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Shaping conscience without a soul: interventionism, deference and libertarian paternalism in regulating corporate social responsibility

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LAWS521 Organisational Law: Corporations, Trusts and Fiduciary Relationships

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Abstract:

Corporate social responsibility has been of growing concern for companies in recent decades. As corporate contributions to various humanitarian crises become more visible, the societal pressure for companies to present an improved CSR presence has increased. Concurrently, regulators across jurisdictions are exercising an increased willingness to mandate aspects of the CSR process. This paper examines New Zealand's regulatory interventionism into CSR through several current and proposed legislative measures. Notably, the New Zealand approach has been to prefer light-touch regulation. In the corporate governance space, the Companies (Directors Duties) Amendment Bill currently before Parliament is likely to increase the scope for directors to consider stakeholder interests during decision-making, though without mandating such consideration or affording stakeholders any corresponding enforcement mechanism. Elsewhere, current and proposed legislative measures exhibit the ideals of libertarian paternalism – 'nudging' individual and corporate behaviour in optimal directions while preserving commercial autonomy to act contrary to those optimal preferences. Overall, this paper examines the normative justifications for interventionism into CSR, and the policy limits that result beyond that justification.

Key words: *"Corporate social responsibility", "corporate governance", "directors' duties", "libertarian paternalism", "regulatory theory"*

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I Introduction[1]

> *"Men immaculate, perhaps,*
> *In all their private functions – once combin'd,*
> *Become a loathsome body…*
> *Hence merchants, unimpeachable of sin,*
> *Against the duties of domestic life, incorporated, seem at once to lose*
> *Their nature."*[2]

One would struggle to go a day without interacting with a corporation in some form. The consumption of something so simple as even a coffee is likely to be underpinned at every step in the supply chain by companies supplying their goods and/or services. Companies are incorporated within and across jurisdictions to facilitate commerce at vastly varying scales, from small entities comprised of one or two shareholders to mega-corporations with annual earnings larger than many countries' GDPs.[3]

For better or worse, then, companies are inescapable. The success of the company as a commercial vehicle is derived from its structure. At its simplest, the company is a legal relationship that affords legal personality to an artificial entity, with the ability to interact with other legal persons.[4] The greatest benefit flowing from incorporation is the partitioning of the company's assets from that of its shareholders, limiting shareholder liability to the extent of their initial capital contribution.[5]

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[1] The author notes that much of this paper was written before the United Kingdom Supreme Court decision in *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25 was released. As such, this paper generally considers the accepted view of directors' duties in the United Kingdom before the decision was released. The decision largely confirms pre-existing academic interpretations of the United Kingdom's duty of good faith. Where so, or where the decision impacts current understandings of the law, is noted in footnotes.

[2] William Cowper "Corporations" in John Poynder (ed) *Literary Extracts* (1844) 266 at 267.

[3] Matthew C Klein "If Apple were a country…" (January 29 2015) Financial Times <ft.com>; and Sabina Seibert *Management Research: European Perspectives* (1st ed, Routledge, United Kingdom, 2018) at 171.

[4] Companies Act 1993, s 15.

[5] "The consequences of incorporation" in Peter Watts, Neil Campbell and Christopher Hare (eds) *Company Law in New Zealand* (LexisNexis, New Zealand, 2016) at 3.1-2; and David Ciepley "The Neoliberal

Innovation then flourishes. Shareholders – as owners of the company[6] and whose capital the company operates with – are willing to endorse corporate risk-taking, recognising that the potential reward for a risky venture thoroughly outpaces the investment they stand to lose.[7] Creators and inventors design and embark on ventures that they otherwise would not if their own assets (beyond shareholder capital) would be liable to meet the company's debts – for example transforming the development of a programming language for personal computers into the world's most valuable company, with a market cap of USD$2.49 trillion.[8] Directors, responsible for steering company direction at a high level, are then more willing to commit to opportunistic ventures with reduced fear of shareholder retribution and personal liability.[9]

The increased pursuit of innovation, however, comes at a price. Companies are artificial, generally profit-driven and amoral entities.[10] Issues of corporate morality and accountability have been agonisingly debated without resolution throughout the corporation's lifespan. First Baron Thurlow perused and addressed the issue in the 18th century: "corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like".[11]

Corporation" in Thomas Clarke, Justin O'Brien and Charles RT O'Kelley (eds) *The Oxford Handbook of the Corporation* (Oxford University Press, United Kingdom, 2019) 274 at 275-6.

[6] Though note that shareholders do not have a proprietary interest in the company's assets – merely an economic interest in ensuring that the company is managed adequately: *BTI 2014 LLC v Sequana SA and others*, above n 1, at [44].

[7] See generally Mara Faccio, Maria-Teresa Marchica and Roberto Mura "Large Shareholder Diversification and Corporate Risk-Taking (2011) 24(11) RFS 3601.

[8] Gregg Pascal Zachary "Microsoft Corporation" (August 16 2022) Brittanica <brittanica.com>; and Samantha Subin "Microsoft passes Apple to become the world's most valuable company" (October 29 2021) CNBC <cnbc.com>.

[9] Michael Bradley and Dong Chen "Corporate governance and the cost of debt: Evidence from director limited liability and indemnification provisions" (2011) 17 JCF 83 at 84.

[10] Milton Friedman "A Friedman Doctrine" *New York Times* (online ed, New York, 13 September 1970); and David Ciepley "The Neoliberal Corporation", above n 5, at 282.

[11] John Poynder, above n 2, at 268.

In the 21st century, with corporations operating at scales unimaginable to 18th century jurists, the issue has arguably never been more dire. Globally, a limited subset of large corporations is responsible for an overwhelmingly disproportionate contribution to greenhouse gas emissions,[12] accelerating the climate crisis and threatening human existence itself.[13] New Zealand companies are equally responsible for New Zealand's contribution to climate change; Fonterra alone accounts for ~18 per cent of New Zealand's emissions and a group of 15 companies is responsible for 76 per cent of New Zealand's emissions.[14] Outside of the climate change space, employees are regularly mistreated and exploited by large corporations singularly focused on production and profit.[15] Among other issues, modern slavery and migrant worker exploitation are becoming of increasing focus and concern for regulators.[16] Elsewhere, companies whose products may endanger consumers are regularly caught prioritising profit over safety.[17] In short, corporate misfeasance scandals can be readily found at each level of interaction between companies and the persons with whom they interact.

Recognising the importance of addressing these issues, several inter-related schools of thought have grown in prominence – each separately examining the ways in which a company interacts with its constituent parts. Within corporate governance, the stakeholder

[12] Tess Riley "Just 100 companies responsible for 71 per cent of global emissions, study says" (10 July 2017) The Guardian <theguardian.com>. See also Marco Grasso and Katia Vladimirova "A moral analysis of carbon majors' role in climate change" (2020) 29(2) EV 175 at 175.

[13] *Smith v Fonterra Co-operative Group Ltd* [2022] 2 NZLR 284; [2021] NZCA 552 at [2]; and Tristan Bove "Start considering the worst-case 'mass extinction' scenarios of climate change, warn scientists in new paper" (August 3 2022) Fortune <fortune.com>. See also Sally Weintrobe *Psychological Roots of the Climate Crisis: Neoliberal Exceptionalism and the Culture of Uncare* (1st ed, Bloomsbury, New York, 2021) at 231-2.

[14] Marc Daalder "Revealed: New Zealand's worst climate polluters" (November 9 2021) Newsroom <newsroom.co.nz>.

[15] See for example Jack Kelly "A hard-hitting investigative report into Amazon shows that workers' needs were neglected in favor of getting goods delivered quickly" (25 October 2021) Forbes <forbes.com>.

[16] Ministry of Business, Innovation and Employment *Modern slavery legislation* (MBIE, July 2021). See also Benn Bathgate "Migrant exploitation complaints jump more than 250 per cent" (January 9 2022) Stuff <stuff.co.nz>.

[17] See for example Rachel Sandler "The Sacklers made more than $12 billion in profit from OxyContin maker Purdue Pharma, new report says" (October 4 2019) Forbes <forbes.com>; and Jack Kelly "When a company prioritizes profit over people: Boeing CEO tells Congress that safety is 'not our business model' (October 30 2019) Forbes <forbes.com>.

governance theory seeks to re-examine the parties for whom companies should create value. Stakeholder governance implores directors to make executive decisions on company direction with reference to parties beyond shareholders, whose interests were once seen to be paramount.[18] Environmental, social and governance (ESG) investing alters the drivers for investment decisions in the capital markets, from the underlying philosophy that companies who perform poorly in one or more of the three metrics are not worthy of investment.[19] ESG investing has been endorsed and fueled recently by legislation driving subjects towards optimal choices in the capital markets, through disclosure regimes and manipulating market incentives. Overall, corporate social responsibility (CSR) – into which each of the above concepts feeds – involves companies' commitments (voluntary or otherwise) to fulfil legal, ethical and public societal expectations.[20]

Once accepted to include only voluntary commitments, the concept of mandatory CSR has since developed – involving regulatory intervention in specified areas of commercial behaviour. This paper articulates the delicate interaction between these concepts at a regulatory level. Part IV examines stakeholder governance. While the issue has never been fully traversed by New Zealand courts, it is generally accepted that company directors are afforded significant scope to consider stakeholder interests under New Zealand's legal regime. That position is likely to be confirmed by a stakeholder-centric amendment to the Companies Act before Parliament at the time of writing. Subparts A-C compare the position in New Zealand to the United Kingdom's equivalent duty, to the conclusion that mandating stakeholder-centric decision-making through the legislative process would be a step beyond appropriate government intervention.

Part V then examines the State's role in incentivising sustainability beyond mandating substantive behavioural change. Regulatory measures that fall short of mandating

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[18] Charles RT O'Kelley "From Berle to the Present; the shifting primacies of corporation theory" in *The Oxford Handbook of the Corporation*, above n 5, at 119-20. See also Milton Friedman, above n 10.
[19] John Hill *Environmental, Social, and Governance (ESG) Investing: A balanced analysis of the theory and practice of a sustainable portfolio* (1st ed, Academic Press, London, 2020) at 13.
[20] "Corporate governance in New Zealand" in Understanding Company Law (online looseleaf ed, LexisNexis) at 16.4.

behavioural change often follow the philosophy of libertarian paternalism: involving shaping social norms and behaviour through ‘nudges’.[21] Commonly utilised where State interference with autonomy would be inappropriate,[22] such measures can be seen throughout New Zealand’s regulatory approach to CSR. Recent legislative measures in the environmental space, and proposed measures in the employment and human rights spaces have been designed to drive subjects to designated optimal outcomes without limiting their autonomy to choose nonoptimal outcomes. This paper examines the justification for adopting such non-intrusive regulatory measures, and their ultimate impact on behaviour despite allowing subjects the autonomy to continue along nonoptimal paths.

Overall, this paper concludes that an overly interventionist approach would be improvident, given the impropriety of substantive intervention in commercial affairs. The better approach is a continued focus on minimum standards to dictate corporate behaviour at the margins, where issues are deemed to be too important to allow subjects the autonomy to make nonoptimal decisions (for example paying employees below minimum wage or allowing a company to facilitate modern slavery within its supply chain). Beyond that, however, regulatory intervention in CSR should be limited to nudging regimes – ever-incentivising ethical behaviour but allowing entities the autonomy to structure their own CSR obligations. Though the various humanitarian crises caused, accelerated and perpetrated in part by companies are too important to ignore, it would be inappropriate to expect regulation alone to provide the solution. CSR must be an objective pursued across the board with appropriate legwork undertaken by corporations themselves outside regulatory bounds.

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[21] See generally Richard H Thaler and Cass R Sunstein *Nudge: Improving decisions about health, wealth and happiness* (2nd ed, Penguin Books, New York, 2009).

[22] The argument against substantive paternalistic intervention in these cases asserts that individuals choose for themselves better than third parties choose for them: Cass R Sunstein and Richard H Thaler “Libertarian Paternalism is not an Oxymoron” (2003) 70(4) U Chi L Rev 1159 at 1167.

II Term definition

This paper considers a number of component parts to CSR and the regulatory efforts that attempt to codify previously moral obligations, or incentivise compliance with moral obligations in areas where substantive regulation would be an overstep. This involves complex concepts whose scope is subject to considerable debate in modern literature. This part outlines definitions for three such concepts – corporate stakeholders; environmental, social and governance investing; and corporate social responsibility – to identify the sense in which they are used throughout this paper.

A Corporate stakeholders

Formulating a single definition for corporate stakeholders is problematic. Generally, any person, group or entity who "can affect, or is affected by, the achievement of a corporation's purpose" can be referred to as a corporate stakeholder.[23] Prima facie, this would include a company's shareholders. However, where stakeholder governance is discussed as an alternative to shareholder primacy, shareholders are generally excluded. Writing in 1932 to counter Adolf Berle's interpretation of the corporation as seeking benefit for stockholders alone,[24] Dodd posited that directors should foster social responsibility towards "employees, consumers and the general public" alongside shareholders.[25] Each appears to have an interest in company performance, although the directness of the general public's interest could be called into question.

Modern literature often includes creditors within the list of a company's stakeholders.[26] However, the United Kingdom's enacted legislation and New Zealand's proposed legislation do not include creditors within their lists of corporate stakeholders for directors

[23] Stephen Cohen "Who are the Stakeholders? What difference does it make?" (1996) 15(2) BPE 3 at 4; citing R Edward Freeman *Strategic Management: A Stakeholder Approach* (1st ed, Pitman, Boston, 1984) at 46 and 55.
[24] Adolf Berle "For Whom Corporate Managers Are Trustees" (1932) 45 HLR 1365.
[25] E Merrick Dodd Jr "For whom are corporate managers trustees?" (1932) 45(7) HLR 1145 at 1160-1.
[26] See for example "A to Z of New Zealand Law" (online ed, Thomson Reuters) at 16.3.2; and Susan Watson "What more can a poor board do? Entity primacy in the 21st century" 23 BLQ 142 at 142, 147 and 150.

to consider,[27] possibly due to creditor recognition being already mandated in certain circumstances through case law.[28] Further, those pieces of legislation include communities and the environment, from whom surely only a tentative link could be drawn directly to the company.[29]

As occasionally suggested, should bondholders be included within a company's stakeholders given their reliance on the company?[30] Perhaps not if one takes the view that a stakeholder is one to whom a fiduciary duty should be owed, but possibly if one takes the more limited view that stakeholders are members that merely deserve consideration during decision-making.

More questions than answers arise when seriously considering who should be a company stakeholder. Though perhaps the answer should remain context-dependent. The strength of any group's interest in a company is likely to vary between companies, industries and decisions. At minimum, a generic list of company stakeholders (notwithstanding shareholders) would likely include employees, customers, suppliers, lenders and society.[31] Though accepting that stakeholder interests can vary, a classification of any person, group or entity who has a direct interest in the outcome of a company decision may be a satisfactory answer, without engaging in the exercise of futility that is defining a set list of stakeholders to address every possible situation.

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[27] Companies Act 2006 (UK), s 172; and Companies (Directors Duties) Amendment Bill (75-1), cl 4.

[28] Creditor recognition is mandated where companies enter insolvent territory. See *Madsen-Ries (as liquidators of Debut Homes Ltd (in Liq)) v Cooper* [2021] 1 NZLR 43; [2020] NZSC 100 at [113(b)]; and *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA) at 250. In the United Kingdom, creditor recognition is mandated where consideration of creditor interests falls within the best interests of the company as whole; namely, in circumstances of near insolvency: *BTI 2014 LLC v Sequana SA and others*, above n 1, at [11] and [48]-[49].

[29] Companies Act 2006 (UK), s 172(d); and Companies (Directors Duties) Amendment Bill (75-1), cl 4(b) and (e).

[30] "Corporate governance in New Zealand", above n 20, at 16.1.

[31] R Edward Freeman *Strategic Management: A Stakeholder Approach*, above n 23, at 31-2.

B Environmental, social and governance investing

Environmental, social and governance (ESG) investing is closely tied to notions of ethical, responsible or sustainable investing. The three acronymic criteria against which investments are to be judged are: environmental (how a company performs as a steward of the natural environment); social (how a company manages its relationship with stakeholders); and governance (including a company's leadership, executive pay and shareholder rights).[32] Broadly, investors evaluate decisions under ESG not solely against a company's financial performance, but after evaluation of the three criteria to obtain a wider understanding of the company's overall health.

Beyond that, though, the lack of consensus across ESG terminology poses difficulties for regulators and investors alike.[33] ESG investors may invest on a relative (investing in sustainable companies relative to others in their industry), exclusionary (excluding industries they view as harmful) or custom (some combination of the two based on the investor's preference) basis.[34] The discretion involved, discrepancy between available strategies and subjective nature of ethical corporate performance itself – in that no singular moral compass can authoritatively define ethical investing – introduce significant complexity. However, given the rising prevalence of 'greenwashing' – generally deceptive communications meant to hide undesirable or embellish desirable aspects of CSR[35] – regulators such as the United States' Securities and Exchange Commission and New Zealand's Commerce Commission are understandably eager to set clear rules on firms utilising ESG terminology.[36]

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[32] At 16.4.

[33] See for example "Environmental, Social and Governance (ESG) Funds – Investor Bulletin" (February 26 2021) US Securities and Exchange Commission <investor.gov>.

[34] Lewis Braham "The three kinds of ESG investing" (2022) 102(23) Barrons S2 at S3-S4.

[35] Alfonso Siano and others "More than words: expanding the taxonomy of greenwashing after the Volkswagen scandal" (2017) 71 JBR 27 at 27.

[36] Lewis Braham, above n 34, at S4. See also Commerce Commission *Environmental claims guidelines: a guide for traders* (Commerce Commission, July 2020).

Moreover, the sense in which ESG investing is viewed influences its scope and effectiveness in providing returns. Some commentators and investors view ESG as a method of value creation, themselves believing or idealistically expecting socially conscious companies to outperform others.[37] Conversely, some investors are willing to sacrifice a proportion of performance below optimal for an investment portfolio that aligns with their normative values.[38] Stuart Kirk argues that ESG investing should diverge into two camps on this distinction, separating those who see ESG-consciousness as a form of value creation and those simply investing on a 'green' basis.[39] Ultimately, any informed discussion of ESG investing must acknowledge its general ambit as focusing on non-financial drivers of performance, while recognising the limitations presented by the subjective nature of ESG factors and the prevalence of legitimate disagreement as to its value.

C Corporate social responsibility

Corporate social responsibility (CSR) is an ever-growing aspect of corporate governance. Generally, CSR refers to a company's obligations to public and society, spanning the economic, social and environmental spheres.[40] CSR is relevant through all aspects of corporate governance and in corporations' interactions with wider society – "from regulatory framework to moral fundamentals".[41] Throughout much of the 20th century, CSR obligations were voluntarily undertaken by only more progressive, socially conscious companies.[42] Under that interpretation, mandatory CSR – enshrined in hard law – would

[37] Willem Schramade "Integrating ESG into valuation models and investment decisions: the value-driver adjustment approach" (2016) 6(2) JSFI 95 at 97.
[38] Lewis Braham, above n 34, at S4.
[39] Stuart Kirk "ESG must be split into two" (September 3 2022) Financial Times <ft.com>.
[40] Rado Bohinc "Corporate social responsibility: (A European legal perspective)" (2014) 20 Canta LR 21 at 22.
[41] Oliver Krackhardt "Beyond the Neem Tree conflict: questions of corporate behaviour in a globalised world" (2005) 21 NZULR 347 at 361.
[42] Julia Maskill "Extending directors' duties to the natural environment: perfect timing for greener companies in Aotearoa New Zealand?" (2016) 22 Auckland UL Rev 281 at 291.

be an oxymoron.[43] However, attitudes towards CSR and its appropriate place within regulatory frameworks are shifting. In 2011, for example, the EU Commission redefined its *European Framework for Corporate Social Responsibility* from voluntary uptake to a responsibility imposed on companies.[44] The extent to which CSR is a responsibility, and the extent to which it may be appropriate for the State to mandate CSR is at the heart of this paper.

A heavily prescriptive CSR regime has not been seriously considered in New Zealand due to current attitudes towards where directorial responsibilities lie and the preservation of autonomy in commercial matters.[45] That sentiment is predominantly shared throughout the Western world. However, the 20th century view of corporations as "paradigmatic private market actors" was not always the prevailing view.[46] Early corporations were inseparably linked to public finance through dividends and taxes.[47] Indeed, the rights received through incorporation and limited liability were once a privilege only granted by the State where doing so would provide some public benefit.[48] Perhaps, then, the increasing size, power and social footprint of large corporations points to a return to an arena in which the State can and should meaningfully dictate CSR trends.[49] This paper will explore that possibility through a mixture of hard and soft regulatory methods.

[43] Li-Wen Lin "Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences" (2021) 23(2) UPJBL 429 at 430.

[44] Rado Bohinc, above n 40, at 21-4.

[45] See part IV below. See also Kevin Campbell and Douglas Vick "Disclosure law and the market for corporate social responsibility" in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, United Kingdom, 2007) 241 at 246, which argues that the current corporate governance system in anglo-American jurisdictions is predicated on a philosophy of minimal interference in commercial autonomy.

[46] David Ciepley "The Neoliberal Corporation", above n 5, at 2.

[47] Ron Harris "Before 1720" in Ron Harris, Randall Calvert and Thrainn Eggertsson (eds) *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge University Press, United Kingdom, 2004) 39 at 42.

[48] William G Roy "Socializing Capital: the rise of the industrial corporation" in *The Oxford Handbook of the Corporation*, above n 5, at 5. See also Kevin Campbell and Douglas Vick, above n 45, at 245.

[49] See generally Peter Muchlinski "Corporate social responsibility and international law: the case of human rights and multinational enterprises" in *The New Corporate Accountability: Corporate Social Responsibility and the Law*, above n 45; Bryan Horrigan *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (1st ed, Edward Elgar Publishing, United

III Problem and scope delineation

As above, an exact definition of CSR – and its derivatives or inter-related concepts – is an exercise in futility. CSR itself appears differently and varies between persons, groups and entities. When examining government intervention in CSR, then, problem identification and definition becomes altogether more critical. In addition, the issues addressed by this paper are of such magnitude and variety that government intervention surely cannot be the sole solution. As such, there is a need to identify realistic targets against which to judge the efficacy of current regulatory efforts and potential for future intervention.

First, regulatory intervention in CSR extends beyond prescriptive, 'command and control', regimes mandating behaviour or minimal legal requirements for corporate conduct.[50] Government intervention tends to fit within one of the following forms: either 'endorsing', 'facilitating', 'partnering' or 'mandating' CSR activity.[51] Regulatory measures limiting commercial autonomy (to varying extents) generally fall within the mandating or facilitating categories – either legislating for substantive behavioural change or developing choice frameworks so end users are led to CSR-optimal choices. Those measures will be the focus of this paper. Conversely, endorsing measures involve the positive affirmation of CSR adoption and adherence by one or more branches of government,[52] and partnering measures involve the adoption of CSR by those entities within government themselves.[53]

In addition, one should not expect a principled CSR regime to transform corporations from perpetrators of sin to glowing, equitable social entities, thus singularly alleviating each of the issues that necessitate government intervention. This is for two reasons. First, a

Kingdom, 2010) at 132-7; and Robert C Hockett "When All Enterprise Was Social: The Public Benefit Origins of the Corporate Form" in Benjamin Means and Joseph W Yockey (eds) *The Cambridge Handbook of Social Enterprise Law* (Cambridge University Press, United Kingdom, 2018) 85.

[50] Bryan Horrigan, above n 49, at 155.

[51] At 145.

[52] At 153-4.

[53] At 158.

regulatory regime impactful enough so as to alleviate all CSR issues (if possible at all) would necessarily over-impose obligations on corporations, unjustifiably limiting commercial autonomy. To do so would manifestly swing the pendulum towards corporations being public actors, predominately more responsible to the State for advancing public welfare than as private actors carrying out their own purposes and objectives.[54] In New Zealand, that approach appears inconsistent with where corporate responsibilities are seen to lie.[55]

Moreover, the wide nature of CSR means that contradictions and contraventions are inevitable. Consumers and employees are generally accepted as two of the groups to whom companies owe moral obligations under stakeholder governance – defined above as an integral component of CSR.[56] Accepting that those groups' interests will often conflict is a matter of economics. Improving employee treatment comes at a cost, to either be borne by consumers in paying for the good/service or shareholders in reduced profits (notwithstanding efficiency or productivity benefits that may arise in improving employee treatment). Any effective regime must allow companies to independently navigate the CSR quagmire, recognising that perfect performance is impossible where it involves a tradeoff between different interests. Individual metrics cannot tell the full story, and movement across all facets of CSR simultaneously is largely unquantifiable. Nevertheless, pursuit of CSR and the improvement of company performance is a noble objective at each level within a company's hierarchy – from directors steering company direction to employees delivering policies and outcomes.

[54] See generally Bryan Horrigan, above n 49, at 112-13.

[55] While CSR is generally growing in prevalence and importance throughout New Zealand, and recognition of stakeholder governance/capitalism is ever-expanding, it is unlikely that public opinion would support government intervention into CSR to this extent.

[56] See above n 25.

IV Corporate governance regulation across jurisdictions

Corporate governance is generally defined as "the system by which companies are directed and controlled".[57] Directors' duties are a key regulatory component of that system.[58] Under either the agency theory (where directors make decisions for shareholder principals)[59] or stakeholder theory (where directors control a web of relationships between corporate stakeholders),[60] directors steward the company – making decisions in its name, and shouldering the responsibility for decisions so made. In New Zealand and many Western jurisdictions,[61] accountability for this discretionary decisions arise through fiduciary duties imposed on directors.[62] To whom those duties are owed has been debated since Berle suggested that maximising shareholder wealth should be the sole responsibility of corporations.[63] An inter-related issue is the extent to which directors may consider corporate stakeholder interests during decision-making, and whether decisions may contradict the interests of existing shareholders in favour of other stakeholders.

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[57] Cadbury Committee *Report on the Financial Aspects of Corporate Governance* (Gee, United Kingdom, 1992) at [2.5].

[58] Ian M Ramsay "The corporate governance debate and the role of directors' duties" in *Corporate Governance and the Duties of Company Directors* (Centre for Corporate Law and Securities Regulation, Melbourne, 1997) 1 at 10.

[59] Jill Solomon *Corporate Governance and Accountability* (5th ed, Wiley, United Kingdom, 2020) at 8.

[60] "Corporate governance in New Zealand", above n 20, at 16.1.

[61] Compare for example Japanese corporate governance, which is generally predicated around a focus on internal expectations with minimal focus on outside accountability: Megumi Suto and Hitoshi Takehara *Corporate Social Responsibility and Corporate Finance in Japan* (1st ed, Springer, United States, 2018) at 5; Simon Learmount *Corporate Governance: What can be learned from Japan?* (1st ed, Oxford University Press, United Kingdom, 2002) at 7.2-3; and Masahiko Aoki, Gregory Jackson and Hideaki Miyajima *Corporate Governance in Japan: Institutional Change and Organizational Diversity* (1st ed, Oxford University Press, United Kingdom, 2007) at 13.4.1.

[62] For New Zealand, see the Companies Act 1993, ss 131-7. For the United Kingdom, see the Companies Act 2006 (UK), ss 170-7. Though note not all duties imposed on directors as fiduciaries are fiduciary in nature: *Keller v Daisley* [2021] NZCA 351 at [140]; and *Wilding v Te Mania Livestock Ltd* [2018] NZCCLR 3; [2017] NZHC 717 at [123].

[63] Adolf Berle "For Whom Corporate Managers Are Trustees", above n 24.

Consideration of stakeholder interests is no recent development for directors.[64] The term ‘stakeholder’ was first used within corporate management literature by the Stanford Research Institute in 1963.[65] However, directors and courts had been dealing with stakeholder consideration long before its emergence in the literature. In 1883, the Court of Appeal (Chancery Division) in *Hutton v West Cork Railway Company* had to determine whether a vote to offer remuneration to directors of an insolvent company was legitimate.[66] There, the Court offered a still frequently-cited statement on executive decision-making: “The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company”.[67] This statement captures the breadth of directorial decision-making and the concept of indirect benefits to the company. It hypothetically refers to a rail company’s decision to provide its employees cakes and ale without any return promise. That decision seemingly costs money that will not be returned – reducing profits which could have been distributed to shareholders. However, such a decision may be permissible where accounting for the wider stakeholder interests would be consequently beneficial for the company’s interests.[68] Despite having no immediate monetary benefit, such offerings may positively impact employee retention and productivity. A company does not benefit if its employees defect because company profits are jealously guarded.[69]

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[64] However, at common law stakeholder interests were only relevant only where “their treatment might affect the company’s interests, understood as the interests of its shareholders”: *BTI 2014 LLC v Sequana SA and others*, above n 1, at [19].

[65] David Mhalanga “Stakeholder Capitalism, the Fourth Industrial Revolution (4IR), and Sustainable Development: Issues to be Resolved” (2022) 14(7) Sustainability 3902 at 3912; and Giles Slinger “Spanning the Gap: The Theoretical Principles that Connect Stakeholder Policies to Business Performance” (Working Paper No. 111, ESRC Centre for Business Research, University of Cambridge, 1998) at 1.

[66] *Hutton v West Cork Railway Co* [1883] 23 ChD 654.

[67] At 673.

[68] *BTI 2014 LLC v Sequana SA and others*, above n 1, at [66] and [294].

[69] See generally Daniel Eseme Gberevbie “Employee Retention Strategies and Organizational Performance” (2008) 16(2) Ile Ife 148. See also Christiane Bode, Jasjit Singh and Michelle Rogan “Corporate Social Initiatives and Employee Retention” (2015) 26 Organization Science 1702, where it is argued that firms with explicit social mandates benefit from positive employee retention rates.

Stakeholder governance may fit within the pursuit of indirect benefits that arise within corporate decision-making. As above, a decision to treat employees to cakes and ale can be to boost employee retention rates.[70] Environmental risks can be similarly restated. An airline's decision to pursue renewable fuel sources may be to avoid a future in which its operations are significantly disrupted by anomalous weather events, or to protect its reputation. It has been theorised that failing to consider climate-related risks would be a breach of duties under this financial re-examination approach.[71] On a wider view, the stakeholder governance movement is predicated around a company's place within society and recognising community-based obligations that result.[72] This part will explore the application of a stakeholder-focused approach within the United Kingdom's corporate governance regulation – enacted in 2006 to reflect greater stakeholder recognition – and compare that approach with New Zealand's current and proposed regulatory framework.

A United Kingdom

The United Kingdom has mandated stakeholder consideration as part of a director's duty to promote the success of the company. The duty falls within the strict legal tier of the United Kingdom's corporate governance framework, supplemented by comply or explain obligations imposed only on listed companies.[73] This section considers the objectives of that reform, before evaluating its effectiveness in preserving stakeholder interests and outlining remaining issues for corporate stakeholders.

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[70] "Extrinsic rewards", including (inter alia) benefits distributed for service, has been found to be one of the most frequently cited reasons for employee retention: John P Hausknecht, Julianne Rodda and Michael J Howard "Targeted Employee Retention: Performance-Based and Job-Related Differences in Reported Reasons for Staying" (2009) 48(2) Human Resource Management 269 at 274.

[71] Daniel Kalderimis and Nicola Swan "Sustainable Finance Forum: Legal Opinion 2019" (online looseleaf ed, Chapman Tripp) at [169].

[72] Helen Anderson and Wayne Gumley "Corporate social responsibility: legislative options for protecting employees and the environment" (2008) 29(1) Adel L Rev 29 at 36-7.

[73] Andrew Keay "Directors in the corporate governance process" in *Directors' Duties* (LexisNexis, United Kingdom, 2020) at [3.1]; and Ian M Ramsay, above n 58, at 10.

A director's fiduciary duty to act in good faith and in the best interests of the company arose from common law.[74] The common law duty was transposed into s 172 of the Companies Act (UK),[75] which requires a director to act in good faith and in a way they consider would be most likely to promote the success of the company, including having regard to:[76]

(a) the long-term consequences of any decision,
(b) the company's employees,
(c) business relationships with suppliers,
(d) environmental and community impact,
(e) maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.

1 A halfway house: enlightened shareholder value

Section 172 was an increase in stakeholder recognition from the previous Companies Act, which merely required directors to consider employee interests in s 309.[77] That provision was regarded as a 'lame duck', as employees had no way to enforce the provision and no cases were ever brought under it.[78] During the reform process, the Company Law Review Steering Group considered whether shareholder primacy or pluralism (stakeholder governance)[79] should underpin corporate governance.[80] The prevailing approach was one of 'enlightened shareholder value', disregarding the idea that to create wealth a company

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[74] *BTI 2014 LLC v Sequana SA and others*, above n 1, at [17]-[18]; and *In Re Smith v Fawcett Ltd* [1942] Ch 304 at 306.
[75] Companies Act 2006 (UK), s 170(3); and *BTI 2014 LLC v Sequana SA and others*, above n 1, at [63].
[76] Section 172(a)-(f).
[77] Companies Act 1985 (UK), s 309.
[78] Andrew Keay "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach" (2007) 29 SYDLR 577 at 593.
[79] Pluralism would see directors responsible to several additional constituency groups, all falling within the corporate stakeholder umbrella as defined above: *BTI 2014 LLC v Sequana SA and others*, above n 1, at [265].
[80] At [372]; and Company Law Review Steering Group "The Scope of Company Law" in *Modern Company Law: The Strategic Framework* URN 99/654 at 5.1.11.

must ruthlessly engage with its suppliers and employees (and other stakeholders).[81] Despite this, the increased recognition for stakeholder relationships is still for the purpose of increasing shareholder value, shown by the inclusion of "members" (shareholders)[82] within s 172.[83] The UKSC has confirmed that shareholders are the ultimate focus of the duty.[84]

The Steering Group were critical of a pluralistic approach, which would hold stakeholder interests on par with shareholders'. While the Group agreed that "the law should provide optimal conditions for companies to contribute to the overall health and competitiveness of the economy", they questioned whether directors' duties was the appropriate place to effect that change.[85] The criticism was that a pluralist approach would lead directors into situations where they would need to address directly conflicting interests equally,[86] or to effectively mitigate that issue would leave directors with an uncontrolled discretion.[87] The Group further noted that directors' duties themselves are subordinated to obligations to uphold a company's constitution, so companies who wished to operate on a stakeholder-centric basis were free to mandate this in their constitution.[88]

In addition, mere consideration suffices to discharge the duty, as the Group emphasised that the weight given to each factor remains reserved for directors.[89] At minimum, consideration is aided by the requirement for companies to prepare 'section 172 statements'

[81] Company Law Review Steering Group "Corporate Governance: Introduction, Background and Overview" in *Modern Company Law: Developing the Framework* URN 00/656 at 2.19. See also *BTI 2014 LLC v Sequana SA and others*, above n 1, at [66], [243] and [265].

[82] At 2.11. See also *BTI 2014 LLC v Sequana SA and others*, above n 1, at [363].

[83] At 2.22.

[84] *BTI 2014 LLC v Sequana SA and others*, above n 1, at [65] and [386].

[85] Company Law Review Steering Group "Corporate Governance: Introduction, Background and Overview", above n 81, at 3.22.

[86] At 3.27-8; and *BTI 2014 LLC v Sequana SA and others*, above n 1, at [266].

[87] At 2.12.

[88] At 3.15.

[89] At 3.19. See also *BTI 2014 LLC v Sequana SA and others*, above n 1, at [295] and [299].

under accompanying regulations.[90] Though this is said to require more than 'lip service',[91] where faced with trading off conflicting interests it may be easier for directors to prioritise short-term profit maximisation after minimal consideration of stakeholder interests.[92] The discretion retained by directors after correctly identifying the ancillary factors (thereby disposing of the statutory requirements) certainly reduces the impact of any additional stakeholder recognition.[93]

Although s 172 appears to prioritise shareholder interests, s 172(2) likely preserves companies' ability to identify and prioritise purposes beyond profit. Section 172(2) replaces "the success of the company for the benefit of its members as a whole" with the purposes of the company as elsewhere denoted (for instance in the constitution).[94] This likely facilitates companies which have profit-making as a secondary or tertiary objective – for example a charitable company.[95] Through this, companies preserve the autonomy to enshrine greater stakeholder consideration than the legislative minimum. However, the provision may be impactless beyond companies with strictly social mandates. Though limited, case law on s 172(2) indicates that where a company has "mixed objects" – as opposed to strictly "altruistic" or "unselfish" objectives[96] – it must promote the company's success for its members while at the same time achieving its other stated objectives.[97] This seemingly limits the provision to only companies who reach the threshold of social

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[90] Companies Act 2006 (UK), s 414CZA; inserted by the Companies (Miscellaneous Reporting) Regulations 2018 (UK), reg 4.

[91] Companies Act 2006 (UK) (explanatory note).
at [328].

[92] Employment Lawyers Association "Submission to the Business, Energy and Industrial Select Committee on Corporate Governance 2016-17" at 3.8.

[93] David Collison and others "Financialization and company law: A study of the UK Company Law Review" (2014) 25 CPA 5 at 11-12. See also *BTI 2014 LLC v Sequana SA and others*, above n 1, at [140].

[94] Companies Act 2006 (UK), s 172(2).

[95] Charities Act 2011 (UK), ss 193 and 353(1). See also *Children's Investment Fund Foundation (UK) v Attorney General and others* [2021] 1 All ER (Comm) 757; [2020] UKSC 33 at [56]-[59].

[96] "Duty to promote the success of the company" in *Encyclopaedia of Forms and Precedents* (online looseleaf ed, Lexis Nexis United Kingdom).

[97] *Stimpson v Southern Private Landlords Association* [2009] EWHC 2072 (Ch) at [26].

enterprise,[98] who are often subject to different governance structures based on the selected method of incorporation.[99]

2 *Remaining issues*

Section 172 has not been a silver bullet for corporate stakeholders. As above, the provision ultimately prioritises shareholder interests. As such, when stakeholder and shareholder interests conflict, directors should disregard stakeholder interests in proper compliance with the duty.[100] Commenters have expressed the view that 'enlightened shareholder value' is shareholder primacy disguised through "very high quality fudge".[101] The Steering Group arguably gave little serious consideration to a pluralistic approach, instead choosing to enshrine minimal stakeholder protection within a shareholder-based overall approach. This position is even more shareholder-friendly than New Zealand's framework, in which shareholder interests are explicitly subordinated below the company's.[102]

The increased stakeholder recognition presented by mandating consideration of the listed factors may itself be an ineffective measure. Even if a wider stakeholder could point to non-consideration of a listed interest, the claim would still have to be brought within one of the traditional avenues, given that stakeholders are left without a corresponding enforcement action under the Companies Act. Actions taken by the Board are usually unlikely due to the concept of 'wrongdoer control'.[103] Broadly, wrongdoer control is the unwillingness of directors to vote for an action against themselves, leading to a majority of 'wrongdoer' directors opposing the action or an equal share blocking the formation of a

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[98] Social enterprises are organisations with "primarily social objectives" whose "surpluses are principally reinvested": Social Enterprise UK *No Going Back: State of Social Enterprise Survey 2021* (online looseleaf ed, Barclays) at 11.

[99] Elizabeth Pollmann "Social and Asocial Enterprise" in *The Cambridge Handbook of Social Enterprise Law*, above n 49, at 15.

[100] Lisa Benjamin *Companies and Climate Change* (1st ed, Cambridge University Press, United Kingdom, 2021) at 66.

[101] David Collison and others, above n 93, at 15. That position has now been confirmed: *BTI 2014 LLC v Sequana SA and others*, above n 1, at [386].

[102] Companies Act 1993, s 169.

[103] *Bhullar v Bhullar and others* [2015] EWHC 1943 (Ch) at [37].

majority.[104] Shareholders – who may apply to bring a derivative action[105] – would rarely share the same concerns about non-consideration of the listed factors as wider stakeholders.[106] Even if such a shareholder could be found, courts in the United Kingdom allow derivative actions on average less than three times per year.[107] As such, there has been no case law meaningfully addressing the listed factors since the Act's passage.[108] In one case where the duty was considered in the context of an environmental claim, the Court noted that company environmental policy should and would be left to the discretion of the Board.[109] The result is that s 172, as framed, appears relatively toothless as it relates to stakeholder recognition.

B New Zealand

Similar to the United Kingdom's regulatory structure, New Zealand's corporate governance framework is split between various levels. The first level, and the point of focus for this part, is the duties in the Companies Act.[110] Within these duties, stakeholder governance is usually considered in the context of a director's duty of good faith or of reasonable care and skill.[111] In light of proposed stakeholder-centric legislative developments, this paper is limited to consideration of the duty of good faith.

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[104] *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] Ch 551 at [54].

[105] Companies Act 2006 (UK), s 261.

[106] Andrew Keay "Enforcement of the duty" in *Directors' Duties* (LexisNexis, United Kingdom, 2020) at 6.182.

[107] Andrew Keay "Submission to the Business, Energy and Industrial Select Committee on Corporate Governance 2016-17" at [9].

[108] The UKSC have noted that a company "has responsibilities of a legal, societal, environmental and… moral or ethical nature" without commenting what compliance with those stakeholder responsibilities would entail, but noted that compliance with them is a matter for directors: *BTI 2014 LLC v Sequana SA and others*, above n 1, at [140], per Lord Briggs.

[109] *People & Planet (R on the application of) v Her Majesty's Treasury* [2009] EWHC 3020 (Admin) (QBD) at [34]-[35].

[110] Companies Act 1993, ss 131-8; and Joshua Blackmore "Evaluating new Zealand's evolving corporate governance regulatory regime in a comparative context" (2006) 12 CanterburyLRev 34 at 53.

[111] Daniel Kalderimis and Nicola Swan, above n 71, at [57].

At the next level, the NZX Code sets out rules to be followed for listed companies only on a comply or explain basis.[112] Behind the Act, the NZX Code is the primary guidance for corporate governance practices for NZX-listed companies.[113] Given that NZX is itself privately-owned, and therefore cannot fall within State efforts to regulate CSR, this aspect of corporate governance is beyond the scope of this paper.[114]

Section 131 of the Companies Act requires directors to "act in good faith and in what the director believes to be the best interests of the company".[115] Of note is the phrase "best interests of the company", variations of which are used commonly across jurisdictions to describe obligations of good faith.[116] This represents a departure from a pure focus on shareholder interests,[117] as any duty owed to shareholders is subordinated to the overarching duty of good faith owed to the company itself.[118] Section 169 further confirms that the duty of good faith is owed to the company, not to shareholders.[119] The company is therefore the proper claimant in an action for breach of duties, to be exercised by the Board acting as the company through ordinary resolution.[120]

[112] NZX "Listing Rules – Appendix 1 – NZX Corporate Governance Code" (10 December 2020) (online looseleaf ed, NZX).
[113] Financial Markets Authority *Corporate governance in New Zealand: principles and guidelines* (FMA, 28 February 2018) at 5.
[114] Companies Office "NZX Limited (1266120)" (29 June 2022) Companies Register <companiesoffice.govt.nz>.
[115] Companies Act 1993, s 131.
[116] See for example Corporations Act 2001 (Cth), s 181: "a director… must exercise their powers… in good faith and in the best interests of the corporation".
[117] *Fulham Football Club Ltd v Cabra Estates Plc* [1992] BCC 863 at 876: "the duties owed by the directors are to the company and the company is more than just the sum total of its members".
[118] Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at 194. See also Lynn A Stout "Takeovers in the ivory tower: how academics are learning Martin Lipton may be right" (2005) 60(4) Bus Law 1435. Though see PM Vasudev "Corporate Stakeholders in New Zealand – the Present, and Possibilities for the Future" in PM Yasudev and Susan Watson (eds) *Corporate governance after the financial crisis* (Edward Elgar Publishing, United Kingdom, 2012) 120 at 130, where it is argued that shareholder primacy still underpins the current legislation.
[119] Companies Act 1993, s 169.
[120] *Wilding v Te Mania Livestock Ltd* , above n 62, at [124].

Only in limited circumstances can others bring an action on behalf of the company for breach of duties. Shareholders may apply to bring proceedings against directors, with the success of the application determined by whether a "prudent business person" would bring the action,[121] the likelihood of the company bringing the action and its prospects of success.[122] Elsewhere, liquidators and creditors may apply to the Court during liquidation to investigate the conduct of an officer of the company and order them to contribute to the company's assets against any finding of wrongdoing.[123]

1 Stakeholder governance in New Zealand

In *Debut Homes v Cooper*, the Supreme Court noted the divergence between shareholder primacy and stakeholder governance but refused to consider which model was correct.[124] Without authoritative judicial determination, discussion of the theoretical underpinnings of New Zealand's duty of good faith remains academic. Peter Watts argues that the only way for a company to overtly priotise profit maximisation is in its constitution,[125] which can only be adopted or amended by shareholders via special resolution.[126] Where a company has not indicated that it wishes to maximise profit, its directors are not directly obliged to do so.[127]

In practice, New Zealand companies often make stakeholder-centric decisions and operate without a singular focus on profit maximisation. As early as 2012, 91 of the 130[128] NZX-listed companies referenced stakeholders throughout various governance documents.[129]

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[121] *Vrij v Boyle* [1995] 3 NZLR 763 (HC) at 765.
[122] Companies Act 1993, s 165.
[123] Section 301.
[124] *Debut Homes*, above n 28, at [28]-[31].
[125] Peter Watts "To whom should directors owe legal duties in exercising their discretion? A response to Mr Rob Everett" [2019] CSLB 49.
[126] Companies Act 1993, s 32.
[127] See Lynn A Stout "New thinking on 'shareholder primacy'" in *Corporate Governance after the Financial Crisis*, above n 118, at 29-30.
[128] At the time of writing the number of companies listed on NZX' Main Board has risen to 184: "NZX Main Board (NZSX)" (2022) <www.nzx.com>.
[129] PM Vasudev, above n 118, at 120.

Elsewhere, the rising ‘B Corp’ phenomenon offers accreditations for companies that meet verified standards of social and environmental impact.[130] To acquire accreditation, a company must satisfy the examiners that it conducts business in a stakeholder-centric manner.[131] Moreover, companies wishing to acquire accreditation must amend their constitutions to include ‘purpose’ and ‘stakeholder’ clauses – generally ensuring the company is constitutionally bound to operate with a ‘triple bottom line’ (economic, social and environmental)[132] approach.[133] As at writing, there are 187 New Zealand B Corps,[134] compared to 45 in 2021.[135] Notwithstanding any indirect financial benefits which may result from a company’s accreditation (for example growing its customer base through improved reputation or goodwill), the prevalence of B Corps in New Zealand indicates that stakeholder governance serves as a legitimate corporate governance strategy.

2 Enforcement of stakeholder interests

While New Zealand companies regularly consider stakeholder interests in practice, corporate stakeholders are unlikely to be able to enforce consideration of their interests. The duty of good faith is traditionally to avoid bad faith and self-dealing by the directors.[136] However, liability may follow if claimants can show that an action taken by directors was outside the best interests of the company, or an action not taken was in the best interests.[137] To establish liability, a corporate stakeholder could frame an omission to consider their interests as financially detrimental to the company. However, significant obstacles would arise for parties attempting to do so.

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130 “Stakeholder Governance” (2022) B Labs <www.bcorporation.net>.

131 “Theory of Change” (2022) B Labs <www.bcorporation.net>.

132 “B Lab Requirement” (2022) B Labs <www.bcorporation.net>.

133 Yifei Li and Gary Paul Green “Green Economies and Community Wellbeing” in Katharine Legun and others (eds) *The Cambridge Handbook of Environmental Sociology* (Cambridge University Press, United Kingdom, 2020) 107 at 107.

134 “Find a B Corp” (2022) B Labs <www.bcorporation.net>.

135 Jihee Junn “The B Corp businesses balancing purpose, planet and profit” (1 October 2021) The Spinoff <www.thespinoff.co.nz>.

136 Peter Watts, above n 125; and *FXHT Fund Managers Ltd (in liq) v Oberholster* [2010] NZCA 197 at [48].

137 *Wilding v Te Mania Livestock Ltd*, above n 62, at [123]-[124].

Initially, whom of the parties entitled to sue would choose to bring proceedings against directors? Actions may be pursued by the Board, shareholders,[138] or liquidators/creditors during a company's liquidation.[139] Absent liquidation proceedings, the latter would be of no assistance to potential claimants. If the wrongdoer directors remain in control, this is likely to dissuade the Board from taking action against itself or one of its own.[140] Alternatively, negative control may prevent a majority from forming.[141]

To address this, the derivative action departs from the traditional rule that the proper plaintiff in an action against directors is the company.[142] Derivative actions avoid wrongdoer control, particularly in smaller companies where the wrongdoer directors may also constitute a majority of shareholders.[143] However, derivative actions can only be brought by shareholders, and therefore would not be available for corporate stakeholders. Any aggrieved stakeholder would first need to convince an eligible shareholder that the claim is worth bringing. Even then, any shareholder applying to bring a derivative action would struggle to meet the prudent business person test – which includes the action's prospects of success – for the evidentiary burdens that would arise when doing so.[144]

A strict causation analysis is necessary to determine whether a director's actions or omissions were causative of some loss,[145] assessed on a 'but for' basis with the onus on the director(s) to prove that the loss would have resulted regardless of the breach.[146] The high liability threshold, often indirect linkages between stakeholders and companies and many variables at play would constitute significant challenges for parties seeking to bring a successful claim under s 131. Though examining causation in a negligence analysis, the

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[138] Companies Act 1993, s 165.

[139] Section 301; and *Yan v Mainzeal Property and Construction Ltd (in liq)* [2021] 3 NZLR 598; [2021] NZCA 99 at [255].

[140] *Bhullar v Bhullar*, above n 103, at [37]; and *Universal Project Management Services*, above n 104, at [54]. See also *Singh v Auckland Taxi Service Ltd* [2021] NZHC 2157 at [49] and [52].

[141] Andrew Borrowdale "The Statutory Derivative Action" [2000] NZLJ 409 at 409.

[142] *Wilding v Te Mania Livestock Ltd*, above n 62, at [124].

[143] *Re Plaztech Trading Ltd* HC Auckland CP31/94, 4 March 1996.

[144] *Vrij v Boyle*, above n 121, at 765.

[145] *Morgernstern v Jeffreys* [2014] NZCA 449 at [99].

[146] *FXHT v Oberholster*, above n 136, at [28].

Court of Appeal in *Smith v Fonterra* were disparaging in assessing the likelihood of claimants establishing sufficient proximity for environmental claims.[147] Striking out the claim, the Court held that "the class of possible contributors (to climate change) is virtually limitless", so attributing harm to a limited class of companies is incredibly difficult.[148] Similar comments have been made in the context of Australian climate change litigation regarding the inadequacy of current scientific processes to attribute emissions to a limited class of defendants.[149]

Take the example of an airline refusing to research and develop a sustainable fuel source. Even if that airline's operations are disrupted or discontinued by extreme weather events, the directors would merely need to establish on balance that the described loss would have happened regardless of their decision. That could be achieved on a *Smith v Fonterra* basis: that no single entity materially contributes to climate change, and that individual weather events cannot be traced back to individual decisions.[150] It remains to be seen whether attribution science – mapping "specific climate change related events… to particular emitters" – will develop to connect climate-related weather events and corporate decisions.[151]

Proving causation against employment, human rights or other stakeholder-centric issues would generally involve more direct linkage between the action or omission and the harm caused. For example, a logical pathway can be drawn between frugality with company profits and a subsequent decrease in revenue through loss of productivity and key staff.[152] However, could that neglect be traced back to a single decision not to treat employees to

[147] *Smith v Fonterra*, above n 13.
[148] At [112].
[149] *Minister for the Environment (Commonwealth) v Sharma (by their litigation representative Arthur)* [2022] FCAFC 35 at [776] and [885].
[150] *Smith v Fonterra*, above n 13, at [19].
[151] Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (paper prepared for Asia Pacific Judicial Colloqium, Singapore, May 2019) at [109].
[152] For the link between "extrinsic rewards" and employee retention, see above n 69; for employee retention and loss of revenue see Stephen Bevan "Analysing, monitoring and costing labour turnover" in George Saridakis and Cary L Cooper (eds) *Research Handbook on Employee Turnover* (Edward Elgar Publishing, Massachusetts, 2016) 79 at 82-3.

cakes and ale?[153] Without any evidence of self-dealing typical within bad faith claims,[154] claimants would have to pursue the argument that the decision was otherwise outside the best interests of the company – a theoretically possible yet generally unsuccessful avenue.[155] To rebut any such claim, directors would need only point to another possible reason for employees to have left the company en masse.[156] For example, employees frequently cite their attachments to others within the organisation as reason for leaving – a factor entirely external to directorial decision-making.[157] If the alternative explanation was plausible, the director(s) would escape liability under s 131.

In addition, the courts are generally unwilling to second-guess directors' business judgment. The test is subjective, determining whether the director(s) themselves believed their decision was in the company's best interests.[158] The courts occasionally look objectively behind personal beliefs, notably where there has been no consideration of the company's best interests or there is evidence of self-dealing.[159] However, each option is difficult to imagine in the context of a claim involving wider stakeholders (notwithstanding creditors).[160] The existence of reasonable alternatives is foreseeable in most cases, especially where to properly account for the relevant stakeholder would require significant expenditure. Where so, the courts would refuse to substitute their judgment for the directors'. Andrew Keay argues that the business judgment rule would prevent the courts from second-guessing commercial decisions made without regard to stakeholders even under the United Kingdom's framework, even though stakeholder consideration is at least

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[153] See *Hutton v West Cork*, above n 66.

[154] See above n 136.

[155] *Wilding v Te Mania Livestock Ltd*, above n 62, at [123]-[124].

[156] *FXHT v Oberholster*, above n 136, at [28].

[157] John P Hausknecht, above n 69, at 274.

[158] *Debut Homes*, above n 28, at [112].

[159] At [113].

[160] Note that creditors are often considered to be a part of a company's wider stakeholder group, and the courts occasionally second guess the honesty of directors' beliefs where there is a failure to consider the interests of creditors. See *Debut Homes* at [113](b); and *Nicholson v Permakraft*, above n 28, at 250.

cemented into their companies legislation.[161] Without an equivalent obligation to consider stakeholder interests, the prospect of New Zealand courts substituting their judgment for directors seems even more remote.

It has been suggested that New Zealand's duty of good faith "require(s) active consideration of stakeholder interests".[162] Beyond the interests of creditors near insolvency,[163] I suggest this is unlikely at present. The above analysis shows the unlikelihood of enforcing stakeholder interests under the current duty of good faith. Establishing breaches of the current duty depends on establishing a director's disloyalty or infidelity to company interests – at least a different and possibly higher threshold than negligence or gross negligence.[164] Without an express requirement to consider the interests of wider stakeholders, it seems unlikely that the duty could be breached through simple disregard for stakeholder interests so long as that disregard could be justified by reference to another company interest that was prioritised instead.

3 Stakeholder interests as permissible considerations

The high threshold required to breach s 131 may prevent the duty from being a catalyst for stakeholder-centric change. However, directors are permitted to make stakeholder-centric decisions under the current duty. The courts' unwillingness to substitute their judgment for directors' permits directors who so desire to make stakeholder-centric decisions. To avoid liability would merely require directors to point to some benefit to the company – financial or otherwise – which would result from their stakeholder-centric decision. For instance, if an airline did decide to pursue research and development of sustainable fuel sources, it would likely receive corresponding reputational benefits that would provide financial

[161] Andrew Keay "The duty to promote the success of the company: is it fit for purpose in a post-financial crisis world?" in Joan Loughrey (ed) *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar Publishing, United Kingdom, 2012) 50 at 74.

[162] Institute of Directors and MinterEllisonRuddWatts "Stakeholder governance: a call to review directors' duties" (online looseleaf ef, IoD) at 14.

[163] Above n 160.

[164] *Richard Geewiz Gee Consultants Ltd (in liq) v Gee* [2014] NZHC 1483 at [112].

justification for its decision.[165] Whether those reputational benefits actually offset the company's expenditure would fall beyond what the courts are expected to do when reviewing management decisions.[166]

The above permissibility approach may allow for change to be influenced by non-legal factors. Given the impropriety of substantial judicial intervention into managerial decision-making, perhaps the focus should be on the scope for corporate governance to evolve through changing societal undertones without any realistic enforcement avenues. That societal attitudes towards CSR are changing is apparent across jurisdictions. For example, following *Roe v Wade* being overturned in the United States,[167] many companies pledged to pay employees' travel expenses to states allowing abortions.[168] Those companies were not required to do so, but either saw some moral imperative in standing behind employees or some ulterior financial gain to be achieved by taking a stance held by the majority.[169] Elsewhere, corporations globally spent money rushing to remove their operations from Russia after the Ukraine invasion, sacrificing any profits gained from the country during their hiatuses.[170] These examples show that stakeholder consideration across jurisdictions is accelerating independently of regulatory developments.

4 The Companies (Directors Duties) Amendment Bill

In New Zealand, this trend towards greater stakeholder recognition[171] may be aided by a Bill confirming the legitimacy of stakeholder governance within s 131.[172] The Bill amends

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[165] See Morgan P Miles and Jeffrey G Covin "Environmental Marketing: A Source of Reputational, Competitive, and Financial Advantage" (2000) 23 JBE 299 at 300.

[166] See *Mountfort v Tasman Pacific Airlines of NZ Ltd* [2006] 1 NZLR 104 (HC) at [31].

[167] *Dobbs v Jackson Women's Health Organisation* 2022 US 3057.

[168] Andrew Edgecliffe-Johnson "US business treads cautious line after Supreme Court abortion ruling" (June 25 2022) Financial Times <www.ft.com>.

[169] Hannah Hartig "About six-in-ten Americans say abortion should be legal in all or most cases" (June 13 2022) Pew Research Center <www.pewresearch.org>.

[170] Jeffrey Sonnenfeld and others "Over 1,000 companies have curtailed operations in Russia – but some remain" (September 8 2022) Yale School of Management <som.yale.edu>.

[171] PM Vasudev, above n 118, at 120.

[172] Companies (Directors Duties) Amendment Bill 2021 (75-1).

the statutory duty of good faith to permit directors to consider: Te Tiriti o Waitangi, reducing adverse environmental impacts, high standards of ethical behaviour, fair and equitable employment practices and the interests of the wider community during decision-making.[173] The Bill is unlikely to serve more than a clarificatory function for directors already implementing stakeholder governance.[174] Deliberately beginning with the phrase "to avoid doubt", the Bill affirms principles avoided in *Debut Homes* (on the legitimate basis that they were not at issue) but already utilised in boardrooms across the country.[175] Given this explicit disclaimer, and the Bill's permissive nature, directors are ultimately likely to continue business as usual – either comforted that the stakeholder-centric approach has been enshrined in legislation or dismissive in the continued pursuit of short-term profit.

To an extent, this can be contrasted with the United Kingdom's duty, which *requires* directors to have regard to the listed factors backed by reporting obligations.[176] While this explicitly retains shareholders as the ultimate beneficiaries of stakeholder consideration, directors are unable to dismiss stakeholders entirely.[177] Responsible MP Dr Duncan Webb has indicated willingness to amend the Bill, including mandating consideration of the listed factors, if shown the right support.[178] However, he has expressed caution at the prospect of turning "company law on its head without the approval of the wider government".[179] Moreover, the arduous political campaigning that would be necessary to obtain wider governmental support may overshadow the Bill's purpose: to confirm the viability of, rather than indicate a policy shift to, stakeholder governance.[180]

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[173] Clause 4.

[174] Joe Windmeyer "Amending directors' duties for company stakeholders" (4 October 2021) Russell McVeagh <www.russellmcveagh.com>.

[175] *Debut Homes*, above n 28, at [28]-[31]. See also The Public Law and Policy Team *Watching Brief – September 2021* (27 September 2021) Russell McVeagh <www.russellmcveagh.com>.

[176] Companies Act 2006 (UK), s 414CZA; inserted by the Companies (Miscellaneous Reporting) Regulations 2018 (UK), reg 4.

[177] Above n 82 and 83.

[178] Joe Windmeyer, above n 174.

[179] Interview with Dr Duncan Webb, MP (Steven Moe, Seeds Podcast, October 3 2021) at 57 minutes.

[180] At 51 minutes.

C Conclusion on political intervention in corporate governance

As the Bill goes through the Parliamentary process, the Government will be faced with the choice whether to amend its wording to reflect greater stakeholder representation. The argument against increasing the number of parties to whom duties are owed is twofold, based on the impropriety of political interference in corporate governance and the untrammeled discretion that may result from overly elevating stakeholder interests.

It is apparent from the United Kingdom's approach that meaningful stakeholder-centric reform must involve corresponding implementation of an enforcement mechanism. Without this, stakeholders could not enforce their own interests and would struggle to convince others entitled to pursue actions against the company to do so. If expanding the ambit of stakeholder governance without mandating stakeholder consideration underpins the change, perhaps the Bill's wording should stay merely permissive. However, if meaningfully improving New Zealand's CSR performance is desired, more must be done to ensure the Bill has the teeth lacking in its United Kingdom counterpart.

To enact meaningful change, one could imagine a derivative action allowing corporate stakeholders to bring an action on behalf of the company where appropriate. The *Vrij v Boyle* test – generally focusing on whether a prudent business person would bring the action – could be supplemented by an additional requirement for a stakeholder to prove a sufficiently close relationship with the company.[181] However, to mandate stakeholder consideration and implement a corresponding enforcement mechanism would be a legislative overreach. To do so would either place directors or the courts in an impossible position. As outlined above at various points, stakeholder interests often directly conflict with each other and with shareholder interests.[182] Where the number of interests and parties to be considered multiplies, the courts may be left with the task of distinguishing and prioritising those interests for directors where decisions are challenged.[183]

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[181] *Vrij v Boyle*, above n 121, at 765.

[182] See above at pt III.

[183] An extended duty may leave directors with 'the mischief of serving two masters': *BTI 2014 LLC v Sequana SA and others*, above n 1, at [244] and [266].

As such, a strict judicial approach to liability alongside duties to consider stakeholders may involve the courts substituting their judgment for directors – a step beyond the courts' proper role in governance accountability.[184] The additional danger for that approach given the conflicting interests at play is that each directorial decision would conceivably be challengeable. A decision to cut costs by moving production offshore may breach new duties owed to employees and the wider community,[185] whereas the inverse decision may breach existing duties owed to the company if operations could be more efficient elsewhere.[186] Conversely, a more deferential approach to liability may leave directors with an untrammeled discretion. That bilateral concern proved the main obstacle to the United Kingdom Steering Group recommending a pluralist approach during its reform process.[187]

Overall, directors occupy a commercial niche within which the courts must be careful, evidenced by the courts' hesitancy to intervene in commercial matters. As such, regulators must take care not to overly prescribe boundaries beyond 'light-touch' regulation.[188] That leaves the legislature with very few options. In its present, permissive state, the Bill sets no hard limits on stakeholder consideration, rendering it unenforceable by aggrieved stakeholders. Though to enact meaningful change would necessitate the simultaneous imposition of heavy-handed enforcement mechanisms, either skewing the balance of power too far towards directors or to the courts.

An enticing alternative option is to mandate stakeholder consideration without any accompanying enforcement mechanisms, openly and explicably following the United Kingdom to consideration without enforceability. If accompanied by an equivalent to the s 172 report,[189] compliance with the stakeholder portion of the duty would then become a

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[184] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832.

[185] Companies (Directors Duties) Amendment Bill (75-1), cl 4(d) and (e).

[186] Michael Spence "Whither the ESG Revolution?" (September 8 2022) Project Syndicate <project-syndicate.org>.

[187] *Modern Company Law: Developing the Framework*, above n 81, at 3.24.

[188] Helen Anderson and Wayne Gumley, above n 72, at 43.

[189] Above n 90.

de facto disclosure regime. Such regimes are common for governments seeking to improve CSR while staying within appropriate regulatory limits,[190] and have been utilised in New Zealand previously to address CSR-related issues.[191] This would accord with concurrent regulatory measures which aim to restrain corporate performance without undue interference into management or individual autonomy, to be discussed below.

V Libertarian paternalism: shaping social norms through law

Traditionally, CSR has been a voluntary undertaking.[192] Its justification falls under one of two lines of reasoning: the moral/normative line asserts that corporations exist to benefit society, which can only be done by upholding obligations to society's various facets; or the business line asserts that serving societal needs will ensure corporations remain profitable in future.[193] From this idea developed mandatory CSR: imposing wider societal obligations onto corporations through law.[194] However, regulatory bodies imposing mandatory CSR are subject to limits beyond which it would be inappropriate to tread. Those limits are set generally by the failure of top-down, command-and-control mechanisms in addressing relevant harms,[195] and the general preservation of autonomy[196] held as inherently valuable by rational actors in a free society.[197] Where those limits are met, non-substantive approaches may be used to supplement the space beyond the appropriate level of government intervention into corporate policy.[198]

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[190] Li-Wen Lin, above n 43, at 432.

[191] See for example Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021.

[192] Ronen Shamir "Capitalism, Governance, and Authority: The Case of Corporate Social Responsibility" (2010) 6(1) Annu Rev Law Soc 531 at 531.

[193] Elena A Iankova "From corporate paternalism to corporate social responsibility in post-Communist Europe" (2008) 29 JCC 75 at 76.

[194] Li-Wen Lin, above n 43, at 430.

[195] Ronen Shamir, above n 192, at 535.

[196] Cass R Sunstein and Richard H Thaler "Libertarian Paternalism is not an Oxymoron", above n 22, at 1160.

[197] Horacio Spector "Autonomy" in Gerald F Gaus and Fred D'Agostino (eds) *The Routledge Companion to Social and Political Philosophy* (Routledge, New York, 2013) 573 at 573.

[198] Cass R Sunstein *Why Nudge? The Politics of Libertarian Paternalism* (1st ed, Yale University Press, New Haven, 2014) at 133-4.

Libertarian paternalism, or soft paternalism,[199] involves developing choice frameworks so as to nudge subjects towards optimal choices.[200] Hard paternalism involves placing limits on voluntary choices.[201] Libertarianism involves the removal of restrictions entirely – permitting actors to decide as they see fit without prescribing mandatory regard to any considerations.[202] Libertarian paternalism sits between the two extremes.[203] Given the evidence suggesting that nudging measures are effective,[204] libertarian paternalism has recently become an increasingly utilised regulatory tool.[205] The most frequently utilised tool across CSR regulation is imposing mandatory reporting obligations on corporations, which seek to influence consumer and investor behaviour by increasing the information available on a corporation's performance.[206] This part analyses New Zealand's libertarian paternalistic measures as an alternative to interference with substantive behaviour within corporate governance.

A Legislative messaging

Statutory language can be crafted to express normative statements about desired outcomes without mandating behavioural change. Hortatory statutes may seek to encourage than mandate, using legislative language that carries normative meaning without the

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[199] Jan Schnellenbach "Nudges and norms: On the political economy of soft paternalism" (2012) 28 EJPE 266 at 266.

[200] Richard H Thaler and Cass R Sunstein *Nudge: Improving decisions about health, wealth and happiness*, above n 21.

[201] Jason Hanna "Hard and Soft Paternalism" in Kalle Grill and Jason Hanna (eds) *The Routledge Handbook of the Philosophy of Paternalism* (Routledge, United Kingdom, 2018) 24 at 24. See also Julia Marshall-Mead "Freedom and fairness in retirement villages: an analysis of the regulatory framework" (2019) 9 NZFLJ 149 at 154.

[202] Mitchell East and Olivia Klinkum "Intractable problems or a case of the wrong tools?" [2022] NZLJ 2 at 3.

[203] Cass R Sunstein and Richard H Thaler "Libertarian Paternalism is not an Oxymoron", above n 22, at 1160.

[204] See generally Cass R Sunstein "Nudges.gov: Behaviorally Informed Regulation" in Eyal Zamir and Doron Teichman (eds) *The Oxford Handbook of Behavioural Economics and the Law* (Oxford University Press, United Kingdom, 2014) 719.

[205] At 720.

[206] Li-Wen Lin, above n 43, at 432-3.

corresponding enforceability typical of statutory expression.[207] The Companies (Directors Duties) Amendment Bill exhibits elements of normative statutory messaging.

1 Normative messaging in the Companies (Directors Duties) Amendment Bill

That the Bill lacks substantive force is apparent from its wording. The only addition it makes to the principal Act is a provision beginning with "to avoid doubt". Such phraseology is common where statutory provisions serve no more than clarificatory functions, explicitly enshrining what was already a legitimate pathway.[208] Such provisions act as a supplement for the provision that originally casted the doubt; in this case, the uncertain scope of shareholder primacy within s 131.[209] Whereas the case has been made for a permissive framework above, the extent of stakeholder consideration permitted would not be evident to directors with merely a surface level understanding of the law.[210] Following enactment, directors will be presented with a glaringly obvious statement of the law as it relates to stakeholder recognition.

Moreover, the Bill may have additional force beyond illuminating the viability of stakeholder governance. The law may play an expressive role in influencing social norms by promoting behaviour without corresponding enforcement activity – having effect only in its ability to signal and encourage change.[211] Selwyn Coles argues that the Bill's primary function is communicatory, given that the subject matter it encompasses is 'morally loaded', and therefore inappropriate for substantive intervention.[212] The case for the accuracy of that statement has been made above, as this paper has argued that directors duties is not a proper place for significant interventionism.

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[207] Jacob E Gersen and Eric A Posner "Soft law: lessons from Congressional practice" (2008) 61(3) Stan L Rev 573 at 584-5.

[208] Selwyn Gordon Coles "The Companies (Directors Duties) Amendment Bill [2022] NZLJ 99 at 99-100. For other examples of provisions using the phrase 'to avoid doubt', see Immigration Act 2009, s 14(2); and Accident Compensation Act 2001, s 21B(6).

[209] Ross Carter, above n **Error! Bookmark not defined.**, at 822-3.

[210] Julia Maskill, above n 42, at 298.

[211] Cass R Sunstein "On the expressive function of law" (1996) 144 U Pa L Rev 2021 at 2032.

[212] Selwyn Gordon Coles, above n 208, at 101.

The normative force of the Bill appears in greater detail when compared to the United Kingdom's equivalent duty. The Bill's explanatory note includes language that explicitly contravenes notions of shareholder primacy, stating that commercial profit need not be the sole or primary objective of corporations, and that directors can take into account matters other than the financial bottom-line.[213] Whereas United Kingdom directors must retain a central focus on 'members' throughout, rendering the listed factors in s 172 no more than mandatory considerations to an end of financial health, New Zealand directors will be afforded greater scope to make decisions without benefit to existing or future shareholders following enactment. If enacted in the same format, this confirmation is likely to be a source of great relief for companies operating between social enterprises and profit-driven entities, and entities who are beginning to recognise either the financial value or moral imperative of improving their CSR presence.

B Disclosure regimes

Within the libertarian paternalism umbrella sits the act of encouraging social norms – influencing the decision-making of private individuals and their interactions within private transactions.[214] The policy objectives of nudging sit within broader discussions of the State's mandate to intervene in the lives of citizens.[215] Recognising that the limits of appropriate intervention often fall short of the change necessary to deliver desired results, libertarian paternalism prefers options that preserve individual welfare while supporting those that seek the desired outcomes.[216] The key theme of libertarian paternalistic regulatory techniques is the development of a choice framework within which subjects are led towards certain outcomes while retaining the ability to choose throughout.[217] Jones et

[213] Companies (Directors Duties) Amendment Bill (75-1) (explanatory note).
[214] Jan Schnellenbach, above n 199, at 270.
[215] Rhys Jones, Jessica Pykett and Mark Whitehead "Governing temptation: changing behaviour in an age of libertarian paternalism" (August 2011) 35(4) PHG 483 at 483-4.
[216] Ludger Heidbrink "Libertarian paternalism, sustainable self-binding and bounded freedom" in Dieter Birnbacher and May Thorseth (eds) *The politics of sustainability: philosophical perspectives* (Routledge, New York, 2015) 173 at 174.
[217] Cass R Sunstein "Nudges.gov: Behaviorally Informed Regulation", above n 204, at 726.

al argue that the retention of personal agency within libertarian paternalistic policies contributed to its growing popularity among regulatory techniques employed in the United Kingdom.[218] Recent reforms in New Zealand impacting CSR-adjacent areas exhibit libertarian paternalistic ideals, including supplying investors with better information about companies' CSR practices and creating financial incentives for sustainable behaviour.

1 ESG investing: sustainability in the capital markets

ESG investing is a relatively recent phenomenon, ever-growing in popularity in New Zealand and abroad.[219] ESG is often unnecessarily conflated with CSR generally despite the nuanced distinction between the two. While CSR generally is the operation of the company in accordance with moral or social obligations (though increasingly legal obligations as well), ESG investing is the process of evaluating companies and investment opportunities based on specified non-financial criteria.[220] Investors assess company performance against the three criterion before factoring in that assessment to their investment decision. As such, its focus is generally on investors rather than management – hence the inclusion of a company's governance within the evaluation.

Investors are free to choose against which strategy they invest their capital. Those doing so on a relative basis compare companies' ESG ratings against others in their industry, investing only in companies that perform well within their particular industry.[221] Within an exclusionary strategy, investors exclude companies involved in problematic industries (such as fossil fuels) themselves seen to be poor performers.[222] However, investors can also invest with a view to improving companies' practices rather than divesting companies

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[218] Rhys Jones, Jessica Pykett and Mark Whitehead "The Geographies of Policy Translation: How Nudge Became the Default Policy Option" (2014) 32(1) EP 54 at 59.
[219] For example, Google searches in New Zealand for the term "environmental, social and corporate governance" have tripled in popularity between September 2004 and March 2022, and Google searches worldwide for the same term have quintupled in popularity between March 2005 and May 2022. See Google Trends "Environmental, social and corporate governance (topic)" (online looselead ed, Google).
[220] Brendan Bradley *ESG Investing* (1st ed, Wiley, United States, 2021).
[221] Lewis Braham, above n 34, at S3-4.
[222] At S3-4.

from their portfolios entirely. This approach is more likely to be pursued by institutional investors with larger shareholdings.[223]

The investment decisions of autonomous individuals are inappropriate for government intervention. Morals against which to invest differ between parties, as “there is no consensus on the threshold beyond which inequality becomes intolerable or even toxic”.[224] For the State to devise an outright paternalistic set of criteria against which investors would be required to invest would be an overreach. Private individuals cannot be forced to choose low-emissions investments – a proposition that applies equally to entities viewed as performing well in the social and governance metrics.[225] Tacit endorsement of the concept and measures that enable investors to make more informed decisions in accordance with ESG criteria are more justifiable. This section examines measures in place that seek to do so – limiting government intervention to libertarian paternalistic nudges rather than mandating substantive behavioural change.

2 Influencing responsible investment

Mandatory disclosure regimes are the most common of the CSR regulatory techniques used globally.[226] Mandated disclosure gives the subject more information to inform their choices, commonly used where unsophisticated parties interact with complex entities where an information barrier would otherwise exist.[227] Investors purchasing financial products in the capital markets would fall into that category. Mandated disclosure offers the investor more information about a company’s sustainability practices, to inform the prospective shareholder and update the current shareholder about matters relevant to the ESG sphere.

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[223] See for example *Mohamed v Guardians of New Zealand Superannuation* [2021] 2 NZLR 612; [2021] NZHC 512 at [22].

[224] Michael Spence, above n 186.

[225] New Zealand Productivity Commission “Low-emissions economy” (NZPC, August 2018) at 179.

[226] Li-Wen Lin, above n 43, at 433.

[227] Omri Ben-shahar and Carl E Schneider “The Failure of Mandated Disclosure” (2011) UPA L REV 647 at 649-50.

The Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act is one critical mandated disclosure method that has been recently introduced.[228] The Act introduced reporting requirements within annual reports for 'climate reporting entities' (including large listed issuers and registered banks) with the risk of criminal and civil penalties for non-compliance.[229] The success of the regime depends on three elements: disclosers must provide the relevant information; disclosees must read it; and disclosees must make 'better' decisions (though noting investment decisions on moral lines are incapable of being *objectively* good) after reading the relevant information.[230] The required reports will be mandated from FY23, and – for many companies – will only codify reporting practices that have been voluntarily undertaken for some time.[231]

When the legislation takes hold to require disclosures from eligible entities, investors could thereafter compare those entities' reports against others' to determine where to invest their capital. For instance, the agriculture, forestry and fishing sector was responsible for 50 per cent of New Zealand's net emissions in 2020, amounting to 39.4 million tonnes of CO_2 (Mt CO_2 -e).[232] That year, two listed entities (Synlait and A2 Milk) were responsible for emitting a combined 1.518 Mt CO_2 -e.[233] Of those, Synlait were the only company to have voluntarily published sustainability greenhouse gas inventory reports (containing similar information to what will fall within the disclosure regime).[234] As such, prospective investors could only compare the two companies' sustainability practices based on the lowest common denominator: information proactively released by A2 Milk of a lower level of detail than that published by Synlait.[235] The required disclosure will reduce information

[228] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021.
[229] Section 8; inserting pt 7A into the Financial Markets Conduct Act 2013.
[230] Omri Ben-shahar, above n 227, at 665.
[231] Meridian Energy Limited *Meridian Integrated Report 2022* (online looseleaf ed, Meridian) at 39. See for example Meridian Energy Limited *2019 Climate Risk Disclosures* (online looseleaf ed, Meridian).
[232] Ministry for the Environment *New Zealand's Greenhouse Gas Inventory 1990-2020* (online looseleaf ed, MfE) at 2. See also appendix 1.
[233] A2 Milk *Annual Report 2020* (online looseleaf ef, A2 Milk) at 27; and Synlait Milk *Greenhuse Gas Inventory Report – FY20* (online looseleaf ed, Synlait Milk) at 23.
[234] Synlait Milk *Greenhuse Gas Inventory Report – FY20*, above n 233; and Synlait Milk *2020 Sustainability Report* (online looseleaf ed, Synlait Milk).
[235] See appendix 2.

asymmetry for investors seeking to compare the two companies, allowing them to make a more informed decision about which company is more likely to be worthy of investment.

While examining the dairy sector, though, one glaring deficiency becomes apparent. With its focus on investors, unlisted companies that do not engage with the capital markets are generally excluded from the legislation. While including large, listed entities captures many of New Zealand's largest emitters, a number are also excluded. Between New Zealand's largest dairy processing emitters, over 3 Mt CO_2 -e across 10 unlisted companies would have been left without the need for further disclosure during FY20.[236] With the general aim of the legislation being the provision of further information for participants in the financial markets and more efficient allocation of capital during the transition to a low-emissions economy, the inclusion of unlisted, non-public companies is generally unhelpful.[237]

The above calculation excludes Fonterra Co-operative Group Ltd, who – in 2019 – held an 81 per cent market share in the dairy sector compared to Synlait Milk's 4 per cent.[238] Fonterra's total emissions for FY20 were 23.564 Mt CO_2 -e; over 15 times higher than Synlait's for the same year.[239] Fonterra is not listed with NZX.[240] However, the regime was designed to ensure entities considered to have a "higher level of public accountability" are captured.[241] Fonterra is included by virtue of its place within the Fonterra Shareholders'

[236] Environmental Protection Authority "ETS Participant Emissions" (Environmental Protection Authority, October 2021) at 27.

[237] Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill (30-1) (Explanatory note). See also New Zealand Productivity Commission, above n 225, at 192.

[238] Philip Barry and Hannah Pattullo *The Dairy Sector in New Zealand* (New Zealand Productivity Commission, October 2020) at 8.

[239] Fonterra Co-operative Group *Fonterra sustainability report 2020* (online looseleaf ed, Fonterra) at 47. See also Appendix 2.

[240] Though note Fonterra does have debt listed on the NZX Main Board: see NZX "Fonterra Shareholders' Fund (NS) NZX <nzx.com>; and Theodore Rose "Time is running out: The urgency of mandatory environmental disclosure in New Zealand Securities Market Law" (LLB (Hons) Dissertation, University of Otago, 2019) at 51. See also Co-operative Companies Act 1996, s 3.

[241] Financial Markets Conduct Act 2013, s 461O; to be inserted by the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021, s 8.

Market,[242] itself a separate market operated by NZX and ensuring that Fonterra qualifies as a "large listed issuer" (and therefore a climate reporting entity).[243]

The inclusion of co-operative or private companies – such as Fonterra and registered banks – may not achieve the legislative goal. As a co-operative group, Fonterra's shareholders are almost exclusively its suppliers (farmers), with shares in the co-operative itself not available to the public. Approximately 90 per cent of Fonterra's emissions come from on-farm livestock, meaning disclosure primarily informs supplier-shareholders of their own emissions.[244] As such, it cannot fulfil the purpose of informing prospective investors of the risks of investing – though Fonterra's inclusion may still achieve the secondary purpose of informing the reporting entity itself of its role in influencing climate change.[245] Similarly, where private company shares are unavailable for public purchase the goal of public accountability is not as effectively achieved. The limited usefulness of mandated disclosure beyond publicly-listed companies may prevent such legislative measures from being truly impactful despite growing recognition for sustainability issues amongst all entities.

3 The insufficiencies of legislative nudges

Disclosure regimes are not limited to addressing environmental crises. They may be of utility wherever an information barrier exists between entity and end user. For example, disclosure regimes are regularly used to protect consumers obtaining credit.[246] Legislative measures targeting transparency and disclosure are being enacted in comparable jurisdictions to identify modern slavery within supply chains and imposing obligations on

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[242] NZX "Fonterra Shareholders' Market (FSM)" NZX <nzx.com>. See also Fonterra "Submission to the Economic Development, Science and Innovation Select Committee on the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Bill" at 1.

[243] Financial Markets Conduct Act 2013, s 6; and Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021, s 8.

[244] Fonterra Co-operative Group, above n 239, at 41. See also appendix 2.

[245] New Zealand Productivity Commission, above n 225, at 191. Mandated disclosure may also subject the entity to unwanted media attention, encouraging the company to improve their behaviour to avoid the 'blacklist': Richard H Thaler and Cass R Sunstein, above n 21, at 193.

[246] Omri Ben-shahar, above n 227, at 653. See for example Credit Contracts and Consumer Finance Act 2003, s 17 and sch 1.

entities to address the issue.[247] In the United Kingdom, commercial organisations of a specified size are required to prepare and publish slavery and human trafficking statements outlining, inter alia, the entity's policies in relation to slavery and human trafficking and its effectiveness in ensuring that slavery and human trafficking is not taking place within its supply chains.[248] Following enactment, the legislation had a significant nudging effect on consumers, investors and staff. Within one review, 97 per cent of respondents reported reputational risk from public worker abuse found in supply chains, and company awareness of investors as a strong driver in addressing modern slavery had increased 25 per cent.[249]

Critics of the United Kingdom legislation point to the minimal action necessary for relevant companies to comply with their legislative obligations, as companies often merely publish "generic statements committing to fight modern slavery without explaining how".[250] Though if the legislation were merely intended to be a disclosure regime, publication of the appropriate statements would be enough to achieve the provision of further information to end users. Companies publishing underwhelmingly generic statements would be left behind by consumers and investors as other companies won the 'race to the top' to protect human rights.[251]

Perhaps that suggests the idea of moral repugnance is influential in setting intervention standards. Few would disagree that modern slavery and child labour deserve total condemnation and eradication.[252] Thus, perhaps a nudge is not enough to address such a universally refuted practice. An independent review of the United Kingdom legislation recommended removing the option for companies to report that they have taken no steps

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[247] Selwyn Gordon Coles and Kathryn Helen Brunt "What is modern slavery legislation and does New Zealand need it?" [2021] NZLJ 300 at 302.
[248] Modern Slavery Act 2015 (UK), s 54.
[249] Quintin Lake and others *Corporate Leadership on Modern Slavery: How have companies responded to the UK Modern Slavery Act one year on?* (November 2016) at 8-9.
[250] Business and Human Rights Resource Centre *FTSE 100 & the UK Modern Slavery Act: From Disclosure to Action* (November 2018) at 03.
[251] Selwyn Gordon Coles and Kathryn Helen Brunt, above n 247, at 302.
[252] Michael Spence, above n 186.

to address modern slavery.[253] Conversely, the preservation of individual and commercial autonomy is a key tool in New Zealand's climate-related disclosure as discussed, and indeed in libertarian paternalism generally. Requiring companies to implement change on environmental issues concurrently with their disclosure obligations under the climate disclosure regime would presumably have been met with more resistance.

New Zealand is set to introduce modern slavery legislation. The Government has indicated its opposition to the general disclosure approach given evidence that such regimes do not lead to a "critical mass" of behaviour change across targeted groups (including investors).[254] Instead, a due diligence approach has been the preference throughout the reform process thus far. That approach would require 'medium and large' entities to audit supply chain partners and take 'reasonable and proportionate' actions where slavery or worker exploitation is found, accompanied by more expansive and prescriptive disclosure obligations.[255] Large entities (annual revenue higher than $50m) would be subject to a more onerous due diligence regime throughout international and domestic supply chains, further exhibiting increased willingness to mandate substantial behavioural change in the area.[256] New Zealand's legislative proposition shows that the justification for substantive or suggestive interpretation can also vary along compliance cost lines,[257] as well as the moral repugnancy of the subject matter and the general importance of autonomy.[258]

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[253] Frank Field, Maria Miller and Baroness Butler-Sloss *Independent Review of the Modern Slavery Act* (Home Office, CP 100, May 2019) at 41.

[254] Ministry of Business, Innovation and Employment *A legislative response to modern slavery and worker exploitation: Towards freedom, fairness and dignity in operations and supply chains* (MBIE, ISBN 978-1-99-102209-7, April 2022) at 37.

[255] At 58.

[256] At 60.

[257] Cass R Sunstein and Richard H Thaler "Libertarian is not an oxymoron", above n 22, at 1166; and Ronen Shamir "Corporate Social Responsibility: Towards a New Market-Embedded Morality" (2008) 9(2) Theo Inq L 371 at 372.

[258] Jason Hanna "Hard and Soft Paternalism", above n 201, at 25; and Mark D White "Paternalism, Moralism, and Markets" in Gerald F Gaus and Fred D'Agostino (eds) *The Routledge Companion to Social and Political Philosophy*, above n 197, at 789.

Disclosure regimes are intentionally ineffective beyond driving a 'race to the top', wherein qualifying entities compete for investor (and consumer) interaction after disclosure of the necessary information.[259] When considering their scope, governments consistently walk tightropes between libertarian paternalistic intervention only, and the imposition of minimum standards not explicitly regulating CSR but indirectly impacting those subject areas.[260] Issues deemed critical enough (such as labour and human rights law) are consistently legislated on, justifiably without deferring to the importance of autonomy because the consequence of an exercise of that autonomy would be the contravention of basic rights.[261] Naturally, debate in these fields ensues about where to place the limits themselves – often settled by where the balance of Parliamentary power sits at any time. Beyond issues worthy of an elimination approach, mandatory disclosure regimes represent a key, libertarian paternalistic tool in the legislative toolbox to shape corporate performance without overstepping. The political mandate for substantial or suggestive intervention also varies based on the fallacy of human rationality, increasingly studied and accounted for in regulation through the discipline of behavioural economics.

C Behavioural economics in environmental regulation

Behavioural economics has played an increasingly significant role in regulation and regulatory theory recently.[262] Generally, behavioural economics identifies the shortcomings of the rational choice theory – that individuals have transitive preferences and make beneficial choices for themselves when given options[263] – to instead assert that humans often make decisions irrationally.[264] Individuals regularly fall short of rationality

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[259] Selwyn Coles and Kathryn Brunt, above n 247, at 302.
[260] Kevin Campbell and Douglas Vick, above n 45, at 242.
[261] Li-Wen Lin, above n 43, at 431. See also Kevin Campbell and Douglas Vick, above n 45, at 242.
[262] Cass R Sunstein "Nudges.gov: Behaviorally Informed Regulation", above n 204, at 719.
[263] Thomas S Ulen "Rational Choice and the Economic Analysis of Law" (1994) 19(2) L & Soc Inquiry 487 at 488.
[264] Thomas S Ulen "The Importance of Behavioural Law" in Eyal Zamir and Doron Teichman (eds) *The Oxford Handbook of Behavioural Economics and the Law*, above n 204, at 93-4.

for a number of reasons.[265] Those defects may influence individuals to make decisions with environmental consequences,[266] and reduce the political mandate the State has for substantive intervention in environmental policy.[267]

Cass and Sunstein argue that excessive pollution is caused by two market deficiencies. First, market actors are faced with a lack of feedback on their individual contributions.[268] As the Court of Appeal recently noted, every person in the world is both responsible for causing the harm and the victim of that harm.[269] Emitters are largely unaware of the extent to which their actions contribute to climate change. Even large companies whose emissions are tracked remain ignorant about the extent of their blameworthiness – a product of the current inability of attribution science to map climate-related weather events to individual emitters.[270] Second, market incentives are not properly aligned; engaging in environmentally costly behaviour results in no individual consequences, yet collectively a "tragedy of the commons"[271] threatens each and every market actor without regard for individual blameworthiness.[272]

The second deficiency presents an issue for regulators. The more invisible a social harm is, the less justification one has to legislate for substantive behavioural change (thereby limiting the subject's autonomy).[273] If one values commercial autonomy,[274] regulation requiring companies to substantially reduce their emissions would seemingly impose

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[265] See Nick Wilkinson *An Introduction to Behavioural Economics* (1st ed, Palgrave Macmillan, New York, 2008) at 49; and Thomas S Ulen "Rational Choice and the Economic Analysis of Law", above n 263, at 492.

[266] See for example Nick Wilkinson, above n 265, at 255.

[267] See Ralph Winkler "Valuation of ecosystem goods and services part 1: An integrated dynamic approach" 59 (2006) Ecol Econ 82 at 85, where it is argued (albeit in the international context of the Kyoto Protocol) that regulatory limits on environmental policy are set not by value calculation, but by political negotiation.

[268] Richard H Thaler and Cass R Sunstein, above n 21, at 187.

[269] *Smith v Fonterra*, above n 13, at [18].

[270] Helen Winkelmann, Susan Glazebrook and Ellen France, above n 151, at [109].

[271] See below at 288.

[272] Richard H Thaler and Cass R Sunstein, above n 21, at 187.

[273] Andrew Simester and Warren Brookbanks "Paternalism" in *A to Z of New Zealand Law* (online ed, Thomson Reuters) at [20.21.4].

[274] The retention of autonomy is a key tenet of reform along libertarian paternalism lines: Cass R Sunstein *Why Nudge? The Politics of Libertarian Paternalism*, above n 198, at 138.

disproportionate obligations on individual emitters given the disconnect between action and harm and New Zealand's limited contribution to climate change globally. To address this issue, regulators use emissions trading regimes to preserve individual autonomy while realigning incentives for corporations to act sustainably.

1 The Emissions Trading Scheme

New Zealand's emissions trading scheme (the Scheme) is the key tool adopted to regulate local greenhouse gas emissions.[275] Implemented to aid New Zealand's obligations under the Kyoto Protocol,[276] the Scheme creates valuable carbon units which must be surrendered by qualifying entities and can be received by offsetting entities.[277] Significant emitters (such as fossil fuel producers) are required to acquire and surrender units to cover their emissions, whereas other entities (for instance landowners with forestry holdings) receive free units to cover their own emissions.[278] Others voluntarily enter the market purely to trade emissions units.[279] Under the Scheme, then, entities are charged for excessive pollution and rewarded for sustainable behaviour.

Schemes of the type are consistent with libertarian paternalistic ideals as parties are free to continue emitting at extreme levels; they simply must pay for the social harm caused by that behaviour.[280] The market then dictates activity. As the price of the harmful action increases, consumption declines.[281] If the Scheme is effective, it no longer becomes *economically* sustainable for companies to emit as they once did freely. One need not worry about the extent to which companies should exhibit moralistic decision-making if sustainability is more immediately profitable than destructiveness.

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[275] *Smith v Fonterra Co-operative Group Ltd* [2020] 2 NZLR 394; [2020] NZHC 419 at [46].

[276] *Kyoto Protocol to the United Nations Framework Convention on Climate Change* FCCC/CP/1997/L.7 (10 December 1997).

[277] *Smith v Fonterra Co-operative Group Ltd*, above n 275, at [48]-[49]. See also the Climate Change Response Act 2002, pt 4.

[278] *Emissions trading scheme major design features* (Ministry for the Environment, Factsheet 3, September 2007) at 2.

[279] At 2.

[280] Richard H Thaler and Cass R Sunstein, above n 21, at 188.

[281] At 188.

Mere nudges in the face of the global warming crisis may initially appear “an effort to capture a lion with a mousetrap”.[282] However, there is evidence that nudging makes for effective policy,[283] and – if successful – can lower compliance costs over regulatory mechanisms mandating substantive behavioural change.[284] Cass and Sunstein note the unequivocal success of an emissions trading scheme in the United States regulating the control of acid rain implemented.[285] That scheme was estimated to have saved USD$357m annually in its first five years over an equivalent command and control (substantive behavioural regulation) measure, and was estimated to have prevented 10,000 premature deaths and 14,500 cases of chronic bronchitis.[286]

2 Obscured transaction costs: the unique nature of environmental regulation

The nature of environmental harms generally renders environmental regulation a particularly delicate area for regulators. Within behavioural economics, humans tend to be affected by the ‘tragedy of the commons’[287] and the time-inconsistency of preferences in considering environmental issues.[288] A tragedy of the commons involves an increase in the number of actors in a scenario proportionately increases the influence of the least trusting and trustworthy members within the group, resulting in a race to ‘defect’ by securing one’s own payoffs without regard for other actors.[289] Wilkinson argues that this influences global problems such as pollution.[290] Moreover, economic actors regularly make time-inconsistent preferences, irrationally prioritising short-term gain without considering the

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[282] At 186.
[283] Maria C de Campos *Behavioural Economics and Regulation: The Design Process of Regulatory Nudges* (1st ed, Taylor and Francis, United Kingdom, 2022) at 98.
[284] Richard H Thaler and Cass R Sunstein, above n 21, at 188 and 190.
[285] At 189.
[286] At 190.
[287] See also above n 272.
[288] Nick Wilkinson, above n 265, at 226-7 and 347.
[289] At 347.
[290] At 347.

long term consequences of the action.[291] In the environmental context, those short term irrational decisions may harm future generations.[292]

Collectively, resources may end up inefficiently allocated where individuals act irrationally.[293] The inefficient allocation of resources may then contribute to the environmental issues that regulators must address. Moreover, if actors remain under the impression that they are acting rationally,[294] the regulator may not have the political mandate to implement more substantive regimes – for example 'command and control' mechanisms limiting emissions to a maximum threshold.[295] On this interpretation, imposing limitations on major polluters (for example) would be an immoral overreach by the legislature. This is especially relevant in the environmental context where transaction costs are largely obscured – to be experienced in the future and without direct links between the harm complained of and the responsible emitter whose autonomy has been infringed.[296]

As such, legislatures may be left with no realistic option but to develop choice frameworks so as to guide the emitting actor back to rationality. This can be contrasted with regulatory areas where harms are immediately visible and attributable. For example, where a company includes a perpetrator of modern slavery in its supply chain the link between action (interacting with the company) and harm (the continued contravention of human rights) is plainly evident. Conversely, the link between substantive intervention (an Act requiring companies to undertake appropriate due diligence)[297] and the desired "critical mass" of

[291] At 227.
[292] At 255.
[293] Jason F Shogren "Behavioural Environmental Economics: Money Pumps & Nudges" (2012) 37(3) JARE 349 at 350.
[294] See Nick Wilkinson, above n 265, at 385 for discussion of rationality in behavioural economics.
[295] Richard H Thaler and Cass R Sunstein, above n 21, at 186.
[296] Richard H Thaler and Cass R Sunstein, above n 21, at 186-7. See also Helen Winkelmann, Susan Glazebrook and Ellen France, above n 151, at [109].
[297] Ministry of Business, Innovation and Employment, above n 254, at 58 and 60.

behavioural change[298] is more clearcut.[299] Thus, the justification for limiting autonomy in the way proposed is accordingly visible.

Regulators across jurisdictions must tread carefully between autonomy preservation and the need to substantively address a prevalent social harm. In the environmental context, as outlined above, the limits of effective policy appear to be influencing consumer and investor choices through libertarian paternalistic nudges. When implementing reform improving performance in one or more CSR-related areas, the State should regularly examine the nature of the targeted harm against the intrusiveness of any intervention. The resulting legislation must remain within the identified limits – collectively comprising the appropriate extent of government intervention into CSR. Beyond those limits, addressing the various crises and issues that initially inspired the emergence of CSR must be left at the behest of the corporation, to be influenced by corporate morality and the various channels of social obligation that may stimulate behavioural change absent accompanying regulation.

VI Conclusion

As an entity, the company has had an incontrovertible impact on facilitating commerce and production for centuries. And in an ever-increasingly globalised world, companies are continuing to expand their outer limits to unimaginable levels. Though the corollary of that influence paints a grim picture. The pursuit of corporate profits has a power to corrupt that is virtually unmatched. To that end, companies were viewed solely as profit-making entities almost universally throughout the Western world until relatively recently. The primary responsibility of all those involved in a company's operations was to return a profit; all other obligations were subordinated. However, attitudes towards companies generally are

[298] At 37.

[299] Christina Stringer, Brent Burmester and Snejina Michailova *Towards a modern slavery act in New Zealand: legislative landscape and steps forward* (1st ed, University of Auckland Business School, Auckland, 2021) at 2-3.

beginning to change. Companies are beginning to be seen as entities with obligations that extend beyond the acquisition of profit and its distribution to shareholders.

CSR then emerged to describe and encapsulate these notions. During its infancy, CSR was seen as an exclusively voluntary undertaking by corporations. Any notions of government interference would have been met with outrage and indignance. However, societal attitudes to that proposition have changed over time. Perhaps the increasing size of multinational mega-corporations imposes 'state-like' obligations upon those companies.[300] Perhaps the benefits of incorporation are met with corresponding public obligations.[301] Perhaps the humanitarian crises the globe faces are too grave and severe to ignore despite the impropriety of government intervention into corporate affairs.

Regardless of the exact justification for more substantive intervention, governments across jurisdictions are continuously implementing regulatory measures dictating corporate behaviour in once-voluntary CSR obligations. The previously oxymoronic mandatory CSR is being utilised more frequently within New Zealand and across jurisdictions.[302] The only way to guarantee performance change from soulless entities is increasingly seen as transitioning voluntary undertakings to legislative initiatives.

This paper has traversed the normative justifications for interventionism into CSR, and the corresponding policy limits that result beyond that justification. One such area where legislatures and courts have been traditionally light-handed is in directors' fiduciary obligations. In New Zealand, a director's duty of good faith is included within the legal tier of corporate governance regulation. The duty has only been owed to the company, without any corresponding obligations to shareholders or corporate stakeholders themselves. This paper argued that the proposed formulation of the duty in legislation before Parliament at the time of writing is the appropriate extent of the duty. Moreover, for the legislature to stray beyond this would be an overstep. To do so would ignore the reality that the courts

[300] Kirsten Stefanik "Rise of the Corporation and Corporate Social Responsibility: The Case for Corporate Customary International Law" (2017) 54 ACDI 276 at 280-1. See also Sabina Seibert, above n 3, at 171.
[301] William G Roy "Socializing Capital: the rise of the industrial corporation", above n 48, at 245.
[302] Li-Wen Lin, above n 43, at 430.

should not be the sole arbiter of truth in commercial matters, but equally that company directors should not enjoy an untrammeled discretion in the same matters.

Mandating behavioural change is not the only tool employed by regulatory bodies seeking to influence corporate behaviour on social issues. In recent years, an increased focus has been placed on reform that follows the ideals of libertarian paternalism. Libertarian paternalism depends on the development of choice frameworks so that individuals and entities are incentivised to make choices deemed by the authority as the 'right' choices, but retaining their autonomy to adopt contradicting positions throughout. Such measures may be effective if employed concurrently with changing social norms; for example, the global trend across financial markets towards ESG investing. In New Zealand, ESG investing is set to be aided by legislation requiring qualifying entities to compile and publish climate-related disclosures regarding their emissions and environmental practices. If successful, the legislation will spark a 'race to the top' that sees companies competing to improve their sustainability practices without any behavioural mandate to do so.[303]

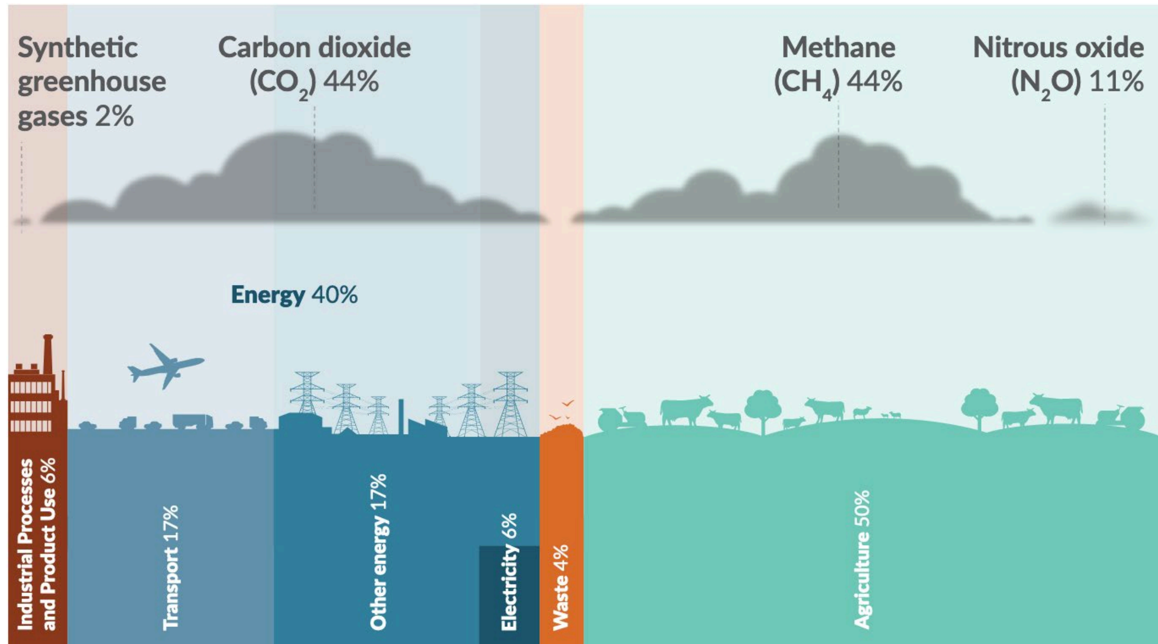
In some instances, the appropriateness of a mere nudge can be called into question. This paper has also explored opportunities to implement disclosure regimes in other areas relevant to CSR. In the employment and human rights area, a legislative proposal intending to enact a modern slavery regime for New Zealand presents an opportunity to examine the effective limits of disclosure. Where the repugnance of the behaviour outweighs the merits of legitimate moral disagreement, the State is justified in stepping beyond limits previously discussed to impose bottom lines protecting the basic rights of subjects and citizens. Those minimum standards tend to be framed as protecting subjects themselves – changing the law within which companies must operate rather than prescribing their decision-making beyond legitimate means.

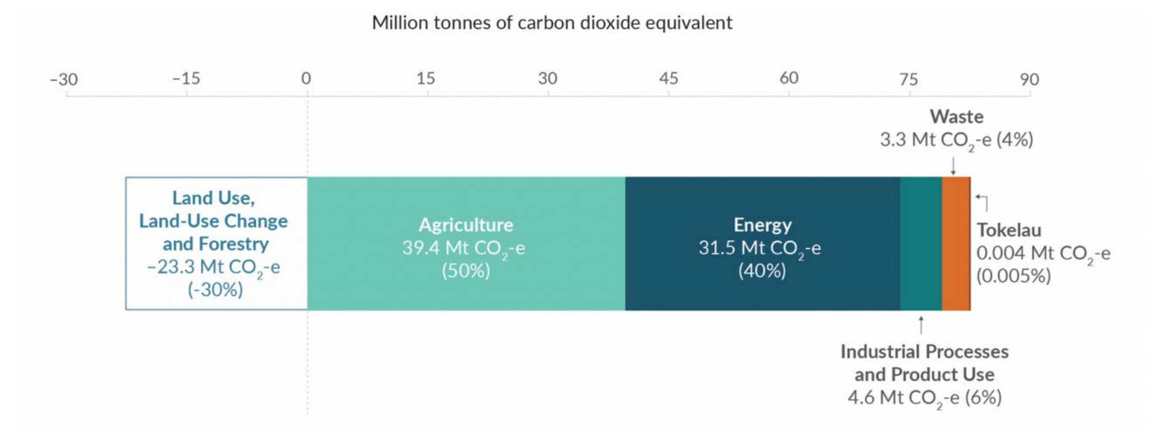
Overall, the State's role in mandatory CSR will be of critical importance in the near future. Each legislative tool described will play a role in addressing the humanitarian crises

[303] Selwyn Coles and Kathryn Brunt, above n 247, at 302.

prevalent today and those emerging in the future. The appropriateness of each regulatory method will also inevitably shift, based on the graveness of the crisis at hand and societal attitudes towards legislative intervention at the time. Though regulatory intervention alone is insufficient to alleviate those crises. Regulation can mandate bottom lines where appropriate and ‘nudge’ in the spaces beyond. The remainder of the transition from soulless entities to responsible corporate citizens rests with the companies and their composite parts themselves.

VIIAppendix 1: New Zealand greenhouse gas emissions by sector





VIII Appendix 2: FY20 emissions for Synlait Milk, A2 Milk and Fonterra GHG emissions

A2 Milk:

Metric	FY20	FY19[10]	FY18
GHG Emissions[4] (tCO_2e)			
Total	488,852	413,233	409,464
Scope 1[5]	224	206	187
Scope 2[6]	1,609	1,507	1,502
Scope 3[7]	487,020	411,520	407,775
Direct operations[8] (Scope 1, 2 and 3)	3,858	4,923	3,930
Third party processing and freight	131,273	102,288	103,869
On-farm[9]	353,722	306,022	301,665

6 Includes electricity estimates and/or extrapolations for some information not yet available.

Synlait:

Table 1: GHG Emissions by scopes

	FY18* (base year) – $tCO_{2}e$	FY19* – $tCO_{2}e$	FY20 – $tCO_{2}e$
Scope 1	114,589	120,127	133,609
Scope 2	6,923	7,035	8,804
Scope 3 (off-farm)	43,996	47,947	50,107
Scope 3 (on-farm) **	743,959	734,858	837,296
Total	**909,467**	**909,967**	**1,029,816**
Emissions intensity	1,035 per $M revenue	888 per $M revenue	834 per $M revenue***

Table 2: GHG Emissions by activities

Emissions sources	FY18 – tCO_2e	FY19 – tCO_2e	FY20 – tCO_2e
Scope 1			
LPG	470	503	586
Coal	108,301	113,643	114,082
Diesel – Milk Tankers *1	4,302	4,196	6,035
Diesel – Boiler *2	Not applicable	Not applicable	906
Distributed Natural Gas	163	169	10,058
Company Cars	73	76	84
Combi lift & Bus *3	0	125	105
Packing Gas	1,266	1,349	1,719
Rental Cars	14	46	34
Refrigerants	0	20	0
Scope 2			
Electricity	6,923	7,035	8,804
Scope 3			
Gas Transmission Losses	19	20	1,181
Electricity transmission losses	565	533	667
Waste to landfill	421	1,108	1,699
Coal & DAF transport	212	209	635
Road freight (outbound) *4	2,481	2,683	3,475
Road freight (inbound) *4	2,152	2,265	2,688
Sea freight (outbound) *4	25,540	25,151	25,831
Sea freight (inbound) *4	9,377	11,983	8,971
Air freight (outbound) *4	392	551	1,617
Air freight (inbound) *4	0	0	99
Inter-warehouse road freight *4	559	605	644
Inter-warehouse sea freight *4	307	756	1,306
Car mileage	4	9	22
Taxi	3	4	Excluded as de minimis
Air travel	1,814	1,829	1,223
Hotel	150	241	49
On-farm emissions *5	743,959	734,858	837,296
Total GHG emissions	**909,467**	**909,967**	**1,029,816**

Table 3: FY20 GHG emissions by gas type

FY20 emissions by type	Total-tCO_2e	CO_2- tCO_2e	CH_4-tCO_2e	N_2O-tCO_2e	HFC-tCO_2e
On-farm emissions	837,296	132,256	535,040	170,000	0
Off-farm emissions	192,520	187,613	3,653	1,254	0

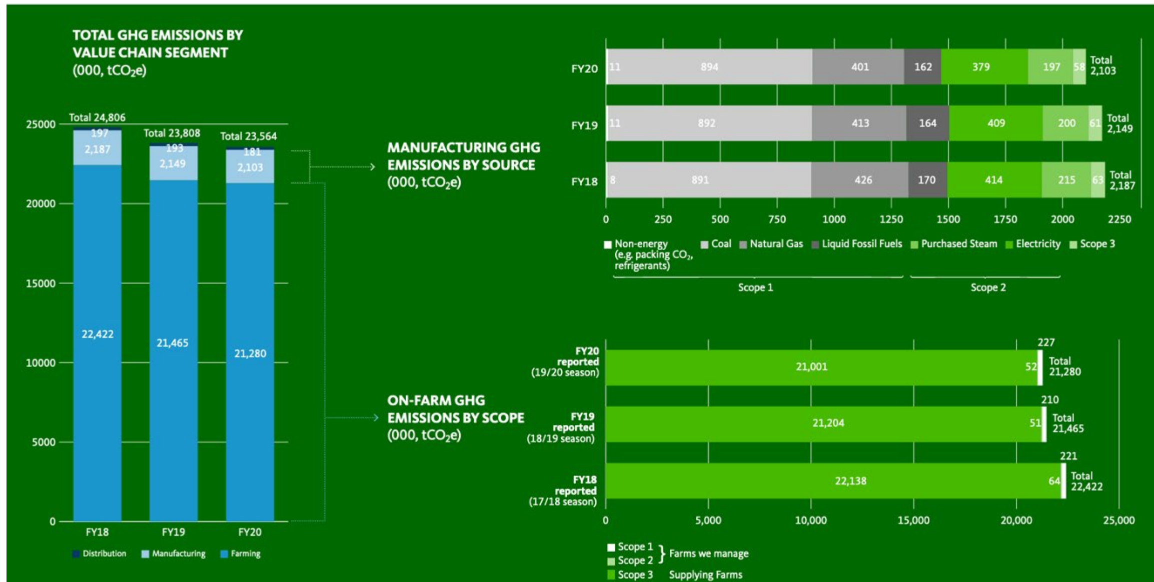
Table 4: Emissions intensity – total and per year

Emission intensity metrics	FY18 tCO_2e	FY19 tCO_2e	FY20 tCO_2e	FY28 target tCO_2e
On-farm emissions/tonne of milk solids[1]	11.69	11.51	10.92	7.60
Off-farm emissions/tonne of production[2]	1.19	1.20	1.00	0.59

Table 5: FY20 emissions intensity by gas type

FY20 emission intensity metrics	Total-tCO_2e	CO_2- tCO_2e	CH_4-tCO_2e	N_2O-tCO_2e	HFC-tCO_2e
On-farm emissions/tonne of milk solids[1]	10.92	1.72	6.98	2.22	0.00
Off-farm emissions/tonne of production[2]	1.00	0.97	0.02	0.01	0.00

Fonterra:



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