

Do I want to be a Member of that Club?

Companies Act 1993 –
Some Relevant Sections for Company Directors

**Fiona Shand
EEO Trust
24 September 2010 - Auckland**

Management of Company

- (1) The business and affairs of a company must be managed by, or under the direction or supervision of, the board of the company.
- (2) The board of a company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
- (3) Subsections (1) and (2) of this section are subject to any modifications, exceptions, or limitations contained in this Act or in the company's constitution.

COMPANIES ACT 1993 - SECT 128

Duty of directors to act in good faith and in best interests of company

- (1) Subject to this section, a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.
- (2) A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
- (3) A director of a company that is a subsidiary (but not a wholly owned subsidiary) may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company and with the prior agreement of the shareholders (other than its holding company), act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
- (4) A director of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

COMPANIES ACT 1993 - SECT 131

Powers to be exercised for proper purpose

A director must exercise a power for a proper purpose.

COMPANIES ACT 1993 - SECT 133

Directors to comply with Act and constitution

A director of a company must not act, or agree to the company acting, in a manner that contravenes this Act or the constitution of the company.

COMPANIES ACT 1993 - SECT 134

Personal actions by shareholders against directors

- (1) A shareholder or former shareholder may bring an action against a director for breach of a duty owed to him or her as a shareholder.
- (2) An action may not be brought under subsection (1) of this section to recover any loss in the form of a reduction in the value of shares in the company or a failure of the shares to increase in value by reason only of a loss suffered, or a gain forgone, by the company.
- (3) Without limiting subsection (1) of this section, the duties of directors set out in -
 - (a) section 90 of this Act (which relates to the duty to supervise the share register); and
 - (b) section 140 of this Act (which relates to the duty to disclose interests); and
 - (c) section 148 of this Act (which relates to the duty to disclose share dealings) -

are duties owed to shareholders, [*emphasis added*] while the duties of directors set out in -

- (d) section 131 of this Act (which relates to the duty of directors to act in good faith and in the best interests of the company); and
- (e) section 133 of this Act (which relates to the duty to exercise powers for a proper purpose); and
- (f) section 135 of this Act (which relates to reckless trading); and
- (g) section 136 of this Act (which relates to the duty not to agree to a company incurring certain obligations); and
- (h) section 137 of this Act (which relates to a director's duty of care); and
- (i) section 145 of this Act (which relates to the use of company information) -

are duties owed to the company [*emphasis added*] and not to shareholders.

COMPANIES ACT 1993 - SECT 169

Reckless trading

A director of a company must not -

- (a) agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or
- (b) cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.

COMPANIES ACT 1993 - SECT 135

Duty in relation to obligations

A director of a company must not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

COMPANIES ACT 1993 - SECT 136

Director's duty of care

A director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation, -

- (a) the nature of the company; and
- (b) the nature of the decision; and
- (c) the position of the director and the nature of the responsibilities undertaken by him or her.

COMPANIES ACT 1993 - SECT 137

Use of information and advice

- (1) Subject to subsection (2) of this section, a director of a company, when exercising powers or performing duties as a director, may rely on reports, statements, and financial data and other information prepared or supplied, and on professional or expert advice given, by any of the following persons:
 - (a) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
 - (b) a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence;
 - (c) any other director or committee of directors upon which the director did not serve in relation to matters within the director's or committee's designated authority.
- (2) Subsection (1) of this section applies to a director only if the director -
 - (a) acts in good faith; and
 - (b) makes proper inquiry where the need for inquiry is indicated by the circumstances; and
 - (c) has no knowledge that such reliance is unwarranted.

COMPANIES ACT 1993 - SECT 138

Delegation of powers

- (1) Subject to any restrictions in the constitution of the company, the board of a company may delegate to a committee of directors, a director or employee of the company, or any other person, any 1 or more of its powers other than its powers under any of the sections of this Act set out in Schedule 2 to this Act.
- (2) A board that delegates a power under subsection (1) of this section is responsible for the exercise of the power by the delegate as if the power had been exercised by the board, unless the board -
 - (a) believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and
 - (b) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

COMPANIES ACT 1993 - SECT 130

False statements

...

- (2) Every director or employee of a company who makes or furnishes, or authorises or permits the making or furnishing of, a statement or report that relates to the affairs of the company and that is false or misleading in a material particular, to -
- (a) a director, employee, auditor, shareholder, debenture holder, or trustee for debenture holders of the company; or
 - (b) a liquidator, liquidation committee, or receiver or manager of property of the company; or
 - (c) if the company is a subsidiary, a director, employee, or auditor of its holding company; or
 - (d) a stock exchange or an officer of a stock exchange, -
- knowing it to be false or misleading, commits an offence, and is liable on conviction to the penalties set out in section 373(4) of this Act.
- (3) For the purposes of this section, a person who voted in favour of the making of a statement at a meeting is deemed to have authorised the making of the statement.

COMPANIES ACT 1993 - SECT 377

Penalty for failure to comply with Act

...

- (4) A person convicted of an offence against any of the following sections of this Act is liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$200,000:
- (a) section 304(6) (which relates to false claims by unsecured creditors in liquidations):
 - (b) section 305(11) (which relates to false claims by secured creditors in liquidations):
 - (c) section 377 (which relates to false statements):
 - (d) section 378 (which relates to the fraudulent use or destruction of property):
 - (e) section 379 (which relates to falsifying records):
 - (f) section 380 (which relates to carrying on business fraudulently):
 - (g) section 382(4) (which relates to persons prohibited from managing companies):
 - (h) section 383(5) (which relates to acting as a director of a company while prohibited by the Court):

- (i) section 385(9) (which relates to acting as a director of a company or taking part in the management of a company while prohibited by the Registrar).
- (j) section 386A(2) (which relates to acting as a director of a phoenix company).

COMPANIES ACT 1993 - SECT 373

Defences

- (1) It is a defence to a director charged with an offence in relation ***to a duty imposed on the board of a company*** [emphasis added] if the director proves that -
 - (a) the board took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or
 - (b) he or she took all reasonable and proper steps to ensure that the board complied with the requirements of this Act; or
 - (c) in the circumstances he or she could not reasonably have been expected to take steps to ensure that the board complied with the requirements of this Act.
- (2) It is a defence to a director charged with an offence in relation ***to a duty imposed on the company*** [emphasis added] if the director proves that -
 - (a) the company took all reasonable and proper steps to ensure that the requirements of this Act would be complied with; or
 - (b) he or she took all reasonable steps to ensure that the company complied with the requirements of this Act; or
 - (c) in the circumstances he or she could not reasonably have been expected to take steps to ensure that the company complied with the requirements of this Act.

COMPANIES ACT 1993 - SECT 376

Disclosure of interest

- (1) A director of a company must, forthwith after becoming aware of the fact that he or she is interested in a transaction or proposed transaction with the company, cause to be entered in the interests register, and, if the company has more than one director, disclose to the board of the company -
 - (a) if the monetary value of the director's interest is able to be quantified, the nature and monetary value of that interest; or
 - (b) if the monetary value of the director's interest cannot be quantified, the nature and extent of that interest.

- (1A) A director of a company is not required to comply with subsection (1) if -
- (a) the transaction or proposed transaction is between the director and the company; and
 - (b) the transaction or proposed transaction is or is to be entered into in the ordinary course of the company's business and on usual terms and conditions.
- (2) For the purposes of subsection (1) of this section, a general notice entered in the interests register and, if the company has more than 1 director, disclosed to the board to the effect that a director is a shareholder, director, officer or trustee of another named company or other person and is to be regarded as interested in any transaction which may, after the date of the entry or disclosure, be entered into with that company or person, is a sufficient disclosure of interest in relation to that transaction.
- (3) A failure by a director to comply with subsection (1) of this section does not affect the validity of a transaction entered into by the company or the director.
- (4) Every director who fails to comply with subsection (1) of this section commits an offence and is liable on conviction to the penalty set out in section 373(2) of this Act.

COMPANIES ACT 1993 - SECT 140

Use of company information

- (1) A director of a company who has information in his or her capacity as a director or employee of the company, being information that would not otherwise be available to him or her, must not disclose that information to any person, or make use of or act on the information, except –
- (a) for the purposes of the company; or
 - (b) as required by law; or
 - (c) in accordance with subsection (2) or subsection (3) of this section; or
 - (d) in complying with section 140 of this Act.
- (2) A director of a company may, unless prohibited by the board, disclose information to -
- (a) a person whose interests the director represents; or
 - (b) a person in accordance with whose directions or instructions the director may be required or is accustomed to act in relation to the director's powers and duties and, if the director discloses the information, the name of the person to whom it is disclosed must be entered in the interests register.

- (3) A director of a company may disclose, make use of, or act on the information if -
- (a) particulars of the disclosure, use, or the act in question are entered in the interests register; and
 - (b) the director is first authorised to do so by the board; and
 - (c) the disclosure, use, or act in question will not, or will not be likely to, prejudice the company.

COMPANIES ACT 1993 - SECT 145

Company to satisfy solvency test

- (1) A power referred to in subsection (1) of section 107 of this Act must not be exercised unless the board of the company is satisfied on reasonable grounds that the company will, immediately after the exercise of the power, satisfy the solvency test.
- (2) The directors who vote in favour of the exercise of the power must sign a certificate stating that, in their opinion, the company will, after the exercise of the power, satisfy the solvency test.
- (3) If, after a resolution is passed under subsection (1) of this section and before the power is exercised, the board ceases to be satisfied on reasonable grounds that the company will, immediately after the power is exercised, satisfy the solvency test, any exercise of the power is deemed not to have been authorised.
- (4) The provisions of section 56 of this Act apply in relation to the exercise of a power referred to in subsection (1) of section 107 of this Act, with such modifications as may be necessary.
- (5) In applying the solvency test for the purposes of section 107(1)(e) of this Act, -
- (a) **assets** excludes all amounts of financial assistance given by the company at any time under section 76 or section 107(1)(e) in the form of loans; and
 - (b) **liabilities** includes the face value of all outstanding liabilities, whether contingent or otherwise, incurred by the company at any time in connection with the giving of financial assistance under section 76 or section 107(1)(e).
- (5A) Nothing in subsection (5) limits or affects the application of section 4(4).
- (6) Every director who fails to comply with subsection (2) of this section commits an offence and is liable on conviction to the penalty set out in section 373(1) of this Act.

COMPANIES ACT 1993 - SECT 108

Indemnity and insurance

- (1) Except as provided in this section, a company must not indemnify, or directly or indirectly effect insurance for, a director or employee of the company or a related company in respect of -
 - (a) liability for any act or omission in his or her capacity as a director or employee; or
 - (b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability.
- (2) An indemnity given in breach of this section is void.
- (3) A company may, if expressly authorised by its constitution, indemnify a director or employee of the company or a related company for any costs incurred by him or her in any proceeding -
 - (a) that relates to liability for any act or omission in his or her capacity as a director or employee; and
 - (b) in which judgment is given in his or her favour, or in which he or she is acquitted, or which is discontinued.
- (4) A company may, if expressly authorised by its constitution, indemnify a director or employee of the company or a related company in respect of -
 - (a) liability to any person other than the company or a related company for any act or omission in his or her capacity as a director or employee; or
 - (b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability, -

not being criminal liability or liability in respect of a breach, in the case of a director, of the duty specified in section 131 of this Act or, in the case of an employee, of any fiduciary duty owed to the company or related company.
- (5) A company may, if expressly authorised by its constitution and with the prior approval of the board, effect insurance for a director or employee of the company or a related company in respect of -
 - (a) liability, not being criminal liability, for any act or omission in his or her capacity as a director or employee; or
 - (b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability; or
 - (c) costs incurred by that director or employee in defending any criminal proceedings -
 - (i) that have been brought against the director or employee in relation to any act or omission in his or her capacity as a director or employee; and

(ii) in which he or she is acquitted.

- (6) The directors who vote in favour of authorising the effecting of insurance under subsection (5) of this section must sign a certificate stating that, in their opinion, the cost of effecting the insurance is fair to the company.
- (7) The board of a company must ensure that particulars of any indemnity given to, or insurance effected for, any director or employee of the company or a related company are forthwith entered in the interests register.
- (8) Where insurance is effected for a director or employee of a company or a related company and -
- (a) the provisions of either subsection (5) or subsection (6) of this section have not been complied with; or
 - (b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (6) of this section, -

the director or employee is personally liable to the company for the cost of effecting the insurance except to the extent that he or she proves that it was fair to the company at the time the insurance was effected.

- (9) In this section, -

director includes a former director

effect insurance includes pay, whether directly or indirectly, the costs of the insurance

employee includes a former employee

indemnify includes relieve or excuse from liability, whether before or after the liability arises; and **indemnity** has a corresponding meaning.

COMPANIES ACT 1993 - SECT 162

Inspection of records by directors

- (1) Subject to subsection (2) of this section, every director of a company is entitled, on giving reasonable notice, to inspect the records of the company –
 - (a) in written form; and
 - (b) without charge; and
 - (c) at a reasonable time specified by the director.

- (2) The Court may, on application by the company, if it is satisfied that -
 - (a) it would not be in the company's interests for a director to inspect the records; or
 - (b) the proposed inspection is for a purpose that is not properly connected with the director's duties, -

direct that the records need not be made available for inspection or limit the inspection of them in any manner it thinks fit.

COMPANIES ACT 1993 - SECT 191