



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HIKINA WHAKATUTUKI

DIRECTOR PROHIBITIONS

Esther Kim and Jade Young
Senior Integrity Officers
Integrity and Enforcement Team



Outline

- Integrity & Enforcement Team
- Director Prohibitions
- How you can help
- Statistics

Integrity and Enforcement Team (IET)

- Part of the Criminal Proceeds, Integrity and Enforcement Team
- Protects and ensures the integrity of registers
- Enforcement arm of the Companies Office (prosecutions and prohibitions)
- Encourages compliance
- Prosecutes offending
- Comprised of Insolvency Act and Companies Act investigators, prohibitions team, and the integrity team

Director Prohibitions

- Section 151 Automatic on prohibition under other legislation or jurisdiction
- **Section 382(1)** **Automatic on conviction**
- Section 383 Court on conviction or on evidence of other grounds
- **Section 385** **Registrar of Companies or FMA for mismanagement**
- Section 385AA Registrar of Companies for non-compliance and persistent breach

Section 385

- Prohibition by Registrar of Companies or FMA where:
 - a) Director or manager of a company that has failed due to insolvency in the previous five years; and
 - b) Management (or mismanagement) of the company contributed to its insolvency.
- Registrar may prohibit for up to 10 years
- Administrative process
- Protection of the public
- Setting of standards and deterrence



Section 385

- Where one company failure, Registrar must be satisfied that mismanagement occurred
- Where multiple company failures, onus is on candidate to satisfy the Registrar that no more than one of the companies was mismanaged
- Subject to requirements of natural justice



Davidson v Registrar of Companies [2011] 1 NZLR 542

"[97]...The Registrar's inquiry is addressed initially to mismanagement of the company's affairs and its causal connection to insolvency, not the behaviour of individual directors. Such mismanagement having been identified, all of the company's directors and managers are eligible for prohibition. The power to prohibit them is broad and discretionary in nature. When exercising it the Registrar is not confined to conduct that caused the company's insolvency; all of the individual director's attributes and conduct in office may be taken into account.

[98] In particular, s 385 does not specify that the individual director or manager whose prohibition is in issue must be responsible for the mismanagement..."



Indications of Mismanagement

- Multiple company failures
- Insolvent trading
- Significant level of debt
- Misapplication of retentions e.g. high preferential PAYE debt
- Historic/aged debts
- Excessive remuneration or drawings by director e.g. overdrawn current account
- Related party transactions for no commercial reason
- Transfer of assets from company for little/no consideration
- Poor record keeping particularly of accounting/financial records

Section 385 process

1. Candidate identified
2. Enquiries made
3. Information reviewed
4. First notice
5. Submissions
6. Deputy Registrar's determination



How can you help?

- Referral of candidates
- Provision of comprehensive information
- Timeliness



Practical assistance

- Section 385 questionnaire
- Financial statements
- Proofs of debt
- Correspondence
- Current account reconciliation

Statistics

- 45 people prohibited under **section 385** in the 2017/2018 financial year (record number of people)
 - ✓ Up to 4 years: 9 prohibited individuals
 - ✓ Between 4 and up to 7 years: 27 prohibited individuals
 - ✓ Between 7 and up to 10 years: 9 prohibited individuals
- Deputy Registrar declined to order prohibition for 1 individual in 2018
- Approximately 160 open section **385 cases**
- 140 people prohibited under **section 382** in the 2017/2018 financial year to date

Notable **Section 385** Prohibitions in 2017/2018

- **May 2017** – prohibition order of 8 years & 6 months given to Kendall Twigden for her failures across 3 companies
- **August 2017** – prohibition order of 8 years given to Ashton Williams for a single company failure
- **October 2017** – prohibition order of 8 years given to John Freeman for his failures across 6 companies
- **April 2018** – prohibition order of 7 years and 6 months given to Stacey Robert Norman Reid for a single company failure

Contact Details

Integrity and Enforcement Team

PO Box 5004
Wellesley Street
Auckland 1141
New Zealand

0508 446 834
(0508 4 INTEGRITY)

prohibitions@mbie.govt.nz

complaints@companies.govt.nz

<https://www.companiesoffice.govt.nz/companies/about-us/enforcement/complaint-form>

