



# Hazard Warning

Tougher times ahead for directors

Company directors must tread carefully through an increasingly treacherous landscape. The minefield of regulatory compliance is growing and so too are the expectations of a raft of stakeholders. Here's what to look out for.

**E**xpect the world for directors of New Zealand companies to become a much more difficult place. There was no mistaking the message at AIG New Zealand's inaugural Corporate Governance Conference in Auckland recently as a strong line-up of legal experts pressed home the importance of good corporate governance.

The warning note chimes with findings from a 2006 Institutional Shareholder Service (ISS) Global Institutional Investor Study (see box "Asset rich and concerned") which concluded that corporate governance has shifted from a compliance obligation to a business imperative.

The ISS survey determined that investors are now seeing corporate governance in a new light, and recognised that it is not just an externally imposed obligation, but an ownership responsibility or "the right thing to do".

Here in New Zealand, our government is trying to encourage the growth and appeal of our capital markets to local

and offshore investors. Good corporate governance, such as timely and accurate disclosures to the market, goes hand in hand with this ideal. As Securities Commission member and company director David Jackson put it at the conference, "in considering market integrity and efficiency, issues of corporate governance are never far away".

As a business imperative, then, what are the current corporate governance issues for our directors and officers? Certainly the impending changes to our securities and insolvency laws, as highlighted by Adam Ross from Chapman Tripp, should be of concern. New Zealand's insider trading regime is undergoing a wholesale re-write, he notes, with securities laws being significantly amended. Liability for civil and criminal penalties is rising. The changes to insolvency laws around voluntary administration, phoenix companies and creditor priorities are also likely to produce an increase in litigation against directors and officers personally.

Keep a weather eye out, too, for more changes ahead as New Zealand and Australia plug on with trans-Tasman harmo-

nisation of business laws and standards. With the coordination and mutual recognition of laws relating to food safety, competition and banking supervision already in place, and the imminent adoption of International Financial Reporting Standards, Bell Gully's Brynn Gilbertson and Garry Downs advise directors to keep tabs on the impact that harmonisation could have, and is already having, on our laws.

Worldwide, the practice of appointing non-executive directors to boards is encouraged: as much for the fresh ideas they can bring to the business as for their independence from any particular management group. According to Sarah Kerr from Hesketh Henry, the days of the sleeping non-executive director are now well and truly over: replaced by a healthy regard for the duties of a non-executive director and their obligation to understand the business, resolve conflict, and question management and executive directors.

Warning notes are also being sounded over the additional liabilities imposed by

the courts on the role of the chairperson and those non-executive directors with specialist expertise.

Minter Ellison's Cathy Quinn alerts directors to the types of behavioural and structural practices that risk managers could, and indeed should, implement into a corporate governance framework forming part of a risk management programme. Boards, she said, must increasingly own the corporate governance framework. The success or otherwise of good governance ultimately lies with directors.

Corporate governance is not solely restricted to directing and controlling a company's activities. Quinn made the point that at the heart of governance lie behaviour and ethics which must be driven from the top down.

As part of a corporate risk management programme, factors such as security of information and property must also be considered. Alex Tan from PriceWaterhouseCoopers' investigations and forensic service team noted that the prevalence of fraud around the world is a significant issue for all businesses. The recognised effects of fraud, both tangible and intangible, on annual revenues, productivity and reputation continue to take their toll. Under-insurance – or, as is often the case, no insurance – for crime exposures will remain a potential bugbear for business.

Directors are advised to pay as much attention to the inner workings of their company's processes for handling money, protection of digital information and background checks on potential employees as they do its strategy and financial position when considering its corporate governance processes.

John Land and Ben Russell from Kensington Swan warned of instances where good corporate governance can fall away and subsequent claims be made

against directors for breaches of statutory duties of care and liquidator's actions for reckless trading. In such cases directors and officers' liability insurance could be utilised to insulate the personal assets of directors facing claims for conduct in which they had no part.

Directors of New Zealand companies face widening exposures to investors, creditors and regulators. Smart directors will manage these risks through sound corporate governance processes across all aspects of their business. Timely access to information and the ability to act speedily upon it is crucial. Directors and officers need to be aware that if they are involved in the capital markets, strict legal requirements around disclosure and trading exist. Personal liability for breach of these regulations is on the rise. Equally, directors can no longer sit back and let the business idle by, especially if they happen to be a non-executive director.

If a business is involved in the Australian market, its directors must be sure that all appropriate regulatory risks are considered and managed. After all, Australia is hardly a benign environment for claims against the managers of a business. As harmonisation of laws between our two countries continues, the trend of increasing claims against directors may well be replicated in New Zealand. The question remains to what degree.

The world for New Zealand directors and officers may indeed be becoming a more difficult place. Yet it is also true that appropriate corporate governance is not only perceived as the right thing to do, but may very well assist directors who want to protect themselves and their growing business. **M**



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## ASSET RICH & CONCERNED

Investors care about how a company is directed and controlled. That much is abundantly clear from the results of an Institutional Shareholder Service (ISS) study earlier this year which tapped into the mindsets of investment institutions from all over the globe including Australia and New Zealand.

Tot up their collective assets – both owned and managed – and we're looking at US\$10.5 trillion. That's nearly one third of the estimated total global equity assets of US\$33.1 trillion.

These people say that good governance matters. That's pretty hard to ignore.