Achieving Meaningful Corporate Social Responsibility: Implementing and Justifying Systemic Reform

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Table of Contents

Introduction

In 2008, New Zealand's iconic Fischer & Paykel appliance company unilaterally announced the closure of their Dunedin factory, costing 430 jobs and "virtually spell[ing] the end of the line for whiteware production in New Zealand."[1] Though the chief executive cited rising labour costs and need to compete globally as the main reasons for the move, the decision was made fundamentally in order to boost profits for shareholders. The Fischer & Paykel move epitomised the failure of corporate social responsibility (CSR). Shareholder interests were blindly favoured over those of employees and the community, who were not even consulted before the public announcement.

Mandatory CSR provides the last bastion of hope for reforming corporate behaviour. So far the law and the free market have failed to meaningfully redirect corporate behaviour in favour of the public interest, and voluntary CSR has been both disappointing and misleading. This does not mean reform is impossible though. Christopher Stone reminds us:[2]

> Nothing in society is a continuing problem because of *itself*, per se; something becomes and remains a problem because of shortcomings in the institutional arrangements we rely on to deal with it.

The overall aim of this dissertation is to explain exactly why our current approach to CSR is inadequate, from both a practical and theoretical perspective. It seeks to provide the justification for implementing more systemic, invasive, and pre-emptive solutions.

Chapter I attempts to determine the meaning of CSR, and then explain why it must be imposed upon corporations by the state. To do this, voluntary CSR, the free market, and criminal and regulatory law will be criticised to illustrate why the status quo is failing. This chapter shows that under our current conception of CSR, our ability to redirect corporate behaviour is severely limited. CSR needs to be understood as a series of essential reforms to

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[1] NZPA, AAP "Fischer & Paykel move 'damages iconic brand'" *The New Zealand Herald* (New Zealand, 17 April 2008). In particular, see the comments of EPMU national secretary Andrew Little.

[2] Christopher D. Stone *Where the Law Ends: the Social Control of Corporate Behavior* (Waveland Press, Inc, Prospect Heights IL, 1975) at xii. Stone is cited frequently throughout this dissertation as one of the foremost scholars on CSR, and an early proponent of systemic solutions. Though decades have passed since Stone's major work, David Engel recently praised Stone as having "accurately identified the heart of what many find objectionable in a society organized heavily around the corporation". David L Engel "An Approach to Corporate Social Responsibility" (2001) 32 UC Davis L Rev 1 at 97.

corporate governance and operation to allow corporations to fulfil the goal for which they were created: to further the public interest.

To justify such an intrusion into corporate operation, Chapter II breaks down the 'orthodox' or conservative conception of the corporation as belonging to the shareholders for the sole purpose of maximising profit. It makes a negative argument attacking the idea that the corporation is a private aggregation of individuals. Chapter III then proves that shareholder primacy does not maximise efficiency. This negates the orthodox counter-argument that, regardless of theory, we simply need shareholder primacy to maximise economic efficiency.

In Chapter IV, I argue that the corporation is an inherently public body and therefore the state is justified in redirecting corporate behaviour to achieve CSR. Since its inception, the corporation's purpose has been to further public ends. This chapter explores the origins of the corporate form as a concession from the state. This bargain for incorporation is still occurring, but in the 21st century the terms need to be extended to include CSR measures. CSR is essential for the safe and effective operation of the corporate form, especially considering the ever-increasing power and influence of multi-nationals.

Chapter V explores what these mandatory CSR provisions might look like. Overseas jurisdictions provide several approaches to imposing CSR. The corporation needs to be evaluated from a systemic perspective in order to appreciate the inefficacy of current reforms and how these pitfalls can be avoided in the future. To achieve CSR, reform needs to be imposed on the core information gathering and decision-making apparatus of the corporation with supervisory boards and public directorships being among potential solutions.

Chapter I: 'Corporate Social Responsibility' and Why We Need It

A: What Is Corporate Social Responsibility?

"The house of CSR has many rooms in the 21st century."[3] For some companies CSR means pursuing the 'triple bottom line', others emphasise positive firm values and culture, or it can be interpreted as narrowly as simply favouring long term profits over immediate ones.[4] More cynically, some sceptics view CSR as merely "a key marketing and branding exercise for most large and medium-sized corporations."[5] In many ways, CSR's defining feature is its lack of a unanimously accepted definition, with Bryan Horrigan emphasising the "futility" of finding a universal meaning.[6] Klaus Schwab, the Executive Chair of the World Economic Forum, even believes using CSR as a monolithic catchall for praiseworthy corporate behaviour is a confusing oversimplification.[7]

A common theme of CSR is doing more than the law requires in the public interest. Instead of solely pursuing profit within the bounds of the law, "good corporate governance means that a company's conduct exceeds what is required."[8] This is a useful starting point for defining CSR because it embraces the notion that corporations have a purpose to serve society in addition to making profit. Stone creates an analogy with human decision-making.[9] When natural people make decisions, they appeal to morality and social norms in addition to the black letter of the law. As with the "responsible person", defining exactly what traits are necessary for this behaviour is difficult, but it can be safely said that corporations need both the mechanisms and inclinations to act responsibly for CSR to be realised.

However, as discussed in the following section, reliance on voluntary corporate benevolence is not enough. Most corporations, especially the powerful ones with the greatest public impact, are simply not going the 'extra distance' to facilitate socially just outcomes. JE

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[3] Bryan Horrigan *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Edward Elgar Publishing Limited, Cheltenham, 2010) at 34.
[4] At 35.
[5] Peter Fleming and Marc T. Jones *The End of Corporate Social Responsibility: Crisis & Critique* (Sage Publications, London, 2013) at 1.
[6] Horrigan, above n 3, at 39.
[7] Klaus Schwab "Global Corporate Citizenship: Working with Governments and Civil Society" *Foreign Affairs* (Council on Foreign Relations, January 2008) at 107.
[8] At 110.
[9] Christopher Stone "Corporate Social Responsibility: What it might mean if it were to really matter" (1985) 71 Iowa Law Review 557 at 559.

Parkinson has a more fundamental problem with defining CSR voluntarily. He sees the public interest as "the root of corporate legitimacy" and therefore CSR should be a "prerequisite" to wielding corporate power in the first place.[10] To define CSR through its voluntary nature is to "risk making CSR marginal to core corporate concerns."[11]

CSR is better defined as the obligations corporations owe society to govern in the public interest. To be responsible, corporations also need the necessary systems in place to avoid disasters, unexpected layoffs, and other negative outcomes for stakeholders. The normative arguments for running the corporation in interests of those other than shareholders are discussed in Chapters II, III, and IV. Respectively, they can be summarised as explaining why shareholder primacy is theoretically indefensible, that shareholder primacy does not guarantee efficiency, and exploring the range of arguments for why the corporation is an inherently public body owing duties to society at large.

B: The Failure of Voluntary CSR

In his history of CSR, William C Frederick notes that corporate philanthropy "first took root within the minds of big business executives."[12] Though perhaps counterintuitive to both critics and proponents of CSR, during the boom of the 1920s corporate managers took it upon themselves to govern the corporation as a public trustee. The facts of *Dodge v Ford* aptly demonstrate this, as the entire cause of action was based around Henry Ford's benevolence to his employees and the community.[13] However, following the Great Depression, the Second World War, and the resurgence of liberal economics in the 1980s, this ideal withered and failed to regain its previous influence.[14] It even became a dirty phrase, with "free market zealots" like Theodore Levitt and Milton Friedman totally deriding the movement as not only useless, but harmful to constructive capitalism.[15] However, CSR appears to have been

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[10] JE Parkinson *Corporate Power and Responsibility: Issues on the Theory of Company Law* (Clarendon Press, Oxford, 1993) at 24-25. See Chapter IV for a more detailed exploration of Parkinson's views on corporate power.
[11] Horrigan, above n 3, at 35.
[12] William C Frederick *Corporation Be Good! The Story of Corporate Social Responsibility* (Dog Ear Publishing, Indianapolis, 2006) at 7.
[13] *Dodge v Ford Motor Company* 204 Mich. 459 (Mich. 1919).
[14] Frederick, above n 12, at 7.
[15] Fleming and Jones, above n 5, at 5.

enjoying a renaissance since the 1990s, with overseas jurisdictions adopting stakeholder statutes and an increase in advertising of ethical and environmental products worldwide.[16]

However, when one looks beneath the Fair Trade logo or commitment to equal opportunity, it becomes obvious CSR has not taken off in any meaningful sense. Corporate disasters are commonplace, both in New Zealand and abroad. Looking at the Pike River mine disaster, the 2010 Gulf of Mexico oil spill, or the 2008 Global Financial Crisis, it is clear that CSR is not being taken seriously. Apart from disasters, a general laissez faire attitude toward CSR in the business community indicates it is mainly being used as a label, rather than as a substantive guide for responsible practice. For example, the New Zealand forestry industry has been put on notice following the sixth worker death in this year alone.[17] Even Enron, the company at the centre of most infamous corporate scandal in recent memory, could have claimed to have one of the best public statements on CSR at the time.[18]

More fundamentally, the pursuit of profit at the expense of all else remains. Corporations routinely outsource labour without consulting their employees.[19] The last decade has continued to be fraught by squabbles for increasingly scarce resources, a "perversely greedy" financial system, and the corporatisation of war.[20] As Fleming and Jones explain, "the list continues indefinitely. This is certainly the right time to herald the end of [voluntary] CSR."[21] Despite what businesses and vendors of ethical products may be claiming, any real adherence to the principles of CSR is sorely lacking. Most tellingly, the 2012/2013 Annual Review on the state of CSR in Australia and New Zealand revealed that CSR was not being prioritised by business, "remain[ing] a more discretionary activity."[22]

Even when companies truly do endeavour to act in a socially responsible manner, they face external pressures that prevent CSR from being achieved. Corporations founded with a commitment to CSR still risk takeover by a more powerful competitor. For example, the

[16] Douglas Branson "Corporate Governance and the New Corporate Social Responsibility" (2000) 62 U. Pitt. L. Rev. 605 at 605-606.
[17] Matthew Backhouse "Forestry industry put on notice after sixth death this year" *The New Zealand Herald* (New Zealand, 19 July 2013).
[18] Horrigan, above n 3, at 39.
[19] See for example NZPA, AAP "Fischer & Paykel move 'damages iconic brand'", above n 1.
[20] Fleming and Jones, above n 5, at 7.
[21] At 7.
[22] Australian Centre for Corporate Social Responsibility *The State of CSR in Australia and New Annual Review 2012/2013* (2013) at 15.

prominent ice cream company Ben and Jerry's was founded as a 'B corporation', committed to the 'triple bottom line' and stating in its articles of incorporation that it would consider the interests of employees, the community, and environment in its corporate decision-making.[23] However, they were unable to resist a takeover by the Dutch conglomerate Unilever, despite sophisticated anti-takeover defences.[24] Reluctantly the board decided to sell, preferring to take Unilever's offer rather than risk testing the company's defences.[25] The exact reasons for the sale are unknown, with commentators suggesting a range of motivations including internal management issues, a desire to cash out, or fear of personal liability should the case be litigated.[26] Regardless of the reason, the takeover highlights the vulnerability of even prominent CSR firms to massive multi-nationals. Unsurprisingly, within three years of the takeover Unilever had laid off one fifth of Ben and Jerry's employees and ceased corporate philanthropy in pursuit of the bottom line – it was a "wakeup call in socially responsible business circles".[27]

C: The Failure of the Market

Part of the reason why we are assured voluntary CSR will work is that there is a competitive advantage in acting responsibly. "Vote with your dollar" has become the catchphrase of modern CSR, allegedly empowering consumers to 'regulate' corporate activity. Businesses are assured CSR provides a unique marketing and branding opportunity, or even to develop the area in which they are based to maximise medium-term profits.[28] With ethical products flooding the market, one could be forgiven for assuming that voluntary CSR, backed by consumer demand and market pressure, has solved the problem of corporate misbehaviour.

This section argues two key reasons for why market driven CSR is failing. First, it is simply not the case that market pressures and consumer input can effectively impose CSR. Fleming

[23] Celia R Taylor "Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Businesses" (2009) 54 NYL Sch L Rev 743 at 759.
[24] Antony Page and Robert Katz "Freezing out Ben & Jerry: Corporate law and the sale of a social enterprise icon" (2010) 35 Vermont Law Review 211 at 213.
[25] At 241-242.
[26] At 240-241. See Chapter V for a more thorough discussion of US constituency statutes and the protection they afford companies resisting hostile takeovers.
[27] Marjorie Kelly "The Legacy Problem: Why social mission gets squeezed out of firms when they're sold, and what to do about it" (2003) 17 Business Ethics: The Magazine of Corporate Social Responsibility 11 at 11.
[28] See generally Michael E Porter and Mark R Kramer "The Competitive Advantage of Corporate Philanthropy" in *Harvard Business Review on Corporate Social Responsibility* (Harvard Business School Press, Cambridge MA, 2003).

and Jones observe that "both eco-products and social investment products offer little promise of radical change except as a palliative to individuals' consciousnesses."[29] Secondly, it reinforces dangerous ideas about regulation and capitalism by deluding consumers into believing they have the power. As the "new opiate of the masses", ethical branding has ironically reduced the political pressure necessary to bring about effective change.[30]

Christopher Stone outlines four systemic reasons why consumers cannot effectively exert market pressure on corporate actors to influence their behaviour in any significant manner.[31] First, consumers must know they are being injured or supporting a product they do not agree with. Much of the time this can only be appreciated in retrospect, such as the harm cigarettes caused throughout the 20th century. Secondly, consumers must know where to apply pressure once they realise they are being harmed. In the era of massive conglomerates, such as Unilever mentioned above, consumers may not know which companies they are actually supporting or boycotting. The recent New Zealand scandal of Glenpark Woodland 'free-range eggs' epitomised this problem. Though consumers thought they were buying an ethical alternative to battery eggs, the parent company, Mainland Poultry, makes the vast majority of its profits from its cage eggs subsidiary, and uses these profits to undercut the free-range market.[32]

Stone's third criticism is that the consumer is often not in a position to apply pressure at all.[33] If a household is affected by pollution from a neighbouring chemical plant, but that household never purchases industrial chemicals, they obviously cannot 'vote with their dollar.' Similarly, when an industry provides an essential product or service, or is dominated by an oligopoly, consumers have little choice but to continue supporting it. Even the most committed environmentalist will struggle to entirely boycott the oil industry. Finally, even if all three of these prerequisites are met, the market does not provide an effective interface through which to communicate with the corporation. Consumer dollars are a very blunt instrument. When consumers withdraw support, corporate managers will not necessarily

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[29] Fleming and Jones, above n 5, at 13.
[30] At 30.
[31] Stone *Where the Law Ends*, above n 2, at 89.
[32] Jessica Wilson "Free-range Eggs: Assurance Schemes" *Consumer Magazine* (New Zealand, 9 May 2010).
[33] Stone *Where the Law Ends*, above n 2, at 90-91.

know they are doing this for ethical or CSR reasons. Even if they do, their response may be to simply deflect the problem rather than remedy it.[34]

Furthermore, all of Stone's reasoning presupposes that consumers actually care enough to make these changes once they become aware of the problem. Fleming and Jones cite two recent studies that show "robust linkages between corporate CSR and actual consumer purchasing patterns did not appear."[35] In their 2004 study, Bhattacharya and Sen concluded, "[c]onsumers' lack of awareness about CSR initiatives is a major limiting factor in their ability to respond", indicating that even if firms are undertaking CSR, they are not advertising it effectively enough to draw any significant change in consumer behaviour.[36] Even when consumers were aware of such initiatives, they were generally unwilling to pay the premium associated with ethical products.[37]

There is a further, more fundamental problem with relying on the market to regulate corporations. Fleming and Jones explain that when faith is placed onto the consumer, it validates excess consumerism and necessarily relies on the acceptance of the power of the market.[38] This legitimates the classical economic presumption that the market will fix all, and that the state has a minimal role in regulating corporate activity. As we have seen though, the market *is* failing to induce CSR. But this pro-market view encourages a solution that has been proven to be ineffective. Additionally, it reduces the public pressure on the state to legislate for meaningful reform and allows politicians to pass the buck to the market. So not only is relying on the market an ineffective way to achieve CSR, but misplaced faith in it as a mechanism for change minimises the call for the systemic reform that is necessary.

D: The Failure of the Law (So Far)

Criminal and regulatory law have also failed to achieve satisfactory CSR. Though they can prohibit certain behaviour, they are blunt, reactive, instruments that fail to direct corporate behaviour in the public interest. Moreover, because the law only sets bare minimums, by its

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34 Stone *Where the Law Ends*, above n 2, at 90-91.
35 Fleming and Jones, above n 5, at 13.
36 CB Bhattacharya and Sankar Sen "Doing Better at Doing Good: When, Why, and How Consumers Respond to Corporate Social Initiatives" (2004) 47 California Management Review 9 at 23.
37 Fleming and Jones, above n 5, at 13.
38 At 12.

very nature it is ill suited to affect the systemic CSR this dissertation argues is necessary. This section provides a summary of the main reasons why the law as it stands is failing to induce CSR.

Subjecting corporate behaviour to the criminal law is essential in order to publicly condemn corporate disasters; achieve retribution, deterrence and rehabilitation of corporate offenders; and to recognise the "effective control" corporations have over their agents.[39] Despite the necessity of the criminal law in regulating corporate behaviour, the main reason why it is inappropriate for achieving effective CSR is its retrospective nature. Criminal law acts as an 'ambulance at the bottom of the cliff', and though it can deter bad corporate behaviour, it cannot effectively address the systemic flaws that led to the incident in the first place.[40] The criminal law prescribes only punishments for certain outcomes, leaving discretion on how to avoid them up to corporate directors who are often optimistically oblivious to the chance of their occurrence.

Regulations are more focused than the criminal law, specifying minimum wages, safety standards, or tolerated pollution levels. In offering more rigid guidelines and without the need to prove mens rea (regulations almost always impose absolute liability),[41] regulations can be more easily enforced, monitored, and enacted than corporate crimes. However, they still fall to many of the same criticisms. Rather than attempting to reform corporate decision-making, they are still an after-the-fact remedy, offering only punishment, not prevention. The penalties they impose are often too small to have any real impact, with fines simply being absorbed into corporate costs. The most obvious example of this is the flagrantly ignored Easter trading rules in New Zealand, where retailers are happy to pay the $1000 fine that is insignificant compared to the turnover otherwise gained from remaining open.[42] Though a benign example, it illustrates the way regulatory fines are simply seen as another cost of

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[39] Aidan Ricketts and Heidi Avolio "Corporate Liability for Manslaughter: The Need for Further Reform" (2010) 13 SCULR 57 at 59.
[40] Stone *Where the Law Ends*, above n 2, at 94.
[41] Proving mens rea for corporate crime has been the main obstacle preventing it gaining any traction. See Todd Archibald, Kenneth Jull and Kent Roach "The Changed Face of Corporate Criminal Liability" (2004) 48 Criminal Law Quarterly 367.
[42] Kurt Bayer "Garden Centre Fined Over Easter Trading Vows to Continue" *The New Zealand Herald* (New Zealand, 20 December 2012).

business. Even in more serious cases, fines usually make up only a small proportion of profits.[43]

A counterargument is to advocate increasing fines until they are at the level where it is simply uneconomical to continue infringing. After BP's Gulf of Mexico oil spill in 2010, the $34 billion fine represented 110% of their income that year.[44] But even when fines are significantly higher, their impact on corporate behaviour is limited for two reasons. The idea that simply jacking up fines will change corporate behaviour presumes that corporations are rational economic actors, an assumption which one becomes "increasingly sceptical" of when how they respond to fines is examined.[45] First, fines do not carry "the same loss of face" that a bungled deal or failed product would.[46] Being struck with a fine is seen as 'bad luck' rather than a lack of skill, and losses through lawsuits are even recorded as "non-recurring" on financial reports.[47] Therefore, the deterrent effect of fines on management is more limited than an equivalent loss from some other cause. Secondly, the philosophy that targeting a corporation's pocket will solve everything presumes that sufficient fines "will smoothly and reflectively institute the proper amount of remedial changes."[48] However, even in the rare cases where fines are large enough to justify such an internal investigation, it is naïve and dangerous for regulators to simply presume corporations will make the changes necessary to avoid a repeat offence.

Stone identifies the "time-lag problem" as a significant barrier to what regulation can achieve.[49] In most industries, top managers and business leaders will know more about the potential harms of their products and practices than legislators. Drug manufacturers and investment banks for example have a much more intimate knowledge of the potential medical and economic problems their products could cause than regulators. Though one of the key advantages of regulations is their specificity, they simply cannot be made fast enough to keep up with new developments, especially when regulators are totally unaware of the dangers these pose. The asymmetry of information makes effective regulation impossible. A more

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[43] See " Punytive Damages: Largest Corporate Fines and Settlements" (6 July 2012) Information is Beautiful <www.informationisbeautiful.net/visualizations/punytive-damages-biggest-corporate-fines/> for the largest recent corporate fines represented as insignificant proportions of the year's profits in which they were issued.
[44] "Punytive Damages: Largest Corporate Fines and Settlements", above n 43.
[45] Stone *Where the Law Ends*, above n 2, at 38.
[46] At 40.
[47] At 40.
[48] At 38.
[49] At 94.

"grotesque" problem, according to Stone, is that even if regulations could be passed in time, it promotes the attitude among businesspeople that "until the law tells them otherwise, the have no responsibilities beyond the law and their impulse".[50]

E: Summary

With voluntary CSR, the market, and the current implementation of the law all failing to induce corporations to act responsibly, we have to question what the solution is. The common theme behind all these failures is their attempt to influence corporate behaviour from the outside. Rather than analysing the systems that make up the corporation, the solutions evaluated in this chapter simply offer carrots and sticks to try to direct corporate managers in a particular, often undefined, direction. This oversimplifies corporate decision-making and fails to account for problems and outcomes that are seen by neither regulators nor corporate actors. The answer lies in mandatory reforms to corporate structure and governance to ensure that important decisions are made in accordance with the main purpose of the corporation: to serve the public good.

[50] Stone *Where the Law Ends*, above n 2, at 94.

Chapter II: Debunking Shareholder Primacy Theories of the Corporation

We have seen why CSR is a desirable force and why current attempts to implement it have failed. However, in order to justify the systemic reform necessary to achieve it, we need to reconceptualise the corporation in a way that justifies such intrusive intervention. Specifically, we need to realise the legitimacy of stakeholder protection and the inherently public nature of the corporation. Mobilising the political will to give proposed reforms any momentum requires provoking people to think differently about the corporation. As Horrigan puts it, "corporate theorising is the bedrock of the normative justifications that inform corporate law making, law reform and practice."[51] Accordingly, if we can understand the corporation in a way that is compatible with systemic reform, we can erode the conceptual obstacles in the way of effective CSR.

A: What Is the 'Orthodox' Conception of the Corporation?

The orthodox or traditional conception of the corporation is as a private enterprise designed to maximise profits for its shareholders. It is epitomised by Milton Friedman's now (in)famous claim in the *New York Times*: "the only social responsibility of business is to increase its profits."[52] Basing this on an ownership claim, Friedman saw the managers as essentially agents of the shareholders whose sole job was to maximise returns on their investments. Though adjusting their conception of the corporation over time, the upholders of the orthodox view have maintained the "pro-shareholder agenda" throughout.[53] Jingchen Zhao explains, "the shareholder primacy norm has always been the dominant principle in corporate law in the traditional judicial approaches in the UK and US."[54] So dominant is this principle that Hansmann and Kraakman have gone so far as to declare that "[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."[55]

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[51] Horrigan, above n 3, at 76.
[52] Milton Friedman "The Social Responsibility of Business is to Increase its Profits" *The New York Times* (United States, 13 September 1970).
[53] See David Millon "Theories of the Corporation" [1990] Duke LJ 201 for historical development on orthodox (and reformist) conceptualisations of the corporation.
[54] Jingchen Zhao "The Curious Case of Shareholder Primacy Norm: Calling for a More Realistic Theory" (2012) 15 Int'l Trade & Bus L Rev 1 at 1.
[55] Henry Hansmann and Reinier Kraakman "The End of History for Corporate Law" (2001) 89 *Georgetown Law Journal* 439 at 439.

The ‘competition’ to which the above scholars refer was catalysed by the debate between Adolph A Berle and E Merrick Dodd, Jr in the 1930s.[56] The context of *Dodge v Ford Motor Co.* which reaffirmed shareholder primacy[57] and the increasing dominance of the corporate form (Berle estimates the top 200 companies owned roughly 38% of all business wealth in 1929),[58] and of course the stock market crash of 1929, formed the backdrop for questioning the role of the corporation in modern society. Behind all of these critical events was the evolving modern business corporation, which was emerging from a sort of enhanced partnership into something more powerful and unique.

Realising the growing disconnect between the shareholder and management of the corporation, Berle argued that management’s powers should be subject to an “equitable limitation” to minimise agency problems.[59] Directors should exercise their power entirely for the benefit of shareholders in a manner similar to that of a person acting as a trustee. Though advocating shareholder primacy, it is vital to note that Berle envisioned a “wide distribution of stockholdings” in order to equitably spread corporate wealth.[60] Since many parties affected by corporate activity would hold shares, Berle’s shareholder primacy can be approximated to modern stakeholder claims. His unique managerialism was to benefit society at large, not just an elite group of stockholders. So though Berle did argue for shareholder primacy, he lacked the diehard neo-liberal edge of modern scholars such as Friedman and Easterbrook and Fischel.

Dodd conceived of the corporation as a separate entity, which was more fitting to both the corporation’s separate legal personality and the failing partnership analogies in light of the rise of professional managers and diversified share ownership. With this distinct legal personhood comes moral agency, and duties are owed to all parties affected by the

[56] See Adolph A Berle and Gardiner C Means *The Modern Corporation and Private Property* (rev ed, Harcourt, New York, 1967), first edition 1932; and E Merrick Dodd, Jr “For Whom are Corporate Managers Trustees?” (1932) 45 Harvard Law Review 1145. Other commentators and academics also participated in the debate, but Berle and Dodd epitomised the conflict between shareholders and the community. See generally Joseph L Weiner “The Berle-Dodd Dialogue on the Concept of the Corporation” (1964) 64 Columbia Law Review 1458; and John CC Macintosh “The issues, effects and consequences of the Berle-Dodd debate, 1931-1932” (1999) 24 Accounting, Organizaions and Society 139.
[57] *Dodge v Ford*, above n 13, found that Mr Ford was obliged to continue paying dividends as opposed to using the money to develop the company and lower product prices.
[58] Macintosh, above n 56, at 140.
[59] Berle and Means, above n 56, at 220.
[60] At xxiii.

corporation's operation.[61] Thus, the best way to conceive of the corporation is "as an economic institution which has a social service as well as a profit making function".[62] He supported his contention with an interview with Mr Young, an executive of the General Electric Company who believed, like Dodd, that the company owes duties to the stockholders, employees, and the general public.[63] Unfortunately, as demonstrated by Friedman, modern corporate managers, and recent scholars, this conception fell by the wayside with the emergence of neo-liberalism in the 1980s.

The following sections show that Hansmann and Kraakman were wrong both in claiming that this debate is over, and that shareholder primacy arguments are the most convincing. Indeed, Zhao believes their declaration was "premature" and that whom directors do and should owe their duties to "remains as ambiguous as ever",[64] a claim echoed by Millon when he explains the "crisis in corporate law".[65] It canvasses the two main conceptions of shareholders that have been employed by the orthodox scholars and illuminate their theoretical and practical flaws.

B: The 'Ownership' Claim

The claim that shareholders are the 'owners' of the corporation is the most pervasive, yet also "the worst of the standard arguments for shareholder primacy."[66] Friedman's statement above – that a corporation's sole duty is to maximise profit for shareholders – rests on the foundation that this assumption is true. Indeed, if the corporation truly is property of the shareholders, then, like any other piece of private property, it may be directed to whatever end they desire (invariably profit maximisation) within the bounds of the law.

The core problem with this assertion is that it is anachronistic. Shareholders have not truly resembled owners since the joint stock company of the 19th century, when corporations formed for the task of constructing a railroad or canal were nothing more than an

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[61] Toni Erskine "States and Quasi-States" in Toni Erskine (ed) *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Palgrave Macmillan, Hampshire, 2003) at 23.
[62] Dodd, above n 56, at 1149.
[63] At 1154-1155.
[64] Zhao, above n 54, at 2.
[65] David Millon "Communitarians, Contractarians and the Crisis in Corporate Law" (1993) 50 Washington and Lee Law Review 1373.
[66] Lynn A Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy" (2001-2002) 75 S Cal L Rev 1189 at 1190.

amalgamation of entrepreneurial capital.[67] Once the work was complete, and all expenses and taxes had been paid, it was reasonable that the residual funds, or profit, belonged to the shareholders who risked their own capital in the first place. This early incarnation of the corporation was seen as a sort of special partnership, with shares simply being the vehicle for collecting the partners' capital, and dividends being the division of profits.

Modern corporations, and more relevantly modern shareholders, no longer fit this paradigm. First, apart from start-ups and IPOs, shareholders do not contribute any new capital to the corporation. When they purchase shares on the stock exchange, they are giving their money to a previous owner rather than the corporation itself. They are the "grandsons or great grandsons of the original 'investors'".[68] Serial traders in particular will often hold these shares for only a brief period of time and have no interest in the company's long-term health. They are thus better conceived of as gamblers on stock price, rather than true investor owners. Accordingly, any comparison with the partnership style corporation of the 19th century falls flat.

Secondly, mature corporations themselves do not require investor-supplied capital. They provide products or services from which they draw income and when they run low on funds it is usually bank loans or bond issues, rather than fresh stock, that provide the necessary capital injection.[69] Doug Henwood explains that though financial trade has been expanding exponentially in recent years, this is because of booming secondary markets rather than new direct investment.[70] It is difficult to claim ownership through a share when the money from the share purchase neither goes to the corporation, nor is required by it. It is worth noting too that though Berle was arguing for shareholder primacy, even he could not dismiss the fact shareholders no longer resemble owners.[71]

Despite the fact the ownership analogy has been theoretically inappropriate since the 1920s,[72] shareholder ownership remains a pervasive myth. Milton Friedman, though not a lawyer,

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[67] Horrigan, above n 3, at 99.
[68] Berle and Means, above n 56, at xv.
[69] At xv.
[70] Doug Henwood *Wall Street* (Vero, London, 1997) at 292.
[71] Berle and Means, above n 56, at 64.
[72] William Allen "Our Schizophrenic Conception of the Business Corporation" (1992) 14 Cardozo Law Review 261 at 270 discusses the rise of the entity conception following the emergence of developed stock markets and highly diversified share ownership.

wields considerable influence as a Nobel Prize-winning economist. The rhetoric of shareholder ownership is prevalent not just in the popular press, but it is not uncommon in legal commentary and even cases.[73] This conception is totally false though. It is the share, a type of corporate security *resembling* ownership, rather than a slice of the company itself that is owned.[74] Paddy Ireland describes shareholders as "passive recipients of income streams external to the company."[75] The separation of ownership and control, noted by both Berle and Dodd in the early 1930s, emphasises this. This separation leads Margaret Blair to warn us "taking 'ownership' as the starting point in discussions about corporate governance… is quite problematic."[76] Unlike true owners of a piece of property, shareholders wield no direct control over the corporation. In New Zealand for example, s 128 of the Companies Act 1993 states the "business and affairs of a company *must* be managed by, or under the direction or supervision of, the board of the company."[77] The law actually mandates that it is the directors, rather than shareholders, who wield control.

This is a necessary reality for modern business. As Alfred D Chandler, Jr points out, the managerial revolution of the late 19th century led to an increasingly technical, specialised and professional class of salaried managers.[78] Until the 1840s, nearly all of the top managers in the United States were either partners or stockholders in the enterprise. But as the role of the manager became professionalised and supplemented by middle managers and other staff, the chasm between ownership and control continued to grow. It is not just the law that states directors must manage the corporation – shareholders simply lack the know-how and experience to run the modern corporation.

Accordingly, the residual control shareholders can exert over the corporation is limited both legally and practically. Shareholders do not have any rights of control of the assets of the

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[73] See for example *Malone v Brincat* 722 F 2d 5, 10 (Del. 1998) at [28] where the Supreme Court of Delaware discusses the duty of management to run the corporation for its "shareholder owners".
[74] The Companies Act 1993 s 35 describes a share as "personal property", emphasising its nature as a distinct from the company itself. See also Wai Shun Wilson Leung "The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests" (1996) 30 Colum JL & Soc Probs 587 at 591-592.
[75] Paddy Ireland "Property and Contract in Contemporary Corporate Theory" (2003) 23 Legal Studies 453 at 477.
[76] Margaret M Blair *Ownership and Control* (The Brookings Institution, Washington DC, 1995) at 5. B
[77] Companies Act 1993, s 128 (emphasis added).
[78] Alfred D Chandler, Jr *The Visible Hand: The Managerial Revolution in American Business* (Harvard University Press, Cambridge MA, 1977), at 8-9.

corporation, nor can they help themselves to the profits of their supposed property.[79] They must wait until directors declare dividends, and these themselves are subject to a range of restrictions.[80] In theory shareholders can replace the board,[81] but Berle observed that share ownership is usually so widespread that mounting a successful coup is virtually impossible.[82] Shareholders have thus become "an anonymous mass," lurking in the background rather than having any "effective control [over] directors."[83] Stout notes that though hostile takeovers allow shareholders the ability to sell *en masse* to a hostile bidder, they are "expensive and uncertain", presenting organisational challenges of their own.[84] Additionally, *Paramount Communications, Inc. v Time, Inc.* allowed directors to resist takeovers in the long-term interests of the company, further reinforcing the lack of control that shareholders wield.[85]

Not only do modern shareholders not legally 'own' the corporation, they fail to exercise sufficient control over it to even resemble owners. More fundamentally, the idea of ownership is incompatible with the central tenet of the corporation's distinct legal personality.[86] Section 15 of the Companies Act explicitly states, "a company is a legal entity in its own right separate from its shareholders."[87] The assumption of ownership therefore "rests on a technical error, since the company is a separate individual legal person" and cannot be owned by a class of people.[88] Ireland drolly illuminates this inconsistency by citing the modern work of Easterbrook and Fischel.[89] In particular, he notes how these orthodox scholars discard separate corporate personality as an inconvenient fiction (despite statute visibly decreeing the contrary) in order to promote the partnership analogy for ownership and contractarianism. However, they resurrect it as essential for limited liability, thereby "having

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[79] Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, at 1191.
[80] Companies Act 1993, ss 52-53 outline the circumstances which must be satisfied before directors can issue dividends, and ss 54 and 56 respectively allow the board to issues further shares instead of dividends, and even recover distributions/dividends.
[81] See Companies Act 1993, s 109 for ability of shareholders to review and replace management.
[82] Berle and Means, above n 56, at 78.
[83] Andrew Keay "Ascertaining the Corporate Objective: An Entity Maximization and Sustainability Model" (2008) 71 The Modern Law Review 663 at 683.
[84] Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, at 1194.
[85] *Paramount Communications, Inc. v Time, Inc.* 571 A.2d 1140 (Del. 1990).
[86] Mia Mahmudur Rahim "The 'Stakeholder Approach' to Corporate Governance and Regulation: An Assessment" (2013) 8 Macquarie Journal Business Law 304 at 312-313.
[87] Companies Act 1993, s 15.
[88] Zhao, above n 54, at 18.
[89] Ireland, above n 75. Stout also levels strong criticism at Easterbrook and Fischel. Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, 1192.

one's corporate cake on page 12 and eating it on page 40".[90] This contradiction cannot be reconciled, further illustrating how ideology drives their arguments.

C: The Residual Claimants Theory Through the 'Nexus of Contracts'

The nexus of contracts conception of the corporation moves away from property claims and instead argues for shareholder primacy from contract. Hailed as "the best book ever written about corporate law",[91] Easterbrook and Fischel's influential work of the early 1990s explains the basis of the theory.[92] They reconceptualise the corporation as an aggregation of private contracts, which overlap in the 'nexus' that is the modern corporation. Shareholders derive their priority not from a property claim of ownership, but rather as a result of fair bargaining. Their cash contribution means they are the "residual risk bearers" who have "contracted for a promise to maximise long-run profits of the firm, which in turn maximise the value of their stock."[93] Easterbrook and Fischel appear to even depart from the line of shareholder primacy, explaining "that a contractual approach does not draw a sharp line between employees and contributors of capital."[94] So the nexus of contracts conception does not seem inherently prejudicial in favour of shareholders – if other groups, like employees or municipal authorities, want rights and consideration, they too can contract for them. Since shareholders are only residual claimants, that is to say their profits are awarded only after everything else is paid, efficiency for everyone is best served when their interests are prioritised.[95]

Before critiquing the nexus of contracts conception, it is worth noting its inconsistency with the ownership claim. Shareholders do not need to contract for their rights if they already have them through ownership. Furthermore, the entity and aggregation conceptions of the corporation are fundamentally incompatible. This inconsistency shows two things. First, the ideology of the orthodox approach is revealed. The need to change their entire conception of the corporation when faced with criticism shows they never chose any one conception

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[90] Ireland, above n 75, at 473.
[91] Ian Ayers "Making a Difference: The Contractual Contributions of Easterbrook and Fischel" [1992] Chicago Law Review 1391 at 1391.
[92] Frank H Easterbrook and Daniel R Fischel *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge MA, 1991).
[93] At 36.
[94] At 37.
[95] Leung, above n 74, at 593.

because they viewed it as 'true' or 'correct', but rather because it better advocates shareholder primacy. As Millon observes, instead of rebutting progressive interpretations of the corporation within the current framework, they "turned instead to an entirely different theory of the corporation."[96] On a related but distinct point, it demonstrates a lack of theoretical cogency. As the analysis above and below shows, each justification for shareholder primacy can be debunked with little in the way of theoretical rebuttal from orthodox scholars. Rather, total reconcepualistion is necessary, avoiding the criticism rather than dealing with it head-on it. This inconsistency of the orthodox scholars makes it difficult to take their arguments seriously.

On a first reading, the nexus of contracts theory seems sound. Rather than being based on an assumption shown to be empirically false like the ownership claim, it has a theoretical backing that appears to explain shareholder primacy and other corporate phenomena.[97] Easterbrook and Fischel propose that their theory is both normative and descriptive: "that corporate law should contain the terms people would have negotiated … [and] that corporate law almost always conforms to this model."[98] In fact, corporate law as a whole is best seen as a set of "off-the-rack" rules to minimise the "costs of contracting".[99] This normative assumption immense though, and it is never comprehensively justified. Rather, it is simply based on the neo-liberal assumption that freedom stems from deregulation and a laissez faire system, and that this automatically leads to the best and most efficient results.

Putting the normative considerations aside, the nexus of contracts thesis contains significant internal problems. Most glaringly, not all stakeholders can effectively contract with the corporation, and certainly not for the primacy shareholders enjoy. Millon notes the entire theory "assumes that feasible contracting strategies exist for the correction of the harmful external effects of the shareholder/management activity".[100] This is untrue though – "contract is a very limited solution."[101] Employees' bargaining power is limited by virtue of their replaceability, and incorporeal entities, such as the environment, struggle to find effective

[96] Millon "Theories of the Corporation", above n 53, at 220.
[97] For example: corporation statutes are the 'default rules' of the contract; market competition ensures the contracts within the nexus are upheld; limited liability is justified through mutual consent. See Easterbrook and Fischel, above n 92, at 15-25.
[98] At 15.
[99] At 34.
[100] Millon "Communitarians, Contractarians and the Crisis in Corporate Law", above n 65, at 1378.
[101] Leung, above n 74, at 594.

agents to contract with the corporation on their behalf. As Wilson Leung points out, stakeholders, "on the whole, are endowed with less bargaining power than managers and shareholders."[102] In reality, most stakeholders affected by the corporation's behaviour cannot adequately bargain for the protection and fair consideration they need.

In fact, even the relationship shareholders have with the corporation is fundamentally different to a traditional contract. This has been highlighted by both New Zealand and Australian courts.[103] Most recently, the High Court of Australia noted five core differences, dating since the mid-19th century, between traditional bargains enforceable at contract law and the "unusual type" of contract that makes up the nexus of contracts.[104] This goes to show that it is not just in critical theory where the nexus of contracts conception fails, but it is not represented in hard law either. The arrangement between the corporation and its shareholders is a special one, and cannot be explained away with an oversimplified analogy to contract.

Why shareholders deserve primacy within the nexus of contracts conception of the corporation relies on the idea that they are the sole 'residual claimants' of the firm's profits.[105] Unlike bondholders and employees with specific contracts detailing their returns, shareholders have risked their capital "for a promise to maximise the long-run profits of the firm, which in turn maximises the value of the stock."[106] However, Stout notes the only time corporate law "comes close to treating shareholders like residual claimants is when the firm *is actually in bankruptcy.*"[107] During the day-to-day business of a large corporation, shareholders are in no way entitled to all residual profits, even after taxes and creditors have been paid. Profits are disbursed through dividends, and only when directors can and are willing to declare them.[108]

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[102] At 594.
[103] *Shalfoon v Cheddar Valley Co-operative Dairy Co Ltd* [1924] NZLR 561; and more recently *Bailey v NSW Medical Defence Union* (1995) 12 ACLC 1698.
[104] The differences noted were: ability to alter the contract without bilateral agreement, no jurisdiction of the equity courts to modify the company constitution, difficulty parties face enforcing their 'contract', contract attaches to the share not the person, and in the inability of shareholders to sue for breach without first seeking recession from the contract. Stephen Bottomley *The Constitutional Corporation: Rethinking Corporate Governance* (Ashgate Publishing, Hampshire, 2007) at 23.
[105] Easterbrook and Fischel, above n 92, at 35-39.
[106] At 36.
[107] Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, at 1193.
[108] Companies Act 1993, ss 52-53 outline the circumstances that must be satisfied before directors can issue dividends, and these are permissive rather than instructive provisions. Ultimate discretion as to dividends lies with the directors.

Though *Dodge v Ford Motor Co.* supports the idea dividends and profits are to be prioritised over reinvestment,[109] Stout reminds us that this is in fact bad law.[110] Despite wielding disturbing influence on businessmen and even corporate law scholars, *Dodge v Ford* has been deemed irrelevant by both courts and legislatures.[111] Steve Wallman agrees with Stout, explaining the court in *Ford* actually "endorsed some degree of latitude in director decisions considering (and often benefitting) non-shareholder constituencies".[112] The case turned on the issue that Ford Motor Company's charter specifically stated it was a for-profit venture. The argument that shareholders are the residual claimants of firm profits is "a naked assertion, and an empirically incorrect one at that."[113]

D: Summary

Chapter II has fundamentally debunked the traditional conceptions of the corporation as an instrument to be run solely for the shareholders. The ownership claim and nexus of contracts theory fall apart when subjected to criticism, and fail to offer any meaningful rebuttal.

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[109] *Dodge v Ford*, above n 13.
[110] Lynn A Stout "Why We Should Stop Teaching *Dodge v Ford*" (2008) 3 Va L & Bus Rev 163.
[111] At 165.
[112] Steve M.H. Wallman "Understanding the Purpose of a Corporation: An Introduction" (1998-1999) 24 J Corp L 807 at 815.
[113] Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, at 1193.

Chapter III: Rebutting the Efficiency Claim

Irrespective of how the corporation ought to be theorised, the pro-shareholder agenda argues the corporation is run most efficiently if the directors are only responsible for shareholder interests. This chapter briefly canvasses and rebuts this claim, and contrasts it with the team production conception of the corporation. The corporation actually operates most efficiently not when shareholders are blindly prioritised, but when the interests of all contributors are considered. Finally, this section considers the empirical evidence, or rather lack thereof, which supports the assertion that shareholder primacy maximises efficiency.

A: The Case for Shareholder Primacy Maximising Efficiency and Rebuttal

CSR is predicated on the idea directors are responsible for a group of interests larger than the shareholders' alone. Obviously, this is totally at odds with the orthodox view that corporations exist solely to further the ends of the shareholders. Easterbrook and Fischel's now staple work addresses the core efficiency problem in the oft-quoted passage:[114]

> A manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither. Faced with demand from either group, the manager can appeal to the interests of the other. Agency costs rise and social wealth falls.

Hansmann and Kraakman state there are "two conspicuous reasons" why shareholder primacy maximises efficiency.[115] It is important to note that they wish to extend primacy to *all* shareholders, not just those with a controlling interest. Their first reason is because without legal protection for shareholders, "business corporations will have difficulty raising capital from equity markets."[116] However, as discussed earlier in this dissertation, most corporations do not rely on equity markets to raise capital. They receive sufficient income through day-to-day business and debt.[117]

Their second contention is that management will make "inefficient investment choices" in favour of the few controlling shareholders, unless directed that decisions must be made in the

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[114] Easterbrook and Fischel, above n 92, at 38.
[115] Hansmann and Kraakman, above n 55, at 442.
[116] At 442.
[117] Berle and Means, above n 56, at xv. See also Chapter II for an assessment of the ownership claim, and discussion of the unimportance of the share market to firm income.

interests of *all* shareholders.[118] This is an interesting claim because it essentially concedes that managers must be directed to consider a broader group of interests to keep the company running at maximum efficiency. The fact directors need to be told whose interests to consider, even if just a wider range of shareholders, reveals the need to run the corporation for the benefit of a group broader than solely those who have a controlling stake. Like the Easterbrook and Fischel quote, it also makes the unsubstantiated presumption that making decisions in the interests of shareholders automatically maximises social wealth. Their claim that total shareholder primacy at the exclusion of stakeholders will result in maximum efficiency is thus undermined.

Another frequently employed efficiency argument against CSR is that regardless of its merits, it is simply too hard to compete in the market if the firm does not single-mindedly pursue profits and prioritise the bottom line.[119] In a world of perfect competition, sustainable deviation from this would be impossible. This can be briefly rebutted. First, we do not live in a world of perfect competition. Dominant corporations can afford to deviate from single-mindedly pursuing profit and still remain successful, as epitomised by the experience of mid-century managerialism.[120] But even if it were true that CSR made it impossible to compete, then we simply have a further argument for making it compulsory. Like minimum wages and labour standards, costly but socially beneficial reforms become new minimum standards, and firms then compete from this platform. Any competition-based criticism of CSR can be countered by making it compulsory.

B: The 'Team Production' Conception of the Corporation

'Team production' analysis makes up the basis of Blair and Stout's theory of the corporation.[121] Corporations are made up of a team, including employees, shareholders, creditors and other contributors, who yield control and claims over firm profits to directors. Directors fulfil the role of 'mediating hierarchs', ensuring fair distribution of surpluses and protection of each member's 'firm specific investment'.[122] Shareholders are just one of many

[118] Hansmann and Kraakman, above n 55, at 442.
[119] Forest L Reinhardt and Robert N Stavins "Corporate Social Responsibility, Business Strategy, and the Environment" (2010) 2 Oxford Review of Economic Policy 164 at 168.
[120] At 168.
[121] Margaret M Blair and Lynn A Stout "Specific Investment and Corporate Law" (2006) 7 European Business Organization Law Review 1.
[122] At 14.

parties involved in this intricate relationship. Thus, instead of property of the shareholders or an aggregated nexus of contracts, the corporation is better seen as an entity run by independent directors for the "joint welfare of the team as a whole".[123]

The reason why all team members happily contribute to the corporation is because they know they will be compensated. However, this goes beyond what is explicitly contracted for. Stout argues that employees contract not only for wages, but, citing labour economists, explains the *implicit* agreement for job security, fair chance of promotion, and pay rises. This implicit contract is equally important to prospective employees entering a relationship with the firm.[124] Leung explains that contracts are "inadequate to cover the gamut of relationships that surround the corporate venture".[125] Understanding "implicit bargains… [is] the first step toward understanding the true nature of corporate relationships."[126] As well as acting as a further argument against the nexus of contracts approach, it provides strong evidence for the team production model as a descriptive account of how corporations actually function.

The faith in these implicit agreements rests on the directors' impartiality. Stout employs a hypothetical posed by Delaware Vice Chancellor Leo E. Strine, to illustrate the centrality of these understandings.[127] Would prospective employees likely take a position knowing they could be laid off if the firm were to be sold off to benefit the shareholders? It is only through faith in the impartial mediating hierarchs that team members continue to make firm specific investments. As the name suggests, developing familiarity with company systems, personnel, and methods are all time investments specific to that particular firm. Employees learn only a limited amount of intrinsically useful transferable skills. The majority of both the skills they develop and the output they produce is specific to and owned by the firm.[128] Team members can only be expected to continue this investment, and thus keep the company cogs turning, if they are assured of compensation and fair treatment.

Stout drives her point home by explaining the efficiency implications of Strine's hypothetical. If the law mandates the sale of shares to the highest bidder at substantial cost to other team members, inefficiencies will arise as all non-shareholders (including the

[123] Horrigan, above n 3, at 101.
[124] Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, at 1196.
[125] Leung, above n 74, at 597.
[126] At 597.
[127] Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, at 1197.
[128] Blair and Stout, above n 121, at 10-11.

executives) would be hesitant to contribute anything to the firm beyond the bare minimum stipulated in their written contracts.[129] Blind shareholder primacy will artificially force the firm to favour immediate short-term interests over the medium and long-term goals of the company, leading to inefficiencies. As put bluntly by Wallman, pure shareholder primacy will yield results that are "just plain bad".[130]

The team production conception provides a sound and compelling account of corporate law. It does not rely on anachronistic analogies like the ownership or nexus of contracts claims, and is compatible with the state of corporate law today. Most importantly for CSR, it demonstrates how consideration of stakeholder interests need not compromise efficiency.

C: Empirical Evidence?

Efficiency is fundamentally an empirical question. Though shareholder primacy and team production both claim to maximise efficiency, hard evidence is necessary to give credence to either side. Even Stout concedes that "the question ultimately cannot be answered *except on the basis of empirical evidence.*"[131]

Contrary to the assertions of orthodox scholars, the corporate takeover movement has actually provided "empirical evidence that shareholder wealth may be an inaccurate proxy for efficiency."[132] Despite conventional wisdom that hostile takeovers promote efficiency by replacing management and generating premiums for shareholders, "the source, extent, and even the observability of these [efficiency] gains remains open to serious dispute."[133] Ian Lee canvasses some of the typical economic arguments in favour of shareholder primacy, but concludes the main contention that managers cannot be trusted (a favourite of the pro-shareholder agenda) "is a questionable assumption."[134]

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[129] Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, at 1198.
[130] Wallman, above n 112, at 809.
[131] Stout "Bad and Not-So-Bad Arguments for Shareholder Primacy", above n 66, at 1201.
[132] Leung, above n 74, at 599.
[133] John Coffee "The Uncertain Case for Takeover Reform: an Essay on Stockholders, Stakeholders and Bust-Ups" [1988] Wis. L. Rev. 435 at 440.
[134] Ian Lee "Efficiency and Ethics in the Debate About Shareholder Primacy" (2006) 31 Delaware Journal of Corporate Law 533 at 569.

Even assuming there is an efficiency benefit for the firm, commentators such as Millon and John Coffee explain that any benefits of hostile takeovers are countered by "strong negative side effects", exemplified by the 'bust-up' takeover wave of the 1980s.[135] The propensity for corporations to totally externalise the negative effects of their actions makes efficiency on a broader societal basis almost impossible to measure:[136]

> Shareholder primacy produces costs and benefits. Because the costs and benefits fall on different groups, any assessment of the net social welfare impact is *prima facie* impossible without an interpersonal utility comparison, and such comparisons are impermissible within welfare economics.

Ultimately, without empirical proof that shareholder primacy focused on boosting stock price actually maximises total efficiency, this argument for shareholder primacy is unconvincing. There is no evidence that shareholder primacy maximises firm generated benefits for society. Instead, the "mythical benefits"[137] of shareholder control are asserted, which are largely unsupported apart from appealing to mistrust in directors and uncompromising neo-liberal economic theory. Easterbrook and Fischel's contention is based on shaky appeals to 'truisms' of the market economy, rather than on a firm foundation of empirical proof.

For example, Easterbrook and Fischel simply assert that every time a company moves location, it creates "greater benefits that workers and communities in the new locale enjoy." Otherwise, "there would be no profit in the move."[138] Of course this is false, especially when the move is to a third world producer which profit only the corporation, costing jobs at home and causing misery abroad.[139] As a further example, Milton Friedman's crusade against CSR is couched in a series of zero-sum arguments.[140] But as Horrigan shows us, "these arguments misfire or are at least misdirected."[141] Shareholder and stakeholder interests are usually not bound together in a zero-sum manner. As Leung explains, "in most situations shareholder, stakeholder, and management interests conflate."[142]

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[135] Leung, above n 74, at 600.
[136] Lee, above n 134, at 569.
[137] Lynn A Stout "The Mythical Benefits of Shareholder Control " (2007) 93 Virginia Law Review 789.
[138] Easterbrook and Fischel, above n 92, at 39.
[139] For example, the collapse of Primark's factory in Bangladesh killed 1129 people this year, highlighting the tendency of firms to externalise cost and risk. Sarah Butler "Bangladeshi factory collapse leaves trail of shattered lives" *The Guardian* (United Kingdom, 6 June 2013).
[140] Friedman, above n 52.
[141] Horrigan, above n 3, at 94.
[142] Leung, above n 74, at 599.

D: Summary

This chapter has undermined the presumption that shareholder primacy maximises efficiency by attacking its premises and emphasising the lack of any empirical evidence to support its claims. The team production conception provides a more realistic and efficient conception of the corporation, and one that is also compatible with CSR.

Chapter IV: Why the Corporation is Best Conceived of as a Public Entity

By breaking down the orthodox obsession with shareholder primacy, Chapters II and III demonstrated how systemic reform should not be understood as an encroachment on insurmountable shareholder rights or a dire threat to efficiency, but rather an opportunity to address the problems outlined in Chapter I. This chapter departs from negative critique of the orthodox position, and makes a positive argument for CSR by exploring the fundamentally public nature of the corporation, and therefore why extensive regulation is justifiable.

A: Concession Theory Justifying Intensive Regulation

First, the history of the corporation and its origins as a publicly granted monopoly will be discussed. Limited liability and legal personhood began as privileges granted by the state, rather than rights achieved through a simple bureaucratic process as they are now. This demonstrates two aspects of the corporation's inherently public nature. First, it reveals the corporation's origins as a body designed to further the public good. Secondly, an argument can be made that because incorporation is bestowed by the state, the corporation owes reciprocal duties to serve the public interest. Known as 'concession theory', this applies to all corporations regardless of size or actual public impact. In return for conceding limited liability and legal personhood, the state has the right to demand socially responsible behaviour from its creations.

1: Tracing the origins of the corporation as a public entity

The corporate form as we know it today – with limited liability, distinct shareholders 'owning' the corporation as private property, and separate legal personality – is a relatively new invention of the mid-19th century.[143] Before this, commercial bodies granted separate legal personality needed to receive incorporation privileges from the state. Blackstone explains "the king's consent [was] absolutely necessary" to form a corporation.[144] The corporation's purpose was indisputably to further the public interest, and it can be useful to conceptualise them as "a from of unofficial extension of government or royal policy."[145]

[143] Justine Simpson and John Taylor *Corporate Governance, Ethics and CSR* (Kogan Page, London, 2013) at 9.
[144] William Blackstone *Commentaries on the Laws of England Vol 1* (1765) ch. 18 at [1].
[145] Simpson and Taylor, above n 143, at 9.

Robert Lowe, the Chancellor of the Exchequer responsible for introducing the Joint Stock Companies Act 1856 to Parliament, provides a contemporary explanation of the severe limitations the state placed over companies prior to the aforementioned Act:[146]

> [T]hese companies come to the Legislature for favours and for privileges, we have a right to impose upon them what terms we choose—that we can make them submit to whatever restrictive law we like.

This was not a process undertaken lightly, and individuals wishing to establish such a company would need significant influence and capital to persuade the sovereign to award corporate status. Even earlier than this (prior to the mid-14th century), incorporation was only granted to non-profit organisations, such as hospitals and universities.[147] Especially in cases of for-profit companies, the only corporations granted incorporation were those "clearly vested with a public purpose and benefited the public fisc".[148]

With a charter came guaranteed monopoly, meaning corporations in this era, such as the Hudson Bay Company and East India Company, wielded unmatched influence.[149] They played an essential and undeniably public role in the new colonies. For example, the East India Company's charter permitted it to "wage war, and make peace with non-Christian rulers, appoint governors, and exercise civil and criminal judicial authority in the company's settlement".[150] The flipside of this was the understandable degree of governmental control to which they were subjected. This is not to mention the outright prohibition of all commercial undertakings (whether partnerships or unincorporated joint stock companies) "tending to the common grievance, prejudice and inconvenience of His Majesty's subjects" after the Bubble Act of 1720.[151]

In practice, the Act outlawed all forms of stock trading and brokerage unless those acquiring shares were genuinely taking over the partnership or company.[152] Transferable shares had become too dangerous in the eyes of the state. Though incorporation charters could still be

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[146] (1 February 1856) 140 GBPD HC 129.
[147] Reuven Shlomo Avi-Yonah "The Cyclical Transformations of the Corporate Form: A Historical Perspective of Corporate Social Responsibility" (2005) 30 Del. J. Corp. L. 767 at 783.
[148] At 783.
[149] Simpson and Taylor, above n 143, at 9.
[150] George S Roukis "The British East India Company 1600-1858: A model of transition management for the modern global corporation" (2004) 23 Journal of Management Development 938 at 942-943.
[151] Simpson and Taylor, above n 143, at 10.
[152] At 10.

issued, these were rare and restricted to the public interest.[153] Exploring the reasons behind the passage of the Act reveals much about the contemporary conception of the corporation as a public entity. Ron Harris identifies three main reasons.[154] The most obvious was to combat the destructive tendencies of the stock market and bubbles arising from the proliferation of the unincorporated joint stock company. Additionally, the government wanted to maintain its monopoly on the issuance of corporate charters in order to first more efficiently regulate enterprise, and secondly to continue to raise revenue through issuance of charters. Harris believes the main factor was the South Sea Company's push to initiate the Bill in order to prevent other enterprises competing for investors' capital. This final reason shows that the disturbing ability of the corporation to influence the legislative process dates back well into the 19th century. As a public-private enterprise, the South Sea Company's success was of substantial concern to the government, explaining why the Bill was so easily passed.

The Bubble Act demonstrated Parliament's willingness to restrict the economic harm the unincorporated joint stock company could cause. Unincorporated joint stock companies were essentially enhanced partnerships, attempting to mimic incorporated companies.[155] However, they did not enjoy the separate legal personality nor the exchangeability of share ownership of their contemporary incorporated companies. Ireland observes from *Duvergier v Fellows* that in 1828 any attempt to create "transferable shares without public authority was not so much illegal as legally impossible."[156] Debts and choses in action attached to the original shareholder and could not be simply assigned to the next purchaser of the share. The unincorporated joint stock company was thus fundamentally different to a company incorporated by royal charter. Though in practice they may have appeared similar or fulfilled similar functions, they lacked the separate legal personality that defines a company. As such, the fact that unincorporated joint stock companies were private does not detract from the claim that incorporated companies were, and are, inherently public entities.

The relevance of this to the current discussion is that, relatively speaking, the idea that the incorporated company is a piece of private property is very new. I am not arguing that

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[153] For example, two marine insurance providers Royal Exchange Assurance Corporation and London Assurance Corporation were granted incorporation charters with the passage of the Act. Ron Harris "The Bubble Act: Its Passage and Its Effects on Business Organization" (1994) 54 Journal of Economic History 610 at 613.
[154] At 611-612.
[155] Ireland, above n 75, at 457.
[156] At 460.

because corporations were seen as public before the mid-19th century that we ought to return to that conception automatically. Quite simply, tracing the history of the corporate form reveals that the proposition that corporations are inherently public bodies is not radical, but was in fact how the corporation was originally envisioned. Even today examples such as Freddy Mac and Fannie Mae in the United States and state-owned-enterprises in New Zealand demonstrate that the corporate form is used by the state for the sole purpose of furthering public ends.

2: The bargain for legal personhood and limited liability

Simpson and Taylor explain that it was the Joint Stock Companies Act 1856 of the British Parliament that effectively birthed the modern business corporation.[157] The defining features of the company could now be achieved through a simple bureaucratic process, rather than requiring a special charter. For the first time, a single Act provided for easy, widely available incorporation and limited liability.[158] However, just because the charter had been replaced with a rubber stamp did not mean the bargain for incorporation was no longer occurring. The overall purpose of this simplification was to facilitate the risky business ventures that were necessary for an industrialising and competitive Britain.[159] The need for railways, canals, mechanised textile and arms factories required unprecedented amounts of capital. However, without protection of the corporate form, "ordinary investors were not readily prepared to put up the money if it meant that they might be ultimately responsible for all debts and liabilities of the business if it failed."[160]

As such, Parliament needed to widen incorporation opportunities to facilitate the business ventures the country needed. There was an undeniable moral and ideological impetus for general incorporation, as well as self-interest from the business community. Mr Lowe in his Parliamentary speech supporting the Act proposed that general incorporation is "no privilege, but a right to be conceded; a state of mischief to be corrected" and that it was a matter of

[157] Simpson and Taylor, above n 143, at 11.
[158] See also the Joint Stock Companies Act 1844 and the Limited Liability Act 1855 which laid the groundwork for the 1856 Act.
[159] Simpson and Taylor, above n 143, at 11. See also Ireland, above n 75, at 462; and Avi-Yonah, above n 147, at 793 who emphasise the importance of the rise of railways with the need for general incorporation and limited liability.
[160] Simpson and Taylor, above n 143, at 10.

individual liberty that one should be able to use the corporate form to do business.[161] Despite the ideological argument for widening incorporation, Parliament's decision was fundamentally pragmatic. RA Bryer reminds us that the "decisive" reason behind the general incorporation and limited liability was to encourage investment:[162]

> Although many arguments were deployed for and against limited liability during the first half of the nineteenth century, this one was ultimately decisive. Without limited liability, the wealthy commercial capitalists and financial aristocracy, from whom the bulk of industrial capital would ultimately have to come, but who had the most to lose, would not invest.

Limited liability gave investors the confidence to invest "as a means of sponsoring useful inventions".[163] The role of the corporation was *still* to advance the public good after the passing of the Act. Whether the genesis of the 1856 Act lies in the incorporated joint stock company being made widely available, or the unincorporated joint stock company becoming legitimised, the result is the same. The government was expanding the opportunity for incorporation and limited liability to encourage investment in the risky, capital-intensive ventures that were necessary to facilitate infrastructure development and benefit society as a whole. The Royal Commission report on amending mercantile laws described general incorporation as:[164]

> The crowning step in removing the fetters from human industry, by removing from her code the last of those enactments which (could) impede a free development of her industrial resources.

My argument is that just as in all other periods of history where incorporation has been granted to advance societal wellbeing, so too is it today. First, legal personhood was awarded to non-profits. Then, it was extended to for-profits when it demonstrably benefited the national interest, such as the overseas trading monopolies of the 17th and 18th centuries. Following the South Sea Bubble, "the Enron of its day",[165] the Bubble Act severely curtailed corporate activity until its legitimacy was restored by the state. Eventually, Victorian Britain opened it to all without a prescribed public purpose, but the understanding was that wider

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161 (1 February 1856) 140 GBPD HC 129.
162 RA Bryer "The Mercantile Laws Commission of 1854 and the Political Economy of Limited Liability" (1997) 50 The Economic History Review, New Series 37 at 40.
163 Josephine Maltby "UK Joint Stock Companies Legislation 1844 – 1900: Accounting Publicity and "Mercantile Caution" (1998) 3 Accounting History 9 at 13.
164 Royal Commission ML (1854) "First Report of the Royal Commission on the Mercantile Laws and Amendments to the Law of Partnership" British Parliamentary Papers, XXVII.
165 Simpson and Taylor, above n 143, at 10.

incorporation would benefit society through stimulating the economy and growth of new essential industries. The theme of reciprocity that can be deduced from the on-going relationship between the state and the corporation is still present today.

3: Reciprocity and concession theory

'Concession theory' builds on the historical origins of the company as a public entity. Essentially, it is the modern incarnation of viewing incorporation "as a privilege granted from the state and therefore inherently justifying state intervention."[166] In this sense it is the opposite of the nexus of contracts understanding of the corporation. Incorporation is a privilege, not a right, and corporate law represents justified state regulation of this privilege rather than 'off-the-rack rules' as contractarians see it. As argued below, exchange for incorporation should extend further to include socially responsible behaviour as part of the deal for limited liability. Wallman explains how today the bargain is in play just as much as it ever was:[167]

> After all, corporations with their limited liability for shareholders and their perpetual life are encouraged, and granted rights because they serve the goal of promoting overall societal wealth. Providing a mechanism for shareholders to obtain attractive returns is the means to the end of benefiting society, it is not the end in itself.

Legal personhood and the accompanying limited liability is a concession from the state. Every company owes its very existence "to an exercise of state power."[168] In return for this privilege granted by the public sphere, the corporation owes a duty to exercise this power responsibly and in accordance with the public interest, just as it has been required to throughout history. When incorporation was still only granted by royal charter, state intervention could easily be justified as any corporate action outside its proscribed purpose was *ultra vires*.[169] This social contract reasoning still lies at the base of concession theory as a justification for further corporate regulation in favour of the public good. Today, in the era of globalisation and unprecedented corporate influence in both political processes and the

[166] Christine Parker *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge University Press, Cambridge, 2002) at 3-4.
[167] Wallman, above n 112, at 810.
[168] Parkinson, above n 10, at 25.
[169] Janet Dine "Companies and Regulations: Theories Justifications and Policing" in David Milman (ed) *Regulating Enterprise: Law and Business Organisation in the UK* (Hart Publishing, Oxford, 1999) at 298.

private lives of individuals, more is needed than simply generating revenue. Incorporation should be awarded in return for acting in a socially responsible manner as an additional qualifier to Wallman's 'obtaining attractive returns'. Though Simpson and Taylor describe the South Sea Bubble as "the Enron of its day", the legislative reactions to the *actual* Enron were insignificant compared to the Bubble Act.

The Sarbanes-Oxley Act, despite being described by former President Bush as "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt", was directed solely at corporate fraud, accounting, and securities practices.[170] There was no addition of broader duties owed by the corporation to society, despite the obvious societal implications of Enron's failure. *Re Rolus Properties & Another* saw the Court use concession theory language to justify accounting regulations.[171] Limited liability was described as a "valuable incentive" to undertake "risky ventures" which will benefit the general economy, but it is nonetheless a "privilege which must be accorded upon terms."[172] The logical extension of the bargain for incorporation in the 21st century needs to include CSR that is enforced through mandatory systemic reforms.

JE Parkinson disagrees with my historical argument above and believes that with general incorporation the state relinquished any claim that the corporation was an entity to further the public good.[173] In his view, "the only remaining peg on which to hang concession theory's claims" lies in the public power exercised by corporations.[174] His argument is based rather on political theory, and can be summarised as "contending that power may be legitimately held only for the purpose of furthering public good."[175] Whether as employers, polluters, providers of essential services, or participants in the political process, corporations can have an undeniable influence on society in both positive and negative ways.[176] Furthermore, this power is exercised over a wide group of people, in many cases over those who did not choose

[170] Elisabeth Bumiller "Bush Signs Bill Aimed at Fraud in Corporations" *The New York Times* (United States, 31 July 2002).
[171] *Re Rolus Properties & Another* (1988) 4 BCC 446.
[172] At 447.
[173] Parkinson, above n 10, at 30.
[174] At 30.
[175] At 31.
[176] See for example Scott Bowman *The Modern Corporation in American Political Thought: Law, Power, and Ideology* (Penn State University Press, University Park, PA, 1995) for discussion on the success of the Business Roundtable not only in resisting corporate regulation, but effectively drafting their own.

to have a relationship with the corporation in the first place.[177] When corporations wield public power, more intensive regulation can be justified to achieve CSR.

B: Public Money and Public Reliance – Too Big to Fail?

The second argument this chapter makes only applies to large, influential corporations such as multi-nationals. First, these corporations have the power and ability to positively influence human development, and on this basis an argument can be made that they should be compelled to do so. Secondly, they provide services that the public comes to rely upon, such as public transport or the banking system. The level of dependence becomes particularly obvious when the state uses public money to bailout such corporations when they face bankruptcy. When corporations are 'too big' or 'too important' to be allowed to fail can they really be considered private?

In the era of the multi-national conglomerate, companies are again approaching the influence they wielded in the time of the East India Company. With this power and influence over the public comes a responsibility to exercise it in the public interest. Orthodox scholars will assert that it is the job of government, rather than 'private' corporations, to remedy society's ills. Additionally, they commonly argue that corporations do not have the knowledge or ability to exercise their power in the public interest – public good is rather indirectly maximised through a single-minded focus on maximising profit.[178] However, Avi-Yonah explains that:[179]

> [I]t is also clear that in many cases, corporations are in a better position to help human development than either governments or not-for-profit organizations. Corporations are typically smaller and more efficient than unwieldy government bureaucracies and, in the developing world, are also less corrupt. Further, corporations possess greater resources, both financial and technical, than most not-for-profit non- governmental organizations (NGOs).

Concession theory can be employed here to argue that with this dominance and ability to affect the public good, governments are justified in imposing CSR reforms to achieve desirable social outcomes. The British East India Company "vigorously addressed" global

[177] Parker, above n 166, at 4.
[178] Horrigan, above n 3, at 116.
[179] Avi-Yonah, above n 147, at 768.

piracy and eliminated the Thuggee criminal organisation as they were expanding into India.[180] There is no reason why we should not similarly expect multi-nationals to assist in solving modern issues such as global poverty and environmental degradation.

With such ability to influence and assist human development, many indispensible functions of society arise out of corporate activity. Especially after the privatisation boom of the 1980s, many services that had always been provided by the state such as hospitals, prisons, and the military were at least partially privatised and are now controlled by corporations.[181] Society has always relied on these services and takes for granted the free and ready provision of them. As such, it is not particularly radical to argue they retain public characteristics. Additionally, society can also have an interest in traditionally private industries when we come to rely upon them. Banks, airlines, and heavy industry are just some examples of corporate activity where the public has a reliance interest in the services provided.

We do not need to look far to find examples of public dependence on so-called private enterprise. In New Zealand, the $885 million bailout of Air New Zealand in 2002 was deemed necessary to preserve an essential facilitator of the country's export and tourism industry.[182] Deputy Prime Minister Jim Anderton commented on Air New Zealand's centrality to tourism, domestic air networks, and New Zealand based employment.[183] The failure of this corporation would have had a public impact that was simply too great for the Government to allow. Most recently, in August of this year, the New Zealand government pledged a $30 million subsidy to the Tiwai aluminium smelter in order keep electricity prices high for the float of state-owned-enterprise Meridian energy.[184] The common theme in all of these examples – and there are many more – is the inextricable link between the public and private spheres when corporate activity begins to impinge on the proper functioning of society.

[180] Roukis, above n 150, at 941.
[181] See for example Jack H Nagel "Social Choice in a Pluralitarian Democracy: The Politics of Market Liberalization in New Zealand" (1998) 28 British Journal of Political Science 223 for an overview of 'Rogernomics' and the extensive privatisation that characterised the era.
[182] For more detail of the centrality of Air New Zealand to New Zealand's economy see "Air New Zealand and New Zealand Tourism" (2013) Airline Consultants.com: Aviation Strategy and Trends Blog <http://airlineconsultants.com/index.php/air-new-zealand-and-new-zealand-tourism/>.
[183] Jim Anderton "Air NZ proposal" (2002) beehive.govt.nz: The official website of the New Zealand Government <http://www.beehive.govt.nz/release/air-nz-proposal>.
[184] Tamsyn Parker "Tiwai Pt Power Deal Done – Meridian" *The New Zealand Herald* (New Zealand, 8 August 2013).

The international credit crisis of 2008 and the multi-billion dollar relief packages offered by governments epitomised society's reliance on not only the private banking sector, but also a strong state to bail out this essential industry.[185] Joseph William Singer explains the 2008 crisis emphasised the huge public role of privately held banks.[186] Therefore the state has a regulatory role to minimise "the externalities associated with arrangements that are indifferent to the rights and needs of third parties and to the nation as a whole."[187] President Obama, writing before the crisis, explains that in such times "we've depended on government action to open up opportunity, encourage competition, and make the market work better."[188] The reforms proposed in Chapter V epitomise the government action necessary to affect CSR.

To summarise, these examples emphasise the blurred lines between the private and public spheres in essential, 'too big to fail' industries. Though perhaps privately held, the public interest depends on their function to a momentous degree, and the state shows ample willingness to bail them out or assist their function when necessary. The reverse is also true. Companies that have a dominant market position because they were a former state-owned monopoly, or have been saved by a bailout, owe much to the state. In such cases of reliance, by either the state or the corporation on the other, the corporation has an undeniably public character.

C: Summary

This chapter has made the case for CSR by arguing that the corporation is a fundamentally public body. The corporation was historically conceptualised as a public body and vigorously regulated to ensure it furthered public aims. Today, we need to return to this conception using concession theory, and use it to impose the invasive reforms that are necessary to achieve CSR. Exploring the public reliance on modern corporate institutions revealed both the extreme power they wield, and the necessity of such reform.

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185 Horrigan, above n 3, at 12.
186 Joseph W. Singer "The Reliance Interest in Property Revisited" (2011) 7 Unbound: Harvard Journal of the Legal Left 79 at 80.
187 At 80.
188 Barack Obama *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (The Text Publishing Company, Melbourne, 2006) at 152.

Chapter V: Systemic Reform

This chapter will explore three interconnected issues to outline some potential methods to implement effective CSR. First, why a systemic approach is needed, rather than continuing to attempt to influence corporate behaviour from the outside, will be discussed. Secondly, some attempts from overseas jurisdictions to achieve CSR in the last decade will be explored. In response to of corporate disasters and scandal in recent years, CSR has been a controversial political topic that has seen legislative attempts to implement it. Thirdly, after examining overseas situations, the options and recommended solutions for New Zealand will be briefly discussed.

A: A Systemic Approach to CSR

The modern business corporation is an immensely complicated entity with multiple levels of management and diffused decision-making, often spread across several jurisdictions. Attempting to direct decision-making from the outside with traditional regulations will therefore always face severe challenges. Additionally, this diffusion of responsibility is a key reason why finding criminal liability in corporate activity is so difficult – the law is ill-equipped to find mens rea in complex systems.[189] Even when the feedback mechanisms of the law and the market work, the corporation is simply too complicated to accurately predict how it will react to incentives such as fines and market signals, as already examined in Chapter I.

Robert Jervis' work *System Effects* examines the difficulty of predicting how complicated systems, including large corporations, will react to inputs. This is because the defining nature of a system is not the components that constitute it, but rather its "emergent properties" which are fundamentally different to its parts.[190] The corporation frequently demonstrates such qualities distinct from its components. Consider the employees, managers, and shareholders of a coal-burning plant. Presumably they all desire clean air and cheap utilities for themselves and their families. Yet the corporation, which together they create, pursues profits alone, contravening both these desires. Even when constituencies with identical goals

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[189] See Archibald, Jull and Roach, above n 41, for an evaluation of finding corporate liability diffused through the corporation, and evolutions in criminal law to more successfully find mens rea.
[190] Robert Jervis *Systems Effects: Complexity in Political and Social Life* (Princeton University Press, Princeton, 1997) at 12-13.

are combined, the "emergent properties" of their system, the corporation, are unpredictable. Only a systems analysis can explain why this happens and propose appropriate solutions.

In addition to its often unpredictable emergent properties, the corporate system is so difficult to regulate because it is "excessively 'self-referential'".[191] What Parkinson means by this is that because systems have "functional autonomy and distinctive internal logic", they operate without internalising their effects on other systems. For example, the economic system operates via a selective language that attempts to quantify utility and efficiency. It fails to translate environmental concerns into its own language, and thus they are not considered.[192] Similarly, the corporate system's language is a sort of "profit-maximisation rationality" and it often fails to interpret and process other considerations such as employee welfare or toxic output.[193] This self-referential system explains why the measures discussed in Chapter I continue to fail. Signals of the market and law are lost amongst the day-to-day running of the firm, and in a system geared towards profit maximisation it is naïve to hope firms will enact meaningful voluntary CSR programmes.

Once the complexity of the corporate system is understood, we can appreciate the difficulty of re-directing corporate behaviour from the outside and therefore why our current attempts to regulate the corporation are failing. The regulations that *are* effective (such as the basic requirements in the Companies Act) are built into the "reflexive [system] rather than an instrumental model of law."[194] Similarly, to achieve CSR the solution is to get inside the corporate processes that control their behaviour:[195]

> Instead of treating the corporation's inner processes as a "black box," to be influenced only indirectly by threats laid about its environment like traps, we need more straightforward "intrusions" into the corporation's decision structure and processes than society has yet undertaken.

Stone wrote this in 1975. In the last decade however, several jurisdictions and organisations have enacted incentives or requirements to induce CSR, with some containing systemic

[191] Parkinson, above n 10, at 328.
[192] At 328.
[193] At 328.
[194] At 328.
[195] Stone *Where the Law Ends*, above n 2, at 121.

elements. These will be explored and assessed in the following section to discover what methods may be useful in achieving universal CSR in New Zealand.

B: CSR Legislation from Outside New Zealand

1: United Kingdom

The UK Companies Act 2006 embodies the principle of 'enlightened shareholder value'. This basically means maximising profits for the shareholders, but doing so by "maximis[ing] overall competitiveness and wealth and welfare for all."[196] Though s 172 contains the ubiquitous general duty to promote success of the company, ss 172(1) specifies stakeholder interests that must be considered, including employees, the community, and environment, with a deliberate emphasis on fairness between the groups.[197] Though an improvement from the prior law, and ahead of New Zealand and Australia, Horrigan expresses disappointment that the reforms did not "grapple more forcefully" with CSR concerns, in particular the impact of multi-nationals.[198] Under the new Act, much of the business community is maintaining a "'business as usual' mindset", and "test cases on some of these changes… are likely to be years in the making."[199]

2: India

The CSR legislation that has garnered the most media attention recently has been the Indian Companies Bill 2012. The Bill replaces the Companies Act 1956 and is perhaps most controversial for its mandatory CSR provision.[200] Though previous laws have required CSR reporting, the Bill is the first piece of legislation in the world with an explicit CSR provision demanding action in the public interest.[201] Irrespective of the efficacy of the Bill, this is a noteworthy achievement and is indicative of the shifting political attitudes towards the merits of enforced CSR. The relevant section, clause 135, mandates that companies that have a net

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196 Patricia Hewitt *Company Law Reform* (White Paper, March 2005) at 20-21.
197 Companies Act 2006 (UK), s 172.
198 Horrigan, above n 3, at 34.
199 At 34.
200 The Companies Bill 2012 (121-C), cl 135. The Bill was ratified 8 August 2013 and will become law once consented to by President Pranab Mukherjee.
201 Caroline Van Zile "India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market" (2012) 13 Asia-Pacific Law & Policy Journal 269 at 271.

worth, revenue, or profit of above a certain margin must spend at least two per cent of their average net profit of the three preceding years on CSR.[202]

Though an important first step, the Bill offers a very watered-down approach to any serious CSR reforms. First, it does not define CSR at all, but allows companies to formulate their own CSR policies in accordance with statutory requirements.[203] As a prominent Indian financial publication cynically remarks, "it seems the law has no problems whether a company uses profits to help commercial sex workers in Mumbai or build places of worship as part of CSR."[204] Moreover, the mandated two per cent spending does not address any of the internal decision-making apparatus of corporations, and therefore is not offering a preventative or systemic solution. Rather, the directed spending is essentially an additional corporate tax. As best said by Stone, "corporate charity, whatever can be said for the practice, is irrelevant to real institutional reform."[205]

3: United States

With few exceptions, CSR in the United States is permissive rather than compulsory. In response to the takeover movement of the 1980s many states enacted constituency statutes, with 31 remaining in force today.[206] Though designed to protect directors of corporations which were takeover targets, they have been seized upon by CSR advocates as "offer[ing] a more capacious view of directors' fiduciary duties."[207] However, they are not in force in Delaware, the most popular state to incorporate in and the most influential in developing corporate law.[208] *Revlon v MacAndrews & Forbes Holdings*[209] held that when facing acquisition offers, the board goes into "auction mode" and has the sole fiduciary duty of maximising immediate shareholder value at the expense of other stakeholders.[210] Though

[202] The Companies Bill 2012 (121-C), cl 135.
[203] Van Zile, above n 201, at 271.
[204] R Jagannathan "Companies Bill: Here are the Pleasure and Pain Points" (2013) moneycontrol.com: India's No. 1 Financial Portal <http://www.moneycontrol.com/news/business/companies-bill-here-arepleasurepain-points_933037.html>.
[205] Stone "Corporate Social Responsibility", above n 9, 557-558.
[206] Taylor, above n 23, at 750.
[207] CA Harwell Wells "The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century" (2002) 51 U. Kan. L. Rev. 51 at 128.
[208] More than half of the Fortune 500 companies are incorporated in Delaware. See Lewis S Black, Jr *Why Corporations Choose Delaware* (Delaware Department of State Division of Corporations, Dover, 2007) at 1.
[209] *Revlon, Inc v MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986).
[210] Anthony Bisconti "The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations stuck in *Revlon* Land?" (2008) 42 Loy L A L Rev 765 at 779.

Paramount Communications v Time later narrowed the circumstances in which this duty is activated,[211] *Revlon* shows the necessity of stakeholder protection to be included in statute if it is to be taken seriously by the courts.

Even when states do have constituency statutes, the language is permissive rather than mandatory.[212] With the exception of Connecticut, directors are not required to consider stakeholder interests.[213] Even there though, no mechanism to enforce these interests exists.[214] Some states' corporate statutes actually explicitly prohibit non-shareholders from suing the board for failing to consider their interests.[215] Combined with the lack of deep legal analysis in the case law, constituency statutes have had more of a symbolic impact than a practical one.[216] In *Baron v Strawbridge & Clothier* for example, the Court upheld the board's defensive actions, stating "[i]t was proper for the company to consider the effects the … tender offer would have, if successful, on the Company's employees, customers and community."[217] However, the Court still emphasised the board's primary fiduciary duty to act in the interests of the shareholders, the issue on which the case ultimately turned. In Anthony Bisconti's analysis of the case: "[t]he outcome would have been identical even without Pennsylvania's constituency statute."[218] In light of the untapped potential of constituency statutes, it is easy to agree with Celia R Taylor's view that "corporate constituency statutes have not fulfilled the promise they initially seemed to offer."[219]

4: Germany and Japan

Germany and Japan will be explored together as they offer a non-Anglo-American insight into CSR from fundamentally different corporate legal systems and cultures, whilst remaining two of the most economically successful nations in the world.[220]

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[211] *Paramount Communication v Time*, above n 85. The target company must either initiate the bidding or be involved in a clear restructuring. Time Inc. intended to continue operating with the same corporate culture and many of the same directors, so 'auction mode' was not initiated and the court allowed the Board to resist the takeover on grounds that the acquisition would not be in the long-term interests of the company.
[212] Bisconti, above n 210, at 783.
[213] Conn Gen Stat Ann § 33-756.
[214] Leung, above n 74, at 620.
[215] See for example NY Bus Corp Law § 717(b).
[216] Taylor, above n 23, at 750.
[217] *Baron v Strawbridge & Clothier* 646 F Supp 690 (E.D. Pa. 1986) at 697.
[218] Bisconti, above n 210, at 784.
[219] Taylor, above n 23, at 751.
[220] Mark J Loewenstein "Stakeholder Protection in Germany and Japan" (2001) 76 Tul L Rev 1673 at 1673-1674.

Historically, German companies were always far more subject to government control, beginning with the Reform Act 1870 that implemented a two-tier management system. The *Vorstand* was the traditional management team, but the supervisory *Aufsichsrat* board was created explicitly to mediate outside stakeholder interests.[221] This system is still in place today, and the Codetermination Act 1976 requires significant employee representation on the board.[222] Following a settled procedure, this model seeks to balance employee concerns with all other opposing interests.[223] This system has been incredibly effective at ensuring sustainable corporate governance and fair treatment of employees, with Andrea Cornfield stating "[t]he importance of employee representatives and the power they hold … should not be understated."[224]

Japan also practices a form of codetermination, with similar corporate governance to Germany.[225] However, the key difference is that Japanese stakeholder consideration is "informal, not legal, in nature."[226] Like New Zealand or the United States, the board is elected by the shareholders and owes its duties to the company at large, without specified stakeholder consideration. Corporate governance in Japan is defined by relationships, with employees, customers, suppliers, and "most importantly" the banks that often hold majority stakes in Japanese companies.[227]

To oversimplify, these banks supply the majority of the corporation's capital rather than public share offerings, resulting in "classically pro-stakeholder" outcomes as the bank "insulates the company from negative external pressures."[228] Combined cross-shareholding between separate companies, Japanese corporations essentially form 'families' (*keiretsu*) that focus on continuing business and cooperation rather than the bottom line.[229] For example, Canon, the Japanese technology company, has adopted a philosophy known as *kyosei* or

[221] At 1676.
[222] Companies with between 500 and 2000 staff must have one third of the board made up of employee representatives, with this proportion rising to one half for entities with more than 2000 workers. Loewenstein, above n 220, at 1677.
[223] Rebecca Page "Co-determination in Germany – A Beginner's Guide" in *Arbeitspapier 33* (Hans-Bockler-Stiftung, Düsseldorf, 2011) at 19.
[224] Andrea Corfield "The Stakeholder Theory and its Future in Australian Corporate Governance: A Preliminary Analysis" (1998) 10 Bond Law Review 213 at 233.
[225] At 235.
[226] Loewenstein, above n 220, at 1684.
[227] Corfeild, above n 224, at 235.
[228] Loewenstein, above n 220, at 1687-1688 for a more detailed explanation of the relationships, often non-legal, between the government, banks and corporations which allow for this pro-stakeholder outcome.
[229] Corfeild, above n 224, at 235.

"spirit of cooperation" working with employees, the community, and other organisations to address global imbalances.[230] Though the Japanese model may sound like the ineffectual voluntary CSR of the Anglo-sphere, it instead emphasises the real importance of corporate culture in achieving effective CSR on a systemic level. Japan seems to achieved CSR through a voluntary approach, fundamentally shifting corporate values away from the sole pursuit of profit.

5: Summary

The above jurisdictions have demonstrated a range of solutions for achieving CSR, some of which, such as the direct employee representation in Germany, offer real hope for affecting change on a systemic level. If nothing else, all of these examples show that jurisdictions around the world are increasingly willing to part with the shareholder primacy view of the corporation, and take legislative steps towards achieving CSR.

C: Working Towards a Systemic Solution

This dissertation's primary focus has been the arguments for mandatory CSR, namely why the state can be justified in imposing systemic reforms. This section explores these potential reforms, but does not seek to propose a comprehensive list of recommendations for New Zealand to adopt. Obviously, to specify particular structural reforms to all corporations when every industry is so different is folly. We need to be careful when proposing blanket reforms to corporate structures, "[o]therwise, in our zeal to reform corporations, we may wind up imposing costs that exceed those of the hazards we are trying to avoid."[231] Rather, with an emphasis on systems theory, some broader potential solutions will be evaluated. The goal is to find:[232]

> [A] form of decentralized control, located at the level of the enterprise itself, the aim of which is to make companies reflect on and be responsive to outside interests, in effect, to prevent them from operating as closed systems.

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[230] Ryuzaburo Kaku "The Path of *Kyosei*" in *Harvard Business Review on Corporate Social Responsibility* (Harvard Business School Press, Cambridge MA, 2003) at 105.
[231] Stone "Corporate Social Responsibility", above n 9, at 561.
[232] Parkinson, above n 10, at 328.

1. Interventionalism

The reforms I advocate in this section fall into the 'interventionalism' school and seek to "bring about a reorientation of the internal bureaucracy directly". [233] As explained in Chapter I, I doubt the efficacy of a voluntary approach. Though it would be ideal and avoids the challenges of law-making – namely ensuring reforms go far enough but do not discourage useful behaviour – recent history suggests that the corporate culture of pursuing the bottom line will not change anytime soon, despite elaborate public relations campaigns that may suggest otherwise.[234] Proponents of voluntarism may argue the Japanese have implemented stakeholder consideration through culture alone, despite having a very similar corporate code to the United States. However, this is because of their fundamentally different legal history where:[235]

> [T]he Germanic and Marxist economic theory that dominated discussions … [meant] the notion that Japanese corporate responsibility extends beyond the shareholders was so widespread in the prewar period that virtually no one asserted the opposite view.

Combined with the generally more communitarian nature of Japanese culture, it is naïve to assume that simply because it worked in Japan, we can will a culture change to improve corporate governance in New Zealand.

Interventionalism offers a 'third way' between total voluntary CSR and heavy-handed outside regulation.[236] To get inside the "black box" of corporate behaviour, reforms need to be targeted in two key areas. Stone continues the human analogue of the "responsible person", used also to define CSR, to suggest reform to the 'nervous system' and 'brain' of the corporation.[237] First, "mending the information net" to ensure all relevant information reaches the appropriate decision maker is essential.[238] Secondly, the decision-making process itself needs to be reformed, especially at the board level. Making decisions after considering the public interest and stakeholders is a crucial step toward achieving CSR. Most importantly, by reforming the corporation from within we escape the reactionary nature of standard

[233] Stone "Corporate Social Responsibility", above n 9, at 560.
[234] Fleming and Jones, above n 5, at 7.
[235] Yoshiro Miwa "Corporate Social Responsibility: Dangerous and Harmful, Though Maybe Not Irrelevant" (1999) 84 Cornell Law Review 1227 at 1250.
[236] Parkinson, above n 10, at 328.
[237] Stone *Where the Law Ends*, above n 2, at 201.
[238] At 199.

regulation and instead develop "opportunities for improvement. As such [reform to corporate processes] does not need to wait for actual disasters."[239]

2. Reform within the corporate system

Before reforming decision-making, we first need to ensure that all relevant information reaches the correct decision makers. This entails massively expanding firms' information gathering networks. Currently, firms largely focus their investigations on economic performance of themselves or rivals, to maximise their bottom line.[240] Furthermore, because firms are so focused on maximising short-term profits for their shareholders, there is often no incentive to bring wider concerns to the board level, especially considering the "information overload" already faced by directors.[241] The solution needs to be systemic, rather than holding individuals personally responsible for reporting information to the board they would rather remain ignorant of. Hale, Bernhard and Freitag remark that "[h]olding people punitively responsible for reported errors and mishaps provides a massive deterrent to report freely and openly."[242]

In order to detect the relevant environmental and societal harms, new officers need to be created whose sole function is to find this information, and then pass it up to the board level.[243] Though invasive, such an approach can be justified by concession theory and has been successful in California. There, each insurance company has a dedicated officer to gather financial reports, who "*must* report the findings to the board; and the minutes *must* reflect they saw it."[244] There is no reason why we should not require the same for public interest reporting. This has several benefits. First, it means the information can be duly considered – a pre-requisite for informed decision-making. Secondly, making the firm's top executives aware of things they would rather remain ignorant of can opens them, and the company, to criminal liability.[245]

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[239] Andrew Hale, Bernhard Wilpert and Matthias Freitag *After the Event From Accident to Organisational Learning* (Permagon, Oxford, 1997) at 8.
[240] Stone *Where the Law Ends*, above n 2, at 202.
[241] At 150.
[242] Hale, Bernhard and Freitag, above n 239, at 99.
[243] Stone *Where the Law Ends*, above n 2, at 205.
[244] At 205.
[245] Finding mens rea is one of the most troublesome aspect of corporate criminal liability. Traditionally, finding the "directing mind and will of the corporation" (*Lennard's Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC

Fleming and Jones believe that under "existing governance arrangements there really is *no choice* the corporation can make other than to pursue profitable growth according to its 'hard-wiring'."[246] One of the core reasons for this, irrespective of the fact directors owe their duties to the company rather than shareholders directly, is that under the current regime it is the shareholders who elect the board.[247] As such, they are inclined to elect directors sympathetic to their interests. The German solution of a separate supervising board with direct representation of employees offers a promising solution. Not only has it been effective in better protecting employee rights,[248] but it targets reform at the decision-making level avoiding the pitfalls of reactionary crimes and regulations. David Engel sees the German system as "[t]he nearest real life model" of systemic CSR, though still far from what could potentially be achieved.[249] Additionally, it provides protection for vulnerable stakeholders. Unlike shareholders who diversify their investments to "get rid of [risk]",[250] employees and stakeholders who make firm specific investments in the company have to rely on the goodwill of the directors for fair treatment. Since stakeholders "surrender a significant amount of mobility" when contracting with the corporation, a German-style supervisory board would go a long way in protecting their vulnerable interests.[251]

More fundamental changes need to be made to the primary board of directors. Part of the solution would be to eliminate inside directors.[252] This is not a particularly radical suggestion, and many companies have a majority of their boards comprised by independent directors.[253] The new Indian Corporations Bill cl 149(4) requires that one third of directors on the board be independent, and the government reserves the right to prescribe a minimum number of independent directors in any class of public companies.[254] "Independent director" is tightly defined to preclude any possible relation, financial or otherwise, to the company.[255]

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705) has been one of the main ways of inferring it. Ensuring board level knowledge of certain activities the company is involved in makes this test much easier to satisfy. See Archibald, Jull and Roach, above n 41.

246 Fleming and Jones, above n 5, at 106.

247 Companies Act 1993, ss 153 and 156 stipulate that directors are appointed and removed by an ordinary shareholder resolution. Section 105 explains ordinary resolutions are a "power reserved to shareholders".

248 Loewenstein, above n 220, at 1681-1683.

249 Engel, above n 2, at 33.

250 Easterbrook and Fischel, above n 92, at 29.

251 Rahim, above n 86, at 305.

252 Stone *Where the Law Ends*, above n 2, at 140.

253 It is a requirement to have a majority of directors as 'independent' to be listed on the NYSE or NASDAQ. "SEC Approves NYSE and NASDAQ Proposals Relating to Director Independence" (2008) FindLaw: For Legal Professionals <http://corporate.findlaw.com/finance/sec-approves-nyse-and-nasdaq-proposals-relating-to-director.html>.

254 The Companies Bill 2012 (121-C), cl 149(4).

255 Clause 149(6).

Independent directors have no vested interest in their continued employment and remuneration from the firm, so are far more likely to report and act on public interest concerns that are not in the company's best interests.[256] Financial independence also ensures the director's focus is not disproportionately on share price.

The most radical board reform, but also the one with the most promise, is the appointment of special and publicly appointed directors. Stone suggests the appointment of a judicial director could be a useful remedy for "recidivist" firms, as both a punishment and effective rehabilitation.[257] Public directors would sit on corporations over a certain size and though they could be outvoted, they would serve several important functions.[258] They would ensure compliance with laws and monitor the internal systems in the firm, but more importantly alert and persuade fellow board members to consider the public interest implications of the corporation's activity.[259] This 'superego' function of public directors transcends their voting power and impacts on the system (the board) to change director behaviour and improve corporate culture. Additionally, they would serve the role of liaising with legislators about new regulations necessary in specific industries, helping fix the 'time-lag' problem discussed in Chapter I. From a systemic perspective, public directors break the insulation of the corporate system by virtue of the fact they are appointed by and liaise with an external affected group (the public). They offer a way to end the blinding 'self-referential' nature of the corporate system by "prevent[ing] them from operating as closed systems".[260] They are crucial to achieve meaningful self-regulation of corporate behaviour.

D Summary

In order to reform corporate behaviour in the public interest, we need to get inside corporate systems and change the way corporations gather information, make decisions, and interact with the wider community. This chapter has explored a variety of overseas solutions, with the German model in particular offering the most promise of systemic, effective reform. Then, it

[256] Stone *Where the Law Ends*, above n 2, at 140.
[257] At 574.
[258] At 158-161. Stone suggests they should comprise 10 per cent of the board for every billion dollars of assets or sales.
[259] At 160.
[260] Parkinson, above n 10, at 328.

discussed reforms that ought to be made to information gathering and corporate governance to ensure important decisions are made by a fully informed and fairly comprised board, and thorough consideration of the public interest.

Conclusion

Invasive and systemic reform is essential to achieve meaningful CSR. This dissertation has proven this from several angles, revealing the practical, theoretical, and normative justifications for mandatory CSR.

Chapter I explained why current attempts to induce CSR have failed, and why this will not change unless we fundamentally adjust our approach toward remedying corporate problems. Corporations, especially influential ones, are failing to voluntarily undertake any meaningful steps towards achieving CSR. Quite simply, the profit incentive to do so is not present. Consumers are disturbingly ambivalent towards CSR concerns, and are either unaware or unwilling to engage with CSR initiatives. Even when they are, they face insurmountable barriers in translating praise or condemnation of such measures into effective market signals.

Criminal and regulatory law fare no better. By attempting to influence corporate behaviour from the outside, they always lag one step behind the latest toxic emission or dangerous product, and are unable to foresee the hideous corporate disasters that have marred the last century.

Chapters II and III then deconstructed the common notion that shareholder primacy is essential for effective corporate functioning. First, it does not fit theoretically with how corporate law conceives of corporations as separate legal entities, and describing shareholders as 'owners' or 'contracting partners' is indisputably anachronistic. Secondly, shareholder primacy in no way guarantees efficiency, either for the firm or society at large. By dismantling these presumptions, the negative and harmful conations of CSR are discredited.

Chapter IV illustrated the inherently public nature of the corporation from both a historical and theoretical basis. The modern firm arose out of a concession from the state, and this bargain is still occurring today. Since the state grants incorporation, it is justified in imposing limitations on how this privilege may be used. In the 21st century, these limitations need to extend to socially responsible corporate governance. Combined with the massive public influence and impact of multi-nationals, the pragmatic and normative justifications of imposing CSR become undeniable.

Translating CSR into effective reform for New Zealand and other legislatures requires a systemic solution. Getting inside the company systems is essential to achieve pre-emptive mitigation and solution of problems that affect both stakeholders and society as a whole. Chapter V concluded the German co-determination model offers a model solution to the problem of stakeholder vulnerability. Redirecting information gathering and decision-making, especially through publicly appointed directors, is the best way to ensure corporate actions are socially responsible.

Implementing these reforms is another matter. Achieving the democratic support to actually impose such justified restrictions on business requires fundamentally changing how the public conceives of the corporation and its role in society. The goal of this dissertation has been to assist with this reconceptualisation. CSR is not just necessary and justifiable, but it fits best with how the corporation is most accurately conceptualised as an entity designed to further the public good. Until governments embrace this though, and are ready to impose the necessary systemic changes from above, CSR will remain nothing more than a buzzword for corporate advertisers.

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