



April

First Defended Market Manipulation Case under FMCA

Financial Markets Authority v Zhong saw the first decision under the Financial Markets Conduct Act section 265 market manipulation provisions resulting from defended proceedings. The Court held that attempting to influence a company's share price by making trades on other people's securities accounts whilst impersonating them amounted to market manipulation.

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July

First New Zealand Case on FMCA Stop Orders

Validus FZCO v Financial Markets Authority is the first appeal of an FMCA stop order that has required a decision of the courts. The Court held that past contravention, likely future contravention, or "imminent danger of substantial damage" could be reasons – amongst others – for making a stop order. Interestingly, the stop order jurisdiction extends to capture financial products not yet in existence.

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August

Update to section 131 of the Companies Act

In the major non-event of the year, section 131 (duty to act in best interests) of the Companies Act 1993 was updated to specifically allow directors to consider factors other than maximising profit (including environmental, social, and governance factors) when acting in the best interests of the company. Despite the fanfare, the amendment does not appear to impose any additional obligations on company directors and is likely to have more of a "signalling" rather than substantive effect. It was observed in Parliament that because "the bill does not permit or prohibit any activity, it would not have any legal effect. The lack of legal effect brings into question whether this legislation is necessary." See our update and analysis of a recent decision under the equivalent, but more stringent, UK legislation [here](#).



August

Supreme Court issues *Yan v Mainzeal Property and Construction Limited (in liquidation)* Decision

The Supreme Court released its much-awaited *Mainzeal* decision, holding that Mainzeal's directors breached sections 135 (reckless trading) and 136 (duty in relation to obligations) of the Companies Act 1993. The Court held that section 135 turns not just on an objective assessment of the likelihood of substantial risk of serious loss to creditors but also on whether the directors applied reasonable care, skill and diligence in deciding whether to continue trading. The Supreme Court upheld the "new debt" measure of loss adopted by the Court of Appeal for section 136 breaches – reflecting the "obligation-by-obligation" and "creditor-by-creditor" focus of the provision. Importantly, the Court also held that section 136 can apply to a period of trading, rather than just incurring discrete obligations.

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October

New Incorporated Societies Act and Regulations

The Incorporated Societies Act 2022 introduces a range of changes for incorporated societies, including the requirement to have a committee as a governing body and maintain an interests register. The Act introduced six officers' duties modelled on directors' duties in the Companies Act 1993, as well as six offences targeting egregious conduct, including falsification of documents and making false statements. Incorporated societies are required to re-register under the Act before 5 April 2026.

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November

Updated Takeovers Panel Guidance

Updated guidance for schemes of arrangement focussed on approving schemes with differential consideration. The Panel noted that important factors include whether all interest classes are adequately protected and whether all members of a particular interest class receive the same consideration. The Panel also provided an update on 'last and final statements' made by parties during a takeover offer, which can be misleading or deceptive if inconsistent with subsequent actions. Announcing parties should clearly and unequivocally qualify any 'last and final statements' to avoid liability.

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Throughout the year...

Updated NZX Rules and Guidance

Throughout the second half of 2023, NZX undertook consultation on a range of initiatives ([here](#)). One significant proposal is to attach trading halt applications to trading halt announcements, rather than the current practice of NZRegCo releasing its own. NZX also confirmed the amendments to the capital raising rules, which will now include permitted ANREOs, will become effective on 15 January 2024. Alongside this confirmation, NZX released its awaited Capital Raising Guidance Note, which outlines the options for issuers to raise capital, as well as the relevant rules, advantages and disadvantages for each approach ([here](#)).

Emerging Trends in D&O Cover

The level of director liability in *Mainzeal* has prompted many boards to review their D&O insurance. Key D&O risks in 2023 included cyber and data loss, health and safety risks (particularly in the light of the Whakaari/White Island director prosecutions), and the increased risk of class actions. Boards should consider whether they hold an appropriate level of D&O cover and discuss with their insurance brokers where appropriate.

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Continuing into the new year...

Major Changes to the ESG Landscape

The External Reporting Board (XRB) and FMA both released guidance this year to help organisations prepare for the first round of reporting under the climate-related disclosures regime (see our update [here](#)). Meanwhile, climate and biodiversity litigation in both New Zealand and overseas continues to explore the boundaries of corporations' duties and responsibilities, with New Zealand awaiting the potentially significant Supreme Court decision in *Smith v Fonterra*. Given National's indication of support for the introduction of modern slavery legislation during the previous Labour-led Government, we will likely see this progressed by the current Government in 2024, though its prioritisation is yet to be confirmed. Competition law will also remain a key challenge for entities looking to collaborate with competitors to achieve sustainability objectives. Read our 2023 ESG round-up [here](#).

Any questions? Contact Kyle and he will put you in touch with our relevant experts



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