Litigation Forecast 2020

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MinterEllisonRuddWatts

Contents

Welcome to MinterEllisonRuddWatts' Litigation Forecast for 2020

Our latest forecast provides a snapshot of regulatory and litigation activity over the last year and highlights the key trends we believe will shape New Zealand's litigation scene in 2020.

If you would like to discuss any of the themes in this report, please contact one of our experts.

Andrew Horne

Jane Standage

Partners and Co-Department Leaders of Dispute Resolution

Climate change risks for companies and directors

Authored by Partner Andrew Horne

Climate change – and the appropriate response – is a defining issue of our time. While there has been discussion about climate change litigation risks for companies and directors, 2020 will be the year that we begin to see some of these issues played out in the New Zealand courts.

Some encouragement to bring climate change proceedings is found in an article published last year by three of our Supreme Court Justices – *Climate Change and the Law*. In it, the judges explain that if companies do not respond adequately to climate change, they may face increased legal risk in direct claims against them concerning their emissions, as well as claims against their directors for breaching their duties under the Companies Act.

Directors' liability: a headline item

At MinterEllisonRuddWatts' annual Corporate Governance Symposium 2019, Professor Will Steffen, Emeritus Professor at the Fenner School of Environment & Science at the Australian National University College of Science, described climate change as the primary topic of the 21st century in the context of directors' duties.

"We have run out of time – the time for talk is over, the time for action is here. We can still make change, however not within the present socio-economic model", says Professor Steffen.

Climate change should be a headline item for directors, who must encourage management to take bold action while accepting that not every initiative will succeed. This is supported by our Supreme Court Justices' article, which expresses the view that there will be an increasing focus on corporate governance issues surrounding climate change.

What are some of the potential claims?

Where directors fail to consider and respond to climate change risks that cause harm to a company, they could face claims that they breached reporting obligations and duties of care, including the risk of regulation, penalties and brand damage, among others. These appear to be the primary risks arising from potential climate change claims.

We see directors as significantly more exposed than companies at present.

Directors can protect themselves from climate change litigation risks

Boards of directors must become what has been described as 'earth-competent', meaning they need to become multi-dimensional in their thinking about climate change. This involves:

- assessing whether boards have the skills, competencies and education to do the best job;
- thinking about how climate change may affect a company; and
- taking appropriate steps to mitigate risk.

In addition, boards of directors should plan for adaptation. This means working together to take greater steps to reduce the risk and impact of climate change in a way that involves customers, investors and employees. The riskiest strategy for directors in this area is, in our view, to do nothing.

2020 will see major NZ companies in the legal spotlight

Although the Supreme Court Justices expressed the view that difficulties of claims against companies are *"starkly apparent"*, the High Court will see in 2020 the first claim made, in any Commonwealth country, against companies for loss and damage alleged to have been caused by their emissions.

The claim, that names seven major New Zealand companies, alleges they have caused the torts of public nuisance and negligence by emitting greenhouse gases as part of their business activities. The litigant, a climate change activist named Mike Smith, claims that the emissions have caused him loss and damage by affecting ancestral coastal lands in which he claims an interest. Mr Smith seeks injunctions against the companies requiring them to reduce their emissions to zero by 2030.

The claim will face significant hurdles under the current law when the issues are played out in Court this year. One issue is that the relief sought is inconsistent with the target of net zero emissions by 2050 imposed under the recently passed Climate Change Response (Zero Carbon) Amendment Act 2019.

MinterEllisonRuddWatts acts for two of the defendant companies

Continued squeeze on directors – increased litigation risk and reduced protections

Authored by Partner Jane Standage

Company directors are called 'directors' because they direct how companies are run. No matter the size of the company, the power to make the big decisions, including setting corporate strategy, ultimately rests with its board. But with great power comes great responsibility.

Historically, directors were largely insulated from liability for the conduct of the company, with few duties owed in their personal capacity and an ability to insure or be indemnified against most risks.

However, this is changing. Recent and proposed amendments to legislation that affect various aspects of company operations, coupled with restrictions on the ability of companies to indemnify directors, show that directors are increasingly likely to be more accountable for a company's liabilities and misdeeds.

Expanding duties

Directors owe statutory, common law and equitable duties to a company, and in some circumstances to its creditors - including duties to act in good faith and in what they believe is the best interests of the company; to exercise their powers for a proper purpose; and to exercise the care, diligence and skill of a reasonable director.

The recent High Court decision ordering the former directors of Mainzeal Property and Construction Limited to pay $36 million to Mainzeal's liquidators is a timely reminder of the significant liability directors can attract for failing to meet the standards of governance imposed by the Companies Act 1993.

Directors will be aware that the *Health and Safety at Work Act 2015* (HSWA) expanded the scope of directors' duties, imposing a new duty upon them to exercise due diligence to ensure that the company complies with the HSWA. Directors who fail to do so are subject to enforcement action by WorkSafe for failure to comply with those duties - and they cannot be indemnified or insured for penalties.

The start of a trend in New Zealand?

This same approach appears to be happening across a range of environments. For instance, the Credit Contracts Legislation Amendment Act (passed in December 2019) further expands the scope of directors' duties by imposing a duty on directors and senior managers of lenders to exercise due diligence to ensure compliance with the *Credit Contracts and Consumer Finance Act 2003* (CCCFA).

Directors are required to take reasonable steps to ensure that the company has appropriate procedures to comply with the CCCFA, detect deficiencies in those procedures and promptly remedy any deficiencies discovered. Failure to discharge this duty exposes directors to prosecution by the Commerce Commission and penalties of up to $200,000 per act or omission.

In a similar vein, the Tax Working Group has recommended making directors who have an economic ownership in a company personally liable for arrears on GST and PAYE obligations where there has been deliberate or persistent non-compliance. The Government considered this a 'high priority', though ultimately did not include this recommendation in its Tax Policy Work Programme for 2019-20.

A recent options paper regarding regulation of the conduct of financial institutions published by the Ministry of Business Innovation and Employment also contemplates the introduction of personal liability for directors and senior managers of financial institutions who fail to discharge the 'overarching duties' of ensuring good outcomes for customers. These include:

- a general duty of care.
- a duty to consider and prioritise the customer's interests to the extent reasonably practicable.
- a duty to pay due regard to the information needs of customers.
- to communicate in a way which is clear and timely.

These proposed directors' duties have not formed part of the recent Financial Markets (Conduct of Institutions) Amendment Bill but may still be on the regulators' radar.

New interpretations to go along with new duties

Beyond adding wholly new duties, existing duties owed by directors may also be interpreted more expansively. Climate change is a notable example. A recent article published by the Institute of Directors suggests that considering, disclosing and taking steps to mitigate foreseeable climate-related risks might be recognised as a component of the director's duty of care under the Companies Act.[1]

For more information on the impact of climate change on corporate decision-making, see page 5.

Limited scope to protect against liability

Following the lead of the HSWA, the Credit Contracts Legislation Amendment Act prevents directors and senior managers of lenders from taking out insurance policies against potential liability and from being indemnified by the company.

This goes a step beyond the restrictions under the Companies Act, which permits such insurance and allows the company to pay for it where it is authorised in the company's constitution; restricts insurance to civil liability; and directors resolve that the cost of the insurance is fair.

The clear intention of these changes is for directors to take greater personal responsibility for the activities of the company and to remove any 'moral hazard' the assumed protection of an insurance policy or indemnity might create.

Board minutes: shield or a smoking gun?

As boards increasingly grapple with how much detail to include in board minutes, we are seeing evidence of the challenges associated with managing the expanding potential for director liability.

On one hand, insufficient detail can expose boards to censure from regulators for failing to adequately consider (or at least document consideration of) compliance risks. For instance, while investigating Wynyard Group Limited for potential continuous disclosure breaches in 2018, the Financial Markets Authority criticised the company's board for inadequately documenting discussions regarding continuous disclosure compliance.

This issue has gained increased salience following the publication of the Australian Royal Commission's report, which singled out the Commonwealth Bank of Australia for its failure to appropriately record board discussions regarding the Bank's AML/CFT obligations between 2013 and 2016[2]. On the other hand, excessively detailed board minutes can bolster regulatory investigations and prosecutions and record unhelpful evidence. A careful balance needs to be struck in managing litigation risk.

Looking forward – what does this mean for directors?

We view the trend of increasing director responsibility as one that will continue. We expect regulators to test the waters by bringing more prosecutions, enforcing duties owed by directors and senior managers in their personal capacity. We will also be watching with interest to see whether personal duties affecting directors might be added to other regulatory regimes (e.g. tax).

Liability deterring enthusiasm for directorships?

If this trend continues, we anticipate this may have a cooling effect on willingness to accept director appointments. In its recent *Director Sentiment Survey 2019*, the Institute of Directors observed an increase in the number of directors reportedly being deterred from assuming governance roles by the increasing scope of potential liability. That is of real concern.

The Institute of Directors has also reported that directors are becoming more cautious in making business decisions, in response to the expanding scope of personal liability. This is also potentially harmful if companies become unduly conservative.

Companies need competent and experienced individuals to sit on boards. If such individuals opt to sit on the side-lines, fearing exposure to personal liability, the quality of corporate leadership in New Zealand will suffer.

Greater compensation?

Another possibility is that directors will expect greater compensation to accept directorships to reflect the increased threat, which will increase the cost of doing business.

Be aware:

Greater exposure to personal liability strengthens the imperative for boards to carefully manage litigation risk. Now, more than ever, it is essential that directors are aware of the personal duties they owe and are proactive in ensuring compliance.

> **The clear intention is for directors to take greater personal responsibility.**

1. *Lloyd Kavanagh "The gathering storm – and how to prepare" (30 Oct 2019) Institute of Directors New Zealand <iod.org.nz>*
2. *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*

Three risks set to pressure businesses (and directors' insurance) in 2020

Authored by Senior Associate Olivia de Pont

2019 brought about several challenges for company directors and officers. The D&O insurance market hardened following a substantial increase in claims in Australia, signs of an increase in the presence of litigation funders in New Zealand, and a rise in the risk and number of class actions and the substantial damages award made against directors in the *Mainzeal* case.

As a result, insurance premiums have increased dramatically, and some insurers have exited the Australasian D&O market altogether.

Looking ahead to 2020, the following trends are likely to place further pressure on the D&O insurance market:

- Securities class action risk
- Regulatory risks
- Climate change risk

These risks should be front of mind for companies' risk officers in the year ahead and considered when D&O insurance cover is purchased or renewed.

Securities class action risk

In the last ten years, Australia has seen an increasing number of securities class actions. Sixteen class actions were filed in 2018, up from an average of four per year just a decade earlier.[3]

A recent article written by our firm's Andrew Horne, insurance broker Marsh and the Institute of Directors noted the impact of this on insurers' financial performance and the market:[4]

The D&O insurance market for publicly listed companies (especially where Company Securities 'Side C' cover or Statutory Liability is included) has incurred the greatest scrutiny over the last two to three years. This change has been driven predominately by the impact of Australian securities class action claims on insurers' financial performance, where the losses incurred greatly outweigh the premium pool available and have done so for several years.

3. Directors and Officers Insurance: Trends and Issues in Turbulent Times (June 2019) at 5.
4. Ibid.

New Zealand is likely to follow this trend

While class actions remain relatively rare in New Zealand, they are on the rise, and may increase further following the Court of Appeal's decision in *Southern Response v Ross* that permitted *'opt-out'* class actions where prospective claimants are deemed to be included in a proceeding unless they expressly opt out of it.

The effect of this decision on the incidence of class actions is not yet clear, as Southern Response has obtained leave to appeal to the Supreme Court (see page 18). However, class actions are nevertheless increasing and expanding to include securities claims.

Directors are likely to be targets. For instance the Supreme Court's 2018 decision in the *Feltex* case that a forecast in a company prospectus was untrue permitted a class action to proceed against its directors. Additionally, a law firm and litigation funder is presently building a book for a claim against the former directors of Intueri Education Group Limited.

Effect: Given this, and the trends seen in Australia, we expect to see an increase in securities class actions and a further hardening of the D&O insurance market.

Regulatory risk

Regulators' focus on conduct and culture is likely to continue into 2020. The Financial Market Authority (FMA)'s 2019/2020 Corporate Plan identified that it will be following up the Banking Conduct and Culture review and its Life Insurance Conduct and Culture review. The FMA and the Reserve Bank have both made it clear that they will be *"expecting to see much deeper accountability of boards, executives and senior managers"*.

Effect: Again, this presents an ongoing risk for directors and officers, and the availability of insurance cover.

Climate Change risk

As discussed on page 5, climate change risks are also increasing.

Effect: Directors will need to consider carefully their risk profile for climate change liability. We expect that insurers will increasingly factor in these risks, particularly from a class action perspective, when pricing D&O cover.

Directors' duties and insolvent trading risk

Authored by Partner Sean Gollin

Insolvent trading risk will continue to be a hot topic for directors and boards in 2020.

In 2019, the *Mainzeal* decision highlighted the risk that directors may be liable for breach of duties when a company experiences financial difficulties. It also piqued the interest of liquidators, creditors and litigation funders in pursuing insolvent trading claims. Significant decisions due to be handed down by senior courts in 2020 will ensure this remains an area of focus for boards and potential claimants alike.

In February 2019, the High Court found the directors of Mainzeal Property and Construction Limited (in liquidation) liable for insolvent trading prior to the company's collapse in 2013, and ordered that they pay, in aggregate, $36 million in compensation to the liquidators[5]. Liability arose in circumstances where the company had been trading while balance sheet insolvent; there was no enforceable assurance of group support on which the directors could reasonably rely if adverse circumstances arose; and the company's financial trading performance was poor and prone to significant one-off losses. An appeal of the decision is due to be heard by the Court of Appeal in April 2020.

The *Mainzeal* decision received widespread media coverage. Mainzeal had been one of New Zealand's largest construction companies. The attention the decision received in part reflected this, as well as the profile of some of the defendants (one of whom was a former prime minister) and the substantial sum awarded as compensation.

The decision was sobering for boards. It provided a blunt reminder of the risks of operating in circumstances of balance sheet insolvency and the need to carefully scrutinise the robustness of shareholder support arrangements, particularly within corporate groups. Additionally, in what many viewed as a departure from the approach to assessing compensation typically taken in insolvent trading cases, the Court awarded compensation notwithstanding that it found the company's liabilities in aggregate had actually decreased over the relevant period.

It is not uncommon for companies to experience periods in which their balance sheet is only marginally solvent or even insolvent. Nor is it uncommon for a company to be reliant on ongoing support from a parent or related company, for instance those fulfilling a treasury function within a corporate group. Scenarios such as these are particularly acute during times of economic volatility and business uncertainty. In the wake of the *Mainzeal* decision, we saw a noticeable up-tick in boards seeking legal advice on the risks of insolvent trading and the adequacy of shareholder support arrangements.

Within a few weeks of the *Mainzeal* decision, the Court of Appeal delivered its judgment in *Cooper v Debut Homes Limited (in liquidation)*[6]. *Cooper* concerned the failure of a small residential property development company and was at the other end of the scale from *Mainzeal*. It nevertheless also addressed the directors' duties engaged on companies operating in circumstances of financial distress.

In *Cooper*, the Court of Appeal found that the director was not liable for insolvent trading notwithstanding that the company's continued operation (to enable the completion and sale of various houses) resulted in the company incurring a significant GST liability to the Inland Revenue Department. The Court considered that the decision to continue to trade in the circumstances was consistent with the director's duty to act in good faith and in the best interests of the company (which, in circumstances of insolvency, equated to the interests of the company's creditors). The Court noted that the company's total exposure at the time of liquidation was less than it would have been had it been placed in liquidation earlier, due to the price achieved from the sale of completed houses being greater than had they been sold earlier in an unfinished state.

An appeal from the Court of Appeal's decision in *Cooper* was heard by the Supreme Court late last year. However, 2019 ended without the Supreme Court having released its decision. 2020 should see that decision handed down and also that of the Court of Appeal in *Mainzeal*. Both decisions will be significant for the guidance on insolvent trading claims. They should not only give greater clarity to directors of financially distressed companies about the risks arising and how they are best managed, but also influence the appetite of liquidators, creditors and their funders for bringing claims.

MinterEllisonRuddWatts acted on the Mainzeal case.

5. MinterEllisonRuddWatts minterellison.co.nz/our-view/learnings-for-directors-from-mainzeal-decision
6. [2019] NZCA 39

Financial services and insurance: further regulation looming

Authored by Special Counsel Fiona Tregonning and Senior Associate Emma Peart

2019 has seen continued focus on conduct and culture-related matters for the Financial Services sector, with legislative and regulatory change signalled following the FMA and RBNZ 2018-2019 banking and life insurance Conduct and Culture Reviews and the fallout from the Australian Royal Commission.

In 2020, we expect ongoing enhanced scrutiny of financial institutions' activities and their efforts to put good customer outcomes at the heart of their businesses. In addition, the AML/ CFT regime is now fully implemented. We expect the supervisory bodies, RBNZ, FMA and Department of Internal Affairs (DIA) will continue their strong focus on enforcing this regime.

Regulatory change and transition

The appetite for regulatory oversight of the financial services sector has increased over the past 18 months, as a result of the various reviews undertaken both in New Zealand and Australia. We are now in a transition phase, with regulatory and legislative changes looming in a number of respects.

Financial markets conduct regime to come:

Following consultation in mid-2019, in September 2019 the Government announced a planned new financial conduct regime to address perceived gaps in regulatory oversight of financial institutions and their intermediaries, and to reduce the risk of harm to consumers.

A Financial Markets (Conduct of Institutions) Amendment Bill was drafted and introduced to Parliament in mid-December 2019. The exact timing for implementation is not yet clear, and regulations will also need to be drafted to implement the new regime.

Key aspects of the new regime include changes to the *Financial Markets Conduct Act 2013* (FMC Act) to:

- Create a licensing regime (under the FMA) for registered banks, licensed insurers and non-bank deposit takers (such as credit unions) who provide 'relevant services'.
- Require licensed institutions and intermediaries to comply with a 'fair conduct principle', to treat customers fairly, including by paying due regard to their interests. This involves:
  - Requiring financial institutions to establish, implement and maintain an effective fair conduct programme through their policies, processes, systems and controls throughout every part of their business.
  - Taking all reasonable steps to comply with the fair conduct programme.
  - Meeting obligations to ensure their intermediaries comply with their fair conduct programme.
- Require financial institutions and intermediaries to comply with regulations to be introduced in due course relating to incentives based on volume or value targets.
- Protect employees and agents who report a breach of the FMC Act or the fair conduct principles to the FMA.

> **"[The Conduct and Culture] reviews by the [RBNZ and FMA] have also highlighted other problems in the banking and insurance sectors, which include weak systems for managing conduct risks and ensuring good conduct is a priority in their business.**
>
> **However, this new principles-based regime leaves much uncertainty about precisely how a fair conduct programme must operate and much of the detail of the Bill has been left to regulations which are yet to be drafted."**
>
> *Commerce and Consumer Affairs Minister Kris Faafoi, 25 September 2019*

Penalties to align with maximum levels for civil liability

The pecuniary penalties for breaches of the new duties will align with the maximum levels for civil liability already in the FMC Act, not exceeding the greater of:

- The consideration for any relevant transaction
- Three times the amount of the gain made or loss avoided, and
- $1 million for an individual, and $5 million for a body corporate.

The Bill provides, however, that no-one can be liable for more than one pecuniary penalty for the same conduct, and that multiple pecuniary penalties cannot be imposed on a person for the same conduct under the *FMC Act, Fair Trading Act,* and *Credit Contracts and Consumer Finance Act*.

Director and executive accountability to be strengthened

Another key development in mid-December 2019 was the announcement by the Government of its intention to increase the accountability of directors of deposit-taking institutions, as part of Phase 2 of the Reserve Bank Act Review.

There will be a third round of consultation in early 2020 regarding the design and details for this, but at present the proposal is to impose positive duties on directors, such as:

- the need to ensure the entity is run in a prudent manner,
- acting with honesty and integrity, and
- dealing with the RBNZ in an open and transparent manner.

Enforcement would be under a civil liability framework, with criminal sanctions applying only where there is clear intent or recklessness by directors.

Development of an ‘executive accountability regime’ is also on the cards, to cover deposit takers and insurers licensed by the RBNZ and FMA. While options are still to be developed, the intention is to bring New Zealand broadly into line with the regimes in Australia (Banking Executive Accountability Regime - ‘BEAR’) and the U.K. (Senior Managers & Certification Regime).

Other changes

2019 saw other changes to the architecture of financial services legislation, which are part of a market wide focus on conduct that will continue into next year.

Amongst these:

- The *Financial Services Legislation Amendment Act* (FSLAA) introduces a new regulatory regime for financial advice, that will come into effect on 29 June 2020.
- A new Code of Conduct for Financial Advice has been approved, also to come into effect in June 2020.
- Draft regulations for financial advice providers’ disclosure obligations were released and consulted on in late 2019 and expected to be finalised in early 2020.

Insurance contract law is also set to undergo change

In December 2019, the Government announced proposed reforms following consultation on an Options Paper. The proposals include:

- Strengthening consumer protections against unfair contract terms in insurance contracts.
- Reforming the disclosure obligation to require consumers to take 'reasonable care not to make a misrepresentation' (effectively, to answer any questions asked truthfully and accurately).
- Ensuring that insurers respond with 'proportionate consequences' when customers fail to disclose material information or make a misrepresentation.
- Codifying the duty of utmost good faith.

In terms of scrutiny, the FMA is to be given extended powers to monitor and enforce compliance with these new requirements, with a resulting overlap in jurisdiction with the Commerce Commission around unfair contract term provisions regarding financial products and services.

An exposure draft of the Bill is to be released in mid-2020.

> **"When there are serious breaches and systemic non-compliance we are willing to take strong regulatory action. It is important that we take regulatory action when there is a risk that criminals are exploiting New Zeland businesses to launder the proceeds of crime."**
>
> *Mike Stone, Director AML Group, Department of Internal Affairs, 17 October 2019*

AML/CFT enforcement to continue

On 1 August 2019, the final categories of reporting entities, the Racing Industry Transition Agency and high-value dealers, became subject to compliance under the AML/CFT regime. The regime is now fully rolled-out, and we have seen significant enforcement activity taking place, which is expected to continue into 2020.

The first trial for criminal offences under the AML/CFT Act took place with a money remitter, Jiaxin Finance Ltd, and two individuals found guilty in November 2019 of criminal offences relating to 311 transactions with a total value of around $53 million. They will be sentenced in 2020 for:

- failing to conduct customer due diligence (knowingly or recklessly, which made this a criminal offence); and for
- failing to keep adequate records relating to a suspicious transaction, and to report a suspicious transaction (both under the standalone criminal offences).

One of the individuals was also found guilty of structuring a transaction to avoid the AML/CFT requirements.

While there is commonality between some conduct that amounts to civil breaches and that which is a criminal offence, we expect the AML/CFT supervisory agencies will reserve criminal proceedings for more serious examples.

The Department of Internal Affairs also obtained judgment in October 2019 in a civil proceeding launched in 2017 against Auckland based money remitter Jin Yuan Finance Ltd (Jin Yuan). Jin Yuan had repeatedly breached AML/CFT compliance requirements, including failing to conduct customer due diligence; failing to adequately monitor accounts and transactions; failing to report suspicious transactions; and failing to keep records.

The DIA had engaged with Jin Yuan extensively over a number of years, and the Court inferred its civil liability actions were intentional and its behaviour misleading. Jin Yuan was ordered to pay a pecuniary penalty of $4 million, including a 15% discount for admitting liability.

During 2019, the DIA also launched two civil proceedings against money remitters - OTT Trading Group Limited and MSI Group Limited.

The FMA and DIA both issued formal warnings to reporting entities under their respective supervisory jurisdictions. While the RBNZ did not issue any warnings to banks in 2019, it signalled to banks it considers the AML/CFT regime is maturing and its appetite for taking more formal enforcement action increased from 1 September 2019.

Ongoing heightened enforcement and scrutiny

While the FMA has not taken a 'Why not Litigate' approach adopted by ASIC in Australia (which saw a 20% increase in the number of ASIC enforcement investigations between June 2018-June 2019), the FMA has nevertheless had a fairly busy enforcement year in 2019, necessitating an increase in its funding for 2019/20.

The increased mandate for the FMA under the new Financial Markets Conduct regime will also require further funding, which is still to be determined. The FMA did signal in its 2019 Annual Report a continuation of a ‘risk-based and proportionate’ approach to enforcement generally, but with a more robust approach, with ‘significant consequences’ to be taken in areas where improvement has been identified as necessary. This includes continuous disclosure, financial advice and AML.

Financial entities can therefore expect ongoing heightened scrutiny, and enforcement action taken to those who lag behind expectations.

There are also plans for an increase in the supervision and enforcement tools available to the RBNZ.
The Government announced in December 2019 - as part of Phase 2 of the Review of the Reserve Bank Act - its plan to increase powers for the RBNZ, to:

- permit on-site inspections by the RBNZ of any licensed deposit taker;
- provide a broader suite of formal enforcement tools, potentially including statutory public notices, infringement fees, enforceable undertakings and civil penalties (further policy work will take place to identify which is required); and
- issue directions to a deposit-taker and enable de-licensing without ministerial involvement.

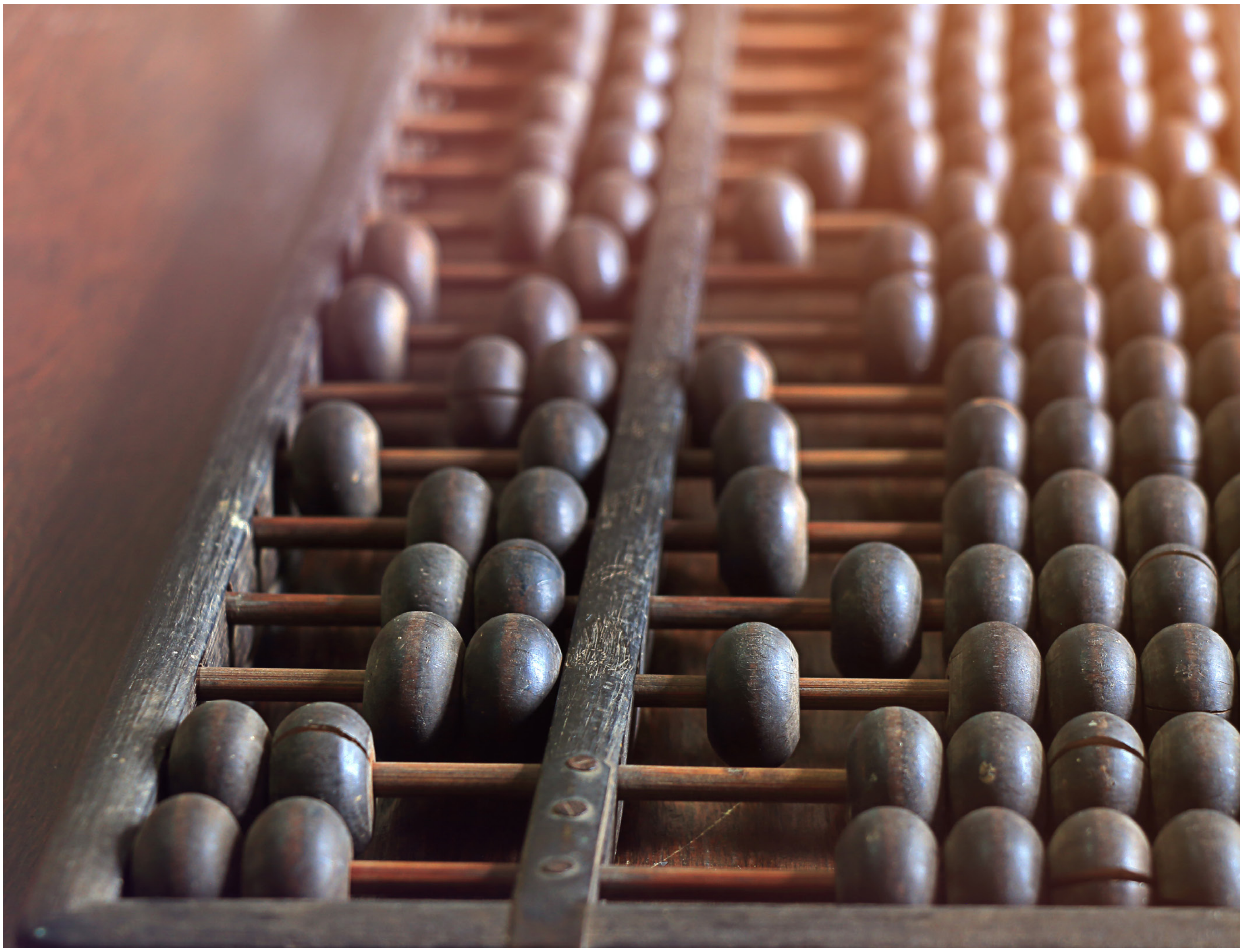
While these plans may take some time to develop, implement and resource, institutions can generally expect an increasingly intensive approach to supervision from the RBNZ, with greater scrutiny of compliance, and in due course greater power to punish breaches.

Conduct will be prioritised by the Council of Financial Regulators

Notably, conduct and governance is also one of the workstream priorities for the Council of Financial Regulators for 2020, to be led by the FMA.

The new conduct regime will mean some overlap with existing regulations and the respective regulators' spheres of influence. In particular, the new financial conduct regime will have some overlap with the *Credit Contracts and Consumer Finance Act 2003* and financial advice regime. This will need to be taken into consideration as the new regime is developed, and ultimately there will need to be co-ordination between the FMA and the Commerce Commission around enforcement.

All in all, those in the financial services sector should generally expect more regulatory oversight and interaction going into 2020 – a position that is unlikely to go away anytime soon.



Commerce Commission: Raring to go in 2020

Authored by Partner Jane Standage

A growing regulator is one to watch and the Commerce Commission is no exception. The Commerce Commission has recently grown significantly both in size as well as functions, powers and duties. This well-resourced and powerful regulator is also looking at changes in nearly all the legislation that it administers. This is set to make a busy 2020.

In addition to the Commission's enduring priorities that include credit issues, product safety, cartel and anti-competitive conduct and mergers, our predictions are that the Commission will be focused on five hot topics of general application:

- **Substantiation claims:** in late 2019 we saw the Commerce Commission requiring businesses to demonstrate the basis on which they have made claims in advertising and whether they are able to substantiate this *at the time* the representations were made. Our pick is that off the back of the first few substantiation cases, the Commission will want to continue to build up a book of case law in this new area.
- **Environmental claims:** this will be a red button issue for 2020. We predict that we will see greater focus on claims such as 'biodegradable' or 'compostable' and 'flushable'. This focus comes after the ACCC, Australia's competition and consumer regulator, was recently unsuccessful in actions it brought against Kimberly-Clark for claims that its wipes were 'flushable' and Woolworths for claims that its 'W Select eco' products were 'Biodegradable and Compostable'. The NZ Commerce Commission has said it will be educating businesses to ensure that claims about the environmental impact of products are accurate and can be relied on by consumers.
- **Privacy concerns:** 2020 may see the Commission's focus widening to include privacy issues particularly where agencies do not follow their own privacy policies or where their policies are onerous or unclear. Unfair contract terms are likely to have a key role to play here.
- **Consumer credit and responsible lending:** the amendments to the CCCFA have now been passed and we expect to see the Commission focusing on making an example out of those directors and senior officers who do not meet the new duties.
- **Greater level of co-operation with other regulators:** this co-operation will need to be stronger than previously seen given the legislative changes. For instance, the new financial conduct regime will overlap with the CCCFA which will require more significant enforcement co-ordination.

New Zealand Commerce Commission focus areas

Online retail

Telco retail service quality

Regulatory rules for fibre broadband services

Environmental impact of products

Fuel market study

Motor vehicle financing and related add-ons

Revenue limits and quality standards for electricity networks

Cartel laws

Source: Commerce Commission Priorities Report 2019/20

Class actions: A new ‘opt-out’ era?

Authored by Partner Nick Frith

Last year, we predicted[7] developments in New Zealand’s class action litigation regime, which has not kept pace with developments in other common law jurisdictions. We have not been disappointed:

- In June 2019, the Law Commission announced that it was reactivating its Class Actions and Litigation Funding project.
- In September 2019, the Court of Appeal issued its landmark decision in *Ross v Southern Response*, in which - for the first time in New Zealand - it made an *‘opt-out’* order, meaning that all potential claimants are automatically included as plaintiffs in the case unless they take a positive step to opt out of the group. The decision has been appealed to the Supreme Court.

Two recent Australian decisions are also likely to provide guidance in New Zealand:

- In October 2019, the Federal Court of Australia issued the first-ever shareholder class action judgment in Australia. Significantly, the Court accepted the *‘market-based causation’* theory - meaning that shareholder class action plaintiffs need only prove that the market (as a whole) was misled, so that they do not need to prove that each individual plaintiff was misled - which is much more difficult.
- And in December 2019, the High Court of Australia issued its decision in the *BMW* and *Westpac* cases, finding that neither the Federal nor New South Wales procedural rules permitted the making of *‘common fund’* orders, which require all plaintiffs in a class to contribute to the costs of funding the litigation.

A busy year ahead

In 2020, we predict that we will see:

- The Supreme Court’s decision in *Ross v Southern Response*, clarifying whether the Court of Appeal’s decision to permit *‘opt-out’* orders will be a lasting change (we predict that it will)
- Progress in the Law Commission’s reactivated Class Actions and Litigation Funding project
- A substantive appellate decision in the Kiwifruit PSA case against the Ministry for Primary Industries
- Interlocutory decisions on representative action procedure in other cases
- A decision on common fund orders, which will impact on litigation funding

We may also see an increase in the number of class actions being pursued, as *‘opt-out’* orders and other developments make them more attractive to plaintiffs and to funders, at least for the time being.

At last, a class action regime for New Zealand?

On 18 December 2019, the Law Commission released terms of reference for its Class Actions and Litigation Funding project. According to the Commission, its review will include, but not be limited to:

Class Actions

- Whether and to what extent the law should allow class actions;
- If class actions should be allowed, how they should be regulated, for example in relation to:
  - the scope of a class actions regime;
  - the criteria and process for commencing a class action, including how a “class” should be defined;
- management of class action proceedings; and
- damages, costs and settlement.

Litigation Funding

- Whether and to what extent the law should allow litigation funding, having regard to the torts of maintenance and champerty;
- The role of the courts, if any, in overseeing litigation funding arrangements;
- Whether and to what extent litigation funders and/or funding arrangements should be regulated, for example in relation to:
  - the nature and extent of the litigation funder’s recovery;
  - the powers and responsibilities of litigation funders;
- the potential for conflicts of interest; and
- disclosure requirements.

While the Law Commission has left open the possibility that reform will not be required, we would be surprised if there was no development. Properly considered reform would reduce the need for costly litigation over the procedural aspects of class actions, improve access to justice and increase certainty for litigants.

Establishing the rules without a formal framework

The New Zealand courts continue to develop a procedural framework for class actions in New Zealand ahead of formal reform. We think that the volume of future class actions in New Zealand is likely to depend, to a large degree, on whether:

- *'Opt-out'* orders are to remain the norm – this will depend upon the Supreme Court's decision in *Ross v Southern Response*
- *Common fund orders* are available in New Zealand. Such orders require all members of the claimant group to contribute to litigation funding costs, regardless of whether they have signed a litigation funding agreement. For obvious reasons, common fund orders make class actions more attractive to litigation funders. We expect that the availability of common fund orders will be decided by the High Court, in the first instance, in the *Ross v Southern Response* case, where an application for such an order has been made.

Of perhaps more academic interest is whether the New Zealand courts will adopt the *'market-based causation'* theory for shareholder class actions, as in the *Myer* case in the Federal Court of Australia. The New Zealand Supreme Court touched on the issue in *Houghton v Saunders*. In relation to Mr Houghton, the Court remarked:

> *"'On the faith of' means in reliance on the truth of the publicly registered document, which informs the market, but does not require that investors have seen or read the prospectus".*

Whether or not this approach applies to all members of the class in that case will be determined by the High Court in stage 2 of the trial, that may be heard in 2020. The outcome will be less relevant to shares purchased pursuant to a regulated offer document under the *Financial Markets Conduct Act*, that contains a rebuttable presumption that purchasers have suffered loss where the shares have dropped in value and the misstatement is proved.

We expect that 2020 will be an exciting year for class actions in New Zealand.

Ross v Southern Response – paving the way without a framework

In September 2019, the Court of Appeal issued a landmark decision permitting the plaintiffs in *Ross v Southern Response* to progress a class action on an *opt out* basis. We cover the case in detail on our website.

Where an 'opt-out' order is made, everyone with the same type of claim as the representative plaintiff will automatically be a class member, unless they expressly opt out of the group.

This was the first order of its kind in New Zealand. The Court was not troubled by the absence of a legislative framework for class actions to make the order. The Court indicated that *'opt-out'* orders will be the norm and whether they are appropriate will be decided based on the circumstances of each case and the interests of justice:

"We are satisfied that there is no jurisdictional barrier to the making of 'opt-out' orders in representative proceedings. Nor is there any policy reason why they should be exceptional. It all depends on the case. In most cases there will be compelling access to justice reasons for making an 'opt-out' order. We do not consider that it is necessary — or appropriate — to wait for detailed legislation about class actions to be enacted before the court is willing to make such orders. The courts have the necessary powers to manage the procedural issues that will arise in the context of opt out representative proceedings."

The decision has been appealed. We expect the Supreme Court to hear and determine the appeal in 2020.

7. *https://minterellison.co.nz/our-view/2019-litigation-forecast-class-actions-change-coming-but-slowly*

2020: The Year of the New Privacy Act

Authored by Partner Briony Davies and Senior Associates June Hardacre and Jennifer Hambleton

It has been coming for years, but 2020 finally looks set to be the year of the new Privacy Act. The much-anticipated privacy reform is making its way through its final stages in Parliament.

The Privacy Bill (first floated in 2012) is now being referred to as the Privacy Act 2020, with hopes that it will be enacted in Q2 2020, and in force in Q3. Given the Bill has bipartisan support, it is likely to be passed in its current state, requiring greater attention to privacy compliance by all organisations in New Zealand.

The Bill's passage into law is a milestone of varied significance

The mixed range of new and old measures in the Bill and the ongoing low penalties for non-compliance, particularly when viewed on an international scale, could affect its significance.

Nevertheless, the enactment commands some attention. The New Zealand Privacy Commissioner has made it clear that he means business with the powers he has been given, and there is an increasing range of options beyond the new Act, including internationally, for organisations to be held to account if they do not take personal privacy and data protection seriously in the years ahead.

'It's 2019, and time to raise your game' was the message from the Privacy Commissioner to New Zealand organisations over the course of 2019, both in terms of overall approach to privacy protection, and in the context of his concerns about the *"pervasive and persistent problem"* of *"click to consent"* data collection (used by agencies worldwide).

Globally, 2019 was a year to be remembered

We saw significant fines levied against global data juggernaut Facebook, as well as sanctions imposed on British Airways and Marriot Hotels for data breaches involving customer personal information. The anti-trust-like levels of financial sanction in these cases demonstrated the might of Europe's General Data Protection Regulation and keenness of data regulators to use the arsenal that is available to them.

Our own privacy regulator is likely to be just as keen, albeit using his own more limited range of tools in his enforcement toolbox. These include the Privacy Commissioner's ability to:

- make binding information access determinations, following requests made by individuals for personal information from agencies;
- issue compliance notices that require an agency to do (or cease doing) something that is inconsistent with the privacy principles; and
- 'name and shame' agencies that are the subject of compliance notices.

Changes will have impact

While the proposed new financial sanctions max out at $10,000 (an increase from $2,000), the reputational impact of 'named and shamed' privacy infringers will be felt in New Zealand's small market.

The Bill's most significant change is that New Zealand will have a Mandatory Breach Reporting regime (following the paths of European, Australian, and Californian privacy laws). The proposed regime will impose obligations on an agency who suffers a data breach to notify both the Privacy Commissioner and affected individuals where the breach could cause 'serious harm'.

Caution against complacency

If breach reporting trends in Australia and the UK are anything to go by, the Privacy Commissioner will have his work cut out for him. In both jurisdictions, the data regulator experienced a significant increase in reporting of breaches; in Australia, the spike in breach reporting was more than 75%.

One difficulty the Privacy Commissioner will face, which he has already publicly grappled with, is whether the resourcing of his office will match the increasing demands placed on it. There is some indication of a resourcing increase, and Kiwi ingenuity will hopefully help bridge at least some of any resourcing gap. It may mean that the Privacy Commissioner needs to make a few high-profile examples of non-compliers early in the new regime and let that set a tone for compliance expectations going forward.

We therefore caution organisations against complacency with respect to privacy. The new Privacy Act 2020 looks set to increase litigation risk for both New Zealand agencies and any agency that carries on business in New Zealand (the Bill does have some extra-territorial effect).

Swimming in the regulator slipstream

The Privacy Commissioner is keenly aware that he is not fully armed on his own to protect the privacy of individuals whose personal information is collected by agencies.

He has argued often and publicly - and to date largely unsuccessfully - for stronger measures to be at his disposal. His office is therefore openly looking around for, and collaborating with, other regulators who are better placed to help fill the enforcement gap.

First in line is the New Zealand Commerce Commission, that is already turning its focus to privacy issues. If international practice is anything to go by, it is likely to have a greater role to play in the privacy arena before long.

Internationally, Facebook has been sanctioned in both the United States and Italy for unfair trade practices by the competition regulators. Further, the ACCC in Australia is investigating both Google and Facebook for unfair practices. The core issue in these types of cases is that agencies are not doing what they say they are doing with personal information, and that is not good enough.

In New Zealand, where agencies are not following their own policies, or policies are onerous or unclear, they risk either:

- a declaration that the privacy policy contains unfair contract terms, or
- engaging in misleading or deceptive conduct in trade.

And the Commerce Commission's 'stick' is far greater than that wielded by the Privacy Commissioner.

2020 – sink or swim

2019 demonstrated that privacy and data protection issues extend into all aspects of organisational culture, management and design, from consumer relations and people functions to legal and commercial risk profiles. Consumers are wising up to the importance of personal privacy protections and are seeing privacy rights enforced in many sectors.

With a new Act in place during 2020, we will likely see our first enforcement action underway within the year, as well as greater activity from the Commerce Commission in this area. No organisation will want to be handed the first sanction. We expect organisations in New Zealand and beyond will need to continually raise their game on protection of personal privacy in the years ahead. Organisations will be well served by treating privacy protection as a cultural norm; to embed it in the design and fabric of how an organisation works.

Employment: Is a re-shaping on the cards in 2020?

Authored by Senior Associate June Hardacre

With 2020 as an election year, we may not see as much of the legislative reform in the employment arena that has been promised, or as we had anticipated this time last year.

However, with an increasing awareness of minimum entitlements we are expecting an uptick in litigation from unions to test new areas of law, such as availability provisions and triangular employment relationships. Another area to watch is the proposal to introduce 'dependant contractor' legislation and 'fair pay agreements'. These proposals would fundamentally re-shape New Zealand's employment law framework and labour market for 2020 and beyond.

Areas to watch in 2020

'Dependent contractor' – a new category of worker?

The use of contractors is standard for most organisations seeking flexible resourcing solutions, along with less 'traditional' work arrangements becoming more common. Against this context, the Government is considering whether a new, third category of worker should be established under New Zealand's industrial relations framework. This category would be somewhere between that of 'employee' and 'independent contractor'.

Under New Zealand's current legislative framework, employees receive minimum employment-related entitlements, rights, and protections. In contrast, contractors largely rely on the contractual terms they negotiate with their principal. These contractors often operate their own businesses and use their own equipment but depend on one entity for most of their income and have little control over their daily work.

The Government has released its special discussion paper on the topic of 'dependant contractors' for public feedback. Depending on the outcome of the Government's review and the 2020 election, organisations might need to reconsider their use of contractors. This may include creating a framework that, under the current proposals, provides certain contractors who would be considered 'dependant contractors' with entitlements and protections such as holiday pay and minimum wage (currently only available to employees). From a litigation perspective, this could mean more status disputes.

Complexity of availability provisions to be felt by employers

Employers will continue to grapple with the complexities and 'grey areas' associated with availability provisions. Availability provisions were introduced in 2016 to protect employees required to be available to work beyond their normal guaranteed hours of work (as agreed with the employer and set out in their employment agreement). Employers are required to have genuine reasons based on reasonable grounds for requiring employees to be available outside the guaranteed hours of work and must provide employees with reasonable compensation in some circumstances. However, employers still have little guidance on what constitutes 'guaranteed hours', 'genuine reasons', 'reasonable compensation' and the circumstances where compensation must be paid, for the purposes of drafting availability provisions. Further complexity is also added when considering non-traditional work arrangements.

We expect to see further litigation on availability provisions in 2020, likely driven by unions seeking to bring claims on behalf of a number of employees. In the absence of legislative amendments, further case law should provide some much needed clarity on the availability provision.

Triangular employment laws to be implemented

From June 2020, new triangular employment laws will be implemented enabling an employee or an employer, in certain circumstances, to join 'a controlling third party' to a personal grievance proceeding. We expect businesses that regularly engage labour-hire companies and 'temp' agencies to feel the effects of this new law the most.

Pay equity and fair pay agreements

We are seeing developments in the pay equity and fair pay agreements spaces. The Equal Pay Amendment Bill is awaiting its second reading, having now been reported on by the Education and Workforce Committee. The Committee shared its views on the Bill and provided its proposed amendments, many of which relate to the pay equity claims section of the Bill. We think this legislation may have significant implications for some employers in target industries.

In the fair pay agreement space, following the Working Group's report, the Government has released another discussion paper obtaining further feedback. Unions are wanting the Government to be more active in progressing this – but given the wide ranging and significant implications for all businesses and other organisations, we can expect this to be a hotly debated issue for election year.

Hurt and humiliation compensation (increases in awards and employees' expectations)

In line with the Chief Employment Court Judge's 2018 decision in *Richora Group Limited v Wai Ying (Melody) Cheng*, the banding approach taken to hurt and humiliation payments under s 123(1)(c)(i) of the *Employment Relations Act 2000* has been informing mediated settlements, and awards in the Employment Relations Authority and Employment Court. Depending on the severity of the harm suffered by an employee and the consequent band they fall into, an employee may expect to be awarded between $0-$10,000 (band 1); $10,000-$40,000 (band 2); or more than $40,000 (band 3). Consequently, employees bringing personal grievances against their employees are often pitching the level of hurt and humiliation they are claiming to have suffered in band two as a starting point and the general trend has been higher awards compared to previous years.

In 2019, we saw individuals pitching their settlement and remedy expectations significantly higher than previous years, and we expect this to continue in 2020.

Holidays Act reform will continue to take shape

A Taskforce was established in May 2018 to review and provide recommendations to improve the *Holidays Act 2003*. This included providing clarity on minimum leave entitlements in the context non-traditional and future work models. The Taskforce has now reported back to the Minister for Workplace Relations and Safety, who is now considering the recommendations.

While a new regime is likely to be 12–18 months away from implementation, it is likely that any legislative changes will not provide a retrospective fix for past non-compliance with the Holidays Act. Businesses with historical non-compliance issues will still have an obligation to address these with employees separate to any new regime.

INZ framework changes

Immigration news has frequently been making headlines throughout 2019. This has been accompanied by Immigration New Zealand (INZ) reviewing its internal procedures and visa frameworks and announcing significant changes to take effect in the near future. Most notable are the changes in the employer-assisted visa space. Key changes include a move to an employer-led visa application process, streamlining a number of existing visa types into a new 'Temporary Work Visa', and using pay (relative to New Zealand median wages), rather than the current ANZSCO skill bands, to categorise jobs.

Employers need keep on top of INZ's announcements, to ensure they are complying with visa requirements and immigration laws as and when they change. This will be crucial to ensure that business can continue to attract top talent and get individuals on-board early.

Health & Safety: Compliant not complacent

Authored by Senior Associate June Hardacre

Health and Safety continues to be the number one item on Board agendas.

With the Health and Safety at Work Act 2015 heading into its fifth year, WorkSafe is focusing on sustainable business models from a health and safety perspective and prioritising the care of workers, rather than compliance alone.

WorkSafe priorities

We expect WorkSafe's key priorities to include:

- **Minimising workplace health exposures:** 750 to 1,000 people are dying each year because of workplace health exposures, such as asbestosis, silicosis, chemical use, and sun-related cancers. Asbestos-related prosecutions are underway, and we predict a greater focus on the prevention of health-exposure harm and increased penalties for businesses failing in this area.
- **Strategic litigation:** We anticipate that WorkSafe will look closely at bringing prosecutions that will develop or clarify the law in a particular area. These include:
  - upstream 'PCBU' duties;
  - officer duties; and
  - discrimination of workers who raise legitimate health and safety issues.
- **Maruiti 2025:** This strategy is aimed at providing a focus for Māori health and safety needs. This is a result of data illustrating a disproportionate level of harm on Māori in the workplace. WorkSafe's aim is to reduce the level of harm to Māori workers to at least the same level as non-Māori by 2025.

Industrial manslaughter

Industrial manslaughter has been an offence in the United Kingdom since 2008 and is an offence in some states in Australia. We expect the discussion on whether to introduce industrial manslaughter in New Zealand to remain live. However, given New Zealand's business community is predominantly made up of small to medium size enterprises, this is not likely to be on the agenda for the Government in an election year.

Health & Safety at a glance

$220,500

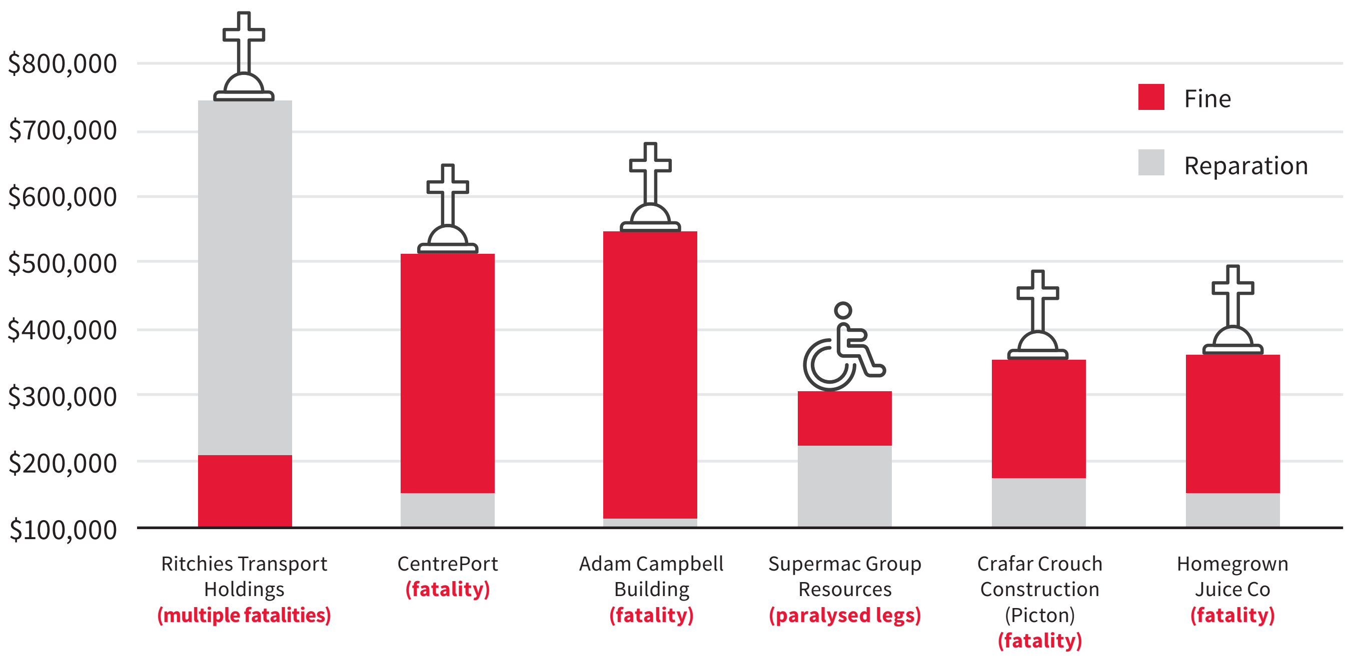
Average fine for
Health & Safety offences

4 enforceable underatakings

50 convictions under the Health & Safety at Work Act 2015

1 prosecution against directors

Recent Health & Safety sentencing decisions



Based on publicly available reporting for 2019

Our litigation and dispute resolution team

Our dispute resolution team has an outstanding track record for resolving the most challenging disputes, and 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. Ranked Band 1 by The Legal 500 Asia Pacific, we have some of the country's brightest and most capable litigators.

Specialist areas of expertise we can help you with include commercial litigation, financial services, litigation, regulatory invesigations, insurance, employment, insolvency and restructuring, consumer and competition, 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 and Supreme Court.

Legal advice across borders and quick access to courts is no problem either, thanks to our international network through the MinterEllison Legal Group.

> **"The team are articulate, competent and always focused on the client, ensuring peace of mind throughout the entire process."**
>
> *Chambers Asia Pacific 2020*

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