Te Kauae Kaimahi

Submission to ECONOMIC DEVELOPMENT, SCIENCE and INNOVATION SELECT COMMITTEE on the:

Companies (Directors Duties) Amendment Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi- 17 January 2023.

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This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 340,000 union members, the CTU is one of the largest democratic organisations in New Zealand.

The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga), the Māori arm of Te Kauae Kaimahi (CTU), which represents approximately 60,000 Māori workers.

Table of Contents

1. Summary of Recommendations

1.1. The CTU supports the Bill.

1.2. However, more needs to be done to ensure that the considerations outlined in the Bill are an integral component of doing business in Aotearoa New Zealand. These considerations are important kaupapa that need to be implemented properly, not paid lip service by businesses. This will require further external regulation of business.

1.3. The nature of work is changing, which means that the way businesses operate are also going to have to change. This Bill helps to ensure that New Zealand heads in the right direction on these counts.

2. Introduction

2.1. The CTU supports the kaupapa behind this Bill.

2.2. Successful businesses depend on their workers and the wider communities in which they are embedded. New Zealand needs to do a better job of ensuring that workers get a fair deal from the value that they provide to businesses. New Zealand also needs to do a better job of ensuring that all New Zealanders have access to decent and fulfilling work. In conjunction with other recent legislative progress in this area, the proposed Bill will help to ensure that New Zealand heads in the right direction on these counts.

2.3. The single-minded profit driven narrative, reinforced in the Act as it currently stands, is unsustainable. It has arguably contributed to worse outcomes for New Zealand workers, and for the country at large. Since the 1980s, the dominant idea has been that the primary responsibility of a firm is to return value to its shareholders – whether this is in the form of a rising stock price, higher profit margins, or larger dividends pay-outs. A leading example of this approach to corporate governance is the New Zealand electricity sector. Over the last decade, the four large generator-retailer electricity firms in New Zealand have paid out close to $9 billion in dividends to their shareholders, while systemically underinvesting in the construction of new generating capacity and renewable sources of electricity.[1] The social outcomes of this strategy are that New Zealand

[1] First Union, NZCTU and 350 Aotearoa, *Generating Scarcity: How the Gentailers Hike Electricity Prices and Halt Decarbonisation* (2022).

households will face higher electricity bills in the future, and the country faces a growing infrastructure deficit.

2.4. Encouragingly, in recent years it has become more widely understood that "shareholder-value maximisation" has driven poorer social and economic outcomes. In this context, leading business organisations have adopted a narrative shift, moving away from the idea that business is only about profits. In 2019, for example, the American Business Roundtable issued a new "Statement on the Purpose of a Corporation", which revised its long-standing emphasis on shareholder-value maximisation. The new statement noted that firms should "focus on creating long-term value, better serving everyone – investors, employees, communities, suppliers, and customers".[2] In the same year, the World Economic Forum launched its 50th-anniversary "Davos Manifesto" on the purpose of a company, promoting the development of "shared value creation" and responsible "corporate global citizenship [...] to improve the state of the world".[3] The incorporation of environment, social, and governance (ESG) criteria into company reporting and investor decision-making has also become more widely promoted in recent years.

2.5. It remains to be seen whether these principles will be put into practice by business leaders or are mere window-dressing. Often, for example, ESG investment criteria are used to "green-wash" investment portfolios – pulling a screen of corporate social responsibility over an otherwise unchanged set of business practices and social outcomes. Nevertheless, the growing recognition that businesses are part of a wider community of stakeholders, to which they have certain responsibilities, is timely and welcome. It is important that this talk gets translated into action.

2.6. This Bill makes further progress on ensuring that "good work" is prioritised in policy in Aotearoa New Zealand. Good work is work that has a positive impact on both the worker and the wider community. This Bill recognises that duties for directors beyond profits are necessary to promote good work.

2.7. The CTU supports each of the new considerations outlined in the Bill.

[2] Business Roundtable, "Business Roundtable redefines the purpose of a corporation to promote 'an economy that serves all Americans'", 19 August 2019.
[3] World Economic Forum, "Davos Manifesto 2020: The universal purpose of a company in the Fourth Industrial Revolution", 2 December 2019.

3. (a) Recognising the principles of the Treaty of Waitangi

3.1. Incorporating te Tiriti principles in the director's duties within this Bill integrates the important kaupapa of meeting the needs of Māori at all levels.

3.2. The change that this Bill seeks to enact can help build stronger partnerships and ensure te ao Māori practices and principles are a foundation of business. Enabling this is crucial to ensuring te Tiriti is ingrained into all areas of our lives.

3.3. This Bill will make progress to enabling different kinds of business leadership, especially those that are more culturally appropriate for, and reflective of, all workers in Aotearoa New Zealand. As the world of work changes, businesses need to be flexible, collaborative, and adaptable for all working New Zealanders. This bill makes a step towards enabling this for Māori workers.

3.4. Recently, progress has been made in embedding te Tiriti in New Zealand's international trade relationships. It is important that this is matched in the considerations of domestic business.

3.5. Finally, engaging Tiriti principles in business will be crucial in manging just transition processes necessitated by climate change, and helping promote sustainable and safe jobs in the future.

4. (b) Reducing adverse environmental impacts

4.1. Decades of narrow-minded business practices has pushed the planet closer towards the destructive climate change. For too long many businesses have been hard-wired to achieve profit at the expense of the environment. We need to ensure that businesses develop internal capacity to respond to climate-related issues, alongside proper external regulation.

4.2. This Bill will help encourage businesses to invest time, commitment, and resources into productively engaging in practices that minimise their impact on climate change and enables them to effectively engage in just transition processes. "Just transition" refers to policies and processes that protects and supports the interests of working people in response to structural economic transitions, such as the transition to a low carbon future.

4.3. This Bill alone will not be enough to regulate the impacts that businesses have on the environment. More will need to be done to improve business practices – for example, to minimise carbon emissions, stop polluting waterways, and improve animal welfare. It is, however, a small step in the right direction.

5. (c) Upholding high standards of ethical behaviour

5.1. We strongly support the notion that company directors should take into account, and we would add, aim to promote, high standards of ethical behaviour when determining the best interests of a company.

5.2. This principle should apply across a company's corporate, social, and environmental responsibilities. That is, a high standard of ethical behaviour should be upheld regarding the governance of a company, the employment terms and conditions it provides, and the impact the company may have on both the social and physical environment in which they are embedded and depend upon.

5.3. We note that although principles such as these are valuable to promote in legislation, they are not a substitute for robust regulatory mechanisms that ensure ethical conduct. Principles such as those proposed here are a step in the right direction, but cannot be expected in and of themselves to produce better social outcomes.

6. (d) Following fair and equitable employment practices

6.1. An important principle underpinning employment law is that employers must act towards their workers in a 'fair and reasonable' manner[4]. This directive supports and aligns with this well-established principle. [5]

6.2. The need to ensure "equitable employment practices" is an important aspect of this direction. Equitable employment practices represent the reciprocal duty that a socially responsible corporation should have towards their employees and the communities out of which they derive their sources of labour.

6.3. For the duration of their employment relationship, workers are expected to abide by a "duty of fidelity" towards their employers[6]. This duty requires workers to

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[4] Employment Relations Act 2000, s 103A(2) provides the statutory 'test of justification' for determining whether an employer's actions caused unjustifiable action or unjustifiable dismissal:

*"The test is whether the employer's actions, and how the employer acted, were what a **fair and reasonable employer** could have done in all the circumstances at the time the dismissal or action occurred."*

[5] The statutory test is informed by a robust body of case law, with origins predating the current test in the Employment Relations Act (see *W&H Newspapers Ltd v Oram* (2001) 6 NZELC 96,197 ; [2000] 2 ERNZ 448; [2001] 3 NZRL 29 (CA)).

[6] In common law, any employment agreement or "contract for service" is held (for the duration of its existence) to contain an implied term that the employee "...will serve his employer with good faith and fidelity. " (*Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243).

express a degree of loyalty and commitment to their employers, which includes protecting and prioritising the interests of their employers.

6.4. Fidelity owed by workers to employers is a serious and expansive duty and encompasses duties both in and out of worktime. The existence of the duty highlights the “relational” nature of the employment “relationship”.

6.5. However, in the context of the employment relationship, there is no clearly defined reciprocal duty to the worker’s duty of fidelity.

6.6. The direction to act consistently with “equitable employment practices” is a reasonable and rational counterbalance to the worker’s duty of fidelity. Employers benefit tremendously from relationships with their workers in terms of profit, loyalty, and stability. Where employees are required to prioritise the wealth and reputation of corporate employers, corporations should also prioritise the wellbeing, stability, and quality of life of their workers and their communities.

7. (e) Recognising the interests of the wider community

7.1. Given the wealth, power, and influence of corporations, the relationship between companies and the communities they are embedded in must be given special consideration.

7.2. These communities provide corporations not only with markets, but with vital labour. Through their workforce, companies become connected to families and social structures. Companies become dependent on societies to provide healthy, intelligent, and talented workers – as evidenced by the fact that the number one problem highlighted by business owners in recent surveys is finding skilled labour.[7] In turn, working communities become dependent on companies for security and income.

7.3. Corporate social responsibility ought to contain principles that acknowledge this reciprocal relationship. Namely, corporations should act consistently with an understanding that they owe duties based in principles of equity to the communities from which they derive so much. This includes recognising the diverse interests of the wider communities in which firms are embedded and rely upon and working to ensure that they do not undermine or harm those interests.

[7] ANZ New Zealand Business Outlook, 20 December 2022.