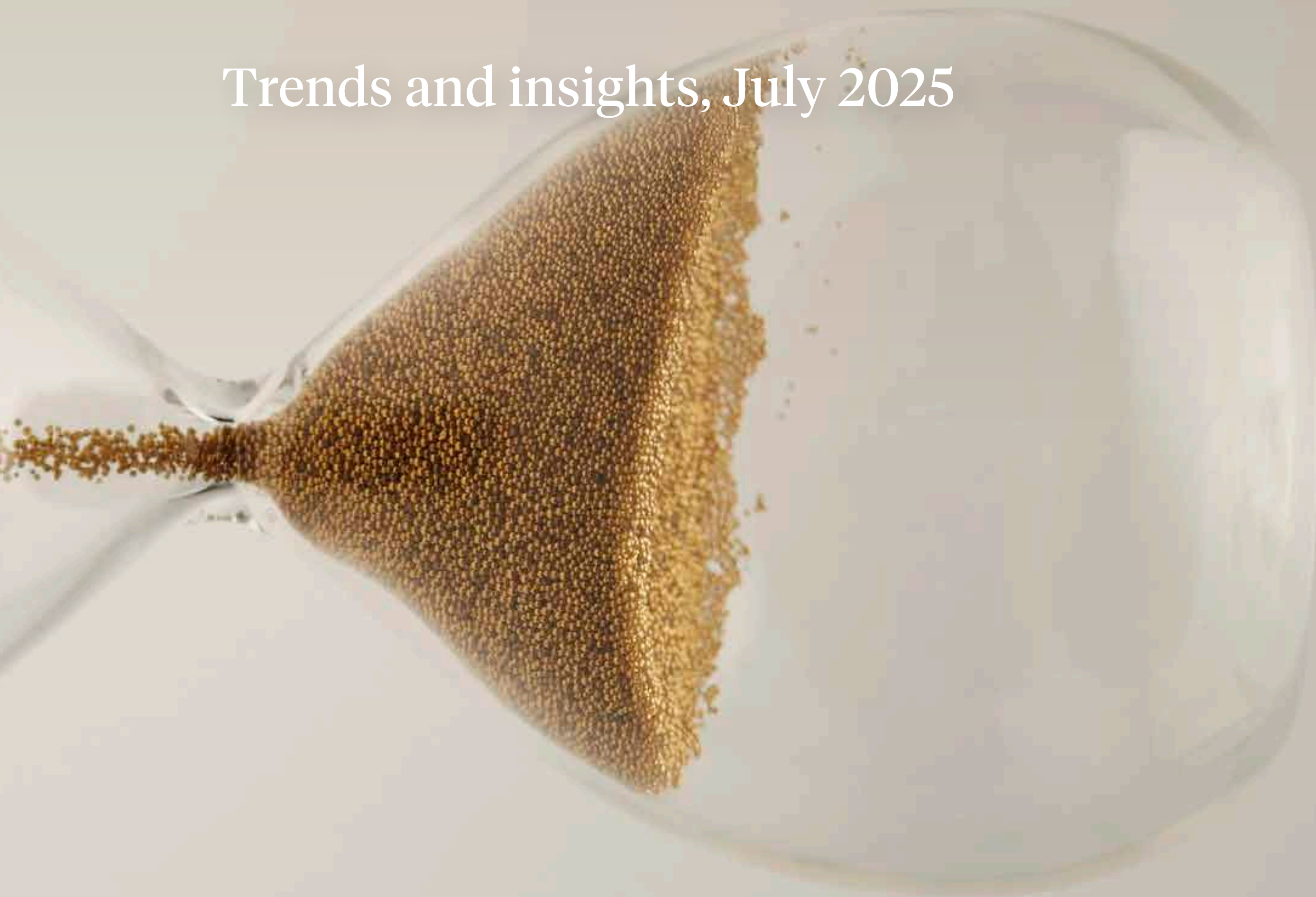
D&O insurance – the shifting sands of risk

Trends and insights, July 2025



Institute of DIRECTORS NEW ZEALAND

Marsh

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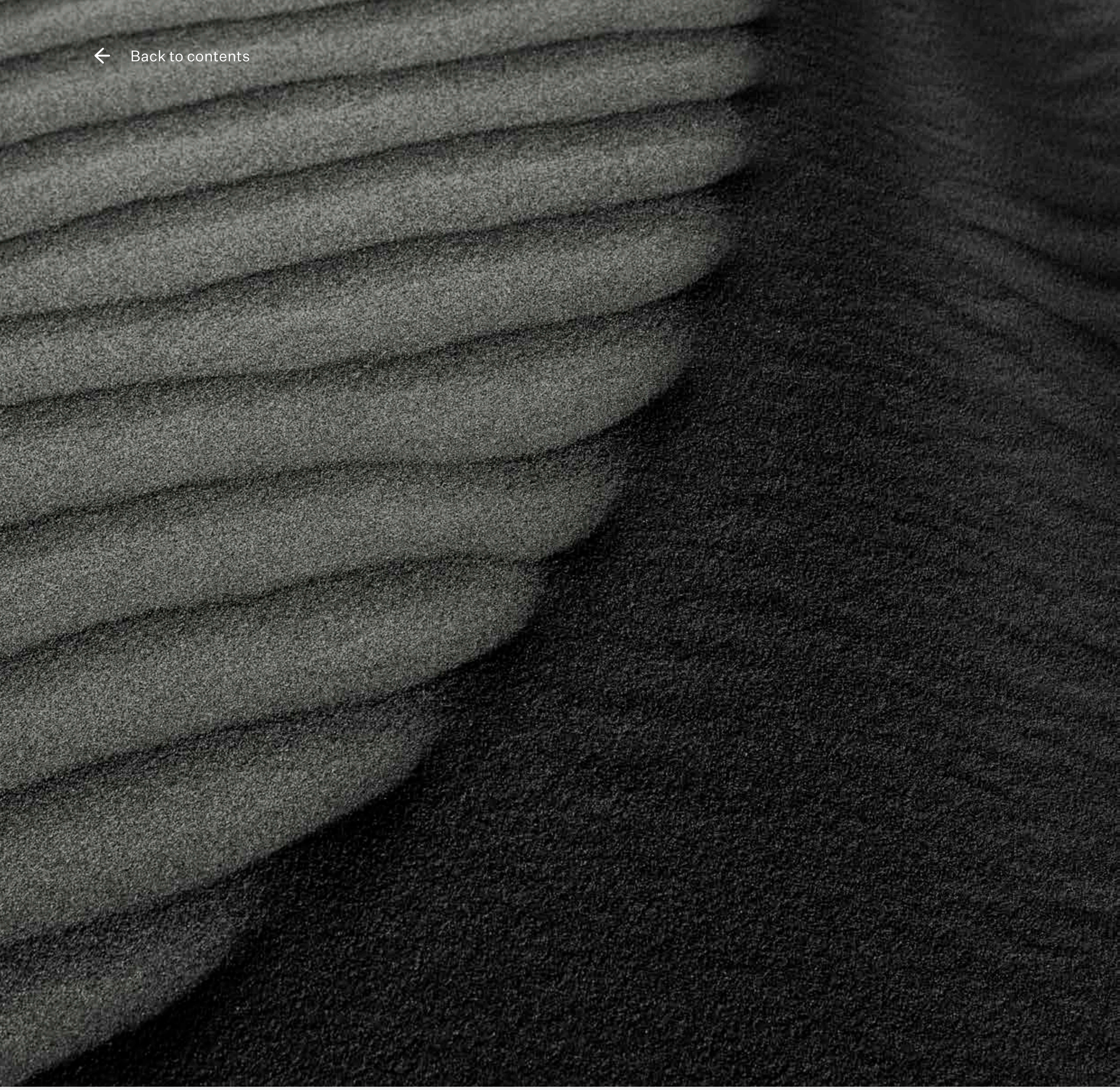

How many directors have D&O insurance?

The IoD's 2024/25 Directors' Fees Report found 94.9% of organisations provided directors with liability insurance

94.9%

1. Introduction *by the Institute of Directors*

As directors navigate an increasingly volatile environment, this year's report explores the evolving risk landscape from litigation and regulation to climate, technology, and insurance market shifts. Staying steady is helped with both foresight and firm footing.

Now in its sixth year, the Directors and Officers (D&O) Insurance trends and insights report continues to track the legal, regulatory and risk developments shaping the governance environment in Aotearoa New Zealand. In 2025, directors are facing increased complexity, scrutiny and liability as the landscape underfoot continues to shift.

From courtrooms to boardrooms, the expectations on directors have expanded significantly. Recent high-profile cases including Mainzeal, Whakaari/White Island and *Smith v Fonterra & Ors* have tested the outer edges of director duties, reinforcing the need for diligence, oversight and resilience in the face of systemic and reputational risk. Meanwhile, the proposed class actions regime and workplace health and safety reforms add new layers of accountability and potential exposure.

In parallel, issues such as climate change and artificial intelligence are no longer distant risks. Climate litigation is advancing, AI governance failures are already being uncovered globally, and reputational risks from greenwashing and "AI washing" (misleading claims about AI use or capability) are drawing increasing legal and stakeholder attention. These emerging threats add more risk factors to governance while traditional risks such as insolvency, financial performance and insurer expectations around board maturity and disclosure remain.

This report brings together expert commentary on D&O insurance market conditions, key legal developments, and strategic insights into the new and emerging risks that directors and officers must navigate. As the risk landscape evolves, the role of D&O insurance remains vital, not only as a protective mechanism, but as a reflection of governance maturity and readiness.

In a time of shifting sands, directors must remain agile and informed, and ensure they have a sound appreciation of risk, underpinned by appropriate protections to support their decisions.

The other publications in this series are available online at:

- D&O insurance – preparing for the tailwinds (2024)
- D&O insurance – hitting the reset button (2023)
- D&O insurance – a rising sea of change (2022)
- D&O insurance in a hard market (2020)
- D&O insurance – trends and issues in turbulent times (2019)

2. Key market updates *by Marsh*

Pricing for directors and officers (D&O) liability insurance has generally declined in New Zealand and the Pacific region for more than two years. While the general decline appeared to be continuing in the beginning of 2025, the pace of reductions slowed from the prior quarter. It remains to be seen if this signals a turning point for the market.

Signs that the tide may be turning in the D&O market include an uptick in claims, which often signals a market cycle shift. The last 12 months have also been characterised globally by geopolitical instability, economic uncertainty, and rapid technological change. However, competition remains strong as insurers strive toward their own growth targets.

This environment presents a strategic opportunity for directors to assess their long-term insurance needs and take advantage of current market conditions to look at securing comprehensive, cost-effective D&O insurance.

Market changes

A slowdown in D&O insurance rate reductions may indicate that factors previously pulling rates lower are beginning to ease. It may also indicate that new risks are emerging that insurers will need to factor into their pricing models.

Capacity remains in the D&O insurance market; however, when rates are trending down, there's generally pressure for insurers to strike a balance between capturing market share and sustainably pricing risk. This can create an inflection point for insurers, where growth goals must align with profitability objectives. In some instances, and depending on specific market drivers at the time, rate decreases may moderate, or coverage may be reduced.

In many cases, organisations can use insurers' competing priorities — balancing market share with sustainable pricing — to secure broader, longer-term coverage.

D&O insurance claims are expected to increase, arising from the general economic challenges and associated business failures, fuelled by active litigation funders in the region. This poses a more complex and challenging risk environment for many boards. Directors should consider the growing scope for potential director liability and ensure their breadth of cover is sufficient for the evolving risk landscape.

Clients that prioritise coverage over price and align their risk management approach with insurers' risk appetites, may be best positioned to benefit from ongoing competition in the market.

Regulatory activity

Directors must remain vigilant in monitoring the regulatory landscape, keeping up with both local legislative changes and global developments that may influence New Zealand's corporate environment.

The landmark decision allowing a climate activist to proceed with an action against a group of greenhouse gas emitters remains an ongoing domestic case that could set a significant precedent, should the activist be successful.

At the same time, recent legislation in New Zealand now requires specific climate-related disclosures *(Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021)* on the part of large financial institutions and large publicly listed companies. This mandatory reporting began in 2024 and, while at the moment it applies only to a limited number of climate reporting entities (CREs), there is a broader impact. For organisations seeking access to finance or smaller businesses with supply chain links to CREs, there's a growing need to start analysing and tracking emissions.

The regulatory requirements may also broaden over time from their initial scope; the 2023 amendments of the *Companies Act 1993* have already made specific provision for directors to incorporate environmental, social, and governance (ESG) considerations into their strategy.

In the near future we expect the Financial Markets Authority, WorkSafe, and the Commerce Commission to remain prominent for New Zealand businesses from a regulatory perspective. However, future legislative changes could arise within the reform of the *Companies Act 1993*, in line with the review of director duties, their liabilities, and enforcement. While the number of insolvencies remains elevated compared to prior years, such changes will be closely monitored.

Additionally, for the finance industry, the Conduct of Financial Institutions (CoFI) legislation has introduced new fair conduct obligations for financial services firms, raising the bar for compliance expectations.

Internationally, regulatory change is accelerating. For example, mandatory cyber incident reporting is being widely adopted in response to an increasing number of cyber breaches reported by insurers. For digital assets the European Union's *Markets in Crypto-Assets Regulation* provides a comprehensive framework, and new legislation on AI is introducing governance obligations that New Zealand regulators are watching closely.

These trends reinforce the importance of comprehensive D&O insurance. Directors may want to ensure their policies provide coverage for regulatory investigation defence costs in addition to formal legal proceedings.

Given the long-tail nature of many D&O insurance claims, actions taken today may be adjudicated under amended legal or regulatory frameworks in the future. This "regulatory lag" underscores the need for insurance policies that include adequate extended reporting periods to maintain protection over time.

Geopolitical tensions

Directors of New Zealand companies are navigating an increasingly complex landscape shaped by escalating geopolitical tensions and persistent economic uncertainty.

Shifts in US trade policy — including the potential introduction of new tariffs — could significantly disrupt established trade flows, particularly for companies reliant on international supply chains or export markets. In this environment, directors must regularly reassess strategic plans, diversify supply chains, and be prepared to respond swiftly to market movements.

Geopolitical risks

Supply chain disruption: Geopolitical tensions can quickly impact supply networks. Directors should implement resilient sourcing and distribution strategies to safeguard operational continuity.

Tariff and cost implications: Changing trade policies may lead to increased tariffs and operational costs. Directors need to assess financial impacts and deploy mitigation measures to protect their company's bottom line.

Market volatility: Geopolitical developments contribute to market volatility, affecting investment confidence, capital access, and strategic partnerships. Robust scenario planning and stress-testing processes are essential for directors to navigate these challenges.

Regulatory adaptation: Shifting global dynamics often lead to regulatory changes across jurisdictions. Directors should ensure their organisations can respond quickly to new compliance obligations while maintaining operational efficiency.

Economic uncertainty

Despite previous forecasts pointing to economic recovery in 2025, New Zealand now faces the prospect of a more prolonged recovery.

Corporate insolvencies are rising, with businesses dependent on discretionary consumer spending especially vulnerable, as are businesses with international exposure. This economic strain increases the risk of D&O insurance claims as directors of financially distressed companies come under heightened scrutiny from creditors, shareholders, and regulators.

Allegations related to trading while insolvent, unpaid wages or taxes, and breaches of fiduciary duties often coincide with the appointment of liquidators. With numerous global events impacting the New Zealand economy through supply chain disruption, rising unemployment (4.4% to 5.1% in the 23 months to March 2025) and rising insolvencies (up nearly 50% year-on-year to July 2025), such allegations illustrate the growing legal and reputational risks directors face.

Companies best placed in this environment are ones that have retained positive insurer relationships and insurance buying patterns, ensuring they have no pitfalls in their D&O policies.

Climate change and ESG

Climate change issues can create significant risks and possible liability for directors and officers. The increasing frequency and intensity of natural disasters driven by climate change pose significant risks, including disruptions to operations, damage to infrastructure, and financial losses.

Boards will increasingly need to demonstrate that these risks have been thoroughly assessed, that appropriate response strategies are in place, and that material environmental impacts are being clearly communicated to stakeholders.

Strong governance and proactive environmental initiatives are increasingly viewed as critical indicators of a company's ability to navigate climate-related challenges. Directors should prioritise effective oversight, clear disclosure, and robust risk management systems.

This view is further supported by legislative change. As noted above, currently around 200 financial institutions and large publicly listed companies are subject to the climate-related financial disclosure regime, under the *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021*. This disclosure framework mandates reporting on environmental, governance, strategy, risk management, and the need to specify metrics and targets.

When reviewing D&O insurance, directors should carefully assess how these areas of liability are addressed within their policies.

TOP GLOBAL CONCERNS OVER THE NEXT DECADE

Extreme weather events: increasing frequency and severity of storms, floods, and heatwaves.

Biodiversity loss: species extinction and habitat degradation.

Critical changes to Earth systems: significant changes in climate patterns and ecosystems.

Natural resources shortages: depletion of vital resources such as water, minerals, and energy.

Source: Marsh, Global Risks Report, 2025

Technology innovation and governance

Rapid technology advancement, particularly regarding AI and generative AI, presents both significant opportunities and potential risks for New Zealand companies.

AI implementation presents new governance challenges for boards. For example, liability risks may emerge if AI systems produce discriminatory outcomes, breach privacy regulations, or if decisions made without sufficient human oversight lead to poor outcomes. Directors should establish specialised governance structures for AI management.

Beyond AI, operational technology security is also critical. As systems become more connected, the risk from cyberattacks increases, posing threats that go beyond data breaches to include physical harm, environmental damage, or disruption of critical infrastructure.

Technology innovation also presents opportunities. Advanced analytics, process automation, and real-time monitoring systems can strengthen governance while reducing operational costs. Insurers are taking note, increasingly recognising and rewarding technology-enabled risk management strategies in their underwriting decisions and pricing models.

Technology-related risks carry significant insurance implications. Directors should ensure their D&O policies adequately cover claims stemming from failures in technology governance. As these risks continue to evolve, clear and specific policy language addressing technology-related liabilities is becoming increasingly important.

Summary

The sands may be shifting in the D&O insurance market but capacity continues to be available. Companies that can demonstrate strong risk management frameworks, effective governance structures, and financial resilience will be well positioned to benefit from insurer competition.

Now is the time for directors to take a proactive approach, evaluating their organisation’s risk profile, ensuring their coverage extends to both emerging and traditional risks, and achieving favourable policy terms.

3. Health and safety legal update – further uncertainty for directors

by James Warren, Partner, Employment and Health and Safety, Dentons New Zealand

Whakaari/White Island's owner has conviction quashed

Following the Whakaari/White Island eruption in December 2019, WorkSafe prosecuted Whakaari Management Limited (WML), the owner of Whakaari Island. It also charged its directors for failing to exercise due diligence. The charges focused on a suggested failure to ensure the safety of the walking tours which WML licenced tour operators to conduct, on the basis the island was a workplace which it managed.

The High Court held that WML did *not* owe a duty under the 'workplace management' section of the *Health and Safety at Work Act*, quashing its conviction in the District Court. It ruled that WML did not actively manage or control the walking tour "workplace" when this was just bare land. There was nothing for WML to manage or control, other than the work itself. Merely granting access to Whakaari was not enough to amount to management or control. However, the Court also explicitly confirmed ongoing uncertainty as to how this duty applies and what it means for commercial landlords.

Former Port of Auckland CEO sentenced for health and safety breaches

Last year the District Court found Tony Gibson, the former chief executive of Port of Auckland Limited, guilty of health and safety breaches leading to the death of a stevedore. Gibson was fined $130,000 and ordered to pay $60,000 in costs when sentenced in February.

Gibson was not directly involved in the relevant accident – the case provided groundbreaking confirmation that officers of a large company can be held liable for breaching their health and safety due diligence duty. However, it raises as many questions as it answers concerning the extent of an officer's responsibilities, and when they may be charged. We understand that the decision is now also being appealed.

Government reform

The Minister of Workplace Relations and Safety, Brooke van Velden, has announced a host of health and safety reforms that are expected to be progressed later this year.

Carve out for small businesses

The Minister announced that there will be a carve out for small low-risk businesses from general *Health and Safety at Work Act* requirements. This would amend the primary duty of care so that the exempt businesses only need to manage critical risks (those that could cause death, serious injury or serious illness) and provide basic workplace facilities.

Removing liability for landowners

The Minister proposed a change that would ensure landowners would not be responsible for those using their land for recreational activities. Health and safety responsibilities would fall only on the organisation running the activities.

Clarifying director duties

The Act will be amended to make clear that "day-to-day management of health and safety risks will be left to managers so that directors and boards can focus on governance and the strategic oversight of the business". Further clarity on this proposed change is still to come, and it is possible the Minister intends to limit the officer duties further than the Gibson decision.

Approved Codes of Practice (ACOP)

Rather than WorkSafe leading the ACOP process exclusively, the Minister is proposing to allow individuals and groups (such as industry organisations) to initiate work on ACOPs, which the Minister herself would then approve against a set of standards. This is intended to speed up the issue of codes and ensure ACOPs 'make sense' for those who deal with the relevant risks. The Minister said that if people comply with an ACOP, they will be treated as fulfilling their health and safety duties.

Other proposed changes

- **Focus on critical risk:** The primary purpose of the Act would be sharpened to focus on critical risk, with the aim that it would reduce 'tick-box activities' that don't protect workers from serious harm.
- **Notification requirements:** Notification to the regulator would only apply to "significant workplace events" involving "deaths, serious injury, illness and incidents". It is unclear how this will differ from the current Act, which requires PCBUs to notify the regulator of "notifiable events".
- **Clarification of boundaries:** The boundaries between the Act and other regulatory systems that manage similar risks are to be clarified. The Minister considers uncertainty in this area has been the source of over-compliance and confusion.
- **Road cone hotline:** The Minister announced that there will be a road cone hotline for the public to report excessive road cone usage, which WorkSafe will then investigate.

4. Navigating AI – 2025 and beyond *by Marsh*

As artificial intelligence (AI) reshapes the global business environment, New Zealand directors face both unprecedented opportunities and complex challenges. Understanding how AI affects operations, cybersecurity, governance, and risk management is essential to building resilient and future-ready organisations.

AI and business transformation

AI is increasingly transforming industries in New Zealand and globally, with profound impact. As AI functionality intersects with human "outputs" in expanding and sophisticated ways, its capabilities continue to grow.

AI's capabilities for deep learning, autonomous decision making, and complex problem solving mean the upsides for international commerce are huge, including enhancing efficiency, accelerating innovation, and supporting better decisions. Yet, with these advancements come increased vulnerabilities, in cybersecurity and other areas.

The rise of generative AI has significantly amplified cyber threats. According to the World Economic Forum's Chief Risk Officer's Outlook 2024, 71% of CROs cite cyber risk as a major concern. According to Cybersecurity Ventures, the global annual cost of cybercrime is predicted to reach $9.5 trillion USD in 2024. Compounding this is the rising cost of damages resulting from cybercrime, which is expected to reach $10.5 trillion by 2025 underscoring the need for strong AI governance and cybersecurity strategies at board level.

Although in New Zealand there is (as yet) no dedicated AI specific legislation or regulation, the regulatory framework enshrined in the *Privacy Act 2020*, the *Bill of Rights Act 1990*, the *Fair Trading Act 1986*, the *Patents Act 2013*, and the *Harmful Digital Communications Act 2015* applies to any business deploying AI-enabled products and services.

These frameworks can be updated to accommodate rapid AI innovation and provide redress for claimants who suffer loss or are harmed by AI-driven infractions. New Zealand legislators will also follow developments in AI regulation in overseas jurisdictions, such as the European Union's *AI Act 2024*, which provides rules for both providers and users of AI.

Key considerations for directors

The absence of specific, codified AI law does not lessen the key role New Zealand directors play to promote sound AI practices. These broad parameters are a guide when assessing the role of AI in business strategies.

Technology and risk management: AI presents both established and emerging risks, including data breaches, privacy violations, and intellectual property concerns. Directors need to ensure their organisations stay vigilant in identifying and mitigating these risks in order to protect their businesses and their reputation.

Social and ethical responsibility: AI raises important ethical and legal questions around privacy, the use of data, and intellectual property. Directors should be familiar with relevant New Zealand legislation (see above) and ensure ethical standards are embedded in AI implementation and deployment.

Effective implementation: Adopting AI should complement, not replace, human decision making. Organisations should invest in reliable systems and processes that reduce human error, while maximising the benefits of AI technologies, to enhance accuracy and reliability.

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Cybersecurity prioritisation: As AI becomes more embedded in operations, organisations need to strengthen their cybersecurity frameworks. This includes identifying system weaknesses and adopting comprehensive risk management strategies to bolster protection against increasingly sophisticated cyberattacks.

Data protection: Safeguarding sensitive and personal information is crucial in the age of AI. Strong data protection policies aligned with local and international standards are essential to prevent data breaches and maintain trust and legal compliance.

Addressing "AI washing": Misleading claims about AI capabilities, known as AI washing, poses a significant risk for companies and can lead to reputational risk and regulatory penalties. Directors need to ensure transparency and accuracy as to how their organisations represent AI use, especially as oversight will likely intensify in this area as New Zealand follows global trends.

A cautionary tale

In March 2024, the US Securities and Exchange Commission (SEC) settled charges against two investment advisers for making false and misleading statements about their use of AI. The SEC found that the two firms marketed to their clients and prospective clients that they were using AI and machine-learning technology in investment decisions and forecasting when in fact, they were not.

In January 2025, the SEC settled charges against a public restaurant-technology company for overstating the capabilities of its AI-based product in drive-through order taking. These developments underscore the growing regulatory focus on AI disclosures. For New Zealand directors, they serve as a timely reminder of the need for responsible governance and honest communication around emerging technologies.

Building capabilities through education

To prepare for the AI-driven future, organisations should prioritise education and upskilling. This includes improving digital literacy, fostering critical thinking, and developing cyber awareness across all levels of the organisation.

Directors should encourage training on identifying threats, such as phishing, and ensure data protection practices are embedded in everyday operations. Hiring skilled professionals, like data scientists and analysts, can also help mitigate AI bias and prevent the spread of harmful AI-generated content.

Strategic leadership in an AI era

Adopt a holistic view of tech risks: Boards should treat AI and cyber risks as business-wide issues. Organisation-wide involvement is necessary to develop robust risk assessments and mitigation strategies.

Conduct scenario planning: Organisations should run simulations to evaluate responses to cyber disruptions. This process should inform investment priorities, resource planning, and insurance decisions.

Establish AI governance frameworks: Clear governance frameworks are vital. They should define roles, responsibilities, and accountability structures, while ensuring regulatory compliance and ethical deployment.

Design risk management strategies: Proactive risk identification and mitigation plans help address AI-related challenges before they escalate. These plans should cover privacy, security and ethical implications.

Ensure transparency and human oversight: Transparency is essential in AI systems. Directors should ensure organisations document data sources, algorithms, and decision-making processes, with built-in human oversight to maintain accountability.

How AI technology is reshaping the D&O insurance industry

The insurance industry offers a clear example of how artificial intelligence and digital innovation are transforming both risk management and product distribution.

Insurers are leveraging AI and advanced data analytics to develop more precise risk profiles, tailor coverage to specific organisational exposures, and make faster, better-informed underwriting decisions. At the same time, digital platforms and tools are capable of broadening access to markets and policyholders, streamlining the distribution of D&O insurance products.

These advancements are improving risk selection and operational efficiency — key factors in lowering the overall cost of risk. As a result, companies may benefit from more competitive premiums, while the market as a whole becomes more stable and less prone to the volatility seen in prior cycles.

For directors, this underscores the connection between sound governance and insurability. Strong oversight and strategic leadership can directly influence a company's risk profile and its access to affordable D&O insurance coverage.

Conclusion

For New Zealand directors, success in the digital age demands a forward-thinking, balanced approach to AI. By understanding the risks, embracing ethical practices, implementing sound strategies, and strengthening cybersecurity and data governance, organisations can confidently navigate the evolving technological landscape.

Responsible leadership and informed decision making will be critical in unlocking AI's potential while safeguarding business continuity and stakeholder trust.

5. Climate change – an ever-present and growing risk *by Marsh*

As the planet's climate alters, environmental risks and a bolstered regulatory framework pose significant challenges for, and impose new responsibilities on, New Zealand businesses. A clearly articulated strategy and genuine transparency in this space are more important than ever.

In the top 10 global risks ranked by severity over the long term in the World Economic Forum 2025 Global Risks Report, the top four related to the environment:

- Extreme weather events and a resulting increase in frequency and intensity of natural disasters.
- Biodiversity loss and ecosystem collapse leading to species extinctions and loss of habitats.
- Critical changes to the earth's systems, specifically climate patterns and ecosystems.
- Natural resource shortages including depletion of critical resources such as water and minerals.

These risks continue to strengthen. More than ever, nature, legislation, and public sentiment demand robust environmental governance by businesses.

How does that translate for organisations in New Zealand?

Greater responsibility

Directors and company officers in New Zealand are increasingly held accountable for environmental risks their businesses pose, and recent legislative change has mandated climate-related disclosures for some larger financial market participants.

Currently, around 200 financial institutions and large companies are subject to the climate-related financial disclosure regime, under the *Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021*. This disclosure framework mandates reporting on environmental, governance, strategy, risk management, and specific metrics and targets on outputs such as greenhouse gas emissions.

The Financial Markets Authority monitors these disclosures. Directors of climate reporting entities (CREs) can face fines or even imprisonment for climate reporting failures. Failure to adequately report is almost certain to challenge access to D&O insurance.

A potential downstream effect of increased regulation and scrutiny is that stakeholders across various sectors are more likely to pressure other companies to provide similar disclosures, regardless of their legal obligations, as New Zealand strives to meet an agreed target of net-zero carbon emissions by 2050. Companies will do well to bring their stakeholders along on their journey to greater climate resilience, whether they are required to by law, or not.

For financial institutions, a rise in ethical investing has seen capital flowing into the sector, supporting activity consistent with sustainability, low emissions, and climate resilience. This has also attracted increased regulatory scrutiny regarding the quality of industry benchmarks used to evaluate ESG aspects, and the introduction of the External Reporting Board's Aotearoa New Zealand Climate Standards.

Financial institutions that lend to and invest in the non-renewable energy sector may face challenges from activist claimants seeking to change company behaviour. Ongoing political developments and uncertainties may influence the level of environmental-themed litigation against financial institutions. The ongoing case of *Smith v Fonterra & Ors* also has the potential to set precedent in terms of the extent to which corporates can be held liable under tort law for the impact of greenhouse gas emissions.

Other legislative changes

Supporting the reality of increased regulatory scrutiny is overt legislative encouragement. In August 2023, amendments to Section 131 of the *Companies Act 1993* ushered in a new subsection (5), which stipulates that when acting in the best interests of the company, directors may consider factors beyond profit maximisation, including environmental matters. This legislative change reinforces the notion that directors have a duty to consider climate risks and other environmental issues in their decision-making processes.

Extreme weather

Climate change is happening now; according to the *Building a Resilient Future report* by Marsh, over the past 50 years, the number of weather-related disasters has risen five-fold, with climate change generally accepted to be a primary driver. In another report by Marsh, *Adapting to Climate Risks*, we see one in two global businesses have been negatively impacted by extreme weather. Changes to earth systems, biodiversity loss, ecosystem collapse, and increasing shortages of natural resources, including water, further exacerbate environmental risks.

New Zealand is far from immune. The Pacific region is particularly vulnerable due to its geography and reliance on natural resources. The significant losses and resulting claims from events such as Cyclone Gabrielle and the Auckland Anniversary Weekend floods underscore the economic toll of climate-related disasters.

This new reality underscores the critical need for businesses to prioritise climate adaptation and resilience strategies.

Adapt to build resilience

Inevitably, insurers bear some of the financial burden from these disasters, which can lead to increased premiums and in some cases make insurance unaffordable or unavailable for certain businesses. When in place, insurance is a recovery tool that mitigates risk, but it doesn't build resilience, and this is key.

As climate change impacts on employee health, operations, supply chains, and infrastructure, investment in climate change resilience becomes an increasingly important board agenda item.

Businesses must adapt, in part by critically and quantitatively examining their adaptive investments and looking beyond asset level risk to the systemic fundamentals of the business. Only then can they assess clear-eyed the risks posed by their supply chain, governments, regulators, and external resources.

This can be challenging, especially as the broader economy navigates conditions that may limit new investment strategies and add complexity to any corporate transactions such as a merger or acquisition, thereby tempering demand. Fewer deals may, conversely, make the D&O insurance market more competitive as insurer premium pools have traditionally been supplemented by transactional premiums from such deals. Directors that remain vigilant and have a disciplined focus on environmental adaptation efforts will also encourage D&O insurers to price accordingly and look more favourably on the risks they are willing to insure.

New Zealand directors must embrace the challenging environmental issues and scrutiny that climate change brings. Investing in climate resilience and developing frameworks to support reporting and visibility will both fulfil legal obligations and align with stakeholder expectations. It will also assist with optimising investment value for money in the D&O insurance market.

6. Market outlook 2025 and beyond *by Marsh*

Some indicators suggest the D&O insurance market in New Zealand may be approaching an inflection point. While capacity remains in the market, directors should always be prepared to face a changing market in an increasingly complex risk environment.

Market conditions

While the D&O insurance market in New Zealand remains competitive, it may be closer to a turning point than it was a year ago.

Rising legal costs, increased frequency of claims, ongoing geopolitical instability, and the growing impact of "long tail" liability — where claims tend to develop years after policies are written — are influencing how insurers assess and price risk.

Given New Zealand's relatively small market size in global terms, it remains vulnerable to external shocks and potential withdrawal of insurer capacity.

The risks facing directors are significant. High-profile cases involving climate governance and consumer protection could set new legal precedents in terms of directors' liability; new legislation and regulation has added scrutiny to environmental performance oversight for some companies. Shareholder litigation, often centred on inadequate disclosure, misrepresentation, or breaches of duty, remains a key focus of insurers in their underwriting of risk at a time of elevated corporate insolvencies and continued macro-economic challenges.

As market dynamics evolve, directors must ensure their D&O insurance policies provide robust protection that reflects the expanding and increasingly complex risk landscape. Now is a good time for companies to take advantage of available capacity and look at their requirements over the longer term.

MARSH'S TOP TIPS FOR 2025

1. **Adopt a long-term perspective:** Consider a three- to four-year time horizon when evaluating your D&O insurance coverage options.
2. **Leverage current market capacity:** Take advantage of the sustained insurance capacity and competitive environment.
3. **Focus on coverage breadth:** While pricing remains favourable, focus on expanding coverage.
4. **Monitor legislation and the regulatory environment:** Adapt to changes quickly and prepare for future changes.
5. **Foster strong insurer/insured relationships:** Use clear and detailed communication.

Positioning for a market shift

Charting a stable course, no matter the market dynamic, is an important consideration for a company's strategy to protect its directors. Organisations that demonstrate financial resilience amid economic uncertainty, and show preparedness for both traditional and emerging risks, will be better positioned to secure favourable terms when the sands shift.

Insurers that best navigate the evolving landscape will be ones that maintain underwriting autonomy, adapt quickly to client expectations, and prioritise long-term relationships. The choice of insurer is typically driven by price and breadth of cover — as directors adapt to a shifting landscape, they should also take the above elements into account to ensure they are aligning with the right partner.

ESG and climate risk

Climate risk remains a central focus for insurers, who increasingly integrate environmental, social, and governance factors into their underwriting strategies.

Recent legislative developments suggest directors may need to consider broader factors, not just profit maximisation, when determining what is in the best interests of the company. Companies with a well-defined ESG and climate strategy are more likely to attract favourable underwriting terms.

Technology risk

As technological advances — for example, the rapid rise of generative artificial intelligence (AI) — alter the way companies operate, they also create new and complex challenges for boards. AI is increasingly a part of corporate strategy decisions, customer interactions, and risk exposures that can be expected to amplify existing vulnerabilities.

AI-related risks — such as human oversight error, system design failure, and others — have the potential to increase discriminatory outcomes and breach privacy laws, among other concerns. Operational technology security is also increasing. Vulnerability to cyberattacks and digital disruptions grows as systems become more interconnected, and thus vulnerable.

Given the ever-evolving nature of technology, directors need to maintain robust oversight of digital and technological transformation.

Implications for D&O insurance

Directors should ensure that their D&O insurance policies do not have any unreasonable or unnecessary restrictions of cover associated with technology governance, including AI deployment, cybersecurity incidents, and broader digital initiatives.

As underwriting practices evolve, a proactive approach to risk disclosure and governance will be essential in securing comprehensive and sustainable coverage. Companies that effectively address both traditional and emerging risks — including cyber risk, geopolitical volatility, and technological advancements such as AI — will be well-positioned in a challenging market.

Looking beyond 2025

D&O liability insurance market capacity remained available in early 2025, but market conditions can shift quickly, particularly if competition recedes. By adopting a strategic, long-term approach now, directors can secure the protection they need to navigate an increasingly complex risk environment.

This is an opportune moment for directors to review their D&O insurance policy limits and coverage terms in light of emerging risks, especially those related to climate governance, regulatory scrutiny, and technology deployment. Ongoing geopolitical tensions and economic uncertainty further heighten the importance of comprehensive risk management.

Regularly reviewing your cover and planning with your insurers to explore multi-year strategic objectives can offer valuable stability through potential market shifts. Directors who act now will be better positioned to manage risk and maintain confidence as the insurance landscape evolves.

Appendix 1: *by Marsh*

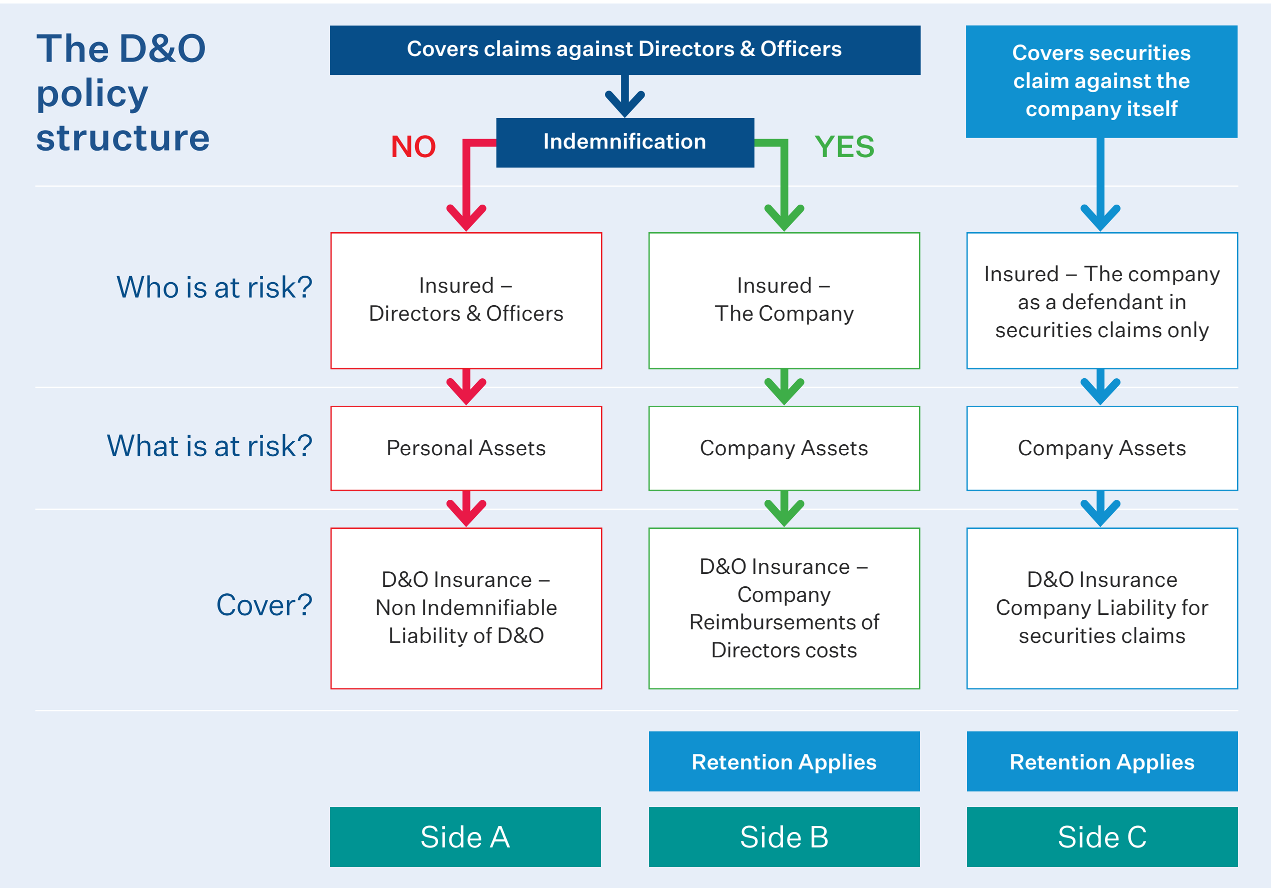
What does D&O insurance cover?

Subject to the particular policy's terms, conditions, and exclusions, cover is commonly provided for:

- Legal costs incurred by or on behalf of the insured director or person in investigating, defending or settling claims, or investigations/prosecutions brought against them.
- Awards/settlements of insured damages (most commonly limited to compensatory damages).

In the absence of D&O insurance, individuals must rely on receiving indemnity from the company to pay their defence costs and any eventual settlement. Where such indemnity is not forthcoming for whatever reason, the individual will have to fund themselves the cost of the defence (which can be protracted and expensive), and if their defence is unsuccessful, they face the loss of their personal assets to pay penalties, or bankruptcy, or prison for criminal activities.

- Traditionally, a D&O policy provided coverage under two categories (insuring clauses) — Side A and Side B.
- Side A pays on behalf of individuals any loss that is not indemnified by the company.
- Side B reimburses the company for amounts it pays under indemnity arrangements.
- Both Sides A and B apply only to loss incurred by the directors and officers in claims made against the directors and officers, but not against the company.
- Side C, if purchased, insures loss incurred by the company, resulting from certain types of claims (for example, securities claims), for the company's own wrongful acts, even if directors and officers are not named as defendants.



Appendix 2: *by Nick Scott, Partner and Jacca Chang, Solicitor at Dentons*

Directors' duties – changes ahead

On 12 February 2025, the government released its *'Going For Growth'* initiative which set out its approach to enable economic growth, to deliver more jobs, higher incomes, and money to invest in projects. That increased economic activity will be largely conducted by companies, and directors play a crucial role in governing each company's affairs.

With power comes responsibility, and directors are subject to the duties contained in the *Companies Act 1993* (the Act). It is worth noting that the definition of a 'director' extends beyond those persons formally appointed as a director. Under section 126 of the Act, a 'director' includes de facto and shadow directors so individuals who act like a director (even if they don't have the title of 'director') may be held accountable for breaches of directors' duties.

Key duties under the Act

The key duties under the Act are:

Section 131 – When exercising powers or performing duties, a director must act in good faith and in what the director believes to be the best interests of the company. While a director's honest belief is relevant, their actions are also judged against what a reasonable person in their position would have done. Only if a company's constitution permits, can a director of a company take into account the interests of that company's holding company or subsidiary (even though those interests may differ from the best interests of their company).

Section 131 – When exercising a power, directors must exercise that power for a proper purpose. For example, directors are permitted to procure a company to issue shares in order to raise capital, but if the underlying reason to issue shares is to dilute a 'troublesome' shareholder below some critical shareholding threshold, this section may be breached.

Section 134 – A director must not act, or agree to the company acting, in a manner that contravenes the Act or the company's constitution.

Section 135 – Directors must not allow the company to engage in *'reckless trading'*. This means the business of the company should not be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors. This duty is relevant if a company is insolvent or nearing insolvency.

Section 136 – Directors must not agree to a company incurring an obligation unless the director believes on reasonable grounds that the company can perform the obligation when required to do so.

Section 137 – When exercising a power or performing a duty, a director must exercise the care, diligence and skill that a reasonable director would in the same circumstances.

Section 138A – A director is prohibited from exercising a power or performing a duty in bad faith towards the company, when believing that the conduct is not in the best interests of the company and knowing that the conduct will cause serious loss to the company. This section is relatively new (having been inserted in 2014), and differs from the other duties, as a potential consequence of breaching this duty is imprisonment.

Where duties have been breached by a director, under section 301 of the Act a liquidator, creditor or shareholder can apply to the Court for orders that the director make payment to the company for such amount that the Court thinks fit. If the Court orders, this constitutes personal liability for the director.

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Upcoming reforms

In the Mainzeal case the Supreme Court recommended that sections 135, 136 and 301 of the Act be reviewed to address the:

a. incoherence in relation to sections 135, 136 and 301 as to the distribution of proceeds of a successful claim; and
b. tension between the purpose of section 301 and its text as to the ability of creditors to obtain direct relief.

In August 2024, the Government announced a two-phase review of the Act. The first phase deals with more straightforward changes including allowing directors the option to remove their home address from the Companies Register (replacing it with an address for service), assigning company directors and shareholders a unique identification number, changes to the definition of a ‘major transaction’ and some improvements to insolvency law.

The second phase is the Government has asked the Law Commission to review director duties and director liability, along with more effective enforcement (which includes the issues raised in the Mainzeal case). This review should commence in 2025 and be welcomed by existing directors and intending directors.

There is a delicate balance to be struck between keeping directors accountable, while encouraging them to make decisions that involve prudent risk. We hope that reform around director duties considers overseas options, including the use of the ‘safe harbour’ mechanism in Australia that provides protection for directors of distressed companies who are taking appropriate professional advice during a restructuring process.

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The IoD is New Zealand's leading organisation for directors and at the heart of the governance community. We believe in the power of good governance to create a strong, fair and sustainable future powered by best practice governance. Our role is to drive excellence and high standards in governance. We support and equip our 10,500+ members and the broader governance community who lead a range of organisations from listed companies, to large private organisations, state and public sector entities, small and medium enterprises, not-for-profit organisations and charities.

Contacts

Stephen Walsh, Chief Client Officer
Marsh Ltd
+64 9 928 3126 | +64 21 858 855
Stephen.Walsh@marsh.com | Auckland

Nick Scott, Partner, Corporate and Commercial
Dentons
+64 9 914 7264 | +64 21 765 424
Nick.scott@dentons.com | Auckland

Guy Beatson, General Manager
Governance Leadership Centre
Institute of Directors
+64 4 499 0076 | +64 27 222 9747
Guy.Beatson@iod.org.nz | Wellington

Judene Edgar, Principal Advisor
Governance Leadership Centre
Chapter Zero New Zealand Lead
+64 4 474 7637 | +64 21 541 927
Judene.Edgar@iod.org.nz | Nelson

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