LAWS531: Special Topic: Corporate Governance

Research Essay

Title: 'New Zealand executives; too much say on pay?'

Research Question: To what extent does the New Zealand legal framework governing executive remuneration allow for executives to influence their own pay, and how could such conflicts of interest affect New Zealand business?

Candidate Name: Scott Macdonald-Patterson

Date: 05/10/20

Word Count: 11,431 words

Abstract

Comments have been made by academics claiming that New Zealand company executives are able to too easily influence their own remuneration, and that the legal frameworks governing executive remuneration in New Zealand may not be aligned with international corporate governance best practice. After establishing the legal frameworks in place for governing executive pay, this research will evaluate the truth of this statement with regard to recent statistics and academic commentary. In doing so it will highlight four areas of potential conflict of interest: executives sitting on remuneration-setting boards, executive influence of other executive and non-executive directors on remuneration setting boards, executive influence over compensation consultants, and executive authorization of financial engineering of performance standards that affect their remuneration. It concludes that there is indeed some truth to the statement that executives can influence their own pay, potentially exacerbated by certain characteristics of the jurisdiction, and alongside this, underpins evidence suggesting that there could be negative impacts on New Zealand business performance. This research offers nine reform proposals for implementation into the New Zealand legal frameworks to potentially address these conflicts of interest and facilitate more efficient market determination of executive remuneration.

Table of Contents

Abstract i

Acknowledgements iii

Part I: Introduction 1

Part II: Theoretical Basis for Executive Remuneration 2

- The Agency Problem 2
- Market Forces and Incentive Alignment 4
- The Optimal Contracting Approach 5
- The Managerial Power Approach 6
- 'Say On Pay' in Executive Remuneration Theory 7
- Conclusion 8

Part III: New Zealand Legal Frameworks Governing Executive Remuneration 8

- The Act's regulation of executive remuneration 9
- The Listing Rules' regulation of executive remuneration 11
- Recommendations for regulating executive remuneration in the Code 12

Part IV: Executives Influencing the Setting of Their Own Remuneration 13

- Executives sitting on remuneration-setting boards 13
- Executives influencing other members of remuneration-setting boards 16
- Executives influencing remuneration consultants 18
- Conclusion 21

Part V: Executive Influence of Performance Standards Affecting Remuneration 22

- Empirical evidence of executives manipulating performance standards 23
- Data Analysis 24
- New Zealand legal framework governing share repurchases and financial disclosure 26
- Conclusion 27

Part VI: Reform Proposals to Address Conflicts of Interest in Executive Remuneration 27

Part VII: Conclusion 31

Bibliography 33

Acknowledgements

I would like to thank Mateo Solinas for being my supervisor, providing research direction and giving me helpful feedback. I would also like to thank Ed Giles for constantly playing devil’s advocate to my every point and highlighting situations where I was getting too caught up in my own ideas; my mother Julie Macdonald for her tireless proofreading; and my father Andrew Patterson for lending his knowledge of economics and business administration for discussion of the addressed topics, and being there to bounce ideas off.

Part I: Introduction

Executive remuneration is one of the most discussed aspects of corporate governance in both the international media[1] and the "lively…scientific debate"[2] of the legal and business journals. Current debate is largely centred around COVID-19 related executive remuneration scandals, however even prior to the pandemic everyone wanted to know who was making what salary, why, who had a say in the decision, and how that amount of money could possibly be fair. Some argue that CEOs are similar to actors or professional sports players, that "many occupations today carry vast rewards" and if the market determines that executive salaries are that high then so be it.[3] Another argument is that CEO remuneration has merely increased alongside stock market growth and shareholder wealth. However, many see the arguments defending the "stratospheric rise" of executive pay in recent decades as unconvincing.[4] Bebchuk and Fried highlight a flaw in the 'market driven salary' argument: actors and sports stars' salaries "rely on the premise of arm's-length bargaining" whereas executives allegedly have a large say over their own pay.[5] Mishel and Schieder's recent analysis of this issue showed that between 1978 and 2017, whilst stock market growth (S&P Index) grew 637 percent, CEO remuneration (based on stock options realized) grew a whopping 1070 percent.[6] The validity of the arguments defending a rise in CEO pay is therefore questionable.

One of the answers to this 'compensation crisis' in the last two decades is 'say-on-pay': "non-binding shareholder vot[ing] on executive pay"; introduced in the UK in 2002 this concept has had a lot of traction in western business.[7] Say-on-pay may be a solution to restraining soaring executive salaries, however this research has a different focus: to what extent the executives being remunerated themselves can influence their own remuneration. Schoenemann highlights that "New Zealand law

---

[1] See for example: Peter Eavis, 'As the Pandemic Forced Layoffs, CEOs Gave Up Little' (*New York Times*, 29th July 2020) <https://www.nytimes.com/2020/07/29/business/economy/ceo-pay-pandemic-layoffs.html> accessed 8th August 2020; Rupert Neate, 'UK's largest firms fail to cut CEO pay to navigate Covid-19 crisis' (*The Guardian*, 5th August 2020) <https://www.theguardian.com/business/2020/aug/05/uks-largest-firms-fail-to-cut-ceo-pay-to-navigate-covid-19-crisis> accessed 8th August 2020.

[2] Andreas Schoenemann, *'Executive Remuneration in New Zealand and Australia: Do Current Laws, Regulations and Guidelines Ensure "Pay for Performance"?'* (2006) Vol. 37 Victoria University of Wellington Law Review pp. 31-68, page 31.

[3] Stephen Bainbridge, *'Is Say on Pay Justified'* (2009) Vol. 32 Regulation No. 1 pp. 42-47, page 42.

[4] Dean Baker, Josh Bivens and Jessica Schieder, 'Reining in CEO compensation and curbing the rise of inequality' (*Economic Policy Institute*, 4th June 2019) <https://www.epi.org/publication/reining-in-ceo-compensation-and-curbing-the-rise-of-inequality/> accessed 8th August 2020, page 4.

[5] Lucian Bebchuk and Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* (Harvard University Press 2006) pages 20-21.

[6] Lawrence Mishel and Jessica Schieder, 'CEO compensation surged in 2017' (*Economic Policy Institute,* 16th August 2018) <https://www.epi.org/publication/ceo-compensation-surged-in-2017/> accessed 22nd September 2020, pages 1-2.

[7] Fabrizio Ferri and David Maber, *'Say on Pay Votes and CEO Compensation: Evidence from the UK'* (2012) Vol. 17 Review of Finance pp. 527-563, pages 527-528.

allows executive directors to be among those who determine their *own* remuneration" and notes that because of this there are certain conflicts of interest.[8] Both the New Zealand Exchange (NZX) Listing Rules ('the Listing Rules') and the NZX Corporate Governance Code ('the Code') have been updated since Schoenemann's 2006 article, so this research will seek to determine to what extent above statement is true and what issues, if any, such conflicts of interests could cause in New Zealand.

Part 2 will highlight two of the key theories underpinning the theoretical basis for executive remuneration: the optimal contracting approach and the managerial power approach, in order to establish the rationale behind and theoretical issues with executive remuneration. Part 3 will illustrate the New Zealand legal frameworks governing executive remuneration. Part 4 will discuss different executive remuneration situations that could be regarded as conflicts of interest: the executive being remunerated sitting on their remuneration committee, influencing other directors sitting on their remuneration committee, and influencing remuneration consultants, and conclude that current regulation may allow for abuse in certain situations. Part 5 will address conflicts of interest related to executives' ability to "internally influence…performance standards",[9] and synthesize recent literature on Earnings-Per-Share bonus-related share repurchasing as it might apply in a New Zealand context. Part 6 will suggest potential reform proposals for dealing with issues raised in Parts 4 and 5, taking both from academic literature, and other jurisdictions' regulation of executive remuneration. It will conclude that there are potential weaknesses with the New Zealand legal framework governing executive remuneration, that some reform would be beneficial, and that additional research may be necessary to determine the most effective way to 'solve' this aspect of the 'compensation crisis'.

Part II: Theoretical Basis for Executive Remuneration

The Agency Problem

As with many issues in corporate governance, executive remuneration begins with the agency problem. One party, the 'agent', "promises performance to another", the 'principle', and that agent has to be incentivized to act in the interests of the principle.[10] The "agency relationship" in this case is between the executives and the shareholders of a company, where the executives are making

[8] Schoenemann, *'Executive Remuneration'* (n 2) page 37.
[9] Michael Jensen, Kevin Murphy and Eric Wruck, *'Remuneration: Where we've been, how we got to here, what are the problems, and how to fix them'* (2004) European Corporate Governance Institute Finance Working Paper No. 44/2004, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=561305> accessed 3rd September 2020, page 76.
[10] Reinier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017) pages 28-29.

decisions on the operation of the company that the shareholders have invested in.[11] An assumption in these scenarios is that "every economic agent…tries to maximize [their]…own self-interests" and therefore there is no "*a priori* reason to believe that CEOs…will necessarily direct their…power to…maximize shareholder wealth".[12] Another assumption is that boards subscribe to a 'shareholder value' position rather than a 'stakeholder value' position: that is that it is a board's principle interest to seek maximization of shareholder interest rather than balancing shareholder interests with those of other stakeholders.[13]

Schoenemann highlights that when executives are being remunerated, the agency relationship between shareholders and boards of directors is also highly relevant because boards are "usually involved in determining…remuneration".[14] Theoretically therefore, to ensure that executives and boards of directors do not "act opportunistically, skimping on the quality of…their performance", shareholder principles ought to monitor the two sets of agents.[15] However, the extent to which this monitoring is viable and effective is questionable due to the legal "separation of ownership and control"[16] for publicly listed companies often limiting potential shareholder interference with company management.[17] Additionally, shareholders will frequently have heterogenous interests which will exacerbate "collective action problems"[18] when deciding how to monitor their agents, especially in companies with more dispersed shareholder structures.[19] There are also incentives for some shareholders to 'free ride' on the monitoring efforts of other shareholders.[20] For these reasons, agency costs may be so high that shareholders choose to not monitor executives or boards of directors enough,[21] leading to a danger of executives being able to pursue goals like "empire building and sub-optimal prestige projects".[22]

---

[11] Schoenemann, *'Executive Remuneration'* (n 2) page 32.
[12] Helen Roberts, *'CEO Power, executive compensation and firm performance, New Zealand, 1997-2002'* (2005) University of Otago Department of Finance Seminar Series <https://ourarchive.otago.ac.nz/handle/10523/1524> accessed 3rd September 2020, page 5.
[13] Jeffrey Gordon, *''Say on Pay': Cautionary Notes on the UK Experience and the Case for Shareholder Opt-in'* (2009) Vol. 46 Harvard Journal on Legislation pp. 323-367, page 328.
[14] Schoenemann, *'Executive Remuneration'* (n 2) page 32.
[15] Kraakman et al, *'Corporate Law'* (n 10) pages 28-29.
[16] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan 1932) page 4.
[17] Jaclyn Braunstein, *'Pound Foolish: Challenging Executive Compensation in the US and the UK'* (2004) Vol. 29 Brooklyn Journal of International Law pp. 747-796, page 779.
[18] Schoenemann, *'Executive Remuneration'* (n 2) page 33.
[19] Guido Ferrarini and Niamh Moloney, *'Executive Remuneration in the EU: The Context for Reform'* (2005) Vol. 21 Oxford Review of Economic Policy No. 2 pp. 304-323, page 305.
[20] Richard Posner, *'Are American CEOs Overpaid, and, if so, What if Anything Should be Done About It?'* (2009) Vol. 58 Duke Law Journal No. 6 pp. 1013-1047, page 1015.
[21] Kiwi Camara, *'Shareholder Voting and the Bundling Problem in Corporate Law* (2004) Wisconsin Law Review pp. 1425-1492, page 1473.
[22] Schoenemann, *'Executive Remuneration'* (n 2) page 33.

Market Forces and Incentive Alignment

Market forces can keep executive and shareholder interests aligned to an extent. Executive labour market forces determining whether a CEO will get dismissed in favour of another can provide that CEO with an incentive run a company effectively.[23] Corporate control market forces determining the vulnerability of the firm to a hostile takeover that could endanger a CEO's position will align incentives.[24] Equity market forces determining the ability of the company to "raise additional capital in the equity market", and product market forces determining competitive advantage of the firm and its ability to turn a profit can both contribute to incentive alignment.[25] However, Bebchuk et al[26] and Schoenemann highlight that "considerable deviations from shareholder interests"[27] are still allowed, meaning that other incentives are needed. This is where monetary compensation comes in. Positive incentives, like compensation, are preferable to other agent-monitoring mechanisms such as greater shareholder control over managerial decision-making because they encourage "*voluntary* alignment of interests" between executive and shareholder.[28]

So it has been established that executives might not act in shareholders' interests, but if executives are compensated then they may be more inclined to align their interests with those of the shareholders. What quantities and structures of remuneration is required to achieve this aim? Many academics, including Camara,[29] Bainbridge,[30] Schoenemann[31] and Jensen[32] hold the view that for the purposes of incentivizing executives, solely providing *fixed* salary compensation is unhelpful because it does not effectively achieve this alignment of interests. Shareholders generally invest for the purposes of achieving some kind of return on their investment, but if executives receive the same compensation regardless of how much of a return is gained they could become "risk averse and prefer the preservation of assets over creating new wealth".[33] If however, the remuneration of the executive is tied to the monetary success of the shareholder: i.e. "performance-linked rewards",[34] then executives' and shareholders' interests will be further aligned and ideally this

[23] Bebchuk and Fried, *Pay Without Performance* (n 5) page 54.
[24] ibid. page 55.
[25] ibid. pages 56-57.
[26] ibid. page 58.
[27] Schoenemann, *'Executive Remuneration'* (n 2) page 34.
[28] ibid.
[29] Camara, *'Shareholder Voting'* (n 21) page 1443.
[30] Stephen Bainbridge, *'Executive Compensation: Who Decides?'* (2005) Vol. 83 Texas Law Review pp. 1615-1662, page 1621.
[31] Schoenemann, *'Executive Remuneration'* (n 2) pages 34-35.
[32] Michal Jensen, *A Theory of the Firm: Governance, Residual Claims and Organizational Forms* (Harvard University Press 2000) page 145.
[33] Schoenemann, *'Executive Remuneration'* (n 2) page 35.
[34] ibid.

should encourage better executive performance.[35] This is also one of the recommendations of the NZX Code, aimed at publicly listed companies in New Zealand.[36]

The Optimal Contracting Approach

Structuring remuneration packages with performance-based elements to effectively align incentives is an incredibly complex task. One theory is that, from a shareholders' point of view, they would want performance-based remuneration granted to the executives of the companies they are invested in up until the point where 'marginal gain of executive incentive' per extra 'margin of remuneration' is zero. This is an aspect of what is dubbed the "optimal contracting approach".[37] Boards deciding remuneration packages would therefore be incentivizing their executives to the maximum possible level without transferring any more wealth to the executive than the board and shareholders are receiving benefit from. This would theoretically maximize the amount of firm profits either being reinvested back into the firm and positively affecting share price, and/or maximize the amount of dividend payments being paid out to shareholders: both outcomes being in shareholders' interests. In practice, this theoretical point of maximal efficiency is almost impossible to attain and failing to find it can either not align shareholder and executive interests enough, or can lead to what Posner[38] and Schoenemann regard as 'excessive remuneration': "…what is paid without providing effective incentives".[39]

Hypothetically, at least under this theory, absurdly high levels of executive remuneration could be viable if they still granted what shareholders might view as useful increasing incentive. However, research has identified some negative impacts of large executive-employee pay disparities on firm performance: poorer "employee performance, productivity and willingness to work".[40] Taking into account these factors is part of what Gordon calls the "social responsibility strand" of contemporary executive remuneration theory, as opposed to a purely "pay for performance" viewpoint.[41] Ferrarini et al recommend executive pay structures pay out in the form of bonuses and/or share-based

[35] Greenbury Committee, *Directors' Remuneration: Report of a Study Group Chaired by Sir Richard Greenbury* (Gee Publishing 1995) para 1.15.
[36] 'NZX Listing Rules Appendix 1 - NZX Corporate Governance Code' (*New Zealand's Exchange*, 1st January 2020) <https://www.nzx.com/regulation/nzx-rules-guidance/main-board-debt-market-rules> accessed 14th August 2020 [hereinafter referred to as 'the Code'], page 26.
[37] Lucian Bebchuk and Jesse Fried, *'Executive Compensation as an Agency Problem'* (2003) Vol. 17 Journal of Economic Perspectives No. 3 pp. 71-92, page 72.
[38] Posner, *'Are American CEOs Overpaid*' (n 20) page 1015.
[39] Schoenemann, *'Executive Remuneration'* (n 2) page 35.
[40] Randall Thomas, *'Should Directors Reduce Executive Pay?'* (2003) Vol. 54 Hasting Law Journal pp. 437-470, pages 438-439.
[41] Gordon, *''Say on Pay''* (n 13) page 328.

payments to most effectively align interests,[42] but firms, boards and executives differ, so what is ideal for one firm may be largely ineffective for another; at least in New Zealand these remuneration policy decisions are generally left to individual company boards.[43] Additionally, regarding share-based remuneration, research points to stock *awards* being generally better at aligning interests than stock *options*, because if firm performance is poor then the stock awards will lose value, whereas executives may be able to not cash out stock options if firm performance is poor and therefore have less of an incentive to maximize said performance.[44]

The Managerial Power Approach

The optimal contracting approach allows that in order to keep shareholders' agency costs as low as possible and to effectively align executive-shareholder interests, executives ought to be granted remuneration which is recommended to be based on the executive's performance. One of the key weaknesses of the optimal contracting approach, as highlighted by Bebchuk and Fried, is that incentive-alignment in this way is less effective if managers have influence over their own pay.[45] Executives can therefore extract "rents": pay in excess of what they would receive through optimal contracting theory, from boards if they exercise influence over the board.[46] This influence can differ depending on the power of the CEO and the structure of the organization and composition of the board in question, but can take the form of an action such as appointing a friend as a director to the board who might look favourably on the executive in remuneration decisions (other scenarios that could constitute rent extraction will be discussed in Part 4).[47] Bebchuk and Fried therefore recommend considering factors of what they call the "managerial power approach" alongside the optimal contracting approach when examining executive compensation practices.[48] The managerial power approach has largely been met favourably as a model, with some US House resolutions being based on it, however some such as Bainbridge have raised criticisms:

> "Does it not seem more plausible that large blockholders tolerate the challenged compensation practices because they are consistent with shareholder interests rather than

[42] Guido Ferrarini, Niamh Moloney and Maria-Cristina Ungureanu, *'Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe'* (2010) Vol. 10 Journal of Corporate Law Studies No. 1 pp. 73-117, page 77.
[43] Schoenemann, *'Executive Remuneration'* (n 2) page 36.
[44] Lawrence Mishel and Julia Wolfe, 'CEO Compensation has grown 940% since 1978' (*Economic Policy Institute*, 14th August 2019) <https://www.epi.org/publication/ceo-compensation-2018/> accessed 22nd September 2020, page 12.
[45] Bebchuk and Fried, *'Executive Compensation'* (n 37) page 72.
[46] Lucian Bebchuk, Jesse Fried and David Walker, *'Managerial Power and Rent Extraction in the Design of Executive Remuneration*' (2002) Vol. 69 The University of Chicago Law Review No. 3 pp. 751-846, page 785.
[47] ibid. page 784.
[48] Bebchuk and Fried, *'Executive Compensation'* (n 37) pages 72-73.

representing management's ability to extract rents inconsistent with shareholder wealth maximization?".[49]

He makes the argument that "evidence does not support the managerial power model".[50] in his 2002 article; Part 4 of this piece will re-examine the data two decades later to see if managerial power may be being exploited.

One of the key elements of the managerial power approach to determining executive remuneration that optimal contracting theory does not address is "outrage costs and constraints"..[51] This is how much reputational harm can occur to a remunerated executive when "relevant outsiders" perceive a remuneration arrangement.[52] There is evidence to show that, for example, negative media attention of firm compensation policies has direct effects on levels of executive remuneration.[53] A recent New Zealand example of this is the resignation of the Watercare CEO after his remuneration controversy surrounding the Auckland water crisis, with the mayor of Auckland stating that the subsequent CEO will start on a "considerably lower salary".[54] Outrage costs and constraints can encourage corporate 'camouflage' of executive remuneration; Bebchuk and Fried highlight how when following optimal contracting theory financial economists "focus on the role of disclosure in getting information incorporated into market pricing", but arguably when it comes to executive remuneration disclosure has a larger impact on either enabling or preventing such outrage.[55]

'Say On Pay' in Executive Remuneration Theory

'Say on pay' was mentioned at the beginning of this research and although it will not be examined in-depth: for that the reader is directed to Ferri et al,[56] Bainbridge,[57] Gordon,[58] Alissa[59] and Thomas et al[60] among others, it will be briefly addressed the extent to which say on pay is a 'solution' to this

[49] Bainbridge, *'Is Say on Pay Justified'* (n 3) page 44.
[50] ibid.
[51] Bebchuk and Fried, *'Executive Compensation'* (n 37) page 75.
[52] ibid.
[53] Marilyn Johnson, Susan Porter and Margaret Shackell, *'Stakeholder Pressure and the Structure of Executive Compensation'* (1997) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=41780> accessed 18th August 2020, page 38.
[54] Bernard Osman, 'Auckland water crisis: Watercare chief executive Raveen Jaduram resigns' (*New Zealand Herald*, 17th August 2020) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12357124> accessed 18th August 2020.
[55] Bebchuk and Fried, *'Executive Compensation'* (n 37) page 76.
[56] Ferri and Maber, *'Say on Pay Votes'* (n 7).
[57] Bainbridge, *'Is Say on Pay Justified'* (n 3).
[58] Gordon, *''Say on Pay''* (n 13).
[59] Walid Alissa, 'Boards' Response to Shareholders' Dissatisfaction: The Case of Shareholders' Say on Pay in the UK' (*European Accounting Review*, 3rd May 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412880> accessed 25th September 2020.
[60] Randall Thomas and Susan Watson, 'Should New Zealand Adopt Say on Pay?' (*Vanderbilt Law School*, 2013) <https://ir.vanderbilt.edu/handle/1803/7331> accessed 25th September 2020.

agency problem. *If* executives are able to abuse their managerial power to extract rents, and/or *if* boards are unable to contract optimally to align executive and shareholder interests, then a solution is to facilitate greater shareholder monitoring of remuneration decisions. This is what say on pay is: non-binding (or binding in the case of the Netherlands, Sweden, Norway and Denmark[61]) shareholder voting on executive remuneration. *Theoretically* this higher level of monitoring could 'solve' the executive-shareholder agency problem by giving shareholders a greater say in these decisions. However, as previously discussed, shareholders suffer from collective action and free riding problems, and the addition of a say on pay scheme will not lessen these issues. Bainbridge highlights that "whatever flaws board governance may have, they pale in comparison to the information asymmetry and collective action problems that lead most shareholders to be rationally apathetic".[62] Therefore despite the widespread adoption of say on pay, and some signs of its alleged effectiveness in the literature,[63] it may not be the sole solution to the 'compensation crisis'.

Conclusion

Finally, it must be noted that methods of executive remuneration can differ depending on industry or certain market scenarios. With regard to the latter, during a financial crisis for example executives (or the boards of their firms) may choose to receive reduced remuneration even prior to disclosure of negative firm performance in order to redirect the flow of firm capital. Different firms in different industries can structure remuneration packages depending on, for example, different income streams: some firms may have regular income, firms with types of agricultural output may have seasonal income, or firms like film production companies may have more irregular income streams. What can be concluded is that executive remuneration involves a balancing exercise of different quantities and methods of incentive alignment, managing executive power and influence over key board actors, transparency and financial disclosure regulations and ancillary factors relating to the specific situation of the firm in question.

Part III: New Zealand Legal Frameworks Governing Executive Remuneration

There are different 'levels' of the regulatory framework in New Zealand: 'hard' law consisting of the Companies Act 1993 ('the Act'), the New Zealand legislation establishing mandatory and default corporate governance rules; 'semi-hard' law which is opt-in "privately established

[61] Jeremy Delman, *'Structuring Say-On-Pay: A Comparative Look at Global Variations in Shareholder Voting on Executive Compensation'* (2010) Vol. 2010 Columbia Business Law Review No. 2 pp. 583-631, page 592.
[62] Bainbridge, *'Is Say on Pay Justified'* (n 3) pages 46-47.
[63] Ferri and Maber, *'Say on Pay Votes'* (n 7) page 559.

[regulation]…recognized by the State", in this case frameworks like the Listing Rules and the NZX Corporate Governance Code; and 'soft' law, corporate governance guidelines which encourage self-regulation in certain ways.[64] Rules and obligations under the Companies Act are enforceable under New Zealand law just like all legislation. The Listing Rules apply only to companies listed on the NZX and are monitored and enforced internally by NZX's regulation team, who can take cases to the NZ Markets Disciplinary Tribunal,[65] and can also refer certain breaches to the NZ Financial Markets Authority[66] (who can then take action through powers granted to them by the FMA Act[67]). The Code on the other hand, functions on what is widely regarded as a "comply or explain"[68] regime: if a company listed on the NZX does not follow a principle recommendation from the Code, then it must explain why it has done so and what "alternative measures it has in place".[69] With regard to soft law, guidelines such as the FMA's corporate governance handbook are available,[70] but are not directly enforceable.

It is also worth noting that as of August 2020, 35 New Zealand companies are dual-listed on the NZX and Australian Stock Exchange (ASX), meaning that as 'ASX Foreign Exempt Listings' they have to comply with the NZX rules *as well as* "a small number of ASX Listing Rules".[71] This small number of Listing Rules currently seem to have no bearing on executive remuneration however, so this will not be further addressed.

The Act's regulation of executive remuneration

The Act applies to all companies in New Zealand. Section 161 of the Act establishes that a company board of directors, subject to the company's constitution, authorizes remuneration payments to directors.[72] The directors authorising remuneration must sign a certificate stating that they have "reasonable grounds"[73] for an opinion that such remuneration is "fair to the company".[74] This

---

[64] Schoenemann, *'Executive Remuneration'* (n 2) pages 38-39.
[65] 'NZX Review 2017' (*New Zealand Financial Markets Authority*, 2017) <https://www.fma.govt.nz/assets/Reports/170629-NZX-Obligations-Report-2017.pdf> accessed 16th August 2020, page 5.
[66] 'How does NZX regulate its markets?' (*New Zealand's Exchange*, 2020) <https://www.nzx.com/regulation/nzx-regulation/how-we-regulate> accessed 16th August 2020.
[67] Financial Markets Authority Act 2011, Part III.
[68] Schoenemann, *'Executive Remuneration'* (n 2) page 39.
[69] 'Corporate Governance Code' (n 36) page 3.
[70] 'Corporate Governance in New Zealand: Principles and Guidelines, A handbook for directors, executives and advisors' (*Financial Markets Authority*, 28th February 2018) <https://www.fma.govt.nz/assets/Guidance/141201-FMA-Corporate-Governance-Handbook-Principles-and-Guidelines2014.pdf> accessed 16th August 2020.
[71] 'New Zealand based companies listed on ASX' (*Australian Stock Exchange*) <https://www.asx.com.au/prices/new_zealand_based_companies.htm> accessed 16th August 2020.
[72] Companies Act 1993, s161(1)(a).
[73] ibid. s161(5)(b).
[74] ibid. s161(4).

concept of fairness has no statutory definition, *Madsen-Ries* establishing that “the concept of fairness [calls]…for a consideration of the potentially competing interests of a company and its directions, a company and its shareholders, and shareholders themselves”.[75] (creditors interests being specifically excluded from establishing fairness under this section of the Act). Other court decisions have been made on the fairness provision with regard to specific company’s situations, such as those in *Managh*.[76] and *Bridgecorp*.[77] Schoenemann highlights that “commentary indicates…fairness relates to the quantity of remuneration rather than…make-up…agreements”, but states that there is little in the way of “conclusive judicial comment” on the fairness test.[78]

Whilst the directors making up the board are acting in their remuneration-setting capacity they are also bound by broader duties under the Act: a duty to act in good faith and in the best interests of the company, to exercise their powers for proper purpose, to not carry out business of the company in a manner likely to create substantial risk of loss to creditors, and “exercise the care, diligence, and skill” of a reasonable director under their circumstances.[79] It is likely that when a court examines the ‘fairness’ and ‘reasonableness’ of a remuneration grant under s161(1) and (4) that their reasoning would be similar to when establishing breaches of ‘good faith’, ‘best interests of the firm’ and ‘proper purpose’ under s131 and s133 with regard to remuneration. Cases like *MacFarlane* can be turned to for guidance on these issues, where the court decided that as directors who were also majority shareholders had granted themselves salaries in excess of what expert witnesses has determined as reasonable, that the directors had breached their s131 and s133 duties.[80]

It must be noted that the Act effectively allows for good faith and best interests duties to be breached if the company constitution allows for it,[81] as well as enabling the restrictions on remuneration in s161 to be circumvented provided there is unanimous assent by shareholders.[82] Additionally, and exceptionally importantly given the subject of this research, ‘interested directors’, being those who “may derive a material financial benefit from the transaction”[83] are allowed to vote on the interested transaction, or take any action related to the transaction in their capacity as director “as if they were not interested in the transaction”.[84] This means that directors can take part

[75] *Madsen-Ries v Petera* [2018] NZLR 500; [2016] NZCA 103, para [38].
[76] *Managh v Jordan* [2010] NZCCLR 4.
[77] *Bridgecorp Management Services Ltd (in rec)* v *Roest* HC Auckland CIV-2008-404-003013, 14 September 2009.
[78] Schoenemann, *‘Executive Remuneration’* (n 2) page 41.
[79] Companies Act (n 72) sections 131(1), 133, 135(b) and 137 respectively.
[80] *MacFarlane v Barlow* [1997] 8 NZCLC 261, paras [6]-[7].
[81] Companies Act (n 72) s131(2)-(4).
[82] ibid. s107(1)(f).
[83] ibid. s139(1)(a).
[84] ibid. s144.

in and vote on board decisions regarding their own remuneration, contrasting with, for example, the Australian Corporations Act which explicitly restricts directors of public companies from being either present or able to vote on matters in which they have material personal interest.[85]

As introduced earlier, equity-based remuneration can be an effective tool for aligning executive-shareholder incentives, therefore Act regulations on issuance of shares or distributions to shareholders may also be applicable.[86] Subject to the company's constitution, new shares may be issued by the board "at any time, to any person, and in any number"[87] which leaves it largely open for directors to be granted shares or stock options as remuneration. If the director being remunerated is already a shareholder and is being granted distributions: share buybacks, dividends or share-related financial assistance,[88] as part of a remuneration package then s52 may apply. The court in *Vercauteren* highlighted that a court will wish to establish whether the distributions are being granted to the director in their capacity as a shareholder or their capacity as a director being remunerated: the former meaning s52 rule will apply and the latter meaning s161 remuneration restrictions will apply.[89]

Finally, the Act requires that the company directors' remuneration, and value of other benefits received from the company be disclosed in an annual report to shareholders.[90] It also requires disclosure of employee remuneration (and therefore executive directors in their capacity as executives) that exceeds $100,000 annually.[91]

The Listing Rules' regulation of executive remuneration

The Listing Rules apply to all publicly listed companies on the NZX, alongside those established in the Act. Director remuneration must be authorized by a simple majority of "Votes of Financial Product holders entitled to vote and voting"; essentially a simple majority of those holding voting rights.[92] "Interested Directors", as defined under the Act, may vote on board decisions regarding their own remuneration because it is an action under the Act that they must sign a certificate to undertake.[93] Directors may be remunerated through issue of equity securities, provided a number of simple rules

[85] Corporations Act 2001, s195(1)(a)-(b).
[86] Companies Act (n 72) sections 41-51 and sections 52-57.
[87] ibid. s42.
[88] ibid. s2(1).
[89] *Vercauteren v B-Guided Media Ltd* [2010] BCL 154, para [39].
[90] Companies Act (n 72) s211(1)(f).
[91] ibid. s211(1)(g).
[92] 'NZX Listing Rules' (*New Zealand's Exchange*, 1st January 2020) <https://www.nzx.com/regulation/nzx-rules-guidance/main-board-debt-market-rules> accessed 17th October 2020, Part A, and section 2.11.1.
[93] ibid. s2.10.2(a).

are followed.[94] If shares are being issued to executive directors in their capacity as executive employees, it can be done so without shareholder approval provided the issue does not exceed 3% of the number of shares of the class issued that period.[95]

The regulations in Section 2.11 (and therefore Section 4.7 if the directors are being remunerated through issue of equity securities) only apply to executive directors in their capacity as directors, not in their capacity as executive employees of the company. Director remuneration for all work in the latter capacity may be approved by a board (provided it is the body that holds competency under the company constitution of course) without the approval of shareholders.[96] If however, the remuneration to the executive in this capacity is over the value of $250,000 per annuum, then it counts as a material transaction that does require a simple majority of those holding voting rights (an ordinary resolution).[97]

Recommendations for regulating executive remuneration in the Code

The Code is set out as an appendix to the Listing Rules, and attempts to provide guidance to all publicly listed companies on the NZX. As previously stated, the Code functions on a ‘comply or explain’ regime, where if a “particular recommendation is not appropriate for an issuer given its size or stage of development the issuer can explain why it has chosen not to adopt the recommendation and the alternative measures it has in place”.[98]

The Code recommends that a company board be responsible for adoption of remuneration policy.[99] It also recommends that a remuneration committee, a subcommittee of the board, function to recommend remuneration packages for directors and construct a policy to remunerate senior executives.[100] The remuneration committee’s charter ought to be publicly available, and the remuneration policy available to investors and stakeholders.[101] Remuneration of directors and executives should be fair and reasonable in the current competitive market, take into account a person’s skills and experience, and the reasons for specific grants of remuneration should be expressed clearly to shareholders.[102] If the board engages remuneration consultants to advise on remuneration packages then consultants should be free of influence of parties related to the service being provided, should sign a declaration of independence, and the board should ensure that

[94] ibid. s2.11.2(b) and s4.7.1(b)-(d).
[95] ibid. s4.6.1.
[96] ibid. s2.12.2.
[97] ibid. s5.2.1 and 5.2.2(i).
[98] ‘Corporate Governance Code’ (n 36) page 3.
[99] ibid. pages 9-10.
[100] ibid. page 16.
[101] ibid. page 17 and page 23.
[102] ibid. page 25.

consultants' reporting means that no members of senior management are making decisions regarding their own remuneration.[103] Remuneration packages for executive directors should consider that fixed remuneration should be fair and based on the scale and complexity of the executive's role, performance-based remuneration should be linked to company performance objectives and risk profiles, and equity-based remuneration should "support a long-term approach and not promote undue risk-taking".[104] Packages for non-executive directors should be primarily fixed-fee remuneration reflecting the burden of their role, and not performance-based to prevent biased decision-making by boards.[105]

Part IV: Executives Influencing the Setting of Their Own Remuneration

Now that the legal frameworks regulating executive remuneration have been established, attention will be turned to highlighting potential weaknesses with regard to harmful conflicts of interest. This analysis will hold to a number of assumptions: firstly, if a company's constitution explicitly allows for these conflicts of interest, then they will not be regarded as such. The following analysis therefore does not discuss the contents of company constitutions, assuming that they do not address these issues to the contrary. Secondly, this discussion will avoid scenarios where executives are influencing their own remuneration but there are no *conflicts* of interest, i.e. where the executive is also the sole shareholder of the company, or the deciding board chaired by the executive being remunerated receives unanimous assent from shareholders that they can award the executive as much as they want. Furthermore, it must be noted that many of the issues raised in this part are not specific to New Zealand businesses nor the New Zealand legal frameworks, they are issues of human nature and/or corporate governance systems in general. Here they will be considered in relation to the New Zealand context. There is limited research into CEO compensation in New Zealand,[106] therefore much of the analysis will utilize literature from other jurisdictions and evaluate to what extent the findings might be applicable to corporate governance in New Zealand.

Executives sitting on remuneration-setting boards

The first and most overt potential conflict of interest is the ability of the executive being remunerated to sit on their own remuneration board or committee. Reiterating our assumption that economic agents will act in their own interest, there is a danger that if, for example, a CEO can sit on

[103] ibid. page 26.
[104] ibid.
[105] ibid.
[106] Krishna Reddy, Sazali Abidin and Linjuan You, *'Does corporate governance matter in determining CEO compensation in the publicly listed companies in New Zealand? An empirical investigation'* (2015) Vol. 41 Managerial Finance No. 3 pp. 301-327, page 307.

their own remuneration committee then they will be inclined to push for excessive remuneration which may be against shareholder interests. Empirical studies across multiple jurisdictions, whilst not conclusive, seem to support a view that this conflict of interest has an effect on remuneration. Core et al, in a study consisting of 495 observations of 205 publicly traded US firms from ’82-’84, found that if the CEO is a board chair, then they are generally paid just over 14% more than a non-board chair CEO.[107] Cyert et al, in another US study of 1648 listed firms between ’92-’93, found that a CEO board chairperson receives on average just over 36% greater equity remuneration than a non-chair CEO.[108] Sapp, in a Canadian quantitative study of 416 publicly listed firms between ’00-’05 show that an increase in the percentage of current CEOs on compensation committees correlated with an increase in CEO compensation.[109]

The New Zealand statistics show similar results. Reddy et al, upon examination of 390 company-years of all publicly listed firms on the NZX between ’05-’10 found that CEOs who serve on boards tend to have higher salaries compared to non-board CEOs.[110] Boyle and Roberts analysed an earlier but larger sample period of the NZX: ’97-’05, and found that CEOs who are also on compensation committees receive annual pay increments up to four times more generous than average performance, and only 39%-45% as sensitive to performance fluctuations.[111] Conversely, an earlier study by Roberts of NZX firms between ’97-’02 showed that when a firm had a board with a separate compensation sub-committee of the board to determine executive remuneration, that CEO pay seemed to be higher when the CEO was on the board but *not* on the compensation committee.[112] The data in Roberts’ earlier study might indicate that such overt executive influence may not be occurring, but more covert influencing of compensation committee members from the board may be. This piece will address situations of more covert influence later in this section. The majority of research however, does find a correlation between higher CEO pay and a CEO’s position on the deciding board of their remuneration.

---

[107] John Core, Robert Holthausen and David Larcker, *‘Corporate Governance, Chief Executive Officer Compensation, and Firm Performance’* (1999) Vol. 51 Journal of Financial Economics pp. 371-406, page 402.
[108] Richard Cyert, Sok-Hyon Kang and Praveen Kumar, *‘Corporate Governance, Takeovers, and Top-Management Compensation: Theory and Evidence’* (2002) Vol. 48 Management Science No. 4 pp. 453-469, page 466.
[109] Stephen Sapp, *‘The Impact of Corporate Governance on Executive Compensation’* (2008) Vol. 14 European Financial Management No. 4 pp. 710-746, pages 740-741.
[110] Reddy et al, *‘An empirical investigation’* (n 106) page 321.
[111] Glenn Boyle and Helen Roberts, *‘Wolves in the Hen-House? The Consequences of Formal CEO Involvement in the Executive Pay-Setting Process’* (2010) New Zealand Institute for the Study of Competition and Regulation Working Paper <http://researcharchive.vuw.ac.nz/handle/10063/4063> accessed 6th September 2020, pages 7-8.
[112] Roberts, *‘CEO Power’* (n 12) page 30.

Nevertheless, correlation does not necessarily mean causation. Quantitative studies on this issue (and on the other issues discussed in this paper) can obviously differ in such factors as, *inter alia*: (a) the remuneration regulation in the sample jurisdiction at the time of sampling; (b) the length of the time period being sampled; (c) number of firms sampled; (d) size and corporate governance structures of the firms in the samples; and (e) the individual circumstances of the executives, board members and shareholders of the sample firms; all factors which could skew the conclusions of the studies. It must be noted that sample size is less of an issue in NZ studies, because the relatively small number of publicly listed firms in NZ means a study of all of them is more practical than say, a study of all publicly listed firms in the US. Therefore findings in a study of New Zealand firms can be seen to be more representative of NZ companies than studies of samples of firms in other jurisdictions. All that can be concluded however, is that there is correlative data that *might* support the hypothesis that having CEOs on the panels that determine their remuneration leads to higher CEO pay, which could be excessive and may be against shareholder interests.

There is no binding part of the NZ legal frameworks governing executive remuneration that prevents a CEO or other senior executive from sitting on their own remuneration-setting board; unlike in, for example, the Australian Corporations Act.[113] There is not even any non-binding recommendations in the NZ framework that suggest actions should be taken against such a situation; unlike, for example, the German and UK corporate governance codes.[114] The only requirements of executives who sit on their own remuneration committees is that they have to sign a certificate regarding the Act's fairness provision, obey the good faith duties of directors and, if the company is listed, if the remuneration is over $250,000 dollars annually it requires an ordinary resolution. This latter requirement will often apply, as the average NZ CEO salary in 2010 was just over NZD$1 million and was growing then at a compound rate of just under 15% per year, meaning it will be higher today.[115] The signing of the certificate at least means that if the remuneration decision does wish to be challenged subsequently then there is a paper trail to be scrutinized. Schoenemann highlights that it can be tough for shareholders to challenge this fairness provision, as they "must establish unfairness although they lack insight into the internal board processes, and the courts are generally reluctant to judge remuneration packages".[116]

---

[113] Corporations Act (n 85) s195(1)(a)-(b).

[114] 'German Corporate Governance Code 2019' (*Regierungskommission*, English translation, 16th December 2019) <https://ecgi.global/node/7493> accessed 6th September 2020, page 9 C.10; 'UK Corporate Governance Code 2018' (*Financial Reporting Council*, July 2018) <https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code> accessed 6th December 2020, page 13 para 32.

[115] Reddy et al, *'An empirical investigation'* (n 106) page 313.

[116] Schoenemann, *'Executive Remuneration'* (n 2) page 56.

Additionally, CEOs on boards can potentially engage the services of compensation consultants, who's "client is the CEO, not the compensation committee",[117] to justify a specific payment package to the board or shareholders[118] in order to validate a fairness provision certificate or influence an ordinary resolution (issues related to compensation consultants will be expanded upon later in this section). Given that, as shown in Reddy et al's 2014 study, two thirds of NZ CEOs are members of their boards of directors,[119] if there is potential for abuse then it could be widespread in New Zealand. In conclusion, there are clear potential weaknesses in the NZ frameworks with regard to overt-CEO influence of their pay in this way.

Executives influencing other members of remuneration-setting boards

Another potential conflict of interest is a senior executives' influence over other sitting board members. Even if the CEO doesn't sit on the remuneration committee or board it may be possible for them to have some level of overt or covert influence over those who do. This influence can appear in a number of ways: often company CEOs have a large say on candidacy of board members,[120] and those who have been appointed may wish to "continue enjoying…board membership…[and] be reluctant to fight the executive",[121] or simply "feel gratitude for the help they received in being appointed".[122] Ozkan notes that "given that executive director's careers are tied to CEOs, they would be reluctant to substantially challenge their boss".[123] Furthermore, there may be "mutual back scratching" between directors on a board voting on each other's remuneration, or directors may sit on multiple boards of which other directors are executives.[124] Directors on a board may be seeking executive positions themselves, and therefore favouring "executive-friendly remuneration policies" may benefit them in the future.[125] Jensen et al proffer that there is "little question that judgement calls…tend to favour the CEO": "Faced with a choice between a sensible compensation plan and a slightly inferior plan favoured by the CEO, the committee will [often]…defer to management".[126]

[117] Jensen et al, '*Remuneration'* (n 9) page 55.
[118] Bebchuk and Fried, *'Executive Compensation'* (n 37) page 78.
[119] Reddy et al, *'An empirical investigation'* (n 106) page 321.
[120] Michael Dorff, *'Softening Pharaoh's Heart: Harnessing Altruistic Theory and Behavioural Law and Economics to Rein in Executive* Salaries' (2003) Vol. 51 Buffalo Law Review No. 3 pp. 811-892, pages 844-845.
[121] Edward Iacobucci, *'The Effects of Disclosure on Executive Compensation'* (1998) Vol. 48 University of Toronto Law Journal No. 4 pp. 489-520, page 496.
[122] Schoenemann, *'Executive Remuneration'* (n 2) page 38.
[123] Neslihan Ozkan, *'Do corporate governance mechanisms influence CEO compensation? An empirical investigation of UK Companies'* (2006) Vol. 17 Journal of Multinational Financial Management pp. 349-364, page 352.
[124] Greenbury Committee, *Directors' Remuneration* (n 35) para 4.8.
[125] Schoenemann, *'Executive Remuneration'* (n 2) page 38.
[126] Jensen et al, '*Remuneration'* (n 9) page 53.

Results of empirical studies on this type of conflict of interest are not as clear-cut as those on CEO's positions on remuneration boards. These studies are usually based around examination of 'insider' and 'outsider' directors on boards: insiders being those with connections to management, and outsiders without. The "bulk of previous research" in the US prior to Boyd's 1994 study "argued that inside directors were essentially pawns of the CEO".[127] Roberts' study of NZX firms between '97-'02 gives empirical support to the statement that CEOs are able to extract higher incomes for *other* executive employees.[128] If Roberts' findings are taken into account alongside Reddy et al's '05-'10 NZX study that supported the view that NZ boards were not very independent of management and found that among sampled firms, higher director compensation correlated with higher CEO compensation,[129] then it could point to a potentially dangerous interdependency between board members in NZ publicly listed companies. Other studies however, show the opposite. Boyd's study of 193 US firms found that "contrary to expectations the ratio of insiders was negatively associated with" CEO compensation, and supported Mizruchi's 1983 hypothesis[130] that "inside directors…may fear the appearance of siding with the CEO, and alienating outside board members".[131] Conyon's more recent US study of over 1500 US firms of varying sizes between '08-'11 supported this lack of correlation between executive pay and non-independent compensation committees.[132] Gregory-Smith came to a similar conclusion in his study of UK FTSE 350 firms between '96-'08, finding that "if anything, a greater proportion of insiders on the board is associated with *less* CEO pay not more".[133]

Again, correlation does not mean causation, and there are many differing factors between these studies that make finding definitive conclusions difficult. A potential explanation for differences in data between the older US/UK studies that Boyd highlights, and the more recent studies finding no correlation, is the proliferation of stricter corporate transparency and disclosure regulations in recent decades. Additionally, a potential explanation for the differing statistical correlations between Reddy et al's recent NZ study and the recent US/UK studies is the fact that there is "only a small pool of directors in New Zealand and those directors tend to sit on many different company boards" therefore finding truly independent directors in NZ is more difficult than in larger overseas

[127] Brian Boyd, *'Board Control and CEO* Compensation' (1994) Vol. 15 Strategic Management Journal pp. 335-344, page 341.
[128] Roberts, *'CEO Power'* (n 12) page 32.
[129] Reddy et al, *'An empirical investigation'* (n 106) page 315.
[130] Mark Mizruchi, *'Who Controls Whom? An Examination of the Relation between Management and Boards of directors in Large American Corporations'* (1983) Vol. 8 The Academy of Management Review No. 3 pp. 426-435, page 431.
[131] Boyd, '*Board Control'* (n 127) page 341.
[132] Martin Conyon, *'Executive Compensation and Board Governance in US Firms'* (2014) Vol. 124 The Economic Journal pp. F60-F89, page F77.
[133] Ian Gregory-Smith, *'Chief Executive Pay and Remuneration Committee Independence'* (2012) Vol 74. Oxford Bulletin of Economics and Statistics No. 4 pp. 510-531, pages 521-522.

markets.[134] Therefore, even *if* there is a general trend of 'insider directors working harder to remain impartial' in recent decades, there may be increased interdependency between executive directors on company boards in New Zealand, and it may be harder to overcome tacit bias with such a small director pool.

The parts of the NZ legal framework that regulate these issues are the same as what regulates CEOs sitting on their own remuneration boards: establishing fairness and the signing of a certificate, good faith principles and an ordinary resolution requirement for remuneration over a quarter million per annum. There are no binding rules, nor even recommendations in the Code, that ask for independent directors, unlike the ASX Corporate Governance Principles which recommend a majority of independent directors with an independent chair.[135] Indeed, Schoenemann notes that "what is labelled best practice in New Zealand…is not ideal when measured against standards advocated in literature or…practiced in other countries",[136] and despite the Listing Rules and the Code receiving updates since his 2006 article, his statement still seems to ring true in this sense.

No concrete conclusions can be drawn from this analysis, but perhaps it could point to more of a danger of board member-interdependency in New Zealand relative to overseas, and maybe *a factor* of that could be less-strict regulation on the issue. It must be noted however, that just as having a smaller director pool in our jurisdiction might exacerbate such an issue, it also could make it harder to regulate. It may be impractical, or even impossible, for all publicly New Zealand firms to have to have majority independent directors on remuneration committees if it was a requirement.

Executives influencing remuneration consultants

The final potential conflict of interest that will be addressed in this section is senior executives' influence over compensation consultants that advise the board on executive remuneration. The two primary conflicts of interest here are 'repeat business' and 'provision of other services to the firm'.[137] Consultancies that provide this remuneration service will often be chosen by a company's human resources department who will report to the CEO who's remuneration is being consulted on.[138] Additionally, if consultancies want to be hired they likely have to cater their services to the firms who hire them: Bebchuk and Fried illustrate this through highlighting a section of an

[134] Reddy et al, *'An empirical investigation'* (n 106) page 309.
[135] 'Corporate Governance Principles and Recommendations: 4th edition' (*ASX Corporate Governance Council*, February 2019) <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf> accessed 18th August 2020, page 29.
[136] Schoenemann, *'Executive Remuneration'* (n 2) page 58.
[137] Kevin Murphy and Tatiana Sandino, *'Executive pay and "independent" compensation consultants'* (2010) Vol. 49 Journal of Accounting and Economics pp. 247-262, page 248.
[138] Bebchuk and Fried, *'Executive Compensation'* (n 37) pages 78-79.

anonymous interview of US directors discussing incentives for remuneration consultancies.[139] The directors state:

> "I would say that it is unusual to find a consultant who does not end up, at the least, being prostitute. The consultants are hired by management. They're going to be rehired by management…the basic goal of compensation consultants is to justify whatever it is the CEO wants to make. After all, who's going to recommend these consultants to other CEOs?".[140]

Iacobucci draws attention to similar situations in Canada, stating that "while…consultants no doubt generally act in good faith…[there is] implicit pressure to satisfy the executive who hired them", [141] and describes a remuneration consultant's experience of explicit pressures: a CEO stating to the consultant when a remuneration package was challenged: "just who do you think is paying your bills anyway".[142] The UK House of Commons Treasury Committee has commented on these conflicts of interest, suggesting that there were serious issues with remuneration consultants, especially in the banking sector and that perhaps reform propositions are needed.[143]

Additionally, often the human resources consultancies that offer remuneration consultant services to the firm's compensation committee or board are also being hired for other, more lucrative employee pay practices for the firm in question.[144] The cross selling of services can "dramatically increase the conflicts of interest" and as Jensen et al so aptly states: "It is not realistic to expect a…compensation consultant to aggressively argue against overpaying a CEO who the consultant knows is going to rule on hiring him to perform a vastly more lucrative actuarial or rank and file consulting contract".[145] A US House of Representatives committee's statement reflects these conclusions, recommending that consultants hired to advise boards on remuneration should not do other work for the company.[146]

---

[139] Bebchuk and Fried, *Pay Without Performance* (n 5) page 38.
[140] Carol Loomis, 'This Stuff is Wrong' (*Fortune Magazine*, 25th June 2001) <https://money.cnn.com/magazines/fortune/fortune_archive/2001/06/25/305435/index.htm> accessed 19th August 2020.
[141] Iacobucci, *'The Effects of Disclosure'* (n 121) page 496.
[142] Graef Crystal, *In Search of Excess: The Overcompensation of the American Executive* (W.W. Norton 1991) page 219.
[143] 'Banking Crisis: reforming corporate governance and pay in the City: Ninth Report of Session 2008-2009' (*House of Commons Treasury Committee*, 12th May 2009) <https://publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/519/519.pdf> accessed 7th September 2020, para 82.
[144] Jensen et al, '*Remuneration'* (n 9) page 55.
[145] ibid.
[146] 'Executive pay: the role of compensation consultants: hearing before the Committee on Oversight and Government Reform, House of Representatives, One Hundred and Tenth Congress, first session, December 2007' (*United States Congress House Committee on Oversight and Government Reform*, 2009) <https://catalog.hathitrust.org/Record/007609273> accessed 7th September 2020, page 5.

Despite the plethora of potential conflict of interest issues, empirical academic studies have produced data of which conclusions are conflicting.[147] Firstly, a Finnish qualitative study by Kostiander and Ikaheimo gathered interview data from 40 anonymous interviews with CEOs and chairpersons of remuneration boards of Finnish firms of various sizes between '06-'07 and reported consistent consultant bias in favour of management.[148] Crombie's study of the 50 largest companies by market capitalisation across the FTSE (UK), the ASX (Australian) and the NZX (New Zealand) on December 31st 1998 and 2007 also supported the conclusion that remuneration consultants favour CEOs in remuneration recommendations.[149] A UK study by Kabir and Minhat of FTSE 350 firms between '03-'06 shows that an increase in the number of consultants is associated with an increase in CEO pay.[150] Murphy and Sandino examined data from 1046 US firms and 124 Canadian firms of varying sizes between '06-'07, finding "significant evidence in both the US and Canada that CEO pay is higher in firms where the consultants provide other services".[151] Conyon's data from 229 UK firms in '03 and constituents of the US S&P 500 between '06-'08 identified a positive "association between CEO pay and the presence of a consultant, especially in the UK data".[152] There are therefore studies that could suggest there is some truth in these conflict of interest claims with regard to consultants.

However, although Armstrong et al's examination of data from over 2100 US firms of varying sizes from '06-'07 found a positive association between consultant use and CEO pay, they noted that this also correlated with weaker corporate governance structures (i.e. larger boards, insider/outsider classification of certain board members etc.).[153] When this factor is taken into account their study found little evidence to support a claim that consultants were more likely to facilitate excess pay levels. Cadman et al's study of 755 S&P 1500 US firms in '06 has similar findings to Armstrong et

[147] Ruth Bender, *'Paying for Advice: The Role of the Remuneration Consultant'* (2011) Vol. 64 Vanderbilt Law Review pp. 359-396, page 369.
[148] Leena Kostiander and Seppo Ikaheimo, *'"Independent" Consultants' Role in the Executive Remuneration Design Process under Restrictive Guidelines*' (2012) Vol. 20 Corporate Governance: An International Review No. 1 pp. 62-83, pages 77-78.
[149] Neil Crombie, *'Institutionalising the Discourse of Executive Remuneration: An Analysis of Corporate Governance Codes and Annual Reports from Australia, New Zealand and the United Kingdom'* (2009) University of Canterbury Department of Accounting and Information Systems <https://ir.canterbury.ac.nz/handle/10092/3587> accessed 4th September 2020, page 22.
[150] Rezaul Kabir and Marizah Minhat, *'Multiple Compensation Consultants and CEO Pay'* (2010) Annual Meeting of European Accounting Association in Istanbul, Turkey <https://ris.utwente.nl/ws/portalfiles/portal/16530324/multiple.pdf> accessed 4th September 2020, pages 24-25.
[151] Murphy and Sandino, *'Executive pay'* (n 137) page 260.
[152] Martin Conyon, *'Executive Compensation Consultants and CEO Pay'* (2011) Vol. 64 Vanderbilt Law Review No. 2 pp. 397-428, page 424.
[153] Christopher Armstrong, Christopher Ittner and David Larcker, *'Corporate governance, compensation consultants and CEO pay levels'* (2012) Vol. 17 Review of Accounting Studies pp. 322-351, page 348.

al's.[154] It is therefore, again, difficult to draw anything resembling a definitive conclusion from a synthesis of the available data.

When applying this data to New Zealand a few potential issues can be highlighted. Firstly, consultants can be used to establish the 'reasonable grounds' that directors need to sign off on to establish the 'fairness provision' under the Act. Alarmingly, if this remunerated executive-consultant influence does occur then the consultant can effectively justify almost any level of remuneration: when firms perform well relative to the market then consultants can recommend remuneration based on higher-than-industry levels of payment, and if the firm does not do well then the consultant can base their recommendations on industry levels rather than firm performance.[155] The only part of the NZ legal framework that governs compensation consultants is the Code, which recommends that consultants be free of influence and should sign a declaration of independence.

Here enters the second New Zealand-specific issue (or at least an issue that could be more prevalent in smaller markets): just as there are relatively less company boards and a smaller pool of directors, there is also going to be less consultancies and a smaller pool of consultants. It may therefore be more difficult to find consultants 'free of influence'; indeed this situation may even justify a firm not having to comply with the Code's recommendations as it gives them an explanation for non-compliance. Perhaps New Zealand could therefore be more exposed to the issue of conflicts of interest stemming from executive-consultant influence than the US, where Cadman et al and Armstrong et al found no correlation.

Conclusion

This section has established that there are potential conflicts of interest with regard to CEOs being remunerated sitting on their own remuneration panels, influencing others sitting on their remuneration panels, and influencing consultants advising these panels. A range of empirical studies have been highlighted that illustrate there might be some danger in these conflicts of interest, and suggested that the dangers may be exacerbated in New Zealand due to our relatively small market size and director pool. Finally, it has been shown that perhaps the NZ regulatory framework may not be enough to adequately deal with the conflict of interest scenarios. When positing their managerial power approach in 2002, Bebchuk et al emphasized that "the costs to the shareholders resulting from the extraction of rents might well be higher than the amount of the rents themselves".[156] The reason these executive remuneration conflict of interest scenarios are being highlighted is because

---

[154] Brian Cadman, Mary Carter and Stephen Hillegeist, *'The incentives of compensation consultants and CEO pay'* (2010) Vol. 49 Journal of Accounting and Economics pp. 263-280, page 280.
[155] Bebchuk and Fried, *'Executive Compensation'* (n 37) page 79.
[156] Bebchuk et al, *'Managerial Power and Rent Extraction'* (n 46) page 785.

of these costs greater than simply the excess remuneration. Boyle and Roberts study show potential "real economic consequences" concluding that: "the greater the predicted quantity of CEO pay growth attributable to formal CEO involvement in the pay-setting process, the lower are future firm stock returns over one-, three- and five- year horizons".[157] *If* this is true, and it is recognized that this conclusion only covers 'formal' CEO involvement and not 'informal' involvement which has been noted to also have conflicts of interest, then New Zealand business performance may benefit from stricter regulation on these issues. Whilst this is nowhere near a definitive conclusion, it suggests that further research in this area could be valuable.

Part V: Executive Influence of Performance Standards Affecting Remuneration

So far it has been discussed how executives can influence their pay-setting process, but that is not the only way they can influence their remuneration. It has been noted previously that many executives are remunerated according to their performance, one such method of remuneration is bonuses based on performance measures relative to a specific performance standard.[158] The executive can "increase bonuses either by taking actions that increase the performance measure or by taking actions that decrease the performance standard".[159] There is nothing wrong with the former actions: this is by no means arguing that CEOs should not seek better firm performance in order to stay away from performance-based remuneration conflicts of interest. It is the latter actions where the danger lays: Reda notes that performance standards "can be manipulated by financial engineering"[160] for executive monetary gain that may not be in the shareholders' interests.

Some examples of different measures that executive bonus plans might be based on are Earnings Per Share (EPS), Return on Equity (ROE), Return on Investment Capital (ROIC), or Return on Assets (ROA).[161] This section will focus on EPS as an example of these conflicts of interest, both because it is one of the most common performance measures,[162] and regarded by many analysts as one of the most important performance targets.[163] EPS is a relatively simple metric for tracking company profit: company net profit divided by the number of shares the company has issued. The potential conflict

---

[157] Boyle and Roberts, *'Wolves in the Hen-House?'* (n 101) page 2.
[158] Jensen et al, '*Remuneration'* (n 9) page 75.
[159] ibid.
[160] James Reda, *'Executive Compensation and Stock Buybacks: The Pros and Cons'* (2018) Vol. 26 The Corporate Governance Advisor No. 4 pp. 1-7, page 7.
[161] ibid. page 6.
[162] Benjamin Bennet, J. Carr Bettis, Radhakrishnan Gopalan and Todd Milbourne, *'Compensation goals and firm performance'* (2017) Vol. 124 Journal of Financial Economics pp. 307-330, page 308.
[163] John Graham, Campbell Harvey and Shiva Rajgopal, *'Value Destruction and Financial Reporting Decisions'* (2006) Vol. 62 Financial Analysts Journal No. 6 pp. 27-39, page 29.

of interest with EPS-related bonus packages and remuneration plans lies with the executives' ability to authorise repurchases of company stock just before bonuses are calculated, thereby decreasing the number of shares issued and 'artificially' inflating EPS levels. Executives can also simply authorize the firm to disclose alternative EPS figures to show greater on-paper earnings. Either of these actions could materially benefit the executive making the decision, and share repurchases *might* not be in shareholders' interest, and likely neither would false earnings reporting. It ought to be noted that repurchases will only increase EPS if the earnings yield of the stock is greater than the after-tax interest rate on the cash spent on repurchasing the shares, therefore repurchasing does not necessarily always lead an increase in EPS.[164]

Empirical evidence of executives manipulating performance standards

The statistics regarding the connection between 'alternative' disclosure of EPS figures and the existence of EPS-related remuneration packages are more conclusive than statistics on the connection between share repurchasing and EPS-related remuneration packages. Grey et al's study of the 500 largest non-financial firms on the London Stock Exchange between '01-'03 concluded that the existence of EPS targets in executive share options grants are significantly and positively related to decisions to disclose alternate EPS figures.[165] A similar conclusion was reached in a US study by Bennet et al of 947 firms between '06-'12, finding evidence consistent with executives 'managing' reported accounting performance to achieve compensation goals.[166] Gao and Kronlund's US findings from 948 firm-quarter observations pointed to conclusion that firms do engage in "real- and accrual-based earnings management to avoid negative" impacts on EPS.[167]

Almeida et al's study showed evidence that EPS targets significantly affected prevalence of stock repurchases in a long-term US study of 385,388 firm quarter observations over a 22 year period of '88-'10.[168] Cheng et al's study supports this hypothesis with a US study of 12,476 firm-year observations between '93-'07, stating additionally that the closer CEOs are to their EPS-bonus

[164] Department for Business, Energy & Industrial Strategy, *'Share Repurchases, Executive Pay and Investment'* (2019) BEIS Research Paper Number 2019/011 <https://www.gov.uk/government/publications/share-repurchases-executive-pay-and-investment> accessed 8th September 2020, page 22.

[165] Colette Grey, Konstantinos Stathopoulos and Martin Walker, *'The impact of executive pay on the disclosure of alternative earnings per share figures'* (2013) Vol. 29 International Review of Financial Analysis pp. 227-236, page 235.

[166] Bennet et al, *'Compensation goals'* (n 162) page 327.

[167] Xing Gao and Mathias Kronlund, *Does Equity-based Compensation Cause Firms to Manage Earnings Per Share?'* (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3073822> accessed 4th September 2020, page 34.

[168] Heitor Almeida, Vyacheskav Fos and Mathias Kronlund, *'The real effects of share repurchases'* (2016) Vol. 119 Journal of Financial Economics No. 1, pp. 168-185, page 184.

thresholds the more likely they are to repurchase.[169] Some UK numbers suggest the same: Young and Yang's examination of the majority of listed firms on the London Stock Exchange between '98-06 reveals a significant association between repurchase activity and the presence of EPS-based compensation arrangements.[170]

The more recent studies however, show different conclusions. The UK Department of Business conducted an in-depth analysis of share repurchases and executive pay, and one of their conclusions from looking at FTSE 350 firms from '07-'16 was that "share repurchases have not been successfully used in the US to hit EPS targets" over the study period.[171] Armstrong et al's US study of a similar time period of '06-'16, evaluated 943 firm-year observations and showed that CEOs place more emphasis on meeting analysts EPS expectations than they do on maximizing cash bonuses through their EPS bonus plans.[172] Gao and Kronlund's study mentioned in the previous paragraph also came to a similar conclusion.[173] There is currently no available NZ studies to synthesize and contribute to this discussion.

Data Analysis

Some empirical evidence, then, shows that executives might authorise accruals management and repurchase shares to inflate their EPS numbers to meet compensation goals, and other evidence presents the opposite. With regard to repurchasing, the more recent studies may suggest less of a correlation due to stricter financial disclosure regulations in recent years. Additionally, Armstrong et al highlight that "because the value of CEO's equity holdings generally dwarf the size of their cash bonus payouts [at least in the US], many researchers argue that bonuses provide CEOs with only modest incentives at best".[174] This could also offer an explanation to why recent studies find less of a correlation: as CEO equity-based remuneration has grown over recent decades there is less incentive for them to try and meet these EPS bonus targets. Such an explanation raises the question of whether or not such bonus targets could offer *more* of an incentive to NZ CEO's because there are

[169] Yingmei Cheng, Jarrad Harford and Tianming Zhang, *'Bonus-driven Repurchases'* (2015) Vol. 50 Journal of Financial and Quantitative Analysis No. 3 pp. 447-475, page 471.
[170] Steven Young and Jing Yang, *'Stock Repurchases and Executive Contract Design: The Role of Earnings per Share Performance Conditions'* (2011) Vol. 86 The Accounting Review No. 2 pp. 703-733, page 704.
[171] Department for BEIS, *'Share Repurchases'* (n 164) page 66.
[172] Christopher Armstrong, Jacky Chau, Christopher Ittner and Jason Xiao, *'Earnings per Share Goals and CEO Incentives'* (2020) Simon Business School Working Paper No. FR 17-09 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919478> accessed 11th September 2020, pages 36-37.
[173] Gao and Kronlund, *'Equity-based Compensation'* (n 167) page 34.
[174] Armstrong et al, '*Earnings per Share Goals'* (n 162) page 3.

less frequent stock and options awards,[175] at least compared to the relatively higher proportions of stock-based remuneration relative to other types of remuneration in the US (76%) and UK (60%).[176]

Hypothetically therefore, there may be more of a risk of CEO 'financial engineering' to increase their cash bonuses, although no empirical evidence offers support to such a hypothesis. Additionally, the New Zealand share repurchase market is somewhat unique and "empirical results from previous studies may not be applicable to New Zealand"[177] because of our dividend imputation system. Whether or not shareholders would benefit more from a firm's excess cash being used to repurchase shares or pay out dividends depends on how each payout is taxed.[178] The dividend imputation scheme lets companies pass on tax credits to shareholders to whom they pay dividends, meaning that it may be more beneficial to shareholders to keep shares and collect dividend payouts than it would be to sell shares back to firms repurchasing.[179]

The next question this leads to is: *if* repurchasing and accruals management is occurring, can it be harmful to shareholders, and to what extent? There is a lot to unpack here, and the literature is inconclusive. For example: if shares are repurchased then those shareholders obviously have no or less claim to future dividend payments from said shares, yet repurchases can also increase short-term stock prices and allow *other* shareholders to sell their shares at higher prices.[180] Young and Yang argue "net benefits to shareholders" with regard to EPS-driven repurchases.[181] Bens et al however, argue based on a study of S&P 500 firms between '96-'99 that there is risk of investment myopia as firms "shift resources *away* from real investments *towards* the repurchase of their own stock".[182] Almeida et al's study does not strongly conclude either way.[183] Certainly there seems to be more potential benefits to shareholders when CEOs manipulate EPS through repurchases than when they do it through accruals management,[184] although ideally neither would be occurring.

---

[175] Boyle and Roberts, *'Wolves in the Hen-House?'* (n 111) page 3.
[176] Patricia Kotnik, Mustafa Sakinc and Dejan Guduras, *'Executive compensation in Europe: Realized gains from stock-based pay'* (2018) Institute for New Economic Thinking Working Paper No. 78 <https://www.ineteconomics.org/uploads/papers/WP_78-KotnikSakincGudurasFinal.pdf> accessed 9th September, page 22.
[177] Hardjo Koerniadi, *'Share Repurchase in New Zealand'* (2005) Department of Finance Faculty of Business AUT <https://nzfc.ac.nz/archives/2005/papers/Koerniadi.pdf> accessed 10th September 2020, page 3.
[178] Department for BEIS, *'Share Repurchases'* (n 164) page 22.
[179] 'Imputation: A guide for New Zealand Companies' (*Inland Revenue* November 2018) <https://www.classic.ird.govt.nz/resources/8/8/8870569c-cc14-4e4f-b04a-f781b5e3ec9f/ir274.pdf> accessed 10th September 2020, page 4
[180] Department for BEIS, *'Share Repurchases'* (n 164) page 21.
[181] Young and Yang, *'Stock Repurchases'* (n 170) page 705.
[182] Daniel Bens, Venky Nagar and M. H. Franco Wong, *'Real Investment Implications of Employee Stock Option Exercises'* (2002) Vol. 40 Journal of Accounting Research No. 2 pp. 359-393, page 390.
[183] Almeida et al, *'The real effects'* (n 168) page 184.
[184] Young and Yang, *'Stock Repurchases'* (n 170) page 705.

New Zealand legal framework governing share repurchases and financial disclosure

Repurchases are regulated by sections 58 through 67 of the Act, where company boards may offer to acquire their own shares if the acquisitions are in the best interests of the company, the terms of the offer for shares are fair and reasonable to the company, and the board has disclosed to shareholders if the offers may be unfair to them in any way.[185] If companies are making special offers to acquire shares through s60(1)(b) then all shareholders must consent in writing, the offer must be fair and reasonable to, and the acquisition must be to the benefit of, the remaining shareholders.[186] All the director's conclusions regarding all of the above must be set out in a resolution, and certificates must be signed.[187] Additionally, the board directors when making these decisions must adhere to their s131, s133, s135 and s137 duties discussed in Part 2. It is difficult to tell how effective the regulatory framework is for preventing abuse, as there are few NZ studies on the issue. Theoretically, the regulation should leave a paper trail to be audited should shareholders or the FMA wish it, and shareholders have to consent to offers to acquire shares. Abuse can still occur within this framework, as hypothetically boards could convince shareholders that actions to repurchase are more in shareholders' interests than they are in reality, but this is a situation almost impossible to regulate against.

Regulation of financial disclosure and accounting records is through sections 11 and 12 of the Act, and larger companies with annual revenue of over $30 million or assets of over $60 million, or ten or more shareholders (unless those shareholders opt out, or less than ten who opt in) have to prepare higher standards of financial reporting[188] to the External Board Reporting standard.[189] There is little point in delving into the specifics of the financial disclosure regulations as they apply to repurchases, as if accruals management is actually occurring it won't matter what the regulations require, because the firms will be showing whatever reporting benefits them. What matters is if auditors or shareholders reviewing the financial and accounting reports catch the accruals management, and to an extent what the level of criminal or civil punishment is disincentivizing firms from 'managing' disclosures.

[185] Companies Act (n 72) s60(3)(a) (s63(1)(b) if acquisition through stock exchange), s60(3)(b) (s63(1)(c) if acquisition through stock exchange) and s60(3)(c)(ii) (s63(1)(d)(ii) if acquisition through stock exchange) respectively.
[186] ibid. s60(1)(b)(i) and s61(1).
[187] ibid. s60(4)-(5).
[188] 'Financial reporting requirements for companies' (*Inland Revenue Department*) <https://www.ird.govt.nz/managing-my-tax/record-keeping/financial-reporting-for-companies/financial-reporting-requirements-for-companies> accessed 10th September 2020.
[189] 'For-profit standards' (*External Reporting Board*) <https://www.xrb.govt.nz/accounting-standards/for-profit-entities/> accessed 10th September 2020.

Conclusion

Part 5 is less of highlighting an argument for reform as it is an illustration of hypothetical issues and areas for additional research. It has been shown that just as there are conflicts of interest in executives taking part in their pay-setting processes, there are also potential conflicts with executives authorizing 'financial engineering' of performance standards to increase their bonuses. Empirical data from other jurisdictions is not wholly conclusive on this issue, and there isn't sufficient New Zealand data to argue more than hypothetical points. Additionally, it again must be noted that EPS-based remuneration packages were used here as a popular example, but there are many other financial standard-target executive bonus packages that could have similar issues that this piece does not have the capacity to cover. There seems to be few problems theoretically with the New Zealand legal framework governing these issues, but there is definitely scope for further study in this area, and certainly greater company transparency regulation can only assist in mitigating the danger of these types of conflicts of interest.

Part VI: Reform Proposals to Address Conflicts of Interest in Executive Remuneration

This section will offer nine reform proposals to attempt to address the conflict of interest situations discussed in Parts IV and V. These proposals are a combination of suggested concrete changes to the existing NZ legal frameworks, or broader corporate governance principles that should be upheld by the corporate community. Reference to the company board in this section is *only* if the board is the entity that is making remuneration decisions, otherwise these proposals are directed at the remuneration subcommittee of the board in their application.

> Reform Proposal 1: Add to the NZX Listing Rules a requirement that the chair of the board or remuneration subcommittee cannot be the executive whom the board is remunerating.

> Reform Proposal 2: Add to the NZX Corporate Governance Code a recommendation that the board or remuneration subcommittee should be chaired by a person who is not the CEO, who was not the CEO, and who will not (imminently) be the CEO.

These two proposals aim to affect the conflict of interest issues with regard to executives being remunerated sitting on their own remuneration boards. Proposal 1 is the only of the nine reforms proposed that could likely have no practical difficulties being enforceable in New Zealand's small market, which is why is added to the Listing Rules rather than comply or explain under the Code. It is recommended to be in the Listing Rules rather than the Act because it is recognized that the dangers the conflict of interest creates will be greater in publicly listed companies with potentially more

dispersed shareholder structures and less of an ability to monitor board and executive actions. There is little need for the executive being remunerated to be the chair of their remuneration committee or board and it is an overt conflict of interest with relatively clear empirical support. Whilst it is recognized that New Zealand has a small pool of directors *and* often a senior executive will also hold board directorship, Proposal 1 can be adequately enforced without being impractical due to lack of available directors because the executive in question can still sit on the board just not chair it.

Proposal 2 is almost identical to that recommended by Jensen et al; they state that "the critical job of the chair is to run the process that evaluates, compensates, hire and fires the CEO…[and] the CEO cannot perform that job adequately".[190] There is also the danger of chairs who used to be the CEO "subconsciously…view[ing] the board through CEO eyes", and being biased in favour of executive remuneration,[191] and those who may have been selected for executive positions in future chairing the remuneration committee attempting to set precedent for greater remuneration which they themselves would benefit from later on. It is acknowledged that there are potential practical issues surrounding decisions of who may or may not be CEO in the future, however ideally these situations would be few and far between and the NZX regulation team will be flexible in their application of the comply or explain regime. The part of Proposal 2 regarding future CEOs is more to prevent overt influence of imminently incoming CEOs setting strong precedent for excess remuneration for those in their soon-to-be position, rather than to complicate medium to long term company plans of those taking executive decisions. Proposal 2 is being recommended to come under the 'comply-or-explain' regime of the Code so that if New Zealand's small director pool makes the discussed actions impractical, then boards can still function if there is adequate reasoning. It would also bring the Code in more line with other jurisdictions' codes, such as the German[192] and UK Corporate Governance Codes[193] on these issues.

> Reform Proposal 3: Add to the NZX Corporate Governance Code a recommendation requiring a majority of independent directors sitting on the board or remuneration committee with an independent chair.

> Reform Proposal 4: Add to the NZX Corporate Governance Code a recommendation preventing outside CEOs sitting on the board or remuneration committees.

[190] Jensen et al, '*Remuneration'* (n 9) page 54.
[191] ibid. page 55.
[192] 'German Corporate Governance Code 2019' (n 114) page 9 C.10.
[193] 'UK Corporate Governance Code 2018' (n 114) page 13 para 32.

These two proposals are targeted at the conflicts of interest created by potential interdependency of boards and management in New Zealand companies. Proposal 3 would align the NZX Corporate Governance Code with the ASX Corporate Governance Principles,[194] which could be appropriate considering the potential for extensive dual listing of Australian and New Zealand companies on the ASX and NZX, as they would be following more similar rules. 'Independent directors' would be defined as directors who were not 'interested' in the transaction, using the definition of 'interested' from the Act.[195] Again, potential impracticalities of Proposal 3 with regard to the small director pool in New Zealand are acknowledged, which is why it has been recommended for the Code under comply-or-explain, but it is believed that it would be a strong step in the right direction to lessening potential executive covert/tacit influence over their remuneration decisions. The potential of making Proposal 3 enforceable under the Listing Rules and then recommending that New Zealand firms bring in independent directors from other jurisdictions was considered, however it was decided that more research into the knock-on effects of such a recommendation was needed before a proposal was made.

Proposal 4 is partially aimed at the 'viewing of the board through executive eyes' mentioned above, but is primarily targeting the potential for cross-boarding and mutually bidding up of different company's executives salaries in New Zealand. This proposal is a New Zealand application of another of Jensen et al's recommendations.[196]

> Reform Proposal 5: Add to the NZX Corporate Governance Code a recommendation requiring that compensation consultants for the purposes of executive remuneration-package consulting be hired by the board or remuneration subcommittee and report to them, not be hired by the company's human resources department and report to company management.
>
> Reform Proposal 6: Add to the NZX Corporate Governance Code a recommendation requiring that the same compensation consultancy firm that advises the board or remuneration subcommittee not be hired by the company for other work.

Both Proposals 5 and 6 are Jensen et al's recommendations[197] adapted to the New Zealand regulatory framework. They are both being suggested as recommendations for the Code under 'comply-or-explain' due to the potential for a small pool of compensation consulting firms in New

[194] ASX Corporate Governance Principles (n 135) page 29.
[195] Companies Act (n 72) s139.
[196] Jensen et al, '*Remuneration'* (n 9) page 55.
[197] ibid. pages 51 and 56.

Zealand making it impractical to require different firms in certain scenarios. There is technically no part of Proposal 5 that requires it to be comply-or-explain and not recommended as enforceable under the Listing Rules, however if Proposal 6 is impractical because, for example, there is only a single functioning compensation consultancy in New Zealand at one time, then an enforceable Proposal 5 would have little substance. The two reform Proposals must function together to be useful. It is argued that if these two principles are followed by firms then much of the potential influence, either explicit or implicit, executives have over compensation consultants will be lessened. This can then facilitate consultants to more effectively use their expert knowledge to align incentives.

> Reform Proposal 7: Add to the NZX Corporate Governance Code a recommendation to encourage greater monitoring of high levels of equity-based executive remuneration because of the increased benefits to executives of manipulating financial reporting and/or operating decisions.

> Reform Proposal 8: Add to the NZX Corporate Governance Code a recommendation to avoid internally influenced performance standards for executive bonus-plan packages.

The former of these two proposals is specifically targeted at the issues discussed in Part 5, and the latter related to these issues but more of a recommendation for executive remuneration as a whole; both are Jensen et al's reform recommendations adapted to the NZ legal framework.[198] The two proposals are recommended to be put in the Code not so they benefit from the comply-or-explain regime, indeed they have been deliberately worded so they are suggestions and not requirements, but merely so they are brought to the attention of publicly listed company's boards more effectively if they were placed in a piece of soft law. It is both difficult and potentially problematic to try and regulate how companies set their performance standards, because, for example, different firms have different goals, and one performance target may work well for one firm where it wouldn't for another. Firm stakeholders in general must be aware however, of the risks of higher levels of equity-based remuneration and the potential of performance standards to be internally influenced.

> Reform Proposal 9: Add to the NZX Corporate Governance Code a recommendation that compensation systems ought to be monitored and reviewed to detect deviations from the intent of the systems, and to identify undesirable outcomes that flow from unavoidable system weaknesses.

[198] ibid. pages 48 and 76.

This final proposal is similar in nature to proposals 7 and 8, in that it is a suggestion and not a requirement, and it ought to be placed in the Code so as it gets sufficient attention from stakeholders. Hill highlights that in 2009, G20 leaders endorsed the Financial Stability Forum's *Principles for Sound Compensation Practices*.[199] One of the principles is that a "compensation system should be monitored and reviewed to ensure that it operates as intended" and that such reviews need to be regular;[200] Proposal 9 is borrowed from these principles. All companies, boards, and employees work differently than one another, which means that one definitive governance framework, like the New Zealand framework through the Act, Listing Rules, and Code, is not going to be able to perfectly facilitate an environment where all executives' will be properly incentivized. Interested stakeholders ought to, and ought to be able to with sufficient transparency, interact with systems *to an extent* to ensure they are functioning as intended. Proposal 9 is a complex and incomplete reform idea, so likely more thinking would be needed until it is an effective proposal.

Part VII: Conclusion

One thing this research has shown is how complex an issue executive remuneration is. It is a balancing act of different quantities and methods of incentive alignment, management of influence, and transparency. The optimal contracting and managerial power approaches are two different lenses that were highlighted through which we can examine executive remuneration. One of Bainbridge's criticisms of the managerial power model was stated in Part II: the fact that there is little evidence to support the model, and revisiting this viewpoint after an examination of the available data indicates that his view is not completely unfounded. Some of the empirical evidence has shown that abuse of managerial influence does not seem to be an issue with regard to executive remuneration. However, Bebchuk and Fried are not arguing that the managerial power approach *replace* the optimal contracting approach, nor that we should not attempt to contract optimally when remunerating executives. They merely offer weaknesses of the optimal contracting approach and suggest use of the managerial power approach *alongside* optimal contracting. Indeed, some of the evidence highlighted in Part IV indicates that there may be abuse of managerial power in determining remuneration. Stakeholders ought to be aware of these potential conflicts of interest

---

[199] Jennifer Hill, *'New Trends in the Regulation of Executive Remuneration'* (2010) European Corporate Governance Institute Working Paper No. 142/2010 <https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id1549429.pdf> accessed 10th September 2020, page 12.

[200] 'FSF Principles for Sound Compensation Practices' (*Financial Stability Forum* 2nd April 2009) <https://www.fsb.org/wp-content/uploads/r_0904b.pdf?page_moved=1> accessed 10th September 2020, page 7.

and their dangers regardless of whether they are formally regulated, and for this the managerial power approach is useful.

Part VI presented reform proposals that would attempt to address these examples of abuse of managerial influence, and it must be acknowledged that some may feel as if additional regulation of executive remuneration may have too much of a moral basis, and be straying from free market principles that underpin the functionality and success of western business. There is certainly a moral argument for regulatory reform, but this one has an economic basis. The market is more effective at determining an executive's level of remuneration than any regulatory framework; just as there is no issue with football players or a movie stars earning millions if people are willing to pay to watch them play, there is no *a priori* reason that a CEO too cannot be paid the same. These reforms seek to facilitate this market determination of remuneration by reducing the ability of one of the biased parties who might wish to alter it from doing so. It has been acknowledged that these reform proposals are not perfect, and additional research in this area and further reform discussion is encouraged, but the fact that many of them would align New Zealand law with other jurisdictions which empirical evidence show these conflicts of interest are less of a problem is an argument in their favour. If the 'compensation crisis' is a 'real' problem, then likely executives influencing their own remuneration is only one aspect of it, but this research would argue that the proposed reforms are a step in the right direction.

Bibliography

Journal Articles

Almeida, Heitor, Fos, Vyacheskav and Kronlund, Mathias, *'The real effects of share repurchases'* (2016) Vol. 119 Journal of Financial Economics No. 1, pp. 168-185

Armstrong, Christopher, Ittner, Christopher and Larcker, David, *'Corporate governance, compensation consultants and CEO pay levels'* (2012) Vol. 17 Review of Accounting Studies pp. 322-351

Bainbridge, Stephen, *'Executive Compensation: Who Decides?'* (2005) Vol. 83 Texas Law Review pp. 1615-1662

Bainbridge, Stephen, *'Is Say on Pay Justified'* (2009) Vol. 32 Regulation No. 1 pp. 42-47

Bebchuk, Lucian and Fried, Jesse, *'Executive Compensation as an Agency Problem'* (2003) Vol. 17 Journal of Economic Perspectives No. 3 pp. 71-92

Bebchuk, Lucian, Fried, Jesse and Walker, David, *'Managerial Power and Rent Extraction in the Design of Executive Remuneration*' (2002) Vol. 69 The University of Chicago Law Review No. 3 pp. 751-846

Bender, Ruth, *'Paying for Advice: The Role of the Remuneration Consultant'* (2011) Vol. 64 Vanderbilt Law Review pp. 359-396

Bennet, Benjamin, Bettis, J. Carr, Gopalan, Radhakrishnan and Milbourne, Todd, *'Compensation goals and firm performance'* (2017) Vol. 124 Journal of Financial Economics pp. 307-330

Bens, Daniel, Nagar, Venky and Wong, M. H. Franco *'Real Investment Implications of Employee Stock Option Exercises'* (2002) Vol. 40 Journal of Accounting Research No. 2 pp. 359-393

Boyd, Brian, *'Board Control and CEO* Compensation' (1994) Vol. 15 Strategic Management Journal pp. 335-344

Braunstein, Jaclyn, *'Pound Foolish: Challenging Executive Compensation in the US and the UK'* (2004) Vol. 29 Brooklyn Journal of International Law pp. 747-796

Cadman, Brian, Carter, Mary and Hillegeist, Stephen, *'The incentives of compensation consultants and CEO pay'* (2010) Vol. 49 Journal of Accounting and Economics pp. 263-280

Camara, Kiwi, *'Shareholder Voting and the Bundling Problem in Corporate Law* (2004) Wisconsin Law Review pp. 1425-1492

Cheng, Yingmei, Harford, Jarrad and Zhang, Tianming, *'Bonus-driven Repurchases'* (2015) Vol. 50 Journal of Financial and Quantitative Analysis No. 3 pp. 447-475

Conyon, Martin, *'Executive Compensation and Board Governance in US Firms'* (2014) Vol. 124 The Economic Journal pp. F60-F89

Conyon, Martin, *'Executive Compensation Consultants and CEO Pay'* (2011) Vol. 64 Vanderbilt Law Review No. 2 pp. 397-428

Core, John, Holthausen, Robert and Larcker, David, *'Corporate Governance, Chief Executive Officer Compensation, and Firm Performance'* (1999) Vol. 51 Journal of Financial Economics pp. 371-406

Cyert, Richard, Kang, Sok-Hyon and Kumar, Praveen, *'Corporate Governance, Takeovers, and Top-Management Compensation: Theory and Evidence'* (2002) Vol. 48 Management Science No. 4 pp. 453-469

Delman, Jeremy, *'Structuring Say-On-Pay: A Comparative Look at Global Variations in Shareholder Voting on Executive Compensation'* (2010) Vol. 2010 Columbia Business Law Review No. 2 pp. 583-631

Dorff, Michael, *'Softening Pharaoh's Heart: Harnessing Altruistic Theory and Behavioural Law and Economics to Rein in Executive* Salaries' (2003) Vol. 51 Buffalo Law Review No. 3 pp. 811-892

Ferrarini, Guido and Moloney, Niamh, *'Executive Remuneration in the EU: The Context for Reform'* (2005) Vol. 21 Oxford Review of Economic Policy No. 2 pp. 304-323

Ferrarini, Guido, Moloney, Niamh and Ungureanu, Maria-Cristina, *'Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe'* (2010) Vol. 10 Journal of Corporate Law Studies No. 1 pp. 73-117

Ferri, Fabrizio and Maber, David, *'Say on Pay Votes and CEO Compensation: Evidence from the UK'* (2012) Vol. 17 Review of Finance pp. 527-563

Gordon, Jeffrey, *''Say on Pay': Cautionary Notes on the UK Experience and the Case for Shareholder Opt-in'* (2009) Vol. 46 Harvard Journal on Legislation pp. 323-367

Graham, John, Harvey, Campbell and Rajgopal, Shiva, *'Value Destruction and Financial Reporting Decisions'* (2006) Vol. 62 Financial Analysts Journal No. 6 pp. 27-39

Gregory-Smith, Ian, *'Chief Executive Pay and Remuneration Committee Independence'* (2012) Vol 74. Oxford Bulletin of Economics and Statistics No. 4 pp. 510-531

Grey, Colette, Stathopoulos, Konstantinos and Walker, Martin, *'The impact of executive pay on the disclosure of alternative earnings per share figures'* (2013) Vol. 29 International Review of Financial Analysis pp. 227-236

Iacobucci, Edward, *'The Effects of Disclosure on Executive Compensation'* (1998) Vol. 48 University of Toronto Law Journal No. 4 pp. 489-520

Kostiander, Leena and Ikaheimo, Seppo, *'"Independent" Consultants' Role in the Executive Remuneration Design Process under Restrictive Guidelines*' (2012) Vol. 20 Corporate Governance: An International Review No. 1 pp. 62-83

Mizruchi, Mark, *'Who Controls Whom? An Examination of the Relation between Management and Boards of directors in Large American Corporations'* (1983) Vol. 8 The Academy of Management Review No. 3 pp. 426-435

Murphy, Kevin and Sandino, Tatiana, *'Executive pay and "independent" compensation consultants'* (2010) Vol. 49 Journal of Accounting and Economics pp. 247-262

Ozkan, Neslihan, *'Do corporate governance mechanisms influence CEO compensation? An empirical investigation of UK Companies'* (2006) Vol. 17 Journal of Multinational Financial Management pp. 349-364

Posner, Richard, *'Are American CEOs Overpaid, and, if so, What if Anything Should be Done About It?*' (2009) Vol. 58 Duke Law Journal No. 6 pp. 1013-1047

Reda, James, *'Executive Compensation and Stock Buybacks: The Pros and Cons'* (2018) Vol. 26 The Corporate Governance Advisor No. 4 pp. 1-7

Reddy, Krishna, Abidin, Sazali and You, Linjuan, *'Does corporate governance matter in determining CEO compensation in the publicly listed companies in New Zealand? An empirical investigation'* (2015) Vol. 41 Managerial Finance No. 3 pp. 301-327

Sapp, Stephen, *'The Impact of Corporate Governance on Executive Compensation'* (2008) Vol. 14 European Financial Management No. 4 pp. 710-746

Schoenemann, Andreas, *'Executive Remuneration in New Zealand and Australia: Do Current Laws, Regulations and Guidelines Ensure "Pay for Performance"?'* (2006) Vol. 37 Victoria University of Wellington Law Review pp. 31-68

Thomas, Randall, *'Should Directors Reduce Executive Pay?'* (2003) Vol. 54 Hasting Law Journal pp. 437-470

Young, Steven and Yang, Jing, *'Stock Repurchases and Executive Contract Design: The Role of Earnings per Share Performance Conditions'* (2011) Vol. 86 The Accounting Review No. 2 pp. 703-733

Books

Bebchuk, Lucian and Fried, Jesse, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* (Harvard University Press 2006)

Berle, Adolf and Means, Gardiner, *The Modern Corporation and Private Property* (Macmillan 1932)

Crystal, Graef, *In Search of Excess: The Overcompensation of the American Executive* (W.W. Norton 1991)

Greenbury Committee, *Directors' Remuneration: Report of a Study Group Chaired by Sir Richard Greenbury* (Gee Publishing 1995)

Jensen, Michal, *A Theory of the Firm: Governance, Residual Claims and Organizational Forms* (Harvard University Press 2000)

Kraakman, Reinier et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press 2017)

Online Sources

Alissa, Walid, 'Boards' Response to Shareholders' Dissatisfaction: The Case of Shareholders' Say on Pay in the UK' (*European Accounting Review*, 3rd May 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412880> accessed 25th September 2020

Armstrong, Christopher, Chau, Jacky, Ittner, Christopher and Xiao, Jason, *'Earnings per Share Goals and CEO Incentives'* (2020) Simon Business School Working Paper No. FR 17-09 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919478> accessed 11th September 2020

Baker, Dean Bivens, Josh and Schieder, Jessica, 'Reining in CEO compensation and curbing the rise of inequality' (*Economic Policy Institute*, 4th June 2019) <https://www.epi.org/publication/reining-in-ceo-compensation-and-curbing-the-rise-of-inequality/> accessed 8th August 2020

'Banking Crisis: reforming corporate governance and pay in the City: Ninth Report of Session 2008-2009' (*House of Commons Treasury Committee*, 12th May 2009) <https://publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/519/519.pdf> accessed 7th September 2020

Boyle, Glenn and Roberts, Helen *'Wolves in the Hen-House? The Consequences of Formal CEO Involvement in the Executive Pay-Setting Process'* (2010) New Zealand Institute for the Study of Competition and Regulation Working Paper <http://researcharchive.vuw.ac.nz/handle/10063/4063> accessed 6th September 2020

'Corporate Governance in New Zealand: Principles and Guidelines, A handbook for directors, executives and advisors' (*Financial Markets Authority*, 28th February 2018)

<https://www.fma.govt.nz/assets/Guidance/141201-FMA-Corporate-Governance-Handbook-Principles-and-Guidelines2014.pdf> accessed 16th August 2020

'Corporate Governance Principles and Recommendations: 4th edition' (*ASX Corporate Governance Council*, February 2019) <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf> accessed 18th August 2020

Crombie, Neil, *'Institutionalising the Discourse of Executive Remuneration: An Analysis of Corporate Governance Codes and Annual Reports from Australia, New Zealand and the United Kingdom'* (2009) University of Canterbury Department of Accounting and Information Systems <https://ir.canterbury.ac.nz/handle/10092/3587> accessed 4th September 2020

Department for Business, Energy & Industrial Strategy, *'Share Repurchases, Executive Pay and Investment'* (2019) BEIS Research Paper Number 2019/011 <https://www.gov.uk/government/publications/share-repurchases-executive-pay-and-investment> accessed 8th September 2020

Eavis, Peter, 'As the Pandemic Forced Layoffs, CEOs Gave Up Little' (*New York Times*, 29th July 2020) <https://www.nytimes.com/2020/07/29/business/economy/ceo-pay-pandemic-layoffs.html> accessed 8th August 2020

'Executive pay: the role of compensation consultants: hearing before the Committee on Oversight and Government Reform, House of Representatives, One Hundred and Tenth Congress, first session, December 2007' (*United States Congress House Committee on Oversight and Government Reform*, 2009) <https://catalog.hathitrust.org/Record/007609273> accessed 7th September 2020

'Financial reporting requirements for companies' (*Inland Revenue Department*) <https://www.ird.govt.nz/managing-my-tax/record-keeping/financial-reporting-for-companies/financial-reporting-requirements-for-companies> accessed 10th September 2020

'FSF Principles for Sound Compensation Practices' (*Financial Stability Forum* 2nd April 2009) <https://www.fsb.org/wp-content/uploads/r_0904b.pdf?page_moved=1> accessed 10th September 2020

'For-profit standards' (*External Reporting Board*) <https://www.xrb.govt.nz/accounting-standards/for-profit-entities/> accessed 10th September 2020

Gao, Xing and Kronlund, Mathias, *Does Equity-based Compensation Cause Firms to Manage Earnings Per Share?'* (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3073822> accessed 4th September 2020

'German Corporate Governance Code 2019' (*Regierungskommission*, English translation, 16th December 2019) <https://ecgi.global/node/7493> accessed 6th September 2020

Hill, Jennifer, *'New Trends in the Regulation of Executive Remuneration'* (2010) European Corporate Governance Institute Working Paper No. 142/2010 <https://ecgi.global/sites/default/files/working_papers/documents/SSRN-id1549429.pdf> accessed 10th September 2020

'How does NZX regulate its markets?' (*New Zealand's Exchange*, 2020) <https://www.nzx.com/regulation/nzx-regulation/how-we-regulate> accessed 16th August 2020

'Imputation: A guide for New Zealand Companies' (*Inland Revenue* November 2018) <https://www.classic.ird.govt.nz/resources/8/8/8870569c-cc14-4e4f-b04a-f781b5e3ec9f/ir274.pdf> accessed 10th September 2020

Jensen, Michael, Murphy, Kevin and Wruck, Eric, *'Remuneration: Where we've been, how we got to here, what are the problems, and how to fix them'* (2004) European Corporate Governance Institute Finance Working Paper No. 44/2004, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=561305> accessed 3rd September 2020

Johnson, Marilyn, Porter, Susan and Shackell, Margaret, *'Stakeholder Pressure and the Structure of Executive Compensation'* (1997) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=41780> accessed 18th August 2020

Kabir, Rezaul and Minhat, Marizah, *'Multiple Compensation Consultants and CEO Pay'* (2010) Annual Meeting of European Accounting Association in Istanbul, Turkey <https://ris.utwente.nl/ws/portalfiles/portal/16530324/multiple.pdf> accessed 4th September 2020

Koerniadi, Hardjo, *'Share Repurchase in New Zealand'* (2005) Department of Finance Faculty of Business AUT <https://nzfc.ac.nz/archives/2005/papers/Koerniadi.pdf> accessed 10th September 2020, page 3

Kotnik, Patricia, Sakinc, Mustafa and Guduras, Dejan, *'Executive compensation in Europe: Realized gains from stock-based pay'* (2018) Institute for New Economic Thinking Working Paper No. 78 <https://www.ineteconomics.org/uploads/papers/WP_78-KotnikSakincGudurasFinal.pdf> accessed 9th September

Loomis, Carol 'This Stuff is Wrong' (*Fortune Magazine*, 25th June 2001) <https://money.cnn.com/magazines/fortune/fortune_archive/2001/06/25/305435/index.htm> accessed 19th August 2020

Mishel, Lawrence and Schieder, Jessica, 'CEO compensation surged in 2017' (*Economic Policy Institute,* 16th August 2018) <https://www.epi.org/publication/ceo-compensation-surged-in-2017/> accessed 22nd September 2020

Mishel, Lawrence and Wolfe, Julia, 'CEO Compensation has grown 940% since 1978' (*Economic Policy Institute*, 14th August 2019) <https://www.epi.org/publication/ceo-compensation-2018/> accessed 22nd September 2020

Neate, Rupert, 'UK's largest firms fail to cut CEO pay to navigate Covid-19 crisis' (*The Guardian*, 5th August 2020) <https://www.theguardian.com/business/2020/aug/05/uks-largest-firms-fail-to-cut-ceo-pay-to-navigate-covid-19-crisis> accessed 8th August 2020

'NZX Listing Rules Appendix 1 - NZX Corporate Governance Code' (*New Zealand's Exchange*, 1st January 2020) <https://www.nzx.com/regulation/nzx-rules-guidance/main-board-debt-market-rules> accessed 14th August 2020

'NZX Review 2017' (*New Zealand Financial Markets Authority*, 2017) <https://www.fma.govt.nz/assets/Reports/170629-NZX-Obligations-Report-2017.pdf> accessed 16th August 2020

'NZX Listing Rules' (*New Zealand's Exchange*, 1st January 2020) <https://www.nzx.com/regulation/nzx-rules-guidance/main-board-debt-market-rules> accessed 17th October 2020

'New Zealand based companies listed on ASX' (*Australian Stock Exchange*) <https://www.asx.com.au/prices/new_zealand_based_companies.htm> accessed 16th August 2020

Osman, Bernard, 'Auckland water crisis: Watercare chief executive Raveen Jaduram resigns' (*New Zealand Herald*, 17th August 2020) <https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12357124> accessed 18th August 2020

Roberts, Helen, *'CEO Power, executive compensation and firm performance, New Zealand, 1997-2002'* (2005) University of Otago Department of Finance Seminar Series <https://ourarchive.otago.ac.nz/handle/10523/1524> accessed 3rd September 2020

Thomas, Randall and Watson, Susan, 'Should New Zealand Adopt Say on Pay?' (*Vanderbilt Law School*, 2013) <https://ir.vanderbilt.edu/handle/1803/7331> accessed 25th September 2020

'UK Corporate Governance Code 2018' (*Financial Reporting Council*, July 2018) <https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code> accessed 6th September 2020

Legislation

Companies Act 1993 (New Zealand)

Corporations Act 2001 (Australia)

Financial Markets Authority Act 2011 (New Zealand)

Cases

Bridgecorp Management Services Ltd (in rec) v *Roest* HC Auckland CIV-2008-404-003013, 14 September 2009.

MacFarlane v Barlow [1997] 8 NZCLC 261

Madsen-Ries v Petera [2018] NZLR 500; [2016] NZCA 103

Managh v Jordan [2010] NZCCLR 4

Vercauteren v B-Guided Media Ltd [2010] BCL 154