Index

accountability
  board decision-making, influences on 219
de-biasing reforms 220–22
  of directors 273–4
acoustic separation
  in Australian cases 19–20, 22–4, 28–30
  in United States cases 3, 7–10
Adams, Henry Carter 189–90
alternative dispute resolution
  multi-stakeholder board decision-making, and 204–5
American Bar Association 188
asymmetric paternalism 228–9
ATSIC 200
Australia
  acoustic separation cases 19–20, 22–4, 28–30
  best interests of company, interpretation 255–8
  bribery of foreign officials 264–5
  business judgment rule 16–17, 22–4, 247
  civil enforcement regime 10–11
  conduct vs. decision rule conflicts 10–30
  corporate culture liabilities 264–5
  corporate democracy models 200
  corporate governance 241
  AICD codes 251–4
  ASX Principles 240, 246–7, 259–60, 266–7
  corporate social responsibility 5–6, 32, 36–41, 255–6, 261–3
  directors’ duties
    background 244–5
    business expectations, and 251–4
  corporate social responsibility 5–6, 32, 36–41
criminal statutory liabilities, and 264–5
delegation and reliance 26–30
disclosure obligations 26, 258–63
duty of care and diligence 4, 11–30, 247–50, 294–5
duty of good faith 108
duty to act in best interests of company 240, 245, 255–8, 261–3
duty to act in good faith 240, 245, 255–8
duty to monitor company affairs 249–50
directors’ duties
  background 244–5
  business expectations, and 251–4
directors’ duties, overlap with 240, 246–50, 267–8
eastern law of torts, and 247
law reform reviews 37–8
law reform trends 244–5
objective tests 239, 247
reasonable skill, and 247–50
soft law approaches 251–4
stakeholder interests, relevance of 36–41, 257–8
standard of care, and 251–4
ethics policies/ codes of conduct
  AICD codes 251–4
  ASX Principles 240, 246–7, 259–60, 266–7
  contractual obligations under 250
corporate social responsibility, overlap between 240–43
  definition 242–3
directors’ duties, overlap with 240, 246–50, 267–8

339
duty of care and diligence 247–50
private enforcement, and 266–7
shareholder activism 267–8
social media influences on 260–61
statutory duties, and 247–51
whistleblowing 260–61
law reform reviews 37–8
nominee directors, and conflicts of interest 117
Regulatory model 4, 10–11, 17–19
Australian Institute of Company Directors (AICD), codes of conduct 251–4
Australian Stock Exchange, ASX Principles 246–7, 259–60, 266–7
banking supervision see also financial institutions
Basel Committee Principles for Enhancing Corporate Governance 2004 308–9, 311
bankruptcy see also insolvency
directors’ duties to US debtors in possession 289–90
Basel Committee on Banking Supervision Principles for Enhancing Corporate Governance 2004 308–9, 311
behavioral economics
asymmetric paternalism, and 228–9
consumer exploitation, and 226–9
libertarian paternalism, and 227
Berle-Dodd dialogue 4
best interests of company
in Australia 240, 245, 255–8, 261–3
creditors’ interests, and 106, 111–15, 282–3, 286–7, 293–4
definition 111–15
disloyalty, and 109
employees’ interests, and 111–12
good faith, and 107–11
goodwill value, and 110
insolvency, and 111–15, 282–3, 286–7
judicial interpretation 107–17
negligence, and 109
in New Zealand 107–17
nominee directors’ duties 115–17
personal gain, and 109–10
stakeholder vs. shareholder interests 111–15
in US 281–3
board decision-making
accountability influences on 219
acoustic separation 3, 5–10
in Canada, influences on 68–9
contractarian approach 222–5, 233
critical realism, and 218
dispositionist influences 218
exploitation of children in advertising, and 211–12, 220–22
legal decision theory, and 217–18
legal vs. moral decisions 224–5
multi-stakeholder boards 194–6, 200–209
non-executive directors’ role 299–301
normative desirability, and 224–5
shareholder primacy model 222–5
rejection of, progressive approaches 229–35
shareholder/stakeholder interest conflicts 4, 30–42
business judgment rule, and 31–2, 61–5
corporate law vs. securities regulation conflicts 65–7
corporate scandal influences 4, 32–3, 42–3
corporate social responsibility 188
decision-making, influences on 68–9
short vs. long term interests 66–7
US cases 30–32
in US conduct vs. decision rules conflicts 3, 7–10, 28, 30–32
board structures see also multi-stakeholder boards
in Australia 200
Breman Group model 199–200
codetermination, and 196–7, 202–5
common vs. structure regimes 198–200
corporate democracy models 198–200
financial institutions, of 298–9, 309
Index

in Germany 196–7
in Netherlands 198–200
stakeholder involvement trends 196–7
supervisory boards 197–8, 202–5
two-tier boards 196, 198
works councils 197
bounty incentives 261
Branco, M. 241
Breman Group 200
bribery of foreign officials 264–5
business ethics see also ethics, generally; ethics policies
business judgment rule
in Australia 16–17, 22–4, 247
in Canada 61–5
consumer exploitation, and 223
independent outsiders, and 64–5
in Italy 144–5
in New Zealand 116
non-executive directors, and 317–18
stakeholder interests, and 31–2, 61–5, 223
in US 5–6, 8, 31–2, 274–6, 287
Business Roundtable 188
Cadbury Report 1992 (UK) 300
Campbell, Angela 213
Canada
corporate social responsibility 32, 41–2
directors’ duties
business judgment rule 61–5
corporate law vs. securities law conflicts 65–7
corporation vs. shareholders, separation of 44–51, 53–8, 70–71
decision-making, influences on 68–9
degree of obligation 55–8
duty of loyalty 53–9
financial distress, and 295
indirect benefit test 46
judicial inconsistencies 49–53, 70–71
oppression remedy 51–2, 55–7, 60–61, 70, 327–9
other stakeholders’ interests, and 49–51
reasonable expectations 55, 58, 60–61, 69–70
remedy challenges 57–8, 70–71
shareholder wealth maximization 44–9
short vs. long term interests 66–7
traditional fiduciary duties 45–9
two-step process 58–8
securities investment
investors, private law remedies for 325–9, 331–2
trends 321–2
Carroll, A. 242
cheque kiting 314
children see also consumer exploitation
decision-making influences 216–17
marketing to 211–12, 214
parental preferences, role of 214–15
purchasing power of 212–14
China
corporate social responsibility 165, 193–4
directors’ duties
duty not to damage interests of company 163
duty of care 164, 169
duty of loyalty 162–3, 169
fiduciary duties 161–4, 169–71
directors, generally
board of directors, purpose and role 160–61
qualifications requirements and exclusions 161
directors’ liabilities
enforcement 165–74
generally 162–4
enforcement of directors’ duties
corporate law breaches 165–6
derivative lawsuits 167–8
direct lawsuits 166–7
judicial practice 169–71
Cooperative Joint Ventures (CJV) 157, 159
corporate governance developments 157–8
corporate shareholder and stakeholder relationships 171–2
corporate social responsibility 165
Cooper, M. 202
Canada
corporate social responsibility 32, 41–2
directors’ duties
business judgment rule 61–5
corporate law vs. securities law conflicts 65–7
corporation vs. shareholders, separation of 44–51, 53–8, 70–71
decision-making, influences on 68–9
degree of obligation 55–8
duty of loyalty 53–9
financial distress, and 295
indirect benefit test 46
judicial inconsistencies 49–53, 70–71
oppression remedy 51–2, 55–7, 60–61, 70, 327–9
other stakeholders’ interests, and 49–51
reasonable expectations 55, 58, 60–61, 69–70
remedy challenges 57–8, 70–71
shareholder wealth maximization 44–9
short vs. long term interests 66–7
traditional fiduciary duties 45–9
two-step process 58–8
securities investment
investors, private law remedies for 325–9, 331–2
trends 321–2
Carroll, A. 242
cheque kiting 314
children see also consumer exploitation
decision-making influences 216–17
marketing to 211–12, 214
parental preferences, role of 214–15
purchasing power of 212–14
China
corporate social responsibility 165, 193–4
directors’ duties
duty not to damage interests of company 163
duty of care 164, 169
duty of loyalty 162–3, 169
fiduciary duties 161–4, 169–71
directors, generally
board of directors, purpose and role 160–61
qualifications requirements and exclusions 161
directors’ liabilities
enforcement 165–74
generally 162–4
enforcement of directors’ duties
corporate law breaches 165–6
derivative lawsuits 167–8
direct lawsuits 166–7
judicial practice 169–71
Cooperative Joint Ventures (CJV) 157, 159
corporate governance developments 157–8
corporate shareholder and stakeholder relationships 171–2
corporate social responsibility 165
Cooper, M. 202
Canada
corporate social responsibility 32, 41–2
directors’ duties
business judgment rule 61–5
corporate law vs. securities law conflicts 65–7
corporation vs. shareholders, separation of 44–51, 53–8, 70–71
decision-making, influences on 68–9
degree of obligation 55–8
duty of loyalty 53–9
financial distress, and 295
indirect benefit test 46
judicial inconsistencies 49–53, 70–71
oppression remedy 51–2, 55–7, 60–61, 70, 327–9
other stakeholders’ interests, and 49–51
reasonable expectations 55, 58, 60–61, 69–70
remedy challenges 57–8, 70–71
shareholder wealth maximization 44–9
short vs. long term interests 66–7
traditional fiduciary duties 45–9
two-step process 58–8
securities investment
investors, private law remedies for 325–9, 331–2
trends 321–2
Carroll, A. 242
cheque kiting 314
children see also consumer exploitation
decision-making influences 216–17
marketing to 211–12, 214
parental preferences, role of 214–15
purchasing power of 212–14
China
corporate social responsibility 165, 193–4
directors’ duties
duty not to damage interests of company 163
duty of care 164, 169
duty of loyalty 162–3, 169
fiduciary duties 161–4, 169–71
directors, generally
board of directors, purpose and role 160–61
qualifications requirements and exclusions 161
directors’ liabilities
enforcement 165–74
generally 162–4
enforcement of directors’ duties
corporate law breaches 165–6
derivative lawsuits 167–8
direct lawsuits 166–7
judicial practice 169–71
non-legal Stock Exchange sanctions 168–9
Party-State role 171–4
securities law breaches 166
shareholders’ assembly role 168
Equity Joint Ventures (EJV) 157, 159
Foreign Invested Enterprises (FIEs), powers of 157
global importance 156
legal norms hierarchy 158
legal practice
binding effects of law 158–9
collective good approach 154–5
historical influences on 154–6
vs. theory conflicts 171–4
networked hierarchies 172–3
non-legal Stock Exchange sanctions 168–9
Party-State influences 171–4
profit-sacrificing actions 193–4
regulatory authorities 158–9
rule of law developments in 154
State-owned Enterprises, organisation principles 171–2
Supreme Court of China, role of 156
Western legal interpretation challenges 155–6, 171–4
Wholly Foreign Owned Enterprises (WFOE) 157, 159
close companies
disclosure duties, in New Zealand 123
communitarianism 234–5
community of interests concept
directors’ duties to shareholders 40
insolvency, and 286–7
companies, generally see also board structures; corporate social responsibility
behavioral economics, and 226–9
benefit to whole society 189, 194–6, 209–10, 222
communitarianism, and 234–5
concession theory 190
constituency definition challenges 206–7
consumer exploitation, and 211–12, 220–22, 235–6
consumer satisfaction, and 211–12
contractarian approach to 222–5, 233
corporate democracy models 198–200
cultural cognition, and 234–5
division of powers 299
feminism, influences of 230–31
progressive approaches 229–35
public interest power concessions 190–91
purpose 189–91
shareholder primacy model 222–5
behavioral economics, and 226–9
business judgment rule, and 223
consumer exploitation, and 223–5
feminism, and 230–31
influences on 223–4, 230–31
legal vs. moral decisions, and 224–5
non-executive directors, role of 299–301
psychological acculturation towards 223–5
rejection of, progressive approaches 229–35
Team Production Model, and 230
social utility vs. power concessions 190–91
Team Production Model 230
concession theory 190
conduct rules
acoustic separation
Australian cases 19–20, 22–4, 28–30
US cases 3, 5–10, 28
aspirational standards vs. legally enforceable rules 8–10
Conference Board 188
confidential information
duties and protections in Italy 147–8
in New Zealand 127
consumer exploitation 235–6
behavioral economics, and 226–9
of children, through advertising 211–12, 214, 220–22
communitarianism, and 234–5
contractarian approach 223–5, 233
Critical Race Theory, and 232–3
cultural cognition, and 234–5
feminist analysis influences on 230–31
legal vs. moral decisions 224–5
parental preferences, role of 214–15
rejection, progressive approaches to 229–35
shareholder primacy model, and 222–5
consumers
children’s purchasing power 212–14
customer constituencies 206–7
de-biasing reforms 220–22
decision-making, influences on 215–17
investors as 321, 332–3
law and behavioral analysis 215–17
rights, non-executive directors as custodians of 304–5
satisfaction vs. exploitation 211–12, 220–25
contractarian approach
principles 222–3
shareholder primacy, and consumer exploitation 223–5
corporate governance see also financial institutions
in Australia
AICD codes 251–4
ASX Principles 240, 246–7, 259–60, 266–7
Basel Committee Principles for Enhancing Corporate Governance 2004 308–9, 311
in China 157–8
ethics, and 241, 243, 251–4
financial crisis influences on 303–4
financial institutions 308–9
non-executive directors’ role 300–320
OECD Principles of 301
Regulator investigations 4–5
scandals influence on 4, 32–3, 42–3
in UK
Cadbury Report 1992 300
Corporate Governance Code 2010 304
Directors’ and Officers’ Liability Insurance 305–6
Higgs Report 2003 301
law reform 301–7
non-executive directors’ role 300–307
risk committees 302
Stewardship Code 2010 304, 306–7
Walker Review 2009 302–3
US legislation 32
corporate opportunity doctrine
in Italy 147–8
in New Zealand 128–32
corporate social responsibility see also multi-stakeholder boards
in Australia 32, 36–41
in Canada 32, 41–2
in China 165, 193–4
constituency definition challenges 206–7
corporate democracy models 198–200
directors’ incentives regarding 187
ethics, overlap between 240–43
exploitation of children, through advertising 211–12, 220–22
in Germany 188
global warming 221
human rights protection, conflicts and challenges 185–7
implementation challenges 207–9
incentives for 207, 209–10
monitoring board proposals 188
OECD Guidelines for Multinational Enterprises 209
optimal targets 207
profit maximisation approach 194
profit-sacrificing approach
in China 193–4
in developing countries, importance of 193–4
efficiency argument 191–4
employees as assets, implications of 193
legal objections to 191–4
self-interest conflicts 192–3
scandal influences on 4, 32–3, 42–3
shareholder supremacy model, and 194
social media influences on 260–61
stakeholder interests, and 188
in UK 32–6  
UN Special Representative Meeting,  
Toronto (2009) 187  
whistleblowing 260–61  
Corporations and Markets Advisory  
Committee (Australia) 36–7  
creditors see also investors  
directors’ duties regarding 87–9, 143,  
181, 293–4  
deepening insolvency claims 288  
in insolvent US corporations  
283–5  
in nearly insolvent US  
corporations 285–8  
US debtor in possession in  
bankruptcy 289–90  
in US generally 282–3  
US unincorporated entities  
290–92  
duty to act in best interests of  
company, and 106, 111–15,  
282–3, 286–7, 293–4  
Critical Race Theory  
consumer exploitation, and 232–3  

Dan-Cohen, Meir 6  
Davis Evans, A. 334  
de-biasing reforms 220–22  
de Jong, G. 199–200  
diligence see duty of care  
directors see nominee directors; non-  
executive directors  
Directors’ and Officers’ Liability  
Insurance 305–6  
directors, generally  
appointment, relevance of 73  
definitions, in UK law 73–4  
shadow directors 74  
directors’ liabilities  
in Australia 264–5  
in China 165–74  
Directors’ and Officers Liability  
Insurance 305–6  
in Italy 142–3, 152–3  
non-executive directors 307  
in Portugal 180–81  
reflective loss, for 310–11  
disclosure duties  
in Australia 26, 258–63  
board knowledge, relevance of 123–4  
close companies 123  
conflicts of duties, and 126  
environmental, social and  
governance (ESG) disclosure  
186  
ethics policies/ codes of conduct,  
and 259–60  
fair value transactions, and 121–2,  
124–5, 134–6  
financial disclosure, law links  
between 26  
good faith, and 120–26  
in insolvency 121  
in Italy 143–4, 146–7  
in New Zealand 120–27, 132–3  
nominee directors 127  
transaction avoidance rights 123–6  
transaction validity, and 123–4  
in UK 95–7, 100–102  
in US 26  
discretion, delegation/ fettering  
in UK 89–91  
Dragomir, Larisa 298–9  
duty of care  
acoustic separation 3, 7–10  
in Australia 4, 11–30, 247–50,  
294–5  
breach of trust, and 103  
in China 164  
corporate officers’ duties 277  
directors’ duties vs. stakeholder  
interests 30–42  
entire fairness standard 275  
fiduciary duty, definition 102–3  
in Italy 145–6, 151–3  
non-executive directors 306–20  
objective test 91–3  
protection presumption 275–6  
reasonable care, skill and diligence  
91–3  
subjective test 91–2  
two-tier test 92–3  
in UK 102–4, 306–20  
in US 3, 6–10, 273–4, 278  
duty of loyalty  
in Canada 53–9  
in China 162–3  
corporate officers’ duties 277  
degree of obligation 55–8  
good faith, and 276–7
Index

in Italy 146–7
non-executive directors 311–12
in Portugal 177–8
stakeholder interests, conflicts with 53–9
in US 273–4, 276–7

Eisenberg, Melvin 6, 188
employees
duty to act in best interests of company, and 111–12
Enron 26, 32
environmental constituencies 206
environmental, social and governance (ESG) disclosure 186
ethics, generally
corporate social responsibility,
overlap between 240–43
definition 240–41, 243–4
law of torts, and 247
social media influences 260–61
stakeholder influences 241–2
ethics policies/ codes of conduct
in Australia
AICD codes of conduct 251–4
ASX Principles 246–7, 259–60, 266–7
criminal statutory liabilities, and 264–5
and directors’ duties, overlap between 240, 246–50, 267–8
judicial influences 261–3
private enforcement trends, and 266–7
social media influences 260–61
bounty incentives 261
business expectations and industry standards 251–4
contractual obligations, and 250
directors’ duties, overlap between 240, 246–50, 267–8
disclosure obligations 259–60
whistleblowers, and 261

fair value transactions
burden of proof 125
definition 121–2, 124–5, 134–6
directors’ share dealing 132–6
fair market value, interpretation 136

in New Zealand 121–2, 124–5, 133–6
transaction avoidance rights 124–6
in US 121–2
Farrar, J. 241–2
fast food marketing 211–14
feminism
shareholder primacy model,
influences on 230–31
fiduciary duties see also duty of care;
duty of loyalty
in China 161–4, 169–71
corporate opportunity doctrine, and 128–32
criticism of concept 106
definition 102–3
directors’ share dealing 133–4
securities investment breaches
investors, private remedies 324–9
investors, public remedies 329–30
uncabined approaches to 278
in US 272–8
beneficiary changes, implications of 293–4
compared with other governance structures 294–7
debtors in possession in bankruptcy 289–90
enforcement 279–92
insolvent US corporations 283–5
investors, private remedies for 325–6
nearly insolvent US corporations 285–8
solvent US corporations 279–83
US unincorporated entities, beneficiaries of 290–92
financial institutions
additional risks 299
Basel Committee Principles
for Enhancing Corporate Governance 2004 308–9, 311
challenges 298–9
characteristics, differences from companies 299
corporate governance
board differences 298–9
non-executive directors’ role 300–320
reform developments 301–4
risk committees 302
non-executive directors
challenges and conflicts 309–20
duties 300–311
standard of care 315–20

Germany
co-determination of shareholders and employees 196–7, 202–5
corporate social responsibility 188
supervisory boards 197, 202–5
voting rights, and stakeholder representation 205
works councils 197
global financial crisis 186
good faith
Australian interpretation 108
corporate officers’ duties 277
corporate opportunity doctrine, and 128–9
definition 107–8
duty of loyalty, and 276–7
duty to act in best interests of company, and 107–11
duty to disclose interests, and 120–26
fair value transactions, and 121–2, 124–5
in New Zealand, duty to act in 107–26
non-executive directors 311–12
objective test 108
opinions must be reasonably held 108–9
personal gain, and 109–10
proper purpose doctrine, and 118–20
subjective test 82–4, 108
in UK, statutory duty to act in 82–4
in US, duty of 274–7

Hansmann, H. 201, 251
Hanson, J. 216
Higgs Report 2003 (UK) 301
Howson, Nicholas Calcina 159, 170
human rights see also corporate social responsibility
corporate abuses 185–7
protection legislation 186–7
protection responsibility conflicts and challenges 185–7

independent outsiders
business judgment rule, and 64–5
indirect benefit test 46
insider trading
directors’ share dealing, interpretation as 133

insolvency
best interests of company
directors’ duties conflicts 282–3
vs. creditors’ interests 111–15, 282–3, 286–7
vs. nominee directors’ interests 117
definition 284–5
directors’ duties
in Australia 294–5
beneficiaries of, implications of changes in US 293–4
beneficiaries of, in US unincorporated entities 290–92
beneficiaries of, shareholder vs. creditor conflicts 286–7, 293–4, 297
beneficiaries of, timing of shift 284–5
best interest of company conflicts 282–3
in Canada 295
community of interests concept 286–7
deepening insolvency claims 288
duty to disclose interests 121
insolvent trading regulations 295–6
in insolvent US corporation 283–5
in Italy 150–53
in nearly insolvent US corporation 285–8
statutory approaches 295–6
trust fund doctrine 284
in UK 295
US debtor in possession in bankruptcy, and 289–90
zone of insolvency, in 285–8

investors
private law remedies
in Canada 325–9
challenges of 329
corporate dissolution 327
derivative actions 326–8
injunctions 326–7
misrepresentation 324
oppression remedy 51–2, 55–7, 60–61, 70, 327–9, 332
and public law, benefits compared 331–5
punitive damages 326
representative actions 327
in UK 324–8
in US 325–6
public law remedies
breach of fiduciary duty, and 330
in Canada 330–31
compensation 330–32
and private law, benefits compared 331–5
public interest jurisdiction 330, 332, 334–5
quasi-criminal actions 330–31
restitutionary rights, and 322–3, 331–4
third party role in 329
in US 331
remedies for
breach of fiduciary duty 111, 325–30
in Canada 325–31, 325–32
compensation 330–32
corporate dissolution 327
corporate law remedies 324–9
derivative actions 326–8
Fair Funds provision 331
importance of 332
injunctions 326–7
law of torts, and 324
misrepresentation 324
in New Zealand 111
nexus of contracts concept, and 323
oppression remedy 51–2, 55–7, 60–61, 70, 327–9, 332
private law remedies 322–9
private law vs. public law, benefits compared 331–5
public interest jurisdiction 330, 332, 334–5
public law remedies 322–3, 329–31
punitive damages 326
quasi-criminal actions 330–31
representative actions 327
restitutionary rights 322–3, 331–4
securities fraud, and 322–3, 333–5
securities law remedies 324
in UK 324–8
in US 325–6, 331
securities investment trends 321–2
Italy
breach of duty, prevention provisions 144
business judgment rule 144–5
conflicts of interest, directors’ actions under 146–7
corporate information, duties and protections 147–8
corporate interests, definition 143–4
corporate opportunity doctrine 147–8
corporate purpose fulfillment requirement 141–2, 146–8
directors’ duties
creditors, and 143
definitions 142–3
delays or omissions, and 150
degression of powers, and 148–9
diligence standards 145–6
disclosure 143–4, 146–7
duty of care 145–6
duty of loyalty 146–7
duty of skill 145–6
duty related to company capital 150–51
duty related to company winding up 150–51
duty relating to company functioning 151
duty to act in corporate interests 141–4
duty to draw up accounts 149–50
duty to monitor and act on informed manner 148–9
duty to prevent unlawful conduct and crimes 143–4
groups of companies, in 148
non-executive directors 148–9
directors’ liabilities
enforcement 152–3
generally 142–3
insolvency, and 150–53
legal clarity, lack of 141
parent company liabilities 148
shareholders and directors,
relationship between 141–4
shareholders’ interests
minority shareholders’ powers,
and 152
relevance of 141–2
shareholder value, interpretation
144
Jackson Commission Report
(Australia) 36–7
Kingsford Smith, D. 253
Kraakman, R. 201, 251
Kysar, D. 216
La Porta, R. 331, 335
law, generally
behavioral analysis 215–18
legal regulation, governance and
ethics, overlaps 242
law of torts
directors’ duties, and 247
investors, private remedies for 324
legal decision theory 215–17
behavioral economics 226–9
board decision-making, and 217–18
critical realism, and 218
debiasing reforms, and 220–22
heuristics, role in 216–17
interpretation of 217–18
limitations 219–20
self-interest, and 215–17, 219
libertarian paternalism 227
Lin, Li-Wen 171
loyalty see duty of loyalty
McGregor, Richard 173
MacNeil, Iain 300
marketing
to children 211–14
corporate accountability, and 220–22
parental preferences, role of 214–15
purchasing power of children 212–14
mediation
multi-stakeholder board decision-
making, and 204–5
Menzies, Douglas 239
Milhaup, Curtis J. 171
Mitchell, Gregory 215, 220–22
Mitchell, L.E. 188–9
Model Business Corporation Act
(MCBA) 272, 276–7
multi-stakeholder boards
alternative dispute resolution, and
204–5
competent body concerns 208–9
critical constituency representation
concerns 206–7
criticisms 200–201
decision-making challenges 201–5
efficiency implications 201–2
implementation challenges 207–9
incentives 207
in multinational enterprises (MNEs)
207–9
OECD Guidelines 209
optimal targets 207
organizational challenges 205–7
principles of 194–6
profit-maximisation conflicts 201–2
stakeholder approval requirements
202–4
stakeholder refusal management
mechanisms 204–5
voluntary vs. mandatory
implementation 207–8
voting rights concerns 205–6
Nader, R. 188
negligence
acting in best interests of company,
and 109
duty of care, and 274
Netherlands
corporate democratic models 198–
200, 202–3
New Zealand
best interests of company
definition 111–15
duty to act in 107–11
nominee directors’ duties 115–17
stakeholder vs. shareholder
interests 111–17
business judgment rule 116
company law reform 105–7
corporation vs. shareholders,
separation of 111–12
directors’ duties
breach of, remedies for 111
Index

codification 105–6
corporate opportunity doctrine 128–32
creditors’ interests, and 106
duty not to enter into obligations unable to be performed 106, 112
duty not to trade recklessly 105, 112
duty to act in best interests of company 107–11
duty to act in good faith 107–26
duty to comply with the Companies Act 106
duty to disclose interests 106, 120–26
duty to exercise powers for proper purpose 118–20
insider trading 133
interests registers 122–3, 132–3
nominee directors 115–17
relevant interests, definition 132–3, 137
statutory duties 105–6, 111, 132–7
fair value transactions 121–2, 124–5, 133–6
financial regulation 137–8
nexus of contracts concept 323
duties of care, skill and diligence 306–20
duty of good faith 311–12
duty of loyalty 311–12
fiduciary duties 311–12
independence of 304–5, 309–10
liabilities limitation of 307
reflective loss, for 310–11
reliance on executive directors, implications of 313–14, 317–18
personal interests, conflicts with 304–5, 320
responsibilities 308
risk management role 307
role of board decision-making 299–301
law review 300–301
monitoring 313–18
in UK 310–11
shareholder primacy model, role in 299–301
shareholders and third parties, duties owed to 310–11
shareholders as, conflicts of interest 304–5
standard of care 311–20
OECD
Guidelines for Multinational Enterprises 209
Principles of Corporate Governance 2004 301
Parkinson, J.E. 191–2, 200–201
Parliamentary Joint Committee Report on Corporations and Financial Services (Australia) 36–7
Portugal
codification of directors’ duties 175–6
contractual basis for duties 175–6, 180–81
creditors, liabilities towards 181
directors’ liabilities 180–81
duty of care 175–7

duty of loyalty 177–8
duty to act in interests of company 175, 178
duty to manage 179–80
duty to monitor 179
duty to report and to render accounts 178–9
general duties 175–6
separation of illicity and fault 180–81
shareholders and stakeholders, liabilities towards 181
tax liabilities 181
progressive approaches
contractarians redux 233
Critical Race Theory 232–3
cultural cognition, and 234–5
feminism, and 230–31
principles 229
Team Production Model 230
proper purpose doctrine
in New Zealand 118–20
reasonable care and skill
UK statutory duty regarding 91–3
reflective loss, liabilities for 310–11
remedies
for investors/ shareholders
breach of fiduciary duty 111, 325–30
in Canada 51–2, 55–7, 60–61, 70, 325–32
compensation 330–32
corporate dissolution 327
corporate law remedies 324–9
derivative actions 326–8
Fair Funds provision 331
importance of 332
injunctions 326–7
in law of torts 324
misrepresentation 324
in New Zealand 111
nexus of contracts concept, and 323
oppression remedy 51–2, 55–7, 60–61, 70, 327–9, 332
private law remedies 322–9
private law vs. public law, benefits compared 331–5
public interest jurisdiction 330, 332, 334–5
public law remedies 322–3, 329–31
punitive damages 326
quasi-criminal actions 330–31
representative actions 327
restitutionary rights 322–3, 331–4
securities fraud, and 322–3, 333–5
securities law remedies 324
in UK 324–8
in US 325–6, 331
private law remedies
in Canada 51–2, 55–7, 60–61, 70, 325–31
challenges of 329
corporate dissolution 327
derivative actions 326–8
injunctions 326–7
misrepresentation 324
oppression remedy 51–2, 55–7, 60–61, 70, 327–9, 332
and public law, benefits compared 331–5
punitive damages 326
representative actions 327
in UK 324–8
in US 325–6
public law remedies
breach of fiduciary duty, and 330
in Canada 51–2, 55–7, 60–61, 70, 330–31
compensation 330–32
and private law, benefits compared 331–5
public interest jurisdiction 330, 332, 334–5
quasi-criminal actions 330–31
restitutionary rights, and 322–3, 331–4
third party role in 329
in US 331
Rodrigues, L. 241
Sarbanes-Oxley Act 2002 32, 331
Sealy, L.S. 107–8
securities investment see also investors
information asymmetry, and 333
investors as consumers 321, 322–3
securities fraud, remedies for 322–3, 333–5
trends 321–2
securities regulation
directors’ duties, corporate law conflicts 65–7
self-interest
behavioral economics, and 226–9
legal decision theory, and 215–17, 219
shareholder interests
behavioral economics, and 226–9
companies as benefit to society as whole, conflicts and challenges 189, 194–6, 209–10, 222
contractarian approach to 222–5, 233
cultural cognition, and 234–5
directors’ duties, conflicts with 4, 30–42
in Australia 37–41
business judgment rule, and 31–2, 61–5, 223
in Canada 32, 41–2, 45–9, 70–71
corporate law vs. securities law approaches 65–7
corporate scandal influences 4, 32–3, 42–3
corporation vs. shareholders, separation of 45–58, 70–71, 111–12
indirect benefit test 46
in New Zealand 111–20
proper purpose doctrine, and 118–20
remedy challenges 57–8
short vs. long term interests 66–7
in UK, statutory duties 33–6, 98
in US, cases 30–32
duty to cooperate with company management 306
duty to monitor company affairs 306–7
profit maximisation, and 194
reasonable expectations, and 55, 58, 60–61, 69–70
shareholder supremacy, criticisms of 194
in US, proxy access 188
shareholder primacy model
behavioral economics, and 226–9
business judgment rule, and 223
consumer exploitation, and 223–5
feminism, and 230–31
influences on 223–4, 230–31
legal vs. moral decisions, and 224–5
non-executive directors, role of 299–301
psychological acculturation towards 223–5
rejection of, progressive approaches 229–35
Team Production Model, and 230
shareholders, generally see also investors
Stewardship Code 2010 304, 306–7
social media 260–61
stakeholder interests see also multi-stakeholder boards
co-determination of shareholders and employees, in Germany 196
companies’ role as benefit to whole society 189, 194–6, 209–10, 222
corporate democracy models 198–200
corporate social responsibility, and 188, 194
critical constituency representation 206–7
directors’ duties, conflicts with 4, 30–42
in Australia 36–41
business judgment rule, and 31–2, 61–5, 223
in Canada 32, 41–2, 53–8
community of interests concept 40
corporate scandal influences 4, 32–3, 42–3
corporation vs. stakeholder interests 53–8, 111–17
degree of obligation 55–8
duty of loyalty 53–9
multiple interest risks 35
in New Zealand 111–17
remedy challenges 57–8
in UK, statutory duties 33–6, 98
in US, cases 30–32
ethics, relevance of 241–2
independent outsiders, and 64–5
profit maximisation approach, conflicts 188, 194
reasonable expectations, and 55, 58, 60–61, 69–70
Stakeholder participation
conflicts and challenges 194–6
employee representative proposals
representative board proposals
voting rights, and board representation 205–6
Stanford prison experiment 218
Statutory duties
to act in good faith 82–4
breach, ratification by shareholder meeting 119
ethics policies/ codes of conduct, and 247–51
in New Zealand 105–6, 111, 132, 137
in UK 33–6, 75–104
Sunstein, C. 227
Team Production Model 230
Thaler, R. 227
trust fund doctrine 284
Uniform Limited Liability Company Act 1996 (US) 278
Uniform Limited Liability Company Act 2006 (US) 278
United Kingdom
corporate governance
Cadbury Report 1992 300
Corporate Governance Code 2010 304
Directors’ and Officers’ Liability Insurance 305–6
Higgs Report 2003 301
law reform 301–7
non-executive directors’ role 300–307
risk committees 302
Stewardship Code 2010 304, 306–7
Walker Review 2009 302–3
corporate social responsibility 187
generally 32–6
profit maximisation conflicts 194
directors’ duties
breach of duty, liability for 102–4
codification of law 75
common law development 74–5
corporate governance, acting within 89–91
conflicts of interest, challenges 86–9, 94–5
conflicts of interest, duty to avoid 93–7
continuity of attention, and 93
corporation vs. shareholders, delegation 28, 89–91
duty to act for benefit of company members as whole 81–2, 84–9
duty to act for creditors in event of insolvency 87–9
duty to act in good faith 82–4
duty to act within constitution and powers 78–81
duty to avoid conflicts of interest 93–7
duty to declare personal interests in proposed transactions 100–102
duty to exercise independent judgment 89–91
duty to exercise reasonable care, skill and diligence 91–3
duty to promote success of company 81–2, 84–9
in financial distress 295
general duties 75–8
historical development 72, 74–5
to investors, private law remedies 324–8
non-executive directors 310–11
no-profit duty 97, 99–100
personal interests disclosure, and 95–7, 100–102
pluralistic approach 81–2, 84–9
retroactive liability, and 96–7
statutory duties 33–6, 75–104
United States
acoustic separation cases 3, 7–10
business judgment rule 5–6, 8, 31–2, 274–6, 287
company management vs. ownership schism 273
company social utility vs. power concessions 190–91
closest vs. decision rules conflicts 3, 7–10, 28
corporate governance legislation 32
directors’ duties accountability, and 273–4
beneficiaries of, shareholder vs. creditor conflicts 286–7, 293–4, 297
beneficiary changes, implications of 293–4
in best interests of company, conflicts and challenges 281–3
conflicts, statutory constituencies 281–2
corporate officers’ duties, and 277
corporate social responsibility, and 187
creditors, conflicts with 282–5
debtors in possession in bankruptcy, and 289–90
duty of care 6–7, 273–4, 278, 289–90
duty of good faith 274–6
duty of loyalty 273–4, 276–7, 289–90
enforcement 272–92
entire fairness standard 275
fiduciary duties, shareholders as beneficiaries of 280–83
financial disclosure, legal links between 26
financial distress, conflicts during 282–3
incorporation models, established under 272–3
insolvent US corporations, in 283–5
investors, private law remedies 325–6
liability limitations 6–7
nearly insolvent US corporations, in 285–8
negligence, and 274
other governance structures, compared with 294–7
protection presumption 275–6
shareholder interests, relevance of 279–83
solvent US corporations, in 279–83
stakeholder interests, relevance of 30–31
trust fund doctrine 284
unincorporated entities, and 278, 290–92
fair value transactions definition 121–2
incorporation models Delaware law, under 272–3, 282, 286–7
directors’ duties, established under 272–3, 276–7
directors’ duties, statutory constituencies for conflicts 281–2
Model Business Corporation Act (MCBA) 272, 276–7
separation of powers, and 273
unincorporated entities 278
insolvency, directors’ duties in beneficiaries of, in US unincorporated entities 290–92
beneficiaries of, shareholder vs. creditor conflicts 286–7, 293–4
beneficiaries of, timing of shift 284–5
best interest of company conflicts 281–3
community of interests concept 286–7
deeptening insolvency claims 288
in insolvent US corporation 283–5
in nearly insolvent US corporation 285–8
trust fund doctrine 284
US debtor in possession in bankruptcy, and 289–90
zone of insolvency, in 285–8
securities investment
investors, private remedies for 325–6
investors, public remedies for 331
securities investment trends 322
shareholder interests
proxy access proposals 188
stakeholder interests
relevance of 30–31

UN Special Representative on Corporate Law and Human Rights
Toronto Meeting (2009) 187
van Witteloostuijn, A. 199–200
video gaming
marketing to children 211, 213–14
Walker Review 2009 (UK) 302–3
whistleblowing 260–61