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BEING A TIDY KIWI COMPANY:

SHOULD NEW ZEALAND REQUIRE ITS COMPANIES TO REPORT ON THEIR ENVIRONMENTAL IMPACTS?

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I. Introduction

New Zealand and New Zealanders have a complex and somewhat contradictory relationship with the natural environment. While New Zealanders enjoy their country's significant natural beauty and profit from its "clean, green" image,[1] New Zealand's per capita greenhouse gas ("GHG") emissions are near to twice those of the United Kingdom[2] and the environmental cost of dairying (New Zealand's highest export earner)[3] arguably exceeds the profit made from it.[4] It is in this context that New Zealand's primary action on climate change is an emissions trading scheme ("ETS") for GHGs that does not include half of its emissions (those that come from agriculture) and would be counted as successful if it reduced emissions only minimally.[5] New Zealand did not commit to the second commitment period under the Kyoto Protocol[6] and yet the current National government continues to maintain the stance that New Zealand should be a "fast follower" when it comes to climate change action.[7] The National government has set the goal of reducing carbon emissions by 50% by 2050[8] and has said that it seeks to encourage a smooth transition to a low-carbon economy.[9] While it could be argued that current policies are not encouraging this transition at all,[10] it is an understandable goal given the significant changes that need to take place. Short of strengthening the ETS, an initiative that could assist in this transition would be requiring companies to take into account their environmental impact and (at least for listed companies) to report on their environmental impacts. Disclosure of environmental impact information by companies would be an important step in transitioning to a low-carbon and otherwise environmentally-sustainable economy and society. To do anything about the problems that humanity faces, the environmental impacts of business must be understood. This accounting asymmetry is one of four political asymmetries that Boston and Lempp identify as being influential in the inability of democracies to take action on climate change.[11] As they quote:[12]

[1] Ministry for the Environment *Valuing Our Clean Green Image* (Ministry for the Environment, August 2001).
[2] Tim Herzog, Jonathan Pershing, and Kevin A. Baumert *Navigating the Numbers: Greenhouse Gas Data and International Climate Policy* (World Resources Institute, 2005) at 22.
[3] Statistics New Zealand *New Zealand in profile: An overview of New Zealand's people, economy and environment* (Statistics New Zealand, February 2014) at 3.
[4] Kyleisha Foote & Mike Joy "The true cost of milk: Environmental deterioration vs. profit in the New Zealand dairy industry" (paper presented at the 2014 New Zealand Agricultural & Resource Economics Society (Inc.), Nelson, August 2014).
[5] Alastair Cameron "New Zealand Emissions Trading Scheme" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis NZ Ltd, Wellington, 2011) 239 at 244 – 245.
[6] Ministry for the Environment "United Nations Framework Convention on Climate Change" www.mfe.govt.nz.
[7] ONE News "John Key defends Kyoto decision" (12 November 2012) http://tvnz.co.nz.
[8] "The Climate Change Response (2050 Emissions Target) Notice 2011" (31 March 2011) 41 *New Zealand Gazette* 987.
[9] Office of the Minister for Climate Change Issues "Emissions Trading Scheme Review 2012 – final decisions on amendments to the Climate Change Response Act 2002".
[10] Jessika Luth Richter and Lizzie Chambers "Reflections and Outlook for the New Zealand ETS: must uncertain times mean uncertain measures?" (2014) 10 Policy Quarterly 57 at 63.
[11] Jonathan Boston and Frieder Lempp "Climate change: Explaining and solving the mismatch between scientific inertia and political inertia" (2011) 24 AAAJ 1001 at 1002.
[12] At 1006.

> What we measure affects what we do; and if our measurements are flawed, decisions may be distorted. Choices between promoting GDP and protecting the environment may be false choices, once environmental degradation is appropriately included in our measurement of economic performance

One reason why climate change action is not taken is because current systems are set up to measure financial cost, without taking into account the environmental costs of particular courses of action. As these costs are better understood, the case for climate change (or other environmental) action becomes much stronger. Corporate environmental disclosure and corporate consideration of the environment when making decisions are areas where New Zealand has not been a "fast follower". New Zealand is not the only country which lacks mandatory corporate environmental reporting; however, other common law countries including the United Kingdom,[13] Australia,[14] and the United States of America[15] all have some form of mandatory corporate environmental reporting, at least in respect of listed companies.[16]

This paper addresses whether New Zealand should introduce a requirement for company directors to consider the environment when making decisions, and, at least for listed companies, require companies to report on their environmental impact. The first section of the paper (Parts II – V) will examine the current relationship between New Zealand companies and the environment, by addressing:

(a) law relating to company decision-making, reporting and disclosure, with a particular focus on companies listed with the NZX (Part II);
(b) global environmental problems arising from a "business-as-usual" approach (Part III);
(c) responses to these environmental challenges in New Zealand's environmental law and the opportunities for corporate discretion (Part IV); and
(d) voluntary responses of New Zealand companies to these issues (Part V).

The paper will then consider whether New Zealand should incorporate environmental considerations and environmental reporting into company law. Part VI will discuss the rationale and justification for requiring corporate consideration of the environment and for corporate environmental reporting. Part sVII - IX will critically analyse three options for influencing corporate decision making in relation to the environment and encouraging corporate environmental reporting. Part VII will consider the United Nations Global Compact ("UNGC") and compare it to existing voluntary environmental initiatives in New Zealand. Part VII will also discuss the efficacy of mandatory environmental reporting. Part

[13] Companies Act 2006 (UK), s 414C.
[14] ASX Corporate Governance Council *Corporate Governance Principles and Recommendations* (3rd ed, 2014), cl 7.4; Corporations Act 2001 (Cth), s299(1)(f).
[15] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.
[16] Companies listed on a relevant stock exchange.

VIII will analyse the "enlightened shareholder value" provisions in the UK Companies Act 2006 and associated regulation. Part IX will assess a suggested directors' duty requiring companies to interact with the environment in a sustainable way. Part X will discuss all three options and conclude the paper.

II. The decision-making and disclosure obligations of New Zealand companies

Not surprisingly, the most important piece of legislation relating to companies in New Zealand is the eponymous Companies Act 1993 ("CA" or "NZ Act"). The CA is the primary source of rules for companies from incorporation through to liquidation. The vast majority of companies incorporated under the CA are limited liability companies;[17] "owners" of the company own shares in it. The shareholders have no direct claim on company assets as the assets are owned by a separate legal person, the company.[18] The CA provides that the company will be managed by or under the supervision of a board of directors[19] who will be elected or appointed by the shareholders of the company.[20] The board can delegate the on-the-ground running of the company to a chief executive officer and other employees if they so wish.[21] However the overall responsibility for the company's actions lies at the feet of the directors.[22]

A. Directors' duties

The CA sets out a number of duties that the directors owe, some to the company and some to shareholders. Many of the duties owed to the company are codified derivations of common law and equitable duties.[23]

Directors owe positive duties to the company to:

(a) "act in good faith and in what the director believes to be the best interests of the company";[24]
(b) exercise their powers for a proper purpose;[25] and
(c) act with "the care, diligence, and skill that a reasonable director would in the same circumstances".[26]

On the other hand, directors owe duties to the company not to:

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[17] Companies Office "Legislation" www.business.govt.nz.
[18] Companies Act 1993, s 15.
[19] At s 128.
[20] At s 36.
[21] At s 130(1).
[22] At s 130(2).
[23] Peter Watts *Directors' Powers and Duties* (LexisNexis, Wellington, 2009) at 125.
[24] Companies Act 1993, s 131.
[25] At s 133.
[26] At s 137.

(a) agree to or cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors;[27] and

(b) agree to the company incurring an obligation, unless the director believes at the time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.[28]

The duties are broadly drawn with case law filling in some of the picture. However, there is a broad discretion left to directors and the courts will usually defer to the judgment of directors where decisions are taken in good faith.[29]

A director's primary duty is to act in the best interests of the company.[30] This is usually interpreted to mean "in the best interests of the shareholders as a whole".[31] The best interests of the shareholders as a whole are presumed to be (unless the constitution says otherwise) to maximise the profits of the company.[32] Where the company is insolvent or close to insolvent, the best interests of the company cease to be completely identified with the interests of the shareholders – at that point, the interests of the creditors must be considered.[33]

There is debate as to whether the best interests of the shareholders as a whole should be interpreted as the best interests of the present shareholders or the best interests of both present and future shareholders – effectively whether the directors should take a short or long term view as to the life of the company. This choice leads to different profit-maximising strategies - for example maximising increases in the value of shares in the short-term or maximising the long-term value of the company which may mean sacrifices in the short term. This has implications for the directors' attitudes towards the environment – it may well maximise short term profits to damage the environment whereas it may be in the long-term interests of the company and society to conserve the natural environment.[34] The profit-maximisation strategy is a discretionary decision by the directors and as long as they act in good faith, it is unlikely that they would face any sanction. Of course, if the shareholders are unhappy with the strategy the director is taking, they have the power to remove the directors and appoint new ones in their place. However, given changing attitudes of society and institutional investors,[35] it seems unlikely that directors would be removed for seeking to be environmentally responsible, provided the company is making some profit.

[27] At s 135.
[28] At s 136.
[29] See for instance *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 per Cooke P (CA).
[30] Watts, above n 23, at 143.
[31] At 129.
[32] At 147.
[33] At 130.
[34] Jonathan Boston "The Nature of the Problem and the Implications for New Zealand" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis NZ Ltd, Wellington, 2011) 87 at 91.
[35] As shown by investor initiatives such as the Coalition for Environmentally Responsible Economies and the Carbon Disclosure Project.

The environment does not currently feature in the directors duties. Arguably, the directors could take into account the interests of the environment (as they can in Canada)[36] provided they still act in the best interests of the company.

B. Enforcement of directors' duties to the company

It is an offence punishable by up to five years' imprisonment or a fine of up to $200,000.00[37] for a director to exercise powers or perform duties as a director in bad faith, believing the conduct not to be in the best interests of the company and knowing that the conduct will cause serious loss to the company.[38] Charges under this section would be brought by the police.[39] In terms of civil enforcement, shareholders can directly enforce duties that the directors owe to them.[40] However, as outlined above, many of the important duties are not owed to shareholders but to the company itself. The only way that a shareholder can bring an action on behalf of the company against a director is by way of a derivative action.[41] The shareholder requires the Court's leave to bring a derivative action.[42] When considering whether to allow the derivative action to proceed, the Court shall have regard to the likelihood of the claim succeeding, the cost of the proceedings in relation to the relief likely to be obtained and the interests of the company in the proceedings being commenced.[43] The costs of the proceeding, once leave is granted, will be paid for by the company, unless it would be unjust or inequitable for it to do so.[44] However, there is little incentive for a shareholder to bring a derivative action against a director retrospectively. Any recovery that was made would go to the company, to pay off creditors and finally shareholders in a liquidation situation.[45]

The CA also contains provisions allowing the company, a shareholder or director or an entitled person to apply for an injunction to prevent the directors or the company from taking an action that is contrary to the company's constitution or is in breach of the CA.[46] If a shareholder or a director knows beforehand about a potential breach of the directors' duties to the company, they could apply for an interim or permanent injunction to prevent the breach from occurring.

The liquidators of a company are empowered to take an action on the company's behalf,[47] and may have more of an incentive than shareholders to take an action against directors if it

[36] *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 SCR 461.
[37] Companies Act 1993, s373(4).
[38] At s 138A.
[39] Brookers Company Law (online looseleaf ed, Thomson Reuters) at [CA373.03].
[40] Companies Act 1993, s 169.
[41] At s 165.
[42] At s 165(1).
[43] At s 165(2).
[44] At s 166.
[45] See s 36(c) – shareholders have a right to shares in the distribution of the surplus assets of the company.
[46] At s 164.
[47] At s 260 and Schedule 6.

would result in a greater recovery for creditors (and for the liquidators themselves in the payment of their fees).[48]

C. Financial reporting obligations

Directors have duties to disclose information about the company's activities to allow shareholders to assess a director's performance as their (or rather the company's) agent. As described above, directors have significant discretion as to the running of the company. The primary power of shareholders in relation to directors is the power to elect and remove directors. Alternatively, the shareholders can seek to sell their shares if they are not happy with the company's performance. To make those decisions, shareholders have to know what directors are doing with shareholders' money – directors have to be accountable. The need for accountability underlies the legislative requirements detailed below for companies to prepare financial statements in accordance with set standards. Having set standards with penalties in place for breaches minimises the likelihood of or the incentive to report financial information or results in a way favourable to the company and hence to the directors maintaining their position.

The CA requires large companies, large overseas companies, companies that are public entities and companies with more than 10 shareholders to prepare financial statements in accordance with generally accepted accounting practice.[49] Large companies are companies that have total assets (including the assets of subsidiaries) of more than $60 million or total revenue (including the revenue of subsidiaries) of over $30 million.[50] The financial statements prepared must be audited by a qualified auditor, unless an exception applies.[51]

Companies that are reporting entities under the Financial Markets Conduct Act 2013 ("FMCA") are exempt from the CA's financial reporting regime and must instead comply with the FMCA reporting regime.[52] Companies listed on the NZX are reporting entities under the FMCA.[53] Like large companies, FMC reporting entities must prepare financial statements in accordance with generally accepted accounting practice.[54] Again, the financial statements must be audited by a qualified auditor.[55]

Both the CA and the FMCA define "financial statements" and "generally accepted accounting practice" with reference to the definitions contained in the Financial Reporting

[48] Under cl 1 of Schedule 7 of the Companies Act, the fees and expenses of the liquidator are the highest priority.
[49] Companies Act 1993, s 201.
[50] See s 198, which refers to the definition in s 45 of the Financial Reporting Act 2013.
[51] At s 207.
[52] At s 197.
[53] See Financial Markets Conduct Act 2013, s 451 (definition of reporting entities) and s 6 (definitions of listed issuer).
[54] Financial Markets Conduct Act 2013, s 460.
[55] At s 461D.

Act 2013 ("**FRA**").[56] "Financial statements" must comply with the applicable financial reporting standards.[57] These standards are produced by the External Reporting Board ("XRB") set up under subpart 1 of part 2 of the FRA. Under the FRA, there are four tiers of reporting obligations. The most stringent are Tier 1 obligations; these apply to entities that are "socially accountable" (including listed issuers)[58] and to large entities.[59] Therefore the actual standards that listed issuers (covered by the FMCA) and large companies (covered by the CA) must meet will usually be the same.

Importantly, the XRB can be empowered[60] to produce financial reporting standards that relate to:[61]

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

As yet, the XRB has not been empowered to do so. If such standards were produced, then companies in the defined categories would have to apply them.

D. Requirement to produce an annual report

Separate to the financial reporting requirements, the CA also requires large companies (as defined above), large overseas companies, companies that are public entities and companies with more than 10 shareholders[62] and all companies that are FMC reporting entities to produce an annual report.[63] This report must, among other things, include a description of any change during the accounting period to the "nature of the business of the company or any of its subsidiaries" or "the classes of business in which the company has an interest" so far as is material to allow "the shareholders to have an appreciation of the state of the company's affairs" and "will not be harmful to the business of the company or of any of its subsidiaries".[64] Companies with fewer than 10 shareholders can opt into this regime.[65]

E. Disclosure under the NZX Listing Rules

[56] Financial Reporting Act 2013, s 2(1).
[57], At s 6.
[58] Standard XRB A1, at paras 12 – 13. The definition of large here is slightly different – the entity must have expenses of over $30 million.
[59] Standard XRB A1, at para 17– 18.
[60] By the Governor-General by Order in Council on the recommendation of the Minister responsible for the FRA.
[61] Financial Reporting Act 2013, s 17.
[62] Unless they opt out for that accounting period under s 207I.
[63] At s 208.
[64] At s 211.
[65] At s 207K.

Another potential source of corporate environmental reporting regulation would be the NZX Listing Rules. Indeed, the ASX has introduced a recommendation in its Corporate Governance Principles and Recommendations for a listed entity to "disclose whether it has any material exposure to economic, environmental and social sustainability risks, and if it does, how it manages or intends to manage those risks." There is no such equivalent provision in the NZX Corporate Guidance.[66] While the NZX Listing Rules repeat and augment the CA requirements for an annual report,[67] listed companies are not required to report on environmental impact. However, some environmental information may be required to be disclosed under the "Material information" provisions.[68] The "Material information" provisions require listed companies to disclose information that "a reasonable person would expect, it if were generally available to the market, to have a material effect on the price of the Quoted Securities of the Issuer".[69]

F. Enforcement of financial reporting and disclosure obligations

Under the CA, it is an offence to fail to comply with the applicable reporting standards.[70] A company can be fined up to $50,000.00 while the directors can be fined that amount or can be imprisoned for up to two years.[71] Breaches of the financial reporting provisions of the FMCA are more strongly sanctioned. Breaches can be the subject of civil pecuniary penalties[72] whereas knowing breaches of financial reporting standards on the part of the companies and directors can be the subject of criminal fines of up to $500,000.00 for directors and $2.5 million[73] for companies. In addition, directors can be sentenced to up to five years in prison.

In relation to the annual report required under the CA, it is an offence to fail to prepare an annual report;[74] if convicted, a director could be fined up to $10,000.00.[75] The annual report (including the financial statements and audit report, if prepared) must be made available to shareholders, either by sending a copy to shareholders or making it available electronically. Again, if this requirement is not met, the directors could be fined up to $10,000.00.[76]

G. Summary

In summary, directors are agents of the company and owe duties to it. They have a very wide discretion to decide how to run the company, as long as it is done in good faith, and in the

[66] Appendix 16 to the NZX Listing Rules.
[67] NZX Main Board/Debt Market Listing Rules, cl 10.4.
[68] At cl 10.1.
[69] See the definition at cl 1.6.1 of the Listing Rules.
[70] Companies Act, s207G.
[71] Companies Act, s207G and s373(3).
[72] Financial Markets Conduct Act 2013, s 461M.
[73] At s461I.
[74] Companies Act 1993, s 208(3).
[75] At s374(2).
[76] At s209(7) and s374(2).

best interests of the company, which usually means in the interests of the shareholders as a whole. The environment does not feature as a mandatory consideration when directors are making decisions nor do companies have any real obligation to report on their environmental impact. The disclosure requirements that companies do have are primarily financial.

However, it would not matter if directors do not consider the environmental impact of the company if New Zealand's environmental law completely protected the environment and required the remedying of any environmental damage caused. Part III will sketch the complex environmental issues that New Zealand and the globe faces while Part IV will identify the sources and coverage of New Zealand's environmental laws to elucidate the areas where directorial discretion could have an impact.

III. Environmental problems

Humans are entirely dependent on ecosystem services for their survival and well-being. Ecosystems provide the air we breathe, the food we eat, the water we drink and many of the materials we use to construct our dwellings. Ecosystem services have been estimated to be worth on average $33 trillion US dollars per year (at a time when global Gross National Product was $18 trillion).[77] While the last few decades of the twentieth century have seen a large increase on the material wellbeing of many people on the planet, this increased standard of living has come at the expense of ecosystem degradation around the globe.[78] One indicator of this degradation is the current extinction rate that is 1,000 times the background extinction rate.[79]

It is clear that many past practices in relation to the environment and the "business-as-usual" attitudes are unsustainable. Humans are eating into the planet's natural capital by exerting unprecedented and concerted pressure on ecosystems all around the world such that the balance of global nutrient cycles and the climate have been affected. The burning of fossil fuels, releasing carbon dioxide into the atmosphere which has been in storage for millions of years has had and is having a major influence on GHG levels, and hence on the climate. Satisfying the needs and wants of the burgeoning human population is influencing five drivers of global environmental change[80] of which anthropogenic climate change is the most well-known. The other drivers are habitat loss (through land-use change and change to waterways), the spread of invasive species, pollution (particularly nitrogen deposition) and over-exploitation.[81] These drivers are themselves driven by the processes that people utilise to satisfy their needs and wants. Land use change is viewed as the biggest driver of global

[77] Robert Costanza et al "The value of the world's ecosystem services and natural capital" (1998) 25 Ecological Economics 3.
[78] Millenium Ecosystem Assessment *Ecosystems and Human Well-being: Synthesis* (Island Press, Washington, 2005) at 1.
[79] At 4.
[80] Millenium Ecosystem Assessment at 14; O. E. Sala et al. "Global biodiversity scenarios for the year 2100" (2000) 287 Science 1770.
[81] Millenium Ecosystem Assessment at 14.

environmental change.[82] As more land is taken from forest, wetland or grassland and put into agricultural production or into urban sprawl, not only is carbon dioxide often released to the atmosphere but native biodiversity is lost, new habitat is opened up for invasive colonisation and changes occur in the water and nutrient cycling in the area.

New Zealand, unfortunately, has examples of all the global environmental drivers. Conversion of farm or forestry land to more intensive dairy farming, a common trend over the past decade, exemplifies agricultural intensification causing the release of carbon and also nitrogen pollution. While New Zealand's average temperature rise is projected to be less than the global average,[83] New Zealand will still feel the effects of rising sea levels, changes in rainfall patterns, an increase in flooding and drought and an increase in other extreme weather events.[84] Being an island nation which relies heavily on agriculture, the effects of climate change on New Zealand could be considerable. The warming climate could also result in invasive species, including pests on agricultural and horticultural crops, being able to establish here. There are also threats to New Zealand's native biodiversity, that in a warming world, New Zealand's unique biota will be less able to compete with invasive plants and animals. As regards over-exploitation, a good example is the overfishing of orange roughy in a number of areas, requiring those areas to be closed for fishing at least a decade.[85] Stocks have now rebounded enough to allow some fishing.

IV. New Zealand's environmental protection laws

It would be utterly astonishing if all this was known about the environment and yet New Zealand was doing nothing about it. New Zealand has an array of environmental laws dealing with different aspects of the drivers of ecosystem change.

A. The Resource Management Act 1991 ("RMA")

The RMA is New Zealand's primary environmental statute. It is a holistic statute that sets out a framework for making plans and decisions about use of the land, freshwater, air and coastal areas. Its purpose is "to promote the sustainable management of natural and physical resources".[86] "Sustainable management" is defined as:[87]

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[82] Sala, above n 81, at 1771.
[83] B. Mullan, D. Wratt, S. Dean, M. Hollis, S. Allan, T. Williams, G. Kenny and MfE *Climate Change Effects and Impacts Assessment: A Guidance Manual for Local Government in New Zealand* (2nd ed, Ministry for the Environment, Wellington 2008) at 15.
[84] At 14.
[85] Ministry of Fisheries *Sustainable New Zealand Seafood: Orange roughy* (Ministry of Fisheries, October 2011).
[86] Resource Management Act 1991, s 5(1).
[87] At s 5 (2).

> *managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—*
>
> > *(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
> >
> > *(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and*
> >
> > *(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

The RMA gives powers to layers of local government to make plans for their districts and regions. District plans and regional plans allow some activities to occur without the need for consent – these are "permitted activities".[88] When people want to carry out an activity that is not one of those activities, they must apply for a resource consent from the district or city council and potentially the regional council as well.[89] This process may involve public consultation. When decision makers are making decisions under the RMA, they must recognise and provide for "matters of national significance"[90] – broadly the protection of the coastal and wetland areas, nationally significant landscapes, heritage areas, areas of indigenous diversity and areas of land and water significant to Maori. Decision makers must have particular regard to other factors including the efficiency of the use and development of resources, the efficiency of the end use of energy, the intrinsic value of ecosystems and maintenance and enhancement of the quality of the environment.[91] Importantly, decision makers have to have regard to the effects of climate change and to the benefits to be derived from the use and development of renewable energy.[92] However, decision makers are not allowed to have regard to whether a proposed activity or development will release GHGs.[93] The rationale behind this is that climate change action is better left to central government action, rather than the ad hoc decisions of different councils around the country.

In terms of global environmental drivers, the RMA may ameliorate the effect of land use changes as it prohibits emissions to air, land or water,[94] unless the activities are specifically allowed for by a national policy statement ("NPS"), rule in a plan or resource consent. It also regulates the taking of water without consent.[95] For all activities which do not meet the permitted activity threshold, an application must be prepared which contains an

[88] See ss 63 – 77D for provisions relating to regional and district plans.
[89] See Part 6.
[90] At s 6.
[91] At s 7.
[92] At ss7(i) and (j).
[93] At ss 70A, 70B and 104E.
[94] At s 15.
[95] At s 14.

environmental impact assessment [96] to determine whether the negative effects on the environment will be more than minor. Adverse effects must be avoided, remedied or as a last resort, mitigated.[97] Conditions are placed on resource consents to minimise environmental impact. If consent holders (or people operating where a consent would be required) do not comply with the relevant consent conditions or regulations, councils may take enforcement action.[98] For newer consents, this process should be able to manage the environmental impacts many activities. However, there still many consents that were given in earlier time periods when standards were not as strict, resulting in residual damage to ecosystems which will not stop until those consents expire.[99]

In summary, the RMA is a comprehensive statute that facilitates the consideration of the various (sometimes divergent) values that are placed on the natural environment. The RMA does set out a complex framework of regulation at various levels; given the complex topic, this may well be appropriate. However, there are different criteria for the success of the RMA. According to the current National government and to developers, the RMA's processes are cumbersome and add too much to the cost of development. There are moves towards changing the RMA which may yet eventuate.[100]

B. Climate Change Response Act 2002

In terms of climate change, New Zealand's most important statute is the Climate Change Response Act 2002. In 2008, this Act was amended to include an emissions trading scheme.[101] The New Zealand ETS ("NZETS") is a measure contributing to New Zealand's actions taken under the Kyoto Protocol.[102] At the time of its introduction, it was envisaged as the first "all-sectors, all-gases"[103] ETS. However, the NZETS was stripped back after the National government came into power in November 2008. The NZETS still includes "all-gases" meaning all six of the GHGs regulated by the Kyoto Protocol (carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride)[104] but the scheme no longer sets out a timeframe for all-sectors to be involved in the scheme.

Under the NZETS, the GHG emissions from the importation or mining of liquid fossil fuel, natural gas and coal must be accounted for by the surrender of "units".[105] These units can be New Zealand Units ("NZU") or Kyoto units or an approved overseas unit.[106] Each NZU

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[96] Resource Management Act 1991, s 88.
[97] At s 17.
[98] See Part 12 of the Act.
[99] See for instances ss 10, 10A, 10B and 20A.
[100] Nick Smith "RMA reform agenda outlined" (press release, 21 January 2015).
[101] Climate Change Response (Emissions Trading) Amendment Act 2008.
[102] Climate Change Response Act 2002, s 3.
[103] Cameron, above n 5, at 247.
[104] At 247.
[105] Climate Change Response Act 2002, ss 63 and 63A and Schedule 3.
[106] At s 4(1). Part 4 and Schedule 3.

allows the emitter to emit 1 tonne of carbon dioxide equivalent into the atmosphere.[107] However, "transitional" provisions introduced by the National government in 2009 and 2012, allow participants to surrender a unit for every two tonnes of GHG emissions.[108] These "transitional" amendments as cap the price of a unit at $25 per tonne.[109] Importers and miners of liquid fossil fuel, natural gas and coal fuel must measure, record and disclose to the government the amount of carbon dioxide equivalent that will be emitted from the burning of the fossil fuel, natural gas and coal.[110] At the end of the year, they must then surrender NZUs to the government, accounting for the amount of carbon dioxide equivalent that will have been emitted to the atmosphere that year by the burning of those energy sources.[111] The importers/miners will pass down the cost of the NZUs onto their customers.[112] Further down the chain, major industrial emitters may choose to take over the obligations for the energy sources that they purchase from up-stream participants. They may do so to better control the cost imposed on them by the NZETS. On the other side of the ledger, participants who carry out "removal activities" are entitled to receive NZUs.[113] "Removal activities" activities are listed in Parts 1 and 2 of Schedule 4 to the CCRA and include owning or leasing post-1989 forest land and producing goods that capture and store carbon are allocated NZUs. Post-1989 forestry owners are voluntary participants in the NZETS[114] while owners of pre-1990 forests who deforest more than two hectares over a five year period are required to be participants.[115]

Excluding land use and land use changes, agriculture accounts for almost 50% of New Zealand's carbon emissions. This is unusual for a developed country where emissions from agriculture are usually much lower.[116] The farming lobby in New Zealand has exerted a strong influence over New Zealand's climate policy – after the 2012 amendments, there is now no date to include biological emissions in the scheme, though certain agricultural participants do have to record and disclose to the government their carbon emissions.[117]

A number of factors have kept the price of emissions low on the NZETS which has limited its efficacy in incentivising emitters to change behaviour. One factor is the allocation of free NZUs to some industrial emitters.[118] Participants only have to surrender one NZU (or equivalent Kyoto credit) for every two tonnes of carbon dioxide emitted.[119] The obligations to surrender emissions units could be met using international carbon credits from other Kyoto schemes. The resulting oversupply of credits in the market, pushed the going price down to

[107] Climate Change Response Act 2002, ss 4(1) and 63.
[108] At s 63A.
[109] At s 178A.
[110] At ss 62 and 65.
[111] At s 63.
[112] Cameron, above n 5, at 249.
[113] Climate Change Response Act 2002, ss 64 and 64A.
[114] At s 57 and Schedule 4, Part 2.
[115] At s 56 and Schedule 3, Part 1.
[116] Climate Change Response (Emissions Trading and Other Matters) Amendment Act 2012, s 96.
[117] Climate Change Response Act 2002, ss62 and 65 and Schedule 3.
[118] See ss 80 – 86F.
[119] At s 63A.

$2 per tonne of emissions in May 2013.[120] A recent survey of participants in the NZETS indicates that the scheme is not having a positive impact on afforestation and may actually be encouraging deforestation as foresters may harvest while the carbon price is very low.[121] The scheme is to be reviewed in 2015[122] but given the National government's previous stance on wanting to minimise the costs of emissions for emitters and for consumers, the chances of significant improvement seem unlikely.

In relation to environmental disclosure, an important point is that the NZETS requires its participants to keep track of the GHG emissions that they are responsible for under the scheme.[123] There are methodologies in place for the various calculations to take place. This could provide a useful background framework for a requirement for listed companies to disclose their emissions. Some listed companies will already be participants in the NZETS which would make it easier for them to comply with a new environmental disclosure obligation. At the moment, NZETS participants only have to disclose their emissions to the government not to other stakeholders. Participants only have to disclose their emissions from some activities – for instance, oil companies would not have to record or disclose the emissions related to the running of their headquarters.[124]

C. Other environmental statutes

Protection of native biodiversity is also part of New Zealand's environmental law and policy. Approximately 33% of New Zealand's land area is set aside for conservation.[125] This is a significant amount, though it is primarily in alpine areas;[126] the majority of lowland areas have long since been converted to human use. Killing endangered fauna[127] is an offence as is trading in endangered species.[128] However, New Zealand's conservation actions are more influenced by the amount of funding the Department of Conservation receives than by the law itself. In New Zealand, conservation of native flora and fauna is often a matter of protecting indigenous biodiversity from the effects of invasive species, particularly mammals. New Zealand's fauna is vulnerable to mammalian predators as it evolved without mammals until the arrival of humans and their associated mammals. The Biosecurity Act 1993 is also important here as it controls what organisms are allowed to come into New Zealand. Again, funding levels have a significant effect on the action in this area.

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[120] Richter and Chambers, above n 10, at 60.
[121] Richter and Chambers, above n 10, at 63.
[122] Cabinet Minute "Emissions Trading Scheme Review 2012: Final Decisions on Amendments to the Climate Change Response Act 2002" (2 July 2012) CAB Min (12) 23/10 at [111].
[123] Climate Change Response Act 2002, ss 62 and 65.
[124] Alastair Cameron "Corporate and Commercial Issues" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis NZ Ltd, Wellington, 2011) 393 at 395.
[125] Ministry for the Environment, *Environmental Snapshot: Legally protected conservation land in New Zealand* (Ministry for the Environment, April 2010).
[126] Ibid.
[127] Wildlife Act 1953, s 67A.
[128] At s 67A.

In terms of over-exploitation, New Zealand has a quota management system for its fisheries, set at a "sustainable level".[129] It also has entered into international agreements to prevent certain destructive fishing practices.[130]

Another statute that could be classed as being environmental law is the Waste Minimisation Act 2008. This sets up a framework encouraging producers to consider the lifecycle of their products and provides for voluntary schemes which producers can enter into to increase efficiency and decrease waste.[131] It also sets out the responsibilities of territorial authorities in relation to waste management and minimisation.[132]

D. Summary

Like other developed countries, New Zealand has a system of environmental law addressing some of the drivers of ecosystem change. However, whether these laws have the capacity to keep New Zealand's environmental impacts to sustainable levels in the long-term is debatable especially as the current National government has shown little appetite to strengthen measures to combat climate change and is foreshadowing changes to the RMA to make it friendlier for developers.[133] In summary, the law provides a minimum amount of protection for the environment.

E. Scope for directors to use their power for good of the environment

However there is significant scope for the exercise of company directors' discretion to improve environmental outcomes, by refraining from taking environmentally damaging actions or by actively promoting environmental health. An obvious example is firms choosing to reduce their GHG emissions as there is no requirement for companies to do so at the moment. Exercising discretion by entering into a voluntary waste minimisation scheme would be beneficial under the Waste Minimisation Act. Companies have choices about what to produce – whether it is legal to carry out an environmentally damaging production process does not mean that a company has to take that step. Companies also have choices about where to get their supplies from and so can choose to buy from suppliers who are minimising their environmental impact – for instance by using timber sourced from forests that have been certified by the Forest Stewardship Council. Companies also have choices about where to invest their profits – again they can choose to invest in less environmentally damaging enterprises. Companies can also exert influence over consumer opinion and over government policy. Companies could improve environmental outcomes by lobbying for regulation to protect the environment or at least not lobby against legislation leading to more sustainable outcomes. Companies could positively influence consumer opinion on environmental issues

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129 Fisheries Act 1996.
130 Ministry of Foreign Affairs & Trade "Treaties and International Law: International Fisheries" http://mfat.govt.nz .
131 Waste Minimisation Act 2008, Part 2.
132 See Part 4.
133 Smith, above n 100.

– for instance by encouraging higher density housing development, thereby reducing urban sprawl. As it stands, the framework under the RMA may allow for a sprawling subdivision or a higher density apartment building. It is the developer's choice as to which option to apply for.

F. Disclosure obligations in environmental law

The preceding analysis of New Zealand's company law and environmental law identifies that companies, including listed companies, do not currently have any obligation to report to shareholders or the public about their environmental impact. Companies applying for resource consents must assess the environmental impact of the activity they want to undertake, and if the consent is successfully obtained, they will likely have to monitor the ongoing environmental impact of the consented activity. These impacts must be reported to the relevant local authority. While resource consents are publically available on request,[134] there will usually be no requirement on the company to disclose the environmental effect of the consented activity to the public. Companies who are participants in the NZETS must keep records of their carbon emissions or of the amount of liquid fuel, natural gas or coal that they mine or import. This must be disclosed to the government so that the company surrenders the correct number of emissions units. Again, there is no requirement to disclose this information to shareholders or to the public. Shareholders and the general public therefore are dependent on the voluntary disclosures of companies to assess their environmental impacts.

V. Voluntary responses by New Zealand companies to environmental problems

Before a legislative requirement is put in place to require companies to consider the environment or to disclose environmental impacts, it is sensible to assess whether voluntary efforts by New Zealand companies are fulfilling those goals. Voluntary disclosures by New Zealand companies (particularly listed companies) are important in the assessment of both parts of the question; the primary way that the public or shareholders determine how directors are exercising their discretion when it comes to the environment is by examining the environmental information that companies voluntarily disclose. However, as it stands, with no mandatory environmental reporting standard, it is easy for companies to just report good news, and little if any of the bad.

A number of New Zealand companies do now produce some sort of "sustainability report". Overall, New Zealand's level of corporate reporting on sustainability is low – 16% of New

[134] Resource Management Act 1991, s 114(3).

Zealand companies report on sustainability issues compared to a global average of 31%.[135] The reporting rate is much higher for the 100 largest companies in many countries but New Zealand's reporting rate is still behind the global average: of the top 100 companies in each of 41 countries KPMG surveyed, 71% of companies reported on corporate social responsibility ("CSR")[136] issues,[137] compared to 47% of New Zealand's top 100 companies.[138]

New Zealand companies are involved in a number of reporting networks. For instance, there are 33 New Zealand entities with reports on the Global Reporting Initiative's ("GRI") Sustainability Disclosure Database,[139] including local bodies, state-owned enterprises, listed companies and others. However, only three so far have uploaded reports for the 2014 year and only 12 for the 2013 year.[140] The GRI, as its name suggests, is a global reporting initiative which promulgates a set of sustainability reporting guidelines. It is the most popular reporting system with large companies globally.[141] These guidelines are used by 78% of N100 companies from the 41 countries surveyed by KPMG who prepare CSR reports refer to these guidelines.[142] According to KPMG's survey of New Zealand's largest 100 companies, more than half of the companies who prepared reports referred to the GRI guidelines. The GRI is a not-for-profit organisation promoting sustainability reporting. It works with business, civil society and other stakeholders to prepare the guidelines. The guidelines require companies to report on environmental, social and human rights issues. It also provides for companies to report on supply chain sustainability. Sustainability reports prepared in accordance with GRI guidelines also "presents the organization's values and governance model, and demonstrates the link between its strategy and its commitment to a sustainable global economy."[143]

Another global reporting movement is the Carbon Disclosure Project. This is a group representing 767 institutional investors holding US$92 trillion in assets, helping to reveal the risk in their investment portfolios.[144] Surveys about environmental impact and risk and GHG emissions are sent to the world's largest companies. In New Zealand, the surveys are sent to the NZX50, while in Australia, the surveys are sent to the ASX200. The individual results for each company are put on the CDP website unless the company indicates that the results are only to be seen by CDP's institutional investor members. Either way, the reporting score

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[135] Grant Thornton "Corporate social responsibility: beyond financials" <www.internationalbusinessreport.com> at 12.
[136] Corporate social responsibility more generally will be discussed in Part VI.
[137] KPMG International *The KPMG Survey of Corporate Responsibility Reporting 2013* (KPMG International, 2013) at 20.
[138] At 25.
[139] Global Reporting Initiative "Sustainability Disclosure Database" <http://database.globalreporting.org/>.
[140] Global Reporting Initiative "GRI Reports List", available from <http://database.globalreporting.org/> accessed on 2 February 2015.
[141] KPMG International, above n 137, at 30.
[142] At 11.
[143] Global Reporting Initiative "What is GRI?" <www.globalreporting.org>.
[144] Carbon Disclosure Project "About Us" <www.cdp.net>.

for each company will be released. In 2014, only 17 companies listed on the NZX responded to the CDP survey, with scores ranging from 10 to 98 out of a possible 100.[145] The scores reflect the comprehensiveness of reporting rather than the amount of carbon dioxide being released to the atmosphere. The majority of NZX50 companies did not respond to the survey. The response rate is down from the previous year when 42% of NZX50 companies responded to the CDP survey, representing 92% of total market capitalisation.[146]

Another group that supports sustainability reporting is the New Zealand Sustainable Business Council ("SBC"). SBC members must report to the SBC their carbon footprint within one year of becoming a member and on their plans to reduce carbon intensity within two years of joining.[147] Within three years of joining, a member must prepare a "sustainable development report demonstrating that member's progress on environmental, social and economic performance"[148] – often referred to as a "triple-bottom-line report". The SBC encourages its members to report to the GRI standards. SBC members commit to the process of "sustainable development" namely "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[149] However, analysis of the discussion of sustainable development in members' reports and in communications from the SBC suggests support for the perpetuation of the status quo rather than re-examining whether current business practices can ever be sustainable in the long-term.[150] As at 3 December 2014, the SBC has 68 member businesses, including Fonterra.[151] However, only nine entities in the NZX50 are members of the SBC.

While a reasonable number of New Zealand's top 50 companies have started reporting on CSR issues (including environmental issues), more than half of those companies consistently do not report on these issues. When it comes to smaller companies, the numbers are even lower. The standard of reporting varies widely between companies – for instance, New Zealand responses to the CDP 2014 ranged from 10 out of 100 (very low) to 98 out of 100 (very high).[152] In summary, reporting is voluntary, ad hoc and varies widely in quality.

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145 CDP Australia & NZ *CDP 2014 ASX 200 Climate Leadership Awards* (Carbon Disclosure Project, Australia, 2014).
146 CDP Australia and New Zealand *Climate Change Report 2013* (Carbon Disclosure Project, December 2013) at 12.
147 Sustainable Business Council "Terms of Membership" <www.sbc.org.nz> at [4(g) – (h)].
148 At [4(a)].
149 Sustainable Business Council "SBC Sustainable Development Principles" <www.sbc.org.nz>. This definition comes from the Brundtland Report – World Commission on Environment and Development, *Our Common Future* (1987).
150 Markus J Milne, Helen Tregidga and Sara Walton "Words not actions! The ideological role of sustainable development reporting" (2009) 22 Accounting, Auditing & Accountability Journal 1211 at 1241.
151 Sustainable Business Council "Our Members" <www.sbc.org.nz>.
152 CDP Australia & NZ, above n 145.

VI. Justifying legislative intervention in the relationship between companies and the environment

Having established that there are opportunities within New Zealand's framework of environmental law for directors of companies to use their discretion to improve environmental outcomes, the question becomes whether directors should have to exercise their decision-making discretion in favour of the environment. To put it another way, would it be justified for the state to require companies to interact with the environment in a sustainable manner? If not, should directors have to take into account the environmental impact of the company's actions even if they do not act in a sustainable manner?

A. Purpose of companies

Whether companies should have to interact with the environment in a sustainable way or take into account the environmental impact of a company's actions, brings into question the purpose of companies. Wealth creation and profit maximisation are commonly thought to be the reasons for the existence of companies.[153] While these goals undoubtedly underlie the existence of many companies, it is increasingly recognised that these goals cannot be pursued at all costs. There are differing opinions however about the extent of the limitations that should be put on a company's actions or, to put it in a positive sense, the scope of a company's responsibility to society. The name given to this general concept is "corporate social responsibility". A well-used definition of CSR is that of the World Business Council on Sustainable Development:[154]

> Corporate social responsibility is the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life.

B. Milton Friedman – "The social responsibility is to increase its profits"

Whether companies should owe any duties except to shareholders has been the subject of debate in the United States since the 1930s with Professors Berle and Dodd arguing whether directors should only act in the interests of shareholders or whether they should also act in the interests of other stakeholders.[155] Since that time, the most famous proponent of the view that companies must act in the interests of shareholders only is the Chicago economist Milton Friedman. He famously wrote an article titled "The social responsibility is to increase its

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[153] Surya Deva *Regulating corporate human rights violations: humanizing business* (Routledge, London & New York, 2012) at 131; James McConvill and Martin Joy "The interaction of directors' duties and sustainable development in Australia: setting off on the uncharted road" (2003) 27 Melb.U.L.Rev. 116 at 117.
[154] Richard Holme and Phil Watts *Corporate social responsibility: making good business sense* (World Business Council on Sustainable Development, January 2000) at 10.
[155] Deva, above n 153, at 120; Jason C Jones "Environmental Disclosure: Toward an Investor Based Corporate Environmentalism Norm" (2010) 20 BU Pub. Int. LJ 207 at 216.

profits".[156] He argued that maintaining that businesses had social responsibilities was akin to socialism. As he saw it, businesses that used profits to benefit the environment or other stakeholders were effectively taxing their customers or their shareholders and deciding how the proceeds would be spent without any of the accountability of elected politicians. According to Friedman, business' responsibility is "to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[157] Friedman was not opposed to spending on community initiatives or other such activities that increased the goodwill of the community and were in the long term interest of the company – he just disdained the label of "social responsibility" as "hypocritical window-dressing". He was also not opposed to pollution regulation (at least in this article) provided that companies did not go beyond their legal requirements. He disdained activist stockholders who sought to persuade companies to go beyond their legal obligations when the activists had been unsuccessful in using the political process to justifiably change the rules of the game.

C. Critique of Friedman

Friedman's views must be put in the context of the time – during the Cold War when, as Deva points out, any derogation from free markets was seen as a threat to capitalism as a whole.[158] However, CSR discourse is quite far from socialism. It only arises where private companies hold positions of power and influence within an economy, such that their effects on society can be seen.[159] Deva (among other CSR theorists) presents a convincing critique of Friedman's thesis. One of the underlying premises to Friedman's argument is that shareholders are the owners of the business and so have a right to control it.[160] It is they who are taking the risk – if the company becomes insolvent, it is their money that will be lost. This approach does not take into account the contributions made and the risks taken by other stakeholders:[161]

> [E]mployees contribute by putting in labour, supply chains contribute by making available necessary materials and other inputs, consumers contribute by buying goods or services, and governments contribute by maintaining law and order and by creating a business-favourable regulatory environment. All these stakeholders contribute to the working and success of corporations, and take *different kinds of risks* while making their respective contributions.

From an environmental standpoint, shareholders may be taking a financial risk but by damaging the environment or depleting natural capital, companies are risking the wellbeing

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[156] Milton Friedman "The social responsibility of business is to increase its profits" *The New York Times Magazine* 13 September 1970.
[157] Ibid.
[158] Deva, above n 153, at 122.
[159] At 123 – 124.
[160] At 125.
[161] At 126 – 127 – emphasis in original.

of the rest of society, now and in the future. Given the risks taken by other stakeholders, it is reasonable that companies should have to balance their interests as well when making decisions. Friedman also ignores the commonalities between shareholders and other stakeholders – shareholders are members of society as well, and have an interest in protecting the environment.[162] These interests do not disappear as soon as they invest in a company.

Deva also argues that Friedman's "CSR spending as tax" is misconceived. Spending on environmental or community initiatives can only be seen as taxation or theft if shareholders have a right to certain level of profit, rather than just an expectation of some profit.[163] There are many reasons why profits would not reach a maximal level – and these factors would not be seen as "taxation".[164]

D. The "business case" for sustainability

Friedman's thesis also suggests that "CSR" initiatives that are profitable should be undertaken – in effect that there should be a business case for some CSR activities. The business case for acting in an environmentally sustainable way is based on there being a competitive advantage to it; that by acting sustainably a business will be more profitable as consumers will prefer their products to those of businesses who do not act sustainably. This is now a commonly used argument to encourage companies to become more socially or environmentally responsible. As Deva explains (in the context of human rights), these sorts of arguments rest on a number of key assumptions; that consumers know about the sustainability practices of various companies (and the products associated with them) and care enough to make buying decisions on that basis.[165] It also assumes that consumer preference will generate enough profit to make the shift worthwhile. These assumptions will not hold true in many situations. The reality is that changing to a low-carbon and environmentally sustainable society will be a costly process for a number of businesses. Some industries will be fundamentally altered. In fact, the cost on business is one of the contributing factors identified by Boston and Lempp resulting in climate change inaction in democratic countries.[166] The "interest group" asymmetry arises because the costs of change to a low-carbon society will fall on concentrated groups, particularly businesses in carbon-intensive industries, while the benefits of the change will be more widely spread in society and over time. The groups who will bear the cost are better organised and have an incentive to lobby government to delay action.

The danger in the focus on "business case" arguments is that companies will only take action on sustainability when it is going to be profitable for them. In order to present a positive impression, companies will report the profitable sustainability actions they have undertaken

[162] At 127.
[163] At 128.
[164] Deva gives the example of paying adequate salaries to employees.
[165] At 140 – 141.
[166] Boston and Lempp, above n 11, at 1006.

and rather than acknowledge their continuing unsustainability, instead suggest that they are being sustainable.[167] For example, in a study looking at the sustainability reports of members of the SBC, the authors concluded that:[168]

> With the exception of one NZBCSD [SBC] member (Landcare Research), ecology, and a wider systems understanding of sustainability, remains largely absent from the constructions of sustainability we have examined. Business talk of sustainability seems likely to compel us ‘to adopt a narrow economic language, standard of judgement, and world view in approaching and utilising the Earth’

The point is that in the long run, businesses should not be allowed to be profitable if certain environmental or human rights standards are not being met. For this to happen, environmental costs are going to need to be taken into account. But before then, businesses should not pretend that true sustainability is achievable by making minimal changes to business as usual. This is not to say that such changes are not useful but it should be acknowledged that sustainability is about more than just energy efficiency. The reason why changes should be made is because companies have a moral responsibility to account for the impacts of their actions, not because they are going to be profitable.[169]

E. The moral obligations of companies

So what are the moral obligations of a company? Deva argues that companies are, like natural people, “social organs” who “ought to comply with basic moral and legal norms of society”. After all, companies “consist of the people, [are] operated by the people and exist for the people”.[170] Natural persons are social organs and “their social status should not cease to exist merely because they decide to act collectively and in an artificial form.”[171] The moral obligations that shareholders have towards other members of society should not be shielded by the corporate veil. To put it another way, just by empowering an agent to act for a person, the principal cannot rid him or her or itself from moral responsibility for the actions the agent takes under his, her or its instruction. The basic duty that moral agents have is not to cause harm to others. People are free to act to the extent that their actions do not harm others.[172] In law, this was expressed as the “Neighbour Principle” in the famous tort case of *Donoghue v Stevenson*:[173]

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[167] Gray, Rob “Does sustainability reporting improve corporate behaviour?: Wrong question? Right time?” (2006) 36 Accounting and Business Research 65 at 81.
[168] Milne et al., above n 50, at 1241.
[169] Deva, above n 153, at 141.
[170] At 146.
[171] At 147.
[172] James Rachels *The end of life: euthanasia and morality* (Oxford University Press, Oxford; New York; London, 1986) at 180.
[173] [1932] AC 562 (HL) at 580.

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; … You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

As set out in Part II, global environmental change is being driven by human needs and wants. Burning fossil fuel to support current lifestyles in the Western world can be reasonably be foreseen to cause harm to future generations through further climate change. Altering ecosystems through nutrient pollution and agricultural intensification causing degraded water and soil quality can also be reasonably foreseen to cause harm to present and future generations. Future generations (including young people alive today) will have to live with the harm caused by the unsustainable practices that count as business as usual now. When the phrase "environmental cost" is used, it can be looked at as meaning a cost that someone else is going to have to incur if they want to have the same ecosystem services that current generations are overexploiting for free. While a tort claim is unlikely to be useful to future generations, the Neighbour Principle is one of the basic norms of society and companies should abide by it to the fullest extent possible.[174]

F. Balancing wellbeing against environmental harm

Having established that companies do broadly owe a moral duty to avoid environmental harm, should this duty be quantified legally and if so, to what extent? To have an absolute legal duty to not emit any GHGs or to not use nitrogen fertiliser for instance would be counter-productive, as people currently derive great benefit from those environmentally-unsustainable activities. In economic terms, environmental damage is a negative externality– it is a cost that is being placed on a "party external to the decision making". [175] This means that more environmentally damaging goods and services are being produced than is societally optimal.[176] To reduce production to more societally acceptable levels, a mechanism should be put in place (such as a tax or trading scheme) so that producers have to take into account the effect their activities are having on others.[177] Prices on those goods or services would go up and fewer would be consumed. However, the key point is that those goods and services will still be produced if people will pay the higher prices. The optimal amount of emissions is not going to be zero because people will pay higher prices for the things they really value.[178]

The change to a more sustainable relationship between economy and environment cannot happen overnight – at best it will take decades. According to current predictions from the International Energy Agency, if states want to keep global warming to under 2°C, carbon

[174] Deva, above n 153, at 147 – 148.
[175] Peter Wilson "The Economics of Emissions Trading" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis NZ Ltd, Wellington, 2011) 127 at 135 – 136.
[176] At 136.
[177] At 142.
[178] At 137.

emissions do not have stop straight away but global emissions need to peak by 2017.[179] The ideal solution would be an international agreement to reduce GHG emissions drastically. States could then set about putting in place mechanisms to incentivise emitters to decrease emissions to the targeted level with the reassurance that everyone else will be doing the same. However, this seems unlikely to happen given that negotiations have been going on for more than two decades[180] and still there is no agreement as to the details of emissions reductions. Strengthening the NZETS would assist in incentivising emitters to decrease emissions. The carbon price however, would need to be much higher in order to do that and the National government has not evinced willingness to increase the price in the New Zealand market. In this context, it would be detrimental to the economy of New Zealand to impose a strict obligation on New Zealand companies to drastically cut emissions and other environmental damage. Doing nothing to incentivise decreasing emissions and other environmental damage would not be helpful. Companies should be encouraged to prepare for a low-carbon future so that a "smooth transition" can occur, as mentioned in the introduction. Measurement and disclosure of environmental impact is an important first step. Strategic decisions about minimising environmental damage while remaining profitable can only made when companies (and governments) have information about the emissions and other environmental impacts of companies.

G. Summary

As identified in Part II, New Zealand's company law is shareholder-focussed. Directors have to act in the best interests of the company, which are usually the interests of shareholders as a whole. Only when a company's solvency is threatened are the company's best interests not identified with shareholders, but rather with creditors. The interests of shareholders as a whole are thought to be the maximisation of profits, unless otherwise specified. This paper will now go on to explore three options for incorporating environmental impact considerations into New Zealand's corporate decision making; directors voluntarily considering the environment, imposing a legal duty to take into account the environmental impact of the company's action or imposing a legal duty to interact with the environment in a sustainable manner. Part VII will consider voluntary options, namely either joining the SBC or joining the UNGC, which is a voluntary, collaborative initiative between the United Nations and businesses to achieve human rights, environmental protection and anti-corruption objectives. It is principles-based and requires disclosure of a company's progress towards implementing the principles. The difference between this option and the other two is that reporting would be voluntary. Hence this section will include an analysis of the efficacy of voluntary reporting in achieving adequate disclosure. The second option, the requirements in the UK Companies Act 2006 requiring directors to take into account the environment in

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179 International Energy Agency *World Energy Outlook 2012: Executive Summary* (OECD/IEA, France, 2012) at 3.
180 Vernon Rive "International Framework" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis NZ Ltd, Wellington, 2011) 49 at 53 – 54.

decision making, will be examined in Part VIII. The third option, to be examined in Part IX, is an additional directors' duty to act in an environmentally sustainable manner, which is not currently in place in any common law country. All three options would involve companies measuring and disclosing their environmental impacts. However, none of the options requires companies not to seek to make a profit; a company cannot be green if it is continually in the red.[181] Companies need to make profits to continue to exist. Investors will not want to invest money where there is no return and people will not work for a company if they are not paid. The point is to make a profit while taking into account environmental cost.

VII. Voluntary initiatives -the UNGC, the SBC and the SBN

A. Introduction to the UNGC

The UNGC is a set of ten principles[182] that companies can choose to adopt. It is a "leadership initiative, involving a commitment by a company's Chief Executive Officer (or equivalent), and supported by the highest-level Governance body of the organization (eg, the Board)."[183] The UNGC was proposed by the then UN Secretary General Kofi Annan in January 1999 and was officially launched in July 2000. There are now more than 12,000 participants,[184] including businesses and other organisations from 145 countries. Currently, there are four New Zealand participants in the UNGC; three small to medium enterprises ("SMEs") and one foundation.[185] The principles are derived from the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption.[186] As the UNGC website describes "The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption."[187] Participation in the UNGC is voluntary and except for detriments to a company's reputation, there are no repercussions for breaching the principles. Participants must report on their progress every year – if a company does not report, then it will be removed from the register of participants.[188]

There are three principles in the UNGC that relate to the environment:[189]

> Principle 7: Businesses should support a precautionary approach to environmental challenges;

[181] David Norton and Nick Reid *Nature and Farming: sustaining native biodiversity in agricultural systems* (CSIRO Publishing, Collingwood, Victoria, 2013).
[182] United Nations Global Compact "The Ten Principles" <www.unglobalcompact.org>. The UNGC originally had nine principles; the tenth principle relating to anti-corruption was added in 2004.
[183] United Nations Global Compact "Business Participation" <www.unglobalcompact.org>.
[184] United Nations Global Compact "Overview of the UN Global Compact" <www.unglobalcompact.org>.
[185] United Nations Global Compact "Participant Search" <www.unglobalcompact.org>.
[186] United Nations Global Compact "The Ten Principles" <www.unglobalcompact.org>.
[187] United Nations Global Compact "The Ten Principles" <www.unglobalcompact.org>.
[188] United Nations Global Compact "What is a COP?" <www.unglobalcompact.org>.
[189] United Nations Global Compact "The Ten Principles" <www.unglobalcompact.org>.

> Principle 8: undertake initiatives to promote greater environmental responsibility; and
>
> Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Principle 7 is derived from the 1992 Rio Declaration which states that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". [190] Principle 8 is essentially the idea that businesses "have the responsibility to ensure that activities on our own yard should not cause harm to the environment of our neighbours."[191] The environmentally friendly technologies referred to in Principle 9 are defined in Agenda 21 as technologies that "protect the environment, are less polluting, use all resources in a more sustainable manner, recycle more of their wastes and products and handle residual wastes in a more acceptable manner than the technologies for which they were substitutes."[192]

B. How well is it working?

The UNGC can be regarded as successful in some respects. It has a truly global membership as well as having local networks of participants in more than 20 countries, encouraging collaboration between companies about the principles.[193] The Compact requires participants to at least consider the principles once a year when the Communication on Progress is filed. It also produces resources that can be used by members. For instance, the UNGC, in partnership with the CDP and the World Wildlife Fund, among others released guidance for companies to positively engage with governments over climate policy.[194] The UNGC is based on the idea of collective learning. The principles are aspirational; members are to report on progress made rather than on standards fulfilled. It also allows businesses to interpret the principles in their own way. This can be regarded as an advantage or disadvantage. On the positive side, it could encourage companies to join the UNGC who otherwise may not if they had to comply with more stringently defined principles.[195] Once in, these companies may be influenced by the interpretations of other companies and come to view their relationship with the environment and with stakeholders in a different way. On the other hand, companies are able to interpret the principles a way that is contrary to the plain meaning of the words.[196] For example in relation to Principle 3 of the UNGC, that "Businesses should uphold… the effective recognition of the right to collective bargaining",[197] which seems on the face of it to require businesses to "institutionalize

[190] *Rio Declaration on Environment and Development* A/CONF.151/26 (1992), Principle 15.
[191] United Nations Global Compact "Global Compact Principle 8" <www.unglobalcompact.org>.
[192] United Nations Sustainable Development *Agenda 21*, at para 34.1.
[193] United Nations Global Compact "Local Networks" <www.unglobalcompact.org>.
[194] United Nations Global Compact *Guide for responsible corporate engagement in climate policy: a caring for climate report* (UNGC, 2013)
[195] Afshin Akhtarkhavari, "The Global Compact, Environmental Principles, and Change in International Environmental Politics" (2009) 38 Denv. J. Int'l L. & Pol'y 277 at 305.
[196] Deva, above n 153, at 97.
[197] United Nations Global Compact "The Ten Principles" <www.unglobalcompact.org>.

'collective bargaining', it [BHP] continued to require its *new* employees to sign individual contracts and disputed that Principle 3 directed that employment be based on collective bargaining."[198] The Global Compact Office seemed to agree.[199]

The UNGC has been the subject of much academic discourse over its 15 year life, examining the types of companies that enter it, the types of companies that delist from it and the impact it has on the companies who join. One such study examined whether US companies entering the UNGC were using it to "blue-wash" their public image.[200] This is a concern given the relatively low membership fee and the less than onerous obligation to produce a Communication on Progress once a year. The study found that firms who were members of the UNGC scored worse than non-members "on costly and fundamental performance dimensions, while showing improvements only in more superficial dimensions" such as having environmental policies.[201] Membership of the UNGC strengthened both of those trends – more environmental concerns were reported at the same time as more superficial positives were added.[202] This suggests that the subjects of the study (large publically-listed companies in the US) were using the UNGC for public relations purposes.[203]

C. Usefulness for New Zealand in comparison to existing initiatives

There is a very low uptake of UNGC membership in New Zealand. However, this does not indicate a lack of interest in sustainability or CSR issues. New Zealand has its own voluntary initiatives that provide similar benefits to the UNGC. The SBC, like the UNGC, provides a network of like-minded businesses and requires its members to report on environmental issues (among others). Both encourage the use of the GRI's guidelines for reporting.[204] The Sustainable Business Network ("SBN"), aimed at smaller businesses in New Zealand, also provides networking and resources for members.[205] The principal difference between the SBC and the UNGC is in their principles. The UNGC principles are wider than just environmental sustainability, embracing human rights and labour standards, whereas the SBC principles are much more specific in what is required of members in terms of reporting and activity.[206] However, the UNGC environmental principles suggest a decision-making metric for members to follow. When making decisions that affect the environment, directors should take a precautionary approach, should take responsibility for their environmental impacts and should be looking towards using more environmentally-friendly techniques. The SBC's principles, centred around the concept of sustainable development, are more prescriptive

[198] Deva, above n 153, at 97.
[199] Ibid.
[200] Daniel Berliner and Aseem Prakash ""Bluewashing" the Firm? Voluntary Regulations, Program Design, and Member Compliance with the United Nations Global Compact" (2014) Policy Studies Journal (forthcoming).
[201] At 1.
[202] At 17.
[203] At 18.
[204] United Nations Global Compact "How do I prepare a COP? Advanced" <www.unglobalcompact.org>; Sustainable Business Council "Sustainable Development Reporting Guide" <www.sbc.org.nz>.
[205] Sustainable Business Network "About the Sustainable Business Network" <sustainable.org.nz>
[206] Sustainable Business Council "Sustainable Development Principles" <www.sbc.org.nz>.

when it comes to process (members must prepare policies, connect with stakeholders etc) but apart from "sustainable development" do not give guidance as to the type of approach that should be taken. In this way, the UNGC principles are more accessible. Like the SBN, the UNGC may be more appropriate to small New Zealand companies; both are significantly less costly to join for small to medium enterprises[207] and are potentially more accessible. The compliance burdens are likely to be lesser as well.

D. Voluntary versus mandatory environmental reporting

When it comes to environmental reporting, the UNGC and the SBC both suffer from being voluntary initiatives. Voluntary environmental reporting does, of course, have its uses. It suggests that those companies are at least aware of and potentially engaging with their environmental impacts. However, in a voluntary reporting regime, companies have the capacity to choose what environmental information to report. In contrast, financial reporting is standardised to enhance accountability and comparability; it would be much more difficult to "spin" financial information without breaking the rules. Voluntary environmental disclosure would not have to be audited or assured in some way and it would not have to be reported in the same way from year to year.

Voluntary environmental reporting is also influenced by the motivation of the company in reporting it. Legitimacy theory suggests that corporations seek to maintain their legitimacy in the community, to prove their place in society and to maintain the support of powerful constituencies by disclosing social and environmental information.[208] In order to retain support, companies may be tempted to report only "good" news rather than presenting a more balanced view of environmental impact. There is a tendency in voluntary corporate disclosures to report more "good" news and little if any bad news.[209] Bolstering legitimacy as a motivation for voluntary environmental disclosure is supported by the tendency towards large companies operating in high-profile industries to report on environmental issues, particularly after well-publicised instances of corporate irresponsibility.[210] Environmental disasters threaten the legitimacy of all the companies in that industry and so all respond with increased disclosure to regain public support.

Mandatory requirements would encourage consistency of reporting, making impacts more comparable between years and across firms. Even if the legislation does not specify a

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[207] Sustainable Business Council "Membership"< www.sbc.org.nz>; Sustainable Business Network "Join the Sustainable Business Network" <sustainable.org.nz>; United Nations Global Compact "How to participate: Business Participation" www.unglobalcompact.org.

[208] Sidelle Pinto and Charl de Villiers "Do firms reduce CSR disclosures during recession?" (paper presented at the 11th A-CSEAR Conference, Wollongong, NSW, December 2012) at 6.

[209] Bikram Chatterjee and others "An analysis of the qualitative characteristics of management commentary reporting by New Zealand companies" (2012) 5 Australasian Accounting, Business and Finance Journal 43 at 54.

[210] Kathy Gibson and Gary O'Donovan "Corporate governance and environmental reporting: an Australian study" (2007) 15 Corporate Governance: An International Review 944 at 947.

particular reporting standard, just requiring environmental impact reporting at all encourages companies to use standards such as GRI and to get their reports assured.[211] Alternatively, legislation could require the use of the GRI guidelines or of other international standards such as those of the Carbon Disclosure Standards Board or of the International Standards Organisation.

An argument against compulsory environmental reporting is that it could be costly for companies to monitor and collect environmental information.[212] This is likely to be the case. However, financial reporting is also costly but it is important in order to assess directorial performance and plan strategy. In the same way, environmental information should become strategically important if it is not already; even the National government has accepted that the economy must become low-carbon at some point, and so companies should be preparing for that eventuality. However, like financial reporting requirements, the environmental reporting requirements should also be tailored to firm size. SMEs should be encouraged to assess and report on environmental impact to some extent but in this paper at least, it is not argued that SMEs should have compulsory environmental reporting requirements. Listed companies should have a fuller range of reporting requirements, in line with their greater complexity and (probably) greater environmental impact. They should also have to provide this information so that investors can make investment decisions based on it if they choose.

Another argument against compulsory environmental reporting is that no one would use it.[213] Investors who want to know can go to the CDP to find out about the impact of some of New Zealand's largest companies. However, not all companies report through the CDP. In addition, research has been carried out with active shareholders who were involved in the New Zealand Shareholders' Association. The majority of participants wanted listed companies to report environmental information, even though they knew that it could be costly.[214]

Fewer than half of the NZX50 or the NZX100 currently report on environmental or CSR issues. The ones who already do would have a head start on the others. The other companies should not have too much trouble finding expertise to assist their reporting efforts; the benefit of New Zealand being a follower in this case is that there are a number of environmental reporting standards already prepared, and there are businesses whose expertise is in helping to measure and report on environmental impact.[215]

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[211] Ioannis Ioannou, and George Serafeim "The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries" (2014)(11-100) Harvard Business School Research Working Paper.
[212] Charl de Villiers and Chris van Staden "New Zealand shareholder attitudes towards corporate environmental disclosure" (2012) 24 Pacific Accounting Review 186.
[213] Rory Sullivan and Andy Gouldson "Does voluntary carbon reporting meet investors' needs?" (2012) 36 Journal of Cleaner Production 60.
[214] de Villiers and van Staden, above n 212.
[215] See for instance carboNZero Ltd which has expertise in measuring, verifying and helping to reduce GHG emissions of businesses.

There are two main benefits of requiring all listed companies to report on environmental impact: balanced reporting and competition. Mandatory reporting requirements should require companies to report bad as well as good environmental news, making it more difficult for companies to spin their environmental impacts. For instance, in the 2014 Fonterra Annual Report, the company reports that its farmers have excluded stock from 95% of defined waterways on their farms.[216] This is undoubtedly positive but what the report does not say is how much its farmers contributed to decreased water quality in those waterways and how much stock exclusion has helped. The other benefit is that comparisons can be drawn between the environmental impact of various companies, or even just the quality of environmental reporting. This is likely to spur companies on to decrease emissions, especially as consumers and investors will be able to see the environmental reports as well.

E. Summary

In summary, the UNGC and SBC both include useful principles for companies to follow. The UNGC, along with the SBN may be more appropriate for SMEs than the SBC, both in terms of membership fee and accessibility of concepts. All three initiatives are positive in that they encourage companies to consider and report on environmental issues. However, being voluntary measures, the reporting carried out under those initiatives may be less balanced and less comparable than mandatory reporting.

VIII. "Enlightened shareholder value" provisions in the UK Companies Act 2006 ("UK Act")

A. The section 172 directors' duty

The UK Act augmented the existing duty of directors to promote the success of the company to include a requirement for directors to "have regard" to certain considerations. Section 172 (1) states that:

> A director of a company must act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –
>
> (a) the likely consequences of any decision in the long term,
> (b) the interests of the company's employees,
> (c) the need to foster the company's business relationships with suppliers, customers and others,
> (d) the impact of the company's operations on the community and the environment,
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
> (f) the need to act fairly as between members of the company.

[216] Fonterra Co-Operative Group Ltd *Fonterra Annual Review 2014* available at <www.fonterra.com> at 42.

This section does not require a director to minimise the company's impact on the environment but environmental impact must be taken into consideration. In this provision, the UK has selected an option in between the shareholder and stakeholder approach: the approach of enlightened shareholder value. This was a change from the previously adopted shareholder approach, which New Zealand still retains. The rationale behind it is that "enlightened" shareholders understand taking into account the company's stakeholders will maximise the long term value of the company. Critics of enlightened shareholder value point out that the end result is the same as under the shareholder approach:[217] the directors must act in the interests of the shareholders where there is a conflict as shareholders are the only ones with power to remove directors or enforce duties against them through derivative action.

B. Reporting on environmental impacts by quoted companies

Given these critiques, the more important parts of the enlightened shareholder value provisions may well be the sections requiring quoted companies to report on their environmental impact. Quoted companies are companies whose equity share capital is listed in accordance with Part 6 of the Financial Services and Markets Act 2000 (c.8) or are officially listed in an European Economic Area State or are admitted to dealing on either the New York Stock Exchange or Nasdaq.[218]

The requirement for quoted companies to report on environmental impact and social and community issues has been in the UK Act since 2006. Amendments to the relevant sections were made in the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013 ("2013 Regulations"), which came into force on 1 October 2013. Unless otherwise stated, the sections mentioned include the amendments brought about by the 2013 Regulations.

It is compulsory for the directors of all companies to prepare a strategic report.[219] The purpose of this report is "to inform members of the company and help them assess how the directors have performed their duty under section 172".[220] A strategic report must contain "a fair review of the company's business"[221] and "a description of the principal risks and uncertainties facing the company."[222] Section 414C of the UK Act sets out that:

> (3) The review required is a balanced and comprehensive analysis of –
>
> (a) the development and performance of the company's business during the financial year, and
>
> (b) the position of the company's business at the end of that year,

[217] See for instance Andrew Keay "Tackling the issue of the corporate objective: an analysis of the United Kingdom's enlightened shareholder value approach" (2007) 29 Sydney L. Rev. 577.
[218] Companies Act 2006 (UK), s385(2).
[219] At s 414A(1). However, s 414A(2) exempts small companies from having to prepare a strategic report.
[220] At s 414C(1).
[221] At s 414C(2)(a).
[222] At s 414C(2)(b).

> consistent with the size and complexity of the business.
>
> (4) The review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include –
>
> > (a) analysis using financial key performance indicators, and
> >
> > (b) where appropriate, analysis using other key performance indicators, including information relation to environmental matters and employee matters.
>
> (5) In subsection (4), "key performance indicators" means factors by reference to which the development, performance or position of the company's business can be measured effectively.
>
> (6) Where a company qualifies as medium-sized in relation to the financial year…, the review for the year need not comply with the requirements of subsection (4) so far as they relate to non-financial information.
>
> (7) In the case of a quoted company the strategic report must, to the extent necessary for an understanding of the development, performance or position of the company's business, include –
>
> > (a) the main trends and factors likely to affect the future development, performance and position of the company's business; and
> >
> > (b) information about –
> >
> > > (i) environmental matters (including the impact of the company's business on the environment),
> > >
> > > (ii) the company's employees, and
> > >
> > > (iii) social, community and human rights issues,
> >
> > including information about any policies of the company in relation to those matters and the effectiveness of those policies.
> >
> > If the review does not contain information of each kind mentioned in paragraphs (b)(i), (ii) and (iii), it must state which of those kinds of information it does not contain.

The material changes to the reporting requirements of quoted companies brought about in the 2013 Regulations include the requirement that quoted companies report on human rights issues, and also on the gender make-up of their boards and senior management.[223] Most importantly, the 2013 Regulations amend the Large and Medium-sized Companies and

[223] At s 414C(8).

Groups (Accounts and Reports) Regulations 2008 to require quoted companies to include in their directors' report:[224]

> the annual quantity of emissions in tonnes of carbon dioxide equivalent from activities for which that company is responsible including –
>
> (a) the combustion of fuel; and
> (b) the operation of any facility.
>
> (3) The report must state the annual quantity of emissions in tonnes of carbon dioxide equivalent resulting from the purchase of electricity, heat, steam or cooling by the company for its own use.

The directors' report of quoted companies must also state the methodologies used to calculate the annual quantity of emissions and include at least one ratio comparing annual emissions to a quantifiable factor associated with the company's activities.[225] The report must also disclose last year's emissions figures, including the ratio.[226]

The amendments make it a fineable offence to approve a strategic report which does not comply with the Act for:[227]

> every director of the company who –
>
> (a) knew that it did not comply, or was reckless as to whether it complied, and
> (b) failed to take reasonable steps to secure compliance with those requirements or, as the case may be, to prevent the report from being approved

The Act already contained a provision making a director of a company liable to compensate the company for any loss suffered by it as a result of any untrue or misleading statement in a report or the omission from a report of anything required to be included in it, provided the director had the requisite knowledge or recklessness.[228] The reports of quoted companies are to be made available on the website of the quoted company.[229]

C. Efficacy of "enlightened shareholder value"

There is no specified standard that quoted companies have to report against in relation to their environmental impact. It is possible that the provisions could be subject to the central problem with voluntary disclosure – that is, companies choosing what to report and only reporting good news. However, the specific requirement to report on GHG emissions from year to year is one that quoted companies cannot escape. The requirement to include

[224] Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008, Schedule 7, at para 15(2).
[225] At para 17.
[226] At para 18.
[227] Companies Act 2006 (UK), s 414D(2).
[228] At s 463. However, for the director to be liable, the director must have known the statement to be untrue or misleading or was reckless as to whether it was untrue or misleading. Likewise, to be liable for an omission, the director must have known that the omission was dishonest concealment of a material fact.
[229] At s 430.

environmental key performance indicators where applicable increases the reliability and usefulness of the reports. The UK Departments for Environment, Food and Rural Affairs ("Defra") produces guidance for companies about their environmental reporting requirements. They suggest reporting on (where applicable) GHG emissions (compulsory for quoted companies), water, waste, resource efficiency and materials, emissions to land, water and air, and finally on biodiversity and ecosystem services.[230]

An evaluation of the UK Act was published in 2010. In it, researchers found that the majority of quoted companies surveyed (56%) were neutral when asked whether there was an increase or decrease in difficulty to comply with the requirements in the business review (requirements now in the strategic report).[231] Directors of quoted companies appeared to find the reporting of environmental and social information easier than providing extra information about essential contractual arrangements and trends affecting the future development of the business.[232] Those surveyed felt that the s 172 duty had not affected the behaviour of directors.[233]

D. Compatibility with New Zealand law

Like the UK before the 2006 reforms, and even arguably after them, New Zealand's company law subscribes to the shareholder approach. The best interests of the company are usually identified with the interests of shareholders as a whole. In this way, the factors that directors must consider under s 172 of the UK Act, including consideration of the company's impact on the environment, could fit quite easily into s 131 of the NZ Act. The requirement to report on the environmental impact and GHG emissions of listed companies could be inserted into the annual report requirements in the NZ Act.

However, it is difficult at present to assess the usefulness of the enlightened shareholder value provisions in encouraging companies to lessen their environmental impact. Changes may occur in the long term but the early indications seem to be that directors and companies do not consider the changes to have had much of an impact. The critiques of the "enlightened shareholder value" approach would also suggest that the provisions will not have a significant impact on business-as-usual corporate decision making. The reporting provisions, particularly in relation to GHGs might have more of an impact as records develop and consumer pressure builds. The XRB (if empowered by the Minister) could set a standard for environmental reporting in the annual report which could make the reporting obligation more powerful.

[230] UK Department for Environment, Food and Rural Affairs *Environmental Reporting Guidelines: Including mandatory greenhouse gas emissions reporting guidance* (June 2013).
[231] Samantha Fettiplace and Rebecca Addis *Department for Business, Innovation and Skills: Evaluation of the Companies Act 2006, Volume 1* (Infogroup/ORC International, 2 August 2010) at 77.
[232] At 77.
[233] At 72.

IX. Directors' duty to interact with the environment in a sustainable way

A. The Australian proposal

A directors' duty requiring interaction with the environment in a sustainable way was the suggestion of two Australian authors, McConvill and Joy. The suggested duty was this:[234]

> (1) A director or other officer of a corporation must exercise their powers and discharge their duties to ensure that the corporation interacts with the environment in a sustainable manner.
> (2) For the purposes of subsection (1), a corporation will be taken to be interacting with the environment in a sustainable manner if it takes all steps reasonably practicable to reduce its ecological impact and increase its resource efficiency.
> (3) A director or other officer of a corporation who makes an environmental judgment is relieved from liability under subsection (1), s 180(1) and s 181(1) and their equivalent duties at common law and in equity.
> (4) In this section: environmental judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation which is rationally made to comply with subsection (1).
>
> Note: The director's or officer's judgment is a rational one unless the belief is one that no reasonable person in their position would hold.

The duty was structured similarly to s 180 of the Corporations Act 2001 (Cth) ("Australian Act") in that it had a primary obligation (to act with a reasonable degree of care and diligence), and then a provision deferring to the discretion of directors provided they comply with certain standards such as acting in good faith for a proper purpose (the business judgment rule).[235]

The duty would fundamentally change the relationship between companies and the environment. Subsection 2 would ameliorate the uncertainty of subsection 1 but would still encourage action on sustainability issues, while subsection 3 and 4 (the ecological judgment rule) would protect directors from prosecution for not maximising profit in the short term:[236]

> If we keep in mind that sustainability is about balance (by maintaining production of resources for present needs, but also setting in place systems to provide for future needs), then so long as these companies can demonstrate that they have in place systems and procedures to achieve this balance, they will not fall foul of the proposed new statutory duty..

McConvill and Joy also suggested that a guidance note be put in place stating that the precautionary principle must govern this provision's interpretation so that scientific

[234] McConvill and Joy, above n 153, at 130 and 134.
[235] At 132.
[236] At 130.

uncertainty would not used as an excuse for inaction.[237] The authors then went on to consider the interaction with the directors' other duties, primarily the traditional rule that directors must seek to maximise the profits of shareholders. The authors' view was that the new directors' duty should take precedence over the maximisation of profit in the short-term.[238] To put it another way, as long as acting in accordance with the ecological judgment rule would maximise profit in the medium or long term, the directors should not be penalised for not maximising profit in the short term. The ecological judgment rule in subsection 3 and 4 of the proposed duty would protect directors from liability for breaches of the duty to act with care and diligence and to act in good faith in the best interests of the company. The business judgment rule would also be amended to include judgments made under the new duty.

The authors also recognised the possibility of environmental groups seeking injunctions against companies in anticipation of breach of the new duty, under the enhanced standing provisions in the Australian Act.[239] As they did not want business to be unduly held up, environmental groups would not have standing to bring injunction actions directly in relation to this section; rather, they would have to persuade the Australian Securities and Investments Commission or Environment Australia to apply for an injunction.[240]

B. Application to New Zealand

A similar provision could be inserted into the NZ Act, perhaps as s 131A. The focus of such a provision would, appropriately, be on encouraging sustainable development. As McConvill & Joy state:[241]

> sustainable development inherently accommodates companies continuing to go about making money for their shareholders through production and development, so long as systems and policies are implemented which provide for improvements in resource efficiency and ecological impact over time. Our proposed statutory duty does not interfere with this balancing of considerations in any way. …A company's production and development activities will only amount to a contravention of the *Corporations Act* when it offends the standards of environmental protection that a reasonable person in the community (which includes the perspective of shareholders and businesspeople as well as environmentalists) would expect a company to meet.

The duty would become stricter as standards change within the community with regard to the importance of sustainable development. There would not be the same concern about injunctions under the NZ Act as standing to apply is only conferred on a restricted class of

[237] At 131.
[238] At 132.
[239] At 135.
[240] At 135 – 136.
[241] At 137 – 138.

people. However, environmental groups should be able to notify a regulator of proposed breaches and that regulator should be able to apply for an injunction. Section 164 of the CA does not provide for a regulator to apply for an injunction; if the new duty was put in place, this should be amended. Environmental groups should also be able to apply to take a derivative action after a breach has occurred. The requirement that anyone seeking to take a derivative action must have the leave of the court would stem the floodgates potentially opened by that change.

X. Discussion and conclusion

This paper has examined the relationship between companies and the environment in New Zealand with a view to suggesting amendments to assist New Zealand's smooth transition towards a low-carbon and environmentally sustainable economy. It has found that directors do not have to consider the environment when taking action, nor do directors have to report on the environmental impacts of their companies. This is a stark contrast to the prescriptive rules (particularly for listed companies) when it comes to financial reporting. This lack of consideration of the environment by companies has contributed to the global environmental problems that New Zealand and the wider world face. The main drivers of global environmental change were described along with the environmental laws that New Zealand has put in place to control some of these drivers. Opportunities were then identified for corporate discretion to have a positive impact on the environment. The paper then went on to consider the voluntary environmental reporting that companies are currently carrying out. Given that less than half of listed companies report on environmental or CSR issues and for those that do, the standard of reporting varies wildly, it seems unlikely that many companies are exercising their discretion in a way that positively benefits the environment.

Next the paper next examined whether companies should have a duty to consider the environment or to reduce environmental impact. Milton Friedman's argument that the only duty of companies is to maximise profit was described and critiqued. Following Deva's analysis, it was argued that companies do owe the moral duties that other participants in society (natural persons) owe – the duties to act within the moral and legal norms of the society. The primary moral duty is to do no harm to others. Causing environmental damage, including by emitting GHGs, causes harm to future generations, and even though it can be difficult to quantify, companies have a moral duty to minimise that harm. A moral duty to minimise environmental damage would seem to justify the imposition of some sort of legal duty for companies to protect or consider the environment. The imposition of such a duty requires trade-offs between the benefits to current generations arising from environmentally degrading activities compared to the long-run harm that is caused to the environment and future generations by the perpetuation of business-as-usual approaches.

Three options were examined that combined some form of environmental consideration by companies with disclosure of environmental impacts. The UNGC and the New Zealand SBC and SBN, all voluntary initiatives, were examined together to determine whether voluntary initiatives were sufficient to encourage companies to consider the environment. While it was suggested that all three had benefits to corporate decision making and corporate disclosure, voluntary disclosure was found to be inferior to mandatory environmental disclosure in terms of numbers of companies reporting and the quality and balance of the reports.

The enlightened shareholder value provisions in the UK Act were considered next. While directors do have to consider the environment, and importantly, quoted companies have to report on their environmental impacts, the provisions were found to lack teeth as they do not move far enough away from the status quo where shareholders are paramount. The imposition of environmental reporting may increase the efficacy of the provisions overall as environmental issues become more important.

The last option examined was the Australian proposal requiring directors to ensure that companies interact with the environment in a sustainable way. This option has the most promise in terms of encouraging directors and companies to take action to minimise environmental impact and become more sustainable. Like the enlightened shareholder value provisions, balancing of various interests would occur but with the Australian proposal, reasonable efforts would always have to be taken to reduce environmental impact. This would not be the case under the UK provisions. The Australian proposal did not set out environmental reporting requirements. However, as suggested for the UK provisions, directors of listed companies could be required to report on environmental impact in the annual report.

From the above analysis, the Australian proposal combined with an environmental reporting requirement for listed companies would be the most effective of the options assessed in requiring companies to take responsibility for their environmental impacts and initiate change towards a low-carbon and environmentally sustainable economy. The safeguards put in place around the duty, such as the ecological judgment rule, would protect from prosecution directors who were making a genuine effort to minimise environmental impact. At the same time, the standard of environmental impact minimisation expected would be kept at the level of reasonableness as assessed with reference to societal expectations. Amending the standing requirements to take a derivative action to include environmental groups would also act as an encouragement for companies to take action, while retaining the leave provision would mean that cases were only taken where they had real merit. Allowing a regulator, such as the Financial Markets Authority or potentially the Ministry for the Environment to apply for an injunction would also be a positive step in making sure that the provisions were taken seriously.

However, if the government is unwilling to require directors to either take into account environmental impacts or to act in such a way as to ensure companies interact with the environment in a sustainable way, the government should still put in place environmental reporting requirements at least for listed companies. This would mean that when society finally demands sustainability on the part of its companies, companies actually know what their impacts are in order to reduce them. Encouraging networks such as the SBC, SBN and UNGC would also be beneficial, particularly for smaller companies.

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