Directors' and Officers' Duties
Evaluation of the 'best interests' duty

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Contents

1 Executive summary

1.1 Background and scope of this paper

The Australian Institute of Company Directors (***AICD***) is interested in assisting members to understand the 'best interests' duty of directors and officers outlined in section 181 of the *Corporations Act 2001* (Cth) (***Corporations Act***) and the scope of that duty to permit the consideration of various stakeholder interests in decision-making.

In this context, the AICD has asked Allens to review the formulation and operation of the best interests duty in Australia, and to compare that duty with the equivalent duty in key comparator jurisdictions of Canada, Delaware, New Zealand and the United Kingdom (the ***Comparator Jurisdictions***).

Further, the AICD has requested Allens consider any international legal developments in the Comparator Jurisdictions that may contribute to a more explicit need for consideration of stakeholders other than shareholders in directorial decision-making (such as customers, suppliers and employees). We will refer to such non-shareholder stakeholders as 'stakeholders' in this paper.

Allens has conducted its review by:

- identifying the 'best interests' duty in Australia and the equivalent duty in the Comparator Jurisdictions;
- assessing the extent to which other stakeholder interests can (or must) be considered in a director's decision-making process; and
- reviewing emerging international legal developments in the Comparator Jurisdictions that seek to reform the existing best interests duty.

1.2 Summary of findings – shareholder interests are key

Best Interests Duty – Section 181(1) of the Corporations Act 2001 (Cth)

A director or other officer of a corporation must exercise their powers and discharge their duties:

(a) in good faith in the best interests of the corporation; and

(b) for a proper purpose.

In summary, the best interests duty in Australia and the Comparator Jurisdictions are founded on the centrality of shareholder interests.

While this is the case, in each jurisdiction the duty permits (or, in the case of the United Kingdom, requires) the consideration of other stakeholder interests. The distinction between each jurisdiction is the extent to which these interests can influence directorial decision-making when complying with the best interests duty. The key differences are summarised as follows:

- Australia, New Zealand and Canada adopt a permissive approach, allowing, but not requiring, consideration of stakeholder interests;
- the United Kingdom takes a mandatory approach, requiring certain non-exhaustive stakeholder interests be considered; and
- Delaware is restrictive, only allowing consideration of stakeholder interests where it otherwise benefits shareholders.

While each jurisdiction allows consideration of stakeholder interests, Australia's best interests duty is the least prescriptive. This is likely because:

- unlike the United Kingdom and Canada and soon to be New Zealand, Australia has not codified specific stakeholder interests which may or must be considered in decision-making;
- unlike Delaware, which makes shareholder wealth the clear best interest of a company, in Australia the best interests of a company is determined by a range of competing, non-codified interests; and
- unlike the United Kingdom and Delaware, in Australia there is no fixed point in time when creditors' interests become paramount, instead they are described as becoming 'increasingly important' as insolvency approaches.

Ultimately we found that despite a number of differences, the substance of Australia's best interest duty largely aligns with that of the Comparator Jurisdictions with each jurisdiction permitting consideration of stakeholder interests, whether this is justified by value maximisation, or by prescription under statute. For ease of reference and comparison, we have prepared a summary of the differences between jurisdictions in Table 1 on page 3.

In relation to potential reform to the existing best interests duty, we identified the following key emerging legal developments in the Comparator Jurisdictions:

- the New Zealand parliament is currently discussing, and Canada has recently passed, legislative amendments to non-exhaustively list stakeholder interests that may be considered when exercising the best interests duty;
- despite having an explicit requirement to consider other stakeholder interests when exercising the best interests duty, there is significant pressure in the United Kingdom to expand the significance of other stakeholders' interests via legislative amendment; and
- to varying extents, all of the Comparator Jurisdictions have implemented reporting obligations that require companies to consider the interests of other stakeholders and report on prescribed risks to the business and how they intend to mitigate them.

Unlike in the Comparator Jurisdictions, there is currently no emerging trend pushing for legislative amendment to the best interests duty in Australia. For example, the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019) did not recommend amending the best interests duty in Australia. This is despite there being no express obligation to consider the interests of other stakeholders or act in the best interests of such stakeholders in Australia. The Commissioner did, however, provide a reminder that the considerations of directors need to extend beyond 'short-termism', to also focus on the long term interests of the company. As noted by the Commissioner, 'the longer the period of reference, the more likely it is that the interests of shareholders, customers, employees and all associated with any corporation will be seen as converging on the corporation's continued long term financial advantage.'[1] Our view aligns with that expressed by the Commissioner.

[1] Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (***Final Report***) at 403.

Table 1: Comparison of scope and operation of 'best interests' duties

	Australia	Canada	Delaware	New Zealand	United Kingdom
What are the legal requirements?	**Duty to act in good faith and in the best interests of the corporation** Set out in legislation and operates in parallel with the general law duty (noting some minor discrepancies in the application of the test).[2]	**Duty to act honestly and in good faith with a view to the best interests of the corporation** Set out in legislation.[3]	**Duty to act in good faith in the best interests of the company** Not codified duty under the Delaware General Corporation Law (Chapter 1 of the Delaware Code), the obligation is purely fiduciary.[4]	**Duty to act in good faith and in the best interests of the company** Set out in legislation.[5]	**Duty to act in good faith to promote the success of the company** Set out in legislation.[6]
Who owes the duty?	**Directors and officers (including de facto directors, shadow directors, company secretaries, shadow officers)**	**Directors and officers**	**Directors, officers and controlling shareholders**	**Directors, including de facto directors**	**Directors, including de-facto directors**
To whom is the duty owed?	**The company** Owed solely to the company.	**The company** Owed solely to the company.	**The company** Owed solely to the company (unless insolvent, in which case it is owed to residual claimants (creditors and shareholders)).	**The company** Owed solely to the company.	**The company** Owed solely to the company unless obliged by other enactment or rule of law to have regard to the interests of creditors as the company nears insolvency.

Which additional stakeholders/factors can directors consider in decision-making (if any)?	Directors may consider the interests of:
	• the **shareholders as a whole**; and
	• **creditors.**
	It is suggested that these categories are sufficiently broad to permit a director to consider the company's:
	• **reputation;**
	• **legal obligations;**
	• **customers;**
	• **employees;**
	• **suppliers;** and
	• **local community.**
		Directors and officers may consider:
		• the interests of:
		  • **employees;**
		  • **retirees and pensioners;**
		  • **creditors;**
		  • **consumers;** and
		  • **governments;**
		• the **environment**; and
		• the **long term interests of the corporation**.
			Directors may only consider additional stakeholders and interests to the extent they contribute to promoting stockholder welfare.	Directors:
				• must consider **creditors** (where the company is insolvent or nearly insolvent); and
				• may consider **employees** (where the company is ceasing to carry on the whole or part of the business).
					Directors must have regard to (amongst other matters):
					• the **likely consequences of any decision in the long term**;
					• the interests of the company's **employees**;
					• the need to foster business relationships with **suppliers and customers**;
					• impact of company operations on the **community and environment**;
					• the desirability of maintaining a **reputation** for high standards of business conduct;
					• the need to **act fairly between members**.

[2] *Corporations Act 2001* (Cth), section 181(1)(a).
[3] *Canada Business Corporations Act*, RSC 1985, section 122(1)(a).
[4] 'General Corporation Law' *Delaware Code*, Title 8, Chapter 1.
[5] *Companies Act 1993* (NZ), section 131.
[6] *Companies Act 2006* (UK), section 172.

2 Scope of review

The AICD is interested in assisting members to understand the 'best interests' duty outlined in section 181 of the Corporations Act and the scope of that duty to permit the consideration of stakeholder interests in decision-making. The role of the best interests duty is broadly to guide the decision-making process of directors, encouraging long-term and strategic planning to achieve an alignment between company interests and shareholder benefit.

While the Australian best interests duty does not explicitly provide for other stakeholder interests to be considered in directors' decision-making processes, our research confirmed the broadly accepted understanding that the Australian best interests duty permits the consideration of such interests where appropriate in the circumstances. However, in light of recent amendments to the laws of Comparator Jurisdictions and increasing focus on environmental, social and governance (***ESG***) considerations and stakeholder interests in corporate Australia, the AICD is interested to provide its members with guidance on the formulation and operation of the Australian best interests duty.

In this context, the AICD has asked Allens to review the formulation and operation of Australia's best interests duty against Comparator Jurisdictions' best interests duties.

To inform its position, the AICD has asked Allens to review:

(a) the formulation and operation of the Australian best interests duty as compared to Comparator Jurisdictions' best interests duties, including a consideration of legal and regulatory requirements, as well as the impact of any potential guiding principles or other 'soft law' requirements; and

(b) key international legal developments in the Comparator Jurisdictions that seek to reform the existing best interests duty, particularly those focussed on increasing the need for further consideration of stakeholder interests in directorial decision-making.

Allens has conducted its review by surveying the formulation and operation of Australia's best interests duty and the Comparator Jurisdictions' best interests duties, with reference to key academic, judicial, legislative and policy sources – a necessarily qualitative exercise. Our analysis of Comparator Jurisdiction laws is based on desktop research by Australian lawyers.

This paper summaries our key findings.

(a) Part 3 describes the formulation and operation of the Australian best interests duties as compared to the Comparator Jurisdictions' best interests duties;

(b) Part 4 sets out certain emerging international legal developments of the Comparator Jurisdictions;

(c) Part 5 provides our overall observations following the comparative analysis between the best interests duties and reflects on the likelihood of further reform to the Australian best interests duty, in light of international legal developments in Comparator Jurisdictions.

3 A comparative analysis of 'best interests' duties

3.1 Background

This section describes the formulation and operation of the Australian best interests duty, along with those of the Comparator Jurisdictions. This section details the requirements of the best interests duty in each Comparator Jurisdiction, and reviews their sources of law (both legal and regulatory requirements and also the impact of any potential guiding principles or 'soft law' requirements) and the ability to consider various stakeholders outside of the company's shareholders.

As a matter of context and influence, the best interests duties of Australia and the Comparator Jurisdictions appear significantly shaped by 'shareholder primacy theory'. This theory entrenches shareholders at the heart of corporate decision-making.[7] While consideration of stakeholder interests is permitted (and in the case of the United Kingdom, required) and in some Comparator Jurisdictions, encouraged, stakeholder interests are generally considered only to the extent they further the financial interests of shareholders.

Rising interest in 'stakeholder primacy theory' has seen the scope of best interests duties expand the extent to which other stakeholder interests can be considered in decision-making. This theory heightens the significance of additional stakeholder interests and requires decision-makers to take a holistic approach, broadening a company's purpose beyond solely profit-generation.[8]

Based on our comparison of the best interests duty in Australia and the Comparator Jurisdictions, we consider that Australia's duty, while not as explicitly formulated, is largely aligned in operation with the Comparator Jurisdictions.

3.2 Australia

(a) Legal and regulatory requirements

At general law, directors and officers are required to act in good faith and exercise their powers bona fide in the interests of the company as a whole and act honestly in what they consider – not what a court may consider – to be the interests of the company.[9] The directors are vested with the right and duty of deciding where the company's interests lie and how they are to be served. A court will only discount the assertions of the director where the decision is such that no reasonable board of directors could think the decision to be in the interests of the company. It should be noted that a director's ignorance of the facts (as opposed to the law) will not ordinarily result in a breach of the general law duty, but directors must exercise independent judgment in order to fulfil the duty of good faith.[10]

Section 181(1)(a) of the Corporations Act requires that a director or other officer of a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation. When interpreting the duty, the courts apply an objective test, based on what a comparable person, having the same knowledge and skills as the director or officer, would reasonably have done in the circumstances. It has been reasoned that 'the standard of behaviour required by section 181 is not complied with by subjective good faith or by a mere subjective belief by a director that his purpose was proper'.[11]

The best interests duty operates in addition to, and not in derogation of, any general law duties that a director or officer might have to a company. While the general law duty and the statutory duty may slightly differ in the standard that they apply – Bret Walker SC and Gerald Ng highlight that in a practical sense the best interests duty would prevail as the directors would have to regulate their conduct by reference to the statutory standard.[12] While the general law duty and the statutory duty may not be perfectly aligned in the standard that they apply, both have afforded

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[7] Adolf A,Berle Jr, 'Corporate Powers as Powers in Trust' (1931) 44(7) *Harvard Law Review* 1049.
[8] Merrick Dodd Jr, 'For Whom are Corporate Managers Trustees?' (1932) 45(7) *Harvard Law Review* 1145 at 1148.
[9] *Re Smith & Fawcett* [1942] 1 Ch 304 at 306.
[10] *Blackwell v Moray* (1991) 5 ACSR 255.
[11] *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at 738.
[12] Opinion of Bret Walker SC and Gerald Ng 'The Content of Directors' "Best Interest" Duty' dated 24 February 2022 (the ***Walker Opinion***) at [18].

directors considerable latitude in identifying the best interests of a company, provided that their decision-making is rational.

It has long been accepted that a company is a separate legal entity and the best interests duty is owed by the director and officer to the *company* and not to the *shareholders*.[13] The interests of the company must take priority, unless it is required in the best interests of the company as a separate legal entity to prioritise particular interests. From this starting point it is unsurprising that courts have found that it would be incorrect to suggest that 'acting in the best interests of the company' and 'acting in the best interests of the shareholders' mean exactly the same thing.[14] It is self-evident that the content of the duty may (and usually will) take into account consideration of the shareholders as a whole. This is largely because the interests of shareholders and the company usually intersect. However, even where this is not the case, section 232 (Grounds for Court order) and section 233 (Orders the Court can make) of the Corporations Act allow the Court to step in where the affairs of the company are being conducted in a manner that is contrary to the interests of the members as a whole. Bret Walker SC and Gerald Ng identify that 'the combination of sections 181 and 232 of the Corporations Act leaves little scope for directors to contend that they are acting in good faith in the best interests of a corporation when, at the same time, they are acting contrary to the interests of its members as a whole.'[15] As such, directors and officers of a company will usually be required to have close regard to how their actions will affect shareholders but these interests are not necessarily insurmountable.

The most pertinent example of shareholders' interests not being insurmountable relates to the consideration of the interests of creditors as the company approaches insolvency. As a company approaches insolvency it becomes more important to ensure that the company does not prejudice the interests of creditors as this could threaten the company surviving as a solvent commercial entity. It has been recognised that it is critical that there is a shift away from shareholders' interest when characterising the best interests duty in an insolvency context as this ensures that shareholders have neither the power nor the authority to ratify any breach of the duty.[16] While the director is required to consider the interests of creditors, the duty cannot be enforced by them nor will the interests of the creditor be the sole consideration of the directors.[17] Instead it should be conceptualised as a spectrum, the closer that a company is to insolvency, the greater the weight that must be accorded to the interests of creditors in order to discharge the best interests duty. This illustrates the fact that the interests of shareholders are not determinative when a director or officer is considering their obligations under the duty.

Even when a director or officer does turn their mind to the interests of shareholders there is complexity as the shareholders of a company are rarely a homogenous group. Some shareholders may have interests that are opposed to the interests of other shareholders and this might impact if they have a long term or short term interest in the company. The Honourable Kenneth Hayne AC QC detailed in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019) that 'the best interests of the corporation cannot be determined by reference only to the current or most recent accounting period.'[18] This is why it could be justifiable in the circumstances, when taking into account all shareholders, for a company to potentially forego immediate profit in the pursuit of future gains in the interests of the company and its shareholders as a whole. The best interests duty requires

[13] *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1 at [4389].
[14] *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1 at [4395].
[15] Walker Opinion at [19].
[16] *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 at 732.
[17] *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* (2008) 37 WAR 1 at [4418].
[18] Final Report at 402 – 403.

directors and officers of a company to consider short term and long term interests of the company before exercising their powers.

Much of the focus around directors and officers considering the interests of other stakeholders is centred around the long term interests of the company. The longer the period of reference for the company the more likely that its interests will converge with those of its stakeholders, such as customers, employees and associates of the company, as they look to maintain the company's long term financial advantage.[19] For example, maintaining positive relationships with other stakeholders will generally assist in generating and maximising financial returns for the company in the long term. While this might suggest that directors must consider a broad spectrum of interests, it is important to remember that each factor must be logically tied to some commercial advantage for the company and not be a pure act of generosity.

The best interests of a company cannot be reduced to a binary choice between the interests of shareholders and the interests of other stakeholders in the business. Instead directors and officers must consider the short and long term interests of the company and how the interests of other stakeholders might impact these interests.

(b) Other relevant requirements

In addition to the legal and regulatory requirements discussed above, guiding principles or other 'soft law' requirements may also be considered by a director or officer when exercising their duty to act in the best interests of the company. When we refer to 'soft law' we are referring to policy, guidance, principles, recommendations and other such matters that are not legally binding.

One example of guiding principles that may impact the best interests duty in Australia are the ASX Corporate Governance Recommendations and Principles (***ASX Recommendations***).[20] ASX listed companies are required to disclose in their annual reports the extent to which they have followed the ASX Recommendations and, if the ASX Recommendations are not complied with, to give reasons for not doing so (ie, an 'if not, why not' approach).[21] While this may ensure directors turn their mind to certain issues, there is no mandatory requirement to act on them in the context of the best interests duty.

In March 2022, the International Sustainability Standards Board (***ISSB***) released two exposure draft standards for public consultation, with one setting out general sustainability-related disclosure requirements and the other specifying climate-related disclosure requirements. In April, the Australian Accounting Standards Board (***AASB***) released a 'request for comment' on both drafts, to assist with the AASB's work in developing its own set of sustainability-related disclosure standards. The AASB has indicated that it intends to use the ISSB's standards (if implemented) as a foundation for its reporting standards. If these standards are adopted by the AASB, directors would need to further consider the company's climate and sustainability related risks, and may need to prepare their financial reports and climate and sustainability related disclosures, in compliance with these new standards.[22]

3.3 Canada

(a) Legal and regulatory requirements

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[19] Final Report at 403.
[20] ASX Corporate Governance Council, Corporate Governance Principles and Recommendations 4th Edition (February 2019).
[21] ASX Listing Rule 4.10.3.
[22] *Corporations Act 2001* (Cth), section 296 requires financial reports for a financial year to comply with the 'accounting standards'.

The current position in Canada for directors to act in the best interests of a company is set out in the *Canada Business Corporations Act* (RSC 1985) (***CBCA***).

Under section 122(1)(a) of the CBCA 'every director and officer of a corporation, in exercising their powers and discharging their duties shall act honestly and in good faith with a view to the best interests of the corporation'. Under section 122(1.1), when acting with a view to the best interests of the corporation under section 122(1)(a), the directors and officers of the corporation may consider, but are not limited to, the following factors:

- the interests of
    - shareholders;
    - employees;
    - retirees and pensioners;
    - creditors;
    - consumers; and
    - governments;
- the environment; and
- the long-term interests of the corporation.

The above factors were only expressly included in the CBCA in 2019, with case decisions having previously been the only source of law for the interpretation of the meaning of acting 'with a view to the best interests of the corporation'.

3.4 Delaware

(a) Legal and regulatory requirements

The Delaware General Corporate Law does not codify director duties, including a duty of best interests. Instead, the duty of loyalty, one of two primary fiduciary duties, requires directors to make business decisions in the best interests of the corporation and its shareholders.[23]

This has been interpreted as allowing directors to 'pursue the best interests of stockholders as they perceive them', allowing consideration of other stakeholder interests as a means of increasing shareholder welfare.[24] This shareholder welfare must, however, be the sole end of director decision-making. For example, when the directors of 'Craigslist' decided not to monetise the Craigslist website (such as by growing the user base) and to instead focus solely on its community of consumers, the Court held that the directors had breached their duty of loyalty.[25]

It follows that directors may consider stakeholder interests, but there must be a rational nexus with creating long-term economic value for shareholders.

Two specific situations are the exemption to this general position.

- The first is in the event of insolvency, at which point directors are required to consider the interests of residual claimants (creditors). Following *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*,[26] Delaware has taken a strict approach,

[23] Ellisa Habbart and Michael Swoyer, 'The Corporate Governance Review' (2016) *Law Business Research* Ch 30.
[24] Honourable Chief Justice Leo Strine, 'The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law' (2015) 50(3) *Wake Forest Law Review* 761.
[25] *eBay Domestic Holdings, Inc. v. Newmark* 16 A.3d 1 (Del. Ch. 2010).
[26] *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla* 930 A.2d 92 (Del. 2007).

requiring actual insolvency and that the 'zone of insolvency' is insufficient to shift the relevant interests to be considered.[27]

- The second is in instances of sale of control transactions where directors cannot consider the long-term best interests of shareholders (including stakeholder considerations) and must maximise immediate sale price.[28]

Delaware has adopted a relatively unique approach to the best interests duty by persisting with common law duties instead of codification. While it does not expressly require consideration of stakeholder interests, directors will generally be permitted to consider such interests if ancillary to long-term value creation. When combined with the presumption that a decision was made in the best interests of the company under Delaware's business judgement rule,[29] directors possess a broad discretion to create long-term value.

(b) Other relevant requirements

Outside of the legal and regulatory requirements discussed above, there are very few additional policies, rules or recommendations that we identified that guide the best interests duty in Delaware. This may be largely due to the unique nature of the jurisdiction, which does not host a stock exchange with listing rules and is often used only as a destination for registration and dispute resolution.

However, companies registered in Delaware must also be aware of requirements at the United States of America Federal level (if listed) and under relevant listing rules. This can include disclosure obligations, such as those required by the Securities and Exchange Commission for directors to report on certain environmental and sustainability issues.[30] While these measures do not substantively amend the best interests duty by requiring stakeholder interests to inform decision-making, they do require disclosure on certain interests, which may be impacted by the various decision-making of directors.

3.5 New Zealand

(a) Legal and regulatory requirements

Section 131 of the *Companies Act 1993* (NZ) (***NZ Companies Act***) requires a director of a company, when exercising powers or performing duties, to 'act in good faith and in what the director believes to be in the best interests of the company'.[31]

Directors are required to consider the interests of other stakeholders under certain circumstances:

- where the company is insolvent or nearly insolvent, directors must consider the interests of creditors. However, this is not considered to amount to a duty to creditors;[32] and

[27] The 'zone of insolvency' describes the period of approaching insolvency which in other jurisdictions has been found sufficient to shift focus to creditor interests.
[28] Following the decision of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc* 506 A.2d 173 (Del. 1986) at 182 directors must pursue the highest short term sale price, rather than long-term best interests, in sale of control transactions.
[29] Allens Linklaters, *Advice regarding the business judgement rule* (2020) AICD commissioned research: Time to reconsider Australia's business judgment rule <http://aicd.companydirectors.com.au/advocacy/research/time-to-reconsider-australias-business-judgment-rule>.
[30] See for example, U.S Securities and Exchange Commission, *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (2022) SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors <https://www.sec.gov/news/press-release/2022-46>.
[31] *Companies Act 1993* (NZ), section 131.
[32] *Madsen-Ries v Cooper* [2020] NZSC 100 at [31].

- in connection with the company ceasing to carry on whole or part of the business, directors are permitted to make provision for the benefit of employees and former employees of the company. This is a qualification to the duty to act in the best interests of the company.[33]

However, while they may consider the interests of these stakeholders in the above circumstances, their duty still remains to act in the best interests of the company.

The duty is owed to the company, and includes directors and de facto directors.[34] The duty contains a subjective test to act in what the director believes to be in best interests of the company, as well as the objective requirement to act in good faith.

The traditional view in New Zealand is that requirements of section 131 are fulfilled by directors acting in the best economic interests of shareholders, also known as the shareholder primacy model.[35] This has been the widely adopted approach to corporate governance, however with evolving expectations of board practices, there has been ongoing discussion around the issue.

As a result, the best interests duty has been the subject of significant academic debate in New Zealand. The emerging theory of stakeholder primacy is challenging the traditional shareholder primacy approach to corporate governance.

There is some ambiguity about exactly what directors can consider when considering the best interests of the company. The subjective nature of the duty impliedly permits directors to take into account a variety of factors in their assessment of the best interests of the company. As to how stakeholder interests should be balanced, this is left to the board to determine so long as it is focussed on benefiting the company.

The courts have taken the position that it is not the judiciary's place to review business decisions, and that directors should have wide discretion in matters of business judgement.[36] Therefore, it is generally accepted that directors are not prevented from considering a range of stakeholders when acting in the best interests of the company.

In light of the above, there is scope that directors can adopt a long-term approach when exercising the best interests duty, with consideration of a range of other stakeholder views, and not purely govern with the aim of profit maximisation. However, given the wording of the best interests duty in the NZ Companies Act, and the reluctance of courts to make a definitive statement on the issue, some ambiguity remains around the accepted approach to corporate governance in New Zealand.

(b) Other relevant requirements

Similar to Australia, there are guiding principles and 'soft law' requirements that a director may also consider when exercising their duty to act in the best interests of the company. The New Zealand Institute of Directors released a Code of Practice for directors, which provides guidance to directors to assist them in carrying out their duties.[37] The paper contains general standards covering board activity, as well as recommending best practice approaches to issues that boards should consider.

The guidance outlines that directors have a fiduciary duty to act in good faith and generally in what they believe to be the best interests of the company. In relation to the best interests duty, it

[33] *Companies Act 1993* (NZ), section 132.
[34] *Companies Act 1993* (NZ), section 126.
[35] *Madsen-Ries v Cooper* [2020] NZSC 100 at [28].
[36] *Madsen-Ries v Cooper* [2020] NZSC 100 at [112]; *Companies Act 1993* (NZ), long title para (d).
[37] Institute of Directors, *Code of Practice for Directors* <https://www.iod.org.nz/assets/About-Us/Documents/Code-of-Practice-IoD.pdf>.

states that the directors should recognise and respect the legitimate interests of stakeholders, including noting the following key points for directors to consider:

- the need to balance accountability to shareholders and responsibility to other stakeholders with the discretion granted to management in the day-to-day running of the company;
- adherence to the law and ethical values helps to ensure appropriate consideration of various stakeholders;
- active management of key stakeholder relationships is generally consistent with acting in the best interests of the company; and
- policies governing stakeholder relationships should reflect the nature of the company, its purpose and the interests of shareholders.[38]

Additionally, New Zealand's Exchange (the ***NZX***) listed companies have reporting requirements under the NZX Corporate Governance Code, which requires them to provide non-financial disclosure at least annually, including considering environmental, economic and social sustainability factors under recommendation 4.3.[39] Like Australia, the NZX Corporate Governance Code is a 'comply or explain' regime, meaning if an issuer does not report against a recommendation of the code, it must explain why not. While this may ensure directors turn their mind to certain issues, there is no mandatory requirement to act on them in the context of the best interests duty.

Overall, the position in New Zealand provides support for varying approaches to corporate governance, so long as directors can reasonably justify that the best interests of the company were at the centre of any decision-making process. As it currently stands, the legislation permits directors to incorporate a range of factors into their decision-making. However, there remains a focus on the traditional view of shareholder primacy, with the economic interests of shareholders given priority over other factors.

3.6 United Kingdom

(a) Legal and regulatory requirements

Section 172 of the *Companies Act 2006* (UK) (***UK Companies Act***) requires a director of a company to 'act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'.[40] In doing so, directors are required to have regard to the likely long-term consequences of the decision, as well as a number of stakeholder considerations including:

- the interests of the company's employees;
- the need to foster the company's business relationships with suppliers, customers and others;
- the impact of the company's operations on the community and the environment;
- the desirability of the company maintaining a reputation for high standards of business conduct; and

[38] Institute of Directors, *Code of Practice for Directors*, para 3.10 <https://www.iod.org.nz/assets/About-Us/Documents/Code-of-Practice-IoD.pdf>.
[39] *NZX Corporate Governance Code*, recommendation 4.3 <https://www.nzx.com/regulation/nzx-rules-guidance/corporate-governance-code>.
[40] *Companies Act 2006* (UK), section 172.

- the need to act fairly as between members of the company.[41]

Although prescribing a number of stakeholder interests for consideration, overall the legislation requires promoting 'the success of the company for the benefit of its members as a whole', so ultimately the interests of shareholders will prevail.

Extending to all directors, shadow directors and de facto directors,[42] the duty is owed solely to the company (other than in circumstances where legislation or common law obliges directors to act in the interests of creditors as a company approaches insolvency).[43]

The duty operates subjectively unless the circumstances make creditors' interests paramount (ie, where an enactment or rule of law requires it) or where there is no evidence of actual consideration of the required stakeholder interests.[44]

In essence, the duty reforms directorial decision-making as an explicitly informed and holistic process. Requiring the consideration of external influence and stakeholders insofar as they are relevant to promoting the success of the company, directors are empowered to meaningfully consider the implications of their decisions outside a commercial vacuum.

While the legislation refrains from prescribing the meaning of 'success', success is implied as a state of affairs in which the members as a whole are benefited. This makes clear that while a range of stakeholder considerations should be considered throughout the decision-making process, the benefit to members remains the priority.

An important caveat to the interpretation of success are the circumstances set out in section 172(2),[45] which make clear that where a company has acknowledged purposes other than member benefit, success will mean the achievement of those purposes. This permits the reimagining of the purpose of a company to extend beyond merely the benefit of its members. In practice, we anticipate this sub-section seems most likely to apply to charitable organisations and the like, although it does appear to conceive a decision-making process in which stakeholder considerations deemed to be a 'purpose' of the company, can be prioritised, even if to the detriment of members.

Ultimately the United Kingdom position adopts an 'enlightened shareholder value' approach,[46] which requires directors to engage in a holistic decision-making process that considers a range of stakeholder considerations. The duty does not go beyond informing directorial decision-making, concentrating on the traditional aim of promoting the success of the company through benefitting members. As such, commercial and financial success typically remain at the forefront of decision-making, with additional stakeholder considerations relevant only where they can be reasonably interpreted as contributing to the success of the company and therefore, benefitting the whole of its members.

(b) Other relevant requirements

The legal and regulatory requirements discussed above are further supported by governance codes and reporting obligations, which assist in enforcing directors' engagement with stakeholder interests.

[41] *Companies Act 2006* (UK), section 172.
[42] *Companies Act 2006* (UK), sections 170(5), 250.
[43] *Companies Act 2006* (UK), section 172(3); see *BAT Industries Plc v Sequana SA* [2019] EWCA Civ 112 for case law guidance indicating the point at which the duty in respect of creditors is triggered.
[44] *Re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch) at [92].
[45] *Companies Act 2006* (UK), section 172(2).
[46] *Companies Act 2006* (UK), section 172, Explanatory notes.

For all companies required to produce a strategic report, reporting requirements mandate that a 'section 172 compliance statement' be included in the strategic report section of the company's annual report.[47] These requirements commenced for annual reports published in 2020. The statement must go beyond confirmation that the relevant stakeholder interests have been considered and describe how directors have had regard to those interests.[48] The underlying intention of the section 172 statement is to encourage directors to think more carefully about how they are taking stakeholder interests into consideration and to improve the visibility of good boardroom practices more generally.[49] This requirement goes beyond the mandatory consideration of stakeholder interests, requiring directors to explicitly demonstrate how stakeholder interests have influenced decision outcomes. However, while intended to encourage the meaningful incorporation of stakeholder interests into approaches to corporate governance, the Financial Reporting Council's research has indicated that the form and substance of such statements needs to be further developed,[50] and investors have remarked that such statements have 'tended to be boilerplate', 'generic' and fail to connect 'to the business model or strategic issues'.[51]

Further to legislative reporting requirements, the 2018 UK Corporate Governance Code and the Wales Corporate Governance Principles for Large Private Companies provides additional context to the consideration of additional stakeholders in decision-making.[52] Operating on a 'comply or explain' basis, the guidance aims to assist companies to move beyond a superficial approach to engaging with stakeholder interests and supports the strengthening of good corporate governance practices.

4 International legal developments

4.1 Background

While there are a number of legal developments in respect of the best interests duty in each of the Comparator Jurisdictions, this paper highlights the following key developments:

- **Canada** – Canada has recently introduced amendments to its best interests duty to expressly list stakeholders that directors may take into account when acting in the best interests of the company. The amendment codified the common law position regarding which stakeholders could be considered by directors.
- **Delaware** – Delaware has shown little movement recently and does not appear to be considering an amendment of the best interests duty. In the United States of America more broadly, in a 'Business Roundtable Statement on the Purpose of a Corporation' signed in 2019, around 180 CEOs committed to leading their respective companies to

[47] *The Companies (Miscellaneous Reporting) Regulations 2018* (UK), regulations 4, 13.
[48] *The Companies (Miscellaneous Reporting) Regulations 2018* (UK), regulations 4, 13.
[49] *The Companies (Miscellaneous Reporting) Regulations 2018* (UK), section 7.3, Explanatory notes.
[50] See Financial Resources Council and Financial Reporting Lab, *Reporting on stakeholders, decisions and Section 172* (July 2021) at 3 – 6.
[51] Financial Resources Council and Financial Reporting Lab, *Reporting on stakeholders, decisions and Section 172* (July 2021) at 6 and 49.
[52] Financial Reporting Council, *2018 UK Corporate Governance Code* <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF>; Financial Reporting Council, *Wates Corporate Governance Principles for Large Private Companies* (2018) <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf>.

deliver value to all stakeholders (customers, employees, suppliers, communities and shareholders),[53] although the effectiveness of these commitments has been questioned.[54]

- **New Zealand** – New Zealand recently introduced a proposed legislative amendment to the best interests duty that seeks to codify modern corporate governance theory, recognising that directors may consider wider interests, including social and environmental stakeholders.
- **United Kingdom** – The United Kingdom has required directors to consider other stakeholders in decision-making since 2007. However, advocates for further reform propose an amendment that would equalise the interests of other stakeholders and shareholders by reframing the fundamental purpose of a company.

The developments in New Zealand, Canada and the United Kingdom broadly appear to target the fundamental understanding of company purposes and the move towards adopting stakeholder theory. Each of these key developments is discussed in more detail below. Note that this paper is not intended to contain an exhaustive discussion of all emerging legal developments in the Comparator Jurisdictions.

4.2 Canada

As noted above, Canada has recently introduced amendments to its best interests duty to expressly list stakeholders that directors may take into account when acting in the best interests of the company. Those factors are discussed in section 3.3(a). The amendment codified the common law position regarding which stakeholders could be considered by directors.

The seminal case concerning the best interests duty in Canada is *Peoples Department Stores Inc (Trustee of) v Wise* (2004 SCC 68). In examining the duty, the Supreme Court held that the phrase 'best interests of the corporation' should not be read simply as the 'best interests of shareholders', adding that from an economic perspective, the best interests of the corporation means the maximisation of the value of the corporation.[55] In determining what is in the corporation's best interests, directors may look to the interests of '*inter alia,* shareholders, employees, creditors, consumers, governments and the environment to inform their decisions'.

Similarly, in *BCE v 1976 Debentureholders* (2008 SCC 69), the Supreme Court of Canada confirmed the reasoning in *Wise*, further deviating from shareholder primacy theory, stating that acting in the best interests of the corporation is not synonymous with acting in the best interests of shareholders. The Court again reiterated a director's discretion to look to a range of stakeholder's interests to inform their decision.

4.3 Delaware

The interpretation of the best interests duty has remained settled in Delaware for many years. Recent cases have provided clarification as to the existing position, but have not indicated an intention to expand the scope of the best interests duty.

While the legal duty has remained unchanged, there have been broader discussions and commitments in the United States of America regarding the purpose of corporations and the

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[53] Business Roundtable, *Statement on the Purpose of a Corporation* (August 2019) <https://purpose.businessroundtable.org/#:~:text=In%20its%20place%2C%20the%20CEOs,communities%20in%20which%20they%20operate.>.

[54] Lucian Bebchuck and Roberto Tallarita, 'Was the Business Roundtable Statement Mostly for Show? – (2) Evidence from Corporate Governance Guidelines' (2020) *Harvard Law School Forum on Corporate Governance*.

[55] *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at [42]; Lynn Buckley 'The foundations of governance: implications of entity theory for directors' duties and corporate sustainability' (2021) 26 *Journal of Management and Governance* 29.

extent to which stakeholders should be considered. In a 'Business Roundtable Statement on the Purpose of a Corporation' signed in 2019, around 180 CEOs (including the CEOs of Amazon, Apple, Exxon Mobil Corporation and McDonald's) committed to leading their respective companies to deliver value to all stakeholders, by delivering value to customers, investing in employees, dealing fairly and ethically with suppliers, supporting communities and generating long-term value for shareholders. While the Statement on the Purpose of a Corporation does not alter the best interests duty in Delaware, it does indicate a potential change in social expectations around director decision making.[56] Although the commitments under the Statement of Purpose of a Corporation have been criticised for a lack of material change in the short-term,[57] there is growing public interest in the matters considered by directors when making decisions.

4.4 New Zealand

There has been significant debate in New Zealand about whether there is a need for legislative reform in the context of the best interests duty. In July 2021, The Institute of Directors released a whitepaper titled 'Stakeholder Governance', which advocated for a review of corporate governance in New Zealand and an amendment to the existing legislation.[58] The paper called on the government to provide clarity to directors in relation to which stakeholders they can have regard to, to what extent, and the prioritisation of other interests in the context of shareholders.

In light of this and recent judicial commentary around the issue,[59] a Bill was introduced before Parliament in October 2021, seeking to amend section 131 of the NZ Companies Act. The *Companies (Directors Duties) Amendment Bill 2021* (***NZ Amendment Bill***) seeks to include a new provision, which makes clear that directors may take into account 'wider matters other than the financial bottom-line' of the company.[60]

The explanatory note to the NZ Amendment Bill outline that the NZ Amendment Bill seeks to codify modern corporate governance theory, which recognises that companies are connected with communities, society, and the environment.[61] As such, companies must 'measure their performance not only in financial terms, but also against wider measures including social, and environmental matters'.[62]

The proposed amendment provides a non-exhaustive list of the factors that may be taken into account, and is as follows:

> *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, such as:*
>
> *(i) recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi);*
>
> *(ii) reducing adverse environmental impacts;*
>
> *(iii) upholding high standards of ethical behaviour;*

[56] These sentiments were most clearly reflected in the 2019 Business Roundtable statement where 181 CEOs committed to leading their companies for the benefit of all stakeholders. See Business Roundtable, *Statement on the Purpose of a Corporation* (August 2019) <https://purpose.businessroundtable.org/#:~:text=In%20its%20place%2C%20the%20CEOs,communities%20in%20which%20they%20operate.>.
[57] Lucian Bebchuck and Roberto Tallarita, 'Was the Business Roundtable Statement Mostly for Show? – (2) Evidence from Corporate Governance Guidelines' (2020) *Harvard Law School Forum on Corporate Governance*.
[58] Institute of Directors, *Stakeholder governance - A call to review directors' duties* (July 2021) <https://www.iod.org.nz/resources-and-insights/research-and-analysis/stakeholder-governance/#>.
[59] See *Madsen-Ries v Cooper* [2020] NZSC 100.
[60] *Companies (Directors Duties) Amendment Bill 2021* (NZ), Explanatory note.
[61] *Companies (Directors Duties) Amendment Bill 2021* (NZ), Explanatory note.
[62] *Companies (Directors Duties) Amendment Bill 2021* (NZ), Explanatory note.

(iv) *following fair and equitable employment practices; and*

(v) *recognising the interests of the wider community*.[63]

The NZ Amendment Bill aims to provide statutory legitimacy to the stakeholder primacy approach, and therefore codify what is already seen by many as the existing practice of most boards. It is important to note that the proposal is permissive rather than mandatory, with the proposed language of the provision merely providing that directors may consider these factors. It is also clear from the language of the amendment, expressed to 'avoid doubt', that such factors may already be considered when acting in the best interests of the company.

The NZ Amendment Bill is currently awaiting its first reading in Parliament. Given it has been proposed by the Government who holds a majority in the house, it is reasonable to expect that the Bill will be passed (subject to the usual parliamentary process). However, given the language of the Bill refrains from enforcing a mandatory requirement upon directors to consider other stakeholders when exercising the best interests duty, it remains to be seen how the legislation (if passed) will impact director decision-making in practice.

4.5 United Kingdom

Following the United Kingdom's explicit requirement for directors to consider prescribed stakeholders in decision-making, advocates of reform have focussed largely on the ability of directors to engage in decision-making that equalises the interests of stakeholders and shareholders.

The Better Business Act Coalition (the ***Coalition***) is at the forefront of championing further, more radical amendment to the existing directors' duty.[64] The proposal originates from B Lab UK, a non-profit network[65] and has received some limited cross-parliamentary support and community backing from over 1,000 businesses including Virgin, Ben & Jerry's and the Institute of Directors.[66]

The Coalition is proposing to introduce a Better Business Act (***BBA***) to amend section 172 of the UK Companies Act by broadening the scope of the 'purpose' of the company to expand beyond the 'benefit of its members as a whole' to include wider society and the broader environment.[67] The proposed legislation also defines the purpose of a company as operating in a manner that 'reduces harms the company creates or costs it imposes on wider society or the environment'.[68] Further, the Coalition intends for the amendment to apply to all businesses by default.[69]

While the proposal may successfully align the interests of shareholders and prescribed stakeholders, such a radical reframing of the duty may pose practical consequences. Further complicating the decision-making process, directors would be required to make strategic choices that align with three, often incompatible, goals.

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[63] *Companies (Directors Duties) Amendment Bill 2021* (NZ), Explanatory note.
[64] 'Better Business Act' <https://betterbusinessact.org/>.
[65] See 'The UK B Corporation Movement' <https://bcorporation.uk/>.
[66] 'Push to do the Right Thing', *Accounting and Business Magazine* (July 2021) <https://abmagazine.accaglobal.com/global/articles/2021/jul/business/push-to-do-the-right-thing.html>; 'Frequently asked questions', *Better Business Act* <https://betterbusinessact.org/>.
[67] 'About the Act', *Better Business Act* <https://betterbusinessact.org/about-the-act/>; *The Better Business Act 2021* (UK) (Draft) <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf>.
[68] 'About the Act', *Better Business Act* <https://betterbusinessact.org/about-the-act/>; *The Better Business Act 2021* (UK) (Draft) <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf>.
[69] 'About the Act', *Better Business Act* <https://betterbusinessact.org/about-the-act/>; *The Better Business Act 2021* (UK) (Draft) <https://betterbusinessact.org/wp-content/uploads/2021/04/The-Better-Business-Act-2021.pdf>.

However, the growing support of the Coalition highlights changing community expectations as to the role of various stakeholder interests in corporate governance.[70] As ESG considerations become increasingly significant in corporate decision-making, the evolving emphasis of aligning community expectations with the law may see initiatives similar to the BBA arise in Australia.

5 Conclusion and key observations

5.1 An express requirement to consider additional stakeholders has little practical influence on directorial decision-making

Though seemingly different in formulation, the influence of shareholder interests on best interests duties across Australia and Comparator Jurisdictions is largely aligned. While the legislation in Australia does not prescribe that various stakeholders interests must be considered when exercising the best interests duty, it engages with stakeholder interests in the practice of good corporate governance.

While most jurisdictions acknowledge that acting in the best interests of the company is not necessarily akin to acting in the best interests of shareholders, it is understood that these interests will generally align. As such, pursuit of financial and commercial success appears to be the implied primary purpose of companies, regardless of jurisdiction.

Some Comparator Jurisdictions such as the United Kingdom and Canada have more explicitly engaged with stakeholder theory, prescribing stakeholder interests (such as employees, the environment and consumers) to be considered within the legislative duty. In the United Kingdom such consideration is required, whereas in Canada it is permitted but not required.

While Australia and New Zealand do not currently adopt this approach, the lack of prescriptive factors does not appear to make a marked difference in the practical operation of the duty. Instead, both jurisdictions acknowledge the significance of stakeholder interests in long-term strategic planning and appear to incorporate additional stakeholder interests into decision-making when acting in the best interests of the company.

Delaware is the most overt in its prioritisation of shareholder interests, being the only jurisdiction in which the requirement to act in the best interests of the company is achieved by creation of value for shareholders. The only jurisdiction without a codified best interests duty, the traditional approach of Delaware is coupled with the general acceptance that consideration of other stakeholder interests can be considered where ancillary to long-term value creation. As such, even the stark contrast in formulation between Delaware and the United Kingdom demonstrates a consistency across jurisdictions that acknowledges the value of various stakeholder interests to the extent that those interests align with the broader purpose of the company.

Though Australia has not adopted legislatively prescribed stakeholder considerations, case law in Australia demonstrates that the courts have indeed been willing to conclude that it is reasonable for directors to consider the interests of a range of stakeholders when upholding their best interests duty. While Canada and the United Kingdom take a more prescriptive approach, the role of stakeholder interests across the jurisdictions appears aligned. That is, stakeholder interests should be considered as part of a holistic decision-making process in which the interests of shareholders are a priority. To the extent stakeholder interests can be satisfied and support this ultimate end, the interests will be incorporated into decision-making. Provided that the fundamental purpose of companies continues to be to act in the best interests of shareholders, the influence of stakeholder interests will always be subservient to the achievement of that

[70] 'Coalition Members', *Better Business Act* <https://betterbusinessact.org/supporters/>.

purpose. The listing of explicit stakeholder interests in some Comparator Jurisdictions does not appear to have affected the interpretation of this purpose.

5.2 Australia aligns with the majority when considering creditors in insolvency

In Australia, as a company approaches insolvency, directors must still act in the best interests of the company, rather than its creditors. While the interests of creditors becomes increasingly important as a company nears insolvency, Australia does not recognise a distinct duty to creditors. Instead, creditors are to be an increasingly important consideration in what is in the best interests of the company under the ordinary duty.

By not recognising a distinct duty towards creditors, Australia's position is largely consistent with the Comparator Jurisdictions.

- Canada and New Zealand both require directors to consider the interests of creditors when insolvent or nearing insolvency as part of what is in the 'best interests of the company', akin to other stakeholders. While creditors must be considered, this is not a distinct duty and reflects the position adopted in Australia.
- Delaware does not recognise any alteration to the best interests duty as a company nears insolvency. As it takes a strict approach to pursuing shareholder interests, there is little scope to consider creditors as insolvency approaches. After insolvency, the best interests duty is owed to residual claimants, which not only includes creditors, but also shareholders and employees with entitlements in arrears. In this sense, creditors are included in the best interests duty once the company becomes insolvent, but only to the extent that they benefit from maximising the overall value of the company, akin to an ordinary best interests duty.
- The United Kingdom similarly does not distinctly address the interests of creditors. It does, however, explicitly carve out that the duty is subject to any enactment or rule of law, with respect to a duty to consider or act in the interests of creditors of the company. While this offers some protection of creditor interests in insolvency, creditors are unable to enforce a breach of the 'best interests' duty owed towards them. Any breach can only be enforced by the liquidator once insolvency occurs and is brought under insolvency legislation rather than the UK Companies Act which houses the usual 'best interests' duty.

5.3 Other adjacent regulatory developments

Australia and all of the Comparative Jurisdictions, have guiding principles or 'soft law' requirements that directors should consider when exercising their duty to act in the best interests of the company. These guiding principles or 'soft law' have been implemented and applied in practice to varying degrees in each jurisdiction, but the intention remains the same – by recommending that directors consider the risks and interests of other stakeholders outside of shareholders they are implicitly bringing those factors into the boardroom and a director's assessment of what is in the best interests of the company.

Each jurisdiction has implemented reporting obligations on listed entities that largely take the form of a 'comply or explain' regime, where if a company does not report against a requirement it must explain why that is the case. This form of reporting obligations requires active investors to question boards where they have not adequately considered material risks. As a result, it has largely been limited to public markets where this is possible.

It is likely that the use of other relevant regulatory requirements, in particular via public markets, will continue to grow as regulators look to put issues in front of company boards. We expect this trend to continue and it is likely that companies will be required to report on more risks and stakeholders in greater levels of detail.

5.4 Trends in international legal developments

The development of the best interests duty across each jurisdiction has reflected changing societal views on the expectations of a company.

Some Comparator Jurisdictions have enacted legislation that codifies modern corporate governance theory. The United Kingdom has listed other stakeholder interests that may be considered by directors when acting in the best interests of a company since 2007, while Canada has recently amended its legislation to include a similar list of stakeholders that may be considered.

More radical reform proposals have arisen in the United Kingdom, which is considering whether to take its best interests duty a step further with proposed amendments that would equalise the interests of additional stakeholders and shareholders by reframing the fundamental purpose of a company. The reforms are targeted towards re-evaluating a company's purpose, by suggesting that directors should be able to prioritise benefit to members alongside the broader society and environment. While these reforms are in their early stages and without popular parliamentary support, their underlying intentions provide insight into the potential trajectory of reform to come.

New Zealand does not currently have legislative clarity on which other stakeholders directors may consider. However, in practice it has become widely accepted that other stakeholder interests should be considered when acting in the best interests of the company. New Zealand has also recently introduced a proposal (which is expected to pass) that seeks to include a similar list of stakeholder interests in legislation that directors may have regard to as part of the best interests duty.

In contrast, Delaware has adhered to the more traditional approach of shareholder primacy, and does not appear to be considering an amendment of the best interests duty. The lack of reform is perhaps explained by the fact that directors may consider other stakeholders where ancillary to the creation of long-term economic value, which arguably will require such a consideration.

The shift in approach to corporate governance has been driven by the notion that shareholders want to see economic growth, but with the expectation that companies consider ESG concerns and the interests of a range of stakeholders, as opposed to purely maximising profit. While no jurisdiction has mandated such an approach, it is now generally acknowledged that considering a variety of stakeholder interests will likely lead to long-term value creation[71] and that the consideration of both financial and non-financial risks is important. Therefore, each jurisdiction has developed a basis for directors to engage with stakeholder interests, either through explicit codification, or the implicit acknowledgement and acceptance of modern corporate governance practices.

Allens

26 May 2022

[71] McKinsey & Company, *Five ways that ESG creates value,* <www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/five-ways-that-esg-creates-value>.