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The Environmental Business Case and Unenlightened Shareholder Value[†]

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Abstract

The business case for corporate environmental responsibility is the claim that behaving responsibly makes financial sense. It is impossible to exaggerate the contemporary significance of this claim, not least in legitimising environmental concerns in the corporate sphere. However, the business case is not without significant empirical and normative limitations, as is illustrated by the corporate environmental problem of supermarket waste. This paper evaluates Enlightened Shareholder Value under section 172 of the Companies Act 2006 in light of such business case limitations. It suggests that section 172, by procedurally mandating the business case for corporate environmental responsibility, is a retrograde step which envisions not enlightened, but rather environmentally unenlightened, shareholders.

Introduction

In this paper, I consider the limitations of the business case for Corporate Environmental Responsibility (CER) and the implications of this for corporate law. The business case is the claim that behaving responsibly makes financial sense; that Corporate Social Responsibility (CSR) pays. Whether this claim is more than mere

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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 paper, I present 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 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 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.

A more normative consideration of the business case is particularly important in view of Enlightened Shareholder Value (ESV), legally instituted in the UK by section 172(1) of the Companies Act 2006, which embeds the business case as a mandatory, procedural corporate law norm. However, when considering these deeper objections to the business case, I suggest that mandatory Enlightened Shareholder Value is a legal development we might have been better off without. And indeed, the problems associated with the business case suggest that, far from being enlightened, the shareholder envisioned under section 172 is *unenlightened*.

This paper begins, in Part 1, by explaining 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. Part 2 explores the two deeper objections to the business case. In order to provide some brief illustration of the issues explored, Parts 1 and 2 make use of examples from the corporate environmental problem of food and packaging waste in the retail grocer sector. Part 3 evaluates ESV in light of objections to the business case for CER.

1. The business case for corporate environmental responsibility

The importance of the business case claim

While there is no strong definitional consensus,¹ 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.² 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.³ This version of 'shareholder primacy' 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.'⁴ While expression of the legal issues in such terms involves oversimplification, this characterisation nonetheless frames much CSR literature.⁵ 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 concerned only with the pursuit of profit or, alternatively, should corporations be subject to broader societal obligations?⁶

¹ See, for example, A McWilliams, D Siegel and PM Wright 'Corporate Social Responsibility: Strategic Implications' (2006) 43(1) *Journal of Management Studies* 1. Indeed, the definitions are numerous; AB Carroll 'Corporate Social Responsibility: Evolution of a Definitional Construct' (1999) 38(3) *Business & Society* 268 identified 25 different ways of defining CSR (see D Melé 'Corporate Social Responsibility Theories' in A Crane, A McWilliams, D Matten, J Moon and DS 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 JH van Oosterhout and PPMAR Heugens 'Much Ado About Nothing: A Conceptual Critique of Corporate Social Responsibility' in Crane et al, above n 1.

² See, for example, K Davis 'The Case for and Against Business Assumption of Social Responsibilities' (1973) 16(2) *The Academy of Management Journal* 312 p 313, describing CSR as beginning 'where the law ends' and N Gunningham 'Shaping Corporate Environmental Performance: A Review' (2009) 19 *Environmental Governance and Policy* 215 p 215. For a multifaceted appreciation of the relationship between CSR and law, see D McBarnet 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability' in D McBarnet, A Voiculescu and T Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2009).

³ M Friedman 'The Social Responsibility of Business is to Increase its Profits' *The New York Times Magazine* (New York: 13 September 1970).

⁴ Friedman, above n 3.

⁵ See, for example, M Blowfield and A Murray *Corporate Responsibility: A Critical Introduction* (Oxford: Oxford University Press, 2008) 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 (P Ireland 'Company Law and the Myth of Shareholder Ownership' (1999) 62(1) *MLR* 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 JE Parkinson 'The Legal Context of Corporate Social Responsibility' (1994) 3(1) *Business Ethics: A European Review* 16; McBarnet, above n 2, pp 22-3. Shareholder primacy is not without positive and normative controversy, and is considered in a little more detail in Part 3, below.

⁶ 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 Who Corporate Managers Are Trustees: A Note' (1932) 45(8) *Harv L Rev* 1365.

It is against this ongoing 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.’⁷ 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.⁸ 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),⁹ improved working conditions (particularly in developing countries)¹⁰ and respect for human rights.¹¹ 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 -- shareholders and society no longer compete.¹²

Empirical evidence for the business case

The literature on the business case is extensive and a thorough overview is beyond the scope of this paper.¹³ However, two separate meta-analyses provide a useful way in to the volume of empirical evidence.¹⁴ While both of these studies indicate an overall positive correlation between CSR and corporate financial performance (CFP),¹⁵ 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.¹⁶ A comparison of the rather different

⁷ D Henderson *Misguided Virtue – False Notions of Corporate Social Responsibility* (London: The Institute of Economic Affairs, 2001) p 128.

⁸ D Vogel *The Market for Virtue – The Potential and Limits of Corporate Social Responsibility* (Washington DC: The Brookings Institution, 2006) pp 17-26.

⁹ See, for example, M McCann and S Wheeler ‘Gender Diversity in the FTSE 100: The Business Case Claim Explored’ (2011) 34(4) *J L & Soc* 542.

¹⁰ See, for example, Vogel, above n 8, ch 4.

¹¹ *Ibid*, ch 6, especially pp 158-9 and references therein.

¹² JD Margolis and JP Walsh *People and Profits? The Search for a Link Between a Company’s Social and Financial Performance* (USA: Psychology Press, 2009) p 5.

¹³ See, for example, J Allouche and P Laroche ‘The Relationship between Corporate Social Responsibility and Corporate Financial Performance: A Survey’ in J Allouche (ed) *Corporate Social Responsibility (Volume 2) – Performances and Stakeholders* (Basingstoke: Palgrave Macmillan, 2006); R Cowe and M Hopkins ‘Corporate Social Responsibility: Is there a business case?’ in J Burchell (ed) *The Corporate Social Responsibility Reader* (Abingdon: Routledge, 2008); EC Kurucz, BA Colbert and D Wheeler ‘The Business Case for Corporate Social Responsibility’ in Crane et al, above n 1; LE Preston and DP O’Bannon ‘The Corporate Social-Financial Performance Relationship: A Typology and Analysis’ (1997) 36(4) *Business & Society* 419; S Zadek ‘Doing Good and Doing Well: Making the Business Case for Corporate Citizenship’ (Report for the Conference Board, New York, 2000).

¹⁴ M Orlitzky ‘Corporate Social Performance and Financial Performance: A Research Synthesis’ in Crane et al, above n 1 and Margolis and Walsh, above n 12. See also SB Banerjee ‘Corporate Social Responsibility: The Good, the Bad and the Ugly’ (2008) 34(1) *Critical Sociology* 51 pp 60-1, relying primarily on these studies.

¹⁵ This is confirmed elsewhere, see, for example, Cowe and Hopkins, above n 13, p 106 and references therein.

¹⁶ See, for example, Allouche and Laroche, above n 13; Cowe and Hopkins, above n 13; Kurucz et al, above n 13; Vogel, above n 8.

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.¹⁷ Conversely, and not unlike other commentators pointing to uncertainty in the empirical evidence,¹⁸ Margolis and Walsh call for caution in the weight attached to the overall positive correlation between CSR and CFP.¹⁹ 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.²⁰ In a similar fashion, Margolis and Walsh encountered 70 different measures of business performance.²¹ These include harder-nosed, traditional accounting measures such as shareholder revenue, but also softer aspects of business performance, including customer attraction, brand value and risk management.²² The sheer volume of variation makes comparison between case studies and surveys difficult, if not impossible.²³

Orlitzky suggests that *environmental* performance seems *negligibly* but nonetheless positively related to business performance.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ Third, there is no agreement as to the existence of systemic negative relationships, either that behaving badly is bad

¹⁷ Orlitzky, above n 14, p 56.

¹⁸ See, for example, the commentators referenced above n 16.

¹⁹ Margolis and Walsh, above n 12, p 13; see also Allouche and Laroche, above n 13; Cowe and Hopkins, above n 13.

²⁰ Margolis and Walsh, above n 12, 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, above n 13; Blowfield and Murray, above n 5, p 135.

²¹ Margolis and Walsh, above n 12.

²² S Zadek, J Sabapathy, H Døssing and T Swift 'Responsible Competitiveness: Corporate Responsibility Clusters in Action' (AccountAbility/The Copenhagen Centre, January 2003).

²³ Margolis and Walsh, above n 12.

²⁴ Orlitzky, above n 14.

²⁵ Blowfield and Murray, above n 5, 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 N Gunningham, RA Kagan and D Thornton *Shades of Green: Business, Regulation, and Environment* (California: Stanford University Press, 2003) ch 5.

²⁶ Cowe and Hopkins, above n 13.

²⁷ Vogel, above n 8, p 30; Blowfield and Murray, above n 5, p 145.

for business,²⁸ or indeed, that behaving responsibly is bad for business.²⁹ But this does not tell us much. Some suggest the lack of evidence for a negative relationship results from a shortage of studies actively researching this hypothesis.³⁰

Understanding business cases - supermarkets and waste

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.³¹ 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.³² Increasingly, it is recognised that win-wins are conditional upon the company itself, the nature of the industry and other situational concerns.³³ 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.³⁴

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.³⁵ Waste reduction offers numerous environmental benefits. It lessens the reliance on environmentally harmful disposal techniques and reduces the demand for raw materials, thus limiting the environmental damage associated with sourcing and transporting virgin materials.³⁶ 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.³⁷ Estimates vary, but UK businesses could achieve cost savings amounting to billions through waste minimisation.³⁸

²⁸ Compare Vogel, above n 8, p xi; Gunningham et al, above n 25, p 69; Allouche and Laroche, above n 13, p 15.

²⁹ JD Margolis and JP Walsh 'Misery Loves Companies: Rethinking Social Initiatives by Business' (2003) 48(2) *Admin Sci Q* 268; Margolis and Walsh, above n 12.

³⁰ Preston and O'Bannon, above n 13; Margolis and Walsh, above n 12, p 16.

³¹ Kurucz et al, above n 13; F Reinhardt 'Market Failure and the Environmental Policies of Firms – Economic Rationales for "Beyond Compliance" Behaviour' (1999) 13 *Journal of Industrial Ecology* 9; NC Smith 'Consumers as Drivers of Corporate Social Responsibility' in Crane et al, above n 1.

³² Vogel, above n 8, p 33; F Reinhardt 'Environmental Product Differentiation – Implications for Corporate Strategy' (1998) 40 *California Management Review* 43; Cowe and Hopkins, above n 13.

³³ See, for example, Cowe and Hopkins, above n 13, p 105.

³⁴ Smith, above n 31; see also Cowe and Hopkins, above n 13, p 109 suggesting that '... the question is not does CSR pay, but when does CSR pay?'

³⁵ In view of space constraints, it was not possible to adopt a second case study. However, many of the conclusions drawn from the supermarket waste study will resonate elsewhere, as I outline briefly later in the paper. It should also be noted that waste also exemplifies ways in which a business case for CER may be partly a function of law. For a fuller account, see S Bell and D McGillivray *Environmental Law* (Oxford: Oxford University Press, 7th edn, 2008) ch 18. Notably, 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.

³⁶ Science and Technology Committee *Waste Reduction* (HL 2007-08, 163-I) [3.1].

³⁷ *Ibid*, [6.1].

³⁸ Oakdene Hollins *The Further Benefits of Business Resource Efficiency* (Defra, March 2011).

Regarding supermarket waste specifically, there would appear to be some scope for the profitable reduction of waste.³⁹ 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.⁴⁰ 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.⁴¹ A number of supermarkets have made packaging reduction pledges and/or are signatories to relevant ‘voluntary agreements’.⁴² Participation in these schemes is justified by reference to a business case, either in the form of direct cost savings or the perceived reputational gains flowing from participation.⁴³

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.⁴⁴ The difficulty in identifying and implementing such strategies is even more challenging if the financial rewards accrue only in the longer term.⁴⁵ 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.⁴⁶ In addition, prejudices regarding the use of certain recycled materials persist, despite the existence of quality protocols.⁴⁷ Legal intervention can also create perverse incentives. For example, the landfill tax is weight-based, making it cheaper to landfill lighter materials, in turn lowering 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.⁴⁸

³⁹ Defra *Report of the Food Industry Sustainability Strategy Champions’ Group on Waste* (Defra, 2007) p 14. Envirowise helped companies and suppliers identify over £12 million of food efficiency savings, see T Stuart *Waste – Uncovering the Global Food Scandal* (London: Penguin Books, 2009) pp 54-5.

⁴⁰ Stuart, above n 39, pp 11 and 208.

⁴¹ Science and Technology Committee, above n 36, [3.7]. Product light weighting involves using less material, or lighter material substitutes.

⁴² The Courtauld Commitments, Phase I (2005-10) and Phase II (2010-12).

⁴³ See P Jones, D Comfort, D Hillier and O Eastwood ‘Corporate social responsibility: a case study of the UK’s leading food retailers’ (2005) 107(6) *British Food Journal* 423; Science and Technology Committee, above n 36, [7.20].

⁴⁴ Science and Technology Committee, above n 36, [6.3]; S Winne and S Standley *Business Resource Efficiency* (AEA Technology Plc, 2009).

⁴⁵ See, for example, Gunningham, above 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.

⁴⁶ Science and Technology Committee, above n 36, [6.3].

⁴⁷ *Ibid*, [4.24].

⁴⁸ *Ibid*, [4.26].

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.⁴⁹ 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.

2. Deeper objections to the business case for corporate environmental responsibility

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.⁵⁰ For Walley and Whitehead, the business case offers illusory ‘rabbit-out-of-the-hat solutions’.⁵¹ It is much better that these conflicts, where they exist, are acknowledged – there must be a preference for openness in this regard.⁵² 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.

So the concern expressed here is not that environmental and economic concerns can never be reconciled.⁵³ Rather, it is the starting point of ready compatibility which is

⁴⁹ On these other societal concerns which receive legitimacy in the corporate sphere by reference to the business case, see above n 9, n 10 and n 11.

⁵⁰ D McBarnet ‘Human Rights, Corporate Responsibility and the New Accountability’ in T Campbell and S Miller (eds) *Human Rights and Moral Responsibilities of Corporate and Public Sector Organisations* (Dordrecht: Kluwer, 2004).

⁵¹ N Walley and B Whitehead ‘It’s Not Easy Being Green’ (1994) 72(3) *Harv Bus Rev* 46.

⁵² *Ibid.*

⁵³ Although some would argue that corporations or certain corporate activities are inherently bad for the environment. This type of argument is seen particularly in critiques of sustainable development on the basis of environmental limits. See A Dobson *Green Political Thought* (London: Routledge, 2nd edn, 2000); J Holder and M Lee *Environmental Protection, Law and Policy (Text and Materials)* (Cambridge: Cambridge University Press, 2nd edn, 2007) pp 250-6.

problematic, 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 ‘business cases’, particularly resource efficiency, tinker only with existing forms of economic activity to make them more environmentally sensitive.⁵⁴ 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.⁵⁵ 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.⁵⁶

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.⁵⁷

The voice for the environment 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 certain consumers or investors value environmentally responsible products, services or investment opportunities. However, the environment has no real voice of its own here – it is difficult to conceive of the environment as a ‘stakeholder’ in the way we might think of shareholders, employees and consumers. The CSR literature itself has been

⁵⁴ Similar concerns have been levelled against sustainable development (see Dobson, above n 53, 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, above n 14, pp 64-7; SL Hart ‘Beyond Greening: Strategies for a Sustainable World’ (1997) 75(1) Harv Bus Rev 6.

⁵⁵ See, for example, Banerjee, above n 14, 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 LM Fairfax ‘The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms’ (2005-6) 31 J Corp L 675. 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.

⁵⁶ See, for example, MA Cherry and JF Sneirson ‘Chevron, Greenwashing, and the Myth of “Green Oil Companies”’ (November 2, 2011, available at <http://ssrn.com/abstract=1953329>); KA Strasser *Myths and Realities of Business Environmentalism: Good Works, Good Business or Greenwash?* (Cheltenham: Edward Elgar Publishing, 2011).

⁵⁷ J Corkin ‘Misappropriating citizenship: the limits of corporate social responsibility’ in N Boeger, R Murray and C Villiers (eds) *Perspectives on Corporate Social Responsibility – Corporations, Globalisation and the Law* (Cheltenham: Edward Elgar, 2008) p 43.

unclear on this point, at times even marginalising the environment.⁵⁸ Werther and Chandler, for example, view the environment as part of a company's 'societal' group of stakeholders, giving rise to a related concern in sustainable development literature that poverty alleviation is emphasised to the detriment of environmental protection.⁵⁹ Wheeler and Sillanpää outline a hierarchy of stakeholders: primary social, secondary social and non-social (including the environment).⁶⁰ Fundamentally, however, the business case expresses the environment indirectly – championed through the voice of these other stakeholders, and ultimately through the attribution of financial value. It is questionable whether this allows the environment to compete on its own terms, a problem familiar to environmental lawyers of expressing environmental value within the market.

In essence, the business case turns corporate environmental responsibility and, by extension, the environment, into a commodity.⁶¹ 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.⁶² 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.⁶³ 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.⁶⁴ While CSR perhaps represents the opening up of the market to a broader range of values,⁶⁵ it is highly questionable whether the business case can fully appreciate them.

⁵⁸ D Ong 'Locating the "environment" within corporate social responsibility' in Boeger et al, above n 57.

⁵⁹ WB Werther Jr and D Chandler *Strategic Corporate Social Responsibility: Stakeholders in a Global Environment* (California: Sage Publications, 2006); Ong, above n 58.

⁶⁰ D Wheeler and M Sillanpää 'Including the stakeholders: the business case' (1998) 31(2) *Long Range Planning* 31.

⁶¹ G Hanlon 'Rethinking Corporate Social Responsibility and the Role of the Firm—On the Denial of Politics' in Crane et al, above n 1.

⁶² *Ibid.*

⁶³ 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, above n 9, 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 T Campbell 'The normative grounding of corporate social responsibility: a human rights approach' in McBarnet et al, above n 2. Contrast this with JE Parkinson *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Oxford: Oxford University Press, 2008) ch 9, distinguishing between 'profit-sacrificing' and 'non-profit sacrificing' (instrumental/business case) CSR, and seeking primarily to justify the former.

⁶⁴ See Holder and Lee, above n 53, pp 34-40 and compare D Pearce and EB Barbier *Blueprint for a Sustainable Economy* (London: Earthscan, 2000) pp 2-8 with F Ackerman with L Heinzerling *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: The New Press, 2004) p 8.

⁶⁵ PR Portney 'Corporate Social Responsibility: An Economic and Public Policy Perspective' in BL Hay, RN Stavins and RHK Vietor (eds) *Environmental Protection and the Social Responsibility of Firms: Perspectives from Law, Economics, and Business* (Washington DC: Resources for the Future, 2005).

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 otherwise hidden values.⁶⁶ Dobson, for example, describes this as the superiority of ‘ecologically motivated citizens’ over consumers or other ‘economic’ actors in driving more sustainable societies.⁶⁷ 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.⁶⁸ 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.⁶⁹

Illustration - supermarkets and waste

Many examples of the business case rely on the various competitive advantages to be gained from environmental product differentiation (‘green’, or rather, ‘greener’ products).⁷⁰ Consumers will pay a premium for an environmentally superior product 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.⁷¹ 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.⁷² 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

⁶⁶ Holder and Lee, above n 53, 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 J Steele ‘Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach’ (2001) 21 OJLS 415.

⁶⁷ A Dobson *Citizenship and the Environment* (Oxford: Oxford University Press, 2003).

⁶⁸ Corkin, above n 57; Hanlon, above n 61.

⁶⁹ This is a general concern with CSR, see, for example, N Gunningham and D Sinclair *Leaders & 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, above n 14, 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.’

⁷⁰ Reinhardt, above n 32; M Porter and C van der Linde ‘Green and Competitive: Ending the Stalemate’ (1995) 73(5) Harv Bus Rev 120.

⁷¹ Science and Technology Committee, above n 36, [5.15]; Smith, above n 31.

⁷² P Jones, D Comfort and D Hillier ‘Marketing and corporate social responsibility within food stores’ (2007) 109(8) British Food Journal 582 p 590.

CER is somewhat oxymoronic, and the claim that consumers can drive CSR through buying patterns downplays the environmental importance of the ‘no-purchase’ option.⁷³

Household food waste is an excellent example of this. It runs directly against supermarkets’ business model to encourage consumers to buy less.⁷⁴ While all the major supermarkets have made voluntary pledges to support food waste reduction,⁷⁵ the most prominent ‘CSR’ communication activities as far as consumers are concerned centre around ‘value for money’.⁷⁶ This is often interpreted, however, as *more* for your money—‘Buy One Get One Free’ (BOGOF) and ‘3-for-2’ offers have been repeatedly implicated in pushing over-purchasing and, as a result, increasing household food waste arisings.⁷⁷ 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.⁷⁸ Such factors include ensuring customers ‘can buy what they want when they want’; favourable profit margins for wasting food; and the use of market power to contractually shift the costs of food waste up the supply chain.⁷⁹ 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.⁸⁰ 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.

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

⁷³ M Lee *EU Environmental Law: Challenges, Change and Decision-Making* (Oxford: Hart Publishing, 2005) p 211 (and references therein).

⁷⁴ Foresight *The Future of Food and Farming – Final Project Report* (The Government Office for Science, 2011) Annex C7; Jones et al, above n 72, p 589

⁷⁵ The Courtauld Commitments.

⁷⁶ Jones et al, above n 72.

⁷⁷ Stuart, above n 39, 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.

⁷⁸ Foresight, above n 74; Defra, above n 39; Stuart, above n 39, pp 24-8, 46-48 and 109.

⁷⁹ *Ibid.*

⁸⁰ For example, T Jackson *Motivating Sustainable Consumption – A Review of Evidence on Consumer Behaviour and Behavioural Change* (Sustainable Development Research Network, 2005).

all) and so tend to end up in landfill.⁸¹ 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. Indeed, the limits of the business case in capturing non-financial, including environmental values, is also well exemplified by the challenges associated with food waste. Misshapen or slightly discoloured produce are routinely wasted because they do not comply with stringent aesthetic standards imposed by supermarkets.⁸² Wholesome food is wasted for cosmetic blemishes.⁸³ It is unclear whether such attitudes originate with consumers or retailers,⁸⁴ but regardless, discarding perfectly edible food for cosmetic reasons suggests that the 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.

Whilst supermarket waste makes a useful case study, and acknowledging there are well known problems with making generalisations based on a case study methodology, we might tentatively explore whether the deeper objections to the business case are limited to the supermarket sector or 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).⁸⁵ More fundamental

⁸¹ Laminates are difficult to recycle and plastics such as polyethylene terephthalate (PET), used as a substitute for infinitely recyclable glass, cannot be recycled in this country, see Science and Technology Committee, above n 36.

⁸² 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, see Stuart, above n 39, p 108.

⁸³ Foresight, above n 74.

⁸⁴ *Ibid*; Stuart, above n 39, pp 108-16.

⁸⁵ 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 HM Government *Enabling the Transition to a Green Economy: Government and business working together* (Crown Copyright, 2011) pp 2 and 4-5. The building 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 R Dawes 'Building to improve energy efficiency in England and Wales' (2010) 12(4) *Env L Rev* 266. UK businesses across a range of economic sectors

similarities between waste and other environmental problems lie in the need for deep, challenging and often only hard-won behaviour change.⁸⁶ A consumer driven business case for environmental responsibility is oxymoronic in any consumption sector, not just retail grocery, with environmental implications beyond waste management.⁸⁷ These 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.

3. Environmentally unenlightened shareholder value

This final Part considers enlightened shareholder value (ESV) in light of these deeper objections to the business case for CER. The aim is not to provide a comprehensive legal analysis of ESV. There are many interesting questions in this regard, but they have been addressed extensively elsewhere.⁸⁸ I outline corporate law issues in broad terms and only to the extent necessary to explain the primary concern in this paper; that is, how ESV problematically embeds the business case as a mandatory corporate law norm, and what this means for section 172 of the Companies Act 2006 from an environmental perspective.

Shareholder exclusivity (in brief) and enlightened shareholder value

The orthodox position in Anglo-American corporate law is that a company should be run for the benefit of its shareholders, what is often referred to as shareholder primacy.⁸⁹ I will use instead the term ‘shareholder exclusivity’, and I do so to denote the exclusion of non-shareholding stakeholders (such as employees, creditors, customers, the environment, et cetera) from corporate affairs in two broad ways. First, overall shareholder exclusivity as to corporate goal, purpose or objective; the ‘end’ of

(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 J Hopkins ‘The Carbon Reduction Energy Efficiency Scheme: overview, rationale and future challenges’ (2010) 12(3) *Env L Rev* 211 p 213.

⁸⁶ See Jackson, above n 80.

⁸⁷ See Lee, above n 73.

⁸⁸ The literature is too voluminous to cite in full, but see, for example, S Deakin ‘The Coming Transformation of Shareholder Value’ (2005) 13 *CG* 11; M Stallworthy ‘Sustainability, the environment and the role of UK corporations’ (2006) *ICCLR* 155; A Keay ‘Enlightened Shareholder Value, the Reform of the Duties of Company Directors and the Corporate Objective’ [2006] *LMCLQ* 335; A Alcock ‘An accidental change to directors’ duties?’ (2009) *Co Law* 362. For the general context of ESV, see The Company Law Review Steering Group (CLRSG) *Modern Company Law For a Competitive Economy - The Strategic Framework* (Department of Trade and Industry, February 1999), particularly ch 5, pp 33-46 and 48-53.

⁸⁹ Sometimes called shareholder value theory or shareholder wealth maximisation. Both normatively and positively, shareholder primacy is controversial, although it does nonetheless represent the orthodox view (see, for example, CLRSG, above n 88, pp 34-7). The academic literature is extensive. See, for example, SM Bainbridge ‘In Defense of the Shareholder Maximisation Norm: A Reply to Professor Green’ (1993) 50 *Wash & Lee LRev* 1423; LA Stout ‘Bad and Not-So-Bad Arguments for Shareholder Primacy’ (2002) 75 *S Cal LRev* 1189; P Ireland ‘Property and Contract in Contemporary Corporate Theory’ (2003) 23 *LS* 453; A Keay ‘Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?’ (November 1, 2009, available at <http://ssrn.com/abstract=1498065>).

corporate governance.⁹⁰ 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 stakeholders more broadly. Second, shareholder exclusivity as to corporate ‘voice’, comprising important quasi-participatory rights in corporate affairs (via general meeting), 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.⁹¹ Shareholder exclusivity should not be confused with exclusivity as to day-to-day decision-making control, which vests in the board of directors.⁹²

In very broad terms, the general position under the Companies Act 2006 is shareholder exclusivity as to corporate voice and governance ends, coupled with director primacy as to corporate governance means. The exclusion of non-shareholding voices from internal corporate affairs is clear; key governance rights vest solely in shareholders to the exclusion of other stakeholders. This exclusivity is part of a broader inside/outside conceptualisation of the company, immediately visible in section 33(1) Companies Act 2006, which provides for a mandatory statutory corporate contract between *only* shareholders and the company. The company is a ‘club’, where shareholders are within the company, or in the club, and non-shareholding stakeholders deal with the company from the outside.⁹³ Section 172(1) Companies Act 2006 confirms this shareholder-centric corporate goal or end, but provides a slightly broader stipulation as to the means by which directors must achieve this. For the purposes of this paper we are concerned specifically with section 172(1)(d):

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 [shareholders] as a whole, and in doing so have regard (amongst other matters) to ... the impact of the company’s operations on the community and the environment.

Section 172 is at the heart of the legal institution of ESV, and is coupled with a narrative reporting obligation in section 417, which requires directors of certain companies to compile a ‘business review’ to inform members how they have performed these duties. In the case of quoted companies, this must also provide information about environmental matters, including the impact of the company’s business on the

⁹⁰ SM Bainbridge ‘Director Primacy: The Means and Ends of Corporate Governance’ (2003) 97(2) NWULR 547.

⁹¹ For director appointment, see Companies Act 2006 (CA 2006), Model Articles (Private Companies), reg 17; Model Articles (Public Companies), regs 19 and 20; *Worcester Corsetry Ltd v Witting* [1936] Ch 640. For director dismissal, see CA 2006, s 168; CA 2006, Model Articles, reg 4. For directors’ duties and the enforcement derivatively thereof by shareholders, see CA 2006, Pts X and XI. The strength of shareholder voice vis-a-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.

⁹² It is well established that directors, not shareholders, manage the business, see CA 2006, Model Articles, regs 3-4; *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34; L Sealy and S Worthington *Cases and Materials in Company Law* (Oxford: Oxford University Press, 8th edn, 2008) p 167 and ch 4.

⁹³ On the idea of the company as a club, see MT Moore ‘Beyond Private Ordering: Towards an “Intelligent Design” Theory of Corporate Law Evolution’ (UCL Research Seminar Working Paper, October 2010) and *Corporate Governance in the Shadow of the State* (Oxford: Hart Publishing, 2012) ch 6 (*forthcoming*).

environment.⁹⁴ The impact of the company's operations on the environment is just one of many 'stakeholder' or 'CSR' type concerns which directors are explicitly required to consider within their decision making process.⁹⁵ And in view of this (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 shareholder exclusivity.⁹⁶

Arguably, however, this optimism overstates the divergence between ESV and shareholder exclusivity.⁹⁷ As the name suggests, enlightened shareholder value is *not* a challenge to the exclusivity of shareholders as to corporate goal or voice. There is no direct duty owed to those 'other' stakeholders, duties are owed to the company,⁹⁸ and directors are to act in a way which promotes the success of the company *for the benefit of members as a whole*.⁹⁹ Indeed, the Company Law Reform Steering Group (CLRSG) stated that ESV maintains the ultimate corporate objective of generating maximum value for shareholders.¹⁰⁰ 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.¹⁰¹ The steering group argued that there was nothing explicit in company law and directors' duties which mandated a narrower approach.¹⁰² 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.¹⁰³ 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

⁹⁴ For a broad overview, see CA Williams and JM Conley 'Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the UK' (2007) 31(2) William & Mary Environmental Law and Policy Review 317.

⁹⁵ CA 2006, ss 172(1)(a)-(f).

⁹⁶ For example (and with varying levels of optimism), see Ji Lian Yap 'Considering the Enlightened Shareholder Value Principle' (2010) Co Law 35; L Roach 'The Legal Model of the Company and the Company Law Review' (2005) 26 Co Law 98; V Harper Ho "'Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36(1) J Corp L 59; S Kiarie 'At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?' (2006) 17(11) ICCLR 329; CA Williams and JM Conley 'An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct' (2005) 38 Cornell Int'l LJ 493.

⁹⁷ Keay, above n 88; A Keay 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach' (2007) 29 Syd LR 577.

⁹⁸ CA 2006, s 170.

⁹⁹ The meaning of 'success of the company' in s 172 is unclear, although ministerial statements suggest this means long-term shareholder value, see D Kershaw *Company Law in Context: Text and Materials* (Oxford: Oxford University Press, 2009) p 349.

¹⁰⁰ CLRSG, above n 88, p 37 [5.1.12].

¹⁰¹ *Ibid*, p 36 [5.1.8]-[5.1.9] and p 40 [5.1.19].

¹⁰² *Ibid*, p 40 [5.1.19].

¹⁰³ *Ibid*, p 36 [5.1.10] and pp 39-41 [5.1.17], [5.1.20]-[5.1.22].

consistently by case law.¹⁰⁴ And on this view, section 172 provides new strength to shareholder exclusivity by way of an ‘unambiguous statement in legislation’.¹⁰⁵

The business case as a procedural legal norm

In essence, section 172(1)(d) mandates, institutes and embeds the business case for corporate environmental responsibility as a procedural norm. 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. The environment is valued instrumentally, not because it has any inherent or intrinsic value.¹⁰⁶ As such, section 172 does not sanction *profit-sacrificing* behaviour motivated by environmental concerns, so that ESV in turn does not provide a direct means by which to address negative environmental externalities.¹⁰⁷ Indeed, the damage recognised under section 172 is not ‘environmental’ damage, but damage to the success of the company, and this is likely to be measured in purely financial terms (possibly by reference to share price depreciation).¹⁰⁸ Ultimately, therefore, ESV’s instrumentality results in the attribution of (corporate) financial worth to environmental value.

Furthermore, there remains no real voice for the environment within ESV. While the language surrounding section 172 talks of ‘inclusivity’,¹⁰⁹ 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.¹¹⁰ In any case, given environmental damage is not 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.¹¹¹ Fundamentally, as with the business case, the

¹⁰⁴ Keay, above n 88; Deakin, above n 88; D Attenborough ‘How Directors Should Act When Owing Duties to the Company’s Shareholders: Why We Need to Stop Applying *Greenhalgh*’ (2009) 20(10) ICCLR 339.

¹⁰⁵ A Keay ‘Moving Towards Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and More: Much Ado About Little?’ (2011) 22(1) EBLR 1 p 41.

¹⁰⁶ Keay, above n 105, p 29 points also to the reform background, in particular the rejection of what was termed a ‘pluralist’ approach, which would see stakeholder concerns as ‘ends in themselves’. The pluralist approach maps what is more generally understood as stakeholder theory (often attributed to RE Freeman *Strategic Management: A Stakeholder Approach* (Boston: Pitman/Ballinger, 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; Freeman, above n 106, p 97. This resonates with the distinction between inherent and instrumental CSR (see Campbell, above n 63).

¹⁰⁷ Keay, above n 105, pp 40-41 and Keay, above n 97, p 592.

¹⁰⁸ A potential ‘environmental’ breach of s 172 is the share price, revenue and reputational costs arising from a failure to implement adequate environmental protection measures (Keay, above n 105, p 29; see also Kershaw, above n 99 on the meaning of ‘success of the company’ and 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) *Co Law* 271). Stallworthy, above n 88, 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.

¹⁰⁹ CLRSg, above n 88, ch 5 generally.

¹¹⁰ The cause of action vests in the corporation, also enforceable derivatively by shareholders (see above n 91).

¹¹¹ 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, J Steele ‘Private Law and the Environment: Nuisance in Context’ (1995) 17 *LS* 236.

environment remains dependant upon indirect financial expression via market advocates (primarily shareholders, but also customers).¹¹² 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.¹¹³

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’.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ Indeed, the lack of a deliberative space for the appreciation of environmental value brings into stark 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 herein, this assumes the compatibility of environmental goals and corporate prosperity. But as has already been suggested, 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.¹¹⁷ Despite this, support

¹¹² 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 Harper Ho, above n 95, pp 101-6, arguing that many stakeholders in ESV are ‘indirect and imperfect substitutes for direct participation’.

¹¹³ See also C Villiers, ‘Directors’ duties and the company’s internal structures under the UK Companies Act 2006: obstacles for sustainable development’ (2011) 8 ICCLJ 47.

¹¹⁴ Stallworthy, above n 88, p 165.

¹¹⁵ Environment Assessment is the most obvious example of this.

¹¹⁶ C Parker ‘Meta-regulation: legal accountability for corporate social responsibility’ in McBarnet et al, above n 2, argues that process-oriented CSR interventions must be accompanied by a norm or value (not necessarily a standard) to yield positive outcomes.

¹¹⁷ 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 SF Copp ‘S. 172 of the Companies Act 2006 Fails People and Planet?’ (2010) Co Law 406). Nonetheless, by embedding the business case as a procedural norm, s 172 adopts this problematic starting point of ready compatibility.

advanced for ESV tends to be achieved by appealing to this type of problematic business case sleight of hand which collapses the divide between the interests of the environment (or society) and shareholders.¹¹⁸

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. And of course, this should all be accompanied by acknowledging the well-rehearsed limitations of information-based regulation in the environmental context,¹¹⁹ especially given the purpose of the business review is to provide a section 172 compliance report for shareholders, not environmental information, or broader CSR disclosure, to stakeholders generally.¹²⁰ Most importantly, however, we ought to question whether silence may have been preferable to buying, legislatively, into the rhetoric of ready environmental and economic compatibility and embedding within corporate law a shallow, instrumental appreciation of environmental value.¹²¹

If corporate law does insist on referencing the environment, then it must move beyond the non-conflictual rhetoric of business cases and purely instrumental environmental value. In view of this, an environmental variant of section 309 of the Companies Act 1985¹²² might have been preferable to its successor, section 172. 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 172.¹²³ An environmental variant of this duty would potentially allow limited space for the expression of intrinsic environmental value by permitting some

¹¹⁸ See, for example, Harper Ho, above n 96, pp 80-83; Kiarie, above n 96; S Deakin 'Squaring the Circle? Shareholder Value and Corporate Social Responsibility in the UK' (2002) 70 Geo Wash LRev 976.

¹¹⁹ See, for example, F Ost 'A Game Without Rules? The Ecological Self-Organisation of Firms' in G Teubner, L Farmer and D Murphy (eds) *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (Chichester: John Wiley & Sons, 1994).

¹²⁰ CA 2006, s 417(2); see also C Villiers *Corporate Reporting and Company Law* (Cambridge: Cambridge University Press, 2006) and IH-Y Chiu 'The paradigms of mandatory non-financial disclosure: a conceptual analysis: Parts 1 and 2' (2006) Co Law 259 and 291 on the distinction between shareholder (or 'non-CSR') and stakeholder-centric reporting.

¹²¹ Debate as to whether s 172 intended to codify or alter the previous common law position (see, for example, Alcock, above n 88, p 368) is irrelevant to the point I make here, which is that ESV is now mandatory and backed by an unambiguous legislative statement.

¹²² Previously Companies Act 1980, s 46.

¹²³ 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, above n 63, pp 82-5, quoting AJ Boyle (ed) *Gore-Browne on Companies* (Bristol: Jordans, 44th edn, 1986)).

environmentally motivated profit sacrificing behaviour,¹²⁴ whilst simultaneously avoiding the problematic business case sleight of hand embodied in ESV.¹²⁵

Given that the enforcement problems associated with section 309 led to the general conclusion that it was ‘next to useless’, an environmental variant of this duty would be far from a solution to the challenges of properly incorporating environmental concerns within corporate law.¹²⁶ Nonetheless, by eschewing the problematic business case rhetoric and instrumental environmental value of ESV, an environmental version of section 309 would arguably have been a step in the right direction for some of the reasons why section 172 arguably is not.

Unenlightened shareholders

Under ESV, the shareholder is now conceptualised as being ‘enlightened’ as to how their own self-interest might be furthered. This shareholder is said to appreciate how a focus on short-term financial gain, coupled with a disregard for the type of stakeholder concerns listed in section 172(1), will be ‘incompatible’ with corporate success in the long term.¹²⁷ In essence, shareholders are re-understood as being aware of the *business case* for CSR, and under section 172(1)(d), the business case for corporate *environmental* responsibility specifically.

One might want to question the understanding of this shareholder 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 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.¹²⁸ While the

¹²⁴ 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 (discussed further, below n 126), this would be a ‘shield’ for director decision making rather than a ‘sword’ for potential litigators.

¹²⁵ As noted by Parkinson, above n 63, 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.

¹²⁶ S 309 was described as a lame duck provision (see A Keay ‘Section 172(1) of the Companies Act 2006: an interpretation and assessment’ (2007) Co Law 106 p 109; B Pettet ‘Duties in Respect of Employees under the Companies Act 1980’ (1981) 34 CLP 199 pp 200-4). 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 s 172 enforcement, see above n 91). Employees therefore had no remedy under the provision. LS Sealy ‘Directors’ “Wider” Responsibilities - Problems Conceptual, Practical and Procedural’ (1987) 13 Mon LR 164 p 177, described s 309 as ‘either one of the most incompetent or one of the most cynical pieces of drafting on record’, since central to its perceived failings was the unusual statutory language of ‘to have regard’ comprising a duty which was owed *not* to the intended beneficiaries of the obligation but rather to the company.

¹²⁷ CLRSG, above n 88, [5.1.12]. See also CA 2006, s 172(1)(a), requiring directors to have regard to the likely consequences of any decision in the long term.

¹²⁸ See, for example, BJ Richardson and W Cragg ‘Being Virtuous and Prosperous: SRI’s Conflicting Goals’ (2010) 92 Journal of Business Ethics 21.

long-term perspective is an important element of ESV,¹²⁹ 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 172.¹³⁰

There has been an acknowledgement in some corporate law scholarship that the conception of the shareholder as uniformly concerned with profit generation is increasingly out of step with reality.¹³¹ 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.¹³² Such shareholders *might* be considered enlightened, but they are not representative of the shareholder envisioned under section 172.¹³³ This shareholder remains environmentally unenlightened.¹³⁴

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

¹²⁹ See above n 127.

¹³⁰ And much more likely a perspective of between three and six months, see O Aiyegbayo and C Villiers ‘The enhanced business review: has it made corporate governance more effective?’ (2011) JBL 699 p 722. One of the respondents to the study outlined in Gunningham et al, above n 25, p 63 referred to this as the ‘tyranny of quarterly returns’, such that long-term benefits can be ‘substantially discounted or ignored.’

¹³¹ See, for example, DJH Greenwood ‘Fictional Shareholders: “For Whom is the Corporation Managed,” Revisited’ (1996) 69 S Cal LRev 1021 and L Stout *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco: Berrett-Koehler Publishers, 2012).

¹³² E Elhauge ‘Sacrificing Corporate Profits in the Public Interest’ (2005) 80(3) NYUL Rev 733.

¹³³ And indeed, 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, above n 130.

¹³⁴ See also Villiers, above n 113, 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.

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 declaratory value of legislation, instituting the business case as a mandatory corporate law norm seems problematic. Nonetheless, through section 172, corporate law legislatively endorses a purely financial and instrumental value to environmental protection, underpinned by rhetoric to the effect that environmental and economic goals walk hand in hand. That shareholders who conceive of the environment in such a manner are ‘enlightened’ is questionable, especially when such shareholders accept the generation of wealth in spite of continued environmental degradation as a direct result. Rather than mandating a corporate purpose defined by reference to these unenlightened shareholders, it might have been better for corporate law to simply remain silent as to the environment, at least until willing to move beyond the non-conflictual rhetoric of business cases and purely instrumental environmental value.