

22 December 2022

Jamie Strange MP  
Economic Development, Science and Innovation Committee  
Parliament Buildings  
Wellington 6160

Email: [edsi@parliament.govt.nz](mailto:edsi@parliament.govt.nz)

Dear Mr Strange

## Submission on the Companies (Directors Duties) Amendment Bill 2021

The Institute of Directors (IoD) appreciates the opportunity to comment on the Companies (Directors Duties) Amendment Bill 2021 (the Bill). We also welcome the focus on the importance of corporate governance in achieving outcomes for shareholders, stakeholders and the wider community. The IoD would like to speak to this submission.

### Main points

While the IoD supports the Bill's intentions, we conclude there are other options that may better address the Bill's objectives:

- The IoD takes no position on whether the amendments in this Bill should be pursued.
- Directors would benefit from more guidance in this area, achieved either through amendments to the Bill, or a range of other mechanisms.
- If the Select Committee concludes that legislative change is required, the IoD seeks amendments to the Bill that promote the completion by company boards of an annual "best interests statement" tabled at companies' Annual General Meetings.
- The IoD would welcome the establishment of an independent Companies Act Working Group tasked with comprehensively reviewing the policy settings and framework underpinning the Companies Act 1993 and other similar governance legislation.

#### About the Institute of Directors

*The IoD has over 10,000 members, is New Zealand's pre-eminent organisation for directors and is at the heart of the governance community.*

*We believe in the power of good governance to create a strong, fair and sustainable future for New Zealand. Our role is to drive excellence and high standards in governance.*

*We support and equip our members who lead a range of organisations from listed companies, large private organisations, state and public sector entities, small and medium enterprises, not-for-profit organisations and charities.*

*Our Chartered Membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good governance.*

## Executive summary

### Is there an issue that requires legislative change?

1. The Companies (Directors Duties) Amendment Bill seeks to reinforce the “best interests” duty in the Companies Act 1993 and claims to be required to remove doubt. IoD is unsure that there is uncertainty, particularly given the range of commentary on the Bill. The issues raised from some commentators are that there is insufficient attention paid to environmental and social issues by companies. They see boards being given more explicit licence to consider a wider set of issues through legislation as a way to prompt more action on these issues. Despite this, we are concerned that legislation to avoid doubt about directors’ duties when no particular doubt exists, may create more uncertainty.

### Aren’t the objectives of the Bill already being addressed?

2. While there may be concerns about the pace of change in boards (and their companies) paying more attention to environmental and social issues (where this in the best interests of the company), we see our member directors taking a long-term view and are looking at long-term trends in customer expectations, environmental and resource management and community expectations based on the 2022 IoD/ASB Directors Sentiment Survey findings.

### How could boards achieve the Bill’s objectives?

3. Legislative change is not the only way to achieve the Bill’s objectives, particularly given the shifts in director and board focus and other legislative change. In that regard Chapter 2, Part 2 of the Legislation Guidelines<sup>1</sup> and paragraph 8, Cabinet Office Circular (CO (20)2)<sup>2</sup> suggest regulatory proposals should consider a range of options to achieve regulatory objectives. We offer three for the Select Committee’s consideration:
  - **Option 1: Rely on other legislation, guidance and support:** Other legislation guides companies to focus on a range of environmental and social issues, the most recent of which is the mandatory requirements for climate-related disclosures. There is also support for this focus in forthcoming changes to the NZX Corporate Governance Code and ESG Guidance Note<sup>3</sup>. Supplementing this are and will continue to be a range of guidance, training, events and networking opportunities led by the IoD (and others) to support directors and boards improve their literacy in these important issues and to take action where this is in the best interests of the company
  - **Option 2: Legislate to promote the completion by company boards of an annual “best interest’s statement”:** Many company directors have indicated that their boards have already

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<sup>1</sup> See [2. Defining the policy objective and purpose of proposed legislation | The Legislation Design and Advisory Committee \(ldac.org.nz\)](#)

<sup>2</sup> See [CO \(20\) 2: Impact Analysis Requirements - June 2020 - Cabinet Office, Department of the Prime Minister and Cabinet \(dpmc.govt.nz\)](#)

<sup>3</sup> See [NZX Rules and Guidance Consultation - NZX, New Zealand’s Exchange](#) for further information

considered the matters outlined in the Bill in their belief of what is in the best interests of their companies<sup>4</sup>. This could be made more explicit by amending the bill to promote the completion by company boards of an annual “best interest statement” tabled at companies’ Annual General Meetings. This would provide increased transparency by regularly outlining to shareholders their belief about the best interests of the company.

- **Option 3: A more thorough review of the Companies Act (and other governance legislation):** The current Bill is a further amendment to the Companies Act 1993 that has been law for nearly 30 years, amended numerous times since then, without a thorough review. The IoD considers that a thorough review of the policy underpinnings of the Companies Act 1993 and other similar governance legislation is needed, and would welcome the establishment of an independent Companies Act Working Group to lead this review.

## Specific comments

### Is there an issue that requires legislative change?

4. IoD thinks it important for the Select Committee to consider whether there is an issue that requires legislative change. If there is, we suggest that the Committee should consider whether the current Bill is the best way to achieve the Bill’s objectives.

#### *The “best interests” duty – amendment to remove doubt*

5. Section 131 of the Companies Act 1993 (the “Companies Act”)<sup>5</sup> provides what is commonly referred to as the “best interests duty” - the “duty of directors to act in good faith and in best interests of company”.
6. The Bill proposes an amendment to this section, on the basis that there is uncertainty about what acting in the best interests of company means. It proposes that *“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.”* Then follows a list of five factors directors may take into account: the principles of the Treaty of Waitangi; the environment; ethical behaviour; equitable employment practices and the interests of the wider community.
7. The Bill’s sponsor Dr Duncan Webb says<sup>6</sup> that *“the bill will simply confirm what many companies have been doing for a long time – namely taking into account the wider impact that they have on society, the community and the environment”*. He has also said that *“somewhere along the way, the interests of the company were conflated with making profits. It is clear that a company must be solvent and not act recklessly, risking creditors’ funds. However, it has never been the law that there is a legal obligation on a director to seek to maximise profits at the cost of all else”*.

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<sup>4</sup> [The 2022 IoD/ASB Directors Sentiment Survey Report](#)

<sup>5</sup> [Companies Act 1993 No 105 \(as at 27 October 2022\)](#)

<sup>6</sup> [Enabling Directors](#) 17 December 2021

8. Further, Dr Webb says *“the bill will enable companies to understand that the interests of a company – even a company which is seeking primarily to provide a return on investment to shareholders – can take a wide range of considerations into account”*.

### ***Is legislation required?***

9. If directors are already considering these factors, as Dr Webb states, why is legislative change required? Where is the doubt that needs to be removed? A range of views have been expressed for and against the Bill ranging from:

- Those who believe no changes are needed. They describe the Bill as *“well-meaning but harmful”*<sup>7</sup>, to *“pointless virtue signalling,”*<sup>8</sup>

to

- Those who think the Bill could go further, and suggest replacing the factors directors “may consider” with those they “must consider” in the Bill<sup>9</sup>.

10. Another concern is that the list of factors directors “may” consider could become a compliance checklist or defence, with directors failing to consider other relevant factors that are not listed.

11. These views are explored further below:

#### **One perspective: No uncertainty – bill not required**

12. Some commentators have stated that the Bill is not needed because directors are already taking a wide range of factors into account, to comply with the best interest’s duty, and this approach is supported by New Zealand case law.

13. For example, Roger Partridge of the New Zealand Initiative has written:

*“There has never been any doubt under New Zealand law that, when considering the best interests of a company, directors are permitted to take account of factors that go beyond the interests of shareholders in maximising short-term profits...the courts have consistently held that they will not consider whether directors have put stakeholder interests ahead of profits when deciding the company’s best interests...directors are already able to take a broad view of what is in a company’s best interests. Satisfying customers. Treating staff fairly. Repaying creditors. Meeting environmental obligations. Acting ethically. These are all interests the modern company – and its directors – must take into account....”*<sup>10</sup>

14. And from lawyer Roger Wallis in an Auckland District Law Society article:

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<sup>7</sup> [Directors Duties Bill is well-meaning but harmful](#) Roger Partridge, NZ Initiative, 4 May 2022

<sup>8</sup> [The new Companies Bill: pointless virtue-signalling or a much-needed clarification?](#) Diana Clement, Auckland District Law Society 20 October 2022

<sup>9</sup> [Proposed changes to the Companies Act mark the beginning of positive change](#) Steven Moe, Stuff, 29 September 2021

<sup>10</sup> [Directors Duties Bill is well-meaning but harmful](#) ibid, Roger Partridge 4 May 2022

*“When making a decision, you’re allowed to take account of impact on the environment, impact on employees and other [stakeholders] that a company might interface with. What you’re not allowed to do is act in a way that’s detrimental to the best interests of shareholders. But it’s a balancing exercise, and [the ESG examples in the bill] are legitimate things to take into account, but not mandatory. So the existing law more than adequately deals with that concept. That’s why we say it’s a complete waste of time.”<sup>11</sup>*

#### **Another perspective: Bill is useful but should go further**

15. Other commentators, including lawyer Emma Geard, have commented that the Bill could go further:

*“The bill won’t force directors to minimise negative climate impacts – it just clarifies what they can consider under the existing law when exercising their duties, under their already wide discretion. It would be better to clarify that directors must act in the long-term interests of the company, rather than listing things they could take into account if they wanted to. The focus should be on improving governance practices, and consider making the duties mandatory, as in the UK.”<sup>12</sup>*

16. And Steven Moe, an active director and legal adviser, writes:

*“A natural extension of what is proposed [in the Bill] would be to require that all companies must have a constitution in which they clearly articulate their mission and purpose. Hand in hand with that could be a requirement that companies report on how they are going about achieving that purpose, to avoid social washing. In other words, the bottom line might no longer be enough”<sup>13</sup>.*

#### **The real doubt – whether the Bill is required**

17. While we support the intention of the Bill, the only thing that does appear to be without doubt based on the views outlined above, is that there is no agreement on whether the Bill, in its current form, is required. The IoD considers it is important for companies to be taking a long term view of the sustainability of the organisation, which includes taking into account issues raised in the Bill. The IoD proposes a range of options that in our submission may better address the Bills’ objectives.

## **Aren’t the objectives of the Bill already being addressed?**

### ***Directors are already focussing on the long term and environmental and social issues.***

18. The 2022 IoD/ASB Directors Sentiment Survey (DSS 2022) report released in November 2022, asked directors what three future trends they were paying close attention to, and approaches they were using to support organisational strategy. The survey results confirmed that directors were thinking long-term, and paying attention to the issues identified in the Bill, as well as focussing on financial sustainability. The top three future trends results, by a clear margin, were:

- Changing customer expectations - 60%

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<sup>11</sup> [The new Companies Bill: pointless virtue-signalling or a much-needed clarification?](#) Ibid 20 Oct 2022

<sup>12</sup> [Ibid](#)

<sup>13</sup> [Proposed changes to the Companies Act mark the beginning of positive change](#), [ibid](#) 29 September 2021.

- Climate change, water & resource management issues - 51%
  - Changing community expectations - 47%.
19. The DSS 2022 confirms directors are already considering changing customer and community expectations. These changing expectations, particularly around climate change, environmental, social and cultural impacts and outcomes, are causing boards to reflect on their organisations' purpose, value proposition and business models.
20. The IoD considered it unsurprising that second on the list was climate change, water and resource management issues - although this is a significant shift from responses received 5-10 years ago. Organisations are now recognising that they need to make changes about how they are governed and how they operate, while also keeping the future impacts of climate change foremost in their planning. A substantial proportion of directors and their boards have recognised this change in focus through their support of the IoD-hosted Chapter Zero New Zealand<sup>14</sup>. This is part of a global network of board directors committed to taking action on climate change through governance.
21. The survey results confirmed that directors are already taking a long term view to respond effectively to community and customer expectations, and pressing environmental and social issues:
- the majority of directors surveyed (64%) identified taking a long-term perspective as the number one way boards can support organisational strategy
  - 59% reported actively seeking new information and perspectives
  - 57% actively promoting risk management practices
  - 55% actively considering the future board skills, experience and knowledge needed to adapt to change and meet new challenges
  - A further 41% were already considering their organisations' "social license to operate".

## How could boards achieve the Bill's objectives?

22. Consistent with good policy<sup>15</sup> and legislative design<sup>16</sup> practice, the Select Committee review of the Bill should consider the range of options available to achieve the Bill's objectives. We suggest three options for the Committee's consideration:

### ***Option 1 - Rely on other legislation, guidance and support:***

23. The results of the DSS 2022 were consistent with some of the feedback the IoD received in response to the July 2021 IoD/MinterEllisonRudd Watts' [Stakeholder governance - A call to review directors'](#)

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<sup>14</sup> [Chapter Zero New Zealand](#) – that has a mission to mobilise, connect, educate and equip directors and boards to make climate-smart governance decisions, thereby creating long term value for both shareholders and stakeholders.

<sup>15</sup> See [CO \(20\) 2: Impact Analysis Requirements - June 2020 - Cabinet Office, Department of the Prime Minister and Cabinet \(dpmc.govt.nz\)](#)

<sup>16</sup> See [2. Defining the policy objective and purpose of proposed legislation | The Legislation Design and Advisory Committee \(ldac.org.nz\)](#)

[duties](#) whitepaper<sup>17</sup>. This paper considered what the “director’s best interest” duty meant in the evolving corporate governance landscape in relation to stakeholders. After reviewing New Zealand law and global developments and trends, the paper called for a review of the framework for directors’ duties in the Companies Act.

24. We received a range of views, from those wanting reform, to those seeing no need to change the current law, but for different reasons, similar to the views on the Bill. We concluded that directors needed clarity of what was expected from them, mostly in legislation and other requirements to meet customer and community expectations.<sup>18</sup>
25. We considered that clarity could be provided through additional guidance, training and support materials to directors, about what acting in the best interests of the company means in the modern corporate world. This would include the desirability of taking a long-term view that will keep them focussed on issues outlined in the Bill and other matters relevant to the best interests of a particular company. Further guidance material on areas such as these could be developed by MBIE in conjunction with the IoD and other governance organisations.

### ***Option 2 - Legislate to make directors/boards view of “best interests” more transparent***

26. As the DSS 2022 shows a majority of directors and their boards are already taking a long-term view, we propose an alternate amendment to the legislation, promoting the completion by company boards of an annual “best interests statement” tabled at companies’ Annual General Meetings.
27. This idea is consistent with the recent [IoD submission to the Ministry of Business, Innovation & Employment \(MBIE\)](#) on its discussion document: *The future of business for Aotearoa New Zealand*<sup>19</sup> wherein the IoD outlined a proposal that boards should take a long term view and develop a “best interest statement”.
28. Our submission to MBIE noted that:
  - Organisations should reflect on why they exist and be clear with their shareholders/members and wider stakeholders on what types of value they intend creating.
  - All businesses have a purpose reflected in the “best interests” of an organisation.
  - A “best interest statement” could be developed in consultation with shareholders, investors or members on medium to long-term, high-level outcomes as well as stakeholders.
  - Good governance practice encourages organisations to embrace a medium to long-term view and develop strategy that results in sustainable business delivering value over time<sup>20</sup>.

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<sup>17</sup> [Stakeholder governance - A call to review directors' duties](#) July 2021 IoD

<sup>18</sup> [Stakeholder governance - Next steps](#) 21 Oct 2021

<sup>19</sup> [IoD submission to the Ministry of Business, Innovation & Employment \(MBIE\)](#) 4 July 2022

<sup>20</sup> See The Four Pillars of Best Practice Governance, section 1.3.1 Short-termism vs long-termism, which notes that: “...good corporate governance is critical to...[helping] companies strike the right balance in decisions affecting short, medium and long-term horizons” (New Zealand Institute of Directors, 2021, p. 34)



29. In Australia, a legal opinion obtained from barristers Bret Walker SC and Gerald Ng<sup>21</sup> on the current meaning of the directors' best interests' duty, also confirms that directors should be taking a long term view, and consider non-shareholder interests, such as those of customers. In response, experienced Australian business leader David Gonski has stated the legal opinion confirms corporations have more scope to support community initiatives linked to the company's purpose, ... and that directors need to take a long term view<sup>22</sup>.
30. The Australian Institute of Company Directors (AICD) updated guidance for directors following the legal opinion includes the following:
- “acting in the best interests of the company means directors should focus on sustainable value creation over time, rather than short-term profit maximisation”, and
  - “maintaining and advancing the organisation’s reputation and community standing are key considerations”.
31. If legislative change is seen by the Select Committee as being needed, the IoD seeks amendments to the Bill that promote the completion by company boards of an annual “best interests statement” tabled at companies’ Annual General Meetings. While details could be developed further, we envisage an annually updated statement setting out each board’s agreed position on what “acting in the best interests of the company/organisation” means in terms of medium to long-term, high-level outcomes (greater than 10 years) and setting those out as the purpose or mission of the organisation.
32. The best interest statement could be presented to the Annual General Meeting for shareholders/ members (and broader stakeholders) to consider, and progress or decisions reflecting the statement could be reported on. This approach would aid in providing transparency by making clear the multiple outcomes the organisation is contributing towards as part of its organisational strategy and simply make transparent steps already being taken by directors and their boards.

### ***Option 3 - A more thorough review of the Companies Act (and other governance legislation)***

33. It has been 30 years since the Companies Act became law. The IoD considers that it is timely for a thorough and independent review of the policy underpinnings of the Companies Act as well as other similar governance legislation based on the same policy thinking and frameworks to occur. Such a review could be undertaken in a similar fashion to the 2009 Tax Working Group established by the Government to examine further improvements in the structure, fairness and balance of the tax system<sup>23</sup>. That working group comprised private sector, academic experts, and relevant senior government officials.

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<sup>21</sup> [Walker-Ng-legal opinion-Feb-2022](#)

<sup>22</sup> [Company directors can look beyond shareholder interests, says Gonski](#), Clancy Yeates, Sydney Morning Herald, 4 December 2022

<sup>23</sup> See [Tax Working Group set up \(ird.govt.nz\)](#)



## Recommendation

34. We conclude that there are other options that may better address the Bill's objectives:

- The IoD takes no position on whether the amendments in this Bill should be pursued.
- However, the IoD considers that directors would benefit from more guidance in this area. This could be achieved either via amendments in the Bill, or through a range of other mechanisms.
- If the Select Committee concludes that legislative change is required, the IoD seeks amendments to the Bill that promote the completion by company boards of an annual "best interests statement" tabled at companies' Annual General Meetings.
- The IoD would welcome the establishment of an independent Companies Act Working Group tasked with comprehensively reviewing the policy settings and framework underpinning the Companies Act 1993 and other similar governance legislation.

35. We appreciate the opportunity to make this submission on behalf of our members, and confirm we would like to be heard in person.

Yours sincerely



Guy Beatson  
**General Manager**  
**Governance Leadership Centre**



David Campbell  
**Senior Advisor**  
**Governance Leadership Centre**