New Zealand Corporate Governance

TRENDS AND INSIGHTS

April 2018

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NZ Law Firm of the Year

Chambers Asia-Pacific Awards 2018

Most Innovative National Law Firm of the Year (New Zealand)

IFLR Asia Awards 2018

New Zealand Deal Team of the Year

2017, 2016 & 2015 Australasian Law Awards

This publication looks at recent developments in New Zealand corporate governance and identifies trends for the year ahead.

2018 trends at a glance

Key themes we expect to see in the governance sphere this year:

More effective stakeholder engagement

A regulatory focus on auditor independence

Slow progress on diversity

More transparency from enhanced disclosures

Improved disclosure

Factors at work in improving the quality of disclosure are the bedding in of Key Audit Matters, now in place for a full reporting season, and the first reports under NZX's revised Corporate Governance Code. The Financial Markets Authority (*FMA*) has refocused its governance handbook on unlisted entities.

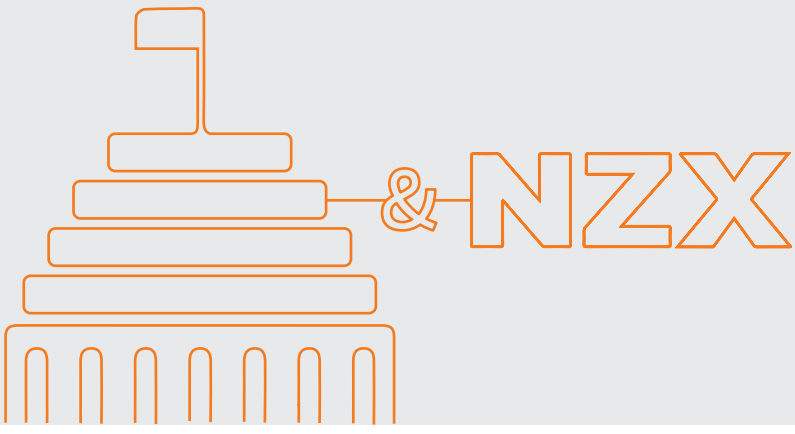
More scrutiny on the horizon

Boards will continue to be subject to high levels of scrutiny, including from the New Zealand Shareholders' Association (*NZSA*), institutional and retail investors, and the FMA. The Takeovers Panel has recently published updated guidance requiring better quality forecast financial information and reinforcing its expectations that directors will offer their own viewpoint when formulating a recommendation.

Governance comparisons

We have updated our data series on annual report disclosures from the top 75 NZX Main Board issuers by market capitalisation[1], and draw board composition comparisons with the portfolio of Crown commercial entities overseen by the New Zealand Treasury.

The comparison highlights some differences in approach to both board composition and the setting of executive remuneration.



1 Market capitalisation as at 31 March 2018. Overseas listed issuers and NZX Smartshares funds have been excluded.

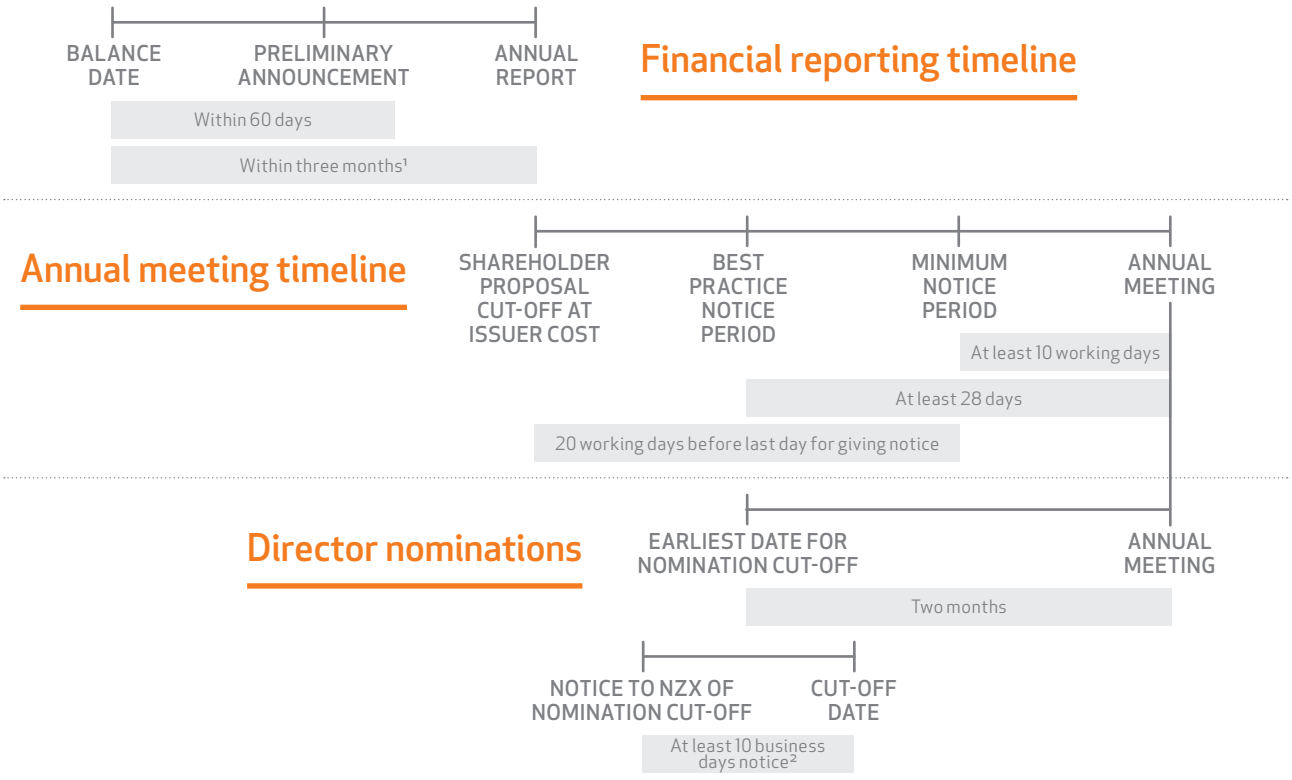
Shareholder engagement

Engagement over activism

In contrast to 2016, which delivered several high profile examples of shareholder activism, 2017 was characterised by more 'behind the scenes' engagement between boards and shareholders. We think this is overall a more constructive approach.

Our experience with institutional investors is that some do not fully appreciate the rights they have under the Companies Act and the listing rules or the timelines that apply for changes to board composition. The diagram below distils the key timeframes for annual financial reporting to shareholders and the nomination periods for director changes at the annual meeting.

Key timeframes



Notes
1 Many of the larger companies choose to release annual reports with a preliminary announcement.
2 Although a minimum of 10 business days notice of director nomination cut-off is required, most issuers give more.

Shareholder engagement *(continued)*

"RULES OF ENGAGEMENT" BETWEEN SHAREHOLDERS

- Hold discussions in confidence
- Do not commit to any particular course of action as a group. Any indication of approach should reserve your right to change position
- Do not trade or tip if you have any inside information (including others' intentions)

DIRECTOR REQUIREMENTS

- At least two, or one third, independent
- At least one third rotate each year
- Rotation exception for MD (for five years) and board/ shareholder appointees
- Board appointees don't count for rotation calculation

Hybrid meetings

Five of the top ten issuers and eight of the top 75 held hybrid shareholder meetings – combining a traditional physical meeting with real-time online participation. This was slightly higher than last year, indicating a developing trend.

Timing of meetings

There continues to be a significant lag between the publication of preliminary financial results and the annual report and the holding of the annual meeting of shareholders. The average gap was 118 days after balance date. This is a slight improvement of 127 days from our analysis last year.

46% of the top 75 complied with NZX Corporate Governance Code recommendation 8.5 that shareholders should be notified of the meeting at least 28 days in advance via publication on the company website.

Proxy advisory firms

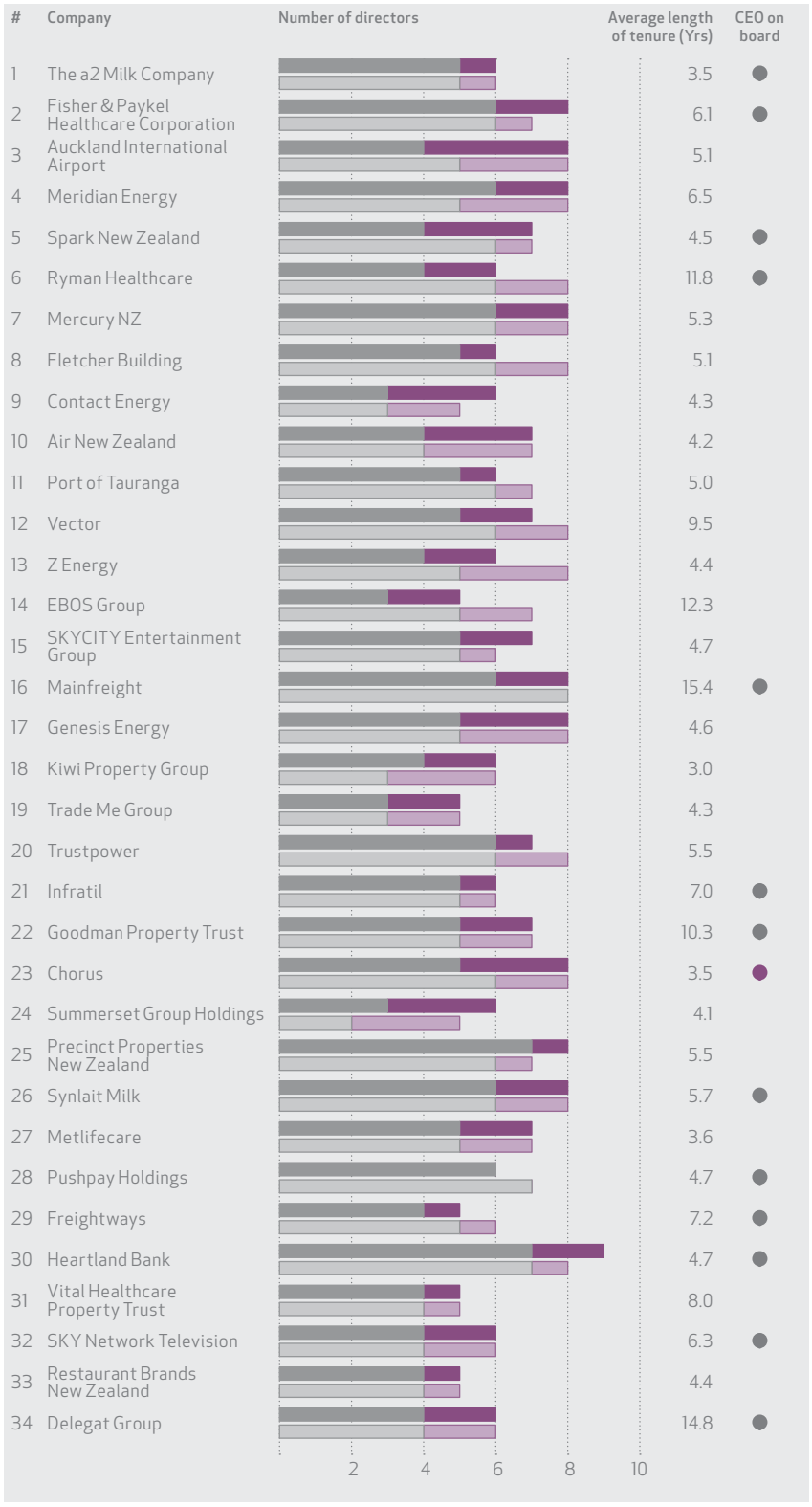
The role of proxy advisory firms continued to attract some attention. The Australasian Investor Relations Association published a *Code for engagement between listed companies and proxy advisers*, structured around five key principles:

- proxy research should be factually accurate
- proxy advisory firms should be adequately resourced
- proxy advisory firms should be provided with adequate feedback
- proxy advisory firms should have a system for managing conflicts of interest, and
- proxy advisory firms should report on a regular basis.

Associated recommendations include offering the issuer a small window to review draft voting recommendations and to correct factually incorrect information.

Board composition – the top 75

as at March 2018



THE TOP 75

The top 75 by market capitalisation ranged from $9b for a2 Milk to $172m for NZME. a2 Milk leapfrogged 16 places in ranking. The other big movers were Fisher & Paykel Healthcare, up four, and Air New Zealand, up six.

The range in 2017 had Auckland Airport at the top on $8b and Abano at the bottom on $185m.

Of the five new entrants to the top 75 last year, only Oceania Healthcare joined through an IPO. The rest got there by increasing their market capitalisation relative to others.

Average board size

The average board size was 6.1 directors (2017: 5.8).

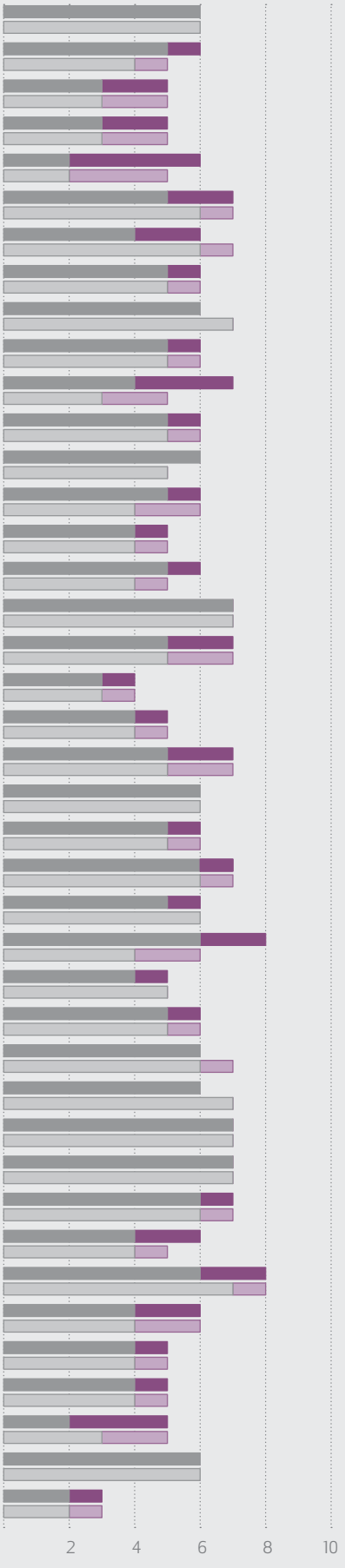
Independence

68% of boards had a majority of independent directors (2017: 76%), of which 19% had only independent directors (2017: 21%). 69% of boards had an independent chair. 39% had the CEO on the board (2017: 35%).

The exposure draft NZX Listing Rules and updated NZX Corporate Governance Code, released on 11 April will better define "independent" directors, and require companies to have a majority of independent directors, or explain why not.

Board composition – the top 75 *(continued)*

#	Company	Average length of tenure (Yrs)	CEO on board
35	Argosy Property	5.8	
36	Property For Industry	10.8	●
37	Fonterra Shareholders Fund	4.3	N/A
38	Briscoe Group	10.2	●
39	Tourism Holdings	4.3	
40	The New Zealand Refining Company	3.1	
41	The Warehouse Group	10.1	
42	Sanford	6.7	
43	Scales Corporation	4.4	●
44	Stride Stapled Group	6.3	
45	Oceania Healthcare	2.4	
46	Tilt Renewables	1.5	
47	Gentrack Group	4.4	
48	Kathmandu Holdings	4.2	
49	Arvida Group	3.4	
50	Vista Group International	7.0	●
51	PGG Wrightson	5.4	
52	T&G Global	4.4	
53	Investore Property	2.1	N/A
54	Skellerup Holdings	8.5	●
55	Comvita	4.1	
56	Millennium & Copthorne Hotels New Zealand	7.0	●
57	Hallenstein Glasson Holdings	19.9	
58	New Zealand King Salmon Investments	7.1	●
59	Tegel Group Holdings	3.7	●
60	NZX	2.9	
61	Tower	4.0	
62	EROAD	5.1	●
63	CDL Investments New Zealand	8.8	●
64	Turners Automotive Group	6.0	
65	The Colonial Motor Company	10.2	●
66	Scott Technology	6.8	●
67	AFT Pharmaceuticals	6.6	●
68	Abano Healthcare Group	6.5	
69	Green Cross Health	5.6	N/A
70	Marsden Maritime Holdings	5.8	
71	Trilogy International	7.4	
72	Serko	4.7	●
73	Steel & Tube Holdings	2.9	●
74	Pacific Edge	5.6	
75	NZME	1.3	



Length of service

The average length of service across the top 75 rose to 6.2 years (2017: 5.8), with the highest board average 19.9 (2017: 18.9). Some companies have significantly reduced their average length of service from last year, most notably Mainfreight and Ebos.

Multiple board roles

Multiple directorships among the top 75 remain comparatively rare. Six directors each have four roles (2017: 6), 11 directors, three (2017: 13) and 55, two (2017: 45).

The top 75 had 473 directors altogether (2017: 469).

Geographic diversity

226 of the 473 roles in the top 75 (48%) were filled by directors who recorded their place of residence as Auckland. Contrary to urban myth, they are located across the greater Auckland area rather than being clustered in the eastern suburbs. Other popular locations were Wellington (36), Christchurch (27) and Queenstown/Wanaka (20).

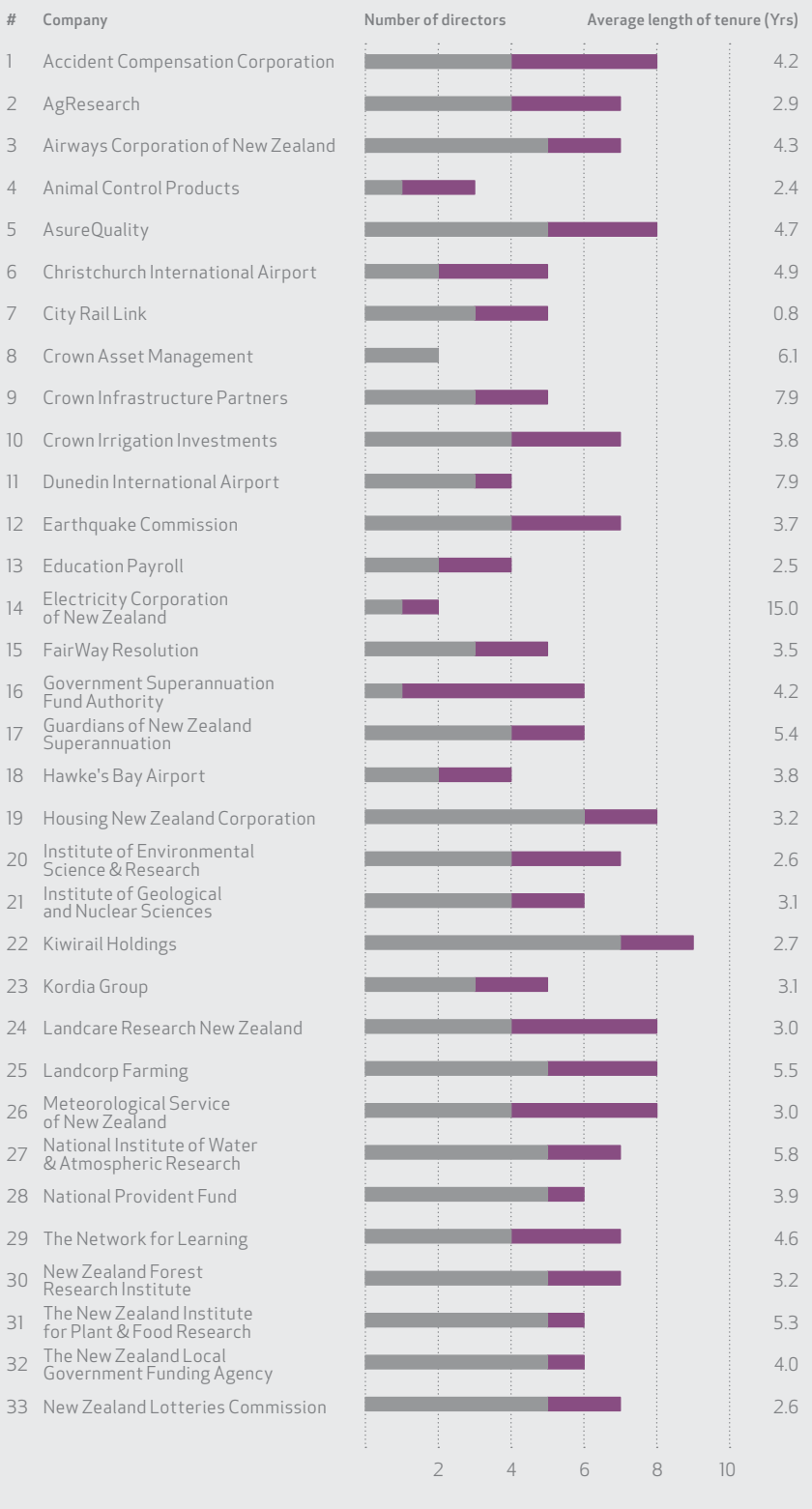
102 roles were filled by directors residing overseas (22%).

Future directors

Ten of the top 75 boards were active participants in the Future Directors programme, an uptick from the seven participants in 2016. In addition, two NZX Main Board issuers outside the top 75 – Augusta Capital and AWF Madison – had future directors.

Board composition – the Crown portfolio

as at March 2018



Number of directors
March 2018 Male Female

CROWN

This year, we have added the portfolio of 47 Crown commercial entities overseen by the New Zealand Treasury, excluding the four companies included in the top 75 in which the Crown is the majority shareholder. A comparison of the metrics shows a greater gender and geographic diversity than among the top 75.

Average board size

The average board size was 5.9 directors. Slightly less than the top 75 average of 6.1.

Length of service

The average length of service across the Crown portfolio was 4.2 years compared to the top 75 average of 6.2 years.

Crown entities tend to operate more structured rotation policies than the top 75. Generally two terms of three years will be the maximum although chairs may serve for nine years (including periods of a non-chair role). There are correspondingly fewer duration outliers than in the top 75.

Gender diversity

38% of roles were filled by female directors, significantly higher than the average for the top 75 (23%). 13 (or 28%) of Crown portfolio boards had the same or more female directors than males.

Board composition – the Crown portfolio *(continued)*

Geographic diversity

The Treasury Commercial Operations record of directors' places of residence shows 39% from Northland/Auckland, 22.5% from Wellington and 12.6% from Canterbury. Although the categorisation differs from our analysis of the top 75, it is clear that the Crown portfolio is significantly less Auckland-centric.

Future directors

The Crown has embraced the future directors programme, with seven Crown agency participants in the programme during 2017.

CURB ON CROWN ENTITY BOARDS' REMUNERATION SETTING DISCRETION

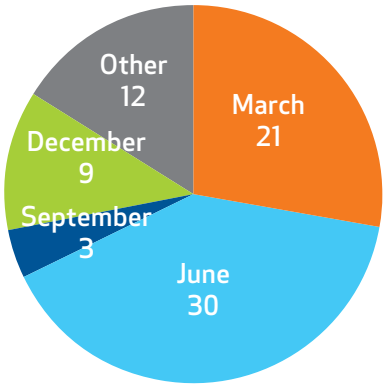
In response to media stories of million dollar plus salaries in the state sector, the government is taking decision-making out of the hands of Crown entity boards.

The State Sector and Crown Entities Reform Bill, now at the select committee stage for passage this year, will:

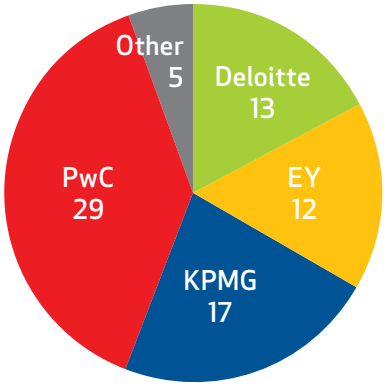
- require the board to obtain the written consent of the State Services Commissioner to any remuneration and employment packages offered to chief executives
- stipulate a maximum appointment term of five years, although with scope for renewal, and
- apply a mandatory code of conduct to board members.

Key audit matters and audit independence

Most prevalent year-end balance dates



Audit firms for top 75 listed issuers



KAMs – expectation gap remains

A stocktake by FMA and the External Reporting Board (*XRB*) on the first year of key audit matter (*KAM*) reporting showed a mixed response from investors about the usefulness of the initial KAM disclosure.

The average number of KAMs identified was around two, which is fewer than the three to four predicted before the regime commenced. The range was zero to five.

The purpose of KAM reporting is to alert the investor to those items the auditor judged most significant when conducting the audit.

Practice has varied on the level and particularity of the disclosure.

There is a tension between providing enough information to convey the significance of the KAM without the reader reading too much into the outcome, given the judgements that need to be applied to complex decisions.

On a more constructive note, many auditors made fulsome voluntary additional disclosure about the materiality applied to the audit and sought to use plain language focused on the needs of the user.

It will be interesting to see whether or how KAM disclosure evolves this year.

Audit independence

The FMA wants directors to play a more active role in auditor independence, particularly around selection of the firm and assessing the impact of non-audit services provided, rather than leaving that to management.

This was the key message in the FMA handbook for directors, published in December, on audit quality.

FMA's recent Corporate Governance update also has a new guideline that the chair of an audit committee should not have a longstanding association with the external audit firm, with the guidance that any employment relationship should have ceased at least three years before the appointment as chair.

> "The FMA wants directors to actively assess non-audit services provided, rather than leaving that to management."

Diversity

Our review shows little progress on increasing gender diversity during 2017, despite some vocal initiatives to achieve change.

Recent prompts included:

- Commencement of the NZX Governance Code enhanced disclosure.
- Political pressure from the Minister for Women – both Paula Bennett under National, and now Julie Anne Genter.
- Simplicity Investment Fund's campaign to persuade the Top 50 to improve the diversity of their board and their senior management.

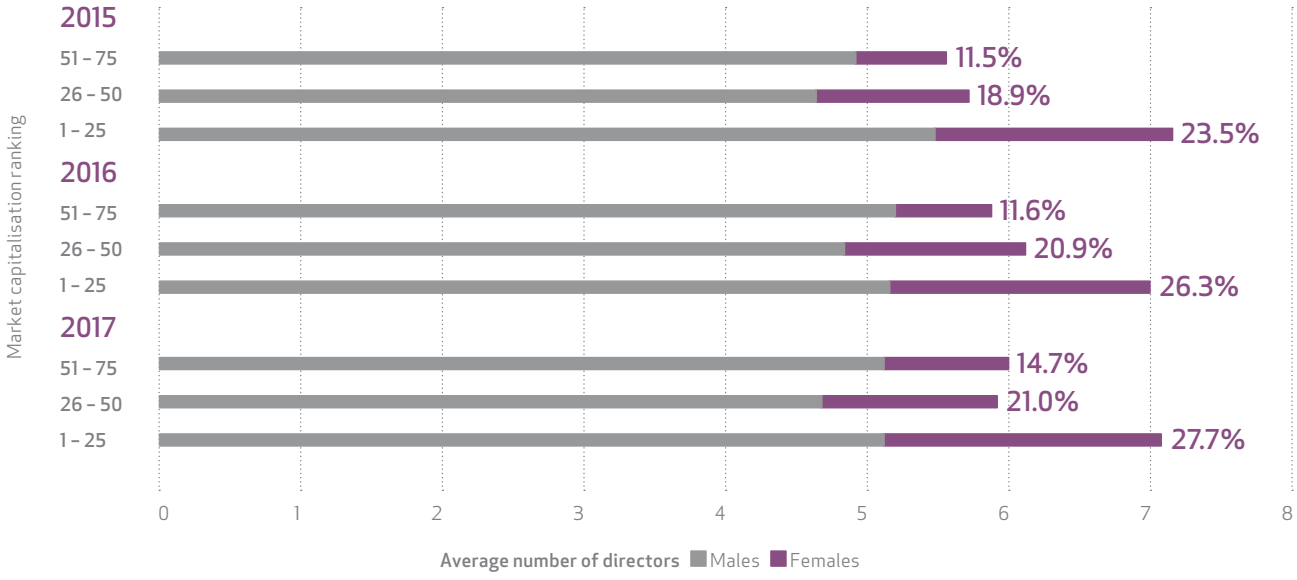
Diversity reporting

Our analysis shows that the top 25 continue to have a higher proportion of women directors than the middle and lowest 25 but that there has been little movement across all three groups.

9% of board chairs were female.

NZX also requires reporting of gender diversity among officers (the CEO and those who report to the CEO). In 2017 the ratio was 23.3%. In both 2015 and 2016, the ratio was about 23.5%. Only one CEO in the Top 75 was a woman (Chorus) and only 13% of CFOs were women (2016: 11.4%).

Director gender by NZX market capitalisation ranking



Conflicts of interest – don't bolt for the door

Conflicts of interest carry legal and reputational risk so must be managed carefully. But good management does not mean defaulting immediately to a "cut and run" response.

That may be safe but the director's first responsibility is to maximise shareholder value by bringing his or her skills and insights into boardroom decision-making – and to do that, you need to be at the table.

A very serious and material conflict may well require an information barrier or similar to be put around a director, or for a director to step away from certain decisions. But this option should always be counterbalanced against the downside of depriving the board of that director's perspective.

A more thoughtful and pragmatic approach might entail:

- noting at the outset that conflict issues may emerge
- agreeing to monitor the risk and ratchet up as necessary, and
- giving each director the opportunity to identify any conflicts as they arise and to absent him or herself from specific discussions as appropriate.

A case in point

A recent judgment[1] from the Federal Court of Australia illustrates that the purpose of conflict rules is to safeguard the outcomes being achieved for the company and its shareholders, and that other interests per se will not always be a drag on shareholder value.

The case concerned a longstanding cross shareholding between two large, publicly listed companies – a brick works and a pharmaceutical company. They entered the arrangement partly as a mechanism to prevent external take-over but also so that they could each diversify from their core business and because they shared a like-minded long-term perspective.

Both were each other's biggest shareholder and both were heavily represented on each other's board. Voting patterns reflected this, particularly on matters relating to the future of the cross shareholding.

Perpetual Investment Management Ltd – an institutional investor with a stake in each company – had been pressing for years to have the cross shareholding unwound on the basis that it was "unfair" and "oppressive" because it worked to entrench control by the incumbent boards.

The Court ultimately took a benign view of the potential conflicts, noting that although it could give rise to actual and perceived conflicts of interest, in practice the boards had both been performing well.

Specifically, the Court commented:

"To date, there is no suggestion that either board has under-performed and, to the contrary, the consensus appears to be that both boards have performed well and both companies are well managed, lending weight to the perception that the cross shareholding, to date, has facilitated stability and a capacity for long-term decision-making," and

"There was good reason to infer that the directors of each company had, and would in future, diligently consider the structure of the companies with their obligations to act in the best interests of the company firmly in mind".

It is easy to imagine a New Zealand court coming to the same conclusion.

1 RBC Investor Services Australia vs Brickworks Ltd and Washington H Soul Pattinson and Company Ltd

Conflicts of interest – don't bolt for the door *(continued)*

Legal requirements engaged in a conflict of interest

DISCLOSURE OF INTERESTS

The Companies Act 1993 requires that directors disclose any interest they may have "forthwith after becoming aware of the fact". A director can be "interested" even if he or she is not positioned to derive a material financial benefit from the proposed decision.

VOTING RESTRICTIONS

The Companies Act does not prohibit directors from voting on matters in which they may be interested, but restrictions to this effect can be imposed through the constitution.

The Listing Rules state that interested directors cannot vote unless the matter is one in respect of which the Companies Act requires a certificate to be signed (e.g. a dividend) or is an indemnities resolution.

USE OF COMPANY INFORMATION

Directors holding multiple directorships must be careful that they do not apply information obtained in one directorship capacity to decisions made in another directorship capacity.

DIRECTOR INDEPENDENCE

A director is deemed to have a 'disqualifying relationship' in the NZX Listing Rules where that person or an associate is a substantial shareholder, or has a relationship with the issuer beyond the directorship and is likely to derive a substantial portion of his or her income from the issuer (generally 10% or more, excluding distributions payable to all shareholders).

NZX Corporate Governance Code disclosure

The new NZX Corporate Governance Code was finalised in May 2017.

Almost a third of the 38 companies in the top 75 with balance dates between 30 June and 30 November chose to voluntarily report against the new Code. Reporting against the Code was mandatory for the ten issuers with a 31 December balance date.

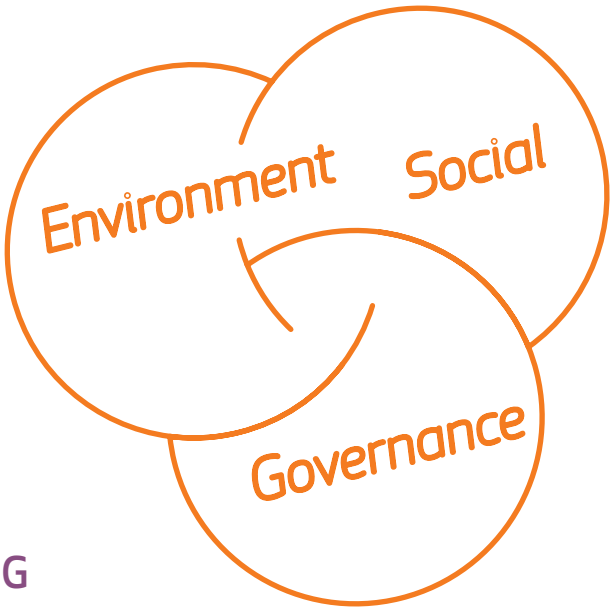
We assessed the initial disclosures against the new requirements of the Code.

Diversity

RECOMMENDATION 2.5

An issuer should have a written diversity policy which includes requirements for the board or a relevant committee of the board to set measurable objectives for achieving diversity (which, at a minimum, should address gender diversity) and to assess annually both the objectives and the entity's progress in achieving them. The issuer should disclose the policy or a summary of it.

All issuers reporting had adopted a diversity policy with measureable objectives.



ESG

RECOMMENDATION 4.3

"An issuer should provide non-financial disclosure at least annually, including considering material exposure to environmental, economic and social sustainability, risks and other key risks. It should explain how it plans to manage those risks and how operational or non-financial targets are measured".

11 issuers had a section in the annual report devoted to Environmental, Social and Governance Disclosure, or reported on it separately.

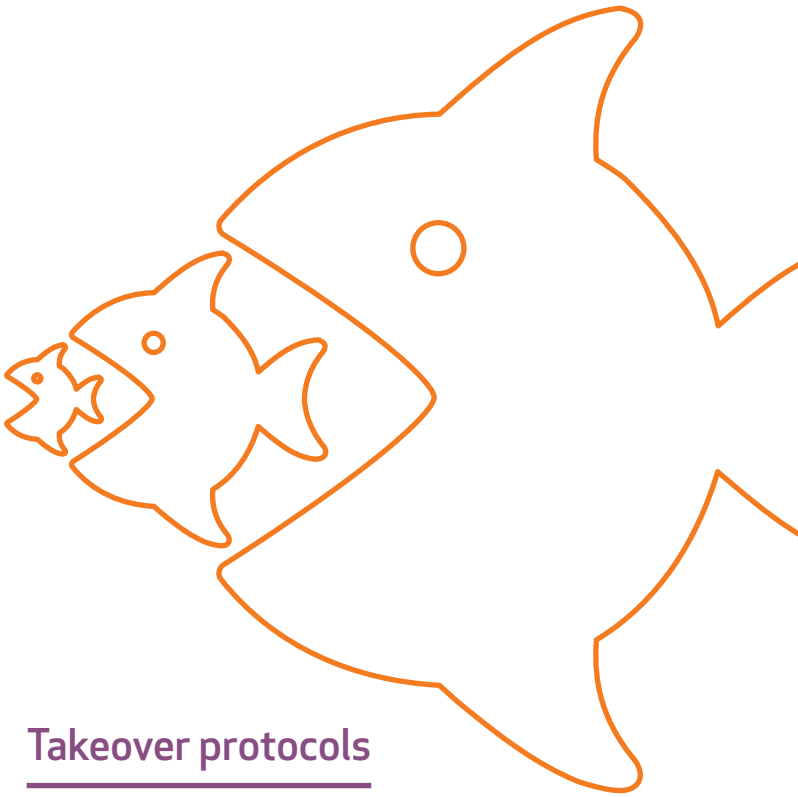
Remuneration disclosure

RECOMMENDATION 5.3

An issuer should disclose the remuneration arrangements in place for the CEO in its annual report. This should include disclosure of the base salary, short term incentives and long term incentives and the performance criteria used to determine performance based payments.

All issuers disclosed their CEO base pay, and the basis for determining short term and long term incentives. The level of detail varied significantly. Four issuers adopted a format substantially similar to that promoted by the New Zealand Shareholders' Association.

Two issuers also voluntarily disclosed the base, STI and LTI remuneration for their CFO.



Takeover protocols

RECOMMENDATION 3.6

The board should establish appropriate protocols that set out the procedure to be followed if there is a takeover offer for the issuer including any communication between insiders and the bidder. It should disclose the scope of independent advisory reports to shareholders. These protocols should include the option of establishing an independent takeover committee, and the likely composition and implementation of an independent takeover committee.

Only nine of the issuers had formal protocols in place for dealing with a takeover at the reporting date. All of the Mixed Ownership Model companies noted that they had not adopted a takeover protocol because their statutory 51% Crown stake meant a takeover would not be possible.

Recent guidance from the Takeovers Panel has reinforced the Panel's expectations that directors responding to a takeover should form their own view on the offer in making their recommendation, while having regard to their own knowledge, expert advice sought and the independent adviser's valuation and assessment of merits.

Disclosure, disclosure, disclosure

Mining giant Rio Tinto Ltd has already copped the largest fine ever imposed by the UK Financial Conduct Authority (*FCA*) for a disclosure breach and has active proceedings against it for the same matter from regulators in the US and Australia.

The FCA fined it £27.4 million, and would have whacked it for more than £39 million had Rio Tinto not won a 30% reduction by agreeing to settle early in the investigation.

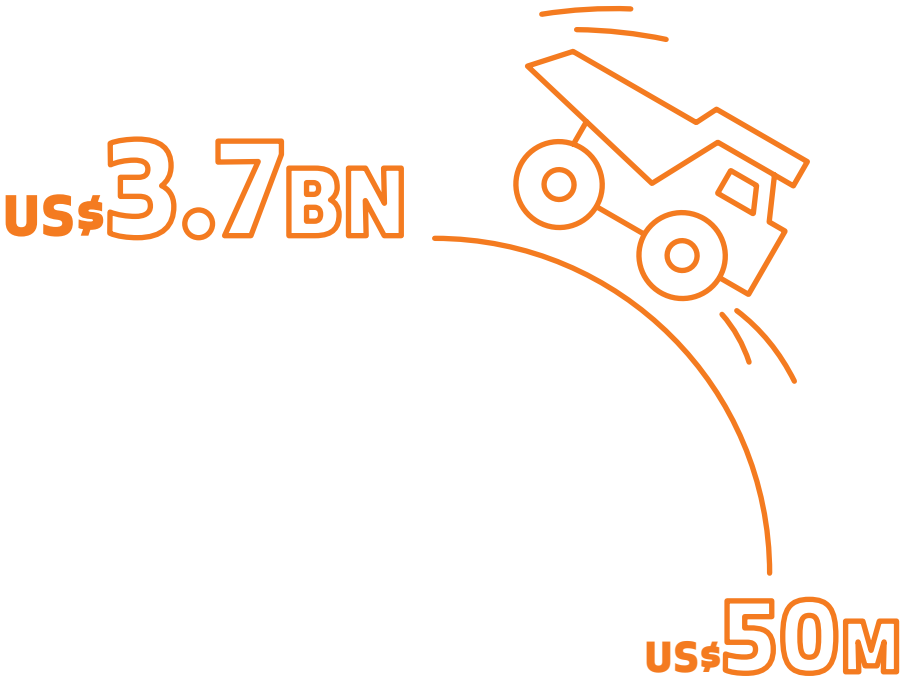
More grief to come

The US Securities and Exchange Commission (*SEC*) is pursuing fraud charges against Rio Tinto in the Manhattan federal court and the Australian Securities & Investments Commission (*ASIC*) last month launched legal proceedings in the Federal Court in Sydney against the company, its former CEO Thomas Albanese and former CFO Guy Elliott.

The context

In August 2011, Rio Tinto completed the takeover of Riversdale Mining Ltd and renamed it Rio Tinto Coal Mozambique. Shortly after the purchase, it learned that the mine had less coal and of lower quality than it was expecting and that the Mozambique government had declined its application to barge the coal down the Zambesi River to the coast for export.

These facts turned the US$3.7 billion acquisition into a disaster, such that it was sold a few years later for US$50 million.



> “The Financial Markets Conduct Act has unequivocally shifted the focus from periodic disclosure to ongoing disclosure.”

Disclosure breaches

Rio Tinto did not announce the impairment of the Mozambique mine, wiping off around 80% of its investment, until January 2013 after an executive in the company’s Technology & Innovation Group found that it was being carried at an inflated value in the financial statements.

ASIC is alleging misleading or deceptive statements in Rio Tinto’s annual report for 2011, published on 16 March 2012, and is charging Albanese and Elliott with failing to exercise their duties with the care and diligence required by the law.

Multi-billion dollar failure

SEC alleges that they “breached their disclosure obligations and corporate duties by hiding from their board, auditor and investors the crucial fact that a multi-billion dollar transaction was a failure”. It is seeking permanent injunctions, the return of any ill-gotten gains plus interest, civil penalties against all three defendants and bans against Albanese and Elliott.

ASIC is seeking declarations of contravention against the company, Albanese and Elliott and pecuniary penalties and a disqualification ban against the two men.

Could this happen in New Zealand?

Yes.

NZX-listed companies must comply with continuous disclosure rules requiring disclosure of material information. They must prepare financial statements which comply with all applicable financial reporting standards. They must ensure that they do not make any misleading statements potentially relevant to any dealing in their shares.

Court intervention

If a company fails to do any of these things, a court can require it to pay pecuniary penalties and to compensate investors who have suffered loss as a result. The court can also make compensation and pecuniary penalty orders (and, potentially, banning orders) against others “involved in the contravention” (including anyone directly or indirectly knowingly concerned in the contravention). This could include some directors and/or senior executives.

In addition, if any person (whether a director or executive) knew that any market disclosure was materially misleading or that the financial statements did not comply with an applicable financial reporting standard, they could be imprisoned for up to five years and both they and the company ordered to pay significant fines.

More transparency

The Financial Markets Conduct Act has unequivocally shifted the focus from periodic disclosure (prospectuses and financial statements) to offer focused disclosure (prospectuses / PDS and register entries) to ongoing disclosure (annual reports, financial statements, market releases and shareholder meeting documentation). It recognises that investors can suffer loss by relying on a wide range of disclosures, and it regulates accordingly.

The world in which listed companies can make low-doc “same class” offers in reliance on continuous disclosure and cleansing notices, and directors do not face strict criminal liability for defective offer documents, is also a world in which all market disclosures are potentially legally significant. Whether it is a market announcement, an annual report or a shareholder meeting pack, it is potentially important for investors and should be treated accordingly when it is prepared and signed off.

Chapman Tripp's Corporate Governance team

Promoting investor confidence through the application of good governance principles

We advise a number of New Zealand's largest listed issuers and government owned companies and agencies on governance and strategic advice, relevant NZX and Financial Markets Authority guidance, and market practice and trends.

Our work includes advising on:

- directors' duties and liabilities, delegations and conflict of interest management
- best practice corporate governance policies and procedures
- market disclosure, insider trading and appropriate procedures and systems
- director and senior executive remuneration structuring and disclosure, including employee share plans and incentive arrangements, and director contracts
- board and sub-committees composition, including charters and best practice, and
- annual reports and preparation for meetings of shareholders.

A number of our partners and consultants are independent directors of NZX-listed companies, crown agencies, and other large business entities. Our partners regularly provide media comment on topical governance issues, and are active contributors to governance law and policy reform initiatives of government, NZX, the Financial Markets Authority and the Takeovers Panel.

We have worked with a number of directors and boards on a range of complex issues including:

- advice on appropriate decision-making processes, management of conflict of interests, and resolution of deadlocks
- acting as a sounding-board for difficult, or strategic, decision-making
- advice on delegation, reasonable reliance on others and required ongoing monitoring and oversight of delegates
- providing external, independent advice to the chair or individual directors including advising on issues of board composition and refreshment
- advice on market disclosure of listed issuers, financial reporting and assurance requirements, and other statutory disclosure obligations
- advice on director and senior manager remuneration policies, appropriate STI and LTI incentives, and other benefits
- advice on director and officer insurance and indemnification
- preparing corporate governance policies, and charters that meet best practice and the requirements of the Listing Rules, Companies Act and other legislation
- assisting with reporting against corporate governance policies in annual reports, or via websites, and comparison with the NZX, FMA and other third party best practice governance codes and recommendations, and
- attending meetings of shareholders and advising on meeting practice and procedure.

"We advise a number of New Zealand's largest listed issuers and government owned companies and agencies on governance and strategic advice."

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