DIRECTING THE COMPANY IN A CHANGING CLIMATE

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Introduction

[D]evelopment of the common law, as a response to changed conditions, does not come like a bolt out of a clear sky. Invariably the clouds gather first, often from different quarters, indicating with increasing obviousness what is coming.

Lord Nicholls, *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680 at [33].

Conditions are certainly changing. Earth will likely reach 1.5 °C of anthropogenic global warming between 2030 and 2052.[1] This will lead to sea-level rise, melting permafrost, ocean acidification, changing suitability of land for agriculture, a decrease in habitable land, and biodiversity loss.[2] Can company law in New Zealand keep pace with climate-related challenges?

The climate risk for companies goes both ways. Activists and experts alike attribute companies with much of the ruinous exploitation and emission that has caused and is causing anthropogenic climate change.[3] Larger companies especially are characterised as a risk *to* the climate. But companies are also at risk *from* climate change. Mark Carney described the issue of climate change for companies as a "tragedy of the horizons" because the detrimental effects lie beyond the horizon of mandates and business cycles.[4] There is a perception that company law and corporate governance mandate the maximisation of shareholder value and, as a partial result, boards of directors have unduly focussed on short-term profits.[5] They do this to the detriment of stakeholders and future generations, but also – this dissertation argues – to the detriment of corporate wellbeing.[6]

[1] Intergovernmental Panel on Climate Change *Summary for Policymakers: Global Warming of 1.5 °C* (IPCC, Incheon, 2018) at 4.
[2] Jim Flynn *No Place to Hide*: *Climate Change - A Short Introduction for New Zealanders* (Potton and Burton, Nelson, 2016) at 41-48.
[3] Colin Mayer "Foreword" in Nina Boeger and Charlotte Villiers (eds.) *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart Publishing, Oxford, 2018) at 3.
[4] Mark Carney, Governor of the Bank of England and Chairman of the Financial Stability Board "Breaking the tragedy of the horizon – climate change and financial stability" (Lloyd's of London, London, 29 September 2015).
[5] Lisa Benjamin "The Duty of Due Consideration in the Anthropocene: Climate Risk and English Directorial Duties" (2017) 2 CCLR 90 at 93.
[6] Gordon Pearson "Destruction by Ideological Pretence: The Case for Shareholder Primacy" in *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart Publishing, Oxford, 2018) 40 at 44.

Although boards of directors dictate corporate action on climate change, scholarly debate on directors' duties as a regulatory response to climate change risk is in its infancy.[7] This dissertation explores the latent role of directors' duties in incentivising directors to consider and mitigate foreseeable risks to their company from climate change. It argues that:

(1) Climate change is not simply an ethical issue, or an externality, but rather a foreseeable risk to a wide range of companies.
(2) The company is a separate legal entity standing at the centre of overlapping capital-contributing constituent groups.
(3) The best interests of that separate legal entity are profit and sustainability.
(4) Directors who do not consider and respond to foreseeable climate change risks to that entity risk breaching their duties of care, and good faith and best interests under the Companies Act 1993.[8]

There have been some proposals to reform directors' duties to shift corporate governance in a climate compatible direction. A popular one is following the United Kingdom's lead and amending s 131 of the Companies Act 1993 to explicitly reflect the principle of enlightened shareholder value by listing the stakeholders that directors should have due consideration for while promoting the interests of the company.[9] Another is to permit stakeholders to bring derivative actions against directors who breach their duties.[10] A bolder overseas proposal is to introduce a corporate duty of environmental care which dictates that "the purpose of the company is to create sustainable value through the balancing of interests of its investors and other involved parties within the planetary boundary".[11] All of these legislative proposals deserve serious consideration.

The arguments put forward in this dissertation, however, are not dependent on amendments or new primary rules regulating liability. Nor do they rely on the voluntary adoption by any company of a corporate social responsibility framework. They stand alone and are based on the capacity of the common law, and company law specifically, to develop in new conditions.

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[7] See as examples of burgeoning discussion: Daniel Kalderimis and Nicola Swan "Legal Opinion 2019" (Aotearoa Circle Sustainable Finance Forum, 2019) and Noel Hutley SC and Sebastian Hartford-Davis "Climate Change and Directors' Duties" (Memorandum of Opinion, 2016 and Supplementary Memorandum of Opinion, 2019).
[8] Sections 137 and 131.
[9] Companies Act 2006 (UK), s 172.
[10] This would entail broadening the definition of "entitled persons" under the Companies Act 1993, s 2.
[11] Beate Sjafjell and Jukka Mahonen, "Upgrading the Nordic Model for Sustainable Companies" (2014) 11(2) ECL 58 at 67.

This dissertation is structured as follows:

Chapter One outlines the risks to companies in New Zealand from climate change: physical, transitional, legal and reputational. It argues that the pervasive shareholder primacy approach to company law exacerbates companies' exposure to these risks and therefore undermines its own goals.

Chapter Two identifies the "company" that directors' owe their duties to under ss 131 and 137. It canvases the origins of the company which are drawn upon by agency and nexus-of-contracts theorists but argues that the legal development of the company from the mid-19th century and our Companies Act 1993 support an entity theory of the company. The implication of this conclusion is that directors are agents of the company, rather than agents of the shareholders.

Chapter Three considers the directors' duty to act in good faith and in the best interests of the company under s 131. It draws on entity theory and overseas authority to argue that the duty has advanced beyond its fiduciary loyalty origins and requires directors to consider climate change risks when forming their view of the company's "best interests": profit and sustainability.

Chapter Four argues that for directors to meet their s 137 duty of care, diligence, and skill to their company in a changing climate they must respond to a range of foreseeable climate-related risks. Domestic and overseas authority – and the long-term profitability and sustainability objectives put forward in Chapter Three – support a wider view of the risks within directors' purview. These include short-to-long term operational, systemic, reputational, legal, and financial climate-related risks to the company.

Chapter Five balances the additional benefits and challenges of using directors' duties and company law as a regulatory response to climate change. It argues that despite practical and philosophical challenges, directors' duties are a helpful place to shape critical board decision-making.

Chapter One: Risks to Companies from Climate Change

This dissertation argues that directors who do not consider and act to reduce or prevent foreseeable climate change risks to their company may be liable for breaching their duties of best interests and care.[12] This chapter outlines the risks posed by climate change to companies in New Zealand. It does so with two specific aims:

(1) First, to illustrate that climate change poses foreseeable risks to a wide range of companies in New Zealand.
(2) Second, to show that the shareholder primacy approach to directors' duties is itself a governance risk hindering companies' ability to adapt to or mitigate other climate change risks. This provides policy support for the arguments put forward in Chapters Two and Three that shareholder primacy is not supported by the Companies Act 1993 and is theoretically flawed.

I. Physical Risks

Physical risks to companies from climate change arise from storm or drought damage, sea level rise, water and other resource scarcity, asset stranding and disrupted supply chains.[13] Tourism companies will be affected by extreme weather and sea level rises; fishing companies by reduced fishing stocks in acidified, warmer waters; ports and all coastal assets might need to move due to changed geographies; disrupted supply chains could impact the production and operation of a range of companies reliant on imports.[14] Climate change will also increase the running costs of many working environments.[15] Insurance companies are also at risk – if they do not act prudently – from the impact of increasingly extreme weather events and related pay-outs.[16]

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[12] Sections 131 and 137.
[13] Helen Winkelmann, Susan Glazebrook, and Ellen France "Climate Change and the Law" (paper presented to the Asia Pacific Judicial Colloquium, Singapore, 2019) at 15; Ministry for the Environment "National Climate Change Risk Assessment for New Zealand: Main Report - Arotakenga Tūraru mō te Huringa Āhuarangi o Āotearoa: Pūrongo whakatōpū" (Wellington, August 2020) at 5.
[14] Ministry for the Environment, above n 13, at 8.
[15] Peter E Wallace "Climate Change, Corporate Strategy, and Corporate Law Duties" (2009) 44(3) Wake Forest L. Rev 757 at 759.
[16] Mark Carney, Governor of the Bank of England and Chairman of the Financial Stability Board "Resolving the climate paradox" (Arthur Burns Memorial Lecture, Berlin, 22 September 2016).

New Zealand is uniquely dependent on industries that rely on natural resources and their ability to function in the current climate. Our primary industries – fisheries, agriculture, aquaculture and forestry – cannot redirect investment the way other industries can. The impacts of their maladaptation to climate change could have serious cascading impacts on the entire economy.[17]

II. Transitional Risks

Climate change mitigation demands lower emissions: a move from high to lower carbon density.[18] This requires new technologies for power and heating, more efficient electronic products, and undoing non-energy damage like de-forestation.[19] Transitional risks are the business and financial risks to companies associated with decreasing carbon density. Companies are at particular risk from potential alterations to the currently favourable regulatory environment.[20]

Our economy is already transitioning. To help New Zealand meet its nationally determined contributions under the 2015 Paris Agreement, the Climate Change Response (Zero Carbon) Amendment Act 2019 was passed. The Act sets reduction targets of zero (excluding biogenic methane) for domestic greenhouse gas emissions by 2050, and biogenic methane reduction targets of 10 per cent below 2017 levels by 2050.[21] It also sets up a system of five-yearly emissions budgets, six-yearly national climate change risk assessments and national adaptation plans.[22] The first emissions budget is expected in 2021. The first national climate change risk assessment was released in August of 2020 and the first adaptation plan will follow in 2022. This publicly available, comprehensive risk assessment provides companies with guidance around national climate change risks and the New Zealand Government's likely transitional priorities. The newly amended Emissions Trading Scheme further commits New Zealand to reducing emissions through a capped carbon market and phasing down industrial allocations

[17] Ministry for the Environment, above n 13, at 68.

[18] Sarah Barker "Directors Duties' in the Anthropocene: Liability for Corporate Harm Due to Inaction on Climate Change" (2013) Corporate Harm Due to Inaction on Climate Change' (2013) http://responsible-investmentbanking.com/wp-content/uploads/2014/11/Directors-Duties-in-the-Anthropocene-December-2013.pdf at 23.

[19] Karen Bubna-Litic "Corporate Social Responsibility: Using Climate Change to Illustrate the Intersection between Corporate Law and Environmental Law" (2007) 24(4) EPLJ 253 at 277.

[20] Hutley SC and Hartford-Davis, above n 7, at 5.

[21] Climate Change Response (Zero Carbon) Act 2019, s 5Q.

[22] Sections 5V-ZO and 5ZP-T.

of carbon.[23] In light of this, directors will find it difficult to argue that transitional risks to their companies are unforeseeable.

These transitions could lead to increased operational costs, changes in consumer demand, and a loss of competitiveness for a wide range of companies.[24] More carbon-exposed companies face the risk of assets dropping in value or becoming stranded. Stranded assets include un-burnable carbon or infrastructure that can no longer be used because of carbon budget restraints or changes in technology.[25] Obtaining permits for greenhouse gas discharges may also become more difficult as local authorities increasingly take climate change into consideration in their decision-making processes, and affected parties become more knowledgeable and motivated to oppose applications.[26] Especially exposed industries might be uninsurable and unable to raise funds through corporate bonds.[27]

Financial institutions may face as much risk as primary sector companies. The government has now proposed that financial firms and listed companies be required to make climate-related financial disclosures.[28] Risks required to be reported include the physical, legal, financial, technology and reputational risks faced in a changing climate.[29] Bad news may well ruin share prices as investors and credit providers aim to limit their own exposure to climate risk.[30] At the very least, costs will be higher and yields lower.

III. Litigation and Reputational Risks

Thomson v Minister for Climate Change Issues and *Smith v Fonterra* have broadly demonstrated the willingness of the High Court to adjudicate on climate change issues.[31] In their 2019 “Climate Change and the Law” paper, Winkelmann CJ and Glazebrook and France JJ of the New Zealand Supreme Court extra-judicially expressed the view that companies who

[23] Climate Change Response (Emissions Trading Reform) Amendment Act 2020.
[24] Lord Sales, Justice of the United Kingdom Supreme Court “Directors’ duties and climate change: Keeping pace with environmental challenges” (Anglo-Australasian Law Society, Sydney, August 2019) at 6.
[25] Noel Hutley SC and Sebastian Hartford-Davis, above n 7, at 15.
[26] Noel Hutley SC and Sebastian Hartford-Davis, above n 7, at 10.
[27] Ministry for the Environment, above n 13, at 73.
[28] Ministry for the Environment, above n 13, at 27.
[29] Chapman Tripp “Climate risk disclosure – coming your way soon?” (18 June 2020) <https://chapmantripp.com/trends-insights/climate-risk-disclosure-coming-your-way-soon/>.
[30] Sarah Barker, above at n 18, at 9.
[31] *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419; *Thomson v Minister for Climate Change Issues* [2017] NZHC 733.

do not adequately respond to climate change face legal risk.[32] Likely legal heads include breaches of directors' duties, corporate disclosure laws and financial risk management laws.[33] Indirect legal exposure could arise from involvement in projects which become the subject of climate litigation.[34] This analysis did not rely on amendments, but rather predicted an increase in the oversight and enforcement of existing laws.[35]

The justices did note that private climate change litigation was more fraught with doctrinal difficulties than claims against governments.[36] These difficulties, as they relate to directors' duties, are discussed in subsequent chapters in this dissertation. Evidential barriers to successful private climate change litigation, on the other hand, are diminishing.[37] The paper suggested that the Global Carbon Budget (GCB) – an estimate of maximum prudent yearly emissions – could serve as a useful tool for private climate change litigation.[38] This is because the GCB helps to establish causal links between individual projects and climate change.[39] Carbon leakage or market substitution arguments by extractive industries in developed countries are also losing favour with courts.[40] The New South Wales Land and Environment Court recently held market substitution arguments based on carbon leaks are a distraction: developed companies must lead global emission reductions.[41]

Despite doctrinal difficulties, there is a strong motivation to target companies with climate change related litigation.[42] This is because companies who have contributed to climate change are seen as the right parties to bear some responsibility for its impacts.[43] However, for cases

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[32] Winkelmann, Glazebrook and France, above at n 13, at 16; Ministry for the Environment, above n 13, at 97.
33At 16.
[34] Kalderimis and Swan, above n 7, at 12.
[35]Winkelmann, Glazebrook and France, above n 13, at 16.
[36] At 16.
[37] Wallace, above n 15, at 760.
[38] Winkelmann, Glazebrook and France, above at n 13, at 35: the Global Carbon Budget is an annual estimate by the Intergovernmental Panel on Climate Change (IPCC) of the amount of carbon dioxide the world can emit while still having a likely chance of limiting global temperature rise to 2 degrees Celsius.
[39] At 35.
[40]Carbon leakage or market substitution arguments refer to the likely increase in global greenhouse gas emissions if applications for coal production or other emitting activities are rejected by authorities in developed countries and investment flows to the same activities in less developed countries with laxer emission constraints. See generally: *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7; *WildEarth Guardians v US Bureau of Land Management* 870 F 3d 1222 (10th Cir, 2017).
[41]*Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 at [539]. Note that this case is being appealed.
[42] Geetanjali Ganguly, Joana Setzer, Veerle Heyvart "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38(4) O.J.L.S 841 at 845.
[43] Ganguly, Setzer, Heyvart, above n 42, at 845.

based on breaches of directors' duties – which this dissertation is focussed on – success will depend on the will of shareholders and liquidators to take action against directors who ignore climate considerations.[44] Directors' duties are primarily enforceable by them.[45]

Unsuccessful shareholder proposals at Auckland International Airport and Meridian Energy's 2017 AGMs – that those companies respectively "investigate other areas of the business that reduce CO2 emissions that the company can be involved in due to forecast climate change" – suggest that some level of shareholder appetite for climate consideration by their boards is present.[46] Relatedly, in the United Kingdom fourteen pension scheme trustees have been threatened with legal action by beneficiaries for failing to consider climate-related financial risks.[47]

Even if the majority of defendant companies deflect claims put forward in climate change litigation, the cases may still change the air. Litigation could contribute to incremental shifts in interpretation and judicial attitudes.[48] A shift in thinking about responsibility for emissions could occur.[49] It could provide opportunities for judges to highlight more fruitful pathways to pursue or could serve as a catalyst for legislative reform.[50] Commentators have pointed to the precedential value of tobacco and asbestos litigation by way of comparison.[51]

Involved companies will also likely incur reputational costs regardless of lawsuit outcomes.[52] Whatever the outcome in *Smith v Fonterra*, for example, the defendant companies have gained notoriety as the top seven New Zealand greenhouse gas emitters.[53] Even without any litigation-related publicity, companies with poor sustainability practices are faced with ever-increasing risk as investors, consumers and potential employees become more conscious of climate change.[54] This is especially true for New Zealand companies that profit from their clean-green branding.

[44] Lord Sales, above n 24.
[45] Companies Act 1993, ss 165 and 301.
[46] Kalderimis and Swan, above n 7, at 11.
[47] Kalderimis and Swan, above n 7, at 11.
[48] Barker, above n 18, at 30.
[49] Winkelmann, Glazebrook and France, above n 13, at 16.
[50] Ganguly, Setzer, Heyvart, above n 42, at 865.
[51] Ganguly, Setzer, Heyvart, above n 42, at 865.
[52] Barker, above n 18, at 28.
[53] *Smith v Fonterra Co-operative Group Ltd,* above n 30.
[54] Hutley SC and Hartford-Davis, above n 7, at 14.

IV. Shareholder Primacy as a Governance Risk

Governance risks are risks that our legislative and decision-making frameworks are not fit for the action required to mitigate and adapt to climate change. The National Climate Change Risk Assessment 2020 emphasised that governance risks were among the most extreme risks faced in New Zealand.[55] If our institutional arrangements do not account for uncertainty and change over longer timeframes – and the Risk Assessment does not think they do – there are reduced structural incentives to adapt, and climate change risks across all areas will be exacerbated.[56] The Risk Assessment's discussion is pitched at central government, but it has parallels with critiques of the corporate governance principal shareholder primacy in light of climate change.[57]

There is support for the proposition that company law in New Zealand reflects shareholder primacy.[58] Chapters Two and Three will consider the legal correctness of this proposition, but this chapter is focussed on the policy implications of short-term, or even long-term, shareholder primacy as a paradigm of corporate governance for companies in a changing climate.

Shareholder primacy is the idea that the primary responsibility of the company's management is to promote the economic interests of their shareholders.[59] Although different shareholders will have different interests, this contributes to a widely held belief that management should act to maximise the share price and dividend pay-outs.[60]Share price is closely linked to a company's quarterly earnings, so this has contributed to a corporate culture of short-term earnings targets, rapid profit strategies and denominator management.[61] This is termed short-term shareholder primacy. Others have argued that shareholder primacy can and should include the long-term interests of shareholders.[62] However, there are many practical incentives placed on boards of larger companies to pursue short-term profit. Carrots include bonuses and

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[55] Ministry for the Environment, above n 13, at 5.
[56] At 5.
[57] At 17.
[58] Peter Watts *Directors' Powers and Duties* (Lexis Nexis, Wellington, 2009) at 134; Kalderimis and Swan, above n 7, at 19.
[59] David Millon "Radical Shareholder Primacy" (2013) 10 U. St. Thomas. J. J. 1013 at 1014.
[60] Millon, above n 59, at 1040.
[61] Millon, above n 59, at 1040
[62] John Parkinson Corporate Power and Responsibility: Issues in the Theory of Company Law (Clarendon Press, Oxford, 1993) at 5.

reputational payoffs.[63] Sticks include pay cuts, job loss, large scale selloffs and consequent decline in share prices.[64]

The economic justification for short or long-term shareholder primacy generally is that profit maximisation by the company leads to the maximisation of social wealth.[65] In those cases where profit maximisation has economically suboptimal results or conflicts with entrenched social values, external constraints can be imposed by government.[66] Building from this economic analysis of the role of the company, the Chicago Law and Economics movement put forward the legal idea that the board of directors are the agents of the shareholders and so should maximise profits in their interests.[67]

The wisdom of shareholder primacy, and whether management should make decisions guided solely by profit and shareholders' interests or rather take into account of the wider interests of third parties and social welfare, has been debated at least since Berle and Means' *The Modern Corporate and Private Property*.[68] Ireland argues that shareholder primacy exacerbates potential for corporate irresponsibility and is deleterious for the long-term productive health of the company.[69] Dysfunctions in light of climate change include:

(1) For short-term shareholder primacy, short-term thinking which reduces directors' incentives to create long-term climate change adaptation plans and invest in and create the products required in our lower-carbon economy.[70]
(2) Success indicators which are dependent on externalising environmental costs and, for some emissions-intensive industries, contributing to climate change.[71]
(3) A view of shareholders as principals. Shareholders, especially in larger companies, are poor principals. They have "little financial or other incentive to ensure that managers behave ethically or decently…because in law they are personally untouchable".[72]

[63] Lynn A. Stout "The Shareholder Value Myth" (2013) Cornell Law Faculty Publications 771 at 773.
[64] Millon, above n 59, at 1019.
[65] Parkinson, above n 62, at 1.
[66] Parkinson, above n 62, at 1.
[67] Millon, above n 59, at 1025.
[68] Adolf A. Berle and Gardiner C. Means *The Modern Corporation and Private Property* (2nd ed, Transaction Publishers, New Jersey, 1968).
[69] Paddy Ireland "Corporate Schizophrenia: the institutional origins of corporate social irresponsibility" in Nina Boeger and Charlotte Villiers (eds.) *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart Publishing, Oxford, 2018) at 16.
[70] Jean Tirole *Economics for the Common Good* (Princeton University Press, New Jersey, 2019) at 175.
[71] Julia Maskill "Extending Directors' Duties to the Natural Environment: Perfect timing for greener companies in Aotearoa New Zealand?" (2016) 22 Auckland U L Rev 281 at 297.
[72] Paddy Ireland, above n 69, at 21.

(4) The suggestion that a director who pursues an alternative company climate adaptation agenda that reduced shareholder profit would be violating their duties owed as the agent of the shareholders.[73]

These governance risks exacerbate the other risks posed to companies by climate change by rendering company management less able or less incentivised to respond to them.

V. Conclusion

Business as usual is not a long-term commercial option for companies in light of climate change.[74] New Zealand is uniquely exposed to climate change risks in our largest sectors and our government is making serious transitional moves. The corporate governance paradigm of shareholder primacy presents an additional governance risk to companies. These risks are translating into increasing legal and reputational risks for companies who fail to perceive them or view environmental considerations as outside the real business of business.

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[73] Millon, above n 59, at 1020. See as an example of such a suggestion: *Hutton v West Cork Railway Co* [1883] 23 Ch D 654.

[74] Barker, above n 18, at 18.

Chapter Two: Who is the "Company"?

Section 15 of the Companies Act 1993 states that:

> A company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand register.

This section, on its face, appears to answer this chapter's question. However, more than 150 years since the first companies act bestowed separate legal personality on the company, its true nature remains subject to debate.

Directors owe their duties of good faith and best interests, and care, to the company explicitly.[75] So, the practical significance of our conception of the company is that it sets the object and scope for these directors' duties. In particular, the extent to which a director is permitted or required to consider climate change in their decision-making is dependent on what is considered internal or external to the company.

The conceptual tension was acknowledged by the New Zealand Law Commission in their *Company Law Reform and Restatement*.[76] The law "suffers from confusion as to whether the best interests of the company, which is the concept which underlies director accountability, requires assessment of the company as the collective shareholders or as the enterprise itself".[77]

This chapter will argue that their Companies Act 1993 reform mandates an entity primacy view of the company.[78] On this view – building on Jeroen Veldman's theory[79] – the company is a social and institutional entity standing at the centre of overlapping capital-contributing constituents.

I. The Development of the Company: from Aggregate to Entity

[75] Sections 131 and 137.
[76] Law Commission *Company Law Reform and Restatement* (NZLC R9, 1989) at [188].
[77] At [188].
[78] Law Commission, above n 76, at [113].
[79] Jeron Veldman "The SLE and the architecture of the modern corporation" in Nina Boeger and Charlotte Villiers *Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity* (Hart Publishing, Oxford, 2018) at 66.

In the early nineteenth century, companies were groups of investors pooling their own risk capital to carry on an enterprise.[80] The joint stock company was an aggregate made by and of investors. Investors were the ones who sacrificed and worked for the development of their company's product or service. Their unlimited liability for losses and debts, therefore, was thought to be the basis for their assumption of full control and direction of the company and the morality of the market.[81] Unlimited liability was considered to act as a strong incentive to direct the investor-partners towards the long-term interests of the company and minimise risks for non-owner stakeholders like employees, suppliers, customers and the community.[82]

Companies were initially only granted corporate charters (their own personality) by the Crown when they undertook public responsibilities.[83] However, by the mid-nineteenth century, the balance had shifted so that the public responsibilities of companies given corporate charters could be small and private privilege could dominate.[84] This was a reflection of the spread of capitalist social relations during the eighteenth and nineteenth centuries.[85] There was growing acknowledgement of the role companies could play as capital managers and generators in a capitalist society. Companies were also growing exponentially in size. The railway companies in Britain, for example, needed to raise huge amounts of capital and had many passive non-directing investors or shareholders.[86] It did not make much sense for passive shareholders to be exposed to the same unlimited liability as investor-partners who directed their companies. Unlimited liability also discouraged the scale of investment and risk-taking required to accumulate capital and fund networks such as railways and telecommunications.[87]

This desire to maximise the wealth-generating role of companies and protect passive shareholders led to statutory changes like incorporation by registration (rather than charter) and the removal of the attribution of unlimited liability from shareholders.[88] The legislative evolution of the modern company was not entirely smooth. The 1856 Joint Stock Companies

[80] Berle and Means, above n 68, at 5.
[81] Veldman, above n 79, at 62.
[82] Veldman, above n 79, at 62.
[83] Susan Watson and Lynn Taylor (general eds) *Corporate Law in New Zealand* (Thompson Reuters, Wellington, 2018) at 18.
[84] Watson and Taylor, above n 83, at 18.
[85] Paddy Ireland "Property, Private Government, and the Myth of Deregulation" in Sarah Worthington (ed) *Commercial Law and Commercial Practice* (Hart Publishing, Oxford, 2003) 85 at 93.
[86] Ireland, above n 69, at 19.
[87] Helen Winkelmann "Foreword" in Susan Watson and Lynn Taylor (general eds.) *Corporate Law in New Zealand* (Thompson Reuters, Wellington, 2018) at v.
[88] Veldman, above n 79, at 66.

Act (UK) introduced shareholder limited liability, only for it to be removed by Parliament two years later in response to high-profile abuse by shareholders.[89] Clearly, there were some reservations about removing the aforementioned safeguard for the 'morality of the market'. By the time the 1862 Joint Stock Act was introduced, however, limited liability was back for good.[90]

These changes – not by chance – coincided with the spread of intangible, financial forms of wealth. From the 1830s onwards courts began to treat shares not as interests in the actual assets of the company, but as intangible rights to profit or receive in certain circumstances.[91] Treating shares as free-standing rights to a portion of revenue offered liquid transferability and an ability to reinvest in the open market.[92]

Nineteenth century shifts in the operation and conception of the company were reflected in New Zealand's first Joint Stock Companies Act 1860, which was adopted directly from the United Kingdom's 1856 Joint Stock Act.[93] It granted limited liability to shareholders as of right and made shares freely transferable by confirming the certainty of their financial obligation.[94] Soon after, the United Kingdom's 1862 Joint Stock Act changed the nature of company further by permitting seven or more shareholders to form *a* company made by not of shareholders.[95] On incorporation, a new corpus or legal person was created.

The full implications of separate legal personality were realised a few decades later in the famous House of Lords case of *Salomon v A Salomon & Co Ltd*.[96] When deciding that the creditors of a bankrupt company could not sue the company's shareholder Mr Salomon for repayment despite him being essentially the only person involved with the company, Lord MacNaughten famously held that:

> "The company is at law a different person altogether from the subscribers to the memorandum: and, though it may be that after the incorporation the business is precisely the same as it was before, and the same persons are managers, and the same persons receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are subscribers as

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[89] Katharina Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, New Jersey, 2019) at 61.
[90] Pistor, above at n 89, at 61.
[91] Ireland, above n 69, at 21.
[92] Veldman, above n 79, at 62.
[93] Watson and Taylor, above n 83, at 18.
[94] Watson and Taylor, above n 83, at 18.
[95] Ireland, above n 69, at 21.
[96] *Salomon v A Salomon & Co Ltd* [1896] UKHL, [1897] AC 22.

members liable, in any shape or form, except to the extent and in the manner provided by the Act."[97]

Had the House of Lords held that Mr Salomon, rather than the company, was principal, then he would have been liable for repayment to the company's creditors on insolvency. But they did not. By the end of the nineteenth century the company was its own legal person or entity. This meant that:

(a) The company had its own capacity to enter into business transactions and acquire debts and liabilities.
(b) Shareholders were largely separated from the management of the company and shielded from liability beyond the value of their shares.
(c) The courts were willing to uphold the company as a separate legal entity even where the reality was a one-man operation.

II. The Nexus of Contracts and Agency Theories of the Company

Despite this 19th century shift, the "vestiges of an older era when shareholders, like partners, controlled their firms"[98] continue to inform company theory.[99]

Proponents for shareholder primacy (discussed in Chapter One) cannot explicitly put forward the idea of the company as being an aggregate or association of shareholders because of section 15.[100] Instead, the nexus of contracts conception of the company as a legal fiction – paired with the residual shareholder-ownership paradigms arising from the origins of the company outlined above – has been used to promote a related agency model of corporate governance in which executives as agents respond exclusively to the shareholders as principals.[101]

The nexus of contracts is a product of the law and economics school of thought. From the 1970s onwards the nature of separate legal personality has been dealt with by characterising the separate personality of the company as a legal fiction. Behind that legal fiction lies the true

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[97] *Salomon v A Salomon & Co Ltd*, above n 96, at 51.
[98] Veldman, above n 79, at 62.
[99] *Greenhalgh v Arderne Cinemas* Ltd [1946] 1 Aii ER 512; [1951] Ch 286 per Evershed MR "the phrase 'the company as a whole', does not (at any case in such a case as the present) mean the company as a commercial entity, as distinct from the corporators" at 289.
[100] Susan Watson "Duties of Directors – Good Faith and the Best Interests of the Company" in Watson and Taylor, above n 83, at 530.
[101] Veldman, above n 79, at 61.

nature of the company: a nexus of contracts.[102] This has been defined as a focal point linking reciprocal arrangements.[103] These contracts or reciprocal arrangements that meet at the company nexus are between shareholders, suppliers, employees, consumers and other corporate constituencies.[104]

Agency theory is based on the notion that the key contract in this nexus is between the shareholders and directors.[105] The primacy of this contract relies on the distinctness of shareholders due to their legally defined company law rights, their investment of capital, their origins as owners of the company, and residual claimant status.[106] Directors are entrusted with safeguarding the investment (or property) of the shareholders. However, they cannot be left to watch over shareholders' property as they would their own. So, the purpose of company law and directors duties is to solve that agency problem.[107] The company's interests can essentially be equated with the interests of the shareholders as a whole because they are the owners of the company and the principals of the director-agents.[108] Directors – on this view – ought to act to maximise their shareholders' returns, often in the short-term (as discussed in Chapter One).

There are flaws in the nexus-agency descriptions of the company. Theorists have argued that nexus of contracts fails to explain key features of the modern company.[109] Contracting alone does not:

1. Provide limited liability for those involved in the company.[110]
2. Bestow immortality on the company.[111]
3. Explain the bureaucratic hierarchy in companies.[112]

On a more linguistic note, Eisenberg argues that the nexus of contracts theory is circular.[113] A company cannot be defined as the reciprocal arrangements that meet at the company.[114] This

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[102] Pistor, above n 89, at 47.
[103] Melvin A. Eisenberg "The Conception that the Corporation is Nexus of Contracts, and the Dual Nature of the Firm" (1998) 24 J. Corp. L. 819 at 822.
[104] Susan Watson "The Corporate Legal Person in Context" in Watson and Taylor, above n 83, at 47.
[105] Veldman, above n 79, at 63.
[106] Watson, above n 104, at 53.
[107] Watson, above n 104, at 47.
[108] Watts, above n 58, at 10.
[109] Eisenberg, above n 103, at 829.
[110] Pistor, above n 89, at 47.
[111] Pistor, above n 89, at 47.
[112] Eisenberg, above n 103, at 829.
[113] At 830.
[114] At 830.

would be to commit the cardinal sin of definitions. It also misses the point that suppliers, employees, and consumers do not contract with the directors of a company, they contract with the company itself.[115] So even if there is a nexus of contracts, they meet at the company and we are still left asking: who is the company?

The link between agency theory and the nexus of contracts theory is also tenuous. Under the nexus of contracts, the body of shareholders only has a contractual claim against the company, rather than the proprietary claim advanced by agency theory.[116] Even if we overlook this inconsistency, the legal separation of shareholders from the company, the assertion that shares are not assets of the company, and the principle of limited liability, all act to diminish agency theory's claims that shareholders are the owners of the company property.[117]

Ireland argues that it makes little theoretical or policy sense to conceive of shareholders as both insider-owners with residual property rights, and as outsiders who – like creditors – have transferred ownership of property to the separate legal entity and are liability free.[118] Agency theory does this by ignoring or explaining away the legal existence of the company when considering in whose interests' directors should act, but "hastily resurrect[ing]" the separate legal entity when it comes to limited liability. [119]

This attempt to advance the position of shareholders is understandable in light of the origins of the company, but it does not accurately reflect the shifts in company law throughout the nineteenth century or our modern Companies Act.

III. The "Company" in the Companies Act 1993

The Companies Act 1993 moved away from shareholder primacy and identified the company with the enterprise. It bestows endless life of the modern company, suggesting that it is its own, enduring entity beyond its current management or shareholding.

[115] Pistor, above n 89, at 52; *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 (PC).
[116] Eisenberg, above n 103, at 833.
[117] Watson and Taylor, above n 83, at 51.
[118] Watson and Taylor, above n 83, at 21: "Although we generally refer to the liability of shareholders as limited, the reality is that once shareholders have paid up their capital contribution, they prima facie have no liability to the company or to third parties to whom the company becomes liable".
[119] Ireland, above n 69, at 21.

This is supported by the full capacity of the company; the ultra vires doctrine was explicitly abolished by the Companies Act.[120] Ultra vires is a common law doctrine that if a corporation is bound by a constitution, articles of association or rules, it cannot act outside of those rules.[121] However, ss 17 and 18 provide that no act or property transfer to or by the company is invalid merely because the company did not have the right or power to act and that the company cannot assert its own incapacity against a third party unless they knew or ought to have known about it.[122] Companies can now also buy their own shares, subject to protections for shareholders and creditors.[123]

The Companies Act distinguishes between duties owed by directors to the company and duties owed by directors to the company's shareholders.[124] Duties of good faith and best interests, and care, are owed to the company explicitly.[125] Shareholders cannot bring a personal action against a director for a breach of those duties. If the company and the shareholders could be equated with one another, this distinction in the object of directors' duties would be unnecessary.

Shareholders can apply for an injunction under s 164, leave to bring a derivative action on behalf of the company under s 165, or for an order under ss 170 or 172 if they feel a director has breached their duties to the company. These provisions reflect an aim of the Companies Act which is to:

> [E]ncourage efficient and responsible management of companies by allowing directors a wide discretion in matters of business judgement while at the same time providing protection for shareholders and creditors against the abuse of management power.[126]

Shareholders can also approve the company's constitution, major transactions, and the liquidation of the company.[127] They are empowered to appoint and remove directors and have a residual claim to the assets of the company post-liquidation.[128] Especially in a country of small and medium enterprises (SMEs) where a handful of people are directors, shareholders

[120] Law Commission *A New Act for Incorporated Societies* (NZLC R129, 2013) at 66.
[121] Law Commission, above n 120, at 66.
[122] Companies Act 1993, ss 17 and 18.
[123] Law Commission, above n 76, at 1.
[124] See ss 131 and 137 as compared to ss 90, 140 and 148.
[125] Sections 131 and 137.
[126] Companies Act 1993, long title at (d).
[127] Sections 32, 106, and 129.
[128] Sections 106, 153 and 156.

and sometimes employees, these rights support the common-sense conception of the company as an aggregate of shareholders not too dissimilar from the joint stock company.

However, while shareholders are clearly a key constituency of the company, they are not *the* company.

Boards do not derive their powers from shareholders. The old Companies Act 1955 conferred the power of management on directors derivatively from the shareholders through the memorandum and articles.[129] Section 128 of the Companies Act 1993, however, confers on directors a statutory jurisdiction to manage the business and affairs of the company. The powers of the board are now "original and undelegated" rather than obtained by deemed contract with the shareholders.[130]

Shareholder's rights do not amount to ultimate decision-making authority either. While shareholders must be allowed reasonable opportunity to question, discuss or comment on the management of the company at a meeting, the default position is that any shareholder resolution relating to the management of the company is not binding on the board.[131]

The common law principle from *Re Duomatic Ltd*[132] that shareholders acting unanimously can ratify a decision made informally by the company was recently questioned in *Attorney General v Ririnui*.[133] The Court of Appeal held that shareholders acting unanimously to override a management decisions of the board would be an unconstitutional decision.[134] This point has not been decided – and there is academic disagreement which the Supreme Court did not entirely resolve on appeal[135] – but the judicial attitude from our highest courts seem to suggest deference to board management and a shift away from acknowledging shareholder control.[136]

Shareholding is not equivalent to ownership of the company's assets. The House of Lords in *Macaura v Northern Assurance Co Ltd* held that shareholders have no legal or equitable

[129] Law Commission, above n 76, at [496].
[130] Stephen Bainbridge "Director versus Shareholder Primacy: New Zealand and USA Compared" (2014) 4 NZ L Rev 551 at 564.
[131] Companies Act 1993, s 109(3).
[132] *Re Duomatic Ltd* [1969] 2 Ch 365.
[133] *Attorney-General v Ririnui* [2015] NZCA 160.
[134] At [55].
[135] Peter Watts "The power of a special majority of shareholders, or of all shareholders acting informally, to override directors – Attorney-General v Ririnui" (2015) CSLB 89 at 91.
[136] See *Attorney-General v Ririnui*, above n 133, per Harrison J at [57] where he states that the directors' power to manage a corporation's operation free from shareholder control is consistent with separate legal personality.

interests in the property of the company.[137] This was despite the shareholder in question being the only human involved in the company.[138]

Non-shareholder constituents also have claims on the company. Their interests may be legitimate or mandatory for directors to consider. Section 132(1) of the Companies Act states that nothing in the duty of good faith and best interests limits the power of a director to make provision for the benefit of employees when the company ceases all or part of its business. This has weight because directors are permitted to pay employees redundancies despite this not being consistent with shareholder-orientated profit maximisation.[139]

Creditors' interests must be considered when the company is near or actually insolvent.[140] This duty is enforceable. Section 301 empowers creditors and liquidators of an insolvent company to apply to the court to (a) inquire into directors' conduct and (b) order the director to pay money or restore property directly to them if they have breached their duties.[141] The practical implication of the distinction between creditors' and shareholders' interests arises near insolvency. [142] The potential for a revival in the company's fortunes may make trading in the shareholders' interests, but the duty to the creditors will require directors' to act otherwise.[143] The unanimous consent of the shareholders would not be enough to justify the breach.[144]

Provision for the consideration of employee and creditor interests could just be viewed as exceptions to shareholder primacy, but it is more in line with the scheme of the Companies Act to view them as examples of the broad interests of the corporate entity which include all of its constituents.[145]

Courts have upheld the distinction between the company and the shareholders despite the New Zealand SME reality. In *Lee v Lee's Air Farming Ltd*, the wife of a deceased governing director and majority shareholder who had died while working in an employee capacity claimed

[137] *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 628.
[138] *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 628.
[139] Parkinson, above n 62, at 82.
[140] *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA); confirmed recently in *Debut Homes v Cooper* [2020] NZSC 100 at [31].
[141] There was no such right under s 321 of the 1955 Companies Act's equivalent provision.
[142] Hugh Rennie QC and Peter Watts "Directors' Duties and Shareholder's Rights" (New Zealand Law Society Seminar, August-September 1996) at 20.
[143] Parkinson, above n 62, at 87.
[144]*Sojourner v Robb* [2006] 3 NZLR 80 (HC) at [25].
[145] Parkinson, above n 62, at 87.

worker's compensation from his company.[146]The Court of Appeal (NZ) in 1959 held that Mr Lee could not have both been worker and an employee because there would exist no power of control or relationship.[147] The Privy Council overturned their decision. They held that:

> "There appears to be no great difficulty in holding that a man acting in one capacity can make a contract with himself in another capacity. *The company and the deceased were separate legal entities*."[148] [My emphasis]

This position was more recently supported by Owen J in the Supreme Court of Western Australia in *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*: "the interests of the shareholders and the interests of the company may be seen as correlative not because the shareholders are the company but, rather, because the interests of the company and the interests of shareholders intersect".[149] The Supreme Court of Canada similarly held that "the directors owe a fiduciary duty to the corporation, and only to the corporation".[150]

IV. An Entity Theory of the Company

The ongoing push from agency theorists to uphold the separate legal personality where it suits shareholders and dismiss it where it does not has contributed to the law's continuing "struggle with the concept of the company as an entity and an organisation that operates in the world".[151] It has led to literature which circularly asserts that the company is "the shareholders as a whole, but this does not mean the duty [of good faith and best interests] is owed to shareholders, the duty is owed to the company".[152]

True entity theory resolves this struggle and is mandated by the Companies Act 1993.[153] Entity theory conceives of the company as a social and institutional entity, defined and protected by company law, standing at the centre of overlapping capital-contributing constituent groups.[154]

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[146] *Lee v Lee's Air Farming Ltd* [1961] NZLR 325 (PC).
[147]*Lee v Lee's Air Farming Ltd* [1959] NZLR 393, 399.
[148] *Lee v Lee's Air Farming*, above n 146, per Lord Morris of Borthy-Gest at 30.
[149] *Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239 at [4385].
[150] *BCE Inc v 1976 Debentureholders* [2008] SCC 69 at [66].
[151] Watson and Taylor, above n 83, at 5.
[152]Silvana Schenone and Igor Drinkovic *Duties and Responsibilities of Directors and Company Secretaries in New Zealand* (5th ed, Wolters Kluwer, Auckland, 2016) at 122.
[153] Winkelmann, Glazebrook and France, above n 13, at 46.
[154] I use and amend Jeron Veldman's definition here: see Veldman, above n 79, at 67.

Capital contributions cover human, intellectual, material, natural, social and financial capital.[155] Capital-contributing constituents, therefore, include:

(a) Shareholders and creditors for their provision of financial capital.
(b) Employees for their provision of knowledge and experience or human capital.
(c) The environment for its provision of natural capital relied upon by the company.
(d) Customers, the community, and government for their provision of social capital or the wider infrastructure in which the company operates.[156]

On incorporation, this new corpus or person is created to whom we can attribute actions, assets, liabilities and interests.[157] Directors and other involved humans are the agents, the entity is the principal.[158] Directors' responsibility to any particular corporate constituency will flow from decisions made "in the interest of the corporation as a single, undifferentiated entity".[159] This means that shareholders' status differs from their status in the context of the joint stock company, but shareholders accepted this new position because it provided them with "the rights, privileges and protections" that investor-partners could not have in the unlimited liability partnership form.[160]

Entity theory makes the Companies Act scheme more coherent. Companies are granted separate legal personality and can transact and be sued in their own name; companies own their own assets; directors owe duties explicitly to the company; directors will sometimes have to consider the interests of non-shareholder constituents; shareholders are shielded from liability by the company; creditors are creditors of the company, even the one-man company; companies live forever.[161]

V. Conclusion

Directors' duties to the company are owed to the company as a social and institutional entity standing at the centre of overlapping capital-contributing constituent groups. This bodes well

[155] Colin Mayer *Prosperity* (Oxford University Press, Oxford, 2018) at 9.
[156] Veldman, above n 79, at 61; and Mayer, above n 155, at 9.
[157] Pistor, above n 89, at 47; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7; [1995] 2 AC 500 (PC).
[158] Pistor, above n 89, at 48.
[159] Lymon P.Q. Johnson & David Millon "Recalling Why Corporate Officers are Fiduciaries" (2005) 46 Wm. & Mary L Rev 1597 at 1644.
[160] Veldman, above n 79, at 64.
[161] Watson and Taylor, above n 83, at 4.

for managing climate risks to the company because entity theory, unlike shareholder primacy, can orient boards towards long-term, broad value creation for the company by conceiving of their duties as owed to an immortal entity dependant on different forms of capital.[162] This wider view is supported by Watson who writes that "the company as an entity as it operates in the world may also capture other forms of capital such as environmental capital which then become interests of the company".[163] On this view, it is more likely that directors' who do not consider and respond appropriately to climate change risks to their company will be in breach of their duties to the company.

[162] Veldman, above n 79, at 64.

[163] Susan Watson "Duties of Directors – Good Faith and The Best Interests of the Company" in Watson and Taylor, above n 83, at 526.

Chapter Three: The "Best Interests" of the Company

The scope of the s 131 duty of good faith and best interests is unclear:

> Subject to this section, a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.[164]

Traditionally, good faith and best interests were shorthand for fiduciary duties of loyalty.[165] More recently, commentators, courts and legislators in other jurisdictions have extended the scope of their s 131 equivalents beyond fiduciary loyalty to require the undertaking of a proper process to achieve a view of the best interests of the company.[166] New Zealand case law on s 131 still predominantly relates to self-interested behaviour by directors, but could our duty extend further too?[167]

Uncertainty is exacerbated by a lack of express statements on what the company constitutes (as discussed in Chapter Two) and the lack of guidance as to the objectives or "best interests" that directors are tasked with pursuing under s 131. As a result, theories of best interests sit on a sliding scale from short-term shareholder profit maximisation to the pluralistic interests of all the company's stakeholders including their employees, creditors, community, and environment.[168]

This chapter will argue for a broader view of s 131 beyond fiduciary loyalty and suggest that in light of entity theory, the company's interests are sustainability and long-term profit. This and the fact of the climate crisis mean that directors will be required to consider climate change risks to their companies. These risks may arise from climate change risks to their capital-contributing constituencies. A failure to do so may, while unorthodox, result in liability under s 131. More probably, a broader view of the best interests of the company will be useful for increasing the standard of care, diligence and skill required of directors under s 137 and the likelihood of climate-related liability under that section.

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[164] Companies Act 1993, s 131(1).

[165] Rennie QC and Watts, above n 142, at 7.

[166] See: Rosemary Teele Langford "Best interests: multifaceted but not unbounded" (2016) 75(3) CLJ 505; Ed Waitzer and Johnny Jaswell "Peoples, BCE and the Good Corporate 'Citizen'" (2009) 47 Osgoode Hall L. J. 439; *BCE Inc v 1976 Debentureholders* [2008] SCC 69; Companies Act 2006 (UK), s 172.

[167] See for examples of cases concerning self-interested directors and s 131: *Sojourner v Robb* [2006] 3 NZLR 80 (HC); *Debut Homes v Cooper*, above n 140.

[168] Langford, above n 166, at 506; *Debut Homes v Cooper*, above n 140, at [28-30].

I. A Wider View of the "Best Interests" Duty under the Companies Act 1993

A. *Section 131: beyond fiduciary loyalty*

As mentioned above, the s 131 duty has its origins in the classic fiduciary duties to not profit or conflict with the principal.[169] Unsurprisingly given the historic status of shareholders as principal-owners of the company canvassed in Chapter Two, unless a company's constitution said otherwise the object or interests of the company were assumed to be the promotion of the financial wellbeing of current shareholders.[170] So long as the company remained solvent, a director's decision to act for the purpose of providing immediate benefits for existing shareholders could not usually have been challenged at common law.[171] Courts were more concerned with ensuring that directors were not conflicted or self-interested (the good faith portion of the duty).[172] Directors were certainly not bound to consider whether decisions would be the best for the business in the medium or long-term.[173]

However, the Companies Act 1993 imposed a more onerous duty.[174] The Law Commission expressed the view in their *Company Law Reform and Restatement* that the standard imposed by the common law duty of good faith and best interests was too low and they intended to overcome that deficiency.[175] The result was that companies had to consider broader interests to a higher standard.[176]

The construction of s 131 is positive. It requires directors to be acting in what they believe to be the *best interests* of the company, rather than just in good faith. This inclusion of "best" imports a requirement into the duty for directors to be looking for the most ideal, rather than just adequate, options for the company at all times during decision-making.[177] This fetter applies to all duties and powers, further suggesting that the interests of the company are wider than avoiding conflicts and ensuring profit maximisation for the shareholders. Section 131 also does not exclude the possibility of a breach through an omission to act.[178]

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[169] Rennie QC and Watts, above n 142, at 7.
[170] Watts, above n 58, at 128.
[171] Rennie QC and Watts, above n 142, at 10.
[172] Rennie QC and Watts, above n 142, at 7.
[173] Rennie QC and Watts, above n 142, at 8.
[174] Rennie QC and Watts, above n 142, at 10.
[175] Law Commission, above n 76, at [188].
[176] Bainbridge, above n 130, at 562.
[177] Watson, above n 163, at 526.
[178] *FAF Holdings Ltd (in liq) v Bethune* [2017] NZHC 2796 at [109].

Read literally s 131 is subjective, but this has not been entirely reflected in the case law. Judges have clearly resonated with the famous dicta from *Hutton v West Cork Railway* that "bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of a company" and read in reasonable grounds into the section.[179] Up until very recently, Fogarty J's reasoning in *Sojourner v Robb* was good law:

> "…the standard in s 131 is an amalgam of objective standards as to how people of business might be expected to act, coupled with a subjective criterion as to whether the directors have done what they honestly believe to be right. The standard does not allow a director to discharge the duty by acting with a belief that what he is doing is in the best interests of the company, if that belief rests on a wholly inappropriate appreciation as to the interests of the company."[180]

This objective approach to s 131 fits with the wider legislative context. Section 137 – the directors' duty of care – explicitly includes a "reasonable director" threshold.[181] Section 138 allows directors to rely on employees, advisors or other directors when performing their duties, but only where they believe on reasonable grounds that they are competent and reliable and make proper inquiries, importing yet another element of objectivity.[182]

The Supreme Court in *Debut Homes v Cooper* rejected Fogarty J's passage.[183] They ostensibly preferred a more subjective test, but accepted a number of exceptions and qualifications to subjectivity:[184]

(a) Where there is no evidence of actual consideration of the best interests of the company.
(b) Where there is a failure to consider the interests of creditors in an insolvency or near-insolvency situation.
(c) Where there is a conflict of interest.
(d) Where the action was one no director with any understanding of fiduciary duties could have taken.
(e) Where a director's decision is irrational or unreasonable.[185]

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[179] *Hutton v West Cork Railway Co* [1883] 23 Ch D 654 at 671; Note also that the Law Commission's draft good faith and best interests duty: Law Commission, above n 76, at [508].
[180] *Sojourner v Robb* [2006] 3 NZLR 80 (HC) at [102].
[181] Companies Act 1993, s 137.
[182] Section 138.
[183] *Debut Homes v Cooper,* above n 140, at [112].
[184] *Debut Homes v Cooper*, above n 140, at [112].
[185] *Debut Homes v Cooper*, above n 140, at [113].

They did not find that these qualifications "detract from the subjective nature of the test," but one might reasonably ask whether the Supreme Court has indeed substantially departed from Fogarty J's dicta in *Sojourner v Robb*.[186]

The High Court in *Hedley v Albany Power Centre* prescribed a process by which directors can meet their s 131 duty.[187] Directors should be: (i) identifying the options available to the company; (ii) assessing each of those options in terms of its present and prospective value to the company, and its present and prospective advantages and disadvantages for the company; and (iii) comparing each option, on the basis of the assessment in (ii).[188]

These cases all concerned self-interested behaviour from directors. However, the dicta suggests a judicial willingness to look behind directors' subjective beliefs and review the process they engaged in to understand the best interests of the company even where there is no conflict of interest.

B. Section 131: beyond shareholder primacy

There is an ongoing debate over which model of corporate governance was adopted by the Companies Act and consequently what the "best interests" of the company that directors are tasked with taking steps to achieve are.[189] At common law, as discussed above, the interests of the company were equated with the interests of the shareholders. Watts argues that this is still the case: directors should aim to grow the value of the business in the shareholders' interests, albeit in the long term.[190]

However, during their reform process, the Law Commission were influenced by the Corporate Social Responsibility (CSR) movement's campaign to impose a legal duty on managers to consider the company's stakeholders, along with dicta on future shareholders being allowed to have their interests embraced.[191] Their shift away from the common law position of equating

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[186] *Sojourner v Robb*, above n 180. See also *Debut Homes*, above n 140, at [109] and [114].
[187] *Hedley v Albany Power Centre Ltd (in liq)* [2005] 2 NZLR 196 (HC) at [64].
[188] At [64].
[189] Acknowledged but not resolved by the Supreme Court in *Debut Homes v Cooper* [2020] NZSC 100 at [28-30].
[190] Watts, above n 58, at 134.
[191] Watts, above n 58, at 134.

the interests of the shareholders with the interests of the company is reflected in the scheme of the Companies Act.

The explicit identification of the 'company' with the immortal enterprise, rather than with the shareholders, certainly broadens the scope of best interests.[192] Chapter Two argues that the "best interests" duty is owed to the company as an entity and that the priority of shareholder interests based on an agency or ownership basis are not supported by the Companies Act. It points to creditors and employees as examples of non-shareholder contributors to the company that directors may or must have regard to when forming their view of the interests of the company. Directors are therefore directed to have a view of the company's interests as an entity beyond the shareholders' short or even long-term interests.[193]

Section 131(2) provides further support for the assertion that the duty does not reflect shareholder primacy.[194] Unless a company's constitution explicitly permits it, its interests should not automatically be identified with the existing shareholders: [195]

> A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.[196]

The long title of the Companies Act further appears to support broader interests for the company beyond the interests of their shareholders:[197]

> (a) To reaffirm the value of the company as a means of *achieving economic and social benefits* through the aggregation of capital for productive purposes, the spreading of economic risks, and the taking of business risks. [My emphasis]

Why then do arguments for shareholder primacy persist despite the evidence that it does not reflect a company's true interests and the fact that the law has moved on (see Chapters One and Two and above)?[198] One reason for this is that the theory "neatly evades" the issue of resolving conflicts between the different corporate constituencies by assuming that only shareholder

[192] Section 15.
[193] Watson, above n 163, at 530.
[194] Watts, above n 58, at 134.
[195] Watts, above n 58, at 134.
[196] Section 131(2).
[197] Watson, above n 163, at 524.
[198] Kalderimis and Swan, above n 7, at 19.

interests count.[199] This efficiency is a fallacy because shareholders do not have uniform interests and short-term or even long-term financial profit maximisation may not always serve them, but it has been a pervasive argument nonetheless.[200] Another reason might be that the Act failed to make explicit what the interests of the company are. In the apparent absence of another clear legal norm – the Law Commission avoided dogmatism on questions of theory – directors and commentators have fallen back on the common law position.[201]

Is there another clear legal norm of corporate governance reflected in our statute? Stakeholder theory has long been pitched as an alternative to shareholder primacy. Proponents for this theory argue that companies rely on many other constituent groups: on state structures and processes, on the creativity and hard work of their employees, and on the environment which they often exploit. These stakeholders pay a high price for the preference of shareholder interests above theirs.[202] Boards should instead manage the corporation in the interests of a wide range of stakeholders in the corporation, even if that comes at the expense of corporate profit or shareholder wealth.[203] This wider view of the company objective is "more equitable and socially efficient than one confined to shareholder wealth".[204]

The term stakeholder is fluid, so an inclusive definition is difficult to formulate.[205] The Australian Corporations and Markets Advisory Committee (CAMAC) attempted: stakeholders are "those groups or individuals that: (a) can reasonably be expected to be affected by the organisation's activities, products and/or services; or (b) whose actions can reasonably be expected to affect the ability of the organisation to successfully implement its strategies and achieve its objectives".[206] This includes workers, creditors, suppliers, consumers, the local community and the environment.[207]

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[199] Lynn A. Stout "The Troubling Question of Corporate Purpose" (2013) 3(1) Accounting, Economics and Law: A Convivium 61 at 67.
[200] Lynn Stout, above n 63, at 12.
[201] Law Commission, above n 76, at [190].
[202] Ireland, above n 85, at 44.
[203] Watson, above n 104, at 53.
[204] Stephen Letza, James Kirkbridge, Xiuping Sun, Clive Smallman "Corporate governance theorising: limits, critics and alternatives" (2008) 50(1) IJLMA 17 at 19.
[205] Richard Annandale "Sustainable Shareholder Value: A Period of Enlightenment for New Zealand?" (2008) 16 Waikato L Rev 14 at 18.
[206] Annandale, above n 205, at 18.
[207] Millon, above n 59, at 1014.

Principle 9 of the Financial Markets Authority (FMA) Corporate Governance Handbook supports boards having regard to for stakeholder interests.[208] There is little legal or practical support, however, for *equating* the best interests of the company under s 131 with the interests of various stakeholders independent of corporate benefit. Stakeholders are not empowered to dispute any disregard for their interests and directors are afforded no guidance on how to balance their interests. By directing the board to balance off the interests of a large group of stakeholders without such guidance, there is also the risk that they may ultimately be accountable to no one in particular.[209] It would also appear out of step with the fiduciary origins of s 131 to have no principal for the director-agent. A firmer bottom line is required.[210]

C. Aid from overseas

Other Anglophone jurisdictions have similarly wrestled with the requirements and objective of the "best interests" duty. A wider view of both is supported by developments in the United Kingdom and Canada.

An apparent statutory compromise between shareholder primacy and stakeholder theory camps – termed Enlightened Shareholder Value (ESV) – was reached by the United Kingdom's equivalent duty to promote the success of the company. Section 172 of the United Kingdom's Companies Act 2006 states that:

> (1) A director of a company must act in the 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

[208] Financial Markets Authority *Corporate Governance Handbook* (2018) at 37, principle 9.
[209] Watson, above n 104, at 53.
[210] Langford, above n 166, at 520.

(f) the need to act fairly as between members of the company.

The section operates by prescribing a procedural requirement for directors to "have regard" for stakeholders while working towards "the benefit of its members as a whole," arguably in the long-term.[211] The duty applies across the full spectrum of a director's role: setting strategy, agreeing to budgets, making business decisions and deciding on governance structures.[212] Section 414CZA of the United Kingdom's Companies Act 2006 also establishes a separate duty for strategic reports to include a s 172 statement which describes how directors have had regard to the environment and other stakeholders in their decision-making.

Directors are therefore required to take practical, positive steps to discharge their "best interests" duty. When ascertaining what the best interests of their company are, they must identify the groups and factors likely to be of strategic importance in achieving the long-term success of the company and report on that process.[213] There are consequently question marks against pre-2006 cases that suggest a total priority of financial returns, especially short-term ones, are in the company's "best interests".[214]

However, section 172 avoided an outcome-based approach to the wider social and environmental factors listed. The practical result of this can be seen in *The Queen on the Application of the People and the Planet v HM Treasury*.[215] HM Treasury's decision to not require their subsidiary (the Royal Bank of Scotland) to change their usual business practices in order to reduce their carbon emissions and be more respectful of human rights was judicially reviewed. HM Treasury argued that to require this of their subsidiary would be cutting across the fundamental duty of the Bank's board to manage the company in the interests of their shareholders under s 172. The Court did not necessarily agree that there was a legal bar to this stronger policy, but concurred with HM Treasury that there were good reasons for not imposing it, not least because it might give rise to litigation by minority shareholders.[216] So while s 172 was heralded by some commentators as realignment of company success, where shareholder interests and stakeholder interests do not align, the section still gives primacy to the former.[217]

[211] Lord Sales, above n 24.
[212] Lord Sales, above n 24.
[213] Lord Sales, above n 24.
[214] Benjamin, above n 5, at 91.
[215] *R (on the application of People & Planet) v HM Treasury* [2009] EWHC 3020.
[216] *R (on the application of People & Planet) v HM Treasury* at [35].
[217] Helen Winkelmann "Foreword" in Watson and Taylor, above n 83, at v; Benjamin, above n 5, at 93.

The explanatory note stressed that 172 just codified the current law which already reflected ESV.[218] Consequently, commentators have suggested that ESV may already be law in other colloquium jurisdictions.[219] In 2006, CAMAC found that ESV amendments to the Australian equivalent best interests duty (s 181) were not required.[220] This was because their Corporations Act 2001 already left sufficient room for directors to consider the interests of stakeholders.[221] This has been upheld in recent cases.[222]

Commentators and courts in New Zealand broadly accept that s 131 permits the same consideration for stakeholders and longer-term interests.[223] But this creeping incrementalism misses the bold legislative reform: by making the object of s 131 the company rather than the "members as a whole"[224] or shareholders, company law in New Zealand has departed further from the ESV view of best interests outlined in s 172. The company is its own entity, with its own interests.

New Zealand's Act was based on the Canadian Business Corporations Act 1985 (CBCA). Section 122(1)(a) of the CBCA provides that:

> Every director and officer of a corporation in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation.

Canadian courts have widened the scope of best interests as social expectations have heightened over time.[225] The three most recent Canadian Supreme Court cases have arguably destroyed notions of shareholder primacy.[226] In 1972, the Supreme Court of British Colombia in *Teck Corporation v Millar* held that while "it would be a breach of their duty for directors to disregard entirely the interests of the company's shareholders…if they observe a decent respect for other interests lying beyond those of the company's shareholders in the strict sense, that will not, leave directors open to the charge that they have failed in their fiduciary duty to the company".[227] Thirty years later, the Canadian Supreme Court in *Peoples Department Store v Wise* determined that the phrase "the best interests of the corporation" should not be read

[218] Companies Act 2006 (UK), explanatory note for s 172 at [325].
[219] Benjamin, above n 5, at 95.
[220]Australian Government Corporations and Markets Advisory Committee *The Social Responsibility of Corporations* (CAMAC, 2006) at [3.12].
[221] At [3.12].
[222] See *Bell Group Ltd (in liq) v Westpac Banking Corporation (no 9),* above n 149, at [4384-4395].
[223] Kalderimis and Swan, above n 7, at 19.
[224] Section 172.
[225] Waitzer and Jaswell, above n 166, at 463.
[226] Waitzer and Jaswell, above n 166, at 441.
[227] *Teck Corporation v Millar* [1972] 33 DLR (3d) 288 at [314].

simply as the best interests of the shareholders.[228] The court further held that in certain circumstances it may be legitimate for directors to consider creditors, employees, the environment and other stakeholders when forming a view to the best interests of the company, though the directors do not owe those stakeholders a direct fiduciary duty.[229]

In 2008, the Supreme Court in *BCE v Debentureholders* went even further in their discussion. They found that directors are required to act in the long-term best interests of the corporation viewed as a good corporate citizen.[230] Good corporate citizenship, the court said, meant that directors may be obliged to consider the impact of their decisions on corporate stakeholders.[231] That framing is reminiscent of Berle and Means' famous social licence to operate, suggesting a significant shift in the conception of corporate interests and the use of the "best interests" duty.[232]

Canadian boldness has resulted in indeterminacy: *BCE* is rightly criticised for not providing guidance on how to resolve conflicting constituent interests to satisfy s 122(1).[233] It has too much guidance in too many directions.[234] This demonstrates the difficulty in departing from the fiduciary loyalty origins of the duty and a shareholder primacy view of the company's interests to reflect contemporary corporate reality without clear legal guidance and norms to replace them.

D. An entity theory of "best interests"

Entity theory resolves the Canadian difficulty, and our own. It cuts through the Gordian knot of considerations and matches the legislative reform in the Companies Act.

As discussed in Chapter Two, under entity theory directors owe their duties to the company viewed as a social and institutional entity, embedded in an environment, and standing at the centre of overlapping forms of capital.[235] It is accepted that the interests of "the company" can include the interests of future shareholders, so identification with the entity under s 131 has

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[228] *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 SCR 461 at [41-47].
[229] At [41-47].
[230] *BCE Inc v 1976 Debentureholders* [2008] SCC 69 at [38] and [81].
[231] At [66].
[232] Berle and Means, above n 68.
[233] Waitzer and Jaswell, above n 166, at 455.
[234] Waitzer and Jaswell, above n 166, at 455.
[235] Veldman, above n 79, at 62.

already been achieved in practice.[236] As to that entity's best interests, the Long Title of the Companies Act clearly expresses that the key purpose of the company is still the "aggregation of capital for productive purposes".[237] With that said, the inclusion of "means of achieving economic and social benefits" discussed above supports a wider regard for the different forms of capital contributed to the entity.[238] This is further reflected in the explicit mention of employees and creditors' interests.[239] The company's endless life also supports a view of s 131 as requiring directors to be conscious of the company's ability to operate in the future.

Directors ascertaining the bests interests of their company under s 131 ought to be considering what will (i) maximise the value of the various forms of capital in the corporate fund and (ii) ensuring the company's sustainability as a going concern.[240] This chapter should be understood to mean sustainability in the traditional sense: development of the company that meets the needs of the present without compromising the ability of the company to operate in the future.[241]

This is not a dramatic departure from a long, or even short-term, shareholder primacy view of s 131. Maximising the value of the company will almost always be in the shareholders' interests too. However, furthering the interests of the company as a separate legal entity permits trade-offs between different capital contributors, a wider view of corporate benefit and a longer-term view of value.[242] For example, under entity theory investment in renewable energy could be linked to the company's interests in light of transitional risks or investor demand, rather than excluded as an external issue that will not benefit shareholders in the short or medium term.[243] Mandated consideration of creditors and employees, which was previously considered by some as exceptions to the shareholder primacy rule, make sense under entity theory. Entity theory also avoids the issues faced by stakeholder theory when balancing constituent interests by providing a clear object and bottom line: entity maximisation and sustainability.

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[236] Law Commission, above n 76, at [189].
[237] Companies Act 1993, long title at (a).
[238] Companies Act 1993, long title at (a).
[239] Section 132; *Debut Homes v Cooper*, above n 140, at [31].
[240] Andrew Keay *The Corporate Objective: Corporations, Globalisation and the Law* (Edward Elgar Publishing Inc, Cheltenham, 2011) at 43.
[241]Adapted from: United Nations Report of the World Commission on Environment and Development: Our Common Future GA A/42/427 (Oslo, 1987) the ('Brundtland Report').
[242] Parkinson, above n 62, at 80.
[243] Langford, above n 166, at 520.

II. Implications for Climate-Related Actions under s 131

It is possible, though unprecedented, to take an action under s 131 against a director who fails to consider climate change risks to the company and hence fails to properly ascertain the best interests of the company.

E. Permissive implications

Regardless of the model of corporate governance (shareholder primacy, stakeholder theory or entity theory) accepted by the courts, directors can consider climate change in their decision-making processes. The model of corporate governance will dictate the scope of those considerations. Short or long-term shareholder primacy will mandate a narrower view of interests focussed primarily on profit for the shareholders. This will increasingly include climate change anyway, given the financial risks likely to arise from physical damage, tightening regulations, shifts in consumer and investor attitudes, climate-related financial disclosures, and other financial risks.[244]

However, black-letter law orders directors to consider the company as an entity.[245] This includes consideration of climate change risks to any of their capital-contributing constituents imperilling the company's profitability and sustainability in the short-to-long term.

Under entity theory, climate change risks that will not foreseeably impact the interests of the company do not come under directors' mandate. Even where a company is contributing to climate change, if that contribution will not foreseeably impact the *company's interests* then directors are not necessarily directed to consider that contribution or mandate change. With that said, the far-reaching risks posed by climate change mean directors would likely be able to draw connections between climate considerations and corporate interest if challenged.

F. Prescriptive implications

Actions tend only arise under s 131 in relation to questions of director loyalty: conflicts of interest or self-interested transactions.[246] However, as discussed above, the duty is arguably broader than the no-conflict rule.[247] Directors need to be taking positive steps to properly understand the best interests of the company, including considering its climate change risks.

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[244] See Chapter One.
[245] Section 15.
[246] Barker, above n 18, at 18.
[247] Langford, above n 166, at 508.

New Zealand's courts defer to apparently legitimate 'business judgments', which adds a non-statutory hurdle to suits.[248] Judges rebuttably presume of business decisions are not breaches.[249] The basis is that risk-taking comes within boards of directors' remit and judges should not apply hindsight bias ex post facto on decisions made with high stakes and under time pressure.[250] Directors can also rely on expert advice provided to them by employees, professional advisors and other directors when considering climate risks to their company and forming a view of their company's interests.[251] However, neither the business judgement rule nor s 138 reliance will absolve directors of liability under s 131 where they rely blindly or fail to properly inquire themselves about climate change risks to their company.[252]

The aforementioned *Hedley* factors provide a template for judges chartering new territory in their application of s 131 to a scenario where a director has failed to consider climate change risks to their company.[253] Did directors consider the climate change risks to the company and weigh their response to them in terms of the present and prospective advantages and disadvantages to the company when forming their view of "best interests"?

This development of directors' duties was foreshadowed by the Law Commission. They cautioned that company law is "not a field of legislation in which finality is to be expected. The law here falls to be applied to a growing and changing subject matter".[254]This apparent willingness to have a wider view of directors' duties when they become out of step with commercial reality bodes well for climate-related claims under s 131.

The ingredients of a potential claim under s 131 for a directors' bona fide failure to consider climate change risks to their company would therefore be:

(1) A company which, viewed as an entity, faces foreseeable climate change risk to their ability to be profitable and remain operational in the short-to-long term.
(2) A director who was unaware of the risk or does not give it significant weight and thus forms an obviously inappropriate view of the company's interests.

[248] *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 (CA) at [71].
[249] Kalderimis and Swan, above n 7, at 16.
[250] Rennie QC and Watts, above n 142, at 47.
[251] Companies Act 1993, s 138.
[252] Kalderimis and Swan, above n 7, at 16.
[253] Above n 187, at [64]: (i) identifying the options available to the company; (ii) assessing each of those options in terms of its present and prospective value to the company, and its present and prospective advantages and disadvantages for the company; and (iii) comparing each option, on the basis of the assessment in (ii).
[254] Law Commission, above n 76, at [48].

(3) A shareholder or liquidator (if the company is insolvent) willing to apply for a derivative action, injunction, or s 301 order, respectively.[255]

III. Conclusion

An entity theory of the company resolves the debate between shareholder primacy and stakeholder theory and provides clearer guidance on what the interests of the company are: profit and sustainability. This third way allows other interests to be considered more explicitly than under shareholder primacy or ESV,[256] but avoids the indeterminacy of stakeholder theory present in Canadian jurisprudence.

Building on the Law Commission's reform, the construction of s 131, dicta from New Zealand courts, and developments in the UK and Canada, this chapter also suggests that the "best interests" duty has advanced beyond its fiduciary loyalty origins. It requires directors to take procedural steps to understand their company's best interests: whatever will ensure its profitability and sustainability. This will include considering climate change risks.

However, the application of s 131 in court lags behind its potential and climate change demands a rapid response. This chapter's reappraisal of "best interests" may be more helpful in conjunction with s 137. A broader view of the company and its best interests will impact the care, diligence and skill required of directors when directing the company.

[255] Companies Act 1993, ss 164, 165 and 301.
[256] *Debut Homes v Cooper,* above n 140, at [30].

Chapter Four: Caring for the Company

Could a director breach their s 137 duty to act with care, diligence and skill by ignoring foreseeable climate change risks to their company? This chapter argues yes. Recent company climate-change opinions – the 2019 Aotearoa Circle Opinion and the 2016 Australian Hutley Opinion – concluded 'yes' too, but without deciding who the company is or what its interests are.[257] Consequently, their analysis focussed on the engagement of s 137 where the company faces financial, more short-term climate-related risks.[258]

This chapter argues that s 137 is more onerous than that: directors are required to respond to a broad range of foreseeable risks. These include short-to-long term climate change-related operational, systemic, reputational, legal, and financial risks.[259] Previous chapters argue that entity theory is embodied in the Companies Act concepts of separate personality and distinct management. The interests of that entity reducible to, or explicable by, shareholder primacy or short-term profit-maximising mandates. This not only informs s 131, it also shapes the reasonable care directors must take when governing the company in its best interests – profit and sustainability – under s 137.

I. The Directors' Duty of Care under the Companies Act 1993

Section 137 imposes a contextual and objective duty of care on directors:

> A director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation –
>
> (a) The nature of the company; and
> (b) The nature of the decision; and
> (c) The position of the director and the nature of the responsibilities undertaken by him or her.

The Act left undefined what a reasonable director would be expected to do when exercising their powers to be considered careful, diligent and skilful. The contextual factors listed in s 137(a)-(c) will necessarily mean that each director is held to a slightly different objective

[257] Kalderimis and Swan, above n 7, at 37; Hutley SC and Hartford-Davis, above n 7, at 3.
[258] Kalderimis and Swan, above n 7, at 37 at [169.1].
[259] See Chapter One for more.

standard.[260] Watts has suggested that the contextual factors do not make the threshold of directorial care and skill variable, but rather allow for extra standards upwards from the threshold.[261] Courts have similarly been unwilling to revert to the common law standard regardless of the context, noting that "the days of sleeping directors…are long gone".[262] This is supported by the lack of an equivalent to s 148 of the previous Companies Act 1955, which allowed to court to relieve a director from liability.

So while "at face value, the notion of a 'reasonable director' does not draw any distinction between those who act in executive or non-executive capacities," the greater the responsibilities undertaken by a directors, the higher standard they are likely to be held to.[263] The Australian case of *Daniels v Anderson*[264] sets out minimum standards for directors that are accepted in New Zealand:

1. Directors must understand the nature of the business of the company and the risks to which it is subject.
2. They are expected to understand the financial statements.
3. They should bring an informed and independent mind to matters coming to the board and may not rely unquestioningly on the abilities and honesty of company managers.
4. They must be able to set goals for the company.
5. They should attend all meetings and generally set aside enough time to complete the above.[265]

Section 137 applies to omissions to act.[266] This is important in the climate-change context where liability will likely arise from a failure to properly understand and address risks.

Section 137 also needs to be read in conjunction with ss 130 and 138.[267] Under s 130, the board of directors may delegate one or more of its powers (excluding the powers set out in Schedule 2 of the Act) to a committee of directors, a director, an employee of the company or any other

[260] Rennie QC and Watts, above n 142, at 43.
[261] Peter Watts *Directors' Powers and Duties* (2nd ed.) (Lexis Nexis, Wellington, 2015) at 234.
[262] *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 at [83].
[263] *R v* Moses, above n 262, at [83].
[264] *Daniels v Anderson* [1995] 16 ACSR 607 (NSWCA).
[265] At [652-668]. Other minimum standards can be found in the Companies Act 1993, ss 52 and 194.
[266] *Grant & Khov v Johnston* [2016] NZCA 157 at [59].
[267]Rennie QC and Watts, above n 142, at 41.

person.[268] This does not absolve delegating directors of the responsibility the use reasonable methods to properly monitor the exercise of power by the delegate.[269]

The same principle of competent oversight in s 138 provides a defence, though it is hard to meet. Under s 138 a director can rely on expert advice from employees, professional advisors or other directors.[270] Understanding climate risks to the company may require advice on physical risks, upcoming regulatory developments, and consumer and investor attitudes.[271] The section provides an affirmative defence which has to meet the s 138(2) requirements and must also be specifically pleaded and proven.[272] It is a defence to being blamelessly badly informed, not for individual error: "directors should not be able to shelter behind information and advice provided and abdicate or attenuate their responsibility for making final judgements".[273] This attitude has informed judicial decisions – directors attempting to rely on s 138 have tended to be unsuccessful.[274]

Business judgement – the reluctance of judges to second-guess the merits of commercial decisions made in good faith – provides another layer of protection for directors under s 137 when evaluating climate risk.[275] The strength of that layer of protection is questionable. The Law Commission did not discuss the desirability of a statutory business judgement rule, though it could be read into paragraph (d) of the long title.[276] Even in Australia, where there is a codified business judgement rule, there are very few examples of successful reliance.[277] The New South Wales Supreme Court has interpreted the rule as:

1. Imposing the onus of proof on the director seeking to take advantage of the rule.
2. Requiring that there be a conscious decision by the director to act or not.

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268 Section 130(1).
269 Section 130(2).
270 Section 138(1).
271 Kalderimis and Swan, above n7, at 21.
272 *Morgenstern v Jeffreys* [2014] NZCA 449 at [75].
273 Law Commission, above n 76, at [521]; *R v Graham* [2012] NZHC 265 at [30-35].
274 Watson and Lynn, above n 83, at 655.
275 Hutley SC and Hartford-Davis, above n 7, at 3.
276 Companies Act, long title "(d) to encourage efficient and responsible management of companies by allowing directors a wide discretion in matters of business judgment while at the same time providing protection for shareholders and creditors against the abuse of management power".
277 Barker, above n 18, at 17.

3. Including an objective gloss on the subjective reasonableness of belief. Judges will consider the importance of the business judgement made, time available to make it, cost, and the nature of competing demands at the time.[278]

Therefore, the business judgement rule will not protect directors from liability for negligence where they unreasonably rely on inadequate information about climate change risk to their company or fail to inquire entirely.[279]

II. A Climate-Related Negligence Claim

Section 137 has not occupied much court time.[280] Claims of directorial negligence usually arise in an insolvency context following a s 301 application.[281] Perhaps because the reckless trading provisions ss 135 and 136 are easier to prove on liquidation, s 137 tends to come up as a secondary consideration.[282]

But, we know from the limited New Zealand case law and the fuller Australian authority that a court will engage in a balancing exercise when determining whether directors' actions were justified.[283] Courts weigh how obvious the risk is, its potential harm, mitigation costs, likely gains and any other conflicting responsibilities the director might have.[284] A risk will be considered foreseeable if it is not something a reasonable person would brush aside as far-fetched or fanciful.[285] The greater the degree of known risk, the greater the degree of care required.[286] The baseline will be what a hypothetical, reasonable director would have done in their position to respond to the risk.[287]

Climate change risks will clearly be foreseeable for an ever-widening range of company directors.[288]

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[278] *ASIC v Rich* [2009] NSWSC 1229, (2009) 236 FLR 1 at [7258] – [7295].
[279] Kalderimis and Swan, above n 7, at 18.
[280] Watts, above n 261, at 233.
[281] Watson and Taylor, above n 83, at 650.
[282] Watson and Taylor, above n 83, at 650. The Companies Act 1993, s 135 targets illegitimate risk taking when the company enters troubled financial waters.
[283] Barker, above n 18, at 17.
[284] Barker, above n 18, at 17.
[285] *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at [520].
[286] *ASIC v Vines* [2005] 55 ACSR 615, NSWSC at [1072 - 1073].
[287] Section 137.
[288] Winkelmann, Glazebrook and France, above n 13, at [117].

Like best interests, this duty is owed to the company explicitly rather than the shareholders collectively.[289] A wider view of the company and its best interests entails a more onerous duty of care and a wider range of risks beyond material financial risks to the shareholders.[290]

This is supported by the case law. Cooke J recently observed that where directors are so focused on contracts won and lost, consequential cash flow, profit forecasts and other operational matters that they do not properly address governance issues and systemic risks, they may fail in their duty to govern their company.[291] This observation is helpful because climate-related transitional risks to companies tend to be systemic rather than operational.

A company might be prudently required to insure themselves against climate risks.[292] The Federal Court of Australia in *Mistmorn Pty Ltd (in liq) v Yassen* held that the possibility of taking out insurance against risk might also need to be considered by directors acting with care.[293] Directors should also monitor the risk of becoming uninsurable due to climate risks when overseeing future operations.

In *ASIC v MacDonald* (no 11) (the James Hardie case) directors were considered negligent for signing off on overstated documents prepared by management suggesting the company had a trust fund adequate to meet impending asbestos-related claims.[294] This scenario is not quite comparable to a failure to respond to climate change because the directors' breach did not relate to the underlying asbestos liability risk. However, the asbestos context provides a helpful example of a health risk that impacted how directors did business.

Edelman J has also recently remarked in *ASIC v Cassimatis* that the concept of foreseeable risk of harm should not be construed narrowly because the legislation does not confine the relevant interests of the corporation.[295] Mr and Mrs Cassimatis were the directors of Storm Financial Ltd and were found liable for breaches of their duties of care and diligence by exercising their powers in a way which led to the delivery of inappropriate advice to their vulnerable investors. This led to serious financial harm to the company, but Edelman J held that:

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[289] Companies Act 1993, s 169(3).
[290] See Chapters Two and Three.
[291] *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255 at [272]. This case is now on appeal.
[292] See Chapter One.
[293] *Mistmorn Pty Ltd (in liq) v Yassen* [1996] 21 ACSR 173 (FCA). The uninsured risk in that case concerned fire and theft.
[294] Watts, above n 261, at 256.
[295] *ASIC v Cassimatis* (No 8) [2016] FCA 1023 at [481]. This was upheld on appeal: *Cassimatis v ASIC* [2020] FCAFC 52.

(a) Harm is not confined to financial harm. It covers harm to all the interests of the corporation, including reputational harm.[296]
(b) The interests of the corporation are not always entirely coincident with the interests of the shareholders.[297] This applies even where directors are the shareholders.[298]
(c) Section 180(1) (the Australian equivalent to s 137) does not require proof of actual loss to the company.[299]

While directors are not held to a perfect standard under s 137,[300] the legislation and case law display a trend towards appreciating a wider view of the company, its interests and the risks that it faces. These include financial, operational, systemic and reputational risks to the particular company in the short-and-long term. Directors can delegate powers, rely on others and rely on some level of business judgement deference from the courts, but not where they have been unreasonable or abdicated their role as company overseer.

Defendant directors may justify their climate ignorance: they might cite industry norms, without making an independent judgment about their own company; they may view risks as inevitable, without reconsidering the company's scope for reinvention; they may see only cost and inconvenience of action, without weighing the costs and inconvenience of terminable decline and inaction.[301] These arguments will not be convincing for many directors for long. As climate change risks to companies increase in magnitude, climate-related disclosures become more widespread and industries start to act, climate change will likely become a regular part of directors' exercise of their duty of care and systemic risk analysis.[302]

III. Conclusion

Increasingly, directors who do not factor climate-change risks into their decision-making risk liability for negligence. Because s 137 is the objectively judged statutory duty and relates directly to the active management of company risks, it has been the subject of more commentary and will likely occupy more court time in climate-related directors' duties

[296] At [483].
[297] At [525].
[298] At [523].
[299] At [483].
[300] *Peoples Department Stores Inc. (Trustee of) v Wise* [2004] 3 SCR 461 at [67].
[301] Letza, Kirkbridge, Sun and Smallman, above n 204, at 30.
[302] Benjamin, above n 5, at 93.

litigation than s 131.[303] However, as noted by Edelman J in *ASIC v Cassimatis*, the duties are interrelated: the *harm* that directors are expected to avoid when acting with care under s 137 are harms to the *interests of the company* which directors must ascertain under s 131.[304] A wider view of the company and its best interests demands a more onerous duty of care.

The best defence to climate-risk related negligence is simply to be a good director. If nothing else, directors must be up-to-date and open-minded when it comes to climate risks. They must be in a position to sensibly supervise the company's ongoing affairs, which can only be good for them. They must not put their head in the sand, or abdicate to industry practice, which the objective standard of care quashes as a defence. There is no business venture without risk – now more than ever – and companies deserve competent management.

[303] Kalderimis and Swan, above n 7, at 37; Hutley SC and Hartford-Davis, above n 7, at 3.
[304] *ASIC v Cassimatis* (No 8), above n 295, at [480].

Chapter Five: Company Law and Directors' Duties as a Regulatory Response to Climate Change

This dissertation has investigated whether directors' duties of best interests and care are legal inhibitors or facilitators of their timely response to climate change risks. It has concluded that directors are permitted to consider these risks. In certain circumstances, directors may be liable for failing to respond to foreseeable risks to their company. The success of this argument in court would bring directors' duties and company law within the realm of regulatory responses to climate change.

This chapter outlines additional practical and philosophical advantages and disadvantages faced by climate-related company law litigation. It argues that while standing for enforcement is a significant practical hurdle, and company law has traditionally been hostile to mandatory extensions of its profit-orientated focus, directors' duties as they stand can and should play a part in shifting corporate behaviour in a climate-compatible direction.

I. Practical Advantages and Disadvantages

The three previous chapters argue that many of the difficulties posed by the common law when trying to enforce directors' duties of care and best interests in relation to climate change risks to their company have been overcome. The Companies Act 1993 duties are broad, onerous and cover omissions. Section 137 is objective. Courts have proven willing to look behind director's subjective beliefs in certain circumstances under s 131.[305] The duties do not reflect shareholder primacy. They are owed to the company as an entity whose interests are long-term sustainability and profitability.

Deference to business judgment may pose a modest hurdle to enforcement.[306] More generally, the legislative scheme encourages informed risk-taking by directors.[307] This is based on the understanding that "a company run on [the] basis that no risks are ever taken is unlikely to be successful".[308] There is an established tension between the need to appropriately control the conduct of directors, and ensuring that they have the freedom necessary to take the risks needed

[305] See for example: *Debut Homes v Cooper,* above n 140*,* at [113].
[306] See Chapter Four.
[307] Companies Act 1993, long title.
[308] *ASIC v Lindberg* [2012] VSC 332, 91 ACSR 640 at [72], per Robson J.

for economic growth. Judges may be reluctant to curb the 'freedom' end of the see-saw for fear of unbalancing the whole contraption. On the whole, however, the current Act has strong objective glosses that tilt it against the bad.

Standing also remains an issue. The right to remedy breaches of directors' duties is limited to shareholders, directors and creditors.[309] Directors are unlikely to sue each other. Creditors are only empowered to sue directors in the course of liquidation.[310] That leaves shareholders for solvent situations. On one hand, the s 165(2)(d) requirement for the court to have regard for the company's interests in granting leave to shareholders for a derivative action supports entity theory.[311] On the other more practical hand, because shareholders are the primary constituent group empowered to bring actions on behalf of the company via derivative action, there is a continued focus on the intersection between their interests and the company's interests.[312]

This does not preclude climate-related litigation against directors for breaching their duties; there is increasing shareholder appetite for it.[313] It does limit its effectiveness as an enforceable regulatory response to climate change, especially in a jurisdiction populated by SMEs where directors and shareholders may often be one and the same. Possibly the class of "entitled persons" able to apply for a derivative action ought to be broadened to employees or other constituents of the company.[314] Even without these changes, however, one or more cases from the ranks of larger listed companies with more climate-motivated shareholders could serve to shift a wider group of directors' attitudes towards the scope of their duties.

Directors' duties have practical advantages over other legal routes for shifting corporate behaviour in a climate-compatible direction. They do not face the same barriers of duty and causation faced by tort claims.[315] Shareholders are likely better resourced than individuals attempting to bring claims in tort.[316] Directors' duties also go to the heart of the short-term business models that need to change in light of climate change.[317] Risk management and

[309] Note that an "entitled person" is defined in the Companies Act 1993 s 2(1) as: (a) a shareholder; and (b) a person upon whom the constitution confers any of the rights and powers of a shareholder.
[310] Section 301(1).
[311] Section 165(2)(d).
[312] Watts, above n 58, at 145.
[313] Kalderimis and Swan, above n 7, at 12.
[314] Ashleigh Heath "Achieving Long-term Value through Stakeholder Theory: Proposed Amendments to the Companies Act 1993" (LLB (Hons) Dissertation, Victoria University of Wellington, 2019) at 44.
[315] Barker, above n 18, at 59.
[316] Ganguly, Setzer and Heyvart, above n 42, at 24.
[317] See Chapter One.

strategic planning do not work retroactively, so influencing board behaviour prior to harm is an important benefit of directors' duties.[318]

The law's dislike for revolution is often cited as a challenge for climate-related legal development which needs to proceed rapidly.[319] Directors' duties already exist, circumventing political impediments to legislative reform. Further, while the common law proceeds incrementally, this dissertation has argued that it would be a modest rationalisation of existing law to find a director had breached their ss 131 and 137 duties by failing to consider and respond to climate change risks to their company.

II. Philosophical Advantages and Disadvantages

According to Fish's institutional community thesis, statutory interpretation occurs within a structure of norms that limit the potential meanings.[320] The structure of legal, social and economic norms in which directors' duties are embedded may limit the language, framing and extent to which climate-related company law cases can be put forward and received favourably in court.

The traditional approach to company law in New Zealand and other anglophone jurisdictions is built on the liberal free-market assumptions of self-interested egoism, utility maximisation and the public/private dichotomy.[321] The social responsibilities of the company are considered limited to maximising profits and built on assumptions of infinite production, consumption and growth.[322] This approach has legitimised and de-legitimised certain ways of thinking about companies and directors' duties in the corporate law interpretive community.[323]

Where the unbounded pursuit of profit has not be desirable for reasons of market failure, for example, controls on the company have tended to be external rather than attempting to shift the

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[318] Barker, above n 18, at 59.
[319] Winkelmann, Glazebrook and France, above n 13, at 53.
[320] Stanley Fish *Is There a Text in this Class? The Authority of Interpretive Communities* (Harvard University Press, Cambridge, 1980) at 318.
[321] Cento Veljanovski "The Economic Approach to Law: A Critical Introduction" (1980) 7(2) British Journal of Law and Society 158 at 162.
[322] Mike Blowfield "Climate Change, Business Transformation" in Nina Boeger and Charlotte Villiers (eds.) Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity (Hart Publishing, Oxford, 2018) 95 at 96.
[323] Blowfield, above n 322, at 96.

internal objective of companies.[324] The Law Commission in 1993 accepted that the internal, economic development-focussed scope of the previous Companies Act 1955 was proper.[325] It did not think company law was an "appropriate vehicle for the imposition of…environmental goals upon companies".[326] Corporate Social Responsibility – which requires corporations to perform to a higher, socially desirable but not legally mandated standard – is voluntary and often used as a pretext for deflecting further regulation, further reflecting an arguably misplaced faith in the market's ability to regulate its actors.[327]

This internal focus of company law mandated by its structure of norms has limited this dissertation's discussion of climate change risks to risks *to the company*. It may also disadvantage litigants who couch their arguments in terms of social responsibility rather than business success.[328] In response to these challenges, commentators have called for directors' duties to be subject to sustainability considerations or for the inclusion of more explicit duties to the environment in the Companies Act 1993.[329]

However, the fabric of the interpretive community is changing. Climate change is calling the trappings of an economic approach to company law like shareholder primacy and externalising costs into question.[330] Increasingly, public profit is defined as not just the betterment of our economic wealth (which corporations are the drivers of), but also the protection of our ability to source essential requirements from the Earth.[331] This has led to changes in economic discourse and an emerging global trend of incorporation of environmental concerns into the legal framework which governs corporations.[332] Examples include s 299(1)(f) of the Australian Corporations Act 2001 which requires the inclusion of the company's performance in relation to environmental regulations in annual directors' reports and the aforementioned s 414CZA of

[324] Parkinson, above n 62, at 261.
[325] Law Commission, above n 76, at 4.
[326] Law Commission, above n 76, at 4.
[327] Lorraine Talbot "Capitalism: Why Companies Are Unfit for Social Purpose and How they Might be Reformed" in Nina Boeger and Charlotte Villiers (eds.) Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity (Hart Publishing, Oxford, 2018) 107 at 119.
[328] Blowfield, above n 322, at 104.
[329] Maskill, above n 71, at 41.
[330] Douglas Kyslar "What Climate Change Can Do About Tort Law" (2011) 41(1) LCLR 1 at 61.
[331] The Interaction of Directors' Duties and Sustainable Development in Australia: Setting of on the Unchartered Road, 118.
[332] James McConvill and Martin Joy "The Interaction of Directors' Duties and Sustainable Development in Australia: Setting Off on Unchartered Road" (2003) 27(1) MULR 116 at 117.

the Companies Act 2006 (UK).[333] The New Zealand government has recently taken a world-first step in announcing their plans to make climate-related financial disclosures mandatory for publicly listed companies, large insurers, banks and investment managers.[334] This shift from viewing the environment as external to internal to the company's affairs could increase the judicial amenability to company law as a regulatory response to climate change.

Climate change could also help company law. Company law has long been critiqued for its increasing isolation from the key social challenges for which it is directly relevant and its institutional incentives for corporate social irresponsibility.[335] The Global Financial Crisis provided a stark example of this.[336] This dissertation has already touched upon the risk of individual companies falling foul to the tragedy of the horizons because climate change risks lie beyond the short-term business cycle mandates and fail to be considered.[337] Ongoing non-climate corporate issues include inequality, excessive risk-taking and the failure of corporations to pay their fair share of taxes.[338] As put extra-judicially by Hon Justice Winkelmann: "judges who decided *Salomon* were not required to turn their minds to how that structure, when combined with the principle that directors must act in the best interests of the company, would operate to drive the search for low-cost labour wherever it exists in the world".[339] The world has moved on. The re-evaluation of the scope and object of directors' duties in light of climate change engaged in by this dissertation and potentially courts in the future could, therefore, be mutually beneficial.[340]

III. Conclusion

Directors' duties will likely be buttressed in time by more climate-specific obligations. The Health and Safety at Work Act 2015 provides a recent example where directors' accountability was re-enforced in light of public policy concerns.[341] Legislative amendments like extending

[333] Discussed above: s 414CZA establishes a separate duty for strategic reports to include a s 172 statement which describes how directors have had regard to the environment and other stakeholders in their decision-making.
[334] Ministry for the Environment "Climate-related financial disclosures: Our proposals, your views" (August 2020) <https://www.mfe.govt.nz/consultations/climate-related-financial-disclosures>.
[335] Ireland, above n 69, at 18.
[336] Ireland, above n 69, at 18.
[337] Carney, above n 16.
[338] Mayer, above n 3, at xvi.
[339] Helen Winkelmann "Foreword" in Watson and Lynn, above n 83, at v.
[340] Kalderimis and Swan, above n 7, at 38.
[341] Maskill, above n 71, at 2.

standing, unequivocally rejecting shareholder primacy, or adding a sustainability-related duty may well be used to overcome practical and philosophical challenges faced by climate-related directors' duty litigation. However, as this dissertation has shown, company law in New Zealand has already overcome many of these hurdles. The steps now required of directors, are matched by enforcement now needed from the courts.

Conclusion

The clouds have gathered. Companies face a foreseeable, broad, and ever-increasing range of risks from climate change. The economic and legislative landscape in which companies operate is changing. Focus is shifting towards boards of directors and the impact of this changing climate on their directors' duties.

This dissertation has argued that the directors' duties imposed by New Zealand's Companies Act 1993 are ahead of their enforcement.

Regardless of the model of corporate governance accepted by courts, directors acting with care in their company's best interests need to consider foreseeable, material climate change risks to their company.[342] However, entity theory best reflects the Companies Act and has the strongest demands of directors.[343]

Under entity theory, duties are owed to a separate legal entity.[344]That entity is social and institutional, defined and protected by company law, standing at the centre of overlapping capital-contributing constituent groups.

The best interests of the company under entity theory are best identified as long-term profit and sustainability. These interests make sense of the law and its advancement past shareholder primacy, while avoiding the indeterminacy of stakeholder theory. They also extend directors' climate change risk purview beyond pure financial risk and break the tragedy of the horizon.

Although section 131 has traditionally been used to enforce fiduciary loyalty, this dissertation has argued that there is legislative potential and overseas support for an extension of its use. Section 131 may require directors to engage in a proper consideration of the capital-contributing constituents relied upon by the company when forming their view of "best interests".[345] This will involve considering climate change risks to constituent groups which are consequently risks to the company. A failure to do so could, while unorthodox, result in liability.

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[342] See Kalderimis and Swan, above n 7, at 37 for a shareholder primacy approach to directors' climate-related liability.
[343] *Debut Homes v Cooper*, above n 140, at [30].
[344] Section 15.
[345] See Chapter Three.

The entity theory of the company and its interests also impacts the directors' duty of care under s 137. Directors are required to consider, manage, and respond to a wide range of foreseeable climate-related risks to the company including short-to-long term systemic and operational financial, reputational, and legal risks. Business judgement, advice from others and industry norms will not protect directors from liability where they rely unreasonably, fail to bring an inquiring mind, or abdicate their role as overseer. The likelihood of liability under s 137 is the strongest.

Standing for enforcement, judicial deference to business judgements, and the encouragement of risk-taking, pose hurdles to the pace and success of climate-related directors' duties litigation. If directors' duties are strengthened by climate-specific obligations in time, these issues may well be tempered or resolved. Until then, it may only take a few cases from larger companies with motivated shareholders to change directors' attitudes.

This dissertation began by observing that climate risks are double-edged: companies are at risk to and from climate change. The reappraisal of directors' duties in light of climate change engaged in by this dissertation goes both ways, too. It could benefit the climate and the companies embedded in it.

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