

ESG Directors Duties Bill fails to get Select Committee endorsement

June 2023

A bill which would have expressly allowed company directors to consider environmental, social and governance (ESG) factors has failed to receive select committee endorsement following strong opposition during the select committee process.

BACKGROUND

The Companies (Directors Duties) Amendment Bill (**Bill**) was introduced into Parliament late last year by Labour MP Duncan Webb. The Bill sought to amend the director duties in the Companies Act 1993 to make it clear that directors could take into account “recognised” ESG factors when determining the best interests of the company - rather than just focusing on profits. The factors included:

- recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)
- reducing adverse environmental impacts
- upholding high standards of ethical behaviour
- following fair and equitable employment practices
- recognising the interests of the wider community.

WHAT WERE THE ISSUES WITH THE BILL?

The Bill faced mixed submissions during the select committee process, including opposition from organisations such as the New Zealand Law Society. Submissions included that:

- the issue the Bill was seeking to resolve was unclear
- directors can already take ESG factors into account under company law
- there are a range of potential unintended consequences, including opening directors up to litigation from interest groups seeking to use the law to advance their interests
- non-legislative means could be used to fulfil the Bill's objectives, such as guidance or training for directors
- the change should be considered as part of a wider – and overdue - review of director duties.

THE SELECT COMMITTEE DECISION

The Committee was unable to agree on the issue the Bill was trying to resolve – and the National Party Committee members were concerned the Bill was “virtue signalling”. Ultimately the Committee was unable to decide if the Bill should pass and left it to Parliament to decide.

The Committee agreed that the Bill could have unintended consequences and that if the Bill were to proceed, the wording ought to be amended. As a compromise, the Committee recommended that the wording of the Bill be replaced with:

“To avoid doubt, in considering the best interests of a company or a holding company for the purposes of this section, a director may consider matters other than the maximisation of profit.”

After long, and somewhat heated debate between MPs, the Bill passed its second reading on 7 June 2023 – but with changes to follow.

While Jackson Russell is fully supportive of ESG principles being embraced by company directors, the amended Bill seems to achieve little and involve a number of the same risks that applied to the original Bill. The law in its current form does not preclude a director from taking into account ESG factors such as those listed in the Bill, and we believe the better approach would have been not to proceed with the Bill.

We will monitor the progress of the Bill and update you on any future developments.

FURTHER INFORMATION

For further information or to discuss how any changes may affect you as a director, please get in touch with one of the lawyers listed below or your usual Jackson Russell advisor.

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