Reconstituting the Contemporary Corporation through Ecologically Responsive Regulation

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Corporate governance and regulation comprise two legal frameworks that operate together from, respectively, the inside out of the corporation and the outside in, to shape business conduct. This article critically analyses two different ways in which corporate governance and business regulation intersect. We argue that both fall short of addressing the ecological and social harms generated by business. The first intersection combines shareholder primacy with domain specific regulation. The second combines a stakeholder model of corporate governance with responsive regulation. Yet, there are signs that a third "ecologically responsive" intersection may emerge to shape business practice in light of the ecological crises we currently face. We see potential for this approach in recent proposals to reform corporate governance to encourage purposive, problem-focused corporations together with greater responsiveness and multiple business forms. To achieve this potential, though, requires a radical re-conceptualisation of regulation towards an "ecologically responsive" approach.

I. Introduction

Debates on corporate governance and business regulation often occur in two completely separate spheres. This article brings these two spheres together. We argue that corporate governance and business regulation together comprise the "inside out" and "outside in" of how the law can shape business conduct. Our particular focus is on the challenge of "taming capitalism" to ensure businesses operate within, and contribute to, flourishing eco-social systems, rather than extracting from and exploiting those life-giving systems. Through our analysis of current practice and proposed reforms, we outline an "ecologically responsive"[1] approach to business regulation. Ecologically responsive regulation provides a potentially robust framework capable of generating external pressure on and incentives for businesses from the outside in. Further, the intersection of ecologically responsive regulation with recently suggested reforms to corporate governance, which are aimed at re-orientating business practice from the inside out, may lead to businesses not only respecting ecological boundaries but also contributing to ecological flourishing.

Our proposed ambitious combination of ecologically responsive business regulation with corporate governance reforms to "tame capitalism" is significant and daunting. In Part II of this article, we briefly describe how current business practices pose a series of continuing and overwhelming threats tied to the interconnected social and ecological crises created by industrial capitalism's over-exploitation of natural and human resources. We also show how law and regulation have historically not only tried to control these harms but at the same time also contributed to their existence.

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[1] Christine Parker and Fiona Haines, "An Ecological Approach to Regulatory Studies?" (2018) 45(1) *Journal of Law and Society* 136; Fiona Haines and Christine Parker, "Moving towards Ecological Regulation: The Role of Criminalisation" in Cameron Holley and Clifford Shearing (eds), *Criminology and the Anthropocene* (Routledge, 2018) 81; Christine Parker, "From Responsive Regulation to Ecological Compliance: Meta-Regulation and the Existential Challenge of Corporate Compliance" in Benjamin van Rooij and D Daniel Sokol (eds), *The Cambridge Handbook of Compliance* (CUP, 2021) 37.

Part III of this article identifies how corporate governance and regulation, both separately and together, shape business behaviour. For corporate law and governance, the focus is on how corporations operate from the inside out in relations between shareholders, officers, and directors, and, to some extent, employees, and creditors. Business regulation addresses corporate behaviour from the outside in, shaping and changing business behaviour to co-ordinate fair and efficient markets on the one hand (eg, through competition and company law as well as infrastructure access regimes) and, on the other, to mitigate and avoid socially and environmentally harmful impacts (eg, through environmental protections, workplace health and safety, anti-discrimination law and so on). We identify two broad ways in which corporate governance and business regulation interact. The first broad way in which corporate governance and business regulation interact involves significant deference to shareholder primacy in the corporate governance sphere combined with deference to the importance of markets in holding regulatory zeal in check in the business regulation sphere. The second intersection involves an "interconnected multi-stakeholder corporate responsibility" model in corporate governance encouraged by a responsive regulatory regime that encourages business to go "beyond compliance". These two types of interactions are realised and contested within interconnected "fields of struggle"[2] over the rules governing business activity. Successive waves of pressure are applied to business to accept more responsibility for their negative impact met by countervailing pressure on government by business to ensure that less is expected of them lest their entrepreneurial flair and vitality dissipate. Thus far, this struggle has witnessed the deepening of the ecological and social crises we now face.

Part IV highlights the fertile ground within recently proposed reforms to corporate governance for the flourishing of a multiplicity of business forms that take problem-solving as their primary purpose. These initiatives hold important potential to re-orientate the "fields of struggle" governing business conduct. As we show, these proposed corporate governance reforms contain the potential to generate substantive improvements in business conduct capable of not only "doing less damage" but contributing to solving the crises we now face.

The article concludes in Part V by arguing that both corporate governance and business regulation need to radically evolve to acknowledge that all human activity, including commercial activity and the way it is governed, is embedded in interconnected social and environmental ecologies, as a matter of both empirical analysis and normative evaluation and design. Moreover, a regulatory environment is needed to support those businesses which actively demonstrate the most ecologically and socially beneficial outcomes. This means going beyond monocultural assumptions about how to regulate, to see regulation as a form of nurturing as much as one of control.

II. Background: The Need to "Tame" Capitalism

A. Threats to a Safe and Just Planet

We now face multiple intersecting ecological crises caused by human activity that threaten the necessary conditions for Earth to sustain both human and non-human plant and animal life. The idea of "planetary boundaries" identifies and measures key ecological systems that are essential to life together with an evaluation of the current threat to those systems caused by human activity.[3] Several planetary limits are now under threat, including climate disruption, biodiversity loss, the disruption of the global nitrogen and phosphorous cycles, and the accumulation of plastics and other novel human-made materials in the ocean and everywhere else.[4] The planetary boundaries concept highlights the way that local and

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[2] Fiona Haines and Kate Macdonald, "Grappling with Injustice: Corporate Crime, Multinational Business and Interrogation of Law in Context" (2021) 25(2) *Theoretical Criminology* 284.

[3] W Steffen et al, "Planetary Boundaries: Guiding Human Development on a Changing Planet" (2015) 347(6223) *Science* 1259855; see also Johan Rockström et al, "Planetary Boundaries: Exploring the Safe Operating Space for Humanity" (2009) 14 *Ecology and Society* 31. The most recent boundary to have been calculated is that of "novel entities" (a term that encapsulates the impact of industrial production on vital ecosystem services, most notably chemical and plastic pollution), a limit that has also been exceeded, see Linn Persson et al, "Outside the Safe Operating Space of the Planetary Boundary for Novel Entities" (2020) 56(3) *Environmental Science & Technology* 1510 <https://doi.org/10.1021/acs.est.1c04158>.

[4] Steffen et al, n 3.

regional environmental impacts can be catastrophic, not only for each individual locale or region but also cumulatively in relation to the very life support system for all beings on planet Earth. Further, the model highlights that changes in one boundary will likely trigger further global environmental change in the others to create destabilising feedbacks. Thus, human activity – such as burning coal and oil, destroying forests and overproducing monocultures of crops and meat – has reverberating catastrophic effects. So, instead of seeing problems like climate change or pesticide and fertilizer over-use as discrete and insular problems that could (in principle at least) be solved by specific interventions aimed at particular practices, we must see them as intrinsically interconnected, needing to be addressed together.

Ecological crises will also further entrench pre-existing social and economic inequalities, that human rights and social and economic regulation regimes were already struggling to address.[5] As Kate Raworth has argued, it is not sufficient only to ensure that human activity operates within the limits of planetary boundaries: policy makers, business and civil society leaders must act to ensure "a safe *and just* (operating) space for humanity".[6] We cannot in fact or in conscience address environmental crisis without at the same time addressing social and economic injustice and inequality, and vice versa. Eco crises like the climate crisis will affect worse those already suffering from unaddressed social and economic inequality. Raworth thus argues for a new economics that integrates sustainable development inside the limits of planetary boundaries.[7]

This eco social crisis has been caused to a large degree by the way capitalism operates to create and perpetuate a "consumptogenic" system – one that "encourages the production and consumption of commodities in greater amounts, more quickly and more often" – and where consumption and production are seen as the primary pathway to economic, global and individual flourishing.[8] A new dimension, what Shoshana Zuboff famously named "surveillance capitalism" adds to these crises.[9] Zuboff describes an expanded logic of accumulation based on extraction of personal attention and behavioural data from human experience. This she sees as a further frontier of capitalist extraction and exploitation beyond the extraction from the environment and labour in traditional industrial capitalism, operated for profit.[10]

There is, then, a significant gap between a safe and just planet and the dire conditions we now face. Below we begin to untangle how corporate governance and business regulation have, in combination, not only tried to ameliorate some of the worst excesses of business behaviour yet have also been implicated in generating these problems.

B. Taming Capitalism through Law and Regulation?

Regulation is fundamental to the expansion of markets, and regulations (both economic and social) generate substance to the rules of the game that govern business practice and the nature of competition in each market or industry. As Levi-Faur[11] and others argue, the proliferation of regulation does not

[5] Ian Gough, *Heat, Greed and Human Need: Climate Change, Capitalism and Sustainable Wellbeing* (Edward Elgar Publishing, 2017).

[6] Will Steffen and Mark Stafford Smith, "Planetary Boundaries, Equity and Global Sustainability: Why Wealthy Countries Could Benefit from More Equity" (2013) 5(3) *Current Opinion in Environmental Sustainability* 403, 404; Kate Raworth, *Doughnut Economics: Seven Ways to Think like a 21st Century Economist* (Chelsea Green, 2017). Raworth pictures this "safe and just space for humanity" as the "sweet spot" between "the social foundation of wellbeing that no-one should fall below" (she defines these in terms of the UN's sustainable development goals) and "an ecological ceiling of planetary pressure that we should not go beyond" (she defines as the planetary boundaries).

[7] Raworth, n 6.

[8] See Christine Parker and Hope Johnson, "From Food Chains to Food Webs: Regulating Capitalist Production and Consumption in the Food System" (2019) 15(1) *Annual Review of Law and Social Science* 205, following Jane Dixon and Cathy Banwell, "Choice Editing for the Environment: Managing Corporate Risks" in Thomas Measham and Stewart Lockie (eds), *Risk and Social Theory in Environmental Management* (CSIRO Publishing, 2012) 175.

[9] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile books, 2019).

[10] Zuboff, n 9; Benedetta Brevini, *Is Ai Good for the Planet?* (Polity, 2022) 26.

[11] D Levi-Faur, "From 'Big Government' to 'Big Governance?'" in David Levi-Faur (ed), *The Oxford Handbook of Governance* (OUP, 2012); see also Brayden G King and Nicholas A Pearce, "The Contentiousness of Markets: Politics, Social Movements,

necessarily hold markets back, but rather helps create new markets. Contemporary capitalism takes the form of "regulatory capitalism" in which new markets are continually being created and old ones destroyed through new networks of public and private governance. Whenever there is conflict and contention over values or policy goals in markets, there is conflict and contention over regulation.[12] Whenever anyone seeks to challenge existing market practices, they must eventually use law and regulation to challenge existing power relations, cultures, and technologies in order to be successful. Conversely, those who benefit from the existing system will seek to use regulation to respond to the challenge while preserving their position.[13] Yet in line with the demands of legitimation and justification, law and regulation are also created to constrain business activity, or at least to promise to do so.[14] The struggle to re-embed economic within social relationships is ongoing and challenging.[15]

Law and regulation create both the conditions for ecological damage as well as ways that damage might be controlled.[16] Regulations often set limits to mitigation but in a manner that, over time, generates further significant ecological damage.[17] But there are also counter-movements seeking to mobilise law and regulation to limit the capacity of commercial activity to extract further economic value from land, workers, consumers, and from our relations with each other and from the environment. So, we can see regulation as a constant contest, that takes place within multiple interconnected "fields of struggle".[18] Within each of these interconnected fields is a common concern over the politics of the market and the very boundaries of what commercial activity is allowable and what is out of bounds.

III. How Corporate Governance and Business Regulation Work Together: Two Approaches

Below we tease out two different ways in which corporate governance and business regulation can interact. In both instances the way they currently operate in practice has not prevented significant ecological destruction. First we discuss the combination of shareholder primacy and instrumental regulation. Here, strong limits are placed on the control of business damage lest entrepreneurial zeal be blunted. Second we discuss the combination of responsive regulation and stakeholder approaches to corporate governance. These approaches expand corporate responsibility and responsiveness to social and environmental demands yet fall short of paying sufficient attention to the network of social *and* environmental ecologies in which all human and business activity is necessarily embedded.

A. Instrumental Regulation and Shareholder Primacy: Small Steps, Little Change

1. Instrumental Regulation in Business Regulation

The dominant liberal conception of regulation and governance aids fragmentation of potentially transformative sites of regulation. It does so by understanding business impact on the social and natural worlds as a series of individual "externalities" – suggesting the need for rules to fix market failures one issue at a time through instrumental regulation designed to intrude as discretely and narrowly as possible

and Institutional Change in Markets" (2010) 36 *Annual Review of Sociology* 249; Simon Deakin et al, "Legal Institutionalism: Capitalism and the Constitutive Role of Law" (2017) 45(1) *Journal of Comparative Economics* 188.

[12] King and Pearce, n 11.

[13] King and Pearce, n 11.

[14] Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar, 2011).

[15] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (first published 1944, Beacon Press, 2001). Nancy Fraser, "Can Society Be Commodities All the Way Down? Post-Polanyian Reflections on Capitalist Crisis" (2014) 43(4) *Economy and Society* 541.

[16] Katharina Pistor, *The Code of Capital* (Princeton University Press, 2019).

[17] Nikos Passas, "Lawful but Awful: 'Legal Corporate Crimes'" (2005) 34(6) *Journal of Socio-Economics* 771.

[18] Haines and Macdonald, n 2.

into commercial activity.[19] The result is a series of siloed regulatory regimes and agencies covering specific domains – different industries (telecommunications, electricity, mining, nursing homes, financial services, etc) and different social and environmental problems (workplace safety, food safety, consumer protection, taxation, environmental pollution, etc).[20] There are undoubtedly many profound and durable benefits that have been generated through such regulation.[21] However, each area of regulation is siloed from the other and, importantly, disconnected from the governance of the corporation and its purpose, which is presumed to be profit.

In this instrumental mode, business regulation is seen as a cost to the economy – an impediment to "the business of doing business" in the classic words of Milton Friedman:

> There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.[22]

This quote exemplifies the instrumental approach to business regulation in two ways. First, it suggests that regulation is only imperfectly connected to "the rules of the game" governing business activity. Environmental and social regulation are rendered vulnerable as not belonging to "the game" and so should be removed.[23] If regulation cannot be removed then corporations can "creatively comply" to maximise profits.[24]

Second, the perfect match between instrumental regulation and shareholder-oriented corporate governance is established. Friedman lays out the case for a shareholder primacy theory of corporate governance that proposes that the responsibility of corporate executives is to the company itself to make a profit, subject only to laws governing "deception or fraud". An instrumental regulation approach matches perfectly with this view. Instrumental regulation assumes that laws restraining business are necessary only to force out the "bad apple" actor. As Friedman points out, attempts to argue for more fulsome business regulation, and even market-based self-regulation aimed at social and environmental responsibility, inevitably come into tension with the market-based profit principle. For-profit companies and their executives have no further social responsibility other than the restraint of executive self-interest in service to their duty to the company and compliance with certain discrete rules to prohibit deception and fraud.

2. Shareholder Primacy and the Move towards Grudging Acceptance of Instrumental Regulation

The combination of shareholder primacy plus instrumental regulation can only ever be imperfectly realised in practice. In practice, this idealised vision of the confined and instrumental place of regulation, the centrality of the market and the dominance of the market conception of government and society more broadly creates a zone of uncertainty. This uncertainty opens the assumed relationship to criticism in academic and public commentary and unstable resolution in law. This manifests in how companies' duty to obey the law and comply with regulation is implemented and operationalised within the governance of the corporation itself. Company law has struggled to articulate exactly what responsibility, indeed if any, the officers and directors have to ensure the company complies with the law.

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[19] Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP, 1999) 9; Julia Black, "Critical Reflections on Regulation" (2002) 27 *Australian Journal of Legal Philosophy* 1, 2–3.

[20] Fiona Haines and David Gurney, "The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict" (2003) 25(4) *Law & Policy* 353.

[21] Carol A Heimer and Elsinore Kuo, "Subterranean Successes: Durable Regulation and Regulatory Endowments" (2021) 15(S1) *Regulation & Governance* S63 <https://doi.org/10.1111/rego.12426>.

[22] Milton Friedman, "A Friedman Doctrine – The Social Responsibility of Business Is to Increase Its Profits", *The New York Times*, 13 September 1970 (quoting from his own 1962 book, *Capitalism and Freedom*).

[23] Ronald Chen and Jon Hanson, "The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law" (2004) 103(1) *Michigan Law Review* 1.

[24] Doreen McBarnet, "Legal Creativity: Law, Capital and Legal Avoidance" in Maureen Cain and Christine Harrington (eds), *Lawyers in a Postmodern World: Translation and Transgression* (New York University Press, 1994) 73.

For example, in her leading comparative study of *Company Directors' Duties and Conflicts of Interest* throughout the common law world, Rosemary Langford points out that the legal and regulatory responsibilities of the companies themselves, such as legislated environmental and employee protections, are often "overlooked in an analysis of directors' duties concerning stakeholders".[25] She suggests that clarity about companies' duties to stakeholders and the law would remove much of the pressure and uncertainty currently surrounding directors' duties by making it obvious that directors' duties to the companies include a duty to ensure the company complies with its legal obligations.[26] That it is seen as necessary to clarify company law in this way speaks volumes about the dominant limited conception of both corporate purpose and directors' duties – that is to pursue profit.

Yet the idea that directors' duty of care to the company should include an obligation to ensure companies comply with their regulatory responsibilities (or prevent breaches of the law) is not at all straightforward. An instrumental approach implies that corporations have the capacity to test the limits of each law and regulation with which they are expected to comply.[27] Since directors' duties are conceptualised in terms of what is in the best *interests* of the company (identified in terms of financial profit), then directors' duties in relation to instrumental regulation are often conceived as to test the limits of each separate law or regulation. That is, if pushing the limits of the law is believed to enhance profitability, then resistance will take precedence over any fulsome sense of obligation to comply. The presumption that instrumental regulation should be kept as narrow as possible to avoid interfering unduly with business, and that legal procedures and principles should support the ability of private businesses to challenge "over-reaching" state enforcement of regulation, gives corporations ample opportunity to evade, resist and creatively interpret the limits of the law.[28]

Company law has therefore "struggled to articulate the proper basis upon which directors and other corporate officers ought to be liable to the state when their behaviour risks – by action or inaction – their corporation contravening the law".[29] For example, when the Chancery Court of Delaware handed down the *In Re Caremark International Inc Derivative Litigation* (*Caremark*) decision in 1996,[30] it was thought to herald the incorporation of companies' external regulatory obligations into the internal governance obligations of boards of directors.[31] The shareholders in *Caremark* succeeded in obtaining the Court's approval to a settlement in a derivative action alleging the directors had breached their duty by failing to adequately monitor company operations to ensure no breach of the law occurred. The Court agreed that in principle the directors had a duty to ensure an adequate internal information and reporting system was in place for the directors to monitor compliance with the company's regulatory obligations, that is a duty to monitor compliance, although, since it was a ratification of settlement, the Court did not decide the matter on the facts. Indeed, the court questioned whether a breach would have been found if the case had proceeded to trial.

The Court also commented that the directors could be liable for a breach of duty to exercise appropriate attention to regulatory compliance if they made a decision that was ill advised or negligent or if they

[25] Rosemary Teele Langford, *Company Directors' Duties and Conflicts of Interest* (OUP, 2019) 316 [10.71].

[26] Langford, n 25.

[27] Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* (Routledge, 2015); David Whyte, *Ecocide* (Manchester University Press, 2020).

[28] McBarnet, n 24; Lauren B Edelman and Shauhin A Talesh, "To Comply or Not to Comply – That Isn't the Question: How Organizations Construct the Meaning of Compliance" in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011); 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* (Ashgate, 2003) 229.

[29] Pamela Hanrahan and Tim Bednall, "From Stepping-Stones to Throwing Stones: Officers' Liability for Corporate Compliance Failures after Cassimatis" (2021) 49(3) *Federal Law Review* 380, 380; see also Sarah E Light, "The Law of the Corporation as Environmental Law" (2019) 71 *Stanford Law Review* 137.

[30] *In Re Caremark International Inc Derivative Litigation*, 698 A 2d 959 (Del Ch, 1996).

[31] For example Christine Parker and Olivia Conolly, "Is There a Duty to Implement a Corporate Compliance System in Australian Law?" (2002) 30(4) ABLR 273, 293.

failed to act in a considered way. The decision was widely interpreted at the time by those interested in improving the "responsiveness"[32] of corporate governance and corporate compliance as requiring directors to ensure effective regulatory compliance systems were in place.[33] However, as mentioned above, no such decision had been made on the facts. It has recently been suggested that the *Caremark* conception of directors' duties would also extend to obligations to consider and report on climate risks.[34] The courts, however, have interpreted the *Caremark* duty of care narrowly. Only the most egregious failures to ensure a monitoring system for compliance with regulation that is critical to the core business of the relevant corporation have been held to be covered by the precedent.[35]

In Australia, "stepping stones" liability jurisprudence emanating largely from the Australian Securities and Investments Commission's (ASIC) enforcement activity, is a more recent attempt to connect directors' duties (and hence corporate governance) with the corporation's regulatory obligations. In these cases, directors and officers are found liable on the basis that they failed to prevent a breach of the law by the corporation. The finding of one breach (by the corporation) is the "stepping stone" to the liability of the directors and officers.[36] Because it is enforced by ASIC, the regulator, this provides the potential for a more public interest (and not purely shareholder) oriented duty in relation to regulatory compliance.

It should hardly be surprising that a director has a responsibility to run a company lawfully and may be held liable if they do not. Yet it has prompted concern about a "new" head of civil liability.[37] Langford argues that stepping stones liability could (and should) be subsumed by the directors' duty of care to the company.[38] Hanrahan and Bednall argue for an alternative to ASIC's current use of stepping stones liability to achieve a similar purpose in a more legitimate and effective way: a legislated statement of directors' responsibility to comply with relevant Commonwealth law would be a particularly useful tool for enforcing the public interest in proper management of corporations.[39] This is so, given the lack of any other explicit statement of positive obligation on directors and officers "to take reasonable steps to ensure their corporation conducts its affairs in accordance with all or specified regulatory requirements".[40]

Stepping stones liability has to date been used mainly for breaches of the corporate law itself, rather than other external regulatory obligations (such as environmental or workplace protection).[41] However, stepping stones type principles could support the argument for directors' duties to ensure compliance with the full range of business regulation responsibilities – pushing the corporate governance plus instrumental regulation approach towards greater discipline when it comes to environmental and social harm. As Langford notes, quoting Edelman J in *Australian Securities and Investments Commission v Cassimatis (No 8)*, a company has a "real and substantial interest in the lawful or legitimate conduct of its activity independently of whether the illegitimacy of that conduct will be detected or will cause

[32] See the discussion of responsive regulation in Part IIIB.

[33] See Carole L Basri, Joseph E Murphy and Gregory Wallace, *Corporate Compliance: Caremark and the Globalization of Good Corporate Conduct* (Practising Law Institute, 1999); Parker and Conolly, n 31.

[34] Sarah Barker, Cynthia Williams and Alex Cooper, *Fiduciary Duties and Climate Change in the United States* (Commonwealth Climate Change and Law Initiative, 2021).

[35] See *Marchand v Barnhill et al*, No 533, 2018 (Del, 2019); Roy Shapira, "A New Caremark Era: Causes and Consequences" (2020) 98 *Washington University Law Review* 1857.

[36] See Langford, n 25, 309–310.

[37] See Langford, n 25, 310–311 [10.55].

[38] Langford, n 25, 310 [10.53] (interpreting Edelman J in *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023: "Just as the duty of care may be breached by a director who fails to prevent loss to the company in other ways, so the duty of care may be breached where directors fail to prevent the company from breaching the law in certain circumstances").

[39] Hanrahan and Bednall, n 29, 407–409 (arguing for a clear statutory statement that officers of a corporation must take reasonable steps to ensure corporate compliance with "specified Commonwealth laws").

[40] Hanrahan and Bednall, n 29, 381–382.

[41] Ian Ramsay and Miranda Webster, "An Analysis of the Use of Stepping Stones Liability against Company Directors and Officers" (2021) 50(1) *Australian Bar Review* 168.

loss … The interests of the corporation, including its interests which relate to compliance with the law".[42] This does not mean a simplistic balancing of amount of fine versus profit to be made from a breach of the law, as an instrumental conception might suggest.[43] Indeed there is great merit in Hanrahan and Bednall's proposal for a clear legislative statement of obligation on officers "to take reasonable steps to secure compliance by the corporation" with all laws that apply to the company.[44]

3. Summary: Exposing the Limits of Instrumentally Focused Regulation and Corporate Governance

The combination of instrumentally focused regulation and shareholder-oriented corporate governance assumes there is clarity with respect to directors' duties (to pursue profit for shareholders) and ambiguity regarding how that might be achieved (by creative compliance, by holding instrumental regulation at bay). The struggles around its realisation in practice both in terms of academic critique and court decisions have seen small but not radical changes. In the United States' decision of *Caremark* there is some, albeit grudging, recognition that the rules of the game might include broader regulatory responsibilities, but very narrowly construed. The duty to prevent breaches of the law is only a breach of directors' duties if it also harms the financial welfare of shareholders. The debate about "stepping stones" type liability in Australia may provide an opportunity (as yet unrealised) to reconfigure directors' duties to include an expectation that directors will take responsibility for corporate compliance with the whole array of legal and regulatory obligations applying to their operations. Such an obligation would support and extend the patchwork of specific individual regulatory provisions, court decisions and regulators' practices that have sought in diverse ways to make directors personally responsible for failures to put in place and monitor systems for compliance with various regulatory regimes.[45]

B. Responsive Regulation and Stakeholder Approaches: Reaching Beyond Compliance?

The second approach to combining regulation and corporate governance is the interaction of "responsive regulation" – pushing companies to go "beyond compliance" from the outside – with, from the inside, corporate governance that is responsive to the pull of the triple bottom line and the need to manage relationships with multiple stakeholders. Companies and their directors are reconceptualised as capable of not only pursuing profit, but also (to at least some degree) broader social and environmental obligations beyond those required in law.

1. Responsive Regulation in Business Regulation

Responsive regulatory theories recognise that business regulation and governance is a dynamic and socially embedded process that can be negotiated and shaped over time – from multiple angles.[46] This combination of dynamism and social embeddedness holds the key to not only compliance with regulatory obligations but "enabling virtue" in business practices.[47] It is premised on the understanding that both individuals and firms act according to multiple motivations. While individuals and firms are certainly motivated by material self-interest including the familiar economic profit motive, social scientists, psychologists and regulatory compliance theorists have shown that individuals and firms are often also motivated by civic and social norms to respond to legal, social and environmental obligations (especially if they can see that those obligations reflect procedural fairness and substantive justice or ethics). People and firms can also be reputationally motivated to act in accordance with social, legal and environmental

[42] Langford, n 25, 338, citing *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209, 301–302 [482]–[483]; [2016] FCA 1023.

[43] Langford, n 25.

[44] See Hanrahan and Bednall, n 29, 384, 407–409.

[45] For example Kayleen Manwaring and Pamela Hanrahan, "BEARing Responsibility for Cyber Security in Australian Financial Institutions: The Rising Tide of Directors' Personal Liability" (2019) 30(1) JBFLP 20.

[46] See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992).

[47] Ayres and Braithwaite, n 46; Fiona Haines, *Corporate Regulation: Beyond "Punish or Persuade"* (Clarendon Press, 1997).

obligations in order to gain the respect and approval of others for the sake of at least being seen to do the right thing.[48]

In their influential theory of responsive regulation, Ian Ayres and John Braithwaite observed the power of these multiple motivations. They proposed that regulatory rule makers and enforcement agencies should therefore be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist or punitive response is needed.[49] They proposed that regulators should actively seek to nurture the civic responsibility of business via a judicious use of persuasion with a credible threat of enforcement in the background where persuasion fails. They also proposed that regulators recruit the help of non-state public interest groups or non-government organisations to hold both state and business accountable.

Similarly, Neil Gunningham and Robert A Kagan see businesses as regulated by social and economic "licenses" alongside the "legal licence" enshrined in official regulatory regimes.[50] Legal, social and economic licences can, in principle, be activated by a multiplicity of plural actors including supply chain partners for each business, banks, insurers, accreditation agencies, public interest groups and social movements, individual citizens and of course official legal regulators. In practice, these diverse regulatory efforts may complement, co-opt or compete with and undermine each other.[51] Various responsive theories of regulation propose that networks of official and non-official regulators can and should intentionally interact and complement one another to improve the effectiveness of business regulation and the virtue of business conduct.[52] Thus responsive regulation theories propose that legal or regulatory pressure, civic or social movement pressure and market or supply chain pressure (from the outside in) can push businesses into taking action via "responsive" corporate governance (from the inside out).[53]

2. Responsive Regulation in Corporate Governance

Responsive regulation articulates well with a responsive approach to corporate governance which reflects but also extends and expands theories such as Blair and Stout's "team production theory" of the corporation.[54] The responsive approach to corporate governance sees the company as an entity, not merely a set of property relations or contracts (against shareholder primacy theorists like Milton Friedman). As Blair and Stout argued, the company is seen as formed and managed, "not to protect shareholders per se, but to protect the enterprise specific investments of all the members of the corporate 'team', including shareholders, managers, rank and file employees, and possibly [definitely in our view!] other groups".[55] On this view, corporate governance is responsive to a variety of different stakeholders with different goals and values. Blair and Stout, therefore, like the responsive regulation theorists, saw corporate managers as capable of having multiple motivations, meaning that the multiple concerns of different stakeholders could in principle be incorporated into governance.[56]

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[48] See Vibeke Lehmann Nielsen and Christine Parker, "Mixed Motives: Economic, Social, and Normative Motivations in Business Compliance" (2012) 34(4) *Law & Policy* 428.

[49] Ayres and Braithwaite, n 46.

[50] Neil Gunningham, Robert A Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press, 2003); see also Fiona Haines et al, "Countering Corporate Power through Social Control: What Does a Social Licence Offer?" (2022) 62(1) *The British Journal of Criminology* 184.

[51] See also Burkard Eberlein et al, "Transnational Business Governance Interactions: Conceptualization and Framework for Analysis" (2014) 8(1) *Regulation & Governance* 1.

[52] Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 398; see also Kenneth W Abbott, David Levi-faur and Duncan Snidal, "Theorizing Regulatory Intermediaries" (2017) 670(1) *The Annals of the American Academy of Political and Social Science* 14; Eberlein et al, n 51.

[53] Parker, n 1, 37; see also Christine Parker, *The Open Corporation: Effective Self-regulation and Democracy* (CUP, 2002); see also Haines, n 47; Robert Eli Rosen, "Risk Management and Corporate Governance: The Case of Enron" (2003) 35 *Connecticut Law Review* 1157; Susan Silbey, Ruthanne Huising and Sal Vinocur Coslovsky, "The 'Sociological Citizen' Relational Interdependence in Law and Organizations" (2009) 59 *L'Annee Sociologique* 201.

[54] Margaret M Blair and Lynn A Stout, "A Team Production Theory of Corporate Law" (1999) 85(2) *Virginia Law Review* 247.

[55] Blair and Stout, n 54, 253. See also Parker, *The Open Corporation*, n 53, 4–5.

[56] Donald C Langevoort, "Lynn Stout, Pro-sociality, and the Campaign for Corporate Enlightenment" (2020) 10(3) *Accounting, Economics, and Law: A Convivium* 20200067 <https://doi.org/10.1515/ael-2020-0067>.

Many contemporary (proposed or actual) reforms can be understood as attempts to instil a responsive approach to the internal governance of companies through their emphasis on interconnected multi-stakeholder responsibility. Relevant reforms and proposals for reform include re-scoping directors' duties to make investors responsible for environmental, social and governance (ESG) factors, requiring companies to be vigilant and report on ESG in their own operations and those of their supply chains, and encouraging companies to articulate a corporate purpose that takes precedence over profit. These reforms and proposed reforms are all aimed at making corporate governance responsive to an expanded set of stakeholders beyond profit-oriented shareholders. They are also aimed at ensuring companies and their directors go well beyond paying the barest lip service to compliance with the law to more fulsomely fulfil their legal, social and environmental obligations.

The "pull" of responsiveness to broaden business obligations meets, however, a messier reality that blunts its aspirations. There is always countervailing pressure from business to make any broader social and environmental obligations not only voluntary but also consistent with a dominant focus on pursuing profit, or "enlightened self-interest". This results in social and environmental obligations being made either voluntary and vague or, when legally binding, narrowly targeted.

(a) Re-Scoping Directors' Duties

Much of the debate over corporate social and environmental responsibility has been concerned with reforms to legislative statements of directors' duties to include explicit statements that clarify that directors can, or indeed should, consider social and environmental concerns in making decisions about the management of the company, and not merely consider direct, short-term financial profit for shareholders.[57] It is widely accepted that stakeholder interests should be considered by directors where there is some "nexus with corporate benefit".[58] This is not, however, explicitly reflected nor clarified in the legislation governing companies in Australia, nor in many other jurisdictions.

In practice, policy proposals for expanding directors' duties to social and environmental stakeholders tend to reflect the social and environmental politics of the marketplace itself witnessed by the emphasis on "enlightened self-interest"[59] as the guiding metric to be used in assessing these duties. As Paul Redmond has argued, "the *enlightenment* in this model of shareholder value lies in the forced scanning of stakeholder impact for the purpose of extracting maximum shareholder advantage in corporate decision-making."[60] On this model, directors would weight social and environmental concerns only to the extent that they believed it mattered to corporate reputation and value. That is, social and environmental concerns would only matter to directors as much as they believed they would ultimately matter to the investors who set the value of the corporation in the financial market. It is for this reason that those concerned with making corporate governance more responsive to social and environmental stakeholders also advocate for reforms aimed at encouraging investors to share a sense of social and environmental obligation to invest "responsibly" or "sustainably", as discussed in the next subsection.

(b) Investor Responsibilities

The increasing recognition of responsibilities on the part of (particularly institutional and sophisticated) investors to adopt responsible ESG investing or sustainable finance addresses the other side of the shareholder profit primacy ideal type, the assumption that shareholders must only and ever be interested in financial profit. Global movements such as the UN Principles of Responsible Investment, the European Union sustainable finance initiative and the Australian sustainable finance roadmap show that a variety

[57] For example, the current UK legislation acknowledges consideration of a range of stakeholder interests: *Companies Act 2006* (UK) s 172(1). In Australia and elsewhere a stream of official reports and scholarly and practical proposals have also considered the issue. For summaries see Langford, n 25, 327–331; Paul Redmond, "Directors' Duties and Corporate Social Responsiveness" (2012) 35 *UNSW Law Journal* 317.

[58] Langford, n 25, 315.

[59] Archie B Carroll, "Corporate Social Responsibility" (2015) 44(2) *Organizational Dynamics* 87.

[60] Redmond, n 57, 337.

of private and public actors in the financial sector are recognising that shareholders too should engage in responsive corporate governance.[61]

However, like the directors' duties reforms discussed above, these strategies also tend to reflect the politics of the market. The results are often little more than greenwashing or symbolic solutions, techno promises, and action based on insufficiently tested knowledge and assumptions.[62] Strategies promoting investor ESG duties also fail to challenge the underlying systemic problems of capitalism. To counter these limitations, extensive environmental and social reporting according to defined metrics is often pursued, as discussed in the next subsection.

(c) Extended Reporting

Corporate governance rules are expanding to recommend or require reporting of a wide range of social and environmental matters.[63] However as with directors' duties, the social and environmental reporting requirements included in company law legislation and corporate governance regulations are generally predicated on the requirement that the matters reported are material to corporate benefit in the form of financial profit. There are now some specific "add-on" reporting requirements that are either legislatively mandated or widely required by influential large institutional investors. These widely mandated social and environmental reporting requirements suggest that there are certain matters that are considered to be mandatory for all responsible corporations to address no matter what, even if it costs more to address them. Most notably, some legislators and many third parties expect corporations to report on internal operations (such as gender equity in hiring or on boards) and direct external impacts (eg greenhouse gas emissions, human rights in certain global south operations such as mines).[64]

These reporting obligations, in principle at least, perform a useful responsive regulation function. They seek to enrol investors, activists, and consumers and even officers and employees into social and environmental regulation of the company. That is, they tend to assume that by forcing corporate management to analyse and report relevant social and environmental information, investors will act out of either economic self-interest or because of their own reputational concerns and sense of civic responsibility. For example, investors might price environmental and social responsibilities into the share price or lending rate or decide not to invest at all. This would result in the market coming to incorporate social and environmental concerns. Such reporting may also provide ammunition for "intermediaries" such as activists and civic networks to either lobby institutional investors to act (eg in divestment from fossil fuel campaigns), or pressure governments and regulatory agencies to regulate more effectively on the basis of information disclosed.[65] These initiatives do show some promise in further "thickening" the

[61] For summaries and evaluations of the impact of these various initiatives see Neil Gunningham, "Roadmaps and Regulation: Sustainable Finance in Australia" (2020) 37 EPLJ 459; Michael MacLeod and Jacob Park, "Financial Activism and Global Climate Change: The Rise of Investor-driven Governance Networks" (2011) 11(2) *Global Environmental Politics* 54; Dirk Schoenmaker and Willem Schramade, *Principles of Sustainable Finance* (OUP, 2019).

[62] See Chitra S de Silva Lokuwaduge and Keshara M De Silva, "ESG Risk Disclosure and the Risk of Green Washing" (2022) 16(1) *Australasian Accounting, Business and Finance Journal* 146 <https://doi.org/10.14453/aabfj.v16i1.10>; Ellen Pei-yi Yu, Bac Van Luu and Catherine Huirong Chen, "Greenwashing in Environmental, Social and Governance Disclosures" (2020) 52 *Research in International Business and Finance* 101192 <https://doi.org/10.1016/j.ribaf.2020.101192>.

[63] For example in Australia, ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (ASX, 4th ed, 2019) Recommendation 7.4 <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf>; US Securities and Exchange Commission, "SEC Proposes Rules to Enhance and Standardize Climate-related Disclosures for investors" (Press Release, No 2022-46, 21 March 2022) <https://www.sec.gov/news/press-release/2022-46>.For broader discussion, see Amr ElAlfy and Olaf Weber, "Corporate Sustainability Reporting: The Case of the Banking Industry" (Centre for International Governance Innovation, 2019) <https://apo.org.au/sites/default/files/resource-files/2019-02/apo-nid221461.pdf>; Brett McDonnell et al, "Green Boardrooms?" (2021) 53 *Connecticut Law Review* 335; Georgina Tsagas and Charlotte Villiers, "Why 'Less Is More' in Non-financial Reporting Initiatives: Concrete Steps towards Supporting Sustainability" (2020) 10(2) *Accounting, Economics, and Law: A Convivium* <https://doi.org/10.1515/ael-2018-0045>.

[64] Gregory Jackson et al, "Mandatory Non-financial Disclosure and Its Influence on CSR: An International Comparison" (2020) 162(2) *Journal of Business Ethics* 323 <https://doi.org/10.1007/s10551-019-04200-0>; Bernard Mees and Sherene A Smith, "Corporate Governance Reform in Australia: A New Institutional Approach" (2019) 30(1) *British Journal of Management* 75, 76.

[65] See Gunningham, n 61; MacLeod and Park, n 61.

nexus between regulatory and social and environmental responsibilities and corporate management, but they are developing only very slowly and in tiny incremental steps. Moreover, they rely on the political and social action of other actors such as investors, activists and ultimately consumers (who might shun or price down products and services form irresponsible companies). ESG reporting in and of itself achieves little if there is no threat of response from investors and stakeholders.

(d) Supply Chain Due Diligence

Now reporting is also being extended to supply chain due diligence, such as regulatory requirements to report conflict minerals, modern slavery, and even "scope 2 and 3" greenhouse gas emissions (ie greenhouse gas emissions occurring downstream in the supply chain from the product or service produced by the reporting company).[66] The European Union is even proposing generalised supply chain due diligence principles. By requiring companies to investigate and report on harmful impacts in their supply chains (forwards and backwards) it also encourages companies to "purify" their supply chains by removing suppliers, partners and business-to-business customers who fail to meet the relevant standards.[67]

4. Summary: The Limits of Responsive Regulation and Governance

The redefinition and extension of directors' duties, investors' responsibilities, corporate reporting, and supply chain due diligence show some promise in tackling the eco-social crises described in the second part of this article. Not least, reforms like these explicitly contemplate corporate managers being required to holistically consider and respond to a range of environmental and social concerns that are otherwise typically siloed by both government policy makers and reactive corporate defence strategies. There has long been at least lip service paid in corporate social responsibility and corporate governance discourse to things like "the triple bottom line". However the serious nature of the eco-social crises now facing the planet means that this cannot be merely a voluntary "balancing" exercise left to corporate managerialism, as it often is under apparently responsive stakeholder oriented approaches to corporate governance.[68] Further, despite their emphasis on plural motivations and plural levers of regulation, theories of responsive regulation remain largely centred on discrete and individual regulatory problems (nursing home standards, pollution controls, tax compliance and so on). "Beyond compliance" as it is understood in the framework of responsive regulation means commitment to compliance with a range of individual and still siloed regulatory obligations. It has not generally come to mean ensuring businesses go beyond a superficial assessment of how their actions contribute to, and alternatively could help address, interconnected ecological and social crises.[69] The promise of responsiveness has not yet been fully realised in a way capable of generating a dynamic of radical change to business behaviour consistent with ecological sustainability.

[66] See, eg, Charlotte Villiers, "Global Supply Chains and Sustainability: The Role of Disclosure and Due Diligence Regulation" in Beate Sjåfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019) 551.

[67] See Paul L Davies, "From Free Will to Duties of Vigilance: Corporate Liability for Wrongdoing" in Ronald J Gilson et al (eds), *Festschrift in Honour of Rolf Skog* (Norstedts Juridik, 2021) <https://ssrn.com/abstract=3940444>; Villiers, n 66.

[68] See de Silva Lokuwaduge and De Silva, n 62; Yu et al, n 62. Responsive regulation has also been critiqued for its separation from tripartism, a complementary aspect of the overall approach that empowers those most affected by non-compliance that is seen as important to ensure greater democratic accountability of both regulators and regulatees, see Haines, n 47, 225–229; Seung-Hun Hong and Jong-sung You, "Limits of Regulatory Responsiveness: Democratic Credentials of Responsive Regulation" (2018) 12(3) *Regulation & Governance* 413 <https://doi.org/10.1111/rego.12193>.

[69] An extended discussion of these points can be found at Parker and Haines, n 1. For a parallel approach to the need for co-ordination of multiple intersecting ecological and social challenges in law and regulation see Rakhyun E Kim and Louis J Kotzé, "Planetary Boundaries at the Intersection of Earth System Law, Science and Governance: A State-of-the-Art Review" (2021) 30(1) *Review of European, Comparative & International Environmental Law* 3 <https://doi.org/10.1111/reel.12383>.

IV. Towards Ecologically Responsive Corporate Governance and Regulation

In this final section we sketch out two potential directions for reform to corporate governance that build on and extend the promise of responsiveness outlined in the previous part towards what we call "ecologically responsive" corporate governance from the inside out. We go on to sketch out two complementary elements of the "outside in" of ecological regulation needed to enliven ecologically responsive corporate governance.

A. Ecologically Responsive Corporate Governance

1. Redefinition of the Corporate Purpose

The proposal by Colin Mayer for the British Academy and many others to explicitly reconceptualise and restate the very purpose of the company holds significant promise.[70] It requires each company to place some social or environmental purpose at the "heart of their operations" and to re-orient its' other aims (including profit) around that aim.[71] This redefinition of corporate purpose challenges the shareholder (profit) primacy conception and replaces it with a formulation of purpose that explicitly includes responsibility to the social ecologies in which businesses are embedded. Colin Mayer and the British Academy concluded that "the purpose of business is to solve the problems of people and planet profitably, and not profit from causing problems".[72] Similarly, Beate Sjåfjell and Mark B Taylor have suggested a redefined corporate purpose as "creating sustainable value within the planetary boundaries while respecting the interests of its investors and other involved partners".[73]

2. Diversifying and Supporting Different Business Forms

A second re-orientation of corporate governance, though, is also necessary. The scholarship, for understandable reasons, often analyses legal requirements relevant for large for-profit corporations. But even with the best of these requirements a reality, history suggests this would entrench an unhelpful advantage to the large corporate form that would see this model dominate.[74] Rosemary Langford usefully addresses this by identifying the need to recognise difference among businesses. She proposes that purpose-based governance is particularly appropriate for not-for-profit charities that perform social functions but can also be a suitable model for for-profit companies with a social or environmental enterprise type function.[75] Her approach is important because it recognises that there are diverse possibilities for enterprising activities within the corporate form itself. Not all corporations are large for-profit financialised entities, despite the apparent monoculture of such activity.[76] Some are small local businesses, some are charities, some are universities and other public purpose large institutions. We see this as an important support for a diverse economy with a range of alternative economic and enterprise vehicles.

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[70] Rosemary Teele Langford, "Purpose-based Governance: A New Paradigm" (2020) 43(3) *UNSW Law Journal* 954; The British Academy, *Reforming Business for the 21st Century: A Framework for the Future of the Corporation* (2018); The British Academy, *Principles for Purposeful Business: How to Deliver the Framework for the Future of the Corporation* (2019).

[71] The British Academy, *Principles for Purposeful Business*, n 70, 19.

[72] The British Academy, *Principles for Purposeful Business*, n 70, 8.

[73] Beate Sjåfjell and Mark B Taylor, "Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose" (2019) 13(3) *International and Comparative Corporate Law Journal* 40, 62.

[74] Sjåfjell and Taylor, n 73.

[75] Langford, n 70.

[76] See Henry Hansmann and Reinier Kraakman, "The End of History for Corporate Law" in J Gordon and M Roe (eds), *Convergence and Persistence in Corporate Governance* (CUP, 2004) 33–68 <https://doi.org/10.1017/CBO9780511665905.002>.

B. Ecologically Responsive Regulation

How then might we imagine ecologically responsive regulation capable of enlivening ecologically responsive corporate governance. We argue that ecological regulation entails at least two steps, steps that re-orientate the regulatory worldview consistent with the reality of our embodiment within a threatened ecological world.[77] First, there is a need for regulatory reform to generate substance to problem-solving to ensure its consistency with ameliorating the ecological and social crises we now face. Second, there is a need for regulation to respond to not only support multiple business forms but also multiple possible ways of living. At its most basic level this involves a regulatory infrastructure that responds to the need for a multiplicity of business forms and not just a default assumption that the for-profit limited liability company is the preferred mechanism to "solve problems".

1. Redefining Regulatory Purpose: The Reality of Ecological Limits

A deep recognition of ecological limits within regulatory governance begins by recognising the "more-than-human" world – animals, plants, local and regional eco systems and so on – as salient actors in regulatory studies, and with this, our own embodiment. In western culture we are only just beginning to develop ways to pay attention to ecology itself through both professional science and attentiveness to other forms of knowing the more-than-human world, including indigenous knowledge traditions.[78] Ecological systems *themselves* regulate business. A simple example here is the way crop diseases shape agricultural production, that in turn creates the incentives for business innovation, that in turn generates further problems. Take for example the shift towards genetically modified seeds and dependence by farmers that use the seeds on specific industry supplied chemicals. This solution to agricultural pests that can wipe out swathes of agricultural production not only facilitates and motivates business to generate solutions to a narrowly defined problem but also deepens farmers' dependency on those agribusinesses that produce such technology.[79] Instrumental regulation that tackles each of these damaging consequences individually and separately (competition implications from large agribusiness, health and safety of the chemicals produced, environmental consequences of entrenching grain monocultures) severely limits the problem-solving capacity of the individual farming businesses that are then constrained by their dependence on large agribusiness. Ecologically responsive regulation would take the destructive consequences of monocultural forms of production as a starting point and provide the regulatory infrastructure that allows multiple solutions to the challenge of enabling a healthy and sustainable food system to flourish.[80]

Related to this is the deeper recognition of embodiment. So, what difference would it make to our accounts if we included as part of the regulatory space the non-human animals in the farm who resist certain treatment, who are vulnerable to disease and death, or evoke feelings of sympathy in the public at large? What about the soil that is salinated or the ocean or bay that becomes unfishable and unswimmable due to run off or the mess produced by fish farming? When we talk about motivations or drivers for compliance, we often talk about self-interested, social and normative motivations for compliance and regulation – but we should add a separate fourth set of motivations, ecological motivations, that relate to our innate sense that we are embodied beings in socio ecological systems. These include the drive to be connected to nature, the pleasure from encountering the sensuous diversity of the non-human world, and the anxiety that occurs when we see mass environmental damage such as the mass deaths of fish in the Menindee Lakes or the dying of the Great Barrier Reef.

[77] See also Margaret Davies, *EcoLaw: Legality, Life, and the Normativity of Nature* (Routledge, 2022).

[78] Kathleen Birrell and Daniel Matthews, "Re-storying Laws for the Anthropocene: Rights, Obligations and an Ethics of Encounter" (2020) 31(3) *Law and Critique* 275; Danielle Celermajer et al, "Multispecies Justice: Theories, Challenges, and a Research Agenda for Environmental Politics" (2021) 30(1–2) *Environmental Politics* 119.

[79] Andy Stirling and Sue Mayer, "A Novel Approach to the Appraisal of Technological Risk: A Multicriteria Mapping Study of a Genetically Modified Crop" (2001) 19(4) *Environment and Planning C: Government and Policy* 529.

[80] Parker and Johnson, n 8.

2. *Valuing and Growing Diverse and Alternative Economies, Societies – Socio Economic Ecologies*

With this in place, we can then explore the generative conditions that are necessary to build ecological compliance sensitivity across a range of domains as a counterweight to regulation that assumes the dominance of a market-based system and the limited liability for-profit company. To do this, regulation itself needs to be pluralised. The current privileging of market-based governance as the solution to all regulatory problems includes private industry standards and certification systems. It also includes a tendency towards emphasising the need for individual consumers, workers and those most disadvantaged in society to be responsible for regulating and controlling the damaging effects of corporate behaviour on their own health or the environment.[81] Whether this is something as seemingly innocuous as telling us that it is up to us to save the Amazon or save the animals by choosing a food with the right provenance and certification, the false assumption is that the market will work (through our actions as consumers) to put limits on itself without collective government action.[82] Instead, the focus should be on what is needed to enliven ecological flourishing.

There are many who are trying different ways to live and flourish. These include regenerative farming, housing and livelihood cooperatives, and different ways of sharing and thriving together.[83] These initiatives need sustained regulatory attention. Ecological regulation would start from the premise that it is necessary to understand the legal and regulatory environment that each initiative inhabits, which regulations are supporting their development and flourishing, and which are inhibiting these, and to progressively change the regulatory environment so they can grow and develop. Further, it demands attention to how compliance is achieved in a way that does not sacrifice core ecological goals. Without this level of attention there is a danger that these initiatives will remain small and isolated, and unable to engender the transformation needed.

V. Conclusion

By focusing on the intersection between corporate governance and regulation, we have highlighted their mutual and necessary inter-dependence in facilitating and disciplining business behaviour from the inside out (corporate governance) and the outside in (business regulation). Their relationship to date reflects the imprint of either or both of two approaches reflected in both the law and in academic commentary on the law: the first combines shareholder primacy with limited narrowly focused "instrumental" regulation; and the second incorporates a more expansive vision of businesses going beyond compliance and accepting responsibility for their social and environmental, not just economic, impact in both corporate governance and regulation. Both approaches have thus far failed to grapple sufficiently with the eco-social crises made visible through the concept of planetary boundaries and visceral images of bushfires, floods, and other examples of eco-social crisis.

We have briefly sketched out a proposed alternative to instrumental regulation and shareholder primacy which develops and extends the promise of responsive regulation to the eco-social crises, which we call "ecologically responsive" governance and regulation. The corporate governance components of this approach will likely include ideas such as requiring all corporations to have socially and ecologically beneficial purposes that precede profit and enabling a range of legal forms to do so.

Ecologically responsive regulation has a clear goal, and a set of principles and strategies for getting there. In terms of business conduct, the goal is a fundamental change to the rules of the game to promote the flourishing that comes from recognising and realising the obligations that come from our ecological and social connectedness and dependency on each other and on the more than human world around us.[84]

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[81] See, eg, Christopher Mayes, *The Biopolitics of Lifestyle: Foucault, Ethics and Healthy Choices* (Routledge, 2016).

[82] For example Christine Parker, Hope Johnson and Janine Curll, "Consumer Power to Change the Food System: A Critical Reading of Food Labels as Governance Spaces: The Case of Acai Berry Superfoods" (2019) 15 *Journal of Food Law and Policy* 1.

[83] Bronwen Morgan and Declan Kuch, "Radical Transactionalism: Legal Consciousness, Diverse Economies, and the Sharing Economy" (2015) 42(4) *Journal of Law and Society* 556; Bronwen Morgan, "Legal Models Beyond the Corporation in Australia: Plugging a Gap or Weaving a Tapestry?" (2018) 14(2) *Social Enterprise Journal* 180 <https://doi.org/10.1108/SEJ-02-2017-0011>.

[84] Davies, n 77.

From this perspective, individual reforms, whether to regulation or to corporate governance, must be assessed in light of the degree to which they engender systemic change or merely legitimate the current destructive path. Moreover, rather than judging each reform effort in isolation, the key question is what combination of initiatives can engender such change. As with all regulatory ideals, the implementation and realisation of ecological governance and regulation will be messy and complex, often straying some way from what is desirable. However, it is fundamentally premised on a different understanding of the role and purpose of business and as such may just contribute to ecological recovery and wellbeing.