TEXT, CONTEXT AND CONSTITUTIONS: DIRECTORS' FUNDAMENTAL DUTIES IN AOTEAROA NEW ZEALAND

Jonathan Barrett*

This article considers fundamental directors' duties under the Companies Act 1993. Drawing on fundamental principles of the rule of law, and Roland Barthes' distinction between lisible and scriptible texts, the article provides a close reading of the text regarding directors' duties. These duties are then considered in a broader context. An argument is also presented for greater use of bespoke constitutions to establish specific corporate purposes.

I INTRODUCTION

Following prolonged consultation and consideration by the Law Commission,[1] the current legislation governing the legal capacities of companies in New Zealand was enacted more than three decades ago.[2] The Companies Act 1993 (CA 1993) included North American

* Associate Professor in Commercial Law and Taxation, Wellington School of Business and Government, Victoria University of Wellington | Te Herenga Waka.

1 See Te Aka Matua o te Ture | Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989); and Te Aka Matua o te Ture | Law Commission *Company Law Reform: Transition and Revision* (NZLC R16, 1990).

2 During the 20th century, New Zealand company legislation was replaced several times: see Companies Act 1908, Companies Act 1933 and Companies Act 1955, which had been significantly amended by the time of repeal. It is plausible that the Companies Act 1993 [CA 1993] is due for a thorough re-examination: see Susan Watson and others "Reimagining the Company in Aotearoa New Zealand" (2023) 30 NZULR 473. The Law Commission has been charged with investigating directors' duties in 2025: see Te Aka Matua o te Ture | Law Commission "Law Commission to undertake project on directors' duties" (press release, 4 June 2024). However, the Hon Andrew Bayly MP, Minister of Commerce and Consumer Affairs, has announced that s 131(5) will be deleted before the Law Commission reports as part of a package of modernisation measures: see Andrew Bayly "Improving fairness and ease of doing business" (press release, 15 August 2024); and Cabinet paper "Modernising the Companies Act 1993 and making other improvements for business" (31 July 2024) at [8] and [18].

innovations,[3] but can nevertheless be situated in the tradition of United Kingdom-heritage corporate law, particularly in relation to directors' duties. The fundamental common law duty of loyalty was included in a New Zealand statute for the first time in s 131 of the CA 1993, which affirms the fundamental principle that:[4]

> … a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.

In 2023, subs (5) was added – temporarily it seems – to s 131 to clarify fundamental duties.[5] The provision states:

> To avoid doubt, in considering the best interests of a company or holding company for the purposes of this section, a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters).

This article makes and explains three propositions.

First, the statutory text should capture, to the extent practicable, the rules that directors must comply with and that interested persons, such as shareholders, employees and creditors, need to understand. In addition to establishing the relationship between the rule of law and accessible legal texts, this article draws analogically on the distinction the semiotician and literary critic Roland Barthes establishes between a "lisible" (readerly) and "scriptible" (writerly) text to argue that the provisions of a statute of general application, unlike, say, a literary novel, should be evident in themselves, and easily understood by the intelligent, non-specialist reader.[6] In practice, however, legal texts, including the CA 1993, are commonly scriptible because they defy ready comprehension.

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3 From a mirroring of English company legislation, New Zealand broadened its approach by looking to an Australian model in the 1960s and 70s, and then opting to a significant extent for a North American model: see Peter Fitzsimons "Australia and New Zealand on Different Corporate Paths" (1994) 8 Otago LR 367 at 367.

4 Section 131(1). It is debatable whether this inclusion should be considered codification. It seems likely that the opinion of Peter Watts and his co-authors is most widely held:

> Although the point is not beyond doubt, it would seem that, except to the extent that there is incompatibility, the two sets [common law and statutory rules] operate in parallel, and that, therefore, the CA 1993 is not a code of duties.

See Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2016) at 373. I would argue that use of the word "define" in the Title indicates an intention to codify.

5 See Companies (Directors' Duties) Amendment Act 2023, s 4.

6 Compare Financial Markets Conduct Act 2013, s 49:

> The purpose of a PDS [product disclosure statement] is to provide certain information that is likely to assist *a prudent but non-expert person* to decide whether or not to acquire the financial products.

Secondly, this article asserts that directors' duties should be considered within various contexts, which include lexical, general law, business and social contexts.

Thirdly, companies legislation typically distinguishes between private (proprietary) and public companies.[7] In New Zealand, a one-size-fits-all model applies, and so no distinction is drawn between, say, a one-person company and a widely held company. However, shareholder numbers matter for financial reporting purposes,[8] and, of course, financial markets rules apply to offers of securities to the public but are governed by legislation outside the CA 1993.[9] Individual companies' constitutions may be crafted to meet their particular needs, but those of small- and medium-sized enterprises (SMEs) commonly do not. Therefore, the role of the company constitution should be elevated to help directors focus their minds on the purposes of the particular companies they control. All stakeholders should have an interest in such specificity and should, of course, be able to readily understand the wording of the relevant constitution.

II TEXT

This part first establishes that an accessible text is a requirement of the rule of law and then draws on the distinction Barthes identifies between "lisible" (readerly) and "scriptible" (writerly) texts to:[10]

> … distinguish, respectively, between texts that are straightforward and demand no special effort to understand and those whose meaning is not immediately evident and demand some effort on the part of the reader.

The concept of the "death of the author" is also introduced.

A Rule of Law

Generally, statutes should be proportionate,[11] reasonable, transparent and effective. Following Lord Bingham's first principle for the rule of law, "the law must be accessible and so far as possible intelligible, clear and predictable".[12] In addition to being consistent with human rights,[13] legislation should adhere to "distinct standards" of legal excellence or principles defining the "inner morality of

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7 See for example Corporations Act 2001 (Cth), s 45A.

8 See CA 1993, s 206.

9 See Financial Markets Conduct Act.

10 See Britannica "readerly and writerly" (1999) <www.britannica.com>.

11 See for example Aharon Barak "Proportional Effect: The Israeli Experience" (2007) 57 UTLJ 369; and Richard Stacey "Proportionality Analysis by the South African Constitutional Court" in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds) *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press, Cambridge, 2020) 193.

12 See Tom Bingham *The Rule of Law* (Penguin Books, London, 2011) at 37.

13 At 66–84.

law".[14] Statutes should, therefore, manifest generality; prospective operation; intelligibility and clarity; avoidance of contradictions and impossible demands; constancy through time; and congruence between official action and publication.[15]

Although the aim of the legal order is that everyone should be equal before the law, despite their power, social standing or political leverage, the administration of law does not work in a vacuum. Cost and ignorance are considerable barriers: "Dependence upon the skills of others has the effect of reducing the common area of shared experience and knowledge and increases social distance".[16]

When Parliament has enacted statutory provisions to govern directorial behaviour, in my opinion, it is unacceptable for disputes to be decided in accordance with a "shadow" law, notably the rules of equity, that are only accessible by a coterie of professional legal specialists. In this regard, Susan Watson observes of s 131:[17]

> Often in cases where a director had usurped a business opportunity of the company, counsel preferred to frame their submissions on the basis that there [had] been a breach of fiduciary duty by directors, ignoring the Act altogether or referring to it in only a cursory way.

B Barthesian Theory

Barthes' often challenging semiotic and literary theories establish two broad ideas relevant to the current discussion. The first is the distinction drawn between lisible (readerly) and scriptible (writerly) texts, and the second is the death of the author.

1 Lisible vs scriptible texts

Barthes was concerned with practices of interpreting literature whereby the goal is "to make the reader no longer a consumer, but a producer of the text".[18] This represents a writerly approach to the interpretation of *literary* texts. In contrast to a literary text, to a great extent, we may want a *legal* text to be "stopped, plasticized by some singular system",[19] that singular system being the usual rules of

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14 See Lon L Fuller *The Morality of Law* (Yale University Press, New Haven, 1969) at 42.

15 At 41.

16 Terence J Johnson "Professional Control" in CM Campbell and Paul Wiles (eds) *Law and Society: Readings in the Sociology of Law* (Martin Robertson, Oxford, 1979) 219 at 219. See generally Philippe Nonet "Legal Competence" in CM Campbell and Paul Wiles (eds) *Law and Society: Readings in the Sociology of Law* (Martin Robertson, Oxford, 1979) 268.

17 See Susan Watson "Duties of Directors – Good Faith and the Best Interests of the Company" in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) 515 at 529 (footnote omitted).

18 See Roland Barthes *S/Z* (Richard Miller (translator), Hill and Wang, New York, 1974) at 4.

19 At 5.

statutory interpretation. With regard to a legal text, we neither want individuals "dispersing it within the field of infinite difference"[20] nor for closed, powerful interpretative communities to determine meaning on their own terms.[21] This is a readerly approach.

A literary actor, such as a translator, may convert a lisible text to a scriptible text.[22] Courts may play a similar role with regard to a statutory text by interpreting a provision through a common law lens. When the Supreme Court upheld the traditional common law conception of the interests of the general body of shareholders being tantamount to those of the company in *Madsen-Ries v Cooper* (*Debut Homes*),[23] it eschewed a lisible interpretation of s 131 to confirm a scriptible interpretation that challenges the plain thinking and wording of the *Salomon* principle: "Either the limited company was a legal entity or it was not".[24]

I seek to read the provisions governing directors' duties – perhaps naively, and perhaps deliberately naively – as lisible texts. According to the Registrar's statistics, almost three-quarters of a million companies are incorporated in New Zealand.[25] All companies must have at least one director.[26] From a rule of law perspective, it is unacceptable if directors of these myriad SME companies cannot understand their duties because the text of the relevant statutory provisions are only comprehensible to the members of a select interpretative community.[27]

Section 15 of the CA 1993, titled "Separate legal personality", presents as an ostensibly lisible text. The section provides: "A company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand register". Practically engaging with the concept of corporate personality is challenging but, as a point of departure, any reader should be able to understand that the corporate entity, unlike a sole proprietor or partnership, is separate from the person or people who hold interests in it.

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20 At 5.

21 For a discussion of the extraordinary syntactical complexity of legal language, see Eric Martínez, Frank Mollica and Edward Gibson "Even laypeople use legalese" (2024) 121(35) PNAS e2405564121.

22 See Clive Scott "Rhythm in translation, with two accounts of Leconte de Lisle's 'Midi'" (2020) 50 Journal of European Studies 91 at 93.

23 *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* [2020] NZSC 100, [2021] 1 NZLR 43 [*Debut Homes*].

24 See *Salomon v A Salomon & Co Ltd* [1897] AC 22 (HL) at 31 per Lord Halsbury LC.

25 See New Zealand Companies Office "Latest company statistics" (5 March 2025) <www.companiesoffice.govt.nz>.

26 CA 1993, s 10(d).

27 See Stanley Fish *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press, Cambridge MA, 1980) at 147–173.

For many companies, entity status does not bear over-analysis. The statutory proclamation might simply be seen as a way of distinguishing a company from a sole proprietorship or a partnership so that an entrepreneur may enter into an employment contract with the company they have registered.[28] The practice of contractors forming alter ego companies to gain tax advantages by not providing personal services directly is so common that income tax legislation typically deems income earned by such companies to be income in the hands of the corporator.[29]

Furthermore, the company exists until it is removed from the register.[30] Since most companies are SMEs, and many of those are incorporated partnerships or sole proprietorships in substance,[31] they do not last beyond the lifetime of their founders. Special purpose vehicles (SPVs) and joint venture (JV) companies may be designed to be wound up once a specific project has been completed. Even very large public companies typically do not survive for more than a generation.[32] This is, however, a matter of difference in fact, rather than a norm. Companies are simply not subject to the time limitations that apply naturally to partnerships or legislatively to trusts,[33] even though some trusts are established to last across multiple generations in a way that most companies are not.

These ideas are so fundamental to company law that it should be considered inconsistent with Bingham's and Fuller's conceptions of the rule and morality of law if the statutory text were to contain hidden meanings.

2 Death of the author

Although the proclamation of the "death of the author" may present as a premonition of artificial intelligence, it essentially stands for the notion that the meaning of a text is derived from the reader's

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28 Despite the general legal principle that one cannot enter into a contract with oneself, tax legislation considers the practical need for individual partners to conclude agreements with the firm, ie all the partners: see Income Tax Act 2007, s HG 2.

29 Sections GB 27–GB 29.

30 Questions may be raised in the light of s 15 of the CA 1993, such as: how does a company become registered; and, under which circumstances can it become deregistered and thereby cease to legally exist? Sections 12, 13, 14 and 355 of the CA generally provide answers. But there appears to be a gap in the incorporation process as recorded in the Act. Even though s 355 refers to a *company* being removed from the register, s 13 only refers to an *application* being registered. Compare Companies Act 2006 (UK), s 15, which expressly states when a company is registered.

31 Lynne Taylor "Corporate Enterprises" in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) 97 at 98–100.

32 See Stéphane Garelli "Why you will probably live longer than most big companies" (December 2016) IMD <www.imd.org>.

33 The maximum duration of a trust in New Zealand is 125 years: see Trusts Act 2019, s 16(1). However, a charitable trust may be incorporated and thereby gain perpetual succession: see Charitable Trusts Act 1957, s 13.

interpretation, rather than the author's intention. Barthes sometimes refers to a reader as a "scriptor", indicating the active role they may play in giving meaning to a text.[34] According to Barthes:[35]

> … a text is not a line of words releasing a single 'theological' meaning (the 'message' of the Author-God) but a multi-dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centres of culture.

The proposition that meaning is socially constructed is plausible,[36] but authorial intention cannot be irrelevant in a search for meaning. Furthermore, some readers' interpretations are more persuasive than others.[37] These considerations take on particular relevance in relation to legal texts, including common law court reports, from which future courts must determine a ratio decidendi.

3 Discussion

Binary oppositions do not neatly divide lisible from scriptible texts, or texts with "living" authors from those with "dead" authors. Rather, some texts are more lisible in nature than others, and some texts require greater attention to authorial intention. For example, s 10 of the CA 1993 in part provides: "A company must have … a name". Although there are restrictions on the names that may be used for a company,[38] any reader should be able to understand this requirement. It is then a lisible text. In contrast, s CA 1(2) of the Income Tax Act 2007 provides that an "amount" is "income of a person if it is their income under ordinary concepts". Since only people versed in taxation might understand what "ordinary concepts" are, this may be seen as a scriptible text.

Normally, when seeking to interpret a statutory provision, courts must ascertain its meaning "from its text and in the light of its purpose and its context".[39] Here, the author (Parliament) is not "dead" or absent, and the reader must seek the authorial purpose. (If the courts interpret the text in a way the legislature did not intend, Parliament may amend the law, even with retroactive effect.) In contrast, with s CA 1(2) of the Income Tax Act, the author is "dead", or at least no longer providing prescriptive

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34 See Roland Barthes "The Death of the Author" in *Image-Music-Text* (Stephen Heath (translator), Fontana Press, London, 1977) 142 at 145–147.

35 At 146.

36 See for example David R Maines "The Social Construction of Meaning" (2000) 29 Contemporary Sociology 577. Compare Ludwig Wittgenstein *Philosophical Investigations* (GEM Anscombe (translator), 2nd ed, Basil Blackwell, Oxford, 1958) at [43].

37 Let us imagine a neighbourhood book club which includes a member who holds a PhD in English Literature. Their interpretation of, say, James Joyce's *Ulysses* is likely to be more persuasive than that of a member who prefers romantic escapism.

38 CA 1993, ss 20–21.

39 Legislation Act 2019, s 10(1).

authority, because the meaning and development of "ordinary concepts" have been left to the courts to determine.

C Application to ss 131(1), 132, 133 and 134

This section attempts to interpret loyalty duties lisibly.

1 Section 131(1)

Section 131(1) of the CA 1993 provides: "a director … must act in good faith and in what the director believes to be the best interests of the company". Although the meaning of "good faith" is not obvious,[40] the second part of the imperative seems clear – the company has its own interests, and a director must decide what those interests are and honour them. Yet, the courts have determined that the company's interests are synonymous with those of the general body of shareholders,[41] including future shareholders. The judicial scriptors have, in effect, usurped and diverted the parliamentary author's intention that a veil should be drawn between the company and the shareholders.[42]

2 Section 132

Section 132 provides that, despite s 131, a director may "make provision for the benefit of employees … in connection with the company ceasing to carry on the whole or part of its business". On a surface reading, directors may consider employees' interests but only in limited circumstances. However, in a parliamentary submission, a leading law firm has asserted that, in practice, directors habitually take the interests of employees (amongst others) into account.[43] The narrow scope of s 132 indicates the distinction and tension between companies' civil and functional capacities. All employers must comply with the suite of employment laws that comprise a code of minimum protections,[44] and most employers understand the critical business importance of looking after staff.[45]

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40 See Watts, Campbell and Hare, above n 4, at 394–395.

41 *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 (CA) at 291.

42 See for example s 172 of the Companies Act 2006 (UK), which explicitly conflates the interests of the company and its members.

43 Bell Gully "Submission to the Economic Development, Science and Innovation Committee on the Companies (Directors Duties) Amendment Bill 2021" at [1.12].

44 Minimum code legislation includes the Employment Relations Act 2000, Holidays Act 2003, Human Rights Act 1993, Parental Leave and Employment Protection Act 1987 and the Wages Protection Act 1983.

45 Jack Welch, the highly successful CEO of the GE conglomerate in the 1990s, described the idea of shareholder wealth maximisation as "the dumbest idea in the world". For Welch, shareholder wealth is a consequence, not a strategy, and "your main constituencies are your employees, your customers and your products": Steve Denning "The Dumbest Idea in the World: Maximizing Shareholder Value" *Forbes* (online ed, United States, 28 November 2011).

3 Section 133

Under s 133, "A director must exercise a power for a proper purpose". The provision has no obvious meaning since the CA 1993 does not explain why a power has been granted.[46] Lynne Taylor and Susan Watson explain the scriptibility of the provision:[47]

> Section 133 is an abbreviated restatement of a longstanding equitable rule that a director must exercise a power only for the purpose for which it is conferred. The simplicity with which even the longer version of the rule can be stated belies its underlying complexity and the extent to which aspects of its application remain unsettled. Section 133 (and the equitable rule that it restates) cannot be understood without reference to a considerable volume of case law.

4 Section 134

"A director of a company must not … contravene this Act or the constitution of the company". The obvious meaning here is that directors (and the company they control) must comply with the CA 1993 and the company constitution. Although this duty may seem obvious, the provision was included to permit shareholders to sue for breach.[48]

D Comment

In *Debut Homes*, the Supreme Court succinctly stated of s 131: "The test is subjective".[49] Only the s 131 duty is expressly subjective, but even then, the courts have rejected features of subjectivity, notably directorial eccentricity.[50] The test is, then, from a judicial perspective, a qualified subjective test despite the bare wording of the Act. The Court explained why the test should be subjective: to avoid usurping directors' business judgement.[51] The argument that a court should not second guess

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46 See *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC). The decision continues to raise questions. How did the Judicial Committee know what the purpose of the power to issue shares was? Was the decision about preventing directors acting in their own interests with the statutory provision being used as a means for enforcing that equitable principle?

47 See Lynne Taylor and Susan Watson "Duties of Directors – Proper Purpose" in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) 553 at 553. The authors quote David Tompkins "Directing the Directors: The Duties of Directors under the Companies Act 1993" (1994) 2 Waikato L Rev 13 at 20:

> A director looking at this provision will be left completely in the dark. Even if he or she consults a lawyer to find out what it means, I doubt that much light will be cast.

48 For a discussion, see Lynne Taylor "Constitutions and Shareholders Agreements" in Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (Thomson Reuters, Wellington, 2018) 225 at 237–242.

49 *Debut Homes*, above n 23, at [112].

50 At [113]–[114].

51 The phrase "business judgment [sic]" only appears in the Title to the Act but is implicit in directors' duties.

directors' decisions is unpersuasive in relation to s 131 since compliance with ss 135, 136 and 137 are objectively tested (although s 137 is objective only in context). Of course, directors' decisions should not be judged from the perspective of hindsight, but there is no plausible reason why their behaviours should not be measured against the broad objective benchmarks of honesty, reasonableness and prudence.

Another problem here lies with the absence of any mention of the constitution in subss (1) and (5) of s 131. And yet it seems that the most obvious text in which to search for the interests of the company is the constitution.[52] The scriptible reader may consider that the relevance of the constitution is implied. But explicit references to the constitution are so common in the CA 1993 – subss (2), (3) and (4) of s 131 being the most proximate examples – that the lisible reader cannot be expected to appreciate that nuance.

III CONTEXT

This part briefly considers the lexical context, the general body of law, the business ecosystem and the society in which the company is incorporated and permitted to operate.

A Lexical Context

The most proximate feature of the lexical context is presented by the other provisions of the CA 1993, notably the Title; the provisions that permit incorporation;[53] the creation of an entity separate from its shareholders;[54] and the legal capacity a company then has.[55]

1 Title

The Title to the CA 1993 is as follows:

> An Act to reform the law relating to companies, and, in particular,—
>
> (a) to reaffirm the value of the company as a means of achieving economic and social benefits through the aggregation of capital for productive purposes, the spreading of economic risk, and the taking of business risks; and
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> …
>
> (c) to *define* the relationships between companies and their directors, shareholders, and creditors; and

52 See *Re Smith and Fawcett Ltd* [1942] Ch 304 (CA).

53 CA 1993, ss 10–14.

54 Section 15.

55 Section 16.

> (d) to encourage efficient and responsible management of companies by allowing directors a wide discretion in matters of business [judgement] while at the same time providing protection for shareholders and creditors against the abuse of management power … (emphasis added)

Although the adoption of a "North American model mirrored the deregulatory movement in New Zealand's economic and political life during the 1980s",[56] social benefits are expressly recorded in the Act. Certainly, the maximisation of profits is not enshrined and there is no indication that the company is synonymous with the general body of shareholders. Conversely, other than creditors, no mention is made of broader stakeholders or ESG (environmental, social and governance) factors,[57] but stakeholder models and ESG principles have only gained momentum in the new millennium.[58]

2 Section 131(5)

Although no particular court decision prompted the addition of s 131(5), parliamentary debate took place in response to the Minister of Finance's 2021 letter of expectation to Air New Zealand in which the Minister expressed an expectation that the company act as "a responsible corporate citizen".[59] The Minister of Finance is the majority shareholder of Air New Zealand, which is one of the few large New Zealand companies to have committed itself to the United Nations Global Compact.[60] And so the company had already undertaken to be a highly ethical corporation. If the Crown owned all the shares in Air New Zealand, in terms of the State-Owned Enterprises Act 1986, the company would be required, among other things, to be a good employer and be "an organisation that exhibits a sense of social responsibility".[61]

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56 See Fitzsimons, above n 3, at 267.

57 See Hadiqa Ahmad, Muhammad Yaqub and Seung Hwan Lee "Environmental-, social-, and governance-related factors for business investment and sustainability: a scientometric review of global trends" (2024) 26 Environment, Development and Sustainability 2965.

58 See Robert G Eccles and Judith C Stroehle "Exploring Social Origins in the Construction of ESG Measures" (12 July 2018) Social Science Research Network <www.ssrn.com>; and Elizabeth Pollman "The Making and Meaning of ESG" (2024) 14 Harvard Business L Rev 403. Leo Strine, a previous Chief Justice of the Delaware Supreme Court, has proposed "EESG", with employees being represented by the additional "E": Leo E Strine Jr "Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future" (University of Pennsylvania Institute for Law and Economics Research Paper 19-39, 2019) at 3.

59 Letter of expectation from Hon Grant Robertson (Minister of Finance) to Therese Walsh (Chair of Air New Zealand Ltd) (8 April 2021) at 1.

60 UN Global Compact "Company: Air New Zealand Limited" <www.unglobalcompact.org>. The company has since been delisted from the Global Compact for non-responsiveness.

61 State-Owned Enterprises Act 1986, s 4(1)(c).

In seeking to clarify directors' fundamental duties, Duncan Webb, previously a law professor and then a Labour MP, submitted a private member's bill which was by chance drawn from the ballot. Clause 4 of the Bill (as introduced) provided for the insertion of the following into the CA 1993:[62]

> (5) To avoid doubt, a director of a company may, when determining the best interests of the company, take into account recognised environmental, social and governance factors, such as:
>
> (a) recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi):
> (b) reducing adverse environmental impacts:
> (c) upholding high standards of ethical behaviour:
> (d) following fair and equitable employment practices:
> (e) recognising the interests of the wider community.

At the select committee stage, the proposal was amended. The new s 131(5) provides:[63]

> (5) To avoid doubt, in considering the best interests of a company … a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters).

This is the first and only mention of "maximisation of profit" in the CA 1993. But this innovation is likely to alert a reader of the subsection to the possibility that maximisation of profit is a normal expectation in considering the best interests of a company, and that other matters may be taken into account but are ancillary. As far as a reading of the pre-existing text is concerned, this apparent expectation is a novelty. Of course, corporate lawyers are aware that the Supreme Court has also made statements in favour of shareholder primacy, thus:[64]

> It is the duty of directors to act in the best interests of the company. The traditional view is that this requirement is fulfilled by directors acting in the best interests of the shareholders as a whole. This is known as the shareholder primacy model.

An obvious response to this statement is that "the traditional view" is inconsistent with s 15 of the CA 1993, the current statutory expression of the *Salomon* principle. A footnote does, however, record "that s 169(3)(d)–(i) makes it clear that ss 131, 133, 135–137 and 145 are duties owed to the company and not to shareholders".[65] In other words, despite s 15 of the CA 1993 declaring a company to be an

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62 Companies (Directors Duties) Amendment Bill 2021 (75-1), cl 4.

63 This clarification does not apply to joint venture (JV) companies. Nor does s 132. Why not? Does this omission mean that, say, the directors of a JV company established between two iwi to hold natural resources interests for generations must assume profit maximisation and ignore ESG matters such as tikanga?

64 *Debut Homes*, above n 23, at [28] (footnotes omitted).

65 At 58, n 14.

entity separate from the shareholders, and the express wording of ss 131 and 169, we are expected to perceptually pierce the veil to treat the company as the general body of shareholders.[66]

Not only does the Court appear to be out of step with the text of the Act on this point, but also s 131(5) presents as a matter of the legislature inadvertently and unnecessarily throwing its weight behind an increasingly disbelieved conception of corporate purpose.[67]

B Legal

A thin line is admittedly drawn here but I argue that a significant difference lies between the legislative text requiring the reader to possess specialist knowledge in order to understand a provision[68] and recognising that an intelligent non-expert reader would understand that a statutory text cannot include a basic course on the law. For example, if the statutory text uses the word "agent", that term must be understood to have its usual legal meaning. Specialists in other disciplines may not understand "agent" in precisely the same way as a lawyer. For example, in neoclassical economic theory, directors are identified as agents.[69] We might say that the signifier "agent" signifies different things for the economist and the lawyer. Nevertheless, in this particular situation, it seems that most businesspeople would know and understand the legal concept of an agent. It is not the generally understood meanings of words that are a matter of concern – rather, it is hidden meanings, writerly phrases or the exclusionary language of select groups. We can expect directors to bring some legal knowledge when interpreting key provisions of the CA 1993. No text can be purely lisible. Every reader must bring some external general knowledge to their reading of any text.

C Business

The relevant provisions of the CA 1993 only govern the civil capacities of the company. As a business – and companies invariably are commercial enterprises, even if they are not for profit – the functional capacities of a company are of utmost importance for directors. Once incorporated, a company operates in a legal-business ecosphere that is regulated by super-statutes governing matters

66 See CA 1993, ss 131(2)–(4).

67 See for example Andrew Keay "Ascertaining The Corporate Objective: An Entity Maximisation and Sustainability Model" (2008) 71 MLR 663; Andrew Keay *The Corporate Objective: Corporations, Globalisation and the Law* (Edward Elgar Publishing, Cheltenham, 2011); and Susan M Watson "The Corporate Legal Entity as a Fund" [2018] JBL 467. Enterprise conceptions of the company are generally traced to E Merrick Dodd Jr "For Whom Are Corporate Managers Trustees?" (1932) 45 Harv L Rev 1145.

68 See the discussion on "ordinary concepts" of income tax under Part II, above.

69 Kathleen M Eisenhardt "Agency Theory: An Assessment and Review" (1989) 14 Academy of Management Review 57.

that include employment relations,[70] occupational health and safety,[71] consumer protections,[72] abuse of market position,[73] financial markets conduct[74] and so forth.[75] These Acts are particularly relevant to directors, since directors can be fined or imprisoned if they cause key provisions to be breached.

Writing extrajudicially in 1997, Michael Kirby cautioned:[76]

> … we should be looking at company law, with the benefit of empirical data concerning the reality of the economy and society in which corporations in Australia today must operate. Any study of company law which ignores globalisation, institutional dominance of investment funds, the impact of technology and down-sizing of employment and the growth of privatisation of formerly governmental corporation is bound to come up with artificial and ineffective responses.

Kirby's contextual features are still relevant, but we also need to consider company law, and directors' duties in particular, in light of contemporary developments such as platform capitalism,[77] the emergence of crypto technology[78] and artificial intelligence.[79] Cyber security is surely an issue that attracts the concerns of directors of large companies far more than the duties of loyalty they owe to the company.

D Social

Anyone in the political community may have knowledge about the consequences of corporate decisions on the community's social, cultural and economic interests. People generally appear to understand the externalities that companies – unlike their profits – seek to socialise. The concept of social licence to operate is also increasingly being used, beyond its origins in the mining industry.[80]

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70 See Employment Relations Act.

71 See Health and Safety at Work Act 2015.

72 See Fair Trading Act 1986.

73 See Commerce Act 1986.

74 See Financial Markets Conduct Act.

75 On super-statutes, see William N Eskridge Jr and John Ferejohn "Super-Statutes" (2001) 50 Duke LJ 1215.

76 Michael Kirby "Australian Corporations Law and Global Forces" (1997) 2 FJLR 41 at 51.

77 See generally Nick Srnicek *Platform Capitalism* (Polity Press, Cambridge, 2017).

78 See Vishal Gaur and Abhinav Gaiha "Building a Transparent Supply Chain" (2020) 98(3) Harv Bus Rev 94.

79 See European Parliament "EU AI Act: first regulation on artificial intelligence" (19 February 2025) <www.europarl.europa.eu>.

80 MinterEllisonRuddWatts "Regulators and an entity's social licence to operate" (9 February 2023) <www.minterellison.co.nz>.

IV CONSTITUTIONS

The CA 1993 provides a default constitution but leaves it to corporators to establish the precise corporate structure they desire. Anecdote indicates that corporators who are sufficiently alert commonly adopt the Auckland District Law Society (ADLS) model. I have seen many constitutions where corporators have lodged the ADLS model constitution with a generic watermark and the company name omitted. In one case, corporators included a marketing statement about the quality of the business's Italian-style almond biscotti as its constitution.

An element of "back to the future" may be suggested here with a company's purpose being stated in the memorandum of association, but I do not suggest that the doctrine of ultra vires should be revived. Rather, a clear statement about why the company has been formed may help directors understand the interests of the company and its purpose. For example, an SPV may be formed for a single short-term project. In such a case, directors do not need to consider the long-term sustainability of the company. In the case of a JV company, a director may act in the interests of a shareholder if the constitution expressly permits it.[81] In this case, it is essential that the constitution clearly states why the company has been formed.

V DISCUSSION

When legislation declares a registered company to be a legal person, these legal actors – more than 725,000 in New Zealand alone – must be controlled by human directors.[82] Determining the nature of these legal creations and how we should interact with them is arguably one of the most challenging of all legal issues. However, I argue that corporate theories should be marginalised, and, particularly with regard to directors' duties, we should rather focus on how directors ought to behave.

Generally, an entity is "something that has a real existence";[83] it is "what exists",[84] a "thing".[85] How does a company exist? An attractive approach to the company as an entity that exists is to portray it as an enterprise. But since the general understanding of an enterprise is "a commercial or industrial undertaking; a firm, a company, a business",[86] it becomes an exercise in circularity – a company is an enterprise which is a company.

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81 CA 1993, s 131(4).

82 Section 151(3).

83 See *Oxford English Dictionary* (Oxford University Press, 2000, online ed), definition of "entity" (n), para 3.a.

84 At para 4.

85 A Pablo Iannone *Dictionary of World Philosophy* (Routledge, 2001, online ed), definition of "ens" (Latin for "thing").

86 *Oxford English Dictionary*, above n 83, definition of "enterprise" (n), para 1.c.

Lord Hoffmann reasoned that there is no such *thing* as a company and asserted that all there is to what we may call a "company" is a set of particular rules that must be interpreted within the context of the greater normative scheme of the law.[87] I agree that the company does not exist as a *concrete* object, but it does exist – between incorporation and deregistration – as an *abstract* object.[88] We can point to concrete objects that betoken a company, such as branded products, constitutions, letterheads, logos and Elon Musk,[89] but we cannot identify a concrete thing that is the company.

Given the uncertainty about what the law means by an *entity* in relation to a company, it is plausible that a certain set of rules might identify a particular company, even if they are not the company as such. Can this view be reconciled with arguments that the company is a corporate fund or an enterprise?[90] I think it can. Rather than looking at the company as a positive thing, we can approach it negatively – as a *non-association* – that may hold property in its own name and enter into contracts. Rules – the constitution, the CA 1993 and general legal principles – tell us how these objectives can be achieved for the abstract object through the acts of human agents.

On a day-to-day basis, we do not need to engage with the ontology of the company or, indeed, any particular theory of the company. Controllers of, and stakeholders in, companies need to know the legal consequences of their actions and behaviours. Shareholders, for example, need to understand when dividends might be declared. Employees need to know their rights in insolvency. Unsecured creditors should be able to gauge in principle when directors may be held personally liable for the debts of the company. These rules should focus on requisite directorial behaviour and should be lisible; they should not be the preserve of a particular interpretive community.

VI CONCLUSION

For widely held companies, it is plausible that the essence of a company is a corporate fund which directors should maintain with an eye to the long term.[91] To that extent, all companies of that type share corporate sustainability as a common purpose. From there, it is a small logical step to claim that long-term sustainability requires some attention to be paid to stakeholders and ESG. However, a corporate model – with a particular corporate purpose implied – based on the archetype of a widely

87 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 11–12.

88 For a full presentation of this argument, see Jonathan Barrett "Metaphysics and the corporation" (2020) 35 Aust Jnl of Corp Law 305.

89 From the perspective of intellectual property, logos, which are typically protected by trade marks, are also abstract objects but are expressed in a concrete form.

90 Many small- and medium-sized enterprises that are, in substance, incorporated partnerships, are not pools of capital. Rather, they are effectively pools of skill. Likewise, incorporated professional firms of engineers, accountants, lawyers and so forth are pools of knowledge.

91 See generally Watson, above n 67.

held (probably listed) company, is simply inconsistent with the reality of most New Zealand companies. For the law to be detached from fact in this way is problematic.

Given the different objectives of different companies, I am sceptical that there can be any such thing as *the* corporate purpose. And, if we expect statutory affirmations of directors' duties to the company to provide decisive information on corporate purpose, we are probably looking in the wrong place. In Barthesian terms, s 131 of the CA 1993 and related provisions are scriptible inasmuch as their meanings are not immediately revealed to the non-specialist reader. The introduction of subs (5) as an ostensibly clarificatory measure has unfortunately muddied waters further. While the provision awaits almost certain repeal, for a likely two-year period, the CA 1993 will include a specific mention of ESG and maximising profit.

Focus might usefully shift from a duty of good faith and loyalty owed to an abstract object to establishing behavioural norms with which all directors should comply. Indeed, I would raise the possibility of scrapping the ostensibly subjective duty of good faith altogether, in favour of requiring directors to act honestly, reasonably and prudently in accordance with the law, the company's constitution, and the business and social context. The specific corporate purpose of a particular company should then be recorded in its constitution akin to the traditional memorandum of association.