

Kick-starting the transition in New Zealand – the role of corporate governance in the transition to a low-carbon economy

Q&A report

1. Milton gets a lot of blame but is it also Western culture which is very individualistic- this might be a symptom of that too... (Steven Moe)

Yes, great point.

2. What are your views on fossil fuel divestment? a lot of people argue that divestment is at best not working. at worst it can backfire by making fossil fuel stock undervalued, therefore making it more attractive to buy to less scrupulous actors (Raoul Verhaegen)

Some fossil fuel divestment will naturally occur because of the rise of funds in Kiwisaver and their equivalent overseas in which individuals opt out of fossil fuels. There are also institutional investors who have largely divested from fossil fuels because of stranded asset risk. Other investors continue to invest because they argue that we need fossil fuels for an interim period of time. So short answer is that investor will make their own choices.

3. A question for Simon, do we need reform of the Companies Act (in terms of the obligation of directors to act in the best interests of shareholders) or do you think the NZ courts have the ability to interpret what “best interests” mean, ie more than just \$ returns? (Kate Gunthorp)

I don't think we need to change the Companies Act as I do think courts can interpret best interests more widely than financial returns – especially where something is in the long term interests of the company (ie you can sacrifice short term financial benefit for longer term benefits which for example could be related to your social licence to operate)

4. The Company Act is currently being reviewed and there is an opportunity to redefine directors duties away from just “acting in the best interests of the company” to something else.

I have suggested via submissions, directors should also “do no harm, where ever practicable”.

Do Lawyers for Climate Action have a view on how the Companies Act should be adjusted to speed up action on reducing climate impact? (richardlauder)

I personally wouldn't agree with that approach. I don't know why you would single out companies to do no harm and not extend that to all citizens (and that would likely be way to controversial).

If you are talking about doing no harm to the company then I think that is implicit in the best interests requirement. If it is to do no harm to the world, then directors duties is the wrong place as they are owed to the Company and can only be enforced by the company (and typically only be a liquidator when one is appointed to recover for the shareholders and creditors)

LCANZI response: LCANZI have not come to a conclusion on this point, but the subgroup has discussed the current proposed changes to the Companies Act and suspect they would have little or no impact. Changing directors duties may have

some effect on cultural change in the long term, but the urgent action needed requires more direct intervention, for example, a functioning emissions trading scheme.

5. Question for Jonathan. Aviation emissions, incl. international flights, make up 12% of NZ's emissions. The aviation industry has a huge focus on reducing % emissions through technology innovations incl. SAF which with the current passenger growth forecasts are unlikely to provide absolute emissions reductions. Passenger demand simply outstrips % reductions. What leadership does Air NZ provide to the aviation sector and the country to reduce demand for flights and moderate its absolute emissions growth? What position does Air NZ have with regard to new airport developments stimulating yet further demand for flying? (rob van der mark)
Air New Zealand is trying to be the most progressive airline on SAF, being the first airline to use electric and hydrogen planes. The challenge of the interim fix that you propose of voluntary demand reduction is that would likely require further regulation to limit competition and such regulation is highly unlikely. In other words, if we dropped the number of flights by 30% and as a result, Qantas or another competitor entered the market, air travel volume does not fall, and our position has materially weakened. An additional challenge is that if underlying demand has not weakened, how does one allocate tickets on these flights—if there's price caps, the flights might start to sell out weeks or months before travel occurs.
6. What is the update on legal cases (in NZ) against government and corporates regarding insufficient climate change action? (rob van der mark)
Kia ora Rob. There are lots of various updates here but two key cases LCANZI is involved in (as an observer and plaintiff) are the a) Smith v Fonterra and b) the judicial review of the Climate Change Commission's advice to government. We are waiting on judgements in both cases.
7. Precision fermentation to produce dairy ingredients without cows offers a massive opportunity to Fonterra to reduce emissions & indeed they've just partnered with Dutch multinational. This new technology is on the precipice of cost parity yet we hear little about this. Where is the open discussion from industry & government about the transition off animal agriculture to these new technologies? (Suzanne Hills)
8. Maori branding for an industry highly threatened by climate change eg AirNZ - is that a risk for all parties? (Bennion Law Online)
All branding is at risk when the organisation using it is inauthentic in its use. There are tell tale signs of this inauthenticity, consultation is usually the first place to highlight it, and that eventuates into a breakable story. Breakable stories undermine any of the brands that represent them. Māori, german, anything in my opinion.
9. Corporate emissions reduction activities are currently voluntary and consequently there we see common use of terms such as carbon zero, net zero, carbon neutral, climate positive with no regulation to standardise the use. This is permitting a wide ranging adoption of greenwash - for example Christchurch Airport promoting its

achievement of being 'climate positive'. Does the panel see a need for regulating these terms to ensure they align with our national, international targets? (Suze Keith)

Yes, big issue for TCFD reporting, with desire for consistency.

10. I'm involved in the campaign to save Te Waikoropupu, puna waiora near Takaka. We environmentalists sometimes feel impatient with Ngati Tama. For us, the farmers in the Takaka Valley need to change their farming approach because they are contributing majorly toward NO3-N pollution of the springs, Ngati Tama are talking Kaitiakitanga and consultation on management and regulating. Please comment, Te Aroha, and any other panel members (Marion Sanson)

I often think that there is an idea that every Iwi has a lot of capacity. We at Ngāti Whātua certainly had this expectation of us as a result of our post settlement mode, but what is often missed is that the agreement made at the settlement level will often affect some members of the tribe. Those conflicts can take more than a generation to solve. The question is who will be the intergenerational partner of your location... and if its Ngāti Tama then all I can say is keep engaging, keep relating.

11. Aware of both legal cases but likely outcome as you know is that judge will rule it a political decision, ie new better legislation. So how do we get companies to show true leadership in this space in the meantime. Many resist legal change actively. So further to Julia's comments which are very comprehensive. What does she see as the role of the media can play to drive further urgency and corporate response. (rob van der mark)

12. Are you going to appeal the case with Auckland Transport's RLTP not in line with their decarbonization goals? (Raoul Verhaegen)

LCANZI response: the All Aboard Aotearoa judgment has been appealed to the Court of Appeal on a number of grounds. The All Aboard Aotearoa press release is found here: <https://www.lawyersforclimateaction.nz/news-events/all-aboard-aotearoa-appeals-jr-decision>

13. For Te Aroha, do you think it is likely that a capitalistic/domination model will lead us into a climate which sustains life? If not, do you have any ideas how we can replace the capitalistic model? (Anonymous Attendee)

I think the human has shown that they can design themselves out of anything. I think we are just wanting us to figure it out faster and leveraging technology to do that. To me capitalism has a lot of new levers that can be potentiated, and the philanthropy model maybe needs a modern day rethink to understand its place in the world of giving.

14. For Simon: To what extent is the 'stewardship model' of directorial duties linked to fiduciary obligations of trustees in NZ (NZ has one of the highest number of trusts per capita in the world)? Would you have any concerns about tikanga Maori linking back into this model or about the Courts becoming arbiters of tikanga? (Please comment other panelists). (FPC)

Quite closely as directors duties are largely a cut down version of trustee duties (ie they are fiduciary). I see this as less the courts being arbiters of tikanga and more interpreting duties in light of the society they apply to and tikanga Maori be more a part of the culture of New Zealand. This means New Zealanders expectations of directors might be subtly different from say the English because cultural norms in NZ differ

15. Kia ora all - Auckland Council recently approved TERP - the Transport Emissions Reduction Pathway. Do you think it is legally enforceable? Part of the challenge is that Councils and agencies consider their climate policies to be 'optional'. There was a recent judicial review on the ATAP which was rejected by the High Court. How can we work on that? If civil society is disregarded (and many, many submissions have been made to public bodies in support of climate action), what options are left? This concept of enforceability feels like a key driver of good corporate governance. (Gabriel.Gati)

There's no quick answer on that one, public law is complicated and success of review requires either a procedural defect or a decision that is flawed on a judicially reviewable ground. So it perhaps reviewable but not something we can advise of without significant work. Ultimately, if decisions are not reviewable, then the options are getting officials elected or in place who are willing to make climate friendly decisions, or altering the law to provide a legal requirement to make climate friendly decisions. For corporates, this pressure may come from stakeholders including customers and shareholders.

16. For LCANZI, it would be interesting to understand what legal remedies may be open in the instance that a corporate emitter signs up to science-based targets and the like while making minimal if any changes to their short-term emissions profile. (Rohan MacMahon)

It really depends on the circumstances including the specific claims being made, but generally it may open a company up to claims of false advertising and complaints to the Commerce Commission or Advertising Standards Authority, it may mislead shareholders which could result in Company law liability, in extreme examples, it could be a criminal act if its obtaining a pecuniary advantage using a false document (some mislabelled free range eggs once resulted in such a conviction). Also if a company is misusing a trademark, particularly an audited trademark (i.e. Toitu certification or a rainbow tick or living wage certification) that can result in passing off or civil liability for infringement of trademarks.

17. Kia ora koutou, a question for anyone please...

The Natural and Built Environment Act - the definition of environment is... environment means, as the context requires,—

(a) the natural environment:

(b) people and communities and the built environment that they create:

(c) the social, economic, and cultural conditions that affect the matters stated in paragraphs (a) and (b) or that are affected by those matters

What difference would removing the word “economic” from (c) of the definition of “environment” make?

Could we arguably be at that point?
Kia ora (Kiri Danielle)

18. How do we ensure that investor/shareholders have expectations of their portfolio company that accord with the science (ie not only investor pressure to phase out, but investor pressure phasing out before it is too late). for example, I understand the IEA's studies showed that there needed to be zero new fossil fuel extraction globally from end of 2021 onwards - how can we get investors to take that seriously, as opposed to requiring that from 2035-2040 onwards when science suggests its too late? (Anonymous Attendee)

19. question for Laura: how can public institutions like ACC steer the companies in their portfolio to the right direction when they only have minority stakes? not even sure they hold voting shares (Raoul Verhaegen)

Collaborative engagement with other investors can be useful. At CA100+ we say the best collaborations will include investors that cover the “three L’s” - local, large and loud. So teaming up with other investors that can cover those bases is smart. I’d also recommend taking a look at small but loud investors such as Wespath and the New York State Comptroller in the US, AP7 and the Church of England Pensions Board in Europe etc - some of these investors won’t even HAVE a holding in a company they are engaging with/lobbying, but they are willing to be loud and build collaborations and that drives impact despite being small/lacking a large holding.

20. How do we minimise real human suffering while waiting for Exxon to be held accountable to paying its investors (not necessarily those suffering most) billions of dollars in 2050 in litigation? (Anonymous Attendee)

We have to persuade companies that they’re better to act now to protect long term shareholder value. Investors voted to require Exxon to put activist investors on its board and these new directors subsequently replaced their CEO and CFO because they dragged their feet on climate change.

21. Let's hear to what extent companies and businesses are taking on board the emotional connections that Te Aroha has talked about. No one else has mentioned it as part of decision-making on modern boards. Why is it not? I'm not after an answer that illustrates the work that is being done to teach about te ao Maori (although I totally on board with that being relevant) I am asking why, at the board table, are people not emotionally invested in dealing with climate change. (Debra Dorrington)

There's been some bad Māori marketing in our past. Plenty of evidence to support that. Often with the same strong messaging over generations, it becomes belief. Unpacking that belief is not instantaneous, and some of us unapologetic biculturalists need to support more there. Biculturalists come in lots of flavours too, not just from an ancestral matrix that resembles mine.

22. re jonathans comments: do we therefore need less focus on revenue growth and more on profitability? (rob van der mark)

Yes. On this note, were it not for migration, almost all OECD countries would have populations that are declining. Japan, Europe, and China are now going into population declines. Countries and companies will have to figure out how to preserve and maintain shareholder value without just producing more stuff.

23. A question for Laura. Could you comment on the use of Paris-aligned benchmarks by fund managers to strengthen commitment on climate change and signalling to companies that a lack of action or credible transition plan would have implications for ongoing investor support. (Peter Jones)

- Yes I think this is potentially huge. Would recommend a read of the Paris Aligned Investing Framework and also the Stewardship Toolkit from the IIGCC (our Euro counterpart) - both of which look at stewardship and the importance of having milestones that clearly signal to companies what benchmarks they need to hit if they want to remain in the portfolio. I'm not a huge fan of divestment except as a last resort but I am a huge fan of active, ambitious engagement. There's not anywhere near enough of that going on yet though.

24. Does bravery for the aviation industry look like investing in trains? (Suze Keith)

Aviation companies' core competency is not train operation or infrastructure build, so such a strategy would not be supported by shareholders. However, Europe has made this choice already and is actively working to switch its citizens out of planes into trains. There has been much discussion in NZ about high speed trains between Auckland, Hamilton, and Tauranga (the Golden Triangle), but no government has wanted to take on the capital cost. New Zealand's low population density makes the economics more challenging.

25. Not a question so much as an observation. I am a new New Zealander. I moved here 3 years ago. It is very odd that the Climate commission has investigated reduction of NZ emissions with no mention of nuclear power. Elsewhere in the world this is seen as part of the solution; in NZ there is a total refusal to even consider it. For a modern country taking a pride in its technological skills this is very odd indeed. (Robert Morfee)

Carbon emission calculations for air travel vary widely. Air NZ's offsetting programme uses the lower end of the range rather than the median. From a business perspective this may seem like a good strategy to communicate least emissions to its customers, but how does Air NZ justify this given their emissions reduction pledge and also in terms of information transparency? (Suzanne Hills)

Air New Zealand's FlyNeutral calculator applies accepted international practice, using emissions factors provided by either the NZ Ministry for the Environment emissions factors, or the UK government. The calculation is audited by Toitū on an annual basis.

The key difference between the Toitū and Air New Zealand calculations is that Toitū applies a radiative forcing multiplier. This is to account for the impact of gases released into the atmosphere when flying at altitude. Currently the science is not settled as to what a radiative forcing multiplier should be. Given this, we do not apply it to our FlyNeutral calculator at this time. However this is something we are

actively considering adding to our FlyNeutral calculation to better account for the true impact of flying on the environment.

Air New Zealand is currently developing bespoke emissions factors, which will more accurately represent emissions from Air New Zealand flights taken. This is also being done in consultation with Toitū. This will provide our customers with more accurate data on their emissions.