



2019

# Litigation Forecast

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**New Zealand's Dispute's Star of the Year, Partner Stacey Shortall** – *Asia Law Asia-Pacific Dispute Resolution Awards 2018*

**New Zealand's Dispute's Star of the Year finalist, Partner Zane Kennedy** – *Asia Law Asia-Pacific Dispute Resolution Awards 2018*

**New Zealand's best National Firm for Women in Business and Law** – *Euromoney Legal Media Group Asia Women in Business Law Awards*

**Best National Firm Mentoring Programme in the Asia Pacific region** – *Euromoney Legal Media Group Asia Women in Business Law Awards*

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# Litigation levers for 2019

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New Zealand businesses saw some substantial changes in 2018, much of it driven by an active enforcement programme by regulators and legislative change. For example, as predicted in our 2018 Litigation Forecast, the past year saw the first test for unfair contract terms being brought by the Commerce Commission and the Labour government rolling out a raft of legislative change, particularly in the Employment space.

We see this trend continuing in 2019, with impetus added by the focus on both sides of the Tasman in 2018 on conduct and culture within the financial services industry and as new legislation here and overseas begins to bite.

In the financial regulatory space, we expect to see heightened scrutiny by regulators on culture and conduct in the financial services industry, and increased enforcement of anti-money laundering and anti-bribery and corruption laws. Similarly in the economic regulatory space, we see continued vigorous enforcement by the Commerce Commission of consumer protection legislation, particularly in relation to responsible lending, retail telecommunications, online retail and motor vehicle sales, with higher fines and penalties being sought and awarded. This will be enhanced by a market studies power and the potential criminalisation of cartel conduct being added to the Commission's armoury.

Class actions has been a slow burn, but several decisions in 2018 will have given encouragement to potential claimants and offer the prospect of more activity in this space, particularly if the Law Commission's currently parked review into class actions is restarted. With the scale of cyber events assailing business (likely to increase in volume and scope in 2019) and rigorous enforcement of cross-border enforcement regimes such as Europe's recently implemented General Data Protection Regulations (GDPR), the potential for further development of class actions adds to an environment of enhanced litigation risk. 2019 will see New Zealand's regulatory response to the threats posed to data integrity with the long anticipated amendments to the Privacy Act expected to be enacted.

Employment, environment and construction are also areas of likely activity in the year ahead. The changes to employment law the Labour government has been rolling out coupled with more emboldened and assertive trade union activity will see further industrial action in 2019 and more cases being brought before the Employment Relations Authority and the Employment Court. We predict an increased focus by local authorities on the use of resource management enforcement tools, and the demand for rapid infrastructure and housing development driving greater litigation around authorisation and consents. The construction industry faces major systemic issues which have

already seen significant and well publicised casualties in 2018. Expect more activity in this space as the legacy created by past practices yields ongoing disputes while broader solutions are sought.

All of this contributes to heightened risk for businesses in 2019 and the potential for becoming embroiled in disputes or subject to regulatory scrutiny and enforcement. Businesses would be wise in these circumstances to tread warily, familiarise themselves with the regulatory regime within which they operate, proactively take steps to embed compliance within their systems and culture, and seek expert advice. Our leading, national litigation and dispute resolution team work closely with regulators and for our clients. We are adept at assisting regulatory investigations, prosecutions and civil proceedings, and with helping businesses plan for the legislative changes impacting on them. We are here to help when you need us.

I hope you find our 2019 Litigation Forecast a useful tool as you navigate the year ahead.

**Sean Gollin**  
Division Leader

# Culture and conduct core focus for financial service sector

Culture and conduct have been key themes of 2018, as regulators in the Financial Services sector were active across a range of focus areas. We predict continuing high levels of activity through 2019, with an emphasis on banking and insurance conduct and culture issues, responsible lending requirements, anti-money laundering enforcement and anti-bribery and corruption efforts.

## **Focus on banks' and insurers' conduct and culture**

Intense scrutiny across the Tasman through the Australian Royal Commission into misconduct in the banking, superannuation and financial services industry, was echoed in New Zealand by the Financial Markets Authority (FMA) and Reserve Bank of New Zealand (RBNZ) review of the major banks and life insurers' conduct and culture.

The misconduct that came to light in the Australian Royal Commission's hearings, together with the Sedgwick report and the APRA Prudential Inquiry into the Commonwealth Bank of Australia, has already seen New Zealand banks and insurers introduce proactive changes to their sales targets, performance frameworks and incentives for front-line staff.

## ***Key issues emerging***

With the FMA and RBNZ having reported in early November 2018 on banks, and in January 2019 on life insurers, we expect banks and insurers to continue assessing their practices, ensuring they are aligned with emerging guidance from the Australian and New Zealand reviews – that is the need to place customer interests at the centre of business.

## ***Increased proactive action from regulators***

Heightened scrutiny by the regulators of conduct and culture issues through 2019 is expected, with proceedings taken when breaches are identified. The Australian Royal Commission was particularly critical of the absence of enforcement action by some Australian regulators, and their failure to prevent widespread breaches of existing laws. The likelihood of enforcement action, rather than 'softer' responses, has therefore increased – we expect New Zealand regulators will wish to avoid being tarred with the same brush.

## ***Potential changes to regulatory frameworks***

There is the prospect of changes to the regulatory framework in light of the regulators' view that there is a gap in their mandates to regulate overall bank and insurer conduct – a number of options have been laid out by the FMA/RBNZ's Conduct

and Culture Reports for consideration by the Government. The government has indicated it is planning to release a consultation paper on proposed changes for the financial services sector by May, and to introduce legislation later in 2019.

**“...we [the FMA/RBNZ] will be expecting to see much deeper accountability of boards, executives and senior managers. We will be looking for progress and clear evidence of change, and want to see this become part of the ethos of all banks in New Zealand.” – FMA/RBNZ**

**Bank Conduct and Culture Report, 5 November 2018, p6**





Disclosure of breaches will also remain a hot topic for banks. In particular, the Reserve Bank has been consulting on a new “Dashboard” approach to quarterly disclosure for locally incorporated banks. The Dashboard requires quarterly reporting in addition to the full year and half year disclosure statements. It is proposed that any breaches of conditions of registration will be published on the Dashboard. This is different to equivalent international jurisdictions. Concerns have been raised that this approach could create issues with the continuous disclosure rules for listed banks under the NZX Listing Rules and could over-simplify the information provided to customers.

### **Responsible lending**

The New Zealand Commerce Commission (NZCC) will continue its focus on responsible lending and the credit sector in 2019. In 2018, there were four warning letters and one judgment issued in consumer credit matters. The NZCC also began High Court proceedings against payday lender Ferratum New Zealand Limited under the Credit Contracts and Consumer Finance Act (CCCFA) over alleged breaches of responsible lending principles.

In 2018, the Ministry of Business, Innovation and Employment (MBIE) sought public feedback on a review of New Zealand's consumer credit regulation. As a result of this, changes to the CCCFA have been proposed to better protect vulnerable consumers from irresponsible lending. These include:

- an interest rate cap on high-cost loans, to stop debt spirals;
- more accountability for mobile traders;
- easier enforcement to ensure fees are reasonable;
- greater transparency and access to redress during debt collection;
- clear responsible lending requirements, to increase compliance; and
- tougher enforcement for breaking the law.

Also in 2018, Cabinet confirmed an amendment to section 99(1A) of the CCCFA, which currently provides that where lenders fail to disclose required information, borrowers are not liable to pay the cost of borrowing (interest and fees) for the period until compliant disclosure is made. The proposed amendment will give lenders the right (for a specified time following discovery of the breach) to seek relief from the courts from the presumption of forfeiture of 100 per cent of the cost of borrowing for the period between the date the amendment comes into force

and the date the breach is discovered (and remedial disclosure provided).

New legislation will be drafted to reflect the above proposals. MBIE has also signalled additional guidance on the Responsible Lending Code. We anticipate these changes will come into force in 2020 and the NZCC will continue to come down hard on lenders seen to take advantage of vulnerable consumers.

### **Greater enforcement of anti-money laundering**

Considerable focus has been directed over the past year by the Department of Internal Affairs (DIA) as supervisor of the implementation of Phase 2 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML/CFT Act). This extended the compliance obligations to lawyers, conveyancers and accountants during 2018, with real estate agents, the NZ Racing Board and high value dealers to come under regulation in 2019. The message from DIA for these newly covered sectors is during the early 'bedding in' days, it will be focussed on a cooperative relationship with an "educative and proportionate approach" to compliance obligations. But there are signs of what will follow if these "Phase 2 entities" do not get their houses in order as expected in good time.

Some of the first civil proceedings brought under the AML/CFT Act were in 2018, for entities in Phase 1.

**“Conduct regulation is no longer a new concept in New Zealand’s financial services sector. All market participants should be fully aware of their licence conditions and/or other obligations under the legislation we oversee. Where we see non-compliance our response will be proportionate to the risk of harm. Lack of time or experience will not be a valid excuse.”**

**– Rob Everett, Chief Executive of the FMA, FMA Annual Report 2017/18, September 2018**

## Civil proceedings brought under the AML/CFT Act

The first defended hearing occurred under the AML/CFT Act, in relation to the sentencing of Qian DuoDuo Limited (QDD). The Court imposed a civil pecuniary penalty of \$356,000 for the admitted breaches of compliance obligations by QDD, an Auckland business which specialised in foreign currency transactions and international money transfers. The breaches were in failing to properly undertake customer due diligence, account monitoring, record keeping and risk assessment. Notably, the DIA had sought a stiff penalty of \$2.5m, out of a maximum available of \$7m.

2018 saw the dismissal of a challenge to the September 2017 judgment against and penalties imposed on Ping An Finance and its director Xiaolan Xiao for breaches of compliance obligations including failures to conduct customer due diligence, keep records, and report suspicious transactions (which saw the company fined \$5.3m). Mr Xiao was bankrupted by the DIA in relation to the unpaid costs award from the case.

The DIA's prosecution of money remitter Jin Yuan Finance Limited for compliance breaches, filed in December 2017, is continuing through the court system at the date of writing. This follows a formal warning that had previously been issued to Jin Yuan.

IE Money Limited, an Auckland money-remitter and forex service provider, was issued a formal warning by the DIA for compliance failures. In commenting, the DIA noted that businesses are required to have robust processes in place to prevent money-laundering and that "when a financial institution continues to fail in meeting their obligations under the AML/CFT Act the Department can and will take action."

### FMA investigations 2017/18



**3211**  
complaints



**17**  
regulator  
impersonations



**41**  
unregistered  
businesses



**21**  
scams

Source: Statistics from: Financial Markets Authority - Annual Report 2017/18



As a sign of things to come, the DIA's resource to undertake action is expanding, with its AML/CFT team planned to increase from 17 staff based in Wellington and Auckland as at June 2018 to a target of 56 full-time staff with a broader geographical focus.

The FMA has also signalled AML/CFT is one of five areas where it is expecting significant investigation and enforcement activity in 2019.

It is clear that Phase 1 entities are now expected to be fully compliant with their AML/CFT obligations, and warnings and prosecutions (particularly if remedial action is not taken where required) are likely to follow where they are found lacking.

The Chief Executive of the FMA stated in the FMA's Annual Corporate Plan for 2018/19 that "we are becoming less tolerant of a lack of attention by firms and individuals" now that key parts of the regime have become more embedded. This is unsurprising given the forthcoming evaluation of New Zealand's AML/CFT policies and practices by the Financial Action Task Force in 2019-20.

Expect AML/CFT compliance to be a continued high priority for each of the supervisors in the coming year.

### **Anti-bribery and corruption**

The last year continued to see action by the Serious Fraud Office (SFO) and others regarding bribery and corruption offences. The SFO reports that the number of bribery and corruption-related

complaints and investigations has risen over the last decade, evidenced in 2018 by enforcement activity which included:

- The prosecution of a bank employee for facilitating bank loans for bribes (as part of a wider fraud) – resulting in a prison sentence of 4 years and 9 months for the bank employee, and 6 years prison for a solicitor who facilitated the bribe payments. The person who made the payment pleaded guilty and was sentenced to 9 months prison for a breach of the Secret Commissions Act.
- The prosecution of an asset manager who had obtained secret kickbacks for sending a disability trust's motor vehicle repairs business to a supplier, and for withdrawing public submissions lodged on behalf of his employer at another trust (without his employer's knowledge) – resulting in home detention and reparation orders for both the asset manager and supplier.
- Charges brought against several people by Police following a joint investigation with the New Zealand Transport Agency in relation to bribes being paid for drivers' licences. One man was sentenced to 11 months home detention.

Expect the focus on corruption to continue. The SFO's view is that "the risk of corruption is increasing and may be more pervasive than is generally acknowledged", even if comparatively New Zealand has low numbers of reported corruption cases. To prevent and deter corruption, key government agencies including the SFO and Ministry of

## **"We are becoming less tolerant of a lack of attention by firms and individuals"**

**– Rob Everett, Chief Executive of the FMA, FMA Annual Corporate Plan 2018/19**

Justice have established an Anti-Corruption Work Programme (ACWP), with the objectives of:

- understanding New Zealand's corruption landscape and vulnerabilities;
- enhancing New Zealand's capability to prevent corruption;
- proactively detecting, disrupting and enforcing laws against corrupt conduct; and
- reforming New Zealand's corruption offence framework.

With the ACWP endorsed by Cabinet, we predict continuing prosecutions for private and public sector corruption, and the prospect of revision of the somewhat archaic Secret Commissions Act 1910 offences (used primarily for private sector corruption) and/or Crimes Act 1961 public sector corruption offences. The question will be whether there are further 'tweaks' made to the Crimes Act (as occurred in 2017), or a more substantial overhaul of the private and public sector corruption offences.

# Competition and consumer regulator shows no signs of slowing

A criticism of failing to take cases to court that was directed at certain Australian regulators, the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority in particular, is not one that has been or is likely to be directed at the New Zealand Commerce Commission (NZCC) any time soon.

The NZCC continues to oversee a pipeline of competition and consumer law investigations, and a healthy portfolio of active litigation. Vigorous enforcement was our prediction for 2018, and that looks set to continue into 2019.

## Legislative enhancements

2018 saw a “bedding in” of the changes to the Commerce Act that were enacted in late 2017, modifying the “cartel provisions” of the Act and introducing new collaborative activities, vertical supply contracts and joint buying exceptions. This was bolstered by new Competitor Collaboration Guidelines issued by the NZCC in early 2018 outlining the NZCC’s interpretation of the new regime.

The coalition Government has, true to its word, prioritised a further amendment Act to introduce (among other changes) a market studies power (or “competition studies” as it is referred to in the Act). Criminalisation of cartels is also back on the legislative agenda, with Labour introducing a

further amendment Bill seeking criminal sanctions for intentional price fixing, market allocation or restrictions on output.

## A regulator “making good” on its enforcement priorities

The NZCC has certainly been “making good” on its enforcement priorities. Retail telecommunications, an enforcement priority for the 2017/18 year, was carried over into the 2018/19 priorities. This year has seen Fair Trading Act cases brought against Vodafone over billing issues and its “FibreX” advertising, and a broadband speed and performance study initiated.

“Non-notified mergers” (i.e. mergers or acquisitions that close without a clearance being sought from the NZCC) is another of the announced priorities for 2018/19. This has been backed up by several investigations under the merger provision (whether the acquisition of the assets of a business or shares substantially lessens competition in a market). Although seeking merger clearance is not compulsory, the NZCC has sent a clear message that it will expect a clearance application unless there are clearly no competition issues.

In other areas of the NZCC’s work, guidance or key compliance messages from the NZCC (eg “Made in NZ” claims, substantiation of representations, and around extended warranties and consumer

guarantees) are being followed up with investigation and case work. The first case asserting unfair contract terms has begun, and we expect to see more in the year ahead.

Responsible lending, online retail and motor vehicle sales are other priority areas for 2019, and can expect attention.

**“Although seeking merger clearance is not compulsory, the NZCC has sent a clear message that it will expect a clearance application unless there are clearly no competition issues.”**

## Fair trading and consumer credit work continues apace

The NZCC continues to seek higher fines and penalties from the Courts, recently obtaining a record Fair Trading Act fine of \$1.88 million against Steel & Tube Holdings for misleading representations about steel mesh (the fine is currently under appeal). The NZCC contended for an end fine range of approximately \$2.7 million to \$3.3 million, three times the highest fine ever imposed under the Fair Trading Act.

Retail telecommunications is a top focus area for the NZCC across both its consumer and regulation work. In 2018, the NZCC laid charges against Vodafone and Spark. Billing issues, particularly billing beyond termination are central to both prosecutions.

The NZCC is also paying particular attention to consumer issues associated with online shopping. It opened four investigations into online retail in 2018,

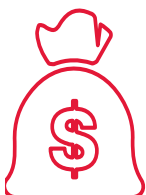
involving alleged issues such as inaccurate product representations, counterfeit goods, and editing of product reviews. The NZCC also filed civil proceedings in August 2018 against Switzerland based ticket resale website Viagogo. The NZCC is seeking declarations; an injunction restraining Viagogo from further breaches; and corrective advertising orders.

As predicted for 2018, the NZCC has brought the first test case for unfair contract terms following its industry reviews into energy retail, telco retail, and gym contracts. The case involves terms relating to a “voucher entitlement scheme” that form part of mobile trader Home Direct Limited’s standard consumer contracts. We have seen further test cases for unsubstantiated representations following Fujitsu, the first case in this area, at the end of 2017. In October 2018, HRV Clean Water was fined after pleading guilty to making unsubstantiated claims about the benefits of its water filter ionisers. The NZCC said that HRV did not have reasonable grounds for claims the filter could soften water through its magnetic process, relying too heavily on information provided by HRV’s supplier without getting this verified by an expert.

### Record Fair Trading Act fines

# \$1.8m

against Steel & Tube Holdings  
(under appeal)



NZCC sought fine  
\$2.7m to \$3.3m

### New Zealand Commerce Commission focus areas



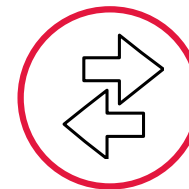
Online  
retail



Telecommunications –  
Consumer & Regulation



Motor vehicle  
sales



Responsible  
lending

Source: Statistics from: New Zealand Commerce Commission Priorities Report 2018/19





### **New “market studies” power already put to use**

A new power to conduct market studies (or “competition studies”), was conferred on the NZCC with the Commerce Amendment Act passed in October 2018. The NZCC is able to conduct detailed reviews into the competitive conditions of markets, either of its own initiative or at the request of the Minister of Commerce & Consumer Affairs. It will be funded to the tune of NZ\$1.5m per year to conduct these studies, which is thought to be sufficient to conduct around one study annually.

Retail fuel has for some time been telegraphed as the likely first industry recipient of a market study, and the NZCC has announced it will review this industry in 2019. Supermarkets and the construction industry have been mentioned in the Hansard debate as possible contenders for future market studies. The NZCC is likely to have views as well, possibly directed at the online world, where a variety of regulators internationally have been looking at competition issues in digital markets.

### **Vigorous enforcement approach to continue**

With a market studies power adding to an already active investigations and litigation portfolio, and potential criminalisation of cartel conduct, we predict the continuation of the NZCC’s vigorous enforcement approach.

# Class actions – change coming, but slowly...

New Zealand's class action regime is in its infancy and lacks a tailored set of procedural rules.

The New Zealand Law Commission announced a project to examine “class actions and litigation funding” early in 2018 only then, unexpectedly, to put the project on hold pending resource availability and due to the priority of other law reform projects. The Commission's project will consider whether a formal procedural regime (and regulation of litigation funders) is required in New Zealand.

Looking ahead to 2019, we predict some progress. The High Court's Rules Committee is consulting on proposed new rules intended to “clarify and formalise” the current procedure for representative proceedings, which will operate as the default in the absence of a properly developed class actions regime.

We expect the year ahead to bring:

- continued dialogue over what a developed class actions regime for New Zealand ought to look like (with an eye to recent reviews and reforms in Australia);
- further development of the case law as pending representative actions progress; and
- several ‘watch-this-space’ group claims in the pipeline.

## Reform needed

There is a compelling case for reform. Even with the status quo, the procedural rules and principles governing representative proceedings must be gleaned from a growing body of cases in which the

courts, using the common law, have been filling the gap left by the absence of detailed class actions rules.

The Rules Committee's proposed new rules to codify the current position will be a useful and important step forward, and likely to improve certainty and accessibility for those bringing or - to a degree - defending group litigation.

The Rules Committee is not, however, considering matters of policy or design (such as whether an opt-in or opt-out regime is more appropriate, or whether regulation governing litigation funders is needed).

Change through legislation is still desirable, in our view, requiring thought, careful analysis and consultation – and so the status of the Law Commission's review remains a key focus for future reform.

**“Our laws are lagging behind other jurisdictions we usually compare ourselves with, such as Australia and the United Kingdom. Practitioners, judges and commentators have argued that the absence of a regulatory regime for class actions and litigation funding in New Zealand is creating inefficiencies in the court system and uncertainty for court users.”**

**– The Hon Sir Douglas White QC, President of the Law Commission**





## Rules Committee proposed rules (representable proceedings)

### Procedure:

Intending lead plaintiffs to file (at the same time as a statement of claim) an application for leave to bring the representative action. To be supported by an affidavit including specified details of the claim, the proposed class, common issues, and to disclose if the claim has litigation funding.

### Governing principles:

Formalising the applicable principles for assessing group claims e.g. that there must be at least one substantial issue of law or fact common to the class (but that there can be individual sub-issues, such as relief and damages, that may require separate determination).

### Limitation:

Confirming that for limitation purposes time ceases to run when the claim is filed, for the lead plaintiff and all those who are later confirmed to be within the class.

## An eye on Australian developments

Australia's class actions regime is much more developed and mature than New Zealand's, however it is still evolving.

Developments across the Tasman signal potential areas for refinement when considering the design for a better class actions framework for New Zealand.

In 2018, there were two reviews conducted of the Australian rules:

- one by the Victorian Law Reform Commission of Victoria's state-level rules, released in March 2018
- one by the Australian Law Reform Commission (ALRC) of the Australian Federal rules to be reported to the Attorney General in December 2018, released on 24 January 2019.

The three main issues considered in the Australian Law Reform Commission's review



## Competing class actions

The Australian regime has permitted “closed class” class actions (where the class definition incorporates only those plaintiffs who have agreed to a litigation funding arrangement). This carries the potential for competing “closed class” class actions with the same or similar claims (potentially funded by different litigation funders and run by different law firms) running concurrently or consecutively. This can cause unnecessary expense and waste of court resources, and is unfair to defendants.

The ALRC consulted on rules requiring the Federal Court to either combine competing class actions or select one to proceed while the other is stayed.

Competing class actions have not so far been a significant issue in New Zealand, although there is scope within the current system for it to become an issue – there are two ongoing class actions against James Hardie in relation to its monolithic cladding, each with a different geographical focus and plaintiff group.



## Contingency fees

Australia is considering whether to permit lawyers to charge US-style contingency fees (i.e. a fee charged as a percentage of the total amount recovered if the claim is successful) – a practice that is currently not permitted in either New Zealand or Australia.

The argument in favour of contingency fees in the class action context is that it may mitigate some of the challenges posed by commercial litigation funding by providing an alternative funding avenue for plaintiffs. Specifically, it may extend the availability of funding options to more cases (e.g. those that are low-value or smaller scale), reduce costs to plaintiffs, and ensure client interests are not side-lined for funders' interests.

The counter-argument is that this can impact the lawyers' incentives and potentially lead to conflicts of interest as between lawyer and client. This needs to balance with the access to justice rationale. The Victorian review recommended allowing contingency fees in some circumstances. The ALRC's final recommendation is that percentage-based fee agreements should be permitted in class action proceedings in Australia provided leave is granted by the Federal Court and subject to some further safeguards such as solicitors being required to provide security for costs. The ALRC considers that these changes may expand access to justice.



## Regulation of litigation funders

Litigation funders are currently lightly regulated in Australia and New Zealand. Litigation funders often sit behind class actions, and assessments of their involvement – such as the terms of a funding agreement – has been the purview of the courts, undertaken on a case-by-case basis. More so in Australia than New Zealand.

The ALRC consulted on a proposal that litigation funders be required to hold an Australian Financial Services Licence. Both reviews suggested that the relevant courts undertake increased oversight of litigation funders and funding arrangements in class actions.

This has relevance for New Zealand, as the Supreme Court has said that the courts do not have a general supervisory role over litigation funders, and saw this as a matter for legislation.

## **‘Watch this space’ group claims**

Plaintiffs had some success in a few actions in 2018. The Kiwifruit growers successfully argued, at a “stage 1” hearing, for a novel duty of care owed and breached by MPI in allowing the PSA bacteria into New Zealand. This result could have a broad impact on the Crown’s operational activities – although the decision is under appeal to the Court of Appeal. Also, in the long-running Feltex case, the shareholders had a measure of success in the Supreme Court, with certain issues to be remitted to the High Court.



### **Kiwifruit growers' appeal**

In 2018, the High Court held that MPI owed a duty of care to Kiwifruit growers in relation to the incursion of PSA.

Watch out for the appeal of the High Court's decision in the Court of Appeal.

### **Feltex shareholders "stage 2" hearing**

In 2018 a Supreme Court judgment went the shareholders' way on certain issues.

Watch out for the High Court "stage 2" hearing which will determine if the shareholders can sustain a claim to damages.

### **Southern Response**

In 2018 a group claim alleging a deliberate policy and settlement was withdrawn; the parties agreed to mediation.

A new claim was filed in September 2018 with new issues and a different group. A first procedural judgment came out in December on the class description and "option" mechanism.

### **Slow progress in cladding class actions**

2018 saw a claim filed against Carter Holt Harvey as well as some minor procedural progress on the two cladding claims against James Hardie. A December 2018 judgment on appeal allowed claims against the JH Holding companies to go to trial.



# Data protection – the perfect storm to justify more focus

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In 2018, there were more than 2000 data breaches reported to CERT NZ – just the tip of a now mammoth iceberg affecting the personal and confidential information of millions of people and businesses globally.

The ever increasing volume and scope of cyber events reflects the new normal that is set to continue expanding its reach throughout 2019. Even in New Zealand, media reports on data breaches occur on a weekly basis, and cyberattacks continue to morph and evolve as criminals develop ever more sophisticated methods to circumvent cybersecurity defences in a never-ending game of cat and mouse.

One of the most significant data protection enactments of the digital era took effect when Europe's gold standard General Data Protection Regulation (GDPR) came into force in May 2018. With extraterritorial reach and antitrust style sanctions, ripples are being felt globally as European data protection regulators flex their muscles. Facebook is facing sanctions of a maximum of USD\$1.6b for breaches of the GDPR, and AggregateIQ (a Canadian based company) is being investigated by the UK's Information Commissioner under the regulator's extraterritorial powers.

In New Zealand, our lawmakers and regulators have been slower to react and respond to the need for stronger individual and organisational data

protection laws in a world where geographical borders mean less, and goods and services are traded by New Zealanders and New Zealand businesses in every corner of the globe. Reforms to the Privacy Act are finally making progress, and should be passed into law in the first half of 2019, despite a four month delay to the Select Committee's deadline to report back. While these proposed reforms aim to make businesses and the Government more accountable to consumers and give the Privacy Commissioner greater enforcement powers, they remain (during the Select Committee stage) comparatively weak. Nor do we see them seeking the extraterritorial reach asserted by Europe through the GDPR or other jurisdictions.

Best practice and good business compels increased and proactive cybersecurity risk management by organisations, irrespective of the status of New Zealand's reforms. In 2019, we will monitor the convergence of GDPR, local law reform, a new National Cyber Security Strategy, CERT NZ's growing visibility, and our commercial regulators increasing attentiveness to cybersecurity.

Added to this mix are the increasingly rigorous national and cross-border data protection compliance regimes, as well as the steady uptick in class action litigation (including in New Zealand [refer to page 13]) both of which will mean greater litigation risk for organisations. In this environment,

**“Best practice and good business compels increased and proactive cybersecurity risk management by organisations, irrespective of the status of New Zealand's reforms.”**

organisations should commit to a 'privacy/data protection by design' framework that aligns New Zealand requirements with gold plated offshore standards, tackles cross-border compliance issues, and ensures sufficient resourcing to respond to a data breach or a cyberattack.

The current refresh of the Government's Cyber Security Strategy and Action Plan (under development by the Government in conjunction with the National Cyber Policy Office in the Department of Prime Minister and Cabinet, and related organisations) will provide some impetus for building cyber resilience by businesses. The refresh project will analyse gaps and opportunities to improve New Zealand's cybersecurity, including through revised institutional arrangements, collaboration with the private sector, efforts to address cybercrime, system-



wide leadership of government information security, and international cyber cooperation and responses. We expect recommendations from the refresh project in 2019.

The renewed focus from government agencies in 2019 should assist organisations to step-up their cyber resiliency efforts. While there remains a degree of consumer apathy over how much personal information is divulged in this digital age – particularly among younger consumers and those who enjoy the benefits of targeted marketing and service provision more than they dislike the sharing of their information – that apathy is not shared by the majority of New Zealanders.

As the data gatekeepers, organisations cannot afford to be complacent about cyber risk. In an increasingly digital society, individuals have a growing awareness of their data protection rights and of the duties owed to them by Government and businesses. We anticipate an increase in information privacy access requests and complaints to the Privacy Commissioner for infractions on individuals' privacy rights. Organisations will need to be equipped and

ready to react to consumer demands for access to, and protection of, personal information, as well as ready to respond to developing national and international compliance standards. The legal risks of inaction should not be overlooked.

### Cybersecurity incidents



**870**  
incidents reported



**\$2.9m**  
in losses



**91**  
unauthorised  
access reports



**27**  
vulnerability  
reports

Source: Statistics from: CERT, Quarter 3 Report 2018



# Employment – back to the future?

As anticipated by our 2018 Litigation Forecast, a raft of legislative change has come through from the current Labour-led Government. The Employment Relations Amendment Bill (Bill) passed in December 2018, adopting a "back to the future" approach by rolling back a large number of changes brought in by the former National-led Government. A number of these changes bolster union powers, including, among other things, reinstating the 30-day rule, giving unions the opportunity to initiate bargaining before the employer and reintroducing the duty on the parties to conclude a collective agreement. Coupled with the significant ramping up of union activities this year, as evidenced by the recent significant spike in strike action, we are likely to see a continuing increase in industrial action and in the number of cases brought before the Employment Relations Authority or Employment Court regarding such matters.

## **Employers will have reduced availability of trial periods and increased settlement costs**

One of the most controversial aspects of the changes is the rolling back of the availability of trial periods and the restoration of reinstatement as the primary remedy in employment disputes. From 6 May 2019, only employers that employ fewer than 20 employees may use a trial period, meaning that only approximately 30% of employers will be able to utilise the provision going forward. Additionally, reinstatement "must" now be ordered by the Employment Relations Authority when it is requested

by the employee and it is reasonable and practicable to do so. As a result, we foresee reinstatement returning to the personal grievance claims books as employees use this remedy as leverage for greater compensation when negotiating settlements. This, in turn, brings a possible increase to the cost in settlements for employers.

## **Pay equity legislation to come into force and claims will rise**

In 2018, legislative developments to address recent scrutiny regarding "equal pay" and "pay equity" flip-flopped heavily, resulting in a significant back-log of cases concerning this matter. However, we expect to see legislation addressing equal pay/pay equity come into force in 2019, and foresee an increase in equal pay/pay equity claims. This may also have a flow-on effect during collective and individual bargaining for increased pay for unaffected roles.

## **Fair Pay Agreements will be brought in**

We are expecting to see further direction on a new concept referred to as "Fair Pay Agreements". Fair Pay Agreements will set minimum terms and conditions (including but not limited to 'pay') for all workers in an entire industry or occupation (and may be expanded under statute to include contractors, not just employees). They are not currently used in New Zealand, but they are a similar concept to the industrial national awards which existed in New Zealand under legislation prior to 2000 and which

**"Fair Pay Agreements will set minimum terms and conditions for all workers in an entire industry or occupation."**

exist in Australia. The Government established the Fair Pay Agreement Working Group in June 2018, chaired by Rt Hon Jim Bolger ONZ, to make recommendations on the design of the system. The Working Group report has been released to the Minister for Workplace Relations and Safety, Ian Lees-Galloway.


## **2019 Predictions**



**Increased**  
industrial action

**Increased**  
employment  
grievances

**Increased**  
settlement costs  
for employers



**"We expect to see businesses continuing to implement innovative ways of working in 2019."**

### **#metoo2019 - WorkSafe will focus on bullying and harassment**

There is no question that 2018 brought bullying, harassment, and appropriate corporate conduct into the spotlight. The impacts of the #metoo movement will continue to unfold in 2019, in both the health and safety and employment space. WorkSafe NZ has committed to building its capability to meet public expectations around sexual harassment and bullying. We expect to see WorkSafe NZ strengthen its attention in this area, as well as other work-related health risks through 2019. In the employment space, we expect the focus on harassment to continue in 2019, and foresee it becoming part of a greater shift towards employers becoming proactive in changing workplace culture.

### **Adoption of innovative ways to work will increase**

High employment levels will result in employers competing to retain employees and offering increased flexibility and innovative work practices. The introduction of the Employment Relations (Triangular Employment) Amendment Bill and the Film Industry Working Group's report (both in 2018) demonstrate that the conversation about the future of the workforce and the suitability of existing employment frameworks is ongoing.

We expect to see businesses continuing to implement innovative ways of working in 2019 to reflect the modern work environment and customer demands (including an increase in automation).

As we continue to move away from a Monday-Friday 9-to-5 work pattern, and employers seek to enable worker requests for more flexible work arrangements, we foresee further litigation on

the employee/contractor distinction. This is particularly in light of developments overseas concerning workers in the 'gig economy' and challenges to the current employment law framework which was built around more traditional work patterns.

### **Holidays Act will change to keep up**

A review of the Holidays Act 2003 is also underway and it is likely that the working group convened to address the problems with this legislation will need to address the significant changes needed to provide clarity on minimum leave entitlements within a framework that accommodates non-traditional and future work models.

### **New 'Dependent Contractor' worker classification**

We expect to see developments in 2019 that will indicate whether New Zealand will follow in the footsteps of the UK by introducing a third category of worker (currently referred to by the Government as a "dependent contractor"), which sits in-between an employee and an independent contractor. There has been a lot of conversation around flexible working this year, including media coverage of private employers introducing a 4 day work week on a permanent basis and employee surveys indicating that pay rises are less important than flexibility to employees.

### **Privacy Act changes will impact workplace obligations**

Finally, employers will need to keep a careful eye on the changes to New Zealand's Privacy Act (refer to page 17) as these changes will also impact on workplace obligations between employers and their employees.

# Health and safety enforcement trends



44

convictions under the Health & Safety at Work Act 2015



23

enforceable undertakings



0

prosecutions against directors

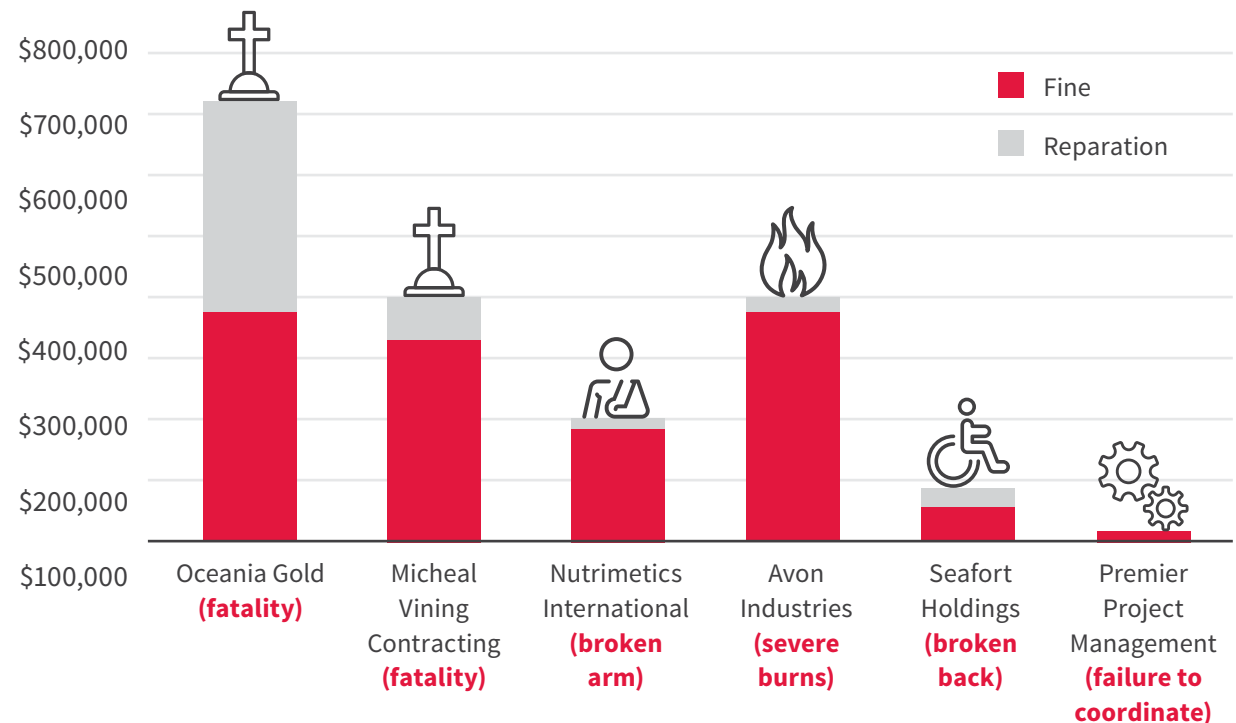
Source: Statistics from: WorkSafe New Zealand



\$266,974

Average fine in the 23 cases where a fine was ordered (no reduction for financial capacity).

## Recent H&S sentencing decisions



# Construction – galvanising a sector

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The construction and building litigation space has been in an active phase, and the past year was notable for the decline and liquidation of some high-profile construction firms. These events have sparked much needed dialogue on a national scale between all key stakeholders. There is hope of isolating the systemic issues affecting the industry throughout the lifecycle of projects, and forging a new and more productive path for all parties involved. A boom in infrastructure and development projects over the coming years necessarily requires a galvanising of the industry to ensure project and stakeholder success.

An issue seemingly systemic to construction industries the world over is the handling (or lack thereof) of the risk of unforeseen ground conditions in contracts between an owner/principal and the contractor. Another key issue is that the success or failure of a construction project relies heavily on the ability of stakeholders on a project (principal, contractor and consultants/subcontractors) to efficiently resolve live conflicts.

The rise of pre-dispute processes and dispute boards is a positive development for the industry, although we feel it is yet to be fully embraced in New Zealand. Where disputes have reached the point of formal litigation, there is tension between lawyers running the litigation process and the experts engaged to

assist them. This can lead to unfortunate outcomes for the expert, lawyer, and ultimately, the client.

## **Government to take the lead on appropriate risk allocation in future contracts**

Given the Government is a significant stakeholder, acting in the capacity of an owner/principal on many high dollar construction and infrastructure projects in New Zealand, we see its leadership on risk allocation in contracts being critical to move the industry in the right direction on this issue. The Government has stated a fairer allocation of risk needs to be struck between principals and contractors and we predict the Government will lead by example on future projects in the coming year.

## **Innovative dispute resolution procedures to become more prominent**

With respect to recently completed or yet to be completed projects, we expect to see ongoing legacy disputes continue as a consequence of the historic imbalance of risk allocation in contracts. As the construction industry grapples with a currently litigious environment, we see innovative pre-dispute or pre-escalation procedures, such as dispute resolution boards, becoming more prominent to assist in the avoidance of costly litigation which ultimately undermines the success of a project and

creates strains on relationships which may continue long after the project has finished.

Tensions between lawyers and experts will continue to persist but heightened awareness of the potential for tensions at the outset of an expert's engagement should assist in a more collaborative and productive process and outcome.

**“We see innovative pre-dispute or pre-escalation procedures, such as dispute resolution boards, becoming more prominent to assist in the avoidance of costly litigation.”**





### Ground condition risk will keep being contentious

Given the difficult climate the construction industry has been navigating, we expect to see the discussion both in New Zealand and globally about the contractor's perspective on unfair risk allocation in contracts continue into 2019. In many cases, contractors feel pressured to assume risk around ground conditions without enough information and/or time to consider the implications, or appropriate contractual protections/carve-outs.

Due to the historic 'lowest bid mentality' this risk is typically excluded in pricing – either directly, or through contingencies or 'tagging' – the contractor possibly hopes to claim a variation post tender

award. However, disputes and cost blowouts follow as the contractor inevitably faces difficulty if the variation relates to the risk assumed under the contract.

Both parties should consider the benefits of facing the issue at the outset – and principals either maintaining or sharing ground condition risk, and/or exploring risk mitigation strategies or appropriate contractual protections. It is also prudent to develop a process where the contractor has sufficient opportunity to investigate to make an informed decision, and price appropriately on ground condition risk. Parties need to be aware that contract provisions that unfairly distribute risks amongst themselves inevitably leads to greater issues for

all and, should those risks crystallise, relationships break down and the project (from all perspectives) suffers.

**“Parties should consider the benefits of facing the issue at the outset – and principals either maintaining or sharing ground condition risk, and/or exploring risk mitigation strategies or appropriate contractual protections.”**



### The use of Dispute Boards will increase

We expect to see the use of Dispute Boards and their functions develop in 2019.

Dispute Boards are a creature of contract, and the contract determines their function. In the United States, Dispute Boards are viewed more as performing a project management function – addressing progress and issues arising during a project, not as a decision making body. In Canada and Australia dispute boards act as review and/or decision making bodies.

While Dispute Boards can hold a variety of functions from interactive, interrogative to ‘adjudication’ bodies to determine (even at an early stage in some cases) disputes arising under the contract, there has been mixed success around the world with these different functions.

Greater success may lie in Dispute ‘Review’ Boards – a proactive and neutral board without an adjudication focus. These boards are, if designed correctly, able to deal promptly and realistically with problems at the time they occur – before the problems develop to a truly adversarial stage and while the facts are ‘fresh’ and prior to the people involved moving on.

### Good lawyer briefings will improve the expert / lawyer relationship

The role of the expert and the tensions between lawyers and experts that arise have been, and will continue to be, a hot topic (despite jurisdictional differences on the role of the expert, these issues appear to be common globally). In the United States there is no code preventing advocacy of the expert and the lawyer plays a crucial role in writing the expert’s brief. In New Zealand, the expert’s overriding duty is to assist the court impartially. Advocacy is not permitted and if an expert is seen as an advocate, the evidence provided will be marginalised as a result.

Experts are often frustrated by the need for guidance from lawyers on the law applying to their evidence and of the embarrassment of being ‘thrown under the bus’ by less experienced lawyers requiring them to perform a role they are not entitled to perform (i.e. determining the ultimate issue in a proceeding) or giving them incomplete or misleading information.

Lawyers may experience frustration when experts want to explore the full picture before the lawyer has crafted the scope of the question to be answered. An expert may not be able to answer any lawyer’s question if they haven’t had the opportunity to gather evidence at an early stage and before it

is destroyed. To solve this issue, lawyers should responsibly brief the expert on their role and the code/law they must follow to produce admissible evidence. They must also provide all relevant evidence for the expert to review – not just the evidence most favourable to their client.

**“Lawyers should responsibly brief the expert on their role and the code/law they must follow to produce admissible evidence.”**

# Increased environmental enforcement on the horizon

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There are three areas which we expect will be a particular focus for environmental litigation throughout 2019:

1. Increased Resource Management Act 1991 (RMA) enforcement action by local authorities;
2. Litigation concerning infrastructure and housing projects; and
3. Litigation on the correct interpretation of requirements relating to the storage and use of hazardous substances.

The Government's proposed changes to the statutory regimes ruling climate change, water and urban development are likely to materialise over the next 12 months, leading to extensive business engagement and debate on what those changes mean for the future direction of New Zealand. However, the changes may be at too early a stage to give rise to much litigation within the next year – litigation to challenge or interpret any changes will be a feature of subsequent years.

## **Increased RMA enforcement**

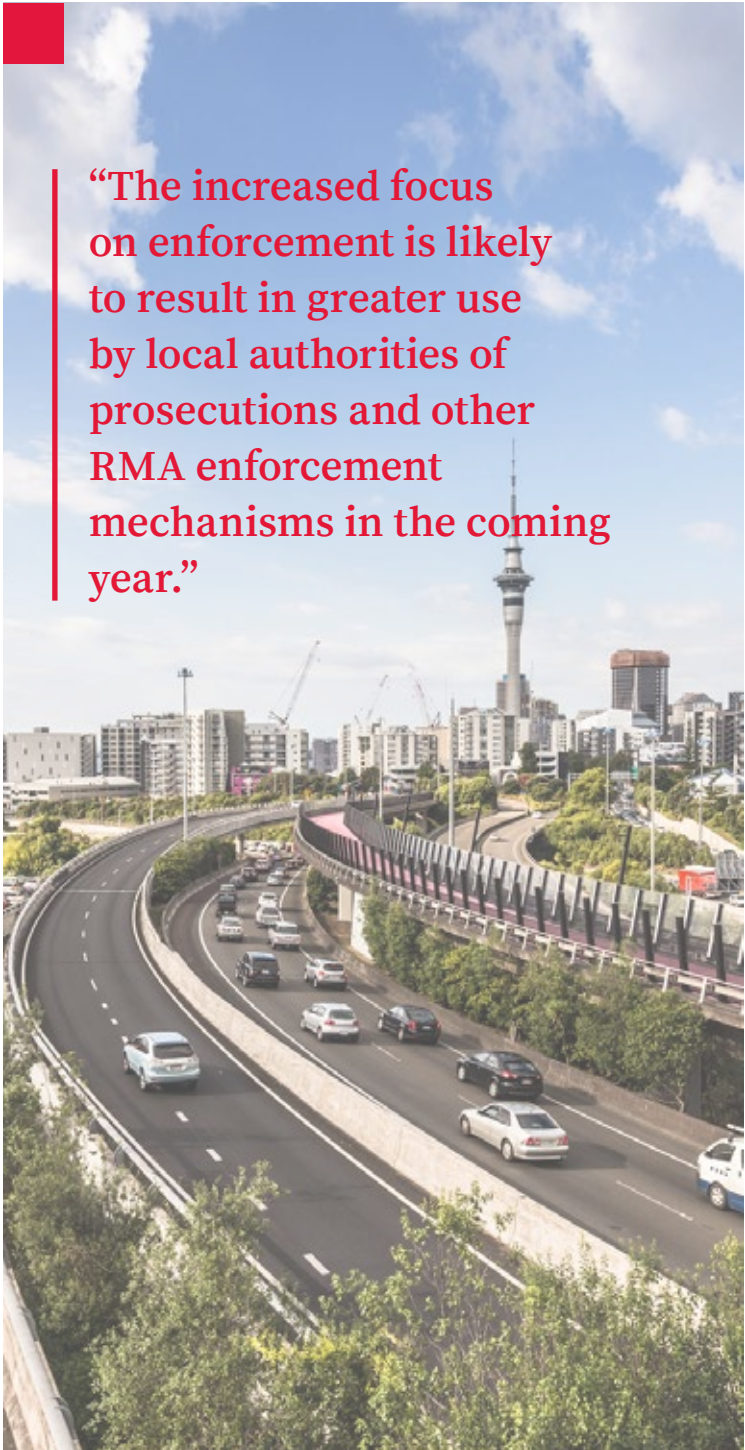
The Government has been clear in its expectation of local authorities being more proactive in

cracking down on environmental offending.

Through the Budget 2018, it proposed a new RMA Enforcement Oversight Unit (Unit) to improve the consistency, effectiveness and transparency of council enforcement decisions. At this stage it is uncertain what shape the Unit will take, however the relatively low level of funding earmarked (\$3.1m over four years) suggests its scope will be narrow.

The increased focus on enforcement is likely to result in greater use by local authorities of prosecutions and other RMA enforcement mechanisms (such as abatement notices and enforcement orders) in the coming year.





**“The increased focus on enforcement is likely to result in greater use by local authorities of prosecutions and other RMA enforcement mechanisms in the coming year.”**

The Ministry for the Environment has also released in-depth guidance to local authorities on RMA compliance, monitoring and enforcement in an effort to improve the consistency in how local authorities undertake those functions.

### **Litigation affecting infrastructure and housing projects**

Auckland is to receive a \$28b boost over the next 10 years to overhaul its transport infrastructure as a result of the Government and Auckland Council jointly funding the Auckland Transport Alignment Project (ATAP). As part of this, \$1.8b of funding has been committed to developing rapid transit from the city to the Auckland Airport, and along the northwest corridor, in the next 10 years.

The Budget has also allocated a further \$369m in capital expenditure and \$234m in operational expenditure to assist in building more state and public housing. Crown Infrastructure Partners has been allocated \$300m over the next 10 years for investment in water and road infrastructure to support the increased housing supply.

Many if not all of these projects will require designations and resource consents, and various other statutory authorisations (with the consequential need for public hearings and, potentially, appeals) and/or public acquisition of land (and associated rights of objection to the Environment Court).

### **Determining the correct interpretation of hazardous substances controls**

With the change in responsibility for hazardous substances controls in workplaces from the Environmental Protection Authority to WorkSafe New Zealand now bedding in, and the relevant hazardous substance controls now largely consolidated under the Health and Safety at Work (Hazardous Substances) Regulations 2017, we are beginning to see some material differences in how the new regulator is requiring controls to be applied in practice. This has the potential to lead to litigation, either enforcement action or (potentially) judicial review to seek to obtain clarity on what is required.

### **More regulations and policy changes to come**

There has been a flurry of discussions, consultations and hints from the Government regarding legislative changes in the environmental sector throughout 2018. Changes are beginning to be implemented, however we expect these changes will gain momentum in 2019 as the Government approaches the beginning of its third year in office.

Litigation in relation to these changes is more likely to be a feature of subsequent years, rather than something we see in 2019.

These changes are focused on three pillars in the environment sector: climate change, water and urban development.





## Climate change

The independent Climate Change Commission and proposed Zero Carbon Bill dominates the Government's focus on climate change. Over 15,000 submissions were received by the Ministry for the Environment on the proposals for the Bill, and it's likely that many changes are being made behind the scenes before the Bill is introduced to the House. The 2018 Budget allocated money to revamp New Zealand's emissions trading scheme, with widespread changes announced in December 2018 by the Government. Further changes are expected to be announced in early 2019. These changes will be provided for in an amendment Act expected in the second half of 2019.

## Water

A multi-agency three waters review has begun, investigating and reporting on the allocation and quality of drinking water, storm water and waste water. This review will take into account the recommendations of the Havelock North inquiry (where legal reform was recommended) and involve extensive cooperation between councils, iwi and all stakeholders with an interest in three waters services. The Government has announced that the necessary works to improve wastewater infrastructure that discharges to freshwater across New Zealand will cost between \$1.4b and \$2.2b.

## Urban development

The Government's new Urban Development Authority (UDA) is poised to facilitate the redevelopment of widespread areas of land, and it may act as the regulator of private developers. The UDA, along with the establishment of an independent infrastructure entity, is likely to support the delivery of major infrastructure projects across the country.

# MinterEllisonRuddWatts' litigation and dispute resolution team

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Our dispute resolution team has an outstanding track record for resolving the most challenging disputes, providing you with practical advice on the law and litigation strategies that enhance your prospects of success. We have acted on some of the biggest cases in New Zealand, and have some of the country's brightest and most capable litigators.

Specialist areas of expertise we can help you with include property and construction, insolvency and restructuring, financial services, employment, economic regulation and competition, insurance, energy, environment and public law.

Our aim is to help you avoid disputes wherever possible, and we can guide you through mediation and arbitration if this is the right option for you. We're also right at home at all levels of the court system including the High Court, Court of Appeal, Supreme Court and the Privy Council. Legal advice across borders and quick access to courts is no problem either, thanks to our international network through the MinterEllison Legal Group.

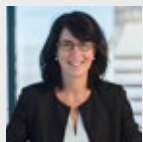
**"More commercially focused than competitors, with great black-letter legal advice to match."**

**– Chambers Asia Pacific 2019**





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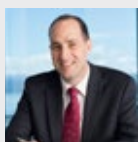
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