SIMPSON GRIERSON

Directors' duties

A practical guide to board judgement and risk



About this guide

This guide is written for directors, not lawyers. It is designed to help boards make better decisions, ask better questions and recognise when legal risk is increasing. It is intentionally practical and commercially focused. It does not replace specific legal advice.

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Introduction

Directorship is not a ceremonial role. Boards are expected to exercise judgement on strategy, risk, capital allocation, culture, integrity, compliance and performance. In ordinary times, that requires disciplined oversight.

Directors are responsible and accountable for responding to this expectation and, in harder times - financial stress, regulatory scrutiny, failed controls, cyber events, climate exposure, activist pressure or rapid technology change - the quality of the board's process can come under intense examination.

This guide explains the main directors' duties in New Zealand in clear terms, but with a practical focus. It is intentionally written to help directors understand what the law expects, what tends to go wrong in practice and what a high-performing board does differently.

The real skill and challenge is in applying the duties in real time, with imperfect information, competing interests and commercial pressure.

Key takeaways for directors



Your duties are owed to the company, but how those duties are applied can shift materially when the company is in financial stress. A stakeholder lens is important.



Liability for a director is rarely determined only on the outcome. The board's process - the quality of information, challenge, judgement and records - is often decisive.



Good governance is not a compliance or 'tick the box' add-on. It is the board's main defence against legal, regulatory and reputational exposure.



Conflicts of interest remain one of the most common situations that can give rise to actual or perceived breach because they can distort judgement and undermine process.



Seek advice - extensively, if needed - whether from management or advisers. Ask questions, test the advice and understand it thoroughly.



Insurance matters, but it is not a substitute for disciplined decision making. Understanding coverage, and its limitations, is important.



Boards are expected to engage seriously with modern risk issues, including AI, cyber, climate, conduct and culture - not because they are fashionable, but because they affect the company's strategy, resilience and licence to operate and, ultimately, its prospects.

The role of directors

The board's role is not to run the business day to day. It is to govern the company: set direction, oversee performance, monitor risk, allocate and protect capital, appoint and hold management to account, and ensure the company is run within acceptable legal, ethical and strategic parameters.

Board versus management

A strong board-management split is fundamental. Management is responsible for executing strategy, operating the business and managing within delegated authority. The board is responsible for setting the framework within which management operates and for testing whether management is performing effectively within it.

That division should be clear throughout practice and rules of engagement - in the board charter, delegations and committee terms of reference. Where the division becomes blurred, boards either drift into management or become too distant from the issues that matter. Both create risk.

> ### What effective boards do
>
> They stay out of day-to-day execution but go deep on the matters that significant company performance and resilience: strategy, capital, people, risk, compliance, culture and major transactions.

What good governance looks like in practice

Good governance is not abstract. It is visible in the way the board operates. Board papers are timely and focus on assisting decision-making. Management presents issues candidly, including downside cases. Directors have sufficient time for discussion. Meetings are not rushed. Important decisions are not buried in consent agendas or made off thin papers. Committees add depth, but not confusion. Minutes reflect reasoning, challenge and judgement rather than simply recording resolutions.

Good governance also requires the right structure: an effective chair, a workable board composition, genuine independence where it matters, robust financial and legal oversight, a disciplined risk framework and the ability to escalate involvement when circumstances deteriorate.

Expectations of modern directors

Modern directors are expected to understand the business well enough to challenge with credibility. That includes knowing the company's strategy, profit drivers, capital structure, key regulatory settings, material risks, culture, key stakeholder relationships and performance metrics.

Directors are also expected to be financially literate. They do not need to be accountants, but they must be able to read financial statements, understand cash flow, identify warning indicators and ask informed questions. A director cannot opt out of financial oversight because that is 'not their area'.

Directors cannot ignore emerging issues on the basis that they are new or technical. AI is a current example. Boards are not expected to become AI engineers, but they are expected to understand where AI is being used, what opportunities it creates, what legal and operational risks it introduces, and what governance guardrails are in place. The same is true of cyber risk, climate exposure and other evolving areas of board oversight.

The stakeholder lens

As a matter of legal principle, directors' core duties are owed to the company. That remains the anchor point. But in practice, directors cannot govern effectively without understanding how board decisions affect shareholders, creditors, employees, customers, regulators, counterparties and other stakeholders. Necessarily, stakeholders will also be the ones that hold directors to account.

That does not mean each stakeholder interest must be treated equally, or that the board serves multiple masters. It means the board should understand which stakeholder interests are relevant to the company's long-term performance, risk profile and strategic position. In financial stress, creditors become especially important. In heavily regulated sectors, regulators may materially shape what prudent governance requires. In public-facing companies, reputation and market confidence can quickly become legal and commercial issues.

Checklist: what effective directors do

- Understand the company's business model, strategy, balance sheet and cash profile.
- Read board papers critically and ask for more information where necessary.
- Challenge assumptions, downside scenarios and optimism bias.
- Ensure enough time is available for major decisions.
- Insist on useful management reporting, not volume.
- Recognise when circumstances require external advice.
- Identify and manage conflicts early.
- Escalate attention when performance, solvency, compliance or culture warning signs appear.
- Support strong records of decision-making, including why the board reached the view it did.
- Continue developing capability, including in areas such as financial reporting, sector regulation, cyber and AI.

Directors' legal duties: the practical framework

The Companies Act 1993 (the **Act**) sets out the core statutory duties. In practice, those duties should be read together rather than as isolated rules. A board decision that is legally defensible will usually involve honest judgment, a proper purpose, reasonable information, adequate care and compliance with the Act and the company's constitution. Where the company is or may be insolvent, the position becomes more exacting.

The discussion below focuses on the main duties most relevant to board decision making. For each duty, we explain what it is, where it tends to bite and what it means in practice.

Quick reference: the core duties

Duty and Act reference	Core question	Where boards most often go wrong	Practical focus
Good faith / best interest [s 131]	Was the decision honestly directed to the interests of the company?	Conflicts, personal agendas, failure to engage with relevant risks	Purpose, rationale, alternatives, reasoning, competing priorities
Proper purpose [s 133]	Was the power used for the purpose for which it exists?	Using legal powers to achieve collateral control outcomes	Identify the true purpose of the decision
Care, skill and diligence [s 137]	Did the board act as reasonable directors would in the circumstances?	Passive reliance, inadequate scrutiny, poor papers	Information quality, robust discussion, challenge, process and records
Compliance with Act and constitution [s 134]	Did the board follow the legal and constitutional framework?	Treating technical requirements as administrative detail	Transaction discipline and company secretarial accuracy
Reckless trading / incurring obligations [s 135, s 136]	Is continued trading or new commitment exposing creditors to unacceptable risk?	Delay, hope instead of diligence, weak financial insight, reliance on uncertain support	Frequent financial review, options analysis, external advice

These duties are explored in more detail in the following sections.

Duty to act in good faith and in the best interests of the company

> **Duty**
>
> A director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company. In considering the company's best interests a director may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters)

This is the central fiduciary duty. In practical terms, directors must bring an honest mind to the question of what is in the company's interests and exercise their powers accordingly.

The language of belief matters: the test is focused on what the director actually believed at the time. But that is not an invitation for after-the-event assertion. A court will look at the surrounding facts, the logic of the decision and whether the circumstances support the claimed belief.

The duty is most likely to come under strain where directors have competing loyalties, personal interests, pressure from controlling shareholders, related-party dynamics or a desire to protect their own position. It can also be engaged where a board fails to confront obvious risk factors, for example in relation to financial stress, governance failures or significant emerging risks.

The duty expressly calls out ESG factors as a subset of what can be considered relevant to any decision. The specific language used underpins the fact that the benchmark against which the duty is assessed is what is in the best interests of the company (not other stakeholders).

This duty is the only one where breach attracts a criminal sanction - up to five years' imprisonment or a fine of up to NZ$500,000. This applies if a director acts in bad faith believing his or her conduct is not in company's best interests in circumstances where the director knows the conduct will cause the company serious loss.

What this means in practice



Consider all material risks and opportunities, including ESG factors and balance them as appropriate. While profit maximisation has been traditionally seen as the benchmark, it is recognised that factors which affect longer term prospects and value can be taken into account.



Be explicit about the decision objective and how it connects to the company's interests.



Recognise any competing interests or pressures before the decision is made.



Test whether the board has considered the material facts, foreseeable risks and realistic alternatives.



Make sure the minutes capture the reasoning, not just the result.



Where the company is part of a group or a joint venture, check carefully whether the constitution permits action in a wider group interest and whether the board is actually operating within that permission. See our wholly-owned company supplement to this guide.

Duty to exercise powers for a proper purpose

> **Duty**
>
> A director must exercise a power for a proper purpose.

Even if directors act honestly, they must still use their powers for the purpose for which those powers were conferred. This duty is often overlooked because it is less frequently discussed in ordinary governance settings, but it becomes critical in capital management, control situations and structural transactions.

The classic example is the issue of shares. Directors have power to issue shares, but that power must be used for a proper corporate purpose - typically raising capital or furthering a legitimate commercial objective - not to manipulate voting power, entrench the board or favour one faction over another. Another good example is a refusal to register a transfer.

What this means in practice

- Ask not just whether the board can do something, but why it is doing it.
- Identify the substantial purpose of the decision and record it clearly.
- Be cautious where the decision affects control, dilution, voting outcomes or tactical leverage.
- Obtain legal advice early on capital actions, defensive tactics and significant governance restructures.



Duty of care, skill and diligence

> **Duty**
>
> A director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation the nature of the company; the nature of the decision; and the position of the director and the nature of the responsibilities undertaken by him or her.

This duty requires directors to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances, taking into account the nature of the company, the nature of the decision and the director's role and responsibilities. It is the duty most closely linked to board process.

The law does not require perfection, and courts are generally reluctant to second-guess properly made commercial decisions. But the board must act as a reasonable board would act. That means asking the right questions, understanding what matters, confronting obvious warning signs and not approving major decisions on inadequate information. The standard required of directors goes beyond the core areas of expertise of a particular director and is benchmarked against the standard of a reasonable director. A higher standard would typically apply to a director of a sophisticated company (to match the applicable needs of that company), but the courts have stated that a director with a specific skillset is not held to a higher standard than his or her peers on the board.

This duty also explains why directors must be financially literate and business-aware. A director cannot avoid exposure by saying management or advisers were responsible. Reasonable reliance is permitted, but only if the director acts in good faith, makes proper inquiry and has a rational basis to rely on the information provided.

Many duty-of-care failures are not caused by a spectacularly bad decision. They are caused by a board making an important decision on poor papers, without enough time, without testing assumptions and without documenting the grounds evidencing the duty was satisfied.

What this means in practice

- Insist on board papers that support decision making. More pages do not equal better information.
- Read financial reports with enough depth to ask informed questions.
- Be particularly careful in areas where you have accepted additional responsibility, such as audit, risk or transaction committees.
- Do not confuse external advice with delegated judgment. Advice informs the board's judgment; it does not replace it.
- If something feels unclear, unresolved or too optimistic, slow the process down.

Duty to comply with the Act and constitution

> Duty
>
> A director of a company must not act, or agree to the company acting, in a manner that contravenes this Act or the constitution of the company.

Directors must not act, or agree to the company acting, in a manner that contravenes the Companies Act or the company's constitution. In practice, this duty tends to arise in a more mechanical way than the general duties, but that makes it no less important. Major transactions, distributions, share issues, buybacks, financial assistance, director benefits, appointments, meeting processes and reserved matters all require close attention to legal and constitutional requirements.

Boards sometimes overlook this duty because the issue appears technical. That is a mistake. Technical process errors can expose the Board or directors to unnecessary risks of challenge when things go wrong.

What this means in practice



Treat the constitution as a live governance document, not a filing-room artefact.



Confirm legal authority before undertaking capital actions or other reserved matters.



Make sure board packs identify approval pathways and any required shareholder, committee or market steps.



Use strong company secretarial support and legal review on technical transactions.

Insolvent-trading duties: reckless trading and incurring obligations

> A director of a company must not
>
> **a.** agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or
>
> **b.** cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.
>
> A director of a company must not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

Financial stress is the context in which directors' duties often become most acute. Once solvency is in doubt, the board's tolerance for optimism, delay and informal assumptions must reduce sharply. Two statutory duties are central here. First, directors must not allow the business to be carried on in a manner likely to create a substantial risk of serious loss to creditors. In broad terms, this duty is focussed on the deterioration of a company's financial position in an insolvency setting. Secondly, directors must not agree to the company incurring an obligation unless they believe on reasonable grounds that the company will be able to perform that obligation when required. In contrast, this duty is focussed on the company's exposure to new obligations. An example of a high risk scenario is the company entering into a long term contract or lease in circumstances where the company's future is in doubt.

These duties do not prohibit legitimate business risk-taking. The Companies Act and the common law recognise that companies exist to undertake business risk. But there is a critical difference between a reasoned attempt to trade through difficulty and a prolonged strategy of exposing creditors to increasing loss without a realistic foundation for recovery.

The board's task is to undertake a sober, ongoing assessment of the company's actual financial position, the causes of distress, the available options and the likely consequences for creditors. Directors are entitled to a short period to take stock and seek advice. They are not entitled to drift.

The insolvent-trading duties are the ones most often triggering director liability.

What this means in practice

- Carefully consider creditor positions and the impact on them moving forward.
- Increase the frequency and quality of cash flow reporting, scenario analysis and board meetings if necessary.
- Identify realistic options early - recapitalisation, asset sales, waivers, standstill, schemes, administration or orderly wind-down.
- Seek legal and financial advice before the company reaches a hard edge.
- Test whether proposed new obligations can genuinely be met when due.
- Ensure any third-party or group support (which underpins a conclusion that a company can meet its future obligations) is documented, enforceable and available when needed.
- Record the board's options analysis and why it regarded the chosen path as justified at the time.



Financial reporting obligations

Financial reporting is a core area of director responsibility and can give rise to personal liability. The regime depends on the company. For "FMC reporting entities", the relevant obligations sit principally under the Financial Markets Conduct Act 2013 (FMCA). For other companies, the Companies Act 1993 is the main source. Directors should know which regime applies and the key standards, timeframes and consequences of non-compliance.

The most demanding requirements apply to FMC reporting entities and to "large" companies (currently those with total assets over NZ$60 million or total revenue over NZ$30 million in each of the two preceding accounting periods). Both must keep proper accounting records, prepare NZ IFRS-compliant financial statements and, as a general rule, have those statements audited. FMC reporting entities must complete and register their audited financial statements within four months of balance date. Large companies generally have five months, although the audit requirement may be opted out of in some cases under the Companies Act.

Smaller companies may not be required to prepare GAAP-compliant financial statements, although statements may still be needed for tax, banking or governance purposes. Even where no full statutory reporting obligation applies, directors must still ensure adequate accounting records are kept and maintain proper financial oversight.

Non-compliance can have serious consequences. For FMC reporting entities, knowing non-compliance with applicable financial reporting standards at the time of registration can expose the company and each director to criminal liability, including up to five years' imprisonment or a fine of up to NZ$500,000, as well as potential civil liability under the FMCA. For companies subject to the Companies Act requirements, breach is an offence punishable by fines of up to NZ$50,000 for the company and each director. Separate offences can also arise for failures relating to accounting records, inspection and filing.

What this means in practice

- Confirm which financial reporting regime applies to the company and ensure the board understands the applicable standards, timeframes and filing obligations.
- Before signing or authorising financial statements, satisfy yourself that they give a true and fair view of the company's financial position and performance. Ask questions where accounting treatments appear unusual, aggressive or inconsistent with prior periods.
- Ensure the company maintains proper accounting records, appropriate internal controls and a robust process for the preparation and review of financial statements.
- Engage constructively with the external auditor. Understand any qualifications, emphasis of matter paragraphs or key audit matters raised, and ensure the board (or audit committee) has direct access to the auditor without management present.
- Monitor compliance with filing deadlines and treat late or incomplete filings as a governance failure requiring immediate remediation, not an administrative matter.

Other obligations on directors

The core duties discussed in this guide are not the full extent of directors' legal exposure. In addition to the Companies Act 1993, a range of other statutes may impose direct duties on directors or otherwise expose them to personal liability in particular contexts. Those additional areas are summarised in the appendix to this guide, which is intended as a practical overview of the wider statutory landscape directors should have in mind. Examples include disclosure liability in capital raisings, health and safety due diligence and obligations, anti-competitive behaviour, misleading conduct, tax, employment standards, privacy and cyber governance, and sector-specific regulatory obligations.

To whom the duties are owed?

The core answer is: to the company. That remains the legal foundation. However, directors cannot apply that answer mechanically. What is in the company's interests can require close attention to creditors, customers, regulators or other stakeholders depending on the issue at hand. In particular, when the company is insolvent or near insolvent, creditor interests become more prominent because creditors are economically exposed to the residual value of the company.

Beyond the strict legal framework, boards must also operate with an appreciation of the expectations of key stakeholders - including shareholders, creditors, regulators, employees and (where applicable) the market. Those expectations do not create a separate fiduciary regime, but they materially shape what good board conduct looks like and how decisions will be assessed if later scrutinised.

Liability pathways

Directors can face exposure through a range of pathways: civil claims, derivative actions, liquidator claims, regulatory proceedings, criminal liability in serious cases, disqualification, and reputational damage. Often the most immediate harm is not a judgment but the cost, distraction and loss of confidence associated with investigation or proceedings. Reputational damage is a key consideration.

That is why directors should think about liability prospectively. The board's objective should not be to litigate well later. It should be to govern in a way that materially reduces the chances of a credible claim arising at all. Directors should also understand that disqualification - which prevents a person from acting as a director for up to 10 years - can be as damaging to a career as a financial penalty, and that the reputational consequences of proceedings often exceed the formal outcome.

Directors should also be aware that conduct in the management of the company may give rise to claims by shareholders under section 174 of the Companies Act 1993 (oppressive, unfairly discriminatory or unfairly prejudicial conduct). The court's remedial powers are broad - including orders regulating future conduct, requiring share acquisitions, directing compensation, or any other order the court thinks fit. These claims can arise from a wide range of board decisions, and compliance with core statutory duties will not necessarily insulate the company from challenge on this basis.

In insolvency, insolvency practitioners act on behalf of the company (and creditors) and so are often active claimants.

Conflicts of interest

Conflicts of interest are among the most persistent governance risks for directors because they can quietly distort judgement or create a risk of that perception. A conflict does not always involve misconduct. It often begins with overlap: dual loyalties, past relationships, personal investments, family interests, multiple directorships, controlling shareholders, related-party dealings or access to information that creates tension between roles.

The legal framework matters, but the practical point is broader: if a conflict could reasonably impair, or be seen to impair, your ability to act in the company's interests, it needs to be acknowledged and actively managed.

What counts as conflict

Conflicts can be financial, positional, informational or relational. A director may be interested because the director personally benefits from a transaction; because the director has ties to another party; because the director represents a shareholder, lender or strategic partner; or because information received in another capacity affects their judgment or confidentiality obligations.

The board should take a broad and practical view. If a matter has the potential to affect independence of judgment, treat it seriously.

Common real-world potential conflict situations

- A director is also a shareholder in the company.
- A director appointed by a significant shareholder or joint venture participant.
- A transaction involving a supplier, customer or adviser with whom a director has a close relationship.
- A director who has consulting, investment or family interests connected to the company.
- A director serving on multiple boards with overlapping strategic interests.
- A director who has guaranteed liabilities of a company and is looking to reduce exposure under the guarantee in preference to discharging liabilities of other creditors.
- Access to non-public information in one role that cannot appropriately be used in another.

Managing conflicts in practice

The first discipline is early disclosure. Directors should disclose promptly and fully so that the board is aware of it and can factor it in to decision-making, and can decide how the conflict should be managed. Depending on the company's constitution and the nature of the issue, that may mean notation in the company's interests register, non-participation in discussion, abstention from voting, temporary exit from the room, or other process steps.

The second discipline is process design. The board should not assume that disclosure alone solves the issue. It should identify who will evaluate independence, whether a committee should handle the matter, whether independent advice is needed, and how the board will demonstrate that the process was robust.

What this means in practice

- Disclose early; update the board if circumstances change.
- Check the constitution as well as the Act; constitutional restrictions can be tighter.
- Assume that apparent independence matters as much as actual independence in sensitive matters.
- Use independent committees and independent advice where the issue is material.
- Do not rely on informal understandings about what you can or cannot do with company information.

Boardroom scenario

A director who was appointed by the company's largest shareholder is asked to participate in a board discussion about a related-party transaction with that shareholder. The director has disclosed the relationship and believes they can act objectively. The board's task is not simply to accept that assurance. It should consider whether the director's participation could reasonably be perceived as compromising the independence of the decision, whether an independent committee should evaluate the transaction, and whether the process will withstand external scrutiny if challenged.



Board process and decision making in practice

From a director's perspective, one of the most important questions is not simply 'what is the duty?', but 'what does a robust and defensible board process actually look like?'. Strong process is where legal principle and practical governance meet. It is also where many high-performing boards distinguish themselves.

What a good board paper looks like

Board papers should explain the decision required, the commercial rationale, key assumptions, principal risks, reasonable alternatives, any stakeholder or regulatory implications, and the recommendation. For major matters, they should also identify the downside case and what would change the recommendation.

The best papers allow the board to exercise judgment. The worst papers are either too thin to be useful or so bloated that the decision logic is obscured.

The board meeting itself

A high-quality board meeting gives significant matters enough time. The chair actively draws out challenge, not just consensus. Management is expected to answer difficult questions directly. The board is alert to whether the issue should be resolved or deferred. If more work is needed, the board asks for it.

Some decisions should not be made solely on the papers. Significant transactions, distress decisions, contentious stakeholder issues, investigations, significant litigation, conduct failures and emerging strategic risks often require fuller discussion than a written pack can provide.

Minutes and records

Good minutes are not transcripts, but they should do more than record attendance and resolutions. They should identify the matters considered, the key issues discussed, the fact that challenge occurred, any advice received, the essential rationale and (where relevant) the basis on which the board considered the decision to be in the company's interests.

Minutes should be accurate, balanced and prepared with care. Over-engineered minutes can be as unhelpful as skeletal minutes. The aim is to create a reliable record of real decision-making, and information and advice on which decisions have been based.

While AI notetakers can be efficient, they must be used with caution - key concerns are accuracy, privacy and litigation risk where there are conflicting accounts. It is important that they do not have a chilling effect on free and frank discussion and debate.

Reliance on managment and advisers

Directors are entitled to rely on management and expert advice, provided the reliance is reasonable – this often provides a defence to claims for breach of duty. In practice that means directors must understand what is being relied on, checking whether the source is competent, identifying assumptions and limits, and asking further questions where something does not stack up. The standard for reasonable reliance is not passive acceptance. A director must act in good faith, make proper inquiry where the circumstances warrant it, and have no reason to believe the information is unreliable.

There is a practical distinction between reliance on management and reliance on external advisers. Management is closer to the business and provides information the board uses routinely - but management may also have incentives that colour reporting. External advisers bring independence but may work from incomplete instructions or within narrow terms of engagement. In both cases, the board should understand the basis and limitations of what it is being told.

Boards should be especially careful where advice is narrow, highly conditional, prepared quickly or based on incomplete information. Those are signals to probe, not reasons to retreat.

Boards should pay particular attention to qualified, heavily caveated or conditional advice. Where an adviser qualifies an opinion, limits its scope, or flags material assumptions, those qualifications are not formalities — they define the boundaries of what the board can reasonably rely on. A board that proceeds on the basis of advice while ignoring its stated limitations cannot later claim reasonable reliance. Similarly, where advice is obtained under time pressure or on incomplete information, the board should treat it as provisional and revisit the position when fuller information is available.

When to slow down and get external advice

- When the company may be entering financial stress or covenant pressure.
- When a decision affects control, independence or related-party dynamics.
- When there is potential market disclosure, regulatory or litigation sensitivity.
- When management reporting is contested or confidence in information quality has fallen.
- When a new technology, product or market expansion creates legal exposures the board does not routinely deal with.
- When directors themselves are divided on whether the board has enough information to proceed.

Dissent and the dissenting director

Directors will not always agree. Where a director disagrees with a board decision, the question is both a governance issue and a personal protection issue. A director who votes against a resolution or formally dissents may have a stronger position if the decision is later challenged - but dissent is not an automatic shield. A director who remains on the board retains ongoing duties, including the duty to monitor whether the decision is being implemented in a way that creates further risk.

In practice, a dissenting director should ensure the minutes clearly record their dissent and, where appropriate, the reasons for it. Actively voting against a resolution is a clearer record than simply noting disagreement. Directors should also consider whether dissent should be accompanied by a request for further information, external advice or a condition on implementation. Where concerns are serious and sustained, the director should consider escalation - to the chair, to the full board or to external advisers.

Where disagreement is fundamental - for example, where the director believes the board is acting unlawfully, recklessly or in a way that will cause serious harm to creditors - the director must consider whether continued board membership is appropriate. Remaining on a board while disagreeing but taking no effective action is unlikely to provide protection. The question is whether the director took all reasonable steps available in the circumstances. Objecting to insolvent-trading (but remaining on the board) will not provide a defence.

Resignation

Resignation is sometimes the appropriate response to an irreconcilable governance failure, a fundamental disagreement on direction, or a situation where continued involvement would compromise the director's integrity or expose them to unacceptable personal risk. However, resignation is not without its own risks — a director who resigns too early may be seen as having abandoned oversight at a critical time, while a director who resigns too late may have accumulated exposure during continued service.

Resignation does not retrospectively remove liability for past conduct. Directors should also be alert to the risk of informal disengagement - ceasing to attend meetings or withdrawing from discussion without formally resigning - which provides no legal protection and may increase exposure, because the director remains subject to all duties but is no longer exercising oversight.

Insurance and indemnities

Directors are increasingly alert to personal risk. That is sensible. But many directors misunderstand what their protections actually do. Insurance and indemnities are important risk-transfer tools, but they do not remove the need for governance discipline and they do not cover every exposure.

D&O insurance: what it is for

Directors' and officers' insurance is intended to protect directors against liabilities and defence costs arising from claims made in connection with their role. It is often the most visible form of balance-sheet protection available to an individual director.

However, D&O cover is policy-based, limited by wording, exclusions, retentions and caps. It should be treated as a negotiated contractual protection, not a general sense of comfort.

Statutory liability insurance and other cover

Depending on the business and risk profile, a company may also have statutory liability cover or other specialist policies that respond to investigations, prosecutions, defence costs or accidental statutory breaches in specific contexts. Boards should understand how these interact with D&O cover and what material exposures remain uninsured.

Indemnities

Indemnities are company undertakings to cover certain liabilities and costs incurred by directors. They are useful, but they are only available to the extent permitted by law and authorised under the company's constitution. A director should understand both the legal scope of the indemnity and the company's practical ability to honour it if the company is under stress.

What is typically excluded

Coverage and indemnity restrictions vary, but the key point is that some of the most serious exposures are typically outside scope. Criminal liability, bad faith and some penalties are commonly excluded or only covered in limited ways (for example defence costs subject to outcome). This is why directors should avoid casual assumptions that 'the insurance will deal with it'.

Questions directors should ask about their cover

What are the policy limits?

Are defence costs advanced and are they under a separate limit?

What key exclusions apply?

Is cover shared across the group?

What investigation costs are covered?

What happens on insolvency?

How does the cover interact with indemnities and any run-off arrangements on resignation or sale?

Common misconceptions

- Assuming policy limits are adequate without stress-testing realistic claim scenarios.
- Assuming the presence of insurance means the board can take more risk.
- Assuming the company's indemnity is always enforceable and valuable, even when the company is financially stressed.
- Ignoring notification obligations, conduct exclusions or timing issues.
- Treating annual renewals as an insurance-team issue rather than a board risk issue.



Māori Governance

Directors involved in the governance of, or interacting with, Māori entities must understand the broader Māori governance context. It is important to recognise that Māori entities take many forms and there is no single model of Māori governance.

Responsibility of directors

Directors must continue to exercise their duties to the particular company they govern, while also understanding why that company exists, where it sits within the relevant Māori political and governance structure, who it serves and what its activities are intended to achieve. Care is needed not to blur the legal responsibilities of separate entities within the structure, while this is the case for all companies, it is particularly relevant for Māori entities.

It is important to recognise that Māori entities take many forms and there is no single model of Māori governance. Their purpose and structure may reflect whakapapa (genealogical connections), kaupapa (purpose), tikanga Māori (Māori customs, law, values and practices) and the aspirations of the whānau (family groups), hapū (sub-tribe), or iwi (tribe) they serve. A Māori company may form part of a wider iwi/hapū governance structure involving representative bodies, trusts, commercial or investment companies, and charitable or social entities.

Each entity may have a distinct purpose and set of legal responsibilities. For example, a commercial company may be responsible for protecting and growing assets and generating returns, while those returns support distributions (made by other entities) for broader cultural, social and environmental goals.

Responsibility of whenua and taonga

For directors, understanding the structure and set of stakeholder relationships and responsibilities matters. Māori governance usually involves a longer-term view of assets and decision-making. An entity may hold whenua (land), taonga (treasured assets or resources), Treaty of Waitangi settlement assets or other assets that have significance beyond their financial value. Its governing body may need to balance current commercial opportunities with the entity's longer-term purpose, including protecting and growing those assets and what they may provide for mokopuna (future generations).

Relationships

Relationships are also a key part of Māori governance and engagement. Māori entities can have close and ongoing relationships with whānau, hapū, iwi, landowners and other groups. These relationships will be connected with the entity's mandate, representation and ability to achieve its kaupapa. Concepts such as whanaungatanga (relationships and connectedness), manaakitanga (care and respect) and kaitiakitanga (care and protection of people, places and resources) may help shape how those relationships and responsibilities are approached.

Tikanga Māori

Tikanga Māori is an important aspect of the governance context. Depending on the entity and its people, tikanga may inform how authority and mandate are understood, how relationships are maintained, how decisions are undertaken and how the entity gives effect to its kaupapa. Tikanga is specific to the people and circumstances involved. Boards should understand the tikanga relevant to the particular context, rather than assuming the same tikanga or practices apply in every setting.

What this means in practice



Understand the kaupapa. A Māori entity's kaupapa helps explain why it exists and what its activities are intended to achieve. Boards working with Māori entities should understand its purpose and priorities, rather than assuming its objectives are solely commercial.



Understand the structure and mandate. Māori entities can sit within wider structures involving representative bodies, trusts, commercial entities and charitable or social entities. Where the entity you are dealing with sits within that structure and where decision-making authority sits, will impact whether other approvals or engagement is required.



Understand the relationships and accountabilities. Relationships with whānau, hapū, iwi, landowners and other groups, connect with the entity's mandate and purpose. For boards working with Māori entities, whanaungatanga means recognising that building and maintaining long-term relationships is seen as an important part of success. This also creates the potential for conflicts of interest that will need to be managed.



Understand the assets. Whenua, taonga and settlement assets may carry historical, cultural or other significance beyond their financial value. Directors should understand the broader impact of those assets with regards to decisions or arrangements that may affect them.



Intergenerational thinking. Immediate commercial value is often only one consideration alongside long-term cultural, social, environmental and economic goals. Māori entities usually consider what today's decisions will mean for mokopuna and the collective interests of the iwi, hapū and whānau.



Understand the decision-making process. The people involved in negotiating a transaction may not hold the final mandate to approve it. Boards working with Māori entities should understand the relevant governance and approval processes, where authority sits and whether time is needed for further engagement.



Understand the relevant tikanga. Tikanga Māori may be relevant to relationships, governance processes, authority and decision making. Its application will depend on the particular iwi, hapū, entity and circumstances.



Know when to seek advice. Legal and governance issues can arise when establishing or changing governance structures, defining the relationship between parent and subsidiary entities, setting investment or distribution frameworks, dealing with significant whenua or taonga, managing conflicts or overlapping governance roles, or reflecting tikanga, kaupapa or relationship arrangements in legal documents.

Additional statutory duties and liability exposures

The duties discussed in this guide focus on the core framework under the Companies Act 1993. However, directors should be aware that a range of other legislation can impose further duties and obligations on them, or otherwise expose them to personal liability where the company contravenes applicable requirements. The appendix below provides a practical overview of a number of key statutory regimes outside the Companies Act 1993 that boards commonly need to keep in view.



Competition law and anti-competitive conduct

Under the Commerce Act 1986, directors should ensure that the company does not engage in conduct that substantially lessens competition, including cartel conduct, market allocation, price fixing or misuse of market power. A director who aids, abets, counsels, procures, or is knowingly concerned in a contravention may face personal liability. Significant pecuniary penalties can be imposed on individuals, criminal liability can arise for cartel conduct, and management banning orders may also be available.



Health and safety duties

Under the Health and Safety at Work Act 2015, directors (as "officers" of a "PCBU") must exercise due diligence to ensure that the business complies with its health and safety duties. That includes keeping up-to-date knowledge of health and safety matters, understanding operational risks, ensuring adequate resources and processes exist, and verifying that incidents and hazards are identified and addressed appropriately. Liability is personal and can be serious, including substantial fines and, in cases of reckless conduct, imprisonment.



Environmental duties

Under the Resource Management Act 1991, directors should ensure that the company complies with resource consent conditions, planning rules and other environmental requirements. A director or agent may be personally liable where they directed, authorised, assented to, acquiesced in, or participated in the relevant offending. Environmental liability can involve fines, imprisonment for serious breaches, and enforcement orders requiring adverse effects to be avoided, remedied or mitigated.



Employment, wages and migrant labour

Under the Employment Relations Act 2000 and the Wages Protection Act 1983, directors should ensure compliance with minimum employment standards, including wages, holiday pay and other statutory entitlements. Personal liability may arise where a director directed, authorised or was knowingly concerned in the breach. Directors should also be alert to the Immigration Act 2009, which can expose directors to liability where the company employs or exploits persons not entitled to work in New Zealand, or otherwise breaches immigration-related employment requirements.



Modern slavery and forced labour

Under the Customs and Excise Act 2018, directors should ensure that the company does not import goods produced by forced labour. New Zealand's proposed modern slavery legislation is also expected to introduce supply-chain reporting obligations for some businesses, with potential personal liability for directors and senior managers in the case of breach. Directors should therefore consider implementing due diligence, supplier governance and escalation processes for modern slavery risks, particularly in cross-border supply chains.



Privacy, information security and whistleblowing

Under the Privacy Act 2020, companies handling personal information must comply with information privacy principles, security obligations and notifiable privacy breach requirements. While the legislation is directed primarily at the agency, directors should treat privacy and cyber security as ongoing governance issues. Directors should also ensure that the company has appropriate whistleblowing and protected disclosure procedures under the Protected Disclosures (Protection of Whistleblowers) Act 2022, as failures in that space can expose significant legal, operational and reputational risk.



Misleading and deceptive conduct

Under the Fair Trading Act 1986, directors should ensure that the company does not engage in misleading or deceptive conduct in trade. Personal liability may arise where a director is knowingly concerned in, or aids and abets, the contravention. This is particularly relevant to representations in marketing material, public statements, product labelling and customer-facing communications.



Capital raising

Under the Financial Markets Conduct Act 2013, directors must ensure that offer documents (such as product disclosure statements) do not contain untrue statements and are not misleading or deceptive. Directors who sign, or are deemed to be directors at the time of an offer, may be personally liable for investor loss caused by defective disclosure. Liability may arise through civil remedies such as pecuniary penalties, compensatory orders or declarations of contravention, and criminal liability may arise where false or misleading statements are made knowingly or recklessly. A due diligence defence may be available where the director can show that all reasonable inquiries were made and that, on reasonable grounds, the statement was believed to be true and not misleading.



Tax obligations

Under the Tax Administration Act 1994, directors should ensure that the company meets its tax obligations, including PAYE, GST and other withholding obligations. Personal exposure can arise under certain look-through or knowledge-based provisions, and criminal liability may arise where a director is knowingly concerned in tax evasion. Directors should ensure that the company maintains adequate systems for accurate reporting, filing and payment.



Sector-specific legislation and product safety

In addition to generally applicable regimes, directors should remain alert to sector-specific legislation affecting the company's industry, licences, products, services or customer base. Depending on the business, additional obligations may arise under financial services, utilities, telecommunications, health, food, transport, building products or other regulatory regimes. For example:

- *Product safety:* where the company manufactures, imports, distributes or retails consumer goods, directors should ensure that adequate systems exist for product testing, incident reporting, escalation, corrective action and recall management.
- *Anti-money laundering:* under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, directors of reporting entities should ensure that the entity has an adequate and effective compliance programme, including appropriate governance oversight, risk assessment, transaction monitoring and staff training. Personal liability can arise where failures are attributable to neglect or a failure to take reasonable steps.

Contacts

Our specialists regularly advise boards and directors on these issues and more, and are ready to work with you to strengthen your governance practices and ensure compliance. Get in touch if you'd like to talk through your specific governance questions or challenges.



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