



**New Zealand director duties to manage
nature-related risk and impact on natural capital
Legal Opinion 2023**



CHAPMAN TRIPP LEGAL OPINION 2023 INSTRUCTED BY THE AOTEAROA CIRCLE – NEW ZEALAND DIRECTOR DUTIES TO MANAGE NATURE-RELATED RISK AND IMPACT ON NATURAL CAPITAL

"To what extent (if at all) are New Zealand company directors required to take nature-related risks to business into account in their decision making?"

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I. INTRODUCTION¹

- 1 Much of the New Zealand economy is directly or indirectly dependent on nature and “natural capital”.² Given their dependence on nature, our primary production (agriculture, forestry and fishing), tourism and manufacturing sectors are particularly vulnerable to the degradation of natural capital. Often taken for granted, unseen or undervalued, natural capital is the foundation of our primary sector dependent economy. But our natural environment is increasingly at risk. The alarming and accelerating rate of biodiversity loss and the associated deterioration of ecosystem services, compounded by climate change, is a global and national crisis – one that has the potential to outstrip the impact of the climate crisis. In light of this increasing awareness and recognition that climate and nature are inherently linked, nature-based risk management is fast following climate-based risk management as a critical area that directors will be expected to be “across”. This is being propelled by regulatory changes in New Zealand and overseas that focus on biodiversity protection.
- 2 This opinion seeks to highlight current and anticipated regulatory and market trends to allow New Zealand directors seeking to stay “ahead of the curve” to enable businesses that are particularly reliant on natural capital to anticipate and adapt to nature-related constraints, risk and opportunities.

II. EXECUTIVE SUMMARY

- 3 In this opinion we advise the Aotearoa Circle³ that New Zealand company directors have a duty to ensure that their businesses are identifying “nature-related risks”⁴ where these are foreseeable and material for their businesses, and equally to take any such risks into account in their decision making. Whether nature-related risks are foreseeable and material for a particular company will be impacted by anticipated domestic and international regulatory change that prioritises protection/enhancement of nature, the degree of understanding of the particular risk and stakeholder expectations.
- 4 Directors’ statutory duties to exercise reasonable care and act in the best interests of the company are duties that evolve with time and context. Expectations of reasonable care depend on the economic, social, and regulatory context that directors find

¹ The authors, Nicola Swan and Alana Lampitt, are grateful for the review and input from many across the Chapman Tripp partnership, and particularly for the research assistance of Nina Opacic, Andrea Curcio Lamas and Kate Wilson Butler. The authors remain responsible for all errors.

² “Natural capital” is defined in footnote 4, and includes natural assets such as forests, wetlands or species and the services or benefits they provide, e.g. crop pollination, water regulation, carbon sequestration or social benefits from recreation.

³ The Aotearoa Circle is a public-private partnership formed to reverse the decline of New Zealand’s natural resources.

⁴ Nature-related risks referred to in this opinion include natural capital loss, ecosystem service decline and biodiversity loss. Those terms have been derived from and are intended to be consistent with the Natural Capital Protocol, at 12, available [here](#):

- **“Natural capital”** - The stock of renewable and non-renewable natural resources (e.g., plants, animals, air, water, soils, minerals) that combine to yield a flow of benefits or services to people.
- **“Ecosystem services”** - Refers to the benefits to people from ecosystems, such as timber, fibre, pollination, water regulation, climate regulation, recreation, and mental health.
- **“Biodiversity”** - Means the variability of living organisms which is critical to the health and stability of natural capital. Biodiversity provides resilience to shocks like floods and droughts, and it supports fundamental processes such as the carbon and water cycles as well as soil formation. Biodiversity is both a part of natural capital and also underpins ecosystem services.



themselves in, and take into account the reasonable knowledge and foreseeability of the impact of potential risks, informed by scientific understanding.

- 5 Directors' standards of care in relation to climate change have been canvassed in legal opinions published around the world.⁵ Similar inferences and views can be reached in relation to directors' duties to manage nature-related risks, notwithstanding the importance of recognising that these risks are in many ways less understood, and more sector-specific and complex.⁶ At a practical level, Chapter Zero New Zealand released a Board Tool Kit in March 2023 to provide a simple framework to allow boards to promote urgent and decisive action on climate risk.⁷ This framework is an excellent foundation to encourage the related discussion of nature-related risk.
- 6 In New Zealand, key factors that will drive developments in expectations of reasonable care for directors overseeing a company's strategy are:
 - 6.1 The increasing domestic and international understanding of nature-related risks on businesses, including corporate and economic dependencies on natural capital via supply chains and corporate impacts on natural capital, ecosystem services and biodiversity (discussed in detail in **Annex I**);
 - 6.2 Enhanced domestic regulatory protection of ecosystems and biodiversity as part of an increasingly wider transition to "nature-positive" regulatory structures. Corporates are increasingly required to measure and redress or enhance ecosystem and biodiversity impacts as part of their activities. Examples are already seen in the form of New Zealand's Resource Management Act 1991 (**RMA**) and its proposed replacement, the Natural and Built Environment Bill 2022 (**NBE Bill**);
 - 6.3 The rapid uptake of mandatory reporting for disclosure of climate-related risk by regulators and corporates. Given nature-related risk assessment tools and expectations have built on the climate-related risk movement, many corporates will have transferrable risk management processes and skills that can (and may increasingly be expected to) be applied to nature-related risks;
 - 6.4 Emerging international mandatory corporate sustainability reporting obligations, which go beyond climate and cover nature and biodiversity. Examples include the European Union's Corporate Sustainability Reporting Directive (**CSRD**) and the UK's Sustainability Disclosure Requirements Framework (**SDR**);
 - 6.5 Growing investor concern and voluntary corporate initiatives to spotlight nature and biodiversity risks, in particular through the identification and management of nature-related risks via programmes that have built on the climate-related risk

⁵ Jennifer Ramos and Zaneta Sedilekova *Biodiversity Risk: Legal Implications for Companies and their Directors* (CCLI, 13 December 2022), available [here](#); Lord Sales, Justice of the UK Supreme Court *Directors' duties and climate change: Keeping pace with environmental challenges* (Anglo Australasian Law Society, 27 August 2019), available [here](#); Noel Hutley SC and Sebastian Hartford Davis *Climate Change and Directors Duties Further Supplementary Memorandum of Opinion* (Minter Ellison, 23 April 2021), available [here](#); Jeffrey WT Chan SC et al *Legal Opinion on Directors' Responsibilities and Climate Change under Singapore Law* (14 April 2021), available [here](#); Daniel Kalderimis and Nicola Swan (Chapman Tripp) *Sustainable Finance Forum Legal Opinion 2019* (Aotearoa Circle, March 2019), available [here](#).

⁶ Nature-related risks have a broader scope of causes than climate-related risks, including climate change itself, habitat degradation, and pollution.

⁷ Chapter Zero, *Chapter Zero New Zealand Board Tool Kit* (March 2023), available [here](#).



- experience, such as the global Taskforce on Nature-related Financial Disclosures (**TNFD**);
- 6.6 Increasing consumer and stakeholder interest in corporate impacts on nature. This is also placing additional pressure on corporates to have a good understanding of, and strategy to manage, their effects on and risks/opportunities with respect to natural capital; and
 - 6.7 Aotearoa-specific considerations related to the lessons that te ao Māori can bring for business, including in light of the increased recognition of mātauranga Māori in New Zealand's regulatory frameworks.
- 7 These factors are likely to mean that directors will increasingly be expected to be aware of these emerging trends in their oversight of company strategy and ensure that their businesses have processes in place to:
- 7.1 **identify** their businesses' own dependencies on natural capital, ecosystem services and biodiversity that are at risk or vulnerable;
 - 7.2 **assess** their businesses' exposure to material nature-related risks including as to foreseeability, vulnerability and financial materiality; and
 - 7.3 **manage** nature-related risks that may have a financially material impact on the business, as they would any other serious business risk.
- 8 The main risk to directors of businesses dependant on nature-based services (particularly in the primary, tourism and manufacturing sectors) is to underestimate the potential impact of nature-related risks (whether or not the business contributes to or has control over the risk). Business decisions made in ignorance of foreseeable nature-related risks that result in financial loss may be open to future challenge. Those directors who have put in place processes to identify and manage material nature-related risks will be best placed to avoid those losses, and/or avail themselves of statutory defences.
- 9 Prudent directors in specific sectors with direct or indirect nature dependencies should be starting on the path to ensure risk management systems (including those developed to address climate-related financial risk) are able to identify nature-based risks, and assess whether they represent material and foreseeable financial risks to their business. This will not only provide them with defences against liability risks, but will also ensure their businesses are best placed to be resilient to, and find opportunities despite the natural capital crisis.
- 10 Importantly, appropriate responses will need to be proportionate to the risk. In this opinion we suggest straight-forward questions that directors can ask of their executive teams to start the conversation, consider the scale of nature-based risks and develop a proportionate response. Helpfully there are already a number of tools available to assist with such responses. There are clear synergies between climate-related and nature-related risk identification and management processes. Directors of businesses with material nature-based risks (particularly those in their initial years of climate-related disclosures) may look for opportunities to integrate nature-related risk assessment into their climate-related risk assessment processes.
- 11 Looking to the future, the increased stakeholder and supply chain focus on the impact of businesses *on* nature, will increasingly require businesses to consider their own



effects on natural capital, even where compromised natural capital does not affect the business itself. Understanding this “double materiality” for nature-related risks will be more important as developing disclosure standards are expected to increasingly require disclosure of both *risks to*, as well as *impacts from*, nature. We therefore recommend that directors closely monitor this emerging trend towards double materiality disclosure. Prudent directors, being aware of such developments may wish to ensure that their single materiality risk management mechanisms are future proofed for this emerging expectation of the investor and consumer community.

III. UNDERSTANDING NATURE-RELATED RISKS FOR BUSINESS

Scale of the crisis

- 12 While there has (rightly) been considerable focus on the impacts of climate change in public discourse, there is a risk that this somewhat narrow focus on the climate crisis obscures the much broader biodiversity and natural capital crisis. When combined with the impacts of climate change, nature-based risks are likely to have a devastating impact on natural capital and therefore people, businesses and the economy.⁸
- 13 The scale of the natural capital crisis is colossal. Global ecosystems have declined by almost 50% compared with the natural baseline.⁹ Around one million species are facing extinction globally,¹⁰ due to a combination of factors, including climate change, deforestation,¹¹ the introduction of invasive alien species,¹² habitat and wetland loss,¹³ overfishing,¹⁴ destructive fishing practices, pollution, land-use conversion, overexploitation, excessive chemical and water use, and infrastructure development.¹⁵ There is also a clear feedback loop with climate change given the world’s ocean, soil and forest ecosystems are the world’s largest carbon sinks; the sustainability (or conversely degradation) of those ecosystems plays a key role in managing the effects of climate change.¹⁶
- 14 This rapid rate of biodiversity loss inevitably affects the quality and quantity of ecosystem services that support a wide range of ecological activity, and by extension business activity that relies on such services. Risk of biodiversity loss has been listed

⁸ Given the central question being answered in this opinion, our conclusions and assessments are inherently anthropocentric. That should be in no way taken as suggesting that the value of natural capital, ecosystems and biodiversity is limited to the extent it can support people. The authors accept and commend the view that natural capital, ecosystems and biodiversity have inherent and independent non-financial value.

⁹ Department of Conservation *Biodiversity in Aotearoa – an overview of state, trends and pressures* (2020) at 16, available [here](#).

¹⁰ The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (2019).

¹¹ As reported by the Secretariat of the United Nations Convention on Biological Diversity, approximately 13 million hectares of forests are lost to deforestation annually (see *Living in Harmony with Nature* at 18, available [here](#)).

¹² *Ibid* at 51.

¹³ IPBES *Assessment Report on Land Degradation and Restoration, Summary for Policy Makers* states that 87% of the world’s wetlands are estimated to have been lost in the last 300 years (at 18, available [here](#)).

¹⁴ About 80% of the world’s fish stocks, for which assessment information is available, are fully exploited or overexploited. See Secretariat of the United Nations Convention on Biological Diversity *Living in Harmony with Nature* at 24, available [here](#).

¹⁵ *Ibid* at 17, 26 and 63.

¹⁶ ClientEarth “What is a carbon sink” (22 December 2020), available [here](#).



in the World Economic Forum's 2023 Global Risk Report in the top four most severe global risks in the next ten years.¹⁷ Around 40% of total annual world trade in the decade from 2010 comprised nature-dependent exports,¹⁸ while it has been estimated that more than half of global GDP is dependent on nature and ecosystem services.¹⁹

- 15 In the context of this global crisis, Aotearoa New Zealand is uniquely vulnerable, having one of the world's highest rates of habitat loss and degradation, and correspondingly the highest proportion of native species at risk of extinction.²⁰ Indeed, the Department of Conservation warns that New Zealand's biodiversity is in a general state of crisis, with over 800 terrestrial species, 130 freshwater species, and 50 marine species facing imminent extinction if current trends are not arrested.²¹ The Government's Environment Aotearoa 2022 report indicates that New Zealand has lost over 60% of its native forests,²² and 90% of its wetlands (with more than half of the remaining wetlands being in a moderately to severely degraded state).²³ More than 80 species have already become extinct,²⁴ and 90% of indigenous seabirds,²⁵ 82% of indigenous shorebirds,²⁶ and 76% of indigenous freshwater fish²⁷ are threatened with extinction.
- 16 In this context of accelerating natural capital loss, entire sectors and financial systems are becoming increasingly vulnerable to significant economic risks.²⁸

Natural capital is often defined as the stock of renewable and non-renewable natural resources (plants, animals, air, water, soils and minerals) that combine to yield a flow of benefits to a country's citizens. The neglect of the value of the natural capital has led to a more and more severe depletion of these stocks and related flows.

Somewhat belatedly, more and more politicians and business leaders are coming to realise that all future endeavours to improve people's material standard of living will fail, miserably, unless and until we secure the physical foundations on which these improvements depend – namely, the natural wealth contained within our soils, forests, rivers, oceans and flora and fauna. It is this which underpins all economic activity on this planet

-Sir Jonathon Porritt

¹⁷ World Economic Forum *Global Risks Report 2023* (January 2023) at 6, available [here](#).

¹⁸ Planet Tracker *Nature Dependent Exporters: What do they have in common?* (September 2022) at 4, available [here](#).

¹⁹ World Economic Forum *Global Risks Report 2023* (January 2023) at 31, available [here](#).

²⁰ Ministry for the Environment and Stats NZ *Environment Aotearoa 2019* (April 2019), available [here](#).

²¹ Department of Conservation *Biodiversity in Aotearoa 2020* (August 2020), available [here](#).

²² Ministry for the Environment and Stats NZ *Environment Aotearoa 2022* (14 April 2022) at 35, available [here](#).

²³ Ibid at 19.

²⁴ Ibid at 23.

²⁵ Ministry for the Environment and Stats NZ *Our marine environment 2022* (October 2022) at 11, available [here](#).

²⁶ Ibid.

²⁷ Stats NZ "Extinction threat to indigenous freshwater species" (9 June 2021) available [here](#).

²⁸ Alexis Gazzo "Why biodiversity may be more important to your business than you realise" (EY, 25 April 2022) available [here](#).



What are nature-related risks to corporates?

- 17 Nature is integral to people, economies and therefore corporates. According to the Commonwealth Climate Law Initiative's (CCLI) 2022 report, ecosystem services are worth US\$125-140 trillion globally per year.²⁹ More than a decade ago, New Zealand's land-based ecosystem services were assessed to contribute \$57 billion to human welfare, equivalent to 27% of New Zealand's GDP.³⁰
- 18 However, nature-based risks do not readily lend themselves to objective measures in the same manner that climate change risk does due to the ability to measure the overarching stressor causing climate risk – GHG emissions. By comparison nature-related risk does not have a single unit of comparison such as tonnes of CO₂-equivalent. As a result nature-related risks will manifest differently around the world and will impact different sectors, and different companies within the same sector, in varying ways. In contrast to climate change, every business will have a different impact on nature and biodiversity not simply related to their outputs, with a range of direct and indirect drivers.³¹
- 19 While potentially more complex than climate-related risks, corporate nature-related risks can be more "niche" and will principally affect corporates who face two categories of risk:
- 19.1 **Dependency risks** – Corporates may be directly or indirectly (e.g. through supply chains) dependant on nature and face risks to their value or viability resulting from the failure, interruption or reduction in the natural services on which they rely. For example:
- (a) Declining bee populations could financially impact companies dependent on pollinators, such as an SME producing Mānuka honey for export.
 - (b) Degradation of soil could financially impact primary sector companies by pushing agriculture on to less productive land, resulting in lower yields or reliance on fertilisers.
 - (c) Loss of upstream canopy cover, wetlands and floodplains could financially impact companies in the construction, real estate and infrastructure sectors dependent on these ecosystems for flood, erosion and storm protection, e.g. infrastructure providers in the aftermath of the Auckland floods and Cyclone Gabrielle.
- 19.2 **Transition risks** – Corporates may face risks posed by regulatory/policy changes, technological advancements or market/consumer preferences resulting from the increased awareness of the natural capital crisis. Transition risks particularly materialise where the speed of regulatory or market change is

²⁹ Jennifer Ramos and Zaneta Sedilekova *Biodiversity Risk: Legal Implications for Companies and their Directors* (CCLI, 13 December 2022) at 5, available [here](#).

³⁰ Patterson MG and Cole AO *Total economic value of New Zealand's land-based ecosystems and their services* (2013) in Dymond JR ed. *Ecosystem services in New Zealand – conditions and trends* (Manaaki Whenua Press, Lincoln, New Zealand).

³¹ It is for this reason, the TNFD has stated that that "*consideration of location – and more specifically the interface of business processes with stocks of environmental assets and flows of ecosystem services – is central to the framework proposed by the TNFD*" (see TNFD "TNFD's definitions of dependencies and impacts" available [here](#)). We note that physical risk, associated with climate adaptation and resilience, is more analogous to nature-related risk in its localised impact.



unanticipated. It may result in prior business decisions, strategies and investments being undermined. For example:

- (a) Kauri dieback has impacted the tourism sector (tour companies, cafes and accommodation providers) through activity and facility closure.
- (b) New Zealand primary sector exporters could face more detailed labelling requirements from large EU purchasers subject to greater EU regulation of supply chain transparency.

- 20 Further explanation of nature-related dependency and transition risks, as well as nature-related opportunities, are addressed in **Annex I** to this opinion. The annex provides examples of how such risks have emerged, or may in the future emerge, for New Zealand corporates.
- 21 In addition, corporates may face risks associated with their impacts, direct or indirect, on nature. Such impacts include adverse effects on habitats, species ecosystems and associated cultural values through land and resource use activities and disruption to natural processes. Corporate impacts on nature-related risks are also discussed below in the context of “double-materiality”.
- 22 Those New Zealand sectors directly reliant on natural capital (including the primary, manufacturing and tourism sectors) will, in many instances, already be well versed in the assessment of risks resulting from the failure of ecosystem services. However, as a result of the international and domestic factors outlined above, corporates in those sectors will increasingly face an expectation to:
- 22.1 identify those risks as systemic, linked; and
 - 22.2 where relevant, have an understanding of the financial materiality of those risks.
- 23 In the context of increasing public, regulator and consumer understanding of the natural capital crisis, it is likely that such corporates will face greater scrutiny of their assessment and management of such nature-related risks. Moreover, adjacent sectors that are exposed to risks via their supply chain having at risk dependencies on natural capital are likely to increasingly identify and manage their supply chain’s exposure to nature-related risks.
- 24 Beyond those sectors with direct and indirect dependencies, it is likely that transition risks – and in particular regulatory, market/consumer and reputation risks – will be felt in advance of the feared physical impacts from direct dependencies. Affected New Zealand companies will need to, over time, adjust to:
- 24.1 greater regulation protecting ecosystems and biodiversity that will increasingly constrain their ability to both impact and utilise the environment;
 - 24.2 emerging consumer expectations of supply chain transparency with respect to nature impacts, as well as potentially changing their product offerings to be more resilient to biodiversity loss; and
 - 24.3 increased scrutiny of corporate actions that directly and indirectly contribute to nature and biodiversity loss.



IV. DIRECTORS' DUTIES OF REASONABLE CARE AND BEST INTERESTS

- 25 It is well understood that the key legal duties engaged in the context of environmental decision-making by New Zealand directors are their duties to exercise reasonable care, diligence and skill (s 137 of the Companies Act 1993 (**CA**)) and to act in the best interests of the company (s 131, CA 1993). While these duties guide directors every day decisions, successful claims for breaches of these duties have traditionally been relatively constrained.
- 26 This opinion is written at a moment in time when business awareness of the scale of the risk to our natural environment is increasing, but against a backdrop of a relatively low appreciation of the scale of business reliance on nature. The pool of understanding of nature-based risk assessment is growing, being propelled in the last 12 months in particular through the efforts of the TNFD. The concepts and processes of TNFD are still unfamiliar to most New Zealand boards (even though some businesses are acutely aware of their dependencies on the environment). However, there are clear indications that these risks will increasingly be relevant to corporates and directors – particularly where their businesses have material dependencies and/or impacts on nature. To ensure they are prepared and can safeguard the success of their businesses, the key question for directors is: What – if anything – should directors reasonably be doing in their own companies to be prepared to address this risk?

Duty to exercise reasonable care, diligence and skill: s 137

- 27 Turning first to the duty to exercise reasonable care, diligence and skill, s 137 of the CA 1993 requires a director, when exercising powers or performing duties as a director, to exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances.³² In applying this standard, a court must take into account context-specific features, including the nature of the company, the nature of the decision, the director's position and the nature of the director's responsibilities.³³
- 28 It is well understood that the standard of care required of directors is of a reasonable, sufficiently alert director, asking the right questions at the right time:³⁴
- 28.1 a director is obliged to obtain at least a general understanding of the business of the company and the effect that a changing economy may have on the business;
- 28.2 directors should bring an informed and independent judgement to bear on the various matters that come to the board for decision;³⁵ and
- 28.3 if directors know, or by the exercise of ordinary care should have known, any facts which would put a prudent director on guard, then they need to act accordingly, with their action being proportionate to the scale of the risk.³⁶
- 29 As the courts have stated in the New Zealand context: "[a] director must understand the fundamentals of the business" and stay on top of performance.³⁷ In this vein, a

³² CA 1993, s 137.

³³ *Daniels v Anderson* (1995) 37 NSWLR 438 (CA).

³⁴ See the discussion in *Daniels v Anderson* (1995).

³⁵ *Ibid* at 500, citing *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 (VSC) at 117.

³⁶ *Ibid* at 502–503, quoting from *Rankin v Cooper* 149 F 1010 (1909) (Fed Ct) at 1013.

³⁷ *Davidson v Registrar of Companies* [2011] 1 NZLR 542 (HC) at [121].



director should bring "*an inquiring mind, in relation to both company strategy and general administration*".³⁸ Directors may seek and rely on advice in discharging their duty of care, but when they do so they must continue to make their own assessment.³⁹ As the Court of Appeal memorably observed, "*the days of the sleeping directors...are long gone*".⁴⁰

- 30 While not determinative, Justice Cooke's remarks in the High Court decision in the recent *Mainzeal* litigation indicate that a board which is too operationally focused and fails to properly address systemic risks may fail in its essential duty to govern a company.⁴¹ This dicta is consistent with New Zealand's Corporate Governance Code guidance for listed companies that directors should have a sound understanding of key risks (including environmental risks) and ensure appropriate frameworks exist to identify and manage them.⁴²
- 31 The question therefore, is whether s 137 would require a director in New Zealand today to take risks to natural capital into account in decision making, and whether a director should also take other nature-related risks to the business into account in setting company strategy.
- 32 In answering this question, we have considered how foreseeable nature-based risks are to New Zealand businesses. This depends in part on the level of understanding of these risks and the potential materiality of their impacts on business, and reasonable expectations of future regulation in this area, informed by domestic and overseas developments. Greater pressure from stakeholders, and increasing litigation risk also inform expectations of what might be reasonable steps for directors to take. We have also overlaid the additional impact of mātauranga Māori and how this may inform a particularly New Zealand lens on director duties.
- 33 Our view is that, consistently with Chapman Tripp's 2019 opinion in relation to director duties to manage climate change related risk:
- 33.1 s 137 would require a director to ensure the business was identifying and managing nature-related risk, including risks to natural capital, where those risks were foreseeable and potentially material to the business. That is what a reasonable director would do in the same circumstances.
- 33.2 In particular:
- (a) the foreseeability of the risk is a key determining factor in relation to what a director is expected to know and do about it, with foreseeability being informed by the broader level of understanding of the risk; and

³⁸ *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 at [404] per Heath J.

³⁹ For example, see *R v Moses* from [419] and *Jefferies v R* [2013] NZCA 188 from [194].

⁴⁰ *Mason v Lewis* [2006] 3 NZLR 225 at [83].

⁴¹ *Yan v Mainzeal Property and Construction Ltd* (in liq) [2019] NZHC 1637 (which remarks were not overturned by the Court of Appeal [2021] NZCA 99; [2021] 3 NZLR 598).

⁴² NZX *Corporate Governance Code* (NZX, 17 June 2022); NZX *ESG Guidance Note* (NZX, 10 December 2020).



- (b) the degree of care expected of a director increases with the likelihood of the risk occurring and its potential harm to the company.⁴³

34 We discuss each of these factors below.

(i) Foreseeability of risk

- 35 While the nature-related risk to the business must be reasonably foreseeable, this is not a hard standard to meet: a risk will be reasonably foreseeable if it is 'real' – i.e., something that a reasonable person would not brush aside as far-fetched or fanciful.⁴⁴ While climate-related physical and transition risks to business are now much better understood, many New Zealand corporates are just starting to understand the impact that natural capital decline will have on their business. While a director might identify certain key risks to natural capital, whether, how and when specific nature-related risks themselves will impact the company are more difficult to identify. This is an inherently company-specific assessment and will undoubtedly affect some business sectors more than others.
- 36 For New Zealand businesses, existing RMA National Policy Statements (particularly those related to freshwater and the coastal environment), the anticipated National Policy Statement on Indigenous Biodiversity (**NPS-IB**) and the incoming NBE Bill demonstrate that a growing focus on nature-related risk and "net gain" and/or nature positive regulatory outcomes is not only foreseeable but clearly signalled (see discussion in **Annex I**).⁴⁵ Many businesses, particularly in the primary sector and sectors with dependence on natural capital, will need to adjust their strategy to respond to this nature-positive trend. Activities that could potentially impact 'significant natural areas' and associated threatened ecosystems or species will be most directly affected as they will increasingly be constrained and/or face biodiversity offsets, compensation or redress requirements (with significant associated costs and/or risks to programme timelines).
- 37 As discussed in Annex I, the obligations that these environmental regulations impose on regulators and developers to gather and report information regarding nature-related risks will also increase our understanding of and therefore foreseeability of such risks.
- 38 In addition, the enhanced monitoring and reporting under both domestic and international regulatory regimes is likely to increase the public understanding of corporate impacts and dependencies on natural capital. This may increase the extent to which nature-related risks can be seen as foreseeable. Moreover the tools developed to support TNFD-style analysis of risks, impacts and dependences on nature mean that this area will continue to evolve rapidly outside the regulatory space. Where a specific and potentially material nature-related risk *is* foreseeable – even with some due diligence to identify it – we think that directors will increasingly come under pressure if they have chosen to ignore it.

⁴³ We also agree with the conclusion by the CCLI: Jennifer Ramos and Zaneta Sedilekova *Biodiversity Risk: Legal Implications for Companies and their Directors* (CCLI, 13 December 2022) at 29: "The relevance of biodiversity dependencies and impacts to directors depends on their foreseeability and materiality".

⁴⁴ *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 at 520, citing *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617 (PC) at 643 per Lord Reid [*The Wagon Mound (No 2)*].

⁴⁵ We acknowledge the distinction between "nature positive" and "net gain" policies (the latter providing room for offsetting and compensation of effects on nature). However, in this option we identify 'nature positive' as the broader trend in policy that moves away from minimising or mitigating adverse effects on nature, and towards the overall improvement in natural capital outcomes.



(ii) Understanding of the risk

39 As articulated by Lord Sales, Justice of the UK Supreme Court, in his 2019 paper, expectations of directors are constantly evolving: ⁴⁶

"The changing environment in which [directors] operate also has a significant impact upon what the law expects of directors in practice...An assessment of the practical implications of those duties has to take account of the general environment of expectation created by initiatives by regulators and in civil society".

40 As outlined above, nature-related risks are both physical dependencies and transitional. Perhaps more so than climate change, it is the regulatory and market (transitional) changes that will force greater action by businesses on protection of natural ecosystems. Here, we can look to overseas and international trends for some indication of the path to come.

- *Trends in disclosure of environmental risks*

41 Corporate understanding of the risk to natural capital is being propelled by the emergence of international frameworks for assessing and disclosing nature and biodiversity-related risks and opportunities.

42 The central framework is being developed by the TNFD. This draws on the existing Task Force on Climate-related Financial Disclosures (**TCFD**), which forms the basis for New Zealand's new mandatory climate-related risk disclosure regime and which has been broadly taken up internationally.⁴⁷ In relation to nature-related risks, the TNFD is being developed via contributions from a range of major multi-national corporate and financial institutions. Current drafts already set out a comprehensive framework for identification and disclosure of financial risk and opportunity connected to impacts on biodiversity, nature and ecosystems.⁴⁸ The final TNFD framework is expected to be released in September 2023 and can be expected to influence expectations of corporate best practice.

43 In addition, the forthcoming standards for General Sustainability-related Disclosures from the International Financial Reporting Standards Foundation (**IFRS**) also emphasise biodiversity-related disclosures.⁴⁹ The current draft standards (IFRS S1) will be effective for reporting dates starting on or after 1 January 2024⁵⁰ and require reporting entities to consider the Climate Disclosures Standards Board's Biodiversity Application Guidance.⁵¹ Meanwhile, the International Accounting Standards Board

⁴⁶ Lord Sales, Justice of the UK Supreme Court "Directors' duties and climate change: Keeping pace with environmental challenges" (Anglo Australasian Law Society, 27 August 2019) at 10, available [here](#).

⁴⁷ In New Zealand the Financial Markets Conduct Act 2013 has been amended to introduce a new Part 7A, requiring large listed issuers, banks, fund managers and insurers to publish mandatory climate-related disclosures against a set of mandatory standards for financial years beginning after 1 January 2023.

⁴⁸ As at the time of writing, the TNFD disclosure framework beta 0.4 is expected to be released in late March 2023, before the release of v1.0 of the full framework in September 2023. The draft TNFD recommendations explain that nature-related risk and opportunity disclosures should cover an entity's nature-related dependencies and nature impacts, and its capabilities for nature-related risk and opportunity assessment and management.

⁴⁹ IFRS Exposure Draft S1 *General Requirements for Disclosure of Sustainability-related Financial Information* (IFRS, March 2022) at 51(b), available [here](#).

⁵⁰ Decision of the ISSB at its meeting 16 February 2023 in Montreal, captured [here](#).

⁵¹ IFRS Exposure Draft S1 *General Requirements for Disclosure of Sustainability-related Financial Information* (IFRS, March 2022) at 51(b), available [here](#).



(**IASB**), part of the IFRS, is also expected to incorporate guidance on the materiality of “trends relating to the natural environment and related regulation” which may warrant disclosure in financial statements.⁵²

- 44 Moreover, the EU’s ground-breaking Corporate Sustainability Reporting Directive (**CSRD**) entered into force on 5 January 2023 and incorporates a specific focus on biodiversity and ecosystem threats.⁵³ The CSRD builds on the existing Non-Financial Reporting Directive (**NFRD**),⁵⁴ which has been in effect in all EU member states since 2018, imposing environmental reporting requirements on approximately 12,000 large companies and groups across the EU.⁵⁵ The CSRD extends these reporting requirements to approximately 50,000 companies,⁵⁶ including some large companies outside the EU.⁵⁷ Companies will have to report according to new European Sustainability Reporting Standards (**ESRS**) currently under development,⁵⁸ including a “Biodiversity and Ecosystems Standard” (ESRS E4), which will require a company to disclose plans to ensure that its strategy is compatible with the transition to ‘no net biodiversity loss’ by 2030, net gain from 2030 and full recovery by 2050. Companies must also disclose measurable biodiversity and ecosystem targets and biodiversity action plans.⁵⁹
- 45 The CSRD reflects a clear direction of travel. In 2017, France had already established a “duty of care” law that requires companies to establish a plan to identify and prevent environmental risks related to their activities and supply chains,⁶⁰ and in 2021, France required financial institutions to disclose biodiversity risks.⁶¹ The UK has also encouraged take-up of the TCFD and TNFD recommendations,⁶² now set to expand under the new Sustainability Disclosure Requirements Framework (**SDR**).⁶³ As part of

⁵² IFRS Exposure Draft Practice Statement 1 *Management Commentary* at 9.4(e), available [here](#).

⁵³ A copy of Directive 2022/2464/EU can be accessed via EUR-Lex [here](#).

⁵⁴ A copy of Directive 2014/95/EU amending Directive 2013/34/EU can be accessed via EUR-Lex [here](#).

⁵⁵ The NFRD applies to large listed companies, banks and insurance companies with more than 500 employees. The NFRD remains in force until the new CSRD rules apply. For more details see the European Commission’s website [here](#).

⁵⁶ European Commission “Corporate sustainability reporting”, available [here](#).

⁵⁷ The CSRD applies to all large and listed companies and includes non-European companies with a net turnover in the EU of EUR 150m and at least one substantial subsidiary or branch in the EU.

⁵⁸ The first set of draft ESRS was released last year [here](#) and is expected to be adopted as delegated acts by mid-2023 (European Financial Reporting Advisory Group (EFRAG) “EFRAG delivers the first set of draft ESRS to the European Commission” (press release, 23 November 2022), available [here](#)).

⁵⁹ EFRAG “ESRS E4 Biodiversity and ecosystems” (November 2022) at 12, 28, 37 and 67, available [here](#).

⁶⁰ The “duty of care” law also requires companies’ to identify and prevent human rights, health and safety and corruption risks. Norton Rose Fulbright “A new duty of care for the most significant companies in France” (March 2017) available [here](#).

⁶¹ The new Article 29 of the French law on Energy and Climate requires financial institutions’ disclosures across both biodiversity and climate. It replaces the pioneering Article 173 (see TNFD “France’s Article 29: biodiversity disclosure requirements sign of what’s to come” (17 March 2021) available [here](#)).

⁶² Allen & Overy “U.S. Securities and Exchange Commission proposes extensive climate-related disclosure regime covering all SEC registrants” (23 March 2022) available [here](#).

⁶³ The SDR creates a framework for sustainability disclosures to enable investors to make informed decisions, following the four pillars of the TCFD Recommendations (governance, strategy, risk management, metrics and targets). The SDR will affect UK corporates, UK asset managers, and UK asset owners (see Ashurst “UK green labels and sustainability disclosures are coming – time to get ready”, 22 October 2021, available [here](#)). The SDR is expected to incorporate the ISSB standards (see: HM Treasury, *Greening Finance: A Roadmap to Sustainable Investing*, October 2021 at 12, available [here](#)), which may include biodiversity-related disclosures. See Jennifer Ramos and Zaneta Sedilekova



its 'Roadmap to Sustainable Investing',⁶⁴ the UK also introduced a new Green Taxonomy which includes disclosure of biodiversity and ecosystem risks.⁶⁵ Looking further ahead, the EU's proposed Directive on Corporate Sustainability Due Diligence (**CSDD**) will require reporting entities to identify, prevent, mitigate and remediate biodiversity loss.⁶⁶ The CSDD – if adopted – would impact around 4,000 companies outside the EU.⁶⁷

- *Investor concern and growing business response to biodiversity loss*
- 46 Disclosure trends aside, investors and the capital markets are increasingly vocal on the need to recognise biodiversity risk, propelled by the movement towards climate-related disclosures. These groupings can drive expectations on New Zealand companies. These include Nature Action 100+ (a global investor engagement initiative focused on driving greater corporate ambition and action to reduce nature and biodiversity loss),⁶⁸ signatories to the Finance for Biodiversity Pledge (supporting collaboration among financial institutions to reverse nature loss this decade),⁶⁹ the Principles for Responsible Investment (a network of over 3,000 institutional investors, which has identified biodiversity loss as a priority area)⁷⁰ and Principles for Responsible Banking, which has recently introduced a PRB Biodiversity Community which has published the first-ever [guidance](#) on biodiversity target setting.⁷¹
- 47 The most significant development to date is the "Make it Mandatory" movement, where more than 330 business and finance institutions from 56 countries are actively calling for mandatory requirements for all large businesses and financial institutions to assess and disclose their impacts and dependencies on biodiversity by 2030, in line with the influential Target 15 of the Global Biodiversity framework adopted in December 2022 (see discussion in **Annex I**). The list contains significant New Zealand-based signatories including Christchurch International Airport Limited and Lyttelton Port Company.⁷²
- 48 Separately, the Science Based Targets Network is expected to launch in 2023 as the first comprehensive and science-based measurement framework for developing

Biodiversity Risk: Legal Implications for Companies and their Directors (CCLI, 13 December 2022) at 51, available [here](#).

⁶⁴ In advance of the UK's COP 26 Presidency, the UK released its "Greening Finance: A Roadmap to Sustainable Investing (2021)", available [here](#). The Roadmap sets out the government's ambition "to make the UK the best place in the world for green and sustainable investment". It sets out where the UK is heading in respect to sustainability disclosure requirements. Specifically, it introduces the Sustainable Disclosure Requirements (SDR), a new UK Green Taxonomy, and an investor stewardship.

⁶⁵ Ashurst "UK green labels and sustainability disclosures are coming – time to get ready", 22 October 2021, available [here](#).

⁶⁶ The CSDD is not expected to be adopted before 2024 and is currently with the European Parliament and Council for agreement: see [here](#)

⁶⁷ Affected non-EU companies are those with turnover of over EUR 150m (or between EUR 40-150m where at least 50% of their turnover is generated in the textile, primary industry, and minerals/metals sectors).

⁶⁸ See Nature Action 100+ website [here](#).

⁶⁹ See Finance for Biodiversity Foundation website [here](#).

⁷⁰ Principles for Responsible Investment *Investor Action on Biodiversity: Discussion Paper* (1 September 2020) available [here](#).

⁷¹ UN Environment Programme "Why the new Global Biodiversity Framework matters to members of the Principles for Responsible Banking" (19 December 2022), available [here](#).

⁷² See Make it Mandatory website [here](#) for the full list of signatories.



science-based targets for nature.⁷³ Just as we have observed in relation to climate change, as metrics and methodologies to measure and monitor nature-related impacts develop, market practice will evolve, along with shareholder awareness and expectations in relation to disclosure of this type of information.

49 Within New Zealand, a range of initiatives are seeking to understand and provide input to the development of TNFD, and apply its framework to corporate risk assessment and decision-making. In 2022, EY began pilot testing TNFD's Locate, Evaluate, Assess, Prepare (LEAP) approach with a range of financial institutions and corporates, and some industry participants across the Asia-Pacific region, with feedback being provided to inform further iterations of the TNFD framework. We also understand that in 2023, a group of Aotearoa Circle partner companies will pilot the application of the TNFD framework ahead of its expected finalisation in October.

- *Litigant and regulator focus on biodiversity*

50 As climate-related cases globally now number in the thousands, nature and biodiversity-related litigation is also on the rise, focussed on improving business understanding and disclosure of risks from, and impact on, nature.⁷⁴ Claims have been brought against the French supermarket chain, Casino, for failure to detail the environmental harms from deforestation linked to the cattle industry in South America,⁷⁵ a US wood pellet producer, Enviva, for contribution to elevated rates of deforestation in the Amazon;⁷⁶ and against ANZ Australia seeking disclosure of natural capital and biodiversity-related risks in its annual report.⁷⁷ More specific claims have succeeded in China halting construction of a hydroelectric dam to save endangered species,⁷⁸ in Costa Rica requiring a study into pesticides that harm bees,⁷⁹ in Australia halting a significant mine extension due to biodiversity impacts,⁸⁰ and in Tanzania, preventing the construction of a road which would disrupt animal migrations.⁸¹ In New Zealand, Sea Shepherd successfully sought from the United States Court of International Trade a ban on the import of nine fish species caught off the west coast of New Zealand's North Island.⁸² These claims all influence expectations as to whether similar threats might need to be on the radar of a New Zealand director.

⁷³ Science Based Targets for Nature, Initial Guidance for Business, September 2020, available [here](#). Version 1.0 of Science Based Targets for Nature are expected to be released in 2023.

⁷⁴ The newer claims have been framed to date as seeking access to information. In the ANZ case, shareholders wrote to the bank arguing its duties under the Australian Corporations Act 2001 required its directors' report to disclose that biodiversity and nature loss represented a material risk. In the Casino case, the claimants demanded a detailed compliant vigilance plan identifying risks caused by the group's activities and compensation to affected parties.

⁷⁵ *Envol Vert et al. v. Casino* (France).

⁷⁶ *Fagen v Enviva Inc.*, No. 22-cv-02844 (D.Md.2022).

⁷⁷ James Eyres "ANZ under pressure to reveal biodiversity risk" Australian Financial Review, 29 August 2022, available [here](#).

⁷⁸ Boya Jiang et al "10 Landmark Cases for Biodiversity" ClientEarth, 3 November 2021 at 2-3, available [here](#).

⁷⁹ Ibid at 13-15.

⁸⁰ Ibid at 25-27.

⁸¹ Ibid at 29-31.

⁸² *Sea Shepherd New Zealand and Sea Shepherd Conservation Society v. United States* No 20-00112 (Ct. Int'l Trade, 28 November 2022), available [here](#).



- *Mātauranga Māori and tikanga Māori*

- 51 Mātauranga Māori, or Māori cultural practices are increasingly recognised as central to our understanding of te Taiao, our environment. Mātauranga Māori encompasses Māori/iwi practices to manage biodiversity concerns, with tikanga surrounding tapu, rahui (banning hunting or fishing to allow ecosystem recovery), dietary changes, internal migration and conservation measures.⁸³ Mātauranga Māori is increasingly recognised in environmental law, and actively used to track changes in nature and biodiversity, contributing – for example – to the Government’s latest survey of the environment.⁸⁴ As outlined in greater detail in **Annex I**, if the NBE Bill is passed in its current form, it proposes to require reference to mātauranga Māori when determining environmental management (as well as Western scientific knowledge) or monitoring;⁸⁵ and requires the design and implementation of any biodiversity offset or redress proposed as part of a development to be informed by science “*including an appropriate consideration of mātauranga Māori*”.⁸⁶
- 52 Therefore, in the context of managing environmental risk, we pause here to acknowledge that increasing understanding of environmental threats from mātauranga Māori may – in an appropriate case – provide relevant context for the assessment of the level of understanding of a particular nature-related risk expected of directors.
- 53 In essence, all of the above factors will inform a director’s understanding of nature-related risk to their business, and also the Court’s expectations of what a reasonable director would understand about that risk. Where a nature-related risk is well understood – including as a result of mātauranga Māori – and where there is significant attention on the issue – for example because of an investor focus or an activist litigant bringing legal claims – then a board, acting reasonably, may well need to make sure the business is aware of and properly managing that risk.
- 54 The final factor is how material the risk is for the company, to which we now turn.
- (iii) Scale and potential impact of the risk: single and double materiality**
- 55 Where a risk may have a material impact on a business, it is clear that a board should be ensuring that risk is identified and managed like any other financial risk. There has been some confusion in this area because of the concept of “double materiality”, which recognises both the impact of a nature-related risk *on the company*, as well as the *impact of the company* on the environment.
- 56 For now, disclosure of nature-related risk pursuant to TNFD appears to be progressing down the path of double materiality, although debate will continue.⁸⁷ For that reason, the current draft TNFD Framework (beta v0.3) does not adopt a particular definition of

⁸³ O’Regan (1994) cited by the Ministry for the Environment “Society’s responses to the pressures on biodiversity”, 30 March 2021, available [here](#).

⁸⁴ Environment Aotearoa, 2022 at 36. For example, Tūhoe Tuawhenua use cultural indicators to evidence the decline of kereru populations in Te Urewera.

⁸⁵ NBE Bill 2022, cl 55 and 783.

⁸⁶ See Ibid, Schedule 3, cl 12, and Schedule 4, cl 11.

⁸⁷ For example, the EU Corporate Sustainability Reporting Directive (CSRD) aims to ensure disclosure of sufficient, adequate information about companies’ risks and opportunities, as well as their impacts on people and the environment (i.e. double materiality). In contrast, other jurisdictions, such as the US (in the context of the SEC’s draft climate-related disclosures rule), uses the traditional “single materiality” concept of whether information would influence shareholder decision-making (traditionally associated with the company’s financial position and performance or ‘enterprise value’).



materiality, but recognises the value of understanding double materiality,⁸⁸ by recommending (but not requiring entities) to disclose both:

- 56.1 nature-related risks that may impact the company (regardless of the company's contribution to these risks), i.e. single materiality – assessed under the TNFD using "magnitude metrics";⁸⁹ and
 - 56.2 nature-related impacts from the company's operations (regardless of whether these impacts then negatively impact the company), i.e. double materiality – assessed under the TNFD framework using "exposure metrics"⁹⁰.
- 57 This structure has parallels in climate-related disclosure: the TCFD, New Zealand's own Climate Standards and the International Sustainability Standards Board (**ISSB**'s) draft climate-related disclosure standard all require disclosure of not only climate-related risks that may impact the company (regardless of the company's own GHG emissions), but also of the company's GHG emissions.⁹¹
- 58 For directors' duties, this opinion focusses on single materiality: where a nature-based risk has foreseeable material risk to the business, it will naturally fall within the set of risks that directors must identify, understand and manage. While companies may also themselves be having negative impacts on nature and biodiversity, these may not yet rise to the level of materiality required to trigger a director's duty of reasonable diligence. Several important caveats to this are that, first, as shareholder understanding of nature-related impacts grows, a company's negative nature-related impacts will likely become more and more material to those shareholders' decisions to invest in the business, *independent* of whether those impacts might on their own have justified director attention. Second, a company having a significant impact on the environment may be exposed to transition risk in the form of regulatory change impacting its behaviour and or consumer or supply chain responses that negatively impact the company. Consequently, while we consider that director's duties do not currently automatically extend to "double materiality" per se, there are instances where a corporate's impacts on nature may manifest as nature-related *transition* risks under the traditional 'single materiality' lens.
- 59 Additionally, looking to the future, the increased stakeholder, supply chain focus and TNFD focus on business impact on nature, will increasingly require businesses to consider their effects on natural capital, even where compromised natural capital does not affect the business itself. We therefore recommend that directors closely monitor this emerging trend towards double materiality disclosure and ensure that their risk management mechanisms outlined above in relation to single materiality are future proofed for these emerging investor and consumer expectations.

⁸⁸ TNFD "The TNFD Nature-related Risk and Opportunity and Disclosure Framework Beta v0.3" (November 2022) at 4, available [here](#).

⁸⁹ Ibid at 50.

⁹⁰ Ibid.

⁹¹ This means that a low-emissions operator seriously exposed to climate-related risk (e.g. an aquaculture producer) must also disclose its own contribution to climate change, even if insignificant. Similarly, a company highly dependent on a threatened ecosystem must disclose this, but it will also need to disclose its own impacts on nature from its operations, even where these do not present any negative impact for itself.



Summary: Duty to exercise reasonable care, diligence and skill

- 60 In assessing a director's duty to exercise reasonable care, diligence, and skill in assessing nature-related risk, relevant context includes the growing scientific consensus on biodiversity impacts, near-global support for the Global Biodiversity Framework and its influential Target 15, the TNFD's fast-evolving recommendations, and the nature positive focus appearing through EU regulatory reform, IFRS and accounting standards, and in New Zealand environmental law.
- 61 We recognise that nature-related risk is not as well articulated or understood as climate-related risk at the time we issued our opinion on director duties to manage climate-related risk in New Zealand. However, in our view, the current scientific, political and regulatory context would *allow* a New Zealand court to accept an argument that a director had failed in their exercise of reasonable care, diligence and skill, if they had failed to take into account foreseeable and material nature-related risks when exercising their decision-making powers as a director. In our view, it would now be considered reasonable practice for a director to be:
- 61.1 asking questions about their company's dependence on natural capital; and
- 61.2 where those dependencies identify nature-related risks that are foreseeable and material, considering how those risks may be managed in a way that is proportional to the risk.
- 62 Importantly, in responding to foreseeable risk, directors are not measured against an impossible or impractical standard. The courts are likely to focus on the level of care, diligence and skill used in directors' decision-making processes. Accordingly, directors who balance the materiality of foreseeable risk of harm against costs of mitigation, and who take decisions based upon a considered and informed assessment, are unlikely to be found in breach.
- 63 It follows that the courts are generally unwilling to second guess the good faith commercial decisions of directors.⁹² In litigation, directors may be protected by the 'business judgement' rule, which grants directors a safe harbour from liability simply because, with hindsight, a different action may have been taken.⁹³ In addition, directors may rely on information supplied by other directors, executives in their business, or third parties. But they must not do so blindly.⁹⁴ And our Supreme Court Justices Winkelmann, Glazebrook and France have cautioned extrajudicially that "*the 'business judgement rule' [will] not protect directors where the legal risk stems from inadequate information or lack of enquiry*".⁹⁵ The director simply must make proper enquiries where it would be sensible to do so. The 'ostrich' defence will not assist a director where they needed to open their eyes to a foreseeable nature-related risk that went unidentified or unmanaged.

⁹² The 'business judgement' rule is generally recognised by the New Zealand courts. See for example *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 (CA) at [71].

⁹³ This principle – which is really a form of judicial deference, protects directors from liability for negligence simply because, with hindsight, a different action may have been taken. Unlike jurisdictions such as Australia, there is no explicit statutory formulation of the principle in New Zealand law.

⁹⁴ See for example *R v Moses* HC Auckland CRI-2009-004-1388, 8 July 2011 at [81]–[87]; *R v Graham* [2012] NZHC 265 at [30]–[35].

⁹⁵ Helen Winkelmann, Susan Glazebrook and Ellen France "Climate Change and the Law" (paper prepared for Asia Pacific Judicial Colloquium, Singapore, May 2019) at [117].



Duty to act in best interests of the company

- 64 Section 131 of the CA 1993 requires a director to act in good faith and in what the director believes to be the best interests of the company. This duty contains both a subjective measure that the director acts in what she believes to be the best interests of the company, as well as an objective measure that the director is acting in good faith.
- 65 As detailed in Chapman Tripp’s 2019 opinion, the courts have traditionally been unlikely to find a breach of the s 131 best interests duty without some indication of the director acting against the company’s interests, and usually in favour of their *own* interest.⁹⁶ Successful claims under s 131 of the Companies Act are less common for the good reason that directors are usually motivated to act in what *they* consider to be the best interests of the business. The courts would usually need to find that the directors had failed to take action despite themselves believing that action was needed.
- 66 That said, this duty is now the focus of significant climate-related litigation in the UK, where a shareholder – backed by a range of pension funds – has issued derivative action proceedings in the English High Court against Shell’s directors, asserting that Shell’s directors have mismanaged climate risk to the financial detriment of the business, in breach of their duties under the UK Companies Act. If allowed to proceed, the case will need to grapple with the scope of the best interests duty in that context.
- 67 As to who “the company” is, directors generally owe their duties to the company as a whole.⁹⁷ But the stakeholder primacy governance theory is putting pressure on the traditional yardstick that short-term returns to shareholders are all that matter.⁹⁸ An attempt to recognise this has surfaced in a members’ bill that is currently before Parliament.⁹⁹ In a case asserting a director had breached s 131 in New Zealand for failure to properly consider nature-related risks to the company, the court would likely need to assess whether the director had sought to assess these risks so that they could form an informed view about whether a particular course of action was in the company’s best interests or not.¹⁰⁰ In our view, should a director deliberately not

⁹⁶ *Holland Corporate Ltd v Holland* [2015] NZHC 1407 at [39] per Duffy J. See Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (online ed, Thomson Reuters) at [16.19.3].

⁹⁷ CA 1993, s 169(3) specifies the duties owed to the company and those owed to shareholders. Susan Watson (ed) *Corporate Law in New Zealand* (online ed, Thomson Reuters) at [16.12.15] and [16.24.2]; *ASI Global Investments Inc v Abbas Ibrahim Yousef al Yousef* [2021] NZHC 288.

⁹⁸ See e.g. Discussion of shareholder vs. stakeholder primacy in PM Vasudev “Corporate Stakeholders in New Zealand – The Present, and Possibilities for the Future” (2012) 18 NZBLQ 167 at 176; A Pavlovich and S Watson “Director and shareholder liability at Pike River Coal” (2015) 21 Cant LR 1 at 29; Rob Everett “Thinking beyond shareholders” (presentation at the NZ Capital Markets Forum, Wellington, 21 March 2019); Peter Watts “To whom should directors owe legal duties in exercising their discretion? — a response to Mr Rob Everett” [2019] CSLB 49; Lord Sales, Justice of the UK Supreme Court “Directors’ duties in a post-Hayne world: ‘the company’ as more than the sum of its shareholders” (Lecture for the 36th Annual Conference of the Banking & Financial Services Law Association, Gold Coast, Australia, 31 August 2019). See also discussion in Peter Watts “Shareholder primacy in corporate law — a response to Professor Stout” (ch 2) in P Vasudev and S Watson (eds) *Corporate Governance After the Financial Crisis* (Edward Elgar, England, 2012) at 43; Peter Watts *Directors’ Powers and Duties* (2nd ed, LexisNexis, Wellington, 2015), ch 5.5 at 137.

⁹⁹ Refer to s 172(1) of the UK Companies Act 2006 (an analogue of New Zealand’s s 131(1) duty), which requires directors to have regard to factors such as the impact of the company’s operations on the community and the environment in their decision-making. There has been much commentary on the impact of this section on directors’ duties in the United Kingdom: see for example Lord Sales, Justice of the UK Supreme Court “Directors’ duties in a post-Hayne world: ‘the company’ as more than the sum of its shareholders” (Lecture for the 36th Annual Conference of the Banking & Financial Services Law Association, Gold Coast, Australia, 31 August 2019).

¹⁰⁰ *Hedley v Albany Power Centre Ltd (in liq)* [2005] 2 NZLR 196 (HC) at [64]. Some commentators do not consider the courts should take this approach: For example, see Peter Watts *Directors’ Powers and*



engage with foreseeable and material nature-related risks, there is still a risk of a s 131 claim.

Duty to exercise a power for a proper purpose

- 68 We have briefly considered whether there is any relevant application of s 133 of the CA 1993, which focuses on whether directors have used specific powers for an improper purpose.¹⁰¹ Section 133 is more precisely concerned with whether a particular corporate power (such as the right to issue shares) is being exercised for its proper purposes. At this stage, we do not see likely factual scenarios that would allow a claim for breach of s 133 on the basis of failure to consider nature-related risk.

Disclosure of nature-related risk

- 69 We briefly note the existing expectation to report on environmental issues in the recently updated NZX Corporate Governance Code and accompanying (though non-binding) ESG Guidance Note.¹⁰² The Corporate Governance Code (which applies to all listed issuers) provides that non-financial disclosure should be provided at least annually, including consideration of material ESG factors.¹⁰³ The NZX suggests using an international reporting initiative (such as the Global Reporting Initiative) to ensure balanced, transparent public disclosure which connects financial, social and environmental performance. The new amendments to the Code and the Guidance Note specifically acknowledge the importance of disclosures relating to an issuer's climate change risks and opportunities.
- 70 While the Corporate Governance Code already emphasises the importance of sound risk management, including of ESG factors,¹⁰⁴ the revised ESG Guidance Note gives greater detail, including that issuers may wish to "*explain the material ESG risks faced by their business, how they intend to manage ESG risks, and the risk management framework that they use to identify, monitor and manage risks*".¹⁰⁵ The Guidance Note also now includes detailed reference to climate-related disclosures and the TCFD framework.
- 71 Directors of listed companies are already required to disclose material information to the business under their NZX Listing Rule obligations. Material information is information which a reasonable person would expect to have an effect on the issuer's share price.¹⁰⁶ Disclosures could extend to nature or biodiversity-related factors but only where they met the established tests for materiality.

V. CONCLUSION

- 72 New Zealand directors will be increasingly expected to ensure appropriate processes are in place to identify, assess and manage material and foreseeable nature-related

Duties (2nd ed, LexisNexis, Wellington, 2015), ch 5.3.2 at 132; and Peter Watts "Judicial review of directors' decisions — another bad idea" [2006] CSLB 7.

¹⁰¹ Susan Watson and Lynne Taylor (eds) *Corporate Law in New Zealand* (online ed, Thomson Reuters) at [16.19.2]. See also *Eclairs Group Ltd v JKC Oil & Gas plc* [2015] UKSC 71 at [15].

¹⁰² The NZX has announced amendments to the NZX Corporate Governance Code available [here](#) that will become effective on 1 April 2023 for issuers with a financial year commencing after 1 April 2023. Issuers with a financial year commencing before 1 April 2023 must report against the provisions of the Code dated 17 June 2022 (or may choose to report against the new Code).

¹⁰³ NZX *Corporate Governance Code* (NZX, amended from 1 April 2023) at Recommendation 4.4.

¹⁰⁴ Ibid Principle 6.

¹⁰⁵ NZX *ESG Guidance Note* (NZX, amended from 1 April 2023), available [here](#).

¹⁰⁶ NZX *Continuous Disclosure Guidance Note* (NZX, 10 December 2020) at 6.



risks to the company as they would any other financial risk. For sectors with heavy reliance on natural capital for profit generation, this is a risk area with which many boards are already familiar. What may be less understood is the degree of risk at issue, the likely regulatory response to nature-related risk, and quickly developing expectations on businesses and their boards.

73 The practical impact of this opinion for directors is:

73.1 Where appropriate, directors of New Zealand companies will be required to take foreseeable and financially material nature-related risks into account when making business decisions. Whether nature-related risks are foreseeable and material for a particular company will be impacted by anticipated domestic and international regulatory change that prioritises protection of nature, the degree of understanding of the risk and stakeholder expectations. The requirement stems principally from the directors' duty to act with reasonable care under s 137 of the CA.

73.2 Although directors are protected by the business judgement rule, this does not excuse a failure to make proper enquiries. Directors of companies reliant on natural capital should:

- (a) ensure that significant foreseeable nature-related risks to the business are being identified;
- (b) periodically assess the nature and extent (materiality) of the risk to the company; and
- (c) decide whether, and if so, how to take proportional action in response, taking into account the likelihood of the risk occurring and possible resulting harm.

73.3 Directors in affected sectors are already doing the above using conventional risk management strategies. Nature-related risk assessment will become increasingly common as climate-related financial disclosures and the work of the TNFD evolve.

73.4 The more a company is reliant on natural capital, and the more that dependency is understood, the greater the foreseeability of the risk, and the more material the risk for the business, the more it would be reasonably expected to be managed.

74 We set out below a set of questions for directors (developed from the CCLI's 2022 "Biodiversity Risk" paper and the TNFD).

Questions for directors

Governance of nature-related risk, risk to biodiversity, and risk to natural capital:

These questions will need to be tailored to the relevant business and sector, and will be most relevant where a risk is foreseeable and material for the business.

- Is the board aware of key nature-related risks that may be financially material for the company?
- Can the board and executive access appropriate expertise to identify what our main nature-related risks are? Do we need training or external advice? Are



there issues common across our industry or community that we can collaborate on?

- Are we assessing the company's nature-related dependencies and risks? Do we understand the implications of our own nature-related impacts for our own supply chain and others? How much of the business is dependent on natural capital or ecosystem services that are vulnerable or under threat? Would interruption pose a material risk to the business?
- Is nature-related risk part of our existing risk management system? How might this be integrated with management of climate-related or other risks?
- Are we measuring nature-related dependencies, risks and impacts in any coordinated way or over time? Is there a process for elevation of key risks through management and to the board?
- Is the business following the progress of TNFD and market implementation of TNFD, as well as relevant regulatory reforms?



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ANNEX I: EXPLANATION AND EXAMPLES OF NATURE-RELATED RISKS

- 1 As noted above, corporate nature-related risks can be classified into:
 - 1.1 Dependency risks; and
 - 1.2 Transition risks.
- 2 In addition, the emergence of such risks can also create nature-related opportunities.
- 3 Each of these areas are discussed in greater detail below.

Nature-related dependency risks

- 4 Many companies are dependent on ecosystem services and the biodiversity that underpins them. The impact of breakdowns in ecosystem services on businesses that rely directly or indirectly on healthy ecosystems and biodiversity can be extensive, and often understated and under-assessed.
- 5 While there are some clear and well understood examples of direct dependence on ecosystem services (for example in the primary sector), there are a multitude of other less 'obvious' sectors/corporates that rely on well-functioning ecosystem services.
- 6 As outlined in Table 1 below, and the following discussion, multiple sectors have dependencies on ecosystem services.

Table 1: Examples of ecosystem service dependencies in various sectors/industries¹⁰⁷

Ecosystem service type	Examples of dependent sectors/industries
Water flow regulation and flood mitigation	Construction, real estate, infrastructure, agriculture, insurance, financial services
Pollination	Agriculture, food and beverage, and fibre
Nursery population and habitat maintenance	Fisheries, tourism
Biological controls (pest control)	Agriculture, food and beverage, and fibre
Recreation and amenity services	Tourism, entertainment (including film and media)

- 7 As noted, the primary sector is a clear example of the direct dependence on ecosystem services. The fisheries sector, for instance, is wholly dependent on nature through ecosystem services providing a viable habitat for fish species and providing conditions

¹⁰⁷ Derived from TNFD *The TNFD Nature-related Risk and Opportunity and Disclosure Framework Beta v0.3* (November 2022), available [here](#).



appropriate to nursery maintenance – these services include clean water, regulated water temperatures and food sources.¹⁰⁸ Climate change is already forcing the New Zealand fishing industry to adapt its practices to accommodate warming sea temperatures that no longer support year round fish farming.¹⁰⁹

- 8 The agricultural sector also heavily relies on ecosystem services. These services range from pollination, to natural predation/pest control, as well as direct provisioning services related to water supply and soil quality.¹¹⁰ Taking pollination as an example, there are widespread international concerns regarding reduced pollination rates due to losses in species providing these services. It is estimated that between US\$235 and US\$577 billion of global crop output is at risk annually from pollinator loss, posing a tangible threat to agricultural firms and their investors.¹¹¹ Indeed, the impact of declining bee populations on the New Zealand agricultural sector has been estimated to be between NZ\$295m and NZ\$728m (US\$213m – 525m) each year if the local bee population continues to decline.¹¹² Another example of nature-related dependency impacts faced by the agricultural sector is the increased rate of loss of available high quality soil or highly productive land to other land-uses, such as urban expansion.¹¹³ The loss and fragmentation of highly productive land has particularly accelerated over the last two decades.¹¹⁴ To illustrate the scale of the impact, the area of highly productive land (which makes up only 15% of New Zealand’s landmass) that was unavailable for agriculture, because it had a house on the parcel of land, increased by 54% between 2002 and 2019.¹¹⁵ This ultimately pushes agriculture to less productive land, resulting in low yields and/or reliance on fertilisers and irrigation to maintain productivity.¹¹⁶
- 9 The construction, real estate and infrastructure sectors are also dependent on ecosystem services. Primarily, these sectors depend on the flood, erosion and storm protection services offered by floodplains, forests and wetlands to act as buffers from intense weather systems. These services are key to prevent flooding, erosion, landslides, and augment runoff rates. The recent events in New Zealand surrounding Cyclone Gabrielle and the Auckland floods exemplify how changes to natural ecosystems that augment flows and contribute to ground stability have the potential to

¹⁰⁸ MacDiarmid AB, Law CS, Pinkerton M, & Zeldis J *New Zealand Marine Ecosystem Services* in JR Dymond ed. *Ecosystem services in New Zealand: Conditions and trends* (2013) Manaaki Whenua Press, Lincoln, New Zealand.

¹⁰⁹ Samantha Gee “NZ King Salmon to close farms due to rising sea temperatures” Radio New Zealand (25 May 2022), available [here](#).

¹¹⁰ Secretariat of the United Nations Convention on Biological Diversity *Living in Harmony with Nature*, available [here](#).

¹¹¹ Forbes, “The Value Of Pollinators To The Ecosystem And Our Economy” (14 October 2019), available [here](#).

¹¹² Food Navigator Asia “Kiwi bee decline could cost economy up to NZ\$728m a year” (10 August 2016), available [here](#).

¹¹³ See Agribusiness and Economics Research Unit *The New Zealand Food and Fibre Sector: A Situational Analysis* (December 2018) at 8-9, available [here](#).

¹¹⁴ Ministry for Primary Industries and Ministry for the Environment, *Regulatory Impact Assessment: Managing and protecting highly productive land under the Resource Management Act (1991)* (September 2022) at 7, available [here](#).

¹¹⁵ Ministry for the Environment and Stats NZ *New Zealand’s Environmental Reporting Series: Our Land 2021* (April 2021) at 17, available [here](#).

¹¹⁶ Ministry for the Environment and Stats NZ *Environment Aotearoa 2022* (April 2022) at 19, available [here](#).



cause significant damage to buildings, businesses and infrastructure.¹¹⁷ An understanding of relationship between well-established forest cover and extreme weather events is by no means new. Following Cyclone Bola in 1998, New Zealand research found that indigenous forest and exotic pine plantations greater than 8 years old provided the best protection against shallow landslides.¹¹⁸ This finding is aligned with more recent research that found that forests have significant benefits for erosion control in New Zealand.¹¹⁹

- 10 Tourism and recreation sectors are often also heavily dependent on ecosystem services and the biodiversity that underpins them. In New Zealand, for example, tourism operators have been hit hard by Kauri dieback, which has led to tourism activity closures that have impacted tour companies, cafes and accommodation providers.¹²⁰ In 2013, the potential cost of Kauri dieback to tourism was estimated to be \$48 million annually.¹²¹ Other examples include the impact of the spread of didymo in waterways which if uncontrolled can have a big impact on fishing, sporting and recreational businesses, as well as industrial and agricultural operators who rely on water intakes.¹²² The unchecked spread of this algae in New Zealand was estimated to cost the country more than \$285 million if left unchecked (as a worst-case scenario).¹²³
- 11 New Zealand's electricity supply network depends heavily on hydroelectric power which is reliant on inflows and is vulnerable to Central Pacific El Niño events.¹²⁴ Aotearoa's food and fibre production is similarly reliant on water supply. Many of New Zealand's natural water systems are already over allocated, resulting in challenges for new productive and community waters uses to secure necessary water supplies.¹²⁵ The expansion of agriculture and horticultural activity into marginal catchments has increasingly seen water take from rivers subject to minimum environmental flows, and extraction of groundwater from some over-allocated aquifers.
- 12 Perhaps less directly, a range of non-sector specific business activities in coastal and marine areas are often highly dependent on relatively overlooked ecosystems such as mangroves and reefs. Mangroves, for example, reduce contaminants in the environment by filtering pollutants from different industrial activities into their roots and branches.¹²⁶ Furthermore, they increase the assimilative capacity of water bodies

¹¹⁷ For further discussion of this topic, see Parliamentary Commissioner for the Environment, *Are We Building Harder, Hotter Cities?: The Vital Importance of Urban Green Spaces* (March 2023), available [here](#); and Scientific American, *Use Nature as Infrastructure* (April 2023), available [here](#).

¹¹⁸ Marden and Rowan *Protective value of vegetation on tertiary terrain before and during Cyclone Bola, East Coast, North Island, New Zealand* (New Zealand Journal of Forestry Science 23(3): 255-263 (1993)).

¹¹⁹ Basher L R *Erosion processes and their control in New Zealand* (2013). In Dymond JR ed. *Ecosystem services in New Zealand – conditions and trends*. Manaaki Whenua Press, Lincoln, New Zealand.

¹²⁰ Stuff NZ "Kauri dieback killing businesses as well as trees, as track closures begin to bite" (22 July 2018), available [here](#).

¹²¹ Ibid.

¹²² A Barrett "Bioplastics to Solve Invasive Algae in New Zealand" (30 December 2019), available [here](#). See also NZ Herald "Algae may cost hundreds of millions" (4 April 2006), available [here](#).

¹²³ NZ Herald "Algae may cost hundreds of millions" (4 April 2006), available [here](#).

¹²⁴ Ministry for Primary Industries, *Water Availability and Security in New Zealand*, MPI Technical paper No: 2022/18.

¹²⁵ Ibid.

¹²⁶ Subodh Kumar Maiti and Abhiroop Chowdhury *Effects of Anthropogenic Pollution on Mangrove Biodiversity: A Review* (2013) 4 Journal of Environmental Protection 1428 at 1431.



and lessen the impact of extreme weather events.¹²⁷ Worldwide, mangrove ecosystems have been assessed to reduce costs from flood damage by more than \$65 billion per annum and protect 15 million people from flooding.¹²⁸

- 13 Additionally even indirect dependencies (e.g. through supply chains and connections to larger industries) could amount to a material dependency.¹²⁹ Take for example the insurance industry's exposure to the costs of the failure of ecosystem services to manage flood events in New Zealand or the banking sector's exposure to mortgage debt associated with properties that are unlikely to be recoverable.¹³⁰

Nature-related transition risks

- 14 The 2019 report from the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (**IPBES**) concluded that goals for conserving and sustainably using nature for 2030 and beyond may only be achieved through transformative economic, social, political and technological change.¹³¹ It is that change – in the form of laws, consumer preferences and technological changes – that results in nature-related transition risks.
- 15 Nature-related transition risks have the potential to be almost as significant as the dependency risks outlined above, but importantly may be felt in advance of the actual failure of ecosystem services. That is because transition risks are likely to result from changes triggered by the response of the general public, regulators, consumers and markets to the anticipated risk of ecosystem failures.
- 16 The immediate example of a nature-related transition risks is regulatory. While environmental laws have always provided for varying protections of environmental values, trends in emerging international and domestic law reform and NGO advocacy evidence an increasing trend towards “nature-positive” regulatory reforms.¹³²
- 17 Although there is no strict definition of what amounts to “nature positive” policies, for the purposes of this opinion we have taken a broad approach to policies that are nature positive. This includes those policies that not only include strict protections / bottom lines for biodiversity and ecosystem values (going beyond managing, monitoring or minimising impacts) but also require no net loss of natural capital (through avoidance, offsetting and compensation), and increasingly require overall net gain – for example through reversal of loss and regeneration/enhancement of natural capital.¹³³
- 18 Nature positive reforms are gaining traction, with “nature positive” increasingly becoming the corollary buzz word to the climate change movement's “net zero”

¹²⁷ The Nature Conservancy *The Importance of Mangroves* (2020), available [here](#).

¹²⁸ I B Billecocq *The business case for investing in resilient coastal ecosystems* (27 October 2021), available [here](#).

¹²⁹ Jennifer Ramos and Zaneta Sedilekova *Biodiversity Risk: Legal Implications for Companies and their Directors* (CCLI, 13 December 2022) at 4.1.1, available [here](#).

¹³⁰ Tamsyn Parker “Auckland floods: Insurance claims could hit nearly \$1 billion - will your premiums increase?” NZ Herald, (31 January 2023), available [here](#).

¹³¹ IPBES *The Global Assessment Report on Biodiversity and Ecosystem Services, Summary for Policymakers* (2019) at 10-19.

¹³² Diane B Holdorf et al *What is 'nature positive' and why is it the key to our future?* World Economic Forum (23 June 2021), available [here](#).

¹³³ Sophus OSE zu Ermgassen et al *Are corporate biodiversity commitments consistent with delivering 'nature-positive' outcomes? A review of 'nature-positive' definitions, company progress and challenges* Journal of Cleaner Production 379 (2) (15 December 2022), available [here](#).



policies. Indeed, in June 2021 the G7 Heads of State announced a joint commitment to a “Nature Compact” which included the statement that “*our world must not only become net zero, but also nature positive, for the benefit of both people and the planet.*”¹³⁴ The second pillar of that compact was to work together to “*dramatically increase investment in nature from all sources, and to ensure nature is accounted for, and mainstreamed, in economic and financial decision-making.*”

- 19 As recognised by the World Economic Forum, “net positive” nature policies represent a paradigm shift in the way we view nature and one which is likely to impact the international and domestic regulatory response to nature-related risks.¹³⁵ In addition to the G7, 88 heads of state have signed the *Leaders Pledge for Nature* to reverse loss of biodiversity by 2030, which also has the support of 126 Nobel Laureates in the *Our Planet, Our Future* statement. There is also growing business support for nature positive reforms with more than 1,100 companies with revenues of more than US\$5 trillion calling on governments to adopt policies now to “reverse nature loss” by 2030.¹³⁶
- 20 It is in this context that in December 2022 the breakthrough Global Biodiversity Framework (**GBF**)¹³⁷ was agreed at COP 15 of the Convention on Biological Diversity is another example of the increased focus on nature positive international commitments to domestic regulation. The GBF targets include the reduction of the loss of areas of high biodiversity importance to “close to zero” by 2030.¹³⁸ The GBF also obligates signatory countries to monitor and report at least every five years on progress against the GBF’s goals and targets.¹³⁹ Under the GBF, governments have committed to mobilising US\$200 billion by 2030 to implement national biodiversity strategies and action plans, including by “*stimulating innovative schemes such as payment for ecosystem services, green bonds, biodiversity offsets and credits, benefit-sharing mechanisms, with environmental and social safeguards*”.¹⁴⁰
- 21 Given the GBF’s near global acceptance,¹⁴¹ its reach and influence is significant and the accountability provided by progress reports means that it is entirely foreseeable that

¹³⁴ G7 2030 Nature Compact, available [here](#).

¹³⁵ Diane B Holdorf et al *What is 'nature positive' and why is it the key to our future?* World Economic Forum (23 June 2021), available [here](#).

¹³⁶ Business for Nature *Call to Action*, launched 2021, available [here](#).

¹³⁷ The final text of the Kunming-Montreal Global Biodiversity Framework is available [here](#). The four long-term goals are: (i) **Goal A:** increase in area of natural ecosystems by 2050; halt to human-induced species extinction (ten-fold reduction in extinction rate by 2050); maintenance of genetic diversity in wild and domestic species; (ii) **Goal B:** sustainable development by 2050 (through sustainable use of biodiversity); (iii) **Goal C:** sharing of monetary and non-monetary benefits from utilization of genetic resources, and protection of traditional knowledge; and (iv) **Goal D:** adequate means of implementation (including financial resource, capacity-building etc) and closing of the biodiversity finance gap of \$700 billion per year. The Framework’s 23 targets are centred around reducing threats to biodiversity, meeting people’s needs through sustainable use and benefit-sharing and tools and solutions for implementation and mainstreaming.

¹³⁸ Kunming-Montreal Global Biodiversity Framework, CBD/COP/15/L.25, adopted 18 December 2022 at Target 1, available [here](#).

¹³⁹ United Nations “Nations Adopt Four Goals, 23 Targets for 2030 In Landmark UN Biodiversity Agreement” (press release 19 December 2022), available [here](#).

¹⁴⁰ Kunming-Montreal Global Biodiversity Framework, CBD/COP/15/L.25, adopted 18 December 2022 at Target 19(d), available [here](#).

¹⁴¹ In December 2022 at COP 15, 188 countries adopted the GBF.



domestic regulatory responses to nature-based risks are likely to be influenced by the nature positive paradigm.

- 22 In New Zealand, domestic laws and law reform already shows evidence of a shift to a more nature positive approach to environmental controls. While New Zealand law has for decades provided protections for biodiversity, habitats and conservation areas,¹⁴² in recent years there has been a markedly increase in regulatory steps to protect and restore biodiversity. Examples of those steps include, most notably:
- 22.1 *Te Mana o te Taiao* - The New Zealand's Biodiversity Strategy 2020;¹⁴³
 - 22.2 Existing national direction under the RMA, including the environmental protection and enhancement focus in the New Zealand Coastal Policy Statement (**NZCPS**)¹⁴⁴ and the National Policy Statement for Freshwater Management (**NPSFM**);¹⁴⁵
 - 22.3 Treaty of Waitangi settlement legislation which incorporates enhancement directions with respect to flora fauna, fisheries and significant sites;¹⁴⁶
 - 22.4 The development of the NPS-IB under New Zealand's overarching environmental law - the RMA;¹⁴⁷ and
 - 22.5 The comprehensive reform of the RMA and its replacement by the NBE Bill.
- 23 In particular the NBE Bill's provisions reflect a number of nature positive principles that are likely to increasingly impact businesses that directly or indirectly rely on activities that require new or replacement resource consents to authorise land and resource use

¹⁴² Pressures on New Zealand's biodiversity are currently managed under an array of laws including the Conservation Act 1987, which established the Department of Conservation, the Reserves Act 1977, which allows for the classification of public reserves, the Marine Reserves Act 1971, which relates to the management and protection of marine reserves, as well as the Resource Management Act 1991, which aims to promote the sustainable management of natural and physical resources. For a more comprehensive overview of the key conservation laws see Ministry for the Environment *Society's responses to the pressures on biodiversity* (30 March 2021), available [here](#).

¹⁴³ *Te Mana o te Taiao* was developed in fulfilment of New Zealand's obligation as a party to the Convention on Biological Diversity to have a national biodiversity strategy and action plan. It provides the overall strategic direction for the protection, restoration and sustainable use of New Zealand's biodiversity, particularly indigenous biodiversity, for the next 30 years. It is intended to guide all those who work with or have an impact on biodiversity, including central and local government, whanau, hapū and iwi, industry, and landowners. *Te Mana o te Taiao* is accompanied by a 'living' Implementation Plan which will be reviewed every 5 years to assess progress towards the outcomes and goals, reassess priorities, and develop new actions. *Te Mana o Te Taiao* is available [here](#) and the 2022 Implementation Plan can be accessed [here](#).

¹⁴⁴ Although the oldest national policy statement, the NZCPS, includes directive provisions requiring the protection of the coastal environment (e.g. Policies 11, 13 and 15). The explicit and directive nature of these provisions was reinforced following the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38.

¹⁴⁵ Central to the NPSFM is the ongoing protection and improvement of freshwater. The NPSFM, for example, includes an "effects management hierarchy" in relation to wetlands and rivers whereby if following the application of each step of the hierarchy, compensation is not appropriate the activity itself must be avoided (see clause 3.21, NPSFM).

¹⁴⁶ See for example the *Vision and Strategy for the Waikato River* under Schedule 2(1)(3)(i), Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

¹⁴⁷ The NPS-IB has had a long history. It was the subject of a failed proposal in 2011, but public consultation on a revised national policy statement in 2019 and 2020, resulted in an exposure draft being released in mid-2022. Implementation of the NPSIB is anticipated to take place in 2023 but as at the date of this opinion, a final document is yet to be released. It is expected to carry over into the replacement regime to the RMA, see Ministry for the Environment *National Policy Statement for Indigenous Biodiversity: Draft implementation Plan* (June 2022) at 6.



activities. It does so through the proposed overarching “system outcomes”. Those outcomes flow through to national and regional planning documents under which resource consents are sought. The NBE Bill’s system outcomes expressly require not only protection of existing natural capital but also the “restoration” of the ecological integrity of degraded ecosystems.¹⁴⁸

- 24 Other examples of the NBE Bill’s nature positive approach are evidenced in its:
- 24.1 application of an “effects management framework” which prohibits certain activities unless “redress” for residual adverse effects is provided by enhancing the affected aspect of the environment;¹⁴⁹
 - 24.2 imposition of responsibilities on regional councils to not only maintain but also “enhance” indigenous biodiversity;¹⁵⁰ and
 - 24.3 application of principles that set an expected standard for the redress of residual biodiversity impacts.¹⁵¹
- 25 The NBE Bill also places on local authorities monitoring and reporting requirements on the state of the environment, including indigenous biodiversity.¹⁵² A regional planning committee will also be required to publish a 5-yearly assessment of environmental changes, trends, pressures, emerging risks and outlooks within their region.¹⁵³ Similarly, improved information and regular monitoring of indigenous biodiversity is a specific policy in the proposed NPS-IB,¹⁵⁴ which requires councils to undertake district-wide assessments to identify and map areas that qualify as ‘significant natural areas’¹⁵⁵ and develop plans to monitor indigenous biodiversity.¹⁵⁶
- 26 New Zealand is by no means the trailblazer in these types of nature positive reforms. Similar (and in many instances much more advanced) regulatory schemes have been advanced in the UK, Australia and Europe.
- 27 Separate to nature positive restoration requirements, regulatory changes that require nature-related disclosure and due diligence obligations can also amount to transition risks – particularly where corporates have not anticipated and do not have data and practices in place to provide sufficiently robust disclosures. The GBF (discussed above) includes a requirement that by 2030, all contracting states – including New Zealand – ensure that large and transnational companies and financial institutions regularly

¹⁴⁸ See NBE Bill 2022 (186-1), cl 5(a) which while not referring specifically to ecosystems does refer to “*air, water, soils, the coastal environment, wetlands, estuaries, and lakes and rivers and their margins and indigenous biodiversity*”. In addition to requiring the restoration of ecological integrity it also requires the restoration of “mana and mauri” of such systems – being Māori concepts related to the respect/prestige/spiritual power and life force/vital essence of such systems, respectively. See discussion at [51] – [53] which considers the incorporation of the Māori world view, te ao Māori, in such protections.

¹⁴⁹ NBE Bill 2022 (186-1), cl 61(e).

¹⁵⁰ Ibid cl 644.

¹⁵¹ Ibid Sch 4.

¹⁵² Ibid cl 783.

¹⁵³ Ibid cl 783(7).

¹⁵⁴ NPS-IB Exposure Draft (June 2022), Policy 17.

¹⁵⁵ Ibid cl 3.8 and 3.9.

¹⁵⁶ Ibid cl 3.25.



monitor, assess, and transparently disclose their risks, dependencies and impacts on biodiversity, and that they report on compliance. This commitment could foreseeably lead to the wide-spread mandatory adoption of corporate reporting frameworks, such as the TNFD.¹⁵⁷ For states like New Zealand and the UK that have imposed mandatory obligations for corporates to disclose climate risks, aligned to TCFD, there are clear precedents and adjacencies. The potential for greater emergence of these disclosure obligations and the impact it has on the context for the assessment of directors' duties is set out in Section IV of this opinion.

- 28 Leaving aside regulatory-related transition risks, consumer and market changes resulting from natural capital risks can also trigger transition risks. Corporates face considerable reputational risks associated with shifting market and consumer expectations regarding their wider supply chain's impact on biodiversity. The consumer backlash to the use of palm oil in food products provides a good example of changes to businesses practices as a result of shift market expectations.¹⁵⁸ Another example is the impact on the New Zealand commercial fishing industry following the recent ruling of the US Court of International Trade issuing an import ban on nine species of New Zealand fish caught in trawl and gillnet fisheries in waters known to provide habitat for the critically endangered Māui dolphins.¹⁵⁹ This ruling sends a strong signal to corporates across the world, as well as in New Zealand, of the increasing importance of taking into account the impact of business activities on biodiversity, and in particular endangered species.
- 29 These risks have already led to corporates seeking to ensure the veracity of their supply chains through the reliance on a multitude of certification schemes, such as the Forest Stewardship Council in the timber sector. Perceptions of poor due diligence on the part of businesses importing products derived from overseas can result in a significant backlash from the public and damage to corporate reputation, as evidenced by the recent media associated with the import of 'blood timber' from Myanmar by a Northland timber firm.¹⁶⁰

Mātauranga Māori and tikanga Māori

- 30 Just as tikanga Māori has been recognised as part of New Zealand's common law,¹⁶¹ mātauranga Māori and te ao Māori are increasingly recognised as central to our understanding of Aotearoa New Zealand. Given the focus on te Taiao, the environment, in te ao Māori, this is a transition risk which reflects that courts may

¹⁵⁷ See e.g. TNFD *The TNFD Nature-related Risk and Opportunity and Disclosure Framework Beta v0.3* (November 2022), available [here](#).

¹⁵⁸ Following consumer complaints concerned about the environmental impact of palm oil production in 2009, Cadbury announced it was removing palm oil from its Dairy Milk recipe in New Zealand (Confectionary News "Cadbury removes palm oil from Dairy Milk in New Zealand" (16 August 2009), available [here](#); see also Radio New Zealand "Cadbury does U-turn on palm oil" (17 August 2009), available [here](#)). Following on from that move by Cadbury numerous other New Zealand consumer good chains have taken voluntary action to exclude palm oil from products. For example, in 2021, RJ's, New Zealand's based confectionery brand, announced that it would be 100% palm oil free (see FMCG Business "RJ's removes palm oil from its products" (8 July 2021), available [here](#)). Ecostore has also made a commitment to using certified sustainable palm oil, while keeping an eye on alternative developments such as oil derived from algae (see Ecostore's Palm Oil policy, available [here](#)).

¹⁵⁹ Lewis & Clark Law School "Victory for the Maui Dolphin" (28 January 2023), available [here](#). See also Sea Shepherd "A win for endangered species; Sea Shepherd lawsuit succeeds in protecting Maui dolphins" (8 December 2022), available [here](#).

¹⁶⁰ See NZ Herald "Revealed: How Myanmar 'blood timber' found its way to Whangarei" (3 March 2023), available [here](#).

¹⁶¹ *Takamore v Clarke* [2012] NZSC 116; *Ellis v R* [2022] NZSC 114 (particularly per Glazebrook J at [108] and Williams J at [261] – [271]).



reference principles or expectations under tikanga Māori in resolving disputes with environmental implications.

- 31 Already, tikanga and mātauranga Māori is increasingly referenced in New Zealand statute, litigation and court decisions:
- 31.1 The concept of kaitiakitanga, in accordance with tikanga, has since 1991 been given particular importance in all decision-making related to natural and physical resources,¹⁶² and the relationship of Māori to taonga which may include ecosystems has been identified as a matter of national importance.¹⁶³
- 31.2 Mātauranga Māori lies at the centre of the significant and far-reaching Wai 262 Waitangi Tribunal claim, lodged in 1991.¹⁶⁴ The Tribunal released its report on the Wai 262 claim in 2011, recommending wide-ranging reforms and calling for a genuine partnership between Māori and the Crown.¹⁶⁵
- 31.3 The Supreme Court recognised earlier this year that tikanga will be relevant to a range of legal obligations, with the extent to which tikanga may impact a particular cause of action depending on both the claim and the parties to the dispute.¹⁶⁶
- 32 Looking to the future, New Zealand’s incoming overarching environmental legislation – the NBE Bill - references te ao Māori concepts including mātauranga Māori throughout. It represents a steep ascent in the recognition of mātauranga Māori and tikanga Māori in environmental law. For example the NBE Bill proposes to:
- 32.1 include as part of its purpose the requirement to recognise and uphold “te Oranga o te Taiao”, which includes the interconnectedness of the environment and its intrinsic relationship with iwi and hapū;¹⁶⁷
- 32.2 require those with legislative duties to recognise and provide for the responsibility and mana of each iwi and hapū to protect and sustain the health and well-being of the environment/te taiao in accordance with the kawa (protocol), tikanga (including kaitiakitanga), and mātauranga in their area of interest;¹⁶⁸

¹⁶² RMA 1991, Section 7(a). Section 2 defines “kaitiakitanga” as meaning “the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship”.

¹⁶³ Section 6(e) of the RMA specifically elevates the following to a matter of national importance that is required to be recognised and provided for: “*the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga*”.

¹⁶⁴ See Wai 262 website [here](#). Focusing mainly on the Crown’s existing laws, policies and practises, the claimants sought to restore “te tino rangatiratanga o te Iwi Māori in respect of flora and fauna and ... taonga” (Wai 262, “Ka Muri – Wai 262”, available [here](#)).

¹⁶⁵ Waitangi Tribunal, “Ko Aotearoa Tēnei: Report on the Wai 262 Claim Released”, available [here](#).

¹⁶⁶ The Court noted that a dispute taking place at the intersection between te ao Māori and the wider community is likely to require careful weighing of common law and tikanga principles, according to the facts and needs of the case: per Williams J in *Ellis v R* [2022] NZSC 114 at [267].

¹⁶⁷ NBE Bill 2022 (186-1), cl 3 and 7. “Te Oranga o te taiao” is defined in clause 7 as meaning (inter alia) the health of the natural environment; the interconnectedness of all parts of the environment; and the intrinsic relationship between iwi and hapū and te Taiao (the environment).

¹⁶⁸ *Ibid*, cl 6.



- 32.3 require reference to mātauranga Māori when determining environmental management or monitoring and in the design of any biodiversity offset or redress proposed as part of a development (as outlined at 51 above);¹⁶⁹ and
- 32.4 require knowledge and expertise in tikanga Māori and mātauranga Māori as a prerequisite for members of key decision-making bodies under the legislation.¹⁷⁰
- 33 Public submissions from iwi groups on the NBE Bill indicate support for the above but call for further recognition of tikanga, mātauranga Māori, Te Tiriti o Waitangi and Te Oranga o te Taiao.¹⁷¹
- 34 Additionally we note that it is important to recognise that biophysical impacts may affect mana whenua values (e.g. impacts on taonga species). Accordingly, cultural effects, which are expressly addressed in legislation (including the RMA and NBE Bill) will also specifically be relevant to nature-related risks.

Nature-based opportunities

- 35 Of course, the emergency and intensification of nature-based transition risks will inevitably lead to nature-related opportunities in certain areas. TNFD has classified nature-related opportunities into five “business performance” opportunities, being:¹⁷²
- 35.1 Markets: Changing dynamics in overall markets, such as access to new markets or locations, which arise from other opportunity categories as a result of changing conditions, including consumer demands, consumer and investor sentiment and stakeholder dynamics.
- 35.2 Capital flow and financing: Access to capital markets, improved financing terms or financial products connected to positive nature impacts or the mitigation of negative impacts.
- 35.3 Products and service: Value proposition related to the creation or delivery of products and services that protect, manage or restore nature, including technological innovations.
- 35.4 Resource efficiency: Actions an organisation can take within its own operations or value chain in order to avoid or reduce impacts and dependencies on nature (for example, by utilizing less natural resources), whilst achieving co-benefits such as improved operational efficiency or reduced costs (for example, micro irrigation which maximises plant health, reduces water use and reduces costs).¹⁷³

¹⁶⁹ NBE Bill 2022 (186-1), cl 55 and 783. Also see Schedule 3, cl 12, and Schedule 4, cl 11.

¹⁷⁰ Ibid Schedule 6, cl 3 and 9, Schedule 13, cl 6 and 24.

¹⁷¹ See, for example, NBE Bill and Spatial Planning Bill: Iwi Leaders Group Submission to the Environment Committee of the Freshwater at [213]-[215]. The Freshwater Iwi Leaders Group is a sub-committee within the Pou Taiao of the National Iwi Chairs Forum.

¹⁷² TNFD *Nature-related Risk and Opportunity Registers* (November 2022), at 8-13, available [here](#).

¹⁷³ For example an Australian vineyard in Tasmania has reduced the area it needs to spray with pesticides by 80% due to the planting of corridors of native vegetation including acacia, banksia, grevillea and eucalyptus trees in rows along the vines. The pollen and shelter provided supports natural predators, which help control pests like moths and aphids respectively. See: Business for Nature, Capitals Coalition, CDP *Make it Mandatory: the case for mandatory corporate assessment and disclosure on nature* (2022) at 10.



- 35.5 Reputational capital: Changes in perception concerning a company's actual or perceived nature impacts, including the consequent impacts on society and engagement of stakeholders.
- 36 In addition, TNFD has defined two "sustainability performance" opportunities relating to nature:
- 36.1 Sustainable use of natural resources: Substitution of natural resources by recycled, regenerative, renewable and / or ethically responsibly sourced organic inputs.
- 36.2 Ecosystem protection, restoration and regeneration: Activities that support the protection, regeneration or restoration of habitats and ecosystems, including areas both within and outside the organisation's direct control.
- 37 Nature-related opportunities may provide multiple benefits. For example, the growing nature-related credit market has the potential to achieve ecosystem protection, restoration and regeneration while also providing the opportunity of access to a new financial product, and may also bring reputational benefits.
- 38 The global compliance and voluntary markets for nature-related credits and offsets are growing.¹⁷⁴ The Taskforce on Nature Markets, established in March 2022, has reported that nature-related credit markets are currently valued at over US\$5 billion per year, 73% of which comes from compliance-driven mitigation banks (restoration projects that issue biodiversity *offsets* approved by government agencies).¹⁷⁵ The report identifies the voluntary nature-related credit market (ie biodiversity *credits*) as an area with potential to scale due to strong demand-side factors, in particular increasing number of private sector companies are making nature-positive commitments, which may require a nature-related credit to achieve.
- 39 As previously noted, under the GBF, governments have committed to mobilising US\$200 billion by 2030 to implement national biodiversity strategies and action plans, including by "*stimulating innovative schemes such as payment for ecosystem services, green bonds, biodiversity offsets and credits, benefit-sharing mechanisms, with environmental and social safeguards*".¹⁷⁶ Australia's draft proposal for a new voluntary nature repair market to encourage investment in biodiversity, underpinned by the Nature Repair Market Draft Bill, is a prime example. Other key initiatives include the Biodiversity Credit Alliance¹⁷⁷ and World Economic Forum's Working Group on Biodiversity Credit Markets.¹⁷⁸ NatureFinance and the Taskforce on Nature Markets have recently released a consultation paper setting out proposals for biodiversity credit markets "*to produce the scaled financing and incentives needed for businesses and*

¹⁷⁴ The compliance market refers to biodiversity offsets required by governments for certain development projects, while the voluntary market refers to biodiversity credits which a company might look to purchase to meet voluntary nature-related commitments.

¹⁷⁵ Taskforce on Nature Markets *Global Nature Markets Landscaping Study* (December 2022), available [here](#).

¹⁷⁶ Kunming-Montreal Global Biodiversity Framework, CBD/COP/15/L.25, adopted 18 December 2022 at Target 19(d), available [here](#).

¹⁷⁷ The Biodiversity Credit Alliance was launched in December 2022 with the mission of bringing "clarity and guidance for the formulation of a credible and scalable biodiversity credit market under global biodiversity credit principles". See [here](#).

¹⁷⁸ Nature Finance and Taskforce on Nature Markets *The Future of Biodiversity Credit Markets, Consultation Paper* (March 2023) at 5, available [here](#).



economies to better align with the Global Biodiversity Framework and the Paris Agreement".¹⁷⁹

- 40 The growing activity in relation to voluntary nature-related credits is mirrored domestically in New Zealand. In 2022, carbon management and certification company, Ekos, completed the issuance of biodiversity units to Profile Group Limited with proceeds from the transaction to be used for conservation management at Maungatautari's (Sanctuary Mountain).¹⁸⁰ New market participants, such as Toha, are designing schemes that enable participants to trade in 'claims' to initiatives that regenerate the natural environment.¹⁸¹
- 41 These developments serve to illustrate that the natural capital crisis can create both risks and opportunities for corporates, and both have potential impacts for directors and their duties to the companies they helm.

¹⁷⁹ Nature Finance *The Future of Biodiversity Credit Markets Governing High-Performance Biodiversity Credit Markets* (March 2023), available [here](#).

¹⁸⁰ Ekos *New Biodiversity Market Launched* (press release, 20 June 2022), available [here](#).

¹⁸¹ Toha *Generate income from actions taken to regenerate Aotearoa New Zealand*, available [here](#).

