# The International Bar Association Company Director Checklist – NEW ZEALAND

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| Item | Number | Check |
| --- | --- | --- |
| **Before appointment** | | |
| Items to understand | 1 | ☐ |
| People to meet with | 2 | ☐ |
| Documents to review | 3 | ☐ |
| **Ongoing duties** | | |
| Points for attention | 4 | ☐ |
| Legal status of directors | 5 | ☐ |
| Parties to which duties are owed | 6 | ☐ |
| Powers of directors | 7 | ☐ |
| Duty of loyalty | 8 | ☐ |
| Duty of care | 9 | ☐ |
| Duty to have and maintain skills | 10 | ☐ |
| Additional duties (confidentiality, etc.) | 11 | ☐ |
| Delegation of powers/authority | 12 | ☐ |
| Conflicts of interest (inc. intragroup dealings) | 13 | ☐ |
| Compliance with statutory obligations | 14 | ☐ |
| Disclosure obligations | 15 | ☐ |

| Item | Number | Check |
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| Potential liability | 16 | ☐ |
| Duration of duties | 17 | ☐ |
| **Special circumstances** | | |
| Bankruptcy | 18 | ☐ |
| Takeover bids | 19 | ☐ |
| Market abuse/insider dealing | 20 | ☐ |
| **Defences** | | |
| Good corporate governance | 21 | ☐ |
| Minutes of board meetings | 22 | ☐ |
| Discharge and indemnification | 23 | ☐ |
| Insurance | 24 | ☐ |
| Resignation | 25 | ☐ |
| Restructuring of assets | 26 | ☐ |
| ESG and D&I policies, metrics | 27 | ☐ |

## Introduction

This checklist is intended to serve as a practical guide to the main duties and obligations of the directors of

- listed public companies in New Zealand, listed on the NZX; and
- private limited companies in New Zealand,
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arising from the following New Zealand legislative sources:

- The Companies Act 1993 (**Act**);
- The Financial Markets Conducts Act 2013 (**FMC Act**); and
- The Financial Reporting Act 2013 (**FRA**).

If any specifics of listed public companies are relevant, see the third column of this checklist below.

## Disclaimer

This checklist is informational in character only and is not intended to be comprehensive in all respects or to serve as a substitute for professional advice. In all cases, however, specific legal advice should be sought. The authors disclaim any liability in respect of anything done in reliance on this publication. This checklist was last updated on 4 March 2022.

| DUTIES AND OBLIGATIONS OF THE DIRECTORS | | | |
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| | **Action/issue** | **Specifics of listed public companies (if relevant)** | **Comments/notes** |
| | **Before appointment** | | |
| **1. Items to understand** | Understand:<br>• are you qualified to be a director under the Act?<br>• what the company does;<br>• what are the company's overarching objectives;<br>• whether it has a good reputation or whether it has been involved in any controversial matters;<br>• if it is profitable in its activities and whether it looks like it will continue to be in the future;<br>• how the company will grow;<br>• who are the company's competitors;<br>• how are internal and external risks managed;<br>• why you have been appointed for the role and what the expectations are of you; and<br>• what is the expected time commitment to the company;<br>• what are the indemnity and insurance arrangements;<br>• what value you can add to the company. | | • Can you offer anything distinct (ie, skills, information, experience or background) from what the board already possesses?<br>• Are you suitably trained for this position and do you have the skills required to ensure that you are more than just a passive director?<br>• What are you expected to contribute?<br>• Do you understand the corporate procedures and are they to your satisfaction?<br>• What is your remuneration and is it appropriate?<br>• Be sure you are not taking on too great a risk and have adequate protection (in the form of indemnities and insurance) in place.<br><br>**Qualifications of Directors**<br><br>A director must be a natural person. A person cannot be a director of a NZ company if they are:<br>• under 18 years of age;<br>• an undischarged bankrupt;<br>• prohibited from directing, promoting or participating in the management of a company under any statutory provision. This includes but is not limited to being:<br>– prohibited from being a director of a company under section 299(1)(b) or (c) of the Insolvency Act 2006 |

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| | | | – convicted of a crime involving dishonesty in the past five years;<br>– prohibited from managing a company by the New Zealand Registrar of Companies; and<br>– prohibited from being a director or promoter of, or being concerned or taking part in the management of, an overseas company under an order made, or notice given, under the law of a prescribed overseas jurisdiction;<br>– subject to a property order made under the Protection of Personal and Property Rights Act 1988 (this relates to having mental capacity); or<br>– not qualified pursuant to the constitution of a particular company.<br><br>**Residency requirement**<br><br>Under Section 10(d) of the Act all New Zealand companies are required to have at least one director that either:<br>(a) lives in New Zealand; or<br>(b) lives in Australia AND is a director of an Australian company.<br><br>Case law suggests that anyone who is physically present in New Zealand for 183 days per year will be deemed to 'live' in New Zealand for the purposes of the residency requirement. Moreover, individuals who do not meet the 183-day threshold may also be |

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| | | | deemed to 'live' in New Zealand. Factors such as time spent in New Zealand, the regularity with which time is spent in New Zealand, personal and professional ties to New Zealand and manner of living when in New Zealand are taken into consideration when assessing whether a director 'lives' in New Zealand. |
| **2. People to meet with** | Meet:<br>• the CEO/CFO;<br>• other directors, including any recently retired directors, if possible;<br>• senior management team;<br>• auditor; and<br>• company lawyer. | Ensure you meet with both the executive and independent directors. | • Obtain a briefing on the history and strategy of the company.<br>• Understand major drivers of performance and key performance indicators.<br>• Get a SWOT analysis of the company.<br>• Get background/resume on other directors and key members of management team.<br>• Understand relationships and roles within management team.<br>• Understand who the key suppliers or customers are.<br>• Understand status of relationships with employees and unions.<br>• Obtain an industry briefing.<br>• Get the auditor's input and perceptions on historical accounts and disclosure issues.<br>• Understand key legal relationships, any past or current litigation and issues with compliance and regulators. |
| **3. Documents to review** | Review the following corporate records of the company, which, under s 189 of the Act, companies are required to keep:<br>• the constitution of the company (if any);<br>• the minutes of all meetings and resolutions of shareholders within the past seven years;<br>• the interests register;<br>• minutes of all meetings and resolutions of directors within the past seven years; | • The NZX Listing Rules<br>• The NZX Corporate Governance Code – it is a comply or explain regime, meaning if an issuer does not report against the recommendation of the code, it must explain why not in its annual report.<br>• The company's annual reports (and in particular, the company's compliance with the NZX Corporate Governance Code).<br>• The company's Code of Ethics. | • Have any abnormal losses explained.<br>• Review accounts for trends.<br>• Are valuations of intangible assets realistic?<br>• Review constitution for any restrictions on your power as a director or any shareholder specific provisions (such as a power to veto board decisions). |

<table>
<tr><td></td><td><ul><li>certificates given by directors within the past seven years;</li><li>copies of all written communications to shareholders within the past seven years;</li><li>copies of all financial statements and group financial statements within the past seven completed financial years;</li><li>share register;</li><li>register of directors.</li></ul>Review the accounting records of the company that are required to be kept under s 194 of the Act.<br><br>Review the financial statements of the company that are required to be prepared under the FRA if the company is ‘large’.<br><br>Ask about indemnities and Directors and Officers insurance, and any prior or existing claims under such indemnities or insurance.</td><td><ul><li>The company’s financial product dealing policy.</li><li>The Board Charter.</li><li>The company’s diversity policy.</li><li>Board procedures for assessing board, director and committee performances.</li><li>Audit Committee Charter.</li><li>Details of takeover protocols.</li><li>Disclosure Policy.</li><li>Risk Management Framework.</li><li>Health & Safety Reports.</li><li>Review company announcements to ensure the company has made full and timely disclosure to the market.</li></ul>Under recommendation 2.3 of the NZX Corporate Governance Code, an issuer is recommended to enter into written agreements with each newly appointed director to establish the terms of their appointment. Seek independent legal advice in respect of any agreement provided. If no agreement is provided, ask why and seek independent legal advice.</td><td><ul><li>Review the interests register to see what interests the existing directors have in company transactions and shares.</li><li>Review board papers and minutes to get a feel for current issues.</li></ul>Under the FRA and the Act, companies are required to prepare and lodge audited financial statements with Companies Office if the company is ‘large’.<br><br>As at 1 January 2022, a NZ subsidiary of an overseas company will be considered ‘large’ in accordance with Section 45(2) of the FRA if:<ul><li>at the balance date of each of the two preceding accounting periods, the total assets of the entity and its subsidiaries exceed NZ$22 million; or</li><li>in each of the two preceding accounting periods, the total revenue of the entity and its subsidiaries exceeds NZ$11 million.</li></ul></td></tr>
<tr><td colspan="4">Ongoing duties</td></tr>
<tr><td>4. Points for attention</td><td>Pay attention to the following to ensure you are carrying out your duties and that the company is run properly:<ul><li>whether the information that has been provided to you is up to date, accurate and whether it is consistent with advice or information from external sources such as auditors and lawyers;</li></ul></td><td></td><td><ul><li>The Act provides that the ‘business and affairs’ of the company are to be managed, or at least supervised, by the board. The board is granted the express powers needed to govern, subject to any modifications, exceptions or limitations contained in the constitution and the Act (s 128). The ‘business and affairs’ of the company includes not only the trading activities of a company, but also all</li></ul></td></tr>
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| | • whether your expectations of the company have been met;<br>• whether there are any gaps in the information or advice you receive; and<br>• whether the information or advice you request is given to you in a reasonable amount of time.<br><br>With particular regard to your duties, know what your general duties are and what your specific duties are. | | management decisions, whether of an internal or administrative nature.<br>• To ensure that the business is run properly, directors are subjected to a number of duties under the Act. These duties emphasise that directors occupy a fiduciary position and must place the company's interests above their own. |
| **5. Legal status of directors** | Subject to any modifications, exceptions, or limitations contained in the Act or in the company's constitution, the business and affairs of a company must be managed by, or under the direction or supervision of, the board of the company and the board has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.<br><br>The 'board' means directors of the company who number not less than the required quorum acting together as a board of directors; or if the company has only 1 director, that director.<br><br>Under the Act, a director, in relation to a company, includes a person occupying the position of director of the company by whatever name called.<br><br>For certain purposes and provisions of the Act, a 'director' may also include –<br>(a) a "shadow director" (s 126(1)(b)(i) and (ii); | | On appointment of a liquidator or administrator the directors remain in office but their powers are limited (s 239X and 248 of the Act). |

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| | (b) a person with managerial powers under the constitution (s 126(1)(b)(iii));<br>(c) a de facto director (s 126(1)(b)(iii) and (c);<br>(d) a delegate of the board (s 126(1)(c));<br>(e) the controller of any of the above (s 126(1)(d)); and<br>(f) a shareholder (s 126(2) and (3). | | |
| **6. Parties to which duties are owed**<br><br>*Section 131 of the Act* | • A director owes its duties to the company. This gives the company the right to sue a director for breach of duty.<br>• Generally, duties are not owed to shareholders. However, a director does owe the following duties only to its shareholders –<br>(a) duty to supervise the share register (s 90);<br>(b) duty to disclose interests (s 140); and<br>(c) duty to disclose share dealings (s 148). | | A shareholder or former shareholder may bring an action against a director for breach of a duty owed to them as a shareholder.<br><br>Duties set out in section 131 (duty of directors to act in good faith and in the best interests of the company), 133 (duty to exercise powers for proper purpose), 135 (reckless trading), 136 (duty not to agree to a company incurring certain obligations), 137 (director's duty of care) and section 145 (relates to the use of company information) are specifically identified as duties owed to the company and are not the shareholders. |
| **7. Powers of the board of directors** | As mentioned above, subject to any modifications, exceptions, or limitations contained in the Act or in the company's constitution, the business and affairs of a company must be managed by, or under the direction or supervision of, the board of the company and the board has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company. | | |
| **8. Duty of loyalty**<br><br>*Section 131 of the Act* | • A director, when exercising powers or performing duties on behalf of a company, must act in good faith and in the best interests of the company. | | Good faith implies acting with a proper motive – without any malice or dishonesty. This also means that directors must avoid acts |

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| | • If expressly permitted to do so by the company's constitution:<br>(a) a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, act in a manner which they believe is in the best interests of that company's holding company even though it may not be in the best interests of the company;<br>(b) a company that is carrying out a joint venture between the shareholders, may when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, act in a manner which they believe is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.<br>• In addition, a director of a company that is a subsidiary (but not a wholly-owned subsidiary) may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company *and* with the prior agreement of the shareholders (other than its holding company), act in a manner which they believe is in the best interests of that company's holding company even though it may not be in the best interests of the company | | that promote their own interests at the expense of the company.<br><br>In accordance with s 138A of the Act, a director commits an offence (and can be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding NZ$200,000), if they exercise powers or perform duties as a director of the company:<br>• in bad faith towards the company and believing that the conduct is not in the best interests of the company; and<br>• knowing that the conduct will cause serious loss to the company.<br><br>However, if the constitution allows the directors to act in the best interests of the parent company or any other entity and the powers or duties are performed in the best interests of that company, the director will not commit an offence. |
| **9. Duty of care**<br><br>*Section 137 of the Act* | Directors, when exercising powers or performing duties, have a duty to exercise the care, diligence and skill that a reasonable director would exercise in the same | | • The standard expected of a director is objective in nature – the conduct of a director is tested against a standard of "reasonableness". |

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| | circumstances, taking into account the following:<br>• the nature of the company;<br>• the nature of the decision; and<br>• the position of the director and the nature of the responsibilities undertaken by them. | | • However, there are also subjective considerations. The director's position is compared with that of other directors in similar circumstances. What is expected from the directors of a large, listed company may be different from what is expected in the case of a small business with one director and shareholder. Although there is no higher standard for directors who possess professional qualifications, in assessing whether the standard has been met, a court will take into account a director's position in a company and the nature of the duties undertaken by that director. For example, a court may consider an executive director to be more familiar with the running of a company than a nonexecutive director. As a consequence, the comparison to a 'reasonable director' may differ in the case of an executive director and a nonexecutive director.<br>• The duty of care applies where a director is exercising powers or performing duties.<br>• In order to exercise the diligence of a reasonable director, it is necessary for a director to remain informed as to the dealings of the company, to undertake inquiries where relevant, and to seek competent advice where it is prudent to do so. |
| **10. Duty to have and maintain skills**<br><br>*Section 137 of the Act* | As mentioned under item 9 above, directors, when exercising powers or performing duties, have a duty to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances, taking into account the following:<br>• the nature of the company; | Refer to comments under item 9 above. | Refer to comments under item 9 above. |

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| | • the nature of the decision; and<br>• the position of the director and the nature of the responsibilities undertaken by them. | | |
| **11. Additional duties (confidentiality, etc.)** | Additional duties imposed by the Act that are not otherwise discussed include:<br>• directors must exercise a power for a proper purpose (s 133);<br>• directors must comply with legislation and company's constitutional documents (s 134);<br>• directors must ensure company does not carry out business in a manner likely to create a substantial risk of serious loss to the company's creditors (s 135);<br>• directors must ensure that the company does not incur an obligation unless there are reasonable grounds that it will be able to perform the obligation (s 136).<br><br>**Use of Company Information (s 145)**<br><br>Subject to limited exceptions, a director who has information in his or her capacity as a director or employee of the company that would not otherwise be available to him or her must not disclose that information, or make use or act on the information except where it:<br>• Is for the purposes of the company;<br>• Is required by law; or<br>• Has occurred in order to comply with the statutory requirement for an interested director to disclose.<br><br>Exceptions to the above include where – | | **Duty to Exercise Power for a Proper Purpose (s 133)**<br>• This relates to situations where a director goes beyond the confines of their office and acts out of an ulterior motive.<br>• An objective test is applied by the court to ascertain whether the exercise of the power is within the scope of the instrument creating it. Where there is more than one purpose behind the exercise of a power by directors, the courts will ascertain the substantial or primary purpose.<br>• Acting without a proper purpose could include a situation where the board is engaged in a struggle with shareholders and issues shares to produce more sympathetic support.<br>• It is possible that the duty to act with a proper purpose may conflict with the duty to act in good faith and in the best interests of the company. For example, a director could act in what they thought was in the best interests of the company, but could still be acting with an improper purpose. Such a situation would arise if the board issued shares for the sole purpose of diluting a troublesome shareholder's shareholding. Even though this may be in the best interests of the company and even encouraged by other shareholders, the board would not be acting with a proper purpose. |

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| | (a) the board has not prohibited the disclosure and the disclosure is to:<br>(i) a person whose interests the director represents; or<br>(ii) a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's powers and duties and, if the director discloses the information, the name of the person to whom it is disclosed must be entered in the interests register.<br>(b) particulars of the disclosure, use, or the act in question are entered in the interests register; and the director is first authorised to do so by the board; and the disclosure, use, or act in question will not, or will not be likely to, prejudice the company. | | **Duty to comply with legislation and company's constitutional documents (s 134)**<br><br>• This duty makes the constitution binding on directors and that by not complying with the Act or the company's constitution, a director would be acting outside their mandate.<br>• Failing to comply with the Act may result in criminal as well as civil liability. For example, failing to maintain a share register may result in a director being convicted of a criminal offence as well as facing civil liability from shareholders.<br><br>**Duty to ensure company does not carry out business in a manner likely to create a substantial risk of serious loss to the company's creditors (s 135)**<br><br>• This duty is aimed at preventing directors from engaging in conduct that could jeopardise the company's solvency. This is known as 'reckless trading'.<br>• Directors who cause or allow a company to trade recklessly may be held personally liable for the debts they incur.<br>• This duty is not meant to dissuade directors from taking on risks – provided the company has the ability and the resources to cover the loss if there is complete failure.<br>• A director's personal opinion is irrelevant when considering a company's ability to continue trading. If the company's financial position would have alerted the director to the real possibility that continuing to trade would cause serious loss to its creditors, but the director |

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| | | | allowed the company to continue to trade they could be engaging in reckless trading.<br>• 'Sleeping directors', who have little or no actual knowledge of the business, may also be liable for the company's debts if the company has carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.<br>• If you take on the position of a director it is imperative that you have a sound understanding and knowledge of the goings on of the company, regardless of your level of involvement.<br><br>**Duty to ensure that the company does not incur an obligation unless there are reasonable grounds that it will be able to perform the obligation (s 136)**<br><br>• Recent case law suggests that if directors agree to debts being incurred where they do not believe on reasonable grounds that the company will be able to perform the obligations when they fall due, then there will be a breach of the directors' duty in relation to incurring obligations.<br>• Unlike reckless trading, which can be committed by being passive ('cause or allow'), a director must not 'agree' to the company incurring an obligation it cannot perform. This means that the director must actually participate in any decision to incur an obligation.<br>• A belief must be held on reasonable grounds. Therefore, it will be difficult for a director to base a belief that the company will be able to perform an obligation on a lack of knowledge. The |

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| | | | director should have information justifying their belief.<br>• By breaching this duty, a director who agrees to the company incurring an obligation the company cannot perform may be held liable for the company's obligation. |
| **12. Delegation of powers/authority** | • The board may delegate, to a committee of directors or to any person, any of its powers (except for the powers set out in Schedule 2 of the Act). Such power to delegate is subject to the company's constitution.<br>• The board is responsible for the exercise of a delegated power, except where the board reasonably believed, before the power was exercised, that the delegate would comply with the duties imposed on the directors by the Act, and the board properly monitored the exercise of the power. | Included amongst the powers set out in Schedule 2 that the board is prohibited from delegating are those relating to a company making an offer on a stock exchange for the company to acquire its own shares. | The only powers the board cannot delegate are those contained in Schedule 2 of the Act, including:<br>• changing the company name;<br>• issuing shares and related actions;<br>• making distributions;<br>• giving shareholder discounts;<br>• making an offer to acquire shares;<br>• the redemption of shares;<br>• providing financial assistance for the purchase of shares;<br>• transferring shares;<br>• changing the registered address and address for service of the company; and<br>• amalgamations. |
| **13. Conflicts of interest (inc. intragroup dealings)** | **Conflicts of Interest**<br>Directors have a fiduciary duty at New Zealand common law to not put themselves in a position where their duty to the company and their personal interests may conflict.<br><br>**Disclosure of Interests in Transactions**<br>The Act requires a director to disclose any interests which he or she may have in transactions with the company. The company has a limited opportunity to avoid the contract once such disclosure has been made.<br><br>A director is 'interested' in a transaction to which the company is a party if the director: | The NZX Listing Rules (as at 10 December 2020) prevent a director (of a company listed on the NZX) that is 'interested' in a transaction from voting on a board resolution, or being counted in the quorum for the consideration of the matter in which that director is interested, unless the matter –<br><br>(a) is one in respect of which directors are expressly required under the Act to sign a certificate; or<br>(b) relates to the grant of indemnity under section 162 of the Act. | • A director is not considered to be 'interested' in a transaction in situations where the company grants security for its obligations to a party who is unconnected to the director and the director has given some form of guarantee in support of these obligations.<br>• A director, as soon after becoming aware of the fact that they are interested in a transaction or proposed transaction, must enter into the interests register, which is required to be maintained under the Act, and disclose to the board the nature and the: |

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| | • is a party to, or will or may derive a material financial benefit from the transaction;<br>• has a material financial interest in another party to the transaction;<br>• is a director, officer or trustee of another party to, or person who will or may derive a material financial benefit from the transaction, not being a party or person that is:<br>  – the company's holding company being a holding company of which the company is a wholly owned subsidiary;<br>  – a wholly owned subsidiary of the company; or<br>  – a wholly owned subsidiary of a holding company of which the company is also a wholly owned subsidiary;<br>• is the parent, child, spouse, civil union partner, or de facto partner, of another party to, or person who will or may derive a material financial benefit from, the transaction; or<br>• is otherwise directly or indirectly materially interested in the transaction.<br><br>Directors are required to disclose to the board the acquisition or disposal of 'relevant interests' in the shares of the company (relevant interest does not include situations where the director is holding shares on trust, for example). The particulars that must be entered into the interests register include the: | The NZX Corporate Governance Code recommends that every company listed on NZX has a Code of Ethics which outlines internal reporting procedures and describe the company's expectation about behaviour, and in particular, that every director (and employee), amongst other things, declares conflicts of interests and actively advises on any potential conflicts. | – monetary value of the director's interest if the monetary value of the interest can be quantified; or<br>– extent of the interest, if the interest cannot be quantified.<br>• Failure to disclose does not affect the validity of the transaction entered into by the company or the director. However, a failure to disclose will render the director liable to a fine of up to NZ$10,000 and will constitute a breach of a duty owed to shareholders.<br>• A transaction in which a director is interested may be avoided by the company within three months of its disclosure to shareholders, but cannot be avoided if the company receives fair value (fair value is determined on the basis of the information known to the interested director and the company *at the time* the transaction was entered into). Transactions entered into in the ordinary course of business and on usual terms and conditions are presumed to be for fair value.<br>• An interested director of a privately held company may do the following, unless the company's constitution provides otherwise:<br>  – be counted as part of the quorum at a board meeting;<br>  – vote on matters related to the transaction;<br>  – sign documents relating to the transaction on the company's behalf; and<br>  – do anything else in their capacity as directors in relation to the transaction. |

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| | • number and class of shares concerned;<br>• nature of the relevant interest;<br>• price paid or received; and<br>• date of the transaction. | | • The requirement to disclose to the board the acquisition of disposal of 'relevant interests' in shares is owed to the shareholders. The shareholders of the company have a personal right of action against a director for failing to disclose such acquisitions or disposals. |
| **14. Compliance with statutory obligations** | As noted above, the board is responsible for maintaining various registers (s 189), these being:<br>• register of directors;<br>• share register; and<br>• interests register.<br><br>Each year, the company must:<br>• file an annual return (s 214), which is an administrative requirement from the Companies Office. Annual returns can be completed online. All that is required is to confirm that the details of the company that are held by the Companies Office are correct; and<br>• ensure that an annual meeting (**AGM**) of shareholders is held not later than six months after the balance date of the company and not later than 15 months after the previous AGM (s 120). A written resolution in lieu of an AGM will be sufficient provided that everything required to be dealt with at an AGM is dealt with in a written resolution (s 122(4)). Currently the only matter required to be dealt with at an AGM is the appointment of an auditor (and only if the company is 'large' as defined in the FRA). | The NZX Listing Rules requires a company to prepare its annual report and release it to NZX within three months' of the company's balance date. | • Failure to maintain any of the registers may result in every director of the company receiving a fine of up to NZ$10,000.<br>• Failure to file an annual return may result in every director of the company receiving a fine of up to NZ$10,000.<br>• Failure to keep accounting records that comply with s 194 may result in every director of the company receiving a fine of up to NZ$50,000.<br>• Failure to prepare financial statements within five months of a company's balance date may result in every director of the company receiving a fine of up to NZ$50,000.<br>• The annual report is the primary means of communicating information relating to the affairs of a company to its shareholders.<br>• Failure to prepare an annual report may result in every director of the company receiving a fine of up to NZ$10,000.<br>• Failure to provide every shareholder of the company with a copy of the annual report, or notice under s 209, at least 20 working days prior to the annual shareholders meeting may result in every director of the company receiving a fine of up to NZ$10,000. |

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| | The board of a company must keep accounting records (s 194) that:<br>• correctly record and explain the transactions of the company;<br>• at any time enable the financial position of the company to be determined with reasonable accuracy;<br>• enable the directors to ensure the financial statements and group financial statements of the company comply with the FRA; and<br>• enable the financial statements of the company to be readily and properly audited if the company is required to audit the financial statements under the FRA.<br><br>The board of a 'large' company, that is not classed as non-active, must ensure that, within five months of the company's balance date, financial statements are prepared, audited and lodged with Companies Office in relation to the entity and that balance date, and dated and signed by at least two directors of the company (s 201 of the Act).<br><br>Under s 45(2) of the FRA a NZ subsidiary of an overseas company will be considered 'large' if:<br>• at the balance date of each of the two preceding accounting periods, the total assets of the entity and its subsidiaries exceed $22 million; or<br>• in each of the 2 preceding accounting periods, the total revenue of the entity and its subsidiaries exceeds $11 million. | | |

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| | Subject to certain exceptions, the board of every 'large' company must also prepare an annual report within five months of the company's balance date (s 208). The board of a company must send to every shareholder either a copy of the annual report or a notice stating that the shareholder can request, within 15 working days of receiving the notice, a copy of the annual report free of charge (s 209). The annual report or notice must be sent to shareholders at least 20 working days prior to the annual shareholders' meeting.<br><br>Separate financial reporting requirements apply to financial market reporting entities under the FMC Act. | | |
| **15. Disclosure obligations of listed companies** | | Pursuant to the Listing Rules, listed companies are subject to continuous disclosure obligations whereby they must promptly disclose material information of which they become aware, through the market announcement platform. There are some exceptions to this rule, including in relation to "incomplete proposals".<br><br>Listed companies must promptly release details of related party transactions.<br><br>Listed companies must release half- and full-year results within 60 days of the end of the relevant period.<br><br>From October 2022, large listed companies and some large entities including registered banks and insurers will be required to produce climate-related disclosures. The reporting standards are soon being finalized. | |

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| **16. Potential liability** | Company directors can be held criminally liable for a range of offences under a number of different statutes.<br><br>**Companies Act 1993**<br><br>Under the Act, directors can be held criminally liable and could face imprisonment for a term of two years or a fine of NZ$50,000 for the following:<br><br>• failing to deliver to a liquidator books, records or documents of the company in that person's possession that the liquidator has requested by notice in writing (s 261);<br>• leaving New Zealand with the intention of avoiding payment of money due to a company that is in liquidation, avoiding examination in relation to the affairs of a company that is in liquidation or avoiding court orders in relation to a company that is in liquidation (s 273(1)(a));<br>• concealing or removing property of a company in liquidation with the intention of preventing the liquidator from taking custody or control of property (s 273(1)(b));<br>• failing to give a liquidator, after a company is put into liquidation, details of company property in that director or former director's possession (s 274(1)(a)); and<br>• failing to deliver property to a liquidator, after a company is put into liquidation, in such manner as directed by the liquidator (s 274(1)(b)). | | There are a number of other statutes whereby directors can be found criminally liable. These include the: Financial Reporting Act 2013; Financial Markets Conduct Act 2013; Fair Trading Act 1986; Income Tax Act 2007; Goods and Services Tax Act 1985; Employment Relations Act 2000; Health and Safety at Work Act 2015; Resource Management Act 1991; Commerce Act 1986; Privacy Act 2020; Human Rights Act 1993; and Building Act 2004. The offences under these statutes have the potential to fix personal liability on directors. Most of the offences relate to fraudulent conduct, intentionally deceiving persons or making false statements. |

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| | A director can be liable to a fine not exceeding NZ$50,000 for –<br>(a) failing to keep accounting records that comply with s 194 of the Act (s 194); or<br>(b) failing to prepare, audit or register the financial statement of the company in accordance with the Act (s 207G).<br><br>In addition, directors can be held criminally liable and could face imprisonment for a term of five years or a fine of NZ$200,000 for the following:<br>• seriously breaching their duty to act in good faith and in the best interests of the company (s 138A);<br>• as an unsecured creditor, intentionally making a false or misleading claim against a company in liquidation (s 304);<br>• as a secured creditor, intentionally making a false or misleading claim against a company in liquidation (s 305);<br>• intentionally making, or authorising the making of, a statement that is false or misleading or intentionally omitting or authorising the omission of any matter that makes a document false or misleading (s 377);<br>• fraudulently taking or applying property of a company for their own benefit or fraudulently concealing or destroying property of the company (s 378); | | |

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| | • intentionally falsifying the register, accounting records, book, paper or other documents relating to a company (s 379);<br>• carrying on a business with intent to defraud creditors of the company or any other person or for a fraudulent purpose (s 380);<br>• carrying on business, as a director, within five years of being convicted of any offence in relation to the promotion, formation or management of a company, or after being convicted for fraud under the Act or any crime involving dishonesty (s 382);<br>• acting as a director of a company when prohibited by the court (s 383);<br>• acting as a director or taking part in the management of a company when prohibited by the Registrar (s 385); and<br>• a director of a failed company acting as the director of a phoenix company (being a company that, at any time before, or within five years after, the commencement of the liquidation of the liquidation of the failed company, is known by a name that is also a pre-liquidation name of the company or a similar name) (s 386A).<br><br>**Crimes Act 1961**<br><br>Under the Crimes Act, a director of a company can be found criminally liable for the following: | | |

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| | <ul><li>making a false statement with intent to (s 242):<ul><li>induce any person to subscribe to a security (as defined by the Financial Markets Conduct Act 2013);</li><li>deceive or cause loss to any person; or</li><li>induce any person to entrust or advance any property to any other person;</li></ul></li><li>intentionally obtaining by deception any property, privilege, service, pecuniary advantage, benefit or valuable consideration or intentionally deceiving or causing loss to any other person (s 260).</li></ul><br>Committing an offence under either of the above sections of the Crimes Act would make a director of a company liable for a prison term up to ten years.<br><br>**FMC Act**<br><br>Under the FMC Act, criminal liability for serious offences requires proof of knowledge and recklessness. For example, a director can be criminally liable if the company contravenes section 82 (which relates to false and misleading statements, omissions and new matters requiring disclosure in a Product Disclosure Statement (**PDS**)). In accordance with section 510 of the FMC Act, a director commits an offence if they know that, or is reckless as to whether the statement is false or misleading or is likely to mislead, or knows that, or is reckless as to whether there is an omission as referred to in section 82, or | | |

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| | knows of, or is reckless as to whether there is a circumstance that arose since the PDS was lodged with the Registrar that would have been required by the FMC Act or the regulations to be disclosed. An individual that commits an offence is liable on conviction to imprisonment for a term of up to 10 years or a fine not exceeding NZ$1 million (or both).<br><br>Lesser offences under the FMC Act include:<br>• failure to provide a PDS if the offer requires disclosure (s 53);<br>• insider trading and tipping (s 244);<br>• making a misleading statement or disseminating misleading information (s 264); and<br>• creating a false or misleading appearance of trading (s 269).<br><br>The above offences can result in an individual being liable on conviction to imprisonment for a term of up to 5 years, a fine not exceeding NZ$500,000 (or both). | | |
| **17. Duration of duties** | Director duties are applicable for the period for which the person is a director. | | |
| **Special circumstances** | | | |
| **18. Bankruptcy** | • There is an increased risk to directors when they continue to trade a company that is in financial distress.<br>• If you suspect that the company may no longer be solvent, seek legal advice immediately. | | The New Zealand Supreme Court decision of *Debut Homes Limited (in liquidation) v Cooper [2020]* demonstrates the increased risk to directors when they continue to trade a company that is in financial distress.<br><br>Several key points can be taken from the case:<br>• Solvency is a key value of the Act.<br>• If a company reaches the point where continued trading will result in a shortfall |

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| | | | to creditors and the company is not salvageable, then continued trading will be in breach of the duty not to trade recklessly (section 135), whether or not continued trading is projected to result in higher returns to some of the creditors than if the company had been immediately placed into liquidation, and whether or not any overall deficit was projected to be reduced.<br>• If directors agree to debts being incurred where they do not believe on reasonable grounds that the company will be able to perform the obligations when they fall due, then there will be a breach of the directors' duty in relation to incurring obligations (section 136).<br>• There will be no breach of section 131 (duty to act in good faith and best interests of the company) if a director honestly believed they were acting in the best interests of the company. However, in an insolvency or near-insolvency situation, there will be a breach of the duty to act in good faith and the best interests of the company (section 131) if directors fail to consider the interests of all creditors.<br>• Where there are no prospects of a company returning to solvency, it makes no difference that a director honestly thought some of the creditors would be better off by continued trading.<br>• The Act provides directors with formal mechanisms as alternatives to liquidation in circumstances where continued trading is projected to result in a shortfall (e.g. compromise with creditors and voluntary administration). Informal |

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| | | | mechanisms in insolvency or near-insolvency situations can only be used where consistent with directors' duties, the scheme of the Act and the salient features of the available formal mechanisms (e.g. ensuring all affected creditors are consulted and agree with the proposed course of action).<br>• The removal of the decision-making powers from directors under the formal mechanisms of the Act is a recognition that directors are not the appropriate decision-makers in times of insolvency or near-insolvency. This is because their decisions may be compromised by conflicting interests and may be too close to the company and its business to be able to take a realistic and impartial view of the company's situation.<br>• Where directors allow a clearly insolvent company to continue trading without using one of the available formal or informal mechanisms, this will be in breach of their duties as directors and will lead to relief being ordered. |
| **19. Takeover bids** | The responsibilities associated with takeovers will depend on the type of company that is being taken over.<br><br>In general, during a takeover, directors must still comply with their duties under the Act, such as:<br>• acting in good faith and the best interests of the company;<br>• exercising powers and performing duties with the level of care and skill that a reasonable director would observe in the circumstances; and | The Takeovers Code will apply to the takeover if the target company is listed on the NZX. | All prospective takeovers of companies that fall under the Takeovers Code must comply with the Takeovers Code and comply with its core concepts of fair and equal treatment and participation of all shareholders. The Takeovers Code has a fundamental rule which prohibits shareholding increases above 20% of a Code company's voting rights, except for increases that are made under the Code's rules.<br><br>It is important to seek legal advice prior to carrying out a takeover or if your company is the target of a takeover. |

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| | • exercising powers for a proper purpose.<br><br>Where the Takeovers Code applies, takeover offers, acquisitions and allotments must be undertaken in compliance with the Takeovers Code. In each case, the Takeovers Code imposes obligations on the target company which must be overseen by the company's directors.<br><br>The Takeovers Code will apply if the target company:<br><br>(a) is listed on the NZX; or<br>(b) has 50 or more shareholders and 50 or more share parcels and is at least 'medium-sized'.<br><br>A company will be at least 'medium-sized' if –<br><br>(a) the company has completed 1 or more accounting periods and either or both of the following is true:<br>(i) on the last day of the company's most recently completed accounting period, the total assets of the company and its subsidiaries (if any) are at least $30 million:<br>(ii) in the most recently completed accounting period, the total revenue of the | | |

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| | company and its subsidiaries (if any) is at least $15 million; or<br>(b) the company has not completed its first accounting period and on the last day of the most recently completed month the total assets of the company and its subsidiaries (if any) are at least $30 million.<br><br>If the Takeovers Code applies, the directors of the target company must also:<br>• ensure that deadlines are complied with;<br>• oversee and prepare a target company statement in accordance (Rule 19 of the Takeovers Code); and<br>• ensure that the target company statement includes all the relevant information so that the target company shareholders are well informed about the target company and are given competent and unbiased advice about whether or not to sell their shares. | | |
| **20. Market abuse/insider dealing**<br><br>*Section 262 and 265 of the FMC Act* | **Market Manipulation**<br><br>*Information-based Manipulation*<br><br>Subject to limited exceptions, it is an offence under the FMC Act for a person to make a statement or disseminate information where a material aspect of the statement or information is false or misleading, the person knows or ought to reasonably know that a material aspect of the statement or information is false or misleading and the | | **Market Manipulation**<br><br>*Information-based Manipulation*<br><br>It is possible for market manipulation to occur on social media accounts and other internet platforms such as chat rooms. Be careful not to post statements about certain companies or particular market activity that are not true or where you do not have a reason to believe they are true. |

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| | statement is likely to induce a person to trade in that product, affect the price of that product, or influence the way someone will vote on shareholder decision in relation to that product (s 262 of FMC Act). This is known commonly as 'information-based manipulation'.<br><br>A person who commits a 'information-based manipulation' commits an offence if the person knows that the statement or information is false in a material aspect or is materially misleading and, an individual (i.e. director) can be liable upon conviction to imprisonment for a term not exceeding 5 years, a fine not exceeding $500,000, or both.<br><br>The size or value of an order or trade doesn't matter if its purpose was manipulation. It is also irrelevant whether or not a person makes any financial gain, or whether their actions actually affect the market – the test is whether they were "likely to" give a false or misleading impression.<br><br>*Transaction-based Manipulation*<br><br>In addition, again, subject to limited exceptions, it is also an offence under the FMC Act for a person to do something (or omit to do something), if the act or omission will have, or is likely to have, the effect of creating, or causing the creation of, a false or misleading appearance with respect to the extent of active trading in financial products (which includes, among other things, a share in a company) or the supply of, demand for, price for trading in, or value of those financial products and the person knows or ought | | Common examples of 'information-based manipulation' include:<br>• Where the manipulator 'pumps' up the price, e.g. by telling everyone the company is under-valued, before 'dumping' or selling their shares when the price increases.<br>• Where the manipulator talks down the price, e.g. by saying the industry is facing issues, before buying the undervalued shares.<br><br>*Transaction-based Manipulation*<br><br>The size or value of an order or trade doesn't matter if its purpose was manipulation. It is also irrelevant whether or not a person makes any financial gain, or whether their actions actually affect the market – the test is whether they were "likely to" give a false or appearance.<br><br>Common examples of 'transaction-based manipulation' include:<br>• Placing orders to buy shares when you do not actually want or intend to buy them. This would give a false impression of demand for the shares.<br>• Buying and selling the same financial products at the same time risks creating a false or misleading appearance about the true market interest in the product. Placing multiple orders in the market at different prices can also amount to market manipulation.<br><br>**Insider Trading**<br><br>An 'information insider' is a person that – |

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| | reasonably to know that the person's act or omission will, or is likely to have, that effect (s 265 of the FMC Act). This is known as 'Transaction-based manipulation'.<br><br>A person who breaches the 'transaction-based manipulation' commits an offence if the person knows that the act or omission will have, or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance and, an individual (i.e. director) can be liable upon conviction to imprisonment for a term not exceeding 5 years, a fine not exceeding $500,000, or both.<br><br>**Insider Trading**<br><br>A person that is an 'information insider' (as defined in the FMC Act) of a listed issuer (e.g. a publicly listed company) is prohibited from –<br><br>(a) trading quoted financial products (e.g. shares that are approved for trading on the stock market) of the listed issuer;<br>(b) directly or indirectly disclosing the inside information to another person if the person knows or ought reasonably to know or believes that the other person will, or is likely to trade quoted financial products of the listed issuer; or advise or encourage another person to trade or hold those products; and<br>(c) advise or encourage another person to trade or hold quoted financial products of the listed issuer or advise or the other person to advise or | | (a) has material information relating to a company or other entity listed on a licensed market (e.g. the New Zealand Stock Exchange); and<br>(b) that information is not generally available to the market; and<br>(c) knows or ought reasonably to know that the information is material information and not generally available to the market.<br><br>'Material Information' in relation to a listed issuer is information that –<br><br>(a) a reasonable person would expect, if it were generally available to the market, to have a material effect on the price of quoted financial products of the listed issuer; and<br>(b) relates to particular financial products, a particular listed issuer, or particular listed issuers, rather than to financial products generally or listed issuers generally.<br><br>Common examples of insider trading include:<br>• A director of a listed company sells their shares in the company before bad news about the company is publicly announced.<br>• A listed company director holds information about offshore expansion that has not been publicly announced and tells their father to buy shares in the company. |

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| | encourage another person to trade or hold those financial products.<br><br>A person who breaches the above can commit and offence and, in the case of an individual, to imprisonment for a term not exceeding 5 years, a fine not exceeding $500,000, or both. | | • A director tells his share-trading friend that a listed company client will soon announce big news that will likely push up the price of its shares. |
| | | **Defences** | |
| **21. Good corporate governance** | • Ensure that there are adequate board reporting and management systems in place.<br>• Understand financial reporting and filing procedures.<br>• Understand risk, and be responsive to risks and conflicts.<br>• Ensure the quality of internal systems of control is high.<br>• Ensure accurate meeting minutes and records are kept. | • Ensure that your company is complying with the NZX Corporate Governance Code or can explain why it is not complying with that code in its annual report. | |
| **22. Minutes of board meetings and publication requirements** | • A company is required to keep minutes of all meetings and resolutions of directors and directors' committees within the last 7 years at its registered office. Failure to do so is an offence and the company and each director could be liable upon conviction to a fine not exceeding NZ$10,000.<br>• Following a meeting, good corporate governance would require the chairperson of the board to first check the minutes and then circulate them to the directors in draft form within a few days of the meeting. The minutes should then be signed by the chairperson as a true and accurate record of the meeting | | • Meeting minutes are not required to quote the meeting verbatim but should be detailed enough to ensure an accurate record of the meeting and the reasons behind any decisions.<br>• Minutes can be used to demonstrate that the directors have done what is required to discharge their duty of care, diligence and skill.<br>• Note that there is the possibility for external scrutiny of minutes as they are discoverable material in legal proceedings. |

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| | (this usually occurs at the beginning of the next board meeting). | | |
| **23. Discharge and Indemnification** | • Check the company's constitution to ensure that it permits directors to be indemnified to the fullest extent permitted under s 162 of the Act. If an indemnity is effected for a director and the constitution does not permit such an indemnity to be effected, the indemnity is void.<br>• Seek independent legal advice in respect of any indemnity. | | • A company can, if allowed under its constitution, may indemnify its directors (within limits) against costs associated with defending or settling a claim for any acts of omission in their capacity as a director or employee. The indemnity cannot cover any criminal liability or liabilities arising from not acting in good faith or in the company's best interests (s 162). |
| **24.Insurance** | • Check the company's constitution to ensure that it permits directors to be indemnified to the fullest extent permitted under s 162 of the Act.<br>• Ensure that the effecting of insurance has been approved by the board and that each director who voted in favour of effecting such insurance has signed a certificate stating that, in their opinion, the cost of effecting the insurance is fair to the company.<br>• If insurance is effected for a director and the constitution does not permit such insurance to be effected, or the board has not approved the effecting of insurance or signed the directors certificate stating that the cost is reasonable, the director will be personally liable to the company for the cost of effecting the insurance unless they can prove that it was fair to the company at the time the insurance was effected.<br>• Request and review a copy of the insurance policy. Seek advice from an | | • A company can, if allowed under its constitution, take out insurance for the benefit of directors (within limits) against the costs associated with defending or settling a claim for any acts of omission in their capacity as a director or employee. The insurance cannot cover any criminal liability.<br>• If insurance is taken out, details of the insurance should be entered in the company's interests register. The particulars must also be disclosed to shareholders in the annual report. |

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| | insurance broker if you have any concerns with the scope of the cover. | | |
| **25. Resignation** | A director of a company may resign office by signing a written notice of resignation and delivering it to the address for service of the company. | | The notice is effective when it is received at that address or at a later time specified in the notice. |
| **26. Restructuring of assets** | Family trusts, as well as other types of trusts, are widespread in New Zealand and it is common for directors to have transferred their personal assets into such trusts. | | |
| **27. ESG and D&I policies, metrics, reports** | No specific legal requirements for private companies. | From October 2022, large listed companies and some large entities including registered banks and insurers will be required to produce climate-related disclosures. The reporting standards are still being finalized.<br><br>A listed entity must include the gender composition of its directors and officers in its annual report, and, if the company has a diversity policy, compliance with this policy must also be reported on. | |