Shaping the future of insurance law

wotton kearney

A founding member of LEGALIGN GLOBAL

NZ Insurance Market Trends Update

Legal trends and developments impacting claims managers, underwriters, brokers and corporates operating in the New Zealand insurance market.

February 2021

W+K INSIGHTS

Welcome to our NZ Insurance Market Trends Update

The W+K New Zealand team is pleased to bring you our bi-annual digital update exploring emerging legal and claims trends impacting insurers, underwriters, brokers and corporates operating in the New Zealand market.

We look at the way many longer-standing issues continue to evolve, including the rise of representative actions, the issue of exclusions in construction defect claims, and increased levels of regulatory pressure adding to professional indemnity risks.

We also consider emerging issues such as the employment claims falling out of the pandemic, the need to navigate the new Privacy Act and mandatory reporting for cyber incidents, and new regulatory pressures on the medico-legal sector.

If you have any queries about any of these emerging issues or would like to know more, please get in touch with our authors or key contacts.

Antony Holden
Managing Partner - New Zealand
T: +64 4 260 4286
E: antony.holden@wottonkearney.com

wotton kearney
A founding member of LEGALIGN GLOBAL

CONTENTS

The LEGAL 500 ASIA PACIFIC TOP TIER 2021

Charter Signatory GENDER EQUALITY CHARTER NEW ZEALAND LAW SOCIETY

wotton kearney

D&O & Representative Actions

D&O ACTIONS ON THE RISE

Actions against directors and officers, including SME directors, are likely to continue to rise given recent decisions and the continuing economic pressures from COVID-19.

The expected standard of directors' conduct for financially distressed companies may now be considered higher following the Supreme Court's judgment in *Debut Homes Ltd (in liq) v Cooper* [2020] NZSC 100 on reckless trading provisions in the *Companies Act 1993*. Given that decision, a director may now be found not to be acting in the best interests of a company or its creditors where the company is balance sheet insolvent and continues to trade when the director knows there will be a shortfall to some creditors – even in circumstances where other creditors would be better off or projected deficits overall would be reduced.

The decision highlights that a director cannot believe they are acting in the best interests of the company or its creditors, and so benefit from a statutory defence, if the director has failed to consider the interests of all creditors.

Debut Homes might signal how the directors' liabilities will be determined in the Court of Appeal's decision in *Mainzeal*, which is due Q1 2021. That case will again see the issues of reckless trading provisions against ordinary business risks and trading-out of financial difficulties closely considered.

Other actions may arise as the safe harbour provisions in the *Companies Act*, which provided relief from the reckless trading provisions for companies facing liquidity issues due to COVID-19, expired on 30 September 2020. Unless the provisions are reinstated, directors of companies that were financially distressed by COVID-19 will need to carefully consider their position.

SIGNIFICANT D&O CASES

The spotlight will remain on D&O claims and their significant risk, given a number of anticipated decisions and developments including:

Mainzeal – The Court of Appeal in *Mainzeal* will consider the assessment of damages and directors' joint and several liability. The original assessment of damages at $36 million may remain given *Debut Homes'* silent endorsement of the High Court's approach in *Mainzeal* (see our earlier article). There may be a demand for an award to hold the director to account and reverse harm to the company, even where there is no difference in the notional increase of overall debts to creditors, restitution or equitable principles. It also remains to be seen whether the Court of Appeal will uphold the High Court's nuanced severing and compartmentalising of directors' liability, rather than the usual joint and several liability.

Intueri Education Group – The Intueri Education Group representative action expects a decision in Q1 2021 on whether summary judgment can be awarded for allegedly misleading and deceptive statements in IPO documents. The plaintiff has asked, in the alternative, for declarations that statements were misleading or deceptive. This novel approach would leave the directors' defences for reliance on third party advice and their honest and reasonable belief for later. A decision that goes against the directors might change how D&O claims are structured and pursued in the future.

The various CBL Group actions – The charges brought by the SFO against two individuals involved in CBL will be heard in September 2021. A common issue across the regulatory actions, criminal proceedings, creditor claims, and representative actions against the CBL directors and officers is the liabilities of independent non-executive directors. This case may be a catalyst for considering these issues more closely.

REPRESENTATIVE ACTIONS

Representative actions will continue to rise, driven by the increase in litigation funders and an absence of comprehensive legislation. The Supreme Court in *Southern Response v Ross* [2020] NZSC 126 confirmed representative actions (and opt-out actions) are possible in the absence of comprehensive legislation (see our recent article for more information).

There will be further litigation on procedural and substantive issues in representative actions to obtain clarity on how a court should supervise and manage these actions. The Supreme Court in *Southern Response* gave only general guidance on a court's effective management and supervision of representative actions. A number of representative actions have considerable procedural issues to resolve – particularly on CBL, given the two competing representative actions, contemporaneous regulatory proceedings and creditor claims. As a result, guidance will continue to be ad-hoc for the time being.

Given the developments in this space, the Law Commission is seeking submissions on its substantive review of representative actions and litigation funding. The Commission's preliminary view is that a statutory regime for representative actions is best, with some reform for litigation funding to address control, conflicts of interest, funder's profits, and adequate capital. More information is available on the Commission's website, with submissions closing on 11 March 2021.

Antony Holden
Partner, Wellington

Michael Cavanaugh
Senior Associate, Auckland

wotton kearney

Professional indemnity

VALUERS

The valuation profession is facing a number of risks:

Residential – while the residential market is generally rising (for now), financial stresses caused by COVID-19 are putting pressure on the edges of the market. This has resulted in an increase in claims by second tier and peer-to-peer lenders. The rising property market has also seen an increase in less experienced and under-funded ‘developers’. This has led to an increase in claims by lenders looking to recover shortfalls from unsuccessful developments.

Commercial – the value of commercial property is equal to the present value of future cashflows, which is often calculated using a capitalisation or discounted cashflow approach. COVID-19 has introduced additional uncertainty to valuations because of the greater risk of a tenant’s business failing, potential disruption from future lockdowns and the introduction of new lease terms. There are also likely future changes in demand, particularly for retail and commercial property, which will flow from changes to shopping and work habits caused by the lockdowns.

Disciplinary – In August 2020, the High Court allowed an application by the Valuers Registration Board to lower the threshold for imposing disciplinary sanctions against valuers. This is likely to result in more matters proceeding to an inquiry and more valuers being subject to disciplinary sanction.

FINANCIAL ADVISERS

Financial advisers are likely to see increased regulatory scrutiny from the Financial Markets Authority (FMA) over the next year, including:

Anti-money laundering and countering financing of terrorism (AML/CFT) – Financial advisers, who were part of Phase 1 of the AML/CFT regime, are now under greater scrutiny as the FMA has increased the number of compliance reviews, particularly desk-based monitoring reviews. This has resulted in formal warnings and requests for evidence of systems to establish future compliance. Failures to comply with FMA requests could result in a pecuniary penalty.

Client disclosure obligations – Recent FMA reports have highlighted that many financial advisers are still failing to comply with their customer disclosure obligations. Issues include disclosing information on fees in a way that is misleading, failing to make customers aware of the scope of the service provided, and only providing disclosure on request. Following the Royal Commissions in Australia, it is possible there will be increased monitoring and disciplinary proceedings in this area.

New financial advice regime – *The Financial Services Legislation Amendment Act* (the Act) comes into effect on 15 March 2021. The Act changes the rules for how financial advice is provided to retail clients. It sets out a range of duties for advisers, including the need to prioritise clients’ interests. Financial advisers will also be subject to a new Code of Professional Conduct, which outlines the standards of conduct, client care, competence, knowledge, and skills required when providing financial advice in New Zealand.

The rules contain a new disclosure regime, which includes a requirement to provide advice on the applicable fees and costs associated with the advice, any commissions or incentives, and any previous disciplinary history. The new financial advice regime makes clear that the conduct recently identified in the FMA’s monitoring is unlawful.

Financial advisers are likely to see increased regulatory scrutiny from the FMA over the next year.

wotton kearney

LAWYERS, ACCOUNTANTS & TRUSTEES

The Trusts Act 2019 (the Act) was designed to increase trustees' accountability and transparency of administration. As it is now in force, lawyers and accountants face increased risks when advising on trusts, acting as professional trustees, or advising on residential property. Key issues include:

Indemnities – Trustees can no longer rely on excessively broad liability exclusions. Any clause that excludes liability or gives indemnity for breach of trust arising from the trustee's dishonesty, wilful misconduct or gross negligence, is invalid. Paid advisers who establish trusts, and then act as trustees, will not be able to rely on an indemnity unless they have taken reasonable steps to ensure the settlor understands 'the meaning and effect' of the indemnity.

Disclosure – Trustees must now make basic trust information available to every beneficiary, and trust information available to beneficiaries who request it. Many trusts were set up for tax purposes, particularly before the minor beneficiary rule was implemented, with income streamed to minors. Payment of income was often recorded in the trust's accounts but not physically transferred to the beneficiary. Many beneficiaries may be unaware that this has occurred, but that will change under the new disclosure regime.

Inland Revenue Department (IRD) – The IRD is starting to look closely at trust account current accounts. In QB 15/11, the IRD confirmed that trustees paying trust income to a beneficiary at the lowest marginal tax rate were not committing tax avoidance. However, the IRD raised the issue of whether the beneficiary will actually benefit or whether they are being moved in and out for convenience. If the beneficiary is not benefitting, the arrangement is likely to be considered tax avoidance.

Increased disciplinary complaints – The Act is going to continue to increase beneficiary awareness and increase interactions. This has already been seen with an increasing number of complaints to the Law Society by beneficiaries, and complaints relating to trusts and estates, as shown in the tables below.

Year	2019	2018	2017
% of complaints relating to Trusts and Estates	20.5%	17.9%	17%

Year	2018	2017	2016	2015	2014
Complaints by beneficiaries	119	103	57	90	77
% of total complaints	7.5%	7.2%	3.9%	5.6%	4.7%

BRIGHT-LINE TEST – ACCOUNTANTS AND LAWYERS

The bright-line test was thrust back into the spotlight in late 2020 with the IRD actively pursuing those who failed to pay tax on investment property.

The bright-line test presents a risk to many lawyers and accountants. A change in the ownership of residential property could meet the bright-line test, or reset the start date, which could result in the bright-line test being met if the property is transferred again quickly. This is particularly a risk where the professional is not involved in the second transaction, and the client unwittingly meets the test.

There are some new and upcoming legislative changes that could result in transferred property meeting the bright-line test. For example:

Changes introduced by the *Trusts Act 2019* (Trusts Act) are resulting in trusts being re-structured to avoid some of the 'opt out' provisions of the Trusts Act. Clients and their professional advisors are responding by tidying up their trusts. In some situations, they are doing this by re-settling property into new trusts, and in others by distributing the trust assets.

A potential new top tax rate of 39% for people earning more than $180,000 may see clients wanting to use trusts or other entities for tax efficiency.

Caution is needed because the government has signalled that attempts to dodge the new tax rate is likely to be viewed as tax avoidance. Inter-generational asset protection is probably a better justification.

Notwithstanding the changes with the Trusts Act, many older settlors/trustees are looking to distribute assets to their children/beneficiaries. Advisers should take care that residential property is not transferred into the personal ownership of the children who then transfer it to a trust or company for asset protection.

Accountants and lawyers who act as professional trustees or directors of corporate trustees need to be actively involved in the management of the trust. The Trusts Act leaves in no doubt that a rubber-stamping approach is unlawful. They cannot leave the management of the trust assets to the non-professional trustees who may acquire and dispose of residential property that meets the bright-line test.

Mathew Francis
Partner, Auckland

James Dymock
Special Counsel, Auckland

Construction – combustible cladding

WHERE THERE'S SMOKE…

London. Dubai. Shanghai. Melbourne. Each city was the site of well-publicised high-rise building fires that caused significant property damage, and, in some cases, serious injury and death. A common factor was the use of aluminium composite panels (ACP) on the buildings' external façades. ACP is made up of two thin aluminium sheets bonded to a polymer core – the combustible element.

Happily, there have not been any high-rise building fires involving ACP in New Zealand. If one does occur, it is unlikely to be as catastrophic as those experienced overseas given recently constructed buildings in New Zealand are required to have sprinklers. While that is somewhat comforting, even a moderate fire can create a significant loss for insurers.

The recent representative action

The recent filing of a representative action against the manufacturers of an ACP product again puts the spotlight on this issue in New Zealand, despite there being a long history of the use of ACP products. Alucobond, a German product, was first developed in the 1960s and has been widely used in New Zealand for at least two decades.

In December 2020, a product liability class action was filed in the High Court of New Zealand against the manufacturers of Alucobond.

The proceedings were filed "on behalf of property owners and lease holders who have suffered, or will suffer, financial loss associated with removing and replacing Alucobond [ACP] or taking other remedial measures." The litigation funder standing behind the proceedings, Omni Bridgeway, is the same litigation funder responsible for pursuing two other ACP class actions in Australia.

How many buildings?

In response to the 2017 Grenfell fire and widespread public concern, there was an initial spate of activity in New Zealand around the issue of combustible cladding. In 2017, the Ministry of Business, Innovation & Employment (MBIE) commissioned an independent audit of ACP certification. The audit recommended certification of 13 ACP products be suspended on the basis that the products were unlikely to be fire resistant. MBIE initially suspended, and then revoked, the certification of the 13 ACP products in 2018.

Several New Zealand city councils investigated the number of buildings that may have been affected. They identified more than 230 buildings with ACP cladding in Auckland, Wellington and Christchurch.

The construction industry has since been cautious about using ACP cladding in new projects. A notable example of this was in early 2019, when SkyCity announced it was removing ACP from the incomplete International Convention Centre at an additional cost of about $25 million.

Who is exposed?

Claims are typically made in the first instance by the owners or occupiers of the building or property damaged by the fire. Insurers with a property book will have exposure to any commercial, strata or residential insured who owns, occupies, or is situated adjacent to an ACP-clad building.

After the property claims are adjusted, follow-on ACP-related insurance claims are often made with litigation involving a wide variety of companies and professionals including:

- manufacturers, importers and distributors of ACP products
- builders and developers
- construction professionals, including architects, designers and fire safety engineers, and
- approvers and certifiers.

Professional indemnity and product liability policies may respond to these follow-on claims, with insurers footing the bill for any award of damages and the defence costs of complex multi-party litigation.

The impact on insurers and industry

In Australia, an 'insurance crisis' has developed in response to the ACP issue. Building practitioners are required to hold (adequate) liability insurance as a licence condition.

A number of insurers have ceased offering cover to the building industry or have heavily restricted cover through the use of combustible cladding exclusions. This has left some building professionals and companies unable to operate.

The recent NZ class action may create a flurry of interest in ACP-clad buildings in New Zealand, so it is an opportune time for insurers to review relevant policies and combustible cladding exclusions.

Katie Shanks
Partner, Auckland

Alana Lathrope
Senior Associate, Auckland

Construction defect claims – exclusions in the spotlight

NAPIER CITY COUNCIL V RISKPOOL[1]

The insurance market will, by now, be well aware that New Zealand's traditional 'leaky building' claims have developed into broader 'mixed defect' claims. The way traditional leaky exclusions are applied to mixed defect claims has recently come under the spotlight, as seen in *Napier*[2]. The High Court's trial judgment, which is expected shortly, will provide further clarity on the issue. However, earlier decisions in *Napier* already offer a timely reminder for insurers to carefully review their insuring clauses and exclusions to ensure they achieve the underwriters' intent.

A broader range of issues

As already discussed, the Grenfell fire has focused attention on cladding and fire rating issues for buildings. The Canterbury Earthquakes did the same for structural issues. The result – claims against those involved in the construction process are no longer just involving leaky issues. They are now much broader in range spanning issues such as failure to meet the building code's requirements for structural stability, fire ratings, cladding and durability. That may not be entirely surprising – the lax construction practices that led to leaky building issues may similarly have caused other building defects that may not have been as easily discovered.

Whilst leaky building exclusions are common in the market, and their application well-trod ground, the way they should be applied to mixed defect claims (where there are some leaky defects and some non-leaky defects) is novel ground – at least in New Zealand. This issue came to a head in *Napier*.

Napier City Council v Riskpool

In *Napier*, the Council faced a multi-million dollar claim for building defects in the Waterfront Apartments. Some defects were leaky, and some were not. The Council settled its liability with the homeowner plaintiffs, and sought indemnity from Riskpool, but only for the portion of the settlement that represented the 'non-leaky' defects. Riskpool declined as the claim (the proceeding as whole) arose at least in part from leaky issues – which is ordinarily sufficient to exclude the entire claim based on the *Wayne Tank* principle.

The Council issued proceedings and Riskpool applied to strike the claim out on the basis of the leaky exclusion.

The High Court held the use of the plural "claims" in the exclusion meant the single proceeding against the Council should be viewed as multiple claims, with each defect being a standalone claim, for insurance purposes. As such, the leaky exclusion only applied to the leaky defects, and the remaining defects were separate claims that could be indemnified. Treating the legal proceeding as multiple claims in this way gets around the *Wayne Tank* principle and the leaky exclusion.

The Court of Appeal overturned that reasoning. However, the Court did have some sympathy for the notion that non-leaky defects should not be excluded from cover, just because they were bound up with leaky defects. The Court was also quite critical of the language in the exclusion, describing it as "a bit of a mess. Not art, and not fine at all". The Court held that the exclusion could not be interpreted without the benefit of evidence at trial, so the strike out application remained unsuccessful. The proceeding has since gone to trial, and a decision is due shortly.

Implications for insurers

Claims against insureds that have multiple heads of loss are not uncommon, and how insurance policies respond is reasonably settled by commonwealth authority. Whether there is one claim or more is normally determined first by the policy language, and then by looking at the connection between the heads of loss and the insured's actions.

So not only are cladding concerns a good reason for insurers to review their exclusions, but it would also be sensible for insurers to make sure their clauses and exclusions do not fall foul of the Court's concerns and uncertainty raised in *Napier*. And if the New Zealand Courts do depart from the commonwealth approach to mixed defect claims (or multiple heads of loss claims), then the application of all exclusions will become a ripe area for litigation.

Mathew Francis
Partner, Auckland

Meredith Karlsen
Associate, Auckland

[1] We use the term "Riskpool" as is he common name for Local Government Mutual Funds Trustees Limited.
[2] *Napier City Council v Local Government Mutual Funds Trustee Limited* [2018] NZHC 2269 and on appeal to the Court of Appeal, *Local Government Mutual Funds Trustee Limited v Napier City Council* [2019] NZCA 444.

wotton kearney

Cyber market faces increased malicious activity

PRIVACY BREACHES

New Zealand's long-awaited *Privacy Act 2020* took effect on 1 December 2020, introducing mandatory notification processes for privacy breaches. The Act will compel organisations to investigate cyber and data incidents, consider the impact and risk posed to those affected, notify parties where appropriate, and make good to the extent possible. While New Zealand's regime lacks the fines found in other jurisdictions, organisations will still face significant compliance costs in properly investigating incidents and liaising with stakeholders, including regulators.

To date, the new rules have only resulted in a handful of mandatory notifications. However, the Office of the Privacy Commissioner (OPC) expects volumes to increase dramatically as we head through 2021.

It remains to be seen how the mandatory reporting regime will be enforced and what degree of reporting will be required following a breach. What is clear is that responsibility for assessing the severity of a particular breach, and deciding whether or not to notify, lies with the affected organisation.

This responsibility cuts both ways. The OPC has also strongly discouraged a liberal approach to notification or notifying simply as a matter of caution. Organisations will need to closely consider the serious harm test set out in the Act to avoid regulatory scrutiny.

The OPC has also signaled that it will give organisations a 6-12 month period to get familiar with the new *Privacy Act 2020* obligations before contemplating penalties for non-compliance. That window should not encourage organisational complacency, as the OPC has also indicated it will continue to focus its attentions on breaches where there is particular risk of harm.

We anticipate breaches involving the vulnerable will be targeted early, as the collection of information about children was highlighted as an area of concern.

Insureds who hold any client information need to be vigilant. If an incident does occur, it's important they quicky get thorough advice to ensure that they are properly assessing the potential harm to individuals.

CYBERCRIME

In 2020, the cybercrime and data risks landscape was rewritten. The rapid and unexpected shift to remote working for many stretched IT infrastructure and increased the number and variability of targets available to cyber criminals.

The nature of remote working creates technical vulnerabilities via the increased use of remote access protocols and employees' home networks. It has also resulted in isolated employees working from home being increasingly vulnerable to social engineering attacks.

Internationally, the ubiquitous IT supply chain provider SolarWinds was the subject of a historic compromise at the hands of hackers connected to the Russian Government.

Closer to home large institutions, including the NZX, Reserve Bank, Fisher & Paykel and Lion, suffered public cyber incidents.

According to CERT NZ's latest quarterly report[1], incidents of reported cybercrime, including malware attacks and business email compromises, rose across the board with 1,137 incidents being reported in Q1 2020, compared to 2,610 incidents reported in Q3 2020.

The tumult of 2020 suggests 2021 will also be a difficult year for cyber and data risks. While the high-profile nature of attacks in New Zealand has led to increased awareness by businesses, organisations should assume malicious activity will continue to rise.

Ransomware, business email compromises and the litany of cybercrime-as-a-service operations remain profitable enterprises, and entrepreneurial criminals will continue to find new ways to circumvent security measures.

[1] https://www.cert.govt.nz/about/quarterly-report/quarter-three-report-2020/

DATA ETHICS

While the *Privacy Act 2020* was a much-needed update to New Zealand's privacy regime, the Act arguably leaves several glaring holes. Protections and obligations commonly found in international legislation, such as the GDPR, are absent. These include those addressing data portability, the right to be forgotten, accountability and record-keeping, algorithmic transparency, and clear obligations on breach notification between agencies and their agents. These gaps in the New Zealand Act were even acknowledged by the Minister of Justice, Andrew Little, who stated at the Act's second reading: "I anticipate a need for ongoing review and incremental reform given the rate of technological change and continual evolution of international privacy standards."

The global struggle for privacy regulation to control harmful privacy practices has seen commentators increasingly argue that data ethics, combined with privacy law compliance, should form part of a healthy approach to organisations' information governance programs. This is reflected in regulators' increased focus on harm caused to individuals. For example, when responding to a privacy breach, the OPC has commented that organisations should ask how they can empower an individual to take back control that may otherwise have been lost. This philosophy arguably extends beyond the black letter law of the Privacy Act itself.

All of this suggests that good data governance, and avoiding the attention of regulators, may require applying relevant privacy law and demonstrating a healthy application of data ethics. Put simply, a good data citizen should not just ask if they *can* process personal information in a particular way, but also if they *should*.

Mark Anderson
Partner, Auckland

Joseph Fitzgerald
Senior Associate, Wellington

Q3 2020

2,610

Q1 2020

1,137

A RISE IN CYBERCRIME INCIDENT NUMBERS, INCLUDING MALWARE ATTACKS & BUSINESS EMAIL COMPROMISES

CERT NEW ZEALAND QUARTER THREE REPORT, 2020

wotton kearney

Employment & EPL issues

COVID FALLOUT WITH EMPLOYMENT CLAIMS

Employment claims determined by the Employment Relations Authority (ERA) arising from the COVID-19 lockdown in March 2020 provided grim reading for employers with the decisions favouring employees. However, the decision in *Gate Gourmet New Zealand Limited & Ors v Sandhu & Ors* [2020] NZEmpC 237 has reversed that trend.

Following New Zealand's lockdown in March 2020, Gate Gourmet (an airline catering provider) restricted its operations to 'essential' and implemented a partial shutdown. It decided staff would be paid at 80% of their normal wage and could top this up to 100% with annual leave. This was agreed by the AWS union subject to Gate Gourmet complying with its legal obligations. The partial shutdown meant that certain staff on the minimum wage were not required to attend work during the lockdown. In this period, there was an increase in the minimum wage. Gate Gourmet passed the increase on to those attending work only.

These decisions were challenged in the ERA. The employees successfully argued that the reduction to 80% and failure to pass on the increase in minimum wage to those not attending work was a breach of the Minimum Wage Act (MWA). The ERA adopted the contractual test of whether the employees were "ready, willing and able to work".

As Gate Gourmet's decisions were the only reason they were not at work, they were entitled to be paid for the time that they would ordinarily have worked. As s.7(2) of the MWA prohibits deductions to the minimum wage, the ERA found the workers were entitled to be paid the minimum wage, including the increase.

The matter was appealed, and a majority of the Employment Court found in favour of the employer. The majority held that for s.7(2) to be engaged, an employee needs to be entitled to a wage for work (s.6 MWA) and it considered the workers who were told to stay at home had not been 'working'. They had no restraints on their freedom, no responsibilities and provided no benefit to Gate Gourmet while they were at home.

Chief Judge Inglis disagreed with the majority. She considered the employees were entitled to minimum wage. Her view was that where there is an agreement to work, the entitlement arises provided the employee was ready, willing and able to work. In her view, this was subject to very limited exceptions and had parliament intended an operational decision of an employer or government action to be an exception, it would have provided for it.

Given the dissenting judgment of the Chief Justice, the employees may yet appeal to the Court of Appeal. However, the decision of the majority is comforting for employers that found themselves severely affected by the pandemic lockdowns.

BULLYING AND HARASSMENT: WHERE TO NOW?

A new Ministry of Business, Innovation and Employment issues paper highlights the prevalence of bullying in New Zealand workplaces, and the long-term trauma associated with this problem. As many as one in five workers are affected each year, with women and minorities reporting the highest levels of bullying. Worksafe has indicated it could be as much as one in three annually from these groups.

Workplace bullying is generally understood to be repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm. All organisations have legal obligations to provide a safe work environment, including one that is free from bullying and harassment. A failure to do so can result in criminal prosecution under the *Health and Safety at Work Act* and civil action, including action under the *Employment Relations Act* or *Human Rights Act*. It may also lead to costly reduced productivity, lower morale and reputational damage.

Sadly, reports of increasing bullying and harassment continue despite more and more businesses addressing their cultural issues. The rise in EPL claims is unlikely to recede quickly despite organisations taking more proactive measures. More complaints are likely as employees feel safer to disclose in zero-tolerance cultures with easier reporting structures. Stopping this trend will require effective cultural change, including increasing diversity and inclusion, to completely stamp out bullying and harassment in workplaces.

wotton kearney

We're confident proactive businesses will continue to construct cultures where bullying is not tolerated. Practical initiatives to achieve this will include:

A 'zero tolerance' culture – with written policies and a code of conduct that sets out expectations and ramifications for bullying and harassment. These will also address how complaints will be dealt with and include easy to understand, flexible processes for reporting complaints.

Customised training – developing the leadership skills of managers and workers in positions of power is critical to preventing bullying. It also helps leaders identify and deal appropriately with any bullying behaviour.

Engagement with workers – typical hierarchies and power imbalances may prevent and discourage workers from speaking up. Empowering them to report bullying or address it appropriately, including where it is observed, is key to attaining the right culture and prevention.

Rather than waiting to react to concerns that may not be raised for fear of victimisation, proactive organisations will have active measures to spot bullying behaviour in place. These could include gathering information through regular surveying of workers on culture, conducting exit interviews, and taking a deeper look into a department or team with a high number of resignations or rise in sick leave.

Responding early to signs of potential bullying increases the likelihood that issues can be resolved in a restorative manner. This will help avoid the potential costs and reputational damage of managing a bullying complaint, a personal grievance, or criminal or civil actions.

EMPLOYEE STATUS CONTINUES TO BE CHALLENGED

While it will sometimes suit individuals to work as a contractor, in other cases, the employer will stipulate that the worker is a contractor for business flexibility or to avoid statutory employment obligations – even where there is little difference between the contractor and an employee. This is particularly prevalent in the gig economy and is likely to be even more common post-COVID, as employers look to minimise costs or ensure flexibility.

Section 6 of the *Employment Relations Act 2000* allows the Authority or Court to look behind the label applied to a contract to determine whether a contractor is really an employee. Some recent cases indicate a rise in such challenges, and a trend to closely scrutinise the real nature of the relationship.

Leota v Parcel Express Ltd – Mr Leota signed an agreement with Parcel Express to be an independent contractor, however the Employment Court found that despite the label, he was actually an employee. Whilst Mr Leota paid for his own van, Parcel Express had a high level of control over his operations. He had no control over where and when he worked, he wore a Parcel Express uniform and was required to comply with directions from Parcel Express. Furthermore, as English was his second language, he didn't have a grasp of the legal requirements relating to his status (contractor vs employee), the drafted agreement, nor the associated documentation.

The Employment Court found he was an employee as Parcel Express had significant control over Mr Leota, who had no business of his own, and was solely in the business of Parcel Express.

Southern Taxis Limited v Labour Inspector – Southern Taxis Limited (STL) hired four commission-based drivers without a written agreement. The drivers considered themselves employees, while STL considered them contractors. STL owned and paid the operating costs of the vehicles, and the drivers operated according to a roster, submitted weekly logbooks and wore a uniform. In addition, PAYE was deducted from their pay. The court considered the control over the drivers, the reliance on them (for business to operate) and the economic factors. Consequently, it held the real nature of the relationship between STL and the drivers was that of employee/employer and not client/contractor.

Arachchige v Raiser New Zealand Limited – Mr Arachchige was a former taxi driver, who sold his taxi franchise to begin working full-time as an Uber driver. Mr Arachchige argued he was an employee of Uber on the basis that Uber and traditional taxi companies operated very similarly. Uber is a ride sharing smartphone app, that allows customers to hail cars and drivers to accept journeys. The Court rejected Mr Arachchige's argument, noting Uber had little control over how and when he worked. They directly compared this to *Leota* and *Southern Taxis*, noting the workers there had no say in how they conducted their business activities.

While it required Mr Arachchige to have a current driver licence and his car meet certain standards, Uber did not intend to, nor at any point did it, control how Mr Arachchige operated. He was therefore considered to be a contractor.

In contrast the UK Supreme Court recently found Uber drivers are "workers," entitled to minimum wage, and other protections. It emphasized the workers' subordination and dependency and Uber's tight control. Worker status in the UK is a lower hurdle than employee and not directly applicable to New Zealand. But the UK decision highlights risks in the gig model.

Trend to protect dependent workers – *Arachchige* may indicate the Court's reluctance to provide protection to gig economy workers, compared to dependent contractors like those in *Leota* and *Southern Taxis*. However, as the world of work evolves post-COVID, such claims are only likely to increase. The Labour Inspectorate is cracking down on what it calls "sham contracting", and the Employment Court will be unsympathetic to businesses cynically engaging workers as contractors. The government also is looking at legislative change to better protect vulnerable contractors, which may further increase businesses' exposures.

Rebecca Scott
Partner, Auckland

Murray Grant
Special Counsel, Wellington

NZ medico-legal trends

COMPLAINTS / DISCIPLINARY CASES

Pressure on the Health and Disability Commissioner (HDC) to deal with health consumer complaints continues to build. This is largely due to the international trends promoting consumer rights, which have led to a steady increase in NZ complaint numbers. This has resulted in an overall increase in formal investigations by the HDC, referrals to regulatory authorities, and disciplinary cases before the Health Practitioners Disciplinary Tribunal.

The issues being complained about have remained largely consistent over the last four years, with misdiagnosis / delayed diagnosis and inadequate treatment being the most common, followed by communication, consent, funding and access. Poor communication between the patient and the health professional is also a common theme in many complaints, whether they arise out of negligence or otherwise. This risk can be minimised by openly reviewing the complaint or concern with the patient at the earliest opportunity.

There has also been a marked increase in disciplinary cases involving allegations of clinical negligence. Historically, discipline tended to be reserved for more aggravating conduct, and this change similarly reflects international trends in the medico-legal arena.

THE PRIVACY ACT 2020

On 1 December 2020, New Zealand's new privacy regime came into effect. The new legislation updated New Zealand's 27-year-old privacy framework, including a new Health Information Privacy Code (Code), which sets out a framework for health practitioners to consider when responding to information requests. Under the Code, health practitioners continue to have an obligation to provide patients with their health information. They also have an obligation to ensure the safety of the private health information. (See our previous articles on *The Privacy Act 2020*).

To minimise the risk of complaints and subsequent regulatory actions, health practitioners and health agencies should ensure they understand:

- what health information can be disclosed and to whom
- in what circumstances information can be withheld
- the need to keep detailed notes about information disclosure decisions, and
- how the Act requires patients to be communicated with about privacy matters.

The Privacy Act 2020 now provides for mandatory breach notifications and, in some situations, failure to notify is a criminal offence.

It is critical organisations have policies and procedures in place to ensure they know what a privacy breach looks like and when it has to be notified. The Privacy Commissioner has signaled that entities, including health practitioners, should avoid erring on the side of caution by notifying absolutely everything. However, it may be more prudent for health practitioners to conduct a risk assessment of the impact on individuals and notify when it is appropriate to do so.

THE END OF LIFE CHOICE ACT

The End of Life Choice Act 2020 will come into force on 7 November 2021. Before then, the government will take a range of preparatory steps, including inviting submissions from health practitioners. We also expect regulatory authorities for medical practitioners and nurses will develop guidelines for doctors and nurses regarding the new legislation and keep a close eye on its implementation.

As assisted dying is a controversial issue, it is likely litigation will also help clarify aspects of the new regime.

Aimee Credin
Partner, Auckland

Sean O'Sullivan
Partner, Wellington

Product liability

DEVELOPMENTS WITH THE FAIR TRADING ACT 1986

The courts have steadily relaxed their view of the application of exclusions and limitations in terms and conditions. While the courts remain wary of conditions that seek to exclude any liability outright, limitations clauses are now relatively standard, and, amongst commercial parties, it will be very difficult to avoid their application.

For example, in *Jardboranir v Summit Hydraulic Solutions Ltd,* Justice Brewer found that a signed statement that the signatory had reviewed and agreed to the terms and conditions was sufficient to uphold the agreement and application of those terms (regardless of whether the signatory had actually read the terms).

Since 2014, the *Fair Trading Act 1986* has specifically prohibited parties contracting out of the Act. However, the Act contains a carve out in s.5D that allows commercial parties to contract out of aspects of the Act. We are increasingly seeing savvy commercial parties taking advantage of this option in their contracts, and the first tranche of cases interpreting these provisions are emerging.

While the cases to date do not provide clear application of the contracting out provisions, *About Image Ltd v Advaro Ltd* considers the requirements in the Act before contracting out is enforceable.

In particular, in assessing s.5D(3) of the Act (which binds the parties to a way that is ‘fair and reasonable’), the *About Image* decision highlights this will involve questions of fact. In other words, the inclusion of an opt out clause is not a guarantee of its application as the courts will also consider whether the contracting out is ‘fair and reasonable’ to the parties.

In another interesting development, in *Adventurer v Cockery* [2020] NZHC 675, Justice Walker applied a contractual monetary limitation to a claim under the *Fair Trading Act 1986*. Remedies under the Act have always been discretionary (s.43), but the application of a contractual limit is a new approach to this discretion. The Judge expressly referenced the 2014 contacting out provisions (s.5C, s.5D) as justification for this approach, finding that they “reflect a more liberal policy approach to exclusion and limitation provisions in commercial agreements”.

This follows an earlier line of cases discussing the ability to contract out of the Act, including *Red Eagle Corporation Limited v Ellis* and *David v TFAC Ltd*. In *David* the Court of Appeal noted that “any resulting contract can be expected to reflect the parties’ wishes as to the allocation of risk and it is difficult to see why they should not be permitted to allocate risks between them by contracting out of the FTA”.

The *Adventure* case was a formal proof decision (uncontested), and it remains to be seen if the courts will follow this approach (given the inherent discretion of s.43 there is no requirement to do so), but we consider this a promising indication that commercial contracts will increasingly be able to draw lines around fair trading liability to suit the risk appetites of the contracting parties. The Fair Trading Act may also have extra-territorial effect where a party has engaged in conduct outside New Zealand to the extent that the conduct relates to the supply of goods or services within New Zealand (s.3 of the Act, *Douglas Pharmaceuticals Ltd v Nutripharm NZ Ltd*).

These cases highlight that all parties should read and understand all possible applicable terms and conditions before entering into commercial agreements. Commercial parties will find it difficult to argue that they should not be bound to exclusion and limitation clauses that were not specifically brought to their attention, or even provided to them at, or before, the date the contract was entered into. Where there are extended supply chains (including international supply chains), parties should also look along the supply chain to understand where back-to-back terms and conditions may apply.

Julia Whitehead
Senior Associate, Auckland

Natasha Cannon
Senior Associate, Wellington

wotton kearney

Property damage – Betterment

A BETTER APPROACH TO BETTERMENT?

In the event of loss or damage to insured property, insurers are contractually obliged to put their insureds back in the position they would have been in but for the loss or damage. Where the claim is settled on an indemnity basis, insurers will meet this obligation by way of a cash payment that represents either the diminution in market value or the cost of repair.

It is possible for an insured who is paid the full cost to repair, reinstate or replace their property – in the absence of a compensating allowance – to be better off than before the damage. This is where the concept of 'betterment' is applied.

Betterment has been recognised by the Supreme Court as being a fundamental part of the indemnity principle. Insurers are entitled to make a deduction for betterment even if the policy does not specifically make provision for this. Betterment may also be excluded by express words. While betterment has long been recognised in insurance, little guidance is provided on how such a deduction should be calculated.

The English Court addressed this question in *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Ltd* [2020] EWCA Civ 308. In *Sartex*, the insured's property suffered significant fire damage. Insurers paid Sartex an amount based on a market valuation. Sartex sought an additional payment based on the actual cost of reinstatement.

Amongst other issues, the insurers argued that a deduction from the cost of reinstatement should be made for betterment. The High Court held that there was insufficient evidence for such a deduction to be made.

On appeal, the Court of Appeal provided the following guidance of general application for subsequent cases:

- Betterment in insurance is the same as other contractual disputes. While it will not be necessary to show a particular figure in all cases, betterment in insurance disputes cannot be ascertained on a broad-brush approach by applying a sweeping percentage deduction.
- Where there is a provable pecuniary benefit to an insured, this must be accounted for. For example, if new machinery provides operating efficiencies, these should be deducted from the claim.
- Non-pecuniary benefits may not need to be accounted for. For example, if an element is replaced with a newer one that is cheaper or the only option available, it may not be necessary to make a deduction for betterment.
- If, however, it can be shown that the upgrade will result in other tangible benefits to an insured, these may be accounted for. For example, if double glazing is used instead of single glazing the ensuing reduction in the insured's energy consumption would be considered.
- Optional upgrades should be deducted, for example if an insured elects to replace single glazing with double (or triple) glazing.
- It will always be a matter of proof whether a deduction for betterment should be made. The burden of proof rests with insurers.

It remains to be seen whether courts in New Zealand will take a similar approach to betterment. Following the Canterbury earthquakes, broader deductions were made for betterment.

To date courts have preferred evidence from valuers when accounting for betterment, as opposed to more specific evidence on an item by item basis. Regardless of the approach, betterment ought to be applied when there is sufficient proof of it in indemnity claims.

Katie Shanks
Partner, Auckland

Andrew Moore
Special Counsel, Auckland

Statutory / environmental liability

IMPENDING ENVIRONMENTAL REFORM

Environmental reform looms large over New Zealand's construction, industrial and primary sectors. Changes in the regulatory environment and public attitudes will continue to result in an enlarged enforcement role for regulators, affecting environmental impairment and statutory liability risks.

The coming months and years will be a busy time for environmental regulation. In the short-term, these developments signal increasing compliance, monitoring and enforcement actions at the local government level.

National Policy Statement for Freshwater Management compliance

In 2020, the Ministry for the Environment published a fresh *National Policy Statement for Freshwater Management*, which is directed at higher standards for the preservation of freshwater ecosystems. Under the policy, regional councils are obliged to set up, in consultation with tangata whenua, a significant framework of objectives, targets and "ambitious" long-term goals for freshwater bodies.

They will also be obliged to take urgent action in response to degradation. As a result, we expect to see more consistent and robust enforcement action regarding discharges to water.

Stock in rivers

The Resource Management (Stock Exclusion) Regulations came into force in September 2020, creating new requirements (with associated penalties) for the fencing of lakes and all rivers with beds wider than 1m. These requirements potentially expose insureds to liability risks. As they are likely to be actively enforced, we also expect to see a number of penalties applied for non-compliance.

Resource Management Review Panel recommendations

A comprehensive overhaul of the *Resource Management Act* has been foreshadowed by the Government following the findings of the Resource Management Review Panel last year. The Panel's recommendations include:

- A "substantial increase" in maximum financial penalties for environmental offending.
- The prohibition of insurance against fines.
- A new enforcement structure with more input from central government, with greater resource applied to monitoring and enforcement.

The new regime is likely to lead to enhanced environmental impairment and statutory liability risks. In the interim, insureds should consider assessing and improving their environmental practices.

THE NEW REGIME IS LIKELY TO LEAD TO ENHANCED ENVIRONMENTAL IMPAIRMENT AND STATUTORY LIABILITY RISKS.

Richard Flinn
Partner, Wellington

Mark Anderson
Partner, Auckland

Luke Knights
Associate, Auckland

Key contacts – talk to us

AUCKLAND:

Aimee Credin
Partner View Profile
T: +64 9 393 9512
M: +64 21 467 989
aimee.credin@wottonkearney.com

Katie Shanks
Partner View Profile
T: +64 9 600 5653
M: +64 27 288 1144
katie.shanks@wottonkearney.com

Mathew Francis
Partner View Profile
T: +64 9 280 0528
M: +64 21 228 0046
mathew.francis@wottonkearney.com

Mark Anderson
Partner View Profile
T: +64 9 280 0524
M: +64 21 757 675
mark.anderson@wottonkearney.com

Rebecca Scott
Partner View Profile
T: +64 9 377 1871
M: +64 21 224 5627
rebecca.scott@wottonkearney.com

Sophie Lucas
Partner View Profile
T: +64 9 280 1870
M: +64 21 198 1800
sophie.lucas@wottonkearney.com

WELLINGTON:

Adam Holloway
Partner View Profile
T: +64 4 260 4636
M: +64 275 611 337
adam.holloway@wottonkearney.com

Antony Holden
Partner View Profile
T: +64 4 260 4286
M: +64 27 684 680
antony.holden@wottonkearney.com

Richard Flinn
Partner View Profile
T: +64 4 472 6962
M: +64 27 223 3550
richard.flinn@wottonkearney.com

Sean O’Sullivan
Partner View Profile
T: +64 4 260 4633
M: +64 274 888 386
sean.osullivan@wottonkearney.com

> Their lawyers have consistently shown an understanding of the key issues in often complex matters, and an ability to cut through the noise and get to the nub of those issues quickly.

CHAMBERS ASIA-PACIFIC, 2021

New Zealand Offices

Auckland
Level 18, Crombie Lockwood Tower
191 Queen Street, Auckland 1010
T: +64 9 377 1854

Wellington
Level 13, Harbour Tower
2 Hunter Street, Wellington 6011
T: +64 4 499 5589

Australian Offices

Sydney
Level 26, 85 Castlereagh Street
Sydney NSW 2000
T: + 61 2 8273 9900

Melbourne
Level 15, 600 Bourke Street
Melbourne VIC 3000
T: +61 3 9604 7900

Brisbane
Level 23, 111 Eagle Street
Brisbane QLD 4000
T: +61 7 3236 8700

Perth
Level 49, 108 St Georges Terrace
Perth WA 6000
T: +61 8 9222 6900

www.wottonkearney.com

wotton kearney

A founding member of LEGALIGN GLOBAL