2018 Litigation Forecast

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Contents

Regulatory investigations, like crises in their many forms, entail both risk and opportunity. They require very careful handling.

The risks are many and obvious: potential fines and penalties; exposure to damages claims, including the prospect of follow-on 'class' actions; enforceability of contract implications; reputational and commercial risk for the organisation and key people implicated; and in some legal contexts the risk of criminal prosecution and sanction.

The opportunities are perhaps less obvious: the opportunity to demonstrate good corporate conduct, compliance intent through policies, systems and processes; the opportunity, where there is an issue, to acknowledge and respond appropriately and responsibly, to take the learnings, and lead industry change.

Through our 2017 *Regulator Series* we offered the commercial regulators we, for our clients, work with most closely, the opportunity to talk directly about their enforcement programmes, priority focus areas and 'hot topics'. We hosted engaging and insightful sessions with the Commerce Commission, the Financial Markets Authority, WorkSafe New Zealand, and the Overseas Investment Office.

Busy regulators are often no less resource-constrained than many businesses. They too must focus resources on the most important matters, prioritise, and use enforcement tools available to them. It is a hallmark of maturity that these regulators are prepared to make transparent, their areas of strategic focus. This will be where the hammers are likely to fall the hardest.

Some common themes emerged across the *Regulator Series*: A consistent focus on consumer outcomes, and a common message to businesses to truly put customers at the heart of what they are trying to achieve, both as a path to compliant conduct and a path to business success. Having compliance programmes, policies and processes in place is critical if issues are to be avoided, but are merely a starting point in fostering a compliance culture. Tone comes from the top. Skilled and customer-focussed complaints handling can resolve matters before they become bigger issues and, used well, can detect wider issues early.

Many of the key points from the Regulator Series are reflected in this forecast for 2018. The regulators we hosted all have active enforcement programmes. Clearly, their active work programmes is a trend that is set to continue.

Our team is adept at assisting with regulatory investigations, prosecutions and civil proceedings, and related litigation. We work closely, for our clients, with these regulators. We are here to help if the need arises.

Sean Gollin
Divisional Leader

Key predictions for 2018

Financial services

Preserving New Zealand's trade reputation is a top priority, with more enforcement action expected in 2018. Cracking down on Ponzi schemes remains a focus for the Serious Fraud Office, with any enforcement action being well-publicised. The Financial Markets Authority will continue its hardline with misconduct, and actively scrutinise secondary markets.

Consumer law

The forceful approach to consumer and credit law enforcement will continue in 2018, with more prosecutions, test cases and higher fines and penalties. The New Zealand Commerce Commission has signalled its largest programme for enforcement in years, prioritising public safety, pricing claims and requests to traders to substantiate claims.

Competition

After a significant year of litigation and legislative change, we expect a bedding in period and increased compliance activity as clients and advisers adjust to new competition and antitrust provisions planned for May 2018. We expect a similar level of applications in 2018.

International arbitration

The recent rise of Singapore and Hong Kong as jurisdictions of choice for international arbitration will continue in 2018, with both well positioned with modern arbitration rules, supportive judiciaries and allowing third party funding. New Zealand and Australia will continue to strengthen and modernise their respective arbitration laws in the year ahead.

Gender diversity in arbitrator appointments will remain a key challenge throughout 2018, and beyond.

Group ("class action") litigation

Group litigation is becoming more established in New Zealand's litigation landscape, despite the lack of a developed framework catering for true 'class actions'. The Law Commission's review of the regime will result in a more formalised approach in the not too distant future.

What is clear is that group litigation is here to stay.

Third party funding

Litigation funding is fast becoming an established feature of the country's litigation environment. This funding approach is attractive to a claimant who may not have the individual means to pursue a claim, and pay nothing if the claim is unsuccessful. With no significant common law or statutory barriers to litigation funding in New Zealand, expect increasing involvement from funders and more of this type of litigation making news in local media.

Cyber security

The constantly evolving and ever-present cybercrime threat, international statutory and regulatory regimes governing data storage and security will continue throughout 2018, while the numbers of reported cyber-crime (and resulting cost) will keep increasing in New Zealand. With the European Union and Australia both imposing mandatory obligations to disclose data breaches, expect renewed impetus for the reform of New Zealand's data and cyber security framework.

A strong push towards pre-planning incident responses and increased use of "breach coaches" is also expected in the year ahead.

Employment

Scrutiny regarding "equal pay" and "pay equity" is set to continue through 2018, and the Government has signalled new legislation to address the gaps. In the health and safety space, protecting mental health and wellbeing will gain momentum.

With the change in Government expect changes to employee entitlement and rights. This is likely to see some employers opting to settle employment disputes over litigation. Collective bargaining and intervention by the courts will likely increase as changes are made to the role of unions.

An increased cost of employment will be passed on to the consumer and we can expect to hear plenty more about it in 2018.

Environment

Environmental litigation continues to become more complex and litigious as new statutory provisions and regulations are tested, and New Zealand's natural and physical resources come under greater pressure.

Litigation relating to infrastructure and house consenting will dominate, as well as further increases in environmental prosecutions.

Construction

Recent legislative amendments and decisions from the courts point to a likely increase in the number of parties referring disputes to adjudication under the Construction Contracts Act in 2018. This will see a reduced level of formal court action.

Financial services

The scope of financial services regulation is wide, and the turf is policed by a number of different regulators, including the Serious Fraud Office (SFO), the Financial Markets Authority (FMA), NZX, The Department of International Affairs (DIA) and the Reserve Bank of New Zealand. It is an area which has seen significant activity in 2017 by a number of regulators. These have included investigations, prosecutions, civil proceedings and other enforcement tools. We foresee this continuing into 2018. The more significant areas of activity are discussed below.

Ponzi schemes, bribery and corruption, and international sanctions

Ponzi schemes

Ponzi schemes of a more modest scale than those in the 2012 Ross Asset Management case have continued to be a target of the SFO in 2017. Those that were prosecuted include:

- Shane Scott, **total offending worth $5.4m**, with no direct evidence of any legitimate investments. The offending involved a mixture of some short term and some longer term investors, including some friends and associates who had invested for over a decade. Mr Scott ultimately pleaded guilty and was sentenced to **4 years', 8 months' prison** in October 2017.
- Paul Hibbs, an unregistered financial services adviser (who ran Cameron Gladstone Investments and then Hansa Limited). **The total offending was worth $17.5m from 16 investors and their families, many of whom he had known for years.** Mr Hibbs, pleaded guilty in October 2017 and was remanded in custody until February 2018 for sentencing.

The continued focus on Ponzi schemes is consistent with the SFO's strategic objective of investigating where there is potentially a significant impact on public confidence in New Zealand as a safe place to invest. We expect to see Ponzi schemes remain targets in 2018, with any enforcement action being well-publicised.

Bribery and corruption

Corruption cases continue to be targets for the SFO, even when payments are relatively low-level given the risk to New Zealand's trading reputation. Expect that to continue in 2018: bribery and corruption remain "priority cases" for the SFO, as confirmed by SFO Director Julie Read, and General Counsel Paul O'Neil, when they spoke at the firm in mid-2017.

- A 2017 example is the prosecution of Simon Hall, a former employee of Fisher & Paykel Healthcare (FPH), for **receiving $213,000 in secret commissions from Middle Eastern clients of FPH** and for deceiving his employer. Mr Hall was sentenced to **8 months' home detention.** Notwithstanding the comparatively small amount involved, the SFO noted that his actions potentially tarnished the reputation of how New Zealand entities do business overseas, and said that "the SFO will continue to act in cases like this to maintain that [corruption free] reputation".

"New Zealand is known for corruption free business practices and the SFO will continue to act in cases like this to maintain that reputation."

Also expect enforcement agencies to go after the proceeds of crime following corruption convictions, as they have following the high profile 2016 Auckland roading contractors' case – in September 2017 the High Court issued a without notice order freezing Mr Borlase's assets worth approximately $8.6m under the Criminal Proceeds (Recovery) Act. In November, the Court of Appeal confirmed both the conviction and sentence of Mr Borlase, stating that the offending over 7 years reflected "generic and systemic corruption with a

tendency to undermine confidence in the administration of public affairs". Following the Court of Appeal's rejection of Borlase's appeal, it is expected that the Commissioner of Police will move to have those assets forfeited.

International sanctions

Too easily overlooked by local businesses, international sanctions bite in New Zealand too – as was brought home this year by the *Pacific Aerospace Limited New Zealand* aircraft manufacturer case, with the company pleading guilty in October to breaches of UN Sanctions and the New Zealand Customs and Excise Act for the indirect export of aircraft parts to North Korea (via China).

New Zealand companies need to remember that, given the current international climate, not only have UN Sanctions been significantly strengthened against North Korea, they are being actively monitored by both the international community and New Zealand.

For example, the *Pacific Aerospace* case was part of a UN Security Council Panel of Experts Report on sanctions against North Korea in February 2017. The detail of the report included excerpts from emails between a Chinese counterpart and Pacific Aerospace showing knowledge by Pacific Aerospace of use by North Korea and plans to provide training and parts.

"The sharing of information and co-ordination of law enforcement action across borders by regulators and enforcement agencies also continues."

The sharing of information and co-ordination of law enforcement action across borders by regulators and enforcement agencies also continues. For example, the International Anti-Corruption Coordination Centre launched in the UK in July 2017, with New Zealand, Australia, Canada, Singapore, the UK, and the USA as members. This collaborative international approach is a trend we expect to continue, consistent also with a "no safe harbours" hard-line on multi-jurisdictional criminal activity.

Market manipulation, insider trading and disciplinary proceedings before the NZMDT

Market manipulation and Insider trading

Last year was an active year for the FMA in litigation matters. Two significant "firsts" were:

- The civil proceedings in *Financial Markets Authority v Warminger*, marking the first extensive judicial analysis of market manipulation in New Zealand. Although the trades involved were relatively modest, the High Court described the conduct as coming from "a very experienced market trader in an attempt to take advantage of parties on the other side of the transaction" and during the subsequent penalty hearing said it was "likely to materially damage the integrity or reputation of New Zealand's securities markets". Mr Warminger was **ordered to pay a pecuniary penalty of $400,000 and is subject to an automatic 5 year management ban.**
- The first successful criminal prosecution of insider trading in New Zealand, involving a former employee at EROAD, Jeffery Honey. Mr Honey, an analytics manager, was convicted in relation to advice given to an associate to sell shares in EROAD on the basis of

"The emphasis toward taking market participants before the NZMDT for other than clear and minor misconduct highlights the need for management and boards to be vigilant with their companies' obligations under the listing rules."

inside information that trading performance in the United States was worse than expected. He was **sentenced to 6 months' home detention.**

The FMA's areas of strategic interest for enforcement in 2018 includes continued scrutiny of secondary markets trading conduct.

- We are already seeing the FMA educating market participants as to how it interprets and will apply the *Warminger* decision in the future. Continuing the theme of protecting the integrity and New Zealand markets will be an FMA priority going forward.

We expect to see a hardline taken when further misconduct is identified as the FMA seeks to bed in the gains made.

A tough approach can also be expected on any identified instances of insider trading. The FMA has recently filed criminal charges in the Auckland District Court relating to insider trading in VMob Group Limited shares (now trading as Plexure Group Limited).

Another area of interest for the FMA's enforcement team is promoting compliance with the Code of Professional Conduct for Authorised Financial Advisors. Emphasising the need for vigilance in this area, the recent decision before the FADC in *Financial Markets Authority v XYZ* shows that the FMA is willing to bring cases despite no apparent client harm or complaints. The decision also shows that even technical breaches of the Code can result in serious consequences.

The FMA's expected approach is also reflected in Chief Executive, Rob Everett's comments following the outcome in *Warminger*:

"Maintaining and promoting the integrity of New Zealand's financial markets is a core part of our mandate and we will continue to respond vigorously where we see misconduct", and those of General Counsel, Nick Kynoch following sentencing in the EROAD case: "Insider trading erodes confidence and harms the integrity of our markets. Where we find examples of this kind of misconduct we will take action and use our enforcement powers to uphold the law."

Also on the FMA's horizon in 2018 are:

- A major criminal prosecution under the Crimes Act against Auckland-based Steven Robertson. Mr Robertson was charged with 47 theft and fraud offences in the Auckland District Court relating to funds received from clients of PTT Ltd and related entities. It is alleged the clients understood the funds would be traded on their behalf or used for the purchase of shares in Mr Robertson's companies when they were not.
- The re-trial in the last of the criminal prosecutions arising out of the failed finance companies, *R v Bublitz*, after the High Court aborted the first trial in May 2017 – almost eight months after it commenced. The trial Judge had earlier dismissed large numbers of charges for reasons of case management and to try and keep the case within manageable bounds.

Increased referrals by NZX to the New Zealand Markets Disciplinary Tribunal

Outside of the courts, we anticipate **increased willingness on the part of NZX to refer market participants for disciplinary proceedings** before its internal New Zealand Markets Disciplinary Tribunal (NZMDT).

In its 2017 NZX Obligations Report, the FMA said that although generally satisfied appropriate levels of enquiry and professional scepticism were being applied in enforcement matters, there were some instances where NZX fell short of its expectations. Infringement notices, the FMA said, should be reserved for "clear and minor breaches of the rules" and the NZX was encouraged to make greater use of the NZMDT where there is "reasonable evidence" of "more than a minor breach of the rules".

There has been a recent drive toward increased penalties before the NZMDT and, compared to the infringement notice regime, the potential consequences are much more significant (the penalty bands are up to $20,000 for minor breaches, up to $200,000 for moderate breaches and up to $500,000 for serious breaches, whereas the four infringement fees during the FMA's review period ranged from $3,000 to $5,000). The emphasis toward taking market participants before the NZMDT for other than clear and minor misconduct highlights the need for management and boards to be vigilant with their companies' obligations under the listing rules.

AML/CFT: No more excuses

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 **(AML/CFT Act)** has now been in force for over four years. Up until now, there has been some leniency to allow time for entities to acclimatise to the new AML/CFT regime. However, the attitude of the DIA, which is responsible for enforcing part of the AML/CFT regime, is that there are no more excuses for non-compliance. The DIA has already had a successful prosecution under the AML/CFT Act in the *Ping An* case[1] in which the Court ordered payment of a pecuniary penalty of $5.3 million. Our view is that 2018 will mark the beginning of a more litigious period against non-compliant reporting entities.

In a signal of what is to come in 2018, on 13 December 2017, the DIA filed its third civil proceedings under the AML/CFT Act in the Auckland High Court against a money remitter, Jin Yuan Finance Limited **(Jin Yuan)**. Proceedings have been brought not because there is any evidence of money-laundering or the financing of terrorism, but because the DIA alleges that Jin Yuan failed to meet AML/CFT Act requirements such as customer due diligence, account monitoring, record keeping and reporting suspicious transactions. This prosecution follows on from a formal warning to Jin Yuan issued by the DIA in July 2015. This shows that the DIA will closely monitor entities who have been warned and will prosecute if remedial action is not taken. This is a case to watch for 2018.

The FMA and the Reserve Bank also have responsibility for enforcing the AML/CFT Act in relation to certain sectors and are actively monitoring the sectors they are responsible for under the AML/CFT Act. These regulators are considering a range of responses, from litigation to formal warnings against reporting entities who are still non-compliant. For instance, on 24 November 2017, the FMA issued a formal warning to Fullerton Markets Limited **(Fullerton)**[1]. An inspection of Fullerton's AML/CFT compliance by the FMA staff showed that the company did not have adequate risk assessment or AML/CFT compliance programmes. The warning required Fullerton to undertake a series of remedial actions to comply with the law. The FMA signalled that if Fullerton failed to take these remedial steps, the FMA would consider further regulatory responses including civil action which can result in penalties of up to $2 million per offence.

In the Annual Report for 2017, the FMA referred to the following problematic issues in AML/CFT. We consider these may be a focus for enforcement action in the future:

- failure to file suspicious transaction reports;
- poor governance and management oversight in relation to AML/CFT;
- lack of staff training in detecting and preventing AML/CFT activities; and
- poor due diligence on high risk customers.

Consumer law

In our 2017 forecast, we anticipated a forceful approach to consumer and credit law enforcement by the New Zealand Commerce Commission (NZCC), further prosecutions and test cases, and higher fines and penalties.

This prediction proved correct with an $800,000 fine against Bike Barn in the first half of 2017, then the first Fair Trading Act 1986 (FTA) fine more than $1 million against Reckitt Benckiser for misleading packaging of Nurofen, rigorous Credit Contract and Consumer Finance Act 2003 (CCCFA) enforcement and the NZCC's latest "case stated" proceeding against Harmoney on the application of the CCCFA to peer-to-peer-lending.

This strong enforcement trend looks set to continue in 2018.

More, and high profile, cases

The NZCC pursued nearly 40 consumer and credit cases in 2017. This included a number of high profile cases such as: the packaging and promotion of Nurofen; pricing claims made by Bike Barn about discounts and the duration, of those discounts; and the ongoing investigation into Bunnings' claims to "lowest" prices. The NZCC issued an open letter to retailers on pricing practices in June and issued fact sheets on a number of these case examples.

The NZCC continues active enforcement of the CCCFA. It has progressed its prosecutions against mobile traders such as Bestdeals 4 You Ltd, Budget Warehouse Ltd and Best Buy Ltd. In addition, the NZCC has taken a range of enforcement actions against several finance companies, prosecuting Acute Finance Ltd for charging unreasonable credit fees, reaching an out of court settlement with Rapid Loans NZ Limited and issuing warnings in three other cases.

Increasing fines and exposures

The NZCC continues to seek higher fines and penalties from the courts – particularly where charges involve broad reach advertising, large corporate traders or reason to believe there is consumer harm or material gain from the conduct.

The NZCC is also focused on individual responsibility of business owners or directors where deliberate conduct appears to be involved. In October 2017, the owner of Lightweight Concrete Limited was fined $152,000 for claiming it supplied a premium brand of concrete cladding panels when it did not, and this fact was or must have been obvious to the owner of the business.

In very serious cases, Crimes Act charges have been laid. In March 2017, the sole director and shareholder of mobile trader, FlexiBuy Limited was sentenced to two years imprisonment for taking consumers' money without any intention to supply goods.

In the CCCFA space, consequences of non-compliance reach beyond the imposition of penalties to include liability for statutory damages and, in respect of certain breaches (such as failures to comply with statutory obligations to provide consumers with certain information regarding their loans), orders requiring lenders to refund fees and interest charged. For example, in 2017 mobile traders Best Buys Ltd and Budget Warehouse Ltd were ordered to refund $37,180 and $33,419 in fees respectively.

Transparency and announced priorities

In July 2017, the NZCC announced its consumer priority focus areas of responsible lending; retail telecommunications; and credence claims.

The announcement of strategic priorities is a new initiative by the NZCC providing greater transparency on its work programme. The NZCC's Consumer Issues Report published in August, reinforced messages about the NZCC's areas of focus.

At our 2017 ***Regulator Series*** the NZCC provided some further insight, noting it will prioritise:

- Matters with a public safety element – an obvious priority for the Commission.
- Pricing claims, such as pricing comparisons, calls to action and representations made about government subsidies.
- Requests to traders for information to substantiate claims – these are already being used by the Commission across many matters.

Telecommunications

Retail telecommunications is a priority focus area for the NZCC across both its consumer and regulation work. This is an industry focus that was flagged in a "Warning for telcos" media release that the NZCC issued in February 2017, and reflected in four warning letters released in August as well as further discussion in the Consumer Issues Report. The NZCC has indicated that its areas of concern include:

- Misleading pricing such as hidden extra charges, undisclosed fees and complex pricing and terms
- Unsubstantiated or misleading claims about performance and coverage, particularly where comparisons are made
- Incorrect billing
- Unfair contract terms
- Failure to identify the subscription nature of mobile add-ons
- Incorrect calculation of broadband usage

Credence claims

Credence claims are claims such as "Free Range" that consumers take at face-value, on trust and cannot be easily verified. Breaching that trust is harmful to consumers, other competitors and New Zealand's reputation with tourists and across export markets.

The NZCC took a precedent setting case to the High Court in 2016, to gain clarity on "New Zealand made" claims. The decision clarifies that presenting a product as "New Zealand made" may be misleading if the key ingredients do not come from New Zealand, even if they are packaged or processed in the country.

2017 decisions involving credence claims included:

- ***CC v Topline & Cook*** - In May 2017, Topline International, a health supplement company and its director were fined $405,000 and $121,500 respectively for 22 charges relating to representations that bee pollen was made in New Zealand when in fact it had been produced and processed in China. The fine imposed on Mr C, as Topline's principal shareholder, director and person with ultimate responsibility for advertising decisions, is among the highest FTA fines imposed on an individual.
- ***CC v Fujitsu*** – In October 2017, Fujitsu General New Zealand Ltd was fined $310,000 for making unsubstantiated or misleading credence claims about some of its heat pumps. The case was brought under the substantiation provisions of the FTA. Fujitsu made a variety of claims about the energy efficiency and performance of some of its heat pumps, including that they were "NZ's most efficient heat pump range", "the most efficient heat pump ever", and that its e3 heat pump delivered "$4.92 for $1 of power". The NZCC said Fujitsu had no reasonable grounds to make the claims. In particular, some claims were based on performance only achieved under laboratory conditions, unlikely to be duplicated by consumers in real-world conditions.

Responsible lending

Overall complaints regarding compliance with the CCCFA have increased by 22% over the past year, with many of the complaints being referred to the NZCC by consumer agencies. We expect the NZCC to start focusing on responsible lending principles as set out in the CCCFA and the Responsible Lending Code, particularly how online processes permit a lender to:

- make reasonable enquiries so the lender can be satisfied that it is likely that the borrower's requirements or objectives will be met and payments can be made without substantial hardship; and
- assist borrowers to make informed decisions and be reasonably aware of the full implications.

22%

increase in compliance complaints during 2017

What's in the pipeline?

The announcement of the NZCC's priority areas provides useful insight into its programme for 2018 – retail telecommunications, responsible lending and credence claims will be in the spotlight. Further test cases for unsubstantiated representations and unfair contract terms, following the NZCC's industry reviews conducted for energy retail, telco retail, and gym contracts, can also be expected.

The NZCC continues to pursue the largest programme for consumer and credit enforcement in years, and we expect enforcement to continue throughout 2018.

Case study:

Credit fees and peer-to-peer lending

Commerce Commission v Harmoney

Following on from the key decision on how fees can be set under the CCCFA in the *Sportzone* case, the NZCC has sought guidance from the courts in relation to peer-to-peer lending fees.

In 2016, the NZCC asked the High Court to answer some questions of law regarding the CCCFA and peer-to-peer lending based on Harmoney Limited (Harmoney)'s fee structure. The NZCC asked whether a "platform fee" which Harmoney charges on its online lending website is a "credit fee" or an "establishment fee" under the CCCFA. If the platform fee is found to be a credit fee or establishment fee, then Harmoney would need to ensure that its fees were "reasonable" in accordance with the stringent CCCFA test requiring that costs recovered via the platform fee are only those costs which are *"closely connected to the fees for which they are charged"*.

In 2017, Harmoney attempted to strike out these questions arguing that these were, in reality, factual questions (not questions of law).[1] The Court struck out two questions but decided that the other questions were permissible with the most interesting for the industry being: is the Harmoney Platform Fee a credit fee under the CCCFA? The judgment on these questions of law is likely to be released in the first half of 2018.

In August 2017, the NZCC also filed civil proceedings in the High Court against Harmoney and Harmoney Investor Trustee Limited seeking a declaration that the companies have charged fees in breach of the Act and seeking orders to compensate affected borrowers.

Competition and antitrust

Merger and cartel litigation likely to continue

A significant year for competition and antitrust litigation, 2017 saw:

- Three appeals of unsuccessful merger clearance and authorisation applications filed and a competitor commence a private proceeding to block a merger. It had been 10 years since an unsuccessful applicant last challenged a merger clearance decision and 2 years since an unsuccessful applicant last challenged a merger authorisation decision. It was also the first time a competitor had commenced a private proceeding to block a merger in the history of the Commerce Act.
- The Commerce Commission (NZCC) actively pursue investigations into several concluded deals where clearance was not sought.
- An increase in effective, and in some instances, highly influential, third party participation in the NZCC's merger clearance and authorisation processes. We expect this trend to continue into 2018.
- The High Court dismiss proceedings brought by the NZCC against two real estate companies and two individuals for alleged price fixing in relation to TradeMe listing fees.
- The NZCC commence High Court proceedings against a herd management and milk testing company for alleged cartel conduct.

It was also a year of legislative changes. The long awaited Cartels Bill came into force in August, replacing the old price fixing prohibition in the Commerce Act with a new prohibition on 'cartel provisions' and introducing a raft of new exemptions. The new Government also indicated it intends to introduce new provisions in late-2018 allowing the NZCC to undertake market studies.

2018 will see the NZCC appeal the High Court's decision in the real estate case to the Court of Appeal and Fairfax and NZME seek leave to appeal the High Court's decision declining their appeal of the NZCC's decision to refuse merger clearance. We will also see the NZCC progress its case against GEA Milfos for cartel conduct and its case against Platinum Equity to prevent its acquisition of OfficeMax New Zealand.

Looking forward, we expect there to be a bedding in period and increased compliance activity as clients and advisers adjust to the new cartel provisions before they 'go live' in May 2018. The NZCC has indicated that it will update its guidelines that are affected by the changes and its cartel leniency policy. We also expect the trend of third party intervention in merger clearance and authorisation processes to continue.

2017 in review

More merger applications declined by the NZCC and appealed to the High Court

In 2017, the NZCC declined more merger applications than it has in previous years. It declined three applications for clearance (Vodafone/Sky, Aon/Fire Protection Inspection Services and Vero/Tower) and one application for authorisation (NZME/Fairfax). In contrast, it declined only one application for clearance in 2016 and accepted all applications in 2015.

Vodafone/Sky, Vero/Tower and NZME/Fairfax appealed the NZCC's determinations to the High Court. This is both unusual and significant as appeals of NZCC determinations are rare and infrequent – the most recent two examples being Godfrey Hirst's unsuccessful appeal of the NZCC's authorisation for the Cavalier/NZWSI merger in 2015 and Woolworths/Foodstuff's unsuccessful appeal of the NZCC's decision to decline clearance for their acquisition of the Warehouse Group in 2007.

Of the three appeals filed, only NZME and Fairfax's appeal proceeded to hearing. The High Court dismissed that appeal in late December. Significantly, the Court found that the NZCC was entitled to attribute decisive weight to maintaining media plurality in its decision to knock back the merger.

Increased third party interest in mergers

A trend towards more active participation from third parties in merger applications and investigations emerged in 2017, for example:

- The Sky/Vodafone application was the NZCC's most contested clearance process to date, with the NZCC receiving 65 submissions and expert reports. Prior to the NZCC's decision being released, Spark, 2degrees and InternetNZ sought and obtained urgent interim orders from the High Court to delay the completion of the merger, should clearance be granted.
- The NZCC received more than 50 submissions on the NZME/Fairfax authorisation application and held a conference of interested parties after releasing its draft determination and before issuing its final determination.

Complete Office Supplies, an office products supplier in Australia,

applied for an injunction to prevent Platinum Equity LLC from acquiring OfficeMax's New Zealand business. This was the first time a competitor had sought an injunction to prevent a merger under the Commerce Act. The NZCC followed suit and also applied for an injunction. The two proceedings have been consolidated and the hearing has been scheduled for June 2018.

NZCC loss in significant price fixing case

The High Court dismissed proceedings brought by the NZCC against Lodge Real Estate Limited, Monarch Real Estate Limited (a franchisee in the Harcourts group) and two individuals for alleged price fixing.

The case is significant because while the NZCC originally filed proceedings against 13 national and regional real estate agencies, only two, Lodge and Monarch, defended the proceedings. The remaining agencies admitted to contravening the Commerce Act, entered into settlement agreements with the NZCC and were subsequently ordered to pay pecuniary penalties totalling more than $18.97 million. The case also raises interesting issues about the meaning of "control" for the purposes of the price fixing prohibition, with the Court finding that an arrangement between agencies not to absorb the cost of TradeMe's new listing fees did not "control" the price charged to vendors.

Cartels Bill introduces new prohibition

Amendments to the Commerce Act introducing (among other things) a new prohibition on entering into or giving effect to

contracts that contain 'cartel provisions' (cartels prohibition) came into force in August 2017.

The amended Act applies immediately to all contracts entered into after 15 August 2017. However, transitional provisions provide for a 9-month grace period during which the NZCC cannot enforce the cartels prohibition on pre-15 August contracts.

The outlook for 2018

Trend of increased third party interest in mergers likely to continue

We expect the trend of third party intervention in merger clearance and authorisation processes to continue.

In its 2017/18 priorities publication, the NZCC said it will improve efficiency and transparency in the merger clearance process in 2018 by:

- Proactively publishing Letters of Issues and Letters of Unresolved Issues for every clearance application (rather than providing these documents to applicants only); and
- Publishing a record of section 47 (prohibition on anti-competitive mergers) investigations on its website as they are opened to ensure the public and wider market are aware of potentially anti-competitive transactions that have not been scrutinised through the clearance regime.

These steps will make it easier for market participants and interested parties to consider and make submissions on what the NZCC sees as key competition issues arising from a merger.

"Greater efficiency and transparency expected from the Commerce Commission in 2018."

Appeal of the Lodge Real Estate and Fairfax/ NZME judgments and continued NZCC enforcement activity

The NZCC has announced its intention to appeal the Lodge Real Estate decision. The appeal, which we expect to be heard in 2018, will likely clarify the meaning of "control" for the purposes of price fixing. Fairfax and NZME have also announced their intention to seek leave to appeal the High Court's decision to the Court of Appeal.

The NZCC's current activity, including its ongoing investigations, injunction proceedings to prevent Platinum Equity LLC from acquiring OfficeMax's New Zealand business and the proceedings against GEA Milfos for cartel conduct, will also continue in 2018.

Responses to law changes

We expect changes introduced by the Cartels Bill to lead to more compliance activity in the competition law space before the new provisions 'go live' in May 2018.

The NZCC has indicated it will update its existing guidance and its cartel leniency policy. We expect the NZCC will also look for opportunities to test the new provisions.

The government has not yet introduced legislation in respect of the proposed new market studies power. We expect this to occur in early 2018, following the conclusion of the new Government's 100-day plan.

International and domestic arbitration

International arbitration has become a popular mechanism for resolving disputes. The benefits of confidentiality, flexibility of procedure, choice of arbitrators and ease of enforceability have proved attractive to commercial parties, particularly in cross-border transactions. This is relevant for New Zealand businesses as they continue to perform in the global economy.

We predict the recent rise of Singapore and Hong Kong as jurisdictions of choice for international arbitrations will continue, with both jurisdictions well positioned geographically, with modern arbitral rules, supportive judiciaries, and now allowing third party funding. Movements in China also signal more openness to arbitration, brought in part by the needs of the Belt and Road initiative – watch this space.

Closer to home, the 2018 ICCA Congress in Sydney and Queenstown will see arbitration further promoted in Australasia. Both New Zealand and Australia continue to strengthen and modernise their arbitration laws. New Zealand arbitral institutions are updating their rules to reflect international best practice, and provide more options for those looking to arbitrate in New Zealand, whether domestically or with international counterparties.

Gender diversity in arbitrator appointments remains a key challenge – and is likely to remain through 2018 and beyond. It is an issue in the hands of arbitration institutions as well as the parties and lawyers.

International arbitration – Continued growth of Asian regional hubs

While the major arbitration institutions, primarily the Paris-based International Chamber of Commerce **(ICC)**, dominate the international market, regional hubs such as Singapore and Hong Kong have seen a sharp increase in the number of arbitration cases over recent years.

The Singapore International Arbitration Centre **(SIAC)** alone saw an increase of 26% in the number of new cases registered in 2016. We expect the popularity of Singapore and Hong Kong (including for New Zealand companies engaged in international arbitration) to continue, with both jurisdictions having made major efforts to increase their attractiveness as arbitral seats. Overall, the strength of these regional hubs, and the expertise that brings, is likely to be an advantage to the Asia Pacific region.

Third party funding for arbitration

Singapore and Hong Kong have increased the "attractiveness" of their arbitration regimes by introducing measures allowing for third party funding.

The amendment of the relevant laws allow for more flexibility and funding availability for parties seeking to arbitrate in the Asia Pacific region - all while ensuring the region is competitive with traditional European arbitration centres.

We expect continued growth in arbitration cases in the Asia Pacific region, especially as third party funding is increasingly seen as a lucrative investment opportunity for funders.

More promising signs for arbitration in China

While China is a strong player in the Asia Pacific business scene, arbitration in China as a foreign party or a Chinese counterparty, is not without its challenges.

China-based arbitration proceedings must meet a number of procedural-type requirements, and historically it has been difficult to enforce foreign arbitral awards against a Chinese entity with assets in China. However, there are signs that China is increasingly using arbitration to resolve commercial disputes – and may be becoming more arbitration friendly.

Drivers for this increase in arbitration include greater foreign trade, foreign direct investment and the dispute resolution and enforcement needs arising from the "Belt and Road" trade route initiative.

Given New Zealand's trade and investment relations with China, these are positive steps.

We predict arbitration involving China will continue to grow during 2018. However, we recommend caution, and suggest parties get appropriate legal advice if contemplating such an arbitration.

Australia making moves

A jurisdiction closer to home to watch in 2018 is Australia. Our closest neighbour bolstered its federal arbitration law in 2015 allowing for greater and easier enforcement of foreign arbitral awards, while ensuring the confidentiality of arbitration proceedings. A second Bill, the Civil Law and Justice Legislation Amendment Bill 2017 (the CLJ Bill) received its second reading in the Australian Senate in 2017 and is intended to *"help ensure that Australian arbitral law and practice stay on the global cutting edge, so that Australia continues to gain ground as a competitive, arbitration friendly jurisdiction".*

Recent arbitration case law in Australia also shows that it is generally well positioned as a pro-arbitration and pro-enforcement jurisdiction. The coming year will also see Sydney host the 2018 ICCA Congress, a major event on the international arbitration calendar. The ICCA Congress will be an opportunity for Australia - and New Zealand with a spinoff event in Queenstown - to showcase itself as an emerging player with the required infrastructure and expertise to become another regional hub for international arbitration.

Arbitration in New Zealand

New Zealand has recently enhanced its legislative arbitral landscape, with updates to the New Zealand Arbitration Act 1996 during 2017:

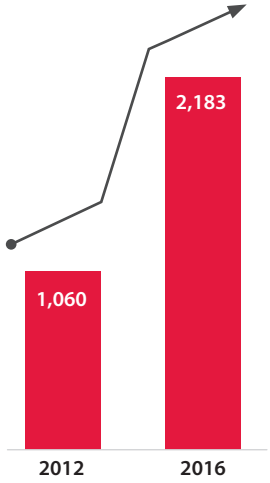
- expanding the definition of 'arbitral tribunal' to include an arbitral institution and an emergency arbitrator.
- making the Arbitrators' and Mediators Institute of New Zealand Inc (AMINZ) the new default appointing body for arbitral appointments.

There is an additional (private member's) Bill that should further enhance arbitrations in New Zealand by ensuring (among other things) confidentiality of any proceedings appealed through the New Zealand Court system, and dealing with challenges to a tribunal's jurisdiction. With the new Government now in place, watch to see if this Bill will be enacted in 2018.

In addition to formal legislative amendments, a key development is the introduction by New Zealand arbitral institutions of new arbitration rules, with AMINZ releasing its updated rules in May 2017, and the New Zealand Dispute Resolution Centre **(NZDRC)** updated rules.

The NZDRC also has rules catering for expedited 45, 60 and 90 day arbitrations (as well as non-time limited domestic arbitrations). The trend is toward arbitration in the sense known internationally, and away from 'High Court practice' but in an arbitral forum.

We expect these rules to be a positive development for arbitration in New Zealand in 2018 and beyond - they provide more options and may re-energise the country's arbitration practice.



Arbitration cases administered in China under the China International Economic and Trade Arbitration Commission (CIETAC) have steadily increased

from 1,060 (2012)
to 2,183 (2016)

An increase of more than

100%
in four years.

Of the 2,183 cases in 2016, 483 were international cases.

In 2015, 25.5% of international business transaction disputes in China were resolved by commercial arbitration.

Source: Statistics available from: https://uk.practicallaw.thomsonreuters.com/3-520-0163?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

Diversity: a continuing challenge

An area with "room for improvement" in 2018 is gender diversity in the international arbitration scene. One step being taken internationally is the Equal Representation in Arbitration Pledge (the Pledge), which as at November 2017 had 2,175 signatories (including some very high profile individuals and organisations).

A key aspect of the Pledge is, where possible, collating gender statistics for appointments and made publicly available.

Here in New Zealand, AMINZ has expressed a commitment to increasing the number of women appointments to arbitration panels – there is currently an under-representation of women available for appointment on their panel. However, the SCC statistics show that it is not only arbitral institutions with a role – the parties themselves, and their advisers, must work to increase diversity on arbitral panels when nominating and selecting arbitrators. Whether there is any change will be something to watch for in the coming years.

14.8%

The ICC had 4.4% female appointments (of those appointed as arbitrators) in 2015 - this was up 14.8% in 2016.

20%

The London Court of International Arbitration had 20% female appointments in 2016.

The Stockholm Chamber of Commerce (SCC) had 16% female appointments in 2016. Broken down further, of the 250 total SCC cases:

when appointed by the SCC itself, women were appointed in

22.5%

of cases.

when appointed by co-arbitrators, women were appointed in

20%

of cases.

but when appointed by the parties, women were appointed in only

11%

of cases.

Group ("class action") litigation

Group litigation is gradually becoming an established part of the New Zealand litigation landscape despite the lack, to date, of a developed legal framework to cater for true 'class actions'. It has been left to the courts to develop principles on a case-by-case basis via "representative actions" brought pursuant to Rule 4.24 of the High Court Rules.

The objectives of group litigation are to foster access to the courts, make litigation less expensive and encourage efficiency by resolving legal issues in relation to multiple claims at the same time. In pursuit of those objectives, the courts have continued to take a *"liberal and flexible approach"*.[2] This permissive approach has led to so-named 'class actions' (technically these are representative actions) being pursued for a variety of claims and in a diverse range of industries. These include insurance claims, claims against banks regarding bank fees, defective building cladding claims (see our article on construction litigation trends on page 32) and claims regarding diseased Kiwifruit crops.

"Group litigation is here to stay. Any business, in any industry, can be subject to a 'class'-type claim which quickly could become a significant issue."

For 2018, the Law Commission has announced that it will conduct a review of the 'class action' regime. As a result, we may see a shift to a more formalised regime in the not too distant future.

What is clear is that group litigation is here to stay. Any business, in any industry, can be subject to a 'class'-type claim which quickly could become a significant issue. Class actions can turn smaller claims, which may not in themselves be financially viable for claimants to pursue, into much larger and more complex claims. It requires careful legal and strategic management: (a) to manage issues to lessen the risk of class actions forming; and (b) to manage the litigation process, if your business is subject to such a claim.

Key themes for 2018

We are likely to see a fairly active period in 2018 for group litigation with the judgment on the first stage of the 'Kiwifruit class action' expected – in which the High Court will rule on whether the Ministry for Primary Industries owed a duty of care to kiwifruit growers to prevent the Psa-V disease from entering New Zealand. Further steps in the 'Southern Response class action' and defective cladding cases are also expected.

Our projection of the key themes for 2018 are:

Facilitation

The courts are continuing to adopt a "liberal and flexible" approach to representative actions. This means that group litigation is relatively easy to commence and is likely to become more common. To obtain an order permitting a group action, the courts merely require group claimants to show that there is an arguable case and that there are common legal or factual issues between the members of the group. A number of orders permitting group actions have been challenged on appeal on the basis that there are no, or insufficient, truly common issues, but those challenges have been unsuccessful.[3] There is also no requirement that the common issues should predominate over individual issues as there is, for example, in the United States.

In addition, the senior courts have signalled little apparent appetite to engage in the substantive legal arguments of the case, or lack thereof, at the preliminary stage of approving group litigation.[4] The

2 *Houghton v Saunders (2008) 19 PRNZ 173 at [100] (HC).*

3 *For instance, the James Hardie https://minterellison.co.nz/our-view/class-actions-liberal-and-flexible-approach-continues and Southern Response class actions. https://minterellison.co.nz/our-view/court-of-appeal-allows-southern-response-claimants-to-proceed See also the End of 2017 Class action update - https://minterellison.co.nz/our-view/class-actions-and-litigation-funding-end-of-year-update-2017*

4 *For instance, Southern Response Earthquake Services Limited v The Southern Response Unresolved Claims Group [2017] NZCA 489 at [16]. See our update on this case at https://minterellison.co.nz/our-view/court-of-appeal-allows-southern-response-claimants-to-proceed.*

Court of Appeal has said that it is *"highly undesirable"* that a mini trial be conducted at a stage when leave is being sought to permit group litigation.[5] All that is required is that the Court undertake a *"provisional appraisal of the merits of the proposed claim"* and this cannot be *"an opportunity for a wide-ranging attack on the merits"*.[6] This means that the merits of the claims will not undergo detailed testing at the outset and obtaining leave to commence group litigation can be expected to be relatively straight-forward.

Creative case management

Courts are also showing creativity in managing some of the practical obstacles to group claims. Recently in the Southern Response proceeding, the group claimants sought to gather from the insurer the contact details of individuals with unresolved claims with Southern Response who had not yet joined the class action.[7] The insurer refused to disclose this information due to privacy concerns. The Court of Appeal decided that in the absence of a detailed group litigation regime, the High Court has the power to order Southern Response to provide information about the proceedings to the potential claimants. This would avoid privacy concerns (as no contact details would be disclosed) and would also ensure that potential group members are made aware of the group action. The Court of Appeal therefore stated that in the absence of orders from the High Court, the parties should work together to resolve the form of the communication to be provided by Southern Response to policy holders with information about the group claim.

In addition, the courts are showing themselves willing to create sub-classes to deal with issues that are not common to all members of a class.[8] In the James Hardie class action, it was argued by James Hardie that the claims would require a *"house by house investigation"* and that there were insufficient common issues for group litigation to be permitted.[9] The Court of Appeal rejected this, stating that the court's powers of case management and ability to be creative should not be underestimated.[10] Claims which had different features (e.g. where cladding was installed at different times and under different versions of the James Hardie "technical literature") could be dealt with via the use of sub-classes.[11]

We are also seeing a continuing trend for complex group litigation involving split trials. A split trial is a first stage hearing to determine common issues that will bind the class, and a further stage hearing to resolve individual matters such as individual causation, loss and damage. A good example of this is the Kiwifruit class action where the first stage trial will decide whether the Ministry for Primary Industries owes a duty of care to the Kiwifruit growers.

No established track record for success yet

The group litigation claims in New Zealand to date do not appear to have resulted in any significant judgments or settlements. That is unlikely to be lost on the commercial litigation funders who are often asked to finance class actions. In the next few years, litigation funders will be looking for a return on their investment. See our article on third party litigation funding on page 22.

5 *Ibid at [16].*
6 *Ibid at [16].*
7 *Southern Response Earthquake Services Limited v The Southern Response Unresolved Claims Group [2017] NZCA 489. https://www.courtsofnz.govt.nz/cases/southern-response-earthquake-services-limited-v-the-southern-response/@@images/fileDecision?r=703.138935879 https://minterellison.co.nz/our-view/court-of-appeal-allows-southern-response-claimants-to-proceed*
8 *James Hardie class action – Cridge v Studorp [2017] NZCA 376.*
9 *Cridge v Studorp at [15].*
10 *Cridge v Studorp at [25].*
11 *Cridge v Studorp at [25].*

Trends for the future

Australia has now had its 25th anniversary of the introduction of a class actions regime. This more mature group litigation market demonstrates some likely trends for New Zealand including:

- An increase in financial services group litigation and shareholder group actions.
- A focus on follow on group litigation from regulators' prosecutions: This is where a regulator brings a proceeding and obtains a determination of liability which groups of claimants then seek to rely on for individual damages claims.
- The increased influence of law firms focussing on plaintiff/claimant-side matters, and the growing influence of commercial litigation funders.

Australia, unlike New Zealand, has a detailed class action regime, including rules about the court's supervisory function over class actions and litigation funders. In contrast, New Zealand's group litigation regime has largely been created by the courts. Given the Law Commission's imminent review of the group litigation regime, a formalised procedure may not be far off.

Case study:

Regulators' rights to bring class actions

Under the Financial Markets Conduct Act 2013, the FMA has the right to bring class action proceedings on behalf of a number of investors if it is in the public interest. The FMA used this power for the first time in the proceeding against Prince & Partners Trustee Company Limited **(Prince & Partners)**. Prince & Partners was the former trustee for debt securities issued by Viaduct Capital Limited, which went into receivership in May 2010 owing secured depositors approximately $7.8 million. The FMA alleged that Prince & Partners had failed to carry out its functions with the care, diligence and skill expected of a reasonably competent and prudent trustee and brought a claim on behalf of investors. It recently settled the proceeding for $4.5m.

Third party funding

Like group litigation (often called 'class' actions), litigation funding is also becoming a more established feature of the New Zealand litigation landscape. A typical model is that a litigation funder will pay for all legal and other costs relating to a proceeding in exchange for repayment of funding costs and a profit margin or share of the damages if the claim is successful. Litigation funding is attractive to claimants who may not have sufficient funds to pursue a claim and who pay nothing if the claim does not succeed. As there are no significant common law or statutory barriers to litigation funding in New Zealand, we predict increasing involvement from funders.

The hot topics for litigation funding in 2018 are likely to be:

Further debate on the proper role of the courts where litigation is funded

Historically, litigation funding was not permitted. It was seen as an abuse of process because the third party funder did not have a direct interest in the claim with the key concern being that such claims were oppressive to defendants and may result in the misuse of the function of the courts.[12] However, the New Zealand courts have, in recent years, followed overseas courts in permitting litigation funding with some safeguards. The safeguards and the role of the courts have been considered in two key cases recently:

a. In 2017, the Supreme Court in *PwC v Walker*[13] considered whether the litigation funder had, in effect, improperly taken assignment of the proceedings from the claimant (refer to case study on page 24). The conclusion of the majority of the Supreme Court was that there was no improper assignment. However, this case displayed a tension between the wish to permit litigation funding (to allow access to justice) and the court's protective function to ensure that there is no abuse of process.

b. Another discussion on the court's role took place in the Southern Response class action litigation. In that case, the Court of Appeal observed that it is not the court's role to approve litigation funding agreements.[14] However, the court will review funding agreements to reassure itself that there are no obviously unfair, oppressive or misleading aspects to the arrangement. The Court noted that the reason why the courts decline to approve funding agreements is because a potential class member might be falsely reassured by the court's approval. The Court considered that this might result in a class member failing to undertake their own due diligence.

Our view is that the courts will continue to test where the boundaries of its protective function lie as litigation funding continues to grow and evolve in New Zealand.

"The business of investing in litigation is on the rise."

Advertising of 'class actions' which are funded by third parties

The Court of Appeal in the Southern Response case was also asked to consider whether the advertising of the group litigation was misleading to some claimants. Southern Response alleged that statements such as *"no win, no fee", "there is nothing to lose by joining"*, and that claimants would be *"no worse off"* may be misleading for some claimants as there was uncertainty as to how the litigation funder's fees would apply. The Court ordered that leave to bring the claims as a class would be conditional until the Group could

12 *PwC v Walker [2017] NZSC 151 at [121]*
13 *[2017] NZSC 151.*
14 *Southern Response Earthquake Service Limited v The Southern Response Unresolved Claims Group [2017] NZCA 489 at [81].*

satisfy the Court that the sub-group would in fact be no worse off by joining the class action.[15] This demonstrates that the courts will scrutinise statements made regarding the likely outcomes of funded litigation. Funders and claimants may face delays in obtaining leave to bring a group claim if inaccurate or misleading statements are made.

Return on investment for funders?

Despite the growth in litigation funding, a key issue for funders in New Zealand is that there has not yet been a track record of substantial pay outs for litigation funders. Indeed, there was $5m costs award in the Feltex proceeding made against the funded shareholders in Feltex.[16] The substantive Feltex claim has been appealed to the Supreme Court and the ultimate outcome could change the costs outcome. A significant adverse costs award would not be lost on the commercial litigation funders currently active in the New Zealand market. That said, litigation funding in Australia is reportedly highly profitable[17] and funders will naturally assess opportunities on a case by case basis.

Litigation funding and the Law Commission's review of class actions

Litigation funding is likely to be a hot topic in the review of the class action regime by the Law Commission, which is due to commence in early 2018. The Law Commission is likely to look closely at whether the courts should take a more active role in supervising third party funding as the Australian courts do (e.g. the Australian courts approve settlements, whereas the New Zealand courts do not). This review may, in time, lead to a more formal regime for litigation funding. A formal regime would, in our view, be preferable to the current position, with plaintiffs' and defendants' legal teams alike being required to navigate the growing body of case law for the applicable principles.

15 *Ibid at [126].*
16 *[2015] NZHC 548.*
17 *IMF funded cases in Australia between August 2001 and June 2010 had an internal rate of return of 75% before overhead expenses. Abrams and Chen "A Market for Justice: A First Empirical Look at Third Party Litigation Funding" 15 U. Pa. J. Bus. L. 1075 at 1094.*

Case study:

PwC v Walker

One of the key litigation funding decisions in 2017 was the decision of the Supreme Court in *PwC v Walker*. In this case, the Court considered the third party funding of claims by Property Ventures Limited (**PVL**) (and others) against PwC, the auditor of PVL. The claims arose out of the liquidation of PVL following a failed property development project in Queenstown. PVL alleged that had PwC not been negligent, PVL's operations would have been wound-up earlier that they were, in which case ongoing losses would have been avoided. SPF No 10 Limited (**SPF**) funded PVL's claims against PwC under a Funding Agreement and also took assignment of a General Security Agreement (**GSA**) over PVL's assets.

PwC applied to the High Court to stay the proceeding on the basis that the combined effect of the Funding Agreement and the GSA was that SPF had taken assignment of PVL's cause of action against PwC. It was alleged that SPF, as a third party to the proceedings, would receive all the proceeds of the litigation and that this was in fact an impermissible assignment of a bare cause of action. The application was heard ultimately by the Supreme Court. However, prior to the Supreme Court issuing its decision, the parties settled the substantive proceedings. Notwithstanding that a settlement had been reached, the Supreme Court took the unusual step of issuing its judgment anyway.

One of the key issues was whether the right under clause 6.3 of the GSA gave SPF control over the proceedings. Clause 6.3 gave SPF the right following PVL's default to *"bring, defend, submit to arbitration, negotiation, compromise, abandon or settle any claim or proceeding, or make any arrangement or compromise, in relation to the Secured Property."* The concern was whether the broad powers in clause 6.3 would trump the Funding Agreement which stated that the liquidator (not SPF) would instruct the lawyers. The majority of the Supreme Court expressed the preliminary view that the specific provisions of the Funding Agreement, which state that the liquidator will instruct the lawyers, would likely constrain SPF's power under clause 6.3.

However, the majority of the Court found that since SPF had confirmed that it would not seek to rely on clause 6.3, the Court did not need to express a view on whether the combined rights under the Funding Agreement and the GSA meant that SPF had a *"bare cause of action"*. SPF also undertook to pay a proportion of the proceeds to the liquidator for the benefit of the unsecured creditors of PVL. As a result of these undertakings, the majority of the Supreme Court was satisfied that the concerns about the combined effect of the Funding Agreement and the GSA were unfounded.

Cyber security

Getting on with business while the regulatory landscape catches up

Cyber threats to business escalated around the world in 2017. Ransomware attacks, such as NotPetya, Bad Rabbit and WannaCry, disrupted businesses worldwide. High profile data breaches made global headlines, including the Equifax breach which exposed the personal information of almost half the population of the United States. The costs of cybercrime continued to climb as defending against and responding to cyberattacks became an accepted and critical component of business operations.

The scene is being set by changing legislative and regulatory regimes in Australia and Europe

Against the backdrop of the evolving and ever-present cybercrime threat, international statutory and regulatory regimes governing data storage and security continue to be updated. Australia's Privacy Amendment (Notifiable Data Breaches) Act 2016 will take effect in 2018 and requires entities regulated under the Privacy Act to notify the Australian Information Commissioner and affected individuals of any eligible data breach. This mirrors the European Union's General Data Protection Regulation, which contains a mandatory breach disclosure provision and will take effect on 25 May 2018 following the culmination of a two year transition period.

Whether the disclosures required will result in follow-on litigation (such as individual or class-action claims for negligence, breach of contract, breach of privacy, or derivative shareholder litigation) remains to be seen. However, this has been the experience in the United States where similar disclosures are already required.

New Zealand's data and cyber security framework awaiting reform

In New Zealand, the legislative and regulatory hiatus over reform of data and cyber security continues, but there are signs that change is on the horizon. Currently New Zealand does not mandate disclosures of data breaches, but the Law Commission's long standing recommendations for amending the Privacy Act include mandatory reporting of privacy breaches, as well as stronger powers for the Privacy Commissioner, new offences and increased fines (these recommendations having been on hold since 2011).

The new Government has stated that the stalled privacy reforms have put New Zealand behind the rest of the world. Labour has committed to implementing most of the Law Commission proposals to strengthen consumer protections, and the Greens and New Zealand First have expressed similar sentiments. Alongside a change of Government, we expect implementation of the Privacy Amendments across the Tasman will give renewed impetus to developing New Zealand's policy and updating the 2011 reform recommendations.

Duty to disclose a data breach?

If your organisation suffers a data breach, your organisation may have contractual or other obligations to disclose that a breach has occurred, depending on the nature of your business and the characteristics of the breach (and may have a strong business reason for disclosure in any event). Consider:

- Privacy Act implications of the breach
- Contractual obligations with suppliers and other third parties
- Whether a cyber-insurance policy is triggered
- Whether you have any regulatory risk reporting obligations
- Extra-jurisdictional requirements: if your company does business offshore, are disclosure obligations trigged, e.g. under the General Data Protection Regulations or Australia's Privacy Amendment (Notifiable Data Breaches) Act 2016?
- Communications strategy for notifying affected parties and addressing media inquiries, if applicable.

Focus on "breach coaches" looks set to continue – with a positive impact on breach response and recovery

In the past year we have seen insurers take on an increasingly active role in assisting organisations to respond proactively to cyber events, including adopting the "cyber breach coach" model.

In 2018 we expect to see a strong push towards such pre-planning of incident response, with more organisations being encouraged to utilise "breach coaches" (usually crisis management and/or legal experts), who can quickly and easily engage pre-committed data forensic, PR and other experts as needed upon discovery of a cyber-incident. In the case of a data breach, this strategy can help reduce the harm from potential or actual disclosures of customer or employee personal information, or a company's confidential and commercially sensitive material.

There are already signs that this approach may be reducing the role of litigation in resolving post-incident disputes in this country, particularly disputes over the adequacy of an organisation's response to cyber breaches.

Cyber security planning makes commercial sense

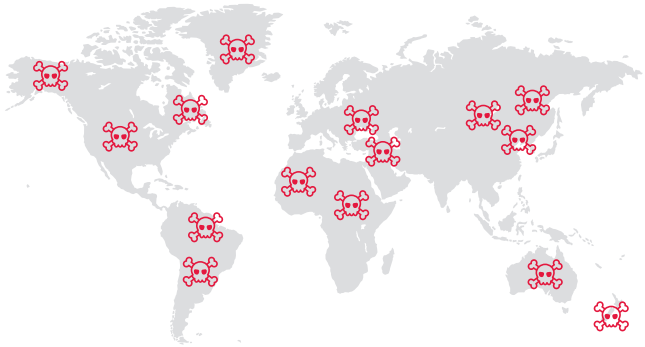
Regardless of whether or when new legislation is introduced, New Zealand organisations are well served by ensuring they have their own policies and practices in place to assess, identify, manage and respond to cyber threats. Given the risks, the business case for developing and implementing a robust cyber plan is a straightforward one. If your organisation has yet to put a cyber-readiness plan in place, MinterEllisonRuddWatts' cyber security toolkit can help you get started.

Cybercrime by the numbers

91% of cyber-attacks start with a phishing email

1.1 billion
total number of identities exposed in 2016 data breaches

143 million
compromised personal records in the US Equifax hack, including names, addresses, birth dates, social security numbers and drivers license numbers



150 countries
impacted by the Wannacry ransomware attack

300 million
losses announced by Maersk and FedEx as a result of the NotPetya ransomware

Employment

Remedies and compensation for hurt and humiliation

As we anticipated in our *2017 Forecast*, we are now seeing the Employment Relations Authority and the Employment Court increase compensatory awards for "hurt and humiliation". These increases have been long signalled by the courts, with comments that hurt and humiliation awards in the Authority and the Employment Court have fallen "woefully" behind.

While the courts will continue to recognise the need for moderation in employment cases, compensation should be reasonable to reflect harm caused to employees. There has also been consideration of compensation "bands" (similar to the Vento bands used in the UK), with the Chief Judge of the Employment Court referring to banding in a recent decision to assist with a compensation assessment. While there is no judicial guidance on the approach to compensation bands, it will be an area to watch for 2018.

Privacy and the GDPR

We have seen no further progress on the long awaited Privacy Act reforms. While the broad drafting of existing privacy legislation has meant it is able to accommodate technological and privacy advances, reform is well overdue. We wait to see where this sits on the new Government's agenda. In that regard, refer to this forecast's article on cyber security, page 25. That said, there is change that businesses need to be aware of outside of New Zealand.

The European General Data Protection Regulation comes into force in May. It has express extra-territorial effect, which means that New Zealand businesses will need to understand the GDPR's reach and whether it has implications for how they collect or process its data.

Mental health and wellbeing

The Health and Safety at Work Act is nearly three years old, and the focus to date has been on individuals' *physical* safety and health. The conversation is now extending to mental health. Mental health is a crucial part of employees' wellbeing and, in addition to progress we have seen in safety, we can expect to see more initiatives being led by WorkSafe and big business to support wellbeing in the workplace.

We have seen this in the introduction of WorkSafe's Good Practice Guidelines on workplace bullying and the use of these by the Employment Relations Authority. The effect of this has been an increase in the investigation and management of workplace bullying concerns as employers hone in on acceptable conduct and standards in the workplace.

Harassment in the workplace - particularly sexual harassment - is an issue that will be closely monitored. The unprecedented momentum and media interest surrounding the #MeToo movement has made the elimination of sexual harassment a key issue of public concern.

Given the new Government's passion in this space, we expect this conversation to continue and gain momentum.

Future of work (2.0)

The future of the workforce continues to be a focus for businesses globally. With the changing demands for business and individuals, businesses are considering whether current models are fit for purpose in the age of the 4th industrial revolution and the "gig-economy".

This includes whether the right balance is being struck between providing protection and minimum entitlements for our most vulnerable, and the flexibility and freedom that is being demanded by individuals. This has generated conversation on whether current employment laws are fit for purpose and is reflected by the new Government's comments around enhanced rights for contractors where they depend on a particular principal for their income.

Global attention continues to be on the employee/contractor tension in the UK after Uber lost its appeal in the Employment Appeal Tribunal. With an appeal to be heard in the Court of Appeal, we are watching this space and its influence on New Zealand businesses.

"Global attention continues to be on the employee/contractor tension in the UK after Uber lost its appeal in the Employment Appeal Tribunal."

Ongoing focus on equal pay and pay equity

Scrutiny regarding "equal pay" and "pay equity' over recent years is set to continue through 2018. During 2017 we saw the settlement of equal pay claims relating to care and support workers, the commencement or continuation of similar litigation by workers in other sectors, and the previous Government's introduction of the Employment (Pay Equity and Equal Pay) Bill.

The Labour-led Government has halted the progress of that Bill, and signalled it will introduce new legislation to address equal pay and pay equity, which will be in line with the recommendations of the Joint Working Group on Pay Equity Principles.

A key difference between the now defunct Bill and the new legislation is likely to relate to identifying an appropriate comparator group when considering pay equity claims for work predominantly performed by women that may have been historically undervalued. Quite how this will be put into practice, and what guidance or assistance will be given to parties bargaining to resolve pay equity issues, remains to be seen. In the first instance, the Government's focus may well be on trying to resolve existing claims in sectors that are publicly funded; pre-election Labour promised to make pay equity for mental health workers a priority.

In the longer term, the introduction of new legislation is likely to have an impact both directly (including equal pay/pay equity claims in a wider range of sectors) and indirectly (such as bargaining for increased pay for unaffected roles, as a flow-on effect of pay equity remuneration increases).

New Zealand's gender pay gap

9.4%

(Source: StatsNZ announcement 1 September 2017)

Possible employment policy changes by the new Government

During the election, Labour campaigned on making a raft of changes to workplace relations laws. Working off the assumption that policies in Labour's manifesto not ruled out by either the Coalition or the Confidence and Supply Agreements with NZ First and the Green parties are still in play, as well as additional commitments made in both of those agreements, there is potential for a lot of changes over the next three years.

These changes will have an impact on how employers and employees engage in the context of employment litigation.

We see three broad themes underpinning the proposed changes to workplace relations laws: employee entitlements and rights, the role of the unions, and the nature of contractors.

In the context of litigation, the changes to employee entitlements and rights are likely to make the greatest impact, including:

- amending the rules around 90 Day Trial Periods to allow employees to contest their dismissal
- restoring reinstatement as a primary remedy for unjustified dismissal
- increasing the number of labour inspectors.

While increasing the number of labour inspectors may see an increase in employers being prosecuted for labour law breaches, the proposed changes to 90 Day Trial Periods and restoring reinstatement as a primary remedy may encourage employers to try to settle employment disputes to avoid the uncertainty of outcome that litigation can bring.

We also expect increased collective bargaining and intervention by the courts as changes are made to the role of unions. These include restoring the duty to reach agreement in collective bargaining and introducing a new type of multi-employer, multi-union collective agreement called a 'Fair Pay Agreement', which could apply to employees across entire industries.

Similarly, the proposal to provide statutory rights, similar to those currently provided to employees, for 'dependent contractors' will impact on the nature of contractors and could lead to greater litigation, with parties wanting to seek the correct status of a contractor (or employee).

Environment

Environmental litigation has continued to rise over the last few years, keeping pace with major plan reviews and development activity. The environmental area continues to become more complex and litigious as new statutory provisions and regulations are tested, and New Zealand's natural and physical resources come under greater pressure.

In 2018 we see these trends continuing, with litigation related to the consenting of infrastructure and housing being two areas of dominance, together with a continued increase in environmental prosecutions.

Infrastructure

A number of infrastructure projects are progressing through the business case and consenting process, and will continue in 2018 and beyond.

Public infrastructure projects, such as roads, rail, telecommunications, schools, hospitals and prisons typically require designations and the public acquisition of land. A requiring authority can proceed with an application for a designation (called a Notice of Requirement (NOR)) to the relevant local authority. Or, if it is a project of national significance, the NOR can be heard in a 'fast track' process by an independent Board of Inquiry.

Where private land is required for a public infrastructure project, we foresee an increase in litigation to determine the compensation payable under the Public Works Act 1981 (PWA) as land prices and the amount at stake becomes higher.

Given the number of projects and interests of landowners and occupiers affected, litigation is inevitable.

The Labour-led Government may make changes to the infrastructure project pipeline. For example, it has signalled it will place less emphasis on roading projects, and more focus on non-road transport, such as rail, shipping and public transportation. However, greater expenditure on infrastructure is expected. The increase in funding available for transport projects of regional importance alone will be doubled from $70-$140m to $140-$280m.

Housing

There are large housing developments underway across the country to address New Zealand's housing shortfall. Residential development is occurring in greenfield areas, and through intensive development in established neighbourhoods.

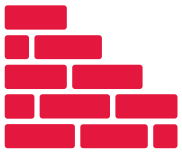
For greenfield areas needing a plan change to get a live zoning to allow development, there will be litigation relating to zone boundaries and controls placed on the land.

Where intensification is in existing neighbourhoods, the 'not in my backyard' mentality will inevitably see some developments proceed

30,453

new homes were consented across New Zealand.

Source: Statistics New Zealand, June 2017



Potential shortfall of about

9,000

new homes consented compared to what is needed to meet demand from a larger population growth.

to court over issues to do with notification to neighbours and potential adverse effects.

The Government has also announced it will legislate this year to establish an urban development authority that "will cut through red tape and drive forward at-scale, master-planned, new communities". While this may not have much impact in 2018, it may significantly change the consenting landscape for some residential development projects in the future.

Enforcement

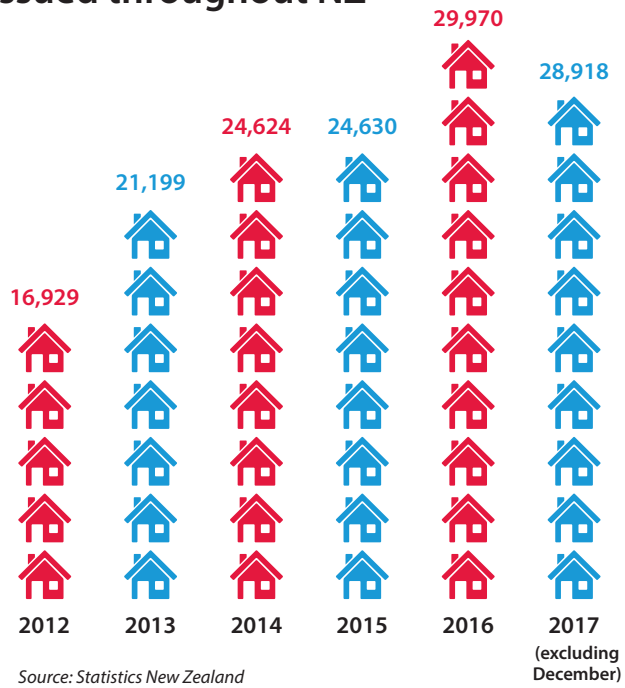
Promises of greater enforcement of the Resource Management Act resonated with some voters during the general election. The Government has said it will back this promise with funding. Traditionally funding for enforcement is woefully inadequate. It would take both strong leadership within councils and a lot of money to see a large change of direction. We expect a slow but steady increase in enforcement. This could come in the form of a broad role for a greater number of 'labour inspectors' to cover health, safety and environmental laws.

In the last 18 months we have seen councils toughen their stance on breaches of environmental law, especially around spills and water. However prosecutions tend to be limited to significant breaches.

Although fines can range up to $600,000 for a corporation (or up to $300,000 or two years imprisonment for an individual) per instance, plus $10,000 per offence per day, penalties have remained fairly low in recent years. Costs associated with mitigation and defence can be exponentially greater than the fines themselves. With a focus on increased enforcement there is potential for an upward trend in penalties.

Typically, environmental compliance is not high on businesses' agendas until there is enforcement scrutiny. Businesses tend to focus on taking steps to ensure good compliance systems are in place to avoid or reduce prosecution risk. However, a lot of management time and effort can be saved if that happens before the inspector turns up.

Total number of building consents issued throughout NZ



Source: Statistics New Zealand

In the year ended November 2017, non-residential building consents across NZ totalled

$6.6 billion

- up 11 percent from the November 2016 year.

Source: Statistics New Zealand

Over the last year Auckland has grown by close to 50,000 people. It is forecast to reach

2 million people by 2028.

Every 3 years Auckland grows by the population equivalent to the city of Tauranga.

(Source – Auckland Council briefing to the Incoming Government – October 2017).

Construction

2017 was an active year in the construction and building litigation space. In light of recent legislative amendments and decisions from the courts, we think 2018 is likely to see an increase in the number of parties referring disputes to adjudication under the Construction Contracts Act 2002 (CCA) instead of taking formal court action. There have also been some interesting judgments relating to class actions in the defective building space, indicating that 2018 may see these types of proceedings on the rise.

Adjudications under the CCA to assume greater prominence

The CCA allows any party to a "construction contract" to refer any dispute arising under that contract to adjudication – a "quick-fire" construction and building dispute resolution process decided "on the papers". Adjudication is not intended to be final – its purpose is to provide a temporary solution to encourage cash flow, pending the final determination of the dispute by way of litigation or the process set by the contract. The entire process can be completed in a matter of 25 working days but usually takes 6 to 12 weeks.

On 1 December 2015, the Construction Contracts Amendment Act 2015 (Amendment Act) came into force, introducing a number of changes to adjudication. Some changes were significant in that they expanded:

(a) The availability of the adjudication process to parties not directly involved in the physical construction of a project. Parties to consultancy agreements for design, engineering and quantity surveying work entered into or renewed after 1 September 2016 can now refer any disputes arising under those agreements to adjudication; and

(a) The types of disputes determined by an adjudicator that are able to be enforced in Court. Adjudicators' determinations on the rights and obligations of parties under both residential and commercial construction contracts are now able to be enforced as Court judgments, not only determinations relating to payment.

Ultimately, these changes fundamentally altered the adjudication regime from one directed at simply securing timely payment and encouraging cash flow, to one directed at all rights and obligations in construction contracts. The changes increase the significance and reach of adjudication determinations, leaving parties to re-litigate in Court under the contractual process in the face of an adverse determination. However, in reality, the time and cost involved in re-litigating the dispute means that parties often do not have the appetite and/or resources to follow it through to this stage.

"Adjudication is likely to assume more prominence in 2018, and is set to become the dominant dispute forum for all parties involved in construction projects."

Because of this, adjudication is likely to assume more prominence in 2018 and is set to become the dominant dispute forum for all parties involved in construction projects in respect of all types of disputes, no matter their complexity. This is not without concern – contractual claims in the construction space often involve technical legal and evidential arguments (in the case of consultants for example, most standard form contracts have a negligence performance standard). An adjudicator (who may not necessarily have a significant legal or expert background) deciding these claims does so within tight timeframes and without the benefit of hearing and testing the evidence through cross-examination. In such circumstances, adjudication determinations are ripe for error, meaning that the number of judicial reviews of adjudication determinations in the High Court may increase in 2018. However, parties should be wary to take such action in the absence of strong grounds – the High Court is becoming increasingly unwilling to interfere with adjudication determinations, encouraging parties to re-litigate the dispute instead (see for example the recent decision of *Body Corporate 200012 v Keene* [2017] NZHC 2953).

Class actions here to stay

The development of representative or "class actions" in New Zealand continued in 2017, particularly in the construction space. The Court of Appeal in *Cridge v Studorp* [2017] NZCA 376 upheld the right of home owners to pursue claims for allegedly defective cladding against cladding manufacturer, James Hardie New Zealand Limited (James Hardie) as a class. The Court of Appeal upheld the High Court ruling that:

1. The plaintiffs in a leaky home matter could bring three different proceedings against James Hardie as one representative action;
2. Issues of duty and breach were sufficiently common to be decided in one proceeding; and
3. The Fair Trading Act 1986 issue of whether particular statements made in the James Hardie technical brochures were misleading or deceptive could also be determined on a representative basis (issues of causation and loss would need to be determined individually).

The Court disagreed that class actions are limited to cases where there is one single event or single source of the damage and held that it is required to take a "liberal and flexible approach" in determining if there is a common interest between class action claimants.

The Court of Appeal's approach is consistent with the claimant-friendly and permissive approach that we have recently seen from the Supreme Court in *Carter Holt Harvey Limited v Ministry of Education,* which enabled claims to be brought by homeowners against manufacturers notwithstanding technical limitation arguments.

In light of the fresh product issues facing the construction industry (such as steel), our view is that class actions are likely to remain prominent in construction litigation and 2018 may see a growth in the number of these proceedings.

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