanga. This is absent from the unitary board corporate governance structure in Aotearoa.

C The Perspective of Power

By giving employees an opportunity to select a portion of the supervisory board under the dual board structure, the western value of power and control changes, because power is dispersed more evenly. Because shareholders nominate the rest of the supervisory board, they remain an important and influential stakeholder to any company governed by codetermination laws.[219] However, the power these shareholders hold is diluted by the mandatory diversity among the supervisory board.

Because power is more widely dispersed among the supervisory board, the interests of a larger group of people must be considered by the management board. Thus, the power held by upper management in a company governed by codetermination is bound by the interests of a wider

[218] Williams, above n 1, at 3.
[219] Block and Gerstner, above n 190, at 131.

range of people than under a unitary board structure.[220] Diversity in the number of interests that are considered and protected is more aligned with tikanga, as tikanga and te ao Māori have a collective focus and does not subscribe to Western individualism.[221]

Germany's dual board system better reflects the value of mana than a unitary board system, because it places robust obligations on the supervisory board. The power of worker-nominated board members is subject to their responsibility to advance worker interests. A greater diversity of interests require consideration by a supervisory board than a board under a unitary structure. This diversity is increased by the requirement that 30 percent of the supervisory board in publicly listed companies be female.[222] This quota requirement is a better reflection of mana because mana denotes responsibility with power, and requires leadership that considers the needs of more than the wealthy few. The check and balance provided by the worker nominated board members creates obligations along with bestowing power, a system more aligned with tikanga.

D The Importance of Profit Maximisation: Distilled

As previously outlined, this paper proposes that despite greenwashing efforts western company law takes a strong capitalist "profit over people and planet" approach to business. Conversely tikanga is guided by principles like kaitiakitanga, which promotes caring for a resource so that it may be preserved for future generations rather than exploiting it as much as possible for short term gain.[223] While kaitiakitanga does allow for the use of a resource for commercial purposes, permitted uses are limited to those that will not actively harm the resource in a way that will prevent others from using it in the future.[224]

The importance of profit is inevitably distilled under German codetermination, which is inherent in the background and history of the laws. As outlined, codetermination laws were introduced to prevent a socialist revolution and appease employees angry about their working conditions.[225] Poor working conditions are a result of western company law values like profit maximisation: the pursuit of profit at the expense of considerations like worker safety and

[220] At 24.
[221] Williams, above n 1, at 2.
[222] At 25.
[223] Kawharu, above n 25, at 349.
[224] Williams, above n 1, at 4.
[225] Muchlinski, above n 179, at 362.

wellbeing. It can therefore be said that codetermination laws were introduced to combat profit maximisation. Under a dual board structure, the concerns and interests of the company's workers, and possibly other stakeholders like the environment, have a far greater chance of consideration than under the unitary board structure. This consideration and preservation of resources comes at the expense of profit maximisation, and shifts corporate governance structures closer to tikanga values like kaitiakitanga.

The dilution of the value of profit maximisation under German codetermination aligns more with tikanga than a western unitary board structure. It is reminiscent of mana because it is underpinned by the idea that those in leadership positions have obligations to those they lead. It also promotes kaitiakitanga, as it encourages the preservation and respect of human resources. By allowing employees as stakeholders of the company and part of the company's resources to have an influence over the company's strategic direction, the focus on profit maximisation is distilled and a more considerate approach reminiscent of tikanga is invoked.

E A Dual Board Structure and Codetermination in Aotearoa?

This paper has sought to demonstrate that a dual board structure with a codetermined supervisory board is better reflective of tikanga values, and shifts away slightly from a western company law approach. It flows from this notion that incorporating a codetermined supervisory board into Aotearoa's corporate governance structures would create more space for tikanga in Aotearoa's legal system.

A complete investigation into the incorporation of a dual board structure in Aotearoa is worthy of a research paper in its own right. A codetermined supervisory board for large public companies would be beneficial to advocate for workers' rights – though it may be argued that Aotearoa already has robust labour laws and strong avenues for dispute resolution that do not necessitate worker representation in high level decision making.[226]

Inclusion of Māori directly within a dual board structure is a more difficult question. This paper suggests that if Aotearoa were to change its corporate governance structures, there could be a number of seats on supervisory boards reserved for Māori representatives. There are 184

[226] Charlotte Parkhill and James Warren "The Employment Law Review: New Zealand" (18 March 2021) The Law Reviews <www.thelawreviews.co.uk>.

companies on the NZX, and while not all of them will have more than 500 workers, this would still be a significant number of suitably qualified Māori to source, especially given the discussed short supply of such people. Further, it is likely a better use of Māori time and resource to focus on lobbying the government to legislate to force companies to better accommodate Māori interests, rather than sit on the supervisory board of a company.

This section has identified that one of the key benefits in the German dual board structure is to dilute the power of the shareholders. However, as discussed in the prior section, Māori entities often place tikanga focused groups like iwi post settlement governance entities in the place of shareholders, so the need to dilute the shareholder's power is not as strong.[227] While a dual board structure is not necessarily useful to directly advance the practice of tikanga in corporate law, a dual board and codetermination better reflects tikanga values, and this is valuable in itself. The distinction is relevant, and demonstrates that as established in *Ellis v R* tikanga is a legitimate source of law in Aotearoa.[228] It is necessary to consider how tikanga can be incorporated into all areas of the law not just to directly serve Māori; it is a source of law to all those living in Aotearoa. If tikanga is to be treated as such, the question of how to create a system that not only promotes the practice of tikanga but is founded on tikanga principles is pertinent.

This section has sought to discuss how the dual board structure and codetermination are examples of how tikanga values, or tikanga type ways of doing things, can be infused into corporate governance structures. This section has shown how the distinction between a dual and unitary board structure is more than a matter of bureaucracy; it is reflective of the values and principles underpinning the law. A dual board is a far cry away from a tikanga compliant corporate governance structure, but it demonstrates that western company law is capable of adaptation to be made more reflective of tikanga values.

F Limitations of the German Comparison with Tikanga

Though this paper proposes that the German codetermined dual board structure is more reflective of tikanga values, there are considerable limitations inherent in the comparison of the two legal systems. The power of the supervisory board is not unbridled – the board cannot

[227] See TDB Advisory, above n 97.
[228] *Peter Hugh McGregor Ellis v R*, above n 10, at [3] – [4].

give formal orders to the management board or make executive decisions.[229] The power of worker nominated members of the supervisory board specifically is further diluted by their voting power within the board. At a maximum, worker nominated board members will fill half of the board seats, and in decision making if there is an even split of votes, the vote of the board's Chair counts twice.[230] The Chair of the board is elected by the shareholders, meaning that the shareholders effectively exercise more control over the supervisory board than the worker nominated board members.[231] This demonstrates that although codetermination provides an avenue through which to embrace stakeholderism and thereby a more tikanga approach, shareholder primacy endures.

Tikanga maintains and celebrates differences in gender, whereas under German codetermination the requirement for female representation on the supervisory board is a distinct attempt to reject gender roles. It is important at the outset of this discussion to note that gender roles under tikanga do not carry the same negative connotation that they do in western society.[232] The different roles of men and women under tikanga transcend the modern western rejection of gender and instead are woven into concepts of tapu and mana.[233] Gender roles under tikanga have a cultural and spiritual dimension that is absent from western law. As this paper is authored by a wahine pākehā, it is not the place of this paper nor within its scope to criticise the role of gender under tikanga.

Notwithstanding the different perceptions of gender between tikanga and western society, tikanga promotes gender roles and German codetermination laws seek to deconstruct them. Though the mandatory female quota on supervisory boards is more reflective of a stakeholder approach, it is uncertain how tikanga would view this quota, as often solely men undertake high level leadership roles under tikanga such as speaking on the marae. A more detailed inquiry into this potential conflict would be necessary to comment further on it, but it is suffice to highlight that this possible tension between the two legal systems limits the effectiveness and usefulness of using German law as a comparison with tikanga.

[229] Deloitte, above n 199, at 6.
[230] At 5.
[231] At 5.
[232] See Ani Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 WkoLawRw 125.
[233] See Wikitoria August "Māori women: Bodies, spaces, sacredness and mana" (2005) 61 NZ Geogr 117.

Finally, the limits on the consideration of the environment under German codetermination laws are difficult to reconcile with the fundamental importance of kaitiakitanga under tikanga. This paper maintains that codetermination laws in promoting stakeholderism allow for the consideration of stakeholders beyond workers such as the environment. However, kaitiakitanga will likely demand that the health and longevity of a resource play a more central role in business activity. Under tikanga resource preservation is imperative, whereas German codetermination laws primarily advocate for and protect the interests of workers.

Limitations are an inevitable part of any comparison between legal jurisdictions, and despite the shortcomings of comparing German law with tikanga, the exercise is still a valuable one. Crucially, though specific tikanga may conflict with German law, codetermined dual boards represent a system of company law more reflective of key values under tikanga. As Aotearoa works toward embracing tikanga as a legitimate source of law, questions of how to adapt our western system to better reflect tikanga values will only become more pertinent.

IX Conclusion

This paper has sought to draw out the key values and principles underpinning western company law, analyse them against values of tikanga Māori, and argue that tikanga values are better reflected in the corporate governance laws of Germany. Western company law places much weight on power and control, profit maximisation, and avoiding taking responsibility for wrongdoings. While some values under tikanga are prima facie similar – for example, profit generation is not necessarily contrary to tikanga – the ethos behind these values differs greatly between the two legal systems.

Despite these differences, the infusion of tikanga into western corporate governance structures occurs regularly throughout Aotearoa. This paper has discussed the corporate governance structures used by Māori entities, in particular iwi, which facilitate incorporating the interests of tikanga into the entity's decision making. Tikanga can be practiced at any level of the business, from influencing everyday ordinary tasks to high level decision making. This paper argues that western law and tikanga are fundamentally at odds because western company law favours shareholder primacy, whereas tikanga aligns more with stakeholder theory. Māori entities have successfully combined the two approaches by, for example, appointing as shareholders individuals who are also committed to upholding tikanga values within the

business. By making proponents of tikanga shareholders, their interests are no longer competing but instead infused.

This paper has identified elements of tikanga values in German codetermination laws, which require a percentage of the supervisory board seats to be won by worker votes. German codetermination law and its dual board structure carries similarities to tikanga because it adopts stakeholderism and promotes notions of obligation, similar to the premise of tikanga values like kaitiakitanga and mana. Limitations are however inherent in this comparison, and this paper recognises that no more than a general and simplified values-based comparative analysis can be made between the two legal systems.

Tikanga is a valid indigenous source of law that is only becoming more recognised and relevant to every part of life in Aotearoa. Following the *Ellis v R* decision, discussion and analysis of how and where tikanga can be infused into and recognised by existing legal structures is increasingly relevant, even in areas like company law.

X Word Count

The text of this paper (excluding table of contents, non-substantive footnotes and bibliography) comprises 13,576 words.

XI Bibliography

A Cases

Berlei Hestia (NZ) Ltd v Fernyhough [1980] 2 NZLR 150 (SC)

Dairy Containers Case Ltd v NZI Bank Ltd [1995] 2 NZLR 30 (HC)

Peter Hugh McGregor Ellis v R [2019] NZSC 49

Re Broadcasting Station 2GB Pty Ltd (1965) NSWLR 164 (SC)

B Legislation

Companies Act 1993

Fair Labor Standards Act 29 USC § 206

C Books and Chapters in Books

Adolph A Bearle and Gardiner C Means *The Modern Corporation and Private Property* (Transaction Publishers, New Jersey, 1932)

Alastair Hudson *Understanding Company Law* (2nd ed, Taylor and Francis Group, Oxfordshire, 2017)

Hirini Mead *Tikanga Maori (Revised Edition): Living by Maori Values* (2nd ed, Huia (NZ) Limited, New Zealand, 2016)

J E Ritchie *Becoming bicultural* (Huia Publishers and Daphne Brasell Associates Press, Wellington, 1992)

Markus Roth *Corporate Boards in European Law: A Comparative Analysis* (OUP Oxford, Oxford, 2013)

Moana Jackson "Justice and Political Power: Reasserting Māori Legal Processes" in Kayleen M Hazelhurst (ed) *Legal Pluralism and the Colonial Legacy* (Ashbury Publishing, Idaho, 1995)

Natalie Coates "Infusing Tikanga into Corporate Māori Governance Entities in the Current Legal Framework" in Robert Joseph and Richard Benton (eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2021) 137

Rāwiri Tinirau and Annemarie Gillies "Turupoutia Tō Piki Amokura: Distinguishing Māori Values and Practices in Contemporary Māori Businesses and Organisations" in Joseph S Te Rito and Susan M Healy *Kei Muri I te Awe Kāpara he Tangata Kē: Recognising - Engaging,. Understanding Difference:4th International Traditional Knowledge Conference 2010* (Knowledge Exchange Programme of Ngā Pae o te Māramatanga, Auckland, 2010)

R Edward Freeman and others *Stakeholder Theory: The State of the Art* (Cambridge University Press, New York, 2010)

R Edward Freeman *Strategic Management: A Stakeholder Approach* (Pitman, London, 1984)

Robert J Bies and Jerald Greenberg "Justice, Culture and Corporate Image: The Swoosh, the Sweatshops, and the Sway of Public Opinion" in Martin J Gannon and Karen L Newman *The Blackwell Handbook of Cross-Cultural Management* (Blackwell Publishers Ltd, New Jersey, 2002)

D Journals

Ani Mikaere "Māori Women: Caught in the Contradictions of a Colonised Reality" (1994) 2 WkoLawRw 125

Andrew L Friedman and Samantha Miles "Developing Stakeholder Theory" (2002) 39 J Management Studs 1

Ani Mikaere "Tikanga as the First Law of Aotearoa" (2007) 10 Yearbook of New Zealand Jurisprudence 24

Chellie Spiller and others “Wise Up: Creating Organizational Wisdom Through an Ethic of Kaitiakitanga” (2011) 104 J Bus Ethics 223

Frank Lorenz Müller “Man, Myth and Monuments: The Legacy of Otto von Bismarck (1866-1998)” (2008) 38 EHQ 626

Jörn M Andreas, Marc Steffen Rapp and Michael Wolff “Determinants of director compensation in two-tier systems: evidence from German panel data” (2012) 6 Rev Manag Sci 33

Graham Page and Helen Fearn “Corporate Reputation: What Do Consumers Really Care About?” (2005) 45 J Advert Res 305

Hans-Joachim Mertens and Erich Schanze “The German Codetermination Act of 1976” (1979) 2 J Comp Corp L & Sec Reg 75

Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law” (2013) 21 WkoLawRw 1

Jean du Plessis and Otto Sandrock “The rise and fall of supervisory codetermination in Germany?” (2005) 2 ICCLR 67

Julian Franks, Colin Mayer and Hannes F Wagner “The Origins of the German Corporation – Finance, Ownership and Control” (2006) 10 Rev Financ 537

Linda Te Aho “Corporate Governance: Balancing Tikanga Māori with Commercial Objectives” (2005) 8 YB NZ Juris 300

Lynn A Stout “Bad and Not-So-Bad Arguments for Shareholder Primacy” (2002) 75 S Cal L Rev

Margaret M Blair “Team Production in Business Organizations: An Introduction” (1999) 24 J Corp L 743

Merata Kawharu “Kaitiakitanga: A Maori Anthropological Perspective of the Maori Socio-Environmental Ethic of Resource Management” (2000) 109 J Polyn Soc 349

Mere Roberts and others “Kaitiakitanga: Maori perspectives on conservation” (1995) 2 Pac Conserv Bio 7

Natalie Coates “The Recognition of Tikanga in the Common Law of New Zealand” (2015) 1 NZ L Rev 1

Patrick De Pelsmacker, Liesbeth Driesen and Glenn Rayp “Do Consumers Care About Ethics? Willingness to Pay for Fair-Trade Coffee” (2005) 39 JCA 363

Peter Muchlinski “The Development of German Corporate Law until 1990: An Historical Reappraisal” (2013) German LJ 339 342

Robert R Keatinge and others “The limited liability company: a study of the emerging entity” (1992) 47 Bus Lawyer 375

Ross Bowden “Tapu and Mana: Ritual Authority and Political Power in Traditional Maori Society” (1979) 14 Pac Hist Rev 50

Ruixue Bai “The Role of the all China Federation of Trade Unions: Implications for Chinese Workers Today” (2011) 14 J Labor Soc 19

Sytse Douma “The Two-Tier System of Corporate Governance” (1997) 30 LRP 612

Virginia Harper Ho “’Enlightened Shareholder Value”: Corporate Governance Beyond the Shareholder-Stakeholder Divide” (2010) 36 J Corp Law 60

VL Stepanov “The Social Legislation of Otto von Bismarck and Worker Insurance Law in Russia” (2008) 47 RSH 71

Wikitoria August "Māori women: Bodies, spaces, sacredness and mana" (2005) 61 NZ Geogr 117

William McNatty and Tom Roa "Whanaungatanga: an illustration of the importance of cultural context" (2002) 3 Jpmd 88

William S Laufer "Social Accountability and Corporate Greenwashing" (2003) 43 J Bus Ethics 253

E Papers and Reports

Ani Mikaere "How will the future generations judge us? Some thoughts on the relationship between Crown law and tikanga Māori" (paper presented to the Ma te Rango te Waka ka Rere: Exploring a Kaupapa Māori Organisational Framework, Te Wānanga o Raukawa, Otaki, 2006).

Bob Frame, Richard Gordon and Claire Mortimer (eds) *Hatched: The Capacity for Sustainable* Development (Landcare Research, January 2010)

David Block and Anne-Marie Gerstner "One-Tier v Two-Tier Board Structure: A Comparison Between the United States and Germany" (paper presented to Global Research Seminar: Comparative Corporate Governance and Financial Regulation, University of Pennsylvania Carey Law School, 2008)

Deloitte *Analysis of the Top 200 Firms and Top 10 Māori Businesses* (April 2020)

Garth Harmsworth *Report on the incorporation of traditional values/tikanga in contemporary Māori business organisation and process* (Landcare Research, October 2005)

Matthew Rout and John Reid *Tribal Economies – Ngāi Tahu: An Examination of the Historic and Current Tītī and Pounamu Economic Frameworks* (Ngāi Tahu Research Centre, 2019)

Te Rūnanga o Ngāi Tahu Group *Annual Report 2019-2020* (October 2020)

Te Runanganui o Ngāti Porou *Ripoata A Tau 2020* (October 2020)

Office of Treaty Settlements *Ka tika ā muri, ka tika ā mua: Healing the past, building a future* (Office of Treaty Settlements, 2008)

P Porter *Four Themes of Māori Leadership, Te whakaarotanga o ngā whakatōranga o ngā mātua, ngā tupuna: Capturing the thoughts of the elders* (The Mira Szászy Research Centre, 2009) as cited in Chellie Spiller and others "Wise Up: Creating Organizational Wisdom Through an Ethic of Kaitiakitanga" (2011) 104 J Bus Ethics 223

Richard Heede "Update on Carbon Majors 1965 – 2018" (Climate Accountability Institute, 9 December 2020)

TDB Advisory *Iwi Investment Report 2020* (TDB Advisory, 6 February 2021)

Te Puni Kōkiri *Hei Whakamārama i ngā Āhautanga o te Tūrua Pō – Investigating Key Māori Business Characteristics for Future Measures: Thinking Paper* (Te Puni Kōkiri, 2006)

Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997)

Waweru Cynthia Njeri "Corporate Governance for State Corporations: A Case for the Two-Tier Board Structure" (LLB Thesis, Strathmore University Law School, 2017)

F Online Sources Including Newspaper and Magazine Articles

Alice Neville "Why it's time to break up with the disposable cup" *The Spinoff* (online ed, Auckland, 26 February 2020)

Amber-Leigh Woolf "New Zealand landfills are becoming full of unloved clothes as 'fast fashion' grows" *Stuff* (online ed, New Zealand, 21 July 2019)

Carwyn Jones "Tikanga Māori in NZ Common Law" *Law Talk* (online ed, New Zealand, Spring 2020)

Charlotte Parkhill and James Warren "The Employment Law Review: New Zealand" (18 March 2021) The Law Reviews <www.thelawreviews.co.uk>

Chastity Heyward "The Growing Importance of Social responsibility in Business" *Forbes* (New Jersey, 18th November 2020)

Darrell M West and Christian Lansang "Global manufacturing scorecard: How the US compares to 18 other nations" (Brookings, 10 July 2018)

"Deepwater Horizon oil spill sparks calls for $10bn levy on BP and drilling ban" *The Guardian* (online ed, London, 5th May 2010); and "BP faces backlash over Gulf oil spill report" *BBC* (online ed, London, 9th September 2010)

Deloitte "The German Supervisory Board: A Practical Introduction for US Public Company Directors" (2021) <www.deloitte.com>

Gilbert Kreijger "Why German corporate governance is different" (28 April 2018) Handelsblatt Today <www.handelsblatt.com>

Gordana Rodden "Handle with care: Fighting the tide of fast fashion" *Stuff* (online ed, Auckland, 9 February 2020)

Heritage New Zealand "Māori Heritage – Ngā Taonga Tuku Iho nō Ngā Tūpuna" <www.heritage.org.nz>.

Institute of Directors New Zealand and Minter Ellison Rudd Watts "Always on duty: the future board" <www.minterellison.co.nz>

John C Moorfield "mana" Māori Dictionary <www.maori dictionary.co.nz>

Katie Gu "Lululemon: Hiding Its Abuses Under the Guise of Being Green" (26 January 2021) Climate Conscious < www.medium.com/climate-conscious>

Lara Robertson "How Ethical is Nike?" (14 August 2020) Good on You < www.goodonyou.eco/>

Leith Huffadine "New Zealand has a long history of going on strike. Now, it's a complex issue" *Stuff* (New Zealand, 30 May 2018)

Lululemon "Our Sustainability" <www.lululemon.co.nz/en-nz/home>

Melanie Earley "Fonterra, Genesis Energy and Z will go to trial for 'failing' to protect against effects of climate change" *Stuff* (New Zealand, 8 March 2020)

Michelle Chen "6 Years After the Rana Plaza Collapse, Are Garment Workers Any Safer?" *The Nation* (online ed, New York, 15th July 2019)

Milton Friedman "The Social Responsibility of Business Is to Increase Its Profits" *New York Times Magazine* (New York, 13th September 1970)

Ngāti Porou mai i Potikirua ki te Toka a Taiau "Ngāti Porou Holding Company Limited Constitution" (18 June 2012) <www.ngatiporou.com>

Ngāti Porou mai i Potikirua ki te Toka a Taiau "Ngāti Porou Holding Company" <www.ngatiporou.com>

Ngāti Porou mai i Potikirua ki te Toka a Taiau "Our Story" <www.ngatiporou.com>.

Nicholas D Kristof and Sheryl Wudunn "Two Cheers for Sweatshops" *The New York Times Magazine* (New York, 24 September 2000)

NZPPTA and NZSTA "Guidelines to Assist Boards of Trustees to Meet Their Good Employer Obligations to Māori" (May 2015) New Zealand School Trustees Association <www.nzsta.org.nz>

OECD "OECD Corporate Governance Factbook 2019" (2019) <www.oedc.org>

Robyn Walker “The great ute FBT debate” *Deloitte Tax Alert* (online ed, New Zealand, August 2021)

Te Puni Kōkiri “What is Governance” <www.tpk.govt.nz>

Te Rūnanga o Ngāi Tahu Group “Constitution of Ngāi Tahu Holdings Corporation Limited” (April 2016)

Te Rūnanga o Ngāi Tahu “Ngāi Tahu Commercialism” <www.ngaitahu.iwi>

T Huriwai and M Baker *Manaaki: Mana enhancing and Mana protecting practice* (Te Rau Matatini, 2016)