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Litigation Forecast 2023

Shaping New Zealand's future

He whakairo i te anamata o te motu

MinterEllisonRuddWatts.

Contents

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Introduction
He kupu whakataki

As each new year starts, it seems that life gets more complex, with new challenges and opportunities to navigate. New Zealand's evolving litigation landscape is no different.

Litigation reflects the biggest issues facing New Zealanders today, and into the future – highlighting the things we care about most.

This year's Litigation Forecast examines the challenges of climate change litigation and greenwashing, the regulators' current focus on business' social licence to operate (rather than simply legal compliance), how slowing global economic activity will impact M&A activity (expect buyers remorse to feature) and create new pitfalls for directors of companies on the verge of insolvency.

We also discuss the complexity of cyber security risks and some of the biggest changes to the country's labour market in decades.

But the more things change the more they stay the same. Excellent legal advice, industry knowledge and experience, astute strategic and procedural thinking and superb client service remain at the heart of dealing skillfully with litigation risk.

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

With a turbulent year predicted by many economic commentators, we are looking forward to supporting clients through 2023 and beyond.

Taking the temperature on ESG and greenwashing

He arotake i te ESG (te taiao, te pū-tāngata me te mana whakahaere) me te māminga tautaiao

What's hot?

Climate change litigation in New Zealand

Consistent with overseas trends, New Zealand is experiencing a rise in climate change litigation. Activists are increasingly turning to the courts to hold to account those perceived as directly or indirectly contributing to climate change. Governments were the initial target, with complaints largely founded upon allegations of failures to do enough to meet international or domestic commitments. More recently, however, private companies that are perceived to have substantial carbon footprints have also emerged as targets.

Photo Arvind Vallabh / Unsplash

In our view, this trend is likely to continue. Private companies' exposure to climate litigation will continue to increase as activists become more engaged and emboldened by litigious activity in overseas jurisdictions, and governments and regulators begin to consider related regulatory action.

In this article, we summarise the key risks associated with increased climate litigation.

Commercial enterprises

The most significant climate change proceeding before the New Zealand courts is *Smith v Fonterra & Ors*[1], which presently awaits a decision by the Supreme Court upon the defendant companies' application to strike out the proceeding as untenable[2]. *Smith* illustrates the challenges that activists present to large enterprises that may be perceived (not always correctly) as having substantial carbon footprints.

Mike Smith, a climate change activist, and spokesperson for the Iwi Chairs Forum, brought proceedings in the High Court against seven companies that he viewed as contributing to climate change. The companies he selected represented a range of industries, including some that generated greenhouse gas emissions directly in New Zealand, others that supplied fossil fuels or facilitated their supply in New Zealand, and one that did not contribute to meaningful greenhouse gas emissions in New Zealand but supplied coking coal (a necessary ingredient in the manufacture of steel) to overseas customers.

Mr Smith pleaded claims in the common law torts of negligence and nuisance, as well as asserting a new tort which he proposed would impose a duty not to contribute to dangerous interference in the climate system. He sought declaratory remedies and injunctions requiring that each defendant reduce their emissions to net zero by 2030, notably a more stringent requirement than the New Zealand Government's own climate targets.

The High Court struck out Mr Smith's claims in negligence and nuisance, but not the proposed new tort. The Court of Appeal subsequently struck out all of Mr Smith's claims. Mr Smith then appealed to the Supreme Court. The appeal was heard over three days in August 2022 and a judgment is presently awaited.

1 *Smith v Fonterra Co-operative Group Limited* [2022] NZSC 35 (Supreme Court leave application decision) and [2021] NZCA 552 (Court of appeal decision).

2 Disclosure – MinterEllisonRuddWatts represents two of the defendants.

To date, the New Zealand Courts have been unwilling to allow Mr Smith's case to proceed to trial because the common law torts traditionally require a proven causal link between the actions of the defendant and the harm suffered by the plaintiff. Climate change is notoriously challenging in this respect; everyone contributes to climate change, and everyone is also a victim of it, in each case to a greater or lesser extent. In the context of a global climate system in which the effects of human conduct are complex and occur over generations, how can there be any realistic prospect of proving that the actions of one enterprise contributing an infinitesimally small proportion of global emissions have any effect upon a single plaintiff? Even if the action was not struck out and allowed to proceed to trial, the defendants say that the plaintiff would face a very significant evidential challenge. It remains to be seen whether the Supreme Court will confirm the approach taken by the Court of Appeal.

If Mr Smith's case is allowed to proceed to trial, the floodgates will open for activists to bring similar proceedings against other enterprises. These need not be private companies, although many large emitters are. They could also be Government entities such as those engaged in large infrastructure projects. It is noteworthy that in the Supreme Court hearing of Mr Smith's case, the Court permitted no fewer than three additional organisations that were not directly involved in the proceeding to attend Court and file written submissions, although not all were permitted to speak. In this case, Lawyers for Climate Action NZ Inc., Te Hunga Rōia Māori o Aotearoa – The Māori Law Society, and the Human Rights Commission were all granted permission to intervene, file submissions and attend the hearing. We see this as an indication that action by climate activists may encourage others to take similar action.

In overseas jurisdictions, while most climate change activists have failed, there have been a few rare successes. In the Netherlands, the environmental group Milieudefensie successfully sued Royal Dutch Shell for its contribution to climate change.[3] The Hague District Court held that Shell, by failing to adequately reduce its carbon emissions and to commit to the same moving forward, breached its duty to comply with an unwritten standard of care set out in the Dutch Civil Code. The Court ruled that the unwritten standard of care required Shell, when determining its group corporate policy with respect to carbon emissions, to observe due care, which the Court found it had not. The Court ordered Shell to reduce its worldwide emissions by 45% of its 2019 levels by 2030, including those of the end users of its products. Unsurprisingly, Shell has appealed the decision.

While there are significant differences between the laws of New Zealand and the Netherlands (which mean that the Shell decision is not directly relevant here), the fact that an activist's claim against an oil major has succeeded in a court in a credible jurisdiction is likely to encourage activists everywhere. It is no longer unthinkable that a court in a credible jurisdiction would order a large oil company to reduce its emissions and those of its customers substantially.

The significance of these cases may lie less in their immediate outcomes than in the increasing number of organisations that are becoming involved in climate change litigation against private companies. We see this as a trend that is likely to become more relevant to an increasing number of commercial enterprises. At the least, they will incur the cost and disruption of defending the claims. The claims may also result in increased scrutiny from Government, the media, customers, and investors.

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

The regulators

In a recent address to the Assembly of Investment Chairs, Otago Business School alumnus Lachie McLean shared the startling results of his research into responsible investment practices. Mr McLean's research identified that in a sample of investment portfolios, the carbon intensity of ESG-named funds had similar – if not greater – emissions intensities than non-ESG named funds.

We expect to see significant regulatory action by the Financial Markets Authority and other regulators in response to unlawful 'greenwashing' in 2023. For a deeper dive into the regulators' approach to ESG claims, see the following article *Greenwashing: A regulatory focus for 2023 and beyond*.

Government

Climate change activists have recently filed two significant court proceedings against New Zealand Government entities.

Lawyers for Climate Action NZ Inc. filed judicial review proceedings against the Climate Change Commission and the Minister for Climate Change, asserting that the Commission's advice to the Minister regarding emissions budgets and New Zealand's Paris Agreement targets was irrational in its reasoning and defective in its lack of ambition – i.e. it did not go far enough. The Court delivered its judgment in late November 2022, dismissing the application and finding that the Commission acted lawfully. The Court held that the Commission interpreted the law correctly and had the power to make the decisions it made. However, the Commission's presentation of its analysis had the potential to mislead, in relation to whether it aligned with the Paris Agreement target to limit global warming to 1.5°C.

On the question of whether costs should be awarded, the Judge noted that climate change is an important issue and judicial review provides an important check on the Commission's tasks. In addition, challenge and debate can lead to better outcomes including enhancing the relevant body's legitimacy. The underlying message was that the Court discouraged the Commission from seeking costs against the unsuccessful applicant. This is likely to encourage activists to bring similar cases.

In a separate case[4], activist Mike Smith (referred to above) also filed High Court proceedings against the Crown, alleging that the New Zealand Government failed (in his view) to take appropriate steps to mitigate climate change, breaching his rights to life and culture as enshrined in the New Zealand Bill of Rights Act 1990, obligations sourced in Te Tiriti o Waitangi, and a previously unrecognised duty of care. As with his claim against the seven private companies referred to above, Mr Smith's claim was struck out on the basis that it disclosed no tenable cause of action. Nonetheless, the proceeding reveals the myriad ways activists might challenge Government agencies in relation to climate change.

Overseas, the Full Federal Court of Australia recently overturned a first instance ruling that the Minister for the Environment had a duty to take reasonable care to avoid exercising statutory powers in a way that could cause harm arising from greenhouse gas emissions. In *Minister for the Environment v Sharma*[5], a group of teenagers brought proceedings seeking to stop the intensification of production at a coal mine. At first instance, they had some success; the Court held that the Minister had a duty to take reasonable care to avoid causing personal injury or death to children in Australia when considering an application to extend a coal mine. On appeal, the Federal Court disagreed, holding that it would be inappropriate to impose a duty on the Minister that was inconsistent with the relevant statutory framework and that this was a political decision rather than one for the courts to determine. The judges also remarked, in different ways, upon the difficulty in proving that the relationship between the children and the Minister was sufficiently close or direct for a duty to arise.

Although the proceedings referred to above have yet resulted in final success for the plaintiffs, a survey of decisions from other jurisdictions, including Germany, the USA, the Netherlands, and Pakistan, confirm that this type of litigation is on the rise and that in some rare instances the plaintiffs may have some measure of success. We see it as likely that New Zealand Government and commercial entities will continue to face challenges from climate activism.

"It is likely that New Zealand Government and commercial entities will continue to face challenges from climate activism."

4 *Smith v AG* [2022] NZHC 1963.

5 *Minister for the Environment v Sharma* (No 2) [2022] FCAFC 65.

Greenwashing:

A regulatory focus for 2023 and beyond

"Zero carbon", "low emissions", "socially responsible"– these are some of the environmental, social or governance (ESG) claims made by businesses to attract customers and investors. Many customers, investors and other stakeholders are keen to vote with their feet to support a better world. But all may not be as it seems.

Overseas, greenwashing trouble is brewing. Banks have made headlines for signing up to a global climate pledge which allowed them to invest unlimited amounts in coal mining and coal power despite promises to tighten the lending rules. In response, the European Central Bank declared in late 2022 that banks face litigation if they do not keep their climate pledges or meet targets they have announced. In Germany, the police raided Deutsche Bank's asset management arm following whistle blower claims that the company was misleading investors about green investments. The German regulator alleged that ESG factors were not taken into account in a large number of investments.

Turning to the Pacific, the Australian Competition and Consumer Commission launched a crackdown on greenwashing in October 2022. It will review over 200 company websites to identify misleading or deceptive ESG claims with possible enforcement action to follow.

Against this backdrop, and the ever-increasing importance New Zealand consumers place on sustainability credentials[1], we should be in no doubt that greenwashing will be front of mind for New Zealand regulators. The regulators have already been carefully scrutinising greenwashing claims, putting in place a variety of legal frameworks and guidelines to make ESG claims more transparent and accessible, and to clamp down on misleading and deceptive ESG claims. Investigations, enforcement actions and complaints in this area are likely to be on the rise in 2023 and beyond.

1 In a 2019 survey by the New Zealand Sustainable Business Council, sustainability was a mainstream concern for 87% of New Zealanders and at least 47% said they cared about sustainability when choosing a brand/product to purchase.

Regulators' focus in New Zealand

Financial Markets Authority (FMA)

In mid-July 2022, the FMA conducted a review of managed fund documentation for integrated financial products (financial products that incorporate non-financial factors, such as ESG factors, alongside financial factors) (IFP funds). The FMA identified issues with the quality, utility, and accessibility of the information that IFP funds provide to their investors in required disclosures.

The FMA found that despite releasing its 'Disclosure framework for integrated financial products' in 2020, "*Managers of IFP funds [still] had a lot of work to do and that the FMA now expected them, assisted by their supervisors, to take the necessary care not to mislead or confuse investors with greenwashing*". Some key issues identified in the review were that the funds did not adequately explain what IFP funds exclude and why, nor their approaches to positive screening (seeking to invest in companies that support their ESG policies) such as investing in clean energy.

More generally, we can expect to see the FMA using its powers under the fair dealing provisions in the Financial Markets Conduct Act 2013 in relation to misleading and deceptive claims, and unsubstantiated representations where an entity has overstated its ESG credentials. And with the new climate-related financial disclosure regime upon us for January 2023, this new regime will be a new frontier of litigation for the financial sector.

We may in time see new claims being driven by AI tools such as ClimateBert which is a tool designed to analyse climate-related corporate disclosure.

Commerce Commission

To date, the Commerce Commission has largely been focused purely on environmental claims rather than broader ESG claims. It released guidelines in 2020 on composition claims (recycled content, 'free-of' claims, and organic), production claims (made with renewable energy, sustainable materials and durability claims, carbon off-sets/carbon neutral) and disposal claims. We have been involved in several requests for information regarding environmental claims but there is currently no significant public enforcement action being taken by the Commerce Commission in relation to greenwashing. We expect this to change.

We can expect more advertising complaints as well, either in the courts, investigations by the regulators or the Advertising Standards Authority (ASA) Complaints Board. Last year the ASA considered a complaint about a gas company which was "going zero carbon". The Board found that this was a "socially significant issue" requiring "a due sense of social responsibility" which had not been met. There was no timeline or detail about how "zero carbon" would be achieved and therefore the board decided this was an unsubstantiated environmental claim and the advertisement was to be removed.

Finally, greenwashing, like any representation to a large group of people, creates significant class action risk. In the United States, greenwashing claims have been made against H&M which allegedly led customers to pay inflated prices for items which H&M said were produced more sustainably than competitors. This same class action formula could apply to ESG claims in relation to any other products and services.

The risk of ESG claims are heightened as ESG terms are not well defined and often mean different things to different people. Sustainability metrics can also cause issues when these are not fully disclosed and explained, and the data source used is not properly detailed. This uncertainty is ripe for litigation risk and, for each entity, will require solid strategy from management and the board to celebrate ESG achievements and targets, while also keeping faith with customers and staying on the right side of the regulators.

Regulators' focus

Aronga kaiwhakarite

Regulators and an entity's social licence to operate

Licences are everywhere in today's regulated businesses. Recently, the concept of a "social licence to operate" (SLO) has been proliferating across regulators' agendas and Government policy formation.

While the term originated in the mining industry, its applicability now spans multiple business sectors. Today, SLO refers to an entity's ability to do business because society has confidence that it will act in socially and environmentally acceptable way, transcending the need for legal and regulatory compliance alone, and taking into account a wider group of stakeholders (such as the environment). This world view is having a real impact on enforcement priorities and decisions. In the financial sector alone, this new focus may be credited (at least in part) with significant remediation payments of over $150m back to customers.[1] It's clear that regulators want to make good conduct and culture worth the mahi – financially, as well as socially and culturally.

With economic commentators forecasting macro-economic headwinds in 2023, there will be heightened sensitivity to conduct which is inconsistent with a business' SLO. Moreover, inadvertent activity which might previously have been excused (provided it was reported and fixed quickly) seems to increasingly be fodder for investigation and enforcement by regulators. The justification for regulatory action is that under-investment, or lack of due diligence regarding systems and controls, leads to poor outcomes for customers and stakeholders, and is at odds with the business' SLO.

We discuss how these themes have been demonstrated by the regulators, and what we can expect for 2023.

> "The justification for regulatory action for inadvertent error is that under-investment, or lack of due diligence regarding systems and controls, leads to poor outcomes for customers and stakeholders.

Financial Markets Authority (FMA)

Samantha Barrass, Chief Executive of the FMA, has emphasised that the regulator's approach is about achieving fair outcomes for markets and consumers. The reference to "fair" outcomes rather than just "*compliant outcomes*" shows that an entity's SLO is now embedded in the FMA's thinking. This is also reflected in the FMA's expanded regulatory remit via the Conduct of Financial Institutions legislation, which will "*put fair treatment of customers at the heart of their business model*".[1]

An approach that takes into account broader conduct issues rather than focussing wholly upon whether specific regulatory obligations have been breached has been in development in recent years. In the FMA's Supervision Insights report of September 2020, which provided an overview of its supervision activities with respect to regulated entities, the FMA expressed the view that "*entities need to think and act beyond minimum legal and regulatory standards, and champion business models that focus on customer interests*." The FMA also indicated that it did not intend to await legislative developments before taking action against conduct that might harm consumers, reporting that "*while we are awaiting a legislative framework for banking and insurance, we are at a point now where the volume of available guidance, level of engagement and maturity of the regulatory regime mean there are no excuses for conduct that presents the risk of harm to investors, customers and the integrity of the markets*."

A focus on fair outcomes is also evidenced by recent enforcement action regarding the wholesale investor disclosure exclusion. This exclusion applies to investors who are highly experienced and/or well resourced. Once applied, the wholesale investor is, to put it bluntly, "on their own" as they do not receive the normal disclosures given to retail customers.[2] The FMA conducted an investigation into the application of the exclusion and issued formal warnings to a number of entities for improper reliance on the exclusion and failing to give appropriate disclosures to investors. The FMA is clearly interested in ensuring investors who should properly be classed as retail investors are adequately protected.

Priorities of the FMA include [3]

A focus on vulnerable customers

This is seen as "key to building and maintaining public confidence in the industry".

Cyber resilience

The FMA is creating an information sheet outlining its expectations for the cyber resilience of financial institutions. The FMA views cyber resilience as important for safeguarding an entity's social licence.

Value for money for KiwiSaver investors

The FMA has piloted a self-assessment tool for KiwiSaver providers to assist them to carry out their annual review of value for money.

Climate related disclosures (CRD)

Ms Barrass indicated the FMA is looking to work with industry on CRDs given it is new territory for both the FMA and the financial sector. This means at the beginning of the regime formal enforcement measures may be used more sparingly. However, an educational approach will only last for a limited period.

A new conduct regime

Implementing the new conduct regime for banks, insurers, and non-bank deposit takers.

1 Samantha Barrass, CEO Financial Markets Authority (speech at 2022 INFINZ Conference – Navigating the Transition, 27 October 2022).

2 As above.

3 Samantha Barrass, CEO Financial Markets Authority (speech at 2022 INFINZ Conference – Navigating the Transition, 27 October 2022 and the Financial Services Council, 16 March 2022).

Commerce Commission

Following the announcement of the major trading banks' financial results towards the end of 2022, the Prime Minister cautioned the trading banks to reflect on their social licence in light of the cost-of-living pressures facing New Zealanders. Days after the Prime Minister's call for caution, the Government announced that the retail banking sector would be the first to implement the Consumer Data Right framework through what is colloquially known as Open Banking. This will allow customers to easily move their data from one bank to another, thereby increasing competition. While a market study into the retail banking industry is a potential option, it's more likely that the Commerce Commission will wait to see what impact the Open Banking reforms have.

The Minister of Commerce and Consumer Affairs, the Hon David Clark, has already identified two other potential industries for the next market study – the insurance industry and electricity industry. We expect the next market study to be announced in the first quarter of 2023.

In 2022, the Commerce Commission launched investigations into the acquisition of land and the lodging of land and lease covenants by supermarkets, as well as a market study into the market for residential building supplies. The Commerce Commission's actions likely reflect concerns over the cost-of-living crisis and inflationary pressures, as well as the expansion of the Commission's powers to conduct market studies. We expect this focus on cost of living to continue into 2023.

Finally, proper remediation will likely be a focus of the Commission in 2023. In the latter part of 2022, the Commission released draft remediation guidance for consultation. The purpose of this guidance is to support businesses to "put the customer right" where they have identified a likely breach of one of the laws the Commission enforces. This provides businesses with a useful reference point for determining if, and how, they should provide remediation in relation to a likely breach of the law. While the guidance has been prepared by the Commission for breaches of legislation it enforces, the principles will be useful guidance for a range of other regulatory contexts.

Reserve Bank of New Zealand

2023 marks two years since the RBNZ's Enforcement Department was established. To date, it has focused primarily on AML/CFT.

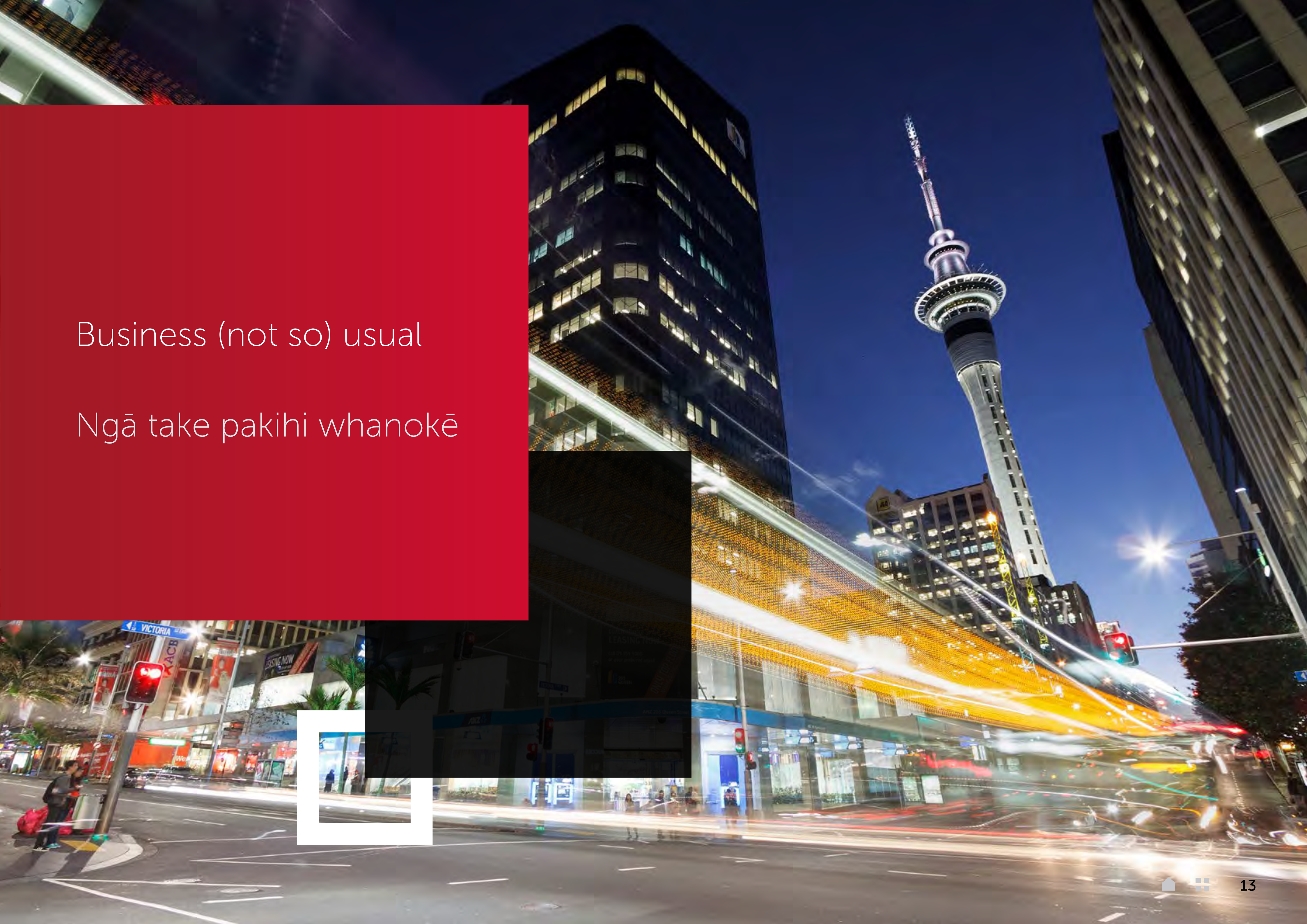
In early 2022, the RBNZ released its Enforcement Principles and Criteria which provide clarity on how and when the RBNZ will take enforcement action. These Principles and Criteria include a number of enforcement criteria and factors which, at their core, relate to the social licence of the entities the RBNZ regulates. In particular, one criterion which will be weighed by the RBNZ when making an enforcement decision is "public trust and confidence". Misconduct which is widespread or significant in its magnitude, and which undermines public trust and confidence in a regulated entity, is also more likely to undermine the social licence of that entity.

Since the Enforcement Principles and Criteria were published, the RBNZ has published one enforcement action. This was a formal warning issued to a bank regarding failures to report the correct location of approximately 50,000 domestic cash transactions. Complementing the Enforcement Principles and Criteria, the RBNZ published its Enforcement Guidelines and Investigation Guidelines on 26 January 2023. The Enforcement Guidelines provide a regulatory response model for enforcement by the RBNZ and include further detail of how RBNZ will apply the Enforcement Principles and Criteria. The Investigation Guidelines describes the RBNZ's approach to investigations and how to apply the Enforcement Principles and Criteria throughout the lifecycle of an investigation. The Investigation Guidelines also describe the use of information gathering powers under the legislation.[4]

We can expect to see the RBNZ issuing formal notices for information requests more regularly than voluntary requests as the RBNZ has expressly recognised in its Investigation Guidelines that recipients of requests for information often feel more protected by a formal request or have obligations of confidence which mean they cannot disclose information without being compelled to do so. It is also important to note that information provided to the supervision arm of the RBNZ can be used by the enforcement team in an investigation and any later enforcement action so a linked up approach to dealings with the RBNZ is required.

As the RBNZ's regulatory culture develops, of which the Enforcement Principles and Criteria, Investigation Guidelines and Enforcement Guidelines are important foundations, it is likely the amount of enforcement action undertaken by the RBNZ will increase significantly.

4 Reserve Bank completes new Enforcement Framework (31 January 2023) MinterEllisonRuddWatts.



Business (not so) usual

Ngā take pakihi whanokē

Buyer's remorse:

Warranty claims on the rise

Global economic activity is slowing, inflation is the highest it has been in decades, and the spectre of a recession looms larger than ever. Against the backdrop of the current financial climate and following hot on the heels of the busiest year for M&A activity on record, we anticipate a greater than usual number of disgruntled purchasers who have bought high and completed low.

An increasing number of our clients are already scrutinising recently completed transactions with an intensity unseen in recent years and our litigation practice is experiencing higher-than-usual warranty related disputes.

Should this trend continue, it will lead to:

- An increase in warranty claims – this could include claims for breach of contract, relating to financial and operational performance, compliance with laws and regulations and (depending on the entity) significant employee claims, whether that be in relation to Holidays Act 2003 or a knee-jerk reaction to the recent Fair Pay Agreement legislation for deals after 1 December 2022.
- Disputes over adjustment mechanisms – we expect that purchasers will be poring over price adjustment mechanisms, wash-ups and earn outs that are intended to correct the price between signing and completion of the transaction. Given current and expected economic volatility, both purchasers and vendors may seek to rely on provisions designed to capture non-recurring or abnormal items for a range of items which were, in fact, expected or entirely ordinary in the context of the business. We have already seen a number of disputes of this nature arising due to COVID-19's effects on profit and whether this produced a non-recurring or abnormal effect.

In reality, this also means that dissatisfied parties are likely to resort to making use of warranties and adjustment mechanisms to re-value bad deals. Where purchasers have overpaid for assets in a buoyant market, they will be incentivised to shoe-horn claims into ill-suited provisions. Even where purely speculative, such claims can lead to significant legal spend and put strain on management resource during already testing times. They may also be lodged solely in order to stop funds being released in a case of buyer's remorse, i.e. in an attempt to hold a deferred payment or escrow to ransom.

Transactional lawyers will, rightly, tell you that the best line of defence for buyers and sellers is a thorough due diligence process conducted over the most important parts of the business (i.e. where the greatest risk exists). Where the parties have already signed, experience in navigating warranties and indemnities disputes, including familiarity with the types of claims and defences deployed in this space, is critical. Although not always possible, a well-advised vendor that acts decisively can achieve the swift resolution of spurious claims, freeing up capital and executive time (e.g. through summary judgment or strike-out proceedings).

If you are a purchaser and a potential claimant, there are a number of stumbling blocks to look out for, from limitation periods and notice requirements to a possible duty to mitigate losses in respect of certain kinds of warranties. If you suspect that you have a claim under a warranty or indemnity included in a sale and purchase agreement, it is important to check the warranty claims requirements so that you do not miss a key date or technical detail for notification.

Finally, do not forget insurance. Insurers may be brought into the equation where the vendor or purchaser has obtained warranty and indemnity insurance to cover financial losses arising from inaccuracies during the transaction. Parties should make sure to check the scope of cover available to them and consider the position of the other side to the deal (are they insured or un-insured?) when considering the strategy in relation to a warranty claim.

Insolvency law meets the moment

Changes in the macroeconomic climate are likely to strain balance sheets and cash flows in 2023. This will heighten existing anxiety within the director community over potential personal liability for breach of the directors' duties when businesses trade on the cusp of insolvency.

Recent consideration of statutory insolvent trading duties by appellate courts provides fresh guidance for managing these risks. Three decisions stand out: two recent, one anticipated. Collectively, they provide (or will provide) a critical roadmap for directors operating businesses in precarious financial positions.

The appetiser: *Debut Homes*

In *Madsen-Ries v Cooper* [2020] NZSC 100 ("*Debut Homes*"), the Supreme Court considered, for the first time, ss 135 and 136 of the Companies Act 1993 (Companies Act). Debut Homes concerned a director's operation of an insolvent property development company whose financial predicament was unsalvageable. Commonly paired as the "insolvent trading duties", ss 135 and 136 respectively require directors not to carry on business in a manner likely to create a substantial risk of serious loss to creditors, and not to agree to obligations without reasonable grounds for believing that the company will be able to perform those obligations when due.

In a September 2020 decision, the Supreme Court offered the following guidance for directors:

- If continued trading will result in a shortfall to creditors of a company, and the company is not salvageable, continued trading will breach the directors' insolvent trading duties regardless of whether or not:
  - continued trading is projected to improve returns to some of the creditors compared with outcomes in an immediate liquidation; and
  - any overall deficit was projected to be reduced.
- Where there are no prospects of a return to solvency, it makes no difference that a director honestly thought some of the creditors would be better off by continued trading. Instead, the appropriate alternatives to liquidation are creditors compromises or voluntary administration under Parts 14 and 15A of the Companies Act, or potentially informal mechanisms.
- If informal mechanisms are used, all affected creditors must be consulted and agree with the proposed course of action, or any arrangement must ensure that all existing debts and future debts arising from continued trading are met.
- The amount of compensation payable will depend on the particular duty breached. The usual approach under s 135 will be to start with the extent of deterioration (if any) in the company's financial position between the date when trading should have ceased, and the date of actual liquidation. By contrast, the starting point under s 136 should be the amount of the new obligations incurred in breach of that section. Various discretionary considerations are then applied.

An English entrée: Sequana

In October 2022, the United Kingdom Supreme Court issued its own significant insolvency decision in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 ("Sequana"). The key issue in Sequana was defining the circumstances in which directors must have regard to the interest of creditors when exercising duties owed to the company, and what obligations that imposes on directors. The common law has long recognised that the directors of a company which is insolvent or bordering on insolvency are obliged to consider and have proper regard to the interests of its creditors and prospective creditors (described as "the creditor duty"). However, there remained uncertainty as to whether this was preserved following the statutory codification of directors' duties in the UK and, if so, as to its scope and application.

Sequana concerned a payment by a company which was solvent but had an uncertain amount of contingent liabilities. These were recorded in company accounts at a fraction of their potential value but ended up being significantly greater than estimated. On the company being placed in insolvent administration, a claim was made against the directors that they owed (and breached) a duty to consider the interests of creditors when deciding to make the payment because there existed a real risk of the company becoming insolvent.

Whilst rejecting the proposition that a "real risk" of insolvency was sufficient to require directors to consider creditors' interests, the UK Supreme Court found that:

- The creditor duty exists; directors of a company which is insolvent or bordering on insolvency are obliged to consider, and have proper regard to, the interests of its creditors and prospective creditors.
- The duty is triggered when insolvency is imminent or when the directors know or ought to know that an insolvent liquidation is probable.
- The extent to which directors must take into account creditors' interests is a sliding scale. Where a company is insolvent or bordering on insolvency, the interests of creditors, including prospective creditors, must be balanced with those of the shareholders, with creditors' interests becoming paramount as the company's fortunes further decline and liquidation approaches.

These findings align with the approach taken by New Zealand courts in relation to s 131 of the Companies Act. That section requires directors to act in what they consider to be in the best interests of the company. Courts here recognise that in cases of insolvency or near-insolvency, consideration of the interests of the company requires consideration of the interests of its creditors, including prospective creditors.

The Main(zeal) course

Debut Homes and Sequana have heightened anticipation in New Zealand for our Supreme Court's forthcoming decision on the appeal of *Yan v Mainzeal Property & Construction Ltd* (in liq) ("Mainzeal"). Mainzeal was one of New Zealand's largest construction companies. It collapsed in 2013 leaving around $110m owing to unsecured creditors. Its liquidators brought proceedings against the former directors under ss 135 and 136, alleging that they had allowed the company to continue trading, and incur significant obligations, while insolvent and without taking appropriate precautionary steps (particularly regarding related party support).

The High Court found the directors had not breached s 136 but had traded recklessly in breach of s 135. Mainzeal was balance sheet insolvent, trading poorly, prone to significant one-off losses and reliant on assurances of support from its shareholders that were informal, conditional, and non-binding. Despite this, the directors permitted Mainzeal to continue trading, exploiting the lag between the time Mainzeal was paid by principals and when it had to pay its sub-contractors. Starting with the net deficiency on liquidation and then discounting for discretionary factors, the Court ordered the directors to contribute $36 million to Mainzeal: the highest award ever made in an insolvent trading case in New Zealand.

The Court of Appeal agreed that the directors had breached s 135, and found they had breached s 136 too. Differing from the High Court, the Court of Appeal held that the appropriate measure of compensation for breach of s 135 was the extent of deterioration in the company's financial position over the relevant period. However, no loss was found to have arisen from this breach, as the High Court had found that Mainzeal's financial position did not deteriorate over the relevant period. As for s 136, the Court considered the directors were liable for the amount of all new obligations Mainzeal assumed without a reasonable basis, with some adjustments to be determined by the High Court. The Court was split as to the existence and extent of a discretion to reduce the compensation payable.

The Court of Appeal offered the following guidance where a business was in a precarious financial position:

- Directors must face up to that financial situation and assess the risk of serious loss to creditors.
- A decision to trade on should be made only after a sober assessment of the likely consequences based on the company's likely future income and prospects. Unfounded optimism is not enough.
- A decision to trade on will likely breach the insolvent trading duties unless the manner in which the directors choose to trade has realistic prospects of enabling the company both to service pre-existing debt, and to meet new commitments arising from ongoing trading.

The Supreme Court heard an appeal by the directors in March 2022, with a decision expected in early 2023. The Court has good reason to take its time. It will need to grapple with a number of complex issues regarding the interpretation and interaction of ss 135 and 136, and how to approach compensation for breach of these provisions. Some of that work was frontloaded in Debut Homes, but Mainzeal involves more complicated facts and a business of much larger scale. The Court will also need to reflect on the extent to which Sequana represents, or ought to be incorporated into, New Zealand law, albeit that Sequana was primarily argued under the UK's equivalent to s 131; not ss 135 and 136 at issue in Mainzeal.

The Supreme Court's position in Mainzeal will be consequential. The Court has an opportunity to reinforce, further develop, walk back, or to provide nuance to the principles it previously expressed on the more straightforward facts presented in Debut Homes. Regardless, much needed clarity should be provided to the interpretation and application of statutory provisions which have received a good deal of criticism and calls for legislative redrafting. In the absence of an overhaul of the statutory insolvent trading duties anytime soon, the Supreme Court's decision is expected to provide clearer guidance for directors operating businesses in an increasingly challenging economic environment.

"In the absence of an overhaul of the statutory insolvent trading duties anytime soon, the Supreme Court's decision is expected to provide clearer guidance for directors operating businesses in an increasingly challenging economic environment."

An ever-evolving workplace

He wāhi-mahi tupu

It's complicated:

The challenges of obtaining cyber insurance (and what to do about it)

The threat of malicious actors breaching commercial firms' and Government entities' cyber defences continues to escalate. Banks, investment funds and insurance companies are particularly attractive targets because of the rich rewards on offer, so much so that the financial sector now ranks second only to health organisations for damaging data breaches.

The head of ANZ Bank's institutional bank, Mark Whelan, considers cyber risk the single biggest threat facing the banking industry today. And in its annual cyber risk report for 2022, our Australian associate firm, MinterEllison noted that Australian organisations reported a 15% increase is ransomware events in the 2020–21 financial year compared with the previous year.

With cyber crimes increasing in number, sophistication, and severity, it is more important than ever for businesses and other organisations to protect themselves from cyber attacks and the resultant business losses and liabilities to third parties. This involves implementing IT security systems and procedures, ensuring that staff are appropriately trained, and taking out appropriate cyber insurance.

Cyber insurance poses increasingly complex challenges for insurers, brokers, and insureds. Insurers rely on predictability to accurately assess risk and set appropriate premiums. In the case of cyber crime, however, they are chasing a moving target. Meanwhile, insurers can afford to be more selective, as demand for cyber cover increases while insurer capacity and appetite for cyber risks reduces. Cyber insurance is increasing in cost and reducing in cover.

Key risks and strategies

We recently hosted a Cyber Risk breakfast at which leading professionals from the legal (MinterEllisonRuddWatts), insurance (AIG), insurance broking (Aon) and IT security (Datacom) industries shared insights on cyber risks and cyber insurance in New Zealand.

The key take-outs from that event included the following:

- New Zealand is a soft target. Our small size and geographical isolation lulls us into a false sense of security. This is wrong: the nature of cybercrime renders a potential victim's location irrelevant.
- Ransomware claims increased 150% from 2018 to 2020 (although the number is beginning to plateau) and by 2021 they comprised one in every five claims. They are increasingly sophisticated, with bad actors now targeting their attacks for maximum damage and effect. Losses include ransom costs, event management costs (such as IT costs), network interruption losses, regulatory actions and customer claims.
- The two best ways to address cyber risk are mitigation and insurance.
- Good IT 'hygiene' and doing the basics well – such as prompt installation of patches and quick responses to cyber events – are critical.
- Remote working increases risk.
- Many organisations run legacy systems with inadequate security. Insurers are asking increasingly detailed questions about customers' IT systems and they will decline to offer cyber cover to those with inadequate security. As a result, cyber insurance cover is becoming a mark of quality for organisations as insurers will only cover firms that have good security technology and practices.
- Losses from cyber crimes include the victim's own loss and damage (operations are halted, money may be stolen), liability to customers and third parties (whose data may be released or misused), and regulatory action and fines. Victims should make no admissions, take prompt steps to recover systems, involve insurers at the outset and take appropriate advice.

> "
> Cyber insurance poses increasingly complex challenges for insurers, brokers, and insureds."

Developing themes for 2023 and beyond

Cyber threats have been increasing

Cyber insurance is challenging to obtain

Insurers’ reliability and consistency is increasingly valued

Cyber insurance continues to offer real value

Threats have been increasing, although their number and severity may be plateauing

There has been no let-up in the onslaught of cyber crime. In 2022, Forbes magazine reported an increase in weekly attempted cyber attacks targeting corporate networks in 2021, up 50% on the previous year. Around the same time, the FBI’s Internet Crime Complaint Centre issued a public service announcement reporting a 65% increase in identified global losses between July 2019 and December 2021.

The New Zealand Government’s Budget for 2022 provided approximately $50 million in additional funding over four years for the GCSB to combat cybercrime and engage in counter terrorism activity. The move reflects concerns around increased frequency and severity of cyber attacks, and aims to protect information services increasingly at risk of cybercrime.

More recently, however, anecdotal evidence from London insurers has indicated that, while not decreasing, the number of cyber crime related claims is appearing to have plateaued. While the ingenuity of criminal actors continues to develop, there is also an increasing sophistication among potential targets.

Cyber insurance is increasingly challenging to obtain

Insurers are responding to the rising risks and costs of cyber events with increasingly detailed assessments of insureds’ IT systems, as well as by reducing cover limits and increasing premiums. One major New Zealand insurer has dealt with this additional complexity by introducing a ‘smart’ cyber questionnaire in which an insured’s answers to the initial questions trigger different or additional questions, depending upon the responses. Other New Zealand insurers have reduced limits significantly or have withdrawn cover altogether. Large firms, such as those with revenue over $100m, are facing increased scrutiny as they present a greater perceived risk.

The complexity of insurers' questionnaires, and their importance, means that IT departments must be well prepared and resourced to answer them. This should be done in advance of the cyber insurance renewal date, as the time commitment is significant, and answers often need to be drawn from different sources. IT departments may realise as they work through the questions pre-emptively that their answers will not satisfy the insurers, so it may be necessary to take remedial steps ahead of time so that a better response can be given.

An additional challenge is that whereas previously insurers might have accepted insureds' responses uncritically, many now test and challenge them. Insurers will often share reports with the insured, and sometimes insureds and their brokers will need to challenge aspects of an insurer's report that may not tell the full story.

A key lesson for brokers and insureds is that 'wrong' answers to questions asked by insurers may have significant effects upon their willingness to offer or renew cyber cover. It is crucial that insureds provide a full explanation of any responses that might not tell the full story. For instance, insurers expect to see multi-factor authentication as a core requirement for access to an insured's system. This means that any circumstances in which multi-factor authentication may not be used, such as where there are other security systems in effect, will need to be explained.

Brokers and insureds need to prepare for their renewals with a full appreciation of the time and work that is likely to be required to present a compelling proposition to a cyber insurer. Insureds will also need to be prepared to consider reductions in cover or moving to different insurers as capacity and limits change.

Insurers, for their part, will need to continue monitoring claims closely and adapting quickly as bad actors change their approaches and the threat landscape develops. Cyber insurers will increasingly need to provide a proactive, advisory service to assist brokers and insureds to understand what their requirements will be and enable insureds to satisfy their expectations, rather than confining their role to a reactive response.

Insurers' reliability and consistency is increasingly valued

The cyber insurance market is volatile. Some insurers that were cyber market leaders in New Zealand in 2020 had reduced capacity in 2021, while others offered new capacity to help meet the resulting demand. Brokers report that many customers were obliged to place cover with new insurers. This further added to the burden faced by insureds' IT departments as they were asked to respond to multiple insurer questionnaires.

Because of this, insureds will increasingly value stability and consistency in their cyber insurers and may prioritise those characteristics over price and cover limits.

Cyber insurance continues to offer real value

While cyber insurance is increasingly challenging to obtain, brokers report that it continues to benefit insureds. Perhaps because of the care taken when it is arranged, it features a relatively high claim acceptance rate compared with other types of insurance.

Cyber insurance also remains one of the few insurance products that assists insureds to prevent claims. Insurance assessments are often valuable tools to identify security weaknesses and remedy them, as insurers often have up to date knowledge of the latest risks. Cyber insurance discussions can therefore benefit insureds by assisting them to improve their systems and remove vulnerabilities.

There is also the additional benefit that cyber insurance provides a badge of quality, as it demonstrates that an insurer has assessed the insured as a good risk. For professional services firms in particular, whose own customers are increasingly demanding reassurance as to their cyber defences, this is likely to be increasingly important.

> "Cyber insurance poses increasingly complex challenges for insurers, brokers, and insureds."

Increased bargaining litigation and other trends impacting employers

We are witnessing some of the biggest changes to the New Zealand labour market in decades. The new Fair Pay Agreement regime has fundamentally changed New Zealand's bargaining landscape across several sectors and pay equity bargaining claims continue to gain traction. We anticipate an increase in bargaining process litigation arising as a direct result of these new legislative regimes.

Meanwhile, employers also continue to navigate the ever-evolving workplace, accelerated by the likes of COVID-19 and rapid technological development. Ongoing uncertainties around worker status issues, the place of Te Ao Māori and tikanga Māori in the workplace, and recruitment and retention strategies will be some of the key issues facing many businesses over the course of 2023.

Trends impacting employers

- Fair pay agreements
- Pay equity
- Worker status
- Te Ao Māori & tikanga
- Retention & recruitment practices

New legislative regimes

Fair Pay Agreements

On 1 December 2022, the Fair Pay Agreements Act 2022 (FPA Act) came into force. The FPA Act establishes a framework for bargaining between employers and employees for Fair Pay Agreements (FPAs).

The FPAs will set minimum employment standards applicable across entire occupations and industries for a period of three to five years, regardless of whether an employer or employee participates in bargaining. Mandatory terms include the standard hours to be worked, wages payable (including overtime and penalty rates if applicable), arrangements for training and development, and leave entitlements.

Unions can initiate bargaining for an FPA if they meet the representation test (at least 1,000 employees or 10% of all employees in the proposed coverage support initiating bargaining) or the public interest test (the relevant employees receive low pay and have little bargaining power or a lack of pay progression, or are not adequately paid, taking into account matters such as long or unsocial hours or contractual uncertainty).

Once bargaining has been initiated, the employee bargaining side (generally, the initiating union and other eligible unions) and the employer bargaining side (generally, eligible employer associations or certain specified organisations in the public sector) must engage in good faith to bargain for an FPA. Proposed FPAs must be ratified via a simple majority of employee and employer votes.

The FPA Act will have significant and wide-ranging impacts. In the coming year, we anticipate increased union activity as FPA bargaining is expected to be initiated on behalf of supermarket workers, bus drivers, retail/hospitality workers, cleaners and security guards (as well as on behalf of non-union members who fall within the proposed coverage of the FPA). Employers operating within these sectors or occupations should be thinking about which eligible entities are likely to satisfy, and seek to be, the employer representative association(s) under the FPA Act. This is because affected employers can only be represented at the bargaining table by employer associations authorised by MBIE.

The Employment Relations Authority (Authority) has a key role to play in the operation of the FPA Act, and we expect more bargaining process litigation to arise as a result. The Authority has wide-ranging jurisdiction to make determinations on matters arising during the bargaining process, as well as making determinations about parties' compliance with their good faith obligations and with the FPA Act. The Authority will be tasked with ensuring the compliance of every proposed FPA with the FPA Act and other employment law, and assessing coverage overlaps.

Most significant in our view though will be the Authority's role in fixing the terms of FPAs. This may occur in a broad range of circumstances, including where ratification has failed twice, where no employer bargaining side has formed (and, in that event, without any bargaining having taken place), and where the bargaining sides have, for a reasonable period, used their best endeavours to use reasonable alternatives to agree the terms of the proposed FPA. A panel of three Authority members will be required to fix the terms of an FPA. It is possible that this workload will create delays for other matters before the Authority. However, the full impact is difficult to predict at this stage and is likely to be impacted by how many separate FPAs are initiated in the first year.

Pay equity

Since coming into force in November 2020, the amendments to the Equal Pay Act 1972 have led to a steady rise in pay equity claims. These amendments created a framework for employees and unions to raise pay equity claims and bargain for pay equity settlements. We understand that there are nearly thirty pay equity claims in progress across the country, and that the first fully private sector claim was raised late last year.

Litigation has so far been limited, and in all cases has involved the District Health Boards or Health New Zealand. However, with an increasing number of pay equity claims on foot, as bargaining progresses and the mediation and facilitation avenues provided by the legislation are exhausted, we expect an increase in litigation in 2023 seeking determinations to fix remuneration that ensures pay equity.

The continued evolution of the workplace

Worker status

We were hopeful that 2022 would bring some legislative clarity around worker status issues. Unfortunately, this did not come into fruition. The Government considered whether a new category of 'dependant contractor' should be introduced to provide better protections for vulnerable contractors, but this was ultimately rejected following the report of the tripartite working group. Instead, the Government shifted its focus to better resourcing the current system. The recent *Uber*[1] decision in the Employment Court failed to produce any clear guidance on the status of each of the workers in question. However, it did re-enforce the fact-specific nature of a worker's status.

Looking ahead to 2023, businesses will need to continue to manage worker status risks given the ongoing uncertainty in the space. A key part of this will be monitoring and reviewing existing and new independent contractor arrangements. That said, the *Uber* decision is being appealed and we will hopefully have some appellate guidance to look forward to in 2023.

Te Ao Māori and tikanga Māori in the workplace

We are seeing an increasing number of employees argue Te Ao Māori and tikanga Māori is not being appropriately applied in employment dispute resolution processes. This is requiring employers to reflect on their degree of cultural competency and consider the place of Te Ao Māori and tikanga Māori in the workplace. In our view, Te Ao Māori and tikanga Māori will have an increasingly important role to play in dispute resolution processes. These concepts support and enhance the statutory duty of good faith and the importance of proper consultation which underpin New Zealand employment law.

Retention and recruitment practices

The 'great resignation' of 2022 will likely spill into 2023. Employers are using new strategies to attract and retain staff in what continues to be an 'employee's market.' While this is industry specific, we are seeing an increased use of retention schemes and incentives, remote working (including use of workers based overseas) and leave without pay arrangements to retain staff. On the recruitment front, different strategies are deployed to attract employees depending on their role, age, and the industry. For example, some employers emphasise flexible working arrangements to entice new recruits, while others choose to promote a 'return to the workplace' for those so inclined. Either way, continued labour market shortages will require businesses to increasingly rely on our new (and somewhat challenging) immigration settings to enable the right skilled labour to enter the New Zealand market in 2023.

1 *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192

Changes in the courtroom

Ngā panonitanga kōti

Judicial review in the spotlight

Over the last few years, we have seen a wave of high-profile judicial reviews of government decision making. Much of the public attention has understandably been on review of COVID-19 related decisions, with a particular focus on vaccine mandates and the legality of lockdowns – restrictions on rights and freedoms as we have not seen before in our lifetimes.

But away from the intensity of COVID-19 disputes, there is an unmistakeable movement towards broader public interest litigation that is seeking to use judicial review and other public law proceedings as an instrument of change. With some COVID-19 regulation still in play, a busy Government change agenda and an empowered business community, citizenry, and public service alike, there are no signs of the judicial review momentum slowing down in the next 12 months. 2023 looks set to be another busy year for keeping public service decision makers (and policy makers) on their game.

The COVID-19 effect

It is well understood that COVID-19 restrictions on people and businesses have changed the way we live, work, and engage with each other. These same COVID-19 restrictions have showcased the much-maligned judicial review as it was always intended, as a "relatively simple untechnical and prompt procedure" [1] to check Government decision making is lawful, fair, and reasonable.

There have been roughly 20 applications for judicial review of COVID-19 related decisions over the past three years, primarily relating to vaccination orders, MIQ exemptions and other travel restrictions, and access to Māori health information. This may not seem like a large number, but when you factor in that many of the cases have been brought by individuals,[2] and judicial review cases are notoriously expensive, hard to win, slow and focussed on decision making processes not outcomes, it has been a significant development in the caseload of our High Court. Cases have been decided in weeks not months, sometimes crowdfunded or undertaken on a pro bono basis, and with a success rate strong enough to keep organisations and individuals

1 *Minister of Energy v Petrocorp Exploration* [1989] 1 NZLR 348, at 353.

2 Andrew Borrowdale's challenge to the legality of the lockdown orders; Murray Bolton's challenge to his declined exemption application from MIQ; Mr Nottingham's application for a writ of habeas corpus/unlawful detainment through the level 3 restrictions.

feeling empowered to use the Courts to air frustrations with Government policy.

There is in fact a long history of judicial review by individuals for private benefit.[3] But what is really striking about the COVID-19 judicial reviews is the speed at which they have been decided in an otherwise clogged Court system, and the relatively high strike rate for successful review of the Government's decision-making processes. Expectations have been set. We have seen a number of themes emerge from the cases. Government decision makers are taking note that:

- The Courts are prepared to construe statutory powers broadly in a crisis but will not keep granting leeway beyond the time of real emergency.
- Government needs to take care to make evidence-based decisions, even when acting under urgency – decision making on the fly will not easily survive judicial scrutiny, even in a global pandemic. Courts will hold Government accountable for rushed, non-evidence-based decision making.
- Decision makers can minimise the risk of successful challenge by identifying and engaging with the facts of each case, rather than applying rigid policies without considering the basis on which people are seeking specific Government decisions.

For people and organisations seeking to challenge Government policy and decisions, our clients are telling us that courts are once again viewed as an accessible way to get adverse decisions reviewed and potentially overturned. And the 'wins' taken from Court proceedings are not only decisions in people's favour – sometimes shining light on the issues is enough to get political momentum for change, and organisations are seeing the benefit from such a strategy in public law cases of late.

Public interest groups stepping up

The number of judicial review applications by public interest groups is growing too, and not just in relation to COVID-19. So why are public interest cases gaining popularity? The simple answer seems to be that, in addition to providing a platform for holding government decision makers to account, media coverage and public debate is turning judicial review into an attractive lobbying tool. Other public law proceedings, such as those seeking declaratory judgments or declarations of inconsistency with the New Zealand Bill of Rights Act 1990, are similarly being used as a political lobbying tool in an attempt to overturn government policy on a broad range of issues.

One significant example was the recent climate change judicial review proceeding brought by Students for Climate Solutions Inc (SfCS), an incorporated body established to enable students to develop and support climate-friendly initiatives [4], and which pursued political litigation as one of its major initiatives. SfCS challenged decisions to grant petroleum exploration permits to private entities under the Crown Minerals Act 1991 on the basis that the relevant decision maker failed to substantively consider the climate change implications of the decisions. SfCS were unsuccessful in their claim but received significant media

3 The majority of judicial review cases fall in this category and involve decisions to decline bail, decisions by corrections officers about the treatment of people in prisons, and decisions to decline immigration visas.

4 *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116.

attention and debate for what the Judge referred to as possibly the most significant issue of our time.

The same can be said for the unsuccessful judicial review by Lawyers for Climate Action NZ Inc against the Climate Change Commission challenging advice it provided to the Government broadly regarding progress towards its emissions reduction and adaptation goals. While dismissing all grounds for review, the Court noted that while the Commission's task is a very important one, with climate change being regarded as "not only quickly developing into the most important issue of our time, but perhaps the most important issue humanity has ever faced", judicial review provides an important check on the statutory task vested in the Commission; and that challenge and debate can lead to better outcomes. Unsuccessful challenges can also bring a public benefit of providing legitimacy to the Commission's work.[5]

Examples of successful public law based legal challenges have included freedom campers successfully judicially reviewing the introduction of a blanket ban on freedom camping across the Marlborough district by the Marlborough District Council.[6] Grounded Kiwis successfully judicially reviewed certain restrictions on persons entering Aotearoa New Zealand requiring that they had a place in MIQ; the way decisions were made for groups entering MIQ and the approach that was taken to applications for places in MIQ under one of the emergency categories.[7] The Court found that the MIQ system operated as an unjustified limit on the right of New Zealand citizens to enter their country. The 'Make It 16' claim successfully sought a declaration that the statutory provisions setting the minimum voting age at 18 are inconsistent with the right to freedom from age discrimination guaranteed under s 19 of the New Zealand Bill of Rights Act.[8] The public profile for 'Make It 16' gained from the proceeding (alongside the successful declaration of inconsistency) has been significant, and no doubt an instrumental part of the reason for the Government's immediate decision to prepare legislation lowering the voting age. While that legislation seems unlikely to pass, the issue has gained wide publicity and debate. The proceeding and the publicity have also coincided, no doubt not unintentionally, with the Independent Electoral Review Panel's consideration of a range of issues including voting age.

The judiciary stepping back?

Just as litigants are feeling empowered by the early Covid-inspired "relatively simple untechnical and prompt" judicial review claims, we have also observed some push back from the Courts on the extent of their role in judicial review.

For example, in the SfSC case, the Judge made clear that "*The applicant represents those who are greatly concerned that not enough is being done. It is significant that they seek to represent those who are part of the next generation. But the issues for the Court are necessarily narrower ones. The Court's role is limited to ensuring that discretionary powers are lawfully exercised... Climate change considerations were not relevant to the decisions...The significant issues about climate change were accordingly not for this decision maker to address. They arise to be addressed in other ways, including in relation to other statutory powers.*"[9]

This is no doubt a timely reminder that judicial review is designed to ensure public decision makers follow correct decision-making processes: did the decision maker consider relevant matters? Was there proper consultation? Is the decision consistent with the evidence provided? Judicial review is not traditionally focused on whether the decision maker made the correct decision (often referred to as the 'merits' of the decision) – that is for Ministers and policy officials.

"
This is no doubt a timely reminder that judicial review is designed to ensure public decision makers follow correct decision-making processes."

5 *Lawyers for Climate Action NZ Inc v Climate Change Commission and Minister for Climate Change* [2022] NZHC 3064 at [315].

6 *New Zealand Motor Caravan Association Inc v Marlborough District Council* (No 1) [2021] NZHC 3157.

7 *Grounded Kiwis Group Incorporated v Minister of Health et al* [2022] NZHC 832 at [429].

8 *Make It 16 Incorporated v Attorney-General* [2022] NZSC 134 at [72].

9 *Students for Climate Solutions Inc v Minister of Energy and Resources* [2022] NZHC 2116 at [114] – [117].

But while the emphasis on the orthodox approach to judicial review will be welcome relief to Government decision makers, we are starting to see that a win in Court is not the end game for those using judicial review and other public law litigation as a political tool to achieve political ends.

The High Court has also recently recognised the availability of protective costs orders in New Zealand, which (in extraordinary cases) may remove some financial barriers to public interest litigation and make it more accessible.[10] Protective costs orders can be granted early in proceedings (i.e. before the parties go to the cost and effort of preparing evidence and submissions) to confirm that costs will not be ordered against a public interest applicant, even if they are ultimately unsuccessful. These orders may be granted where a claim raises issues of general public importance, and where there is a real risk that the claim will not be pursued without the order. We expect to see more public interest groups applying to take advantage of these orders although such orders will be far from the norm in our view.

Some caution about the costs of litigation seems needed, however. Where wholly unmeritorious arguments are put before the Courts, the publicly visibility gained for a cause may be cancelled by significant costs orders for the unsuccessful party regardless of whether a claim is brought for wider "public interest" considerations. The Court of Appeal has been clear in the judicial review context in the last few years that, for costs purposes, arguments that lack merit "*cannot be shielded by the cloak of public interest; it being axiomatic that it can never be in the public interest to place unmeritorious arguments before the courts*".[11] Against that, the Lawyers for *Climate Change* proceeding is an example where the Judge has given the successful party a strong steer that she is not inclined to make a costs order even though the case failed, given the role of judicial review "as an important check on this very important statutory task vested in the [Climate Change] Commission".[12]

What does this mean for Government and private sector relations in 2023?

While challenges to the Government's COVID-19 response will come to a natural end, the reactivation of judicial review as an option for challenging Government administrative decisions seems likely to continue for some time. So does the public interest and political litigation. Even as we write, local media are reporting that philanthropic organisation the Gama Foundation is applying to judicially review the Auditor-General's approach to enforcement of repayments under the Covid lockdowns wage subsidy scheme.

In this environment, whether you are in Government or engaging with Government, through 2023 we see merit in your legal risk management processes including a pragmatic assessment of litigation risk and litigation options as you plan the best way to achieve optimal regulatory and public policy outcomes.

10 *Gordon v Attorney-General* [2022] NZHC 2801.

11 *New Zealand Democratic Party for Social Credit Inc v Minister for Land Information* [2021] NZCA 599 at [85].

12 *Lawyers for Climate Action NZ Inc v Climate Change Commission and Minister for Climate Change* [2022] NZHC 3064 at [315].

Access to (speedier, cheaper) justice?

The Rules Committee | Te Komiti mō ngā Tikanga Kooti released its 'Improving Access to Civil Justice' report in late November 2022. The report's recommendations will, if implemented, create a sea change in litigation procedure in the High Court for most civil cases.

Implementing the Committee's recommendations will likely result in a period of flux and a paradigm shift in litigation culture. In the short term, we predict that any implementation may well see further increases in the use of arbitration to maintain the procedural status quo.

The report is the culmination of almost 4 years of consultation with the legal profession, which initially began with a review of the procedural rules of the District and High Court to improve access to civil justice in Aotearoa New Zealand. A widening of the initial focus to questions of legislative and policy reform led to additional consultation, a longer process and ultimately recommendations which could dramatically overhaul certain aspects of New Zealand's civil justice system.

The report identifies that financial, psychological, cultural and information disparities are barriers to accessing justice. Such entrenched challenges are beyond the scope of procedural rules but can be ameliorated by amendments to those rules and to the jurisdictions and registries more broadly.

In response, the Committee has recommended 23 changes straddling all levels of the dispute resolution system.

Key recommendations

- **High Court:** making significant changes to the High Court Rules to include proportionality as a guiding principle, narrow the scope of witness evidence and document discovery, require exchange of more limited written evidence at a far earlier stage and increased focus on facts that are genuinely in dispute.
- **District Court:** reinvigorating the civil jurisdiction of the District Court through appointment of a Principal Civil District Court Judge and part-time deputy judges, from the experienced bar, to strengthen the expertise of the court's civil registry to ensure best practice in case management.
- **Disputes Tribunal:** substantially increasing the jurisdiction of the Disputes Tribunal (from $30,000 to $70,000 as of right or $100,000 with the consent of the parties) to achieve justice in an expeditious, efficient and proportionate manner, with an increase in the scope of appeals for claims over $30,000.

Recommended changes to High Court procedure

Of particular interest to large commercial entities will be the desire to streamline evidence and discovery processes in the High Court that often present the largest burden on internal resources and external legal spend.

Many submitters and the Committee identified in the High Court a "maximalist" culture of litigation, often spurred by adversarial clients and anxious practitioners. Observations from the profession were that this culture was enabled by the judiciary due to the absence of effective case management and light enforcement of procedural rules – resulting in increased time and cost.

The more radical changes proposed include:

- expanded initial disclosure to include adverse documents known to the parties with subsequent discovery only ordered at a judicial issues conference where necessary and proportionate;
- exchange of witness statements shortly after the exchange of pleadings, which are to be taken as read at trial and supplemented by further statements or viva voce evidence at trial;
- a judicial issues conference to occur following expanded initial disclosure and exchange of witness statements and which will require much more active case management than current conferences;
- a strict limit applied of only one expert witness per issue per party with mandatory expert conferral;
- core events to be established at trial by document record evidenced by the documents in the agreed bundle and chronologies, which will be admissible as to the truth of their content.

Such changes, along with the proposed permanent adoption of practices developed in response to the COVID-19 pandemic for remote hearings should help pave the way for speedier, economic determinations. Yet without buy-in from the profession and sufficient judicial oversight, the changes may simply front-foot the time and expense of litigating.

If implemented successfully, the changes should be welcome news for any participants in the civil justice system where times to trial in the country's busiest registries have been stretched to all-time highs in previous years.

A larger role for arbitration and mediation?

Arbitration has also increased recently as a response to court system delays. As well as the potential for truncated processes (especially where the parties are working cooperatively on the timetable), arbitration has the added benefit of being private and confidential subject to limited exceptions. A survey of arbitrations between 1 January 2019 to 31 December 2020 recorded domestic arbitrations involving amounts from $30,000 to more than $3 million taking between 9–10.4 months to complete, which is generally much quicker that High Court proceedings.[1] While shorter does not always mean cheaper, given the potential for an almost two-fold reduction in duration, an effectively managed arbitration process can provide both time and financial upsides to the parties.

The Committee's recommendations can also be viewed in the context of other parts of the justice system, where legislative and regulatory reform has sought to promote the prompt and economical settlement of disputes. For example, mediation has long been incentivised (if not required) by the Employment Relations Authority at the outset of disputes between employers and employees. Similarly, the more recently introduced changes to trust law brought by the Trusts Act 2019 (which came into force on 30 January 2021) expressly provide for alternative dispute resolution processes for both internal and external trust disputes.

The Committee has invited submissions on its recommendation, due by 24 February 2023. These submissions will be considered in deciding on the implementation of any changes.

1 The 'Inaugural Aotearoa New Zealand Arbitration Survey' authored by Royden Hindle and Dr Anna Kirk assisted by Diana Qiuin collaboration with the New Zealand Dispute Resolution Centre.

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