Changing the world of work for good

Restoring trust in audit and corporate governance - TUC response

July 2021

Introduction

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5 million working people in 48 trade unions across the economy. We campaign for more and better jobs, a better working life for everyone, and support trade unions to grow and thrive. We seek to represent the interests of all working people and their families, at work, in the community and at home.

The TUC has engaged in corporate governance debate over many years. We recognise that the way companies are run, the decisions of boards and the framework that shapes this have major impacts on our members and all those who work in the private sector. When things go wrong, it is our members who pay the heaviest price of any stakeholder group. Yet, no company can succeed without the work and skills of its workforce.

As its introduction sets out, the consultation document pulls together recommendations from three reviews focused largely on audit that followed the collapse of Carillion. The TUC recognises the importance of audit and its role in ensuring accurate accounts on which all stakeholders can depend. However, the failures that led to Carillion were not only failures of audit. There were serious failures in terms of the decision-making of the board, which contributed directly to the decline and eventual collapse of the company, with disastrous consequences for suppliers, sub-contractors and thousands of workers who depended on Carillion for their livelihoods.

While the consultation raises many important questions about audit, audit reform alone will not prevent another Carillion. Audit is by definition a backward-looking exercise, and cannot change things that have already taken place. Wider corporate governance reform is needed and crucially reform that will change the culture and priorities of the boardroom to improve the quality of board decision-making. For this, reform to directors' duties and board composition are vital.

The TUC's submission highlights an important opportunity to bring the Companies Act into the 21st Century and broaden the scope of directors' responsibility and reporting requirements to cover the whole workforce, rather than only directly-employed employees as at present. This amendment would greatly improve the quality of employment reporting and ensure that company directors cannot outsource responsibility and accountability through their use of insecure and indirect employment models. As the Companies Act will have to be amended in order to implement the proposals set out in the consultation, this provides a much-needed opportunity to put this vital amendment in place. The Companies Act was last revised in 2006; we cannot wait another 15 years to update the way it references working people and the opportunity to act on this now must not be missed.

Proposal 1: change the word 'employee' to 'workforce' throughout the Companies Act

The TUC believes that the word 'employee' should be changed to 'workforce' (or similar, for example 'a member of the workforce' in some cases) throughout the Companies Act.

The amendment would have the effect of broadening the scope of the reporting requirements and directors' duties in the Companies Act, to require companies to report on, and have regard to, their whole workforce, rather than just their directly employed employees as at present.

We believe that this amendment would restore the requirements of the Companies Act to the original intentions of lawmakers in the early 2000s.

When the most recent revisions to the Companies Act were being drafted prior to 2006, all forms of non-direct employment were much less prevalent than they are now and the word 'employee' was widely used to mean an employer's workforce in general terms – as indeed it still is. The TUC was involved in discussions with government at that time and has studied the reports of the Company Law Review, whose recommendations led to the drafting of Section 172 on directors' duties and Section 417 non-financial reporting requirements set out in the 2006 Act. It is clear that the use of the word 'employee' was not intended to differentiate between different part of a company's workforce.

In legal terms, 'employee' covers only those who are directly employed by the company. It does not include those who are indirectly employed through agencies, umbrella companies or other third parties, the self-employed, casual and other seasonal workers or a significant proportion of those on zero-hours or short-hours contracts.

The use of the word 'employee' in the Companies Act has a direct impact on the quality and accuracy of company reporting. Many companies that employ a significant proportion of their workforce using non-employee employment relationships or through an outsourcing/ franchising model exclude, either partially or completely, those workers from their company reports, despite the latter's contribution to the company's products or services and profitability.

The rise of non-standard employment

In the early 2000s, forms of employment other than being an employee were a much lower proportion of the overall labour market than is now the case. Zero hours contracts were not a common feature of the labour market at that time, but are now commonly used throughout the retail, hospitality, care and logistics sectors. The number of people working as self-employed has also grown significantly; while some of these are genuinely working for themselves, Citizens Advice has estimated that nearly half a million are in bogus or false self-employment, required to work in that way by employers for tax or other purposes[1]. Other insecure work, through agencies and other casual or season employment, has also risen. Overall, people in insecure employment are now a significant part of the private sector workforce: the TUC has estimated that prior to the pandemic, 11 per cent of the workforce, or one in nine working people, were in some form of insecure employment. The vast majority of these are employed in the private sector.

The rise of insecure employment since 2006		
Type of insecure non/standard employment	**2006[2]**	**2019/20[3]**
All self-employed	3.75m	5.0m
Low paid self-employed (earning less than government minimum wage)	n/a	1,91m
Zero-hours contract workers (excluding the self-employed and those falling in the categories below)	70,000	876,800
Other insecure work - including agency, casual, seasonal and other workers, but not those on fixed-term contracts	770,000	824,400*
TUC estimate of insecure work (those in low-paid self-employment plus zero hours contracts workers and other insecure work)	n/a	3.6m
Proportion in insecure work	n/a	11%

Source: ONS and FRS 2019/2020 data (see references for more details)

* Methodological changes make this figure not directly comparable with the 2006 figure; if amended to be consistent with the 2006 figure, the total is 540,044.

The charts below illustrate the rise in self-employment and zero hours contracts since the mid-2000s and especially since the financial crisis.

[1] Citizens Advice, Bogus self-employment costing millions to workers and Government, 19 August 2015 https://www.citizensadvice.org.uk/cymraeg/amdanom-ni/about-us1/media/press-releases/bogus-self-employment-costing-millions-to-workers-and-government/

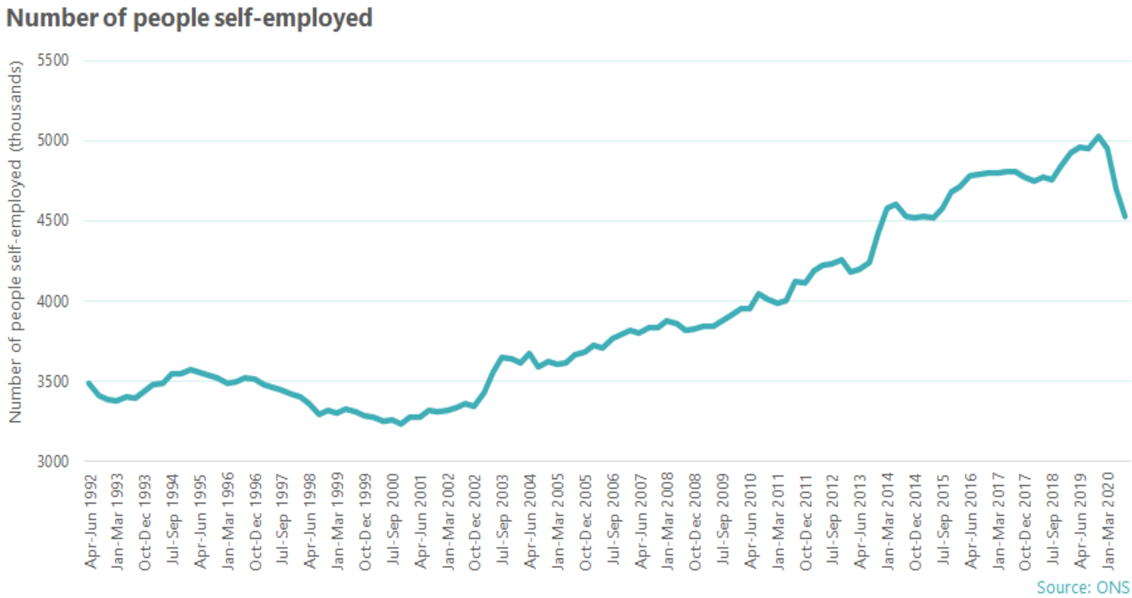
[2] For more detail on 2006 data, see TUC, Living on the Edge: The rise of job insecurity in modern Britain, 2016 https://www.tuc.org.uk/research-analysis/reports/living-edge

Nb We do not have a figure for low paid self-employed for 2006.

[3] All self-employed is from the ONS Dec 2019 – Feb 2020; zero hours and other insecure work is from ONS Q4 2020; low paid self-employed is from FRS 2019/2020

Rise of self-employment

The number of people in self-employment has risen from 3.75 million in 2006 to 5 million in 2019-20, an increase of 33 per cent.



Rise of zero hours contracts

The chart shows that there has been a sharp rise in the use of zero hours contracts in the UK – although methodological issues make direct comparisons difficult over time.

Source: ONS (May 2021) 'People in employment on a zero hours contract' NB changes to the methodology in 2013/14 and between 2019 and 2020 mean that figures may not be directly comparable before and after these dates, but the trend towards an increased use of this type of contract is clear.

In addition, there has been a significant rise in the use of outsourcing, franchising and employing workers through labour intermediaries over the last 15 years.

Outsourcing is the contracting out of tasks, operations, jobs or processes to an external contracted third party. The 'Business Services Association' representing outsourcing firms, estimates that they employ around 3.3 million workers in the UK and that 70% of business services are provided for the private sector.[4]

Unite the Union has provided some information on outsourcing in certain sectors. In the finance sector, companies have outsourced a wide range of roles, including facilities management, maintenance, catering, cleaning, security, IT, administration (including contact centres) pensions administration, post, media and digital. In the aviation sector, companies have outsourced fuelling, baggage handling, cleaning, catering and IT services. House-building and construction, energy and pharmaceutical companies are also named as having large numbers of outsourced workers.[5]

Franchising is where a franchisor grants a license, which entitles the franchisee to own and operate their own business under the brand and business model of the franchisor. Franchised businesses employ over 710,000 people in the UK[6], a rise of 27% since 2013. Despite the requirements that the franchisor may have in terms of how the franchised business is managed, often this does not extend to employment standards and unions have experience of franchisors rejecting responsibility for how workers employed in operations carrying their brand are treated.

The use of labour market intermediaries to source workers has increased significantly over the past decade. Using recruitment agencies, umbrella companies and personal service companies means that organisations can avoid employment law and tax obligations of directly employing their workforce. We estimate that there are approximately 2 million people employed via labour market intermediaries[7].

There is large scale noncompliance with basic employment rights in the UK labour market. TUC analysis suggests that the fragmentation of employment relationships as organisations transfer accountability to other parties has played a significant part in this non-compliance. 420,000 workers were paid below the minimum wage in April 2019[8]. TUC analysis shows that in 2016 at least 2 million workers were not receiving legal minimum paid holiday entitlements, missing out on £1.6bn in paid holiday per year[9]. More information on the use

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[4] Business Services Association Annual Review 2017 http://www.bsa-org.com/wp-content/uploads/2017/11/BSA-Annual-Review-2017.pdf

[5] More information on specific companies is available on request.

[6] The British Franchise Association, 2018 bfa NatWest Franchise Survey https://www.thebfa.org/about-us/industry-research/

[7] TUC, Shifting the risk Improving enforcement of employment rights, 2018 https://www.tuc.org.uk/research-analysis/reports/shifting-risk

[8] LPC (2020) Non-compliance and enforcement of the National Minimum Wage https://www.gov.uk/government/publications/non-compliance-and-enforcement-of-the-national-minimum-wage

[9] Labour Force Survey Q4 2016

of fragmented employment models and the consequences for workers in terms of pay and missing out on employment rights is set out in the TUC's 2018 report Shifting the risk[10].

The TUC has set out elsewhere its views on insecure work and fragmented employment relationships[11]. This submission does not seek to address the debate around employment status or the arguments for and against the use of these forms of work. It simply argues that where workers – however they are employed – are contributing to a company's products or services, or maintaining the operations, buildings, transportation and other infrastructure that supports this, they should be included in company reporting and have the right for their interests to be taken into account by company directors, alongside directly employed employees of the company.

The use of non-standard employment is largely missing from company reporting

While it is complex, information on the numbers of workers in different categories of non-standard employment can be found in the labour market statistics of the ONS. The majority of these workers are employed in the private sector. However, they are largely absent from company reports, which are generally vague or silent about companies' use of these forms of employment and include either little or no information on their non-employee workers in the section of their reports covering employment matters.

Indirect workers are often not included in initiatives such as staff engagement surveys and are not included in the staff numbers that are required to be reported under UK company law.

Some examples of employment reporting from companies from different sectors are given below. The names of the companies have been removed as we are not suggesting that these companies are necessarily worse or particularly different from others; they are simply examples of what are common practices.

Food delivery service company – Annual report 2020

The annual report includes a short section on couriers. The section includes some courier numbers, although the total number of couriers is not absolutely clear and no information is given on the geographical spread. It sets out the company's use of a range of different employment models for couriers, which is welcome, but gives no numbers against each or indication of the geographical spread. The section has one sentence that focuses on the interests of couriers, noting that "couriers are provided valuable employment benefits in specific markets, such as training, holiday pay and sick leave". There is no further information on the interests of couriers, and nothing on engagement with couriers or health and safety indicators such as accident rates.

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[10] TUC, Shifting the risk Improving enforcement of employment rights, 2018
https://www.tuc.org.uk/research-analysis/reports/shifting-risk

[11] TUC, Insecure work Why decent work needs to be at the heart of the UK's recovery from coronavirus August 2020 https://www.tuc.org.uk/research-analysis/reports/insecure-work-0
See also TUC, Living on the Edge, 2016 and TUC, Shifting the risk, 2018, cited above

The section on 'our people' is approximately twice as long as the couriers section and has a greater focus on the interests of staff. It includes a section on employee engagement that discusses the results of an engagement survey that included questions on health and safety, welfare and learning and development. It appears, from the contents and numbers involved, that this survey was restricted to employees and did not include indirectly employed couriers.

The 'our people' section also includes some information on the company's approach to diversity and rewards that appear to refer only to directly employed staff. The report includes information on employee numbers, making clear that this does not include 'independent contractors'.

Hotel chain with a mix of franchised and directly managed hotels – Annual report 2020

The annual report states that 83% of the company's revenues come from fees from franchised hotels, while in terms of room numbers, 71% are franchised, with nearly all the rest directly managed. Franchised hotels are run under the company's brands, for which hotel owners pay a fee.

In its 'our people' section, the report states that "We directly employ individuals in our corporate offices, reservation centres, and managed, owned, leased and managed lease hotels. However, not all individuals in managed, owned, leased and managed lease hotels are directly employed, and we do not employ any individuals in franchised hotels (nor do we control their day-to-day operations, policies or procedures)."

The report states that employees were put on furlough, had their compensation reduced and in some cases were made redundant over the year as a result of the pandemic and the impact on travel. It is not clear from the report how many staff were made redundant or put on furlough or by how much compensation was reduced and whether low-paid staff were protected from the pay cuts.

Workers who contribute the majority of the company's revenues in its franchised hotels are not mentioned at all in the 'our people' section. The employee engagement statement makes clear that it relates only to the company's directly employed workforce. The company runs an employee share plan, which is available to the majority of 'corporate employees', but not to staff working in the majority of hotels carrying the company branding. There is no information given about employment standards and practices in franchised hotels carrying the company's branding and no indication that the company considers that it has any responsibility for this, despite the critical role of this workforce within its business model.

Retail and logistics chain – Annual report 2020

The company has traditionally employed the vast majority of warehouse staff through agencies, while directly employing staff in its retail stores, and it is the TUC's understanding that this is still the case.

There is no discussion of the company's employment model in the annual report. It uses a mixture of words throughout the relevant sections, including employees, staff and workforce, but it is not clear whether these are used interchangeably or are designed to differentiate between different groups of staff. There is one reference each to salaried staff and to agency staff, which do appear to be referring specifically to each group respectively.

The section entitled 'staff' within the company's Section 172 statement talks about a number of initiatives, including a whistleblowing hotline, a staff engagement scheme and a staff wellbeing team. It is not clear whether all staff or just employees have access to these schemes.

Within the report's human resources section, the health on safety report includes short sections on stores, warehouses and head office, which is welcome. This is not the case with other elements of the HR section such as training and development. The discussion of retention gives figures on salaried staff turnover but there is no mention of turnover of agency staff or turnover of staff by workplace category, such as store, warehouse and head office.

The one reference to agency staff is in the section on COVID, which states that agency staff have been reduced to a 4-day a week rota to reduce the number of shift patterns per day. There is no mention of whether this was discussed with the affected staff or simply imposed or on the impact of this decision on the income and welfare of affected staff.

Within the section on COVID, the report switches in places from using the word 'staff' to the word 'employees'. To understand properly the actions of the company it is important to understand whether this is intentional and denotes reference to directly-employed employees only – or whether the word is being used to mean staff more broadly. There is no way of knowing this from the report.

Impact on secondary legislation - pay ratio reporting

It is much easier to lay secondary legislation than primary legislation and for this reason secondary legislation is often used, where possible, as a means of amending or adding to the law. While the Companies Act itself has not been amended since 2006, a number of regulatory instruments enabled by the Companies Act have been passed. Requirements that take their force from the Companies Act are, however, limited by the scope of the latter and cannot go beyond it. This has implications for other regulatory requirements, including The Companies (Miscellaneous Reporting) Regulations 2018[12] that set out requirements for companies to report on pay ratios across the company (henceforth pay ratio reporting requirements).

The pay ratio reporting requirements are limited in their scope to 'employees', reflecting the wording of the Companies Act, from which they stem. This means that pay ratios are affected by the employment model used by each company and whether or not the company uses an outsourcing or franchise model. This limits the comparability and utility of the figures that companies report.

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[12] The Companies (Miscellaneous Reporting) Regulations 2018 https://www.legislation.gov.uk/uksi/2018/860/contents/made

This was highlighted in the High Pay Centre's analysis of the first year of pay ratio reporting, which noted that "The exclusion of indirectly employed workers - coupled with the lack of data on pay for employees below the lower quartile threshold - is a weakness of the disclosures. Many commonly outsourced roles are in low-paid occupations, so their omission will have a significant impact on the recorded pay ratio in many cases."[13] The analysis points to the difference in CEO to lower quartile pay ratios between BP at 543:1 and Shell at 147:1 as an example of this, suggesting that Shell's use of a franchise model for its petrol stations and consequent exclusion of these workers from its pay ratio calculation, even though the petrol stations are Shell branded, is part of the reason for the significant difference between the Shell and BP pay ratios[14].

Several construction companies report median pay as significantly higher than levels suggested by Unite as a typical rate of pay for a construction worker within the NVQ level 2 band that covers the largest number of workers in the sector. This reflects the fact that sub-contracting is endemic in the construction sector so construction companies are not reporting on the pay of many – and perhaps the majority – of workers on their construction sites.

Companies should be responsible and accountable for their whole workforce

There is increasing recognition that stakeholder relationships are a key element of company performance and that this must be reflected in corporate governance requirements. In a significant departure from the previous version, the 2018 Corporate Governance Code emphasises company purpose, creating value for society as well as shareholders and relationships with stakeholders and shareholders in its opening principles. The Code also places much greater emphasis on relationships with the workforce, reflected in Principle E:

"The board should ensure that workforce policies and practices are consistent with the company's values and support its long-term sustainable success. The workforce should be able to raise any matters of concern."[15]

There are further provisions (5 and 6) on engagement with the workforce and enabling the workforce to raise issues of concern. The Code refers to 'workforce' rather than 'employees' throughout.

The Wates Corporate Governance Principles for Large Private Companies, published by the Financial Reporting Council in 2018 are the first set of corporate governance principles for private companies in the UK. Again, the Wates Principles refer to 'workforce' rather than 'employees' throughout. The introduction highlights the reporting regulations that provide part of the background to the Principles, noting that the regulations refer to 'employee', while the Principles have explicitly adopted the term 'workforce'.

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[13] Rachel Kay and Luke Hildyard, Pay Ratios and the FTSE 350 An analysis of the first disclosures, High Pay Centre, December 2020 https://highpaycentre.org/pay-ratios-and-the-ftse-350-an-analysis-of-the-first-disclosures/

[14] ibid, p16

[15] Financial Reporting Council, The UK Corporate Governance Code, July 2018 https://www.frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code

It is time to close this gap. Company law has fallen behind the times and should be amended to reflect the modern labour market and the significant variation in employment models that companies have chosen to develop and use.

Section 172 of the Companies Act is perhaps the most well-known part of the Act and is often quoted as illustrating the legal responsibility of company directors to take account of stakeholder interests in their decisions. It is right that companies should be required to take account of stakeholder interests, but this principle is fundamentally undermined if workers who contribute to the products or services or operations but who are not directly employed by them are excluded. This omission creates a loophole that allows companies to exclude consideration of workers who are contributing directly to the profitability and success of the company from their decision-making.

In recent years there has been increased interest from a wide range of constituencies, including investors, unions, civil society and business organisations, in improving standards of corporate reporting on workforce issues. A selection of initiatives are set out below:

- In 2015, the Pensions and Lifetime Savings Association (PLSA) published a report "Where Is the workforce in corporate reporting – An NAPF discussion paper"[16], which argued that investors need more information about the workforce of the companies in which they invest. Following this, the PLSA developed Understanding the worth of the workforce: a stewardship toolkit for pension funds.[17]
- In 2017 the Investment Association published its "Long Term Reporting Guidance", which includes discussion of a company's approach to human capital management and the link with productivity[18].
- ShareAction has brought together a coalition of investors to launch a Workforce Disclosure Initiative, which asks companies to provide information on key workforce issues.[19] The indicators included draw on the work of the Committee for Workers Capital.
- The Committee on Workers' Capital (CWC), an international union network on responsible investment, published "Guidelines for the Evaluation of Workers' Human Rights and Labour Standards"[20], a comprehensive set of key performance indicators (KPIs) for investors to evaluate companies' performance on labour issues.

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[16] NAPF Where is the workforce in corporate reporting An NAPF discussion paper 2015 https://www.plsa.co.uk/Policy-and-Research/Document-library/Where-is-the-workforce-in-corporate-reporting-An-NAPF-discussion-paper (The PLSA was at that time called the National Association of Pension Funds or NAPF)

[17]PLSA Understanding the worth of the workforce A stewardship toolkit for pension funds 2016 https://www.plsa.co.uk/Policy-and-Research/Document-library/Understanding-the-worth-of-the-workforce-a-stewardship-toolkit-for-pension-funds

[18] The Investment Association, The Investment Association Long Term Reporting Guidance May 2017 https://www.ivis.co.uk/media/12519/Long-Term-Reporting-Guidance.pdf

[19] See https://shareaction.org/wdi/ for more information.

[20] Committee for Workers Capital, Guidelines for the Evaluation of Workers' Humn Rights and Labour Standards, May 2017 http://www.workerscapital.org/images/uploads/CWC_Guidelines-Workers'%20Human%20Rights%20and%20Labour%20Standards_final_May17(1).pdf

- The CIPD in 2018 produced a report "Hidden Figures How workforce data is missing from corporate reports"[21], which highlights inconsistent and poor-quality reporting on workforce issues in FTSE 100 companies.

In addition, in 2017 the government-commissioned *Taylor Review of Modern Working Practices*[22] called for companies to be open about their working practices, arguing that "Businesses should be more transparent about the structure of their workforces, so that consumers, shareholders and workers can take informed decisions." It recommended that companies should be required to report on their employment model and include information about zero hours and agency workers. Implementing these recommendations requires legislation that will not be possible without amendments to the Companies Act, because the necessary reporting requirements would be beyond the scope of regulations that can be drawn from the existing Act.

The lack of information on companies' employment model makes company reports incomplete, creating risks for all stakeholders. Many investors lost considerable sums as Boohoo's share price dived, following revelations in the Sunday Times[23] about abuse in the company's supply chain. Had more information about the extent of sub-contracting within its supply chain been included in Boohoo's reports, all stakeholders would have been better informed about the risks of holding shares or undertaking other engagements with the company. And perhaps the significant abuse of working people that the Sunday Times' investigation revealed would have been avoided.

It is necessary and urgent that the Companies Act is amended to close what is effectively a loophole that allows companies legally to exclude from their reporting workers contributing directly to their products and services but not directly employed by the company.

Amending directors' duties and reporting requirements

The references that are most important to the TUC's concerns are Section 172 Duty to promote the success of the company, Section 411 Information about employee numbers and costs and chapter 4A Strategic Report.

Section 172 currently requires directors to "*have regard (amongst other matters) to…(b)"the interests of the company's employees*".

Under our proposal, directors would be required to "*have regard (amongst other matters) to…(b)"the interests of the company's workforce*".

[21] CIPD, Hidden Figures How workforce data is missing from corporate reports 2018 https://www.cipd.co.uk/knowledge/strategy/governance/hidden-figures-workforce-data
[22] Good Work: The Taylor Review of Modern Working Practices, July 2017 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf
[23] Vidhathri Matety Boohoo's sweatshop suppliers: 'They only exploit us. They make huge profits and pay us peanuts' Sunday Times 5 July 2020 https://www.thetimes.co.uk/article/boohoos-sweatshop-suppliers-they-only-exploit-us-they-make-huge-profits-and-pay-us-peanuts-lwj7d8fg2

Section 411 "*Information about employee numbers and costs*" would become "*Information about workforce numbers and costs*" under our proposal. There are some consequent amendments that would follow.

Section 414A currently requires directors to prepare a strategic report for each financial year. Section 414C Contents of the strategic report includes the requirement that

"(4)*The review must, to the extent necessary for an understanding of the development, performance or position of the company's business, include—*

(a)analysis using financial key performance indicators, and

(b)where appropriate, analysis using other key performance indicators, including information relating to environmental matters and employee matters."

Under our proposal, Section 414C 4(b) would be changed to

"(*b)where appropriate, analysis using other key performance indicators, including information relating to environmental matters and workforce matters*."

Section 414C (7) sets out additional requirements for quoted companies:

"(7)*In the case of a quoted company the strategic report must, to the extent necessary for an understanding of the development, performance or position of the company's business, include—*

(a)the main trends and factors likely to affect the future development, performance and position of the company's business, and

(b)information about—

(i)environmental matters (including the impact of the company's business on the environment),

(ii)the company's employees, and

(iii)social, community and human rights issues,

including information about any policies of the company in relation to those matters and the effectiveness of those policies."

Under our proposal, Section 414C (7)(b)ii would be amended to

"(ii)the company's workforce…"

The TUC has also examined the many other references to 'employee' throughout the Companies Act. With the possible exception of references to 'employee share schemes', we believe replacing 'employee' with the word 'workforce' or in cases where the reference is to an individual, to 'a member of the workforce', would work.

Definition of workforce

Using the word "workforce" in the Companies Act would require a definition to be included in the Act. It is our view that the Companies Act definition should be broad and inclusive. At the moment, secondary regulation that takes its force from the Companies Act is limited by the wording of the latter. However, it is always possible for secondary legislation to be more specific than the primary law from which it stems, so if there is a need for greater specification in particular circumstances, this could be addressed in subsequent secondary regulation.

The Wates Principles use the following definition:

"Workforce' will involve those with formal contracts of employment (permanent, fixed-term and zero-hours) and other members of the workforce who are affected by the decisions of the board, so for example companies should consider including individuals engaged under contracts of service, agency workers and remote workers. Companies should be able to explain who they have included and why."[24]24

The Companies Act definition of 'workforce' should include all those whose work is contributing to a company's products or services or operations, or maintaining the buildings, transportation and other infrastructure that supports this, on a regular or ongoing basis. In addition, all those whose work contributes to a company's products or services or operations, or maintaining the buildings, transportation and other infrastructure that supports this, on a one-off, but substantial basis, should also be included.

This would normally include those in the following non-exhaustive categories:

a) employees and workers of the company, whether on permanent, temporary, zero or short hours contracts;

b) outsourced workers who work regularly on the company's premises or infrastructure (for example cleaning or catering or staff with a contract to maintain IT or finance systems);

c) workers employed via a franchisee who work on premises with company branding (for example, staff employed via a franchise working at a hotel with company branding);

d) workers employed via a sub-contractor to work on a company's products or services or maintain buildings, transportation and other infrastructure, on a one-off, but substantial basis (for example, staff making products with company branding on a sub-contracted basis).

A possible definition of workforce could be "people who provide work, directly or indirectly, for the company" (or indeed this could be used instead of 'workforce' to replace 'employees' throughout the Companies Act).

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[24] Financial Reporting Council, The Wates Corporate Governance Principles for Large Private Companies, December 2018, p14 https://www.frc.org.uk/directors/corporate-governance-and-stewardship/governance-of-large-private-companies

Proposal 2: Reform directors' duties to remove shareholder primacy

The TUC believes that directors' duties should be amended to remove the priority currently given to shareholders.

The TUC believes that shareholder primacy contributed directly to the collapse of Carillion. The company paid dividends to shareholders every year until the summer of 2017. In 2012, the company's cash flow became negative, but despite this, dividend payments went up each year, despite the ups and downs of the company's cash income. From 2012 to 2016 - during which the company was cash negative in 2012, 2013 and 2016 - Carillion paid out £376 million in dividend payments, while generating only £159 million in cash. In 2016, when Carillion lost £38 million in cash, the company paid its highest ever level of dividends of £78.9 million[25].

If the board had decided to pay no dividends from 2012, the company would, everything else having been equal, have been £375 million better off in the summer of 2017 and better able to withstand the financial pressure it was under. In addition, the fact that dividend payments were not only paid but rose year on year contributed to investors (and others) failing to realise that the company was facing severe financial problems. Inadvertently, or not, it acted as a disguise for the company's situation.

This is not a rare or one-off situation. A report by the TUC and High Pay Centre[26] examined dividends, share buybacks and net profits for the FTSE 100 from 2014 – 2018 inclusive. We found that in 27% of cases, returns to shareholders were higher than the company's net profit, including 7% of cases where dividends and/or buybacks were paid despite the company making a loss. In 2015 and 2016, total returns to shareholders came to more than total net profits for the FTSE 100 as a whole. Shareholder primacy squeezes the resources left for wages: returns to shareholders grew by 56% over the period, growing nearly seven times faster than the median wage for UK workers, which increased by just 8.8% (both nominal).

The research also found that profits varied significantly more than returns, with profits ranging more than twice as much as returns over the period. This contradicts the idea that shareholders are exposed to the greatest risk of all business stakeholders, as it suggests that they can expect consistent returns, regardless of profitability.

The priority given to shareholders in corporate governance is often justified by the argument that shareholders carry the greatest risk in relation to company performance. This argument is belied by the reality. Institutional shareholders hold highly diversified portfolios

[25] See figures in 'The Collapse of Carillion' House of Commons Library Briefing Paper Number 8206, 14 March 2018 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8206#fullreport
[26] TUC and High Pay Centre, How the shareholder-first business model is contributing to inequality A briefing note from High Pay Centre, and the TUC, 2019 https://www.tuc.org.uk/research-analysis/reports/how-shareholder-first-business-model-contributing-inequality

with shareholdings in hundreds, if not thousands, of companies across different geographies precisely to spread their risk. Workers, on the other hand, invest their labour, skills and commitment in the company they work for, and cannot diversify this risk. Few workers can simply walk from one job into another and if their company fails for any reason workers and their families pay a heavy price – the loss of employment and income, skills, confidence and health that this can bring.

The priority given to shareholder returns also hampers investment in R&D. Research for the Bank of England found that the most important reason for under-investment was a constraint on using profits for investment purposes, with three quarters of firms rating distribution to shareholders (including dividends and share buybacks) and purchase of financial assets (including mergers and acquisitions) ahead of investment as the most important use of internally generated funds. Strikingly, 80 per cent of publicly owned firms agreed that financial market pressures for short-term returns to shareholders had been an obstacle to investment[27]. This demonstrates how the role of shareholders in the UK's corporate governance system contributes to under-investment and short-termism.

To address shareholder primacy, the TUC proposes that directors' duties should be reformulated so that company directors are required to promote the long-term success of the company as their primary aim. Through the long-term success of the company, the interests of other key stakeholders, including workers and long-term shareholders, would also be served. Directors should be required to have regard to the interests of shareholders, alongside those of workers and the other stakeholder groups already included in section 172 of the Companies Act.

The current wording of section 172 of the Companies Act is set out below, followed by the TUC's suggested rewording, which is based on the existing wording of section 172 with minor amendments.

Section 172 Duty to promote the success of the company:

"(1) A director of a company must 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, and in doing so have regard (amongst other matters) to —

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment..."

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[27] Sir Jon Cunliffe, Are firms underinvesting – and if so why? Speech to the Greater Birmingham Chamber of Commerce, 17 February 2017 https://www.bankofengland.co.uk/-/media/boe/files/speech/2017/are-firms-underinvesting-and-if-so-why.pdf?la=en&hash=96588BB2D1AEEA1C13C0E2E159962B2B3E505DD4

TUC proposal:

"A director of a company must act in the way s/he considers, in good faith, would be most likely to promote the long-term success of the company, and in so doing, should have regard to the need to:

i. deliver fair and sustainable returns to investors

ii. promote the interests of the company's workforce

iii. foster the company's relationships with suppliers, customers, local communities and others, and

iv. take a responsible approach to the impact of the company's operations on human rights and on the environment..."

Proposal 3 Worker directors on company boards

The TUC has set out the case for worker directors and our proposals for implementation in detail in *All Aboard Making worker representation on company boards a reality*[28]. We will set out in brief why this proposal is relevant to this consultation.

As argued above, poor-quality decision-making by the Carillion board was a major factor in the company's collapse. The minutes of board meetings leading up to the company's collapse gives the impression that the board were more focussed on trying to reassure internal and external stakeholders than in addressing the company's problems. For years, the company had taken on increasing levels of debt, developed a highly complex corporate structure with over 300 subsidiaries and bid for contracts at margins which were too low to be sustainable. This record does not reflect well on the directors who served on the Carillion board over that period.

In addition to addressing the priority given to the interest of shareholders, reforming board composition is also important to change the culture and priorities of the boardroom and improve the quality of board decision-making.

There is strong evidence that more diverse boards make better decisions. The TUC supports measures to promote greater gender and ethnic diversity on boards.

We also believe that measures to include workers directors on company boards would improve the quality of broad decision-making in the UK. Worker directors would bring people with a very different range of backgrounds and skills into boardrooms, helping to challenge 'groupthink'. It is clear from the minority of UK companies with worker directors

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[28] TUC, 2016 All Aboard Making worker representation on company boards a reality https://www.tuc.org.uk/research-analysis/reports/all-aboard-making-worker-representation-company-boards-reality

and from evidence from countries where worker directors are common that bringing the perspective of an ordinary worker to bear on boardroom discussions is particularly valued by other board members.

Workers have an interest in the long-term success of their company and their participation would encourage boards to take a long-term approach to decision-making. They would bring direct experience to bear on the important area of workforce relationships, a key area for company success.

However, the arguments for worker directors go beyond the impact on board-decision making, important though that it. It is also a matter of justice: of all company stakeholders, the workforce is generally the most affected by the priorities and decisions of company boards. It is a matter of justice and democracy that they should have a voice in those decisions.

Worker directors are the norm across most of Europe. In 19 out of 27 EU Member States plus Norway (i.e. 19 out of 29 European countries) there is some provision for workers' representation on company boards, and in 13 of these countries the rights are extensive in that they apply across much of the private sector.

Countries with strong workers' participation rights perform better on a whole range of factors, including R&D expenditure and employment rates, while also achieving lower rates of poverty and inequality[29].

In the UK, the 2018 Corporate Governance Code now includes provisions on engagement with the workforce, with worker directors one of the options included. However, only four companies to date have chosen to comply with the Code by appointing worker directors (making a total of five, as the FTSE 250 company FirstGroup plc has had an employee director since the company's inception in 1989).

A report[30] published by the Financial Reporting Council on how companies have implemented the new provisions on workforce voice found that where worker directors have been appointed they are valued and working well.

The TUC believes that elected worker directors should comprise one third of the board at all companies with 250 or more staff.

[29] Sig Vitols (2010), available at http://www.worker-participation.eu/About-WP/European-Participation-Index-EPI

[30] Chris Rees and Patrick Brione, Workforce Engagement and the UK Corporate Governance Code: A Review of Company Reporting and Practice May 2021 https://www.frc.org.uk/getattachment/56bdd5ed-3b2d-4a6f-a62b-979910a90a10/FRC-Workforce-Engagement-Report_May-2021.pdf

Consultation questions

Question 1

The TUC strongly agrees that large private companies should be included in the definition of a Public Interest Company or PIE. This is because there are many other stakeholders, notably the workforce, suppliers, local communities and customers, who are affected by company performance and failure. The workforce and small suppliers are particularly badly hit by company failure.

Question 2

The TUC believes that the primary determination of company size should be workforce numbers. We are therefore more attracted to the threshold of 500 workers given in option 2 than the threshold of 2,000 workers in option 1.

However, we are also concerned that option 2 would cover less companies (and possibly less workers in total). While we understand the desire to align the proposals with existing thresholds, we do not believe that this should prevent the development of a threshold that is most appropriate for this purpose. A new threshold could be introduced in a phased manner, allowing companies time to adapt. We would therefore propose that options 1 and 2 are combined so the threshold of 500 workers is combined with the turnover/balance sheet specification of option 1 to create a new definition of:

- over 500 employees, or
- a turnover of more than £200 million and a balance sheet of more than £2 billion.

It is very important that the whole workforce and not just directly employed employees are counted for the purposes of PIE designation. The employment footprint of Carillion extended to tens of thousands of workers employed through a complex web of sub-contractors, but its directly-employed staff was much smaller. As shown by the examples of Carillion and more recently Boohoo, companies that use extensive sub-contracting and complex supply chains often carry particular risks and it is important that their wider employment footprint is taken into account in terms of PIE designation.

This submission has set out in proposal 1 (pages 2 - 14) that the word 'employee' should be replaced by 'workforce' throughout the Companies Act. This is critical to ensuring that the PIE definition is based on a company's genuine employment footprint, rather than being skewed by its employment model. Excluding non-employees from the PIE calculation would have the perverse effect of excluding companies whose business model created greater likelihood of risk.

Questions 3 – 8

The TUC believes that it is the economic and social impact of the organisation, rather than the type of organisation, that should determine their inclusion in the PIE definition. In all cases, the size of the workforce should be a key factor.

Question 10

The definition of PIE that is established will have a long-term impact on the regulation and oversight of companies (and potentially other organisations) going forwards. It is more important that the right thresholds to ensure an appropriate level of scrutiny are set, even if this requires more time for implementation.

Question 11

As set out under question 2 above, the TUC would support the introduction of a new definition of PIE that combined the lower figure of 500 workers from option two with the turnover/balance sheet threshold of option 1. We believe that phasing could be helpful to allow companies time to prepare for this.

Questions 12 – 14

The TUC recognises the importance of strengthening internal audit and controls.

We are not commenting in detail on the proposed options, but have some overall comments on the proposals.

We strongly believe that reform should be taken forward through legislation, rather than through the Corporate Governance Code. It is important that private companies, as well as listed companies, should be covered by strengthened internal audit requirements. Other than shareholders, private and listed companies have the same stakeholder relationships and wider economic and social impacts, and it would be inappropriate to differentiate between them on this issue.

The illustrative factors set out in Table 1 should include corporate complexity and the use of subsidiaries and sub-contracting within a company's business model. In the case of Carillion, it seems highly likely that very few people, if any, understood properly the financial situation of the company or had an overall grasp of its operations. One reason for this was its highly complex corporate structure, operating through numerous subsidiaries and using lengthy sub-contracting chains through which operations were carried out. These are clear risk factors for the effectiveness of internal controls and should be included in terms of assessing whether companies should follow a strengthened internal audit regime.

Question 15

The TUC disagrees that the current rules on dividend payments have operated effectively and prevented excessive dividend payments (2.2.4).

The TUC and High Pay Centre carried out research on shareholder returns by the FTSE 100 between 2014 and 2018 inclusive[31] (referred to on page 15 above). This research found that across the FTSE 100 as a whole, returns to shareholders increased by 56%, despite net income as a whole falling by 3% over the period.

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[31] TUC and High Pay Centre, How the shareholder-first business model is contributing to inequality A briefing note from High Pay Centre, and the TUC, 2019 https://www.tuc.org.uk/research-analysis/reports/how-shareholder-first-business-model-contributing-inequality

In 27% of cases, returns to shareholders were higher than the company's net profit, including 7% of cases where dividends and/or buybacks were paid despite the company making a loss. In 2015 and 2016, total returns to shareholders came to more than total net profits for the FTSE 100 as a whole. The research also found that profits varied more than twice as much as dividends, which remained more consistent from year to year. This shows that many companies pay dividends even when not justified by company performance and that decisions on dividends are influenced by other considerations (such as maintaining the company's share price).

This has a direct impact on the resources left for other spending. While FTSE 100 returns to shareholders rose by 56%, the median wage for UK workers increased by just 8.8% (both nominal). If pay across the UK economy had kept pace with shareholder returns, the average worker would have been over £9,500 better off.

Research from the Bank of England cited above (page 16) shows that the priority companies place upon payments to shareholders contributes to under-investment. Low pay and underinvestment both undermine long-term sustainable company success.

The TUC supports the regulator having stronger responsibilities for defining what should constitute profit and loss and what can legally be paid out in dividends. Much greater emphasis should be placed on the role of cash and debt in a company's balance sheet than is currently the case. It is important that share buybacks are included so that the rules take account of shareholder returns as a whole.

The TUC proposes that the rules should require that companies set out the rate of increase of shareholder returns over the previous year and the previous five years against the rate of increase for staff pay (that is, pay rises as experienced by individual staff, not as an aggregate) over the previous year and the previous five years.

Question 16

The TUC supports in principle new distributable profit reporting requirements.

The new requirements should give clear guidance on the use of concepts like 'goodwill' and other subjective accounting concepts of intangible value. It is essential that companies cannot hide behind these subjective concepts to inflate profitability and hide problems of cashflow, as was the case with Carillion.

Question 17

The TUC supports the proposal that directors should be required to make a statement on dividend levels, their effect on the future solvency of a company, and how the proposed dividend payments have taken account of matters to which directors must have regard under Section 172.

Companies should be transparent about the distribution of company revenues to different stakeholder groups. As argued above, we believe that companies should be required to report on the relative rates of increase of shareholder returns and wage levels.

Question 18

We do not agree that the current reporting requirements are sufficient to ensure that companies are transparent about how company resources are distributed between different stakeholder groups. As argued above, companies should be required to report on the rate of increase in returns to shareholders in relation to wage levels.

Question 19

It is not clear that a Resilience Statement based on the factors set out in 3.1.13 alone would have been sufficient to draw attention to the vulnerability of Carillion in the months and years leading up to its collapse.

Additional factors should be drawn up that would cover:

- threats to liquidity, solvency and business continuity in response to existing contracts failing to deliver sufficiently high revenues (Carillion's business model was based on expansion and in winning new contracts to bring in revenues, thus compensating for the poor performance of its existing contracts);
- the relationship between the company's subsidiaries in terms of cross-subsidisation and the resilience of different parts of the business in the face of the potential failure of others (Carillion operated through hundreds of subsidiaries which made the company's operations and finances much more complex to manage and understand – yet this corporate structure offered no protection to the subsidiaries when the company collapsed);
- corporate complexity and the use of long chains of sub-contractors, which both creates risk in terms of effective management and then passes risk down the contracting chain; and
- the use of employment models based on outsourcing, employing people through third parties and insecure employment relationships such as zero hours contracts, which pass risk down to low paid and vulnerable workers.

Question 20

We believe that the Resilience Statement could be an appropriate vehicle for TCFD reporting.

Question 21

We strongly support requiring both private and listed PIEs to provide a Resilience Statement. Phasing in the requirement for some categories is acceptable to facilitate this.

Questions 25 and 26

The TUC supports improved reporting on supplier payments and agrees that it is appropriate for this to fall within the audited part of the annual report. Prompt payment of suppliers is both critical for the interests SMEs and other suppliers and is also an indicator of company performance and resilience. The minority of shareholders who noticed that Carillion was starting to struggle financially were alerted by its late payments of suppliers.

This is not an onerous obligation and we believe it should apply as widely as possible and at a minimum to all PIEs.

Question 28

The TUC agrees that the regulator's corporate reporting review powers should cover the whole of the annual report.

It is also important that the regulator is open to complaints from all company stakeholders and on all aspects of the annual report. There is a tendency for some elements of the annual report to be written with a view to presenting a positive picture, rather than accuracy. Company stakeholders and the general public should be able to rely on all elements of the annual report and the regulator must take seriously evidence of inconsistencies or errors that are brought to its attention across all of the disclosures.

We have some concerns that making brevity an explicit aim of the reporting framework will in practice act to blunt the aims of comprehensibility and usefulness. For information to be useful, it must be sufficient in its scope as well as clear. Brevity does not necessarily make something easier to understand, and encouraging brevity may fuel the tendency that exists in particular in relation to some narrative reporting to pick and choose information with a view to presenting an overly positive picture. The reporting framework should include a reference to the information provided being sufficient in scope to provide clarity and useability.

Question 32

We would support directors of PIEs being required to meet behavioural standards of honesty and integrity in relation to corporate reporting and audit. This should cover all of the annual report. This would help foster a focus on accuracy and balance in reporting, rather than the selection of information being influenced by the desire to create an overly positive impression.

This requirement should be extended to the directors of all large companies, not just PIEs.

Question 33

We would support the proposed enforcement powers being made available to the regulator in respect of breaches of directors' duties. This should include all directors' duties, including Section 172. Section 172 and is the only part of the Companies Act that sets out directors' responsibilities towards company stakeholders is widely considered to be one of the most important parts of the Act. However, it is effectively unenforceable, other than by minority shareholders, which means that while it retains symbolic value it lacks force in terms of determining corporate priorities and behaviour. An enforcement regime would add significant force to the requirements set out in Section 172. Please see our answer to question 98 for additional comments on this.

Please see also our Proposal 2 on pages 15 – 17 of this submission, which is relevant to this issue.

Question 34

The TUC broadly agrees with the proposal to extend malus and clawback provisions. However, we are not convinced that they are particularly effective in deterring poor judgement and behaviour. Rather, the government should act to reform directors' duties to require directors to promote the long-term success of the company as their primary aim and require that one third of board members are election worker directors, whose participation would encourage boards to focus on strategies for long-term, sustainable company success. Please see proposals 2 and 3 in this submission (pages 15 – 18) for further details on this.

The bullet 'unreasonable failure to protect the interests of employees and customers' should be replaced by 'unreasonable failure to protect the interests of the workforce, suppliers and customers and to protect human rights and the environment'. Please see proposal 1 in this submission (pages 3 – 14) for further details on the importance of using the word 'workforce', rather than 'employees'.

Question 35

We are broadly supportive of the proposal that statutory audit should require the consideration of wider information and director conduct. It is important that this broad aim is not lost in the detail of the detailed standards that it is envisaged would be created by the regulator to assist this.

Question 40

We are broadly supportive of the proposal for an overarching and enforceable set of principles for corporate auditing and agree that those proposed by the Brydon Review provide a good starting point. We would welcome a more explicit reference to having regard to the interests of company stakeholders as well as the wider public interest and would propose an additional principle that auditors should consider any information received from company stakeholders.

Question 43

We do not believe that the proposed duty to consider wider information and director conduct will be sufficient to encourage auditors to consider whether the company's Section 172 statement reflects "observed reality". The proposed duty to consider wider information and director conduct is very broad and does not specify what sort of information or conduct should be examined.

We would in principle welcome consideration of Section 172 statements by auditors but have some concerns about possible unintended consequences at this time. Section 172 statements are still relatively new, and there has been significant variation in their quality, with some much more useful and informative than others. It is not clear how auditors could make a useful judgement on the extent to which some of the briefer and more boilerplate statements reflect "observed reality" and there is a risk that making vague statements could make it harder for the auditor to throw doubt on the statements' veracity.

The TUC would propose that rather than focussing solely on the Section 172 statement, auditors should be required to highlight any concerns that they have about possible breaches of Section 172, based on all the information and experience of the company that they have access to.

In addition, the TUC would welcome steps to improve the quality and veracity of Section 172 statements. We suggest that the government or ARGA should draw up proposals to promote this, drawing on wide consultation and another one or two years of Section 172 statements. This should include consideration of the role of auditors in relation to Section 172 statements.

Question 64

The TUC is sceptical that the proposals for operational separation between audit and non-audit functions at the major audit firms will be effective in tackling conflicts of interest in audit practice. While non-audit work continues to bring in revenue for the firms – and especially while non-audit work brings in the greater share of overall revenue – there will continue to be an inherent conflict of interest in carrying out audit work created by a potential disincentive to appear critical of company practices in the audit report. We believe that complete separation of audit and non-audit business would have been a more effective measure.

Question 74

We support the inclusion of a broad public interest objective and the reference to corporate reporting, rather than financial reporting, within ARGA's objectives. However, we believe that the draft objective should be revised to address some important omissions.

The objective as drafted emphasises ARGA's reporting functions only and makes no reference to ARGA's role in relation to corporate governance. This is a serious omission. ARGA will continue to be responsible for the Corporate Governance and Stewardship Codes, which play a central role in the UK's overall corporate governance system. Corporate governance is critical in determining the social and economic performance of companies going forwards, while good quality reporting is focused on accurately representing past experiences. Good quality reporting can help to inform decisions about future strategies, but this is dependent on companies having effective corporate governance systems in place, including in terms of board composition, culture, policies and practice. Making no reference to corporate governance sends the wrong signal to companies and their stakeholders and to ARGA itself about its role, and we strongly urge that ARGA's overall objective should make specific reference to corporate governance.

In addition, there is no reference to company stakeholders other than shareholders and 'other users of corporate reporting'. This is another important omission. It is through their impacts on stakeholder groups, in particular the workforce, local communities, suppliers and customers, that companies effect the broader public interest. In recent years, there has been much greater recognition of the importance of stakeholder relationships and impacts to corporate governance and this is reflected in the 2018 Corporate Governance Code. It was the impact on the workforce that created the greatest public concern in relation to the corporate failures which led to the reviews that preceded this consultation. Again, it sends the wrong signal to companies, their stakeholders and to ARGA that company stakeholders are not explicitly referred to in ARGA's objectives, and we urge that this should be addressed.

Question 75

As set out in response to question 28 above, the TUC has reservations about giving ARGA an explicit duty to promote brevity in corporate reporting. We are concerned that promoting brevity will be prioritised over clarity and usefulness, especially as brevity is the first of these to be mentioned. Brevity does not necessarily make something easier to understand, and encouraging brevity may fuel a tendency to pick and choose information with a view to presenting an overly positive impression. We would suggest that 'brevity' should be replaced by a reference to corporate reporting being sufficient in scope to provide clarity and useability.

The proposed duties for ARGA are too narrow and omit any reference to company stakeholders. This is a step backwards, given the moves the FRC has made in recent years to recognise the importance of stakeholder relationships within corporate governance, reflected in the 2018 Corporate Governance Code and by the establishment of its Stakeholder Advisory Committee. We believe that ARGA should have an explicit duty to promote corporate governance and audit practices that promote positive and sustainable stakeholder relationships and that help companies to deliver success for the benefit of all of their stakeholders.

We believe that ARGA should have an explicit duty to keep corporate governance policies (including Codes and guidance as well as legal requirements) and practice under review. It should be required to report periodically (perhaps every three or five years) on whether there are areas where it believes that improvement are needed. This expands on Kingman's proposed function 1 set out in Table 4.

As well as working closely with regulators, ARGA should be required to work closely with groups/organisations representing stakeholders whose interests are affected by corporate practice. (It should be noted that the reference in Table 4 to "other users of financial information" does not cover this, as company stakeholders are affected more by corporate practice that stems from corporate governance systems than by their direct use of financial information.)

Question 79

The TUC would support the creation and enforcement of a code of ethics that would apply to members of the chartered bodies and believe that there is a case for its wider application. We believe the creation of a code of ethics would help maintain a focus on addressing conflicts of interests in order to protect the wider public interest within audit work and among auditors.

Question 84

We are concerned that making principles-based standards legally binding could lead to actuarial work becoming less focused on the needs of the users and more box-ticking in nature.

Question 94

In addition to the matters proposed, the TUC believes that auditors should have to report to the regulator if they have concerns about the veracity of information provided by the company or the motivations of those providing it. This might not be provable, but the notification would enable ARGA to increase its scrutiny of the company's reports and undertake other investigatory steps as appropriate.

Question 95

It seems sensible for auditors to receive statutory protection from breach of duty claims in relation to relevant disclosures made in good faith to the regulator.

Question 97

We would support the regulator being able to publish a summary of the expert reviewer's report where it considers it to be in the public interest.

However, we believe that restricting the regulator's power to require an expert review to situations where the regulator has identified concerns as to whether a public interest entity's corporate reporting and audits comply with requirements enforced by the regulator is too narrow. We propose that the regulator should be able to require an expert review if there are significant concerns about a PIE's corporate governance practices, given the importance of corporate governance to sustainable corporate performance.

Question 98

Are there any additional powers that you think the regulator should have available where an expert review identifies significant non-compliance by a company in relation to its corporate reporting and audits?

As argued in response to questions 75 and 97 above, we believe that there is an insufficient focus on corporate governance in the proposals. We believe that ARGA should have an explicit duty to keep corporate governance and practice under review and should report periodically on recommendations for improvements. We believe that this would help to promote high standards of corporate governance and corporate behaviour.

Linked to this, we propose that ARGA should have a role in upholding standards of practice commensurate with directors' duties as set out in section 172 of the Companies Act.

Great weight is put on Section 172 of the Companies Act in setting out companies' responsibilities towards their stakeholders. But it is extremely difficult to enforce, and, with the exception of minority shareholders, is not enforceable at all by the groups whose interests it is designed to protect.

The TUC proposes that ARGA should be given responsibility for developing an oversight system for directors' duties and convening a suitable panel of stakeholder representative groups to assist in this process.

Additional comments

Stakeholder representation on ARGA's board

The key debates in corporate governance over recent years have concerned the interests and representation of stakeholders.

As the body responsible for corporate governance regulation, ARGA's board should reflect this by including company stakeholder groups on its board so that those affected by companies and contributing to company success contribute to its discussions.