

Corporations, Responsibility and the Environment

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I, Carrie Julia Bradshaw, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

Corporate Environmental Responsibility (CER)—that corporations can and should play an active role in the governance of environmental protection—is justified primarily by reference to the business case; the claim that behaving responsibly *pays*. In privileging a market voice for the environment, however, the business case alone is an inadequate justification for CER. As such, this thesis considers a qualitatively different justification: that there exists normative and pragmatic space for CER within contemporary approaches to environmental law and regulation. The thesis suggests that CER is best understood and justified by reference to the positive and normative implications of decentred regulation, where regulation is no longer the preserve of government and, in view of the limitations of governmental control, nor should it be. A waste-based case study illustrates the potential and limits of CER in this regard.

However, this normative space for CER in decentred environmental regulation is not mirrored within corporate law and governance. Notwithstanding references to the ‘environment’ in the Companies Act 2006, the theoretical orthodoxy and its influence over the positive mainstays of UK corporate governance regard environmental concerns as largely *irrelevant* to company law and decision-making. In order to remedy this problematic position of corporate environmental irrelevance, as well as to more generally enhance CERs limited normative appeal, the thesis examines the nature and location of a voice for the environment *within* corporations. It argues that intra-corporate environmental voice should be enhanced through company law, providing environmental management systems (EMSs) as one possible example of ways in which company law might provide room for corporate environmental conscience to breathe.

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Abbreviations

AD	Anaerobic Digestion
BMW	Biodegradable Municipal Waste
BOGOF	Buy One Get One Free
BIS	Department for Business, Innovation and Skills
BSI	British Standards Institution
CA 2006	Companies Act 2006
CBI	Confederation of British Industry
CC1	Courtauld Commitment Phase 1
CC2	Courtauld Commitment Phase 2
CC3	Courtauld Commitment Phase 3
C&D	Construction and Demolition (waste)
CD&E	Construction, Demolition and Excavation (waste)
CER	Corporate Environmental Responsibility
CFP	Corporate Financial Performance
CHP	Combined Heat and Power
CORE	The Corporate Responsibility Coalition
CSR	Corporate Social Responsibility
DECC	Department of Energy & Climate Change
DEFRA	Department for Environment, Food & Rural Affairs
EA	Environment Agency
ELVs	End-of-life Vehicles
EMAS	EU Eco-Management and Audit Scheme
EMS	Environmental Management System
ENGO	Environmental Non-Governmental Organisation
EPA 1990	Environmental Protection Act 1990
EPR	Extended Producer Responsibility
EPR 2010	Environmental Permitting (England and Wales) Regulations 2010
ESV	Enlightened Shareholder Value
EU	European Union
FRRP	Financial Reporting Review Panel
ISO	International Organization for Standardization
JCT	Joint Contracts Tribunal
KEPI	Key Environmental Performance Indicators
KPI	Key Performance Indicators
LATS	Landfill Allowance Trading Scheme
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-Operation and Development
OFR	Operating and Financial Review
PRN	Packaging Recovery Notes
PERN	Packaging Export Recovery Notes

PET	Polyethylene terephthalate
RN	(Packaging) Recovery Notes
SME	Small and Medium-sized Enterprise
SRI	Socially Responsible Investment
SWMP	Site Waste Management Plan
WCA	Waste Collection Authority
WDA	Waste Disposal Authority
WEEE	Waste electrical and electronic equipment
WFD	Waste Framework Directive
WRAP	Waste & Resources Action Programme
WTO	World Trade Organization

Chapter 1

Introduction

1. Corporate Social Responsibility

This thesis asks two main questions. First, should corporations play an active role in the regulation and governance of environmental protection? By this, I mean corporate activities which go beyond the narrow confines of legal compliance in a proactive and engaged manner, although it will become clear that there is no simple dichotomy between compliance and non-compliance. Second, how might such an active role be encouraged, aided or enhanced through legal intervention? These two questions feature prominently in the literature on Corporate Social Responsibility (CSR), of which Corporate Environmental Responsibility (CER) might be considered a sub-species.¹

The term ‘CSR’ (and by extension, CER) comes with a fair amount of definitional baggage.² To start with, there is overlap with other labels for related territory, including business ethics, corporate citizenship and corporate accountability.³ We might otherwise label corporate *environmental* responsibility as sustainable/green business, corporate greening or corporate environmentalism.⁴ Labelling aside, CSR at

¹ Neil Gunningham (ed), *Corporate Environmental Responsibility* (Farnham: Ashgate, 2009).

² And indeed, no consensus emerges, and the definitions are numerous, see Abigail McWilliams, Donald S Siegel, and Patrick M Wright, ‘Corporate Social Responsibility: Strategic Implications’ (2006) 43 *Journal of Management Studies* 1; Archie B Carroll, ‘Corporate Social Responsibility: Evolution of a Definitional Construct’ (1999) 38 *Business & Society* 268; Domènec Melé, ‘Corporate social responsibility theories’ in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008). For an argument that CSR is a useless term with little explanatory value, see J. (Hans) van Oosterhout and Pursey PMAR Heugens, ‘Much Ado About Nothing: A Conceptual Critique of Corporate Social Responsibility’ in Crane *et al*, *Oxford CSR Handbook* (n 2).

³ Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon and Donald S Siegel, ‘Introduction’ in Crane *et al*, *Oxford CSR Handbook* (n 2). The use of different labels can imply a distinct approach, discipline or conceptual basis adopted. For example, some consider CSR a sub-discipline of management, whereas political science might inform corporate citizenship, see, for example, Michael Blowfield and Alan Murray, *Corporate Responsibility: A Critical Introduction* (Oxford: Oxford University Press, 2008), p 12.

⁴ See, for example, Thomas P Lyon and John W Maxwell, *Corporate Environmentalism and Public Policy* (Cambridge: Cambridge University Press, 2004); Aseem Prakash, *Greening the Firm: The Politics of Corporate Environmentalism* (Cambridge: Cambridge University Press, 2000), Ian

its broadest refers to a multi-disciplinary area of scholarship, and perhaps an academic discipline in its own right.⁵ The research questions scholars engage with are vast and varied. They can be normative or theoretical, such as the appropriate nature of the relationship between business, government and society. CSR might, therefore, be understood as a unifying concept around which these issues have been (heatedly) debated from a variety of perspectives and disciplinary backgrounds. CSR is thus a site of political, philosophical or ideological contestation.⁶ Research questions can also relate to more management, implementation and operational issues, such as how corporations account for (or not) the external impact of their operations.⁷ Indeed, CSR is also increasingly understood as a profession, with the role of CSR managers well established within large corporations. These roles often come with a broader strategic remit than the compliance-oriented position of traditionally understood environmental managers. At the same time, countless CSR associations and institutes, together with corporate accountability NGOs, have emerged since the 1990s.⁸ In view of this, some go so far as to describe CSR as a ‘movement’,⁹ which, whilst being heavily business-influenced, seems to garner political consensus.¹⁰

Worthington, *Greening Business: Research, Theory, and Practice* (Oxford: Oxford University Press, 2012).

⁵ See, for example, Andrew Crane and Dirk Matten, ‘Corporate Social Responsibility as a Field of Scholarship’ in Andrew Crane and Dirk Matten (eds), *Corporate Social Responsibility* (London: SAGE Publications, 2007), p vii, arguing that CSR is best understood in such terms, rather than as a concept, construct or theory. However, they reject the notion of CSR as substantive academic discipline in its own right. See also Andy Lockett, Jeremy Moon, and Wayne Visser, ‘Corporate Social Responsibility in Management Research: Focus, Nature, Salience and Sources of Influence’ (2006) 43 *Journal of Management Studies* 115, arguing that CSR is ‘a field without a paradigm’, particularly given the lack, in their view, of any dominant theoretical approach, assumption or method. Compare with Blowfield and Murray, *Corporate Responsibility* (n 3), p 3 and the points made below as to the centrality of stakeholder theory.

⁶ Crane and Matten, ‘CSR as a Field of Scholarship’ (n 5). As such, defining CSR is in part a normative exercise of setting out what corporations should be responsible for, not merely a technical exercise, see Crane *et al*, ‘Introduction’ (n 3).

⁷ This reflects the broad delineation made by Crane and Matten, ‘CSR as a Field of Scholarship’ (n 5), p iv, that CSR scholarship can have ‘... “pure” theoretical aims as well as distinctly practical inclinations’.

⁸ See Doreen McBarnet, ‘Corporate social responsibility beyond law, through law, for law: the new corporate accountability’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2009). See, for example ‘CORE’, The Corporate Responsibility Coalition <http://corporate-responsibility.org> (accessed 30 July 2013), a coalition of NGOs, academics trade unions and lawyers.

⁹ *Ibid.*, p 15, see also Deborah Doane, ‘The Myth of CSR’ *Stanford Social Innovation Review* (Fall 2005).

¹⁰ See Joseph Corkin, ‘Misappropriating citizenship: the limits of corporate social responsibility’ in Nina Boeger, Rachel Murray and Charlotte Villiers (eds), *Perspectives on Corporate Social Responsibility - Corporations, Globalisation and the Law* (Cheltenham: Edward Elgar 2008), p 59 for a brief overview. Until recently, the UK had a minister for CSR, and the European Union (EU) has released various

In a narrower sense, definitions of CSR cluster around ‘what counts’ as corporate responsibility.¹¹ On this basis, the scope of CSR is restricted to what corporations do for stakeholders ‘voluntarily’, in the absence of compulsion from state-originating law.¹² CSR thus refers to ‘beyond compliance’ behaviour, and ‘begins where the law ends’.¹³ I will argue later in the thesis that such a definition is impoverished, particularly in view of the difficulties involved in drawing lines between the binary classifications of *voluntary v. involuntary* and *compliance v. beyond compliance* behaviour.¹⁴ At the same time, however, the relationship between corporate environmental activities and legal compliance is still relevant to CSR, if not determinative as to its scope. In view of persisting debates as to the appropriate purpose of both the corporation and company law, the idea that corporations should be permitted or required to sacrifice profits, *beyond what is required by law*, remains controversial.

Influenced by these broad and narrow definitions of CSR, I adopt a twofold definition of CER. These definitions in turn map on to the main ideas I explore in the thesis. First, I conceptualise CER in the broad sense (as an area of scholarship or as a movement) by reframing these debates as attempts to locate an adequate ‘voice’ for the environment in the corporate world. This concept of voice reflects my suggestion that we need to conceptualise the environmental interest differently from other CSR concerns. Second, I use CER in the narrower sense as definitional shorthand for a pragmatic and normative claim that corporations can, and should, play an active role in

papers on CSR and associated legislative action. See, for example, Commission, ‘A renewed EU Strategy 2011-14 for Corporate Social Responsibility’ (Communication) COM (2011) 681 final.

¹¹ Of course, much of so-called ‘responsible’ business involves doing nothing (*not* investing in a particular technology because it is environmentally harmful, or *not* contracting with a particular supplier because of their poor environmental record). Passivity nonetheless often stems from some form of active strategic decision.

¹² See, for example, Paul R Portney, ‘Corporate Social Responsibility: An Economic and Public Policy Perspective’ in Bruce L Hay, Robert N Stavins and Richard HK Vietor (eds), *Environmental Protection and the Social Responsibility of Firms: Perspectives from Law, Economics, and Business* (Washington DC: Resources for the Future, 2005), p 108 arguing that if CSR is to mean anything, it must mean beyond compliance behaviour. See also the European Commission’s earlier definition of CSR as a ‘concept whereby companies integrate social and environmental concerns in their business operations and in their actions with their stakeholders on a voluntary basis’, see Commission, ‘Promoting a European framework for Corporate Social Responsibility’, (Green Paper) COM (2001) 366 final, p 6. Compare with the Commissions revised definition of CSR as ‘the responsibility of enterprises for their impacts on society’ Commission, ‘A renewed CSR strategy’ (n 10), p 6.

¹³ See Keith Davis, ‘The Case for and against Business Assumption of Social Responsibilities’ (1973) 16 *The Academy of Management Journal* 312, p 313; Neil Gunningham, ‘Shaping corporate environmental performance: a review’ (2009) 19 *Environmental Policy and Governance* 215, p 215.

¹⁴ Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Cheltenham: Edward Elgar Publishing, 2010), p 8.

environmental protection; a role going beyond a defensive or passive stance to the goals or requirements of environmental regulation.¹⁵ Instead, I suggest that there is ‘space’ for CER within environmental law, regulation and governance. However, in doing so, I leave aside the language of voluntarism, or the suggestion that CER is separate from, or ‘beyond’, environmental law. The twin and related concepts of *voice* and *space* underpin my response to the first research question—should corporations play an active role in the regulation and governance of environmental protection—which I address primarily in Part I of the thesis.

This introductory chapter is structured as follows. In section 2, I explain why making a case in favour of CER is necessary. In sections 3 and 4, I provide an overview of the concepts of voice and space, respectively. Section 5 considers space and voice for the environment within company law and corporate governance. In section 6, I outline the core arguments made in Part II of the thesis, which relates to the second research question: how CER’s limitations might be enhanced by locating and amplifying a voice for the environment *within* corporations and company law. Section 7 outlines my methodology, and section 8 provides a brief overview of the thesis structure.

2. Making the case for CER

CSR has normative and justificatory origins, and heated debate as to its legitimacy continues today. Plaguing this debate is a number of dichotomies,¹⁶ prevalent within both CSR literature as well as the slightly narrower confines of corporate theory. The central dichotomy is that of *shareholder v. stakeholders*. This tension strikes right at the heart of claims as to CSR’s illegitimacy, underpinned by often ideologically informed understandings of what (or who) the corporation is *for*. This somewhat intractable question of the appropriate ‘corporate purpose’ was famously debated on

¹⁵ Corkin, ‘Misappropriating citizenship’ (n 10), p 58, explaining how CSR might be understood as an active responsibility to contribute to the proper working of global governance. See also Nigel Roome, ‘Developing environmental management strategies’ (1992) 1 *Business Strategy and the Environment* 11

¹⁶ Horrigan, *CSR* (n 14).

the pages of the *Harvard Law Review* by Adolf Berle and E Merrick Dodd:¹⁷ should corporations be run purely in the interests of shareholders, or in the interests of stakeholders and society more broadly?

Inescapably related to this question is what the corporation actually *is*. Some argue that a company is simply a hub around which ‘private’ individuals freely contract (in which case, corporate decision-making and company law ought to be legitimately insulated from broader welfare or regulatory goals).¹⁸ Others understand the corporation in broader terms, sometimes as a social institution (so that the company and its associated legal framework should be subject to the interests of the ‘public’ and non-shareholding stakeholders).¹⁹ Subscribing to a shareholder-centric view of the corporation often goes hand-in-hand with a private conception of both the corporation and company law.²⁰ As will be explained in slightly more detail below, such views tend to regard CSR as largely irrelevant. But at the extreme, these types of positions often give rise to interpretations of CSR as *illegitimate*—of CSR being *against* the law²¹—where CSR activities and associated costs are characterised as little more than theft from shareholders.²² As a matter of doctrinal law, this assertion is not without problems. As will be seen, this conception nonetheless frames much of the debate surrounding CSR, particularly questions regarding CSR’s legitimacy.

Chapter 2 outlines the most significant and influential justification for CSR—the business case—the claim that behaving responsibly makes financial sense. The idea that CSR *pays* is, for obvious reasons, highly seductive, but it also purports to cut through the tension subsisting at the heart of CSR: should companies be concerned only with the pursuit of profit or, alternatively, should corporations be subject to broader societal obligations, including a respect for the environment? If the two go hand-in-hand—if there is no conflict between corporate success and, for example, environmental protection—then the polarity in the debate collapses, and the intractable

¹⁷ E Merrick Dodd, ‘For Whom Are Corporate Managers Trustees?’ (1932) 45 *Harvard Law Review* 1145 and AA Berle Jr, ‘For Whom Corporate Managers Are Trustees: A Note’ (1932) 45 *Harvard Law Review* 1365.

¹⁸ See, for example, Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press, 1996).

¹⁹ For an early incarnation of this, see Dodd, ‘Corporate Managers’ (n 17), see also JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Oxford University Press, 1993).

²⁰ David Millon, ‘Theories of the Corporation’ (1990) 2 *Duke Law Journal* 201.

²¹ McBarnet, ‘CSR beyond law’ (n 8).

²² Milton Friedman, ‘The Social Responsibility of Business is to Increase Its Profits’ *The New York Times Magazine* (13 September 1970).

question of corporate purpose becomes a non-issue. However, despite a large body of empirical research on the topic, no consensus emerges as to the existence of a generalised link between CSR and corporate financial performance. In Chapter 2, I outline two objections to the business case which run deeper than these empirical uncertainties.

The first objection relates to the rhetoric of the business case claim, which suggests that corporate/environmental win-win situations exist as a matter of course. The ready or easy compatibility of environmental and economic concerns is taken as a starting point, and this starting point is problematic. Regardless of the generalised claim, trade-offs and points of conflict between environmental and economic goals do and will continue to exist. Furthermore, many of these trade-offs are deeply embedded in business practice and societal interactions, the reversal of which would require significant behavioural change. With this in mind, I suggest that the rhetoric of the business case sends a misleading and unhelpful message regarding the effort required to ensure environmental protection.

The second objection relates to the value afforded to CER investments in the business case. Ultimately, environmental protection is commodified, so that its value is expressed only in terms of profits, and advocated indirectly by the demands of market actors (primarily consumers and investors). However, it is notoriously complicated and controversial to express environmental value in monetary terms, and any inherent or intrinsic value there might be in CER is crowded out and rendered practically irrelevant. So while the business case for CER potentially legitimises environmental protection as a business concern, it comes at the cost of sacrificing real environmental value. Furthermore, as will be familiar to environmental lawyers, there are limitations to market interactions in bringing about meaningful environmental change, and the business case privileges market over political interactions as a driver for corporate behavioural change. For these reasons, I suggest we must look elsewhere in order to justify CER.

3. Environmental voice

Chapter 2, which considers the business case, also critiques what I locate as the main ‘voice’ for the environment within both mainstream CSR and orthodox (contractarian) corporate theory: the market. This concept of voice is my tentative response to problems with the primary means by which CSR literature consciously accounts for environmental concerns; that is, via the concept of corporate ‘stakeholders’. Whilst contested, stakeholder theory is a firmly established framework within CSR. The terminology is ubiquitous in both academic and corporate literature, and it is probably the closest we get to a unifying paradigm for CSR.²³ The main theme that runs through references to stakeholders is the inclusion of interests beyond those of shareholders alone, either in corporate decision-making or, more radically, in corporate governance.²⁴ Such interests include those of employees, creditors, customers, the local community and even the ‘environment’. The arguments put forward for their inclusion may be strategic or normative.

In its original form advocated by Freeman, stakeholder theory was a *management strategy* for the purposes of value generation and corporate survival.²⁵ Stakeholder interests must be taken into account, otherwise the business will underperform (or fail). As such, subscribing to stakeholder theory need not necessarily involve any attack on shareholder-centric visions of the firm. *Normative versions* of stakeholder theory, in contrast, attach economic and/or moral significance to certain corporate stakeholders in order to justify calls for their acknowledgement in corporate governance.²⁶ Employees, for example, contribute a form of firm-specific capital, which might justify representation on the board, or acknowledgement in the definition of the corporate purpose. These differences notwithstanding, the concept of stakeholders is the primary conceptual device within CSR literature through which non-shareholder (and traditionally ‘non-business’) concerns are included or accounted for.

²³ Blowfield and Murray, *Corporate Responsibility* (n 3), p161; see also José Allouche and Patrick Laroche, ‘The Relationship Between Corporate Social Responsibility and Corporate Environmental Responsibility’ in José Allouche (ed), *Corporate Social Responsibility (Volume 2) – Performances and Stakeholders* (New York: Palgrave Macmillan, 2006), arguing that CSR lacks a unifying paradigm.

²⁴ Will Hutton, ‘An Overview of Stakeholding’ in Gavin Kelly, Dominic Kelly and Andrew Gamble (eds), *Stakeholder Capitalism* (London: Macmillan, 1997).

²⁵ R. Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984).

²⁶ Blowfield and Murray, *Corporate Responsibility* (n 3), p 161; Margaret M Blair, *Ownership and Control: Who’s at Stake in the Corporate Governance Debates* (Washington DC: Brookings Institution, 1994).

However, as I explain in Chapter 2, it is not clear what analytical work the concept of a stakeholder does in the context of the environment, certainly when compared with the likes of shareholders, employees, creditors, customers and other groups of essentially *human* interests. Laudable attempts to include the environment within existing stakeholder management frameworks often result in direct or indirect marginalisation of the environmental interest. In addition, as already suggested, we might wish CSR and corporate decision-making to account for environmental goods in a manner which is divorced from their economic use or value to humans. Such intrinsic value is not easily captured (if at all) by shoehorning or anthropomorphising the environment into the essentially human concept of a stakeholder. Furthermore, as will be explained in Chapter 4, corporate stakeholders are in actuality decentred ‘regulators’. They can demand improved outcomes for their own interests through a range of legal and extra-legal techniques, all of which exert pressure on a firm’s ‘social licence to operate’.²⁷ As will be seen however, the environment itself does very little, if any, ‘regulating’ on its own, relying on some form of human advocacy.

The concept of environmental voice is a tentative response to my dissatisfaction, both practical and intuitive, with conceiving of the environment as a corporate ‘stakeholder’. Instead, I use the concept of voice to capture the way in which environmental concerns tend to be heard in two main sites or locations. Within mainstream CSR, corporate theory and company law, these are the ‘market’ and ‘regulatory’ voices for the environment. I discuss their respective strengths and weaknesses in Chapters 2 and 3-4. There are two important matters to bear in mind with respect to environmental voice. First, there is a problematic tendency to privilege the market voice. In CSR literature, this is a result of the contemporary significance of the business case, an essentially market-driven concept. As will be seen below, under orthodox corporate theory, privileging market voice is a result of the market’s perceived superiority as a pricing mechanism for corporate governance terms. Second, the market and regulatory voices are external to the corporation and to company law; they operate on the corporation from the outside, rather than internally. Having explained the limitations of the market voice for the environment, it is now worth

²⁷ Neil Gunningham, Robert A. Kagan and Dorothy Thornton, ‘Social License and Environmental Protection: Why Businesses Go Beyond Compliance’ (2004) 29 *Law & Social Inquiry* 307.

sketching out the regulatory voice for the environment, together with the concept of space for CER.

4. Regulatory voice and space for CER

In view of the limitations of the business case, Part I of the thesis posits a qualitatively different justification for CER. I argue that there is normative and pragmatic ‘space’ for CER within existing modes of environmental law, regulation and governance. Importantly, I suggest that there remains a significant role for CER even in areas subject to extensive governmental regulation. This is significant, as there would be little role for CER if, by definition, it were limited to beyond compliance behaviour.

This of course is not to say that these existing modes of regulation and governance are perfect. Rather, my argument posits that the most appropriate way to understand and justify CER is to appreciate it as one aspect of increasingly ‘decentred’ environmental regulation.²⁸ I argue that CER is a positive manifestation of this decentring. In what others have described as decentred regulatory space,²⁹ ‘regulation’ is no longer the preserve of government. Rather, a range of social and market actors, including companies, ‘regulate’. Importantly, the decentred understanding of regulation has normative implications. Not only is regulation no longer the preserve of government, but in view of the limitations of governmental regulation, *nor should it be*. I extend this normativity of decentred regulation to CER, so that in view of the limitations of governmental regulation, CER activities are potentially to be welcomed.

Imbued within this brand of normativity is a pragmatic claim. On the one hand, I argue that CER has the potential to offer environmental benefits it would be mistaken to ignore. Chapter 4 in particular explains the potential for corporations to regulate in the environmental interest, and to address certain problems only problematically reached by governmental intervention, if at all. At the same time, I am also sympathetic to certain criticisms and dangers of CSR, especially objections based on a deep-seated mistrust of the modern corporation. Nonetheless, on the somewhat simple

²⁸ See especially Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103.

²⁹ Leigh Hancher and Michael Moran, ‘Organizing regulatory space’ in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Regulation* (Oxford: Oxford University Press, 1989).

observation that corporations (and CSR, it would seem) are here to stay, it seems worth at least considering the ways in which corporate power might be harnessed towards environmental goals. Moving away from the business case for CER, to the more subtle and nuanced confines of decentred regulatory space, I suggest, provides a framework for a form of pragmatism which remains attuned to the dangers of CSR.

And indeed, as will be seen, I acknowledge that this pragmatic and normative space for CSR is *limited*. There is reason for caution with respect to CSR, coupled with a need for governmental oversight. However, I do not make this argument on the basis of one of the most trenchant criticisms of CSR; that CSR is somehow undemocratic. For a number of reasons, recourse to models of democracy to reject CSR, at least in the context of decentred regulation, is superficial. Rather, the reason for caution relates to the limitations of the regulatory voice for the environment. Whilst Chapter 2 considers the weaknesses of the market voice for the environment, Chapters 3 and 4 consider the potential and limits of the regulatory voice for the environment. For a number of reasons, I argue that there is considerable scope for the crowding out of environmental interests in decentred regulatory voice.

5. Regulatory voice and space for CER in company law and corporate governance

The ideas of regulatory voice and space also demand consideration within the context of company law and corporate governance. Whilst I argue that there is (limited) normative space for CER within contemporary environmental law, regulation and governance, the same cannot be said for company law and corporate governance. My early thinking in this regard was rather more optimistic. Recent reforms to company law seem to suggest an implicit acceptance of CER's normativity, given references made to the 'environment'. Most notable here is section 172(1) of the Companies Act 2006 (CA 2006), which forms part of the now codified regime of directors' duties, and requires directors to promote the success of the company:

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so, have regard (amongst other matters) to—

- a) the likely consequences of any decision in the long term,
- b) the interests of the company's employees,
- c) the need to foster the company's business relationships with supplies, customers and others,
- d) the impacts of the company's operations on the community and the environment,
- e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- f) the need to act fairly as between members of the company

At first sight, section 172(1)(d) might seem to represent an opening up of company law to the norms of environmental protection. However, as I argue in Chapter 5, the normative space for CER within company law would appear either (at best) limited and (at worst) non-existent. To the extent that the positive mainstays of UK corporate governance are influenced by the (orthodox) contractarian theory of the firm, the environment is largely irrelevant. There are two facets of this 'environmental irrelevance'. First, corporate environmental irrelevance is the corollary of shareholder exclusivity in matters of corporate governance and decision-making. The environment is not relevant to the internal operations of the company. Second, environmental irrelevance is part of a broader conceptualisation of the purpose of company law as merely facilitative of private interactions, rather than 'regulatory'. Environmental protection is not a relevant concern for company law, but is a matter for 'external' (environmental) regulatory intervention. This dual position of environmental irrelevance subsists notwithstanding section 172(1)(d) Companies Act 2006, which essentially imports into company law the business case for corporate environmental responsibility. This moves company law away from the irrelevance position only very little, if at all, and fails to provide adequate voice for the environment within corporations or company law.

In the same way that I address the limitations of normative space for CER within decentred environmental regulation, I also question whether corporate environmental irrelevance is acceptable. Should company law be open to the norms and goals of environmental protection? In justifying a position of environmental irrelevance, I suggest far too much is assumed regarding the adequacy of the market

and regulatory voices for the environment *outside* or *external* to company law and corporate decision-making. Crucially, aspects of company law may in fact work at cross-purposes to environmental regulation, especially newer, more flexible types of regulation which encourage reflection and seek to engender a sense of commitment to environmental protection.

Given the weakness of the external voices for the environment pursuant to the market and decentred regulation, I argue that looking for environmental voice *within* the company offers potentially fruitful ways to enhance the normative and pragmatic appeal of CER. It thus follows that we contemplate the use of company law for the public/regulatory goals of environmental protection, despite the present objections existing in the theoretical and positive orthodoxy. This idea resonates with observations in regulatory literature that direct or command and control methods of regulation, environmental law included, treat the firm as a ‘black-box’. In response, these observations are coupled with a plea to regulate *from the inside*.³⁰ In Part II of the thesis (Chapters 6 and 7), I consider this ‘how’ question of corporate environmental relevance. How we might locate intra-corporate environmental voice, and amplify this through the reform of company law.

6. Addressing the limitations of CER: intra-corporate environmental voice

Part II of the thesis addresses primarily the second research question: how might an active role for corporations in environmental regulation and governance (normative and pragmatic space) be encouraged, aided or enhanced through legal intervention? The critique of the current regulatory arrangements pursuant to environmental and company law in Chapters 3-5 suggests we ought to consider the use of company law for environmental purposes. This is due to the lack of an adequate voice for the environment within corporations and within company law; together with the barriers this creates to the proper functioning of the ‘external’ (environmental) rules of the game.

³⁰ See, for example, Cary Coglianese and Jennifer Nash (eds), *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Washington DC: Resources for the Future 2001); Jennifer A Howard-Grenville, ‘Inside the “Black Box”: How Organizational Culture and Subcultures Inform Interpretations and Actions on Environmental Issues’ (2006) 19 *Organization & Environment* 46.

In Chapter 6, I consider the location of environmental voice within the corporation. I draw on the idea of ‘corporate conscience’. There are various, albeit loose, manifestations of this in the literature.³¹ I argue that the primary source of environmental voice within the corporation is the environmental conscience of real individuals. In essence, this represents a commitment to values in addition to profit, and when extended to the idea of an environmental conscience, a commitment to environmental protection. As will be seen, this jars with the economic model of behaviour underpinning company law, which leaves no room whatsoever for corporate actors to behave with conscience. If we take section 172 of the Companies Act 2006 as a rough proxy for corporate conscience, then we find a business case for other-regarding behaviour. However, because section 172 admits only a financially contingent corporate conscience, it is necessarily weak (if it could be considered open to conscience at all). In essence, corporate actors are presumed to behave like *homo economicus*; selfish and amoral economic calculators.

However, I argue that *real* individuals are a source of environmental conscience and voice within corporations. I use laboratory-based experiments on prosociality,³² together with empirical research into the reasons for environmental compliance,³³ to challenge this economic model of behaviour. However, due to a number of constraints on conscience arising from organisational membership and the stock market, individuals are admittedly a somewhat limited voice for the environment within corporations. At the same time, the organisational nature of corporations implies that a level of analysis which focuses solely on individuals is inadequate. As such, corporate conscience is necessarily collective or organisational in nature; the corporation has a conscience ‘of its own’. In making these observations, I do not seek to posit a novel theory of the corporation. However, I do enrich this understanding of corporate conscience with reference to corporate theory. It will be immediately clear to the corporate theorist that, in adopting both individual and collective levels of analysis, my exposition of corporate conscience bridges across two broad divisions

³¹ See, for example, Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge: Cambridge University Press 2010).

³² See Lynn Stout, *Cultivating Conscience: How Good Laws Make Good People* (Oxford: Princeton University Press, 2010).

³³ See, for example, Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Regulatory Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar, 2011).

commonly made in corporate theory: (i) aggregate (or individualistic) and (ii) entity (institution) approaches.

Given the constraints on environmental voice and conscience arising from organisational and market factors, Chapter 7 considers how appropriate regulatory intervention might amplify environmental voice, or give corporate environmental conscience room to ‘breathe’.³⁴ I propose rather modest reform towards this aim, based upon the inadequacies of sections 172 and 417 CA 2006. Having mentioned (rather than properly incorporated) environmental concerns in sections 172 and 417, company law now ought to go about environmental relevance *properly*, otherwise not at all. I suggest that Environmental Management Systems (EMS) would be a marked improvement on the current state of affairs. As such, they should be mandatory pursuant to company law, where the responsibility for the institution of an EMS ought to be included within the codified regime of directors’ duties. Under the reform proposal, ‘external’ environmental law would continue to invoke a range of regulatory techniques, tailored to both the particular environmental problem and the nature of the regulated community. Mandatory EMSs would not change this. Rather, the aim of an EMS is to open up company law to the norms of environmental protection, so that there is less scope for company law to work at cross-purposes to environmental regulation generally.

7. Methodology

Recall the two main questions I ask in this thesis. First, should corporations play an active role in the regulation and governance of environmental protection? If so, and second, how might such a role be encouraged, aided or enhanced through legal intervention? Both of these questions invite a number of research methods. Indeed, this thesis adopts, as is common, a mixed-method approach, invoking doctrinal analysis; theoretical approaches; the derivative/secondary use of empirical research and multi-disciplinarity. All of these methods inform the reform-oriented method

³⁴ See Dan Awrey, William Blair and David Kershaw, ‘Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?’ (2013) 38(1) Delaware Journal of Corporate Law (forthcoming) (available at <http://ssrn.com/abstract=2157588>).

adopted overtly in the final substantive chapter. As such, the thesis is contextual and socio-legal in the broader (non-empirical) sense.

Those parts of the thesis that consider normative claims are largely theory-based. CSR's normativity has already been critiqued from a number of theoretical and disciplinary perspectives, including notably ethics and politics.³⁵ And of course, within the legal academy, CSR has been most trenchantly criticised by the law-and-economics methodological individualism of contractarian theory.³⁶ Given my research question sought to place CSR in the context of environmental regulation, the most obvious framework to use was regulatory theory, considered in detail in Chapters 3 and 4. Approaches to and critiques of regulation are (broadly) (i) economic or (ii) socio-political.³⁷ I adopt a predominately socio-political framework, for a number of reasons.

First, given the scepticism within environmental politics and theory as to the viability of economic instruments and economic approaches to environmental protection (themes deployed in Chapter 2 to critique the environmental business case), an economic critique of regulation seemed misplaced. Second, overtly economic critiques and analyses of regulation / public policy interventions for CSR had in any case already been addressed quite extensively elsewhere (and within the economic discipline).³⁸ Third, a number of the legal-regulation perspectives on CSR (often not written by legal scholars), tend to be reduced to the rather impoverished and stale voluntary/involuntary dichotomy, mentioned above.³⁹ I knew in advance that the socio-political understandings of regulation generally avoided this dichotomy, and I could thus deploy them to cut through some of the on-going tedium in this debate.

Significant parts of the thesis necessitated a doctrinal approach. In particular, this is the case when outlining waste regulation, and mapping the contractarian

³⁵ See for example, Mary Crossan, Daina Mazutis, and Gerard Seijts, 'In Search of Virtue: The Role of Virtues, Values and Character Strengths in Ethical Decision Making' (2013) 113 *Journal of Business Ethics* 567; Sally Wheeler, *Corporations and the Third Way* (Oxford: Hart Publishing 2002); Dirk Matten and Jeremy Moon, 'Corporate Citizenship: Introducing Business as an Actor in Political Governance' (Social Science Research Network 2013) (Available at SSRN: <http://papers.ssrn.com/abstract=2283703>).

³⁶ See in general Chapter 5, and Easterbrook and Fischel, *Economic Structure of Corporate Law* (n 18).

³⁷ Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103.

³⁸ See, for example, Lyon and Maxwell, *Corporate Environmentalism* (n 4), Portney, 'CSR—an economic perspective' (n 12).

³⁹ For an exception to this, see Jeremy Moon and David Vogel, 'Corporate Social Responsibility, Government, and Civil Society' in Crane *et al*, *Oxford CSR Handbook* (n 2).

orthodoxy of environmental irrelevance onto positive UK company law. In addition, the critique of Enlightened Shareholder Value (ESV) against the norms of procedural regulation, and the corresponding superiorities of the EU's Eco-Management and Audit Scheme (a particular EMS), is also partly doctrinal. In a very broad sense, the thesis is doctrinal in its exploration of tension-ridden relationship between two traditionally separate sub-legal disciplines: company and environmental law (or more precisely, the tensions between the established goals thereof).

Whilst I do not undertake any empirical research of my own, I draw on the empirical work of others to inform certain points; to question and challenge orthodoxies; and, in Chapters 3 and 4, to exemplify the potential and limits of CER and associated regulatory intervention. I adopt this approach in all Chapters, with the exception of Chapter 5 (although the arguments made in Chapter 5 are in essence a crescendo to Chapters 2-4). As will be seen, some of the empirical areas of research I draw on raise questions for corporate theory (in an inductive, methodological sense), although unfortunately these questions are beyond the scope of the thesis.

When writing the research proposal, I had considered the possibility of some modest empirical research of my own. In view of the project's breadth, together with the restricted period, the most appropriate empirical method (if any) would be a qualitative case study, probably limited to one or two individual companies. However, whilst developing the empirical research proposal, I simultaneously undertook a wide-ranging CSR literature review. In doing so, I came across countless CSR-based case studies of particular corporations or particular industries.⁴⁰ In view of the plethora of similar qualitative studies, I began to question the contribution to the field I could make via my own empirical work. In addition, it became increasingly clear when drafting the empirical research questions that a company/companies case study simply jarred with the otherwise very broad nature of the thesis. The range of issues explored, particularly at that early stage, translated into too many qualitative research questions for me to address in the context of doctoral work. I justified the decision on this basis to my upgrade panel, which agreed.

Having given some thought to the possible merits of a case study, I did decide that a focus on a particular environmental sector was necessary, not least because of

⁴⁰ See, for example, the following journals: *Business Ethics*, *Business Strategy and the Environment* and *Corporate Social Responsibility and Environmental Management*.

the acknowledged way in which different environmental problems give rise to varying regulatory challenges. I thus use the problem of waste reduction in the supermarkets sector and construction industry to provide illustration of some of the theoretical, doctrinal and pragmatic points made in Part I (Chapters 2-5). In a similar way to the limits of the case study design,⁴¹ we must be careful about making generalised claims beyond the problem of waste and beyond the industries considered. However, many of the challenges faced in this area relate to behaviour change, and this is common to all sorts of environmental problems. There is thus some *scope* for broader generalisation on this basis.

I chose the problem of waste for a number of reasons. I wanted to avoid climate change, as there is a tendency in CSR literature (and by corporations) to focus on this issue. I make no particular comment either as to the correctness of this. My view was simply that other environmental problems in the context of CSR were underexplored. In addition, the nature of waste regulation in England and Wales (much of which is pursuant to EU Law) seemed particularly appropriate in view of the research questions. As will be seen in more detail in Chapter 3, historically, waste regulation has focussed on the safe treatment and disposal of waste via direct or command and control regulation.⁴² However, it is widely accepted that direct environmental regulation is unlikely, alone, to ‘move up the waste hierarchy’.⁴³ This hierarchy prioritises the reduction, re-use, recycling and recovery of waste over safe disposal.⁴⁴ The general thrust of the hierarchy is that, while the prevention of environmental pollution through the safe treatment and disposal of waste is important, it would be better to reduce the amount of waste actually generated, and to re-use, recycle and recover if we cannot eliminate waste arisings entirely (‘zero waste’).

The challenges involved in moving up the waste hierarchy have invited a mixed approach to regulation. This includes economic instruments, reflexive mechanisms and a string of voluntary agreements, together with softer policy options such as awareness campaigns and information provision. In this sense, waste is an

⁴¹ See Alan Bryman, *Social Research Methods* (Oxford: Oxford University Press, 2012), Ch 3.

⁴² See in particular the Waste Framework Directive (Directive 2008/98/EC on waste) (‘WFD’) together with the Environmental Permitting (England and Wales) Regulations 2010/675 (as amended).

⁴³ See, for example, Jane Holder and Maria Lee, *Environmental Protection Law and Policy: Text and Materials* (Cambridge: Cambridge University Press, 2007), Stuart Bell, Donald McGillivray and Ole W Pedersen, *Environmental law* (Oxford: Oxford University Press, 2013); Eloise Scotford, ‘The new Waste Directive - trying to do it all...an early assessment’ (2009) 11 *Environmental Law Review* 75.

⁴⁴ WFD, Art 4.

area of extensive (and notoriously complex) regulation, which seemed particularly important in view of my aim to consider CER in the context, rather than absence, of law. At the same time, the limitations of law in fostering widespread behaviour change are particularly prominent in the area of waste reduction, and there thus seems to be considerable space for CSR to achieve reductions in waste beyond that which might be achieved through direct legal intervention.

In view of time and space constraints, as well as the need for depth of analysis, it was also necessary to focus on particular areas within the problem of waste. I opted for the construction industry and supermarkets given the focus attached to these industries (and associated waste streams) in the main policy document in place, the 2007 *Waste Strategy*.⁴⁵ Construction, demolition and excavation (CD&E) waste was the largest source of waste arisings in the UK (by weight).⁴⁶ Food and packaging waste in the supermarket supply chain were particularly high profile, and received considerable policy attention.⁴⁷ Both sectors were at the time also engaged in ‘voluntary agreements’ aimed at addressing waste in the absence of direct regulation,⁴⁸ with obvious overlap with CSR.

As is perhaps the nature of research, the illustrations from waste management feature much less in the overall structure and argument of the thesis than I originally intended. As the thesis developed, and as the research led me to spend more time than expected on issues pursuant to company law, the focus of the second research question—appropriate regulatory intervention—changed. In view of the developing critique of company law, I became concerned with how environmental and company law norms might be reconciled or integrated at a general level. Here, the focus on waste (or indeed any specific environmental problem) seemed inappropriate. As a matter of practicality, I realised that company law will never be able to fully address the spectrum of regulatory complexity in the environmental area. However, it might be more open or accommodating to environmental goals generally. Therefore, whilst the problem of waste management serves a number of purposes in Part I—illustrating the limits of normative and pragmatic space for CER, and exemplifying the

⁴⁵ Defra, *Waste Strategy for England 2007* (Cm 7086, Crown Copyright, 2007).

⁴⁶ Ibid. p 24.

⁴⁷ Ibid., Chs 4 and 7.

⁴⁸ See Defra, *Government Review of Waste Policy in England 2011* (PB 13540, Crown Copyright, 2011).

inadequacies of the market and regulatory voices for the environment—the problem of waste does not feature in Part II.

Finally, I should acknowledge that CSR does raise interesting and challenging questions on a global level, particularly the activities of multinational corporations in so-called weak governance zones, together with a range of codes of practice agreed at the international level. However, I restrict the scope of this thesis to CER in the UK, and in essence, England and Wales. This was a conscious choice, which I justified to my upgrade panel, in order to impose some boundaries on the otherwise already broad scope of the thesis.

8. Thesis structure

The thesis is structured as follows. In Part I (Chapters 2-5), I set out the potential and limits of normative and pragmatic space for CER, addressing predominately the first research question pertaining to justifying CER. Chapter 2, in reviewing the business case, explains why this justification is necessary. Chapters 3 and 4 seek to explain CER's normative and pragmatic appeal in the context of decentred environmental law, regulation and governance by reference to the concept of 'space'. Chapters 2 and 3-4 also serve the additional purpose of explaining the respective limits of the market and regulatory voices for the environment. Weaknesses as to environmental voice inform the arguments made in Chapter 5 as to the untenable position of corporate environmental irrelevance subsisting within the orthodox contractarian theory and positive company law. Part I concludes that there is a distinct, but limited, pragmatic and normative space for CER within environmental law and regulation. However, the untenable position of corporate environmental irrelevance suggests that CER's normativity, environmental voice and overall corporate behaviour would be improved by the appropriate reform of company law.

In Part II, I address the second, reform-orientated research question pertaining to encouraging CER, on the premise that modifications to company law seem necessary. In particular, Part I suggests that company law ought to accommodate some form of intra-corporate environmental voice. Chapter 6 locates this voice first and foremost in the environmental conscience of real individuals. But given the

organisational nature of corporations, this voice or conscience is necessarily collective, or what I term corporate conscience. In Chapter 7, I advocate one particular type of procedural regulation, EMSs, as a means by which to amplify this environmental voice within the corporation. Chapter 8 concludes; explains the broad, pragmatic argument pursued in the thesis; and makes suggestions for further research questions and conversations.

Before proceeding to Chapter 2, it is worth noting that, throughout the thesis, I use the terms CSR / CER somewhat interchangeably. Even though the focus of the thesis is *environmental* responsibility, I inevitably draw on broader CSR literature. As such, I often use that term in order to avoid ascribing (inadvertently) any sectoral specificity to the work of other authors. At certain points, however, I do seek to differentiate the environment from other corporate responsibility sectors. When I do so, it will be clear that I use the term CER specifically. Otherwise, my usage of different terminology is not significant.

Part I

Environmental Voice and Space for Corporate Environmental Responsibility—Potential and Limits

Chapter 2

Market Voice and the Business Case

1. Introduction

In this chapter, I consider the business case for CER. The business case is the claim that behaving responsibly makes financial sense; that CSR *pays*. It is impossible to exaggerate the contemporary significance of this claim, not least in legitimising environmental concerns in the corporate sphere. Whether this claim is more than mere assertion, however, is disputed. Despite a large body of empirical research on the topic, no consensus emerges as to the existence of a generalised link between CSR and corporate financial performance. In this chapter, I present two objections to the business case which run deeper than these empirical uncertainties. These objections serve two main purposes within the broader scope of the thesis. First, critiquing the business case for CER explains why we must look elsewhere to justify CER. Second, the business case represents a primarily market-driven approach to CSR. Critiquing the business case thus helps us to understand the limitations of the market voice for the environment.

My first objection relates to the rhetoric of the business case claim, which suggests that win-win situations exist as a matter of course. The ready or easy compatibility of environmental and economic concerns is taken as a starting point, and this starting point is problematic. Regardless of the generalised claim, trade-offs and points of conflict between environmental and economic goals do and will continue to exist. Furthermore, many of these trade-offs are deeply embedded in business practice and societal interactions, the reversal of which would require significant behavioural change. With this in mind, I suggest that the rhetoric of the business case sends a misleading and unhelpful message regarding the effort required to ensure environmental protection. In the sense that it is thus misrepresentative, the business case as a primary voice for the environment is inadequate.

The second objection relates to the value afforded to CER investments in the business case. Ultimately, environmental protection is commodified, so that its value

is expressed only in terms of profits, and advocated indirectly by the demands of market actors. However, it is notoriously complicated and controversial to express environmental value in monetary terms, and any inherent or intrinsic value there might be in CER is practically irrelevant. So while the business case for CER potentially legitimises environmental protection as a business concern, it comes at the cost of sacrificing real environmental value. Furthermore, as will be familiar to environmental lawyers, there are limitations to market interactions in bringing about meaningful environmental change, again implying a certain inadequacy of the market voice.

The chapter is structured as follows. In section 2, I briefly explain my reasons for preferring the framework of ‘voice’ to stakeholding as a means by which to capture environmental concerns within the corporate sphere. In section 3, I explain the significance of the business case claim; the empirical evidence thereof; and the reasons why companies may fail to divert resources towards win-win investments. In section 4, I explore the two deeper objections to the business case. In order to provide some illustration of the issues explored, sections 3 and 4 make use of examples from the corporate environmental problem of waste in the retail grocer sector and construction industry.

2. Stakeholders and environmental voice

The central way in which CSR literature accounts for non-business interests (and the interests of non-shareholders) is via the concept, language and theory of ‘stakeholders’. Most obviously, it features in numerous definitions of CSR. While there is no consensus,¹ CSR is often understood as involving activities which stretch beyond shareholders to consider stakeholder-type interests, as well as going beyond

¹ See, for example, Abigail McWilliams, Donald S Siegel and Patrick M Wright, ‘Corporate Social Responsibility: Strategic Implications’ (2006) 43(1) *Journal of Management Studies* 1. Indeed, the definitions are numerous; Archie B Carroll, ‘Corporate Social Responsibility: Evolution of a Definitional Construct’ (1999) 38(3) *Business & Society* 268 identified 25 different ways of defining CSR (see Melé ‘Corporate Social Responsibility Theories’ in Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon and Donald S Siegel (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008)). For an argument that CSR is a useless term with little explanatory value, see J. (Hans) van Oosterhout and Pursey PMAR Heugens, ‘Much Ado About Nothing: A Conceptual Critique of Corporate Social in Crane *et al*, *CSR Handbook* (n 1).

externally imposed legal requirements which protect those stakeholder concerns.² In this sense, reference to stakeholders is positive or descriptive. However, stakeholder theory also has normative aspects; companies *should* consider the interests of ‘stakeholders’. In addition, stakeholders are often a crucial denominator in *explaining* CSR or associated ‘beyond compliance’ behaviour (stakeholders make demands beyond the requirements of formal law to which corporations, through a range of CSR activities, respond). Whilst I do not reject stakeholder approaches in a general sense, I do have some reservations as to the suitability of a ‘stakeholder’ framework in the context of the environment. Before explaining these reservations in more detail, it is worth briefly outlining the notion of corporate stakeholders in a little more detail.³

Stakeholder theory, whilst contested, is a firmly established framework within CSR. The term ‘stakeholder’ is ubiquitous in both academic and corporate literature, and it is probably the closest we can get to a unifying paradigm for CSR.⁴ The main theme that runs through references to stakeholders is inclusion; specifically, the inclusion of interests beyond those of shareholders alone (for example, employees, creditors, customers, the local community and even the ‘environment’), either as concerns in corporate decision-making or, more radically, as the recipients of

² See, for example, Keith Davis, ‘The Case for and against Business Assumption of Social Responsibilities’ (1973) 16 *The Academy of Management Journal* 312, p 313, describing CSR as beginning ‘where the law ends’ and Neil Gunningham, ‘Shaping corporate environmental performance: a review’ (2009) 19 *Environmental Policy and Governance* 215, p 215. For a multifaceted appreciation of the relationship between CSR and law, see Doreen McBarnet, ‘Corporate social responsibility beyond law, through law, for law: the new corporate accountability’ in Doreen McBarnet, Aurora Voiculesco and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2009).

³ The literature is too vast cite in full, but see, for example; R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984); José Allouche (ed), *Corporate Social Responsibility (Volume 2): Performances and Stakeholders* (New York: Palgrave Macmillan, 2006); Archie B Carroll and Ann K Buchholtz, *Business and Society: Ethics and Stakeholder Management* (Mason, OH: South-Western, 2008); Andreas Rasche and Daniel Esser, ‘From Stakeholder Management to Stakeholder Accountability: Applying Habermasian Discourse Ethics to Accountability Research’ (2010) 65 *Journal of Business Ethics* 251; Jill Brown and William Forster, ‘CSR and Stakeholder Theory: A Tale of Adam Smith’ (2012) *Journal of Business Ethics* 1; Margaret M. Blair, *Ownership and Control: Who’s at Stake in the Corporate Governance Debates* (Washington DC: Brookings Institution, 1994); Gavin Kelly and John Parkinson, ‘The Conceptual Foundations of the Company: A Pluralist Approach’ in John Parkinson and others (eds), *The Political Economy of the Company* (Oxford: Hart Publishing, 2000); Elaine Sternberg, ‘The Stakeholder Concept: A Mistaken Doctrine’ (Social Science Research Network 13 March 2001) (Available at SSRN: <http://papers.ssrn.com/abstract=263144>); Lisa M Fairfax, ‘The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms’ (2005) 31 *Journal of Corporation Law* 675.

⁴ Michael Blowfield and Alan Murray, *Corporate Responsibility: A Critical Introduction* (Oxford: Oxford University Press 2008), p 161.

participatory rights in corporate governance.⁵ Adopting a broad division, stakeholder theory can be sub-divided into whether the case for inclusion is either strategic or normative.⁶

In its original form advocated by Freeman, stakeholder theory was a management approach for the purposes of value generation and corporate survival.⁷ Freeman did not posit the theory as an attack on the primacy of shareholders,⁸ unlike the brand of stakeholder theory as is generally understood by corporate lawyers.⁹ Rather, stakeholder interests must be taken into account, otherwise the business will underperform (or fail). Normative versions of stakeholder theory, in contrast, attach either economic and/or moral significance to certain corporate stakeholders in order to justify calls for their acknowledgement in corporate governance.¹⁰ The method of acknowledgement comes in many forms, although broadly speaking calls are made for (i) stakeholders to be considered, represented or involved in board decision-making, and/or (ii) a definition of the corporate interest which is more expansive than recourse to the interests of shareholders. Employees, for example, contribute firm-specific capital, which justifies representation on the board. Subscribing to stakeholder theory need not necessarily, therefore, represent any attack on shareholder-centric visions of the firm, but in some instances it does.

My dissatisfaction with conceiving of the environment as a corporate ‘stakeholder’ is both practical and intuitive. Practically, the usage of stakeholders to ‘explain’ CSR behaviour makes less sense in terms of the environment. As will be seen below, as well as in Chapter 4, corporate stakeholders are often presented as driving CSR and explaining the reasons for beyond compliance behaviour. They can demand improved outcomes for their own interests through a range of legal and extra-

⁵ Will Hutton, ‘An Overview of Stakeholding’ in Gavin Kelly, Dominic Kelly, and Andrew Gamble (eds), *Stakeholder Capitalism* (London: Macmillan, 1997).

⁶ See Melé, ‘CSR Theories’ (n 1); Blowfield and Murray, *Corporate Responsibility* (n 4); Ch 6; James P. Walsh, ‘Book Review Essay: Taking Stock of Stakeholder Management’ (2005) 30 *Academy of Management Review* 426.

⁷ Freeman, *Strategic Management* (n 3).

⁸ James P Walsh, ‘Book Review Essay: Taking Stock of Stakeholder Management’ (2005) 30 *Academy of Management Review* 426.

⁹ See, for example, the exposition of ‘pluralist’ approaches in The Company Law Review Steering Group, *Modern Company Law For a Competitive Economy - The Strategic Framework (Consultation Document)* (Crown Copyright, 1999), Ch 5; Margaret M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Washington DC: Brookings Institution Press, 1994); John Kay and Aubrey Silberston, ‘Corporate Governance’ (1995) 153 *National Institute Economic Review* 84. I will return to the related concept of shareholder primacy in Chapter 5.

¹⁰ See, for example, Kelly and Parkinson, ‘The Conceptual Foundations of the Company’ (n 3).

legal techniques, all of which exert pressure on a firm's 'social licence to operate'.¹¹ This social licence represents the terms set for business behaviour and survival outwith the confines of formal law; what some have referred to as 'civil' or 'private' regulation.¹² In this sense, stakeholders include those who have influence over the company, not just those (negatively) affected by corporate operations. In the context of environmental stakeholders, this most obviously brings to mind Environmental Non-Governmental Organisations (ENGOS).¹³ As will be seen in Chapter 4, the environment itself does very little, if any, 'regulating' on its own, and rather relies on some form of human advocacy. As such, the environment 'itself' is not a stakeholder.

In addition, whilst laudable attempts have been made to include the environment as a stakeholder, these management frameworks often result in direct or indirect marginalisation of the environmental interest.¹⁴ Wheeler and Sillanpää, for example, outline a hierarchy of stakeholders: primary social, secondary social and non-social (including the environment).¹⁵ Here, the importance of the environment is relegated. Werther and Chandler, in contrast, view the environment as part of a company's 'societal' group of stakeholders.¹⁶ But this gives rise to concerns, similar to those expressed in the context of sustainable development literature, that societal or economic concerns might be inappropriately emphasised to the detriment of environmental protection. Vogel similarly questions how the 'environmental stakeholder' can hold sway in the face of competing claims of corporate responsibility from more powerful (shareholders) or more vociferous (workers) stakeholder groups.¹⁷

¹¹ Neil Gunningham, Robert A. Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29 *Law & Social Inquiry* 307.

¹² See, for example, David Vogel, 'The Private Regulation of Global Corporate Conduct Achievements and Limitations' (2010) 49 *Business & Society* 68–87; Peter Grabosky, 'Beyond Responsive Regulation: The expanding role of non-state actors in the regulatory process' (2013) 7 *Regulation & Governance* 114; McBarnet, 'CSR beyond law' (n 2).

¹³ See, for example, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992) and John Braithwaite and Peter Drahos, *Global business regulation* (Cambridge: Cambridge University Press, 2000).

¹⁴ David M Ong, 'Locating the "environment" within corporate social responsibility' in Nina Boeger, Rachel Murray and Charlotte Villiers (eds), *Perspectives on Corporate Social Responsibility - Corporations, Globalisation and the Law* (Cheltenham: Edward Elgar, 2008).

¹⁵ David Wheeler and Maria Sillanpää, 'Including the stakeholders: The business case' (1998) 31 *Long Range Planning* 201.

¹⁶ William B Werther Jr and David B Chandler, *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (California: Sage Publications, 2006); Ong, 'Locating the environment' (n 14).

¹⁷ David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington DC: Brookings Institution, 2006).

Intuitively, the nature of a stakeholder jars somewhat with the far more nebulous concept of ‘the environment’, certainly when compared with the likes of shareholders, employees, creditors, customers and other groups of essentially human interests. In this sense, is not clear what analytical work the concept of stakeholder does in the context of the environment. In addition, shoehorning or anthropomorphising the environment into an essentially human concept potentially does environmental value a disservice. As I will go on to argue, we might wish CSR and corporate decision-making to account for environmental goods in a manner which is divorced from their socio-economic use or value to humans. Such intrinsic value is not easily captured (if at all) within the concept of a stakeholder.¹⁸

The concept of environmental voice is a somewhat tentative response to these dissatisfactions with conceiving of the environment as a corporate stakeholder. Semantically, this is probably partially (though not deliberately) influenced by frequent reference to the idea of shareholder ‘voice’ in company law, used to express the shareholder collective vis-à-vis director decision-making. I use it to capture the way in which environmental concerns are voiced via advocates, and how these advocates might broadly be understood as inhabiting two separate but overlapping locations. I suggest that within mainstream CSR, corporate theory and company law, there are two main sites or locations of environmental voice. First, a market voice. Second, a regulatory voice, but with an understanding of regulation which is understood to include non-actors (and the ‘regulatory’ activities thereof) beyond ‘government’. I explain the latter in more detail in Chapters 3 and 4. In this chapter, I am concerned primarily with the market voice for the environment, and its significance in CSR literature is seen in the dominance of the business case. I will explain the place of these voices within company law and corporate theory in Chapter 5.

3. The business case for CER

There has been a continual and much-visited attempt to ‘justify’ CSR. Indeed, this area of scholarship has justificatory origins. It is important to distinguish from the

¹⁸ Similar problems have been experienced within environmental law itself, particularly in the context of standing to sue. See Christopher D Stone, *Should Trees Have Standing? Towards Legal Rights for Natural Objects* (Tahoe City, CA: Tioga Books, 1988).

outset two main modes of justification employed to legitimise the business assumption of societal responsibilities. First, moral or ethical *assertions* – behaving responsibly is the right thing to do. This somewhat broad claim presents itself in various guises. The concept of corporate citizenship, for example, is grounded in political science and conceptions of civic virtue—corporations should act as good citizens.¹⁹ In addition, this is not necessarily accompanied by the deep ethical or political analysis that has occurred within the area of business ethics and corporate citizenship, respectively. Sometimes commentators present the ethical case as a *fait accompli*—and certainly large corporations accept this as a matter of rhetoric in their corporate reports (if not evidenced by action).

But the ethical case is by no means uncontroversial. Admittedly, in the pursuit of profit for shareholders, corporations have arguably contributed a great deal to the ‘societal’ interest, even without so-called ‘additional’ CSR or philanthropy. Henderson, in a contemporary attack on CSR, argues that corporations meeting the bottom line, whilst providing vital goods and services, should not be ‘distinguished from what a business can contribute by way of “giving back to society”’.²⁰ On this basis, the defining contribution of business to society is the corporate form’s unrivalled ability to efficiently generate wealth. As will be seen below, and in more detail in Chapter 5, some aspects of corporate theory interpret CSR as, far from being ethical, but an illegitimate abrogation of the private contractual rights vested in shareholders to the company’s (residual) assets. In this chapter, however, I am more concerned with the second, much more influential justification for CSR: financial or business *rationales* – behaving responsibly makes financial sense.²¹ The broad business case claims that, through CSR, companies can:

... improve their reputations and operational efficiency, while reducing their risk exposure and encouraging loyalty and innovation. Overall, they are more

¹⁹ Andrew Crane, Dirk Matten, and Jeremy Moon, ‘The Emergence of Corporate Citizenship: Historical Development and Alternative Perspectives’ [2008] (Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085270).

²⁰ David Henderson, *Misguided Virtue* (London: Institute of Economic Affairs, 2001), Ch 8.

²¹ Elizabeth C Kurucz, Barry A Colbert and David Wheeler, ‘The Business Case for Corporate Social Responsibility’ in Crane *et al*, *CSR Handbook* (n 1) make a similar point, though are critical of the distinction which prevails. See also Melé, ‘CSR Theories’ (n 1); Keith Davis, ‘The Case for and Against Business Assumption of Responsibilities’ (1973) 16(2) *Academy of Management Journal* 312.

likely to be seen as a good investment and as a company of choice by investors, employees, customers, regulators and joint venture partners.²²

The importance of the business case claim

As I mentioned above, while there is no strong definitional consensus, CSR is often understood as involving activities which stretch beyond shareholders to consider stakeholder-type interests, as well as going beyond externally imposed legal requirements which protect those stakeholder concerns.²³ At the heart of CSR debates is this tension between shareholders and stakeholders: for whom should corporations be run? One need not look very far in CSR scholarship or textbooks before finding Milton Friedman's famous *New York Times* article, declaring that the only social responsibility of business is to increase its profits for shareholders.²⁴ This version of 'shareholder primacy', as hinted at above, is often interpreted to render CSR illegitimate. A consideration of stakeholder interests is in direct contradiction to the requirement to remain singularly focussed on the interests of shareholders. In the extreme, CSR expenditures on, for example, reducing pollution beyond what is required by environmental law, are presented as little more than theft from shareholders as owners of the company: such investments involve 'spending someone else's money for a general social interest.'²⁵ As will be seen in Chapter 5, while expression of the legal issues in such terms involves oversimplification, this characterisation (or caricature) nonetheless frames much CSR literature.²⁶ And of course, this tension persists in a heated body of corporate law scholarship dating back (at least) 80 years as to the appropriate corporate purpose; should companies be

²² Vogel, *The Market for Virtue* (n 17), p 11 quoting Arthur D Little, *The Business Case for Corporate Citizenship*, p 8.

²³ See, for example, Davis, 'Social Responsibilities' (n 21), p 313, describing CSR as beginning 'where the law ends' and Gunningham, 'Shaping Corporate Environmental Performance' (n 2), p 215.

²⁴ Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' *The New York Times Magazine* (New York: 13 September 1970).

²⁵ Friedman, 'The Social Responsibility of Business' (n 24).

²⁶ See, for example, Blowfield and Murray, *Corporate Responsibility* (n 4), p 211, referring to shareholders as owners of the company (which is also the presumption underpinning Friedman's argument). Of course, shareholders do not own the corporation or its assets, see Paddy Ireland, 'Company Law and the Myth of Shareholder Ownership' (1999) 62 *The Modern Law Review* 32; *Short v Treasury Commissioners* [1948] 1 KB 116. On oversimplification generally, particularly in view of the wide discretion afforded to directors by courts in determining what is in the best interests of the company, see John Parkinson, 'The Legal Context of Corporate Social Responsibility' (1994) 3 *Business Ethics: A European Review* 16; McBarnet, 'CSR beyond law' (n 2), pp 22-3. Shareholder primacy is not without both positive and normative controversy, and is considered in more detail in Chapter 5.

concerned only with the pursuit of profit or, alternatively, should corporations be subject to broader societal obligations?²⁷

It is against this on-going debate that the business case for CSR must be understood. Of course, as a justification for CSR, the business case is probably what matters for companies: ‘if CSR palpably fails in financial terms, it cannot last.’²⁸ The simple rhetoric and language that acting responsibly is good for business also plays an important role in legitimising ‘non-business’ issues, including the environment, in the eyes of companies themselves, mainstream management theorists and, arguably, even Friedman himself.²⁹ Indeed, there now seems no end to the variety of CSR-type concerns for which business case claims are invoked, including, for example, equality and diversity (including the increase of female participation at boardroom level),³⁰ improved working conditions (particularly in developing countries)³¹ and respect for human rights.³² Fundamentally, however, the business case purports to simply remove the tension subsisting at the heart of CSR, in the process sidestepping an almost century-old body of corporate governance scholarship. In ‘business case CSR’, where a whole host of societal responsibilities are aligned with the generation of corporate profit, the polarity in the debate simply collapses—shareholder and society no longer compete.³³

Empirical evidence

The literature on the business case is extensive and a thorough overview is beyond the scope of this paper.³⁴ However, two separate meta-analyses (one by

²⁷ The origins are usually traced back to E Merrick Dodd Jr ‘For Whom Are Corporate Managers Trustees?’ (1932) 45(7) Harv L Rev 1145 and AA Berle Jr ‘For Whom Corporate Managers Are Trustees: A Note’ (1932) 45(8) Harv L Rev 1365. See also Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (London: Transaction Publishers, 1991).

²⁸ Henderson, *Misguided Virtue* (n 20), p 128.

²⁹ Vogel, *The Market for Virtue* (n 17), pp 17-26.

³⁰ See, for example, Mark McCann and Sally Wheeler, ‘Gender Diversity in the FTSE 100: The Business Case Claim Explored’ (2011) 38 Journal of Law and Society 542.

³¹ See, for example, Vogel, *The Market for Virtue* (n 17), Ch 4.

³² *Ibid*, Ch 6, especially pp 158-9 and references therein.

³³ Joshua Daniel Margolis and James P. Walsh, *People and Profits?: The Search for a Link Between a Company’s Social and Financial Performance* (Mahwah, NJ: Lawrence Erlbaum Associates, 2001), p 5.

³⁴ See, for example, José Allouche and Patrick Laroche, ‘The Relationship Between Corporate Social Responsibility and Corporate Environmental Responsibility’ in Allouche, *CSR 2* (n 3); R Cowe and M Hopkins ‘Corporate Social Responsibility: Is there a business case?’ in Jon Burchell (ed), *The Corporate Social Responsibility Reader* (Abingdon: Routledge, 2008); Kurucz *et al*, ‘The Business Case for CSR’ (n 21); Lee E. Preston and Douglas P. O’Bannon, ‘The Corporate Social-Financial Performance Relationship: A Typology and Analysis’ (1997) 36 Business & Society 419; Simon Zadek,

Orlitzky, the other by Margolis and Walsh) provide a useful way in to the volume of empirical evidence.³⁵ While both of these studies indicate an overall positive correlation between CSR and corporate financial performance (CFP),³⁶ this empirical evidence for the business case remains uncertain. In short, there is no consensus as to whether there exists a generalised positive relationship between corporate social responsibility and CFP.³⁷ A comparison of the rather different conclusions drawn from these meta-analyses is instructive as to some of the reasons why uncertainty persists.

Orlitzky is critical of what he sees as continued but paradoxical resistance to evidence which challenges the traditional trade-off hypothesis of an assumed conflict between business and societal interests.³⁸ Conversely, and not unlike other commentators pointing to uncertainty in the empirical evidence,³⁹ Margolis and Walsh call for caution in the weight attached to the overall positive correlation between CSR and CFP.⁴⁰ This is particularly in view of the string of methodological criticisms levelled against the empirical research. For example, one problem is a lack of uniformity, not least with that of measurement. Studies in the area employ a seemingly infinite host of indicators to measure CSR, including the influence of ethics, values and principles on a company's programmes, or the record on eco-efficiency.⁴¹ In a similar fashion, Margolis and Walsh encountered 70 different measures of business performance.⁴² These include harder-nosed, traditional accounting measures such as shareholder revenue, but also softer aspects of business performance, including

'Doing Good and Doing Well: Making the Business Case for Corporate Citizenship' (Report for the Conference Board, The Conference Board of Canada, 2000).

³⁵ Marc Orlitzky, 'Corporate Social Performance' (n 35); Margolis and Walsh, *People and Profits* (n 33). See also Subhabrata Bobby Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly' (2008) 34 Critical Sociology 51, pp 60-1, relying primarily on these studies.

³⁶ This is confirmed elsewhere, see, for example, Cowe and Hopkins, 'CSR: is there a business case?' (n 34), p 106 and references therein.

³⁷ See, for example, Allouche and Laroche, 'The Relationship between CSR and CFP' (n 34); Cowe and Hopkins, 'CSR: is there a business case?' (n 34); Kurucz *et al*, 'The Business Case for CSR' (n 21); Vogel, *The Market for Virtue* (n 17).

³⁸ Orlitzky, 'Corporate Social Performance' (n 35), p 56.

³⁹ See, for example, the commentators referenced above n 16.

⁴⁰ Margolis and Walsh, *People and Profits* (n 33), p 13; see also Allouche and Laroche, 'The Relationship between CSR and CFP' (n 34); Cowe and Hopkins, 'CSR: is there a business case?' (n 34).

⁴¹ Margolis and Walsh, *People and Profits* (n 33), p 8, noted that social performance was measured by drawing on 27 different data sources covering 11 different domains of corporate practice. See also Zadek, 'Doing Good and Doing Well' (n 34); Blowfield and Murray, *Corporate Responsibility* (n 4), p 135.

⁴² Margolis and Walsh, *People and Profits* (n 33).

customer attraction, brand value and risk management.⁴³ The sheer volume of variation makes comparison between case studies and surveys difficult, if not impossible.⁴⁴ Problems go beyond the challenges of measurement. Some question the external validity of many studies, together with insufficient consideration of control variables.⁴⁵ The sampling of business case empirical research has also been questioned, particularly small sample sizes and the use of extreme-cases.⁴⁶

Orlitzky suggests that *environmental* performance seems *negligibly* but nonetheless positively related to business performance.⁴⁷ The most forceful evidence of an environmental business case concerns eco-efficiency measures and environmentally differentiated ('green') products influencing the more intangible, softer aspects of business practice.⁴⁸ However, not only is this relationship very slight in any event, there are a number of reasons for scepticism as to the empirical basis for the environmental business case. First, of course, there is the string of methodological concerns (outlined above). Second, establishing causal connections remains problematic.⁴⁹ It has yet to be demonstrated that positive relationships between CER and CFP are not a matter of reverse causality, where profitable firms are simply more able to afford environmental performance investments.⁵⁰ Third, there is no agreement as to the existence of systemic negative relationships, either that behaving badly is bad for business,⁵¹ or indeed, that behaving responsibly is bad for business.⁵² But this does

⁴³ Simon Zadek, John Sabapathy, Helle Døssing, and Tracey Swift, *Responsibility Competitiveness: Corporate Responsibility Clusters in Action* (AccountAbility/The Copenhagen Centre, 2003).

⁴⁴ Margolis and Walsh, *People and Profits* (n 33).

⁴⁵ See Allouche and Laroche, 'The Relationship between CSR and CFP' (n 34), Margolis and Walsh, *People and Profits* (n 33), p 12.

⁴⁶ Ibid.

⁴⁷ Orlitzky, 'Corporate Social Performance' (n 35), p 14.

⁴⁸ Blowfield and Murray, *Corporate Responsibility* (n 4), p 140. There is evidence to suggest that environmental laggards are less likely than businesses with a developed environmental mindset to attach significant value to these softer aspects of corporate performance, see Dorothy Thornton, Neil A. Gunningham, and Robert Kagan, *Shades of Green: Business, Regulation, and Environment* (Stanford: Stanford University Press, 2003), Ch 5.

⁴⁹ Cowe and Hopkins, 'CSR: is there a business case?' (n 34),

⁵⁰ This is the slack-resources hypothesis. See Dinah A Koehler, 'Capital Markets and Corporate Environmental Performance' in Stefan Schaltegger and Marcus Wagner (eds), *Managing the Business Case of Sustainability: The Integration of Social, Environmental and Economic Performance* (Sheffield: Greenleaf Publishing, 2008); Khaled Elsayed and David Paton, 'The impact of environmental performance on firm performance: static and dynamic panel data evidence' (2005) 16 *Structural Change and Economic Dynamics* 395; Vogel, *The Market for Virtue* (n 17), p 30; Blowfield and Murray, *Corporate Responsibility* (n 4), p 145.

⁵¹ Compare Vogel, *The Market for Virtue* (n 17), p xi; Gunningham *et al*, *Shades of Green* (n 48), p 69; Allouche and Laroche, 'The Relationship between CSR and CFP' (n 34), p 15.

not tell us much. Some suggest the lack of evidence for a negative relationship results from a shortage of studies actively researching this hypothesis.⁵³

Understanding business cases

The search for a generalised and systematic positive relationship between social and financial performance will no doubt continue. However, there is a growing body of scholarship which asserts that this endeavour is by its very nature misguided.⁵⁴ At a basic level, corporate responsibility strategies are no different from other business investments, and one would not expect all investments to consistently generate sizeable returns.⁵⁵ Increasingly, it is recognised that win-wins are conditional upon the company itself, the nature of the industry and other situational concerns.⁵⁶ This might be characterised as a move away from establishing *the* business case for responsibility to understanding the varying and idiosyncratic business *cases* for corporate responsibility. This position acknowledges that there is no ubiquitous financial justification for engaging in CSR strategies and instead, more recent research seeks to unearth those factors which explain the existence of win-win situations.⁵⁷

Corporate waste reduction measures are a classic case of both the existence of a business case for corporate environmental responsibility, as well as its variability. Waste reduction offers numerous environmental benefits. It lessens the reliance on environmentally harmful disposal techniques and reduces the demand for raw

⁵² Joshua D Margolis and James P Walsh, 'Misery Loves Companies: Rethinking Social Initiatives by Business' (2003) 48 Administrative Science Quarterly 268; Margolis and Walsh, *People and Profits* (n 33).

⁵³ Preston and O'Bannon, 'The Corporate Social-Financial Performance Relationship' (n 34); Margolis and Walsh, *People and Profits* (n 33), p 16. See also Vogel, *The Market for Virtue* (n 17), pp 40-44 drawing attention to companies with strong CSR profiles but (at times) poor financial performance, together with a number of 'responsible' companies that have failed to survive (or have been taken over by comparatively irresponsible companies).

⁵⁴ Kurucz *et al*, 'The Business Case for CSR' (n 21); Forest Reinhardt, 'Market Failure and the Environmental Policies of Firms: Economic Rationales for "Beyond Compliance" Behavior' (1999) 3 Journal of Industrial Ecology 9; N Craig Smith, 'Consumers as Drivers of Corporate Social Responsibility' in Crane *et al*, *CSR Handbook* (n 1).

⁵⁵ Vogel, *The Market for Virtue* (n 17), p 33; Forest Reinhardt, 'Environmental Product Differentiation – Implications for Corporate Strategy' (1998) 40 California Management Review 43; Cowe and Hopkins, 'CSR: is there a business case?' (n 34).

⁵⁶ See, for example, Cowe and Hopkins, 'CSR: is there a business case?' (n 34), p 105.

⁵⁷ Smith, 'Consumers as Drivers' (n 54); see also Cowe and Hopkins, 'CSR: is there a business case?' (n 34), p 109 suggesting that '... the question is not does CSR pay, but when does CSR pay?' See also Matthew J Kiernan, 'Social Rating and Corporate Social Responsibility: An Investor's Perspective' in Allouche, *CSR 2* (n 3) arguing in the context of Socially Responsible Investment (SRI) that the CSR/CFP debate is somewhat spurious, given that investment returns depend on the style of investing, the focus and size of the invest companies, the quality of the portfolio construction and the time period in question.

materials, thus limiting the environmental damage associated with sourcing and transporting virgin materials.⁵⁸ Minimising waste thus tends also to reduce carbon emissions and energy and water consumption.⁵⁹ At the same time, resource efficiency measures such as waste reduction are often considered *inherently* good for business; waste disposal is not free, but simply wasting materials is costly in itself.⁶⁰ Estimates vary, but UK businesses could achieve cost savings amounting to billions through waste minimisation.⁶¹ It should be noted, however, that the area waste exemplifies the ways in which a business case for responsible behaviour may partly be a function of law and regulation. As will be seen in Chapter 3, waste deposited in landfill is subject to a weight-based tax escalator, making diversion from landfill more financially attractive than might otherwise be the case. In addition, the extraction of certain raw materials is subject to a levy, which potentially makes the re-use of aggregates less costly than virgin materials.⁶²

Regarding supermarket waste, there would appear to be some scope for the profitable reduction of waste.⁶³ For example, supermarkets have developed sophisticated and efficient systems for stock management, and widely used electronic point of sale systems cut down on food waste through improved records and demand forecasting.⁶⁴ An increasingly high-profile (and reputational) concern for supermarkets is packaging waste. In response, product light weighting strategies, particularly the use of aluminium and glass, has reduced both the quantity (and hence cost) of material used as well as the energy consumed in transport.⁶⁵ A number of supermarkets have made packaging reduction pledges and/or are signatories to relevant ‘voluntary agreements’.⁶⁶ Participation in these schemes is justified by reference to a

⁵⁸ Science and Technology Committee, *Waste Reduction* (2007-8, HL 163-), [3.1].

⁵⁹ *Ibid.*, [3.1].

⁶⁰ *Ibid.*, [6.1].

⁶¹ Oakdene Hollins, *The Further Benefits of Business Resources Efficiency* (Defra, 2011).

⁶² Aggregate is simply a range of materials (sand, gravel, slag) used in construction (particularly drainage and roads). Aggregate materials are the most mined material in the world, and mining of course has negative extensive environmental impacts.

⁶³ Defra, *Report of the Food Industry Sustainability Strategy Champions’ Group on Waste* (Crown Copyright, 2007), p 14. Envirowise helped companies and suppliers identify over £12 million of food efficiency savings, see Tristram Stuart, *Waste: Uncovering the Global Food Scandal* (London: Penguin, 2009), pp 54-5.

⁶⁴ Stuart, *Waste* (n 63), pp 11 and 208.

⁶⁵ Science and Technology Committee, *Waste Reduction* (n 58), [3.7]. Product light weighting involves using less material, or lighter material substitutes.

⁶⁶ The Courtauld Commitments, discussed in Chapter 4.

business case, either in the form of direct cost savings or the perceived reputational gains flowing from participation.⁶⁷

Waste reduction can also be employed in the construction sector with economic benefits. Considering waste at the design stage in particular can save on costs. Plasterboard is a good example. Used extensively in the construction sector, plasterboard is historically associated with large amounts of waste because it tends to come in standard sizes with large wastage created by cut-offs. Plasterboard is also difficult to dispose of, since landfilling gypsum-based substances can produce hydrogen sulphide, which is toxic and odorous. Through early interaction with the supply chain, designers can ensure that standard manufactured components suit a specific design, or vice versa.⁶⁸ There appears to have been progress in this area, with manufacturers' technical guidance facilitating the elimination of site waste through rigorous design and specification processes.⁶⁹ The re-use of construction materials also offers economic and environmental win-wins. Using recycled aggregates, for example, reduces the demand for virgin materials, the environmental damage associated with extraction and the amount of material sent to landfill. Re-use also avoids the financial costs of landfilling aggregate waste and extracting virgin materials whilst mitigating the risks concerning aggregate depletion.⁷⁰

Despite these opportunities, however, research highlights how CSR often fails at the first hurdle of simply identifying business case opportunities. The ability to do so is dependent upon, amongst other things, sufficient technical expertise, information, management motivation and resources. This capability is also hindered by bounded rationality, where a focus on perceived core business functions misses the scope for savings which might be made through environmentally beneficial behaviour.⁷¹ The difficulty in identifying and implementing such strategies is even more challenging if

⁶⁷ Peter Jones, Daphne Comfort, David Hillier, and Ian Eastwood, 'Corporate social responsibility: a case study of the UK's leading food retailers' (2005) 107 *British Food Journal* 423; Science and Technology Committee, *Waste Reduction* (n 58), [7.20].

⁶⁸ Science and Technology Committee, *Waste Reduction* (n 58), [4.6].

⁶⁹ See WRAP, *Ashdown Agreement – Annual Report* (WRAP, 2010).

⁷⁰ Scarcity as a result of increasing depletion, though a concern, is not the most pressing risk. The planning and other regulatory regimes restrict access to domestic reserves, a number of which are within or in close proximity to National Parks. Transport costs are thus expected to rise as material is hauled increasing distances from fewer extraction sites, and the UK is becoming increasingly reliant on foreign imports. See AEA Technology Plc, *Review of the Future Resource Risks Faced by UK Businesses and an Assessment of Future Viability* (Defra, 2010).

⁷¹ Science and Technology Committee, *Waste Reduction* (n 58), [6.3].

the financial rewards accrue only in the longer term.⁷² Failures to engage in resource efficiency are classic examples of this, and in the area of waste reduction bounded rationality remains a problem: ‘the single biggest barrier to waste reduction’ is lack of awareness.⁷³ In addition, prejudices regarding the use of certain recycled materials persist, despite the existence of quality protocols.⁷⁴ Legal intervention can also create perverse incentives, as will be seen in more detail in Chapter 3. For example, in certain circumstances, it is cheaper to landfill than re-use construction waste, notwithstanding the Landfill Tax and aggregates levy.⁷⁵ In addition, the landfill tax is weight-based. This makes it cheaper to landfill lighter materials, which in turn lowers the incentive to recycle them. This operates against business case strategies such as product light weighting, particularly with the use of aluminium, large amounts of which are sent to landfill despite being infinitely recyclable.⁷⁶

These difficulties notwithstanding, clearly there are considerable environmental and financial win-win opportunities. Business case efforts such as resource efficiency ought, therefore, to be actively encouraged, particularly in view of problems associated with bounded rationality. On a more general level, the rhetoric of the business case has also played an important role in placing traditionally ‘non-business’ issues on the corporate agenda – environmental and other societal concerns become (more) legitimate business issues.⁷⁷ To this extent, the business case has some appeal. However, there are deeper reasons, beyond uncertainty as to the empirical evidence and the challenges involved in encouraging win-win investments, for which one might wish to be concerned about the business case claim. It is to some of these deeper objections that I now turn.

4. Deeper objections to the business case for CER

⁷² See, for example, Gunningham, ‘Shaping Corporate Environmental Performance’ (n 2), p 218 suggesting that the ‘single largest impediment’ to CER, even in the presence of a win-win, is probably a focus on short-term profit.

⁷³ Science and Technology Committee, *Waste Reduction* (n 58), [6.3].

⁷⁴ *Ibid.*, [4.24]. This is particularly the case for recycling aggregates.

⁷⁵ *Ibid.*, [4.69].

⁷⁶ *Ibid.*, [4.26].

⁷⁷ On these other societal concerns which receive legitimacy in the corporate sphere by reference to the business case, see above (n 30), (n 31) and (n 32).

Conjuring and associated dangers

The first of these objections is that the rhetoric of the business case, in suggesting a generalised positive relationship between corporate environmental responsibility and CFP, assumes the ready compatibility of economic and environmental concerns. Even if the empirical evidence points to an overall positive relationship, points of conflict between environmental and economic goals do and will continue to exist. For this reason, conjuring imagery is often invoked in critiques of the business case. Doreen McBarnet refers to so-called win-win situations as ‘sleight of hand’, masking the scope for conflict.⁷⁸ For Walley and Whitehead, the business case offers illusory ‘rabbit-out-of-the-hat solutions’.⁷⁹ It is much better that these conflicts, where they exist, are acknowledged – there must be a preference for openness in this regard.⁸⁰ As a general body of literature, business case research does not *necessarily* deny the existence of such trade-offs. However, in taking compatibility as a matter of course, there does remain the potential for tensions between corporate prosperity and environmental goals to be swept under the carpet. And of course, when there *is* a conflict between profits and the environment, where there is no ‘win-win’, there is no guarantee that the environment will come out on top. Indeed, it is far more likely that the environment will lose out, being unable to compete against business imperatives.⁸¹

The concern expressed here is not that environmental and economic concerns can never be reconciled, though as I point out below, I am sympathetic towards critiques of this nature. Rather, my main point of contention is the starting point of ready compatibility, particularly in view of the potential this has to send counterproductive and potentially dangerous messages regarding the scale of effort and intervention required to ensure environmental protection. The rhetoric of the business case gives the impression that behaving responsibly is easy, and that environmental responsibility is readily assimilated within existing business models. In this sense, the starting point of compatibility privileges a business status quo; many identified

⁷⁸ Doreen McBarnet, ‘Human Rights, Corporate Responsibility and the New Accountability’ in Tom Campbell and Seumas Miller (eds), *Human Rights and Moral Responsibilities of Corporate and Public Sector Organisations* (Dordrecht: Kluwer, 2004).

⁷⁹ Noah Walley and Bradley Whitehead, ‘It’s Not Easy Being Green’ (1994) 72 *Harvard Business Review* 46.

⁸⁰ *Ibid.*

⁸¹ Joseph Corbin, ‘Misappropriating citizenship: the limits of corporate social responsibility’ in Boeger *et al*, *Perspectives on Corporate Social Responsibility* (n 14), p 43.

‘business cases’, particularly resource efficiency, tinker only with existing forms of economic activity to make them more environmentally sensitive.⁸² Much broader questions about the fundamentals of a particular industry model (or even its very existence) remain unasked. Similar concerns are mirrored in broader CSR literature—that corporate responsibility initiatives serve primarily the corporate interest (they privilege the business status quo) and simultaneously legitimise and consolidate, rather than challenge, corporate power or damaging but routine business practices.⁸³ There is also the added danger that the business case provides scope for corporations to attach misleading or exaggerated CSR claims to what may be relatively shallow environmental efforts; the business case may permit or encourage ‘greenwash’ activities.⁸⁴

Some would argue that corporations or certain corporate activities are inherently bad for the environment. This is seen in a number of places, including critiques of sustainable development on the basis of environmental limits;⁸⁵ or more radical discourses on the environment which point to the need for widespread, deep, institutional change in order to address the real causes of environmental degradation.⁸⁶ In the context of CER specifically, the business case has an obvious overlap with ecological modernisation.⁸⁷ There tends to be an assumption underpinning ecological modernisation that economic growth and the resolution of environmental problems can (under the right conditions) be reconciled. However, it can also be understood in

⁸² Similar concerns have been levelled against sustainable development (see Andrew Dobson, *Green Political Thought* (Abingdon: Routledge, 2000), pp 62-8). For an argument that sustainable development has been co-opted or hijacked by corporations to promote the business status quo (in particular through CSR-type activities geared towards ‘sustainability’) see Banerjee, ‘CSR’ (n 35), pp 64-7; Stuart L Hart, ‘Beyond Greening: Strategies for a Sustainable World’ (1997) 75 *Harvard Business Review* 6.

⁸³ See, for example, Banerjee, ‘CSR’ (n 35), pp 52-9, who refers to this as the ‘emancipatory rhetoric’ of CSR, where (as is argued here) such rhetoric is misleading or obfuscatory and, ultimately, dangerous. For a different understanding of ‘stakeholder’ rhetoric, see Fairfax, ‘The Rhetoric of Corporate Law’ (n 3). Fairfax uses an Aristotelian conception of rhetoric which, rather than being deceptive or mere double talk, has an inherent ‘truth’ value. This includes seeing rhetoric as ‘expressive’, so that the use of stakeholder language by corporations indicates growing public dissatisfaction with shareholder primacy.

⁸⁴ See, for example, Miriam A Cherry and Judd F Sneirson, ‘Chevron, Greenwashing, and the Myth of “Green Oil Companies”’ (2012) 3 *Washington & Lee Journal of Energy, Climate, and the Environment* 133; Kurt A Strasser, *Myths and Realities of Business Environmentalism: Good Works, Good Business or Greenwash?* (Cheltenham: Edward Elgar, 2011).

⁸⁵ See Dobson, *Green Political Thought* (n 82); Jane Holder and Maria Lee, *Environmental Protection Law and Policy: Text and Materials* (Cambridge: Cambridge University Press, 2007), pp 250-6.

⁸⁶ See, for example, John S. Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford: Oxford University Press, 2005), pp 181-227.

⁸⁷ See, for example, Arthur PJ Mol, David A Sonnenfeld and Gert Spaargaren (eds), *The Ecological Modernisation Reader: Environmental Reform in Theory and Practice* (Abingdon: Routledge, 2009).

(slightly) more radical or transformative ways, with the ‘ecologicalisation’ of the market and the restructuring of relationships between the state, citizens and private enterprise. John Elkington in particular links corporate/environmental win-wins with these developments, arguing they are manifestations of the changing nature of ‘environmentalism’, marked by the growth of ‘green’ consumers and products, the ‘green’ economy and a belief that positive environmental solutions can be brought about through market interactions.⁸⁸ This ‘changed’ perception of environmentalism is, however, a departure from more radical discourses which posit the environment and a liberal, capitalist and globalised economy in direct conflict. Indeed, in the same way I express the business case as involving some form of obfuscatory rhetoric, Hajer argues that ecological modernisation can be a strategy to manage ecological dissent and which *avoids* addressing tensions that other discourses might have introduced’.⁸⁹

In this sense, CSR re-emphasises and increases corporate power, in turn providing businesses with more room to act on the basis of their own economic agenda interests.⁹⁰ Dine and Shields are similarly concerned that CSR acts a ‘deflection device’, diverting attention from substantive questions of corporate accountability.⁹¹ These concerns arguably lend further credence to criticisms of CSR as further embedding or entrenching capitalist social relations and the subjection of aspects of social life (inappropriately) to the dictates of the marketplace.⁹²

Environmental value within the business case

The second of these deeper objections relates to how, in business case CSR, the value of the environment is expressed via the demands of the market. Beyond resource efficiency measures, environmental and economic win-wins exist because

⁸⁸ John Elkington, ‘Towards the Sustainable Corporation: Win-win-win Business Strategies for Sustainable Development’ (1994) 36 California Management Review 901 John Elkington, *Cannibals with Forks: Triple Bottom Line of 21st Century Business* (Oxford: Capstone, 1999).

⁸⁹ Maarten A Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford: Clarendon Press, 1997); Peter Christoff, ‘Ecological modernization, ecological modernities’ (1996) 5 Environmental Politics 476.

⁹⁰ Charlotte Villiers, ‘Corporate law, corporate power and corporate social responsibility’ in Boeger *et al*, *Perspectives on CSR* (n 14), p 88; Jem Bendell, ‘Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement’ (Technology, Business and Society Programme Paper 13, United Nations Research Institute for Social Development, 2004).

⁹¹ Janet Dine and Kirsteen Shields, ‘Corporate social responsibility: do corporations have a responsibility to trade fairly? Can the Fairtrade movement deliver the duty?’ in Boeger *et al*, *Perspectives on CSR* (n 14)

⁹² Gerard Hanlon, ‘Rethinking Corporate Social Responsibility and the Role of the Firm: On the Denial of Politics’ in Crane *et al*, *CSR Handbook* (n 1).

certain consumers or investors value environmentally responsible products, services or investment opportunities, or ENGOs advocate similar demands. In essence, the business case turns corporate environmental responsibility and, by extension, the environment, into a commodity.⁹³ As such, Hanlon argues that an environmental strategy or product is pursued or produced not for the inherent quality it has, but because the market values it enough to justify the investment.⁹⁴ A product or policy's 'exchange value'—what it can be bought or sold for, what profits it will reap—is what counts. Any inherent or 'use value' is practically irrelevant. In a similar fashion, the business case values the environment only for its financial worth, not for any inherent value there may be in environmental protection.⁹⁵ Even more problematically, this assumes that the value of the environment can be expressed in purely monetary or financial terms, even though it is notoriously difficult and indeed, controversial, to do so.⁹⁶ While CSR perhaps represents the opening up of the market to a broader range of values,⁹⁷ it is highly questionable whether the business case can fully appreciate them.⁹⁸

In response, there is often a preference for political or deliberative engagement; such engagement is much more likely than market interactions to reveal true or

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ One might prefer to value environmental protection or seek enhanced corporate environmental responsibility for reasons other than profit. A similar argument has been made in the context of increased gender diversity on corporate boards, where the business case has become the 'established narrative'; arguably, however, the case for diversity is more appropriately encapsulated in the non-profit values of social justice, equality and non-discrimination (see McCann and Wheeler, 'Gender Diversity in the FTSE 100' (n 30), pp 543-4 and 551).

My concern that any inherent value in environmental protection is lost in business case CSR resonates with Tom Campbell's distinction between 'instrumental' and 'intrinsic' CSR. Interestingly, Campbell considers the normative grounding for instrumental (business case) CSR fairly uncontroversial, in stark contrast to what has been argued here, see Tom Campbell, 'The Normative Grounding of Corporate Social Responsibility: A Human Rights Approach' in McBarnet *et al*, *The New Corporate Accountability* (n 2). Contrast this with JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Oxford University Press, 1993), Ch 9, distinguishing between 'profit-sacrificing' and 'non-profit sacrificing' (instrumental/business case) CSR, and seeking primarily to justify the former.

⁹⁶ See Holder and Lee, *Environmental Protection* (n 85), pp 34-40 and compare David Pearce and Edward B Barbier, *Blueprint Series for a Sustainable Economy* (London: Earthscan, 2000), pp 2-8 with Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: The New Press, 2004), p 8.

⁹⁷ Paul R. Portney, 'Corporate Social Responsibility: An Economic and Public Policy Perspective' in Bruce L Hay and others (eds), *Environmental Protection and the Social Responsibility of Firms: Perspectives from Law, Economics, and Business* (Washington DC: Resources for the Future, 2005).

⁹⁸ See also Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London: Allen Lane, 2012) detailing through numerous examples the ability of the market to crowd out nonmarket norms.

otherwise hidden values.⁹⁹ Dobson, for example, describes this as the superiority of ‘ecologically motivated citizens’ over consumers or other ‘economic’ actors in driving more sustainable societies.¹⁰⁰ The business case for CER is susceptible to similar criticism. Relying on the business case to foster CER lends further credibility to the economic expression of environment value whilst, according to some, simultaneously shifting power away from the (ecological or environmental) citizenry.¹⁰¹ In essence, it prefers the market over democratic participation (and by extension, legislative intervention). If the business case fails, or in situations where there are no corporate/environmental win-wins, environmental legislation provides an important, additional layer of protection; and the ecological citizenry potentially has an important role in driving this. However, if too much emphasis is placed on the business case, there is a danger that these important modes of environmental voice and protection will be crowded out.¹⁰² As I suggest in Chapter 4, conceiving of the business case in the context of decentred regulation not only allows us to more adequately deconstruct some of the democratic critiques of CSR, but also provides a framework within which to be more open in our acknowledgement of the scope for this potential for crowding out.

Illustration

Many examples of the business case rely on the various competitive advantages to be gained from environmental product differentiation (‘green’, or rather, ‘greener’ products).¹⁰³ Consumers will pay a premium for an environmentally superior product

⁹⁹ Holder and Lee, *Environmental Protection* (n 85), p 450. The reasons for demanding public participation and deliberation in environmental decision-making are well-rehearsed within environmental law scholarship, in particular that more inclusive participation can yield substantively better outcomes. See Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach’ (2001) 21 *Oxford Journal of Legal Studies* 415.

¹⁰⁰ Andrew Dobson, *Citizenship and the Environment* (Oxford: Oxford University Press, 2003); see also Mark Sagoff, *The Economy of the Earth: Philosophy, Law, and the Environment* (Cambridge: Cambridge University Press, 2007).

¹⁰¹ Corkin, ‘Misappropriating citizenship’ (n 81); Hanlon, ‘Rethinking CSR’ (n 92).

¹⁰² This is a general concern with CSR, see, for example, Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield: Greenleaf Publishing, 2002), Chs 6 and 7, suggesting that CSR type activities (such as ‘self-regulation’) are sometimes adopted in the hope of avoiding (more exacting) governmental regulation, and Banerjee, ‘CSR’ (n 35), pp 62-3, arguing that CSR discourses ‘could have the effect of reducing governmental scrutiny of corporate practices because they promote a particular form of self-governance.’

¹⁰³ Reinhardt, ‘Environmental Product Differentiation’ (n 55); Michael E Porter and Class van der Linde, ‘Green and Competitive: Ending the Stalemate’ (1995) 73 *Harvard Business Review* 120;

and shareholders will prefer to invest in environmentally responsible companies. Concerning consumers and supermarkets, this claim is limited. If CSR plays any role in purchasing patterns, it matters only at the margins; quality and price feature more heavily in consumer preferences.¹⁰⁴ Indeed, marketing strategies seem to reflect this trend. Within stores at least, there is little evidence that food retailers consistently use environmental credentials to promote either products or their own retail brands.¹⁰⁵ In addition, we cannot always rely on consumers (with potential informational asymmetries) to target the most environmentally sensitive issues. For example, over-packaging has been an area where consumers have been particularly vocal, though this is perhaps without realising that packaging may be a very small representation of the overall environmental impact of a product.¹⁰⁶ However, given the inherent economic and environmental trade-off in retail industries, the very nature of a consumer-driven business case is itself logically problematic. Environmental degradation is frequently associated with increasing levels of consumption, yet retail business models are premised entirely on maintaining (or increasing) those levels. Viewed with this in mind, a consumer-driven business case for CER is somewhat oxymoronic, and the claim that consumers can drive CSR through buying patterns downplays the environmental importance of the ‘no-purchase’ option.¹⁰⁷

Household food waste is an excellent example of this. It runs directly against supermarkets’ business model to encourage consumers to buy less.¹⁰⁸ While all the major supermarkets have made voluntary pledges to support food waste reduction,¹⁰⁹ the most prominent ‘CSR’ communication activities as far as consumers are concerned centre around ‘value for money’.¹¹⁰ This is often interpreted, however, as *more* for your money—‘Buy One Get One Free’ (BOGOF) and ‘3-for-2’ offers have been

Michael E Porter and Mark R Kramer, ‘The Competitive Advantage of Corporate Philanthropy’ (2002) 80 *Harvard Business Review* 56.

¹⁰⁴ Science and Technology Committee, *Waste Reduction* (n 58), [5.15]; Smith, ‘Consumers as Drivers’ (n 54).

¹⁰⁵ Peter Jones, Daphne Comfort and David Hillier, ‘Marketing and corporate social responsibility within food stores’ (2007) 109 *British Food Journal* 582, p 590.

¹⁰⁶ Shampoo packaging, for example, tends to account for about three per cent of the product’s total carbon footprint, see Science and Technology Committee, *Waste Reduction* (n 58), [5.7].

¹⁰⁷ Maria Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Oxford: Hart Publishing, 2005), p 211 (and references therein).

¹⁰⁸ Foresight, *The Future of Food and Farming (Final Project Report)* (London: The Government Office for Science, 2011), Annex C7; Jones *et al*, ‘Marketing and CSR within food stores’ (n 105), p 589.

¹⁰⁹ The Courtauld Commitments, discussed in more detail in Chapter 4.

¹¹⁰ Jones *et al*, ‘Marketing and CSR within food stores’ (n 105), p 589.

repeatedly implicated in pushing over-purchasing and, as a result, increasing household food waste arisings.¹¹¹ In addition, food waste *within* the supply chain is profitable, at least for supermarkets. A combination of factors allow for the financially viable and routine over-ordering of stock, in turn driving overproduction levels of between ten and forty per cent.¹¹² Such factors include ensuring customers ‘can buy what they want when they want’;¹¹³ favourable profit margins for wasting food;¹¹⁴ and the use of market power to contractually shift the costs of food waste up the supply chain.¹¹⁵ This is not to lay blame solely on supermarkets. Individuals must take some responsibility for over-purchasing and food waste. However, it is almost trite to acknowledge that altering behaviour towards more sustainable outcomes is extremely challenging.¹¹⁶ By implying easy solutions, the rhetoric of the business case significantly underestimates the challenges in addressing these embedded trade-offs. And as already indicated, such rhetoric hides the inherent conflict between economic and environmental goals in the context of consumption.

¹¹¹ Stuart, *Waste* (n 63), p 69. Since 2008, there does seem to have been a decline in BOGOF promotions in favour of price reduction deals, although 3-for-2 offers persist.

¹¹² Foresight, *Food and Farming* (n 108) suggests 10 per cent. See also Defra, *Report of the Food Industry Sustainability Strategy Champions’ Group on Waste* (Defra, 2007), pp 24-5 and Stuart, *Waste* (n 63), Ch 1 and pp 46 and 109: ‘Over-producing to avoid under-supplying supermarkets is absolutely standard practice in the agricultural sector for [certain] crops...; as one NFU representative told me, planting 140 per cent of actual demand is “not an unstandard example of the industry being inefficiency to avoid shortfall”.’

¹¹³ See Foresight, *Food and Farming* (n 108) and also Stuart, *Waste* (n 63), p 27, who explains how supermarkets ensure products are always in stock for fear of losing dissatisfied customers, as well as the supposed aesthetic appeal of fully stocked shelves. One manager at Asda said this generally meant that they ‘always put more stock on there rather than less’, irrespective of the scope for waste.

¹¹⁴ Stuart, *Waste* (n 63), p 28, uses the example of sandwiches. If the retail price is twice the cost price, it can still be more profitable ‘to overstock than to forgo sales by under-stocking’. Factored in to this of course should be the perceived business risks associated with empty shelves and lost clientele, as well as the cost of disposal. Landfilling a sandwich of approximately 200g costs less than £0.01 whereas a profit may be a hundred times this. Stuart’s calculation was based on a £60 / tonne rate, but the margin will be practically unaffected by landfill tax rises (which with the escalator will reach £80 by 2014).

¹¹⁵ For example, supermarkets are known to make quantity forecast orders which they often reduce when placing the final order. Through contractual take-back clauses, they are then able to shift the costs of this waste to their suppliers, whilst sometimes forbidding suppliers from selling this surplus elsewhere. The insistence that produce is not sold on is common, but tends to be confined to own-brand produce. Nonetheless, this leaves suppliers little choice but to waste surplus, and in order to meet rigid demands on full quantity delivery, producers in turn adopt strategies of overproduction to avoid adverse consequences of failing to supply. In terms of the market power, this is quite extensive. Stuart tells the story of one supplier who, when his crop failed, bought thousands of trays of parsnips and sold them on to a supermarket at a loss of £5,500. If he had failed to meet the target, he would have lost his contract altogether. He now aims to grow 25 per cent more than contracted to supply as a buffer in case of poor harvests, all on the fear of losing future supply contacts. See Stuart, *Waste* (n 63), pp 48 and 109.

¹¹⁶ For example, Tim Jackson, *Motivating Sustainable Consumption – A Review of Evidence on Consumer Behaviour and Behavioural Change* (Sustainable Development Research Network, 2005).

Furthermore, trade-offs exist beyond the economic/environmental. The business case also seems to assume compatibility between environmental, social and corporate prosperity goals. Nonetheless, it is clear these can conflict on many levels. For example, from an environmental perspective, conceiving cheaper food and ‘BOGOF offers’ as an example of corporate responsibility is highly questionable. When factoring in the social perspective, however, the issue increases in complexity. Environmental or ecological goals in themselves can also compete. For example, the pursuit of business case-packaging waste reduction has a number of environmental benefits, in particular by using less material and consuming less energy. However, light-weighting strategies to achieve cost-effective waste reduction has its own environmental costs. The use of lighter substitutes, such as laminates and plastics, are not easily recycled in the UK (if at all) and so tend to end up in landfill.¹¹⁷ It is unclear whether reduced material and energy use is the environmentally preferable outcome.

Finally, it is not obvious that the question of how to resolve these various tensions and trade-offs is appropriately answered by the economic metrics of the business case. As suggested, political engagement is likely preferable. The challenges associated with food waste exhibit the limits of the business case in capturing non-financial, including environmental, values. Misshapen or slightly discoloured produce are routinely wasted because they do not comply with stringent aesthetic standards imposed by supermarkets.¹¹⁸ Wholesome food is wasted for cosmetic blemishes.¹¹⁹ It is unclear whether such attitudes originate with consumers or retailers,¹²⁰ but regardless, discarding perfectly edible food for cosmetic reasons suggests that the

¹¹⁷ Laminates are difficult to recycle and plastics such as polyethylene terephthalate (PET), used as a substitute for infinitely recyclable glass, could only recently be recycled in this country, see Science and Technology Committee, *Waste Reduction* (n 58).

¹¹⁸ The UK Soil Association estimated that supermarkets reject between 25 and 40 per cent of most British-grown crops, although this is partly owing to EU uniformity rules on fruit and vegetables. Nonetheless, supermarkets are known to impose stricter requirements than these rules, notably Waitrose and M&S, see Stuart, *Waste* (n 63), p 108.

¹¹⁹ Foresight, *Food and Farming* (n 108).

¹²⁰ Ibid. and Stuart, *Waste* (n 63), pp 108-16. Cosmetic demands may of course be consumer driven, but consumer preferences are themselves subject to external influence, and it is probably disingenuous to supermarket influence which fosters the expectation of perfect produce. A National Farmers Union advisor referred to this as consumer ‘manipulation’, (Stuart, *Waste* (n 63), p 116) and of course this sort of manipulation of consumer preferences in turn implies a certain inherent weakness to the idea of a ‘consumer-driven’ business case for responsibility. This is an example of the weaknesses of ‘consumer sovereignty’, see especially, N. Craig Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability* (London: Routledge 1989), pp 33-42; Parkinson, *Corporate Power* (n 95), pp 12-5; Charles E. Lindblom, *Politics and Markets: The World’s Political Economic Systems* (New York: Basic Books, 1980), pp 149-55.

marketplace neglects food's inherent value as a source of sustenance. A business case for wasting food indicates the prioritisation of food's exchange value, and the profitable creation of food waste suggests a systemic failure to account for the environmental costs associated with both the production and disposal of food.

As these brief examples illustrate, there is considerable scope for a number of deeply embedded trade-offs, and the effort necessary to move away from these would be considerable. The assumptive starting point of the business case, that environmental and economic (and other) goals are readily compatible, is thus problematic. There are also a number of values at stake in corporate activities. The business case is incapable of capturing the true significance of these, and as such it is questionable whether the business case provides an appropriate channel through which to resolve tensions between these often conflicting goals.

Acknowledging the problems with making generalisations based on case study and similar methodologies, we might tentatively explore whether the deeper objections to the business case are limited to the environmental problem of waste. Waste might for example be considered a 'special case' because waste *reduction* is sometimes presented as being inherently good for business (although as has been seen, this is not strictly true). But the idea of a *prima facie* environmental and economic win-win with respect to resource efficiency applies equally to other areas, such as energy efficiency (especially in the context of climate change).¹²¹ More fundamental similarities between waste and other environmental problems lie in the need for deep, challenging and often only hard-won behaviour change.¹²² A consumer-driven business case for environmental responsibility is oxymoronic in any consumption sector, not just retail grocery, with environmental implications beyond waste management.¹²³ These

¹²¹ In part because of the perceived environmental business case, energy efficiency has featured heavily in climate change mitigation activities, and Government publications frequently invoke similar imperatives when seeking to sell the benefits of moving towards a 'green' or low-carbon economy. See, for example, HM Government, *Enabling the Transition to a Green Economy: Government and business working together* (Crown Copyright, 2011), pp 2 and 4-5. Indeed, the building / construction sector has been singled out as a particularly fruitful area for just such initiatives, with success likely to be hampered by energy efficiency 'behavioural barriers' similar to those outlined above, see Ruth Dawes, 'Building to improve energy efficiency in England and Wales' (2010) 12 Environmental Law Review 266. UK businesses across a range of economic sectors (subject to certain thresholds and exemptions) now participate in the Carbon Reduction Commitment Energy Efficiency Scheme, a mandatory emissions trading scheme made slightly more palatable by estimated savings of around £1 billion from reduced energy bills, see Joanne Hopkins, 'The Carbon Reduction Commitment Energy Efficiency Scheme: overview, rationale and future challenges' (2010) 12 Environmental Law Review 211, p 213.

¹²² See Jackson, *Motivating Sustainable Consumption* (n 116).

¹²³ See Lee, *EU Environmental Law* (n 107).

similarities suggest that conflict between environmental and corporate goals will exist in other areas, making the business case more generally problematic. Similarly, attaching financial value to environmental goods and bads is controversial and difficult, as discussed above, regardless of the type of environmental damage.

5. Conclusion

When viewed in terms of profits, environmental protection is potentially a more credible corporate concern than would otherwise be the case. As such, the business case might be seen as playing an important role in legitimising CER. Furthermore, despite the empirical uncertainty as to a generalised business case, considerable opportunities for environmental and financial win-wins exist. Barriers remain, in particular regarding awareness, but encouraging businesses to seek profitable ways in which to reduce their environmental impact would seem a sensible strategy.

However, there are good reasons to operate extreme caution in the reliance we place on the business case. As a generalised claim, the business case assumes the easy compatibility of environmental protection and corporate goals. As has been argued, rhetoric to this effect is potentially unhelpful. A classic type of win-win, resource efficiency, is an excellent example of the way in which business case strategies may involve only relatively minor changes to the fundamentals of an environmentally degrading but nonetheless deeply embedded business status quo. Broader or deeper structural and institutional changes are difficult to contemplate within the business case. In addition, the instrumental and purely economic value afforded to environmental protection is problematic, not least because it places reliance on market rather than political impetus for enhanced responsibility.

As a sole justification for CER, and as a basis on which to consider possible forms of regulatory intervention, the business case is inadequate. This critique of the business case also exposes the weaknesses of the market voice for the environment within the corporate sphere. As such, in the following two chapters, I consider an alternative justification for CER in the context of contemporary approaches to environmental law, regulation and governance. These contemporary approaches also reflect what I term a very broad ‘regulatory’ voice for the environment.

Chapter 3

Regulatory Voice (I): The Limitations of Governmental Regulation

1. Introduction

In the previous chapter, I introduced the most important justification for CSR—the business case; the claim that behaving responsibly pays. I argued that as a justification for the CSR movement and, by extension, as the basis upon which to build legal intervention, the business case is inadequate. In addition, the business case affords only a market voice for the environment. This, in turn, leaves little room for any inherent value there might be in environmental goods, environmental protection, and CER. The following two chapters posit a qualitatively different justification for CER. I argue that there is normative and pragmatic space for CER within increasingly decentred environmental law, regulation and governance. This space exists as a result of the limitations of governmental regulation, particularly (but not limited to) direct or command and control regulation.¹ The term *governmental* regulation is deliberate, as in Chapter 4, I will invoke an understanding of regulation which includes the activities of non-state, ‘private’ actors.²

¹ Jane Holder and Maria Lee, *Environmental Protection Law and Policy: Text and Materials* (Cambridge: Cambridge University Press, 2007), p 352, prefer ‘direct’ regulation, pointing out that ‘command and control’ is a pejorative or derogatory term.

² I understand ‘state’ and ‘non-state’ as those which have a legal mandate (particularly national governments, but also international organisations founded by treaty as well as the EU) and those which do not, respectively; see Julia Black, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ (2008) 2 *Regulation & Governance* 137, p 139. I acknowledge that, in practice, delineating clearly between the two may be difficult. The concept of ‘government’ itself is problematic, given the increasingly multi-levelled models of decision-making by transnational bodies, such as the OECD, WTO and Council of Europe. The role of the EU in the area of environmental protection, particularly the institution of governance frameworks which imply the ‘involvement of actors other than classically governmental actors’ where no single actor has autonomous power, further blurs the state / non-state division. See, for example, Gráinne de Búrca and Joanne Scott, ‘Introduction: New Governance, Law and Constitutionalism’ in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006), p 2; Joanne Scott, ‘REACH: Combining Harmonisation with Dynamism in the Regulation of Chemicals’ in Joanne Scott (ed), *Environmental Protection: European Law and Governance* (Oxford: Oxford University Press 2009). The concept of ‘national’ government is also equally complex. Rhodes, for example, describes the ‘hollowing of the state’, caused in part by the loss of functions to the European Union (EU), see RAW Rhodes, ‘The Hollowing Out of the State: The Changing Nature of the Public Service in Britain’ (1994) 65 *The Political Quarterly* 138. To add to this layered complexity, the regulatory boundaries of the

This chapter outlines the limitations of governmental regulation, including various forms of complexity; the interdependence and diversity of autonomous social actors; the social construction of knowledge; and the fragmentation of information and control. I use the problem of waste management to illustrate these challenges, as well as to provide a flavour of the range of interventions beyond direct regulation available to governments. The limitations of governmental control are starkly exhibited when attempting to move away from the safe handling and treatment of waste to addressing the creation or causes of waste arisings. This has given rise to a range of regulatory alternatives to command and control. Whilst many of these interventions are to be welcomed, significant limitations to governmental regulation remain, command or others. In considering this mixed approach to the regulation of waste, this chapter also serves the dual purpose of critiquing the strengths and weaknesses of the governmental regulatory voice for the environment, as well as providing some illustration of the sheer policy complexity in this area.

The chapter is structured as follows. In section 2, I provide an overview of the main ideas and concepts used to explain the limitations of command and control. Section 3 illustrates these limitations through the problem of waste management. In section 4, I explain how a range of regulatory techniques, beyond command and control, are often simultaneously invoked as a response to the limitations of direct regulation. Again, the problem of waste management illustrates this.

2. The limitations of command and control

This chapter is concerned with the limitations of governmental regulation, particularly, but not limited to, command and control. Command and control is the ‘classical’ form of regulation with which lawyers are most familiar.³ It typically comprises the

‘state’ are difficult to draw in the context of the environment. This is not only because of the transboundary nature of environmental problems (discussed further below), but the regulatory responses of the EU in this regard, which include regulating activities situated abroad and the enactment of so-called ‘extraterritorial legislation’. See especially the work of Joanne Scott, for example, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62 *American Journal of Comparative Law* (forthcoming, available at SSRN: <http://ssrn.com/abstract=2276433>) and ‘The Multi-Level Governance of Climate Change’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011).

³ Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge: Cambridge University Press, 2007), pp 80-1.

promulgation of a rule or standard, the breach of which results in either civil or criminal sanctions.⁴ Direct regulation is a staple in environmental regulatory strategy, although as will be seen, is increasingly complemented by other techniques. Criticisms of command and control or direct regulation come from a range of quarters, and are well rehearsed in regulatory literature. It is not necessary here to provide a comprehensive overview of these limitations. Rather, I outline the limitations of governmental intervention which in turn provide normative support for CER activities.

At the heart of the limitations of governmental control, particularly direct regulation, are various problems of complexity.⁵ The term is rather catchall, as it underpins many of the challenges that exist in solving environmental (or other societal) problems. Dryzek characterises the complexity of environmental problems in three ways.⁶ First, environmental problems are physically complex. They are ‘interconnected and multidimensional’; arise from the open-ended nature of ecosystems; and are compounded by scientific uncertainty and the limits of knowledge.⁷

Second, environmental problems are subject to socio-political complexity. Rarely is there a ‘right’ or ‘single’ answer to addressing environmental problems, especially as there are no ‘robust, universal, and uncontested understandings of environmental problems and of environmentally ethical behaviour’.⁸ As was discussed briefly in Chapter 2, ecological or environmental goals can in themselves compete, and environmental goals can in turn compete with social and economic imperatives. In the face of such tensions and conflict, regulation and regulatory standard setting is political, value-ridden, and raise questions of distribution.⁹

Third, environmental problems ‘do not present themselves in well defined boxes’.¹⁰ Environmental problems are collective in nature, both in their causes, as well

⁴ Morgan and Yeung, *Law and Regulation* (n 3), pp 80-1.

⁵ Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103, pp 106-7. In the environmental context, see especially John S Dryzek, *Politics of the Earth: Environmental Discourses* (Oxford: Oxford University Press, 2005), pp 8-9.

⁶ Dryzek, *Politics of the Earth* (n 5), pp 8-9 and Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases & Materials* (Oxford: Oxford University Press, 2013), p 24.

⁷ Dryzek, *Politics of the Earth* (n 5), pp 8-9 and Fisher *et al*, *Environmental Law* (n 6), pp 24 and 32-7.

⁸ Fisher *et al*, *Environmental law* (n 6), p 22.

⁹ On the conflict between regulatory goals, see for example Tony Prosser, *The Regulatory Enterprise* (Oxford: Oxford University Press, 2010), who exposes the tensions which riddle regulatory decision-making. See also Fisher *et al*, *Environmental Law* (n 6), p 22.

¹⁰ Fisher *et al*, *Environmental Law* (n 6), p 22 quoting Dryzek, *Politics of the Earth* (n 5), p 8.

as in their solutions.¹¹ In addition, environmental problems cross boundaries, most notably geographical / state lines, but also between values.¹² Environmental problems also cut across disciplinary boundaries, including sub-disciplines within law.¹³ As will be seen in Chapter 5, there is an uncertain and controversial relationship between environmental law and company law and corporate governance.

Complexity in the range of societal actors also undermines the effectiveness of regulation. The regulated community is incredibly diverse. However, command and control can involve uniform or fixed standards imposed universally on the full spectrum of regulated actors.¹⁴ This is potentially inefficient, in the sense that it requires the same level of abatement regardless of respective costs.¹⁵ In addition, imposing a fixed standard provides little incentive to innovate and reduce pollution beyond this, or to go ‘beyond’ compliance.¹⁶ More broadly than this, it is problematic to assume that the same regulatory strategy (command and control or otherwise) can be applied with equal effectiveness to a spectrum of differing firms and industry sectors.¹⁷ Variance compounds complexity. Firms differ in size and economic significance, culture or management style, and the challenges from both the environmental and business perspective differ across industrial sectors. As a result, a ‘one size fits all’ is unlikely to be appropriate or successful, both in the application and enforcement of command and control itself, as well as in the use of a *range* of legal tools in place of or in tandem with direct regulation.¹⁸

¹¹ Ibid.

¹² See Fisher *et al*, *Environmental Law* (n 6), p 29, referencing Bruno Latour, *We Have Never Been Modern* (Catherine Porter tr, Cambridge, MA: Harvard University Press, 1993).

¹³ There are countless possible examples, but it is arguable that rarely will an environmental problem touch only upon ‘environmental law’. See, for example, Elizabeth Fisher, Bettina Lange, Eloise Scotford and Cinnamon Carlarne, ‘Maturity and Methodology: Starting a Debate about Environmental Law Scholarship’ (2009) 21 *Journal of Environmental Law* 213, p 230 referencing Maria Lee, *EU Regulation of GMOs: Law and Decision Making for a New Technology* (Cheltenham: Edward Elgar, 2009), Ch 5.

¹⁴ This is not always the case, however, as will be seen with regard to the permitting and registration regimes for waste treatment and transport, discussed below. It is thus important to be alert to the caricatures of command and control; see Holder and Lee, *Environmental Protection* (n 1), p 352 and Black, ‘Decentring Regulation’ (n 5), p105.

¹⁵ See Holder and Lee, *Environmental Protection* (n 1), p 421; Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Hart Publishing, 2004). See also Black, ‘Decentring Regulation’ (n 5), p 106, describing the use of inappropriate and unsophisticated regulatory tools as ‘instrument failure’.

¹⁶ Ogus, *Regulation* (n 15); Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield: Greenleaf Publishing, 2002).

¹⁷ Gunningham and Sinclair, *Leaders and Laggards* (n 16).

¹⁸ Neil Gunningham and Darren Sinclair, ‘Regulatory Pluralism: Designing Policy Mixes for Environmental Protection’ (1999) 21 *Law & Policy* 49; Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992); Neil

The effectiveness of governmental regulation is also limited by the autonomy of actors.¹⁹ Societal actors develop in their own way, by reference to their own sets of norms, even in the absence of legal intervention.²⁰ The result is that law or regulation cannot take the behaviour of those regulated entities as constant or predictable.²¹ In addition, compliance with regulation itself depends upon the attitudes of those subject to regulation, such that the autonomy of social actors has the potential to render external regulation ineffectual.²² Systems theory provides insight here, where autonomous self-referential social subsystems, with their own internal (i.e. self-referential) norms and codes, restricts the influence one might have on the other.²³ Environmental imperatives, for example, are ‘filtered, adapted and refracted’ when considered by the business community; ‘particular norms are not perceived in one sphere as they are in the other.’²⁴

Direct regulation can also be costly; imposing administrative and compliance costs on industry as well as regulators. Regulators’ costs also include what Black refers to as the problem of implementation found in monitoring and enforcement.²⁵ Daintith also points to the costs arising out of uncertainty, not least in terms of information.²⁶ First, all forms of behaviour change need some form of determination as to ‘how’ the regulated community ought to behave, in turn implying certain costs at the point of setting standards and targets.²⁷ Not only is standard setting often complex and sector-specific, but the desired regulatory outcome is not always easy to discern

Gunningham and Peter Grabosky with Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Oxford University Press, 1998).

¹⁹ Black, ‘Decentring Regulation’ (n 5), pp 108-9.

²⁰ Ibid.

²¹ Ibid. There is overlap here with autopoiesis and Teubner’s regulatory trilemma, see Gunther Teubner, *Law as an Autopoietic System* (Oxford: Wiley-Blackwell, 1993).

²² Black, ‘Decentring Regulation’ (n 5), pp 108-9. See also Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Regulatory Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar, 2011). Attitudes to environmental compliance are considered in more detail in Chapter 6.

²³ I consider systems theory in more detail in Chapter 7. In general, see Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law and Society Review* 239; Gunther Teubner, ‘Juridification: Concepts, Aspects, Limits, Solutions’ in Gunther Teubner (ed), *Juridification of Social Spheres - A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare* (Berlin: Walter De Gruyter, 1987).

²⁴ Gunther Teubner, ‘Juridification – Concepts, Aspects, Limits, Solutions’ in Robert Baldwin and others (eds), *A Reader on Regulation* (Oxford: Oxford University Press, 1998), p 407 and 426-7.

²⁵ Black, ‘Decentring Regulation’ (n 5), p 106.

²⁶ Terrence C Daintith, ‘The Techniques of Government’ in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford: Clarendon Press, 1994). See also Black, ‘Decentring Regulation’ (n 5), p 106.

²⁷ Daintith, ‘The Techniques of Government’ (n 26).

(and there is unlikely to be a single ‘right’ answer, as mentioned above). Second, information is needed on the current level of behaviour.²⁸ Again, this is not always easy to discern. Third, regulators also require information as to the appropriate level or the sanction or incentive necessary in order to bring behaviour into compliance.²⁹ Historically, fines for breaches of environmental law have been relatively low, though this may be in part a problem of perception—environmental regulatory offences are not ‘real’ crimes³⁰—rather than a perceived business-regulatory informational asymmetry.

There are additional information asymmetries. Regulators do not necessarily have sufficient knowledge, compared with the capabilities of industry, to design appropriate solutions.³¹ Indeed, the regulated community is arguably in a better position (regardless of the incentives to do so) to design out environmental impacts than regulators, on the basis of both their proprietary and commercial knowledge. These informational and knowledge asymmetries are not necessarily one-sided; in view of the many aspects of complexity already alluded to, it is unlikely that ‘... any one actor has all the necessary information to solve social problems’.³² Furthermore, information and knowledge are ‘socially constructed’, so that the meaning of concepts, most notably ‘compliance’, are themselves contested.³³ ‘Creative compliance’ illustrates the problems associated with this. Creative compliance often involves the construction of highly artificial transactions or corporate structures which, while being perfectly legal (‘compliant’), find their way around regulatory obligations; compliance with the letter but not the ‘spirit’ of law.³⁴ A less extreme example of this involves

²⁸ Ibid.

²⁹ Ibid. See also Anthony Ogus and Carolyn Abbot, ‘Sanctions for Pollution: Do We Have The Right Regime?’ (2002) 14 *Journal of Environmental Law* 283; Robert Cooter, ‘Prices and Sanctions’ (1984) 84 *Columbia Law Review* 1523; Morgan and Yeung, *Law and Regulation* (n 3), p 117.

³⁰ Martha Grekos, ‘Environmental Fines – All Small Change?’ [2004] *Journal of Planning Law* 1330.

³¹ See Black, ‘Decentring Regulation’ (n 5), p 106, describing this as ‘information failure’.

³² Black, ‘Decentring Regulation’ (n 5), p 107.

³³ Black, ‘Decentring Regulation’ (n 5), p 107. See also Bettina Lange, ‘Compliance Construction in the Context of Environmental Regulation’ (1999) 8 *Social & Legal Studies* 549; arguing that there is a difference between the ‘strict’ rules on the books. This will be discussed in more detail in Chapter 4.

³⁴ See Doreen McBarnet and Chris Whelan, *Creative Accounting and the Cross-Eyed Javelin Thrower* (Chichester: John Wiley & Sons, 1999); Doreen McBarnet and Chris Whelan, ‘Creative Compliance and the Defeat of Legal Control: The Magic of the Orphan Subsidiary’ in Keith Hawkins (ed), *The Human Face of the Law* (Oxford: Oxford University Press, 1997); Doreen McBarnet, ‘When compliance is not the solution but the problem: from changes in law to changes in attitude’ in Valerie Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Dartmouth: Ashgate, 2003); Doreen McBarnet, ‘Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability’ in Doreen McBarnet, Aurora Voiculescu, and Tom Campbell (eds), *The*

regulatory bargaining, where the meaning of compliance may be renegotiated,³⁵ particularly in the context of compliance-based rather than deterrence-based approaches to enforcement.³⁶ This all has implications for the command and control implementation gap mentioned above. Perhaps more difficult and intractable from a behaviour change perspective is McBarnet's research on white collar crime, which suggests that creative compliance derives from a pervasive *attitude* to law as 'material to be worked on'.³⁷ As long as this attitude persists, so will creative compliance. The attitude (or autonomy) of social actors has the potential to thus render the command ineffectual.

Power and control is similarly fragmented.³⁸ A variety of social actors have the ability to exert pressure and induce behaviour change, not just governments. The fragmentation across a range of actors of both knowledge (above) and control makes effective regulation by a single actor impossible. This in turn imposes constraints on what government (especially through command and control), alone, can achieve. As such, interactions and interdependencies between social actors are not only inevitable, but when seeking to change behaviour, they are necessary. Both society and government have 'problems (needs) and solutions (capacities)', and each should be seen as being 'mutually dependent on each other for their resolution and use'.³⁹ Indeed, fragmentation implies not only the limits of command and control, but arguably governments in general.

3. Direct waste regulation

Waste poses significant challenges, environmentally and economically. In 2008, households, commercial and industrial businesses, together with the construction

New Corporate Accountability: Corporate Social Responsibility and the Law (Cambridge: Cambridge University Press, 2009).

³⁵ Neil Gunningham, 'Negotiated Non-Compliance: A Case Study of Regulatory Failure' (1987) 9 *Law & Policy* 69; see also Lange, 'Compliance Construction' (n 33).

³⁶ This will be discussed further in Chapter 4.

³⁷ See above (n 34).

³⁸ Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] *Public Law* 329.

³⁹ Black, 'Decentring Regulation' (n 5), p 110.

sector, generated 165.1 million tonnes of waste in England.⁴⁰ Almost half of this is from construction, demolition and excavation (CD&E) waste.⁴¹ In 2010, a total of 23.4 million tonnes of household was generated, of which 40.3 per cent was recycled, re-used or composted (an increase from 39.7 per cent on the previous year).⁴² Whilst recycling rates are increasing, historically, most waste in the UK was disposed of via landfill (almost 80 per cent of municipal waste), with low levels of recovery and recycling.⁴³ As will be seen, obligations pursuant to European Union (EU) Law mean the UK must continue to reduce its reliance on landfill, and despite improving levels of recycling, it seems likely that these obligations will be met primarily through an increase in incineration (with energy recovery).⁴⁴

In this section, I am concerned primarily with the limitations of direct regulation. Command and control is used extensively in the area of waste. It is imposed on a number of actors, including the UK as a Member State of the European Union, local authorities in the form of statutory obligations, as well as a range of public and private actors who produce, hold, transport, broker and treat waste. Whilst direct regulation is an appropriate response to some of the environmental impacts of activities which deal with waste *after* it has been produced, the limitations of command and control are starker when addressing the causes of waste and seeking to move up the ‘waste hierarchy’. Here, the criticisms of command and control as to complexity, autonomy, fragmentation and interdependence are played out extensively. The overview of direct waste regulation here is by no means comprehensive.⁴⁵ Rather, it aims to illustrate some of the general criticisms of command and control outlined above, as well as provide a flavour of the nature of direct waste regulation.

Supra-national command and control

⁴⁰ See Defra, *Government Review of Waste Policy in England 2011* (PB 13540, Crown Copyright 2011), p 17 and <<https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs/series/waste-and-recycling-statistics#statistical-data-sets>>. These are the most recent statistics available. Waste data is compiled from a number of sources (mostly for particular or discrete policy measures) and over differing periods. As such, data may not always be strictly comparable without comprehensive central analysis. For the UK, this figure was 288 million tonnes, see Stuart Bell, Donald McGillivray and Ole W Pedersen, *Environmental law* (Oxford: Oxford University Press, 2013), p 669.

⁴¹ CD&E waste accounted for 81.4 million tonnes of waste generated in 2008, Defra, *Waste Review* (n 40), p 17.

⁴² Defra, *Waste Review* (n 40), p 17.

⁴³ In the early 1980s, the recycling rate for household waste was less than 1%; 12% by 2001’ 26% by 2005-6’ and 40% by 2010-11. See Bell *et al*, *Environmental Law* (n 40), p 699,

⁴⁴ Bell *et al*, *Environmental Law* (n 40), p 669.

⁴⁵ *Ibid.*, Ch 18.

Much of the waste regulation in place at the national level is pursuant to EU Law. In dictating specific measures to Member States, this is a form of ‘supra-national’ command and control.⁴⁶ There are two main aims to regulation in this area. First, the safe handling and treatment of waste. Second, the reduction of waste arisings. These two broad goals are exhibited in the central apparatus of waste policy, the waste hierarchy.⁴⁷ At the top of the hierarchy (the most preferred waste management option) is prevention, followed by preparing for re-use, recycling, other recovery operations (for example, energy recovery) and finally, disposal.⁴⁸ Prevention is primarily concerned with addressing the causes of waste, or preventing creation of waste at source.⁴⁹ However, prevention also involves avoiding the negative environmental and human health impacts associated with waste treatment.⁵⁰ It is of course preferable to prevent the generation of waste arisings even if simply to reduce reliance on recovery and disposal options, which have their own environmental and economic costs. Landfill, for example, releases methane (a more potent climate change gas than carbon dioxide); creates local nuisances; and can cause water and soil contamination.⁵¹ But beyond this, the mere presence of waste indicates a failure to use resources (materials and energy) effectively, as discussed in the previous chapter.

⁴⁶ Richard Macrory, ‘Regulating in a Risky Environment’ (2001) 54 Current Legal Problems 619.

⁴⁷ Directive 2008/98/EC on waste, otherwise known as the waste framework directive (WFD), Art 4 and the Waste (England and Wales) Regulations 2011/988, reg 12. Member States are required to apply and act in accordance with the waste hierarchy, subject to considerations of technical and economic viability, and always against a backdrop of delivering ‘the best overall environmental outcome’, WFD, Art 4(2).

⁴⁸ Ibid. ‘Re-use’ is concerned with re-using materials and products for the same purpose, and this can be prepared for by, for example, appropriate cleaning, WFD, Art 3(16).

Recycling is ‘any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It includes the reprocessing of organic material but does not include energy recovery...’, WFD, Art 3(17). This should be read with the definition of ‘recovery’ as ‘any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy’, WFD, Art 3(15). Annex II set out a non-exhaustive list of recovery operations. ‘Energy recovery’ though specifically mentioned in the waste hierarchy as a ‘non-recycling’ aspect of recovery, is not defined. However, it is included within WFD, Annex II, and the use of waste as a fuel or other means to generate energy must conform to certain efficiency standards, WFD, Annex II R1(*). Disposal is ‘any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances from energy’, WFD Art 3(19). Recovery operations must have as their *principal result* waste serving a useful purpose by replacing other materials or the preparation thereof. A non-exhaustive list of disposal operations is provided in WFD, Annex I, including landfill and incineration.

⁴⁹ For the full definition see WFD, Art 3(12) and Waste Regulations 2011, reg 4(3).

⁵⁰ WFD, Art 3(12).

⁵¹ Holder and Lee, *Environmental Protection* (n 1), p 451.

EU Law also requires much of the command and control regulation (offences, registration requirements and permitting regimes) discussed below.⁵² In addition to this, the EU Landfill Directive sets limits on the amount of biodegradable municipal waste (BMW) Member States may send to landfill.⁵³ EU Law also prohibits landfilling certain materials, including for example explosives and batteries.⁵⁴ Member States are also required to increase recovery and recycling rates for particular materials pursuant to certain quantitative targets. This includes quantitative, weight-based recycling and recovery targets for household waste (at least a 50% increase in paper, metal, plastics and glass by 2020) and for non-hazardous construction and demolition (C&D) waste (a minimum increase of 70% by 2020).⁵⁵ As will be seen further, below, EU Law also imposes recycling and recovery targets as part of a range of Extended Producer Responsibility (EPR) regimes, which apply to specific waste streams (including packaging, electrical equipment and vehicles).⁵⁶ Finally, EU law requires the separate collection of various materials in order to support recycling,⁵⁷ which in turn translates into command-like statutory duties on local authorities.⁵⁸

Safe waste management – permitting, registration, the duty of care and waste offences

⁵² See, for example, WFD, Arts 15 and 23-7.

⁵³ The Landfill Directive 1999/31/EC, Art 2 defines municipal waste as ‘waste from households, as well as other waste which, because of its nature or composition, is similar to waste from households’ and ‘biodegradable waste’ as ‘any waste that is capable of undergoing anaerobic decomposition (AD), such as food and garden waste, and paper and paperboard’. These limits are 75% of the total amount of biodegradable municipal waste produced in 1995 by 2006; 50% by 2009; and 35% by 2016 (Landfill Directive, Art 5). In the UK, the deadlines for these targets are 2010, 2013 and 2020, respectively, to reflect its historic reliance on landfill.

⁵⁴ Landfill Directive (n 53) and Batteries Directive 2006/66/EC.

⁵⁵ While household targets concern the re-use and recycling of waste materials, meeting the C&D target may in addition include other, non-recycling, recovery operations. However, these targets are qualified by the requirement for Member States to introduce measures ‘designed to achieve’ these aims. These targets are complemented by the rather ‘ambiguous’ obligation to take ‘the necessary measures to ensure’ that waste undergoes recovery operations in accordance with the waste hierarchy, accompanied ‘where necessary’ by separate collection of waste, (by 2015 for paper, metal plastic and glass), provided it is technically, economically and practicable to do so. See WFD, Arts 10-11; Eloise Scotford, ‘The new Waste Directive: trying to do it all...an early assessment’ (2009) 11 Environmental Law Review 75; and the Waste (England and Wales) Regulations 2011/988, regs 13-14.

⁵⁶ Directive 2012/19/EU on waste electrical and electronic equipment (WEEE); Directive 2000/53/EC on end of life vehicles (ELVs).

⁵⁷ See WFD, Art 10-11.

⁵⁸ Waste Collection Authorities (WCAs) (district councils and London boroughs) play the primary role. For example, they are under statutory duties to provide kerbside collection of recyclable materials, including (from 2015) separate collection for waste paper, metal, plastic and glass, see EPA 1990, s 45; Household Waste Recycling Act 2003; the Waste (England and Wales) Regulations 2011, (‘Waste Regulations’), regs 13-15, 2011).

Direct waste regulation in England and Wales includes a suite of registration and permitting regimes, underpinned by a number of criminal prohibitions. The nature of regulation varies in relation to the relative risks associated with a particular activity, or in respect of different producers or types of waste.⁵⁹ This layering provides a notorious complexity to waste law, compounded by a dependence, typical of many areas of environmental law, on technical operational requirements.⁶⁰

A general prohibition on the unauthorised or harmful deposit, treatment or disposal of waste underpins various positive regulatory obligations, together with a broad offence of ‘dangerous’ waste management.⁶¹ It is also an offence to actually, or knowingly, cause or permit, waste to be disposed of or submitted to activities operating without an environmental permit.⁶² In addition to this, the riskiest waste treatment activities, including waste disposal and recovery operations, come within an environmental permitting regime.⁶³ The Environment Agency (EA), or sometimes a local authority, determines these permit applications; sets conditions; and carries out associated enforcement in accordance with the main principles of the Waste Framework Directive (in particular the requirement to ensure that waste management is carried out in a manner which does not harm human health or endanger the environment).⁶⁴ Additional technical requirements apply pursuant to specific EU Directives on landfill and waste incineration, and for specific types of waste.⁶⁵ The use of waste exemptions, however, reduces certain regulatory burdens for lower risk waste operations, by requiring registration instead of a full permit application.⁶⁶ As

⁵⁹ Hazardous waste, for example, is subject to obligations *in addition* to those which attach to waste, see the Hazardous Waste (England and Wales) Regulations 2005/894. This is because hazardous waste is still ‘waste’, but with additional objective ‘hazardous properties’, i.e. it is explosive or toxic. The Regulations require the separation of hazardous waste; prohibit mixing different (complex) categories of hazardous waste; and impose obligations of notification, consignment and record-keeping to ensure the traceability of hazardous waste.

⁶⁰ Stephen Tromans, ‘EC Waste Law—A Complete Mess?’ (2001) 13 *Journal of Environmental Law* 133. These technical operation requirements are seen in the standards for waste disposal and recovery, see the Environmental Permitting (England and Wales) Regulations 2010/675 (as amended) (‘EPR 2010’).

⁶¹ EPA 1990, s 33. Offences are accompanied by certain clean-up powers held by the EA and Waste Collection Authorities (WCAs), see EPA 1990, ss 33 and 59.

⁶² *Ibid.*

⁶³ EPR 2010, regs 2, 8 and 12.

⁶⁴ EPR 2010, regs 32, 36-44, and WFD, Art 13.

⁶⁵ EPR 2010, schs 10-13 and 19; see also, for example, the Landfill Directive 1999/31/EC; Directive 2010/75/EU Industrial Emissions (Integrated Pollution Prevention Control); Directive 2006/66/EC on batteries.

⁶⁶ For example, the re-use or recovery of some construction waste is exempted, subject to certain volume and time thresholds, with such an exemption being a partial response to problems expressed by

with most permitting regimes, the Regulations set out a number of offences, including operating a regulated facility without a permit or for breach of the conditions thereof.⁶⁷

It is an offence to carry or transport waste on a professional basis unless registered with the EA.⁶⁸ The registration requirement is essentially a consent system, as the EA can refuse registration if it is considered ‘undesirable’ that the applicant be authorised to transport waste.⁶⁹ Similarly, waste brokers or dealers must be registered with the EA, with associated offences for a failure to do so.⁷⁰ In addition to permitting and registration obligations, the waste duty of care imposes positive obligations on all of those who deal with waste to handle it safely.⁷¹ Breach of the duty of care is a criminal offence.⁷² Complying with certain aspects of the duty can be achieved through quite simple means, for example by ensuring proper storage and security measures.⁷³ However, the duty also includes obligations when transferring waste to other parties, and these duties are more exacting. In addition to documenting waste transfers through proper record keeping, waste producers and holders must take reasonable steps to ensure that waste leaving their possession will be managed safely, and that they transfer waste only to authorised persons.⁷⁴ Thus, in order to comply with one’s own duty, reasonable steps must be taken to ensure safe handling and treatment further down the waste chain, which introduces an element of self-policing.⁷⁵ Any establishment subject to the duty of care must take all reasonable steps to comply

the construction industry that waste regulation hinders the re-use of certain materials (see further, below). See EPR 2010, regs 2, 5 and 8 together with schs 2-3. This is an example of flexibility in regulating waste, so that lower-risk activities are dealt with in a less intrusive fashion, see Bell *et al*, *Environmental Law* (n 40), p 672.

⁶⁷ For example, EPR 2010, regs 12(1) and 38.

⁶⁸ The Control of Pollution (Amendment) Act 1989, s 1.

⁶⁹ The Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991/1624, reg 5 and the 1989 Act, s 3(6).

⁷⁰ Waste Regulations 2011, reg 25. This is also a consent system, subject to the broker or dealer being considered desirable by the EA, see reg 29.

⁷¹ EPA 1990, s 34 including any person who produces, imports, carries, keeps, treats or disposes of waste, or as a broker who has control of such waste. The waste duty of care does not apply to occupiers of domestic properties in respect of household waste, who are subject to a more modest duty of care, see EPA 1990, ss 34(2) and (2A).

⁷² EPA 1990, s 34A. The duty of care is broken irrespective of whether harm is caused.

⁷³ *Waste Management Duty of Care Code and Practice* (issued by the Secretary of State for the Environment *et al* pursuant to EPA 1990, ss 34(7) and (8)).

⁷⁴ EPA 1990, ss 34(3) and (4).

⁷⁵ Bell *et al*, *Environmental Law* (n 40), p 698, *Environment Agency v Short* [1998] Env LR 300; *Waste Management Duty of Care Code and Practice* (n 73).

with the waste hierarchy,⁷⁶ although of course this very broad duty poses obvious challenges of enforcement.

Limitations

This suite of direct regulation—offences, permitting and registration requirements, together with a positive duty of care—has been instrumental in improving the environmental outcomes associated with waste treatment processes. However, challenges remain, and these echo and exemplify the critiques of command and control outlined above. Enforcement is problematic, especially in controlling fly tipping and other unpermitted waste activities;⁷⁷ what Black referred to as the ‘implementation gap’.⁷⁸ This is particularly the case with construction contractors, the large volume of which poses challenges for enforcing the waste carrier registration regime.

The definition of waste is itself challenging, exemplifying that knowledge is socially constructed. Waste can have both negative value or stigma connotations, as well as a positive financial value (one person’s waste may be another person’s ‘treasure’).⁷⁹ In addition, the nature of the environmental risk posed by waste is primarily the *potential* for pollution. This is a function of the ‘subjective’ attitude of a holder to a material or object, rather than any particular physical or ‘objective’ qualities which the object has.⁸⁰ When the holder no longer has any use for the material, nor perceives any financial value in it, the self-interest to handle an item with care is removed. As such, an inherent probability arises that such items will be dumped, in turn causing pollution. In view of this, the objective properties of a material are, strictly speaking, irrelevant to the question of whether something is ‘waste’. The definition of waste is thus primarily with the subjective intentions of the holder: waste is ‘*any substance or object which the holder discards or intends or is required to discard*’.⁸¹

⁷⁶ Waste Regulations 2011, reg 12.

⁷⁷ Defra, *Waste Review* (n 40), pp 36-40.

⁷⁸ Black, ‘Decentring Regulation’ (n 5), p 106.

⁷⁹ See Eloise Scotford, ‘Trash or Treasure: Policy Tensions in EC Waste Regulation’ (2007) 19 *Journal of Environmental Law* 367.

⁸⁰ Ilona Cheyne, ‘The Definition Of Waste In EC Law’ (2002) 14 *Journal of Environmental Law* 61. Hazardous waste is an exception to this, where objective properties are central to whether waste is ‘hazardous’ or not, see (n z), above.

⁸¹ WFD, Art 3(1) (emphasis added).

However, the legal definition of waste has had unintended (negative) consequences for attempts to move up the waste hierarchy. This is an example of causal complexity. The definition of ‘waste’ determines which activities should (and should not) be subject to permitting obligations for waste treatment. In view of the overarching aim to prevent harm to the environment and human health, the Courts have tended to adopt a ‘broad’, purposively drawn definition of waste to ensure a wide reach of permitting and other requirements.⁸² The flipside is that this subjects certain beneficial recycling and recovery activities to the costly regulatory burdens associated with ‘waste’.⁸³ These regulatory burdens can then act as a disincentive to such activities. In this sense, the broad goal of ensuring safe waste disposal jars with the policy imperatives of moving up the waste hierarchy.⁸⁴ The construction industry in particular considers the wide definition of waste a barrier to sustainable waste and resource management.⁸⁵

Similar problems are seen elsewhere in the context of central, governmental control, for example, the command and control aspects of the waste Landfill Allowance Trading Scheme (LATS), discussed further below. The limits imposed on the amount of BMW that local authorities were permitted to landfill under this scheme were perceived to be a barrier to the collection of additional commercial waste by local authorities. They claimed to be keen to provide this service on a more routine basis, but for a fear of incurring financial penalties by breaching the limits imposed under the LATS.⁸⁶ Most worryingly in environmental terms, this created particular problems for the provision of recycling services to SMEs, who are not well served by the private sector.⁸⁷ Command and control of local authorities in this case had (unpredictably) made it more difficult for SMEs to deal with their waste responsibly. Complexities of

⁸² Scotford, ‘The New Waste Directive’ (n 55). For an example of the broad approach taken to the definition of waste, see Case C-9/00 *Palin Granit Oy* [2002] Env LR 35.

⁸³ Scotford, ‘The New Waste Directive’ (n 55).

⁸⁴ *Ibid.*

⁸⁵ See Science and Technology Committee, *Waste Reduction* (2007-08, HL 163-I), [4.36].

⁸⁶ Environment, Food and Rural Affairs Committee, *Waste Strategy for England 2007: Government Response to the Committee’s Third Report of Session 2009-10* (2009-10, HC 510), pp 10-11; Environment, Food and Rural Affairs Committee, *Waste Strategy for England 2007* (2009-10, HC 230-I), [64]. WCAs are obliged to collect commercial waste, where requested to do so, though they may recover a reasonable charge for the collection and any disposal costs passed on by the WDA (EPA 1990, s 45).

⁸⁷ Defra, *Consultation on meeting EU Landfill Diversion Targets* (Crown Copyright, 2010), pp 18-25; Science and Technology Committee, *Waste Reduction* (n 85), [4.28].

this nature make it much harder for regulation, particularly rigid direct regulation, to yield predictable and effective outcomes.

Indeed, it is moving up the waste hierarchy—away from waste management to waste reduction—that most starkly illustrates the limitations of command and control. The creation of waste involves a large chain of actors, to the extent that the causes of environmental problem are collective. It is not only the final consumer or end-user implicated in the generation of waste arisings, but producers further up the chain. As a result, the knowledge and control necessary to address the creation of waste is fragmented. For example, designers and manufacturers, by virtue of their knowledge, proprietary information and expertise, are better placed than state regulators to influence the ecological footprint of a product. But at the same time, it is state regulators (local authorities) who in turn control the extent to which a product collected from households is recyclable in any given area.

The nature of actors involved in the generation of waste is also incredibly diverse, including both individuals / households, as well as companies of varying size and influence operating in diverse industrial activities. Additionally, individual consumers and companies often generate waste as a result of deeply ingrained (potentially subconscious) behavioural habits.⁸⁸ It seems unlikely that the same governmental strategy could be successfully or indeed appropriately applied to all these types of waste generators. As already suggested, this large body of actors results in the fragmentation of information and control, in turn implying the necessity of their mutual interaction and co-operation in fully addressing the problem of waste.

The autonomy of social actors has also impeded governmental waste regulation, exhibited in particular by the Landfill Tax. As will be discussed below, on an orthodox understanding the tax is an ‘economic instrument’. There are, however, ‘command’ aspects to any tax, including the requirement to pay and criminal offences for evasion (or non-compliance). The Tax puts a price on landfill disposal, in the hope

⁸⁸ See, for example, Tim Jackson, *Motivating Sustainable Consumption – A Review of Evidence on Consumer Behaviour and Behavioural Change* (Sustainable Development Research Network, 2005) on the challenges of sustainable consumption. See Thaler and Sunstein on various decision-making flaws which undermine ‘rational’ decision-making (Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (New Haven: Yale University Press, 2008)). A continual problem in addressing waste reduction by companies has been ‘bounded rationality’, where a focus on the perceived core of business operations has blinkered managers and employees to the opportunities of cost-effective waste reduction strategies: beliefs persist that waste reduction is necessarily costly, as discussed in Chapter 2.

of moving away from this otherwise cheap waste treatment option.⁸⁹ However, the initial response to the increasing cost of landfill was an increase in incidents of fly tipping,⁹⁰ rather than (responsible) waste management options further up the hierarchy. In addition, it would appear that increasing the cost of disposal has in part lead to an increase in the amount of waste being exported.⁹¹ ‘Creative compliance’, where the attitude (or autonomy) of social actors can render direct regulation ineffectual, is also an additional problem. Loopholes and exemptions in waste management legislation (particularly the environmental permitting regime, above) have afforded opportunities for the creative avoidance of the Landfill Tax.⁹² The social autonomy of actors thus renders direct waste regulation less effective.

4. Beyond command

The previous section outlined some of the limitations of the direct regulation of waste. The need to move 'beyond command' has been recognised, and, as suggested by the references above to the Landfill Tax and LATs, a range of alternative regulatory tools are deployed in response to the limitations of command and control. Some of these regulatory tools, however, also suffer from the limitations of direct regulation. In addition, whilst these measures originate with the state, the nature of intervention

⁸⁹ Landfill operators pay the tax at the point of disposal (Finance Act 1996, s 41), but pass on the costs to waste producers. In 2012, the standard rate of tax was set at £64 per tonne, with an annual escalator of £8, so that by 2014 the standard rate of tax will be £80 tonne.

⁹⁰ Macrory, ‘Risky Environment’ (n 46).

⁹¹ Bell *et al*, *Environmental Law* (n 40), p 669, referencing European Commission (eurostat), *Waste shipment statistics* (12 December 2012) <http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Waste_shipment_statistics> accessed 22 July 2013. In addition, recycling and recovery obligations pursuant to the Extended Producer Responsibility regime for packaging waste (discussed further below) can be met by exporting waste, provided packaging waste export recovery notes (PERNs) are purchased to evidence compliance. Increases in waste exports should be compared with the principles of proximity and self-sufficiency, pursuant to WFD, Art 16.

⁹² See Bell *et al*, *Environmental Law* (n 40), p 706, and Macrory, ‘Risky Environment’ (n 46). The vehicle for creativity has been the definition of ‘waste’ under Finance Act, s 46. See, for example, *Her Majesty’s Revenue v Customs v Waste Recycling Group Limited* [2008] EWCA Civ 849 (material received on a landfill site put to use on-site not taxable) and *Packwood Landfill v Customs and Excise Commissioners* [2003] Env LR 19 (materials deposited at site and reused for construction and landscaping not taxable). There was some concern expressed by HM Treasury and HM Revenue and Customs that, because of such cases, a ‘significant amount of waste’ was outside the scope of the tax (see HM Treasury and HM Revenue and Customs, *Modernising landfill tax legislation* (Crown Copyright, 2009), pp 8-9). In response, the Landfill Tax (Prescribed Landfill Site Activities) Order 2009/1929 brings certain wastes back into the scope of the tax. Creative compliance has also been documented in waste permitting, see Lange, ‘Compliance Construction’ (n 33).

indicates more generally the limitations of government acting alone to address the causes of waste. As will be seen, given the problems of complexity and fragmentation, these tools, in a variety of ways, seek to harness or enhance the ability of non-state waste producers to reduce their waste arisings. As such, the very existence of alternative regulatory approaches exhibits the limitations of governmental control broadly, not just command and control.

Categorisation of these various techniques and tools is difficult.⁹³ For example, direct regulation will often be used in conjunction with other approaches, simultaneously or sequentially.⁹⁴ Furthermore, many so-called alternatives to command and control in themselves either rely on, or actively include, command and control elements.⁹⁵ These difficulties notwithstanding, Morgan and Yeung provide a useful typology of regulatory techniques against which to understand the mixed approach to waste regulation: in addition to command, techniques include competition, consensus and communication.⁹⁶

Competition

Competition-based techniques are otherwise known as economic instruments, and include charges and taxes, subsidies / incentives, trading schemes and liability rules.⁹⁷ A number of these techniques are used in the context of waste regulation.⁹⁸

⁹³ Morgan and Yeung, *Law and Regulation* (n 3), pp 79 and 105-112, See Black, 'Decntring Regulation' (n 5), pp 105-6; Robert Baldwin, 'Regulation: After Command and Control' in Keith Hawkins (ed), *The Human Face of the Law* (Oxford: Oxford University Press, 1997); Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Oxford University Press, 1998), pp 38-50.

⁹⁴ See in particular Gunningham and Sinclair, *Leaders and Laggards* (n 16). Additionally, as will be seen, certain regulatory regimes combine a mixture of regulatory techniques, most notably, extended producer responsibility.

⁹⁵ Taxes and trading schemes are a good example of this (see above, as to the 'command' aspects of the Landfill Tax and LATS).

⁹⁶ Morgan and Yeung, *Law and Regulation* (n 3), pp 80-105. Morgan and Yeung also include code-based techniques. These operate in contrast to communication strategies (which harness the rationality of the regulated community and other interested parties in order to effect behaviour change, see further, below). Code-based techniques alter certain architectures to eliminate, design-out or make more unlikely the possibility of undesirable behaviour. This is most prevalent in cyberspace regulation. Code in this sense is not used in the area of waste regulation, although as will be seen in Chapter 4, choice architecture is implicated heavily in consumption patterns, and might be harnessed to reduce waste arisings. On code generally, see Roger Brownsword, 'Code, control, and choice: why East is East and West is West' (2005) 25 *Legal Studies* 1 and on choice architecture, see Thaler and Sunstein, *Nudge* (n 88).

⁹⁷ See Ogus, *Regulation* (n 15), Ch 1 and Morgan and Yeung, *Law and Regulation* (n 3), pp 85-92.

⁹⁸ In addition to those discussed below, other examples include recycling credits for WCAs (EPA 1990, s 52), together with a grant funding scheme to trial rewarding local authorities and community groups who produce less waste (see Defra, *Waste Review* (n 40), pp 45-6 and Defra, *Progress with delivery of*

Economic instruments are said to address the inefficiencies of direct regulation; either that the costs of direct regulation outstrip the environmental benefits, or that direct regulation is more costly than alternative forms of intervention.⁹⁹ For example, it is often claimed that economic instruments avoid the costly process of information gathering and standard setting by providing ‘broader targeted goals’.¹⁰⁰ They also provide a constant financial incentive to reduce environmental impacts, whilst simultaneously providing greater freedom and flexibility in achieving these goals than might be the case with performance standards pursuant to environmental command and control.¹⁰¹ However, there are limitations to economic instruments, certainly if used alone. The Landfill Tax exhibits some of these limitations.

The Landfill Tax taxes (by weight) waste which is landfilled.¹⁰² It seeks to reduce the amount of waste sent to landfill by increasing the cost of this otherwise relatively cheap method of disposal. Landfill operators pay the tax at the point of disposal, but pass on the costs to waste producers (including local authorities and the private sector).¹⁰³ As a nod to the problems of fragmented knowledge and control, the Tax, rather than specifying particular waste management alternatives, creates an

commitments from the Government’s Review of Waste Policy in England (2011) (PB 13738, Crown Copyright 2012), p 11). The reward scheme is part of a deliberate move away from ‘sticks’ to ‘carrots’, exhibited also by the removal of powers given to local councils to charge householders based on how much waste they produce (see Localism Act 2011, s 47).

Defra is also considering incentives to reduce food waste. However, little detail is provided in this regard (although the ‘initial exploration’ is underway), see Defra, *Waste Review* (n 40), p 60 and Defra, *Waste Review Progress* (n 98), p 17. Of major importance for the diversion of food waste from landfill is the suite of financial incentives for Anaerobic Digestion, which as a process to produce renewable energy, is the best environmental option for *unavoidable*, separately collected food waste (it is in no terms a substitute for reducing food waste arisings). AD is a natural process in which micro-organisms, in the absence of oxygen, break down organic matter to produce biogas and digestate (a fertiliser). Biogas can be burnt, either to produce heat or heat and power (combined heat and power, CHP), or cleaned to produce biomethane, which can be used in vehicles or injected into the national gas grid like natural gas. Incentives for AD originate from other regulatory regimes, including the Renewables Obligation, electricity Feed-In Tariffs and the Renewable Heat Incentive. AD will also play a role in meeting the greenhouse gas emission reduction targets pursuant to the Climate Change Act 2008 and the UK’s obligation under the EU Renewable Energy Directive to source 15% of its energy from renewable sources by 2020. See Department for Energy & Climate Change (DECC) and Defra, *Anaerobic Digestion Strategy and Action Plan* (PB 13541, Crown Copyright, 2011), pp 21-3. AD would also be supported by restrictions on sending food waste to landfill, the case for which (and associated evidence) is still being considered, see Defra, *Reducing and managing waste* (July 2013) <<https://www.gov.uk/government/policies/reducing-and-managing-waste>> accessed 25 July 2013.

⁹⁹ Holder and Lee, *Environmental Protection* (n 1), p 421.

¹⁰⁰ Ogus, *Regulation* (n 15).

¹⁰¹ We could also understand these instruments as governmentally created business case for certain types of behaviour.

¹⁰² See above (n 89).

¹⁰³ Defra, *Consultation on meeting EU Landfill Diversion Targets* (Crown Copyright, 2010), pp 18-25.

incentive for the regulated community itself to decide on (and invest in) those alternatives.

However, an economic incentive can invite a shallow response, as indicated by the responses to a price on landfill: higher incidences of fly-tipping, increasing quantities of waste being exported, and various incidences of creative compliance.¹⁰⁴ As such, governmental interventions beyond command and control also suffer from the challenges faced both by causal complexity and autonomy of social actors. In addition, evidence seems to suggest that, while the Tax does influence the diversion of waste from landfill, it has not had a significant impact on waste arisings.¹⁰⁵ Indeed, without more, the obvious effect of the Landfill Tax is simply to shift away from landfill to other modes of disposal (most notably incineration), moving up the hierarchy only very little.¹⁰⁶ Despite claims to the contrary, economic instruments, like direct regulation, can also be undermined by informational deficits. For example, at one point it was cheaper to landfill than re-use or recycle C&D waste.¹⁰⁷

As discussed above, the Landfill Directive set limits on the amount of BMW Member States can send to landfill. Between 2003-13, the primary instrument deployed to reach these targets was not the Landfill Tax (though of course this remained supportive), but a cap and trade system for landfill waste, the LATS. The Scheme came to an end in England at the end of March 2013,¹⁰⁸ as it was no longer seen as a significant driver for landfill diversion against the backdrop of the rising level of the Landfill Tax.¹⁰⁹ It is worth outlining the Scheme briefly, however, as it exhibits both the mixed approach to regulation generally, as well as some of the limitations of governmental regulation.

LATS allocated allowances for the landfilling of a fixed quantity of waste to each local authority, and penalties were imposed for each tonne of waste landfilled in excess of allowances held.¹¹⁰ Because the allowances were tradeable, local authorities

¹⁰⁴ Bell *et al*, *Environmental Law* (n 40), p 706.

¹⁰⁵ *Ibid.*, p 706.

¹⁰⁶ Maria Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Oxford: Hart Publishing, 2005).

¹⁰⁷ Science and Technology Committee, *Waste Reduction* (n 85), [4.69]. This implies an information deficit, since the rate of the Landfill Tax, together with the corresponding levy on aggregate extraction, were not high enough to achieve desired regulatory outcomes.

¹⁰⁸ The Waste and Emissions Trading Act 2003 (Amendment) Regulations 2013/141, regs 3, 7 and 8.

¹⁰⁹ Defra, *Waste Review* (n 40), p 47.

¹¹⁰ In 2011/12, one regulated party exceeded their allowance; see Environment Agency, *Report on the Landfill Allowance Trading Scheme 2011/12* (LIT 7851, Environment Agency, January 2013).

could comply with their own target, could buy additional allowances, or could sell their allowances to other local authorities. The justification for the trading scheme, in common with other trading schemes, was that reductions in the quantity of waste landfilled would be achieved where it was most cost-effective to do so. Those local authorities able (perhaps because of the availability of recycling infrastructure) to reduce cheaply the amount of waste they landfilled would have an incentive to sell their allowances, those who found it more expensive, would be more likely to purchase additional allowances. But the same amount of waste would be sent to landfill overall. The overall LATS cap (the amount of allowances allocated to all local authorities), and hence the share of tradable allowances allocated, reduced progressively every year in line with the landfill reduction obligations pursuant to the Directive.

It is important to note that LATS allowances were allocated to local authorities, Waste Disposal Authorities (WDAs) (county councils) specifically.¹¹¹ In 2011/12, English WDAs sent around 6.4m tonnes of BMW to landfill; 1.4m tonnes less than the previous year, and 2.3m tonnes less than the original allocation of 8.7m tonnes for that period (with authorities using around 74% of the allocation).¹¹² Collectively, local authorities sent 59% less BMW to landfill than in 2001/2 (when base data was collected).¹¹³ Whilst during that year, 50 WDAs were involved in trading allowances,¹¹⁴ it was not apparent that the LATS did any meaningful work as a ‘market mechanism’. Cost-effective solutions (the rallying cry of economic incentives, especially trading schemes) are a function of true engagement with the market dynamics of a trading system—strategic or planned buying, selling or banking of permits. However, it was never clear that local authorities ‘grasped the possibilities’ of the LATS,¹¹⁵ suggesting that a trading scheme may have been inappropriately applied to the public sector. More importantly for our purposes, the LATS created unintended problems for the recycling activities of SMEs (as discussed

¹¹¹ WDAs are responsible for the disposal of waste collected in its area; see EPA 1990, s 51. Arrangements however are made with private companies, who to some extent create a competitive market for the provision of waste disposal.

¹¹² Environment Agency, *LATS Report 2011/2* (n 110).

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Paul Street, ‘Trading in Pollution: Creating Markets for Carbon and Waste’ (2007) 9(4) *Environmental Law Review* 260. Certainly in the early stages, there was very little trading activity. Southampton (Hampshire), was an exception, and displayed its forward thinking approach to waste management.

above). This was an additional reason for the Scheme's abolition,¹¹⁶ and again indicates some of the problems of complexity associated with regulation.

Consensus

Consensus-based regulation comprises a very broad range of regulatory measures typically referred to as 'self-regulation'.¹¹⁷ Classically understood, self-regulation involves industry-level agreements between sector participants, with no governmental involvement ('unilateral initiatives').¹¹⁸ Self-regulation may also involve partnerships between government and specific businesses or industries ('voluntary agreements').¹¹⁹ These may be bilateral, or with the involvement of other stakeholders, such as NGOs. Self-regulation might also involve the delegation of certain regulatory functions to a professional body, perhaps coupled with some remaining state oversight.¹²⁰ Self-regulation can also come in the form of state-designed programmes which recognise voluntary or beyond compliance behaviour.¹²¹ As will be seen in Chapter 4, we should be careful in equating self-regulation with voluntariness. Most forms operate in the shadow of the state to at least some degree. This might be direct, in response to explicit threats of regulation, or in anticipation of (and perhaps the hope to avoid) the tightening of regulatory standards. Self-regulation may also be a response to social forms of pressure and threats to firm or industry-level reputations.¹²² So whilst self-regulation has potential benefits (as will be discussed)

¹¹⁶ Defra, *Waste Review* (n 40), p 47.

¹¹⁷ Morgan and Yeung, *Law and Regulation* (n 3), p 95

¹¹⁸ Ibid. See also Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97; Jonathan C Borck and Cary Coglianese, 'Voluntary Environmental Programs: Assessing their Effectiveness' (2009) 34 *Annual Review of Environment and Resources* 305, pp 307-9. The Responsible Care Programme is a prominent example of this. The regime was set up in the wake of chemical and gas leaks in Bhopal. It does not operate without criticism, however, see Gunningham and Sinclair, *Leaders and Laggards* (n 16).

¹¹⁹ Borck and Coglianese, 'Voluntary Environmental Programs' (n 118), pp 307-9.

¹²⁰ Morgan and Yeung, *Law and Regulation* (n 3), p 95. This would be a form of hybrid regulation, combining both command and consent.

¹²¹ Borck and Coglianese, 'Voluntary Environmental Programs' (n 118), pp 307-9. An early example of this is the 33/50 Program run in the USA, which sought to reduce certain toxic chemical emissions by 33% and 50% over four and seven year periods. The incentive was public recognition to firms who voluntarily committed to these toxic pollutant reductions. See also Gunningham and Sinclair, *Leaders and Laggards* (n 16).

¹²² See Gunningham and Sinclair, *Leaders and Laggards* (n 16); Ogus, *Regulation* (n 15). Indeed, the Bhopal disaster, which gave rise to the Responsible Care Programme (n 118) constituted a major breach of one particular company's social licence to operate, with implications for chemical industry's collective reputation or 'licence to operate'.

such initiatives come with inherent reasons for scepticism as to desirability of their existence.

A number of ‘voluntary responsibility deals’ are in place to address waste challenges. Some of these will be discussed in the following chapter, but it is worth providing a few examples here. A deal with the waste management industry seeks to improve SME access to and awareness of cost-effective recycling services, the difficulties of which were mentioned above.¹²³ Defra has worked with a number of groups to construct the deal, including local authorities, the Chartered Institute of Waste Management, the Federation of Small Business and the Environmental Services Association. The fragmentation of information and control necessary to design solutions to this problem—including the interplay of public and private waste collection, together with the sheer number of SMEs—necessitates a level of interdependence and interaction which limit the effectiveness of governmentally-developed solutions alone. Furthermore, it is questionable whether the collaboration necessary could be achieved through direct regulation. However, the results of the deal will not be reported until Summer 2014, so it is too early for assessment. However, it is worth noting that progress will be reported against Key Performance Indicators (KPIs)—performance measurements used to evaluate the success of activities against key goals. KPIs do not operate without controversy.¹²⁴ However, in view of the need for transparency and the scope this provides for scrutiny (discussed in more detail in Chapter 4), the commitment to report in a robust manner is significant.

This deal, and others, are accompanied by SME Waste Minimisation Networks, to encourage further waste reduction, particularly through resource efficiency knowledge sharing.¹²⁵ A similar set up is in place with local authorities with the Local Authority Recycling & Waste Services Commitment, aimed at making it easier for households to reduce and recycle waste.¹²⁶ The Commitment involves Defra, the Local Government Authority and WRAP, and shares information and case studies on

¹²³ See Defra, *Waste Review* (n 40), p 51 and Defra, *Waste Review Progress* (n 98), p 1. Other examples include deals on paper, food waste in the hospitality sector and voluntary actions on textiles.

¹²⁴ Some of the general criticisms of KPIs will be seen in Chapter 7 in the context of Environmental Management Systems (EMSs). EMSs and KPIs can generate tick-box, formalistic behaviour geared towards those specified measurements, rather than reflection and creativity in addressing the broader norm or goal which KPIs seek to measure. See, for example, Robert D Austin, Tom DeMarco and Timothy R Lister, *Measuring and managing performance in organizations* (New York: Dorset House Publishing, 1996).

¹²⁵ See Defra, *Waste Review* (n 40), pp 25-7, Defra, *Waste Review Progress* (n 98), p 11.

¹²⁶ See Defra, *Waste Review* (n 40), pp 43-4, Defra, *Waste Review Progress* (n 98), p 11.

collection systems and appropriate communication with householders.¹²⁷ Again, in view of the limitations of command and control, these efforts are to be welcomed. But in shifting activities beyond government, the existence of these measures also indicates the limitations of governmental influence generally.

Communication

Communication-based or ‘informational’ regulation comes in a number of forms. An important form is disclosure (mandatory or involuntary), which may regulate behaviour by improving or enriching the availability of information available to a targeted audience, in turn aiding the ability of interested parties to leverage behaviour change. In addition, the requirement to generate information may itself help to improve behaviour, certainly if it unearths information which may have otherwise remained hidden. I will return to the role of disclosure in Chapter 7. Communication strategies can also include public information campaigns (‘exhortation or risk communication’); guidance (‘explanation’) and performance acknowledgement / naming and shaming (‘exclamation’).¹²⁸

The reward schemes proposed for householders mentioned above,¹²⁹ are in part exclamatory. They are also complimented by information provision, such as the ‘Love Food Hate Waste’ campaign, which exhorts household food waste reduction by providing food waste reduction strategies.¹³⁰ Technical support and advice on food waste collection is also provided to local authorities by government, in collaboration with WRAP.¹³¹ DEFRA is also running a number of programmes to assist companies in making win-win waste reductions, including sector-specific case studies, financial models and waste prevention toolkits.¹³² Defra and WRAP will also launch a ‘Zero Waste Award’.¹³³ Through a stepped accreditation system of gold, silver and bronze awards, this will incentivise and acknowledge communities and businesses which

¹²⁷ See also the ongoing Business Waste & Recycling Collection Commitment, which seeks to address how local authorities can assist businesses in waste management and make it easier for them to recycle, Defra, *Waste Review Progress* (n 98), p 12.

¹²⁸ See Morgan and Yeung, *Law and Regulation* (n 3), p 96 and Karen Yeung, ‘Government by Publicity Management: Sunlight or Spin?’ [2005] Public Law 360.

¹²⁹ See above, (n 98).

¹³⁰ See Defra, *Waste Review Progress* (n 98), p 16 and WRAP, *Love Food Hate Waste* <<http://www.lovefoodhatewaste.com/>> accessed 24 July 2013.

¹³¹ See also support in respect of the Weekly Collection Scheme, Defra, *Waste Review Progress* (n 98), p 15.

¹³² See Defra, *Waste Review Progress* (n 98), pp 6 and 10.

¹³³ Defra, *Waste Review Progress* (n 98), p 6 and Defra, *Waste Review* (n 40), pp 45-6.

demonstrate a zero waste ethos. Leading by example is also one example of communication, particularly in the context of public procurement.¹³⁴ Again, these seem to be sensible interventions in view of the limitations of direct regulation, whilst also acknowledging the crucial role of non-governmental actors in reducing waste arisings.

Regulatory hybridity: producer responsibility and site waste management plans

As mentioned above, governmental interventions can blend a number of techniques in one regime. Extended Producer Responsibility (EPR), which imposes obligations on producers for the post-consumer phase of a product's life cycle, exhibits this form of regulatory hybridity. EPR also represents a shift in regulatory focus up the hierarchy: away from the end-of-pipe solution of ensuring safe handling and disposal of materials once they become waste, to addressing the creation of waste itself. There are a number of EPR regimes for specific waste streams, although most interesting for us is the Packaging Waste regime,¹³⁵ which implicates supermarkets.

The regime requires packaging producers to recycle and recover specified quantities of packaging waste.¹³⁶ This is an economic instrument, as the majority of packaging producers do not in fact carry out recovery and recycling activities themselves. Instead, they must furnish evidence of compliance with their recovery and recycling targets by purchasing packaging recovery notes (PRNs) or packaging export recovery notes (PERNs)¹³⁷ from 'accredited reprocessors'.¹³⁸ Producers can also meet

¹³⁴ See Defra, *Waste Review Progress* (n 98), p 33 on the Government Buying Standards for Food, requiring caterers to take steps to minimize food waste and improve how food waste is dealt with.

¹³⁵ The Producer Responsibility Obligations (Packaging Waste) Regulations 2007/871 ('Packaging Waste Regulations 2007') (as amended) and the Packaging (Essential Requirements) Regulations 2003/1941 ('Essential Requirements Regulations 2003') (as amended). These regulations implement Directive 94/62/EC (as amended) on packaging and packaging waste. On packaging waste in the EU generally, see Patricia M Bailey, *Packaging Law Europe* (Aldershot: Ashgate, 1999).

¹³⁶ The overall prescribed target is 75% in 2013, which increases one percentile annually to a resulting 79% requirement in 2017. The overall targets are in turn broken down across different materials, and percentage responsibilities are weighted differently for different classes of producers, see Packaging Waste Regulations 2007, sch 2.

¹³⁷ Packaging Waste Regulations 2007, regs 4 and 20-21.

¹³⁸ Packaging Waste Regulations 2007, regs 23-26. PRNs and PERNs (collectively, 'Recovery Notes' [RNs]) also operate as a way to channel producer funding to the most needed recycling and recovery operations. Accredited reprocessors or exporters purchase packaging waste material from WCAs. Part of the accreditation process for reprocessors requires explanations and strategies as to how funds acquired from issuing RNs will be used to develop collection and reprocessing capacities for packaging waste and new markets for subsequent recyclates. Furthermore, RNs have a market value depending on normal principles of supply, demand and perceptions of scarcity. The value of a RN will be a function of availability (cost and ease) of reprocessing capacity for a particular material. For example, the more

these obligations by joining a compliance scheme, which assumes the legal responsibility for compliance on behalf of its members, but passes on the costs through contracts of membership.¹³⁹

By requiring producers to meet recycling and recovery costs, EPR encourages the reduction of waste through the better design (or improved recyclability) of products, inviting a more holistic, life-cycle approach to manufacturing practices.¹⁴⁰ This might involve using readily recycled products, or the use of recycled material, but without stating how, or in what form, eco-design should be achieved (subject however to certain minimum requirements, discussed below). This is a nod to the fragmentation of information and control, impliedly accepting that those involved in design are better placed to formulate solutions. It also displays the reflexive elements of EPR.¹⁴¹ Reflexive approaches to regulation will be discussed in further detail in Chapter 7, but in essence they aim to make corporations think about their environmental impacts, but often indirect and without any strict stipulation as to how impacts are to be reduced. Reflexive approaches thus seek to harness the otherwise fragmented capacities of firms. The regime also includes notable command aspects, such as the supporting (minimum) Essential Requirements on packaging design principles, over-packaging and toxic substance concentration levels.¹⁴² Producers also commit an offence if they are unable to show that they have taken all reasonable steps to ensure that any packaging placed on the market is compliant with these requirements.¹⁴³

The Packaging Regime imposes obligations on the broad range of actors implicated in the packaging life cycle, inducing a ‘shared’ approach to packaging

difficult or expensive materials are to collect and recycle, the higher the cost of a RN. A tonne of packaging waste material will have an intrinsic value to a reprocessor (the value of produced recyclate), together with a RN value (as determined by the market). Packaging waste materials with a low value may be still collected and purchased because they are effectively subsidised by the added value of the RN, ensuring that even low value materials should be recoverable at a rate economic for the operator to do so.

¹³⁹ Packaging Waste Regulations 2007, regs 6 and 14-18 and sch 3.

¹⁴⁰ See, for example, Enrique Tufet-Opi, ‘Life After End of Life: the Replacement of End of Life Product Legislation by a European Integrated Product Policy in the EC’ (2002) 14 *Journal of Environmental Law* 33; Maria Lee, ‘New Generation Regulation? The Case of End-of-Life Vehicles’ (2002) 11(4) *European Energy and Environmental Law Review* 114; Gerhard Roller and Martin Führ, ‘Individual Producer Responsibility: A Remaining Challenge under the WEEE Directive’ (2008) 14 *Review of European Community & International Environmental Law* 277.

¹⁴¹ See above (n 140).

¹⁴² Essential Requirements Regulations 2003, regs 2(2), 5.

¹⁴³ *Ibid.*, reg 9.

waste reduction.¹⁴⁴ This is seen in the broad definition of ‘producers’, all of whom must comply with the recycling and recovery obligations, and includes manufacturers, packers, importers and sellers/retailers.¹⁴⁵ This deliberately broad definition, Kroepelien argues, initiates ‘major changes in the institutional design of the market place’, and has the potential to bring corporations more fully into normative debates about how products should be produced, and even whether they should be produced.¹⁴⁶ In particular, it forces at least some interaction between these otherwise potentially disconnected actors. In view of fragmentation, this is significant, as it potentially harnesses the capacities—reflexive, informational, power and influence—of a range of actors.

However, measuring the success of the packaging EPR regime is difficult. To start with, packaging design and associated life-cycle considerations are complex, involving a number of environmental trade-offs; as suggested above, often, there is no ‘right’ answer to complicated environmental problems. For example, whilst the perception of ‘over-packaging’ is a continual concern amongst consumers,¹⁴⁷ inadequate packaging may compromise products, especially food. This in turn has implications for food waste arisings.¹⁴⁸ Eco-design strategies such as light-weighting, while minimising resource use,¹⁴⁹ may involve increased use of laminates which are difficult to recycle¹⁵⁰ or involve substitution with plastics not readily recyclable in the UK.¹⁵¹ The additional downside of lighter packaging is that there is little incentive for the collection and recycling of these lighter products (such as aluminium and plastic waste) when the targets for these activities are weight-based.¹⁵²

¹⁴⁴ Defra, *Waste Review* (n 40), p 32.

¹⁴⁵ Packaging Waste Regulations 2007, reg 4 and sch 1.

¹⁴⁶ Knut F Kroepelien, ‘Extended Producer Responsibility New Legal Structures for Improved Ecological Self-Organization in Europe’ (2000) 9 *Review of European Community and International Environmental Law* 165.

¹⁴⁷ Defra *et al*, *Making the most of packaging: A strategy for a low-carbon economy* (PB 13189, Crown Copyright, 2009), p16.

¹⁴⁸ Defra, *Waste Review* (n 40), p 30.

¹⁴⁹ *Ibid.*, p 17.

¹⁵⁰ Science and Technology Committee, *Waste Reduction* (n 85), [3.11] and [7.19].

¹⁵¹ While glass could be recycled infinitely with a high recycled content, it is heavy and often replaced with plastics such as polyethylene terephthalate (PET), which was not recyclable in the UK until very recently, see Science and Technology Committee, *Waste Reduction* (n 85), [7.19]; Rebecca Smithers, ‘Breakthrough in mixed plastics recycling as new plant opens’ *Guardian Online* (14 May 2012).

¹⁵² Defra *et al*, *Packaging Strategy* (n 147), p 17.

The UK has, since 2008, met or exceeded all recycling targets pursuant to the EU Packaging and Packaging Waste Directive.¹⁵³ However, questions have been raised as to whether the Directive itself imposed high enough costs on producers (which were ‘minimal’ compared to other business costs) to ‘rethink design’.¹⁵⁴ Meeting recycling and recovery targets is not necessarily proof of either the internalising or reflexive claims of EPR. Doubts have been raised over the reflexive aspects of the regime, with little or no ‘change’ in business mindsets and behaviour.¹⁵⁵ This is in some respects unsurprising. For most packaging producers, ‘compliance is limited to a financial transaction: the purchase of evidence notes, with little understanding as to what [money] ... they pay for PRNs/PERNs is used for.’¹⁵⁶ So whilst this form of governmental control is probably an improvement over direct regulation, it is not without problems.

The construction industry, like supermarkets, is similarly subject to a hybrid form of regulation. Site Waste Management Plans (SWMPs)¹⁵⁷ have the two-fold aim of improving materials resource efficiency and reducing construction-related fly tipping.¹⁵⁸ Prior to the Regulations, SWMPs operated on a voluntary basis, though are now compulsory for all construction projects with an estimated value over £300,000.¹⁵⁹ A Plan must be in place before construction work begins.¹⁶⁰ Failure to comply with this, and a number of other obligations pursuant to the Regulations, is an offence.¹⁶¹ This is classical command and control. However, the requirements impose no quantitative stipulations as to waste treatment options or waste reduction. Instead, they dictate a process by which clients and contractors are required to think about (plan) how they will deal with waste produced on site, in the hope that this will nonetheless result in waste reductions and better waste management. Like EPR, SWMPs are thus an example of reflexive law.

¹⁵³ Packaging recycling rates have doubled since 1997 to 62% in 2009 and 67% in 2010, although performance varies across different materials; wood recycling rates, for example, are relatively low, see Defra, *Waste Review* (n 40), p 32 and Defra, *Reducing and managing packing waste* (July 2013) <<https://www.gov.uk/government/policies/reducing-and-managing-waste/supporting-pages/packaging-waste-producer-responsibility-regimes>> accessed 25 July 2013. On the Directive, see above (n 135).

¹⁵⁴ Science and Technology Committee, *Waste Reduction* (n 85), [3.22] and [4.51].

¹⁵⁵ *Ibid.*, [4.53].

¹⁵⁶ Defra *et al*, *Packaging Strategy* (n 147), p 17.

¹⁵⁷ Site Waste Management Plans (SWMP) Regulations 2008/314.

¹⁵⁸ See Defra, *Non-statutory guidance for site waste management plans*, (Crown Copyright, 2008), [1.1].

¹⁵⁹ SWMP Regulations 2008, reg 5.

¹⁶⁰ Construction work is essentially the physical aspects of a project, not including the design or planning phases, SWMP Regulations 2008, reg 2.

¹⁶¹ SWMP Regulations 2008, reg 5.

Plans must identify the proposed waste management options (including re-using, recovery and disposal) for each different type of waste the project is expected to produce, and record any pre-drafting decisions relating to design, method and materials which minimise the quantity of waste produced on site.¹⁶² This is a prod towards reducing waste through design (recall, from Chapter 2, the importance of this), and for most projects, designers will prepare SWMPs on behalf of their clients.¹⁶³ Principal contractors are subject to the additional duty to ensure, ‘so far as is reasonably practicable, that waste produced during construction is re-used, recycled or recovered’.¹⁶⁴ Furthermore, a declaration must be made that all ‘reasonable steps’ will be taken to comply with the waste duty of care and that materials will be handled ‘efficiently’ and managed appropriately.¹⁶⁵ The Plan must be reviewed and updated, with any deviations explained, and records kept of waste removed from the construction site, including types, identity of collectors and final location.¹⁶⁶ The Regulations also impose more stringent review requirements on projects worth more than £500,000, including a comparison of the estimated and actual quantities of each waste type, and an estimate of the cost savings that were achieved ‘by completing and implementing the plan’.¹⁶⁷

This forced cost-benefit analysis, together with SWMP obligations generally, are geared towards addressing the perception within the construction industry that waste prevention and management necessarily costs money. However, given this perception persists predominately with smaller companies,¹⁶⁸ coupled with the belief that smaller companies are generally not aware of good waste management practices,¹⁶⁹ it is odd that this is imposed only on larger projects. Reflecting on the quantities of waste produced, and the associated costs, provides an opportunity for lesson learning (reflection),¹⁷⁰ arguably beneficial to all projects indiscriminately. Of

¹⁶² SWMP Regulations 2008, reg 6.

¹⁶³ Defra, *SWMP Guidance* (n 158), p 8.

¹⁶⁴ SWMP Regulations 2008, reg 11.

¹⁶⁵ SWMP Regulations 2008, reg 6(5).

¹⁶⁶ SWMP Regulations 2008, reg 7. This supports measures taken to comply with the waste duty of care.

¹⁶⁷ SWMP Regulations 2008, reg 8.

¹⁶⁸ Science and Technology Committee, *Waste Reduction* (n 85), [6.11].

¹⁶⁹ Environment, Food and Rural Affairs Committee, *Waste Strategy for England 2007* (n 86), [67].

¹⁷⁰ See Defra, *SWMP Guidance* (n 158), p 13: ‘clients, principal contractors, designers and others involved in the planning and execution of projects may ... wish to consider the most appropriate way of integrating the outcomes of SWMPs into further construction work.’

course, this should be balanced with regulatory burdens placed on SMEs,¹⁷¹ but the Regulations were expected to assist contractors in complying with existing legal obligations. Nonetheless, by forcing reflection on waste management options, SWMPs require those ‘at the coalface’ (more appropriately rather than government) to tackle the problem of construction waste arisings. This is a welcome response to some of the limitations of command and control whilst simultaneously acknowledging government’s informational disadvantages generally.

It is thus regrettable that Defra proposes to repeal the SWMP Regulations.¹⁷² Admittedly, SWMPs have failed to have a significant impact on incidents of fly tipping.¹⁷³ Otherwise, however, the reasons for repeal are unconvincing. First, Defra notes the importance of the design phase in reducing construction waste arisings, but then gives as a reason for repeal that SWMPs tend to be produced after the design phase.¹⁷⁴ There is some evidence to dispute this (as above, designers often write SWMPs). However, given the Regulations prod towards (rather than require) the preparation of plans early on in the design stage, this implies amendment or review would be suitable, not repeal. Second, some of the reasoning for repeal is backwards. For example, according to Defra, ‘repealing the regulations will provide a cost saving to business, while retaining SWMPs as a tool that can be applied to any project where savings are possible.’¹⁷⁵ However, as was noted above, SWMPs may operate as a tool to help companies *identify* those savings, rather than as a tool to use once the potential for savings has already been recognised.

5. Conclusion

In this chapter, I laid the groundwork for arguments I make in Chapter 4 by illustrating the limitations to governmental regulation. These limitations include complexity; the interdependence and diversity of autonomous social actors; the social construction of

¹⁷¹ Environment, Food and Rural Affairs Committee, *Waste Strategy for England 2007* (n 86).

¹⁷² Defra, *Proposed repeal of construction Site Waste Management Plans regulations (2008)* (Crown Copyright, 2013); the associated consultation ended on 16 July 2013, and responses are still being analysed, see <<https://www.gov.uk/government/consultations/site-waste-management-plans>> accessed 24 July 2013.

¹⁷³ Defra, *SWMP Repeal* (n 172), p 7.

¹⁷⁴ *Ibid.*, p 7.

¹⁷⁵ *Ibid.*, p 8.

knowledge; and the fragmentation of information and control. I argued that these limitations were most starkly illustrated by the challenges involved in moving up the waste hierarchy, although the use of direct regulation to ensure the safe handling and disposal of waste itself is not without problems.

In response, government has deployed a range of regulatory techniques seeking to move up the hierarchy. These include taxes, voluntary agreements, stakeholder partnerships and information provision, together with hybrid regulatory regimes to deal with packaging and construction waste. Whilst there are positive aspects to a number of these interventions, many of them suffer from similar problems to those experienced in the context of direct regulation. As such, there are quite significant limitations to what governments, alone, can achieve, especially in the face of the types of structural and collective complexities of environmental problems.

This chapter also exposes the weaknesses of a regulatory voice for the environment, at least when this voice comprises only government or state-based regulators. However, if we expand our understanding of regulation to consider the regulatory behaviour of non-state actors, then the regulatory voice for the environment has the potential to be far more potent. It is this broader concept of regulation, as well its relationship with CER, which I consider in the following chapter.

Chapter 4

Regulatory Voice (II): CER and Decentred Regulatory Space

1. Introduction

In Chapter 3, I outlined the limitations of command and control regulation, and explained how this has given rise to a range of alternative regulatory approaches. These alternatives are vast, varied, and difficult to categorise, but they all display some of the limitations of governmental control, including the complexity of social and environmental problems; the fragmentation of information and control; the autonomy of social actors and the interdependence thereof. By outlining the limitations of governmental control, Chapter 3 also served the dual purpose of critiquing the governmental contribution to the regulatory voice for the environment.

This chapter considers the strengths and weakness of a more broadly defined regulatory voice for the environment. I invoke an understanding of regulation beyond governments to include the behaviour of non-state actors.¹ I argue that a role for CER can be seen in the positive and normative implications of ‘decentred regulatory space’. In this space, regulation is not the preserve of governmental regulators, and in view of the limitations of command and control, *nor should it be*. On this basis, CER is simply a positive manifestation of decentred regulation, in two main ways. First, corporations are subject to extra-governmental regulation by non-state actors which drives ‘beyond compliance’ behaviour. Second, corporations are themselves decentred regulators, with considerable resources and influence which, used responsibly, have potentially significant benefits for environmental protection. I extend the normative implications of decentring analysis to provide normative support for CER. In view of the limitations of governmental control, CER activities are potentially to be welcomed.

¹ As noted in Chapter 3, I draw a distinction between ‘state’ actors (those with a legal mandate) and ‘non-state’ actors (those without), see Julia Black, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ (2008) 2 Regulation & Governance 137, p 139.

This normative space for CER, however, is both pragmatic and limited. I argue that decentring analysis offers an appropriate framework for this form of pragmatism,² which I propose in response to the limitations of the business case for CER. As discussed in Chapter 2, I am sympathetic to structural criticisms of CSR, especially dismissal of the movement on the basis of a mistrust of the modern corporation and scepticism about the room for environmental protection in a market economy. At the same time, corporations (and CSR, it would seem) are here to stay, and the limitations of governmental control point us to the potential for corporations to ‘regulate’ in the environmental interest. On this basis, I argue that harnessing the regulatory capability of corporations offers benefits which it would be mistaken to ignore. As will be seen, there remains reason for caution and concern. However, by moving beyond the dangerous and misleading rhetoric of the business case, decentred regulatory space affords the opportunity to look critically at a range of CER activities, and thus to be pragmatic about the advantages and disadvantages of an active role for corporations in the regulation and governance of environmental protection. Whilst CER has much to offer, I argue that its normative space is limited. In particular, it is possible that corporate interests will crowd out environmental concerns, and the demands being made of Environmental Non-Governmental Organisations (ENGOS) are too great. As such, there remains a role for continuing governmental oversight.

Finally, appreciating the role of companies and the environment in decentred regulatory space provides important insight into appropriate definitions of CSR. I suggest that, rather than conceiving of CSR’s relationship with law in binary terms (as is typical), CSR is more appropriately understood as part of the complex process of decentred regulation by governmental and non-governmental actors. Law does remain relevant to CSR debates, however, not least in considering the appropriate relationship between corporate activities and the content or absence of legal intervention.

The chapter is structured as follows. In section 2, I outline the idea and causes of decentred regulatory space, and extend its normative implications to provide limited

² This might be called a form of regulatory pragmatism, used similarly to the manner often invoked by Neil Gunningham to indicate a level of realism or compromise in the face of challenges, difficulties and possible imperfections (see, for example, Neil Gunningham, ‘Environment Law, Regulation and Governance: Shifting Architectures’ (2009) 21 *Journal of Environmental Law* 179, p 210). It should thus be differentiated from the more loaded idea of ‘eco-pragmatism’ invoked by Daniel Farber, which is concerned with when, and how, to sacrifice environmental values in the face of significant financial costs, see Daniel A Farber, *Eco-pragmatism: Making Sensible Environmental Decisions in an Uncertain World* (Chicago: University of Chicago Press, 1999).

normative and pragmatic space for CER. Section 3 exemplifies the potential and limits of this pragmatic and normative space for CER via the challenges of waste reduction. In section 4, I critique traditional definitions of CSR in light of decentred regulation.

2. Normative and pragmatic space for CER

In Chapter 3, I explained how complexity, autonomy, fragmentation and interdependence all inform the limitations of direct regulation. The problem of waste management illustrated this problem. While ensuring the safe handling of waste seems appropriately dealt with by direct regulation (though not without remaining challenges), the difficulties of moving up the waste hierarchy to reduce waste arisings more starkly highlights the limitations of direct regulation. As a result, there has been increasing creativity in the forms of governmental regulation deployed, with a blend of tools in addition to command and control being used. Many of these tools seek to capture or support the various capacities (influence and knowledge) of non-state actors. An example of this was the shared approach to problem-solving within the Extended Producer Responsibility (EPR) regime for packaging waste. The mixed approach to waste regulation thus exhibits the inherent limitations of governments, alone, to address the causes of environmental problems. However, as will be seen, the limitations of governmental control have important implications for our meaning of regulation, as well as for the descriptive and normative aspects of CER.

Decentred regulatory space and its analytical strengths

The limitations of command and control have led commentators to point to the way in which the act of steering or changing behaviour is not the preserve of governmental intervention.³ Indeed, the fragmentation of power and control necessarily indicates this; influence is spread across a range of actors.⁴ As a result, the term regulation has multiple possible meanings. In a narrow sense, regulation refers to

³ Colin Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' [2001] Public Law 329; Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems 103; Bettina Lange, 'Regulatory Spaces and Interactions: An Introduction' (2003) 12 Social & Legal Studies 411.

⁴ See also Tim Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 American Journal of Sociology 297, discussing this fragmentation across state boundaries.

state-originating law, although not necessarily limited to the classical understanding of regulation as command.⁵ Increasingly, however, regulation is understood more broadly as any activity, by governmental actors or otherwise, which controls or influences the behaviour of others.⁶ As will be seen, regardless of the presence of governmental control, regulation occurs ‘in many rooms’.⁷ What emerges is a decentred regulatory space, inhabited by a range of actors, all of whom ‘regulate’.⁸ These actors include governments, corporations, NGOs and interest groups, consumers and citizens. Furthermore, the interactions between these actors bridge across and blur a simple divide between public and private activity. As such, regulation is no longer a purely ‘public’ activity, and the term ‘regulator’ can thus be expanded to include traditionally-understood ‘private’ actors.⁹ This decentred regulatory space is what I term the regulatory voice for the environment within the corporate world, and includes both governments and non-state actors.

The descriptive or positive claim of decentring analysis, that regulation is not the preserve of governmental regulators, is coupled with a normative claim.¹⁰ In view of complexity, autonomy, fragmentation and interdependence, governments ought not to have the monopoly on regulation. There is considerable overlap between the normative claims of decentring and related concepts, frameworks or regulatory

⁵ The relationship between ‘law’ and ‘regulation’ is itself subject to definitional disputes. See, for example, Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds), *Regulating Law* (Oxford: Oxford University Press, 2004), p 34, outlining how ‘regulation’ can be considered a broader social phenomenon than ‘law’, and state-originating law might be understood as one type of ‘regulation’. Relatedly, a broad conception of ‘transnational law’ implies further definitional challenges for what ‘counts as law’, extending the broad idea of decentred understanding of regulation outlined in this chapter beyond state-boundaries, see Jolene Lin and Joanne Scott, ‘Looking Beyond the International: Key Themes and Approaches of Transnational Environmental Law’ (2012) 1 *Transnational Environmental Law* 23, pp 23-4.

⁶ See, for example, Black, ‘Decentring Regulation’ (n 3), pp 103-4; Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Cheltenham: Edward Elgar Publishing, 2010), p 60; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge: Cambridge University Press 2007); Tony Prosser, *The Regulatory Enterprise* (Oxford: Oxford University Press, 2010).

⁷ Black, ‘Decentring Regulation’ (n 3), pp 103-4; Colin Scott, ‘Regulation in the Age of Governance: The Rise of the Post-Regulatory State’ in Jacinta Jordana and David Levi-Faur (eds), *The Politics of Regulation* (Cheltenham: Edward Elgar, 2004); David Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (2005) 598 *The ANNALS of the American Academy of Political and Social Science* 12.

⁸ See Leigh Hancher and Michael Moran, ‘Organizing Regulatory Space’ in Leigh Hancher and Michael Moran (eds), *Capitalism, Culture and Regulation* (Oxford: Oxford University Press, 1989) and Scott, ‘Analysing Regulatory Space’ (n 3).

⁹ Hancher and Moran, ‘Organizing Regulatory Space’ (n 8); Black, ‘Decentring Regulation’ (n 3).

¹⁰ Black, ‘Decentring Regulation’ (n 3), p 103.

prescriptions, including tripartism,¹¹ regulatory pluralism¹² and new governance.¹³ It is beyond the scope of the thesis to consider the relationship between these in detail, although I use the literature on new governance to draw comparisons.

Arguably, CSR is a positive manifestation of decentred regulatory space. With regulation no longer a strictly governmental venture, corporations are subject to both governmental and non-governmental regulation. For example, in the context of CSR, companies speak of their ‘social licence to operate’, the terms of which are defined by a number of actors or corporate stakeholders beyond government.¹⁴ Various forms of

¹¹ Tripartism is a regulatory policy of empowering public interest groups, and is made in response to the problems of cooperation, corruption and capture experienced when business regulation is modelled as ‘a game between two players – the regulatory agency and the firm’. It forms part of Ayres and Braithwaite’s highly influential work, *Responsive Regulation*. Whilst this is decentred in the sense that it brings non-state actors into the regulatory process (through information provision, a seat at the regulatory deal-making table and standing to sue as a regulator), it is still state-centric. In addition, their famous ‘enforcement pyramid’ is similarly state-centred. See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford, Oxford University Press 1992); Peter Grabosky, ‘Beyond Responsive Regulation: The expanding role of non-state actors in the regulatory process’ (2013) 7(1) *Regulation & Governance* 114 and Christine Parker, ‘Twenty years of responsive regulation: An appreciation and appraisal’ (2013) 7 *Regulation & Governance* 2. The problem with responsive regulation and tripartism as a basis for understanding and justifying CER is its reliance on the scope for and discovery of ‘win-win’ solutions, ‘instead of a babble of many conflicting voices talking past each other’. As I suggested in Chapter 2, the rhetoric of win-wins and the business case for CER has the potential to collapse these conflicts.

¹² See Neil Gunningham and Darren Sinclair, ‘Regulatory Pluralism: Designing Policy Mixes for Environmental Protection’ (1999) 21 *Law & Policy* 49 and Grabosky, ‘Beyond Responsive Regulation’ (n 11) although there is a tendency for this sometimes to mean pluralist instrument choice and, like responsive regulation, is similarly state-centric.

¹³ New governance mechanisms vary, and while there is no single, defining characteristic, Scott and Trubek suggest they include some (or all) of the following: expanded participation and power-sharing in regulation and policy making; machinery to achieve the integration of non-state actors in governmental processes (and in the context of the EU, at multiple [hierarchical] levels of government); decentralisation of decision-making (again, in the context of the EU, this may mean decision-making at the lowest possible level); techniques to foster deliberation between stakeholders; a reliance on open-ended, flexible standards as opposed to the types of hard rules associated with some forms of command and control, all subject to iterative revision; and an openness to experimentation and new knowledge. See Joanne Scott and David M Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ (2002) 8 *European Law Journal* 1, pp 5-6). As noted by Maria Lee, *EU Environmental Law, Governance and Decision-making* (Oxford: Hart Publishing 2014), Ch 4 (forthcoming), both governance and regulation are ‘subject to bewildering definitional proliferation and contestation’. Fisher *et al* suggest that governance is a ‘catch-all’ term for ‘any strategy, tactic, process, procedure, or programme for controlling, regulating, shaping, mastering or exercising authority over others...’ (see Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases & Materials* (Oxford: Oxford University Press, 2013), pp 501-2, quoting Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press 1999), p 15). However, both governance and regulation scholars try to address the limitations of command and control, often with reference to ‘regulatory’ approaches which are ‘less rigid, less prescriptive ... and less hierarchical in nature’, see Gráinne de Búrca and Joanne Scott, ‘Introduction: New Governance, Law and Constitutionalism’ in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006), p 2. For our purposes here, there is thus sufficient synergy between the two that we need not be too concerned about the on-going definitional disputes.

¹⁴ Michael Blowfield and Alan Murray, *Corporate Responsibility: A Critical Introduction* (Oxford: Oxford University Press 2008), p 60. Dorothy Thornton, Neil Gunningham and Robert Kagan, *Shades*

private or civil regulation, carried out by shareholders, NGOs, consumers and citizens, exhibit how corporations are increasingly subject to regulatory pressure beyond formal state-originating law.¹⁵ Furthermore, a number of CSR-type ‘obligations’, or de facto market entry requirements in the form of certification requirements, do not originate from state-made law.¹⁶

Importantly, civil regulation and the terms of this social licence can compel behaviour that both adheres to, and goes beyond, formal legal requirements.¹⁷ Indeed, decentred regulation by a range of stakeholders or societal actors points to the way in which legal compliance provides only one aspect of de facto corporate obligations. Simply seeking refuge in legal compliance has become a particularly unwise strategy for corporations in view of this. As such, compliance with formal legal requirements provide a ‘blunt proxy’ for an exhaustive account of overall corporate responsibility when operating within decentred regulatory space.¹⁸ On this basis, CSR is the result of non-governmental or surrogate regulators providing an extra layer of accountability beyond what could be achieved through governmental regulation alone, command or otherwise. This is arguably to be welcomed, and interventions seeking to assist these actors in their provision of extra-governmental regulation and scrutiny are thus a logical response to critiques of direct regulation.¹⁹

of Green: Business, Regulation, and Environment (Stanford: Stanford University Press, 2003) outline a number of ways in which a company’s ‘social licence to operate’ strengthen the ‘regulatory licence’ (legal obligations), either through its direct enforcement by civil society (particularly by NGOs), or demands for the tightening of legal standards themselves.

¹⁵ See, for example, Doreen McBarnet, ‘Corporate social responsibility beyond law, through law, for law: the new corporate accountability’ in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2009); David Vogel, ‘The Private Regulation of Global Corporate Conduct’ (2010) 49(1) *Business and Society Review* 68; John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham: Edward Elgar, 2008) and Simon Zadek, *The Civil Corporation: The New Economy of Corporate Citizenship* (London: Earthscan, 2007).

¹⁶ In particular, the Environmental Management System ISO 14001, discussed further in Chapter 7. See also Steven Bernstein and Benjamin Cashore, ‘Can non-state global governance be legitimate? An analytical framework’ (2007) 1 *Regulation & Governance* 347; Benjamin Cashore, ‘Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority’ (2002) 15 *Governance* 503.

¹⁷ Blowfield and Murray, *Corporate Social Responsibility* (n 14), p 60. See also Scott, ‘Regulation in the Age of Governance’ (n 7).

¹⁸ Horrigan, *Corporate Social Responsibility* (n 6), pp 26-7.

¹⁹ And indeed, there is already a large body of literature on the topic. See in particular John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000) on the role of NGOs and the ‘third sector’ in business regulation. See also the range of ‘next-generation’ regulatory techniques which seek to institute stakeholder participation in environmental decision-making and harness the power of so-called surrogate regulators, in Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield: Greenleaf

In decentred regulatory space, corporations are not only the subject of decentred regulation, they are also decentred regulators themselves; corporations are simultaneously governed and governors.²⁰ As major hubs of information and influence, large companies are also quite significant governors or regulators in decentred regulatory space.²¹ Indeed, as will be illustrated below, the capacity of corporations in their role as environmental regulators is certainly considerable. In view of governmental deficits, and provided corporate expertise and control can be harnessed towards appropriate environmental goals, support for CSR can thus be found in the normativity of decentred regulatory space. As such, there is ‘normative space’ for CER within decentred approaches to environmental law, regulation and governance.

This normativity for CSR activities within decentred regulatory space involves conceptualising, at least as a starting point, corporations as part of the solution to environmental problems. As will be illustrated below, CER has the potential to offer considerable environmental benefits, over and above governmental regulation, which ought not to be dismissed or ignored.²² Imbued within this argument is a plea for pragmatism. Corporations (and CSR, it would seem) are here to stay, and considering ways in which to capitalise on their various capabilities, and work within the discourse of CSR, warrants serious consideration. At the same time, we must be attuned to the criticisms and dangers of CSR, some of which were discussed when considering the business case for CER in Chapter 2. In particular, objections based on a mistrust of the modern corporation and scepticism as to the compatibility of environmental protection with market-based interactions, might be borne in mind.

As was implicit in my rejection of the business case as a source of normativity for CER, I am sympathetic to many of these criticisms. I argued that an over-reliance

Publishing, 2002), and the success with Environmental Improvement Plans in Victoria, Australia, see Gunningham, ‘Shifting Architectures’ (n 2).

²⁰ See, for example, Hancher and Moran, ‘Organizing Regulatory Space’ (n 8), arguing that large firms have become ‘governing institutions’.

²¹ Ibid.

²² See Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Oxford University Press, 1998) and Ayres and Braithwaite, *Responsive Regulation* (n 11) arguing how, often, ‘more can be achieved by harnessing the enlightened self-interest of the private sector than through command and control regulation’. However, as mentioned above (n 11), this ‘self-interest’ is in part dependent upon the existence of ‘win-wins’, which is problematic for the reasons discussed in Chapter 2. In addition, as will be seen in Chapter 5, the concept of ‘enlightened self-interest’ resonates with the UK’s adoption of Enlightened Shareholder Value (ESV) in company law, which, I suggest, is environmentally *unenlightened*.

on the business case leaves CSR wide open to legitimate critique as being little more than superficial greenwash or obfuscatory corporate rhetoric. This paints a sinister or dangerous picture of the CSR movement and its associated discourses. And deep, structural change is indeed difficult to contemplate in the context of the business case. When confining CER to environmental/economic win-wins, we are only tinkering with a status quo, rather than questioning it. There is some overlap here with critiques of new governance. As noted by de Búrca, new governance is sometimes described as ‘normatively empty’ because ‘...it is as much open to being a vehicle for a neo-liberal deregulatory agenda as it is to promote social justice or equity’.²³

However, by placing CSR in the context of decentred regulatory space, we can usefully drag it (and associated debates) away from the business case-driven call for responsibility. This arguably allows more room for reconfiguration and contestation than would otherwise be the case within ‘win-win’ CER. My invocation of decentring analysis thus deliberately moves away from the business case, market-centric rationality for CER. In this, it echoes one of de Búrca’s possible responses to the ‘normative emptiness’ critique of new governance; that scholars can ‘place themselves at different points on the spectrum’.²⁴ Of course, by offering corporations as part of the solution, my justification for CSR does risk re-emphasising corporate power, and heightens the potential for companies to hijack social or environmental agendas in favour of their own economic interests. In this sense, my case for CER argument is not radical or transformative. However, decentring analysis is seen as providing a framework through which to view the pragmatic space for CER. Whilst it will be shown that CER does have potential benefits over and above governmental control, there is, nevertheless, reason for caution. This is especially the case with the concept of companies behaving as ‘regulators’, with related questions of legitimacy and inappropriate corporate influence, to which I now turn.

Concerns about corporate regulators

²³ Gráinne de Búrca, ‘New Governance and Experimentalism: An Introduction’ [2010] Wisconsin Law Review 227, p 237 (quoting Amy J Cohen, ‘Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law’ [2010] Wisconsin Law Review 357).

²⁴ That is, by being explicit about whether new governance is understood as part of a neo-liberal deregulatory agenda, or as committed to a theory (existent or perhaps new governance-specific) of distributive, participatory or deliberative justice, see de Búrca, ‘New Governance and Experimentalism’ (n 23), pp 237-8 and Cohen, ‘Governance Legalism’ (n 23).

The idea that non-governmental actors are ‘regulators’ raises questions of democratic legitimacy. This is the major normative objection to CSR; the pursuit of social (and environmental) goals ‘is better justified by a mandate from the body politic through law’.²⁵ Friedman famously suggested that corporate responsibility, when defined as expenditures for environmental and other societal concerns beyond what is required by law, represents a form of tax on shareholders, employees and customers without the legitimacy of a democratic mandate.²⁶ Conversely, others have suggested that certain aspects of CSR may appear to represent inappropriate privatised standard setting, with companies or sometimes industry associations deciding what constitutes responsible and irresponsible corporate behaviour.²⁷

However, in decentred regulatory space, it is not just companies who act as regulators, and easy distinctions cannot be drawn between different ‘regulators’. Admittedly, the idea of companies being subject to non-governmental regulation is perhaps more palatable to some than the idea of companies acting as regulators themselves, but we ought to be careful in making this assumption. Notwithstanding the benefits of external pressure being placed on corporations, in view of the normative implications of decentred regulation, ENGOs similarly regulate without any democratic mandate. Although they are perhaps rightly characterised as serving a more benign purpose than some corporations, it is potentially unhelpful to draw arbitrary divides as to the acceptability of non-governmental regulation on the basis of whether the actor is ‘corporate’ or not.²⁸

Equally, it is important to keep in mind the comparison with state-originating environmental law. It would be mistaken to assume that current environmental decision-making models necessarily perform any better on a democracy litmus test than ‘private’ CER—in reality, a non-majoritarian entity is likely to have the final

²⁵ Horrigan, *Corporate Social Responsibility* (n 6), p 11.

²⁶ Milton Friedman, ‘The Social Responsibility of Business is to Increase Its Profits’ *The New York Times Magazine* (13 September 1970).

²⁷ Hevina S Dashwood, ‘Corporate Social Responsibility and the Evolution of International Norms’ in John J Kirton and Michael J Trebilcock (eds), *Voluntary Standards in Global Trade, Environment and Social Governance: Hard Choices, Soft Law* (Aldershot: Ashgate Publishing, 2004).

²⁸ Indeed, ENGOs cannot always be trusted to advocate in the environmental interest. Greenpeace, for example, was criticised for significantly overstating the environmental case against disposing of the Brent Spar oil storage tanker and loading buoy at sea, and critics of large corporation have been known to play ‘fast and loose’, see Grabosky, ‘Beyond Responsive Regulation’ (n 11); John Vidal, Dave Morris and Helen Steel, *McLibel: Burger Culture on Trial* (London: Macmillan, 1997).

word.²⁹ In addition, Prosser argues that our understanding of democracy ought not to be limited to the ‘electoral mandate’,³⁰ which is in part implicit in some rejections of CSR.³¹ As he suggests, even when regulatory decisions are clearly taken by government, there is no direct ‘electoral legitimacy’ for the regulatory solution: ‘once we accept that regulatory decisions involve values, and values which are often conflicting, we have to find other sources of their legitimisation’.³²

In view of the decentring phenomenon, recourse to democratic illegitimacy in broad condemnation of CSR is somewhat superficial.³³ As has already been argued, decentred understandings of regulation suggest that corporate involvement in the (traditionally conceived) ‘public’ or ‘democratic’ sphere of regulation is both inevitable and, in view of the limitations of governmental intervention, something to be potentially welcomed. At the same time, this decentred regulatory space is in fact representative of a partial collapse of the public / private divide. As such, there is perhaps little to be gained in the dichotomous language of public versus private.³⁴ Yet rejections of CSR on the basis of democratic legitimacy impliedly rest on this restricted and potentially inaccurate assumption that the roles of ‘public’ and ‘private’ actors can be authoritatively or easily distinguished.³⁵ If there is a critique to be made, it is subtler.

In the context of decentred or governance regimes, scholars point to mechanisms of legitimacy and accountability beyond representative models of democracy.³⁶ A recurring theme is the need for proper participation.³⁷ The criteria

²⁹ Often an environmental agency of some sort, see Jane Holder and Maria Lee, *Environmental Protection Law and Policy: Text and Materials* (Cambridge: Cambridge University Press 2007). And of course, regulators frequently make decisions as to conflicts between values, the determination of which is arguably political rather than technical. The Environment Agency in the UK is a good example of this, being characterised by Prosser, *The Regulatory Enterprise* (n 6) as both an economic and social regulator, with obvious potential for clashing values.

³⁰ Prosser, *The Regulatory Enterprise* (n 6), p 8.

³¹ See especially Friedman, ‘The Social Responsibility of Business’ (n 26).

³² Prosser, *The Regulatory Enterprise* (n 6), p 8.

³³ Indeed, one would also expect some expression of the model of democracy alluded to (e.g. representative, participatory or deliberative). Whilst it is beyond the scope of the thesis, it might be argued that, within the context of decentred understanding of regulation together with the ‘civil regulation’, CSR might be broadly compatible with participatory or deliberative models of democracy.

³⁴ Hancher and Moran, ‘Organizing Regulatory Space’ (n 8).

³⁵ And even if we were to deny the corporation certain ‘public’ regulatory roles often associated with CSR, their decisions on research, investment and employment would still have implications which resonate in the ‘public’ sphere.

³⁶ For example, enhancing democratic governance through network accountability and an enhanced role for auditors, see Colin Scott, ‘Accountability in the Regulatory State’ (2000) 27 *Journal of Law and*

for this are of course extensive, but at a minimum should include sufficient space for contestation (or for challenging perceived wisdom), which in turn relies on the provision of adequate and impartial information.³⁸ Similarly, the forums of public participation are varied, but arguably include the courts.³⁹ It is beyond the scope of this thesis to consider these mechanisms in any detail. For present purposes (democratic critiques of CSR), I am less concerned with the so-called ‘solutions’ to the challenges of legitimacy and accountability presented by decentring (though of course these are important and challenging), but rather Julia Black’s calls for a deeper understanding of what it means to be ‘legitimate’.⁴⁰ As discussed in Chapter 3, knowledge and information is socially constructed. So is the concept of legitimacy.⁴¹ According to Suchman, legitimacy is ‘a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.’⁴² Given the relevance

Society 38; Carol Harlow and Richard Rawlings, ‘Promoting Accountability in Multilevel Governance: A Network Approach’ (2007) 13 *European Law Journal* 542.

³⁷ See, for example, de Búrca, ‘New Governance and Experimentalism’ (n 23). Of course, participation is partly justified in democratic terms (see Maria Lee, *EU Environmental Law: Challenges, Change and Decision-Making* (Oxford: Hart Publishing, 2005), Ch 5). However, the point (as will be made below) is that the role of representative, or electoral, understandings of democracy are lessened in decentred regulation and new governance; see Joanne Scott and Susan Sturm, ‘Courts as Catalysts: The Role of the Judiciary in New Governance’ (2006) 13 *Columbia Journal of European Law* 565.

³⁸ See, for example, Orly Lobel, ‘The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’ (2005) 89 *Minnesota Law Review* 324; Joanne Scott, ‘REACH: Combining Harmonization with Dynamism in the Regulation of Chemicals’ in Joanne Scott (ed), *Environmental Protection: European Law and Governance* (Oxford: Oxford University Press, 2009). Scott, ‘REACH’ (n 38), p 75, is critical, for example, of the exclusion of NGO, academic and industry ‘voices’ from those able to instigate some of the reflection processes pursuant to the EU Regulation on the registration, evaluation, authorisation and restriction of chemical substances (REACH).

³⁹ On the importance of judicial review, see Richard B Stewart, ‘The Global Regulatory Challenge to US Administrative Law’ (20005) 37 *New York University Journal of International Law* 695, referenced by Black, ‘Legitimacy and Accountability’ (n 1). See also Scott and Sturm, ‘Courts as Catalysts’ (n 37). It is beyond the scope of this thesis to give detailed consideration of the role of courts in decentred regulatory space. Arguably, courts do (and should) contribute to the legitimacy and accountability in this context, notwithstanding more traditional understandings of their role and a broad distinction often drawn in governance scholarship between judicial and political accountability mechanisms. Scott and Sturm dispute this traditional understanding forcefully. For example, they point to standing, where courts adjudicate on who can participate in processes. In this sense, the judiciary ‘prompts’ public participation in decision-making. As such, rather than operating in a vacuum, courts are in ‘dynamic relationship’ with other institutions of governance, and are thus a real and significant location for the elaboration (and a limited source) of legitimacy and accountability norms.

⁴⁰ Black, ‘Legitimacy and Accountability’ (n 1).

⁴¹ Black, ‘Legitimacy and Accountability’ (n 1), p 144: ‘in sociological terms, legitimacy may be an objective fact, but it is socially constructed’.

⁴² Mark C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20 *Academy of Management Review* 571, p 574. ‘In a governance or regulatory context, a statement that a regulator is “legitimate” means that it is perceived as having a right to govern both by those it seeks to govern and those on behalf of whom it purports to govern’ (Black, ‘Legitimacy and Accountability’ (n 1), p144). See also David Beetham, *The Legitimation of Power* (London: Macmillan 1991).

of perception, there is also the potential for multiple and conflicting legitimacy claims.⁴³

Arguments as to the anti-democratic aspects of corporate activity can thus to some extent be diffused by deconstructing the meaning of 'legitimacy'. The point I make is certainly not that democracy does not matter. Rather, the questions and associated 'answers' are more subtle, nuanced and complex in decentred regulatory space, and unlikely to be fully understood by recourse to primarily democratic / electoral constructions of legitimacy. What *is* a concern, however, is the extent to which existent corporate power dominates decentred regulatory space, potentially crowding out the influence of other actors, governmental or otherwise, as well as the interests of the environment.⁴⁴ There are similarities here with democratic deficit critiques of new governance, where new governance is said to 'devalue or distort' democratic legitimacy and establish structures or networks which are 'elitist rather than democratic or broadly participatory.'⁴⁵ This is particularly the case where regulatory space is inhabited by a '... narrow range of self-selecting and usually already powerfully positioned participants.'⁴⁶

The extent of corporate power, influence or dominance is disputed, although there is some unhelpful polarisation in debates. At one extreme, David Henderson is particularly scathing about claims that companies are usurping or overriding governmental power.⁴⁷ His primary attack is on CSR literature.⁴⁸ Implicitly, however, this extends to regulation scholars attaching significance to the power of large firms in regulatory space. In his overall argument, Henderson attaches significance to the retained role of government to make laws and levy taxes.⁴⁹ This arguably fails to appreciate the limitations of these types of legal intervention (consider creative

⁴³ Black, 'Legitimacy and Accountability' (n 1).

⁴⁴ Hancher and Moran, 'Organizing Regulatory Space' (n 8). See, for example, Barley's concern that corporations can undermine representative democracy, not only by promoting legislation that benefits corporations at the expense of citizens, but also via privatisation and regulatory capture, Stephen R. Barley, 'Corporations, Democracy, and the Public Good' (2007) 16 *Journal of Management Inquiry* 201. See also Robert B Reich, *Supercapitalism: The Battle for Democracy in an Age of Big Business* (Cambridge: Icon Books, 2009).

⁴⁵ See de Búrca, 'New Governance and Experimentalism' (n 23), p 235-6, see also William E. Scheurman, 'Democratic Experimentalism or Capitalist Synchronization: Critical Reflections on Directly-Deliberative Polyarchy' (2004) 17 *Canadian Journal of Law & Jurisprudence* 101.

⁴⁶ See de Búrca, 'New Governance and Experimentalism' (n 23), p 236.

⁴⁷ David Henderson, *Misguided Virtue* (London: Institute of Economic Affairs, 2001).

⁴⁸ Particularly the work of Michael Hopkins, *The Planetary Bargain: Corporate Social Responsibility Matters* (London: Earthscan, 2003); Peter Schwartz and Blair Gibb, *When Good Companies Do Bad Things: Responsibility and Risk in an Age of Globalization* (New York: John Wiley & Sons 1999).

⁴⁹ Henderson, *Misguided Virtue* (n 47).

compliance, for example), as well as corporate activities which seek to dilute the strength of these laws.⁵⁰ At the opposite extreme are those who suggest that the power and influence of companies is so pervasive as to completely subvert the regulatory activities of democratic governments.⁵¹ If the decentred understanding of regulation provides input here, it is that distributions of power and influence are subtle and nuanced, and are unlikely to uniquely conform to either of these polar positions.⁵² The truth as to corporate power is therefore probably somewhere in the middle, and likely to vary depending upon the subject area of government intervention. As such, more nuanced appreciations of the benefits of CSR suggest that it will be more appropriate in certain areas than others.⁵³ Again, a similar argument is made regarding new governance. Whilst some present new governance as ‘a totalizing theory’, others respond that it may not be appropriate for all types of regulatory problems.⁵⁴

Suggestions that CSR might be more appropriate in certain areas than others warrants consideration of whether we might differentiate the environment from other CSR concerns. How are we to understand ‘the environment’ within the decentred regulatory space? The environment is not really a social ‘actor’. A similar problem was encountered in Chapter 2 when trying to conceptualise the environment as a corporate ‘stakeholder’. The environment perhaps performs a small amount of ‘regulating’ on its own, but only at the extremes (for example, with ecosystem collapse and limits to growth). One might argue, however, that these regulating constraints are

⁵⁰ See, for example, Simon McRae, ‘Hidden Voices – The CBI, corporate lobbying and sustainability’ (Friends of the Earth, 2005), documenting ‘the never-ending Confederation of British Industry’s (CBI) mantra against higher environmental standards’, primarily justified through what McRae argues are exaggerated costs of regulation. See also Jeremy Moon and David Vogel, ‘Corporate Social Responsibility, Government, and Civil Society’ in Andrew Crane, Abigail McWilliams, Dirk Matten, Jeremy Moon and Donald S Siegel (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2009); Gregory Shaffer, ‘How Business Shapes Law: A Socio-Legal Framework’ (2009) 42 Connecticut Law Review 147.

⁵¹ See especially Reich, *Supercapitalism* (n 44); Robert B. Reich ‘The Case Against Corporate Social Responsibility’ (2008) (available at <http://ssrn.com/paper=1213129>). Others attuned to the dangers of corporate power (though less extreme in their diagnosis and prescription) include Charlotte Villiers, ‘Corporate law, corporate power and corporate social responsibility’ in Nina Boeger and others (eds), *Perspectives on Corporate Social Responsibility - Corporations, Globalisation and the Law* (Cheltenham: Edward Elgar, 2008); Joseph Corkin, ‘Misappropriating citizenship: the limits of corporate social responsibility’ in Boeger *et al*, *Perspectives on CSR* (n 51).

⁵² On the way in which CSR scholarship remains stuck in ‘bi-polar arguments and sweeping dichotomies’, see Horrigan, *Corporate Social Responsibility* (n 6), p 8.

⁵³ Horrigan, *Corporate Social Responsibility* (n 6), p 122.

⁵⁴ See de Búrca, ‘New Governance and Experimentalism’ (n 23), p 238.

imposed not by the environment itself, but by embedded social practices.⁵⁵ The paradigm of a regulator or stakeholder sits more happily with companies, NGOs, investors and employees than it does with the environment. Ultimately, environmental concerns are thus dependant upon the advocacy of others. This is either regulation by a variety of social actors collectively understood as civil society (including ENGOS), as well as of course through formal governmental intervention broadly understood as environmental law. As already suggested, these advocates collectively act as the regulatory voice for the environment, in the absence of it having a voice of its own.

However, the potential for the corporate interests to crowd out other regulatory actors seems, at least at first sight, to be especially the case when considering the environment. The fact that the environment is not really an ‘actor’ in the decentred understanding of regulation potentially places it at an immediate disadvantage when compared with other CSR ‘stakeholders’, such as employees or investors, as well as against corporations generally.⁵⁶ However, this immediate disadvantage is partially offset by the significant role of ENGOS in decentred regulatory space. Braithwaite and Drahos, for example, point to the fact that few (if any) areas of corporate regulation and CSR have the broad popular base or ‘political clout’ of ENGOS.⁵⁷

Nonetheless, this places enormous reliance on ENGOS to regulate on the environment’s behalf, and we ought not to assume that this can always be effectively achieved. ENGOS suffer from resources discrepancies when compared with companies (and certainly when companies act collectively as an industry). In addition, the (decentred) regulatory aspects of ENGOS activity may require a certain level of visibility to a particular environmental problem (or associated corporate behaviour) in order to exact meaningful regulatory leverage.⁵⁸ In the context of waste, the siting of waste treatment facilities has been very high profile locally, but it can be difficult to engage people on a broader policy basis.⁵⁹ But the lack of a proximate or daily-

⁵⁵ For example, there are absolute limits on the use of non-renewable resources, and there is decreasing capacity for landfill. However, neither of these ‘environmental’ constraints would be an issue were it not the case that society routinely (over-) relies on both.

⁵⁶ I acknowledge that of course these actors face challenges, but there is space for the possibility of direct advocacy, even if barriers do exist.

⁵⁷ Braithwaite and Drahos, *Global Business Regulation* (n 19), pp 271-2.

⁵⁸ Frances E. Bowen, ‘Environmental visibility: a trigger of green organizational response?’ (2000) 9 *Business Strategy and the Environment* 92.

⁵⁹ Fisher *et al*, *Environmental Law* (n 13), p 278. Indeed, ENGOS play a key role at the policy and law-making level. This role is especially important if individuals are otherwise unengaged. From a decentring perspective, ENGOS play a significant role in the multi-levelled governance frameworks (and

relevant issue can make life difficult for ENGOs as regulators, at least if they depend on mass public concern to exact corporate behaviour change.⁶⁰ Not all corporate environmental impacts come with the same level of public attention and condemnation, although the LoveFoodHateWaste campaign (discussed briefly in Chapter 3), together with associated media reporting, is perhaps an exception.

So whilst there is normative and pragmatic space for CER in the decentred law, regulation and governance of environmental protection, this space is limited. The limitation relates less to the classic critique of CSR (that it is undemocratic), but rather that corporate power in decentred regulatory space has the potential to crowd out environmental concerns. The absence of a direct ‘environmental’ voice places enormous reliance on ENGOs. While perhaps being well equipped compared with NGOs for other sectoral concerns of CSR,⁶¹ reliance on ENGOs is an imperfect solution to advocating environmental interests within decentred regulatory space. As such, there is a continuing role for governmental intervention and oversight,⁶² and I return to the possible nature of this in Chapter 7.

3. Potential and limits of CER in decentred regulatory space

In this section, I use the problem of waste management to illustrate some of the claims made above. In particular, I aim to show that corporations as ‘regulators’ have the

associated distributions of regulatory power) pursuant to EU Law, see, for example, Joanne Scott, ‘The Multi-Level Governance of Climate Change’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011). At the same time, however, new governance processes generally encourage or involve ‘the participation of affected actors (stakeholders) rather than merely representative actors’ (see de Búrca and Scott, ‘Introduction’ (n 13), p 3). For reasons already discussed, this is problematic when considering the environmental interest, and hence my recourse to the broader concept of voice.

⁶⁰ Furthermore, it is not always the case that mass public concern attaches to the most worrying environmental problems. For example, as discussed in Chapter 2, over-packaging has been an area where consumers have been particularly vocal on matters of environmental concern. What seems to receive less attention is that the packaging may be a very small representation of the overall environmental impact of a product, see Science and Technology Committee, *Waste Reduction* (2007-8, HL 163-I), [5.7]. See also Braithwaite and Drahos, *Global Business Regulation* (n 19), p 273.

⁶¹ Workers and consumers may also rely a representative, see Braithwaite and Drahos, *Global Business Regulation* (n 19), in general and at pp 271-2.

⁶² See, for example, Braithwaite, *Regulatory Capitalism* (n 15), stressing the importance of both public and private regulation; Vogel, ‘Private Regulation’ (n 15), arguing that ‘civil regulation’ is not a substitute for state authority; and Grabosky, ‘Beyond Responsive Regulation’ (n 11), suggesting that examples of the successes of private regulation do not necessarily mean that ‘government should abdicate their regulatory roles’.

potential to reach causes of environmental problems only problematically addressed (if at all) through governmental regulation, particularly regarding corporate influence over a very broad range of actors, most notably large supply chains and consumers. These examples are provided to give a flavour of CER's potential, particularly regarding some of the more favourable aspects of descriptive decentring. When CER is understood on this basis—a 'companies-as-regulators' appreciation of CSR—we are presented with a compelling case for seeking ways to ensure corporate regulatory reach is geared towards environmental goals. As I argued in the previous section, however, the examples provide evidence as to the negative consequences of decentring, and expose related problems with CSR. As such, pragmatic and normative space for CER is limited.

Voluntary agreements / responsibility deals

Some of the more descriptive claims as to decentring, and its relationship with CSR, can be seen in the adoption of 'voluntary agreements' or 'responsibility deals' for waste reduction. These have been advocated and supported by government, but tend to be run by the non-governmental, not-for profit limited company Waste & Resources Action Programme (WRAP). None of these agreements are truly 'voluntary'. Although they involve targets set outside of formal legal regulation, they must be considered in light of the Landfill Tax, the on-going threat of landfill bans for various materials, together with recycling and recovery targets for packaging and construction and demolition (C&D) waste.⁶³ Furthermore, as was discussed in Chapter 2, waste reduction measures can save on costs.

The existence of these agreements can also be understood, in part, as the outcome of corporations being subject to decentred or 'civil' regulation (further undermining the idea that they are 'voluntary'). Food and packaging waste, for example, is an area of reasonable public concern, and many companies refer to the perceived reputational gains which flow from participation in these voluntary agreements.⁶⁴ At the same time, the responsibility deals also involve companies acting as regulators. This is especially the case when agreements involve targets for waste

⁶³ As discussed in Chapter 3.

⁶⁴ See Peter Jones, Daphne Comfort, David Hillier, and Ian Eastwood, 'Corporate social responsibility: a case study of the UK's leading food retailers' (2005) 107 *British Food Journal* 423; Science and Technology Committee, *Waste Reduction* (n 60), [7.20].

reduction by householders or within a supply chain, rather than by the signatory companies themselves.

WRAP often expresses the value of these various agreements as moving entire sectors towards a 'common goal', together with the type of stakeholder interaction, cooperation and information-sharing facilitated by WRAP which would be more difficult to achieve via government alone. The Ashdown Agreement on plasterboard, particularly with its qualitative stakeholder engagement objectives, was an excellent example of this.⁶⁵ The Agreement generated technical guidance to facilitate the elimination of waste through more rigorous design and specification processes, and generally spurred greater interaction between designers and supplies.⁶⁶ Indeed, this confirms some of the cooperative benefits exhibited by CER which respond to the challenges of fragmented information and control.⁶⁷

Of course, there are reasons for concern with some of the voluntary agreements (in addition to those explored further, below). The Courtauld Commitments exhibit some of the limitations in this type of CER activity. Phase 1 (2005-10) (CC1) included signatories from supermarkets and convenience stores, and heralded itself as contributing to the halt in packaging waste growth by 2010. However, the agreement faced criticism for its over-focus on light weighting (recall the problems with this explained in Chapter 2), rather than sustainability more generally.⁶⁸ In addition, there was a failure to engage with and address the consumer aspects of packaging waste, in

⁶⁵ The Ashdown Agreement, made between the Gypsum Products Development Association and WRAP, set out shared objectives for the diversion of plasterboard from landfill. The long-term goal is zero plasterboard to landfill, though in the interim, broad qualitative 'stakeholder engagement' objectives were coupled with quantitative targets. First, to reduce the amount of waste sent to landfill from UK plasterboard manufacturing operations to 5000 tonnes (from 10,000) per year by 2010 (target met). Second, by 2010, to increase the take back and recycling of plasterboard waste by 50% of new construction waste arisings (not met, only 26%, although this is still a considerable increase). See WRAP, *Ashdown Agreement – Annual Report* (WRAP, September 2010).

⁶⁶ See WRAP, *Ashdown Agreement - Annual Report* (n 65), p 10, and the work of Knauf Drywall, in particular, with regard to bespoke specifications, at p 22.

⁶⁷ See also the Construction Waste Commitment, agreed by the Strategic Forum for Construction, WRAP and DEFRA, which set a 50% reduction target (based on 2008 levels) by 2012 in CD&E waste sent to landfill, together with a 20% reduction in construction packaging waste; see BERR *et al*, *Strategy for Sustainable Construction* (Crown Copyright, 2008), 48. As of 26 July 2013, there is still no confirmation from WRAP or the Strategic Forum for Construction whether this target was met (although the data collection can take some time, and the Courtauld Commitment Phase 2 concerning packaging waste will not report until Autumn 2013, despite finishing at the end of 2012). However, in July 2012, the construction industry was on track to meet its target.

⁶⁸ Science and Technology Committee, *Waste Reduction* (n 60).

particular in communicating reasons for packaging choices (which may at first sight appear excessive and of which a perception amongst consumers persists).⁶⁹

Phase 2 of the Courtauld Commitment (CC2) (2010-12) was broader in terms of its participants than CCI, including a number of food producers. It sought to combine the ‘less packaging’ imperative of CC1 with a new imperative of ‘smarter’ packaging.⁷⁰ The Commitment applied only to ‘groceries’, and included a vague target concerning packaging optimisation: to ‘reduce the weight, increase recycling rates and increase the recycled content of all grocery packaging, as appropriate’. This was coupled with quantitative targets to reduce the carbon impact of grocery packaging by 10%, and the traditional grocery product and packaging waste in the supply chain by 5%. There was also some ‘consumer interaction’ rhetoric to the new agreement, which in principle is positive. However, it is not at all clear what this actually involved.

CC2 completed in December 2012. The results will not be reported until Autumn 2013, although WRAP reported in October 2012 that the sector was on track to meet the targets. In the meantime, WRAP directs us to a series of case studies and quotes provided by the Commitment Signatories (retailers and manufacturers).⁷¹ These case studies are celebratory and self-congratulatory, rather than critical or reflective. Combined with the extensive use of corporate logos in the document, this smacks of PR at least as much as it does of a genuine commitment to the norms of waste reduction underpinning the agreement. The nature of these case studies, together with the lack of information on the nature of consumer interaction under CC2, ought to be contrasted with the Ashdown Agreement. This Agreement published an annual report, the comparable transparency of which is important.⁷² In addition, the annual report was (or at least attempted to be) self-critical.⁷³

The Courtauld Commitment agreements worked as part of a broader packaging strategy which includes the associated Extended Producer Responsibility (EPR) regime for packaging and packaging waste. A continuing problem in this area is excessive packaging. The approach to addressing the problems of excessive packaging

⁶⁹ Science and Technology Committee, *Waste Reduction* (n 60).

⁷⁰ See WRAP website: <http://www.wrap.org.uk/retail/courtauld_commitment/index.html> (accessed 8 May 2010).

⁷¹ WRAP, *Courtauld Commitment 2 Voluntary Agreement – signatory case studies and quotes* (WRAP, November 2012).

⁷² WRAP, *Ashdown Annual Report* (n 65).

⁷³ Ibid.

are now to be addressed with a third Courtauld Commitment (CC3) (2013-15),⁷⁴ together with a decentred understanding of responsibility:

It is up to all consumers to let business know when packaging goes beyond what we regard as normal, or acceptable ... by contacting retailers, manufacturers, or Trading Standards Officers... It is up to retailers and manufacturers to explain the benefit of certain packaging types to the consumer.⁷⁵

This might be characterised as a reliance on CER, at least when we understand CER as a positive manifestation of the decentred regulation *of* (rather than *by*) companies.

Some of the challenges faced in reducing packaging waste illustrate the need for a continual coordinating role for government. The attempts of supermarkets to reduce packaging waste are often hindered by the overall recycling infrastructure in the UK. This is an example of fragmented control, and the interdependence it creates. Efforts by supermarkets to reduce packaging waste rely on consumers being able to readily recycle that waste. However, retailers have repeatedly expressed concern that recyclable packaging is not collected (for recycling), a problem caused by considerably variable recycling practices across local authorities.⁷⁶ This makes it ‘virtually impossible’ to assess end-of-life consequences when developing production processes or selecting materials.⁷⁷ Businesses, supermarkets included, characterise this as a major barrier to the successful implementation of waste reduction strategies.⁷⁸

CC3 also includes targets for food and drink waste reduction. There are two weight-based targets, one for reducing household food and drink (5% by 2015, 9% in real terms) and supply chain food waste (3% by 2015, 8% in real terms).⁷⁹ The household targets, of course, implicate consumers. However, the agreement of targets in respect of this with retailers is a nod to the regulatory influence of companies (the

⁷⁴ CC3 is a combined food and packaging waste reduction commitment. The target for packaging is to reduce packaging waste in the grocery supply chain by 3% by 2015 on a 2012 baseline (an 8% reduction relative to anticipated production and sales volumes).

⁷⁵ Defra *et al*, *Making the most of packaging: A strategy for a low-carbon economy* (PB 13189, Crown Copyright, 2009), p 36.

⁷⁶ Science and Technology Committee, *Waste Reduction* (n 60), [4.22].

⁷⁷ *Ibid.*, [4.21].

⁷⁸ *Ibid.*

⁷⁹ Both of these are against a 2012 baseline. The ‘real terms’ figures are in view of expected increases in food productions and sales.

company-as-regulator brand of CER). The targets have been criticised for being inadequately ambitious,⁸⁰ and should be contrasted with the target pursuant to the Waste Framework Directive (WFD) of a 50% increase in food waste recycling and recovery by 2020.⁸¹ In addition, given the levels of over-production which drive food waste within the supply discussed in Chapter 2, we might query whether it was appropriate for this target to be lower than the household equivalent.

Supply chains and sustainability clauses

Increasingly, CER activities are associated with the influence large companies have over their supply chain, and this is a good example of how CER has the potential to reach areas that could only with great difficulty be regulated through governmental intervention (if at all). Doreen McBarnet characterises this as *CSR through law*, which involves corporations driving behaviour that goes beyond governmental requirements but is nonetheless achieved through legal, non-governmental, mechanisms.⁸² In the case of both the construction industry and supermarkets, driving waste reduction within the supply chain through direct regulation would be extremely challenging, not least because of sheer volume of actors who would comprise the ‘regulated community’.⁸³ At the same time, corporations (Small and Medium-sized Enterprises (SMEs) and larger companies working collectively) are arguably better placed than governments to make certain strategic decisions as to the best ways in which to achieve waste reduction within the supply chain. This may be through, for example, design measures at early phases of construction projects, or as regards demand forecasting with respect to ordering and supplying fresh produce in supermarkets.⁸⁴ In both sectors, it is clear that regulation by corporations over the supply chain, particularly through contractual provisions, takes place.

⁸⁰ Tim Burns, head of Waste Watch, expressing his views at the Westminster Food and Nutrition Forum, reported by Darrel Moore, ‘Courtauld Commitment 3 “Needs Tougher Targets”’ *Chartered Institution of Waste Management (CIWM) Online* (8 July 2013).

⁸¹ WFD, Art 11. As discussed in Chapter 3, this is qualified by the requirement for Member States to introduce measures ‘designed to achieve’ the target.

⁸² McBarnet, ‘CSR Beyond Law’ (n 15).

⁸³ On the difficulties associated with regulating such communities, particularly ones dominated by SMEs, see Gunningham and Sinclair, *Leaders and Laggards* (n 19).

⁸⁴ As discussed in Chapter 2.

The use of contract provisions relating to waste reduction / management in the construction industry are still in the early stages of development in the UK.⁸⁵ There is of course an array of potential terms, with varying levels of strictness. ‘Prohibited materials clauses’ in contracts are already common, and are easily adaptable to waste-related matters.⁸⁶ These might include a stipulation to exclude the use of virgin aggregates, or positive obligations to source and use more sustainable (e.g. recycled) materials. The process of sourcing sustainable material can also be facilitated through clauses sensitive to the challenges involved in doing so. Oats and Douglas, for example, point to contractual clauses giving allowances (time and money) for difficulties encountered in sourcing particular materials or pursuing specific sustainable objectives.⁸⁷

A number of Joint Contracts Tribunal (JCT) standard form contracts (used in 70 per cent of building contracts in the UK),⁸⁸ already contain waste-type provisions, albeit rather weak. The Framework Agreement cl 17 requires the employer to ‘consider’ environmental considerations, including construction / engineering techniques which involve reductions in waste.⁸⁹ In addition, the JCT Pre-Construction Services Agreement (Specialist), a contract designed for the interim appointment of consultants to carry out pre-construction services, allows for early-involvement of a specialist during the pre-construction period.⁹⁰ Importantly, this engages various actors in the supply chain at an early stage, and as has already been suggested, this is when waste is most easily avoided. The JCT recently carried out a consultation on sustainability provisions (including waste-related clauses),⁹¹ with recent amendments to the suite including requirements to reduce, re-use and recycle, together with limits on waste generated.⁹²

The type of control wielded by supermarkets over their supply chain displays some of the more worrying aspects of CER. The influence of the retail sector is widely

⁸⁵ Helen Garthwaite, ‘Sustainability gains ground’ (2009) 20 Construction Law 6. As such, there is further research to be pursued here, and I use the examples below as illustrative of the broader potential for CER subject to that further research proviso.

⁸⁶ Simon Oats, ‘Sustainability Contracts’ (2008) 19 Construction Law 29.

⁸⁷ Oats and Douglas, ‘Sustainability Contracts’ (n 86).

⁸⁸ Shona Frame, ‘More changes expected from JCT’ (2009) 20 Construction Law 17.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Adam Nell, ‘Sustainability in the recession’ (2009) 20 Construction Law 6.

recognised,⁹³ and the ‘awesome’ purchasing power of large buyers is inevitably significant.⁹⁴ Retail grocery is no exception.⁹⁵ However, as was seen in Chapter 2, the use of sheer market power to impose unfavourable but wasteful (and environmentally damaging) contractual terms on food suppliers is commonplace. The exploitation of the supply chain by supermarkets has received considerable attention in the last two decades, and has been the subject of two major competition-related inquiries in recent years.⁹⁶ The culmination of these is the Groceries Code Adjudicator Act 2013, which sets up an adjudicator to oversee and enforce a revised and strengthened Groceries Code. While the background debates display some awareness of the environmental implications of supply chain control in this area, the waste generated as a result of contractual control is clearly tangential to the main regulatory objectives.⁹⁷

Choice architecture and consumers

As was explained in Chapter 2, the purchasing patterns of consumers have a large impact on food waste arisings. In addition, it was also outlined how purchasing behaviour, particularly over-purchasing, is framed and actively encouraged by supermarkets. Retailers thus have extensive influence over consumer behaviour, and as such the regulatory potential here is significant. Arguably, this influence is also more potent than governmental regulation. Indeed, in the context of food waste, supermarkets are arguably uniquely placed in terms of their influence. This power is

⁹³ Michael E Porter, *The Competitive Advantage of Nations* (London: Macmillan 1998); Grabosky, ‘Beyond Responsive Regulation’ (n 11).

⁹⁴ Grabosky, ‘Beyond Responsive Regulation’ (n 11); See also Peter Dauvergne and Jane Lister, ‘Big brand sustainability: Governance prospects and environmental limits’ (2012) 22 *Global Environmental Change* 36.

⁹⁵ See Michael P Vandenbergh, ‘The New Wal-Mart Effect: The Role of Private Contracting in Global Governance’ (2007) 54 *UCLA Law Review* 913 who suggests that the private contractual requirements in the retail sector ‘trumps’ state regulatory activities, naming this the ‘new Walmart effect’.

⁹⁶ See Anthony Seely, ‘Supermarkets: competition inquiries into the groceries market’ (SN03653, House of Commons Library, August 2012) On the relationship between environmental protection and competition law, see Suzanne Kingston, *Greening EU competition law and policy* (Cambridge: Cambridge University Press, 2012).

⁹⁷ It is beyond the scope of the thesis to provide detailed consideration of the Competition Commission’s interventions, as well as the 2013 Act, although of course this clearly warrants further investigation from an environmental perspective. In addition, the environmental costs associated with food waste in the supermarket sector, together with the difficulties which have been involved in addressing this, would seem to contradict main assumptions in the literature that a consumer product marketed by a retailer with a brand to protect are more easily regulated, at least when compared with industries (such as the construction industry) which are comparatively insulated from such private, consumer-driven regulatory forces (see, for example, Bartley, ‘Institutional Emergence’ (n 4) and Grabosky, ‘Beyond Responsive Regulation’ (n 11)). Of course, in recent months, the topic of food waste has received considerable attention in the popular media, which may change the dynamics of civil regulation in years to come.

seen particularly in the concept of choice architecture, where consumer behaviour is drastically affected by the way in which purchasing decisions are framed or contextualised. According to Thaler and Sunstein, altering this architecture—changing the way in which options are presented—can result in quite significant behavioural changes, but indirectly and in ways which people may not notice.⁹⁸ Crucially, altering choice architecture is something open to both private companies and public institutions. However, whether so-called ‘nudge’ interventions (including choice architecture) are a legitimate basis for policy intervention is somewhat disputed. The House of Lords Science and Technology Committee, for example, suggest that nudge-type interventions are less likely to be effective if used in isolation, rather than as part of a range of possible regulatory and policy interventions.⁹⁹ Karen Yeung is similarly sceptical as to some of nudge’s empirical assertions.¹⁰⁰

Scepticism as to the viability of nudge as a policy option aside, supermarkets as choice architects nonetheless have considerable influence over consumer behaviour. For example, purchasing choices are framed by subliminal techniques, such as product placement and shop floor organisation.¹⁰¹ However, problematically, these techniques are often used to drive over consumption, with negative implications for the environment. For example, altering the architecture (or reframing the option) from ‘buy one get one free’ to ‘half-price’ offers, would be particularly beneficial. In essence, at the root of the difficulties here are the problems discussed in Chapter 2 as to the limitations of the business case for CER in retail sectors. It goes against a supermarket’s business model to encourage consumers to purchase less. This provides limited space for the all-important ‘no-purchase’ option. Whilst choice architecture does not necessarily ignore the no-purchase option—‘... a basic principle is that you can never be made worse off by having more options, because you can always turn them down’¹⁰²—it seems to miss the broader point that the abundance of choice itself is implicated in environmental degradation and waste arisings. Choice architecture in this sense preserves freedom of choice, rather than altering the available range.¹⁰³ On

⁹⁸ See, for example, Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (New Haven: Yale University Press, 2008). The basic premise is that most consumers are uninformed and irrational, particularly as a result of various flawed heuristics.

⁹⁹ Science and Technology Committee, *Behaviour Change* (2010-12, HL 179).

¹⁰⁰ Karen Yeung, ‘Nudge as Fudge’ (2012) 75 *The Modern Law Review* 122.

¹⁰¹ Thaler and Sunstein, *Nudge* (n 98).

¹⁰² Thaler and Sunstein, *Nudge* (n 98), p 43.

¹⁰³ Yeung, ‘Nudge as Fudge’ (n 100).

this basis, choice *editing*, restricting choice, may be seen as a more viable way in which to influence consumption patterns.¹⁰⁴

4. CER and ‘law’

In the previous section, I provided positive and negative examples of CER in decentred regulatory space. In particular, this included the potential for corporations as regulators to reach the causes of environmental problems only problematically addressed, if at all, by governmental regulation. However, in my discussion of voluntary agreements, I also alluded to the implications that decentring analysis has for the so-called voluntariness of CSR. This raises corollary questions for definitions of CSR by reference to classical command and control. Importantly, when placing CER in the context of decentred regulatory space, it becomes unhelpful and potentially redundant to describe CSR as activities which go ‘beyond compliance’. Furthermore, in view of corporate influence in decentred regulatory space, CSR scholarship must also pay attention to the relationship between CSR and the *absence* of command and control.

Definitions of CER by reference to command

Decentred regulation has implications for traditional definitions of CSR. While there is no strong consensus,¹⁰⁵ two broad approaches are instructive here. First, some define CSR as comprising only corporate *legal* responsibility; CSR is understood as entailing compliance with law and nothing more.¹⁰⁶ Second, and more commonly, CSR encompasses *only* those activities which go ‘beyond compliance’,¹⁰⁷ so that social

¹⁰⁴ See, for example, Science and Technology Committee, *Waste Reduction* (n 60), [5.17]-[5.20], although the context here was editing choice so that options were between sustainable products, rather than deleting choices.

¹⁰⁵ See, for example, Abigail McWilliams, Donald Siegel and PM Wright, ‘Corporate Social Responsibility: Strategic Implications’ (2006) 43(1) *Journal of Management Studies* 1; Domènec Melé, ‘Corporate social responsibility theories’ in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008).

¹⁰⁶ Horrigan, *Corporate Social Responsibility* (n 6).

¹⁰⁷ Neil Gunningham, ‘Shaping corporate environmental performance: a review’ (2009) 19 *Environmental Policy and Governance* 215, p 215.

responsibility ‘begins where the law ends’.¹⁰⁸ The centrality of compliance to these definitions implies governmental command and control or direct regulation—where there is a fixed and definable compliance standard which, depending upon the definitional scope of CSR, corporations must either meet or go beyond. However, these definitions involve an impoverished understanding of CER. Command and control is a narrow definition of governmental intervention (as discussed in Chapter 3). In addition, the relationship between CSR and ‘regulation’, whilst extremely complicated, is nonetheless highly relevant (as discussed above). However, even when taking a narrower understanding of law as the starting point, binary definitions of CSR by reference to either compliance or beyond compliance are superficial.

It is relatively uncontroversial that for corporations to behave responsibly, they must comply with legal obligations.¹⁰⁹ Legal compliance forms an important part of a number of CSR taxonomies,¹¹⁰ and has been considered by some as the ‘most fundamental’ of corporate responsibilities.¹¹¹ Even for Milton Friedman, one of CSR’s staunchest opponents, profits must be generated ‘within the rules of the game’, effectively ruling out profitable non-compliance.¹¹² However, when stating that corporations must comply with the law, this is often coupled with a failure to appreciate the difficulty involved in ensuring that compliance. And in ‘beyond compliance’ definitions, the contemporary frontier of responsible behaviour, ensuring compliance with the minimum legal floor is assumed to be a battle which has largely been won. This assumes far too much. Ensuring compliance remains a significant

¹⁰⁸ See Keith Davis, ‘The Case for and Against Business Assumption of Social Responsibilities’ (1973) 16(2) *The Academy of Management Journal* 312 and Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper and Row, 1975).

¹⁰⁹ Archie B Carroll and Kareem M Shabana, ‘The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice’ [2010] *International Journal of Management Reviews* 85.

¹¹⁰ See, for example, the most widely cited framework for understanding corporate responsibilities provided by Archie B. Carroll, ‘A Three-Dimensional Conceptual Model of Corporate Performance’ (1979) 4 *The Academy of Management Review* 497, where one dimension of corporate responsibility is compliance with legal obligations.

¹¹¹ Blowfield and Murray, *Corporate Social Responsibility* (n 14), p 25.

¹¹² Friedman, ‘The Social Responsibility of Business’ (n 26). Addressing the scope for profitable non-compliance (or dealing with what Kagan and Sholz would refer to as the ‘amoral calculator’, Robert A Kagan and John T Scholz, ‘The “Criminology of the Corporation”’ in Keith Hawkins and John Thomas (eds), *Enforcing Regulation* (Boston: Kluwer-Nijhoff Publishing, 1984)) is by no means easy, even in countries with developed regulatory regimes, see, for example, Richard Macrory, ‘Regulatory Justice: Making Sanctions Effective (Final Report)’ (Cabinet Office, 2006).

challenge, certainly for environmental laws and even in developed regulatory regimes.¹¹³

These approaches also assume that the meaning of ‘compliance’ is uncontroversial. However, as was discussed in Chapter 3, this is untrue, especially in view of the creative compliance. If corporate social responsibility is defined only as compliance with the letter of the law, then presumably this means (problematically) that creative compliance is permissible. When defining CSR as being concerned only with actions which ‘go beyond’ compliance, then the intractable problem of creative compliance is essentially left out of the rubric. Creative compliance also highlights difficulties in drawing a binary distinction between compliance and non-compliance, making it much harder to use law as a clear means by which to identify corporate irresponsibility. This compliance / non-compliance dichotomy implies an overly legalistic account of law and regulatory enforcement, narrowly conceived in terms of sanction-focussed interventions.¹¹⁴ Consider Ayres and Braithwaite’s influential ‘enforcement pyramid’, for example.¹¹⁵ This dictates that regulatory non-compliance should be initially addressed at the bottom of the pyramid, where enforcement techniques are softer and aim to ‘coax’ compliance by persuasion.¹¹⁶ Should this fail, further enforcement will go through several phrases, becoming increasingly ‘formal and punitive’.¹¹⁷ As with creative compliance, the meaning of compliance becomes socially constructed, with some of these regulatory options being described as *negotiated*, but nonetheless acceptable (in appropriate circumstances) non-compliance.¹¹⁸

We ought to add to these various dichotomies one of compliance / beyond compliance, where the definition of ‘CSR beginning where the law ends’ becomes problematic. In certain legal environments, the term beyond compliance is descriptively redundant. This is the case with waste reduction. With the exception of

¹¹³ For an excellent account of business reactions to regulatory compliance, see the collection of essays in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Regulatory Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar, 2011).

¹¹⁴ Horrigan, *Corporate Social Responsibility* (n 6), p 26.

¹¹⁵ Ayres and Braithwaite, *Responsive Regulation* (n 11), pp 21-7.

¹¹⁶ Carolyn Abbot, ‘The Regulatory Enforcement of Pollution Control Laws: The Australian Experience’ (2005) 17 *Journal of Environmental Law* 161, p 162 referring to Ayres and Braithwaite, *Responsive Regulation* (n 11).

¹¹⁷ Ibid. See also Macrory, ‘Regulatory Justice’ (n 112).

¹¹⁸ Neil Gunningham, ‘Negotiated Non-Compliance: A Case Study of Regulatory Failure’ (1987) 9(1) *Law & Policy* 69.

EPR regimes, companies are under no quantitative waste reduction obligations.¹¹⁹ There is no ‘compliance’ standard for waste reduction ‘beyond’ which companies might go. Are *all* efforts therefore ‘beyond compliance’? If we define the scope of CSR by reference to the absence of quantitative legal intervention, then the answer is yes. However, as has already been seen, a mixture of regulatory interventions, beyond substantive environmental standards, has been deployed to encourage and facilitate the reduction of waste arisings. In view of this, describing waste reduction efforts as ‘beyond compliance’ is somewhat disingenuous, especially the price put on waste disposal by the Landfill Tax.

In addition, the notion of beyond compliance with law has a different meaning to beyond compliance with regulation. As argued above, however, CSR is more appropriately understood by reference to a decentred understanding of regulation. On decentring analysis, beyond compliance CSR is likely to be the result of non-governmental regulation.¹²⁰ This implies a need for caution in assuming that beyond compliance behaviour is somehow ‘voluntary’. I do not deny the relevance of compliance or beyond compliance. Rather, as a basis for defining CSR, the line between compliance and beyond compliance is likely to be superficial and impoverished. Instead, CSR is part of a broader reconfiguration of ‘regulation’ occurring in many rooms, encompassing de facto obligations beyond those embodied in narrow or classical definitions of law.

CER and the absence of command in decentred regulatory space

Whilst beyond compliance and ‘beginning where the law ends’ are, as a starting point, important in outlining the scope of CSR, it does not follow that law is irrelevant. If CSR begins where the law ends, then the *absence* of command-type law matters also—both the absence of more exacting standards, as well as spheres of non-intervention in the form of governmental regulatory gaps.¹²¹ In particular, if CSR initiatives occur because of an absence of governmental intervention, then it is necessary to question why such a legal vacuum exists, and assess the acceptability of

¹¹⁹ As was explained in the previous chapter.

¹²⁰ Horrigan, *Corporate Social Responsibility* (n 6), p 26.

¹²¹ Moon and Vogel, ‘CSR, Government and Society’ (n 50). The fact that areas in which a state has assumed central control are less likely to be the focus of voluntary corporate initiatives is used as a reason to explain why CSR emerged first in the USA rather than Europe (particularly on labour practices), and why the paradigms of CSR alter between the two.

this. Of course, an absence of law or command does not mean there is no regulation whatsoever—state or non-state. But where corporations are subject to the decentred or ‘civil’ regulation of non-state actors, CSR’s emergence in part reflects a perceived ‘government deficit’,¹²² and the nature of this deficit is important.

In particular, it is important to remain aware of more cynical explanations for the existence of so-called self-regulatory or ‘voluntary’ initiatives, including that companies hope to avoid command-type substantive standards or more exacting regulatory obligations.¹²³ At the same time, and mentioned briefly in Chapter 3, self-regulation is not always separate from state influence. This is the case even considering initiatives which are ‘voluntary’ in the sense that they are not legally required,¹²⁴ because the absence of formal state-originating law does not indicate an entire absence of governmental pressure. Considering CSR on the basis of decentring analysis does not necessarily involve a full shift from ‘hierarchy’ to ‘heterarchy’, therefore, as governments may assert its hierarchical authority in subtle and indirect ways.¹²⁵ In this sense, the absence of law does not necessarily imply the absence of the state.

There is also a relationship between CSR and the content of command and control. It might be argued that CSR should not be limited to going beyond compliance, but ought to involve raising the very standards of compliance.¹²⁶ Crane and Matten, for example, argue that CSR ought to be concerned not only with problems or issues ‘subsisting where the law ends, but have a role in *where the law begins*.’¹²⁷ In this context, the relationship between CSR and law is complicated by

¹²² Moon and Vogel, ‘CSR, Government and Society’ (n 50).

¹²³ Gunningham and Sinclair, *Leaders and Laggards* (n 19); Corkin, ‘Misappropriating citizenship’ (n 51). Black, ‘Decentring Regulation’ (n 3) also makes this point: whether ‘self-regulation is a problem posing as a solution’.

¹²⁴ Moon and Vogel, ‘CSR, Government and Society’ (n 50).

¹²⁵ Gunningham, ‘Shifting Architectures’ (n 2); Corkin, ‘Misappropriating citizenship’ (n 51); hierarchy is even imposed weakly by tacitly approving or consenting to self-regulation and the outcomes thereof.

¹²⁶ David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington DC: Brookings Institution, 2006), p 171, is particularly forceful here, arguing that the definition of CSR needs to be redefined to include a responsibility to support the capacity of governments to establish higher minimum standards. He is also critical of CSR writers who fail to ignore the importance of CSR activity in the development of government policy, as well as the absence in the demands of activists and social investors to confront negative aspects of business-government relationships. Robert Reich’s solution that corporations should play no role in affecting public policy is probably unrealistic.

¹²⁷ Andrew Crane and Dirk Matten, ‘Corporate Social Responsibility as a Field of Scholarship’ in Andrew Crane and Dirk Matten (eds), *Corporate Social Responsibility* (London: SAGE Publications, 2007).

the way in which companies shape the meaning and standards of legal compliance through their activities in decentred regulatory space.¹²⁸ Importantly, the very meaning of legal compliance, as well as the reliance upon it to define acceptable and robust minimum standards, is called into question by lobbying activities which attempt to block or minimise proposed regulatory intervention.¹²⁹ And as was suggested, the environment's reliance on indirect advocacy places great reliance on ENGOs in this respect, which is not ideal. In the CSR context generally, concerns of corporate influence have led many to argue for an expanded definition of CSR which considers the nature of corporate participation in policy and law-making processes,¹³⁰ with some making even more extreme suggestions that they ought to be excluded entirely.¹³¹ As was suggested above, decentring analysis is relatively attuned to this concern.

The various voluntary agreements in place concerning waste reduction and diversion from landfill are backed up by subtle, hierarchical influence by government. Such agreements of course operate with the Landfill Tax and other regulatory mechanisms operating in the background, but some of the earlier ones were also agreed upon with an explicit threat of legislative intervention should improvements not be forthcoming. The voluntary agreements were a *regulatory option*; part of the governmental toolkit. In the recent Waste Policy Review, the tone has changed slightly. Voluntary agreements are rebranded 'responsibility deals'. They are seen as a less 'burdensome' alternative to regulation rather than as a form of regulation itself, in a context where (governmental) 'regulation' should be used 'only where strictly necessary'.¹³² The language is not explicitly 'de-regulatory' in the Waste Review, but a common refrain throughout is the aim of reducing the burden of regulation on business.

There is nothing necessarily wrong with this. Indeed, an advantage of these voluntary agreements is the partnership with WRAP, which in turn provides for co-operation amongst a number of stakeholders. Arguably, this might be difficult to achieve through hard legislation. But there is reason for caution. CSR literature is rife

¹²⁸ Gregory C Shaffer, 'How Business Shapes Law: A Socio-Legal Framework' in David Coen, Wyn Grant and Graham Wilson (eds), *The Oxford Handbook of Business and Government* (Oxford: Oxford University Press, 2009).

¹²⁹ See McRae, 'Hidden Voices' (n 50).

¹³⁰ Moon and Vogel, 'CSR, Government and Society' (n 50).

¹³¹ Reich, *Supercapitalism* (n 51).

¹³² Defra, *Government Review of Waste Policy in England 2011* (PB 13540, Crown Copyright 2011), p 12.

with concern that voluntary measures have the potential to deflect attention away from necessary legal measures.¹³³ Robert Reich in particular calls for scepticism about political claims that ‘the public can rely on the “voluntary” corporation or the private sector to achieve some public purpose or goal’.¹³⁴ Given CC3, for example, has been described as unambitious, then there is good reason for some of Reich’s scepticism here. Whilst the CER aspects of the voluntary agreements are sometimes better than nothing, CC3 may be a PR-driven distraction in the absence of more robust intervention. Responsible corporate behaviour would, along the lines of Crane and Matten’s comments, involve more exacting targets; that is raising the standards of ‘compliance’, albeit perhaps in the context of a voluntary agreement to do so.

5. Conclusion

In this chapter, I sought to present a justification for CER by reference to a decentred understanding of regulation. I argue that a role for CER can be found in the positive and normative implications of ‘decentred regulatory space’. In this space, regulation is not the preserve of governmental regulators, and in view of the limitations of direct governmental regulation, nor should it be. I suggested that CER is best understood as a positive manifestation of decentred regulation, and in view of the limitations of governmental control, CER activities are potentially to be welcomed. Indeed, the civil regulation aspects of CER, where a range of non-state actors exact improved corporate environmental outcomes, add an additional layer of regulation and accountability. In addition, the potential of companies themselves as regulators, especially in view of their considerable informational and influential resources, seems to have the potential to address the causes of some environmental problems only problematically reached (if at all) by governments. Indeed, with respect to their influence over consumers and the supply chain, companies are particularly well placed to contribute to environmental protection.

As such, harnessing the regulatory capability of corporations would appear to offer benefits it would be mistaken to ignore, particularly given the limitations of

¹³³ See, for example, Villiers, ‘Corporate Law, Power and CSR’ (n 51), p 97; Horrigan, *Corporate Social Responsibility* (n 6), p 65.

¹³⁴ Reich, *Supercapitalism* (n 51), p 121.

governmental control in addressing consumer behaviour and extensive influence large corporations have over contractual supply chains. I make this point about the potential of corporations as regulators in response to some of the objections to CSR and corporations outlined in Chapter 2. Whilst I am sympathetic to these, my argument rests on the observation that corporations, and CSR, it would seem, are here to stay, and we need to be pragmatic about this. Decentred regulatory space allows us to move beyond the dangerous rhetoric of the business case for CER, and look critically at both the pros and cons of the corporate responsibility movement and CER activities.

And indeed, there are good reasons for concern. This normative space for CER within decentred regulation is admittedly limited. In particular, it is constrained as a starting point in the context of corporate *environmental* responsibility, given environmental interests essentially rely on imperfect ENGO representation. In view of this, there was a concern that the dominance of corporations in decentred regulatory space has the potential to crowd out environmental concerns. The problems with food waste in the supermarket supply chain illustrated some of these dangers. However, whilst CER comes with dangers and problems, the limitations of governmental control point us to the potential benefits of harnessing the potential of corporations, rather than dismissing their role outright. As such, the pragmatic and normative space for CER within decentred environmental law, regulation and governance exists, but it is *limited*.

Finally, I argued that appreciating the role of companies and the environment in decentred regulatory space provides important insight into appropriate definitions of CSR. I suggest that, rather than conceiving of CSR's relationship with law in binary terms (as is typical), CSR is more appropriately understood as part of the complex process of decentred regulation by governmental and non-governmental actors. Law does remain relevant to CSR debates, however, not least in considering the appropriate relationship between corporate activities and robustly questioning the content or absence of legal intervention.

Chapter 5

Regulatory Voice (III): Company Law and Environmental Irrelevance

1. Introduction

In the previous chapters, I considered the respective limits of the market and regulatory voices for the environment. I argued that the broad decentred regulatory voice for the environment is a more preferable site of advocacy for environmental concerns than the market voice. However, as was noted, the regulatory voice is not without limitations. The foregoing chapters also considered justifications for CSR. In Chapter 2, I rejected the adequacy of the business case in this regard. Instead, I argued that CER is more appropriately justified within the framework of decentred regulatory space. On this basis, I argued that there is an existent, but limited, normative space for CER within decentred environmental law, regulation and governance. In this chapter, I consider the normative space for CER within company law and, in view of this, the extent to which company law might be considered a barrier to more environmentally responsible corporate behaviour. This normative space would appear either (at best) limited and (at worst) non-existent. To the extent that the positive mainstays of UK corporate governance are influenced by contractarian logic, the environment is largely irrelevant. There are two facets of this ‘environmental irrelevance’.

First, corporate environmental irrelevance is the corollary of shareholder exclusivity in matters of corporate governance and decision-making. The environment is not relevant to the internal operations of the company. Second, environmental irrelevance is part of a broader conceptualisation of the purpose of company law as merely facilitative of private interactions rather than ‘regulatory’. Environmental protection is not a relevant concern for company law but is a matter for external (environmental) regulatory intervention. As such, it is not possible to locate a form of ‘regulatory’ voice for the environment within company law. Importantly, I argue that this dual position of environmental irrelevance subsists notwithstanding section

172(1)(d) Companies Act 2006, which, I argue, moves company law and corporate governance away from the irrelevance position only very little, if at all. Ultimately, the corollary of environmental irrelevance is the absence of a voice for the environment within corporations and company law.

I question whether environmental irrelevance is acceptable; should company law be open to the norms and goals of environmental protection? While company law and contractarian theory largely regard all sorts of broad ‘societal’ obligations as irrelevant, I consider the specific normativity of *environmental* irrelevance. I build on arguments made in previous chapters to argue that, in justifying a position of environmental irrelevance, company law and contractarian corporate theory assume too much regarding the adequacy of a ‘voice’ for the environment *outside* or *external* to company law and corporate decision-making. Building on the arguments in Chapters 2-4 as to the weaknesses of the market and regulatory voices for the environment, this chapter makes a case for the ‘why’ question of corporate environmental relevance. That is, why there ought to be space for environmental concerns within company law and, by corollary, why it is both appropriate and necessary to use company law for environmental goals. In Chapters 6 and 7, I move on to the ‘how’ question of corporate environmental relevance, or how we might otherwise locate, outside the contractarian orthodoxy, an intra-corporate environmental voice and enhance it through the reform of company law.

The broad structure of this chapter is as follows. In section 2, I explain the origins of environmental irrelevance within the normative contractarian thesis. In section 3, I consider the positive claim of environmental irrelevance alongside enlightened shareholder value. In section 4, I challenge the environmental irrelevance position, making a case for corporate environmental relevance.

2. Environmental irrelevance: the normative contractarian thesis

The aim of this section is to explain how the contractarian, or ‘nexus of contracts’, theory of the firm,¹ is central to the normative impetus of what I term ‘corporate environmental irrelevance’. I focus on the contractarian approach in view of its dominance within Anglo-American corporate theory, as well as a proxy for the highpoint of hostility towards CER, environmental relevance or an intra-corporate environmental voice.² Importantly, contractarianism tends to present both a normative and positive thesis.³ The normative thesis is that company law should represent the bargains rational individuals strike, (or would have struck, were the costs of negotiating at arm’s length low enough).⁴ The positive thesis, which I return to in section 3, is that company law generally represents or maps these bargains.⁵ In this section, I outline the normative impetus of environmental irrelevance as reflected in the normative contractarian thesis, and provide a flavour of the bargaining methodology for those less familiar with contractarian theory. In doing so, I fully acknowledge that my portrayal of contractarianism is by no means complete, but indeed, this is beyond both the scope and the purpose of this chapter.

¹ The seminal works include Ronald H Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386; Armen A Alchian and Harold Demsetz, ‘Production, Information Costs, and Economic Organization’ (1972) 62 *American Economic Review* 777; Michael C Jensen and William H Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure’ (1976) 3 *Journal of Financial Economics* 305 (available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=94043); Eugene F Fama, ‘Agency Problems and the Theory of the Firm’ (1980) 88 *Journal of Political Economy* 288; Eugene F Fama and Michael C Jensen, ‘Separation of Ownership and Control’ (1983) 26(2) *Journal of Law and Economics* 301; Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge, MA: Harvard University Press, 1996).

It should be noted that there is a broad distinction between the transaction cost theory of the firm and a ‘pure’ nexus of contracts approach. However, as other authors have done, I do not distinguish between the two in my exposition of contractarian logic, as a thorough and comprehensive exposition is not necessary for the purposes of this chapter. See, for example, Gavin Kelly and John Parkinson, ‘The Conceptual Foundations of the Company: A Pluralist Approach’ in John Parkinson, Andrew Gamble and Gavin Kelly (eds), *The Political Economy of the Company* (Oxford: Hart Publishing, 2000), pp 116-121; Paddy Ireland, ‘Defending the Rentier: Corporate Theory and the Reprivitisation of the Public Company’ in Parkinson *et al*, *The Political Economy of the Company* (n 1), pp. 380-8.

² In doing so, I acknowledge that the contractarian approach is perhaps received in the British academe with less enthusiasm than by American scholars, and there is some debate as to whether contractarianism is the dominant, mainstream or orthodox approach in the UK. Compare, for example, Alan Dignam and John Lowry, *Company Law* (Oxford: Oxford University Press, 2012), p 397; Brian R Cheffins, *Company Law: Theory, Structure and Operation* (Oxford: Clarendon Press, 1997); Paddy Ireland, ‘Property and contract in contemporary corporate theory’ (2003) 23 *Legal Studies* 453, p 454. However, its dominance in the UK context is perhaps difficult to dispute given that, as argued by Moore, the Company Law Review Steering Group (CLRSG) formulated its recommendations on an ‘explicitly contractarian basis ... [establishing] one objectively indisputable fact: that the contractarian paradigm is unquestionably the dominant ideological reference point within the field of Anglo-American corporate law and governance today’; see Marc T Moore, *Corporate Governance in the Shadow of the State* (Oxford: Hart Publishing, 2013) p 71-2.

³ Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 1), p 15.

⁴ *Ibid.*

⁵ *Ibid.*

Key corporate bargains: shareholder exclusivity as to corporate goal and voice

Contractarian approaches conceptualise the company as a ‘nexus’ or ‘hub’ around which rational and private individuals freely contract, a corollary of which is that the corporation is not a ‘thing’ in itself, in the sense that it has any real separate personality.⁶ This hub is simply representative of the economic reality that housing factors of production as a firm reduces transactions costs associated with repeat contracts.⁷ The actual contracts and terms which these parties generate (or would generate) are complex, diverse and comprise both explicit and implicit agreements.⁸ Conceived in this way, what we call ‘company law’ is simply a specialised enclave of contract, which sets freely available *default* or off-the-rack rules (a standard-form contract) representing the bargain corporate constituents do, or would, strike in most situations.⁹ These governance terms could be obtained contractually, but bargaining is costly, and a standard form contract provided by statute (supplemented by common law) reduces these costs.¹⁰ In order to discern what corporate governance bargains would be struck (in the vast majority of cases) when contracting at arm’s length without significant costs, contractarian approaches theorise the behaviour of rational

⁶ As explained by Jensen and Meckling, ‘Theory of the Firm’ (n 1), p 9, ‘The firm is not an individual. It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals (some of whom may “represent” other organizations) are brought into equilibrium within a framework of contractual relations.’

⁷ The key works here are Coase, ‘The Nature of the Firm’ (n 1); and Alchian and Demsetz, ‘Economic Organization’ (n 1), who explain the economic rationality of the firm (and hence corporate) structure. Coase provided explanations as to why individuals housed themselves within a firm rather than organising themselves as sole operators by reference to the coordination benefits and authority of the risk-bearing entrepreneur (‘fiat’). The existence of fiat replaces a series of repeat contracts between various factors of production with a single contract, thus reducing transaction costs. Alchian and Demsetz conceived the firm as a market itself, represented by the continual renegotiation of contracts. All contractual activity proceeds on the basis of equality of bargaining of power, and since the firm is a market, the price allocation system removes the need for authority or ‘fiat’. The existence of firms are therefore explained by reference to the benefits of team production, where cooperation leads to a greater output than the mere sum of individual inputs. See also Dignam and Lowry, *Company Law* (n 2), pp 383-5.

⁸ Frank H Easterbrook and Daniel R Fischel, ‘The Corporate Contract’ (1989) 89 *Columbia Law Review* 1416, p 1426.

⁹ Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 1), p 15. The notional contract also includes implied terms on the basis that contractors would bargain for these were they able to address the issue(s) explicitly, see Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1418 and 1428. On the normative reality of ‘hypothetical’ bargains see, for example, David Charny, ‘Hypothetical Bargains: The Normative Structure of Contract Interpretation’ (1991) 89 *Michigan Law Review* 1815.

¹⁰ Ireland, ‘Property and contract’ (n 2); Cheffins, *Company Law* (n 2), especially pp 31-41; Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1418.

corporate contractors. While there is some disagreement as to the strength of ‘rationality’ these individuals are constructed with,¹¹ the highpoint of contractarian hostility to CER assumes these actors are economically self-interested, and we will return to this construction of corporate actors as *homo economicus* in Chapter 6.¹²

All corporate contractors would bargain for what I call ‘shareholder exclusivity’. To avoid confusion with various terminology in the literature,¹³ I use this term to denote the exclusion of non-shareholding contractors or stakeholders from corporate affairs in two broad ways. First, shareholder exclusivity as to corporate *goal*, purpose or objective; the ‘end’ of corporate governance.¹⁴ This denotes that a company be run only in the interests of shareholders, as opposed to the polar opposite of being run in the interests of multiple non-shareholding constituents or stakeholders.¹⁵ Second, shareholder exclusivity as to corporate *voice*, comprising important quasi-participatory rights in corporate affairs, particularly the powers of board appointment and dismissal, the power to make directions and the right to initiate legal proceedings for breaches of directors’ duties.¹⁶ Shareholder exclusivity as to corporate goal and voice should not be confused with exclusivity as to day-to-day decision-making control, or the ‘means’ of corporate governance,¹⁷ which, as will be seen, rational contractors would vest in a board of directors.

¹¹ Moore, *Corporate Governance* (n 2), pp 247-252; and Charny, ‘Hypothetical Bargains’ (n 9).

¹² Arguably, even the ‘satisficing’ contractor is still purely self-interested, favouring a ‘degree of group wealth-creation tempered by an offsetting level of concern for *individually* adverse socio-distributional outcomes’ (see Moore, *Corporate Governance* (n 2), p 251-2 emphasis added). On satisficing generally, see Herbert A Simon, ‘Theories of Decision-Making in Economics and Behavioral Science’ (1959) 49 *The American Economic Review* 253.

¹³ Such as shareholder primacy, shareholder value theory or shareholder wealth maximisation. The academic literature is extensive. See, for example, Stephen Bainbridge, ‘In Defense Of The Shareholder Wealth Maximization Norm: A Reply To Professor Green’ (1993) 50 *Washington and Lee Law Review* 1423; Lynn A Stout, ‘Bad and Not-so-Bad Arguments for Shareholder Primacy’ (2001) 75 *Southern California Law Review* 1189; Andrew R Keay, ‘Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?’ (available at SSRN: <http://ssrn.com/abstract=1498065>).

¹⁴ Stephen M Bainbridge, ‘Director Primacy: The Means and Ends of Corporate Governance’ (2003) 97 *Northwestern University Law Review* 547.

¹⁵ See, for example, Gavin Kelly, Dominic Kelly, and Andrew Gamble (eds), *Stakeholder Capitalism* (London: Macmillan, 1997); Kelly and Parkinson, ‘The Conceptual Foundations of the Company’ (n 1); Margaret M Blair, *Ownership and Control: Who’s at Stake in the Corporate Governance Debates* (Washington DC: Brookings Institution, 1994)

¹⁶ See also Moore, *Corporate Governance* (n 2), pp 74-8 who makes use of the term shareholder exclusivity to denote shareholders as, structurally, the ultimate beneficiary of board accountability norms; in essence, the combined effect of what I term shareholder exclusivity as to corporate goal *and* voice. As will be seen, my reason for the distinction is to delineate slightly different facets of corporate environmental irrelevance.

¹⁷ Bainbridge, ‘Director Primacy’ (n 14).

Why would non-shareholding corporate contractors bargain for what would seem to be, *prima facie*, a set of governance terms which place them at a material disadvantage? And why would these corporate contractors relinquish day-to-day control of the corporation to a separate body, the board? The starting point is the conceptualisation of shareholders as voluntary residual risk-bearers in a comparatively weaker position than other non-shareholding parties. Shareholders have no priority on insolvency, so bear ‘most of the risk’ of business failure.¹⁸ They also receive a return (dividend) on their investment *only* from profits, and only ever at the discretion of the board, so periodically shareholders will receive nothing. With no fixed or periodically defined return, shareholders make necessarily uncertain investments on the basis of ‘incomplete’ contracts.¹⁹ Other contractors, such as employees and general creditors, enter into (comparatively, at least) ‘complete’ contracts, with a defined return on their production input or capital investment.²⁰ In order to compensate for these ‘downside’ risks, rational shareholders would bargain for additional forms of protection held *to the exclusion* of other contracting parties.²¹ These include the ‘upside’ right to the entirety of the residual,²² as well as hierarchical governance protections such as the appointment of the board of directors; the corollary ‘shotgun’ power of director dismissal; and the *ex post facto* settling up mechanism of enforcing fiduciary duties, including a duty that directors run the company with a view to maximising shareholder wealth.²³ Since non-shareholding parties hold complete contracts, they would consider such protective measures unnecessary.²⁴ As such, *all* parties would bargain for shareholder exclusivity.

Corporate contractors would also bargain for the delegation of day-to-day decision-making authority to a specialised body, so that despite shareholders’

¹⁸ Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1425.

¹⁹ Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1446.

²⁰ I.e. a debt contract will be complete in the sense that the level of return and the date thereof will be specified. Shareholders by contrast receive no guarantee as to any additional return on the investment. See Oliver E Williamson, *The Mechanisms of Governance* (Oxford: Oxford University Press, 1999), arguing that all corporate contracts, not just shareholders’, are, to some extent, *necessarily* incomplete.

²¹ Alchian and Demsetz, ‘Economic Organization’ (n 1); Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1446.

²² Shareholders get ‘all of what is left over’, Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 1), p 11.

²³ Often called the ‘maximand’ promise (Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 1), p 36) including the long-term interests of the shareholders; Michael C Jensen, ‘Value Maximization, Stakeholder Theory, and the Corporate Objective Function’, 1 October 2001 (available at SSRN: <http://ssrn.com/abstract=220671>).

²⁴ Alchian and Demsetz, ‘Economic Organization’ (n 1); Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1446.

exclusivity as to governance rights vis-à-vis non-shareholding stakeholders, their power to interfere with day-to-day decision-making would be limited. This would be beneficial to all contractors for a number of reasons. For example, central authority, or ‘fiat’, held by a board of directors, overcomes the costs associated with collective decision-making,²⁵ whilst separating corporate functions allows for specialisation and expertise (shareholders as diversified risk-bearers, directors as decision-makers).²⁶ Whilst the delegation of decision control gives rise to agency costs (costs arising from the diversion between the interests of directors and shareholders), a number of external factors control (or monitor) these costs. These include increased liquidity and the market for corporate control and the specialised director labour market, together with the combined effects of shareholder exclusivity which steer decision-making towards the interests of shareholders.²⁷ The efficient control of agency costs is also served by orienting directors towards a single corporate goal defined exclusively by reference to the interests of shareholders. And this single line of accountability avoids the costs associated with the ‘two masters’ problem, where accountability to many results in accountability to none.²⁸

The normative contractarian thesis and environmental irrelevance

As such, contractarian theory presents shareholder exclusivity as to corporate goal and voice as representative of what all corporate contractors would rationally bargain for. Let us now return to the logic underpinning the contractarian normative

²⁵ Alchian and Demsetz, ‘Economic Organization’ (n 1) and Fama and Jensen, ‘Separation of Ownership and Control’ (n 1). See also Stephen Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford: Oxford University Press 2008), pp 38-4. Decision-making by large groups also provides opportunity for various forms of (individual) shirking—a classic free-riding problem, where the costs are borne by the group, see Alchian and Demsetz, ‘Economic Organization’ (n 1).

²⁶ Fama and Jensen, ‘Separation of Ownership and Control’ (n 1).

²⁷ Initially, given they hold only incomplete contracts, residual risk-bearers were presented as having the greatest incentive of all corporate contractors to monitor firm production and control agency costs (Alchian and Demsetz, ‘Economic Organization’ (n 1)). The diversification of shareholding (portfolio approaches), together with easy exit from companies as a result of increased liquidity in capital and share markets, reduced the significance of the individual shareholder as a monitor (perhaps with the exception of institutional shareholders) and hence the emphasis on the market for corporate control by Fama, ‘Agency Problems’ (n 1) and Fama and Jensen, ‘Separation of Ownership and Control’ (n 1). On the rationality of director decision-making primacy despite its apparent lack of appeal in view of agency costs, see further Moore, *Corporate Governance* (n 2), pp 78-81.

²⁸ See Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 1), p 38; Jensen, ‘Value Maximization’ (n 23), p 301; Stephen Bainbridge, *The New Corporate Governance* (n 25), pp 66-7. The ‘two masters’ problems is a common criticism of stakeholder / pluralist approaches. For an argument in response as to the indeterminate meaning of shareholder primacy, and hence not being a solution to the ‘two masters’ problem, see Keay, ‘Shareholder Primacy in Corporate Law’ (n 13).

claim, namely, that company law should merely reflect these bargains which contracting parties would strike were they able to bargain without significant costs.

When governance terms represent a notional contract between rational corporate contractors (the *positive* claim), then the legitimacy of existing governance arrangements is simply presumed. This presumption is based first on freedom of contract, where corporations are simply extensions of individual (contractual) freedom. This is seen as a good in itself and therefore ought to be subject to only minimal intervention.²⁹ Thus, with company law being a rather specialised form of contract, the only legitimate role for the state is to represent those notional transactions and serve a purely ‘private-ordering’ function. Second, and relatedly, efficiency of governance outcomes created under such procedurally uninhibited conditions is also presumed.³⁰ The on-going process of contracting by freely negotiating, rational private parties yields efficient corporate governance outcomes, because governance terms (including both the good and bad aspects thereof) negotiated among interested parties are fully priced by the market’s pricing mechanism.³¹ As noted by Ireland:

... once it is established (or presumed) that a particular set of [corporate] arrangements ... are the product of free market contracting, it follows for law-and-economists that they are, by definition, *just and efficient*.³²

However, the commitment to private ordering and efficiency within contractarian logic means that there is very limited normative space within company law for CER or environmental voice and, indeed, broader CSR concerns. As Easterbrook and Fischel provocatively argue:

An approach that emphasizes the contractual nature of a corporation removes from the field of interesting questions one that has plagued many writers: what

²⁹ This is what Ireland describes as the ‘procedural’ justification; Ireland, ‘Property and contract’ (n 2), p 485; see also Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1418 polemically emphasising the importance of *free choice*.

³⁰ This is what Ireland terms the ‘substantive’ or ‘consequentialist’ justification; see Ireland, ‘Property and contract’ (n 2), p 485.

³¹ Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1430 and *The Economic Structure of Corporate Law* (n 1), 19. See also Ireland, ‘Property and contract’ (n 2), p 485.

³² Ireland, ‘Property and contract’ (n 2), p 482 (emphasis added).

is the goal of the corporation? Is it profit (and for whom)? Social welfare more broadly defined? ... Our response to such questions is: 'Who Cares?'³³

As such, company law conceived contractually is a thoroughly private affair concerned only with the internal functioning of relations between those parties to the corporate contract. In fact, any intervention is a *prima facie* affront to contractual liberty.³⁴ This invocation of the public / private divide requires respect for the division between 'private (contractual)' and 'public (regulatory)' law,³⁵ with a very strong anti-regulatory aspect to contractarian logic, especially regarding disruptions to the *internal* affairs of the company.³⁶ With this division, the state's role is reduced to simply replicating and, where necessary, facilitating the private ordering process of corporate contracting in a non-coercive manner, primarily through off-the-rack governance terms.³⁷ Save in narrow circumstances, public interest-geared state intervention in the *internal* affairs of corporations, in the contractual bargains struck by individuals, is an illegitimate constraint on 'private sector autonomy within a free political economy'.³⁸

Furthermore, because existing governance mechanisms are efficient, there is, in theory, no need for public interest oriented state intervention, since any state intervention with the invisible hand and market pricing of contracts will result in *inefficiency*.³⁹ Since the market monitoring mechanism ensures efficiency through a presumption that shareholders maximise their own self-interest, social responsibility expenditures, including those towards environmental concerns, would be similarly inefficient.⁴⁰ As such, CSR in fact is unnecessary, since the maximisation of shareholder wealth 'automatically' benefits non-corporate constituents by providing jobs, wages, goods and services, together with a general increase in the wealth of societies who can in turn afford 'luxury goods' such as cleaner environments.⁴¹

³³ Easterbrook and Fischel, 'The Corporate Contract' (n 8), p 1446.

³⁴ Ireland, 'Property and contract' (n 2), p 485.

³⁵ Moore, *Corporate Governance* (n 2); Ireland, 'Property and contract' (n 2).

³⁶ Moore, *Corporate Governance* (n 2) refers to this as an 'anti-regulatory' as opposed to 'anti-law' hue.

³⁷ *Ibid.*, p 93.

³⁸ *Ibid.*

³⁹ Legal interventions on direct public policy grounds are, according to the contractarian thesis, 'inclined to be suboptimal'; see Moore, *Corporate Governance* (n 2), p 97-8.

⁴⁰ Dignam and Lowry, *Company Law* (n 2), p 386.

⁴¹ Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 1), p 38 and Dignam and Lowry, *Company Law* (n 2), p 387. See also David Henderson, *Misguided Virtue* (London: Institute of Economic Affairs, 2001).

For Easterbrook and Fischel, the only exception to the legitimacy of this private ordering conception of company law relates to limitations in the pricing mechanism evidenced by the generation of externalities – that is, impacts on third parties (non-contracting constituencies).⁴² However, since the basic presumption is that shareholder maximisation benefits everyone, there remains here a general suspicion even to ‘external’ regulation. Indeed, externalities seem to be considered a rarity; corporate governance terms, it is argued, ‘generally’ do not impose costs on third parties, or at least not ‘substantial’ costs.⁴³ Nonetheless, externalities are not really an exception to the private ordering paradigm, because negative impacts on third parties are to be dealt with by *external public regulatory* law and are not a matter for *internal private* company law or corporate governance. For Easterbrook and Fischel, ‘[t]o view pollution ... as *governance* matters is to miss the point.’⁴⁴ The environment is simply ‘irrelevant’ to both (i) the goals of company law and (ii) the internal functioning of the company and corporate decision-making.⁴⁵ The norm which emerges is shareholder wealth maximisation⁴⁶ within the external, public-regulatory ‘rules of the game’.

3. Weak environmental relevance: the positive contractarian thesis

In the previous section, I outlined how contractarian logic provides normative impetus for two (related) aspects of environmental irrelevance. First, company law is characterised as a species of non-regulatory private law, so that company law may not legitimately be used for ‘public’ or ‘social’ purposes. As such, company law is not an appropriate medium through which to address environmental problems and bring about enhanced corporate environmental responsibility. Second, and consequently, the environment is not a relevant concern to the internal functioning of corporate decision-making. This irrelevance stems from a series of hypothetical or notional corporate

⁴² Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1445.

⁴³ Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), pp 1421 and 1429-30.

⁴⁴ *Ibid.*, p 39.

⁴⁵ See also David Millon, ‘Theories of the Corporation’ (1990) 2 *Duke Law Journal* 201, pp 225-229 on the ‘irrelevance’ of CSR claims.

⁴⁶ Or at least shareholders’ interests first, if not the maximand promise, mentioned above at (n 23).

bargains struck by rational corporate actors culminating in shareholder exclusivity as to corporate goal and voice.

In this section, I consider the extent to which the normative position of environmental irrelevance is mapped positively by UK company law. In doing so, I do not mean to suggest that the nexus of contracts approach is of unassailable descriptive accuracy when considering UK law,⁴⁷ and so I do point to key inaccuracies to give a flavour of this. This notwithstanding, contractarian influence on UK company law and governance is extensive. As will be seen, the Companies Act 2006 represents a decidedly ‘contractual’ conception of company law, as well as replicating the key contractarian governance terms which give rise to shareholder exclusivity as to corporate goal and voice. Crucially, as regards corporate environmental irrelevance specifically, the positive contractarian thesis broadly holds under UK company law.

‘Contractual’ UK company law

The positive contractarian claim is perhaps most strongly apparent in the ‘quasi-contractual’ effect given to the company’s constitution, the articles of association, under the statutory corporate contract pursuant to section 33(1) CA 2006.⁴⁸ This provides that the ‘provisions of a company’s constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions’.⁴⁹ In accordance with the general thrust of contractarianism, flexibility and private ordering can be seen in the fact that the articles of association are both privately determined (or available off-the-rack under the Model Articles) and freely alterable by the shareholders.⁵⁰ Similarly, the board’s authority rests on a quasi-contractual basis, being left to the

⁴⁷ See, for example, Moore, *Corporate Governance* (n 2); Cheffins, *Company Law* (n 2); and Stout, ‘Bad and Not-so-Bad Arguments for Shareholder Primacy’ (n 13).

⁴⁸ See Moore, *Corporate Governance* (n 2), p 139.

⁴⁹ The effect of CA 2006, s 33 is to bind the company, as well as the members (in their capacity as members) by the terms of the articles of association (the constitution) (*Hickman v Kent or Romney Marsh Sheep-Breeders’ Association* [1915] 1 Ch 88); the articles do not constitute a contract between the company and someone who is *not* a member (*Eley v Positive Government Security Life Assurance Co Ltd* (1876) 1 Ex D 88).

⁵⁰ By a special resolution (75%) of the members acting in General Meeting, ss 21 and 283(1) CA 2006.

articles of association⁵¹ which also confirm that directors, not shareholders, manage the business of the company.⁵²

However, section 33 is in some ways *anti-contractual* because it is *mandatory*. Mandatory rules generally undermine the positive contractarian thesis, in the sense that it suggests a more regulatory conceptualisation of company law than private-ordering contractarianism would permit. I will return to this broader issue below; suffice to say for our purposes here that the statutory contract and articles of association do nonetheless confirm the contractarian conceptualisation of company law as broadly ‘contractual’. Of course, the nature of the statutory corporate contract is slightly different from the type envisaged by contractarianism, where *all* corporate contractors bargain into agreement, rather than shareholders alone—the statutory contract provides a contract between *only* shareholders (members) and the company.⁵³ On this basis, the company is a ‘club’; shareholders are within the company, or in the club, whereas non-shareholders deal with the company from the outside.⁵⁴ As such, this is arguably still in accordance with the general thrust of shareholder exclusivity, given, as will be seen, shareholders receive governance privileges to the exclusion of non-shareholding corporate contractors. Importantly, section 33 represents a contractual principle right at the heart of UK company law.

In addition to this core contractual principle, Moore also cites the following as broadly supportive of positive contractarian claims, including: the common law internal management doctrine, which exhibits judicial deference to private ordering; the only marginal legislative and judicial intervention into the core corporate

⁵¹ Moore, *Corporate Governance* (n 2), pp 142-4.

⁵² See The Companies (Model Articles) Regulations 2008/3229, art 3; *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34; Len Sealy and Sarah Worthington, *Sealy’s Cases and Materials in Company Law* (Oxford: Oxford University Press, 2010), p 167 and ch 4.

⁵³ See (n 49), above. In addition, part of the positive strength of the contractarian claim falls away simply by looking at the precise wording of s 33, which establishes ‘the company’ as a party in the multi-party corporate contract, indicating in turn that the company exists as a separate entity. The contractarian rejection of separate corporate personality might thus be considered a key starting point in rejecting the theory’s positive claim, since there is clear support within UK company law beyond s 33 for the existence of the company as separate from its constituents. Indeed, separate corporate personality is usually the first principle company law students are required to grasp (i.e. the Salomon doctrine, *Salomon v A Salomon & Co Ltd* [1897] AC 22). Separate corporate personality is often also presented as anti-contractarian, since it depends upon the granting of legal status and ‘personhood’ to the company by the state as a result of the (public) process of corporate registration. In response, see, for example, Cheffins, *Company Law* (n 2), pp 40-1, who argues that separate corporate personality (together with limited liability) can be achieved contractually / by private bargaining pursuant to a deed of settlement, and would have been had it not been for the acknowledgement by Parliament that it would be far more convenient (facilitative) to establish a general incorporation procedure.

⁵⁴ Moore, *Corporate Governance* (n 2), p 141.

governance issue of board structure and composition, which is otherwise left to private arrangements; and the regulation of corporate boards pursuant to the soft law ‘private’ (market-based) rather than ‘public’ (democratic) UK Corporate Governance Code.⁵⁵

Enlightened Shareholder Value (ESV)

In addition to the basic relationships in company law being defined in contractual terms, most importantly for our purposes is that key contractarian governance terms giving rise to shareholder exclusivity as to corporate goal and voice are also present in UK company law. UK company law provides that key collective quasi-participatory rights, or what I termed corporate voice, are held by shareholders to the exclusion of other stakeholders. These include the appointment of the board of directors, (found generally in the Model Articles);⁵⁶ the ‘shotgun’ power of director dismissal (section 168 Companies Act 2006);⁵⁷ the reserve power to give specific directions to directors regarding the management of company;⁵⁸ together with the enforcement of directors’ duties (duties and enforcement by derivative action provided in Parts 10 and 11 Companies Act 2006, respectively).⁵⁹

Most important for our purposes, however, is section 172(1)(d) Companies Act 2006, since it *prima facie* contradicts my argument that UK company law adopts a position of environmental irrelevance:

⁵⁵ Ibid., Ch 5. It is not necessary to consider these in detail, as we are concerned in this section with the extent to which the normative contractarian claim of environmental irrelevance is reflected positively in UK company law.

⁵⁶ A company’s articles typically provide that first directors are appointed by subscribers to the memorandum and thereafter directors are elected by members in general meeting. See Companies Act 2006 Model Articles (Private Companies), reg 17; Model Articles (Public Companies), regs 19 and 20. In the absence of related provisions in the articles, the general meeting has an inherent power to appoint directors by ordinary resolution (50% of the vote in general meeting, CA 2006, s 282), see *Worcester Corsetry Ltd v Witting* [1936] Ch 640.

⁵⁷ By ordinary resolution s 168(1) CA 2006. See also The Companies (Model Articles) Regulations 2008/3229, reg 4.

⁵⁸ Ibid.

⁵⁹ The strength of shareholder voice vis-à-vis the board of directors is of course open to debate, but the point made here is that shareholders hold voice to the exclusion of other stakeholders. One source of positive inaccuracy with the contractarian claim is the (sometimes) portrayal of directors owing duties to shareholders (often on a presumption that they are agents of shareholders). However, directors are *not* agents of shareholders, and while shareholders (to the exclusion of other stakeholders) may enforce breaches of directors’ duties derivatively on behalf of the company, directors’ duties are owed *to the company*. See CA 2006, s 170; *Percival v Wright* [1902] 2 Ch 421.

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to ... the impact of the company's operations on ... the environment.

Together with a narrative reporting obligation (which I return to in Chapter 7),⁶⁰ section 172 forms the basis of the legal institution of Enlightened Shareholder Value (ESV).⁶¹ From a CSR perspective, there has been a tendency to view ESV with some optimism, in particular because it is presented as representing a shift away from, or a challenge to, shareholder exclusivity.⁶² The impact of the company's operations on the environment is just one of many 'stakeholder' or 'CSR' type concerns to which directors are explicitly required to consider within their decision making process.⁶³

⁶⁰ CA 2006, s 417, requiring directors of certain companies to compile a 'business review' reporting compliance with the s 172 duty. In the case of quoted companies, this must provide information about environmental matters, including the impact of the company's business on the environment. For a discussion of the implications of s 417 for ESV see Cynthia A Williams and John M Conley, 'Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the UK' (2007) 31 William & Mary Environmental Law and Policy Review 317.

⁶¹ For the general context of ESV, see The Company Law Review Steering Group (CLRSG), *Modern Company Law For a Competitive Economy - The Strategic Framework (Consultation Document)* (Crown Copyright, 1999), particularly ch 5, pp 33-46 and 48-53. The ESV literature is too voluminous to cite in full, but see, for example, Simon Deakin, 'The Coming Transformation of Shareholder Value' (2005) 13 Corporate Governance: An International Review 11; Mark Stallworthy, 'Sustainability, the environment and the role of UK corporations' [2006] International Company and Commercial Law Review 155; Andrew Keay, 'Enlightened Shareholder Value, the Reform of the Duties of Company Directors and the Corporate Objective' [2006] Lloyd's Maritime and Commercial Law Quarterly 335; A Alcock, 'An accidental change to directors' duties?' (2009) 30 Company Lawyer 362.

⁶² Shareholder primacy, normally conceived as a focus on short-term profit maximisation / share price, is routinely diagnosed in the CSR literature as a barrier to improved corporate responsibility and a repeated cause of corporate irresponsibility. There are varying degrees of optimism regarding ESV in view of this. Lee Roach, 'The Legal Model of the Company and the Company Law Review' (2005) 26 The Company Lawyer 98 presents ESV as somewhat 'radical'. Virginia Harper Ho, "'Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 Journal of Corporation Law 59 suggests that ESV is a moderate move away from the standard shareholder wealth norm and a small step towards stakeholder theory. Sarah Kiarie, 'At crossroads: shareholder value, stakeholder value and enlightened shareholder value: which road should the United Kingdom take?' (2006) 17 International Company and Commercial Law Review 329, describes ESV as a normatively and pragmatically superior hybrid of shareholder primacy and stakeholder theory, taking the best aspects of both and 'killing two birds with one stone'. Cynthia A Williams and John M Conley, 'An Emerging Third Way?: The Erosion of the Anglo-American Shareholder Value Construct' (2005) 38 Cornell International Law Journal 493 posit ESV in the UK as an emerging and unique British 'third way' between the positions of (American) shareholder primacy and (Continental) stakeholder approaches, which in turn nudges companies towards enhanced social responsibility. Indeed, ESV is presented as moving 'significantly beyond' the narrow shareholder focus traditionally associated with Anglo-American corporations, as "'transcending" the shareholder-stakeholder divide'.

⁶³ CA 2006, ss 172(1)(a)-(c) and (e)-(f) provide these, and include, for example, (b) the interests of the company's employees and (e) the desirability of the company maintaining a reputation for high standards of business conduct.

Arguably, however, this optimism overstates the divergence between ESV and shareholder exclusivity.⁶⁴ As the name suggests, enlightened shareholder value is *not* a challenge to the exclusivity of shareholders as to corporate goal or voice. Section 172(1) confirms the shareholder-centric corporate goal or end, but provides a slightly broader stipulation as to the ‘means’ by which directors must achieve this. There is no direct duty owed to those ‘other’ stakeholders; duties are owed to the company,⁶⁵ and directors are to act in a way which promotes the success of the company *for the benefit of members as a whole*.⁶⁶ Indeed, the Company Law Review Steering Group (CLRSG) stated that ESV maintains the ultimate corporate objective of generating maximum value for shareholders.⁶⁷ At the same time as maintaining this shareholder exclusive goal, ESV represents the CLRSG’s belief that directors should adopt an inclusive and long-term approach which recognises wider interests of the community and, to the extent appropriate, minimises negative impacts of corporate activity.⁶⁸ The steering group argued that there was nothing explicit in company law and directors’ duties which mandated a narrower approach.⁶⁹ However, managerial perceptions of (short-term) shareholder demands, together with widespread misunderstandings in the practical interpretation of the pre-2006 law, militated against the adoption of the desired and more inclusive approach to corporate decision-making.⁷⁰ As such, section 172 in many ways aims at legal clarification.

This notwithstanding, it is arguable that until section 172, shareholder exclusivity as to corporate governance goal was not fully enshrined in law or supported consistently by case law.⁷¹ And on this view, section 172 provides new

⁶⁴ See Andrew Keay, ‘Enlightened Shareholder Value’ (n 61) and Andrew Keay, ‘Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom’s Enlightened Shareholder Value Approach’ (2007) 29 Sydney Law Review 577.

⁶⁵ S 170, CA 2006.

⁶⁶ The common law, upon which the general duties are based (s 170), tended to distill the ‘company as a whole’ down to the interests of its members (shareholders) as a whole, so that the corporate goal was defined by reference to shareholder interests (see *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 and *Gaiman v Association for Mental Health* [1971] Ch 317). The meaning of ‘success of the company’ in s 172 is unclear, although ministerial statements suggest this means long-term shareholder value, see David Kershaw, *Company Law in Context: Text and Materials* (Oxford: Oxford University Press, 2009), p 349.

⁶⁷ CLRSG (n 61), p 37 [5.1.12].

⁶⁸ *Ibid.*, p 36 [5.1.8]-[5.1.9] and p 40 [5.1.19].

⁶⁹ *Ibid.*, p 40 [5.1.19].

⁷⁰ *Ibid.*, p 36 [5.1.10] and pp 39-41 [5.1.17], [5.1.20]-[5.1.22].

⁷¹ Keay, ‘Enlightened Shareholder Value’ (n 61), Deakin, ‘The Coming Transformation of Shareholder Value’ (n 61); Daniel Attenborough, ‘How Directors Should Act When Owning Duties to the Company’s Shareholders: Why We Need to Stop Applying Greenhalgh’ (2009) 20 International Company and Commercial Law Review 339.

strength to shareholder exclusivity by way of an ‘unambiguous statement in legislation’.⁷²

The environmental business case as a legal norm - weak environmental relevance and voice

As already suggested, requiring directors to ‘have regard’ to the impact of the company’s operations on the environment suggests *prima facie* environmental relevance (rather than irrelevance).⁷³ However, the overall substantive corporate goal remains shareholder-centric.⁷⁴ Directors must have regard to environmental impacts, but only insofar as this contributes to the overall corporate goal of promoting the success of the company for the benefit of shareholders. In essence, therefore, section 172(1)(d) mandates, institutes and embeds the business case for corporate environmental responsibility as a procedural norm. As such, the limited normativity of the business case expressed in Chapter 2 is applicable to section 172. Under section 172, as with the business case, the environment is therefore valued instrumentally, not because it has any inherent or intrinsic value. Keay, for example, points to the reform background, in particular the rejection of what was termed a ‘pluralist’ approach, which would see stakeholder concerns as ‘ends in themselves’.⁷⁵ As a matter of legislative intent, therefore, this instrumentalism is deliberate. It follows that section 172 does not sanction *profit-sacrificing* behaviour motivated by environmental

⁷² Andrew Keay, ‘Moving Towards Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and More: Much Ado About Little?’ (2011) 22 European Business Law Review 1, p 41. Debate as to whether s 172 intended to codify or alter the previous common law position (see, for example, Alcock, ‘An accidental change to directors’ duties?’ (n 61), p 368) is irrelevant to the point I make here, which is that ESV is now mandatory and backed by an unambiguous legislative statement.

⁷³ There is no definition of ‘to have regard’, although it is likely to require more than ‘lip service’, given the requirement to ‘have regard’ appears to be objective (it will not be sufficient for the director to have regard to factors and constituents which he *thought* were relevant to the decision). As such, the ‘have regard’ requirement in section 172 will likely be subject to the duty of reasonable care, skill and diligence in s 174 CA 2006; see Kershaw, *Company Law* (n 66), pp 350-1; Keay, ‘Moving Towards Stakeholderism?’ (n 72), pp 29-30.

⁷⁴ Andrew Keay refers to this as a ‘shareholders first’ approach, see Keay, ‘Tackling the Issue of the Corporate Objective’ (n 64), p 592.

⁷⁵ Keay, ‘Moving Towards Stakeholderism?’ (n 72), p 29. The pluralist approach maps what is more generally understood as stakeholder theory (often attributed to R Edward Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984)). However, there is disagreement as to whether this requires stakeholders to be treated as ends in themselves, or merely as means to a (corporate) end (albeit perhaps in a firm with a corporate objective pertaining to the creation of value for all corporate constituents, not just shareholders); see, for example, JP Walsh, ‘Book review essay: taking stock of stakeholder management’ (2005) 30(2) Academy of Management Review 426. This resonates with the distinction between inherent and instrumental CSR discussed in Chapter 2.

concerns, so that ESV in turn does not provide a direct means by which to address negative environmental externalities.⁷⁶ Indeed, the damage recognised under section 172 is not ‘environmental’ damage, but damage to the success of the company; a potential ‘environmental’ breach of section 172 might thus be the share price, revenue and reputational costs arising from a failure to implement adequate environmental protection measures, rather than environmental damage itself.⁷⁷

Furthermore, there remains no real voice for the environment within ESV. While the language surrounding section 172 talks of ‘inclusivity’,⁷⁸ the exclusivity of shareholder voice is preserved. This includes the important right to initiate legal proceedings for a breach of section 172, so that there is no cause of action for ‘corporate environmental wrongs’ exercisable on behalf of the environment by the world at large.⁷⁹ In any case, as mentioned above, given environmental damage is not

⁷⁶ This is a very different conception of ESV from the (normative) version presented by Ho, ‘Enlightened Shareholder Value’ (n 62) at 98, where she argues that it is in cases where market forces pressure firms away from social responsibility that the contrast between shareholder wealth maximisation and ESV is clearest since, she argues, legally compliant but nonetheless negative externalities are fully compatible with shareholder wealth maximisation, whereas under an ESV rule, ‘the firm must assess the potential impact on stakeholders. If a course of action is optimal only when the costs to stakeholder are ignored, then it should not be taken or the firm must absorb the costs.’ As has been made clear, this is not what is required by s 172, nor does s 172 seem to actually permit this.

⁷⁷ Keay, ‘Moving Towards Stakeholderism?’ (n 72), p 29; see also Kershaw, *Company Law* (n 66), on the meaning of ‘success of the company’, together with the hypothetical application of s 172 to the BP oil disaster in the Gulf of Mexico by R Alexander, ‘BP: Protection of the Environment is Now to be Taken Seriously in Company Law’ [2010] *Company Lawyer* 271). Stallworthy, ‘Sustainability and UK corporations’ (n 61), p 159, suggests that the duty-emphasis on shareholder interests is representative of a reluctance in private law generally to accommodate values beyond a raw and narrow economic individualism.

⁷⁸ *CLRSG* (n 61), ch 5.

⁷⁹ It is beyond the scope and indeed the purposes of this chapter to consider the enforcement technicalities of section 172 in any great detail. For a much fuller account see Keay, ‘Moving Towards Stakeholderism?’ (n 72). In short, since duties are owed to the company (s 170), a breach of directors’ duties constitutes a wrong committed against the company and so the cause of action vests in the company (this is ‘the proper claimant rule’ originally stated in *Foss v Harbottle* (1843) 2 Hare 461). As the primary decision-making organ of the company, the decision whether or not to initiate legal proceedings is taken by the board of directors, who are generally unlikely to bring an action against themselves. If the board fails to bring an action in respect of breach, then shareholders may bring an action on behalf of the company derivatively. It may be the case that an environmentally minded shareholder would be willing to bring an action, but the hurdles, both financial and legal, to bringing a derivative action are extensive (see Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford: Oxford University Press, 2007)). In particular, a shareholder must seek the court’s permission to bring the claim, and in considering the application the court *must* dismiss the permission application if a person acting with s 172 (promoting the success of the company) would not seek to continue the claim (CA 2006, s 263(2)). This would seem to rule out the environmental ‘activist’ motivated to litigate for (adverse) publicity reasons. Injunctive relief would be a further possible enforcement option, although the scope for this would seem minimal. As argued by Keay, ‘Moving Towards Stakeholderism?’ (n 72), p 34 it is questionable whether a court would accede to the application of a non-member, and it is likely they will have to rely on rights beyond company law, ‘and certainly this is where the CLRSG thought that stakeholders’ safeguards lay’. See also *CLRSG* (n 61), pp 10-11.

recognised, any benefit to the environment that might be gained from pursuing an action for breach of section 172(1)(d) will ultimately be incidental.⁸⁰ Fundamentally, as with the business case, the environment remains dependent upon indirect economic expression via market advocates (primarily shareholders, but also customers).⁸¹ No deliberative space is provided to allow for the non-economic expression of environmental concerns within corporate decision-making, and section 172 does not provide legitimacy for CER undertaken on the basis of an inherent value in doing so.⁸²

Nonetheless, Mark Stallworthy, for example, welcomes section 172, arguing that the admission of ideas other than profitability discussed within company processes is ‘from an environmental perspective, obviously attractive’.⁸³ He points, in particular, to the familiarity of procedural tools of regulation in environmental law, as well as the dictation of processes without a substantive environmental standard.⁸⁴ However, while procedural requirements in the absence of a substantive standard are relatively common in environmental law, the goal or *norm* to which the process is geared is normally ‘environmental’ in some way. The process is imposed because, in theory, it can yield substantively better environmental outcomes. This is lacking in section 172. The process is not geared towards an environmental outcome, since there is no alteration to shareholder exclusivity as to corporate goal.⁸⁵ Indeed, the lack of a deliberative space for the appreciation of environmental value brings into stark

⁸⁰ In essence, this is a problem of using ‘private’ law instrumentally for environmental purposes. This will be familiar to environmental lawyers, particularly concerning private nuisance. See, for example, Jenny Steele, ‘Private Law and the Environment: Nuisance in Context’ (1995) 15 *Legal Studies* 236; John Wightman, ‘Nuisance — the Environmental Tort? *Hunter v Canary Wharf* in the House of Lords’ (1998) 61 *The Modern Law Review* 870; John Lowry and Rod Edmunds, *Environmental Protection and the Common Law* (Oxford: Hart Publishing, 2000); Maria Lee, ‘What is Nuisance?’ [2003] *Law Quarterly Review* 298.

⁸¹ ESV clearly prioritises investors as the voice for corporate environmental responsibility, though of course business cases arise from other economic actors, including customers and environmental NGOs. However, with business case CER and instrumentalism in ESV, even the advocacy of NGOs (who might be expected to express the value of the environment in non-economic terms) boils down to impacts on the financial bottom line. See Ho, ‘Enlightened Shareholder Value’ (n 62) 101-6, arguing that many stakeholders in ESV are ‘indirect and imperfect substitutes for direct participation’.

⁸² See also Charlotte Villiers, ‘Directors’ duties and the company’s internal structures under the UK Companies Act 2006: obstacles for sustainable development’ (2011) 8 *International Company and Commercial Law Review* 47.

⁸³ Stallworthy, ‘Sustainability and UK corporations’ (n 61), p 165.

⁸⁴ Environment Assessment is the most obvious example of this, see Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford: Oxford University Press, 2006).

⁸⁵ Christine Parker, ‘Meta-regulation: Legal Accountability for Corporate Social Responsibility’ in Doreen McBarnet and others (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007) argues that process-oriented CSR interventions must be accompanied by a norm or value (not necessarily a standard) to yield positive outcomes. I return to these issues of appropriate regulatory intervention for CER in Chapter 7.

question the optimism that mere proceduralisation will yield substantially better environmental outcomes. And given profit-sacrificing behaviour is not permitted and that, therefore, profitable (regulatory compliant) environmental degradation is sanctioned, ESV seems actually rather *indifferent* to substantive environmental outcomes.

The incidental substantive environmental benefits envisaged under ESV indicate the problematic assumption underpinning the relationship between process and substance in section 172; namely, that the two are somehow mutually supportive. In the language of the business case critique presented in Chapter 2, this assumes the compatibility of environmental goals and corporate prosperity. But as I argued there, this is the wrong starting point; it hides the scope for environmental and economic trade-offs and, more worryingly, sends a potentially dangerous and misleading message regarding the scale of effort necessary to ensure environmental protection.⁸⁶ Despite this, support advanced for ESV tends to be achieved by appealing to the type of problematic business case sleight of hand which collapses the divide between the interests of the environment (or society) and shareholders.⁸⁷ To clarify, this is not as an argument against procedural approaches generally, but rather that section 172 represents only in a limited way proceduralisation as is typically understood by environmental lawyers.

Given ESV represents the business case for corporate environmental responsibility as a mandatory procedural requirement, the form of environmental relevance which it affords suffers a range of normative limitations. The instrumental, financial appreciation of environmental value and the limited form of market environmental voice ESV envisages in corporate decision-making suggests that the relevance afforded to environmental concerns is a form of *weak* and ultimately inadequate environmental relevance only. By extension, ESV admits to corporate decision-making a very weak form of environmental voice, and one which ultimately

⁸⁶ The institution of ESV is not necessarily a denial that environmental and shareholder interests may *never* diverge, but rather that any manifestations of this mismatch (negative environmental externalities) ought to be addressed not through company law, but by environmental regulation (see, for example, Lord Goldsmith during Parliamentary debates, HL Deb 6 February 2006, vol 678, col GC271 and Stephen F Copp, 'S. 172 of the Companies Act 2006 Fails People and Planet?' [2010] Company Lawyer 406. Nonetheless, by embedding the business case as a procedural norm, s 172 adopts this problematic starting point of ready compatibility.

⁸⁷ See, for example, Ho, 'Enlightened Shareholder Value' (n 62), pp 80-83; Kiarie, 'At crossroads' (n 62), p 96; Simon Deakin, 'Squaring the Circle - Shareholder Value and Corporate Social Responsibility in the U.K.' (2002) 70 George Washington Law Review 976.

draws into the corporation, or relies upon, the market voice for the environment outlined in Chapter 2.

Unenlightened shareholder value and private ordering - is ESV environmentally 'regulatory'?

Even though section 172 admits a very limited form of environmental relevance to corporate decision-making, what does ESV mean for the claim that the environment is irrelevant to company law? Section 172 and ESV, for the most part, might be easily understood in contractarian terms, albeit perhaps inspired by more progressive, 'stakeholder' versions of contractual logic which attach significance to the value of often intangible inputs made by non-shareholding stakeholders.⁸⁸ Most notably, Michael Jensen considers enlightened shareholder value as forming part of the bargain which rational corporate constituents would reach, to the extent that a failure to consider corporate impacts on, *inter alia*, the environment, would be overall shareholder welfare-reducing and damaging to the company.⁸⁹ Indeed, rather than an adjustment of the corporate contract per se, ESV is arguably a *very slight* adjustment to the economical rationality ascribed to shareholders in contractarian theorising. The (hypothetical) contracting shareholder is now 'enlightened' as to how their own self-interest might be furthered and how an exclusive focus on the financial bottom line, coupled with a disregard for the type of stakeholder concerns listed in section 172(1), 'will often be incompatible' with corporate success in the long term.⁹⁰ In essence, the shareholder is re-understood as being aware of the *business case* for CSR, and under section 172(1)(d), the business case for CER specifically. On this analysis, section 172 can be viewed in contractarian, private-ordering terms, simply mapping the hypothetical bargains these now 'enlightened' corporate constituents would strike.

If section 172 is understood in such terms, then there is very little space for suggesting that section 172 represents a general opening up of company law to 'regulation' seeking to address environmental externalities. Indeed, the general thrust

⁸⁸ Moore, *Corporate Governance* (n 2); *CLRS* (n 61), pp 36-7 [5.1.10] exhibiting some of this thought.

⁸⁹ Jensen, 'Value Maximization' (n 23). See also Ho, 'Enlightened Shareholder Value' (n 62), 98 who similarly presents ESV as a revision of the corporate contract to better reflect the public realities of modern business against the backdrop of an increasing emphasis on CSR. For a contrary argument that s 172 is 'paternalistic' in identifying the proper range of considerations the board should take in to account in any major strategic decision, see Moore, *Corporate Governance* (n 2), pp 193.

⁹⁰ This language of 'incompatibility' comes from the *CLRS* (n 61), pp 37 [5.1.12].

of the reform debate would square with this view of section 172. ESV was seen primarily as contributing to the general competitiveness of UK business on the basis of a business case for CSR, and, importantly, redress for stakeholder ‘damage’ (including environmental degradation) was presented as being a matter of concern for *external* environmental law. As such, section 172 is not regulatory in the sense that it is *environmentally* regulatory; as has been seen, the purpose of ESV is not to protect the environment, or to reduce negative externalities.⁹¹ In addition, while there may be some (limited) scope for considering that section 172 is a form of procedural or reflexive regulation, the ‘overwhelming thrust of academic opinion’ is that section 172 will have relatively little practical re-orientation of day-to-day decision-making, particularly because it reaffirms doctrinally the economic welfare of the company’s shareholders as the ultimate litmus test for the propriety of directors’ decision-making.⁹² Furthermore, any environmental benefit which comes as a result of ESV will be incidental or indirect, either as a result of changes in decision-making process geared towards the business case, or as a result of any ‘enforcement’ action. Importantly, given the mismatch between procedural environmental relevance and substantive irrelevance, ESV does not represent the opening up of company law to environmental *norms*, but merely an understanding of the financial benefits for companies (and UK competitiveness in general) of a regard for the environment. This is simply the opening up of company law to the perceived financial value *for shareholders* of the environment.

One might want to question the understanding of this hypothetical shareholder pursuant to section 172 as being somehow now ‘enlightened’. The value of the environment to this shareholder is that of instrumental wealth generation, of only a purely financial appreciation of natural or environmental resources, and one who accepts wealth generation in spite of continued environmental degradation as a direct result. Such a shareholder buys in to an assumptive starting point of economic and environmental compatibility, and hence is generally, and uncritically, accepting of the

⁹¹ I make no argument as to whether or not company law more broadly is *necessarily* private or ‘non-regulatory’ (see further, Moore, *Corporate Governance* (n 2), Ch 7). The point I make is that s 172 is not *environmentally* regulatory, given that (i) external regulation is presented as the appropriate means by which to address environmental externalities and (ii) s 172(1)(d) can be understood as a slight, non-transformative adjustment to the self-interested rationality of corporate contractors to appreciate the business case for CER.

⁹² Moore, *Corporate Governance* (n 2). And as already suggested, above, s 172 represents only in a very limited way proceduralisation as is typically understood by environmental lawyers.

corporate status quo. This shareholder is also mirrored in contemporary approaches to socially responsible investment (SRI) initiatives, the justification for which also tends to rest on a business case and thus similarly buys into an instrumental appreciation of environmental value.⁹³ While the long-term perspective is an important element of ESV,⁹⁴ it adds little to the enlightenment of our section 172 shareholder. The mismatch between the environmental and corporate meaning of the ‘long term’ is potentially considerable, and in reality, massive, given companies struggle to think much beyond an annual timeframe, even in the presence of section 172.⁹⁵ There has been an acknowledgement in some company law scholarship that the conception of the shareholder as uniformly concerned with profit generation is increasingly out of step with reality.⁹⁶ Instead, ‘real’ shareholder interests are linked to both economic and non-economic goals, such that if an individual derives non-financial benefits from socially and morally desirable corporate activities, maximising shareholder value is not the same as maximising shareholder profit.⁹⁷ Such shareholders *might* be considered enlightened, but they are not representative of the shareholder envisioned under section 172.⁹⁸ This shareholder remains environmentally unenlightened.⁹⁹

⁹³ See, for example, Benjamin Richardson and Wes Cragg, ‘Being Virtuous and Prosperous: SRI’s Conflicting Goals’ (2010) 92 *Journal of Business Ethics* 21.

⁹⁴ CA 2006, s 172(1)(a) requires directors to have regard to the likely consequences of any decision in the long term.

⁹⁵ And much more likely a perspective of between three and six months, see Olajo Aiyegbayo and Charlotte Villiers, ‘The enhanced business review: has it made corporate governance more effective?’ (2011) 7 *Journal of Business Law* 699, p 722. One of the respondents to the study outlined in Dorothy Thornton, Neil Gunningham, and Robert Kagan, *Shades of Green: Business, Regulation, and Environment* (Stanford: Stanford University Press, 2003), p 63 referred to this as the ‘tyranny of quarterly returns’, such that long-term benefits can be ‘substantially discounted or ignored.’

⁹⁶ See, for example, Daniel JH Greenwood, ‘Fictional Shareholders: for Whom Are Corporate Managers Trustees, Revisited’ (1996) 69 *Southern California Law Review* 1021; Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco, CA: Berrett-Koehler, 2012).

⁹⁷ Einer Elhauge, ‘Sacrificing Corporate Profits in the Public Interest’ (2005) 83 *New York University Law Review* 733.

⁹⁸ There is some empirical evidence to suggest that the attitudes of investors (generally, as well as after the institution of ESV) do not correspond with more exacting notions of ‘responsible investment’, see Aiyegbayo and Villiers, ‘The enhanced business review’ (n 95).

⁹⁹ See also Villiers, ‘Directors’ duties’ (n 82), arguing that enlightened shareholder value, despite first appearances, is not really compatible with (stronger or more transformative) versions of sustainable development, although this argument is more focussed on gender diversity at board level than with environmental concerns.

4. Environmental irrelevance and environmental voice

This final section considers the normativity of the environmental irrelevance position. I argue that the acceptability of the irrelevance position is called into question when the difficulties of locating environmental voice are brought to the fore. In justifying a position of environmental irrelevance, too much is assumed about the external market and regulatory voices for the environment. As such, these faulty assumptions render the orthodoxy of environmental irrelevance untenable. Before explaining these faulty assumptions in more detail, I should acknowledge that the arguments I make are inevitably influenced by the extensive critique of shareholder exclusivity.¹⁰⁰ Much of this literature demands an opening up of both company law and the internal affairs of corporations to interests beyond the generation of profit for shareholders. As such, this literature indirectly supports the arguments I make below, and vice versa.

Reliance on external environmental voices

Recall the normative contractarian thesis. The theory comprises an overall goal of efficiency coupled with procedural and substantive justifications for a private-ordering, facilitative conception of company law.¹⁰¹ The procedural justification is that corporate governance terms are the outcome of private bargaining and freedom of contract, and, as a matter of liberty and freedom, these bargains should be subject to a sphere of state non-intervention. The substantive justification is that the outcome of bargaining in such conditions will yield efficient outcomes, particularly in view of the free market's superiority as a pricing mechanism (at least compared with governments or regulators).

¹⁰⁰ See, for example, Keay, 'Shareholder Primacy in Corporate Law' (n 13); Stout, 'Bad and Not-so-Bad Arguments for Shareholder Primacy' (n 13); Lawrence E Mitchell, *Corporate Irresponsibility: America's Newest Export* (New Haven: Yale University Press, 2002); Ronald Green, 'Shareholders As Stakeholders: Changing Metaphors Of Corporate Governance' (1993) 50 Washington and Lee Law Review 1409.

¹⁰¹ A common starting point for rejecting shareholder exclusivity is a rejection of efficiency itself as the only relevant criterion for the normative assessment of governance arrangements. Fairness, morality, ethics, all of which are excluded by a singular focus on efficiency, are of value to society and hence, by extension, company law should be similarly concerned with these other non-economic values. This is what Keay describes as the 'narrow and glib' critique of efficient shareholder primacy, where it is seen as simply impossible 'to reduce everything to a matter of profit'. Keay, 'Shareholder Primacy in Corporate Law' (n 13), pp 46-8, see also Paddy Ireland, 'Defending the Rentier' (n 1).

As a non-contracting corporate party, the environment is excluded from the active process of bargaining. As such, any environmental damage caused by corporate governance terms (particularly those giving rise to shareholder exclusivity) is an externality—a failure of the market to fully include the cost of environmental damage within the price of bargains. As with other negative impacts on third parties or ‘involuntary’ creditors, this results in *inefficiency*, and hence external ‘environmental’ regulation is permitted to address this market failure. This external regulation should be in the form of generally applicable environmental laws, as opposed to interventions with the private bargains represented by company law. The presumption, however, is that external regulation is somewhat of a rare last resort, given, according to Easterbrook and Fischel, corporate governance terms do not ‘generally’ result in ‘substantial’ externalities, or the imposition of risks and negative effects on third parties.¹⁰² In this bargaining logic, the environment is thus represented foremost by a market voice, and secondly, by externally imposed regulation through a regulatory voice. There are a number of problems with this reliance on external voices for the environment.

To start with, the presumption regarding externalities is problematic. Easterbrook and Fischel do not make the ‘Panglossian’ claim that profit and social welfare are always perfectly aligned, but they do adopt a business case-type argument regarding the presumed compatibility of corporate goals and other objectives.¹⁰³ As was argued in Chapter 2, there are numerous points of routine (as opposed to rare) conflict between the pursuit of corporate profit and environmental protection. In addition, and most importantly, corporate governance terms, most notably those giving rise to shareholder exclusivity, are implicated in both permitting and actively incentivising the creation of extensive externalities.¹⁰⁴ Taking externalities as a rarity, in a similar fashion to taking the ready compatibility of environmental and economic concerns, is the wrong starting point.

¹⁰² Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), pp 1421 and 1429-30.

¹⁰³ ‘Frequently the harmony of interests between profits maximisation and other objectives escapes attention’ Easterbrook and Fischel, *The Economic Structure of Corporate Law* (n 1), p 38.

¹⁰⁴ Mitchell, *Corporate Irresponsibility* (n 100) highlights a *systematic* failure in corporate law which permits the routine and widespread shifting of risk and liability onto society. Joel Bakan’s rather vividly extreme conclusion is that corporate law permits the development of a ‘psychopath’, unconcerned with extensive negative externalities and the creation of unchecked social costs, see Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable & Robinson, 2005). See also Stallworthy, ‘Sustainability and UK corporations’ (n 61).

The reliance on the market as a voice for the environment, together with the primacy afforded to it, is also problematic. As argued in Chapter 2, it is controversial and potentially impossible to suggest that the value in environmental protection or the cost of environmental damage can be appreciated only in purely financial terms. Even if corporate contractors value the environment and it is therefore priced *within* contracts, it is nonetheless represented indirectly, via consumers, lenders or investors to create a corporate business case for environmental responsibility. Even beyond this, environmental damage in bargaining logic tends to be conceived in anthropocentric terms (contracts to pollute ‘affect *people* who are not parties to the deal),¹⁰⁵ so that harm to the environment is ultimately transformed into financial value attributed by reference to human utility rather than inherent ecological value. This is a narrow conceptualisation of environmental harm, and would perhaps be objectionable in and of itself were environmental law generally not reasonably subject to the same criticism.

However, even if we are willing to accept an anthropocentric understanding of environmental damage, as was argued in Chapter 2, unearthing non-financial values is more likely in open, deliberative or political forums than in market interactions or the expression of environmental concerns indirectly by market actors. Indeed, this is a direct challenge to the assumption made in contractarian logic that the market is a superior pricing mechanism, at least when considering the impact of governance terms on the environment. Yet it is precisely the assumed superiority of the market (governance terms properly priced by the market) which is used to protect intra-corporate affairs from state intervention and to insulate company law from concerns such as environmental protection. Since it is not obvious that market-based bargaining by rational economic (human) actors can ever fully appreciate environmental ‘value’, it is similarly not obvious that corporate governance terms which reflect solely the outcome of hypothetical private bargaining are superior to state-guided regulatory interventions.

At the same time as adopting an overly narrow conception (and value) of environmental harm, contractarian logic, together with UK company law, makes a consistent claim that corporate environmental protection is not a matter for company law. It simply does not matter that company law and corporate decision-making fails to

¹⁰⁵ Easterbrook and Fischel, ‘The Corporate Contract’ (n 8), p 1434 (emphasis added).

have true regard for environmental concerns, because this is more appropriately dealt with by environmental regulation. For the most part, contractarians and corporate lawyers are relatively silent about what they mean by environmental regulation. It is perhaps not unfair to assume that, generally, when corporate lawyers talk of environmental regulation, they have in mind command and control. Taking this narrow meaning of regulation as a proxy for the environment's regulatory voice in contractarian thinking, the position of environmental irrelevance makes two problematic assumptions.

First, it presumes the *adequacy* of external environmental regulation (the adequacy of 'rules of the game'). Recall Chapter 3. There is an extensive body of literature detailing the challenges faced in building legal intervention for environmental problems. To name but a few, these included the complexity of social and environmental problems; the fragmentation of information and control; the autonomy of social actors and the interdependence thereof. This critique of the limitations of direct regulation has resulted in a growing tendency to adopt a mixture of regulatory techniques in addressing the challenges faced by environmental damage. Environmental irrelevance, however, becomes problematic when the inadequacy of these 'rules of the game' are brought to the fore. In the language of the contractarian approach, externalities become not just an example of 'market' failure, but increasingly are examples of 'regulatory' failure (or at least regulatory limitations).

Second, justifying environmental irrelevance presumes the ability of external regulation to properly function in the face of a body of company law which fosters either environmental irrelevance or weak (instrumental) relevance; that is, where corporations remain legitimately insulated from environmental *norms*. Particularly relevant in view of this is the growing use of procedural approaches to environmental regulation. I will discuss these approaches in more detail when addressing the 'how' question of corporate relevance.¹⁰⁶ For our purposes here, and in brief, procedural approaches to environmental protection work on the premise that dictating certain procedures stimulates 'self-reflection' upon the nature of environmental problems and can in turn foster an appreciation and commitment to the goal underpinning that

¹⁰⁶ See Chapter 7 and the more detailed references therein.

process.¹⁰⁷ The aim, therefore, relates more to the internalisation of a *norm*, rather than a financial *cost* (most obviously ‘internalised’ via a fine).¹⁰⁸ As will be seen in Chapter 5, a commitment by corporations or the individuals who comprise them can reduce instances of non-compliance, encourage beyond compliance behaviour and, in general, improve corporate environmental performance. Requiring corporations to reflect upon environmental impacts in this way mirrors calls for environmental integration, suggesting environmental impacts are better addressed (and hopefully avoided) when considered early and deeply embedded within decision-making procedures, not bolted on as a last-minute consideration, and certainly not entirely *excluded*.

However, if company law and decision-making remains resistant to environmental norms, which is arguably the case when adopting even a weak relevance position, then it is directly obstructive to the functioning of the (new, reflexive) rules of the game.¹⁰⁹ Some remain highly sceptical that purely reflexive models will induce firms to internalise any goal (or norm) other than profit, certainly if they are unable to ‘cut themselves loose from their central focus on profit-making and engage in objectively valid self-examination and social-learning’.¹¹⁰ This is why Christine Parker, for example, argues that in the context of process-orientated interventions, procedures should be accompanied by a norm or value (not necessarily a

¹⁰⁷ Francois Ost, ‘A Game Without Rules? The Ecological Self-Organization of Firms’ in Gunther Teubner and others (eds), *Environmental Law and Ecological Responsibility: Concept and Practice of Ecological Self-Organisation* (Oxford: Wiley-Blackwell, 1994).

¹⁰⁸ That is, we might distinguish between two broad types of ‘internalisation’. First, where *values* or norms are incorporated within the self (one of the oft-intended goals of procedural approaches to environmental regulation). Second, where people (or corporations) *are made to act as if* the value were internalised (often by internalising the *financial cost*, as with economic instruments), without necessarily affecting preferences; see Beate Sjøfjell, ‘Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers’ (2009) 40 *George Washington International Law Review* 977, pp 987-91 on implications for the perceived normativity of company law in view of the difference between the internalisation of norms and costs. See Chapter 7 and the more detailed references therein.

¹⁰⁹ See, for example, Beate Sjøfjell, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law, with the Takeover Directive as a Test Case* (Kluwer Law International, 2009), Ch 1, p 5 making a similar argument regarding company law and environmental protection on the basis of integration imperatives that:

... there is a risk that legislative initiatives in one area of the law will work at cross-purposes with initiatives in other areas, if we allow the argument that we have specific areas of the law to deal with—for example, the environment, human rights, labour rights and development—to lead us to overlook the connection between these areas of the law and those that are traditionally economic.

¹¹⁰ Sanford E Gaines and Cliona Kimber, ‘Redirecting Self-Regulation’ (2001) 13 *Journal of Environmental Law* 157, p 169; see also Leonie Breunung and Joachim Nocke, ‘Environmental Officers: a Viable Concept for Ecological Management?’ in Teubner *et al*, *Environmental Law and Ecological Responsibility* (n 107).

standard) in order to yield positive outcomes.¹¹¹ If we retain a position of corporate environmental irrelevance, an instrumental concept of environmental value, newer regulatory interventions geared towards environmental reflection and integration will arguably be hindered. Privately conceived company law would appear to be a barrier to the goals of these ‘external’ regulatory interventions, when it could (potentially) be facilitative. And on the basis of integration imperatives, it must be.¹¹²

A note on narrow understandings of ‘regulation’ and the ‘private’ sphere of non-intervention

Whilst not being the central argument made in this chapter, it is worth highlighting that there might be implications for contractarian thinking when taking a broader definition of ‘regulation’. Contractarian (and other) corporate theories often seek to insulate the corporation from broader societal or environmental goals on the basis of a sharply drawn ‘public / private’ divide.¹¹³ Implicit within this is a narrow appreciation of ‘who’ regulates; namely, government. In CSR literature, this division is described variously as the falsely dichotomous view of business and government, a mono-functional theory of social responsibilities, or the autonomous conception of business activity within society, all of which indicate a full separation of the public and private spheres.¹¹⁴

This ought to be contrasted with the decentred understanding of regulation presented in Chapters 3 and 4. In decentred regulatory space, descriptively and normatively, ‘regulation’ is no longer the preserve of governments. In particular, the meaning of the term ‘regulator’ is expanded to include a number of actors traditionally understood as ‘private’, including companies; and as exhibited in the case study,

¹¹¹ Parker, ‘Meta-regulation’ (n 85).

¹¹² See Sjøfjell, ‘Internalizing Externalities’ (n 108) making a similar argument regarding the integration of concerns into EU Company Law on the basis of (i) the limits of what I term the environment’s ‘external regulatory voice’ and (ii) the ‘integration principle’ in EU Law pursuant to Art 6 EC / Art 11 TFEU, which provides that ‘Environmental protection requirements must be integrated into the definition of the Union policies and activities, in particular with a view to promoting sustainable development’.

¹¹³ See, for example, Millon, ‘Theories of the Corporation’ (n 45).

¹¹⁴ Domènec Melé, ‘Corporate social responsibility theories’ in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008); Jeremy Moon and David Vogel, ‘Corporate Social Responsibility, Government, and Civil Society’ in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford: Oxford University Press, 2008).

corporations do indeed perform a lot of ‘regulation’. Conceiving of the corporation as a ‘regulator’ jars somewhat with the conception of the company as a thoroughly private actor, by extension blurring the lines of the public / private divide. The decentred understanding of regulation would, therefore, appear to lend support to those corporate scholars who have rejected conceptions of the company as a ‘private’ institution.¹¹⁵ The normative and positive implications of decentred regulation, implicating positively and normatively corporations as regulators, raises challenging questions for the sustainability of arguments which seek to insulate company law from a whole host of supposedly irrelevant ‘societal’ concerns, not least those asserting the legitimacy and contractual freedom of ‘private’ corporate power.¹¹⁶

5. Conclusion

In this chapter, I outlined the dual position of environmental irrelevance subsisting within company law; that the environment is irrelevant to both company law as well as corporate decision-making. I argued that this dual position of environmental irrelevance subsists notwithstanding section 172(1)(d) of the Companies Act 2006, which moves company law and governance away from the irrelevance position only very little, if at all. As I suggested, the orthodox justification for environmental irrelevance can be found in the normative contractarian thesis, and the extent to which UK company law and governance reflects contractarianism positively. In essence, this leaves very little room for intra-corporate environmental voice and CER within corporations or company law, in turn diminishing my broader argument that CER can be justified to the extent that it fits appropriately with existing modes of environmental and corporate governance.

However, I also argue that either environmental irrelevance, or what I term weak relevance subsisting under section 172, are untenable positions. I argued that, in justifying a position of environmental relevance, company law and contractarian

¹¹⁵ See, for example, Robert Alan Dahl, *A Preface to Economic Democracy* (Berkeley: University of California Press, 1992); JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Oxford University Press, 1993); E Merrick Dodd, ‘For Whom Are Corporate Managers Trustees?’ (1932) 45 Harvard Law Review 1145.

¹¹⁶ See, in particular, Parkinson, *Corporate Power* (n 115).

corporate theory assume far too much regarding the adequacy of a voice for the environment outside or external to company law and company decision-making. As such, I argue that company law ought to adopt a position of environmental relevance. Having provided my explanation as to this ‘why’ question of environmental relevance, it is to the ‘how’ question which I now turn; how we might otherwise locate, outside the contractarian orthodoxy, an intra-corporate environmental voice and foster it through the reform of company law, in turn enhancing the overall normative space I perceive for CER.

Part II

Intra-Corporate Environmental Voice

Chapter 6

Intra-Corporate Environmental Voice and Corporate Conscience

1. Introduction

In this chapter, I consider the idea and location of an internal corporate conscience, an environmental conscience specifically. There are various manifestations of corporate conscience in the literature. CSR scholarship tends to call it a responsibility mindset;¹ Gunningham *et al* have a similar notion in their typology of environmental management styles.² I will adopt Lynn Stout's definition of conscience, which encapsulates behaviour which is prosocial, unselfish or 'other-regarding'; actions which evidence concern for someone or something beyond one's own material interests.³ Generally speaking, we are talking of corporate commitment to values in addition to profit, and in particular, commitment to environmental protection. My aim is not to provide a precise, legal definition as to the location of corporate conscience, but rather to paint corporate conscience as a *realistic* aspiration on the basis of laboratory-based psychological and empirical research. Corporate conscience is arguably a powerful source of environmental voice *within* companies, separate from the external market and regulatory voices for the environment discussed in Chapters 2-4. As will be seen, corporate conscience matters; theory and emerging empirical evidence suggests that conscience, mindset, management style (whatever we call it) leads to improved corporate environmental performance. In Chapter 7, I suggest

¹ See Michael Blowfield and Alan Murray, *Corporate Responsibility: A Critical Introduction* (Oxford: Oxford University Press, 2008).

² Dorothy Thornton, Neil Gunningham and Robert Kagan, *Shades of Green: Business, Regulation, and Environment* (Stanford: Stanford University Press, 2003); see also Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge: Cambridge University Press, 2010), making use of the idea of a 'corporate conscience' (though with little by way of definition).

³ 'At its most basic level, conscience demands we sometimes take account of others' interests, and not only our own selfish desires, in making decisions'. Conscience can be 'active' (for example, donations to charity) or 'passive' (refraining from taking advantage of others even though it would be personally profitable to do so), see Lynn Stout, *Cultivating Conscience: How Good Laws Make Good People* (Oxford: Princeton University Press, 2010), pp 11 and 13-4.

corporate conscience and environmental voice may be enhanced or encouraged through regulatory techniques beyond command and control.

In locating conscience and voice within the corporation, I suggest that the starting point ought to be real individuals. In contrast to the economic model of behaviour generally underpinning company law, which leaves no room whatsoever for corporate actors to be other-regarding, *real* individuals are a source of environmental conscience and voice within corporations. However, due to the constraints on conscience arising from organisational membership and the stock market, individuals are admittedly a somewhat limited voice for the environment within corporations. At the same time, the *organisational* nature of corporations implies that a level of analysis which focuses solely on *individuals* is inadequate. As such, corporate conscience is necessarily collective or organisational in nature, and I make use of work on collective conscience and corporate culture to understand the challenging idea of a corporation having a conscience of ‘its own’ which is somehow distinct from the individuals who comprise the organisation. This does not mean, however, that individuals do not matter. They are the raw material of conscience at varying levels of seniority within the corporation, and various strands of corporate research point to the importance of particular individuals in shaping corporate conscience, particularly top-level management and directors.

Throughout the chapter, I seek to enrich my understanding of corporate conscience with reference to corporate theory. It will be immediately clear to the corporate theorist that, in adopting both individual and collective levels of analysis, my approach bridges across two broad divisions commonly made in corporate theory: (i) aggregate and (ii) entity approaches. As such, I do not seek to posit a novel theory of the corporation. It is nonetheless clear that the areas of research I draw on raise questions for corporate theory⁴ and indeed, the exploration of the relationship between conscience and corporate theory is by no means comprehensive. But these questions are beyond the scope of both this chapter and the thesis generally. Rather, I aim to

⁴ As do other (related) areas of research; see, for example, the polyphonic model of the firm developed to reflect / accommodate empirical findings as to the organisational effects of Environmental Management Systems (EMSs) in Oren Perez, Yair Amichai-Hamburger and Tammy Shterental, ‘The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior’ (2009) 43 *Law & Society Review* 593. I return to the relationship between corporate conscience and EMSs in the following chapter.

locate corporate conscience to the extent necessary to paint it as a realistic source of environmental voice within companies.

The chapter is structured as follows. In section 2, I outline the potentially nonsensical idea of corporate conscience, and outline the limited space for corporate conscience in the type of corporate actor, *homo economicus*, envisioned under UK company law. Section 3 deconstructs this actor, arguing that they are fictitious bearing little resemblance to flesh and blood human beings. We can see *glimpses* of corporate conscience by looking to real individuals, although individual conscience is constrained by a range of organisational and market factors. In section 4, I explain the necessarily organisational and idiosyncratic nature of corporate conscience, using works on collective conscience and corporate culture to sketch the aspirational but realistic notion of corporate conscience.

2. The fiction theory of the firm and corporate conscience according to company law

Conceptual problems with corporate conscience - the corporation is a legal fiction

Corporations are legal persons. A central feature of company law is that the process of incorporation creates a separate legal being capable of enjoying rights and subject to obligations.⁵ However, despite the attribution of separate legal personhood, the idea of corporations having a conscience⁶ is potentially nonsensical. Indeed, it is far from obvious that corporations, despite being legal *persons*, are capable of having *human* characteristics and qualities.⁷ According to the fiction theory of the firm, the legal person has no substantial reality, no mind and will;⁸ it is a *persona ficta* which

⁵ Len Sealy and Sarah Worthington, *Sealy's Cases and Materials in Company Law* (Oxford: Oxford University Press, 2010), p 71. On separate corporate personality, see *Salomon v A Salomon & Co Ltd* [1897] AC 22.

⁶ Or what Mitchell and Gabaldon term corporate morality, see Lawrence E Mitchell and Theresa A Gabaldon, 'If I Only Had a Heart: Or, How Can We Identify Corporate Morality' (2001) 76 Tulane Law Review 1645.

⁷ According to Marks, most definitions of a 'conscience' involve a 'uniquely human characteristic to determine right from wrong based on an internal "feeling" or "moral sense". But corporations are obviously not human.' Law does, however, ascribe human characteristics to corporations (such as a reputation, or an intention to defraud). See Colin P Marks, 'Jiminy Cricket for the Corporation: Understanding the Corporate "Conscience"' (2008) 42 Valparaiso University Law Review 1129, p 1144.

⁸ Ben Pettet, *Company Law* (London: Longman 2005), p 48.

‘does not act, speaks no words, thinks no thoughts’.⁹ The corporation is an artificial creation of the state,¹⁰ ‘is merely a creature of intellect’,¹¹ and hence we are confronted with the old legal saw of corporations having ‘no conscience or soul’.¹²

Similar problems are encountered when considering the contractarian theory of the firm which, for the most part, denies the existence of the ‘corporation’ as a separate legal entity.¹³ The firm is simply a hub around which parties contract—a ‘transactional network’.¹⁴ It would be illogical to suggest that an entity conscience exists here, where no entity itself exists. And to the extent that there might be room for considering conscience on the part of contracting parties (for example, the shareholder who invests responsibly), this would seem to generally be denied by most expositions of contractarian thinking, which tend to use rational economic actors, *homo economicus*, as the basis for theorising the hypothetical bargaining behaviour.¹⁵ Since such actors are selfish, amoral calculators, they are devoid of conscience.¹⁶ I will return to the assumed economic behavioural model of corporate actors in more detail later in this chapter.

⁹ Frederick William Maitland, ‘Introduction’ in Otto Gierke, *Political Theories of the Middle Age* (Frederick William Maitland tr, Cambridge: Cambridge University Press 1987), pp xxi. See also Marks, ‘Jiminy Cricket’ (n 7), p 1168: ‘the corporation is an artificial entity, soulless and devoid of the ability to reflect upon its actions.’

¹⁰ The fiction theory of the firm is sometimes associated with the grant / concession theory of the firm, see David Millon, ‘Theories of the Corporation’ (1990) 2 Duke Law Journal 201; Ron Harris, ‘The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business’ (2006) 63 Washington and Lee Law Review 1421; Alan Dignam and John Lowry, *Company Law* (Oxford: Oxford University Press, 2012). These theories lost relevance with the advent of general corporate registration, where incorporation no longer depended upon a specific charter or Act of Parliament.

¹¹ John Dewey, ‘The Historic Background of Corporate Legal Personality’ (1926) 35(6) Yale LJ 655, pp 669.

¹² Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper and Row, 1975), p 35; see also John C Coffee, “‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment” (1981) 79 Michigan Law Review 386.

¹³ As was discussed in Chapter 5.

¹⁴ Gunther Teubner, ‘Enterprise Corporatism - New Industrial Policy and the “Essence” of the Legal Person’ in Sally Wheeler (ed), *A Reader on the Law of the Business Enterprise* (Oxford: Oxford University Press 1995), p 52.

¹⁵ Even though there is some disagreement as to the level of ‘rationality’ with which individuals in hypothetical bargains should be imbued, they are nonetheless self-interested, economic actors, see Chapter 5.

¹⁶ “‘Economic Man’ does not worry about morality, ethics, or other people. He worries only about himself, calculating and opportunistically pursuing the course of action that brings him the greatest material advantage’, see Stout, *Cultivating Conscience* (n 3), p 3. *Homo economicus* is a later incarnation of the ‘bad man’ propounded by Oliver Wendell Holmes Jr, ‘The Path of the Law’ (1897) 10 Harvard Law Review 457, who, while not cruel or sadistic, is indifferent to others, lacking an internal voice we call ‘conscience’ (Stout, *Cultivating Conscience* (n 3), p 24).

Directors and legal personification - homo economicus and corporate psychopathy

Despite the fiction theory of the firm, the granting of legal personhood means that corporations meet areas of law which apply to normal persons. When liability depends on a mental state, such as intention or negligence, it has thus been necessary for law to locate a corporate mind.¹⁷ Historically, the legal technique adopted has been to look to top management, the identification approach, explained vividly by Denning LJ:

A company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants or agents who are nothing more than the hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.¹⁸

On this basis, top management, particularly directors, represent the corporate mind and hence are the primary source of conscience within the corporation. By considering those aspects of company law which hone in on director decision-making, we can thus get reasonably close to the corporate mind legally personified.¹⁹ Taking section 172 Companies Act 2006 as an albeit rough proxy, company law defines (or mandates the remit of) the director's conscience in rather narrow terms. I argued in the previous chapter that section 172 envisions corporate actors who are unenlightened. By extrapolating some of this reasoning, we can conclude that there is very little space within section 172 for conscience, prosociality or other-regarding behaviour in any

¹⁷ Stone, *Where the Law Ends* (n 12), p 10; Pettet, *Company Law* (n 8), p 28.

¹⁸ *Bolton Engineering v Graham* [1957] 1 QB 159, 172; see also Pettet, *Company Law* (n 8), p 28.

¹⁹ If we were to assume that the corporation is *capable* of human characteristics whilst simultaneously being a legal fiction, then we ought to look to company law to define its personality. See, for example, Chief Justice Marshall's statement in *Dartmouth College v Woodward* (1819) 17 US 518, 636: 'A Corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it ...'. See also Maitland, 'Introduction' (n 9), p xxx, on the fiction and concession theories of the corporation: 'Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust'.

meaningful sense. Recall Chapter 5. While section 172 does require that directors have regard, amongst other things, to the impact of the company's operations on the environment, it does so only to the extent such a regard serves the interests of the company and its shareholders as a whole. Crucially, these interests tend to be defined financially, favouring returns accruing in the short term.²⁰ Section 172 therefore represents, at best, a financially contingent environmental conscience.²¹ But because it is financially contingent, it is necessarily weak.²²

In rather vividly extreme terms, Joel Bakan suggests that shareholder primacy-type requirements, similar to s 172, mean that corporations exhibit the medically recognised traits of a psychopath, particularly in view of a legal mandate which not only permits, but arguably requires, a disregard for issues outside the realm of its own self-interest.²³ According to Bakan, since, like a psychopath, the corporation is 'singularly self-interested and unable to feel genuine concern for others', the corporation is morally blind:

The corporation's legally defined mandate is to pursue, relentlessly and without exception, its own self-interest, regardless of the harmful consequences it might cause to others ... The corporation is an externalizing machine ... Nothing in its legal makeup limits what it can do to others in pursuit of its selfish ends, and it is compelled to cause harm when the benefits of doing so outweigh the costs.²⁴

²⁰ Of course, CA 2006 s 172 requires directors to have regard to the long-term interests of the company, but a range of factors militate against this (as was discussed in Chapters 2 and 5). See also Lawrence E Mitchell, *Corporate Irresponsibility: America's Newest Export* (New Haven: Yale University Press, 2002); Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco, CA: Berrett-Koehler, 2012)

²¹ See Mitchell, *Corporate Irresponsibility* (n 20), p 69 on (financially) contingent corporate morality.

²² For the same reasons explored in Chapter 5 as to why s 172 admits only a weak form of environmental relevance to company law and decision-making.

²³ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (London: Constable & Robinson, 2005). Antisocial Personality Disorder is the formal psychiatric label for psychopathy, see Stout, *Cultivating Conscience* (n 3), p 45 for a more detailed survey.

²⁴ Bakan, *The Corporation* (n 23), pp 1-2, 60, 70. The reference to the corporation's legal makeup or legally defined mandate reflects the orthodox view that social or environmental concerns are irrelevant to the internal operations and goals of companies and company law (as was explained in Chapter 5). Of course, the corporation remains subject to the external rules of the game, so that the personality of the corporation is tempered somewhat by external factors. According to Marks, 'Jiminy Cricket' (n 7), p 1150 this is an *external* corporate conscience, comprising 'a complex combination and interaction of social and market forces'. But as noted above, if we assume that the corporation is a *legal* creation, a creature of company law, then we must surely rely *only* on company law to explain its internal make up (and conscience). In addition, as argued in previous chapters, there are limits to the external conscience, or the external voice for the environment. Recall Chapter 2, on the limits of a market voice for the environment and Chapters 3 and 4 on the limits of the (external) legal rules of the game in the context of

In other words, corporate actors (directors, shareholders, and the corporation ‘itself’) are presumed to behave like *homo economicus*; economic but fundamentally amoral actors.²⁵ This suggests anything but a corporate conscience. Indeed, this characterisation of the corporation suggests that there is no room whatsoever for the existence of an internal corporate conscience. Corporate psychopathy, or the corporation and corporate actors personified in the vision of *homo economicus*, are the very antithesis of conscience.²⁶

3. Beyond the *persona ficta*: real individuals

On this basis, the company law appreciation of corporate actors leaves very little room for conscience. However, in this section, I argue that these actors so understood are merely fictitious constructs which bear little resemblance to real individuals. I suggest that, as a starting point, we might seek to locate corporate conscience within those real individuals who make up the corporation.²⁷ From a sociological perspective, there can be no ‘organisation’ without the behaviour of individuals,²⁸ and both Ben Pettet and Adolf Berle saw the corporation’s conscience as residing in the values and ideas of those individuals who make up the corporation.²⁹ Looking to the real individuals who

environmental protection. Marks’ external corporate conscience is analogised to Jiminy Cricket (or The Talking Cricket), who was appointed to act as Pinocchio’s conscience. See also a further children’s book analogy of the corporation as the heartless Tin Man from the Wizard of Oz in Mitchell and Gabaldon, ‘If I Only Had a Heart’ (n 6).

It should be noted that Bakan’s thesis is not without controversy, not least in its presentation of company law doctrine; see, for example, Mitchell, *Corporate Irresponsibility* (n 20), and Ian B Lee, ‘Is There a Cure for Corporate “Psychopathy”?’ (2005) 42 *American Business Law Journal* 65–90.

²⁵ See Stout, *Cultivating Conscience* (n 3).

²⁶ As noted by Stout, *Cultivating Conscience* (n 3), p 32 *homo economicus* is a psychopath.

²⁷ This approximates with Mitchell and Gabaldon’s (‘If I Only Had a Heart’ (n 6)) first proposition for locating corporate morality: ‘the corporation is an aggregate of individuals - the only morality is individual morality’. See also Theresa A Gabaldon, ‘Corporate Conscience and the White Man’s Burden’ (2002) 70 *George Washington Law Review* 944, p 947; Stone, *Where the Law Ends* (n 12), p 3; Parker, *The Open Corporation* (n 2), p 203 ‘Business organisations ... are made up of individuals’ and Marks, ‘Jiminy Cricket’ (n 7), 1144 ‘... even if a corporation is “soulless”, it is made up of and run by human beings’.

²⁸ Albert J Reiss Jr, ‘Organizational Deviance’ in M David Ermann and Richard J Lundman (eds), *Corporate and Governmental Deviance: Problems of Organizational Behavior in Contemporary Society* (Oxford: Oxford University Press, 1978), pp 30-31; see also James S Coleman, ‘Power and the Structure of Society’, in the same volume.

²⁹ According to Pettet, ‘the conscience of a corporation resides in the moral values of all those who are connected with it, whether by managing it, working for it, electing the managers, or otherwise; the

make up a corporation moves us away from fiction theory towards more individualistic, aggregate theories of the company.³⁰ However, as will be seen, by considering lower-level employees in addition to holders of equity and debt securities, I adopt a broader notion of the corporate aggregation than orthodox contractarian theory.³¹

In particular, I argue that by looking to *real* individuals, there is plenty of evidence to challenge the company law personification of corporate actors as *homo economicus* devoid of conscience. I suggest that, in challenging the assumed model of economic, psychopathic behaviour on the part of corporate actors, (i) environmental compliance literature, together with (ii) laboratory-based, psychological behavioural experiments on pro-sociality, provide at least *glimpses* of conscience. The purpose is not to provide a detailed overview of these vast areas of research, but rather to import some key findings as rough indicators of the potential for individuals as a source of corporate conscience and environmental voice. Awrey, Blair and Kershaw, for example, adopt a similar approach, importing frameworks of personal ethics and culture to better understand corporate morality and financial regulation.³² However, whilst many have highlighted how there can be no ‘organisation’ without individual behaviour, it is equally impossible to understand individual behaviour without

values being those that they hold in relation to their respective roles in it and in relation to its role in society.’ See Ben Pettet, ‘The Stirring of Corporate Social Conscience From “Cakes and Ale” to Community Programmes’ (1997) 50 Current Legal Problems 279–314, p 286. Berle understood corporate conscience as ‘the existence of a set of ideas, widely held by the community, and often by the organisation itself *and the men who direct it*, that certain uses of power are “wrong”’ (Adolf A Berle Jr, *Power Without Property - A New Development in American Political Economy* (New York: Harcourt, Brace & Company, 1959), p 90 (emphasis added)).

³⁰ See Dignam and Lowry, *Company Law* (n 10), pp 404–5, ‘aggregate theories emphasise the real persons behind the corporation’, and as will be seen, differ from entity approaches in that the corporate aggregation ‘...has no independent existence and everything is explained by reference to the members of the corporation’. In dismissing the fiction theory and reconceptualising the corporation in aggregate means ‘... a clearer view may be had of the actual human beings interested...’, see Millon, ‘Theories of the Corporation’ (n 10), p 214, quoting Henry Taylor, *A Treatise on the Law of Private Corporations Having Capital Stock* (Philadelphia: Kay and Brother, 1884), p iv.

³¹ On these broader conceptions of the corporate aggregation, see, for example, Clyde Summers, ‘Codetermination in the United States: A Projection of Problems and Potential’ (1982) 4 Journal of Comparative Corporate Law and Securities Regulation 155, p 170; Joseph Singer, ‘The Reliance on Property’ (1988) 40 Stanford Law Review 611, p 701; Millon, ‘Theories of the Corporation’ (n 10), pp 236–7.

³² Dan Awrey, William Blair, and David Kershaw, ‘Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?’ (2012) 38 Delaware Journal of Corporate Law (available at SSRN: <http://papers.ssrn.com/abstract=2157588>).

considering the organisational setting.³³ As it turns out, individuals are a limited and organisationally constrained source of conscience within corporations.

Glimpses of conscience: (i) environmental compliance and (ii) prosociality

Traditionally, compliance or non-compliance with regulatory obligations has been explained by reference to the deterrence model of behaviour,³⁴ which in turn also assumes that individuals and businesses behave like *homo economicus*; self-interested economic actors, or ‘amoral calculators’, who will only undertake costly environmental protection measures when required by law and backed up with credible enforcement.³⁵ According to this model, decision-making is ‘one-dimensional’, focussed on the perceived utility of compliance (or non-compliance);³⁶ one weighs the financial cost of non-compliance against that of compliance. However, the deterrence model does not stand up to empirical scrutiny. It is clear that extra-legal forces are at work – be it factors operating internally within a company (an internal licence to operate),³⁷ or pressures acting on it externally (a social licence to operate).³⁸ More recent compliance research thus uncovers a pluralistic and complex account of motivations. In addition to economic costs, there are also ‘social’ and ‘normative’ motivations for pro-environmental behaviour,³⁹ both of which challenge the economic

³³ Reiss, ‘Organizational Deviance’ (n 28), pp 30-31.

³⁴ See, for example, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992) and Holmes’ ‘Bad Man’ theory of law, above (n 16).

³⁵ Credible enforcement means both that detection is likely and resulting penalties are sufficiently severe. See Robert A Kagan, Neil Gunningham and Dorothy Thornton, ‘Fear, duty, and regulatory compliance: lessons from three research projects’ in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Regulatory Compliance: Business Responses to Regulation* (Cheltenham: Edward Elgar 2011), p 39; Robert A Kagan and John T Scholz, ‘The “Criminology of the Corporation”’ in Keith Hawkins and John Thomas (eds), *Enforcing Regulation* (Boston: Kluwer-Nijhoff Publishing, 1984); Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Hart Publishing, 2004); Anthony Ogus and Carolyn Abbot, ‘Sanctions for Pollution: Do We Have The Right Regime?’ (2002) 14 *Journal of Environmental Law* 283.

³⁶ Christine Parker and Vibeke Lehmann Nielsen, ‘Introduction’ in Parker and Nielsen, *Explaining Regulatory Compliance* (n 35), p 10. Sally S Simpson and Melissa Rorie, ‘Motivating compliance: economic and material motives for compliance’ in Parker and Nielsen, *Explaining Regulatory Compliance* (n 35), p 60 explain how the economic model treats offending / non-compliance as a choice between a ‘finite set of alternatives, each with its particular costs and benefits’.

³⁷ See, for example, Jennifer Howard-Grenville, Jennifer Nash and Cary Coglianese, ‘Constructing the License to Operate: Internal Factors and their Influence on Corporate Environmental Decisions’ (2008) 30 *Law & Policy* 73.

³⁸ Gunningham *et al*, *Shades of Green* (n 2).

³⁹ Parker and Nielsen, ‘Introduction’ (n 36), pp 10-12. See also Kagan *et al*, ‘Regulatory compliance’ (n 35), pp 37-9 explaining how sociological explanations of law-abidingness point to three basic motivational factors - fear of detection (mapping generally the ‘economic’ motivation), concern about

model of both individual and firm behaviour.⁴⁰ For present purposes, I am interested in the third broad motivation for compliance behaviour - normativity.⁴¹

Normative motivations match what I have termed ‘conscience’, encompassing internalised commitments to environmental compliance and other environmental norms. Doing something because it is ‘the right thing to do’ is a normative motivation; there is a sense of moral duty to comply with regulation generally, with specific types of regulatory intervention,⁴² or particular environmental norms. Kelman, for example, distinguishes between ‘compliance based on external contingencies’ and what he termed ‘self-regulation linked to ... internalisation’.⁴³ Given the reason for complying with law or other norms of behaviour may be ‘internalised’,⁴⁴ normative motivations are thus distinguishable from ‘social’ motivations, which are a function of what *others* see as desirable.⁴⁵ Indeed, one of the more consistent findings across a range of studies is ‘a strong inhibitory effect of morality on noncompliance’.⁴⁶ The body of research in general suggests that individuals within corporations (as well as expressions of ‘firm-level’ motivations) do not always match the amoral, economic (and, *in extremis*, psychopathic) model of behaviour often presumed for individual corporate actors. Of course, normative motivations or conscience would be idiosyncratic. For example, regulatory responses appear to be influenced by personality traits, allowing for differences in emotionality

bad reputation (‘social’ motivations) and a sense of duty (‘normative’ motivations). See also Ayres and Braithwaite, *Responsive Regulation* (n 34).

⁴⁰ Kagan *et al*, ‘Regulatory compliance’ (n 35), p 40, there is plenty of socio-legal research which ‘indicates that managers in regulated business firms do not resemble closely those pictured in the economic model’. See also Peter J May and Soren C Winter, ‘Regulatory enforcement styles and compliance’ in Parker and Nielsen, *Explaining Regulatory Compliance* (n 35).

⁴¹ Social motivations match a company’s ‘social licence to operate’, used generally to describe extra-legal forces which compel both compliance and, sometimes, beyond compliance behaviour (see Gunningham *et al*, *Shades of Green* (n 2)).

⁴² Parker and Nielsen, ‘Introduction’ (n 36), p 11; Kagan *et al*, ‘Regulatory compliance’ (n 35), pp 37-9. There is some evidence to suggest that compliance is more likely when the regulated individual or corporation perceives the intervention as ‘legitimate’, see Tom R Tyler, ‘The psychology of self-regulation: normative motivations for compliance’ in Parker and Nielsen, *Explaining Regulatory Compliance* (n 35).

⁴³ Tyler, ‘The psychology of self-regulation’ (n 42), p 79; recall, also, the distinction between internalising costs and norms, discussed in Chapter 5.

⁴⁴ Kagan *et al*, ‘Regulatory compliance’ (n 35), p 37.

⁴⁵ Parker and Nielsen, ‘Introduction’ (n 36), p 11; see also Tyler, ‘The psychology of self-regulation’ (n 42).

⁴⁶ Simpson and Rorie, ‘Motivating compliance’ (n 36), p 64 and references therein.

or morality, and indicative of a complicated *internal* licence to operate.⁴⁷ Nonetheless, normative motivations are found consistently to exist and this is significant.

Similarly, a large body of data emerging from laboratory-based behavioural experiments challenge the economic construction of conscienceless corporate actors. These experiments are variants of the prisoner's dilemma; gaming scenarios played by real individuals faced with opportunities to defect (behave selfishly) or cooperate (behave prosocially).⁴⁸ These games have been repeated thousands of times with consistent results: real people playing prisoner's dilemmas often cooperate.⁴⁹ As noted by Lynn Stout, upon a detailed survey of the evidence:

The results are remarkably robust. While individual subjects may differ in their proclivity to cooperate or defect, at the group level, researchers running similar games make strikingly similar findings. Unselfish behavior turns out to be anything but haphazard and quirky. To the contrary, it seems common and predictable.⁵⁰

Indeed, these repeated experiments show, beyond reasonable dispute, that the vast majority of human beings are, at least to some degree, prosocial.⁵¹ Unselfish prosocial behaviour, including unselfish compliance with legal and ethical rules, is, however, triggered by the social context, in turn mapping onto fundamental traits of human

⁴⁷ Ibid., p 72; Howard-Grenville *et al*, 'Constructing the License to Operate' (n 37).

⁴⁸ The prisoner's dilemma depicts two individuals arrested on suspicion of burglary whilst trespassing an empty home. They are placed in separate cells and cannot communicate. Each is told that if neither confess, they will be charged with trespass and receive a one year sentence. They are also given an offer: confess, implicate the partner in *burglary*, and the informant (or defector) will go free, whilst the non-confessing prisoner will be convicted of burglary and sentenced to fifteen years. However, they are also told that if *both* prisoners inform ('squeals' or defects), both will be convicted of burglary and sentenced to ten years. If both prisoners selfishly defect or squeal, they will be individually and collectively worse off (ten years in prison each) than if both unselfishly 'cooperate' by remaining silent (one year in prison each). Of course, if one prisoner cooperates and stays silent, he/she runs the risk of a ten-year sentence should the other squeal. Stout, *Cultivating Conscience* (n 3), pp 51-3.

⁴⁹ 'Since then, prosocial behaviour has proven ubiquitous in the lab', see Stout, *Cultivating Conscience* (n 3), pp 51-3.

⁵⁰ Ibid., p 81.

⁵¹ Ibid., pp 11 and 13-14; recall the understanding of conscience outlined in the introduction. Stout uses unselfish prosocial behaviour (involving acts, rather than feelings) as a more exacting version of the word 'conscience'. It includes both 'active' altruism (for example, donations to charity) and 'passive' altruism (refraining from taking advantage of others even though it would be personally profitable to do so). There is an overlap with Stout's use of another term employed in social science, that of being 'other-regarding', to describe actions that evidence concern for someone or something beyond one's own material interests. 'At its most basic level, conscience demands we sometimes take account of others' interests, and not only our own selfish desires, in making decisions', *ibid.*, p 57.

behaviour. Prosocial behaviour increases with (1) instructions from authority (obedience); (2) beliefs about others' prosocial behaviour (conformity); and (3) the magnitude of benefits to others (empathy).⁵² Perhaps predictably, prosocial behaviour declines as the personal cost increases.⁵³ Nonetheless, individuals can, in the right circumstances, be relied upon to make modest personal sacrifices to behave with conscience and avoid harm to something (such as the environment) or someone else beyond one's own material interests. Marry this with the fact that the *homo economicus* model 'predicts a zero probability' of prosociality, and the results are striking indeed: the economic model is misleading.⁵⁴

Organisational and group constraints

However, it is relatively uncontroversial that an individual's values, morality or conscience are affected by group membership.⁵⁵ That individuals are able to freely exercise conscience in the corporate setting is 'belied by both psychology and sociology',⁵⁶ and there is a well-documented mismatch between human beings as moral actors and human beings as corporate actors.⁵⁷ For a number of reasons, organisational life suppresses, constrains or 'mutes' an individuals' own sense of conscience,⁵⁸ a process described as institutional socialisation.⁵⁹

⁵² Ibid., pp 99 and 101; Ch 5 generally.

⁵³ Ibid., pp 99 and 101.

⁵⁴ Ibid., pp 85 and 93

⁵⁵ Larry May, *The Socially Responsive Self: Social Theory and Professional Ethics* (Chicago: University of Chicago Press, 1996), p 6. See also Awrey, Blair and Kershaw, 'Between Law and Markets' (n 32), making use of Robert Ellickson's work to provide a framework for considering constraints on personal ethics in a similar manner to the organisational constraints on conscience discussed herein.

⁵⁶ Mitchell and Gabaldon, 'If I Only Had a Heart' (n 6), referring to the work of John Darley (psychologist) and Robert Jackall (sociologist), see references below.

⁵⁷ As is central to Lawrence Mitchell's thesis in *Corporate Irresponsibility* (n 20); see also William W Bratton, 'Never Trust a Corporation' (2002) 70 *George Washington Law Review* 867, p 867; Reiss, 'Organizational Deviance' (n 28); Frederick Bruce Bird, *The Muted Conscience: Moral Silence and the Practice of Ethics in Business* (Westport, CT: Greenwood Press, 2002); Robert Jackall, *Moral Mazes: The World of Corporate Managers* (Oxford: Oxford University Press, 2009); May, *The Socially Responsive Self* (n 55); Kermit Vandivier, 'Why Should My Conscience Bother Me?' in Ermann and Lundman, *Corporate and Governmental Deviance* (n 28).

⁵⁸ Ibid., especially Bird's exposition of 'muted conscience', caused by what he terms moral silence, moral deafness and moral blindness in the context of business ethics Bird, *Muted Conscience* (n 57).

⁵⁹ This is Hannah Arendt's term, her central concept in exploring the atrocities committed by the Nazi regime; Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1999) see May, *The Socially Responsive Self* (n 55) for an overview of the significance of this work for corporations and professional ethics. Socialisation is a form of 'learning, especially a development of attitudes, beliefs, and habits concerning one's role in a ... group' (May, *The Socially Responsive Self* (n 55), p 72).

The collective nature of enterprise has implications for conscience. In particular, the psychologist John Darley, in analysing the various ways that corporations can encourage wrongdoing, cites the diffusion of responsibility felt in *group* scenarios.⁶⁰ The organisational setting can ‘distance’ one’s actions from decisions, particularly in large institutions; when many are involved in decision-making, ‘none feels personal responsibility for the ultimate outcome’.⁶¹ Individuals can feel as though they are mere functionaries; small, *anonymous* and sometimes dehumanised ‘cogs’ in large machines.⁶² This disconnect between actions and outcomes, coupled with a sense of anonymity, has obvious implications for the cognitive dimensions of shame or guilt,⁶³ for lower-level employees and directors alike. Various psychological phenomena have been identified regarding organisational or group decision-making, such as ‘risk shift’ (taking riskier decisions because it is on behalf of an organisation), ‘groupthink’ (acting in accordance with organisational norms despite inconsistency with one’s own conscience) and the ‘Abilene paradox’ (agreeing to group decisions against one’s better judgment in order to avoid conflict).⁶⁴ As such, people can ‘in concert’ behave in ways that they would never have found acceptable otherwise.⁶⁵

Perhaps the most obvious cause of muted conscience in the workplace is economic vulnerability, especially if the individual has dependants.⁶⁶ The business ethics literature is riddled with narratives of would-be whistle-blowers, who feared that acting according to their conscience would lead to job loss or impede career development.⁶⁷ Underpinning this vulnerability is the strict notion of hierarchy and

⁶⁰ Mitchell and Gabaldon, ‘If I Only Had a Heart’ (n 6), p 1653, referencing John M Darley, ‘How Organizations Socialize Individuals into Evildoing’ in David M. Messick and Ann E. Tenbrunsel (eds), *Codes of Conduct: Behavioral Research into Business Ethics* (New York: Russell Sage Foundation, 1996).

⁶¹ Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge: Cambridge University Press, 1998).

⁶² May, *The Socially Responsive Self* (n 55), p 81.

⁶³ *Ibid.*, p 81-2.

⁶⁴ Parker, *The Open Corporation* (n 2), p 33. See also Michael B Metzger, ‘Organizations and the Law’ (1987) 25 *American Business Law Journal* 408; Ronald R Sims, *Ethics and Organizational Decision Making: A Call for Renewal* (Westport, CT: Greenwood Press, 1994); Ronald R Sims, *Managing Organizational Behavior* (Westport, CT: Greenwood Press, 2002).

⁶⁵ Stone, *Where the Law Ends* (n 12), p 5; May, *The Socially Responsive Self* (n 55), p 70.

⁶⁶ This is the first step in Hannah Arendt’s process of institutional socialisation, see May, *The Socially Responsive Self* (n 55).

⁶⁷ An oft-cited example is Vandivier’s account of the Goodrich air-brake scandal (see Vandivier, ‘Why Should My Conscience Bother Me?’ (n 57)). Vandivier was subject to formal and informal pressures to falsify safety tests for military aircraft brakes, with death of test pilots a probability. The company

authority which characterises business corporations. May, for example, argues that the hierarchical nature of business corporations is central to the process of institutional socialisation.⁶⁸ Great (extreme) efforts are sometimes made to please the individual at the apex of the hierarchy, the CEO.⁶⁹ But of course the system of line management ensures that everyone has a superior. According to one corporate individual: ‘What is right in the corporation is not what is right in a man’s home ... *What is right in the corporation is what the guy above you wants from you.*’⁷⁰ Toeing the corporate line, behaving with conformity, is also key in corporate morality and the way in which employees are assessed. Individuals are primarily functionaries in a specific job role, requiring them to ‘first and foremost’ satisfy the requirements of that role in accordance with what is best for the company.⁷¹ Expectations as to individual performance become solely defined by that role,⁷² what Slovak refers to as role morality.⁷³ Individuals outside of the corporate setting may have multiple standards against which to judge their conduct, whereas individual actors in corporations ‘are subsumed and socialised by organisational bureaucracies’.⁷⁴

deliberately chose to take the contract at a loss, in the hope of securing future orders; but even the financial case for not supplying faulty brakes was ignored (an example of moral deafness, see Bird, *Muted Conscience* (n 57)). The consequences need not be so severe as in this case. Robert Jackall’s classic *Moral Mazes* (n 57) is full of non-life threatening examples of individuals engaging in circumspect or unethical practices to provide for a family, conform to the ‘moral imperative’ to ‘get ahead’, or based on a fear that ‘moral talk’ would hinder career development or lead to ‘special assignment’ (business speak for being sent to Siberia). See, for example, the routine but dubious practice of ‘milking’, (extreme measures to make short-term efficiency gains, giving a picture to superiors of excellent performance but which results in long-term costs / damage) or the way in which ‘teamwork’ is defined within the corporate environment as ‘not rocking the boat’. The short-term profit focus is an issue here also. See, for example, the ‘supermodel effect’ on CEOs, where a relatively short life span and pressure for short-term gains ‘militates against them seriously considering the future, including ethical and long-term ... responsibility issues’ (Parker, *The Open Corporation* (n 2), p 32).

⁶⁸ May, *The Socially Responsive Self* (n 55).

⁶⁹ Jackall, *Moral Mazes* (n 57), p 23. See also his account of the bizarre and endemic use of sailing vernacular in one of the companies investigated (‘aye, Skipper’ etc), all because the CEO was a sailing enthusiast.

⁷⁰ Jackall, *Moral Mazes* (n 57), p 115, and at p 20: ‘A subordinate must ... not circumvent his boss nor ever give the appearance of doing so.’

⁷¹ May, *The Socially Responsive Self* (n 55), p 80.

⁷² *Ibid.*, p 72.

⁷³ Jeffrey S Slovak, ‘The Ethics of Corporate Lawyers: A Sociological Approach’ (1981) 6 American Bar Foundation Research Journal 753.

⁷⁴ Parker, *The Open Corporation* (n 2), p 33. See also Mitchell, *Corporate Irresponsibility* (n 20), pp 43-5, ‘The problem is that when these people act within the corporation, they are acting as corporate people ... They are no longer people, but something else: directors, officers, and employees of a corporation. With this, they forego their capacity for self-determination.’

As such, it is often seen as illegitimate to use extra-organisational standards to critique the value of the work an individual performs in their role.⁷⁵ Organisations can thus cause people to ‘bracket’ in the workplace any private moralities they might hold, and to follow instead the ‘prevailing morality’ of the particular organisation.⁷⁶ Interestingly, once individual behaviour is brought into conformity with otherwise amoral corporate norms, individuals often express belief as to having behaved honourably, even ‘morally’.⁷⁷ The combination of some, or all, of these factors can lead to a total transformation of individual conscience within the group setting. Individuals, whilst being otherwise capable of responsible and prosocial behaviour, are a *limited* source of conscience within the corporation.⁷⁸

Key corporate individuals: directors constrained by shareholders

The importance of authority or hierarchy should be highlighted; it is clear that management and directors (their motivations, opinions etc) have a strong overarching influence on the expression (or bracketing) of conscience within the organisation, as well as on organisational behavioural patterns generally. Various strands of corporate research confirm this, and indeed, this seems to be the logic behind the identification principle in locating the corporate mind. Hierarchy and authority are the mark of business organisations. There is no reason to assume, however, the directors are any less prosocial, environmentally minded, or conscientious than other individuals, at least outside of the corporate environment.⁷⁹ This ought to be the starting point, rather than *homo economicus* or the financially contingent form of conscience on behalf of directors mandated under section 172. Of course, director conscience is subject to some of the constraints on conscience outlined above (conformity, for example), as well as the process of *group* decision-making (risk shift, groupthink, the Abilene

⁷⁵ Parker, *The Open Corporation* (n 2), p 33. See also Jackal’s account (*Moral Mazes* (n 57), p 116) of how colleagues derided an accounting officer (who blew the whistle on fraudulent accounting practices) for having appealed to his own moral code and the ethics of his profession. These values were thought to be irrelevant.

⁷⁶ Jackall, *Moral Mazes* (n 57), p 4.

⁷⁷ Through a multi-staged process of socialisation, certain institutions can change the meaning of conscience so ‘that loyalty to the institution becomes the highest moral act’, suggesting a ‘thorough transformation of conscience’ (May, *The Socially Responsive Self* (n 55), p 66-69).

⁷⁸ Though of course we would *hope* otherwise. The danger is that merely accepting ‘amoral role-fillers’ rather than ‘human moral actors’ as the agency by which the corporation acts itself has the potential to perpetuate the diffusion of responsibility in an organisational setting. Mitchell and Gabaldon, ‘If I Only Had a Heart’ (n 6) make a similar point.

⁷⁹ Lawrence Mitchell also makes this argument in *Corporate Irresponsibility* (n 20), p 13.

paradox). However, while there can be a tendency to picture directors at the apex of corporate hierarchy, directors are themselves, at least indirectly, constrained or steered by an additional source of influence: shareholders.⁸⁰

Despite the lack of any formal legal duty owed *directly* to shareholders,⁸¹ director behaviour and decision-making is heavily influenced by the demands of shareholders and the stock market. As was seen in Chapter 5, whilst legal doctrine does not require directors to be singularly focussed on increasing share price at all costs in the short term, shareholder exclusivity as to corporate *voice* and *ends* creates powerful incentives to do so. Lawrence Mitchell makes a similar argument.⁸² The structural traps of voting, the derivative action and the sale of control (the takeover market), each the province of shareholders alone, mean that the goal of the corporation, ‘by structure if not doctrine’, is to maximise short-term stock price, in turn ‘constraining’ the freedom of corporate actors, particularly directors, to behave ‘responsibly and morally’.⁸³ For Lynn Stout, the problem is less about the structural traps of company law, but rather the flawed but pervasive *ideology* of shareholder primacy or shareholder value thinking.⁸⁴ This ideology assumes, much like section 172, that shareholders are psychopathic. She argues that in reality, however, shareholders are:

... not an abstract creature obsessed with the single goal of raising the share price of a single firm today, but real human beings with the capacity to think for the future and to make binding commitments, with a wide range of investments and interests beyond the shares they happen to hold in any single firm, and with conscience that make most of them concerned, at least a bit, about the fates of others, future generations, and the planet ... [I]n directing managers to focus only on share price, shareholder value thinking *ignores the reality that different shareholders have different values* ... It reduces shareholders to their lowest possible common human (or perhaps subhuman) denominator: impatient,

⁸⁰ Recall the various aspects of shareholder exclusivity outlined in Chapter 5, which orient decision-making to the interests of shareholders.

⁸¹ As was discussed in Chapter 5; at least as a matter of formal doctrine, directors owe duties to the company, not to shareholders (CA 2006, s 170(1)).

⁸² Mitchell, *Corporate Irresponsibility* (n 20).

⁸³ Mitchell, *Corporate Irresponsibility* (n 20), pp 3, 43 and 98.

⁸⁴ Stout, *The Shareholder Value Myth* (n 20). Stout’s thesis presents shareholder value thinking as an ideology rather than a strict legal requirement.

opportunistic, self-destructive, and psychopathically indifferent to others' welfare.⁸⁵

Of course, whilst most shareholders are not psychopathic, a number of factors encourage shareholders to 'act as if they had no conscience, no soul, no responsibility for their ownership'.⁸⁶ In turn, this casts a long and antisocial shadow over director decision-making.

While this may all sound rather bleak, the environmental compliance literature does nonetheless suggest that there is scope for normative, conscience-driven commitments to the environment to survive the tyranny of the market, and of course, evidence on prosocial behaviour should lead us to accept that directors and shareholders are at a base-level conscientious. In addition, there is some evidence that corporate leaders believe they have 'a moral obligation to protect the environment'.⁸⁷ Indeed, the rational economic calculator model of behaviour does not reflect the 'practical experience' of managers; making a business case and appealing to the norms of the market is of course important, but often advocacy and decision-making is more nuanced than this. Christine Parker, in her empirical work on the design and implementation of compliance schemes, provides the example of a compliance professional who had to appeal to a number of different motivations when attempting to secure top-level attention and commitment, including a fine blend of business case and normative (conscience) rationales.⁸⁸ In addition, corporate responsibility increasingly features on MBA and management courses. This, coupled with a change

⁸⁵ Stout, *The Shareholder Value Myth* (n 20), pp 6 and 9-10.

⁸⁶ Mitchell, *Corporate Irresponsibility* (n 20), p 136. In particular, the nature of the modern stock market creates a number of obstacles to pro-social investment. According to Stout, diversified shareholders are uninvolved or ignorant - they are not in a position to police or even know about antisocial corporate behaviour, and they face a classic collective action problem. The prevalence of the secondary liquidity market over the primary investment capital market, together with portfolio approaches, creates a logic that denies the importance of any single company or the way in which it behaves. Once one has invested, the uniqueness of any individual corporation is largely irrelevant. A lack of involvement in corporate governance, coupled with ignorance, while thus being entirely rational, 'is not an attitude that produces caring shareholders.' Shareholder value rhetoric or ideology also triggers various social cues, mapping fundamental traits of human behaviour mentioned above, to behave antisocially. Shareholder value thinking tells investors to behave antisocially (obedience or authority), and its prevalence in business thinking is self-perpetuating, since behaviour is influenced by the behaviour of others (conformity). See Stout, *The Shareholder Value Myth* (n 20) and Mitchell, *Corporate Irresponsibility* (n 20).

⁸⁷ Jonathan C Borck and Cary Coglianese, 'Beyond compliance: explaining business participation in voluntary environmental programs' in Parker and Nielsen, *Explaining Regulatory Compliance* (n 35), p 142.

⁸⁸ Parker, *The Open Corporation* (n 2), p 68.

in the language and climate of business in the 21st century which at least partially challenges shareholder value thinking,⁸⁹ might lead one to expect a greater level of top management-commitment to environmental and other issues as the next generation of CEOs take up positions. Furthermore, as will be seen in Chapter 7, there are regulatory interventions which have the potential to loosen the various constraints on individual conscience. Emerging empirical evidence as to the effects of these regulatory tools paint a much more promising picture for corporate environmental voice than some of the business ethics research outlined above.

4. Organisational conscience

Appropriate levels of analysis and corporate theory hybridity

I have argued that looking to the reality of individual corporate actors, rather than their economic or company law construction, is an important and appropriate starting point. In particular, it challenges assumptions that individuals do not or will not behave with conscience. This, I suggest, provides glimpses of corporate conscience. However, given the organisational and market constraints on individual behaviour, it is clear that a level of analysis which focuses on individuals alone is inadequate. Some account must also be taken of the *organisational* or *collective* nature of corporations.⁹⁰

By locating corporate conscience in this manner, I do not seek to posit a novel theory of the corporation. Rather, the empirically and psychologically informed understanding of the company presented herein, implicitly requiring an appreciation of individual and collective levels of analysis, bridges across two broad divisions commonly made in corporate theory: (i) aggregate and (ii) entity approaches.⁹¹ My

⁸⁹ Lisa M Fairfax, 'The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms' (2005) 31 *Journal of Corporation Law* 675.

⁹⁰ I use the terms 'collective' or 'collectivist' merely to distinguish between *individualistic* and organisational understandings of conscience, rather than in any deeper philosophical or political sense.

⁹¹ Absolute divisions / categorisations are of course difficult, especially when terminology varies. See, for example, the delineation of corporate theories into (i) fiction (ii) aggregate and (iii) real entity in Harris, 'Corporate Personality Theories' (n 10). Corporate theories can also be organised according to their explanations for corporate existence, either as (i) an artificial creation of law (the fiction theory, outlined above) or (ii) the natural initiative of private individuals. These in turn tend to map, respectively, onto views of whether company law is a form of (a) public / regulatory or (b) private law. It should be noted that entity theories can be further subcategorised. Artificial entity theory might be

approach might therefore be described as a form of corporate theory hybridity. Before explaining this a little further, I acknowledge that some may object to this hybridity. Arguably, however, no theory of the corporation fully accounts for the realities of the company or positive company law,⁹² nor, perhaps, should we expect it to.⁹³ In addition, other scholars have similarly adopted approaches which are arguably ‘hybrid’ in nature, including, for example, Blair and Stout’s ‘Team Production’ theory of the firm, which accepts the basic individualistic economic methodology of the nexus of contracts theory whilst simultaneously conceiving of the company as an entity in its own right.⁹⁴

So in taking individuals as the starting point, I necessarily adopt an individualistic approach, mirroring aggregate theories not unlike contractarianism, outlined in Chapter 5. However, whilst it is not the primary argument in this chapter, it is clear that I indirectly challenge a methodological individualism which takes *homo economicus*, rather than *real* individuals, as the starting point.⁹⁵ It is of course possible that hypothetical bargaining which uses pro-environmental conscientious individuals, rather than *homo economicus*, as the unit of analysis, might give rise to notional

contrasted with natural entity theory, the latter emphasising the corporation as the creation of private individuals. Natural entity theory has some resonance with aggregation approaches, in the sense that it asserts the private individuals behind the company. Natural entity theory also implies a characterisation of company law as private, but simultaneously affirms the corporation as an entity by drawing a distinction between the interests of the company and shareholders (see, for example, Millon, ‘Theories of the Corporation’ (n 10), pp 205-32). On the difference between natural and real entity approaches, see below (n 100). Categorisation is further complicated by the way in which corporate theories can be manipulated to yield different political conclusions, particularly as to whether the corporation ought to be subject to, or insulated from, ‘public’ goals, see Mark H Hager, ‘Bodies Politics: The Progressive History of Organizational “Real Entity” Theory’ (1989) 50 University of Pittsburgh Law Review 575, p 637; Dewey, ‘Corporate Legal Personality’ (n 11), p 669.

⁹² Dignam and Lowry, *Company Law* (n 10), p 155.

⁹³ Marc T Moore, *Corporate Governance in the Shadow of the State* (Oxford: Hart Publishing, 2013).

⁹⁴ Margaret M Blair and Lynn A Stout, ‘A Team Production Theory of Corporate Law’ (1999) 85 Virginia Law Review 248.

⁹⁵ Recall that the objection outlined in Chapter 5 related not to contractarian methodology *per se*, but rather to the faulty foundations of environmental irrelevance. Many commentators have sought to contradict certain conclusions of contractarianism by playing closer attention to the construction of individuals concerned. See, for example, Daniel JH Greenwood, ‘Fictional Shareholders: for Whom Are Corporate Managers Trustees, Revisited’ (1996) 69 Southern California Law Review 1021; Einer Elhauge, ‘Corporate Managers’ Operational Discretion to Sacrifice Corporate Profits in the Public Interest’ in Bruce L Hay and others (eds), *Environmental Protection and the Social Responsibility of Firms: Perspectives from Law, Economics, and Business* (Washington DC: Resources for the Future, 2005). See also Stout, *The Shareholder Value Myth* (n 20) displacing the idea of the homogeneous shareholder uniformly concerned with wealth maximisation (measured in particular by share price). For an attempt to imbue the outcomes of hypothetical bargaining with moral legitimacy, see Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford: Oxford University Press, 2005) where ‘bargaining’ takes place behind a Rawlsian veil of ignorance between parties who are free, equal and endowed with *inter alia* reasonableness and rationality.

governance terms which differ from shareholder exclusivity as to corporate goal and voice. This is not the argument made in this chapter, however, which is that, as a starting point, we can locate a voice for the environment via the advocacy of *real* individuals who comprise business organisations. My approach also differs from the highpoint of contractarian theory outlined in the previous chapter by adopting a broader notion of the corporate aggregation, including, in addition to directors and the holders of equity and debt securities, top management and lower-level employees.⁹⁶

At the same time, taking account of organisational influences on individual conscience necessarily adopts a collective rather than individual level of analysis. Indeed, other commentators have also alluded to collectivist rather than individualistic conceptions of the corporate mind or will,⁹⁷ perhaps most notably Teubner, arguing that the *social reality* of the corporation is *collectivity*; a sequence of cyclic, ‘pulsating’ and ‘meaningfully interrelated communicative events’.⁹⁸ Additionally, recent legal developments involve more collective appreciations of the corporation. Alice Belcher, for example, points to the move away from the identification principle to broader concepts of ‘management failure’ and ‘corporate culture’ when attributing corporate criminal responsibility in the UK and Australia, respectively, and also argues that the ‘internal control’ provisions of the UK’s Combined Code (now the UK Corporate Governance Code) suggest a view of the corporation more as a behavioural entity, rather than a nexus of contracts.⁹⁹

My approach perhaps resonates most obviously with corporate realism / real entity theories.¹⁰⁰ The real entity theory, often attributed to Gierke (although he

⁹⁶ See, for example, Summers, ‘Codetermination in the United States’ (n 31), p 170; Singer, ‘The Reliance in Property’ (n 31), p 701; Millon, ‘Theories of the Corporation’ (n 10), pp 236-7.

⁹⁷ For example, Haugeland alludes to a collectivist conception of the corporate ‘mind’, which ‘is not found in any particular spot or aspect of the organization but is in many parts of the organization’ (quoted in May, *The Socially Responsive Self* (n 55), p 56.

⁹⁸ Teubner, ‘Enterprise Corporatism’ (n 14), pp 54-55. However, Teubner rejected the relevance of actual individuals as the units of the pre-legal reality of legal personhood, whereas I suggest that, in order to see the realities and potential of corporate conscience, we cannot ignore individuals.

⁹⁹ Alice Belcher, ‘Inside the Black Box: Corporate Laws and Theories’ (2003) 12 *Social & Legal Studies* 359.

¹⁰⁰ See Dignam and Lowry, *Company Law* (n 10), pp 404-6; Gierke, *Political Theories of the Middle Age* (n 9); Millon, ‘Theories of the Corporation’ (n 10). There are of course differences of degree and the usual provisos as to categorisation apply, but I use the term real entity theory in part to distance real entity approaches from natural entity theory’s conceptualisation of company law as private.

concerned himself very little with business organisations) and imported to British discourses by, *inter alia*, Maitland,¹⁰¹ posits that the corporation:

... is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act, it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand. It is not a fictitious person ... it is a group-person, and its will is a group-will.¹⁰²

Importantly, real entity theory appropriately captures the alterations to conscience which occur as a result of group membership, 'for when individuals associate together, a *new* personality arises which has a distinctive sphere of existence and will of *its own*'.¹⁰³ Stone argued along similar lines, arguing that human constituents are transformed by 'an institutional structure so pervasive that it [the corporation] might be construed as having a set of goals and constraints (if not a mind and purpose) of *its own*'.¹⁰⁴ As I argued above, organisational conscience will clearly be different from what we might expect from an individual's conscience when acting alone. As such, there is a certain 'realism', for want of a better word, to distinguishing between the entity *itself* and the individuals which comprise it, at least when seeking to understand organisational conscience. As I have already argued, however, individuals must not be ignored. I regard individuals' proclivity for other-regarding behaviour as a basis for conscience environmental voice within the corporation.¹⁰⁵

Of course, the idea of conscience residing in the corporation *itself* is challenging.¹⁰⁶ It is clear that we must look beyond company law for this purpose, particularly section 172. Research clearly demonstrates that corporate motivations and

¹⁰¹ See Maitland, 'Introduction' (n 9), p xviii; see also Harris, 'Corporate Personality Theories' (n 10).

¹⁰² See Maitland, 'Introduction' (n 9), p xxvi.

¹⁰³ Pettet, *Company Law* (n 8), p 48 (emphasis added). See also, for example, Coleman, who describes corporate 'power' as residing not in the hands of single individuals, but rather 'in the corporate actor itself', (Coleman, 'Power and the Structure of Society' (n 28), p 27).

¹⁰⁴ Stone, *Where the Law Ends* (n 12), p 7. Dodd could also be described as a corporate realist (see Dignam and Lowry, *Company Law* (n 10), p 406) although he implicitly rejected the individualism of aggregate models, which I suggest remains relevant if not determinative.

¹⁰⁵ In this regard, my approach might be distinguished from corporate realism more broadly, given that Dignam and Lowry, *Company Law* (n 10), p 405 summarise the corporate realist collective as taking '... on a life of its own which cannot be referenced back to its members'.

¹⁰⁶ Stone, *Where the Law Ends* (n 12), p 35.

behaviour are multi-faceted, deeply complex and influenced by a range of economic, normative and organisational factors.¹⁰⁷ Indeed, corporate actors are not easily characterised as being motivated by single or singular priorities,¹⁰⁸ despite what section 172 would seem to suggest. In this final section, I suggest that research into collective conscience and corporate culture may provide assistance in understanding the idea of an entity, organisational or corporate conscience, and it is to these concepts that I now turn.

Collective conscience and corporate culture - a brief overview

Collective conscience is typically associated with societies, or specific types of organisations (clubs, religious groups etc), and is commonly understood as a ‘shared system of values and beliefs dependent on rituals that facilitate consensus within the group’.¹⁰⁹ Central to collectivist conceptions of conscience is ‘solidarity’, which binds individuals together on the basis of their felt bond with one another, rather than to a set of rules.¹¹⁰ Solidarity is thus likely to be weak in the corporate sphere when compared with the other types of aforementioned organisation, given the strict notions of hierarchy which typify business organisations are more likely to create adherence to ‘rules’ rather than adherence to one another. Nonetheless, at least weak solidarity can be achieved through (i) authority, (ii) homogeneity and (iii) dependency.¹¹¹ The prevalence of authority has already been mentioned (*what is right in the corporation is what the guy above wants from you*). Employing organisations ‘put strong pressure on the individual to conform’ to its normative standards (homogeneity).¹¹² Dependency in the workplace is achieved via economic vulnerability. This all matches reasonably

¹⁰⁷ Simpson and Rorie, ‘Motivating compliance’ (n 36), p 60-5.

¹⁰⁸ See Vibeke Lehmann Nielsen and Christine Parker, ‘Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance’ (2012) 34 Law & Policy 428.

¹⁰⁹ Emile Durkheim, *Emile Durkheim on Morality and Society* (Robert N Bellah (ed), Chicago: University of Chicago Press, 1973); May, *The Socially Responsive Self* (n 55), p 30.

¹¹⁰ Bellah (ed), *Emile Durkheim* (n 109); May, *The Socially Responsive Self* (n 55), pp 29-30. See also Lon Fuller’s work on types of human association, drawing a distinction between those bound by commitment and common goals (universities, religions) and those bound by legal principle (particularly corporations); Lon L Fuller, ‘Two Principles of Human Association’ in J Roland Pinnock and John W Chapman (eds), *Voluntary Associations* (New York: Atherton Press, 1969, referenced by Mitchell, *Corporate Irresponsibility* (n 20), pp 79-81.

¹¹¹ Bellah (ed), *Emile Durkheim* (n 109); May, *The Socially Responsive Self* (n 55), p 29.

¹¹² May, *The Socially Responsive Self* (n 55), p 41. See also, for example, Jackall’s (*Moral Mazes* (n 57)) account of corporate homogeneity, and the need to ‘conform’; and dependence can be slightly reinterpreted to fall in line with the economic vulnerability posited as the first step of institutional socialisation.

well with some of the results from behavioural experiments, where the social contexts necessary for prosocial behaviour include instructions from authority (obedience) and beliefs about others' behaviour (conformity).

Work on corporate cultures has an obvious resonance with collective conceptions of the corporate mind and can be broadly understood as 'the tacit understandings, habits, assumptions, routines, and practices that constitute a repository of unarticulated source materials from which more self-conscious thought and action emerges'.¹¹³ Awrey, Blair and Kershaw, whilst acknowledging that culture can be a 'slippery' concept, understand culture in broadly similar terms, as 'the body of non-legal norms, conventions or expectations shared by actors when operating in social or institutional settings'.¹¹⁴ Culture is a mediating factor between structure (formal corporate systems and hierarchy) and agency (managers and employees) by 'providing a repertoire of filters' through which agents perceive formal structures and 'conceive of possible responses'.¹¹⁵ The general sociological understanding of culture is that certainly in the context of compliance and responsibility, culture can result in powerful changes.¹¹⁶ Of course, reactions to and engagement with corporate culture vary across the perceptions, motivations and strategies of individuals within the organisation, and can involve avoidance, resistance, ritualism, creative compliance, commitment and capitulation.¹¹⁷ So the relationship is complex and dynamic; these perceptions both contribute to, as well being in part constructed (mediated) by, the organisation's culture.¹¹⁸ In the context of CSR and compliance, Parker and Gilad provide a useful mode of analysis which focuses on three main nodes of the corporation; (i) top management (ii) the mediating function of professional compliance and corporate responsibility managers, and (iii) the process of communication to lower level employees.¹¹⁹ They argue that each level of agency 'directly influences different

¹¹³ Christine Parker and Sharon Gilad, 'Internal corporate compliance management systems: structure, culture and agency' in Parker and Nielsen, *Explaining Regulatory Compliance* (n 35), p 176.

¹¹⁴ Awrey, Blair and Kershaw, 'Between Law and Markets' (n 32), pp 14-5.

¹¹⁵ Parker and Gilad, 'Internal corporate compliance management systems' (n 113), p 176.

¹¹⁶ See, for example, Mitchell, *Corporate Irresponsibility* (n 20), p 14: 'culture matters'.

¹¹⁷ Parker and Gilad, 'Internal corporate compliance management systems' (n 113), p 175.

¹¹⁸ Ibid., pp 172-3. As Silbey suggests, culture must be understood as 'emergent', and as 'an indissoluble dialectic of system and practice behaviour, both a product and context of social action' Susan S. Silbey, 'Taming Prometheus: Talk About Safety and Culture' (2009) 35 *Annual Review of Sociology* 341, p 343.

¹¹⁹ Parker and Gilad, 'Internal corporate compliance management systems' (n 113), pp 172-3.

aspects of the adoption, implementation and outcomes' of formal policies, including those measures aimed at engendering responsibility.¹²⁰

Collective conscience, corporate culture and the role of authority

Let us consider these nodes of the corporation in more detail and how they apply to conscience. In defining the nature of a corporation's culture and collective conscience, top-level management and directors remain significant. Numerous corporate responsibility and compliance studies point to the importance of top management support and commitment in encouraging a mindset of environmental responsibility within the organisation as whole.¹²¹ Given earlier indications as to the strength and power of hierarchy and authority within the organisational setting, this should be no surprise.¹²² Finding conscience here of course relies on the CEO or other key members of the board having an internalised, normative commitment to responsible practices in the first place. As has already been suggested, (and removing from the picture the nature of the socialisation process in a business organisation and the structural traps of company law and stock markets) there is no reason to think that directors and top-level managers are any different from other human beings, the vast majority of which are, at least to some degree, other-regarding.¹²³ Of course, if particular values or behavioural patterns are deeply embedded in a corporate culture, then overcoming such barriers may take an 'exceptional kind of organizational leadership that is not readily found or easy to create.'¹²⁴

While top management-commitment is crucial to the nature of corporate conscience, as well as a meaningful corporate responsibility programme within a

¹²⁰ Ibid., p 173.

¹²¹ See, for example, Borck and Coglianese, 'Beyond compliance' (n 87), p 159, referencing Cary Coglianese and Jennifer Nash, 'Government Clubs: Theory and Evidence from Voluntary Environmental Programs' in Matthew Potoski and Aseem Prakash (eds), *Voluntary Programs: A Club Theory Approach* (Cambridge, MA: The MIT Press, 2009); Parker, *The Open Corporation* (n 2), p 62. See also Simpson and Rorie, 'Motivating compliance' (n 36), p 63, 'because decisions within an organizational setting follow distinct lines of authority, the likelihood of compliance [and other prosocial behaviour] increases if someone "orders it".'

¹²² Borck and Coglianese, 'Beyond compliance' (n 87), p 159.

¹²³ Mitchell, *Corporate Irresponsibility* (n 20); Stout, *Cultivating Conscience* (n 3).

¹²⁴ Cary Coglianese and Jennifer Nash, 'Environmental Management Systems and the New Policy Agenda' in Cary Coglianese and Jennifer Nash (eds), *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Washington DC: Resources for the Future, 2001), p 14. See also Cary Coglianese and Jennifer Nash (eds), *Leveraging the Private Sector: Management-Based Strategies for Improving Environmental Performance* (Washington DC: Resources for the Future, 2006).

company, it is not all that matters. Less senior corporate employees are important sources of conscience and drivers of responsibility, though these voices may be lost in the dysfunctional consequences of the ‘hierarchy credibility gap’.¹²⁵ Employees at lower levels are often significant sources of information and counter-hegemonic views, yet are often unable to persuade senior officers of either the relevance or credibility of their knowledge.¹²⁶ The existence of a role or function for compliance and corporate responsibility managers is not enough unless they have what is routinely referred to as ‘clout’; a type of organisational muscle which will be non-existent without top level-commitment, but which must be effectively communicated to lower level employees in the day-to-day habits of decision-making.¹²⁷ We will return to these roles (and others) in more detail in Chapter 7 when considering the merits of mandatory corporate-environmental procedures; suffice to say for now there is some limited role for corporate conscience to be cultivated and encouraged across a range of corporate actors through appropriate leadership combined with a receptive corporate culture.¹²⁸

While corporate culture clearly matters, given it is idiosyncratic and dynamic--a complex interaction of agency and structure—we should be slow to assume that managers can precisely engineer certain desired cultures. Parker and Gilad are forceful in this regard:

... language suggesting that corporate leaders should be responsible for creating a compliance culture throughout their organization implies that it is possible for ‘good’ motivations to be culturally engineered into existence. It reasons that since individuals’ perceptions, preferences and behaviours are socially constructed, it should be possible for certain individuals ... within an organization to instrumentally create a new ‘culture’ that makes the organization committed to [certain norms]. But it is a fundamental misunderstanding of the concept of ‘culture’ to suggest that it can be used to show how propounding

¹²⁵ Garry C Gray and Susan S Silbey, ‘The other side of the compliance relationship’ in Parker and Nielsen, *Explaining Regulatory Compliance* (n 35), pp 124-5.

¹²⁶ Gray and Silbey ‘The other side of the compliance relationship’ (n 125), p 125.

¹²⁷ Parker, *The Open Corporation* (n 2), p 55.

¹²⁸ See, for example, Belcher, ‘Inside the Black Box’ (n 99), describing some of the systematic means by which firms do (and should) bring new members into their culture, including screening at entry level that makes candidates wonder if they are good enough; humility-inducing experiences in the first months; promotion tied to proven record; attention to corporate values (e.g. IBM’s mantra: ‘respecting the decency of the individual’); and reinforcing folklore (e.g. Bell’s anecdotes of employees who made sacrifices to keep phones working).

some regulatory initiative will invariably lead in a direct line ... from top management commitment to [desired] behaviour.¹²⁹

Silbey agrees, arguing that conceptualising culture as something which can be malleably engineered ‘elides’ features of complex organisations, including ‘normative heterogeneity and cultural conflict, competing sets of interests within organizations, and inequalities in powers and authority.’¹³⁰ Silbey prefers the idea that ‘sociologically reflective citizens’ who exhibit a willingness to experiment and intervene in arrangements, can ‘sometimes find solutions to particular problems by intentionally using social networks and the constructed nature of social reality to change culture’.¹³¹ It is thus possible to accept that agency has influences on culture, without assuming the precise engineering thereof. Top-management and certain corporate professionals therefore have a gravitational force over corporate cultural scripts and mores, albeit in potentially diffuse, imprecise and uncertain ways. And indeed, the evidence as to the negative uses of power of hierarchy in corporations does suggest that it might be quite a powerful driver of corporate conscience were it appropriately directed in a more palatable direction than corporate psychopathy.

What is corporate conscience, and why does it matter?

What, then, is corporate conscience? I accept from the outset that corporate conscience is likely to elude precise legal definitions. As I already have suggested, locating the ‘corporate mind’ through the identification principle and looking to directors is a good start, but it is a very narrow understanding of the corporate mind or will. However, it is not necessary to come to a legally precise location of the corporate mind and conscience; the aim is not to draw lines of accountability (liability) based on conscience, but rather to paint conscience as an aspiration. It represents an amalgamation of idiosyncratic corporate culture and varying environmental management styles, underpinned by evidence that individuals and corporations can and do behave in a manner that does not always approximate to the economic model of

¹²⁹ Parker and Gilad, ‘Internal corporate compliance management systems’ (n 113), pp 176-7.

¹³⁰ Susan S Silbey, ‘Taming Prometheus: Talk About Safety and Culture’ (2009) 35 Annual Review of Sociology 341, p 343; See also Parker and Gilad, ‘Internal corporate compliance management systems’ (n 113), p 177.

¹³¹ See Silbey, ‘Taming Prometheus’ (n 130); Susan S Silbey, ‘The sociological citizen: Pragmatic and relational regulation in law and organizations’ (2011) 5 Regulation & Governance 1.

behaviour. This is supported by the fact that generally prosocial, conscientious individuals (or sociological citizens) can behave with conscience within the corporate setting, provided cultures and leadership are receptive and open to this. As with culture and management style, corporate conscience is not something which will easily be seen through quantitative research, but glimpses of it have already been seen in the literature reviewed.

Conscience will also be idiosyncratic, and some corporations will have a better conscience than others (just like individuals). As noted by Kagan *et al*, the level and intensity of normative or internalised commitments varies across firms and contexts.¹³² But rough typologies and categorisations have been usefully attempted in other areas, such as Kagan and Scholz's trio of business images (*amoral actors, organisationally incompetents, and politics citizens*)¹³³ and Gunningham *et al*'s similar categorisation of corporate management style (*environmental laggards, reluctant compliers, committed compliers, environmental strategists and true believers*).¹³⁴ We might apply similar categorisations to conscience. While not wishing to categorise the location of conscience too forcefully in one place (as indicated already, we must adopt multiple levels of analysis), the commitment of management is of course crucial. The existence of corporate conscience will necessitate:

... a set of managerial attitudes towards environmental issues and actions that go beyond the formulation and systematic implementation and evaluation of environmental policies. It includes such variables as how open and responsive managers are in dealing with regulators and environmental groups, how imaginatively and energetically they scan for win-win opportunities, and what kind of calculus they employ in evaluating business benefits of investments in environmental improvements.¹³⁵

¹³² Kagan *et al*, 'Regulatory compliance' (n 35), p 46.

¹³³ Kagan and Scholz, 'The "Criminology of the Corporation"' (n 35).

¹³⁴ Gunningham *et al*, *Shades of Green* (n 2). See also Gary Lynch-Wood and David Williamson, 'The Receptive Capacity of Firms—Why Differences Matter' (2011) 23 *Journal of Environmental Law* 383, suggesting that commonalities between firms allow them to be placed within broad classifications based on their respective 'receptive capacities' to environmental regulation and goals. They provide similar examples to Gunningham *et al*, such as 'vulnerable satisfiers', 'delinquents' and 'major strategic players'.

¹³⁵ Gunningham *et al*, *Shades of Green* (n 2), pp 155-6.

The space for corporate conscience, and hence environmental voice, is of course constrained and limited. It is important not to overstate its potential. Group membership clearly limits the extent to which we can rely on otherwise conscientious individuals to behave as they normally would within organisational environments. We must also not forget company law, which does suggest that, despite empirical evidence which challenges the economic model of behaviour, corporations as actors are more likely than humans to approximate to that amoral vision of business.¹³⁶

The existence of a corporate conscience is crucial to understanding corporate interaction with both legal obligations and CER more generally. As indicated, the aspirational appreciation of a corporate conscience is deeper than the mere presentation of green behaviour. Most importantly, many commentators point to the significance of corporate conscience, culture, responsibility mindset, environmental management style (whatever we call it), in improving environmental performance.¹³⁷ Gunningham *et al*'s much-cited empirical work, for example, provided striking confirmation of this (at least within their sample of pulp and paper mills).¹³⁸ The internal environmental management style of a firm was a more powerful predictor of environmental performance than both regulatory regime or corporate size and earnings. Similarly, ethnographic studies confirm that what goes on *inside* companies can make crucial differences in shaping their environmental behaviour and performance.¹³⁹ Much of the edge in this regard seemed to stem from a dedicated, day-to-day approach to environmental management and implementation. The way a corporation interprets and responds to the terms of its legal and social licences to

¹³⁶ See William W Bratton, 'Never Trust a Corporation' (2002) 70 George Washington Law Review 867; see also Stout, *Cultivating Conscience* (n 3), pp 166-74.

¹³⁷ See Coglianese and Nash, 'Environmental Management Systems' (n 124), p 16 who have argued that managerial attitude—particularly what they label management commitment—is the key variable in shaping corporate environmental performance. On those who believe that deep and permanent improvement in environmental performance depends on changes in the cultural structures of a firm, see also Chris Argyris and Donald A Schon, *Organizational Learning: A Theory of Action Perspective* (Reading, MA: Addison Wesley, 1978) and Edgar H Schein, *Organizational Culture and Leadership* (San Francisco, CA: Jossey Bass, 2010).

¹³⁸ Gunningham *et al*, *Shades of Green* (n 2).

¹³⁹ See, for example, Jennifer A Howard-Grenville, 'Inside the "Black Box": How Organizational Culture and Subcultures Inform Interpretations and Actions on Environmental Issues' (2006) 19 Organization & Environment 46; Jennifer Howard-Grenville, *Corporate Culture and Environmental Practice: Making Change at a High-technology Manufacturer* (Cheltenham: Edward Elgar, 2009); Howard-Grenville *et al*, 'Constructing the License to Operate' (n 37). See also Magali A Delmas and Michael W Toffel, 'Institutional Pressures and Organizational Characteristics: Implications for Environmental Strategy' [2010] (Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711785).

operate is affected by the corporation's own cultures and conscience. Conscience might thus be understood as an intervening variable; the impact of external drivers on corporate performance is mediated by the attitudes of individual companies (and in turn the individuals within the firm):

A firm's environmental management style affects the way it deals with inevitable uncertainties in the terms of its licences — how it learns about, interprets, and responds to diverse external pressures for environmental improvement, how it calculates the likely costs of resistance and the benefits of responding favourably, how it goes about communicating with critics and implementing environmental responses, how it perceives and responds to pressures from regulatory regimes and economic constraints.¹⁴⁰

As such, finding ways in which to bring about or enhance a corporate conscience would appear to offer significant benefits for environmental protection which ought not to be ignored. In the following chapter, I consider the potential role for law in this regard.

5. Conclusion

In this chapter, I sought to locate intra-corporate environmental voice in the real individuals who comprise business organisations. I suggested that real individuals, rather than *homo economicus*, are generally pro-social or other-regarding, and exhibit this other-regarding nature in the context of the environment in the form of normative commitments to environmental protection. However, as was seen, a level of analysis which looks to individuals ignores the organisational nature of corporations, and the way in which a range of organisational, hierarchical and market factors constrain or mute individual conscience. As such, I suggested that the organisation itself has a form of conscience *of its own*; in view of dominance of organisational factors, intra-corporate environmental voice must thus be properly understood as residing in the organisational conscience of the corporation itself, rather than individuals. I used work

¹⁴⁰ Gunningham *et al*, *Shades of Green* (n 2), pp 95-6.

on collective conscience and corporate culture to help us better understand this corporate conscience, although of course individuals, particularly top management and directors, nonetheless remain important.

Given this conscience is idiosyncratic, and some corporations are likely to display the aspirational aspects of corporate conscience better than others, it would seem appropriate to consider potential ways in which to enhance this corporate conscience. This question is particularly important in view of the limited normative space for CER within company law; recall Chapter 5, where I argued that company law adopts an untenable position of corporate environmental irrelevance. In order to enhance overall support for CER, I argued that company law must adopt a position of environmental relevance. As such, potential answers to the ‘how’ question of corporate environmental relevance lie in the appropriate reform of company law. It is to this question, and its relationship with corporate conscience and environmental voice, that I now turn.

Chapter 7

Corporate Conscience and Procedural CER

1. Introduction

In the previous chapter, I outlined the idea of a corporate conscience as a source of *internal* voice for the environment within corporations; a voice distinct from the external market and regulatory voices discussed in Chapters 2-4. I suggested that individuals who comprise business organisations represent a powerful starting point in locating a voice for the environment within the corporation. However, given they are subject to a range of organisational, hierarchical and role constraints, we cannot rely alone on the conscience of individuals within the corporation to voice environmental concerns or drive CER. In addition, given the organisational nature of the corporation, I argued that the corporation as an actor *itself* has a collective form of conscience, located in the norms and culture of the particular organisation created by the complex interactions between the flesh and blood individuals therein. Whilst conscience is located at (and ought to permeate) every level of the corporate hierarchy, drive from top-level management will be a key factor in defining, moulding or explaining corporate conscience.

In this chapter, I address more explicitly the second research question, concerning appropriate legal intervention to enhance, encourage or aid CER. The foregoing chapters argued that we consider company law reform, and there is already a large literature on possible CSR-related reforms in this regard.¹ For example, some

¹ And it is too voluminous to cite in full. For a spectrum of the literature, see (in addition to the references cited throughout this chapter), for example, Ralph Nader, Mark Green and Joel Seligman, *Taming The Giant Corporation: How the Largest Corporations Control Our Lives* (New York: Norton & Company, 1976); Christopher D Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (New York: Harper and Row, 1975); George Goyder, *The Responsible Company* (Oxford: Blackwell, 1961); Melvin Aron Eisenberg, 'The Modernization of Corporate Law: An Essay for Bill Cary' (1983) 37 University of Miami Law Review 187; Judd Sneirson, 'Doing Well By Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decisionmaking' (2007) 3 Corporate Governance Law Review 438; JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Oxford University Press 1993); Beate Sjøfjell, 'Regulating Companies as If the World Matters - Reflections from the Ongoing Sustainable Companies Project' [2011] (available at SSRN: <http://ssrn.com/abstract=1964213>); Janis Sarra, 'New Governance, Old

have called for alterations to the board of directors, so that it comprises representatives from all corporate constituencies.² Others recommend affirmative obligations to particular stakeholders, often based on stakeholder theories of the firm and with obvious implications for the shareholder-centric construction of the corporate purpose.³ Whilst employees tend to receive considerable attention here, others have extended this to the realms of CER by calling for a more nebulous duty to the ‘environment’.⁴ Perhaps the most radical adjustments to company law advocated in this area involve inroads in to limited liability, in order to control excessively risky behaviour and limit the externalisation of excessive environmental and social costs.⁵

In this chapter, I posit a CSR intervention which aims to address the deficiencies of CER which I outlined in the foregoing chapters. So whilst I have inevitably been influenced by the richness of the broader literature on this, my own reform proposal thus has a more specific purpose: to provide or enhance the internal space within corporations for the expression of conscience and environmental voice. Most apposite in this regards would appear to be interventions which focus on how the corporation ‘thinks’, broadly referred to herein as procedural law. The aim of this chapter is not to comprehensively outline, or add to, the theoretical underpinning of these types of regulatory intervention, although I do provide a brief overview. Instead, I argue that as a means of enhancing a corporate conscience and providing for an environmental voice within corporations, regulation which focuses on corporate decision-making would appear to offer benefits over and above what traditional direct regulation might achieve alone. As already suggested, the ability to create or enhance

Norms, and the Potential for Corporate Governance Reform’ (2011) 33 *Law & Policy* 576; Peter Utting and José Carlos Marques (eds), *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development?* (London: Macmillan, 2010); Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge: Cambridge University Press, 2011); Christine Parker, ‘Reinventing Regulation within the Corporation’ (2000) 32 *Administration & Society* 529; Angus Corbett and Stephen Bottomley, ‘Regulating Corporate Governance’ in Christine Parker and others (eds), *Regulating Law* (Oxford: University Press, 2004); John C Coffee, ‘Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response’ (1977) 63 *Virginia Law Review* 1099.

² Nader *et al*, *Taming The Giant* (n 1).

³ On stakeholder theory, see Chapter 2.

⁴ David M Ong, ‘Locating the “environment” within corporate social responsibility’ in Nina Boeger and others (eds), *Perspectives on Corporate Social Responsibility - Corporations, Globalisation and the Law* (Cheltenham: Edward Elgar, 2008).

⁵ See, for example, David Millon, ‘Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability’ (2006) (available at SSRN: <http://papers.ssrn.com/abstract=932959>); Stephen M Bainbridge, ‘Abolishing Veil Piercing’ (2001) 26 *Journal of Corporation Law* 479; Jonathan Crowe, ‘Does Control Make a Difference? The Moral Foundations of Shareholder Liability for Corporate Wrongs’ (2012) 75 *The Modern Law Review* 159; Michael Blowfield and Alan Murray, *Corporate Responsibility: A Critical Introduction* (Oxford: Oxford University Press, 2008), p 45.

an environmental conscience is central to the success and normative appeal of CER, in particular in addressing the problematic position of corporate environmental irrelevance outlined in Chapter 5. In this sense, this chapter offers one potential response to what I termed the ‘how’ question of corporate environmental relevance.

In particular, I argue that robust environmental processes must be embedded, in a holistic and integrated fashion, within mandatory company law. This should include a regime of more exacting CER reporting than is presently required under section 417 of the Companies Act 2006 (CA 2006). This reporting obligation should in turn form an integral part of a mandatory Environmental Management System (EMS). Such an EMS would create a more detailed framework for corporate environmental decision-making processes than section 172. Unlike section 172, this framework ought to be open (rather than closed) to the possibility of tensions between corporate and environmental goals. I use EMAS III, the EU’s most recent Eco-Management and Audit Scheme, as an example of the legal regulation of EMSs in order to illustrate what a mandatory EMS regime might look like.

The overall aim of the EMS is to ‘amplify’ environmental voice within the corporation by opening up a deliberative space in which environmental concerns can be expressed. I acknowledge that there are good reasons for *not* mandating an EMS, especially concerns that EMSs can generate tick-box responses rather than genuine environmental reflection. However, it is my view that UK company law’s adoption of weak environmental relevance, via a loose but inadequate environmental procedure, bolsters the case I make for EMSs. That is, we ought to consider mechanisms capable of instituting a stronger form of corporate environmental relevance than is achieved under the present regime.

The chapter is structured as follows. In section 2, I provide a brief overview of key aspects of procedural approaches to law; their relationship to CER and decentred regulatory space; and their superiority over direct regulation when seeking to foster an environmental conscience and intra-corporate environmental voice. In section 3, I outline the inadequacies of current procedural approaches to CER within mandatory UK company law. Section 4 outlines the operation of EMAS and the associated benefits of EMSs for corporate conscience. In section 5, I make a case for mandating EMSs via company law.

2. Decentred regulatory space, procedural law and CER

As has already been seen, environmental management style, or the nature (and existence) of an environmental corporate conscience, matters; both for legal compliance, and for CER. This is not to say that regulation does not matter, however. Surveys of corporate managers repeatedly and emphatically show the importance of regulation in providing a minimum floor to environmental performance.⁶ In addition, regulated enterprises consistently cite regulation as an important driver for improved environmental performance, particularly where this improvement is the result of costly changes which would not otherwise have been made.⁷ However, when seeking to develop a corporate conscience, reliance on direct or command and control regulation is likely to be inadequate. As indicated in Chapters 3-4, the limitations of command and control are well rehearsed, and importantly, the imperatives underpinning calls for a shift to the use of reflexive or procedural law have particular relevance when considering the extent to which a corporate conscience can be enhanced through legal intervention.

Procedural / reflexive forms of law

Procedural approaches to regulation originate primarily from Gunther Teubner's concept of reflexive law.⁸ Somewhat radically, reflexive theory points to the increasing 'differentiation' of society into separate subsystems, so that the regulated community is characterised as a separate, autopoietic social sphere resistant to intervention from other external subsystems. These different subsystems include law, politics and the market-economy (the latter including corporations operating

⁶ See, for example, Dorothy Thornton, Neil Gunningham and Robert Kagan, *Shades of Green: Business, Regulation, and Environment* (Stanford: Stanford University Press, 2003).

⁷ Ibid.

⁸ See Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239; Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed), *Juridification of Social Spheres - A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare* (Berlin: Walter De Gruyter, 1987); Gunther Teubner, 'After Legal Instrumentalism? Strategic Models of Post-Regulatory Law' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin: Walter de Gruyter, 1988). See also Gunther Teubner, Lindsay Farmer, and Declan Murphy (eds), *Environmental Law and Ecological Responsibility: Concept and Practice of Ecological Self-Organisation* (Oxford: Wiley-Blackwell, 1994).

therein). This differentiation is part of the decentring phenomenon outlined in Chapters 3 and 4:

the differentiation of specialized discourses within society precludes a simple hierarchical model of rulers and ruled, ... the ‘subsystems of society’ attain ‘considerable relative autonomy from each other and from the central integrating institutions: state and law’.⁹

These autonomous, self-referential subsystems have their own internal codes, logic and discourse.¹⁰ They are normatively closed, recognising as valid only internally, self-produced norms.¹¹ Such systems, including corporations, *self-regulate* according to these own self-produced norms, independently from and in the absence of state intervention.¹² Whilst normatively closed, subsystems are cognitively open. That is, they are capable of observing and interacting with (or ‘about’) the social environment in which they operate, but in doing so, stamp their own construction, meaning and order on the external noise made by separate systems.¹³ This autopoietic autonomy, comprising normative insulation but cognitive responsiveness, means that no one system can act directly upon the other.¹⁴

Fundamentally, this in turn constrains the ability of law to direct specific or detailed behaviour change.¹⁵ Legal imperatives are perceived differently by a separate social subsystem, including corporations; environmental regulatory goals, for example, are ‘filtered, adapted and refracted’, so that ‘particular norms are not perceived in one sphere as they are in the other’.¹⁶ In short, these systems are not easily influenced or

⁹ Eric W Orts, ‘Reflexive Environmental Law’ (1994) 89 Northwestern University Law Review 1227, pp 1261-2.

¹⁰ Ibid., p 1260.

¹¹ Gunther Teubner, *Law as an Autopoietic System* (Oxford: Wiley-Blackwell, 1993), pp 32-34; Julia Black, ‘Proceduralising Regulation: Part I’ (2000) 20 Oxford Journal of Legal Studies 597, p 602.

¹² Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54 Current Legal Problems 103, p 111.

¹³ Black, ‘Proceduralising Regulation I’ (n 11), p 602. See also Sanford E Gaines and Cliona Kimber, ‘Redirecting Self-Regulation’ (2001) 13(2) Journal of Environmental Law 157 on the shift of Teubner’s later work in the environmental context to a focus on self-contained autopoiesis, away from a socially open discursive model.

¹⁴ Julia Black, ‘Critical reflections on regulation’ (2002) 27 Australian Journal of Legal Philosophy 1, p 5.

¹⁵ Recall that there was a similar discussion in Chapter 6 as to engineering specific corporate cultures.

¹⁶ Gunther Teubner, ‘Juridification – Concepts, Aspects, Limits, Solutions’ in Robert Baldwin and others (eds), *A Reader on Regulation* (Oxford: Oxford University Press, 1998), p 407 and 426-7. In turn leading to Teubner’s ‘regulatory trilemma’ - the indifference of the target system to the intervention, the

manipulated by either (what Teubner describes as) ‘formal’ or ‘substantive’ law. Formal law involves the rule-orientated resolution of bilateral, private disputes. In the context of environmental issues, private nuisance is the most obvious example of this, and the challenges of addressing the diffuse and collective nature of environmental wrongs through formal law are well-documented.¹⁷ Substantive law, associated with the rise of the ‘regulatory state’, represents the deliberate and goal-oriented administrative control or regulation of social problems, aptly exemplified by the extensive use of command and control intervention for environmental purposes.¹⁸ As such, fostering a corporate environmental conscience, or rectifying the lack of one, through the use of substantive or command and control type legal intervention alone, is likely to be inadequate.

Reflexive or procedural law is a response to these categories of law in the face of the disaggregation of society,¹⁹ and focuses on enhancing and harnessing self-referential and self-regulating capacities of institutions outside the legal system towards public policy goals.²⁰ But rather than attempting direct ‘control’ through highly detailed substantive standards, procedural approaches are indirect mechanisms and structures which, in the context of CER, encourage and engender environmental responsibility by corporations.²¹ In other words, tools which encourage the development of a corporate (environmental) conscience. The substantive goals of the legal and political subsystems remain, but reflexive law involves changing the means by which they are achieved, not through substantive control but rather the *proceduralisation* of law to encourage thinking in the right direction.²² Procedural law regulates social behaviour by creating the structural conditions for ‘organisational

destruction of the target system itself, or the destruction of the intervening system; see also Black, ‘Critical reflections on regulation’ (n 14), p 5.

¹⁷ See, for example, Jenny Steele, ‘Private Law and the Environment: Nuisance in Context’ (1995) 15 Legal Studies 236.

¹⁸ As was seen in Chapter 3.

¹⁹ Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17(2) Law and Society Review 239; Orts, ‘Reflexive Environmental Law’ (n 9), pp 1253-7.

²⁰ Orts, ‘Reflexive Environmental Law’ (n 9), pp 1231-2; Black, ‘Decentring Regulation’ (n 12), p 111; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge: Cambridge University Press, 2007), Chs 3-4.

²¹ Orts, ‘Reflexive Environmental Law’ (n 9), pp 1231-2.

²² Ibid., p 1264; Black, ‘Proceduralising Regulation I’ (n 11), p 598. Although, as noted by Black, a focus on techniques can divert attention away from the issue of how those substantive ends should be defined, and by who.

conscience', establishing self-reflective processes to 'irritate' businesses into creative, critical and continual thinking about how to minimise environmental harms.²³

Proceduralisation and CSR

Reflexive law is also characteristically decentred (society is increasingly differentiated into separate subsystems), with a recognition of heterarchical as opposed to hierarchical relationships between law and other systems, replacing (or at least supplementing) 'state control with effective internal control.'²⁴ Again, this is achieved by 'adjusting, balancing, structuring, facilitating, enabling, negotiating, but never directly telling and never directly trying to control.'²⁵ As with decentred regulation, this envisages redistributions of more centred notions of power and influence, with procedural law seeking to externalise the implementation of environmental measures from government and, in turn, to encouraging systems to internalise the effects they have on others. Reflexive solutions therefore offload some of the weight of environmental regulation to other social actors, creating an 'atmosphere of co-operation rather than coercion', harnessing the knowledge and resources of corporations to solve environmental problems.²⁶

The potential benefits of procedural approaches over and above command and control are not new in the context of environmental protection,²⁷ especially given advocating reflexive law is bound up in varying notions of complexity, with obvious parallels in the context of environmental problems. Nor is the connection between corporate social responsibility, corporate governance and reflexive approaches new either.²⁸ Various CER instruments harbour reflexive characteristics, which, as will be

²³ Black, 'Proceduralising Regulation I' (n 11), p 603; Orts, 'Reflexive Environmental Law' (n 9), pp 1231-2.

²⁴ Black, 'Proceduralising Regulation I' (n 11), p 603.

²⁵ Black, 'Decentring Regulation' (n 12), p 111.

²⁶ There are potential benefits here in view of the fragmentation of information and control (discussed in Chapter 3). This atmosphere of cooperation was seen in those aspects of CSR which involve stakeholder interaction, illustrated by some of the voluntary agreements in place for waste reduction (discussed in Chapter 4).

²⁷ See Neil Gunningham, 'The New Collaborative Environmental Governance: The Localization of Regulation' (2009) 36 *Journal of Law and Society* 145 on new forms of collaborative governance, and the growth of environmental assessment as a reflexive regulatory tool.

²⁸ See Doreen McBarnet, 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2009) on the multi-faceted nature of corporate accountability. In particular, McBarnet points to the possibility of enhancing CSR through indirect or next-generation forms of governmental intervention which, in turn, might have benefits over and above command and control. See also,

seen below, often include the reflexive tools of disclosure requirements and/or the adoption of a management system. Non-state market driven but fundamentally reflective mechanisms in particular represent what traditionally would be understood as ‘CER’ in the sense that they are not legally mandated, but rather generated independently from the state and adopted by corporations in the absence of legal compulsion.²⁹ These types of initiatives are, in principle, a good fit with the type of proceduralisation increasingly associated with environmental regulation.³⁰ Indeed, reflexive law has inspired a range of broadly procedural approaches seeking to bring about corporate responsibility, including not only management systems but the related concepts of ‘process CSR’, reflexive corporate governance and meta-regulation.³¹ Though differing in some respects, these all focus on the nature of corporate decision-making and the ways we might encourage corporate reflection.

Christine Parker’s account of meta-regulation in the context of corporate accountability offers a powerful basis for critiquing in more detail some of the ways in which we might design procedures which help foster or enhance a corporate conscience. Meta-regulation is in essence a type of procedural law, and involves the external, legal regulation of internal self-regulation and corporate conscience, and should involve frameworks within which business enterprises put themselves through a CSR *process* which, crucially, is oriented to CSR *outcomes*.³² That is, corporate decisions should be meaningfully directed towards, and opened up to, external values,

Andrew Johnston, ‘Governing Externalities: The Potential of Reflexive Corporate Social Responsibility’ (Centre for Business Research, University of Cambridge, Working Paper No. 436 September 2012) (available at SSRN: <http://papers.ssrn.com/abstract=2165616>).

²⁹ ISO 14001 (discussed below) is an example of this.

³⁰ Most obviously Environmental Assessment (see, for example, Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford: Oxford University Press, 2006); Joanne Scott and Jane Holder, ‘Law and New Environmental Governance in the European Union’ in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006). The Extended Producer Responsibility Regime for packaging waste and Site Waste Management Plans, both discussed in Chapter 3, also bear some of the hallmarks of reflexive law.

³¹ Parkinson, *Corporate Power* (n 1); Colin Scott, ‘Reflexive governance, meta-regulation and corporate social responsibility: the “Heineken effect”’ in Nina Boeger, Rachel Murray and Charlotte Villiers (eds), *Perspectives on Corporate Social Responsibility - Corporations, Globalisation and the Law* (Cheltenham: Edward Elgar, 2008); Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (Cambridge, Cambridge University Press, 2010); Christine Parker, ‘Meta-regulation: Legal Accountability for Corporate Social Responsibility’ in McBarnet *et al*, *The New Corporate Accountability* (n 28).

³² Parker, *The Open Corporation* (n 31), p 237.

including both regulatory norms and multi-stakeholder influences.³³ Importantly, meta-regulation should seek to make companies engage and meet those external norms in a manner which transcends their own self-interest, in turn envisaging the institutionalisation of corporate structures, cultures and management which are ‘open’ or ‘permeable’ to such external values.³⁴ Possible structures which would assist in helping to produce a responsible culture and management practice include high-level statements and demonstrations of responsibility commitments; management systems; training and communication programmes as regards these commitments, together with associated internal reporting, monitoring and auditing.³⁵ While this places corporations within a social responsibility framework, meta-regulatory law also accepts that the main goals of a company include providing a return to investors.³⁶ In view of this:

Meta-regulating law should allow space for the company itself to take responsibility for working out how to meet its main goals within the framework of values set down by regulation, provided its main goals can be carried on consistently with social responsibility values. Meta-regulating law should be careful to leave space, to the greatest extent possible, to allow the companies it regulates to decide for themselves how to institutionalise responsibility. This means meta-regulating law does not assume command-and-control is the only appropriate technique for regulating social responsibility. It is willing to experiment with more indirect or facilitative techniques for engendering responsibility, including through requiring or capacitating non-state agencies

³³ Parker, *The Open Corporation* (n 31), p 237. See also the calls for adequate opportunities for public participation within reflexive environmental interventions by Gaines and Kimber, ‘Redirecting Self-Regulation’ (n 13).

³⁴ Parker, ‘Meta-regulation’ (n 31), p 215; see also Gaines and Kimber, ‘Redirecting Self-Regulation’ (n 13), pp 169-70:

... the “self” needs a frame of reference for deciding what regulation to impose on itself. For environmental protection, that frame of reference is necessarily external to the firm because the natural environment is external. ... Even for highly capable and responsible industrial enterprises, we are sceptical about their ability to cut themselves loose from their central focus on profit making and engage in objective valid self-examination and social-learning.... We see the dominance of the profit motive as a significant, if not insurmountable, barrier to the ability of a firm to be truly environmentally self-critical.

See additionally Leonie Breunung and Joachim Nocke, ‘Environmental Officers: a Viable Concept for Ecological Management?’ in Teubner *et al*, *Environmental Law and Ecological Responsibility* (n 8).

³⁵ Parker, ‘Meta-regulation’ (n 31), p 216. As will be seen, EMAS III combines all of these.

³⁶ *Ibid.*, p 217.

(such as auditors, NGOs or the public at large) to help regulate corporate behaviour (for example through audit requirements, provision of information about corporate performance to the public, and so on).³⁷

Importantly, given this ‘space’ for decision-making is constrained by the extent to which a corporation can meet its own goals *consistently* with CSR norms, meta-regulation is not simply *self-regulation*, it is law;³⁸ as already indicated, it is the legal regulation of self-regulation, or ‘an approach to legal regulation in which the *internal* “corporate conscience” is *externally* regulated.’³⁹

Critiques of procedural approaches to regulation include concerns that process is instituted at the expense of (beneficial) substantive outcomes. In the context of CSR, there is a particular concern that processes allow companies to avoid proper (or any) accountability for the substantive outcomes of their behaviour, and that corporate conscience requirements will be implemented in a superficial and half-hearted manner, with little commitment to the external values to which such requirements were geared. Indeed, this is a general concern with the CSR movement itself; that it involves external image manipulation more than a true commitment to responsible behaviour. In addition, there is a concern that, in a similar vein to superficiality, procedural approaches permit companies to avoid any conflicts that may arise within decision-making between social (or environmental) values and the corporate self-interest (in turn, outsourcing the substantive risks to separate entities). In short, CSR processes:

that ostensibly put in place a corporate conscience may be used to contain, mollify and transform dissent about whether the company has followed

³⁷ Ibid., p 217.

³⁸ Ibid., p 217

³⁹ Parker, ‘Meta-regulation’ (n 31), p 237. Meta-regulation can be distinguished from Colin Scott’s characterisation of reflexive corporate governance, which he suggests is more bottom-up than meta-regulation’s reliance on top-down legal instruments. Reflexive corporate governance therefore acknowledges that corporate behaviour is driven by extra-legal forces; see Scott, ‘Reflexive governance’ (n 31) and Bryan Horrigan, *Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business* (Cheltenham: Edward Elgar, 2010), pp 175-6. While I find Parker’s analysis persuasive, it ought to be already clear from Chapters 3 and 4 that I do not discount the importance of external sources of corporate conscience (or decentred regulatory voice). The two concepts are not inconsistent in any case, since at the heart of both reflexive corporate governance as well as meta-regulation is the creation of structures within which corporations engage in critical reflection.

appropriate values in particular instances without addressing the conflict and allowing it to be authoritatively and accountably resolved.⁴⁰

Importantly, this is why processes must nonetheless be geared towards externally determined societal (environmental) goals,⁴¹ and where management fails to resolve tensions within corporate decision-making structures, such conflicts must be subject to external, authoritative and legitimate resolution and enforcement. There is, of course, a fine line to tread here. It is not easy to distinguish which decisions should and should not be subject to corporate resolution, particularly in view of democratic concerns (indeed, this is at the heart of CSR legitimacy debates, as was seen in Chapters 3-4). For our purposes, suffice to say, that in order to foster or enhance reflection and conscience, procedural interventions must envisage the institution of corporate structures and cultures which are open to, and do not suppress the scope of conflict between, a multitude of internal and external goals or values.

3. The limitations of UK company law for corporate conscience

Problems with the environmental process under section 172 CA 2006

The most obvious source of procedural CER for UK corporations is section 172 of the Companies Act 2006, which requires that directors, in promoting the success of the company, have regard to the impact of the company's operations on the environment. Recall Chapter 5, where it was argued that section 172 admits only a weak form of environmental relevance to corporate decision-making which is largely indifferent to substantive outcomes; directors are required to have regard to the environment only to the extent that doing so will promote the success of the company for the benefit of its members as a whole. For John Parkinson, under his concept of 'process CSR', this is not necessarily problematic.⁴² The aim is not to produce any particular outcome, but rather to institute the 'socialisation' or 'sensitisation' of board-room decision-making to the interests of third parties by requiring directors to reflect

⁴⁰ Parker, 'Meta-regulation' (n 31), p 227 and Parker, *The Open Corporation* (n 31), pp 156-64.

⁴¹ In response perhaps to some of the criticisms often made against Teubner that reflexive law need not be concerned with substantive outcomes. See also Black, 'Proceduralising Regulation I' (n 11).

⁴² Parkinson, *Corporate Power* (n 1), pp 345-6.

on the consequences for corporate actions; all in the hope that a better balancing of company and external interests will result.⁴³

However, section 172 does not match up with some of Christine Parker's prescriptions for procedural CSR interventions. Section 172 provides only instrumental relevance to CSR in terms of corporate success, rather than a procedure geared towards an environmental norm. In addition, the business case approach to decision-making under section 172 provides ample scope for the masking of environmental and corporate conflict, despite calls for procedural interventions to leave space for such conflicts to emerge. Indeed, as discussed in Chapter 5, the persistent prioritisation of shareholders over non-shareholders is a likely barrier to procedural environmental law generally, at least when subordinate to corporate profit. Insofar as section 172 assumes away conflicts in decision-making and provides space for only a financially contingent environmental conscience, I doubt anyone, regardless of their scepticism towards procedural approaches generally, would be convinced that section 172 encourages deep reflection on corporate environmental impacts.

Indeed, if anything, section 172 has the scope to suppress rather than encourage the glimpses of conscience outlined in Chapter 6. Normative explanations of behaviour emerging from the environmental compliance literature are incompatible with the form of financially contingent environmental conscience mandated by section 172. In addition, whilst scientific behavioural research shows a general proclivity for modest personal sacrifices to avoid harming something beyond one's own material advantage, section 172 does not envisage or condone profit-sacrificing behaviour of any kind.⁴⁴ In view of this, one might also make an additional criticism of section 172 as a rough proxy for the legal representation of the corporate 'mind'. As has been frequently argued throughout this work, research into corporate behaviour frequently expresses how individual and corporate motivations are myriad, complex, and routinely marked by potentially conflicting normative, social and economic goals. It is difficult to characterise anyone, companies and managers without exception, as being motivated by a single priority. Section 172 problematically assumes away all sorts of these routine, inevitable and complicated conflicts or motives and, as such, probably

⁴³ Parkinson, *Corporate Power* (n 1), pp 345-6; see also Horrigan, *CSR in the 21st Century* (n 39), pp 200 and 241-2; Lawrence E Mitchell, 'The board as a path toward corporate social responsibility' in McBarnet *et al*, *The New Corporate Accountability* (n 28).

⁴⁴ As was discussed in Chapters 5 and 6.

bears little resemblance to the complicated realities of corporate decision-making; in this sense, section 172 mandates a sort of non-realism.

Finally, since section 172 applies to directors, there is nothing which necessarily encourages reflection, conscience, or a responsibility mindset, to permeate the corporation at varying levels of hierarchy. Of course, it is a sensible starting point to target directors, given the importance of authority and top-level management.⁴⁵ But as the literature suggests,⁴⁶ in order to promote environmentally conscientious behaviour by corporations, environmental issues must hit at various nodes within the organisation. Nothing in section 172 requires or necessarily implies this.

Problems with mandatory environmental reporting under the section 417 business review

Disclosure, or reporting, is of course a precondition for external scrutiny and proper accountability,⁴⁷ and is an important aspect of CSR. The process of reporting increases awareness, and the more corporations are subject to public scrutiny, the more likely it will be that companies will avoid questionable environmental activities.⁴⁸ Indeed, the release of information provides the information necessary to exert external regulatory pressure on corporate activities, and is thus central to the type of decentred regulatory accountability associated with CER (as was discussed in Chapter 4).⁴⁹ In addition, reporting can be a reflexive or procedural tool in itself. The process of reporting can necessitate the generation of information which may have otherwise remained hidden. Furthermore, disclosure can perform a ‘house cleaning’ role, where knowledge of future disclosure influences decision-making towards more responsible behaviour *ex ante*, as opposed to reviewing certain practices *ex post*, in response to external scrutiny.⁵⁰ As such, the mandatory non-financial reporting obligation pursuant to section 417 CA 2006 is also a source of procedural CER within company law. Before looking to the specific business review requirements pursuant to UK

⁴⁵ Recall the importance of this discussed in Chapter 5.

⁴⁶ That is, research surrounding EMSs (discussed below) as well as the scholarship outlined in Chapter 6 on compliance and corporate cultures.

⁴⁷ Rob Gray, Dave Owen, and Carol Adams, *Accounting and Accountability* (London: Prentice Hall, 1996), p ix.

⁴⁸ Mark Sargent, ‘State Disclosure Regulation and the Allocation of Regulatory Responsibilities’ (2012) 46 *Maryland Law Review* 1027.

⁴⁹ See also Parker, *The Open Corporation* (n 31), p 216.

⁵⁰ Sargent, ‘State Disclosure’ (n 48), p 1045.

company law, it is worth unpacking the meaning of ‘non-financial’ disclosure. Both Villiers and Chiu subdivide non-financial reporting into ‘CSR’ and ‘non-CSR’ disclosure, both of which have their own regulatory audiences and rationales.⁵¹

Non-CSR disclosure is in essence shareholder- and market-centric; corporate responsibility issues, such as impacts on the environment, are disclosed only for their relevance to corporate success. The purpose of the disclosure is to facilitate investment and credit assessment, so that the envisaged target audience comprises shareholders and potentially creditors. Even though reporting on environmental issues is of a *prima facie* non-financial dynamic, they are viewed through the ‘prism’ of the enterprise’s financial performance,⁵² against an overall evaluation of the (short term) profitability of a corporation.⁵³ Such reporting is also a precondition for shareholder discipline, providing the necessary information to exercise control, and is justified primarily in instrumental terms to that overall shareholder-oriented aim.⁵⁴

CSR disclosure, in contrast, seeks to serve a broader public purpose, satisfying not the needs of capital or debt investors, but of stakeholders more generally. In particular, CSR disclosure provides information for the monitoring of corporate activities in relation to CSR issues. It is justified normatively rather than instrumentally, by reference to the implications of stakeholder theory or other CSR / non-contractarian conceptualisations of the company, and that information flows ought to be extended in light of this. The recipients of CSR disclosure are ultimately customers, employees and those interested in securing greater environmental or social responsibility. Their informational demands and interest in monitoring corporate activity are different from most investors. CSR disclosure is not concerned with evaluating conventional short-term financial performance, but relates to issues of societal (rather than investor) accountability.

⁵¹ Chiu classifies non-financial disclosure in two categories: (i) reporting excluding social responsibility disclosure (‘NFR’) and (ii) corporate social responsibility disclosure (‘CSD’). Villiers refers to the former as ‘conventional corporate responsibility’ reporting, the latter as 21st century corporate responsibility reporting aimed at servicing a wider range of public accountability needs. See Iris H-Y Chiu, ‘The paradigms of mandatory non-financial disclosure: a conceptual analysis: Part 1’ [2006] *Company Lawyer* 259; Iris H-Y Chiu, ‘The paradigms of mandatory non-financial disclosure: a conceptual analysis: Part 2’ [2006] *Company Lawyer* 291; Charlotte Villiers, *Corporate Reporting and Company Law* (Cambridge: Cambridge University Press, 2006).

⁵² Horrigan, *CSR in the 21st Century* (n 39), p 187.

⁵³ Chiu, ‘The paradigms of disclosure (part 1)’ (n 51).

⁵⁴ *Ibid.*, in particular by reference to the (disputed) efficient capital markets hypothesis (see Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco, CA: Berrett-Koehler, 2012)).

In a similar fashion to a number of jurisdictions,⁵⁵ narrative reporting in the UK, known as the business review, is of the non-CSR variety.⁵⁶ This is clear immediately from section 417(2), which tags the business review to the procedural business case for CER envisaged under section 172: the purpose of the review is to inform *shareholders* of how directors have complied with the duty to promote the success of the company.⁵⁷ The primary audience is therefore shareholders. In addition, the explicit requirement to consider environmental matters applies only to quoted companies (though of course the procedural environmental duty in section 172 applies regardless, which may indirectly require at least superficial mention of environmental matters). Furthermore, the disclosure requirement takes an investment perspective, with an emphasis upon how environmental factors relate to profitability and business strategies, risks and operations rather than as a means of societal accountability more generally. Nor is the CSR-type reporting obligation absolute, but contingent upon it being ‘necessary for an understanding of the development, performance or position of the company’s business’. This places flexibility in the hands of directors, rather than regulators, as to what matters must be reported on, leaving considerable room for variance in the approach boards take to the obligation.⁵⁸

The business review does potentially require the generation of information on environmental issues which perhaps otherwise would remain hidden or not considered, which in turn may imply certain corporate structures to be developed in order to facilitate this new information burden. However, evidence so far is not indicative of this,⁵⁹ and what is a rather weak reporting requirement does not necessarily in itself

⁵⁵ Including the US, the EU and the OECD guidelines, see Horrigan, *CSR in the 21st Century* (n 39), pp 190-2.

⁵⁶ From 1 October 2013, the business review will be repealed and replaced with the requirement to produce a ‘strategic report’ (see The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013, approved 17 July 2013). Some of the changes include that quoted companies must now also disclose the number of women on their boards, and the Regulations confirm that the requirement under s 417 to report on environmental, employee and social community matters also includes a consideration of human rights. However, for the purposes of the arguments made in this chapter, the changes made are insignificant. Indeed, the regulations largely reflect (and in fact copy) many of the s 417 business review requirements.

⁵⁷ This is no different with respect to the content of the new strategic report (see above, (n 56)). The purpose of the strategic report is still to inform shareholders of how directors have complied with the duty to promote the success of the company under CA 2006, s 172 (see The Companies Act 2006 (Strategic Report and Directors’ Report) Regulations 2013, reg 3).

⁵⁸ Villiers, *Corporate Reporting* (n 51), pp 216-7.

⁵⁹ Olajo Aiyegbayo and Charlotte Villiers, ‘The enhanced business review: has it made corporate governance more effective?’ (2011) 7 *Journal of Business Law* 699.

involve reflexive processes - it does not necessarily enable or promote reflection.⁶⁰ Furthermore, there is evidence to suggest that the provisions are failing to deliver high-quality, adequate and comparable information.⁶¹ As discussed in Chapter 4, this is a necessary pre-condition for external scrutiny. There are three main reasons for this failure.⁶²

The first reason relates to the weakness of the obligation itself (discussed above), together with a lack of appropriate guidance. Responses to the recent consultation exercise carried out by the Department for Business, Innovation and Skills (BIS) highlighted in particular the ‘patchiness’ of reporting (a lack of comparability), as well as the difficulties experienced in finding key information.⁶³ In part, this is due to the lack of clarity within the regime, such as to the issues to be covered and the amount of information to be provided.⁶⁴ A lack of clarity in the regime, however, cannot forgive findings that a large number of reports fail to even comply with the regime, at a basic level, by reporting against Key Performance Indicators (KPIs).⁶⁵

Second, and relatedly, non-compliance with the business review appears to have been under-enforced.⁶⁶ While the Financial Reporting Review Panel (FRRP) has a number of powers in this regard,⁶⁷ they are rarely used.⁶⁸ This is partly because the FRRP is under resourced.⁶⁹ However, more worryingly, some have made a connection between under enforcement and FRRP’s perceived lack of independence. Unsurprisingly, the FRRP is comprised almost entirely of City lawyers and

⁶⁰ This was Colin Scott’s conclusion as regards the Operating and Financial Review (OFR) the precursor to CA 2006, s 417, see Scott, ‘Reflexive governance’ (n 31). See also Cynthia A Williams and John M Conley, ‘Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the UK’ (2007) 31 William & Mary Environmental Law and Policy Review 317.

⁶¹ Jennifer A Zerk, ‘Simply Put - Towards an effective UK regime for environmental and social reporting by companies’ (The Corporate Responsibility (CORE) Coalition, May 2001), p 4.

⁶² Zerk, ‘Simply Put’ (n 61), p 5.

⁶³ Zerk, ‘Simply Put’ (n 61), p 9; Department for Business, Innovation and Skills (BIS), *The Future of Narrative Reporting - A Consultation* (URN 10/1057, Crown Copyright, 2010); Department for Business, Innovation and Skills (BIS), *The Future of Narrative Reporting - A Consultation (Summary of Responses)* (URN 10/1318, Crown Copyright, 2010).

⁶⁴ This is partly due to uncertainty regarding ‘materiality’; that is, in interpreting what information is ‘necessary’ for the purposes of the review (see the main body text accompanying (n 58), above).

⁶⁵ Zerk, ‘Simply Put’ (n 61), p 9.

⁶⁶ Zerk, ‘Simply Put’ (n 61), pp 19-20.

⁶⁷ Including powers to demand documents or to petition a court for a declaration of non-compliance / made an order for a revised report, see CA 2006, ss 459 and 456, respectively.

⁶⁸ Zerk, ‘Simply Put’ (n 61), p 19; see also Financial Reporting Review Panel, *Annual Report 2010* (FRRP, 2010).

⁶⁹ Zerk, ‘Simply Put’ (n 61), p 20.

accountants, but there is a notable lack of environmental and social management reporting specialists.⁷⁰

Third, inadequately robust auditing requirements and activity undermines the regime.⁷¹ The audit requirement is weak indeed, limited to a statement as to ‘whether in his opinion the information given in the directors’ report ... is consistent’ with the accounts.⁷² The Financial Services Authority has also raised concerns over the conduct of auditors.⁷³ In particular, there is too much focus on gathering and accepting evidence to support the assertions made in reports, rather than on whether the reporting standards have been adequately applied.

Issues pertaining to comparability of information, non-compliance, under-enforcement and weak auditing could be addressed by reform to the current framework. This might involve the provision of statutory guidance on the content of reports, changes to the composition of the FRRP, or strengthening the auditing obligations. However, the business review would still remain tied to the problems associated with section 172, and the primary audience would nonetheless remain shareholders, rather than stakeholders more broadly. On this basis, narrower reform as to the enforcement and auditing of the business review would be inadequate. It is worth keeping in mind the enforcement and auditing problems, however. As will be seen, similar concerns will remain relevant in the context of EMSs, to which I now turn.

4. EMSs and corporate conscience

Environmental management systems

⁷⁰ Ibid. On some of the tensions between accountancy / audit roles and environmental reporting, see Brendan O’Dwyer, ‘The legitimacy of accountants’ participation in social and ethical accounting, auditing and reporting’ (2001) 10 *Business Ethics: A European Review* 27.

⁷¹ The 2013 Regulations (n 56), replacing the business review with a strategic report, make no amendments to the role of auditors in this respect.

⁷² CA 2006, 496. Zerk, ‘Simply Put’ (n 61), p 17, contrasts this with the more robust and detailed auditing requirements for financial reports (see CA 2006, s 495), as well as the requirements pursuant to the previous OFR framework. Under the OFR, auditors were required to state whether any matters had come to their attention during the audit which, in their opinion, were inconsistent with the narrative information given in the OFR. The OFR was the precursor to the business review, see above Williams and Conley, ‘Triumph or Tragedy?’ (n 60).

⁷³ Financial Services Authority and Financial Reporting Council, ‘Enhancing the auditor’s contribution to prudential regulation’ (Discussion Paper 10/3, June 2010), [3.9].

For a number of reasons, therefore, sections 172 and 417 are inadequate procedural CER interventions. It is thus appropriate to contrast procedural aspects of company law with more robust templates. Disclosure (as already briefly discussed) is one example, but much more focussed on decision-making processes are environmental management systems (EMSs), although as will be seen, disclosure obligations often form part of EMS standards. Cary Coglianese provides the following overview of what an EMS should entail:

An EMS consists of a series of internal planning processes and operational procedures implemented by a firm both to ensure compliance with regulatory standards as well as to try to improve the firm's environmental performance. Although the specific shape and structure of an EMS can vary across different firms, all management systems involve some kind of environmental planning and internal policy making. To create an EMS, managers begin by establishing environmental goals and creating a specific plan to achieve these goals. Managers and workers are assigned responsibilities for implementing parts of the plan, and they are trained in what they need to carry out these responsibilities. They keep records that document their compliance with the plan and periodically the firm (or an outside auditor) reviews these records and assesses the firm's performance in meeting its goals and following its internal procedures. These periodic reviews are supposed to feed into revision and continuous improvements in the firm's overall system. When auditing turns up deficiencies or problems, managers take remedial action and, as needed, amend their plan, returning to the start of what is commonly referred to as the "plan-do-check-act" cycle.⁷⁴

There are a few issues worth highlighting with this. EMSs, with a focus on process, bear the hallmarks of reflexive or procedural environmental law,⁷⁵ leaving goal-setting to the firm. The general belief, common with reflexive approaches, is that '... if

⁷⁴ Cary Coglianese, 'The Managerial Turn in Environmental Policy' (2008) 17 NYU Environmental Law Journal 54, pp 55-6. See also Leigh Holland and Yee Boon Foo, 'Differences in environmental reporting practices in the UK and the US: the legal and regulatory context' (2003) 35 The British Accounting Review 1, p 5; Michael Watson and Anthony RT Emery, 'Law, economics and the environment: A comparative study of environmental management systems' (2004) 19 Managerial Auditing Journal 760, p 762.

⁷⁵ Orts, 'Reflexive Environmental Law' (n 9), p 1312.

appropriate processes are in place, the desired outcomes will follow.’⁷⁶ EMSs also differ from traditional methods of environmental regulation, such as the use of emission limits or technology specifications via command and control, by opening up the ‘black box’ of the firm.⁷⁷ In particular, they seek the embedding of environmental considerations within corporate decision-making and operations—a form of intra-corporate environmental integration (recall the importance of this explored in Chapter 5—which in turn implicates employees at various levels of hierarchy. Crucially, there is no ‘single’ EMS template; an EMS is generated by a corporation itself, tailored to its own organisational needs. By giving corporations flexibility and responsibility for developing their own responses to environmental problems, EMSs have the potential to overcome some of the problems outlined in Chapters 3 and 4 as to the fragmentation of information and control.⁷⁸

EMSs seem particularly appropriate for the purposes of enhancing a corporate environmental conscience. Such systems aim to provide a framework for internal, recursive and reflective processes within businesses, encouraging them to adopt a critical approach to their operations and reflect seriously on environmental issues.⁷⁹ They envisage ‘fundamental structural change in the everyday life of business institutions ... [aiming at] the transformation of business culture.’⁸⁰ Deep and lasting culture change is of course difficult to achieve.⁸¹ This is particularly the case if an EMS is used, as they sometimes are, primarily for external image manipulation rather than as genuine commitment to environmental concerns.⁸² Nonetheless, for the purposes of working upon, or enhancing a corporate conscience, EMSs seem to offer

⁷⁶ Aseem Prakash and Matthew Potoski, *The Voluntary Environmentalists: Green Clubs, ISO 14001, and Voluntary Environmental Regulations* (Cambridge: Cambridge University Press 2006), pp 26 and 90.

⁷⁷ Coglianese, ‘The Managerial Turn’ (n 74), p 54.

⁷⁸ *Ibid.*, p 55.

⁷⁹ Orts, ‘Reflexive Environmental Law’ (n 9), p 1312; see also Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield: Greenleaf Publishing, 2002).

⁸⁰ Orts, ‘Reflexive Environmental Law’ (n 9), p 1313, talking specifically about EMAS. See also Coglianese and Nash, ‘EMSs and the New Policy Agenda’ (n 80), pp 11-2: ‘some evidence suggests that the process of developing and implementing an EMS may lead to changes in corporate culture’.

⁸¹ ‘Genuine, lasting cultural change is difficult to bring to any organization’, see Coglianese and Nash, ‘EMSs and the New Policy Agenda’ (n 80), p 13. Research on organisational behaviour shows that changing underlying firm values and established patterns of behaviour can be a very slow process indeed, see Edgar H Schein, ‘Coming to a New Awareness of Organizational Culture’ (1984) 25 *Sloan Management Review* 3.

⁸² Coglianese and Nash, ‘EMSs and the New Policy Agenda’ (n 80); Jennifer Nash and John Ehrenfeld, ‘Codes of Environmental Management Practice: Assessing Their Potential as a Tool for Change’ (1997) 22 *Annual Review of Energy and the Environment* 487.

significant benefits over direct regulation, whilst also representing the sort of shift *towards* heterarchy considered potentially beneficial in Chapters 3 and 4. Generally, organisations that seek to manage environmental matters systematically can be expected to perform better than firms which do not,⁸³ and as will be seen, tentative (though not conclusive) evidence suggests that EMSs can bring about considerable environmental improvements.

Despite EMSs being necessarily tailor-made by the organisation itself, frameworks are available to corporations to assist in the preparation of their own EMS, sometimes coupled with additional requirements for external validation or certification. Most prominent is the ISO 14001 EMS standard developed by the International Organization for Standardization (ISO).⁸⁴ This EMS has now been incorporated into the EU's Eco-Management and Audit Scheme (EMAS III),⁸⁵ but as will be seen, EMAS imposes requirements in addition to those in ISO 14001. While both schemes operate at a voluntary level, the ISO framework is generated privately, whereas the source of EMAS is a state-backed ('public') EU legal framework.⁸⁶ Both standards directly compete with one another on a global stage, since EMAS registration is now available to non-EU corporations.⁸⁷ In this section, I provide an overview of the operation of EMAS III (incorporating the ISO 14001 EMS) to provide an example of the legal regulation of EMSs. I then go on to consider the empirical evidence surrounding the operation of EMSs and their potential in fostering corporate conscience.

The EMAS Regulation

In order to apply for EMAS registration, organisations must fulfil a number of obligations.⁸⁸ Firms must carry out an *environmental review*, constituting an initial

⁸³ Coglianese and Nash, 'EMSs and the New Policy Agenda' (n 80), p 11.

⁸⁴ ISO 14001 is the most widely recognised EMS in the world. In 2008, an estimated 188,000 companies from 155 countries were certified as ISO 14001 compliant; see Coglianese, 'The Managerial Turn' (n 74), p 56; Prakash and Potoski, *The Voluntary Environmentalists* (n 76).

⁸⁵ Regulation (EC) 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), Art 4(1)(b) and Annex II. As of 30 March 2012, more than 4,600 companies and 7,800 sites were registered with EMAS, although only 59 organisations and 289 sites were registered in the UK; cf with Germany, where registration figures were 1348 and 1877, respectively. See http://ec.europa.eu/environment/emas/pictures/Stats/2012-03_Overview_of_the_take-up_of_EMAS_in_the_participating_countries.jpg (accessed 30 July, 2013).

⁸⁶ I return to the nature of the ISO as a private rule-maker later in the chapter.

⁸⁷ EMAS, Art 1.

⁸⁸ EMAS, Art 4.

comprehensive analysis of direct and indirect environmental impacts (sometimes referred to ‘aspects’), performance, management and practices related to the organisation's operations,⁸⁹ and provide evidence of compliance with environmental law.⁹⁰ On the basis of the environmental review, organisations develop and implement an EMS which meets the requirements of the ISO 14001 series.⁹¹ Central to the EMS is the organisation's environmental policy.⁹² This is formally expressed by top management, and provides the overall environmental intention and direction of the organisation, as well as including a commitment to continuous improvement of environmental performance and outlining detailed (and where practical, quantifiable) objectives and targets.⁹³ Corporate self-setting of performance targets is an important aspect of EMAS, particularly as the same is not repeated in ISO 14001,⁹⁴ but it is important to reiterate that EMAS itself does not specify levels of performance, leaving the firm to determine its own performance objectives.⁹⁵ This policy should be communicated to employees and made available to the public.⁹⁶ The EMS sets up and outlines the programmes for implementing the environmental policy and is based around the ‘plan-do-check-act’ methodology.⁹⁷ If implemented properly, it creates large paper trails⁹⁸ and can be quite costly.⁹⁹ The EMS should designate responsibility for achieving targets at appropriate levels and functions within the company, including a top management representative(s) responsible for implementing and reporting on the

⁸⁹ EMAS, Art 2(9). Indirect impacts arise from the interaction with third parties and which can ‘to a reasonable degree,’ be influenced by an organisation (EMAS, Art 2(7)). This implies indirect or subtle control over environmental impacts in the supply chain. I discussed the importance of the supply chain in Chapter 4.

⁹⁰ EMAS, Art 4(4).

⁹¹ EMAS, Art 4(1)(b) and Annex II.

⁹² EMAS, Art 2(13) and Annex II Part A.2

⁹³ EMAS, Arts 2(1), (11) and (12).

⁹⁴ ISO 14001 itself does not stipulate or require any substantive, positive, measurable or tangible environmental improvements or outcomes; in this sense, EMAS is more performance-based than ISO 14001, see Gunningham and Sinclair, *Leaders and Laggards* (n 79); Riva Krut and Harris Gleckman, *ISO 14001: A Missed Opportunity for Sustainable Global Industrial Development* (London: Earthscan, 1998).

⁹⁵ In accordance with the general arguments of reflexive theorists, who posit ‘autonomous goal setting’ for industrial industries; see Gaines and Kimber, ‘Redirecting Self-Regulation’ (n 13), p173.

⁹⁶ The policy is made public as part of the environmental statement (see below), EMAS, Art 2(18)(b).

⁹⁷ Ira R Feldman, ‘ISO standards, environmental management systems, and ecosystem services’ (2012) 21 Environmental Quality Management 69. The environmental programme is a description of the measures, responsibilities and means taken or envisaged to achieve environmental objectives and targets and the deadlines thereof (EMAS, Art 2(10), Annex II Part A.3.3).

⁹⁸ Prakash and Potoski, *The Voluntary Environmentalists* (n 76), p 91.

⁹⁹ Ibid., p 27.

performance of the system.¹⁰⁰ In addition, EMAS outlines requirements for employee involvement and participation, acknowledging that active employee involvement is a driving force and prerequisite for continuous environmental improvement.¹⁰¹ Management should in turn ensure the availability of necessary resources (financial, expertise, training where appropriate) to establish, implement, improve and monitor the EMS.¹⁰²

Firms must additionally carry out an *internal environmental audit*, both before registration and at least every three years.¹⁰³ The audit is a systematic evaluation of environmental performance, as well as compliance and conformity with the environmental policy and management system.¹⁰⁴ Information on the results of audits should be provided to top management, who in turn should subject the EMS, and general environmental performance of the organisation, to periodic review.¹⁰⁵ All of this should be documented, accompanied by systems of document creation, control and review, and accompanied by procedures for internal communication.¹⁰⁶ This in turn assists firms in their preparation of a comprehensive *environmental statement* made publicly available (in essence, this is a robust reporting requirement).¹⁰⁷ The statement reports on both the environmental policy and management system, necessarily detailing environmental impacts, programme, objectives, targets and performance, all reported against key environmental performance indicators (KEPIs). In order to receive EMAS registration from a competent body,¹⁰⁸ the environmental review, management system, policy, internal audit and statement, as well as the organisation's continuous environmental improvement, must be validated as compliant with the EMAS Regulation annually by an accredited verifier.¹⁰⁹

¹⁰⁰ EMAS, Annex II Part A.4.1.

¹⁰¹ EMAS, Annex II Part B.4; recall the importance of employee involvement at all levels of hierarchy as discussed in Chapter 6.

¹⁰² EMAS, Annex Part A.4.1.

¹⁰³ This is four years for those with a small organisation derogation (EMAS, Art 7 and Annex II). There are also specific matters to be taken into account when verifying small organisations, and measures should be taken by Member States to encourage their participation. See EMAS, Arts 7, 26 and 36.

¹⁰⁴ EMAS, Arts 4(16) and (17), 9 and Annex III

¹⁰⁵ EMAS, Annex II A.5.5 and A.6.

¹⁰⁶ EMAS, Annex II A.5.4.

¹⁰⁷ EMAS, Arts 2(18) and 4(1)(d) and Annex IV.

¹⁰⁸ EMAS, Arts 4-6, 13 and 14. Registration is renewed every three years. Any substantial changes require an additional review, with changes and updates to the environmental policy, programme, system and statement accordingly (Art 8). EMAS registration permits the use of the EMAS logo, including on organisation publications, although not on products or packaging (Art 10). Non-compliance with the EMAS Regulation can result in deletion from the EMAS register (Art 15).

¹⁰⁹ EMAS, Arts 2(24) and (25), 18, 19, 20, and Chs V and VI generally.

EMSs and corporate conscience

Empirical evidence as to whether implementing an EMS leads to measurable improved environmental outcomes is unclear, and varies across sectors and contexts.¹¹⁰ Prakash and Potoski's analysis suggests that, on average, ISO 14001 certified facilities experienced significantly larger reductions in pollution emissions than non-certified facilities, and in general their analysis indicated that 'joining ISO 14001 significantly improves facilities' regulatory and environmental performance.'¹¹¹ Florida and Davidson revealed in their survey of companies that those adopting a formal EMS tended to be more innovative in their processes generally,¹¹² and numerous case studies show how companies have improved their environmental performance by implementing an EMS.¹¹³ While conclusive evidence either way remains elusive, Coglianese and Nash, in an overall survey of the literature, suggest that there are 'definite indicators that firms may use [EMSs] successfully to find new ideas for making socially desirable environmental improvements'.¹¹⁴

Qualitative research as to corporate conscience, or the effects of EMSs on the internal dynamics of operations and decision-making, are in shorter supply than studies

¹¹⁰ For example, Dasgupta *et al*'s study of firms in food, chemical and non-metallic minerals industries found that ISO 14001 adopters complied better with government regulations (Susmita Dasgupta, Hemamala Hettige, and David Wheeler, 'What Improves Environmental Performance? Evidence from Mexican Industry' (2000) 39 *Journal of Environmental Economics and Management* 39). Russo found that ISO 14001 membership was associated with decreased toxic emissions (Michael V. Russo, 'Institutional Change & Organizational Strategy: ISO 14001 and Emissions in the Electronics Industry' (Eugene, OR: University of Oregon, Academy of Management Proceedings, 2001)). However, Andrews *et al* provide evidence that ISO 14001 did not improve environmental performance (Richard NL Andrews, Nicole Darnall, Deborah Rigling Gallagher, Suellen Terrill Keiner, Eric Feldman, Matthew L Mitchell, Deborah Amaral, and Jessica D Jacoby, 'Environmental Management Systems: History, Theory, and Implementation Research' in Coglianese and Nash, *Regulating from the Inside* (n 80). Dahlstrom *et al*, looking at UK IPC firms, found that implementing EMSs improved certain procedural aspects of firms' environmental management but it was not associated with an improvement in firms' regulatory performance (Kristina Dahlström, Chris Howes, Paul Leinster and Jim Skea, 'Environmental management systems and company performance: assessing the case for extending risk-based regulation' (2003) 13 *European Environment* 187). See also generally Cary Coglianese and Jennifer Nash, 'Management-Based Strategies: An Emerging Approach to Environmental Protection' in Cary Coglianese and Jennifer Nash (eds), *Leveraging the Private Sector: Management-Based Strategies for Improving Environmental Performance* (Washington DC: Resources for the Future, 2006).

¹¹¹ Prakash and Potoski, *The Voluntary Environmentalists* (n 76), p 166.

¹¹² See Richard Florida and Derek Davison, 'Why Do Firms Adopt Advanced Environmental Practices (and Do They Make a Difference)?' in Coglianese and Nash, *Regulating from the Inside* (n 80). Of course, as expected, the causal connection could not be fully untangled (see Coglianese, 'The Managerial Turn' (n 74), p 60).

¹¹³ Coglianese, 'The Managerial Turn' (n 74), p 61; see also above (n 110).

¹¹⁴ Coglianese and Nash, 'EMSs and the New Policy Agenda' (n 80), p 19; see also Coglianese, 'The Managerial Turn' (n 74), p 55.

which seek to address quantitatively the link between management-based regulation and substantive environmental or regulatory performance. A recent study based on interviews with Israeli firms adopting ISO 14001, however, provides evidence of the powerful potential of EMSs for corporate conscience.¹¹⁵ Perez *et al* argue that ISO 14001, through the various new routines it introduces, can trigger changes in the firm's internal dynamic and, in essence, foster the development of a corporate environmental conscience. The routines of information generation, ordering and review ensure that environmental concerns 'receive stronger presence in the firm's decision making processes, allowing for the discursive expression of motivations and ideas that may have been suppressed' without a rigorous EMS.¹¹⁶ They argue that an EMS facilitates a shift into a 'new dynamic equilibrium' where environmental concerns are given more weight.¹¹⁷ The various recursive processes aimed at continual improvement, rather than a rigid system of sanctions, provide a framework for involving employees in the environmental aspects of the organisation, in turn opening up space for the internalisation of environmental imperatives by employees and strengthening any intrinsic pro-environmental attitudes that might already have been held.¹¹⁸ Within the sample, the perception of the firm's environmental commitment amongst managers and employees was higher in certified than non-certified firms.¹¹⁹

Importantly, while a firm obviously carries out certain profit-orientated cost-benefit analyses, an economic calculus will not necessarily be determinative; Perez *et al*'s findings challenge assumptions that internal firm dynamics are entirely dominated by the logic of profit examination.¹²⁰ This of course has positive implications for CSR scholars concerned that the profit motive of corporations leads to the occlusion of ethical concerns, and confirms the glimpses of conscience seen in environmental compliance literature and research into prosociality outlined in Chapter 5. Key to this, they argued, was the way in which the EMS, by imposing a process of continual improvement and reflection, coupled with third-party auditing and certification, makes

¹¹⁵ Oren Perez, Yair Amichai-Hamburger, and Tammy Shterental, 'The Dynamic of Corporate Self-Regulation: ISO 14001, Environmental Commitment, and Organizational Citizenship Behavior' (2009) 43 *Law & Society Review* 593.

¹¹⁶ *Ibid.*, p 598.

¹¹⁷ See also Kathleen M Eisenhardt and Jeffrey A Martin, 'Dynamic capabilities: what are they?' (2000) 21 *Strategic Management Journal* 1105.

¹¹⁸ Perez *et al*, 'The Dynamic of Corporate Self-Regulation' (n 115), pp 599-600.

¹¹⁹ *Ibid.*, p 619.

¹²⁰ *Ibid.*, p 620.

environmental issues more *salient*,¹²¹ driving organisations to ‘deal with competing (internal) economic and environmental demands and to develop new mechanisms for resolving potential tensions between them.’¹²² While ISO 14001 does not offer a complete algorithm for resolving these conflicts, the iterative and recursive processes instituted by the EMS created more environmentally ‘sensitive’ mechanisms to address such tensions.¹²³

5. Appropriate company law proceduralisation

Given the inadequacies of the process obligations in sections 172 and 417 CA 2006, the relationship between EMSs and corporate conscience suggests that corporate processes, appropriately designed, could play a powerful role in fostering an environmental conscience and provide space for intra-corporate voice. In this final part, I propose a regulatory intervention as one possible response to the ‘how’ question of corporate environmental irrelevance,¹²⁴ and at least a response more suitable than the type of weak environmental relevance afforded under sections 172 and 417.

I propose a regime of non-financial CER reporting more exacting than that which is presently required. This reporting obligation should be entirely separate from financial reporting. Crucially, this report should form an integral part of a robust EMS which might be loosely based on EMAS.¹²⁵ For both practical and symbolic reasons, responsibility for instituting and ensuring the proper implementation of an EMS should be mandated by company law via the codified regime of directors’ duties. In making

¹²¹ That is, certification has a kind of internal reputation effect, mirroring the external effects emphasised by Prakash and Potoski, *The Voluntary Environmentalists* (n 76), pp 598 and 619.

¹²² Perez *et al*, ‘The Dynamic of Corporate Self-Regulation’ (n 115), p 598.

¹²³ Ibid., p 620. This dovetails with findings elsewhere, which suggest that EMSs can improve the alignment of profit motives with environmental benefits, see Prakash and Potoski, *The Voluntary Environmentalists* (n 76), p 3.

¹²⁴ Of course, this would still interact with other forms of legislative intervention, and ought to be considered as working in tandem with a suite of existing environmental interventions in a pluralistic regulatory regime. As was discussed in Chapter 3, regulatory strategies which make use of a variety of legal tools, are an important hallmark of environmental law. Coglianese makes a similar point regarding the interaction of management-based regulation and other legal norms, (see ‘The Managerial Turn’ (n 74), pp 64-5), mandatory EMSs.

¹²⁵ I do not suggest that the EMAS Regulation should be transplanted in its entirety, nor indeed do I suggest that EMAS is the only appropriate model. Rather, I have outlined the workings of EMAS because it is an existing example of the legal regulation of EMSs. As such, its use herein serves a more illustrative rather than prescriptive function.

this suggestion, I fully accept that there are just reasons for scepticism as to the merits of either mandatory or voluntary EMSs¹²⁶—they are certainly no panacea—and so I do address some of these concerns. On balance, however, I believe a case can be made for at least serious consideration of my proposal.

EMSs versus sections 172 and 417 CA 2006

Before addressing some of the major objections to mandating EMSs, I should first pull together material in the previous two sections to argue why EMSs would be a marked improvement over current company law processes, acknowledging, of course, that there is no one ‘solution’ to the ‘how’ question of environmental relevance.¹²⁷ Recall, first, problems with the section 417 reporting obligation. In particular, I drew a distinction between CSR and non-CSR reporting, with section 417 being an example of the latter. Other commentators have already made compelling arguments for separating these types of reporting. Chiu argues that, given these types of reporting have differing (and potentially diverging) regulatory purposes, they should not be bundled together in a single, non-financial disclosure regime. In particular, the ‘ad hoc disclosure of potential business risks that also happen to be environmental ... in nature is not the same as systematic disclosure of CSR.’¹²⁸ She suggests that a separation of the two paradigms would allow for the proper and detailed development of CSR disclosure, for it ‘to be fashioned into a more specific and sophisticated system of disclosure’. Charlotte Villiers argues along similar lines.¹²⁹

Arguably, however, a reporting obligation of this nature would be much more effective if it were integrated as part of an ‘environmental procedure’ more exacting than section 172. The environmental statement under EMAS is actually a robust CER reporting requirement, much more detailed and defined than the business review in section 417, and not viewed or developed through a shareholder-centric profit prism. In addition, it (appropriately) forms part of a broader integrated environmental process

¹²⁶ See, in addition to references cited below and for example, Michael S Wenk, ‘The European Union’s Eco-Management and Audit Scheme (EMAS): Still a Viable Entity or a Concept Spiraling Towards Obscurity?’ (2009) 6 *Journal for European Environmental & Planning Law* 37; Watson and Emery, ‘a comparative study of EMS’ (n 74); ENDS, ‘EMAS-2 opens for business’ *ENDS Report* 316 (1 May 2001); ENDS, ‘Tackling a crisis of confidence in ISO 14001’ *ENDS Report* 327 (1 April 2002); Cary Coglianese and Jennifer Nash, ‘Bolstering Private Environmental Management’ [2001] (available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=266685).

¹²⁷ See (n 124).

¹²⁸ Chiu, ‘The paradigms of disclosure’ (part 2), (n 51), p 293.

¹²⁹ Villiers, *Corporate Reporting* (n 51), pp 229-30.

which appears to address some of the deficiencies of section 172. Indeed, in comparison to EMAS and ISO 14001, section 172 seems rather half-hearted, and does nothing to ensure that companies go beyond a superficial approach.¹³⁰ EMAS, by contrast, requires the generation not only of a tailored environmental management system which details structures, plans, activities, practices and resources for addressing environmental issues, but also the generation of a top-level environmental policy and an initial environmental review. Importantly, the environmental policy under EMAS requires corporations, top-management specifically, to set environmental *goals* in the form of measurable environmental performance targets and objectives. In view of Parker's call for CSR *processes* geared towards CSR *norms*, this is important and of course lacking under section 172, where the norm to which the process is geared is non-environmental.

In addition, it would seem that a rigorous and mandatory EMS would provide more salience to environmental issues than section 172, in turn suggesting the opening up of space within the corporation for the expression of environmental voice. Recall how the various recursive and iterative processes associated with an EMS can ensure that environmental concerns are given more weight, in turn allowing for the type of discursive expression of varying motivations and ideas that would in theory be suppressed by the financially contingent conscience required by section 172. Importantly, a continual process of reflection seems to create more environmentally sensitive mechanisms to address competing and conflicting economic and environmental demands in such a manner that the economic calculus is not always determinative. As such, both ISO 14001 and EMAS are more appropriately open to corporate / environmental conflicts. Finally, EMAS requires employee-wide participation and that processes and resources be instituted to this effect. As was seen in Chapter 5, this is crucial in the development of cultures amenable to the expression and development of corporate conscience. Again, this is lacking under section 172.

Necessary adjustments to a 'voluntary' model and general issues as to legislative detail

¹³⁰ Of course, CA 2006, s 172 is subject to the minimum objective floor provided in the duty to exercise reasonable care, skill and diligence under s 174 (and s 179 provides that more than one of the general duties may apply).

There is of course legislative detail which would be necessary for the institution of a mandatory EMS. A full consideration of this is beyond the scope of this work and, of course, more appropriately addressed via consultation processes etc. The purpose in this chapter is primarily to outline company law EMSs as an idea, and to give a flavour of why they offer potential benefits. It is worth, however, addressing how some of the bigger issues regarding legislative intervention *might* be addressed, subject to the above proviso.

A mandatory EMS and associated requirements based on EMAS model would of course require some modification in view of EMAS' voluntary nature.¹³¹ EMAS registration acts like a 'goldstar' for environmental performance; firms seek registration as a way in which to differentiate themselves from competitors on the basis of environmental excellence.¹³² As such, certain aspects of EMAS would be inappropriate within a mandatory regime. For example, whilst EMAS requires evidence of full compliance with environmental law (this is a very exacting requirement), a mandatory EMS could have a 'commitment to compliance' requirement, similar to that under ISO 14001.¹³³ Legislation could additionally provide for the acknowledgement of exceptional performance,¹³⁴ and those able to evidence full compliance could still register for EMAS registration, which would continue to run alongside a mandatory regime. Of course, within a mandatory model, the so-called competitive advantages of ISO 14001 or EMAS are lost (the playing field is levelled, at least nationally), although this is actually a potential benefit of mandating given, as will be seen, the scope for external image manipulation via voluntary models.

For both practical and symbolic reasons, I suggest that responsibility for 'instituting and ensuring the proper implementation' of an EMS should be mandated

¹³¹ Again, this discussion is subject to the proviso above (n 125) as to my use of EMAS as illustrative rather than prescriptive.

¹³² Research suggests, however, that the rewards or incentives associated with differentiation may not be great enough to spur voluntary uptake, see Wenk, 'EU EMAS' (n 126). There is some evidence to suggest, however, that even though firms believe that the monetary costs from adopting the system outweigh the benefits, they nonetheless view EMAS as generally successful, see Esben Rahbek Pedersen, 'Perceptions of performance: how European organizations experience EMAS registration' (2007) 14 *Corporate Social Responsibility and Environmental Management* 61.

¹³³ Whilst the ISO 14001 standard encourages firms to comply with and even go beyond the requirements of law, it only requires a commitment to rather than demonstration of regulatory compliance. Compare EMAS, Annex II Part A (ISO14001) with Annex Part B ('ISO 14001+' under EMAS).

¹³⁴ On these types of regulatory approaches and associated enforcement flexibility, see especially Gunningham and Sinclair, *Leaders and Laggards* (n 79).

via the codified regime of directors' duties. As discussed in Chapter 5, top management and, in particular, directors, are crucial as regards their influence over corporate cultures and conscience. Such an obligation imposed at the apex of the corporation would lend support and weight to the EMS, and provide a legal incentive for leadership to ensure that the implementation and operation of a management system is taken seriously throughout the organisation. Directors' duties are of course owed *to the company*. I do not suggest any change to this, and the duty could be judicially policed in a similar way to other duties.¹³⁵ In addition, imposing a duty to ensure the implementation of appropriate environmental procedures avoids some of the problems associated with a more nebulous 'duty to the environment' that might be proposed under an environment-as-stakeholder type of intervention.

However, the environmental process suggested here should be open (rather than closed) to the possibility of tensions between corporate and environmental goals. As already argued, section 172(1)(d) shuts down these tensions. Were an EMS mandated in an ideal reform environment, references to 'the environment' in section 172 should be entirely omitted from any kind of duty to promote the success of the company. Alternatively, such a reference should be placed on the type of semantic equality with shareholder interests, as was the case for employees under section 309 of the Companies Act 1985. Section 309 required directors to have regard to the company's employees *as well as* the interests of shareholders. The phrasing is significant here, given that there is at least a semantic equality between employees and shareholders, and certainly not the immediately noticeable subordinate or instrumental value afforded to stakeholders under section 172.¹³⁶ An environmental variant of this duty would potentially allow limited space for the expression of intrinsic environmental value by permitting some environmentally motivated profit sacrificing

¹³⁵ For example, it is generally recognised that the directors' duty of care (CA 2006, s 174), at least in larger companies, imposes significant procedural requirements. While the decided cases tend to deal with financial concerns, the duty requires the installation, maintenance and supervision of internal controls over employees and operations. See, for example, *In re Barings plc (No 5)* [2000] 1 BCLC 523 and *Equitable Life Assurance Society v Bowley and others* [2003] EWHC 2265 (Comm).

¹³⁶ There was debate as to the precise effect of s 309. Some suggested that since section 309 gave 'no indication' that the interests of employees and shareholders were to be weighted differently, directors were thus required to balance the interests of employees with those of shareholders. Others, in rejecting any notion of balancing, pointed out that s 309 did not affect the 'interests of the company', which continued to be defined by reference to shareholders (see Parkinson, *Corporate Power* (n 1), pp 82-5).

behaviour.¹³⁷ This would also avoid the problematic business case sleight of hand under Enlightened Shareholder Value (ESV).¹³⁸ However, even without these broader amendments to directors' duties, a mandatory EMS would still offer considerable benefits for intra-corporate environmental voice, even within a shareholder-exclusive paradigm of the company, by opening up space within the company for its expression.¹³⁹ As with EMAS and the business review, exemptions and derogations could be included to accommodate SMEs.¹⁴⁰

Negative effects of compulsion and the limits of 'engineering' conscience

There are a number of potential objections to mandating EMSs. As was seen in Chapter 4, CSR discourses are permeated by a voluntary / involuntary dichotomy. Implicit in this dichotomy is that voluntary CSR, in the absence of state-originating legal compulsion, affords a certain amount of beneficial flexibility. On this basis, it follows that mandatory requirements can be positively harmful to CER efforts. In the context of EMSs specifically, Coglianese and Nash suggest that 'compulsion might ... fail to promote (and could even hurt) earnest efforts by firms to look for ways to go beyond compliance with existing regulations.'¹⁴¹ Kagan similarly suggests that while mandatory requirements may work so as to induce '*accountability* according to law, they may tend to undercut the continuing exercise of *responsibility* and improvements

¹³⁷ This would be a defence for directors in that they would be permitted to have regard to the environment other than instrumentally for shareholder wealth generation. Given the limited enforcement routes, this would be a 'shield' for director decision-making rather than a 'sword' for potential litigators. As with s 172, the s 309 duty was owed to the company, so that in turn any wrong was against, and the cause of action vested in, the company (on this, see Chapter 5). Employees therefore had no remedy under the provision. See generally LS Sealy, 'Directors' Wider Responsibilities - Problems Conceptual, Practical and Procedural' (1987) 13 Monash University Law Review 164, p 177; Andrew Keay, 'Section 172(1) of the Companies Act 2006: an interpretation and assessment' [2007] Company Lawyer 106; p 109; Ben Pettet, 'Duties in Respect of Employees under the Companies Act 1980' (1981) 34 Current Legal Problems 199, pp 200-4.

¹³⁸ As was discussed in Chapter 5. As noted by Parkinson, *Corporate Power* (n 1), p 82, there is 'inevitably' conflict between the interests of employees and shareholders, so that the duty to have regard to employees is not necessarily harmonious with, or instrumental to, shareholder wealth generation. Win-win rhetoric, therefore, did not underpin s 309.

¹³⁹ As was seen in some of the empirical evidence concerning ISO 14001, see above. On shareholder exclusivity as to corporate goal and voice, see Chapter 5.

¹⁴⁰ Regarding accommodating SMEs within EMAS, see above (n 103). On some of the difficulties SMEs face in EMAS registration or ISO 14001 certification, see V Biondi, M Frey, and F Irlando, 'Environmental management systems and SMEs: motivations, opportunities and barriers related to EMAS and ISO 14001 implementation' (2000) 29 Greener Management International 55; Ruth Hillary, *Small and Medium Sized Enterprises and the Environment: Business Imperatives* (Sheffield: Greenleaf Publishing, 2000).

¹⁴¹ Coglianese and Nash, 'Management-Based Strategies' (n 110), p 19.

in performance that the best self-regulatory regimes generate.’¹⁴² There is a concern that mandating EMSs, or ‘mandatory CER’ more broadly, may simply generate tick-box, formalistic compliance rather than real environmental reflection and thinking,¹⁴³ whilst also, in their rigidity, constrain otherwise beneficial efforts to behave responsibly. Relatedly, some argue that the success of EMSs lie in what their ‘voluntary’, rather than mandatory, uptake implies: true managerial and organisational commitment to environmental values.¹⁴⁴ In this sense, a voluntary EMS is symptomatic of an environmental conscience, rather than causative, suggesting in turn that mandatory EMSs might be ineffectual in the engineering of corporate conscience.

In the context of EMSs, the inflexibility argument lacks force. An EMS should not be characterised as inflexible simply because it is supported by a mandatory, involuntary framework. It is true that the EMAS regulation is detailed. However, in accordance with the general thrust of reflexive law, there is room for companies to tailor and design their own approaches. Indeed, as already mentioned, a management system will necessarily be idiosyncratic and company-specific, and the generation of an environmental policy allows for a series of self-set targets, allowing corporations to take ownership over their environmental processes.¹⁴⁵ In this sense, mandating an EMS might be more appropriately characterised as facilitative, rather than a form of pure compulsion typically associated with direct regulation.

Moreover, we ought to be very careful in assuming that ‘voluntary’ uptake is symptomatic of a commitment to environmental concerns or an indicator, in and of itself, as to the existence of a strong corporate conscience. Of course, in some instances, voluntary uptake will equate to some form of environmental commitment or conscience, but equally, some firms adopt EMSs for less palatable reasons of external image manipulation and other motivations not easily characterised as conscience-

¹⁴² Robert A Kagan, ‘American Adversarial Legalism and Intra-Corporate Regulatory Systems’ (paper presented at the annual meeting of the Law and Society Association, Aspen, Colorado (1998)), quoted in Coglianese and Nash, ‘EMSs and the New Policy Agenda’ (n 80), pp 21-2 (original emphasis).

¹⁴³ See, for example, Richard MacLean, ‘Environmental management systems: do they provide real business value?’ [2004] *Environmental Protection* 12, p 13; Coglianese, ‘The Managerial Turn’ (n 74), p 62.

¹⁴⁴ See, for example, Coglianese, ‘The Managerial Turn’ (n 74), p 62.

¹⁴⁵ Indeed, one of the virtues of EMSs over traditional regulation is that they are ‘adaptable to the organisations that create and use them’, see Coglianese and Nash, ‘EMSs and the New Policy Agenda’ (n 80), p 4.

driven.¹⁴⁶ In addition, that some firms have differing takes on the values and goals underpinning environmental regulation (ranging between hostility; reluctant, ritualistic or formalistic acceptance; and embedded, internalised or ‘spirit’ oriented compliance) is a criticism which applies to *all* types of EMSs indiscriminately, voluntary or mandatory, and indeed, to all forms of environmental law.¹⁴⁷ In any case, as seen in Chapter 4, it is highly questionable whether we can describe the generation of an EMS as ‘voluntary’ simply because it is not legally required. ISO 14001 certification in particular has become close to a de facto market entry-requirement for many firms.¹⁴⁸ And if the rationale for EMS adoption is market access, then a commitment to environmental protection is not necessarily a driver.¹⁴⁹

That an EMS will be unable to ‘engineer’ corporate conscience (in the same way regulators should refrain from assuming they can engineer certain ‘cultures’)¹⁵⁰ is a more valid criticism. However, it is also not quite the argument being made here. In Chapter 5, I argued that the starting point in locating corporate conscience and intra-corporate environmental voice is to look to the *real* individuals who comprise business organisations. There is plenty of evidence to suggest that these individuals are other-regarding and (potentially) environmentally conscious. In this sense, conscience and environmental voice are already there within corporations, the problem is that they are muted by a system of organisation, hierarchical and market constraints. As such, my argument is not that EMSs will directly engineer a corporate conscience. Rather, I suggest that the various iterative processes of an EMS, implicating a range of employees across the organisation, have the potential to open up a deliberative space for this conscience to be expressed. In this sense, an EMS amplifies environmental voice within the company, rather than engineering voice of pro-environmental behaviour more generally. Awrey, Blair and Kershaw make a similar argument regarding personal ethics in the context of financial irresponsibility; meta-regulation,

¹⁴⁶ See, for example, Coglianese and Nash, ‘Bolstering Private Environmental Management’ (n 126) on the limits of the mere presence of an EMS as an appropriate metric for differentiating among firms.

¹⁴⁷ See, for example, Robert A Kagan and John T Scholz, ‘The “Criminology of the Corporation”’ in Keith Hawkins and John Thomas (eds), *Enforcing Regulation* (Boston: Kluwer-Nijhoff Publishing, 1984); Gunningham *et al*, *Shades of Green* (n 6); Gary Lynch-Wood and David Williamson, ‘The Receptive Capacity of Firms—Why Differences Matter’ (2011) 23 *Journal of Environmental Law* 383. See also Coglianese and Nash, ‘Bolstering Private Environmental Management’ (n 126), pp 8-9 outlining a range of potential reactions to mandatory EMSs.

¹⁴⁸ Prakash and Potoski, *The Voluntary Environmentalists* (n 76),

¹⁴⁹ Krut and Gleckman, *ISO 14001* (n 94), p 90.

¹⁵⁰ As was discussed in more detail in Chapter 6.

they suggest, may give personal ethics the room they need to ‘breathe’.¹⁵¹ At the very least, it is arguable that an EMS, in the salience it affords to environmental concerns, opens this space to a greater extent than the loose environmental procedures currently mandated within company law.

Inexperience

There is a fair argument that my proposal might be premature in view of the relative inexperience with both reporting and EMSs.¹⁵² Whilst it is true that reporting and EMSs are still in their (relative) infancy,¹⁵³ this is not a reason in itself against mandating. All legislative developments are arguably susceptible to such criticisms, and were this argument always successful, there would be no experimentation with new regulatory approaches whatsoever. As regards the infancy of CSR reporting, the forward-looking aspects of financial reporting are themselves less well understood than traditional financial reporting, despite forming part of the business review under section 417.¹⁵⁴ In addition, the development of reporting guidelines, measures and metrics, such as those under Global Reporting Initiative (as just one example),¹⁵⁵ do mean that reporting expertise is developing and there already exists a reasonable pool of experience on which regulatory design could draw. Regarding EMSs, many firms already have some form of EMS in any case; so issues of inexperience, if any, are more to do with the inexperience of regulators / legislatures, rather than the would-be regulated community. Experience could be gained through a trial period with a limited number of companies, and could conceivably run ahead of any decisions as to legal compulsion across the board.

¹⁵¹ Dan Awrey, William Blair, and David Kershaw, ‘Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?’ (2012) 38 Delaware Journal of Corporate Law (available at SSRN: <http://papers.ssrn.com/abstract=2157588>), p 4.

¹⁵² See, for example, Coglianese, ‘The Managerial Turn’ (n 74), p 73: ‘Additional empirical evaluation is needed to understand better precisely when and how to use management-based strategies’. Note, however, that Coglianese is not dismissive of EMSs, as ‘management-based strategies have shown themselves to be a promising instrument in the policy toolkit’.

¹⁵³ Horrigan, *CSR in the 21st Century* (n 39), p 19.

¹⁵⁴ The UK Accounting Standards Board’s first review of narrative reporting suggested that companies were able to describe their present market position, but coped less ably with the future aspects. Horrigan, *CSR in the 21st Century* (n 39), p 62.

¹⁵⁵ Global Reporting Initiative, *Sustainability Reporting Guidelines* (GRI, Boston, 2000). Although it should be noted that there is some disagreement as to how much of the GRI is business—as opposed to society—regarding. Horrigan, *CSR in the 21st Century* (n 39), p 134, Villiers, *Corporate Reporting* (n 51), pp 241-3.

Comparability, legitimacy and credibility

If most companies already have some form of EMS, why is legal compulsion necessary at all? Under contractarian theorising, given that ISO 14001, for example, is a de facto requirement for many firms, it might be reasoned that market bargaining has achieved the same result in any case. Based on the contractarian normative thesis (governance terms should reflect what most corporate contractors do or would bargain for), one might argue that company law ought to reflect this. My response, however, is different, centring on issues of comparability, legitimacy and credibility.¹⁵⁶ More so for reporting than for EMSs, the proliferation of standards, coupled with the sheer variance with which major companies approach corporate responsibility reporting,¹⁵⁷ suggests that there is some scope for harmonisation.¹⁵⁸ Indeed, the existence (and in the inadequacies) of the business review, discussed above, display the need for regulatory oversight and related guidance. The key to the value of reporting as a CSR mechanism is that it provides the necessary information for external scrutiny and accountability. Without *comparable* and transparent reporting,¹⁵⁹ the value of CER disclosure must be severely diminished. A particularly valuable role for government (and probably one only government can achieve) would, through a mandatory CSR disclosure obligation, ensure some level of uniformity to CSR reporting.¹⁶⁰

My arguments relating to legitimacy and credibility are illustrated by a comparison of EMAS and ISO 14001. For two main reasons, EMAS has tended to avoid these types of criticisms more routinely levelled against ISO 14001. First, it is significant that EMAS was developed within the comparatively more democratic forum of the EU, including a broader coalition of different interest groups than the 'private' confines of the ISO.¹⁶¹ The ISO is a non-governmental organisation. Its membership comprises non-governmental national standards institutes (such as the

¹⁵⁶ Of course, comparability / uniformity is accepted as a valid reason for (limited) state intervention in private ordering, as it facilitates comparisons and thus assists private selection methods. See Jeffrey N Gordon, 'The Mandatory Structure of Corporate Law' (1989) 89 Columbia Law Review 1549.

¹⁵⁷ Horrigan, *CSR in the 21st Century* (n 39), p 186. There is of course some convergence with EMSs, given that ISO 14001 is the most widely adopted environmental standard in the world. As will be seen, the arguments for credibility and legitimacy apply more forcefully in the context of mandatory EMSs than the issue of comparability.

¹⁵⁸ Villiers, *Corporate Reporting* (n 51), p 245-6.

¹⁵⁹ Gunningham and Sinclair, *Leaders and Laggards* (n 79).

¹⁶⁰ Recall, as explained above, the problems experienced with this under the business review.

¹⁶¹ See Prakash and Potoski, *The Voluntary Environmentalists* (n 76), pp 25, 84 and 169 and for a damning critique of ISO 14001's lack of democratic legitimacy and the negative environmental consequences of this, see Krut and Gleckman, *ISO 14001* (n 94).

BSI), and the standards and codes it promulgates seek primarily to facilitate trade and commerce.¹⁶² As such, even though it is non-governmental, the ISO is not an NGO in the sense of being an activist group or coalition seeking a specific (societal or environmental) policy outcome. In essence, the ISO is an international industry association.¹⁶³ The ISO does ‘consult’ various participants, including firms, regulators and other stakeholders, but in the development of ISO 14001, there was a strong sense on the part of NGOs that they were effectively left out of the ISO drafting and negotiating processes.¹⁶⁴

As such, outputs of the ISO are not subject to the type of public scrutiny associated with state-originating law. As argued in Chapter 4, within the decentred understanding of regulation, this is not *necessarily* problematic. However, we ought to be particularly mindful of the risks also outlined in that chapter as to the dominance of corporate actors in decentred regulatory space. This problem was exacerbated by the mismatch between the strength of corporate and environmental voice, providing scope for the crowding out of environmental concerns in particular. The ISO is a classic example of decentred rule making, but Krut and Gleckman argue forcefully that the environmental norms underpinning the *idea* behind ISO 14001 were crowded out in the ISO’s rule-making forum.¹⁶⁵ As such, ISO 14001 in some ways was a step backwards for environmental voice in decentred regulatory space.¹⁶⁶ In view of this, the fact that large numbers of companies are certified (or, as will be seen, ‘self-certified’) as ISO 14001 compliant provides little reassurance as to the strength of an environmental voice provided within corporation. Some governmental oversight seems duly appropriate, therefore.

Secondly, the auditing and verification process associated with EMAS addresses some of the credibility problems associated with ISO 14001. ISO 14001 does control some of the shirking and free riding typically associated with self-

¹⁶² Krut and Gleckman, *ISO 14001* (n 94), p 3. For a more detailed overview of membership rules, see pp 43-7.

¹⁶³ *Ibid.*, p 17.

¹⁶⁴ See Krut and Gleckman, *ISO 14001* (n 94), pp 23-5 on the various barriers to NGO’s effective participation; developing countries were similarly excluded.

¹⁶⁵ In fact, they argue more strongly that, in the process of its development, ‘the creators of ISO 14001 were *uninterested*’ in a host of environmental imperatives, especially calls made for broader participation in environmental decision-making, Krut and Gleckman, *ISO 14001* (n 94), pp 1 and 29 (emphasis added).

¹⁶⁶ See, for example, J Cameron, ‘ISO 14001: Globalization and the trading system’, keynote paper ISO 14001: Regulation, Trade and the Environment (July 1996, Australian Centre for Environmental Law, Canberra, Australia), quoted in Krut and Gleckman, *ISO 14001* (n 94), p 40.

regulatory regimes by requiring those who wish to be ‘members’ to receive certification upon an external audit (and in order to retain membership, surveillance by an auditor at least annually, together with a complete re-audit and re-certification every three years). This external audit identifies and excludes members who fail to adhere to the standard.¹⁶⁷ However, while the ISO strongly encourages firms to receive third party audit and certification, firms are (problematically) permitted to *self-audit* and *declare* themselves to be in compliance.¹⁶⁸ This is impermissible under EMAS. Generally, ISO 14001, unlike EMAS, leaves core components (dangerously) to be determined within the realm of corporate discretion. This includes not only external verification and evaluation elements, but the extent to which details of the EMS and associated elements (such as the statement and results of audit) are made public. It is not unreasonable to suppose that the more exacting requirements of EMAS when compared with ISO 14001, particularly its weaker credibility requirements, are at least in part an explanation as to EMAS’ comparably lower uptake.

Auditing and verification is of course no panacea. As was seen above with respect to the business review, this is the case even in the context of governmental, as opposed to ‘private’, regimes. However, research does suggest that if done properly, and situated within stakeholder-based institutions, audits can be an effective (and important) tool in governance processes.¹⁶⁹ In line with the calls made in Chapter 4, there is a need for continual governmental involvement. Indeed, given the inherent flexibility in the way in which a company ‘complies’ with an EMS, some regulatory

¹⁶⁷ Prakash and Potoski, *The Voluntary Environmentalists* (n 76), p 88. The ISO itself does not operate the certification process; rather, one of more than 720 registration bodies gives written assurance of conformity to specific requirements, which in turn acts as ISO 14001 certification. These certification bodies require accreditation, ‘formal recognition’ that they are ‘competent to carry out specific tasks ... of ISO 14001 certification in specific business sectors.’ Again, this accreditation is not by the ISO itself, but an accreditation authority in respective nation states (e.g. the UK Accreditation Service (UKAS)). An audit carried out by an accredited third party is an extensive and rigorous process, usually carried out by a specialised private consulting firm.

¹⁶⁸ Gunningham and Sinclair, *Leaders and Laggards* (n 79), p 92. Krut and Gleckman, criticise this expansion of the concept of ‘audit’ to include routine internal monitoring, arguing that it abandons a commitment to audit ‘in the traditional compliance sense’ (see Krut and Gleckman, *ISO 14001* (n 94), p 13). In addition, the audit criteria ensure only that the EMS standards are met; they do not assess environmental performance. In contrast, EMAS requires a commitment to continual improvement of environmental performance and the auditing thereof. EMAS is thus both performance- and systems-based, whereas ISO 14001 is merely the latter. It would seem appropriate that environmental performance goals within mandatory EMSs should be at least set, as it gives something for the corporation to aim for. Appropriate legislative detail could appropriately accommodate a failure to achieve these self-targets, such as evidence of due diligence coupled with a duty ‘comply or explain’.

¹⁶⁹ Sasha Courville, ‘Social Accountability Audits: Challenging or Defending Democratic Governance?’ (2003) 25 Law & Policy 269.

oversight would be welcomed.¹⁷⁰ In short, enforcement of the EMS matters,¹⁷¹ but perhaps a form of decentred enforcement. Most obviously, the role for government might logically target the accreditation processes for verifiers, at least as a starting point,¹⁷² as well as ensuring that the enforcement of EMSs is carried out by a properly constituted and well-resourced oversight body.

Environmental integration and strong environmental relevance

Finally, embedding a serious environmental process in *all* corporations would address some of the problems with reflexive environmental law generally and more adequately fulfil calls made for environmental integration. Whilst procedural approaches are used extensively in environmental regulation, they tend to be rather *ad hoc*, applied in problem-specific contexts and not in an integrated or systematic manner. For example, in the waste sector, there are a whole host of reflexive or procedural obligations.¹⁷³ A mandatory EMS would be a unifying feature for a range of environmental compliance obligations and environmental issues more generally, which in turn would assist corporations in achieving more systematic approaches to addressing environmental impacts. In addition, recall how in Chapter 4, it was argued that the shareholder or profit-focussed goals of company law, particularly section 172, could act as a barrier to the functioning of external environmental regulation, including reflexive approaches to environmental law. As has already been seen, EMSs have the potential to open up corporations to non-profit values, in turn having the potential to enhance the effectiveness of the ‘external rules of the game’.

Were corporate legislation silent as to environmental matters (as was the case pre-2006), then the case for EMS-inclusion might have been weaker. In my view, however, reforms under the Companies Act 2006 make the case stronger. It seems only appropriate that affording relevance to the environment in corporate decision-making be done properly, affording a *strong(er)*, rather than weak, form of

¹⁷⁰ Coglianese, ‘The Managerial Turn’ (n 74), p 70, making a similar point, whilst also highlighting some of the problems which might be encountered in ‘enforcing’ EMSs. See also Coglianese and Nash, ‘Bolstering Private Environmental Management’ (n 126), p 8 arguing that reduced / non-existent regulatory oversight ‘may actually weaken the EMSs that firms implement, because incentives for using EMSs aggressively to achieve positive outcomes may be reduced’.

¹⁷¹ See Awrey, Blair, and Kershaw, ‘Between Law and Markets’ (n 151).

¹⁷² Recall that a firm’s compliance with the EMAS regulation must be validated by a verifier. These verifiers must themselves be accredited annually, see above (n 109).

¹⁷³ See, for example, the Site Waste Management Plans Regulations and Extended Producer Responsibility regimes, outlined in Chapter 3.

environmental relevance. EMSs of course are no panacea. For all the reasons above, however, they are at least superior to the current state of affairs. Otherwise, company law should remain environmentally silent. This may appear inappropriately absolutist, but as I have already argued, section 172, far from being a positive development from an environmental perspective, is actually unhelpful.

6. Conclusion

In this chapter, I sought to advocate one potential regulatory intervention to address the ‘how’ question of corporate environmental relevance. In previous chapters, I sought to build a case as to why this question even matters. I suggested that the ability for company law and corporate decision-making to properly accommodate an environmental voice in addition to those found external to the company via the market and regulation was central to the normative appeal of CER; there ought to be a normative space for CER within company law. However, as was seen in Chapter 4, company law adopts a position of (at worst) environmental irrelevance and (at best) weak, but inadequate, environmental relevance. Given the limitations of the market and regulatory voices for the environment, I argued that both of these positions are untenable. Thus, in order to enhance the perceived normativity of CER generally, I suggested the need for an intra-corporate environmental voice; the representation of environmental concerns both within company law, as well as within corporate decision-making. In short, I made a case for strong(er) corporate environmental relevance.

In the previous chapter, I suggested there is already the raw material of intra-corporate environmental voice in the real individuals who comprise business organisations, who in turn have the ability to provide a form of organisational conscience. However, due to the suppression of individual conscience by a range of organisational, hierarchal and market factors, corporate conscience was limited. Finding ways for this conscience to breathe would therefore appear to be a powerful answer to the ‘how’ question of environmental relevance. Whilst I argued that procedural regulation would appear to offer the most appropriate form of governmental intervention for this purpose, current environmental procedures under the Companies Act 2006 are, for a number of reasons, inadequate.

As such, I advocated the mandatory institution of more robust procedural interventions, to provide environmental relevance both within company law and corporate decision-making. EMAS III, with its integrated reporting and environmental managers systems, offers one potential model for legal regulation in this regard. Environmental management systems are of course no panacea, but emerging empirical evidence displays their powerful potential in providing the room for the expression of intra-corporate environmental voice. Whilst there are arguments against mandating EMSs, I sought to defuse some of these concerns, suggesting that the inadequate procedures currently mandated by company law bolsters an argument for the consideration of more robust alternatives.

Chapter 8

Conclusions

This thesis asks two related questions. The first question is concerned with justifying corporate environmental responsibility. Should corporations play an active role in the regulation and governance of environmental protection? In Part I of the thesis, I argued that, in view of the limitations of governmental control, there was a distinct normative and pragmatic space for CER within the increasingly decentred nature of environmental regulation and governance. While the ability of corporations to ‘regulate’ for the environmental good might be quite potent indeed, this space or justification for CER is limited. In particular, my concern is that the dominance of corporations in decentred regulatory space has the potential to crowd out environmental interests. As such, there is a case for a healthy dose of caution and scepticism regarding CER, together with a continuing role for governmental oversight.

The second question is concerned with encouraging corporate environmental responsibility. If CER can be justified, how might this role for corporations in the regulation and governance of environmental protection be encouraged, aided or enhanced through legal intervention? In view of the inadequacies of voices for the environment *external* to the corporation (the market and regulatory voices), I argue that company law and corporate decision making should be opened up to the norms of environmental protection. In particular, this should be done through regulatory interventions which ‘amplify’ intra-corporate environmental voice. ‘Regulating the inside’, including procedural regulation which forces companies to ‘think’, are most appropriate in this regard. As such, mandatory Environmental Management Systems offer a significant improvement over the current state of affairs of Enlightened Shareholder Value (ESV).

1. Justifying CER and decentred regulatory space

I explained the importance of the first research question (justifying CER) in Chapter 2, where I outlined the limitations of the main justification for CSR, the business case—the claim that behaving responsibly *pays*. When viewed in terms of profits, environmental protection is potentially a more credible corporate concern than would otherwise be the case. As such, the business case might be seen as playing an important role in legitimising CER in the corporate world. Furthermore, despite the empirical uncertainty as to a generalised business case, considerable opportunities for environmental and financial win-wins exist. Barriers remain, in particular regarding awareness, but encouraging businesses to seek profitable ways in which to reduce their environmental impact would seem a sensible strategy.

However, we should operate caution in the reliance we place on the business case, both as a justification for CER, as well as a basis for regulatory intervention seeking to bring about more responsible corporate behaviour. As a generalised claim, the business case assumes the easy compatibility of environmental protection and corporate goals. As was argued, rhetoric to this effect is potentially unhelpful. A classic type of win-win, resource efficiency, illustrates how business case strategies may involve only relatively minor changes to the fundamentals of an environmentally degrading but nonetheless deeply embedded business status quo. Broader or deeper structural and institutional changes are difficult to contemplate within the business case. In addition, the instrumental and purely economic value afforded to environmental protection is problematic, not least because it places reliance on market rather than political impetus for enhanced responsibility.

In view of the inadequacies of the business case, I posit a qualitatively different justification for CER, one that seeks to understand CER in the context of law and regulation. In Chapters 3 and 4, I outlined how the positive and normative implications of decentred regulation apply to CER. Given the limitations of governmental regulation, ‘regulation’ is no longer the preserve of the government, and CSR is merely a positive manifestation of this. In addition, the normative implications of decentred regulation can also be extended to provide support for CER. Regulation is no longer the preserve of government, but in view of the limitations of governmental regulation, *nor should it be*. In particular, I suggested that CER is capable of responding to some of the challenges experienced when seeking to achieve behaviour

change through government interventions alone. These challenges include complexity, fragmentation, actor-autonomy and interdependence.

The problem of waste management illustrates the very broad phenomena of decentring explained by regulation scholars, and highlights the existent but limited normative and practical space for CER. While ensuring the safe handling of waste seems appropriately dealt with by direct regulation (though not without remaining challenges), the challenge of moving up the waste hierarchy to reduce waste arisings highlights more starkly the problems created by, for example, the fragmentation of information and control. This has resulted in a range of creative governmental ‘regulation’, not limited to command and control. However, despite the heavy governmental regulation of waste (through command or otherwise) there nonetheless remains considerable space for CER. This includes the regulatory ‘space’ left by the limitations of governmental control, as well as those aspects of waste generation only problematically addressed (if at all) by governmental interventions.

In particular, the ability of large corporations to ‘regulate’ is, in some contexts unparalleled. This is particularly the case in the context of consumers and supply chains. However, not all of this regulation is necessarily to be welcomed. The negatives of CER are exhibited quite powerfully by the supermarket control over the food supply chain, with poor outcomes for the environment in the quantity of waste arisings. Similarly, as choice architects, corporations with a consumer face also have massive (framing) influence over the everyday consumption patterns of individuals. Again, this places corporations in a unique position to regulate for the environmental ‘good’, though of course it is not necessarily the case that they will. CER’s normativity is, therefore, limited. As such, there is just reason for caution in embracing CER, and a corollary case for continuing governmental oversight. Indeed, the dominance of corporations in regulatory space is especially worrying in the context of CER. The scope for the crowding out of environmental concerns seems especially acute, not least because of the mismatch between corporate and environmental voice in decentred regulatory space.

2. Encouraging CER – the environmental proceduralisation of company law

Whilst I explain the idea of space for CSR by reference to the existing concept of regulatory space, I present the idea of environmental voice somewhat more tentatively. As indicated, the idea responds to my dissatisfaction, both practical and intuitive, with conceiving of the environment as a corporate ‘stakeholder’. Instead, I suggest it makes more sense to trace within CSR literature, as well as within orthodox company law and theory, two main locations where environmental interests are represented. First, via the market. Second, via regulation (where regulation is understood in broader, decentred terms). Problematically, the market voice for the environment tends to be privileged, as evidenced by the contemporary significance of the business case within CSR literature, and by the centrality of bargaining between market actors pursuant to the orthodox, contractarian theory of the firm.

The strengths and weaknesses of the market and regulatory voices, discussed in Chapters 2 and 3-4, respectively, underpin the broad case I make against the acceptability of the theoretical orthodoxy that regards the environment as irrelevant to both company law and corporate decision-making. As discussed, there are two aspects of this environmental irrelevance. First, corporate environmental irrelevance is the corollary of shareholder exclusivity in matters of corporate governance and decision-making. The environment is not relevant to the internal operations of the company. Second, environmental irrelevance is part of a broader conceptualisation of the purpose of corporate law as merely facilitative of private interactions rather than ‘regulatory’.

However, when CER debates are reframed to understand the challenges of properly accounting for the environmental interest within the business world—as a struggle for appropriate environmental advocacy or ‘voice’—then the UK position of corporate environmental irrelevance starts to look inadequate. ESV, despite its claims of ‘inclusion’, provides very little room for the full consideration of environmental interests. This, in turn, diminishes my broader argument that CER can be justified to the extent that it fits, or that there is ‘space’ for it, within existing modes of governance. However, in justifying a position of environmental irrelevance, too much is assumed as to the adequacy of a ‘voice’ for the environment *outside* or *external* to company law and corporate decision making. As such, a major problem with both the acceptability of CER, as well as company law more generally, is the lack of what I termed intra-corporate environmental voice.

In Part II, I locate intra-corporate environmental voice in the real individuals who comprise business organisations. These real individuals, rather than *homo economicus*, are generally prosocial or other-regarding, and exhibit this environmentally in the form of normative commitments to environmental compliance. In order to account for the collective nature of corporations, and the way in which a range of organisational, hierarchical and market factors constrain or mute individual conscience, I argued that the organisation itself has a form of conscience *of its own*. In view of dominance of organisational factors, intra-corporate environmental voice must thus be properly understood as residing in the organisational conscience of the corporation itself, rather than individuals.

I interpreted the organisational and market constraints on individual conscience as a combined set of factors which mute environmental voice. In the final Chapter, I thus turned to the question of how appropriate regulation might rather serve to amplify this environmental voice, and give environmental corporate conscience room to breathe. Whilst I argued that procedural regulation would appear to offer the most appropriate form of governmental intervention for this purpose, current environmental procedures pursuant to the Companies Act 2006 (CA 2006) are, for a number of reasons, inadequate. As such, I advocated the mandatory institution of more robust procedural interventions, to provide environmental relevance both within company law and within corporate decision-making. The EU's Eco-Management and Audit Scheme (EMAS), with its integrated reporting and environmental management system, is a useful example of the legal regulation of Environmental Management Systems (EMSs). EMSs are of course no panacea, but emerging empirical evidence displays their powerful potential in providing room for the expression of environmental concerns within company decision making and, hence, the amplification of intra-corporate environmental voice.

3. False dichotomies and questions of legitimacy

In the introduction, I alluded to a number of sweeping dichotomies permeating CSR debates. These include *voluntary v. involuntary*, *compliance v. beyond compliance*, and *stakeholders v. shareholders*, all of which point to a more overarching

‘public/private’ divide. It is my contention that looking at CSR in the context of decentred regulation exposes the falsity of these dichotomies, giving way to the possibility of more nuanced and realistic understandings of CSR. Importantly, the decentred understanding of regulation allows for the diffusion of the two most visible critiques of CSR. First, that CSR is largely irrelevant to company law. Second, that CSR is illegitimate as a matter of democracy. At the root of both of these critiques is some recourse to a clear delineation between the ‘public’ and ‘private’ spheres, which in decentred regulatory space, becomes much more difficult to discern.

The *involuntary v. voluntary* and *compliance v. beyond compliance* dichotomies are closely related, being the sharp distinctions central to most understandings of what ‘counts’ as CSR. Recall the narrower definition of CSR, where CSR is restricted to what corporations do voluntarily in the absence of compulsion from state-originating law. CSR thus refers to ‘beyond compliance’ behaviour, and ‘begins where the law ends’. The centrality of compliance in these definitions implies command and control or direct regulation, involving a fixed and definable compliance standard beyond which CSR kicks in. However, as explained in Chapter 4, the idea of CSR being voluntary or beyond compliance ignores the increasingly decentred nature of environmental regulation. It is not clear that the ‘beyond compliance’ element does any real analytical work in areas marked by mixed and decentred regulation. In these contexts, the term ‘beyond compliance’ can in fact be descriptively redundant, and even disingenuous. This is the case in waste reduction. With the exception of extended producer responsibility regimes, companies are under no quantitative waste reduction obligations. There is no general ‘compliance’ standard for waste reduction ‘beyond’ which companies might go. At the same time, describing all waste reduction efforts as ‘beyond compliance’ is misleading, given the price put on waste disposal by the landfill tax. If we add to this the type of decentred analysis regulation carried out by a range of non-governmental actors, then describing CSR as voluntary seems similarly inaccurate.

While I argue that CSR should be less concerned with the divide between compliance and beyond compliance, it does not follow that we should ignore state-originating law (direct regulation or otherwise). In particular, if CSR continues to imply some beyond compliance component, then the *absence* of law matters, and this absence warrants scrutiny. While the reform proposal I make is driven by a shift in the

nature of the second research question (ways in which to open up company law to the overall norm of environmental protection in an integrative manner), the so-called ‘external’ regulatory environment remains significant. As was suggested in Chapter 4, one might suppose that the lack of more robust measures to address the large quantities of pre-consumer food waste results from inappropriate supermarket dominance in decentred regulatory space. A mandatory reporting requirement seems an obvious regulatory intervention here, given accurate information is a prerequisite for the external scrutiny of corporate activities. At the same time, this type of information would come within a robust EMS, particularly because it requires the inclusion of indirect environmental effects (namely, those within the supply chain).

There are also implications for contractarian thinking when taking a broader definition of ‘regulation’. As was seen in Chapter 5, contractarian (and other) corporate theories often seek to insulate the corporation from broader societal or environmental goals on the basis of a sharply drawn public/private divide. However, in decentred regulatory space, regulation is positively and normatively no longer the preserve of governments. In particular, the term ‘regulator’ is expanded to include a number of actors traditionally understood as ‘private’, including companies. Of course, describing the corporation as a ‘regulator’ jars somewhat with the conception of the company as a thoroughly private actor, but by extension it blurs the line of the public/private divide. The decentred understanding of regulation appears therefore to lend support to scholars who have rejected conceptions of the company as a private institution. The normative and positive implications of decentred regulation thus challenge arguments which seek to insulate company law from a whole host of supposedly irrelevant societal concerns, or to emphasise the interests of shareholders over stakeholders.

One of the most trenchant criticisms of CSR is its supposed lack of democratic legitimacy. In view of this, the idea of corporations being ‘regulators’ may be unattractive. However, I argued that rejections of CSR based on democratic legitimacy impliedly rest on this restricted and potentially inaccurate assumption that the roles of public and private actors can be easily distinguished. Indeed, as a result of decentring, ‘legitimacy’ is not necessarily limited to a public democratic mandate. When deconstructing the meaning of ‘legitimacy’ in decentred regulatory space, arguments as to the anti-democratic aspects of corporate activity lose force. Whilst

questions of democracy and the role for governmental oversight remain relevant, questions of legitimacy and associated ‘answers’ are more subtle, nuanced and complex in decentred regulatory space. They are unlikely to be fully understood by recourse to democratic / electoral constructions of legitimacy.

4. Structural critiques, pragmatism and ways forward

The attempt I made to cut through some of these CSR dichotomies is symptomatic of the broader, pragmatic thrust of the thesis. As was seen when seeking to justify CER in Part I, the brand of pragmatism I call for is partly regulatory. I argue that CER has the potential to offer considerable environmental benefits, over and above governmental regulation, which it would be mistaken to ignore. This is not least in view of the potential of corporations as environmental regulators. This argument seeks to appeal to some of the more structural objections to CSR. CSR generally comes with an implicit belief that markets are imperfect. As such, there is a need for additional controls. However, coupled with this implicit belief is an acceptance that private enterprise is not inherently exploitative.¹ This might be understood as the ‘twin hemispheres’ of corporate responsibility.² Capital, poverty, inequality and environmental degradation are all entwined, but CSR must promote capitalism as a solution to key social and environmental issues. The challenge of course is to bridge across, or pull together, these two hemispheres. I argue that pragmatism, together with a rejection of the business case, provide a compromise which allows us to pull these hemispheres together.

As already indicated, I make the pragmatic point partially in response to the admitted criticisms and dangers of CSR, especially objections based on a mistrust of the modern corporation and scepticism about the room for environmental protection in a globalised market economy. I am sympathetic to these positions. Indeed, in Chapter 2, these sorts of concerns informed my own rejection of the business case as a justification for CER. I suggested that an over-reliance on the business leaves CSR

¹ Michael Blowfield and Alan Murray, *Corporate Responsibility: A Critical Introduction* (Oxford: Oxford University Press, 2008), p 56.

² I borrow the phrasing from Raymond W Baker, *Capitalism’s Achilles Heel: Dirty Money and How to Renew the Free-Market System* (Chichester: John Wiley & Sons, 2005).

wide open to legitimate criticism as being little more than superficial greenwash or obfuscatory corporate rhetoric. Such a position allows a much more sinister or dangerous picture of the CSR movement, and its associated discourse, to emerge. At the same time, deep, structural change is difficult to contemplate in the context of the business case. When confining CER to environmental/economic win-wins, we are only tinkering with a status quo, rather than questioning it.

Of course, by offering corporations as part of the solution, my justification for CSR does risk re-emphasising corporate power, and heightens the ability of companies to hijack social or environmental agendas in favour of their own economic interests. In this sense, the argument is not radical or transformative. I present CER as a compromise position in this regard. However, by placing CSR in the context of decentred regulatory space, and dragging it (and associated debates) away from the business case-driven call for responsibility, there is arguably more room for reconfiguration and contestation than would otherwise be the case. The very nature of CSR, with its twin hemispheres, means it is unlikely to be ecological, deeply green or marked by the type of environmental consciousness envisioned by radical environmental discourses.³ These discourses envision a richer connection between individuals and the Earth, and reject arguments that truly sustainable communities can be built within the economic rationalism of the market and capitalism more generally. Shifting to the more political, deliberative forum of decentred regulatory space may not involve radical restructuring, but it arguably provides more room to do so than within the market confines of the business case.

Where does this leave the research agenda? One possible way forward is to consider ways in which UK company law might distance itself from the business case approach to environmental protection. To this end, there is considerable scope for fruitful cross-learning and feedback between corporate and environmental/regulatory lawyers. For example, as was noted in Chapter 5, the orthodoxy of corporation environmental irrelevance seems to rest on the narrow assumption that environmental law equals command and control. On the other side, the impact of company law on the effectiveness of 'external' regulation warrants greater consideration. Environmental lawyers might consider in more detail the scope for company law, together with the

³ See, for example, John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford: Oxford University Press, 2005), Ch 9.

norms and cultural scripts it encourages, to work at cross-purposes to the goals of environmental law. For example, whilst EMSs are an example of regulating ‘from the inside’, the associated environmental regulatory literature makes little, if any, reference to what impact the company law framework might have. Indeed, various structural traps embedded within company law breed irresponsibility into the very form of the company, in particular those aspects of company law and governance which provide for shareholder exclusivity as to corporate goal and voice. As I argued in Chapters 5 and 7, this creates potential barriers to the proper functioning of all sorts of external regulation.

The thesis also raises questions on corporate theory and company law in other ways. In Chapter 6, I suggested that research into conscience and normative commitments to environmental protection might have the potential to soften contractarianism towards CSR. That is, if the associated methodology were to take real individuals, rather than *homo economicus*, as the unit of analysis for hypothetical bargaining. Similarly, work on collective conscience and corporate culture could perhaps breathe life into the otherwise marginalised real entity theory. In addition, as was suggested in Chapter 7, the contrast between real individuals and *homo economicus* exposed the behavioural non-realities of section 172 CA 2006. While real individuals exhibit quite frequently an environmental conscience, even in the context of company decision-making, section 172 arguably mandates something closer to psychopathy.

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