

Companies (Directors Duties) Amendment Bill

Member's Bill

As reported from the Economic Development, Science and Innovation
Committee

Commentary

Recommendation

The Economic Development, Science and Innovation Committee was unable to agree that the bill should pass, but recommends amendments to the bill, set out in this report, should it be determined by the House that the bill be passed.

Introduction

The Companies (Directors Duties) Amendment Bill is a member's bill that proposes an amendment to section 131 of the Companies Act 1993. Section 131 provides that when exercising powers or performing their duties, the director of a company must act in good faith and in what they believe are the best interests of the company.

The bill would add new subsection 131(5) as an "avoidance of doubt" provision. It would include a non-exhaustive list of five environmental, social, and governance (ESG) matters that a director may take into account when deciding what is in the best interests of the company.

According to the general policy statement, the bill aims to make clear that a director, in acting as the mind and will of the company, can take actions which take into account wider matters than the financial bottom-line.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to the question of whether the bill's intention could be achieved by non-legislative means. We discuss our consideration of this matter in more detail later in this commentary.

Proposed amendments

This commentary covers the main amendment we recommend to the bill as introduced. We do not discuss minor or technical amendments.

New subsection 131(5) could be shortened and still achieve its objective

Some submitters maintain that the law already allows a director to consider ESG factors when deciding what is in the best interests of their company. They note that the current law is general and principles-based, and does not limit what can be considered by directors when they determine the best interests of the company.

We believe that the bill as introduced could have unintended consequences. It could confuse directors about their responsibilities by listing specific ESG factors and giving the impression that these factors should be given more weight than others. The reference to the principles of Te Tiriti o Waitangi could be an additional source of confusion, because the relationship between the Crown and Māori is governed by Te Tiriti, and this relationship does not typically include other individuals or private entities.

We understand that the bill may create inconsistencies within the Companies Act and with other legislation. Wording similar to that used in section 131 is used in other parts of the Act and in other acts, such as the Incorporated Societies Act 2022. If similar legislative references or duties were not clarified elsewhere, this may create confusion as to how they are to be interpreted, or why they are not framed in a similar way.

Non-legislative alternatives could fulfil the bill's objective. These might include guidance or training materials from the Government to educate directors.

The member who first sponsored the bill, Hon Dr Duncan Webb, and some submitters considered that the bill could help to dispel uncertainty about a director's duties in cases where financial or profit-related considerations appear to be in conflict with ESG-related ones. We agree, but consider that proposed new subsection 131(5) could be shortened and still serve that purpose. Specifically, we consider that removing the list of ESG factors that a director may consider would address the concern that directors may be required to give some factors more weight than others.

We therefore recommend replacing subsection 131(5) of the bill as introduced. Our replacement wording would make it clear that, when considering the best interests of a company or holding company for the purposes of the section, a director may consider matters other than the maximisation of profit.

New Zealand National Party view

The New Zealand National Party believes that many companies already take into consideration their ESG/social obligations in their decision-making, as it is in the best interest of their companies to do so and consequently the bill is not necessary.

Important organisations such as The New Zealand Law Society and the Legislative Design and Advisory Committee oppose the bill. We agree with the concerns from the Law Society that “strongly caution against ad-hoc changes to the directors’ duties regime”.

The bill may have the unintended consequences of opening up directors to potential court action. There is no clear rationale on what the proposal by the member is required and we are concerned that this is more of a solution looking for a problem and virtue signalling.

Whilst we agree that there is benefit in corporate leaders taking into account ESG factors, we note that directors already have existing obligations under their fiduciary responsibilities.

Appendix

Committee process

The Companies (Directors Duties) Amendment Bill was referred to the committee on 9 November 2022. We held a hearing of evidence with the member in charge of the bill at that time, Hon Dr Duncan Webb, on 30 January 2023.

We called for submissions on the bill with a closing date of 17 January 2023. We received and considered submissions from 51 interested groups and individuals. We heard oral evidence from 19 submitters.

We received advice on the bill from the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Naisi Chen (Chairperson)

Jamie Strange (Chairperson and member until 8 February 2023)

Glen Bennett

Barbara Kuriger (until 8 February 2023)

Ingrid Leary (from 8 February 2023)

Melissa Lee

Stuart Smith (from 8 February 2023)

Hon Michael Woodhouse (from 14 February 2023)

Andrew Bayly participated in some of the consideration of this bill.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Camilla Belich

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Companies (Directors' Duties) Amendment Act **2021**.

2 Commencement

This Act comes into force on the day after the date on which it received the Royal assent. 5

3 Principal Act

This Act amends the Companies Act 1993 (~~the principal Act~~).

4 Section 131 amended (Duty of directors to act in good faith and in best interests of company)

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After section 131(4), insert:

- (5) ~~To avoid doubt, a director of a company may, when determining the best interests of the company, take into account recognised environmental, social and governance factors, such as:~~

- ~~(a) recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi):~~
 - ~~(b) reducing adverse environmental impacts:~~
 - ~~(c) upholding high standards of ethical behaviour:~~
 - ~~(d) following fair and equitable employment practices:~~
 - ~~(e) recognising the interests of the wider community.~~
- (5) To avoid doubt, in considering the best interests of a company or holding company for the purposes of this section, a director may consider matters other than the maximisation of profit.

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Legislative history

23 September 2021
9 November 2022

Introduction (Bill 75–1)
First reading and referral to Economic Development, Science
and Innovation Committee