

UNDERSTANDING CORPORATE PURPOSE: LESSONS FROM AOTEAROA NEW ZEALAND'S REFORM DEBATE ON DIRECTORS' DUTIES

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What a difference a single year can make. Just over 18 months ago, Aotearoa New Zealand's Parliament, for the first time since the enactment of the Companies Act in 1993, attempted a reorientation of corporate directors' duties away from the theory of 'shareholder primacy'. In doing so, it challenged the traditional view of corporate purpose – that businesses should be managed solely to maximise shareholder wealth – and raised timely questions about the extent to which directors may prioritise other interests and constituencies when exercising corporate powers.

The Companies (Directors' Duties) Amendment Act 2023 received Royal assent on 3 August 2023 and reformed s 131 of the Companies Act, which places a duty on corporate directors to act in good faith and in the best interests of their companies. Specifically, the Act added a new s 131(5) to explicitly clarify that, in determining the best interests of a company, a director "may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters)". This reform was controversial from the outset. While its opponents argued that the addition was unnecessary, as corporate directors already have discretion to consider the factors enumerated in the new subsection, its supporters contended that the clarification was needed to dispel uncertainty surrounding directors' duties when profit maximisation and broader societal interests are perceived to be in conflict.

Unsurprisingly, given its contentious origin, it is now clear that the new s 131(5) will not survive for very long. Merely 11 months after its commencement, the newly elected Government announced a plan to, among other reforms, repeal it. This is now expected to be introduced as part of a Corporate Governance Amendment Bill.

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That s 131(5) will be short-lived should not obscure the important questions that it has raised. How we envision corporate directors' duties affects – and reflects – whom we think businesses should serve and the societal role we think businesses should play. Directors' duties matter because corporations matter. Businesses employ, house, feed and connect us; their presence is manifest in our daily lives. Should the law reflect Milton Friedman's famous proclamation that "there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game"?¹ Or, considering the tremendous power and influence over all aspects of our lives, should businesses and their directors be held legally accountable to a broader constituency than solely wealth-maximising shareholders? Do prevailing conceptions of corporate directors' duties incentivise businesses to, as Professor Colin Mayer puts it in his keynote address and contribution to this special issue, "profi[t] from producing problems" instead of solving problems for others? And if so, could legal reform produce an effective solution: one that commits businesses and their directors toward pursuing purposes that are meaningful, manageable and measurable? In short, should corporate purpose be regulated?

These were the issues that were subjected to spirited scrutiny at the Symposium on Corporate Purpose, which took place in Wellington in July 2024 and was jointly organised by Te Herenga Waka | Victoria University of Wellington and the University of Richmond School of Law. The discussions from the Symposium are captured within the various pieces within this special issue.

When the Symposium occurred, we suspected that s 131(5) marked only the beginning of a debate over the proper scope of directors' duties in Aotearoa New Zealand, and we cherished the hope that the conversation could be enriched by the experiences of other jurisdictions and the insights they have generated. We wondered as well if the unique features of s 131(5) could, in turn, advance the global corporate purpose debate. One such feature arises from an early version of s 131(5); the original private member's bill that was introduced in Parliament expressly enumerated five non-exhaustive factors that directors could consider, including "recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)". As Mihiarangi Piripi and Briar Peat explain in their contribution to this special issue, although the inclusion of this particular Treaty principle clause in the private company context raises thorny doctrinal concerns, much could be gained from applying a tikanga-based lens to corporate purpose and studying Māori organisations for whom profit maximisation must be authentically balanced against tikanga, the system of values, principles and practices by which "correctness, rightness or justice is maintained" in te ao Māori.

As the Symposium proceeded, we discovered to our delight that s 131(5) anchored rich conversations on a diversity of topics beyond directors' duties and the shareholder-versus-stakeholder debate. One particular focus was statutory design. Existing practices can be altered by legislative reform or by judicial interpretation. In the case of s 131(5), the judicial train was arguably already

1 Milton Friedman "A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits" *The New York Times* (New York City, 13 September 1970).

underway when it was enacted. The New Zealand Supreme Court | Te Kōti Mana Nui in 2020 interpreted a director's s 131 duty to be subjective, requiring the director to act in what she believes to be in the best interests of the company.² Most practitioners and scholars agree that what a director believes to be in the company's best interests may include broader considerations than solely maximising shareholders' profit. Against this backdrop, was the addition of s 131(5) superfluous? Perhaps, but perhaps not. Symposium participants wrestled with this question from a wide range of perspectives and approaches, as reflected in many of the articles that follow in this issue. As calls for reform of the Companies Act grow and debates ensue in the wake of Te Aka Matua o te Ture | Law Commission's review of directors' duties and liabilities to begin in the first half of 2025,³ we hope these insights will prove valuable.

A few expressions of thanks to conclude. We are immensely grateful for funding from the late Judge Ian Borrin and the Victoria University of Wellington Law Review, as well as organisational support from the New Zealand Centre of International Economic Law and the New Zealand Association of Comparative Law. Behind the scenes, Denise Blackett, Jess Gray, Carol Sorenson and numerous other university staff members worked tirelessly to ensure the success of the Symposium and this special issue. Finally, this special issue would not have been possible without the extraordinary dedication and efforts of Blair Mumm, the Student Editor-in-Chief of the Victoria University of Wellington Law Review, and his team of volunteer student editors.

2 *Madsen-Ries (as liquidators of Debut Homes Ltd (in liq)) v Cooper* [2020] NZSC 100, [2021] 1 NZLR 43 at [112] and [177].

3 Te Aka Matua o te Ture | Law Commission "Law Commission to undertake project on directors' duties" (press release, 4 June 2024).

