MAY 2022

# New Zealand Corporate Governance

## Trends & Insights

chapman tripp

# Tracking and analysing trends in the corporate governance arrangements of our largest listed entities

**Method of analysis**

Chapman Tripp analysed the board composition of the NZX Main Board Top 75, as recorded in the public register maintained by the New Zealand Companies Office at 31 March 2022. We also reviewed the NZX portals for the Top 75 and certain NZX announcements made by them.

Our sample comprises the Top 75 entities by market capitalisation at the close of trading on 31 March 2022. For the purposes of preparing the data set, we have excluded overseas companies and listed funds.

Every effort has been made to ensure the accuracy of this publication but the information is necessarily generalised and readers are urged to seek specific advice rather than relying solely on the text.

## Contents

# Time for directors to bring their best game to the board

## Any director who thought that, once the world entered post-pandemic mode, things would settle down and life would be easier will be well and truly disabused of that notion by now.

Rampant inflation after decades of relative price stability, reform across almost every institution of government, new reporting requirements in prospect for both climate change risk and modern slavery, the list goes on.....

All will demand attention at board level, requiring boards to continue to play their best game rather than take some much needed down time after the stresses of managing their organisations through the disruption created by COVID-19.

The intensity of change experienced over the last few years has underlined the need for the law governing directors' duties – sections 131 to 138 of the Companies Act 1993 – to be reviewed, ideally by the Law Commission.

The need for reform has been long understood among the legal profession but has been made painfully evident by the *Debut Homes* and *Mainzeal* litigation.

Commerce Minister David Clark has not kiboshed the idea but is inclined to await the outcome of the *Mainzeal* proceedings in the Supreme Court. Chapman Tripp has been trying to persuade him to start sooner.

A private members' bill which would amend section 131 has been drawn from the ballot and, as it is sponsored by Labour MP Dr Duncan Webb, is likely to make some progress, given Labour's clear majority in the House.

View the Companies (Directors Duties) Amendment Bill online here

But we hope that the select committee will recommend Dr Webb's bill not proceed, as it will achieve nothing useful and, if passed in its current form, could cause unnecessary confusion.

There is useful work going on, in particular the review by NZX of aspects of its Corporate Governance Code, focusing on the extent to which tenure should be regarded as a fetter on directorial independence, and the importance of assessing a director's holistic interests in order to determine independence, rather than treating the factors contained in the Code as bright-line criteria.

Chapman Tripp considers that there is definite room for improvement in both areas.

Our data series tracks developments in the board composition of the NZX Main Board Top 75, and has been running since we started our data set.

See our analysis of the Top 75 boards on pages 8–11

The main movements thrown up by our analysis have been a trend toward more gender balance and toward shorter average tenure. There is minimal evidence, so far, of broader social and ethnic diversity since we started our data set.


Roger Wallis
Partner, Auckland


Josh Blackmore
Partner, Wellington


Fiona Bennett
Partner, Christchurch

# Director independence: a nuanced question

**Too often boards look to apply a simple formulaic approach to whether a director can be designated "independent" under the NZX Listing Rules but a much more contextualised assessment is required, taking into account the issuer's overall relationships and corporate structure.**

## The NZX test

The Listing Rules define an "Independent Director" as a person that is not an employee and who has no "Disqualifying Relationship". A disqualifying relationship is defined in Recommendation 2.4 as:

Any direct or indirect interest, position, association or relationship that could reasonably influence, or could reasonably be perceived to influence, in a material way, the Director's capacity to:

- bring an independent view to decisions in relation to the issuer
- act in the best interests of the issuer, and
- represent the interests of the issuer's Financial Product holders generally, having regard to the factors described in the NZX Corporate Governance Code that may impact director independence.

The NZX Corporate Governance Code deliberately does not seek to apply a prescriptive test, instead recommending a range of factors for a board to consider, including whether the director:

- is currently or has, within the last three years, been employed in an executive role by the issuer or had a material business relationship or material contractual relationship with the issuer
- has, or has had within the last 12 months, a senior role in a material professional services provider to the issuer
- is a substantial product holder of the issuer or has close family ties with anyone in the categories above, or
- has been a director of the issuer for a length of time (no time period is indicated) that may compromise independence.

The NZX is reviewing the Code, last updated in 2018, with a focus on:

- the extent to which tenure should be regarded as a fetter on directorial independence, and
- the importance of assessing a director's holistic interests and relationships in order to determine independence rather than treating the factors contained in the Code as bright-line criteria. (This was an objective of the 2018 changes but NZX considers that, in too many cases, they have not produced the desired effect).

Submissions closed on the initial consultation round on 28 January this year. Further rounds of consultation will be undertaken before final decisions on any changes are made.

We broadly agree with the submission of the New Zealand Corporate Governance Forum, in particular; updating the definition of "Disqualifying Relationship" in the Listing Rules to record that the assessment of independence should be undertaken "***including*** having regard to the factors described in the NZX Corporate Governance Code" to reinforce that the general principle test needs consideration too.

The Forum also recommends a number of amendments to better align the NZX Rules with the ASX, specifically:

- providing guidance for when extended tenure may lead to a loss of independence (the Forum proposes 10 years, which is the ASX guidance). Importantly, reaching this number would not mean automatic loss of independent status but "enhanced reporting" to justify the board's decision
- broadening the tenure wording to pick up that independence can be compromised from relationships formed over time with management or substantial shareholders, and
- changing "close family ties" to "close personal ties", to reflect recent changes to the equivalent test for ASX.

### Our view – context is everything

A determination by a board on a director's independence should take into account the full nexus of that individual's relationships and whether they might compromise their ability to bring an independent perspective to conflicts should they arise. The evaluation should include tenure but not in a mechanistic sense.

For example, a director who has held office for 15 years will have a depth of experience and institutional knowledge, so should not be automatically disqualified from being an Independent Director, especially if the rest of the board and the management team are relatively new.

As recognised by the ASX Code, a mix of tenure will serve the board well.

### Tenure changes

Length of service figures are reasonably predictable as boards at the top of the tenure ratings must eventually refresh their membership.

| | Average length of service (years) | | | |
|---|---|---|---|---|
| **Company** | **March 2017** | | **March 2022** | |
| Delegat | 13.8 | vs | 10.4 | 3.4 yrs (24.6%) |
| EBOS | 13.3 | vs | 9.2 | 4.1 yrs (30.8%) |
| Millennium & Copthorne Hotels | 10.2 | vs | 7.8 | 2.4 yrs (23.5%) |
| Property For Industry | 11.9 | vs | 8.7 | 3.2 yrs (26.9%) |
| Ryman | 9.3 | vs | 8.5 | 0.8 yrs (8.6%) |
| Vector | 9.9 | vs | 3.0 | 6.9 yrs (69.7%) |

# Director Duties Bill – a road to nowhere

## The debate over shareholder primacy vs stakeholder theory that was reignited by former Financial Markets Authority CEO Rob Everett in 2019 has now made its way to the debating chamber in the form of the Companies (Directors Duties) Amendment Bill (Bill).

The member's bill, sponsored by Labour MP and chair of the Finance and Expenditure Committee, Dr Duncan Webb, was drawn from the ballot last year and is awaiting its first reading. It's a simple one-page Bill, the working bit of which is accomplished in a single clause to amend section 131 of the Companies Act (Act).

The purpose of the amendment is purportedly to make it clear that, when a director determines what is in the best interests of the company, the director ***may*** take into account "recognised environmental, social and governance factors".

### Virtue signalling

In our view, the Bill adds nothing to the existing law of director duties and is a virtue signal to the stakeholder theory of corporate governance.

Section 131 of the Act requires directors to act in the "best interests of the company". The traditional view is that this requirement is fulfilled by directors acting in the best interests of the shareholders as a whole, i.e. shareholder primacy.

View the Companies (Directors Duties) Amendment Bill

The stakeholder theory calls for the interests of those with some stake in the company and its business (such as employees, creditors and the wider public) to be taken into account by the directors, alongside the interests of shareholders.

The Supreme Court confirmed in *Debut Homes* that the "acting in the best interests" test is a subjective one; the director must act "in what the director believes to be the best interests of the company". Therefore, there is no doubt a director can, under the current section, take into account factors such as those in the Bill if they believe that is also in the best interest of the company.

> "The Bill is trying to fix an issue that doesn't exist – the current law does not prevent or preclude a director from taking into account factors such as those listed in the Bill."

Michael Arthur
Partner, Auckland

**New section 131(5) proposed by the Webb Bill**

To avoid doubt, a director of a company may, when determining the best interests of the company, take into account recognised environmental, social and governance factors, such as:

(a) recognising the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)

(b) reducing adverse environmental impacts

(c) upholding high standards of ethical behaviour

(d) following fair and equitable employment practices

(e) recognising the interests of the wider community.


Because the Bill does not use mandatory language, it will not create any new ability for shareholders to claim that directors failed to consider the non-exclusive list of factors it will introduce. We think that is a good thing as it could otherwise undermine directors' business judgement and provoke vexatious litigation.

Importantly, if shareholders are not happy with the direction of the company, they have the right to replace the board (or chair, or individual director) with persons more aligned to the stakeholder theory – if that is what they want.

As for creditors, even with the Bill enacted, it won't be any defence at all for a director to say that they were acting in the best interests of the stakeholders (or other factors listed in the Bill, such as Te Tiriti/The Treaty).

Directors are obliged to avoid substantial risk of serious loss to creditors, and it is difficult to see how the proposed new considerations could lessen that obligation.

## More harm than good?

Rather than clarifying the law, the Bill might have the opposite effect as there are a couple of drafting areas which require elucidation: what is meant by "recognised environmental, social and governance factors", recognised by whom, and at what point in time?

Those hoping this Bill would result in similar obligations imposed under section 172 of the UK Companies Act 2006 will be sorely disappointed.

## Wider reform needed

We have asked the Government to put a review of sections 131 – 138 of the Companies Act on the Law Commission work programme. There is no need to wait, including for a decision from the Supreme Court on the *Mainzeal* litigation. Urgent comprehensive reform is needed in this area now.

The Bill is just a distraction. We think it best that the Select Committee recommend it not proceed.

Read our submission and other commentary on our website

# Choosing the best share issue structure

## Boards have a lot to think about, and some difficult choices to make, in deciding the fairest and most efficient structure to use when raising capital.

The answer will depend on a range of contextual factors – whether the raising is for balance sheet repair, growth/acquisition, or to provide working capital; whether the issuer is in control of the timetable; the profile of the share register (institutional or retail-based); whether the offer should be underwritten, and transaction cost.

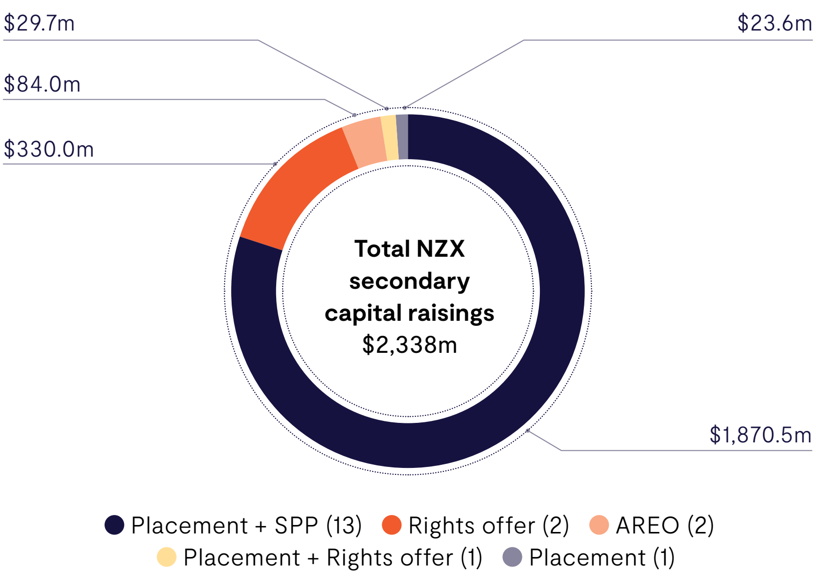
Section 47 of the Companies Act recognises the complexity involved in these decisions by requiring directors to exercise judgement and to certify what they consider to be fair and reasonable to both the company and existing shareholders. For issues at more than a 15% discount, the listing rules also require directors to certify the price is fair to those not participating.

As with the director's duty to act in the best interests of the company, the section 47 duty leaves considerable room for directors to exercise their commercial nous.

Most of the various structural alternatives enable director's to seek to facilitate a pro rata outcome, as contemplated by Recommendation 8.4 of the NZX Corporate Governance Code, with some options having reduced market risk, lower dilution and underwriting cost.

For a deeper look at the trade-offs involved, see our recent Brief Counsel on this topic

**NZX capital raisings completed ($ value by structure)**
12 months to 31 March 2022




**NZSA independent advice to the board and other policy developments**

The New Zealand Shareholders' Association (NZSA) has abandoned its Role of the Company Secretary policy in favour of a position which better recognises the roles played by multiple internal executives and external professionals in ensuring that the Board receives effective assurance in the governance of key risks.

The new policy currently being developed will instead emphasise the importance of boards having access to independent advice, no matter where it comes from. We agree with this approach.

The NZSA is also reviewing, a number of its 21 policies. Four of these – Director Fees, Director Tenure, Future Directors, and Independent Directors Share Ownership have been updated and a further two are out for consultation.

We recommend directors familiarise themselves with the updated policies, as the NZSA's influence continues to grow.

# The Top 75 – board analysis

**This is the sixth year of Chapman Tripp's data series. Results are as at 31 March 2022. Our comparison base is 2020, when we last published our analysis.**

### Overview

The Top 75 by market capitalisation ranged from Fisher & Paykel Healthcare at $14.0b to Gentrack Group at $177m – a smaller spread than in 2020, when the range was $17.5b to $83m.

Big movers were Rakon, up 53 places; NZME up 39 (from a low base during the depths of COVID in 2020); Pacific Edge up 39; and SkyTV up 19. Synlait Milk dropped 19 places. Green Cross Health (which had jumped up in 2020) fell 15 places, and Fonterra Shareholders' Fund, 13 places as a by-product of Fonterra's surprise capital restructure proposals.

Hallenstein Glasson remains the longest Top 75 listing by NZX or predecessor exchanges, at almost 75 years, and Winton Land, which listed last year, is the newbie.

The average time since first listing on NZX is 21.8 years (2020: 20.2). 36 of the Top 75 are also listed on ASX (48.0%).

### Independence

77.3% of boards had a majority of independent directors, with 20.0% having only independents (against 81.3% and 22.6% in 2020).

77.3% of boards also had an independent chair (2020: 84%) and 32.9% had the CEO on the board (2020: 32%). This trend reflects the continuing impact of the revised 2019 NZX Listing Rules and the updated NZX Corporate Governance Code recommendations.

### Length of service

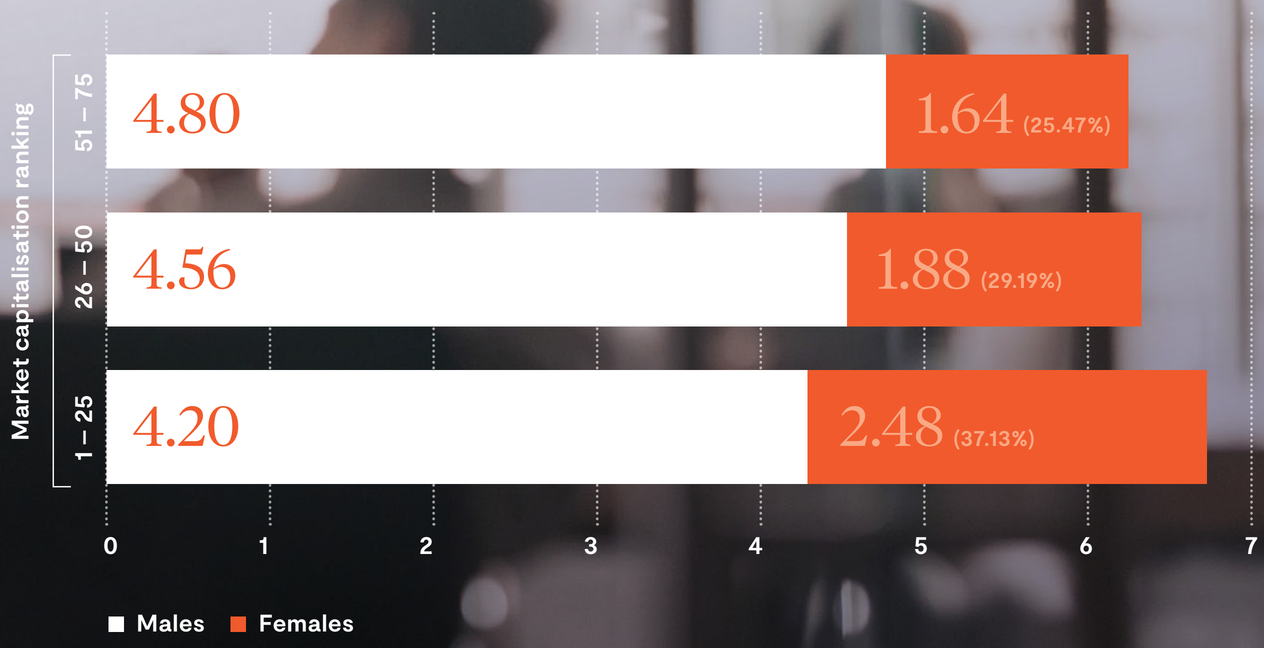
The average length of service across the Top 75 increased slightly to 6.0 years (2020: 5.8). The longest average tenure was 19.3 years, and was held by the same company as in 2020, when it was 19 years.

### Skills matrix

68% of the top 25 published a director skills matrix in their most recent annual report, and 36.0% of the middle 25, and 28% of the bottom 25. 44% of the Top 75 overall did so.

## Director gender by NZX market capitalisation ranking

March 2022




### Multiple board roles

Multiple directorships remain comparatively rare among the Top 75. No director has five roles this year (2020: one), three directors have four roles (2020: four), 15 directors have three (2020: 13), and 44 directors have two (2020: 43).

The Top 75 had 492 directors altogether (2020: 487).

### Gender diversity

16 of the Top 75 board chairs, or 21.3%, were women (2020: 13, 17.3%), as were six CEOs (8.2%) (2020: four), and 10 CFOs (14.1%) (2020: 12, 17.0%).

30.7% of directors overall were female, up from 19% in March 2017.

Our analysis continues to show that the top 25 of the Top 75 are leading the way on gender diversity over the middle 25 or bottom 25.

### Geographic diversity

225 of the 492 roles in the Top 75, or 45.7%, were filled by directors who recorded their place of residence as Auckland. Other popular locations were Wellington (34), Christchurch (26) and Queenstown/Wanaka (23). 102 roles were filled by directors residing overseas.

These metrics are all broadly the same as for 2020.

### Average board size

**6.51 directors**

down slightly from 6.54 in 2020

### Gender diversity – board chairs in the Top 75

**21.3% women**

up from 17.3% in 2020

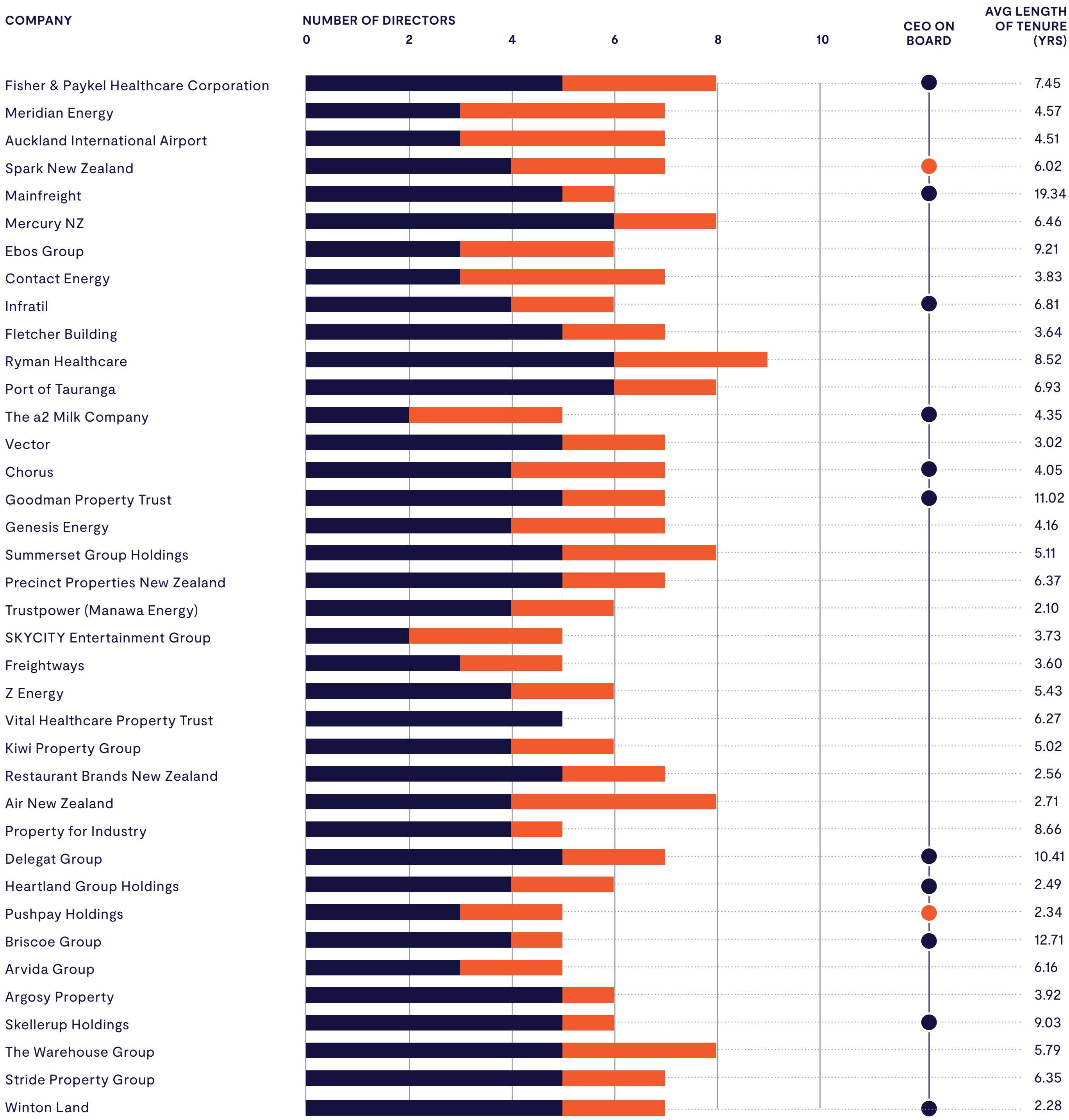
### Geographic diversity – directors in the Top 75

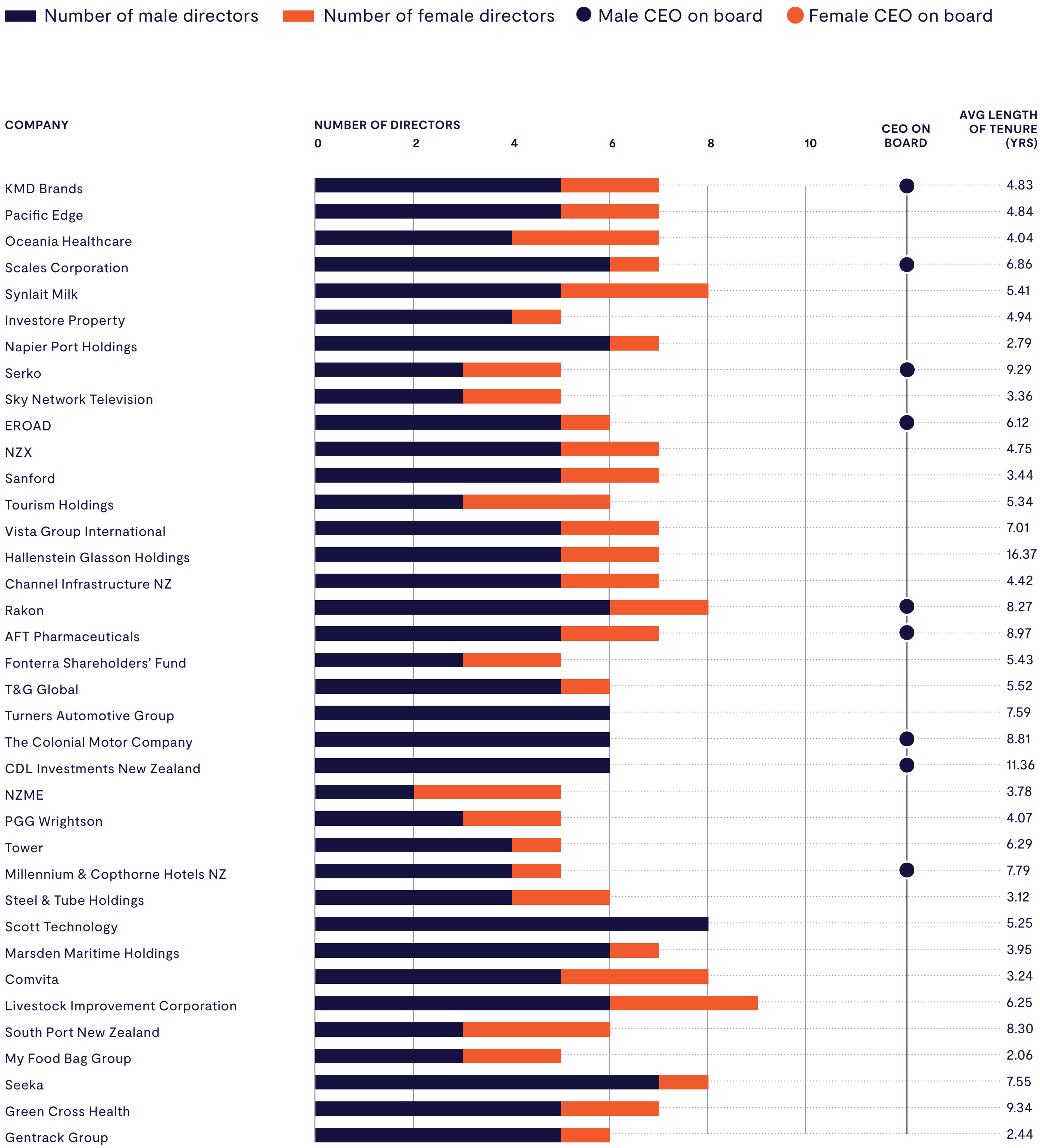
**46% Auckland-based residence**

up slightly from 44.8% in 2020

# The Top 75 – board composition, size, diversity and length of service

as at 31 March 2022




Number of male directors
Number of female directors
Male CEO on board
Female CEO on board
COMPANY
NUMBER OF DIRECTORS
0 2 4 6 8 10
CEO ON BOARD
AVG LENGTH OF TENURE (YRS)
KMD Brands 4.83
Pacific Edge 4.84
Oceania Healthcare 4.04
Scales Corporation 6.86
Synlait Milk 5.41
Investore Property 4.94
Napier Port Holdings 2.79
Serko 9.29
Sky Network Television 3.36
EROAD 6.12
NZX 4.75
Sanford 3.44
Tourism Holdings 5.34
Vista Group International 7.01
Hallenstein Glasson Holdings 16.37
Channel Infrastructure NZ 4.42
Rakon 8.27
AFT Pharmaceuticals 8.97
Fonterra Shareholders' Fund 5.43
T&G Global 5.52
Turners Automotive Group 7.59
The Colonial Motor Company 8.81
CDL Investments New Zealand 11.36
NZME 3.78
PGG Wrightson 4.07
Tower 6.29
Millennium & Copthorne Hotels NZ 7.79
Steel & Tube Holdings 3.12
Scott Technology 5.25
Marsden Maritime Holdings 3.95
Comvita 3.24
Livestock Improvement Corporation 6.25
South Port New Zealand 8.30
My Food Bag Group 2.06
Seeka 7.55
Green Cross Health 9.34
Gentrack Group 2.44

# Developments in shareholder engagement

When we commenced our analysis of the Top 75 in 2017, 'hybrid' shareholder meetings were rare, and 'virtual' shareholder meetings unheard of. But social distancing requirements under COVID-19 have, for lack of any alternative, made virtual engagement the norm.

Views on whether issuers should continue with a 'virtual' or 'hybrid' format post-pandemic are mixed. Virtual meetings offer some benefits:

- more certainty that a meeting may proceed, regardless of restrictions on gatherings, flight disruptions or other disruptive events
- time and cost efficiency for the issuer and shareholders (travel costs are eliminated for shareholders, and the cost of a venue and set up etc. is reduced)
- potential increased attendance, and greater participation from a shareholders resident in a broader range of geographies, including overseas, and
- easier access for those with disabilities, including visual or hearing impairments.

But there are dynamics attached to everyone being in the same room that are not easily achievable online. Which is why the New Zealand Shareholders' Association (NZSA) is clear that, now the COVID-19 contact limitations have been lifted, it expects companies to offer a physical meeting as well as a virtual meeting.

"NZSA believes hybrid Annual Shareholder Meetings (ASMs) or Special Shareholder Meetings (SSMs) maximise shareholder participation and should become the default format for all listed issuers."

New Zealand Shareholders' Association – Policy #19: Shareholder Meetings

The NZSA operates a Standing Proxy service which allows NZSA to cast votes on behalf of both its members and non-members alike on shareholder resolutions of those issuers it covers. It exercised between 1,500 and 2,000 Standing Proxies across 152 issuer meetings in 2021, and expects the service to become more popular as it expands into covering ASX-listed New Zealand companies this year.

**Meeting types held**

| | Hybrid | Virtual | In-person |
|---|---|---|---|
| Top 25 | 16.0% | 80.0% | 4.0% |
| Middle 25 | 27.3% | 59.1% | 13.6% |
| Bottom 25 | 21.7% | 52.2% | 26.1% |

**The number of meetings NZSA exercised Standing Proxies:**

**124** in 2020

**152** in 2021

**20%** increase

Another initiative that is sure to increase shareholder voting rate is Computershare's Proximity service, which was soft-launched in New Zealand late last year, for use on a more widespread basis for the post-June 2022 ASM season. The service will allows institutional investors to access key meeting information more easily and vote until the meeting voting deadline. This could in practice allow institutions up to six additional days to consider the business of the meeting and submit their votes (compared to current postal or email options).

For some quaint reason, some institutional custodians still submit proxy forms by facsimile machine!

### Attendance and participation

Shareholder attendance at annual and special meetings remains extremely low, notwithstanding the introduction of more virtual and hybrid style meeting formats. Voting also remains low, but the impending introduction of an automatic share voting process by online investment platform Sharesies may soon shake that up.

Sharesies tend to only tell members about votes that have the "potential for material impact on the share price". But few Sharesies investors currently choose to cast their vote, even when the vote is of crucial importance.

Sharesies investors collectively own more than 7% of Air New Zealand, their largest percentage holding of a NZX50 company. Currently, the vast majority of those underlying shareholders do not cast a vote.

"The reason why we haven't done this already is we want to do this well. That means with appropriate education alongside any voting options, explaining why investors should care. We want to make voting accessible to everyone."

**Gus Watson**
Sharesies Head of Investment

### Notices of meeting

The NZX Corporate Governance Code recommends that an issuer ensures its notices of meeting are "posted on the issuer's website as soon as possible and at least 20 working dates prior to the meeting". The Companies Act requires notices of meetings to be sent to every shareholder entitled to receive one not less than 10 working days before the meeting.

**82.6%** of the Top 75

provide 20+ working days' notice (on average)

### Month of the most recent annual meeting of the Top 75*

As most balance dates for the Top 75 are in March or June, there is a clear skew of annual meetings being held in the latter half of 2021, reaching a peak in October and November.

This may make it difficult fo investors with diversified portfolios to attend all meetings.

| June | July | August | September | October | November | December | January | February | March | April | May |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 4 | 9 | 6 | 6 | 18 | 10 | 6 | – | 2 | – | 4 | 5 |
| 2021 | | | | | | | 2022 | | | | |

### Top 75 annual meeting times*

| Time | | 9:00am | 9:30am | 10:00am | 10:30am | 11:00am | 11:30am | 12:00pm |
|---|---|---|---|---|---|---|---|---|
| No. of Companies | | 1 | 2 | 15 | 7 | 5 | 2 | 2 |
| **Time** | **12:30pm** | **1:00pm** | **1:30pm** | **2:00pm** | **2:30pm** | **3:00pm** | **3:30pm** | **4:00pm** |
| No. of Companies | 1 | 10 | 1 | 16 | 3 | 4 | 0 | 1 |

*due mainly to new listings, only 70 of the Top 75 had held an annual meeting at the date of publication.

# Modern slavery rules coming

New Zealand is likely to see modern slavery and worker exploitation legislation enacted in the near future. Our approach will follow the UK and Australian model but, as currently proposed, would go further in terms both of coverage and of the obligations imposed.

**Proposed responsibilities**

Some New Zealand businesses already report under the UK and Australian regimes, both of which require the publication of an annual Modern Slavery Statement detailing the entity's identification and management of modern slavery risk in its operations and supply chains.

But both are limited to businesses over a certain revenue threshold and neither requires mandatory due diligence. The New Zealand proposal would capture companies, sole traders, partnerships, state sector organisations, local government, charities, trusts, and incorporated societies with responsibilities graduated according to size – below \$20m, \$20m to \$50m, and above \$50m.

| | Responsibility |
|---|---|
| All entities | To **take reasonable and proportionate** action if the entity becomes aware of modern slavery in its operations and supply chains at home or abroad or worker exploitation in its NZ operations. |
| | To **undertake due diligence** to prevent, mitigate and remedy modern slavery and worker exploitation by NZ entities **where they are the parent or holding company or have significant contractual control.** |
| Entities with annual revenues above \$20m | To **disclose** the steps the entity is taking to address modern slavery in its operations and supply chains at home and abroad and worker exploitation in its NZ operations. There would be mandatory reporting criteria. Disclosure would be through a public statement as per the Australian/UK model. |
| Entities with annual revenues above \$50m | To **undertake due diligence** to prevent, mitigate and remedy modern slavery in its international operations and supply chains and worker exploitation in its NZ operations. |

**What is modern slavery?**

Modern slavery includes situations of forced labour, debt bondage, forced marriage, slavery, and human trafficking and would apply to an entity's international and domestic operations and supply chains. Modern slavery is distinguished from worker exploitation, which covers breaches of New Zealand employment standards.

See our website for further insights on the proposed reporting

**Enforcement**

The proposed enforcement regime would include a range of tools – e.g., infringements, improvement notices, enforceable undertakings, and the publication of good and bad practice.

Penalties are yet to be determined but would likely be in line with those under the Financial Markets Conduct Act, the Health and Safety at Work Act and the Anti-Money Laundering and Countering the Financing of Terrorism Act – i.e., between \$600,000 and \$5m for body corporates. Criminal sanctions are not being considered.

MBIE is seeking feedback on whether remediation should be required, particularly for large entities where there is "a clear link between their actions and the harm".

**What this means for directors**

Directors will need to consider the practical application of the proposed regime, as part of a broader trend towards recognition of ESG (environmental, social and governance) matters in New Zealand.

# Climate change posing ever larger legal risks to boards

**The directors of Royal Dutch Shell are being taken to court in the UK by environmental NGO ClientEarth in a shareholder derivative action alleging they are in breach of their duties under the UK Companies Act for failing to take adequate action to support a global shift to a low carbon economy.**

This will be the first attempt to sheet liability for climate change risk at director level. Most climate related litigation globally so far has tended to be directed against governments, local and national, and against government agencies.

And where the target has been corporate, the sights have been set on the company rather than on the board – a local example being the ongoing action by Mike Smith, climate change spokesperson for the Iwi Chairs Forum, against seven New Zealand companies[1].

The ClientEarth case builds on a majority judgment in May 2021 by a first instance court in the Netherlands which itself set new ground by requiring that Royal Dutch Shell reduce its net emissions by 45% against 2019 levels by 2030.

This was the first such decision to be issued against a private sector entity and is under appeal. ClientEarth is now seeking to challenge the Shell board by claiming that Shell (which recently announced the company was shifting its headquarters to the UK) is not doing enough to comply with the Court's instruction.

Directors will be best served by staying across domestic regulatory developments (including the recently released National Adaptation Plan and soon to be released Emissions Reduction Plan) and in touch with the expectations of their shareholders and employees.

1 Chapman Tripp is acting for multiple respondents in this litigation which is presently before the Supreme Court.

"Even if we assume that the ClientEarth challenge does not succeed, the volume of climate-related cases is steadily growing and directors themselves are increasingly asking whether their business is doing enough to prepare for a net zero economy by 2050."

Nicola Swan
Partner, Wellington

### New reporting requirements

Much attention has been placed on the development of the new climate related reporting regime, ushered in by the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act. This will be rigorous, demanding a significant investment of time and cost for reporting entities.

To date, reporting entities have been getting to grips with the requirements to identify and assess priority to climate related risks and opportunities for their particular business. The expectations being proposed by XRB are much more granular, reflecting international developments in reporting standards. For example, two areas of direct relevance to boards are the requirements to describe:

- the actual and potential financial impacts of climate-related risks and opportunities on financial position, financial performance and cash flows, and
- how climate-related risks and opportunities serve as an input to financial planning processes, including for capital deployment and financing.

This information will be publicly available and will be a key focus for investors, banks, insurers, climate activists, iwi and affected community groups – so not one audience but multiple, and each with its own perspective. How, then, do directors minimise their own and the company's risk.

This will be dictated to some extent by size, both of the organisation and of its exposure.

Chapman Tripp's commentary on the XRB consultation is available here

View the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act online

Boards at the serious end of the spectrum will need to prioritise climate risk identification, strategy alignment, and climate adaptation and transition planning. New Adaptation and Transition Reports will be required from 2024 and 2025 respectively which will focus stakeholder attention.

To create the space and capacity within a business to achieve the strategic shifts needed to align with a net zero economy, measures might include:

- creating a dedicated climate risk management governance structure. This could include a dedicated board committee, led by the chair or the deputy chair
- identifying responsibility for the net zero transition within the executive, as well as engaging a broad stakeholder group
- freeing up resources to do an early and thorough physical and economic transition risk assessment, with a focus on business opportunities
- developing and maintaining under continuous review quantitative, qualitative and realistic climate related targets and commitments
- maintaining relationships with your stakeholders so that they know the climate actions the business is taking and you can keep them onside (knowing whether they are with you or not is the best indicator of future legal risk), and
- explore the feasibility of sector engagement on climate change scenario analysis (the disclosure standard will require assessing the resilience of the reporting entity's business model against, at least, a 1.5˚C scenario and a greater than 2˚C scenario. While the particular impacts of any particular climate change scenario will be business specific, identifying the likely physical and economic scenario that the business will be operating within will often apply across the sector).

Smaller or low emission businesses may not have the means, or the need to engage in a response of this order. Directors would still need to focus at a minimum on:

- ensuring governance at board and executive level to allow for proper identification, analysis and management of climate related risk
- periodic assessment of the nature and extent of the risk, including by seeking and critically evaluating advice as necessary
- deciding whether, and what action to take, taking into account the likelihood of the risk and the possible resulting harm, and
- disclosure of material risks as appropriate.

### TCFD/Sustainabilty voluntary reporting

Some listed issuers are already voluntarily preparing TCFD or ESG reports, separate from their annual reports.

**Companies which disclosed a TCFD/Sustainabilty report**

**28%**
of the Top 25

**24%**
of the Middle 25

**16%**
of the Bottom 25

# Our team of experts

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