Environmental Law Initiative
Submission:

# Companies (Directors Duties) Amendment Bill

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*Tiakina te mauri o te taiao*

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## ABOUT US

The Environmental Law Initiative (ELI) thanks Economic Development, Science and Innovation Committee for the opportunity to submit on the ***Companies (Directors Duties) Amendment Bill.***

ELI is a registered charitable trust, whose objective is to support the effective protection of Aotearoa's natural resources and environment. We are advised by a small team of experts in environmental law, policy, science, ecology and management.

Though operating independently, we partner with a range of other groups and individuals —including iwi, hapū, governmental agencies, charities, and organisations— to achieve positive outcomes for the environment.

In ELI's view, the law is our best tool for effectively protecting the environment. Our research and advocacy is centred around improving legislation and policy to better protect and restore Aotearoa's marine, freshwater, and terrestrial environments and biodiversity.

As a non-profit, our ultimate objective is to bring sound environmental research to decision-making in matters of the environment and move towards a sustainable, healthy Aotearoa for all.

For more information, see www.eli.org.nz

If you have any questions about our submission, we would welcome the opportunity to discuss any issues.

**To: The Economic Development, Science and Innovation Committee**

1. Overall, ELI supports the Companies (Directors Duties) Amendment Bill (the Bill). In this submission, we raise several technical points, and make one broader suggestion. Our submission is primarily focussed on clause 4, inserting 5(b). We are not in a position to comment on the other proposed sub clauses, though we are generally supportive.

2. In summary, our view is that, under the current law, directors can already consider all relevant matters, which may include those listed in clause 4, when determining the best interests of a company. However, we accept that there may be doubt among some directors and also, among shareholders, on the ability to do so. We support this Bill as a means of addressing this.

3. We consider that legislative change is an appropriate method for removing this doubt. However, the amendment will only be effective in changing behaviour if it is well understood. We encourage officials to prepare complementary guidance for directors around their ability (or duty) to consider relevant ESG factors.

4. We ask the Committee to consider the following amendments:

### *Reducing adverse environmental impacts*

5. Clause 4 of the Bill refers to 'reducing adverse environmental impacts.' This should be broader, in order to include avoiding, remedying and mitigating adverse effects. In addition, an action which promoted positive environmental impacts could also potentially be relevant to the best interests of the company. We are concerned that the current wording would raise the question of whether the ability to consider these matters had been deliberately left out. The logical approach is to include them as they are all closely related. For example, consideration of ways to 'reduce' environmental impacts will likely also include consideration of measures to 'avoid' those impacts.

### *Taking into account recognised factors*

6. The current drafting provides that directors can take into account 'recognised environmental … factors' such as 'reducing adverse environmental impacts.' The meaning of 'recognised' factors is not clear. The drafting should allow directors to take into account environmental issues which are recognised in the scientific community, even if not yet widely known or understood by the public.

### *Consequences of decisions in the long term*

7. Clause 4 of the Bill lists five factors which directors may take into account in determining the best interests of the company. We request the addition of a sixth, namely the consequences of decisions in the long term. This would reflect that a company is an enduring entity whose interests are not necessarily the same as those of a group of current shareholders.

8. This addition would align with the purpose and scope of the Bill. The Bill seeks to clarify that a director can take into account wider matters than the financial bottom line. However, useful consideration of the matters listed in clause 4 will often require long term assessments. The Companies Act 2004 already allows for this but, in line with the justification for the current content of the Bill, it would be useful to include this in order to remove doubt.

### *Assessing the interests of holding companies and shareholders*

9. We request that the Committee consider whether clause 4 should be reworded to allow directors to take the listed matters into account when assessing the best interests of holding companies and shareholders in the situations allowed by section 131(2) to (4) of the Act. Although a director may, in practice, be likely to take advice from a representative of the holding company or joint venture shareholders, section 131 does envisage them making their own assessment. Although arguably less likely in the case of shareholders, the factors listed in clause 4 of the Bill do have potential to be relevant to this assessment. Considering them should not detract from the end goal of identifying the best interest of shareholders or holding companies. If the Bill does not provide for this, it could be inferred that it had been deliberately excluded and the factors should not be considered, potentially even in situations where they are relevant.

### *Ensuring the list of factors is an open list*

10. The list of factors appears to be an open list. To ensure it is clear to directors that they may still consider all relevant factors, we request the Committee check with the Parliamentary Counsel Office as to whether the first sentence should end with ‘such as’ or ‘including, without limitation.’

### *Requiring factors to be taken into account*

11. We request that this Bill go further, and *require* directors to take specific environmental, social and governance matters into account. We refer the Committee to the approach taken in the United Kingdom via section 172 of the Companies Act 2006. A requirement would need to be drafted in a way which did not limit the general ability of directors to consider any relevant matters. We acknowledge that drafting this in a clear and effective way would be a big job, but

we trust that the Committee, officials and the Parliamentary Council Office could achieve it. Our reasons for preferring this approach are:

a. Environmental issues now pose material risks for many companies and it is in the interests of shareholders and others that these are considered.
b. It is becoming more widely accepted that directors can, and should, consider a range of environmental, social and governance matters, provided that they do not pursue those interests without any regard to the company's interests.
c. Requiring consideration of relevant matters should result in better decision making. The end goal would still be for the director to determine the best interests of the company.

12. Overall, we see this Bill as a step in the right direction. The Committee will already be aware of the Institute of Directors' white paper[1] calling for a review of the corporate governance landscape in Aotearoa. We request that Committee members consider this report as well as the Sustainable Finance Forum Roadmap for Action[2] and, as a next step following the passage of this Bill, support the establishment of a working group to carry out a broad review of our corporate governance legislation. This review could examine further opportunities for improvement in the way that corporate governance and financial system actors consider, manage and account for environmental and other risks, opportunities and impacts.

[1] https://www.iod.org.nz/resources-and-insights/research-and-analysis/stakeholder-governance/#

[2] https://static1.squarespace.com/static/637d83c964e50e3125f983aa/t/637d88f7bb81cc1f51a2dc32/1670385195639/Sustainable%2BFinance%2BForum%2BRoadmap%2Bfor%2BAction