

Chapter 8

Meta-Regulation: Legal Accountability for Corporate Social Responsibility?

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1. Introduction: Legal Accountability and Corporate Social Responsibility

The very idea that law might make business responsible for corporate social responsibility is paradoxical. We might argue that ideally CSR includes compliance with business' legal responsibilities but goes 'beyond compliance'² to encompass the *economic* ('to produce goods and services that society wants and to sell them at a profit'), *ethical* ('additional behaviours and activities that are not necessarily codified

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² See N. Gunningham, R. Kagan and D. Thornton, 'Social licence and environmental protection: Why businesses go beyond compliance?', *Law & Social Inquiry* 29 (2004), 307.

into law but nevertheless are expected of business by society's members') and even *discretionary* ('those about which society has no clear-cut message for business', but society does expect business to assume some discretionary role, e.g. making philanthropic contributions) expectations of society.³ If so, how is it possible for the law to make companies accountable for going *beyond the law*?

On the other hand, we might argue that CSR is a set of vague, discretionary and non-enforceable corporate responses to social expectations.⁴ If so, then might not companies use CSR to stave off more demanding legal regulation? Does not the idea of corporations taking responsibility themselves for meeting society's expectations undermine the very idea of legal accountability for meeting substantive standards?

This chapter is concerned with the way in which law could (and sometimes does) seek to hold businesses *accountable* for taking their *responsibilities* seriously by using various mechanisms to encourage or enforce businesses to put in place internal

³ A. B. Carroll, 'A three-dimensional conceptual model of corporate performance', *Academy of Management Review* 4 (1979), 497, 500 (italics added). Carroll's definition recognises that all four overlap, some obligations may simultaneously fall into more than one category and obligations may move from being purely ethical to legal over time. They are all aspects of *society's* expectations of what corporations are obligated to do, and hence are *social* responsibilities.

⁴ R. Shamir, 'Mind the gap: The commodification of corporate social responsibility', *Symbolic Interaction* 28 (2005), 229, and 'Between self-regulation and the Alien Tort Claims Act: On the contested concept of corporate social responsibility', *Law & Society Review* 38 (2004), 635. For a discussion of the ambiguity of 'corporate social responsibility', see D. Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, DC: Brookings Institution Press, 2005), pp. 4-6.

governance structures, management practices and corporate cultures aimed at achieving responsible outcomes. Law attempts to constitute corporate ‘consciences’⁵ – getting companies ‘to want to do what they should do’⁶ – not just legally compliant outputs or actions. I have previously labelled regulatory initiatives that seek to do this ‘meta-regulation’ because they represent the (attempted) regulation of internal self-regulation.⁷ Meta-regulation – the proliferation of different forms of regulation (whether tools of state law or non-law mechanisms) each regulating one another – is a key feature of contemporary governance.⁸ The focus of this chapter, however, is on the meta-regulatory potential only of law.

To the extent that law focuses on companies’ *internal responsibility processes* rather than *external accountability outcomes*, law runs the risk of becoming a substanceless

⁵ Selznick uses the term ‘corporate conscience’: P. Selznick, *The Communitarian Persuasion* (Washington, DC: Woodrow Wilson Center Press, 2002), p. 101. See also n. 26 below.

⁶ *Ibid.*, p. 102

⁷ C. Parker, *The Open Corporation* (Cambridge: Cambridge University Press, 2002). For similar uses of ‘meta-regulation’ or cognate terms, see J. Braithwaite, ‘Meta-risk management and responsive regulation for tax system integrity’, *Law and Policy* 25 (2003), 1; C. Coglianese and D. Lazer, ‘Management-based regulation: prescribing private management to achieve public goals’, *Law & Society Review* 37 (2003), 691 (government as ‘meta-manager’); P. Grabosky, ‘Using non-governmental resources to foster regulatory compliance’, *Governance* 8 (1995), 527, 543 (‘meta-monitoring’). For commentary, see R. Baldwin, ‘The new punitive regulation’, *Modern Law Review* 67 (2004), 351, 374-82; J. Black, ‘The emergence of risk-based regulation and the new public risk management in the United Kingdom’, *Public Law* Autumn (2005), 512, 543-5; M. Power, *The Risk Management of Everything: Re-thinking the Politics of Uncertainty* (London: Demos, 2004), p. 21.

⁸ C. Parker, J. Braithwaite, C. Scott and N. Lacey (eds.), *Regulating Law* (Oxford: Oxford University Press, 2004).

sham, to the delight of corporate power-mongers who can bend it to their interests. Law might be hollowed out into a focus on process that fails to recognise and protect substantive and procedural rights.⁹ If the law itself fails to recognise and protect substantive and procedural rights, then business will doubly fail to do so.

Putting the critique so starkly anticipates the response. This chapter argues that it is possible, in principle at least, to imagine (and even to see partial examples of) legal meta-regulation that holds business organisations accountable for putting in place corporate conscience processes that are aimed at substantive social values. However, this requires that procedural and substantive rights of customers, employees, local communities and other relevant stakeholders, as against businesses,¹⁰ are adequately recognised and protected. ‘Meta-regulatory’ accountability for corporate responsibility is possible – but it may have little to do with most current business and government ‘corporate social responsibility’ initiatives.

This chapter:

⁹ W. Heydebrand, ‘Process rationality as legal governance: a comparative perspective’, *International Sociology* 18 (2003), 325.

¹⁰ Including their senior managers and shareholders: see, for example, Gideon Haigh, *Bad Company: The Strange Cult of The CEO* (London: Aurum Books, 2004) (how remuneration of CEOs affects corporate behaviour); Christopher Kutz, *Complicity: Law and Ethics for a Collective Age* (Cambridge: Cambridge University Press, 2000) (an argument for shareholder liability for corporate irresponsibility).

- (1) Sets out what meta-regulating law must do and be in order to hold companies accountable for their responsibility, and briefly explains how this notion of meta-regulating law relates to the plurality of legal, non-legal and quasi-legal 'governance' mechanisms at work in a globalising, 'post-regulatory' world;
- (2) Sets out the critique that law that attempts to meta-regulate corporate responsibility will focus on internal governance processes in a way that allows business to avoid the conflict between self-interest and social values, and therefore to avoid accountability; and
- (3) Argues that law or regulation that falls into this critique does not fall within the criteria I have defined for meta-regulation of corporate responsibility. My conception of legal meta-regulation is a useful tool for evaluating proposals to use law to encourage or enforce CSR precisely because it addresses the main critiques of attempts to regulate CSR.

2. Meta-Regulation: Legal Regulation of Corporate Conscience

Meta-regulation

The concept of meta-regulation can be fitted into a broader literature in which governance is seen as increasingly about 'collaborations', 'partnerships', 'webs' or 'networks' in which the state, state-promulgated law, and especially hierarchical command-and-control regulation, is not necessarily the dominant, and certainly not

the only important, mechanism of regulation.¹¹ States, businesses, non-governmental organisations and people operating even outside these three sectors may all be active in constituting various governance networks that steer (or attempt to steer) different aspects of social and economic life.¹² States and law may be important to a greater or lesser extent in each of these networks, with overlapping forms of governance coming together in different ways to frustrate or accomplish various regulatory goals.¹³

The term ‘meta-regulation’ itself has been used as a descriptive or explanatory term within the literature on the ‘new governance’ to consider the way in which the state’s role in governance and regulation is changing and splitting. The state is regulating its own regulation as a consequence of policies to apply transparency, efficiency and market competition principles to itself (e.g., government units that assess the social and economic impact of regulation proposed by other departments before allowing

¹¹ See, e.g., J. Braithwaite, ‘The new regulatory state and the transformation of criminology’, *British Journal of Criminology* 40 (2000), 222; J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); M. Dorf and C. Sabel, ‘A constitution of democratic experimentalism’, *Columbia Law Review* 98 (1998), 267; J. Freeman, ‘The private role in public governance’, *New York University Law Review* 75 (2000), 543, and ‘Collaborative governance in the administrative state’, *UCLA Law Review* 45 (1997), 1; R. Lipschutz, *Globalization, Governmentality and Global Politics: Regulation for the Rest of Us?* (Abingdon: Routledge, 2005); O. Lobel, ‘The renew deal: the fall of regulation and the rise of governance in contemporary legal thought’, *Minnesota Law Review* 89 (2004), 342; H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart Publishing, 2005).

¹² C. Shearing and J. Wood, ‘Nodal governance, democracy, and the new “denizens”’, *Journal of Law and Society* 30 (2003), 400, 405.

¹³ See C. Scott, ‘Analysing regulatory space: fragmented resources and institutional design’, *Public Law Summer* (2001), 283.

new legislation to be proposed;¹⁴ regulating or auditing the quality assurance mechanisms of semi-independent government agencies [such as schools or universities], newly privatised or corporatised entities [such as prisons, rail operators or telecommunications companies], and government departments).¹⁵ ‘Meta-regulation’ can also entail any form of regulation (whether by tools of state law or other mechanisms) that regulates any other form of regulation. Thus it might include legal regulation of self-regulation (e.g., putting an oversight board above a self-regulatory professional association), non-legal methods of ‘regulating’ internal corporate self-regulation or management (e.g., voluntary accreditation to codes of good conduct, etc.), the regulation of national law-making by transnational bodies (such as the EU), and so on.

Some of this governance literature is mainly analytical or descriptive. Some writers are critical of the ‘hollowing out of the state’ by plural governance mechanisms. Some actively encourage it. Others are cautiously optimistic about the possibilities for increased participation in decision-making entailed by changes in governance. Some seek to suggest ways in which governance networks might be made more democratic, just and/or fair starting from the assumption that plural governance mechanisms are

¹⁴ B. Morgan, ‘The economisation of politics: meta-regulation as a form of nonjudicial legality’, *Social & Legal Studies* 12 (2003), 489.

¹⁵ M. Power, ‘Evaluating the audit explosion’, *Law & Policy* 25 (2003), 185; C. Scott, ‘Speaking softly without big sticks: meta-regulation and public sector audit’, *Law & Policy* 25 (2003), 203. Also see C. Hood, O. James, C. Scott, G. Jones and T. Travers, *Regulation Inside Government* (Oxford: Oxford University Press, 1999); J. Jordana and D. Levi-Faur, ‘The politics of regulation in the age of governance’, in J. Jordana and D. Levi-Faur (eds.), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham, UK: Edward Elgar, 2004), p. 1.

(and always have been) a reality for good or for ill. There is no consensus (among either scholars or practitioners) about what substantive values, if any, the techniques of meta-regulation and the new governance represent.¹⁶ Nor is there any consensus about what role, if any, law at the national, and especially international level, can and should play in facilitating, enforcing, regulating or supplanting governance networks.¹⁷

Why, then, might we be interested in thinking about law ‘meta-regulating’ corporate responsibility?

Most practically, we would expect that law (or indeed other forms of regulation/governance) that can focus itself on the inside of corporations to constitute corporate consciences that go beyond compliance might be able to achieve more sustainable compliance with traditional regulatory goals more effectively and efficiently because it latches onto companies’ inherent capacity to manage

¹⁶ See Jordana and Levi-Faur, ‘The politics of regulation’, p. 11 (‘the true colours of the regulatory state are still to be determined’).

¹⁷ Contrast, for example, Vogel, *The Market for Virtue* (cautious support for the possibility of achieving CSR at an international level through market mechanisms and civil society action); Lipschutz, *Globalization* (a substantial argument that current transnational governance mechanisms and CSR reform proposals are both based on market regulation that exclude political participation and regulation aimed at the common good); Schepel, *The Constitution of Private Governance* (detailed analysis of law and practice to show that ‘private’ governance already represents the ‘centre’ of product safety-setting in way that is ineluctably intertwined with ‘public’ law on the periphery).

themselves.¹⁸ Recognition of the plurality of governance provides an opportunity. Meta-regulating law could connect with communities, networks and organisations that are rich with the possibility of regulating themselves and one another responsibly, and work with that possibility to invigorate and enliven their inner commitment to responsibility.

Secondly, even if meta-regulation cannot be shown to have practical effectiveness and efficiency benefits, we might still think it is good to develop a meta-regulatory aspect to law because it makes the law more accurately track the way we think about organisational responsibility for identifying, preventing and correcting legal and ethical wrongdoing – meta-regulatory law recognises the complex ways in which organisational processes and structures can sometimes lead to wrong actions or outputs, and gives us techniques for holding organisations and their management responsible for the wrongness of those processes, as well as for the wrongness of their outputs.¹⁹

Finally, in the context of the new governance, meta-regulation might be one of the ways in which the practice and theory of law must be transformed and

¹⁸ See references at n. 7 above, and at n. 31 below. See also B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993). Note this argument assumes a certain level of management competence and coherence, assumptions that are not always justified in practice (see critique of meta-regulating corporate responsibility in section 3 below).

¹⁹ I have set out previously the ways in which more traditional command-and-control regulation of business frequently fails to achieve these first two objectives, and how meta-regulation does: see Parker, *The Open Corporation*.

reconceptualised in order for us to work out how law interacts with other strands of governance.²⁰ Meta-regulatory law might recognise, incorporate or empower initiatives developed by non-state actors or partnerships of actors that can regulate corporate governance processes (e.g. by enforcing management system standards developed by international NGOs). Taking a meta-regulatory approach to law might also allow us to recognise that some governance mechanisms that we might not have traditionally thought of as law could in fact be thought of as 'law' in an extended sense, and evaluated according to criteria of legality.²¹ And, vice versa, we might understand better the ways in which law's regulatory goals are achieved or frustrated via regulatory forces outside the law (e.g. pollution limits are only observed by companies to the extent that relevant technology is available and management

²⁰ See C. Sabel and W. Simon, 'Epilogue: Accountability without sovereignty', in G. de Búrca and J. Scott (eds.), *New Governance and Constitutionalism in Europe and the US* (Oxford: Hart Publishing, 2006) (on the 'transformation' or 'hybridisation' of law in the context of the 'new governance'). The concept of meta-regulation would be aimed towards similar ideals as those represented by Teubner's idea of 'reflexive' law: G. Teubner, 'Corporate fiduciary duties and their beneficiaries: A functional approach to the legal institutionalization of corporate responsibility', in K. Hopt and G. Teubner, *Corporate Governance and Directors' Liabilities: Legal, Economic and Sociological Analyses of Corporate Social Responsibility* (Berlin: Walter de Gruyter, 1985); Nonet and Selznick's 'responsive' law: P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law*, 2nd edition (New Brunswick: Transaction Publishers, 2001), and, earlier, Durkheim's notion of law as coordinating between different social roles and functions, especially as represented in associational governance regimes: see R. Cotterrell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh: Edinburgh University Press, 1999), pp. 111, 176-80.

²¹ See, for example, Schepel's study of product standards developed outside formal legal mechanisms yet incorporated into law and much more important than law in many ways: Schepel, *The Constitution of Private Governance*.

implements that technology appropriately in corporate production processes), and we might better understand the limits of law's regulatory reach. Meta-regulatory law is a response to the recognition that law itself is regulated by non-legal regulation, and should therefore seek to adapt itself to plural forms of regulation.

What would law need to do in order to meta-regulate CSR?

Legal regulation characteristically works by holding people *accountable* for meeting 'threshold criteria of good conduct or performance' after the fact.²² Legal regulation of business has typically involved imposing liability for conduct that has an impact or manifestation external to the business that fails to meet the legal standard e.g. pollution, the death or injury of a worker, price-fixing, harmful products etc.²³ CSR requires *responsibility*. As Philip Selznick puts it, *responsibility* goes beyond accountability to ask 'whether and how much you care about your duties. An ethic of responsibility calls for reflection and understanding, not mechanical or bare conformity. It looks to ideals as well as obligations, values as well as rules... Responsibility internalizes standards by building them into the self-conceptions, motivations, and habits of individuals and into the organization's premises and routines'.²⁴

²² Selznick, *The Communitarian Persuasion*, p. 29

²³ Of course, law does not always regulate by setting standards, monitoring compliance and prosecuting and punishing non-compliance: see Parker, et al. (eds.), *Regulating Law*.

²⁴ Selznick, *The Communitarian Persuasion*, pp. 29, 102.

Responsible institutions, like responsible individuals, must have an inner commitment to doing the right thing²⁵ – they must have a corporate ‘conscience’. For a corporation we need to look at its governance, management and culture in order to see whether, or what kind of, corporate conscience, it has. Selznick puts this well:

A corporate conscience is created when values that transcend narrow self-interest are built into the practice and structure of the enterprise. This can be done in several ways; by clarifying policies and making them public; by practicing sensitive recruitment of staff; by inculcating appropriate attitudes and habits; by establishing special units to implement policies affecting the well-being of employees, or environmental and consumer protection; and by cooperating with relevant outside groups, such as trade unions and public agencies. All this becomes an “organisational culture,” a framework within which the main goals of the enterprise are pursued. Although self-interest is by no means rejected, the realities of interdependence are accepted, the benefits of belonging acknowledged. Self-interest is moderated and redirected, not forgotten or extinguished.²⁶

Selznick’s morally ‘thick’ conception of what meta-regulation should aim to do set out here can be contrasted with the morally ‘thin’ reasons for which the critics argue

²⁵ P. Selznick, *The Moral Commonwealth* (Berkeley: The University of California Press, 1992), p. 345.

See also K. Goodpaster, ‘The concept of corporate responsibility’, *Journal of Business Ethics* 2 (1983), 1 (corporations should be expected to take ethical responsibility through internal decision-making processes analogous to individual ethical reasoning).

²⁶ Selznick, *The Communitarian Persuasion*, p. 101.

meta-regulation has been adopted. For example, Kim Krawiec argues that meta-regulatory techniques aimed at internal compliance systems have grown in popularity in the US because policy-proposers and makers see corporate compliance breaches too narrowly as a principal-agent problem – that is, that ‘misconduct within organizations results from the acts of single, independent agents who disregard the preferences of shareholder principals and their representatives – the board of directors and senior management’.²⁷ According to her, meta-regulation is therefore aimed narrowly at giving organisational principals incentives to more carefully police their agents, rather than substantively addressing the ways in which organisational management, systems and culture shape and/or implicitly encourage misconduct. She also argues that ‘heightened organizational liability in exchange for a “safe harbor” in the form of mitigation based on internal compliance structures’ is ‘far less onerous’ to business than actually ‘altering current business practices or paying damages for agent misconduct’, and in that sense it is a public choice response to organisational liability (that is, business preferences have shaped the nature of organisational liability).²⁸ She may be right or wrong about the factual reasons why US law has incorporated so many apparently meta-regulatory initiatives. But even if she is right, this does not mean that meta-regulation cannot be justified, and evaluated, on the ethically thicker grounds proposed by Selznick and adopted in this chapter.

In order to instigate, catalyse and hold accountable corporate social *responsibility*, law would have to be aimed at ‘regulating’ the internal self-regulation of businesses.

²⁷ K. Krawiec, ‘Organizational misconduct: beyond the principal-agent model’, *Florida State Law Review* 32 (2005), 1, 28.

²⁸ *Ibid.*, 41. See also the references at n. 4 above.

Following Selznick's formulation of what 'corporate conscience' requires in the quotation above, I suggest that legal 'meta-regulation' of internal corporate self-regulation (or conscience) requires the following three things. Achieving these three things in combination is what would distinguish legal regulation that 'meta-regulates' CSR from other types of legal regulation.²⁹ If it means anything to hold companies legally accountable for CSR, this is what it must mean:

(1) Law that meta-regulates CSR must be aimed at making sure that companies meet 'values that transcend narrow self-interest'

Law that meta-regulates CSR must be aimed clearly at values or policy goals for which companies can take responsibility, not merely compliance with output rules.³⁰ Social and economic regulation are usually promulgated for specific, articulated policy purposes (albeit vague and/or contested to a greater or lesser extent) – a healthy environment, a fair and competitive market, a high degree of security of financial investment for individuals. Relevant values or policy goals might also come from other sources such as human rights or labour rights instruments at a global level, whether they are seen as law or 'soft law', or neither.

(2) Law that meta-regulates CSR must be aimed at making sure these values are 'built into the practice and structure of the enterprise'

²⁹ Note this chapter is concerned only with considering the *legal* regulation of CSR, not (meta-)regulation by other means.

³⁰ See J. Braithwaite and V. Braithwaite, 'The politics of legalism: Rules versus standards in nursing home regulation', *Social and Legal Studies* 4 (1995), 307.

An organisation, not being an individual, can only be responsible by building responsibility into its practice and structure. Selznick mentions a number of ways in which responsibility might be 'institutionalised' within a business enterprise. This echoes an extensive literature on what it takes for organisations to be internally committed to legal compliance,³¹ and indeed to go 'beyond compliance'.³² The aim is that each company would have an organisational culture that supports and sustains responsibility, and that management would be carried out in practice in a way that demonstrates responsibility. Generally, in order to achieve these objectives, meta-regulating law would require companies to put in place formal governance structures and management systems that help produce a responsible culture and management in practice. These might include high-level statements and demonstrations of commitment to compliance with legal and/or ethical obligations; institutionalised in management and worker accountability and performance measurement systems and standard operating procedures; communication and training programs for disseminating information about these policies and systems; internal reporting and

³¹ J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London: Routledge and Kegan Paul, 1984); J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany: State University of New York Press, 1985); F. Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (Oxford: Oxford University Press, 1997); B. Hutter, *Regulation and Risk: Occupational Health and Safety on the Railways* (Oxford: Oxford University Press, 2001), pp. 301-12; D. McCaffrey and D. Hart, *Wall Street Polices Itself: How Securities Firms Manage the Legal Hazards of Competitive Pressures* (New York: Oxford University Press, 1998); Parker, *The Open Corporation*, pp. 43-61, 197-244; J. Rees, *Reforming the Workplace: A Study of Self-regulation in Occupational Safety* (Philadelphia: University of Pennsylvania Press, 1988).

³² N. Gunningham, R. Kagan and D. Thornton, *Shades of Green: Business, Regulation and Environment* (Stanford: Stanford University Press, 2003); A. Prakash, *Greening the Firm: The Politics of Corporate Environmentalism* (Port Chester, NY: Cambridge University Press, 2000).

monitoring systems for gathering information about compliance with those obligations and procedures; processes for gathering and resolving relevant complaints, grievances, suggestions and whistleblowing reports from those both internal and external to the organisation; and internal and external reviews or audits of the functioning and performance of the whole system that feeds back to the highest level and into the design and operation of the systems.³³ I have previously argued that these are all ways of making corporate management ‘open’ or ‘permeable’ to external values.³⁴

(3) Law that meta-regulates CSR must recognise that ‘the main goals of the organisation’ are still to be pursued within the responsibility framework

The stance of meta-regulating law is to recognise that the main goals of a company are not merely to make sure it acts socially responsibly, but also to meet its main goals of producing particular goods and/or services, providing a return to its investors, and/or providing paid employment to its workers and managers. Meta-regulating law should allow space for the company to take responsibility itself for working out how to meet its main goals within the framework of values set down by regulation, provided its main goals can be carried on consistently with social responsibility values. Meta-regulating law should be careful to leave space, to the greatest extent possible, to allow the companies it regulates to decide for themselves how to institutionalise responsibility. This means meta-regulating law does not assume

³³ Parker, *The Open Corporation*, pp. 197-244, includes a more sophisticated analysis of what such systems are likely to require in order to be effective. See also the other references in nn. 31 and 32 above.

³⁴ See Parker, *The Open Corporation*.

command-and-control is the only appropriate technique for regulating social responsibility. It is willing to experiment with more indirect or facilitative techniques for engendering responsibility, including through requiring or capacitating non-state agencies (such as auditors, NGOs or the public at large) to help regulate corporate behaviour (e.g., through audit requirements, provision of information about corporate performance to the public, etc.). It is also willing to treat firms that show different levels of inner commitment to responsibility in different ways.³⁵ Note the rider, as much room ‘as possible’ consistent with ensuring companies do operate within a responsibility framework – meta-regulating law is law, not merely self-regulation.

In summary

Meta-regulation should be about requiring organisations to implement processes (point 2 above) that are aimed at making sure they reach right results in terms of actions that impact on the world (point 1 above). It recognises, however, that law-makers and regulators may not know exactly what the ‘right’ processes, and even the right results, will look like in each situation. The people who are involved in the situation are best placed to work out the details in their own circumstances, *if* they can be motivated to do so responsibly (point 3 above). Whenever we see these criteria being met, we see law seeking to make companies responsible – that is, meta-regulating companies’ internal consciences.³⁶ Meta-regulating law can also recognise

³⁵ See N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon, 1998) and N. Gunningham and R. Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (Oxford: Oxford University Press, 1999) for comprehensive examinations of the various techniques available in two regulatory arenas.

³⁶ For a similar conception, see Coglianese and Lazer, ‘Management-based regulation’.

that motivation, standards and even monitoring and enforcement systems for responsibility come from places other than law – from consumer activism, voluntary industry codes, the desire to protect organisational reputation, etc. – and that regulators and regulation can usefully facilitate, coordinate, extend and simply recognise these other forms of governance.³⁷ The details of corporate responsibility processes and their goals will often be ‘negotiated’ to one extent or another with industry – by explicitly negotiating standards and goals with individual companies or industry, leaving it for individual companies to decide exactly how to design a compliance management system for their own situation, by incorporating into legal requirements voluntary standards developed by industry, or simply because the relevant law or policy instrument provides only for management systems in the most general terms.

Examples of techniques of legal meta-regulation

At a *national level* we will generally find clear examples of legal meta-regulation of CSR within specific domains of social and economic regulation of business.

The most common method is through determinations of corporate liability, damages or penalties in civil or criminal law by reference to whether the corporation has implemented an appropriate compliance system. Meta-regulating law makes it a good legal risk management practice to implement processes to ensure internal corporate responsibility for meeting regulatory goals. One of the oldest examples is probably the duty to provide a safe system of work in relation to occupational health

³⁷ See Braithwaite and Drahos, *Global Business Regulation*; Vogel, *The Market for Virtue*.

and safety liability in tort and statutory regulation. The most famous is the US Federal Sentencing Guidelines for organisations, which state that the existence of an effective compliance system (as defined in the Guidelines) will provide companies or individuals with a reduction of penalty if they are found to have breached the law.³⁸ A variety of other regulatory liability regimes in the US are now predicated on similar considerations.³⁹ In other jurisdictions implementation of a compliance system is an important aspect in determining liability or penalties in relation to competition and consumer protection law, and vicarious liability for sexual harassment and discrimination or unequal employment opportunity.⁴⁰ Recent UK and Australian proposals to introduce an offence of corporate manslaughter could also be seen as examples of meta-regulation through the use of liability. For example, the 2005 UK Home Office's Draft Corporate Manslaughter Bill provides that an organisation will be guilty of corporate manslaughter 'if the way in which any of the organisation's activities are managed or organised by its senior managers (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased'.⁴¹

³⁸ See D. Murphy, 'The Federal Sentencing Guidelines for Organizations: A decade of promoting compliance and ethics', *Iowa Law Review* 87 (2002), 697.

³⁹ For a comprehensive overview, see Krawiec, 'Organizational misconduct', 14-21.

⁴⁰ See Parker, *The Open Corporation*, pp. 249-51.

⁴¹ But for a thorough evaluation of the limits of the UK Bill, see Centre for Corporate Accountability, *Response to the Government's Draft Bill on Corporate Manslaughter* (June 2005), available at <http://www.corporateaccountability.org/manslaughter/reformprops> (accessed 27 October 2005); see generally A. Hall, R. Johnstone and A. Ridgway, 'Reflection on Reforms: Developing Criminal Accountability for Industrial Deaths' (April 2004), *National Research Centre for Occupational Health*

A second technique of legal meta-regulation of corporate responsibility is when regulators ‘settle’ *potential regulatory enforcement actions with businesses only on condition that they implement internal changes* to identify, correct and prevent future wrongdoing. Or, where courts make *corporate ‘probation’ orders* that require the company to do so as part of the organisation’s sentence. The US Sentencing Guidelines state that organisations that do not have an effective compliance program should be placed on probation to implement one.⁴² Regulators in the UK and other Commonwealth jurisdictions have used discretionary powers to informally make settlements requiring compliance system implementation for years. Similarly, US prosecutors under a number of regulatory regimes consider whether a business has implemented an effective compliance program or not in deciding whether to prosecute or not.⁴³ Australian regulatory law seems to be specialising in formalising these type of settlements as ‘enforceable undertakings’ in legislation.⁴⁴

Another common method of meta-regulation is to make the implementation of internal corporate conscience mechanisms *a condition of licenses or permissions*

and Safety Working Paper 33, available at

<http://www.ohs.anu.edu.au/publications/pdf/WorkingPaper26pdf.pdf> (accessed 27 October 2005).

⁴² In Australia, see Trade Practices Act 1974 (Cth), s. 86C for provision for corporate probation orders in relation to competition and consumer protection offences.

⁴³ See C. Parker, *The Open Corporation*, p. 260.

⁴⁴ The first was Trade Practices Act 1974 (Cth), s. 87B. See C. Parker, ‘Restorative justice in business regulation? The Australian Competition and Consumer Commission’s use of enforceable undertakings’, *Modern Law Review* 67 (2004), 209.

required before a company can engage in a certain business, or build facilities in a certain location. The most common examples are the environmental management systems and local community consultations often required as part of the licence obligations for permissions required from environmental regulators for manufacturing facilities. The license requirements for financial services firms usually include broad-ranging internal systems for ensuring integrity of funds (preventing fraud, ensuring proper investment decisions, avoiding conflicts of interest, etc.) and investor disclosure (including consumer protection measures such as 'know your client' principles) regulation.⁴⁵ In New South Wales, the regulator of the corporatised/privatised gas and electricity providers regularly audits their internal compliance systems to make sure they comply with license obligations, with the frequency of audits partially dependent on the results of the previous audit.⁴⁶

Then there are a number of more *voluntary meta-regulatory initiatives that seek to encourage or reward 'beyond compliance' internal management systems by granting extra regulatory flexibility* to firms that voluntarily adopt superior internal systems that go 'beyond compliance' – for example, by fast-tracking the granting of permissions or licences to such firms, scheduling inspections less frequently for them, or providing public recognition for them through allowing them to use a seal or logo

⁴⁵ See, for example, Black, 'The emergence of risk-based regulation'; P. Hanrahan, '(Ir)responsible entities: Reforming manager accountability in public unit trusts', *Company & Securities Law Journal* 16 (1998), 76; H. Lauritsen, 'Enforced self-regulation under the Financial Services Reform Act: Ensuring the competency of financial intermediaries', *Company & Securities Law Journal* 21 (2003), 468.

⁴⁶ See 'Licence Compliance' page in section on Electricity Licensing at <http://www.ipart.nsw.gov.au> (accessed 16 May 2006).

that is publicised as a mark of superior performance. US environmental and occupational health and safety regulators have been particularly active in experimenting with such schemes.⁴⁷

The law might also seek more *indirect or partial methods of meta-regulation*. Often more indirect, less coercive methods of meta-regulation are used (or proposed) for schemes aimed more at the ethical and discretionary aspects of CSR, or for schemes aimed at improving CSR as a whole (rather than focused on the goals of a specific regulatory regime). For example, laws, such as the US *Sarbanes-Oxley Act* (2002), that require certain corporate employees to report suspected corporate fraud up to senior management and require or encourage companies to put in place whistleblower policies are a form of partial encouragement to internal corporate conscience, since a corporate policy encouraging and protecting whistleblowers (generally in relation to any breach of legal or ethical obligations, not just financial fraud) would be one element of the sort of processes that companies would need to have in place to ensure their own responsibility.⁴⁸ But much more would also be necessary. Laws that simply protect whistleblowers (e.g., by providing that they should not be sacked or sued for their actions, and giving them the right to sue for compensation if they are sacked), rather than mandating implementation of policies, provide indirect encouragement to

⁴⁷ See N. Gunningham and D. Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (Sheffield: Greenleaf Publishing, 2002), pp. 111-15; O. Lobel, 'Interlocking regulatory and industrial relations: The governance of workplace safety', *Administrative Law Review* 57 (2005), 1071.

⁴⁸ On the US Sarbanes-Oxley reforms, see R. Rosen, 'Resistances to reforming corporate governance: The diffusion of QLCC's', *Fordham Law Review* 74 (2005), 1251.

internal corporate conscience.⁴⁹ The availability of damages indirectly holds businesses accountable for allowing a culture or management system that ignores and punishes whistleblowers to go unchecked, and encourages whistleblowers to make their concerns known. Other examples might include government ‘approved’ or sponsored voluntary CSR management accreditation and auditing schemes,⁵⁰ voluntary undertakings to implement CSR management systems given to government and enforceable by contract, tax incentives, and government procurement decisions predicated on implementation of CSR systems.⁵¹

In the final section, we will evaluate some of these more ambiguous examples.

Much discussion about CSR is about corporate observation of human rights at the *transnational level*. It is hard to find good examples of transnational *legal* meta-regulation of CSR because, as is well-known, there are few avenues for holding corporations accountable under international law at all, and none in relation to human

⁴⁹ Corporations Act (Cth), Part 9.4AAA (commenced 1 July 2004).

⁵⁰ For example EMAS, the Eco-Management and Audit Scheme, a voluntary initiative established by the European Commission (Council Regulation 761/01): see http://europa.eu.int/comm/environment/emas/index_en.htm (accessed 27 October 2005).

⁵¹ These had both been proposed by the EC, but not even that level of legal ‘enforceability’ is being given to CSR by the EC at this stage: see Commission of the European Communities, *Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, Brussels, 2 July 2002 COM(2002) 347 final.

rights, the main focus of CSR at the transnational level.⁵² (There are many attempts at *non-legal* regulation of transnational CSR, with varying degrees of success.)⁵³ In order to find examples of *legal* regulation of transnational CSR, we will generally need to look for situations where nations legally regulate the conduct of TNCs in accord with international obligations, or adopt or enforce voluntary global corporate responsibility standards,⁵⁴ or where national law has an extra-jurisdictional impact on

⁵² See D. Kinley and J. Tadaki, 'From talk to walk: the emergence of human rights responsibilities for corporations at international law', *Virginia Journal of International Law* 44 (2004), 931 (concluding that there is no binding transnational law on human rights obligations for corporations; but there is 'an expanding body of extraterritorial domestic jurisprudence that focuses on the human rights implications of actions taken by corporations overseas'; at 935; and a number of multilateral institutions have created 'soft-law' human rights standards for the conduct of TNCs, although these have generally not been implemented, monitored or enforced in any way; at 949-52).

⁵³ See n. 37 above.

⁵⁴ Things like SA8000 (an accreditable and auditable social accountability standard), and possibly ISO14000, have a focus on internal corporate management systems, but barely count as law of any kind, even 'soft law'. In the future they might be adopted or encouraged by national laws by being used for reporting standards, liability or incorporated by contract (by government or by private companies): see Kinley and Tadaki, 'From talk to walk', 957; A. Wawryk, 'Regulating transnational corporations through corporate codes of conduct', in J. Frynas and S. Pegg (eds.), *Transnational Corporations and Human Rights* (Basingstoke: Palgrave Macmillan, 2003), p. 53; K. Webb and A. Morrison, 'The law and voluntary codes: Examining the "tangled web"', in K. Webb (ed.), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Ottawa: Carleton University Research Unit for Innovation, Science and the Environment, 2002), p. 93. For a comprehensive overview of the ways in which environmental management system certification programs can be incorporated into, enforced or facilitated by the law, see E. Meidinger, 'Environmental certification programs and U.S. environmental law: closer than you may think', *Environmental Law Reporter* 31 (2001), 10162.

transnational corporations.⁵⁵ In the future multilateral institutions might also seek to enforce obligations on TNCs directly, rather than relying on member states to do so.⁵⁶

We might also find international ‘networks’ of regulation in which state law, transnational voluntary codes, global civil society organisations and so on reinforce one another to regulate corporate conscience.⁵⁷

Our concern in this chapter is the extent to which any of these forms of transnational legal regulation of business might be meta-regulatory – that is, aimed at the corporate

⁵⁵ E.g., Alien Torts Claim Act liability in the US and equivalents in other jurisdictions and the proposed (but failed) attempts to legislate by the Australian, UK and US government for companies based in those respective countries to be required to observe certain human rights standards in overseas operations: Kinley and Tadaki, ‘From talk to walk’, 939-42. So far these initiatives do not have a meta-regulatory aspect.

⁵⁶ See R. Mayne, ‘Regulating TNCs; the role of voluntary and governmental approaches’, in S. Picciotto and R. Mayne (eds.), *Regulating International Business* (Basingstoke: Macmillan Press, 1999), p. 235; cf. T. McInerney, ‘Putting regulation before responsibility: the limits of voluntary corporate social responsibility’ (2005), *The George Washington University Law School Public Law and Legal Theory Working Paper No. 123*, available at <http://ssrn.com/abstract=658081> (accessed 27 October 2005) (voluntary CSR is not enough and global business regulation should develop national capacity to regulate).

⁵⁷ See Braithwaite and Drahos, *Global Business Regulation*. The same types of networks regulate at a national level too, of course (see references at n. 11 above). See also R. O’Brien, ‘NGOs, global civil society and global economic regulation’, in S. Picciotto and R. Mayne (eds.), *Regulating International Business* (Basingstoke: Macmillan Press, 1999), p. 257.

conscience, not just corporate outputs.⁵⁸ One partial example of meta-regulation at the transnational level is the *Basle Accord on Banking Regulation*, a voluntary multilateral agreement by which G10 nations agree to harmonised standards for national banking regulation. Under this accord, the robustness of banks' internal systems for managing operational risk (a concept that includes breach of legal compliance requirements and reputational loss through breach of ethical obligations to stakeholders and other CSR failures) should be an element in deciding their capital adequacy ratios (the proportion of the investments they hold for customers that they must have available in cash in order to be able to operate).⁵⁹

The World Health Organisation's *International Code of Marketing of Breast Milk Substitutes*⁶⁰ is probably the most successful example of international regulation that applies to business organisations. It includes a primitive meta-regulatory aspect: 'manufacturers and distributors of products within the scope of this Code should regard themselves as responsible for monitoring their marketing practices according

⁵⁸ For one proposal for a meta-regulatory initiative to be enforced by the World Bank or ILO, see A. Fung, D. O'Rourke and C. Sabel, 'Realizing labour standards', *Boston Review* 26 (2001), 1, available at <http://www.bostonreview.net/BR26.1/fung.html> (accessed 16 May 2006).

⁵⁹ Basel Committee on Banking Supervision, *Basel II: International Convergence of Capital measurement and Capital Standards: A Revised Framework* (June 2004), available at <http://www.bis.org/publ/bcbs107.htm> (accessed 27 October 2005). See also D. Ho, 'Compliance and international soft law: Why do countries implement the Basle Accord?', *Journal of International Economic Law* 5 (2002), 647.

⁶⁰ World Health Organisation, 1981.

to the principles and aims of this Code, and for taking steps to ensure that their conduct at every level conforms to them'.⁶¹

National governments have implemented it to differing degrees but usually only partially as labelling regulation. They have not legally enforced the internal corporate responsibility aspect. An NGO, however, the International Baby Food Action Network has been extremely active in monitoring compliance with the code (including the meta-regulatory provision quoted above) by Nestlé and other baby food companies (as well as governments), and enforcing it through social and political action.⁶²

3. Critique: Process at the Expense of Substance?

The main critique of meta-regulatory-style developments in the law is that they will focus on corporate responsibility processes in a way that allows companies to avoid accountability for substance.⁶³ Meta-regulatory law runs the danger of hollowing

⁶¹ Para. 11.3.

⁶² See the critiques of implementation of the code in internal systems and documents by Nestlé (but also other manufacturers) at the IBFAN webpage: <http://www.ibfan.org> (accessed 27 October 2005). Despite its relative success, see the critique of this regime in J. Richter, *Holding Corporations Accountable: Corporate Conduct, International Codes and Citizen Action* (London: Zed Books, 2001).

⁶³ The critique from the other side (those who are less sympathetic to CSR obligations, and also those who are wary of rule of law values being undermined) is that meta-regulation will appear to focus on allowing companies to set processes that meet their own needs, but so much unaccountable power and discretion will be given to regulators and other stakeholders (who might be given the right to

itself out into a focus merely on corporate governance processes that avoid necessary conflict over the substantive values that should apply to corporations. In her work on risk regulation by financial services regulators that utilises firms' internal risk management systems, Julia Black (rather gently) criticises the idea of meta-regulation:

the firm's internal controls will be directed at ensuring the firm achieves the objectives it sets for itself: namely profits and market share. Whilst proponents of meta-regulation are correct to argue that its strength lies in the ability to leverage off a firm's own systems of internal control, and indeed that regulators should fashion their own regulatory processes on those controls, this *difference in objectives* means that regulators can never rely on a firm's own systems without some modifications. The problem then arises, however, of *locating those differences*, and ensuring both regulator and regulated understand them.⁶⁴ (emphases added)

participate in or influence corporate decision-making) that inappropriate and illegitimate substantive values will in fact be imposed on corporations in ways that would not be possible under more traditional legal regulation. See, for example, K. Yeung, *Securing Compliance – A Principled Approach* (Oxford: Hart Publishing, 2004), pp. 204-14. See Lobel, 'Interlocking regulatory and industrial relations', for an examination of the way in which US meta-regulatory initiatives in OHS have been stymied by administrative laws that impose unsuitable regulatory accountability requirements on them. I have previously addressed Yeung's critique in Parker, 'Restorative justice in business regulation?' (2004).

⁶⁴ Black, 'The emergence of risk-based regulation'. For a more robust articulation of a similar critique, see F. Pearce and S. Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Dartmouth: Ashgate, 1998).

The ability of regulators and stakeholders to locate and hold businesses accountable for those ‘differences’ – that is, potential conflict between social values and corporate self-interest – is likely to be frustrated in several overlapping ways by companies:

(1) Companies will avoid conflict over substantive change to their internal management, structure and practices by implementing ‘corporate conscience’ requirements in a half-hearted, partial and surface-level way

Companies will implement management systems to the extent necessary to ensure legitimacy, but will make no substantive change to their ordinary modus operandi, if not necessary.⁶⁵ As Lauren Edelman and her co-authors argue, ‘organizations create symbolic structures as visible efforts to comply with law, but their normative value does not depend on effectiveness so they do not guarantee substantive change’.⁶⁶

⁶⁵ Parker, *The Open Corporation*, p. 145; S. Simpson, *Corporate Crime, Law and Social Control* (Cambridge: Cambridge University Press, 2002), pp. 103-6.

⁶⁶ L. Edelman, S. Petterson, E. Chambliss and H. Erlanger, ‘Legal ambiguity and the politics of compliance: Affirmative action officers’ dilemma’, *Law & Policy* 13 (1991), 73, 75. See also S. Beder, *Global Spin: The Corporate Assault on Environmentalism* (Melbourne: Scribe Books, 1997), pp. 128-130; L. Cunningham, ‘The appeal and limits of internal controls to fight fraud, terrorism, other ills’, *The Journal of Corporate Law* 29 (2004), 267; K. Krawiec, ‘Cosmetic compliance and the failure of negotiated governance’, *Washington University Law Quarterly* 81 (2003), 487, 514, 542; D. McBarnet, ‘Legal creativity: law, capital and legal avoidance’, in M. Cain and C. Harrington (eds.), *Lawyers in a Postmodern World: Translation and Transgression* (New York: New York University Press, 1994), p. 73; S. Tombs, ‘Understanding regulation’, *Social & Legal Studies* 11 (2002), 113; G. Weaver, L. Trevino and P. Cochran, ‘Corporate ethics practices in the mid-1990’s: An empirical study of the Fortune 1000’, *Journal of Business Ethics* 18 (1999), 283 (finding that the vast majority of US Fortune 1000 firms have committed to the low-cost, possibly symbolic, side of ethics management).

They will be able to satisfy regulators and prosecutors by ‘ticking the boxes’ that show they have gone through prescribed processes, but regulators and prosecutors will not assess whether management systems are producing outputs that meet the policy goals of the relevant regulatory regime – indeed, policy goals may not even be defined.⁶⁷ It has been suggested that the whole push for meta-regulation, rather than strict output liability, is an attempt by corporate interests to avoid substantive internal change by focusing liability instead on meaningless processes.⁶⁸

(2) The implementation of corporate conscience requirements may be subsumed into the risk management of legal liability in ways that have little to do with commitment to social values and which obscure possibilities for corporate accountability⁶⁹

As Baldwin says of the ‘challenges’ of meta-regulation, ‘Managers may see regulatory liabilities as risks to be managed, not as ethically reinforced prescriptions’.⁷⁰ For example, the internal management systems required by meta-regulating law may be used to obscure senior management/entity responsibility for breaches, and/or to shift blame for breaches onto individual employees (workers, line managers or compliance staff). Thus Laufer suggests that corporations may ‘game’

⁶⁷ W. Laufer, ‘Social accountability and corporate greenwashing’, *Journal of Business Ethics* 43 (2003), 253, 254. See, for example, the critiques of regulators’ inadequate use of audit of required internal management systems in M. Power, *The Audit Society: Rituals of Verification* (Oxford: Oxford University Press, 1997); C. Parker, ‘Regulator-required corporate compliance program audits’, *Law & Policy* 25 (2003), 221.

⁶⁸ Krawiec, ‘Organizational misconduct’.

⁶⁹ R. Rosen, ‘Risk management and corporate governance: The case of Enron’, *Connecticut Law Review* 35 (2003), 1157, 1180.

⁷⁰ Baldwin, ‘The new punitive regulation’, 378. See also Power, *Risk Management*.

regulators to fully insulate the company as an entity and top management from liability by ‘reverse whistle-blowing’ – offering up culpable subordinate employees, or at least putting all the responsibility for compliance onto employees and line managers.⁷¹ Similarly, regulatory responsibilities might be identified by internal ‘corporate conscience’ processes but then managed by ‘outsourcing’ the risk of not acting responsibly – performing ethically or legally questionable activities through separate legal entities that bear the risk of any failure of responsibility. For example, Enron used its joint venture partners to bear responsibility for questionable financial transactions. Brand name retailers have done the same by leaving it to manufacturers in other countries to work out how to comply with labour standards *and* meet production demands at the same time. Insurance, electricity and gas, and telecommunications companies frequently outsource compliance obligations to independent sales agents who must also meet tight sales targets in order to be paid. In Australia, James Hardie famously completely separated off its asbestos compensation responsibilities into a separate legal company set adrift from the rest of the corporate group without adequate financial provision. Socio-legal scholars’ critiques of risk management imply that the management of potential legal/regulatory liability is a motivating factor for companies in their adoption of a risk management approach to

Comment [K1]: Not sure where you want the quotes in n. (‘vice’-president ?)

⁷¹ W. Laufer, ‘Corporate liability, risk shifting and the paradox of compliance’, *Vanderbilt Law Review* 52 (1999), 1341, and ‘Corporate prosecution, cooperation and the trading of favours’, *Iowa Law Review* 87 (2002), 643. See also J. Braithwaite, *Corporate Crime*, p. 308 (on the ‘vice’-president responsible for going to jail); Hutter, *Regulation and Risk*, pp. 145-7 (British rail employees believe the purpose of health and safety systems was to shift responsibility away from the Board and pass the buck to staff); Parker, *The Open Corporation*, pp. 149-56.

business.⁷² But potential legal accountability may barely rate a passing thought – risk management can be a whole approach to business decision-making, in which it is assumed that legal and compliance risks, like all other risks, can be transformed, hedged or insured against, rather than eliminated (by substantive compliance).⁷³ Meta-regulatory law therefore falls into the trap of giving company lawyers a set of process rules perfectly designed to be manipulated into meaninglessness in the context of a risk management culture.

(3) Management systems that ostensibly put in place a corporate conscience may be used to contain, mollify and transform dissent about whether the company has followed appropriate values in particular instances without addressing the conflict and allowing it to be authoritatively and accountably resolved⁷⁴

Internal corporate governance processes may simply not be capable of resolving such conflict appropriately because of management incompetence or failures of strategic imagination to overcome deadlocks and stultification over dissent.⁷⁵ The mollification of dissent and conflict within internal processes may also be more strategic. For example, internal sexual harassment and EEO complaints systems have been shown to be a way of containing contestations of equality and reframing appeals to rights as

⁷² We are all tempted to think that our own special area of interest is just as important to others as it is to ourselves!

⁷³ See Rosen, 'Risk management'.

⁷⁴ See Parker, *The Open Corporation*, pp. 156-64.

⁷⁵ Baldwin, 'Punitive regulation', 379.

human resources management issues that avoid court action.⁷⁶ Similarly stakeholder engagement programs may simply be a way of ‘cooling out’ protesters.⁷⁷ We normally like to think that legal accountability (ideally anyway) can be a way in which conflicts about corporate behaviour can be brought into open court and determined. Law that mandates corporate responsibility processes gives management the perfect ‘legal’ cover for keeping conflict out of the public eye and the accountability processes of the courts. Meta-regulatory law requires and rewards them for ‘managing’ conflict internally.

According to this critique, the development of meta-regulating law in practice and in scholarly writing shows that businesses might be succeeding in shaping the notion of CSR to suit themselves. Meta-regulating law is seen as the spearhead of a corporate campaign to pull back the reach of regulatory accountability through existing command and control regulation of business. Thus, Shamir argues that multinational corporations are responding to the heat of protests against them by seeking to shape the notion and practice of CSR in terms of ‘a voluntary and altruistic spirit and with notions implying honesty toward investors, with charity-oriented “good citizenship” campaigns, and with more or less elaborate schemes of voluntary self-regulation’.⁷⁸

⁷⁶ Edelman, et al., ‘Legal ambiguity’; L. Edelman, H. Erlanger, and J. Lande, ‘Internal dispute resolution: The transformation of civil rights in the workplace’, *Law & Society Review* 27 (1993), 497; J. Kihnley, ‘Unraveling the ivory fabric: Institutional obstacles to the handling of sexual harassment complaints’, *Law & Social Inquiry* 25 (2000), 69.

⁷⁷ See J. Conley and C. Williams, ‘Engage, embed, embellish: Theory versus practice in the corporate social responsibility movement’, *Journal of Corporate Law* 31 (2006) (forthcoming).

⁷⁸ Shamir, ‘The Alien Tort Claims Act’, 644. See also Conley and Williams, ‘Theory versus practice in the CSR movement’.

To the extent that scholars and policy-makers focus on achieving CSR through corporate governance processes (i.e., meta-regulation), it ‘signifies a decisive move in the direction of abandoning traditional “command and control” state regulatory schemes in favor of “responsive regulation,” which is supposed to facilitate – yet not enforce and dictate-self-regulation programs and “compliance-oriented” regulation, which is to be carried out through corporate consent and voluntary organizational processes of reflexive learning’.⁷⁹

The application of substantive standards⁸⁰ to corporations is not facilitated, but conflict forestalled by this ‘responsibilisation of subjects who are empowered to discipline themselves’.⁸¹

Kim Krawiec makes the same point from a different angle. She argues that internal compliance-based liability regimes (meta-regulation) are ‘negotiated’ – the gaps are filled by firms and their legal compliance professionals, and they are likely to do so in ways that are favourable to them.⁸²

⁷⁹ Shamir, ‘The Alien Tort Claims Act’, 660.

⁸⁰ Shamir’s concern is with human rights standards.

⁸¹ Shamir, ‘The Alien Tort Claims Act’, 660. He concludes that ‘the idea that human rights standards will be imposed by the courts (whether national or international) and the idea that corporations may be coerced into compliance in this area through formally binding regulations (whether national or transnational) are still far on the horizon’ (at 660-1).

⁸² Krawiec, ‘Cosmetic compliance’, 494.

In short, the incompleteness of law creates room for interpretation and manipulation by a variety of public and private actors. As such, it presents a political opportunity for those with a stake in regulation to push their agenda through renegotiation during the implementation and enforcement phases of governance by constructing a gap-filling interpretation that serves the group's self-interest.⁸³

Corporations (their managers, lawyers and compliance professionals) will be able to take advantage of the fact the law is focusing on process to avoid conflict over substantive change.

These critiques of meta-regulating law would apply regardless of whether the meta-regulating law includes enforcement mechanisms or not (and what kind they are – direct or indirect, rewards or sanctions). The point of the criticisms is that there is nothing worthwhile to be enforced anyway. The problem is that the process orientation of the meta-regulating law leaves too many gaps and too much room for interpretation, in a context where some interests are more equal than others, and relevant social values heavily contested.⁸⁴ These are a principled set of objections to meta-regulation.⁸⁵

⁸³ *Ibid.*, 542.

⁸⁴ See Scheuerman, 'Reflexive law', 101. See also Shearing and Wood, 'Nodal governance' (for a similar argument that inequality of access to purchasing power is the basis for a governance disparity that mean some people are unable to participate in governance processes); Lipschutz, *Globalization* (the new governance is based too much on people participating through markets rather than politics aimed at the public good); Cf. Braithwaite and Drahos, *Global Business Regulation* (arguing that

4. Response: Meta-regulation as a process aimed at a substance

The key feature of each of the three critiques of the idea of meta-regulating CSR above is that meta-regulation runs the risk of creating legal accountability for a vague process without substantive goals because it leaves it up to business itself to define the details of responsibility processes, and then leaves it to the process to define the appropriate outcomes or goals: 'the substance of CSR seems to be process'.⁸⁶ Neither

seeming powerless interests can sometimes find the right strand to pull in regulatory webs to have a big influence).

⁸⁵ Note there are also another set of (related) arguments about whether it is possible to specify standards for internal management systems and how to identify the features of management systems, governance structures or corporate cultures that reliably 'work' to achieve more responsible outcomes in different contexts; how to monitor whether these internal processes have been effectively implemented; what enforcement mechanisms (rewards and sanctions, direct and indirect, persuasive and coercive, formal and informal, etc.), if any, to use; or whether it is better to rely on other diffusion mechanisms that do not rely on legal enforcement. These issues will not be dealt with in detail in this chapter. See R. Kagan, N. Gunningham and D. Thornton, 'Explaining corporate environmental performance: how does regulation matter', *Law & Society Review* 37 (2003), 51; V. Nielsen and C. Parker, 'Chapter 4: Degree of compliance', in *The ACCC Enforcement and Compliance Survey: Report of Preliminary Results* (Canberra: RegNet, ANU, 2005), available at <http://cccp.anu.edu.au/projects/project1.html> (accessed 28 February 2006); M. Potoski and A. Prakash, 'Covenants with weak swords: ISO14001 and facilities' environmental performance', *Journal of Policy Analysis & Management* 24 (2005), 745. Cf. Krawiec, 'Organizational misconduct'; Krawiec, 'Cosmetic compliance', 542; M. McKendall, B. De Marr and C. Jones-Rikkens, 'Ethical compliance programs and corporate illegality: Testing the assumptions of the corporate sentencing guidelines', *Journal of Business Ethics* 37 (2002), 367.

⁸⁶ Conley and Williams, 'Theory versus practice in the CSR movement'.

the process nor the goals are adequately set from outside business, and therefore we cannot expect meta-regulation to make business accountable for anything – there is nothing to be accountable for, no-one to be accountable to.

Meta-regulation could be seen as an aspect of a broader shift in the way law regulates in the context of the new governance – ‘the creation of a new type of rationality or mode of governance based on a logic of informal, negotiated processes within social and socio-legal networks.’⁸⁷ However, as Heydebrand points out, this ‘process rationality’ can come ‘at a heavy cost, namely the emergent deconstruction of procedural and substantive rights, the dissolution of the normative legality that is historically embedded in formal justice, and the deformation of constitutional protections and safeguards’.⁸⁸ And again, ‘Process rationality shares neither the rule-governed, proceduralist schemata of formal legal rationality nor the consensual goal-directedness of substantive rationality. Process drives substance, not the other way around ... Whatever goals are associated with process rationality tend to emerge dialectically from within the process itself rather than directing it from outside’.⁸⁹

⁸⁷ Heydebrand, ‘Process rationality’, 326. See also Scheuerman’s assessment of Teubner’s notion of reflexive law applied to global business regulation: W. Scheuerman, ‘Reflexive law and the challenges of globalization’, *Journal of Political Philosophy* 9 (2001), 81.

⁸⁸ Heydebrand, ‘Process rationality’, 334. Although Heydebrand does see substantive rationality continuing to operate in areas of administrative regulation where ‘social policy and substantive rights protection remain relatively intact’ (at 337). Contrast Selznick’s idea of ‘responsive law’ as built upon the foundations of formal justice rather than dissolving it: Nonet and Selznick, *Law and Society in Transition*; Selznick, *The Moral Commonwealth*, pp. 463-5.

⁸⁹ Heydebrand, ‘Process rationality’, 328.

Yet there is nothing inherent in the idea of meta-regulation as a technique that means this must be true, that business must drive the process and the process must drive the substance. We can discriminate between a substance-oriented process (consistent with the distinctives of meta-regulation as defined above) and process driving substance.⁹⁰

Certainly, meta-regulation is about setting a process. *But* it must be a process that is ‘going somewhere’.⁹¹ That means it must be set in a context in which it is clearly aimed at social policy goals (or responsibility values) that are defined by the law or by some other mechanism that can garner widespread legitimacy. Conflicts over the meaning of those values must be capable of external authoritative resolution where corporate management fails to do so appropriately. People who are affected by corporate failure to observe the relevant values or reach the policy goals must be able to contest them within the organisation. If management cannot work out how to cooperatively resolve conflicts over value identified by contestation in this way within the organisation, then the conflict needs to be made obvious and dealt with authoritatively by law or some other mechanism external to the organisation.

⁹⁰ Compare also Heydebrand, ‘Process rationality’, 341 (describing Habermasian communicative rationality as a ‘kind of substantively oriented process rationality’ and commenting ‘[i]t is not yet clear, however, to what extent these normative conceptions will remain utopian visions, or else, can be realized and implemented in a concrete, empirical context’).

⁹¹ Borrowing Thomas Shaffer’s phrase for describing what the ‘ethics of care’ requires of deliberation between a lawyer and client: T. Shaffer and R. Cochran, *Lawyers, Clients and Moral Responsibility* (Eagan: West Publishing Co, 1994).

In other words, the *substantive goals* at which internal processes are aimed must be adequately specified and enforced external to the company. Moreover, the *standards for the companies' internal processes* must be specified sufficiently to make sure that those values are represented within internal decision-making processes. This will often involve making sure that stakeholders who might otherwise be excluded from contesting corporate decisions are given specific rights to do so. Meta-regulating law must meet 'traditional formalistic ideals' at least 'by insisting that procedural and organizational norms are relatively clear and cogent'.⁹² The aim of meta-regulation in this conception is precisely that substantive conflict between social values and corporate ways of doing things is forced to be dealt with and resolved inside the organisation, or the organisation forced to respond to external resolution.

By stating it that way, we should be able to evaluate some of the proposals for law to be involved in holding companies accountable for CSR and come to a conclusion on whether they are likely to be worthwhile or not.

Using 'meta-regulation' to evaluate CSR initiatives

The ideal form of meta-regulating law I have set out here is a normative standard that we can use to evaluate various existing approaches and proposals. Whether particular legal mechanisms meet the requirements of meta-regulation that is more than mere process is likely to be highly context-dependent. We will need to examine the

⁹² Scheuerman, 'Reflexive law', 99 (rephrasing and referring to I. Maus, 'Sinn und Bedeutung der Volkssouveranitet in der modernen Gesellschaft', *Kritische Justiz* 24 (1991), 137).

surrounding law and governance for each initiative in order to determine whether substantive and procedural rights are adequately specified, or able to be adequately debated and determined in democratically legitimate ways (whether by traditional formal law or by other mechanisms), before we can come to a conclusion on the meta-regulatory value of particular attempts to build CSR.

Most examples of what governments are doing to promote CSR, beyond traditional business regulation, can barely be stretched to count as law or regulation at all. And where they can, they are not meta-regulatory – that is, they are not focused on constituting corporate consciences internally. One area where government proposals to reform the law might be perceived as meta-regulatory is *corporate governance proposals to require companies/directors to report on CSR issues, or even to expand directors' duties to allow them to take into account stakeholder interests*.⁹³ One example was the (now repealed) requirement introduced in the UK in 2005 that directors of quoted companies should prepare an operating and financial review (OFR) each year in addition to their normal reporting requirements.⁹⁴ The OFR included a 'balanced and comprehensive analysis' of:

⁹³ For an overview of Anglo-American developments in this area, see C. Williams and J. Conley, 'An emerging third way? The erosion of the Anglo-American shareholder value construct', *Cornell Journal of International Law* 38 (2005), 493. See, for example, the Australian parliament's Joint Committee on Corporations and Financial Services inquiry into corporate responsibility:

http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/tor.htm (accessed 28 October 2005).

⁹⁴ The Companies Act 1985 (Operating and Financial Review and Directors' Report, etc.) Regulations 2005 (SI 2005 No. 1011); See also *Guidance on the OFR and Changes to the Directors' Report* (Department of Trade and Industry, April 2005). The OFR requirement has now been repealed by the

- The business's development and performance during the financial year;
- The company's (or group's) position at the end of the year;
- The main trends and factors underlying the development, performance and position of the company (or group) and which are likely to affect it in the future.

This will include a company's (or group's) objectives, strategies and the key drivers of the business, focusing on more qualitative and forward-looking information than has traditionally been included in annual reports in the past. It must include a description of the resources available to the company (or group), and of the capital structure, treasury policies and objectives and liquidity of the company (or group).

In fulfilling these general requirements, directors will need to consider whether it is necessary to provide information on a range of factors that may be relevant to the understanding of the business, including, for example, environment, employee and social and community issues.⁹⁵

Companies Act 1985 (Operating And Financial Review) (Repeal) Regulations (SI 2005 No. 3442) on the basis that the OFR requirement essentially duplicated the requirement that the Directors' Report include a Business Review that had been introduced at the same time by section 234ZZB of the Companies Act 1985.

⁹⁵ *Guidance on the OFR*, p. 6.

We might see provisions requiring reports such as the OFR as meta-regulatory because they implicitly require management or directors to collect information about the possibility of breach of CSR obligations (as a risk to reputation and performance).⁹⁶ The meta-regulatory hope is that having collected the information for the report, management will be encouraged to use it in decision-making and to implement systems to manage the risks they have identified, or at least they might be forced to do so by their shareholders.

However, the law requiring OFRs, as with other laws requiring CSR reporting, was purely process-oriented – it was not aimed at any values, it did not require the company to identify and commit to any values, and it gave no external representative of any values any right to participate in defining what values or targets are to be met.⁹⁷ Laws requiring CSR reporting may well be a useful, facilitative adjunct to more substantive regimes that do have clear policy values and do give ‘stakeholders’ rights, but on their own they can achieve no meta-regulation of the corporate conscience.

⁹⁶ The OFR might also include information about the company’s corporate governance processes, but it is not required: see *ibid.*, p. 7.

⁹⁷ See D. Owen, ‘Corporate social reporting and stakeholder accountability: The missing link’, *International Centre for Corporate Social Responsibility Research Paper Series No. 32-2005* (Nottingham University Business School, 2005) (‘[reporting] reform is viewed in isolation from any necessary institutional reform which may provide the means for stakeholders to hold company directors accountable for actions affecting their vital interests’). One might also object that these reforms generally suggest ‘social and environmental issues are only of relevance when there are financial implications for the company’ (at 23).

It is rather like the way the term ‘compliance culture’ is used in Division 12.3 of Australia’s *Commonwealth Criminal Code Act* (1995). ‘Corporate culture’ is defined in that legislation to mean ‘an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place’. The existence or not of a ‘corporate culture’ defined in this way can be relevant to the determination of the criminal liability of companies and directors under certain Australian Commonwealth laws. But this is only useful if there are other laws that the definition will apply to. Similarly, proposals to amend directors’ duties to allow them to take into account obligations to stakeholders would be purely facilitative – allowing directors to use such information in decision-making and spend money on ensuring compliance, assuming that they are motivated to do so by some other means. Companies will go through the form and will do as much or as little internally of any substance as they would have done anyway.

These proposals are too generic in the absence of sufficient meta-regulation aimed at specific values. Contrast Australia’s affirmative action regime – a regulatory regime with little teeth which was based purely on requiring companies to report on their process for setting targets and implementing equal employment opportunity measures. Although the affirmative action regime required only reporting of progress and the only sanctions available were being named in Parliament, and possibly losing government contracts, the regime did have a clear set of substantive values (equal employment opportunity) and required companies to go through a clear process and

set substantive targets, and was relatively successful in improving the proportion of women employed in companies that came under the regime.⁹⁸

A good example: The Environment Protection Authority Victoria's (EPA) environmental improvement plans (EIPs).⁹⁹

Comment [K3]: Is this a sub-heading?

The EIP requires site representatives to develop an internal compliance management system aimed at improving environmental performance, and monitoring and reporting on those improvements on a regular basis. It is likely to cover issues such as regulatory compliance, waste minimisation, environmental audit, elimination, reduction or control of environmental impacts and risks (e.g., greenhouse emissions, offensive odours, reduction of water consumption, introduction of new technology, etc.), and arrangements for dealing with accidents and spills. The Victorian EPA allows industrial sites to volunteer for the EIP program, often requires an EIP as a licence condition, as a condition of works approval for new developments and also has legislative power to direct a site to enter into an EIP.¹⁰⁰

⁹⁸ See V. Braithwaite, 'The Australian government's affirmative action legislation: Achieving social change through human resource management', *Law & Policy* 15 (1993), 327.

⁹⁹ More details on this case study are available in Gunningham and Sinclair, *Leaders and Laggards*, pp. 157-88; Parker, *The Open Corporation*, pp. 226-7.

¹⁰⁰ Environment Protection Act 1970 (Vic), s. 31C; EPA Victoria, *Guidelines for the Preparation of Environment Improvement Plans* (June 2002, Publication 739). Note that the 2002 *Guidelines* state that community involvement is not necessary for all types of EIPs. The discussion in the text, however, concerns only those EIPs where community participation was required.

The EIP program was first developed in response to ongoing conflict between the manufacturers at a large chemical complex in Altona and local residents over odours, air emissions and noise. Not only were the site's neighbours unhappy, but the conflict meant it was difficult for the manufacturers to get approval to make any changes to their plants, as community members used the planning approval process to object to all proposed changes. In the late 1980s, the EPA hired a 'community liaison officer' (a social worker) to help set up a community consultation process in which site representatives, local community members (including those who had complained regularly) and local council representatives could meet together and agree an action plan for resolving problems. The success of this process led to the EPA's development of the EIP program in the early 1990s.

The EIP process required representatives of site management to meet intensively with a Community Liaison Council (CLC) – local community members and local government representatives – which had to be consulted on every aspect of the development of an EIP from target-setting to implementation. Clear targets for performance had to be set as part of this consultative process, and the whole EIP (including the targets) generally became part of the site's license to carry on its activities from the EPA. This process could take up to 12 months with regular meetings of the CLC and site management over that period. After agreeing the EIP, site representatives had to continue to meet regularly with the CLC and report on the site's implementation of systems and performance on the targets it set for itself. The site's activities also remained subject to local government planning approval and other legal controls (including the possibility of enforcement action for breach of the

law or the site's licence) in the normal way. EIPs were not seen as a replacement for the normal application and enforcement of the law.

Gunningham and Sinclair published an in-depth evaluation of the program in 2002 which concluded that 'as a form of process-based regulation, EIPs frequently generated greater environmental commitment within the enterprise' but 'over and above such process-based changes (and in contrast to initiatives such as ISO 14001 and Responsible Care), the EIP also requires ... [that] enterprises committing to an EIP must meet specified performance targets within a specified time-period (for example, they may commit to upgrade equipment to meet objectives under the plan, or to meet specified emission or waste reduction targets)'.¹⁰¹ They cite interviews suggesting that entering into an EIP meant that companies incorporated community concerns at an early stage of the planning process for new developments, rather than fighting about them with local residents later on.¹⁰² The EPA itself saw the EIPs as a way to improve how the companies conducted their businesses generally and communicated with their local communities.¹⁰³

The EIP program was therefore meta-regulatory and process-oriented. Companies that entered into an EIP had to go through a process of consultation and reporting with the CLC which was mainly focused on internal management issues. But the EIP was not a process-based sham. The companies' legal obligations were reasonably well-known

¹⁰¹ Gunningham and Sinclair, *Leaders and Laggards*, p. 170.

¹⁰² *Ibid.*, p. 169.

¹⁰³ EPA Victoria, *25 Years of Making a Difference* (1996), p.13.

and enforceable. The process itself required them to set clear ‘beyond compliance’ targets for environmental improvement outcomes for themselves, and made it clear that they would be held accountable for them – by having to face the CLC to report on their performance, and by making the EIP a licence condition.

This type of meta-regulation worked because community representatives were given a right to participate in the EIP process, and their right to participate in that process was backed up by the fact that they had clear rights at general law to object to developments or actions that impacted on the local environment, and the fact that the EPA was acting as broker for the whole consultation and negotiation process. Conflict was not swept under the carpet. Where the program worked, conflict was brought into the open and dealt with in the CLC meetings – the EPA’s community liaison officer reported that the first few meetings of the CLC were often quite heated as conflicting views and values were expressed. Indeed, according to Gunningham and Sinclair’s evaluation, the process seemed to work best where conflict was greater and therefore community members’ motivation to participate higher. The commitment of the EPA to providing officers to make sure that local community members who vociferously complained about companies’ environmental impacts were included in community consultation processes and to guide the CLC through the early stages of negotiating an EIP was clearly key to making this meta-regulatory initiative successful.

5. Conclusion

‘Meta-regulation’ is a useful way of conceptualising what legal accountability for CSR ought to, and could, look like. As we have seen, it is relatively easy to find examples of partial, or attempted, meta-regulation. It is not so easy to find examples of regulation of CSR that fully meet the normative criteria for meta-regulation that I have set out here. The argument of this chapter is that legal accountability for CSR must be aimed at making business enterprises put themselves through a CSR process aimed at CSR outcomes. The outcomes must themselves be accountable applications of substantive values to specific situations; and the process must be one that opens up management to external values, stakeholders and regulatory influences, not closes it down. In other words, legal accountability for CSR must amount to meta-regulation – an approach to legal regulation in which the *internal* ‘corporate conscience’ is *externally* regulated.

If by ‘corporate social responsibility’ is meant something voluntary and discretionary that businesses on their own can ‘take responsibility’ for, then the idea of legal accountability for CSR does not make any sense. Indeed, on its own, the whole notion of CSR makes sense only within the context of more substantive discussions of regulatory and social policy which tell us for *what* corporations must take responsibility. Mechanisms for nudging companies towards CSR indirectly (e.g., tax incentives or government procurement policies aimed at encouraging CSR) or in a way that is aimed at CSR generically without setting specific substantive standards or goals (such as the UK’s repealed OFR requirement) are likely to fail badly unless they are adequately buttressed by specific regulatory regimes which specify social policy goals, and identify and give rights to stakeholders to participate in or contest corporate decisions. These regulatory regimes need not take the form of traditional, hierarchical

legal regulation promulgated by nation states. ‘Meta-regulating’ law might include international networks of governance, more traditional state-based regulatory enforcement activity, and traditional law that authorises, empowers, co-opts or recognises the regulatory influence of industry, professional or civil society bodies to set and enforce standards for CSR processes and outcomes.¹⁰⁴ That type of regime generally only comes about through considerable struggle and conflict.

¹⁰⁴ Compare Gunningham and Grabosky, *Smart Regulation*, pp. 93-134.