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Litigation Forecast 2025

Shaping New Zealand's future

MinterEllisonRuddWatts.

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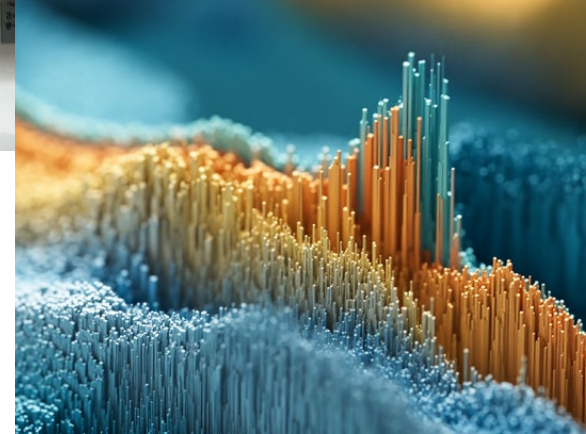


Introduction

Each year introduces new challenges and opportunities to navigate. New Zealand's dynamic litigation landscape is no exception. Litigation reflects the prominent issues affecting New Zealanders today and moving forward – emphasising what we care about the most.

Our 2025 Litigation Forecast provides an update on key issues of the day. We discuss climate change litigation in New Zealand and delve into the continuing challenges of greenwashing while examining the emerging risks associated with "AI washing". We discuss the ongoing impact of the Russia Sanctions Act 2022 on New Zealand businesses, highlighting the challenges of sanctions compliance and the growing issue of de-banking, which may lead to significant regulatory changes. Additionally, we reflect on the courts' steady application and recognition of tikanga over the last year.

We explore the current state and future development of constraints on the exercise of contractual powers in New Zealand, highlighting recent court cases and the often-overlooked fact that only discretionary powers can be restrained through the 'default rule' or the 'Braganza approach'.

With litigation funding markets in the UK and Australia having undergone significant changes, and we analyse the implications for New Zealand businesses and the potential regulatory shifts that could impact class action litigation funding. As the Financial Markets Authority re-evaluates its role, we examine the upcoming regulatory landscape. We also address the heightened emphasis on anti-bribery and corruption compliance, particularly due to Australia's recent legal reforms, and provide recommendations for New Zealand businesses to strengthen their policies to reduce regulatory risks.

We look at the newly enacted Contracts of Insurance Act, which modernises New Zealand's insurance legislation, requiring significant changes in processes and training for insurers and intermediaries, and introduces new consumer protections and disclosure obligations.

We highlight updates to New Zealand's employment law, targeting productivity boosts, simplified hiring and firing, and reduced compliance costs, while considering the impact on employee rights and how courts will interpret these changes. From a health and safety litigation perspective, we delve into officer liability following the Ports of Auckland and Worksafe's new prosecution strategy.

Finally, we look at the growing number of IT disputes and claims as they continue to increase in size and complexity.

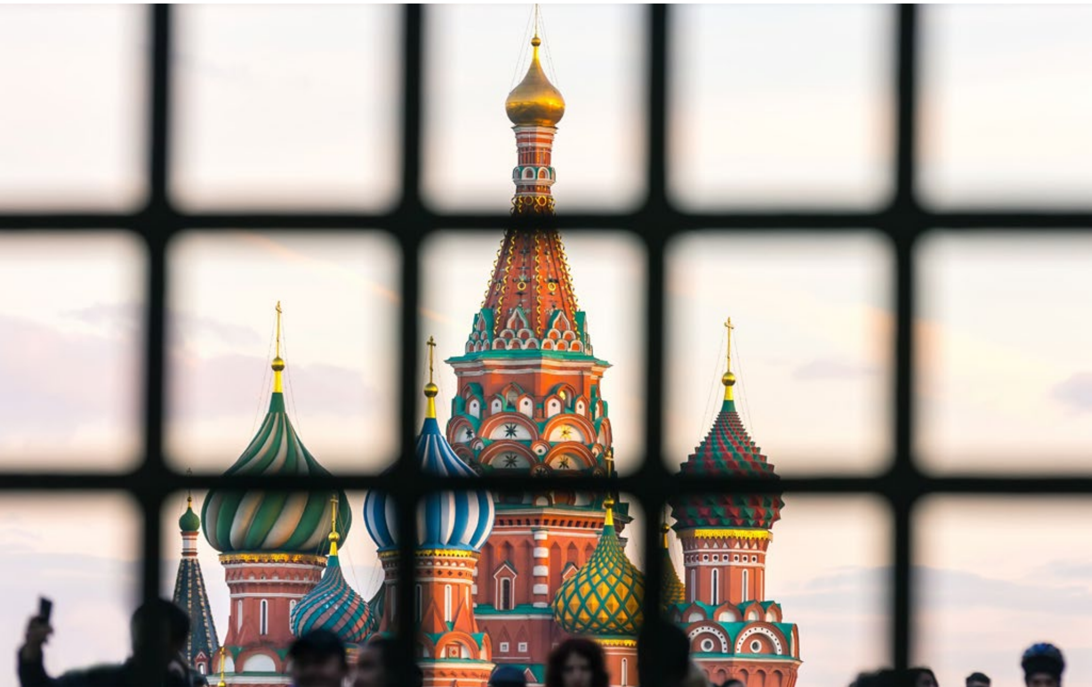
Our Tier 1 Litigation and Dispute Resolution team has long-standing experience in dealing with New Zealand's most important litigation and was in the thick of last year's largest and most complex cases.

With a turbulent year predicted by many economic commentators, we are looking forward to supporting clients through 2025 and beyond.

Regulatory

Sanctions and de-banking

It has been almost three years since the Russia Sanctions Act 2022 came into force following Russia's invasion of Ukraine in February 2022. The continued focus on economic and other sanctions, both globally and in New Zealand, shows no sign of diminishing in the current geopolitical climate. Over this period, businesses have demonstrated their ability to adapt processes and policies to ensure they are fit for purpose in a country with a heavy reliance on international trade.



We expect that sanctions compliance will remain front of mind in the year ahead, especially for banks and financial institutions contemplating further regulatory scrutiny with the spectre of de-banking looming large following recent decisions here and abroad.

Statutory review of the Russia Sanctions Act 2022 and managing compliance

The Ministry of Foreign Affairs and Trade (MFAT) has commenced a mandatory statutory review to assess the Act's effectiveness and functionality. MFAT's consultation document invited submissions during December 2024 to determine what is (and is not) working with the Act. This review provides a valuable opportunity for interested parties to shape the further development of the sanctions regime and, indirectly, guide the Government's broader consideration of expanding New Zealand's autonomous sanctions framework. Officials are due to prepare a report presenting findings and recommendations for consideration by Parliament in early 2025.

In the meantime, the business community is having to navigate a complex web of restrictions, to minimise disruptions to supply chains, increased costs, and missed opportunities.

- **Increased compliance costs:** Due diligence and monitoring efforts are crucial to ensuring that sanctions regimes are not inadvertently infringed. This can involve substantial expenditure in staff and technology capabilities which might be disproportionate to the scale of particular undertakings.
- **Disruptions to supply chains:** New Zealand's economic reliance on importing and exporting goods and services means that disruption and delays can increase costs as companies seek alternative suppliers or markets.
- **Missed business opportunities:** As well as the obvious detriment of an existing trading relationship being frozen or forbidden, it is often the case that present and growth opportunities cannot be capitalised on because other market participants are able to move more swiftly without the same compliance obligations constraining them.

The significant ramifications of infringement, both financial and criminal, has a dampening effect on risk appetite for particular transactions and financing arrangements depending on the legislative and regulatory frameworks at play in the circumstances. Banks and other financial institutions play a critical role in facilitating international trade. However, as a result of sanctions regimes, local and foreign banks may block (or significantly delay) transactions which pose a risk from a sanctions perspective.

De-banking and the potential for legislative intervention

Another significant impact of sanctions is the de-banking of high-risk customers (the practice where a bank or financial institution ends its relationship with a customer). We have previously commented on the interaction between sanctions and de-banking in the context of our involvement in *Targa Capital Limited v Westpac New Zealand Limited* [2023] NZHC 230 where MinterEllisonRuddWatts acted in successfully defending an injunction application to force a bank to continue providing services in circumstances where it was not satisfied that a customer was not ultimately controlled by a sanctioned individual. Whether or not it is sanctions related, it is clear that de-banking is a very hot topic in New Zealand.

The decision in December in Bank of *New Zealand v The Christian Church Community Trust & Ors* [2024] NZCA 645 has increased the focus on de-banking, the role of banks in society and whether given the 'essentiality' of electronic transactions in an increasingly cashless modern society renders the provision of a bank account a fundamental service which should be made mandatory. In that case, the Court of Appeal expressly considered whether there was a serious question to be tried as to whether the bank was subject to a public interest obligation as an essential service to provide a minimal or transactional banking facility to customers without alternative banking options. The firm view was that, in contrast to some jurisdictions (e.g. where the provision of basic transactional accounts for natural persons is imposed by statute), there is no legislative requirement in New Zealand and the common law does not impose one.

One potentially interesting aspect that does not appear to have been considered in the proceeding was the relevance of the bank's position as the holder of a 'state-privilege', namely a banking license, and whether that should inform its ability to refuse to provide services to the public. Instead, the judgment's focus on the clear wording of the contract between bank and customer and the bank's discretion to end the relationship "for any reason" has been the subject of significant comment from industry and the legal profession. There is apparent concern regarding the potential for 'moral' decisions to be made about whether to provide or continue providing services to commercial counterparties.

Given Andrew Bayly's (Minister of Commerce and Consumer Affairs) stated willingness to implement regulatory change swiftly where required, it will be interesting to see whether significant reform in this space is on the agenda in the near future.

Where to next?

Sanctions have a profound impact on New Zealand organisations given the reliance on international trade and the imperative for the country to remain at the front of the pack in terms of the ease and security of doing business on a global scale. Businesses need to ensure they manage compliance effectively and stay on top of developments in a fast-moving area of the law. This is only likely to increase if MFAT's consultation process leads to expansion of New Zealand's autonomous sanctions regime.

Vigilance and adaptability will be key characteristics to successfully navigating the 'winds of change' given the potential exposure to geopolitical events.

Constraints on the exercise of contractual powers

Constraints on contractual powers have long been a topic of debate that has received surprisingly little academic attention in New Zealand. However, this area has recently garnered increased attention due to several recent cases in New Zealand's courts. We discuss the current state of constraints on the exercise of contractual powers in New Zealand and consider how this area may develop in the future. We also emphasise what is commonly overlooked, or even forgotten: that the only contractual powers capable of restraint through the 'default rule' or the '*Braganza* approach' are terms granting discretionary powers.

Absolute contractual rights vs contractual discretions

What we have seen applied overseas in this area is the 'default rule' for constraints on discretionary contractual powers, which was first developed in the UK in *Abu Dhabi National Tanker Co. v Product Star Shipping Ltd (No 2) (the "Product Star")*[1]. At its simplest, the default rule implies a term into all contracts conferring a discretionary power on one party, that the discretionary power must not be exercised arbitrarily, capriciously, or unreasonably. This approach draws from the second limb of the *Wednesbury* test, which determines reasonableness of the outcome reached in the public law judicial review context.[2] While decisions must not be arbitrary, capricious or unreasonable, parties are not compelled to prioritise the other party's interests at the expense of their own.

Importantly, the default rule is limited to contractual powers that are discretionary and not those conferring absolute contractual powers, although the difference between them is not always easy to determine. The UK case of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*[3] considered this distinction, making several comments to

1 [1993] 1 Lloyd's Rep 397 (CA).

2 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

3 [2013] EWCA CIV 200.

help distinguish the two. In particular, *Mid Essex* held that a discretionary power is not a simple decision whether or not to exercise an absolute contractual right. Instead, a discretionary power involves making an assessment, or choosing from a range of options, and taking into account the interests of both parties. Simply put, not whether to exercise a discretion but how to exercise it. The Court also clarified that where the contract itself expressly provides a contractual mechanism that guides the use of the discretionary power, especially one that is an objective test, there is no basis to imply a different one. While this distinction is difficult, it is important to discern which contractual powers should be qualified by a reasonableness standard and which are absolute contractual powers that should not be so restricted.

For discretionary powers, the default rule was significantly widened by the United Kingdom Supreme Court in *Braganza v BP Shipping Limited*.[4] Often referred to as the 'expanded default rule' or the '*Braganza* approach', this approach opens the Court's review to both limbs of the *Wednesbury* test – requiring the party exercising its contractual power to take into account all relevant matters and disregard irrelevant matters. In essence, this requires the court to review both the substantive decision reached by the party exercising the discretion and the process it undertook to reach that decision.

Importantly, as with the default rule, *Braganza* relates only to contractual discretions and not absolute contractual powers. It also tends to be most relevant in cases where there may be a conflict of interest or an imbalance of power, such as in the employment context (as was the case with *Braganza*). Currently, it remains to be seen whether *Braganza* may be implied into commercial contracts, however, it is likely any adoption of this rule in a commercial context will be the subject of criticism. Given *Wednesbury* concerned the constraint of powers conferred for the public good, extending this approach to a commercial contract (which confers a self-interested power that conflicts with that of the counterparty) may be an overreach. It is also readily apparent that commercial contracts lack that special type of relationship that *Braganza* did adding to the view that it may be inappropriate in this setting.

Overview of New Zealand's Law

In cases of contractual discretion, the New Zealand courts have affirmed the approach of *Mid Essex*, determining that absolute powers are not reviewable in the same way as discretionary powers. The Supreme Court in *Bathurst Resources Ltd v L&M Coal Holdings Limited*[5] clarified that where a party has a choice to use a contractual power, this does not make that power discretionary. Notably, the Supreme Court held that "*it is true that Bathurst could choose not to take the benefit of cl 3.10, that could be said about most contractual rights. That choice does not convert the contractual right into a contractual discretion.*"[6]

In cases of discretionary contractual powers, there has been very little consideration of the UK cases and their application in New Zealand. In 2023, in *Woolley v Fonterra Co-operative Group Limited*, New Zealand's Court of Appeal considered the expansion of the 'default rule' by *Braganza* and its application in New Zealand for the first time.[7]

4 [2015] UKSC 17, [2015] 1 WLR 1661.
5 [2021] NZSC 85.
6 at 279.
7 [2023] NZCA 266.

In *Woolley*, the contractual discretion under scrutiny was Fonterra's decision to suspend the collection of milk under a milk supply agreement with a dairy farmer, Mr Woolley. The milk supply agreement gave Fonterra the ability to suspend milk collection in certain circumstances, including in response to environmental sustainability issues. Fonterra suspended the agreement in response to an Environment Court decision that prevented milking until Mr Woolley could show his effluent disposal system met his resource consent.

Fonterra's ability to suspend milk collection was characterised by the Court of Appeal as a contractual discretion rather than an absolute contractual right. This characterisation enabled the implication of a term pursuant to the default rule or the more expansive *Braganza* rule (if the Court chose to do so) and distinguished the facts of the case from those in *Bathurst*.

In *Woolley* the Court of Appeal assumed that the default rule applies in New Zealand, without expressly deciding so. In respect of the expanded default rule, the Court considered that the appeal was not the appropriate forum to endorse or reject the *Braganza* approach. In particular, the Court noted that the case concerned an ordinary commercial contact rather than that special, relational contract like the employment contract considered in *Braganza*. It recognised that an endorsement of the expanded default rule would be "*a significant development in contract law*", and, for now, noted that a view on *Braganza* must await another day.

The *Woolley* decision therefore left New Zealand's law in a state of uncertainty – that the default rule likely applies, and the expanded default rule could apply. It is, therefore, unsurprising that plaintiffs in subsequent cases have attempted to rely on causes of action that require the use of a contractual discretion to be reasonable.

One such example of this is the recent Court of Appeal decision in *Bank of New Zealand v Christian Church Community Trust* [2024] NZCA 645, where the Christian Church Community Trust (Gloriavale) submitted that it is arguable that the default rule applies in New Zealand, with the result that BNZ must exercise its power of termination honestly and in good faith, and must not exercise the power arbitrarily, capriciously or unreasonably. Gloriavale also said it was arguable that the *Braganza* approach applied, with the result that BNZ is required to consider all relevant matters, and not consider irrelevant matters before exercising its power to terminate Gloriavale's accounts.

Like *Woolley*, the Court of Appeal in *Gloriavale* declined to determine whether the default rule or the *Braganza* approach apply in New Zealand as it considered an interlocutory appeal not to be the appropriate forum. It also considered that the terms of the contract were so clear and express so as to override the implication of the default rule / *Braganza* in any event.

Key takeaways

Following *Woolley* and *Gloriavale*, it is clear that parties will continue to test the law in this area. We expect this may be particularly so where a party regrets entering a contract or where a contractual power has been exercised to their detriment.

What parties should keep in mind, however, is the distinction between an absolute contractual right and a discretionary right. The dividing line between the two is often difficult to draw and is therefore ripe for argument. Disputes may be won or lost depending on the court's characterisation of a contractual power and, as demonstrated in Bathurst, the court will not imply a standard of reasonableness into an absolute contractual power. This distinction should be front of mind for drafters, parties and litigators involved in contracts governed by New Zealand law.

Parties should keep in mind that the default rule may be displaced by express terms to the contrary or by a contractual mechanism that guides the use of a party's discretionary power. There may, however, need to be some care taken when drafting to ensure that contractual discretion retains the flexibility it requires while also trying to avoid the default rule. In the future, we expect to see litigation where express contrary terms and their relationship with the default rule (or even *Braganza*) are tested.

Despite there being no clear endorsement of the default rule in New Zealand, parties to an ordinary commercial contract should keep in mind that their conduct may be subject to a reasonableness standard when exercising a discretion conferred upon them. As it is likely that the default rule applies in New Zealand, parties should be discouraged from exercising their discretion arbitrarily, capriciously or unreasonably. Given New Zealand's courts reluctance to imply the *Braganza* rule into commercial contracts, however, commercial parties in New Zealand should feel comfortable continuing to give considerable weight to their own interests.

Ultimately, the current climate in New Zealand is welcome news for those seeking to rely on black and white contractual clauses. For discretionary powers, we look forward to seeing the courts continue to balance the risk of abuse of contractual power with the freedom of contract.

Changing face of regulatory engagement

Fair play and sandboxes – the FMA's focus for 2025

Over the past year, the Financial Markets Authority (FMA) has been doing some soul searching about its role, with the themes of fairness and innovation at the top of its agenda.

In 2024, it opined and consulted on what constitutes fairness to consumers, giving rise to some fairly prescriptive statements about what that fairness entails. The FMA has also expressed a keenness to allow freedom for innovation, piloting a regulatory 'sandbox' to allow firms to test innovative products, services or business models, albeit with a surprisingly short time frame.

In 2025, we also expect to see continued growth in influence of the FMA's new Perimeter and Response team, which is triaging matters regarded as being at the FMA's regulatory perimeter and deciding which matters ought to be referred to the enforcement team, as well as investigating 'perimeter' matters itself. The focus in the past year on the perimeter has had a significant impact, with a number of new investigations launched in addition to fair conduct proceedings, with some resulting in hefty penalties.

We are also seeing an increasingly litigious regulatory approach from the FMA, as it demonstrates a new willingness to "take the bull by the horns" and seek guidance from the courts in a number of areas on the legislation it administers. Most recently, we have seen the FMA bring a case stated proceeding seeking a determination from the High Court as to who may qualify as an "eligible investor" under clause 41 of schedule 1 of the Financial Markets Conduct Act 2013 (FMCA) and, as such, a "wholesale investor" to whom disclosure under Part 3 is not required.

Regulators will, however, need to take care not to overreach their powers, following the Court of Appeal's decision in *R v Pikia* which found that the Serious Fraud Office (SFO) had conducted searches and issued statutory notices unlawfully. Recipients of notices demanding the production of documents should take advice on the legality of those notices.

All of this activity has been taking place against a backdrop of Andrew Bayly's priorities, as Minister for Commerce and Consumer Affairs, for the financial sector for 2024/2025, one of which is to "*simplify complex financial policy and regulatory settings to remove unnecessary barriers and transactional costs, promote growth objectives and encourage competition*". [1] With the Conduct of Financial Institutions legislation or "CoFI" also coming into force in March, 2025 is set to be another year of change and debate. We discuss these issues in more detail below, as well as the increasing scope of the FMA's mandate.

Fair conduct outcomes and what this means for litigation

The FMA's consultation document on fair outcomes created some confusion in the market when it was first released as to the legal basis and effect of the FMA's statements about fair conduct. The FMA itself notes that: "*submitters also expressed a range of concerns, including that the focus on detailed outcomes statements gave an impression that these would be treated as new rules or compliance obligations for firms and that it was unclear how the FMA would operationalise outcomes focus in practice*".[2] The FMA says it has taken time to consider the industry response, and that it would be beneficial to explain the FMA's regulatory approach so that financial service providers and other stakeholders understand how it intends to use its outcomes-based focus to prioritise and carry out its work. Interestingly, this kind of confusion was something that in April 2024, Minister Bayly said he wished to avoid. In his letter of expectations to the FMA, he stated that "*the FMA should ensure that market participants have a clear understanding of their legal obligations, and the distinction between legal obligations and guidance and that regulatory expectations set by the FMA are properly founded in the law*".[3] Unsurprisingly, shortly before Christmas, Samantha Barrass, the CEO of the FMA, assured the market that "[these] will not be new rules" and a new publication would explain the FMA's approach in the New Year.

Despite Minister Bayly's views about how regulatory guidance should be treated, it is commonplace for courts to use guidance from regulators as interpretive aids. Any guidance from the FMA, while not having legislative effect, could create a de facto standard and have a significant impact on litigation in the future. While a regulator's views of reasonable conduct are not to be taken as gospel, it often receives deference from courts who see regulators as experts in their fields.

Learning by play – the regulatory sandbox and litigation risk

At the other end of the spectrum, the FMA says that it wants the industry to innovate, and a regulatory 'sandbox' is being piloted to encourage this. This may be in answer to criticism (sometimes from the market and sometimes from Government circles) that the FMA is slower than it should be to permit innovation, as novelty is harder to regulate. The sandbox will, however, have a surprisingly short time frame, initially from January to July 2025 with a decision being made later in the year as to whether to make this initiative permanent. This may be a good option for firms to test new innovative ideas and reduce the risks of litigation from a novel product or service launch.

1 https://www.fma.govt.nz/assets/Minister/Letter-of-expectations/Annual-letter-of-expectation-from-Hon.-Andrew-Bayly.pdf
2 https://www.fma.govt.nz/business/focus-areas/consultation/proposed-fair-outcomes-for-consumers-and-markets/
3 https://www.fma.govt.nz/assets/Minister/Letter-of-expectations/Annual-letter-of-expectation-from-Hon.-Andrew-Bayly.pdf

Mandate and role of the FMA's new Perimeter and Response Team

In 2017, the FMA's Strategy Risk Outlook identified what it calls its "regulatory perimeter" – meaning the borderline of its formal powers with a focus upon financial services that are unregulated or lightly regulated – and began taking a proactive approach to minimising activities on the so-called 'perimeter' that are likely to pose risk or cause harm to the public and erode confidence in the system. This was formalised in 2023, with the FMA establishing the role of Director of Specialist Supervision and Response, and a Perimeter and Response Team (PRT).

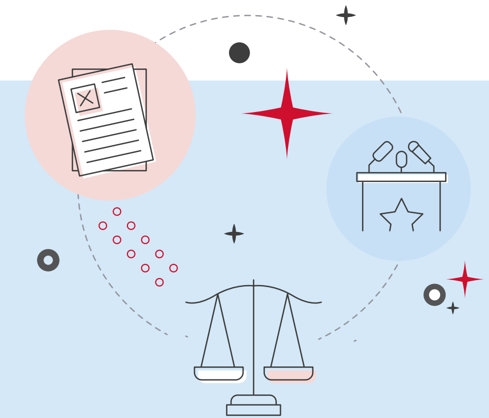
While the FMA Outlook 2023/24 listed one of the FMA's strategic objectives as "Proactively minimise harmful conduct on the perimeter", the Outlook for 2024/25 does not refer to conduct on the perimeter at all. Further, we understand that in practice the PRT is essentially triaging matters and deciding whether enforcement action is required, consistent with the FMA's focus on proportionate engagement with regulated entities. Accordingly, we expect that regulated entities may increasingly hear from the PRT in relation to potential breaches of regulatory obligations, and its engagement with the PRT will be critical to whether potential issues are resolved without formal enforcement action.

R v Pikia – a warning to regulators

Last year, the Court of Appeal issued a landmark decision in *R v Pikia* [2024] NZCA 408, finding that the SFO had overreached in its use of its statutory powers when investigating Mr Pikia.

In an appeal concerning the admissibility of certain evidence gathered by the SFO into his affairs, Mr Pikia argued that more than 200 notices issued by the SFO under section 9 of the Serious Fraud Office Act 1990 in addition to their use of multiple search warrants, in totality, went beyond what was reasonably required and amounted to an unlawful general warrant. He said that the section 9 notices were overly broad or used to obtain information beyond the scope of section 9, that there were insufficient grounds to justify the search warrants and that the SFO's failure to maintain any record of the investigative searches carried out meant that the Court could not assess whether they were reasonable and proportionate.

The Court of Appeal considered that each of the notices and warrants needed to be assessed individually, and in carrying out that assessment, it agreed that a number of the notices issued and warrants obtained by the SFO were overly broad and thus unlawful. For example, notices to obtain travel records and electronic devices without sufficient specificity were unreasonable. The Court also observed that section 9 only empowers the SFO to compel the production of documents that it has reason to believe may be relevant to the investigation into a particular offence. The Court said that the regulator must pay careful attention to this restriction to ensure that the exercise of its intrusive statutory powers is undertaken in a reasonable and proportionate manner, particularly given that a person or corporation who does not comply with a request may be subject to penal consequences.



The Court held that section 9 notices must strike a balance between the need for a thorough investigation and respecting individual rights. Specificity is crucial to ensure notices target only documents and information reasonably believed to be relevant to the investigation and avoid becoming a de facto general warrant.

In light of this decision, recipients of notices to produce documents or other warrants should consider and take advice on whether the notice is reasonable and proportionate, and consistent with the statutory power under which it has been issued. It should be noted, however, that the SFO's use of more than 200 statutory notices in the *Pikia* case was extreme and most investigations involve many fewer such notices.

Department of Internal Affairs assuming responsibility for AML/CFT

On 23 October 2024, Nicole McKee, as Associate Minister of Justice, announced that the Department of Internal Affairs (DIA) would assume overall supervisory responsibility for New Zealand's AML/CFT regime. This overhaul in supervisory structure will be made to *"allow the system to be more responsive to industry and community needs, more agile, and more focused on the real risks posed by money laundering to New Zealand businesses."*.[4]

Currently, the AML/CFT regime is supervised by the Reserve Bank, the FMA and the DIA, which are each responsible for different sectors. Their administration, application and enforcement of the AML/CFT regime also involved a large number of other organisations, including the New Zealand Police, Inland Revenue Department, Ministry of Business, Innovation and Employment and Commerce Commission.

The proposed overhaul aligns New Zealand more closely with the more efficient AML/CFT regulatory approaches seen in many other jurisdictions. For example, Australia currently operates on a single supervisory model overseen by the Australian Transaction Reports and Analysis Centre, a specialist agency set up for AML/CFT purposes. However, other jurisdictions do have multiple supervisors, such as the United Kingdom which has 25 anti-money laundering supervisors, including three statutory supervisors and 22 professional body supervisors.

There is a question as to whether the governance arrangements for the DIA's AML/CFT function will be sufficiently robust, as it is a core government department with many functions. By contrast, the FMA and Reserve Bank have a corporate-style board governance, with the FMA in particular having arguably more experience in regulatory litigation than the DIA.

Notwithstanding the above, once the DIA's capability and resourcing is established, there should be clear efficiency and effectiveness benefits to having a single regulator. For example, the DIA should be able to release more timely guidance, given that guidance will no longer need to be agreed by multiple entities that may have differed in their approach.

4 Government to overhaul anti-money laundering regime | Beehive.govt.nz;

Commerce Commission's priorities for the year ahead

Specific priorities for 2025

The Commission has announced seven specific enforcement priorities for the upcoming year:

1. **Bid-rigging cartels:** The Commission will be particularly focussed on the procurement of public services and public infrastructure contracts. In December 2024, we saw the first sentencing in a criminal cartel case in New Zealand, in relation to bid-rigging on two major public infrastructure projects. A second construction company and its director are due to face trial in October 2025.
2. **Non-compete agreements:** Whether in arrangements between competitors or other types of anti-competitive arrangements.
3. **Illegal online sales conduct:** Fake reviews, misleading scarcity claims, 'drip' pricing and subscription traps.
4. **The grocery sector.** This was also a focus in 2024, with the Commission issuing proceedings against Foodstuffs for lodging anti-competitive land covenants, resulting in a $3.25 million penalty.
5. **Telecommunications sector:** Particularly misleading marketing, sales or billing practices of telecommunication providers.
6. **Motor vehicle finance:** The Commission will prioritise matters where vulnerable consumers are impacted.
7. **Unconscionable conduct:** The Commission is seeking opportunities to test this relatively new prohibition under the Fair Trading Act before the courts.

This list of priorities is not exhaustive, and the Commission will monitor other areas as necessary. For example, while the Commission has not identified 'greenwashing' as a specific enforcement priority, it has said it is prepared to take enforcement action if businesses who engage in greenwashing breach the Fair Trading Act, and it is working with other agencies around greenwashing issues.

Enduring priorities

In addition to its specific enforcement priorities, the Commission has also updated its enduring priorities. The Commission's enduring priorities are:

- Cartel conduct
- Anti-competitive conduct
- Product safety
- Vulnerable consumers
- Actions that support the Commission's market and economic regulation functions

These priorities are key areas that pose significant harm to New Zealand consumers, businesses and markets, alongside areas which are core to the Commission's regulatory role.

Key takeaways for the year ahead

We expect to see more enforcement action from the Commission over the coming year, including under the Commerce Act. The Commission has advised that it intends to be a more active enforcer and has budgeted to overspend its litigation fund by $2–3 million.

The Commission's update of its enforcement priorities is a good opportunity for businesses to reflect on their compliance with relevant competition and consumer laws and identify any practices that may pose compliance risks, particularly those related to the Commission's updated priorities.

A time of change in the global litigation funding market

Large-scale consumer actions can pose significant financial and reputational risks for businesses. The litigation funding market has and continues to provide claimants with funding to allow them to bring these claims. However, recent developments in the United Kingdom and Australia have given market participants a lot to think about.

In this article, we examine the changing landscape for litigation funders overseas, and consider how these changes, coupled with the proposed regulation for New Zealand's own litigation funder market, may affect the market here.

PACCAR: Developments in the UK

In 2023, the United Kingdom Supreme Court issued its decision in R *(on the application of PACCAR Inc) v Competition Appeal Tribunal*, sending ripples through the litigation funding industry.[1] The Supreme Court determined that, where litigation funding agreements provide for the funder's fee to be calculated as a percentage of the damages award, those agreements fall within the definition of a "*damages-based agreement*" under the Courts and Legal Services Act 1990 (UK). It was initially feared that this decision might have wide-ranging consequences:

a. In certain proceedings, such as opt-out class actions in the Competition Appeal Tribunal, where consumer class actions are often brought in the UK, damages-based agreements are prohibited altogether under the Competition Act 1998 (UK).

b. For other types of proceedings, damages-based agreements are unenforceable if they do not meet the conditions set out in the Damages-Based Agreements Regulations 2013 (UK), as litigation funder agreements commonly did not.

However, post-*PACCAR* case law has shown that litigation funding agreements could nevertheless be enforceable if they adopt an alternative approach to the calculation of the litigation funder's fee. For example, in *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe*, the Competition Appeal Tribunal held that a litigation funding agreement was not a damages-based agreement where the funder's fee was determined by reference to a multiple of the "*Costs Limit*", being the amount of funding that the funder was obliged to provide.[2] While these adapted agreements have been accepted in lower Courts, appellate courts could well disagree. Anecdotally, the number of class action claims does not seem to have been impacted.

1 *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28.

2 *Alex Neill Class Representative Ltd v Sony Interactive Entertainment Europe* [2023] CAT 73.

In response to the Supreme Court's decision in *PACCAR*, the UK Government has introduced the Litigation Funding Agreements (Enforceability) Bill 2024, which sought to reverse the effects of *PACCAR* by explicitly excluding litigation funding agreements from the definition of "*damages-based agreement*" in the Courts and Legal Services Act. However, the Bill is in limbo following the 2024 UK General Election and is not expected to be reintroduced until mid-2025. Simultaneously, the Civil Justice Council is conducting a wide review of third-party litigation funding in the UK, which includes a consultation process with the industry and public that will likely inform the Government's attitude towards the Bill.

Australia's shifting regulatory landscape for litigation funders

The Australian litigation funding market has been subject to periodic uncertainty for some years now. In 2009, the Australian Federal Court in *Brookfield Multiplex Ltd v International Litigation Fundings Partners Pte Ltd* held that litigation funders fall under the existing regulatory regime for managed investment schemes, and must meet those requirements accordingly.[3] Successive governments passed legislation for and against that position. The Federal Court then overruled its own decision in *Brookfield* in [2022].

The upcoming 2025 Australian Federal Election may lead to further changes. On top of restoring the pre-2022 position where litigation funders would be subject to financial services regulations, the Coalition is proposing policies that would impose caps on recoverable fees for litigation funders and would require disclosure of investors in litigation funders' schemes, citing concerns of interference by foreign actors via strategic litigation funding.

Implications for New Zealand's litigation funding market

Litigation funding remains less common in New Zealand than in overseas jurisdictions. As matters currently stand, the New Zealand market is relatively quite favourable to class actions. The Supreme Court has recently permitted opt out class actions and common fund orders (which require all members of an opt-out class action to contribute to the third party funding of the class action out of any proceeds, regardless of whether they have signed a funding agreement).[4]

However, New Zealand is likely to face changes in the funding industry if the Class Actions legislation recommended by the Law Commission is introduced. This would require disclosure of any litigation funder agreements to the High Court for approval. To give its approval, the Court must be satisfied that the plaintiff group has taken independent legal advice on the agreement, and the agreement as a whole is fair and reasonable. The then Government agreed to the Law Commission's recommendations in principle in November 2022, but no progress has been made since the change in Government in October 2023.

If the Government was to proceed with the Law Commission's recommended statutory scheme, the current incentive of a low-regulation environment might well be diminished, potentially discouraging offshore litigation funders from taking risks in financing New Zealand class action litigation.

As ever, New Zealand businesses must remain alive to the risk of representative or class actions. The future of regulation remains uncertain and, in any event, institutions within the remit of the Financial Markets Authority (FMA) could still face a consumer class action brought by the FMA pursuant to provisions in the Financial Markets Authority Act 2011. While that power has yet to be used, if class action activity slows or stalls due to an absence of funding, the FMA may see a public benefit in bringing this kind of representative action to seek to vindicate consumer rights.

The collective futures of litigation funding in the UK, Australia and New Zealand will likely be at the mercy of appellate court decisions and Government priorities leading into 2025 and beyond, so it will be important to watch these with interest. While litigation funding activity may fluctuate around the world, businesses should be keenly aware of the now well-embedded risk of class actions, particularly in the face of challenges like climate change, the rise of artificial intelligence, natural disasters, and continued economic instability.

3 *Brookfield Multiplex Ltd v International Litigation Fundings Partners Pte Ltd* [2009] FCAFC 147, (2009) 180 FCR 11.

4 *ANZ Bank New Zealand Limited v Simons* [2024] NZSC 330.

Industry overhaul:

Contracts of Insurance Act 2024

The much anticipated Contracts of Insurance Act received Royal Assent late last year. It helpfully consolidates New Zealand's disparate and in some cases antiquated insurance legislation.[1] Its "modernisation" of much of the previous law will have a significant impact on the insurance industry. The Act better aligns New Zealand with insurance legislation in the United Kingdom and Australia.

We expect that many insurers and insurance intermediaries will have to make wide-ranging changes to their processes and procedures. Staff training, process changes and IT transformation projects will need to be implemented within a relatively short timeframe – with the Act coming into force in November 2027 at the latest.

We touch on the key changes brought about by the Act and our predictions for the industry, including the likely effect on insurance disputes.

Key changes brought about by the Act

Consumer focus

The Act elevates the importance of consumer protection to bring insurance legislation into line with many other recent legislative changes. It does this in part by introducing a new distinction between consumer insurance contracts and non-consumer insurance contracts. The focus of the distinction is the purpose of the insurance policy rather than the policyholder's identity. A contract of insurance is a consumer contract where it is "*ordinarily entered into by a policyholder wholly or predominantly for personal, domestic or household purposes*". It mirrors the test for a consumer credit contract under the Credit Contract and Consumer Finance Act 2003.

As reflected in submissions at the Select Committee stage, there will likely be practical issues with this distinction that will require insurers and insurance intermediaries to recategorise policies previously treated as commercial. The position may be unclear in some instances, such as insurance for a residential

1 Life Insurance Act 1908, Part 2 of the Law Reform Act 1936, Insurance Law Reform Act 1977, Insurance Law Reform Act 1985 and Insurance Intermediaries Act 1994. Life Insurance Act 1908, Part 2 of the Law Reform Act 1936, Insurance Law Reform Act 1977, Insurance Law Reform Act 1985 and Insurance Intermediaries Act 1994.

apartment block where the policyholder is a body corporate. This is likely to be addressed through regulations declaring certain types of policies consumer or non-consumer insurance contracts.

Fundamental change to duty of disclosure for consumer insurance contracts

A consumer insurance policyholder will have a much diluted disclosure obligation at entry into, renewal, or variation of the policy. They must "*take reasonable care not to make a misrepresentation to the insurer*". As well as lowering the required standard, the Act effectively shifts the burden of ensuring adequate disclosure to insurers by requiring insureds only to answer questions asked of them.

The duty may be breached where a policyholder fails to disclose information in response to a direct and specific request from an insurer, or incorrectly answers a question put to them by an insurer, where there was a lack of reasonable care by the policyholder in the relevant answer or omission.

Insurers will no longer be able to rely on generic requests for information, such as those asking the prospective policyholder to disclose "anything else material to the risk". They will also need to ensure that questions asked are sufficiently detailed, specific and clear so that policyholders cannot say their response was reasonable.

Reworking the duty of disclosure for non-consumer insurance contracts

Non-consumer insurance policyholders will have a duty to make a "fair presentation of the risk". A prospective policyholder must disclose every material circumstance that it know or ought to know, or give the insurer sufficient information to put a prudent insurer on notice of the need to make further enquiries.

The Act will clarify the knowledge element of the test. A policyholder's knowledge will include that of its senior management and/or its personnel responsible for placing insurance, which includes brokers and their employees. Both corporate and non-corporate policyholders ought to know what could be revealed by a reasonable search for information available to the policyholder, including information held by their broker.

Although the language is different, we expect that in practice this will largely reflect the previous disclosure obligations under the common law. The New Zealand courts will take guidance from English cases under its equivalent regime. However, there are still likely to be disputes over the sufficiency of information disclosed, and whether a prudent insurer was or ought to have made further enquiries.

Proportionate remedies for non-disclosure

The Act introduces alternatives to the "all or nothing" approach for non-disclosure under the current law. Where there has been a misrepresentation before the contract is entered into and the insurer proves that:

1. the misrepresentation was deliberate or reckless, it may avoid the contract, refuse all claims and retain the premium;
2. without the misrepresentation it would not have entered into the contract at all, it may avoid the contract and refuse all claims, but return the premium;
3. without the misrepresentation, it would only have entered into the contract on different terms, either:
    a. treat the policy as if it had been placed on those different terms e.g., with certain exclusions/limits; or
    b. reduce proportionately the amount paid on a claim.

Similar remedies apply to misrepresentations made before a policy is varied.

Broadly speaking, these new remedies bring New Zealand into line with the regimes in Australia and the United Kingdom.

Despite assistance from cases in the United Kingdom and Australia, there will still be disputes in New Zealand relating to the extent of remedies available to insurers where misrepresentation is alleged.

Abolition of third party statutory charge

Under current law, a plaintiff seeking to recover funds from a defendant's insurance policy has a statutory charge over the policy proceeds up to the defendant's alleged liability.[2] The purpose of the charge is to "overcome the unfairness that ensued when insurance proceeds were paid to the general pool of creditors of an insolvent insured rather than to the party who had suffered the loss to which the policy responded".[3] It brought about a need for separate defence costs cover for directors and officers insurance because the statutory charge would otherwise prevent them accessing insurance funds to defend an action.

2 Law Reform Act 1936, s 9.
3 *Livingstone v CBL Corporation Ltd* (in liq) [2021] NZHC 755.

The Act does away with this concept and instead provides a claimant with a direct right against the insurer of "*specified policyholders*", essentially insolvent or deceased[4] policyholders. As with the current regime, a claim will be limited to the policyholder claimant's alleged liability. The Act will also clarify the extent of an insurer's liability to the third party, the defences an insurer can raise in defence of claims against it, and the information third parties are entitled to access about insurance policies and from whom.

The changes should do away with the need for separate defence costs cover required following the famous decision in *Steigrad*.

It may be that the direct claim concept incentivises insurers to settle claims early to reduce defence costs. Directors and officers will want to pay specific attention to clauses in their liability policies that address insurer control of litigation, to avoid disputes over whether claims should be settled or defended.

FTA unfair contract terms regime in the FTA applies to some insurance contracts

The Contracts of Insurance (Repeals and Amendments) Act, split from the predecessor to the Act following the Select Committee stage, amends the Fair Trading Act to extend its unfair contract terms regime to consumer insurance contracts and non-consumer insurance contracts with an annual value of less than $20,000. However, some key terms of insurance contracts are not subject to the regime, including terms that relate to the amount of premium payable under a life policy, specifying the subject matter insured, specifying the sums insured and setting out exclusions or limits on indemnity.

Other changes

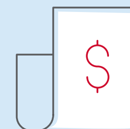
There are other changes introduced in the Act.

Notification

Insurers will be required to notify policyholders of their duty of disclosure and the potential consequences of failure to comply at entry into a new policy or variation of an existing one.

Claim payments

Claims must be paid within a reasonable time, with guidance that what is reasonable includes time for the insurer to gather information and investigate and assess the claim.



Premium payments

An insurer will be able to recover premiums held by a broker for more than the 50-day period as a due debt.

Payments to policyholders

A broker must pay funds received from an insurer to a policyholder within specified periods, including within 7 days of receipt for non-consumer policyholders.

4 In both the natural and corporate senses.

Timeframes for implementation of policies and procedures to address the Act

The Act comes into effect upon Orders in Council. Where no orders are made for any part of the Act, it come into force on 15 November 2027. We expect the most significant aspects of the Act to come into force on or close to this date.

Transitional provisions will apply to many of the new obligations. The new disclosure duties will apply to new contracts of insurance, including renewals, or variations of existing contracts of insurance that occur after the commencement date.

Our predictions

In the short term, we expect the primary industry focus to be on ensuring compliance with the provisions of the Act and necessary changes to products, policy wordings and processes. In doing so, insurers and insurance intermediaries will need to address tricky issues such as the application of the definitions of consumer and non-consumer insurance contracts to those policies that do not neatly fit within either, and where to draw the line between being thorough in information requests in consumer insurance proposal forms to gather necessary information and reduce the prospect of arguments over breach of the duty of disclosure. Insurers will also be mindful of not overburdening prospective insureds and risking losing market share.

These steps and the general shift towards consumer rights may have an impact on premiums in the short term.

In the medium term, we expect to see disputes testing the efficacy and procedure of the Act, most likely in relation to:

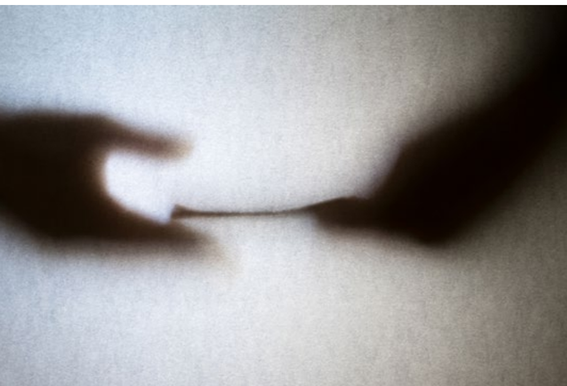
- insurers' decisions to act on deliberate or reckless misrepresentations, including allegations that insurers' proposal forms are insufficiently clear or prescriptive;
- how insurers are able to apply the ability to treat policies as if they contained provisions that they consider would have been applied had proper disclosure been made, and the content of those terms;
- whether business insureds have made fair risk presentations and, if not, the outcomes available to insurers including the proper quantification of proportionate claim reductions;
- direct third party claims on insurance policies held by insolvent companies, particularly given the current volume of company liquidations and recessionary conditions.

Long term, litigation will likely provide greater guidance regarding the duty of consumer policyholders to take reasonable steps not to make a misrepresentation, including what constitutes reasonable steps. Insurers will be able to learn from this to implement pre-contract and pre-renewal forms that put them in the best position when non-disclosure occurs.

Anti-bribery and corruption:

Is AB&C a bellwether for increased white-collar and regulatory expansion?

It will not be news to readers that regulators have been increasing their focus on corporate misconduct, and that leading businesses have been strengthening their risk management framework across a range of white collar and regulatory matters (whether that be sanctions, industry related regulation, tax and financial obligations compliance, or matters such as health and safety, privacy and minimum employment terms). For many corporates these trends have been an additional drive to put in places risk mitigation such as whistleblowing hotlines and increased compliance training and processes.



One area where this increased focus continues, and where we think further regulatory focus is inevitable, is in the area of anti-bribery and corruption (AB&C).

Recent Australian law amendments – shifting the corporate liability landscape for foreign bribery and corruption.

Over the past 24 months Australia has undertaken major reforms to its AB&C framework to align with international best practice. Following the establishment of the National Anti-Corruption Commission in 2023, last year saw Australia implement the second major anti-corruption reform with the passing of the Crimes Legislation Amendment (Combating Foreign Bribery) Act 2024 (the CFB Act) which came into force in September 2024.

The CFB Act amended Australia's Criminal Code and significantly shifted the corporate liability landscape for foreign bribery and corruption in Australia. Companies are now exposed to a wider set of anti-bribery and corruption compliance risks and a greater need to ensure policies and procedures are fit for purpose.

In summary, the CFB Act widens the reach of foreign bribery laws in an attempt to addresses previous criticism regarding the low number of foreign bribery convictions in Australia, which has seen only a handful of corporations and individuals convicted for foreign bribery since the enactment of foreign bribery laws in 1999. The CFB Act does this by:

- widening the existing offence for bribing foreign public officials so that the advantage sought may be of a personal or business nature and treating candidates for public office as foreign public officials; and
- widening the definition of an "associate" to include anyone who performs services on behalf of the company. Previously companies were only liable for their officers, employees, and agents.

However, the standout change is the creation of a new offence for failing to prevent bribery of a foreign public official by an associate. This has been modelled off the similar offence contained in the United Kingdom's Bribery Act 2010. What makes this new offence significant is that it is an absolute liability offence. This means a company can now be successfully prosecuted even if they had no knowledge of the bribery and did not intend for the bribery to occur.

A company will have a defence to the offence if it can prove it had "adequate procedures" in place designed to prevent the bribing of a foreign public official.

What the Australian reform means for NZ business

It appears that there is one thing about the Australian reforms that is not well understood in New Zealand – namely that the Australian reforms are really bringing AB&C regulatory principles into trans-Tasman alignment and the world leading jurisdiction, the United Kingdom.

Under New Zealand law, following amendments to the Crimes Act 1961 in 2015, there is a presumption that a body corporate commits any wrongdoing committed by an employee or agent, unless the organisation can show that it took "reasonable steps" to prevent the offence. This is very similar to the "adequate procedures" defence now introduced in Australia.

So, if we have already had this in place, how does the Australian reform affect NZ business?

Well, since 2015 the AB&C regulator in New Zealand, the Serious Fraud Office, has been increasingly active with investigations and prosecutions. It is yet to take a prosecution against a corporate for, effectively, failing to take "reasonable steps" to prevent bribery, but in our view it is only a matter of time. And with recent reform in Australia, and presumably a push by Australian authorities to progress their new standards, we consider it inevitable that the SFO will look to prosecute its first corporate in this area, potentially in cooperation with their Australian partners.

Further, any New Zealand business with a presence in Australia, is now going to fall under the new Australian AB&C regime. In our view, these two matters combine to mean that there is renewed need for New Zealand business to review its position on AB&C, and to ensure it has in place "adequate procedures" around AB&C awareness, training, investigation and reporting, to ensure it is able to avail itself of a "reasonable steps" to prevent bribery defence if that is necessary.

Increasing consistency of global anti-bribery and corruption requirements

The Attorney-General of Australia has issued official guidance on what constitutes "adequate procedures" to prevent foreign bribery. As noted above, Australia's new foreign bribery laws closely mirror those in the United Kingdom's Bribery Act 2010. For this reason, the guidance issued by the Attorney-General of Australia shares a number of similarities with the guidance issued by the United Kingdom's Secretary of State for Justice. In summary, similar to the UK's guidance, Australia's guidance focuses on 6 core elements in establishing "adequate procedures":

- fostering a control environment to prevent foreign bribery;
- responsibilities of top-level management;
- risk assessment;
- communication and training;
- reporting foreign bribery; and
- monitoring and review.

The guidance recommends that companies put in place controls that are proportionate to their operations, including the level of its exposure to foreign bribery risks and its business activities, which includes the relationship between the company and its contractors.

Staying ahead of the curve

Preventing bribery is self-evidently good for your business. It addresses matters of ethical standards (expected by the market, and your employees and business partners), and avoids the risk of individuals and the business being caught up in scandals, legal investigations and prosecutions.

The SFO and the New Zealand Police have joint responsibility for investigating bribery matters. As set out in the SFO's most recent strategic areas of focus and public comments before Christmas, we expect foreign bribery and corruption of public officials will remained a key area of focus for the SFO throughout 2025.

Given that continued focus, the law reform here in 2015 creating a de facto 'failure to prevent' offence, and the recent reforms in Australia (aligning NZ and Australia with the UK and other leading offshore jurisdictions), we consider it is only a matter of time before the first NZ corporate is prosecuted for failing to prevent bribery. You don't want that corporate to be you.

To avoid that risk, and to stay ahead of this regulatory curve, we recommend a review of your business practices with an AB&C lens applied. You should ensure that your risk management procedures adequately deal with your AB&C risk, and ensure that your staff, and those who work with you, are fully aware of the risks and expectations in this space. Proactive management of risks, in case litigation arises, or to avoid litigation, is also strongly advisable.

Towards orthodoxy?

Recognition of tikanga by the Courts

The application of tikanga in Parliament during the passing of laws was an area of public division and debate as 2024 closed out. But away from the political and legislative stage, the steady recognition and application of tikanga by the Courts across a growing range of issues in dispute has continued much as anticipated over the past 12 months.

We expect this trend will continue, particularly in the context of disputes involving interpersonal issues. As some orthodoxy starts to emerge for consideration of tikanga – where relevant to the context – to resolve relational disputes, 2025 is also lined up to further test the boundaries for application of tikanga in situations involving potential torts and fiduciary duties. As a developing area of law, the case for all organisations understanding tikanga principles and how tikanga may apply to day-to-day interactions and to resolve disputes is becoming increasingly persuasive.

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Recognition in disputes with a relational dimension

The Law Commission's 2023 *He Poutama* Report on how tikanga and State law intersect describes tikanga Māori as including *"all of the values, standards, principles or norms that the Māori community subscribe to, to determine the appropriate conduct."*[1] That is, tikanga is closely connected with how people relate to, and interact with, one another. This relational dimension has been reflected in 2024 through increasing recognition and consideration of tikanga by our courts where relevant in disputes involving insolvency, employment and trusts and estates – all business-as-usual areas of law relevant in a wide range of factual contexts.

Tikanga is closely connected with how people relate to, and interact with, one another"

Insolvency

In the insolvency context, the High Court has recently considered the tikanga of koha (donations or offerings with an element of reciprocity) and ea (balance) in resolving a dispute about whether the forgiveness of a debt, claimed to be given as a koha, should be treated as a 'gift' for the purposes of the Insolvency Act 2006, or recognised as a koha that sits outside of the insolvency regime.[2]

In *Official Assignee v Honey*, the respondent relied on the tikanga of koha to argue that her ownership of a house she had received partially by koha was not a gift for the purposes of the Insolvency Act as it did not involve a one-sided 'taking' (as would be the case in the context of a pure gift). She claimed it was given in recognition of the *reciprocal relationship* between the parties to the koha, and it thereby created ea and harmony between those parties.

As the koha was given in relation to Māori freehold land under Te Ture Whenua Māori Act 1993[3], the High Court accepted tikanga as "properly an ingredient in a broader analysis in which the relevant statutes and common law have already developed rules or principles that must be taken into account". Having done so, the Court drew on the tikanga around ea in finding that even with the giving of koha there was a reduction in the monetary value of the bankrupt's assets available to the Assignee and creditors. Treating koha as something other than a gift would disrupt the sense of ea between the bankrupt and their creditors already established through operation of the Insolvency Act alongside the priority given to prospective purchasers set out in the Te Ture Whenua Māori Act. In effect, the Court found that recognition of tikanga was built into laws such as Te Ture Whenua Māori Act already operating in a Te Ao Māori context. Any additional application of tikanga principles needed to occur with a broader lens – in this case to the ea of the broader regime.

Employment

The employment jurisdiction has underscored the importance of providing the court with an appropriate level of detail and evidence about tikanga for the case at hand, whether that is by way of submissions, an expert's statement of tikanga, or through use of a court-appointed pūkenga (expert). As the law is presently developing in this area, the Employment Court has been clear that it will exercise restraint in the absence of sufficient expert evidence.

One recent example is the proceeding brought by Associate Professor Wiles against her employer, the University of Auckland, for unjustifiable disadvantage, breach of contract, and breach of good faith.[4] The plaintiff did not make an express claim of breach of tikanga, but made submissions on the role of tikanga in employment law generally, in particular the tikanga principles of manaakitanga, whanaungatanga, kotahitanga, and kaitiakitanga.[5] But the plaintiff provided no evidence from pūkenga on the application of tikanga to the matters at issue (as would generally be expected in circumstances where issues of tikanga arise that are outside the Court's expertise). Significantly, Judge Holden in the Employment Court accepted that the University was bound to act consistently with tikanga insofar as it applied to the employment relationship, and confirmed she considered the relevant tikanga principles generally in making her decision. However, the Judge applied an expressly cautious approach due to the lack of evidence before the Court regarding the relevant tikanga principles, which limited her ability to apply them to the matters at issue.

1 'He Poutama' Study Paper 24.
2 *Official Assignee v Honey* [2024] NZHC 2216.
3 The land was the ancestral papakāinga (original home) of the respondent's whānau.
4 *Wiles v The Vice Chancellor of the University of Auckland* [2024] NZEmpC 123.
5 Law Commission 'He Poutama' Study Paper 24, Part 1, chapter 3, for a detailed explanation of these tikanga principles.

The emphasis on appropriate evidence on application of tikanga was echoed in *MW v Spiga*[6]. Here, the Employment Court considered the relevance of tikanga when assessing whether a non-publication order should be made in relation to a party to a dispute in the Employment Relations Authority. The Court found that tikanga was relevant to such an assessment, noting the natural synergies between tikanga and the relationship-centric nature of employment law.

While the Court emphasised the need for cautious application of tikanga by judicial bodies that are not the makers of tikanga nor experts in it (echoing the Supreme Court in the *Ellis* decision from late 2022),[7] it acknowledged the relevance both of case specific tikanga norms and that certain principles, like whakamā (shame or embarrassment), are likely to be relevant in most non-publication cases particularly where privacy or reputational concerns are involved. It reiterated that the weight given to tikanga principles in any particular case will depend both on the context and the availability of expert evidence.

Trusts and estates

Two recent cases relating to trusts and estates similarly confirm the importance of an appropriate level of evidence on tikanga and its application in this developing area of law.

Paton v Acropolis Holdings[8] involved an application to review trustee decisions concerning an estate as well as an application by the trustees seeking directions on the same decisions. The plaintiff (who, notably for present purposes, is pākehā) argued that tikanga principles such as mana, whakapapa (genealogical connection), and whanaungatanga (kinship)[9] supported his claim that the trustees' decisions regarding the allocation of shares were unreasonable. Justice Churchman confirmed that tikanga could apply where the parties are pākehā (following the *Ellis* decision), indicating the key question is not what the ethnicity of the parties is but whether there is an evidential basis for tikanga to be recognised in the matter. Ultimately, the Court declined to apply tikanga on the facts of the case as it found there was insufficient evidence to establish the relevance of tikanga in assessing the reasonableness of the trustees' decision.

In contrast, *Adams v Adams*[10] concerned a claim brought by an individual who was the mokopuna and whāngai (adopted by custom) [11] of a person who had passed away. The plaintiff sought an order for the sale of a property (purportedly) held in trust for the benefit of the deceased's surviving children. While the specific requirements of the Property Law Act 2007 regarding the establishment of a trust were not followed, the Court considered the intentions of the settlors (the whānau) through a tikanga lens and found that they had established a trust to hold the property. The Court placed weight on detailed evidence that the whānau had operated consistently with tikanga in their management of the relevant property, particularly through their intent to hold the property collectively for the benefit of the whānau (and future generations) and in the way they interacted with one another and conducted hui (all of which involved acting in accordance with tikanga and acting as a collective).

6 *MW v Spiga* [2024] NZEmpC 147.

7 *Peter Ellis v R* [2022] NZSC 114. See *MW v Spiga* [2024] NZEmpC 147, at [67].

8 *Paton v Acropolis Holdings* [2024] NZHC 43.

9 See 'He Poutama' Study Paper 24, Chapter 3 at [3.22] onward for an explanation whakapapa and whanaungatanga.

10 *Adams v Adams* [2024] NZHC 171

11 See 'He Poutama' Study Paper 24, Chapter 7 at [7.60] onward for an explanation of whāngai.

Development of a unique, indigenous body of law?

As the Courts gain comfort with the notion that tikanga may have relevance in resolving certain relational disputes, the platform is set for 2025 to test boundaries for applying tikanga in the ongoing development of other parts of the common law.

One such area is the application of tikanga to fiduciary duties and equity. We have seen this recently in *Stafford v Attorney-General*,[12] where the High Court was asked to determine whether the Crown breached its fiduciary duties to the customary owners of land in Whakatū Nelson by not reserving a tenth of the land acquired by the New Zealand Company in the 1840s to create the settlement of Nelson. In October 2024, the Court recognised that tikanga was clearly relevant to the case (as a claim on behalf of a Māori collective for the return of ancestral land) and that the Crown had breached its fiduciary duties to the customary owners of the whenua. But the Court dismissed the claim for cultural loss (which was said to have arisen from the customary owners' alienation from their land/whenua) as there was insufficient evidence to assess the loss suffered from a tikanga perspective.

The Court acknowledged extensive customary and expert evidence it received on tikanga and the relationship of Māori with land, and accepted the application of tikanga as a lens through which to assess evidence and legal arguments. But it stopped short of applying tikanga as a matter of substantive law in its own right. The plaintiffs had argued that the fiduciary duties owed must be informed by tikanga as well as English private law rules of equity; that there is ""a dialogue" between tikanga and the common law", which "involves the weaving together of two systems of law."[13]

In response, the High Court reiterated the risks noted by the Supreme Court (in *Ellis*) that "care must be taken not to pick and choose elements of tikanga, thereby depriving it of its essential value or distorting the concepts", and that " judges are not mandated to pronounce on or develop the content of tikanga". The High Court held that the evidence received on tikanga did not go far enough to explain how the relevant tikanga concepts might apply to the specific case circumstances or how it had responded in similar circumstances. Ultimately, the Judge "trod lightly and with caution" in those areas where there was insufficient evidence and/or submissions regarding the interrelationship between tikanga and the common law, stating that the "proceeding (and judgment) should be read and understood as a contribution to an ongoing discussion about how to weave tikanga with state law as part of an incremental process."[14]

The Crown has appealed the High Court's decision, and it is likely to be heard by the Court of Appeal in the next 12–18 months. It remains to be seen whether the Court of Appeal will shift the boundaries of private law concepts such as fiduciary duties to recognise the application of tikanga.

Finally, the Supreme Court's decision (against strike out) in the *Smith v Fonterra*[15] case has been well canvassed including the Court's acknowledgement that tikanga is relevant to consideration of Mr Smith's claims in tort (in particular public nuisance). The Court said that aspects of tikanga will need to be addressed at trial, in terms of the plaintiff's relationship with the relevant land and how that may impact on any loss and damage suffered in ways that are not necessarily financial or economic. The case has been referred back to the High Court for trial, scheduled to take place in 2025.

"The relevance of tikanga in the formulation of tort and equity claims will be a key issue to watch in the coming years as these cases continue through the legal system.

Organisations from across the business, government and not-for-profit sectors are increasingly likely to be engaged in disputes involving arguments around the role and application of tikanga. Those that are proactive about the relevance of tikanga for their people and business will be best placed to respond when the need arises.

12 *Stafford v Attorney-General* [2024] NZHC 3110.
13 Stafford at [180]-[181].
14 Stafford at [181]-[188].
15 *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5.

Environmental, social and governance (ESG)

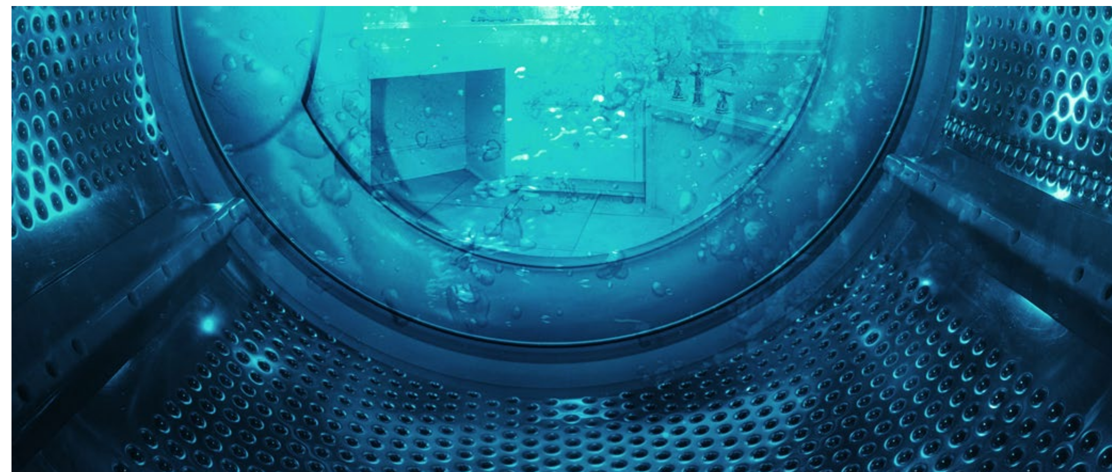
A growing laundry list of washing:

An update on ESG and AI washing

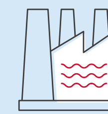
ESG washing penalties, including those related to "greenwashing" and "social washing", continue to pose one of the greatest risks to private entities arising from ESG related obligations. Being added to this growing laundry list of washing is an emerging risk around "AI washing". "Washing" occurs when organisations make misleading claims about their goods, services, or organisational practices to appeal to consumers, investors, or workers.

Risks include for example, overstating their sustainability related credentials ("greenwashing"), their social responsibility ("social washing"), or the use and/or capability of AI in their goods or services ("AI washing"). While the law behind ESG and AI washing in New Zealand is essentially governed by the concept of misleading and deceptive conduct in the Fair Trading Act 1986 and the fair dealing provisions of the Financial Markets Conduct Act 2013, the application of that law is far from simple. Washing can be international or inadvertent in that an organisation can make a statement about its ESG or AI credentials which on its face is true, but could be considered misleading and deceptive if it causes a misleading impression overall.

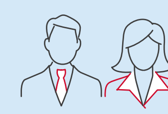
While ESG washing has existed for some years, it, along with AI washing, is becoming more frequent and significant in the context of both increasing global regulation requiring mandatory disclosure and the importance placed by consumers on these representations in making purchasing decisions. In addition to penalties arising from legal/regulatory action, other risks for organisations include loss of reputation, loss of stakeholder trust and goodwill, and employee brand damage.



AI washing



Greenwashing



Social washing

AI washing

Is your product or service less intelligent than you claim? In a nutshell, AI washing is the practice of misstating your organisation's or your product's AI capabilities for the purpose of gaining a competitive advantage or improving your organisation's reputation. These misstatements can be in the form of how an organisation describes the use of AI, the efficacy of AI over existing techniques, the flexibility of AI, or the extent to which AI is fully operational. In turn, these misstatements can create problems for consumers by offering goods or services that do not meet expectations, causing overpayment for goods or services and making it hard for consumers to identify whether they have received the promised good or service. More broadly, this type of conduct can erode consumer trust in AI and AI related goods or services.

What makes AI washing different from other forms of ESG washing is that some of the features that make AI beneficial can also amplify the risks of misleading statements. AI systems can change their performance over time and adapt by learning from data, but if that data contained inaccuracies, that can result in unwanted bias and misleading or entirely erroneous outputs (known as 'hallucinations'). This risk is amplified further with AI systems that are designed to make decisions independently, without human intervention at any stage of the decision-making process. Therefore, the AI product or service can evolve, meaning that representations made at the time of sale may no longer be true.

AI washing has recently been a particular focus of the U.S. Securities and Exchange Commission (SEC). Last year saw the SEC bring cases against investment advisers for their statements regarding AI, marking the first instance of regulatory action against the practice in the US. In many of the cases, the SEC found the investment advisers had neither developed nor implemented the AI capabilities they advertised. The US is not alone in taking action against AI washing, the EU's new AI Act includes strict transparency requirements to protect consumers and markets from deceptive AI usage. While we are yet to see similar cases in New Zealand, prudent organisations should be ensuring that any statements they make about the use of AI in their goods or services and the capabilities of that AI are factually accurate to reduce the risk of being accused of AI washing.

Greenwashing

Greenwashing claims continue to grow both domestically and internationally. In New Zealand, we are awaiting the outcome of the first greenwashing case, in which Consumer NZ is seeking declarations from the High Court that an energy company allegedly breached the Fair Trading Act with misleading statements about emissions reductions through a public advertising campaign.

In Australia, both the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investment Commission (ASIC) have continued to focus on ESG washing as top enforcement priorities. In its 2024–25 Compliance and Enforcement Policy and Priorities, the ACCC identified consumer, product safety, fair trading and competition concerns in relation to environmental claims and

sustainability as one of its 10 compliance and enforcement priorities for this year. This follows proceedings commenced by the ACCC in the Australian Federal Court against Clorox Australia Pty Ltd, the manufacturer of GLAD-branded kitchen and garbage bags, for allegedly making false or misleading representations that certain kitchen and garbage bags were partly made of recycled 'ocean plastic', in breach of the Australian consumer law. At the time of writing, we are still awaiting a judgment. On a related note, at the end of last year, the ACCC released its final guide on sustainability collaborations and Australian competition law. The guide is designed to help businesses understand the competition law risks that may arise when contemplating working together to achieve positive sustainability outcomes.

Meanwhile, ASIC has had good enforcement success in the past 12 months pursuing greenwashing cases. This focus has been renewed in its priorities for 2025 with ASIC suggesting that its 2025 greenwashing focus will be broadened to include listed entities, managed funds and superannuation funds. Two recent examples are Vanguard and Active Super. The Australian Federal Court ordered Vanguard Investments Australia to pay a $12.9 million penalty for making misleading claims about ESG exclusionary screens. Vanguard admitted it misled investors that certain funds would be screened to exclude bond issuers with significant business activities in certain industries, including fossil fuels, when this was not always the case. In Active Super, the Federal Court found LGSS Pty Limited, as trustee of the superannuation fund Active Super, contravened the law in connection with various misleading representations concerning its ESG credentials. Active Super claimed in its marketing that it eliminated investments that posed too great a risk to the environment and the community, including gambling, coal mining and oil tar sands. However, the Federal Court found that Active Super invested in various securities that it had claimed were eliminated or restricted by ESG investment screens.

Social washing

Similar to greenwashing, social washing occurs when organisations make misleading claims about their goods, services, or organisational practices in relation to social issues. Social washing often occurs in the context of statements made about an organisation's supply chain and the absence of human rights abuses, forced labour, modern slavery, child labour and/or the impacts on the communities in which their supplies operate.

Last year, institutional investors in Boohoo Group Plc, a UK-based fashion retail company, filed a claim against the company seeking compensation for allegedly misleading disclosures relating to its ESG responsibilities, which are alleged to have resulted in a financial loss for its shareholders. This claim is one of the first of its kind in the UK and relates to a failure by Boohoo to disclose serious labour rights violations at its suppliers' factories, which were exposed by the UK media, leading to Boohoo's share price significantly falling. The media exposed the mistreatment of workers, including that some workers were being paid well below the minimum wage and forced to work in unsafe and unsanitary conditions during the Covid-19 pandemic.

Cooling off?

Climate change litigation in New Zealand

New climate change litigation is trending down, notwithstanding increases in climate-related disasters worldwide. We expect New Zealand to follow suit when it comes to claims against corporates, at least pending the outcome of the "test case" of *Smith v Fonterra*. However, based on international experience, we may see more claims against Government entities challenging decisions of regulatory bodies where climate change is relevant and policy responses to climate change.

Global trends

The rate of new climate change proceedings may be slowing globally, according to the latest annual statistics published by the Grantham Research Institute on Climate Change and the Environment.[1] 2023 was the second year in which the number of new proceedings decreased from the pinnacle of 2021. The Institute suggests that this is a result of consolidation and concentration of strategic litigation efforts in high-impact areas.

In particular, cases against the Government have seen recent successes. These cases challenge policy response ambitions or implementations.

Although there is a significant number of ongoing cases worldwide, precedents are becoming available slowly, as many of these cases have not yet reached a final decision stage or even the evidential stage.

One important case that has provided an appellate decision is *Milieudefensie v. Shell*. The first instance decision of the Hague District Court in 2021, hailed as a landmark decision for climate change litigation, required Shell to increase its emissions reductions. However, that order was overturned on appeal late last year.

Environmental group Milieudefensie (Friends of the Earth Netherlands) sued Royal Dutch Shell for its claimed contribution to climate change.[2] They alleged that Shell owed a duty to comply with an unwritten standard of care set out in the Dutch Civil Code and that Shell's failure to adequately reduce its carbon emissions now and in the future was a breach of that duty. The Hague District Court accepted the existence of the claimed unwritten duty of care and ruled that it required Shell, when determining its group corporate policy with respect to carbon emissions, to observe due care, which the Court found it had not. The Court held that Shell was required to reduce its global scope 1, 2 and 3 emissions by 45% by the end of 2030 as compared with 2019 levels.

1 https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024-snapshot.pdf. Statistics not yet available for 2024.

2 *Milieudefensie v Royal Dutch Shell* plc ECLI:NL RBDHA:2021:5339 (26 May 2021) (DC, Hague).

The Court of Appeal of the Hague also recognised that Shall was constrained by a duty of care arising from a social contract requiring private companies to take responsibility for combating climate change in line with international obligations, even where that was not explicit in in the written laws of the country where it operated.

However, the Court of Appeal did not order Shell to adhere to specific emissions reductions because it had largely met the reduction targets in respect of scope 1 and 2 emissions. For scope 3 emissions, the Court of Appeal determined there was insufficient scientific consensus about specific reduction percentages to which corporates like Shell should adhere. The Court considered the issue problematic, given the varied nature of carbon emissions, different carbon intensities of fossil fuels and alternating sector outputs. It also found that there was insufficient consensus from climate reports on the reduction figure upon which courts could base an order against a specific company in the oil and gas sector.

Finally, the Court accepted Shell's position that there was insufficient evidence to establish that a reduction in Shell's emissions would lead to a global reduction because end-users would seek out fossil fuels from other sources.

New Zealand's climate change landscape

These issues are yet to be resolved on our shores. In the Supreme Court's decision in early 2024, *Smith v Fonterra* survived the defendants' strike out applications. However, there is unlikely to be a final outcome in that case for years, as it progresses through case management, trial and possible appeals.

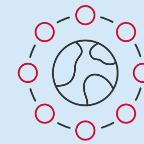
There is more activity in claims against Government. In the second half of last year, the Better New Zealand Trust issued proceedings against the Minister for Transport challenging the Government's weakening of the Clean Care Standard. The group seeks a determination of whether changes to that standard meet the statutory requirement of increasing the supply of zero and low emission vehicles in New Zealand and is consistent with our emissions reduction plan.

Similarly, the High Court this year heard, and dismissed, Major Gas Users' Group Incorporated's appeal from a decision of the Commerce Commission related to input methodology changes in the face of climate policy, which it said resulted in higher gas user costs.

We expect more challenges to decision-making and policy changes in New Zealand over the next few years.

Looking further into the future, we may see some litigation in two other areas within the corporate claims categories:

- Cases concerning decision-making and management of corporations, including possible claims against directors and officers tasked with ensuring the success of a business. Internationally, seventeen 'transition risk' cases have been recorded as issued since 2015, with one new case in 2023.[3] In New Zealand, these claims would face the difficulty that they would need to be shoehorned into the director's duties provisions in the Companies Act 1993.
- Cases challenging the flow of finance or other services such as insurance to projects and activities that are considered high-emitting or are otherwise not aligned with climate policy. This issue was explored as part of the Finance and Expenditure Committee's Inquiry into banking competition, including at the hearings held between October and December 2024.

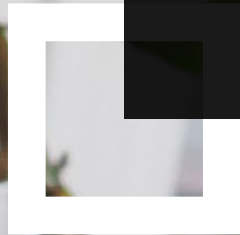


Conclusion

Climate change litigation is still developing both globally and in New Zealand, with climate policy and frameworks being tested to mitigate or slow climate change. As demonstrated by the lengthy discussion regarding social contract in *Milieudefensie*, the cases spotlight the tension between government policy, private rights and public interests. Although the number of climate cases issued is decreasing, new cases are more likely to be brought in a more consolidated and strategic manner.

3 Grantham Research Institute Global trends in climate change litigation 2024 summary: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/06/Global-trends-in-climate-change-litigation-2024_summary-brief.pdf.

An ever-evolving workplace



Workplace:
A state of change

The employment law landscape in New Zealand is poised for significant change this year. The aim is to boost productivity, make it simpler for employers to hire and fire, and reduce compliance costs. Given some of the changes will remove existing statutory rights for employees (and case law developed by the courts), we expect the courts will interpret and apply any changes strictly (as we saw with the introduction and re-introduction of the 90-day statutory trial period). The Chief Judge of the Employment Court has recently indicated that international instruments may inform and influence the Employment Court's interpretation and application of New Zealand laws. This means that legislation will need to be carefully worded in order to clearly reflect Parliament's intention.

Personal grievance reform

High income threshold

Similar to existing laws in Australia, the Government has proposed a law that will prevent employees with an annual base salary of more than NZD180,000 from bringing an unjustified dismissal claim.[1] The Minister for Workplace Relations and Safety has said these changes aim to provide parties with 'greater choice when negotiating'. Parties will be able to opt back in to the existing personal grievance regime by agreement, or they may choose to negotiate their own dismissal procedures. Interestingly, Cabinet has agreed 'in principle' that the threshold will also apply to existing employment agreements for employees earning above the income threshold, with a 12-month transitional provision, subject to the Minister receiving further advice on this.

This proposed change is not dissimilar to other Commonwealth jurisdictions (such as Australia and the UK) but would mark a significant move away from the employee friendly protections including to have access to New Zealand's personal grievance regime irrespective of the amount of an employee's income.

We anticipate that disputes will arise from this law once it is in place. This is because of the material shift in employee access to litigation. Arguments may arise during pre-employment negotiations over the classification of compensation, as employees may prefer a lower base salary with higher benefits or incentive payments to retain unjustified dismissal protections. Further, parties may opt in to unjustified dismissal protections or negotiate their own dismissal procedures, so challenges by employees over the fairness and legality of those negotiations may arise, as well as whether other forums such as arbitration will be permitted to resolve disputes.

Significant changes to employee remedies

In the same pen stroke, the Government is proposing to remove all remedies for employees whose behaviour constitutes serious misconduct, as well as allowing remedy reductions of up to 100% where an employee's behaviour has contributed to the grievance. A 100% reduction in remedies has long been sought by employers, so this will be a welcome change. Additionally, the reforms would remove an employee's eligibility for

1 More flexible dismissal process for high-income employees | Beehive.govt.nz.

permanent reinstatement to their role if their behaviour has contributed to the grievance.

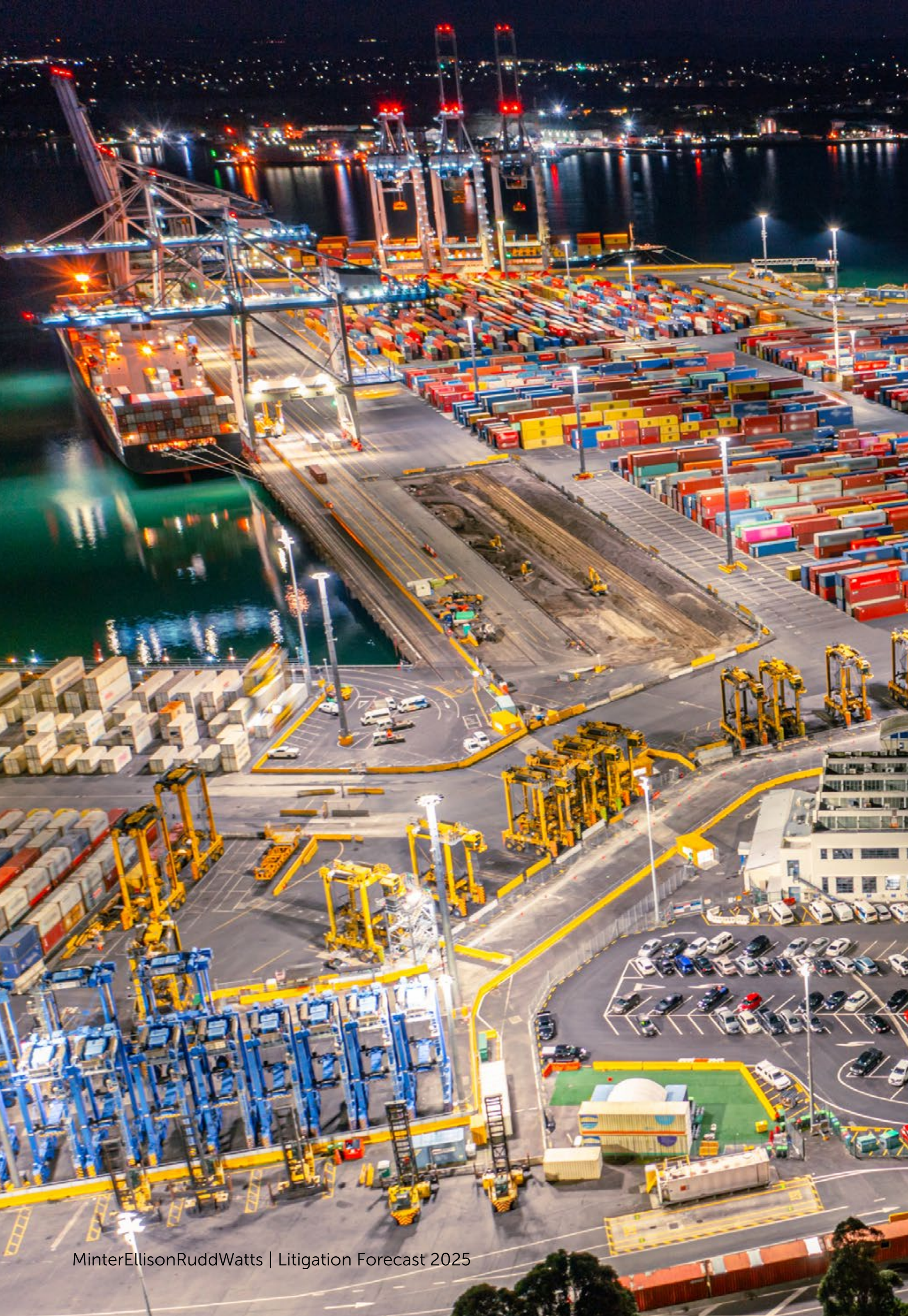
We may see the courts respond to this by 'raising the bar' of what constitutes serious misconduct (given it is a case-by-case assessment that is based in decades old case-law). This may open both employers and employees up to scrutiny over processes and practices that gave rise to the conduct in question

Other legislative change

A Member's Bill aimed at protecting exit negotiations is being considered and would give employers the ability to negotiate an exit with an employee without the risk of certain personal grievance claims. This is similar to laws in the UK that can oil the wheels of departure in a respectful and low-risk way. The courts will face the challenge of aligning this new law with existing employment laws and principles, ensuring consistent application within the broader legal framework. Again, the legislation will need to be carefully worded if disputes over the interpretation are to be avoided or at least minimised.

Worker status continues to rumble through to our highest court (the Supreme Court), with the final appeal by Uber over its decision to uphold the Employment Court's finding that four Uber drivers were employees rather than contractors. The Government's response to this has been to propose a new legislative 'gateway test' for worker status. This legislation would prevent independent contracting relationships from being challenged if certain tests are met. Worker status will remain a prominent issue in 2025. The court decisions to date may encourage more claims from individuals asserting they are employees. While legislative clarity will certainly help, debates over its interpretation and application can be expected.

In summary, we watch this space: draft legislation is expected in the second half of 2025. While it is will be welcome relief for employers, some of these changes will impact workers with union protections. We expect the early adopters of the relief that will be provided under new legislation will face robust challenge, and testing, by both employee representatives, unions, and in our courts. Clarity of drafting to provide certainty as to Parliament's intention will be crucial.



Health and safety litigation:

Officer liability following the Ports of Auckland and WorkSafe's new prosecution strategy

The Ports of Auckland

On 26 November 2024, Tony Gibson (the former chief executive of the Ports of Auckland (POAL)) was found guilty of exposing workers to a serious risk of death or injury in breach of his due diligence duties as an officer under the Health and Safety at Work Act 2015 (HSWA).[1]

This outcome is significant as it is the first successful prosecution of an officer of a large complex organisation under the HSWA. Prior prosecutions against officers have tended to involve small closely held companies or similar organisations, where the officers in question were much closer to the day-to-day operation of the business or undertaking. The only exception to this is the unsuccessful prosecution of the directors of Whakaari Management Limited in 2023 following the Whakaari White Island eruption.[2]

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The prosecution of Mr Gibson stems from a 2020 incident in which a stevedore was killed by a container falling from a crane. Mr Gibson was charged with failing to exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances to ensure that POAL complied with its statutory duty to ensure the safety of its stevedores. The particulars of the charges alleged that Mr Gibson had failed to take reasonable steps to:

- ensure that POAL had available for use, and used, clearly documented, effectively implemented, and appropriate exclusion zones around cranes;
- ensure that POAL had available for use, and used, clearly documented, effectively implemented, and appropriate processes for ensuring coordination between lashers and crane operators; and
- verify the provision and use of the resources and processes described above.

1 *Maritime New Zealand v Gibson* [2024] NZDC 27975

2 *WorkSafe New Zealand v Buttle (No 5)* [2023] NZDC 18939

Health and safety litigation:
Officer liability following the Ports of Auckland and WorkSafe's new prosecution strategy

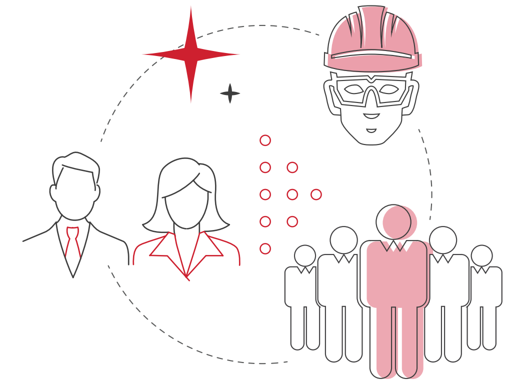
Mr Gibson was found guilt in relation to the first and third particulars but not guilty in relation to the second particular. In reaching its decision, the Court summarised several general principles that relate to the assessment of an officer's exercise of due diligence, including:

- Whether an officer has exercised due diligence must, necessarily, be fact and circumstance dependent.
- The due diligence duty applies to all officers across all PCBUs, large and small, with both flat and hierarchical structures. An officer operating at the head of a large, hierarchical organisation does not mean that the officer's obligations are diminished.
- A breach of duty by a PCBU does not imply an officer's failure to exercise due diligence. Equally, failure to exercise due diligence is a strict liability offence, meaning an officer does not need to act intentionally or even recklessly to be found in breach.
- An officer in a large organisation does not need to be involved in day-to-day operations in a hands-on way but cannot simply rely upon others within the organisation either. An officer must personally acquire and maintain sufficient knowledge to reasonably satisfy themself that the PCBU is complying with its duties under the HSWA. In this regard, an officer must:
  - ensure that people with assigned health and safety obligations or roles have the necessary skills and experience to properly execute their roles;
  - acquire and maintain sufficient knowledge of the PCBU's operations and the work actually carried out "on the shop floor" to adequately identify and address actual hazards and risks;
  - ensure entrenched and adequate systemic processes are put in place to ensure the PCBU complies with its duties (which is described as key in large organisations);
  - ensure there are effective reporting lines and systems for the flow of necessary health and safety information to the officer and others with governance and supervisory functions (again, described as key in large organisations); and
  - engage upon, or arrange, an effective process of monitoring, reviewing and/or auditing of the PCBU's systems, processes and work practices to ensure they are achieving their purposes and being adhered to (as applicable).
- Industry standards, guidelines, and comparators are relevant to the Court's assessment, but not determinative.

While it is unclear whether Mr Gibson will appeal, this case sets a clear precedent that officers of large, complex organisations can be held liable for breaches of their due diligence obligations, even if they are not directly involved in day-to-day operations. This should give officers of large organisations pause for thought.

As we look ahead to 2025, we consider this decision will influence the approach taken by WorkSafe (and other health and safety regulators) to the enforcement of officer duties under the HSWA. While we do not anticipate any immediate spike in the number of officer prosecutions, we do anticipate:

- A greater level of interest by WorkSafe in officer duty compliance more generally. This may include an increase in proactive engagement with officers in the absence of workplace incidents. We may also see WorkSafe placing a greater emphasis on the use of standards and guidelines to support compliance with officer duties, for example, the new *Health and Safety Governance: A Good Practice Guide* released by the Institute of Directors in July 2024.[3]



- An increase in the number of investigations into officer duty compliance following workplace incidents, particularly serious harm incidents. As part of this, we may see the general principles from the POAL judgment (summarised above) influencing the shape and scope of WorkSafe's investigations. For example, we may see a greater focus on issues around assumed knowledge and the degree to which officers appropriately test and challenge the information they receive via health and safety reporting.
- A gradual increase in the number of officer prosecutions under the HSWA, to the extent that this aligns with WorkSafe's new prosecution strategy.

3 *Health and Safety Governance: A Good Practice Guide*, Institute of Directors New Zealand, 16 July 2024.

WorkSafe's new prosecution strategy

In November 2022, Te Tari Ture o te Karauna | Crown Law was commissioned to undertake a review of WorkSafe's prosecution function.[4] In August 2024, Crown Law completed its review and issued a report. At a high level, the report concluded that, among other things, there is *"a level of confusion and uncertainty as to what WorkSafe's remit, priorities, and goals are when it comes to enforcement…"* This results in an excessive number of investigations, placing a strain upon the organisation's resources and negatively impacting the quality and timeliness of investigations. It also requires WorkSafe's legal team to advise on whether to file charges without adequate information and under time pressure. This reality has been reflected in several recent successfully defended WorkSafe prosecutions.[5]

To address these issues, WorkSafe has taken steps to refresh and refocus its prosecution strategy.[6] As we move into 2025 and beyond, WorkSafe has indicated that it will take a more "targeted" approach to investigations and prosecutions in order to "maximise their deterrent effect".

WorkSafe's refreshed strategy is to target three specific types of harm:

Acute harm
being any serious injury, illness, or death that arises from a single event

Chronic harm
being any serious injury, illness, or death, that is caused over time

Catastrophic harm
being any serious injury, illness, or death, affecting multiple people – usually from a single event.

WorkSafe has identified four industries that are the most susceptible to these types of harm: construction, manufacturing, agriculture, and forestry. This is nothing new. WorkSafe has consistently identified these industries as high-risk, and the new prosecution strategy will continue to focus on these areas.

While the impact of this new prosecution strategy remains to be seen, we expect to see a greater focus on incidents of acute, chronic, and catastrophic harm in 2025.

4 *Review of WorkSafe's Prosecution Function*, Crown Law, August 2024.

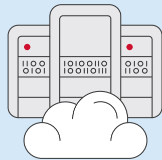
5 *WorkSafe New Zealand v Glenbrook Farming & Equipment Hire Limited* [2024] NZDC 19871; *WorkSafe v Whakaari Management Limited* [2023] NZDC 23224; *WorkSafe New Zealand v RDAgritech* [2024] NZDC 12446 and *Maritime New Zealand v Goodhew* [2024] NZDC 12301.

6 *Where we focus our effort: priority plans 2024–2026*, 26 August 2024; and WorkSafe Strategy 2024.

Cyber and IT

Trends in IT disputes

IT claims and disputes continue to increase in size and complexity. While the risks of technology project failures and cyber-attacks are well understood, litigation resulting from them is increasingly common. In addition to these known risks, last year also saw a new appreciation of the risk of claims and losses arising from IT system failures that result from non-malicious causes, with the global effects of the CrowdStrike IT outage that affected millions of Microsoft users.



We are seeing an increase in IT disputes and litigation in the following areas in particular:

- IT project disputes where the customer claims that promised solutions are not delivered or achieved, estimates or budgets are exceeded, or requirements change
- The fallout from the effects of cybercrime, which can result in a complex web of claims between affected parties and further complexities from their insurance claims
- Disputes arising from inappropriate IT subcontractor arrangements
- Very substantial claims, including 'class actions', arising from breaches of privacy as a result of data breaches (which may result from cybercrime or innocent errors)
- Early indications of an increase in regulatory investigations arising from regulated entities' IT failures affecting their customers

Drivers behind the increase in IT disputes

The rise in IT disputes is partly due to the growing complexity and integration of technology solutions and the process of designing and building them to meet the needs of particular organisations. System failures and data breaches often have significant consequences, leading to disputes over responsibility and cost. Delayed, over-budget, or failed IT projects can severely impact business operations and financial performance, leading to litigation.

Technology underpins almost every aspect of business operations, and contracts that govern the supply of technology services and solutions are critical. As the stakes increase, the likelihood of disputes arising from failures and problems increases as well. We are seeing disputes arising from poorly thought-out projects, unclear performance obligations, ambitious promises, ambiguities in change management processes, termination rights and other causes.

Well-drafted IT project contracts are crucial for avoiding disputes. Even then, terms agreed at a project's inception may become inappropriate as requirements and expectations change. This can lead to disputes, particularly where expectations were unrealistic, solutions were over-promised or the scope is poorly defined. Additionally, hasty contract terminations or a failure to comply with the contractual variation approval process can result in claims and disputes, including claims of repudiatory conduct that may bring a contract to an end.

A relatively new development is an increase in claims where there are assertions of misrepresentations or misleading conduct, often made after projects have gone off-track or system failures have occurred.

In the financial services industry, an uptick in regulatory scrutiny further increases the risk. For example, the Financial Markets Authority (FMA) now imposes a standard licence condition upon licensed entities that specifically require them to maintain appropriate IT systems to ensure that customers' needs are met. Additional obligations are imposed upon organisations that provide critical banking systems, which include director responsibility.

More generally, companies that operate across multiple jurisdictions may find themselves embroiled in cross-border disputes or needing to adapt their contracts to meet higher compliance standards and obligations, such as data protection requirements and cyber breach reporting.

We are seeing some key types of disputes

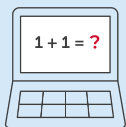
Software implementation failures

While IT disputes have always arisen from software solution implementation failures, project delays and overspends, these appear to be increasing. We see this as likely due to the increasing number and importance of IT systems and projects. Issues generally arise when an organisation engages a vendor to deliver a solution, only to find that the final product falls short of expectations. Disputes normally centre on whether the vendor delivered to all the agreed specifications, whether at all or on time and on budget. The supplier's response is typically that the issues arose, or were exacerbated, by the customer's failure to provide sufficient and timely information and assistance during the process. The involvement of third-party subcontractors appears to be on the increase, with increasing specialisation and products supplied by suppliers who may not themselves manage large scale projects, which complicates claims and disputes further. Disputes arising from these issues are often very complex and expensive to litigate because of the number of relevant issues and documents and the number of parties involved.

Misrepresentation claims under the Fair Trading Act 1986

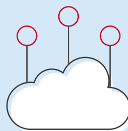
Claims arising from IT projects have usually been framed as breaches of contract, but increasingly they are also brought as misrepresentation claims. We are seeing an increase in claims under the Fair Trading Act for misleading and deceptive conduct alongside more typical breach of contract claims. Promises to a customer about system performance and cost during the procurement phase may prove to be unrealistic, particularly where the customer's requirements are not well understood at the outset and prove more challenging or complex than expected. Sales teams may speak of systems as providing functionality "off the shelf", "fully integratable" with the customer's legacy systems or "state-of-the-art security" without adequately defining these terms or explaining any risks or reservations adequately, which increases the likelihood of disputes and claims.

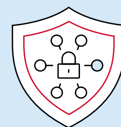
Key types of disputes



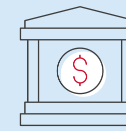
Software implementation failures

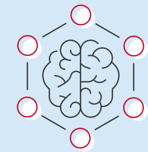
Misrepresentation claims under the Fair Trading Act 1986


Cloud service agreement disputes


Cybercrime

Innocent IT failures


Financial markets


Artificial intelligence

One reason for the increase in misrepresentation claims is that claims under the Fair Trading Act provide an opportunity to circumvent contractual exclusions and limits of liability that are normally found in vendors' IT project contracts. A recent example of this was a successful claim by the Department of Corrections against its IT system provider following the cancellation of a project to replace its human resources management system. The prime contractor was found liable to the Department for its wasted project costs but was able to recover only part of its liability from its subcontractor, which had limited its own liability in its subcontract.[1]

Where a contract purports to contract out of the supplier's obligations under the Fair Trading Act, there will usually be an issue as to whether that was fair and reasonable, whether any rights have been waived,[2] and whether the exclusions should apply to all claims. These issues were tested in the IT context in the Department of Corrections case. In that case, the Court held that a limitation of liability was fair and reasonable in relation to the costs of software design and implementation, but not for the cost of a software licence agreement, primarily because the Judge viewed the latter as a windfall for the subcontractor.

Cloud service agreement disputes

Another increasingly common area of dispute involves cloud service agreements. As organisations increasingly migrate their IT requirements to the cloud, they rely on cloud services providers to ensure the security and availability of their data. Data breaches or service outages, both localised and small-scale or global events such as the recent CrowdStrike outage, can lead to significant claims and conflicts. Where a cloud provider's terms limit liability to the cost of the service, a business suffering substantial losses due to a data breach may find itself with limited recourse. Providers may also change or vary their terms during the course of the contractual term without clearly notifying the customer, resulting in disputes as to what the relevant contractual provisions are.

Cybercrime

Cybercrime continues to increase, as do claims and disputes arising from cyber events. Cyber criminals appear to be increasingly sophisticated, taking more time to search systems for the most critical data and strike in the most effective way. Often this will involve the threatened or actual release of sensitive customer data. A recent example is the cyber attack upon major Australian health insurer Medibank, which has resulted in two class actions against it on behalf of customers whose sensitive health data is claimed to have been released following a cyber-attack. These claims can involve millions of customers, which greatly expands the financial risk and the opportunity for lawyers and litigation funders to become involved in bringing and supporting claims.

Claims arising from the effects of cybercrime can be very complex. As well as the complex web of claims between the victim organisation, its customers, and its service providers who provided the relevant IT systems, each of them will have relevant insurers and there may be a number of relevant insurance policies held by each. Unravelling and resolving these disputes can be very complex.

A typical example is the recent attack upon Lehigh Valley Health Network in the US, whose refusal to pay a ransom led to a data breach in February 2023 and the release of cancer patients' sensitive medical information, including photographs. Unsurprisingly, a class action was filed on behalf of the affected patients, and a settlement was agreed resulting in payments totalling USD65 million. More recently, in August 2024, Microsoft systems in New Zealand including Outlook and Teams faced disruptions and were unable to operate due to a distributed denial-of-service cyberattack.

1 *Chief Executive of the Department of Corrections v Fujitsu New Zealand Limited & Anor* [2023] NZHC 3598. Our firm acted for the third party in this proceeding.

2 This was the case in *CBL Insurance Ltd (in liquidation) v Harris* [2021] NZHC 1393, in which the High Court upheld a limitation of liability clause.

Innocent IT failures

Innocent IT failures can also result in substantial claims. One of the largest IT outages in history occurred on 19 July 2024, when the global cybersecurity company CrowdStrike released a faulty software update which caused widespread IT system outages by rendering approximately 8.5 million devices running Microsoft software unusable. Although a fix was quickly provided, the fault rendered computers unavailable and the fix typically required IT professionals to intervene, which prolonged the resulting downtime. The issue affected only about 1% of Microsoft customers, but the impact was severe because many of those affected were critical service providers. Banks lost access to payment systems, airlines were forced to ground flights, and hospitals had to revert to manual processes. This caused flow-on losses to many other businesses and organisations. Delta Airlines is reportedly seeking to recover losses from CrowdStrike in the vicinity of USD500 million, although CrowdStrike has applied to have this claim dismissed on the basis of the clauses that limit its liability and provide a maximum cap for damages claims. These claims may fall through the cracks of traditional insurance policies, which tend to focus upon cybercrime events.

Financial markets

Financial services regulators are also increasingly issuing warnings about their expectations of regulated entities in relation to the resilience and cyber security of their IT systems which are essential to protect their customers. The FMA conducted a thematic review of the cyber resilience of FMA-regulated operators in 2019, and subsequently introduced new standard conditions for fully licensed financial advice providers (FAPs) as part of the change in the financial advice regime under the Financial Services Legislation Amendment Act 2019. More recently, the Financial Markets (Conduct of Institutions) Amendment Act 2022 (CoFI Act) will impose a standard licensing condition that licensed entities “make sure that their critical technology systems are operationally resilient”.

In July 2022, the FMA finalised six standard conditions for financial institutions. The CoFI Act comes into force in March 2025, by which time all registered banks, licensed insurers and licensed non-bank deposit takers in the business of providing relevant services must have a financial institution licence. Like the standard conditions for FAPs, Standard 5 focuses on business continuity and technology systems. It requires licensees to maintain a business continuity plan and the operational resilience of technology systems if their disruption would materially affect the provision of services or other licensee obligations. Licensees’ business continuity plan and technology systems must comply with their fair conduct programme.

Artificial intelligence

The adoption of artificial intelligence in almost every industry is likely to introduce performance issues, particularly where processes are algorithmically driven without human involvement, vendors cannot be certain of how AI algorithms work, and/or the AI product ‘hallucinates’ an output. Additional issues will likely arise in relation to data protection, copyright infringement or ownership, the allocation of risk and liability, and substantiation of claims about a company’s use of AI – known as “AI washing”.

Dealing with the increase in IT and cyber claims

Disputes involving technology often raise unique and sometimes unprecedented questions. They will remain a significant risk for IT companies and their customers as technology continues to evolve. Who succeeds will depend on the specific facts of each case, including relevant contract requirements, whether any relevant promises or representations were appropriately qualified and whether the relevant contracts include clauses purporting to exclude or limit liability. Organisations may avoid much of the burden of the increase in litigation by being aware of the risks, by investing in their contract processes and building checks and protections into their pre-contract processes to avoid making actionable representations.

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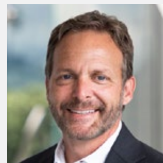

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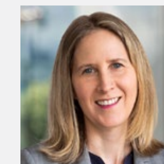

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